THE BROWN UNIVERSITY

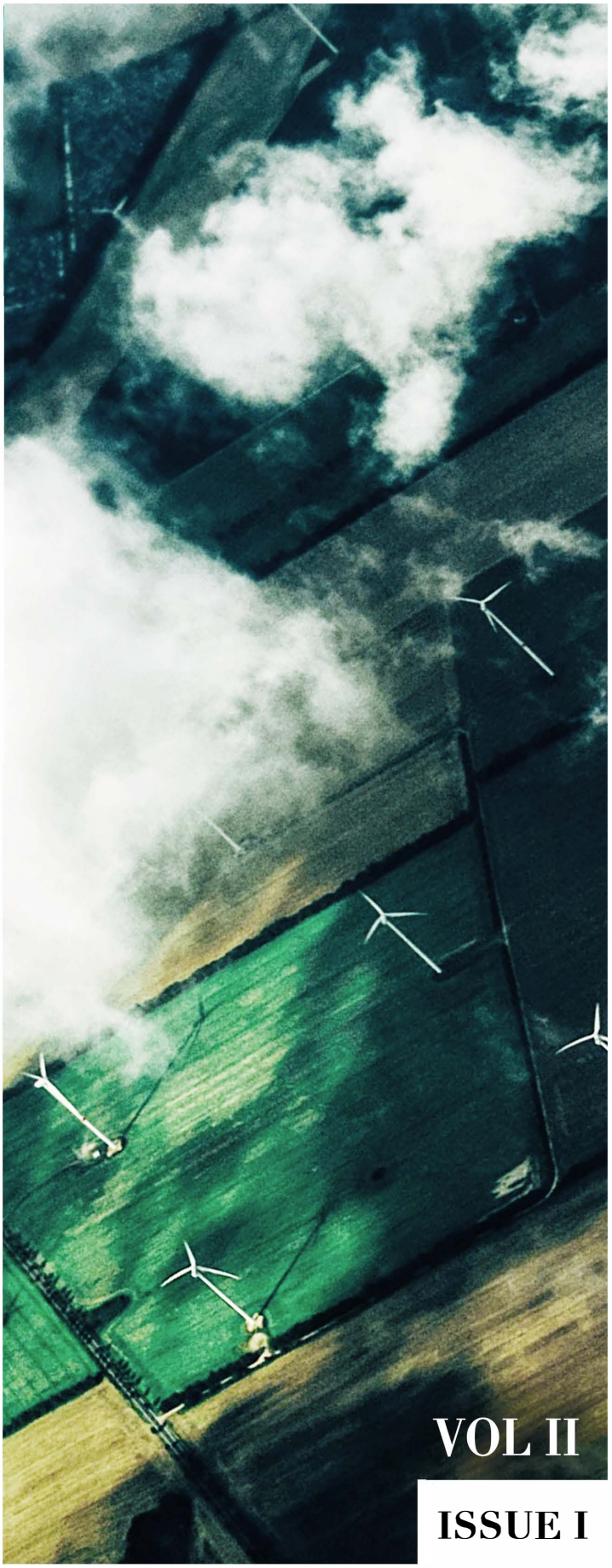
JOURNAL OF PHILOSOPHY, POLITICS & ECONOMICS

Special Feature:

ENVIRONMENT

With a contribution from

Senator Sheldon Whitehouse



VOL II

ISSUE I

The Brown University

Journal of Philosophy, Politics & Economics

Volume II, Issue 1

ACKNOWLEDGMENTS

The Brown Journal of PPE is immensely grateful for the continued support and funding of the Political Theory Project. Moreover, we are thankful for the contribution of Senator Sheldon Whitehouse and for the support of their staff at the United States Senate. Most importantly, the Journal would like to thank all those who submitted essays; the participation of university students around the world and their innovative ideas about contemporary issues are the heart of this publication.

FOUNDING STATEMENT

The Brown University Journal of Philosophy, Politics, and Economics (JPPE) is a peer reviewed academic journal for undergraduate and graduate students that is sponsored by the Political Theory Project and the Philosophy, Politics, and Economics Society Program at Brown University. The JPPE aims to promote intellectual rigor, free thinking, original scholarship, interdisciplinary understanding, and global leadership. By publishing student works of philosophy, politics, and economics, the JPPE attempts to unite academic fields that are too often partitioned into a single academic discourse. In doing so, the JPPE aims to produce a scholarly product greater than the sum of any of its individual parts. By adopting this model, the JPPE attempts to provide new answers to today's most pressing questions.

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FOREWORD

In recent years, the world's attention has increasingly turned to environmental issues. Once a subject that interested only a few committed activists and academics, climate change and other related issues have now gained the interest and concern of a large number of people all around the world. In recent years, we have witnessed the signing of a landmark protocol – the Paris Agreement – that seeks to tackle some of the causes of climate change. Moreover, world leaders of the caliber of Pope Francis, French President Emmanuel Macron and former US Vice President Al Gore have attempted to draw attention to the harm humans cause to the environment. Yet, concurrently we have seen the rise of those who deny the existence or minimize the importance of a concerning rise in world temperature, most notably President Donald Trump.

Aside from the political debate on climate change, academics have started engaging with the issue more and more often. Universities all over the world now have departments that focus on environmental studies. Pioneering scholars like Wallace Broecker, Phil Jones, Michael Mann, Susan Solomon and Veerabhadran Ramanathan have devoted their entire career to the study of various aspects of this important issue. Notably, the work of Yale economist William Nordhaus was awarded the Nobel Prize in Economic Sciences in 2018 for "integrating climate change into long-run macroeconomic analysis."

This edition of the Brown Journal of Philosophy, Politics and Economics is, in part, devoted to climate change both as a political and academic issue. To explore this guiding theme, we feature a submission by United States Senator Sheldon Whitehouse, from Brown's home state of Rhode Island, who has led the charge to raise awareness about climate change in the American political arena. In addition, one of our submissions examines and compares how the environment fits into the political imagination in Germany and the United States. It is our hope that these two pieces will help our readers better understand this crucial global issue.

Yet, this edition of these Journal also features pieces on a number of other topics. Amongst others, our submissions explore subjects that range from realism in Chinese cinema to the value of shareholder activism, from gerrymandering in the United States to the ethics of using drones. Indeed, it is our sincere hope that by reading this semester's edition our readers will be exposed to a number of distinct yet interrelated topics and that the value and insights of these papers will be enhanced when looking at them together rather than individually.

The Editorial Board

Special Feature

Senator
Sheldon Whitehouse

Sheldon Whitehouse is the junior United States Senator from Rhode Island. A Democrat, Sen. Whitehouse was elected in 2007, after having served as the Attorney General of Rhode Island between 1999 and 2003. He takes an active interest in environmental issues, advocating the need to find solutions to climate change. As of March 2018, Sen. Whitehouse gave over 200 speeches on the topic, urging his colleagues to take concrete action.

Every week that Congress is in session, I head to the Senate floor to urge my colleagues to take action on preventing climate change. In more than 225 of these speeches delivered since 2012, I have emphasized the mounting scientific evidence that our carbon pollution is driving dangerous changes in the atmosphere and oceans. I have also called out the powerful fossil fuel industry, which the International Monetary Fund reports enjoys a nearly $700 billion annual subsidy just in the United States. That immense conflict of interest—protecting that subsidy—is the reason the industry has marshalled its massive resources to promote climate change denial and prevent Congress from doing anything to reduce our dependence on dirty energy.

Under President Donald Trump, former industry operatives fill executive branch posts, working to roll back climate protections. When the administration released its legally mandated National Climate Assessment in November, officials timed it for Black Friday during the Thanksgiving holiday, when it would be unlikely to get public attention. The report, written by 13 federal agencies, described the monumental damage the United States faces from climate change. It contradicted nearly every assertion Trump and his fossil-fuel-flunky Cabinet have made about climate change.

Tellingly, the administration tried to bury the report, rather than contest it. That may be because the science of climate change is incontrovertible. (Back in 2009, even Donald Trump said it was "irrefutable.") Damage from climate change is already occurring. There is no credible natural explanation Human activity is the dominant cause.

Future damage from further warming will be worse than we previously thought. Economies will suffer. And as the report declares, we are almost out of

time to prevent the worst consequences of climate change.

The effects of climate change are felt in every corner of the nation. From the Ocean State, we're already seeing sea levels rise, as oceans warm and land ice melts. If fossil fuel emissions are not constrained, the National Climate Assessment says, "many coastal communities will be transformed by the latter part of this century." Along coasts, fisheries, tourism, human health, even public safety are under threat from increasingly extreme weather events and rising seas.

Out West, "more frequent and larger wildfires, combined with increasing development at the wildland-urban interface portend increasing risks to property and human life." We need to look no further than the massive wildfires Californians battled last year for stark evidence.

More than 100 million people in the U.S. live with poor air quality, and climate change will "worsen existing air pollution levels." Increased wildfire smoke heightens respiratory and cardiovascular problems. With higher temperatures, asthma and hay fever rise.

Groundwater supplies have declined over the last century, and the decrease is accelerating. "Significant changes in water quantity and quality are evident across the country," the report finds.

The government assessment finds that Midwest farmers take a big hit: warmer, wetter, and more humid conditions from climate change; greater incidence of crop disease, and more pests; worsened conditions for stored grain. During the growing season, the Midwest will see temperatures climb more than in any other region of the U.S.

Climate change will "disrupt many areas of life," the report concludes, hurting the U.S. economy, affecting trade, and exacerbating overseas conflicts for our military. Costs will be high: "With continued growth in emissions at historic rates, annual losses in some economic sectors are projected to reach hundreds of billions of dollars by the end of the century—more than the current gross domestic product of many U.S. states."

Danger warnings already flash in some economic sectors. The huge federal home loan corporation Freddie Mac has warned of a coastal property value crash, suggesting economic losses from climate change are likely to exceed those of the housing crisis and Great Recession. The Bank of England, as a financial regulator, is warning of a "carbon asset bubble."

The solution to climate change is to decarbonize, invest more in renewables, and broaden our national energy portfolio. A carbon price would allow this big shift to happen, all while generating revenues that could be cycled back to citizens, and help the hardest-hit areas of transition.

The smart move we need to make does not have to be painful. It can actually be a big economic win. Nobel Prize winner Joseph Stiglitz has testified:

"Retrofitting the global economy for climate change would help to restore aggregate demand and growth. Climate policies, if well designed and implemented, are consistent with growth, development, and poverty reduction. The transition to a low-carbon economy is potentially a powerful, attractive, and sustainable growth story, marked by higher resilience, more innovation, more livable cities, robust agriculture, and stronger ecosystems."

Or we could do it the hard way, continuing to do the fossil fuel industry's bidding and racking up the dire economic consequences of flooding, drought, wildfires, and stronger storms. The status quo is not safe.

Which way we now go depends on whether Congress can put the interests of our people ahead of the interests of the polluters. The record is not good, I'm afraid. Since the Supreme Court's disastrous Citizens United decision, which unleashed unlimited corporate money into our elections, the politics of climate change is a tale of industry capture and control. So far, despite the industry's massive conflict of interest and provable pattern of deception, and despite clear warnings from scientists and economists, the Republican Party has proven itself incapable of telling the fossil fuel industry "no."

So it doesn't look good. But the climate report does say we still have time—if we act fast.

There is one major development gives me great hope for the future. Survey after survey shows that the generation coming of political age today overwhelmingly supports taking action on climate change. They have longer to live on this planet than members of my generation, and they are determined to make it a better place. I expect they will.

I'll close with a reference to The Gathering Storm, Winston Churchill's legendary book about a previous failure to heed warnings. Churchill quoted a poem, of a train bound for destruction, rushing through the night, the engineer asleep at the controls as disaster looms:

> "Who is in charge of the clattering train?
> The axles creak, and the couplings strain.
> . . . the pace is hot, and the points are near,
> [but] Sleep hath deadened the driver's ear;
> And signals flash through the night in vain.
> Death is in charge of the clattering train!"

We are that sleeping driver; the signals of a changing climate flash at us, so far in vain. It's time to wake up.

Two Forms of Environmental-Political Imagination: Germany, the United States, and the Clean Energy Transition

Nathan S. Chael
Stanford University

Edited by
Fabienne Tarrant, Lori Kohen,
Huayu Wang and Connor Riley

ABSTRACT

The United States and Germany have followed markedly different paths thus far in the 21st century in their efforts to reduce emissions from energy production and thereby combat climate change through national policy. I extend Professor Jedediah Purdy's notion of the "environmental imagination" to discuss the "environmental-political imagination," or implicit vision of the environment, politics, and how they ought to be approached and structured, latent in each country's central 21st-century climate policy initiative. I find that a general spirit of individuation and conflict marks the United States' modern environmental-political imagination, while a general spirit of collective enterprise and continuity marks Germany's. A parallel series of examples is used in each country to illustrate this, including understandings of economy and environment, particular forms of energy and landscape, and ideas of leadership and agency, and finally some objections are considered.

I. Introduction

"'W*e're the first generation to feel the impact of climate change and the last generation that can do something about it.' And that's why I committed the United States to leading the world on this challenge.*"[1] – President Barack Obama

"*Dealing with climate change means facilitating and promoting social and economic change in the best possible way. Germany's Energiewende, or energy transition, is an encouraging example of how that can be done, despite all the challenges its details pose. We intend to continue down this route—with everyone on board,*

1 Barack Obama, "Remarks Announcing the Environmental Protection Agency's Clean Power Plan - DCPD-201500546" (Office of the Federal Register, National Archives and Records Administration, August 3, 2015), https://www.govinfo.gov/app/details/DCPD-201500546.https://www.govinfo.gov/app/details/DCPD-201500546Obama.

including each individual sector of the economy."[2] – Dr. Barbara Hendricks, former German Minister for Environment, Nature Conservation, and Nuclear Safety

"*In a world we can't help shaping, the question is what we will shape.*"[3] – Jedediah Purdy

These are, to say the least and state the obvious, complicated political times in both the United States and Germany. From the midst of the complexity and chaos, though, at least one emergent trend stands out: there is a widespread sense that Germany is overtaking at least part of the mantle of global leadership that has characterized the United States' posture towards the world since the fall of the Soviet Union and before. This phenomenon has been particularly pronounced since the election of President Donald Trump in the US—German Chancellor Angela Merkel has since been pointedly labeled the new "leader of the free world" in numerous news outlets[4]—but is surely reflective of deeper and longer-standing political and ideological currents in both nations. In this essay I wish to trace the legal and philosophical contours of this trend in one particular arena: that of environmental policy, and in particular energy policy.

German and American environmental attitudes have, and have long had, marked differences, and these attitudinal differences manifest in a correspondingly deep divergence between the two countries' environmental laws. A particularly rich and currently relevant pair of examples of this historical disparity can be found in the Clean Power Plan in the United States and the *Energiewende*, Germany's 21st-century suite of goals and policies aimed at a transition to a low-carbon economy. These recent federal policy efforts to spur a transition to lower-emission energy sources in each country reveal a distinctive set of underlying contemporary notions about what Americans and Germans take the environment and its value to be—what the legal scholar and historian Jedediah Purdy has called "the environmental imagination"[5]—and, relatedly, what they take the role of law to be relative to the environment. That is, what an appropriate set of energy and environmental policies looks like, what the nation is responsible for in combating environmental

2 Barbara Hendricks, Foreword, in "The German Government's Climate Action Programme 2020 - Cabinet Decision of 3 December 2014" (Federal Ministry for the Environment, Nature Conservation, Building and Nuclear Safety (BMUB), December 3, 2014).

3 Jedediah Purdy, After Nature: A Politics for the Anthropocene (Cambridge, Massachusetts: Harvard University Press, 2015),

4 See, e.g., Suzanne Moore, "Angela Merkel Shows How the Leader of the Free World Should Act | Suzanne Moore," The Guardian, May 29, 2017, sec. Opinion, https://www.theguardian.com/commentisfree/2017/may/29/angela-merkel-leader-free-world-donald-trump.

5 Purdy, After Nature, 6.

problems that affect both its own people and other nations, and what roles its different individual and institutional actors ought to have in creating and advancing those policies. Taken together, following Purdy, I label this set of underlying philosophical views connecting the environment, law, state, and society the "environmental-political imagination" of each nation, and later in the paper will have much more to say about this concept.

The structure of the essay is as follows. First, I describe the contents of, and, in a pre-philosophical way, tell the stories of a pair of recent environmental laws/policy initiatives, the Clean Power Plan (CPP) in the United States and the so-called *Energiewende*, or "energy transition," in Germany. While this pair merely scratches the surface of German and American environmental law, I show that they constitute a particularly significant set of policies, and comprise a particularly rich contrast for the exploration of the two nations' dominant ways of understanding the intersection of environment and politics. In the paper's second section I elaborate upon the concept of the environmental-political imagination and its specific utility here, then argue for a particular characterization of the environmental-political imagination that underpins each country's contemporary energy policy initiative. The claim at which I arrive comprises the central philosophical contention of the essay: a spirit emphasizing the individuation and conflict of different spheres of activity, landscapes, interests, and agents pervades the 21st-century American environmental-political imagination, while across the same set of diverse aspects, the contemporary German environmental-political imagination is marked by a sharply contrasting and equally pervasive spirit of collectivism and continuity. After arguing for this view, in the essay's third section I articulate and provide short responses to some potential objections to my argument, attempting to clarify and trace some of its ramifications.

Before beginning in earnest, a few notes on the paper's methodology. First, while German and American environmental law and their underlying imaginative ideologies have rich and compelling histories, rather than sustaining a full historical argument here I confine myself mainly to this century's developments, using the CPP and recent developments in the *Energiewende* as contemporary lenses onto deeply historical phenomena for the sake of scope and analytical clarity. Where necessary, however, events deeper in history are discussed; it should simply be kept in mind that in a larger sense all current laws and ideologies are inextricably rooted in historical factors. I shall have more to say later about how we might understand this temporal issue. Second, it will doubtless be noted that establishing unquestionable causal linkages between such concrete phenomena as environmental laws and such slippery, implicit ones as "environmental-political imaginations" is a difficult, nigh impossible, exercise, particularly without the benefit of a full historical account. To do so is not my aim. Instead, this essay is meant to provide a

form of rational reconstruction: given the issues and policies in question, how they came into being, and the way Germans and Americans both in and outside government think and talk about them, I aim to give the most plausible and revealing characterization of the underlying logics that root them. Some measure of causality running from these imaginative attitudes to the production of the policies at issue is, I believe, necessarily present (as is some causal connection is from earlier law and policy to these recent attitudes), but the paper makes no attempt to account for all the specific social and institutional factors by which such attitudes are mediated before becoming legally manifest. door between government and the private sector has packed corporate boardrooms and staff ranks alike with former intelligence and defense personnel.

II. The Clean Power Plan and the Energiewende

The issue of climate change driven by anthropogenic greenhouse gas (GHG) emissions into the global atmosphere is fundamentally both an economic and environmental one. Carbon dioxide (CO2), the GHG primarily responsible for increasing global temperatures[6], is emitted in fossil fuel combustion that produces electricity and powers industrial equipment, vehicles, and the many other machines of modern economic activity. The historical causal link between CO2 emissions and economic growth is strong and well-documented[7]. In short, emissions-intensive fuels are the lifeblood of today's global economy; CO2 emissions, economic production, and climate change thus constitute a tightly linked trio of phenomena, and the United States and Germany are quite similar nations in a host of ways closely related to it. Both are highly industrialized nations with immense economic and emissions output: the US economy is the world's largest, and Germany's is

6 See, e.g., D.a. Lashof and D.r. Ahuja, "Relative Contributions of Greenhouse Gas Emissions to Global Warming," Nature 344, no. 6266 (April 5, 1990): 529. For more information on secondary GHGs like methane and nitrous oxide, including their industrial and agricultural sources, see United States Environmental Protection Agency, "Sources of Greenhouse Gas Emissions," Overviews and Factsheets, US EPA, December 29, 2015, https://www.epa.gov/ghgemissions/sources-greenhouse-gas-emissions.

7 For a general global analysis, see Douglas Holtz-Eakin & Thomas M. Selden, Douglas Holtz-Eakin and Thomas M. Selden, "Stoking the Fires? CO2 Emissions and Economic Growth," Journal of Public Economics 57, no. 1 (May 1995): 85-101. For an early economic analysis linking CO2, growth, and climate, see William D. Nordhaus, William D. Nordhaus, "Economic Growth and Climate: The Carbon Dioxide Problem," The American Economic Review, no. 1 (1977): 341. For an examination of several industrialized nations, including the US and Germany, that provides empirical evidence against the theoretical notion in environmental economics that beyond a certain level of development, emissions and growth vary inversely, see S.M. de Bruyn et al, Economic Growth and Emissions: Reconsidering the Empirical Basis of Environmental Kuznets Curves, 25 Ecological Econ. 161-175 (1998). For an analysis focused on China, see S.S. Wang et al., "CO2 Emissions, Energy Consumption and Economic Growth in China: A Panel Data Analysis," Energy Policy 39 (September 1, 2011): 4870–75, https://doi.org/10.1016/j.enpol.2011.06.032.

fourth largest globally and by far the largest in the European Union (EU)[8]. The US and Germany ranked 13th and 19th in the world, respectively, in per capita GDP in 2015,[9] and 3rd and 8th respectively in per capita CO2 emissions in the same year.[10] The structures of the two economies are strikingly similar: while Germany's economy is somewhat more reliant on industrial production, both derive about 1% of national GDP from agriculture, between 20 and 30% from industry, and the remaining large majority from the service sector.[11]

Beyond these basic economic likenesses, the two federal republics maintain immense bureaucratic apparatuses for research, monitoring, regulation and enforcement related to the environment. Both countries founded federal environmental agencies, the Environmental Protection Agency (EPA) in the US and the German Federal Environment Agency (UBA, for its initials in German), in the early 1970s. Both federal-level agencies help set and enforce national-level policy floors that state-level agencies enforce and can augment in their jurisdictions (though, as will be discussed in greater detail, Germany's federal environment apparatus has expanded significantly since the founding of the UBA).[12] From a distance, then, the two nations appear to share a basic economic and governmental structure relative to environmental issues, with some history in common to boot. Despite social and cultural differences, this might suggest that the United States and Germany would pursue the transition to low-carbon economies based on clean energy along similar pathways. Yet the two nations have in recent years diverged drastically in their federal policy efforts to facilitate this transition. The CPP and *Energiewende* constitute the central components of this divergence. Though they cannot capture all there is to say on the issue, they provide a striking contrast that will allow for interrogation to its heart. For a brief examination of the facts of each, I turn first to the US and then to Germany.

8 "GDP (Current US$) | Data" (World Bank, 2018), https://data.worldbank.org/indicator/NY.GDP.MKTP.CD?year_high_desc=true.

9 "GDP per Capita, PPP (Current International $) | Data" (World Bank, 2018), https://data.worldbank.org/indicator/NY.GDP.PCAP.PP.CD?end=2015&start=1960&year_high_desc=true.

10 "Each Country's Share of CO2 Emissions," Union of Concerned Scientists, October 11, 2018, https://www.ucsusa.org/global-warming/science-and-impacts/science/each-countrys-share-of-co2.html.

11 "The World Factbook," Central Intelligence Agency, 2016, https://www.cia.gov/library/publications/the-world-factbook/.

12 United States Environmental Protection Agency, "Our Mission and What We Do," Overviews and Factsheets, US EPA, January 29, 2013, https://www.epa.gov/aboutepa/our-mission-and-what-we-do; "About Us," Umweltbundesamt, September 6, 2013, http://www.umweltbundesamt.de/en/the-uba/about-us. For a lay overview of the EPA's history and functions, see Robinson Meyer, "How the U.S. Protects the Environment, From Nixon to Trump," The Atlantic, March 29, 2017, https://www.theatlantic.com/science/archive/2017/03/how-the-epa-and-us-environmental-law-works-a-civics-guide-pruitt-trump/521001/.

A. The Clean Power Plan

The CPP emerged from a context of hesitation and failure on the part of the US government to regulate GHG emissions. In 2007, the Supreme Court in Massachusetts v. EPA ruled that the EPA had the authority and duty, if it found CO2 to be a driver of climate change, to regulate CO2 emissions and thereby combat climate change under the Clean Air Act[13]. The decision, while empowering the EPA to promulgate the rule codifying the CPP eight years later, was actually a defeat for it at the time: the Bush-era EPA did not wish to regulate CO2 emissions, and argued in the case that the Clean Air Act did not cover them.

Two years later, legislative efforts to regulate emissions through a "cap-and-trade" scheme similar to the EU's, wherein a legal limit of GHG emissions is set and emitters can buy and sell permits to emit beneath that cap,[14] failed when the American Clean Energy and Security Act (also known as the Waxman-Markey Bill) passed the House but was never brought to a vote in the Senate. The deadening impact this had on federal climate action, early in Obama's first term with Democratic majorities in both legislative chambers, was palpable: in Purdy's view, "when Waxman-Markey failed, a whole generation of reformist thinking went with it."[15]

Frustrated by legislative stagnation, President Obama later directed the EPA to formulate a rule regulating GHG emissions in the power sector.[16] This rule ultimately became the Clean Power Plan, an EPA regulation designed to decrease power-sector CO2 emissions by 32% by 2030, relative to 2005 levels, by instituting emissions guidelines for fossil fuel-fired power plants and directing states to create and implement their own such standards.[17] About 40% of US CO2 emissions came from the power sector in 2005,[18] so other things equal the CPP alone would cut total US emissions over 12% between 2005 and 2030. This would be the largest legally-mandated emissions reduction in US history, and, accordingly, upon its announcement President Obama labeled the CPP "the single most important step

13 Massachusetts v. Environmental Protection Agency, No. 05–1120 (Roberts Court April 2, 2007).

14 "EU Emissions Trading System (EU ETS)," Climate Action - European Commission, accessed January 2, 2019, https://ec.europa.eu/clima/policies/ets_en.

15 Meyer, "How the U.S. Protects the Environment."

16 "The Clean Power Plan: EPA Interprets the Clean Air Act to Allow Regulation of Carbon Dioxide Emissions from Existing Power Plants.," Harvard Law Review 1152 129, no. 4 (February 2016), https://harvardlawreview.org/2016/02/the-clean-power-plan/.

17 Environmental Protection Agency, "Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units | 80 FR 64661" (Federal Register, December 22, 2015), https://www.federalregister.gov/documents/2015/10/23/2015-22842/carbon-pollution-emission-guidelines-for-existing-stationary-sources-electric-utility-generating.

18 United States Environmental Protection Agency, "Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990-2016," Reports and Assessments, US EPA, January 30, 2018, https://www.epa.gov/ghgemissions/inventory-us-greenhouse-gas-emissions-and-sinks-1990-2016.

America has ever taken in the fight against climate change."[19]

However, backlash to the CPP from industry and political groups was immediate and intense. Also, before the rule could take effect, the Supreme Court issued an order blocking its entry into force until all litigation challenging it was complete.[20] Then, after President Trump took office, he ordered the EPA to review it, and an EPA proposal to repeal it was soon unveiled.[21] While the CPP remains technically alive as of this writing in August 2018, its repeal is expected to be officially complete soon. When that happens, the rule that the Harvard Environmental Law Program has called "the crown jewel of America's international climate commitments"[22] will be dead before it ever came alive.

The CPP was designed to reduce CO2 emissions predominantly by decreasing the use of coal-fired power plants, which have high emissions intensity relative to other energy sources.[23] Market forces, coincidentally, have recently made a major impact in the direction intended by the CPP, as a dramatic shift in energy prices caused by cheap natural gas usage from shale sources has taken place. US CO2 emissions rose steeply from 1990 to 2005, when shale-sourced natural gas hit the market,[24] and have dropped 12% since then.[25] Still, bracketing this fortunate trend, the overall picture of US climate progress is less rosy: annual US GHG emissions remain about 2% greater than they were in 1990.[26] In the absence of any prospect of federal action to aggressively cut emissions, and in light of President Trump's 2017 decision to withdraw from the Paris Agreement, many cities, states, and private enterprises have taken matters into their own hands and pledged to enforce their own emissions cuts.[27]

B. The *Energiewende*

The idea of *Energiewende*, or "energy transition," in Germany goes back

19 Barack Obama, "Remarks Announcing the Environmental Protection Agency's Clean Power Plan."
20 Robinson Meyer and Matt Ford, "A Major Blow to Obama's Climate-Change Plan," The Atlantic, February 9, 2016, https://www.theatlantic.com/politics/archive/2016/02/supreme-court-clean-power/462093/.
21 40 C.F.R. §60.
22 "Clean Power Plan / Carbon Pollution Emission Guidelines - Environmental & Energy Law Program," Harvard Law School, September 27, 2017, https://eelp.law.harvard.edu/2017/09/clean-power-plan-carbon-pollution-emission-guidelines/.
23 United States Environmental Protection Agency, "FACT SHEET: Clean Power Plan Overview," Overviews and Factsheets, accessed January 3, 2019, fact-sheet-clean-power-plan-overview.html.
24 Robert Rapier, "Yes, The U.S. Leads All Countries In Reducing Carbon Emissions," Forbes, accessed January 3, 2019,
25 US EPA, "Carbon Pollution Emission Guidelines," ES-6.
26 United States Environmental Protection Agency, "Sources of Greenhouse Gas Emissions," Overviews and Factsheets, US EPA, December 29, 2015, https://www.epa.gov/ghgemissions/sources-greenhouse-gas-emissions.
27 See, e.g., Hiroko Tabuchi and Henry Fountain, "Bucking Trump, These Cities, States and Companies Commit to Paris Accord," The New York Times, January 20, 2018, sec. Climate, https://www.nytimes.com/2017/06/01/climate/american-cities-climate-standards.html.

to the late 1970s and early 1980s, when environmentalist groups opposed to nuclear energy and fossil fuels called for a transformation of Germany's energy sources in the wake of nuclear plant construction and the 1973 and 1979 oil crises.[28] However, the term did not describe a substantive policy initiative until the turn of the millennium, when Germany's governing coalition of the Green Party and the center-left Social Democrats began to take widespread action to promote a transition to new forms of energy production.

Since the passage of the first Renewable Energy Sources Act in 2000, *Energiewende* has become shorthand for a vast array of goals and timetables for renewable energy production and emissions cuts, research reports supporting these goals and timetables, and legal requirements enforcing them.[29] The action of the *Energiewende* is not localized to one federal ministry or even branch of government. Instead, its regulations spring from multiple sources: administratively, the Federal Environment Agency (UBA), the Federal Ministry for the Environment, Nature Conservation, and Nuclear Safety (BMU), and the Federal Ministry for Energy and Economic Affairs (BMWi) all play a part in setting and realizing its goals. The chancellor and legislative branch are heavily involved in *Energiewende* policy creation as well.

The key reports and policy components of the *Energiewende* are as follows. 2000's Renewable Energy Sources Act (EEG) guaranteed a twenty-year period of high prices for electricity from renewable sources sold into the grid[30], and was updated in 2004, 2009, 2012, 2014, and 2017 to increase the law's renewables targets and adjust its pricing mechanisms.[31] 2007's Integrated Energy and Climate Programme, also known as the Meseberg decision, approved a package of fourteen new laws and amendments to provide a policy basis for the doubling of Germany's emissions reductions targets for 2020 from 20 to 40%, compared to 1990 levels.[32] A long-term plan for Germany's use of various sources of energy in different sectors was approved in 2010 as a cornerstone of the *Energiewende*,[33] and in 2014 and 2016 the federal cabinet approved long-term climate action plans for 2020 and

28 Hardy Graupner, "What Exactly Is Germany's 'Energiewende'?" DW.COM, January 22, 2013, https://www.dw.com/en/what-exactly-is-germanys-energiewende/a-16540762.

29 "Sunny, Windy, Costly and Dirty," The Economist, January 18, 2014, https://www.economist.com/europe/2014/01/18/sunny-windy-costly-and-dirty.

30 "Renewable Energy Sources Act (Erneuerbare-Energien-Gesetz EEG)," International Energy Agency, 2000, https://www.iea.org/policiesandmeasures/pams/germany/name-21702-en.php.

31 BMWi - Federal Ministry for Economics Affairs and Energy, "Renewable Energy," 2018, https://www.bmwi.de/Redaktion/EN/Dossier/renewable-energy.html.

32 See generally Federal Ministry for Environment, Nature Conservation, and Nuclear Safety (BMU), "The Integrated Energy and Climate Programme of the German Government," 2007.

33 See generally Federal Ministry of Economics and Technology and Federal Ministry for the Environment, Nature Conservation and Nuclear Safety, "*Energy Concept* for an Environmentally Sound, Reliable and Affordable Energy Supply," September 28, 2010.

2050, respectively.[34]

In addition to CO2 reductions and renewables increases, a central and heavily publicized component of the *Energiewende* is its move to abolish nuclear energy production in Germany. After the Fukushima nuclear disaster in 2011, in which a magnitude 9.0 earthquake off the coast of Japan triggered a tsunami which caused a meltdown at the Fukushima Daiichi nuclear plant, the German government under intense public pressure announced plans to immediately cease operations of eight of its oldest nuclear power plants, with all remaining nuclear plants to be closed by 2022.[35]

The *Energiewende*, for all its progress, has been enormously expensive. Much of the cost of the heavy renewables subsidies has been passed onto consumers: a renewables surcharge on utilities bills has raised the average household's monthly fee by 50% since 2007.[36] Moreover, the decade-long sprint to close the nation's nuclear plants necessitates a costly rapid increase in the use of other sources, since Germany has long sourced a large portion of its power supply from nuclear energy.[37] Even beyond costs caused by solar subsidies and cuts to nuclear energy, the *Energiewende* today faces other challenges: for instance, due to recent rapid economic and population growth, German CO2 emissions reductions have stagnated since 2014 and the country will therefore likely
miss its 2020 target.[38] The fact remains, though, that through a concerted policy effort Germany has cut its total CO2 emissions over 26% from its levels in 1990 (the key baseline year for emissions reductions in international climate policy). In absolute terms, it has cut emissions more than any other EU nation since then,[39] and since the passage of the EEG in 2000 it has sextupled its electric power production from renewables, mainly wind and solar, to a full 36% of national supply in 2017.[40] This is an enormous figure by global standards. The *Energiewende*, though costly and facing obstacles, has made impressive strides.

34 See generally "The German Government's Climate Action Programme 2020 - Cabinet Decision of 3 December 2014" BMU, December 3, 2014; BMU, "Climate Action Plan 2050 – Germany's Long-Term Emission Development Strategy," 2016, https://www.bmu.de/en/topics/climate-energy/climate/national-climate-policy/greenhouse-gas-neutral-germany-2050/.

35 Federal Ministry for the Environment, Nature Conservation and Nuclear Safety, "The Federal Government's *Energy Concept* of 2010 and the Transformation of the Energy System of 2011," 2011.

36 Jeffrey Ball, "Germany's High-Priced Energy Revolution," Fortune, March 14, 2017, http://fortune.com/2017/03/14/germany-renewable-clean-energy-solar/.

37 Kerstine Appunn, "The History behind Germany's Nuclear Phase-Out," Clean Energy Wire, January 2, 2018, https://www.cleanenergywire.org/factsheets/history-behind-germanys-nuclear-phase-out.

38 See e.g., Sören Amelang, "Germany on Track to Widely Miss 2020 Climate Target – Government," Clean Energy Wire, June 13, 2018, https://www.cleanenergywire.org/news/germany-track-widely-miss-2020-climate-target-government.

39 Eurostat, "Greenhouse Gas Emission Statistics - Emission Inventories," June 2018, https://ec.europa.eu/eurostat/statistics-explained/index.php/Greenhouse_gas_emission_statistics_-_emission_inventories.

40 BMWi, "Renewable Energy," 2018.

Thus we have two modern, industrialized, immensely productive nations, expected to be regional and global leaders on a variety of issues, with markedly different policy responses to the climate and energy problem: one with a climate policy crafted, immediately challenged, and quickly repealed upon a change of government, and the other making imperfect but steady progress. Furthermore, despite the two countries' basic similarities, few today would be surprised by this stark contrast. It is generally understood that Germany, to use the jargon of energy policy circles, is "ambitious on climate," while the United States is not.

For the remainder of this paper, I aim to use the facts of these two policy initiatives and their development in order to interrogate this general understanding rather than take it for granted, and thereby go a level or two deeper into the human reasons that might explain why it, and certain facts adjacent to it, hold. Such major differences in the two nations' contemporary laws on energy and climate provide important loci for insights into the imaginative and ideological characteristics of these nations with respect to politics, law, and the environment. Since these policies mandate (or, in the case of the CPP, attempted to mandate) how they, as states and societies, must respond to climate change, such differences provide comparative lenses onto how Germany and the United States view their relationships to their own populations and other nations that climate change will harm, and to the natural world which provides the resource basis for their economic production and which they in turn affect through greenhouse gas emissions. As Purdy puts it, "Law is a circuit between imagination and the material world"[41]; the laws that exist came about through processes expressing an underlying imagination, and can be expected through the realization of what they require to influence the imagination of the future. Examining this pair of policy initiatives, then, what imaginative structures underlying German and American environmental and political life could help account for this vast difference?

III. The Contemporary German and American Environmental-Political Imaginations via the CPP and the Energiewende

Before laying out dominant features of the two nations' environmental-political imaginations, I must briefly elaborate upon the concept of the environmental-political imagination itself, and clarify how it relates to Purdy's concept of the

41 Purdy, After Nature, 22.

environmental imagination. Neither concept refers directly to the explicit ideological statements parties make in their environmental platforms, nor theories of the true, the good, or the just in tracts on environmental or political philosophy; as Purdy says, "Imagination is less precise, less worked out, more inclusive than ideas, and it belongs to people in their lives, not philosophers working out doctrines. Imagination is a way of seeing, a pattern of how things must be."[42] It might be thought of as taking place on the mental level prior to ideology, or as ideology's raw material. It has to do with the way people, individually and in institutions, think and make assumptions about what exists in nature and the human world, how those things are organized, what is valuable about them, and what ought to be done with them, here in particular with respect to climate and energy, and the collective decision-making proper to the political sphere. It is an implicit, blurry set of notions, perhaps internally contradictory, largely submerged or subconscious, that acts as inputs in the formation of laws and policies that then make explicit what may and may not be done.

I borrow this framing of "imagination" from Purdy, but employ it in the discussion of somewhat different material from what is referred to by his concept of the "environmental imagination." As Purdy uses it, the environmental imagination refers primarily, though not exclusively, to how people understand and act upon the environment at the level of landscape, rather than atmosphere and climate.[43] While Purdy acknowledges that, in the future, different nations or regions might develop their own "ethics and politics of climate change,"[44] he does not examine in a descriptive sense how such different environmental-political imaginations are already at work in different places. My analysis here is meant to fill this gap, to focus on the particular environmental, economic, and political issue of climate change and explore how the US and Germany are in fact seeing and acting upon it by using Purdy's framing of the environmental imagination as a conceptual starting point. Purdy's political focus is mainly on how people's imaginative notions of the environment work their way into political life, since decisions about how to approach and use the environment are made in the political sphere. I wish to inquire further about Americans' and Germans' imaginative notions of politics itself: their notions and assumptions about what politics is like, how government ought to be organized and decisions made, and what we owe to others inside and outside the polity. Thus the imagination discussed here is itself both environmental and political. Also, since I shall discuss not only how people imagine the climate or the atmosphere but also how their imaginative notions of the environment—

42 Purdy, After Nature, 22.
43 Purdy, After Nature, e.g., 8, 23, 30, 47.
44 Purdy, After Nature, e.g., 8, 23, 30, 47.

generally, of nature overall—affect their nations' action on climate specifically, "environmental-political" is more appropriate than "climate-political." The term thus seemed to be the best fit for a capacious idea that extends Purdy's notion in a logical way.

A. The 21st-Century American Environmental Imagination

The contemporary American environmental-political imagination, as seen through the story of the Clean Power Plan, can best be characterized by a sensibility of individuation and conflict. By a sensibility of "individuation," I mean that there exists a pervasive imaginative stress on the sharp divisions among different problems, parties, and conceptual categories of environment and politics, rather than on their continuities; particularly emphasized is the split between the environmental and the economic spheres. Normatively, there is a corresponding imaginative insistence that starkly individualized approaches to such disjoint issues must be appropriate. By a spirit of "conflict," I mean that these individuated issues, categories, and parties are often imagined as necessarily at odds with one another: there is a powerful sense that trade-off and adversarial relations are inherent to them and to climate change in particular, and that such conflict cannot be overcome by any sense of reconciliation or unification. Individuation is the more fundamental of the two descriptors here, frequently accompanied with an adversarial tone, since two ideas, issues, outcomes, actors, and so on can only be viewed as conflicting if they are first given sharp individuating boundaries. To illustrate this, I marshal a range of evidence from the CPP and beyond to investigate three aspects of the United States' environmental-political landscape: its view of the relationship between the categories of the "economic" and the "environmental"; its understanding of particular American landscapes and coal, a particularly significant form of energy; and its latent conception of leadership and agency on climate action.

A1. Environment and Economy

The American environmental-political imagination contains, first and foremost, an insistence upon a sharp distinction between the economic and environmental spheres. "Economic" and "environmental" are not understood as merely two ways in which to view a larger human-natural system, two modes of its measurement that can be usefully distinguished, but instead as two ontologically distinct categories which in practice ought, so far as possible, to be governed by different procedures and norms. In the context of the CPP, this can be initially seen from the law's institutional backdrop, the structure of which reflects a sharp conceptual disconnect between economy and environment. President Obama

instructed the EPA, and the EPA alone, to prepare what became the CPP.[45] It is true that the EPA was created during a time in American history when recognition of human-environmental interconnection was ascendant,[46] and aids human safety through its insurance of clean air and water, but the EPA is explicitly dedicated to environmental protection alone rather than some larger joint goal of environmental-economic harmony. The implicit assumption in much of its work is that the environment is distinct from the economy and other human spheres and will need to be guarded against them. Some EPA officials have even suggested that the EPA has done its job of ensuring clean air and water too well, such that many Americans lose sight of ways in which economic production impacts the environment.[47] Conversely, the US Department of Commerce, the cabinet ministry that proclaims to be tasked with just "one overarching goal: Helping the American Economy Grow"[48] (emphasis in the original), mentions no environmental, ecological, or sustainability concerns in any of its five strategic pillars that support its central aim. Thus in the executive branch's structure, the concepts of environment and economy are thoroughly and formally separated. The Department of Energy (DOE) might be expected to mediate the two, but it has a strong defense and pure research bent: at once handling nuclear weapons research, nuclear energy research and operations, and clean and fossil energy research. These specifics of bureaucratic organization may seem somewhat arbitrary, but they dictate both how federal agencies' fields of action are defined and approached and how official discourse regarding those fields is expressed in public. I submit that both of these have significant consequences for how Americans perceive environmental, economic, and energy issues and their nation's ways of handling those issues.

In the context of this division of labor, President Obama's executive assignment of the CPP's preparation to the EPA alone appears symbolic of where climate change fits into the American environmental-political imagination, representing the official assignment of US action on climate change to the environmental sphere alone rather than the economic one. The huge backlash against the CPP illustrates the conflictual, not merely individuating, nature of this aspect of the environmental-political imagination:[49] many perceived the CPP as a conferral of environmental benefits and therefore also a sentence of concomitant economic

45 The White House Office of the Press Secretary, "Presidential Memorandum - Power Sector Carbon Pollution Standards," June 25, 2013, https://obamawhitehouse.archives.gov/the-press-office/2013/06/25/presidential-memorandum-power-sector-carbon-pollution-standards.

46 Purdy, After Nature, 210.

47 See, e.g., Jonathan Cannon, former EPA general counsel, quoted in Meyer, "How the U.S. Protects the Environment, From Nixon to Trump."

48 "About Commerce | U.S. Department of Commerce," 2018, https://www.commerce.gov/about.

49 See, e.g., "Mission | Department of Energy," accessed January 3, 2019, https://www.energy.gov/mission; and Department of Energy, "Nuclear Security & Nonproliferation | Department of Energy," 2018, https://www.energy.gov/nnsa/nuclear-security-nonproliferation.

sacrifice and degradation. A host of challenges were immediately raised against the proposed law, and the ensuing political warfare was intense.[50]

This is deeply ironic in light of the fact that the government's own study of the Clean Power Plan indicated that, in fact, due to long-term increases in energy efficiency, savings on climate adaptation costs, and savings on health expenditures due to reducing vast quantities of harmful fumes like sulfur dioxide in the air, it would likely have saved the US billions per year by 2030 relative to the status quo.[51] Much has been made of the idea that organizations like fossil fuel companies, many of which stand directly to lose from a transition to low-emission energy sources and lobbied hard against the CPP,[52] are the real villains preventing America's energy transition. Coal and oil companies certainly lobbied hard against the CPP and may have played a large role in spreading the notion that emissions reductions, like environmentally beneficial policies generally, necessarily conflict with economic benefits. However, it was not merely these companies that voiced their concerns: amid both an outpouring of support for and backlash against the proposed rule, the EPA received over 4.3 million comments on it in six months.[53] Much has also been made of the deep partisan divide on belief in and concern about climate change itself,[54] which tracks the two parties' divergent emphasis on action to protect the environment and action to aid the economy. This divide was clearly visible in the battle over the CPP, for instance, when the 11 Senate Republicans of the Environment and Public Works Committee issued a letter in support of repealing the CPP in 2017 that made no mention of the environment or climate change. That letter mentioned only "the pervasive, negative effects [the CPP] would have had on Americans across the country. The CPP would have driven up energy prices, eliminated American jobs, and hurt local communities that

50 See, e.g., Environmental Protection Agency, "Electric Utility Generating Units: Repealing the Clean Power Plan: Proposal," Policies and Guidance, US EPA, October 4, 2017, https://www.epa.gov/stationary-sources-air-pollution/electric-utility-generating-units-repealing-clean-power-plan-0; Robinson Meyer, "How Obama Could Lose His Big Climate Case," The Atlantic, September 29, 2016, https://www.theatlantic.com/science/archive/2016/09/obama-clean-power-plan-dc-circuit-legal/502115/.

51 OAR US EPA, "Clean Power Plan Final Rule – Regulatory Impact Analysis," Reports and Assessments, October 23, 2015, /cleanpowerplan/clean-power-plan-final-rule-regulatory-impact-analysis, 3-23.

52 See, e.g., sections on ExxonMobil, Peabody Energy, and Southern Company in "Who's Fighting the Clean Power Plan and EPA Action on Climate Change?" Union of Concerned Scientists, https://www.ucsusa.org/global-warming/fight-misinformation/whos-fighting-clean-power-plan-and-epa-action-climate.

53 OAR US EPA, "FACT SHEET: Clean Power Plan By The Numbers," Overviews and Factsheets, accessed January 3, 2019, fact-sheet-clean-power-plan-numbers.html.

54 See, e.g., Megan Brenan and Lydia Saad, "Global Warming Concern Steady Despite Some Partisan Shifts," Gallup.com, March 28, 2018, https://news.gallup.com/poll/231530/global-warming-concern-steady-despite-partisan-shifts.aspx.

depend on coal."[55] Importantly, though, the imagined conflict between economic and environmental benefits on climate change policy cannot be merely a result of American partisanship: that Democrats and Republicans predictably gravitated to their sides of that conflict on the Clean Power Plan means that the idea of the environmental-economic conflict itself was already generally accepted, and action to counteract climate change has simply been imaginatively sorted mainly into the pro-environment rather than pro-economy category (this is not to say, however, that both parties are exactly equally narrow-minded in their understanding of climate change). The imagined disconnection and conflict between the two spheres is thus fertile ground for, rather than a simple output of, increased partisan division. Also, while I will not examine the American imagination of markets in depth here, there seems to be a notable similarity between the way Americans notionally separate the economy and the environment and the well-recognized way they notionally separate markets and government intervention in the economy. It seems that in America, pro-environment action is imagined as government interference into the workings of the market, and for that reason is anti-economic. This is despite the fact that in practice governments always set the rules of the market in the first place, and that in many cases, like the CPP, government action would increase overall economic welfare in the context of the market's failure to internalize all costs. That the CPP's emissions reductions would actually save America money and relieve it of immense human suffering in the long term might have saved it in another time or place, but could not in the contemporary United States.

A2. Coal and Landscape

Beyond the pronounced economic-environmental distinction, another form of individuation prominent in the American environmental-political imagination and visible in the narrative of the CPP is the uniqueness assigned to the landscape of America's coal mining country, along with an associated imaginative privileging of coal miners themselves and their imagined conflict with nature to extract its energy. This reflects a more general American notion that a sharp definitional line ought to be drawn between particular landscapes, and between them and humankind, a notion easily recognizable in American lore and law historically; one example of this is the Wilderness Act of 1964, which provided for protected, isolated areas that would remain "untrammeled by man" and would each keep their

55 "EPW Republicans Send Letter to EPA in Support of Clean Power Plan Repeal," U.S. Senate Committee on Environment and Public Works, January 12, 2018, https://www.epw.senate.gov/public/index.cfm/2018/1/epw-republicans-send-letter-to-epa-in.

"primeval character" in spite of an expanding, modernizing population.[56]

However, in the realm of energy production, a somewhat different individuating mood is at work than in wilderness protection, one that associates specific energy resources with specific landscapes and imagines a zero-sum conflict for primacy between them. The CPP would have achieved its emissions reductions mainly through cuts in the use of coal-fired power plants.[57] As the letter from the Republicans of the Senate Committee for Environment and Public Works illustrates, a key source of opposition to the CPP was a sentiment that the nation's jobs in coal production must be politically protected. As with the CPP cost-benefit analysis indicating that in the long term the plan would actually have been economically profitable, here too there is a deep and ironic seed of irrationality; just over 160,000 Americans work in coal production, less than half of the number involved in the fledgling solar industry, which the CPP would have benefited,[58] and coal production has already steeply declined because of market forces alone, with cheap natural gas largely supplanting it since 2005.[59] Simple interest-group politics are always, of course, a factor, and support for coal jobs as a public position is due in large part to the rhetoric of President Trump, who has thrust coal production incessantly into the political arena, making it a more partisan issue and implicitly highlighting its racial associations (and, though not discussed extensively here, race is yet another sphere of deep divisions in the American environmental-political imagination, as, for instance, the work of the environmental justice movement has sought to show).[60]

However, as Republicans and Democrats seized upon rather than created an imagined fundamental conflict between the economic and environmental spheres, President Trump seized upon rather than created the American glorification of the coal industry and its imagined battle with forms of energy hostile to it. Many Americans view coal miners as an interest group with a special claim to reverence, in some sense especially American, their connection to coal country's

56 Purdy, After Nature, 190.

57 US EPA, supra note 21.

58 Department of Energy, "2017 U.S. Energy and Employment Report," January 2017, 29.

59 DOE, "U.S. Energy and Employment Report," 21.

60 For a theoretical overview of environmental justice and its critical discussion of race, see David Schlosberg, "Theorising Environmental Justice: The Expanding Sphere of a Discourse," Environmental Politics 22, no. 1 (February 1, 2013): 37–55, https://doi.org/10.1080/09644016.2013.755387); For information about the high proportion of black Americans living near a coal-fired power plant, see "Environmental Racism in America: An Overview of the Environmental Justice Movement and the Role of Race in Environmental Policies," Goldman Environmental Foundation, June 24, 2015, https://www.goldmanprize.org/blog/environmental-racism-in-america-an-overview-of-the-environmental-justice-movement-and-the-role-of-race-in-environmental-policies/; By contrast, for statistics showing employment in the coal industry to be disproportionately white, see United States Department of Labor Bureau of Labor Statistics, "Employed Persons by Detailed Industry, Sex, Race, and Hispanic or Latino Ethnicity," 2018, https://www.bls.gov/cps/cpsaat18.htm.

lifeways and landscape that is morally and aesthetically unimpeachable even as they level its mountains and plumb its depths for the dirtiest fossil fuel available. Our version of fascination with and elevation of coal is uniquely American. Millions of Americans outside of coal country are able to glorify coal production imaginatively, thanks in part to the very fact that they have never been to coal country, because coal is closely associated with one of America's many distinct, individuated landscapes, cultures, and forms of productive connection to the environment. Oil is certainly imaginatively American, in the sense that it can make one rich quickly. But no other source of energy evokes the sort of hardscrabble, manful battle with nature that coal does, up in the mountains and away from the friendly confines of civilization. Actual coal production, of course, is much less attractive than it is imagined to be in its symbolic overcoming of an unfriendly nature: as Purdy notes, "mountaintop-removal mining dynamites hills and hollows into a flat, treeless terrain and buries many hundreds of miles of Appalachian streams."[61] But politically, huge swaths of the country lionize it for its imaginative associations, and even those who resist this celebration must engage with and seek to erode that picture of it. The point is not that no Americans recognize that burning coal pollutes the atmosphere intensely and that relatively few Americans actually make their living in its industry; it is that the fact that the US has been collectively unable to privilege other goals, such as combating climate change through the CPP, over its glorification of the unique landscape and culture of coal bespeaks a deep temperamental inclination toward the particular and the adversarial in the way the nation imagines what ways of relating to the environment ought to be honored and preserved.

Coal also plays a role in the notion of the US as particular and individuated itself because of the role it plays in contributing to US energy independence. The US, despite what political advertisements advocating drilling in yet another remote wilderness might have you believe, is highly energy-independent—on net importing just 7% of its total energy use.[62] This fact provides one strut undergirding the spirit of individuation latent in how the nation views itself globally on climate change. In keeping with its degree of energy independence, there is little sense that the country is truly indebted to other nations in the energy arena. A logic therefore prevails that, politically, it is the United States' right to individuate itself in the international discourse on climate change. This is true even prior to Donald Trump's explicit protectionism and withdrawal from the Paris Agreement, an ultimate act of individuation; the resonance of his "America First" message, despite

61 Purdy, After Nature, 30.

62 International Energy Agency, "Energy Imports, Net (% of Energy Use) | Data" (The World Bank, 2015), https://data.worldbank.org/indicator/EG.IMP.CONS.ZS?locations=US&year_high_desc=false.

its multiple valences, can at least partially be attributed to a widespread sentiment that America is not necessarily dependent on the rest of the globe and can therefore act on its own terms in international affairs. Accordingly, when it is not refusing to participate on a particular issue, it is seen by much of its own population and government as the proper global leader on that issue. This is true of America's action on climate change through the Clean Power Plan, and I therefore turn now to sketching the particular ideal of American leadership on climate change manifest in the law's progression. This ideal is glory-seeking and exceptionalist, placing the US on an imagined pedestal above the other nations attempting to reduce emissions.

A3. Leadership and Agency

While setting about repealing the CPP, the Trump administration has made an extravagant claim about American leadership on climate change: that, because it cut emissions more than any other nation in 2017, it is therefore "leading the world" on addressing climate change overall.[63] These claims are transparently based on bad-faith: the US is the world's second-largest emitter, far ahead of third place and only behind China that has coal-fired its way to yearly emissions increases since 2000,[64] so any proportionally nontrivial American emissions cut in 2017 was likely to be the world's largest in absolute terms that year. Moreover, this "world's largest" title is just one year old, and is due basically entirely to market forces making it increasingly uneconomical to use coal[65] even as the Trump administration attempts to prop it up through the repeal of the CPP.

Nonetheless, Trump's administration is not the only one in the CPP era to loudly proclaim American climate and energy leadership when the full facts of the situation did not support it. As noted in the paper's epigraph, Obama claimed upon announcement of the CPP that he was "[committing] the United States to lead the world on this issue."[66] In hindsight, given Trump's cancellation of the CPP and withdrawal of the US from the Paris Agreement, Obama's idealistic portrayal of the CPP as a legal and political commitment to US climate leadership may look like little more than a cruel joke of history, a genuine and dignified gesture of

63 Nicole Lewis, "Fact Checker: EPA Administrator Scott Pruitt's Claim That the U.S. Is 'Leading the World' in 'C02 Footprint' Reductions," The Washington Post, October 23, 2017, https://www.washingtonpost.com/news/fact-checker/wp/2017/10/23/epa-administrator-scott-pruitts-claim-the-u-s-is-leading-the-world-in-c02-footprint-reductions/?utm_term=.57dfb8ccf34b.

64 Jan Ivar Korsbakken, Robbie Andrew, and Glen Peters, "Guest Post: China's CO2 Emissions Grew Less than Expected in 2017," Carbon Brief, March 8, 2018, https://www.carbonbrief.org/guest-post-chinas-co2-emissions-grew-less-expected-2017.

65 Benjamin Storrow, "Trump's 'Affordable Clean Energy' Plan Won't Save Coal," Scientific American, August 21, 2018, https://www.scientificamerican.com/article/trumps-affordable-clean-energy-plan-wont-save-coal/.

66 Obama, "Remarks Announcing the Environmental Protection Agency's Clean Power Plan."

America's desire to lead for the greater good twisted into a dark irony by a shift in the political winds. Even at the time, it made little sense in light of how much had been accomplished in other portions of the developed world: by 2015, Germany had 15 years of experience with renewable energy tariffs, had set 2020 climate targets, and the whole EU had agreed on 2030 targets with a decade of emissions trading experience behind it.[67] Obama's insistence on American leadership despite this mountain of evidence indicating that the US was far from a position to lead on emissions reductions is therefore revealing. He was certainly aware of how truly far behind America was in 2015 on climate action, but singular American leadership was nonetheless a central thrust of his pitch of the CPP to the American people. Obama's rhetoric reflects an American sensibility that, on environmental issues like all others, the US must be unique, particular, special, glorious.

This sense of entitlement to climate leadership on the global stage manifests today not in widespread federal government action, but in the individual person of the president. The unilateral actions of Presidents Obama and Trump on the CPP—Obama singly directing the EPA to create it, Trump singly directing the EPA to review and replace it—express, despite their different circumstances, a sense of deserved presidential individuality: that is, a right to define
America's international climate leadership in one's own way regardless of its previous instantiations. Beyond making for less stable policy, this feature of contemporary American climate politics has the effect of being, if not anti-democratic, only minimally democratic: whichever section of the population elected the last president gets to determine policy on climate and energy, regardless of later public opinion[68] and congressional intervention aside. Any major climate action requires governmental leadership, but the current American version, with its current structure of top-down leadership, leaves little room for individual Americans to play a major role in a clean energy transition. They are simply not viewed as important actors in this context. Their support is not needed, and political leaders do not think to call upon them to help in direct action on climate and energy. Even when Obama did connect environmental concerns, economic ones, and ordinary Americans in his rhetoric on the CPP, he argued merely that it would help keep energy "reliable and affordable for American businesses and families,"[69] which is not exactly a moving call to purposeful collective action on an issue of immense national and

67 The European Commission, "EU Emissions Trading System (EU ETS)."

68 It seems notable here that for the entire period between Obama's direction of the EPA to craft the CPP in 2013 and his announcement of the final rule in 2015, his approval rating stayed beneath 50%; see Gallup, "Presidential Approval Ratings -- Barack Obama," Gallup.com, accessed January 4, 2019, https://news.gallup.com/poll/116479/Barack-Obama-Presidential-Job-Approval.aspx.

69 The White House Office of the Press Secretary, "Presidential Memorandum -- Power Sector Carbon Pollution Standards," whitehouse.gov, June 25, 2013, https://obamawhitehouse.archives.gov/the-press-office/2013/06/25/presidential-memorandum-power-sector-carbon-pollution-standards.

global importance.

Meanwhile, while millions of Americans, mainly along partisan lines, recognize climate change as a serious problem and some individuals among them have achieved success in discussing it an environmental, economic, and political issue,[70] there has been no grassroots climate movement that has been successful in shifting the national conversation overall or forcing government action. Obama's unilateral move to force action in a government gridlocked along party lines is ample evidence of this point. A true change in the American popular consciousness analogous to, say, what followed Rachel Carson's Silent Spring seems out of reach on climate in this moment. Ironically, then, the general pattern of individuation of, and emphasis upon the political import of, distinct institutional actors, relevant landscapes, and concepts of different human and environmental spheres in the American environmental-political imagination fails to elevate the individual himself or herself.

Thus a particularly executive-focused version of what is often labeled "American exceptionalism" plays a prominent role in the American environmental-political imagination of climate, as seen through the story of the CPP. But an idea of American exceptionalism is not the fundamental category in that imagination; instead, it fits into its larger spirit of partitioning and antagonism among different notional elements, a sense that—despite the idea that climate change ought to be siloed in the environmental sphere and ought to have no claim on activities outside it—the United States must stand alone at the head of the world's climate change-battling ranks. This imagination is thus both particular to the environmental-political realm and simultaneously reflective of well-recognized aspects and assumptions of American cultural life.

Perhaps nothing captures this better than that the US's spirit of partition and individuation is not an admission of limitation in each partitioned sphere, whether it be the realm of international affairs, executive leadership, the economic sphere, the environmental, or one of the many landscapes Americans insist upon as particularly special. Instead, this partition bespeaks the idea that by conceptually and legally separating each from the other, the US can grasp the infinite in each; it needs not face limitation; it can have its cake and eat it too. This truth of the environmental-political imagination holds now but is profoundly historically rooted: as Purdy notes, "American democracy had taken shape in historically unique exemption from the basic problem of modern and democratic politics: the problem of managing conflicting interests and values in a world of relative scarcity."[71] That

70 See e.g., Naomi Klein, This Changes Everything: Capitalism vs. the Climate (New York: Simon & Schuster, 2014).

71 Purdy, After Nature, 34.

foundational thread is still clearly visible today.

B. The German 21st-Century Environmental Imagination

In a deep contrast to its American counterpart, the essential spirit of the contemporary German environmental-political imagination, as viewed through the lens of the *Energiewende*, can be described by a spirit of continuity and collectivism. The German environmental-political imagination is marked by a sensibility that highlights the ways that humans and the environment are interconnected, believes that all sectors of the human population can (indeed, can only) progress by stewarding nature responsibly, and responds with a persistent, determined concentration upon collectively undertaken gradual reforms designed to benefit domestic society, provide leadership to global society, and preserve nature all at once. In some sense, this notion is similar to the ecological form of the American environmental imagination that Purdy describes, dominant in the latter part of the 20th century,[72] but it is more expansive: it does not merely attempt to capture a fact about how the natural world and humankind are necessarily continuous with each other, but extends also to how different sectors of the human population are interdependent, both inside and outside Germany, and is charged with a forward-looking normative temperament that emphasizes social solidarity in collective action both across society and across time. In order to parallel the American case, I again explore how the economic and environmental spheres are imagined to relate to one another, how culturally important forms of energy and landscape play into prevailing beliefs about how the *Energiewende* ought to be managed politically, and how leadership on reducing emissions is viewed. As in the American case, critical interpretation of the discourse and structure of government provides the primary evidence base, but a range of other sources, like political party platforms to public opinion polling, supports this characterization as well.

B1. Environment and Economy

The way the *Energiewende* is discussed by its prominent advocates, policy leaders, and involved government ministries generally integrates humanity and nature, conceptually fusing notions of what benefits the German economy and what benefits the climate and environment. It evinces a recognition of the interconnectedness of human and environmental systems and an ethic of responsible stewardship of both simultaneously, with neither given fundamental priority, even as it eschews the tone of more traditionally environmentalist rhetoric emphasiz-

72 Purdy, After Nature, 207.

ing a profound spiritual interconnectedness of man and nature. For example, the very name of 2007's Integrated Climate and Energy Action Programme, even as it heads a highly technical package of legislation that lays out specific binding mechanisms for Germany's transition to clean energy, suggests continuity between the natural climate system and humanity's economic system. The government's announcement of this package of legislation makes explicit the perspective of unified economic and environmental goals that the name suggests: "The German government's guiding principles for energy policy remain the three objectives of security of supply, economic efficiency and environmental protection."[73] In the government's view, these objectives, while they can be usefully distinguished, are not in a deeper sense truly distinct and competitive, with ever-unavoidable trade-offs that must be weighed and decided. If in some cases trade-offs are present, they are not allowed to distract from the larger continuity of the economic and environmental spheres; individuation and competition do not constitute an imaginative focus. Instead, economic ends and climate action are understood as mutually reinforcing: "Efficient climate protection modernises the economy and society."[74] This language of modernization is telling: in the German environmental-political imagination, human and environmental interconnectedness does not demand the abandonment of current technology or a return, even temporarily, to a pre-industrial way of being, as the American romantic imagination might have it.[75] Instead, humanity can become more modern even as it effectively stewards nature, and along with economic-environmental interconnectedness there is a continuity between today's Germans and future generations, to whom Germans owe fair treatment.[76]

The name of 2010's *Energy Concept for an Environmentally Sound, Reliable, and Affordable Energy Supply* (henceforth simply *Energy Concept*) similarly weaves together economic and environmental goals. The *Energy Concept* describes a plan to attempt to achieve both, arguing that emissions reductions are not just helpful but fundamental for German economic success, and proclaiming that "a high level of energy security, effective environmental and climate protection and the provision of an economically viable energy supply are necessary for Germany to remain a competitive industrial base in the long term"[77] (emphasis mine). The government's Climate Action Programme 2020 claims that "Germany benefits from its pioneering role in climate change mitigation. The technical,

73 BMU, supra note 15, at 2.
74 Id., at 1.
75 See, e.g., Purdy, After Nature, 24.
76 BMU and BMWi, "*Energy Concept* for an Environmentally Sound, Reliable and Affordable Energy Supply," 4.
77 BMU and BMWi, "Energy Concept for an Environmentally Sound, Reliable and Affordable Energy Supply," 5.

cultural and social innovations it entails create added value especially for small and medium-sized companies."[78] Such examples of federal agencies proclaiming the economic benefits of climate change-combating emissions reductions are, in short, abound. However, notably, despite the extensive discussions of the *Energiewende*'s potential benefits for the German economy in government publications, none appear to assert economic health as the fundamental reason for why the *Energiewende* is worthwhile. The vision is instead one of a healthy, collective balance of economic and environmental goals that are irreducibly worthy and in some ways inextricable.

Parallel to how American federal agencies institutionally embed the imaginative view of economy and environment as sharply individuated seen in the narrative of the CPP, the German institutional setup reflects a perception of them as integrated, with neither given explicit priority over the other. For example, rather than having a single agency for environmental protection to which CO2 emissions regulations are assigned, in Germany three agencies split the bulk of the *Energiewende*: the Federal Environment Agency (UBA), the Federal Ministry for Environment, Nature Conservation, and Nuclear Safety (BMU), and the Federal Ministry for Energy and Economic Affairs (BMWi). Although divisions between these bureaucracies are helpful for defining which organization focuses on which aspect of the *Energiewende*, there is clear continuity in the categories and the goals relative to which emissions, sustainable development, and climate are discussed across agencies, as the quotations from multiple agencies in the reports cited above illustrate. The *Energy Concept*, for instance, was prepared jointly by the BMU and BMWi. The economy is not entirely treated as linked to the environment—there is also a ministry for economic cooperation and development, and of course one for finance[79]—but the BMWi's deep involvement in the *Energiewende* shows that on energy issues the economy is not seen as a removed and independent entity to be managed apart from its inescapable linkage points with the natural world, nor is the environment to be managed without due consultation of economic experts. The institutional realization of these viewpoints came early in the *Energiewende* era, with departmental reorganization in 2005.

Also, constitutionally, the German system is conceptually friendlier to the objective of environmental protection than the American one, and has become even more so in recent history. For example, since 1949 the Grundgesetz (GG), Germany's Constitution, has provided for the "protection of the natural foundations of life and animals" by executive, legislative, and judicial action, with explic-

78 BMU, "The German Government's Climate Action Programme 2020 - 2014" 18.

79 "The German Federal Government," deutschland.de, January 23, 2018, https://www.deutschland.de/en/topic/politics/the-german-federal-government.

it reference to the nation's responsibility to future generations.[80] A round of GG reform was completed in 2006, granting the federal government more powers in environmental policymaking.[81] German constitutional tradition also allows for the subordination of private property to environmentally protective uses on the basis of social welfare and human interconnectedness: "The potential obligation to 'sacrifice' [one's] property rights to public needs derives from the concept of a 'situational commitment of the property' that follows from the view of man as an individual who is dependent on society."[82] Thus it appears that a German perspective of environmental and economic solidarity is deeply built into the German legal and political consciousness,[83] with neither sphere deserving of absolute priority, and the legal foundations of this view have evolved alongside the *Energiewende* overall. By contrast, in the absence of explicit constitutional discussion of how nature is to be safeguarded, in the US environmental protection has been defined primarily with reference to and in implicit subordination to the economy: the major US environmental laws derive their constitutional power from the Commerce Clause's permission for the regulation of interstate commerce.[84]

In addition to the foundational structure of the German government that evinces a prevailing integrative imagination of the environment, society, and how they should be legally approached in the *Energiewende*, several other popular sources suggest a similar conceptualization. One is the ways political parties express themselves in their bids for citizen support. That the Green Party has been influential since the beginning of the *Energiewende*, and governed in a coalition with the Social Democrats, is a powerful statement of a popular German belief that environmental considerations should be built into political decision-making. Even more revealing, though, is the stance of the Christian Democratic Union (CDU),[85] Angela Merkel's pro-business, center-right party. While the Republicans in the US have understood 21st-century pro-business conservatism to require general opposition to new environmental protections, the CDU has since 1978 included an environmental pillar alongside its three core party pillars focusing on econom-

80 "Basic Law for the Federal Republic of Germany - Article 20a [Protection of Natural Foundations of Life and Animals]" (Federal Ministry of Justice and Consumer Protection and Federal Office of Justice), accessed January 4, 2019, https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0119.

81 "The German Environmental Constitutional Law," Umweltbundesamt, January 29, 2016, http://www.umweltbundesamt.de/en/the-german-environmental-constitutional-law.

82 Monika Neumann, "The Environmental Law System of the Federal Republic of Germany," Annual Survey of International & Comparative Law 3, no. 1 (1996): 69–110.

83 Jonathan Cannon, Environment in the Balance (Harvard University Press, 2015), http://www.hup.harvard.edu/catalog.php?isbn=9780674736788.

84 Arlan Gerald Wine, "Enforcement Controversy Under the Clean Air Act: State Sovereignty and the Commerce Clause," Transportation Law Journal 8 (1976): 383–400.

85 See, e.g., Massachusetts v. Environmental Protection Agency, No. 05–1120; wherein the Bush-era EPA opposed regulation of CO2 emissions.

ic growth. The phrase they used when adding this pillar was "quality-oriented growth,"[86] conveying the notion that proper economic progress and proper environmental stewardship are intertwined. That year's platform included the following statement articulating how the party viewed the connection between freedom and responsibility, and the social interconnectedness between generations: "The conservation of our life support system is part of the responsible liberty. He who now irresponsibly exploits this system and alters the environmental relationship damages the solidarity between generations."[87] In 1989, the CDU advocated a tax on CO2 emissions in keeping with an explicitly religious desire to properly care for Creation.[88] All this — which would sound confidently liberal, if not outright radical in the United States — stemmed from Germany's main conservative party, which has been the one constant in a series of coalitions overseeing the *Energiewende* from the German Parliament since 2005. Thus, while highly visible in the policy prescriptions of the *Energiewende* since the turn of the century, the interconnected German imagination I describe has its roots in long-held popular understandings of what nature is and is for, how economic growth ought to be understood, and how citizens of different social stations and ages bear responsibilities to one another.

B2. Nuclear, Coal, and Landscape

Like as with the passage of and response to the CPP, particular sources of energy and their associations with culture and landscape have figured prominently in the story of the *Energiewende*. In Germany, both nuclear energy and coal have been hotly debated. Nuclear energy has been at the center of discussion because of a tension between its convenient lack of emissions and popular sentiment against it, and coal for the exact opposite reasons: its high emissions and historical association with German identity. Unlike the executive-led course reversal in the American case constituted by the CPP repeal, however, the German response to these difficulties has been to alter its path to the *Energiewende*'s original goal of emissions reductions by phasing out nuclear energy and reducing the use of coal.[89] In doing so, Germany has collectively displayed a persistence and willingness to sacrifice for the sake of the demands it believes follow from its interconnectedness with

86 Konrad Adenauer Stiftung, "History of Environmental Policy in Germany: CDU Perspectives 1958–2015,"n.d.,https://www.kas.de/c/document_library/get_file?uuid=57153b6c-1ac9-6dd4-4048-b7e8732ba709&groupId=252038.

87 Konrad Adenauer Stiftung, "History of Environmental Policy in Germany," 2

88 Konrad Adenauer Stiftung, "History of Environmental Policy in Germany," 22.

89 For discussion of coal, see BMU, "Climate Action Plan 2050 – Germany's Long-Term Emission Development Strategy"; for discussion of the abolition of nuclear energy see "German Chancellor Merkel on Energy Nuclear Policy, Jun 9 2011 | Video | C-SPAN.Org" (C-SPAN 3, June 9, 2011), https://www.c-span.org/video/?300059-1/german-chancellor-merkel-energy-nuclear-policy.

nature and with other nations. The abolition of nuclear energy in particular illustrates the political strength of German emphasis on interconnectedness, in multiple senses beyond the previously discussed environmental-economic linkage.

Strong anti-nuclear sentiment in Germany dates back decades. In the 1970s and early 1980s, local activist movements sprang up to oppose the construction of nuclear power plants on the basis of concerns about pollution of beloved local landscapes like the Saxony wine country. These movements occurred alongside a spirit of grassroots opposition to a view of the military, the nuclear industry, and a too-powerful state as noxious bedfellows.[90] In fact, the original use of the term"Energie-Wende" came in the title of a pamphlet imagining "Growth and Prosperity without Oil and Uranium."[91] In 1986, the Chernobyl disaster occurred in nearby Ukraine, increasing fears of nuclear energy and support for the anti-nuclear Green Party.[92] More recently, in 2000 the parliamentary coalition of the Greens and Social Democrats passed a law planning the gradual phase-out of nuclear energy.[93] However, Angela Merkel's CDU reversed this decision when it swept into power in 2009, arguing that, as a zero-emissions energy source, nuclear power would be valuable for achieving the *Energiewende*'s emissions reductions targets as a "bridging technology" that would "[pave] the way for the age of renewable energy" by acting as a buffer against both high fossil fuel emissions and high renewables costs.[94] Thus there were two schools of thought: one Green, activist, and anti-nuclear, in favor of nuclear phase-out for the purposes of environmental friendliness and more localized energy production, the other in favor of nuclear energy with the an established and pragmatic consideration of the costs of the *Energiewende*, and pro-nuclear, at least for the near future.

Then, in 2011, the Fukushima Daiichi nuclear disaster hit Japan. Days afterward, Angela Merkel gave a speech announcing that Germany would be immediately closing eight nuclear plants and would shutter the rest by 2022. Given that roughly 30% of German electricity was nuclear-powered at the start of the millennium,[95] and that nuclear energy had been reinvigorated by Merkel's initial rise, such rapid closure represented a sudden and radical shift. On its face, such a strong German reaction to a Japanese disaster thousands of miles away seems surprising. Fundamentally, however, this German response to Fukushima was about an imagination of international interconnectedness, the reawakened ability of the

90 Paul Hockenos, "The History of the Energiewende," Clean Energy Wire, June 12, 2015, https://www.cleanenergywire.org/dossiers/history-energiewende.

91 Hockenos, "The History of the Energiewende."

92 Hockenos, "The History of the Energiewende."

93 Ball, "Germany's High-Priced Energy Revolution."

94 BMU and BMWi, "Energy Concept for an Environmentally Sound, Reliable and Affordable Energy Supply," 15.

95 Appunn, "The History behind Germany's Nuclear Phase-Out."

population and government to imagine a similar disaster happening in Germany. As Merkel put it, "In Fukushima we have to take note that even in a high-tech country like Japan"—and thus a country like Germany—"the risks of nuclear energy cannot be controlled safely."[96] Ironically, the factors to blame for Fukushima, which were a magnitude 9.0 earthquake at sea and a resultant tsunami crashing into nuclear plants on the shore of the open ocean, are not comparable risk factors for Germany, something Merkel even acknowledged.[97] But that was not the point, nor was it the point that Germany produced far less nuclear energy than some other advanced high-tech nations, like France and the US, which did not move to shutter their plants after Fukushima. The point was that Germans viewed their own destiny as remarkably bound up with the rest of the world's, to the extent that a nuclear catastrophe in east Asia meant a whole nation's nuclear supply in west-central Europe must be shut off. This rapid phase-out of a well-established, zero-emissions fuel source makes achieving the near-term emissions cuts targets of the *Energiewende* difficult, and doing so cost-effectively even more so.[98] But, at least as of 2015, opposition to nuclear energy remained high, with one poll showing 81% of Germans still in outright opposition to it.[99] Germany's environmental-political imagination thus has its headstrong elements. That the nuclear phase-out is discussed as central to the *Energiewende* even though the phase-out makes the central *Energiewende* goal of fast, hefty emissions cuts much more difficult indicates that a larger integrative vision of how Germany should relate to its neighbors and to the environment drives both denuclearization and decarbonization.

Coal, another energy source with a potent imaginative valence of landscape and environment in Germany, was also discussed at the coining of the term *Energiewende* in the early 1980s. However, unlike nuclear energy, the use of coal was celebrated rather than attacked. Since coal is a particularly "dirty" fuel, in that it emits more CO2 per unit of heat energy produced than other common fossil fuels,[100] such celebration may seem puzzling now, in the context of an *Energiewende* focused on reducing emissions. However, at the time, the goal of reduced emissions was less clarified, and instead coal was promoted because of its particularly German flavor. The use of *heimische* Kohle, or "domestic coal," in place of oil

96 "German Chancellor Merkel on Energy Nuclear Policy, Jun 9 2011 | Video | C-SPAN.Org."

97 "German Chancellor Merkel on Energy Nuclear Policy, Jun 9 2011 | Video | C-SPAN.Org."

98 See, e.g., Kenneth Bruninx et al., "Impact of the German Nuclear Phase-out on Europe's Electricity Generation—A Comprehensive Study," Energy Policy 60 (September 1, 2013): 251–61, https://doi.org/10.1016/j.enpol.2013.05.026; Hardy Graupner, "What Exactly Is Germany's 'Energiewende'?," DW.COM, January 22, 2013, https://www.dw.com/en/what-exactly-is-germanys-energiewende/a-16540762.

99 Poll by Emnid, cited in "4 Jahre Nach Fukushima: Große Mehrheit Für Energiewende - Politik Inland - Bild.De," Bild, March 14, 2015, https://www.bild.de/politik/inland/atomausstieg/4-jahre-nach-fukushima-grosse-mehrheit-fuer-energiewende-40148648.bild.html.

100 B.D. Hong and E.R. Slatick, "Emissions Factors for Coal," Quarterly Coal Report January-April 1994, 1994, 1–8.

was promoted, where heimische is a version of "domestic" that carries particular warm connotations of the German homeland. Germany has long gotten, and still gets, a huge proportion of its electric power from its vast coal reserves. It remains the world's largest producer of lignite, a particularly inefficient and dirty form of coal.[101] But, unlike in the US, where the current government has dubiously pitched its replacement for the CPP as a savior for the coal industry, despite American coal's uneconomically high cost relative to natural gas,[102] Germany has shown itself to be willing to move away from coal despite its historic connotations, its current potential utility in an energy transition complicated by the nuclear phase-out, and its home sourcing in a nation largely dependent on Russia for other fossil fuels. But the emissions reductions logic is clear: as the country's 2050 Climate Action Plan states, "It will only be possible to meet the climate targets if coal-fired electricity production is gradually reduced."[103] Accordingly, the country has formed an executive commission to oversee the phase-out of coal, and to ensure it is done in an inclusive way that will allow for a transition for its former workers and regions.[104]What explains this willingness to leave coal behind? I contend that, imaginatively, this readiness stems from an inward-facing sense of continuity and collectivism that complements the outward-facing form that motivated the nuclear phase-out decision after Fukushima. Unlike in the US, where coal is associated with one specific, romanticized landscape and culture over any other, in Germany heimische Kohle is not romanticized to the same extent. This is not to say the German coal industry has not battled the *Energiewende*, but it lacks the comparative political support of the US industry, and the resulting political mood is far different. Today, amid the effort to forge a new, more modern national energy identity, the old ideal of self-reliance from national coal production has lost its sway as Germans generally prefer to see a modern country unified in the face of climate change, a collective pursuing a responsible *Energiewende*. They celebrate the connections between landscape and society other ways, like in the country's fifteen recently established UNESCO biosphere reserves which celebrate a balanced relationship of nature and humankind, and its many nature parks that preserve cultural, historical, and environmental sites together.[105] Germans have become quite confident on this issue: as

101 Kerstine Appunn, "Coal in Germany," Clean Energy Wire, October 29, 2014, https://www.cleanenergywire.org/factsheets/coal-germany.

102 Jessica Wentz, "6 Important Points About the 'Affordable Clean Energy Rule,'" State of the Planet | Earth Institute | Sabin Center for Climate Change Law (blog), August 22, 2018, https://blogs.ei.columbia.edu/2018/08/22/affordable-clean-energy-rule/.

103 BMU, supra note 34, at 35.

104 Benjamin Wehrmann, "Germany's Coal Exit Commission," Clean Energy Wire, May 31, 2018, https://www.cleanenergywire.org/factsheets/germanys-coal-exit-commission.

105 "Nature Protection and Biodiversity - National Responses (Germany)," SOER 2010 Common environmental theme (Deprecated), European Environment Agency, accessed January 5, 2019, https://www.eea.europa.eu/soer/countries/de/nature-protection-and-biodiversity-national.

Rainer Baake, a deputy minister of the BMWi, said bluntly in an interview with The New York Times when asked about high energy costs, "The energy transformation in Germany will be carried out by two main sources—those are wind and solar."[106]

B3. Leadership and Agency

Leadership on the energy transition in Germany has long had a public face with deep experience on environmental issues: As Germany's minister for the environment, Angela Merkel (sometimes called the "Climate Chancellor")[107] presided over the first-ever UN conference on climate change, held in Berlin in 1994.[108] However, that Germany happened to elect an experienced former environmental minister as chancellor for the best part of the century's first two decades is far from the whole story of the idea of leadership in the *Energiewende*. This section more deeply examine the components of leadership and agency in Germany's environmental-political imagination: who it sees as responsible for taking action, what latitude leading agents have to change the course of existing initiatives, the nature of Germany's participation on environmental issues in the international sphere, and the values that implicitly drive these understandings. It argues that a collectivist view of leadership focused on reciprocity and persistence prevails, in which each sector of German society (particularly individual citizens) is both empowered and expected to take action that furthers the *Energiewende*. The federal government is respected in its role as overseer of the *Energiewende*, but is expected to provide a fair deal from which all will benefit as a result. Internationally, Germany imagines itself as an environmental first mover that leads by example, its internal collective action a display of good-faith responsibility that ought to spur trust and reciprocity in the larger collective of nations.

As in the United States, an important portion of Germany's direction on climate and energy policy comes from the top. Chancellor Merkel has acquired a reputation as a forceful climate hawk, and, as much of this essay's sourcing thus far has shown, hierarchical federal ministries set a great deal of *Energiewende* policy. But the way figures at the top discuss the action of the *Energiewende* makes clear that they conceive of it as necessarily a collective endeavor. Merkel, when announcing Germany's retreat from nuclear energy, put it this way: "All of us,

106 Melissa Eddy, "German Energy Push Runs Into Problems," The New York Times, December 20, 2017, sec. Business, https://www.nytimes.com/2014/03/20/business/energy-environment/german-energy-push-runs-into-problems.html.

107 Ellen Thalman and Julian Wettengel, "The Story of 'Climate Chancellor' Angela Merkel," Clean Energy Wire, November 26, 2015, https://www.cleanenergywire.org/factsheets/making-climate-chancellor-angela-merkel.

108 Konrad Adenauer Stiftung, "History of Environmental Policy in Germany," 30.

government and opposition, federal, state and local governments, society as a whole, every single one of us, all of us, if we do it properly, can combine ethical responsibility with economic success in this future project. This is our shared responsibility."[109] Dr. Barbara Hendricks, then head of the BMU, wrote in her foreword to the 2020 Climate Action Programme that "All of us—all areas of industry and all individuals—have to step up to the plate."[110] One way this collective spirit manifests is in the federalist relationship between the central government and the Länder, the German states. Whereas the CPP's direction of each state to develop its own scheme for CO2 emissions reductions set off near-immediate battles in court about whether this fragmented approach constituted "bread-and-butter federalism" or gross federal overreach,[111] the German chancellor and minister for energy and economic affairs meet twice yearly with the heads of all of the sixteen Länder to discuss *Energiewende* policy implementation and enjoy a close and generally functional, if not frictionless, relationship.[112]

A rhetorical approach framing reciprocal collective participation as necessary for a successful *Energiewende* prevails especially strongly with respect to individual Germans. As one BMU report puts it, "Particularly here [in the *Energiewende*] it is therefore important to create opportunities for the public to get involved and to support people in becoming aware of their scope for action...Climate action depends far more than any other policy area on the active involvement of as many people as possible."[113] The government says that rather than asking individuals to sacrifice their own time and resources to reduce emissions, it will provide opportunities for citizen participation such that they themselves benefit. [114]Furthermore, the government has pledged to cut its own emissions to demonstrate its own responsibility and commitment to the cause.[115] Its statements of support for a ground-up *Energiewende* have, so far, been more than just so much grassroots talk: a cornerstone incentive of the push for emissions cuts has been the Renewable Energy Sources Act's high federally subsidized prices, guaranteed for renewable energy sold to the grid by small-scale producers like individuals, households, and local co-ops.[116] Early in the century, the government promoted the adoption of small-scale photovoltaic (PV) solar installations with the so-called

109 "German Chancellor Merkel on Energy Nuclear Policy, Jun 9 2011 | Video | C-SPAN.Org."
110 BMU, "The German Government's Climate Action Programme 2020," 6.
111 See Meyer, "How Obama Could Lose His Big Climate Case."
112 BMWi, Monitoring and Steering the Energy Transition (2018), https://www.bmwi.de/Redaktion/EN/Dossier/energy-transition.html.
113 BMU, supra note 34, at 12.
114 See, e.g., BMU, "The Integrated Energy and Climate Programme," 2; 13.
115 BMU, "The Integrated Energy and Climate Programme," 63.
116 Alexander Franke and Energiewende Team, "How Winning over Rural Constituents Changed the Political Discussions on Renewables in Germany," Energy Transition (blog), November 18, 2014, https://energytransition.org/2014/11/german-fit-helped-making-energiewende-non-partisan/.

"100,000 Roofs" initiative, which provided government loans for people to buy rooftop solar systems. Germans have responded by engaging: by 2003, the program was successfully completed,[117] and by the end of 2017 there were 1.6 million PV installations nationwide,[118] with over 40% of total renewable capacity owned by citizens.[119] Much of this subsidizing has aided rural areas in particular, with farmers coming to own a greatly disproportionate percentage of PV installations and the generally conservative farmers' association pushing the CDU to greater support of the *Energiewende*.[120] The mere thought of today's rural, conservative Americans strongly supporting federal climate change policy illustrates both how vast the gulf is between Germany and the US on this issue and how powerful subsidies can be.

For the most part, then, the German population does not aid its country's climate policy as a sacrifice: it does so while gaining generous federally-designed benefits. But this profitability is part of the nation's imagination of climate change as an integrated social-environmental problem that offers the opportunity to progress and modernize. The *Energiewende* is not fully democratic, per se, since the executive branch of the federal government from the beginning has played a strong role in setting its policies, but it has become truly collective in its implementation and its expansion of renewable energy enjoys 95% popular support.[121] Thus, in its rhetoric and action, Germany has to a significant extent successfully cast climate change not merely as an international political issue but as a collective German one, and as an opportunity to be addressed by the fulfillment of a social contract. Everyone must do their part, and accordingly, the benefits will be reaped by all. Unlike the autocratic "picking [of] winners and losers"[122] which the CPP was imagined to be by many in the US, the *Energiewende* is an "an investment in our own future."[123] The understanding of this investment transcends the merely financial. For instance, the environment ministry stresses the need not just for

117 Gerhard Stryi-Hipp, "THE EFFECTS OF THE GERMAN RENEWABLE ENERGY SOURCES ACT (EEG) ON MARKET, TECHNICAL AND INDUSTRIAL DEVELOPMENT," 2004, https://doi.org/10.13140/2.1.1444.6404, 1.

118 BMWi, "Renewable Energy," 2018.

119 Craig Morris, "Share of German Citizen Renewable Energy Shrinking," Energy Transition (blog), February 7, 2018, https://energytransition.org/2018/02/share-of-german-citizen-renewable-energy-shrinking/.

120 Franke et al, "How Winning over Rural Constituents Changed the Political Discussions on Renewables."

121 David Meyer, "95% of Germans Support Green Energy Subsidies Despite Their High Price," Fortune, August 8, 2017, http://fortune.com/2017/08/08/germans-renewable-energy-energiewende-subsidies/. Just as remarkably, 56% of Germans said their average annual electricity bill surcharge of around 240 euros was either reasonable or too low.

122 Former EPA Administrator Scott Pruitt, quoted in "Scott Pruitt Signs a Measure to Repeal the Clean Power Plan," The Economist, October 10, 2017, https://www.economist.com/democracy-in-america/2017/10/10/scott-pruitt-signs-a-measure-to-repeal-the-clean-power-plan.

123 BMU supra note 29; see also, e.g., BMU, "The Integrated Energy and Climate Programme," 14: ("it is therefore...their own interest").

technical research and development, but social and cultural research to increase understanding of "how people perceive climate change, what consequences it has for their lives, and...how all sections of the population can be included and social acceptance fostered."[124] This sort of holistic environmental-political idea—linking often-separated human categories like "social," "cultural," and "economic" into a continuous whole addressing the state of the public under the banner of the issue of climate change—is, as we have seen, quintessentially modern German.

If the *Energiewende* is supposed to be an endeavor which involves all sectors of society and is positively viewed by both the government and the public—the first and third of Hegel's three spheres of consciousness in ethical life[125]—where does that leave German businesses, the key element in Hegel's second sphere of civil society? How do economic actors understand this initiative that has cost so much? For one, the high level of popular support, combined with consistent governmental action, guarantees that German businesses—though they might not be automatically inclined to accommodate the demands of the *Energiewende*—have little choice but to make the best of it and adapt, as they are squeezed from above and below. This is particularly true of energy companies: as one former utilities executive put it, the *Energiewende* is "an irreversible process now."[126] The country's two largest power companies have both in recent years split in two, with one company emerging dedicated to traditional fuels and one to renewables.[127] Germany's environmental-political imagination as realized in the *Energiewende* is thus not a utopian one, where achievement of the large social transition demanded by sharp emissions reductions arises from simple good will and is painless for all. However, given the demanding goal, what is required is clear: as the 2020 climate plan put it, "The energy industry is the sector with the highest greenhouse gas emissions and the greatest technical and economic potential for reduction."[128] But while certain big businesses may not be happy, others are, as smaller companies dedicated to the production, installation, equipment, and maintenance of renewable energy technology have sprung up and the *Energiewende* has gained the support of industry groups like the German Confederation of Small and Medium-Sized Enterprises.[129] Plus, the collectivist temperament of the *Energiewende* extends to the hurt businesses: The government has pledged to work, including at EU level,

124 BMU, "The Integrated Energy and Climate Programme," 65.

125 Paul Redding, "Georg Wilhelm Friedrich Hegel," in The Stanford Encyclopedia of Philosophy, ed. Edward N. Zalta, Summer 2018 (Metaphysics Research Lab, Stanford University, 2018), https://plato.stanford.edu/archives/sum2018/entries/hegel/.

126 Thomas Birr, quoted in Ball, "Germany's High-Priced Energy Revolution."

127 Ball, "Germany's High-Priced Energy Revolution."

128 BMU, supra note 34, at 16.

129 Franke et al, "How Winning over Rural Constituents Changed the Political Discussions on Renewables"; for a more general discussion of the Energiewende and small- to medium-sized enterprises (SMEs), see "The German Government's Climate Action Programme 2020," BMU, 15.

to create job opportunities in regions most affected by the switch to renewables.[130]

The dominant German conception of political leadership on environment outside its own borders is close to the imagination just described inside them. The federal government claims and demonstrates responsible leadership by example, acknowledging its interdependence with other nations without which a major dent cannot be made in international environmental issues like climate change, then expects them to follow suit just as it expects its own citizens and private enterprises to contribute to the *Energiewende*. This ideal of leadership, as read through Germany's public statements and actions, is recognizable on both the European stage and the global stage. At the European level, Germany casts itself as a proudly trustworthy friend acting in solidarity for the larger collective European cause of which it is a part, willing to take on heavy burdens to encourage action by others. In the BMU's words, "Germany's climate policy is embedded in European and international agreements and legal obligations. Germany has always been a reliable partner in international and European climate policy."[131] Since the early 2000s, it has shown leadership multiple significant times in the EU. First, following the publication of the Stern Report on the Economics of Climate Change in 2006, which argued that the worst effects of climate change could still be prevented with rapid and concerted action,[132] Germany led the EU during its Presidency of the Council of the European Union to its landmark 20-20-20 targets, which committed the EU as a whole to 20% reductions in CO2 emissions, 20% of power from renewable energy, and 20% increased energy efficiency levels by 2020.[133] Shortly after, in 2007, it passed major *Energiewende* legislation doubling these EU baseline commitments, pledging to cut its own CO2 emissions 40% by 2020.[134] For the most part, the EU has followed suit. As of August 2018, it is on track to meet its 20-20-20 commitment,[135] and several EU countries have now caught up to Germany in terms of emissions cuts and renewables production.[136] To exactly what extent these positive changes would have occurred without Germany taking leadership on the issue through the *Energiewende* is impossible to say, but its leadership has been

130 "The Energy of the Future: Fourth 'Energy Transition' Monitoring Report – Summary" (The Federal Ministry for Economic Affairs and Energy (BMWi), November 2015), https://www.bmwi.de/Redaktion/EN/Publikationen/vierter-monitoring-bericht-energie-der-zukunft-kurzfassung.pdf?__blob=publicationFile&v=1.

131 BMU, supra note 34, at 18.

132 Nicholas Stern, The Economics of Climate Change: The Stern Review (Cambridge, UK ; New York: Cambridge University Press, 2007).

133 European Environment Agency (EEA), Overall Progress Towards the European Union's '20-20-20' Climate and Energy Targets (2018), https://www.eea.europa.eu/themes/climate/trends-and-projections-in-europe/trends-and-projections-in-europe-2017/overall-progress-towards-the-european.

134 BMU, "The Integrated Energy and Climate Programme," 3.

135 EEA, supra note 127.

136 Kerstine Appunn et al, Germany's Energy Consumption and Power Mix in Charts, Apr. 3, 2018, Clean Energy Wire, https://www.cleanenergywire.org/factsheets/germanys-energy-consumption-and-power-mix-charts.

immensely publicized and other nations have both followed in its footsteps and learned from its mistakes.

Germany's actions on the global stage in the 21st century have also evinced an imagination of itself as a responsible actor seeking to initiate a reciprocal exchange of actions rather than to gain credit for its own glory. The aforementioned 2007 decision to cut CO2 emissions 40% by 2020, the "Meseberg decision," also immediately preceded the 2007 UN Climate Change Conference (COP13) in Bali. The government's statement on the legislation proclaimed,

> By implementing the key elements adopted in Meseberg, Germany is demonstrating that climate protection can be implemented in all sectors in an economically viable way. With Meseberg we are moving away from the attitude in international climate policy of "you first" towards "this is what I'm doing, what about you?" This is the only way to break the deadlock in international negotiations.[137]

The negotiations at COP13 in Bali ultimately achieved somewhat underwhelming results,[138] in part due to strong US objections to a proposal by developing countries. However, Germany's 21st-century form of climate leadership by example has been durable and persistent despite international mediocrity: seven years after Bali, it put forth a new and more ambitious emissions reductions plan ahead of the 2015 UN Climate Change Conference (COP21) in Paris, which finally produced a (limited) international breakthrough in the form of the landmark Paris Agreement. Recycling their argument from the domestic context that emissions reductions and renewable power are crucial for economic modernization, ahead of Paris, Germany wrote that "Germany can, and must, play a key role internationally and must demonstrate that taking climate action in an industrialised country does work and, in fact, is crucial for any economy that wants to be competitive in the 21st century."[139]

While climate change is today's signal international environmental issue, it is not the case that Germany's sharp international environmental-political desire for responsible, reciprocal action is limited to climate and energy. There is a broader environmental conceptual connectivity, a common language for understanding environmental issues that must be politically approached, at work. For instance, in the context of biodiversity preservation, one of the UN Sustainable Development Goals,[140] a prominent German environmental NGO argued, "only if we in Germa-

137 BMU, "The Integrated Energy and Climate Programme," 14.
138 Peter M. Haas, Climate Change Governance after Bali, 8:3 Global Environmental Politics 1-7 (2008).
139 BMU, supra note 34, at 9.
140 "About the Sustainable Development Goals," United Nations Sustainable Development, accessed January

ny take the lead and preserve...habitats from destruction, will we also be able to expect such conservation ideas to take root in poorer countries."[141] A likely important factor contributing to this keen perception of international interdependence and leadership on environmental issues in Germany is its position in the center of Europe, caught as the most important nation in a terrestrial geographic web of dense population, commerce, borders, and laws. This position plays a part in both cross-border environmental issues that Germany must aid in solving, and issues of energy dependence: Germany depends on nearby, oil-rich, unfriendly Russia for 40% of its oil imports[142] and a significant quantity of natural gas to boot, a position that increasing its supply of renewables through the *Energiewende* aims to help it escape.

The last feature of leadership and agency as understood in the modern continuous, collectivist German environmental-political imagination that I shall discuss here is its leaders' respect for the temporal continuity of policy. This is well exemplified in the logical coherence of *Energiewende* policy since the turn of the millennium. Successive German central governments, for the most part, do not feel empowered or motivated to craft a climate and energy policy that is entirely their own. Instead, they adjust old policies and craft innovative ones atop an established structure that keeps the original fundamental goals intact, bespeaking a respect for prior action and an effective norm that holds it unacceptable to simply throw out the work of previous governments and attempt to start over. This pattern is a temporal corollary to the emphasis on social solidarity and collective action discussed so far that characterizes German environmental leadership.

This persistent, collective gradualism is visible in the official discourse of the *Energiewende*: most laws, policy announcements, and statements by political leaders include provisions for frequent recalibration of the policies designed to cut emissions and increase renewables use.[143] For instance, the government in 2007 assured people at the outset of its doubling of emissions cuts targets that, in the event of ineffectiveness or cost-inefficiency in the design of the policy, its mechanisms would be redesigned.[144] Such assurances are often accompanied by exhortatory language about the value of determination and staying the course. For

5, 2019, https://www.un.org/sustainabledevelopment/sustainable-development-goals/.

141 "Wilderness in Germany," Zoologische Gesellschaft Frankfurt, accessed January 5, 2019, https://fzs.org/en/projects/wildnis/.

142 Sören Amelang and Julian Wettengel, "Germany's Dependence on Imported Fossil Fuels," Clean Energy Wire, June 22, 2015, https://www.cleanenergywire.org/factsheets/germanys-dependence-imported-fossil-fuels.

143 See, e.g., Hendricks, Foreword, in "The German Government's Climate Action Programme 2020 - Cabinet Decision of 3 December 2014"; BMU supra note 15, at 13; BMU, "The Integrated Energy and Climate Programme," 13: ("the reduction requirement may be higher or lower and will be constantly reviewed until 2020."

144 BMU, "The Integrated Energy and Climate Programme," 11.

instance, from the minister of the BMU's foreword to the 2020 Climate Action Programme: "Germany's *Energiewende*, or energy transition, is an encouraging example...despite all the challenges its details pose. We intend to continue down this route—with everyone on board, including each individual sector of the economy."[145] As in the case of its domestic inclusion and international leadership, this ambitious talk has generally in the *Energiewende* been convincingly backed by action. The sheer volume of legislation passed each year to update and fine-tune the *Energiewende*, usually in the direction of greater policy ambition, is a testament to a deep-seated incrementalist perseverance. The repeated revisiting of the 2000 Renewable Energy Sources Act is a good example of this. New versions of the act have been passed five times since its original passage, in order to update its pricing mechanisms and the rates of its energy subsidies in light of new evidence and emissions reductions progress, but the core structure has remained in place.[146] This is undoubtedly thanks in part to the way it and other *Energiewende* policies have intentionally involved and benefited individual citizens, such that reversing it would be fatally unpopular, but updating it remains popularly accepted.

This patience of the German environmental-imagination when it comes to leadership and effective action also guarantees that beneficial policy experiments are encouraged, and the government can learn from its mistakes. For instance, after a successful experimental cross-border wind energy auction with Denmark, Germany laid plans to expand its cross-border renewables connectivity within Europe.[147] Such experimentation and improvement within a broader continuity rarely occurs in a modern US environmental-political context defined largely by the desire of each administration to craft its own signature policies on key issues like energy. In the US, more typical than a rhetoric of adjustment, gradual improvement, and persistence are words like "repeal," "rule unconstitutional," and "replace."[148] This pendulum effect on climate and energy policy in the US reflects an environment of partisan hostility, certainly, but also a vision of environmental politics as a zero-sum game played between individuated competing parties. Moreover, the German imagination of temporal continuity and gradual adjustment of laws dovetails with a conceptual continuity of environmental outcomes, which is the opposite of the American case. In contemporary Germany, the climate problem, along with environmental problems generally, tends not to be framed as a binary with either an outcome of glorious victory or devastating failure depending on which of competing policies is selected. Instead, a more realist, incremental

145 Hendricks, Foreword, in "The German Government's Climate Action Programme 2020 - Cabinet Decision of 3 December 2014" 6.
146 BMWi, "Renewable Energy."
147 BMWi, "Renewable Energy."
148 See, e.g., Meyer, "How Obama Could Lose His Big Climate Case."

perspective prevails: better environmental outcomes can be achieved on a spectrum of possible outcomes by improving the design and implementation of laws. As a BMU dossier explaining Germany's climate policies put it, "Climate change cannot be reversed...Nevertheless, it is still possible to slow down climate change and limit its impacts on humans and the environment."[149] Words like "fighting" climate change, rather than "solving" it or "defeating" it, are common.[150] Accordingly, Germany has not just emissions reductions plans, but an official strategy for adaptation to climate change.[151] The US, where action on climate change tends to be framed as either part of a once-and-for-all climate solution or a total failure, has no such plan. There is no place in American environmental-political rhetoric for a reasoned gradualism, even an urgent one: as Obama put it, ours is "the last generation"[152] that can do something about climate change, and that "doing something" is cast usually as "solving" climate change, or failing to do so.[153] Rather than climate change becoming progressively worse the less each generation acts to prevent it, in this imagination the generation of today becomes "the last generation" that can act, the glorious individual agent who either succeeds or fails. The desire in the US political imagination for glorious leadership by a particular individual or group is not limited to competing parties or economic interests, then, but extends over time: America particularizes the present. In Germany, by contrast, persistence, gradualism, and the principle of "fairness between generations"[154] deeply influences the German moral and political compass and produces an approach to policy better suited to the problem of CO2 emissions itself: needful of sustained cuts over time and productive of a problem that can get a bit worse when policy is a bit less effective.

To conclude this section: in the German environmental-political imagination, climate change is an issue of collective responsibility on which Germany ought to lead in a persistent, patient, and reciprocal way, both domestically and internationally, with participation from the top to the bottom of society and benefit

149 Federal Ministry for the Environment, Nature Conservation and Nuclear Safety, "What is climate action about?," Bundesministerium für Umwelt, Naturschutz und nukleare Sicherheit, accessed January 5, 2019, https://www.bmu.de/en/topics/climate-energy/climate/what-is-climate-action-about/.

150 See, e.g., "Fighting Climate Change," Energy Transition, accessed January 5, 2019, https://book.energytransition.org/fighting-climate-change.

151 See generally German Federal Government, "German Strategy for Adaptation to Climate Change," December 17, 2008, https://www.bmu.de/fileadmin/bmu-import/files/english/pdf/application/pdf/das_gesamt_en_bf.pdf.

152 See Obama, "Remarks Announcing the Environmental Protection Agency's Clean Power Plan.

153 See, e.g., "Global Warming Solutions: Reduce Emissions," Union of Concerned Scientists, accessed January 5, 2019, https://www.ucsusa.org/our-work/global-warming/solutions/global-warming-solutions-reduce-emissions.

154 BMWi and BMU, "Energy Concept for an Environmentally Sound, Reliable and Affordable Energy Supply."

for all involved.

III. Objections and Clarifications

Here, I shall briefly outline and answer a few objections to the arguments I provide in the following sections. One potential question raised by the discussion of Germany's stance toward international action concerns the EU is the following: given the EU's size and active role in coordinating climate action, might it not be more productive to compare the US with the entire EU than with Germany alone? Comparing the EU directly to the US in terms of climate policy and environmental-political imagination would itself be an interesting case study. However, given the size, diversity, and complex, sui generis institutional structure of the EU, this is a task of far greater magnitude than a comparison between two nation-states alone. The idea behind this objection retains some force to the extent that, because of the influence of the EU, Germany and the US are no longer ruled by as fundamentally similar a system of laws as they used to be, and the emergent culture and society of the EU likely has relevant imaginative properties worth examining apart from Germany's, particularly in the area of climate change where the EU acts as one to a significant degree. In a sense, it is impossible to discuss Germany's environmental-political imagination without considering the influence of the EU, because, as argued briefly in the essay, it seems likely that Germany's position within the EU helps explain the German environmental-political imagination's crucial emphasis on interconnectedness and reciprocal collective action. The US has no comparably binding commitments to simultaneously lead and follow, and accordingly has comparatively little imaginative capacity for the idea of American connectedness with the rest of the world, except when that connectedness means unchallenged American leadership.

Another potential question raised by the essay's argument is that, while factors of basic economic structure cannot fully account for the divergence in the two nations' climate policy, could we not consider this divergence more an accidental outcome of political structure in the two nations than anything more deeply philosophical, a matter mainly of accidental differences in electoral outcomes and how specific interest groups in each country behave? This objection, at bottom, rests on a misunderstanding of the nature of the environmental-political imagination as an object of analysis and of its ability to causally account for events in the world. I do not wish to discount the impact on policy of political structures and mechanisms that might be studied by, say, a quantitatively-oriented social scientist. The environmental-political imagination concept is not meant to displace such explanations, but to orient our view of them from the perspective of the notions at work within individuals and institutions so that the human inputs to

such political structures can be more fully understood. On the issue of electoral structure and outcomes, there is certainly a degree of randomness inherent in the policy outcomes of any large modern democratic state, some of which depends on how the party system is structured. However, the fact remains that these are participatory democracies, and their elected officials can still be taken to reflect the will of their people—informed by the environmental-political imagination—to a significant degree. Interest group politics can be understood to a significant extent by using the environmental-political imagination concept as well: the environmental-imagination can be thought of as both an input into and an output of the political views of any particular interest group. Our views on what course of action should be taken regarding the environment, or any other issue, are never merely a function of one-dimensional group or individual interest alone; such one-dimensional expressions of support or opposition are formed through complex systems of values as well as perceptions of political fairness and agency, which can change over time and are influenced by what other people and groups express and do. The environmental-political imagination attempts to capture the emergent aspects of this murky sphere of underlying mental content as it continuously works its way through human political systems, in this case by critically scrutinizing the complex, highly varied, sometimes internally contradictory process of (in this case, federal) policy creation.

Still another possible response to this characterization of the German and American imaginations is that, given America's deep division and Germany's relative unity, perhaps it is not useful to speak of a single "American environmental-political imagination" at all, and instead decompose the US imagination into different forms for the two competing political camps or for different regions. It is true that views on what should be done with respect to the environment generally, and climate and energy particularly, are quite polarized in the US. However, all Americans still operate in the context of federal government policy, are influenced by it, and respond to it in some way, which, as I have attempted to show, creates a set of broadly held imaginative patterns which are more general than opposing ideological views on particular policies. Putting it briefly, the American imagination of the environmental and economic spheres is a shared substratum upon which people build their polarized views by sorting their preferences into different of these sharply defined categories. American division is itself part of the American environmental-political imagination. It is also important to note, however, that my characterization of the environmental-political imagination in both the US and Germany ought to be taken as a sketch, a discussion of contours I see as certainly present and probably dominant but also non-exhaustive. My aim was not to provide the last word on this underlying substance, but to discuss it in its relation to a pair of policies of great and undoubtable importance to climate change.

Conclusion

Viewed from the perspective of global climate change, the future of these laws is, in a sense, the only thing that ultimately matters. But the future of the CPP and the *Energiewende* remain deeply unclear. Will a Democrat be elected president in 2020 and reinstitute the CPP or something much like it, swinging the pendulum of American climate policy to the left, imaginatively pro-environmental and anti-economic side again? Will high energy costs or an economic downturn finally begin to erode public support for the *Energiewende*? Time will tell if the ideals of solidarity and persistent, collective leadership that have characterized German energy policy to this point in the century will remain robust in the face of future obstacles. Open legal and political questions whose outcomes could set off important effects in the environmental-political imagination, particularly in the US, include how the many climate-related lawsuits making their way through the courts will ultimately turn out, and whether individual states can succeed in doing what the federal government will not. We are in a position now to say that prediction of these outcomes is more or less impossible given only the information discussed here, largely because examination of these attitudes and logics in their 21st-century context has shown how rooted in deeper history they are, shaped by constitutional law, institutional structure, and cultural attitudes dating back decades or further. It is easy to see, though, that, assuming that cutting emissions to curb climate change is a global goal, and that progress toward it ought to be led by richer countries more historically responsible for greenhouse gas emissions and better-equipped than developing countries to adapt to climate change, Germany has made vastly more progress than the United States. This is not to say that Germany is perfect; despite its significant progress in cutting emissions, not all of its goals are being met on time. It remains the EU's largest CO2 emitter, and among the largest several EU economies it has fallen behind the UK in terms of percentage CO2 emissions reductions since 1990. Even given comparative German success, though, it is an open question whether the US should attempt to learn from Germany's example, whether it could hope to intentionally piece together within its borders some of the imaginative elements that make for Germany's relative success in crafting effective policy on climate and energy. Simple normative commentary in support of the general idea that the US ought to "learn from the German imaginative example" seems, for the most part, facile, because what is at issue are complex and multifaceted mental arrangements engaging many different ideas about nature, morality, economy, and national identity. Saying the US should attempt to generally approximate the German example just seems wrong.

The most honest answer, in this era of crisis across so much of American

law and politics, is that we simply don't know what will happen to US climate politics, or indeed what the range of possibilities might be for when we are spit out the other side. This admission tempts many to despair, to "compose their feelings into the right existential attitude" about the fate of the planet and our capacity to act, and feel that has been enough. I maintain instead that there can be a deep well of hope in unpredictably. The stakes are high for both the United States and Germany, and their climate action itself turns out to be, after all, inextricably interconnected: because of Germany's relatively small share of global CO2 emissions, the *Energiewende* can, despite its imperfections, still be judged successful in climate terms—and can only be judged successful in climate terms—if it inspires other nations to follow its example. There is no more significant nation, on a global scale, that could follow suit than the United States. As Purdy writes, "addressing climate change means making new values or adapting old ones"; therefore, with public support in its own nation overwhelmingly behind it, old values adapted and new values forged, the meaning of Germany's climate project may depend more than anything now on the changing of American minds.

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Realism, Perspective and the Act of Looking: A Comparison of Chinese Cinematic Representations of the Second Sino-Japanese War

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Edited by
Zoe Zacharopoulos, Alexander
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Introduction

Jiang Wen's *Devils on the Doorstep* (2000) and Lu Chuan's *City of Life and Death* (2009) belong to a new generation of Chinese cinema representing the traumas of the Second Sino-Japanese War (1937-45). As sixth-generation Chinese filmmakers, Jiang (born 1963) and Lu (born 1971) both began their filmmaking careers in China's post-socialist era when the gradual opening of China's film market to foreign investment transformed the landscape of Chinese cinema.[1] Their films, in many ways, reflect on the social contradictions of their time—not only in regard to China's unequal economic rise, but also to the amnesia that celebrates China's spectacular imperial past while ignoring its more recent and less glorious history.[2] In this context, China's "War of Resistance against Japan" is perhaps the most brutal part of its "century of humiliation and exploitation."[3]

Undeniably, the atrocities inflicted on the Chinese people during the Sino-Japanese War have left a lasting wound on the national psyche. Yet, collective memory of this period—more specifically, its cinematic representations—has evolved alongside the changing priorities of the Chinese government. With fierce contestations for political legitimacy between the Chinese Communist Party (CCP)

1 Vivian Lee, "The Chinese War Film: Reframing National History in Transnational Cinema," in American and Chinese-Language Cinemas: Examining Cultural Flows, eds. Lisa Funnell and Man-Fung Yip (New York: Routledge, 2014), 101.

2 Gary Xu, Sinascape: Contemporary Chinese Cinema (Plymouth: Rowman & Littlefield, 2007), 38-39.

3 Yinan He, "History, Chinese Nationalism and the Emerging Sino-Japanese Conflict," Journal of Contemporary China 16, no. 50 (February 2007), 8.

and the exiled Nationalist Kuomintang (KMT) party, early Chinese films depicting the war tended to glorify the CCP as the only resolute and successful force fighting Japanese imperialism. Simultaneously, these films typically portrayed the KMT as corrupt, incompetent, or otherwise traitorous collaborators.[4] Echoing the Japanese narrative that pinned wartime responsibility on a narrow "military clique," the socialist "Red Classics" of this period also avoided elaboration on Japanese war crimes for fear of "disseminating sentimentalism and capitalist humanism."[5] It was not until the 1980s, with the attempt to heal the Communist-Nationalist fissure, that the official narrative of the war began to sharply change emphasis, stressing the Chinese-Japanese conflict much more than the domestic, ideological one. In these representations, the nationalistic message of popular resistance against the Japanese enemy is emphasized, and anyone who collaborates with the Japanese is quickly and uncritically denounced as an unpatriotic traitor. This narrative of righteous resistance offers a kind of vindication for the Chinese nation who, while remaining historically defeated by the Japanese, can find celebration of victorious battles on screen. As Chinese writer Yu Hua notes, there is "a joke that more Japanese have been 'killed' at Hengdian (China's largest film studio) than at all the actual battlefields put together—more, even, than the total population of Japan."[6]

Set against this new backdrop of Chinese war films, *Devils on the Doorstep* and *City of Life and Death* seem to depart radically from traditional cinematic representations of the War of Resistance, and perhaps as a consequence, caused significant controversy in China. The former was banned from formal release in China, with the Chinese Film Bureau citing "errors in historical representation" and labelling the film as being "insufficiently patriotic."[7] The latter, although not banned, was criticized by the Chinese media for its sympathetic portrayal of, and even identification with, its protagonist: a Japanese soldier plagued by guilt for witnessing the atrocities committed by his fellow soldiers against the Chinese. In this regard, the strong reaction to both films indicates how uneasily they sit with usual nationalist narratives about the Chinese "self" and Japanese "other." Not only is the Japanese enemy humanized in some way, both films also problematize the issue of wartime collaboration and sideline the CCP's role in leading the national

4 Timothy Tsu, Sandra Wilson and King-fai Tam, "The Second World War in postwar Chinese and Japanese film," in Chinese and Japanese Films on the Second World War, eds. King-fai Tam, Timothy Tsu and Sandra Wilson (New York: Routledge, 2015), 2-3.

5 Yinan He, "Remembering and Forgetting the War: Elite Mythmaking, Mass Reaction, and Sino-Japanese Relations, 1950-2006," History & Memory 19, no. 2 (Fall 2007), 49. 'Red Classics' (translated from the Chinese term hongse jingdian) refer to art works that reflect the ideological underpinnings of the CCP and often are used with reference to works that were approved during the Cultural Revolution.

6 Yu Hua, "China Waits for an Apology," New York Times, April 9, 2014, https://www.nytimes.com/2014/04/10/opinion/yu-hua-cultural-revolution-nostalgia.html.

7 Timothy Tsu, "A genealogy of anti-Japanese protagonists in Chinese war films, 1949-2011," in Chinese and Japanese Films on the Second World War, 23.

resistance.

The relationship between both films extends beyond the content of their similarly controversial and unconventional representations of the war. Though utilized for somewhat different purposes, Lu Chuan's use of the black-and-white format in *City of Life and Death* owes a certain "creative debt" to Jiang Wen's *Devils on the Doorstep*, which pioneered the use of the medium to represent the Second Sino-Japanese War in an age of color cinema.[8] Undoubtedly, this aesthetic decision to film in black and white is an attempt by both films to grapple with the broader issues of realism and artificiality, especially within the context of historical trauma. In representing the traumas of the war, both films also employ first-person perspectives and narratives, albeit in different ways. While *Devils on the Doorstep* depicts the experiences of war from the narrow perspective of an ordinary Chinese peasant, *City of Life and Death* adopts an approach common in the genre of docudramas by switching between different perspectives, though focusing on the experiences of a conscience-stricken Japanese soldier. Despite both films showing some commitment to representing the ordinary and subjective experiences of the war, the latter's approach effaces individual histories and uses the victim's perspective merely as melodrama in a more conventional narrative of Chinese victimhood.[9] By comparing both films in their relationship to realism and nationalist remembrances of the war, I argue that while the representation of the war in *City of Life and Death* reflects predominant historiographical problems concerning the Sino-Japanese War, *Devils on the Doorstep* is a more self-reflexive attempt to subvert and deconstruct nationalist narratives of the war.

Set in the last year of the war in the Japanese-occupied part of northern China, *Devils on the Doorstep* captures the horrors and absurdity of the war from the perspective of a group of Chinese villagers who are mysteriously tasked by the Communist resistance to house and interrogate two captives—a Japanese soldier and his Chinese translator. Among the villagers, Ma Dasan—a strong, straight-minded, credulous and bumbling peasant—becomes the unwilling protagonist. Initially a farcical comedy depicting the confusion of the villagers who are unsure about how to deal with this unexpected and unwanted disruption of their lives, the story takes a darker turn when Dasan is tasked with killing the two prisoners. Partly because Dasan is unable to do the deed, and partly because the executioner he employs turns out to be a fraud, Dasan and the villagers eventually agree

8 Jie Li, "Discolored vestiges of history: Black and white in the age of color cinema," Journal of Chinese Cinemas 6, no. 3 (2012), 250.

9 Dai Jinhua, "I Want to Be Human: A Story of China and the Human," Social Text 29, no. 4 (2011), 141-142. My understanding of melodrama is borrowed from Amos Goldberg's exploration of the relationship between the victim's voice and melodrama. See Amos Goldberg, "The Victim's Voice and Melodramatic Aesthetics in History," History and Theory 48, no. 3 (Oct 2009), 220-237.

to return the prisoners to the Japanese army in return for food. While this deal is initially honored by the Japanese army, the celebratory banquet unexpectedly turns into a cold-blooded massacre of the entire village by the carousing Japanese soldiers, leaving Dasan as the sole survivor and witness of the massacre. When the war ends and the Japanese soldiers are pardoned by the returning Nationalists, Dasan finds himself unable to deal with the guilt and tries to kill every Japanese soldier he can in revenge. However, he is quickly subdued and in an ironic turn of events, executed, at the order of the returning Nationalist government by the same Japanese soldier that he saved.

As a docudrama about the Nanjing Massacre, *City of Life and Death* adopts a vastly different approach to represent the traumas of the Sino-Japanese War. Switching primarily between the perspectives of the ordinary Japanese soldier Kadokawa Masao, the Nazi Party member John Rabe, and his fictional secretary Tang, the film tells a "collaged" story about the fall of Nanjing and the establishment and subsequent dissolution of the Nanjing Safety Zone.[10] Without a coherent dramatic narrative, three plot points stand out in the film, each centering around one of the three main characters: Rabe is pressured into providing the Japanese army with one hundred Chinese comfort women from the Safety Zone he sets up; Tang collaborates with the Japanese in an attempt to protect his family after Rabe announces his recall to Germany; and Kadokawa, stricken by guilt after witnessing the horrors and brutality of war, releases two Chinese prisoners and commits suicide at the end of the film. Given Lu Chuan's style of realistic representation, it is needless to say that scenes of executions, mass shooting, and rape form the mise-en-scène of the film.

The Gaze in Cinematic Realism

Borrowing from Daniel Morgan, I propose that cinematic realism can be thought of in two different ways that correspond with the two films discussed in this paper.[11] Following the canonical understanding of André Bazin's theorizations of film realism, the first conception, corresponding with Lu Chuan's interpretation in *City of Life and Death*, sees realism as "a recreation of the world in its own image, an image unburdened by the freedom of interpretation of the artist or the

10 Yanhong Zhu, "A past revisited: Re-presentation of the Nanjing Massacre in *City of Life and Death*," Journal of Chinese Cinemas 7, no. 2 (2013), 87-88. While most of Lu's characters are ostensibly "historical analogues" inspired by real characters that have been written about, the two Western foreigners in the film—John Rabe and Minnie Vautrin—are actual people who lived in Nanjing during the massacre and documented it extensively in their diaries and correspondence. Together with other foreigners, they helped to set up the Nanjing Safety Zone.

11 Daniel Morgan, "Rethinking Bazin: Ontology and Realist Aesthetics," Critical Inquiry 32, no. 3 (Spring 2006), 443-481.

irreversibility of time."[12] On the other hand, as Morgan argues, realism need not be understood as a set of stylistic conventions that have come to define the realist aesthetic. Instead, he suggests that Bazin "sees a more complicated relation between style and reality. Though a film, to be realist, must take into account… the ontology of the photographic image, realism is not a particular style, lack of style, or a set of stylistic attributes, but a process and mechanism."[13] Seeing realism as a way of interpreting reality thus enables "realist" films, like *Devils on the Doorstep*, to explore alternative stylistic and imaginative resources in their representation of reality.

Discussing the use of black and white in *City of Life and Death*, the film's cinematographer Cao Yu explained how the use of black and white not only provided the film with "a sense of reality" and "spiritual abstraction," but was also necessary in avoiding the gory excesses and pornographic pleasures of the horror genre.[14] However, when mediating between these sometimes conflicting goals, the film seems to prioritize the achievement of authenticity and realism. In conducting research for the film, Lu Chuan and the rest of the production team spent weeks on end at the Jianchuan Museum Cluster in Sichuan combing through close to five hundred thousand photographs depicting the Sino-Japanese War with the main purpose of imitating the "reality effect" of the most compelling historical photographs.[15]

The pursuit of realism and authenticity in cinematic representations of the Nanjing Massacre is not new and is perhaps, in the context of Japanese denial of the massacre for more than half a century, a symptom of a broader national anxiety to "'prove' that it actually happened."[16] A comparison can be made here between *City of Life and Death* and its cinematic precedent, Mou Tun-fei's Black Sun (1995). Blurring the line between documentary and fiction, Black Sun integrates documentary footage of the Nanjing Massacre into its dramatized and fictional narrative. In one of the most shocking images of the film, the meticulously reenacted execution of an elderly Chinese monk by a Japanese soldier cuts to the actual photograph which the scene is based on just as the gunshot is heard. In many ways, the recreation of such gory and violent images seems to be, at best, an attempt to bear testimony to the most excessive, horrific, and spectacular scenes of the Nanjing Massacre, and at worst, an exploitative atrocity film. Even though Lu

12 André Bazin, What is Cinema (Berkeley: University of California Press, 1967), 25.

13 Morgan, "Rethinking Bazin," 445.

14 Li Yue, "Dancing with the Camera: A Special Interview with Nanjing! Nanjing!'s Cinematographer Cao Yu" (in Chinese), May 11, 2009, http://old.pku-hall.com/WYPPZZ.aspx?id=456. Note that Nanjing! Nanjing! is the alternative English-language title for Lu Chuan's *City of Life and Death*.

15 He Xi, "Nanjing! Nanjing!'s Sichuan Connection" (in Chinese), April 24, 2009, http://www.cinema.com.cn/YingYuTianXia/2245.htm. I borrow the concept of the "reality effect" from Roland Barthes, who argues that what we call "real" is "never more than a code of representation." See Roland Barthes, S/Z: An Essay, trans. Richard Miller (New York: Hill and Wang, 1974), 80.

16 Michael Berry, "Cinematic Representations of the Rape of Nanking," East Asia 19, no. 4 (2001), 88.

Chuan disavows the medium of horror in representing the Nanjing Massacre and does not use archival footage to shock the audience in the same way that Black Sun does, there is a similar attempt to mimic reality in *City of Life and Death*. Using the existing visual culture of the Sino-Japanese War to create the film's "aura of authenticity," Lu Chuan develops the setting of the film by drawing on documentary photographs that would be familiar to a Chinese audience exposed to scenes of a war-ravaged Nanjing.[17]

The appropriation of and reference to archival footage in the name of historical realism, however, poses its own problems. In referring to "historical analogues" in the name of realism, there is an underlying assumption that archival photographs and film footage can capture the past as it happened—an objective, dispassionate record of scenes and events.[18] Yet, as Susan Sontag suggests, this is an impossible task for photography as "people quickly discovered that nobody takes the same picture of the same thing, the supposition that cameras furnish an impersonal, objective image yielded to the fact that photographs are evidence not only of what's there but of what an individual sees, not just a record but an evaluation of the world."[19] In the context of war and genocide, however, the issues of realism are not only a theoretical debate, but have implications for our attempts to understand that past. Aside from film footage taken by the American missionary John Magee and a few other exceptions, the vast majority of all surviving visual records of the massacre were produced by the Japanese.[20] The collection of photographs that *City of Life and Death* was based on was in fact acquired from Japan and taken by Japanese soldiers and camera crew during the invasion of and subsequent massacre in Nanjing.[21] Although the motivations that lie behind the production of these images were very different from those of contemporary filmmakers like Lu Chuan, the mimicking of these photographic visions risk reproducing the very gaze of the perpetrator. As Elie Wiesel discusses in the context of the Holocaust:

For the most part the images derive from enemy sources. The victim had neither cameras nor film. To amuse themselves, or to bring back souvenirs back to their families, or to serve Goebbel's propaganda, the killers filmed sequences in one ghetto or another…The use of the faked, truncated images makes it difficult to omit the poisonous message that motivated them…Will the viewer continue to remember that these films were made by the killers to show the downfall and the

17 Rebecca Nedostup, "*City of Life and Death* (Nanjing! Nanjing! 2009) and the Silenced Nanjing Native" in Through a Lens Darkly: Films of Genocide and Ethnic Cleansing, eds. John Michalczyk and Raymond Helmick (New York: Peter Lang, 2013), 64.

18 Shao Yan, "In the film we have kept our integrity: Exclusive interview with Lu Chuan" (in Chinese), Dianying shijie, April 2009, 24-29.

19 Susan Sontag, On Photography (New York: Farrar, Straus and Giroux, 1977), 88.

20 Berry, "Cinematic Representations of the Rape of Nanking," 95.

21 He Xi, "Nanjing! Nanjing!'s Sichuan Connection."

baseness of their so-called subhuman victims?[22]

Yet as Wiesel recognizes, these photographs serve an important purpose, whether for "eventual comprehension of the concentration camps' existence" or as a representation of how the perpetrators perceived their role in war and genocide.[23] In this context, the problem with Lu Chuan's appropriation of the photographic record is how it treats these photographs as an objective truth that allows one to unproblematically access the past. Rather than acknowledging the limits of the visual archive for our understanding of the Nanjing Massacre, *City of Life and Death* seems to reproduce the gaze of the perpetrators without self-reflexivity. In a startling sequence, hundreds of disheveled Chinese men, mistaken by the Japanese to be Chinese soldiers, are passively herded to the execution grounds and later mowed down by a barrage of bullets. At the end, the audience is almost made to identify with the Japanese perpetrators as the camera zooms in on the back of a Japanese soldier looking down on a sea of individually indistinguishable corpses, accompanied by non-diegetic and somewhat triumphant martial music.

A Japanese soldier, standing on a pedestal, gazes out on a sea of Chinese corpses after a mass shooting. Scene from ***City of Life and Death.***

In relying on historical photographs, the realist cinematography of *City of Life and Death* also runs the risk of being tacitly pornographic in its depiction of sexual atrocities committed as part of the Nanjing Massacre. By transforming grainy photographs of women's bodies into the aesthetic medium of cinema, the naked bodies of rape victims become a spectacle to fulfill the "public fantasies" associated with watching rape on-screen.[24] The relationship between reality and

22 Elie Wiesel, "Foreword" (trans. Annette Insdorf) in Annette Insdorf, Indelible Shadows: Film and the Holocaust (Cambridge: Cambridge University Press, 1989), xii.

23 Wiesel, "Foreword," xii.

24 Amanda Weiss, "Contested Images of Rape: The Nanjing Massacre in Chinese and Japanese Films," Journal

interpretation must again be problematized, and the gaze of the perpetrator is even more pernicious in inscribing meaning onto sexual atrocities. As film scholar and feminist Tanya Horeck argues, since the same scene of rape can be interpreted differently depending on the viewer and context, representations of rape in cinema are "battles over the ownership of meaning and of reality."[25] In the context of *City of Life and Death*, sexual assault survivors are depicted as passive and disenfranchised victims whose voices never get heard. The subjectivity of the rape victim is not only effaced by the photographic gaze of the Japanese perpetrator, but continues to be suppressed in representations of rape within national discourse. As Chungmoo Choi convincingly argues in reference to the comfort women issue in Korea, "comfort women discourse displaces the women's subjectivity, which is grounded on pain, and constructs the women only as symbols of national shame. As such, the primacy of the discourse on comfort women attends not to the welfare of women's subjectivity but to the national agenda of overcoming colonial emasculation."[26] Applying Choi's analysis to the context of the Nanjing Massacre, it is telling how the "Rape of Nanking" continues to persist as a popular moniker for the "Nanjing Massacre," which has been for many years the standard in both English and Chinese language scholarship. By conflating actual experiences of sexual atrocities with the metaphorical rape/penetration of the national homeland, the name appropriates rape into a masculine national discourse that obfuscates individual experiences of pain and trauma.

In its representation of rape, *City of Life and Death* operates firmly within this national discourse. Depicting most of the Chinese characters in the film as an indistinguishable mass, Lu again represents the massive scale of sexual victimization at the cost of reducing the nature of these women to mere victims of rape. Like the "numbers game" which dominates national contestations over the history of the Nanjing Massacre between China and Japan, it is not the individual and subjective experiences of trauma, but its scale that counts towards the national narrative of victimhood.[27] Images of rape and sexual abuse abound in the film, but two female Chinese characters seem to stand out: Xiao Jiang, a prostitute, and Jiang Shuyun, a teacher. In one of two moments of dramatic self-sacrifice in the film, Xiao Jiang is the first to volunteer herself as one of the "100 comfort women" given to the Japanese army so as to spare the rape of other girls within the Safety Zone. While

of Women in Culture and Society 41, no. 2 (Winter 2016), 437.

25 Tanya Horeck, Public Rape: Representing Violation in Fiction and Film (New York: Routledge, 2013), 13.

26 Chungmoo Choi, "The Politics of War Memories towards Healing" in Perilous Memories: The Asia-Pacific War(s), eds. Takashi Fujitani, Lisa Yoneyama and Geoffrey White (Durham: Duke University Press, 2001), 399.

27 Daqing Yang, "The Challenges of the Nanjing Massacre: Reflections on Historical Inquiry," in The Nanjing Massacre in History and Historiography, ed. Joshua Fogel (Berkley: University of California Press, 2000), 151. See also Fujiwara Akira, "The Nanking Atrocity: An Interpretive Overview," in The Nanking Atrocity, 1937-38, ed. Bob Wakabayashi (New York: Berghahn Books, 2007), 51-52.

in the other sequence the Nationalist soldier Lu Jianxiong calmly stands up to face a certain but heroic death, Xiao Jiang's sacrifice of her body is "naturalized by virtue of her being a prostitute in the first place."[28] Raped to death, Xiao Jiang's nude body is tragically and unceremoniously tossed into a pile of other bodies.

Conversely, Shuyun's death happens in a far more merciful and sympathetic manner. Captured by Japanese soldiers near the end of the film, Shuyun begs Japanese soldier Kadokawa to shoot her so as to save her from being sexually abused. It is thus implied that while Shuyun's chastity is more important than her survival, for Xiao Jiang the sacrifice of her body and ultimately her life to protect the "pure" schoolgirls is an expectation. In doing so, the film fetishizes both the chastity of the schoolgirls and the illicit sexuality of the prostitutes. Such a portrayal fails to explore the individual subjectivities of the female characters, instead presenting them as symbolic rather than real figures. Like the discourse surrounding comfort women that prioritizes "a narrative of virgins forcefully kidnapped and raped over other experiences of victimhood," the filmic representation of rape in *City of Life and Death* marginalizes the traumas suffered by individual rape victims, as it is the "compromised" and "indecent" women who are raped and their deaths neatly mark the national humiliation as a distant past.[29]

Objectivity and Authenticity

Entangled with the film's quest to "recreate the world in its own image," the pursuit of an objective representation of the Nanjing Massacre seems to be the film's raison d'être. In this regard, a significant portion of *City of Life and Death* is framed from the perspective of the detached and presumably impartial Western observer.[30] Without a coherent narrative arc, the film is framed by a series of postcards written in English, by the American missionary Minnie Vautrin.[31] The film opens with a series of postcards that establish the historical background of the Nanjing Massacre, narrating the progress of the Japanese army from Beijing to Shanghai and finally to the then-capital Nanjing. Interestingly, there is no evidence that Vautrin actually wrote and sent postcards like these during the Japanese invasion of China in 1937, even though she and Rabe—the two Westerners central to the film—detailed the fall of Nanjing extensively in their own diaries.[32] It is thus

28 Nedostup, "*City of Life and Death*," 65.

29 Weiss, "Contested Images of Rape," 437.

30 As Michael Berry notes, the reliance on presumably impartial and objective foreigners to authenticate the Nanjing Massacre is not new to Chinese cinema, and he traces this "legitimizing power of the West" to Luo Guanqun's Massacre in Nanjing (1987). See Berry, "Cinematic Representations of the Rape of Nanking," 90-91.

31 Kevin Lee, "*City of Life and Death*," Cineaste 35, no. 2, Spring 2010, https://www.cineaste.com/spring2010/cityof-life-and-death/.

32 John Rabe, The Good Man of Nanking: The Diaries of John Rabe, trans. John Woods (New York: Alfred A. Knopf, 1998). Minnie Vautrin, Terror in Minnie Vautrin's Nanjing: Diaries and Correspondence, 1937-38 (Chicago: University of Illinois Press, 2008).

revealing that the film chose to imagine what Vautrin, rather than any Chinese character, would have written in her correspondence. In this case, the film's quest for authenticity is implicated by the same notions of objectivity and detachment that plague the historiography of the Nanjing Massacre.

Even though a vast collection of oral testimonies given by survivors has been collected, historical scholarship on the Nanjing Massacre has been slow to acknowledge and use these testimonies as reliable evidence.[33] Significantly, when Japanese reporter Honda Katsuichi published an extensive collection of interviews with Chinese survivors of the Nanjing Massacre and other Japanese war crimes, he was accused of "presenting the Chinese side of the story uncritically" and deniers were quick to seize on any discrepancies in the testimonies as "evidence of the fabrication of the Nanjing Massacre."[34] While there are undoubtedly limits to the ability of oral testimonies to serve as unquestionable facts, the testimonies of victims illuminate a particular contingent and subjective truth that cannot otherwise be understood. The fetishization of objectivity and neutrality thus leads one to prioritize the written records of detached Western observers, consequently obscuring a historically significant part of the Nanjing Massacre. Considering how Western foreigners were either expelled from the city by December 15 or otherwise confined within the Safety Zone, they could have only witnessed at best "a fraction of what actually happened afterwards in a larger area with hundreds of thousands of residents."[35]

In the face of continuing Japanese denial, reflected most notably in a statement made in 2012 by Mayor Takashi Kawamura stating that the "so-called Nanjing Massacre is unlikely to have taken place," the quest for objective detachment is simultaneously understandable and obfuscating.[36] On one hand, the eyewitness testimonies of detached Western observers like John Rabe and the American missionaries present at the scene of the Nanjing Massacre are perceived, even within China, to provide an objective account of the massacre that can be used in the battle against denial. Yet on the other, the testimonies of Western observers can only be testimonies of themselves and of their immediate context. If, as Leo Tolstoy suggests, the gap between a real event and the various fragmentary and distorted recollections of it can only be overcome "by collecting the memories of every individual (even the humblest soldier) who had been directly or indirect-

33 Yang, "The Challenges of the Nanjing Massacre," 139-143. Iris Chang's The Rape of Nanking also describes the Chinese trauma of the Nanjing Massacre primarily through the lens of Western observers, relying heavily on the diaries of American missionaries Minnie Vautrin and John Magee, as well as the German businessman and Nazi Party member John Rabe. See Iris Chang, The Rape of Nanking: The Forgotten Holocaust of World War II (New York: Basic, 1997).

34 Yang, "The Challenges of the Nanjing Massacre," 142; Honda Katsuichi, The Nanjing Massacre: A Japanese Journalist Confronts Japan's National Shame (New York: M.E. Sharpe, 1998).

35 Yang, "The Challenges of the Nanjing Massacre," 139.

36 Paul Armstrong, "Fury over Japanese politician's Nanjing Massacre denial," CNN, February 23, 2012, https://www.cnn.com/2012/02/23/world/asia/china-nanjing-row/index.html.

ly involved in the battle," then the attempt to frame and understand the Nanjing Massacre from the narrow perspective of Western observers elides the voices of Nanjing residents and survivors who undoubtedly experienced and remembered very differently from foreign bystanders.[37] Even though the choice to emphasize the role played by Western observers may not have been an ideal one for Lu Chuan, it is nonetheless an inadvertent effect of historiography that relies on written-documentation generated by Western observers—the famous The Rape of Nanking by Iris Chang is one prominent example.[38] Belonging to a different world, the computer-animated yet realist postcards written in Vautrin's hand reveal the limits of a Western perspective in representing the trauma of the Nanjing Massacre—its language is detached and devoid of the emotions that often underlie the testimonies collected from Nanjing residents and survivors.

One of the postcards written by Minnie Vautrin shown immediately after brutal scenes of massacre and rape. Scene from ***City of Life and Death****.*

Rethinking Realism

Even though *City of Life and Death* and *Devils on the Doorstep* share the distinctive stylistic feature of black-and-white cinematography, its use in the latter film subverts the canonical understanding of realism and reveals the constructed nature of the photographic image. Jiang's endeavor is an interesting and ambitious one, not only because cinematic realism originated in black-and-white cinematography, but also because, as highlighted earlier, war newsreels are frequently incorporated into documentary and docudrama films to enhance the authenticity of historical

37 Carlo Ginzburg, "Just One Witness" in Probing the Limits of Representation: Nazism and the "Final Solution," ed. Saul Friedlander (Cambridge: Harvard University Press, 1992), 95.

38 Lu Chuan declined an offer to direct a film about the Nanjing Massacre that, according to him, "valorized" the role of John Rabe. See Keen Zhang, "City of Sorrow: Competing film portrayals of the Nanjing Massacre," China.org.cn, April 30, 2009, http://china.org.cn/culture/2009-04/30/content_17702091.htm. Interestingly, the heavy influence of Western-centric historiography on *City of Life and Death* can be observed from how the main character Kadokawa Masao was reconstructed from a "historical analogue" found in Vautrin's diaries. See Vautrin, Terror in Minnie Vautrin's Nanjing.

narratives. In a similar way, historical documentation is often perceived to possess a certain realist quality as a black-and-white text with fixed meaning, even though like photography, it is mediated by layers of language and interpretation.[39]

Like *City of Life and Death*, Jiang's film shares a close relationship with historical photographs of the Second Sino-Japanese war. In an interview, Jiang revealed how, in preparing for the film, they "took photographs of our actors in their costumes and made Xerox copies of them and placed them next to Xeroxes of actual historical photographs. No one could distinguish between them."[40] Yet, unlike *City of Life and Death*, *Devils on the Doorstep* makes neither pretension to being a documentary nor attempts to imply the historicity of the narrative.[41] Instead, the film uses the visual medium associated with realism to make a self-reflexive critique of the relationship between history as the past and history as a representation. In the final moments of *Devils on the Doorstep*, the black-and-white aesthetic switches to color just as Ma Dasan is beheaded in an execution ordered by the returning Nationalist government. In this scene, we are shown Dasan's execution first from the perspective of a Chinese villager watching the public execution, and then, in the only subjective shot in the entire film, from the disturbing perspective of Dasan's decapitated head, watching as the crowd cheers.[42] Unlike scenes of execution and death in *City of Life and Death*, the depiction of violence in this scene is swift and hardly pornographic. The lack of sentimentality and horrific excess—the two elements that characterize portrayals of violence in *City of Life and Death*—makes this scene, in some ways, even more brutal and disturbing.

On one level, by shifting attention away from the violence and to the act of watching it, Jiang criticizes the passive act of spectatorship that the surrounding Chinese villagers are guilty of and that we, as the audience, are complicit in. The spectating peasants exhibit no sympathy for Dasan, laughing and howling in a manner reminiscent of how the Japanese soldiers laughed and watched while butchering Dasan's entire village. While parallels can be drawn between the reactions in these two situations, the contexts and the actors within it are obviously not analogous. Yet it is also the semblance of law and order in the case of Dasan's execution that makes this scene especially troubling. While the Nationalist government claims to restore civilization to a village previously ruled by the savage

39 This is encapsulated in the Chinese phrase "白纸黑字" (baizhi heizi), which literally means "white paper with black words" and refers to the fixity/conclusiveness of written evidence.

40 Li, "Discolored vestiges of history," 250.

41 Jerome Silbergeld, Body in Question: Image and Illusion in Two Chinese Films by Director Jiang Wen (Princeton: Princeton University Press, 2008), 150.

42 In doing so, the film departs the realm of conventional realism and into the realm of surrealism. See Kristof Van den Troost, "War, Horror and Trauma: Japanese atrocities on Chinese screens," in Chinese and Japanese Films on the Second World War, 62-63.

Japanese devils,[43] they are guilty of what Michael Taussig calls "mimetic excess" by appropriating the very savagery they are meant to abolish.[44] Of course, this critique folds back on and implicates the spectators, who are not troubled by the brutality but behave with a veneer of civility which they believe divorces them from the plight of the victims.

On another level, the shifts in perspective in this final scene expose the inherent gap between representation and reality, and consequently, the appropriation of wartime suffering and trauma by national narratives of the past. As the camera shifts away from Dasan's perspective and to a frontal shot of Dasan's decapitated head, the moving picture transforms into still photography and then into iconography.[45] Not only is this implied by the woodcut-like texture of the final shot, the image itself closely resembles widely-circulated atrocity photographs that have become a cliché in depicting Japanese wartime cruelty.

In this way, the multiple shifts in perspective force the audience to question the truth and reliability of each perspective and to eventually acknowledge the gap between these different representations of reality and reality itself. Jiang further interrogates the relationship between representation and reality using Lu Xun's The True Story of Ah Q, to which Jiang frequently compared his film.[46] The novella tells the story of an ordinary Chinese peasant with the ability to transform personal humiliations and defeats into victories through deliberate renaming and misnaming. Though Ah Q is eventually publicly executed for committing theft, the narrator turns away from his satirical tone and presents this moment in a sympathetic and reflective manner. Lu Xun writes at the end of the novella: "Naturally all agreed that Ah Q had been a bad man, the proof being that he had been shot; for if he had not been bad, how could he have been shot?"[47] Turning the target of satire from Ah Q to the villagers, Lu Xun highlights the artifice of allegedly true representations: whether Ah Q's stories of his defeats/victories, the court's narrative of Ah Q's guilt, or even, in a self-reflexive turn, the narrator's/ Lu Xun's

43 This is, of course, a reference to the eponymous "devils" in the film. In fact, Jiang Wen's connection of the "devils" to the Japanese soldiers is even clearer in the original Chinese-language title of the film "鬼子来了" (guizi lailie), with the guizi (literally "devils"/"ghosts") being frequently invoked in both wartime and postwar parlance to refer to the Japanese. See Julian Ward, "Filming the anti-Japanese war: the devils and buffoons of Jiang Wen's Guizi Laile," New Cinemas: Journal of Contemporary Film 2, no. 2, September 2004, 107-108.

44 Michael Taussig, Mimesis and Alterity: A Particular History of the Senses (New York: Routledge, 1992). David Wang applies the same concept to his analysis of Lu Xun's literature, who was traumatized by his experience of the First Sino-Japanese War and subsequent turned to writing literature as a way of 'saving China's soul'. See David Wang, The Monster That Is History: History, Violence, and Fictional Writing in Twentieth-Century China (Berkeley: University of California Press, 2004), 35.

45 Li, "Discolored vestiges of history," 254.

46 Lu Xun, "The True Story of Ah Q," in Call to Arms (Beijing: Foreign Language Press, 2010), 141-212. Cheng Qingsong and Huang Ou, My Camera Doesn't Lie (in Chinese) (Beijing: Zhongguo Youyi, 2002), 72-73.

47 Lu Xun, "The True Story of Ah Q," 209.

"true story" of Ah Q.[48] While the motivations for Lu Xun's literature must be read against the social and intellectual milieu of the May Fourth Movement, his critique of the "violence of representation" and of the privileging of certain voices over others remains highly relevant to the study of Chinese representations of the War of Resistance.48 In this regard, Jiang's dialogue with The True Story of Ah Q highlights how conventional historical narratives about the war, framed as narratives of heroic national resistance and eventual triumph, ultimately purge history of its horrors and violence.

Deconstructing Nationalist Tropes

Like Lu Xun's novella, *Devils on the Doorstep* must also be situated within the social context in which Jiang grew up. In various interviews, Jiang reveals how the images of Japanese "devils" in the film are based on "their looks, as I remembered them."[49] Born in 1963, Jiang obviously did not see Japanese soldiers firsthand, but nonetheless had a certain image of them based on the representations of the war he grew up with. Growing up during the Cultural Revolution, Jiang was familiar with images of the Japanese devil created in the "Red Classics" and other revolutionary films of that time. In these black-and-white propaganda films, such as Railroad Guerrillas (1956) and Mine Warfare (1962), the Japanese soldiers, always referred to colloquially as guizi,[50] were treacherous but ultimately silly and comical figures that would be easily ambushed and defeated by patriotic villagers.[51] Cognizant of the problems with such representations, Jiang resists conventional stereotypes of the Chinese peasant as ones which would avenge the nation for Japan's brutal occupation.

Devils on the Doorstep attempts to do this by considering how ordinary people experienced the war and faced up to the "prospect of imminent death during wartime."[52] Like "Survival," the novella from which the film was adapted, *Devils on the Doorstep* shifts away from the dominant perspective of patriotic Chinese soldiers and focuses on ordinary peasants' quotidian struggle for survival.[53] Even though the mysterious resistance fighter catalyzes the tragic chain of events, he is

48 Feng Zongxin, "Fictional Narrative as History: Reflection and Deflection," Semiotica 170, no. 1, 2008, 189; Andrew Jones, "The Violence of the Text: Reading Yu Hua and Shi Zhicun," Positions 2, Winter 1994, 593. See also Martin Huang, "The Inescapable Predicament: The Narrator and His Discourse in 'The True Story of Ah Q'," Modern China 16, no. 4, October 1990, 435.

49 Cheng and Huang, My Camera Doesn't Lie, 75.

50 A derogatory term referring to the Japanese and other foreigners. See note 42.

51 Ward, "Filming the anti-Japanese war," 107-108. See also Xu, Sinascape, 43-44.

52 You Fengwei, From 'Survival' to '*Devils on the Doorstep*' (in Chinese) (Beijing: Beijing Publishing House, 1999), 5.

53 You Fengwei, "Survival," in Life Channel (in Chinese) (Beijing: Renmin Wenxue, 2005).

ultimately a marginal figure in the film, appearing only once to drop off the two prisoners and, unlike in the "Red Classics" that Jiang alludes to, is never a heroic figure that leads the peasant resistance. Thus, resistance against the Japanese, the arch-signifier of the Chinese war mythology, is represented in the film as an abstract ideology foisted on the reluctant peasants, with a heavy and palpable dose of the absurd.[54]

Rather than portray heroic and martial resistance, the film depicts the daily life of a Chinese village under Japanese occupation as if told from the perspective of the peasants themselves.[55] *Devils on the Doorstep* opens not with a scene of soldiers fighting or of Japanese "devils," but of daily life in an ordinary village in Japanese-occupied China. It is clear from the opening sequence that despite having been a base for Japanese navy reservists for eight years, the village has been relatively untouched by the war. As Japanese sailors parade through the village playing their jaunty naval song, local Chinese children clamor in excitement while waiting for the Japanese commander to hand out candy. The commander then stops to bark instructions at one of the adult villagers to bring him clean water that night and the latter responds pliantly, like one of the children, even calling the Japanese soldier sensei (Japanese for "teacher"). While there is certainly a clear sense of hierarchy governing their interactions, and perhaps some fear in the peasant receiving the orders, there is no hatred and vengefulness as one might expect. Instead, the villagers adapt to the occupation with ingenuity, compromising with Japanese soldiers so as to create for themselves a space of autonomy and local "resistance." From this perspective of the peasants, one can appreciate how the daily life of the war was motivated by a palpable sense of survival more than any abstract and ideological notion of nationhood. Yet it is also the everyday struggle for survival that reveals both the cruelty of war and the resilience of humanity, whose historical struggles against violence often get drowned in "black-and-white versions of history that pay attention only to the grand schemes of antagonism, such as class, nation, and ideology."[56]

54 Haiyan Lee, The Stranger and the Chinese Moral Imagination (Stanford: Stanford University Press, 2014), 256.

55 Much of the film is shot within the claustrophobic interiors of village houses, where the villagers discuss and deliberate what to do with the prisoners. The use of language and poetry also reflects the playfulness and lyricism of peasant storytelling methods. See Ward, "Filming the anti-Japanese war," 112.

56 Xu, Sinascape, 44. See also Ward, "Filming the anti-Japanese war," 113.

Chinese peasant children dancing to the tune of the Japanese naval song, excitedly awaiting candy from the Japanese naval commander. Scene from ***Devils on the Doorstep****.*

By representing the War of Resistance from below, Jiang also blurs the lines between wartime collaboration and resistance, perhaps explaining state and popular censure against *Devils on the Doorstep*.[57] The issue of collaboration during the War of Resistance has been a thorny issue in Chinese national memory. Broadly remembered as a "good war" which legitimized the nation, the party and the experiences of some who lived through it, national remembrances of the Second Sino-Japanese War tend to emphasize the Chinese as "positive and patriotic figures who are at the same time victims of savagery by others, rather than authors of their own misfortune."[58] In this national narrative, collaborators, like the translator Dong Hanchen in *Devils on the Doorstep* and Rabe's secretary Mr. Tang in *City of Life and Death*, are dismissed and demonized as hanjian, a term that is conventionally used to mean "traitor" but literally means a "betrayer of the Chinese race."[59]

Even though both films address the issue of collaboration, the discourse of salvation in *City of Life and Death* ultimately places the nation above the individual and fails to challenge nationalistic representations of collaboration. Hoping to protect the rest of his family from the brutality of the Japanese army, Tang collabo-

57 Even though *Devils on the Doorstep* won the Grand Jury Prize at the 2000 Cannes Film Festival, Jiang's success was almost completely ignored in China. His film was later banned for release in China. Chinese critics have argued that the film was "insufficiently patriotic" and had "grave errors in the representation of historical truth." See Wang Fanghua, "*Devils on the Doorstep*'s Black and White Emotions through a Color Filter" (in Chinese), Dianying Pingjie, August 2013, 36-37.

58 Rana Mitter, "China's 'Good War': Voices, Locations, and Generations in the Interpretation of the War of Resistance to Japan" in Ruptured Histories: War, Memory, and the Post-Cold War in Asia, eds. Sheila Miyoshi Jager & Rana Mitter (Cambridge: Harvard University Press, 2007), 188-189.

59 Yun Xia, Down with Traitors: Justice and Nationalism in Wartime China (Seattle: University of Washington Press, 2017), 5.

rates with the Japanese by informing on Chinese "soldiers" living within the Safety Zone, simultaneously earning for himself the titles of tomodachi (Japanese for "friend") and hanjian.[60] While this portrayal of Tang humanizes him far more than most representations of collaborators in Chinese cinema, and consequently seems to put him in a moral gray zone, the film ultimately adopts the nationalist narrative as Tang redeems himself and sacrifices his life for the sake of another, morally untainted Chinese compatriot.[61] By making Tang atone for his sin of collaboration, Lu projects patriotic heroism as a form of fantasy and an imaginative attempt at self-salvation. By telling the story of wartime collaboration as a heroic narrative of salvation, *City of Life and Death* not only obfuscates individual narratives and understandings of collaboration, but also suggests that the individual may somehow lose his life to save the nation to which he belongs. It is telling that Tang's last words to his Japanese executioner were "my wife is pregnant again," suggesting again that his patriotic death ensures the longevity of the Chinese nation.[62] In this regard, the film seems to be an attempt to "undo Japanese imperialism and injustice through a patriotic narration of the unity of the Chinese nation," subordinating the individual to the nation, and ultimately failing to uphold collaboration as a possible moral choice.[63]

In contrast, *Devils on the Doorstep* problematizes the meaning and morality of collaboration. Even though the most obvious collaborator—the translator Dong Hanchen—dies at the end of the film, his death is not a heroic one that absolves him of his guilt or puts the Chinese nation on a pedestal. It is instead an absurd execution filled with grim irony. When the KMT soldiers return and replace the Japanese dictatorship with a Nationalist one, the first order of business is the punishment and execution of wartime collaborators. Made an example by the Nationalist government, Hanchen is denounced as "scum who aided the Japanese to slaughter their own compatriots." He is portrayed by the KMT military spokesperson, a comical figure speaking with a high-brow accent that distinguishes him from the village folk, as having "aided tyranny and avoided arrest," his hands "stained with Chinese blood," and "only execution will quell the masses anger."[64] The irony of the KMT's statements cannot be more clear—not only are Hanchen's hands not "stained with Chinese blood," Hanchen himself is not the typical oppor-

60 Not only is the line between "soldier" and "civilian" blurred in the film and in reality, where a significant portion of the Chinese resistance army was composed of poorly trained and ill-equipped conscripts, most of the "soldiers" in the Safety Zone were also injured and disarmed, as Tang makes clear.

61 Zhu, "A past revisited," 102.

62 Lu Chuan, Nanjing! Nanjing!: *City of Life and Death*, 2009.

63 Siu Leng Li, "The theme of salvation in Chinese and Japanese war movies," in Chinese and Japanese Films on the Second World War, 82.

64 Wen Jiang, *Devils on the Doorstep*, 2000.

tunistic collaborator who has betrayed his people to serve the enemy.[65] Rather than acting strictly as a translator for Hanaya, the Japanese soldier for whom he works, Hanchen deliberately mistranslates Hanaya in an attempt to preserve the peace. For example, the comical opening encounter between the villagers and the prisoners reads something like this:

Village head:	So what's his name? Have him tell us himself.
Hanaya (in Japanese):	Shoot me! Kill me! If you've got the guts, cowards!
Village head:	Has he killed Chinese men? Violated Chinese women?
Villagers:	How come his name is so long?
Village head:	Has he killed Chinese men? Violated Chinese women?
Hanaya (in Japanese):	Of course, that's what I came to China for!
Hanchen (translating):	(hesitating) He's new to China. Hasn't seen any women yet. He's killed no one. He's a cook. (turning to Hanaya) Why are you doing this?
Hanaya (in Japanese):	I want to anger these cowards! I won't cooperate with swine!
Hanchen (translating):	He begs you not to kill him!

From this sequence, it can be observed how Hanchen is not a spineless stooge of the Japanese and does not merely "turn Japanese into Chinese and Chinese into Japanese."[66] Through his mediation of language, he instead opens up a "humane channel of communication" that offers some hope of rapprochement between the Chinese and the Japanese.[67] In contrast, without a translator, the town square becomes like the Tower of Babel when the Chinese KMT first return. It is comical how the KMT representative and the accompanying American and British soldiers, despite their military rank, are unable to "order" a Japanese peddler to move his goods off the road or even just to stand still. Unable to communicate with each other whatsoever, they eventually drive their military jeep over his goods and use the language of force to achieve their goals. Seen in this context, Hanchen is not merely a passive translator who is servile to his Japanese masters but is instead an active agent who uses language as a way to shape reality and avoid violence. In his use of language, Hanchen can perhaps be compared to Guido in Roberto Benigni's Life is Beautiful (1997), a controversial film that similarly used both humor and surreal scenes to represent the Holocaust. As the main character who generates most of the comedy of the film, Guido turns the threats issued by con-

65 Paola Voci, "The Sino-Japanese War in Ip Man: From miscommunication to poetic combat," in Chinese and Japanese Films on the Second World War, 46.
66 Jiang, *Devils on the Doorstep*.
67 Silbergeld, Body in Question, 93.

centration camp guards into instructions for a game so as to shelter his son from the horrors of their experience. Unable to stop the perversity of the camp and the likely death that awaits both of them, Guido's translations are at least an attempt to protect his son's childhood and innocence. In this regard, Guido and Hanchen both purposefully severe the link between words and their signified reality so as to seek a way out of an otherwise entrapping situation and to reclaim the possibility of survival.[68] Crucially, Hanchen's "translations" help the peasants overcome the social and cognitive distance that Hanaya strives to enlarge with his racist vitriol and yearnings for martyrdom, possibly avoiding violent confrontation and defusing the situation.

Dong Hanchen and Hanaya Kosaburo panting after frantically shouting over each other during the interrogation – Hanaya shouting in Japanese and Hanchen in Chinese. The latter deliberately mistranslates Hanaya's demands to be killed. Scene from ***Devils on the Doorstep****.*

By looking at the discourse surrounding collaboration (hanjian) from the perspective of the villagers, *Devils on the Doorstep* also exposes the ambiguous and populist aspects of the label. Even though the Nationalist legislature established the hanjian crime as early as August 1937, in the immediate aftermath of the Japanese attack in Beijing, the term was broadly defined and indiscriminately used.[69] In part, this may have been because positions about collaboration and

68 Paola Voci, "The Light out of the tunnel: Re-thinking Chinese cinema's war film realism," Parol XXVII, no. 25,
2014, 93. See also Ruth Ben-Ghiat, "The Secret Histories of Roberto Benigni's Life is Beautiful," Yale Journal of Criticism 14, no. 1, 2001, 255.
69 Xia, Down with Traitors, 11-12.

resistance were constantly evolving. Despite its efforts to present itself as a resistance government, the KMT practiced a policy of non-resistance towards Japan for years and did not completely reject the idea of peace talks with Japan until August 1937.[70] Combined with the encouragement of popular vigilantism in the prosecution of collaborators, the label of collaboration gained a populist valence that empowered passive victims of the war with "an opportunity to redeem their passivity with a display of patriotic fervor."[71] Not only is this evident at Hanchen's public execution, the villagers in the film constantly throw around the term hanjian, struggling to reach a stable meaning for the term and to reconcile that meaning with their own understandings of right and wrong. Is it collaboration to return the prisoners to the Japanese? Is it collaboration to feed the prisoners? Conversely, what if one were to starve them to death instead? What about the simple act of referring to the Japanese soldiers as "teacher" (sensei)? Eventually, however, the decisions made by the villagers remain outside the demands of nationalistic loyalties and discourse. When they find out the Japanese prisoner Hanaya is a peasant like them, the villagers, rather than "coming out with hackneyed expressions of hatred for a despised enemy," acknowledge respect for someone with whom they have common ground and find solidarity with.[72] While their identification with Hanaya and exchange with the Japanese army may be seen through the nationalist lens as collaboration and fraternization with the enemy, the villagers ultimately complicate the nationalist dichotomy between collaboration and resistance, and open up the possibility of acknowledging the indiscriminate use of the demonizing label hanjian.[73]

Unlike in *City of Life and Death*, collaboration in *Devils on the Doorstep* is always presented as an active choice, albeit under the oppressive conditions of war and occupation. By representing the war from the perspective of a single village, Jiang Wen confronts the complexity of communal decision-making in the village and avoids portraying his characters as one-dimensional and passive victims of the war. In contrast, the capacity for choice is evaporated in *City of Life and Death* when a kaleidoscope of perspectives is presented without interrogating any single one. Tang's collaboration with the Japanese is presented as a natural consequence of his fear and uncertainty upon hearing about Rabe's recall to Germany. Likewise, even the film's protagonist—the sympathetic Japanese soldier Kadokawa—is presented as a character stripped of choice. In many ways, he is the morally upright and pure Japanese soldier corrupted by the brutality and arbitrariness of war. In the

70 Rana Mitter, Forgotten Ally (London: Penguin Books, 2013), 203.
71 Xia, Down with Traitors, 7.
72 Ward, "Filming the anti-Japanese war," 114.
73 Xia reaches a similar conclusion from the analysis of postwar trial records of Chinese hanjian. See Xia, Down with Traitors, Chapter 2.

only scene where he kills, his shooting is an impulse without any lethal intention.[74] He is also only an observer to the brutal scenes of rape and massacre, seemingly absolving him of responsibility by attributing these acts to the universal character of war. Forced to witness the brutality, yet in no position to stop it, Kadokawa endures the trauma and guilt of war, himself becoming a victim of the war he is complicit in perpetrating. Confronted with this choiceless situation, Kadokawa ultimately commits suicide to rid himself of his guilt.[75] Such representations of the dehumanizing aspect of the Sino-Japanese war are, however, neither new nor exclusive to cinematic depictions of the war. Many soldiers who testified to the atrocity in Nanjing put the blame squarely on the war, and while these statements are truthful and useful to some degree,

> ...blaming everything on the war is at best inadequate and at worst can be used as an excuse to avoid confronting the crucial issue of agency, for even in the most brutal of wars not everyone killed or raped civilians. Acknowledgment of the dehumanizing impact of war, although highly important, cannot replace a critical analysis of the individual decisions as well as the particular political institutions.[76]

Even though *Devils on the Doorstep* focuses more significantly on the Chinese experience of the war, it can be considered a cinematic attempt at critically analyzing the individual decisions made during the war. Jiang's attempt at doing so can be appreciated by comparing his film with the original novella on which it is based. Told using the mode of heroic resistance, You Fengwei's "Survival" presents the village chief who receives the two prisoners as acting primarily out of a sense of political duty. As kind-hearted folks, the villagers treat the prisoners humanely; but when it is revealed by the communist leadership that the prisoners are no longer of use and should be executed in situ, the villagers eventually carry out what amounts to a military command.[77] When confronted by the interpreter-prisoner, the chief's only defense is: "Tell you what, you and the Jap devil's capital punishments were decided by the resistance fighters, not us. We are just carrying out their orders. Understand?"[78] By justifying their actions as an order, the villagers are able to relieve themselves of the moral burden.

74 Stephanie Brown, "Victims, Heroes, Men, and Monsters: Revisiting a Violent History in *City of Life and Death*," Quarterly Review of Film and Video 32, no. 6, 2015, 531.

75 Zhu, "A past revisited," 95-97.

76 Yang, "The Challenges of the Nanjing Massacre," 157-158.

77 Tian Yu, "From Red Sorghum to *Devils on the Doorstep*: Conceptual evolution in Chinese film adaptations," Postscript 23, no. 3, Summer 2004.

78 Translation from Haiyan Lee. See Lee, The Stranger and the Chinese Moral Imagination, 258.

In contrast, the film version presents the choices available to Dasan even amidst the oppressive conditions of occupation. Even though the mysterious resistance fighter forced Dasan to take in the prisoners at gunpoint, Dasan is later conscious of the choices available to him and his fellow villagers. For example, he speaks out against the option of killing the two prisoners even though they present a palpable and constant threat to the lives of the villages. To Dasan, killing the prisoners is "just not right" and he insists that "we [the villagers] can't just decide to kill them. It's just not good."[79] Even though he eventually fails to convince the other villagers and it is decided through the drawing of lots that the task of executing the prisoners would fall on him, Dasan is still able to carve out space for himself to do what intuitively feels right to him. Acting against fate, he chooses to hide the prisoners instead of killing them as was ordered by his fellow villagers. Thinking of himself as an active agent rather than a passive victim, Dasan ultimately blames himself for the Japanese massacre of his village and attempts to seek revenge for it. While holding himself responsible for the deaths of his fellow villagers denies him "the complication of moral luck," it is nonetheless clear that attributing what happened purely to luck "voids the subject of moral responsibility."[80] In this context, *Devils on the Doorstep* presents the possibility for choice, no matter how limited, under the conditions of war and occupation. For Jiang, the conditions of nationalism and war are no longer adequate or exculpatory justifications for acts of violence—not only did Dasan choose to shelter the prisoners in spite of an execution order, the Japanese soldiers also chose to commit the senseless acts of violence even after the Japanese Emperor Hirohito's surrender. In the final scene of the war, the burning village is disturbingly set against Hirohito's radio announcement of unconditional surrender, ironically asserting: "Should we continue the fight, not only would the Japanese nation be obliterated, but human civilization would be totally extinguished."[81] Framed in this way, the orgy of violence at the end of the war is not so much a direct military command even if it is linked symbolically with the Emperor, but is instead a choice made by Japanese soldiers, having fraternized with the Chinese, to purge themselves of the polluting effects of proximity.[82]

Conclusion

By visualizing wartime atrocities, cinema claims a place in the public consciousness of history by recording, re-envisioning, and investigating the past. For *City of Life and Death*, the representation of trauma is an indisputable testament to the

79 Jiang, *Devils on the Doorstep*.
80 Translation from Haiyan Lee. See Lee, The Stranger and the Chinese Moral Imagination, 262.
81 Jiang, *Devils on the Doorstep*.
82 Silbergeld, Body in Question, 105. See also Xu, Sinascape, 49.

violence and brutality of the Second Sino-Japanese War. In adopting the aesthetics of conventional cinematic realism, the film posits that the past can be recreated in its own image and that the audience can thus be somehow transported back into that past. Referring to the use of three-dimensional dioramas in the War of Resistance Museum just outside Beijing, the museum guide states that by "cleverly taking models, artifacts and tableaux and making them into one, so that the eye cannot distinguish between what is painting and what is a model, [it feels] as if you were placing yourself on the battlefield at the time [of the event itself]."[83] While used in a different context, the realist sensibilities of dioramic representation seem to be equally characteristic of *City of Life and Death*. Yet as Hayden White argues, the scale and intensity of the traumatic events of the twentieth century make it impossible for any single human agent to have a full and conscious view of the causes, effects and moral implications of such events. Consequently, any expectation of representational objectivity must be set aside as well. The failure of humanist historiography for White means abandoning realist storytelling techniques and seeking literary modernism, which "provide the possibility of de-fetishizing both events and the fantasy accounts of them which deny the threat they pose, in the very process of pretending to represent them realistically."[84] Nonetheless, the relationship between realism and other modes of representation are far more complicated. In this regard, *Devils on the Doorstep* is realistic without necessarily being realist.[85] By acknowledging that the past cannot be recreated in its own image, the film forces a critical rethinking of cinematic realism that achieves, in some ways, a more truthful representation of the Second Sino-Japanese War

83 Rana Mitter, "Behind the Scenes at the Museum: Nationalism, History, and Memory in the Beijing War of Resistance Museum, 1987-1997," China Quarterly 161, March 2000, 288.

84 Hayden White, "The Modernist Event," in The Persistence of History: Cinema, Television and the Modern Event, ed. Vivian Sobchack (New York: Routledge, 1996), 32.

85 Silbergeld, Body in Question, 82-86.

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The Duty to Use Drones in Cases of National Self-Defense

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INTRODUCTION

Since the tactic was first implemented, targeted killing by drones has been associated with political secrecy, dubious legality, and unsavory practices, and has thus garnered a negative reputation. In this essay, I endeavor to vindicate the use of drones, if only under the constrained circumstances of national self-defense. I argue the following: If a state can permissibly carry out targeted killings for the purpose of national self-defense, then it ought to do so with drones because of the minimized risks to soldiers and civilians.

To argue this position, I first demonstrate that we should think of targeted killing as fitting into the self-defense paradigm, rather than military or law enforcement paradigms. I explain that states may permissibly engage in targeted killing when it is justified in terms of national self-defense. Next I explain how drones minimize risk to both soldiers and civilians. By combining the logic of self-defense with the principle of risk minimization, I arrive at the conclusion that in circumstances where targeted killing is necessary for national self-defense, states have a duty to use drones. Finally, I respond to potential objections about the use of drones, all of which can be addressed by improved drone policy.

Military and Law Enforcement Paradigms Provide Inadequate Justification for Targeted Killing

Targeted killing is a practice in which many governments engage. To justify targeted killings, theorists and politicians generally invoke one of two paradigms that permit the use of deadly force: the military paradigm and the law enforcement paradigm. These paradigms act to orient government policy—they direct how we may morally and legally behave towards our enemy. Targeted killing remains con-

troversial because it cannot be clearly endorsed by either paradigm.

The Military Paradigm

The military paradigm activates the laws and conventions of war. Enemy combatants are the only parties liable to death. According to the jus in bello[1] convention, combatants can permissibly be killed during wartime without punishment (with some exceptions). Hostile treatment towards a combatant is permissible simply by virtue of combatant status, rather than any actions taken by the individual in question. In other words, a combatant's liability to death derives precisely from assumption of the role of a soldier. In this paradigm, identifying an enemy terrorist as a combatant engaged in acts of war could enable the state to justify permissibly killing him without a trial. So, the fact that targeted killings of terrorists occur without trial suggests potential use of the logic of the military paradigm.

Furthermore, in the case of the United States' conflict with Al-Qaeda, we notice that the military paradigm seems to underlies the operative language of both parties, although it does not fully account for the conflict's operative logic. Declaring a "War on Terror" and Jihad (Holy War),[2] respectively, implies at least nominally that each side considers the other's fighters to be enemy combatants. The problem, of course, is that under international law a private citizen (such as Osama bin Laden) cannot declare war as that is a right granted only to sovereign states.[3] Conversely, under international law, a state cannot declare war against a non-state actor.[4]

We may doubt the applicability of the military paradigm to targeted killings for several other reasons. First, terrorists willingly forgo the conventions that govern combatant status. The convention states that combatants wear the insignia of their country and carry their weapons openly.[5] Terrorists, however, do not wear uniforms, and hide amongst civilians. Of course, the main tactic of terrorists—targeting civilians—violates the jus in bello convention of noncombatant immunity.

It is not only the status of the terrorists that is unclear; the status of those who carry out targeted killing is equally blurry, as civilian leaders often order targeted killings. In the United States, the Central Intelligence Agency (CIA), a civilian

1 Term of art meaning "just conduct during war."

2 This is not to conflate the version of jihad that means "holy war" with its broader meaning: that is, a spiritual struggle within oneself against sin.

3 Jeff McMahan, "Targeted Killing: Murder, Combat or Law Enforcement?" in Targeted Killings: Law and Morality in an Asymmetrical World, eds. Claire Finkelstein, Jens David Ohlin, and Andrew Altman, (Oxford: Oxford University Press, 2012), 142.

4 McMahan, "Targeted Killing,"142.

5 This is a long-standing military convention, explicitly defined in by the United States' "Military Commissions Act of 2006," to respond to the lack of its explicit codification under the Geneva Convention.

organization, has the authority to command drone strikes.[6] CIA control over drone strikes blurs the line between combatant and civilian, since civilians do actively engage in hostile conduct. This further complicates traditional boundaries of warfare with respect to justice and permissibility.

Finally, naming someone in advance to be placed on a hit list runs counter to the very idea of status-based liability. In war, individual soldiers on the battlefield are not identified by the enemy and specifically targeted. Rather, a soldier is attacked by another soldier as part of a relationship of hostility qua soldier.[7] In other words, a soldier is liable to be killed due to his status as a soldier, rather than because of his actions. The practice of naming a target in advance singles him out qua individual. Therefore, the naming practice is fundamentally at odds with the status-based logic of legitimate military hostility.

The Law Enforcement Paradigm

Political theorists and governments have also justified targeted killing under a law enforcement paradigm. These parties maintain that terrorists should be considered criminals, rather than combatants.

However, the goal of law enforcement is to arrest—not kill—the criminal. By the law enforcement paradigm, it is wrong to deprive a suspected criminal of due process by killing him before a trial. Indeed, the instances where law enforcement officers can permissibly kill are restricted to cases wherein a criminal resists arrest by putting the life of officers or others at risk. In this situation, liability to death is action-based rather than status-based. In other words, the criminal has effectively forfeited their right to life by initiating an attack. Liability to death may also come after the trial as retributive justice. So in certain cases, certain crimes may be punishable by death. While the death penalty is controversial, in cases where it is legal, it also represents an instance of action-based liability as punishment for a past action.

However, by its very nature, targeted killing skips the fundamental steps of arrest and trial. Placing a name on a hit-list presumes guilt, and the individual listed becomes liable to instantaneous death by drone strike without being afforded due process. Under the law enforcement paradigm, this would be considered an extrajudicial execution, tantamount to murder.[8]

6 Under the Obama administration, this power was transferred to the Pentagon, thereby placing drone strikes under military jurisdiction. However, this policy was reversed in March 2017 by the Trump administration, placing drone strikes in the jurisdiction of civilians again. See Mark Bowden, "Killing Machines," The Atlantic, and "Trump Gives CIA Authority to Conduct Drone Strikes," Reuters.

7 Thomas Nagel, "War and Massacre," Philosophy & Public Affairs 15, no. 6 (July 1972): 123-44.

8 Michael L. Gross, "Assassination and Targeted Killing: Law Enforcement, Execution or Self-Defence?" Journal

Invoking the Principle of Self-Defense to Justify Targeted Killings: *The Self-Defense Paradigm*

In this discussion, I will draw from the work of several authors, such as McMahan, Gross, and Finkelstein, who analyze targeted killing as an act of self-defense. The self-defense paradigm better addresses the conceptual lacunae in the military and law enforcement paradigms as they concern targeted killing, and thus maps more clearly onto the practice of targeted killing. The basic premise of the self-defense paradigm is that when there is a threat to national security, a state has a right to protect itself. Self-defense can be considered a special offshoot of the law enforcement paradigm because, as described above, it is sometimes permissible for law enforcement officers to engage in certain self-defensive practices involving lethal force.[9] This paradigm deals with the threats that terrorists pose to national security and so is preemptive in nature. In this way, the killing of a terrorist should not be conceived of as punishment or retributive justice, since the paradigm does not deal with past actions. Instead, under the self-defense paradigm, someone who has never committed an attack could be just as liable as someone who has already committed several, provided that they pose the same current threat. Indeed, under this framework, a terrorist's past crimes only serve as an epistemic gauge for predicting the likelihood that the individual will strike again.[10]

The self-defense paradigm bypasses the military paradigm's murky combatant-noncombatant distinctions because its liability criterion centers on action rather than status. If someone poses a threat to a state, the actions a state may take against the individual are not constrained by their status. Rather, the individual's status is irrelevant both to their liability to death as well as our ability to retaliate. The self-defense paradigm also circumvents the law-enforcement paradigm's crucial steps of arrest and trial because it operates on the logic of preemptive justice rather than retributive justice.

Like the law enforcement paradigm, the self-defense paradigm uses the logic of action-based liability to death, but in a less evident manner. A terrorist's liability to death derives from the notion that in planning an attack, a terrorist wrongs innocent people by increasing their likelihood of harm.[11] Thus, the harm

of Applied Philosophy 23, no. 3 (August 2006): 325.

9 McMahan, "Targeted Killing,"135; Claire Finkelstein, "Targeted Killing as Preemptive Action," in Targeted Killings: Law and Morality in an Asymmetrical World, eds. Claire Finkelstein, Jens David Ohlin, and Andrew Altman, (Oxford: Oxford University Press, 2012), 179.

10 McMahan, "Targeted Killing," 139.

11 McMahan, "Targeted Killing," 139.

caused by the terrorist's death would need to be proportional to the harm prevented by protecting innocents from the attack. In other words, if their death would not disrupt realization of that harm, the targeted killing is not justified. Finally, it must also be considered whether or not the targeted killing could result in dangerous unintended consequences.When these criteria are met under the self-defense paradigm, the result would be that targeted killing is permissible as an act of self-defense. In the next sections, I argue that in the cases where targeted killing is permissible, states have a duty to use drones to carry them out because drones reduce risk to both civilians and soldiers.

The Duty to Minimize Risk in Cases of Self-Defense: Individual Cases

To demonstrate the duty to minimize risk to civilians and soldiers in cases of national self-defense, I will employ an analogy involving individual self-defense. Imagine that an individual is attacked in a way that threatens their life. It is uncontroversial that they have the right to defend themselves against the attack. By initiating the attack, the attacker has forfeited their right not to be harmed. Because the victim's life is threatened, responding proportionally to the attack means that they may permissibly kill the attacker, if that is the only way to thwart the attack. However, imagine that the attack occurs in a crowded location. While the victim still has the right to defend themselves, they would wrong bystanders by inflicting harm on them, or risking their harm. The bystanders, detached from the conflict, have done nothing to make themselves liable to harm. Consequently, they must minimize the harm to which bystanders are exposed. Therefore, the means by which one may defend themselves in this crowded location are constrained. For instance, while the victim may shoot the attacker in the open, the victim many not shoot indiscriminately into the crowd in order to scare the attacker away. Similarly, if the attacker hides within the crowd, it would be wrong to simply aim at the group of people if there existed high likelihood that a bystander would be harmed.

Furthermore, imagine the victim had the choice between two weapons that each afford equal capabilities to thwart or end the attack. One of the weapons is more precise than the other. For example, consider a handgun in comparison to a large vehicle (to be used as a deadly weapon). By aiming a gun at the attacker, they have a lower chance of accidentally hitting a bystander than if they were to drive the vehicle into the crowd. Because the victim has the choice between the two weapons, it would be wrong to choose the car, because it poses higher risk to bystanders.

These two examples demonstrate that even in the presence of bystanders the victim retains the right to self-defense, yet has a duty to minimize the risk they

pose to the innocent. For the bystanders simply have the misfortune of being in the wrong place at the wrong time, and have done nothing to make themselves liable to harm.

The duty to minimize risk even when acting in self-defense is not only a consideration which must be undertaken with respect to bystanders, but at the state level also stretches to the defensive capabilities afforded by the state to its soldiers. Consider an analogy offered by Bradley Strawser. He imagines a commander who orders their troops to take off their bullet-proof vests and run at the enemy, and concludes that the commander wrongs the troops by ordering them into a dangerous situation without the normally available protection.[12] In doing so, the commander unjustly increases their risk to harm. While there may exist important moral differences between denying defensive capability to soldiers and aiming a weapon at a crowd of bystanders, Strawser's analogy highlights the fundamental idea that it would be wrong to increase the possibility of harm to a soldier, or civilian, through deprival of defensive capability.

Applying a Duty to Minimize Risk to Cases of Self-Defense: State-Level

The duty to minimize harm to bystanders in the individual case can be extended to situations of state-level self-defense as a duty to minimize the risk of harm to civilians and soldiers. If under reliable intelligence a state discovers an imminent threat to its national security, the state has a right to defend itself against that threat. But at the same time, the means available to the state for the purpose of self-defense must be bound by a duty to minimize risk to civilians and to soldiers. If a state can justifiably respond to an imminent threat of a terrorist attack, it does not have a carte blanche to employ any weapon in its arsenal. For instance, a state could launch a nuclear bomb on the city where the attacker is hiding. While this would certainly be an effective method to kill the attacker, it is a grossly disproportionate and as such obviously unjust. Instead, the state might instead choose a "boots on the ground" mission to find the individual, or any number of other more precise strategies.

Any kind of armed engagement involves risk to both civilians and to the soldiers involved. As in the case of individual self-defense, it is the state's duty to employ a strategy that offers the least risk to all parties involved. I will now explain how drone technology seems to be the obvious choice for risk reduction in such a scenario.

12 Bradley Jay Strawser, "Moral Predators: The Duty to Employ Uninhabited Aerial Vehicles," Journal of Military Ethics 9, no. 4 (December 2010): 346-7.

Risk Reduction Through Use of Drones

Undertaking targeted killing with drones reduces the risk of harm to a state's own soldiers, as well as foreign civilians, in several ways. For pilots, the remote operation of unmanned weapons dramatically reduces chance of harm: drone pilots can operate from a base thousands of miles away from the conflict zone. They personally face no threat of harm, retaliation, or retribution. In contrast, engaging in a "boots on the ground" mission puts the soldiers involved at an increased risk because they are directly exposed to the hazards of a hostile territory, which leaves them open to the possibility of attack.

The remote aspect of drone strikes may also reduce harm to civilians in the conflict zone. Journalist Michael Lewis perceptively reasons that because drone pilots feel secure, they are surprisingly less likely to initiate a strike out of fear or anxiety for their personal safety.[13] What Lewis articulates is that the mistakes frequently made by soldiers in the "fog of war" can be minimized by drones.[14]

Moreover , drones themselves can act as intelligence-gathering machines. A target may be surveyed for months before an attack is carried out. This has several benefits. First, it confirms that the target is actually involved in terrorist activities, reducing the chance of targeting an innocent person. If the suspect is the right person, then the extensive intelligence allows the pilot to identify a pattern in the subject's daily life so that the subject may be targeted at times when they are more likely to be alone.

Furthermore, when operated with due care, drones are precise, capable of striking only a single person. As journalist Mark Bowden notes, "[A drone's] extraordinary precision makes it an advance in humanitarian warfare. In theory, when used with principled restraint, it is the perfect counterterrorism weapon. It targets indiscriminate killers with exquisite discrimination."[15] To ensure that its deployment is as precise as possible, operators have adopted measures to minimize civilian risk. For example, a recent review of drone procedures by the International Security Assistance Force in Afghanistan recommended that strikes occur while the target is in a vehicle, rather than in a compound. This is because it is easier to keep track of those entering and exiting vehicles than those entering and exiting compounds, reducing the likelihood that a target's family member or close asso-

13 Michael W. Lewis, "Drones: Actually the Most Humane Form of Warfare Ever," The Atlantic, August 21, 2013, accessed November 20, 2018, https://www.theatlantic.com/international/archive/2013/08/drones-actually-the-most-humane-form-of-warfare-ever/278746/.

14 Lewis, "Drones: Actually the Most Humane Form of Warfare Ever."

15 Mark Bowden, "The Killing Machines," The Atlantic, September 15, 2013, accessed November 20, 2018, https://www.theatlantic.com/magazine/archive/2013/09/the-killing-machines-how-to-think-about-drones/309434/.

ciate will also be hit. In addition, the strike could take place on an isolated road, further reducing the risk to bystanders.[16] Even under unideal operation conditions, drone strikes are generally less deadly to civilians than other available means, such as ground strikes or piloted airstrikes.[17]

Finally, the practice of targeted killings itself can reduce a conflict's escalation and thus its casualties. Targeted killing, when justified as preemptive action as described above, functions to avoid prolonged engagement or full-scale war. Comparing the civilian casualties of war to drone strikes demonstrates clearly that conventional warfare is the deadlier of the two.[18]

Thus, for the aforementioned reasons, when states can permissibly carry out targeted killing for the purpose of national self-defense, they have a duty to do so with drones because they minimize risk of harm for civilians and soldiers alike. This duty to employ drones should be understood as prima facie, a strategy that should be adopted unless specific circumstances require the use of other measures. In other words, the duty stands as long as using drone technology will minimize risk to bystanders and soldiers involved in the operation. If in a given operation, certain material limitations, geographical specificities, or procedural carelessness will cause an elevated risk of harm, the duty no longer stands.

Objections

Many critics object to drones on the grounds that civilians sometimes are killed in drone strikes—because of this unjust risk to civilians, they argue that the use of drones cannot be justified.

I will first respond by emphasizing that my argument deals with minimizing risk, not eliminating risk altogether. To eliminate risk completely would be to advocate for pacifism. We need to compare the risk that drones pose to civilians to the risk that other weapons and armed operations pose to civilians. Recent figures indicate that in comparison to conventional measures, drone strikes have ranged from slightly to far less lethal in producing collateral damage.[19]

The above objection can take on a more nuanced character, deserving a different response. Perhaps critics feel an intuitive discord between the very precise capability of the drone and the fact that it nevertheless produces civilian collateral, damage which seems to imply carelessness in drone operations. To respond

16 Lewis, "Drones: Actually the Most Humane Form of Warfare Ever."
17 Bowden, "Killing Machines."
18 Daniel L. Byman, "Why Drones Work: The Case for Washington's Weapon of Choice," Brookings (blog), November 30, 2001, https://www.brookings.edu/articles/why-drones-work-the-case-for-washingtons-weapon-of-choice.
19 Bowden, "Killing Machines," The Atlantic.

to these critics, I argue that their concern has more to do with mishandling and reckless use of the technology than with a problem with the technology itself. This kind of criticism is not unique to drones; any weapon can be used well or poorly. However, I contend that because drones are known for their precision, concern over rates of collateral damage may be even more relevant than in the case of use of other weapons. As such, elevated numbers of civilian casualties may be an indication of faulty intelligence or careless policy. I reiterate that the duty to use drones is only prima facie: if drones cause or exacerbate harm—either as a result of material factors or policy faults—then the duty to use them is dissolved. Indeed, I would agree with critics that these cases call for rigorous reassessment of policy and procedure. However, I would highlight that by focusing on drone technology in discussing this problem we misplace responsibility by blaming the weapon for the faults of its operators.

In his 2006 essay "Terrorism and Just War," Michael Walzer advocates for targeted killing as a counterterrorism measure. He acknowledges that counterterrorism occurs in the grey area between war and law enforcement, and usually away from active war zones. In his view, to keep the effects of counterterrorism from resembling the effects of terrorism, it is the duty of counterterrorist fighters to take extensive measures to prevent civilian casualties. For it is the care and protection of civilians that distinguishes legitimate counterterrorist activities from the illegitimate engagement of terrorists, as terrorists do not operate with similar notions of "collateral damage." Walzer believes this care for civilians should be upheld even more so in the case of targeted killings because they are activities outside of wartime. He concludes that "what justice demands is that the army take positive measures, accept risks to its own soldiers, in order to avoid harm to civilians."[20]

While I believe that the motivation for Walzer's argument is noble, it rests on a false premise. For, when read carefully, we observe that Walzer takes risk as a sort of sliding scale oscillating between the two extremes of risk to soldiers or risk to civilians. Rather, it is possible to work to minimize risk for civilians without this occurring at the expense of soldiers, minimizing risks for both parties. Walzer does not seem to entertain this possibility. However, when used with due care, the drone is the most precise weapon that we have in our arsenal. Its use would minimize risk to civilians while simultaneously eliminating risks to soldiers as well. If this is truly the case, then there does not seem to be a reason that, by his criteria, Walzer would object to their use. It does not seem that acknowledging the duty to avoid harming civilians would necessarily preclude the duty to avoid harm to soldiers. Again, however, my argument for the use of drones is only a prima facie. If it is indeed the case that more civilians would be harmed by the use of drones, either

20 Michael Walzer, "Terrorism and Just War," Philosophia 34, no. 1 (2006): 9.

due to material limitations or reckless policy, then they should not be used.

Many critics argue that if drones make targeted killing easier and less risky to soldiers, states will undertake more targeted killings than they would otherwise. They worry that the easy, efficient, and asymmetric nature of drone engagement may cause operators to ignore or forget that killing is only permissible when absolutely necessary to prevent greater harm. In turn, criteria for appearing on a hit-list for such targeted killings could become weaker and weaker. Walzer expresses this concern in his essay "Targeted Killing and Drone Warfare." He writes, "why should we think it different from the sniper's rifle? The difference is that killing-by-drone is so much easier than other forms of targeted killing. The easiness should make us uneasy. This is a dangerously tempting technology. It makes our enemies more vulnerable than ever before, and we can get at them without any risk to our own soldiers" (italics added).[21] Therefore, he and likeminded observers assume that when there is lower risk to military personnel, the "necessity" threshold for pursuing a targeted killing would be lowered.

My immediate response to such an objection is to specify that I do not argue for a blanket duty to use drones. My argument only pertains their use in justified instances of self-defense. Just because drones are tempting to overuse or abuse, it does not follow that they will definitely be misused. In a similar vein to my previous responses, I emphasize that the key is a consistent and honest drone policy, with transparency and accountability. If states consistently hold themselves to a high bar of certainty required to permissibly engage in a targeted killing, then temptation does not have to materialize into a dubious precedent.

Similarly, some critics contend that the remote warfare aspect of drones will create a "video game mentality" in its operators, emboldening them to undertake even more risks.

This notion, however, is simply untrue. According to a 2011 Department of Defense study, drone operators experience depression, anxiety, and PTSD at rates similar to combat pilots.[22] In the Atlantic article "The Killing Machines," Mark Bowden, after conducting interviews with drone pilots, describes why these pilots experience such emotional distress. Combat pilots are not responsible for long-term intelligence collection, and are trained to leave the scene as soon as their missions are complete. On the other hand, a drone operator is responsible for collecting intelligence. This operator may observe the same person for months, becoming intimately familiar with the target's daily life after seeing him with his

21 Michael Walzer, "Targeted Killing and Drone Warfare," Dissent Magazine, January 11, 2013, accessed November 20, 2018, https://www.dissentmagazine.org/online_articles/targeted-killing-and-drone-warfare.

22 James Dao, "Drone Pilots Are Found to Get Stress Disorders Much as Those in Combat Do," The New York Times, February 22, 2013, accessed November 20, 2018, https://www.nytimes.com/2013/02/23/us/drone-pilots-found-to-get-stress-disorders-much-as-those-in-combat-do.html.

friends and family. What's more, the drone's camera feed continues after a missile is launched. Drone pilots witness "the carnage close-up, in real time—the blood and severed body parts, the arrival of emergency responders, the anguish of friends and family…War by remote control turns out to be intimate and disturbing."[23]
One might also worry that justifying targeted killing with the logic of preemptive self-defense fails to address the combatant-noncombatant ambiguity previously discussed in reference to the military paradigm. For, if someone is killed before he commits a wrongful action, doesn't that indicate that his killing could have only been status-based?

I respond to this objection by reiterating that self-defense operates on the logic of action-based liability. While not immediately obvious, planning a deadly attack is a type of wrongful action severe enough to warrant liability to death, as it increases the likelihood of harm to a innocent people.[24] In this way, the assailant's status is irrelevant; it is the nature of the threatening action that allows permissible retaliation. However, because of the preemptive nature of the response, there will always remain some uncertainty—indeed, the assailant could have had a change of heart and not followed through with the planned attack. Given this uncertainty, it is necessary to set the epistemic bar rather high when assessing the true likelihood that a suspected assailant will follow through with the threat. Indeed, extended surveillance should be used to ensure—to a degree of near certainty—that the targeted individual's outward behaviors definitively imply intention to carry out an imminent attack. This would be possible with use of a drone, since it carries intelligence gathering capabilities. Ultimately, we should make quite certain that the assailant is truly preparing an attack for which killing them would be proportional to prevent the harm to innocents.

In sum, my responses to these five objections follow a specific trend, emphasizing the need for stringent procedural constraints in use of drones, a high epistemic bar for identifying targets who pose a threat before proceeding to killing, and conducting the strikes with tremendous care for the welfare of civilians. I believe that if the policy for targeted killings was transparent, rigorously regulated, and strictly followed, the objections discussed above would be void.

Conclusion

In this essay, I have demonstrated that whenever targeted killing is permissible as an act of national self-defense, states have a duty to use drones to carry out the attack. In support of this argument, I have explained that the logic of self-defense

23 Bowden, "Killing Machines."
24 McMahan, "Targeted Killing," 139.

is better applicable to targeted killings than either the logic of military conduct or of law enforcement. As the self-defense paradigm requires use of means which reduce risk to all parties involved, drones stand out as the obvious choice—precise, remote weapons which reduce the risk of harm to both soldiers and civilians. Finally, I responded to several objections to drone technology, ultimately concluding that strict and thoughtful procedures with regards to the technology's use could allay critics' overarching unease.

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A Fair Free Lunch?[1] Reconciling Freedom and Reciprocity in the Context of Universal Basic Income

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"A society that relies on generalized reciprocity is more efficient than a distrustful society, for the same reason that money is more efficient than barter. Honest and trust lubricate the inevitable frictions of social life."

-Robert Putnam, Bowling Alone: The Collapse and Revival of American Community

Introduction

In the 1970s, the Canadian federal government ran a large randomized experiment in giving citizens a basic income called "Mincome." When Mincome participants were asked "Why wouldn't you go on welfare, even if it would improve your income?" 37% responded that they would rather support themselves, giving explanations such as, "Welfare to me was accepting something for nothing," or, "I feel more useful working."[2] Similarly, in a survey of 121 working Germans, most participants rejected the provision of a basic income, because it was independent of level of need or contribution.[3] In both the scholarly discussion of basic income and in public opinion surveys, the unconditional freedom granted by universal basic income (UBI) seems to directly contradict the social norm of reciprocity. Reciprocity, most generally, is the idea that those who enjoy a share of the benefits of social cooperation owe a corresponding contribution to that society in return, as long as they are able.[4] This concept of reciprocity is central to the idea of the social contract itself: citizens owe

1 A play on Philippe Van Parijs's book title, What's Wrong with a Free Lunch?

2 David Calnitsky, "'More Normal than Welfare': The Mincome Experiment, Stigma, and Community Experience," Canadian Sociological Association 53, no. 1 (February 2016): 54.

3 Stefan Liebig and Steffan Mau, "A Legitimate Guaranteed Minimum Income?" in Promoting Income Security as a Right: Europe and North America, ed. Guy Standing, 210-224. (London: Anthem, 2004), 210.

4 Catriona Mackenzie, The International Encyclopedia of Ethics, s.v. "Reciprocity," Oxford: John Wiley & Sons, 2013.

to each other some degree of cooperation in order to receive social benefits.

Is it possible to reconcile reciprocity and freedom in this context? If so, how? I argue that UBI succeeds in reconciling reciprocity and freedom by making its definition more inclusive, and by restricting our definition of freedom to a more morally defensible conception of republican freedom, all while endowing trust in participants. First, I briefly define basic income. Second, I explain the ethical conflict inherent between freedom and reciprocity as discussed by contemporary basic income scholars, primarily Stuart White and Philippe Van Parijs. Third, I argue that republican freedom deserves moral priority over real freedom in a non-ideal society. Fourth, I argue that a more egalitarian and inclusive conceptualization of reciprocity is required for justice in a non-ideal society. Finally, I compare UBI's efficacy in achieving this reconciliation to Anthony Atkinson's proposal of participation income.

Defining Basic Income and This Paper's Normative Framework

UBI generally has five definitional features: basic income is in cash, unconditional, universal, individual, and consistent. In this way, UBI is a significant departure from most welfare benefits in the United States. Existing benefits are almost all means tested and often in-kind (e.g., food stamps) rather than cash, given on a household basis (allowing for potential domination of one spouse over another), and conditional on the performance of paid work for a period of time—as is required by the Earned Income Tax Credit, Social Security, and Unemployment Insurance. There are also features of UBI that vary dramatically across proposals: the specific cash amount given, the frequency with which it is given, how it is funded, and the package of policies it entails. The exact features of basic income greatly affect the extent of the tension between freedom and reciprocity—for example, the larger the grant is, the greater the freedom of the individual, but also the smaller the impetus to reciprocate. For the sake of this paper, I will assume a UBI as a $1,000 monthly grant, as is being tested by Y Combinator, a startup accelerator, and I will assume that UBI will be in an addition to existing welfare, save for the most redundant programs. I will limit this paper to considering UBI in the context of the United States.

As this is a primarily conceptual paper, I will not construct my argument from a specific full-bodied normative framework, such as republican or libertarian political theory. Rather, I will rely on the normative framework of an egalitarian policymaker interested in the principles of justice required for a non-ideal society, and I will hold that a nonideal society is one without institutions that fully correct

for unequal access to the means of production and inequalities of natural ability.[5] The United States, of course, is one such nonideal society. As such, I write from a framework that (1) recognizes the inability of current institutions to meet the basic requirements of a social contract that requires all citizens, regardless of race, gender, or class, to be treated equally, and (2) strives to evaluate policies by their success in treating all citizens as moral equals while still protecting citizens' basic freedoms.

The Conflict Between Freedom and Reciprocity

While UBI offers a radical but simple proposition to provide a basic level of economic security for all regardless of one's history of paid work, it also appears to contradict the social norm of reciprocity: the idea that those who enjoy a share of the benefits of social cooperation owe a corresponding contribution to that society in return, as long as they are able. The idea of reciprocity is often incorporated as a central tenet in theories of justice, such as in John Rawls's theory of justice as fairness, as well as in economic theory, as in Adam Smith's theory that reciprocity serves as a social invisible hand that allows the free market to function. On a societal level, one might say that citizens internalize the idea of reciprocity by performing paid work, paying taxes, and performing civic duties, while receiving government benefits in the form of public services, protection, and the insurance of government transfers in times of need.

Stuart White, in his book The Civic Minimum, provides a useful account of justice as fair reciprocity. In society's nonideal form where institutions are incapable of correcting for inequalities of natural ability, society must only meet the "threshold of basic fairness"—meaning that class inequality is minimized to the extent possible and that all citizens have access to jobs with above-poverty wages, opportunities for self-realization, and security against abuse and vulnerability. In a society that has met this threshold, citizens are required to reciprocate either in the form of paid labor or specific kinds of care work. One reason that White finds fair reciprocity to be essential is that it is both a product and stimulus of a society of democratic mutual regard, in which "individuals seek to justify their preferred political and economic institutions to others by appealing to shared basic interests, and to related principles that express a willingness to cooperate with their fellow citizens as equals."[6] As such, White finds this form of reciprocity necessary to the social cooperation inherent in a functioning social contract.

5 Stuart White, The Civic Minimum: On the Rights and Obligations of Economic Citizenship, (Oxford: Oxford University Press, 2003), 17.

6 White, The Civic Minimum, 17.

Justice as inextricably connected to reciprocity seems to be critically at odds with the unconditional freedom granted by UBI. It is most at odds with Philippe Van Parijs's account in "Why Surfers Should be Fed," in which Van Parijs argues that the most central tenet of justice is not reciprocity, but rather "real freedom."[7] Under this conception of justice, society ought to maximize individuals' ability to pursue their own conception of the good life, including what they might want to do in the future. This would imply that even able-bodied individuals who decide to spend all their time surfing (i.e., not concretely contributing to society) deserve a basic income just as much as those who spend time working in various ways to contribute to society and the funding of basic income. His argument centers on the following provocative thought exercise:

Consider Crazy and Lazy, two identically talented but rather differently disposed characters. Crazy is keen to earn a high income and works a lot... Lazy is far less excited by the prospect of a high income and has decided to take it easy. With the Basic Income at the highest feasible level… Crazy is rather miserable because her net income falls far short of the income she would like to have. Lazy however is blissful.[8]

Our traditional understanding of reciprocity would say that Crazy is being exploited by Lazy, whom we might see as free-riding off of the hard work of Crazy. Van Parijs turns this argument on its head with his Job Assets Argument, in which he asserts that jobs are an asset essential to real freedom, and that in our arguably non-Walrasian world, there will remain "morally arbitrary inequality in opportunity" between those lucky enough to be employed, and the involuntarily unemployed.[9] Thus, it might be Crazy, not Lazy, who has unsustainable preferences, and perhaps individuals like Lazy deserve to live off of their share of capital rents that have been monopolized by individuals like Crazy.

Whether or not one believes Van Parijs's Job Assets argument, Lazy is still exploiting Crazy by free-riding off of the work of Crazy, thereby violating the norm of reciprocity. Van Parijs does not try to imply that Lazy is not exploiting Crazy; rather he argues that Crazy has also exploited Lazy in an equal if not more severe way. Crazy's exploitation of Lazy, however, is an issue that White finds to be based in the structural inequalities of society that cannot be directly solved by basic income. Regardless of whose understanding of asset distribution one believes, the debate between White and Van Parijs demonstrates that there is a clear and serious tension between reciprocity, as it has been traditionally defined, and real freedom.

7 Philippe Van Parijs, "Why Surfers Should Be Fed: The Liberal Case for an Unconditional Basic Income," Philosophy and Public Affairs 20, no. 2 (1991): 103.

8 Van Parijs, "Why Surfers Should Be Fed," 105.

9 White, The Civic Minimum, 156.

Real freedom, by definition, places the individual's ability to realize their own potential above all else, including reciprocal obligations. Thus, a basic income that prioritized individuals' real freedom could make no promise that recipients would make specific contributions in return if these contributions conflicted with the recipients' ability to realize their real freedom. To resolve this tension, it is necessary to critically examine what definitions of reciprocity and freedom are those most necessitated by the pragmatic justice of an egalitarian policymaker.

A Republican Re-Conception of Freedom

In this section, I assert that real freedom is the inappropriate freedom to be juxtaposed with reciprocity, both because real freedom is nearly impossible to measure and because republican freedom deserves moral priority over real freedom in a nonideal society. Republican freedom is defined as freedom from nondomination and independence from arbitrary power. Real freedom, as defined by Van Parijs, necessitates not only the negative freedom required by republican freedom, but also the resources and capacities to carry out one's will.[10]

First, it seems nearly impossible to measure whether or not real freedom is being maximized in a society, unless one makes the assumption that income can be translated to real freedom on a one-to-one basis. How is it possible to measure the achievement of individuals being as free as possible to do what they might want to do? While there are some ways to estimate achievement of republican freedom, such as the number of workers with basic protections or changing poverty rates, it seems impossible to measure real freedom without assuming that income and real freedom share a monotonic relationship.[11] Though we cannot expect an exact measurement of whether or not a society is meeting the goal set by a theory of justice, such as equality, it does seem important to be able to at least approximate the extent to which we are meeting that goal in order to reassess and reevaluate policies. For real freedom, this process of approximation seems impossible.

Second, republican freedom deserves moral priority over real freedom even under the most base egalitarian framework. Philip Petit defines republican freedom as nondomination, or the absence of unreasoned control.[12] Under a republican conception of freedom, the protection of individuals' negative liberty (e.g., the freedom from exploitation and violation) is prioritized over the protection of individuals' positive liberty—like the freedom to choose to spend one's day surfing. Elizabeth Anderson critiques Van Parijs for not considering the fact that cer-

10 Van Parijs, "Why Surfers Should Be Fed," 104.

11 Brian Barry, "UBI and the Work Ethic," The Boston Review, October, 2000, http://bostonreview.net/archives/BR25.5/barry.html.

12 Philip Petit, "A Republican Right to Basic Income?" Basic Income Studies 2, no. 2 (2007): 4.

tain freedoms might deserve to be considered more worthy of defense than others. In explaining what freedoms are worth defending, Anderson says:

> What we owe [to each other] are not the means to generic freedom but the social conditions of the particular, concrete freedoms that are instrumental to life in relations of equality with others. We owe each other the rights, institutions, social norms [and] public goods … to exercise the capabilities necessary for functioning as equals in a democratic state.[13]

In stating this, Anderson asserts that in the context of UBI, republican freedom is more morally defensible than real freedom.

To an extent this seems to be true. An argument for real freedom could easily be co-opted by the wealthy asserting that any form of taxation is an affront to their real freedom, which may consist of purchasing multimillion-dollar yachts. Cases such as this would seem to erode the foundation for a social contract grounded in some idea of reciprocity, as any level of tax or contribution necessary to fund the freedom of the disadvantaged could be seen as an undeserved attack on the real freedom of the advantaged. It would seem more morally desirable to an egalitarian policymaker to first protect individuals from base levels of oppression—such as a woman who can leave an abusive relationship or an immigrant who can leave an exploitative job due to UBI—before protecting an unmeasurable freedom to do that which one might want to do.

In Stuart White's ideal world, in which all citizens already possess egalitarian social rights and in which institutions have the capacity to correct for inequalities of ability, there seems to be a reason for thoughtful debate on the relative moral priority deserved by real freedom and republican freedom. Increasing equality in individuals' sense of real freedom constitutes a necessary later step in treating all citizens as moral equals. However, in the nonideal society of the United States, republican freedom is both the freedom most deserving of moral prioritization for anyone concerned with egalitarian values and the freedom that is most compatible with reciprocity. As demonstrated by the yacht example, real freedom will often create conflict with even the broadest definition of reciprocity. However, republican freedom will rarely create this same conflict. In fact, one might even argue that protecting people from base levels of oppression and domination empowers people to better reciprocate, rather than removing the impetus to do so. Once society moves closer to White's ideal society, it will be appropriate to reconsider the

13 Elizabeth Anderson,"Forum Response: A Basic Income for All," The Boston Review, October, 2000, http://bostonreview.net/forum/basic-income-all/elizabeth-anderson-optional-freedoms.

prioritization of real freedom. Until then, there is a hierarchical order of priority in which, to meet Stuart White's "threshold of basic fairness," republican freedom ought to be prioritized over real freedom.

An Egalitarian Re-Conception of Reciprocity

Although prioritizing republican freedom over real freedom has brought us closer to reconciling freedom and reciprocity, there remains the issue of what precisely we ought to mean by reciprocity. Reciprocity, most generally, is the idea that those who enjoy a share of the benefits of social cooperation owe a corresponding contribution to that society in return, as long as they are able.[14] If we take the existing structures of welfare benefits in the US as a model of what it means to reciprocate in our society, then reciprocation largely means to have paid work, to have recently had paid work, or to actively be in search of paid work. Paid work, as valued by the current structure of policies, is elevated as the most—if not the only—legitimate form of reciprocity.

This constitutes an unacceptably exclusive form of reciprocity for a theory of justice concerned with treating all individuals as moral equals. Large parts of society are excluded from a narrow definition of reciprocity that focuses on the economic contributions made through paid labor in the form of taxes. The most excluded cohort is the severely disabled, who are mostly unable to obtain paying jobs to economically contribute to society. According to Eva Kittay, to assume (as does John Rawls) that individuals are "normal" and cooperating members of society and that justice for disabled individuals can be determined at a later point is to fail to meet a standard of justice in which principles apply equally to citizens capable of fully cooperating and those unable to cooperate.[15] That standard of justice is one which treats all citizens as moral equals.

A second cohort that is excluded by a narrowly-focused definition of economic reciprocity is those who perform unpaid labor in the home, primarily women. This exclusion has been noted by feminist proponents of basic income who lament the androcentric basis of the current social safety net.[16] The US welfare system is almost entirely built on such androcentric norms; a number of benefits are conditioned on whether the recipient engages in paid work outside the home, including the Earned Income Tax Credit, Unemployment Insurance, the Child Tax Credit, and to an extent, Social Security. Single mothers are particularly penalized by the system's current structure. These women are often forced to choose between

14 Mackenzie, The International Encyclopedia of Ethics, 1.
15 Mackenzie, The International Encyclopedia of Ethics, 7.
16 Almaz Zelleke, "Institutionalizing the Universal Caretaker Through a Basic Income?" Basic Income Studies 3, no. 3 (2008): 2.

taking care of their child and not having enough to live off, or working enough to pay for child care, not seeing their child enough, and still barely having enough to live off. Unsurprisingly, the poverty rate for single-mother families in 2016 was 35.6%, or five times the rate for married-couple families.[17]

A narrow definition of reciprocity that excludes the disabled, women performing unpaid labor, and others such as children and the elderly, is unacceptable under an egalitarian framework in which humans are to be treated as moral equals. To solely focus on reciprocity as an economic activity is to neglect the fact that such economic participation would be impossible without the unpaid and socially necessary caregiving work within homes. In fact, one could argue that such a narrow-minded definition of reciprocity performs the precise injustice that reciprocity seeks to avoid: exploitation, in which those performing unpaid and socially unrecognized contributions to society are exploited by those who are performing paid contributions enabled by unpaid, unrecognized care givers. Lastly, the number of people excluded from a narrow definition of reciprocity as purely economic will only grow to be more unsustainable in a future scenario in which available employment decreases and more are employed involuntarily or part time.

Basic income, by definition, does not depend on a form of reciprocity that only recognizes monetary contributions. Instead, basic income recognizes a more inclusive form of reciprocity in which recipients can reciprocate in a number of ways: child care, volunteering, civic participation, accepting lower paying jobs, and more. In this way, basic income not only acknowledges that there are multiple ways to contribute to society, but also is forward-looking in recognition of the fact that access to dependable, well-paying wage employment may decrease in future scenarios of technological unemployment.

Participation Income vs. Universal Basic Income: A Matter of Trust

We have now clarified the moral priority of republican freedom over real freedom under the framework of a pragmatic, egalitarian policymaker, as well as the need for a more inclusive definition of reciprocity. A policy that prioritizes republican freedom over real freedom would presumably first focus on offering a basic level of income (i.e., an amount sufficient to offer citizens the ability to "say no" to oppressive environments and situations, but perhaps not enough to do all that which they might want to). A policy that rejects the current exclusive definition of reciprocity would either explicitly expand reciprocity beyond financial contributions to include specific forms of participation or be entirely value neutral in allowing for a variety of interpretations of reciprocity.

17 Kayla Patrick, "National Snapshot: Poverty Among Women & Families, 2016," National Women's Law Center: Washington, D.C., 2017.

At first glance, Anthony Atkinson's participation income appears to be the version of UBI which most directly addresses the tension between freedom and reciprocity inherent in basic income. Participation income is basic, like in UBI, but is conditional on "participation," which includes a broad range of activities ranging from employment or self-employment to education, training, care-taking, or volunteer work. The condition necessitates "neither payment nor work," and thus greatly expands what is meant by social contribution, despite not quite being value neutral.[18] Conceptually, participation income succeeds at addressing the serious concern regarding basic income's threat to reciprocity by making reciprocity a condition of UBI. Furthermore, Atkinson's broad definition of participation mitigates most concerns about the groups that are arbitrarily excluded from current interpretations of reciprocity. Of course, practically enforcing the conditions of participation income would be a public administration nightmare. It would be impossible for a government to measure whether or not a citizen made their "quota" of contribution hours for a month without enacting an immense surveillance state that would deprive from citizens the very freedom that basic income is supposed to expand. Nevertheless, participation income succeeds in providing a useful framing mechanism by which UBI proponents can assuage public concerns regarding the effect of basic income on traditional reciprocity.

However, there is also a normative trade-off for this improved political framing. By making income conditional on immeasurable outcomes, rather than trusting citizens' own sense of justice to constructively contribute to society, participation income fails to endow citizens with trust. This notion is both unreasonable and undesirable. It is unreasonable to think that citizens will wholly stop constructively contributing to society if the cash amount is in fact "basic"; one would only be able to live an extremely simple life off of $12,000 per year (it should be noted that the federal poverty level income for a family of four is $24,600, or about $12,300 per adult). It is undesirable because participation income continues to rely on the norm of distrust that is a foundation for today's conditional welfare system. If UBI is to constitute the beginnings of a new, more just social contract, that contract cannot be created without the development of trust.

In his essay "How can we trust our fellow citizens?" Claus Offe defines trust as "the belief that others, through their action or inaction, will contribute to my/our well-being and refrain from inflicting damage upon me/us."[19] Offe notes that trust is often self-stabilizing; in other words, being trusted creates within us moral obligations that make us act in a trustworthy fashion in return. There

18 Anthony Atkinson, "The Case for a Participation Income," The Political Quarterly 67, no. 1 (January 1996): 69

19 Claus Offe, "How Can We Trust Our Fellow Citizens?" in Democracy and Trust, ed. Mark Warren (Cambridge: Cambridge University Press, 1999), 47.

is already some degree of empirical evidence that unconditional income creates self-stabilizing trust. For example, in a World Bank report reviewing 19 global experiments in unconditional cash income, only one study showed a statistically significant increase in the purchase of temptation goods such as alcohol and tobacco. Many studies actually showed statistically significant decreases in consumption of alcohol and tobacco. This result seems to further suggest that when people are trusted, they often act according to the moral obligations that receiving that trust creates.[20] Furthermore, in the Canadian Mincome experiment, participants stated they felt greater trust in their government and in themselves, with one respondent saying that "[basic income] trusts the Canadian people and leaves a man or woman, their pride."[21]

Alaska's Permanent Dividend program offers insights similar to those of the Canadian Mincome experiment. Due to abundant oil production and revenue, the Alaskan government has, since the 1980s, paid out an annual dividend of around $1,000 to all eligible Alaskan residents. The majority of residents in Alaska now say that that they would prefer higher taxes as opposed to ending the Alaska Permanent Dividend,[22] indicating a new trust in government and fellow citizens. Economic research has recently showed that the Alaska Permanent Dividend has had no effect on full-time employment, and has actually increased part-time work by 17%.[23] The experiments in Canada and Alaska not only show that basic income has the potential to increase trust in others and the government, but also that there is little evidence of unconditional basic income negatively affecting economic reciprocity.

As early experiments in basic income are beginning to show, the statement of trust made by unconditional income may reinforce the very reciprocity that many are concerned the unconditionality in basic income will destruct. Thus, while participation income provides useful political framing that connects basic income to reciprocity and boldly expands our definition of reciprocity, it fails to constitute either a practicable policy solution or an ideal toward which we ought to strive as a society. If we truly desire to create a fairer, more inclusive social contract, it must begin with trusting our fellow citizens. UBI is precisely the policy

20 David Evans and Anna Popova, "Cash Transfers and Temptation Goods: A Review of Global Evidence," World Bank Policy Research Working Paper 6886, The World Bank Africa Region, Office of the Chief Economist, Washington, D.C., 2014: 23.

21 David Calnitsky, "'More Normal than Welfare': The Mincome Experiment, Stigma, and Community Experience," Canadian Sociological Association 53, no. 1 (February 2016): 61.

22 Michael Coren, "Alaska Shows Even People in the Most Conservative States Prefer a Basic Income to Lower Taxes," Quartz, June 30, 2017.

23 Damon Jones and Ioana Marinescu, "The Labor Market Impacts of Universal and Permanent Cash Transfers: Evidence from the Alaska Permanent Fund," NBER Working Paper No. 24312, The National Bureau of Economic Research, Cambridge, MA, 2018.

with which to create that new standard of trust. As experiments demonstrate, that trust will likely pay off.

Conclusion

I have shown that, for a theory of justice striving to treat individuals as moral equals, a republican conception of freedom is more appropriate than a conception of real freedom. I have also shown that current definitions of reciprocity are inadequate in treating all individuals as moral equals. I have compared the capacity of unconditional basic income and participation income to respond to this tension, and have asserted that only unconditional basic income succeeds in rectifying an exclusionary social contract by endowing all participants with trust.

As the social contract currently exists, UBI may not be the most efficient way to reduce inequality. However, only UBI provides the groundwork for a new social contract in which not only freedom and reciprocity are reconcilable, but citizens are also trusted to meaningfully contribute to society. If current experiments in basic income continue and do not significantly diverge from the findings of ones previously conducted in Africa, Alaska, and Canada, this normative conclusion will continue to be furnished with empirical evidence about the self-stabilizing nature of trust endowed by UBI.

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Enhancing Value or Stifling Innovation: Examining the Effects of Shareholder Activism and Its Impact on American Capitalism

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ABSTRACT

Shareholder activism is an increasingly common practice in American capitalism. In fact, in 2016 alone, 21% of S&P 500 companies were approached publicly by activist shareholders. The existing thought on shareholder activism is split into two sharply divided camps. On one side, experts decry activism as a detrimental, "short-term" practice that must be guarded against. On the other, scholars and hedge fund managers argue that activists enhance shareholder value and improve underperforming corporations. This paper seeks to understand why there is such disagreement over the same data. Using interviews of key actors, primary and secondary research, and corporate governance theory, this paper finds that activism can deliver greater management and board accountability and can improve the way in which capital is allocated. However, despite its potential to call attention to and improve issues in some situations, it argues that activism is a negative influence for the long-term health of corporations, as it frequently overlooks important measures of corporate success and stifles innovation.

Chapter 1: Introductions

In October 2017, hedge fund manager Nelson Peltz waged the most expensive proxy fight in history against Proctor and Gamble (P&G). As the world's largest consumer products maker by market value and creator of iconic household names that include Gillette razors and Tide detergents, P&G represents the formidable greatness of American business. However, despite P&G's massive market capitalization of nearly $200 billion, Peltz's Trian Fund Management shook the behemoth of a company by announcing just a 1.5% ownership. Over the course of a year, Trian and P&G spent a combined $100 million on mailings, advertisements, and phone calls as part of a proxy contest to win the support of shareholders in

order to seat directors on the P&G board.[1] Although the fight for a place on or even the control of a board is frequently publicized as the culmination of the relatively novel phenomenon of shareholder activism, proxy fights represent just one example of the longstanding practice of shareholder intervention in the governance of public companies.

Upon opening The Wall Street Journal or The Financial Times on any given day, one is destined to notice the mention of "shareholder activism." Frequently referring to hedge fund interventions in public companies, this term has become prolific in describing the way in which investors interact with companies in an effort to express their views. It is not only the use of the term that has grown; the practice of shareholder activism has expanded greatly in the last number of years, primarily as a result of the expanded role of institutional investors and cash-flush asset managers. Following the financial crisis in 2008, "activist" funds have ballooned from managing just $36 billion in 2009 to over $112 billion in 2014.[2] This growth in assets under management (AUM) at hedge funds considered "activists" is shown in figure 1.

Only two years later there was more than $120 billion in dedicated activist funds, deployed in nearly 300 activist campaigns. The scale of interventions is so large that 21% of S&P 500 companies were approached publicly by activist shareholders in 2016 alone.[3]

Although many are familiar with recent examples of shareholder activism, such as Peltz's fight with P&G, broadening its definition illustrates a long history of activist interventions. Activism can be defined as a set of actions taken by shareholders of a public company with the explicit intention of influencing a change within the organization in order to enhance the value of the company's stock.[4] While in most cases shareholder activism is directed at publicly held companies, there are notable exceptions such as Benchmark Capital's suit against Uber to remove founder Travis Kalanick from management.

It has long been argued that shareholder activism is a relatively recent phe-

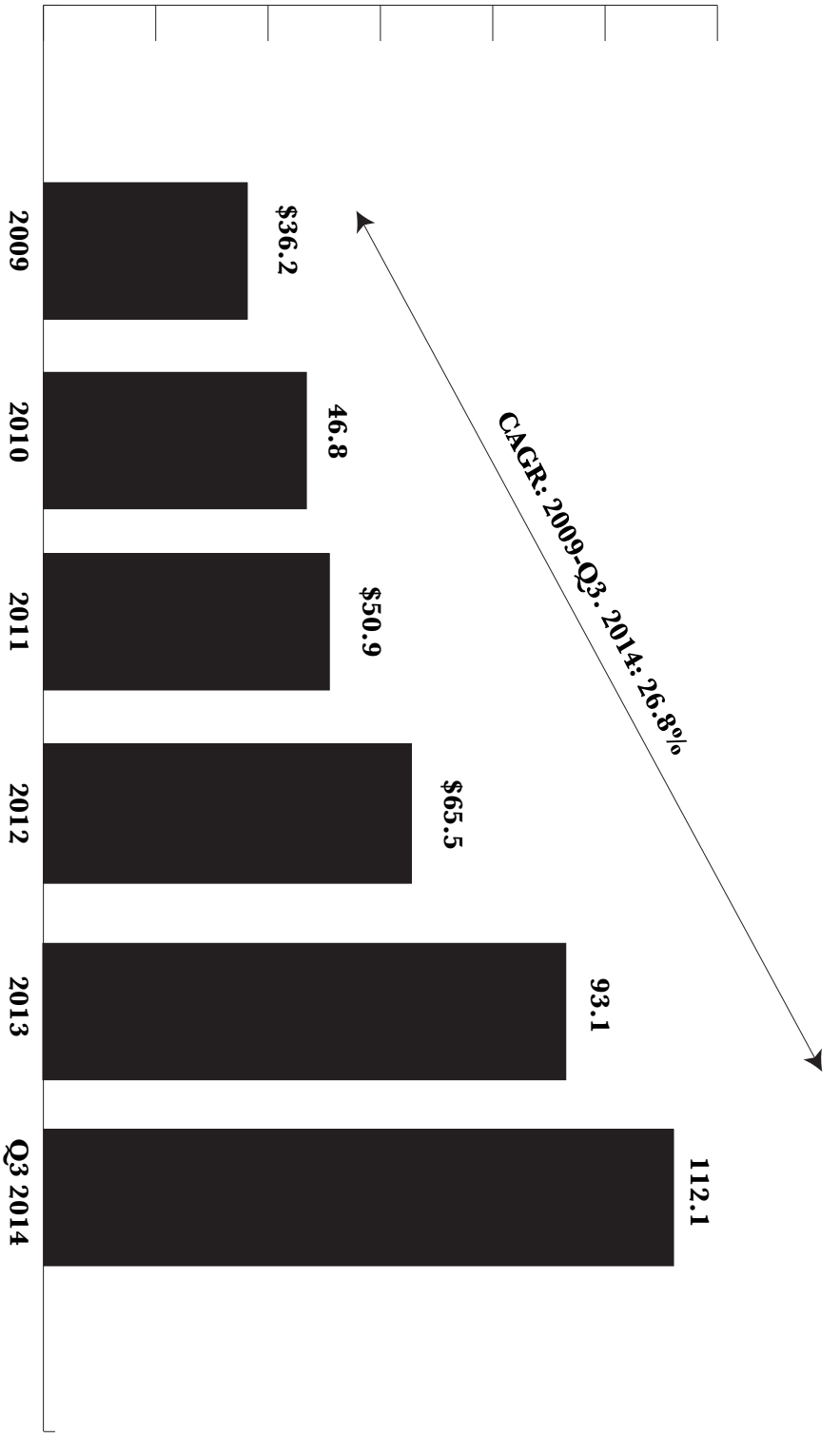
1 Sruthi Ramakrishnan and Michael Flaherty, 'Trian Takes off the Gloves, Aiming to Put Peltz on P&G's Board', Reuters, 17 July 2017, sec. Business News, https://www.reuters.com/article/us-procter-gamble-stake-trian-fund-idUSKBN1A20YA.

2 'The Activist Revolution: Understanding and Navigating a New World of Heightened Investor Scrutiny' (J.P. Morgan, January 2016), https://www.jpmorgan.com/jpmpdf/1320693986586.pdf.

3 Gregory Taxin and Betsy Atkins, 'Activism's New Paradigm', Harvard Law School Forum on Corporate Governance and Financial Regulation, 28 September 2017, https://corpgov.law.harvard.edu/2017/09/28/activisms-new-paradigm/.

4 Taxin and Atkins.

Figure 1: Total Activist Hedge Fund AUM ($bn)
Note: AUM numbers only account for single-strategy activist managers—multi-strategy funds and investment managers engaging in activism as a sub-strategy are excluded.
Source: (J.P. Morgan, 2015)



nomenon in American capitalism.[5] However, the insistence of investors to speak up and stimulate corporate executives and boards to focus more on strategies that create shareholder value has a long history in American capitalism. In Dear Chairman (2015), Jeff Gramm traces this type of activist intervention by shareholders back hundreds of years. The concept itself—shareholders of a company rising from passivity to voice demands—is recorded as long as four hundred years ago when shareholders accused the executives at the Dutch East India Company of corruption. One of the first instances of activism led by professional fund managers is visible in the twentieth century. In 1927, noted investor and Columbia professor Benjamin Graham wrote a letter to Northern Pipeline, a subsidiary of John D. Rockefeller's Standard Oil monopoly, calling for the company to dividend out its excessively large pile of cash and improve its capital structure.

Although there is no language of the massive proxy fights or public relations strategies that are associated with activist campaigns today, the concept of an investment firm buying into a public company to push for improvements represents the same underlying principle of activism. More recently, the 1980s phenomenon of "corporate raiders," in which actors such as T. Boone Pickens and Oscar Wyatt sought to ignite hostile takeovers and the breakup of companies similarly illustrate the presence of outsiders attempting to influence company actions.[6]

While the long history of shareholders voicing demands makes it clear that activism itself is not a new concept, the context around activism has shifted as corporate ownership has become concentrated in fewer institutional hands. The Securities and Exchange Commission (SEC) defines an institutional investor as an investment manager with over $100 million in assets.[7] From 1900 to 1945, the proportion of equities managed by institutional investors hovered around five percent. As of 2010, institutional holdings controlled 67 percent of all stocks, showing that institutional investors control a large portion of the equity of publicly traded corporations.[8] The growth of pension funds, mutual funds, and hedge funds, which include mega-investment firms such as BlackRock and Fidelity, have empowered money managers with greater influence and control of public corporations through activism.[9] The changing financial landscape, in which a few investors retain such

5 John Lanchester, 'How Should We Read Investor Letters?', The New Yorker, 29 August 2016, https://www.newyorker.com/buhttps://www.newyorker.com/magazine/2016/09/05/jeff-gramms-dear-chairman-boardroom-battles-and-the-rise-of-shareholder-activismsiness/currency/when-shareholder-activism-goes-too-far.

6 Mary Ann Cloyd, 'Shareholder Activism: Who, What, When, and How?', Harvard Law School Forum on Corporate Governance and Financial Regulation, 7 April 2015, https://corpgov.law.harvard.edu/2015/04/07/shareholder-activism-who-what-when-and-how/.

7 Marshall E. Blume and Donald B. Keim, 'Institutional Investors and Stock Market Liquidity: Trends and Relationships' (Rochester, NY: Social Science Research Network, 21 August 2012), https://papers.ssrn.com/abstract=2147757.

8 Blume and Keim.

9 Sophia Dai and Christian Helfrich, 'The Structure of Corporate Ownership and Control', Comparative

concentrated power, has raised the hotly debated question of whether the resulting activist intervention by hedge funds—with the agreement or complacency of mutual and pension funds—has a positive effect on a company's stock value. This paper seeks to address this question and the reason for the disagreement about the results of shareholder activism.

By synthesizing primary anecdotes from relevant actors—investors, management, and academics—along with existing scholarly research and theory, this paper finds the following: On the "pro" side, activists argue that they help unlock value by fostering greater management and board accountability, questioning the decisions that the company makes, and forcing executives and directors to allocate their capital wisely to create value. Based on our findings, although we conclude that activism can address governance shortcomings and improve returns in certain situations, it frequently stifles innovation and overlooks additional measures of corporate success including sustainability, risk, corporate practices, and customer satisfaction, which are key to the long-term value of the enterprise. This paper argues that despite its potential to call attention to and improve issues in some situations, activism is a negative influence for the long-term health of corporations.

Chapter 2: Literature Review and Theory

Theoretical Framework

In order to analyze activism, it is important to consider two competing frameworks for understanding how corporations run and set their goals: shareholder theory and stakeholder theory. Shareholder theory argues that a company manager's primary responsibility and fiduciary duty is to develop a business strategy that, over a reasonable period of time, will enhance shareholder returns. Shareholders are defined in this view as the individual owners of a company's private or public stock. These owners advance capital to a company's management, which then makes decisions on the basis of whether or not value is directly created for the owners. Shareholder theory became popularized in 1970 when Milton Friedman, an American free-market economist at the University of Chicago, argued against early corporate social responsibility practices. Friedman famously said: "There is one and only one social responsibility of business—to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which is to say, engages in open and free competition without deception or fraud."[10] Friedman explains that managers have a fundamental obligation to do

Corporate Governance and Financial Regulation, 2016, https://scholarship.law.upenn.edu/fisch_2016/9.

10 Fulton Friedman, 'A Friednzan Doctrine-', The New York Times, 13 September 1970, sec. Archives, https://www.nytimes.com/1970/09/13/archives/a-friedman-doctrine-the-social-responsibility-of-business-is-to.html.

only that which maximizes the shareholders' returns. To that end, spending corporate funds on socially beneficial endeavors does not create value and ultimately reduces shareholders' returns.

Stakeholder theory, on the other hand, provides a different conception of the ultimate goals of a corporation by adding the interests of other groups, such as employees and customers, into the mix. According to stakeholder theory, managers are the agents of all stakeholders—employees, customers, communities, among others—and must guarantee the ethical rights and balance the legitimate interests of a broader base in making decisions.[11] Stakeholder theory arose soon after shareholder theory, in part due to Edward Freeman's Strategic Management: A Stakeholder Approach. In his book, Freeman defines a stakeholder as "any group or individual who can affect or is affected by the achievement of an organization's purpose."[12] By this definition, stakeholders extend beyond just employees and customers to include the local community, suppliers, competitors, financiers, trade unions, governmental bodies, and many others. Stakeholder theory argues that managers must balance the different interests of all stakeholders, and balance the urgency and legitimacy of their respective claims, in order to make decisions that maximize outcomes.[13] Varying attributes, however, frequently complicate management's ability to make decisions that both maximize the total combined value and maximize the individual benefit of each group.

Despite the prominence of profit-minded stereotypes of American society and the embrace of shareholder theory by academics, many have begun to embrace varying degrees of stakeholder theory. Supporters of pure shareholder theory believe that companies exist solely to produce a profit through the creation of goods and services. Furthermore, these supporters believe that accounting for the interests of other stakeholders will in no way aid the pursuit of profit and is therefore unwise. However, there is a discrepancy between what the theory favors and what industry practitioners actually believe. In a recent survey of 15,000 managers worldwide, a majority supported the view that companies are responsible for the well-being of various stakeholders, as opposed to only the pursuit of profit. This shows a misalignment between theorists and managers' view on the ground.[14]

11 H. Jeff Smith, 'The Shareholders vs. Stakeholders Debate', MIT Sloan Management Review (blog), n.d., https://sloanreview.mit.edu/article/the-shareholders-vs-stakeholders-debate/.

12 R. Edward Freeman, Strategic Management: A Stakeholder Approach (Cambridge: Cambridge University Press, 2010).

13 Ronald K. Mitchell, Bradley R. Agle, and Donna J. Wood, 'Toward a Theory of Stakeholder Identification and Salience: Defining the Principle of Who and What Really Counts', The Academy of Management Review 22, no. 4 (1997): 853–86.

14 Charles Hampden-Turner and Fons Trompenaars, The Seven Cultures of Capitalism: Value Systems for Creating Wealth in the United States, Britain, Japan, Germany, France, Sweden and the Netherlands (London: Piatkus, 1995).

Additionally, there is growing support for the view that commerce is not necessarily a zero-sum game in which the interests of shareholders are at odds with other stakeholders. An article in Business Ethics Quarterly explains: "Certainly, there are those who defend the view that managers' primary fiduciary obligation is to shareholders, as well as those who argue for the importance of shareholders in corporate governance. But the view that a successful company could be built without even considering the interests of other stakeholders is simply too implausible to be taken seriously."[15] Fully understanding the interests and desires of customers is especially relevant for a company's profit, which is a product of customer sales, satisfaction, and loyalty. Prioritizing customer needs, although it may require additional expenses and product refinement that can cost shareholders up front, ultimately maximizes the shareholder returns and stakeholder benefits.

The main criticism of stakeholder theory is that the presence of various and often competing interests makes it difficult for management to determine the collective interest and direction for the firm's objectives. Critics argue that this dilemma has the potential to give unscrupulous management an excuse to act in their own self-interest.[16] The complexity of stakeholder theory in practice consequently leads some to support the traditional shareholder theory that certain actions should be taken only if they improve a company's profitability and by doing so increase shareholders' returns.

In the context of shareholder activism, these frameworks are critical for explaining the motivations of investors. Some activist investors are clearly motivated by a belief that companies should only prioritize shareholder returns. However, certain activists, such as Barry Rosenstein of JANA Partners, contend that companies have a larger ethical purpose than just profit maximization. According to Rosenstein, activism can be a vehicle to best serve both shareholders and greater stakeholders. In a 2017 presentation on Activism and Ethics at Lehigh University, Rosenstein said: "Activism is like most other professions, except perhaps reality TV, in that you can make it ethical. That is why I, my partners, and my team try to do it every day."[17] Rosenstein is just one example of the many different viewpoints expressed by shareholder activists.

Literature Review

Within this theoretical framework of the objectives of corporations, there exist two primary views about the impact of shareholder activism and its ability

15 Chris McDonald, 'Review of Managing for Stakeholders: Survival, Reputation, Success', Business Ethics Quarterly 19, no. 4 (2009): 621–29.

16 Toni Ike Nwanji and Kerry E. Howell, 'The Stakeholder Theory in the Modern Global Business Environment', International Journal of Appliied Institutional Governance 1, no. 1 (2005): 1–12.

17 Kelsey Leck and Dawn Thren, 'Barry Rosenstein '81 Presents Shareholder Activism and Ethics', Lehigh University, 23 November 2016, http://www2.lehigh.edu/news/barry-rosenstein-81-presents-shareholder-activism-and-ethics.

to benefit shareholders and stakeholders respectively. On one side of the debate, experts such as Martin Lipton of the leading law firm Wachtell, Lipton, Rosen & Katz argue that activism is short-term focused and detrimental to companies. In an April 2018 memo , Lipton illustrates the attack strategies of activist hedge funds, and explains the need and ways for companies to defend themselves.[18] This document implies the negative consequences of activists, due to the potential misalignment between activist interests and long-term investors, and the consequential need for defense. Laurence Fink, Chairman and CEO of BlackRock, takes this view further by directly charging that activist hedge funds undermine the long-term value of all stakeholders:

Without a sense of purpose, no company, either public or private, can achieve its full potential. It will ultimately lose the license to operate from key stakeholders. It will succumb to short-term pressures to distribute earnings, and, in the process, sacrifice investments in employee development, innovation, and capital expenditures that are necessary for long-term growth. It will remain exposed to activist campaigns that articulate a clearer goal, even if that goal serves only the shortest and narrowest of objectives. And ultimately, that company will provide subpar returns to the investors who depend on it to finance their retirement, home purchases, or higher education.[19]

Fink argues that activism inhibits a company's ability to innovate and perform strongly in the long-term. This would hurt not only the company, but also the other shareholders that depend on a better long-term outlook.

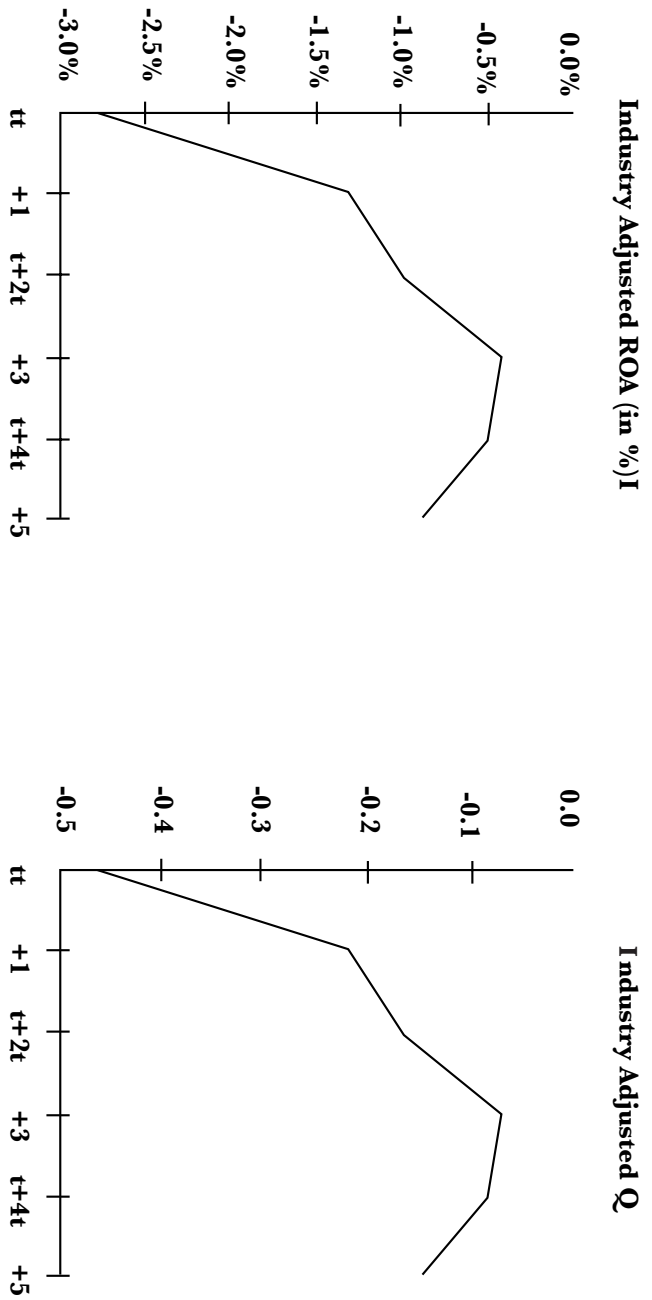
On the other side of the debate, Harvard Law Professor Lucian Bebchuk argues against the previous "short-termism" argument, suggesting that activism is a positive phenomenon. In a study of over 2,000 activist hedge fund interventions from 1994 to 2007, Bebchuk empirically tests for the effects of activism on the company's operating performance and stock price up to five years after each intervention. In examining ROA (EBITDA/Assets) as a proxy for evaluating operating performance, Bebchuk explains that this performance is higher in each of the five years after an intervention. Similarly, Bebchuk invokes a measure designed by 1960's Nobel Prize-winning economist, James Tobin. Tobin's Q (Total market value of firm/Total asset value) reflects the effectiveness with which a company turns book value into market value accrued to investors.[20] Bebchuk finds that Tobin's Q is improved five years after an intervention, as shown in Figure 2.

18 Martin Lipton, 'Dealing Wiith Activist Hedge Funds' (Wachtell, Lipton, Rosen & Katz, April 2018), http://www.wlrk.com/files/2018/TakeoverResponseChecklist_DealingWithActivistHedgeFunds.pdf.

19 Lipton.

20 Alon Brav et al., 'How Does Hedge Fund Activism Reshape Corporate Innovation?' (Rochester, NY: Social Science Research Network, 3 July 2017), https://papers.ssrn.com/abstract=2409404.

Figure 2: The Evolution of ROA and Q over Time.
Note: Despite the decrease beginning in year t+3, ROA is still higher than before the observed intervention. Industry adjusted Q consistently increases following the intervention. Source: (Bebchuk, Brav, & Jiang, 2015, p. 10)



Although activists target underperforming companies relative to peers, Bebchuk concludes that short-term earnings are not increased at the expense of long-term earnings. Bebchuk defines underperformance as returns of targeted companies being systematically lower than what would be expected given standard asset pricing models or returns of targeted companies being lower than those of firms with similar size and book to market.[21] Even after activists sell their shares and dip below 5% ownership, there is no support for the "pump and dump" view that the value of the company will decrease in the long-term, as is frequently argued by vehement opponents of activism. Furthermore, Bebchuk's research notes that even though 19% of activists sought to reduce long-term investment and resources, there is no evidence that these cuts are bad in the long-term, but on the contrary increase shareholder value, as seen in figures 1 and 2. Even when an activist is adversarial and threatens a proxy contest, lawsuit, or public campaign, no negative impact is found on the company.[22]

Suraj Srinivasan of Harvard Business School builds on Bebchuk's work to provide additional support for the positive operating performance effect of activism.[23] Srinivasan finds that ROA increases by more than 2% over the five years after interventions. Proxy contests, regardless of the outcome, have a statistically significant positive effect on share prices. Other findings include: increased divestiture, decreased acquisition activity, higher probability of being acquired, lower cash balances, higher payout, greater leverage, higher CEO turnover, lower CEO compensation, lower capital expenditures and lower R&D. These effects are even greater when activists gain board representation, which is consistent with the view that board seats are an important vehicle for bringing about the demands of activists. When activists receive a board seat, their average holding period increases from 2.4 years to 3 years.

However, even though Bebchuk and Srinivasan argue that activism is consistent with better operating performance and stock price appreciation for shareholders, their explanations omit a discussion of other stakeholders and consequent-

21 Brav et al.

22 Brav et al.

23 Ian D. Gow, Sa-Pyung Sean Shin, and Suraj Srinivasan, 'Activist Directors: Determinants and Consequences', Harvard Business School, 26 June 2014, https://www.hbs.edu/faculty/Pages/item.aspx?num=47599."plainCitation":"Ian D. Gow, Sa-Pyung Sean Shin, and Suraj Srinivasan, 'Activist Directors: Determinants and Consequences', Harvard Business School, 26 June 2014, https://www.hbs.edu/faculty/Pages/item.aspx?num=47599.","noteIndex":23},"citationItems":[{"id":476,"uris":["http://zotero.org/users/4763833/items/GN4S99TJ"],"uri":["http://zotero.org/users/4763833/items/GN4S99TJ"],"itemData":{"id":476,"type":"article-journal","title":"Activist Directors: Determinants and Consequences","container-title":"Harvard Business School","source":"www.hbs.edu","URL":"https://www.hbs.edu/faculty/Pages/item.aspx?num=47599","title-short":"Activist Directors","language":"en-us","author":[{"family":"Gow","given":"Ian D."},{"family":"Shin","given":"Sa-Pyung Sean"},{"family":"Srinivasan","given":"Suraj"}],"issued":{"date-parts":[["2014",6,26]]},"accessed":{"date-parts":[["2019",4,17]]}}}],"schema":"https://github.com/citation-style-language/schema/raw/master/csl-citation.json"}

ly only value each company from the perspective of shareholder theory. These results are therefore not enough to prove that activism is genuinely value-enhancing, as opposed to simply consistent with better operating performance and stock returns.[24]

These dual literatures provide an important space to insert primary research and determine why activism is quite so polarizing. In the following sections, we work within these frameworks of existing theory and understanding of activism to explain why there is such disagreement over activism. It is clear that the practice of activism can be both positive and negative depending on the factors one considers when valuing the effects of corporate decisions on shareholders. In the next section, the potential for positive impacts of activism are discussed.

Chapter 3: The Positives of Shareholder Activism

To fully understand and evaluate shareholder activism, it is important to consider the arguments put forward by its supporters. Given that such a range of professionals speak in favor of activism—academics, hedge funds, mutual fund directors, and even a select few corporate managers—it is clear that activism may have a positive impact under certain circumstances. In fact, activism can be a positive force in some situations by filling a corporate governance shortfall. There is a major issue in the United States in which corporate governance is frequently ill-suited to maximize shareholder value and protect the interests of all shareholders. While activism can correct this issue by intervening, chapter four explains that it overlooks other important factors than just operating metrics when it fills this corporate governance hole. This chapter discusses the systemic governance issues of public corporations, and the ways in which activists can unlock value by fostering greater management and board accountability, questioning the decisions that the company makes, and forcing executives and directors to allocate their capital wisely. The potential for a positive impact is particularly exemplified in activists' partnerships with passive investment funds and from the examples of DuPont and Microsoft.

Delivering Accountability

One of the strongest cases made in favor of activism is that it encourages greater accountability to shareholders. In the United States today, there is a

24 Gow, Shin, and Srinivasan."title-short":"Activist Directors","language":"en-us","author":[{"family":"Gow","given":"Ian D."},{"family":"Shin","given":"Sa-Pyung Sean"},{"family":"Srinivasan","given":"Suraj"}],"issued":{"date-parts":[["2014",6,26]]},"accessed":{"date-parts":[["2019",4,17]]}}],"schema":"https://github.com/citation-style-language/schema/raw/master/csl-citation.json"}

systemic argument that holds the view that poor corporate governance rises from the structure of many boards. This view is buttressed by the belief that too many directors are selected by, or at least that candidates are put forth by, management. Thus, an "old boys" network is self-perpetuating with board members owing their selection and fees to incumbent executives. Hence, it is argued that governance at a company is conflicted from the start by this process.

This reality runs counter to the concept of good corporate governance. By definition, directors on boards of public corporations are elected by shareholders to serve as their agents.[25] According to the Commonsense Principles of Corporate Governance, a series of principles intended to provide a basic framework for sound, long-term oriented governance, there are a number of clear roles that a board should play. Specifically, this document, which is supported by firms ranging from BlackRock and Berkshire Hathaway to General Electric and ValueAct Capital, explains that the Board of Directors' responsibilities include: communicating the board's thinking to the shareholders, reviewing the performance of the CEO and key management, creating shareholder value with a focus on the long term, evaluating strategic issues such as acquisitions and capital commitments, setting standards of performance, evaluating risks, and determining compensation.[26]

In many public companies, however, boards are not directly accountable to shareholders, as the shareholders are not able to effectively monitor a board's action.[27] As a result, directors often fail to execute their responsibilities of properly overseeing a corporation to ensure long-term value for shareholders. Michael Goldstein, former chairman and CEO of Toys "R" Us in the 1990s and an outside independent director on a number of public corporations, explains that many boards only meet four times each year, and are not sufficiently active. According to Goldstein, boards often lack members with relevant expertise to monitor and advise on corporate strategy, and are unwilling to improve the board and consequently the company out of a desire to remain "collegial".[28]

This concept is similarly expressed in a 2003 Harvard Business Review article, in which Montgomery and Kaufman explain that serving on a board is a perk that directors have little incentive to give up or threaten by pushing for change that could help shareholders: "[Boards carry] prestige and other intangible perks associated with membership in an exclusive club. Almost all of these benefits can

25 Cynthia A. Montgomery and Rhonda Kaufman, 'The Board's Missing Link', Harvard Business Review, 1 March 2003, https://hbr.org/2003/03/the-boards-missing-link.

26 Margaret Popper and Sard Verbinnen, 'Commonsense Principles of Corporate Governance', Harvard Law School Forum on Corporate Governance and Financial Regulation, 22 July 2016, https://corpgov.law.harvard.edu/2016/07/22/commonsense-principles-of-corporate-governance/.

27 Andrew Keay and Joan Loughrey, 'The Framework for Board Accountability in Corporate Governance', Legal Studies 35, no. 2 (1 June 2015): 252–79.

28 Goldstein, Interview

be had whether or not the stock is soaring."[29] Furthermore, board members are not personally liable for company failures, so they do not face significant consequences from poor performance.[30] Although board members want to prevent disaster that would damage their personal reputation, their interest frequently lies in preserving their position in the exclusive "club" of the board rather than thinking creatively or advocating for improvement.

This desire of board members to hold onto their position and incentive to not "rock the boat" can provide an opening for activists to better enhance shareholder value. Given that directors rarely have direct input from shareholders, and have little incentive to spend political capital and emotional energy on anything but the "path of least resistance," boards may overlook poor strategy and fail to promote growth.[31] Activists argue, therefore, that they can bring value to shareholders by voicing new ideas and difficult changes that passive board members are not willing to entertain. For example, while board members may not challenge the CEO, who is simultaneously chairman in 52% of S&P 500 companies, on their compensation plan, an activist will often voice concern and demand a better alignment of compensation to performance, thereby protecting shareholders from management abuse.[32]

In another example, boards may be overly trusting of management, and not question decisions of acquisitions and growth strategies. Activists, on the other hand, argue that they can deliver higher returns and better performance to shareholders by demanding that the board more closely monitor strategic decisions and even push for other actions to create shareholder value. The argument generally put forth is that activists, many of whom own significant shares in a company, have interests that are more aligned with other shareholders than do the incumbent management and board. One activist investor who is frequently pointed to as a model for delivering new ideas and effective pressure is Jeff Ubben of ValueAct Capital. ValueAct pitches itself as a "management friendly" investor, which eschews the public fights and bellicose campaigns against CEOs that are often associated with activism, in favor of working with companies to improve performance and identify better strategic decisions.[33]

29 Montgomery and Kaufman, 'The Board's Missing Link'.

30 Greg Zipes, 'Ties That Bind: Codes of Conduct That Require Automatic Reductions to the Pay of Directors, Officers, and Their Advisors for Failures of Corporate Governance' (Rochester, NY: Social Science Research Network, 7 January 2015), https://papers.ssrn.com/abstract=2546301."plainCitation":"Greg Zipes, 'Ties That Bind: Codes of Conduct That Require Automatic Reductions to the Pay of Directors, Officers, and Their Advisors for Failures of Corporate Governance' (Rochester, NY: Social Science Research Network, 7 January 2015

31 Montgomery and Kaufman, 'The Board's Missing Link'.

32 David F. Larcker and Brian Tayan, 'Chairman and CEO: The Controversy Over Board Leadership Structure', Stanford Closer Look Series (Stanford Graduate School of Business, 24 June 2016), https://www.gsb.stanford.edu/sites/gsb/files/publication-pdf/cgri-closer-look-58-independent-chair.pdf.

33 Shira Ovide, 'Activist Storms Microsoft's Board', Wall Street Journal, 30 August 2013, sec. Management,

One well-known example of ValueAct's positive influence was its 2013 intervention in Microsoft. In 2013, ValueAct was rumored to have orchestrated the resignation of CEO Steve Ballmer and the replacement by Satya Nadella, an action that a large number of shareholders had supported after watching Microsoft's shares and innovative leadership languish for over a decade.[34] ValueAct encouraged Microsoft to refocus attention and resources on its popular software systems and cloud infrastructure, while simultaneously responding to shareholder demands to increase dividends. These actions critically contributed to the company's reinvigoration—as evinced in its doubling share price—and increased responsiveness to shareholders.[35] This example demonstrates how activism can fill oversight gaps in a positive manner and be a catalyst for managerial change.[36]

Improved Capital Allocation

In addition to increasing the general accountability of directors to shareholders, activism can have a clear impact on a company through scrutinizing the method by which capital is allocated. By presenting boards and management with new ideas and concerns, activists can often bring reasonable suggestions for how to improve a business. Stemming from the lack of sufficient oversight at many companies and failure of directors to question strategic decisions, there can exist an opening for activists to affect valuable change. For example, even in public and contested proxy fights publicized in the news, such as that between DuPont and Trian Fund Management in 2011, activists can suggest value-enhancing measures. In this case, a few of Trian's demands included completing the spinoff of a less profitable chemicals division and cutting other high costs such as R&D.[37] Although former CEO Ellen Kullman indicated that DuPont had already planned to spin-off its chemicals division and that Trian demanded actions such disagreed with such as increasing leverage, Trian at the very least acted as an impetus to complete the spin-off and forced the company to reexamine and defend its strategic capital allocation decisions to ensure profitability.[38]

In another example, activists frequently demand a review of investment and R&D expenditures. While investment and R&D are crucial to companies'

https://www.wsj.com/articles/microsoft-opens-board-seat-for-activist-shareholder-valueact-1377897865.

34 Jay Greene, 'ValueAct Pressure May Have Played Role in Ballmer Leaving', The Seattle Times, 23 August 2013, sec. Business, https://www.seattletimes.com/business/valueact-pressure-may-have-played-role-in-ballmer-leaving/.

35 Wayne Duggan, 'A Look Back At ValueAct's Massive Microsoft Bet', Yahoo! Finance, 17 August 2016, http://finance.yahoo.com/news/look-back-valueacts-massive-microsoft-180723177.html.

36 Stephanie Gandel, 'Hedge Fund Shaking up Microsoft Is a Kinder, Gentler Barbarian', Fortune, 10 October 2013, http://fortune.com/2013/10/10/hedge-fund-shaking-up-microsoft-is-a-kinder-gentler-barbarian/.

37 Trian Fund Management, 'Trian's Letter to DuPont Board', SEC, 16 September 2014, https://www.sec.gov/Archives/edgar/data/30554/000093041315000107/c79721_ex1.htm.

38 Kullmen, Interview

long-term health, there are cases in which activists can validly demand improvement to an unwise or inefficient allocation of capital. In a 2014 intervention by Starboard Value in Darden Restaurants, Starboard demanded that Darden cut costs, spur creativity, and remain closer to its core business of serving food by spinning off its real estate holdings. This action forced the board to reconsider the actions it had been taking for many years in regard to capital allocation, and eventually agree that value would be enhanced by ceding control of its property investment and changing many of its practices in its restaurants. In the end, by the time Starboard's Jeff Smith resigned from the board in 2016, Darden's stock had risen 47% versus the 6% of the S&P 500, and its year-over-year sales had increased for six straight quarters.[39]

While many critics assert that activists are only "short term" thinking because they curtail investment and R&D, a frequent assurance of the profitability of investment practices is necessary for companies to remain profitable. Many critics charge that activists' encouragement of dividend payments and share buybacks in the place of this investment defines their intentions as short term focused. However, dividend payments and share buybacks alone can be critical to driving increased shareholder value and long-term financing by increasing the perception and stability of a stock, making it inaccurate to assert that these actions are always short-term focused.[40]

Furthermore, while Bebchuk's work shows activists' ability to improve equity value, this potential for a positive impact can also be extrapolated from the ongoing partnerships with mutual funds. As explained in chapter 1, mutual and pension funds have grown substantially in recent history to control large portions of public companies. These funds, which are not activists in themselves, frequently support activist hedge funds in proxy fights for their demands for change. Jeff Smith of Starboard Value explained that even passive investors such as Fidelity solicited his firm many times to target one of their investments and improve their poor strategy.[41] The ongoing support by passive funds debunks the claim that activism is always short term, as these pension funds are invested in companies for far longer.

Shareholder activism is a practice that is being employed by a greater number of hedge funds and institutional investors. While the increased denominator increases the chances that some are only looking out for their own return, many

39 David Benoit, 'The Activist Laboratory: Less R&D Spending, But More Innovation', WSJ (blog), 9 June 2016, https://blogs.wsj.com/moneybeat/2016/06/09/the-activist-laboratory-less-rd-spending-but-more-innovation/.

40 Jon Sindreu, 'How to Woo Investors in Volatile Times? Pay Them Cash', Wall Street Journal, 18 April 2018, sec. Markets, https://www.wsj.com/articles/how-to-woo-investors-in-volatile-times-pay-them-cash-1524043837.

41 Smith, Interview

activists' actions have the potential to enhance the value of all shareholders. The argument that activists are only short-term focused, therefore, is an inaccurate generalization. The following chapter illustrates, however, that activists ignore many other metrics to a company's success, consequently outweighing the potential for positive impact.

Chapter 4: Harmful Effects of Shareholder Activism

Despite the potential for shareholder activism to deliver improved financial performance in certain situations, many argue that activism overlooks other important measures of a company and discourages actions that are critical to long-term success. In particular, the "con" perspective argues that activists frequently ignore long-term drivers of success, and promote tactics that do not solve the core operational issues of corporations. While acknowledging the positive effects that activism can promote in select circumstances, the following sections discuss the negatives of shareholder activism that detract from ideal corporate decision-making. As a result of these major drawbacks and the excessive growth in the use of activist techniques by new players, the paper concludes that shareholder activism is not worth the positives that it can bring, but rather is a harmful practice that threatens to make the American economy hostile to innovation and creative thinking.

Misaligned Incentives and Overlooking Long-Term Drivers of Success

Chapter 3 explains our view that American capitalism currently faces a corporate governance issue, in which boards are ill-suited to guide complex organizations and remain accountable to the interests of shareholders. Many proponents of shareholder activism, including activist investors themselves, argue that this practice is necessary to enhance profitability and protect shareholders. However, while activism may deliver value in certain circumstances, as described in the previous chapter, the presence of an investor such as Nelson Peltz introduces a host of new issues. One of the most blatant issues—a misalignment of incentives—leads activists to overlook aspects of companies that are critical to long-term success.

Most activist investors maintain a desire to protect and even promote their own reputations. When activists approach a corporation, they typically advertise their investment as beneficial to the wider base of shareholders, and use strategic communication and the media to promote this message.[42] Hedge funds in particular spend millions of dollars working to convince shareholders through presentations, regulatory filings such as SEC compliance documents, mailing materials, and

42 'The Effect of Shareholder Activism on Corporate Strategy', Shareholder Activism Survey Report (NYSE Governance Services, 2016), https://www.nyse.com/publicdocs/Shareholder_Engagement_Survey_Report_2016.pdf.

marketing as part of proxy contests and general campaigns to win board seats.[43] While other shareholders may benefit from activism in certain cases, the interests of activists are simply not the same as those of other investors, creating a critical gap and misalignment of interests. For example, an investor looking to remain in a stock for many years may not benefit from the cost-cutting actions and financial engineering demanded by an activist, who frequently sells his or her shares within two to three years.[44]

Concurrent with their desire to increase a portfolio company's share price and generate a return on investment (ROI), activist hedge funds have an interest in enhancing their reputation and public image. In a 2015 Global Hedge Fund Survey, EY notes that hedge fund managers report assets under management (AUM) growth as one of their top priorities, and as a critical success factor.[45] Given that hedge funds make a profit by charging a fee—typically 2% of assets under management and 20% of any gains generated—they have a clear interest in increasing their reputation, as this will likely encourage additional actors to entrust them with capital.[46] It is paramount, therefore, for hedge funds to protect their reputation and to grow their AUM, especially in the increasingly crowded investor space with private equity and real estate firms competing for capital.[47] This creates an inherent misalignment of interests, as activists are primarily concerned with promoting actions that immediately look good to enhance their reputation and promote their image.

Waging large proxy fights and engaging in a successful public campaign has also become a means to get more money invested in activist funds. Ellen Kullman notes that Nelson Peltz intentionally made a show of Trian's intervention in DuPont to enhance his self-image and name, and raise more capital for his own funds. Kullman elaborated, saying that Peltz wanted to get on CNBC and judge her for the 10 years of company performance prior to her time in office to exaggerate and popularize the scene.[48] Even if one does not take Kullman at her word, it is clear that activists maintain their own incentives to promote their reputation and show that they are responsible for improvements. This divergent interest suggests

43 Miles Weiss, 'Peltz, P&G Expect to Spend $60 Million on Record Proxy Fight', Bloomberg, 2 August 2017, https://www.bloomberg.com/news/articles/2017-08-02/peltz-and-p-g-expect-to-spend-60-million-on-record-proxy-fight.

44 Alex Edmans, 'The Answer to Short-Termism Isn't Asking Investors to Be Patient', Harvard Business Review, 18 July 2017, https://hbr.org/2017/07/the-answer-to-short-termism-isnt-asking-investors-to-be-patient.

45 'The Evolving Dynamics of the Hedge Fund Industry' (EY, 2015), https://www.ey.com/Publication/vwLUAssets/ey-2015-global-hedge-fund-and-investor-survey/$FILE/ey-2015-global-hedge-fund-and-investor-survey.pdf.

46 Investopedia, 'What Are Hedge Funds?', Forbes, 22 October 2013, https://www.forbes.com/sites/investopedia/2013/10/22/what-are-hedge-funds/.

47 'The Evolving Dynamics of the Hedge Fund Industry'.

48 Kullman, Interview

that many activists are not truly on the same "team" as other shareholders.
As a result of the primacy of this self-interest, many activists push interventions that are aimed at short-term profit at the expense of innovation and risk-taking. One particularly harmful tactic that is often invoked by activist investors is curbing the amount of research and development (R&D) a portfolio company undertakes. For certain companies, curtailing R&D in favor of a more targeted allocation of resources can increase profit and the efficiency of product improvement.[49] In these cases, activism can call attention to runaway spending on R&D and have a positive impact. For a great number of companies, however, R&D is the vehicle through which long-term innovations and successes are achieved. Activists' primary focus on increasing immediate profit motivates a decline in the latitude offered to management to innovate, remain creative, and research new technologies that are difficult to develop.

In the DuPont example, Kullman explains that Peltz explicitly demanded that the company not invest a single dollar in research that would not generate a positive return within five years.[50] Peltz's attempt to cut R&D in such an extreme way is representative of actions taken by activists across the board. Data from Capital IQ illustrates that S&P 500 companies targeted by activists reduced capital expenditures in the five years after activists bought their shares to 29% of operating cash flow, down from 42% the year before. In the same period, spending on dividends and buybacks rose to 37% of operating cash flow from 22%.[51] Despite disagreement in the field about the effects of these changes, they provide a strong indication that activist investors are willing to trade the potential for future profit and discoveries to earn more in the short term.[52] Without a commitment to R&D, DuPont's agriculture business, which became one of the most profitable divisions, never would have developed or created substantial value for the company's shareholders. According to Kullman, it took twelve years of effectively profitless R&D in order to generate massive returns from this business.[53] That, she noted, would not have been the case under the Peltz formula.

In addition to slashing research budgets, activists frequently downplay important drivers of success. For example, while Starboard Value identified a number of important improvements to Darden, as discussed in Chapter 3, the language used to justify these changes is exclusively based on margins and profitability. In Starboard Value's 2014 report, the hedge fund demands that Darden's Olive

49 Brav et al., 'How Does Hedge Fund Activism Reshape Corporate Innovation?'
50 Kullman, Interview
51 Vipal Monga, David Benoit, and Theo Francis, 'As Activism Rises, U.S. Firms Spend More on Buybacks Than Factories', Wall Street Journal, 27 May 2015, sec. Business, https://www.wsj.com/articles/companies-send-more-cash-back-to-shareholders-1432693805.
52 Benoit, 'The Activist Laboratory'.
53 Benoit.

Garden chain curtail the number of breadsticks delivered to tables to save $4-5 million each year. Despite justifying this change by claiming that it will curb waste and improve the customer experience, the presentation lacks any surveys or support to indicate a care for what customers actually value.[54] This is just one example of a typical activist focus on margins and profit rather than customer experience, sustainability, and reputation.

Many proponents of activism point to Bebchuk's research, showing the increase in share price even many years after an activist intervention, to argue that activism always creates value. However, equity value, which is driven by share price, "cannot and does not reflect all variables" to measure the value of a company.[55] While equity value frequently increases following an activist intervention, this measure fails to account for long-term innovation, as seen in DuPont's successful agriculture business which took over a decade to innovate and then commercialize. For example, even if share price may have increased by slashing R&D costs and consequently increasing short-term EPS, this action would have deprived DuPont of the later profit attributable to the agriculture unit. This implies that share price always reflects the true value of a company; but a true measure of the value of an entity must incorporate additional metrics including sustainability, risk, corporate practices, social responsibility, productivity, employee and customer satisfaction and reputation.[56] Whether one conforms to shareholder and agency theory, as many activists do, or the broader stakeholder theory, it is clear that activism overlooks these more nuanced drivers of success, and consequently is not better at generating genuine accountability to shareholders than the problematic boards of the present.

Lack of Operational Expertise

In addition to maintaining divergent interests with other shareholders, activist investors frequently rely on financial engineering to change companies, not targeted operational improvements that come from expertise in a given industry. While an activist intervention may solve an issue of a "sleepy" board, it can encourage pressure towards unwise actions. Hedge fund investors are undeniably intelligent people, with years of expertise in money management and boardroom battles. However, just as Michael Goldstein decried the lack of industry expertise on boards, the presence of an activist investor frequently does little to enhance operational insight. Despite some exceptions, in which an activist presents strong claims for improv-

54 'Transforming Darden Restaurants' (Starbord Value, 11 September 2014), http://www.shareholderforum.com/dri/Library/20140911_Starboard-presentation.pdf.

55 Sophia Dai and Christian Helfrich, 'The Structure of Corporate Ownership and Control', Comparative Corporate Governance and Financial Regulation, 2016, https://scholarship.law.upenn.edu/fisch_2016/9.

56 Dai and Helfrich.

ing a business, most activists rely either on replacing management or on financial engineering tools, such as using cash flow to engage in a major stock repurchase program, to create "value," rather than addressing core operational issues.[57]

One example of an activist relying on an ill-equipped toolkit of financial engineering is evident in investor Bill Ackman's 2007 intervention in Target, the nation's second-largest retailer. After forcing his way onto the board following his accumulation of a 9.6% stake in the company, Ackman successfully pressured the board and management into divesting much of its credit card business, and focused attention on creating a REIT to spin-off 20% of its real estate holdings through an IPO.[58]

However, even though these actions may have succeeded in creating a better perception of the company upon a glance at its balance sheet, they failed to address the declining sales and profit margins that occurred throughout 2008. Target's inability to quickly adjust to this rapidly changing customer base which was migrating to online shopping, coupled with the cut in consumption as part of the 2008 financial downturn, was responsible for Target's poor operating performance.[59] Yet Ackman's activism did not address these issues, but rather detracted from management's ability to focus on expanding digital commerce to compete with stores such as Walmart. The proxy fight cost Target more than $11 million and Standard & Poor's Ratings Services described it as a distraction for the retailer's management experienced board members.[60] In this case, activism represents a harm to shareholders, as stock prices declined 39% from their peak in July of 2017, and Target's competitive position took a major hit that only improved by 2015. This is just one example of activist investors relying on actions that rework the balance sheet of companies, yet do little to address or improve operational issues for long-term success, demonstrating the potential to distract from operational improvements.

Systemic Threat to American Capitalism

In addition to burdening the long-term performance of companies, shareholder activists' focus on immediate financial returns represents a threat to the innova-

57 James Surowiecki, 'When Shareholder Activism Goes Too Far', The New Yorker, 14 August 2013, https://www.newyorker.com/business/currency/when-shareholder-activism-goes-too-far.

58 'Timeline: Ackman Pushes for Change at Target Corp', Reuters, 17 March 2009, https://www.reuters.com/article/us-target-ackman-sb-idUSTRE52F4LR20090317.

59 Thomas Lee, 'Here's How Activist Investor William Ackman Got It Wrong', San Francisco Chronicle, 24 June 2015, sec. Business, https://www.sfchronicle.com/business/article/Here-s-how-activist-investor-William-Ackman-got-6344927.php.

60 Ann Zimmerman and Leslie Eaton, 'Bill Ackman To Make Case For Changing Target Board', Wall Street Journal, 12 May 2009, sec. Business, https://www.wsj.com/articles/SB124199670678804803.

tion that has characterized American capitalism since the Industrial Revolution. In today's business world, the use and frequently even the threat of shareholder activism scares companies and quality managers from the actions necessary to excel and tackle problems.

One of the most important systemic issues presented by activism, as discussed in the first section of this chapter, is a fear to innovate, and a consequential "punishment" of outliers. Many of the great discoveries and innovations throughout history would not have been possible had companies been constrained to demonstrating that R&D would produce a return within a few years. In fact, two of the most forward-thinking and profitable businesses in the world today, Facebook and Apple, rose to supremacy despite many years of high R&D and expenses relative to return to shareholders.[61] High R&D spending allowed these companies to think big and long-term, directly contributing to their sustained industry dominance.
In their focus on return, it becomes clear that shareholder activists maintain a different conception of the need to pursue immediate financial return. Outliers such as Steve Jobs of Apple or Jeff Bezos of Amazon, however, acknowledge the more nuanced aspect of measuring the profitability of a company, making them more in line with the view of stakeholder theory. By reinvesting quarterly profits year after year, Bezos enabled Amazon to pursue and perfect new endeavors ranging from its web services business to in-home smart devices.[62] Although Amazon could have simply distributed the profits to shareholders as increased dividends, reinvestment was essential for the company's present dominance. Visionaries such as Jobs and Bezos, however, are more likely to be punished in the increasingly activist-dominated world today. The growing presence of shareholder activism in the American economy threatens their ability to think differently, beyond return for shareholders, and innovate. Companies are preemptively cutting R&D for fear of becoming the subject of activist intervention.[63] This is a major, systemic problem. In our economy we need CEOs and management teams to think outside the box and act as outliers. Activism, however, denies leaders a chance to demonstrate the effectiveness of their atypical thinking or techniques.

This "punishment" of outliers also opens the door to biases. While all activists explain that they target "underperforming companies," this can manifest as a search for weaknesses, or perceived weaknesses, of companies. This is evident

61 Rani Molla, 'Tech Companies Spend More on R&D than Any Other Companies in the U.S.', Recode, 1 September 2017, https://www.recode.net/2017/9/1/16236506/tech-amazon-apple-gdp-spending-productivity.

62 Shira Ovide, 'Stop Worrying and Love Amazon's Meager Profits', Bloomberg, 27 October 2016, sec. Opinion, https://www.bloomberg.com/opinion/articles/2016-10-27/amazon-earnings-stop-worrying-and-love-meager-profits.

63 John C. Coffee and Darius Palia, 'The Wolf at the Door: The Impact of Hedge Fund Activism on Corporate Governance' (Rochester, NY: Social Science Research Network, 4 September 2015), https://papers.ssrn.com/abstract=2656325.

in the language that defense lawyers, such as Martin Lipton, use about "protecting" companies against activist interventions and their "aggressive" attacks and tactics.[64] In going after companies perceived as weak, it becomes increasingly likely that biases, such as targeting a high percentage of female CEOs, come into play. Ellen Kullman mentioned that effectively all peer female CEOs have faced an activist at some point.[65] Similarly, Gupta, Mortal and Turban confirm in their 2018 journal article that female CEOs face a greater threat of shareholder activism than male CEOs.[66] Although it is difficult to prove empirically that activists target certain companies because of the gender of their leaders, Kullman believes that she and her female peers, including Irene Rosenfeld, formerly of Kraft and now CEO of Mondelez International, were targeted partially because of their supposed "weakness" or perceived inability to lead effectively as a woman. Even if most activists are not motivated by an explicit bias toward minorities, females, or other underrepresented groups, activism still provides an opening to exploit those who simply are perceived as weak or vulnerable, suggesting that this practice creates a situation in which biased targeting and poor judgment is more likely. This will hinder the pluralism of innovative ideas which have driven American capitalism.

Finally, it is important to circle back to the proliferation of the use of activism. The increasing number of activist interventions and players is creating an environment in which companies are disincentivized from entering public markets. The number of activist interventions has increased greatly in recent years.[67] In 2016, 758 companies worldwide received public activist demands, a 13% increase from the 673 companies in 2015.[68] The recent period of low interest rates has also compelled many investors to seek alternative investment strategies, including activism, to achieve higher returns. The jump in the use of activism has taken a concept that, when used sparingly, has the potential to address issues in poor-performing companies to an extreme degree. Competition among hedge funds has made it clear that activists are going further to seek out targets which are not always poorly run companies.

This growth has discouraged many rising companies from tapping into the important source of capital of public markets, which has supported the capital for innovation for hundreds of years. This development is clear in the growing presence of unicorns, private venture capital-backed companies valued at $1 billion or more. These companies, which at the time of writing include Uber and Airbnb, have been raising

64 Lipton, 'Dealing Wiith Activist Hedge Funds'.

65 Kullman, Interview

66 Vishal K. Gupta, Sandra Mortal, and Daniel B. Turban, 'Research: Activist Investors Are More Likely to Target Female CEOs', Harvard Business Review, 22 January 2018, https://hbr.org/2018/01/research-activist-investors-are-more-likely-to-target-female-ceos.

67 Riichard J. Grossman, 'Continued Rise of Shareholder Activism' (Skadden, Arps, Slate, Meagher & Flom LLP and Affiliates, n.d.), https://files.skadden.com/sites%2Fdefault%2Ffiles%2Fpublications%2Fpublications1651_0.pdf.

68 Josh Black, 'The Activist Investing Annual Review 2017', Harvard Law School Forum on Corporate Governance and Financial Regulation, 21 February 2017, https://corpgov.law.harvard.edu/2017/02/21/the-activist-investing-annual-review-2017/.

more money and staying private longer. In 2017, unicorns collectively raised $19.2 billion in capital, the highest of any year on record.[69] Despite the massive funding these companies received, their trepidation to access the public capital markets denies them a critical source of capital.[70] The growth of activism discourages not only companies from entering public markets, but also CEOs. If boardrooms continue to become increasingly hostile to innovation and radical thinking, it is likely that the best talent and CEOs will not want to work at public companies where they are constrained.[71] The pressure these companies face represents an unsustainable and systemic threat that activism presents to the American economy.

Chapter 5: Conclusion

Summary of Findings

Shareholder activism, and in particular activism by hedge funds, can deliver mixed results to corporations. On the positive side, its effects include bringing greater accountability and transparency to managers and boards, and improving a firm's discipline when it comes to capital allocation. The claim that activists are only short-term focused, as popularized in the media, is debunked by their ongoing and growing support from large passive funds and the long-term financial success of some companies following activist investments. More frequently in recent years, funds managed by Fidelity, Vanguard, and the California State Teachers Retirement System, for example, have supported activists for board seats or backed an activist-sponsored proposal. Indeed, even Warren Buffett has a bit of a shareholder activist streak in him. Buffett recently told CNBC that Berkshire Hathaway voted its nearly 30% stake against the director slate put forth by USG, a major building company, because in Buffett's words, "we did not think the [USG's] directors were essentially doing their job." Buffett went on to say that he could not think of a prior time that he ever voted against a board of directors slate until then. Following Buffett' move, the board of USG authorized management to explore the possible sale of the company to Knauf KG of Germany, which had offered to purchase the

69 'Record Unicorn Financings Drove 2017 Total Venture Capital Investments to $84 Billion, the Largest Amount Since Dot-Com Era', CTSTUN: PR Newswire, n.d., https://www.prnewswire.com/news-releases/record-unicorn-financings-drove-2017-total-venture-capital-investments-to-84-billion-the-largest-amount-since-dot-com-era-300579527.html.

70 Amy Westbrook and David A. Westbrook, 'Unicorns, Guardians, and the Concentration of the U.S. Equity Markets', SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, 3 March 2017), https://papers.ssrn.com/abstract=2928949."plainCitation":"Amy Westbrook and David A. Westbrook, 'Unicorns, Guardians, and the Concentration of the U.S. Equity Markets', SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, 3 March 2017

71 Timothy B. Lee, 'Why Wall Street's Campaign to Enrich Shareholders Could Be Bad for Everyone Else', Vox, 30 November 2015, https://www.vox.com/business-and-finance/2015/11/30/9780802/activist-investor-debate-explained.

company only to have USG unwilling to negotiate with the bidder.

In some notable cases, shareholder activism has been shown to be produce better operating performance and stock price increases. However, the authors of this paper find that the cost frequently stifles long-term drivers of a company's success by taking actions such as slashing R&D that curtail innovation, or cutting back on marketing campaigns that can reduce future sales. The incentives of activists to raise funds and establish their firms' reputations create a situation in which their demands are geared toward enhancing immediate value, not taking risks or promoting outside-the-box thinking. Furthermore, even if activists may deliver accountability, their actions frequently encourage financial moves that can distract managers from the core operational areas in need of attention. These actions collectively limit a manager's ability to invest in the future and innovate, representing a threat to customers, employees and communities. We find that activism's prioritization of financial returns threatens the culture of innovation and creativity that is central to the well-being of the American economy. Implications and Areas for

Further Study

There are a number of important implications that arise from the growth of shareholder activism and consequential threat to innovation. One of the most salient issues, as discussed in chapter 3, is the issue of directors' accountability to shareholders, which has precipitated the rise of shareholder activism. It is clear that US corporations must improve their corporate governance practices and prioritize the appointment of strategic actors to boards. Recent exposures of excessive and wasteful spending make this issue particularly relevant today. For example, it was recently revealed that Jeff Immelt, when he was CEO of General Electric, would use two private jets during his travels, one empty but still following behind (Muoio, 2017). Wasteful actions such as this represent the abuse of shareholders' money and interests. To solve this issue, corporations must demand stricter governance standards and greater transparency in the ways in which a company uses its capital. Boards should become more proactive in displaying prudent spending and the benefits and capital allocation policies. In addition, they should hold more frequent meetings, retain only committed individuals with valuable expertise, and be held accountable to performance standards themselves to determine compensation.

Shareholder activism, in theory, presents a way to solve this corporate accountability issues. However, in practice, activism threatens corporate innovation and consequently the strength of the national economy, making it too large a tradeoff. Companies such as Uber, Airbnb, and WeWork are waiting longer to IPO and enter the public markets. This reality not only limits companies by denying them an important access to capital, but also exacerbates income inequality in the US.

As more companies remain in the hands of fewer private investors, typical Americans are offered fewer chances to invest and profit when these companies grow. Furthermore, forcing companies to remain private in order to innovate opens the door to even lower accountability and the potential for abuse, as evident from the exposure of Uber's abusive workplace under former CEO Travis Kalanick.

Neither of the current alternatives—remaining complacent to sleepy boards or allowing activism to threaten American ingenuity—is a good option. It is necessary for policymakers and economic leaders in the United States to work together to improve corporate governance. In order for the United States to remain at the forefront of innovation and economic output, this improvement is critical exposure of Uber's abusive workplace under former CEO Travis Kalanick.[72]

72 Mike Isaac, 'Uber's C.E.O. Plays With Fire', The New York Times, 23 April 2017, sec. Technology, https://www.nytimes.com/2017/04/23/technology/travis-kalanick-pushes-uber-and-himself-to-the-precipice.html.

Appendix

List of Interviews Conducted:

Barry Rosenstein, JANA Partners
Ellen Kullman, Former Chairman and CEO, DuPont
Jeffrey Smith, Managing Member and the Chief Executive Officer & Chief Investment Officer, Starboard Value
Kim Castellino, Strategic Government Advisors
Martin Lipton, Founding Partner, Wachtell, Lipton, Rosen & Katz
Michael Goldstein, Former CEO ToysRUs, former Chairman Charming Shoppes
Ron Shaich, Founder & Chairman and Former CEO, Panera Bread
Suraj Srinivasan, Harvard Business School
Vice President of Investment Stewardship at Large Investment Manager (Requested Anonymity)

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The Individual Unfreedom of the Proletarian

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Abstract:

In this essay, I engage with G.A. Cohen's argument by analogy that proletarians are individually free. I grant that Cohen's analogy successfully represents the world. I disagree, however, with his conclusion, and use Philip Pettit's conception of freedom as non-domination to demonstrate that proletarians are individually unfree. Specifically, I argue that even though fewer proletarians leave the proletariat than possibly could, they are nonetheless "dominated"—and thus, each is individually unfree.

This essay grants the accuracy of Cohen's analogy, and from this assumption draws the conclusion that proletarians are individually unfree. In drawing this conclusion, this essay follows the style of modus ponens. It first argues for the conditional: if Pettit's notion of freedom holds, then the conclusion Cohen draws must fail. It then argues that Pettit's notion holds, showing that it accurately captures our intuitions on the subject. In arguing for the conditional, this essay contends that Pettit's criteria for unfreedom are satisfied for each individual proletarian. In arguing for the antecedent, it demonstrates a number of intuitive considerations which support Pettit's conception of freedom. From this, it concludes that each character in the room of Cohen's analogy is unfree. Combined with the original hypothetical stance that Cohen's analogy accurately relates to the world, it follows that proletarians are individually unfree.

In *The Structure of Proletarian Unfreedom*, G.A. Cohen addresses the status of wage-earners whose only available resource is their potential to work for a salary; they are unable to produce the necessities of life themselves. These people are known as proletarians; the class of all such proletarians is known as the proletariat. Cohen begins with the view that since only a few proletarians are able to advance from the proletariat, proletarians—taken as a whole—are forced to sell their labor power. He denies, however, that this conflicts with his claim that "most proletarians are not forced to sell their labor power," justifying this denial with an analogy:

> Ten people are placed in a room the only exit from which is a huge and heavy locked door. At various distances from each lies a single heavy key. Whoever picks up this key—and each is physically able, with varying degrees of effort, to do so—and takes it to the door will find, after considerable self-application, a way to open the door and leave the room. But if he does so he alone will be able to leave it. Photoelectric devices installed by a jailer ensure that it will open only just enough to permit one exit. Then it will close, and no one inside the room will be able to open it again.[1]

The structure of this analogy is relatively simple. A group of people are imprisoned, all are initially able to escape, but ultimately only one is allowed to do so. He draws out the significance of this analogy by saying that:

> Whomever we select, it is true of the other nine that not one of them is going to try to get the key. Therefore it is true of the selected person that he is free to obtain the key, and to use it. He is therefore not forced to remain in the room. But all this is true of whomever we select. Therefore it is true of each person that he is not forced to remain in the room, even though necessarily at least nine will remain in the room, and in fact all will.[2]

Here, Cohen alludes to the crucial assumption that whoever attempts to exit the room will not be interfered with from this task by the other occupants (elsewhere: "…each is free to use [the means of egress], since, ex hypothesi, no one would block his way"[3]). Cohen uses this analogy to argue that every individual in the proletariat is free to leave it. He neatly introduces this line of thought by saying that "there are more exits from the British proletariat than there are workers trying to leave it. Therefore, British workers are individually free to leave the proletariat."[4] He calls this "argument 7." Analogously: just as any chosen member of the room is able and free to leave it, Cohen believes that this same freedom applies to any—and therefore every—member of the proletariat.

Yet, Cohen understands that "there is a great deal of unfreedom in their situation."[5] He invents a term for this unfreedom, naming it "collective unfreedom," which describes the case in which "not more that one can exercise the liberty they

1 Cohen, G. A. "The Structure of Proletarian Unfreedom." Philosophy & Public Affairs 12, no. 1 (1983): 9.
2 Cohen, "Proletarian Unfreedom," 10.
3 Cohen, "Proletarian Unfreedom," 10.
4 Cohen, "Proletarian Unfreedom," 13.
5 Cohen, "Proletarian Unfreedom," 11.

all have."[6] Cohen uses this device to explain our intuitions about the unfreedom of this situation, ultimately claiming that "there are very few exits from the British proletariat and there are very many workers in it. Therefore, British workers are collectively unfree to leave the proletariat."[7] He calls this "argument 8."

Cohen means to hold argument 7 (that proletarians are individually free) and argument 8 (that proletarians are collectively unfree) together in a state of non-contradiction in order to satisfy our intuitions about freedom on both collective and individual levels. It is the aim of this essay to show that, on the contrary, argument 7 fails. To do this, Philip Pettit's conception of liberty as non-domination is enlisted. In short, Pettit holds that X dominates Y if X has the capacity to interfere on an arbitrary basis in certain choices that Y is in a position to make. There are three components to Pettit's view of domination: one is dominating if they have (a) a capacity to interfere, (b) on an arbitrary basis, (c) in certain decisions another is able to make. Critically, domination is an inherently potential characterization of unfreedom. It is the capacity for a certain kind of interference, not the interference itself.

With respect to (a), the capacity to interfere, Pettit claims that this interference must be intentional and must worsen the other's situation. He claims as much when he says that "when I interfere I make things worse for you, not better. And the worsening that interference involves always has to be more or less intentional in character: it cannot occur by accident."[8] Thus, in situations where only accidental or positive interference is possible, it violates Pettit's view to say that there is domination.

In describing how a choice situation may be worsened, Pettit provides three variables: options, expected payoffs, and outcomes. Understanding the idea of worsening options is pretty straightforward—Pettit explains this as "changing [for the worse] the range of options available."[9] For our purposes, the elimination of options fits this criterion. By "worsening the expected payoffs," Pettit means the attachment of punishment to a certain course of action in order to discourage it. By "worsening the outcomes," Pettit means attaching punishment to a course of action that has already occurred in order to negatively affect the actual payoffs.

Pettit qualifies (b), the condition of arbitrariness, by studying the relative locations of the agent deciding and the person affected ("the other"). He understands an act to be arbitrary if "it is subject just to the arbitrium, the decision or judgment, of the agent," and moreover, that the action is done "without reference

6 Cohen, "Proletarian Unfreedom," 11.
7 Cohen, "Proletarian Unfreedom," 14.
8 Pettit, Philip. Republicanism: A Theory of Freedom and Government. (Oxford: Oxford Univ. Press, 2010), 52.
9 Pettit, Republicanism, 53.

to the interests, or the opinions, of those affected."[10] In other words, an arbitrary action is one which denies the status of the affected party as a meaningful human being by disregarding their wants and needs. On the other hand, Pettit sees non-arbitrary decisions as those which track, or take into account, the preferences and welfare of the people liable to interference.

Pettit explains (c), or "certain decisions the other is able to make," as a way of compartmentalizing different domains of freedom and domination. He says that the most salient aspect of this clause "is that it mentions certain choices, not all choices. This highlights the fact that someone may dominate another in a certain domain of choice, in a certain sphere or aspect or period of their life, without doing so in all."[11] In other words, the other can be dominated at work while free in the home, or vice versa; the other can be dominated politically or socially, but not in their decisions of which music to listen to, etc. Pettit holds that domination—and therefore, freedom—can vary in extent, intensity, and across different domains. Domination can be in the form of absolute power over another in many critical domains, limited ability to interfere in largely inconsequential domains, and everything in-between. The intensity of domination varies along both of these dimensions, and though Pettit fails to give an explicit framework for determining an order of severity, he acknowledges, at the very least, that loose hierarchies exist.

It is critical to understand that Pettit's conception of domination is such that interference does not need to be actual in order for there to be unfreedom. At the heart of this view is the fact that the mere ability to interfere engenders unfreedom through domination. He writes that:

> The possession by someone of dominating power over another—in whatever degree—does not require that the person who enjoys such power actually interferes...it does not require even that the person who enjoys that power is inclined in the slightest measure towards such interference. What constitutes domination is the fact that in some respect the power-bearer has the capacity to interfere arbitrarily, even if they are never going to do so.[12]

Here, Pettit explains that unfreedom can occur even without actual interference. Not only does he believe this, but also that unfreedom can occur even where actual interference seems very unlikely. He strongly emphasizes that the mere ability of arbitrary interference, however "small" that interference may be, causes a propor-

10 Pettit, Republicanism, 55.
11 Pettit, Republicanism, 58.
12 Pettit, Republicanism, 63.

tional amount of unfreedom.

It is now possible to apply Pettit's view to Cohen's analogy. In Pettit's view, any one person in the room is dominated by any other person in the room. This is true because each person has the relevant capacity to interfere in the relevant way with every other person. Suppose we initially select one person from the hypothetical room, as Cohen does. It is true that they have the capacity to interfere in the relevant sense—intentionally and harmfully. This person could choose to leave the room, thus rendering every other inhabitant finally trapped. In Pettit's terminology, this certainly worsens their choices, since it removes their choice to leave the room. It is especially clear that this is a worsening of their choices when one recalls that the room stands for the proletariat, and exiting it stands for ascending to a higher class. It is further possible that this person could make their exit in order to intentionally worsen the lives of the other occupants. There is nothing stopping the person from growing resentful of their peers, and seeking to harm them by leaving the room for the sake of finally imprisoning them. Even if this sounds unlikely, it is important to remember that "what constitutes domination is the fact that in some respect the power-bearer has the capacity to interfere arbitrarily, even if they are never going to do so."[13] Domination is not a question of probability, but rather capacity. Thus, by having the ability to leave the room, the selected person has the ability to intentionally interfere in the lives of the others for the worse.

Second, this person may perpetuate this act on a totally arbitrary basis. Nothing forces the person to track the interests of the other occupants of the room when deciding whether or not to leave. They are free to make their decision to leave without any regard for the wants or needs of the others, and can reason purely from their own preferences and needs. Thus, the selected person has the capacity to interfere arbitrarily. Finally, their interference is, indeed, in "certain choices that the others are willing to make." It is a real decision whether or not the others choose to leave the room. The capacity to arbitrarily interfere centers on this very locus of choice, and thus meets the third criteria for domination.

Therefore, the selected person has the capacity to interfere—on an arbitrary basis—in certain choices that the others are in a position to make. But this is just the definition of domination—thus, the selected person dominates the others, which means that each of the others is in a position of domination. In Pettit's view, this amounts to saying that each of the people in the room is unfree. But as Cohen writes, all this is true of "whomever we select."[14] Thus, each person in the room dominates all the others, which means every person in the room is in a position of domination. Therefore, every person in the room is individually unfree. This

13 Pettit, Republicanism, 63.

14 Cohen, "Proletarian Unfreedom," 10.

conclusion is the negation of Cohen's in his "argument 7."

It is worth briefly noting that Pettit generally formulates the dominating relationship between persons. He says that "while a dominated agent, ultimately, will always have to be an individual person or persons, domination may often be targeted on a group or on a corporate agent: it will constitute domination of individual people but in a collective identity or capacity or aspiration."[15] Thus, the fact that the chosen agent is able to arbitrarily interfere in the same particular domain of choice for multiple other people does not mean it is not domination.

A more serious objection to the claim that each person in the room is dominated and therefore unfree, however, is the thought that reciprocal domination over an identical domain of choice is impossible. It seems, prima facie, that because each person is dominating all the others just as much as the others dominate them, all have the same choice options; since the idea of domination seems to intuitively rely on asymmetrical relationships, it would seem that the idea of reciprocal domination is internally inconsistent. This worry may be mitigated in a number of ways. First, it is important to keep in mind the precise definition of domination: X dominates Y if X has the capacity to interfere, on an arbitrary basis, in certain choices Y is in a position to make. There is nothing in this definition which logically excludes it from being a reflexive two-place relation. The intuitive connection with asymmetry can be explained by the fact that the capacity for arbitrary interference is often made possible by asymmetries such as wealth, power, status, and others.

Though this is the case, Pettit explicitly mentions that reciprocal power to interfere may be used as a strategy for achieving non-domination. He mentions two possibilities: defense and deterrent. He writes that "the strategy of reciprocal power is to make the resources of dominator and dominated more equal so that, ideally, a previously dominated person can come to defend themselves against any interference on the part of the dominator."[16] In other words, the dominated party would be able to use their resources to counter the arbitrary interference of the other, and thus, this very possibility would eliminate the capacity of arbitrary interference and dissolve the dominating relation. However, it is not clear how this defensive interference would be possible in Cohen's analogy, since he assumes that if one tried to leave, "no one would block his way," and once the original person left the room, no one else could leave in order to finally imprison them.[17] By the very nature of this particular kind of interference, defensive interference—within Cohen's analogy—is impossible.

15 Pettit, Republicanism, 52.
16 Pettit, Republicanism, 67.
17 Cohen, "Proletarian Unfreedom," 10.

Pettit himself admits that the "ideal" of defensive interference will rarely materialize. Instead, he discusses retaliation as a second way of using reciprocal power to reduce domination. He says that the dominated agent may be able "at least to threaten any interference with punishment and to impose punishment on actual interferers."[18] Cohen's analogy, however, does not speak to such retaliatory interference. Given that the others would be locked in the room, it is hard to see how they would be able to affect the escaped person. Here, though, the analogy breaks down, since there is nothing necessarily physically separating someone who "recently exited the room" (e.g., joined the corporate workforce, or gained control of a company) from the wrath (e.g., physical attack) of their previous fellows. Still, it is not the original situation of reciprocal domination which engenders the possibility of retaliation. The relevant kind of domination—that is, leaving the room and trapping the rest—does not enable retaliation. Ultimately, then, this response has no bearing on the claim that the reciprocal domination must be self-annihilating, since it is not in virtue of this that retaliation is possible.

For example, suppose that A and B work in a factory. A hates B, and so A decides to harm B by getting promoted to become the owner of the factory—eliminating B's ability to do so. B cannot retaliate by also coming to own the factory. The job has been filled; the "room" has been "exited." Yet, B can destroy A's property, harass A's person, or even threaten A's life. This retaliation does not stem from the original position of reciprocal domination. Thus, Pettit's only two ways that reciprocal domination might eliminate itself do not find application in Cohen's scenario. We may safely conclude, then, that all the people in the room are dominated by at least one (and in fact all) of the others, which just means—in Pettit's view—that each person in the room is individually unfree.

It will now be the aim of this essay to motivate Pettit's view independently from its application to Cohen's argument. I shall do this by arguing that, even on the negative view of liberty, it is intuitively desirable to expand the horizon of freedom from mere non-interference to non-domination in Pettit's sense. To begin with, certain kinds of obvious unfreedoms cannot be recognized as such under a negative conception of liberty which only recognizes interference as unfreedom. For instance, consider a slave whose master has not exercised their capacity to arbitrarily interfere in the slave's life for the worse, and gives no indication that they ever will. Obviously, the slave is unfree, for the slave is a slave. Pettit remarks that:

> The observation that there can be domination without interference connects with the theme highlighted in the last chapter, that slav-

18 Pettit, Republicanism, 67.

> ery and unfreedom is consistent with non-interference: that it can be realized in the presence of a master or authority who is beneficent, and even benevolent.[19]

In other words, the example of the slave under a benevolent (non-interfering) master shows first that a strictly negative view of liberty fails to account for this obvious instance of unfreedom. The strength of Pettit's view lies in the fact that the reasons we conclude this slave to be unfree are simply that the criteria of domination are met—and this shows the intuitive strength of his view. In elucidating these intuitions, Pettit quotes Richard Price as saying that "individuals in private life, while held under the power of masters, cannot be denominated free, however equitably and kindly they may be treated."[20] Like Pettit, Price focuses on the persons "under the power of masters," though not actively interfered with. Being under the power of another, in Price's sense, certainly seems to imply the master's capacity to arbitrarily interfere. Analyzing the unfreedom of the slave leads Price to conclude that it is this capacity to be arbitrarily interfered with which engenders unfreedom.

Pettit himself characterizes domination as leading to this kind of slavish relationship. In domination, he says, "the powerless are at the mercy of the powerful and not on equal terms. The master-slave scenario will materialize, and the asymmetry between the two sides will become a communicative as well as an objective reality."[21] Pettit also finds examples of this intuition in Machiavelli and Montesquieu. Machiavelli describes the power of a free community as "the power of enjoying freely his possessions without any anxiety, of feeling no fear for the honor of his women and his children, of not being afraid for himself," and Montesquieu defines liberty as the "tranquility of spirit which comes from the opinion each one has of his security, and in order for him to have this liberty the government must be such that one citizen cannot fear another citizen."[22] In both characterizations of freedom, the common denominator is that when the conditions of domination are met—that is, when one has to "bow and scrape," appease their dominator, and maintain "eternal discretion"—there is personal unfreedom (and vice versa). In other words, it is strongly intuitive to claim "freedom if and only if non-domination." What Pettit's definition does is make this intuition explicit.

Pettit's view is further strengthened by accounting for the intuition that a state of freedom should foment equality among the agents by whom it is enjoyed. Pettit often alludes to this intuition by showing the converse: in a dominating rela-

19 Pettit, Republicanism, 64.
20 Pettit, Republicanism, 64.
21 Pettit, Republicanism, 61.
22 Pettit, Republicanism, 71.

tionship, the individuals are not able to look each other in the eye. The dominated person may only assert their equality on the pain of being interfered with, which is to say, they cannot. Similarly, the dominating agent's power suggests a condescending mindset. More to the point, it seems that domination dehumanizes the dominated, while non-domination forces the would-be dominator to see the other as a person. Pettit says that in a state of non-domination,

> You do not have to live either in fear of that other, then, or in deference to them. The non-interference you enjoy at the hands of others is not enjoyed by their grace and you do not live at their mercy. You are a somebody in relation to them, not a nobody. You are a person in your own legal and social right.[23]

Here, Pettit argues that when one is free from domination, one secures one's personhood. By this argument, Pettit seeks to directly align non-domination with freedom, as opposed to appealing to the converse, as above. Non-domination seems to imply fundamental equality and restores the relationship to that which holds between equal persons, instead of that which holds between master and slave. Because non-domination shares this intuitive property of freedom, and because of the (above) strong intuitions that the conditions for freedom are those of non-domination, Pettit's view of freedom of non-domination ought to be accepted.

Finally, it should be noticed that the intuitive support for Pettit's conception of freedom does not trivially apply to the people in Cohen's analogical room. Since the people in this room are on equal standing, it may seem like there is no room for the master-slave relationship to emerge, that people will be able to meet each other in the eye, and that there can be no degradation of personhood as there is when the domination is truly one-sided.

A thought experiment will make clear how the intuitive strength of Pettit's view holds, even in contexts like Cohen's analogy in which there is reciprocal inter-domination. Imagine the following situation: persons A, B, and C are in the room. Person A wishes to have an affair with person C and afterwards leave the room. However, person B is jealous of this, and plans to leave the room as soon as the affair commences—if it does—in order to forever imprison A, denying A's ultimate wish for escape. B makes this known to A. Now, A must appease B by not having an affair with C in order to fulfill their ultimate wish to leave the room. Thus, B dominates A, as A is unable to exercise their individual freedom: in order to exit the room, A must "bow and scrape" to B's preferences. The mere fact that A also dominates B does not mean that A does not acutely feel the unfreedom of

23 Pettit, Republicanism, 71.

their domination by B. A cannot look B in the eye, because B stands between A and A's desires. B's whim determines the fate of A's life. That A may leave the room, forever trapping B and C, does not negate this fact.

All this thought experiment seeks to demonstrate is that the intuitions which locate freedom with non-domination are still present in Cohen's analogy. Succinctly, these intuitions are first that someone is free if they are able to exercise their freedoms without the approval of another, and unfree if not (which is equivalent to defining freedom as non-domination). This is exactly the case in the analogy of the room: person A is unable to exercise their freedoms because they lack the approval of person B. Backtracking for a moment, the second intuition is that freedom as non-domination accords with the intuition that freedom produces equality. The inverse, that unfreedom induces inequality, also holds in Cohen's room: precisely because of the possibility of situations such as the above thought experiment, the people in the room will be unable to look each other in the eye. Since this is the inverse, it is hardly a rigorous proof; however, even the inverse demonstrates a correlation between equality and non-domination which certainly does not malign the suggestion that they are equivalent.

Suppose instead that the people in the room were individually free, as Cohen claims. Then they would enjoy equality amongst themselves, according to the rule: if there is freedom, then there is equality. When Cohen speaks of the possibility of solidarity among the members of the room—for instance, those who want to rise, not out of the proletariat, but with the proletariat—he asserts the possibility of the consequent, implying the situation is one of genuine freedom. However, two considerations must be noticed. First, the above thought experiment is meant to show that this possibility is nontrivial, and must be argued for. As the experiment shows, there is also a great possibility that there is profound inequality—an inability to "look each other in the eye"—amongst the members of the room. Insofar as this denies the consequent, it speaks to the possibility of the original situation being one of unfreedom. Second, it is important to remember that even if Cohen were able to succeed in proving the possibility of equality amongst the members of the room, it would be fallacious to conclude from this that they were free. Therefore, both of the original intuitions which support Pettit's particular notion of freedom (respectively, the potentiality of interference and the relationship between freedom and equality) remain relevant to Cohen's analogy of the room. Since these intuitions remain intact, Pettit's concepts should still be held in the analogy of the room. Thus the individuals in Cohen's analogy are individually unfree.

Before concluding, it is worth noting that Cohen modifies his analogy in the same paper: in the modified analogy, exactly two people may leave the room. However, this modification leaves the above arguments unaffected. Indeed, as long

as there are fewer exits than people in the proletariat, nothing changes. This is because the above arguments remain unchanged if we select two people at random, treat them as a single agent, and then in a similar manner proceed to show that the others are dominated by them, concluding that since they were chosen at random, all are dominated. Pettit has no problem with this kind of strategy, saying that "while a dominating party will always be an agent…it may be a personal or corporate or collective agent: this, as in the tyranny of the majority, where the domination is never the function of a single individual's power."[24] Thus, considering the dominating agent as an arbitrary group of people (the exact count of which equals the number of exits from the proletariat) rather than a single individual does not threaten any of the above conclusions.

In conclusion, this essay first demonstrated that on Pettit's view of freedom as non-domination, Cohen's analogical backing for "argument 7" fails to prove that any proletarian is individually unfree. This is precisely because in this analogy, every person in the room is individually dominated. Assuming, with Cohen, that this analogy accurately represents reality, it is useful to step out of the analogy and towards what it depicts: Cohen begins by saying that there are more exits from the proletariat than proletarians leaving, and thus that any proletarian is individually free to leave the proletariat. Pettit's view, however, shows how proletarians can hardly be said to enjoy freedom, since they are constantly threatened with losing it based on the arbitrary whims of their peers. Thus, holding Pettit's view entails rejecting Cohen's. This essay then argued for the intuitive strength of Pettit's view, showing first that Pettit's formulation of freedom matches with common, intuitive formulations, and then showing how the claim that 'freedom is non-domination' accurately tracks our intuitions about the relationship between equality and freedom. From this, in the style of modus ponens, it follows that the people in the room are individually unfree. Once again stepping out of the analogy, it follows that proletarians are each and all individually unfree

24 Pettit, Republicanism, 52.

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Oedipus and Ion As Outsiders: The Implications and Limitations of Genealogical Citizenship

An Analysis of Oedipus at Colonus by Sophocles and Ion by Euripides

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INTRODUCTION

In ancient Athenian society, the collective myth of autochthony[1] provided the basis for social order, determining who got the benefits of citizenship and who was excluded from the polis.[2] According to their autochthonous myth, the citizenry of Athens did not emigrate from elsewhere, but instead arose from the earth upon which ancient Athens stood. Theirs was not a city of immigrants; from their very origins, the people of Athens believed themselves to be the only population that had always belonged to Athenian soil. Thus, each true-born Athenian carried within them the essential spirit of the Athenian people, passed down from generation to generation. To determine and confirm their citizenship on an individual level, each Athenian had to demonstrate their autochthonous familial descent when they came of age in a dokimasia, an examination wherein citizen tribunals

1 Autochthony: n., The quality, state, or condition of being autochthonous; an instance of this. Autochthonous: (of an inhabitant of a place) indigenous rather than descended from migrants or colonists. Oxford English Dictionary, "autochthony" and "autochthonous," OED Online, December 2018.

2 Polis refers to a Greek city-state. Here, more specifically, it refers to the people allowed within government in Athens, the people who constituted the voter base and who were included in all aspects of civic life.

collected testimony from friends and family members in support of one's claims to citizenship.[3] In this way, one's lineage became the sole factor determining one's inclusion in the polis.

Once blood became the basis for citizenship, citizens who were established as autochthonous could not be excluded from the polis on the basis of class. The poorest citizens had the same right to participate in Athenian government as the elite, although in practice the higher classes enjoyed special privileges, such as training in rhetoric, which poorer citizens did not. For ancient Greek city-states, this level of inclusivity was groundbreaking; most city-states did not consider their lower- or even middle-class members to be citizens, even in democratic systems of governance. However, this is not to say that Athens was entirely without social divisions, for more than just fully-privileged citizens lived within the city walls. Overall, inhabitants were sorted into three groups: citizens, metics, and slaves. While citizens enjoyed all the rights and benefits of the polis, including the right to vote and to participate in public forums, metics were an in-between, catch-all group, not subjugated like slaves but not as privileged as citizens. They could not participate in government or vote, for example, but were still able to participate economically in Athenian society. Metics were what we today might call a migrant class, as they did not meet the full requirements for blood-based citizenship but were still free. Metics were not confined to only the lower classes; like citizens, metics existed in every economic stratum, from the poorest to the richest. However, regardless of economic class, citizens, being true-born Athenians, were more socially vaunted.

While lauded by political theorists for its groundbreaking inclusivity, the Athenian genealogical grounds for inclusion, like any other such system, necessitated that some be excluded so that the polis might be defined and unified rather than indistinct and anarchic. This exclusion, at least theoretically, was to be on the grounds of blood-based requirements for citizenship.[4] However, as Oedipus at Colonus by Sophocles, the second in his trilogy about the eponymous protagonist, and Ion by Euripides make abundantly clear, this distinction did not always play out as it ought. In fact, the existence of exceptions to the rule of blood-based citizenship reveals that its apparent legitimacy was, at its core, fallacious. The tragedy

3 Dokimasia: n, The term δοκιμασία and the related verb dokimazein were used in various Greek contexts to denote a procedure of examining or testing, and approving or validating as a result of the test. Oxford Classical Dictionary, 2016, "dokimasia."

4 At the time in which Ion is set, the requirement for citizenship was having one Athenian parent, not two, as it was after Pericles' citizenship law. For Oedipus, the distinction is irrelevant because both of his parents are Thebans—or, in his father's case, a naturalized Theban ruler.

of Oedipus and Ion is in that the knowledge of their parentage, which should haved moved them out of their marginal social positions and into the sociopolitical centers of their respective poleis, actually prevented them from claiming their rightful places within society. This is due to the fact that in practice, blood did not stand alone in determining membership to the polis. Athenian society instead relied upon adherence to socially-codified, secondary behavioral implications of blood-based membership, as shown through a further examination of the Athenian city-state and the plays Oedipus at Colonus and Ion. What's more, the rule of descent necessarily meant that any violations of these secondary behaviors were inheritable and thus contaminated an individual's entire genetic line from their transgression onward. In examining the social structures as they are presented in these two works, in light of the historical context of ancient Athens, it is clear that the lineage-based autochthony myth was only the beginning of the implied social order.

Literary Background

Before diving into the social structure of Athens, a short summary of each play is in order, which will highlight the most relevant plot points. Thanks to Freud, most are familiar with Oedipus, or at least with his infamous acts: killing his father, marrying his mother, and fathering her children. Once he discovers all that he has unknowingly done, Oedipus blinds himself and is outcast from Thebes, his home and onetime kingdom. All of this takes place in Oedipus Rex, the first in Sophocles' trilogy of plays about Oedipus and his family. Following these events is Oedipus at Colonus, which shows Oedipus in exile from Thebes as he approaches the Athenian acropolis. During the course of the play, Oedipus encounters a pair of Athenian citizens, who fetch Theseus, the Athenian king, to determine if Oedipus will be allowed to stay in Athens. After a lengthy debate, Theseus decides to accept him, thanks in part to the pleading of Oedipus's daughters, who have been helping him in his blindness. At the conclusion of the play, Oedipus is led away into the forest of Athens where he dies without leaving a trace, with Theseus as his sole witness swearing not to say a word about what happened to him. The themes of Oedipus at Colonus reach their pinnacle in Antigone, the final play in Sophocles' trilogy, wherein Oedipus's children are all killed, save Ismene, whether it be by their own hands or those of their political rivals.

Ion by Euripides centers around another family drama, although perhaps not as well known as that of Oedipus. In the play, Ion is an orphan like Oedipus, raised in the Temple of Apollo at Delphi. The play starts when Creusa, forebear and Queen of Athens, and her husband Xuthus, a war hero and metic, visit the Temple to ask for a prophecy concerning Xuthus's prospects of having any children. There, the couple meets Ion, and the prophecy leads Xuthus to assume that

the now-grown orphan is his true-born son. By the end of the play, however, Creusa and Ion discover his true parentage: that it is she who is really his mother, and that his father is actually the god Apollo, who raped her before she married Xuthus. Following council from the goddess Athena, they choose to keep this knowledge secret from Xuthus for reasons that will later be discussed, and Ion goes on to eventually found the Ionian race.

The Athenian City-State

With the above summaries in mind, we will begin our analysis of the Athenian city-state. Athenian democracy, while more inclusive of lower classes than any prior sociopolitical structure, necessarily imposed limits on those allowed into the privileged citizenry. Voting could only be meaningful if it were limited; absolute freedom to participate in the polis would be, as Jacques Derrida says of unconditional hospitality, "a law without imperative, without order and without duty. A law without law, for short."[5] For order and social duty to exist, there must be a specific group to whom these imperatives apply, or else all is unordered chaos. The necessary trade-off in this collective unification is the creation of an out-group against which the citizenry can be defined and assert its exceptionalism. In this way, the social order itself creates the outlaw, the metic, the orphan, and the bastard: broad, inferior social categories designed to include those who do not adhere to the implied social code. Those considered "outside of the law" are not actually so, for they fall into categories created by the social order. The only individuals truly outside of the law are those who cannot be defined by it, which we shall see is the case for Ion and Oedipus. The social rule creates the social rulebreakers, and at the same time the rule-breakers throw the rule itself into relief. Each is the inverse of the other's positive assertion, becoming a co-constitutive axis. They provide legitimacy by means of a relation of difference through which to define themselves, while in reality neither category exists outside of the artificial, dyadic social construction.

In order for a society to function, however, it must be able to overlook the arbitrariness of social delineation and instead see it as legitimate, even inherent to its subjects. To that end, Athens turned to a system of social order that on its face seemed absolute, inherent, and infallible: blood-based citizenship dependent upon genealogical descent from an autochthonous original populace. In the way of legitimacy, autochthony appeared acceptable to its citizens because it could not

5 Jacques Derrida, Of Hospitality: Anne Dufourmantelle Invites Jacques Derrida to Respond, Trans. Rachel Bowlby, (Stanford: Stanford University Press, 2000), 83.

be disproven, even though it was just as much of a social construct as any other conception of citizenship and justification of exceptionalism. Because the mythical original autochthonous population from which Athenians claimed citizenship was ancestral, its supposed existence could not be called into question based on facts, since there were none to confirm or deny its existence. Like the founding myth of any society, the lie at the core of Athenian structure not only persisted but, interestingly, added legitimacy to the regime.

Autochthony also provides a reason to see status as inherent to the citizen, since it "grounds difference in claims of nature—specifically, in earth and blood—[which gives] these categories the appearance of an ontological status."[6] That is, Athenian exceptionalism appeared justified since it was traceable back to inherent natural differences between people. The lie of one's social status being inherent, especially in a system based on blood, means that both adhering to its standards and violating them are not seen as merely shifting status, but are actions sublimated into the person themself. Oedipus, answering the question the Chorus poses as to his identity, does not say, "I am in exile"—that is, inhabiting an external, imposed state—but "I am an exile" (italics added).[7] His status has become his being, since blood determines both. Just as Thomas Kuhn conceives of paradigm shifts in science as not only incorporating past scientific information, but also as proclaiming past paradigms unscientific, so too do new information and actions that cause a change in status retroactively re-write one's entire self. Everything that previously signaled one's status becomes a lie, and, in a world where statuses can change, passing becomes both possible and inevitable.[8] This is the unavoidable fallout of the idea of social status as inherent and blood based.

While autochthony's claims of being inherent certainly rested on shaky ground, these were not the only fallacious premises upon which Athenian self-conception depended. Because autochthony was meant to order, it centrally imposed its structure down to even the level of individual family, and in doing so, manifested itself as a myth of unity. Above all, genealogical claims were meant to be objective and clear, "largely to guard against the kind of mingling and confusion of identities that blurs discrete lines of demarcation in the social order."[9] The ideological primacy of a clearly-ordered and unified family structure was designed to

6 Demetra Kasimis, "The Tragedy of Blood-Based Membership: Secrecy and the Politics of Immigration in Euripides's Ion," Political Theory 41(2):231-256 (2013), 15.

7 Sophocles, Oedipus at Colonus, trans. Robert Fitzgerald (New York: Harcourt, Brace, 1941), 92, line 9. The exact blood-based social conventions Oedipus violates that lead to his expulsion from Thebes will be explored later.

8 Passing, or being perceived and accepted as something other than what one actually is, is certainly an important part of any strictly-delineated social order. For example, in the post-Jim Crow era, certain people who would legally have been considered African American could "pass" in their daily lives as white. Passing is especially important in relation to Euripides' Ion, but further discussion is not within the scope of this paper.

9 Kasimis, "The Tragedy of Blood-Based Membership," 15.

make orderly life possible, with a cohesive overall clan structure which mirrored the internal structure of the family. In this way, the polis functioned ideologically as a single entity, its uniform organization all the way down to the individual level supplementing its unifying claim to one collective heritage. This ideology is far from abstract, and is in fact visible in much of the literature Athenian citizens produced. In Pericles' Funeral Oration, for example, "the 'populus,' in the general sense of the term, is not politically divided," and, indeed, "is never divided in the works of the tragic poets."[10]

This broad claim of unity is seen in Oedipus at Colonus as well, when Theseus, reacting to Creon's abduction of Oedipus's daughters, proclaims, "Your [Creon's] behavior is an affront to me, / A shame to your own people and your nation," and that "the whole city [Athens] / Must not seem overpowered by one man." [11] In a unified citizenry, any citizen exemplifies that citizenry, and thus the actions of one man can impact the reputation of the entire polis. In this way, the citizen is metonymic of the polis, and conflating one with the other is both an easy and powerful move in a mythically-unified city like Athens, especially by its figurehead Theseus. What this means, however, is that the broad-reaching social order determines not only social status, but behavior. One must act in accordance to its social prescriptions, or else one endangers the social ideal of collective unity. Thus, those who violate the social norms, especially those important enough to be codified into law, must either be expelled from the polis by being placed into one of the excluded classes—in extreme cases, such as with Oedipus, this meant being expelled from the city itself and branded an exile—or eliminated entirely. In a society founded on absolute, broad-reaching, inherent order, any person whose very presence defies that system of order threatens the entire conception of the polis, a conception that must be kept in place so that democracy and the state as a whole can function. In order to see why Oedipus and Ion are not able to take their rightful places, then, it is necessary to examine exactly which secondary social prescriptions they violate that threaten the order and unity of the polis.[12]

The Social Implications of Blood

While the primary concern of a genealogical social organization is creating a clear order, it must also be a self-sustainable system. What this means is that in order to

10 Pierre Vidal-Naquet, "Oedipus Between Two Cities: An Essay on Oedipus at Colonus," in Myth and Tragedy in Ancient Greece, eds. Jean-Pierre Vernant and Pierre Vidal-Naquet, trans. Janet Lloyd (New York: Zone Books, 1988), 331; 334.

11 Sophocles, 132, lines 8-9; 136, lines 14-15.

12 Ion is the son of the sun god Apollo and the Athenian princess Creusa; Oedipus is the son of two Theban monarchs. Thus, both theoretically should be included in their respective poleis on the basis of blood, especially since it is the blood of the elite.

reproduce viable citizens, and thereby the entire social order, secondary behavioral prescriptions become necessary. A system meant merely to determine whether or not one was citizen (i.e., pure lineage) became instead a guiding social principle, dictating not only social standing but also desired social behavior. To borrow a term coined by James C. Scott, the requirement of pure lineage in a genealogical society set into motion "a process by which 'a measure colonizes behavior'"—that is, what is meant to be descriptive becomes prescriptive.[13] In the quest to create social order and obtain clarity through kinship organization, a blood-based society generated secondary regulations that helped further its own existence. No longer did it merely order society, but the desire to adhere to the blood standard now shaped the ways Athenians lived their lives.

For example, the stringency of claims to autochthony biased societal perceptions of preferable marriages. Athenian-Athenian matches, or, more generally, marriages between members of the polis with clearly-defined statuses were considered more appropriate in ancient Athenian society. These biases played into the need for social order: if one was certain who one's parents were, one's own status was clearly defined. Conversely, if one was uncertain about their parentage, their social status was diminished due to the social order. We see this bias throughout history, with orphans and bastards historically being treated as lower-class citizens, inferior to those of straightforward lineage. With unclear parentage, one is not immediately stateless, per say, but one experiences a sort of social statelessness. As Creusa says of Ion, "It was for your good that Loxias settles into a noble house. If you were called the god's son, you would not have had a house as your inheritance or a father's name."[14] Because Athenian women could not hold property, Ion must pass as the son of a metic in order to inherit a name of any meaning. Indeed, we see at the beginning of the play that Ion has no name at all until Xuthus gives it to him.[15] Naming is a familial claim, but as a bastard of Apollo, Ion has no name to claim whatsoever. While his Athenian mother ought to make him Athenian as well, revealing his true parentage would render Ion not only destitute, but without any form of social identification. To have a subordinate place in the social order is better—at least as Ion is coerced to believe by Xuthus and Athena—than to have no place at all.

While his parentage is clear, Ion's social status is not, revealing one of the major failures of a blood-based system. Inheritance can only deal with facts that it was built to incorporate for it is based on the grounds that it stems from absolute fact. While being the son of a god ought to have positive effects on his social stand-

13 James C. Scott, Two Cheers for Anarchism: Six Easy Pieces on Autonomy, Dignity, and Meaningful Work and Play (Princeton: Princeton University Press, 2014), 114.

14 Euripides, Ion, trans. H.K. Lee (Warminster, England: Aris & Phillips, 1997), 503.

15 Euripides, Ion, 403.

ing, the fact that Apollo has entered the social order from a place completely external to it means that Ion and all of his progeny are also unable to fit into the social system at all. Ion cannot even be defined by one of the catch-all categories such as "orphan" that have been built into society for extreme, non-standard cases. A social order based on genetic lineage "expresses a demand to repeat (over generations) what can only happen once (the original birth)."[16] Genealogical in-grouping made both citizenship and violations of its reproductive practices iterative: if one's ancestors made a mistake in marriage or reproduction, it would be reproduced throughout the entire genealogical line with no chance of correction, save through covering it up. Once revealed, Apollo's original sin of impregnating Creusa—or, as it was more likely to be seen in this society, Creusa's original sin of giving birth to Ion—would haunt Ion's family line forever. Ion therefore must follow Athena's advice and pass as a metic until the end of his days, his knowledge of his true parentage keeping him from fully joining the polis lest he become disenfranchised and lose his social classification of orphan, along with the protection that classification affords.

While Ion's crime against the social order is his very birth, Oedipus's crime is more nuanced, hinging on his transition from ignorance to knowledge of his own parentage. Oedipus at Colonus thus explores what happens when that which goes against the social order is revealed, instead of staying safely hidden. While Ion confounds orderly overall social classification, Oedipus hopelessly confuses the internal family ordering upon which the whole of Athenian society was based. Oedipus not only confuses this order by killing his father, upending the proper power dynamic and sinning against the polis's conception of the ideal family, but also by marrying his mother and having children by her. This creates social positions untenable within Athenian society: sister-daughters, son-brothers, father-siblings, grandmother-mothers, etc. In his ignorance, Oedipus commits crimes that, upon coming to light, make both himself and his entire family socially unclassifiable, for the social order has no way of coping with the complications of incest. Just as Ion's potential outing could contaminate the legitimacy of his entire line, Oedipus's revelation does contaminate his entire family structure because of the supposedly inherent and unifying qualities of blood. This inherited contamination is evident in the ill fate of Oedipus's daughters in the following play, Antigone. What brings people together in the social order can just as quickly spread social contamination.

Oedipus and his family, especially his offspring, each inhabit multiple social categories, which contradict each other in their implications of exclusion and inclusion. Despite Oedipus and by extent his children being at least doubly

16 Kasimis, "The Tragedy of Blood-Based Membership," 13.

Theban, the revelation of Oedipus's parentage means they cannot be allowed to remain in the polis. Society has no outcast category in which to put the members of this family, so they must be expelled. They have violated the social order and thus cannot stay in the city since their continued presence threatens the myth of broader social unity. While the concept of unity was not as important in Thebes as in Athens, at least from an Athenian perspective, incest was still taboo. To some extent, Oedipus's family had to be Theban since Thebes served as Athens' dramatic foil, a place where scenes were allowed that couldn't play out in Athens, even mythically.[17] Thebes was a place to explore social possibilities. If Oedipus's stories took place within Athens' idealized system, even in fiction, they risked exposing too directly its fragility. The slight distance between the two cities, both physically and ideologically, was what made such socially-shattering myths as Oedipus palatable. They were allowed to explore the potential effects that taboo events such as incest could have within Athens without threatening the social order with its intense emotional baggage.

Conclusion

The Athenian social order tolerates certain types of aberrations as long as they fall within the outcast categories it has created so that its myth of unity can persist despite inevitable anomalies. If an individual falls outside of these catch-all categories then they must be eliminated. Indeed, we see this occur through the plays as Oedipus's children—who break no laws but whose very existence as daughter-sisters and brother-sons exposes the fragility of blood-based social order—eventually kill themselves and each other. The sin must be cut off at the source or else it will grow exponentially with every following generation. All of Oedipus's family must end to cleanse the blood and the city.

Unlike with Ion, Oedipus's familial social transgressions are known, precluding him from the approved social order. Therefore, Oedipus faces no other socially-viable option but to be expelled from the polis. He threatens the polis's behavioral unity, the myth of unity that the entire polis is founded upon, and therefore, the polis itself. The mythically-unified polis, for whom all included individuals are metonymic representatives, cannot include an individual who has violated its secondary socio-familial prescriptions even if those transgressions are not intentional. Interestingly, Oedipus is asked to conditionally rejoin Thebes after his expulsion because the metonymic power the polis has over its citizens supersedes all other considerations. The claim which Athens newly asserts over Oedipus

17 Vidal-Naquet, "Oedipus Between Two Cities," 334: "There is one place where stasis [social division] finds a special home: It is Thebes,…an anti-city."

infringes upon that primary consideration, and so his secondary sins can be overlooked in favor of his primary birthright.

Oedipus's parentage is revealed, while Ion's is not, and these revelations are what shaped their tragic fates. However, in a genealogical system that gains legitimacy based on the claim that blood is objective, inherent, and unfakeable, how is it possible that either of their lineages, at any point, not be revealed? The answer, in short, is that despite its apparent objectivity, blood does not speak for itself. One cannot look at someone and tell who their parents are, and, like Ion, individuals might be mistaken about their true parentage. This opens up the possibility of acting and passing as a citizen, even unintentionally, when one is not. This possibility threatens the autochthonous myth of blood being self-evident and inherent—thereby threatening the entire Athenian social order. As the bastard child of a god and an Athenian, Ion, while objectively an Athenian, does not fit neatly into the social narrative. Revealing his parentage may lead to questions about his autochthony. To secure his high position of power, a palatable lie must be constructed to ensure the propagation of his own line and the social order as a whole. Blood in this case is a performance, willing or not, for the sake of the social order to which his own exceptional circumstances must be subsumed. Because the autochthonous genealogical citizen myth is founded on the basis that it has no exceptions, having a questionable figurehead at one of the most important family lines might incite social crumbling from the top down. As an inevitable consequence of the need to preserve the mythical unity that this society was founded on, Ion, whose familial transgressions can be subsumed into pre-existing social categories, is able to be a metic as long as he hides his familial transgressions under a socially-acceptable genealogical narrative. Oedipus, on the other hand, who reveals his familial transgressions under extreme emotional duress,[18] must necessarily be evicted from his polis for his violation of its secondary prescriptions since the assertion of his status along family lines implicates his other behavior.

The tragedy of Oedipus and Ion is that the knowledge they gain of their parentage, which should shift them from their marginal social positions into the sociopolitical centers of their respective poleis, actually means that they cannot claim their rightful places in society. The knowledge of their parentage is inextricable from the knowledge that either they or their parents violated the secondary prescriptive norms of their genealogically-based society. Despite its claims to being inherent, providing clear order, and unifying the polis, (blood) autochthony failed in almost every one of these respects, as does any other basis for social

18 Euripides, Ion, 104, lines 17-18: "Nothing so sweet / As death, death by stoning, could have been given me." Oedipus's distress comes from his internalization of the prescribed external social standards, which hold so much weight as taboo that he, as a metonymic citizen, feels anguish from actively breaking these rules, even if unaware he was doing so.

organization and delineation of citizenship. In order to preserve and reproduce this order, the reproduction of individuals needed to adhere to secondary behavioral prescriptions that blood-based membership entails, lest their entire family lines be contaminated. Due to the different natures of Ion's and Oedipus's social crimes, as well as the secrecy of sensitive information or lack thereof, Ion is able to pass within the polis while Oedipus must be expelled in order to preserve the social myth. However, neither is able to claim what is rightfully theirs: the title of citizen.

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Partisan Gerrymandering: Re-Establishing the Political Question Doctrine in *Gill v. Whitford*

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ABSTRACT

American politics is more divided and more contentious than ever, and the Supreme Court recently published a decision that will define the nation's political landscape. In Gill v. Whitford, the Wisconsin Elections Commission asked the Supreme Court to overturn a divided three-judge district court decision striking down a Wisconsin voter redistricting plan as an unconstitutional partisan gerrymander. But the court has yet to clearly define the constitutional boundaries of partisan gerrymandering, having provided contradictory holdings and reasoning for decades. In its June 2018 decision, the court held that the plaintiffs lacked standing to sue, but never reached the merits of partisan gerrymandering, leaving the justiciability of that issue unresolved. This paper finds that partisan gerrymandering is correctly viewed as a non-justiciable political question, due to a lack of judicially-manageable standards, the proper role of the judiciary, and judicial hyperpartisanship. Furthermore, alternatives under the First and Fourteenth Amendments carry implications that inevitably circle back to the rationale for invoking the political question doctrine in the first place. While the court is not bound by ethical rules, general ethical principles should guide the Justices' own moral compass towards the political question doctrine.

Introduction

American politics is more divided and more contentious than ever, and the Supreme Court recently published a decision that will define the nation's political landscape.[1] The Wisconsin Elections Commission petitioned the Supreme Court to overturn a divided three-judge district court decision striking down a voter redistricting plan for the Wisconsin state assembly as an unconstitutional partisan gerrymander.[2] However, the Supreme Court has not clearly defined the constitutional boundaries of partisan gerrymandering. In *Gill v. Whitford* in 2018, the Supreme Court held

1 *Gill v. Whitford*, No. 16-1161 (U.S. July 2017): ("Gill isn't being overhyped: a ruling against extreme gerrymanders could re-jig American politics at the state and national levels for the coming decade and beyond."); S.M., "Justice Kennedy Will Take Centre Stage during the Supreme Court's Upcoming Term," The Economist, August 15, 2017, https://www.economist.com/democracy-in-america/2017/08/15/justice-kennedy-will-take-centre-stage-during-the-supreme-courts-upcoming-term.

2 See Brief for Appellants, *Gill v. Whitford*, No. 16-1161 (U.S. July 2017).

that the plaintiffs lacked standing—that is, the ability to even bring the lawsuit in court.[3] The court did not decide the merits of the case, and the court made the unusual decision to remand the case back to the district court to afford the plaintiffs an opportunity to properly bring their claim and litigate its merits in the future.[4] Notably, the court did not decide whether partisan gerrymandering is justiciable, leaving the issue unresolved.[5] This piece analyzes the judicial process of deciding the politically-charged *Gill v. Whitford* case, a decision which will inevitably shift the balance of the nation's political power towards either the Republican or Democratic party.

"Gerrymandering" is a pejorative term, referring to "the dividing of a state, county, etc., into election districts so as to give one political party a majority in many districts while concentrating the voting strength of the other party into as few districts as possible."[6] It comes from former Massachusetts Governor Elbridge Gerry, who, in 1812, designed convoluted voting districts resembling the shape of a salamander.[7] More than two hundred years later, gerrymandering continues in Wisconsin and throughout the nation.[8]

However, the judiciary is not the appropriate forum to address partisan gerrymandering grievances. This piece argues that the plaintiff's partisan gerrymandering claims in *Gill v. Whitford* presents a non-justiciable political question, due to a lack of judicially-manageable standards for resolving the claim, the proper role of the judiciary within the government, and judicial hyper-partisanship that renders adjudication on the merits inappropriate.

Part I of this piece provides background on the *Gill v. Whitford* case. Part II outlines the law of partisan gerrymandering leading up to Gill, demonstrating that the time was ripe for clarification from the court. Part III explains why the partisan gerrymandering claim in Gill presents a non-justiciable political question. Part IV considers alternative resolutions on the merits of First and Fourteenth Amendment claims, but finds that they inevitably circle back to the rationale for invoking the

3 Gill, 138 S. Ct. 1916.

4 Gill, 138 S. Ct. 1916.

5 Gill, 138 S. Ct. 1916.

6 "Gerrymander," Www.Dictionary.Com, accessed January 5, 2019, https://www.dictionary.com/browse/gerrymander.

7 Erick Trickey, "Where Did the Term 'Gerrymander' Come From?," Smithsonian, accessed January 5, 2019, https://www.smithsonianmag.com/history/where-did-term-gerrymander-come-180964118/.

8 See Thomas Wolf, "What the Briefs Say About Extreme Gerrymandering | Brennan Center for Justice," Brennan Center for Justice, September 6, 2017, https://www.brennancenter.org/blog/what-briefs-say-about-extreme-gerrymandering.

political question doctrine in the first place. Finally, part V explores whether judicial ethics provide any useful guidance for the court, finding persuasive support for invoking the political question doctrine.

I. Gill v. Whitford

Gill v. Whitford, a group of Democratic voters sued members of the Wisconsin Elections Commission, claiming that invidious and "aggressive partisan gerrymandering" violates their Fourteenth and First Amendment rights.[9] The Fourteenth Amendment claim alleges that Wisconsin's redistricting "purposely distributed the predicted Republican vote share with greater efficiency so that it translated into a greater number of seats, while purposely distributing the Democratic vote share with less efficiency so that it would translate into fewer seats."[10] The argument is supported by seemingly irreconcilable statistics of voters' current partisan allegiances and the corresponding election results. Specifically, Republicans received 48.6 percent of the two-party statewide vote in 2012 but won 61 percent of the assembly seats; they also received 53 percent of the statewide vote in 2014 but won 64 percent of the assembly seats.[11] Plaintiffs believe a new mathematical test called the "efficiency gap" provides a judicially-manageable standard for the court to determine unconstitutional partisan gerrymandering by measuring the proportion of votes "wasted" by gerrymandering.[12] The First Amendment claim further alleges these wasted votes suffocate voters' freedom of association with the political party of their choosing, as well as the freedom of expression for their political views.[13]

The Western District of Wisconsin agreed with the plaintiffs, holding that partisan gerrymandering was unconstitutional.[14] The Wisconsin Elections Commission then appealed, but the Supreme Court vacated the district court's decision and remanded it, "so that the plaintiffs may have an opportunity to prove concrete and particularized injuries using evidence...that would tend to demonstrate a burden on their individual votes." The court's determination and adjudication of partisan gerrymandering claims significantly impacts the American political

9 Whitford v. Gill, 218 F. Supp. 3d 837, 854 (W.D. Wis. 2016).

10 Whitford, 218 F. Supp. 3d at 854.

11 Whitford, 218 F. Supp. 3d at 853. See also Michael Li and Thomas Wolf, "5 Things to Know About the Wisconsin Partisan Gerrymandering Case," Brennan Center for Justice, June 19, 2017, https://www.brennancenter.org/blog/5-things-know-about-wisconsin-partisan-gerrymandering-case.

12 Complaint, 14–16, Whitford, 218 F. Supp. 3d 837.

13 Complaint, p. 27–28, Whitford, 218 F. Supp. 3d 837.

14 Whitford, 218 F. Supp. 3d at 910; as amended by Amended Judgment, Whitford v. Gill, No. 15-cv-421-bbc (W.D. Wis. Feb. 22, 2017).

landscape.[15] Partisan gerrymandering is a widespread issue not limited to Wisconsin,[16] and a Supreme Court decision striking down electoral maps for partisan gerrymandering can open the floodgates for challenges to district maps across the country.[17] Make no mistake, "Gill isn't being overhyped: a ruling against extreme gerrymanders could re-jig American politics at the state and national levels for the coming decade and beyond."[18]

II. The Time Remains Ripe for the Supreme Court to Clarify Whether Partisan Gerrymandering is Justiciable

For decades, American jurisprudence has debated whether gerrymandering involves a "non-justiciable political question"—which is, broadly, an issue inappropriate for resolution in the judiciary.[19] Currently there is no clear answer, even after the Supreme Court's 2018 decision in Gill.

The political question doctrine can be traced as far back as 1803 in Marbury v. Madison,[20] but the modern doctrine has its roots in the 1960s, when gerrymandering claims fought against discrimination and racial redistricting. In 1962, Baker v. Carr held that racial gerrymandering claims are justiciable, reasoning that "if 'discrimination is sufficiently shown, the right to relief under the equal protection clause is not diminished by the fact that the discrimination relates to political rights.'"[21]

However, *Gill v. Whitford* is about partisan gerrymandering rather than racial gerrymandering, a concept first alluded to in Gaffney v. Cummings (1973). Gaffney suggested that political gerrymandering might be unconstitutional if it correlates strongly enough to racial demographics as to constitute racial discrimination.[22] The court reasoned that:

> What is done in so arranging for elections, or to achieve political ends or allocate political power, is not wholly exempt from judicial scrutiny under the Fourteenth Amendment...For example,

15 Erwin Chemerinsky discussed *Gill v. Whitford* at a Federalist Society event the author attended in Los Angeles. See also Azam Nizamuddin, John Pcolinski, and Tim Klein, eds., "Supreme Court Review," DCBA Brief | The Journal of The DuPage County Bar Association 30 (October 2017), https://www.dcba.org/mpage/vol301017art3. ("According to Erwin Chemerinsky...'There is really no issue more important than whether partisan gerrymandering should continue.'").

16 Nizamuddin et al, "Supreme Court Review." ("*Gill v. Whitford* is a case which may have implications far beyond Wisconsin.").

17 See, e.g., Wolf, "What the Briefs Say About Extreme Gerrymandering"; Gill, 138 S. Ct. at 1934.

18 S.M., "Justice Kennedy Will Take Centre Stage"; Gill, 138 S. Ct. 1916.

19 See Gwynne Skinner, "Misunderstood, Misconstrued, and Now Clearly Dead: The 'Political Question Doctrine' as a Justiciability Doctrine," Journal of Law and Politics 29 (May 28, 2014): 427.

20 See Marbury v. Madison, 5 U.S. 137 (1803).

21 Baker v. Carr, 369 U.S. 186, 209–10 (1962).

22 Gaffney v. Cummings, 412 U.S. 735, 754 (1973).

> multimember districts may be vulnerable, if racial or political groups have been fenced out of the political process and their voting strength invidiously minimized.[23]

The court still limited its reasoning to racial discrimination though, noting the "impossible task of extirpating politics from what are the essentially political processes of the sovereign States."[24]

In 1986, the court directly addressed partisan gerrymandering for the first time in Davis v. Bandemer. A plurality held that "political gerrymandering cases are properly justiciable under the Equal Protection Clause."[25] The court generally analogized the rationale prohibiting racial gerrymandering to political gerrymandering, explaining "that the claim is submitted by a political group, rather than a racial group, does not distinguish it in terms of justiciability. That the characteristics of the complaining group are not immutable or that the group has not been subject to the same historical stigma…[does] not justify a refusal to entertain such a case."[26] Dissenting, Justice O'Connor instead felt that "members of the Democratic and Republican Parties cannot claim that they are a discrete and insular group vulnerable to exclusion from the political process by some dominant group: these political parties are the dominant groups, and the court has offered no reason to believe that they are incapable of fending for themselves through the political process."[27]

In 2004, the court changed course when a plurality held political gerrymandering is a non-justiciable political question in Vieth v. Jubelirer. The court reasoned that "no judicially discernible and manageable standards for adjudicating political gerrymandering claims have emerged (since Davis). Lacking them, we must conclude that political gerrymandering claims are non-justiciable and that Davis was wrongly decided."[28] But this justiciability holding failed to achieve majority agreement.[29]

In 2006, the court failed to clarify the conflicting Davis and Vieth pluralities. Then, in League of United Latin Am. Citizens v. Perry (2006), the court merely noted that "disagreement persists" as to whether political gerrymandering is justiciable and analyzed the merits because justiciability was not disputed by

23 Gaffney v. Cummings, 412 U.S. at 754 (emphasis added).
24 Gaffney v. Cummings, 412 U.S. at 754.
25 Davis v. Bandemer, 478 U.S. 109, 143 (1986).
26 Davis v. Bandemer, 478 U.S. at 125.
27 Davis v. Bandemer, 478 U.S. at 152 (1986). (O'Connor, J., concurring).
28 Vieth v. Jubelirer, 541 U.S. 267, 281 (2004).
29 See Vieth v. Jubelirer, 541 U.S. at 306 (Kennedy, J., concurring); at 317 (Stevens, J., dissenting); at 343 (Souter, J., dissenting); at 355 (Breyer, J., dissenting).

the parties.[30] The court held that "[they] do not revisit the justiciability holding but do proceed to examine whether appellants' claims offer the court a manageable, reliable measure of fairness for determining whether a partisan gerrymander violates the Constitution."[31] The court reasoned that partisan gerrymandering was inconsistent with both the Fourteenth Amendment's prohibition against invidious discrimination and the First Amendment's protection from retaliation based on political affiliation.[32]

Ostensibly, League of United Latin Am. Citizens (LULAC) left Davis intact, but only because the parties did not dispute justiciability. The Davis and Vieth pluralities provide conflicting answers for whether partisan gerrymandering is justiciable. The Supreme Court's considerable efforts in Gaffney, Bandemer, Vieth, and LULAC do not resolve whether such claims may be brought in cases involving allegations of partisan gerrymandering.[33] Gill thus presented the court with an opportunity to finally clarify the irreconcilable case law, but it remanded the case back to the district court on standing grounds before it could reach the merits.[34] Currently, the justiciability of partisan gerrymandering claims remains unclear.

III. The Political Question Doctrine Must Apply to Partisan Gerrymandering Claims

As a threshold issue in any partisan gerrymandering claim, the court must decide whether partisan gerrymandering is a non-justiciable political question before it proceeds with the rest of the case. The contours of the political question doctrine are poorly defined,[35] but the Supreme Court has explained that "sometimes...the law is that the judicial department has no business entertaining [a] claim...[where] the question is entrusted to one of the political branches or involves no judicially enforceable rights...Such questions are said to be 'nonjusticiable,' or 'political

30 League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 414–15 (2006).

31 League of United Latin Am. Citizens v. Perry, 548 U.S. at 414.

32 League of United Latin Am. Citizens v. Perry, 548 U.S. at 461. (Stevens, J., concurring in part and dissenting in part).

33 Gill, 138 S. Ct. at 1929.

34 Gill, 138 S. Ct. at 1931. ("We leave for another day consideration of other possible theories of harm not presented here and whether those theories might present justiciable claims giving rise to statewide remedies.")

35 See generally Chris Michel, "There's No Such Thing as a Political Question of Statutory Interpretation: The Implications of Zivotofsky v. Clinton," The Yale Law Journal 123, no. 1 (October 2013), https://www.yalelawjournal.org/comment/theres-no-such-thing-as-a-political-question-of-statutory-interpretation-the-implications-of-zivotofsky-v-clinton; Louis Michael Seidman, "'The Secret Life of the Political Question Doctrine' by Louis Michael Seidman," 37 J. Marshall L. Rev. 441-480 (2004), accessed January 5, 2019, https://scholarship.law.georgetown.edu/facpub/563/.

questions.'"[36] The court has outlined six non-exhaustive, independent factors to identify such non-justiciable political questions:

> [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; [2] a lack of judicially discoverable and manageable standards for resolving it; [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; [5] an unusual need for unquestioning adherence to a political decision already made; [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

The doctrine is rooted in both "constitutional and prudential considerations,"[37] as well as "respect for the separation of powers, including the 'proper—and properly limited—role of the courts in a democratic society.'"[38] Case law has also proscribed a nuanced distinction between non-justiciable political questions and cases with political ramifications, the latter of which remains justiciable.[39]

As an initial matter, most cases are not decided by political ideology, but as a matter of law. Justices of different ideologies routinely agree with each other irrespective of political agenda. But this paper explores the "5 percent of cases that are truly difficult,"[40] rather than the 95 percent of run-of-the-mill decisions. Gerrymandering claims are often among those difficult cases because they necessarily involve issues that impact the balance of partisan power in the legislature.

36 Vieth v. Jubelirer, 541 U.S. 267, at 277. (Internal citations omitted).

37 Though unclear, some argue the political question doctrine has evolved to "eliminate judicial consideration of the prudential aspects of the political question doctrine or severely limit the application of Baker's second factor—a lack of judicial standards." Jared Cole, "The Political Question Doctrine: Justiciability and the Separation of Powers," CRS Report (Congressional Research Service, December 23, 2014), https://fas.org/sgp/crs/misc/R43834.pdf, 24.

38 Cole, "The Political Question Doctrine," 1. See also Charles A. Wright and Arthur M. Miller et al., "§ 3534.1 Political Questions—Political Issues and Separation of Powers," in Federal Practice and Procedure, 3rd ed., vol. 13C, 2015. (The political question doctrine is derived from "the conclusion that in the separation of federal powers, certain matters are confined to the political branches").

39 Baker v. Carr, 369 U.S. 186, at 217. ("The doctrine of which we treat is one of 'political questions,' not one of 'political cases.'"). See also Cole, "The Political Question Doctrine"; Gill, 138 S. Ct. at 1931. ("It is important to distinguish the political question doctrine from cases presenting political issues. Courts adjudicate controversies with political ramifications on a regular basis...The political question doctrine applies to issues that courts determine are best resolved within the politically accountable branches of government—Congress or the executive branch.").

40 Neal Devins and Lawrence Baum, "Split Definitive: How Party Polarization Turned the Supreme Court into a Partisan Court," Supreme Court Review 2016 (January 30, 2017), https://papers.ssrn.com/abstract=2432111. (Citing Nomination of John Roberts, 109th Cong, 1st Sess. (Sept 22, 2005), in 151 Cong. Rec. 21032 (remarks of Senator Obama)).

It has been said that for federal judges, "political elections are the devil's domain," and the court should remain cautious when deciding partisan gerrymandering claims.[41] The court should have held in Gill—or should hold in the future—that partisan gerrymandering is a non-justiciable political question due to (1) a lack of judicially-manageable standards for resolving the claim, (2) the proper role of the judiciary within the government, and (3) judicial hyperpartisanship that renders adjudication on the merits inappropriate.

A. Partisan Gerrymandering Claims Lack Judicially-Manageable Standards

The partisan gerrymandering claim in Gill presents a non-justiciable political question because the claim satisfies Baker's second factor of "a lack of judicially discoverable and manageable standards for resolving it,"[42] and because there are "no judicially enforceable rights."[43]

First, the proposed "efficiency gap" solution is not a judicially-manageable standard. It fails to clearly identify the impact of partisan gerrymandering and is a rough approximation at best—Chief Justice Roberts calls it "sociological gobbledygook."[44] Most notably, it fails to distinguish between so-called wasted votes caused by gerrymandering and natural causes.[45] For example, geography is a major cause of wasted votes. [46] Many urban districts overwhelmingly vote Democrat, causing wasted votes that are not the result of partisan gerrymandering.[47] Another problem is that "the efficiency gap is very noisy. It can shift back and forth from cycle to cycle" because voters can simply change their minds and side with a different political party.[48] In Gill, Judge Greisbach's district court dissent pointed out that efficiency gaps measure "change every election based on a number of factors, including the issues raised, quality of local candidates, [waves], turnout, and other natural phenomena such as shifts in demographics."[49] It is not hard to imagine a

41 Ronald K.L. Collins and David K. Skover, The Judge: 26 Machiavellian Lessons (Oxford, New York: Oxford University Press, 2017), 94.
42 Baker v. Carr, 369 U.S. 186, at 217.
43 Vieth v. Jubelirer, 541 U.S. 267, at 277.
44 Oral Argument Tr. at 40, *Gill v. Whitford*, No. 16-1161. (Questioning by Chief Justice Roberts).
45 Nate Cohn and Quoctrung Bui, "How the New Math of Gerrymandering Works," The New York Times, October 3, 2017, sec. The Upshot, https://www.nytimes.com/interactive/2017/10/03/upshot/how-the-new-math-of-gerrymandering-works-supreme-court.html, https://www.nytimes.com/interactive/2017/10/03/upshot/how-the-new-math-of-gerrymandering-works-supreme-court.html.
46 Cohn and Bui, "How the New Math of Gerrymandering Works."
47 Cohn and Bui, "How the New Math of Gerrymandering Works."
48 Cohn and Bui, "How the New Math of Gerrymandering Works."
49 See Whitford v. Gill, 218 F. Supp. 3d at 964. (Greisbach, J., dissenting).

scenario in which voters' partisan preferences change day-to-day if, say, a candidate receives negative publicity. Such a district might then fail the efficiency gap test because of that publicity, not the map.

Second, the claim in Gill does not involve judicially-enforceable rights. Plaintiff-Appellees claim violations of the First and Fourteenth Amendments, which guarantee the rights of an individual, but the district court incorrectly focused on injuries to the Democratic Party as a group.[50] The Supreme Court correctly explained that "the associational harm of a partisan gerrymander is distinct from vote dilution."[51] In one amicus brief, several states[52] pointed out that "the district court's reliance on vote-dilution cases fundamentally misunderstands the difference between those claims regarding individual rights versus the novel group-based right recognized here."[53] Justice Burger also pointed out in Davis that those who believe partisan gerrymandering is justiciable improperly "focus...not on access to the political process as a whole, but entirely on statewide electoral success...[and] whether the complaining political party could be expected to regain control of the state legislature."[54] Many commentators and amici seem to transparently view Gill as a tool for political ends, even advocating to erode Republican power and "regain" Democratic control.[55] The logic has drifted quite far from claims about individual rights. The district court committed a logical leap from protecting individual rights to granting the Democratic party rights as a group and as a result, allowed for judicial manipulation of the balance of political power in the Wisconsin state legislature.

On the other hand, the district court, Plaintiff-Appellees, and some commentators agree that judicially-manageable standards exist. The "efficiency gap" at least provides some sort of metric for courts to apply,[56] unlike previous partisan gerrymandering cases. This test also reduces the analysis to a narrow set of analytical factors, which courts should be able to handle.[57] And big-data computing can provide cutting-edge measurements that did not exist when Vieth suggested

50 Whitford v. Gill, 218 F. Supp. 3d at 853.

51 Gill, 138 S. Ct. at 1938.

52 Note that all of these states except Nevada voted Republican in the 2017 presidential election. See Brief for the States of Texas, Arizona, Arkansas, Indiana, Kansas, Louisiana, Michigan, Missouri, Nevada, Oklahoma, South Carolina, and Utah as Amici Curiae in Support of Appellants, *Gill v. Whitford*, No. 16-1161, 3.

53 Brief for the States of Texas et al., *Gill v. Whitford*, No. 16-1161, 2.

54 Davis v. Bandemer, 478 U.S. at 158. (Burger, J., concurring).

55 Michael Li and Thomas P. Wolf, "Supreme Court Has Historic Chance to End Extreme Gerrymandering," The American Prospect, June 21, 2017, https://prospect.org/article/supreme-court-has-historic-chance-end-extreme-gerrymandering. ("Extreme [political gerrymandering] maps...account for at least 16 and maybe 17 seats in the Republican majority in the House of Representatives. That's a sizeable chunk of the 24 seats Democrats would need to regain control of the House in 2018.").

56 Whitford v. Gill, 218 F. Supp. 3d at 944.

57 Wolf, "What the Briefs Say About Extreme Gerrymandering."

that partisan gerrymandering claims lack judicially-manageable standards. [58] Other commentators believe there are numerous alternatives that are also judicially-manageable.[59]

Although the "efficiency gap" is better than any other test to date, its flaws still render it insufficient. Even if the measurement is considered reliable, the logical solution to eliminate "wasted votes" is a political system of proportional representation.[60] But the court held there is no constitutional requirement for proportional representation, and "equating a party's statewide share of the vote with its portion of the congressional delegation is a rough measure at best."[61] In Davis, the court held that a lack of proportional representation is not enough to prove unconstitutional discrimination.[62] Moreover, hyperefficient "partisan symmetry" erodes the concept of voting districts altogether. The district court in Gill keenly foresaw this criticism by acknowledging the potential extremes of partisan gerrymandering, explaining that "to say that the Constitution does not require proportional representation is not to say that highly dis proportional representation may not be evidence of a discriminatory effect."[63] Appellees instead claim they argue for "partisan symmetry" rather than proportional representation.[64] However,Chief Justice Roberts quipped that it "[sounded] exactly like proportional representation to [him]."[65] While Justice Kennedy expressed a more open mind, asking whether the most egregious instance of partisan gerrymandering might be unconstitutional,[66] the court would still be required to enforce—or at least approach—a system of proportional representation under the "efficiency gap" standard. This leads to another reason for holding that partisan gerrymandering is a non-justiciable political question: it is not the court's place to make such structural changes to the government.

B. The Supreme Court Should Not Overstep Its Proper Role

Prudential considerations also suggest that court should have invoked the political question doctrine in Gill or should invoke it for future partisan gerrymandering

58 See Wolf, "What the Briefs Say About Extreme Gerrymandering." (Stating there are "two factors [that] would narrow down the range of potentially unconstitutional maps to just a handful this cycle").

59 Wolf, "What the Briefs Say About Extreme Gerrymandering."

60 Whitford v. Gill, 218 F. Supp. 3d at 904. ("In a purely proportional representation system, a party would be expected to pick up votes and seats at a one-to-one ratio.").

61 See Oral Argument Tr. at 41, *Gill v. Whitford*, No. 16-1161. (Questioning by Chief Justice Roberts) ("Proportional representation . . . has never been accepted as a political principle in the history of this country."). See also League of United Latin Am. Citizens v. Perry, 548 U.S. at 419.

62 Davis v. Bandemer, 478 U.S. at 132.

63 Whitford v. Gill, 218 F. Supp. 3d at 906.

64 Oral Argument Tr. at 41, *Gill v. Whitford*, No. 16-1161.

65 Oral Argument Tr. at 41, *Gill v. Whitford*, No. 16-1161.

66 Oral Argument Tr. at 26, *Gill v. Whitford*, No. 16-1161.

claims. Satisfying Baker's fourth element, it would be impossible to reach an "independent resolution without expressing lack of the respect [towards other] branches of government."[67] The political question doctrine defines the court's proper role within the federal government.[68] The framers of the United States Constitution did not design the judiciary as a political body;[69] they intended the court to be "insulated from the chaotic politics that consume the executive and legislative branches of government."[70] Congress, not the court, should maintain "complete control over the amendment process," and court decisions should not function as constitutional amendments.[71]

Deciding Gill on its merits would fall outside of the court's appropriate place within the government structure. Thirteen of the fifteen states with voting districts that fail the "efficiency gap" standard in 2018 are Republican states.[72] Implementing that standard thus reflects a willingness for the judiciary to actively reshape the nation's balance of political power towards one party in particular. This plainly falls beyond the proper role of the judiciary—even the district court, which felt it had standing to hear the case, acknowledged that "state legislative apportionment is the prerogative and therefore a duty of the state government."[73] Instead, the legislature is the proper forum to address partisan gerrymandering. By answering political questions such as partisan gerrymandering claims, the court would discourage the proper legislative process, almost enabling legislative dysfunction.

In addition, adjudicating partisan gerrymandering claims falls outside of the framers' designed role for the court. In the American two-party political system, partisan gerrymandering claims are inherently political, because revoking political power from one party automatically shifts power to the other party. In this respect, affirming the district court would be an undemocratic fix to a democratic problem, where judges determine the outcome of politically-divided elections—therefore creating "appointed" or "unelected" congressmembers. In Gill, the Supreme Court said it must apply a standard that "ensures that [they] act as judges, and do not engage in policymaking properly left to elected representatives."[74] Then, in Davis, Justice Burger said "the Court offers not a shred of evidence to suggest, that the Framers of the Constitution intended the judicial power to encompass the making

67 See Baker v. Carr, 369 U.S. at 217.

68 See Baker v. Carr, 369 U.S. at 278.

69 See, e.g., Alexander Hamilton, "Federalist No. 78: The Judiciary Department," May 28, 1788, http://avalon.law.yale.edu/18th_century/fed78.asp.

70 Lucas Rodriguez, "The Troubling Partisanship of the Supreme Court," Stanford Politics (blog), January 7, 2016, https://stanfordpolitics.org/2016/01/07/troubling-partisanship-supreme-court/.

71 Wright and Miller et al., "§ 3534.1 Political Questions—Political Issues and Separation of Powers."

72 Cohn and Bui, "How the New Math of Gerrymandering Works."

73 Whitford v. Gill, 218 F. Supp. 3d at 883.

74 *Gill v. Whitford*, 138 S. Ct. at 1923. (Emphasis in original).

of such fundamental choices about how this Nation is to be governed."[75] To the contrary, Alexander Hamilton in Federalist No. 78 wanted the judiciary to be the "least dangerous" political branch, whereby judges would act with "neither force nor will."[76] And James Madison in Federalist No. 51 explained that "legislative authority necessarily predominates" the judiciary,[77] suggesting that legislative resolution to partisan gerrymandering is more appropriate than judicial resolution.

But there is another possibility: maybe the court is the perfect place to address partisan gerrymandering. It's not hard to imagine that voters and the legislature cannot properly fix the issue themselves. Citizens may not be able to vote the gerrymandering party out of office if the maps are too heavily skewed.[78] Their votes cannot fix partisan gerrymandering; their votes are defined by partisan gerrymandering. In that sense, court intervention seems appropriate because although the issue falls outside of the court's role, the other branches either cannot or will not fix the problem. Political gerrymandering may also exacerbate partisan gridlock throughout the nation,[79] so court intervention appears appropriate to surpass a paralyzed legislature. Others are also concerned that the negative effects of partisan gerrymandering will worsen if not reversed, given the precision and influence of big data technology.[80]

Although these are important considerations, they operate on the assumption that the Constitution grants a right to protection from another political party, and, even if it does, the court is able to proscribe manageable standards to protect that right. In Gill, the Supreme Court explained that its "power as judges to 'say what the law is'...rests not on the default of politically accountable officers."[81] On balance, it is simply improper and unworkable "to inject the courts into the most heated partisan issues."[82]

75 Davis v. Bandemer, 478 U.S. at 145. (Burger, J., concurring).

76 Hamilton, Oral Argument Tr. at 41, *Gill v. Whitford*, No. 16-1161. ("The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever."). See also Collins & Skover, The Judge.

77 James Madison, "The Federalist #51," February 6, 1788, http://constitution.org/fed/federa51.htm.

78 Li & Wolf, "5 Things to Know About the Wisconsin Partisan Gerrymandering Case."

79 A bipartisan group of 36 members of Congress, "have decried partisan gerrymandering as 'a substantial cause of the dysfunction of contemporary politics.'" "Bipartisan Support for Whitford | Brennan Center for Justice," Brennan Center for Justice, accessed January 6, 2019, https://www.brennancenter.org/bipartisan-support-whitford.

80 Wolf, "What the Briefs Say About Extreme Gerrymandering."

81 *Gill v. Whitford*, 138 S. Ct. at 1929.

82 Davis v. Bandemer, 478 U.S. at 145. (O'Connor, J., dissenting), (emphasis added).

C. Judicial Hyper Partisanship Renders Adjudication on the Merits Inappropriate

There are legitimate concerns that the court cannot prevent its own bias and achieve an "independent resolution," again satisfying Baker's fourth factor.[83] Failing to invoke the political question doctrine would demonstrate a "lack of respect" for the Wisconsin state legislature, because the Justices could not redesign Wisconsin's legislature without imposing their own ideologies.

Alternatively, this piece proposes that "judicial hyper-partisanship rendering adjudication inappropriate" functions as a new factor for determining non-justiciable political questions. This proposed factor would (1) be consistent with the Baker factors, (2) function as a "prudential consideration" which is one aspect of the political question doctrine[84], and (3) fit seamlessly into the political question doctrine's overall purpose to ensure the proper role of the court. While this proposition deserves full discussion at another time, it highlights the fact that the court could proffer an entirely new justification for invoking the political question doctrine, since the six Baker factors are non-exhaustive.[85]

Irrespective of which "factor" applies, partisan polarization is increasing at all levels of government.[86] A highly-politicized Supreme Court is relatively new, though: "before 2010, the Court never had clear ideological blocs that coincided with party lines."[87] Authorities like Richard Posner now believe "the Supreme Court is not an ordinary court but a political court...strongly influenced in making its decisions by the political beliefs of the judges."[88] And empirical evidence proves this. Justices now vote along party lines more frequently in politically-charged cases. Less than two percent of the court's decisions were 5-4 between 1801 and 1940, but in 2005, this rate topped 20 percent[89] and even spiked to 30 percent in 2006 and 2008.[90] The Senate's Supreme Court confirmation process is another indicator: the four most senior Justices on the court received less than 21 negative votes on average, while the five newest Justices received more than 40 negative

83 Baker v. Carr, 369 U.S. at 217.

84 See Zachary Baron Shemtob, "The Political Question Doctrines: Zivotofsky v. Clinton and Getting Beyond the Textual–Prudential Paradigm," The Georgetown Law Journal 4 (2016): 1013-7.

85 See Baker v. Carr, 369 U.S. at 217.

86 Rodriguez, "The Troubling Partisanship of the Supreme Court."

87 Devins and Baum, "Split Definitive," 301.

88 Richard Posner, "The Supreme Court Is a Political Court. Republicans' Actions Are Proof.," Washington Post, March 9, 2016, https://www.washingtonpost.com/opinions/the-supreme-court-is-a-political-court-republicans-actions-are-proof/2016/03/09/4c851860-e142-11e5-8d98-4b3d9215ade1_story.html. (Discussing Republicans senators' decision to not consider President Obama's nominations to the Supreme Court).

89 Rodriguez, "The Troubling Partisanship of the Supreme Court"; David Paul Kuhn, "The Incredible Polarization and Politicization of the Supreme Court," The Atlantic, June 29, 2012, https://www.theatlantic.com/politics/archive/2012/06/the-incredible-polarization-and-politicization-of-the-supreme-court/259155/.

90 Kuhn, "The Incredible Polarization and Politicization of the Supreme Court."

votes on average.[91] The recent cases of Judge Garland, Justice Gorsuch, and Justice Kavanaugh likewise illustrate how judicial office now seems defined by partisanship from the start.[92]

Hyperpartisan judicial decisions are detrimental to a well-functioning judiciary. Chief Justice Roberts has expressed concern that the increase in 5-4 decisions erodes the public's confidence in the court "as a partisan institution," threatening its credibility and legitimacy.[93] Lawyers have also started preying on the Justices' partisanship, as "more and more appellate litigators have come to appreciate that the federal 'courts are a sort of untapped resource for pursuing [a political party's] agenda.'"[94]

On the other hand, maybe the court could have decided Gill on the merits without the bias seen in recent decades.[95] For example, the National Association for the Advancement of Colored People (NAACP) asserts that "gerrymandering isn't just a political fight between the parties...'both Democratic and Republican legislatures have used the power of the state to enact extreme partisan gerrymanders.'"[96] At least one poll shows bipartisan voter consensus against partisan gerrymandering.[97] And several Republicans—not just Democrats—publicly advocate against it.[98] For example, a group of Republicans including Arnold Schwarzenegger, John Kasich, and Bob Dole filed an amicus brief asserting that if the "Court does not stop partisan gerrymanders, partisan politicians will be emboldened to enact ever more egregious gerrymanders...That result would be devastating for our democracy."[99]

Alternatively, maybe adjudicating the merits would not have displayed a lack of respect for Wisconsin's legislature because the current Justices are not

91 Rodriguez, "The Troubling Partisanship of the Supreme Court."

92 Jessica Yarvin and Daniel Bush, "Is the Hyper-Partisan Supreme Court Confirmation Process 'the New Normal'?" PBS NewsHour, September 13, 2018, https://www.pbs.org/newshour/nation/is-the-hyper-partisan-supreme-court-confirmation-process-the-new-normal.

93 Jeffrey Rosen, "The Supreme Court Has a Legitimacy Crisis, But Not For the Reason You Think |," New Republic, June 11, 2012, https://newrepublic.com/article/103987/the-supreme-court-has-legitimacy-crisis-not-the-reason-you-think. But other studies suggest Justice Roberts may be wrong on this point, because most Americans don't know or understand the political allegiances of the Justices.

94 Collins & Skover, The Judge, xiii.

95 See Devins & Baum, Devins and Baum, "Split Definitive," 314.

96 Wolf, "What the Briefs Say About Extreme Gerrymandering." Note also, this is not completely correct. See Cohn & Bui, "How the New Math of Gerrymandering Works," (showing that nearly all maps violating the "efficiency gap" are Republican districts).

97 Li & Wolf, "Supreme Court has Historic Chance to End Extreme Gerrymandering." ("The most recent Harris poll shows that 74 percent of Republicans, 73 percent of Democrats, and 71 percent of independents believe that politicians shouldn't have a hand in drawing lines that benefit them.").

98 See generally Brief of Republican Statewide Officials as Amici Curiae in Support of Appellees, *Gill v. Whitford*, No. 16-1161. See also Wolf, "What the Briefs Say About Extreme Gerrymandering."

99 Brief of Republican Statewide Officials as Amici Curiae in Support of Appellees, *Gill v. Whitford*, No. 16-1161. See also Wolf, "What the Briefs Say About Extreme Gerrymandering."

to blame for hyper-partisanship. Decades ago, the court said that "politics and political considerations are inseparable from districting and apportionment...The reality is that districting inevitably has and is intended to have substantial political consequences."[100] Others assert that judicial impartiality is a myth[101] and that law is unavoidably political.[102] Yet more argue that "judges are inevitably political actors, and hence their decisions are ultimately based on their ideological convictions."[103] If partisanship is unavoidable, maybe the court should have decided Gill on its merits anyway.

It is also unclear that invoking the political question doctrine actually eliminates the negative effects of a political decision. Just as adjudication on the merits favors the plaintiff's political party and disfavors the defendant's party, not ruling on the merits favors the defendant's party and disfavors the plaintiff's party. In other words, evading the merits of Gill—perhaps under the guise of the political question doctrine—is still a political maneuver.[104] Some case law demonstrates that declining to rule still yields a victor and shapes policy.[105] Nevertheless, passive political maneuvers are at least more palatable than active political maneuvers. Even if the political question doctrine is invoked as a political tool, it cannot be completely arbitrary, because Justices are constrained to provide coherent legal reasoning behind their decisions.[106]

On balance, the court should have held in Gill, or should hold in the future, that partisan gerrymandering is a non-justiciable political question, because judicial hyperpartisanship renders the issue inappropriate for judicial resolution—even though there is bipartisan support, hyperpartisanship is not the court's fault, and the political question doctrine itself resembles a political maneuver. The best advice comes from Justice O'Connor, who, looking back on Bush v. Gore, expressed regret for not invoking the political question doctrine, explaining that "maybe the Court should have said, 'We're not going to take it, goodbye'" and that the case "'stirred up the public' and 'gave the Court a less than perfect reputation.'"[107]

100 Gaffney v. Cummings, 412 U.S. at 753.

101 Collins & Skover, The Judge, 15.

102 Collins & Skover, The Judge, xii–xiii. ("Law is political. . . . Whatever the political stripes, the charge is always the same: Judge-made law has become politicized.").

103 Cass R. Sunstein, "Moneyball for Judges," The New Republic, April 10, 2013, https://newrepublic.com/article/112683/moneyball-judges.

104 See Shemtob, "The Political Question Doctrines"; Madison, "The Federalist #51."

105 Collins & Skover, The Judge, 33.

106 Shemtob, "The Political Question Doctrines," 1027.

107 Jeffrey Toobin, "Justice O'Connor Regrets," The New Yorker, May 6, 2013, https://www.newyorker.com/news/daily-comment/justice-oconnor-regrets.

IV. Refuting the Alternative of Ruling on the Merits

Two rationales might support the decision to ignore the political question doctrine and address the merits in Gill, neither of which were reached because the court remanded the case on standing grounds.[108] First, Gill might not involve a political question at all. The court could have held that the "efficiency gap" analysis provides a judicially manageable standard, prudential considerations are irrelevant, and hyperpartisanship will not affect the outcome. Some even argue the political question doctrine does not exist at all.[109] Second, Gill might involve a political question that the court should have addressed anyway—akin to a "justiciable political question." The court has confronted contentious political questions before.[110] Bush v. Gore (2000) is perhaps most analogous, because it determined the outcome of a political election under the Equal Protection and Due Process clauses. There, the court ignored the political question doctrine, even though the case had high-profile and partisan implications.[111] Others argue this case taught judges the art of political manipulation under the guise of apolitical judiciousness."[112] Thus, cases like Bush v. Gore may have set precedent for the court to ignore the political question doctrine in Gill.

Regardless of the rationale for ignoring the political question doctrine, the merits of Gill implicate the Fourteenth and First Amendments.

A. The Fourteenth Amendment Claim

Plaintiff-Appellants claimed that partisan gerrymandering violates their Fourteenth Amendment rights.[113] The Equal Protection Clause of the Fourteenth Amendment[114] "guarantees the opportunity for equal participation by all voters in the election of state legislators."[115] In the context of voting districts, it requires that "seats in both houses of a bicameral state legislature must be apportioned on a

108 *Gill v. Whitford*, 138 S. Ct. at 1937–38.

109 See Michel, "There's No Such Thing as a Political Question of Statutory Interpretation," 143–44.

110 See D.C. v. Heller, 554 U.S. 570, 603 (2008). See also Collins & Skover, The Judge, 71: ("Originalism, textualism, historicism—they were all isms perfectly suited to Justice Scalia's conservative constitutional jurisprudence.").

111 Collins & Skover, The Judge; Cole, "The Political Question Doctrine," 94.

112 Collins & Skover, The Judge, 102.

113 Complaint, p. 24–27, Whitford v. Gill, 218 F. Supp. 3d 837.

114 "Constitution of the United States - Amendment XIV" (United States Senate), accessed January 6, 2019, https://www.senate.gov/civics/constitution_item/constitution.htm#amendments.

115 Reynolds v. Sims, 377 U.S. 533, 565–66 (1964).

population basis."[116] This protects the "one-person, one-vote" principle enshrined in the Equal Protection Clause.[117] More specifically, partisan gerrymandering "may" create unconstitutional districts if political groups (1) have been "fenced out of the political process," and (2) have had their voting strength "invidiously minimized."[118] The purpose is to achieve "fair and effective representation" for all citizens.[119]

First, there are credible arguments that voters have been fenced out of the political process, and the alleged "wasted votes" seem to violate the "one-person, one-vote" standard. At oral argument, Justice Ginsburg focused on partisan gerrymandering's effect of denying individuals of "the precious right to vote," expressing concern that "if you can stack a legislature in this way, what incentive is there for a voter to exercise his vote?...The result is preordained in most of the districts. Isn't that -- what becomes of the precious right to vote?"[120] On the other hand, it is more persuasive that partisan gerrymandering does not violate the "one person, one vote" principle, because Plaintiff-Appellants unavoidably seek damages to the Democratic party as a whole,[121] not to "one person." Unlike the constitutional right to protection from racial gerrymandering, which specifically targets and harms individuals based on their human identity, regardless of who they vote for, partisan gerrymandering is inextricably intertwined with the outcome of a political party rather than individuals who can change their voting preference at any time.

Second, Wisconsin's map seems to satisfy Gaffney's "invidious" requirement, because it was designed to fix future elections and "the goal of the map...was to 'determine who's here 10 years from now.'"[122] This "invidious" trend seems to occur in districts nationwide too, generally hurting Democrats more than Republicans.[123] Commentators note that "the Supreme Court has also picked up on the widespread agreement and has often assumed, at least implicitly, that the drawing of majority-minority districts comes at a cost for the Democratic Party."[124]

Even if partisan gerrymandering seems "invidious" towards Democrats, it is not unconstitutional unless shown to have fenced voters out of the political process. As discussed in Section III, these claims present a lack of judicially-manage-

116 Reynolds v. Sims, 377 U.S. at 568.
117 Whitford v. Gill, 218 F. Supp. 3d at 844. See also Reynolds v. Sims, 377 U.S. at 558.
118 Gaffney v. Cummings, 412 U.S. at 754 (emphasis added).
119 Reynolds v. Sims, 377 U.S. at 565–66.
120 Oral Argument Tr. at 24, *Gill v. Whitford*, No. 16-1161. (Questioning by Justice Ginsburg).
121 See, e.g., Complaint, p. 2, Whitford v. Gill, 218 F. Supp. 3d 837. ("Extreme partisan gerrymandering is also contrary to core democratic values because it enables a political party to win more legislative districts.") (emphasis added).
122 Whitford v. Gill, 218 F. Supp. 3d at 853.
123 See Cohn & Bui, "How the New Math of Gerrymandering Works."
124 Adam B. Cox and Richard T. Holden, "Reconsidering Racial and Partisan Gerrymandering," The University of Chicago Law Review 78, no. 2 (2011): 560.

able standards to make such a determination. Even if such measurements like the "efficiency gap" are accepted, their use falls outside of the court's proper role in the government, and even if it falls within the court's proper role, judicial hyperpartisanship makes such a determination inappropriate. Thus, adjudicating Gill under the Fourteenth Amendment inevitably circles back to the rationale for invoking the political question doctrine in the first place.

The First Amendment Claim

The plaintiffs also argued that partisan gerrymandering caused "wasted votes" and diluted voting power, "unreasonably burden[ing] their First Amendment rights of association and free speech."[125] The First Amendment states that "Congress shall make no law...abridging the freedom of speech...or the right of the people peaceably to assemble,"[126] and protects individuals from infringement by the states.[127] The court has held that "in the context of partisan gerrymandering...First Amendment concerns arise where an apportionment has the purpose and effect of burdening a group of voters' representational rights,"[128] bearing resemblance to the Fourteenth Amendment's "invidious" and "fencing out" elements.

A First Amendment analysis at least semantically alleviates problems associated with the Fourteenth Amendment analysis—particularly with respect to prudential considerations and judicial hyperpartisanship. Under a First Amendment analysis, the court would ensure the voting process is fair for all voters, rather than directly comparing the "equality" of two political parties at large. Thus, the court would not have purported to analyze or manipulate the balance of partisan power in Wisconsin's legislature. By extension, risks associated with judicial hyperpartisanship seem to disappear as well.

However, the outcome would have remained the same under the First Amendment—one party wins and one party loses. Justices who wish to manipulate the balance of partisan power could still do so, just under the guise of another constitutional provision. Still, the First Amendment analysis is more appealing than the Fourteenth, because even if the court alters the balance of power, at least it will not be blatant, mitigating concerns about the court's public reputation and the appearance of bias.[129]

Most significantly, the First Amendment would not alleviate the lack of judicially-manageable standards. Measuring the effect of partisan gerrymandering under the First Amendment still requires calculations like the "efficiency gap."

125 Complaint, p. 2, Whitford v. Gill, 218 F. Supp. 3d 837.

126 "Constitution of the United States - Amendment I" (United States Senate), accessed January 6, 2019, https://www.senate.gov/civics/constitution_item/constitution.htm#amendments.

127 Williams v. Rhodes, 393 U.S. 23, 30–31 (1968).

128 Vieth v. Jubelirer, 541 U.S. at 314.

129 See Kuhn, "The Incredible Polarization and Politicization of the Supreme Court."

Like the Fourteenth Amendment analysis, the First Amendment analysis inevitably circles back to the rationale for holding that partisan gerrymandering is a non-justiciable political question.

VI. The Supreme Court's Ethical Obligations in Gill v. Whitford

There aren't any—at least, not prescribed by law.

All federal judges, except Supreme Court Justices, are bound by the Code of Conduct for United States Judges,[130] which provides pertinent guidance in Gill: Canon 1 states "[a] Judge Should Uphold the Integrity and Independence of the Judiciary," Canon 2 states "[a] Judge Should Avoid Impropriety and the Appearance of Impropriety in all Activities...A judge should not allow...political... relationships to influence judicial conduct or judgment," and Canon 5 states "[a] Judge Should Refrain from Political Activity."[131] The Code is further buttressed by sections of the non-binding American Bar Association (ABA) Model Code of Judicial Conduct, such as Rule 2.3, which provides that "[a] judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice... including but not limited to...political affiliation."[132] And Rule 2.4 further complements that "[a] judge shall not permit...political...interests or relationships to influence the judge's judicial conduct or judgment."[133]

The ABA Code of Judicial Conduct does not apply to the Supreme Court, however.[134] Several Justices have stated they follow it regardless,[135] and all Justices take the Judicial Oath of Office, swearing to "faithfully and impartially discharge and perform all the duties incumbent upon [them]."[136] But the Code remains non-binding and the Oath of Office does not create an enforcement mechanism once Justices take office.

The Code thus provides persuasive support for invoking the political question doctrine in Gill. Manipulating the balance of political power in a state legislature would erode the integrity and independence of the judiciary,[137] violating Canon 1. Adjudicating the merits of the claims to propel political agendas would be neither independent nor impartial, violating Canons 2 and 5. Allowing such

130 The Code omits the Supreme Court from coverage. See "Code of Conduct for United States Judges | 69 F.R.D. 273," United States Courts, 1973, https://www.uscourts.gov/judges-judgeships/code-conduct-united-states-judges. ("This Code applies to United States circuit judges, district judges, Court of International Trade judges, Court of Federal Claims judges, bankruptcy judges, and magistrate judges.").

131 "Code of Conduct for United States Judges | 69 F.R.D. 273," United States Courts.

132 American Bar Association, "Model Code of Judicial Conduct," August 16, 2018, https://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct/.

133 American Bar Association, "Model Code of Judicial Conduct."

134 See "Code of Conduct for United States Judges | 69 F.R.D. 273," United States Courts.

135 "Supreme Court Justices and the Code of Conduct," Judicature 95, no. 4 (2011).

136 "Text of the Oaths of Office for Supreme Court Justices," supremecourt.gov, accessed January 6, 2019, https://www.supremecourt.gov/about/oath/textoftheoathsofoffice2009.aspx.

137 See discussion supra Part III.C.

political bias to influence the decision-making process also stands in the face of ABA Rules 2.3 and 2.4. And under Canon 5, this all would apply whether or not political agendas are the underlying motivation, simply because it would appear improper.

Although the Code does not apply to the Supreme Court, the existence of scribed rules isn't the point of ethics. As Judge Alex Kozinski puts it, "we'd all be better off in a world with fewer rules and a more clear-cut understanding that impartiality and diligence are obligations that permeate every aspect of judicial life—obligations that each judge has the unflagging responsibility to police for himself."[138] Justices should be held to the highest moral and ethical standards, guided by their own moral compass, even if not required by rule. It's true that if determined to do so, the Justices can find a way to apply or not apply the political question doctrine to further their political agenda in partisan gerrymandering cases—if that is their goal.[139] But if they wish to invoke the political question doctrine, ethical principles support them.

Conclusion

After decades of debate and contradictory Supreme Court decisions, *Gill v. Whitford* presented an opportunity for the Supreme Court to clarify whether partisan gerrymandering is justiciable. The court should have held that partisan gerrymandering is a non-justiciable political question, due to a lack of judicially-manageable standards, the proper role of the judiciary, and judicial hyper-partisanship. Furthermore, alternatives under the First and Fourteenth Amendments carry implications that inevitably circle back to the rationale for invoking the political question doctrine in the first place. While the court is not bound by ethical rules, general ethical principles should have guided the Justices' own moral compass towards the political question doctrine.

Partisan gerrymandering claims, like those presented in *Gill v. Whitford*, can be analyzed under both the political question doctrine or the First and Fourteenth Amendments. Those analyses lead to drastically different consequences for American politics: adopting the political question analysis would ultimately favor the Republican party, while adopting the First Amendment analysis would ultimately favor the Democratic party. The prevailing analysis has the power to permanently alter the American political landscape.

138 Alex Kozinski, "The Real Issues of Judicial Ethics," Hofstra Law Review 32, no. 4 (January 1, 2004), https://scholarlycommons.law.hofstra.edu/hlr/vol32/iss4/1, 1106.

139 Kozinski, "The Real Issues of Judicial Ethics," 1105. ("A judge can appear to act ethically and still betray his responsibility in essential respects, and in ways that no one will ever know about.").

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