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#### The role of the ballot is to determine the efficacy of a topical proposal relative to the status quo or a competing option.

#### The ‘core’ antitrust laws are Sherman, Clayton, and FTC

Michael A. Rataj 21, PC, Law Degree from the Detroit College of Law, “Consequences for Breaking Antitrust Laws”, 5/12/2021, https://www.michaelrataj.com/blog/2021/05/consequences-for-breaking-antitrust-laws/

The core antitrust laws are…

The three core antitrust laws are the Sherman Act, the Federal Trade Commission Act and the Clayton Act. The Sherman Act primarily prohibits unreasonable restraint of trade and monopolization. Those who are in violation of the Sherman Act may face hefty fines, up to $100 million, and up to 10 years behind bars.

The FTC Act prohibits unfair practices or acts and unfair approaches to harming competition. Only the FTC can file cases under this act. The Clayton Act is a catch-all that covers every practice not covered by the Sherman and FTC Acts. Then consequences for violations of both of these acts are usually civil in nature.

#### ‘Expanding the scope’ must increase the area covered by antitrust law

Cesar A. Noble 17, Judge on the Connecticut Superior Court, Hartford Judicial District, 777 Residential, LLC v. Metro. Dist. Comm'n, 2017 Conn. Super. LEXIS 4178, \*4-5 (Conn. Super. Ct. August 1, 2017), 8/1/2017, Lexis

The defendant relies upon §7-249 as authority for the supplemental assessment. The statute provides that "[b]enefits to buildings or structures constructed or expanded after the initial assessment may be assessed as if the new or expanded buildings or structures had existed at the time of the initial assessment." The parties dispute whether the conversion of the property constitutes a construction or expansion of buildings or structures granting authority to the defendant to levy a supplemental assessment. The plaintiff argues that because the conversion did not constitute an expansion, that is, an increase in the volume or physical area of a building the defendant had no authority under §7-249 for the supplemental assessment. 5 In the view of the plaintiff it is significant that the conversion did not increase the physical footprint or interior square footage of the property in any way including by a vertical [\*5] enlargement. Absent such an increase, asserts the plaintiff, there can be no construction or expansion of any building or structure. The defendant assert that the construction of the 285 new residential units constitute new structures within the plain meaning of §7-249. The court agrees with the defendant.

[FOOTNOTE]

5 The plaintiff relies upon the definition of the word "expand" found in Merriam-Webster's Collegiate Dictionary (10th ed. 2002) of "to open up; to increase the extent, number, volume, or scope of."

#### Violation---the affirmative doesn’t defend prohibitions on anticompetitive business practices by the private sector by at least expanding the scope of its core antitrust laws.

#### The impact is clash---debates about scholarship in a vacuum are myopic and breed reactionary generics---they allow the aff to cement their infinite prep advantage, because all the aff has to do is find evidence supporting an ideological orientation towards the world---this crushes clash because all of our prepared negative strategies are based on praxis, and by not defending a clear actor and mechanism we lose 90% of negative ground, and the aff still retains traditional competition standards like perms to make being neg impossible---clash is an intrinsic good and it’s vital to the overall practice of debate. Every debater is here for different reasons, but they trace back to the pedagogical uniqueness of the space. An open topic prevents iteration through shallow debates, unpredictable advocacies, and lack of testing.

### OFF---Pharma DA

#### The plan creates a rippling, cross-industry effect that wrecks pharma innovation

Dr. Douglas Holtz-Eakin 21, Ph.D. in Economics from Princeton University, President of the American Action Forum, and B.A. in Economics and Mathematics from Denison University, “Losing Focus on Antitrust”, American Action Forum – The Daily Dish, 2/11/2021, https://www.americanactionforum.org/daily-dish/losing-focus-on-antitrust/

The point of antitrust law is to ensure that markets deliver the maximal possible benefits to Americans. Specifically, a prime tenet of competition policy is the consumer welfare standard. Vigorous market competition ensures that no firm is able to exploit consumers. Testing whether a business practice, merger, or acquisition diminishes consumer welfare is the right bottom line for checking on the quality of competition.

It is troubling, then, that Senator Amy Klobuchar introduced the Competition and Antitrust Law Enforcement Reform Act (CALERA), the first significant bill regarding potential changes to antitrust law in the 117th Congress. As AAF’s Jennifer Huddleston points out, most of the attention around competition is usually focused on Big Tech and the notion of a “kill zone” that allows Big Tech companies to gobble up competitors before they can rise to challenge the dominance of giants. Unfortunately, the kill zone is a fiction and the significant, deleterious changes in CALERA would apply economy-wide.

Among CALERA’s proposed changes are three important and troublesome aspects. The first is removing the need for enforcers to define the market in which a company is accused of acting anti-competitively. To the non-lawyer, this change is baffling. In absence of identifying the goal, how can enforcement authorities identify the impact that behavior has on competition for that goal? Competition is for something – a gold medal, a promotion, or the sale of a good or service. Identifying the market defines the goal, so leaving out any definition of the market leaves undefined the nature of the competition. This definition is often a critical point of debate in current antitrust cases, so eliminating the need for it gives enforcers a substantial advantage over firms.

The second change is to weaken the consumer welfare standard. Specifically, per Huddleston, “it would change the government’s requirement from proving that a merger would substantially lessen competition (and thereby reduce consumer options) to showing only that a merger would ‘create an appreciable risk of materially lessening competition.’” This is like changing the legal standard from “beyond reasonable doubt” to “beyond all doubt”; after all, there is always a risk of something. As a result, the regulatory cost for any merger would rise significantly, likely deterring even beneficial ones.

Finally, CALERA would change the burden of proof in analyzing the competitive impacts of mergers and acquisitions. This is literally a simple as switching from “innocent until proven guilty” to “guilty until you can prove you are innocent.” Not only does this again make beneficial mergers more difficult, but such a change flies in the face of the entire American legal tradition.

Why should one care about these changes? One can’t do the needed rigorous analysis of competitive behavior without a definition of the market; this change would allow decisions based on all sorts of ancillary considerations. The latter two are particularly harmful in markets (such as the technology or pharmaceutical sectors) where it is often difficult for anyone to predict where rapid changes may fundamentally change the market itself and where the role of mergers and acquisitions is misunderstood. This is a risk under the current standards, but under the proposed changes it could lead to a chilling effect or bureaucratic denial of mergers that would actually benefit consumers.

The current standards focus antitrust on clearly defined markets, the quality of competition in those markets, and the resulting consumer benefits. Losing focus on consumer welfare is tantamount to losing the rudder on a ship; who knows where it ends up?

#### Pharma innovation stops extinction from natural disease and bioweapons

Dr. Piers Millett 17, PhD, Senior Research Fellow at the University of Oxford, Future of Humanity Institute, and Andrew Snyder-Beattie, MS, Director of Research at the University of Oxford, Future of Humanity Institute, “Existential Risk and Cost-Effective Biosecurity”, Health Security, Volume 15, Number 4, 8/1/2017, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5576214/

Abstract

In the decades to come, advanced bioweapons could threaten human existence. Although the probability of human extinction from bioweapons may be low, the expected value of reducing the risk could still be large, since such risks jeopardize the existence of all future generations. We provide an overview of biotechnological extinction risk, make some rough initial estimates for how severe the risks might be, and compare the cost-effectiveness of reducing these extinction-level risks with existing biosecurity work. We find that reducing human extinction risk can be more cost-effective than reducing smaller-scale risks, even when using conservative estimates. This suggests that the risks are not low enough to ignore and that more ought to be done to prevent the worst-case scenarios.

Keywords: : Biothreat, Catastrophic risk, Existential risk, Cost-effectiveness, Cost-benefit analysis

How worthwhile is it spending resources to study and mitigate the chance of human extinction from biological risks? The risks of such a catastrophe are presumably low, so a skeptic might argue that addressing such risks would be a waste of scarce resources. In this article, we investigate this position using a cost-effectiveness approach and ultimately conclude that the expected value of reducing these risks is large, especially since such risks jeopardize the existence of all future human lives.

Historically, disease events have been responsible for the greatest death tolls on humanity. The 1918 flu was responsible for more than 50 million deaths,1 while smallpox killed perhaps 10 times that many in the 20th century alone.2 The Black Death was responsible for killing over 25% of the European population,3 while other pandemics, such as the plague of Justinian, are thought to have killed 25 million in the 6th century—constituting over 10% of the world's population at the time.4 It is an open question whether a future pandemic could result in outright human extinction or the irreversible collapse of civilization.

A skeptic would have many good reasons to think that existential risk from disease is unlikely. Such a disease would need to spread worldwide to remote populations, overcome rare genetic resistances, and evade detection, cures, and countermeasures. Even evolution itself may work in humanity's favor: Virulence and transmission is often a trade-off, and so evolutionary pressures could push against maximally lethal wild-type pathogens.5,6

While these arguments point to a very small risk of human extinction, they do not rule the possibility out entirely. Although rare, there are recorded instances of species going extinct due to disease—primarily in amphibians, but also in 1 mammalian species of rat on Christmas Island.7,8 There are also historical examples of large human populations being almost entirely wiped out by disease, especially when multiple diseases were simultaneously introduced into a population without immunity. The most striking examples of total population collapse include native American tribes exposed to European diseases, such as the Massachusett (86% loss of population), Quiripi-Unquachog (95% loss of population), and the Western Abenaki (which suffered a staggering 98% loss of population).9

In the modern context, no single disease currently exists that combines the worst-case levels of transmissibility, lethality, resistance to countermeasures, and global reach. But many diseases are proof of principle that each worst-case attribute can be realized independently. For example, some diseases exhibit nearly a 100% case fatality ratio in the absence of treatment, such as rabies or septicemic plague. Other diseases have a track record of spreading to virtually every human community worldwide, such as the 1918 flu,10 and seroprevalence studies indicate that other pathogens, such as chickenpox and HSV-1, can successfully reach over 95% of a population.11,12 Under optimal virulence theory, natural evolution would be an unlikely source for pathogens with the highest possible levels of transmissibility, virulence, and global reach. But advances in biotechnology might allow the creation of diseases that combine such traits. Recent controversy has already emerged over a number of scientific experiments that resulted in viruses with enhanced transmissibility, lethality, and/or the ability to overcome therapeutics.13-17 Other experiments demonstrated that mousepox could be modified to have a 100% case fatality rate and render a vaccine ineffective.18 In addition to transmissibility and lethality, studies have shown that other disease traits, such as incubation time, environmental survival, and available vectors, could be modified as well.19-21

Although these experiments had scientific merit and were not conducted with malicious intent, their implications are still worrying. This is especially true given that there is also a long historical track record of state-run bioweapon research applying cutting-edge science and technology to design agents not previously seen in nature. The Soviet bioweapons program developed agents with traits such as enhanced virulence, resistance to therapies, greater environmental resilience, increased difficulty to diagnose or treat, and which caused unexpected disease presentations and outcomes.22 Delivery capabilities have also been subject to the cutting edge of technical development, with Canadian, US, and UK bioweapon efforts playing a critical role in developing the discipline of aerobiology.23,24 While there is no evidence of state-run bioweapons programs directly attempting to develop or deploy bioweapons that would pose an existential risk, the logic of deterrence and mutually assured destruction could create such incentives in more unstable political environments or following a breakdown of the Biological Weapons Convention.25 The possibility of a war between great powers could also increase the pressure to use such weapons—during the World Wars, bioweapons were used across multiple continents, with Germany targeting animals in WWI,26 and Japan using plague to cause an epidemic in China during WWII.27

Non-state actors may also pose a risk, especially those with explicitly omnicidal aims. While rare, there are examples. The Aum Shinrikyo cult in Japan sought biological weapons for the express purpose of causing extinction.28 Environmental groups, such as the Gaia Liberation Front, have argued that “we can ensure Gaia's survival only through the extinction of the Humans as a species … we now have the specific technology for doing the job … several different [genetically engineered] viruses could be released”(quoted in ref. 29). Groups such as R.I.S.E. also sought to protect nature by destroying most of humanity with bioweapons.30 Fortunately, to date, non-state actors have lacked the capabilities needed to pose a catastrophic bioweapons threat, but this could change in future decades as biotechnology becomes more accessible and the pool of experienced users grows.31,32

What is the appropriate response to these speculative extinction threats? A balanced biosecurity portfolio might include investments that reduce a mix of proven and speculative risks, but striking this balance is still difficult given the massive uncertainties around the low-probability, high-consequence risks. In this article, we examine the traditional spectrum of biosecurity risks (ie, biocrimes, bioterrorism, and biowarfare) to categorize biothreats by likelihood and impact, expanding the historical analysis to consider even lower-probability, higher-consequence events (catastrophic risks and existential risks). In order to produce reasoned estimates of the likelihood of different categories of biothreats, we bring together relevant data and theory and produce some first-guess estimates of the likelihood of different categories of biothreat, and we use these initial estimates to compare the cost-effectiveness of reducing existential risks with more traditional biosecurity measures. We emphasize that these models are highly uncertain, and their utility lies more in enabling order-of-magnitude comparisons rather than as a precise measure of the true risk. However, even with the most conservative models, we find that reduction of low-probability, high-consequence risks can be more cost-effective, as measured by quality-adjusted life year per dollar, especially when we account for the lives of future generations. This suggests that despite the low probability of such events, society still ought to invest more in preventing the most extreme possible biosecurity catastrophes.

Here, we use historical data to analyze the probability and severity of biothreats. We place biothreats in 6 loose categories: incidents, events, disasters, crises, global catastrophic risk, and existential risk. Together they form an overlapping spectrum of increasing impact and decreasing likelihood (Figure 1).\*

A spectrum of differing impacts and likelihoods from biothreats. Below each category of risk is the number of human fatalities. We loosely define global catastrophic risk as being 100 million fatalities, and existential risk as being the total extinction of humanity. Alternative definitions can be found in previous reports,33 as well as within this journal issue.34

The historical use of bioweapons provides useful examples of some categories of biothreats. Biocrimes and bioterrorism provide examples of incidents.† Biological warfare provides examples of events and disasters. These historical examples provide indicative data on likelihood and impact that we can then feed into a cost-effectiveness analysis. We should note that these data are both sparse and sometimes controversial. Where possible, we use multiple datasets to corroborate our numbers, but ultimately the “true rate” of bioweapon attacks is highly uncertain.

Biocrimes and Bioterrorism

Historically, risks of biocrime‡ and bioterrorism§ have been limited. A 2015 Risk and Benefit Analysis for Gain of Function Research detailed 24 biocrimes between 1990 and 2015 (0.96 per year) and an additional 42 bioterrorism incidents between 1972 and 2014 (1 per year).36 This is consistent with other estimates of biocrimes and bioterrorism frequency, which range from 0.35 to 3.5 per year (see supplementary material, part 1, at http://online.liebertpub.com/doi/suppl/10.1089/hs.2017.0028).

Most attacks typically result in no more than a handful of casualties (and many of these events include hoaxes, threats, and attacks that had no casualties at all). For example, the anthrax letter attacks in the United States in 2001, perhaps the most high-profile case in recent years, resulted in only 17 infections with 5 fatalities.37 The 2015 Risk and Benefit Analysis for Gain of Function Research detailed only a single death from the recorded biocrimes.\*\* Only 1 of the bioterrorism incidents in the report had associated deaths (the 2001 anthrax letter attacks).36 Based on this data, for the purposes of this article, we assume that we could expect 1 incident per year resulting in up to tens of deaths.

Biological Warfare

Academic overviews of biological warfare†† detail 7 programs prior to 1945.38 A further 9 programs are recorded between 1945 and 1994.39 For most of the last century, at least 1 program was active in any given year (Table 1).

The actual use of bioweapons by states is less common: Over the 85 years covered by these histories (1915 to 2000), 18 cases of use (or possible use) were recorded, including outbreaks connected to biological warfare (see supplementary material, part 2, at http://online.liebertpub.com/doi/suppl/10.1089/hs.2017.0028). Extrapolating this out (dividing 18 by 85), we would have about a 20% chance per year of biowarfare. It is worth noting the limitations of these data. Most of these events occurred before the introduction of the Biological Weapons Convention and were conducted by countries that no longer have biological weapons programs. Since many of these incidents occurred during infrequent great power wars, we revise our best guess to around 10% chance per year of biowarfare.

We use 2 sets of data to estimate the magnitude of such events. The first dataset was Japanese biological warfare in China,40 where records indicate a series of attacks on towns resulted in a mean of 330 casualties per event and 1 case in which an attack resulted in a regional outbreak causing an estimated 30,000 deaths (see supplementary material, part 3, at http://online.liebertpub.com/doi/suppl/10.1089/hs.2017.0028). The second data set came from disease events that were alleged to have an unnatural origin.41 In one case study, a point source release of anthrax resulted in at least 66 deaths. In a second case study, a regional epidemic of the same disease resulted in more than 17,000 human cases. While these events were not confirmed as having been caused by biological warfare, contemporary or subsequent analysis has suggested that such an origin was at least feasible. Combined, these figures provide an estimated impact of between 66 to 330 and 17,000 to 30,000.

For the purposes of this analysis, we are assuming the lower boundary figures from biological warfare are indicative of events, with a likelihood of 10% per year and an impact ranging between tens and thousands of fatalities. The upper boundary figures from biological warfare are indicative of disasters, with a likelihood of 1% per year and an impact range of thousands to tens of thousands of fatalities.‡‡

Unlike standard biothreats, there is no historical record on which to draw when considering global catastrophic or existential risks. Alternative approaches are required to estimate the likelihood of such an event. Given the high degree of uncertainty, we adopt 3 different approaches to approximate the risk of extinction from bioweapons: utilizing surveys of experts, previous major risk assessments, and simple toy models. These should be taken as initial guesses or rough order-of-magnitude approximations, and not a reliable or precise measure.

An informal survey at the 2008 Oxford Global Catastrophic Risk Conference asked participants to estimate the chance that disasters of different types would occur before 2100. Participants had a median risk estimate of 0.05% that a natural pandemic would lead to human extinction by 2100, and a median risk estimate of 2% that an “engineered” pandemic would lead to extinction by 2100.42

The advantage of the survey is that it directly measures the quantity that we are interested in: probability of extinction from bioweapons. The disadvantage is that the estimates were likely highly subjective and unreliable, especially as the survey did not account for response bias, and the respondents were not calibrated beforehand. We therefore also turn to other models that, while indirect, provide more objective measures of risk.§§

Recent controversial experiments on H5N1 influenza prompted discussions as to the risks of deliberately creating potentially pandemic pathogens. These agents are those that are highly transmissible, capable of uncontrollable spread in human populations, highly virulent, and also possibly able to overcome medical countermeasures.44 Previous work in a comprehensive report done by Gryphon Scientific, Risk and Benefit Analysis of Gain of Function Research,36 has laid out very detailed risk assessments of potentially pandemic pathogen research, suggesting that the annual probability of a global pandemic resulting from an accident with this type of research in the United States is 0.002% to 0.1%. The report also concluded that risks of deliberate misuse were about as serious as the risks of an accidental outbreak, suggesting a 2-fold increase in risk. Assuming that 25% of relevant research is done in the United States as opposed to elsewhere in the world, this gives us a further 4-fold increase in risk. In total, this 8-fold increase in risk gives us a 0.016% to 0.8% chance of a pandemic in the future each year (see supplementary material, part 4, at http://online.liebertpub.com/doi/suppl/10.1089/hs.2017.0028).

The analysis in Risk and Benefit Analysis of Gain of Function Research suggested that lab outbreaks from wild-type influenza viruses could result in between 4 million and 80 million deaths,36 but others have suggested that if some of the modified pathogens were to escape from a laboratory, they could cause up to 1 billion fatalities.45 For the purposes of this model, we assume that for any global pandemic arising from this kind of research, each has only a 1 in 10,000\*\*\* chance of causing an existential risk. This figure is somewhat arbitrary but serves as an excessively conservative guess that would include worst-case situations in which scientists intentionally cause harm, where civilization permanently collapses following a particularly bad outbreak, or other worst-case scenarios that would result in existential risk. Multiplying the probability of an outbreak with the probability of an existential risk gives us an annual risk probability between 1.6 × 10–8 and 8 × 10–7.†††

Model 3: Naive Power Law Extrapolation

Previous literature has found that casualty numbers from terrorism and warfare follow a power law distribution, including terrorism from WMDs.46 Power laws have the property of being scale invariant, meaning that the ratio in likelihood between events that cause the deaths of 10 people and 10,000 people will be the same as that between 10,000 people and 10,000,000 people.‡‡‡ This property results in a distribution with an exceptionally heavy tail, so that the vast majority of events will have very low casualty rates, with a couple of extreme outliers.

Past studies have estimated this ratio for terrorism using biological and chemical weapons to be about 0.5 for 1 order of magnitude,47 meaning that an attack that kills 10x people is about 3 times less likely (100.5) than an attack that kills 10x–1 people (a concrete example is that attacks with more than 1,000 casualties, such as the Aum Shinrikyo attacks, will be about 30 times less probable than an attack that kills a single individual). Extrapolating the power law out, we find that the probability that an attack kills more than 5 billion will be (5 billion)–0.5 or 0.000014. Assuming 1 attack per year (extrapolated on the current rate of bio-attacks) and assuming that only 10% of such attacks that kill more than 5 billion eventually lead to extinction (due to the breakdown of society, or other knock-on effects), we get an annual existential risk of 0.0000014 (or 1.4 × 10–6).

We can also use similar reasoning for warfare, where we have more reliable data (97 wars between 1820 and 1997, although the data are less specific to biological warfare). The parameter for warfare is 0.41,47 suggesting that wars that result in more than 5 billion casualties will comprise (5 billion)–0.41 = 0.0001 of all wars. Our estimate assumes that wars will occur with the same frequency as in 1820 to 1997, with 1 new war arising roughly every 2 years. It also assumes that in these extreme outlier scenarios, nuclear or contagious biological weapons would be the cause of such high casualty numbers, and that bioweapons specifically would be responsible for these enormous casualties about 10% of the time (historically bioweapons were deployed in WWI, WWII, and developed but not deployed in the Cold War—constituting a bioweapons threat in every great power war since 1900). Assuming that 10% of biowarfare escalations resulting in more than 5 billion deaths eventually lead to extinction, we get an annual existential risk from biowarfare of 0.0000005 (or 5 × 10–7).

Perhaps the most interesting implication of the fatalities following a power law with a small exponent is that the majority of the expected casualties come from rare, catastrophic events. The data also bear this out for warfare and terrorism. The vast majority of US terrorism deaths occurred during 9/11, and the vast majority of terrorism injuries in Japan over the past decades came from a single Aum Shinrikyo attack. Warfare casualties are dominated by the great power wars. This suggests that a typical individual is far more likely to die from a rare, catastrophic attack as opposed to a smaller scale and more common one. If our goal is to reduce the greatest expected number of fatalities, we may be better off devoting resources to preventing the worst possible attacks.

Why Uncertainty Is Not Cause for Reassurance

Each of our estimates rely to some extent on guesswork and remain highly uncertain. Technological breakthroughs in areas such as diagnostics, vaccines, and therapeutics, as well as vastly improved surveillance, or even eventual space colonization, could reduce the chance of disease-related extinction by many orders of magnitude. Other breakthroughs such as highly distributed DNA synthesis or improved understanding of how to construct and modify diseases could increase or decrease the risks. Destabilizing political forces, the breakdown of the Biological Weapons Convention, or warfare between major world powers could vastly increase the amount of investment in bioweapons and create the incentives to actively use knowledge and biotechnology in destructive ways. Each of these factors suggests that our wide estimates could still be many orders of magnitude off from the true risk in this century. But uncertainty is not cause for reassurance. In instances where the probability of a catastrophe is thought to be extremely low (eg, human extinction from bioweapons), greater uncertainty around the estimates will typically imply greater risk of the catastrophe, as we have reduced confidence that the risk is actually at a low level.48 §§§

Given that our conservative models are based on historical data, they fail to account for the primary source of future risk: technological development that could radically democratize the ability to build advanced bioweapons. If the cost and required expertise of developing bioweapons falls far enough, the world might enter a phase where offensive capabilities dominate defensive ones. Some scholars, such as Martin Rees, think that humanity has about a 50% chance of going extinct due in large part to such technologies.49 However, incorporating these intuitions and technological conjectures would mean relying on qualitative arguments that would be far more contentious than our conservative estimates. We therefore proceed to assess the cost-effectiveness on the basis of our conservative models, until superior models of the risk emerge.

### OFF---Frame Subtraction

#### We affirm the 1AC sans its call for the ballot.

#### The 1AC’s value stands on its own---responding to it with judgement and the ballot is a hollow validation that siphons off political energy and draws them into the oppressive gaze of the academy---vote Negative to decline affirmation

Phillips 99 – Dr. Kendall R. Phillips, Professor of Communication at Central Missouri State University, PhD in Speech Communication from Pennsylvania State University, MA in Speech Communication from Central Missouri State University, BS in Psychology and Sociology from Southwest Baptist University, “Rhetoric, Resistance, and Criticism: A Response to Sloop and Ono”, Philosophy & Rhetoric, Volume 32, Number 1, p. 96-101

My concern with this movement centers around an issue that Sloop and Ono seem to take as a given, namely, the role of the critic. On one hand, calling for the systematic investigation of existing marginalized discourses is a natural extension both of critical rhetoric (see McKerrow 1989, 1991) and of the general ideological turn in criticism (see Wander 1983). On the other hand, the ease of transition from criticism in the service of resistance to criticism of resistance may obscure the need to address some fundamental issues regarding the general function of rhetorical criticism in an uncertain and contentious world. Beyond licensing the critic to engage in political struggle, Sloop and Ono advocate the pursuit of covert resistant discourses.

Such a move not only stretches our understanding of rhetoric and criticism, but also alters significantly the relationship between critic and out- law. Critical interrogation of dominant discursive practices in the service of political/cultural reform is supplanted in favor of positioning covert out- law communities as objects of investigation. Invited to seek out subversive discourses, the critic is positioned as the active agent of change and the out-law discourse becomes merely instrumental. Rather than academic criticism acting in service of everyday acts of resistance, everyday acts of resistance are put into the service of academic criticism.

Rhetorical resistance

That we are "caught within conflicting logics of justice that are culturally struggled over" (Sloop and Ono 1997, 50) and that rhetoric is employed in these struggles seems an uncontroversial statement. Despite the theoretical miasma surrounding judgment, Sloop and Ono accurately note, the material process of rendering judgments (and of disputing the logics of litigation) continues in the world of actually practiced discourse. In the materially contested world, rhetoric is utilized both by those seeking to secure the grounds of dominant judgment and by those seeking to undermine or supplant dominant cultural logics with some out-law notion of justice.

The distinction between these two cultural groups, "in-law" and out- law, however, deserves some consideration prior to any discussion of the role of the critic as implied in the out-law discourse project. The discourse of the dominant or those within the bounds of superordinate logics of litigation is reminiscent of Michel De Certeau's (1984) strategic discourse. For De Certeau, strategies are utilized by those who have authority by virtue of their proper position. Strategies exploit the institutionally guaranteed background consensus by which power relations (and litigations) are maintained and advanced. In contrast, tactics are utilized by those having no proper place of authority within the discursive economy who must seek opportunities whereby the discourse of the dominant might be undermined and contested. To extend Sloop and Ono's definition, out-law discourses are those that can (and, by their analysis, do) take advantage of situations (e.g., race riots) to disrupt the regularity of dominant cultural groups.

The ongoing struggle between strategically instituted cultural dominants and the "out-law always lurk[ing] in the distance" (66) is acknowledged, even celebrated, by Sloop and Ono. What their acknowledgment fails to provide, however, is a clear need for critical intervention. Indeed, quite the reverse is presented: It is the critic (particularly the left-leaning critic) who needs out-law discourse. While the struggles over justice, equality, and freedom have gone on, the left-leaning critics are those who have theoretically excluded themselves from the disputes. The study of out-law dis- courses, then, provides a means to reinvigorate the intellectual and re-institute (academic) leftist thinking into popular political struggles (53-54). Thus, Sloop and Ono's project incorporates three types of rhetoric: the rhetoric of the in-law, presumably the traditional object of critical attention; the rhetoric of the out-law, the study of which may transform our understanding of judgment as well as reinvigorate leftist democratic critiques; and the rhetoric of the critics who, having lost their political po- tency, can exploit the discourse of the out-law to promote ideological struggles. It is to this critical rhetoric that I now turn.

Resistance criticism

Sloop and Ono (1997) clearly state the relationship they envision between the rhetorical critic and out-law discourse: "Ultimately, we will argue that the role of critical rhetoricians is to produce 'materialist conceptions of judgment,' using out-law judgments to disrupt dominant logics of judgment" (54; emphasis added). Here the critic seeks out vernacular discourse (60), focuses on the methods and values embodied in these communities (62), listens to and evaluates the out-law community (62-63), and chooses appropriate discourses for the purpose of disrupting dominant practices (63). Essentially, it is the critic who seeks out marginalized discourses and returns them to the center for the purpose of provoking dominant cultural groups (63).

Despite acknowledging the efficacy of out-law discourses, Sloop and Ono assume that the critiques generated and presented by the out-law community have only minimal effect. The irony, and indeed arrogance, of this assumption is evident when they claim: "There are cases, however, when, without the prompting of academic critics, out-law discourses serve local purposes at times and at others resonate within dominant discourses, disrupting sedimented ways of thinking, transforming dominant forms of judgment" (60; emphasis added). Sloop and Ono seem to suggest that such locally generated critiques are the exception, whereas the political efficacy of the academic critic is the rule. This seems an odd claim, given that the justification for their out-law discourse project is the lack of politically viable academic critique and the perceived potency of out-law conceptions of judgment. Their suggestion that out-law communities are in need of the academic critic contradicts not only the already disruptive nature of existing out-law discourses (the grounds for using out-law discourse), but also the impotence of contemporary critical discourse (the warrant for studying out-law discourse).

By this I do not mean that the critiques and theories generated by academically instituted intellectuals have not been incorporated into subversive discourses. Just as out-law discourses inevitably mount critiques of dominant logics, so, too, the perspectives on rhetoric and criticism generated by academics are used in resistance movements. Feminist critiques of patriarchy, queer theories of homophobia, postcolonial interrogations of race have found their way into the service of resistant groups. The key distinction I wish to make is that the existence of criticism (academic or self-generated) in resistance does not necessitate Sloop and Ono's move to a criticism of resistance.

What Sloop and Ono fail to offer is an adequate argument for "taking public speaking out of the streets and studying it in the classroom, for treating it less as an expression of protest" (Wander 1983, 3) and more as an object for analysis and reproduction within the political economy of the academy. Philip Wander made a similar charge against Herbert Wicheln's early critical project, and this concern should remain at the forefront of any discussion aimed at expanding the scope and function of criticism. Sloop and Ono offer numerous directives for the critic without addressing whether the critic should be examining out-law discourses in the first place. While it is too early to suggest any definitive answer to the question of criticism of resistance, some preliminary arguments as to why critics should not pursue out-law discourses can be offered:

(1) Hidden out-law discourses may have good reasons to stay hidden. Sloop and Ono specifically instruct us that "the logic of the out-law must constantly be searched for, brought forth" (66) and used to disrupt dominant practices. But are we to believe that all out-law discourses are prepared to mount such a challenge to the dominant cultural logic? Or, indeed, that the members of out-law communities are prepared to be brought into the arena of public surveillance in the service of reconstituting logics of litigation? It seems highly unlikely that all divergent cultural groups have developed equally, or that all members of these groups share Sloop and Ono's "imperial impulse" (51) to promote their conceptions and practices of justice.

(2) Academic critical discourse is not transparent. Here I allude to the overall problem of translation (see Foucault 1994; Lyotard 1988; Lyotard and Thebaud 1985; Zabus 1995) as an extension of the previous concern. Critical discourse cannot become the medium of commensurability for divergent language games. Are we to believe that the "use" of out-law dis- course by critics to disrupt dominant practices can fail to do violence to these diverse/divergent logics? Are out-law discourses merely tools to be exploited and discarded in the pursuit of returning leftist academic dis- course to the center?

(3) Perhaps the academic translation of out-law discourse could be true to the internal logic of the out-law community. And, perhaps the re-presentation of out-law logic within the academic community will bestow a degree of legitimacy on the out-law community. Nonetheless, the effect of legitimizing out-law discourse is unknown and potentially destructive. In an effort to siphon the political energy of out-law discourse into academic practice, we may ultimately destroy the dissatisfaction that serves as a cathexis for these out-law discourses. It seems possible that academic recognition might take the place of struggle for material opportunities (see Fraser 1997). But, will academic legitimation create any material changes in the conditions of out-law communities? I mean to suggest, not that it is better to allow the out-law community to suffer for its cause, but rather that incorporating the struggle into an (admittedly) impotent academic critique does not offer a prima facie alternative.

(4) Criticism of resistance denies the practical and theoretical importance of opportunity. Returning to De Certeau's notion of tactics, the crucial element of these discursive moves is their use of opportunity to disrupt the proper authority of the dominant. The kairos of intervention provides the key to undermining "in-law" discourses. But when is the "right moment in time" for the academic reproduction of out-law discourse? Mapping the points of resistance (ala Foucault and Biesecker) entails interrogating "in-law" discourses for their incongruities and contradictions, not turning the academic gaze upon those communities waiting for an opportunity. Out-laws do not lurk in the forefront (66), hoping to be exposed by academic critics; they wait for the right moment for their disruption. Rhetoricians can provide rhetorical instructions for seeking opportunities and for exploiting these opportunities (literally making the culturally weaker argument the stronger), but this does not justify interrogating (intervening in) the cultural logics of the marginalized.

The concerns raised here are not designed to dismiss Sloop and Ono's provocative essay. The divergent critical logic they outline deserves careful consideration within the critical community, and it is my hope that the concerns I raise may help to further problematize the relationship between

resistance and rhetorical criticism.

Rhetorical criticism

As I have suggested, my purpose is to use the provocative nature of Sloop and Ono's project to extend disputes regarding the ends of rhetorical criticism. Diverging perspectives on the ends of criticism have been categorized by Barbara Warnick (1992) as falling along four general lines: artist, analyst, audience, and advocate. Leah Ceccarelli (1997) discerns similar categories around the aesthetic, epistemic, and political ends of rhetorical criticism.

The out-law discourse project presents clear ties to the notion of critic as advocate. For Sloop and Ono, the critic is an interested party, discerning (and at times disputing) the underlying values and forces contained within a discourse. Additionally, however, the out-law discourse critic is an analyst focusing on the hidden, aberrant texts of the out-law and "rendering] an incoherent or esoteric text comprehensible" (Warnick 1992, 233). Now, I am not suggesting that a critic must serve only one function or that the roles of advocate and analyst are mutually exclusive; rather, these entanglings of power (political ends) and knowledge (epistemic ends) are inevitable. My concern is that we not neglect the complexity of these entanglements. Turning covert out-law discourses into objects of our analyses runs the risk of subjecting them both to the gaze of the dominant and to the power relations of the academy. As the works of Michel Foucault (especially 1979, 1980) aptly illustrate, practices presented as extending such noble goals as emancipation and humanity may endow institutions of confinement and objectification. Any justification for studying out-law dis- course because doing so may extend our political usefulness in the pursuit of emancipatory goals must not obscure the already existing power relations authorizing such studies. Our attempts to extend our domains of knowledge and expertise (authority) must not be pursued unreflexively.

### OFF---CP

#### The United States federal government should prohibit anticompetitive practices by nucleus participants at the root layer of blockchains.

#### Anticompetitive exclusions and lack of legal certainty over the applicability of antitrust dry up investment and innovation, artificially centralizing digital ecosystems---applying antitrust solves

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2 THE SPECTER OF NEUTRALIZATION

I hope to have convinced readers that antitrust law and blockchain contribute to similar, if not identical, objectives (i.e., preserving agents’ ability to act freely in the market, which entails the decentralization of decision-making processes).42 For that reason, one might expect that both communities would work hand in hand to achieve decentralization. And yet, despite pursuing a common goal, blockchain and antitrust may end up canceling each other out. Here’s why.

2.1 One Goal, Two Methods

Blockchain seeks the decentralization of decision making by eliminating intermediaries, while antitrust aims to achieve it by eliminating anticompetitive practices. They converge toward the same objective. That said, one should not be candid about how easy it will be to make them cooperate. First, the Sherman Act is concerned with trusts43 - hence the name “anti-trust”. Since there is no trustee in the sense of a third-party fiduciary in blockchain’s first layers, the target of antitrust laws is absent.44 Blockchain may thus undermine the *raison d'etre* of antitrust law, which will trigger epidermal reactions.

Furthermore, blockchain and antitrust may at times attack each other. Blockchain may be used to implement anticompetitive practices and be enforcement resistant, while antitrust may reinforce the role of intermediaries in the economy (by protecting them from different forms of anticompetitive exclusions) and label various blockchain behaviors as anticompetitive - regardless of the overall usefulness of these blockchain features.

In fact, antitrust law and blockchain ecosystems seek decentralization at two different levels. Antitrust law prohibits certain categories of conduct, creating tensions with tech communities without focusing much on digital architectures. Blockchain, on the contrary, seeks to decentralize by providing its users with a specific digital architecture. It does not prohibit (anticompetitive) practices where code allows. This creates tensions between them, as I show in Part 2 of this book. Their cooperation will require the identification of ways to deal with these mutual provocations, as I will explain in Part 3.

As things stand, both of these communities exhibit what Veblen called “trained incapacity” - the difficulty to think beyond a set of constraints and assumptions. Policymakers tend to believe that the law should be the most important constraint organizing our lives. For that reason, legal rules are often applied without looking for ways to coordinate with other constraints, including digital architectures.45 In the meantime, blockchain communities tend to view legal enforcement as an adversary, and not as an ally. As John Perry Barlow stated in 1996: “I ask you of the past to leave us alone. You are not welcome among us. You have no sovereignty where we gather.” After all, the law liberates, but it also implies illegality, lawsuits, liability assignment and sanctions. The antitrust and blockchain communities will gain from over- coming these biases.

2.2 The (Long) Road Ahead

If we want antitrust and blockchain to collaborate on a long-term basis, we need to talk about the problems that their cooperation will encounter along the way. The challenge before us is intricate.46 On the one hand, it is a matter of getting legal minds to recognize that technology can help achieve objectives that the law cannot achieve on its own. There are three reasons for this. First, blockchain provides a technical approach to the subject. It serves as a framework for decentralizing the economy by default, while antitrust mostly applies ex post by correcting past behaviors.47

Second, antitrust agencies’ detection rate remains low, meaning that illegal behavior often goes unpunished.48 And enforcement is costly, which makes it impossible to pursue all potentially illegal practices. This is particularly problematic in a world where illegal practices can be implemented through coding that quietly and immediately affects billions of users. Also, the rule of law is (unfortunately) inapplicable in some places. This is the case when the state bypasses legal constraints,49 and when jurisdictions are mutually unfriendly and do not enforce foreign laws.50 For example, enforcement of U.S. court judgments abroad can prove especially difficult in light of divergent rules on jurisdiction, requirements for special service of process, reciprocity and some foreign countries’ public policy concerns,51 including in Europe.52

Finally, antitrust law is complex and cannot be fully mastered by all companies - the compliance costs are high and many firms unwittingly infringe the law. Blockchains could therefore supplement antitrust by creating an architecture that leads to fewer anticompetitive practices.

On the other hand, blockchain communities would gain from working with (not against) antitrust law enforcers. That is because antitrust would eliminate practices that artificially centralize blockchain ecosystems and that blockchain architecture cannot stop or prevent. 1 will analyze them in Part 2. Doing so would also provide legal certainty, thus fostering investments and benefiting all the actors involved in commercial activities that rely on blockchain. For these reasons, one should think of antitrust and blockchain as allies - not enemies - as they both seek the same objective, while presenting complementary strengths and defects. Doing so would lead policymakers to promote and implement a new “law + technology” approach that recognizes that the benefits of cooperation outweigh those of one-off confrontations. A game theorist would represent that approach as illustrated in Figure 5.1.

#### Decentralizing the blockchain allows scalable transaction validation

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2 BLOCKCHAIN INTERNAL FACTORS

The evolution of blockchain also depends on internal balances in terms of design and governance. Overall, choices that will be made within each blockchain will prove important for their evolution. As I show, it all comes down to human interactions.

2.1 The Trifecta: Intra-blockchain Evolution

A blockchain trilemma has emerged in the literature over the last several years. It can be summed up as follows: ensuring blockchain’s decentralization, scal- ability and security entails tradeoffs, at least in the short term. Although this makes sense on a technical level, it does not capture the entirety of our subject. Let us take a closer look. I have discussed decentralization at length through- out this book. It is blockchain’s central feature, in terms of both architecture and philosophy. “Scalability” refers to the ability to validate large volumes of transactions rapidly. Last, blockchain’s security hinges upon its ability to maintain integrity: that only desirable transactions take place - for example, by preventing double spending.42

To a certain extent, we have seen together that the mechanisms that ensure decentralization at different blockchain layers may conflict with security.43 This is what Awemany’s story in Chapter 1 revealed. Decentralization implies the distribution of power, limiting the ability to act unilaterally in case of an emergency. At the same time, decentralization can also affect the scalability of blockchain: Proof of Work is decentralized by nature, but it prevents the rapid validation of large transaction numbers. Conversely, a private blockchain can restrict access to the ledger or certain functions, raising security and scalability issues.44

In the long run, however, these three objectives are mutually reinforcing. The more a blockchain is decentralized, the more it stands out from the centralized platforms and services that readers know only too well. By differentiating themselves, blockchains attract users by offering a different value proposition. In turn, this generates scalability. The same goes for security, as the more participants use a public blockchain, the harder it becomes to alter the registry or perform a 51 percent attack. The blockchain trilemma is thus useful for thinking about what needs to be done, but it cannot provide a coherent analytical framework in the long term. It will become less relevant with technical advances, to the point where some blockchains will maximize these three objectives. Those who manage to do so will prosper.

#### Scaling blockchain unlocks its use for energy, waste, and supply chain sustainability---extinction

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Two years ago nobody talked about blockchain. Now the distributed ledger technology behind cryptocurrencies like bitcoin is suddenly everywhere.

Enthusiastic experts predict that in the coming 10 years, blockchain will change the way we do everything, from financial markets to health records to supply chain management, and so much more. It's near impossible to name all the applications for the new technologies, but here are a few that will contribute to making our world a better place (or even save the planet).

Energy

Most visible for average users will be the impact of blockchain on the energy sector. The power grids of today are usually centralized oligopolies dependent on a very small selection of power sources (i.e. a few nuclear plants, augmented by oil and gas).

That means long distribution lines, bad management of demand, and susceptibility to power outages during earthquakes and other natural disasters.

A peer-to-peer blockchain-based energy system would reduce the need to transmit electricity over long distances. It will certainly reduce the need to store energy in inefficient ways, which means fewer batteries, for example, which are expensive and need a lot of raw materials whose extraction often causes massive pollution. Imagine if every house had a solar panel and a wind turbine, or produced electricity from new smart materials on the outer walls.

Add road surfaces that produce kinetic or solar energy, and add in all the existing infrastructure like nuclear plants, oil or coal. Now imagine every one of these sources could trade with every other source, all managed automatically by a computer system, with unfalsifiable records based on blockchain. And everyone gets paid for it into their digital wallet. This is the future of energy.

Waste Recycling

Current systems for recycling are often cumbersome and don't give enough incentives to participate. Even the best intentions fall foul to human greed and laziness.

Here then is the future of recycling: you identify yourself with your smartphone at any recycling station and deposit your empty bottles (or batteries etc.). The system scans what you deposit and credits your electronic wallet.

If done right, this system could enable users in countries without local recycling industries to get paid the same way as users in locations with large recycling operations.

Companies could set up recycling plants and literally collect garbage from anywhere in the world. It would make it easy to transparently track data like volume, cost, shipping data, and profit, and to evaluate the impact of each location, company, or individual participating in the program.

Think one step further and the recycling containers could be fitted with solar drone technology and fly themselves to the recycling center when full.

Supply Chain Management

The way we transport goods around the world is wasteful and damages the environment. Industry 4.0 is bringing us a revolution of already connected devices; 3D printing means more decentralized manufacturing in much smaller batches.

Blockchains can be used to track products from the manufacturer to the shelf and help prevent waste, inefficiency, fraud, and unethical practices by making supply chains more transparent.

They improve shipping ways, volumes, avoid empty shipments and will thus allow for fewer ships and trucks. Combined with drones and solar-powered airships we could even see pollutant-free solar shipments of individual consignments over long distances, secured, tracked and paid for through blockchain technology.

Or think about this: a blockchain enabled 3D-printer as a public service, secured, tracked, and monetized through blockchain.

The food industry is forging ahead hear with the tracking of origin and transportation paths of food.

Environmental Protection

From waste and transportation, it is an easy jump to the overall enforcement of environmental protection. Blockchain is ideally suited to manage records and incentives.

In can be difficult to track the real impact of environmental protection plans, agreements, or even international treaties. Very often incentives are misaligned, or corporate interests and even criminal elements prevent successful implementation.

Blockchain could discourage stakeholders from reneging on their commitments, misreporting progress, or giving in to pressure from nefarious players, because the technology would allow the reliable tracking of important environmental data.

After all, data in the public ledger of the blockchain is transparent and traceable forever. Environmental protection is at its core a contractual problem. Just like blockchain will revolutionize the storage and manipulation of legal records, it will reduce or eliminate fraud and manipulation of environmental schemes.

Development programs

Like environmental protection, development programs are contracts between remote parties that need to be enforced.

When you donate to a charity, non-profit, development program or similar entity, you hardly ever know what really happens with your money. Bureaucracy, corruption, and inefficiency are still common in the charity space. Blockchain technology can ensure that money intended to be a reward for conservation, or a payment to a specific cause, does not disappear into unintended pockets through bureaucratic labyrinths.

Blockchain-based money could even be released automatically to the correct parties in response to meeting specific environmental targets. This is particularly relevant in countries without modern banking structures. In particular, there are several schemes under consideration for the tracking of water usage in very dry areas of the planet.

Carbon Tax

In the current system, the environmental impact of each product is difficult to determine, and its carbon footprint is not factored into the price.

This means that there is little incentive for consumers to buy products with a low carbon footprint, and little incentive for companies to sell such products.

Tracking the carbon footprint of each product using the blockchain would protect this data from tampering, and it can be used to determine the amount of carbon tax to be charged on at the point of sale. If a product with a big carbon footprint is more expensive to buy, this would encourage buyers to buy products that are more environmentally friendly, and would therefore encourage companies to restructure their supply chains to meet the demand for such products.

Such a blockchain-based reputation system would compute a score for each company and product. This would make manufacturing more transparent, and discourage wasteful and environmentally unfriendly practices.

You could automatically see (e.g. by scanning a barcode on a product), if it was made by an environmentally sound low-carbon facility, or a wasteful polluter.

Access to credit

Just as it tracks financial payments and all the data mentioned above, blockchains could be configured to manage access to credit.

This would enable millions of people to escape poverty, by giving them easy access to small amounts of money and start their own business. Unlike the micro-finance banking model, such a credit blockchain would be entirely transparent and thus safe from abuse.

Summary

In short, blockchain technology allows the management of incentives.

Consumers, companies, and governments would immediately see the direct effects of their actions on the planet. The blockchain can be used to transparently track a variety of data like the carbon footprint of each product, the greenhouse gas or waste emissions of a factory, or a company's overall history of compliance to environmental standards.

Companies and individuals can be incentivized to act in an environmentally sustainable way through the availability of information, tokenized credits being issued for taking certain actions, or blockchain-based reputation systems.

There are many hurdles to overcome. We still do not know if the blockchain is really as safe and unhackable as promised. As a cybersecurity consultant I spoke to for this article said: "sooner or later, everything will be hacked."

There are still doubts about the usability of blockchain for micro-transaction, due to the time proof-of-work takes, and the energy cost associated with computing.

The final hurdle is the willingness of governments to change, and the willingness of participants to live in such a transparent world.

But I believe that managing incentives on the micro-level with blockchain could completely change the drivers of our economy, and benefit not only us but the future generations living on our planet.

### OFF---CP

CIL CP:

We demand, the United States federal government should substantially increase affirmation of piarchal swarming under customary international law.

#### The CP competes and solves the case without abolishing anything under ‘antitrust law.’

Banks ’12 [Ted; 2012; Scharf President, Compliance & Competition Consultants; Denver Journal of International Law & Policy, “40th Anniversary Edition: The International Law of Antitrust Compliance,” 368]

Introduction

It was not so long ago that the concept of international criminal law was an idea with which lawyers struggled. In 1987, Ved Nanda and M. Cherif Bassiouni put together what may have been the first one-volume compendium of information on antitrust, securities, extradition, tax, and other subjects that made up the developing area of international criminal law. Today, it is well-accepted that there are certain standards of behavior that are the norm in practically all nations, and through national laws and multinational treaties, these principles are entering the realm of customary international law.

Developments in the area of competition law, or antitrust as it is known in some countries, have been particularly dramatic. Countries understand that the encouragement of competition is a key to economic development, and national laws have been enacted where they did not exist before, along with enforcement cooperation agreements among increasing numbers of countries. 1 Enforcement of criminal antitrust laws takes place against both individuals and businesses, 2 and while it is clear that there are situations where business entities must be held responsible for actions of their employees, there are other situations where the intent of the corporation may be contrary to the actions of the employee. Throughout the world, in competition law, as well as in other areas of law, there is a consensus that it is appropriate for companies to adopt compliance and ethics programs to utilize management techniques to foster compliance with law. So, as standards of corporate [\*369] conduct become more universal, they reflect adherence to what is essentially an international law - the international law of competition. At the same time, more national authorities recognize that companies are expected to have compliance programs, and that a bona fide compliance program reflects a corporate intent not to violate the law, and therefore should be a positive factor in how authorities treat such companies, including as a mitigating factor for any penalty that might be imposed based on the ultra vires act by an employee.

It is well accepted that compliance and ethics programs are an expected part of corporate activity, and while no program can always guarantee human behavior, these programs do work to mitigate violations of law. Indeed, it can be said that it is now a standard for companies to have compliance programs or at least some elements of such programs such as codes of conduct. We submit that this growing recognition of the purpose of compliance and ethics programs has reached broad-based acceptance and should now be recognized in the competition law field by the United States and other governments as a standard of international law.

The Concept of Organizational Liability

Under many legal regimes, a corporation cannot be criminally punished for the actions of its employees, and until relatively recently (at least if you consider a century relatively recent), under the common law, a corporation was viewed as a legal fiction, 3 which could not be held liable for the criminal conduct of its employees. In the United States, it was not until 1909, in New York Central & Hudson River Railroad v. United States, 4 that the Supreme Court ruled that because the great majority of business transactions were conducted by corporations, it was time to abandon the "old and exploded doctrine" that a corporation was not indictable. 5 The Court reasoned that, as a matter of public policy, because a corporation could be held civilly liable, criminal liability should also follow. 6

This concept of corporate liability has been extended to the point where the business is often held liable for acts of employees even if the [\*370] company was not aware of the violation, 7 prohibited the conduct that led to the violation, 8 or there was no actual benefit to the corporation through the acts of the employee. 9 So even if none of the three justifications for corporate liability are present, i.e., knowledge, benefit, or authority, corporate liability for the acts of an employee - in addition to the liability of the employee - may still be found. A number of reasons have been given for this approach, but a consistent argument is that this type of liability will have an in terrorem effect on the corporation and force the entity to make certain that employees obey the law. 10 As a practical matter, it also reflects the reality that employees working through a corporation, whether or not their actions are authorized, can cause harm far beyond the abilities of one person. Therefore, according to this line of reasoning, it is appropriate that the entity be punished criminally (and pay civil damages).

The usual rule in the United States and other common law countries is that a corporation is liable for acts of agents and employees acting within the scope of their employment and, in most cases, with the intent to benefit the company. 11 This approach derives from the common law doctrine of respondeat superior, which held that a master is generally liable for the actions of servants, but may escape liability if the servant acts outside the scope of employment (i.e., takes action for [\*371] which there is no actual or apparent authority). 12 The concept of apparent authority, the authority that outsiders would normally assume the agent to possess judging from his or her position in the company and the circumstances surrounding previous instances of conduct, is often the foundation for a finding of corporate liability. 13 Employees are assumed to be acting within the scope of their employment 14 if they are doing acts on the corporation's behalf in the performance of their general line of work. 15 An agent must be "performing acts of the kind which he is authorized to perform, and those acts must be motivated - at least in part - by an intent to benefit the corporation." 16 It is not necessary that the acts actually benefited the corporation, only that they were intended to do so.

The court decisions and statutes that led to these multiple bases for finding enterprise liability grew up in an era where there was recognition of the power of the "faceless" corporation and the need to control its activities. Courts would impute knowledge or intent to the corporation, even where there was no benefit to the enterprise by the wrongful acts of the employee and the activities did not benefit the corporation, although some courts are willing to consider whether the violation was foreseeable. 17 In other situations, liability might be imputed to a corporate officer or director for failure to exert their authority to ensure that the corporation (i.e., acting through employees) did not do wrong. 18

But it is also an inescapable fact of our human existence that people are fallible, and that in some cases people will ignore instructions and do things that they were expressly forbidden to do. By holding a corporation liable for virtually anything that any employee does, a situation of strict liability is created that may, in fact, be outside the scope of many laws that require an intent to violate the law. [\*372] Notwithstanding the desire to control the power of the corporation, there are limits to what it can do. The efforts of the corporation to control the actions of employees are a valid consideration in determining whether the corporation should be held liable for the actions of an employee, as was noted in the instructions to the jury after the trial of Arthur Andersen in connection with the Enron debacle:

If an agent was acting within the scope of his or her employment, the fact that the agent's act was illegal, contrary to the partnership's instructions, or against the partnership's policies does not relieve the partnership of responsibility for the agent's acts. A partnership may be held responsible for the acts its agents performed within the scope of their employment even though the agent's conduct may be contrary to the partnership's actual instructions or contrary to the partnership's stated policies. You may, however, consider the existence of Andersen's policies and instructions, and the diligence of its efforts to enforce any such policies and instructions, in determining whether the firm's agents were acting within the scope of their employment. 19

The key here is "diligence." Was a compliance program something that existed only on paper, 20 or were there indicia of sincerity on the part of the corporation that showed that it legitimately tried to enforce its policy of compliance? The diligence of the corporation in enforcing its policy should be a key factor in determining if it is the kind of program that should entitle the corporation to some measure of mitigation from legal penalties imposed as a result of the actions of an employee that disobeyed the policy. 21

[\*373] Competition law imposes certain standards of behavior that are accepted because of an understanding that society benefits from competition. Therefore, in most cases, cartels are prohibited, as is abuse of market power or dominance. There is a recognition in many areas of law that transparency is beneficial, and thus bribes or secret rebates are prohibited for their disruptive impact on competition, as well as their inherent corruptness.

But how do these standards become accepted? It is not sufficient only to implement national laws and multinational agreements. Enforcement authorities recognize that there must also be private action to enforce policies within corporations and to demonstrate that noncompliance with law will not be tolerated. As will be discussed below, there are benchmarks of what is an "effective" compliance and ethics program that have received broad-based acceptance. Standards of international competition law cannot have their desired impact without international standards and efforts for compliance. Companies need to be able to know that what they do to implement compliance standards does matter so that they will make a diligent effort to prevent cartel behavior from happening. If a company has taken serious action to enforce its standards, such as by discharge of employees who violate the law, 22 this level of corporate compliance, which is expected by enforcement authorities, should be recognized when deciding how to treat corporations, including charging and penalty decisions.

So, there is a combination of factors at work here. Competition law standards are virtually universal in their acceptance. 23 To get those standards to actually be implemented by corporations, there need to be corporate compliance and ethics programs in place. Standards of culpability recognize that factors such as intent, knowledge, and benefit are relevant to findings of corporate liability. A number of countries do specifically encourage compliance and ethics programs, including in the antitrust area. 24 Therefore, this growing, worldwide acceptance, combined with universal necessity, has established an international law not just for antitrust, but for antitrust compliance. The countries that do not formally recognize the value of bona fide compliance programs as relevant to corporate liability, perhaps seduced by the possibility of collecting huge fines from a corporate piggy-bank, are out-of-step with the reality of what is necessary to truly promote the principles of competition law.

#### U.S. invocation of CIL prevents the disintegration of international economic law---extinction.

Arcuri ’20 [Alessandra; 2020; Full Professor of Inclusive Global Law and Governance at the Erasmus School of Law, Journal of International Economic Law, “International Economic Law and Disintegration: Beware the Schmittean Moment,” vol. 23]

Introduction

There was a time when national sovereignty was out of fashion. In the nineties, international lawyers were engaged in imaging the global order beyond the nation-state. Theories to make this order possible were proliferating: from Global Administrative Law to global constitutionalism.1 International Economic Law (IEL) played an important role in the journey toward the global order. Our markets could be integrated through an almost brand new organization, the World Trade Organization (WTO). The WTO was created and endowed with a powerful set of new agreements, promoting the harmonization of health and safety law—through the Sanitary and Phytosanitary (SPS) Agreement—and technical regulation—Technical Barriers to Trade (TBT) Agreement—and establishing (relatively uniform) Intellectual Property Rights regimes worldwide (the TRIPS Agreement). The WTO also included a brand new dispute settlement system, considered by many as a manifestation of the rule of law at the international level. Similarly, organizations such as the World Bank and the International Monetary Fund (IMF) were indirectly spreading (de-)regulatory policies throughout the developing world.2 Globalization, nudged by a global technocratic elite, was alive and kicking, back then.

Today we face a crisis of the regime of international economic law and, more broadly, global economic governance. The system appears broken for its incapacity to face some of the most daunting challenges of our time: the widespread and dramatic process of environmental degradation and the unacceptable inequalities between poor and rich. On its face, the phenomenon of far-right populists, partly reflected in Brexit and Trump politics, and spreading across the Atlantic is shaking the system of international economic law, by hailing nationalist policies. The idea that the nation-state may be a desirable source of disintegration of the global (legal) order is gaining traction across the political spectrum. It appears clear that the answer to the legitimacy crisis of the system of international economic law and governance offered by progressives3 resorts also to entrusting the nation state with more political space—a space that allegedly has been unduly constrained by the global economic order.

Not only politicians but also progressive academicians, such as Professor Dani Rodrik, have defended the importance of national sovereignty,4 as one of the necessary paradigms to fix our broken world order. The gist of the reasoning is simple: global institutions went too far in eroding national sovereignty, which is the real basis for democratic liberal regimes. Without the nation-state, environmental, industrial, and redistributive policies cannot be realized. As Rodrik put it: ‘So, I accept that nation-states are a source of disintegration for the global economy.’5

This article critically engages with the idea that the nation-state is a legitimate force of disintegration of the international economic order, with particular attention to trade and investment agreements. There are disparate circumstances, from the realm of food safety regulation to the regulation of capital flows,6 in which it is arguably desirable that domestic institutions (re-)gain more power. Most importantly, the nation-state is today an important site of democracy and, only for that reason, it is worth defending. Yet, in times of raising authoritarianism, it is crucial to reflect on some of the limits of the nation-state and on the necessity to develop alternative paradigms for integrating economies and societies.

This article presents a two-fold critique of the idea that an expansion of national sovereignty is going to achieve a better socio-economic world order per se. The first critique is internal, showing that the nation-state does not possess intrinsic characteristics to facilitate democracy, equality, and sustainability. The second is external and focuses on the necessity to look reflexively at the goals of the system of international economic law, to re-imagine it as capable to address questions of inequality and environmental degradation.

In a more pragmatic fashion, this article posits that more nation-state may be a misleading and possibly dangerous response to today’s daunting challenges. It is misleading in so far as it promises solutions that nation-states alone cannot deliver. It is dangerous in so far as the rhetoric of the nation-state paradoxically facilitates the turn toward an expansion of the ‘rule of exception’ and, eventually, authoritarianism. Above all, in advocating for disintegration through the nation-state, we need to reckon with our haunting past where economic autarchy has been deeply intertwined with the ascent of fascism and Nazism. If today the nation-state may appear as a beacon of democracy, the role of nationalism in generating the nemesis of democracy should not be neglected. In short, and at the risk of oversimplification, ‘America first’ echoes too closely fascist slogans.7

I. A PROGRESSIVE DEFENSE OF THE NATION-STATE AND THE RISK OF A ‘SCHMITTEAN MOMENT’

Let me start by rehashing the two interconnected and equally formidable challenges we are facing today: the question of environmental degradation and the unacceptable level of inequalities whereby a large part of the population in the world lives in poverty (both in developing and developed countries, but still overwhelmingly concentrated in so-called developing countries) vis-à-vis a small elite enjoying incredible wealth. Economic integration that does not deal with these challenges is not only doomed to fail; it is a type of economic integration that we should not aspire to.

It is plausible that Brexit and the disintegrationist economic policy of Trump have been partly enabled by the growing inequalities in the Anglophone nations. It is no brainer that a large fraction of Brexiteers and Trump voters are the ‘left behind.’8 In wealthy countries, the working class often felt left behind by thriving globalization, which has benefited only the elites. The—often labelled—‘populist turn’ rests on the idea that the ‘other’, the ‘foreigner’ has stolen ‘our’ welfare and a more nationalistic policy is needed to protect the losers of the current state of affairs. This is evident from Trump’s slogan ‘Buy American, Hire American.’ It is worrying how this type of nationalism is entrenched in racism and in the othering of the non-American.

However, as mentioned earlier, the case for more nation-state has also been made by ‘progressive’ politicians and intellectuals. Among progressive economists, Dani Rodrik stands out for having defended the nation-state with compelling arguments. Let me quote him at length: ‘When it comes to providing the arrangements that markets rely on, the nation-state remains the only effective actor, the only game in town. Our elites’ and technocrats’ obsession with globalism weakens citizenship where it is most needed—at home—and makes it more difficult to achieve economic prosperity, financial stability, social inclusion, and other desirable objectives.’9 Not only is the nation-state the only game in town, when it comes to issues of redistribution, social security and safety, the nation-state is also desirable because it can deliver institutional diversity which is needed to realize the social contract: ‘Developing nations have different institutional requirements than rich nations. There are, in short, strong arguments against global institutional harmonization.’10 The nation-states can meet different preferences, and ‘[i]nsufficient appreciation of the value of nation-states leads to dead ends.’ Rodrik also concedes that international market liberalization is the offspring of well-functioning nation-states rather than international institutions: ‘Domestic political bargains, more than GATT rules, sustained the openness that came to prevail.’11 Against this background, Rodrik defends ‘economic populism’ in so far as it constitutes a form of resistance to ‘liberal technocrats’ imposing undue restraints on domestic economic policy.12 The rigid focus on price stability in low-inflation environments is a clear example of global or EU-driven policies largely insensitive to the effects on employment and paradoxically even growth.13

Many of Rodrik’s arguments are compelling, such as his critique of the economic profession’s misleading analysis of trade and investment agreements. Some of his reform proposals, such as the strengthening of green industrial policy,14 are arguably desirable. Most crucially, the nation-state may be at present one of the most developed sites of democracy, albeit an imperfect one. When global institutions constrain nation-state policies formed following democratic decision-making, this may legitimately be seen as a threat to democracy. Rodrik’s work has had a wide echo in legal circles, as evidenced by the publication of a book with the goal of reimagining trade and investment law, 15 which is opened by several chapters all commenting—in overwhelmingly positive terms—on Rodrik’s Straight Talks on Trade. The nation-state and, more generally, sovereignty is (re-)gaining traction also among progressive political theorists. In times of economic and existential uncertainties, sovereignty is there to offer protection ‘from unfettered markets and from permanently incumbent austerity’ and it constitutes a ‘refusal of a “liquid society” and of its very solid … inequalities.’16 Some of the most lucid analyses of the current international economic order point at the dramatic consequences of an increase of capitalist power that has incapacitated states to act in defense of its own people.17 The attention on sovereignty is also partly reflected in recently negotiated provisions of new trade and investment agreements, where states are explicitly endowed with a ‘right to regulate.’ Despite the unclear practical implications of such jargon, its symbolic value is unambiguously bearing witness to the shared view that states ought to maintain (or regain) political space. Against this background, Trump’s claims to defend the Ohio steel workers by whatever trade measures it takes may appear more acceptable. Could we then read in this reinvigorated faith in sovereignty a ‘Grotian moment’?18

Without indulging on this question, this article posits that we should beware the ‘risk’ of entering a ‘Schmittean moment’.19 This term is here used to refer to a major shift toward an ideal of unfettered national sovereignty as the chief paradigm to re-orient the international (economic) order. Under such ideal, any international normative benchmark is brushed away by an allegedly more intellectually honest ‘political’ dimension, which can find its realization only in the decisionist state.20 To understand the risk of a ‘Schmittean moment’, it is important to recognize that the move toward more nation-state is partly animated by the legitimate concerns over the existing international legal order; legitimate concerns, which have eloquently been articulated by Schmitt himself.

Carl Schmitt’s work offers a lucid critique of the ‘exclusionary character of liberal universalism.’21 His critique exposes the hypocrisy underpinning many universalisms, most prominently the legal canon of ‘just’ war.22 In fact, it is the very core of the contemporary international legal project that gets questioned: ‘The concept of humanity is an especially useful ideological instrument of imperialist expansion, and in its ethical-humanitarian form, it is a specific vehicle of economic imperialism. Here, one is reminded of a somewhat modified expression of Proudhon’s: whoever invokes humanity wants to cheat.’23 This argument has direct relevance for the domain of international economic law. In an endnote to this claim—discussing the extermination of Indians in North America—Schmitt explains the danger to use certain moral canons as exclusionary devices: ‘As civilization progresses and morality rises, even less harmless things than devouring human flesh could perhaps qualify as deserving to be outlawed in such a manner. Maybe one day, it will be enough if people were unable to pay its debts.’24 This consideration is of extreme actuality in relation to the current international legal order, which seems to have crystallized structures of annihilation of debt states, and their very peoples.25 In decrying how the economical is rescinded by the political, Schmitt unveils the absent ‘presence’ of (mostly American) politics in the economy. In short, Schmitt’s analysis cogently engages with the problem of depoliticization that the international liberal order yields.26 It is at this juncture that the thoughts of Schmitt and Rodrik may intersect. In some sense, Schmitt’s critique resonates with the critique of ‘hyper-globalization’ articulated by Rodrik:27 ‘one type of failure arose from pushing rule making onto supranational domains too far beyond the reach of political debate and control.’28

Before elaborating on this intersection, it is key to rehash some flaws of Schmitt’s analysis. While he has certainly a point in showing how liberal universalism can be used to arbitrarily exert hegemonic power in the name of humanity (and has so been used in such way by the US and other predominantly Western countries), the alternative he implicitly propounds rests on a nostalgia for a mythical past—a golden age based on the jus publicum Europaeum. Regrettably, this age has been golden only for some; the jus publicum Europaeum for all its glory was made of colonial relations, exploitation, and violence. It has also been noted how Schmitt’s historical analysis, which portrays the times of the jus publicum Europaeum as times where war gets domesticated by the modern state eclipses the fact that the ‘development of the modern state apparatus … helped bring about unprecedented capacities for organized state violence, even if such violence was no longer typically unleashed against fellow Europeans.’29 His conception of sovereignty, which finds essential realization only in the ‘unlimited jurisdictional competence’ normalizes the rule of exception. A related trouble with Schmitt’s core normative ideas is the totalizing enemy-friendship antithesis: ‘the distinction of friend and enemy denotes the utmost degree of intensity of a union or separation, of an association or dissociation.’30 This is particular fatal to an ideal of nonviolent international law, as it denies even the aspiration of solidarity beyond borders.31 In other words, Schmitt conceptualization of the international legal order crystallizes nation-state borders in deeper existential structures, leaving no hope for common projects of different communities inhabiting the earth. In exposing the violence of allegedly humanitarian projects, Schmitt is de facto hollowing out the concept humanity, reducing its essence to violence in potentia: ‘the entire life of a human being is a struggle and every human being symbolically a combatant. The friend, enemy, and combat concepts receive their real meaning precisely because they refer to the real possibility of physical killing.’32 In denouncing the hypocrisy of moralism, Schmitt seems to negate the possibility of morality altogether. The Nomos of the earth, starting with the act of appropriation—nehmen (take)—and continuing with dividing the land—nemein (divide)—does not engage with the morality of the first act of appropriation nor with its division. And this is also what Hanna Arendt contests to Schmitt: ‘to remove justice from the content of the law.’33

## Case

### Top Level---1NC

#### Presumption---1AC Ramini concedes there’s no telos to the 1AC---even if the aff is continually acting, that never reaches an end goal for solvency AND proves that the ballot isn’t key to solvency.

#### Undoing squo power relations requires analyzing and attacking power structures through pragmatic struggle---normative appeals alone are ineffective.

Naomi **Zack 17**. Professor of philosophy at the University of Oregon. 02/2017. “Ideal, Nonideal, and Empirical Theories of Social Justice: The Need for Applicative Justice in Addressing Injustice.” The Oxford Handbook of Philosophy and Race, Oxford University Press.

Ideals of justice may do little toward the correction of injustice in real life. The influence of John Rawls’s A Theory of Justice has led some philosophers of race to focus on “nonideal theory” as a way to bring conditions in unjust societies closer to conditions of justice described by ideal theory. However, a more direct approach to injustice may be needed to address unfair public policy and existing conditions for minorities in racist societies. Applicative justice describes the applications of principles of justice that are now “good enough” for whites to nonwhites (based on prior comparisons of how whites and nonwhites are treated). Social information just dribbles in, bit by bit, and we simply get used to it. A single story about a person really hits home at once, but the grinding injustices of daily life are endured. It is easy to ignore them and we do. Judith Shklar, The Faces of Injustice (Shklar 1990, 110) IDEAL theory about justice extends from Plato’s Republic to John Rawls’s A Theory of Justice, including many careers devoted to analyses and criticism about such texts in political philosophy. Rawls offers a picture of the basic institutional structures of a just society, on the premise that in order to correct injustice, we must first know what justice is. According to Rawls, while “partial compliance theory” studies the principles that govern how we are to deal with injustice, full compliance theory, or ideal theory, studies the institutional principles of justice in a stable society where citizens obey the law. Rawls began A Theory of Justice with the claim: “The reason for beginning with ideal theory is that it provides, I believe, the only basis for the systematic grasp of these more pressing problems” (Rawls 1971, 8). Rawls’s ideal theory is too abstract to correct injustice or provide justice for victims of injustice in reality, because it is based on a thought experiment and the assumption of a “well-ordered” society in which there already is compliance with law (Zack 2016, 1–64). What people care about in reality concerning justice is not what ideal justice is or would be, but how immediate injustice can be corrected. Injustice is always specific in concrete events that are recognizable as certain types, for example, theft, murder, or police racial profiling. Injustice can be corrected by punishing those responsible for it in specific cases and instituting social changes that prevent or reduce future occurrences of the same type. Rawlsian nonideal theories of justice, constructed for societies where people do not comply with just laws, rely on ideal theory as a standard for just institutional structures. The main question driving nonideal theory is how to construct a model or picture of justice that will result in the future correction or avoidance of present injustices. John Simmons quotes John Rawls from Law of Peoples, on this matter. Nonideal theory asks how this long-term goal might be achieved, or worked toward, usually in gradual steps. It looks for courses of action that are morally permissible and politically possible as well as likely to be effective [LOP p. 89]. (Simmons 2010, 7) However, injured or indignant parties may not care about the long-term goal of justice that could lead to balance or compensation for their situations. Not only are what P. F. Strawson (1962) called “reactive attitudes,” such as moral indignation, blame, and a desire for deserved punishment, strong in their focus on injustice, but the best theory of justice in the world does not tell us what to do about the injustices we are faced with in the here and now, especially “the more pressing problems” of race-related injustices. Such questions cannot be answered with reference to ideal theory or some application of ideal or nonideal theory to their concrete situations, because the a priori nature of both of these does not provide a fit with specific contingencies—ideal and nonideal theories do not generate practical bridge principles. As theories, they posit ideal entities, but without the apparatus of scientific theories which provides connections to observable entities or events. (Moulines 1985). The correction of injustice or injustice theory requires a philosophical foundation for itself. Models of justice have often been naïvely utopian throughout the history of philosophy, because they are based on an assumption of automatic total compliance, as though the right words or pictures by themselves have the power to transform reality, or as though agreement with those right words or pictures will automatically result in action that will automatically make the world instantiate those words or pictures. When they are not fantastically and ineffectively utopian in this way, such models have been used to justify the already-existing dominance of some groups over others. (A prime example is John Locke’s Second Treatise of Government, written decades before 1688 Glorious Revolution, to express the interests of the new rising class of landed gentry, which were eventually fulfilled by a Protestant king on the throne and a strong representative parliament after that revolution [Laslett 1988].) Models of justice have legitimately served to inspire law in modern societies with government constitutions and national and local law. But, sometimes, as in US founding documents, although universal and absolute justice is proclaimed, subsequent events make it clear that this language was intended to legitimize just treatment for members of selected groups only, that is, white male property owners, at first. As a result of just law and its selective application, over time, there comes to be justice for an expanding group, but still not everyone in society. However, what is written, together with descriptions of real justice for some, can be a powerful lever for obtaining justice for at least some of the excluded. To understand how that works, it is necessary to develop an approach to justice that begins with injustice, in real situations where there is already some degree of justice in a larger whole. The extension of existing practices of justice to members of new groups is applicative justice, a concept with substantial historical and intellectual precedent, although not by that name. In what follows, more will be said about the idea of applicative justice and then its history will be considered. Voting rights and housing rights are examples of candidates for applicative justice in our time. Finally, content in the form of narrative may be motivational for social change. The Idea of Applicative Justice Applicative justice is an approach to justice with the goal of making the unjust treatment of some comparable to those who already receive just treatment. Applicative justice takes a comparative approach, for example, comparing how young black males are treated by police officers in contemporary US society, to how young white males are treated (Jones 2013; Zack 2013, 2015). Applicative justice rests on a pragmatic approach to social ills, which includes the premise, based on Arthur Bentley’s 1908 insights in The Process of Government, that government is much more than the apparatus of state and written laws and court decisions. Government is an extended, dynamic process, an ongoing contention among interest groups in society. This full-bodied, empirical and pragmatic view of government process entails, for example, that we consider as parts of the same political mix/phenomenon/raw material all of the foregoing: the Fourth and Fourteenth Amendments, the 1960s Civil Rights Legislation, doctrines of probable cause, the disproportionate incarceration of African Americans, racial profiling, and police homicide with impunity. Thus, Rawls’s insistence that “the rights secured by justice are not subject to political bargaining or to the calculus of social interests” (Rawls 1971, 4), should be understood as “the rights secured by justice should not be subject to political bargaining or to the calculus of social interests.” In reality, “the rights secured by justice” are constantly subject to political bargaining and the living calculus of social interests. One consequence of this empirical perspective is that moral outrage, critiques of white supremacy, or analyses of white privilege, along with other forms of blame, cannot be assumed to have the power to change anything, by themselves. By contrast, changing relationships between police officers and their local communities, or changing the rules of engagement when police stop or attempt to stop suspects, might on this view have some causal power (Ayres and Markovits 2014). It is important to realize that such changes in practice would not be specific applications of a theory of justice, but ways of changing social reality into a different political mix. However, a better theory of justice, even a more racially egalitarian one and even a theory of applicative justice that was widely accepted, would still be no more than a change in what Bentley calls “political content.” Any theory of justice or any set of just laws is compatible with widespread racially unequal and unjust practice. And the converse also holds. Unjust laws or laws with gaps for unjust practice are compatible with just practice. Thus, applicative justice is pragmatic in taking the whole political mix/ phenomenon/raw material as its subject for a specific injustice. Unlike ideal or nonideal justice theory, the applicative justice approach brooks little faith that reality can be changed by a special conceptual space or mode of critical moral discourse that is undertaken apart from reality. Reality cannot be changed by normative pronouncements, by or on behalf of the oppressed, but only by shifts in existing interests of groups of real people. To base hopes for change on normative content alone may ~~paralyze~~ [eliminate] the means for taking action that could result in change, because such content proceeds as though matters of justice were only matters of argument. Those who have opposed social racial justice have understood this well enough, because instead of mainly arguing against new just law over the twentieth century, they have taken action to block progress. Race and Justice Consideration of race and injustice together, within political philosophy, focuses on the need for specific groups to not be treated unjustly. For a group to be treated justly, a large number of its members need to be treated justly. But for a group to be treated unjustly, it is sufficient if a smaller number or lower proportion than required to meet the standard of just treatment be treated unjustly. One reason for this asymmetry is that just treatment is easily normalized within communities, whereas unjust treatment of only a few is disruptive and considered abnormal among other members of the group to which victims belong (although not necessarily by members of groups who are generally treated justly). The unjust treatment of a small number ripples from their friends and relations to other members of the same group, who realize that they are subject to similar unjust treatment from their membership in that group alone. More broadly, if the group treated justly and the group treated unjustly belong to the same larger collective, such as whites and blacks in the United States, then the unjust treatment of even a very small number of that total collective of residents or citizens should be disruptive to the whole collective, given promulgated principles of “justice for all.” But that does not always happen, at least not in ways that result in real change. Apathy and self-absorption of those not treated unjustly is part of the reason, although another significant part is that the group treated justly already knows that the national collective rhetoric of justice is intended to apply primarily to them. It is that kind of disparate treatment, which does not disrupt everyone, even though it should, which calls for a theory of applicative justice, on the abstract level where people call for justice. But applicative justice is not only an abstract theory. Applicative justice requires comparisons of group treatment. If minorities are treated unjustly, a description of that injustice does not require an ideal or nonideal theory or model of justice, but simply a comparison with how the majority is treated. (The term “minorities” refers to those disadvantaged or oppressed, because sometimes minorities are greater in number than “majorities,” e.g., blacks under apartheid in South Africa, American slaves in some Southern states, or black Americans in some twenty-first-century cities.) The principles and mechanics of justice that work well enough for most white Americans need to be applied to nonwhite Americans. For rhetorical purposes, it might be evocative to talk about black lives or black rights, but strictly speaking the subject is a racial framework that is color-blind in an important part of law—constitutional amendments and federal legislation—but not in reality. This gap between written law and social reality can be viewed as hypocrisy, racial bias, or white supremacy, only if one assumes that written law is an accurate description of, or blueprint for, social reality. But a perspective that takes in the whole process of government reveals that the gap and what is permissible within it, are parts of the same whole process. The contrast between blueprints and maps is important to consider. Political philosophers often proceed as though their writings about justice are blueprints, when they should instead begin by constructing maps. Present politics or a political party in power may present obstacles and challenges to applicative justice in any specific case. Those who aim for applicative justice must struggle against such obstacles and challenges, as well as the ignorance, prejudice, and ill will of large parts of voting publics under democratic government, and in addition, media misrepresentations, business interests in a status quo, and lack of understanding of oppression by those who are treated unjustly. For example, the injustice in the disproportionately large number of African Americans in the US criminal justice system has been supported by law-and-order politics, the War on Drugs, belief in racial gender myths (e.g., the larger-than-life black rapist), explicit racism, media sensationalism of crime committed by black men, profits made by for-profit prison corporations, and embrace of self-destructive subcultures by some black men who become incarcerated. At the same time, as an efficient cause or precipitating factor, ongoing racial profiling by police helps feed the system with new suspects, about 90 percent of whom plead guilty in preference to the risks and costs of a trial (Kerby 2013; Rakoff et al. 2014). Intergenerational poverty, unemployment, and undereducation contain people within this system, and the high rates of nonwhites in the prison population are used as official justification for racial profiling (Zack 2015, chap 2). Thus, the complexity of causes and background factors associated with the disproportionate number of African American male prison inmates can be understood through a number of approaches. The normative approach of applicative justice would be to address those causes or factors, distinctly and individually, through specific changes in concrete practice, as well as changes in law, as relevant.

#### Failure to produce a workable telos means the aff accomplishes nothing but violent totalitarianism---embrace pragmatic reform.

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The theories of social change that dominated American Communication Studies at the close of the twentieth century echoed those of the Western humanities. These theories spurred extensive thought about the performances of individual identity and the relationship of identity to mass media and culture, and they probably had some laudable influence on the broader culture. They are, however, inadequate to the evolving contexts I have described. One can sum up the most widely circulating theories of social change among “critical social theorists” of the twentieth century in the following, admittedly simplified, statement: There is an (evil) Totality (fill in the blank with one or more: patriarchy, whites, the West, the U.S., neo-liberalism, global capitalism) that must be overturned by a Radical Revolution. We don't know the shape of what will come after the Revolution, but The Evil is a construction of the Totality, so anything that comes after will be better. All you need is … (fill in the blank: Love, Courage, Violence, etc.). For an example, read Slavoj Žižek's attack on the evil Totality (“capitalism,”5 pp. 41/49), which requires the “excess” of violence named as “courage”6 (pp. 75, 78, 79), via “a leap”7 (p. 81), to eliminate “democracy” for a yet-to-be-imagined “new collectivity” (p. 85).8 The resilience of this social theory identifies it as a rhetorical attractor; a predispositional symbolic set that readily transmits emotive potency. To appropriate Kenneth Burke's terms, the bio-symbolics of human political relationships readily create a “grammar” and “rhetoric” in the form of a unified enemy that can be imagined as defeated in a singular battle, after which, things in “our” tribe may be harmonious. To identify this fantasy theme in this way is to suggest that it may not merely be the product of “Western” or “capitalist” imaginations, but rather that it arises from an intersection of the structural characteristics of language systems and the nature of human biologies (which readily adopt both tribal social cooperation and inter-tribal competition). Because neither biology nor symbolics are deterministic systems, this fantasy theme is avoidable, even if it is powerfully attractive. Because both biology and symbolics are material, however, specific kinds of work are necessary in order to avoid the lure of that predisposition. This point is crucial, because it invalidates the twentieth century (idealist) approaches to social change, which envisioned a single (violent) leap away from the social as sufficient to create and maintain better worlds. Thus, when Žižek and others urge us to “Act” with violence to destroy the current Reality, without a vision of an alternative, on the grounds that the links between actions and consequences are never certain, we can call his appeal both a failure of imagination and a failure of reality. As for reality, we have dozens of revolutions as models, and the historical record indicates quite clearly that they generally lead not to harmonious cooperation (what I call “AnarchoNiceness” to gently mock the romanticism of Hardt and Negri) but instead to the production of totalitarian states and/or violent factional strife. A materialist constructivist epistemology accounts for this by predicting that it is not possible for symbol-using animals to exist in a symbolic void. All symbolic movement has a trajectory, and if you have not imagined a potentially realizable alternative for that trajectory to take, then what people will leap into is biological predispositions—the first iteration of which is the rule of the strongest primate. Indeed, this is what experience with revolutions has shown to be the most probable outcome of a revolution that is merely against an Evil. The failure of imagination in such rhetorics thereby reveals itself to be critical, so it is worth pondering sources of that failure. The rhetoric of “the kill” in social theory in the past half century has repeatedly reduced to the leap into a void because the symbolized alternative that the context of the twentieth century otherwise predispositionally offers is to the binary opposite of capitalism, i.e., communism. That rhetorical option, however, has been foreclosed by the historical discrediting of the readily imagined forms of communism (e.g., Žižek9). The hard work to invent better alternatives is not as dramatically enticing as the story of the kill: such labor is piecemeal, intellectually difficult, requires multi-disciplinary understandings, and perhaps requires more creativity than the typical academic theorist can muster. In the absence of a viable alternative, the appeals to Radical Revolution seem to have been sustained by the emotional zing of the kill, in many cases amped up by the appeal of autonomy and manliness (Žižek uses the former term and deploys the ethos of the latter). But if one does not provide a viable vision that offers a reasonable chance of leaving most people better off than they are now, then Fox News has a better offering (you'll be free and you'll get rich!). A revolution posited as a void cannot succeed as a horizon of history, other than as constant local scale violent actions, perhaps connected by shifting networks we call “terrorists.” This analysis of the geo-political situation, of the onto-epistemological character of language, and of the limitations of the dominant horizon of social change indicates that the focal project for progressive Left Academics should now include the hard labor to produce alternative visions that appear materially feasible.

#### Markets are societally ingrained

Levi **Bryant 12**, Professor of Philosophy at Collin College, “We’ll Never Do Better Than a Politician: Climate Change and Purity,” <https://larvalsubjects.wordpress.com/2012/05/11/well-never-do-better-than-a-politician-climate-change-and-purity/>

It is quite true that it is the system of global capitalism or the market that has created our climate problems (though, as Jared Diamond shows in Collapse, other systems of production have also produced devastating climate problems). In its insistence on profit and expansion in each economic quarter, markets as currently structured provide no brakes for environmental destructive actions. The system is itself pathological. However, pointing this out and deriding market based solutions **doesn’t get us very far**. In fact, such a response to proposed market-based solutions is **downright dangerous** and **irresponsible**. The fact of the matter is that 1) we currently live in a market based world, 2) there is not, in the foreseeable future an alternative system on the horizon, and 3), above all, **we need to do something now**. We **can’t afford to reject interventions** simply because they **don’t meet our ideal conceptions** of how things should be. We have to **work with the world that is here**, not the one that we would like to be here. And here it’s crucial to note that pointing this out **does not entail** that we shouldn’t work for producing that other world. It just means that we have to grapple with the world that is **actually there before us**. It pains me to write this post because I remember, with great bitterness, the diatribes hardcore Obama supporters leveled against legitimate leftist criticisms on the grounds that these critics were completely unrealistic idealists who, in their demand for “purity”, were asking for “ponies and unicorns”. This rejoinder always seemed to ignore that words have power and that Obama, through his profound power of rhetoric, had, at least the power to shift public debates and frames, opening a path to making new forms of policy and new priorities possible. The tragedy was that he didn’t use that power, though he has gotten better. I do not wish to denounce others and dismiss their claims on these sorts of grounds. As a Marxist anarchists, I do believe that we should fight for the creation of an alternative hominid ecology or social world. I think that the call to commit and fight, to put alternatives on the table, has been one of the most powerful contributions of thinkers like Zizek and Badiou. If we don’t commit and fight for alternatives those alternatives will never appear in the world. Nonetheless, we still have to grapple with the world we find ourselves in. And it is here, in my encounters with some Militant Marxists, that I sometimes find it difficult to avoid the conclusion that they are **unintentionally aiding** and **abetting** the **very things they claim to be fighting**. In their **refusal to become impure**, to **work with situations** or **assemblages** as we find them, to **sully their hands**, they end up **reproducing the very system** they wish to **topple** and **change**. Narcissistically they get to sit there, smug in their superiority and purity, while **everything continues as it did before** because they’ve **refused to become politicians** or engage in the **difficult concrete work** of assembling human and nonhuman actors to **render another world possible**. As a consequence, they occupy the position of Hegel’s beautiful soul that denounces the horrors of the world, celebrate the beauty of their soul, while depending on those horrors of the world to sustain their own position. To engage in politics is to engage in networks or ecologies of relations between humans and nonhumans. To engage in ecologies is to descend into networks of causal relations and feedback loops that you cannot completely master and that will modify your own commitments and actions. But there’s **no other way**, there’s no way around this, and we **do need to act now**.

#### Status quo social movements fail---cant reverse neoliberalisation, create political change or trans-nationalize

Petar Kurecic 16, Assistant Professor of Economics at University North, Croatia, 12/26/2016, “Social movements as (in)effective way of struggle against neoliberal geopolitics (i.e. essentially detrimental ideology aimed at destruction of the welfare state)?”, https://www.academia.edu/32030532/Social\_Movements\_and\_Neoliberal\_Geopolitics

Recognition of neoliberalism’s geographies of poverty, inequality, and violence as intertwined across a multiplicity of sites impels us to view its geographies of protest, resistance, and contestation in the same light (Springer, 2011: 553). Because the changes associated with neoliberal policies often had negative distributional impacts on the working class, the poor, the small-business sector, and the environment, diverse forms of resistance and contestation have emerged (Kurecic, 2016: 35)¶ Anyhow, if we have the TNC on one side, then it should probably be most effective to fight its goals and actions with means of social action that transcends national borders – transnational social movements . In other words, transnational demos should be able to fight “the Cabal”.¶ What actually are social movements? Nilsen (2015: 4-5) points out that social movements can be seen as “being simultaneously constituted by and constitutive of praxis, and thus as being situated at the very heart of the making and unmaking of the structures and processes that underpin both social order and social change. Social movements should be understood according to the way how they play a role in shaping and reshaping the current form of given institutional fields and political economies, and taking seriously the basic intention that animates social movements, that is, the intention of moving, of becoming more than what they currently are.”¶ Although neoliberalism’s power to “press upon” stems from its institutional arrangement and hegemonic discourses backed by the United States’ military might (Harvey 2003; Peet 2007), the presence of power that “presses upon” does not negate the possibility of subaltern counter-politics. In fact, the presence of power that presses upon also gives rise to productive power, or the power to resist and transform (Foucault, 1979). The power of those adversely affected by neoliberalism is dependent on their alliances, relations, networks and counterhegemonic discourses (Waquar, 2012: 1063).¶ Social movements typically grow from “cramped spaces”, situations that are constricted by the impossibilities of the existing world with a way out barely imaginable. But precisely because they are cramped, these spaces act as incubators or greenhouses for creativity and innovation (The Free Association, 2007).¶ Social movements of the present day world are definitely thriving because of the two main processes. The first process is the neo-liberally inspired internationalization (which the ideologists of globalization refer to as “globalization”) that increases social inequality in both rich and poor states, concurrently increasing inequalities between the developed and non-developed states, increasing the number of least-developed states. The second is the revolution in information technologies that has invented “new media” and then made them available to significant parts of the world population (in developed states, the percentage of Internet users well surpasses 50%). Internet and its tools have become ubiquitous (Kurecic, 2016: 35).¶ Unfortunately, social movements usually pursue only their national agenda, and their transborder actions are in most cases ineffective. On the other hand, it is very difficult for a politician connected with social movements to be elected in office, on any level, and in any country, hence all the influence, funds, media, and state security apparatuses are acting to prevent any such event to occur. Therefore, the pursuers of progressive agendas always carry an immense burden even before they start a race for office.¶ Castells (2012) has identified over a 100 diffused and on social networks active social movements that have thrived in 2009-2012 period, in various parts of the world, in democratic and developed states (various movements in European states, Occupy Wall Street Movement etc.), as well as in the autocratic regimes of the developing world (for instance, the Arabian Spring movements, protests in Russia against Putin). All these movements used social media as a means of coordinating their actions and announcing their messages to their supporters and to the outside world.¶ However, we have to ask ourselves – what is the results of all these social movements? What has Arab Spring brought to the Arab countries? Stability, prosperity? Not a chance. On the other hand, we are witnessing chaos, terrorism and destruction after the rise of the political Islam. Is Russia a more democratic country than in 2012 before Putin was elected (again) as President? Is Wall Street less predatory and more socially responsible than it was before the Great Recession and the Occupy Wall Street Movement actions? Maybe it is a bit more regulated. Anything more than that – hardly.¶ In that sense, in their fight against neoliberal geopolitics and the bourgeois capitalist state, social movements have not been very successful. Usually, the elite would make a couple of superficial moves that lowered the levels of tension and social action in a certain society that witnessed the build-up of grievance and social action, manifested through social movements. Then the level of dissatisfaction of the “masses” would exhaust and everything would return to normal, one way or the other. This is, unfortunately a rule when it comes to social action tied with social movements. The trends of neoliberal totalitarian dominance over the economy and politics in most countries of the world have not been reversed. If 62 people have more money than the poorer half of the world’s populations, then it is clear that everything and not just something is deeply wrong. The system needs a reset. Nevertheless, social movements have not been able to reset the system, at least so far.

### Turn---1NC

#### Capitalism is key to space col---that solves inevitable extinction and the case---but it requires sustained growth and social investment

Spring 16 – BA in journalism from Purchase College, SUNY (Todd, "A Case for Capitalism, In Regards to Space Travel," Medium, <https://thepolicy.us/a-case-for-capitalism-in-regards-to-space-travel-d77e50f8116e)//> gcd

In the news yesterday was an article about how Elon Musk plans to start sending men to Mars in the year 2024 — a mere eight years away. Although the project may be ambitious — ridiculous even — if anyone can pull it off it is Elon Musk and his company SpaceX. And regardless of whether he succeeds in his quest or whether he does not succeed, the point will remain: At least he had the courage to try. For years, we have been waiting for N.A.S.A. (or some other government-funded agency) to begin pulling up their breeches when it comes to the manned exploration of our solar system…but thus far they have not been able to get their act together. We have waited and waited, but as of yet nothing has come to pass but brief mention of such travels here and there…like a wind with neither haste nor purpose. As of now, N.A.S.A. does not plan on sending a manned mission to Mars until the 2030s — assuming, of course, they get the government funding they need to undertake such a massive project. Considering the recent cuts to deep space exploration, down nearly $300 million from 2016, I am not certain what the condition of the program will look like in another two years…much less the gap between now and the 2030s. Where, then — if the government and its agencies will not provide us with the money for exploration — will we turn to slake our thirst for cosmic space travel? SpaceX. Private corporations. Capitalism. Seeing this article in the news, reading day after day the story of budget cuts to N.A.S.A. in regards to deep-space exploration and other related programs, got me thinking about just how important it will be for private companies and corporations to undertake these projects…such as Elon Musk’s SpaceX, and countless others (read the full list here). The problem is that we have gotten it into our heads that Capitalism is the root cause of our economic woes in the United States, perhaps failing to understand that such policies are something like a double-edged sword: they could also be our salvation. This article provides a great list of the pro’s and con’s of Capitalism. I would recommend you take the short passing of time it requires to read it through-and-through before continuing. Now then. I have never been for for fully-unhindered Capitalism. I do not believe that the government should stay out of economic affairs entirely, for as provided in the article many of the con’s relate to improper regulation (monopolization) as opposed to something fundamentally wrong, but I do not believe that any government should be going about shoving their claws into every economic affair either. There must be a healthy balance, especially if Capitalism is to work as it is supposed to work. The same goes for any policy. The government should be there to bolster competition between businesses…not favor one or bail-out the other. The more regulation, the more interference or amendment, the less it works…but this mix of regulation and free market must fall in the “goldilocks zone” if the citizens of said society are to reap its full benefit. If not, like planets about a star, the society shall either burn or freeze. One of those benefits is highlighted by Elon Musk’s SpaceX: the intervention of privately-funded companies to do things that a traditional government agency cannot. Namely, the exploration and eventual colonization of Mars in a reasonable, step-by-step timeframe…unlike the “we will get to it eventually” mindset plaguing the bowels of the United States government. Were not the policies in place to foster the growth of private companies, our best chance at getting people out of Earth-orbit — the Bush-approved, now-cancelled, insanely-expensive Constellation program — would have gone the way of promises and well-wishes. It is my hope that Elon Musk and space entrepreneurs like him are not simply blowing steam, and that one day — perhaps even within my lifetime — I could be on my way to a space hotel on the Moon, flying aboard a space airliner with the name of a private company plastered across the side. Regardless, if we humans are to truly become a multi-planet species we must not hinder economic growth with narrow thoughts. We must not become confused that the “problems down here” and the “problem of getting out there” must be in conflict; they do not need to, and we must not suppose they should. They are two separate issues with two unique sets of problems, and thus this policy of taking resources from one to give to the other will only ensure that neither issue is given that which it needs, or enough to fix what must be solved. Therefore I propose that we support these pioneers of space travel in any way that we are able. Let us not forget that solving the issue of “how do we get there” might just lead to the end of our “problems down here”.

#### Extinction outweighs---it’s the upmost moral evil and disavowal of the risk makes it more likely.

Burns 17 – (Elizabeth Finneron-Burns is a Teaching Fellow at the University of Warwick and an Affiliated Researcher at the Institute for Futures Studies in Stockholm, What’s wrong with human extinction?, <http://www.tandfonline.com/doi/pdf/10.1080/00455091.2016.1278150?needAccess=true>, Canadian Journal of Philosophy, 2017)

Many, though certainly not all, people might believe that it would be wrong to bring about the end of the human species, and the reasons given for this belief are various. I begin by considering four reasons that could be given against the moral permissibility of human extinction. I will argue that only those reasons that impact the people who exist at the time that the extinction or the knowledge of the upcoming extinction occurs, can explain its wrongness. I use this conclusion to then consider in which cases human extinction would be morally permissible or impermissible, arguing that there is only a small class of cases in which it would not be wrong to cause the extinction of the human race or allow it to happen. 2.1. It would prevent the existence of very many happy people One reason of human extinction might be considered to be wrong lies in the value of human life itself. The thought here might be that it is a good thing for people to exist and enjoy happy lives and extinction would deprive more people of enjoying this good. The ‘good’ in this case could be understood in at least two ways. According to the first, one might believe that you benefit a person by bringing them into existence, or at least, that it is good for that person that they come to exist. The second view might hold that if humans were to go extinct, the utility foregone by the billions (or more) of people who could have lived but will now never get that opportunity, renders allowing human extinction to take place an incidence of wrongdoing. An example of this view can be found in two quotes from an Effective Altruism blog post by Peter Singer, Nick Beckstead and Matt Wage: One very bad thing about human extinction would be that billions of people would likely die painful deaths. But in our view, this is by far not the worst thing about human extinction. The worst thing about human extinction is that there would be no future generations. Since there could be so many generations in our future, the value of all those generations together greatly exceeds the value of the current generation. (Beckstead, Singer, and Wage 2013) The authors are making two claims. The first is that there is value in human life and also something valuable about creating future people which gives us a reason to do so; furthermore, it would be a very bad thing if we did not do so. The second is that, not only would it be a bad thing for there to be no future people, but it would actually be the worst thing about extinction. Since happy human lives have value, and the number of potential people who could ever exist is far greater than the number of people who exist at any one time, even if the extinction were brought about through the painful deaths of currently existing people, the former’s loss would be greater than the latter’s. Both claims are assuming that there is an intrinsic value in the existence of potential human life. The second claim makes the further assumption that the forgone value of the potential lives that could be lived is greater than the disvalue that would be accrued by people existing at the time of the extinction through suffering from painful and/or premature deaths. The best-known author of the post, Peter Singer is a prominent utilitarian, so it is not surprising that he would lament the potential lack of future human lives per se. However, it is not just utilitarians who share this view, even if implicitly. Indeed, other philosophers also seem to imply that they share the intuition that there is just something wrong with causing or failing to prevent the extinction of the human species such that we prevent more ‘people’ from having the ‘opportunity to exist’. Stephen Gardiner (2009) and Martin O’Neill (personal correspondence), both sympathetic to contract theory, for example, also find it intuitive that we should want more generations to have the opportunity to exist, assuming that they have worth-living lives, and I find it plausible to think that many other people (philosophers and non-philosophers alike) probably share this intuition. When we talk about future lives being ‘prevented’, we are saying that a possible person or a set of possible people who could potentially have existed will now never actually come to exist. To say that it is wrong to prevent people from existing could either mean that a possible person could reasonably reject a principle that permitted us not to create them, or that the foregone value of their lives provides a reason for rejecting any principle that permits extinction. To make the first claim we would have to argue that a possible person could reasonably reject any principle that prevented their existence on the grounds that it prevented them in particular from existing. However, this is implausible for two reasons. First, we can only wrong someone who did, does or will actually exist because wronging involves failing to take a person’s interests into account. When considering the permissibility of a principle allowing us not to create Person X, we cannot take X’s interest in being created into account because X will not exist if we follow the principle. By considering the standpoint of a person in our deliberations we consider the burdens they will have to bear as a result of the principle. In this case, there is no one who will bear any burdens since if the principle is followed (that is, if we do not create X), X will not exist to bear any burdens. So, only people who do/will actually exist can bear the brunt of a principle, and therefore occupy a standpoint that is owed justification. Second, existence is not an interest at all and a possible person is not disadvantaged by not being caused to exist. Rather than being an interest, it is a necessary requirement in order to have interests. Rivka Weinberg describes it as ‘neutral’ because causing a person to exist is to create a subject who can have interests; existence is not an interest itself.3 In order to be disadvantaged, there must be some detrimental effect on your interests. However, without existence, a person does not have any interests so they cannot be disadvantaged by being kept out of existence. But, as Weinberg points out, ‘never having interests itself could not be contrary to people’s interests since without interest bearers, there can be no ‘they’ for it to be bad for’ (Weinberg 2008, 13). So, a principle that results in some possible people never becoming actual does not impose any costs on those ‘people’ because nobody is disadvantaged by not coming into existence.4 It therefore seems that it cannot be wrong to fail to bring particular people into existence. This would mean that no one acts wrongly when they fail to create another person. Writ large, it would also not be wrong if everybody decided to exercise their prerogative not to create new people and potentially, by consequence, allow human extinction. One might respond here by saying that although it may be permissible for one person to fail to create a new person, it is not permissible if everyone chooses to do so because human lives have value and allowing human extinction would be to forgo a huge amount of value in the world. This takes us to the second way of understanding the potential wrongness of preventing people from existing — the foregone value of a life provides a reason for rejecting any principle that prevents it. One possible reply to this claim turns on the fact that many philosophers acknowledge that the only, or at least the best, way to think about the value of (individual or groups of) possible people’s lives is in impersonal terms (Parfit 1984; Reiman 2007; McMahan 2009). Jeff McMahan, for example, writes ‘at the time of one’s choice there is no one who exists or will exist independently of that choice for whose sake one could be acting in causing him or her to exist … it seems therefore that any reason to cause or not to cause an individual to exist … is best considered an impersonal rather than individual-affecting reason’ (McMahan 2009, 52). Another reply along similar lines would be to appeal to the value that is lost or at least foregone when we fail to bring into existence a next (or several next) generations of people with worth-living lives. Since ex hypothesi worth-living lives have positive value, it is better to create more such lives and worse to create fewer. Human extinction by definition is the creation of no future lives and would ‘deprive’ billions of ‘people’ of the opportunity to live worth-living lives. This might reduce the amount of value in the world at the time of the extinction (by killing already existing people), but it would also prevent a much vaster amount of value in the future (by failing to create more people). Both replies depend on the impersonal value of human life. However, recall that in contractualism impersonal values are not on their own grounds for reasonably rejecting principles. Scanlon himself says that although we have a strong reason not to destroy existing human lives, this reason ‘does not flow from the thought that it is a good thing for there to be more human life rather than less’ (104). In contractualism, something cannot be wrong unless there is an impact on a person. Thus, neither the impersonal value of creating a particular person nor the impersonal value of human life writ large could on its own provide a reason for rejecting a principle permitting human extinction. It seems therefore that the fact that extinction would deprive future people of the opportunity to live worth-living lives (either by failing to create either particular future people or future people in general) cannot provide us with a reason to consider human extinction to be wrong. Although the lost value of these ‘lives’ itself cannot be the reason explaining the wrongness of extinction, it is possible the knowledge of this loss might create a personal reason for some existing people. I will consider this possibility later on in section (d). But first I move to the second reason human extinction might be wrong per se. 2.2. It would mean the loss of the only known form of intelligent life and all civilization and intellectual progress would be lost A second reason we might think it would be wrong to cause human extinction is the loss that would occur of the only (known) form of rational life and the knowledge and civilization that that form of life has created. One thought here could be that just as some might consider it wrong to destroy an individual human heritage monument like the Sphinx, it would also be wrong if the advances made by humans over the past few millennia were lost or prevented from progressing. A related argument is made by those who feel that there is something special about humans’ capacity for rationality which is valuable in itself. Since humans are the only intelligent life that we know of, it would be a loss, in itself, to the world for that to end. I admit that I struggle to fully appreciate this thought. It seems to me that Henry Sidgwick was correct in thinking that these things are only important insofar as they are important to humans (Sidgwick 1874, I.IX.4).5 If there is no form of intelligent life in the future, who would there be to lament its loss since intelligent life is the only form of life capable of appreciating intelligence? Similarly, if there is no one with the rational capacity to appreciate historic monuments and civil progress, who would there be to be negatively affected or even notice the loss?6 However, even if there is nothing special about human rationality, just as some people try to prevent the extinction of nonhuman animal species, we might think that we ought also to prevent human extinction for the sake of biodiversity. The thought in this, as well as the earlier examples, must be that it would somehow be bad for the world if there were no more humans even though there would be no one for whom it is bad. This may be so but the only way to understand this reason is impersonally. Since we are concerned with wrongness rather than badness, we must ask whether something that impacts no one’s well-being, status or claims can be wrong. As we saw earlier, in the contractualist framework reasons must be personal rather than impersonal in order to provide grounds for reasonable rejection (Scanlon 1998, 218–223). Since the loss of civilization, intelligent life or biodiversity are per se impersonal reasons, there is no standpoint from which these reasons could be used to reasonably reject a principle that permitted extinction. Therefore, causing human extinction on the grounds of the loss of civilization, rational life or biodiversity would not be wrong. 2.3. Existing people would endure physical pain and/or painful and/or premature deaths Thinking about the ways in which human extinction might come about brings to the fore two more reasons it might be wrong. It could, for example, occur if all humans (or at least the critical number needed to be unable to replenish the population, leading to eventual extinction) underwent a sterilization procedure. Or perhaps it could come about due to anthropogenic climate change or a massive asteroid hitting the Earth and wiping out the species in the same way it did the dinosaurs millions of years ago. Each of these scenarios would involve significant physical and/or non-physical harms to existing people and their interests. Physically, people might suffer premature and possibly also painful deaths, for example. It is not hard to imagine examples in which the process of extinction could cause premature death. A nuclear winter that killed everyone or even just every woman under the age of 50 is a clear example of such a case. Obviously, some types of premature death themselves cannot be reasons to reject a principle. Every person dies eventually, sometimes earlier than the standard expected lifespan due to accidents or causes like spontaneously occurring incurable cancers. A cause such as disease is not a moral agent and therefore it cannot be wrong if it unavoidably kills a person prematurely. Scanlon says that the fact that a principle would reduce a person’s well-being gives that person a reason to reject the principle: ‘components of well-being figure prominently as grounds for reasonable rejection’ (Scanlon 1998, 214). However, it is not settled yet whether premature death is a setback to well-being. Some philosophers hold that death is a harm to the person who dies, whilst others argue that it is not.7 I will argue, however, that regardless of who is correct in that debate, being caused to die prematurely can be reason to reject a principle when it fails to show respect to the person as a rational agent. Scanlon says that recognizing others as rational beings with interests involves seeing reason to preserve life and prevent death: ‘appreciating the value of human life is primarily a matter of seeing human lives as something to be respected, where this involves seeing reasons not to destroy them, reasons to protect them, and reasons to want them to go well’ (Scanlon 1998, 104). The ‘respect for life’ in this case is a respect for the person living, not respect for human life in the abstract. This means that we can sometimes fail to protect human life without acting wrongfully if we still respect the person living. Scanlon gives the example of a person who faces a life of unending and extreme pain such that she wishes to end it by committing suicide. Scanlon does not think that the suicidal person shows a lack of respect for her own life by seeking to end it because the person whose life it is has no reason to want it to go on. This is important to note because it emphasizes the fact that the respect for human life is person-affecting. It is not wrong to murder because of the impersonal disvalue of death in general, but because taking someone’s life without their permission shows disrespect to that person. This supports its inclusion as a reason in the contractualist formula, regardless of what side ends up winning the ‘is death a harm?’ debate because even if death turns out not to harm the person who died, ending their life without their consent shows disrespect to that person. A person who could reject a principle permitting another to cause his or her premature death presumably does not wish to die at that time, or in that manner. Thus, if they are killed without their consent, their interests have not been taken into account, and they have a reason to reject the principle that allowed their premature death.8 This is as true in the case of death due to extinction as it is for death due to murder. However, physical pain may also be caused to existing people without killing them, but still resulting in human extinction. Imagine, for example, surgically removing everyone’s reproductive organs in order to prevent the creation of any future people. Another example could be a nuclear bomb that did not kill anyone, but did painfully render them infertile through illness or injury. These would be cases in which physical pain (through surgery or bombs) was inflicted on existing people and the extinction came about as a result of the painful incident rather than through death. Furthermore, one could imagine a situation in which a bomb (for example) killed enough people to cause extinction, but some people remained alive, but in terrible pain from injuries. It seems uncontroversial that the infliction of physical pain could be a reason to reject a principle. Although Scanlon says that an impact on well-being is not the only reason to reject principles, it plays a significant role, and indeed, most principles are likely to be rejected due to a negative impact on a person’s well-being, physical or otherwise. It may be queried here whether it is actually the involuntariness of the pain that is grounds for reasonable rejection rather than the physical pain itself because not all pain that a person suffers is involuntary. One can imagine acts that can cause physical pain that are not rejectable — base jumping or life-saving or improving surgery, for example. On the other hand, pushing someone off a cliff or cutting him with a scalpel against his will are clearly rejectable acts. The difference between the two cases is that in the former, the person having the pain inflicted has consented to that pain or risk of pain. My view is that they cannot be separated in these cases and it is involuntary physical pain that is the grounds for reasonable rejection. Thus, the fact that a principle would allow unwanted physical harm gives a person who would be subjected to that harm a reason to reject the principle. Of course the mere fact that a principle causes involuntary physical harm or premature death is not sufficient to declare that the principle is rejectable — there might be countervailing reasons. In the case of extinction, what countervailing reasons might be offered in favour of the involuntary physical pain/ death-inducing harm? One such reason that might be offered is that humans are a harm to the natural environment and that the world might be a better place if there were no humans in it. It could be that humans might rightfully be considered an all-things-considered hindrance to the world rather than a benefit to it given the fact that we have been largely responsible for the extinction of many species, pollution and, most recently, climate change which have all negatively affected the natural environment in ways we are only just beginning to understand. Thus, the fact that human extinction would improve the natural environment (or at least prevent it from degrading further), is a countervailing reason in favour of extinction to be weighed against the reasons held by humans who would experience physical pain or premature death. However, the good of the environment as described above is by definition not a personal reason. Just like the loss of rational life and civilization, therefore, it cannot be a reason on its own when determining what is wrong and countervail the strong personal reasons to avoid pain/death that is held by the people who would suffer from it.9 Every person existing at the time of the extinction would have a reason to reject that principle on the grounds of the physical pain they are being forced to endure against their will that could not be countervailed by impersonal considerations such as the negative impact humans may have on the earth. Therefore, a principle that permitted extinction to be accomplished in a way that caused involuntary physical pain or premature death could quite clearly be rejectable by existing people with no relevant countervailing reasons. This means that human extinction that came about in this way would be wrong. There are of course also additional reasons they could reject a similar principle which I now turn to address in the next section. 2.4. Existing people could endure non-physical harms I said earlier than the fact in itself that there would not be any future people is an impersonal reason and can therefore not be a reason to reject a principle permitting extinction. However, this impersonal reason could give rise to a personal reason that is admissible. So, the final important reason people might think that human extinction would be wrong is that there could be various deleterious psychological effects that would be endured by existing people having the knowledge that there would be no future generations. There are two main sources of this trauma, both arising from the knowledge that there will be no more people. The first relates to individual people and the undesired negative effect on well-being that would be experienced by those who would have wanted to have children. Whilst this is by no means universal, it is fair to say that a good proportion of people feel a strong pull towards reproduction and having their lineage continue in some way. Samuel Scheffler describes the pull towards reproduction as a ‘desire for a personalized relationship with the future’ (Scheffler 2012, 31). Reproducing is a widely held desire and the joys of parenthood are ones that many people wish to experience. For these people knowing that they would not have descendants (or that their descendants will endure painful and/or premature deaths) could create a sense of despair and pointlessness of life. Furthermore, the inability to reproduce and have your own children because of a principle/policy that prevents you (either through bans or physical interventions) would be a significant infringement of what we consider to be a basic right to control what happens to your body. For these reasons, knowing that you will have no descendants could cause significant psychological traumas or harms even if there were no associated physical harm. The second is a more general, higher level sense of hopelessness or despair that there will be no more humans and that your projects will end with you. Even those who did not feel a strong desire to procreate themselves might feel a sense of hopelessness that any projects or goals they have for the future would not be fulfilled. Many of the projects and goals we work towards during our lifetime are also at least partly future-oriented. Why bother continuing the search for a cure for cancer if either it will not be found within humans’ lifetime, and/or there will be no future people to benefit from it once it is found? Similar projects and goals that might lose their meaning when confronted with extinction include politics, artistic pursuits and even the type of philosophical work with which this paper is concerned. Even more extreme, through the words of the character Theo Faron, P.D. James says in his novel The Children of Men that ‘without the hope of posterity for our race if not for ourselves, without the assurance that we being dead yet live, all pleasures of the mind and senses sometimes seem to me no more than pathetic and crumbling defences shored up against our ruins’ (James 2006, 9). Even if James’ claim is a bit hyperbolic and all pleasures would not actually be lost, I agree with Scheffler in finding it not implausible that the knowledge that extinction was coming and that there would be no more people would have at least a general depressive effect on people’s motivation and confidence in the value of and joy in their activities (Scheffler 2012, 43). Both sources of psychological harm are personal reasons to reject a principle that permitted human extinction. Existing people could therefore reasonably reject the principle for either of these reasons. Psychological pain and the inability to pursue your personal projects, goals, and aims, are all acceptable reasons for rejecting principles in the contractualist framework. So too are infringements of rights and entitlements that we accept as important for people’s lives. These psychological reasons, then, are also valid reasons to reject principles that permitted or required human extinction.

#### Cap net reduces war

Mousseau 19—Professor in the School of Politics, Security, and International Affairs at the University of Central Florida (Michael, “The End of War: How a Robust Marketplace and Liberal Hegemony Are Leading to Perpetual World Peace,” International Security, Volume 44, Issue 1, Summer 2019, p.160-196, dml)

Is war becoming obsolete? There is wide agreement among scholars that war has been in sharp decline since the defeat of the Axis powers in 1945, even as there is little agreement as to its cause.1 Realists reject the idea that this trend will continue, citing states' concerns with the “security dilemma”: that is, in anarchy states must assume that any state that can attack will; therefore, power equals threat, and changes in relative power result in conflict and war.2 Discussing the rise of China, Graham Allison calls this condition “Thucydides's Trap,” a reference to the ancient Greek's claim that Sparta's fear of Athens' growing power led to the Peloponnesian War.3

This article argues that there is no Thucydides Trap in international politics. Rather, the world is moving rapidly toward permanent peace, possibly in our lifetime. Drawing on economic norms theory,4 I show that what sometimes appears to be a Thucydides Trap may instead be a function of factors strictly internal to states and that these factors vary among them. In brief, leaders of states with advanced market-oriented economies have foremost interests in the principle of self-determination for all states, large and small, as the foundation for a robust global marketplace. War among these states, even making preparations for war, is not possible, because they are in a natural alliance to preserve and protect the global order. In contrast, leaders of states with weak internal markets have little interest in the global marketplace; they pursue wealth not through commerce, but through wars of expansion and demands for tribute. For these states, power equals threat, and therefore they tend to balance against the power of all states. Fearing stronger states, however, minor powers with weak internal markets tend to constrain their expansionist inclinations and, for security reasons, bandwagon with the relatively benign market-oriented powers.

I argue that this liberal global hierarchy is unwittingly but systematically buttressing states' embrace of market norms and values that, if left uninterrupted, is likely to culminate in permanent world peace, perhaps even something close to harmony. My argument challenges the realist assertion that great powers are engaged in a timeless competition over global leadership, because hegemony cannot exist among great powers with weak markets; these inherently expansionist states live in constant fear and therefore normally balance against the strongest state and its allies.5 Hegemony can exist only among market-oriented powers, because only they care about global order. Yet, there can be no competition for leadership among market powers, because they always agree with the goal of their strongest member (currently the United States) to preserve and protect the global order based on the principle of self-determination. If another commercial power, such as a rising China, were to overtake the United States, the world would take little notice, because the new leading power would largely agree with the global rules promoted and enforced by its predecessor. Vladimir Putin's Russia, on the other hand, seeks to create chaos around the world. Most other powers, having market-oriented economies, continue to abide by the hegemony of the United States despite its relative economic decline since the end of World War II.6

To support my theory that domestic factors determine states' alignment decisions, I analyze the voting preferences of members of the United Nations General Assembly from 1946 to 2010. I find that states with weak internal markets tend to disagree with the foreign policy preferences of the largest market power (i.e., the United States), but more so if they are major powers or have stronger rather than weaker military and economic capabilities. The power of states with robust internal markets, in contrast, appears to have no effect on their foreign policy preferences, as market-oriented states align with the market leader regardless of their power status or capabilities. I corroborate that this pattern may be a consequence of states' interest in the global market order by finding that states with higher levels of exports per capita are more likely than other states to have preferences aligned with those of the United States; those with lower levels of exports are more likely to have interests that do not align with the United States, but again more so if they are stronger rather than weaker.

Liberal scholars of international politics have long offered explanations for why the incidence of war may decline, generally beginning with the assumption that although the security dilemma exists, it can be overcome with the help of factors external to states.7 Neoliberal institutionalists treat states as like units and international organization as an external condition.8 Trade interdependence is dyadic and thus an external condition.9 Democracy is an internal factor, but theories of democratic peace have an external dimension: peace is the result of the expectations of states' behavior informed by the images that leaders create of each other's regime types.10 In contrast, I show that the security dilemma may not exist at all and how peace can emerge in anarchy with states pursuing their interests determined entirely by internal factors.11

## 2NC

### Case---2NC

#### Intellectual humility---debates over antitrust and competition are constantly in flux, thus requiring openness to error.

Michael C.A. Stork 10, BA, Economics, Boston College, "Untying Cerberus: A Gatekeeper's Guide to Economic Evidence," Boston College, 2010, pg. 25-26.

In the philosophy of science, fallibilism is the realization that our current ideas will probably turn out to be wrong.115 The history of science demonstrates the constant replacement of old theories by new theories, so scientists would be well-advised to anticipate that such a pattern will continue. As Albert Einstein noted, “There are no eternal theories in science. It always happens that some of the facts predicted by a theory are disproved by experiment. Every theory has its period of gradual development and triumph, after which it may experience a rapid decline.”116 Fallibilism is creative destruction in the marketplace of ideas, and it fosters an intellectual humility regarding our economic theories. The impact of fallibilism can be found in the way that statisticians talk about hypothesis testing; they are careful to either “reject the null hypothesis” or “fail to reject the null hypothesis,” never confirming either way.117

Because fallibilism is well-supported in the philosophy of science,118 it is important for judges to rely on evidence that deals with the problems that fallibilism presents. In sum, judges must prefer empirical approaches because only empirical approaches progress; empirical approaches offer the best chance to avoid applying false theories. If fallibilism is like creative destruction, then empiricism is like the price system; empiricism is in constant flux, rejecting theories that become inconsistent as we gather more data or improve how we make observations. To complete the analogy, theoretical approaches are like a planned economy; a priorism does not respond to observation, meaning that the a priori conclusions are static in spite of any changes or improvements. If the caution of fallibilism is correct, then we should be eager to embrace empiricism—the approach that helps us weed out bad theories.

Now a praxeologist may view this type of constancy as an advantage of a theoretical approach. In fact, a praxeologist would probably point to the constant uncertainty in empirical studies as an indication of problems with empiricism.119 To refute such a claim, one only needs to study the history of an empirical discipline—whether economics or a natural science—and conclude that contemporaneous scientists have more predictive power than earlier scientists. A number of factors, whether technological, cultural, or institutional, affect the stock of scientific knowledge, and it would be radical to argue that human beings have the same understanding of the world today as we had in ancient times. Such a growth in the stock of knowledge is characteristic of empirical, not theoretical, approaches. Because the axiom of human action is true at all times for all people, the same conclusions should hold today and two millennia from now. What empirical economists know today, however, may be only a fraction of what they will know in the future.

To clarify the need for a progressive approach, consider the evolution of tying law over the past century. Initially, tying arrangements were treated as per se illegal by the courts, means that they were considered inherently anti-competitive. 120 As antitrust became more economically-based in the second half of the twentieth century, however, courts began to judge tying arrangements according to the rule of reason, meaning that the consequences of the arrangements had to be considered before a ruling could be made. If the courts had insisted on using the a priori per se rule, there would be no way for an efficient tying arrangement to survive. An arrangement that would benefit consumers, therefore, would be deemed illegal. The advantage of the rule of reason and for empiricism is clear: as judges come to better understand the world, they can adjust their rulings to generate better consequences.

#### That’s vital to inculcate epistemic tolerance---refines decision-making and improves advocacy.

Vlasta Sikimić et al. 20, Carl Friedrich von Weizsäcker Center, University of Tübingen; Tijana Nikitović, Institute of Psychology, Department of Psychology, Faculty of Philosophy, University of Belgrade; Miljan Vasić, Institute for Philosophy, Department of Philosophy, Faculty of Philosophy, University of Belgrade; Vanja Subotić, Institute for Philosophy, Department of Philosophy, Faculty of Philosophy, University of Belgrade, "Do Political Attitudes Matter for Epistemic Decisions of Scientists?" Review of Philosophy and Psychology, 08/25/2020, Springer.

As mentioned, the principal aim of our research was to operationalize and empirically test epistemic attitudes, with epistemic tolerance construed as an epistemic virtue, epistemic authoritarianism as an epistemic vice, and skepticism towards the scientific method as a Janus-faced epistemic attitude, rather than virtuous at all times. The first step concerns the confirmation of the quality of the newly proposed scales and the interpretation of the descriptive statistics of all scales presented in the previous section.

When it comes to descriptive statistics, from skewness and kurtosis values, as well as from Kolmogorov-Smirnov tests of normality, we see that none of the relevant variables are normally distributed. This does not necessarily indicate a problem with the used scales but rather reflects upon the underlying nature of the measured phenomena, as well as the characteristics of the scientific community. Our sample of researchers is shown to group around high values in cases of epistemic tolerance and beliefs about the theory of evolution. On the other hand, the participants’ scores group around low values in cases of epistemic authoritarianism, skepticism towards the scientific method, and beliefs in astrology. It is important to note that the standardized skewness of conservatism did not deviate from the normal distribution. The high negative value of kurtosis indicates a higher number of cases with extreme values than expected in a normal distribution. Therefore, we were able to ensure the diversity of the sample with regard to conservatism, which cannot be said for the political orientation. Namely, there was a small number of participants who classified themselves as being on the far-right side of the political spectrum. This could be a specific characteristic of the scientific community, though it should be noted that we used convenient sampling methods.

As indicated by the internal reliabilities and measures of representativeness, the three proposed scales for epistemic attitudes performed well. The adequateness of the scales is further demonstrated by the results of the confirmatory factor analysis that reproduced the factors of the three scales with the corresponding items. The fact that epistemic authoritarianism and tolerance are moderately correlated, with skepticism being related to epistemic authoritarianism but not tolerance, as well as the results of the principal component analysis, suggest that these constructs cannot be theoretically reduced to one another.Footnote7

An overview of the main relationships found in the study can be seen in Fig. 4. The relationships between conservatism and epistemic attitudes (epistemic tolerance, epistemic authoritarianism, and skepticism towards the scientific method) are present but weak. This, alongside the fact that our second hypothesis was not confirmed, i.e., that the political orientation does not affect the epistemic attitudes, implies that, contrary to common expectations, political attitudes do not strongly affect professional beliefs and decisions of scientists. This finding goes in the direction that science could be free of political views (cf. Mattes 2019). Moreover, the effect of the scientific field on epistemic attitudes was more relevant than the effect of sociopolitical views. Natural scientists were, on average, more epistemically authoritarian and less epistemically tolerant. This is to be expected given the nature of their field, i.e., the methods used by natural scientists are stricter in comparison to the ones of social scientists. Nonetheless, it is worth noticing that both natural and social scientists are, to a large extent, tolerant, even though social scientists exhibit higher levels of epistemic tolerance.

[Chart omitted]

The career stage also plays a role in the skepticism towards the scientific method, with junior social researchers being more skeptical than seniors in the same field. On the other hand, there are no differences between junior and senior researchers among natural scientists. These results may indicate that with their professional development, researchers’ trust in the scientific method increases. On the other hand, it seems that junior researchers in the field of natural sciences do not consider the option of questioning the methods used in their field. This is further supported by the finding that there are no differences in beliefs about the theory of evolution between junior and senior researchers in natural sciences. However, junior researchers in the field of social sciences question the theory of evolution more than seniors. This could indicate that researchers in social sciences develop a greater trust in the scientific method in general during their careers.

We have also investigated the sociopolitical views of scientists. Conservatism has a weak positive correlation with beliefs in astrology. A medium effect was found between the participants’ political orientation and their beliefs about the theory of evolution. These results are in line with the finding that participants who score higher on the conservatism scale are more prone to questioning the theory of evolution (Miller et al. 2006). This is in accordance with our expectations: the results are compatible with the previous findings that different forms of scientific acceptance and rejection are generally grounded in conservatism (Rutjens et al. 2018).

The novelty of our findings stems from the fact that participants in our study are researchers from natural and social sciences. Our study challenges the conclusions of Bayir et al. (2014), who found no differences in natural and social scientists’ views on the nature of science.Footnote8

As previously mentioned, this is an exploratory study, pioneering measures of novel constructs, that are essentially attitudes, some of which are socially desirable. Most notably, our participants showed high levels of epistemic tolerance and low levels of epistemic authoritarianism, as well as little skepticism towards the scientific method. They declared themselves as predominantly liberal and held the theory of evolution in high regard, while the same could not be said about astrology. Therefore, it is important to take these characteristics of the scientific community into account when drawing conclusions and implications from the results. The question remains whether our sample represents the scientific community as a whole and if greater effects would be found if there were more variations within our sample.

Conclusions

Epistemic tolerance and epistemic authoritarianism play an important role whenever scientists make epistemic decisions about competing theories in their discipline. Epistemically tolerant researchers do not dismiss the work of their peers with opposing views, while epistemically authoritarian scientists are less willing to revise views that they adopted. On the other hand, skepticism towards the scientific method is connected with the tendency to question and investigate the limits of science. Both epistemic tolerance and epistemic authoritarianism of scientists, as well as their level of skepticism towards the scientific method, were empirically measured for the first time. We proposed three measuring scales. The conducted analyses showed that all of the scales capture independent phenomena and that they are statistically reliable. Additionally, we compared the epistemic attitudes with the sociopolitical views of our survey participants in order to examine whether their epistemic attitudes are in any way “sullied” by their political orientation and level of conservatism.

Our results represent a positive finding regarding the scientific community: scientists, at least on a declarative level, see themselves as epistemically tolerant towards opposing theories and approaches, and not epistemically authoritarian. These values influence their epistemic decisions, such as equal consideration of rivaling theories in their field. On the other hand, the results revealed that the epistemic attitudes of scientists are, to a certain degree, dependent on their discipline and the level of their experience. As expected, given the irregular patterns governing their field of expertise, social scientists are to some extent more epistemically tolerant. Moreover, junior researchers in social sciences tend to relativize the scientific method more than their experienced colleagues. We attribute this finding to the fact that they are new to science and most likely did not yet become advocates for any specific approach. When it comes to endorsing pseudoscience, scientists dismissed believing in astrology almost unanimously, regardless of their political orientation, field of expertise, or career stage. Interestingly, junior researchers in social sciences also tend to believe less in evolutionary theory than the senior researchers, while such a difference was not found between junior and senior researchers in natural sciences. Finally, as for the impact of sociopolitical views on the corpus of epistemic attitudes, we pointed out that the tested epistemic values are not influenced by political orientation and are only weakly correlated with conservatism. Rather, the specific scientific field directs one’s level of epistemic tolerance. Hence, based on our findings, the influence that political attitudes have on the epistemic decisions of scientists is marginal.

#### Err towards more humility---its benefits are numerous and arise at the margins.

---SIH = Sociopolitical Intellectual Humility.

Elizabeth J. Krumrei-Mancuso & Brian Newman 20, Professor of Psychology, Social Science Division, Seaver College; Professor of Political Science, Social Science Division, Seaver College, "Intellectual Humility in The Sociopolitical Domain," Self and Identity, Vol. 19, Issue 8, 2020, T&F.

Our analysis of the links between SIH and political engagement confirm that SIH is distinct from political disengagement or not caring about politics, a finding consistent with Porter and Schumann (2018). All else equal, people with higher SIH were actually a bit more interested in politics, less likely to avoid political discussions, and no more or less likely to report voting in the 2018 elections or otherwise participate in political life. Future research might examine whether these findings can be explained on the basis of people with different levels of SIH having different experiences in civic and political life. There is also room for future research to explore whether people with different levels of SIH are mobilized into political action on the basis of different motivations or via different routes (e.g., calls to action on behalf of positive values or on behalf of values threatened by opponents).

Consistent with previous research (e.g., Iyengar et al., 2012; Iyengar & Westwood, 2015), we observed evidence of substantial affective polarization within our sample. Republicans and Democrats, and conservatives and liberals, gave strongly diverging feeling thermometer ratings. We found support for our hypothesis that SIH depresses such affective polarization. The differences in feeling thermometer ratings of politically relevant target groups between strong Democrats and strong Republicans and between extreme liberals and extreme conservatives were smaller among participants with higher levels of SIH. Since affective polarization has negative effects on important and diverse outcomes such as personal and family relationships, political governance, and economic exchange (e.g., Hetherington & Rudolph, 2015; Iyengar et al., 2012; McConnell et al., 2017), finding that SIH can mitigate affective polarization points toward the importance of SIH. This suggests there may be value in exploring whether and how SIH can be cultivated.

SIH was mostly unrelated to belief in under-supported claims. SIH was unrelated to the belief that agents acting on behalf of the Russian government tampered with vote totals in the 2016 presidential election. Higher SIH initially predicted less belief in the claim that millions of immigrants voted illegally in the 2016 presidential election. However, the effect was no longer significant when controls were included (though the p-value remained somewhat close to statistical significance, p = .07). Based on these data, SIH approached significance in predicting more skepticism about under-supported claims, but did not reach a level of significance in predicting skepticism (or gullibility) with regard to under-supported political claims. These findings may have been the result of the particular claims assessed and the extent to which they were asserted in news and social media. Therefore, future research seems warranted regarding the links between SIH and belief in a variety of types of truth claims.

Finally, we examined two potential manipulations with regard to change in the strength or direction of people’s views on a specific political topic (crime rates among immigrants), observing significant, but small, effects. The lack of robust findings may have related to the fact that the sample, on average, already disagreed at the outset of the study with the statement that crime rates were higher among immigrants than nonimmigrants, which concurred with the factual information provided.

SIH played some role, albeit small, in motivated reasoning. When participants were exposed to an accuracy motivation condition, their levels of SIH were not predictive of change in levels of agreement after being exposed to factual information. In contrast, for participants assigned to a defense motivation condition, SIH was linked to change in levels of agreement. Low SIH participants in this condition did not change from their original view much at all, whereas high SIH participants shifted by about 0.6 points consistent with the content of the information they were exposed to. This suggests that SIH may provide a buffer against the effects of defense motivated thinking. That is, SIH seems to make a difference for individuals who are placed in a position of defending their own viewpoint, as may happen frequently in American society, particularly in public discourse and social media.

Here again, SIH may prove beneficial to the body politic. The consequences of motivated reasoning are often challenging for the democratic system and corrosive of the social fabric. Motivated reasoning makes it difficult for Republicans and Democrats to agree on the current state of the world (e.g., economic conditions are good or bad, immigration causes harms and/or benefits, climate change is happening or not happening) much less the best policies for making improvements. Moreover, motivated reasoning can undermine accountability and the doling out of punishment and reward for a political job done poorly or well, when such responses may be appropriate. Some have argued American politics is in this state now, with compromised accountability (e.g., Achen & Bartels, 2016; Donovan et al., 2019). Moreover, motivated reasoning can further polarize the public when people encounter information that challenges their existing views and they are motivated to argue against the new information. When this happens, the original views can be strengthened and may become more extreme (Levendusky, 2013). SIH may mitigate these effects by encouraging people to attend more to the conflicting or inconclusive nature of evidence and consider their conclusions as provisional and open to revision, rather than fixed and in need of reaffirmation. To the degree that SIH dampens motivated reasoning, interventions that can boost SIH may reap important benefits. Although the effect sizes in this study are quite small, any positive impact in the often toxic domain of sociopolitical discussion could be important, and at least encourages further research.

Finally, this study examined a second potential, simple intervention: calling explicit attention to the fallibility of one’s knowledge on a particular topic. We did this by having participants complete a brief self-assessment of specific IH about the topic being assessed (Hoyle et al., 2016). The results indicated that priming participants to think about the fallibility of their knowledge about a topic was an effective method of making them more responsive to information for participants with high trait-levels of SIH, but not for those with low trait-levels of SIH. In fact, individuals with low SIH seemed more resistant to change on the basis of information when they were asked to assess the level of fallibility of their knowledge of the issue compared to those with similar levels of SIH who had not been asked to reflect on the fallibility of their knowledge. Presumably, the self-assessment resulted in these individuals reflecting on their assumed lack of fallibility of thinking on the topic. Although some individuals will have gained substantial expertise in an area that may minimize the fallibility of their knowledge within the particular domain, the current findings suggest that for those who falsely presume a lack of fallibility, educating them about common cognitive fallacies and biases may be a first step in helping them to recognize their IH on a particular topic. On the basis of the current findings, it seems that high characteristic levels of SIH relate to responsiveness to information particularly when IH is made salient to the person in the moment, on the topic in which the person is engaged. The findings were very small in magnitude, yet provide an incentive to replicate. Future research would be required to establish whether a general IH prime, rather than a specific IH prime, would also have demonstrated an effect. Given that IH intervention work is at its beginning stages, the current findings provide some hints about when and how IH primes may function as interventions.

Notable limitations of the current research include that the findings are based on mostly cross-sectional data from one sample. In addition, SIH was assessed on the basis of a measure of general IH that was adapted to instruct participants to answer specifically within the context of their sociopolitical views. As levels of IH may depend both on a person’s trait levels of IH and on the particular domain that is being assessed (Hoyle et al., 2016), ongoing work should continue to tease apart how assessments of general IH and specific IH function differently within the literature. To date, the specific intellectual humility scale (Hoyle et al., 2016) has successfully been applied to multiple, diverse domains. Certainly, the potential of IH in general and SIH in particular to mitigate some of the most pressing problems in the political domain encourage additional work on this topic.

Conclusions

Our results expand on the small number of studies exploring IH’s role in the political domain. Previous studies have demonstrated connections between general IH and a handful of political outcomes like openness to new arguments (Porter & Schumann, 2018) and leniency toward politicians who changed their issue positions (Leary et al., 2017). A small number of studies have explored the links between IH in the specific context of the sociopolitical domain and a small set of broad sociopolitical outcomes, like social dominance orientation and social justice values (Hoyle et al., 2016; Krumrei-Mancuso & Newman, 2019). Here we presented evidence that SIH is distinct from political disengagement and is unrelated to believing in under-supported claims. Further, SIH may have significant, positive sociopolitical consequences, since it was linked to less affective polarization and seems to buffer against defense motivated thinking. Our findings suggest that SIH may be most impactful when individuals are provided an opportunity to reflect on the fallibility of their thinking on a particular topic. Future research should continue to build on these findings given their potential to reshape the public square, even if only in circumscribed ways.

#### Investigating legal intervention into sectors of the economy opens the toolbox for reconfiguring the broader economic system.

Renee Hatcher 19, Assistant Professor of Law at John Marshall Law School-Chicago, where she serves as the Director of the Community Enterprise and Solidarity Economy Clinic, "Solidarity Economy Lawyering," Tennessee Journal of Race, Gender, & Social Justice, Vol. 8, Issue 23, 2019, Lexis.

"To most public interest-minded law students and lawyers, practicing transactional law isn't an obvious path to saving the world . . . [But] now transactional lawyers are needed, en masse, to aid in an epic reinvention of our economic system." -- Janelle Orsi 1

An emerging cohort of lawyers are working to transform the dominant economy from one that centers on self-interest, greed, and profit maximization to an economy that centers the needs of people and the planet. These lawyers work in private practice, at legal service organizations, as in-house counsels, clinical professors, and pro-bono volunteers. Their work includes corporate structuring, contract drafting, real estate deals, regulatory advising, and law reform projects, among other things. Their clients are individuals, organizations, small businesses, social enterprises, cooperatives, worker self-directed nonprofits, community land trusts, time banks, and other collective experiments that seek to build alternative mechanisms for both economic justice and social liberation. 2 This is the "solidarity economy" movement, a growing movement building a new economic system rooted in economic democracy, social solidarity, and environmental sustainability. 3

At the heart of this new economic system are five unifying principles: (1) solidarity, (2) equity in all dimensions (race, gender, ability, etc.), (3) pluralism, (4) participatory democracy, and (5) sustainability. 4 The movement's ultimate vision is twofold, first to grow these values and practices through grassroots initiatives, and second to link these solidarity economy activities in a network of mutual support, transforming the current dominant global economy into a just, democratic, and sustainable economic system. 5 To that end, the core principles are embedded in the organizational and business structures, governance, financing, and the ways in which solidarity economy enterprises and organizations build their supply chains and partnerships. As a result, solidarity economy lawyers, lawyers that work with solidarity economy clients, often work at the cutting edge of corporate law, securities regulations, employment law, licensing, and intellectual property. However, in some cases the current legal regime is ill suited for these new types of enterprise. So, while solidarity economy practitioners are reimagining the economy and means of economic exchange, solidarity economy lawyers are attempting to reimagine the law to reflect the needs of their clients.

This essay explores solidarity economy lawyering as an emergent field of practice in the United States. After a short explanation of solidarity economy theory and practice, the essay explores the way in which transactional representation of solidarity economy enterprise clients is different from traditional business and nonprofit representation. The essay goes on to argue that transactional lawyers have a particular role to play in 1) advocating for corporate, regulatory, and contract law reform to better suit the needs of grassroots solidarity economy enterprises, 2) creatively redeploying legal techniques and practices relating to risk management, organizational form, and the allocation of property rights to further the purpose of internalizing social and ecological values into the heart of [\*26] economic exchange, otherwise known as 'radical transactionalism', and 3) "scaling up" the solidarity economy through the linkage of solidarity economy organizations and enterprises. These contributions are instrumental to the long and short-term success of the solidarity economy movement. The essay concludes with some thoughts on how solidarity economy lawyers can be most effective.

I. What is Solidarity Economy?

The solidarity economy (SE) 6 is a set of theories and practices that promote equitable, solidaristic, democratic, ecological, and sustainable development with an ultimate vision of 1) growing these values and practices through grassroots initiatives, and 2) linking these solidarity economy activities in a network of mutual support, such that they transform the current dominant global economy into a just, democratic, and sustainable economic system. 7 Many communities, across the United States and across the globe, are engaging in SE activities through grassroots economic initiatives such as: alternative currencies; community-run resource libraries; participatory budgeting; worker, consumer, and producer cooperatives; community land trusts; intentional communities; community development credit unions; community supported agriculture programs; open source free software initiatives and others. 8 Not only do SE initiatives and enterprises currently exist in every sector of the dominant economy, but they also are prevalent in informal diverse economies.9 \*\*\*FOOTNOTE BEGINS\*\*\* See, e.g., J.K. GIBSON-GRAHAM, A POSTCAPITALIST POLITICS 69 (2006) ("[W]hat is usually regarded as the "economy" -- wage labor, market exchange of commodities, and capitalist enterprise -- comprises but a small subset of the activities by which we produce, exchange, and distribute value." Diverse economies refers to a theoretical framework that accounts for all of the alternative means of economic activity.); J.K. GIBSON-GRAHAM, THE END OF CAPITALISM (AS WE KNEW IT): A FEMINIST CRITIQUE OF POLITICAL ECONOMY 4 (1996); Brian Burke & Boone Shear, Introduction: Engaged Scholarship for Non-capitalist Political Ecologies, 21 J. POL. ECON. 127 (2014); Janelle Cornwell, Worker Co-operatives and Spaces of Possibility: An Investigation of Subject Space at Collective Copies, 44 ANTIPODE 725, 739 (2012); J.K. Gibson-Graham, Diverse Economies: Performative Practices for 'Other Worlds', 32 PROGRESS HUM. GEOGRAPHY 613, 623-24 (2008). \*\*\*FOOTNOTE ENDS\*\*\* As a political project, solidarity economy proposes a transformational shift of [\*27] the relationships between the market, the state, and people, centering the needs of people and the environment over the needs of private interests and capital. 10 In doing so, SE seeks to be the "next system," replacing neoliberal capitalism by building and connecting networks of grassroots economic initiatives and practices that embody the five core principles of SE: solidarity, sustainability, equity in all dimensions (race, gender, ability, etc.), participatory democracy, and pluralism. 11

Solidarity economy is not a static concept or blueprint for a new economy. It is an ever-evolving movement that grows from existing and emergent practices, guided by the theoretical principles. 12 In other words, the theory and the practice of SE are circular through an ongoing praxis of "debate, experience research, organizing and reflection." 13 This continuous iterative evolution of SE allows for new forms of organization and experiments of exchange that best serve the material needs of its practitioners. 14 Solidarity economy broadly defines the economy as all of the ways in which people, communities, and organizations meet their material needs. 15 Therefore, solidarity economy can be thought of as "a dynamic process of economic organizing in which organizations, communities, and social movements work to identify, strengthen, and create democratic and liberatory means of meeting their needs." 16 Figure 1 illustrates some of the current kinds of initiatives that make up the solidarity economy. 17

[\*28] Figure 1. Ethan Miller, Defining Solidarity Economy: Key Concepts and Issues.

While many communities and cultures have longed practiced solidarity and cooperation to provide for the material needs of its members, 18 solidarity economy theory in the United States is relatively new. The U.S. solidarity economy movement emerged in 2007, although solidarity economy practices have existed since early in the twentieth century. 19 As in other parts of the world, the solidarity economy movement in the United States directly grew out of failures of the dominant economy, neoliberal and austerity policies, and the impending economic downturn of 2008. In many ways, the economic downtown, spurred by the collapse of the mortgage securities market and subprime loans catastrophe, shook not only the U.S. economy but also main-street's general trust in the invisible hand of the market and integrity of the financial industry. It was in the early days of the economic downtown, that communities and organizations took the first steps to nationally coordinate the U.S. solidarity economy movement. In 2007, at the U.S. Social Forum, a number of SE practitioners and organizations convened, discussed emerging practices, and strategized the future of the SE movement in the U.S. 20 Subsequently, there [\*29] have been numerous meetings to discuss the theory and future of the movement. 21 Over the last decade, the solidarity economy in the United States has grown significantly. 22 By one conservative estimate, there were more than 700 solidarity-economy businesses in 2016. 23

Moreover, the solidarity economy movement is in many ways a movement of movements, as many current movements are incorporating solidarity economy strategies into their organizing work. For example, the Movement for Black Lives Policy Platform advocates for the support of cooperative development and social economy networks as a tenet of economic justice. 24 Furthermore, a number of solidarity-economy initiatives have sprung out of local organizing efforts affiliated with the Black Lives Matter movement. 25 The indigenous rights and environmental justice movements are pushing for the creation of public banks in the wake of the Standing Rock protests. 26 Immigrant-rights advocates are incubating worker cooperatives to ensure immigrant workers can take ownership of their labor and have a say in their working conditions. 27 These efforts and other SE initiatives need legal support to thrive and flourish.

II. Transactional Lawyering in the Solidarity Economy Movement

At its core, transactional lawyering is about the structuring of organizational and individual relationships within the parameters of the law. Transactional lawyers structure businesses, negotiate and draft contracts, and advise clients on relevant laws and [\*30] regulations. 28 These skills are imperative to the long-term success of the solidarity economy movement. SE enterprises, like traditional enterprises, retain lawyers to advise on entity formation and governance, draft relevant agreements and contracts, and counsel on applicable regulations. However, SE initiatives are markedly different from traditional enterprises in three major ways: 1) the motivations of the enterprise are guided by the five SE principles and not the maximization of profit, 2) the relationships within the enterprise are often blurred and overlapping, and 3) the means of exchange are varied and diverse. 29 It's important that lawyers understand and explore these differences as there are implications on the law and legal practice.

For example, imagine a group of seven women seek out a lawyer to start a catering and prepared-food business. The women decided that they want to be equal partners, share in profits and put up the same value of start-up capital. Easy enough. This is a scenario that most experienced transactional lawyers would be able to address. However, imagine for a second that the women go on to say 1) all of the women will work and contribute to the day-to-day decisions based on democratic consensus, 2) two of the women are applying for asylum and do not have work authorization, 3) the business will provide free meals to those that are food insecure in their community, 4) a number of the capital contributions will be in the form of sweat equity, and 5) the business intends to compensate the lawyer not in dollars, but in future meals prepared by the business. '

Each additional piece of information would have an impact not only on the laws implicated but also how the lawyer might approach the case. To begin, in the spirit of consensus building, the lawyer might ensure that all seven women could attend and participate in any future client meetings. This particular business, a worker cooperative, would require a deeper analysis of entity formation and applicable regulations to help meet the client's goals. 30 Cooperative law varies greatly from state to state and the lawyer would need to think through the relevant state and federal regulations that might classify the worker-owners as either an employee or an owner of the business. 31 The lawyer would carefully have to research and analyze the relevant immigration and employment regulations to ensure that all members can participate and will be classified as owners for the purpose of federal work authorization laws. 32 The implications of such classifications can mean the difference between success and failure of the business, as well as the protection of its members. 33 Given that the business' purpose is in-part charitable, and inpart wealth building (for-profit), the lawyer would want to identify the best combination of benefits and structures, as well as carefully draft governance agreements. 34 As such, the lawyer would need to do additional fact investigation and have a better understanding of [\*31] the client's goals and priorities to provide effective counseling on entity formation. 35 In addition to considering the various entity options, the lawyer would need to explore the issue of sweat equity contributions by the worker-owners. The Fair Labor Standards Act (FLSA), 36 or other relevant state laws, might potentially prevent the worker-owners from investing sweat equity without receiving immediate compensation. The lawyer's compensation is also an issue, as the lawyer would need to research relevant regulations for the proposed barter arrangement. 37 What language would go into an engagement letter if the attorney agreed to represent the business in exchange for a future promise of food? Would the prepared meals be taxable income for the lawyer? Would the lawyer get to try the food first? All important questions that would need to be addressed before moving forward with representation of the client.

This is just one cursory example of how a solidarity economy business client might be different from a traditional business. Yet, it demonstrates the new type of legal practice that is emerging to adequately serve solidarity economy clients. SE lawyers must have a broad understanding of the full range of legal structures. Otherwise the tendency may be to propose those structures with which they are most familiar, leaving other potential options unexplored. Other substantive areas of law include securities law, employment law, tax law, intellectual property, contact law, and commercial law. Still, SE practice can implicate a wide range of legal issues far beyond these traditional bodies of business law. In the example above, the lawyer would need to research immigration law, Good Samaritan food statutes, and barter exchange taxation regulations to adequately serve the client. This is not uncommon. SE clients are rethinking and remaking the means of economic exchange. 38 This will continue to require transactional SE lawyers to expand their substantive areas of practice. Further, many solidarity economy initiatives are connected to or a part of social movements. 39 Such connections are likely to have an impact on the legal support required. In the long term, SE lawyers may need to regularly consult and collaborate with attorneys in a range of practice areas and be nimble in responding to the needs of their clients.

Beyond the technical skills and expertise of transactional practice, SE lawyering also requires what has been referred to as the right "culture fit" or the "touch." 40 This can best be explained as the willingness of a lawyer to embrace the imaginations and experimentations of clients, and subsequently put the law in service to those ends. 41 Both in legal education and mainstream practice, the minimization of risks is emphasized as the lawyer's primary concern. 42 While important, a fixation on risks in SE practice often will not best serve the goals of the clients.

[\*32] There are many gray areas of law related to SE practice. 43 It's the lawyer's job to assess, analyze, and provide the most viable options for achieving the client's goals, recognizing that the law is not always clear. 44 Specifically, in a SE lawyering practice, it's necessary for the lawyer to demonstrate creative capacity, a deep understanding of the client's perspective and goals, and a commitment to the shared values of the solidarity economy movement. 45 Recognizing that the attorney-client relationship is more than just a mere transaction, effective solidarity-economy lawyers build authentic and solidaristic relationships with their clients. 46 Relationship building is a primary way in which SE lawyers can demonstrate a shared commitment to SE values and principles. As SE lawyers grow in their experience and practice, they come to rely on their acquired knowledge, while continuing to embrace the innovative goals of SE initiatives. 47 Furthermore, as is the case with all effective lawyering, SE lawyers will need to commit themselves to understanding the context in which their clients are operating, including the movements that clients may ground themselves in. Currently, lawyers across the country are engaged in SE lawyering. 48

A growing cadre of lawyers are representing SE organizations at legal service organizations, community economic development law clinics, law firms, and in solo practice. 49 For example, the Sustainable Economies Law Center (SELC), a 501(c)3 organization, is an institutional pioneer in solidarity economy lawyering. 50 SELC has provided legal services to hundreds of solidarity economy enterprises through their Resilient Communities Legal Cafes, 51 direct representation, and legal resources on their website, including materials on cooperative law, grassroots financing, community renewable energy law, food enterprises, and alternative forms of exchange or money. 52 Beyond providing legal support to SE enterprises, SELC is an example of a solidarity economy legal service organization. 53 The organization functions as a worker self-directed nonprofit, a hybrid governance model in which a nonprofit organization adopts governance characteristics of a worker cooperative. 54 Worker self-directed nonprofits empower their workers to collectively make decisions on behalf of the organization. 55 While these nonprofits still have a governing board of directors, the board concedes significant decision-making authority to the employees or members. 56 This particular model of nonprofit governance embodies the SE principle of participatory democracy. 57 Moreover, [\*33] in furtherance of solidarity and equity principles, all SELC employees, legal and non-legal, receive the same salary, 58 and the organization provides services on a sliding scale. 59

While SELC is often cited as "the" solidarity economy legal service organization," 60 a number of legal service organizations specialize in SE lawyering. A few are worth mentioning in an attempt to build awareness for law students and interested lawyers. Baltimore Activating Solidarity Economies, for example, has provided support to a number of SE initiatives in Baltimore, Maryland, including a mapping project of the local solidarity economy. 61 Likewise, the Urban Cooperative Legal Center based in Newark, New Jersey, provides legal support to start-up coops and organizes community events to discuss cooperative development. 62 Additionally, the Urban Justice Center's Community Development Project works with a number of New York City cooperatives and SE initiatives. 63 In the same vein, the Center for Community Based 2 Enterprise (C2BE) in Detroit, Michigan, not only provides cooperative legal support but also integrates cultural organizing to scale the local Detroit solidarity economy. 64 Law for Black Lives has also provided and facilitated legal support to a number of SE campaigns. 65 Finally, organizations like the Working World and the ICA Group have lawyers on staff that regularly engage SE legal practice. 66

Similarly, a number of transactional and community economic development (CED) law school clinics around the country provide legal support to SE enterprises. For the past two years, the clinic that I direct at John Marshall Law School-Chicago has used solidarity economy theory as a framework for case selection, prioritizing those clients that exemplify the five principles of SE (equity, sustainability, participatory democracy, solidarity, and pluralism). Currently, most of our clients are worker cooperatives and cooperative incubators. Recognizing the local emerging solidarity economy and gap in legal services [\*34] in Chicago, the clinic at John Marshall Law School is currently being rebranded from the Business Enterprise Law Clinic to the Community Enterprise and Solidarity Economy Clinic. Other clinics to highlight with a SE practice are Vermont Law School's New Economy Law Center, 67 Harvard Law School's Community Enterprise Project, 68 Hofstra Law's Community and Economic Development Clinic, 69 New York Law School's Nonprofit and Small Business Clinic, 70 University of Baltimore School of Law's Community Development Clinic, 71 University of Michigan Community and Economic Development Clinic, 72 American University Washington College of Law's Community and Economic Development Law Clinic, 73 and CUNY Law School's Community and Economic Development Clinic. 74 There are also a number of law firms engaged in SE practice including the Tuttle Law Group, 75 Dorsey & Whitney LLP, 76 Gilmore Khandhar LLC, 77 the Law Office of Elizabeth Carter, 78 and Sarah Kaplan Law Office 79 to name a few. Lawyers at these institutions and others are exploring new organizational forms and governance structures, engaging in law reform projects, and structuring relationships between SE enterprises. 80

III. SE Lawyers are Reimagining the Law

Law reform is a particular point of intervention in which lawyers can add value to the SE movement. In examining the fullness of the solidarity economy movement, there are complex and innovative initiatives that require the exploration of "gray areas" of the law, law reform projects, and the creative redeployment of transactional practice, referred [\*35] to as 'radical transactionalism.' 81 Unlike traditional businesses, SE enterprises do not fit neatly within established laws. The current statutory framework is largely designed to regulate adverse self-interests of economic actors in the mainstream economy, like the employer/employee, landlord/tenant, and producer/consumer relationship. 82 As such, our laws often fail to account for the diverse economic arrangements and overlapping, solidaristic nature of relationships within the solidarity economy. Continuing with the example of a worker cooperative, there are numerous state and federal laws that regulate the employer-employee relationship. 83 Most of these statutes assume that there are two separate and distinct parties, the employer and the employee, that have separate and adverse interests. However, in worker cooperative enterprises, worker-owners are effectively both employees and employers. This leaves significant ambiguity as to whether worker-owners will be classified as an employee under any given regulation or if an employee relationship exists within a worker cooperative business.

In the course of their work, lawyers are well positioned to identify the insufficiencies of the law to address the needs of SE clients. In understanding the confines of the legal framework, lawyers can propose and participate in law reform campaigns that better accommodate the innovation of the SE movement. For example, SELC has been instrumental in a number of policy reform campaigns in California, 84 most recently helping to secure the California Worker Cooperative Act. 85 The statute provides important visibility to California worker cooperatives, and also provides some clarification on the employee classification of worker-owners. 86 The law also confers additional benefits on worker cooperative businesses, including important securities exemptions and limiting the power of "community investors". 87

Often law reform efforts are guided by SE organizational coalitions. Lawyers can play an important role within these coalitions. Specifically:

[\*36] 1. SE lawyers can serve as legal translators of the status quo and produce popular education resources on the current state of the law. 88

2. SE lawyers can identify which aspects of the law are barriers for the long-term success of the SE movement.

3. SE lawyers can draw upon their experiences in practice to craft legislation that's responsive to the wider SE movement.

4. SE lawyers can work with government staffers to draft legislation.

5. SE lawyers can provide legal alerts and continuing legal education programs to educate lawyers on updates to the law.

In each of these roles, lawyers can add value and support to the larger SE movement. While SE lawyers are currently doing this work, many more are needed to support local and state law reform efforts.

Beyond law reform, lawyers are also, more daringly, radically reimagining the laws of economic activity. "Radical transactionalism" is the creative redeployment of transactional legal techniques and practices to reimagine and reconfigure the legal building blocks of the economy based upon social and ecological values. 89 One such example is the reimagining of intellectual property law and copyright licensing that gave way to the creation of the Creative Commons license. 90 The Creative Commons license, established in 2001, "provides free, easy-to-use copyright licenses to make a simple and standardized way to give the public permission to share and use creative works." 91 Created by law professor Lawrence Lessig, Creative Commons is a relatively new innovation that legally allows individuals to share "knowledge and creativity to build a more equitable, accessible, and innovative world." 92 In the larger scheme of our hegemonic legal underpinnings, this example only begins to scratch the surface of what is possible. Imagine if a group of 1000 SE lawyers, based in communities, actively and collectively began to reimagine the "rules of our economic road." What would it look like to infuse the principles of equity, sustainability, solidarity, and participatory democracy into contract law, employment law, property law, and the laws of business organizations? The result would be nothing less than a transformation of the current social economic system.

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Developing and popularizing alternative rules based upon transformative principles can be the beginning of a more just future. 93

[\*37] The difference between law reform and radical transactionalism is akin to the difference between reformist reforms and transformational re-imaginings. 94 In the case of law reform, the given policy proposal starts from the status quo and often deals in rigid legal frameworks, as well as the assumptions and ideological underpinnings of the current system. Radical transactionalism as applied to SE lawyering, begins with the principles and values of solidarity economy theory. From there the lawyer deconstructs and re-envisions the legal building blocks of economic activity. This kind of political project and radical reimagining, again, speaks to the creative capacity necessary for effective solidarity economy lawyering.

IV. SE Lawyers are Positioned to Scale the Solidarity Economy

SE lawyers can also add value to the solidarity economy movement by linking and structuring relationships between solidarity economy enterprises. As local communities continue to innovate diverse SE initiatives, the larger part of SE theory and practice is linking these various grass-root organizations in international networks of exchange to build out a just global economy. In other words, the full ambition of the solidarity economy movement is a "pluralistic conglomeration of worldwide economic activities that share a set of core values." 95 To achieve this goal, the solidarity economy rejects the traditional concept of "scale" and focuses on the meaningful linkage and integration of SE initiatives into larger solidaristic networks. 96 "Scaling-up" the solidarity economy includes the structuring of supply chains and the provision of services between SE enterprises, but also extends to activities of mutual aid and support like collective skill-sharing and workshops, policy advocacy, financing, joint ventures, and the development of solidarity markets. 97 All of these activities serve to move an even-larger share economic activity out of the dominant capitalist sector and strengthen the growing global solidarity economy.

SE lawyers are poised to aid in this important work of scaling-up the solidarity economy. Lawyers are well situated to identify potential scaling opportunities and structure relationships between solidarity economy initiatives. Being few and far between, SE lawyers tend to work with a number of SE enterprises in their specific locales. As a result, SE lawyers can be instrumental in mapping the local solidarity economy, identifying the needs and offerings of existing SE enterprises, and structuring business relationships between SE initiatives by drafting agreements. For example, in 2018, the Business Enterprise Law Clinic at John Marshall Law School- Chicago was commissioned by the Illinois Worker Cooperative Alliance to complete a policy report that included mapping the local worker cooperative ecosystem. 98 Law students in the clinic researched, identified, and interviewed existing worker cooperative businesses, some of which were current or previous clients. 99 The clinic is also participating in a local coalition building effort, Chicagoland Cooperative Ecosystem Coalition (CCEC), that aims to facilitate opportunities for cooperation among cooperatives and supporting technical assistance [\*38] providers. 100 Another example is the work of SE lawyers with the Baltimore Roundtable for Economic Democracy (BRED). BRED is a network table of Maryland-based worker cooperatives established in 2016. 101 BRED provides non-exploited financing and technical assistance support to further the local Baltimore solidarity economy. 102 The organization also provides popular education and workshops on cooperative development to the larger Baltimore community. 103 Solidarity economy lawyers in Baltimore have been an integral part of the BRED initiative, 104 and contributed to mapping project of the Baltimore solidarity economy. 105 These examples highlight some of the ways in which lawyers are currently scaling the SE movement.

CONCLUSION

In conclusion, solidarity-economy lawyering is an emerging practice for transactional lawyers. Skilled transactional lawyers are needed to provide direct representation to the increasing number of SE enterprises. If attorneys are to be effective in the endeavor of SE lawyering, they will need to use new creative approaches and utilize every tool in the transactional lawyering toolbox. Specifically, SE lawyers need to have a broad knowledge business law concepts, including the full range of legal entities, commercial law, tax, employment law, intellectual property law, and securities. Beyond a working knowledge of the substantive areas of law, effective SE lawyers will need to embrace the imaginations and experimentations of SE clients, and put the law in service of their clients' visions. This requires creative capacity and the willingness to explore and advise SE clients on "gray areas" of the law. Navigating this kind of practice also necessitates a meaningful understanding of the client's context and goals.

## 1NR

### CIL CP---1NR

#### Custom is binding and antitrust’s the perfect case because core laws leave broad scope for interpretive discretion.

Swaine ’1 [Edward; 2001; Assistant Professor, Legal Studies Department, The Wharton School, University of Pennsylvania; William and Mary Law Review, “The Local Law of Global Antitrust,” vol. 43]

This preference for local understanding does not require a parochial focus on the positions staked by those branches themselves, which we should assume are also capable of appreciating the views of their sovereign counterparts. 368 Nor does it require subscribing to the view that custom is federal law only by virtue of independent, political-branch lawmaking. 369 But where [\*719] primary sources suggest that the inquiry is a close one, any clear position staked out by the local sovereign should be favored in construing local political enactments. 370 This approach also bears on the treatment of emerging custom. As noted previously, it is inappropriate for a court to regard a yet-emerging custom as equivalent to one that has fully bloomed; at the same time, the line between the two is often hard to draw, and gainsaying a position taken by the political branches on the question may unduly interfere. The best approach, on balance, is to permit legitimate, if not necessarily wholly mature, assertions of customary inter-national law to influence the judicial construction of domestic law, without requiring that courts take a position on the existence or relevance of that norm at the precise moment of decision.

Perhaps unsurprisingly, this approach is well suited to antitrust. The Sherman Act is notorious for conferring interpretive freedom on the courts and federal agencies, 371 including the authority to reconcile its reach with international law.

Footnote 371:

E.g., Appalachian Coals, Inc. v. United States, 288 U.S. 344, 359-60 (1933) (describing the Sherman Act as a "charter of freedom," with "a generality and adaptability comparable to that found … in constitutional provisions"); see also 1 Areeda & Hovenkamp, supra note 50, P 103, at 63 (explaining that "the Sherman Act effectively vested the federal courts with a power to make competition policy analogous to that of common law courts"); id. P 103 at 62-63 (observing that "judges sometimes talk as if Congress has already decided the question before them but [t]his is usually a misconception"); Frank H. Easterbrook, Statutes' Domains, 50 U. Chi. L. Rev. 533, 544-47, 551-52 (1983) (contrasting broad enactments such as the Sherman Act that invite courts to fashion common law with more precise enactments whose gaps should not be filled).

End of Footnote 371.

In enacting the Foreign Trade Antitrust Improvements Act of 1982 372 and the International [\*720] Antitrust Enforcement Assistance Act of 1994, 373 Congress appears to have deliberately avoided addressing the propriety of Timberlane and kindred jurisdictional tests. In taking advantage of this latitude, courts applying the Charming Betsy canon have properly refrained from resolving the scope of the custom bearing on the question. 374 The result allows arguably "soft" principles like comity the opportunity to emerge as international law. 375 If such [\*721] principles are more than merely colorable, and can be reconciled with federal antitrust laws, unnecessary conflict with domestic political enactments perhaps may be avoided.

C. Local Actors: Differentiating Authority

Respect for the separation of powers may seem superficial when the judiciary posits customary norms that purportedly bind the political branches. An international law of antitrust, for example, might constrain not only the initial exercise of prosecutorial discretion by the U.S. government, but also the ability of the federal courts to assist in any party's enforcement of the Sherman Act. In the face of such custom, half-measures are awkward. Deferring to the executive stewardship of foreign relations, for example, would simply leave U.S. law inconsistent with our international obligations. 376

Footnote 376:

Unless, of course, the international law is later- in-time, and is deemed to override the domestic law. See supra text accompanying note 339.

End of Footnote 376.

#### The CP creates an equivalent substantive obligation, sends a huge signal, is more certain and durable AND the act forwards an assertion of economic law that becomes quickly globalized.

Helfer ’16 [Laurence; 2016; Professor of Law at Duke University; Michigan Journal of International Law, “Customary International Law: An Instrument Choice Perspective,” vol. 37]

Strikingly, however, the rational design, legalization, and instrument choice scholarship has all but ignored CIL. Numerous studies of international lawmaking barely mention custom, lump it together with soft law, or view it as a less binding form of commitment than treaties. 11 More specifically, these accounts fail to consider the distinctive design features of CIL or whether and when states might choose custom as their preferred legal instrument. 12

An instrument choice perspective offers three interrelated insights that reveal custom's continuing relevance to contemporary international lawmaking. First, the perspective identifies the distinctive design elements that distinguish CIL from treaties and soft law. Second, instrument choice illuminates the constraints that limit states' use of custom to particular types of cooperation problems. And third, the approach predicts that states, in these constraints, will continue to prefer custom over treaties and soft law when custom's design features or its substantive norms offer advantages over treaties or soft law.

Before proceeding, we offer a few qualifications and caveats. First, in line with standard rationalist accounts of international cooperation, we view states as the primary actors. This does not imply that the individuals and institutions within states - executive branch officials, legislatures, civil society groups, and so forth - do not influence the selection of custom over treaties or soft law. Our focus, however, is on the dynamics of instrument choice at an international level, where the preferences of these actors have been aggregated and incorporated into the positions states adopt [\*567] vis-a-vis one another. We encourage other scholars to explore the micro-foundations of instrument choice, in particular when and why different domestic actors express a preference for custom over international conventions and nonbinding norms, and how those preferences are translated into official state policy.

Second, we make a simplifying assumption that nations intentionally select one international instrument over another. This assumption - that states "choose" custom, rather than having custom imposed upon them or having it develop as an essentially unconscious process - is borne out by the examples discussed in Part IV. We also recognize, however, that powerful nations have a greater ability than weaker states to control the content of CIL, and we take account of this fact in our analysis.

A third preliminary observation concerns our description of custom's "design features." We use this term to refer to the attributes or characteristics of CIL itself, not to specific tools or mechanisms, such as treaty exit and escape clauses that states can select, discard, or modify when negotiating written international instruments. 13 A state that chooses custom over treaties or soft law is expressing a preference for an instrument with characteristics that cannot be changed or are very difficult to modify. This comparative lack of flexibility helps us to explain why CIL is limited to particular types of cooperation problems - what we label as "custom's domains" - and to identify when custom's design features and substantive norms have advantages for one or more states over those of treaties and soft law.

The remainder of this Article proceeds as follows. We begin in Part II by considering custom's design features, which we distinguish from the canonical elements of custom (state practice and opinio juris) and the individual doctrines associated with CIL. Specifically, we contend that, as an ideal-type, custom is non-negotiated, unwritten, and universal, three characteristics that distinguish CIL from both treaties and soft law, which are almost always negotiated, written, and rarely universal either in formation or application. 14 These design features help to explain some of custom's peculiar doctrinal characteristics, and they cut across the doctrinal divide which is said to distinguish "traditional" and "modern" custom. 15

[\*568] Part III considers the constraints that limit states' recourse to CIL to particular types of cooperation problems or "domains." Although custom's design features make it ill-suited to resolve many transborder public goods or collective action problems, 16 we argue that states can nonetheless generate custom in a range of potentially important contexts. Drawing upon numerous historical and contemporary examples, we show that the design features discussed in Part II facilitate custom's formation primarily in three situations: when all states benefit from a customary rule with low distributional costs, when powerful nations impose a custom on weaker states, and when states seek to entrench shared normative values. Outside of these three domains - or where there is overlap among them - custom is much less likely to form.

Part IV considers custom's future in an international legal landscape dominated by multilateral treaties and soft law initiatives. We argue that states select CIL as their instrument of choice (within the constraints imposed by custom's domains) when its substantive norms or its design features confer advantages over those of soft law or treaties. For example, states may use custom to "unbundle" certain negotiated aspects of multilateral conventions, especially those that preclude reservations. A state could decline to become a party to such a treaty yet profess that some or most of its provisions (in particular those it favors) are binding as CIL. Drawing from the law of the sea, international economic law, human rights, the laws of war, and other substantive issue areas, Part IV provides numerous contemporary examples in which states prefer custom to treaties or soft law, based on either its substantive norms or design features. Accordingly, custom remains relevant even in the age of soft law and treaties, so long as states act within the constraints imposed by custom's domains. Part V concludes.

II. The Design Features of Customary International Law

This Part identifies three design features - custom's universality, its unwritten nature, and its non-negotiated character - that are essential structural characteristics of CIL, which differentiate it from treaties and soft law as a form of international cooperation. We distill these characteristics from the extensive legal literature on custom as a source of international law, in both its traditional and modern guises.

We acknowledge at the outset that these three design features (universal, unwritten, and non-negotiated) are ideal types, and that treaties and soft law share these features to a limited degree. However, if one views [\*569] each attribute along a spectrum, there can be little doubt that custom occupies the high end of the spectrum for each variable as compared to treaties and soft law. Moreover, custom's design features are fixed. Although states are largely free to select the design features of treaties and soft law that best suit their purposes, they generally lack the power to do so with respect to custom. 17 In the discussion that follows, we first address each characteristic separately and then consider potential objections to this typology.

A. Universal

Customary law aspires to universality in both its formation and application. Article 38 of the International Court of Justice (ICJ) provides the canonical definition of custom, as "a general practice accepted as law." 18 As the word "general" suggests, the practice of all nations is potentially relevant to the formation of custom. States may choose to negotiate treaties and soft law instruments with only a select group of states. By contrast, participation in the formation of custom is in principle open to all nations, 19 even if powerful or specially affected countries often have more control over its development than do weaker or less interested states. 20 Even for regional custom (discussed below), all states within the region may participate in the practice that gives rise to a legal obligation.

This formulation of the state practice requirement reflects a normative commitment to facilitating the creation of legal rules in which all nations participate and that, in turn, apply to all nations. 21 Consider how this compares with other sources. Treaties achieve universality, if at all, only after decades of arduous country by country ratification. 22 Indicia of widespread [\*570] state support for soft law are found in more diverse sources, such as votes for resolutions in international organizations, endorsements by government officials, campaigns by civil society groups, and nonbinding agreements. Yet there is no accepted method of evaluating these practices to determine the extensiveness of international support for nonbinding norms.

For custom, in contrast, it is widely agreed that a universal rule arises even when many or even most states do nothing. These nations are said to "tacitly accept" or "acquiesce" in an emerging rule; their consent may be "inferred" from silence, 23 if their consent is in fact required. 24 These assumptions, which make the development of universal custom markedly easier, hold true for both traditional and modern forms of custom. "Traditionally, customary law has been made by a few interested states for all." 25 The process unfolds inductively, building up from specific examples of affirmative practice. "The awareness and opinions of other states that take no overt position are rarely considered." 26 Modern custom flips this analysis, applying a deductive process that begins with assertions of opinio juris rather than discrete instances of practice. 27 The result in either case is the same: a universally applicable binding rule of international law. 28

Three legal doctrines buttress custom's universal aspirations: the position of new states, the status of persistent objectors, and assertions of regional custom. Each of these doctrines, properly understood, reinforces custom's universalist tendencies.

First, it is "widely accepted that a new State is bound by all rules of general customary international law which existed at the time that State came into being," although such a state had no opportunity to support, acquiesce in, or oppose these preexisting customs. 29 The rationales offered to justify this rule range from a benign desire to preserve stability in international relations to a nefarious effort to shackle "uncivilized" peoples emerging from colonialism to legal rules previously developed by and benefiting Western powers. 30 Whatever the explanation, there has been little [\*571] if any pushback against this doctrine from the dozens of new nations that have emerged since the end of the Second World War. 31 When paired with the well-settled (although recently challenged) prohibition on unilateral withdrawal from extant custom, 32 the result is a marked geographic expansion of customary law's reach.

The second legal doctrine, the persistent objector, arose to alleviate the anxieties of positivist scholars, who were troubled by the notion that states could be bound through acquiescence rather than express consent. 33 According to the doctrine's canonical definition, a nation that regularly and vociferously opposes an emerging custom will, if the new rule eventually forms, not be bound by the rule in its relations with other states. 34 Consistent with the rules applicable to the formation of custom, the option to object is open to all nations.

If states regularly staked out positions as persistent objectors, our claim that universal application is one of custom's distinctive features would be questionable. In fact, although most courts and commentators now accept the persistent objector concept in principle, 35 its application in practice is both exceedingly rare and difficult to sustain in those few instances when such an objection is raised. 36

Why might this be the case? One answer is found in the principle of reciprocity, which disadvantages putative objectors by forcing them to bear the new custom's burdens without enjoying its benefits. As Michael Byers has illustrated with an example from the law of the sea, "even the most powerful of the maritime States - the United States, the United Kingdom and Japan - eventually abandoned their persistent objection to the development of the twelve-mile territorial sea as a rule of customary international law." 37 They did so "at least partly as a result of coastal fishing and security concerns. Although foreign fishing vessels and spy ships were able to operate just outside the three-mile limits of the persistently objecting States, the objecting States' vessels were excluded from waters [\*572] within twelve miles of other States' coastlines." 38 Reciprocity, in other words, systematically discourages persistent objection to emerging customs that involve reciprocal rights and obligations. Thus, in practice, the doctrine of persistent objectors poses little if any impediment to custom's applicability to all nations. 39

A third doctrine reinforcing custom's universality is the presumption against regional custom. Commentators have long asserted that a custom can, in principle, be restricted to a geographically linked group of countries. Such a rule would bind only the states in that area, leaving nations elsewhere unaffected. If regional custom were a common source of international legal obligation, it would cast doubt on our universality claim. Examples are few and far between, not the least because the ICJ has actively discouraged the formation of regional custom.

In the Asylum Case, 40 the World Court considered Colombia's allegation that a Latin American custom required Peru to grant safe passage to an individual to whom Colombia had granted political asylum. The ICJ rejected this claim, reasoning that a state's silence in response to an emerging regional custom was to be construed as an objection. This is precisely the opposite of the rule governing global custom, where silence is equated with acquiescence. Why, David Bederman pointedly asks, "did the World Court change the calculus of consent for regional custom in The Asylum Case?" His answer:

One can only conclude that the Court wished to suppress regional custom, and there is no more effective way to do so than to declare a presumption that fundamentally disrupts the formation of such regional practices. [The ICJ] was concerned that development of distinctive bodies of regional rules - not just for Latin America, but perhaps also for Europe, Africa, and Asia - might unduly interfere with the universal aspirations of international law. 41

The use of procedural rules that discouraged regional custom thus "preserved the ICJ's prerogative to declare the content of customary international law … for the benefit of … the global community at large." 42

B. Unwritten

A second feature that distinguishes custom from treaties and nonbinding norms is that custom is an unwritten form of law. In a review of international law sources in the early years of the 20th century, Lassa Oppenheim asserted that "the rules of the present international law are to a great extent not written rules, but based on custom." 43 Numerous recent studies concur that custom is unwritten law, some even labeling this as one of custom's "defining characteristics." 44

In contrast, the vast majority of treaties are memorialized. Drafts are circulated and marked up during negotiations, ultimately leading to the adoption of a final authoritative text that is opened for signature. Several rules and institutional features of the international legal system provide strong incentives for states to put their agreements in writing. The Vienna Convention on the Law of Treaties (VCLT) - and the benefits of its many default rules - apply only to written treaties, a limitation intended to promote predictability and legal certainty and reduce future interpretive disputes. 45 In addition, treaties cannot be entrusted to a depository or included in published compendia such as the United Nations Treaty Series unless they are in written form. 46 Finally, some national laws require treaties to be memorialized for various purposes. 47

Nonbinding norms too are overwhelmingly written. Dinah Shelton's authoritative treatise identifies two types of soft law - primary and secondary - both of which are embodied in written instruments. Shelton defines primary soft law as "those normative texts not adopted in treaty form that are addressed to the international community as a whole or to the entire membership of the adopting institution or organization." 48 Examples include [\*574] the U.N. Standard Minimum Rules for the Treatment of Prisoners, the U.N. Standard Minimum Rules for the Administration of Juvenile Justice, the Declaration on Rights of Indigenous Peoples, and declarations adopted at the close of U.N.-sponsored human rights conferences. 49 Secondary soft law includes "the recommendations and general comments of international human rights supervisory organs, the jurisprudence of courts and commissions, decisions of special rapporteurs and other ad hoc bodies, and the resolutions of political organs of international organizations applying primary norms." 50 These illustrations reveal that primary and secondary soft law come in many shapes and sizes, but one feature that unites all of these examples is their written form.

To be sure, written documents often provide evidence - sometimes the best evidence - of state practice and opinio juris. Yet, references to written materials to prove these elements does not transform custom into written law. Rather, they further underscore the differences between custom on the one hand, and treaties and soft law on the other.

First, custom is a "norm without a [formal] act, at least, without a founding act, where you might hope to find its origin and from which you might be able to derive its authority." 51 Proving the existence of custom cannot, unlike most treaties and nonbinding norms, be done by consulting a single authoritative text. Rather, a putative rule must be pieced together from numerous sources - official publications, historical records, newspaper articles, and so forth - in dozens of nations. 52 Diligent researchers may identify these materials relatively easily for the few industrialized nations that publish digests of state practice, but the task is far more difficult elsewhere. And even for governments with large and sophisticated international law departments, "customary practices are often not formally recorded at all." 53

In addition, some treaties codify existing customary rules or crystalize the formation of new custom, with the result that the same norm exists in both sources of international law. This overlap between treaties and custom does not, however, render the latter as written law. To the contrary, [\*575] treaty and custom remain separate sources of obligation. 54 As we later explain, the enduring separation of these sources is particularly important for non-ratifying countries and for state parties that later withdraw from a treaty that embodies a customary rule.

C. Non-negotiated

A third distinctive characteristic of custom is that it is not negotiated in the manner of treaties and soft law. Commentators describe the practice that produces custom as "informal, haphazard, not deliberate, even partly unintentional and fortuitous" as well as "unstructured and slow." 55 Even scholars who perceive some order in this chaos characterize custom as emerging from a "struggle for law reflected in exchanges of signals, cues, bids, and responses" 56 among states "competing in a marketplace of rules." 57 Custom, in other words, is formed by iterated claims and defenses in which some "groups of states may 'bid' new norms, while others may object, and yet other countries may simply remain silent and so acquiesce." 58

This process does not involve negotiation, which is commonly defined as a "formal discussion between people who are trying to reach an agreement." 59 Custom is not produced by a formal discussion or exchange of views. In fact, the state practice that serves as its basis may not even be motivated by a desire to reach an agreement. 60

Many negotiations over legal instruments involve another element as well, bargaining. Negotiation over treaties, for example, often involves competing demands and concessions in which the parties trade various aspects of the form and substance of the agreement. Consider multilateral [\*576] conventions that regulate global public goods or club goods. 61 Most of these agreements contain carefully crafted compromises, often hashed out in exquisite detail among cross-cutting alliances. 62 A group of states may give up a preferred position in one section of a treaty (or in one treaty in a nested treaty regime, such as the WTO) in exchange for benefits in another section. Or a party may agree to less favorable substantive rules only if those rules are phrased very broadly or if the treaty includes express exit or escape clauses. 63 These exchanges expand the zone of agreement, facilitating the resolution of "multilateral coordination problems [that] cannot easily be solved in the informal, unstructured, and decentralized manner typically associated with customary international law." 64

Custom also generally arises on a rule by rule basis. State practice and opinio juris focus on a single, discrete legal issue, often expressed at a high level of generality, rather than a fully fleshed-out group of norms with carefully delineated contours and exceptions. This partly reflects the largely unwritten nature of custom, which increases the cost and reduces the efficacy of establishing multiple, related customs at the same time. But it also makes custom a useful tool for general international rules that eschew country-specific or case-specific tailoring. As Bradley and Gulati assert with reference to the custom of diplomatic immunity, "if nations can assume that the same rules of diplomatic immunity apply, no matter where, then there will be no need to negotiate specific rules every time a diplomatic mission is established in a new country." 65

One potential objection to our claim that custom is non-negotiated arises from the widely-held view that U.N. General Assembly resolutions are evidence of customary international law. These resolutions are sometimes the subject of intensive negotiations among dozens of countries, including on-the-record debates, bargaining among state representatives, and attempts to reach agreement on a written text. In 2013, for example, the General Assembly adopted a resolution on data privacy 66 that was the product of extensive negotiations. States that engage in widespread data collection were especially active in these negotiations and succeeded in weakening the resolution's final language. 67

[\*577] If such resolutions were in themselves binding as CIL, our claim about that source's distinctive features would be difficult to sustain. Although a few scholars have asserted that some General Assembly resolutions create "instant custom," 68 such a claim is now discredited. Rather, it is widely agreed that General Assembly resolutions provide only evidence of CIL, with the weight of that evidence dependent upon factors such as voting patterns, express reference to custom in the text, and, most importantly, whether legal norms referred to in the resolution are subsequently reinforced by other indicia of state practice and opinio juris. 69 In addition, structural limitations constrain opportunities for negotiation of General Assembly resolutions. The Assembly and its Main Committee include all U.N. members. Negotiation on this scale is unwieldy, reducing the ability of individual states to influence the drafting of language that describes the resolution's relationship to extant or emerging custom. 70

A second potential objection to custom as non-negotiated relates to the use of treaties as evidence of custom. 71 Some treaties are intended to codify preexisting custom, thereby rendering it less vague by memorializing it. 72 Such treaties may then serve as evidence of the content of the customary norm, meaning that the negotiation of the treaty is potentially also a negotiation about the content of custom. 73 Yet states have an incentive to continue to promote the customary norm even after the conclusion of the treaty because the norm binds all states, even those not party to the treaty. 74

[\*578] Other treaties aim to facilitate the development of new customary norms. Still other agreements both restate existing custom and include provisions that may crystalize into custom, in part through their inclusion in the treaty. The VCLT is a well-known example. To the extent that treaties such as the VCLT are adopted with the purpose of facilitating the formation of new custom, the negotiation of the treaty is potentially also an indirect negotiation of the customary norm.

Seen from this perspective, the distinction between custom and treaties may seem quite thin, particularly with regard to the comparatively non-negotiated character of custom. Jose Alvarez succinctly captures this view, arguing that many multilateral codification conferences are "international law-making fora for the purposes of not one but two potential sources of international obligation" - treaty-making and "the elaboration of codified custom." 75 Aware of this double function, states participating in such conferences employ "conscious stratagems for reaffirming, modifying, or elaborating codified custom." 76 This new form of creating custom, Alvarez contends, "responds to states' contemporary needs for a more rapid, less vague, and deliberative process for the establishment of preferably written and clear global rules." 77

Nevertheless, like General Assembly resolutions, treaty norms do not automatically become custom. As Robert Jennings has observed, "the very fact of changing the law from an unwritten source to a written source is in itself inevitably a major change." 78 Accordingly, the argument that treaty provisions reflect preexisting or subsequently formed custom is often contested or based on evidence found in multiple legal instruments. The purported duty to prevent transboundary pollution, for example, is based in part on certain treaty clauses, but also rests on soft law documents such as recommendations of the Organization for Economic Cooperation and Development, the Stockholm and Rio Declarations, and U.N. General Assembly Resolutions, among other sources. As a result, whether customary international law in fact imposes such a duty remains contested. 79

To the extent that treaties do articulate customary norms it is often because they reflect preexisting norms of customary law, like pacta sunt servada. The subsequent treaty does not render the preexisting custom negotiated. To the contrary, the act of codification often changes the content of rule for the treaty but not for its customary law antecedent. Codification treaties generally "lay down the customary rule in a more precise and systematic manner," and the "jus scriptum may cure omissions, eliminate [\*579] anachronisms, introduce recent doctrinal findings, or even consider the eventual enforcement (or adjudication) of the written rule. As a result, codification contains a creative element and regularly entails a certain amount of change." 80

Moreover, the kinds of treaties that are generally cited as evidence of custom tend to have a somewhat less negotiated character. Many are drafted or negotiated under the auspices of an international organization such as the United Nations General Assembly (through a referral to the International Law Commission). The involvement of international organizations tends to expand the number of states involved, 81 increase the presence of NGOs, involve high levels of openness, and increase the importance of independent experts - all of which reduces the ability of particular states to control the outcome. 82 Nevertheless, some of the treaties that emerge from this process are highly negotiated, including the U.N. Convention on the Law of Sea and the Rome Statute establishing the International Criminal Court. Consistent with their negotiated character, neither permits reservations, and both have proven to be especially controversial evidence of customary international law. 83

We anticipate a number of objections to our claim that CIL has three essential structural characteristics, which we label as custom's design features. Positivist international law scholars may protest that we give insufficient attention to state practice, opinio juris, and canonical legal doctrines associated with CIL. We agree that these topics are central to understanding when states choose custom over treaties and soft law. However, we see these doctrines - both in their traditional form and as re-envisioned by modern approaches to custom - as products of the three overarching attributes we identify. Indeed, analyzing custom from the perspective of its design features illuminates potential explanations for longstanding areas of doctrinal confusion, as well as topics, such as the persistent objector and the presumption against regional custom that garner significant attention in legal treatises but are rarely followed in practice.

Other commentators may challenge our claim that the three design features accurately characterize CIL or distinguish it from treaties and soft law. Some customary rules are, after all, memorialized in written documents, [\*580] and some nonbinding instruments are adopted by international organizations with little if any negotiation among member states. Our overarching response to this critique is to reiterate that custom's three distinctive attributes are not rigid, binary categories. We have been careful to describe custom as universal, unwritten, and non-negotiated in relation to treaties and soft law. If all three norms were located along a spectrum that runs, for example, from fully non-negotiated at one end to entirely negotiated at the other, custom would be much closer to one pole than the other two legal norms. The same is true for the other two characteristics. Our contention is that these differences, even if they are differences in degree rather than in kind, are empirically accurate, legally consequential and (as we now discuss) illuminate constraints on the creation of CIL that help to explain why custom has emerged in some areas of interstate cooperation but not others.

III. Custom's Domains

The foregoing section described three distinctive design features of CIL - it is universal, unwritten, and non-negotiated. Because these characteristics are relatively fixed and cannot be manipulated to the same extent as the design elements of treaties and soft law, 84 the characteristics constrain when states can turn to custom to create international law. Given these constraints, we argue that CIL forms primarily in three domains - when all nations benefit from a general legal norm with low distributional costs, when powerful countries make visible and sustained commitments to a legal norm, and when states seek to entrench shared normative values. The significance of each of the three distinctive design features varies context to context, but all three features are important to understanding custom's domains.

A. Custom that Benefits All States

States will use a non-negotiated, universal, and unwritten form of legalized cooperation to create rules from which all states benefit. Because such rules advantage all nations in relatively equal measure regardless of their size, economic might, or military power, they have few distributional consequences and reinforce the foundational principle of sovereign equality. 85

The three distinctive features of custom identified in Part II facilitate the generation of this category of international norms. Negotiation is unnecessary because states benefit from the rules as such without the need to make specific demands and concessions. Unwritten practice suffices to engender consensus about general rules that lack tailored or detailed provisions. Indeed, the unwritten character of custom helps to secure states' [\*581] agreement to a legal norm articulated at a high level of generality by deferring potential disputes over specific interpretations or applications. Universality means that states can predict that other nations will be bound to the rule, which may constrain self-interested behavior in the future when some states face strong incentives to defect.

All-states-benefit custom often arises from areas of interstate behavior that were previously unregulated by any international rules, and it is comprised of legal norms that are articulated at a high level of generality. Many venerable rules of international law have these qualities. 86 For example, all nations gain from having predetermined methods of communicating with each other through representatives without the fear of arrest or civil suits related to the officials' duties. Customary law thus provides for the immunity of diplomats and consular officials. Other examples include pacta sunt servana, territorial prescriptive jurisdiction, the prohibition of piracy, and the immunity of states from suit in foreign courts over sovereign or public acts (jure imperii). 87 Two additional illustrations from the law of the sea and outer space help to illuminate the contours of this category of custom.

Consider the mare liberum principle, first espoused by Hugo Grotius, which has long protected freedom of navigation over the world's oceans. As Sir William Scott wrote in an early 19th century court case rejecting British efforts to enforce a domestic ban on the slave trade against foreign vessels, the universal appeal of mare liberum was an important justification for its acceptance as custom:

all nations being equal, all have an equal right to the uninterrupted use of the unappropriated parts of the ocean for their navigation. In places where no local authority exists, where the subjects of all states meet upon a footing of entire equality and independence, no one state, or any of its subjects, has a right to assume or exercise authority over the subjects of another. 88

A similar rationale undergirds the countervailing custom that the flag state has sole jurisdiction over vessels that sail on the high seas under its badge of nationality. As one commentator has explained, the benefits accruing to all nations from the mare liberum and flag state rules were "mutually reinforcing," aiding the formation of both customs:

reciprocal respect for the exclusive jurisdiction of states over their ships provided a sort of state-to-state equality of opportunity. All states met upon equal footing on the high seas and could make free use of the sea for maximum benefit, but no state could independently impose its legislative will upon the modalities of use. 89

Turning from the oceans to the heavens, the universal recognition that "outer space is unsusceptible to national or private appropriation" aided rapid acceptance of the non-appropriation principle - a prohibition of territorial occupation or acquisition - as the customary ground norm for future activities in space. 90 The principle has benefitted all states, facilitating "the orderly development of space activities for more than forty years and … effectively preventing a colonial race in the high frontier." 91 To be sure, disagreements have arisen at the margins, in particular over the upper extent of the earth's atmosphere. But consistent with our theory, the contending positions over these boundary issues have been advanced, and compromises achieved, via multilateral treaties and soft law, not by challenges to the customary non-appropriation principle as such. 92

In sum, the all-states-benefit principle explains the formation of many foundational rules of customary international law. But it also sheds light on why custom plays only a limited role in other areas of interstate cooperation. Many important problems faced by the international community involve difficult and contentious questions of how to distribute the benefits and burdens of cooperation among differently situated states. If governments perceive that distributive effects of an international rule are high, unwritten and non-negotiated custom will serve as a poor alternative to treaties and soft law, where specific quid pro quo trade-offs can be worked out, or finely-tuned language can be negotiated, to suit all parties at the table. Climate change and other global environmental problems are prime examples. In these contexts, to the extent that custom forms at all, it will do so around highly abstract norms that leave distributive questions to future negotiations. For example, customary rules of international environmental law tend to be extremely broad and open-ended - what Dan Bodansky describes as a "common ethical framework." 93 They also tend to be derived from soft law and treaties, which allow states to shape rules with distributional consequences in mind. 94

[\*583] As explained above, the unwritten character of all-states-benefit custom means that the resulting legal rules are often amorphous and malleable. This facilitates widespread initial agreement to a rule, while also giving states leeway to assert their preferred interpretation when applying that rule to specific contexts or new circumstances. To be sure, no rule is entirely free from distributional consequences. As general rules become increasingly particularized in response to these claims, however, distributional issues often become more acute. Custom's distinctive features make it far less useful for resolving these distributional controversies. Instead, states attempt to resolve these concerns through treaty negotiations and codification exercises. Consistent with the argument advanced here, Tim Meyer has shown that efforts to codify preexisting custom is "often driven by distributional concerns." 95 This highlights an important corollary to our theory - over time, all-states-benefit custom tends to become more contentious as it is applied to new circumstances, increasing the likelihood that states will turn to treaty-making or codification to resolve disagreements over the norm. As we explain in Part IV, however, all-states-benefit custom remains relevant even after norms have been codified.

The history of sovereign immunity illustrates this trajectory. Early domestic suits against foreign states were often brought against state-owned maritime vessels. The doctrine of absolute immunity thus benefited countries with large navies and merchant marines, which were immune from suit. 96 On the other hand, private firms and individuals in these countries often had potential claims against foreign vessels, so these states bore the burden as well as the benefit of an absolute immunity rule. As states became more significant economic actors in first part of the 20th Century, the economic importance of state immunity rules increased, which magnified existing distributional effects and generated new ones. The benefits accruing to governments that nationalized private industries and the "State trading activities" of the Soviet Union and other socialist nations were particular concerns. 97 In part as a result, many states abandoned absolute [\*584] immunity in favor of a restrictive rule, which does not protect the commercial activities of foreign sovereigns. Consistent with our claim, although the absolute immunity arose with little dissent, the shift to restrictive immunity remains contested after more than a century. As one Chinese author recently explained, "developing countries, to better protect their own national interests, should continue to adhere to the principle of absolute immunity and should not follow the footsteps of the developed countries to accept the restrictive approach." 98

The heightened salience of distributional costs and the collapse of consensus around absolute immunity also coincided with the growth of treaties governing this topic. 99 Unable to secure acceptance of restrictive immunity as a customary rule, proponents of that approach turned to bilateral or regional agreements. 100 Efforts to codify restrictive immunity in a global treaty have been less successful. A U.N. convention endorsing that approach was adopted in 2004, but has yet to enter into force. 101

B. Hegemonic Custom

The non-negotiated, universal, and unwritten characteristics of custom also facilitate efforts by powerful states to create international rules that bind all nations. We label these rules as hegemonic custom. That powerful states play an important or even dispositive role in the formation of CIL is not a new observation, 102 but no other scholar has (to our knowledge) [\*585] linked the role of power to custom's distinctive design features or used it to develop a theory of instrument choice for custom. Below we discuss a number of variations of hegemonic custom, identify the conditions that make it more or less likely to be accepted by other nations, and analyze when powerful states turn to treaties and soft law to bolster their efforts to promote a desired customary rule. Before proceeding, we emphasize that we do not take a position on the normative desirability of hegemonic norm creation, focusing instead on its relationship to custom's distinctive characteristics. We take up normative issues in the paper's conclusion.

It is hardly surprising that powerful nations advance international rules that further their interests regardless of whether those rules benefit other countries. Yet given custom's universal scope and the ability of all states to object to the formation of an emerging norm, one might assume that attempts by hegemons to instantiate a preferred rule or practice as binding law would be doomed to failure. In fact, less powerful nations have sometimes embraced or at least acquiesced in campaigns for new customary rules by one or more powerful nations.

Perhaps the best examples involve the law of the sea. President Truman issued a proclamation in September 1945 claiming for the United States jurisdiction and control over its continental shelf, including beyond its territorial sea. 103 Because that area of the seabed was then part of the high seas and thus available for exploitation by all, the Truman Proclamation had significant distributional consequences. Yet coastal states quickly emulated the Proclamation and asserted sovereignty over their respective continental shelves. 104 Perhaps more surprisingly, landlocked nations also rapidly accepted the norm. The speed with which the custom crystalized was striking. As one commentator pithily noted, "the Truman proclamation was revolutionary in 1945 but passe by 1958." 105

What explains the rapid and universal acceptance of this new legal norm, advanced by the world's most powerful maritime nation, without formal negotiations or carefully delineated treaty texts? The timing - just after the end of the Second World War - was propitious. Many nations were still recovering from that conflict and others become economically or politically dependent on the United States during the Cold War's first decade. Both trends discouraged efforts to "challenge the [Truman] doctrine or reveal its flaws." 106 In addition, the new rule's distributional costs were somewhat uncertain. Most countries lacked the resources or technological knowhow to exploit the continental shelf (by drilling for oil, for example). [\*586] But such distributional costs that could be identified were partly mitigated by Truman's promise to issue leases to foreign corporations. Arguably the most important explanation for the doctrine's acceptance, however, was the claim by other coastal states - including two veto-wielding permanent members of the recently-created U.N. Security Council - that asserting sovereignty over their respective continental shelves was permitted by customary international law. 107

The credible, visible commitments to the new custom by these nations yielded a better outcome for all states than the uncertainty of no agreement, even if some governments would have preferred a different rule (in other words, there are distributional consequences in selecting a particular rule). Game theorists label this as a "battle of the sexes." 108 Ed Swaine has applied this analysis to the formation of new custom. He argues that "it is at these early stages where credible commitments, backed by reputational investment in the customary international law regime, may usefully diminish uncertainty and allow coordination to be attained more rapidly and with less friction." 109 Announcing a customary rule "permits a state to commit to one of the equilibria and to have its representation regarded as binding." 110 Although Swaine does not limit his analysis to a particular type of nation, his example - the development of the three-mile territorial sea - concerns a rule backed by two powerful maritime countries, England and the United States. 111

We extend Swaine's insight by explaining how custom's distinctive features facilitate the formation of hegemonic custom in a battle of the sexes situation. A hegemon's credible public commitment to a new legal rule on a take-it-or-leave-it basis may convince other governments that they are unlikely to obtain a more favorable rule through a treaty or soft law. Weaker states in particular may conclude that resistance is not worth the effort (since, by definition, the proffered custom is better than none), or they may see little reason to try to improve the rule through negotiations in which the powerful state may have an even stronger hand. For the new custom's proponents, this method of international norm creation is often faster and less onerous than either formal treaty-making processes or breaching existing rules. Although the "continual, overt exercise of power" is possible, it is also costly, providing hegemons with a strong incentive to legalize interstate relations in "settled rules." 112

[\*587] Another type of hegemonic custom concerns rules espoused during periods when a relatively small number of powerful nations dominated international society, a state of affairs that reached its apogee in the late 19th and early 20th century and continued, to a diminishing extent, until the end of colonialism in the 1960s. Commentators have rightly emphasized how the international rules of this period systematically harmed or ignored non-European nations and peoples. However, there were also battles over custom among the Western states. Britain's efforts to outlaw the transatlantic slave trade is the most prominent example.

Beginning in the early 1800s, Britain deployed a multi-prong strategy to stamp out the slave trade. It asserted a unilateral right to interdict vessels on the high seas, seized vessels carrying human chattel from Africa to the Americas, and sought to establish a basis in treaties and customary international law for proscribing the slave trade and enforcing that ban via interdiction. 113 The outcome of these efforts, by the end of the 19th century, was a customary law prohibition on the slave trade that extended to states that had not ratified treaties proscribing that practice and, by analogy to piracy, permitted any nation to seize slaving ships. 114

Unlike the Truman Proclamation, however, Britain's ultimately successful campaign against the slave trade required sustained legal and diplomatic efforts lasting over half a century. These efforts paired the negotiation of bilateral and multilateral treaties with other European powers and the United States with soft law declarations and assertions of customary international law. The early years of the campaign met with stiff resistance. The first bilateral treaties Britain secured did not authorize interdiction, and a key British court decision in 1817 held that searching vessels on the high seas infringed the exclusive jurisdiction of flag states. 115 The result, as Michael Byers has explained, was that the British government failed in its initial "attempt to assert a putative new right of customary international law against a nonconsenting state." 116

[\*588] This failure did not, however, lead Britain to abandon its effort to secure a universally applicable rule. Although the later treaties it negotiated outlawed the trade and provided a limited right of interdiction, these agreements did not bind nonparties. 117 Nevertheless, British ships continued to interdict the vessels of nations that were lawfully transporting African slaves across the Atlantic. 118 By these actions, Britain sought "to convert the[] practice of vigilante justice into a lawful act in accord with the larger framework of the public order of the oceans" and "a universally accepted legal norm." 119 The government did so by a clever recasting of slave trade as an act of piracy, a longstanding crime under customary international law that all nations were authorized to prevent and punish. 120

In sum, "the history of the British attempt to ban the transatlantic slave trade demonstrates how very difficult it is to achieve a customary international law right of interdiction on the high seas." 121 That such a custom arose notwithstanding the hurdles to its formation is due in large part to the sedulous campaign waged by the world's then most powerful maritime nation. To be sure, other factors aided the formation of the custom, most notably that "enforcing the prescription … became less contentious and more widely accepted when few states had a competing interest in favor of preserving the practice." 122 Yet as scholars have shown, the slave trade did not collapse under its own weight. To the contrary, governments and firms only abjured the lucrative practice in response to a massive transnational social movement and sustained political and legal pressure by abolitionist nations, most notably Britain, that reframed what had been viewed as an economic transaction in humanitarian terms. 123

Most important for our purposes, custom's distinctive features aided Britain's efforts to eradicate the slave trade. The government sought a universal ban, a result more easily achieved via a customary rule than by a series of bilateral and plurilateral treaties with varying terms that, in any event, did not bind nonparties. These gaps in treaty coverage were a genuine concern. As Noora Arajarvi has recently written, "many (dominant) countries, which were not party to the treaties, for instance Spain, continued to exercise the slave trade" during the middle decades of the 19th century. 124 This sheds additional light on the references to the slave trade as piracy in the compacts that Britain negotiated. Although these provisions [\*589] were "couched within an essentially contractual agreement," they had a broader aim: "extending the right of visitation to vessels from nonconsenting states" and thus facilitating the formation of a new custom. 125 Britain's interdiction of vessels on the high seas and its assertions of a legal right to interdict - both unwritten practices - were crucial to maintaining pressure on non-parties to renounce the slave trade. Finally, for nations reluctant to sign a treaty, negotiations were of little use; unilateral actions and assertions of legal rights were far more important.

The Truman Proclamation and the abolition of the slave trade are examples of successful hegemonic custom. Powerful nations do not, however, always prevail in their efforts to promote a new international rule. To the contrary, the rapid increase in the number of nations and in the diversity of their interests following the Second World War has eroded - although not entirely eliminated - the creation of hegemonic custom.

Demands by the United States and other capital-exporting nations for full compensation for expropriated alien property provides a classic example. The U.S. position was most famously asserted by U.S. Secretary of State Cordell Hull in a letter to the government of Mexico in the late 1930s. In response to Mexico's expropriation of property owned by U.S. nationals, Hull, coining the doctrine that was to bear his name, asserted that under customary international law "no government is entitled to expropriate private property, for whatever purpose, without provision for prompt, adequate, and effective payment therefor." 126 According to some scholars,

Secretary of State Hull accurately presented the then current position in international law in 1938 when he wrote his famous letter to the Mexican Government … . Even though the Soviet Union and Latin American countries had challenged the rule before that time, it appears that the overwhelming practice and the prevailing legal opinion supported Hull's position." 127

If there was consensus regarding the standard of full compensation, however, it was short lived. By the 1960s, the objections of Latin American states were joined by those of newly independent countries in Africa [\*590] and Asia, which together turned to the U.N. General Assembly to assert a legal rule that was far more favorable to expropriating nations. 128

Yet the most extreme position advocated by capital-importing countries did not prevail. Latin American nations had long advocated a competing legal rule - the Calvo doctrine - which held that "aliens are not entitled to rights and privileges not accorded nationals, and that therefore they may seek redress for grievances only before the local authorities," not via international arbitration or diplomatic protection. 129 Since custom did not limit a government's power to seize the property of citizens, this national treatment standard gave expropriating states a legal justification for not compensating foreigners either. 130 Over time, however, expropriating countries abandoned this extreme position and accepted "that compensation must be paid for expropriated alien property as a matter of international law." 131 The amount of such compensation has remained contested, however, which helps to explain why the United States and European nations have successfully championed the Hull doctrine in a dense web of bilateral investment treaties, which now themselves are cited as evidence of CIL. 132

C. Normative Custom

States also use custom to entrench other-regarding values or goals in international law. We refer to this as "normative custom," which we broadly define to include an assertion of a customary rule that is plausibly advanced as salutary for the international legal system as a whole, even if the rule has distributional costs. The other-regarding character of normative custom distinguishes it most obviously from hegemonic custom - although the two categories may overlap, as illustrated by the divergent motivations for abolishing the slave trade, discussed above. We do not, however, endorse any external standard for assessing whether a putatively other-regarding custom is in fact generally desirable. 133 Rather, such claims will succeed or fail depending on whether other states and non-state actors accept the asserted normative custom as genuinely other-regarding. Although open-ended, this capacious conception of normative [\*591] custom intuitively captures one important way that states raise and contest claims about custom in the international legal order.

As with all-states-benefit and hegemonic custom, it is custom's characteristics as unwritten, universal, and non-negotiated that make it a useful instrument for states seeking to entrench a particular normative standard of conduct in the international legal order. First, normative custom is conducive to development through non-negotiated, tacit agreement. If for all-states-benefit custom there is no reason for any particular state to object, and if for hegemonic custom such objection would be futile, in the case of normative custom, there are political and moral impediments to contestation. Stated another way, normative custom develops through tacit consent if other nations feel morally or politically compelled not to speak out against it. Unlike all-states-benefit custom, there may be high distributional costs to the rules of normative custom, but the costs of contesting the rule are even higher.

Genocide and the death penalty provide useful opposing examples. A 1946 U.N. General Assembly Resolution prohibits genocide. 134 The resolution was adopted by a unanimous vote and no state representative publicly maintained that genocide was permissible under international law. 135 Now consider the death penalty. Many human rights advocates and some states have argued that customary international law prohibits capital punishment. But, many other governments publically refute the existence of such a custom, and some openly continue to impose and carry out death sentences, thereby preventing the norm from becoming custom through tacit consent. 136 At some point, the combination of active endorsement and tacit consent may become so widespread that a custom will form except for a handful of persistent objector countries. For now, however, the death penalty is not prohibited under CIL.

States seeking to develop normative custom may also be drawn to custom's universal applicability, such as its ability to bind new states not in existence when the norm developed and its ban on unilateral withdrawal. 137 In addition, some customary rules have attained the status of jus cogens - non-derogable rules that can only be changed by another rule of the same stature. 138 States seeking to develop the normative bona fides [\*592] of a customary rule would be especially drawn to these features, which help entrench the norm and make it valid against all nations in ways that treaties and soft law do not.

Universality is also attractive for normative custom. States motivated by other-regarding values likely want the norms they espouse to be accepted as broadly and deeply as possible. Anthea Roberts captures this desire when analyzing custom that is derived from treaties: "Where the treaty precedes the custom, the movement to custom often reflects recognition of, or a desire to recognize, the core commitments as non-revocable and binding on all states, thereby increasing their obligatory nature or scope." 139 The same is true of normative custom more generally.

Consider the well-known example of the prohibition on torture. The Convention against Torture is widely, but not universally, ratified. 140 For states that favor a global torture ban, instantiating such a ban in custom binds all nations, and does not permit states to withdraw unilaterally, as does the Convention. Some may challenge these assertions, citing the persistent objector doctrine. Yet even if that doctrine remains available in theory, its application to the prohibition on torture is especially unlikely. The torture ban embodies very widely-held values, and it would be costly for states to explicitly and openly reject such a prohibition. Theodor Meron makes a similar observation about the normative anchoring effect of custom when describing the dual protection of humanitarian norms: "[The] consensus that the Geneva Conventions are declaratory of customary international law would strengthen the moral claim of the international community for their observance because it would emphasize their humanitarian underpinnings and deep roots in tradition and community values." 141

Current controversies surrounding data privacy and mass surveillance offer a different example - the potential emergence of new normative custom. 142 Concerns about internet privacy and the collection of data have been increasingly voiced by states and civil society organizations in various multilateral venues. The U.N. General Assembly adopted two strongly worded and widely supported resolutions on "the right to privacy in the digital age" in 2013 and 2014. 143 The Office of the U.N. High Commissioner for Human Rights issued a report in June 2014 expressing strong support for protecting data privacy and serious concern with mass surveillance [\*593] and retention of personal data. 144 Most recently, in March 2015, the U.N. Human Rights Council adopted by consensus a resolution - supported by 55 co-sponsors from different regions - appointing a new special rapporteur to gather information on these same topics. 145

Regional and national developments are bolstering these emerging norms. 146 Domestic legislation in a growing number of countries provides a right to data privacy. 147 In a landmark ruling in 2014, the European Court of Justice invalidated the EU's Data Retention Directive as an infringement of the right to private life and protection of personal data. 148 The following year, special representatives of the OSCE, OAS, and African Union jointly condemned "untargeted or 'mass' surveillance [as] inherently disproportionate and … a violation of the rights to privacy and freedom of expression," 149 and the Special Rapporteur of the Inter-American Commission on Human Rights called on the Unites States "to introduce strong reforms to the NSA telephone metadata collection program." 150

Much of the debate surrounding data privacy focuses on the application of existing human rights norms to online settings, but it is framed in a way that reiterates the legally binding nature of these norms. 151 Some [\*594] commentators have gone further, arguing that extant international custom specifically protects a right of data privacy. 152 Whether states ultimately recognize customary law restrictions on mass data and surveillance will depend in part on whether data privacy is widely understood as a fundamental right, such that the political or moral costs of objecting to such a rule are too high to incur. We thus expect any custom that emerges from this process to rely heavily on tacit consent, with some governments taking strongly supportive positions and others acquiescing. Such a custom is also likely to be vague, deferring many questions about specific applications of the norm.

A possible impediment to the emergence of a data privacy custom would be objections by nations which, as a result of their more advanced technological capabilities, will incur higher costs of international regulation. Such opposition may, however, be weakened or even defused if a group of relatively powerful states actively supports the custom - a dynamic suggested by recent sparring over data privacy resolutions in the United Nations. 153 Hegemons may also turn to custom for a different reason - because they disagree with the capacious soft law norms advocated by human rights NGOs and experts and seek to develop competing (and more state-friendly) legal rules regarding data privacy.

D. Custom's Overlapping Domains

Extrapolating from the design features that constrain the formation of CIL, this Section has argued that custom has three principal domains: norms that benefit all states, norms backed by visible commitments from powerful nations, and custom that reflects shared normative values. International norms or potential norms that fall outside these domains are not well-suited for regulation via custom. For example, when a custom becomes increasingly distributional in effect, or when it loses the backing of a powerful (enough) hegemon, states are likely to shift to more negotiated forms of international cooperation. The shift from absolute to restrictive immunity is an example of the first, and the decline of the Hull doctrine due to opposition from newly independent states is an illustration of the second.

What we have labeled as domains might, however, also be conceptualized as a set of overlapping and interactive factors that tend to make the formation of custom more likely. For example, even if a putative customary [\*595] norm has distributional impact, a stronger, visible commitment from powerful countries may nevertheless spur its formation. All other things equal, the stronger the distributional effect, the greater the projection of power required.

Hegemons may also spur the formation of international rules that reflect deeply held normative values even if those rules also have distributional consequences. The Nuremberg Tribunal provides an illustration of such a hybrid hegemonic-normative custom. Together, the Tribunal and the Charter that created it, 154 their reception by states, and the subsequent affirmation of their principles by the U.N. General Assembly, 155 established individual criminal responsibility as part of CIL. 156 These developments were unquestionably driven by the visible commitments of the victors of World War II - the United States, France, the United Kingdom and the Soviet Union. 157 The Nuremberg Tribunal corresponded to widely-held normative values: the atrocities committed in World War II were unprecedented in scale and brutality, generating universal condemnation and widespread sense that perpetrators should be held legally accountable. 158

The influential Tadic decision by the International Criminal Tribunal for the former Yugoslavia (ICTY) 159 illustrates how a hybrid normative-hegemonic custom can arise notwithstanding its potential distributional effects. The ICTY Appeals Chamber in that case held that war crimes liability for grave breaches of the Geneva Conventions applies not only to armed conflicts between states but also to internal and non-international armed conflicts. 160 The judges purported to simply restate a preexisting customary rule, but the evidence they cited for that proposition was very thin. 161 The decision did, however, prompt subsequent state practice that crystalized into customary international law. 162

Tadic unquestionably had a normative component, which the Appeals Chamber emphasized in asserting that civilians in all types of armed conflicts should be protected from egregious conduct such as rape, torture, or [\*596] the wanton destruction of hospitals. 163 Yet, the Tadic rule also imposes greater costs on states that regularly experience civil wars or other armed conflicts within their borders. Under the Tadic rule, these states face potential war crimes prosecutions for their conduct in such conflicts; without the Tadic rule, they did not. This may explain the earlier opposition of developing countries to war crimes liability in non-international armed conflicts. 164 In addition, countries such China, India, Pakistan, and Russia opposed incorporating the Tadic rule into the International Criminal Court Statute in 1998. 165 Ultimately, this position was rejected, and the U.N. Security Council later endorsed the Tadic rule (at least tacitly) in resolutions concerning international crimes committed in Libya, 166 Sierra Leone, 167 and Rwanda. 168 By 2011, opposition to Tadic had dissipated further, with India, China, and Russia all voting in favor of a U.N. Security Council resolution asking the ICC to investigate the "serious violations of international humanitarian law" committed during the civil war in Libya. 169 No government criticized the referral on the grounds that potential war crimes had been committed during a non-international armed conflict. 170 According to one commentator, this silence may reflect a desire by developing countries to avoid "picking a fight with an institution established by the powerful Security Council." 171 In sum, the distributional consequences of Tadic were overcome by the confluence of normative and hegemonic support for the rule as international custom.

IV. The Future of Custom in an Age of Soft Law and Treaties

Having described custom's unique features and mapped its domains, we turn to a discussion of custom's relationship to treaties and soft law. This relationship might be understood as complementary: custom can be seen as a fungible form of "soft" hard law or "hard" soft law that exists on a continuum between soft law and treaties. Such a framing suggests that [\*597] custom may be rendered obsolete as unwritten international norms are codified and soft law grows in scope and complexity. 172

We recognize that custom sometimes functions as a complement to treaties or soft law, as the literatures on legalization and instrument choice at times suggest. But, the distinctive (and less malleable) characteristics of custom, as compared to soft law and treaties, create continuing incentives for states to choose custom over the other legal instruments if doing so advances their respective national interests or shapes the content, scope, or application of international rules in ways that favor them. If this account is correct, the demand for custom will not be affected by whether a particular subject area becomes more heavily populated by treaties and/or soft law.

We argue that there are two overarching rationales for states to choose custom over treaties and/or soft law: preferable substantive norms or preferable design features. States dissatisfied with the content of nonbinding norms or treaty provisions might, for example, attempt to develop alternative customary rules with different substantive obligations. Or states might agree with the substance of a treaty or soft law, but turn to custom because of its distinctive design features, such as its preclusion of the ability to "opt-out" by non-ratifications, treaty withdrawals, or reservations.

We represent the two dimensions of the choice between custom on the one hand and treaties and soft law in Figure 1 below. The legal instruments that are alternatives to custom appear on the x-axis, and the two rationales for states to choose custom are listed on the y-axis. The diagram depicts custom that arises later in time than treaties or soft law. 173 We focus on this temporal relationship because we view it as a more significant challenge to custom's continuing relevance to international cooperation. To be sure, as Tim Meyer has shown, custom that develops first may lead states that prefer codified legal norms to advocate, for example, for ILC-generated conventions or draft articles. 174 Yet if states continue to prefer custom - even in areas replete with treaties or nonbinding norms - such a choice casts doubt on predictions of custom's demise in an age of soft law and treaties, and on commentators who discount CIL's role in international cooperation.

A. Custom's Advantages over Treaties: Design Features

The top left box illustrates situations in which states turn to custom to modify or obviate the design features of preexisting international agreements. A prominent illustration of custom that competes with treaty design features is the protection of civilians in CIL and also in the 1949 Geneva Conventions for the Protection of Victims of War. Theodor Meron has argued that the protection of civilians in customary law is important in part because custom, unlike the Geneva Conventions, does not permit unilateral withdrawal and because "reservations to the Conventions may not affect the obligations of the parties under provisions reflecting customary law to which they would be subject independently of the Conventions." 175 Meron also notes that "as customary law, the norms expressed in the Conventions might be subject to a process of interpretation [\*599] different from that which applies to treaties" 176 - a further indication of custom's continuing relevance.

The protection of civilians is a hard case for our theory because the Geneva Conventions have been universally ratified, which some might claim renders custom irrelevant. More common but still supportive examples are multilateral agreements - such as the Convention on the International Sale of Goods and the Vienna Convention on the Law of Treaties - at least some provisions of which are accepted as having attained the status of CIL, thus permitting their application to countries that have refrained from ratifying those instruments. 177

A different use of custom to work around treaty design features is provided by the United States' relationship to the U.N. Convention on the Law of the Sea (UNCLOS). The United States played a lead role in negotiating UNCLOS, but has never ratified the Convention. It has, however, consistently maintained that some aspects of the Convention - in particular, those concerning freedom of navigation - reflect customary international law. 178 Critically for our purposes, the United States recognizes that the navigation rules embodied in these two sources of law are substantively the same. 179 However, because UNCLOS does not permit reser- vations, 180 it precludes treaty parties from opting out from any of its substantive provisions - including provisions, such as UNCLOS' dispute settlement clauses, to which the United States objects. By remaining outside of the Convention while selectively adhering to some of its provisions as custom, the United States is, controversially, using CIL to pick and choose those aspects of UNCLOS that benefit it while avoiding the concomitant burdens of provisions it disfavors 181 - [\*600] precisely what the no reservations clause of UNCLOS was adopted to prevent. 182

B. Custom's Advantages over Treaties: Substantive Norms

The box in the upper right quadrant of Figure 1 depicts situations in which states choose custom over treaties because they prefer CIL's substantive norms. 183 A different area of international maritime law provides a "striking example[] of modification" of a treaty through custom. 184 The 1958 Geneva Convention on the High Seas recognized the freedom of states parties to unilaterally exploit non-living resources on the deep seabed. 185 Yet in the years following the Convention's adoption, a competing principle - the "common heritage of mankind" - emerged and rapidly crystalized as custom. 186 Pursuant to this principle, a state could exploit seabed resources only when acting as an agent of the international community as a whole. 187 Importantly, the common heritage idea arose in part from legal claims by non-parties to the Geneva High Seas Convention, claims that would have gained little if any traction as treaty revisions, but [\*601] were far more salient as efforts to develop new CIL applicable to all nations. 188

The Tadic decision, discussed above in the context of custom's overlapping domains, provides another example of the substantive advantages of a custom over treaties that regulate the same subject area. The Geneva Conventions themselves apply almost exclusively to international armed conflicts, 189 leaving other military hostilities largely unregulated by the laws of war (with only a few exceptions, such as Common Article 3). 190 In Tadic, the ICTY held that certain provisions in the Conventions apply to internal armed conflicts as a matter of CIL. 191 In effect, the decision invoked custom to expand the Geneva Conventions' substantive norms to non-international armed conflicts. In the decades that followed, states increasingly embraced Tadic's substantive expansion of the customary laws of war beyond what the Geneva Conventions themselves require. Interestingly, states had previously considered and rejected precisely such an expansion when negotiating Protocols to the Geneva Conventions in the 1970s. 192

Humanitarian intervention offers another illustration of this relationship. The U.N. Charter prohibits the unilateral use of force in response to humanitarian crises in the absence of U.N. Security Council authorization or plausible claims of self-defense. 193 Yet as recent world events have made painfully clear, U.N. Security Council approval is often blocked by political differences among that body's five veto-wielding permanent members. As discussed in greater detail below, 194 some states dissatisfied with the status quo have turned to customary international law, implicitly or explicitly, to justify a military response to humanitarian crises if the U.N. Security Council fails to act. Such states are, in effect, claiming that custom offers a superior substantive norm that should displace the substantive constraints of the U.N. Charter.

C. Custom's Advantages over Soft Law: Design Features

The box on the lower left of Figure 1 depicts situations in which custom and soft law share the same substantive norms but have different design characteristics. The principal difference is obvious - CIL is legally binding and nonbinding norms are not. But there are other differences as well. Soft law is easier and faster to create and modify than custom, making it useful for situations of uncertainty and experimentation where flexibility is prized. Whether states can alter an existing customary rule without violating it is a question that has long bedeviled scholars. Deviating from soft law incurs no international legal responsibility and no (or at least lower) political and reputational costs, neatly sidestepping these difficulties.

### Blockchain CP---1NR

#### It’s strategic duplicity that implodes capitalism from within. Direct rejection fails.

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It would be very naive of us to think you could just walk out of capitalism. We’re not that naive. Neoliberalism is our natural environment. We therefore operate with what we call strategic duplicity. This involves recognizing what works in the systems we work against. Which means: We don’t just oppose them head on. We work with them, strategically, while nurturing an alien logic that moves in very different directions. One of the things we know that the university does well is that it attracts really interesting people. The university can facilitate meetings that can change lives. But systemically, it fails. And the systemic failure is getting more and more acute. And so what we imagine is that the Institute, assisted by the 3E Process Seed Bank, will create a new space that might overlap with some of the things the university does well, without being a part of it (or being subsumed by its logic).

MASSUMI.— Going back to the question of value, we want to create an economy around the platform that does not follow any of the usual economic principles. There will be no individual ownership or shares. There will be no units of account, no currency or tokens used internally. The model of activity will not be transactional. Individual interest will not be used as an incentivizer. What there will be is a complex space of relation for people to create intensities of experience together, in emergent excess over what they could have created working separately, or in traditional teams. It’s meant to be self-organizing, with no separate administrative structure or hierarchy, and even no formal decision-making rules. It’s anarchistic in that sense, but through mobilizing a surplus of organizing potential, rather than lacking organization. You could also call it communistic, in the sense that there is no individual value holding. Everything is common.

MANNING.— Undercommon.

MASSUMI.— Yes, undercommonly. The undercommons is Fred Moten and Stefano Harney’s word for emergent collectivity, which is one of our inspirations. We want to foster emergence and process, but at the same time find ways of making it sustainable. That means that the strategic duplicity has to extend to the economy as we currently know it. We have to be parasitical to the capitalist economy, while operating according to a logic that is totally alien to it.

What we’re thinking of is making the collaborative process moving through the platform function according to the radically anti-capitalist principles we were just talking about, centering on the collective production of surplus values of life, and separating that from the dominant economy by a membrane. A membrane creates a separation, but at the same time allows for movements across. It has a certain porosity. The idea is that we would find ways, associated with the affect-o-meter we were describing earlier, to register qualitative shifts in the creative process as it moves over its formative thresholds, and moves back and forth between online operations and offline events. What would be registered is the affective intensity of the production of surplus value of life, its ebbs and flows. The membrane would consist in a translation of those qualitative flows into a numerical expression, which would feed into a cryptocurrency. Basically, we’d be mining crypto with collaborative creative energies—monetizing emergent collectivity. The currency would be “backed” by the confidence we could build in our ability to keep the creative process going and spin it off into other projects, as evidenced by the activities of the Three Ecologies Institute as an experiment in alter-education.

On the side of the membrane facing the monetary economy, we would be producing a recognizable, quantifiable movement of value. But the membrane would shelter the creative process going on inside the platform from being colonized by that logic. We’d try to have the best of both worlds. It would be essential that the currency not be just a speculative vehicle that joins the crowd of coins. Our economic space would have to inhabit an ecology of other economic spaces experimenting with adapting blockchain and post-blockchain autonomous organization to cooperative endeavors. The key, once again, is finding workable solutions to the problem of how to use qualitative analysis to register movements of creative intensity—how to coax numbers into an alliance with qualities of experience. There is a new concept being developed by Nora Bateson that she calls “warm data” that has a similar goal, in relation to basic science, that we’d like to hook into.

MARC.— You want to use blockchain to create a parasitic economy that reappropriates speculative finance to generate profit from collaborative events. You are working within the immaterial level that the movement to occupy public spaces only gestured at, and uses the collaborative spirit common to any movement. Do you consider yourself to be “occupying” the abstract?

MANNING.— If we’re “occupying an abstraction,” we’re doing it in a way that is extraterritorial. All of this is a thought experiment that we want to help sow, but needs to be continued by others, and with others. It will be interesting if it manages to produce process seeds that get away from us and end up going beyond anything that we could have imagined. I’m not sure what Brian would say, but my feeling is that if we’re occupying anything, it’s the imagination. The postcapitalist imagination.

MASSUMI.— Another way of saying it is that we are talking about creating what’s often been called a temporary autonomous zone, but recognizing that we’re all complicit with capital, and not pretending we can just step outside that and go our merry way. If you do that, you only end up carrying unexamined presuppositions with you, and everything breaks down. We want to work from and with that complicity, using strategic duplicity. That doesn’t mean being deceptive. It means working in two registers at once.

We want to create a temporary autonomous zone (TAZ), following anarcho-communist logic, while at the same time being able to articulate it to the existing neoliberal economy, because like it or not, those are the conditions under which we live, and its grip is so tentacular, reaching not only all around us but inside of us, that you have to work hard and with great technique to start loosening the grip. You have to find ways of inhabiting the present, while setting off sparks of futurity that prefigure a postcapitalist world to come. So it’s an occupation in the sense that it’s a cohabitation. The TAZ isn’t a world apart. It’s a pore in the world as it is, in which something else can grow. It’s a relational space that you can enter without the conceit that you’re leaving the existing world. It starts by supplementing, rather than purporting to replace right away. Hopefully that supplementation grows and takes more and more of our cohabitation in, to the point that it can rival the dominant economy.

#### The aff fails without the CP

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What started in 2008 as an economic crisis morphed into a social crisis, leading to mass unrest; and now, as revolutions turn into civil wars, creating military tension between nuclear superpowers, it has become a crisis of the global order.

There are, on the face of it, only two ways it can end. In the first scenario, the global elite clings on, imposing the cost of crisis on to workers, pensioners and the poor over the next ten or twenty years. The global order – as enforced by the IMF, World Bank and World Trade Organisation – survives, but in a weakened form. The cost of saving globalization is borne by the ordinary people of the developed world. But growth stagnates.

In the second scenario, the consensus breaks. Parties of the hard right and left come to power as ordinary people refuse to pay the price of austerity. Instead, states then try to impose the costs of the crisis on each other. Globalization falls apart, the global institutions become powerless and in the process the conflicts that have burned these past twenty years – drug wars, post-Soviet nationalism, jihadism, uncontrolled migration and resistance to it – light a fire at the centre of the system. In this scenario, lip-service to international law evaporates; torture, censorship, arbitrary detention and mass surveillance become the regular tools of statecraft. This is a variant of what happened in the 1930s and there is no guarantee it cannot happen again.

In both scenarios, the serious impacts of climate change, demographic ageing and population growth kick in around the year 2050. If we can’t create a sustainable global order and restore economic dynamism, the decades after 2050 will be chaos.

So I want to propose an alternative: first, we save globalization by ditching neoliberalism; then we save the planet – and rescue ourselves from turmoil and inequality – by moving beyond capitalism itself.

Ditching neoliberalism is the easy part. There’s a growing consensus among protest movements, radical economists and radical political parties in Europe as protest movements, radical economists and radical political parties in Europe as to how you do it: suppress high finance, reverse austerity, invest in green energy and promote high-waged work.

But then what?

As the Greek experience demonstrates, any government that defies austerity will instantly clash with the global institutions that protect the 1 per cent. After the radical left party Syriza won the election in January 2015, the European Central Bank, whose job was to promote the stability of Greek banks, pulled the plug on those banks, triggering a €20 billion run on deposits. That forced the left-wing government to choose between bankruptcy and submission. You will find no minutes, no voting records, no explanation for what the ECB did. It was left to the right-wing German newspaper Stern to explain: they had ‘smashed’ Greece.3 It was done, symbolically, to reinforce the central message of neoliberalism that there is no alternative; that all routes away from capitalism end in the kind of disaster that befell the Soviet Union; and that a revolt against capitalism is a revolt against a natural and timeless order.

The current crisis not only spells the end of the neoliberal model, it is a symptom of the longer-term mismatch between market systems and an economy based on information. The aim of this book is to explain why replacing capitalism is no longer a utopian dream, how the basic forms of a postcapitalist economy can be found within the current system, and how they could be expanded rapidly.

Neoliberalism is the doctrine of uncontrolled markets: it says that the best route to prosperity is individuals pursuing their own self-interest, and the market is the only way to express that self-interest. It says the state should be small (except for its riot squad and secret police); that financial speculation is good; that inequality is good; that the natural state of humankind is to be a bunch of ruthless individuals, competing with each other.

Its prestige rests on tangible achievements: in the past twenty-five years, neoliberalism has triggered the biggest surge in development the world has ever seen, and it unleashed an exponential improvement in core information technologies. But in the process, it has revived inequality to a state close to that of 100 years ago and has now triggered a survival-level event.

The civil war in Ukraine, which brought Russian special forces to the banks of the Dniestr; the triumph of ISIS in Syria and Iraq; the rise of fascist parties in the Dniestr; the triumph of ISIS in Syria and Iraq; the rise of fascist parties in Europe; the paralysis of NATO as its populations withhold consent for military intervention – these are not problems separate from the economic crisis. They are signs that the neoliberal order has failed.

Over the past two decades, millions of people have resisted neoliberalism but in general the resistance failed. Beyond all the tactical mistakes, and the repression, the reason is simple: free-market capitalism is a clear and powerful idea, while the forces opposing it looked like they were defending something old, worse and incoherent.

Among the 1 per cent, neoliberalism has the power of a religion: the more you practise it, the better you feel – and the richer you become. Even among the poor, once the system was in full swing, to act in any other way but according to neoliberal strictures became irrational: you borrow, you duck and dive around the edges of the tax system, you stick to the pointless rules imposed at work.

And for decades the opponents of capitalism have revelled in their own incoherence. From the anti-globalization movement of the 1990s through to Occupy and beyond, the movement for social justice has rejected the idea of a coherent programme in favour of ‘One No, Many Yes-es’. The incoherence is logical, if you think the only alternative is what the twentieth century left called ‘socialism’. Why fight for a big change if it’s only a regression – towards state control and economic nationalism, to economies that work only if everyone behaves the same way or submits to a brutal hierarchy? In turn, the absence of a clear alternative explains why most protest movements never win: in their hearts they don’t want to. There’s even a term for it in the protest movement: ‘refusal to win’.4

To replace neoliberalism we need something just as powerful and effective; not just a bright idea about how the world could work but a new, holistic model that can run itself and tangibly deliver a better outcome. It has to be based on micro-mechanisms, not diktats or policies; it has to work spontaneously. In this book, I make the case that there is a clear alternative, that it can be global, and that it can deliver a future substantially better than the one capitalism will be offering by the mid-twenty-first century.

It’s called postcapitalism.

Capitalism is more than just an economic structure or a set of laws and institutions. It is the whole system – social, economic, demographic, cultural, ideological – needed to make a developed society function through markets and private ownership. That includes companies, markets and states. But it also includes criminal gangs, secret power networks, miracle preachers in a Lagos slum, rogue analysts on Wall Street. Capitalism is the Primark factory that collapsed in Bangladesh and it is the rioting teenage girls at the opening of the Primark store in London, overexcited at the prospect of bargain clothes.

By studying capitalism as a whole system, we can identify a number of its fundamental features. Capitalism is an organism: it has a lifecycle – a beginning, a middle and an end. It is a complex system, operating beyond the control of individuals, governments and even superpowers. It creates outcomes that are often contrary to people’s intentions, even when they are acting rationally. Capitalism is also a learning organism: it adapts constantly, and not just in small increments. At major turning points, it morphs and mutates in response to danger, creating patterns and structures barely recognizable to the generation that came before. And its most basic survival instinct is to drive technological change. If we consider not just info-tech but food production, birth control or global health, the past twenty-five years have probably seen the greatest upsurge in human capability ever. But the technologies we’ve created are not compatible with capitalism – not in its present form and maybe not in any form. Once capitalism can no longer adapt to technological change, postcapitalism becomes necessary. When behaviours and organizations adapted to exploiting technological change appear spontaneously, postcapitalism becomes possible.

That, in short, is the argument of this book: that capitalism is a complex, adaptive system which has reached the limits of its capacity to adapt.

This, of course, stands miles apart from mainstream economics. In the boom years, economists started to believe the system that had emerged after 1989 was permanent – the perfect expression of human rationality, with all its problems solvable by politicians and central bankers tweaking control dials marked ‘fiscal and monetary policy’.

When they considered the possibility that the new technology and the old forms of society were mismatched, economists assumed society would simply remould itself around technology. Their optimism was justified because such adaptations have happened in the past. But today the adaptation process is adaptations have happened in the past. But today the adaptation process is stalled.

Information is different from every previous technology. As I will show, its spontaneous tendency is to dissolve markets, destroy ownership and break down the relationship between work and wages. And that is the deep background to the crisis we are living through.

If I am right we have to admit that for most of the past century the left has misunderstood what the end of capitalism would look like. The old left’s aim was the forced destruction of market mechanisms. The force would be applied by the working class, either at the ballot box or on the barricades. The lever would be the state. The opportunity would come through frequent episodes of economic collapse. Instead, over the past twenty-five years, it is the left’s project that has collapsed. The market destroyed the plan; individualism replaced collectivism and solidarity; the massively expanded workforce of the world looks like a ‘proletariat’, but no longer thinks or behaves purely as one.

If you lived through all this, and hated capitalism, it was traumatic. But in the process, technology has created a new route out, which the remnants of the old left – and all other forces influenced by it – have either to embrace or die.

Capitalism, it turns out, will not be abolished by forced-march techniques. It will be abolished by creating something more dynamic that exists, at first, almost unseen within the old system, but which breaks through, reshaping the economy around new values, behaviours and norms. As with feudalism 500 years ago, capitalism’s demise will be accelerated by external shocks and shaped by the emergence of a new kind of human being. And it has started.

Postcapitalism is possible because of three impacts of the new technology in the past twenty-five years.

First, information technology has reduced the need for work, blurred the edges between work and free time and loosened the relationship between work and wages.

Second, information goods are corroding the market’s ability to form prices correctly. That is because markets are based on scarcity while information is abundant. The system’s defence mechanism is to form monopolies on a scale not seen in the past 200 years – yet these cannot last.

Third, we’re seeing the spontaneous rise of collaborative production: goods, services and organizations are appearing that no longer respond to the dictates of services and organizations are appearing that no longer respond to the dictates of the market and the managerial hierarchy. The biggest information product in the world – Wikipedia – is made by 27,000 volunteers, for free, abolishing the encyclopaedia business and depriving the advertising industry of an estimated $3 billion a year in revenue.

Almost unnoticed, in the niches and hollows of the market system, whole swathes of economic life are beginning to move to a different rhythm. Parallel currencies, time banks, cooperatives and self-managed spaces have proliferated, barely noticed by the economics profession, and often as a direct result of the shattering of old structures after the 2008 crisis.

New forms of ownership, new forms of lending, new legal contracts: a whole business subculture has emerged over the past ten years, which the media has dubbed the ‘sharing economy’. Buzzterms such as the ‘commons’ and ‘peer- production’ are thrown around, but few have bothered to ask what this means for capitalism itself.

I believe it offers an escape route – but only if these micro-level projects are nurtured, promoted and protected by a massive change in what governments do. This must in turn be driven by a change in our thinking about technology, ownership and work itself. When we create the elements of the new system we should be able to say to ourselves and others: this is no longer my survival mechanism, my bolt-hole from the neoliberal world, this is a new way of living in the process of formation.

In the old socialist project, the state takes over the market, runs it in favour of the poor instead of the rich, then moves key areas of production out of the market and into a planned economy. The one time it was tried, in Russia after 1917, it didn’t work. Whether it could have worked is a good question, but a dead one.

Today the terrain of capitalism has changed: it is global, fragmentary, geared to small-scale choices, temporary work and multiple skill-sets. Consumption has become a form of self-expression – and millions of people have a stake in the finance system that they did not have before.

With the new terrain, the old path is lost. But a different path has opened up. Collaborative production, using network technology to produce goods and services that work only when they are free, or shared, defines the route beyond the market system. It will need the state to create the framework, and the postcapitalist sector might coexist with the market sector for decades. But it is postcapitalist sector might coexist with the market sector for decades. But it is happening.

Networks restore ‘granularity’ to the postcapitalist project; that is, they can be the basis of a non-market system that replicates itself, which does not need to be created afresh every morning on the computer screen of a commissar.

### Frame Subtraction---1NR

#### Their speech had value in and of itself, not because it was viewed by you, and it is fleeting and exists only in the moment---attempts to later connect to it via the ballot gives too much power to the audience because the speaker is structurally blocked from controlling the (re)presentation of their representations---this is a means of turning over one’s identity to the same reproductive economy that underwrites liberalism, which turns the case

Phelan 6 – Peggy Phelan, Chair of New York University's Department of Performance Studies, “Unmarked: The Politics of Performance”, in Visual Culture: Experiences in Visual Culture, p. 146-149

Performance’s only life is in the present. Performance cannot be saved, recorded, documented, or otherwise participate in the circulation of representations of representations: once it does so, it becomes something other than performance. To the degree that performance attempts to enter the economy of reproduction it betrays and lessens the promise of its own ontology. Performance’s being, like the ontology of subjectivity proposed here, becomes itself through disappearance.

The pressures brought to bear on performance to succumb to the laws of the reproductive economy are enormous. For only rarely in this culture is the “now” to which performance addresses its deepest questions valued. (This is why the now is supplemented and buttressed by the documenting camera, the video archive.) Performance occurs over a time which will not be repeated. It can be performed again, but this repetition itself marks it as “different.” The document of a performance then is only a spur to memory, an encouragement of memory to become present.

The other arts, especially painting and photography, are drawn increasingly toward performance. The French-born artist Sophie Calle, for example, has photographed the galleries of the Isabella Stewart Gardner Museum in Boston. Several valuable paintings were stolen from the museum in 1990. Calle interviewed various visitors and members of the muse um staff, asking them to describe the stolen paintings. She then transcribed these texts and placed them next to the photographs of the galleries. Her work suggests that the descriptions and memories of the paintings constitute their continuing “presence,” despite the absence of the paintings themselves. Calle gestures toward a notion of the interactive exchange between the art object and the viewer. While such exchanges are often recorded as the stated goals of museums and galleries, the institutional effect of the gallery often seems to put the masterpiece under house arrest, controlling all conflicting and unprofessional commentary about it. The speech act of memory and description (Austin’s constative utterance) becomes a performative expression when Calle places these commentaries within the 147 representation of the museum. The descriptions fill in, and thus supplement (add to, defer, and displace) the stolen paintings. The fact that these descriptions vary considerably—even at times wildly—only lends credence to the fact that the interaction between the art object and the spectator is, essentially, performative—and therefore resistant to the claims of validity and accuracy endemic to the discourse of reproduction. While the art historian of painting must ask if there production is accurate and clear, Calle asks where seeing and memory forget the object itself and enter the subject’s own set of personal meanings and associations. Further her work suggests that the forgetting(or stealing) of the object is a fundamental energy of its descriptive recovering. The description itself does not reproduce the object, it rather helps us to restage and restate the effort to remember what is lost. The descriptions remind us how loss acquires meaning and generates recovery—not only of and for the object, but for the one who remembers. The disappearance of the object is fundamental to performance; it rehearses and repeats the disappearance of the subject who longs always to be remembered.

For her contribution to the Dislocations show at the Museum of Modern Art in New York in 1991, Calle used the same idea but this time she asked curators, guards, and restorers to describe paintings that were on loan from the permanent collection. She also asked them to draw small pictures of their memories of the paintings. She then arranged the texts and pictures according to the exact dimensions of the circulating paintings and placed them on the wall where the actual paintings usually hang. Calle calls her piece Ghosts, and as the visitor discovers Calle’s work spread throughout the museum, it is as if Calle’s own eye is following and tracking the viewer as she makes her way through the museum.1 Moreover, Calle’s work seems to disappear because it is dispersed throughout the “permanent collection”—a collection which circulates despite its “permanence.” Calle’s artistic contribution is a kind of self-concealment in which she offers the words of others about other works of art under her own artistic signature. By making visible her attempt to offer what she does not have, what cannot be seen, Calle subverts the goal of museum display. She exposes what the museum does not have and cannot offer and uses that absence to generate her own work. By placing memories in the place of paintings, Calle asks that the ghosts of memory be seen as equivalent to “the permanent collection” of “great works.” One senses that if she asked the same people over and over about the same paintings, each time they would describe a slightly different painting. In this sense, Calle demonstrates the performative quality of all seeing. 148

I

Performance in a strict ontological sense is nonreproductive. It is this quality which makes performance the runt of the litter of contemporary art. Performance clogs the smooth machinery of reproductive representation necessary to the circulation of capital. Perhaps nowhere was the affinity between the ideology of capitalism and art made more manifest than in the debates about the funding policies for the National Endowment for the Arts (NEA).2 Targeting both photography and performance art, conservative politicians sought to prevent endorsing the “real” bodies implicated and made visible by these art forms.

Performance implicates the real through the presence of living bodies. In performance art spectatorship there is an element of consumption: there are no left-overs, the gazing spectator must try to take everything in. Without a copy, live performance plunges into visibility—in a maniacally charged present—and disappears into memory, into the realm of invisibility and the unconscious where it eludes regulation and control. Performance resists the balanced circulations of finance. It saves nothing; it only spends. While photography is vulnerable to charges of counterfeiting and copying, performance art is vulnerable to charges of valuelessness and emptiness. Performance indicates the possibility of revaluing that emptiness; this potential revaluation gives performance art its distinctive oppositional edge.3

To attempt to write about the undocumentable event of performance is to invoke the rules of the written document and thereby alter the event itself. Just as quantum physics discovered that macro-instruments cannot measure microscopic particles without transforming those particles, so too must performance critics realize that the labor to write about performance (and thus to “preserve” it) is also a labor that fundamentally alters the event. It does no good, however, to simply refuse to write about performance because of this inescapable transformation. The challenge raised by the ontological claims of performance for writing is to re-mark again the performative possibilities of writing itself. The act of writing toward disappearance, rather than the act of writing toward preservation, must remember that the after-effect of disappearance is the experience of subjectivity itself.

This is the project of Roland Barthes in both Camera Lucida and Roland Barthes by Roland Barthes. It is also his project in Empire of Signs, but in this book he takes the memory of a city in which he no longer is, a city from which he disappears, as the motivation for the search for a disappearing performative writing. The trace left by that script is the meeting-point of a mutual disappearance; shared subjectivity is possible for Barthes because two people can recognize the same Impossible. To live for a love whose goal is to share the Impossible is both a humbling project and an exceedingly ambitious one, for it seeks to find connection only in that which is no longer there. Memory. Sight. Love. It must involve a full seeing of the Other’s absence (the ambitious part), a seeing which also entails the acknowledgment of the Other’s presence (the humbling part). For to acknowledge the Other’s (always partial) presence is to acknowledge one’s own (always partial) absence.

In the field of linguistics, the performative speech act shares with the ontology of performance the inability to be reproduced or repeated. “Being an individual and historical act, a performative utterance cannot be repeated. Each reproduction is a new act performed by someone who is qualified. Otherwise, the reproduction of the performative utterance by someone else necessarily transforms it into a constative utterance.”4 149

Writing, an activity which relies on the reproduction of the Same(the three letters cat will repeatedly signify the four-legged furry animal with whiskers) for the production of meaning, can broach the frame of performance but cannot mimic an art that is nonreproductive. The mimicry of speech and writing, the strange process by which we put words in each other’s mouths and others’ words in our own, relies on a substitutional economy in which equivalencies are assumed and re-established. Performance refuses this system of exchange and resists the circulatory economy fundamental to it. Performance honors the idea that a limited number of people in a specific time/space frame can have an experience of value which leaves no visible trace afterward. Writing about it necessarily cancels the “tracelessness” inaugurated within this performative promise. Performance’s independence from mass reproduction, technologically, economically, and linguistically, is its greatest strength. But buffeted by the encroaching ideologies of capital and reproduction, it frequently devalues this strength. Writing about performance often, unwittingly, encourages this weakness and falls in behind the drive of the documentary. Performance’s challenge to writing is to discover a way for repeated words to become performative utterances, rather than, as Benveniste warned, constative utterances.