# 1AC

## Disclosure T

#### Debaters at the Woodward JV National Championship must practice consistent disclosure of speech documents and round reports on the NDCA wiki.

#### They violate—they’ve competed in varsity at 3 bid tournaments on this topic alone and disclosed nothing.

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#### Disclosure is good—it levels resource disparities between large and small schools and democratizes information which opens the marketplace of ideas and vastly improves the quality of debates. It also bolsters substantive engagement by dis-incentivizing tricks and spikes that rely on surprise or misunderstanding.

#### Saying “contact me privately” is not sufficient.

#### 1. It’s not verifiable. There’s no way to ensure they disclose the same set of arguments to each person or otherwise disclose truthfully.

#### 2. It leads to strategic footdragging in which they have incentive to take as long as possible, sucking up neg pre-round prep.

#### 3. It doesn’t solve their offense—debate rounds are already public, and they claim to be willing to disseminate all their cases to whoever asks, which means any personal info is subject to outing either way.

#### 4. If your cases are truly too personal to put on a wiki, then it’s unethical to expect me to have to argue against them because it puts me in the position of having to negate their personal experience which is inconsistent with making the debate a safe and accessible space for the aff.

#### Drop the debater—the skew’s already happened and we’re already on an uneven playing field.

### Framework

#### I affirm.

#### The value is justice, which is giving each their due as “is unjust” is the evaluative phrase in the topic.

#### Justice is only possible under a unified rule of law

Waldron 96

Waldron, Jeremy [Professor of Law and Philosophy at the NYU School of Law]. “Kant’s Legal Positivism” Harvard Law Review, May, 1996, Vol. 109, No. 7 (May, 1996), pp. 1535-156

It is certainly not inappropriate to use force to achieve justice. But there is an affront to the idea of justice when force is used by opposing sides, confrontationally and contradictorily, in justice's name. The point of using force in the name of justice is to assure people of that to which they are entitled. But if force is being used to further contradictory ends, then its connection with assurance is ruptured. In such a situation, force is being used simply to represent the vehemence with which competing opinions about justice are held, and this use of force may well be worse than force not being put to the service of justice at all. Hence, there is the need for a single, determinate community position on the matter - one whose enforcement is consistent with the integrity and univocality of justice. Certainly, justice is affronted in another way if the position identified and enforced as that of the community (on, say, testamentary freedom) is morally wrong. But given the inevitable disagreement on that issue and given the symmetry, for all practical purposes, of the rival positions on the matter - each side is sincere, each side thinks that its view captures what is really just, each side believes that the other is objectively mistaken - there is no political way in which the prospect of this substantive affront can be precluded. All we can do, politically, for the sake of the integrity of justice is ensure that force is used to uphold one view and one view only - a view that anyone may readily identify as that of the community, whatever his substantive opinions on the matter. The integrity of justice, then, evokes the concept of positive law and the philosophical doctrine of legal positivism: law must be such that its content and validity can be determined without reproducing the disagreements about rights and justice that it is law's function to supersede.

#### This is a sequencing question- ensuring freedom comes prior to focusing on consequences. Otherwise, it justifies forcing people to act against their will

Ripstein, 9 -- Professor of Law and Philosophy and University Professor at the University of Toronto

[Arthur, "Force and Freedom: Kant’s Legal and Political Philosophy", Harvard University Press, 2009, accessed 1-14-22]

My aim in this chapter is to use the example of traffic laws to cast doubt on the very idea of balancing benefits and burdens, and to defend the idea that state power is only justified to create a system of equal freedom. I will not defend the implausible claim that speed limits or the timing and placement of traffic lights can be deduced from some index of freedom and appropriate facts. As I shall explain, the expectation that any alternative to balancing must aspire to some such claim is itself symptomatic of everything that is wrong with the balancing picture. Nor shall I join Michael Walzer in celebrating the claim that “the car is also the symbol of individual freedom.”11 Instead, I will argue that the state’s entitlement to make traffic rules is rooted in its obligation to provide the conditions of equal freedom.

On the view I will defend, the fundamental rationale for the exercise of the police power is to create a regime of equal private freedom. In order to do so, the state must create and sustain the systematic preconditions both of the exercise of private freedom and of the conditions of its ability to provide them. It can compel citizens to do their part in creating and sustaining a rightful condition. The provision of these conditions is a distinctive case of mandatory cooperation, which is subject to distinctive normative constraints. In providing roads, the state is entitled make people contribute, both positively and negatively, to their provision, and to regulate them based on a variety of considerations. None of this, I will argue, requires any assumptions about the state having any more general power to make life convenient, or to force people to contribute to cooperative arrangements on fair terms. Nor does it depend on the idea that, apart from the state, people have a basic obligation to participate in beneficial practices, or even those practices from which they benefit. I will argue instead that the state’s power reflects the fact that it is a public authority: its entitlement to obligate individual citizens reflects its obligation to act on behalf of the citizens as a collective body. The difficulties faced by the balancing picture are only compounded when it is joined to the common supposition that the state’s entitlement to bind its citizens must be aggregated out of obligations of individual citizens,12 by getting them to do things that they would have had fully formed and concrete obligation to do in the state’s absence.

Kant himself discusses neither one-way streets nor traffic lights, but he offers an account of the irreducibly public nature of mandatory forms of social cooperation, which follow from the role of the state as “supreme proprietor” of the land.13 Kant observes that the state, as supreme proprietor, is charged with the “division” of the land, rather than the “aggregation” of the state’s territory from antecedent private holdings.

I will argue that rather than being the main business of the state, limited only through important interests, questions about the allocation of benefits and burdens arise only within public provision of the preconditions of freedom. If a government must provide something, it must provide that thing fairly, which will normally mean equally. Governments do not have a general power to force people into forms of cooperation either by making some bear burdens for the benefit of others or by making people bear burdens because those same people have received benefits. Both of these ideas—the utilitarian idea that someone can be compelled to contribute whenever others will benefit, and the “principle of fair play” according to which people can be compelled to contribute to practices from which they benefit—are inconsistent with the idea that people are free to determine what their own purposes will be. Neither the benefit to others nor the fact that you yourself receive a benefit is sufficient to compel you to pursue an end that you do not share. However, public provision does not require any such principle.

#### Therefore, the criterion is respect for the rule of law. To clarify, I’m not saying that anything that follows from the rule of law is just. Instead, an action that fails to adhere to rule of law is unjust.

#### Prefer this criterion for 2 additional reasons.

#### First, rule of law is instrumentally necessary for a well-functioning society

Bingham 10

Baron Tom Bingham of Cornhill, KG, PC, FBA, was an eminent British judge who was successively Master of the Rolls, Lord Chief Justice and Senior Law Lord. He was described as the greatest lawyer of his generation, 2010, The Rule of Law, London: Allen Lane.

I think there are really three reasons. First, and most obviously, if you and I are liable to be prosecuted, fined and perhaps imprisoned for doing or failing to do something, we ought to be able, without undue difficulty, to find out what it is we must or must not do on pain of criminal penalty. This is not because bank robbers habitually consult their solicitors before robbing a branch of the NatWest, but because many crimes are a great deal less obvious than robbery, and most of us are keen to keep on the right side of the law if we can. One important function of the criminal law is to discourage criminal behaviour, and we cannot be discouraged if we do not know, and cannot reasonably easily discover, what it is we should not do. The second reason is rather similar, but not tied to the criminal law. If we are to claim the rights which the civil (that is, non-criminal) law gives us, or to perform the obligations which it imposes on us, it is important to know what our rights or obligations are. Otherwise we cannot claim the rights or perform the obligations. It is not much use being entitled to, for example, a winter fuel allowance if you cannot reasonably easily discover your entitlement, and how you set about claiming it. Equally, you can only perform a duty to recycle different kinds of rubbish in different bags if you know what you are meant to do. The third reason is rather less obvious, but extremely compelling. It is that the successful conduct of trade, investment and business generally is promoted by a body of accessible legal rules governing commercial rights and obligations. No one would choose to do business, perhaps involving large sums of money, in a country where the parties’ rights and obligations were vague or undecided. This was a point recognized by Lord Mansfield, generally regarded as the father of English commercial law, around 250 years ago when he said: ‘The daily negotiations and property of merchants ought not to depend upon subtleties and niceties; but upon rules easily learned and easily retained, because they are the dictates of common sense, drawn from the truth of the case.’ In the same vein he said: ‘In all mercantile transactions the great object should be certainty: and therefore, it is of more consequence that a rule should be certain, than whether the rule is established one way or the other. Because speculators [meaning investors and businessmen] then know what ground to go upon.’ But this is not an old-fashioned and outdated notion. Alan Greenspan, the former chairman of the Federal Reserve Bank of the United States, when recently asked, informally, what he considered the single most important contributor to economic growth, gave as his considered answer: ‘The rule of law.’ Even more recently, The Economist published an article which said: ‘The rule of law is usually thought of as a political or legal matter ... But in the past ten years the rule of law has become important in economics too ... The rule of law is held to be not only good in itself, because it embodies and encourages a just society, but also as a cause of other good things, notably growth.’ The article went on to acknowledge some dispute among economists about the strength of the connection between the rule of law and economic growth, drawing attention to China as an exception, but did not suggest there was no connection. Given the importance of this principle, we cannot be surprised to find it clearly stated by courts all over the world. In the House of Lords in 1975 Lord Diplock said: ‘The acceptance of the rule of law as a constitutional principle requires that a citizen, before committing himself to any course of action, should be able to know in advance what are the legal principles which flow from it.’ He made much the same point a few years later: ‘Elementary justice or, to use the concept often cited by the European Court [the Court of Justice of the European Communities], the need for legal certainty demands that the rules by which the citizen is to be bound should be ascertainable by him (or, more realistically, by a competent lawyer advising him) by reference to identifiable sources that are publicly available.’ The European Court of Human Rights at Strasbourg has spoken to similar effect: [T]he law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case ... a norm cannot be regarded as a ‘law’ unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able — if need be with appropriate advice — to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail . So too the Chief Justice of Australia, listing the practical conclusions held by Australian courts to be required by the principle of the rule of law: ‘the content of the law should be accessible to the public’.

#### Second, a shared intuition of moral theories reflect the idea that justice requires a sovereign

Nagel 5

(Thomas Nagel - University Professor of Philosophy and Law, Emeritus, at New York University, where he taught from 1980 to 2016. His main areas of philosophical interest are legal philosophy, political philosophy, and ethics). “The Problem of Global Justice”, Philosophy & Public Affairs Vol. 33, No. 2 (Spring, 2005), pp. 113-147 (35 pages) Published By: Wiley Philosophy & Public Affairs, NCS, DOA 1/15/22, <https://www.jstor.org/stable/3558011>

It seems to me very difficult to resist Hobbes’s claim about the relation between justice and sovereignty. There is much more to his political theory than this, of course. Among other things, he based political legitimacy and the principles of justice on collective self-interest, rather than on any irreducibly moral premises. And he defended absolute monarchy as the best form of sovereignty. But the relation between justice and sovereignty is a separable question, and Hobbes’s position can be defended in connection with theories of justice and moral evaluation very different from his. What creates the link between justice and sovereignty is something common to a wide range of conceptions of justice: they all depend on the coordinated conduct of large numbers of people, which cannot be achieved without law backed up by a monopoly of force. Hobbes construed the principles of justice, and more broadly the moral law, as a set of rules and practices that would serve everyone’s interest if everyone conformed to them. This collective self-interest cannot be realized by the independent motivation of self-interested individuals unless each of them has the assurance that others will conform if he does. That assurance requires the external incentive provided by the sovereign, who sees to it that individual and collective self-interest coincide. At least among sizable populations, it cannot be provided by voluntary conventions supported solely by the mutual recognition of a common interest. But the same need for assurance is present if one construes the principles of justice differently, and attributes to individuals a non–selfinterested motive that leads them to want to live on fair terms of some kind with other people. Even if justice is taken to include not only collective self-interest but also the elimination of morally arbitrary inequalities, or the protection of rights to liberty, the existence of a just order still depends on consistent patterns of conduct and persisting institutions that have a pervasive effect on the shape of people’s lives. Separate individuals, however attached to such an ideal, have no motive, or even opportunity, to conform to such patterns or institutions on their own, without the assurance that their conduct will in fact be part of a reliable and effective system. The only way to provide that assurance is through some form of law, with centralized authority to determine the rules and a centralized monopoly of the power of enforcement. This is needed even in a community most of whose members are attached to a common ideal of justice, both in order to provide terms of coordination and because it doesn’t take many defectors to make such a system unravel. The kind of all-encompassing collective practice or institution that is capable of being just in the primary sense can exist only under sovereign government. It is only the operation of such a system that one can judge to be just or unjust. According to Hobbes, in the absence of the enabling condition of sovereign power, individuals are famously thrown back on their own resources and led by the legitimate motive of self-preservation to a defensive, distrustful posture of war. They hope for the conditions of peace and justice and support their creation whenever it seems safe to do so, but they cannot pursue justice by themselves. I believe that the situation is structurally not very different for conceptions of justice that are based on much more other-regarding motives. Without the enabling condition of sovereignty to confer stability on just institutions, individuals however morally motivated can only fall back on a pure aspiration for justice that has no practical expression, apart from the willingness to support just institutions should they become possible. The other-regarding motives that support adherence to just institutions when they exist do not provide clear guidance where the enabling conditions for such institutions do not exist, as seems to be true for theworld as a whole. Those motives, even if they make us dissatisfied with our relations to other human beings, are baffled and left without an avenue of expression, except for the expression of moral frustration.

#### Thus, I affirm that the private appropriation of outer space is unjust because it does not respect the rule of law

### C1

#### Contention 1 is arbitrariness

#### Any act of appropriation is indeterminate absent a common understanding of property found in law

Waldron 96

Waldron, Jeremy [Professor of Law and Philosophy at the NYU School of Law]. “Kant’s Legal Positivism” Harvard Law Review , May, 1996, Vol. 109, No. 7 (May, 1996), pp. 1535-156

The main subject matter of justice and right in Kant's political philosophy is property - the possession and use of external material resources. For Kant, the concept of property, and the allied concepts of empirical and intelligible possession, are amenable to philosophical exposition. (He expounds them in the first seventeen paragraphs of the Metaphysical First Principles of the Doctrine of Right.) I will not bore the reader with the details; it is enough to say that, although the exposition is terribly convoluted, Kant does not indicate that he thinks the complexities of these concepts are the source of the disagreements we are trying to explain. Kant makes pretty clear, however, that the concepts he develops are likely to involve considerable difficulty and controversy in their applications. In a state of nature, to have property along Lockean lines or anything like it, people's rightful holdings would have to be based on a principle such as first occupancy. But occupancy, which Kant interprets to mean "taking control," is quite indeterminate: how do we correlate one's acts of control with an exact extent of land controlled? Besides, the question of how much exactly one comes to own when one takes control of a piece of land will be bound up in part with one's sense of the effect of one's action on others' situations. But it may be unclear how many others there are, or it may be a matter of dispute how many of all the others there are (everywhere) one is supposed to take into account. Inevitably, disputes will also arise about who is (or who was) the first occupant of a piece of land. That prospect is more or less unavoidable, given Kant's account of appropriation. To appropriate X is not only to take X under one's physical control, but to do so in a way such that one's right in X will be violated if, subsequently, another person uses or encroaches upon X even while the initial appropriator is not actually in physical control of X. In the state of nature, however, if one appropriates a piece of land and then wanders off, how is another to know whether the land has already been appropriated or is still available for first occupancy? (This problem is particularly acute in a theory like Kant's that does not insist on any mark of occupancy, such as labor.) Notice that these difficulties of application are not matters on which reason offers no guidance or matters to be settled by arbitrary stipulation, like the rule about which side of the road to drive on. Surely, of two people wrestling for control of a piece of land, one or the other was in fact the first occupant; surely, there is a right answer to the question of whether someone, in violation of the Lockean proviso, has taken more than his share. Moreover, the fact that people think there is a right answer will likely inspire each party to struggle vehemently for his view of the matter; in contrast, nobody fights very hard over questions like which side of the road to drive on. The trouble with the application of acquisition principles is not that, in theory, no right answers exist, but that there is no basis common to the parties for determining which answers are right.

#### No such unified legal system exists for allowing property rights to outer space; therefore, all private appropriation of space is unjust

Tronchetti 7

Fabio Tronchetti (International Institute of Air and Space Law, Leiden University, The Netherlands). “The Non-Appropriation Principle Under Attack: Using Article II of The Outer Space Treaty In Its Defence.” 50 PROC. L. OUTER SPACE 526, 530 (2007). JDN. <https://iislweb.org/docs/Diederiks2007.pdf>

However, it must be said, that nowadays there is a general consensus on the fact that both national appropriation and private property rights are denied under the Outer Space Treaty. Several ways of reasoning have been advanced to support this view. Sters and Tennen affirm that the argument that Article II does not apply to private entities since they are not expressly mentioned fails for the reason that they do not need to be explicitly listed in Article II to be fully subject to the non-appropriation principle8. Private entities are allowed to carry out space activities but, according to Article VI of the Outer Space Treaty, they must be authorized to conduct such activities by the appropriate State of nationality. But if the State is prohibited from engaging in certain conduct, then it lacks the authority to license its nationals or other entities subject to its jurisdiction to engage in that prohibited activity. Jenks argues that “States bear international responsibility for national activities in space; it follows that what is forbidden to a State is not permitted to a chartered company created by a State or to one of its nationals acting as a private adventurer”9. It has been also suggested that the prohibition of national appropriation implies prohibition of private appropriation because the latter cannot exist independently from the former10. In order to exist, indeed, private property requires a superior authority to enforce it, be in the form of a State or some other recognised entity. In outer space, however, this practice of State endorsement is forbidden. Should a State recognise or protect the territorial acquisitions of any of its subjects, this would constitute a form of national appropriation in violation of Article II. Moreover, it is possible to use some historical elements to support the argument that both the acquisition of State sovereignty and the creation of private property rights are forbidden by the words of Article II. During the negotiations of the Outer Space Treaty, the Delegate of Belgium affirmed that his delegation “had taken note of the interpretation of the non-appropriation advanced by several delegations-apparently without contradiction-as covering both the establishment of sovereignty and the creation of titles to property in private law”11. The French Delegate stated that: “…there was reason to be satisfied that three basic principles were affirmed, namely: the prohibition of any claim of sovereignty or property rights in space…”12. The fact that the accessions to the Outer Space Treaty were not accompanied by reservations or interpretations of the meaning of Article II, it is an evidence of the fact that this issue was considered to be settled during the negotiation phase. Thus, summing up, we may say that prohibition of appropriation of outer space and its parts is a rule which is valid for both private and public entity. The theory that private operators are not subject to this rule represents a myth that is not supported by any valid legal argument. Moreover, it can be also added that if any subject was allowed to appropriate parts of outer space, the basic aim of the drafters of the Treaty, namely to prevent a colonial competition in outer space 3 and to create the conditions and premises for an exploration and use of outer space carried out for the benefit of all States, would be betrayed. Therefore, the need to protect the non-appropriative nature of outer space emerges in all its relevance.

#### That links to the framework—ignoring the standing law would violate the rule of law

Waldron 96

Waldron, Jeremy [Professor of Law and Philosophy at the NYU School of Law]. “Kant’s Legal Positivism” Harvard Law Review , May, 1996, Vol. 109, No. 7 (May, 1996), pp. 1535-156

How we think about disagreement on matters of public concern will determine how we think about politics, and - because law is the offspring of politics - how we think about disagreement will determine, in some measure, how we think about law. For example, the members of a community may be divided on the question whether a testator should have the power to exclude a surviving child from the enjoyment of his estate. Imagine that some citizens, celebrating testamentary freedom, say that he should - it is, after all, his property that is passing by his will. Others say that he should not - once he is dead, the importance of respecting his arbitrary freedom diminishes in comparison to the importance of securing the welfare of his dependents. The issue is a political one not simply because the citizens disagree, for we disagree about all sorts of things - for instance, the virtues of the modern novel, the causes of the Punic Wars - on which no political decision is necessary. The issue of testamentary power is a political onebecause those who disagree on the merits nevertheless agree that the community needs to reach some determinate resolution. Testamentary freedom is not something on which we can agree to differ. Or, rather, we can agree to differ in our opinions, but it is necessary, all the same, that we arrive at some position on the issue to be upheld and enforced as the community's position on the testamentary powers of property owners. Because we disagree about which position should stand and be enforced in the name of the community, we need a process - a political process - to determine what that position should be. And we need a practice of recording, respecting, and implementing positions of this sort by individuals and agencies acting in the name of the community - a practice that is resilient in the face of disagreement with the community position on the part of those entrusted with its implementation. If we call the position that is identified as the community's position the law of that community, then the resilience of the practice to which I have just referred is what we mean by the rule of law. Understood in this way, the rule of law is not simply the principle that officials should apply the law even when it disserves their own interests. It is the principle that an official should enforce the law even when it is in his confident opinion unjust, morally wrong, or misguided as a matter of policy. The enactment of the law in question is evidence of the existence of a view different from his own concerning the law's justice, morality, or desirability. In other words, the law's existence, together with the official's own opinion, indicates moral disagreement in the community. The official's failure to implement the law because he believes that it is unjust, or his decision to do something other than what the law requires because he believes that action would be more just, is tantamount to abandoning the very idea of law - namely, the very idea of the community taking a position on an issue on which its members disagree. It is a reversion to the situation in which each person acts on his own judgment and does whatever seems right or just to him. Would this result be such a calamity? It may be, if people's moral judgments are irrational, ill-thought-through, uninformed, or biased. But even assuming that each person does his best to ascertain what is really right or really just, there will still be problems to the extent that different persons arrive (however scrupulously) at different conclusions.

#### Alternative theories of property cannot solve the problem of indeterminateness

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[Arthur, "Force and Freedom: Kant’s Legal and Political Philosophy", Harvard University Press, 2009, accessed 1-14-22]

Kant’s understanding of the basic range of public powers is austere in one sense, yet permissive in another. The only powers a state may exercise are ones that fall under various aspects of its duty to create, maintain, and improve a rightful condition, and it may only do so in ways consistent with each citizen’s innate right of humanity. Yet the range of powers that can actually be exercised under that duty seems capacious and openended. The constraint that all powers be derived from the duty to create a rightful condition—parallel to the way that the power of a parent to “manage and develop” the child is derived from the duty to raise the child into a responsible being—is a real constraint, but it does not preclude most of the familiar activities of modern states. Even substantial changes can be understood as falling under the duty: fundamental land reforms that abolish forms of slavery or serfdom are the creation of a rightful condition. Even things that seem less directly related seem easy to accommodate to the Kantian account. We shall see in Chapter 9 that preventing private dependence underwrites a variety of public activities, and also that nothing in Kant’s account precludes overinclusive implementation. Kant makes space for even more state activity when he includes the state’s right to “administer the state’s economy and finances,”67 and still more when he suggests in Theory and Practice that when the supreme power “gives laws that are directed chiefly to happiness (the prosperity of the citizens, increased population and the like), this is not done as the end for which a civil Constitution is established but merely as a means for securing a rightful condition, especially against a people’s external enemies.”68 The only thing that is ruled out is organizing the state around private purposes. The only test imposed by the idea of the original contract is that it be possible to give public grounds of justification for such activities, that is, to relate them to the maintenance of a rightful condition.

The flexibility of the Kantian account on such issues reveals the underlying difference between it and both libertarian and utilitarian/egalitarian accounts. From Kant’s perspective, the apparently intractable disagreement between the two extremes has the classic structure of an antinomy: the disagreements reflect a premise that both sides presuppose. The premise in question is that the purpose of political and legal institutions is to approximate a moral result that is perfectly determinate, even if imperfectly known, independently of them. A version of the same antinomy lurks in disputes between libertarian and utilitarian/egalitarian theories of the morality of property. The Lockean libertarian supposes property rights to be morally complete and fully determinate without reference to political institutions, and regards the state as a remedy to disagreements that, at least in principle, have complete answers. The utilitarian or egalitarian rejects the idea that anyone could have a morally basic right to property, and thinks that rules governing the dominion of particular persons over particular objects can only be designed so as to bring about a morally desirable result that can be described without any reference to anything like rules. As we saw in our discussion of private right, Kant conceives of private rights fundamentally differently. Their structure can be articulated without reference to legal institutions, but they do not apply to particulars outside of a rightful condition. Outside of legal institutions, property cannot be acquired conclusively, property rights cannot be enforced coercively, and disputes about them have no resolution consistent with the equal freedom of the parties. Again, although it can be shown as a general principle of private right that a person who is not party to a contract is not entitled to sue on it, or that a person who was deprived of the use of something to which he or she has no proprietary or possessory right has no claim against the person who damages the thing, in most cases concepts alone will not decide a particular case. Both the Lockean libertarian and a utilitarian/egalitarian see legal rules as trying to match something that is completely determinate without any reference to legal institutions. The Kantian sees legal rules as making determinate something that is morally binding but by itself partially indeterminate.

In the case of public right, the parallel antinomy concerns the use of public power. Although the libertarian insists that public power can only be used in the minimal ways that citizens have actively authorized, and the utilitarian or egalitarian thinks that it can be used to bring about good results (perhaps subject to certain constraints), they share a premise according to which a public authority’s moral role is to bring about specific results that can be specified without any reference to a public authority. For the Lockean libertarian, the result is the protection of private rights to person and property, which are supposed to be fully determinate without reference to institutions charged with enforcing them. For the utilitarian or egalitarian, the morally relevant results are characterized differently and more broadly, whether in terms of welfare, prosperity, or a certain pattern of distribution. The structure of the account, however, is exactly the same: institutions are justified only insofar as they bring about results that can be specified without any reference to them.

The Kantian approach rejects the common premise, and understands public right as requiring institutions in order to give effect to the structural features of a rightful condition. The public purposes are contained in the idea of a rightful condition, but so, too, is the requirement that properly constituted public authorities determine how to implement them. In so doing, public officials have no alternative but to exercise judgment about the significance to attach to competing considerations, subject only to the constraint that they make only laws that the people could impose upon themselves.

### 2

#### Contention 2 is cooperation

#### Appropriation makes space conflicts inevitable because property rights are indeterminate in outer space- that creates rivalrous competition and congestion

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[Hope M., B.A., Smith College; L.L.B., Yale, "The Public Trust Doctrine, Outer Space, and the Global Commons: The to Call Home ET", Syracuse Law Review, Vol. 69, No. 2, 2019, p. 191-262, <https://scholarship.law.georgetown.edu/facpub/2201>, accessed 1-14-22]

III. PROPERTY IN OUTER SPACE

“Space law must take into account private needs and build on private opportunities; to do this, it must embrace the principle of private property.”215

In our legal system, there are three types of property ownership— private, public, and communal.216 Private property usually involves a single owner, either “a legal person like a corporation” or “a natural person.”217 Public property, on the other hand, is owned by the state or its agents, while “common property” usually involves at least two entities who “hold the property in question either as joint tenants or as tenants in common.”218 If neither of these situations is involved, the property may be “characterized as null property, open-to-entry property, or res nullius, and the resources covered by these arrangements are open to use by one and all without restrictions.”219

The debate over the property ownership provisions of the OST and the Moon Treaty is between private and common ownership with commercial interests favoring the first, and those concerned with assuring the sustainability of outer space resources and equitable access to them favoring ownership in common.220 This Part explores these two types of ownership in the context of outer space,221 identifying their benefits and flaws before concluding that considering outer space as common property owned by the citizens of the globe is more closely aligned with overarching international principles of how space should be managed.222

At its heart, the debate about property type is about rights in that property. Property rights, like any other right, are “social artifacts.”223 They are neither fixed nor assumed, and may “vary from one society to another and over time within the same society.”224 They consist of “bundles of rights that can be and often are separated or combined in complex ways.”225 Some forms of property management, like custodial or stewardship management, allow for disaggregating those bundles.226

At a minimum, these bundles include possessory rights or the entitlements of ownership per se, usufructuary rights or rights to make use of property in specified ways, exclusion rights or rights to prevent others from using property without permission, and disposition rights or rights to dispose of property according to the wishes of the owner.227

Some of these rights, such as exclusion rights, the right to prevent access to or use of the property, and disposition or alienation of the property, may be problematic in outer space under international law, as discussed in Part IV.228

Possessory rights, a stick in the property rights bundle, can be “subdivided.”229 Some of the ways this can be done are discussed in Part VI and are worth considering in the context of outer space.230 “[E]ven relatively full bundles of rights are not unlimited or unrestricted.”231 Imagining property regimes of less than full and unimpeded ownership in outer space is conceivable, as is altering the structure of property rights to eliminate or lessen perverse incentives, like competition, from the implementation of those rights.232

For private property rights to emerge out of a common property regime or from null property where there is no ownership, like outer space, “cost-effective technologies for measuring, monitoring, and enclosing private property must emerge” to enable the claiming and transferring of “identifiable units of the resource.”233 If there is no private rights technology or “the distributional cost hurdle is too high, private property rights cannot emerge because the transaction cost wedge is simply too large.”234 Instead, “political or regulatory property rights will emerge.”235 While property rights are continually created and abandoned, depending on economic conditions, the act of defining property “has a high fixed cost element,” such as the cost of establishing and defending boundaries, which can have an effect on the emergence of property rights.236

One of the problems facing the creation of private property rights in outer space is the emergence of technology to define those rights in an area that is without static geographic and political boundaries.237 Another problem is how to grant, let alone enforce, those rights without violating international space law that bans the appropriation of outer space and its resources. So, the presence of potential entrepreneurs eager for the development of that technology, like Bruce Yandle and Andrew Morriss’s cattlemen of yore and the development of barbed wire, may not stimulate its production because its application would conflict with international prohibitions.238

Robert Ellickson suggests that “bottom-up, somewhat ad hoc property systems can [emerge and] reproduce most or all of the benefits of formal property law with a minimum of economic investment, procedure, and social disruption.”239 “Informal governance, like formal regulation, can ‘privatize’ [CPRs]”; Zachery Arnold points to “the ‘lobster gangs’ chronicled by James Acheson” as a “classic example of informal privatization.”240 Elinor Ostrom writes about how communities under the right “sociopolitical conditions” can protect valuable CPRs from over-consumption or damage.241 But, none of these approaches appears appropriate for circumstances in outer space where small groups are unlikely to form around CPRs or where communication among entities will be intermittent at best, making any sharing of informal management approaches unlikely.242 With this as background, the Article describes what space might look like under the two basic property regimes—private ownership and ownership in common.

A. Space Under a Traditional Private Property Regime

Private property is the cornerstone of American ideals and “a foundation of the Constitution as well as its philosophical precepts.”243 Indeed, “private property—and individual ownership specifically—runs throughout the DNA of this Nation.”244 Private property is often considered a driver of our economy because it creates incentives for investments in new technology and resource development, both of which are in play in the development of outer space.245 Property ownership can also encourage people to care about their property, protect adjacent land owners from the external effects of activities undertaken on their property, and assure its sustainability for future generations.246 Selfinterest can motivate a property owner to preserve their property to attract future buyers.247 To Richard Posner, the value of possession lies in its “economic efficiency” because it “tends to allocate resources to those persons best able to use them productively, for they are the people most likely to be willing to incur the costs involved in possession.”248 Possession of property puts the rest of the world on notice of that possession.249 While possession is most commonly understood as physically holding onto an object, a more modern view sees it as a “form of control.”250

But, private property can also “enhance income disparity, exacerbate[] economic tensions among individuals, and consolidate[] power among the one percent.”251 M. Alexander Pearl calls property privatization “a black hole focused solely on centralization of power and economic wealth without regard to the sustainability of an essential resource or the communities that depend upon its continued existence.”252 Hanoch Dagan goes further, quoting Eric Posner and Glen Weyl, by saying,

The key remedy for this predicament is to eradicate the institution of private ownership. Since “private ownership of any asset, except homogenous commodities, may hamper allocative efficiency,” we need to reconstruct markets so they are “competitive by design.” More precisely, we must discard private property and adopt in its stead a regime that partly transfers property’s “two most important ‘sticks’”— the right to use and the right to exclude—”from the possessor to the public at large.”253

When the value of a resource is increasing, it is more likely to be privatized so that the entity responsible for developing it can “fully capture the resulting benefits.”254 Indeed, a movement from common to private property occurs when the efficiency gains from private property are more than the costs of creating and maintaining it, such as “the basic costs of exclusion (fences, guards, and so on) and the extra vigilance needed to deter interlopers from absconding with rising-value resources.”255 This balancing of costs and benefits may be irrelevant in outer space, as the costs of establishing private property in the first place would be huge, and the complexity and cost of technological innovations called for in outer space would be magnitudes greater than what is required on Earth.256

1. The Positive and Negative Features of Private Property

Many believe that transporting the concept of private property to space should cause no concern; in fact, they view it positively.257 “By guaranteeing rights in extracted minerals taken from space, private industry could usher all of humanity into a new technological era.”258 Among the advantages of private property ownership in space is the “reduc[tion] of wasteful use” and the right to transfer alienability to others, which “would compensate for positive externalities, thereby creating added incentive to productively develop space.”259 Private property would also enable colonization of celestial bodies like the moon.260

In the absence of private ownership, there is the possibility that “each individual developer will seek to maximize his or her own gain by extracting as much value as quickly as possible without regard to the effect on the communal resource.”261 The President’s Commission on Implementation of U.S. Space Exploration Policy found that although the idea of private property in space is complicated because of national and international legal issues, it was imperative that they be addressed early in the process, “otherwise there will be little significant private sector activity associated with the development of space resources, one of our key goals.”262

For those who seek development of space resources, “a reliable property rights regime will remove impediments to business activities on these bodies and inspire the commercial confidence necessary to attract the enormous investments needed for tourism, settlement, construction, and business development, and for the extraction and utilization of resources.”263 The resources supporting private space mining companies are essentially worthless if the companies have no legal right to the resources they have mined.264 “Without the legal right to use water and hydrogen mined from celestial bodies, and to alienate platinum group elements, the potential profitability of private space expeditions collapses along with the goals of deeper space exploration and settlement.”265 The lack of a stable private property regime in outer space also means that space settlements will not be able “to claim sufficient land to yield enough of the only ‘product’ the settlement can sell profitably enough to guarantee its survival.”266 The strong belief is that unless private property rights in outer space and its resources are recognized, commercial enterprises will be unable to sustain any type of successful commercial activities in outer space.267

The absence of “‘security derived from ownership and sovereign control, [means that] entities that might be interested in the development of space resources will be reluctant to undertake [the] expensive and risky path’ implicit in all space travel”268 without some return on their investment.269 In all likelihood, such a return would be “in the form of the right to exploit limited areas of space and in proceeds from the sale of space resources.”270 This uncertainty arguably leaves a large “legal void, a wasteland of indeterminacy and instability.”271 According to Reinstein, “Unless people and nations are encouraged to exploit the riches of space, humanity will never know their benefit. And the more we are able to exploit, the more humanity stands to benefit. If commercialization is to be successful, space law must encourage investment in outer space development.”272

But, recognition of private property claims by the United States or by any other country could violate Article II of the OST’s prohibition against the national appropriation of space resources, including the surface of celestial objects.273 “[E]ven well-crafted domestic legislation that carefully addresses international law issues would create a significant risk of frustrating the explicit terms of the Outer Space Treaty, the intent and purpose of the treaty, or both.”274 No nation, including the United States, can independently alter the current international legal framework governing activities in outer space.275 And amending the OST to strike the language is unlikely, since the ban against appropriation of property in outer space is a “fundamental tenet of the treaty.”276

Coffey believes that

full ownership rights further [violate] the OST by disregarding the concerns of developing nations. If lunar real estate were put on the market, only the wealthy, developed nations and their citizens would be able to purchase it. If developing nations tried to purchase land later when they could afford it, they would be at a disadvantage because the prime locations are likely to be taken and the land’s current owners could demand whatever price they wanted. This could perpetuate current disparities of wealth and resources on Earth to the [m]oon and outer space.277

This would be in violation of the Treaty’s intent as expressed in Article I that outer space and its resources shall be the “province of all mankind.”278 Ownership of space real estate could also lead to speculative purchases, the goal being not to develop the property, but to hold it until market conditions are more favorable, and then sell it for a large profit— again, leading to the exclusion of poorer nations from the market.279 In all likelihood, the international community would react unfavorably to “a private property regime in outer space” because it would be perceived as benefiting large space-faring nations, like the United States and Russia, “at the expense of nations that do not have such capabilities.”280 But restricting ownership to anything less than fee simple absolute, like a lease or a license,281 means that the rights-holder could not alienate their property in any way, which decreases any significant incentive to acquire the right in the first place.282

2. The Rule of First Possession

The “most extreme proposal” with respect to implementing a property regime in outer space is to apply “first possession rules.”283 Under these rules, a country could claim territory it discovered, and then decide whether “to open up settlement in its new territory to its own citizens or to the international community as a whole.”284 Within its own territory, the discovering nation’s sovereignty “would extend to its outer space territory, where it could govern as it pleased.”285 Such an approach would directly conflict with international space law forbidding countries from appropriating outer space or its resources.286 MacWhorter also worries that a first possession rule in space could devolve into “a space race and colonialism in a situation that requires limitation and prudence,” and would be difficult to sell to other nations, especially non-space faring ones.287 If the rules were applied to commercial enterprises, without a “centralized mechanism for demarcating the property”288—such as a sovereign289—the inevitable result would be disputes among putative property owners, like what happened in the West during the homesteading era.290 Reinstein agrees: “If the rule of ownership was no more than ‘first come, first served,’ with ownership going to the first person to grab a celestial body, an unmitigated land-rush would ensue.”291 But MacWhorter also believes that limited property rights under a first possession rule might be an “appropriate first step,” if, for example, the property claim extended no further than to the claimed materials brought back to Earth.292

Those who are concerned that less technically adept nations would be severely disadvantaged by a property rights regime that is premised “on the ‘right of [first] grab,’ the first-come, first-served theory of property acquisition,” oppose such an approach.293 “By the time space capable nations develop the technological prowess and capital reserves to fund meaningful development of outer space, the earlier space-faring nations [and their citizens], left unchecked, might already have locked up the most accessible and valuable resources.”294 This would carry forward current disparities in global wealth distribution into the “Space Age.”295

The argument against a right of first possession gains salience from the fact that prior wrongs inflicted on less developed countries may be the reason they are not “space-capable.”296 This inequitable situation would persist, as those who profit from private property rules like the right of first possession will have the political ties, money, and understanding of the “rules of the game” to prevent their reform.297 An additional problem with the proposal is its enforceability. The fact that outer space is infinite makes it more difficult to “police” and to enforce the various treaties that apply to it.298 In outer space, “a breaching private party could pursue its interests outside the scope of such an agreement with relative impunity before it was discovered by the relevant international authority.”299

3. Less than Fee Ownership

There are less than fee ownership property regimes that can give the holder of a defeasible fee all the rights of an owner with complete title to the property, except the right to alienate it.300 Thus, “leaseholds, licenses, reversionary interest, easements, and covenants” might work well in outer space without violating international laws.301 There are also three types of defeasible fees that might be useful in outer space.302 “Defeasible fees, unlike fee simple absolute,” might convey property to a company, but are encumbered by an “automatic reversion or right of entry interest.”303 The first of these is a “fee simple subject to condition subsequent.”304 These conditions, “if triggered, would revert the realty back into the control of the multinational community.”305 So to the extent space resources have been appropriated, the withdrawal is not permanent.306

Then there is a “fee simple determinable,” which is like a fee simple subject to condition subsequent, “except that a fee simple determinable creates an automatic reversion to the grantor upon the occurrence of the condition—the grantor need not assert the right of reverter in order to reestablish possession of the property.”307 A third type of defeasible fee is a “fee simple subject to executory limitation[, which] reverts ownership upon the occurrence of a specified event or condition not back to the grantor, but to an heir or third party.”308 In each of these situations, a fee simple is less than absolute because it can revert back to the grantor or a third party if some later condition occurs.309 In the case of development of outer space resources, examples of later changes in circumstances that could revert title to the grantor might be those that damage the resource or make its continued development non-sustainable, or the developer’s violation of international law or any terms regulating or otherwise limiting their actions.

Leases and licenses are additional examples of impermanent types of property transfers.310 While a lease transfers exclusive possession of property from a grantor to a grantee, the transfer is only for a limited period of time; a license does not transfer any property and merely allows one party to use property that is managed and controlled by another party.311 Then there are easements, which “are rights, conveyed with the property.”312 Easements generally allow the property owner who owns the transferred property to continue to make some specified use of it.313 A negative easement, on the other hand, allows the entity that transferred property to prohibit the person who received it from using it in a specified way.314 Covenants are found in property conveyances and may prevent the grantee from using the property in some specific way.315

In each situation, not only is less than a full fee interest in property conveyed, but that interest can be restricted in a multitude of ways.316 In some situations, when the restrictive conditions are not complied with, the property can revert back to its original holder; in other cases, the reversion is automatic if conditions contained in the grant occur.317 But, each situation is predicated on some entity owning or holding the property in question, which would violate the terms of international space law unless the entity was some international authority.318 An international organization could establish specific rules governing activities in outer space, oversee their implementation, and enforce them.319 The International Seabed Authority (ISA), established by UNCLOS, could serve as a model for such an authority.320 The ISA was established in 1994 and since then it has issued new regulations governing exploring and prospecting for marine mineral resources and has contracted with seven nations granting them exclusive fifteen-year prospecting rights.321

However, “[t]here are drawbacks to forming a new international body to oversee the exploitation of space resources.”322 They can be expensive to establish and support.323 Non-spacefaring nations might not want to invest money in a venture which might “freeze them out of the decision-making process and put them at a disadvantage if they someday are able to participate in lunar missions.”324 There are the inevitable questions that arise whenever a new international governing organization is created, such as whether it should be under the authority of the United Nations or be completely independent, and how power should be allocated between spacefaring nations and developing countries without the expertise of money to venture into space.325 Further, there is an underlying equity question about spending money to create a new administrative authority.326 That authority will spend money that might otherwise have helped poorer countries develop the capacity to participate in outer space directly.327

An alternative to creating a new entity and new laws to administer a private property system in outer space is to extend terrestrial property law to outer space.328 Coffey proposes dividing the ISS between participating nations and then allowing each participant nation to apply its law to its assigned portion.329 But, this alternative suffers from some of the same flaws that establishing a centralized authority suffers—namely, it allows the powerful countries to control activities in outer space, specifically access.330 It allows those countries to collectively “set precedent for property rights in space instead of establishing formal international laws that the international community agrees upon.”331 The proposal “disregards the ‘common heritage’ provision of the OST,” because it completely excludes developing nations, who likely are not participants in the ISS, and provides them with no benefits from resources derived from space unless they eventually become technically proficient.332 Allowing countries to dictate any agreement that governs behavior in outer space also presents a risk that a country may be excluded from participation for unrelated reasons, like “diplomatic problems between the nations, unwillingness to share equipment and resources, or pressure from other members.”333

Thus, while establishing a private property regime in outer space might encourage development of celestial resources, it is hard to design a way around the ban against appropriating property and to establish a system that is both workable and protects the interests of less developed countries.

B. Space Under a Commons Property Regime

This Section discusses what about space makes it more like a commons than private property. Indeed, early space treaties treated space as though it was a commons.334 But, like private property, commons also have negative features that may be problematic in space, and simply declaring something a commons does not dictate the rules under which it should be managed. When various commons management approaches are tried, like the law of first possession under a private property regime, they are also found wanting.335

1. Early Treaties and Analogous Areas of the Globe

Early treaties, such as the 1968 Agreement on the Rescue of Astronauts, the Return of Astronauts, and the Return of Objects Launched into Outer Space, which “requires space-faring nations to rescue stranded astronauts and wayward objects and return them to the appropriate country,” “envisions space as a commons beyond the possession and control of any one nation or people.”336 So too, the 1972 Convention on International Liability for Damage Caused by Space Objects, which “was established to resolve concerns over financial liability in the event that a spacecraft or other space machine causes damage to other space-based or [e]arth-bound assets,” and the 1975 Convention on Registration of Objects Launched into Outer Space, which “imposes a requirement that states maintain and submit to the [United Nations] thorough records of all objects launched into outer space.”337

Indeed, the 1967 OST “allocates the use of orbital space as if it were a common property resource”338 by declaring outer space an open access resource and banning appropriation by any country.339 Jared Taylor notes that “during the Treaty’s preliminary negotiations, one drafter analogized the absence of property rights in space to the absence of property rights in the ocean.”340 According to Taylor, later treaties, as well as the practices engaged in by spacefaring nations and private companies, “have confirmed the spirit of the Outer Space Treaty: space is a resource from which no nation or private entity can be excluded”341—a true open access commons.342

The 1959 Antarctic Treaty343 established “the foundation for international space law.”344 Like outer space, Antarctica and the oceans “presented a dilemma regarding habitation and defense. No nation occupied these territories and no nation desired a ‘race to own’ without a guarantee of who would emerge victorious.”345 Both the Antarctic Treaty and the Deep Seabed Hard Mineral Resources Act (the “Deep Seabed Act”)346 eschewed the concept of private property as well as the rights of first possession, in part, because the riches of those areas might allow developing nations to share in those riches as opposed to remaining economically marginalized.347 The Deep Seabed Act provides a model for how to regulate activities in a commons, like outer space, which it manages to do without privatizing the marine resource.348 As a result, it is “customary and accepted legal reasoning” to analogize between private ownership rights outside of national sovereignty, like those the Deep Seabed Act granted, and a “land claims recognition law for celestial bodies.”349

“The oceans and Antarctica . . . have much in common with the moon. They can be harsh environments that are difficult to reach to extract minerals [and are resource rich]. They are also designated international areas in which no nation has a sovereign claim.”350 The history of the earth’s oceans is a progression from “the domain of conquering armadas and privateers, when good legal title required as little as arbitrary lines drawn on a map,” to the concept of a “free sea” open to all countries, where no single country could “obstruct the use of that privilege.”351 International space law built on that history of open passage and “free sea.”352 The roots of the idea of granting non-space faring nations right of access can also be found in the 1958 Geneva Convention on the High Seas, which granted “landlocked states the right to sail the oceans by requiring their coastal neighbors to grant free passage over land and through territorial waters.”353 The legal framework of UNCLOS united “a broad spectrum of national and private interests into a shared agreement on the possession and usage of a seemingly borderless area of the global commons,” setting another useful precedent for outer space.354 However, UNCLOS, as a model, is impractical in “the vast reaches of outer space”—space is simply too vast and unlimited.355’

2. Common Property

Common property is property, the rights to which belong to more than one entity.356 Like private property, common property is endemic to life in the United States and always has been, even though many Americans view it ambivalently.357 There is considerable overlap between property held in common and that which is privately owned. Carol Rose suggests that collective, but privately owned property, like a tenancy in common, “has all the hallmarks of individual private property,” and, therefore, should not be seen as “fundamentally problematic or prone to inefficient use.”358 Additionally, the plasticity of the commons, demonstrated by the appearance of new commons, like the “knowledge commons, cultural commons, infrastructure commons, and neighborhood commons,” indicates that the concept might fit in outer space.359

A commons, or CPR, is frequently asserted to resist “privatization and/or commodification of those resources,” making it oppositional to a claim that something is private property.360 Sheila Foster and Christian Iaione’s suggestion that the “language of the ‘commons’” is often used to prevent the enclosure of public urban space “by economic elites,” resonates with the situation in outer space where wealthy countries or private companies want to claim or enclose space that the public owns.361 A claim that something is a commons acknowledges that “it is a shared resource that belongs to all of its inhabitants,”362 like outer space, which is the “province of all mankind.”363

But there are problems with the idea of declaring anything a commons, just like there are problems with declaring something private property. One problem with the commons approach is the inability to exclude members of the commons from using the resource.364 Lacking the right to exclude, a user of CPRs has no incentive to do anything other than fully exploit the commons because if she refrains, her co-users will.365 The result is an “open access resource vulnerable to the tragic conditions of rivalry, overexploitation, and degradation.”366 Another problem is that since under a commons property regime the rights and interests of the present generation dominate those of future generations, there is no assurance that the claims of an unidentified future generation will have any effect on how the commons is managed.367 There are also management difficulties.368 “Under a communal system, one member wishing to preserve the CPR for future generations’ use faces significant—and perhaps insurmountable—transaction costs of negotiating with all members of the community and paying them to use the resource suboptimally.”369 And, exiting a commons when group action causes individual harm, without destroying “social gains from cooperation,” can be difficult.370

There is no one-size-fits-all solution to these problems, and there may be multiple approaches to the development of solutions.371 In the search for solutions, various legal scholars have promoted variations on the concept of a commons, highlighting different features.372 Pearl proposes something he labels the “vital commons,” which includes CPRs that are “essential to human existence,” like air or water, and which may require a different approach to their management.373 Pearl’s vital commons has five key traits:

(1) the benefits of the CPR are internalized by nearly all members of a given massive population; (2) the costs of the CPR’s depletion are externalized among nearly all members of that same massive population; (3) augmentation or depletion of the CPR by one party affects the ability to use the CPR by another party within the same massive population; (4) the CPR itself is necessary for sustenance; and 5) damage or depletion of the CPR is non-remediable or extremely difficult to correct.374

Outer space has most of these traits—the potentially affected population is the entire globe; its resources, as far as is known, are not renewable; and the benefits and costs of development of outer space resources could be widely internalized or externalized.375 Additionally, restoration of any depleted resources in outer space may be difficult, and the impact on any of those resources may be so dire that its overuse and depletion could be “the epitome of apocalypse.”376 Finally, the vastness of outer space makes it difficult to subject it to “local” regulation—i.e., regulation by individual nations, which might opt not to regulate certain activities or to regulate lightly.377

Similar to Garrett Hardin’s open pasture, a major problem with a commons is that, “absent a system that allocates use rights, it is difficult, if not impossible, to restrain the impulse of users to pursue their individual self-interests, even when pursuit of those interests result in the degradation or exhaustion of the resource.”378 This is why, he argued, “‘freedom in the commons’—i.e., the lack of controls on individual behavior and self-interest—ultimately leads to its ruin and hence to the ‘tragedy.’”379 If the amount of use of a CPR or the intensity of that use is too much, then the result can be “congestion” that decreases the values of those resources.380 “Similarly, certain types of uses can create incompatibilities with many ordinary uses and conservation of such spaces, creating the conditions for rivalry or subtractability.”381

The unbounded nature of space and the variety and wealth of its resources is already attracting potential users with competing or conflicting ideas about how space should be used.382 Even if space was regulated, this “magnetic pull” to occupy and develop space may create rivalry among different users, especially if those users are drawn to the same areas of outer space.383 Unless the development of outer space resources is regulated, too many entities vying for the same resource could lead not only to congestion and rivalous behavior,384 but also to accidents and serious conflict—the conditions the space treaties are intended to avoid.385

The way to prevent a tragedy on land held in common is not necessarily its transformation to private property, which is one solution Hardin called for.386 Oran Young says “[i]nstitutional innovation,” like individual transferable quotas, “can create a form of private property and, in the process, alleviate the perverse incentives arising from the condition of non-excludability.”387 Creating public property or, in the alternative, using regulatory controls can also avoid the tragedy to the commons.388 The owners of a commons can also self-regulate to control the adverse effects of non-excludability.389

But as Young notes, while each approach has its plus side, each approach, like privatization, can also have negative effects.390 “Privatization can lead to outcomes that are grossly unfair[, and] [g]overnments [may] lack both the capacity and the will to manage public property well.”391 And common property approaches can lead to nonsustainable use of the property, and “work best in situations where the sense of community is strong and social pressure is capable of controlling behavior effectively”—characteristics uncommon in outer space.392

So, we have learned thus far that (1) the race is on to extract valuable resources from outer space and celestial bodies;393 (2) the international legal framework governing those activities is far from complete, inviting behavior that may be in the economic best interests of the actor, but not necessarily of the globe;394 (3) the international legal principles governing this behavior may be counter-productive when it comes to incentivizing economic behavior, but beneficial non-spacefaring countries;395 and (4) the push to privatize space, which is clearly a global commons, may lead to rivalrous behavior, which could dissolve into military activity and squeeze out poorer countries from the benefits of space, in direct contradiction of the goals of international space law.396

We have also learned that while privatizing open access areas, like outer space, is not necessarily good or necessary to avoid the tragedy of the commons (the over-utilization of common or shared pool resources), the features of a commons make it difficult to avoid that tragedy and to provide for future generations.397 So the solution may lie in crafting new property regimes, perhaps combining the best features of both approaches. It is to that task this Article now turns—the circumstances in which new forms of property might emerge and what they might be.

### UV

#### Scholarly discourse and engagement with politics is key to effective structural reform - critique is insufficient.

**Purdy ’20 -** Jedediah S. Britton-Purdy et al, 20 - ("Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis by Jedediah S. Britton-Purdy, David Singh Grewal, Amy Kapczynski, K. Sabeel Rahman :: SSRN," 3-2-2020, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3547312)//ey/>

To embrace the possibility of democratic renewal requires rejecting the terms of the Twentieth-Century Synthesis. We believe that the legal realists—and thinkers in a much longer history of political thought—were right in believing that "the economy" is neither self-defining nor self-justifying. The emphasis in these traditions has been the right one: on power, distribution, and the need for legitimacy as the central themes in the organization of economic life. Moreover, precisely because economic ordering is a political and legal artifact, the idea of an "autonomous" economic domain has always been obscurantist and ideological, even when accepted in good faith.' Law does not and never could simply defer to such a realm. Rather, **law is perennially involved in creating and enforcing the terms of economic ordering,** most particularly through the creation and maintenance of markets. One of its most important roles, indeed, is determining who is subject to market ordering and on what terms, and who is exempted in favor of other kinds of protection or provision.' Thus the program of law, politics, and institution building often called "neoliberalism" is, and can only be, a specific theory of how to use state power, to what ends, and for whose benefit.'The **ideological work** of the Twentieth-Century Synthesis has been **to** naturalize and **embed in legal institutions from the Supreme Court to the** Antitrust Office and **W**orld **T**rade **O**rganization a specific disposition of power**.** This power represents a deployment of market ordering that produces intense and cross-cutting forms of inequality and democratic erosion. However, Twentieth-Century Synthesis theorists tend not to see this, precisely because the Synthesis makes it so hard to see (or at least so easy to overlook). If it is to succeed, **law and political economy** will also **require something beyond mere critique. It will require a positive agenda.** Many **new** and energized **voices**, from the legal academy to political candidates to movement activists, are already building in this direction,' **calling for** and giving shape to **programs for more genuine democracy that also takes seriously questions of economic** power **and racial subordination;**171 more equal distribution of resources and life chances;172 more public and shared resources and infrastructues;173 the displacement of concentrated corporate power and rooting of new forms of worker power;174 the end of mass incarceration **and broader contestation of** the long history of the criminalization and **control of poor people and people of color in building capitalism;**175 the recognition of finance and money as public infrastructures;176 the challenges posed by emerging forms of power and control arising from new technologies;177 and the need for a radical new emphasis on ecology.178 These are the materials from which a positive agenda, over time, will be built. **Political fights interact generatively with scholarly and policy debates in pointing** the way **toward a more democratic political economy.** The emergence of new grassroots movements, campaigns, and proposals seeking to deepen our democracy is no guarantee of success. But their prevalence and influence make clear the dangers and opportunities of this moment of upheaval—and highlight the stakes of building a new legal imaginary. 179 Neoliberal political economy, with its underlying commitments to efficiency, neutrality, and anti-politics, helped animate, shape, and legitimate a twentieth-century consensus that erased power, encased the market, and reinscribed racialized, economic, and gendered inequities. By contrast, **a legal imaginary of democratic political economy**, that takes seriously underlying concepts of power, equality, and democracy, **can inform a wave of** legal **thought whose critique and policy imagination can amplify and accelerate these movements for structural reform** and, if we are lucky, help remake our polity in more deeply democratic ways.

#### Reform makes revolution more likely. Rejecting it condescendingly asserts the possibility of radical change is better than the certainty of real improvement.

**Delgado ’87 -** Delgado, Richard [teaches civil rights and critical race theory at University of Alabama School of Law. He has written and co-authored numerous articles and books], “The Ethereal Scholar:  Does Critical Legal Studies Have What Minorities Want?”, Harvard Civil Rights - Civil Liberties Law Review, 1987

Critical scholars reject the idea of piecemeal reform. Incremental change, they argue, merely postpones the wholesale reformation that must occur to create a decent society.38 Even worse, an unfair social system survives by using piecemeal reform to disguise and legitimize oppression. 39 Those who control the system weaken resistance by pointing to the occasional concession to, or periodic court victory of, a black plaintiff or worker as evidence that the system is fair and just.40 In fact, Crits believe that teaching the common law or using the case method in law school is a disguised means of preaching incrementalism and thereby maintaining the current power structure.41 To avoid this, CLS scholars urge law professors to abandon the case method, give up the effort to find rationality and order in the case law, and teach in an unabashedly political fashion. 42

**The** CLS **critique of piecemeal reform is** familiar, **imperialistic and wrong.** **Minorities know from bitter experience that occasional court victories do not mean the Promised Land is at hand.**43 **The critique** is imperialistic in that it **tells minorities and other oppressed peoples how they should interpret events affecting them.**44 **A court order directing a housing authority to disburse funds for heating** in subsidized housing **may postpone the revolution, or it may not. In the meantime, the order keeps a number of poor families warm.** This may mean more to them than it does to a comfortable academic working in a warm office. **It smacks of paternalism to assert that the possibility of revolution later outweighs the certainty of heat now**, unless there is evidence for that possibility**.** The Crits do not offer such evidence.

Indeed, some **incremental changes may bring revolutionary changes closer**, not push them further away**.** Not all **small reforms** induce complacency; some may **whet the appetite for further combat.** The welfare family may hold a tenants' union meeting in their heated living room. CLS scholars' **critique of piecemeal reform** often **misses these possibilities, and neglects the question of whether total change, when it comes, will be what we want.**

#### Adopt a hybridizing strategy - exploiting contradictions in hegemonic discourse maintains critical distance while effectively challenging the state. Kapoor ‘08

Kapoor, 2008 (Ilan, Associate Professor at the Faculty of Environmental Studies, York University, “The Postcolonial Politics of Development,” p. 138-139)

There are perhaps several other social movement campaigns that could be cited as examples of **a ‘hybridizing strategy’**.5 But what emerges as important from the Chipko and NBA campaigns is the way in which they **treat** laws and **policies**, institutional practices, **and ideological apparatuses as deconstructible**. That is, they refuse to take dominant authority at face value, and proceed to reveal its contingencies. Sometimes, they expose what the hegemon is trying to disavow or hide (exclusion of affected communities in project design and implementation, faulty information gathering and dissemination). Sometimes, they problematize dominant or naturalized truths (‘development = unlimited economic growth = capitalism’, ‘big is better’, ‘technology can save the environment’). In either case, by contesting, publicizing, and politicizing accepted or hidden truths, they hybridize power, challenging its smugness and triumphalism, revealing its impurities. They show power to be, literally and figuratively, a bastard. While speaking truth to power, a **hybridizing** strategy also **exploits the instabilities of power**. In part, this involves showing up and taking advantage of the equivocations of power — conflicting laws, contradictory policies, unfulfilled promises. A lot has to do here with **publicly shaming the hegemon, forcing it to** remedy injustices and **live up to stated commitments** in a more accountable and transparent manner. And, in part, **this involves** nurturing or **manipulating the splits and strains within institutions. Such maneuvering can take the form of cultivating allies**, forging alliances, or throwing doubt on prevailing orthodoxy. Note, lastly, the way in which a **hybridizing** strategy **works with the dominant discourse**. This reflects the negotiative aspect of Bhabha’s performativity. The strategy may outwit the hegemon, but it does so from the interstices of the hegemony. The master may be paralyzed, but his paralysis is induced using his own poison/medicine. It is for this reason that cultivating allies in the adversarial camp is possible: **when you speak their language and appeal to their own ethical horizons,** you are building a modicum of common ground. It is for this reason also that **the master cannot easily dismiss or crush you.** Observing his rules and **playing his game** **makes it difficult for him not to** take you seriously or **grant** you **a certain legitimacy**. The use of non-violent tactics may be crucial in this regard: state repression is easily justified against violent adversaries, but it is vulnerable to public criticism when used against non-violence. Thus, the fact that Chipko and the NBA deployed civil disobedience — pioneered, it must be pointed out, by the ‘father of the nation’ (i.e. Gandhi) — made it difficult for the state to quash them or deflect their claims.

#### Using the government as a heuristic is better pragmatically and forces us to truly investigate political structures in search of ways to improve instead of using abstract solutions for concrete impacts.

**Zannoti ’13 -** Zannoti, Laura, associate professor of Political Science at Virginia Tech., Ph.D. from the University of Washington in 2008 and joined the Purdue University faculty in 2009. “Governmentality, Ontology, Methodology: Re-thinking Political Agency in the Global World”, originally published online 30 December 2013, DOI: 10.1177/0304375413512098, P. Sage Publications MC

By questioning substantialist representations of power and subjects, inquiries on the possibilities of political agency are reframed in a way that focuses on power and subjects’ relational character and the contingent processes of their (trans)formation in the context of agonic relations. **Options for resistance to governmental scripts are not limited to ‘‘rejection,’’ ‘‘revolution,’’ or ‘‘dispossession’’ to regain** a pristine ‘‘freedom from all constraints’’ or **an immanent ideal social order. It is found** instead **in** multifarious and contingent **struggles** that are **constituted within the scripts of governmental rationalities and at the same time exceed and transform them. This approach questions oversimplifications** of the complexities **of liberal political rationalities and** of their interactions with non-liberal political players and **nurtures a radical skepticism about identifying universally good or bad actors or abstract solutions to political problems.** International power interacts in complex ways with diverse political spaces and within these spaces it is appropriated, hybridized, redescribed, hijacked, and tinkered with. **Governmentality as a heuristic focuses on performing complex diagnostics of events.** It invites historically situated explorations and careful differentiations rather than overarching demonizations of ‘‘power,’’ romanticizations of the ‘‘rebel’’ or the ‘‘the local.**’’** More broadly, theoretical formulations that conceive the subject in non-substantialist terms and focus on processes of subjectification, on the ambiguity of power discourses, and on hybridization as the terrain for political transformation, open ways for reconsidering political agency beyond the dichotomy of oppression/rebellion. **These alternative formulations** also **foster an ethics of political engagement,** to be continuously taken up through plural and uncertain practices, **that demand continuous attention to ‘‘what happens’’ instead of fixations on ‘‘what ought to be.’’**83 **Such ethics of engagement would not await the revolution to come** or hope for a pristine ‘‘freedom’’ to be regained**. Instead, it would constantly attempt to twist the working of power by playing with whatever cards are available and would require intense processes of reflexivity on the consequences of political choices.** To conclude with a famous phrase by Michel Foucault ‘‘my point is not that everything is bad, but that everything is dangerous, which is not exactly the same as bad. If everything is dangerous, then we always have something to do. So my position leads not to apathy but to hyper- and pessimistic activism.

## Paralax Perm

#### Perm: Do the aff as a display of the kritik.

#### That allows us to view politics from a parallax view—supercharges alt solvency

Zizek ‘03(Slavoj, senior researcher of sociology at the University of Ljubljana, lecturer at the European Graduate School, Ph.D in philosophy from the University of Ljubljana, in an interview with Eric Dean Rasmussen, a researcher in linguistic and aesthetic studies at the University of Bergen, “Liberation Hurts: An Interview with Slavoj Žižek”, <http://www.electronicbookreview.com/thread/endconstruction/desublimation> DOA: 7/19/12 ARW)

I'm trying to avoid two extremes. **One extreme is** the traditional pseudo-radical position which says, **"If you engage in politics** - helping trade unions or combating sexual harassment, whatever - **you've been co-opted"** and so on. Then you have **the other** extreme which **says,** "Ok, **you have to do something**." I think both are wrong. I hate those pseudo radicals who dismiss every concrete action by saying, **"This** will all be co-opted**."** Of course, everything can be co-opted [chuckles] but this **is** just **a nice excuse to do** absolutely **nothing.** Of course, there is a danger that "the long march through institutions" - to use the old Maoist term, popular in European student movements thirty-some years ago - will last so long that you'll end up part of the institution. **We need** more than ever, **a parallax view** - a double perspective. **You engage in acts,** beingaware of their limitations. This does not mean that you act with your fingers crossed. No, you fully engage**,** but **with the awareness** - the ultimate wager in the almost Pascalian sense - that is not simply that this act will succeed, but **that the** very **failure of this act will trigger a much more radical process.**

#### They totalize queerness are pure antinormativity---that creates queer exceptionalism that excludes allies

**Ruti 17** (Mari, Professor of critical theory and of sexual diversity studies at the University of Toronto, “The Ethiscs of Opting Out: Queer Theory’s Defiant Subjects,” Page 161)

Paradoxically, then, queer theory’s disavowal of sovereign subjectivity establishes the unstable (nonsovereign) queer subject’s legitimacy as uniquely antinormative, subversive, and deviant. According to Huffer, such a stance—which I have earlier in this book defined as one of the pillars of queer exceptionalism—valorizes undecidability “to the point where being ‘queer’ and being ‘undecidable’ have become virtually synonymous” (2013, 66). In this manner, queer theory creates a counterintuitive dynamic by which the queer subject appears more heroic than other subjects by virtue of its intense instability; in a way, the less of a subject the queer subject is, the more powerful it becomes. Challenging this “universalist logic at work in the development of the seemingly anti-universalist category of ‘queer’ ” (64), Huffer calls for a greater degree of accountability for those who cannot or do not wish to approximate queer theory’s ideal of instability. Furthermore, she posits that queer theorists frequently appear “disingenuous in their embrace of the queer subject’s radical instability” (62) in the sense that even they are not able to live up to this ideal.

#### Permutation – do both – even if the aff is problematic in some ways, we can still be valuable – their alternative forecloses the ability to conduct any constructive project at all, but using a range of attitudes and approaches solves Halberstam’s critique best

Wang 10 (Jackie, “Negative Feminism, Anti-Social Queer Theory and the Politics of Hope”, http://loneberry.tumblr.com/post/724635724/negative-feminism-anti-social-queer-theory-and-the)

What is negative feminism and anti-social queer theory? My fragmentary answer: it is a queer critique that aims to decenter positivity, productivity, redemptive politics of affirmation, narratives of success, and politics that are founded on hope for an imagined future. It’s rude politics and has no interest in being polite. It embraces masochism, anti-production, self-destructiveness, abjection, forgetfulness, radical passivity, aggressive negation, unintelligibility, negativity, punk pugilism, and anti-social attitudes as a form of resistance to liberal feminist and gay politics of cohesion. It’s about not-becoming because the notion of becoming is perceived as following the capitalist logic of production and models of success that are often tied up with colonialism. It asks, why the fuck should queers be nice? And asserts that politeness is heteronormative and **we should embrace our utter failure** at functioning within a colonialist, heteronormative, capitalist, racist, sexist and transphobic framework. Jack “Judith” Halberstam is an academic who has probably articulated this theory most lately. I want to talk about his theories and raise some pressing questions and criticisms of his controversial ideas in the context of my limited conversations with him. This essay is largely based on Jack’s article, The Anti-Social Turn in Queer Studies (pdf). Driving in a car with Jack, my roommate Matthew and his partner JD. We have excited conversation about everything from bats to drag. Jack is rushed to get to get to the airport but is incredibly calm, easy going, and undemanding even though there’s no time for the promised dinner with the college’s budget. JD is a Buddhist enthusiast, eager to discuss this inspiring interest of his. In the car he mentions how much happier his is since coming to Buddhism, how it has transformed his thinking and allowed him to think lovingly of strangers, even the little buggers with their giant carts of shit standing in front of you in line at the grocery store. Now Jack is some whose recent work revolves around the heteronormativity of politics of hope and the imperialism of happiness. Jack adds, “But why would I want to think lovingly of everyone? Maybe there are people out there that are truly undeserving of my love.” The comments JD made sparked a fascinating discussion emotional dynamicness and the value of positive feelings, giving me a glimpse of the place from which Jack’s theories of queer failure and negative feminism come from. We questioned why there is a tendency to privilege certain “positive” or “good” feelings and examined the impulse to flatten or repress the full spectrum of affective responses. For me, the (anti)politics of negation discussed by Jack arise from a queer resistance to emotional flatness and the privileging of feeling good to feeling like shit. It’s about challenging the productive and rationalist logic of capitalism that makes you feel insane if you can’t function within its framework. It’s about thinking through how emotion informs how we approach politics and how privileging an approach that only values positive feelings erases and denies the position of people who refuse to or simple just can’t feel happy about participating in such a shitty context. People who are angry or depressed as fuck and seek self-annihilation because the world demands our unity. So where does radical negation get us? Jack’s borrowed mantra, no future, rejects such temporal considerations. **But most of us out there probably still care about the viability specific political strategies**. While I was at Ida, I got into a discussion with two people who were critical of Jack’s negative feminism and anti-social queer theory. They raise some good criticisms that I am trying to think through here. It was a few months ago when I brought Jack to New College to give a lecture. I was working as the Gender and Diversity Center Program Coordinator and got to spend some time with writers and intellectuals like bell hooks and Eileen Myles. At the time I was most familiar with Jack’s work on trans men, queer temporalities and subcultures, and female masculinity; but was wholly fascinated by his lecture on the queer art of failure. It seemed relevant given that lately, in the radical queer community, there seems to be a point of contention between those who adhere to a politics of community and affirmation and those who adhere to a politics of cynicism. But of course it’s not that simple, and maybe it’s more accurate to say that some approach politics with an attitude of constructiveness and other approach it with an attitude of destructiveness. Jack is trying to explore the destructive side of things; particularly a disorganized and unintelligible form of self-destructiveness and masochism as a form of resistance. But unlike the nihilistic posturing of those that are too-queer-for-everything, Jack is not interested in an a purely aestheticized attitude, nor is he necessarily all critique. What we get is still a strategy, albeit an anti-rational and anti-organizational one. While Jack’s theories are somewhat nihilistic, it dissociates itself from nihilism’s historical complacency with sexism. He writes that he would rather “turn to a history of alternatives, contemporary moments of alternative political struggle and high and low cultural productions of a funky, nasty, over the top and thoroughly accessible queer negativity.” So I wouldn’t say that Jack’s theories don’t advocate doing nothing, rather, doing something through a refusal to do anything, a radical form of passivity. Similar, Jack notes that, “Negativity might well constitute an anti-politics but it should not register as apolitical.” A passive consumer who watches TV all day and drives an SUV to work wouldn’t be the same as, say, the narrator of Jamaica Kincaid’s Autobiography of my Mother, who refuses to be happy or do anything because she rejects the impetus to participate while she is forced to exist under colonialism. Jack writes that, “She opposes colonial rule precisely by refusing to accommodate herself to it or to be responsible for reproducing it in any way. Thus the autobiographical becomes an unwriting, an undoing, an **unraveling of self**.” While the narrator is resistant to the logic of production and participation, the strategy is—in a roundabout kind of way—a perverse form of productivity. Criticism of the Negative Turn One major critique is that it **invalidates and delegitimizes the work of people who are committed to queer struggle that is not anti-social,** negative, anti-communitarian, or anti-identitarian in character. Constructive, affirmative and restorative forms of political engagement are portrayed as decidedly unqueer. When Jack **tosses memory out in favor of forgetfulness**, Bea, a person I met at Ida who studies history, rightfully asks, what the fuck? People who adopt an attitude of queer cynicism often shit on and belittle the efforts of people carrying out any constructive project. But Jack is critical of this types of cynicism when he describes the “archive of feelings” (Ann Cvetkovich) that characterizes much (gay) anti-social theory. The affective response in the archive consists of “fatigue, ennui, boredom, indifference, ironic distancing, indirectness, arch dismissal, insincerity and camp,” but he notes the limitations of this repertoire and favors a more dynamic set of emotions including “rage, rudeness, anger, spite, impatience, intensity, mania, sincerity, earnestness, over-investment, incivility, brutal honesty and so on.”While the problem with any constructive project is that it will always be problematic in one way or another, **it is still valuable** to carry out an imperfect project rather than to recoil with frustration over the impossibility of getting everything right. There is no way to be fully outside the context that we are at odds with, no way to overcome the limitations of language, no way to easily undo all our internalized responses. When I spent time with former BLA and Black Panther Party member Ahanti Alston, he emphasized a process-oriented, experimental form of action where you act without necessarily having all the details worked out. Because you can’t let yourself get trapped in inactivity and you will figure out more as you go. It’s a hell of a lot easier to perform these exercises in pure critique than it is to **actually engage something in an active way**. But like I said earlier, I don’t think Jack is all critique because he is offering an alternative strategy, whether we agree with its validity or not.A lot of the criticism raised in this brief conversation made me question and think through why I was initially so receptive and open to Jack’s ideas. For one, I encountered the ideas in the context of meeting Jack—who is an extremely thoughtful, energetic, and engaging scholar, not to mention a sweet person overall. But more importantly, Jack’s idea’s spoke to me on this different level—they were so visceral, so much about affectivities and affectivities in relation to the formation of politics. I have always kind of separated the two—the political ‘self’ and the self-destructive, over-feeling and dysfunctional ‘self’—because I felt that the two could not be reconciled, because politics seemed to demand a certain level of functionality and affective distance. Jack spoke of self-destructive behavior as a valid emotional response to the world we are confronted with. And maybe through my feminism I have internalized the idea that masochism and depression are things to be overcome, things that mark you as weak. Masochism, cutting, self-annihilation and so forth seem incompatible with feminism because they might be viewed as forms of self-punishment that arise from internalized sexism, misogyny, and of hatred for one’s status as woman. But maybe the self-destructive impulse arises when we realize that we are at odds with the system that surrounds us, when we realize that participation would mean symbolic death and we are fashioning a new kind of refusal.In a blog post titled The Artist Is Object – Marina Abramovic at MOMA, Jack uses the term “shadow feminism” to describe this feminist re-conception of masochism and the shattering of self through pain. He writes: In this genre, we find no “feminist subject” but only un-subjects who cannot speak, who refuse to speak; subjects who unravel, who refuse to cohere; subjects who refuse “being” where being has already been defined in terms of a self-activating, self-knowing, liberal subject. We find a feminism that stages a refusal to become woman and that locates this refusal deep in the heart of masochistic pain/pleasure dynamics? Yoko Ono, Cut Piece (1964) In his discussion of feminist performance art, Jack also discusses the masochistic and passive performance pieces of Yoko Ono’ 9 min “Cut Piece.” Jack is interested in exploring the negativity territory often associated with femininity. But this notion of feminine negativity is really nothing new, and I think Jack does not acknowledge the debt he owes to French feminism. Decades ago Xavier Gauthier wrote, And then, blank pages, gaps, borders, spaces and silence, holes in discourse: these women emphasize the aspect of feminine writing which is the most difficult to verbalize because it becomes compromised, rationalized, masculinized as it explains itself….If the reader feels a bit disoriented in this new space, one which is obscure and silent, it proves, perhaps, that it is a woman’s space. In my thesis on race, gender, and the practice of writing, I consider the appropriation of silences as a rhetorical strategies that disrupts the masculinist system of meaning. This perspective views silence itself as a rupture, as resistance to a system of signs that values presence and occupation over gaps and absences. The view of woman as non-subject can also be traced back to Jacques Lacan, who asserted that women occupy a state of non-being because they are merely a lack—a negative sign. The territory of femininity is marked by irrationality, madness, and silence because women are seen as fundamentally alienated by a phallocentric system of signification. But ultimately, I did not buy into this deterministic view and tended to side more with the approach of writers like Helene Cixous, who rejected death, the authority of the phallus, and the view of woman-as-castrated in favor of “limitless life.” And Audre Lorde, who—in an essay titled “The Transformation of Silence into Language and Action” wrote: I was going to die, if not sooner than later, whether or not I had ever spoken myself. My silences had not protected me. **Your silence will not protect you**…Because the machine will try to grind you into dust anyway, whether or not we speak. We can sit in our corners mute forever while our sisters and our selves are wasted, while our children are distorted and destroyed, while our earth is poisoned; we can sit in our safe corners mute as bottles, and we will still be no less afraid. Ultimately, I find that **a purely oppositional or negative politics has major limitations**, no matter how radical. Negative feminism and queer theory challenges the idea that participation is the only option. **But it doesn’t acknowledge that negative politics is still inscribed within the same framework. Negation isn’t a form of escape**. It can make you even more limited by the structure that surrounds you because it promotes an approach that is defined **exclusively by the structure**, can only think in a way that is **reactive**. This can make you even more stuck than if you were drawing on your context as a point of departure for constructing alternatives. Concluding Thoughts The issue, for me, does not come down to hope vs. cynicism, but figuring out how we can resist the tendency to normalize from the position of a privileged affective response or attitude. This means challenging the hegemony of happiness, which invalidates people who are too crazy or angry or fucked up by the world to function or participate in a polite way. With that said, I am not wholeheartedly for feminist and queer negativity as a singular perspective. I am interested in the mingling of destruction and construction—concurrent undoing and doing—and building my politics on spontaneity, dynamicness and an understanding of subjectivity as extremely volatile in order to account for radical emotional instability. Because our affective responses are in flux, **shifting our outlooks and we should be able to utilize a range of attitudes and approaches**. I’m wondering if it’s okay if I’m sometimes full of a whole lot of negativity and hope, wondering why we think of things as mutually exclusive or why it sometimes seems so hard for us to think of things as multiple.

**Negativity creates cycles of melancholy politics which lock in violence**. **Snediker 06**

(Michael, Visiting Assist. Prof. of American Literature @ Mount Holyoke College, *Queer Optimism*, pgs. 4)

My critical project arises from a sense that **queer theory, for all its contributions to our understandings of affect, has had far more to say about negative affects than positive ones. Furthermore, that in its attachment to not taking personhood qua personhood for granted, queer theory's suspicious relation to persons has itself become suspiciously routinized**, if not taken for granted in its own right. Risking charges of producing but another reductive binary, I shall for present, heuristic purposes be calling this tropaic gravitation toward negative affect and depersonation queer pessimism. It's worth noting that queer pessimism has as little truck with conventional pessimism as queer optimism has with optimism, per se. Still, **queer theory's habitation of this pessimistic field is cause for real concern. Melancholy, self-shattering, shame, the death drive**: these, within queer theory, are categories to conjure with. These terms and the scholarship fueled by them do not in and of themselves comprise queer theory. To argue that they do caricatures both queer theory and the theorists who have put these terms on the map. **These terms** - this queer-pessimistic constellation - nonetheless **have dominated and organized much of queer-theoretical discourse, even as they have often seemed immune to queer theory's own perspicacities.**

#### It doesn’t matter how great of an academic you are. Without a specific defense of action to be taken, you’ll never be the radical that the system needs because you just bind the revolution inside of a book. Instead, the meaningless production of the 1NC only recreates the system it critiques by attempting to combat monolithic ideals.

Bryant 12 (Levi Bryant is Professor of Philosophy at[Collin College](http://en.wikipedia.org/wiki/Collin_College)“McKenzie Wark: How Do You Occupy an Absnatraction” August 4, 2012 <http://larvalsubjects.wordpress.com/2012/08/04/mckenzie-wark-how-do-you-occupy-an-abstraction/> )

In the language of my machine-oriented ontology or onticology, we would say that we only ever encounter local manifestations of hyperobjects, local events or appearances of hyperobjects, and never the hyperobject as such. Hyperobjects as such are purely virtual or withdrawn. They can’t be directly touched. And what’s worse, contrary to Locke’s principle of individuation whereby an individual is individuated by virtue of its location in a particular place and at a particular time, hyperobjects are without a site or place. They are, as Morton says, non-local. This, then, is a central problem, for how do you combat something that is everywhere and nowhere? How do you engage something that is non-local? If an army is over there I can readily target it. If a particular munitions factor is over here, then I can readily target it. But how do we target something that is non-local and that is incorporeal? This is the problem with occupying an abstraction. Second, contemporary capitalism is massively redundant. This, I think, is what Wark is getting at when he speaks of contemporary power as “vectoral”. Under what Wark calls “vector power”, we have configurations of power where attacks at one site have very little impact insofar as flows can simply be re-channeled through another set of nodes in the network. Like a hydra, you cut off one head only to have another head appear in its place. The head can never be cut off once and for all because there is no single head. The crisis of contemporary politics is thus the crisis of the erasure of site. In the age of hyperobjects, we come to dwell in a world where there is no clear site of political antagonism and therefore no real sense of how and where to engage. Here I’m also inclined to say that we need to be clear about system references in our political theorizing and action. We think a lot about the content of our political theorizing and positions, but I don’t think we think a lot about how our political theories are supposed to actually act in the world. As a result, much contemporary leftist political theory ends up in a performative contradiction. It claims, following Marx, that it’s aim is not to represent the world but to change it, yet it never escapes the burrows of academic journals, and conferences, and presses to actually do so. Like the Rat-Man’s obsessional neurosis where his actions in returning the glasses were actually designed to fail, there seems to be a built in tendency in these forms of theorization to unconsciously organize their own failure. And here I can’t resist suggesting that this comes as no surprise given that, in Lacanian terms, the left is the position of the hysteric and as such has “a desire for an unsatisfied desire”. In such circumstances the worst thing consists in getting what you want. We on the left need to traverse our fantasy so as to avoid this sterile and self-defeating repetition; and this entails shifting from the position of political critique (hysterical protest), to political construction– actually envisioning and building alternatives. So what’s the issue with system-reference? The great autopoietic sociological systems theorist, Niklas Luhmann, makes this point nicely. For Luhmann, there are intra-systemic references and inter-systemic references. Intra-systemic references refer to processes that are strictly for the sake of reproducing or maintaining the system in question. Take the example of a cell. A cell, for-itself, is not for anything beyond itself. The processes that take place within the cell are simply for continuing the existence of the cell across time. While the cell might certainly emit various chemicals and hormones as a result of these processes, from its own intra-systemic perspective, it is not for the sake of affecting these other cells with those hormones. They’re simply by-products. Capitalism or economy is similar. Capitalists talk a good game about benefiting the rest of the world through the technologies they produce, the medicines they create (though usually it’s government and universities that invent these medicines), the jobs they create, etc., but really the sole aim of any corporation is identical to that of a cell: to endure through time or reproduce itself through the production of capital. This production of capital is not for anything and does not refer to anything outside itself. These operations of capital production are intra-systemic. By contrast, inter-systemic operations would refer to something outside the system and its auto-reproduction. They would be for something else. Luhmann argues that every autopoietic system has this sort of intra-systemic dimension. Autopoietic systems are, above all, organized around maintaining themselves or enduring. This raises serious questions about academic political theory. Academia is an autopoietic system. As an autopoietic system, it aims to endure, reproduce itself, etc. It must engage in operations or procedures from moment to moment to do so. These operations consist in the production of students that eventually become scholars or professors, the writing of articles, the giving of conferences, the production of books and classes, etc. All of these are operations through which the academic system maintains itself across time. The horrifying consequence of this is that the reasons we might give for why we do what we do might (and often) have little to do with what’s actually taking place in system continuance. We say that our articles are designed to demolish capital, inequality, sexism, homophobia, climate disaster, etc., but if we look at how this system actually functions we suspect that the references here are only intra-systemic, that they are only addressing the choir or other academics, that they are only about maintaining that system, and that they never proliferate through the broader world. Indeed, our very style is often a big fuck you to the rest of the world as it requires expert knowledge to be comprehended, thereby insuring that it can have no impact on broader collectives to produce change. Seen in this light, it becomes clear that our talk about changing the world is a sort of alibi, a sort of rationalization, for a very different set of operations that are taking place. Just as the capitalist says he’s trying to benefit the world, the academic tries to say he’s trying to change the world when all he’s really doing is maintaining a particular operationally closed autopoietic system. How to break this closure is a key question for any truly engaged political theory. And part of breaking that closure will entail eating some humble pie. Adam Kotsko [wrote a wonderful and hilarious post](http://itself.wordpress.com/2012/08/04/the-practical-know-how-of-humanities-academics/) on the absurdities of some political theorizing and its self-importance today. We’ve failed horribly with university politics and defending the humanities, yet in our holier-than-thou attitudes we call for a direct move to communism. Perhaps we need to reflect a bit on ourselves and our strategies and what political theory should be about.

2ar

At the top I am going for theory. First of all, disclosure comes first- how am I supposed to be able to engage with queerness if I don’t even know theyre reading it? They say contact solves but it doesn’t- it gives nwegative incentive to take a long time to respond. Even if they say theyd do it, its arbitrary