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About

The Claremont Journal of Law and Public Policy is an undergraduate journal published by students of the Claremont Colleges. Student writers and editorial staff work together to produce substantive legal and policy analysis that is accessible to audiences at the five colleges and beyond. The CJLPP is also proud to spearhead the *Intercollegiate Law Journal* project. Together, we intend to build a community of students passionately engaged in learning and debate about the critical issues of our time!

Submissions

We are looking for papers ranging from 4 to 8 single-spaced pages in length. Our journal is especially receptive to research papers, senior theses, and independent studies or final papers written for classes. Papers need not be on American law or public policy. Students in any field of study are encouraged to submit their work, so long as their piece relates to the law or public policy.

Please submit your work (Word documents only) and direct questions or concerns by email to info.5clpp@gmail.com. We use the Chicago style for citations. Include your email address on the cover page.

Selected pieces will be published in the print edition of the *Claremont Journal of Law and Public Policy*. Other pieces may be selected for online publication only. Due to the volume of submissions that we receive, we will only get in touch with writers whose work has been selected for publication.

Letter from the Editor-in-Chief

Dear Reader,

Happy New Year, and welcome to the ninth print edition—Vol. 5, No. 2—of the *Claremont Journal of Law and Public Policy* (CJLPP)! After reviewing many highly-qualified submissions, the editorial team is delighted to feature several particularly stimulating papers and two abridged interview articles in this issue. For our digital content as well as submissions from across the U.S. and overseas, please be sure to visit our website at www.5clpp.com.

The articles you are about to read are all products of several rounds of editing. I would like to express my sincere gratitude to the gifted writers whose work the editorial board selected for this issue; senior editors Audrey Jang, Arthur Chang, Désirée Santos, Emily Zheng, Isaac Cui, and Jerry Yan—all of whom dedicated time to evaluate submissions and finalize edits with the authors during winter break; outgoing interview editor Matilda Msall, who will return to the journal after her semester abroad; digital content editors Allie Carter and John Nikolaou; and design editor Noah Levine.

2017 was a truly rewarding year for the journal. We dramatically increased the frequency with which we publish blog and interview articles, welcomed new members, partners, and external contributors alike, increased the number of print editions, streamlined the distribution process, diversified the range of events we host, introduced our alumni network, and collaborated on brainstorming other ideas to further facilitate important dialogues on law and public policy in Claremont and beyond. Looking ahead, I am sure that 2018 will prove itself to be another greatly fulfilling year for this organization, thanks to all of all highly-dedicated members.

In my last Letter from August, I expressed the journal staff's excitement about launching the *Intercollegiate Law Journal* (ILJ) with CJLPP's collaborators. We are thrilled to share that together with our partner journals, we have successfully launched the ILJ website and established a regular publishing schedule to feature the best undergraduate legal and policy writing from the U.S. and Canada. We invite you to visit www.intercollegiatelawjournal.com, and welcome new partners to join us. Special thanks should go to Greer Levin, our highly-competent chief operating officer who oversees the business side of the journal, design editor Noah Levine, outgoing webmaster Alice Zhang, and business directors Ali Kapadia, Franco Liu, and Kim Tran, for taking great initiatives throughout the initial phases of this ambitious new project.

Complete with new project managers Erin Burke and Elise Van Scoy, webmaster Wentao Guo, and layout designer Daphne Yang, the spring 2018 business team has a number of exciting events and other plans lined up, including more talks by legal and policy experts, pre-law events for local communities, data journalism proposals, etc. We especially encourage readers in the Southern California area to follow our Facebook page for regular updates for events that may interest you. Meanwhile, our new interview editor, Kaela Cote-Stemmermann, is also arranging a number of promising interview opportunities for CJLPP writers, who will strive to share thought-provoking interview articles with readers throughout the semester.

I would like to take this opportunity to welcome new staff writers and digital content writers. Meanwhile, I am very looking forward to seeing the products of the strengthened off-campus correspondence program, for which we now have seven off-campus correspondents based in Washington D.C., the United Kingdom, Morocco, Denmark, and France. Not only will this program, which we previously had in place informally, allow our members to continue contributing to the journal while being away from campus, it will also offer CJLPP readers more firsthand access to policy and legal analysis, as well as potential interviews, from various parts of the world. Isaac Cui is our inaugural international/D.C. editor.

On a personal note, this will be my last semester serving as editor-in-chief. Reflecting on my college career as a second-semester senior now, I am most grateful for the brilliant opportunity to grow alongside the journal and its people throughout the past three and half years, and cannot wait to keep up with the organization's future achievements.

As always, I would like to close my Letter by thanking our faculty advisor, Prof. Amanda Hollis-Brusky, for her continued guidance and mentorship. Our journal is also indebted to the Salvatori Center, the Atheneum, the 5C politics, legal studies, and public policy departments, for their support over the years, as well as to all of our readers, partners, alumni, prospective members, and other supporters. If you enjoy reading our articles and would like to share your own writing, keep in mind that the CJLPP always welcomes submissions to our blog and future print editions. Please refer to the "Submissions" page on our website for details. In addition, for our Claremont readers, if you feel that you could be a valuable addition to our team, I invite you to visit our "Hiring" page for potential openings or email us at info.5clpp@gmail.com.

Happy Reading!

With Warmest Regards,
April Xiaoyi Xu
Editor-in-Chief

Lifting the Veil: America's Foster Care to Child Trafficking Pipeline

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Introduction

Child trafficking in the United States is becoming an increasingly difficult battle to win. In 2016, the National Center for Missing and Exploited Children (NCMEC) released a report estimating that one out of six child runaways disclosed to NCMEC were likely victims of sex trafficking.[1] Of the 18,500 reported runaways, approximately 86 percent of these children were either in the custody of social services or foster care at the time of their disappearances.[2] These statistics severely underestimate the magnitude of child trafficking in America because of underreporting and a lack of public awareness on the issue.[3] While there may be disagreement regarding the exact population of trafficked children in America due to varying definitions of trafficking and methodologies when studying this topic, the United States Administration of Health and Human Services on Children, Youth and Families has found that a consistent 50 to 90 percent of child trafficking victims are involved with child welfare services.[4] This demonstrates that a foster care to child trafficking pipeline exists in the United States. By taking a closer look into the system that is designed to "promote the safety, permanency, and well-being of children, youth, and families," my argument will highlight the ways in which the United States is inadvertently contributing to this growing epidemic through: conflicting family welfare and child protection goals, inconsistent state-by-state foster care policies, lack of structural and emotional support for caseworkers to perform their duties effectively, and a continued effort to keep child trafficking in the U.S. a well-kept secret from the public.[5]

Overview of Foster Care in United States

Foster care is a provisional service provided by states for minors who are unable to live with their guardians.[6] Laws, legislation, and regulatory actions constitute the trifecta of federal engagement to which states are bound. Some of the most critical pieces of legislation that have worked to essentially standardize child protection in America include:

- The Child Abuse Prevention and Treatment Act outlines the federal government's approach to addressing and preventing child maltreatment in America, the Adoption Opportunities program, and The Abandoned Infants Assistance Act.[7]
- Title IV – B of the Social Security Act "promote[s] State flexibility in the development and expansion of a coordinated child and family services program." Under this Title, States and Indian Tribal Organizations are eligible for payments only when the Secretary has approved their respective plans to address child welfare in their territories.[8]
- Title IV – E of the Social Security Act outlines federal payments for foster care and adoption assistance programs, which also must be approved by the Secretary to be eligible for payments. This Title also addresses foster care maintenance and federal funding that may be allotted for State programs geared towards assisting those who are projected to remain in the foster care system until age eighteen.[9]

Individual states may exercise the freedom to develop plans of action that further augment the nation's effort to support at-risk youth so long as it meets the conditions outlined in federal law. The issue, however, lies in the discrepancies among states' varying child welfare statutes. For example, according to California's Health and Safety Code § 1529.1; DSS Manual Title 22, § 89405, foster care guardian applicants must complete the following courses, seminars, conferences, or training accepted by the licensing agency to meet the training requirements, including, but not limited to:

- Child development
- Recognizing and assisting a child with learning disabilities
- Infant care and stimulation
- Parenting skills
- The complexities, demands, and special needs of children in the home
- Building the self-esteem of a child
- Recordkeeping
- Caregiver rights, responsibilities, and grievance process
- Licensing and placement regulations
- Existing laws and procedures regarding the safety of foster youth at school, as specified in the California Student Safety and Violence Prevention Act of 2000.[10]

Whereas Georgia's foster care applicants under Rules & Regs. r. 290-9-2.07 must be provided with an overview of what being a foster parent entails as well as training on the following topics:

- The agency's grievance policies and procedures
- Annual training requirements:
    1. If child more than twelve months old, at least fifteen hours of training relevant to type of child placed
    2. If child younger than twelve months old, at least eight hours of training
- The agency's policies and procedures for behavior management techniques and emergency safety interventions
- Child abuse recognition, reporting, and investigation procedures
- Characteristics of children served and their developmental needs, including special needs, when applicable
- The agency's policies and procedures for handling medical emergencies and managing use of medications by children in care.[11]

While each state places emphasis on topics such as catering to the specific needs of a child and grievance processes, California assumes a more holistic approach to bridging the caregiver-foster child gap than Georgia.

The inconsistencies across state policies regarding more critical topics may be the difference between a foster child's successful transition to a loving family and a foster child's re-traumatization.

Issues in Foster Care System

Policymakers have been attempting to untangle themselves from the web of politics, money, and prioritization that constrains the foster care system in the U.S. for decades now. At the heart of most foster care narratives in America is a lack of stability in low-income homes, which leads to an increase in stress on families. This often manifests in neglect or abuse of any children that may reside in the same home.[12]

To tackle the issues of familial poverty and child maltreatment in America, President Bill Clinton enacted the Temporary Assistance to Needy Families (TANF) in 1996. The premise of this bill is to grant conditional assistance to families in need. While providing a safety net of sorts, TANF also aims to encourage parents/ guardians to engage in the workforce so as to avoid dependency on governmental assistance.

The conflicting goals of family welfare and child protection play out in a few ways. If familial poverty were to increase, the demand for child protective services would also increase due to their strong interrelation. The cost required to employ child protective services when there is cause for concern is projected to "outstrip" the economic benefits made by the "families who succeed in the labor market."[13] Therefore, it is in the best interest of the United States to invest in welfare programs that support families in need in order to avoid the heavy costs of protective services in the long term.

In 1995, the federal government spent approximately $12,000 per child on "foster care maintenance and administration costs," but only $1,012 for each recipient of Aid Dependent Families and Children (ADFC).[14] The drastic investment disparity between preventative and reactionary methods is still seen today. According to a 2016 report released by the Children's Bureau, States planned to allocate 45 percent of their grant funds on protective services and less than 10 percent on family support/ preventative measures. This illustrates that the United States is more inclined to deploy mass amounts of resources to assist children in already harmful conditions than financially aiding struggling families as a preventative measure.[15]

The federal government has made its priorities clear when handling child maltreatment and family welfare. Though billions of dollars are funneled into child protective services that may not have been necessary if familial circumstances were ameliorated, the United States is determined to avoid creating dependent families at all costs. The condition to participate in the work force in order to obtain any form of assistance under TANF inadvertently creates another issue for recipient families to resolve. The pressure to not only find work, but to also find adequate placement for children to stay is an extremely pervasive narrative among economically marginalized families. While the intention of TANF's work condition is understood, the harsh realities of securing gainful employment and having access to a suitable form of child care are overlooked and make it difficult for struggling families to achieve stability.

Overview of Child Trafficking in the United States

Child trafficking in the United States is an issue that extends far beyond the scope of what many Americans can even conceptualize. Trafficking of individuals occurs in every state of the nation and is the most lucrative underground business behind illegal drugs and firearms. According to a 2014 International Labour Organization report, human trafficking netted $150 billion with commercial sex exploitation alone raking in about $99 billion in profits.[16]

Particularly susceptible populations are victims of sexual abuse and runaway children. In a study funded by the U.S. Department of Health and Human Services, "between 21 percent and 42 percent of runaway and homeless youth were victims of sexual abuse before they left their homes."[17] The Dallas Police Department found a significant correlation that identified chronic runaways as an extremely vulnerable population to "recruitment by traffickers."[18] This phenomenon is a result of the subculture that exists among pimps and prostitutes that allows traffickers to generate specific profiles of ideal victims and seduce these vulnerable youth accordingly. Children who have experienced sexual abuse often experience one or more of these emotional injuries: "traumatic sexualization, betrayal, powerlessness, and stigmatization."[19] These emotional injuries often color victimized children's behavior and impact who they will interact with to receive any form of acceptance, love, and security – making them prime targets for pimps.

Why Foster Care Children Are at Risk to Be Trafficked

Foster care children are a particularly susceptible population to traffickers and are pursued specifically because of their background of abuse and neglect.[20] Typically having experienced a history of physical, sexual, emotional abuse or some traumatic event, children in the foster care system often exhibit patterns of impulsivity, mistrust, and insecurity. As a result, tactics such as exercising control over victims by means of violence, falsely promising young recruits a life of love and security, and threatening victims to remain obedient are extremely effective in creating and reinforcing the ideal relationship between a trafficker and victim. Through force, fraud, and coercion, pimps not only teach foster recruits to expect violence and dodge law enforcement, but they also manipulate their victims to feel societal shame and rejection in order to curb temptations to reach out for help.

What Happens to These Children When Contacted by a Pimp

Once a child is in the hands of a pimp, there is often a very structured culture that the new recruit is introduced to. The primary goal of sex trafficking is to rake in big profits per victim. In order to do this, pimps often create advertisements and post them on websites such as Backpage, Craigslist, and various online chat rooms to get dates and build a clientele for their victim. The money that is made by each child trafficking victim is turned over to the pimp in its entirety. That money is then used to support the pimp and any upkeep he/she deems is necessary to maintain his/ her child prostitute. The victim experiences a complete loss of autonomy–from what sexual acts he/she will engage in to how many purchasers he/she will have to service per night to who he/ she will communicate with. Child trafficking victims often live in a constant state of fear as pimps often employ tactics of physical, mental, and emotional abuse if their "stable" is behaving "out of pocket."[21]

Why This Is Important

Abducting, coercing, and sexually exploiting children for profit is our modern day slavery. We have encountered a technological age where adults and children alike are being bought and sold as easily as used cars on Craigslist. The United States is continually focused on the prospect of its future; however, we as a nation have jeopardized our own future by not allocating the necessary policy and media attention to address child trafficking on an accessible enough platform to educate the public. By negating the magnitude of commercially exploited children in America, the United States is not only endangering more children, but it is also aiding and emboldening sexual predators to continue their pursuits under the radar. Child trafficking is an epidemic occurring right under the noses of law enforcement and the public. International Boulevard in Oakland, California, Figueroa Street in Los Angeles, California, Multnomah County in Oregon, and

Fulton Industrial Boulevard in Atlanta, Georgia are just a few internationally known human trafficking corridors that are active today. With child pornography and sex advertisements available on the surface web, the dark web is only an exacerbation to this already growing enterprise.

Issues in the Legal System

Protecting foster care children from the dangers of child trafficking starts with remedying the legal issues that further break down an already shaky system. As previously mentioned, child protection and family welfare go hand in hand. With the majority of neglected and abused children coming from homes that are burdened with financial and other forms of stress, it is critically important that the U.S. government, social workers, and attorneys are equipped to assist recipient families of TANF and child protection services. Navigating between the requirements of both TANF and child welfare agencies can be extremely difficult and almost impossible for dual-system families, which can pose serious risks for families if they feel as though they have to hide information from caseworkers in order to maintain their active status in both welfare systems.

Another serious issue that needs to be addressed through legal restructuring is the overloading of cases on social workers. Budget cuts, low salaries, and lack of sufficient support from child welfare agencies have all contributed to caseworkers' high turnover rate. In such a high pressure environment with minimal compensation for emotionally involved and high-stakes cases, social workers are often spread far too thin and inevitably fail to adequately serve their clients: children awaiting permanent families are backlogged because of overworked caseworkers, foster kids go unvisited for weeks or even months at a time – leaving children at risk of remaining in "inappropriate" placement homes that may threaten their physical, mental, and emotional health.[22]

A third area of focus that is crucial in protecting foster children long-term is focusing on those who age-out of the system. This concern is somewhat dependent on alleviating the workload on social workers because as "time goes by, prospects of landing in safe, loving, permanent homes grow dimmer for foster youth."[23] According to a 2015 report published by the Administration for Children and Families, more than 20,000 foster children who had case goal plans of family reunification or placement in permanent homes had aged out of foster care, and 17,000 had case goal plans of emancipation.[24] The problem with aging out of the system is that these newly minted adults are suddenly expected to be self-sufficient individuals without a guiding support system – essentially setting graduates of the foster care system up for failure.

Trump's 2018 Proposed Budget Cuts

While it is clear that the United States foster care system is in dire need of restructuring through policy reform and additional funds, a key way to prevent at-risk youth from ending up in the system in the first place is by strengthening the family unit. Providing support to struggling families is not only important to the overall welfare of the economy and society, but is also vital in protecting children from being victims of unfortunate and preventable situations.

President Trump's current 2018 budget proposal, however, will not only ignore this growing epidemic; it will likely exacerbate the foster care to child trafficking pipeline. Though he increased the foster care and adoption assistance allowance by $224 million, this 0.2 percent increase is countered by a series of major cuts to family assistance funds.[25] Listed are just a few of the proposed budget cuts as it pertains to family welfare:

Temporary Assistance for Needy Families (TANF)	-$21.9 billion	-12.9%
Child Support and family support programs	-$840 million	-1.8%
Supplemental nutrition assistance programs (food stamps)	-$193.6 billion	-25.3%
Project-based rental assistance	-$14.5 billion	-11.7%

The defunding of such critical programs completely overlooks the strong, established correlation between family welfare and child protection and puts millions of children at risk for removal and replacement. These budget cuts leave struggling families without a safety net and create volatile living conditions between family members as stress surmounts. These volatile living conditions that often manifest into neglect and abuse – the very issue that the United States is seemingly dedicated to eradicating – are exactly what child traffickers and predators prey on.

What Needs to Be Done

Allocation of money and resources are two of the most pivotal changes that need to occur to protect foster care children from child trafficking. Federal money needs to be redistributed to programs that support struggling families to find jobs, housing, child care, food, and other basic necessities. In this way, millions of cases of child abuse and neglect can be mitigated and removal from the home can be avoided. This not only protects children from traumatization, but it also protects them from added feelings of abandonment, marginalization, and shame that are typically results of being placed in out-of-home care.

Resources such as more solidified training sessions for foster care parents and facilities, incentives to encourage more individuals to take up social work, federal programs that assist with the emotional, mental, and even physical rehabilitation of foster youth, and dissemination of information regarding local safe houses and phone numbers that foster children are able to contact in the event that they run away are also important mechanisms that can further protect and empower at-risk children from falling victim to the ploys used by traffickers and pimps.

Through implementing a philosophy of child welfare that emphasizes both rehabilitation and empowerment, the United States foster care system can reshape the way foster children view themselves, their potential, and those around them. A focus on character development and reintegration into their families and society, as opposed to quick fixes, can have immense positive effects on not only foster children as they grow to contribute to their communities, but also killing the supply of vulnerable foster youth for pimps and traffickers.

In addition to money, resources, and a restructured approach, the United States must end its silence around the topic of child trafficking in America. To even scratch the surface of this epidemic, a united commitment among law enforcement, policymakers, and community members must be established. Children are being bought and sold on some of the most well-known and populated streets, raped in Disneyland hotel rooms, and exploited on the

internet. The pervasiveness of this issue is beyond the reach of any one sector of society. Media attention, billboard ads, public information sessions in areas that are red-flagged for trafficking, and mandatory training for all occupations that come into contact with children are all part of the aggressive attitude we must take in order to eradicate child trafficking in the United States. By shedding a light on this heinous subculture, the United States can effectively strip pimps and traffickers of their ability to rely on the public's lack of knowledge on the issue and inspire a coalition of child trafficking task force members across the nation.

Conclusion

Modern day slavery has found its grip onto the lives of foster care youth in America. Extremely high profit margins are achieved through the continuous turnover rate of a single child's body and sustained by the high-demand market of sex with a minor. While the United States has made its stance on child trafficking clear on paper, the denial of its own domestic branch of this epidemic only furthers America's complacency in the commercial exploitation of children. This denial paired with the defunding of crucial programs that aim to reunite and stabilize families plays right into the hands of pimps and traffickers across the United States and needs to be corrected.

In order to stop feeding into this pipeline, the United States must: remedy its historically reactive approach to dealing with child abuse and neglect and reinvest money into family welfare programs and services that aim to keep families intact during trying times; actively recruit case workers with benefits and incentives so as to ease the current load on social workers and improve contact between agency and child in need; implement a program within the foster care system that is specifically designed to assist children who are about to age-out of the system with the necessary tools to reintegrate with their families and move forward with their lives; and restructure the philosophy that drives the current foster care system to not merely protect, but empower foster care youth.

These mechanisms of change are just the first steps to tackling the foster care to child trafficking pipeline. However, instituting a multi-dimensional and collective action approach will not only revolutionize our current welfare system to genuinely protect at-risk youth from danger, it will also signal future efforts to address the practices that allow for this industry to thrive •

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Private Military Corporations and Federal Transparency

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Staff Writer

In September of 2007, the private security forces of Blackwater massacred 17 Iraqi civilians in Nisour Square, Baghdad. Overnight, Blackwater became a household name, and the role of similar private military companies within the U.S. military actions was thrust prominently into media scrutiny. Part of the publicity and widespread condemnation that made Blackwater a household name was also the Iraqi government's vehement and immediate response. Iraq's Interior Ministry demanded that Blackwater forces be expelled from the country within twenty-four hours of the shooting.[1] Questions regarding the use and oversight of private military forces unveiled how little the public was aware of the actions and legality of private military companies (PMCs), while simultaneously their scope and influence was developing rapidly throughout the post-9/11 era. During an interview about the massacre with Erik Prince, founder and CEO of Blackwater, these conflicts of transparency and federal complicity became starkly evident. Prince refused to answer questions regarding the details of Blackwater's profits, stating that "we're a private company. The key word there is 'private.'"[2] This statement reflects a loophole in the mandate for transparency in federal spending, especially given that 90 percent of Blackwater's parent company's profits are from the U.S.-federal government.[3]

The purpose of this study is not to argue for or denounce PMCs, but to rather comprehensively evaluate the role that PMCs have come to play in U.S. international conflicts. In this article I will examine the historical precedent of PMCs, evaluate "pessimist" and "optimist" conceptions of how PMCs can influence a state, and ultimately grapple with the misleading and un-transparent nature of these forces and their complicity in government surveillance and intelligence. I will conclude with a discussion of how a dependence on PMCs for military might creates a hole in federal transparency because citizens do not have a right to demand information from private companies to the same extent that they have to right to demand transparency from a democratic government.

Introducing PMCs

Peter Singer, former Senior Fellow at the Brookings Institute and one of the first political scientists to isolate and discuss in-depth the rise of PMCs, defines these forces as "corporate bodies that specialize in providing military skills."[4] PMCs are business firms whose product is intimately tied to warfare and military services, including but not limited to "combat operations, strategic planning, intelligence, risk assessment, operational support, training, and technical skills."[5] The rise of these PMCs blurs public-private sector divisions; traditionally, military services have been relegated a special position outside of the private sector, considered best left to governments and financed through citizen taxes, by even the most radical libertarian thought.[6] Samuel Huntington delineated this difference in The Soldier and the State, "while all professions are to some extent regulated by the state, the military profession is monopolized by the state."[7] Therefore, the post-Cold War rise in PMCs has come to undermine and break down the state's traditional monopoly on violence by relegating some of the responsibility to the private sector.[8]

The Rise of PMCs in the Post-Cold War Era

PMCs have spread to become a global phenomenon, acting on every continent except Antarctica.[9] These "mercenaries in modern dress," as Fred Smoler dubs them, arose from both the supply and demand sides; after the end of the Cold War nearly seven million soldiers were no longer employed by the warring nations, and "some of these were highly trained men from first and second world states…. willing and able to sell their services on the open market."[10] Relatedly, on the demand side many countries were now stripped of their Cold War patrons and desperately were seeking security forces.[11] In the United States, a massive wave of privatization in the Reagan years had drastically shifted many federal operations to the private sector.

However, this privatization did not extend to the military until Dick Cheney's time as Defense Secretary from 1989-1993.[12] This massive privatization drive manifested itself in the military as massive cuts to funding for training and facilities. PMCs such as Blackwater benefited from these cuts because as federal military facilities suffered, they were able to profit by providing top-notch alternative training facilities. The United States did not reach its current scope of dependence on PMCs until the Iraq War, when the Bush administration's occupation required many more qualified soldiers than was possible to obtain even from the regular services, reserves, U.S.-allies, or Iraqi security forces. The privatization was advantageous for public optics, reducing the firestorm that would accompany each announcement of troops committed overseas. A higher volume of contractors corresponded to a more acceptable number of federal troops. So, from Blackwater's inception it was politically and logistically advantageous for federal involvement. Additionally, Molly Dunigan explains in her provocatively titled Victory for Hire another political advantage of PMC use: democratic nations can be less selective as to what international conflicts they intervene within, because private companies do not have to answer to constituents.[13] Perhaps most demonstrative of PMC proliferation is the fact that during WWII 10 percent of U.S. forces were contracted, while during the Iraq and Afghanistan wars 50 percent of U.S. forces were contracted.[14]

Optimist vs. Pessimist Evaluations of PMCs

Criticism and outlook toward PMCs can adopt a "pessimist" or an "optimist" approach, as theorized by Deborah Avant in *The Market for Force*. The optimist approach regards PMCs as an asset and additional resource to troops, to pass off the work they do not want to complete and increase efficiency.[15] An example of a PMC intervention that lends itself to this "optimist" argument is the Brown & Root Services intervention in the Balkans during the late 90s. The Kosovar uprising against Serbian abuses erupted into a civil war that developed into an serious humanitarian crisis.[16] The Milosevic forces drove hundreds of thou-

sands of Kosovars out of their provinces as part of an ethnic-cleansing campaign, creating an international refugee crisis. However, despite the devastation, the U.S. political climate at the time was not in favor of the campaign, and getting the political support to call-up reserves was difficult. Therefore, the U.S. government outsourced the issue to the Texas-based PMC Brown & Root Services, which constructed housing for refugees as well as ran a supply system for U.S. forces in the region. U.S. forces were fed, housed, and otherwise supposed by Brown & Root, and the company was hailed by General Dennis Reimer as a crucial component of the peace-seeking mission.[17] This benevolent example of how PMCs can be hired by the government to support campaigns that cannot amass widespread political support can be hailed as an efficient use of PMCs. To respond to this optimist evaluation of PMCs, however, a pessimist perspective would additionally note that Brown & Root was also contracted by the federal government to build the Guantanamo Bay detention center for $45 million.[18]

The pessimist approach draws largely on the argument presented by Singer, that is, the privatization of military power usurps the state's monopoly on violence and puts it into the hands of corporations. Ultimately, defense policy will reflect profit interests rather than political motives, resulting in the commodification of violence as a "private commodity rather than a public good."[19] Exemplar of a pessimist evaluation is the criticism attacking the moral quandary of PMCs. They are profit-producing enterprises, arguably amoral because they use military force for profit, unlike national militaries which are posited as fighting to preserve national identities and keep countries safe. Additionally, incidents of mass violence are often justifications for the growth of PMCs. For example, Blackwater was not offered its first General Services Administration (GSA) contract until 2000, after the horror of the Columbine massacre in 1999.[20] As Scahill describes, business for Blackwater only began to boom after two landmark terrorist attacks attributed to Osama bin Laden. The first was the October 2000 suicide attack on the USS Cole, which resulted in a 35.7 million dollar contract with the U.S. Navy.[21] The second was the largest terrorist attack in U.S. history: the 9/11 attack on the World Trade Center. By 2008, Blackwater had grown its GSA contracts from its initial $125,000 to over one billion dollars, within an eight-year timespan.[22] One of the founding Blackwater members, Al Clark, noted that "Osama bin Laden turned Blackwater into what it is today."[23] Despite how PMCs may be morally construed in contrast to the U.S. Military, the profitability of these mass-scale terrorist attacks for companies such as Blackwater is undeniable.

However, neither a totally optimist nor totally pessimist evaluation of PMCs stands true, due to the ever-shifting nature of PMC roles, which can be affected by an increase in publicity and investment. For example, the initial idea for Blackwater is attributed to Al Clark, one of Prince's mentors in the Navy SEALs. Scahill explains that "the concept grew out of Clark's experience as a Navy firearms trainer, when he recognized firsthand what he saw as an inadequate infrastructure for what was one of the most vaunted forces in the U.S. military machine."[24] True to this purpose, when Blackwater was first launched, it mainly offered top-notch facilities and training. Blackwater was exceptional because it offered tactical shooting training, while in contrast other private training was run by "trophy shooters."[25] Additionally, it was lauded for its top-tier facilities: Steve Waterman, a journalist assessing Blackwater for Soldier of Fortune wrote that "I would put Blackwater ahead of any of the civilian or military training sites I have visited."[26] Scahill describes, "by late 1998, Blackwater boasted a nine-thousand-square-foot lodge with conference rooms, classrooms, lounge, pro shop, and dining hall. A wide variety of ranges including an urban street facade and a pond for water-to-land training were just some of the early offerings."[27] It was not until the beginning of the Iraq War that Blackwater formed Blackwater Security Consulting and began to offer soldiers-for-hire, that made the company name so notorious.[28] In fact, Blackwater's shift from mainly just training facilities to combat roles closely coincided with Al Clark's split from the company, remarking vaguely that Blackwater had no longer become a place "built by professionals for professionals."[29] So although Blackwater may have initially began as a benign training facility, with investment growth and leadership changes, it became something wholly other.

To Know the Unknowable

It is important to acknowledge the shifting role of PMCs, from the post-Cold War era to the post-9/11 world. As Axelrod and Dubowe's observe, "In the post-9/11 world the vast majority of PMCs specialize in consultation, logistics, training (often of a specialized and highly technical nature), intelligence and surveillance, and security (including escort, close protection, force protection, and threat analysis) rather than in operations involving offensive action directly against an enemy."[30] This shift from overt military interventions fulfills the demand for intelligence and surveillance that was called for after 9/11. In an optimist evaluation, therefore, PMCs shifted their role to the market demands. However, this also augments a lack of transparency and knowledge of what role PMCs are playing in international military operations. In trying to frame their role as "intelligence agents," they are in fact obscuring the actual extent of their involvement. As PMCs shift to operating mostly behind-the-scenes through surveillance and intelligence, it will become even more difficult to parse out their actions and level of involvement.

Peter Singer expresses frustration with the lack of transparency surrounding PMCs is his important work, *Corporate Warriors*, "Because these firms' operations are almost always controversial and secrecy is often the norm, research is difficult."[31] In fact, PMCs contracted out do not report to Congress, therefore evading federal oversight and further obscuring the actions of these companies, even from the elected officials who technically contract them.[32] For example, months before the 2007 Nisour Square shoot-out members of Congress sent letters to the Department of Defense requesting documents related to Blackwater contracts, only to receive a reply months later with none of the actual requested documents.[33] If Congress cannot even access documents for required federal oversight of PMCs, then how are these organizations to be regulated?

Additionally, Singer notes that many companies try to appear open while actually covering up the scope of their activities. This ambiguity about the actual roles and func-

tions of PMCs is further complicated by the fact that recently much of the private military industry has been consolidated by large firms who then present themselves as wide-scale engineering and logistical firms, yet another layer over the intelligence and surveillance narrative.[34] Axelrod notes that "many present themselves as security consultants, even if they actually perform operational services."[35] These operational services are clearly evident in the media, even despite PMC rhetoric of surveillance and intelligence. For example, in 2015, a program once managed by Prince was discovered secretly sending Colombian troops to fight in Yemen, on behalf of the United Arab Emirates.[36] In the same year, South African mercenaries played an increasingly decisive role in Nigeria's fight against Boko Haram.[37] In 2016, an increasing number of Russian mercenaries fought on the ground in Syria.[38] There is no shortage of examples of PMC direct military intervention.

After the 2007 Blackwater watershed moment, the company essentially fell-apart under public scrutiny. Blackwater's name was changed to Xe Services LLC in 2009, and then changed again to Academi in 2011.[39] Erik Prince stepped down as CEO in March 2009, although he remained chairman of the board and is still involved with other PMC services, as exemplified by his involvement in sending Colombian forces to Yemen.

Mercenaries vs. PMCs: A Legal Differentiation

Some scholars have noted that mercenaries are not simply profit-seeking private companies but rather are politically implicated through their corporate structures. In his review "Mercenaries and Markets" Fred Smoler explains that the rise of the "modern state" has conventionally been understood as characterized in part by the replacement of mercenary armies with national armies.[40] Smoler criticizes this understanding to be "inaccurate" because of the far more subtle ways PMCs have worked their way into the fabric of the American military.[41] I would argue that this has been made possible by the modernized manifestations of mercenary forces in the post-Cold War era. In order to establish their legitimacy, contemporary PMCs have been contrasted with more traditional forms of mercenary forces, which have been branded as antiquated and outdated compared to the newer manifestation, which contains the following "markers of legitimacy."

PMCs' greatest difference from traditional mercenaries is that they are corporatized. Both Axelrod and Singer note that the main way PMCs are legally justified is through the language of corporatization, a largely emergent theme during the 80s.[42] Contrasted to individual mercenaries who choose to offer their services for their own ends, whether that be for money, adventure, or even to sate a dark and pathological desire for murder, PMCs are organized as corporations and therefore are structured to seek profit. Their goals fit into economic models of profit-seeking businesses; PMCs profit openly and are subject to taxation laws and may even be subject to shareholders if they are publicly traded, therefore requiring a certain degree of transparency.[43] Many PMCs are also in the game for the long haul, unlike their mercenary counterparts who might just be trying to make a quick buck. Their necessary commitment to the long-term, therefore, creates a motive for moral responsibility and good outcomes in order to assure continued interest in their services.

The corporatization of PMCs often links these military services to larger parent corporations that may otherwise be uninvolved with military actions. Vinnell, a well-known PMC now based in Virginia was originally founded as a construction firm and helped to build the Los Angeles freeway and Dodger Stadium. Now Vinnell almost exclusively functions as a military outfitter, supporting the modernization effort of the Saudi Arabia National Guard, as per a 1975 deal. Perhaps even more significant, Vinnell is only one branch of the larger corporation BDM, which is owned in part by the Carlyle Group, an investment firm that includes members such as former Secretary of State James Baker and former Secretary of Defense Frank Carlucci.[44] These political connections have fueled the argument that these supposed "markers of legitimacy" are actually politically motivated. It is a popular notion that PMCs are nothing more than "front companies" for governments, essentially "covert public entities with political rather than economic motivations." [45] Axelrod and Dubowe address this argument, asking "How legitimate is too legitimate?"[46] While on one hand, it might be safer that contemporary PMCs are legitimized through economic and political institutionalization, Axelrod and Dubowe note the dangers of a PMC becoming so attached to larger corporations that have intimate links with government officials and essentially begin to act as proxies for the government itself. This becomes especially tricky when we consider how the government benefits from these extra-constitutional military forces, as "their distance and disconnection from government provides officials with a screen from public scrutiny as well as from congressional questioning."[47] The plausible deniability that these private military forces allow shields government officials from having to answer questions about PMC actions.

Conclusion

Regardless of whether an optimistic or pessimistic evaluation of PMCs holds true, the fact that the national military is increasingly contracting out all of its operations to private, corporate, multi-billion dollar PMCs constitutes serious implications for federal transparency As PMCs become intricately involved with the intelligence, surveillance, and combat arms of the United States military, we risk PMCs such as Blackwater, non-elected, private sector actors, acting in roles delegated to the military and free from constitutional checks and balances. Especially given that PMCs increasingly espouse their technical support with regards to military surveillance and intelligence, this issue ultimately returns to the perennial question of the correct balance between federal responsibility for national security, and the mandate of federal transparency for the sake of democratic governance.

Some will argue that full transparency is unnecessary and actually jeopardizes covert government operations while simultaneously placing military decisions into the hands of an uneducated general population. However the flip side of this argument relies on our willingness to turn a blind-eye to the actions of PMCs in the international community. It is a fact that the contemporary U.S. military could not function without PMCs, however the alterna-

tive is a drastic expansion of the U.S. military to take over the jobs of PMCs. Should we avoid expanding our military by outsourcing these tasks to private companies? Or is it worth enlarging the U.S. military in order to take down these private corporations? The U.S. will be forced to grapple with these questions in the near future, as Dr. Sean McFate, author of The Modern Mercenary, notes that "America can no longer go to war without the private sector."48 Better we begin this discussion now, than when forced to choose between our national security or federal autonomy •

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Unpacking the American Dream: Interview with Michael Tanner

Frankie Konner (PZ '21)
Staff Writer

Michael Tanner is a senior fellow at the CATO institute, who has focused his research on poverty and welfare policy. He has written many books about public policy, with a particular focus on welfare and poverty reform issues. Tanner helped to launch the Project for Social Security Choice, which is considered to be one of the leading plans for national program. On November 3rd, he met at the Pomona Student Union for a debate and discussion about income inequality at the Claremont Colleges with Camille Charles, University of Pennsylvania Africana Studies chair. Dr. Charles' research focuses mainly on public policy relating to racial inequality. Prior to the panel CJLPP was able to interview Mr. Tanner individually and discuss affirmative action, welfare, and racial injustice, among other issues.

This interview has been condensed and lightly edited for this print edition. The full version, along with our interview with Dr. Charles, can be found online at www.5clpp.com.

CJLPP: The name of the Pomona Student Union panel this afternoon refers to the "American Dream." What do you perceive to be the modern American dream, and who is excluded from it? How does access to higher education play into this dream? To what degree does a college education ameliorate social immobility?

Tanner: There are several different parts of that, so let me try to break it down a little bit. I think the "American Dream" is still what it always was, and that is that people are able to become self-sufficient, that they are able to take care of themselves and their family, but most of all that they're able to become fully actualized human beings in the sense that they are able to rise as far as their talents can take them, that they are able to become all that they can be. If you look at Maslow's hierarchy of needs, it's well beyond simply the physical needs at the bottom; it is really the top of the pyramid that we all strive to attain: the ability to be everything that a human being can be. I think that's still our goal and our dream, and of course we want that for our children and for their children and for future generations.

I think that in general we do have a large section of our society that is not included in that right now. If you look at how poverty is dealt with in this country, we do a pretty decent job of dealing with that bottom rung. We spend a great deal of money dealing with poverty in this country. We spend, at the federal and state level combined, about a trillion dollars every year on anti-poverty programs. The result of that is that we do a fair job of ensuring that people have basic needs. We reduce material poverty to some degree but we don't do a very good job of enabling people to reach the top rung of that pyramid. We don't enable people to become self-sufficient; we don't enable people to take full advantage of their talents and their opportunities. We sort of have a paternalistic attitude towards poverty, through which we keep people in a custodial type of thing where we feed them, house them, and take care of them but we don't let them become fully actualized human beings. I think that that is a particular problem that we face in this country.

CJLPP: Do you believe that the purpose of affirmative action policies is to restitute past inequality or to create a more diverse campus environment? What different implications do these interpretations have?

Tanner: I think both of those are important actually. I think diversity is important in terms of developing a community, because people have different perspectives and different experiences in their life and they bring different things to the community because of those past experiences and that's important. Also, we want to be able to interact with people who are different than us. We don't want to grow up in a little cocoon in which we've never had an experience with someone who's not just like us. I think it is important to understand that diversity extends beyond race, gender, sexual orientation, those kinds of categories, to diversity of thought as well. We want to be exposed to people who have ideas that are very different than our own as well and that may or may not correspond with other categories but I think it's very important that we do have those experiences that are beyond ourselves. The whole idea of growing as a human being is that you experience things that you've never experienced before and I think that's very important.

The other aspect of affirmative action, in terms of rectification, I think we need to look at very seriously. The whole idea of rectification is restitution for past misconduct. The fact is that our society has not treated various groups very well. Certainly African Americans—we have a 400-year history of racial oppression. Women have not been treated the same as men, we have treated people of non-conforming genders badly, and we need to make up for the bad behavior we've had in the past. The actual implementation of those ideas, however, becomes problematic sometimes, in terms of affirmative action. How do you determine what individual falls into what category? I've looked, for example, very seriously at the question of reparations and think that there's a moral case to be made for reparations. But if you actually look at the first woman that brought a legal case for reparations in Louisiana, she was actually a descendant on one side of her family from slave owners and on the other side from slaves. Does she pay herself? Is she qualified for affirmative action? How do we determine the categories? Do we go back to the racist trope of one drop of black blood makes you black? How do we determine who benefits from these programs and who doesn't? In many cases we have to be careful that we don't set up such a rigid system under affirmative action that we actually penalize some groups in our society simply because of their racial characteristics or their background. Asians have been limited in many schools. Jews have been limited in many schools in terms of their ability to attend. We've got to be careful that we don't cross boundaries and simply create new forms of discrimination.

CJLPP: In the wake of President Donald Trump's election, many people have argued for the recognition of the poor white class in America that faces issues of social immobility and that is often ignored in policy discussions. Are there key differences between this poor white class and people of color's social mobility prospects?

Tanner: Yeah, absolutely. I think that at every level if you take people who are similarly situated in other characteristics, whites will always be one-up on a similarly situated African American. Whites may have their problems, but the fact is that African Americans have been treated worse throughout society. You can say that poor whites have many problems with social mobility, they have educational issues, they have issues with their jobs going away and so on. That's not the same thing as slavery, followed by Jim Crow, followed by the continuing racial oppression that exists today in terms of law enforcement, in terms of educational policy, in terms of housing, and so on. So I certainly think that you've got to differentiate between the two.

That said, we can't overlook the fact that there is a growing divide among whites in terms of class structure and in terms of opportunity. To some extent it's an age-based phenomenon as well. What we're seeing is essentially people whose way of life has changed radically in the last few decades. What we're seeing is that the type of job where you used to be able to drop out of high school, go down to the factory and get to support your family is not there anymore, that sort of situation has changed. At the same time, their social fabric is changing: there are now African American families living on their street, their boss is a woman, a gay couple got married in the next neighborhood. What they grew up believing that life was has been turned on its head and that's very hard for them to accept. People by and large don't accept change well.

CJLPP: One of your central arguments about the failings of the welfare system is that "poverty has been made comfortable." Can you expand on this?

Tanner: Yeah. I'm suggesting that we actually do a pretty good job of making poverty—"comfortable" is not a good word—but less miserable. We actually do a reasonable job with anti-poverty programs in terms of reducing the hardships of poverty. If you go back even to 1965, when Lyndon Johnson declared war on poverty and look at the structures in place there, about one third of people didn't have running water, electricity hadn't been extended to many poor houses, the number of houses' whose nutrition needs were not being met is much larger than it is today. Today, very few people are actually starving. We might say that they have food insecurity and things like that, but they're not actually starving the way they were at one time. Most of the major problems, in terms of the physical needs, that poor people have are being met, maybe not adequately, but to a large degree. What we're not doing is enabling people to get out of that, as I said earlier, to climb that rung of actualization and becoming self-sufficient. We seem to be failing at that. We focus too much of our poverty policy simply on those material needs: "should we spend a billion dollars more or a billion dollars less on food stamps?" We do not focus enough on how can we actually change the structures of society in order to enable people to rise.

CJLPP: What measures need to be taken to give all people the opportunity to succeed?

Tanner: Surprisingly, I think these are actually outside of redistribution questions. I think that what we really need to do is make some more structural changes to society. Number one is that we need to change the criminal justice system. I think the fact that the criminal justice system is biased against poor people generally, but minorities in particular, is an ongoing problem. You can't take a million and a half young African American men out of society, especially in urban areas, because they are in the criminal justice system. They are under arrest, on probation, have criminal records that may prevent them from getting into a college or getting a job and even renting housing. All of those things criminal records can prevent you from achieving. That, in turn, has its own problems in terms of marriageability. William Julius Wilson, a scholar from Harvard, has pointed out that if you essentially take a pool of marriageable men out of society it becomes a problem for poor women as well.

I think that we need to reform the education system. I think the fact that we have a K-12 system that largely fails to educate in the inner city is an enormous problem and I think that we need to be looking at the government monopoly on education and how that has failed. I think we need to look at housing, particularly the fact that housing is so expensive that it limits mobility. It prevents people from moving to areas where there might be more jobs or better education, less crime and so on. I think that a big factor in that is government policies in terms of zoning, in terms of land-use regulations, that can add, in some cities, as much as 50 percent of the cost of housing, which is a significant barrier to the poor in terms of their mobility.

I also think we need to look at ways to encourage savings among the poor. Essentially, banking laws penalize the poor. About 20 percent of poor people don't have identification, which means they can't open a bank account, which means they are stuck carrying around cash. This either renders them vulnerable to robbery or leads to the police thinking they're drug dealers, and so on. They can't borrow money the way wealthier people can because they don't have collateral. Basic welfare programs tend to discriminate against the collecting of assets. [The government] basically says that if you spend all of your money, that's fine, but if you put money away for your kids' education, they take away your benefits. I think we need to look at those barriers to savings.

Finally, and most importantly, I think we need to look at the whole question of economic growth. Nothing has reduced poverty in the history of mankind as much as economic growth. The simple fact is that not so long ago, everybody was poor. Not just worldwide, but in this country. If you go back to the turn from the nineteenth to the twentieth centuries, what you find is that just about every American was poor. Even the people that were considered rich would be considered poor by today's standards. The fact is that we've reduced poverty significantly over that period of time and that we've significantly raised the standard of living of even the poorest among us. This has largely come about not as the result of any government program, but as the result of simply growing the economy

and being richer as a society. We need to look at things in society that hold back economic growth, in terms of taxes and regulation overall. In particular, we need to look at the barriers that prevent poor people from fully participating in the economy. Things like occupational licensing laws, things like minimum wage laws, things like occupational zoning, and regulations of childcare. Things of that nature tend to prevent people from being able to get a job, start a business, or otherwise get into the economy and take advantage of the growth that's out there. We have to have growth, but we also have to have growth distributed across the entire population.

CJLPP: What do you think the government's role should be in ensuring the quality of education? How can the problems in inner city schools be ameliorated?

Tanner: Studies don't show any link between the amount of money we spend on education in a school and the outcomes we get for that money. If you look at some of the worst performing school systems in the nation: Chicago, Washington D.C., Baltimore, they are among the cities that spend the most per-child in terms of education. Of course you can argue a little bit chicken and egg there, but the fact is that spending more money doesn't seem to provide better outcomes. I think that is partly because of our education system,: our K-12 system is really kind of mired and concrete. There are very few things that have changed in education over the last couple hundred years. Basically, now we've put a computer screen up there or an LCD screen or whatever instead of a blackboard, but the pedagogy is still the same. We don't see innovation. We don't see innovation because we don't see competition. We are high-bound by rules and regulations, including teachers' unions and the government regulations that go with it. I think what we really need to do is open up education to much more competition, much more control by parents, much more choice. Basically, we need to allow poor kids to go to the same schools that rich kids can go to. Right now, you're very much limited by your geography, and we know that, of course, housing patterns are discriminatory both in terms of class and race. You're required, in most places, to attend the public school in your neighborhood. Well, that might be a pretty crummy school, and there's not much you can do about it. I think that people should be able to pick up and go wherever you want. If that means going out to the suburbs, because that's where the good schools are, you should be able to go there. If you can't find a good public school, you should be able to go to private school. But you should be able to go to the school that you want to go to, that your parents want you to go to, and I think that would help a great deal.

CJLPP: Do you think charter schools facilitate academic equality or hinder it?

Tanner: I think charter schools are a big help. But they're still ultimately, in the end, a government school and subject to government regulations. If I were sort of drawing a pyramid of reform, we should start with simply deregulating the public schools, changing tenure laws, for example, so that bad teachers can be weeded out. Second, we should move to charter schools, so that we can have fewer regulations, more opportunities, more types of schools that are growing up, and parents could take advantage of that. Third, would be some sort of voucher program, but vouchers come with strings, a limit to where they could go, but parents could still move to private schools where they'd have fewer regulations. And lastly, I think scholarship type programs where parents are simply given the money and it doesn't come directly from the government so it doesn't have so many strings. The Arizona Scholarship Fund is a good model for that. The fewer regulations, the fewer strings there are. The more choices that parents have, the more control over the money children and parents have. I think that is the answer. Money should belong to schools; money should belong to parents and kids.

CJLPP: That is all the time we have. Thank you so much for your time and expertise •

Green Leadership on the Golden Coast

Kaela Cote-Stemmermann (SCR '18)
Interview Editor

Over the past year, the Trump administration has continually rolled back the climate policies passed by the Obama administration. From repealing Obama's Clean Power Plan that reduced pollution from coal-fired power plants,[1] slapping trade barriers on imported solar equipment,[2] to withdrawing from the Paris Climate Agreement, the present administration is tearing down environmental protections in the name of economic growth. With the U.S. federal government retreating from its previous commitments to fight climate change, California has emerged as a leading political actor in the international environmental movement.

One step at a time, California is pursuing its own environmental goals, directly contradicting Trump's anti-environmental platform. For example, on July 17, 2017, California's State Assembly and Senate voted to extend the state's cap-and-trade program, which uses market incentives to limit emissions, through 2030.[3] Earlier that summer, Governor Jerry Brown flew to Beijing to meet with international climate leaders on a campaign to mitigate global warming.[4] California is spearheading a new era of state-based foreign policy in the United States. This article discusses California's unique political position and rich history of progressive environmental policy in order to evaluate the state's current efforts to build multilateral climate policy cooperation at the state[5] and international levels. If the Californian executive branch pesses ahead with such aggressive foreign policy, it will find itself in direct confrontation with the Trump administration, who sees California's actions as a threat to U.S. federalism and an attack on federal authority.

The Power of the Golden Coast

California owns an economy and political structure that allows the state to pursue alternative environmental policies that are less feasible for other states. California by itself has the largest economy in the U.S., and recently surpassed France as the sixth largest economy in the world.[6] The state's impressive gross state product of $2.6 trillion[7] lends the state negotiating power in conducting diplomacy with foreign political leaders. Given the Democrat majority in California—Clinton won California by over 30 percentage points, one of the largest democratic victories since 1936[8]—the state can effectively take on the powers of a nation-state in conducting pro-environmental foreign policy without the political constraints facing the federal government. California has the worst air pollution in the U.S., with over 90 percent of residents living in counties with unhealthy levels of air pollution;[9] thus, Californian policy leaders have plenty [of] incentive to pursue a climate-friendly agenda. Moreover, after the 2016 election, Californian leaders have actively defined their state as a political focal point for resistance against Trump's policies. California's strong democratic majority creates a sturdy liberal base, allowing for climate policies such as the cap-and-trade program and climate deals to pass with relative ease and widespread support.

In his State of the State speech in Sacramento, Governor Brown promised that California would continue in the fight against climate change. "Whatever they do in Washington, they can't change the facts," Brown stated, "The science is clear. The danger is real."[10] This statement follows from a long history of climate protection policies, made possible by California's liberal base regardless of national party leanings. Starting with the California Global Warming Solutions Act of 2006 (AB 32), the first program to introduce regulatory and market mechanisms to reduce greenhouse gas emissions, California has introduced a number of policies to help achieve AB 32's goal of limiting emissions to below 1990 levels.[11] For example, in 2007 the Low Carbon Fuel Standard Executive Order was issued, helping to lower California's reliance on oil.[12] In April 2012, Governor Brown also signed SBX1 2, which requires one-third of the state's electricity to come from renewable sources.[13] Such policies paved the way for the adoption of California's cap-and-trade regulation, adopted in October, 2011. Especially under the current populist Republican administration, California's black sheep policies are coming into ever starker contrast with that of the rest of the nation.

Accusations of Overreach

But when does California's freelancing verge on pushing the boundaries of federalism and state limitations? Articles I and II of the U.S. Constitution gives the federal government, rather than the states, responsibility for foreign and defense policy.[14] Yet the state of California holds considerable power under the Tenth Amendment, which stipulates that the powers not explicitly delegated within the Constitution are left to individual states, thus forming the idea of federalism.[15] The boundaries between state and federal authority have been contested throughout U.S. history. While conservatives have typically worked to defend the rights of states to refute federal legislation, liberals prefer a larger government. However, in the aftermath of the Trump election, liberals have adopted the principles of federalism and conservatives are abandoning federalist principles in favor of a strong central government. This role reversal is reflected in several issues, such as drug prohibition, healthcare and gun control.[16] Despite controversies over the extent of federal authority, states have typically left dealings with foreign governments and global issues to the federal government.[17] However, California is using its political and economic prowess to seemingly push the boundaries of the Tenth Amendment.

Cap-and-Trade

The process by which California's cap-and-trade program was developed provides a case study for how California is challenging and shifting the boundaries of federalism. The cap-and-trade program functions by increasing the cost for companies that emit greenhouse gases into the atmosphere.[18] Sources that emit over 25,000 metric tons of CO2 per year are subject to a *cap*,[19] which limits the total amount of emissions allowed in a certain area over a specified time period.[20] The owners of an emission source are able to to buy and sell permitted pollution allowances amongst themselves depending if they are polluting more of less than the annual limit. Therefore, the cost of investing in new greener technology becomes less expensive than buying annual permits. Companies that successfully lower their emissions can then sell their unused carbon permits for a profit, incentivizing green technology and lowering pol-

lution. As the amount of carbon in the atmosphere diminishes, the prices of permits slowly increase and the total number of permits decrease, to encourage further reduction of emissions.

In 2006, the California Global Warming Solutions Act allowed state regulators to develop a market based system that encourages polluters to limit their annual greenhouse gas emissions.[21] This policy allowed the California Air Resources Board (CARB) to launch California's first cap-and-trade program in 2013. Now, over 85 percent of California's greenhouse gas emissions, such as CO2, CH4 and N2O, are regulated by the cap-and-trade program.[22] Regulators are confident that the pollution sources covered under the cap-and-trade program are on track to meet the goal of reducing emissions by 334.3 metric tons by 2020, a reduction of 15 percent from 2015 emissions levels.[23] Recently, the California's State Assembly and Senate voted to extend this program an extra 10 years, until 2030.[24] This legislative victory represents a large win for Governor Brown and other California policy makers, and constitutes a defiant rejection of the Trump administration and towards a position of climate leadership.

Taking California to the Global Stage

In the wake of the U.S. withdrawal from the Paris Climate Agreement, Governor Brown and state lawmakers have taken the state's green leadership to a global scale. California policymakers have publicized adamant disagreement with Trump's decision, and now the state is taking steps to replace the U.S. in the area of international climate change. Mario Molina, a Nobel Prize Winning Scientist, noted, "With Trump indicating that he will withdraw from climate change leadership, the rest of the global community is looking to California, as one of the world's largest economies, to take the lead."[25] Indeed, Governor Brown plans on representing California this fall at the United Nations' climate change meeting in Bonn, Germany.[26] The state's increasing role in global affairs is placing California at the front of the fight to mitigate climate change.

From climate pacts with Canada and Mexico to foreign policy agreements with China, California is comfortably stepping into the shoes of a global negotiator. California environmental officials are working with Canada and Mexico to form what has been nicknamed the "NAFTA of climate change," or more formally, the Under2 Climate Coalition.[27] The coalition includes a number of cities, states and countries that have pledged to limit the increase of global average temperature to under 2 degrees Celsius, which scientists say is necessary to avoid dangerous environmental consequences.[28] The coalition includes over 170 jurisdictions, equivalent to 37 percent of the global economy.[29] Welcomed to the coalition by Governor Brown, Canada's Minister of Environment and Climate Change remarked, "The governments in the Under2 Coalition, like California, are leading the fight against climate change… I applaud their leadership in reducing emissions and supporting clean innovation."[30] The international arena has welcomed California as an active player in the fight against climate change. According to a statement by the Chinese Foreign Ministry, President Xi Jinping encouraged California to establish ties with China on the basis of innovation and green development.[31] In this way, California draws upon its history of environmental leadership, its successful programs, and economic position in not only contradicting Washington, but stepping up as a climate leader acknowledged by foreign governments.

In April, a delegation from California traveled to Beijing to discuss emissions trading and other climate positive efforts in order to further fill the gap left when President Trump withdrew from the Paris Climate Agreement.[32] Drawing upon the success of its cap-and-trade program, California advised China on how to establish their own cap-and-trade program. Furthermore, Governor Brown and the Chinese Science Ministry signed a pledge agreeing to reduce their emissions.[33] This agreement between Governor Brown and Chinese officials introduced state-run foreign policy for the first time in U.S. history. Whereas the U.S. federal government must consider its political interests in China, such as the South China Sea and commitment to human rights, as a subnational actor, California is unencumbered by contradicting diplomatic objectives. This allows California to work more effectively with China on climate issues with fewer conflicts of interest or competing agendas.

A Cleaner Future

While California's efforts of environmental foreign policy have received support from international actors, they are not nearly so popular in Washington. It is unclear whether the Trump administration will continue to give California free reign to impose its own foreign policy. Many worry that California's actions detract from broader governmental goals, send a mixed message, and even bend the laws of the Constitution.

The administration could hobble the state's ability to serve as a national environmental pacesetter by reducing federal spending to the state, similarly to how the Interior Secretary cut Alaska's funding after Senator Murkowski voted against the repeal of the Affordable Care Act.[34] Another possible strategy for Washington is to delegitimize federalism. Indeed, Scott Pruitt, the Environmental Protection Agency Chief responsible for the rollback of Obama's environmental policies, has already issued strong anti federalist rhetoric. Traditionally a strong federalist and "champion for states rights," Pruitt even created a Federalism Unit as attorney general, dedicated to combating overreaching federal regulations.[35] However, when it comes to states strengthening environmental protections, Pruitt has shown significantly less enthusiasm, stating that California's action are "not federalism—that's a political agenda hiding behind federalism." continuing, "Is it federalism to impose your policy on other states? It seems to me that Brown is being the aggressor here," Pruitt told the *New York Times*, "but we expect the law to show this."[36] By arguing that California's environmental policy does not fall into the realm of federalism but is actually aggressive and illegal, Pruitt calls into question California's national and international legitimacy.

Moving to counter California's new environmental policies would be a mistake for Washington. California is now portrayed by western media as a "port in the storm" of a post-Paris Agreement world of climate denial.[37] Legally attacking California would not only be reversing the Trump administration's own overarching platform of federalism, it would also undermine global efforts to mitigate carbon production and protection of the environment. In order to avoid such conflict, California policymakers should focus on increasing cooperation within the state government, increasing transparency in its foreign and domestic environmental policy, and work to minimize the legal risks of its foreign policy actions.[38] California has demonstrated its growing influence on the global stage, and its ability to fill in the vacuum left by Washington. It has proven that a subnational actor can successfully go against

one of the most powerful countries in the world. California's actions indicate a new future for independent policies by state governments, and a new norm for conducting environmental foreign policy •

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A Proposal to Categorize Hate Speech as an Exception to the First Amendment

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The events that transpired in Charlottesville, Virginia this past summer came as a shock to many Americans who believed we were living in a post-racial society. However, it only reaffirmed what most people of color already knew: that racism is still deeply rooted in our society. The Southern Poverty Law Center has a comprehensive list of hate groups that they monitor on their website across the United States. They define a hate group as "an organization that—based on its official statements or principals, the statements of its leaders, or its activities—has beliefs or practices that attack or malign an entire class of people, typically for their immutable characteristics."[1] The FBI uses similar criteria in its definition of a hate crime which is classified as, "[A] criminal offense against a person or property motivated in whole or in part by an offender's bias against a race, religion, disability, sexual orientation, ethnicity, gender, or gender identity."[2] Even though the FBI does not treat hate itself as a crime, the definitions both organizations have of a hate crime and a hate group can be used as the framework for how legislators might ban hate speech.

Another place the United States can look to in determining how to define hate speech is Great Britain. In reaction to the violence that occurred in Charlottesville, Great Britain made the decision to treat online hate crimes as seriously as they treat face to face hate crimes. This means that the act of hate does not have to be committed in person in order for it to be considered a hate crime. In comparison to the United States, Great Britain's definition of a hate crime is geared more towards how the person on the receiving end of the offense perceives the exchange. The Crown Protection Service of Great Britain defines a hate crime as "any criminal offence which is perceived by the victim or any other person, to be motivated by a hostility or prejudice."[3] In the year 2017, the Home Office of Great Britain found that there was nearly a thirty percent increase[4] in the amount of hate crimes reported. However, Paul Iganski, a hate expert and professor of criminology at Lancaster University attributed this increase, in part, to "advances made by the criminal justice system and police" in dealing with hate crimes.[5] Thus, the result of Great Britain broadening their definition of hate crimes was an increase in the number of hate crimes being reported. Overall, what the United States can learn as a country from the initiatives taken by Great Britain is that it is crucial to include the voices of those who are targeted by hate speech when attempting to define it in the form of legislation.

This essay is an analysis of how hate speech such as the one expressed in Charlottesville could be ruled unconstitutional. In the first section, I acknowledge the defenses of hate speech. Next, I discuss the negative effects of hate speech. In the third section, I argue that existing exceptions to the First Amendment—imminent lawless action, true threats, fighting words, and the reasonable time, place, and manner restrictions—preclude hate speech from constitutional protection. In the final section, I argue that the Equal Protection Clause is selectively applied based on who is exercising their freedom of speech by comparing the police response to the Charlottesville hate rally and the Ferguson protests.

Defenses of Hate Speech

In the aftermath of the tragedy that occurred in Charlottesville, VA, David Cole, who is the national legal director of the American Civil Liberties Union, published an article stating why free speech must still be defended. In his article "Why We Must Still Defend Free Speech," Cole argues that in a democracy the state acts in the name of the majority and not in the disadvantaged minority's interests which creates doubt that the majority would ever get rid of hate speech. To drive home his point, Cole cites the time period in which America embraced the "separate but equal" doctrine and contends that it was the freedom to contest that view, guaranteed by the First Amendment, that lead to the rejection of separate but equal. However, a major reason why the separate but equal doctrine ended was because the law changed in *Brown v. Board of Education*,[6] before significant social debate and consensus had come to the conclusion that separate but equal was wrong. Laws have the power to significantly influence the shifting of societal norms in the long term which is why it would be beneficial to formally categorize hate speech as an exception to the First Amendment.

The Supreme Court's very own Justice Louis Brandeis was also a strong advocate of free speech even if the message being expressed was unpopular by societal standards. In *Texas v. Johnson*,[7] the Court drew on Justice Brandeis' reasoning when they proclaimed that, "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[8] Even within the context of Johnson, the Court did not rule out the idea of the government prohibiting the expression of an idea; the prohibition just cannot solely be based on how offensive or disagreeable the idea is. Additionally, Justice Brandeis also recognized legislators' need to curb speech that created a clear and present danger in the case of *Whitney v. California*.[9] Therefore, the harmful ideologies that some extremist groups possess and their actions towards specific groups of people should be enough for the government to prohibit speech, even if one generally believes in strong First Amendment protections for speech.

Negative Effects of Hate Speech

The expression of hate speech creates high levels of distress for those who are on the receiving end of the message. In *Snyder v. Phelps*,[10] Justice Alito offered a powerful dissent against the majority's decision to affirm the Fourth Circuit's ruling. The case involved the family of a fallen marine and the Westboro Baptist Church picketing and protesting at the marine's funeral because of his sexuality. The Westboro Baptist Church displayed picket signs with hurtful words

such as "God hates you,"[11] "Fag troops,"[12] "You're going to hell,"[13] and "Thank God for dead soldiers."[14] Because the marine was homosexual and the idea of homosexuals in the military is classified as a public concern, the Court found that the "inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern."[15] However, the Court was erroneous in ruling that speech having to do with a matter of public concern cannot be the basis of liability for emotional distress. Justice Alito also dissented with the Court's decision and stated that "[The Supreme Court's] profound national commitment to free and open debate is not a license for the vicious verbal assault that occurred in this case."[16] The father of the fallen marine suffered severe and lasting emotional injury[17] due to the Westboro Baptist Church's speech. In addition to emotional damages, by allowing the Westboro Baptist Church to picket and protest at other funerals, the Court is ignoring people's right not to be defamed.[18] Justice Alito's dissent touched on the tightrope the Supreme Court is forced to walk on when trying to uphold the First Amendment and protect the rights of marginalized groups. Hate speech does not contribute meaningfully to the "free and open" debate that the Court is committed to fostering. The Court, in the past, has allowed states to regulate the manner in which people conduct speech; that precedent should have been applied to this case.

Exceptions to the First Amendment

Imminent Lawless Action

As per *Brandenburg v. Ohio*,[19] speech that incites imminent lawless action does not receive protection under the First Amendment, if (1) the advocacy is directed at inciting or producing imminent lawless action, and (2) the speech is likely to incite or produce such action. Hate speech is likely to produce imminent lawless action, as can be seen in the instance of the Unite the Right rally. During their gathering on the University of Virginia's campus, many of the white supremacists carried tiki-torches and shouted a slew of phrases linked to Nazi and white supremacist slogans[20] such as, "Blood and soil," "You will not replace us!" "Jews will not replace us!" The crowd of white supremacists came face-to-face with a group of 30 UVA students, consisting of both students of color and white students. Some of the white supremacists then proceeded to make monkey noises, which has a history of racial undertones, at the students of color and began chanting, "White lives matter!"[21] Their goal was to provoke a violent response from the counter-protesters, and, as a result, the confrontation between the two opposing groups quickly became violent. Punches were thrown, and people were shoved; chemical irritants were sprayed by individuals on both sides. Numerous accounts from journalists about the violence that broke out in Charlottesville during the rally[22] demonstrate that the ideology of the white supremacists, coupled with the delayed response of law enforcement, induced imminent lawless action. More specifically, the speech of the white supremacists incited imminent lawless action by advancing white dominance. The white supremacists used Nazi slogans which was once used to justify the abhorrent treatment of the Jews as well as other who did not fit the characteristics of the Aryan race. The Unicorn Riot, which is a news-outlet that covers protests around the nation, gave their account of what happened by providing footage of white supremacists charging at counter-protesters who rejected their ideology. Therefore, by the Brandenburg standard, the white supremacists' speech should be banned because the group's advocacy is directed at inciting imminent lawless action and is likely to produce such a result based on what happened in Charlottesville.

True Threats

In *Virginia v. Black*,[23] the United States Supreme Court's definition of true threats excludes conduct and instead relies on "[s]tatements made by a speaker who means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals."[24] It is important to note that "[t]he speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats protects the individual from the fear of violence and the disruption that fear engenders, as well as from the possibility that threatened violence will occur."[25] The Supreme Court should have determined that the act of cross burning in tandem with its history of racial violence and intimidation cannot be constitutional. In this case, Virginia had passed a law which prohibited cross burning due to its long history of being used by Ku Klux Klan members to intimidate African-Americans. Justice Thomas was right in dissenting with the Court and arguing that:

"[Virginia's] statute prohibits only conduct, not expression. And, just as one cannot burn down someone's house to make a political point and then seek refuge in the First Amendment, those who hate cannot terrorize and intimidate to make their point. In light of my conclusion that the statute here addresses only conduct, there is no need to analyze it under any of our First Amendment tests."[26]

By ruling that conduct with a history of violence and intimidation can receive protection under the First Amendment, the Court set a precedent that enables domestic terrorist groups to terrorize minority communities. Thomas' dissent draws attention to the societal implications for deeming certain actions as protected speech and others as true threats.

The views of white supremacists in attendance at the Unite the Right rally should have been classified as true threats by the district court before the protest happened. On August 11th, 2017, a federal district judge granted Jason Kessler, the man who applied to have a permit for the Unite the Right rally, a temporary injunction so that the protest could happen as planned. Jason Kessler is an alt-right activist who is known for asserting white supremacist views.[27] If courts were to acknowledge the tactics of violence and intimidation white nationalist groups have used since Reconstruction to subjugate minorities, certain content-based speech that engenders fear could be constitutionally banned.

Fighting Words

The exception to the First Amendment most relevant to hate speech is the "fighting words" doctrine, developed in *Chaplinsky v. New Hampshire*.[28] This case involved the arrest of a Jehovah's Witness for shouting fighting words at

a police officer. The Court determined the following in its decision to uphold the arrest:

"There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting words' — those which by their very utterance inflict injury or tend to incite a breach of the peace.... [S]uch utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[29]

As the Court so eloquently explained, there is little to no social value or benefit of hate speech. The hate speech of the white supremacists at Charlottesville showed the world that each instance of hate speech raises the risk of breaching the peace and interfering with an individual's pursuit of happiness. Furthermore, the existence of hate speech signifies that not all people are treated equally. While having public debate is necessary in order for society to grow, the Supreme Court does not need to place protection on speech that is meant to demean and dehumanize minority groups in order for dialogue to occur.

Reasonable Time, Place, and Manner Restrictions

In the cases of *Adderley v. Florida*,[30] and *Schenck v. United States*,[31] the Court ruled that a state can regulate which public spaces can be used for protests and the time and manner during which the practice of freedom of speech can be exercised. This means that government entities have the power to impose reasonable time, place, and manner restrictions on speech if a significant governmental interest is being served, the restriction is content neutral, narrowly tailored, and alternative methods of communication are present. In order to modify the reasonable time, place, and manner restrictions to include hate speech, there would need to be a provision that explicitly criminalizes hate speech. Under this new provision, state legislators would be able to restrict hate speech by assessing how inflammatory the manner of speech is and by limiting the number of public spaces that can be used for protests. The result of these new restrictions would be the prevention of more hate rallies such as the one that occurred in Charlottesville. After evaluating how these exceptions to the First Amendment can influence hate speech's constitutional status, I move on to address the problem with the way the government responds to freedom of speech when it comes from disadvantaged minority groups.

Police Response to Charlottesville vs. Ferguson

When comparing the number of people who were arrested in the Ferguson protests to the amount of people who were arrested in the Charlottesville protest, we see that the police response to Ferguson was harsher than the police response to Charlottesville. In the civil rights era case *Edwards v. South Carolina*,[32] the Supreme Court held that freedom of speech must also be protected by the Fourteenth Amendment which guarantees equal protection under the law. However, there is a stark contrast between the way free speech is protected under the law for whites and for racial minorities; it is often the case that the speech of minority groups are viewed as more detrimental than the speech of white supremacists groups. When hundreds of protesters stormed the streets of Ferguson, Missouri after a verdict of not-guilty was returned in the case involving police officer Darren Wilson and Michael Brown, the St. Louis County Police Department met them with armed vehicles, snipers, and riot gear.[33] Ferguson, Missouri has a population that is 67 percent African-American,[34] and 76 percent of the 155 people who were arrested at the protest came from the St. Louis area.[35] At Charlottesville, however, the majority of people who attended the Unite the Right rally were from out of state, and court documents show that out of the eight people who were arrested, six were from out of state.[36] Furthermore, the Department of Justice launched an investigation into Ferguson's police department shortly after the protests and concluded that "Ferguson police officers routinely violate the Fourth Amendment in stopping people without reasonable suspicion, arresting them without probable cause, and using unreasonable force against them."[37] This shows that the police in Ferguson were unjustly profiling individuals who were exercising their First Amendment right to protest the death of Michael Brown. While both protests turned violent at some point, the majority arrested people at the Ferguson protests were charged with a failure to disperse, not for any violent acts.[38] The media coverage of the Ferguson protests created the illusion that there were more violent protesters than peaceful ones which was not the case. In contrast, nearly half of the people who were arrested in connection to the Unite the Right rally were charged with misdemeanor assault and battery. Despite the numerous allegations of violence that were reported in connection to the Unite the Right rally, the reason why the police response to the white supremacists in Charlottesville was not the same as the police response to African-American protesters in Ferguson is because white men are perceived as less threatening than African-American men[39] and the people who attended the Unite the Right rally were predominantly white men.

Hate speech goes against the fundamental values that the United States was founded upon. The Founding Fathers believed that everyone was endowed with certain inalienable rights, and that all men were created equal. However, just as the institution of slavery existed to serve white supremacy, hate speech also seeks to maintain white dominance. The Constitution permits legislative bans on hate speech due to the First Amendment's exceptions. It is just a matter of individuals being willing to come to a consensus and recognize that banning hate speech will only lead to a more equal society. As I have argued throughout this entire paper, hate speech can feasibly be recognized as an exception to the First Amendment because like the current exceptions, hate speech does not meaningfully contribute to debate. While the United States may formally recognize hate crimes as punishable offenses, the next step is for the government to formally recognize hate speech as a punishable offense if the common goal is to prevent the violence that broke out in the Charlottesville protests from happening again •

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Jonesing for Shipping Reform: The Merchant Marine Act in the 21st Century

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The Merchant Marine Act of 1920, commonly known as the "Jones Act," protects the American shipping industry at the expense of American consumers. Its basic requirement is that any ship which is transporting goods from one American port to another American port must be built in the U.S., registered in the U.S., owned by mostly Americans, and staffed by mostly Americans. The protections which the Jones Act provides can, however, be waived in limited circumstances, including cases of natural and man-made disasters. These waivers, which require the approval of the Secretary of Defense or Homeland Security, have prompted the question of whether the Jones Act should be repealed. Supporters of such a reform argue that the Jones Act harms non-contiguous American states and territories, distorts the market for air and land transportation, and hurts American industries, which struggle to compete with imports that are not subject to Jones Act regulation. The harms to non-contiguous territories have hit Puerto Rico especially hard in its efforts to rebuild after Hurricane Maria, as the Act's regulations pushed up prices on any goods imported from the mainland United States. Puerto Rico's ongoing suffering has thrust the Act into mainstream American political debate. Some defend the Jones Act on the grounds that it protects both American shipping companies and national security. The economic argument, however, privileges one industry over the health of the economy on the whole, while the security-based argument is badly outdated. The weight of the evidence therefore supports Jones Act reform.

Context

The Merchant Marine, which the Jones Act exists to protect, is comprised of domestic civilian ships engaging in peacetime commerce which are also able to be conscripted into military service during wartime.[1] Naval strategists have traditionally preferred these vessels to be American ones in order to be trusted with potential military tasks.[2]

Americans have long perceived the independence of the America Merchant Marine as a lynchpin of the United States' economy, history, and even national-identity. George Washington warned in his second State of the Union address, "I recommend it to your serious reflections how … to guard against … contingencies … to our own navigation as will render our commerce … less dependent on foreign bottoms …. [T]he transportation of our own produce offer[s] us abundant means for guarding ourselves."[3] John Adams wrote in his memoirs, "no group of individuals did more for establishing our country than the American Merchant Seamen."[4] Thomas Jefferson agreed: "For a navigating people to purchase its marine afloat would be a strange speculation, as the marine would always be dependent upon the merchants furnishing them …. We must, therefore, build them for ourselves."[5] Influential Americans from the nation's founding have put a high premium on domestic shipping. American history is rife with support for nationalist shipping policies. This historical outlook culminated with the Jones Act.

Merchant Marine Protectionism

The most notable landmark legislation in this tradition is the Merchant Marine Act of 1920. The act, often called the Jones Act in reference to its sponsor, Senator Wesley Livsey Jones (R-WA) built on prior legislation. Caught up in the nationalist shipping sentiment of the time, the First Congress in 1789 passed "An Act for Registering and Clearing Vessels, Regulating the Coasting Trade, and for other purposes,"[6] which enacted a tax on foreign built and owned ships to protect the American trading industry from British competition.[7] While this legislation was initially seen as sufficient protection, the frequent use of naval blockades and submarine attacks during World War I increased America's focus on the link between maritime commerce and warfare, providing a new reason to tighten protections for the domestic industry.[8]

The Jones Act primarily sought to raise standards for ships[9] engaging in cabotage—the shipping of goods between American ports.[10] The Act created four primary requirements for vessels transporting "merchandise between points in United States": they must be owned by companies that are at least 75 percent U.S. citizen owned, operated by a crew that is at least 75 percent U.S. citizens, built in the U.S., and registered in the U.S. Multiple administrative agencies enforce these rules, including the Coast Guard and the Federal Maritime Commission, and those agencies have interpreted the Act to apply to nearly every commercial vessel, including cruise ships.[11] Federal courts have also extended the definition of the kind of "merchandise" Jones Act-applicable vessels must carry to include anything of a commercial value, including dredged materials used for landfill.[12] Despite the expansive definition granted to the Jones Act, it covers very few actual ships. While the Act covers 30,000 total vessels, the most recent estimates suggest there are only 91 large Jones Act-eligible vessels in existence because 89 percent of commercial vessels produced in U.S. shipyards since 2010 are barges or tugboats.[13] The Jones Act, then, is significant in how restrictive it is. It has effectively limited all large-material American cabotage trips to just 91 vessels.

Jones Act Exceptions

Nonetheless, the Jones Act has not always been enforced to the fullest extent of the law. It has become increasingly common for the government to permit foreign-owned, -staffed, -registered, and/or -built vessels to operate where only Jones Act vessels could before. For example, the Bowaters Act of 1958 reduced the minimum fraction of U.S. citizens staffing a vessel, for the purposes of Jones Act compliance, to only half of the crew if the ship is heavily engaged in the American manufacturing or mineral industries.[14] A 2006 amendment, the most recent categorical change to the Jones Act, provided that the Secretary of Transportation can waive the requirements for foreign-built passenger vessels that carry no more than

12 clients if he or she determines that doing so will not adversely affect U.S. vessel builders or vessel employers.[15] Such waivers are permanent, and they are granted roughly 75 times annually.[16]

Jones Act Waiver System

The most significant Jones Act exceptions are temporary waivers offered in the interest of national defense. There are two legal avenues for the executive branch to waive the Jones Act.[17] First, U.S. Code Title 46 provides that Jones Act requirements can be waived "to the extent the Secretary [of Defense] considers necessary in the interest of national defense."[18] For example, Secretary of Defense Donald Rumsfeld ordered a Jones Act waiver in 2006 to transport military helicopters from Tacoma, Washington to Anchorage, Alaska.[19] Second, Title 46 continues that Jones Act requirements can be waived "following a determination by the Maritime Administrator … of the non-availability of qualified United States flag capacity to meet national defense requirements."[20] In other words, the executive may waive the Jones Act if the Maritime Administrator determines that a Jones Act vessel is not available to do the job. In the 21st century, precedent has vested this power in the Secretary of Homeland Security, whom this statute empowers to offer "discretionary" Jones Act waivers, which are only distinguished from the Secretary of Defense's waiver system in that "discretionary" waivers must be effectively precleared by the Administrator of the Maritime Administration (MARAD).[21] Regardless of which Secretary orders the waiver, the law states that it "shall terminate at such time as the Congress by concurrent resolution or the President may designate."[22]

Historical precedent has also stretched the definition of "national defense" to make humanitarian response efforts the most frequent cause of recent Jones Act waivers. Following the 1989 Exxon Valdez oil tanker spill in Alaskan waters, Exxon requested foreign oil skimming barges to help clean-up efforts. MARAD and the Department of Defense both supported a Jones Act waiver, with the Department of Energy adding that a slow or inefficient response could jeopardize American energy supplies and therefore the interest of national defense.[23] In 2005, Secretary of Homeland Security Michael Chertoff suspended the Jones Act during the aftermath of Hurricane Katrina.[24] Chertoff reasoned that the hurricane disrupted oil and gas production and transportation, causing "large runups in the price of oil, gasoline and other refined products" as well as "threatened or actual shortages of gasoline, jet fuel, and other refined products."[25] He thus concluded, "a waiver, in accordance with the terms set forth below, is in the interest of the national defense."[26]

The BP Deepwater Horizon oil spill, though, marked a turning point in Jones Act waiver precedent. Writing in the *Washington University in Global Studies Law Review*, former Special Assistant District Attorney for Kings County Joseph M. Conley[27] explains that "in contrast to Hurricane Katrina … the BP oil spill did not effectively inflict damage to infrastructure or limit the availability of oil and gas. Instead, the spill caused massive economic and environmental damage."[28] Conley thus concludes that the precedent of the BP oil spill established "the availability and practicality of a Jones Act waiver when necessary" for a broad array of interests, such that "any interested party could apply for a Jones Act waiver."[29] With the precedent of the waiver President Obama offered to BP baked into the Jones Act waiver system, the executive has since offered waivers in response to crises as wide reaching as the American 2011 military efforts in Libya,[30] Superstorm Sandy in 2012,[31] and hurricanes Irma and Harvey in 2017.[32]

Hurricane Maria

On Wednesday, 20 September 2017, Category 4 Hurricane Maria—the fifth strongest storm to ever hit the United States—made direct landfall on Puerto Rico.[33] Within hours of landfall, the hurricane destroyed 80 percent of the crop value in Puerto Rico.[34] Maria also knocked down 80 percent of the island's transmission lines.[35] In late October 2017, 75 percent of Puerto Ricans were still without power according to a Rhodium Group report which concluded, "Hurricane Maria has caused the largest blackout in American history."[36] Efforts to restore power were estimated to take four to six months as of November,[37] and at the start of 2018, nearly half of power customers in Puerto Rico still lacked electricity.[38] While the Federal Emergency Management Agency (FEMA) and its partners were providing 200,000 meals a day as of October 2017, it was nonetheless running a daily shortfall of between 1.8 million and 5.8 million meals.[39] Compounding the aid shortfall, FEMA announced on January 17 that it would withhold a Congressionally approved billion-dollar emergency loan to help Puerto Rico recover from Hurricane Maria on account of the island's lack of financial transparency.[40] Moody's Analytics' estimated that Maria will cost Puerto Rico between $45 billion and $95 billion, equivalent to 65-135 percent of its gross national product.[41]

Despite the magnitude of the disaster, the Trump administration's attitude towards a Jones Act waiver has been parsimonious. On September 27, a full week after the hurricane made landfall, President Trump stated publicly that the administration was "thinking about" issuing a waiver, "but we have a lot of shippers and a lot of people that work in the shipping industry that don't want the Jones Act lifted, and we have a lot of ships out there right now."[42] On the same day, a Department of Homeland Security official told reporters, "As based upon our current conversations, there is not a lack of vessels to move the goods that we need to support the humanitarian relief efforts."[43] Despite this public restraint, the next day, with the President's authorization, Acting Secretary of Homeland Security Elaine Duke issued a 10-day Jones Act waiver covering all products shipped to Puerto Rico.[44] Citing 46 U.S.C. 501, as discussed above, Duke stated, "I am exercising my authority to waive the Jones Act for a 10-day period, commencing immediately … This waiver applies to covered merchandise laded on board a vessel within the 10-day period of the waiver and delivered by October 18, 2017."[45] On October 9, 2017, the administration allowed the waiver to expire without an extension, in contrast to the September waivers issued in response to hurricanes Harvey and Irma, which the administration extended for an extra week after their expiration.[46]

With the precedent of Jones Act waivers for hurricanes established by prior administrations and continued by the Trump administration for Hurricanes Irma and Harvey,

the initial reluctance of President Trump to support a Jones Act waiver in response to Hurricane Maria renewed public discussion of the merits of the Act.[47]

Arguments in Support of Jones Act Reform

Economic Harms of the Act to non-Contiguous Territories

The principle argument against the Jones Act pertains to its effect on consumer prices in Puerto Rico. The Jones Act prevents American vessels from having to compete with foreign ones during domestic shipments. These foreign competitors may offer lower prices, or pressure domestic shippers to bring down their prices to compete.[48] Indeed, foreign ships do offer more competitive prices: Jones Act vessels' daily operating costs are more than twice those of foreign-flagged vessels.[49] Shippers with less competition can charge their business-clients more, and those clients pass the increased shipping cost onto their consumers. While this is mostly irrelevant for trade among the contiguous 48 states, which have little reason to use the merchant marine to transport goods, Hawaii, Alaska, Guam, and especially Puerto Rico do experience the consequences of this market-distorting protectionism.[50]

A wealth of empirical evidence supports the economic theory. The Federal Reserve Bank of New York found in 2012 that the same twenty-foot container of household and commercial goods that costs $3,063 to ship from the East Coast of the U.S. to Puerto Rico would cost only $1,504 to ship from the Dominican Republic or $1,687 from Jamaica—destinations that are not subject to Jones Act restrictions.[51] Regardless of which foreign island one benchmarks status quo costs against, then, the Act doubles shipping costs. Indeed, a 2015 report commissioned by the Puerto Rican government and written by three current and former International Monetary Fund economists found that Puerto Rico pays "import costs at least twice as high as in neighboring islands on account of the Jones Act."[52] These high import costs manifest themselves in higher prices for Puerto Rican consumers. Another 2015 report, prepared by Puerto Rico's Institute of Statistics, found the cost of living in Puerto Rico was 13 percent higher than that of a collection of more than 325 urban areas in the U.S., with supermarket items 21 percent more expensive than in U.S. states, gasoline 12 cents more expensive per gallon, and monthly household energy costs more than 2.5 times higher.[53] While this cannot be entirely attributed to the Jones Act, Puerto Rico's combination of a low per capita income and high cost of living suggests that detrimental public policy almost certainly is to blame. Economists have found that, in general, variations in cost of living across the United States are largely a function of variations in per capita income.[54] However, per capita income in Puerto Rico is half the U.S. average,[55] suggesting that its price inflation is not merely a natural product of high wages pushing up consumer prices. These numbers, of course, also do not account for how much considerably more expensive items are during a natural disaster.[56]

Former New York State assemblyman Nelson A. Denis thus summarized in the *New York Times*, "this is a shakedown, a mob protection racket, with Puerto Rico a captive market."[57]

Similar effects exist for other non-contiguous parts of the U.S. For example, shipping prices contribute greatly to Hawaii's highest-in-the-country cost of living, which is 12 percent higher than the next most expensive state in the Union.[58] In 2002, the U.S. International Trade Commission concluded that the annual economic gain from repealing the Jones Act to the residents of Puerto Rico, Alaska and Hawaii would be, in current dollar values, between $5 billion and $15 billion.[59]

Increased Reliance on Air and Land Transportation due to the Act

By driving up the price of cabotage, the Jones Act distorts the American transportation sector in general. The Act increases reliance on land and air transport. As an odd result, the Act has pushed ranchers to fly their cows on airplanes rather than having them loaded and shipped on boats.[60] The end result of this and other similar cases is that only 2 percent of domestic freight distributed among the lower forty-eight states travels by water, even though half the population lives near the coast. In contrast, Europeans ship over 40 percent of their domestic freight along so-called motorways of the sea.[61]

This has the harmful side effect of increasing highway congestion.[62] The Jones Act leaves Americans with virtually no coastal shipping for cargo between U.S. ports in the lower forty-eight states despite the interstate highway system being at or near capacity, and road infrastructure crumbling.[63] Without the Jones Act, estimates suggest that such coastal water transport would be about 60 percent cheaper.[64]

Harms of the Act to Other Domestic Industries' Competitiveness

But where goods are still transported on the water, the Jones Act does not just hurt consumers who have to pay higher prices. Because the Act pushes up input costs on American industries, forcing them to increase prices, it therefore also encourages consumers to turn to foreign firms who offer a lower price. If an American firm must charge a higher shipping cost because of the Jones Act, American consumers will not buy American. For example, in Boston, getting oil from Texas is three times more expensive than getting it from Europe, which economists attribute directly to the Act.[65] For another example, mid-Atlantic states import road salt from Chile and Mexico rather than buying it from mines in Ohio and Louisiana, and U.S. steel plants avoid deals with American scrap metal sellers, in both cases due to cheaper transport costs.[66] Similarly, cruise ships cannot carry passengers directly from Washington to Alaska without paying for the higher price of a Jones Act vessel, so many Alaskan cruises originate in Vancouver, hurting the potential Washingtonian cruise industry.[67] The Jones Act thus protects the domestic shipping industry at the expense of all other industries, making them less competitive than their foreign counterparts who need not limit their transportation options. Holistically, a 1996 analysis estimated that if Congress repealed the Jones Act, American industries would boom, with $1.5 billion growth in the water sector, $158 million in petroleum, $103 million in chemicals, $91 million in air transporta-

tion, $50 million in steel, $40 million in plastics, and $32 million in lumber.[68]

Arguments Against Jones Act Reform

Benefits of the Act to the Domestic Shipping Industry

The Jones Act's benefits to the American Merchant Marine are without a doubt the primary source of its political strength.[69] The Jones Act is indeed the lifeline of the American shipping industry—in the face of consistently subsidized foreign competition, the U.S. would face a rapid decline in its merchant marine fleet without the Act's protection.[70] In addition to subsidies, foreign ships are not subject to the American level of taxes and wages, complying with an American level regulatory apparatus, and defending themselves from litigation in our court system.[71]

All these facts would make American ships uncompetitive in a post-Jones Act world. On the other hand, a 2001 Department of Commerce assessment of the U.S. shipbuilding industry explains, "the Jones Act … provides a fleet of sealift capable vessels, a workforce of experienced and knowledgeable people and a shipbuilding industrial base."[72]

The suffering of the American shipping industry could have serious economic effects. As of 2006, the Jones Act fleet employed nearly 74,000 Americans, including vessel construction and maintenance, the crewing of vessels, and shore-side trade management, in addition to 425,000 more jobs attributed to the JoAct through indirect and induced employment.[73] Moreover, in 2011, domestic shipping goods and services contributed $33.6 billion in sales taxes, $21.7 billion in taxes on labor compensation, and $9.9 billion in taxes to state and local governments.[74]

Benefits of the Act to National Security

There are multiple avenues through which the Jones Act might protect American national security. First, Jones Act vessels can play an active role in responding to national security emergencies.[75] For example, the SS Northern Lights, which normally runs between Tacoma and Anchorage as a merchant mariner, made 25 voyages and 49 port calls to the Iraqi war zone during Operation Iraqi Freedom due to a need for a fast and shallow vessel to move military vehicles and hardware to the conflict area.[76] On the whole, U.S. merchant mariners moved 90 percent of the combat cargo and supplies used by the military in the Iraq war.[77] But if Congress repealed the Jones Act and economic incentives drove the domestic shipping industry into the subsidized hands of foreign competition, it may leave the U.S. to pick from one of several undesirable options: provide massive subsidies to the shipping industry to (literally) keep it afloat, rely on foreign-owned vessels to carry American military cargoes, or build a government-owned fleet of cargo vessels.[78]

Another national security benefit offered by the Jones Act concerns American border security. Daniel Goure of the Lexington Institute notes that while the current debate on U.S. border security has focused on the undocumented movement of people and goods from the border with Mexico, in fact, the 95,000 miles of national shoreline dwarf all U.S. land borders taken together.[79] He writes, "for regulatory, safety and security purposes, it includes 361 ports, over 3,000 facilities and more than 14,000 regulated domestic vessels."[80] U.S. Coast Guard Assistant Commandant for Prevention Policy Rear Admiral Joseph Servidio testified in committee at the House of Representatives in 2012, "The vastness of this system and its widespread and diverse critical infrastructure leave the nation vulnerable to terrorist acts within our ports, waterways, and coastal zones, as well as exploitation of maritime commerce as a means of transporting terrorists and their weapons."[81] Moreover, access to America's internal waterways would give a terrorist a path to many of America's most important urban centers, as well as close proximity to other vessels, land lines of communications, and oil and gas pipelines.[82] To prevent such a threat, the Department of Defense, Department of Homeland Security, and law enforcement agencies at the state and federal levels expend enormous resources to monitor any foreign vessels that enter the U.S. from abroad.[83] The same is not the case for U.S. vessels and their crews engaged in the movement of goods or the provision of services solely within U.S. waters, where laws and regulations governing ships involved in cabotage are far less demanding.[84] Without the Jones Act, the federal government, as well as the state and local governments with which it collaborates, would have to either increase the budgets of those regulatory agencies, or accept the enhanced national security threat that they might bring.

Rejoinder to Arguments Against Jones Act Reform

Rejoinder to Benefits of the Act to the Domestic Shipping Industry

The argument for the Jones Act based on its benefits to the American shipping industry goes against the weight of the economic evidence. Insofar as proponents of the Jones Act concede that foreign vessels would outcompete domestic ones, they are also admitting that there would be benefits to all the consumers who enjoy less shipping price passed on to them in turn. Indeed, foreign vessels would outcompete domestic ones because of their lower maintenance costs and longer trade routes that let each vessel spread its costs over a larger amount of cargo, making operating costs cheaper.[85] Economists, including 100 percent of economists who responded to a University of Chicago survey, tend to agree as a general rule that the macroeconomic benefit of these sorts of cheaper prices for consumers will outweigh the benefit of protecting a domestic industry.[86]

Rejoinder to Benefits of the Act to National Security

The argument for the Jones Act from national security is plainly outdated. As noted above, only 91 large Jones Act vessels exist.

While Operation Iraqi Freedom—hardly a moment in recent history that should serve as a model for the future—might seem to indicate that the Jones Act fleet can play a continuing role in military operations, the United States' previous military engagement with Iraq prove it unnecessary: during the Persian Gulf war, 85 percent of dry-cargo ships chartered by the United States Military Sealift Command were foreign-flagged.[87] Indeed, the Department of Defense itself has stated that the when the Military Sealift

Command "has a requirement to charter a vessel, nearly all of the offers are for foreign-built ships."[88] Jones Act defenders need not fret, then, about who would carry American military cargo to battle without a strong American merchant marine: foreign ships already do it.

Finally, the suggestion that foreign vessels bring with them terrorism sounds alarming but has little factual basis. There have been thousands of foreign ships per year docked in U.S. ports since 2001 without a single terrorist incident tied to them.[89] Additionally, the suggestion that foreign crewmembers will be able to enter the U.S. without breaks, enabling terrorist infiltration, is erroneous. A strict system for airplane crewmember visas already exists[90] and has worked continuously to keep Americans safe. Congress could use that same system for post-Jones Act maritime crews.

Conclusion

Reform Proposals

The expiration of the Maria waiver despite ongoing relief efforts in Puerto Rico have prompted calls for sweeping Jones Act reform.[91] These proposals include a modernization of the Act's language so that the Executive can issue waivers more broadly,[92] Rep. Nydia Velazquez (D-NY)'s more limited proposal for a full-year Jones Act waiver for Puerto Rico,[93] Senators John McCain (R-AZ) and Mike Lee (R-UT)'s introduced legislation to permanently exempt Puerto Rico from the Jones Act,[94] and a full repeal of the Act.[95]

North Carolina State Professor Emeritus Thomas Grennes floated several more methodologically complex reform ideas in his recent analysis of the Jones Act for the Mercatus Center. They include a repeal of the Jones Act paired with a subsidy for the production of domestic vessels and a temporary but complete repeal with an evaluation of the effects of the repeal after it sunsets, and then a revote in Congress on the issue.[96]

Evaluating the Issue

The Jones Act is a law whose time has passed. It puts American industrial transportation in a chokehold of unnaturally high prices that are felt both by consumers and American industries that struggle to compete with foreign corporations not subject to the same regulations. While subjecting Americans, especially Puerto Ricans, to harsher economic conditions, it does little to support one specific interest group—the shipping industry—while doing even less to aid national security in a modern context. The Jones Act is disadvantageous for the same reason that all tariffs are; they inevitably harm a wider range of interests than they help.[97] The dwindling size of the Jones Act fleet and the essential early days of response that Hurricane Maria put on display make the reality of America's shipping problem abundantly clear: it is not worth keeping a law on the books to waive it every time it becomes relevant. The time it takes the legislative or bureaucratic processes to act during crises are not worth meager, if existent, protections that the Act offers.

Congress would be well advised to implement a full and permanent repeal of the Merchant Marine Act to help move American transportation into the 21st century, American industry into a more competitive market standing, and Puerto Rico into a more viable economic condition •

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Interview with Christine Loh: Former Hong Kong Politician and Environmental Activist

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Christine Loh is a former Hong King Legislative Councilor and Under Secretary for the Environment. Through her distinguished career, she has held roles in the business world as a commodities trader, government as a legislator, and the NGO sector as the founder of Civic Exchange, a public policy think tank. In this interview, the CJLPP had the opportunity to ask her about her unique career path and what she has learned about the challenges of legislating environmental policies.

This interview has been condensed and lightly edited for this print edition. The full version can be found online at www.5clpp.com.

CJLPP: You have certainly had an interesting career path. How did a commodity trader become a policymaker in the Hong Kong government?

Loh: I do have a checkered past! I studied law thinking I was going to become a lawyer, but that did not happen. I was offered a short-term job as a commodity trader and I ended up doing that for 12 years. During that time, I had a secret life of sorts—everybody has their passions beyond their main job, it's part of being multidimensional. Mine happened to be being part of an armchair group of diverse professionals who liked to meet and talk about Hong Kong affairs. For me it was an introduction to social policy questions that I had never thought of before, I never knew that it would end up being my longer-term career. While I was still in my commercial career, I was actually known more for being a member of this group rather than being a trader.

In 1992, when Chris Patten came to Hong Kong looking for younger people who were passionate about politics, I was invited to join the legislature. In those days, I was in my mid-30s and I was appointed to the government by nature of me being in those circles. In the end, me and another person from my group were invited to be part of the government. This launched us into many years of direct political engagement. Then after 10 years I thought, we have to vote on a lot of issues but we seldom have enough time to gather knowledge about these great big subjects that we have to vote on. So, I decided not to stand for re-election and founded a non-profit think tank to try and consider solutions. I did that for 12 years.

CJLPP: What do you think is the best relationship between business, government, and civil society?
Loh: We need to have cross-sector discussion. One of the things I ended up doing a lot of was leading cross-sector discussions. I think people, deep inside, know that we have to talk to each other but there is a lot of what I call "assertion of position." In the end if you want to find a solution you have to work across sectors. We don't have to agree on everything, we don't have to change people's ideologies, but can we agree on something that we can work together on? I believe in that. And having different backgrounds that we can draw from is really helpful. I think I was one of the only politicians in Hong Kong that came from a legal background, having had substantial work in the business world before I became a politician. And during this time I was also a founder of a variety of NGOs, so I was not afraid of that community either.

One issue where all of this was useful was in addressing discrimination in Hong Kong. We did not have anti-discrimination laws. Me and another colleague tried to pass a lot of social legislation to address this and it was helpful to have a broad view on these issues and work with different groups.

CJLPP: Regarding the environmental policies you worked on, improving air pollution in Hong Kong must have required great coordination with the Chinese government. What is the key to effective collaboration between two governments that in many ways are quite different?

Loh: Well, I always believe in people. Systems are always different, but we first need to agree that there is a common problem and that by cooperating we will be able to solve the problem in a better way than if we were to just do our own thing. I think your own demeanor and enthusiasm for cooperation is the first important thing. Secondly, today in China, as in Hong Kong, if you want to deal with a problem your first question is "what data do we have? How are we justifying addressing this problem?".

CJLPP: What is an example of an issue that required great collaboration?

Loh: Shipping pollution was not even measured when I began working on it. Even more recently, research has been done to study the public health impacts of shipping pollution here in California. Unsurprisingly, it was very bad because big ships burn bunker fuel, which is the dregs of the oil refining process. It's thick, dark, and heavy so it has a lot of emissions. NGOs here raised the issue that the Long Beach port was polluting heavily and thus they threatened to sue the port. This stimulated the development of a comprehensive plan to deal with pollution. This made California the first state to call for these changes.

In Hong Kong, I read this research and these developments, and I was intrigued because we have a bigger port and a lot more people living around the port. Comparatively, there are no people living near the Long Beach port! So, we did research for Hong Kong, articulated the problem in a similar way that California did, and argued that if North America was working on these issues, we need to catch up because these ships are coming to us and polluting here rather than in California. When we showed the data and the argument, it was all very compelling to the head of the Hong Kong government. In our first policy iteration, we made it a front and center issue. For our colleagues on the Chinese side, it showed them that we were serious about changing our policies and law. After two and half years, we

successfully made the permanent policy changes.

CJLPP: About successful environmental policies, what were the guiding normative principles you followed when making environmental policy? Did you focus on rights or value maximization, for example?

Loh: In Hong Kong, it is really important for us to be evidence based. If we can show that, "this is the magnitude of reduction you can get using this measure" based on science, and at what cost to what benefit, that speaks for itself. In the American system, you try and find the least cost way to achieve an outcome. From our point of view, we want to look at that too, but it also depends on what gains we are looking at.

Public health gains are always significant. We need to invest more research into determining public health benefits. Working with the World Health Organization on air pollution, for example, is helping us determine the risks air pollution poses to public health. This is helping the public feel confident that even a small reduction in air pollution would produce benefits for the entire population. Then it is very hard to argue that it's not worthwhile.

CJLPP: What can other countries learn from Hong Kong's success in environmental policies? Are there any general suggestions you can offer to other countries?

Loh: One of the things that I feel we can go on to do is that [the shipping emission problem]. In the U.S. and Canada, there's now quite good control of shipping emissions along the coast for the big ships. Then, if you look at Europe, especially in northern Europe, there's similar control of shipping emissions. The next part of the world where control measurements like these are implemented is along the cost of China. If you look at global terms, there are so many parts of the world with a lot of shipping that are not doing it yet. My own sense is the global control of shipping could really spread to other parts of the world. This could bring measurable public health benefits to all of the people along the coast, as well as, to countries like China and us with major inland ports. Once we finish fixing the coastal policies, we should focus on inland ports.

CJLPP: How far off is Hong Kong from creating its ideal energy mix?

Loh: Hong Kong used to use a lot of coal. In 1997, we had already made the decision not to make any new coal plants. However, the thing about energy sources is that Hong Kong is a small space. In contrast, China, 20 years ago, was a large country with few energy options. So they started to build up energy systems and are now catching up fast. Now considering Hong Kong's status quo, we can take the U.S. or even Claremont, and ask how are we going to build energy sources? How much energy do we use? Do we have the right condition to use reusable energy? Your answer may be to use solar—we have the sun. The question would be how much energy does Claremont need to go off grid. So, every city can ask themselves this same question: what can they do?

In Hong Kong, if we look at what we can do in terms of reusable energy, we can't use wind farms because we don't have much space and we can't use water because the water around us is not ideal. Today we can't go from coal to renewable energy because those renewable energy sources don't have the capabilities and Hong Kong needs a lot of power. Today the technology is just not there for us to have such renewable energy, so the only viable lower carbon replacement for power is natural gas. We're switching to gas to replace coal plants now in Hong Kong.

CJLPP: How do you perceive Hong Kong as a purchaser of energy in a global market? Could the U.S. be a source of energy for Hong Kong?

Loh: The first question is going to be big—that Hong Kong is going to be a big market with high energy demand. Always remember that we all live in high rises, so our energy source is really important to feed the power plants so we don't brown out, which would affect lots of people. This is just so important. As we switch from coal to gas, Hong Kong needs long term supplies, and right now we have supplies from various parts of the world. In the future, as gas becomes available in the U.S., I don't see why we can't bring in U.S. natural gas to Hong Kong, for example.

CJLPP: Another option for clean energy would be nuclear energy. In the U.S., however, there are massive problems concerning the over regulation of nuclear energy and nuclear waste. What's your opinion on the feasibility of nuclear energy and dealing with nuclear waste?

Loh: Nuclear is an unsettled problem. The essential technology is there, but we have witnessed bad incidents like the Chernobyl disaster and Fukushima nuclear disaster that still scare people nowadays. Now, the nuclear waste is probably buried deep down somewhere, and countries like the U.S., France and China are all dealing with this problem. But I can step back and just talk about China, because our nuclear resources come from China, and the first commercial plant that was built in China is called Daya Bay and was built with Hong Kong money.

When China thinks about energy, it needs so much: 20 years ago, it didn't have that much, but when a country is under the process of industrialization, it needs so much energy. People all remember brown outs in China's past. China also didn't put all its eggs in one basket; it didn't say it's only going to do nuclear power or only something else. Their thinking was that they need a lot of power and they need to be the energy leader worldwide. China has a lot of coal, and it can't just say goodbye to it. Therefore, their thinking was, since China needs to be a leader in energy, it can be in the coal energy field. Questions arose on how to use coal more efficiently so that emissions decrease. That's their aim. Secondly there is gas as transition fuel, since it can bring down emissions sooner. Renewable energy? China definitely needs it. China doesn't want to give up on nuclear, so you can see, for China, we try everything since the need is great.

We can see now that China is going through a new phase where they are going to be more open about nuclear power. They understand that like France, they need people to feel safe, so they need to open up and have people come into the nuclear plants. In France, it's interesting because 70 percent of the power comes from nuclear and they need

to bring the community along to continue to support nuclear power. For Hong Kong, 23 percent of power comes from nuclear power, we are a nuclear city.

CJLPP: Two Democratic senators in the U.S. just proposed an "environmental justice" bill to give communities more power to sue companies for pollution. Do you think Hong Kong's laws and regulations provide for enough environmental justice?

Loh: In other parts of the world including Hong Kong, we don't have the traditional system of publicly suing the government or businesses on a particular issue. Also, the issue of the language of environmental justice is not part of the legal discourse in places like Hong Kong. Therefore, I don't see Hong Kong necessarily adopting the U.S. way of looking at things. This does not mean that if there's a case, that a certain business or plant has caused harm, that there couldn't be a legal case built.

Maybe it's more useful to look at China: in the future, how would the Chinese government deal with cases where a certain area has been destroyed? If it's a state-owned enterprise, there's rectification costs and there is compensation given to people who were harmed. I think these places are different from the U.S. and they don't necessarily have to follow the U.S. tradition. The U.S. system involves litigation to solve environmental issues, but this doesn't mean other counties have the same method in solving such issues. A bi-cultural discuss of how one would solve these questions would be great.

CJLPP: What are your thoughts on international environmental agreements like the Paris Climate Accord? Do you think their success is dependent on support of large countries like the U.S.?

Loh: I think the Paris agreement is very successful since so many countries are willing to put their names on it. It is successful because it solves so many problems. It allows a bottom up approach that allows countries to say, "I'm willing to do this" and once a country is committed to this, it is allowed to sign up for what they think they can do. Allowing a lot of previous arguments about environmental justice, in a way, to be settled.

The gesture of countries willing to sign on seems to be that people are willing to abide by it. For example, in Hong Kong, we're taking the agreement seriously since it requires Hong Kong to have reporting periods and it requires to review what Hong Kong said it's going to do every five years in order to do more. So that means if you take Paris Agreement seriously, you report every five years and you need to put new stuff on the table. The idea of the Paris Agreement is that maybe people would then go faster and faster. We now have a transparent reporting process, so you need to report, and you need to say what the next step of fixing the environment is.

CJLPP: What advice would you give students who want to influence environmental policies? Which sector do you think will be the most effective for them to do that in? NGOs? Government?

Loh: The first thing I always say is that it doesn't matter if you're an undergraduate student or someone with a higher education level, focus on what you're interested in. If you say you're interested in some potential area, then understand the issue. If the issue is not understood, you will not be able to lead and think through it. When you think you're onto something, the general test is to ask yourself how you want to change your own action. I do find that people who are more conscious and change their lifestyle and so on are more successful at influencing their environments.

Secondly, there are many ways for you to make a difference. You can do it directly, meaning you can go to graduate schools studying something related to environments and start from there to law, engineering and many different areas that have an environmental aspect to them. You could already be joining NGOs, think tanks, courses, and go on to listen to other people. Later in life, sometimes when you're really busy with other things, do whatever you have to do to spend time on what you are interested in. If the environment is something that's really interesting to you, you will always come back to it. The environment itself will be a hot topic in the future, but the angle from which you approach it, whether it's law, technology, architecture, biology or another developmental area, can be very unique. While some may be more profitable, they all can have an impact. For example, even if you're an artist, you can use your art to conceptualize things and help to articulate certain themes you're interested in.

CJLPP: That is all the time we have. Thank you so much for your time and expertise •

Outdated and Ineffective: The Problems with Copyright Law

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Introduction

The U.S. government introduced the concept of copyright with the intention to promote the progress of "useful arts." Copyright legislation did this by granting creators a limited monopoly over their works.[1] Though regulations are typically effective during the short period following their inception, the ephemeral nature of technology, and therefore the methods of consumption and distribution of copyrighted works, quickly render copyright legislation outdated.

Thus, copyright law has long been a point of contention between legislators, copyright holders, and licensors. With the recent strides in technological innovation related to copyrighted content, the shortcomings are becoming increasingly apparent. The inefficiency of the music licensing system poses a legitimate threat to the innovation, stability, and future as a whole of the music industry. This article examines the current issues of copyright legislation in relation to music licensing and the necessary steps to reconcile the two.

Basic Overview of Current Copyright Law

In order for a work to be considered copyrightable, it must be original, fixed in a material form, and possess a minimum level of creativity.[2] Under current legislation, copyright on an original work is granted immediately upon its fixation. In the case of music, a composition is considered fixed once it has been made tangible, i.e. produced in the form of a sound recording or a written composition.[3] However, this automatic copyright does not allow the holder to enforce or protect their material against copyright infringement through litigation. Once rights holders officially register their copyrights with the U.S. Copyright Office, they are granted several additional rights. A registered copyright allows the rights holder to protect his or her material in court, qualifies the author to receive statutory damages, and provides a public record of copyright claim.[4] For non-dramatic music (musical works not associate with musical theater), there are two distinct categories of copyrightable materials: musical compositions and sound recordings. A musical composition consists of music and any accompanying lyrics and may be either a written copy or phonorecord.[5] A phonorecord is any tangible object, including cassette tapes, CDs, vinyl records, and USB flash drives, that embodies a series of recorded sounds and from which sounds can be reproduced and perceived.[6] The second classification of musical works are sound recordings, which are the actual recordings of musical composition.[7] In other words, a musical composition is the idea of the music, and a sound recording is the performance of it. A recording artist or producer typically holds the copyright on the sound recording while the song writer and lyricist hold the copyright on the musical composition. It is often the case that one individual can be both the songwriter and performer, and therefore hold both copyrights.

The owners of copyrighted sound recordings are accorded the exclusive rights over their copyrighted materials to reproduce their work, create derivative works, distribute copies of their work, and perform sound recording by means of digital audio transmission.[8] Musical composition copyright holders are granted the two additional exclusive rights of public performance and public display of their work.[9] This creates a disparity between the royalties yielded from a copyright to a musical composition and one to a sound recording.

In order to use copyrighted material in any ways that infringe upon the exclusive rights, a license must be obtained from the copyright holder. A majority of licenses are voluntarily granted by means of a written contract outlining a negotiated fee, the terms of the deal, which rights are granted to the licensee, and, if applicable, the royalties to be paid to the copyright holder.[10] There are certain exceptions to the exclusive rights of a copyright that allow for statutory licenses. It is required for copyright holders to grant statutory licenses, also known as compulsory licenses, when their work has been previously recorded and distributed to the public. A compulsory license allows its holder to record and distribute a new recording of a copyrighted song as long as the new recording does not implement any major changes to the original musical arrangement.[11] Rather than allowing for a negotiated fee, compulsory licenses have standardized fees determined by the Copyright Royalty Board. While compulsory licenses were introduced to reduce the likelihood of a monopolistic system within the music industry, they are rarely utilized. Rather, the statutory prices now primarily function as a price ceiling for voluntary license deals.[12]

In regard to musical works and sound recordings, there are four classes of licenses: public performance, synchronization, print, and mechanical. As the name suggests, public performance licenses cover the right to any public performance of a song, including live and recorded performances on radio, on television stations, in commercial establishments, etc. In most cases, public performance royalties are paid only to the holders of the musical composition copyrights. The exception to this is a digital transmission, which additionally requires the licensee to pay a royalty to the sound recording copyright holders.[13] Synchronized licenses are required in order to accompany copyrighted music with any visual images. Synch licenses are used for music in movies, video games, commercials, etc., with royalties being paid to copyright holders of both the underlying composition and of the sound recording.[14] Print licenses primarily cover sheet music and folios, which are compilations of songs, and provide payouts to musical composition copyright holders.[15] Mechanical licenses cover the physical reproduction of songs, such as CD's and digital downloads, and although not legally determined, have generally been understood to cover streaming as well.[16] With legislation left unaltered with the introduction of interactive streaming services such as Spotify and Apple Music, mechanical royalties have become an area of great dispute.

To ensure the proper collection of their royalties, songwriters typically sign with publishers.[17] Composers sign the copyrights of their works over to the publishers and in return, publishers issue licenses, find users, and collect and distribute money to the songwriters.[18] Most of the time, publishers will affiliate with performance rights organizations (PRO), meaning that they sign over the public performance rights of all their writers' works. In turn, PROs issue public performance licenses, collect money, and pay royalties to the publishers.[19] In the United States, ASCAP (American Society of Composers, Authors and Publishers) and BMI (Broadcast Music, Incorporated), both non-profit PROs, make about up ninety percent of the PRO market share. The largest mechanical licensing counterpart in the United States is the Harry Fox Agency, which follows a similar process, but collects and distributes mechanical royalties.

Technology Causing Issues in Copyright Laws

The introduction of interactive streaming services like Spotify have led to an increase in music consumption and overall music industry revenue. Streaming services are considered interactive if they allow listeners to actively choose songs. Although growth of the music industry is in many aspects beneficial, it has been catastrophic for album and song sales, both physical and digital, and it has changed the structure of the entire industry. In 2016 alone, overall album sales and song downloads decreased 13.9 percent and 23.8 percent, respectively.[20] This augmented revenue has not been properly distributed among all deserving parties; with this shift away from music ownership and towards music streaming, money is migrating away from artists and songwriters, and into the pockets of large streaming companies. As copyright holders are collecting substantially less royalties from music sales, they are relying more heavily on streaming royalties. While the music industry has evolved leaps and bounds, the laws governing the industry have remained largely stagnant. In fact, current copyright law in the U.S. does not define interactive streaming nor does it state which exclusive rights interactive streaming infringes upon, resulting in ambiguity and significant complications in proper payouts.

Due to the vague nature of outdated legislation, there are no laws outlining which licenses are necessary in on-demand streaming. Instead, the industry guidelines were formed under general industry consensus. Whereas regulation is typically stipulated by law, the rules for copyrights in on-demand streaming were developed through practice and are not held accountable by any legislation. In the case of digital downloads, it was determined that only mechanical rights are exploited. Online personalized radio services, which are non-interactive, only require public performance licenses. Terrestrial radio broadcasts only require performance licenses for the musical compositions, which means that they only pay the songwriters, not the performers of a song. This is because when legislation regarding radio was written, terrestrial broadcasting companies successfully argued that radio provided free advertising for record labels and their artists. However, this notion has recently become more controversial, with copyright holders attempting to collect greater royalties from radio broadcasts.[21] Until recently, it was generally accepted that interactive streaming services exploited both mechanical and public performance rights. As compensation becomes a greater point of contention in the music industry, copyright holders are fighting to change the detrimental guidelines that prevent artists from collecting much of the royalties that they deserve.

In 2015, two class action lawsuits were filed against Spotify, accusing the streaming service of distributing copyrighted music without mechanical licenses. The two class actions were merged and a settlement of $43.4 million was reached, but it did not provide a solution to the problem of unpaid mechanical royalties. One factor in this issue is that Spotify utilizes the mechanical licensing services of the Harry Fox Agency, and although they are the predominant mechanical licensing organization in the U.S., their database does not contain the copyright information for all musical work. As a result, there are mechanical royalties that go unpaid.[22] In July 2017, Spotify was again faced with two lawsuits concerning unpaid mechanicals. However, the second time these allegations were made against Spotify, it elicited a different response. The streaming service's lawyers filed a motion asserting that they were not obligated to pay mechanical royalties. The legislature's failure to define, or even acknowledge, interactive music streaming in regard to copyright law allows for this argument to even be made.[23] In order to avoid future disputes, copyright legislation must be updated to consider the current state of technology and consumption of copyrighted material.

Another prominent issue resulting from the rise of music streaming is a lack of standardized payment rates. While it may not make a substantial difference to listeners what platform they use to stream music, the disparity between royalty rates is significant to artists and record labels. Streaming services typically pay record labels a large fee for an umbrella license of all their songs. On top of that, the streaming services and record labels negotiate a royalty. These rates are undisclosed, but researchers have estimated the sound recording royalties per stream. According to these calculations, Napster and Tidal provide the highest payouts, both hovering just over one cent per stream. Apple Music is estimated to pay royalties of about 6/10 of a cent, Spotify 4/10 of a cent, Pandora 1/10 of a cent, and YouTube 6/100 of a cent per stream.[24] These fractions of cents per stream are allocated to record labels, which in turn pay an even smaller amount to the recording artists. The royalties are typically determined in the artists' record deals. On top of that, artists do not necessarily know what the negotiated royalties are between their labels and the streaming services. This is an extremely simplified illustration of streaming services royalties as there are several other considerations that must be taken into account to completely comprehend such payments. For instance, free, ad-supported streaming services provide significantly lower royalties than premium, subscriber based platforms. In the case of YouTube, factors of monetization include user engagement and the brand and type of ads played throughout a video.

The intersection of the legality of such royalty standards and the modern dissemination of music results in the concept known as the value gap: the hypothetical disparity between the royalties that services should be paying for content and what copyright holders actually receive. One

jarring example of this value gap is the fact that although YouTube accounted for the most music streams by a significant margin, it generated less revenue than vinyl sales did in the first half of 2017.[25] When the most utilized streaming service distributes the lowest royalties to creators, it raises concerns about the survival of artists and songwriters in the context of modern technology and obsolete laws. In order for the music industry to continue to thrive, legislation must be crafted to allow creators to make a living. To further complicate the situation, the millions of daily micro-transactions necessary to calculate streaming royalties are incredibly difficult to perfectly track. Therefore, royalties are often left unpaid or ignored. The multitude of distinct considerations for each platform, a lack of transparency in payment, and the absence of standardized industry laws result in a severe discrepancy in royalties paid to artists, labels, publishers, and songwriters.

Another shortcoming of copyright legislation is evident in the Digital Millennium Copyright Act (DMCA). The DMCA was signed into law in 1998 in order to promote access to information and the growth of the internet, but since its enactment, the internet has evolved significantly while legislation has not. Title II of the DMCA, the Online Copyright Infringement Liability Limitation Act (OCILLA), granted online service providers safe harbor absolving them of monetary liability in certain cases of copyright infringement. If a provider is unaware of material transmitted, cached, stored or linked by its users that infringes upon a copyright, it cannot be held monetarily liable. The only two requirements for a provider to be eligible for liability limitation are that they "(1) adopt and reasonably implement a policy of terminating in appropriate circumstances the accounts of subscribers who are repeat infringers; and (2) must accommodate and not interfere with "standard technical measures."[26]

The OCILLA effectively allows online service providers like YouTube to profit off of illegal materials. With automatic ad placement on user uploaded videos that infringe upon songwriters' and artists' copyrights, YouTube can claim ignorance and remove the material only once the copyright holder has submitted a notification of copyright infringement. Often, material that is removed due to copyright infringement is quickly re-uploaded, adding to the persisting value gap.[27] As technology rapidly improves, it not only produces better distribution but also allows for further circumvention of the law, demonstrating the necessity for legislation to evolve with technology. With companies developing new methods of music distribution and simultaneously lobbying to pay the creators as little as possible, the result is inevitably an unsustainable relationship.

Government Shortcomings in Copyright Legislation

Beyond the questionable actions taken by corporations in the private sector and the exploitation of ambiguous and archaic laws, there are also several flaws in the legislative and judicial processes in regard to copyright laws. One of the foremost shortcomings is the lag of legislation behind technology. As technology continually develops and evolves, it is constantly changing the scope of copyright law. Consequently, legal delay is an inherent complication, as copyright law inevitably will struggle to maintain stride with technology. Nevertheless, it is unreasonable to expect Congress, through its intentionally arduous and deliberate legislative process, to constantly alter laws at the rapid pace of technological dissemination. Indeed, few bills and amendments have recently been passed in order to adjust to advancements in technology utilized in the consumption of copyrighted works, creating opportunity for firms to capitalize on outdated regulations.[28]

Aside from the prolonged legislative process, legal delay is also a result of the dynamic and unpredictable nature of technology. As the implications of technology are often difficult to comprehend until it comes into prevalent use, it is nearly impossible for the government to aptly revise legislation. Consequently, copyright laws are left as open-ended standards to avoid the constant need for amendments and revisions.[29] Such imprecision results in the aforementioned ambiguity and leeway for the exploitation of copyrighted material. As technology continues to develop and affect the structure of the music industry, the problems will inevitably amplify.

Open-ended copyright guidelines incite legal conflict. As demonstrated by the plethora of copyright lawsuits, ambiguity in copyright legislation often results in adjudication in court. Drawn-out judicial action frequently deepens legal delay, and in that time, people can continue to act within the vague limitations of the copyright regulation. Furthermore, new technology can arise during that period, rendering the current issues obsolete.[30] Not only are the courts a less efficient solution to copyright disputes, but courts are, according to Justice Breyer's concurrence in the *MGM Studios, Inc. v. Grokster, Ltd*. case, "less well suited than Congress to the task of accommodat[ing] fully the varied permutations of competing interests that are inevitably implicated by such new technology."[31] This arises in part from the court's lack of expertise in copyrights and the relevant technology. Due to these shortcomings in the U.S. government's approach to copyright lawmaking and adjudication, copyright legislation is significantly less effective than it needs to be.

Potential Solutions

With issues prevalent in both the private and government approaches to addressing copyrights in the music industry, one is left questioning how the two entities can be reconciled in order to find the proper solutions. If the two sectors cannot successfully cooperate to rectify the predominant problems in the music industry, who is better equipped to remedy the ailments afflicting the copyright holders?

As previously mentioned, one of the difficulties in calculating streaming royalties is the sheer number of plays and micro-transactions that occur on a daily basis. Many private firms and startups are turning to blockchain technology, popularized by cryptocurrencies like Bitcoin, to help resolve this problem. Blockchain forms a decentralized database by breaking information into 'blocks' which are stored on a network of computers. These blocks of data are encrypted and linked to all previous blocks in that 'chain' of information. Utilizing blockchain technology, digital songs can be encrypted and the resulting chain would provide transparent data of every subsequent download and

stream of that file. Not only would this be beneficial for the formation of a comprehensive, public copyright database, but it would also increase transparency in the payment chain, allowing copyright holders access to details on their royalties. Blockchain technology would make accurately tracking the millions of daily micro-transactions considerably more feasible. Furthermore, the meta-data embedded in these blocks would provide digital services all the necessary information to provide appropriate payment. Such meta-data could include information on the artists, songwriters, publishers, and all fractional owners of any relevant copyrights.

There are several measures that the government should take in order to modernize copyright legislation. In order to deter arguably legal misuse of copyrighted materials, Congress must introduce more focused legislation that acknowledges current technology. By creating regulations with a narrower scope, legislators can reduce ambiguity. Existing policies do not even address interactive streaming services or define the term streaming, allowing companies to operate on generally accepted guidelines which are not legally binding. With definitive regulations, corporations would not be able to act as questionably in regards to music licensing. Concurrently, more concentrated and applicable rules will minimize the necessity for judicial action in deciding copyright cases. For instance, legislation that specifies which rights interactive streaming exploits would preempt cases similar to those that Spotify has faced. A more effective attempt to keep legislation up-to-date with and relevant to modern technology and the distribution of music will benefit the protection of copyrights and encourage fair compensation. With regards to services such as YouTube, the government is passively augmenting the value gap by allowing the company to continue to operate under the DMCA. Failure to acknowledge that technology has surpassed the original scope of legislation and is now legally infringing upon the original intent permits unfair and insufficient compensation. Congress could also consider the implementation of standardized royalties and licensing fees across streaming platforms of a specific structure, either ad-supported or subscriber-based. This would produce a system that would not penalize artists and songwriters whose music is streamed more through services with lower payouts.

One current attempt at solving some of these issues is the creation of a comprehensive copyright database. A complete database of copyright information would provide all involved entities with sufficient knowledge regarding copyright ownership and who should receive royalties for the use of specific songs. However, private firms and the U.S. government have both initiated attempts at such an endeavor, and are currently at loggerheads over how it should be approached. In July 2017, Congressman Sensenbrenner introduced the Transparency in Music Licensing and Ownership Act, which would "establish a database of nondramatic musical works and sound recordings to help entities that wish to publicly perform such works and recordings to identify and compensate the owners of rights in such works and recordings."[32] The database would be established and maintained by the U.S. Copyright Office, available for free to the public, and serve to provide information for licensing and enforcement of copyrights. Information of each musical work would include the title, copyright registration date, copyright owner, entity through which it can be licensed through, international standard musical work or recording code, featured recording artists, titles of any album containing the work, and the publically distributed catalogue number and label name.[33]

Soon after the introduction of Rep. Sensenbrenner's bill, ASCAP and BMI, the aforementioned largest PROs in America, announced that they had been working together for a year to create a similar database to improve transparency in the music industry.[34] An immediately apparent flaw of the ASCAP-BMI joint database is its exclusivity. Though the ASCAP and BMI represent a majority of musical works copyright holders, the database would not include copyright information from smaller PROs such as SESAC, forming an incomplete database. Additionally, the database would only include copyright information from PROs, not publishers. Thus, it would be ineffective in keeping track of and providing information for mechanical licensing. But there are certain advantages to the private sector's reaction to the Transparency in Music Act. Rep. Sensenbrenner's bill stipulates that the Copyright Office is to build the database from scratch, requiring significantly more time and labor, whereas the ASCAP-BMI database is already in the works. A potential solution would be for the two efforts to join together; however the two parties are in conflict, with Sensenbrenner calling the ASCAP-BMI database an attempt "to maintain power over a failing process that only serves their interests, not those of the American consumer."[35] Similarly, many members of the music industry do not want further government intervention. With the two sides at odds, a joint effort seems unlikely.

In 2015, the U.S. Copyright Office published a report entitled Copyright and the Music Marketplace, outlining several principles it believed to be necessary in the reformation of copyright laws. Unfortunately, the U.S. Copyright Office does not have the power to enact legislation, only to administer the laws and advise Congress in matters concerning copyrights.[36] The report discusses several concepts necessary in the restructuring of copyright laws. One of the most important principles is consistent regulation of copyrights across the same platforms and uses. This proposal would resolve many ambiguities and inequities in the realm of digital platforms, requiring uniform rights for both the owners of sound recording copyrights and musical composition copyrights. Additionally, the report stipulates that terrestrial radio broadcasters should be required to obtain sound recording public performance licenses. Not only would this provide fair compensation for sound recording rights holders, it would also improve competition between terrestrial radio broadcasters and other services that require sound recording licenses.[37] Another noteworthy concern that the Copyright Office addresses is the absence of a uniform rate-setting standard for statutory license fees, especially across platforms that offer similar services. They suggest an overhauled single rate standard that will reflect the fair market value of copyrighted works.[38] In regard to the lack of transparency in the payment process, the Copyright Office proposes a comprehensive public database of copyrights, which would require the cooperation and contribution of information from private actors, such as ASCAP and BMI. This would potentially help to fill the gaps of copyright knowledge that prevent proper compensation. The abovementioned database would be the foun-

dation for an updated licensing system, operating through MROs, which would be the mechanical rights equivalents of PROs.[39] If enacted, the proposals of the U.S. Copyright Office would provide a much needed update to copyright laws, but it is imperative to note that not only would it require enormous amounts of cooperation and legislation, it would also require continual revising and amending as technology develops in order to maintain its intended effects. The responsibility lies upon Congress to take into account the opinions and expertise of individuals within the music industry and the U.S. Copyright Office and to take legislative action.

Conclusion

The dynamic state of technology combined with stagnant copyright legislation has resulted in several of the pressing issues evident in the music industry. As most of the relevant laws were written before current technologies became commonly used, they are ill-equipped to address the complications brought about by new forms of music consumption. Failure to acknowledge changes in technology has culminated in laws that are unreasonably ambiguous and susceptible to manipulation, creating a problematic system of compensation for copyright holders. If the failure to pay artists fair and reasonable royalties persists, the music industry will inevitably lose creatives, who are the very heart of the industry. If artists are unable to support themselves as fulltime musicians, they will be forced to commit less time and effort to producing the music. Not only will this be extremely detrimental to the quality of music and entertainment, but it will also negatively affect the streaming services who underpay these musicians. In fact, it is in the best interest of the entire music industry to properly compensate artists, as they create the music that sustains the business. In order to resolve these current issues, copyright legislation must be amended to address the modern state of technology. To preserve the music industry and its constituents, Congress must work in conjunction with the private sector to rectify the shortcomings of copyright legislation and modernize the existing law •

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