GADFLY

Volume 1, 2021

Undergraduate Journal of Political Science

Journal de science politique du premier cycle

GADFLY
UNDERGRADUATE JOURNAL OF POLITICAL SCIENCE

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Acknowledgements & Thanks / Reconnaissance & remerciements

Simon Fraser University's three campuses occupy the unceded traditional territories of xʷməθkʷəy̓əm (Musqueam), Sḵwx̱wú7mesh Úxwumixw (Squamish), səl̓ilw̓ətaʔɬ (Tsleil-Waututh), qʼíc̓əy̓ (Katzie), kʷikʷəƛ̓əm (Kwikwetlem), Qayqayt, Kwantlen, Semiahmoo and Tsawwassen peoples. We recognize and support the return of territorial sovereignty to the Indigenous peoples of these lands.

Les trois campus de l'Université Simon Fraser occupent les territoires traditionnels non-cédés des xʷməθkʷəy̓əm (Musqueam), Sḵwx̱wú7mesh Úxwumixw (Squamish), səl̓ilw̓ətaʔɬ (Tsleil-Waututh), qʼíc̓əy̓ (Katzie), kʷikʷəƛ̓əm (Kwikwetlem), les peuples Qayqayt, Kwantlen, Semiahmoo et Tsawwassen. Nous reconnaissons et soutenons la restitution de la souveraineté territoriale aux peuples autochtones de ces terres.

This volume is dedicated to every single person involved in its creation. Your work is unquestionable in its rigour, and your character unquestionable in its perseverance.

Cette édition est dédiée à chaque personne qui a contribué à sa création. La rigueur de votre travail et la persévérance de votre esprit sont incontestables.

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Journal Staff / Personnel du journal

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Hazards of a Socially Conscious Endeavour

The publication of this volume has been an experience full of pedagogical encounters. Those encounters were costly, and most students did not have access to the necessitated wealth, which should be understood as a hidden systemic prerequisite of involvement. Unavoidably, this journal was, and will continue to be affected by some of the most difficult and punitive aspects of our social systems; this difficulty was simply aggravated by the pandemic. The number of hours of unpaid labour poured into every single aspect of the editorial workflow, the countless burnouts stemming from being overworked on multiple fronts, the lack of material support in any sense of the term, and so many other obstacles shattered the spirit of many students throughout the year. Consequently, we were powerless in addressing many of these obstacles.

For a student journal—an undergraduate one, especially—the question of power, and the lack of it, echoed every action in the processes of production. The biggest one perhaps was a commitment to greater social awareness, and grounding that awareness in the editorial function. Any form of social awareness that was pursued led us to a greater examination of epistemic injustice and its various manifestations. Unfortunately, this imposed a great cost beyond most students' social paycheck. Inevitably, we would be barred from an activity like this due to our lack of support and resources, which is deeply ironic. Institutional barriers and a defunct social epistemology could have metaphorically 'blocked out the sun' when it came to addressing these issues. And this certainly extends to the continued unaffordability of participation in projects like ours for students who are often the victims of these barriers. At that point, what is left of the journal are students who are not as deeply affected by discriminatory practices, or, students who end up sacrificing more than they could afford to. With the pandemic as another burden on these students, social and epistemic justice were downgraded as a priority.

Important to note, again, is that the pandemic did not create a new social condition, it simply heightened various contradictions in our social systems. Students who could not afford to work for free remained excluded; students who felt like academic journals were way beyond their capacity as a 'possessor of knowledge' remained excluded; students with various accessibility needs that deviated from the 'norm' remained excluded. And these are students in our immediate proximity. We are not even talking about the global dimension of this epistemic apartheid. For example, working-class students—racialized working-class students in particular—faced not only a challenge, but a painful reminder of their social position. This potent form of discrimination is perpetuated not through explicit, legally-bound doctrines

(often, I should add). Rather, exclusionary practices are strengthened through the social condition in which all matters of contradiction, distinction, and opposition are obscured in favor of a liberal numbness: a state of social ineptitude and 'peace' where any matter of conflict outside of a 'healthy' competition is correctly understood as a threat to the order of the day. For such students, this is nothing short of disastrous.

We also grappled with performativity, feasibility, and appropriateness when it came to our encounter with epistemic injustice. One of these questions was centered on decolonization. Decolonization has had a tremendous paradigmatic influence over the progressive academic aesthetic, and we were not excluded from it. This was not merely a 'let's decolonize the journal' situation. On the contrary, we had many conversations around the possibility of such a pursuit. We often asked, 'can a journal like ours, with its current staff, in this institution, commit to such a task without reducing its significance and political rigour?' Answers ranged from weary maybes to unabashed nos, with the rare and cautious affirmative once in a while.

An outside observer might suggest that these issues will dissipate without any need for intervention in the incremental process already underway in the academy. This is, however, incredibly false. Any social transformation worthy of mentioning has required immediate and absolute intervention. So, as students working with journals, I implore you to explore the dimensions of intervention. This might include a variety of practices tied to unlearning exclusionary norms, or possibly looking outside the academic framework altogether.

(Un)learning is an important part of the human experience. What we need is a rapid reconsideration of the way our pedagogical systems function and how they continue to actively ignore most people. We need to think and speak in a way that is more socially accessible. The possibility of such a leap in institutional practice depends entirely on our greater social circumstance. That entails opening the institution to the historically disempowered, unconditionally. This opportune moment for student journals is only supplementary to greater material social transformation, in which a mighty apparatus of reproduction—the academy—could play a fundamental role.

Parsa Alirezaei
Co-Editor-in-Chief

Letter from the French Section / Lettre de l'équipe française

Contre toute attente… la francophonisation de l'académie en contexte minoritaire

Alors que le journal *Gadfly* a été créé en novembre 2020, l'équipe française de *Gadfly* est née par hasard un jour de janvier 2021. Lors d'une de nos premières rencontres d'équipe, une conversation entourant des occasions à utiliser la langue française a eu lieu, ce qui a mené à la création d'une section française du journal. La décision de créer cette section a été facile : elle permettrait aux étudiants de premier cycle d'expression française de contribuer à l'académie et aux conversations entourant la science politique qui sont souvent en anglais. Donc ce n'était pas une question de savoir si nous voulions créer une section française, mais si nous *pouvions* la créer. Comme nous sommes des jeunes d'expression française dans un contexte minoritaire, nous avons rencontré et surmonté des difficultés à recruter assez de personnel pour notre équipe. En outre, comme ce journal et cette équipe sont nouveaux, nous avons le privilège et la responsabilité d'établir des précédents qui seront suivis par des générations de l'équipe française à l'avenir.

Dès le moment où nous avons accepté des travaux écrits, nos rédacteur.rice.s avaient des décisions difficiles à entreprendre. Puisque nous sommes en milieu minoritaire et puisque notre journal est nouveau, il est normal que nous recevions un taux bas de soumissions—toutefois, ceci compliquait nos décisions éditoriales. Bien que nous ne voulions pas décourager les auteurs qui avaient soumis leurs textes, nous avons dû accepter que ceci était une partie du processus afin d'avoir un journal de haute qualité. Notre équipe a dû aussi travailler en étroite collaboration. Notre équipe de rédaction est composée de seulement quatre personnes alors prendre des décisions éditoriales a pris du temps. Cela dit, elle permettait une forte coopération et une compréhension très spécifique des difficultés que subit nos rédacteur.ice.s adjoint.e.s. Ce processus a été fort difficile, mais certainement gratifiant aussi.

Les prochaines étapes de notre processus, celles qui sont la rédaction et la traduction, nécessitaient aussi des décisions difficiles. Entre autres, nous avons dû choisir entre l'ancienne et la nouvelle orthographe, ou alors l'adoption du langage inclusif ou pas, etc. Nous avons choisi l'ancienne orthographe puisque nous avions appris l'ancienne orthographe, mais à l'avenir, notre but est d'apprendre comment utiliser la nouvelle orthographe et comment l'employer pour nos prochaines éditions. Ensuite, nous avons choisi d'utiliser le langage inclusif puisque le mandat de *Gadfly* nous encourage à questionner et à critiquer la norme.

L'idéal aurait été de traduire chaque texte dans son intégralité, afin de pouvoir les rendre plus accessibles à un plus grand public. Mais comme nous sommes une petite équipe de bénévoles sans formation spécialisée en traduction, nous avons décidé d'entamer un projet plus faisable—celui de traduire les titres, les résumés et les mots-clés de chaque article. La question

est toujours de trouver l'équilibre entre ce que l'auteur.e veut dire et ce qui a du sens dans l'autre langue, sans tomber dans les pièges de la traduction directe (règle cardinale de la traduction !). Il faut surtout faire gaffe aux anglicismes, puisque la majorité des traductions sont de l'anglais vers le français.

C'est tout à fait possible d'arriver à une dizaine de possibilités pour chaque proposition. Mais ce qui importe c'est de trouver le juste milieu. Sans doute, s'attaquer à la traduction est une très belle expérience d'apprentissage. Les deux plus grandes leçons sont les suivantes. Premièrement, parfois (ou alors souvent), il n'y a pas de traduction parfaite et il faut se contenter de la meilleure option. Quand il y a des néologismes, ce n'est pas du tout évident ce qu'il faut choisir comme terme dans l'autre langue. Certaines phrases nous appellent à exercer un peu plus de créativité. Deuxièmement, le but ultime c'est surtout et toujours de rester le plus fidèle possible au texte original. Autrement dit, il faut trouver un compromis en ce qui concerne le style et savoir limiter notre influence dans la traduction d'un texte. Nous tenons à cœur la vision de l'auteur.e et nous sommes très conscient.e.s de cette responsabilité envers ceux qui ont décidé de partager leurs textes avec nous.

La création et l'entretien de la section française aurait été irréalisable sans l'aide et la coopération de plusieurs groupes et partenaires. Nous devons un grand remerciement à tous les auteur.e.s qui ont soumis leurs textes à notre équipe. Nos collègues dans l'équipe anglaise qui rencontraient des obstacles similaires aux nôtres et avec lesquels nous nous sommes conseillé.e.s durant des décisions difficiles, merci de votre soutien continu. Nous ne pouvons pas exprimer notre gratitude sans remercier le Bureau des Affaires Francophones et Francophiles et les professeurs du French Cohort Program qui nous a soutenu.e.s cette année—sans eux, la section française n'aurait jamais vu le jour. L'équipe fantastique du BAFF nous a soutenu.e.s dans leur capacité administrative et financière dès le début. Leurs conseils nous ont aidé.e.s à diriger notre travail dans la bonne direction et à attirer un plus grand public. Les conseils relatifs au processus éditorial et sur l'académie des professeurs du French Cohort Program ont été inestimables. Toute l'équipe *Gadfly*, mais surtout l'équipe française, veut remercier le BAFF et ces professeurs pour tout leur soutien de cette initiative et leur doit une dette de gratitude.

Finalement, nous devons un grand merci à vous, le/la lecteur.ice pour votre soutien de cette ambitieuse initiative.

Bien cordialement,

L'équipe française de *Gadfly*

Politics & Governance / La politique et la gouvernance

Pride is Dead, Long Live Pride: A Study of the Commodification of Identity Politics Through an Analysis of Matthew Warchus' Pride (2014)

B. Dalia Hatalova

Keywords: Identity Politics, class politics, left-wing melancholia, neoliberal capitalism, commodification

Mots-clés: Politique identitaire, politique de classes, mélancolie de gauche, capitalisme néolibéral, marchandisation

The transformation of pride from being a quality of economically disadvantaged groups that sought acceptable living standards to individuals engaging with a commodified ideal that rests upon celebrating uniqueness has created another element to be negotiated in the world marketplace, separating the haves from the have-nots. While certain forms of marginalization benefit the middle-classes who strive for recognition in an increasingly anonymous world, such diverse and beautiful colours do little to clothe and feed the multitudes that remain below poverty levels worldwide. Matthew Warchus's *Pride* (2014) tells the story of the mining and the LGBTQI+ communities' political support for each other during Margaret Thatcher's government, highlighting what was perhaps the last period in which such a coalition between two now distinct political groups was possible. The subsequent disintegration of class politics as the central focus of the political left, replaced by a new emphasis on identity politics, created an atmosphere where some previously marginalized groups became integrated into mainstream culture; therefore, the neoliberal capitalist system dismantled communal action through division that privileged distinct non-class-based identities as new commodities for exchange – eliminating the possibility of unity between those groups marginalized on the basis of race, gender, sexual orientation, among others and those structurally subordinated due to class. Warchus' *Pride* provides one alternative that may since have been lost. Still, if the political left is to regain its ability to prioritize equality, it must relinquish its bonds to the commodification that has begun to pervade its socio-political agenda.

La transformation de la fierté comme qualité des groupes économiquement défavorisés qui recherchaient des conditions de vie acceptables à un idéal marchandisé

reposant sur la célébration de l'unicité a encore une fois créé un élément à négocier dans le marché mondial qui sépare les nanti.e.s des démuni.e.s. Alors que certaines formes de marginalisation sont à l'avantage de la classe moyenne qui cherche à se faire reconnaître dans un monde qui est de plus en plus anonyme, des couleurs aussi riches et diverses sont peu utiles pour habiller et nourrir la population qui se trouve encore sous le seuil de pauvreté. Le film de Matthew Warchus, Pride (2014), raconte l'histoire du soutien politique mutuel entre la communauté LGBTQI+ et la communauté minière lors de l'époque de l'administration de Margaret Thatcher. Le film souligne ce qui est peut-être une des dernières périodes où une telle coalition entre deux groupes politiques aussi distincts aurait pu être possible. Suite à la désintégration de la politique des classes comme point focal de la gauche politique, la politique identitaire a pris sa place, ce qui a généré une atmosphère dans laquelle certains groupes – autrefois marginalisés – se sont intégrés dans la culture dominante. Par conséquent, le système capitaliste néolibéral a démonté l'action communautaire en employant la division privilégiant des identités distinctes qui ne sont pas fondées dans la classe. Ces identités sont aussi de nouvelles marchandises à échanger, éliminant la possibilité d'unir les groupes marginalisés à cause de leur race, leur genre, leur orientation sexuelle, entre autres raisons, ainsi que ceux et celles qui sont structurellement subordonné.e.s à cause de leur classe. Le film Pride de Warchus parle d'une possibilité qui est peut-être perdue à jamais depuis. Néanmoins, si la gauche politique veut retrouver sa capacité de donner la priorité à l'égalité, il faut qu'elle abandonne la marchandisation qui a déjà commencé à imprégner son programme sociopolitique.

Introduction

We are no longer spectators, we are 'embarked' [...] and can neither escape nor contemplate from a distant, secure observatory, the calamities that surround us; we belong to and participate in them.

- Enzo Traverso, *Left-Wing Melancholia: Marxism, History and Memory*

The definition of the term 'pride' proves to be as diverse as the issues concerning it. According to the Merriam-Webster dictionary's description, 'pride' can point to "a feeling that you respect yourself and deserve to be respected by other people" or "a feeling that you are more important or better than other people," and finally, "a feeling of happiness that you get when you or someone you know does something good, difficult, etc." (Merriam-Webster, n.d.). These various definitions of the word have in common the term 'feeling' as a prerequisite to meaning that places emphasis on the nature of pride as the experience of a subject. Simultaneously, they highlight the distinction (and, perhaps, thin line) between the assertion of one's worth and the recognition of others.

Contemporaneously, 'pride' has expanded to include another dimension to its usage as the symbol of freedom and celebration of diversity found in the establishment of annual Pride Parades that began to be organized in the wake of the Stonewall riots of 1969 (Britannica, n.d.). This political movement forms the basis of Matthew Warchus's film *Pride* (2014), which explores the events that brought together a Welsh mining community and London gays/lesbians in the 1980s. The film forms the basis of my examination of how class politics have come into conflict with identity politics in the left-wing political sphere. While both areas have been associated with seeking equity and justice, their foundational premises prove reconcilable unless we broaden the meaning of identity in our society.

Building on examples from *Pride's* diegesis, I examine the issues of class and identity as they intersect to better understand the basis of current political movements of the left-wing party. Focusing on political developments in the last decades of the 20th century from a theoretical perspective, I then expand on the shift towards identity politics and the decrease of socialist ideology by exploring the literature on left-wing melancholia. My examination also observes the different forms of political struggle that are required by the miners versus the LGBTQI+ community through the lenses of "redistribution" and "recognition," respectively. In the last section, I use the theories of Jonathan Crary (2014) and Guy Debord (1970) to probe the role that neoliberalist capitalism has played in identity politics, the fashioning of identity as a new commodity, and the resulting undermining of the possibility of revolutionary political action.

Pride & value structures in the modern left

Eliminating class differences has become a problematic goal in 21st century neoliberal capitalism in view of the left's growing emphasis on identity politics. Social perceptions have begun to turn away from a definition of self-respect as stemming from underprivileged groups who find their worth in spite of class-based discrimination. Instead, self-respect becomes connected to a positive affirmation of marginalized identities that demand broader social recognition. However, these groups have already often been accepted into the middle-class on an economic level. This latter form of pride is concerning as it ultimately rests upon a process of self-commodification by basing its value on valorizing individual differences. As a result, persons are invited to market that difference in the realm of social exchange, partaking in—rather than challenging—the current neoliberal system.

In contemporary identity politics, even though marginalized identities have played a critical part in previous struggles against economic disparities, they have since become integrated into the mainstream. The shift in the meaning of 'pride in one's identity' from a unitary expression to a separatist one (in terms of both persons and collectives) is only one factor that signifies the intensity of current individualism and complicates the creation of an

equal post-capitalist society. Consequently, these developments interfere with the possibilities of finding common ground between traditionally discriminated groups (based on race, gender, sexuality, etc.) and class-based struggles. The left-wing – historically a predominantly class-conscious party – has begun to increasingly change its focus to these issues of recognition. Currently, the left-wing's politics being "defined less by economic or ideological concerns than by questions of identity" seems to play into a broader theme of "lost socialism [being] replaced by accepted capitalism" instead of providing counter-hegemonic ideals with the potential of changing the very foundations that have led to class (and other) discriminatory practices (Fukuyama 2018; Traverso 2019, 15; Taylor 2016, 206); Hence these developments require a re-evaluation of the profound implications that focusing on identity as separate from class may entail and whether such a disjuncture is reasonable.

I propose that the two value structures – one based primarily on addressing class inequality and the other focusing on affirming identities – are in their current state incompatible. The discussions surrounding identity often neglect to view these issues from the perspective of not only a capitalist but consumerist society; However, the two value structures appear to be intimately linked. The idea of solidarity needed for embracing class equality finds itself directly opposed to the individualist and consumerist ideologies that fuel current identity struggles. Whereas forming coalitions is possible when the central purpose is achieving equality, solidarity is antagonistic to a culture that is founded on a constant desire to outpace others for one's own benefit. An examination that not only focuses on one of these elements but on the complex interactions between class, identity, and commodification is essential to shedding further light on this problem.

The performance of identities is increasingly becoming the source of meaning and social power (Fisher 2013; Lilla 2016). As a result, striving for a state that benefits the entire community and is founded on eliminating differences is increasingly obsolete. The question remains open on whether today's identity groups can still feel a kinship with class-based identities that aim for integration. However, it becomes clear that when seeking to find incentives for populations to pursue greater class equality, current movements will have to center their efforts on combating the commodification of culture. Without such an understanding, searching for answers in coalitions where interest groups may have foundationally dissimilar stakes may be innately futile.

An ideal comradeship in disarray

Warchus' *Pride*, released in 2014, traverses London's gay and lesbian urban spaces, as it follows the historical events that resulted in the LGBTQI+ collective's support of the initially rigid and traditional community of Welsh coal miners who were striking under Thatcher's conservative government. While LGBTQI+ culture remains at the center of many identity

debates today, the film presents the community at a very different historical point. *Pride* centers predominantly on the historical figure of Mark Ashton, a gay man and a member of the Communist Party, who initiates the LGBTQI+'s support of the miners. The second protagonist is Joe 'Bromley' Cooper, a young man from the suburbs who has still not come out to his parents. He serves as the film's essential link, oscillating between his gay identity and his middle-class suburban background. Similarly, a coal miner named Cliff is presented as a typical member of his community, but one who later reveals that he is gay. The film is created to represent the 1980s era, but it simultaneously acts as a reflection of the changes that have occurred between the time of the narrative events and the production of the film; Thus, *Pride* is a useful audio-visual text for helping understand the shifts in critical components of the various identities on and off-screen. By adding characterizations of people who come from varied intersections of identity, *Pride* adds a sense of hope and leverage to the possibility of finding common ground across unrelated marginalized populations. Anthony Appiah notes that identities "can expand our horizons to communities larger than the ones we personally inhabit" (2019). However, the terms of negotiating these identities have also led to problems that illustrate that such connective intersectionality may have been precipitous.

For Craig Haslop, who researches televisual representations of sexual identities and online harassment at the University of Liverpool, *Pride's* representations are a positive example of the interaction of queer and class identity, where the experience of the former is necessarily altered based on individuals' position within the latter. Raising several key concerns about this divide, Haslop writes, "multiple facets of identity, particularly across the queer/class axis, create specific subjectivities" (Haslop 305). Economic dependence/independence has distinct implications on how queerness will be experienced by individuals. Lacking financial autonomy can lead to not being open about one's sexuality because their family might be dismissive of their identity, which could result in being evicted from one's home. Blue collar employers also may have more 'masculine' values that make it challenging for LGBTQI+ members to be hired into a traditional gender-separated work culture (Finnigan 2020, 2). However, there is yet another important aspect of the queer/class axis found in the media image of queerness; Commenting on the middle-class glamourization that is steadily beginning to be associated with LGBTQI+ members, Haslop explains that the lifestyle of the LGBTQI+ community is often commodified. Perceiving LGBTQI+ community members as affluent in society is a result of "a mainstream media that is most interested in the best presented and 'marketable' aspects of LGBTQI+ culture" (Haslop 306). This emphasis on a queer lifestyle removed from the proletariat, despite the economic hardships experienced by many in the LGBTQI+ community, is symptomatic of a recent turn toward separating identity-based from class-based concerns.

As queer identity has gained social traction in the last decades, the developments in media images have led to it being opposed to class identity. Meanwhile, social class is necessary based on lack and hence cannot be positively affirmed. Samir Gandesha's work on the

interaction of capital with identity politics proves crucial here, as it exposes the underlying distinction between the groups' foundational premises. Writing on these distinct characteristics of identity groups, he comments, "race, gender, ethnicity, sexual orientation and other identities demand recognition and affirmation" (Gandesha). Collectives based on economic disadvantage, however, are crucially different in this regard; instead of seeking recognition, collectives' class-based identity is utilized for unification in struggles, but those struggles ultimately strive to abolish the very basis of their categorization. Gandesha explains that the proletariat constitutes one such negative identity because it has "an interest in *its own self-dissolution*" (Gandesha). Consequently, identities that strive for broader recognition have conflicting needs from the self-negating proletariat, which seeks a redistribution of resources. The recognition-based paradigm sees justice as a system that is based on everyone gaining acceptance and respect for their uniqueness; meanwhile, redistribution is an approach that centers on establishing a difference-less society in pursuit of equality. In their book *Redistribution or Recognition?* (2003), Nancy Fraser and Axel Honneth write that historically "questions of difference [were] usually relegated to the sidelines, [while] claims for egalitarian redistribution appeared to typify the meaning of justice" (Fraser and Honneth 2). The disappearance of dialogues surrounding negative identities is fairly recent; yet, with the rise of awareness of marginalized communities' struggles, Fraser and Honneth emphasize that in the contemporary sphere, "neither recognition nor redistribution can be overlooked" (2). However, the problem arises that the ideal future envisioned by these two approaches – current needs for individual recognition versus desire for redistribution and the creation of an egalitarian society – may be fundamentally incompatible.

In addition to the intersectionality of identity, an essential characteristic exposed in *Pride* is how the experience of mutual suffering has previously enabled similar priorities for populations struggling with recognition or redistribution. In the 1980s, the LGBTQI+ and coal miners' respective communities both benefited from unifying their strengths because their experiences paralleled each other in discriminatory economic and social practices they had encountered. The gay and lesbian characters have felt similar oppression by media, police, and the state. Early in the film, Ashton uses this as a key argument to convince his fellow LGBTQI+ members to take up the miners' cause as their own. This empathy is necessary to understanding how disparate groups were able to feel solidarity due to their facing a common enemy under a conservative and restrictive government and consequently analogous challenges. As Ashton makes a speech in the coal miners' community hall, he remarks upon the similarity of his current address to a prior speech made by one of the miners in a gay London nightclub. The sequence highlights the comparable circumstances and priorities that lead them to join forces and, additionally, points to the need for coalitions to have a well-grounded basis for effective collaboration. Recently, this ability to identify similarities between discrete economically-marginalized groups has been disrupted by changes in members' perception of

what constitutes the basis for the bond between members, similarly to the severed link between Black and white workers in the United States (Taylor 2016, 215). The previously unifying experience of being destitute (or equally targeted by police brutality) is often replaced by a tribalism that centers on a collective need for recognition that rests on an imaginative, emotional identification as groups' fundamental premises (Chua 2018; Martineau 2012, 5).

Critiquing the divisions established by identity politics and advocating the unity that *Pride* features, Francis Fukuyama states that left-wing parties should be organized around universal goals instead of the interests of incongruent groups. He argues, "the remedy is not to abandon the idea of identity [...] it is to define larger and more integrative national identities" and to create a liberal democracy "built on the rights of individuals to enjoy an equal degree of choice and agency in determining their collective political lives" (Fukuyama). Nevertheless, while collectivity would indeed benefit liberal politics, the differences between these different interest groups' current values may be too disparate to foster unity.

Left-wing melancholia & liberal destiny

In her essay *Resisting Left-wing Melancholia* (1999), Wendy Brown observes the lethargy that had overtaken the left-wing following the disappointments accompanying the rise and fall of socialism in the 20th century. Unlike Fukuyama, Brown wonders whether or not the way forward might lie in reshaping the left to address new concerns, even if that means drawing away from class-based politics. She asks, "how might we draw creative sustenance from socialist ideals of dignity, equality, and freedom while recognizing that these ideals were conjured from historical conditions and prospects that are not those of the present?" (Brown 27-28). Brown's views on the fall of socialist ideals, the commencement of novel cultural-political movements, and poststructuralism enables at least a partial understanding of the complicity of the liberal party in regards to the current neoliberal system. Brown observes, "the Thatcher-Reagan Right was a symptom rather than a cause of failure" (19). Viewing the rise of neoliberalism as a result of left-wing failure is an apt observation explaining the recent shift in global politics. Still, Brown does little to justify the left's change in policy other than by emphasizing the need to accept the loss of a "crushed ideal, contemporarily signified by the terms *left, socialism, Marx, or movement*" (22).

Meanwhile, Enzo Traverso, whose work focuses extensively on political violence in the European context, debates whether such failures may instead lead to new beginnings in his essay *Left-wing Melancholia: Marxism, History, and Memory* (2019). For Traverso, socialist defeats can be defined as the "necessary premise for reacting, mourning, and preparing a new beginning" because even if socialism "failed in the twentieth Century [...] we cannot exclude the possibility that its utopia will be accomplished in the future" (Traverso 1, 7). However, despite Traverso's viewing of left-melancholia as a positive tendency that allows for rebirth, he

questions whether such a resurrection truly has potential. Concluding that after the fall of communism, "the coming neoliberal wave – as individualistic as it was cynical" (19) brought about the end for class-based change on the left, Traverso buries his remnants of hope for socialist utopias. Yet, the optimism for class-based revolutions remains the focus of many contemporary scholars' work, who have been able to connect the effects of class inequality with recognition-based forms of discrimination, seemingly reviving 20th-century socialist ideals.

In her work on Black identity struggles, Keeanga Yamahtta Taylor describes how racism allowed capitalism to assert a moral right to subjugate black people. However, according to her, capitalism "would also come to use racism to divide and rule" (Taylor 206). By separating groups that were previously able to find strength through cooperation, the goal of such politics was to "blunt the class consciousness of all" (206). Taylor's words illuminate the connection between past class struggles and systematic discrimination of minorities and suggest the perils of divisions. Michael Powell similarly emphasizes the need to shift our understanding of racism in order to perceive its ties to issues of class inequality and, consequently, utilize greater political power. Arguing for the expansion of the current left-wing agenda, Powell asserts that "the most powerful progressive movements, they say, take root in the fight for universal programs" (Powell). Notwithstanding these connections between race and class, the surge in identity politics over the past decades has not only failed in developing enhanced class consciousness but resulted in placing class-related questions out of the spotlight of social and political campaigns. Turning to earlier work on inequality may help clarify these contemporary problems, bringing forward the internal differences that have begun to predominate class versus identity-based politics.

Jean-Jacques Rousseau's theory on inequality provides a potential foundation for comprehending identity politics' lucrative and profitable aspects for individuals in a capitalistic system. He contends that inequality's cause is to be found in the establishment of a socio-political system early on in civilization's development, where "property, once recognized, gave rise to the first rules of justice; for, to secure each man his own, it had to be possible for each to have something" (Rousseau). The property concept can be found in capitalism's fashioning of identity in much the same way as those of intangible objects: through its exchange value and the necessitating of others' respect for one's supposed owned property; so having a particular identity recognized can be purely something of socially acknowledged value. In contrast, when identity value is redistributed evenly, it defeats that established sense of security that rests upon individual ownership. In the 20th century, identities formed a crucial part of global liberation movements that targeted the issues of economic discrimination and the effects of colonialism – epitomized by Franz Fanon's self-affirmation. Significantly, such affirmation of identity has persisted in our society beyond its class-based foundations, with no longer the final goal of a new uniform culture as the utopia on the horizon. Charles Taylor argues that the current measures urged on the grounds of ending discrimination have the goal not of bringing

"us back to an eventual 'difference-blind' social space but, on the contrary, to maintain and cherish distinctness, not just now but forever" (Taylor 40). To Taylor, misrecognition or difference-blindness is problematic because it leads to a state that accepts an existent hegemonic culture as normative (43). However, the alternative of embodying distinct identities may not provide the anticipated liberation but can merely obscure the deeply entrenched systems of property that ultimately are to the benefit of the bourgeoisie.

Critiquing the left-wing's embrace of identity-focused politics, Mark Lilla reveals that supplanting priorities from class to identity politics has negatively impacted news reporting. He observes that particularly the younger demographic of journalists and editors seem to assume that simply by focusing on identity politics, they are doing their work adequately (Lilla). This is a concerning trend, leading to the question of whether, through identity struggles, we are not sinking deeper into oppression. As Mark Fisher suggests in his essay, "Exiting the Vampire's Castle," left-wing liberalism ignores the persistent issues of poverty and identity politics have become a game for the bourgeoisie that precludes class consciousness. He further emphasizes that identity politics do little to aid minority groups – provided they do themselves not fall within the middle-class. Subsequently, in the purview of left-wing identity politics, "class has disappeared, but moralism is everywhere [...] solidarity is impossible, but guilt and fear are omnipresent" (Fisher). To Fisher, this only serves as an obstruction, as fundamentally, the implications of class are far-reaching, negatively impacting even those who appear to profit through the capitalist system.

Since the period in which *Pride* is set the LGBTQI+ and the Welsh coal miner communities have moved in opposing directions along the spectrum of need for redistribution and recognition. They form a typified example of the changing priorities of the left – with one on the rise in the party's focus and the other fringing on obscurity – that express a post-left-melancholia reality. With the improvement in social acknowledgement of LGBTQI+ community members, issues of poverty for that demographic have become largely eclipsed. In America and Europe, economically, individuals that are non-binary appear to be no longer discriminated against in the 21st century (though, as Haslop has pointed out, that may not be true for all members – especially trans-people). Nonetheless, *Pride* portrays a world existing in 1984, where economic plight and physical lack of security were still at the forefront of LGBTQI+ rights movements. Two scenes in the second half of *Pride* are representative of the vulnerability on these levels faced by the community at the time. In the first, the owner of a gay bookshop, Geffin, gets badly beaten up, landing him in the hospital. Meanwhile, the scene is paralleled by another illustration of hardship with being out as gay, when Joe's middle-class family finds out about his gay identity, leading him to leave home and to take refuge with a lesbian friend. Both events present the very physical and economic problems tied to being gay in the Thatcher era, which allowed for one of the commonalities for building a coalition between the LGBTQI+ and the coal miners. In the present, such an idealistic union is not be possible, with subcultures

being integrated into the opposite side of the capitalistic system. In Haslop's view, this is not necessarily the case, as he argues that *Pride* illustrates that sub-culture “can still be a place beyond neoliberal commodified consumption, a space to draw strength and unity as a community” (Haslop 314). But perhaps the world inhabited since the setting of *Pride* has altered too much for the negative class-based identity to have that equal position with affirmative sub-cultures. According to Fukuyama, while specific identities are welcomed, poverty remains dismissed and stigmatized. He observes, "economic distress is often perceived by individuals more as a loss of identity than as a loss of resources" (Fukuyama). Consequently, identity politics may only be possible as middle-class politics – not politics that benefit all. As the working class becomes integrated into the middle class in many industrialized countries, the implications of these developments become acute for the portion of the population that still remains in poverty (Fukuyama). To understand why and how deeply identity politics are linked to bourgeois ideology requires an inspection of affirmative identities' connection to commodification.

The commodification of our ‘liberating’ identities

In the new era following the failure of 20th century communism, the disillusioned left was presented with what Traverso referred to as the "innumerable outlets offered by the universal commodification of neoliberal capitalism" (Traverso 2). This shift created a state where the left’s ideology began to grasp onto ideals beyond the exhausting pursuit of anti-capitalist utopias; hence the focus on identity and its associated commodification provided a crucial outlet. Following a period of tense battles for human rights that established meaningful change, giving a fresh purpose to the left, the progression to aiding populations facing discrimination seemed natural. However, requiring recognition gained further traction with digitalization, altering the objective of the movements from collective action to individualism in an online world. For Jonathan Crary, in this 24/7 landscape, "everyone, we are told – not just businesses and institutions – needs an 'online presence'" (Crary 104). This desire for exposure is an integral component of the interrelation between one's political and personal identity. The cultural changes that allowed for the merger can be found within the current reduction of separation between public and private, entertainment and work, living in the attention has become “overridden by a compulsory functionality of communication” (Crary 76). The effect of these increased and multi-relational communicative practices is that individuals increasingly derive personal meaning and social leverage by distinguishing themselves by ascribing to specific groups with the aid of social media platforms. Greg Lukianoff and Jonathan Haidt observe that identity – and its derivative of being offended at misrecognition – become trump cards in contemporary cancel culture. Lukianoff and Haidt describe that "opposing parties use claims of offence as cudgels" (Kukianoff and Haidt). Consequently, while a 24/7 landscape

provides a merger of political and everyday life, one's identity becomes a point of exchange and power for online – and, later, real-world – interactions.

In *Pride,* these issues become more apparent when viewing the previous era's interactions as a counterpoint to the existing political state. Both the LGBTQI+ member and coal miners wanted to achieve adequate economic and living conditions in much the same way, which could be summarized as a desire for *equal* participation in social life; the sought utopia was one of inclusion instead of segregation. Since then, the definition of identity as a comparative term for evaluating individuals' rights to participation has begun to dominate, displacing the idea of understanding group identities as labels for enabling structuring around a common cause of shared suffering. Simultaneously, new media allow for an abstracted visualization of these identities, impeding persons from fully grasping their material possessions. Instead, what is fostered is a craving for recognition of individual uniqueness, which obscures real-world problems, and in the contemporary world is a desperate task for the vast majority of the population (Urban, 2013).

By viewing identities from the perspective of Louis Althusser's work on the Ideological State Apparatuses (ISA), this incorporation of identities into the capitalistic system can be understood as a natural extension of the various systems in place for population control. Althusser writes, "if the ISAs 'function' massively and predominantly by ideology, what unifies their diversity is precisely this functioning" he continues "insofar as the ideology by which they function is always in fact unified, despite its diversity and its contractions, *beneath the ruling ideology*" (Althusser 98). Identity politics have been revered a place outside of capitalism, concerned with an administration of a certain form of partisan justice. However, Althusser's observation implies that while identity politics, as Charles Taylor suggests, counter a specific cultural western hegemony, they may continue to feed into consumer capitalism's broader ideology. More clearly, "the relative autonomy of the superstructure" is reliant on "the reciprocal action of the superstructure on the base" (Althusser 91). This process explains the incorporation of the 20th century's struggles for liberation that relied upon affirmation of their identity into the reciprocal 21st century neoliberal capitalism's superstructure. Identity as a product of the neoliberal system is further concerning when it not only works as part of the ISA but functions as a commodity that is desired for itself – allowing for manipulation of the people with a lucrative but elusive disavowal of their individual insignificance. In his work, Guy Debord explores the role of commodification, writing that we have entered upon the ground of "domination of society by 'intangible as well as tangible things," resulting in "the tangible world [being] replaced by a selection of images which exist above it" (Debord pp. 36). Perhaps identity has become another intangible thing that has begun to dominate us, grasping us not through force but by manipulating our desires. Akin to Althusser's theory, Debord observes that in the capitalist system, "*the humanism of the commodity* takes charge of the 'leisure and humanity' of the worker, simply because political economy can and must now dominate these spheres as

political economy" (pp. 43). The current amalgam of the private sphere with the political landscape finds particular prevalence on social media. As Mark Fisher observes, in the online world, "there is little protection from the psychic pathologies propagated by these discourses" (Fisher). As a solution, Fisher suggests we should strive in our struggles "towards the construction of a new and surprising world, not the perseveration of identities shaped and distorted by capital" (Fisher). However, achieving such a world may be a Herculean task, as it will require us to not only change our perception of what identity means, but to also redefine the meaning of 'us' and 'our' as concepts. The formation of the broader communal into our sense of self is crucial, as identities are negotiatory values by which individuals in society function. Appiah describes that not only do identities give us a personal sense of direction but that "because others, seeing who they think we are, call on us, too" (Appiah); accordingly, it is only through collective awareness and action that repurposing identity to fulfil once again the people's needs instead of the will of capital may be possible.

These complex interactions demonstrate a significant alteration of the meaning of 'identity' on the left, a topic that is aptly exemplified in *Pride's* final scenes. After the miners lose their strike yet solidify their new friendships with the LGBTQI+ community, the narrative ends with the main protagonists resolving their personal journeys. Following the outing by his parents that Joe experienced, Ashton encourages him to own his gay identity and to express pride when facing his homophobic parents. Subsequently, Joe gets dropped off by the LGBTQI+ van at his sister's engagement party, gathers his things and rebelliously takes leave of the family home. Despite the empowerment for gay pride that the scene would have had in the 1980s, it bears a double meaning in the 21st century. Whereas Joe's assertion is a free expression of who he truly is, it is unfortunately accompanied by a severing with everything that is other to it. Thus, the scene can also be viewed as a harbinger of cancel culture where Joe's gay identity unwittingly begins to dominate his social relations. Unlike the fellow gay activist Geffin, whose departure from his home in a mining community a generation prior was filled with shame but led to an eventual reconciling with his mother once new ideas infiltrated rural spaces, Joe's exit is filled with a pride that is not unlike a contemporary cancellation. By one definition, "being 'cancelled' means an individual, group, organization, or work has been shut down or silenced for a perceived wrongdoing or offence" (Ibrahim, 2021). The cancellation in this context is illustrated by Joe's abandoning a potential place of conversation with his parochial parents. In turn, the exchange inhibits a conversation that would allow both sides to place arguments that could be reparative or instill a mutual understanding. Still more troubling are Joe's interactions at the engagement party, where he resorts to personal insults addressed to his sister and his future brother-in-law, who seem to symbolize the middle-classes. This outburst is indicative of the general vilification of anyone who stands in contradiction to recognizing one's identity and leaves little space for future reconciliation – as had been possible in the case of Geffin. Despite the potential for interpreting the scene as a denouncement of the

bourgeoisie as a whole, it cannot help but also highlight the instigation of an era of identity polarization. Meanwhile, the well-meaning, though oblivious, questions posed by some of the coal miners bring back to mind the time that existed where ignorance was able to be met with enlightenment. In response to the miners, the LGBTQI+ members – particularly Ashton – engage with them and can forge friendships in spite of their initial skepticism and prejudice. Therefore, Joe symbolizes the contemporary gay man who defends his identity as a possession; meanwhile, Ashton is at the historical point where using dialogue and education, he overcomes the group's differences and unifies their forces. Establishing such common ground can only occur when a conversation is allowed to bridge differences instead of offence being taken immediately when one's identity is disputed.

Today, finding allies for lower-class citizens is difficult because class equality not only consists of better living conditions but a commodified ideal of equal participation in social life for citizens. Yet because all citizens' equal status would run contrary to what current affirmative identification practices seem to imply – with the desire for recognition not only of being human but unique – class struggles remain on the margins of the left's progressively more neoliberal priorities; thus following the epoch of socialist idealism, there may indeed be a "loss of viable alternatives to the political economy of capitalism" (Brown 1999, 22). The result is a system where instead of freely experiencing and asserting our own identities, affirming those identities become processes that have become directed by a socio-economic system that promises individual fulfillment at the cost of both collective and, ultimately, individual liberty. Georg Wilhelm Friedrich Hegel's definition of consciousness illuminates why the assertion of identity may be less empowering than anticipated. For Hegel, it is the slave who does not require recognition and the master who cannot be without it, whereby "the master is the consciousness that exists for itself; but no longer merely the general notion of existence for self." Of the master, he explains, "it is a consciousness existing on its own account which is mediated with itself through an other consciousness" (1807). When applying Hegel's power structure to contemporary identity, we can wonder whether we have not all been given the illusion of believing ourselves to be masters who are speciously in control of our identities, while being inherently reliant on recognition of the 'other'. However, through such an illusion, we would end up being reliant upon the system surrounding us for recognition – being masters who are, in truth, slaves. Following Hegel's reasoning, we can understand that while the old ideals of socialism fought against the corporate machines that engulfed workers, for the next part of the journey, we may have to fight against the desires that engulf ourselves. A new political force is needed to counter neoliberal capitalism that targets not only the power of the ruling class but the very desire for identity instilled in the people under the guise of empowerment. Thus, the issues of redistribution have been placed in a polar opposite direction of recognition, where the former demands equal respect, but the latter a uniqueness that has become a marketable self-value configuration that rests upon competition.

Conclusion

As *Pride* ends, the coal miners become assimilated into the large crowd of the London Pride Parade, having lost their own battle for equitable living standards. This ending foretells the future story of identity politics, leading to questions about what means can be employed to unify these interest groups in the present neoliberal world. Crucially, the film's title may provide one of the answers: 'pride' comes in two forms within the narrative. The first meaning of the word can be viewed as internal, coming from the self-dignity in facing adversity, and is accepted by oneself for oneself. However, the second meaning – which Joe ultimately adopts – is a need for respectful treatment and recognition that is not internal but from others, bringing back our reliance on the Hegelian conundrum. By examining these issues in relation to *Pride*, I described the foundational elements that are the basis of the respective class and non-binary based identities (which stand in for a broader set of affirmative identities). Since then, the divisions in these two identity groups' priorities may have become too segregated to enable coalitions today, necessitating a deeper look into the functioning of identity politics if expanding communities is to be possible in the future. Contemporary LGBTQI+ culture has become integrated into the bourgeois model; meanwhile, lower-class individuals have become increasingly abandoned, even by the left-wing party. Viewing identity politics as a symptom of left-melancholia following the failed idealism of the 20th century may be needed to understand identity's increasing connections with neoliberalism. Lastly, the fetishism of identity results in a self-commodification that is a symptom of integration into a broader market system rather than rebellion against capitalist structures – perpetuating the very systems that earlier insurrections fighting for recognition had sought to overturn in the 20th century.

To provide a sense of meaning, social change is needed in individuals' approaches to their own desires for recognition in order for greater class equality and collective well-being. At present, the foundation of identities and self-worth has become tied to a comparative model, where status has once again become relative and remains tied to existing class discrimination. Examining these effects requires further research that addresses not only how the two definitions of identity and pride have become incompatible but how to combat that incompatibility within our complex global and digitalized world. Increased governmental control provides one alternative to dealing with capitalism's effects; however, such an option hardly seems viable following the socialist realities of the 20th century. Perhaps the impetus ultimately rests in self-reflectivity instead of self-recognition and gaining a deeper understanding of our motivations for belonging to identity groups; However, the difficulties remain. How can we begin to find a way to control our own conceptions and relations within an overwhelmingly digital landscape? What would we have to do to avoid being ensnared by our desire for external recognition? Finding a way to approach identity is a daunting task; it requires imagining a future where we take pride in ourselves without the requirement of others' recognition.

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Politics & Governance / La politique et la gouvernance

Abandoning All Pretense: A Game-Theoretic Model of the Senate Confirmation Process of Judge Amy Coney Barrett

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Keywords: United States Supreme Court, game theory, critical nominations, institutional politics, Senate confirmation process

Mots-clés: Cour suprême des États-Unis, théorie des jeux, nominations critiques, politiques institutionnelles, processus de confirmation par le sénat

Supreme Court nominations are a way for a president to exercise some measure of control on policy beyond the bounds of his term. In October 2020, the close proximity of Amy Coney Barrett's nomination to the November presidential election, as well as the symmetry with President Barack Obama's failed 2016 nomination of Merrick Garland made this nomination and confirmation process particularly contentious. Despite heavy media attention on this appointment, fairly little focus was paid to President Donald Trump's decision-making, while the decision-making process of the senators was highly scrutinized. This paper will analyze, through a game-theoretic lens, the strategic voting process of the Senators of the 116th Congress in the roll call vote on the nomination of Amy Coney Barrett to the Supreme Court. Using the factors affecting confirmation vote decision-making established in previous research on Supreme Court nomination politics, such as ideology, public opinion, and the relative importance of the nomination, this paper uses a game-theoretic model to show how each senator made a rational decision in saying 'yea' or 'nay' to the appointment of Justice Barrett.

Les nominations à la Cour suprême sont souvent perçues comme un moyen pour le président américain d'exercer un certain contrôle sur la politique au-delà des limites de son mandat. À la fin d'octobre 2020, le processus de nomination et de confirmation d'Amy Coney Barrett s'avérait notamment controversé en raison des parallèles vis-à-vis l'élection présidentielle et l'échec de la nomination de Merrick Garland par le président Obama en 2016 ainsi que la proximité entre l'élection et la nomination dans les deux cas. Bien que cette nomination ait reçu une importante couverture de presse, il y avait peu d'intérêt sur la prise de décision de M. Trump par rapport à la prise de décision des sénateur.trices qui a été examinée minutieusement. À travers une lentille de théorie des jeux, le present document analyse le processus de scrutin stratégique des sénateurs du 116e Congrès lors

du vote par appel nominal sur la nomination d'Amy Coney Barrett à la Cour suprême. En employant des facteurs qui influencent la prise de décision lors du vote de confirmation constaté dans les recherches précédentes sur les politiques de nomination à la Cour suprême––y compris l'idéologie, l'opinion publique et l'importance relative de la nomination––cet article montre comment chaque sénateur a pris une décision rationnelle en disant « oui » ou « non » à la nomination de juge Barrett.

Introduction

In late September 2020, Supreme Court Associate Justice Ruth Bader Ginsburg passed away after a long battle with pancreatic cancer. With weeks until the next presidential election, President Donald Trump and his Senate copartisans rushed to confirm a new Associate Justice to the Supreme Court, Trump's third such nomination. In record time, Amy Coney Barrett breezed through her Senate hearings, and by October 26th, 2020, had been approved to sit in the late Justice Ginsburg's former seat on the bench (BBC 2020).

Given the polarized political climate in the United States, the confirmation of Amy Coney Barrett received a great deal of media attention. Supreme Court nominations are a way for a president to exercise some measure of control on policy beyond the bounds of his term, and in this regard, Trump has been exceptionally effective. Six of the nine Justices sitting on the nation's highest court are now Republican appointees, half of those having been appointed by Trump himself (Supreme Court of the United States n.d.) This considerable shift in the partisan politics of the Court, Judge Barrett's personal ideological stance, and the shadow cast by the symmetry of the situation with President Barack Obama's failed 2016 nomination of Merrick Garland made this appointment particularly contentious.

At the same time, little media attention was spent examining Trump's unsurprising, although controversial, decision to nominate another judge to the court. The spotlight seemed to instead be focusing on Judge Barrett's Senate confirmation vote, where the decision-making process of some individual senators was highly scrutinized. This paper will analyze, through a game-theoretic lens, the strategic voting process of the Senators of the 116th Congress in the roll call vote on the nomination of Amy Coney Barrett to the Supreme Court. With critical nominations like the confirmation of Justice Barrett, it is extremely important for analysts to understand the factors at play. This paper uses a game-theoretic model to confirm that the variables identified in the academic debate over Supreme Court nomination politics do contribute to the decision-making of the senators and argues that party goals generally appear to have more influence than individual goals when the two are at odds.

This paper will be organized into the following sections; First, it will discuss the historical background of Supreme Court nominations and review the relevant literature on the determinants affecting senators when casting confirmation votes; Second, it will outline the methodology and data sources used to analyze the decisions of several subsets of the Senate; lastly, it will apply the described model to the grouped and individual cases to better understand the motivations and considerations of the implicated actors, before considering some counterarguments. Through this process, this paper aims to shed light on the constraints, goals, and payoffs considered by senators when making consequential and highly visible votes.

Literature review

Supreme Court nominees have historically seen largely consensus approval votes, even in the cases of more ideologically extreme candidates (Sulfridge 1980, 560). From the nomination of Hugo Black in 1937 to the 2005 nomination of John Roberts, only about 11% of the over 3700 roll call votes casted were 'nay' (Epstein et al. 2006, 298). Overall, there have been 28 nominations that were defeated by various forms of Senate opposition, including the Senate's 2016 refusal to vote on the nomination of Merrick Garland (McGrath & Rydberg 2016, 324). There is a consensus in the academic literature that since the 1987 nomination of Robert Bork, the Senate confirmations of Supreme Court justices have become more divisive and politicized (Epstein et al. 2006, 296). While clashes over nominations used to be rare, they have become the norm (Basinger & Mak 2012, 737), and there was no reason to think that the Barrett case would be an exception.

Not all nominations are created equal, for there are certain variables regarding the nature of the nomination itself that seem to indicate its likelihood for success. For instance, unsuccessful nominations frequently take place in the last year of a president's term, especially when the party opposing the President controls the Senate (Ruckman Jr. 1993, 797; Segal 1987, 1001). It is also important to consider the nature of the nomination, as well as the vacancy created by the departing Justice (Zigerell 2010, 394). Certainly, the qualifications and the ideological background of the nominee are important variables, but so is the ideology of the former Justice whose seat they hope to fill, as a great number of unsuccessful nominations took place when there was an attempt to replace a former Justice with a member of the opposite party (Ruckman Jr. 1993, 797). In this vein, one must also consider how the new appointee will affect the median of the bench as a whole (Zigerell 2010, 393). Critical nominations, meaning those nominations which would create considerable change in the partisan make-up of the court, are naturally more divisive (Ruckman Jr. 1993, 793). While each of these factors might influence the senators uniquely, there are also some variables to consider that may only apply to some individual senators' decisions.

With such a closely watched decision, individual senators will be calculating not only how their decision might impact not just their party, but their own individual goals. The academic literature shows that senators will carefully consider a great deal of electoral factors, such as the support for the nomination in their home state, from their constituents as well as their partisan base (Kastellec et al. 2010, 787) and how competitive their individual race might be (McGrath & Rydberg 2016, 325). Senators will also have concerns based on personal characteristics such as their level of party loyalty (Basinger & Mak 2012, 738) and the ideological distance between themselves and the nominee (Sulfridge 1980, 562). All these competing considerations must be distilled into a single 'yea' or 'nay' vote.

Research methods

There are 100 senators representing the 50 states, and therefore 100 unique cost-benefit analyses took place to form the result of Judge Barrett's confirmation vote. Although each has exactly the same set of strategies in front of them, the varying motivations affecting each senator will make them consider the decision differently. This being said, it is clear that for some senators this decision would be simpler than for others. This could be because some senators have fewer factors to consider in making their vote, or perhaps because the factors they are considering are easily aligned with each other.

In separating the senators into distinct groups for analysis we will consider their party identification and their ideology, as well as several electoral factors—namely whether they are retiring, whether they are up for reelection in 2020, 2022, or 2024, the relative competitiveness of their state-level race, and the level of support for Judge Barrett by the median voter and by copartisans. These individual factors will affect senators differently and might lead them to weigh certain considerations more heavily than others.

At the time of the vote the 100 Senate seats were held by 53 Republicans, 45 Democrats, and 2 independent senators, both of whom caucus with the Democrats. Of these, 45 seats, 23 held by Republicans and 12 by Democrats, were up for election in the November 2020 election, just one week after the confirmation vote took place. The FiveThirtyEight Senate forecast and aggregate polling averages will be used to determine the relative competitiveness of these races. In this analysis, the polling averages will be more useful than the actual election results they are attempting to predict, as this information should be closer to the data that the senators themselves had contemporaneously when making their votes. Given the variables described here and through the literature review, the senators can be divided into two larger groups based on their electoral position.

Table 1. Groupings based on strength of electoral position. For individual senator breakdown, see Appendix A.

Name	Description
Strongly positioned partisan votes	These senators are retiring, not up for reelection in the 2020 races or else are in non-competitive races (described by FiveThirtyEight as either 'Solid R/D' or 'Likely R/D' in their favour).
Weakly positioned partisan votes	These senators are up for reelection in the 2020 races and in competitive races (described by FiveThirtyEight as either 'Lean R/D' or 'Toss-up', or 'Likely R/D' in favour of the opposing party).

These divisions are based on the varying electoral costs that a given senator might consider to be attached to this highly divisive vote. Given that actors tend to discount future payoffs over current benefits, the specter of future electoral consequences will be much stronger for those senators who face an election only a week later, and especially weak in those senators not considering running for reelection at all. The 'weakly positioned' senators are those whose personal goal of reelection might clash with their party's goal of confirming or blocking Judge Barrett's nomination, and may have to choose between these objectives.

We must also consider that there are some senators whose personal ideology and opinion might differ from that of their party on this particular decision. In those cases, a senator might also have to decide between their personal objectives and those of their party, although in this event the senator's personal objective would be ideologically rather than electorally motivated.

In summary, some goals can be clearly determined, especially those that apply to a larger group. It is reasonable to assume that the Republican Party wishes to see Judge Barrett confirmed to the Supreme Court, while the Democratic Party does not. It is also reasonable to assume that the average senator hopes to be reelected if they are in fact running for reelection, be it in 2020, 2022, or 2024, though it is more likely for those whose reelection vote took place only a week later that they may feel this confirmation vote may have an effect. How each senator personally feels about this particular vote is difficult to measure, but it can be assumed that they would prefer to vote their conscience on all decisions. All the actors involved in this decision would hope to ideally see their personal goals realized, as well as those of their group. However, where these goals do not align, senators will have to carefully evaluate their motivations and preferences.

Game theory is well suited to analyzing this interaction. It is exceedingly rare to find a political game which is played only once. Interactions are usually one of a long string, and as

such, reputation and the weight of future payoffs must remain at the forefront of consideration. This confirmation vote is of course not taking place outside the bounds of normal senatorial politics. That being said, it is exceptional that an American president, especially a single-term president, has the opportunity to nominate a third judge to the United States Supreme Court. The confirmation of Justice Barrett is critical to the make-up of the Supreme Court, likely for decades to come. While many political decisions could be reversed by a future administration, Supreme Court Justices are nominated for life, and extremely difficult to remove from the bench.

Even from the Democratic point of view, being successful in blocking this nomination could be just as long-term a success. Given how close the 2020 election was to this confirmation vote, if the Democratic senators were able to block or even delay Judge Barrett's nomination, it was possible that after the election, they would have taken over the majority in the Senate as well as the office of the President. In this environment, they, not the Republicans, would be able to choose the judge to fill Ruth Bader Ginsburg's seat. As such, the long-term impact this one decision will have might lower a senator's considerations for the repeated nature of the political game and focus more fully on the immediate payoffs of their decision: whether or not Judge Barrett becomes Justice Barrett, and how this affects their electoral prospects in the next week.

Findings & discussion

Based on previous academic debate, the confirmation of Amy Coney Barrett was not a guarantee. Though the Senate majority and the President belonged to the same party, this nomination did have some of the variables that have caused the downfall of previous Supreme Court nominees. Not only was Judge Barrett nominated during the last year of Trump's presidency, but she was also nominated only weeks before the presidential election. Moreover, the Judge herself faces some complicating factors in her qualifications and ideology. Amy Coney Barrett is exceptionally young for such an appointment at 48 years old, although she does come from the United States Appeals Court, which is common among Supreme Court nominees (Thompson-Deveaux in Druke, 2020). Ideologically, this nomination was considered critical by many observers, given the solid Republican majority it would create on the Court, and Judge Barrett's own conservative views on controversial issues such as abortion (Thompson-Deveaux in Druke, 2020). Judge Barrett's ideology puts her rather at odds with former Justice Ginsburg, whose seat she will fill, a quality found in many previously unsuccessful nominations (Ruckman Jr. 1993, 797). Given Amy Coney Barrett's political ideology, her jurisprudence, and the nature and timing of her appointment, the American public opinion was very divided over her possible confirmation. According to the Gallup poll conducted over the course of Judge Barrett's nomination and subsequent Senate hearings, only 3% of the American public had not formed an opinion on her nomination, a historic low, especially compared to the average of 25% (Brenan, 2020). Additionally, the partisan divide was starker even than it was for Brett

Kavanaugh and Neil Gorsuch, Trump's previous nominees, with 84% of Democrats against Barrett's approval and 89% of Republicans in support (Brenan, 2020). Using this information, the senators should rationally analyze the proportional partisan make-up of their constituents, and attempt to vote as their constituents wish, or else expect to incur some electoral costs as a result of disregarding the position of their constituents (Cameron et al. 1990, 527).

Applying the framework set out above (Table 1) to this case, we find that nine senators find themselves in strategically 'weak' positions, leaving 91 with fairly clear-cut strategies in front of them. The payoff matrix below shows only a number corresponding with the payoffs of the vertical player, the senator in question, in regard to the outcome. The number assigned is simply to be used in relation to other possible outcomes.

Tables 2 and 3. Strongly positioned partisan (Democrat on the left, Republic on the right) payoff matrices

Strongly positioned Democrat	**Overall Senate Vote**	
	Yea	Nay
Yea	1	2
Nay	**3**	**4**

Strongly positioned Republican	**Overall Senate Vote**	
	Yea	Nay
Yea	**4**	**3**
Nay	2	1

For the senators in stronger electoral positions (Appendix A), their individual electoral ideological goals likely align with that of their party, making this cost-benefit analysis calculation simple by giving them a dominant strategy (on Tables 2 and 3 in bold). To gain electorally, they should follow the wishes of their constituents, which also happen to be in line with what their Party wants them to do. In the case of a Democratic senator in a largely Democratic-voting constituency, the rational decision is to vote against Judge Barrett's appointment to the Supreme Court, as is the preference of both their Party and a majority of the voters in their constituency. In the case of a Republican senator in a largely Republican-voting constituency, the rational decision is to vote for Barrett's confirmation. The numerical values given illustrate this calculation. In the best-case scenario (4), the senator's personal and party goals are both attained, while in the worst case (1), neither is successful. In the second-best case (3), the senator votes with their party, in keeping with the wishes of their constituents, but their party's goal is unsuccessful, though through no fault of their own. This is given preference above the alternative scenario (2), where the party goal is successful through no help from the senator, as in this case the senator has needlessly hurt themselves politically among their constituents and copartisans in the Senate. This payoff matrix gives the 91 senators deemed to be electorally strong clear, dominant strategies (see Tables 2 and 3, in bold).

We might find the game that the senators in a weaker electoral position must play to be something synonymous to the classic Stag Hunt, or assurance game. In this quintessential game, each hunter within the group must make a decision: to either work with the group to hunt a stag or work individually to catch a hare. If all the hunters choose to hunt the stag, they will be successful and bring down a much larger animal which they can share, but if even one chooses to deviate from this plan to chase a hare, the stag will escape. The individual hunter might have his smaller meal, but the rest of the hunters will go hungry.

Table 4. The Stag Hunt payoff matrix.

Player 1	**Player 2**	
	Stag	Hare
Stag	4,4	1,3
Hare	3,1	2,2

For the senators in weaker electoral positions, this Stag Hunt game is a useful comparison, the difference being that while the analogous stag or hare would both serve to fill the hunter's stomach, though to different extents, the group and individual goals in the senator's case serve different purposes. In this case, the group, the Republican or Democratic Party, can work together to achieve a larger goal with a higher payoff; putting a Justice on the Supreme Court who will be able to affect policy for decades to come (or blocking such an appointment), or the individual senator might choose to pursue their individual goal, the metaphorical hare, of improving their reelection chances by voting against their party and with their constituent's desires. The key similarity this case has with the Stag Hunt game is should the group lose too many senators, their group's goal will be unattainable. With their 53-seat majority in the Senate, the Republicans can afford to lose a maximum of 3 votes, assuming no Democrats join their side, as this vote requires a simple majority to pass. With this in mind, an individual weakly-positioned Republican senator might note that they can vote 'nay' and still have the confirmation vote pass, thus achieving both their party and individual goals, so long as not too many of their colleagues are thinking similarly.

Tables 5 and 6: Weakly positioned partisan payoff matrices

Weakly positioned Democrat	Overall Senate Vote	
	Yea	Nay
Yea	x	4
Nay	1	y

Weakly positioned Republican	Overall Senate Vote	
	Yea	Nay
Yea	x	1
Nay	4	y

1 < x, y < 4

Similarly, to the previous payoff matrices, the worst (1) and best (4) case scenarios for these senators is clear, managing to obtain both their personal and group goals is ideal and failing in both would be the worst-case scenario. Unlike the previous case, however, for the best-case scenario to occur for these senators, they must vote against their group's goal while still hoping that it will ultimately be successful, giving them no clear dominant strategy. This creates a situation where the weakly positioned senators have to weigh carefully whether they would prefer to pursue their individual electoral goals or their party's aim for this confirmation vote. This creates the uncertainty shown in the payoff matrices above by the x and y symbols. While both x and y are between 1 and 4, it is not clear where they land between them, and which is higher than the other.

The amount of electoral jeopardy between the weakly positioned senators is not equal, and so they will be split further into three groups as described below.

Table 7: Descriptions and members of the sub-groupings within the weakly positioned senator group

Group	Description (based on FiveThirtyEight forecast)	Members
Likely losses	The forecast is predicting a 'likely' victory for the party opposing the sitting senator. 4	Doug Jones (D-Alabama), Martha McSally (R-Arizona), and Cory Gardner (R-Colorado)
Learning seats	The forecast is predicting a 'lean' in the race towards the opposing party.	Kelly Loeffler (R-Georgia) and Thom Tillis (R-North Carolina)
Toss-ups	The forecast is predicting a 'toss-up' race between the two parties.	David Perdue (R-Georgia), Joni Ernst (R-Iowa), and Susan Collins (R-Maine)

Between these groups we can discern that the calculations of x and y might yield different results. For the three senators already likely to lose their seats in the upcoming election, they might assume that their personal goal of reelection is already out of their grasp,

and thus vote their conscience, with their party's goals, or both, should these two align. All three of these senators did in fact vote with their party on this vote, and subsequently lost their reelection bids.

For those senators whose race was leaning slightly against them, a small uptick in favourability could be the difference in winning or losing their reelection race. However, the level to which a vote in favour of their constituent's goals would help them electorally is unclear. Additionally, with a margin this close it is important to consider how the senator's ideology might affect their decision. Both senators in this group are Republicans in races that were leaning towards the Democratic candidate at the time of the confirmation vote, who ultimately both decided to vote for Judge Barrett's confirmation. This decision could have been made based on their own ideology, a judgment that this decision likely would not sway a significant number of voters towards or against them, or a determination that the Republican goal of confirming Judge Barrett was worth a possible electoral loss. Ultimately, Sen. Tillis did hold onto his seat, while Sen. Loeffler netted only 25.9% of the vote share in the 2020 election, and eventually lost her Senate seat in a January 2021 special election.

For the senators in the third group, any minute change to the electorate could make the difference in their race. As such, these senators need to make a careful calculation as to the voters they are appealing to, as swaying more voters away from them than they are able to attract would create a net loss. Clearly, the senators within this group made different calculations as to the best move to make, as while Sens. Perdue and Ernst voted yea, Sen. Susan Collins was the only senator to deviate from their party on this vote, and each subsequently netted a different outcome.

Tables 8 and 9. Payoff matrices of toss-up race senators (Perdue, Ernst on the left, Collins on the right), with bold emphasis to show the decision made and ultimate payoff reached.

Sens. Purdue, Ernst	**Overall Senate Vote**	
	Yea	Nay
Yea	**x**	1
Nay	4	y

1 < x, y < 4

Sen. Collins	**Overall Senate Vote**	
	Yea	Nay
Yea	x	1
Nay	**4**	y

In analyzing the tables above, both Sens. Ernst and Collins managed to vote in the way they felt would most appeal to their constituents in Iowa and Maine respectively, while also seeing the Republican Party's goal of having Justice Barrett confirmed be successful. Assuming these decisions were also in line with each senator's ideological stance on this vote, they were both able to achieve their best-case scenario, while choosing opposing strategies. Like Sen.

Loeffler, Sen. Perdue faced a run-off election in January 2021, although with a slight lead over his opponent that Loeffler did not share. Given that Sen. Perdue could have, along with Sen. Collins, voted against Judge Barrett and still seen her be confirmed in a 51-49 vote, it is possible that a 'nay' vote could have been more electorally advantageous to him than his 'yea'. This does not, however, take into account Sen. Perdue's own ideological stance on the matter. This was a unique case where not only were Judge Barrett's qualifications and ideology part of the debate, but so was the strength of the precedent set by the Senate Republicans' 2016 decision to block Obama's nomination of Merrick Garland to the Supreme Court during an election year. In her dismissal of Judge Barrett's nomination, Sen. Collins chose to focus on the precedent set by the 2016 case rather than make any judgment on Amy Coney Barrett's qualifications to serve on the Supreme Court . Meanwhile, in Sen. Perdue's press release, he focused on what he found to be Judge Barrett's strengths and qualifications for the position, using this to explain his 'yea' vote . It is difficult to make assumptions on what the personal stances of these senators might be towards these votes, but what can be said is that Sen. Perdue chose to use his vote to appeal to the Republican Party, both those in Georgia and in the Senate, and quite possibly himself, while Sen. Collins chose to appeal to those voters in Maine opposed to Judge Barrett's nomination.

It is also relevant that Sen. Collins' choice to vote to confirm Brett Kavanaugh's nomination in 2018 received a great deal of backlash and saw the donations to her competitor's Senate campaign skyrocket (Ackley 2020). Her weakened electoral position in the 2020 election as opposed to her previous landslide victories is largely considered to be tied to her Kavanaugh confirmation vote (Higgins 2020). It is therefore notable that Sen. Collins is not just a senator facing a very close race, but one who is generally accustomed to winning by a significant margin. Given this information, either Susan Collins felt the precedent set by 2016 was truly the differentiating factor in her positions towards these two similar cases, or else the looming election one week later had a greater influence on her vote this time than the anger she faced over her decision in 2018. These two decisions give another example of the level of future discounting taking place between an election two years away, and one only days away.

Addressing counterarguments

This model makes certain assumptions to create its outputs, including on the points of ideology and reelection rate. While this paper does clearly show that the variables identified in previous literature on Supreme Court nomination politics do influence the decision-making of senators, it is difficult to measure or quantify determinants such as ideology except through proxy indicators, such as party membership. This means the model assumes that the views of the senators' party and copartisan constituents align with their own personal opinions. There is the possibility that an individual senator might be ideologically opposed to their party's views on this particular vote, in which case their calculation will vary slightly with the addition of another personal and diametrically opposed goal. We might consider that some moderate

senators might find themselves in this camp, regardless of what their electorally rational decision should be. It was for this reason that Senator Mitt Romney, who is seen as a moderate Republican, received a lot more media attention surrounding his vote than other strongly positioned Senators. On the other hand, given the results of the roll call vote, all the 'strongly positioned' senators voted as would be considered electorally rational for them, meaning that either they personally agreed with the decision, or else their electoral concerns outweighed their desire to vote their conscience.

Another argument against this model might be the amount of focus placed on those senators who were in a difficult electoral position at the time of this vote, as it is difficult to quantify if and how much this confirmation vote actually affected voting results in the 2020 elections. Additionally, incumbency is usually used as a key indicator in measuring electoral chances, a factor which is ignored in this model. This is because all the players in this game, the senators making individual decisions in the Barrett confirmation vote, were necessarily incumbents. While it is impossible to tell how much a rogue decision, which we did not see in this confirmation vote, could have impacted electoral outcomes, it is logical that a high-profile decision taking place immediately before an election would likely create a situation wherein the senators would be weighing all decisions against the backdrop of the quickly approaching election.

Conclusions

Many factors about this particular confirmation vote, notably its magnitude, made it feel more like a singular game than most other political interactions. This is not to say that the small set of strategies available to the senators in this game, "yea" or "nay," did not have a multitude of different effects. The goals, strategies, and foresight utilized by the senators themselves to analyze this game with the incomplete information they had contemporaneously, make this vote particularly apt to be analyzed through a game-theoretic lens. This model allows us to measure the ways in which ideology and public opinion affected the decision-making of the Senators of the 116th Congress. We can see that all but Senator Collins (R-Maine) voted with their party. This, despite the varying individual reelection considerations at hand, shows that overall, the party goal, rather than the individual goal, generally won out when senators were faced with opposing options.

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Appendix A – Senators' groupings based on electoral strength

Senator	State	Party	2020 Election Forecast	Vote Share D (%)	Vote share R (%)	Grouping
Doug Jones	Alabama	D	Likely R	45.6	54.4	Likely losses
Richard Shelby	Alabama	R				Strong
Dan Sullivan	Alaska	R	Likely R	44.6	50.4	Strong
Lisa Murkowski	Alaska	R				Strong
Martha McSally	Arizona	R	Likely D	52.6	47.4	Likely losses
Kyrsten Sinema	Arizona	D				Strong
Tom Cotton	Arkansas	R	Solid R	23.9 (I)	76.1	Strong
John Boozman	Arkansas	R				Strong
Dianne Feinstein	California	D				Strong
Kamala Harris	California	D				Strong
Cory Gardner	Colorado	R	Likely D	51.7	44	Likely losses
Michael Bennet	Colorado	D				Strong
Richard Blumenthal	Connecticut	D				Strong
Chris Murphy	Connecticut	D				Strong
Chris Coons	Delaware	D	Solid D	63.9	33.1	Strong
Tom Carper	Delaware	D				Strong
Marco Rubio	Florida	R				Strong
Rick Scott	Florida	R				Strong
Kelly Loeffler	Georgia	R	Lean D	32.8	21.9	Leaning race

David Perdue	Georgia	R	Toss up	49	49.3	Toss up
Brian Schatz	Hawaii	D				Strong
Mazie Hirono	Hawaii	D				Strong
Jim Risch	Idaho	R	Solid R	34.8	58.7	Strong
Mike Crapo	Idaho	R				Strong
Dick Durbin	Illinois	D	Solid D	59.5	35.5	Strong
Tammy Duckworth	Illinois	D				Strong
Todd Young	Indiana	R				Strong
Mike Braun	Indiana	R				Strong
Chuck Grassley	Iowa	R				Strong
Joni Ernst	Iowa	R	Toss up	48.2	49.6	Toss up
Pat Roberts	Kansas	R	Likely R	45.8	51.6	Strong
Jerry Moran	Kansas	R				Strong
Mitch McConnell	Kentucky	R	Solid R	42.5	55.5	Strong
Rand Paul	Kentucky	R				Strong
Bill Cassidy	Louisiana	R	Solid R	15.1	41.1	Strong
John Kennedy	Louisiana	R				Strong
Angus King	Maine	I				Strong
Susan Collins	Maine	R	Toss up	51	49	Toss up
Ben Cardin	Maryland	D				Strong
Chris Van Hollen	Maryland	D				Strong
Ed Markey	Massachusetts	D	Solid D	65.7	31.5	Strong
Elizabeth Warren	Massachusetts	D				Strong

Gary Peters	Michigan	D	Likely D	52.3	45.3	Strong
Debbie Stabenow	Michigan	D				Strong
Tina Smith	Minnesota	D	Solid D	54.8	42.5	Strong
Amy Klobuchar	Minnesota	D				Strong
Cindy Hyde-Smith	Mississippi	R	Likely R	44.8	54	Strong
Roger Wicker	Mississippi	R				Strong
Roy Blunt	Missouri	R				Strong
Josh Hawley	Missouri	R				Strong
Jon Tester	Montana	D				Strong
Steve Daines	Montana	R	Lean R	48.4	51.6	Strong
Ben Sasse	Nebraska	R	Solid R	30.6	62.6	Strong
Deb Fischer	Nebraska	R				Strong
Catherine Cortez Masto	Nevada	D				Strong
Jacky Rosen	Nevada	D				Strong
Jeanne Shaheen	New Hampshire	D	Solid D	57.7	40.6	Strong
Maggie Hassan	New Hampshire	D				Strong
Cory Booker	New Jersey	D	Solid D	61.5	36	Strong
Bob Menendez	New Jersey	D				Strong
Tom Udall	New Mexico	D	Likely D	54.9	42	Strong
Martin Heinrich	New Mexico	D				Strong
Chuck Shumer	New York	D				Strong

Kirsten Gillibrand	New York	D				Strong
Thom Tillis	North Carolina	R	Lean D	50.5	47.3	Leaning race
Richard Burr	North Carolina	R				Strong
John Hoeven	North Dakota	R				Strong
Kevin Cramer	North Dakota	R				Strong
Sherrod Brown	Ohio	D				Strong
Rob Portman	Ohio	R				Strong
Jim Inhofe	Oklahoma	R	Solid R	37.5	59.7	Strong
James Lankford	Oklahome	R				Strong
Jeff Merkley	Oregon	D	Solid D	60.3	35.9	Strong
Ron Wyden	Oregon	D				Strong
Bob Casey Jr.	Pennsylvania	D				Strong
Pat Toomey	Pennsylvania	R				Strong
Jack Reed	Rhode Island	D	Solid D	74	26	Strong
Sheldon Whitehouse	Rhode Island	D				Strong
Lindsey Graham	South Carolina	R	Likely R	46.6	51.7	Strong
Tim Scott	South Carolina	R				Strong
Mike Rounds	South Dakota	R	Solid R	38.1	61.9	Strong
John Thune	South Dakota	R				Strong
Lamar Alexander	Tennessee	R	Solid R	36.6	59.6	Strong
Marsha Blackburn	Tennessee	R				Strong
John Cornyn	Texas	R	Likely R	45.3	52.6	Strong
Ted Cruz	Texas	R				Strong

Mike Lee	Utah	R				Strong
Mitt Romney	Utah	R				Strong
Patrick Leahy	Vermont	D				Strong
Bernie Sanders	Vermont	I				Strong
Mark Warner	Virginia	D	Solid D	58.2	40	Strong
Tim Kaine	Virginia	D				Strong
Patty Murray	Washington	D				Strong
Maria Cantwell	Washington	D				Strong
Shelley Moore Capito	West Virginia	R	Solid R	36.4	60.7	Strong
Joe Manchin	West Virginia	D				Strong
Ron Johnson	Wisconsin	R				Strong
Tammy Baldwin	Wisconsin	D				Strong
Mike Enzi	Wyoming	R	Solid R	32.3	67.7	Strong
John Barrasso	Wyoming	R				Strong

Politics & Governance / La politique et la gouvernance

On Trust and Good Government: Swedish Trust in Policymakers & Fellow Citizens

Jonathan Ferguson

Keywords: Gross national happiness, GNH, needs-based testing, Nordic policy, social trust, trust tax, welfare states

Mots-clés: Bonheur national brut, BNB, tests fondés sur les besoins, politique des pays nordiques, confiance sociale, taxe de confiance, État providence

Increasingly, the field of political science assesses the dynamics of trust through the lens of national governance. This research paper assesses the degree to which social trust – both vertical (trust held in governing institutions) and horizontal (between citizens) – impacts governance. Using Sweden as a case study, I compare Swedish and American propensities to trust alongside the differences between the political structures of each state. In particular, this project considers the differences in approaches to welfare distribution. This paper finds that vertical trust has a slightly greater impact on horizontal trust than vice versa. Nevertheless, it finds that the two are closely interdependent and that consequently, significant increases (or decreases) in one of these directions of trust results in similar changes to the other. To that end, their relationship can be described as existing within upward or downward feedback loops; therefore the findings of this research imply that national governments interested in increasing social trust in either a vertical (toward themselves) or horizontal (among their citizens) direction would do well to not view these variations of trust as existing in silos. Efforts to increase either will have a positive impact on both, and relevant policy focusing on increasing trust should reflect as much.

Dans le domaine de la science politique, il est de plus en plus fréquent que les chercheur.euse.s évaluent la dynamique de la confiance sous l'angle de la gouvernance nationale. Cette analyse évalue le degré de l'impact de la confiance sociale sur la gouvernance, sous sa forme verticale (envers les institutions gouvernementales) et sa forme horizontale (entre citoyen.ne.s). La Suède sert d'étude de cas. Je compare les propensions suédoises et américaines à faire confiance et j'examinerai aussi les différentes structures politiques de ces deux États. En particulier, ce projet considère les différences dans chacune de leurs approches envers la distribution de l'aide sociale en particulier. Cette analyse conclut que la confiance verticale a un impact légèrement plus grand sur la confiance

horizontale que vice versa. Néanmoins, les deux sont intimement interdépendants. Par conséquent, une augmentation (ou une réduction) significative de la confiance dans un sens ou dans l'autre mène à des changements similaires dans son double. En somme, la relation entre ces deux facteurs peut être caractérisée comme existant dans une boucle de rétroaction, soit à la hausse ou à la baisse. Les conclusions de cette recherche sous-entendent que les gouvernements nationaux qui veulent augmenter le niveau de confiance sociale, soit verticale (envers le gouvernement) soit horizontale (envers les citoyen.ne.s), ne devraient pas considérer les deux formes de confiance comme existant en vase clos. Les efforts visant une augmentation de l'un ou de l'autre auront des impacts positifs sur les deux; les politiques pertinentes qui cherchent à augmenter la confiance devraient faire preuve de cela.

Introduction

In recent years, both academic literature and governmental institutions – be they national or international – have begun to assess the benefit of social trust. (Harring 2018, 1). This is a wise choice. Trust has been proven to correlate with happiness and health, happiness and health with higher productivity, and higher productivity with increased gross domestic product (GDP) per capita (Bjørnskov 2006, 1). This is significant since countries are beginning to turn increasingly to happiness as a measure of success over GDP - with those same countries having received global praise for their handling of the COVID 19 pandemic (Economist 2020, *A Hard Task Ahead*). In this context, understanding the origins of social trust is a must for all policymakers and academics.

This paper will assess one high-trust state, Sweden, and compare it to a low-trust state, the United States (Rothstein & Eek 2009, 81; Kuwabara 2014, 344). It will do so to better understand the origins of high social trust, since it can be argued that such trust brings with it desirable benefits to governance as well as the general strengthening of a state, and that this may play a role in elevating a state's international profile (Covey 2008, 20). It will attempt to better understand the origins of Sweden's high social trust, distinguish trust in the people and institutions implementing policies from trust in fellow citizens, and end by prescribing how this trust might be replicated elsewhere.

This paper employs the use of several key terms. The first is *social trust*. *Social trust* refers to the informal institutions in a society, which are established belief systems or the behaviour of other citizens (Rothstein & Eek 2009, 83). The second group of terms is *particularized* and *generalized* trust. *Particularized* trust refers to trust toward a known

individual, whereas *generalized* trust refers to trust toward individuals (or systems) not personally known (Bjørnskov 2006, 2).[1]

The third and perhaps most important terms used in this paper are *horizontal* and *vertical* trust. For the purposes of this paper, the definitions are inspired by their use by Rothstein and Eek (2009, 81) as well as by Mohseni and Lindström (2008, 28). The use of these terms in this paper compares top-down trust to peer-to-peer trust. Specifically, *horizontal* trust refers to the degree of trust held in fellow citizens whereas *vertical* trust refers to the degree of trust citizens hold in any and all individuals in public service who create, enforce or administer the law. The definition of vertical trust in this paper is purposefully vague, so as to broadly encompass all those involved in the governance of a state or nation. Under this definition, all those who hold power, from elected officials to law enforcement to *street-level* bureaucrats are included (Kumlin and Rothstein 2005, 349).

Literature review

Before undertaking an analysis, it is important to first contextualize the research topic through analysis of relevant literature as well as any external events which may affect the quantity of this literature. The following section will consider literature surrounding Swedish trust in the people and institutions implementing policy vis à vis fellow citizens.

Literature related to social trust is plentiful. Literature related to Scandinavian social trust – particularly Swedish social trust – is no exception (Bergg & Öhrvall 2018, 146; Bjørnskov 2006, 1; Delhey & Newtown, 2005, 1; Haring 2018,1; Kumlin & Rothstein 2005, 339). While literature regarding trust has existed for the better part of a century – notably in the field of sociology – the emergence of the role of trust within the field of political science and international relations is more recent (Hardin, 2002, xix; Brørnskov 2021, 1). Relevant literature began to emerge in 1993 with Robert Putnam's popularization of the term *social capital* (Brørnskov 2021, 1).

Roughly a decade later, literature began to distinguish between social networks and social trust itself (Brørnskov 2021, 1). Following this distinction and into the late 2000s, topical literature and real-world politics began to intersect as at least one state – Bhutan – began to seriously and publicly pursue policy grounded in *gross national happiness* (GNH). (GNH Centre Bhutan). In 2008, Bhutan enshrined into law its national constitution which committed the state to the pursuit of GNH (GNH Centre Bhutan). Following the creation of this constitution, Bhutan and the United Nations collaborated to promote GNH with the successful adoption of

[1] For the purposes of this paper, all further references toward trust should be assumed references toward generalized trust, unless otherwise indicated.

Resolution 65/309, which invited member states to pursue policy development rooted in increasing well-being (and by extension, social capital). (UN Resolution 65/309 2011). The UN Sustainable Development Solutions Network published the first *World Happiness Report* in 2012 – it contained 68 mentions of *trust* (World Happiness Report 2012, full document). This context is important, as it appears that in the decade following these events, there has been a notable increase in literature exploring the relationship between state policy and social capital. Importantly, recent relevant literature makes clear the fluidity and reciprocity between vertical and horizontal forms of generalized trust: that is to say, academics continue to debate whether vertical trust primarily impacts horizontal trust (Daniele & Geys 2015, 1; Rothstein & Eek 2009, 81, Levi & Stoker 2000, 501) or if horizontal trust has a greater impact on vertical trust (Uslaner 2003, 171). Some argue that this relationship is reciprocal; both impact each other in a positive – or negative – feedback loop (Mohseni & Lindström 2008, 33).

A variety of themes have been identified in this literature. Institutional quality was deemed especially important to the creation of generalized trust, particularly in building trust with immigrant populations (Nannestad et al. 2014, 544). Literature on trust also calls on its academic roots in sociology, exploring the age at which lasting trust (or lasting distrust) develops most (Bergh & Öhrvall 2018, 1146). Classroom diversity has been linked to greater social trust among immigrant populations in the long term (Loxbo 2019, 182); however, one Swedish study discovered the inverse to be true for native-born Swedes (Loxbo 2019, 182). Still, this demonstrates a challenge identified throughout the literature: trust is highly subjective to each state, or more specifically to each culture (Hardin 2002, xx; Kuwabara 2014, 344). Literature highlights how cultures grounded in a distrusting past – notably post-Communist states – continue to rank among the least trusting of states today (Paldam 2000, 7).

Literature also calls attention to the role of the rule of law (Knack & Zak 2003, 91). Some argue that the rule of law is conducive to increasing generalized trust (Knack & Zak 2003, 91) while others present data that indicates the opposite (Bergh & Öhrvall 2018, 1152). With regard to policy support, academics highlight how both generalized trust and distrust – particularly that directed toward private, non-state organizations, including polluters – can be linked to support for certain types of policies (Pitlik & Kouba 2015, 355; Harring 2018, 1). Aside from these rare mentions of private interests (Harring 2018, 1), literature on the subject generally fails to address the role of private interests and corporations, regardless of any impact the action of private actors may (or may not) have on increasing or decreasing generalized trust. In other words, this is an area where literature is generally lacking and is therefore one area academics could explore more profoundly in future analyses.

The most recent literature on social trust considers its impact during the COVID-19 pandemic, demonstrating how high trust in culture can itself be counterproductive to the creation of pandemic restrictions (or lack thereof) (Nygren 2021, 8).

Research methods

This research paper will seek to answer the question, which aspect of Swedish trust matters more: trust in the people and institutions implementing policies, or trust in fellow citizens? In other words, it will assess the relative impact of Swedish vertical and horizontal trust. The hypothesis of this paper is that both vertical social trust and horizontal social trust would play nearly equally important roles in impacting the successful governance of the state. It will begin by assessing vertical trust in each state and will then consider the origins and impact of high vertical trust. The same process will be repeated with regard to horizontal trust. The relative impact of the two will then be compared. The paper will then consider the potential benefit of interdisciplinary cross-analysis to the replication of trust elsewhere.

Findings & discussion

Assessing Swedish vertical trust

Before assessing Swedish vertical trust, it is important to first explore Swedish social trust in a more global context. As indicated by the 2014 *World Values Survey* (WVS), Swedish vertical trust is incredibly high (WVS 2014). For context, Sweden will be compared to another state in the Global North, the United States.

When asked how much confidence they had in their government, nearly twice as many Swedes indicated they had either "quite a lot" or "a great deal" of confidence in their national governments (59.9 percent) than Americans (32.6 percent). Similarly, Swedes held nearly four times as much confidence in political parties (42.2 percent compared to 12.5 percent) and three times as much confidence in Swedish Parliament compared to American Congress (59.3 percent compared to 20.4 percent). However, confidence in the civil service was similar (50.6 percent in Sweden compared to 45.1 percent in the United States) and confidence in the police was higher in the United States (68.3 percent in the United States compared to 51.3 percent in Sweden).[2] [3]

Having established that Swedish vertical trust is *considerably* higher than the American vertical trust, it is crucial to consider why. Several factors are at play. The first, and perhaps most noteworthy, is the Swedish welfare state (Kumlin 2005, 349). The universal welfare state and subsequent lack of needs-based testing all but eliminates both the potential for

[2] Responses to the answers "quite a lot" and "a great deal" have been combined throughout the paper to facilitate comparison.

[3] Although the most recent WVS report for Sweden has not yet been released, the 2017 WVS for the United States indicates that vertical trust has decreased only slightly overall, except for trust in Congress, which decreased from 20.4 percent to 14.8 percent.

bureaucratic prejudice and for citizens looking to "game" welfare benefits, resulting in unjust welfare distribution (Kumlin 2005, 349). Sweden's strong governance, high GDP per capita and overall income equality also contribute to high levels of vertical trust (Delhey & Newton 2005, 311). Circumstantial factors, such as the presence of a constitutional monarchy and a strong history of democracy also support Swedish vertical trust. (Bjørnskov 2007, 8; Paldam & Svendsen 2000, 7; Uslaner 2003, 171).

Equally important to determining the origins of vertical trust is considering the impact of this trust. Substantial evidence points to vertical trust having an impact on horizontal trust (Daniele & Geys 2015, 1; Levi & Stoker 2000, 501). Importantly, this relationship has proven to be true in both high-trust and low-trust societies (Rothstein and Eek 2009, 81). Greater vertical trust also correlates closely with better self-assessed health (although causality here is unclear)(Mohseni & Lindstrøm 2008, 28). Stronger vertical trust is also proven to result in stronger support for environmental policy (Harring 2018, 3). That is not to say that distrust and policy support are mutually exclusive, however. As pointed out by Harring, distrust still often correlates with support for punitive policy measures (Harring 2018, 3). Vertical trust, however, typically results in greater support for less punitive regulatory policy (Pitlik & Kouba 2015, 355). That said, stronger vertical trust logically results in a stronger support for policymakers to create and implement the policies they see most fit, meaning that it is likely in the best interest of policymakers for there to be stronger vertical trust.

Assessing Swedish horizontal trust

Similar to Swedish vertical trust, Swedish horizontal trust is also substantially higher than American horizontal trust. When asked if most people can be trusted or if one need be very careful in dealing with others, 60.1 percent of Swedes answered that people can be trusted, compared to only 34.8 percent of Americans. Swedes also responded that they were over twice as likely to trust those of another religion, over three times as likely to trust those of another nationality and over four times as likely to trust their neighbours (WVS 2014, summary of data). Social trust is clearly much higher in Sweden than in the United States.

There are several reasons Swedes trust one another more than Americans trust one another. Swedes have very low inequality thanks to an effective welfare state, which as previously mentioned, is key to supporting horizontal trust (Kumlin & Rothstein 2005, 339; Knack & Zak 2003, 91). Additionally, as highlighted earlier, strong vertical trust results in strong horizontal trust no matter the environment - and Sweden has incredibly strong vertical trust (Daniele & Geys 2015, 1; Levi & Stoker 2000, 501; Rothstein and Eek 2009, 81).

Beyond this, however, results are either debated or circumstantial. Knack and Zak argue a strong the rule of law is to thank; while Bergh & Öhrvall disagree (Knack & Zak 2003, 91; Bergh & Öhrvall 2018, 1152). Some factors explaining Swedish horizontal trust are circumstantial;

however, ethnic homogeneity appears to play a role in horizontal trust (Delhey & Newton 2005, 311; Loxbo 2018, 182). That said, further research indicates that regardless of cultural circumstances, institutions matter more than culture (Nannestad et al. 2014, 544). This is particularly noteworthy for low-trust states that may worry that culture is the primary determinant in building trust. In general, universal welfare states build far stronger horizontal trust than need-testing states (Kumlin & Rothstein 2005, 352).

Having determined the primary factors contributing to Swedish horizontal trust, it is key to consider what impact this trust has. On top of contributing to overall greater social capital, horizontal trust results in greater support for the welfare state (Daniele & Geys 2015, 1). Trust has also proven to be particularly crucial to conducting economic transactions (Bergh 2018, 1146). Additionally, although the degree to which horizontal trust impacts vertical trust is arguably not as strong as the degree to which vertical trust impacts horizontal trust, its presence is still undeniable (Mohseni & Lindström, 2008, 33; Uslaner 2003, 171).

Comparing vertical & horizontal trust

Prior to this analysis, the stated hypothesis of this paper was that both vertical social trust and horizontal social trust would play nearly equally important roles in impacting the successful governance of the state. As presented in the literature review, literature on the subject remains generally divided. Relevant literature tends to agree that vertical trust has a greater propensity to influence horizontal trust and that by extension, vertical distrust results in horizontal distrust more than horizontal distrust would result in vertical trust. To that end, the relevant literature can be said to support the claim that vertical trust is the most impactful of the two, albeit slightly.

Having completed this analysis, it is reasonable to conclude that this assertion is true. There appear to be, both logically and empirically, a higher number of important examples in which vertical trust impacts horizontal trust. What is more, the clear reciprocity between the two undeniably indicates a feedback loop whereby horizontal trust builds vertical trust, and vice versa. By contrast, distrust in either would feed into distrust in both. To that end, it appears the hypothesis does not matter as much as initially speculated. While it is true that investment in strengthening vertical trust through good governance and strong social policies grounded in the universal welfare state may result in a more efficient 'return on investment', it is clear that the feedback loop is such that investment in either appears both logical and worth pursuing.

That being said, the goal of this analysis was not only to establish which flavour of trust has a greater impact, but specifically to determine how the Swedish propensity to trust and pursuit of well-being might be replicated abroad. As such, it is crucial to critically analyze which (non-circumstantial) causes of both vertical and horizontal trust can and should be applied to other contexts.

The 'speed of trust': replicating Swedish success

While this research has so far touched upon several ways in which strong social trust, both vertical and horizontal, can be fostered abroad, this analysis stands to benefit considerably from perspectives and approaches outside of the traditional auspices of political science literature, especially due to the inherently human nature of political science and subsequent room for interdisciplinary analysis with other social sciences in academia. Specifically, there exists within the realm of commerce studies extensive literature on trust building within businesses and organizations. A curious intersection emerges here due to the fact that literature on interactions and trust in the world of commerce date back significantly further than those in the realm of political science – notably to the publication of Dale Carnegie's world famous *How to Win Friends and Influence People,* published in 1936 (Carnegie 1936, title referenced). Much of this commerce-based literature is centred in and written by Americans, which is both particularly ironic given the United States' comparatively low propensity to trust, as well as perhaps indicative of the subsequent American desire to build trust.

With regard to the positive feedback loop previously mentioned, such "spirals" have already been well established in commerce literature, particularly within the realm of customer service (Friend et al. 2010, 458). Another commerce-grounded theory of trust is based in what Stephen Covey refers to as the *trust tax* (Covey 2008, 17). The theory argues that in the world of business, trust is the so-called hidden variable that amplifies strategy and execution, bringing about even greater results (Covey 2008, 20). Policymakers and political scientist academics alike may stand to learn something. If a state is interested in fostering stronger vertical trust (due to the pre-established 'trickle down' effect it has on horizontal trust) then it likely has the goal of increasing trust in arms of the state such as its bureaucracy. If the same logic presented by Covey can be applied to bureaucracy, there may be untold optimization benefits. In other words, if citizens actually began to trust bureaucracies, the *trust dividend* presented by Covey would result in greater bureaucratic efficiency. Perhaps another dividend would emerge from any improved sense of national unity due to improved vertical and horizontal trust. Admittedly, this is not flawless logic. Covey is clearly referring to particularized trust more than he is generalized trust. Nevertheless, the notion that vertical trust may result in more efficient bureaucracies is a notion that policymakers should consider in greater depth.

Interdisciplinary cross-analysis aside, the question of how trust can be replicated elsewhere must be answered. Regardless of where a state may stand on the chicken-and-the-egg debate on whether horizontal or vertical trust impacts the other more, it is within states' powers to begin by engaging in vertical trust by focusing on three primary struggles: tackling income inequality, demonstrably practicing good governance and maintaining a sufficiently high GDP per capita (Knack & Zak 2003, 91; Delhey & Newton 2005, 311). While this

strengthening of vertical trust should be enough to indirectly foster horizontal trust, it is worth noting that there are also mechanisms for a state to engage in direct fostering of horizontal trust. In particular, there are always opportunities for states to increase interpersonal understanding, considered key to horizontal trust by Knack and Zak, through education (2003, 91). This is a particularly important step to undertake both due to the demonstrated tendency of native-born children to have less horizontal trust and due to the fact that trust established before the age of 30 tends to remains with a citizen throughout their life (Loxbo 2019, 182; Bergh & Öhrvall 2018, 1146).

Finally, it is key to ask, why bother? Why should states engage in time-consuming, idealistic, constructivist-sounding trust-building? The COVID-19 pandemic supplies the answers. Two of the most noteworthy – if not only – states in the world which have prioritized *global national happiness*, and by extension trust (Bhutan and New Zealand) have global leaders on pandemic response and crisis management.

In 2019, the Government of New Zealand announced it would be prioritizing happiness and well-being in what became its first ever "well-being" budget (Ellsmoor 2019). As previously mentioned, the Government of Bhutan adopted happiness and well-being, both grounded and interconnected with trust, in its founding constitution as a democracy. New Zealand's famous COVID-19 response and management allowed the country to continue virtually as if no pandemic were occurring - leading to the landslide re-election of the Ardern government in what became the state's first ever majority under a system of proportional representation (Economist 2020, *A Hard Task Ahead*). In April 2021, the Government of Bhutan succeeded in inoculating a staggering 85 percent of its population with COVID-19 vaccines in a mere seven days (Economist 2021, Bhutan). These are incredible successes, neither of which should be overlooked.

This analysis indicates the potential benefits that high-trust states which prioritize well-being and happiness are able to bring about, especially during times of crisis and when paired with good governance that succeeds in crisis response.

Conclusion

In conclusion, it is clear from this analysis that Sweden's high degree of vertical and horizontal social trust is not an exclusive phenomenon, but rather in large part thanks to strong institutions and conscious policy decisions grounded in income equality and good governance. It is also clear that while vertical trust appears to have a greater impact on horizontal trust than vice versa, both forms of trust build off of one another in either a positive or negative spiral. Lastly, it is evident that although this approach of political science research has emerged somewhat recently in the field of political science academia, the conversation has long been

ongoing in other fields like sociology and commerce. Policymakers and academics alike would stand to benefit from interdisciplinary analyses.

Although the volume of literature on this topic has been steadily increasing over the last twenty years (and the last ten years in particular), more research can and should be completed to establish the reciprocal dynamic more clearly between vertical and horizontal trust. Moreover, certain comparative analyses can be completed with the aim of comparing certain variables while holding others constant. An avenue for future research would be to compare otherwise similar states, such as Sweden and Finland, that allow for the isolation of variables like the alleged role of constitutional monarchies in the degree of vertical trust in their citizens.

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Politics & Governance / La politique et la gouvernance

Canada's Senate: The Need for Reform

Breanna Hamilton

Keywords: Canadian Senate, executive dominance, triple-E Senate, Senate Reform, citizen representation

Mots-clés: Sénat du Canada, domination de l'exécutif, Sénat triple E, réforme du Sénat, representation de citoyens

The idea of a Canadian Senate reform has slowly gained popularity over the past few decades for three main reasons: the Senate has become more symbolic than results-driven, the Senate's democratic legitimacy is questionable because it is appointed, and the current form of the Senate maintains and contributes to the growing executive dominance in Canada. A reform of the Canadian Senate could contribute to solving these concerns. This article offers recommendations for the best way to create a Senate that is elected, effective, and equal. An ineffective Senate ultimately leads to a lack of representation of citizen's interests across Canada, making it necessary to consider reform to protect the democracy of Canadian citizens. The following paper will provide further insight into the concerns that the current form of the Senate contributes to, such as the minimally checked powers of the Prime Minister and the control that the Prime Minister maintains over political parties. The original proposal for a Triple-E Senate, however, has many flaws, therefore, alternative methods of reform are examined in-depth. It is suggested that half of the Senate should be elected by Members of Parliament in the House of Commons to ensure a standard of legislative experience, and the other half of the Senate should be elected by Canadian citizens to encourage regional representation and the representation of minority groups.

Au cours des dernières décennies, l'idée de réformer le Sénat du Canada est de plus en plus répandue, ceci pour trois raisons principales. Premièrement, le Sénat est devenu plus symbolique et donc, moins axé sur les résultats. Deuxièmement, sa légitimité démocratique est remise en question puisque les sénateur.rice.s sont nommé.e.s. Troisièmement, le modèle actuel du Sénat maintient et contribue à la dominance croissante du pouvoir exécutif au Canada. Réformer le Sénat du Canada peut aider à résoudre ces problèmes. Cet article émet des recommandations sur la meilleure méthode pour former un Sénat qui est à la fois élu, efficace et égalitaire. En fin de compte, un Sénat inefficace mène à un manque de représentation des intérêts des citoyen.ne.s partout au Canada; il est

donc nécessaire de considérer des réformes afin de protéger la démocratie des citoyen.ne.s canadien.ne.s. Ce texte éclaire des préoccupations liées à l'organisation actuelle du Sénat, comme le contrôle exercé de façon minimale sur les pouvoirs du premier ministre canadien ainsi que son contrôle des partis politiques. Cependant, il existe de nombreuses failles dans la proposition originale d'un Sénat triple E. Par conséquent, ce texte examine d'autres possibilités de réforme en profondeur. Il est donc proposé que les député.e.s de la Chambre des communes élisent la moitié des membres du Sénat et que la seconde moitié soit élue par les citoyen.ne.s canadien.ne.s afin d'encourager la représentation des régions et des groupes minoritaires.

Introduction

In Canada's legislative branch of government, the Senate was created with the intention of being a chamber of "sober second thought" for bills that were passed through the House of Commons, in addition to having an institution that represented and protected regional interests (Galligan 2018, 77). The Senate's enormous legal powers exist to protect Canadians from legislation that threatens their rights and freedoms (Kennedy 2017, 180). However, in recent years, the Senate has become more symbolic than action-based in Canada's legislative process. This is because, despite their formal powers, the Senate has no legitimacy in Canadian democracy, since Senators are appointed rather than elected (Galligan 2018, 77). Over the years, the growth of executive dominance in parliament has "[limited] the original purposes behind the creation of the Senate" (Kennedy 2017, 180). In this paper, it will be argued that reform is needed in Canada's Senate because its current functionality encourages executive dominance. The proposal for a Triple-E Senate that is elected, effective, and equal, however, has many flaws and needs to be limited.

This article is heavily influenced by the suggestions made in the 1985 Canada West Foundation report, for recommendations for Canadian Senate Reform, the University of Alberta's 2015 "Time for Boldness on Senate Reform" conference, as well as Robert A. Mackay's study on the Canadian Senate. To achieve an ideal Senate reform, the ideas from all three sources should be combined. It is proposed that half of the Senate should be elected by Members of Parliament in the House of Commons to ensure a standard of legislative experience, and the other half of the Senate should be elected by the citizens of Canada to encourage regional representation and the representation of minority groups. This will be argued by examining the theoretical foundations of the Canadian Senate, and by scrutinizing how executive powers control political parties—leading to a lack of representation of the people's interests. As well, the issues that arise when considering Senate reform, specifically a

"Triple-E" Senate, will be analyzed. Lastly, methods of reform will be considered other than the original proposal of a Triple-E Senate.

Literature review

Theoretical foundations of the Senate

Article text goes here. The desire for Senate reform was popularized in the 1980s as a "means for dealing with Western alienation" (Galligan 2018, 78). In other words, the Western provinces of Canada are frustrated by the lack of representation that they receive within the current federal government– leaving the citizens to feel alienated from "political representatives, [and] processes of political decision-making" (Lawson 2005, 128). Historically, Western provinces felt alienated from national policymaking because their predominantly conservative interests were underrepresented due to Liberals dominating federal elections and holding office for most of the post-war years. (Galligan 2018, 78). Despite the constitution guaranteeing each section of Canada be represented in the Senate, appointments are made by the government in office. For many years, the dominating Liberal governments appointed mostly Liberal Senators, consequently making the West feel like their interests were not being adequately met (Ibid). The lack of representation of Western Canada has made the idea of Senate reform a primary objective of the West (Lusztig 1995, 39). However, the idea of reform has been debated and inhibited because it is not clear what the "proper role of an upper house in a federal liberal democracy" might be (Ibid). Therefore, to clearly promote a method of reform that will benefit the most Canadian citizens and residents, it is important to understand the responsibilities and foundations of the Senate.

There are three theoretical foundations that the upper chamber rests on: legislative review, the mutual veto-authority principle, and federal representation (Ibid). In summary, legislative review is the Senate's ability to supervise legislation passed from the House of Commons without the ability to veto a bill, and mutual veto-authority provides a countervailing power, so one chamber of parliament does not become dominant (Lusztig 1995, 39-40). While the Senate has to provide equal regional representation, it does not have to represent equally. By appointing Senators, the government compromises its ability to equally represent regional interests at the federal level (Lusztig 1995, 42). For example, a Liberal Prime Minister can appoint a liberal Senator to represent the conservative-dominated West.[4] It is significant to note that the Senate does not see this as an issue. The Senate website states that they have "evolved from defending regional interests to giving voice to underrepresented groups" (Senate of Canada, 2021). However, regional interests should not have to be renounced to represent

[4] Under new rules, it's possible for a Senator to be politically liberal, but not a member of the Liberal party since Trudeau disbanded the Senate Liberal caucus.

minority groups. The political interests of one group should not be forgone for another. The Canadian Senate should be structured in a way that can adequately meet the interests of both regions and underrepresented groups. Since the twentieth century, legislative review has become the primary role of Canada's Senate; thus, the idea of reform is to re-implement the other two foundations in a new Senate (Lusztig 1995, 40).

Balancing executive dominance

Another reason reform is desirable is to provide a counterweight to executive dominance. The position of Prime Minister "tends to enjoy powers to a degree that may be unhealthy in a democratic society" (Bakvis 2018, 61). As Bakvis explains, there is an "ever-increasing concentration of power in the center," including the Prime Minister, Cabinet, and other central agencies (Ibid). There are four main reasons for the increase of prime ministerial powers over the past few decades. The first reason is that the Prime Minister and Cabinet no longer work by the principle, "*primus inter pares*" or "first among equals" (Bakvis 2018, 64). This leads to fewer decisions being made within the Cabinet, and more made between the Prime Minister and senior officials. Second, the Prime Minister in Canada exercises their control more extensively through party discipline compared to other countries under the parliamentary system. The Prime Minister uses coercion to enforce party discipline and ensure that their political party votes together. If Members of Parliament (MP) do not follow the advice of the Prime Minister, they face repercussions like losing funding and support from their political party. The third reason the Prime Minister has excessive power is that they have the responsibility of appointing Senators. Prime Minister Justin Trudeau tried to remedy this issue in 2016 by establishing a non-partisan "Independent Advisory Board for Senate Appointments," (Government of Canada 2021). Trudeau's intention was to "restore public trust in the Senate and move towards a less partisan and more independent Senate" (Ibid). The Advisory Board provides advice to the Prime Minister on who to appoint for Senate. While Trudeau's efforts are an important step in creating a more independent and efficient Senate, the Prime Minister still has the final decision of the appointing process, so a completely non-partisan Senate cannot be guaranteed. Moreover, Trudeau has been the only Prime Minister to appoint Senators with the new process, so it cannot be ensured that future Prime Ministers will follow the advice of the Advisory Board.

Since the Senate is not elected, Senators do not have to worry about a confidence vote to maintain their positions, meaning there is little party discipline and they are able to vote freely; however, Senators who are appointed that have no official political experience often align themselves with the party of the Prime Minister (Bakvis 2018, 70). This leads to an ineffective Senate as they do not adequately critique bills passed by the House of Commons (Ibid). Lastly, without an elected Senate or a check on party discipline in the House of Commons and Senate, there are few meaningful checks and balances on executive dominance, aside from

the media and provincial powers under a federal system (Ibid). Trudeau has also made progressive changes to promote Senators to vote freely. In 2019, Trudeau dismantled the "Senate Liberal caucus" to cut ties between the Liberal party and its Senators (Global News 2019). The new "Progressive Senate Group,"—which consists of nine Senators who do not sit as party members—only has "loose affiliations" left with the Liberal party, like their values, and the Senators are now allowed to vote freely without the threat of party discipline (Ibid).

However, enhancing democracy by lessening party discipline or by creating more counterweights to executive power, does not necessarily mean there will be a "diffusion of power" (Bakvis 2018, 70). For example, if party discipline was reduced and MPs were granted more free votes, the Prime Minister's power would be decreased and spread more widely in the House of Commons rather than being concentrated in one person (Ibid). This "diffusion of power," however, does not automatically make Parliament more "accountable or transparent" (Ibid). There is also no guarantee that democracy would be enhanced because academic evidence suggests that MPs who lack parliamentary experience are more susceptible to party discipline (Ibid). They're also unable to "scrutinize and effectively critique government action" (Ibid). Therefore, the implementation of a free vote does not automatically equate to dispersing Prime Ministerial power if MPs are still susceptible to the Prime Minister's influence. To create a reformed Senate that is effective in remaining impartial from the influence of the Prime Minister, legislative experience should be a prerequisite for elected Senators. This is a crucial requirement for the Senate to maintain independence from Prime Ministerial powers.

Critique of the Triple-E Senate

The idea of a Triple-E Senate was introduced in 1981 by the Canada West Foundation but gained popularity when it was re-proposed by the subcommittee of the Alberta legislature in 1985 with the objective of reforming Canada's Senate into one that is "elected, effective, and equal" (Lusztig 1995, 36). As Lusztig explains, the "Triple-E proposal attempts to inject both the mutual veto-authority principle and federal representativeness" into Canada's Senate (Lusztig 1995, 43). However, the reoccurring proposal of a Triple-E Senate may not necessarily be helpful for regional agendas, especially those of the Western provinces (Lusztig 1995, 36). According to Cody, advocates for the original Triple-E Senate proposal often understood equal representation to mean that all of Canada's provinces would enjoy "equal constitutional status" (Cody 1995, 23). However, provincial equality in the Senate is unlikely as "Canada's constitution and many federal-provincial programs treat the provinces differently" (Ibid). Cody argues that complete equality of representation in the Senate is not required for the upper house to effectively perform their responsibility of preventing legislation from the House of Commons which only represents the interests of the larger provinces (Ibid). An elected Senate, however, is necessary for an effective Senate. With less party discipline, Senators would be able to better represent regional interests and veto or amend legislation that does not apply to the interests

of all provinces, especially in the case of majority governments (Lawson 2005, 132). Reforming the Senate so that seats are allocated according to population is also not an ideal solution, as this would give the larger provinces more seats in the Senate (Ibid). It may be argued that the Senate should cater to what most Canadians want. However, to restate the Senate itself, they have "evolved" to "[give] voice to underrepresented groups" (Senate of Canada 2021). While the Senate was specifically referring to minority groups like "Indigenous peoples [and] visible minorities," the importance of representing groups other than the majority was expressed, nonetheless (Ibid). The current structure of the Senate inadequately represents the interests of smaller regions, like the Western provinces, and a reform is required to provide adequate representation. The proposal for the classic Triple-E Senate, however, will likely unsatisfy the desire for equal regional representation.

It has also been suggested that a Triple-E Senate would only decrease party cohesion and minimize the likelihood of majority governments ultimately making the Senate less effective (Lusztig 1995, 44). An elected Senate, however, would make the upper house more legitimate in Canadian democracy, and create an "effective check" on executive dominance in the House of Commons (Lusztig 1995, 43). Nevertheless, the notion that the "elimination of party caucuses will overcome partisanship and promote regional representation in the Senate" remains a problem (Lusztig 1995, 44). One major purpose of political parties is to cover the cost of campaigns (Ibid). To effectively campaign across provinces in a country that is geographically massive, the Senate candidates would require help from an organized political party (Ibid). This would promote partisanship because the party would expect allegiance in return for helping the Senators' campaign. Therefore, if Canada's Senate became elected instead of appointed, partisanship would be unlikely to decrease because the Senators would still be dependent on a political party (Ibid). As well, a reform would most likely increase public spending due to more elections, which is against the agenda of the West who are often advocates for decreased spending by Parliament (Lusztig 2005, 47).

As Lawson explains, it is important to note that the classic proposal for a Triple-E Senate would require a constitutional amendment, and has therefore lost its allure in recent years—causing more "modest" proposals for a Senate reform to be made (Lawson 2005, 132). For example, the Canadian West Foundation suggested that the Prime Minister appoint Senators who were "previously elected in the provinces or regions" (Ibid). This would increase democratic legitimacy in the Senate, as well as regional representation. This proposal will be examined more in-depth below.

Alternate recommendations for Senate reforms

Currently, one of the main issues that need to be addressed when considering Senate reform is maintaining independence from Prime Ministerial power. In 1985, the Canada West

Foundation (CWF) created a detailed report making recommendations for a Canadian Senate reform, based on the experiences of Australia's reform into an elected Senate (Galligan 2018, 80). They determined four main problems that arise with a reform: the "effects of proportional representation, the problem of combining responsible government with an elected Senate, measures for ensuring the independence of the Senate, and methods coordinating elections for both Houses of Parliament" (Galligan 2018, 83). More recently, in March 2015, the University of Alberta held a "Time for Boldness on Senate Reform" conference, which allowed "academics, legal practitioners, Senators, and interested members of the public" to create a conversation and discuss the logistics of a Senate reform, where three main goals for a reform were determined (Burton and Patten 2015, 2). First, the Senate and the House of Commons are not meant to compete, but to support each other; Second, the Senate should maintain its role as a chamber of "sober second thought" by reviewing and refining legislation passed in the House of Commons and; third, the Senate should be non-partisan and free from influence by the government (Ibid).

The CWF report determined that the only way the Senate could be effective in representing different regions of Canada is if it was free from party discipline and "adversarial party politics" (Galligan 2018, 90). The government would only be responsible to the lower house and would not require the confidence of the Senate; therefore, there would be little need for partisanship and discipline, allowing Senators to be independent and to vote freely without restrictions from a party caucus (Ibid). Trudeau has achieved this by dismantling the "Senate Liberal caucus" but it is unknown if his efforts will be maintained under a different government (Global News 2019). An elected Senate would also create independence, as well as legitimacy—but the struggle would be to maintain its neutrality. If Senate leaders are ministers in the government's Cabinet, this would contradict one of the purposes of an elected Senate, which is to represent regional interests without the influence of party discipline (Galligan 2018, 82). The report suggested that Senators be "constitutionally barred from accepting Cabinet appointments unless they resign immediately" followed by pursuing election into the House of Commons (Ibid). The 2015 conference dived deeper into this idea, suggesting that Senators should be free from public opinion as elected politicians' decisions are often concerned with being re-elected (Burton and Patten 2015, 3).

While they aim to lessen executive dominance, both arguments have limitations. There is a difference between partisanship where Senators have values and beliefs that align with a political party and being coerced by party discipline. The CWF report and the University of Alberta conference make political partisanship appear unacceptable because it will prevent Senators from effectively fulfilling their responsibilities. However, partisanship cannot be completely erased from the Senate because those who want to serve as Senators, have intentions that are aligned with platforms of a political party even if they do not work for the political party directly. For example, an individual with no political or legislative experience

could independently campaign to become a Senator, but their platform will be influenced by their past political decisions, such as consistently voting conservative or liberal in previous elections. It is finding a way to keep the Senate independent from party discipline that is the problem. The idea that Senators should remain free from the influence of the public is also not likely to manifest. The flaw of an elected Senate is that it encourages Senators to act in ways that benefits their re-election rather than focusing on specific platforms that best suit regional interests. However, an elected Senate would achieve the goal of decreasing executive dominance by minimizing party discipline as much as possible.

To solve the issue of combining responsible government with an elected Senate, the CWF report proposed that the principle of responsible government would be maintained and protected by giving the House of Commons a veto power where they could override the Senate's decision to reject legislation if they had an "unusual majority" (Galligan 2018, 86). The report does not specify what an "unusual majority" is; however, it does state that the government would have to gain support from at least one of the opposition parties (Ibid). The report rejected the idea of keeping a single-member plurality for elections because it produces an unequal Senate. The form of proportional representation, where the percentage of seats for each party is equal to their percentage of the popular vote, was also rejected because it is based on party interests rather than regional interests (Galligan 2018, 83). Instead, the "single transferable vote" proportional representation system was recommended, where each voter would rank the candidates in order of preference to "enhance representative pluralism" (Ibid). The largest downfall of this election system, according to Galligan, would be the "complexity of processing votes" (Ibid). In addition, the CWF report also recommended that elections for the Senate be held concurrently with those for the House of Commons to prevent an excessive number of elections (Galligan 2018, 92).

Robert A. Mackay also wrote a study on the Canadian Senate which argued that half of the Senate should be elected by MPs in the House of Commons (Kennedy 2017, 181). His suggestion would allow each section of Canada to elect its own Senator. This would promote proportional representation and would set a standard of experience for the Senate by only including candidates with "adequate experience in federal and provincial legislatures and cabinets" including former and retiring Senators (Ibid). The other half of the Senate would be appointed as it is now; however, candidates would come from groups "representing eminence in fields of activity other than party service" (Ibid). This is a solution to make the Senate representative of the different regions of Canada, in addition to setting a standard of knowledge for Senators to promote "well-informed discussion and adequate national investigations" (Kennedy 2017, 182). Mackay's proposal is relevant because it takes into consideration the importance of Senators requiring a level of excellence and experience to sit in the upper house. However, his suggestions are not beneficial for lessening executive dominance. If Senators were elected by MPs -assuming it would not be a free vote—this would

increase party discipline and ultimately the power of the Prime Minister, especially if the vote for Senate occurred during a majority government. As mentioned above, individuals with no parliamentary experience are more easily influenced by Prime Ministerial powers, and appointed Senators would most likely align themselves with the political party of the Prime Minister- thereby reinforcing the current, ineffective structure of the Senate.

At the University of Alberta conference, it was suggested that each province would have six Senators, with extra seats for larger provinces to account for the differences in population (Burton and Patten 2015, 3). While this is a constructive idea that would improve on the current structure of the Senate and allow for more consistent regional representation, it does not promise equal representation. Smaller regions like the East Coast and the Prairies would continue to be minimized in their effectiveness at the Senate level against larger regions. This proposal would be more effective if Senate elections occurred at the provincial level, rather than the federal level because it would promote a more accurate representation of regional interests. By reducing the influence of political parties on Senators, the Senate would be able to effectively meet its responsibility of legislative review, without the threat of party discipline. It was also proposed at the conference that a reformed Senate should be more inclusive of "groups that are underrepresented in the House of Commons" (Burton and Patten 2015, 5). It should be acknowledged that the Canadian Senate generally has a decent track record of consistent francophone representation (Tardif and Terrien, 2009). However, their representation of "women, people of colour, new Canadians, Canadians with disabilities, and Aboriginals" has been less than sufficient (Ibid). This is one of the most pertinent and important additions that could be included in a reformed Canadian Senate. To create these changes, it is important that Canadian citizens are made aware of the complex power structures and limited resources that inhibit minority Senate candidates. To get minorities to run for Senate, there would have to be social incentives to enable them to do so. For example, the federal government could create bursaries or funding to encourage minority candidates to campaign, or provide government-assisted work leaves, so candidates can afford to take time off work during their campaigns. This would allow the campaigning process to be more accessible for all individuals, while adding "important voices to the legislative process that, in the past, have not been adequately heard" (Ibid).

Conclusion

To achieve an ideal Senate reform, the ideas from the CWF report, the University of Alberta conference, and Robert Mackay should all be combined. Canada's Senate requires a reform because the current state of the Senate encourages executive dominance, and with the Prime Minister's minimally checked powers, they can control political parties, resulting in a lack of representation of citizens' interests across Canada. However, there has to be a limit to what a Triple-E Senate entails. Ensuring that Senators have legislative experience makes the Senate as

a whole less susceptible to the influence of Prime Ministerial power; Therefore, half of the Senate should be elected by MPs in the House of Commons if it can be ensured that it would be a free vote. What's more, not allowing Senators to be in Cabinet is a necessity to maintaining the independence of the Senate. The other half of the Senate should be elected by the Canadian citizens to encourage regional representation as well as the representation of minority groups. Giving the House of Commons veto power to reject decisions made by the Senate would accommodate the possible lack of legislative experience in the Senate, while also respecting the notion of responsible government. Lastly, by using a "single transferable vote" method, regional representation would be maximized. With these suggestions, the Senate would be able to effectively exercise their responsibility of legislative review, while providing a countervailing power against executive dominance, and equally representing the many regions of Canada.

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Politics & Governance / La politique et la gouvernance

The Growth of Democracy in South Korea: A Political Analysis of the Gwangju Uprising & 1980s Democracy Movement

Laken Kim

Keywords: Democratic movements, civic society, class movements, civil rights movements, democratization, Gwangju Uprising.

Mots-clés: Mouvements démocratiques, société civile, mouvements de classe, mouvements de droits civils, démocratisation, Gwangju Uprising, soulèvement de Gwangju.

In the 1970s and 1980s, South Korea underwent a democratic movement, in which the civilians fought against an authoritarian regime in hopes of establishing democracy. The authoritarian regime's rule was oppressive and strict, making every-day life difficult for the average citizen. Students, workers, and women were at the forefront of the movement. Their protests peaked in an event known as the Gwangju Uprising of 1980, in which civilians involved were cracked down upon by the military. Numerous casualties took place. However, even though the Gwangju Uprising may be viewed as a failed protest—this paper argues that the Gwangju Uprising played a pivotal role in the democratization of South Korea. The Uprising provided a sense of motivation for protestors, encouraged more of the public to join in support, and identified weaknesses of previous movements. It is for such reasons that South Korean democracy would become a reality in the late 1980s and early 1990s.

Dans les années 70 et 80, il y avait un mouvement démocratique en Corée du Sud, lorsque les civil.e.s luttaient contre le régime autoritaire, dans l'espoir d'établir la démocratie. Le règne du régime autoritaire était oppressif et strict, ce qui rendait la vie de tous les jours très difficile pour les citoyen.ne.s moyen.ne.s. Les étudiant.e.s, les travailleurs.euses et les femmes étaient au premier plan de ce mouvement. Le soulèvement de Gwangju en 1980 fut l'apogée des manifestations, lorsque l'armée a réprimé les civil.e.s. Il y a eu de nombreuses pertes humaines. Cependant, même si certain.e.s considèrent le soulèvement comme un échec, la présente analyse fait valoir que le soulèvement de Gwangju a joué un rôle essentiel dans la démocratisation de la Corée du Sud. Le soulèvement servait de motivation pour les manifestant.e.s, en ayant encouragé un plus

grand public à y participer et en ayant identifié les points faibles des mouvements précédents. C'est pour de telles raisons que la démocratie de la Corée du Sud a pu se réaliser plus tard dans les années 80 et au début des années 90.

Introduction

The fight for democracy around the world is of utmost importance, as democracy allows for the people of a state the right to govern themselves, and the ability to therefore determine how their lives will be politically structured. In the case of an authoritarian political system, or dictatorship, this is not so. Being such a significant issue, it is of no surprise that so many countries around the world have held their own unique fights for democracy, while many others continue to strive for the same. South Korea is one such country that has become democratic. In the 1970s and 1980s, South Korea was locked in conflict between the military-led dictatorship and the civilians who demanded the right to live by their own rules in democracy (Ahn 2003, 163). South Korea's fight was long and difficult and peaked in an event known as the Gwangju Uprising. This paper argues that while the Gwangju Uprising is an event which is described by academics as "sad" and "bloody," it was a significant factor leading to South Korea's overall successful transition to democracy (Kim 2003, 231).

This paper will provide a political analysis of the South Korean democracy movement of the 1970s and 1980s. The paper will first cover the context of the movement, looking at its social and political background, as well as the political aims of the participants. It will also define the exact objectives of the movement, providing a more concise image of the democracy that South Korea wished to achieve. Then, the paper will look at the political decisions made by protests within the movement, and the government response to such decisions. Finally, the paper will conclude by analyzing the outcome, long-term impact, and significance of the movement.

The regime: South Korea's political history leading to the democracy movement

In 1980, from May 18 to May 27, crowds of people in South Korea gathered in the city of Gwangju to protest martial law and the authoritarian government that they felt was oppressing them (Ahn 2003, 163; Kim 2003, 225). A short summary of the Gwangju Uprising as provided by historian and author Jean Ahn states that it was "the struggle of democratic forces against the violent suppression by monopolistic capitalist classes subordinate to a global capitalist system." (162). During a ten-day demonstration, during which civilians intended to remain peaceful, the military arrived and conducted a massacre of anyone involved in the opposition (Kim 2003,

225). Though this event, later known as the Gwangju Uprising, was a failure in its goal of abolishing martial law, it became a symbol of civilian power, "establishing the principle of civilian supremacy during the democratic transition period" (Kim 2003, 225). Perhaps most importantly, it arguably contributed to the overall success of obtaining democracy in South Korea (Kim 2003, 225; Na 2003, 177).

Contextual factors of the democracy movement: authoritarianism & economic unrest

The time leading up to this defining moment of South Korean history was harsh and challenging for South Korean civilians. In 1961, the military performed a coup that harmed democracy in South Korea (Kim 2003, 228). Following this coup, South Korea lived under an oppressive authoritarian government regime, known as Yushin under the lead of Dictator Park Jeong Hee (Kim 2003, 229). Prior to Park Jeong Hee's rise, South Korea was extremely politically turbulent (Lee 1993, 353). Any democratic institutions, such as transparent and fair governmental elections that may have previously existed before his rise to power became more and more scarce until they disappeared entirely (Park 2003, 265). This authoritarian regime held a very high political capacity, referring to its ability to penetrate into civilians' daily activities. Accordingly, the citizens had limited control over their own lives, such as the ability to freely express any dissent against the government due to extensive censorship laws. (Tarrow and Tilly 2015, 57). Nonetheless, South Korea during this era did experience a large amount of economic growth (Ahn 2003, 164). However, this economic growth was extremely segregated between the ruling and working classes, and many within the working classes were suffering under strict labour standards—including poor working conditions and low wages. (Ahn 2003, 165). However, following Park Jeong Hee's assassination in 1979, there was a resulting power vacuum creating a new era of political turbulence (Ahn 2003, 168; Kim 2003, 230). In the same year, the military performed yet another coup on December 12th, managing to take full control of the country (Kim 2003, 230). With this development, Military Jeon Doo Hwan, a key figure in the inner military coup ruled as leader of the country (Park 2003, 265). He reorganized the government, held the country under tight martial law, and suppressed the South Korean people's ability to exercise political and social freedom. Jeon Doo Hwan came to power and his creation of a supposed 'hybrid' regime in which elections took place but were corrupt under the existing Constitution, led to the beginning of the mobilization for democracy (Lee 1993, 355). Nonetheless, there was no such 'hybrid' aspect to his rule: rather, his rule was entirely authoritarian in nature. Through a combination of the lack of democracy and the worsening economic conditions for workers, the South Korean democratic movement began in the late 1970s and continued into the late 1980s.

Breakdown of the democracy movement

Goals

The goals of the Democracy Movement were relatively simple—first and foremost, protestors wanted the installment of democracy into their government and country (Kim 2003, 229). The second most significant goal was the demolition of the financial gap between the ruling and working classes, and a redistribution of resources (Ahn 2003, 163; The Guardian, 2020).

While specific polling data is unavailable for the Yushin regime, the literature suggests most citizens felt that the Yushin regime lacked democratic legitimacy (Lee 1993 353). Protestors asked for fair, direct elections and the immediate dismantling of the Martial Law the government imposed (Ahn 2003, 163). They also asked for the right to political opposition (Kim 2003, 229). In this period, any political opposition detected was quickly, and often violently, shut down (Kim 2003, 239). This also went for those who protested strict labor laws (Park 2005 264). Overall, the protestors fought for a form of 'civilian first' political structure (Kim 2003, 240).

In relation to the financial gap, protestors asked for the end of the monopoly which the ruling class held over finances and much of resource distribution, such as food and medical supplies. (Park 2005, 265). They also asked for better working conditions, the increase of wages, labour unions, and inter-workplace democratization (Lee 1993, 353). Inter-workplace democratization refers to the application of democratic institutions (such as the ability of workers to vote, voice their concerns, and make appeals to employers) within the workplace (Timmings and Summers 2020, 710). There is also noted to be a positive correlation between the implementation of inter-workplace democratization, and promotion of democratic ideals by employees in the political realm as well (Timmings and Summers 2020, 720).

Role of workers and students

A number of social actors played a role in the Democracy Movement. These included industrial workers, white-collar workers, sectors within the military, intellectuals, students, and conservative-opposed politicians (Lee 1993 353). Many of the white-collar workers who lived in urban areas were highly educated and professionally skilled (Lee 1993, 354). University students, who have traditionally played a large front-line role in previous South Korean social movements, once again took up their role (Park 2005, 267).

These protestors are arguably a clear example of the allegiant/assertive protestor model (Welzel and Dalton 2016, 115). As previously mentioned, though South Korea was living in an authoritarian regime and later a hybrid regime, economic growth rose dramatically. South Korean citizens were exposed to a new level of modernization, and with it felt that their labour

should be appropriately compensated, and at the very minimum, reformed with better workplace policies (Welzel and Dalton 2016, 113-123). However, they were far from compensated, as the economic divide between the ruling and working class continued to become larger and more distinct (Ahn 2003, 166). It is also important to note that during the Yushin period, Korea had both the longest working hours in the world and some of the poorest working conditions (Ahn 2003, 166). The working-class citizens who were previously more allegiant therefore became more assertive and began to join protests as a means of demanding their rights which continued to deteriorate (Welzel and Dalton 2016 114).

Interestingly, it was not the workers who first began the democratic movement against the Yushin regime, but the university students, who often held pro-democratic ideals relating to academic freedom and improved workers' rights. South Korean students have often historically been found at the forefront of political protests. Through their dedication and passion, they gained widespread support from the working class (Lee 1993, 355). This combination of worker and student became the central leading organizational group of the social movement (Lee 1993, 355).

Role of women

Women are an often-forgotten part of the Democracy Movement (Kang 2003, 194). As the movement became more organized and prominent in the city of Gwangju, women also became systemized in their actions (Kang 2003, 197). Songbakho, a women's organization in Gwangju, began to host small-group studies focused on politically educating any who came on their rights, and the mistreatment they suffered at the hands of the government (Kang 2003, 198). Furthermore, in the beginning of the ten-day uprising, women were a significant part of the street demonstrations and public activities, doing things such as distributing flyers, hosting broadcasts, and organizing rallies (Kang 2003, 200). Women also took care of providing food and resources for front-line protestors (Kang 2003,199). Kang suggests that this protest may not have been able to take place if not for the under-appreciated support of women (2003, 204).

Organization

Leading up to the Gwangju Uprising, students created numerous specialized groups. Some focused on discovering why previous movements failed, while others were focused on the mobilization and collectivity of the working class (Tarrow and Tilly 2015, 49).

A student group known as 'hakchul' would infiltrate factories as a means of directly speaking to workers and organizing unions and strikes (Park 2005, 275). Others went to the countryside, to volunteer and engage with farmers and other poor workers (Park 2005, 276). Student unions focused on educating the mass population on labour rights, often through night

schools (Park 2005, 278). Faced with harsh political oppression, students were forced into utilizing informal, and sometimes illegal, networks such as study sessions, or cultural clubs for singing and dance (Park 2005, 280). These cultural clubs were also used in connecting with traditional repertoires— 'mandanggeuk' (public plays), 'talchum' (masked dancing), and 'pungmul' (folk dancing) were all used as ways of promoting political consciousness in the general public (Park 2005, 283). Traditional arts and music were also used to spread information about the economic conditions of the country (Park 2005, 283).

The Gwangju Uprising and massacre

As a result of its spontaneity, the Gwangju Uprising was unorganized in its initial stages. (Na 2003, 178). It began when student protestors were asked to leave the front gate of Chonnam National University by police and refused (Na 2003, 178). When these students were physically and violently removed by the police and military, resulting in many injuries, workers and regular townspeople of Gwangju became angered (Na 2003, 178). Groups of people protested in front of police stations, which later grew to fill entire streets of Gwangju (Na 2003, 179). Though this event was spontaneous, it became an event of collective action between students and the regular townspeople (Na 2003, 179). From the first day on, thousands of people continued to join the protests and demonstrations, which took over nearly the entire city (Na 2003, 180). Part of the reason for this large-scale collectivism was the outrage over the inhumane treatment of the college students at the university (Na 2003, 180). State violence as a form of motivation for radicalization and mobilization of supporters was present in the Gwangju Uprising, due to the collective emotion of the people. Emotion, presenting itself through grief, sorrow, and a hope for justice, played an important role in motivating the people, allowing for great dedication and self-sacrifice (Na 2003, 184). Anyone who was opposed to the Yushin Regime and Martial Law was seen as a member and comrade of the movement, united together by their shared political grievances and resistance to authoritarian rule in the face of economic scarcity (Na 2003, 181, 184). Later into the Uprising, more defined groups began to emerge, such as specialized study groups, women's groups of support, and project organizational groups (Na 2003, 181).

Governmental response and result

The response of the government to the various protests was usually harsh and determined. The methods undertaken made use of large-scale violence as a means of quickly shutting down any opposition (Na 2003, 265).

The first military coup was justified by the military as a necessary event in order to promote and enhance South Korean economic growth (Kim 2003, 228). Even though there were those who spoke out against the poor economic conditions suffered by the workers, their

complaints were ultimately ignored in favour of the grand, prosperous, overall picture the government proclaimed.

The second coup was justified by Park Jeong Hee's emphasis of the need for stability and maintenance within the regime (Kim 2003, 228). His response towards political opposition followed the historical pattern leading up to his rule; he would quickly call-in troops to deal with any kind of significant political opposition (Kim 2003, 228; Na 2003, 265).

The Yushin regime was ultimately Park Jeong Hee's answer to increasing political opposition and protests. The Yushin regime was stronger in its authoritarian policies than the previous regimes had been, and essentially all democratic values were dismantled (Kang 2003, 197). The people were faced with few legal or formal ways of making their complaints heard. Political movements and activities were entirely banned, and the press became highly censored (Kim 2003, 230). Martial law was fully embedded within the government (Kang 2003, 197). Furthermore, Park Jeong Hee also created the Hanahoe: a set of secret, elite military soldiers, dispatched to eliminate protesters when necessary (Kim 2003, 229). With all of these measures in place, it is evident that political protests faced many difficulties in rising and maintaining themselves. (Kim 2003, 230). While it cannot be said in absolute terms why the Gwangju Uprising managed to take place whereas other protests did not,many feel that it is in part due to the location of Gwangju, within South Jeolla province. South Jeolla province has historically been a location of great political defiance and protest.

The Gwangju Uprising was immensely violent. The students and regular townspeople who protested in the streets were quickly attacked by soldiers operating under martial law, who made little effort to distinguish between protestors and uninvolved citizens (Ahn 2003, 163). Many people were attacked with batons or simply beaten and stripped (Na 2003, 179). The Gwangju Uprising peaked from May 18 to May 21, when the soldiers, later, reinforcements, conducted a massacre against the protestors with guns (Na, 2003 179). Anywhere from 200 to 2000 people were killed, thousands were injured, and even more were arrested (Kim 2003, 232). These people included civilians, students, police, and soldiers. Due to the disorderly nature of the Gwangju Uprising, it has been impossible to determine any universally agreed-upon number of casualties. It is clear that as the Gwangju Uprising was a mass, chaotic, large-scale event, the reaction of the government was similarly large and chaotic. The protest was forcefully cracked down upon (Na 2003, 177).

With the ending of the Gwangju Uprising, the government sealed its rule by creating the Special Committee for National Security Measures, which portrayed the Gwangju Uprising in the media as a reckless attack orchestrated by communist sympathizers (Kim 2003, 232). The Special Committee also organized widespread "clean-ups", in which thousands of people suspected to be involved in the protests were fired from their jobs and/or arrested (Kim 2003, 232).

Long-term impact of the Gwangju Uprising

The political protests and Democratization Movement came to a head with the Gwangju Uprising. The Gwangju Uprising, though it ended in failure, was of vital importance to the overall successful establishment of democracy and civil society (Lee 1993, 359). This event was not historically isolated and can be viewed as part of the extended Democratization Movement (Ahn 2003, 159). In a sense, the Gwangju Uprising may be understood as a key, critical event of the overall democracy movement. Ironically, though it is perhaps the most unorganized and reactionary event of the democracy movement, it is simultaneously the most impactful as it functioned as a future source of motivation for those continuing to protest. The massacre which took place functioned as a source of new motivation for protestors against the regime (Kim 2003, 233). Students and protestors were put into a position that required them to examine past democratic movements and identify what their strengths and limits were, and what prevented them from ultimate success (Kim 2003, 233). They were able to determine that the connections between protestors were of utmost importance—in particular, the power held in 'minjung' (grass-roots people) (Kim 2003, 233; Park 2005, 274). It was necessary not only to bridge gaps between students and workers but all sectors of South Korean society-at-large (Lee 1993, 355). "Nation, democracy, and minjung" became key terms following the Gwangju Uprising, which created a sense of joint resistance among the various sectors of Korean society (Park 2005, 275). In this way, South Korean protestors not only greatly expanded their numbers but also adopted a more radical ideology of not only removing the military regime but reshaping the government entirely, for the Gwangju Uprising clearly revealed the government's flaws (Park 2005, 267). Therefore, it is possible to see that success can be ambiguously defined in this case (Gupta 2017, 246). Even though the protests leading up to the Gwangju Uprising and Gwangju Uprising itself met a violent end, their lasting impact helped to shape society in a legitimate and necessary manner (Gupta 2017, 249, 250).

June uprising

This is especially seen in the late 1980s. In popular academic opinion, the Gwangju Uprising is said to be the direct reason and cause for the June Uprising of 1987 (Kim 2003, 234). In 1987, due to reinvigorated mass societal and political unrest, later known as the June Uprising, a "Special Declaration" was declared by the government, which consisted of a direct presidential election (Lee 1993 356). The South Korean government ultimately reached a breaking point in which the military regime could not uphold itself against the continued protests of society. This year is extremely important in South Korean history, as it marks the reinstatement of democracy and civil society in South Korea (Park 2005, 262). Roh Tae Woo, chairman of the Democratic Justice Party was elected president (Kim 2003, 235; Lee 1993, 356). The Democratic Justice Party also merged with the Reunification Democratic Party (Kim 2003,

236). Under the leadership of the new joint party, the Korean political regime began to undergo mass reorganization. This included strong measures of liberalization, such as freedom of the press, and local political autonomy—namely, the right to local elections (Lee 1993, 357). Political protest and oppression also became tolerated, and many took the opportunity to ask for better policies concerning the economy and labour (Lee 1993, 356). This reorganization resulted in a great loss of state capacity in favour of citizen involvement and power (Lee, 1993 357; Tarrow and Tilly 2015, 57). The following President Kim Young Sam also abolished the Hanahoe and introduced measures to depoliticize military leaders (Kim 2003, 237).

Conclusion

South Korea is an example of a successful transition to democracy. South Korea has shown little to no evidence of reverting to authoritarian rule, and remains democratic in nature in the present day (Kim 2003, 225).

The Democratization Movement is valuable in that the Gwangju Uprising provides us with an opportunity to determine what one may mean by "success". There is no right answer as to whether the Gwangju Uprising and its massacre justify the implementation of democracy. Many lives were lost, and thousands more forever changed.

Overall, the Democratization Movement and Gwangju Uprising are important to the study of protest politics because it allows us as a global society to learn from our mistakes, examine our concerns, and continue to improve upon our structures of government and political regimes.

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Energy & Environment / L'énergie et l'environnement

Necessary but Insufficient: The Right of Humans & Nature in an Age of Climate Harms

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Keywords: climate change, climate crisis, global heating, global environmental politics, ecomodernism, social green theory, human rights, rights of nature

Mots-clés: changement climatique, crise climatique, réchauffement planétaire, politiques environnementales, éco-modernisme, théorie sociale verte, droits humains, droits de la nature

This paper analyses the relevance of human rights to the ongoing climate emergency, with focus on the impacts upon human rights from the effects of global heating, and the prospects for climate mitigation. I argue that a human rights-centric analysis is a necessary but insufficient approach to analysing global heating, and must be supplemented and balanced by an understanding of the rights of nature. Since the effects of the climate emergency erode the enjoyment of human rights worldwide, and disproportionately impact Indigenous and developing societies, global heating is necessarily a problem of human rights. However, a human rights-centric approach is insufficient, since it threatens to perpetuate an anthropocentric orientation which has contributed to the climate crisis. Following the work of Boyd and others, I argue that a rights of nature approach is necessary to safeguard the well-being of ecosystems and animals beyond their utility to humans. This paper also performs a critical analysis of various environmental philosophies aimed at mitigating climate change and their impacts on human rights, with focus on the social green and ecomodernist approaches. The most coherent and defensible approach to climate change-mitigation must substantiate and respect the underlying rights of nature.

Ce texte analyse la pertinence des droits humains par rapport à la crise climatique actuelle et porte une attention particulière aux impacts du réchauffement climatique sur les droits humains et les chances d'une atténuation climatique. J'argumente qu'une analyse centrée sur les droits humains est nécessaire. Pourtant, c'est une approche insuffisante

[5] This essay was approved by Gadfly staff through the regular review process before Mr. Lynch joined the Gadfly team.

pour analyser le réchauffement climatique et elle doit être assimilée avec une connaissance des droits de la nature. Puisque les effets de l'urgence climatique érodent la jouissance des droits humains à l'échelle mondiale et qu'elle affecte de manière disproportionnée les sociétés autochtones et les sociétés en développement, le réchauffement climatique est forcément une problématique de droits humains. Toutefois, une approche centrée sur les droits humains est insuffisante, car elle risque de perpétuer l'orientation anthropocentrique qui a contribué à la crise climatique. Suivant les œuvres de Boyd, entre autres, je soutiens qu'une approche des droits de la nature est nécessaire pour sauvegarder le bien-être des écosystèmes et des animaux au-delà de leur utilité pour les humains. Ce texte effectue également une analyse critique d'une multitude de philosophies environnementales qui visent à atténuer le changement climatique et leurs impacts sur les droits humains, surtout les approches sociales vertes (social green) et éco-modernistes. Je conclus mon argumentation en affirmant que l'approche la plus cohérente et défendable pour atténuer le changement climatique doit incorporer et étayer les droits fondamentaux de la nature.

As a global environmental hazard, climate change affects the enjoyment of human rights as a whole and therefore, it is at the core of the indivisible, interdependent and interrelated nature of each and all human rights as initially emphasized by the Universal Declaration of Human Rights.

- *The Office of the United Nations High Commissioner for Human Rights, 2018*[1]

The day will come when the failure of our laws to recognize the right of a river to flow, to prohibit acts that destabilize Earth's climate, or to impose a duty to respect the intrinsic value and right to exist of all life will be as reprehensible as allowing people to be bought and sold.

- *Cormac Cullinan, Wild Law: A Manifesto for Earth Justice*

Introduction

From flooding to desertification, ours is an age of mounting ecological disasters. With these disasters caused largely by human activity, their cumulative effect is justly described as a climate *crisis*.[6] While this ongoing crisis is plainly an environmental issue, a growing field of legal and environmental scholarship seeks to conceptualize it as a crisis of human rights as well. Not only has the climate crisis drastically harmed the enjoyment of human rights across the world, but efforts to mitigate global heating themselves threaten to undermine the rights of already vulnerable populations. This essay explores these issues, analyzing the climate crisis within the framework of legal rights.

My thesis is twofold. First, I argue that the climate crisis is *necessarily* a problem of human rights, as both global heating and strategies of mitigation present severe problems of human rights. Second, I argue that a human rights-centric approach is *insufficient*, and must be coupled with a nature rights approach which safeguards the rights of ecosystems and nonhuman living beings. My theses are closely related, as the fight to mitigate climate change involves potential violations of human rights (namely the right to self-determination) which I will argue can best be resolved by invoking the underlying rights of nature.

I begin by analyzing the implications of the climate crisis on human rights, with emphasis on the disproportionate degradation of rights incurred by women, developing countries, and Indigenous peoples. Next, I turn to the major rights implications of climate change mitigation. Finally, I analyze the insufficiency of human rights as a framework for conceptualizing climate harms, with an in-depth examination of the rights of nature.

The human rights implications of climate

The primary dimension of relevancy between legal rights and climate change is the degradation of human rights by what political scientist Jonathan Symons terms “climate harms” (2019). Climate harms are caused by a broad range of destructive phenomena driven by anthropogenic global heating, including extreme weather events such as hurricanes and floods,

[6] A note on terminology: throughout this paper, I will use the term “global heating” as opposed to “global warming”. Where applicable, I will use the term “climate crisis” over “climate change”. In doing so, I am following a change in style implemented widely throughout both journalism and academia, which aims to better reflect the gravity and seriousness of the ongoing ecological crisis caused predominately by human civilisation. For an explanation of the style-change by British newspaper The Guardian, see: https://www.theguardian.com/environment/2019/may/17/why-the-guardian-is-changing-the-language-it-uses-about-the-environment.

rising sea levels, increased pollution, infectious diseases, forced environmental migration, and the degradation of ecosystems upon which humans depend for sustenance and income. [7]

Climate harms constitute a definite threat to the enjoyment of basic human rights, including the rights to food, water, health, adequate standards of living, and ultimately, to life. The human right to adequate food, substantiated in 1966's International Covenant on Economic, Social and Cultural Rights (ICESCR), is under particular threat from climate change. By 2050, the United Nations Environment Programme (UNEP) estimates that nearly half the world's population will be at risk of undernourishment due to population increase and the effects of climate change (International Federation for Human Rights, 2015). A heating climate will similarly undermine the human right to water (ICESCR, General Comment 15), as climate change will inevitably "exacerbate the problems of scarcity and equitable access" to safe water that threaten to impact up to 3.5 billion people by 2025 (International Convenant on Economic, Social, and Cultural Rights 2010, General Comment no. 15 & Mukheibir 2010, 1027-1028).

For millions of people, climate harms threaten to undermine even the most basic human right to life. Environmental scholar Rob Nixon argues that climate harms inflict nothing less than "slow violence" upon affected populations. Defined as "a violence of delayed destruction that is dispersed across time and space," the slow violence of climate change is "incremental and accretive," yet no-less destructive to human well-being (Nixon 2011, 2). Slow violence is inflicted in the ongoing desertification of the Sahel, the lung disease-inducing air pollution of Beijing, and the melting of pack-ice in Inuit territory. By rendering human habitats unlivable, the slow violence of global heating threatens the enjoyment of human rights at the most basic level.

Climate harms, however, are not felt equally across human society as exposure to climate harms is mitigated by wealth and geography.[8] The victims worst affected by environmental degradation are often residents of developing nations that lack access to economic resources, social services, and technology necessary to mitigate against environmental crises. As Symons notes wryly, "Wealth insulates, literally, against climate harms" (2019, 46) Regions like sub-Saharan Africa which are already vulnerable to resource scarcity are poised to endure the harshest blows of an unstable climate, with the UN estimating that wheat production in the region will fall by 36 percent by 2050 (UN Women). Thus the world's poorest are thus doubly harmed: deprived of the economic and technological benefits of globalization

[7] These disasters also present a gendered dimension to human rights degradation as a result of climate change, with the United Nations Development Programme stating that women and children are 14 times more likely than men to die in a natural disaster. Source: International Federation for Human Rights, "Global warming, a challenge to human rights."

[8] At a simple geographical level, countries of the Global South are located closer to the equator, and therefore face increased exposure to the Sun, exacerbating the effects of global heating.

(and often harmed precisely by those processes), the poor nevertheless suffer the worst depredations of the climate harms wrought by the activity of richer nations.

Climate change also disproportionately harms the rights of Indigenous peoples, as their territories and ways of being are eroded by environmental destruction and rising temperatures. Indigenous activists such as Sheila Watt-Cloutier have been at the forefront of efforts to recognize climate harms as issues of human rights, with Watt-Cloutier arguing that the melting of Arctic sea-ice poses an infringement of the economic and cultural rights of Inuit peoples (2018). Climate-induced habitat degradation directly challenges many of the rights enshrined in UNDRIP, which asserts that Indigenous peoples have "the right to conservation and protection of the environment and the productive capacity of their lands"—a right undermined by ecological devastation from Brazil's rainforests to the increasingly plastic-ridden shores of Polynesian islands (UNDRIP 2007, Article 29.1). Extractive industries such as mining and logging further erode the Indigenous right to freedom from the "disposal of hazardous materials" upon their territory, even as these industries fuel global heating through industry-related emissions (UNDRIP 2007, Article 29.2).

One could list the ways that climate change impacts the enjoyment of human rights at tedious length. It is hardly controversial to conclude, as did UNEP, that climate change "will have a profound [negative] effect on the enjoyment of human rights" worldwide (2015) However, human rights also face the prospect of erosion in the process of combating climate change. As the international community commits to greater emission reductions, these dimensions will become increasingly relevant.

Infringements upon human rights presented by climate change solutions

A second major relevancy between human rights and climate change involves the degradation of human rights in policies and efforts aimed at mitigating climate harms. While the UN Human Rights Office states that climate change "should be addressed in a way that is fair and just," this aspiration often remains unfulfilled in practice. This section assesses the implications for human rights in the fight against climate change, beginning with a brief overview of the relevant proposed solutions.

While proposed solutions to the climate crisis vary widely, for the purposes of this paper they may be broadly sorted into two categories. The first, espoused by social green and environmentalist theorists, involve dramatically curtailing economic production and consumption in efforts to curb the release of hydrocarbons and ecological destruction wrought by industrial activity. A second, opposing category of proposed solutions, espoused by market liberals and ecomodernist thinkers, argues that greater energy use, agricultural intensification, and technological innovation are needed to "decouple" human civilization from dependence on the natural world (Asafu-Adjaye et al. 2015, 2). This typology of environmental philosophies is

articulated at greater length by political scientists Peter Dauvergne and Jennifer Clapp in their "*Paths to a Green World*".[9]

I argue that a rights-centric approach is crucial to a fair and reasoned evaluation of these options, as both present critical implications for the enjoyment of human rights.[10] First, the social green strategy of "de-growth," potentially undermines a number of human political and economic rights, thereby complicating any straightforward mitigation of climate change (Martinez Alier 2009, 1099). Notable efforts to *curb* fossil fuel-usage have indirectly undermined human rights; the search for renewable energy sources, for instance, prompted a "rush into biofuels" which, according to Oxfam, has rendered 60 million Indigenous people at risk of displacement worldwide (Oxfam International 2008, 16). Mitigation policies such as the World Bank's ban on financing for oil and gas developments in the Global South threaten to erode developing states' ability to pursue economic growth and provide the standard-of-life necessary to withstand climate harms (Symons 2019, 138). In doing so, these policies may encroach upon the right to self-determination established in the 1941 Atlantic Charter, and thereafter enshrined as a core tenet of the anti-colonial movements of the mid-twentieth century (Ibhawoh 2014, 843).

Several leading ecomodernist thinkers have decried policies of de-growth on human rights grounds, arguing that their effectiveness is predicated on "extreme constraints on human freedom" (Symons 2019, 110-111). The critique of political scientists such as Jonathan Symons argues that attempts to reduce emissions by lowering population growth and economic activity in developing countries are inherently unjust. In areas where industry is dependent on unsustainable or extractive practices—as in oil and mining sectors—efforts to combat climate change by banning pollutive industries will contravene the right of peoples to "freely dispose of their natural wealth and resources" enshrined in ICESCR 1.2 (International Covenant on Economic, Social, and Cultural Rights 1966, Article 1.2). Since many developing countries rely heavily upon these industries, their eradication would further undermine the economic rights of already-vulnerable populations.

However, the ecomodernist approach itself presents unique and potentially-graver human rights concerns. Ecomodernist approaches aim for an *acceleration* of existing trends of modernity, including agricultural intensification and urbanization, to reduce the dependence of

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[9] Throughout this essay, my categorisation of environmental philosophies will be based on the typology articulated by political scientists Peter Dauvergne and Jennifer Clapp. Source: Jennifer Clapp and Peter Dauvergne, "Peril or Prosperity? Mapping Worldviews of Global Environmental Change," in *Paths to a Green World: The Global Political Economy of the Environment* (MIT Press, 2011): 3-14, https://tinyurl.com/y8xu4vfw.

[10] As a necessary caveat, I must note that I will not here evaluate the *feasibility* of either of these approaches to combat climate change, but rather simply their ramifications for human rights. Both approaches present possible critiques of their feasibility and political viability, which require extensive evaluation in their own right.

humanity on land and natural resources (Asafu-Adjaye et al. 2015, 7). Yet, unless some technological magic bullet is conceived which can render global industry nigh-instantly sustainable, the acceleration and intensification of modernization processes will risk compounding the inequalities caused by the imperatives of unrestrained capitalism. Critical social theorists argue that by "propelling the same old patterns into the future," ecomodernist solutions will perpetuate the human rights abuses extant in the current international system, including those wrought by dramatic inequality, expanding urban slums, increasing worker disposability wrought by technological development in richer countries, and the simple exploitation of many millions of workers subsumed in the processes of economic modernization (Collard et al. 2016, 232). Modernity—as defined by the ecomodernists as the acceleration of industrial intensification, technological development, and urbanization (Asafu-Adjaye et al. 2015)—has not been experienced as uniformly benign, and the processes which have improved the well-being of billions have caused acute suffering for billions of others.

A concrete example of the degradation of human rights incurred by ecomodernist environmental policies may be seen in China. The Chinese state has defined its official environmental strategy as "ecological modernization" for nearly two decades, implementing a broad set of ecomodernist reforms aiming at poverty alleviation and agricultural intensification throughout its borders (Research Group for China Modernization Strategies, 2007).[11] As the pastoral and nomadic practices of ethnic groups such as Tibetans and Hui Muslims stand in the way of these goals, the state has utilized large-scale ecological resettlement programs (called *shengtai yimin*) to end pastoral agriculture by sedentarising nomadic populations in China's peripheral regions.[12] Not incidentally, the cultural and political autonomy of resettled communities is greatly diminished as communities centred on grassland herding are forced to take up farming in state-built settlements.[13]

While the impacts of China's ecological resettlement policy is by no means a *necessary* product of *shengtai yimin's* underlying ecomodernist framework, it demonstrates how seamlessly ecomodernist goals of decoupling and agricultural intensification can co-exist with authoritarian goals of centralised control and state security. If anything, China's pursuit of "ecological modernisation" demonstrates that accelerating modernization in the name of

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[11] Billions of dollars have also been spent in the past two decades in major ecomodernist-style projects of forest planting and protection, land retirement, and de-desertification. Source: Emily Yeh, "Greening Western China: A Critical View," *Geoforum* 40, no. 5 (2009): 886.

[12] Jarmila Ptackova, "Orchestrated Environmental Migration in Western China," 224.

[13] Edward Wong, "Resettling China's Economic Migrants." For a more in-depth analysis of this subject, see my paper *Ecomodernist Authoritarianism: The Costs and Motivations of Ecological Resettlement in China*, published in the University of British Columbia's Journal of Political Studies, 23rd Edition: https://www.ubcjps.com/the-23rd-editionn.

climate change-mitigation—the central goal of the ecomodernists—may be just as destructive to human rights as the curtailment of modernized industry espoused by social green theorists.

Furthermore, approaches which seek to prioritize human economic rights over climate change-mitigation in the *present* risk harming human rights at a far more serious level in the future. If preserving the human rights to self-determination and resource use results in hydrocarbon production reaching a tipping-point of runaway warming, the resulting exacerbation of global heating may ultimately threaten the right to life itself—the "prerequisite for the enjoyment of all other human rights" (UN Human Rights Committee 2016, General Comment no. 36, Article 6). An estimate by the WHO predicts that, by 2050, current climate trends are expected to cause 250,000 additional deaths annually due to malnutrition, disease, and heat stress alone.[14] If dangerous warming is not prevented, deaths as a result of habitat collapse, rising sea levels, and extreme weather events could reach cataclysmic proportions.

Thus, any solution to climate change must attain a balance between rights infringements incurred as a result of climate mitigation, and the looming risk of far-broader rights infringements produced as a result of inaction. Since the enjoyment of basic human rights will be challenged in either case the more basic human rights to life and security must take primacy over economic rights, until dangerous climate change is averted.

This point leads directly to this paper's final section. I argue that a broadening of rights-vocabulary is crucial to combating global warming, as a focus limited to human rights will neglect the well-being of critical ecosystems. The protection of the rights of nature, therefore, constitutes the critical point of orientation against which infringements on human rights through climate mitigation must be weighed.

Insufficiencies of the human rights approach

I have hitherto argued that both the deleterious impacts of global heating upon the enjoyment of human rights and the rights-implications of various approaches to climate change mitigation render human rights integral to the problem of climate change. In the remainder of this essay, I argue that any approach to the climate crisis that is limited to questions of human rights is insufficient. By only critiquing the effects of human activity—whether in causing or alleviating climate change—*on the rights of humans*, one ignores the dimension of rights embodied in nonhuman, natural entities. I begin by analyzing the limitations of a human rights-

[14] While this number does seem rather low, one must keep in mind that the annual deaths from these diseases already rank in the millions (air pollution, for instance, already causes some 4.3 million deaths a year). Source: The WHO, "Climate change and health," *The World Health Organisation*, February 1, 2018, https://www.who.int/news-room/fact-sheets/detail/climate-change-and-health.

centric approach, before analyzing the case for a vocabulary of the rights of nature and its relevance to combating global heating.

The first limitation to a human rights-centric approach to combating climate change is the "individualistic and anthropocentric focus" inherent to much of human rights discourse (Albers 2018, 120). Defining anthropocentrism as the belief that humanity is "separate from, and superior to" the natural world, environmental scholar David Boyd argues that the substantiation of anthropocentrism in the international legal canon has led to broadly-harmful outcomes (2017, xxiii). By reducing the primary bearer of rights to the *homo sapiens* species, a human rights-limited approach to climate change neglects to safeguard the nonhuman organisms which suffer as a result of human activity, as well as the underlying ecological systems which sustain life itself.

This anthropocentric approach is embodied in many articulations of the human 'right to environment.[15] Despite the host of qualifiers which have been prefixed to 'environment' (including, as Julie Albers notes, "healthy, clean, safe, secure, adequate, decent, viable, or satisfactory"[36]) the right to environment nonetheless assumes the primacy of the human *over* a nature which is conceived of as "merely a collection of things intended for human use."[37] If human rights are the only metric by which climate harms are tallied, there is little incentive to safeguard natural ecosystems beyond the level that humans deem necessary to preserve their *own* imminent well-being.

Furthermore, if human rights are the primary framework by which climate harms are *prosecuted*, many cases will present nigh-intractable legal difficulties that threaten to stall any meaningful action against climate change. Bridget Lewis notes that climate harms adhere "neither [to] territorial boundaries nor jurisdictional limits"—crucial elements within the current paradigm of legal prosecution—and that the systemic nature of climate change often prevents the identification of specific actors in derogation of legal duty.[16] Daniel Bodansky provides a still-harsher assessment, arguing that while climate change might erode the *enjoyment* of human rights, it no more *violates* rights "than does a hurricane, [or] earthquake" (Lewis 2018, 173). The mostly stifled efforts of activists like the aforementioned Watt-Cloutier to treat climate

[15] Anthropocentric language is also found in major international human rights treaties. Article 3 of the United Nations Framework Convention on Climate Change states that countries "should protect the climate system for the benefit of present and future generations of humankind," rather than out of respect for any inherent worth of the beings and ecosystems which constitute the "climate system." The Rio Declaration on Environment and Development, is even more explicit, asserting that "Human beings are at the centre of concerns for sustainable development." Source: UN General Assembly, *United Nations Framework Convention on Climate Change*, 20 January 1994, https://www.refworld.org/docid/3b00f2770.html; David R. Boyd, *The Rights of Nature,* xxv.

[16] The notable exception would be in cases where an identifiable entity, such as a corporation, is responsible for the environmental harms under consideration in a specific area. Source: Bridget Lewis, *Environmental Human Rights and Climate Change: Current Status and Future Prospects*, (Singapore: Springer Singapore, 2018), 173-174.

change as a problem of human rights illustrates the inadequacies of the current legal rights paradigm in addressing issues of deteriorating ecosystems.

While the difficulties of prosecuting global warming as a human rights violation are surely not wholly intractable, I argue that a broadening of rights-vocabulary is necessary to fully combat global warming. I next examine the host of nations, Indigenous peoples, and scholars who are affecting a "rights revolution" by attributing legal rights to nature itself (Boyd, 2017).

A necessary extension: the rights of nature and ecosystems

According to David Boyd, over 100 countries have signed treaties or laws substantiating the idea that nature "has intrinsic value, regardless of its utility for humans," in opposition to the dominant legal paradigms which define the status of nature only insofar as it relates to human consumption, and thereby commodify natural systems (2017, 99). This section will analyze the relevancy of this counter view of rights to the climate crisis.

The rights of nature approach aims to ground legal protection for ecosystems and animals in the interrelatedness of all living systems. Nature rights-systems reorient humans from an anthropocentric position of separateness from and superiority over nature into a position of relationship *within* nature. This relationship, writes environmental advocate Cameron LaFollette, is essentially defined by mutual reciprocity, wherein all "the physical elements and the biological components" that constitute an ecosystem sustain and are sustained by each other (LaFolette and Maser 2017, 367). This interrelatedness, states the Universal Declaration of the Rights of Mother Earth (UDRME)—one of the premier political statements on the rights of nature—confers upon all living beings "a common destiny," thus eroding the arbitrary distinction between the well-being of humans and that of the natural systems which sustain them. (2010, Preamble)

A nature rights approach seeks to sustain this "common destiny" by attributing to nature many of the rights previously considered intrinsic to humans. The UDRME thus recognizes natural systems' rights to life, clean air and water, unique identity, and "integral health" (2010, Article 2). In landmark cases in Colombia and New Zealand, courts have recognized the inherent rights of certain rivers to "protection, conservation, and restoration" (Boyd 2017, 226). In countries like Bolivia and Ecuador, the rights of nature have been framed to reflect Indigenous spiritual principles, recognizing ecosystems not merely as rights-possessing entities but systems of sacred worth (Boyd 2017, 199). Other countries have used religious justifications to safeguard nature rights, with Indonesia's official Islamic clerical organization issuing a *fatwa* banning wildlife trafficking (Boyd, 2017).

Certainly, implementing and defending the rights of nature through legally-binding international treaties raises major difficulties—several of which I have mentioned above. It

remains difficult, for instance, to imagine what entity would defend a river or mountain's rights in a physical court. Yet these problems are by no means insuperable, and concerted efforts to tackle them may aid massively in the conceptualization of human rights in an age when climate change-mitigation strategies are sorely needed.

Nature rights present the crucial point of orientation from which human rights must be considered. Since the natural world ultimately sustains *all* life, the right of nature to flourish takes primacy over rights implicated only at advanced stages of human development. The corollary for the protection of the rights of nature, as Boyd states, "requires eliminating or modifying" any human activities which undermine the well-being of nature (2017, 230). While efforts at climate change-mitigation may infringe upon the human right to economic self-determination, the underlying capacity for humans to have laws at all depends itself on the ability of the global ecosystem to sustain life. "[P]lacing Nature's Rights first," concludes Cameron LaFollette, "is the *only way* that human life can thrive sustainably" (LaFolette and Maser 2017, 367). By recognizing the necessity of the well-being of ecosystems for the well-being of humankind, the incorporation of the rights of nature into the legal discourse of climate change may thus, however tentatively, coherently allow for mitigation strategies which curb certain human economic or social rights in the short term in order to prevention of drastic degradation of those rights in the medium and long term.

Conclusion

Human rights present a necessary but insufficient dimension to any assessment of the harms of, and solutions to, the climate crisis. Yet human rights must be supplemented by the recognition of the inherent rights of nature if either is to survive at all.

However, human rights and the rights of nature are not mutually opposed. Indeed, only in tandem can *either* be fully realized. The rights of humanity will not guard against the harmful imperatives of anthropocentrism unless balanced against the inherent worth of natural systems. Conversely, the rights of nature are incoherent unless situated in relation to the vocabulary of freedoms and obligations which define human rights.[17] By extending the vocabulary of human rights to nature in order to safeguard biodiversity and ecological well-being, the rights of nature can embody the highest principles of human rights.

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[17] As Stephen Humphreys notes, human rights "have come to provide a primary language for the expression and contestation of justice claims." It is no surprise, then, that the rights of nature are necessarily articulated in much of the same language and contextual framework as are human rights. Source: "Competing Claims: Human Rights and Climate Harms," In *Human Rights and Climate Change*, edited by Stephen Humphreys, (Cambridge: Cambridge University Press, 2009), 39, https://tinyurl.com/yhrb3fr8.

Our current paradigm of internationally-recognised rights was created in the mid-twentieth century not to function as a set of abstract legal mechanisms, but to protect individuals from the crimes of state power, following an age of massive political persecution and genocide. In our era, it is not only individuals but ecosystems which the international system must seek to protect, and the threat of global heating is surely no less existential a crisis than the wars and genocides of the past century. If the language of rights is to remain humanity's highest defense against abuses of power and loss of life—indeed, if it is to remain of any real relevance at all in an age of climate harms—it must be expanded and reworked to counter the most serious ongoing crises of the well-being of living systems, both human and nonhuman.

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Legal Analysis / L'analyse juridique

How the Supreme Court of Canada Would Rule on TransLink's Mandatory Mask Policy

Colin Schuler Ram

Keywords: Mask mandates, COVID-19, Charter of Rights and Freedoms, Freedom of expression, Reasonable limitations, Supreme Court of Canada.

Mots-clés: Mandats des masques, COVID-19, Charte des droits et libertés, liberté d'expression, limites raisonnables, Cour Suprême du Canada

I argue TransLink's COVID-19 August 2020 mask mandate would be found to infringe the Canadian Charter of Rights of Freedoms section 2(b)—freedom of expression—but upheld as a reasonable limitation under section 1 as it serves important public health purposes. I conduct a legal analysis with a blended approach, using scientific evidence on mask effectiveness and the experience of TransLink and other jurisdictions alongside reasoning from analogous cases given a dearth of Canadian mask mandate jurisprudence. I pay specific attention to the role of court deference. Evidence supported that an infringement of s. 2(b) would be found; not wearing a mask is potentially a political statement, and expression is compelled by effect by forcing mask-wearing. Despite controversy, I believe the Supreme Court of Canada would uphold TransLink's policy under section 1 of the Charter, at least on a s. 2(b) challenge. Lowering the incidence of COVID has been recognized as a highly pressing and substantial goal. The Court would likely defer to the government's evidence and accept a rational connection based on past cases involving public health and medical evidence. The means are within reasonable alternatives given how widespread mask policies are, the exceptions delineated, lack of apt substitutes, and non-overbreadth/vagueness. The limitation is proportional given the Court's import given to COVID against the low value of the suppressed speech.

Je soutiens que le mandat de masque COVID-19 mis en oeuvre par Translink en août 2020 serait considéré comme une infraction de l'article 2(b) de la Charte canadienne des droits et libertés –– celle qui porte sur la liberté d'expression –– mais constituerait une limitation raisonnable en vertu de l'article 1, car le mandat répond aux objectifs importants de santé publique. J'aborde une analyse juridique avec une approche mixte en utilisant des preuves scientifiques sur l'efficacité des masques ainsi que l'expérience de Translink et d'autres juridictions, accompagnée d'une logique basée sur des cas analogues, étant donné

l'absence de jurisprudence canadienne sur le mandat des masques. Je porte une attention particulière à la retenue judiciaire. Des preuves ont démontré qu'une infraction de l'article 2(b) serait constatée; ne pas porter un masque est potentiellement une déclaration politique, et le fait de rendre le port du masque obligatoire contraint l'expression de chacun. Malgré la polémique, je crois que la Cour suprême du Canada défendrait la politique de Translink en raison de l'article 1 de la Charte, au moins en contestant l'article 2(b). Réduire l'incidence de la COVID a été reconnu comme un objectif très urgent et considérable. Il est probable que la Cour s'en remette aux preuves du gouvernement et accepte un lien rationnel basé sur des cas précédents concernant la santé publique et des preuves médicales. Étant donné la généralisation concernant la politique du port du masque, les exceptions définies, l'absence de substituts appropriés et l'ambiguïté font en sorte que les moyens sont dans des limites raisonnables. La limitation demeure proportionnelle compte tenu de l'importance que la Cour suprême accorde à la COVID par rapport à la faible valeur du discours supprimé.

Introduction

The COVID-19 pandemic requires no introduction. The disease has severe and sometimes fatal health effects and has devastated multiple economies and industries. As of this writing (November 30, 2020), there is no widely-available vaccine and over 400,000 Canadians have contracted the disease with over 12,000 dying from it (Reynolds 2020)[18]. Canada has recently federally recommended—though not mandated—multi-layer cloth mask (hereinafter, 'masks') use to slow the spread of the novel virus. Many municipalities, agencies and businesses globally within the past few months have gone further and put into effect mandatory mask policies. TransLink is one such agency.

The debate over the necessity/effectiveness of such policies is widespread, current and contentious. Many maintain mask policies are essential to stop COVID's spread. Others argue they disproportionately affect certain groups such those with disabilities, or unjustifiably impair rights and freedoms such as expression—or that they are simply ineffective (Bogart, 2020). The last point at least holds merit: the effectiveness of masks in stopping the spread of respiratory illnesses is not an entirely settled issue, with studies finding mixed results (see Chughtai, Seale, & Macintyre 2020; extensive examination in later-discussed arbitration cases). This is, however, a secondary point to my paper's scope.

[18] I cite a Canadian COVID case tracker found at the bottom of the article. The case tracker updates regularly and thus no longer reflects the given number of 12,000 deaths.

The question this paper seeks to answer is: how would the Supreme Court of Canada (hereinafter, SCC) rule if legal challenges to TransLink's mandatory mask policy were brought before it? To date, there have been no Canadian court rulings related to mask mandates—though there have been arbitration cases about mask policies for unvaccinated healthcare workers (HCWs), along with American cases upholding similar policies. Given opponents' dialogue centering of speech and opinion, I focus on the right to freedom of expression found under the Charter of Rights and Freedoms section 2(b). I argue TransLink's mask mandate would be found to infringe Charter section 2(b) but upheld as a reasonable limitation under section 1 as it serves important public health purposes.

I begin with discussing my scholarly and substantive contribution through a literature review. I then set out the law at issue and briefly overview analogous rulings. I then provide an overview of my data sources and analytical method. From there, I move into testing whether the SCC would find an infringement of s. 2(b) of the Charter. With a violation established, I assess whether it would constitute a reasonable limit of expression rights under s. 1 of the Charter. Throughout my analysis, I consider potential counterarguments. I finally provide an overall conclusion with limitations and suggestions for future inquiry.

Literature review

Mask effectiveness

What is under examination here are multi-layer cloth masks as opposed to medical-grade masks. COVID is primarily transmitted through droplets expelled from the mouth or nose that disperse roughly six feet from an individual. The theory behind universal mask-use is to provide a physical barrier to filter out these droplets, and thus reduce the spread of COVID—especially as asymptomatic or presymptomatic carriers could infect others. Indeed, the CDC estimates 50% of transmissions can be attributed to such carriers (Centers for Disease Control and Prevention, 2020). Masks are just one component of the public health response to this pandemic (Reynolds, 2020).

The picture emerging from my research is that fabric masks provide protection sufficient for public use but not for HCWs (see Chughtai, Seale, & Macintyre 2020). America's CDC recommends their use in community settings (ibid). In their meta-analysis, masks blocked 50-80% of droplets expelled, and up to half inhaled; they also point to numerous observational studies showing reduced risk (Centers for Disease Control and Prevention, 2020). One such study in Ontario found a 25-31% decrease in weekly-new COVID-19 cases in areas that imposed mask mandates immediately after the implementation of such policies (Karaivanov et al. 2020, 1). Expert evidence adduced in HEABC and HSA (2013) suggests masks may have some value in limiting droplet transmission.

Debate over constitutionality

Within the academic sphere, this is a new area of inquiry, and I will contribute to the fledgling debate. There is debate regarding whether mask mandates are constitutional under the Charter in Canada. Groups such as the Canadian Constitution Foundation believe they may be valid with amendments to narrow their application. They believe the right to liberty under s. 7 is violated by mask mandates as forcing face covering interferes with bodily integrity (Van Geyn 2020, 1). They also charge that mask mandates violate ss. 15 and 8, the rights to equality and to be secure from unreasonable search and seizure, respectively as they have a disproportionate impact on those with disabilities—they necessarily disclose private medical information by not wearing a mask where others do (1). They moreover believe the low rate of COVID transmission does not warrant such a mandate, nor is the mandate minimally impairing given it requires masks at all times and thus the law cannot be saved under s. 1 (2-3). Other groups such as the Canadian Civil Liberties Association (CCLA) charge they are overbroad, based on questionable evidence and thus not minimally impairing nor rationally connected under s. 1 (Canadian Civil Liberties Association 2020).

Relevant law and legal cases

TransLink's regulations & applicability of the Charter

TransLink is a publicly funded agency created and governed by the BC Transportation Authority Act. The case of Canadian Federation of Students v. Greater Vancouver Transportation Authority (2009) (hereinafter, GVTA) established "TransLink [is] government within the meaning of s. 32 of the Charter" and thus Charter review of its policies/actions may be conducted (para. 24). Section 6 of the Greater Vancouver Transit Conduct and Safety Regulation authorizes any transit employee to require customers to obey TransLink's signs or comply with its rules. Recent signs placed on transit vehicles require all persons travelling on transit to wear a mask or face covering unless exempted from the mandate by reasons such as medical condition, disability, or age—with enforcement including fines up to $230 or being required to leave (Tindale 2020). The full text is provided in Appendix A.

Overview of analogous cases

Similar mask mandates have been upheld on public health grounds in American cases such as Machovec v. Palm Beach County (2020). There is yet to be a Canadian ruling on mask mandates, though Vaccine Choice Canada has filed a legal claim against such policies in Ontario (Butler 2020). The only processed challenge to a COVID-related rights restriction I located was Taylor v. Newfoundland, which relates to provincial border closures. The Newfoundland Supreme Court found these infringed s. 6(1) rights but upheld the closure under s. 1. I will

discuss the reasoning more in-depth later and apply some of the judge's reasoning to the present issue of mask mandates in Canada which does not appear to have been addressed yet.

I found three relevant arbitration cases dealing with vaccinate-or-mask (VOM) policies. Broadly, these required HCWs who did not receive the influenza vaccine to wear a surgical mask when working with the goal of reducing the transmission of influenza (which transmits in the same manner as COVID). One case upheld the policy, finding it reasonable (HEABC). Two struck it down as unreasonable: Sault Area Hospital and Ontario Nurses' Association (2015); and St. Michael's Hospital and Ontario Nurses' Association (2018). Arbitration cases are of course not binding on courts, but contain reasoning that will likely be applicable/relevant given the lack of domestic cases on mask requirements.

Of relevance to my paper, in HEABC the policy was challenged under Charter s. 2(b). Arbitrator Diebolt found even if the policy forced expression infringing s. 2(b), it was saved by s. 1 as a reasonable limitation (114). The goal was clearly pressing/substantial given influenza's harm. Evidence that masks reduce infection rates proved the VOM policy was rationally connected to its goal. Concerning minimal impairment, VOM policies existed in numerous jurisdictions and the employer attempted other voluntary measures which fell short. Requiring masks if not immunized was a reasonable, proportional balance given the importance of patient safety against minor uncomfortable effects to HCWs wearing them.

In Sault Area Hospital, the policy was challenged under labour-relations law. Arbitrator Hayes undertook an in-depth analysis of the expert evidence which largely explains the difference in outcome from HEABC. He found the union's evidence of masks' ineffectiveness to undermine the employer's such that the policy was irrational. Mask use was moreover found too onerous due to many union members finding them uncomfortable, and essentially operated as a consequence for refusing to get the vaccine (107-109). It was then deemed inconsistent with the collective agreement as it essentially coerced immunization, which was optional for HCWs (108-109). St. Michael's Hospital was highly similar. Even additional evidence adduced was insufficient to establish unvaccinated HCWs pose a substantial risk when asymptomatic/presymptomatic and that masks significantly prevent the spread of influenza. It was thus not an evidence-based policy, and when balanced against its effects (mainly discomfort) on HCWs, was found to be unreasonable (52-53).

Substantive contribution

Given how current and polarizing this issue is today and that it affects nearly the entire population of Canada, my research will be of great use for many groups. It is useful as a reference for members of the public to use in debating the issue, especially as I have tried to make the paper accessible to those without much background knowledge. My finding that mandates would likely be upheld provides proponents' arguments a stronger evidentiary basis.

The results also serve pragmatic functions. TransLink—and members of any level of Canadian government—could use the findings in improving or drafting and implementing new policies. Lawyers or interested parties could derive inspiration from the challenges and precedents contained within in drafting arguments before Canadian courts.

Research methods

My paper is mainly a legal analysis. I use Taylor as it is the only case I could find dealing with a pandemic-related rights restriction in Canada, and its reasoning is used extensively in s. 1 analysis. I use Machovec and Jacobson v. Massachusetts (1905) as they illustrate persuasive approaches from a similar legal system to adjudicating a similar issue. The arbitration cases were chosen as they focus on issues analogous to mask mandates for the purpose of s. 1 analysis, and are the only ones I could find. RJR-MacDonald Inc. v. Canada (AG) (1995) and Canada (AG) v. JTI-Macdonald Corp (2007) are selected as they discuss how the SCC balances public health interest against rights-infringements under s. 1; I felt these best to apply given they balance compelled expression against public health, which is the present issue. Other cases, such as Irwin Toy Ltd. v. Quebec (AG) (1989), R. v. Keegstra (1990), Carter v. Canada (AG) (2015), and GVTA were selected as they expand on s. 2(b) and/or provide discussion of the SCC's approach to deference in s. 1 analysis. None of these cases have been overturned.

Evidence supporting my thesis includes COVID-related rights restriction cases and/or vaccinate-or-mask policies and/or other analogous issues being found to infringe section 2(b). Logically, it is vice-versa for evidence refuting it. Judicial reasoning employed in s. 1 analysis upholding a law would also serve as evidence. I especially look to that which explains how courts balance competing rights or objectives, or where they are deferential—for example, how the SCC handles policy based on complex evidence. Other evidentiary sources also provide support for my thesis, such as medical evidence speaking to the effectiveness of masks.

My method of analysis is as follows: I first lay out the test the SCC has developed for section 2(b), along with cases that expand and clarify upon it. I then deliberate whether an infringement would be found using this test, using claims from opponents with reasoning from analogous issues. I then turn to s. 1 to assess whether the infringement be upheld. I take a blended approach, using scientific evidence on mask effectiveness and the experience of TransLink and other jurisdictions alongside reasoning from analogous cases. I pay specific attention to the role of deference—in this case, to the executive.

Findings & discussion

Is freedom of expression violated?

Section 2(b) of the Charter provides that everyone has the fundamental freedom of expression. Its aim is to protect the search for truth, artistic self-fulfilment, and participation in social and political life—all of which have value to the community and individual. It is seen as fundamental to democracy and thus presumed protected and upheld stringently (Keegstra 1990, 699, 729).

Expression is defined very broadly; to qualify, something must simply attempt to convey meaning (Keegstra 1990, 698). It could entail silence or intentional omission (HEABC; JTI-Macdonald, para. 132). If something is deemed to be expression, it is then considered whether it has been restrained. This can be explicitly or by effect. If by effect, a claimant must show the law infringes on the ability to participate in political debate or democratic discourse, or that it inhibits their autonomy and self-fulfilment (Keegstra 1990, 729-730). As a note, certain forms of expression are held to not be protected (and thus limitable without justification), such as that which promotes violence or that which is incompatible with the historical and current function of a venue/location (GVTA, para. 28). Moreover, not all restrictions "rise to the level of interfering with how [one chooses] to express themselves" (JTI-Macdonald, para. 132). If an infringement is established, a s. 1 analysis is conducted to determine if it will be upheld.

Is it expression?

It could be contended that requiring one to wear a mask is a form of compelled expression, and this form of expression is held to be protected (RJR-Macdonald). In the absence of the mandate, one could elect not to wear one. It is a statement in itself to not wear a mask; some choose to not wear it as a symbol of resisting perceived tyranny (Bogart 2020). There is thus expressive content to wearing (or opting to not wear) a mask.

How is it restrained?

It is not TransLink's purpose to force expression, but rather unquestionably to uphold safety given their COVID-19 Safe Operations Program's goals (2020). Expression is then restrained by effect. Most notably, it affects an individual's autonomy/self-fulfilment, which entails the ability to develop and articulate ideas as one sees fit (Keegstra 1990, 763). Statements made during the "March to Unmask" event such as "I believe that masks should be totally freedom of choice", illustrate this line of thinking (Bogart 2020, 1). By forcing one to wear a mask, this is hindered; individuals are not being given a choice to express themselves in the way they wish by virtue of law. Moreover, mask usage is a politicized viewpoint, and the state

ought not hinder/condemn a political view (Keegstra 1990, 764), which is arguably what mask mandates do.

For thoroughness, the location where expression is seemingly infringed upon does not invalidate its protection. As noted in GVTA, the historical and actual function of a place's compatibility with expression must be considered along with whether other aspects of it undermine the values underlying free expression (para. 39). When related to the present issue, the primary and historical function of Translink's buses and trains are "[vehicles] for public transportation" (paras. 42-43). They are public spaces by nature (ibid). There is then nothing to suggest it is incompatible with expression.

Freedom of expression conclusion

There thus seems to be expression that is at face value protected and infringed upon. That said, in HEABC it was speculated forced masking likely would not rise to the level of values protected by s. 2(b) and thus a challenge to mask mandates would have no constitutional basis (p. 111). I do not think a court would agree with his speculation. The context of such a mask mandate has changed. Given it relates to COVID-19 and all transit riders, it is undoubtedly a more widespread political issue that impacts a much broader population. Even if I am wrong in this prediction, the SCC will likely have legal challenges that result in an infringement found, or they may simply assume an infringement of freedom of expression and consider the claim under s. 1.

Would infringements be upheld?

As Diebolt notes in HEABC, one does not have "an unfettered right to be free from forced expression" (108). Indeed, as JTI-Macdonald illustrates, some compelled expression may be upheld in the interest of public health or other fundamentally important collective goals (in that case, requirements for prominent health warnings on cigarette packaging to promote public health) (para. 37). To determine if a rights infringement can be upheld, courts use section 1 of the Charter, which provides any right or freedom is limitable when the limit prescribed by law and demonstrably justified within a free and democratic society. The interpretation of this section was set out in the case of the Oakes decision (as cited in para. 36 of JTI-Macdonald), which briefly requires:

I. Infringements must be created through law;
II. Infringements to have sufficiently important goals: be "pressing and substantial";
III. Means chosen to have a rational connection to achieving those goals;
IV. Means employed to be within a range of reasonable alternatives;
V. Proportionality between the benefit to society against the value/worth of the individual's right.

I will now consider each component of section 1 analysis. I believe each stage will be met.

Prescribed by Law

The limitation of free expression is created through law in the Safety Regulation. As recognized in GVTA, the policies of TransLink delineate the rights of individuals who use their services, are general in scope, and are sufficiently accessible and precise (para. 72). They thus satisfy the requirement of "prescribed by law" for s. 1 purposes.

Pressing & substantial goal

While not directly stated in the Safety Regulation, TransLink's aim can be inferred to be to reduce the spread of COVID on its premises given its aforementioned Safe Operations Program (2020). The SCC will undoubtedly find this to be "pressing and substantial", as Canadian courts seem to assign great importance to containing COVID.

In Taylor, Justice Burrage opened with "it is difficult to overstate the global impact of … COVID-19 … it has claimed the lives of close to one million, hospitalized many times that number, and left entire economies shaken" (para. 1). COVID was moreover characterized as a public health emergency. It remains a serious issue, especially in the jurisdiction TransLink serves. I unfortunately could not locate the rate of transmission on transit, but the number of daily cases is high, with nearly 8,000 active cases (Lindsay 2020)[19]. Even in the absence of such statistics, mere presence of potential cases was sufficient to establish a pressing and substantial goal in Taylor (paras. 426-437).

Rational connection

It was largely at this stage where analogous arbitration cases were struck down—with the exception of HEABC—albeit under different evidentiary standards. As noted before, the arbitrators in Sault Area Hospital and St. Michael's Hospital carried out extensive reviews and weighing of evidence. Notably, they found there was a dearth of evidence speaking to masks' effectiveness and asymptomatic transmission rates. The present evidence regarding mask use however appears much stronger. There are now numerous credible medical bodies globally that speak to the effectiveness of masks in reducing COVID's spread such as the Public Health Agency of Canada and the CDC. There is moreover estimation by the CDC (2020) that those who have no symptoms account for 50% of all transmissions.

[19] The source was revised after this paper was written, the actual case numbers at the time of writing were 7,360.

It is of course possible to point to contradictory evidence such as mask ineffectiveness or potential low rates of transmission on transit. Even then, the SCC will likely adopt a highly-deferential stance in favour of TransLink here. In RJR-Macdonald, the Court delineated that schemes for public health do not require precise scientific proof; the government need only show there is a causal connection between the infringement and the benefit sought "on the basis of reason or logic" (para. 153). This view was affirmed in JTI-Macdonald: "at the very least, it must be possible to argue that the means may help to bring about the objective" and significant deference is required in allowing establishing a rational connection when considering a complex social problem (para. 40-41). Carter, which similarly dealt with complex evidence, also held this view at paras. 99-101.

I am further inclined to predict this deferential approach being taken in the present case as it was adopted in Taylor, dealing with the same social problem: the COVID-19 pandemic. Indeed, Justice Burrage notes that s. 1 analysis must be undertaken with attention to context, and the nature of the social problem changes the nature of the evidence relied upon (para. 404). He concluded based on his contextual analysis that evidence must only establish it is reasonable to suppose a connection, not guarantee it—and accepted less conclusive evidence given it is an emerging problem. It was not necessary for him to do an in-depth examination and weighing of the evidence (para. 438).

With the social problem and objective of the Safety Regulation being the same as in Taylor, it is likely the test for rational connection will be met. TransLink would be able to make a reasoned argument, and thus the court would defer; TransLink would need not show how common/deterministic the relationship is. It moreover is unlikely a court, with its noted lack of medical expertise will find against a policy in-line with a recommendation by its country's own Public Health Agency (Taylor para. 458). Additionally, the appellant would be unable to argue use of other measures makes the policy illogical. In Taylor, it was recognized that other preventative measures can be successful, and these don't make other measures unnecessary (para. 441). Put another way, TransLink is permitted to employ many methods to achieve its goal.

Within reasonable alternatives

Even if means to achieve the pressing and substantial objective are found to be rationally connected, they must be shown to be minimally impairing, or within a range of reasonable alternatives when considering social policy (Irwin Toy, as cited in para. 43 of JTI-Macdonald). This is likely to be the most critical/contentious part of the Court's analysis. The SCC would afford some degree of deference here, but less-so than at the previous stage. In Irwin Toy the SCC recognized the courts are not positioned to second guess parliament's decisions in social policy cases (989). They set out then that courts should afford greater

deference in such cases, as social policy's creation requires mediating between competing groups' claims on the basis of conflicting scientific evidence while balancing limited resources (993-994). Furthermore, in Taylor Justice Burrage noted "a degree of flexibility in crafting a solution to the spread of COVID-19 [is necessary]" (para. 454). It was acknowledged that restrictions related to COVID are essentially medical decisions made on best evidence available—of course, TransLink is not a medical body, but it is following national/provincial health guidelines. That said, the "court must not abdicate its responsibility as guardian of the Constitution and rule of law" by affording total deference (Taylor, para. 460). There are many ways TransLink could defend itself.

As noted in JTI-Macdonald, the reasonableness of legislation may be supported by other jurisdictions having adopted similar restrictions (para. 138). TransLink would have no trouble showing this, both domestically and globally. British Columbia and multiple municipalities in Ontario have adopted mask mandates, along with 37 of America's states—most of which extend to transit (Bogart 2020; Markowitz 2020)[20]. This is likely solely insufficient to establish minimal impairment as in JTI-Macdonald, the Court considered other factors, so I will turn to whether TransLink could show there are not suitable alternatives.

The means chosen to deal with a social problem need not be the literally least-impairing. Also, as mentioned earlier, multiple interventions can rightly be used in targeting it—especially where public health is concerned. Indeed, in Taylor Justice Burrage recognized, "there is no simple one size fits all solution to the effective management of a pandemic … A variety of public health measures are required in combination" (para. 469). TransLink does take multiple measures including frequent cleaning, limiting capacity, and installing signage (TransLink 2020). It would be easy to show that not one of these is a substitute given recognition of a comprehensive approach's necessity and that relying solely on measures such as self-isolation/contact tracing is insufficient (Taylor).

Also supporting TransLink's policy is its effectiveness in achieving its aim compared to less coercive prior attempts. TransLink had previously employed a voluntary mask policy, which around 30-40% of transit riders followed (Zytaruk 2020). A month following the mandatory policy, 92-95% rates were achieved (ibid). Making the policy optional would then render it far less effective.

The SCC appreciates deliberate attempts to impair rights as little as possible. Consider the legislative response of R.J.R-Macdonald and JTI-Macdonald. In the former, despite having a highly pressing/substantial public health goal, the government had created legislation that was

[20] The Markowitz source is now out of date, as the article updates regularly. The most recent update occurred on May 7th 2021.

overbroad and failed to establish that certain forms of advertising led to increased consumption of tobacco, thus their scheme was struck down. Parliament in effect implemented the Court's recommendations in the latter's legislation, which the Court specifically makes reference to in upholding it (para. 7).

Of course, there is no former case to refer to here. In fact, the current mask policy is broader than what was seen in earlier-discussed arbitration cases. That said, the Court is sure to positively consider TransLink's attempts at creating exceptions for certain groups. These do not necessarily relate to expression, but reflect an attempt to minimize the impact on various groups that would be otherwise disproportionately affected—especially those with disabilities and medical conditions. Without these exceptions, it is likely that overbreadth could be found, which I will discuss below.

Two other considerations that may arise in s. 2(b) challenges are overbreadth, which considers "whether the provision … catches more expression than necessary", and vagueness, whether "the language is vague [and could] be applied … beyond the legislator's stated goals" (JTI-Macdonald, para. 78). These can be shown not to be the case by arguing "adequate guidance [was provided] to those expected to abide by it" and that it "[limits] the discretion of [those] responsible for its enforcement (ibid. para. 79).

TransLink's Safety Regulation by necessity compels some expression, but is not overbroad given its exceptions. A potential challenge could be to require an exception for conscientious objectors to masks. This group however is qualitatively different from those currently-exempt, such as: those with disabilities; young children; and public servants during an emergency. It is only an inconvenience for conscientious objectors to wear a mask, rather than an inability or act of urgency. The Court would likely be unpersuaded.

Van Geyn (2020) suggests a similar mask-mandate is too broad. She suggests remedying it by adding in masks are only mandatory "when six feet of social distancing is not possible" (3). It is unlikely a court will be persuaded by this argument in the present case. Even if six feet of distance were theoretically possible, it may not be adhered to and masks provide extra safety in that case. Moreover, distance is not an effective substitute here. Rising transit demand prevents TransLink from reducing capacity further than it has to allow for six feet between all passengers (Little 2020). Increasing the number of transit vehicles to adhere to social distancing guidelines would result in inordinate financial losses to TransLink. It would also bring about greater delays to those using or relying on transit, especially if TransLink could not increase service to accommodate reduced capacity. Moreover, masks are relatively cost-efficient, highly-feasible and effective (Karaivanov et al. 2020, p. 3).

The wording on s. 11 of the Safety Regulation is highly precise in delineating when and who must wear a mask. This will likely be sufficient to show the Regulation is not vague,

especially as this was the case in Machovec (p. 9). Taken together with above considerations and likely deference, the Safety Regulation would be found minimally impairing. The last step is to consider its proportionality.

Proportionality

Courts consider the benefit to society against the value/worth of an individual's right. Logically, it seems the greater the violation, the greater the benefit/importance must be (JTI-Macdonald). Additionally, it appears that the further expression is removed from its core values, the easier it is to justify an infringement (Keegstra 1990, p. 787).

While it may be for political purposes, the expression in question, not wearing a mask, may place others at least at risk of great mental harm through fear of potentially contracting COVID and is thus probably of low value. Moreover, opponents have numerous other forums in which to take issue with the policy; their expression is not totally stifled. When balanced against COVID, "a virulent and potentially fatal disease" of highest importance, the common good will undoubtedly override individual rights—especially as a travel ban, which is arguably more drastic an infringement on rights, was upheld in Taylor. Jacobson, in which the U.S. Supreme Court upheld mandatory smallpox vaccinations in favour of public health would likely also be referred to. Given that a mandatory vaccination is clearly far more intrusive than a face covering, it is likely to in part persuade a Canadian court to the proportionality of masks. A mask mandate was also upheld in the American case of Machovec, which employed a balancing test similar to Oakes further reinforcing my prediction. Sault Area Hospital and St. Michael's Hospital would be distinguished from, given that discomfort of wearing a mask would not be at issue here, as (non-cruel nor unusual) discomfort is not constitutionally protected.

Conclusion

Mask mandates like TransLink's are undoubtedly controversial. My paper is one of the first to provide a balanced examination of the issue in the Canadian legal context. The evidence supported that an infringement of s. 2(b) would be found; not wearing a mask is potentially a political statement, and expression is compelled by effect by forcing mask-wearing. Despite controversy, I believe the SCC would uphold TransLink's policy under section 1 of the Charter, at least on a s. 2(b) challenge. Lowering the incidence of COVID has been recognized as a highly pressing and substantial goal. The Court would likely defer to the government's evidence and accept a rational connection based on past cases involving public health and medical evidence. The means are within reasonable alternatives given how widespread mask policies are, the exceptions delineated, lack of apt substitutes, and non-overbreadth/vagueness. The limitation is proportional given the Court's import given to COVID against the low value of the suppressed speech.

This provides supporters of mask mandates (and potentially other pandemic-related rights restrictions) good evidence from a legal lens—though with limitations. Notably, I am not a lawyer. I also only had a modestly-sized case selection and used analogous or persuasive cases at best being a novel issue. There are moreover a myriad of other legal challenges and arguments available. I only looked at sections 2(b) and 1 of the Charter on one mask mandate. Other issues likely would arise if TransLink's policy were challenged, especially ss. 7 (right to life, liberty and security of the person), 8 (privacy), and 15 (equality), but I did not have the space nor time to examine them. I also did not consider procedural matters, such as how TransLink verifies a claim of disability and enforces the policy and whether legal challenges could be brought there. These all warrant future inquiry. Another note is the scope of my scientific evidence was narrow. This was partially because of word limitations, but also as I am not trained in epidemiology nor biological sciences. I also believe the SCC will ultimately be deferential to evidence adduced by the state given decades of precedent on social policy.

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Appendix A: Relevant provisions of the Greater Vancouver Transit Conduct and Safety Regulation

6(1) If the authority or one of its subsidiaries makes rules, or posts signs on transit vehicles or other transit property, for the safety, good order or convenience of persons while they are on, entering or leaving a transit vehicle or other transit property, a transit employee may require, as a condition of allowing any person to enter or remain on the transit vehicle or transit property, that the person obey the signs or comply with the rules.

(2) If a person does not obey a sign or comply with the rules when required to do so by a transit employee acting in accordance with subsection (1), any transit employee may do any of the following:

(a) refuse that person permission to enter the transit vehicle or other transit property;

(b) order that person to leave the transit vehicle or other transit property;

(c) order that person not to enter any transit property or not to enter specified transit properties for a period not exceeding 24 hours from the time the order was made.

…

The sign provides that:

11. All persons travelling on transit vehicles, including any bus, SkyTrain, SeaBus, or train, will be required to wear a mask or face covering while on board, unless they are exempted by one of the categories below: (a) anyone with an underlying medical condition or disability which inhibits the ability to wear a mask or face covering; (b) persons unable to place or remove a mask or face covering without assistance; (c) children under 5 years of age; (d) transit employees working behind a physical barrier or within areas designated for transit employees and not for public access; (e) police, transit employees, or first responders in an emergency situation.

Legal Analysis / L'analyse juridique

Bedford 2.0: Challenging the Constitutionality of Canada's "New" Sex Work Laws

Kirat Gill

Keywords: Sex Work Laws, Protection of Communities and Exploited Persons Act, PCEPA, Canada (AG) v. Bedford, Charter of Rights and Freedoms

Mots-clés: Loi sur la protection des collectivités et des personnes victimes d'exploitation, LPCPVE, loi sur le travail du sexe, Canada (AG) v. Bedford, Charte des droits et libertés

Following the 2013 landmark *Bedford* decision, Stephen Harper's Conservative government enacted the *Protection of Communities and Exploited Persons Act* (PCEPA) in 2014. Many scholars claim that the *PCEPA* refashioned the former sex work laws struck down in *Bedford*—reproducing similar harms. In this paper, I consider a hypothetical s.7 *Charter* challenge to the *PCEPA*, specifically the purchasing and material benefit offences. My data includes the social science data cited in *Bedford* and *Anwar*. These factual findings will speak to the impact of sex work laws on sex workers, with the judicial rulings serving as a basis for my legal analysis. Furthermore, I rely on several social science papers, which discuss the effectiveness of the Nordic Model and the impact of the *PCEPA* on sex workers. My paper ultimately finds that both the purchasing offence and material benefit offence violate the right to security of the person and this infringement cannot be saved under s.1 of the *Charter*. In regard to the purchasing offence, the law is arbitrary to its objective as there is no substantial evidence illustrating the success of criminalizing buyers (the Nordic model). As for the material benefit offence, the law is overbroad, as it captures non-exploitative relationships between third parties and sex workers. When comparing the judgement in Bedford to my research, the same issues associated with the laws struck down in Bedford are again brought up with the *PCEPA*. In both, the laws prevent sex workers from protecting themselves or hiring third parties to protect them. As such, the claim that many scholars make, which is that the *PCEPA* refashioned the former sex work laws struck down in *Bedford*, is proving to be true.

Suite à la décision historique de Bedford en 2013, le gouvernement conservateur de Stephen Harper a mis en vigueur la Loi sur la protection des collectivités et des personnes victimes d'exploitation (LPCPVE) en 2014. De nombreux.euses chercheurs.euses affirment que la LPCPVE reconstitue les anciennes lois sur le travail du sexe qui ont été éliminées par

l'arrêt Bedford. Par conséquent, la LPCPVE reproduit les mêmes maux. Dans cette analyse, j'examinerai la possibilité d'une contestation judiciaire contre la LPCPVE à partir de l'article 7 de la Charte canadienne des droits et libertés – notamment sur la question de l'infraction relative à l'achat et de l'infraction visant à interdire l'obtention d'un avantage matériel. J'utilise des données sur les sciences sociales citées dans les arrêts Bedford et Anwar. Ces conclusions de fait expliciteront l'impact de la législation sur le travail du sexe sur ces professionnel.le.s concerné.e.s et les décisions judiciaires fonderont la base de mon analyse juridique. En outre, je m'appuie sur plusieurs articles concernant l'efficacité du modèle nordique et l'impact de la LPCPVE sur les travailleurs.eues du sexe. Dans ce texte, je conclus que l'infraction relative à l'achat et l'infraction visant à interdire l'obtention d'un avantage matériel enfreignent le droit à la sécurité de la personne. Une telle atteinte ne peut pas être protégée par l'article 1 de la Charte. Quant à l'infraction relative à l'achat, la loi est arbitraire par rapport à son objectif puisqu'il n'y a pas de preuve considérable qui démontre le succès de la criminalisation des acheteurs (modèle nordique). En ce qui concerne l'infraction visant à interdire l'obtention d'un avantage matériel, la loi est trop vague, car elle comprend aussi les relations qui ne relèvent pas de l'exploitation entre les travailleurs du sexe et des tierces personnes. En comparant l'arrêt Bedford et ma propre recherche, les mêmes problèmes associés aux lois éliminées dans le cadre de l'arrêt Bedford sont encore présents dans la LPCPVE. Dans les deux cas, les lois empêchent les travailleur.euse.s du sexe de se protéger ou d'engager une tierce personne pour se défendre. Par conséquent, il est peut-être vrai que la LPCPVE refaçonne les lois qui ont été invalidées par l'arrêt Bedford, comme le réclament de nombreux chercheur.euse.s.

Introduction

In 2013, the Supreme Court of Canada (SCC) struck down sex work laws in *Canada v Bedford*. Pro-sex work advocates celebrated the landmark decision as signaling the end of a tumultuous battle. However, the victory was short-lived as then-Minister of Justice, Peter MacKay, introduced *Bedford's* legislative sequel, Bill C-36—formally known as the *Protection of Communities and Exploited Persons Act* (*PCEPA*). The *PCEPA* received royal assent in 2014. Some scholars, like Chris Bruckert (2015), Andrea Krusi and Brenda Belak (see Red Light Labour 2018) argue that the *PCEPA* refashioned the laws struck down in *Bedford* and reproduces the same harms; however, few scholars have discussed how to challenge this legislation in court (Durisin, van der Meulen, and Bruckert 2018). As such, this paper will examine two provisions of the *PCEPA* regarding the criminalization of buyers and third parties. The research question this paper seeks to answer is: Do sections 286.1 and 286.2 of the *PCEPA* violate section 7 (s.7) of the Canadian *Charter* of Rights and Freedoms (*Charter*)? If so, is it justified under section 1 (s.1)? In this paper, I will argue that these provisions of the *PCEPA* violate s.7 of the *Charter*, and these

infringements cannot be justified as a reasonable limit under s.1. This paper has four objectives; first, to engage in a review of the existing literature. Second, to provide a background discussion on the specific provisions subject to challenge and their legislative objective; third, to outline the methodology of the paper, the methods of analysis, and a limitation to my methodology and; fourth, to engage in the s.7 and s.1 analysis of the *PCEPA* using legal principles and case law.

Literature review

The existing literature on the constitutionality of the *PCEPA* is limited. Many authors undertake social science research to demonstrate the effects of the *PCEPA* on sex workers (see Red Light Labour 2018). However, a small section of the literature discusses the *PCEPA*'s constitutionality. The two authors that have taken up the question are Stewart and Haak. Stewart (2016) argues that the *PCEPA* is unconstitutional because it has two conflicting policy objectives: to discourage sex work on the one hand and to reduce harms to sex workers on the other. Stewart (2016) asserts that these objectives are in tension with one another. As a result, he finds the *PCEPA* to be an incoherent piece of legislation. Thus, Stewart (2016) argues that one way to challenge the constitutionality of the *PCEPA* is to question these inconsistent objectives.

On the contrary, Haak (2017) rejects Stewart's discussion of two objectives. She argues that the *PCEPA*'s goal is to reduce the demand for prostitution, and there is no second purpose of making it safer. She finds it difficult to argue that the legislation is arbitrary or grossly disproportionate to that objective. Haak (2017) points out that the goal of the *PCEPA* is to reduce demand and make prostitution illegal by criminalizing the purchaser. With that goal in mind, to argue that the purchasing offence makes sex work more dangerous is difficult. Ultimately, Haak (2017) concludes that the *PCEPA* will be difficult to render unconstitutional because the legislation is in line with the government's objective.

Furthermore, while Haak and Stewart are some of the only scholars that have engaged in a s.7 legal analysis of the *PCEPA*, other authors have questioned the constitutionality of the *PCEPA* in a much more informal way. For example, Lawrence (2014) argues that any successful challenge to the *PCEPA* will require new data and scholarship. Thus, Lawrence implies that robust empirical evidence may help to render the *PCEPA* unconstitutional. Additionally, Galbally (2016) discusses the legislation from a human rights perspective. Galbally (2016) concludes that the *PCEPA* is inconsistent with its objectives. The *PCEPA* is based on the Nordic model, and as such, according to the government, the new legislation is important to protect women from exploitative and coercive third parties (Galbally, 2016). However, Galbally (2016) argues that the

legislation increases sex workers' risk of violence, which contradicts the purpose of asymmetrical criminalization.[21]

In essence, these scholars do not undertake a comprehensive legal analysis with a definitive conclusion. My research offers a new perspective. Where existing literature looks at either the effect of the legislation on sex workers or briefly mentions the possibility of a s.7 challenge, I will undertake a hypothetical s.7 challenge to the *PCEPA* and offer a conclusion as to the constitutionality of ss. 286.1 and 286.2. Specifically, my paper responds to Haak's arguments by demonstrating that there is a way to successfully challenge the *PCEPA*, even though the legislation aligns with the legislative objective. In addition, my research makes substantive contributions to those embroiled in discussions on the constitutionality of the *PCEPA.* Given that the *PCEPA* is a contentious piece of legislation, this legal analysis is important to prohibitionists who rebuke sex work, pro-sex work advocates, harm reductionists who want to make the industry safer, criminal justice personnel, advocates and Canadians interested in the debate. The aim is that after reading this paper, readers can better understand how the *PCEPA* can be challenged in courts and on what grounds it can be struck down.

Background

The provisions: ss. 286.1 & 286.2

The *PCEPA* is rooted in the idea that prostitution is inherently exploitative (Department of Justice [DOJ] 2017). The Purchasing Offence (s.286.1) is at the core of the *PCEPA* (Canada 2014). The *PCEPA* is based on the Nordic model, which criminalizes buyers and third parties (DOJ 2017). Consequently, s.286.1 makes it so that purchasing or communication for the purpose of purchasing sexual services is illegal (*Protection of Communities and Exploited Persons Act* [*PCEPA*] 2014). On the other hand, the Material Benefit Offence (s.286.2) seeks to criminalize exploitative third parties (Canada 2014). The legislation posits that everyone who "receives a financial or other material benefit" from the provision of sexual services of another person is subject to criminalization (*PCEPA* 2014). Also, s.286.2(4) outlines exceptions, stating that those in a legitimate living arrangement, receiving goods/services out of a moral obligation, offering goods/services available to all Canadians or offering goods for fair value are exempt from criminalization (*PCEPA* 2014). However, s.286.2(5) holds that those exceptions in subsection (4) do not apply in contexts of violence, abuse of authority, provision of drugs or other intoxicating substances, procurement or a commercial enterprise (PCPEA 2014).

[21] Asymmetrical criminalization refers to a legislatively scheme whereby buyers of sexual services are criminalized, instead of directly criminalizing sex workers.

Legislative objective

Since this paper focuses on s.1 and s.7 of the *Charter*, the legislative objective is fundamental to my analyses. Accordingly, I will outline the legislative objective of ss.286.1 and 286.2. The *PCEPA* is modelled after Sweden's sex work laws (commonly referred to as the Nordic or Swedish model), which relies on asymmetrical criminalization (DOJ 2017, 7; Durisin et al. 2018, 6-7). Canada's sex work laws emulate this model as s.286.1 criminalizes buyers and s.286.2 criminalizes third parties. Underlying Canada's sex work laws and asymmetrical criminalization is the notion that sex work is inherently exploitative. As per the DOJ Technical Paper (2017), the *PCEPA* treats prostitution "as a form of sexual exploitation that disproportionately and negatively impacts… women and girls" (2). Missing from the government's discussion is any mention of sex workers who do not identify as women (transgender, two-spirit, gender non-binary or non-conforming, male sex workers) (Burke 2018; Redwood 2018; Page 2018; Lyons et al. 2017). In framing as a violence against women, the experiences of sex workers who do not identify as women are overlooked, even though they are also impacted by the very same laws. Furthermore, underlying the aforementioned objective, the government is making a moral statement about sex work and sex workers. By labelling sex work as exploitative and a violence against women, sex workers are viewed as victims in this legislative framework (DOJ 2017, 3). Ultimately, in recognizing sex work as inherently exploitative, the government, through the *PCEPA*, seeks to prohibit the demand for sex work and the exploitation of sex workers by third parties (DOJ 2017, 3). The government recognizes buyers as those who create the demand for sex work and third parties as those who capitalize on this demand and seek to economically benefit from the provision of someone else's sexual services (DOJ 2017, 3). Thus, the government's objective with ss.286.1 and 286.2 is to reduce demand for the purchase of sexual services by criminalizing buyers and third parties, with the goal of ultimately abolishing the industry because the government views sex work as inherently exploitative and seeks to prevent the commodification of women.

Methodology

To answer my research question, I will draw from case law on s.7 and s.1 and Sharpe and Roach's 2017 book on the *Charter* to interpret and apply the relevant legal principles. Additionally, I will use the Department of Justice's (DOJ) Technical Paper and the Standing Committee on Justice and Human Rights hearings on the *PCEPA*. This information will aid my s.1 analysis, particularly when establishing the government's objective. In addition, I will rely on the *Anwar* and *Bedford*—Ontario Superior Court of Justice (ONSC) and SCC—*cases*. Since there is little case law regarding challenges to the *PCEPA*, I will use the social science evidence cited and findings of fact established in these cases. These findings will speak to the effects of legislation on sex workers' lives, while the judgement will provide a basis for my legal analysis. Moreover,

Anwar is the first and only case that has successfully challenged the *PCEPA*, thus its judgement is highly relevant. Furthermore, I will rely on social science papers that assess the effectiveness of the Nordic model (Levy and Jakobsson), speak to sex workers' experience under the *PCEPA* (Red Light Labour), and Stewart's paper, which discusses the constitutionality of the *PCEPA*.

To test my hypothesis, I will use the aforementioned data sources to analyze the impacts of the *PCEPA* on sex workers. Additionally, counterarguments and potential responses from the federal government are embedded within each section of the analysis. To prove a s.7 violation, I need to demonstrate that the legislation infringes on sex workers' right to life, liberty, and security of the person and that this infringement is contrary to the principles of fundamental justice. Once I prove that the *PCEPA* infringes s.7 of the *Charter*, I need to determine whether this infringement is saved under s.1. My thesis is proven true if the evidence demonstrates that the *PCEPA* exacerbates instances of violence and exploitation to the extent that it infringes sex workers' s.7 right. Additionally, I would have to demonstrate that this infringement is incompatible with the principles of fundamental justice and that the provisions fail the *Oakes* test.[22] On the other hand, my thesis would be refuted if the evidence demonstrates that the *PCEPA* does not exacerbate harms for sex workers, and as a result, does not infringe on s.7 of the *Charter*. My thesis would also be refuted if the evidence proves that the *PCEPA* infringes on s.7 of the *Charter*; however, this infringement is saved under s.1.

Limitations

A limitation of my methodology is the lack of case law on the issue. As the *PCEPA* received royal assent in 2014, it is considered a fairly new piece of legislation. To date, there has been one case that has challenged the *PCEPA* (*Anwar*), which did so successfully, and it was decided in February of 2020. As the case was decided in favour of the defendant, the charges were dropped, and it does not appear that the Crown will appeal (Dubinski, 2020). Ultimately, in the absence of case law, this paper has to fill the gaps using social science evidence and government documents. This is a limitation as I have little case law to draw on to guide my application and interpretation of the *PCEPA*.

[22] Not all legislation that violates the *Charter* has to be struck down. Under s.1 of the *Charter* (the reasonable limits clause), legislation that can be justified as a reasonable limit on an individual's *Charter* right may be saved (not struck down). To determine whether a *Charter* infringement can be justified, the SCC developed the *Oakes* test in *R v Oakes* (1986). The *Oakes* test asks 4 questions; first, whether the objective of the legislation in question is pressing and substantial. Second, whether there is a rational connection between the legislation and its objective. Third, whether the legislation minimally impairs the *Charter* right in question. Fourth, whether the negative and positive effects of the law are proportional to each other. In weighing these four questions, a specific law may be justified as a reasonable limit and saved by s.1.

Analysis

Section 7: legal principles

The "right to life, liberty, and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice" is guaranteed by s.7 of the *Charter*. A claim made under section 7 is subject to a two-part analysis. First, the infringement must violate the right to life, liberty or security of the person (Sharpe and Roach 2017, 246). In *Carter v. Canada (AG)* (2015), the SCC held that the right to life refers to a situation where the legislation or state action increases someone's risk of death or causes death (para. 62). The right to life can be best described as the "right not to die" (Sharpe and Roach 2017, 249). The right to liberty refers to people's ability to make fundamental choices about their personhood without interference, such as abortion and physician-assisted death (Sharpe and Roach 2017, 250). Essentially, this right goes beyond physical restraint (*Blencoe v. British Columbia* 2000, para. 49). Furthermore, the right to security protects people from state-imposed harm (Sharpe and Roach 2017, 252). This right includes harm to one's body, health and psychological stress (Sharpe and Roach 2017, 252). In *Blencoe* (2000), the Court reiterated that "ordinary stresses and anxieties" as a result of state action do not violate one's right to security of the person (para. 81).

During the second stage, the violation must be weighed against the principle of fundamental justice. The phrase "in accordance with the principles of fundamental justice" is an internal limit to s.7 (Sharpe and Roach 2017, 254). This means that in order for a law to violate s.7, it must be demonstrated that the infringement of the right to life, liberty, and security of the person is not in accordance with the principles of fundamental justice.[23] For the purpose of this paper, I will discuss one pre-established principle applied in *Bedford* and *Anwar*: overbreadth. Overbreadth refers to overly broad legislation that deprives more people of their s.7 right than necessary to meet its objective (Sharpe and Roach 2017, 264). For example, in *Bedford* (2013), the SCC struck down the living on the avails of prostitution offence because it was overbroad as it criminalized non-exploitative relationships (para. 140).

[23] As reiterated in *R v Malmo-Levine; R v Caine* (2003), principles of fundamental justice are widely accepted legal principles about the proper and fair operation of the legal system. Under section 7 of the *Charter*, principles of fundamental justice must have "sufficient societal consensus" and "must be identified with sufficient precision to yield a manageable standard against which to measure deprivations of life, liberty, or security of the person" (2003, para. 113).

Section 7 analysis: s.286.1

Life, liberty, and security of the person: section 286.1

In the 2013 *Bedford* decision, the SCC struck down s.213(1)(c), which prohibited communicating in public for prostitution because it prevented sex workers from enhancing their safety (paras. 71-72). Krusi and Belak (2018) argue that s.286.1 reproduces the same harms caused by the former communications provision (214, 220). As such, applicants advancing this hypothetical *Charter* challenge are likely to argue that s.286.1 infringes on the right to security of the person as it prevents sex workers from taking safety measures to protect themselves. The provision, while criminalizing the buyer, poses great risks and harms for sex workers as the latter are prevented from screening clients and are displaced to isolated areas. A government defending this legislation may argue that the provision only criminalizes buyers, and sex workers are shielded from criminal liability. However, the criminalization of clients also negatively impacts sex workers.

According to Krusi and Belak (2018), sex workers struggle to maintain regular clientele because of the criminalization of buyers and their associated fear of being caught (217). Moreover, since there are fewer clients because the purchase is illegal, sex workers are pushed to the edge of precarity by having to accept clients and provide services they otherwise would not (Krusi and Belak 2018, 217; Levy and Jakobsson 2014, 599-600). In *Bedford v Canada* (2010), Justice Himel accepted expert evidence that stated that maintaining a regular clientele is one way through which indoor-based sex workers can keep themselves safe (para. 420). The targeting of buyers makes it harder to keep this type of consistency.

Additionally, s.286.1 has the effect of displacing sex workers to isolated areas (Sayers 2018, 63). This is largely due to sex workers and their clients wanting to avoid police detection (Sayers, 2018, p. 63; Krusi and Belak 2018, 219). As a result, sex workers are forced to meet clients in isolated areas, away from the busy streets, thus increasing their vulnerability to violence by clients (Sayers 2018, 63; Krusi and Belak 2018, 219). Ultimately, while the legislation is focused on targeting clients, it negatively impacts the security of sex workers by displacing them to unsafe places and forcing them to hurry into the cars of their clients in fear of police harassment and criminalization (Sayers 2018, 63). As demonstrated in this discussion, sex workers are seriously prevented from protecting themselves and taking the necessary measures to enhance their safety as a result of s.286.1. Thus, s.286.1 violates sex workers' right to security of the person.

Principles of fundamental justice: section 286.1

The second stage of the s.7 analysis involves a consideration of the principles of fundamental justice and the objective. See the discussion on pages 4-5 for the legislative objective. The government will argue that the criminalization of buyers achieves their objective of reducing demand for sex work by targeting those who create the demand. However, the applicants will likely argue that s.286.1, while criminalizing buyers, has adverse consequences for sex workers. As such, s.286.1 is overbroad.

As demonstrated in the discussion above, the Purchasing Offence exacerbates harm for sex workers. The government's objective with the Purchasing Offence is to reduce demand for sex work because the government deems sex work exploitative. However, the effects of the legislation go beyond this objective. Ultimately, while s.286.1 is intended to penalize buyers, the risks associated with this law are offloaded onto sex workers. For example, in *R v Anwar* (2020), Atchison, an expert witness, testified that because of the "heightened enforcement of criminal prohibitions against communicating for the purpose of prostitution or by clients" sex workers (especially street-based workers) struggle to properly screen clients and often work in more isolated areas (para. 27). This results in street-based workers being "particularly vulnerable to both predatory and situational violence" (*Anwar* 2020, para. 27). Ultimately, in fear of the clients' potential for criminalization, sex workers often forgo screening their clients and negotiating the terms of their transaction or do not do a thorough check before accompanying them (Sayers 2018, 63; Krusi and Belak 2018, 218). In *Bedford* (2013), the SCC upheld Justice Himel's finding that screening clients is "an essential tool for enhancing [sex workers'] safety" (para. 22). Thus, s.286.1 is overbroad because it goes beyond its objective of reducing demand for sex work and criminalizing buyers to achieve that goal; the effect of s.286.1 is an increased risk of harm for sex workers.

Section 7 analysis: s.286.2

Life, liberty, and security of the person: section 286.2

The Material Benefit Offence focuses on third parties' role in the provision of sexual services. As demonstrated by a close reading of the DOJ Technical Paper, the social science evidence presented in *Anwar* and the works of reputable scholars in the field, s.286.2 reproduces the same harms caused by the former living on the avails offence. Thus, drawing on the legal reasoning emerging from *Bedford* and *Anwar* and the findings from social science evidence, I argue that a Court will find that s.286.2 negatively impacts the security of sex workers.

A government defending this legislation will refer to the DOJ's Technical Paper. The paper acknowledges that the legislation targets exploitative third parties, and that non-exploitative relationships will be exempt as per s.286.2(4) (DOJ 2017, 4-5). With that said, the *PCEPA* does not formally define the difference between exploitative and non-exploitative parties. The Technical Paper holds that all third parties receiving a material benefit from the sexual services of another are exploitative as they capitalize on the demand for sex work and commodify sex workers (DOJ 2017, 2-3). However, there are exceptions to the offence, legislated under s.286.2(4), which are referred to as the non-exploitative relationships (see page 5 for discussion on s.286.2(4)) (DOJ 2017, 4).

The challenge lies with the exceptions to the exceptions codified in s.286.2(5) (see page 5). Specifically, s.286.2(5)(e), which holds that receiving material benefits "in the context of a commercial enterprise that offers sexual services for sale" is subject to criminalization (DOJ 2017, 4). The Technical Paper lists strip clubs, escort agencies and massage parlours as examples of commercial enterprises; however, the DOJ notes that courts may find informal enterprises to be commercial (DOJ 2017, 4-5). With this expansive definition of commercial enterprise, it appears as if sex workers cannot hire assistants, drivers, bodyguards and managers because doing so would be contrary to s.286.2(5)(e). This idea is reiterated by Stewart (2016), who argues that while the DOJ insists that bodyguards and drivers are not criminalized under the *PCEPA*, that assertion is not in line with their explanation of s.286.5(e) and how it should be broadly defined (74). Furthermore, assistants, managers, drivers and bodyguards may be criminalized under s. 286.2(5)(d), which makes it an offence to receive a material benefit as a result of procurement (*PCEPA*, 2017). According to the DOJ (2017), procuring refers to causing or inducing someone to sell their sexual services (5). Under this definition, a driver who knowingly takes a sex worker to their clients or an assistant/manager who books a client for a sex worker is likely to be captured by s.286.2(5)(d). This is problematic because findings of fact in *Bedford v Canada* (2010, para. 420) and *Anwar* (2020, para. 88) reiterate that third parties, such as drivers, bodyguards, managers and assistants, can increase sex workers' safety.

Furthermore, the legislation prevents sex workers from working in fixed, indoor locations. In *Bedford v Canada* (2010), Justice Himel found that indoor sex work is safer than street-based work (para. 300). This was later reaffirmed in *Anwar* (2020, para. 88). While sex workers may rent or purchase a space to work out of, they run the risk of creating their own informal "commercial enterprise," and/or the landlord of a rental property may be caught up in charges related to 286.2(5)(d) (procurement) (Stewart 2016, 78). Ultimately, as illustrated through these examples and evidence, the Material Benefit Offence infringes upon the security of sex workers. By preventing sex workers from enhancing their security by hiring third parties and from working in fixed, indoor locations, s.286.2 negatively impacts the security of sex workers.

Principles of fundamental justice: section 286.1

The second stage involves a discussion on the principles of fundamental justice. The first consideration is the legislative objective; see pages 6-7 for a discussion on the objective. The government realizes its goal through the criminalization of third parties via the Material Benefit Offence. Next, the discussion turns to the principles of fundamental justice. For this legal analysis, a court is likely to find that the provision is overbroad because the law has the effect of assuming that all third parties are parasitic (*Anwar* 2020, para. 202).

In making their arguments, the Crown will point out that the Material Benefit Offence is narrower than its predecessor (the living on the avails offence), and it distinguishes between exploitative and non-exploitative relationships (DOJ 2017, 4). While this is true as s.286.2 is subject to many different subsections and exceptions, the evidence above has demonstrated that the impact of s.286.2 has negatively affected sex workers. The law's effects are the criminalization of non-exploitative relations, such as drivers, bodyguards and managers, those who try to make sex workers safer (Stewart 2016,78). The legislation opens non-exploitative third parties to criminalization through the various exceptions to the exceptions it has legislated under s. 286.2(5). As such, while s.286.2's objective is to prevent the further commodification of women and reduce the demand for sex work by targeting exploitative third parties; this legislation also captures non-coercive relations. For that reason, the provision is overbroad.

Section 1: legal principles

There are parallels between a s.7 and s.1 analysis. The principle of fundamental justice, overbreadth, is similar to the minimal impairment stage of the *Oakes* test (Sharpe and Roach 2017, 265). However, the SCC has maintained the two are distinct (*Bedford* 2013, para. 218). A s.7 analysis is interested in whether the law infringes individual rights, where the onus is on the claimant to prove that it does (*Bedford* 2013, paras. 125, 127). On the other hand, s. 1's focus is broader and the discussion centres on whether the law's negative effects are proportionate to its objective, which is pressing and substantial and in the public interest (*Bedford* 2013, para. 126). Under s.1 the onus is on the government to prove that their legislation is justified (*Bedford* 2013, para. 126). As such, courts will engage in both analyses in their judgements. Furthermore, Sharpe and Roach (2017) emphasize that s.7 rights cannot be easily overridden; it is rare for a s.7 violation to be upheld under s.1 (247).

While s.7 and s.1 are similar, this paper will engage in a full s.1 analysis using the *Oakes* test developed in the 1986 *R v Oakes* case. The *Oakes* test is a two-stage analysis that guides the courts' interpretation of the reasonable limits clause. Once a piece of legislation is determined to infringe upon the *Charter*, the next step of the *Charter* analysis is assessing whether this

violation is a reasonable limit (Sharpe and Roach 2017, 66). The onus is on the government to explain why the infringement is justified (Sharpe and Roach 2017, 92). The first stage in the *Oakes* test is determining if the objective is pressing and substantial. This objective must be of significant importance that it is justified in overriding a *Charter* right/freedom (Sharpe and Roach, 2017). The second stage involves a 3-part proportionality test, which determines whether the *Charter*-infringing legislation is rationally connected to the objective, the law minimally impairs the *Charter* right, and whether there is proportionality between the deleterious effects of the legislation and the government's objective (Sharpe and Roach 2017, 72-73).

Section 1 analysis: s.286.1

Pressing and substantial objective

The government is seeking to reduce the demand for sex work because the industry is exploitative. As such, the objective is pressing and substantial. Additionally, it is important to note that the SCC's decision making has demonstrated that the Court is willing to defer to the government at the pressing and substantial objective and rational connection stages. Thus, the Court would likely accept this objective (Sharpe and Roach 2017, 70).

Rational connection

To demonstrate rational connection, the government is likely to claim that s.286.1 and the criminalization of buyers is directly related to the government's objective of reducing demand for sex work and preventing exploitation. As mentioned in the previous stage, the government is likely to be deferential and agree that the legislation is rationally connected to the objective.

Minimal impairment

At this stage, the government is likely to argue that its legislation is based on a model, the Nordic model, which other governments have introduced or endorsed. Using their research in the 2017 DOJ Technical Paper, the government will point out that Norway and Iceland adopted the Nordic model, while government committees in Ireland and the United Kingdom both recommended the model (7). Additionally, the government will stress that the model is endorsed/recommended by the European Parliament and the United Nations Committee on the Elimination of Discrimination against Women (DOJ 2017, 7). Furthermore, the government will point to studies conducted by the Swedish and Norwegian government, which conclude that the Nordic Model has been "successful in deterring purchasers of sexual services," and decreasing the number of sex workers (DOJ 2017, 8). As such, the government will argue that

since other countries embrace this model, other governments have rendered the criminalization of buyers an approach that minimally impairs sex workers' right. Specifically, the government is likely to point out that Sweden's sex work laws have been in place since 1999 and are still standing (DOJ 2017, 7). Thus, reinforcing the notion that governments, especially Sweden, have held that the criminalization of the purchase of sexual services minimally affects sex workers' rights.

While the government maintains that the Nordic model is successful, the applicants are likely to point to evidence to the contrary. They may argue that the Nordic model has not accomplished its objective of reducing demand for sex work through the criminalization of buyers/clients. The Court will have to look to expert and international evidence that speaks to the effectiveness of the Nordic Model, specifically as it targets buyers.

In a study of the Sexköpslagen (Sweden's sex work laws) by Levy and Jakobsson (2014), they find no convincing evidence that demonstrates that levels of prostitution in Sweden have decreased since its implementation (597). Also, they conclude that the Sexköpslagen has exacerbated the risk of violence and harm to sex workers (598). Levy and Jakobsson (2014) note that while street-based sex work has declined since the law was introduced, there is no data that suggests that indoor or online sex work has decreased (597). The scholars acknowledge that while Swedish governmental officials use this decrease in street-based work to praise the Nordic model, they argue that street-based sex work figures cannot be assumed to be indicative of the overall levels of sex work (597). In addition, they point out that this decline may be due to prostitution being driven underground; this increases sex workers' vulnerabilities to harm (598).

Goodyear and Weitzer (2011) also assess Sweden's sex work laws. They note that three evaluations conducted by Sweden's National Board of Health on the Sexköpslagen find no concrete evidence pointing to its success (23). In fact, the Board of Health's 2007 report indicates a rise in street-based work after an initial decline when the laws were first implemented (Goodyear and Weitzer 2011, 23). Additionally, they assert that the legislation has increased the risk of violence to sex workers by driving the industry underground (23-24). Furthermore, in *Anwar* (2020), Atchison, an expert witness, testified that there is no substantial evidence that proves that Sweden's sex work laws have successfully reduced sex work or deterred clients (para. 37). Justice McKay, in *Anwar* (2020), reaffirmed Atchison's testimony by noting that there is no evidence pointing to whether the Nordic model "reduce[d] the existence of, or demand for, prostitution" (para. 89). Ultimately, the legislation is not minimally impairing as there is no significant evidence demonstrating that the Nordic model has reduced the demand for sex work.

Proportional effect

At this stage, the government may cite a variety of material from international contexts that speak to the success of the Nordic model. Additionally, the government may draw on Haak's argument by asserting that the *PCEPA*'s objective is to reduce demand and deter sex work; thus, any harm experienced by sex workers from the criminalization of the buyer is a result of being party to a crime. The issue is that while the government can cite Swedish reports validating claims that asymmetrical criminalization has been successful, reputable scholars in this field have failed to find concrete evidence to confirm this claim. Moreover, the criminalization of the buyer has had negative impacts on the security of sex workers. Ultimately, the positive impact of reducing demand for sex work and eradicating what the government contends is an inherently exploitative industry is outweighed by the law's negative impact, which exacerbates the risk of harm for sex workers. Any potential benefit from reducing demand by criminalizing buyers is significantly reduced because the law increases sex workers' vulnerabilities to harm.

Section 1 analysis: s.286.2

Pressing and substantial objective

See the discussion on the legislative objective of s.286.2 on pages 6-7. Moreover, as argued by MacKay in the Standing Committee (Canada, 2014), sex workers are vulnerable to physical and emotional violence and pimping by exploitative and coercive third parties. As such, the Court is likely to affirm that the government is pursuing a pressing and substantial objective.

Rational connection

To demonstrate rational connection, the government is likely to argue that its legislation differentiates between exploitative and non-exploitative relations, as illustrated by the exceptions under s.286.2(4) . The Court is likely to accept this argument advanced by the Crown. There is a strong connection between the legislative objective of preventing third parties from capitalizing on others' sexual services and the Material Benefit Offence.

Minimal impairment

At the third stage, similar to the arguments made under the rational connection section, a government defending the legislation may argue that the law is reasonable because it criminalizes parasitic third parties, all while legislating exceptions that allow sex workers to retain third parties. However, a Court is unlikely to accept this argument. At this stage, the court

will evaluate the degree to which s.7 is impaired. As ruled by Justice McKay in *Anwar* (2020) and evidence presented in the s.7 analysis, s.286.2 has had the effect of making sex work more dangerous for sex workers . Even though the government attempts to legislate the distinction between exploitative and non-exploitative parties through ss.286.2(4) and (5), the law negatively impacts non-exploitative third parties. Therefore, the law is not minimally impairing because it captures non-exploitative relationships and increases sex workers' vulnerability to harm.

Proportional effect

In this final step, a government defending the legislation may argue that the specific exceptions captured in ss.286.2(4) and (5) are necessary to identify the complex ways in which exploitative relationships can develop between sex workers and third parties. However, the Court is likely to disagree. The law's deleterious effect of increasing sex workers' vulnerabilities by preventing them from retaining third parties that enhance their security outweigh the law's salutary effect of penalizing third parties who capitalize on sex workers' provision of sexual services.

Conclusion

In essence, after conducting the legal analysis, my thesis was proven true as the evidence demonstrated that ss. 286.1 and 286.2 violate s.7 of the *Charter*, and these infringements were not saved under s.1. To remedy the s.7 *Charter* violation, the Court is likely to strike down ss. 286.1 and 286.2 from the Criminal Code. While the debate surrounding the constitutionality of the *PCEPA* will continue until the SCC hears an appeal on the matter, my legal analysis of a hypothetical *Charter* challenge has provided a glimpse into what the Crown and applicants may argue. The central issue is the security of sex workers. Ss. 286.1 and 286.2 infringe upon sex workers' right to security of the person and are overbroad. In regard to s. 286.1, the law, while criminalizing buyers, exacerbates harm for sex workers. As for s.286.2, the law is overbroad as it captures non-exploitative relationships between third parties and sex workers.

Furthermore, in the future, there needs to be greater research into the effects and constitutionality of the other provisions in the *PCEPA*. As with other scholarship on the *PCEPA*, this paper focused on the Purchasing Offence and Material Benefit Offence; however, the *PCEPA* enacted legislation that re-criminalizes procuring and limits how sex workers can advertise their services (*PCEPA*, 2014). Future research should build on *Anwar's* (2020) decision regarding advertising and procurement, specifically, as the advertising offence criminalizes third-party website hosts and the potential for sex workers providing advice to be criminalized under the offence for procurement (paras. 123, 172).

In sum, the *PCEPA* is a contentious piece of legislation, and all sides (e.g., prohibitionists and pro-sex work advocates) have a vested interest in the outcome of any judicial rulings on its constitutionality. As hypothesized in my thesis and demonstrated in this paper, ss. 286.1 and 286.2 of the *PCEPA* violate s. 7 of the Charter. I argued that both sections violate sex workers' right to security and are overbroad. Specifically, in attempting to criminalize buyers, s. 286.1 increases sex workers' vulnerabilities to harm, and s.286.2 captures non-exploitative third parties and their relationships with sex workers. Ultimately, while many people thought that the legal battle ceased with the landmark *Bedford* decision, that was far from reality. Any future SCC ruling on the constitutionality of the *PCEPA* will have consequences for sex workers all across Canada, third parties, advocates and Canadians who are interested in the debate. If the SCC upholds the *PCEPA*, sex workers will continue to be subject to the harms outlined in this paper. However, suppose the SCC strikes down the legislative scheme. In that case, there are new opportunities for Members of Parliament to engage in discussions about the potential for the criminalization, decriminalization, or legalization of sex work. Nonetheless, the battle regarding sex work legislation in Canada is far from over.

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Legal Analysis / L'analyse juridique

Charter Rights in Prison: A Legal Analysis & Prediction

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Keywords: Supreme Court of Canada, Charter rights, administrative segregation, prisoners rights

Mots-clés: Cour suprême du Canada, Charte des droits et libertés, isolement carcéral, droits des prisonnier.ère.s, droits des détenu.e.s

Cases regarding prisoners' rights have been difficult for prisoners and prisoner advocates to win as courts tend to be deferential to prison officials. Two cases from Ontario and British Columbia have been granted leave to appeal and will be jointly heard before the Supreme Court of Canada regarding the use of administrative segregation in prisons. Throughout this paper, the author attempts to forecast the outcome of this upcoming case by analyzing how courts determine which Charter rights can be justifiably violated once an individual is imprisoned. An initial prediction is made based on the thesis that the main factor contributing to these determinations is the presence of inherent limitations. However, evidence of an alternative, stronger factor is found, thus leading to a new prediction for the outcome of the upcoming Supreme Court case. Based on an analysis of decisions made during previous Supreme Court prisoners' rights cases, the varying levels of emphasis on empirical evidence is the strongest factor influencing courts decisions on which rights can be justifiably violated once imprisoned. Based on these findings, the author makes a new prediction that the outcome of the upcoming Supreme Court segregation case will be a success for the claimants. These findings highlight the importance of prisoners' accessibility to adequate resources especially when compared to the expansive resources available to the government to gather impactful empirical evidence.

Pour les prisonnier.ière.s et leurs défenseur.euse.s, les procès concernant les droits des détenu.e.s demeurent difficiles à gagner puisque les tribunaux ont tendance à s'en remettre aux responsables pénitentiaires. Deux affaires judiciaires en particulier qui traitent de l'isolement administratif, à savoir en Colombie-Britannique et en Ontario, ont accédé à la Cour suprême du Canada. Dans le cadre de ce travail de recherche, l'auteure a pour objectif de prédire le jugement ainsi que les conséquences qui s'en suivront de ces deux dossiers judiciaires en analysant la façon dont les tribunaux décident ce qui constitue un droit ou liberté qui peut être violé de manière justifiable à l'égard des personnes emprisonnées. Le pronostic initial se fonde sur l'hypothèse que les jugements se basent principalement sur la

présence des limites intrinsèques. Pourtant, il existe aussi des preuves qui laissent entendre une autre possibilité qui est nettement plus convaincante, ce qui amène à une tout autre prévision par rapport à l'aboutissement de ces dossiers parvenus à la Cour suprême du Canada. Le présent document est ancré dans une analyse de la jurisprudence de la Cour suprême portant sur les droits des détenu.e.s. La conclusion est donc la suivante : le degré d'importance accordé aux preuves empiriques est en fait le facteur le plus déterminant concernant les décisions judiciaires sur les droits et libertés des détenus qui peuvent être enfreints de façon légitime. En s'appuyant sur ces conclusions, l'auteure prévoit de nouveau le succès des requérant.e.s, soulignant l'importance de l'accès aux ressources suffisantes pour les aider à recueillir des preuves empiriques solides, surtout par rapport aux vastes ressources que dispose le gouvernement.

Introduction

In 2019, two cases were heard at the Courts of Appeal in both Ontario and British Columbia regarding Charter violations arising from the administrative segregation of prisoners in federal prisons. These two cases have since been granted leave to appeal and will be jointly heard before the Supreme Court. Cases regarding prisoners' rights in Canada have consistently been difficult for prisoners and prisoner advocates to win. Courts tend to be deferential to government and prison officials with regard to a prisoner's Charter rights being violated (Iftene 2017). Therefore, there have been certain rights, such as s.7 rights, that have been justifiably infringed due to the fact that an individual was imprisoned. Although prisoners do not enjoy the same liberty rights as the general population, they do retain residual liberty rights within the prison population (Parkes 2007). This leads to the question: how do the courts determine which rights can and which rights cannot be justifiably violated with imprisonment. This paper argues that the main factor contributing to these determinations is the presence of inherent limitations in certain Charter rights. Therefore, I make an initial prediction that the upcoming segregation case will result in an unsuccessful outcome for the claimants, the British Columbia Civil Liberties Association (BCCLA) and the Canadian Civil Liberties Association (CCLA). The presence of inherent limitations transfers burden from the government onto the claimant to prove that a violation of their rights was unjustified.

This paper predicts the Supreme Court will decide the segregation case using the patterns of decision making from previous, relevant Supreme Court cases. This paper will start with a summary of three key papers that discuss prisoners' Charter rights and past prisoners' rights litigation. It will then discuss the methods of analysis used to answer the research question. Finally, it will discuss the results of the analysis and, based on this paper's findings, will make a final prediction of how the Supreme Court will decide the segregation case.

Review of key papers

There have been various pieces of literature discussing prisoners' rights litigation, however, few focus primarily on the Supreme Court decisions regarding prisoners' rights. Given this paper focusses on the Supreme Court's approach to prisoners' rights, my research will contribute to the literature by outlining the patterns that can be seen in various Supreme Court prisoners' cases. This will assist future claimants in learning from the mistakes of previous prisoners' cases where claimants have failed to receive their desired outcome. Prisoners are very vulnerable to the abuses of state power. As this often happens out of view from the public, prisoners are adversely affected by the indifference of the public (Parkes 2007). Therefore, it is greatly important to understand the ways in which the Supreme Court makes decisions on prisoners' rights cases. Further, my research will contribute to the literature by providing a prediction for a case that has not yet been heard, based on a pattern of Supreme Court decisions.

Lisa Kerr's (2019) paper focusses on the path taken by litigation regarding prison segregation and on the most current cases heard in Ontario and British Columbia. Kerr (2019) outlines courts' movement away from the acceptance of solitary confinement in prisons and towards the final stages of the unconstitutional use of solitary confinement. This path is demonstrated through the discussions of various cases such as *R v Capay* and *R v Ugbaja* in which the fairness of trials and the judicial process was impacted by the use of administrative segregation. These cases, along with other instances and expert medical literature presented before the courts, have led courts to widely accept that there are negative health effects caused by solitary confinement (Kerr 2019).

Kerr (2019) refers to *R v Capay*, a case that resulted in a stay of proceedings because the defendant was kept in isolation which damaged their psychological integrity and memory of the instance in question. She uses this case to demonstrate the additional harmful effects of solitary confinement on the pursuit of justice. Further, Kerr (2019) uses *R v Ugbaja*, a case in which the claimant was kept in segregation and the official documents were found to be false and misleading, to demonstrate the lack of regulations on the prison's use of administrative segregation. Kerr (2019) then goes on to discuss the most recent prison segregation cases heard in Ontario and British Columbia. She discusses the details of similarities and differences between the decisions made in both provinces at both the trial court level and the appeals court level. Kerr's (2019) piece of literature effectively identifies the path that the courts have taken towards acknowledging the harms of solitary confinement.

In Debra Parkes' (2007) paper, an account of past prisoners' rights litigation in Canada is presented in detail. Parkes (2007) first discusses the general change in the courts' approach to prisoners' rights cases. In the early half of the 20th century the courts took a hands-off approach to prisoners' litigation and often deferred to prison officials. Many prison decisions were seen as

administrative and made at the discretion of the prison officials. However, after widespread prison riots throughout the 1970's, the House of Commons created the MacGuigan Report, stating the Rule of Law must prevail in Canadian prisons (Parkes 2007). Then, with the Charter came explicit guarantees of freedoms. Parkes (2007) notes that the Canadian Charter did not have prisoner-specific rights such as in South Africa's Charter. However, the statement that rights are held by every individual, recognises that prisoners are included in the Charter and that Charter rights can be used to impact the lives of those in prison (Parkes 2007).

Parkes (2007) goes on to discuss various Charter rights, such as s.7, s.2, and s.12, in terms of a prison context and the various prisoners' rights cases that have been brought to court. This piece of literature is helpful in explaining and establishing the context for prisoner's rights cases. However, few cases mentioned throughout the paper were heard at the Supreme Court level. Thus, this is a gap that this research will help address.

Adelina Iftene's (2017) paper offers a detailed look at s.7 of the Charter and the elements required to bring forward a s.7 challenge. It does so in the context of arguing that the treatment of aging prisoners could be a s.7 violation. Iftene (2017) discusses the evolution of how s.7 has been implemented by the courts. At first, s.7 only applied to matters on criminal justice regarding physical liberty being threatened by imprisonment. Then, it slowly came to apply in contexts outside the area of administration of justice, including matters such as the personal choices of medical treatment and where to live (Iftene 2017). Iftene (2017) emphasises the court's reliance on social science evidence to evaluate the three principles of fundamental justice: arbitrariness, overbreadth, and gross disproportionality. Arbitrariness refers to an action or piece of legislation that has no relationship to its objective. Overbreadth points to a law or action that is broader than it needs to be in order to achieve its objective. Finally, gross disproportionality makes reference to a law or action that has effects on rights that are too extreme. The analysis of these three principles is conducted with regard to the connection between the objective of the legislation and its effects, which violate Charter rights (Iftene 2017).

Iftene (2017) goes on to discuss the lack of access to resources for the medical needs of aging prisoners as an argument for a violation of a positive right under s.7. This argument, in the context of administrative segregation, would be parallel to the argument of a lack of access to effective mental health treatment in segregation. I agree that this is a strong argument and it is echoed in the Supreme Court of British Columbia's decisions on the matter as well. Iftene (2017) discusses the finding that those with mental illness were often being sent to segregation as a way of dealing with difficult behaviours. She describes this as an example of a direct connection between the legislation and the deprivation. Additionally, those whose mental health has been harmed after segregation would likely not behave well when reintegrated into the general prison population, a result contrary to the objective of segregation (Iftene 2017).

Iftene (2017) also discusses the dysfunctionality of the grievance process within prisons and the barriers opposing any efforts to bring forward a Charter challenge. Grievances are often filed by prisoners but due to the significant delay or halting of the process, many prisoners never receive a reply (Iftene 2017). I believe this paper will be very helpful for my research as it outlines the inefficiencies of the internal procedures and the court's tendencies of deference upon grievances reaching the point of a court hearing, a negative outcome for prisoners. My research will contribute to the work done in Iftene's (2017) piece of literature by analyzing a broader range of Charter rights in terms of the prison context.

My research will add on to the work of Kerr (2019). The foregoing analysis will assess the pattern of Supreme Court decisions on a variety of prisoners' rights cases and will expand on Kerr's (2019) discussion of the Ontario and British Columbia segregation cases by making a prediction on the outcome of the Supreme Court case.

Theory

My thesis argues that the main factor in the Supreme Court's determinations of which Charter rights are justifiably violated when imprisoned, is the presence of an inherent limitation. When the Supreme Court hears a Charter rights case, they first determine if a violation has occurred. If so, they then turn to the Oakes test to determine if the violation was justified. Using this test, the government has the burden of proving that the infringement was justified by addressing its every step. First, the government must prove that their objective is pressing and substantial. Second, they must pass the proportionality test by proving that the means they chose to use were rationally connected to the objective, that means were minimally impairing to the Charter rights in question, and that the benefits of the means were proportional to the negative effects (Iftene 2017). However, certain rights have inherent limitations, where the language of the right itself justifies violations in certain circumstances.

Some Charter rights with inherent limitations include s.7 by stating that everyone has "the right to life, liberty and security of the person *except in accordance with the principles of fundamental justice"* (*Canadian Charter,* 1982, s7). Further, s.8 has an inherent limitation in stating that, everyone has "the right to be secure against *unreasonable* search or seizure" (*Canadian Charter,* 1982, s8). Rights with inherent limitations transfer the burden on to the claimant to prove that a violation was not justified. As prisoners, it can be difficult to get access to the courts. They often lack the same resources available to the general public, such as frequent communication with their lawyers (Iftene 2017). Additionally, prisoners now also have the onus of proving that their right was not only violated but that it was not justified. Therefore, my initial prediction for the upcoming Supreme Court segregation case is that the claimants will be unsuccessful as the burden will be on the claimants to prove a violation was unjustified.

Method of analysis

In order to answer how the Supreme Court determines which Charter rights are justifiably violated once an individual is imprisoned, I will conduct a comparative case study analysis using four contributing factors in Supreme Court decisions. To do so, I will analyze the decisions made in three cases, *Sauve v Canada*, *Weatherall v Canada*, and *Ewert v Canada*. There are many prisoners' rights cases that have not reached the Supreme Court, such as *R v Capay* and *R v Ugbaja*, that have not been included in this paper. Further, there have been prisoners' rights cases that regarded a specific instance as a violation, such as *R v Shubley* and *Cunningham v Canada*, that have also not been included. In order to ensure comparability between cases, only cases that have been decided by the Supreme Court and are not regarding specific, individual situations have been chosen for analysis. *Sauve v Canada* discusses prisoners' right to vote, while *Weatherall v Canada* discusses the use of cross-gender searches and frisks in prisons, and *Ewert v Canada* discusses the use of risk assessment tools on Indigenous prisoners. These three cases may not be the only cases that fit these criteria but they have been identified as three prominent cases that allow for a detailed analysis of the Supreme Court's opinions on Charter rights in prison.

When stating a claimant's success or defeat in a particular case, a determination is set forth based on whether the court did not find the right to be violated or if the court deemed a right violated but found it was justified. Both are instances of the claimant being unsuccessful. In order to understand and compare the decisions made in each of these cases, four factors have been identified that contribute to the outcomes of the cases. The four factors are as follows: whether or not there is an inherent limitation in the Charter right in question, whether the alleged violation is a substantive or a procedural issue, whether there is an emphasis on empirical evidence, and the presence of interveners and factums.

These four factors were identified to explain the differences in the outcomes of the three selected cases. Inherent limitations are a possible explanation as the burden is placed on the claimants to prove a violation is unjustified. The difference between substantive or procedural issues can be a contributing factor given that challenging the constitutionality of a piece of legislation may be more or less difficult than challenging the constitutionality of an action or practice. The emphasis on empirical evidence is another contributing factor as claimants have more difficulty gathering the necessary resources and empirical evidence in comparison to the government. Finally, the presence of interveners is a contributing factor as found by previous research, such as the work of Morton and Allen, which demonstrated the influence that interveners such as the Women's Legal Education and Action Fund (LEAF) can have on the outcomes of cases (Morton & Allen 2001).

I will examine the decisions of the court for each of the three cases and will evaluate the various factors of each case in accordance with the four factors listed. Then, I will compare the

factors of the segregation cases to the factors of the three selected cases in order to make a prediction on the outcome of the Supreme Court segregation case. My thesis predicts that the presence of an inherent limitation is the deciding factor in this decision. If this factor is the only, or the largest difference between the cases, my thesis will be supported. If there are other prominent differences that arise while considering the factors, they would represent alternative reasons for the court's decisions, thus refuting my thesis.

Limitations

A limitation to this method of analysis is present in the number of interveners and factums. Factums were unavailable for all interveners in *Weatherall v Canada* as this case was heard in 1993. This was an unexpected limitation but had this case been removed from the analysis, the overall research would have suffered. Therefore, *Weatherall v Canada* remains in the analysis despite this limitation. Further, no publications were found on the case that provided any information as to which parties the interveners supported. This limitation occurred again for one intervener in *Sauve v Canada* and one intervener for the British Columbia Court of Appeal segregation case. Due to this limitation, there are certain gaps in the information for the fourth factor. However, analysis and predictions will be done using the information available.

Results & discussion

Factors	Sauve v Canada (sec.3 & sec. 15)	Weatherall v Canada (sec. 7, sec. 8, & sec.15)	Ewert v Canada (sec. 7 & sec.15)	BC and Ontario Segregation (sec. 7, sec. 12, & sec.15)
Presence of inherent limitation	No inherent limitations	Sec. 7 & 8- inherent limitations Sec. 15 – no inherent limitations	Sec. 7 – inherent limitations Sec. 15 – no inherent limitations	Sec. 7 & 12 – inherent limitations Sec. 15 – no inherent limitations
Substance or procedural issue	Substantive issue	Procedural issue	Procedural issue	Substantive and procedural issues
Emphasis on empirical evidence	No emphasis on empirical evidence	Emphasis on empirical evidence	Emphasis on empirical evidence	Emphasis on empirical evidence
Number of interveners	For claimants: 4 For government: 2 Unknown: 1	Unknown: 6	For claimants: 10 For government: 0	For claimants: 6 For government: 1 Unknown: 1

In *Sauve v Canada* the claimants brought forward a s.3 and s.15 Charter challenge to s.51 of the Canada Elections Act which denied the right to vote to anyone imprisoned for a sentence of more than two years. In a five to four decision, the court found that s.3 was violated and that it was not saved under s.1 of the Charter. The government conceded that the legislation violated s.3, and therefore, the courts turned to the Oakes Test [6]. The Majority found that the government failed to establish a rational connection between denying the right to vote and their objectives to enhance civic responsibility and respect for Rule of Law and to enhance the general purposes of criminal sanctions [53]. After determining the s.3 violation was unjustified, the Majority found it unnecessary to consider the s.15 challenge [63].

However, as it was a closely split decision, it is important to also consider the Dissenting opinion. The Dissent found that the violation of s.3 was justified because they had differing philosophies from the Majority. The Dissent preferred to defer to the government's view that a denial of the right to vote would enhance the value of the right to vote [68]. In considering the

s.15 challenge, they also found there was no violation, as being imprisoned did not constitute an analogous or enumerated ground. This was based on the understanding by the Dissent that being imprisoned is not due to a stereotypical, presumed group characteristic, but rather because of a serious criminal offense being committed [195].

In considering the first factor of the case, the Charter rights that were challenged had no inherent limitations. S.3 includes the words "every citizen" and s.15 states "every individual is equal under and before the law" (*Canadian Charter,* 1982, s3 & s15). For the next factor, *Sauve v Canada* deals with a substantive issue as s.51 of the Canada Elections Act is a law that is being challenged rather than an action. With regard to the third factor, this case did not exhibit an emphasis on empirical evidence as the issue at hand was more philosophical in nature. As noted by the Dissent, the expert testimonies heard were primarily concerning legal and political philosophies rather than social science evidence. Thus, the evidence was more abstract and symbolic in nature [101;102]. With regard to the final factor, this case had seven interveners, four of which supported the claimants, two of which supported the government, and one of which is unknown.

In *Weatherall v Canada* the claimants brought forward a s.7, s.8, and s.15 Charter challenge against the cross-gender frisks and unannounced searches of male prisoners. The claimants argued that this was an invasion of their privacy and that frisks and searches by female guards could result in inappropriate touching and prisoners being seen undressed. The court came to a unanimous decision that none of the challenged rights had been violated. The court determined that prisoners can not hold a reasonable expectation to privacy as surveillance and searching are necessary aspects of the prison institution. Frisks and patrolling are conducted to ensure prisoners' safety and to ensure they are not engaging in activities that are detrimental to the good order and security of the prison. Further, the court concluded that the possibility of inappropriate occurrences was minimized by the special training guards received in order to ensure prisoners' dignity and that searches were conducted professionally.

The court also found that s.15 was not violated. The fact that female prisoners were not subject to cross gender searches was not discrimination, but rather different treatment constituted by the historical trend of violence against women. Further, if s.15 had been violated the court found that it would be justified considering the government's objectives of employment equity, rehabilitation, and the security of the institution.

In regards to the first factor of this case, whether there are inherent limitations or not, s.7 and s.8 both have inherent limitations. S.7 includes "except in accordance with the principles of fundamental justice" and s.8 includes the word, "unreasonable" (*Canadian Charter,* 1982, s7 & s8). S.15, however, does not have an inherent limitation. For the second factor, whether the case deals with a substantive or procedural issue, this case discussed a procedural issue as it was relevant to the actions of the prison guards rather than a law. In considering the third factor,

whether there is an emphasis put on empirical evidence, this case did exhibit emphasis on empirical evidence as the courts pointed to the number of times an inappropriate sighting had actually occurred. Further, the court referred to the proven historical trend of violence against women with regard to s.15. For the final factor, factums for this case were unavailable and thus, there is not enough information available to determine which party each intervener supported.

In *Ewert v Canada* the claimants brought forward a s.7 and s.15 challenge against the prison's use of five risk assessment tools on Indigenous people. The claimant argued that given there was no research confirming that the assessment tools would apply to Indigenous people, the use of these tools violated s.7 rights as they led to adverse affects from decisions made based on the tools' results [4;19]. The Supreme Court made a seven to two decision that neither s.7, nor s.15 had been violated. The court determined that the claimant had failed to prove on a balance of probabilities that the use of these risk assessment tools resulted in inaccurate results when applied to Indigenous prisoners, therefore constituting a violation of the principles of fundamental justice [70]. The court also found that s.15 was not violated because there was a lack of evidence proving that the tools overestimated the risk of Indigenous prisoners or that the results led to harsher punishments for Indigenous prisoners [79].

In regards to the first factor, s.7 does have inherent limitations while s.15 does not. As for the next factor, this case deals with a procedural issue as it is regarding the actions of the prison rather than a law. As for the third factor, this case has a heavy emphasis on empirical evidence. The burden was placed upon the claimant to prove that the risk assessment tools resulted in inaccurate results for Indigenous prisoners, a fact the claimant failed to prove. When considering the final factor at last, this case had ten interveners, all ten in support of the claimants.

British Columbia & Ontario Courts of Appeal

The segregation cases brought forward in both the Ontario and British Columbia Courts of Appeal had similar outcomes yet were decided based on different reasons. The claimants in both cases argued that the use of administrative segregation, as permitted through the *Corrections and Conditional Release Act (CCRA),* constituted solitary confinement and was thus, unconstitutional. In both Ontario and British Columbia, the Courts of Appeal found the use of administrative segregation unconstitutional.

In British Columbia the court determined that s.7 of the Charter had been violated for three reasons. The first reason was because the *CCRA* allows prolonged and indefinite segregation for anyone [145]. Expert testimonies before both trial courts demonstrated that prolonged segregation, meaning more than fifteen consecutive days, posed the risk of serious and possibly permanent psychological harm. It was also discussed that this harm would be much greater for a prisoner with mental illness [90]. The second reason the British Columbia court found s.7 was violated was due to the fact that the *CCRA* allowed for internal segregation review

hearings [145]. The court found that procedural fairness had not been met as internal reviews allow the institutional head to be both the judge and prosecutor at the hearings. It is not possible for the institutional head to be impartial and unbiased in such a situation, thus, external review is necessary [174;192]. The third reason found by the British Columbia Court of Appeal was that the *CCRA* deprives prisoners of their right to counsel at segregation review hearings [145]. The *CCRA* requires that prisoners have the opportunity to consult with counsel but it does not state that counsel can be present at review hearings [202]. Given the decision's significant effect on prisoners, the important role of counsel during hearings, and the prison's tendency to over-rely on administrative segregation, the deprivation of counsel at the hearings was determined to be a violation of s.7 [206].

The British Columbia Court of Appeal then turned to s.15 which they found had not been violated. In regards to Indigenous prisoners the *CCRA* requires that Indigenous social history and culturally appropriate alternatives are considered when deciding whether to release the prisoner or continue segregation [211]. Additionally, when considering prisoners with mental illnesses, the *CCRA* requires that the state of health and the health care needs of the prisoner are considered [220]. Thus, the individualized assessment and decision-making process does not create discriminatory distinctions or perpetuate disadvantages, meaning s.15 was not violated [236; 237].

In the Ontario Court of Appeal, the government did not challenge the trial court's decision that s.7 had been violated due to inadequate review processes (Kerr 2019). Therefore, the court focussed on the s.12 Charter challenge. The threshold for cruel and unusual punishment is the point in which the effects of the punishment are considered to be grossly disproportionate or to outrage the standards of decency [59]. The court found that the foreseeable and expected negative psychological harm that is caused by prolonged segregation constitutes cruel and unusual punishment. Further, they found that various safeguards in the *CCRA* were inadequate and ineffective at preventing grossly disproportionate treatment [114;115]. As a result, the court then turned to the Oakes Test. It was decided that the s.12 violation is not justified as the severe negative effects of prolonged segregation are not minimally impairing [126].

In considering the first factor, s.7 and s.12 have inherent limitation, while s.15 does not. S.12 has an inherent limitation found in the words "cruel and unusual" (*Canadian Charter,* 1982, s12). Upon analysis of the second factor, these cases deal with a mix of procedural and substantive issues. The cases are with regard to the laws that allow solitary confinement as well as to the actions of the prison officials providing inadequate conditions that harm prisoners. In regards to the third factor, these cases have a heavy emphasis on empirical evidence. The expert testimonies, demonstrating the severe psychological harm of prolonged segregation, formed the basis for many of the courts' decisions. Finally, the British Columbia and Ontario Courts of Appeal

had a combined total of eight interveners, six supporting the claimants, one supporting the government, and one unknown.

When appealing the case to the Supreme Court, the government will likely continue to argue that the negative effects of segregation are the result of a maladministration of staff rather than of the *CCRA* itself, and that the nature of s.12 is fundamentally individual and requires specific evidence regarding an individual. In both the British Columbia and Ontario cases, the government argued that the *CCRA* does not violate s.7, s.12, or s.15, but rather that any instance in which a violation occurred was due to staff conducting incorrect administration of the Act (Kerr 2019). With regard to s.7 and s.12, the British Columbia and Ontario Court of Appeal respectively, rejected the government's argument. However, in British Columbia, the court agreed with the argument brought by the government with regard to s.15. Therefore, the decisions regarding s.7 and s.12 will likely be the decisions the government will challenge in the Supreme Court. Based on the forgone analysis, if the Supreme Court were to decide on the s.15 challenge, they would likely find it is not violated as s.15 has shown to be a difficult challenge to win across the previous prisoners' rights cases.

Alternative reasoning & counterargument

In applying the patterns present in each factor individually, the predicted outcome of the segregation case varies depending on which factor is most influential. Based on the first factor of analysis, the segregation case shows the presence of inherent limitations, similarly to *Weatherall* and *Ewert*. Thus, if the first factor were the most influential the outcome would be a failure for the claimants. If the second factor were the most important it would lead to an undetermined prediction given the segregation case is a mix of substantive and procedural issues. If the fourth factor were the most significant it would also lead to an undetermined prediction as the number of interveners has not shown a consistent relationship with the outcomes of the cases and there were limitations to the availability of information for this factor. *Ewert v Canada*'s interveners all supported the claimants but the claimants were still unsuccessful, while most of *Sauve v Canada's* interveners supported the claimants yet it led to a success. Finally, if the third factor were the most influential the outcome would be a claimant success as empirical evidence was heavily emphasized. This emphasis is common among the segregation cases, *Weatherall* and *Ewert*. However, the evidence supports the claimants' arguments in the segregation cases while, in *Weatherall* and *Ewert,* the evidence worked against the claimants resulting in their unsuccessful outcomes. This is an unexpected finding that arose out of the research. Although the presence of inherent limitation is a strong determining factor, this research has found an emphasis on empirical evidence to be an even stronger factor. To restate my thesis in light of this finding, the strongest factor in the Supreme Court's determinations of which Charter rights are justifiably violated when imprisoned, is the emphasis on empirical evidence. The Ontario and British Columbia Courts of Appeal referred to well-established evidence presented by expert

testimonies throughout their reasonings. Therefore, my prediction is that the Supreme Court decision will result in a claimant success, given that the emphasis on empirical evidence is the strongest factor.

This finding demonstrates that the strongest determining factor is the emphasis on empirical evidence. This factor is likely so influential due to the gap in the resources available to the government and the resources available to the claimants. As prisoners, there are many barriers to obtaining legal advice, such as limited opportunities to call lawyers or difficulties having a lawyer present in review hearings. These barriers can make it more difficult for the claimants to gather the necessary empirical evidence when compared against the expansive resources the government has to gather empirical evidence. In *Ewert* and *Weatherall*, the claimants were unsuccessful, but in the segregation cases the claimants were successful at the Court of Appeal level. This demonstrates empirical evidence as the strongest determining factor since the support of empirical evidence can result in a different outcome.

Conclusion

This paper set out to determine how the Supreme Court decides which Charter rights are justifiably violated when an individual is imprisoned and to make a prediction on the outcome of the upcoming Supreme Court segregation case. My initial thesis was that the presence of inherent limitations was the main factor in the Supreme Court's decision-making process. However, the analysis of the four factors, whether there is an inherent limitation, whether the case deals with a substantial or procedural issue, whether there is an emphasis on empirical evidence, and the presence of interveners and factums, brings up an alternative factor with significant impact, an emphasis on empirical evidence. Therefore, based on the forgone analysis, my initial prediction for the outcome of the segregation case has changed. My final prediction is that the claimants will be successful in the Supreme Court case based on the well-established evidence from expert testimonies and studies as well as the general acceptance of this evidence in the lower courts. Therefore, although the presence of inherent limitations is a strong factor for Supreme Court outcomes on prisoner rights cases, the support from empirical evidence has a stronger impact.

This paper provides a starting point from which future research, focussing primarily on the role of evidence in prisoners' rights cases, can be done. Further investigation should take a look at the accessibility of evidence to prisoners and prisoner advocates, specifically in contrast to the abilities and resources available to the government. As prisoners face many barriers before their cases can be heard in courts, the availability of necessary information and context is essential to their success. Therefore, the patterns outlined in my research from various Supreme Court prisoners' cases can assist those bringing future cases forward by allowing them to learn from the mistakes of previous prisoners' cases. Further, my research contributes to existing

literature by focussing on Supreme Court decisions and making a prediction on an upcoming case that has yet to be heard. As prisoners are often subject to rights infringements outside of the view of the public, it is important for future claimants to be well informed of the most significant factors contributing to Supreme Court decisions on prisoners' rights.

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Political Thought / La pensée politique

L'idéologie: Mieux comprendre son influence sur l'élection québécoise

Vincent Paquet

Mots-clés: Québec, vote, idéologie, élection, gauche-droite

Keywords: Quebec, voting, ideology, election, left-right political spectrum

La politique québécoise a longtemps été caractérisée par un clivage opposant les fédéralistes et les souverainistes. L'élection de 2018 a mis un terme à plus de 40 ans de bipartisme entre les deux principaux partis incarnant ce clivage. La victoire de la Coalition avenir Québec, un parti ayant mis de côté la question nationale, vient changer la donne. Ainsi, cette recherche s'intéresse à la montée de l'idéologie comme facteur explicatif du comportement électoral de la population québécoise. En ce sens, est-ce que les déterminants idéologiques—le clivage gauche-droite, le conservatisme moral et la gestion de la diversité—ont eu une influence significative sur le vote lors de la dernière élection, comparativement à l'élection de 2012 ? La victoire de la CAQ ainsi que la montée électorale de QS semblent avoir été causées par ces déterminants lors de la dernière élection. À partir du modèle de Michigan, cette recherche emploie la régression logistique binomiale afin de déterminer l'impact des variables indépendantes sur le vote. Une fois les résultats obtenus puis comparés, il apparait que le conservatisme moral et la gestion de la diversité ont constitué des déterminants idéologiques significatifs pour la CAQ et QS. Ceux-ci incarnant des positions opposées sur ces dimensions. Il semble alors que ces variables expliquent en partie la victoire de la CAQ et la montée de QS en 2018.

Politics in Quebec have long been depicted as being polarized, with federalists on one side and sovereigntists on the other. The 2018 election put an end to forty years of bipartisanship between the two main opposing groups in this divide. The victory of Coalition avenir Québec (CAQ) was a major shift as the party sidestepped questions regarding Quebec's status and independence. This research paper focuses on the rise of ideology as an explanatory factor in the voting behaviour of people in Quebec. From this perspective, do ideological factors (such as the division between the left and the right, moral conservatism, and managing diversity) have a significant influence on voting in the last election when compared to the 2012 general election? These factors appear to influence CAQ's victory as

well as the rise of Québec solidaire (QS). This research paper is based on the Michigan model and uses binomial logistic regression to evaluate the impact of independent variables on voting. After obtaining the results and comparing them with the 2012 election, it appears that moral conservatism and diversity management were the two most significant ideological factors for the CAQ and QS, which are parties with conflicting positions on these matters. These factors seem to partially explain the CAQ's victory and the rise of QS in 2018.

La place du Québec au sein du Canada a longtemps constitué un enjeu clivant pour les électeurs et les électrices du Québec (Pétry 2013, 61). La question nationale fut à ce point déterminante qu'elle relaya les autres facteurs explicatifs du vote à la périphérie (Bélanger, Nadeau, Henderson et Hepburn 2018, 134). Or, l'élection québécoise de 2018 a été le théâtre d'un grand changement. Après plus de 40 ans de bipartisme entre le Parti libéral du Québec (PLQ) et le Parti québécois (PQ), la Coalition avenir Québec (CAQ)—un parti fusionné avec l'Action démocratique du Québec—s'est emparée du pouvoir avec 37,4 % des votes exprimés (Élections Québec 2018). La victoire de la CAQ en plus des résultats électoraux de Québec solidaire, deux partis véhiculant un positionnement idéologique plus prononcé que le PLQ et le PQ, laisse présager qu'un réalignement électoral commence à s'opérer chez la population québécoise[24].

Sachant cela, une étude sur le comportement électoral des Québécois et des Québécoises permettrait d'examiner en profondeur certains déterminants susceptibles d'avoir une incidence sur le vote. Parmi ces déterminants, une attention particulière sera accordée aux variables idéologiques, car elles connaitraient une remontée auprès de l'électorat, surtout chez les jeunes (Montigny et Cardinal 2019). Cette recherche vise donc à éclaircir le lien nébuleux qui existe entre l'idéologie et le vote pour les quatre principaux partis politiques du Québec en 2018. Elle suppose alors que la victoire de la CAQ et la montée électorale de QS auraient été influencées par une montée des déterminants idéologiques. De ce fait, l'objectif n'est pas de démontrer que le Québec traverse une phase de réalignement, mais plutôt de mieux comprendre, grâce au prisme de l'idéologie, le comportement électoral. Afin de confirmer ou d'infirmer cette hypothèse, il faudra d'abord s'appuyer sur un modèle explicatif du comportement électoral. Par la suite, il sera nécessaire de passer en revue la littérature au sujet de l'idéologie pour en dégager des indicateurs. Enfin, des équations devront être assemblées pour modéliser le comportement électoral des Québécois et des Québécoises. Les résultats qui en émergeront devront alors être

[24] Le paysage politique québécois est composé de quatre principaux partis : le Parti Libéral du Québec (PLQ), le Parti québécois (PQ), la Coalition avenir Québec (CAQ) et Québec Solidaire (QS). Au cours des 40 dernières années, le PLQ et le PQ se sont partagés le pouvoir. L'enjeu ayant dominé cette période fut la place du Québec au sein de la fédération canadienne, le PQ représentant l'option souverainiste et le PLQ l'option fédéraliste. QS est apparu dans le paysage politique en 2006 et obtient son premier siège à l'Assemblée en 2008. Ce parti se positionne plus à gauche sur l'échiquier que le PQ et partage sa position souverainiste. La CAQ apparait en 2011 et devient la deuxième opposition en 2014. Ce parti défend un nationalisme autonomiste, mais non souverainiste. Il se positionne au centre-droit sur l'axe gauche-droite.

interprétés à l'aune de résultats électoraux antérieurs. Cela permettra d'observer l'évolution des déterminants idéologiques en fonction d'un étalon de comparaison.

La littérature au sujet des idéologies est abondante. Il en résulte alors une pluralité de définitions. Toutefois, un certain consensus ressort quant à quelques caractéristiques. Premièrement, l'idéologie n'est plus considérée, par les chercheurs et les chercheuses, comme quelque chose de péjoratif. En ce sens, l'idéologie ne constitue pas une mystification de la réalité, comme le concevaient les théoriciens et théoriciennes marxistes, mais plutôt l'articulation systématique d'une pensée politique (Maynard et Mildenberger 2018). Conséquemment, l'idéologie est fondamentalement politique, car elle promulgue une certaine conception de l'arrangement de l'espace public. La communauté académique s'entend, également, sur le fait que l'idéologie s'apparente à un système d'idées plus ou moins cohérent (Maynard et Mildenberger 2018). Une idéologie constitue donc un schème d'idées organisées systématiquement et qui émet des prescriptions quant à la manière d'organiser la société.

En ce qui concerne l'opérationnalisation de cette variable, la littérature suggère deux approches : spatiale et non spatiale (Maynard et Mildenberger 2018). Dans le cadre de cette recherche, l'approche spatiale sera priorisée. Celle-ci permet de cartographier les idéologies dans un plan cartésien. De ce fait, il est possible d'en extraire des mesures en fonction de coordonnées. Une des échelles de mesure utilisées pour cette recherche s'étalera de 0 à 10. Les idéologies de gauche s'étendent de 0 à 4, et les idéologies de droite vont de 6 à 10. L'échelle permettra de bien modéliser le clivage gauche-droite. Comme l'utilisation d'un seul axe dénature la complexité de l'idéologie, d'autres indicateurs seront employés. Le clivage souverainiste-fédéraliste, le conservatisme moral et la gestion de la diversité ajouteront de la profondeur à l'analyse, car ils correspondent à des dimensions idéologiques qui ont une incidence sur le comportement électoral. Bien que l'approche spatiale ne soit pas la plus exhaustive pour ce qui est du contenu des idéologies, il s'agit de la meilleure approche pour quantifier les idéologies (Maynard et Mildenberger 2018).

Afin de répondre à la question de recherche et de vérifier l'hypothèse, il faudra employer un cadre théorique qui permette d'analyser le comportement électoral et les idéologies. Après avoir passé en revue la littérature, le modèle qui répond le mieux à ces exigences est le modèle Michigan théorisé par Campbell et collaborateurs (1976). Celui-ci met en relation des variables explicatives de long terme et de court terme, dans un entonnoir de causalité, pour comprendre le comportement électoral (Lewis-Beck et Jacoby, Norpoth et Weisberg 2008). Les données utilisées pour cette étude proviennent d'un sondage conçu par Nadeau et Bélanger, et réalisé le mois suivant l'élection de 2018. Les questions permettront d'obtenir des données pour les variables indépendantes, mais aussi pour les variables dépendantes. Ce projet consiste en l'utilisation secondaire de données. Cette recherche privilégie, donc, les méthodes quantitatives.

Comme plusieurs variables sont mobilisées pour expliquer le comportement électoral des Québécois et des Québécoises, cette recherche s'appuie sur l'analyse multivariée. Dès lors, quatre équations ont été produites. Chaque équation se rapporte à l'un des quatre principaux partis politiques du Québec. Les variables indépendantes demeurent les mêmes, seules les variables dépendantes changent. À partir de celles-ci, quatre analyses de régression logistique binomiale sont effectuées. Cela permettra d'examiner les coefficients de régression logistique de chacune des variables. Les coefficients indiqueront le sens de la relation entre les variables. De plus, des changements de probabilité seront effectués afin de mesurer l'influence de chacune des variables indépendantes sur le vote. Une fois les résultats obtenus, un parallèle sera dressé entre ceux-ci et les résultats électoraux de 2012. Cette comparaison permettra de vérifier si les déterminants idéologiques du vote ont connu une recrudescence au courant de la dernière élection. C'est donc à l'aune de ces résultats que cette recherche pourra rendre compte de l'impact des déterminants idéologiques sur le comportement électoral des Québécois et des Québécoises.

Revue des écrits

Cadre théorique

Traditionnellement, deux types d'approches permettent de modéliser l'idéologie en sciences sociales, l'approche spatiale et l'approche non spatiale (Maynard et Mildenberger 2018, 568). La première consiste, dans la majorité des cas, à cartographier le positionnement idéologique des partis politiques ou celui de l'électorat sur un plan cartésien. Pour ce faire, un petit nombre de dimensions sont sélectionnées afin de rendre compte des différentes composantes de l'idéologie. Parmi elles, la plus répandue est l'axe gauche-droite, mais d'autres dimensions telles que le conservatisme moral ou le clivage libéralisme autoritaire permettent d'ajouter de la profondeur au modèle. L'approche spatiale possède l'avantage de s'opérationnaliser plus facilement dans un contexte méthodologique quantitatif (Maynard et Mildenberger 2018, 568). Les approches non spatiales recensées par Maynard et Mildenberger (2018) sont aux nombres de deux, les modèles symboliques et les modèles descriptifs denses. Les premiers représentent les idéologies comme des systèmes interconnectés de symboles visuellement représentables alors que les seconds examinent dans le détail le contenu et la nature des idéologies (Maynard et Mildenberger 2018, 568). Les approches non spatiales ont l'avantage d'exposer plus clairement le contenu propre aux idéologies. Les modèles symboliques ont toutefois de la difficulté à représenter le contenu individuel des éléments qui composent l'idéologie. Les modèles descriptifs denses, de leur côté, s'opérationnalisent plus difficilement étant donné le type de contenu qu'ils produisent (Maynard et Mildenberger 2018, 569). Ainsi pour les fins de cette recherche, l'approche spatiale sera privilégiée étant donné la question de recherche initiale et la méthodologie utilisée.

Hinich et Munger proposent un modèle spatial permettant de comprendre l'interaction entre le vote et les idéologies (Hinich et Munger 1992, 1994). Cette théorie s'appuie grandement sur les axiomes formulés par Antony Downs dans son modèle économique du vote (Downs 1965). Le modèle de Hinich et Munger cherche à représenter empiriquement le choix des citoyens et des citoyennes à l'aide des idéologies. Pour ce faire, ils postulent que ces choix se déclinent sur un espace à n-dimensions. Les enjeux correspondent à une décision politique qui affecte les membres de la société (Hinich et Munger 1994, 165). Ici, les idéologies constituent le cadre de référence à partir duquel l'électorat associe un enjeu à un parti politique. Les citoyens et les citoyennes votent alors pour le parti qui représente le mieux leur idéologie. Corollairement, les partis politiques vont tenter de s'aligner le plus près de l'idéologie dominante pour se faire élire (Hinich et Munger 1994, 165-66). Cependant, le modèle proposé par les deux politologues a pour défaut de n'inclure aucune autre variable explicative. Le contexte québécois nécessite un cadre théorique qui inclut d'autres déterminants du vote. Le modèle proposé par Hinich et Munger n'est alors pas compatible avec les besoins de cette recherche.

Afin de prendre en compte la pluralité de déterminants qui peuvent influencer le vote d'un individu, le modèle de Michigan, maintes fois repris par de nombreux auteurs (Lewis-Beck et al. 2008), est l'un des plus pertinents. Campbell et collaborateurs partent du principe que, pour analyser le comportement d'une personne à un moment précis, il faut examiner la chaîne d'évènements ayant mené à celui-ci (Campbell, Converse, Miller et Stokes 1976, 24). Les auteurs utilisent l'analogie de l'entonnoir de causalité pour illustrer leur propos, et où l'axe vertical représente la dimension temporelle. Ainsi, chaque événement se suit et converge dans une chaîne de causalité allant de l'embout supérieur à l'embout inférieur de l'entonnoir (Campbell et al. 1976, 24). Dans cette perspective, les événements ou déterminants se situant au sommet de l'entonnoir sont à plus grandes distances de l'objet d'étude, à savoir le vote. Leur influence est plus grande, car ils façonnent depuis plus longtemps le comportement électoral. Dès lors, il est possible de distinguer l'impact des variables en examinant leur distance dans le temps par rapport au moment du vote (Nadeau et Bélanger 2013, 192). De ce constat, la littérature distingue deux catégories de variables. Il y a les variables à long terme dites « lourdes ». Il s'agit des variables sociodémographiques, de l'identification partisane, et des déterminants idéologiques. La deuxième catégorie comprend les variables à court terme ou contextuelles, par définition moins stables temporellement, et qui exercent une influence moins prononcée sur le comportement électoral. En ce sens, les enjeux particuliers propres à une élection ainsi que la perception des chefs par l'électorat sont tous des variables à court terme qui ont un impact sur le vote (Bélanger et Nadeau 2009, 36 ; Lewis-Beck et al. 2008, 23 ; Nadeau et Bélanger 2013, 192-93). Le modèle de Michigan offre les bases théoriques adéquates à la réalisation de cette recherche. Or, son application nécessite des précisions.

Bélanger, Lewis-Beck, Chiche et Tiberj utilisent une variation de ce modèle afin d'étudier l'élection présidentielle française de 2002. Les politologues élaborent une équation dans laquelle

le vote est fonction de l'identification partisane, des idéologies, des clivages et des enjeux (Bélanger, Lewis-Beck, Chiche et Tiberj 2006, 504-5). Les auteurs mettent l'accent sur les variables lourdes pour expliquer le comportement électoral des Français et des Françaises. Ils n'incluent que la dimension « enjeux » et laissent de côté la performance des chefs de partis. L'emploi de variables spécifiques à la situation française démontre que, dans une certaine mesure, le modèle de Michigan est adaptable à divers contextes. Dans cette optique, un examen plus en profondeur du contexte électoral québécois est nécessaire pour identifier les variables explicatives pertinentes.

Dans leur ouvrage sur le comportement électoral, Bélanger et Nadeau (2009) passent en revue la littérature sur les déterminants qui influencent l'électorat québécois. Pour préciser leur recension, ils établissent une distinction entre deux catégories de variables, soit les facteurs à long terme et les facteurs à court terme. En ce qui concerne la première catégorie, ils identifient sept clivages importants associés aux caractéristiques sociodémographiques de la population. Ainsi, la langue, l'âge, le sexe, la région, l'éducation, le revenu et la pratique religieuse sont tous des clivages sociaux qui structurent la clientèle partisane du Québec (Bélanger et Nadeau 2009, 36-7). Parmi cet ensemble de déterminants, l'âge, la langue et la région sont considérés comme étant des variables explicatives cruciales (Bélanger et Nadeau 2009, 39). En ce sens, le modèle pour cette recherche devra nécessairement inclure ces trois variables. Les auteurs associent également aux facteurs à long terme les valeurs et les croyances des électrices et des électeurs, et qui orienteraient les préférences électorales. Au Québec, cela se divise en deux dimensions idéologiques. La première dimension, il y a le clivage sur la modernisation politique, c'est-à-dire sur le degré d'intervention et de laisser-faire de l'État dans la sphère économique. Ce clivage se traduit généralement par un classement des électeurs et des électrices ou des partis politiques sur un axe unidimensionnel gauche-droite. La question nationale constitue la seconde dimension du clivage idéologique au Québec. Elle met en opposition les souverainistes aux fédéralistes (Bélanger et Nadeau 2009, 39). Toutefois, parmi ces deux dimensions idéologiques, Bélanger et Nadeau soulignent que la question nationale a quelque peu éclipsé le clivage gauche-droite. Cette dernière possèderait un poids plus déterminant dans l'explication du comportement électoral au Québec (Bélanger et Nadeau 2009, 40). La littérature sur le sujet corrobore ce constat (Bélanger et al. 2018, 134-35 ; Pétry 2013, 61). Un dernier facteur à long terme identifié par les politologues est l'identification partisane. Cependant, ces derniers remarquent que l'effet de ce déterminant est expliqué par d'autres variables en particulier le profil sociodémographique des individus ainsi que leur opinion quant à la question nationale (Bélanger et Nadeau 2009, 40). L'identification partisane, en contexte québécois, ne constitue donc pas un facteur explicatif essentiel pour comprendre la manière dont les citoyens et les citoyennes votent. Pour ce qui est des variables à court terme, les deux auteurs considèrent la conjoncture économique comme étant un facteur déterminant. Plus spécifiquement, cela signifie que les chances de réélection d'un gouvernement seraient influencées par la performance de l'économie durant son mandat.

L'économie agirait dès lors comme un critère d'imputabilité. L'effet de ce mécanisme a été observé au Québec (Bélanger et Nadeau 2009, 41). L'économie n'est toutefois pas le seul enjeu qui structure le comportement des électeurs et des électrices. La santé, l'environnement, l'immigration et le féminisme seraient aussi des enjeux qui influenceraient la manière dont les individus votent (Bélanger et Nadeau 2009, 41-2). La performance des chefs de partis et l'image qui en découle sont aussi un facteur explicatif non négligeable dans l'étude du comportement électoral. Ainsi, une image négative d'un chef de parti traditionnel avantagerait les tiers partis (Bélanger et Nadeau 2009, 42-3). En somme, l'ouvrage de Bélanger et Nadeau met en lumière les déterminants significatifs qui doivent être inclus dans cette recherche afin de bien cerner le comportement électoral au Québec.

L'idéologie

Une fois le cadre théorique et le contexte québécois spécifiés, il est nécessaire de définir l'idéologie. Comme l'idéologie se déploie dans plusieurs dimensions du comportement électoral, la revue de littérature doit couvrir les plus déterminantes pour cette recherche.

Selon Elinor Scarbrough, l'idéologie correspond à un système de pensée propre à un groupe (Scarbrough 1984, 26). Ce système agit de la même façon qu'une carte, c'est-à-dire qu'il guide les membres d'un groupe dans les actions à prendre. D'après la politologue, l'idéologie est composée de croyances centrales se subdivisant en trois catégories : les suppositions, les valeurs et les buts (Scarbrough 1984, 28-34). Ces croyances représentent la partie abstraite de l'idéologie, car elles correspondent à une conception particulière de la réalité. Le passage de l'abstrait au concret s'effectue par ce que Scarbrough appelle le principe d'action (Scarbrough 1984, 34). Cette notion transpose les croyances centrales d'une idéologie en contenu empiriquement vérifiable. Les gestes ou les actions d'un groupe deviennent le matériau à partir duquel l'analyse quantitative est possible. Il semble donc que le principe d'action proposé par Scarbrough permette de cartographier spatialement le positionnement idéologique. Cependant, ce dernier demeure un outil peu efficace, car l'auteure ne spécifie pas quel type d'action est à gauche ou à droite sur le spectre politique.

Dans le but de remédier aux questionnements persistants sur les conceptions de l'idéologie, Maynard et Mildenberger ont effectué une revue systématique de la littérature sur ce sujet. Dans un premier temps, les deux politologues constatent que l'idéologie, de manière générale, s'est affranchie de son aspect péjoratif. Ainsi, elle n'est pas théorisée comme un reflet inversé de la réalité, propre à la conception marxiste (Maynard et Mildenberger 2018, 564-65). Dans un deuxième temps, les auteurs démontrent que, dans la majorité des cas, la littérature définit l'idéologie comme un système d'idées. Quant à la cohérence de ces idées dans le système, il semble toujours y avoir un débat. Cependant, Maynard et Mildenberger remarquent que la communauté académique tend vers une définition qui accorde une plus grande flexibilité à la

cohérence qui unit les idées (Maynard et Mildenberger 2018, 565). Enfin, pour ce qui est de la substance de l'idéologie, il ne semble pas y avoir de consensus clair. Les disciplines, telles que la science politique et la psychologie, conçoivent l'idéologie comme en ensemble d'attitudes et de valeurs tandis que d'autres disciplines, comme la philosophie politique et l'histoire des idées, mettent de l'avant le rôle des concepts, de leur signification et du langage pour expliquer la substance de l'idéologie (Maynard et Mildenberger 2018, 566-67).

À la lumière de toutes ces informations, il est désormais possible de faire émerger une définition de l'idéologie qui permettra de répondre à la question de recherche. Ainsi, l'idéologie correspond à un système d'idées qui n'émet pas de jugement normatif sur sa substance ou sur les actions qu'elle prescrit. En ce sens, l'idéologie est non péjorative. Les idées qui la composent, qu'elles proviennent de valeurs, d'attitudes ou de concepts, sont plus ou moins cohérentes les unes avec les autres. Lorsque assemblée en un système d'idées, l'idéologie permet d'expliquer, en partie, la réalité et de guider l'action politique. Elle sert donc de repère pour les électeurs et les électrices.

Le clivage gauche-droite

Selon Noël et Thérien, la distinction gauche-droite, en tant que fait social, est porteuse de signification, même si sa configuration dans le temps et dans l'espace varie (Noël et Thérien 2010, 27). En d'autres termes, les éléments qui composent ce clivage peuvent changer en fonction du pays et de l'époque dans lesquels ils se trouvent, sans pour autant perdre leur valeur analytique. Noël et Thérien ne conçoivent pas la dichotomie gauche-droite comme un conflit à propos de la modernité politique opposant le progrès à la réaction. Pour les politologues, le clivage idéologique relève d'une opposition sur le sens donné au principe d'égalité dans une société libérale moderne (Noël et Thérien 2010, 37). Ainsi, toutes les idéologies prétendent à l'égalité, mais différemment. Afin de distinguer les caractéristiques propres à la gauche et à la droite, Noël et Thérien s'appuient sur la notion d'état de nature. Partant de ce point, les auteurs concluent que les idéologies de droite portent un regard pessimiste sur cet état des choses. Il en résulte, alors, une attitude compétitive ainsi qu'une recherche de sécurité. Dès lors, l'égalité est théorisée à l'aide de droits individuels. Quant aux idéologies de gauche, elles sont optimistes à l'égard de l'état de nature. Cela se traduit par une plus grande confiance envers le vivre-ensemble au sein des communautés. Dans cette perspective, elles accordent davantage de latitude à l'État, afin que celui-ci protège les citoyens et les citoyennes des risques sociaux influençant l'égalité (Noël et Thérien 2010, 44). Ici, le rôle de l'État passe donc par les droits sociaux qu'il confère aux citoyens et aux citoyennes. Les droits associés à la gauche ont une plus grande portée interventionniste, il n'y a qu'à penser aux politiques de l'État providence (Noël et Thérien 2010, 170). Ainsi de manière générale, le rôle de l'État tend à varier selon l'enjeu en question. Par exemple, les partisans et les partisanes de la droite économique s'opposent généralement à l'intervention de l'État en ce qui concerne le marché. Cela correspond à leur notion de l'égalité

qui passe par la liberté individuelle. En somme, bien que les politologues s'appuient sur une notion abstraite pour bâtir leur argumentaire, ils prennent soin de moderniser et d'examiner le déploiement des idéologies de gauche et de droite dans le contexte libéral actuel.

Cochrane, de son côté, considère que le clivage gauche-droite est un concept contingent et évolutif. Ce faisant, il remarque que la population, en général, est apte à positionner les partis politiques sur l'axe unidimensionnel, mais parvient difficilement à expliquer le contenu de ce positionnement (Cochrane 2015, 12-3). Le politologue constate que la majorité des définitions sur la gauche et la droite s'entendent pour dire qu'il s'agit, directement ou indirectement, d'une méthode inductive (Cochrane 2015, 14). Ainsi, les citoyens et les citoyennes interprètent le positionnement idéologique des partis politiques à partir de leurs observations. Ils et elles vont, ensuite, les classer en fonction du clivage gauche-droite. Il apparait, alors, que chaque membre de la société possède des présuppositions tacites sur les implications de la dichotomie idéologique, et c'est à partir de celles-ci qu'ils et elles naviguent le paysage politique. De ce point de vue, le clivage gauche-droite fait référence à un ensemble de désaccords politiques qui s'articule à travers les perceptions de la population (Cochrane 2015, 32). Ainsi, le contenu du clivage varie en fonction des individus. Il devient difficile d'identifier précisément les composantes particulières aux idéologies de gauche et de droite. La conceptualisation proposée par Cochrane est pertinente, car elle accorde une place à l'autoidentification du positionnement des partis par les citoyennes et les citoyens. En ce sens, il est plus pertinent d'examiner le positionnement idéologique des partis selon l'impression des électeurs et des électrices.

Conservatisme moral et immigration

Afin de comprendre les enjeux idéologiques soulevés dans le conservatisme moral, il faut situer d'où ils proviennent. Les controverses morales sont essentiellement des disputes culturelles dans lesquelles des opposants défendent une position et rejettent toutes les autres. Lorsque des enjeux ou des politiques touchent les valeurs profondes des personnes, celles-ci répondent de manière émotionnelle (Smith et Tatalovich 2003, 13-5). Le conservatisme moral ne relève donc pas de la dimension économique, car les gains financiers à réaliser sur ces questions sont minimes. La peine de mort, le droit à l'avortement, les droits des personnes homosexuelles et l'immigration sont des exemples d'enjeux susceptibles d'entrainer des conflits moraux (Smith et Tatalovich 2003, 14). Pour démystifier la séparation du clivage, les auteurs mobilisent le concept d'identité de statut. Les conflits moraux, selon eux, seraient liés à la position sociale du statut. Ainsi, les personnes de droite considèrent qu'elles doivent préserver leur statut en maintenant leur situation de pouvoir et de privilège. Les individus de gauche, quant à eux, désirent aplanir les inégalités en élargissant l'accès au pouvoir et en éliminant les privilèges liés à l'identité de statut (Smith et Tatalovich 2003, 29-30). En d'autres termes, le conservatisme moral s'articule autour d'enjeux de valeurs souvent liés à la place des groupes dans la société. L'étude de cette dimension de l'idéologie est donc tout à fait pertinente pour comprendre plus en détail

les facteurs explicatifs du vote. L'enjeu lié à la gestion de la diversité a sa place dans ce conservatisme moral, mais possède une place spéciale. Selon Inglehart et Norris, l'afflux d'immigrants dans les pays occidentaux aurait un impact important sur la façon dont les citoyens et les citoyennes orientent leur positionnement politique (Inglehart et Norris 2017). Cela s'inscrit dans une nouvelle dynamique politique entre la vieille politique et la nouvelle politique. Dans le premier, les enjeux économiques de classes sont mis de l'avant, alors que dans le second ce sont les enjeux liés à l'identité qui dominent la sphère politique (Nadeau 2019). En incluant la dimension du conservatisme moral et la gestion de la diversité, cette recherche couvre des déterminants idéologiques de la vieille et de la nouvelle politique. Ainsi, l'idéologie est couverte dans plusieurs de ses articulations.

L'étude électorale 2012

Étant donné que cette recherche s'intéresse à l'évolution des déterminants idéologiques du vote au Québec, il est nécessaire d'utiliser les résultats d'une étude électorale précédente comme étalon de comparaison. Les résultats de Nadeau et Bélanger (2013) sur l'élection québécoise de 2012 serviront à cet effet. Cette étude électorale est privilégiée, car elle emploie une méthodologie similaire à celle de cette recherche. En plus, le cadre théorique incorpore presque toutes les variables qui seront insérées dans le présent modèle. Enfin, l'élection de 2012 est particulière dans la perspective où la CAQ était à son premier baptême électoral, et où QS faisait élire une deuxième députée à l'Assemblée nationale. Il est également important d'ajouter que l'élection de 2012 s'est soldée par la formation d'un gouvernement minoritaire péquiste. Cette victoire mettait fin à un règne libéral de neuf ans. Ainsi, le choix de cette élection pour des fins de comparaison est fortement influencé par la méthodologie et le contexte entourant ces deux partis politiques. Pour ce qui est des résultats obtenus par Nadeau et Bélanger, une comparaison approfondie sera effectuée plus loin dans la recherche. Toutefois, il est possible de constater que la question nationale a été une dimension idéologique significative pour les clientèles électorales du PLQ, de la CAQ et du PQ. Fait intéressant, les électeurs et les électrices de QS n'ont pas été influencés par ce clivage alors que ce parti est indépendantiste. Le clivage gauche-droite, quant à lui, a été significatif pour les quatre partis, mais à des degrés différents. Enfin, le conservatisme moral a été une variable significative seulement pour la CAQ. L'étude électorale de Bélanger et Nadeau sur l'élection de 2012 fournit donc un modèle de comparaison pertinent pour prendre compte de l'évolution des déterminants idéologique du vote au Québec.

Méthodologie

Cette recherche vise à déterminer l'influence des idéologies sur le vote lors de la campagne électorale québécoise de 2018. Pour y arriver, il faut, dans un premier temps, mesurer l'impact de ces variables lors de la dernière élection au Québec. Dans un deuxième temps, il est nécessaire de comparer les résultats obtenus avec ceux d'une élection précédente afin de rendre

compte de l'évolution des déterminants idéologiques. Ainsi, les méthodes quantitatives seront employées pour répondre à la question initiale. À cet effet, cette recherche s'effectuera à partir de l'utilisation secondaire de données.

Le sondage et l'étude électorale

Les données qui serviront à l'élaboration de cette recherche proviennent d'un sondage exécuté par une équipe de recherche dirigée par Richard Nadeau et Éric Bélanger. Dans le but de s'assurer de la validité et de la fiabilité du sondage, un prétest a été réalisé à l'aide de 79 entrevues le 10 octobre 2018, soit 10 jours après l'élection. La collecte de données s'est poursuivie jusqu'à la fin du mois. Le sondage a été effectué sur une plateforme Web auprès de 3 072 Québécois et Québécoises âgés de 16 ans et plus. La taille de cet échantillon garantit un degré de certitude élevé quant à sa représentativité au sein de la population (Bernatchez et Turgeon 2016). Il est également important de spécifier que la sélection des participants et des participantes a été réalisée à partir d'un échantillonnage aléatoire à l'intérieur d'un panel Internet de LegerWeb. Afin d'augmenter la représentativité de l'échantillon, les résultats ont été pondérés en fonction du sexe, de l'âge, de la langue maternelle, de la scolarité et de la région administrative. En ce qui concerne les poids de pondération, ceux-ci ont été attribués grâce aux données de recensement produites par Statistique Canada.

L'étude électorale de Nadeau et Bélanger sur l'élection de 2012 (2013) utilise quatre modèles de régression logistique binomiale pour mesurer l'influence de déterminants sur le vote des Québécois et des Québécoises. Plusieurs variables sociodémographiques pertinentes sont incluses dans l'équation : l'âge, la langue, la résidence, le revenu, l'éducation et le genre. L'étude intègre également des variables idéologiques telles que la question nationale, le clivage gauche-droite et le conservatisme moral. La recherche de Nadeau et Bélanger sur l'élection de 2012 s'inscrit dans une démarche méthodologique similaire à celle préconisée dans cet article. Dès lors, elle offre un étalon de comparaison pertinent pour la réalisation de cette recherche.

L'approche méthodologique

La présente recherche s'intéresse à la relation entre les déterminants idéologiques et le comportement électoral des citoyens et des citoyennes du Québec lors de la dernière élection. Afin de mesurer l'idéologie, quatre variables sont mobilisées : le positionnement des électeurs et des électrices sur l'axe gauche-droite, et le conservatisme moral, la gestion de la diversité et la question nationale. L'idéologie est alors comprise comme un système d'idées plus ou moins cohérent qui influence la manière dont les électeurs et les électrices votent. De plus, comme le contenu des concepts de « gauche » et de « droite » sont relativement différents pour chaque personne (Cochrane 2015), l'autopositionnement des répondants et des répondantes est priorisé. En ce qui concerne le comportement électoral, il est quantifié par le vote. Enfin, des variables

sociodémographiques sont incluses dans le modèle pour contrôler les déterminants idéologiques. Cette recherche se penche exclusivement sur les quatre principaux partis politiques du Québec.

Comme plusieurs autres variables exercent une influence sur le comportement électoral de la population québécoise, il est nécessaire d'utiliser un modèle du vote qui permet de les inclure. En ce sens, le cadre théorique proposé par Campbell et ses collaborateurs (1976) puis révisé, ensuite, par Lewis-Beck et collaborateurs (2008) est le plus apte à expliquer le vote en fonction de déterminants présents dans le paysage politique du Québec.

Le modèle de Michigan établit que certaines variables, telles que les caractéristiques sociodémographiques, l'identification partisane, les clivages et les déterminants idéologiques ont un impact relativement stable sur le comportement électoral. Les variables « lourdes » ont, également, une influence sur les déterminants à court terme. Ceux-ci correspondent à la conjoncture économique, les enjeux importants lors de la dernière campagne et la perception des leaders de partis. Ces deux catégories de variables ont un effet différent sur le vote, car elles n'agissent pas en fonction de la même temporalité. Ce cadre théorique semble donc incorporer tous les éléments nécessaires à la résolution du questionnement de départ. Toutefois, il doit être légèrement adapté au contexte québécois pour assurer une plus grande validité des résultats.

Il est vrai que le paysage politique québécois est bien différent de celui des États-Unis—endroit où la recherche de Campbell et collaborateurs a été réalisée. Parmi les particularités propres au Québec, la question nationale est un déterminant très significatif sur le comportement électoral. Selon Bélanger et ses collaborateurs, l'enjeu d'indépendance avait, lors de l'élection de 2014, préséance sur tous les autres clivages, surtout celui entre la gauche et la droite (Bélanger et al. 2018, 134). Nadeau et Bélanger vont même jusqu'à affirmer que le clivage entre fédéraliste et souverainiste constitue un déterminant à long terme beaucoup plus structurant que l'identification partisane (Nadeau et Bélanger 2013, 193). Dans cette optique, il est primordial d'inclure la question nationale dans les déterminants à long terme. Cela permettra de contrôler cette variable dans le but d'obtenir des résultats plus précis. L'identification partisane n'est pas incluse dans le modèle parce que sa valeur explicative est moindre que celle d'autres facteurs en contexte québécois (Bélanger et Nadeau 2009). Les variables de court terme sont jugées impertinentes pour le modèle, elles ne seront pas retenues.

Le cadre théorique étant explicité, il est maintenant possible de construire les équations. Chaque parti politique—CAQ, PLQ, PQ et QS—est associé à une équation. Le vote pour un parti est alors comptabilisé dans son équation. Les variables indépendantes seront les mêmes pour chacune des quatre équations : les caractéristiques sociodémographiques, le clivage fédéraliste-souverainiste, le clivage gauche-droite, le conservatisme moral et la gestion de la diversité. Il est à noter que l'équation incorpore la constante « a », mais aucune valeur ne lui est attribuée pour cette recherche. Ainsi, les équations prennent la forme suivante :

$$Y = \beta_0 + \beta_1 x_1 + \beta_2 x_2 + \beta_3 x_3 + \beta_4 x_4 + \beta_5 x_5 + \varepsilon$$

$$Vote_{CAQ} = a + Socdémo*\beta_1 + Clivage\ F\text{-}S*\beta_2 + G\text{-}D*\beta_3 + Cons.\ Moral*\beta_4 + Immigration*\beta_5 + \varepsilon$$

$$Vote_{PLQ} = a + Socdémo*\beta_1 + Clivage\ F\text{-}S*\beta_2 + G\text{-}D*\beta_3 + Cons.\ Moral*\beta_4 + Immigration*\beta_5 + \varepsilon$$

$$Vote_{PQ} = a + Socdémo*\beta_1 + Clivage\ F\text{-}S*\beta_2 + G\text{-}D*\beta_3 + Cons.\ Moral*\beta_4 + Immigration*\beta_5 + \varepsilon$$

$$Vote_{QS} = a + Socdémo*\beta_1 + Clivage\ F\text{-}S*\beta_2 + G\text{-}D*\beta_3 + Cons.\ Moral*\beta_4 + Immigration*\beta_5 + \varepsilon$$

Cette recherche s'appuie donc sur une analyse multivariée pour déterminer l'influence de l'idéologie sur le vote. Afin d'obtenir des valeurs pour les variables, des régressions logistiques binomiales seront effectuées. Cette opération permet d'obtenir des coefficients de régression logistique pour chacune des variables explicatives. La valeur en soi des coefficients de régression n'est pas interprétable, mais ils permettent de connaitre le sens de la relation entre la variable indépendante et le vote (Nadeau et Bélanger 2013, 198). Ainsi, des changements de probabilité pour les quatre équations seront effectués. Cela permettra d'observer l'augmentation et la diminution des chances de voter pour un parti en faisant varier les catégories d'une variable (de sa catégorie minimale à sa catégorie maximale) (Bélanger et Nadeau 2009, 70). Dès lors, il sera possible d'interpréter les coefficients. La régression logistique binomiale fournit également des coefficients de détermination « pseudo-R^2 » pour chacune des équations. Ils permettent d'examiner la force des déterminations statistiques et la qualité des prédictions (Franklin 2008, 257-58). La régression logistique binomiale jumelée avec des changements de probabilité fournit donc des résultats qui permettront de valider ou d'infirmer l'hypothèse initiale.

L'opérationnalisation

L'opérationnalisation des variables, c'est-à-dire le passage de l'abstrait au concret, se fera à partir des questions et des réponses provenant du sondage de Bélanger et Nadeau. Le tableau A1 en annexe fournit des informations sur le codage des variables. L'annexe A2 explicite les questions de sondage et leur choix de réponse plus en détail.

Afin d'opérationnaliser le comportement électoral des citoyennes et des citoyens du Québec, une seule question du sondage sera nécessaire « pour quel parti avez-vous voté ? ». Les répondants et les répondantes ont le choix entre les quatre principaux partis politiques au Québec, PLQ, PQ, CAQ et QS, un autre parti, le vote blanc ou la non-réponse. Cette question est essentielle pour cette recherche, car elle permet de mesurer la variable dépendante. Comme l'analyse se base sur la régression logistique binomiale, la variable dépendante doit être dichotomique. Ainsi, le vote pour un parti prend la valeur de « 1 » et le vote pour les trois autres

partis prend la valeur de « 0 ». Comme quatre partis sont à l'étude, quatre modèles explicatifs du vote sont nécessaires. Les autres réponses sont exclues parce qu'elle n'apporte aucune valeur. De plus, la taille de l'échantillon permet de conserver la représentativité.

Le sondage réalisé par Nadeau et Bélanger comprend un grand nombre de questions sur les caractéristiques sociodémographiques. Il est d'abord essentiel d'inclure les questions à propos de l'âge, la langue et la région, car elles sont incontournables dans le contexte québécois (Bélanger et Nadeau 2009). Le sondage possède deux questions sur l'âge, seulement une sera retenue. Le codage de cette variable est standardisé pour que les résultats s'étendent de 0 à 1. Pour ce qui est de la langue, la question de sondage se décline comme suit « Quelle est la langue principale que vous avez apprise en premier lieu à la maison dans votre enfance et que vous comprenez toujours ? ». Les choix sont « français », « anglais », « autre », « je ne sais pas » et « je préfère ne pas répondre ». Cette variable est codée de manière dichotomique où « 1 » équivaut à français et « 0 » à anglais et autre. Les deux autres choix de réponses sont exclus. Comme les réponses à la question du lieu de résidence sont des codes postaux, un codage est nécessaire. La variable région est codée en trois catégories dichotomiques où Montréal est la catégorie de référence. Ainsi, une personne habitant la région du 450 sera codé « 1 ». Toutes autres réponses seront codées « 0 » dans cette catégorie. Il en va de même pour le Québec et le reste du Québec. Le total des répondants et des répondantes est de 1866 ; 166 réponses sont manquantes.

Trois autres variables sociodémographiques sont ajoutées dans le modèle, soit le niveau de scolarité, le revenu et le genre. Les variables de niveau de scolarité et de revenu sont standardisées et prennent des valeurs allant de 0 à 1, où la réponse minimale est codée « 0 » et la réponse maximale « 1 ». Finalement, pour le genre, les réponses « femme » prennent la valeur de « 1 » et les réponses « homme » équivalent à « 0 ». Pour ces trois variables, les réponses non concluantes—« je ne sais pas » et « je préfère ne pas répondre »—sont exclues. Ainsi, grâce à toutes ces caractéristiques, il sera possible d'examiner l'influence de l'idéologie sur le comportement électoral pour une pluralité de groupes au sein de l'électorat.

Afin de mesurer le clivage entre fédéraliste et souverainiste, une seule question du sondage sera nécessaire : « si un référendum sur l'indépendance avait lieu aujourd'hui vous demandant si vous voulez que le Québec devienne un pays indépendant, voteriez-vous OUI ou voteriez-vous NON ? ». Ici, les répondants et les répondantes ont le choix entre oui, non, ne sais pas et ne préfère pas répondre. Évidemment, les réponses intéressantes pour ce projet de recherche sont les deux premières, car elles indiquent une volonté claire quant à la question nationale. En ce sens, dans le code, la réponse « oui » prend la valeur de « 0 » et la réponse « non » prend celle de « 1 ». Dès lors, les souverainistes sont associés au code « 0 » et les fédéralistes au code « 1 ». Au total, 2032 personnes ont répondu par oui ou par non à cette question, et 265 ont répondu une autre chose. Étant donné que le taux de réponse est élevé, les autres réponses ne sont pas incluses. Parmi toutes les questions du sondage au sujet de l'indépendance du Québec, celle-ci

est la plus pertinente, car elle prend le pouls des répondants et des répondantes à un moment précis ; quelque temps après l'élection. De plus, elle est claire, donc elle ne laisse place à aucune ambiguïté.

En ce qui concerne le clivage gauche-droite, il est mesuré à l'aide d'une question de type fermé, c'est-à-dire qu'elle impose un choix aux répondants et aux répondantes. Ainsi, la question va comme suit : « [sur une échelle allant de 0 à 10, où 0 est le plus à gauche et 10 est le plus à droite] où vous placeriez-vous, de manière générale ? ». Deux autres choix s'offrent aux répondants et aux répondantes, soient « je ne sais pas » et « je préfère ne pas répondre ». Dans le cadre de cette recherche, les réponses exprimant un positionnement centriste « 5 » seront considérées. Bien qu'il ne s'agisse pas d'un positionnement idéologique significatif, cela correspond, tout de même, à un positionnement (Bélanger et al. 2006, 504). Ainsi, en incluant ces réponses, l'analyse aura davantage de validité. De plus, les réponses « je ne sais pas » et « je préfère ne pas répondre » sont codées de manière à prendre la position centriste. Ce procédé permet de conserver 281 réponses pour un total de 2032 réponses. 11 catégories allant de 0 à 1 ont été créées pour cette variable. Ainsi, un score de « 4 » sur l'échelle de 0 à 10 équivaut à « 0,40 » une fois recodé et standardisé. Il en va de même pour les autres données. Cette manière de coder permet d'obtenir un score individuel pour chacune de 11 positions idéologiques. En somme, cette question est la plus pertinente pour opérationnaliser le clivage gauche-droite parce qu'elle laisse la liberté aux personnes de s'autopositionner, et que le taux de réponse est élevé.

Pour évaluer le conservatisme moral de la population québécoise, l'énoncé suivant est utilisé : « Il y aurait beaucoup moins de problèmes au Québec si on accordait plus d'importance aux valeurs familiales traditionnelles ». Cette question permet d'évaluer l'attitude des Québécoises et des Québécois par rapport aux valeurs familiales. Ces valeurs s'inscrivent dans la lignée du conservatisme moral, car la préservation des valeurs familiales traditionnelles implique une certaine anxiété quant à son statut (Smith et Tatalovich 2003). De plus, elle met en opposition un positionnement conservateur à un positionnement libéral ou progressiste. Cette question implique des valeurs qui suscitent un débat moral et éthique bien plus qu'économique. Les choix de réponses sont ordinaux allant de « tout à fait d'accord », « plutôt d'accord », « plutôt en désaccord » et « tout à fait en désaccord ». Le codage de cette variable est standardisé. Les répondants et les répondantes qui sont tout à fait d'accord avec l'énoncé de la question obtiennent la valeur de « 1 », et ceux et celles qui sont tout à fait en désaccord prennent le score de « 0 ». Les autres réponses s'étendent entre ces deux valeurs. Le nombre de réponses est de 2032 et le nombre de non-réponses est de 69. Cette question est donc idéale pour cette recherche.

Enfin, la variable qui mesure la gestion de la diversité est opérationnalisée à l'aide de l'énoncé suivant : « Il y a trop d'immigrants au Québec ». Ici, les répondants et les répondantes ont les mêmes choix de réponse qu'à l'énoncé précédent. Cette variable est codée de la même manière

que celle pour le conservatisme moral. Une personne considérant que la diversité au Québec est très mal gérée obtiendra le score de « 1 ». Cette question soulève également un conflit de valeur entre les individus d'une société qui s'apparente au clivage conservateur-progressiste. L'intégration de cette dimension dans le modèle vient approfondir l'analyse des déterminants idéologiques sur le vote. De plus, il s'agit d'une variable qui a été rarement mesurée dans les précédentes études électorales. Elle constitue donc une source potentielle d'information inédite sur le comportement électoral des Québécois et des Québécoises.

Ainsi, ce modèle explicatif du vote est construit avec deux blocs de variables indépendantes. Le bloc sociodémographique est constitué de l'âge, la langue, le lieu de résidence, le genre, l'éducation et le revenu. Ces facteurs explicatifs agissent comme des variables de contrôle pour mieux isoler la relation entre l'idéologie et le vote. En plus, ils permettent d'obtenir des résultats précis en fonction de différents critères. Le bloc idéologique regroupe le clivage fédéraliste-souverainiste, le clivage gauche-droite, le conservatisme moral et la gestion de la diversité. Toutes sont des variables d'intérêt à l'exception du clivage fédéraliste-souverainiste. Celle-ci agit aussi comme variable de contrôle étant donné l'importance de ce déterminant en politique québécoise. Ces deux blocs de variables sont introduits simultanément dans le modèle et non en fonction de blocs récursifs. Les variables de court terme ne sont pas incluses, car elles ne cadrent pas avec l'objectif de cette recherche. Ce choix méthodologique s'explique par la question de recherche ainsi que par le contexte politique québécois. Enfin, une fois les variables opérationnalisées et les résultats obtenus, il sera possible d'effectuer la comparaison avec l'étude de Nadeau et Bélanger sur l'élection de 2012.

Résultats

Une fois les régressions logistiques binomiales effectuées, des coefficients de régressions pour chacune des variables indépendantes du modèle sont obtenus. Les résultats se retrouvent dans le tableau A3 également situé en annexe. Dans ce dernier, les coefficients indiquent le sens de la relation entre les variables indépendantes et le vote. Le degré de signification statistique, obtenu à l'aide de tests bilatéraux, est illustré avec des astérisques. Comme ces coefficients ne fournissent pas d'autre information, des changements de probabilité ont été insérés entre parenthèses sous ceux-ci. Les changements de probabilité fournissent de l'information sur l'augmentation ou la diminution des probabilités de voter pour un parti lorsqu'une variable passe de sa catégorie minimale à sa catégorie maximale (Bélanger et Nadeau 2009, 70). Le tableau A4 sur l'élection de 2012 possède les mêmes caractéristiques en termes de présentation des résultats. Il servira d'étalon de comparaison avec les résultats de 2018. Celui-ci se trouve aussi en annexe.

A3. Analyse de régression logistique du vote à l'élection québécoise de 2018

	Partis politiques			
	PLQ	**CAQ**	**PQ**	**QS**
Âge	1,47** (0,15)	0,18 (0,033)	1,31** (0,16)	-3,06** (-0.32)
Femmes	0,16 (0,017)	0,38** (0,068)	-0,27 (-0,033)	-0,42* (-0,043)
Éducation	0,30 (0,031)	-0,53 (-0,097)	0,35 (0,043)	0,31 (0,033)
Revenu	0,39 (0,041)	-0,11 (-0,02)	0,79** (0,097)	-0,8** (-0,091)
Région 450	-0,84** (-0,088)	0,68** (0,12)	0,26 (0,032)	-0,24 (-0,025)
Québec	-1,15** (-0,12)	0,75** (0.13)	-0,056 (-0,007)	0,21 (0,022)
Reste du Québec	-0,64** (-0,067)	0,55* (0,081)	0,44* (0,054)	-0,21 (-0,22)
Francophones	-2,31** (-0,24)	1,65** (0,29)	1,56** (0,19)	1,67** (0,17)
Fédéralisme	2,81** (0,29)	1,12** (0,21)	-2,52** (-0,31)	-0,49** (-0,051)
Gauche/droite	1,72** (0,18)	1,81** (0,33)	-0,95* (-0,12)	-3,26** (-0,34)
Conservatisme moral	0,11 (0,012)	0,50* (0,091)	0,28 (0,034)	-0,89** (-0,092)
Immigration	-1,55** (-0,16)	1,68** (0,31)	0,13 (0,016)	-1,28** (-0,13)
Constante	-2,57	-5,03	-2,84	1,57
N	1340	1340	1340	1340
Pseudo-R^2 (Nagelkerke)	0,40	0,18	0,28	0,24
**p ≤ 0,01 ; *p ≤ 0,05 (test bilatéral)				

Déterminants sociodémographiques

En examinant les coefficients associés à la variable âge, il est possible de constater qu'elle a joué un rôle important pour trois des quatre partis politiques lors de l'élection de 2018. En effet, l'âge a été un déterminant significatif pour le PLQ, le PQ et QS. En ce qui concerne les deux partis traditionnels du Québec, le sens du coefficient indique que leur clientèle partisane respective est, toutes choses étant égales par ailleurs, relativement plus âgée. Pour QS, le sens du coefficient démontre que les personnes ayant voté par ce parti sont généralement plus jeunes. Ces résultats ne sont pas surprenants. Les électeurs et les électrices plus âgés ont davantage de chance d'appuyer un des deux partis traditionnels, alors que les jeunes sont plus enclins à voter pour un parti qui incarne des idéaux comme l'environnement et la gratuité scolaire (Québec solidaire 2018).

La variable genre n'a pas autant contribué à expliquer le vote que l'âge. Toutefois, deux observations ressortent. En 2018, les femmes ont, toutes choses étant égales par ailleurs, choisi la CAQ plutôt que les autres partis. QS se trouve dans la situation inverse. Il y a plus de chance que des hommes aient voté pour ce parti que des femmes lors de la dernière élection provinciale.

De son côté, le niveau d'éducation ne semble pas avoir joué un rôle significatif durant l'élection. Cette variable ne permet pas d'expliquer le comportement électoral des Québécois et des Québécoises en 2018. Cela peut paraitre surprenant étant donné l'importance de cette variable pour QS lors des précédentes joutes politiques (Bélanger et al. 2018 ; Nadeau et Bélanger 2013).

Pour ce qui est du revenu, cette variable a été un déterminant du vote significatif pour le PQ et pour QS. Le sens du coefficient pour le Parti québécois indique que les électeurs et les électrices de ce parti ont, toutes choses étant égales par ailleurs, plus de chance d'avoir un revenu élevé que ceux et celles ayant voté pour un autre parti. La clientèle électorale de QS est, quant à elle, dans une situation financière plus précaire que celle du PQ étant donné le sens négatif du coefficient. Une certaine cohérence ressort au sein de l'électorat du PQ. En effet, un électorat plus âgé a plus de probabilités d'avoir un revenu supérieur à celui d'un électorat plus jeune. En ce sens, la situation de QS est la même que celle du PQ, mais inversement. Sa clientèle est plus jeune, donc elle occupe possiblement des emplois où le salaire est moins élevé.

En ce qui concerne la variable résidence, un bref rappel s'impose. Celle-ci a été divisée en trois catégories dichotomiques (Région du 450[25], Québec et le reste du Québec) avec Montréal comme catégorie de référence. Sachant cela, il est possible de constater que la CAQ a pu bénéficier du soutien des électeurs et des électrices de ces trois régions. Ainsi, toutes choses

[25] La région du 450 recouvre les régions en périphérie de Montréal : Laval, la Rive-Nord et la Rive-Sud de Montréal, Lanaudière, la Montérégie et les Basses-Laurentides.

étant égales par ailleurs, la clientèle électorale de la Coalition avenir Québec se situe partout au Québec sauf à Montréal. Ce constat est tout à fait l'inverse pour le PLQ. Comme tous les coefficients sont significatifs et négatifs, il est possible de déduire que l'électorat de ce parti habite principalement à Montréal. Les coefficients permettent également de démontrer que, lors de l'élection de 2018, le PQ a reçu des appuis des citoyens et des citoyennes se situant dans le reste du Québec. Les coefficients de cette variable ne sont pas significatifs pour QS.

Enfin, le dernier déterminant sociodémographique, la langue, fut une variable significative pour les quatre partis politiques durant la dernière élection. À l'exception du PLQ, les coefficients de chacun des partis sont positifs. Cela indique que, toutes choses étant égales par ailleurs, les électeurs et les électrices de la CAQ, du PQ et de QS ont comme langue maternelle le français. Dès lors, la clientèle électorale du PLQ est davantage composée de personnes qui ont une autre langue que le français comme langue maternelle.

Les déterminants sociodémographiques permettent de poser un regard sur la composition de l'électorat de chacun des partis politiques. Toutefois, ces variables agissent comme contrôle. Elles ne fournissent pas d'information sur l'hypothèse et la question de recherche. C'est pourquoi une attention particulière est accordée aux déterminants idéologiques.

Déterminants idéologiques

La variable qui mesure le clivage entre les souverainistes et les fédéralistes, et qui agit aussi comme contrôle, est significative pour les quatre partis politiques. Une tendance est constatable. Les partis qui défendent ouvertement l'indépendance du Québec ont des coefficients négatifs. Dès lors, les électeurs et les électrices qui défendent le projet de souveraineté ont, toutes choses étant égales par ailleurs, appuyé le PQ ou QS durant l'élection de 2018. Les citoyens et les citoyennes qui préfèrent que le Québec conserve son statut de province à l'intérieur du Canada ont voté pour la CAQ ou pour le PLQ, deux partis qui défendent cette idée.

Le clivage gauche-droite constitue également une variable significative pour les quatre partis étudiés. Les coefficients associés au PLQ et à la CAQ sont positifs. Le sens de la relation entre le vote et cette variable indique que la clientèle partisane de ces deux partis se situe, toutes choses étant égales par ailleurs, à droite sur l'échiquier politique. Quant aux électeurs et aux électrices du PQ et de QS, ils et elles ont plus de chance d'être à gauche sur l'axe unidimensionnel. Cela se traduit par des coefficients négatifs.

Le conservatisme moral ne possède pas une aussi grosse incidence sur le comportement électoral que les deux variables idéologiques précédentes. Cependant, les coefficients sont significatifs pour la CAQ et QS, mais varient en sens inverse. L'électorat de la CAQ est, toutes choses étant égales par ailleurs, plus conservateur sur les enjeux moraux que les Québécois et les Québécoises ayant appuyé QS lors de la dernière élection.

Pour ce qui est de la dernière variable idéologique, la gestion de la diversité, elle est significative pour trois des quatre partis politiques. L'immigration a constitué un déterminant du vote pour les électeurs et les électrices de la CAQ, du PLQ et de QS. D'après le sens des coefficients, la clientèle du PLQ et de QS ne considère pas que l'immigration constitue un problème au Québec. Le coefficient positif pour la CAQ signifie que, toutes choses étant égales par ailleurs, la gestion de la diversité n'est pas adéquatement encadrée dans la province. De ce fait, les électeurs et les électrices, qui considèrent qu'il y a trop d'immigrants au Québec, auraient appuyé la Coalition avenir Québec en 2018.

En somme, les résultats obtenus par régression logistique binomiale semblent corroborer la littérature au sujet des déterminants du vote au Québec (Bélanger et Nadeau 2009 ; Nadeau et Bélanger 2013 ; Bélanger et al. 2018). La clientèle électorale du PQ et du PLQ est significativement plus âgée que celle de QS. Montréal constitue un bastion pour le PLQ qui obtient la majorité de son appui de cette ville. Il existe toujours un appui indéfectible des non-francophones pour le PLQ. Le PQ et QS, deux partis de centre-gauche, ont reçu le vote des électeurs et des électrices s'identifiant à gauche. La CAQ et le PLQ, de leur côté, ont été appuyés par les personnes s'identifiant à droite. La question nationale demeure un clivage déterminant en politique québécoise ; elle est significative pour tous les partis. Fait étonnant, l'éducation n'a pas été une variable déterminante pour les partis politiques qui bénéficient du vote des électeurs et des électrices éduqués, soit le PQ et QS. Concernant les déterminants idéologiques, ils ont eu un impact non négligeable sur le comportement électoral des Québécois et des Québécoises. Toutefois, les résultats obtenus par régression ne peuvent que partiellement valider l'hypothèse de départ. En ce sens, les changements de probabilité permettent d'approfondir l'interprétation.

Changement de probabilité

Dans le cas du PLQ, il est possible de constater que les probabilités de voter pour ce parti diminuent de 24 % lorsqu'un passage de la catégorie minimale de la variable langue à sa catégorie maximale est réalisé. En d'autres termes, le fait d'être francophone diminue de 24 % les probabilités de voter pour le Parti libéral du Québec. Dans le même ordre d'idées, les chances de voter pour ce parti augmentent de 29 points de pourcentage si les électeurs et les électrices sont en faveur du fédéralisme. En ce qui concerne les déterminants idéologiques d'intérêt, il est possible de constater que les probabilités de voter pour le PLQ augmentent de 18 % lorsqu'un saut est fait de 0 à 10 sur l'échelle gauche-droite. Les personnes à droite sur l'échiquier politique votent donc plus pour ce parti. Enfin, une personne hostile à l'encontre des immigrants et qui perçoit le PLQ comme le parti qui les défend le mieux a 16% de chances de ne pas avoir voté pour ce parti.

Pour le Parti québécois, les probabilités d'appuyer ce parti diminuent de 31 points de pourcentage lorsqu'une personne favorise le fédéralisme au souverainisme. Le seul autre

déterminant idéologique significatif pour ce parti est le clivage gauche-droite. Le changement de probabilité indique que les chances de voter pour le PQ diminuent de 12 % quand cette variable passe de sa catégorie minimale à sa valeur maximale. À la lumière de ces informations, il est possible d'affirmer que le PQ est davantage le parti du souverainisme que le parti de la gauche. Toutefois, cela ne signifie pas que ces deux identités soient mutuellement exclusives.

Quant à la Coalition avenir Québec, ce parti mérite son titre de parti des régions. En effet, les probabilités de voter pour la CAQ augmentent respectivement de 12 %, 13 % et 8,1 % pour les électeurs et les électrices qui résident dans la région du 450, à Québec ou dans le reste du Québec. Durant l'élection de 2018, la CAQ possédait des appuis partout sauf à Montréal. Cela se traduit dans l'appui accordé par les francophones à ce parti. Les probabilités de voter pour la CAQ augmentent par 29 points de pourcentage par le fait d'avoir le français comme langue maternelle. Pour ce qui est de la question nationale, le fait d'être fédéraliste augmente les chances de 21 % d'appuyer la CAQ. Le changement de probabilité de la variable gauche-droite indique qu'un passage de l'extrême gauche à l'extrême droite augmente les chances de voter pour la CAQ de 33 %. Tout comme le PLQ, la Coalition avenir Québec attire l'électorat de droite. De plus, les citoyens et les citoyennes tout à fait d'accord avec la préservation des valeurs familiales traditionnelles ont 9,1 % de voter pour la CAQ s'ils et elles perçoivent ce parti comme incarnant cette position. L'électorat de ce parti est, toutes choses étant égales par ailleurs, plus conservateur moralement. Finalement, la gestion de la diversité constitue aussi un déterminant significatif pour expliquer les votes de la CAQ. Le changement de probabilité démontre qu'un saut de la valeur minimale à la valeur maximale de la variable immigration entraine une augmentation de 33 % des probabilités de voter pour ce parti.

Les changements en probabilité permettent également d'éclaircir la signification des déterminants idéologiques du vote chez Québec solidaire. Il est possible de constater que les probabilités d'appuyer ce parti diminuent de 5,1 % pour les souverainistes comparativement aux fédéralistes. Un changement de 0 à 10 sur l'échelle gauche-droite provoque une augmentation de 34 points de pourcentage des chances de voter pour QS. Pour ce qui est de la variable du conservatisme moral, les probabilités d'appuyer QS diminuent de 9,2 % en passant de la catégorie minimale à la catégorie maximale. En fin, le score de -0,13 à la variable immigration indique que les chances d'appuyer ce parti diminuent de 13 % lorsqu'un saut est fait de la valeur minimale à la valeur maximale.

Grâce aux changements de probabilité, il est possible de déduire quelques constats sur les déterminants idéologiques du vote lors l'élection de 2018. Dans un premier temps, le PQ (-0,31) et le PLQ (0,29) constituent toujours les véhicules politiques de choix pour les souverainistes et les fédéralistes. Néanmoins, QS (-0,051) et la CAQ (0,21) représentent aussi des options pertinentes pour l'électorat québécois. De ce fait, il semble que la question nationale demeure une dimension structurante du paysage politique québécois. Dans un deuxième temps, les

électeurs et les électrices s'identifiant à droite ont davantage voté pour le PLQ et la CAQ que pour QS et le PQ. L'électorat de QS est celui qui se situe le plus à gauche (-0,34) tandis que la clientèle électorale de la CAQ est le plus à droite (0,33) sur l'échiquier politique. Le positionnement sur l'axe gauche-droite a donc constitué un déterminant particulièrement significatif pour ces deux partis. Dans un troisième temps, le conservatisme moral n'a pas constitué une variable significative pour le PQ et le PLQ. Cependant, elle s'est avérée pertinente pour la CAQ (0,091) et QS (-0,092). Les électeurs et les électrices de ces partis ont exprimé un avis contraire sur la place des valeurs familiales traditionnelles dans la société québécoise. Il est alors possible d'affirmer que, toutes choses étant égales par ailleurs, l'électorat de QS est progressiste par rapport à conservateur sur les enjeux moraux, et inversement pour la clientèle électorale de la CAQ. Finalement, la gestion de la diversité a permis de séparer les électeurs et les électrices de la CAQ (0,31) de ceux et celles du PLQ (-0,16) et de QS (-0,13). Ces personnes partagent une opinion similaire sur le nombre d'immigrants au Québec. À la lumière de ces informations, il est possible d'affirmer que les déterminants idéologiques ont effectivement eu un impact sur le comportement électoral des Québécois et des Québécoises en 2018. Cela se remarque particulièrement pour la CAQ et QS. Ces deux partis incarnent des positions idéologiques opposées sur le clivage gauche-droite, sur le conservatisme moral, sur la gestion de la diversité et sur la question nationale. Cette opposition idéologique pourrait expliquer la performance électorale de la CAQ et de QS en 2018. Une analyse chronologique s'impose alors pour constater l'évolution de ces déterminants idéologiques.

Comparaison

Afin d'observer les variations des déterminants idéologiques du vote au Québec, l'étude de Bélanger et Nadeau (2013) sur l'élection de 2012 servira d'étalon de comparaison. Les résultats de cette étude se trouvent dans le tableau ci-dessous. La comparaison permettra de vérifier l'hypothèse à savoir si la victoire de la CAQ et la montée de QS en 2018 ont été influencées par les déterminants idéologiques du vote.

A4. Étude électorale 2012[26]

	Partis politiques			
	PLQ	**CAQ**	**PQ**	**QS**
Âge	1,30** (0,41)	0,12 (0,32)	0,23 (0,35)	-1,05 (0,56)
Femmes	0,18 (0,19)	-0,31* (0,15)	0,46** (0,17)	0,24 (0,27)
Scolarité	-0,79 (0,44)	-0,17 (0,34)	-0,87* (0,36)	1,98** (0,65)
Revenu	0,19 (0,37)	1,07** (0,29)	-0,68** (0,32)	-1,34** (0,52)
Pratique religieuse	0,61* (0,30)	-0,43 (0,26)	0,19 (0,28)	-0,34 (0,54)
Francophones	1,34** (0,28)	1,60** (0,29)	0,42 (0,46)	0,51 (0,54)
Montréal	-0,09 (0,24)	-0,36 (0,21)	-0,11 (0,21)	0,80** (0,31)
Régions-ressources	0,32 (0,33)	-0,60* (0,27)	0,33 (0,26)	0,22 (0,45)
Québec/ Chaudière-Appalaches	-1,04** (0,31)	0,85** (0,20)	-0,49* (0,24)	-0,67 (0,54)
Question nationale	-5,08** (0,42)	-1,45** (0,25)	4,68** (0,34)	0,58 (0,54)
Gauche/droite	2,00** (0,51)	1,62** (0,40)	-1,03* (0,44)	-4,47** (0,74)
Conservatisme moral	-0,12 (0,33)	0,56* (0,27)	-0,34 (0,32)	-1,00 (0,67)
Malaise démocratique	-0,88** (0,30)	0,57* (0,23)	-1.03** (0,26)	1,65** (0,44)
N	1152	1152	1152	1152
Pseudo-R^2 (Nagelkerke)	0,55	0,23	0,52	0,26
% correctement prédit	86	76	80	94
**p ≤ 0,01 ; *p ≤ 0,05 (test bilatéral)				

[26] (Nadeau et Bélanger 2013, 316)

En comparant les coefficients de régression des variables idéologiques de 2012 à ceux de 2018, il apparait que le clivage fédéraliste-souverainiste ainsi que le clivage gauche-droite sont tous les deux stables dans le temps. La seule exception, ici, est la variable fédéraliste pour QS. En 2012, elle n'était pas significative tandis qu'elle le devient en 2018. Cette évolution peut s'expliquer par le fait qu'en 2012, QS était encore un jeune parti, et que le PQ, le parti de l'indépendance, ait remporté les élections. Le clivage gauche-droite a joué un rôle tout aussi déterminant en 2012 qu'en 2018. Cette variable a été significative pour les quatre partis. Toutefois, la comparaison des changements de probabilité indique qu'en 2012, le PLQ (0,51) était le parti qui avait le plus de chances de récolter le vote des électeurs et des électrices de droite. La CAQ (0,40) était alors la deuxième option pour la clientèle de droite. De son côté, QS constitue la meilleure option pour l'électorat de gauche en 2012 et en 2018. Québec solidaire semble donc être le parti refuge de la gauche au Québec. En ce qui concerne le conservatisme moral, cette variable n'a pas eu un impact significatif en 2012 excepté pour la CAQ. En 2018, la situation change. Ce déterminant devient significatif pour QS. Il parait donc qu'une évolution est survenue au niveau des enjeux moraux entre l'élection de 2012 et celle de 2018. En somme, la CAQ et QS sont les deux partis, pour qui, cette variable a eu un impact significatif. L'étude électorale de 2012 n'inclut cependant pas la variable sur la gestion de la diversité. Une comparaison est donc impossible.

La mise en parallèle de l'élection de 2012 à celle de 2018 fait émerger quelques constats. D'abord, la question nationale constitue l'enjeu idéologique par excellence au Québec. Cette variable est significative pour presque tous les partis lors des deux élections. Les quatre partis politiques étudiés ont une position sur cet enjeu. Ensuite, le clivage gauche-droite est lui aussi un déterminant significatif pour les deux élections. Il est donc nécessaire de se pencher sur les deux autres déterminants pour examiner l'impact de l'idéologie sur le vote en 2018.

Lors des deux élections étudiées, le conservatisme moral a été une variable significative pour deux partis, la CAQ et QS. De plus, comme il a été démontré lors de l'élection de 2018, ces deux partis possèdent des positions différentes aux yeux de l'électorat. Ainsi, l'évolution de cette variable chez QS et la divergence morale entre les deux partis confirment que ce déterminant a eu une incidence sur le comportement électoral des Québécois et des Québécoises lors de l'élection de 2018. La variable immigration ne peut qu'apporter une réponse partielle au questionnement étant donné qu'il est impossible de constater son évolution dans le temps. Certes, elle fournit tout de même des informations éclairantes. Similairement au conservatisme moral, les clientèles électorales de la CAQ et de QS ont des opinions opposées sur la gestion de la diversité. De plus, l'importance de cette variable pour le PLQ laisse présager que cette dimension idéologique prend racine auprès de l'électorat québécois. Cela s'apparente à la montée du *New politics* plus axé sur l'immigration que sur les conflits économiques. Les partis

auraient donc intérêt à adopter une position à propos de la gestion de la diversité afin de bénéficier de l'appui des électeurs et des électrices.

L'analyse des coefficients de régression, des changements de probabilité et la comparaison avec les résultats de 2012 font ressortir une tendance. La CAQ et QS semblent bénéficier des déterminants idéologiques du vote contrairement au PLQ et au PQ. Ces derniers demeurent toujours les partis du fédéralisme et du souverainisme respectivement. La Coalition avenir Québec, ainsi que Québec solidaire se sont donc démarqués des partis traditionnels en adoptant des positions plus franches sur les questions idéologiques. Cela leur a permis de récolter le vote des électeurs et des électrices qui accordent une plus grande importance aux positionnements idéologiques. Néanmoins, ces positionnements sont jumelés à la question nationale, qui constitue encore le déterminant par excellence de la politique québécoise. Ainsi, en contrôlant pour cette variable et les facteurs sociodémographiques, il apparait que les déterminants idéologiques ont eu une influence sur le comportement électoral en 2018. De plus, la comparaison effectuée à l'aide de l'étude électorale de 2012 semble indiquer que le conservatisme moral ait joué un rôle plus déterminant en 2018. L'impact de la variable immigration, surtout pour QS et la CAQ, et des autres déterminants idéologiques lors de la dernière élection permet, dans la mesure des choses, de valider l'hypothèse de départ. Dès lors, la victoire de la CAQ ainsi que la montée de QS, à la lumière des résultats, semblent avoir été influencées significativement par les déterminants idéologiques du vote lors de l'élection de 2018. Par voie de conséquences, cela aurait nui au PLQ et au PQ. Ces derniers ont vu leur appui diminuer au profit des deux autres partis.

Conclusion

Cette recherche s'est intéressée à la relation qui existe entre l'idéologie et le comportement électoral des citoyennes et des citoyens du Québec. Plus précisément, le but était de comprendre l'influence des variables idéologiques—le clivage gauche-droite, le conservatisme moral et la gestion de la diversité—sur le vote lors l'élection québécoise de 2018. Afin de guider ce questionnement, une hypothèse a été formulée : la victoire de la CAQ et la montée électorale de QS auraient été influencées par des déterminants idéologiques du vote.

Pour y arriver, le modèle de Michigan a été retenu. Grâce à celui-ci, il a été possible d'examiner le comportement électoral des Québécois et des Québécoises à l'aune de différentes variables de long terme. Les caractéristiques sociodémographiques ainsi que l'opinion par rapport à l'indépendance du Québec ont été incluses dans le modèle comme variable de contrôle. Les variables de court terme n'ont pas été retenues, car elles ont été jugées impertinentes pour la réalisation de cette recherche.

Une fois les déterminants sélectionnés, le sondage postélectoral de Bélanger et Nadeau a été mobilisé afin de mesurer ces variables. Elles ont ensuite été codées. L'opérationnalisation a permis de produire une analyse multivariée dans laquelle le vote est fonction des caractéristiques sociodémographiques, le clivage fédéraliste-souverainiste, le clivage gauche-droite, le conservatisme moral et la gestion de la diversité. Cette équation a été reproduite quatre fois pour la CAQ, le PLQ, le PQ et QS. Les quatre équations ont alors permis de réaliser une régression logistique binomiale pour chacun des partis politiques. Des coefficients de régression logistiques pour chacune des variables des quatre équations ont pu être obtenus. Toutefois, comme les coefficients ne fournissent que peu d'informations sur les variables, des changements de probabilité ont été effectués. Ils ont permis de constater l'impact de variable en la faisant varier de sa valeur minimale à sa valeur maximale. De plus, afin d'ajouter de la profondeur à l'analyse des résultats, une comparaison a été faite entre les résultats d'une étude électorale de 2012 et les résultats obtenus dans cette recherche. Cette analyse chronologique permet de constater l'évolution des déterminants idéologique d'une élection à l'autre.

Les résultats de cette recherche confirment quelques constats à propos de la politique québécoise. Premièrement, le PLQ et le PQ ont un électorat, toutes choses étant égales par ailleurs, plus âgé que celui de QS. Deuxièmement, le Parti libéral du Québec a encore bénéficié du vote des électeurs et des électrices non-francophones. Les trois autres partis se sont divisé le vote francophone. Enfin, la question nationale demeure, toujours en 2018, l'enjeu idéologique structurant de la politique au Québec.

En comparant ces résultats à ceux de 2012, il est possible de constater que le clivage gauche-droite est resté relativement stable durant ces deux élections. Le PLQ et la CAQ sont les partis de la droite alors que le PQ et QS sont les formations politiques de la gauche. Le conservatisme moral n'a pas joué un rôle aussi déterminant en 2012 qu'en 2018. Seule la clientèle électorale de la CAQ accordait de l'importance à cet enjeu en 2012. Lors de la dernière élection, les électeurs et les électrices de QS ont joint la CAQ à ce titre. Cependant, il apparait que ces deux partis incarnent des positions opposées au sujet des questions morales. Cela se déduit par le signe de chacun des coefficients de régression de cette variable. La gestion de la diversité fut aussi un enjeu qui opposa l'électorat de la CAQ à celui de QS lors de l'élection de 2018. Les électeurs et les électrices du PLQ ont également été influencés par cette variable.

À la lumière des résultats et de la comparaison, il semble que les déterminants idéologiques aient eu une influence sur le comportement électoral des Québécois et de Québécoises lors de la dernière élection. L'évolution du conservatisme moral de 2012 à 2018, en plus de l'influence de l'immigration durant l'élection de 2018, sont des constats qui appuient cette affirmation. En ce qui concerne l'hypothèse, les résultats laissent paraitre que les déterminants idéologiques ont en effet eu un plus gros impact pour QS et la CAQ. Cela s'explique, selon moi, par la divergence de positions que ces deux partis occupent tant sur l'axe gauche-droite que sur les questions

morales et sur la gestion de la diversité. Le PLQ et le PQ n'ont pas su se positionner adéquatement sur ces enjeux ce qui a permis à la CAQ de gagner l'élection et à QS de connaitre une croissance importante de sa députation.

Toutefois, certaines limitations atténuent la portée de cette recherche. Ainsi, il est important de spécifier que le sondage a été réalisé après l'élection de 2018. En ce sens, il faut faire preuve de prudence dans l'interprétation des résultats. Néanmoins, la méthode d'échantillonnage et la pondération garantissent une certaine certitude à propos de la représentativité au sein de l'échantillonnage. Ensuite, l'étude électorale utilisée à des fins de comparaison n'a pas été réalisée avec la même méthodologie que la présente recherche. De plus, ce ne sont pas toutes les mêmes variables qui ont été employées pour analyser le comportement électoral des Québécois et des Québécoises. Dans cette perspective, les résultats de cette étude ne constituent pas une suite cohérente avec l'étude de 2012. La réalisation d'une étude longitudinale qui emploie la même méthodologie et les mêmes variables permettrait de résoudre ce problème. Enfin, l'idéologie est un concept complexe, qui englobe une pluralité d'éléments et de nuances. Il est donc possible que certains déterminants idéologiques aient été omis par erreur dans cette recherche. L'emploi d'une méthode mixte qui joint l'approche spatiale et non spatiale pourrait être envisagé pour réaliser une étude exhaustive de l'idéologie.

Bien que ces résultats doivent être interprétés avec précaution, ils fournissent des pistes de réponses intéressantes sur le rôle des déterminants idéologiques par rapport au comportement électoral des Québécois et des Québécoises. Cette recherche pose une première pierre dans l'étude du réalignement des préférences électorales au Québec. Elle permet également de rendre compte des éléments pouvant expliquer la fin du bipartisme qui a caractérisé le paysage politique pendant plus de 40 ans. Ainsi, cette recherche offre des pistes de réponses modestes, mais rigoureuses sur l'importance de l'idéologie lors de l'élection québécoise de 2018 et des prochaines. Elle pave la voie à de futures études comparatives sur l'état du clivage fédéraliste-souverainiste et son rôle dans le comportement électoral au Québec.

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Annexes

A1. Description des variables et de la codification

Variables	Codification
Variables dépendantes	
Vote pour le PLQ	0. Autrement 1. PLQ
Vote pour le PQ	0. Autrement 1. PQ
Vote pour la CAQ	0. Autrement 1. CAQ
Vote pour QS	0. Autrement 1. QS
Variables indépendantes	
Âge	Scores standardisés (0 à 1)
Langue	0. Autrement 1. Langue française
Région du 450	0. Autrement 1. Région du 450
Québec	0. Autrement 1. Québec
Reste du Québec	0. Autrement 1. Reste du Québec
Genre	0. Homme 1. Femme
Éducation	Scores standardisés (0 à 1)
Revenu	Scores standardisés (0 à 1)
Question nationale	0. Souverainisme 1. Fédéralisme
Gauche/droite	Scores standardisés (0 à 1)

A2. Questions de sondage sélectionnées pour l'opérationnalisation

Vote

« Pour quel parti avez-vous voté ? » :

Parti libéral du Québec, Parti québécois, Coalition avenir Québec, Québec solidaire, un autre parti, j'ai annulé mon vote et je préfère ne pas répondre.

Âge

« En quelle année êtes-vous né(e) ? » :

Entrez l'année et le mois de naissance ou je préfère ne pas répondre.

Langue

« Quelle est la langue principale que vous avez apprise en premier lieu à la maison dans votre enfance et que vous comprenez toujours ? » :

Français, anglais, autre, je ne sais pas et je préfère ne pas répondre.

Résidence

« Quel est votre code postal ? » :

Entrez le code, je ne sais pas ou je préfère ne pas répondre.

Genre

« Quel est votre sexe ? » :

Masculin ou féminin.

Éducation

« À quel niveau se situe la dernière année de scolarité que vous avez complétée ? » :

Aucune scolarité, cours primaire (pas fini), cours primaire (complété), secondaire 1, secondaire, secondaire 3, secondaire 4, secondaire 5 (Diplôme d'Études Secondaires), secondaire 5 (Diplôme d'Études Professionnelles), CÉGEP (pas fini), CÉGEP (avec le Diplôme d'Études Collégiales), CÉGEP (Programme technique), université non complétée, baccalauréat, maîtrise ou doctorat et je préfère ne pas répondre

Revenu

« Parmi les catégories suivantes, laquelle reflète le mieux le revenu total avant impôt de tous les membres de votre foyer pour l'année 2017 ? Ceci inclut les revenus de toutes les sources telles que l'épargne, les pensions, les loyers, en plus des salaires. Était-ce » :

Moins de 8 000 $; 8 000 $—15 999 $; 16 000 $—23 999 $; 24 000 $—39 999 $; 40 000 $—55 999 $; 6 000 $—71 999 $; 72 000 $—87 999 $; 88 000 $—103 999 $; 104 000 $ ou plus ; je préfère ne pas répondre.

Gauche/droite

« [En politique, les gens parlent de la "gauche" et de la "droite". Sur une échelle allant de 0 à 10, où 0 est le plus à gauche et 10 est le plus à droite], où vous placeriez-vous, de manière générale ? »

Conservatisme moral

« [Veuillez indiquer si vous êtes tout à fait d'accord, plutôt d'accord, plutôt en désaccord, ou tout à fait en désaccord avec les énoncés suivants] : "Il y aurait beaucoup moins de problèmes au Québec si on accordait plus d'importance aux valeurs familiales traditionnelles." »

Immigration

« [Veuillez indiquer si vous êtes tout à fait d'accord, plutôt d'accord, plutôt en désaccord, ou tout à fait en désaccord avec les énoncés suivants] : "Il y a trop d'immigrants au Québec." »

Souveraineté

« Si un référendum sur l'indépendance avait lieu aujourd'hui vous demandant si vous voulez que le Québec devienne un pays indépendant, voteriez-vous OUI ou voteriez-vous NON ? »

A3. Analyse de régression logistique du vote à l'élection québécoise de 2018

	Partis politiques			
	PLQ	**CAQ**	**PQ**	**QS**
Âge	1,47** (0,15)	0,18 (0,033)	1,31** (0,16)	-3,06** (-0.32)
Femmes	0,16 (0,017)	0,38** (0,068)	-0,27 (-0,033)	-0,42* (-0,043)
Éducation	0,30 (0,031)	-0,53 (-0,097)	0,35 (0,043)	0,31 (0,033)
Revenu	0,39 (0,041)	-0,11 (-0,02)	0,79** (0,097)	-0,8** (-0,091)
Région 450	-0,84** (-0,088)	0,68** (0,12)	0,26 (0,032)	-0,24 (-0,025)
Québec	-1,15** (-0,12)	0,75** (0.13)	-0,056 (-0,007)	0,21 (0,022)
Reste du Québec	-0,64** (-0,067)	0,55* (0,081)	0,44* (0,054)	-0,21 (-0,22)
Francophones	-2,31** (-0,24)	1,65** (0,29)	1,56** (0,19)	1,67** (0,17)
Fédéralisme	2,81** (0,29)	1,12** (0,21)	-2,52** (-0,31)	-0,49** (-0,051)
Gauche/droite	1,72** (0,18)	1,81** (0,33)	-0,95* (-0,12)	-3,26** (-0,34)
Conservatisme moral	0,11 (0,012)	0,50* (0,091)	0,28 (0,034)	-0,89** (-0,092)
Immigration	-1,55** (-0,16)	1,68** (0,31)	0,13 (0,016)	-1,28** (-0,13)
Constante	-2,57	-5,03	-2,84	1,57
N	1340	1340	1340	1340
Pseudo-R^2 (Nagelkerke)	0,40	0,18	0,28	0,24
**p ≤ 0,01 ; *p ≤ 0,05 (test bilatéral)				

A4. Étude électorale 2012

	Partis politiques			
	PLQ	**CAQ**	**PQ**	**QS**
Âge	1,30** (0,41)	0,12 (0,32)	0,23 (0,35)	-1,05 (0,56)
Femmes	0,18 (0,19)	-0,31* (0,15)	0,46** (0,17)	0,24 (0,27)
Scolarité	-0,79 (0,44)	-0,17 (0,34)	-0,87* (0,36)	1,98** (0,65)
Revenu	0,19 (0,37)	1,07** (0,29)	-0,68** (0,32)	-1,34** (0,52)
Pratique religieuse	0,61* (0,30)	-0,43 (0,26)	0,19 (0,28)	-0,34 (0,54)
Francophones	1,34** (0,28)	1,60** (0,29)	0,42 (0,46)	0,51 (0,54)
Montréal	-0,09 (0,24)	-0,36 (0,21)	-0,11 (0,21)	0,80** (0,31)
Régions-ressources	0,32 (0,33)	-0,60* (0,27)	0,33 (0,26)	0,22 (0,45)
Québec/ Chaudière-Appalaches	-1,04** (0,31)	0,85** (0,20)	-0,49* (0,24)	-0,67 (0,54)
Question nationale	-5,08** (0,42)	-1,45** (0,25)	4,68** (0,34)	0,58 (0,54)
Gauche/droite	2,00** (0,51)	1,62** (0,40)	-1,03* (0,44)	-4,47** (0,74)
Conservatisme moral	-0,12 (0,33)	0,56* (0,27)	-0,34 (0,32)	-1,00 (0,67)
Malaise démocratique	-0,88** (0,30)	0,57* (0,23)	-1.03** (0,26)	1,65** (0,44)
N	1152	1152	1152	1152
Pseudo-R^2 (Nagelkerke)	0,55	0,23	0,52	0,26
% correctement prédit	86	76	80	94

**p ≤ 0,01 ; *p ≤ 0,05 (test bilatéral)

Political Thought / La pensée politique

Why Should I Care? Reasons Internalism & Moral Realism: A Reply to Shafer-Landau

Bianca Verjee

Keywords: Reasons internalism, reasons externalism, moral realism, ex post validation, motivation, rational deliberation

Mots-clés: Internalisme des raisons, externalisme des raisons, réalisme moral, validation ex post, motivation, réflexion rationnelle

According to reasons internalism, an agent has a normative reason to act if and only if there is something in the agent's subjective motivational set (their desires, preferences, interests, etc.), or its rational extension, that will be served by so acting. However, for the reasons externalist, some reasons apply to everyone regardless of their particular commitments. Russ Shafer-Landau (2003/2007) is a proponent of moral realism, the view that some moral judgements are objectively true. Reasons internalism serves as a premise in an argument against moral realism. In an attempt to defend moral realism against this argument, Shafer-Landau offers two anti-internalist arguments. This paper considers and rejects both arguments. His first anti-internalist argument is a counterexample designed to show that the internalist restriction on normative reasons is "illegitimate" (Shafer-Landau, 318). I work through several possible avenues for rejecting this argument. My first two arguments show that Shafer-Landau's example is not a counterexample to internalism, as it can be accommodated under the internalist view. My third argument demonstrates that there cannot be a case like the one Shafer-Landau is attempting to construct. I then briefly address Shafer-Landau's second anti-internalist argument, which attempts to show that our moral practices regarding blame and punishment seem incompatible with reasons internalism. For each of my arguments, I consider and respond to some possible objections, and conclude that Shafer-Landau's arguments are not sufficient to warrant rejecting internalism. Thus, his argument in defence of moral realism is weakened.

Selon l'internalisme des raisons, un.e agent.e a seulement une raison normative d'agir si un élément, dans l'ensemble de ses motivations subjectives (ses désirs, ses préférences, ses intérêts, etc.) ou son extension rationnelle, sera servi par cette action. Cependant, pour l'externaliste des raisons, certaines raisons s'appliquent à tous, quels que soient leurs engagements particuliers. Russ Shafer-Landau (2003/2007) est un partisan du

réalisme moral, l'idée que certains jugements moraux sont objectivement vrais. L'internalisme des raisons sert d'une prémisse à un argument s'opposant au réalisme moral. Dans une tentative de défendre le réalisme moral contre cet argument, Shafer-Landau propose deux arguments anti-internalistes. Le présent article considère et rejette les deux arguments. Son premier argument anti-internaliste est un contre-exemple destiné à montrer que la restriction internaliste sur les raisons normatives est « illégitime » (Shafer-Landau, 318). J'explore plusieurs pistes possibles afin de rejeter cet argument. Mes deux premiers raisonnements démontrent que l'exemple de Shafer-Landau n'est pas un contre-exemple à l'internalisme, car son exemple peut être accepté dans le cadre de la vision internaliste. Mon troisième argument démontre qu'il ne peut y avoir un cas comme ce que Shafer-Landau tente de construire. J'aborde ensuite brièvement le deuxième contre-argument de Shafer-Landau, qui essaie de montrer que nos pratiques morales concernant le blâme et la punition semblent incompatibles avec l'internalisme des raisons. Pour chacun de mes arguments, je considère et réponds à certaines objections possibles, et je conclus que les arguments proposés par Shafer-Landau ne suffisent pas pour justifier le rejet de l'internalisme. Par conséquent, son argument en faveur du réalisme moral est affaibli.

Introduction

When do we have a reason to do something? Do moral requirements give us good reasons to act? There are two sorts of answers to these questions. Some assert that the only reasons we have come from our own commitments—our desires, preferences, goals, interests, etc. This position is known as reasons internalism (hereafter, simply internalism)—you have a normative reason to do something because doing it will help you achieve what matters to you. In particular, internalism is the view according to which an agent has a normative reason to act if and only if there is something in the agent's subjective motivational set (their desires, preferences, interests, etc.), or its rational extension, that will be served by so acting. However, especially when it comes to moral reasons—reasons to do what morality demands of us—it seems that some reasons apply to everyone regardless of their particular commitments. This latter position is known as reasons externalism (hereafter, simply externalism)—sometimes we have a reason to do something regardless of our personal desires, preferences, goals, interests, etc. For the externalist, sometimes an agent has a reason to do something regardless of anything internal to that agent, and thus, a reason claim will not be falsified by the absence of a relevant motive (Williams, 292).

Moral realism is the view that some moral judgements are objectively true. Internalism serves as a premise in an argument against this view. In an effort to defend moral realism,

Shafer-Landau offers two anti-internalist arguments. The goal of this paper is to challenge these two arguments.

I will begin with a description of the anti-realist argument and Shafer-Landau's aim, and discuss the features of internalism. I will then present Shafer-Landau's first anti-internalist argument, provide three counter arguments, and address some objections. Finally, I will present Shafer-Landau's second anti-internalist argument and provide a possible route for objecting to this argument.

Shafer-Landau & moral realism

Russ Shafer-Landau (2003/2007) is a proponent of moral realism. According to Shafer-Landau, moral realism "insists on fixing the content of moral demands in a stance-independent way" (312). Internalism serves as a premise in an anti-realist argument, which Shafer-Landau calls the Desire-Dependence Argument:

1. Necessarily, if S is morally obligated to ϕ at *t*, then S has a good reason to ϕ at *t (Moral Rationalism*);

2. Necessarily, if S has a good reason to ϕ at *t*, then S can be motivated to ϕ at *t* (*Reasons Internalism*);

3. Necessarily, if S can be motivated to ϕ at *t*, then S must, at *t*, either desire to ϕ, or desire to ψ, and believe that by ϕ-ing S will ψ (*Motivational Humeanism*), and;

4. Therefore, necessarily, if S is morally obligated to ϕ at *t*, then S must, at *t*, either desire to ϕ, or desire to ψ, and believe that by ϕ-ing S will ψ.[27]

(Shafer-Landau, 312)

If this argument is sound, then the content of moral obligations crucially depends on the agent's commitments. This is incompatible with moral realism. For Shafer-Landau, the conclusion of the Desire-Dependence Argument must be false, for it "tells us, in effect, that any putative moral requirement that fails, or is believed to fail, to fulfil our desires is too demanding, and so *cannot be* morally obligatory" (312). For Shafer-Landau and many others, this goes against our common sense ideas about morality. Since the Desire-Dependence Argument is valid, moral realists must show that the argument is unsound, by rejecting at least one of the premises. Shafer-Landau states that there is no consensus on which premise to

[27] S stands for some subject (or agent), ϕ and ψ each stand for some action, and *t* stands for some time.

abandon, but attempts to undermine premise 2—reasons internalism. He aims to defend the position that necessarily, there is always good reason to do what morality requires, even if these reasons cannot motivate the agent to whom it applies (Shafer-Landau, 313),

What is internalism?

According to the internalist, the only reasons we have come from our own commitments (our beliefs, desires, long-range projects, and so on) because all reasons must be linked to considerations that are capable of motivating us. Something can be a reason for a person to act only if it presently motivates her, or would motivate her, were she to deliberate soundly from her existing motivations (Shafer-Landau & Cuneo, 283). If this does not happen, the agent has no reason to act. The reasoning behind this view is that "the reasons why an action is right and the reasons why you do it are the same" (Korsgaard, 302). In other words, "[t]he reason that the action is right is both the reason and the motive for doing it" (Korsgaard, 302). As we will see, for Williams, this reason is that the action would serve some consideration in the agent's subjective motivational set. A reason must imply the existence of a motive, because without a motive, the reason cannot be used to explain the agent's action. As Korsgaard states, if a reason does not imply a motive, "we cannot say that the person *P* did the action *A* because of reason *R*; for *R* does not provide *P* with a motive for doing *A*, and *that* is what we need to explain *P*'s doing *A*: a motive" (302). If a reason claim did not imply a motive, someone presented with a reason for action could ask why they should do what they have reason to do. Thus, "unless reasons are motives, they cannot prompt or explain actions" (Korsgaard, 302).

In "Internal and External Reasons," Williams asserts that an agent has a reason to ϕ if and only if there is something in the agent's *subjective motivational set*—their "*S*" (292)—that would be served, or that the agent *believes* would be served, by ϕ-ing. In addition to desires, "*S* can contain such things as dispositions of evaluation, patterns of emotional reaction, personal loyalties, and various projects … embodying [the agent's] commitments" (Williams, 294). It is important to note that not all elements in an agent's *S* will necessarily be egoistic (Williams, 294); one can, for instance, have a desire to help homeless individuals. A reason statement must be relative to an agent's *S* because, in order to explain their action, the reason we cite must be capable of having motivated them to so act (Williams, 293).

An agent can add to their *S* through rational deliberation. For instance, rational deliberation might lead to the conclusion that one has reason to ϕ because ϕ-ing would be the most convenient, pleasant, or economical way to satisfy some element in one's *S*.[28] This means one's reason to ϕ can come from their existing motivations, or from additional motivations they

[28] While this is an especially clear example of practical reasoning leading to conclusions about what one has reason to do, Williams notes that there are "much wider possibilities for deliberation" (294).

would have after rational deliberation. Among other things, deliberation can involve imagination and persuasion from others. As a result of these processes one can come to see that she has a reason to do something, which she had not realized she had reason to do. The deliberative process can also subtract elements from *S*. For instance, it can lead an agent to discover that some belief is false, and thus come to realize that she actually has no reason to do something she thought she had reason to do. Since the deliberative process can add new actions for which we have internal reasons, add new internal reasons for actions, and subtract elements from our *S*, we should not think of *S* as static. (Williams, 294)

We can now see why internalism serves as a premise against moral realism. Internalism is incompatible with moral realism because moral realism requires that at least some moral facts or values be objective. That is, some moral facts or values are reason-providing for every individual, regardless of what they care about. However, if internalism is true, there are no such reasons; whether a moral fact or value provides an individual with a reason to ϕ depends on whether there is something in the individual's *S* that would be served by ϕ-ing.

It is important to note that internalism requires that the member (or members) of *S* that would be served by ϕ-ing "succeed in motivating us [only] insofar as we are rational" (Korsgaard, 305). In other words, R is a reason for agent A to ϕ only if A would be motivated to ϕ if A were rational. Thus, internalist reason statements are meant to apply to agents only insofar as they are rational. Williams seems to agree, stating that "the internal reasons conception is concerned with the agent's rationality" (293). Since agents are not always rational, they will not always be aware of the reasons they have. This also means they may not currently have elements of *S* that they would have if they were to rationally deliberate.

Korsgaard states that "to act irrationally [...is...] to fail to be motivationally responsive to the rational considerations available to us" (304). This failure could, for instance, be the result of "some physical or psychological condition" (Korsgaard, 304). However, the agent still has reason to act, "for all that is necessary for the reason claim to be internal is that we can say that, if a person did know and *if nothing were interfering with her rationality*, she would respond accordingly" (Korsgaard, 304).

Shafer-Landau's first argument against internalism

Shafer-Landau's first anti-internalist argument is a counterexample to internalism, intended to show that this internalist restriction on normative reasons to only those linked to the agent's *S* or its rational extension, is illegitimate. He asks the reader to consider someone who expects the worst due to her pessimism, negative self-image, shyness, and reluctance to take risks, and to suppose that she would in fact gain pleasure "were she to emerge from her shell" (Shafer-Landau, 318). In fact, "the value of [these] experiences would have been endorsed

by the agent herself, after she has had the benefit of those experiences" (Shafer-Landau, 319). "It is this *ex post* validation that makes it true to say of her, in her earlier phase, that she had a reason to extend herself" (Shafer-Landau, 318). However, because of her attitude and personality, she does not see that she would benefit from these actions, despite her having good reason to do so. "[N]othing in her existing motivations [her *S*] would lead her to take [these] steps" (Shafer-Landau, 318). Since internal reasons statements are "falsified by the absence of some appropriate element from *S*" (Williams, 293), internalists are committed to saying that she has no reason to engage in these beneficial activities, which seems quite counter-intuitive. This suggests that internalism is the wrong view.

For the sake of simplicity, I will call this agent Clara and will suppose that the action she would gain pleasure from is going to a party.

The first avenue to rejecting this argument I will explore, is to show that Shafer-Landau's example is not a counterexample to internalism because his example suggests that there is at least one element in the agent's *S* that is preventing her from seeing that she has reason to go to the party, and that element is grounded in a false belief.

Either Clara has nothing in her *S* that would motivate her to go to the party, or, there is something in her *S* that motivates her *not* to go to the party. Shafer-Landau is not completely clear on which of these situations his example is supposed to emulate. However, he describes Clara as having an aversion to the idea of going to the party, which suggests the latter of the two possible interpretations.

According to Shafer-Landau, Clara anticipates no pleasure from going to the party, and the dread she experiences when imagining it, prevents her from taking any steps towards going to the party (318). This, combined with the fact that going to the party would in fact bring her pleasure, suggests that something in her *S* is preventing her from seeing that she would benefit. Since she would in fact benefit, that element in her *S* must be grounded in a false belief. For instance, she may believe that in order to go to a party, you have to be very extroverted, confident, and interesting. Since she considers herself to be more of an introvert, is quite shy, and considers herself quite uninteresting, she anticipates embarrassment and awkwardness, and thus has a desire to avoid parties. This desire to avoid parties, which is an element of her *S*, is grounded in false beliefs; she is not uninteresting, and it is not true that one needs to be extroverted and confident in order to go to a party.

However, according to the internalist, elements in *S* that are based on, or grounded in, false beliefs cannot give rise to legitimate internal reasons. Suppose, Considering Williams' gin and tonic example, you desire a gin and tonic. You believe the liquid in front of you is gin, but it is in fact petrol. Do you have reason to mix the liquid in front of you with tonic and drink it (Williams, 293)? Most people's intuition, including my own, is that you do not have reason to mix

the liquid with tonic and drink it. In fact, you have every reason *not* to drink it. The item in your *S* grounded in false belief in this scenario is the desire to drink what is in front of you. You want to drink it because you believe it is gin, but this belief is false. Thus, you *think* you have reason to do something, but in fact, you do not have reason to do it. Likewise, Clara has a desire to avoid parties, but, given that she would actually really enjoy the experience, she must have a false belief which is grounding this desire. The consequence of this is that she thinks she has reason to avoid parties, but in fact, she has no such reason. In other words, she thinks she has no reason to go to the party, when in fact, she does have reason to go to the party.

Williams states that an agent may falsely believe an internal reason statement about himself (293). Based on the above discussion, it seems that Clara falsely believes the following reason statement about herself: that she has reason to avoid going to the party. Williams also states that an agent may not know some true internal reason statement about themselves, and that one reason for this is that the agent may not know some fact such that if they did know it, they would be disposed to ϕ, in virtue of some element of their *S* (293). Based on what was discussed above, it seems that Clara does not know the following true reason statement about herself: that she has reason to go to the party; and that furthermore, upon discovering the fact that her beliefs about the party are false, she would be disposed to go to the party, in virtue of some element in her *S*. Thus, this is not a counterexample to internalism; the reason that she is unable to get from her current state to the conclusion that she has reason to go to the party by rational deliberation is not that there is no such sound deliberative route, but rather that this route is blocked by the element of her *S* that is grounded in a false belief. The internalist can say here that the agent *would* see that she has reason to go to the party were it not for the item in her *S* that is grounded in a false belief.

One might object here by arguing that not all false predictions about whether one would enjoy an experience, are grounded in false beliefs. However, I find it hard to conceive of a case in which one predicts that an experience will be unpleasant, finds that it is actually enjoyable upon trying it, but where all their beliefs relevant to that prediction are true. This is because, for a rational person, their predictions are grounded in their beliefs. Consider an individual who is averse to some experience and predicts no pleasure from it, but, upon trying it out, learns that they actually like the experience. What did the individual learn if not that some of her beliefs relevant to what the experience will be like, were wrong? In such a case, it seems that, by trying the experience, the individual has learned that their prior outlook was not completely accurate. Since one's prior outlook is presumably comprised of beliefs about the experience in question, there must have been some such beliefs that turned out to be false. Therefore, the agent's aversion when imagining what the recommended experience will be like, combined with the fact that she would actually enjoy the experience, suggests that there is an element in her *S* grounded in false belief, that is preventing her from seeing that she has reason to go to the party.

However, there is one problem with this avenue to rejecting Shafer-Landau's argument. Shafer-Landau cannot have meant his example to be interpreted in this way. He must have intended that there be no element in her *S* from which a sound deliberative route could lead to the conclusion that she has reason to go to the party, rather than that there be an element of her *S* blocking that route, as this is what would be necessary to produce a counterexample to internalism. Thus, in order to be charitable, we must assume he meant the former—that there is nothing in Clara's *S* that would lead her to conclude that she has reason to go to the party.

The second avenue to rejecting Shafer-Landau's counterexample I will explore is to show that, though it is possible that such an agent could exist, that agent would not be rational; if she were rational, then she would come to know that she would find pleasure in going to the party, and thus see that she has reason to go to the party. Thus, Shafer-Landau's example can be accommodated under internalism and is therefore not a counterexample to internalism.

Shafer-Landau describes several important features of his example. The first is that Clara has certain attributes, including melancholia, pessimism about future happiness, shyness, and poor self-conception (Shafer-Landau, 318). Here the internalist can argue that these psychological conditions prevent Clara from deliberating rationally. For instance, upon imagining what it would be like to go to the party, Clara might only be imagining the things that could go wrong, due to her pessimism. However, in considering a choice, a rational person considers both the positives and the negatives. Without this interference from her psychological conditions, she would be properly motivated by these reasons.

The second feature of Shafer-Landau's example is that Clara is "clear-headed enough, and can imagine the experiences of mingling, social chat, and light flirtation" (Shafer-Landau, 318). But this does not guarantee that Clara is fully rational, for it is possible to understand the argument theoretically, without understanding the practical implications. According to Korsgaard, "[a] person in whom [the motivational path from ends to means] is, for some cause, blocked or nonfunctioning may not respond to argument, even if this person understands the argument in a theoretical way" (306). Since this possibility is not ruled out by anything in the example, it remains a possible objection to those that would claim the agent is rational. However, it is important to note that this point on its own would not be sufficient to establish that Clara is irrational. For though it is possible that she does not understand the practical implications, the most charitable way of reading Shafer-Landau's claim is that Clara understands both the theoretical argument, and its practical implications.

Third, Clara anticipates no pleasure from going to the party, and the dread experienced when she imagines the experience prevents her from taking any steps towards going to the party (Shafer-Landau, 318). This, combined with the fact that these experiences would in fact bring Clara happiness, gives one reason to think that Clara is not rationally considering the possible and likely outcomes. For, at least one possible outcome of going to the party is a

positive one; a rational agent would be able to see these possible positive outcomes, in addition to the negative ones. There are also likely several things Clara would like about the party; surely a rational agent would be able to see at least some of these.

Fourth, "nothing in her existing motivations would lead her to take [the recommended] steps" (Shafer-Landau, 318). But this claim does not consider the possible rational extensions of Clara's *S*, in which case it may be that she would have an element in *S* that would motivate her to act, were she to rationally deliberate. Furthermore, even if we take Shafer-Landau to be referring to both existing motivations and their rational extensions, it could be that she is unable to see that she has reason to act, due to her present (irrational) state.

Earlier in his paper, Shafer-Landau states that, for internalists, "[t]here can be a sound deliberative route from one's motivations to a reason even if psychological impediments prevent one from ever being able to trace such a route" (313-314). This gives even more support to the possibility that the agent has reason to act, despite her being unable to see this in her current state.

Shafer-Landau takes his example to demonstrate several things. First, "[i]t is true of many … that if they were somehow to 'look beyond' the picture of things they have grown used to, they would find themselves with an outlook, a plan of life, and set of circumstances that they would find more valuable than they could ever have imagined" (Shafer-Landau, 318). However, the phrase 'look beyond' seems to describe thinking more rationally—taking a step back from one's current feelings and looking at things more objectively. Since internalism requires only that the agent be motivated insofar as she is rational, and the above point seems to suggest that she would be so motivated, this provides no issue for internalism.

Second, "realizing the relevant benefits often requires a change of character" (Shafer-Landau, 318). While this seems a large barrier to realizing the benefits in question, the internalist could argue that the only change required is a more rational outlook. Nothing in the agent's core nature need change. In order to see that we have reason to do something, we need not change our goals, personality, commitments, etc. We merely need to consider the possible benefits of what we supposedly have reason to do, from a more rational perspective.

Third, "prior to this change [in character], the prospects of the new life do not appeal, just because they are rationally unrelated to one's present outlook" (Shafer-Landau, 318). However, although the prospects of the new life may be rationally unrelated to one's present outlook, because it is an irrational one, this does not mean they are rationally unrelated to one's present *situation*. Clara's present outlook—her attitude, mood, and perspective— is a pessimistic, and thus, irrational one. However, her situation is that she has certain desires, interests, likes, etc., and doesn't have many friends. One's outlook changes more easily and frequently, while one's situation is more stable. For instance, I may not feel like starting my

paper because I am so frustrated with the class in which the paper is due and am struggling to understand the material. However, I may still have a reason to start my paper (though I do not realize it at the moment) because I desire to do well in the course and need to start as soon as possible so that I have ample time to complete it. In this scenario, my current outlook—my frustration—is preventing me from thinking rationally. However, were I to think more rationally, I would see that I have reason to start my paper now. Likewise, although Clara may not see that she has reason to go to the party, due to her current outlook, she may still benefit from going to the party given her desires, interests, likes, and the fact that she might make some friends. She may simply be unable to see this relation due to their present (irrational) outlook. All that is required is that she would be motivated to act, if she were rational.

Fourth, the recommendations will likely "fall on deaf ears" (Shafer-Landau, 319). This is unproblematic because not being convinced by good reasons is compatible with nevertheless having good reasons, so long as it is true that the agent is not rational. According to Korsgaard, "it will not always be possible to argue someone into rational behaviour" (306). However, this does not mean they have no internal reason to act. It only means they are not rational enough to see it. Since I have already argued for Clara's irrationality, her not being appropriately motivated by the available reasons is not an issue.

From all this, Shafer-Landau concludes that his example describes a situation in which the agent has reason to act, despite there being nothing in her *S* that would motivate such actions, and so internalism must be false. However, having provided internalist objections to each of Shafer-Landau's points, it seems that we have shown that his example can be accommodated by internalism. Clara's failure to see the benefits of acting can be just as easily explained by claiming she is irrational, as by claiming she ought to be motivated by things unrelated to her *S*. If this is true, then Shafer-Landau's argument fails to show the illegitimacy of the internalist restriction on normative reasons.

One might object here by pointing out that my proposed internalist response, and indeed Korsgaard's view of internalism, "falls short of a defense of internalism" (Shafer-Landau, 315) because it only guarantees a "motivational link" (Shafer-Landau, 315) between the agent and their reasons when the agent is practically rational. According to Shafer-Landau, a defence of internalism needs to show that reasons are "capable of motivating us full stop" (315). However, Korsgaard has only shown that "our reasons must be capable of motivating us to the extent that we are practically rational" (Shafer-Landau, 315). Since we are not always practically rational, her view does not amount to a defence of internalism. If Shafer-Landau is right, then my objections lose much of their force.

This objection takes it to be problematic that reasons are only capable of motivating us insofar as we are rational. But how could it be otherwise? I do not think it should be a problem for the internalist that an irrational individual may not be properly motivated by their reasons.

For, to be rational is to respond appropriately to our situation. When we are irrational, our faculty of reasoning is not working as it should be. Thus, the agent "fails to make the rational connection" (Shafer-Landau, 315) between their subjective motivational set and the recommended actions, or succeeds in making the connection, but "fails thereby to be motivated" (Shafer-Landau, 315), possibly owing to "psychological infirmities" (Shafer-Landau, 315).

For someone whose rational faculties are not properly functioning, we cannot say anything of what we should expect them to do. Irrationality is unpredictable—it means the agent is not acting or thinking as they should. For someone who is in such a state, we cannot say anything of how they will think or act. Such agents may respond appropriately to their reasons, but they may not. Thus, the internalist cannot be expected to provide an account of how motivation, thought, and action work in an irrational individual because the fact that they are irrational means that something is just not *working* in the first place.

In fact, that an agent is only motivated by their reasons if they are rational, seems to be a benefit of internalism, for it explains why some individuals do not act on their good reasons. On the internalist view, a rational individual and an irrational individual may both have good reason to ϕ, but it may be that only the rational individual is motivated by this reason. This explains why many people do not act in accordance with their reasons. It seems to me that a theory of moral reasons divorced from the particulars of the agent and current situation will have a more difficult time explaining why some individuals are motivated by their good reasons, while others are not. Thus, the internalist's theory need not explain the agent's behaviour when that agent is irrational. It is sufficient to provide an internalist account of moral reasons that guarantees a "motivational link" (Shafer-Landau, 315) only for those who are rational. Thus, this objection does not present a problem for my argument that Shafer-Landau's example can be accommodated under internalism.

While both these strategies (arguing that there is an element in Clara's *S* grounded in false belief, and showing how each feature of the example can be accommodated under internalism) may respond to the example as it is presented by Shafer-Landau, it does not address what Shafer-Landau likely intended his example to do. In particular, there are two key features that Shafer-Landau likely intended his example to have. The first is that there is no element in Clara's *S* or its rational extension from which to draw the conclusion that she has reason to go to the party. We see evidence of this intention in Shafer-Landau's statement that his example "makes its point only if the appeal does not contain a rational relation to the addressee's existing motivations" (Shafer-Landau, 319). The second is the idea of *ex post* validation; were Clara to go to the party, she would in fact find pleasure and value in it. It is these two key features that produce a counterexample to internalism—a case in which an agent has reason to ϕ, despite there being nothing in her *S* or its rational extension that would

motivate her to do so. I will discuss both of these intended features, and argue that such a case could not exist. I will then consider some objections to my argument.

In my first argument, I argued that there was some element in Clara's *S* that was preventing her from seeing the sound deliberative route from her current position, to the conclusion that she has reason to go to the party. In my second argument, I argued that though an agent such as Clara could exist, she would not be rational. However, the externalist can reply to these claims by pointing out that in Shafer-Landau's example, it is supposed to be true, *ex hypothesi*, that nothing in Clara's *S* or its rational extension would lead her to go to the party. In other words, there is supposed to be no item in Clara's *S* or its rational extension from which there is a sound deliberative route to her being motivated to go to the party. This is the first key feature of the counterexample Shafer-Landau intended; it is supposed to be the case that no amount of rationally accessible information will get Clara to see that she has reason to go to the party, because there is no element in her current *S* or its rational extension from which to reason from in order to arrive at the conclusion that she has reason to go to the party. These are meant to be constraints on the case, and thus, the internalist responses I have provided so far have been unsuccessful.

The second key aspect of Shafer-Landau's intended counterexample is the idea of *ex post* validation. He asks the reader to suppose that, were Clara to "emerge from her shell" (Shafer-Landau, 318), or in our case, attend the party, "she would find new pleasure, even some delights" (Shafer-Landau, 318). He says that she would consider herself much better off than if she had not gone to the party, and would come to endorse the value of the experience from within. "It is this *ex post* validation," says Shafer-Landau, "that makes it true to say of her, in her earlier phase, that she had a reason to [attend the party]" (318). Together, these features create a case in which the agent has reason to do something, even though nothing in her *S* would motivate her to do it.

This seems, at first, to be a plausible scenario. Sometimes you do not know that you will like something until you try it, and thus, you cannot be rationally expected to know that you would like it without trying it. To illustrate this idea, we can consider Frank Jackson's example of Mary the colour scientist. While the example was not intended for this purpose, it can be used to help illustrate the idea that we can learn new things from experience that no amount of information or rational deliberation will help us to discover, and to reveal an important dimension of Shafer-Landau's intended counterexample.

According to Jackson, Mary is an extremely bright scientist who has been forced to learn about the world from a black and white room through a black and white television screen. She specializes in the neurophysiology of vision and has acquired all the physical information there is about colour and what goes on when we see colour. Jackson asks us to consider what will happen when Mary is freed from the black and white room, or is provided with a colour

television screen. He states that "[i]t just seems obvious that she will learn something about the world and our visual experience of it" (Jackson, 130). In other words, Mary will learn from her experience something she never could have learned, no matter how rational she was and how much information she had. Likewise, it may be the case that Clara will learn something about parties that she could never have learned from more information or rational deliberation. Both Mary and Clara gain something new from their experience.

However, there is an important difference between Jackson and Shafer-Landau's examples. While Jackson's example is meant to demonstrate the existence of *qualia* (subjective phenomenal features that accompany experience), Shafer-Landau's example is meant to demonstrate that Clara will enjoy and find value in the experience. For Clara, the point is not merely that, by going to the party, she will know what it feels like to go to a party. Rather, Shafer-Landau's point is that, from these feelings, she will conclude that the experience is enjoyable and valuable to her. Having highlighted a key dimension of Clara's case, my next task will be to illustrate the relevance of Clara drawing a conclusion from her novel experience.

Suppose Clara actually does go to the party, and does in fact find it extremely enjoyable. What explains why she enjoyed it? Surely it must be something about Clara and what she likes and values; presumably, Clara enjoyed the party because it had features which were attractive or valuable to her. Perhaps she liked it because she finds chatting with others fun and interesting, or perhaps she liked getting dressed up. Whatever the explanation, it seems to be the case that any explanation will refer to some feature of the party that corresponds to Clara's characteristics (her values, likes, interests, etc.). In other words, an explanation of why Clara found the experience enjoyable must refer to some element or elements in her *S*. If this is the case, then it seems that it should have been possible for Clara to rationally deliberate from this element, call it S_1, to the conclusion that she would enjoy the party and thus, has reason to attend it (assuming that she is fully rational, and has epistemic access to the elements of her *S*). Now she may not take the time to fully reason this out and rationally deliberate, and thus, may not actually discover S_1, and come to the conclusion that she has reason to go to the party. However, so long as it is possible for her to do so, she can be considered as having an internal reason to go to the party.

In short, I do not doubt that there are experiences out there for which we will never know what it feels like until we try it. What I do doubt is that one could have such an experience, enjoy the experience, *and* be able to explain why it was enjoyable without referring to anything in their *S* or its rational extension. There is a tension between the lack of a relevant element in *S,* and the *ex post* validation, that I cannot reconcile. Thus, I do not think such a case is possible.

One could object here by stating that perhaps the party added a new item to her *S*. Williams does note that an agent's *S* should not be considered as statically given—items can be

both added to and removed from it. So, perhaps nothing in Clara's *current S* would have led to the conclusion that she would enjoy the party, but after the party, a new item is added to her *S*, explaining why she enjoyed it. For instance, perhaps Clara does not know that she likes getting dressed up until she tries it. For the internalist, your reasons depend on where you are now; perhaps Shafer-Landau is trying to exploit this. He does note that one may have reason to change their present outlook (Shafer-Landau, 318). He states that "the goods available only to those who make such changes may be so valuable as to make it true that one has, despite one's present motivations, a reason to make the necessary changes" (Shafer-Landau, 318-319).

Shafer-Landau seems to be saying here that one may come to see the value in some activity if they were to change their outlook, traits, preferences, motivations, or some other element, or elements, in their *S*. While I recognize that people's personality and attributes change over time, I find it hard to conceive of what could by meant by something like: "You would have enjoyed it if you'd tried it" except that, based on the sort of person you are *now*, your characteristics, your mental states, etc., you would have enjoyed the party, had you attended it. When you say to someone: "*You* would enjoy it," you are presumably saying it because you believe it will be valuable to *that person* in particular, which means that there is at least one thing about the person as they are now (their values, personality traits, interests, goals, etc.) that makes you think they would enjoy it. This fact about the person that grounds your belief or assertion that they will enjoy the activity, would be a member of their current *S* (or its rational extension). Thus, it seems it cannot be the case that Clara would enjoy the activity, but nothing in her present situation would lead to that conclusion.

In sum, I have argued that, even when we take a more charitable interpretation of Shafer-Landau's example, considering the counterexample he likely intended to create, it seems that such an example could not exist. Thus, Shafer-Landau's counterexample argument does not succeed in undermining internalism.

Shafer-Landau's second argument against internalism

Up to this point I have only addressed the first of Shafer-Landau's two anti-internalist arguments. I would now like to leave the reader with a consideration that may cast some doubt on his second argument as well.

Shafer-Landau asks us to consider a person who has a strong dislike of others, is completely indifferent to what others think, and is so determined to be cruel, that nothing in his *S* or its rational extension would prevent him from committing the most heinous crimes, and so, it is irrational for him to refrain. Shafer-Landau states that such a scenario is a problem for the internalist because we tend to think that people have reason to refrain from such behaviour, regardless of their personal commitments—of what they care about. However, if

internalism is true, then since there is no rational deliberative route from some element in their *S* to the conclusion that they have reason to avoid committing these heinous crimes, the person in question has no reason to refrain from such crimes. But since blame requires "failure to adhere to good reasons" (Shafer-Landau, 319), and such people have no reasons to avoid these evil deeds, they are morally blameless. Such people also presumably cannot be punished, since punishment is "predicated on blameworthiness" (Shafer-Landau, 319). Thus, if internalism is true, such people cannot be justly blamed or punished for failing to refrain from these actions. Since such people are, in fact, justly blamed and punished, internalism must be false (Shafer-Landau 319).

There are two questions at issue here. The first is whether one can blame an agent for doing something which, on the internalist view, they had no reason to avoid. The second is whether one can rightly punish such a person. I interpret blame as consisting of attitudes toward the agent in question, including our judgements about what they should have done, and what kind of person they are in virtue of not doing what they ought to have done. In contrast, I consider punishment to be the actions we take towards them to deter future crimes, such as limiting their freedom by putting them in jail. I am willing to bite the bullet that we cannot justifiably blame an agent who could not be reasonably expected to have acted otherwise. However, it is possible that we could be justified in punishing such agents. The agents we are considering act because there is nothing in their *S* or its rational extension to motivate them to refrain. So, it seems that what is needed is a reason for them not to perform such actions in the future. Punishment can provide such a reason; it can add to their *S* a desire to avoid punishment. This also means they can be rightly blamed *and* punished for failing to avoid these actions in the future.

This certainly requires an explanation of why such agents ought to have reason to refrain from these actions—an issue that is beyond the purview of this paper. However, it at least leaves open the possibility of a route to objecting to this second of Shafer-Landau's anti-internalist arguments.

Implications

Up The ideas developed in this paper regarding reasons internalism have implications for political science, sociology, anthropology, and psychology. A deeper understanding of reasons internalism can help us to better understand the causes of human behaviour in terms of how individuals respond to their reasons and what motivates them to act. This can help us to better understand and predict human behaviour. For instance, throughout this paper, we have seen that individuals are motivated by items in their subjective motivational set, such as desires, preferences, and interests. As we have seen, what reasons an individual has, and whether they will respond to those reasons, depends on whether they are rational, what

psychological conditions are interfering with their ability to reason, whether they have taken time to rationally deliberate, what facts and information they have taken into account in this deliberation, and whether they have any false beliefs. Considering each of these factors can help us to more accurately determine what a given individual might do.

In addition, my discussion of our moral practices regarding blame and punishment has important implications for law and governance. In particular, my argument highlights the importance of having laws with clearly specified punishments. This is essential because, for those in society who are not otherwise motivated to refrain from undesirable and harmful behaviours, the threat of punishment creates a desire to avoid punishment, which then creates an internal reason to refrain from those harmful behaviours. If citizens are unaware of the punishments for failing to refrain from some harmful behaviour, they may be less inclined to refrain. The government must also ensure that it strongly enforces its laws and is consistent in its dispensing of punishments. For, if some individuals are punished while others are not, citizens who lack other motivations to refrain from crime will have less reason to refrain. Furthermore, the government must ensure that the punishments are severe enough that an individual who is considering whether to commit a crime, will have reasons to refrain that are stronger than their reasons to commit the crime. In other words, their desire to avoid the punishment in question must be able to compete with and trump their motivations for committing the crime.

Conclusion

At the start of this paper, I explained that Shafer-Landau's anti-internalist arguments were a necessary component of his defence of moral realism. However, I have shown that Shafer-Landau's first argument—his counterexample—can, in fact, be accommodated under the internalist view, and even a more charitable interpretation of his example fails, as there cannot be a case like the one he is attempting to construct. I have also cast doubt on Shafer-Landau's second argument by asserting that the threat of punishment can give an agent a reason to avoid committing crimes, despite a lack of other motivations to refrain, thus allowing us to justly blame and punish such agents, in keeping with our current moral practices. Having demonstrated that his first argument fails, and casting doubt on his second, I have shown that Shafer-Landau's arguments are not sufficient to warrant rejecting internalism, and thus his argument in defence of moral realism is weakened.

In addition, I hope that my exploration and analysis of reasons internalism has provided the reader with a deeper understanding of human motivation and action with which to better predict human behaviour and inform our governing practices.

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