



The Gettysburg Social Sciences Review Spring 2020

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**Economies of Security: Foucault and the Genealogy of
Neoliberal Reason**

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Abstract: Michel Foucault is well-known for his theorizations of institutional power, normativity, and biopolitics. Less well-known was the fact that Foucault developed his analysis of biopolitics in and through his historical investigation of neoliberalism. While critique of neoliberalism has today become a commonplace of humanities discourse and popular resistance to neoliberalization proliferates globally, it remains unclear that the historical specificity of neoliberalism is widely understood. In particular, the distinction between classical liberalism and neoliberal governance tends to dissolve in popular discourse. This paper followed Foucault in tracing the historical emergence of neoliberalism from the classical liberalism of the eighteenth century, attending to the continuities, as well as the radical discontinuities between these political forms. Particular attention was given to the history of neoliberalism in its German and American variants. Because neoliberalism characterized the governmental and economic reason and practice of late modernity, recalling Foucault's analysis prepared us to understand and engage the social, political, and economic conjunctures reverberating throughout the world today.

Keywords: Foucault, neoliberalism, political economy

Introduction

Michel Foucault dedicated his 1977-1978 lectures at the Collège de France to the genealogy of modern governmental reason and practice. In these lectures, Foucault famously used the term “governmentality” to broadly define methods of governance, administration, and direction, as well as the formations of knowledge which render governing possible (Foucault 2009:109). Governmentality names a network of discourses and practices; these may have fostered the productive and quasi-scientific administrative management of population, which Foucault termed “biopolitics,” or more explicitly coercive and repressive modalities of power (Foucault 2010:22). From 1978-1979, Foucault pivoted his focus to the contemporary world, analyzing a neoliberal governmentality first articulated in the 1930s and developed in Europe and the United States through the postwar period. Foucault was often remembered for his theorization of “bio-power,” or those forms of governance and administration which grasp populations and manage individuals insofar as they are living beings (Foucault 1978:144). Yet it was often forgotten that Foucault developed his analysis of biopolitics in and through his historical investigation of neoliberal government and the mechanisms of security which sustain it. In addition to illuminating the political landscape of our contemporary world, recalling Foucault’s lectures on neoliberalism shed significant light on more well-known aspects of his philosophical legacy.

Today, critique of neoliberalism has become a staple of humanities discourse, and popular resistance to neoliberalization

proliferates globally.¹ However, it remained unclear that the historical specificity of neoliberalism was widely understood; in particular, the distinction between classical liberalism and neoliberal governance has a tendency to dissolve in popular discourse. As a result, neoliberalism was widely misconstrued as a simple extension of the free market. Foucault's landmark analysis destabilized this view, demonstrating that neoliberalism was irreducible to an augmented liberalism appropriate to the late twentieth and early twenty-first centuries: it was something more. This paper followed Foucault in tracing the historical emergence of neoliberalism from the classical liberalism of the eighteenth century, attending to the continuities, as well as the radical discontinuities between these political forms. Beginning with a detailed exposition of Foucault's analysis of eighteenth-century liberalism and its emergence from earlier formations of state politics, I charted Foucault's genealogy of neoliberalism in its early (German) and later (American) variants. Because neoliberalism characterized the governmental and economic reason and practice of late-modernity, Foucault's analysis prepared

¹ See, e.g., Brown, Wendy, *Undoing the Demos: Neoliberalism's Stealth Revolution* (2017); Harcourt, Bernard, *The Illusion of Free Markets: Punishment and the Myth of Natural Order* (2011); or the 2013 special edition of *SocialText*, "Genres of Neoliberalism." Examples of global popular resistance are numerous. If the privatization of public goods represents a constitutive feature of neoliberalism, then the 2018 struggle against education privatization in Puerto Rico may serve as one example of such resistance. Likewise, the movement against prison privatization in the United States can fruitfully be viewed through the prism of resistance to neoliberalism: see, e.g., Wang, Jackie, *Carceral Capitalism* (2018).

us to understand and engage the social, political, and economic conjunctures reverberating throughout the world today.

1. The Emergence of a Liberal Governmentality

To contextualize a discussion of *neoliberalism*, it was worth considering, first, the historical conditions under which liberalism emerged, as well as the formations of governmental practice which preceded it. First, a provisional and rather general definition of liberalism may help orient the reader. Liberalism tended to define individuals as rights-bearing subjects who are formally equal before the law. Often, liberal sovereignty was understood to emanate from the governed themselves, hence some form of democratic politics commonly accompanied a liberal state. Perhaps more pertinent to the present investigation, liberalism implied an economic order which presupposed the irreducibility or naturalness of relations of private property ownership. Such relations assumed their meaning and import in a marketplace unencumbered by external elements, for instance the state. In the market, the law of equal exchange preponderated. While the organizational and conceptual features of liberalism will be analyzed in greater detail in the following section, here I examined the conditions of liberalism's historical emergence.

The mid-eighteenth century saw a new formation of liberal government beginning to take shape against the backdrop of a rigid police state which had been erected throughout Europe from the sixteenth through the eighteenth century. In the police states which dominated early modern Europe, sovereign power was exercised in

the form of direct intervention at every level of the economy. Policy emphasized favorable competition between states, which was achieved through the attenuation of imperial objectives in the international sphere, counterbalanced by a domestic policy of near total control over production, circulation, and the conduct of citizens in general. As the dream of a single, absolutely dominant empire receded, European states began to acknowledge that economic competition must be kept within reasonable limits to maintain international stability. A legalistic sovereignty of command, mercantilist economic policy, an ethos of European balance in international trade and relations, and a domestic police state: such were the general characteristics of the formations of governmental reason and practice which proliferated in Europe from the sixteenth to the eighteenth century, on Foucault's account.

The emergence of a science of political economy in the late eighteenth century formed a substantive development in the transition which swept away previous formations of *raison d'état*, ushering in a distinctively liberal governmentality. While continuing to emphasize favorable inter-state competition, political economy opened a discursive space in which governmental practice could no longer take the shape of unchecked edict, fiat, and command. Approaching the market as a set of "phenomena, processes, and regularities" which occurred naturally and intelligibly, and which could be hampered or allowed to unfold unimpeded by governmental practices, classical political economy unearthed "a certain naturalness specific to the practice of government itself" (Foucault 2010:15). Henceforth,

governmental practices could be successes or failures *vis-a-vis* the natural phenomena and dynamics which were their objects. Like all others, the sovereign was subject to the natural laws which reign in the market.

Broadly, eighteenth century political economy asserted that natural market mechanisms, left to their own devices, would produce a “true” price: a price which accurately demonstrated the “relationship between the cost of production and the extent of demand” (Foucault 2010:30). According to Foucault, a new “regime of truth” was opened, wherein the market acted as a “site of veridiction” for governmental practice (Foucault 2010:18, 32). Governmental practice could be evaluated correlative to the market and deemed inapt if it disrupted the production of true prices. Thus, a matrix of success and failure supplanted a juridical matrix of sovereign command in governmental practice. In light of the revelations of political economy, which indicated that the economic field required limited intervention, the sixteenth and seventeenth century police states were gradually replaced by a governmentality whose fundamental principle was that of the “self-limitation of government” (Foucault 2010:19).

2. The Art of Least Possible Government

Understanding the conditions of liberalism’s emergence prepares us to understand what was historically unique about a liberal political order. Earlier formations of *raison d’état* had addressed themselves to the question of how best to organize and govern a state,

or how to institute and elaborate a regime of governance which would be dense, rigid, and more or less total. The scientific revelations of eighteenth-century political economy, however, called for limited intervention in the natural production of true prices. A liberal governmentality was born, which understood itself in terms of a new network of questions: how little can one govern? where is governmental intervention necessary? where can it be abandoned? In the formulation of these questions by political economists, and the responses offered by jurists, advisors, reformers and revolutionists, one can discern the emergence of an unprecedented liberal governmentality, or what Foucault calls “the art of the least possible government” (Foucault 2010:28).

Throughout the period of early liberalization, calls for the curtailment of government intervention came from several angles. Diverse justifications were employed. Today, a particular tendency is emphasized in the narration of liberalism; liberal government is most often understood in terms of the irreducibility of human freedom, the necessity of political emancipation and organization on the basis of natural rights, in short, a whole liberalistic theory of human nature. Not controversially, Foucault linked this tendency to the thought of Jean-Jacques Rousseau, a great humanist and a champion of eighteenth-century political liberalism. Against the Rousseauist tendency, Foucault distinguished those calls for limited government which issued, not from the mouths of humanist revolutionists and reformers, but from the scientific revelations of political economy. These, he argues, have had the most consequential and enduring

political effects, and bear the most forcefully on our modernity. Foucault organized his analysis around three key conceptual innovations which undergirded the sort of liberalization demanded by political economy. These concepts, which this section addressed in turn, are *the market*, *utility*, and *the principle of collective enrichment*.

The classical political economists of the eighteenth century argued that the market must be allowed to function according to the natural laws by which it was governed. Such a natural order demands an ethos of minimum governmental intervention. Doubtless, many observations could be made concerning the diverse currents in eighteenth-century thought which coincided with this view: the apprehension of a certain naturalness which could be understood but could not be subjected to an alien authority, the development of the human sciences and natural history, deism, or the reinterpretation of god as a transcendent being who, for all that, did not intervene in the world human affairs. Liberalism, as Foucault saw it, developed as the governmental rationality suitable to such a world: a new governmentality whose principle was its own self-limitation, observing the dictates of the market forces unearthed by the science of political economy.

If classical economy could be said to organize itself around a single concept or principle, it was doubtless exchange. As Foucault noted, the market was here defined by “free exchange between two [parties] who through this exchange establish the equivalence of two values” (Foucault 2010:118). That was to say, in classical economy, two values were determined to be equivalent insofar as they could be

exchanged for one another by free actors in a market unencumbered by external forces. On this view, the state should not intervene in the market or the process of exchange, except to guarantee that the freedom of both parties to exchange value for value was respected. The state's principle role, then, was not *within* the market as a site of exchange, but rather *outside* the market, at the site of production: the state provided the institutional framework which guaranteed the "necessity of private property for production" (Foucault 2010:118). The market itself was governed by natural laws of equivalent exchange, was defined as a space of freedom, and must be uninhibited by governmental practice.

In the mid-eighteenth century, two general models existed for establishing and fixing the limits of the art of least possible government. As we have seen, Rousseauism sought to define the natural rights of political subjects and analyze the social contract by means of which some rights are transferred to the sovereign and others are deemed inalienable. Such an analysis would determine the *maximum* limit of acceptable governmental intrusion into the individual affairs of political subjects. Beyond this limit, power would be illegitimate. Against the Rousseauist tendency, Foucault distinguished a utilitarian project, which was liked more closely in his view to the demands of classical economy. Utilitarianism endeavors to determine where government must apply itself; when; in what manner; and to what extent. Where was government useful? Conversely, utility will determine where governmental intervention was ineffective, detrimental, or useless. Such analysis determined the

minimum limit of necessary government, directing government to its most useful points of application, while “continually questioning government [...] as to its utility or non-utility” (Foucault 2010:41).

The principle of utility in governmental practice, informed by reflection and analysis of the market, dictates that government limit its action not out of “respect for the freedom of individuals,” but rather based on the “evidence of economic analysis which it knows has to be respected” (Foucault 2010:62). In Foucault’s view, utilitarianism has “stood fast” while Rousseauism has “receded” (Foucault 2010:43). Despite the fact that Rousseauist avowals of human liberty remained a persistent feature of the dominant political narrative in the neoliberal period, it was the utilitarian, rather than the Rousseauist tendency of classical liberalism which formed a key element in the genealogy of neoliberal government, according to Foucault. Indeed, as the fourth section of this paper will illustrate, economic calculation and evaluation continued to dictate government intervention and non-intervention in the contemporary neoliberal state.

Alongside the principle of the market and the principle of utility, Foucault emphasized a *principle of collective enrichment* characteristic of classical political economy. Prior to the emergence of liberalism, mercantilist economic analysis had figured economic activity in a zero-sum manner. On this view, one actor’s enrichment was necessarily realized at another’s expense, and economic activity can in no way maximize the wealth of all parties. Classical economists, on the other hand, argued that in a marketplace based on

free exchange, all parties benefit through the pursuit of their own interests, when they exchange value for value, thereby establishing equivalence. Because each party freely exchanged something of less for something of greater utility, all parties to exchange are beneficiaries. In a like manner, Foucault argued that “Europe as a collective subject” emerges in economic reflection in the late eighteenth century, as classical economists projected that Europe would become rich “en bloc” through the mechanism of competition between states, which maximizes utility for all (Foucault 2010:54). Where mercantilism suggested protectionist, economics based on an insulated national economy, classical economists stressed free trade as a vehicle for collective enrichment.²

3. Administering Liberalism

Liberalism emerged in response to the revelations of political economy, instituting a general *laissez-faire* policy as concerns the market. And yet, despite this *laissez-faire* policy, Foucault rejected the view that liberalism constitutes a regime in which subjects enjoy quantitatively more or less freedom than they do or did under other organizations of power. For Foucault, to adopt this view would be to treat something abstract and relative—freedom—as if it were a quantifiable absolute. It was Foucault’s view

² It is evident that the classical stress laid on free trade persists to this day, and in general remains an important feature of the neoliberal order. Interestingly, some commentators have noted that the recent resurgence of nationalist, protectionist international economic policy gestures towards a return to the outmoded views of the mercantilists (Nelson 2019).

that liberalism constitutes itself through a “productive/destructive relationship [with] freedom” (Foucault 2010:64). To be sure, liberalism required certain conditions of freedom to be met: those of the market, exchange, etc. Yet in circumscribing the field in which such freedoms could obtain, a liberal governmentality must establish “limitations, controls, forms of coercion and obligation” which fix the limits of freedom (Foucault 2010:64). Hence, liberalism could be said to both “produce” and “consume” freedom. (Foucault 2010:63, 65). Rather than being “a given [...] which has to be respected,” Foucault argued that we should understand freedom as the necessary minimum condition which must be *produced* and sustained in order for liberalism to function (Foucault 2010:65). Political liberties were not natural facts or pre-political givens which governmental practice was tasked to observe. Rather, such liberties were “object-effects” of a given arrangement of discourses and practices instituted under liberalism and sustained through its elaboration (Foucault 1979:305).

More concretely, it was evident that the institution of a market economy whose principle is free exchange required the preservation of the collective interest against the corrosive impacts of the interests of individuals, while on the other hand the interests of individuals must be left relatively unencumbered, such that market mechanisms can function in a natural way. Liberal governmentality thus exhibited a bipolar character, tending on the one hand towards collectivist tyranny, and on the other towards anarchic individualism. The conditions of freedom which were requisite to the liberal order required constant supervision, maintenance, readjustment, and

organization. This led Foucault to conclude that, rather than instituting a regime of increased freedom in an abstract sense, liberalism represented a transition from the *police state* to the *security state*.

In *Security, Territory, Population* (2009), Foucault juxtaposed apparatuses of security to juridical institutions and disciplinary regimes. Juridical institutions addressed subjects with legal commands and interdictions in a formal, linear relay topped by a central authority or sovereign. Disciplinary regimes managed individuals at the level of the body, through a diffuse yet rigid “micro-physics of power” invested in networked institutions such as prisons, schools, and hospitals (Foucault 1979:26). Security apparatuses, on the other hand, are directed towards the collection of statistical data concerning population and natural phenomena, and the use of such data towards the implementation and refinement of programs intended to manage and direct general forces to produce optimal outcomes. Security apparatuses measure probabilities, calculate cost, risk, and benefit, establish averages and set the limits of acceptable excess, rather than focusing on meticulous or rigid control.

Security measures may be difficult to recognize as such, for the very reason that they constituted the overall fabric of government and administration to which we were accustomed. Foucault’s project hinged on revealing this fact in its radical historical particularity. Security has not always operated as the dominant mode of government: it emerged in large part with the eighteenth-century art of least possible government. Security apparatuses managed the

economy of freedom instituted in the liberal order. Foucault specified: “the problem of security is the protection of the collective interest against individual interests,” and *vice versa* (Foucault 2010:65). The economy of power instituted under liberalism was a site of constant play between the freedoms required for liberalism’s operation and the management of risks which attend those freedoms. Such management cannot be rigid and total, but must remain flexible and probabilistic. It was the task *par excellence* of security. Notably, security apparatuses continued to organize the neoliberal governmentality of the present.

The institution and maintenance of security apparatuses, disciplinary techniques, and juridical institutions, all of which were required in some measure for liberalism’s optimal performance, demanded a “culture of danger” to proliferate within a liberal regime: individuals were “conditioned to experience their situation, their life, their present, and their future as containing danger” (Foucault 2010:66f). In Foucault’s view, the production and manipulation of fear was a precondition of the liberal order, or its “internal psychological and cultural correlative” (Foucault 2010:67). Only when faced with constant and multiple risks will subjects conditioned to esteem freedom accept the curtailments of freedom which liberalism paradoxically required. Producing certain freedoms while maintaining others at an optimal level, countervailing their attendant risks and justifying their consumption: such are the complex tasks of liberal governmentality.

Doubtless, one could emphasize other features of liberalism than those highlighted by Foucault. His analysis was not intended to be exhaustive. Rather, following a “genealogical” protocol, he highlighted specific features of classical liberalism which bear on contemporary regimes of governmentality, illuminating lines of continuity and discontinuity between liberal and neoliberal arrangements of political and economic discourse and practice (Foucault 1984:76). Insofar as it formed a link in the genealogy of neoliberal government, classical liberalism was a formation of power and knowledge which analyzed its programs in terms of their utility rather than their legitimacy, where utility was verified through effects on a market whose principle was exchange and whose requisite was limited intervention. Liberalism approached exchange as a vehicle for collective enrichment, a principle which holds for inter-state competition in the context of a world market. It produced and consumed freedom, that is, it instituted and arranged an economy of liberties, organizing this economy through apparatuses of security and a culture of danger augmented by discipline and surveillance. Strikingly prescient in today’s political landscape, Foucault’s remarks remind us that, if the neoliberal era was in fact distinct from the epoch of classical liberalism, certain elements of a liberal governmentality remained persistent features of the neoliberal order.

4. Neoliberalism

The emergence and development of a complex social formation such as neoliberalism could not be reduced to a unilinear

narrative of “progress” (Foucault 1984:85). Its line of descent was fractured and multiple, combining an array of antecedent forces in a novel way. Nor was neoliberalism itself homogenous, as if it emerged in a single gesture, fully formed. Foucault’s genealogy distinguished between two major variants in neoliberalism. The first arose in Germany during the period of post-World War II reconstruction and developed through a critique of National Socialist economic and social policy. The second, American variant of neoliberalism defined itself in reaction to New Deal interventionism implemented in the wake of the Great Depression. While both tendencies reflected a reaction against interventionist economic policy, there were important historical and conceptual distinctions to be made between German and American neoliberalism. This section reconstructed Foucault’s analysis of neoliberalism in its German and American forms, emphasizing those features of neoliberal governmentality which bear most forcefully on our historical present.

4.1. German Neoliberalism

In the wake of World War II, many European states were employing Keynesian economic policies. An eminent twentieth-century British economist, John Maynard Keynes advocated for government intervention, specifically active fiscal and monetary policies, to help mitigate the deleterious effects of recession and inflation. Needless to say, interventions of the sort proposed by Keynes seriously contradicted the liberal ethos of minimal economic intervention. According to Foucault, the Keynesian interventionism

implemented in postwar Germany had three general objectives: infrastructural reconstruction, economic stabilization via planning, and social objectives considered “indispensable in order to avoid the renewal of fascism and Nazism” (Foucault 2010:80). German neoliberalism arose in reaction to Keynesian intervention, which was seen by German neoliberals as symptomatic of the very forces which had produced National Socialism.

The general social and economic causes of the Third Reich’s rise were topics of unparalleled intellectual import in postwar Germany. Foucault located the intellectual fountainhead of German neoliberalism in the Freiburg School, where economists endeavored to resolve—within the framework of capitalist production—the “irrational rationality of capitalism” (Foucault 2010:105). This economic irrationality, it was feared, had social consequences that may have contributed to the rise of the Third Reich. According to the Freiburg School economists, the economic policy of the Third Reich represented the consolidation of numerous undesirable elements culled from Germany’s modern history; it brought together “protectionist economics, the economics of state aid, the planned economy, and Keynesian economics” (Foucault 2010:109). Because they contradicted the basic premises of a free market, these policies rendered irrational the rationality of a free market. Further, if these economic elements had ushered in the Third Reich, then their utter liquidation, and not their re-implementation in the interest of reconstruction, would be required to prevent the re-emergence of fascism.

The birth of German neoliberalism in Freiburg could be counterposed to simultaneous attempts by Western Marxists to challenge the basic logic of capital and its accumulation. Such efforts were exemplified by critical theorists of the Frankfurt School, whose work frequently gesture towards social, cultural, and aesthetic subversion of capitalist relations, emphasizing the pervasive and injurious effects of Enlightenment “instrumental reason” (Horkheimer and Adorno 2001:237). The German neoliberals, on the other hand, endeavored to redefine and buttress the economic rationality of capitalist production, while avoiding the social irrationality which had surged under National Socialism. They accepted some key elements of the Western Marxist critique of a consumer society composed of alienated, atomized individuals, yet they typically view this polemic as misdirected. Where critical theory attributed the virulent “leveling” of the social fabric to the corrosive impacts of capitalism, the neoliberals of the Freiburg School attributed the same afflictions to illiberalism and a society which “has chosen a policy of protectionism and planning in which the market does not perform its function and in which the state [...] takes responsibility for the everyday life of individuals” (Horkheimer and Adorno 2001:9; Foucault 2010:114). For the Freiburg School neoliberals, the social irrationality which spawned the Third Reich could be attributed to the dominant role played by the state, where critical theory found in the same irrationality only the evidence of capitalist exploitation and abstraction.

For the neoliberals of the Freiburg School, National Socialism should not be misconstrued as the apotheosis of Enlightenment instrumental reason, nor as an exaggeration of the general social form assumed by late capitalism. Rather, National Socialism offered a vivid illustration of the natural link between the economic antecedents it combined: protectionist economics, the economics of state aid, the planned economy, and Keynesianism. According to Foucault, the “*coup de force*” of the Freiburg school is the notion that each of these economic strategies are “linked to each other[,] and if you adopt one of them you will not escape the other three” (Foucault 2010:110). The Freiburg School effectively drew an internal link between any sort of interventionist policy whatsoever and National Socialism. The conclusion naturally drawn by the German neoliberals was to abandon economic intervention in all its forms.

As the German state attempted to reconstitute itself in the wake of the Third Reich, neoliberal advising led the nascent West German Republic to ground its sovereignty in the voluntary attraction of economic subjects to an institutional framework which guaranteed a space of economic freedom, i.e., a free market. This was, in Foucault’s words, the “legitimizing foundation of the state on the guaranteed exercise of an economic freedom” (Foucault 2010:82f). By accepting the legitimacy and desirability of the particular sort of economic freedom guaranteed by the state, economic subjects “produce a [...] political consensus” concerning the state itself (Foucault 2010:85). If this is so, then favorable economic

performance—evidenced in a strong currency and a favorable rate of growth—became an indicator of the legitimacy and good governance of the state. In postwar Germany, then, “the economy produces political signs that enable the structures, mechanisms, and justifications of power to function” (Foucault 2010:85). The German neoliberal state was, according to Foucault, a “radically economic” state: its sovereignty is founded upon the consensus of subjects to participate in a space of freedom opened by the economic institution of the market (Foucault 2010:86).

Clearly, this neoliberal formation diverged sharply from a Rousseauist political liberalism founded upon the assertion of natural rights and the primacy of human liberty. Rather than sovereignty emanating from a social contract among the governed, in postwar Germany the economy itself “produces sovereignty,” that is, “the economy produces legitimacy for the state that is its guarantor” (Foucault 2010:84). Classical political liberalism began with a legitimate state and endeavored to produce a space of economic freedom therefrom. German neoliberalism, on the other hand, founds the state as the guarantor of a space of economic freedom. German neoliberalism was opposed to classical liberalism, then, insofar as the neoliberal state followed from the free market, rather than the free market following from the legitimate state. Because economic indicators authorized state sovereignty in this neoliberal order, Foucault could rightly remark that the neoliberal state is a “state under the supervision of the market, rather than a market supervised by the state” (Foucault 2010:116).

If the neoliberal state found itself under the market's supervision, it must also be noted that the basic principle of the market under neoliberalism was not that of the classical economists. As we have seen, classical economy theorized the market as a space of exchange defined by equivalence. Under neoliberalism, the market's basic principle was not equivalent exchange, but competition. This pivot from exchange to competition constituted a radical discontinuity between classical and neoliberalism. Yet, as Foucault noted, this shift was not a novelty of the twentieth century. It was traceable to the nineteenth, constituting an important channel in neoliberalism's genealogy. In the nineteenth century, liberal economists had already begun to figure the market as a site of competition, a space ruled "not [by] equivalency [as in a market based on exchange] but on the contrary inequality" (Foucault 2010:119). It was competition, and not exchange, which guaranteed economic rationality, insofar as competition itself conditions exchange. The inevitable presence of competition provided the guarantee that values produced in exchange will be determined, not by individual parties themselves, but by market forces in general. Competition's presence influenced and, in a sense, determined the process through which the formation of equivalent value occurs. Still, the liberal economists of the nineteenth century continued to view market competition as a *natural* dynamic, requiring nonintervention. Whether the fundamental conceptual dyad of the market was exchange-equality, as in early classical analysis, or competition-inequality, as in the

nineteenth century, the practical implication is a policy of *laissez-faire*.

It was on this point that the neoliberals of the Freiburg School articulate a radical break with earlier liberal economists. While they, too, saw competition as the fundamental principle of the market, they envisioned competition not as a “natural datum” but rather as a “formal structure” which “will only appear and produce its effects under certain conditions which have to be carefully and artificially constructed” (Foucault 2010:120). Competition, then, was an objective of governmental reason and practice, not a natural phenomenon which must be left unimpeded. The mechanism of competition, as the root principle of the market in German neoliberal thought, was guaranteed by governmental praxis and the juridical order. As Foucault noted, the juridical here “gives form to the economic,” by setting the conditions in which the competitive mechanism of the market could operate (Foucault 2010:162). The role of government was to facilitate the market, to produce the conditions under which the market’s basic principle, competition, could operate. Neoliberalism should by no means be conflated with a *laissez-faire* liberalism. It must be identified with “permanent vigilance, activity, and intervention” at the level of a governmental practice whose role was to guarantee the necessary conditions deemed optimal for a market based on competition (Foucault 2010:132).

Because the German neoliberals emphasized a deregulated economy, any “vigilance, activity, and intervention” on the part of the state must not introduce constraints or regulation on the market itself,

in the forms of “price control, support for a particular sector of the market, systematic job creation, or public investment” (Foucault 2010:132, 139). Rather, a continuous and multilateral governmental intervention must be directed at the antecedent conditions of the market. In other words, intervention and regulation by the state must be manifested in *formal structures*, rather than direct initiatives with specific objectives, as in the case of a planned economy. Neoliberal formal intervention was described by Foucault in terms of a regulatory architecture applied to game whose outcome cannot be known in advance. Government could not endeavor to produce specific outcomes in specific sectors or within particular elements of the economy. It must adopt policies which optimize the general conditions of the free market—first among them, competition. Here, the logic of security intersected with neoliberal governance, in contradistinction to a more rigid disciplinary architecture characteristic of state planning. Neoliberal governmentality targeted elements *outside* the market, specifically those elements which functioned as the preconditions for the market’s operation.

According to Foucault, a key objective of German neoliberal policy was price stability, which was achieved through controls on inflation and the rate of interest. Price stability, however, was only a means; its end was economic growth. Economic growth as an end in itself could be considered the objective *par excellence* of German neoliberalism. Full employment, on the other hand, was not an objective of German neoliberal policy. It had been for Keynes and his disciples; but in the view of the German neoliberals, regulations to

produce full employment constituted destructive interventions in the market, subverting the mechanism of competition. In general, social rather than economic activity became the target of governmental intervention. For instance, agricultural production was not regulated directly, via price controls or subsidies, but indirectly, through security measures such as the encouragement of desirable flows of population from one region or sector to another, the proliferation and distribution of technical instruments and innovations, the production of knowledge, and the organization of training. Where direct governmental intervention in the economy itself must be light, intervention must be dense and consistent at the level of a population which was grasped as the market's condition of existence.

At the level of social policy, German neoliberalism positioned itself against all strategies, tactics, and objectives associated with Keynesianism. As Foucault noted, Keynesian social policy emphasized all subjects having "relatively equal access to consumer goods" (Foucault 2010:142). This implied redistributive measure aimed at an average deemed optimal for market consumption. For the neoliberals of the Freiburg School, on the other hand, a social policy which emphasized equalization undermines the mechanism of competition which organizes the market. Further, redistributive social policy which attempted to produce conditions of equality risks transferring "the part of income that generates savings and investment" to another sector of the population, to be used for consumption. Rather than equality, *inequality* within acceptable parameters must be an objective of neoliberal governmentality, since it was precisely

inequality which sustained competition. The maximum acceptable redistributive intervention will be the transfer of a portion of income which would be used for “over-consumption” in one sector to members of the population who “find themselves in a state of under-consumption” because of permanent or temporary disability (Foucault 2010:143). Redistributive measures were in short strictly exceptional, and an emphasis on the inequality requisite for economic competition was pushed to the foreground.

A final exemplary feature of German neoliberal social policy was privatization rather than socialization or collectivization of the insurance against risk. For the economists of the Freiburg School, social policy should above all foreground economic growth, which would allow individuals “to achieve a level of income that will allow them the [...] individual or familial [capital] with which to absorb risks” (Foucault 2010:144). On this view, growth would render collectivized insurance, and social support programs more generally, unnecessary; privatized and individualized social policy was a cornerstone of neoliberal governmentality *tout court*, which in part explained the conventional wisdom which associated neoliberalism with “small” government. Notably, while moderate socialization of insurance against risk has come to characterize many European liberal democracies, the contemporary politics of the United States remained firmly rooted in the neoliberal principle of privatized insurance described by Foucault.

In summary, German neoliberal policy emphasized growth through non-intervention in the market. State sovereignty was rooted

in the economic and evaluated in economic terms. The market was organized around the principle of competition, understood as an artificial structure which must be maintained, rather than as a natural force. Despite its extreme emphasis on non-intervention in the market, neoliberalism should not be conflated with non-interventionism generally; rather, German neoliberal governmentality—which posits an immanent link between any sort of economic interventionist policy and authoritarianism—targeted individuals, groups, social forces, and resources as preconditions of the market, which must be managed properly to foster the market’s optimal performance and growth. With recourse to the apparatuses of security, such management was ensured. Above all, economic growth in a competitive market would require persistent inequality in the distribution of resources among economic agents.

4.2. American Neoliberalism

Despite the incongruity of conditions between postwar Germany and the postwar United States, American neoliberalism emerged, as in Germany, in reaction to Keynesian economic policy and the construction of a welfare state from the late 1930s through the postwar period. To be sure, many of the features of German neoliberalism described by Foucault approximated or were reflected in American neoliberal reason and practice. Still, the background conditions of American neoliberalism’s emergence differed markedly from those present in postwar Germany: liberalism has always been and continues to be the dominant current in American politics,

perhaps uniquely so. In the context of the United States, Foucault noted, “the demand for liberalism founds the state rather than the state limiting itself through liberalism” (Foucault 2010:217). American neoliberals clearly did not face a number of the entrenched obstacles confronted by their German counterparts; America’s liberal heritage in a sense eased neoliberalism’s emergence. And yet, something historically unique was indeed achieved in the establishment of an American neoliberal governmentality.

Foucault articulated three features of American neoliberal reflection, which distinguished it from German neoliberalism on the one hand and the classical liberalism endemic to American politics on the other. These features were, respectively, the “epistemological transformation” of the object of economic analysis, the theory of human capital, and the generalization of the market-form (Foucault 2010:222). Discussing each of these theoretical innovations in turn, this section highlighted those features of early American neoliberal reason and practice which have left their mark most imperiously on our historical present. Even when we did not call them by name, the artifacts of neoliberalism were familiar to us: they have been inscribed in our governmentality, embedded in our social practices, and invested in our conduct.

American neoliberalism first established a breach with classical economic analysis at the level of its object. We have already seen that the principle object of German neoliberal reflection was not the marketplace as a site of exchange but rather the mechanism of competition, viewed as a formal structure which guaranteed the

rationality of market activity. American neoliberals presupposed the German conclusions concerning competition, but proposed that the principle object of economic analysis should be neither the market as a *space* nor competition as a *structure*, but rather the economic decision-making processes of individuals. For the American neoliberals, economics must concern itself with “the way in which individuals allocate [...] scarce means to alternative ends” (Foucault 2010:222). Notably, the economic decision-making which formed the principle object of American neoliberal economic reflection may well be irrational and must therefore be studied in its human depth and local particularity, rather than through the construction of abstract models and deductive reasoning. As a sort of empiricism, economics was “no longer the analysis of the historical logic of processes,” but is rather “the analysis of [...] the strategic programming of individuals’ activity” (Foucault 2010:223). This epistemological shift not only marked out the analytical field of American neoliberal thought. It represented the emergence of an entirely new economic *subject*—as an *object* of knowledge and manipulation—which would play a crucial role in the development of the theory of human capital.

The analysis of labor as human capital marked another major breach with classical economic reflection. To the extent that classical economy analyzed labor, it did so quantitatively, in terms of time. For the classical economists, productive labor was generally expressed as a duration of labor-time, an equation which Foucault termed the “Ricardian reduction,” in reference to David Ricardo, the classical theorist *par excellence* of labor-value (Foucault 2010:220). In the

classical view, labor was treated rather like an abstract, homogenous substance. If laborers were not entirely bereft of subjecthood, it was only to the extent that they were consumers. Labor as such, no matter how productive, was an object acted upon, and was never analyzed from within. Marx, like Ricardo, analyzed labor in an abstract manner, as labor-power which was forcibly reduced to a passive variable, indeed a commodity, seized by the process of capitalist exploitation and delivered to the mechanism of capital's self-expansion. Even for early twentieth-century economists, such as Keynes, labor was figured as a passive or dependent variable of production and was therefore subject to a given rate of capital investment. For all these theorists, labor was fundamentally heterogenous *vis-à-vis* the economic forces which acted upon it.

The American neoliberals understood the abstraction of labor as an artifact of the analysis of labor offered by classical economy. Abstraction was neither the universal truth of labor nor the contingent effect of capitalist production. It was, quite simply, symptomatic of "the way in which these processes have been reflected in classical economics" (Foucault 2010:221). For the American neoliberals, a new analytic must grasp labor, not simply as an abstract force of production, but at the complex level of the human laborer as an economic actor, endowed with drives and inclinations, desires and interests. Labor must be analyzed in a qualitative rather than a quantitative manner, in order to avoid the abstraction which perturbed classical analysis. As a result, labor will no longer be

apprehended as heterogenous *vis-à-vis* capital; labor was itself an investment of a particular sort of capital—*human capital*.

In the theory of human capital, the act of laboring produced an income which formed the incentive for the laboring subject to labor. Income was not conceived as a *wage*, as in classical analysis, but rather as the return on the investment of one's time, expertise, and body, to a given form of labor. Far from a passive subject acted upon by capital, the laborer was him or herself capital, with the potential to develop this capital in various ways and to various ends. Human capital could be invested; in fact, it was always invested in one way or another, and like all investments, this investment may be lucrative or disadvantageous. Production no longer appeared, as it did in classical analysis, as a meeting between an active and a passive force—labor and capital—but as a collaboration between individuals with human capital of greater and lesser value. As Foucault noted, in this frame each laborer “appears as a sort of enterprise for himself” (Foucault 2010:225). Thus, the economic subject, or *homo œconomicus*, of classical liberalism—*homo œconomicus* as a party to exchange—was completely replaced in American neoliberal thought by an essentially entrepreneurial *homo œconomicus*. As an economic enterprise unto herself, the laborer's each and every move would henceforth be an economic decision regarding her status as human capital.

The neoliberal analysis of labor as human capital dovetailed with the epistemological shift in the object of economic analysis, insofar as labor was no longer analyzed as an object operated on by

capital, but was rather an investment of human capital made by the living laborer, an economic subject who engaged in production and consumption for various reasons, and who above all made choices concerning investment and expenditure of his or her time and resources. This enormous shift—a shift which continues to define our historical present—invested every category of social life with new meaning: every choice concerning the self was an *economic* choice which bears on the dearness of one’s self as human capital. This is, of course, common knowledge to all of us today, whether or not we are familiar with the theory of human capital; one of the benefits of Foucaultian genealogy was its ability to reveal our accustomed ways of seeing in their radical historical specificity, so we might recognize them as strange. Education, training, health, ability, appearance and social relations, have all been radically reconfigured as elements in an imposing matrix of “investment” in human capital introduced by American neoliberal reflection (Foucault 2010:229).

In his analysis of the Freiburg School, Foucault noted that German neoliberalism instituted a “generalization of the enterprise form,” wherein the individual was rendered a “permanent and multiple enterprise” integrated in the social body (Foucault 2010:242, 241). This analysis resembled Foucault’s remarks on the theory of human capital and the entrepreneurial nature of American neoliberalism; to be sure, the American neoliberal economic subject, as human capital, was structured as an enterprise. Still, Foucault asserted that American neoliberalism, in the most general sense, erected itself not through a generalization of the enterprise-form, but

through a “generalization of the economic form of the market” (Foucault 2010:243). This generalization was most clearly manifested in the tendency to subject those domains traditionally thought to fall beyond the purview of economics to economic analysis. American neoliberal reflection found market dynamics at work in all aspects of the social field; the market acted as the analytical paradigm through which all social processes were apprehended, interpreted and evaluated.

We have already seen such economic evaluation in the government of the self as human capital. Foucault likewise noted that a “permanent criticism” confronted all government action and public policy with a matrix of economic cost-benefit analysis (Foucault 2010:247). As in the case of German neoliberalism, such criticism did not furnish a *laissez-faire* categorical imperative for governmental non-intervention in the market. Instead, government policy must grasp those elements which condition the market and rigorously organize them according to the imperative of market expansion. Neoliberal analysis and critique of public policy furnished a “permanent economic tribunal confronting government,” wherein specific policies and initiatives were evaluated almost exclusively in the *terms* of the market, as well as in terms of their *effects* on the market (Foucault 2010:247). Public policy not only served, but mimicked, the organization of the market.³ Social relations, too, came

³ A notable contemporary example of such mimesis was the commonplace implementation of “cap-and-trade” carbon emissions regulations, which articulate a “carbon market” within the market itself (see, Bailey 2007).

to be analyzed as if they were economies, as if all behavior were calculable in terms of cost and benefit. If American neoliberalism has transformed economic reflection, it has equally altered political practice and inscribed itself in our discourse.

The subjection of the personal, interpersonal, and social fields to economic analysis in American neoliberalism was given its most succinct and dramatic articulation by Gary Becker, an eminent American economist and neoliberal theorist of the Chicago School. For Becker, economic analysis could be used to analyze any circumstance in which an “individual’s conduct [...] reacts to reality in a non-random way” (Foucault 2010:269). In Foucault’s reading of Becker, economics could be defined “as the science of the systematic nature of responses to environmental variables” (Foucault 2010:269). Implicit in this assertion was a total reversal of the picture of economic subjecthood which characterized classical economy. For economists in the classical tradition, *homo oeconomicus* was a subject governed by her interests; as an agent, she must be free to pursue these interests through her voluntary engagement in economic affairs. Interests themselves, on this view, were as such beyond the reach of government; in classical economy, it was precisely insofar as the human subject is a *homo oeconomicus* that she was beyond the reach of government.⁴

⁴ This is not to suggest that society was uncontrolled or unmanaged in the eighteenth and nineteenth centuries; on the contrary (Foucault 1979). Social forces were indeed controlled, but this control was suffused with a different meaning: elements such as crime, delinquency and vagabondage, if left to their own devices, would interrupt the

For the American neoliberals, on the contrary, economic analysis could be applied to the individual in all her decision-making processes. These decision-making processes, insofar as they responded to the external world and not to obscure unreachable “interests,” could be directed and governed. The neoliberal *homo oeconomicus* was precisely “the person who accepts reality or who responds systematically to modification in the variables of the environment,” and who was therefore “eminently governable” (Foucault 2010:270f). In American neoliberal economic reflection, economic subjects could be effectively managed by managing the variables which condition their interests and their decision-making processes. Advertising, as the government of individual economic interests, proliferated under neoliberalism. Yet such manipulation unfolded within the frame of security: the process of “programming” individuals in neoliberalism does not exactly correspond to an individualized protocol. Rather, individuals appeared as members of populations, classes, or “interest groups,” which were targeted as general forces. Even in our society of individuals, the individual tended to recede as the target of population management.

Where classical analysis apprehended human beings as economic agents whose natural element was, as it were, the free market, neoliberal economic reflection concerned itself with the conditions which produced human beings as the sort of economic

naturalness which reigned in the market. Under neoliberalism, on the contrary, the market is itself artificial, and social control constitutes one of its conditions of existence.

decision-makers they were, endowed with specific economic desires and interests. American neoliberal reason and practice, like its German counterpart, found its root principle in a market defined by competition. It apprehended the totality of the social field in a manner traditionally reserved for the market, approaching the category of labor in a qualitative rather than a quantitative manner. It foregrounded the concrete decision-making processes of individuals, who appeared in economic reflection as human capital. Further, American neoliberal reflection furnished a vision of economic subjects as immanently governable at the level of their interests. Foucault's analysis powerfully demonstrated that American neoliberalism, like its German counterpart, should not be grasped as a simple resurgence of classical liberal themes. In a dramatic movement, neoliberalism erected itself through a series of reversals of classical liberal principles, while nevertheless inscribing itself within the horizon of the eighteenth-century art of the least possible government.

Conclusion: Living the Neoliberal Present

We no longer live in the post-Depression boom which prompted the rise of American neoliberalism. The 1970s brought the more or less complete liquidation of Keynesian economics, along with a pattern of welfare-state retrenchment that extended to the present day. Other crises have come and gone; their redress under neoliberalism has often been as exacting and deleterious as their

immediate effects.⁵ Since Foucault's writing, striking features of neoliberalism have emerged which remained marginal in his account: the proliferation of creditor-debtor relations and the ascendancy of finance capital. Yet Foucault's analysis remains prescient. It allowed us to see that neoliberalism was anything but a framework whose practical implication was a policy of *laissez-faire*. Neoliberal governmentality was an active governmentality, facilitating the market by governing those forces external to it but conducive to its stability and growth. Continuing privatization of medical care and the insurance against risk; increased privatization in education, policing and punishment, surveillance and defense; dependence on corporate contracting and private partnership within those goods still held in common: these were the policies or the effects of a governmentality whose object was economic expansion, and whose root principles are competition and inequality.

If neoliberal governmentality represented a dense network of policies and tactics, as Foucault suggested, it was indeed far removed from the *laissez-faire* classical governance which confronted a market ruled by the laws of nature. But if this is so,

⁵ Unsurprisingly, the worst affected in the case of crisis are almost invariably those already marginalized. To cite just two examples: losses suffered between 2008 and 2011 effectively widened the yawning wealth gap between Black and white households, a gap which expanded in the teeth of federal initiatives intended to stabilize the economy (Glaude 2016); what's more, municipal debt and the curtailment of municipal and state spending in the post-2008 United States have precipitated waves of "extractive" policing, with disproportionate and calamitous effects on communities of color (Wang 2018:153).

neoliberalism was equally a network of points to which resistance may be applied. The market unearthed by classical analysis was defined by its inaccessibility; utilitarian reflection showed that market intervention was futile at best. But under neoliberalism, the market's very existence demanded that formal structures be rigorously maintained to ensure competition and growth. The tactics through which neoliberalism produced and sustained such a market—the application of security techniques, the mechanisms of privatization, the generalization of the market-form, the government of interest and the production of self-governing subjects as human capital— were points of articulation that may equally be targets for tactical intervention. Under a neoliberal governmentality, a precise understanding of neoliberal reason and practice may enable us to better resist the structures governing the present.

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**Flooding, Landslides, Wildfires, Air Pollution, and Income: Risk
in California**

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Abstract: California is infamously known for its likelihood of environmental hazards such as flooding, landslides, air pollution, and forest fires which can be attributed to the natural climate of the area as well as anthropologically influenced climate change. Air pollution also posed potential threats and dangers to the civilians of California as increasing populations and uses of fossil fuels continued to contribute to the growing issue of climate change. The goal of this study was to examine and analyze the geospatial trends environmental hazards in California such as landslides, air pollution, flooding, and forest fires. A weighted test, zone and slope reclassifications, and quantified tests were conducted in order to study the effects of climate change on risk level in California. It was found that the greatest air quality and fire risk is located within Central Valley while fire and landslide risk showed opposite effects. Areas of high environmental hazard risk and low income were scattered amongst the state but mainly concentrated in the northern and eastern areas of California.

Keywords: GIS, ArcGIS, California, flooding, landslides, air pollution, wildfires, income, risk assessment, satellite

Introduction

California has been infamously known for its likelihood of environmental hazards such as flooding, landslides, air pollution, and forest fires which could be attributed to the natural climate of the area as well as anthropologically influenced climate change (Adams et al. 2014; Harris 2017; Montgomery 2018; Hanson 2018). Air pollution also posed potential threats and dangers to the civilians of California as increasing populations and uses of fossil fuels continued to contribute to the growing issue of climate change (Benmarhnia 2017). Climate change additionally worsens air pollution, as ground-level ozone (O₃) formed through reactions from sunlight and other air pollutants such as nitrous oxides. Ozone formation further accelerated under higher temperatures as well (Allen 2014). The effects of climate change that lead to dangerous natural events such as wildfires in California oftentimes created positive feedback loops that led to worsened conditions such as drought or inundation depending on regional circumstances (Barnard et al. 2018). Exposure to environmental disasters was also found to increase risk for long-term mental health disorders such as Post-Traumatic Stress Disorder (PTSD) and major depression (Lowe et al. 2015). Evidence suggested that lower income areas may be purposefully placed in locations that exposed them to more environmental disasters as well as lower air quality due to factors like environmental racism and a lack of political change (ESRI and Geiling 2015).

The goal of this study was to examine and analyze the geospatial trends of environmental hazards in California such as

landslides, air pollution, flooding, and forest fires. We also compared the risk of these hazards to average income within California census tracts. Two research questions were inquired in this study: Where in California were people exposed to more environmental hazards? Additionally, were California areas with lower overall annual income more exposed to environmental hazards?

Methods

In order to analyze risk of environmental hazards in California on a census-tract scale, we followed modified methods of Carver, Tricker, and Landres (2013) by creating ranks and weights of qualities to create a visual representation of a certain characteristics of the environment. In order to get a holistic perspective of environmental hazard risk, we quantified the risk of air pollution (specifically ozone and particulate matter) exposure, landslides, flooding, and fire by assigning specific properties of the hazards a risk-ranking from 0 (smallest risk) to 4 (highest risk). To finalize overall hazards risk, we did a weighted overlay analysis, combining the four environmental hazards. Finally, we compared individual and overall environmental hazards risk to income to determine if there was a relationship between risk and income.

To quantify flood risk, we reclassified the flood zones of California and assigned them a risk-ranking from 0 to 4 (*Table 2*). For the fire quality, we directly used the fire threat raster from the California Fire Resource Assessment Program (FRAP) that was

already classified into five classes based on severity of fire threat (*Table 3*).

To quantify landslide risk, we first reclassified the slope of California into a risk ranking (*Table 4*). To account for the influence of soil compaction and stability, we reclassified each land classification in the National Land Cover Database into five classes (*Table 5*). Because wildfires loosen soil and increase landslide risk (Montgomery 2018), we used the overall fire risk as a quality of landslide risk. To generate a holistic landslide risk character, we conducted a weighted overlay analysis, giving both slope and fire risk a weight of 40%, because a landslide is dependent on slope and fires can significantly increase landslide chances. We gave land cover a weight of 20%.

To quantify risk to exposure of air pollution in California, we quantified the risk of exposure to both ozone and particulate matter PM_{2.5} microns. Ozone and particle pollution were selected as the two indicators of exposure to air pollution due to their direct and severe effects on human health: ground-level ozone can lead to respiratory deficiency and asthma while particulate matter can cause an increase in heart attacks along with other decreased lung functions (Environmental Protection Agency 2018). We assigned both ozone and PM_{2.5} a risk-ranking based on the amount of each in a daily maximum 8-hour period (*Table 6*; *Table 7*). We then conducted a weighted overlay analysis of these two pollutants, giving each equal ranking (50%) due to their high cost to human health.

To quantify the overall risk of environmental hazards in California, we conducted a weighted overlay analysis of all four environmental hazards. Specifically, we gave fire risk a weight of 30% because of the high wildfire frequency of California and flood hazard a weight of 20% because the semi-arid climate results in little precipitation to cause much flooding (Barnard et al. 2018). Meanwhile, we assigned both landslide risk and air pollution risk a ranking of 25%, as they are subject to change but still have a rather impactful influence on the natural disasters that could occur within a given area (Barnard et al. 2018).

In order to analyze the relationship between socioeconomic class and environmental hazards exposure risk, we used GeoDa to generate a standardized scatterplot of income versus overall natural hazards risk within the California census tracts. We selected the census tracts with both average to below-average income and average to above-average natural hazards risk so to evaluate spatial distribution of higher risk, poorer areas. We also created scatterplots of each of the four individual environmental hazards in comparison to income to closely analyze any possible correlations between each of the hazards to income that may affect the overall relationship.

Results

The severity of flood risk varied throughout California, as the greatest amount of risk lies along a vertical medial line of the state from the city of Red Bluff to Rosamond within Central Valley. The lowest areas of flood risk tended to cluster together such as the

southeastern region of California as well as several areas along the northern and eastern part of the state (*Figure 1a.*). Areas around the Central Valley between Red Bluff and Rosamond as well as part of southeastern California were least likely to be impacted by landslides and fires (*Figure 1b., 1c.*). The greatest air quality risk was located within Central Valley and the amount of risk gradually decreased in adjacent areas (*Figure 1d.*).

In regard to overall environmental hazard risks, the areas of the lowest amount of risk included regions of southwestern California and a small number of northern areas at the northern end of Central Valley (*Figure 2*). The eastern edge of the valley and the southern areas of the state had the highest overall natural hazard risks (*Figure 2*). There was not a clear spatial pattern of census tracts with average to above-average risk and average to below-average income (*Figure 3*). There was not a clear relationship between any individual environmental hazard risk and income (*Figure 4*). There was also not a clear relationship between overall environmental hazard risk and income (*Figure 5*).

Discussion

Flood risk and air pollution risk were highest around the Central Valley region (*Figure 1a., 1d*). Fire risk and landslide risk were lowest in this region (*Figure 1b., 1c.*). Overall, the areas in California with the highest natural hazard risk bordered the Central Valley region (*Figure 2*). There was not a clear relationship between income and any or overall natural hazard risk (*Figure 4, Figure 5*).

There did not appear to be a clear spatial pattern of areas with average to above-average hazards risk and average to below-average income (*Figure 3*).

Our results could be generally explained by the topography of the region. The Central Valley, for example, would have had a high flood risk due to its flat elevation (California Physical Map 2018). Its flat elevation also explained the low landslide risk. Additionally, the Central Valley was quite developed, minimizing the number of shrubs, trees, and grasslands that could have otherwise had high fire risk (Hanson 2018). In contrast, high fire risk areas were composed of more grasslands and shrubs that caused a positive feedback event of wildfires (Hanson 2018). Finally, the mountains surrounding the Central Valley could trap ground-level ozone and PM_{2.5} within its borders. (Irceline 2018). There was less air pollution risk along the western coast due to the strength and high frequency of coastal winds which pushed air pollution eastbound (Adams et al. 2014). In reference to overall risk, the relatively higher weight of fire risk (30%) and relatively lower weight of flooding (20%), may explain the high risk in the areas surrounding the central valley and the low risk within it. With landslide risk also incorporating fire risk, fire risk significantly impacted overall natural hazard risk.

Our overall results were not supported by previous studies. One study by Bolin, Boone, and Grineski (2015) found that affluent populations were oftentimes more exposed to certain natural hazards, such as flooding, as affluent populations could afford insurance to mitigate the risks while enjoying and affording the luxuries associated

with water-front property. The study also found that less affluent populations often resided near areas with high air pollution, as there is not any insurance that could mitigate the costs of this hazard (Bolin et al. 2015). Several other studies have found that lower-income communities were more exposed to air pollution, although other factors such as race also play a role in distribution (Brulle and Pellow 2006; Marshall 2008; Clark et al. 2014).

Our study is important because it allows local governments to better prepare and mitigate environmental hazards. It is important to understand the geographic trends of environmental hazards in order to utilize the proper, necessary resources to help high-risk communities. This study was not without limitations. For one, we had to give a ranking of 0 (lowest risk) for areas with no data (such as areas with undetermined flood zones). Additionally, we had to simplify the criteria of risk for each natural hazard as there are an immeasurable number of factors that could influence flooding, landslides, and fires. However, in order to quantify the complexity of these hazards, we had to simplify the factors.

To further this study, further research should include an in-depth analysis into how varying the weights when quantifying individual natural hazards risk (such as flooding) as well as when quantifying the total environmental hazard risk in California will impact the findings. Further research should also incorporate additional environmental hazards, such as drought, to expand upon the current results. It would also be valuable to assess the relationship

of risk to natural hazards with other socioeconomic factors, such as race.

Figures and Tables

Table 1. Data sources

Name	Who Created	Time Valid	Description
National Flood Hazard Layer	FEMA	2018	Shapefile of flood data for California, including flood zones
California Air Pollution 2018	Office of Environmental Health and Hazard Assessment	2018	Shapefile of California with data of air pollution exposure (including but not limited to ozone and particulate matter 2.5), respiratory health diseases, and income
National Land Cover Database 2011	USGS	2011	Raster of the land use types in California
Fire Threat in California	State of California Fire Resource and Assessment Program (FRAP)	2005	Raster of fire risk in California. Created by combining fire frequency and potential fire behavior.
California Shapefile	State of California	2018	Shapefile of the state of California
California 90m DEM	Data Basin- from NASA and NGA data	2000	(An incomplete) Digital Elevation Model of California at 90-meter resolution
California 90m DEM-Tiles	USGS	2013	Tiles of California and Arizona Digital Elevation Models to complete the California DEM
California Census Tracts	American Fast Finder	2012-2016	Table of census data for census tracts of California, including but not limited to income data.
California Census Tracts Shapefile	US Census Bureau	2010	Shapefile of California census tracts

Table 2. Rationale for Reclassified Flooding Ranking (Second Look Flood, N.d.)

Flood Zone	Rank	Reason
“Area not included”; “D”	0	“D” rankings are possible but undetermined flood hazard areas.
“X”	1	Area of minimal or moderate flood hazard
“A”; “A99”; “AE”; “AH”; “Open Water”	2	Areas with a 1% annual chance of flooding or areas where clear base flood elevations
“AO”	3	Area with a 1% or greater chance of flooding each years with an average depth of 1-3 feet
“V”; “VE”	4	High risk coastal areas

Table 3. FRAP Fire Threat Rankings

FRAP Value	Our Rank	Definition
-1	0	Little to No Threat
1	1	Moderate
2	2	High
3	3	Very High
4	4	Extreme

Table 4. Rationale for Reclassified Slope Ranking (Clark et al. 2018)

Slope Degrees	Rank	Reason
0-1	0	Need some slope in order for a landslide to occur
1-10	1	Steep slopes not a necessary prerequisite for landslides to occur. Gentle slopes at 1–2 degrees can also cause landslides
10-20	2	Increasing slope allows for greater chance of mass wasting
20-40	3	Major landslides are often associated with slopes from 20-40 degrees
40-83	4	Extremely steep

Table 5. Rationale for Reclassified Land Cover Ranking (Montgomery 2018)

Land Cover	Rank	Reason
Open water Woody Wetlands Perennial Snow/Ice	0	Open water. High tree density in woody wetlands. Overall little soil to mass waste.
Deciduous forest; Emergent herbaceous wetlands; Evergreen forest; Mixed forest	1	High tree density keeps soils compact and prevents mass wasting
Shrub/scrub; Developed High Intensity	2	Shrub/scrub has some roots to stabilize soils; Little soil to mass waste in highly developed areas
Cultivated Crops; Pasture/Hay; Developed Medium Intensity; Herbaceous	3	Herbaceous, Cultivated crops, and pasture/hay lands have little roots to stabilize soils; A little bit of soil to mass waste in medium
Developed Open Space; Low Intensity; Barren Land; Unclassified	4	Developed Open Space, Low Intensity, and Barren land have little to no roots or structures to compact and stabilize soils.

Table 6. Rationale for Reclassified Ozone Ranking* (ESRI and Geiling 2015)

Ozone (ppm)	Rank	Reason
0.026- 0.34	0	Equal interval division rounded based on EPA standard of 0.070 as acceptable ozone level, noticeable amounts and respiratory effects, painless
0.3401 - 0.043	1	Uncomfortable patterns of breathing in some individuals
0.04301- 0.051	2	Coughing and throat irritation, more frequent episodes of coughing
0.05101 - 0.060	3	Chest pain, coughing, shortness of breath
0.0601- 0.068	4	Meets upper end of EPA standard - chest pain, intense coughing, difficulty breathing for individuals both with and without asthma

*Based on the amount of each in a daily maximum 8-hour period

Table 7. Rationale for Reclassified Particulate Matter (PM_{2.5}) Ranking* (EPA 2018)

PM	Rank	Reason
0 - 3.92	0	Equal interval division rounded based on range of 0-19.60 PM _{2.5} annually in California using 7.89 CA state average- particles linger in atmosphere and are breathed into lungs
3.9201 - 7.84	1	Slightly more acidic waters and possible irritation of throat and eyes
7.8401 - 11.76	2	Acidic waters and hazy air, depletes nutrients in soil
11.7601 - 15.68	3	Exertion experienced by sensitive individuals with increased possibilities of the following: nonfatal heart attacks, irregular heartbeat, aggravated asthma, decreased lung function, increased respiratory symptoms
15.6801 - 19.60	4	Lack of oxygen intake along with nonfatal heart attacks, irregular heartbeat, aggravated asthma, decreased lung function, increased respiratory symptoms, and premature death

*Based on the amount of each in a daily maximum 8-hour period

Figure 1. Four Risks of Environmental Hazards in California

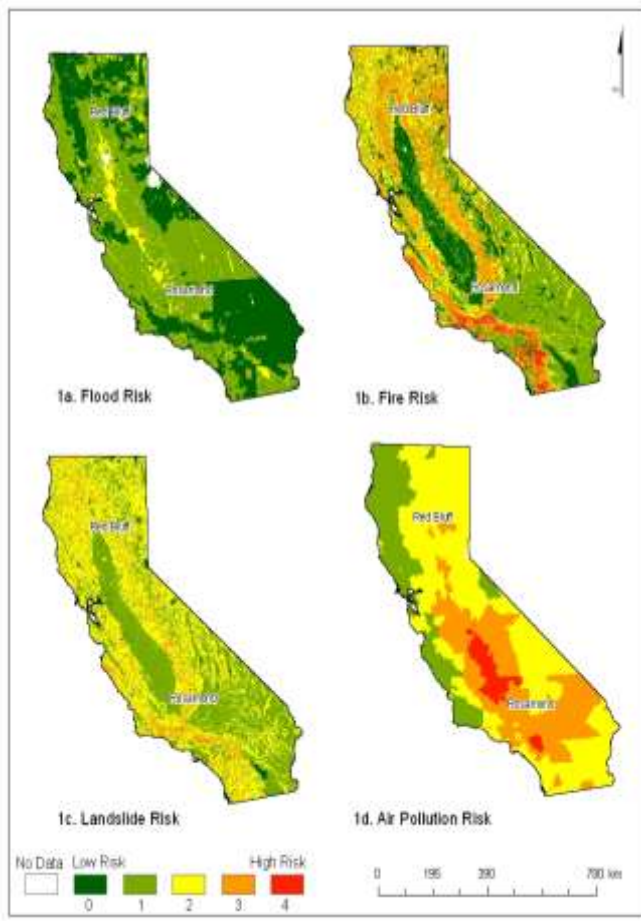


Figure 2. Overall Natural Hazard Risks in California

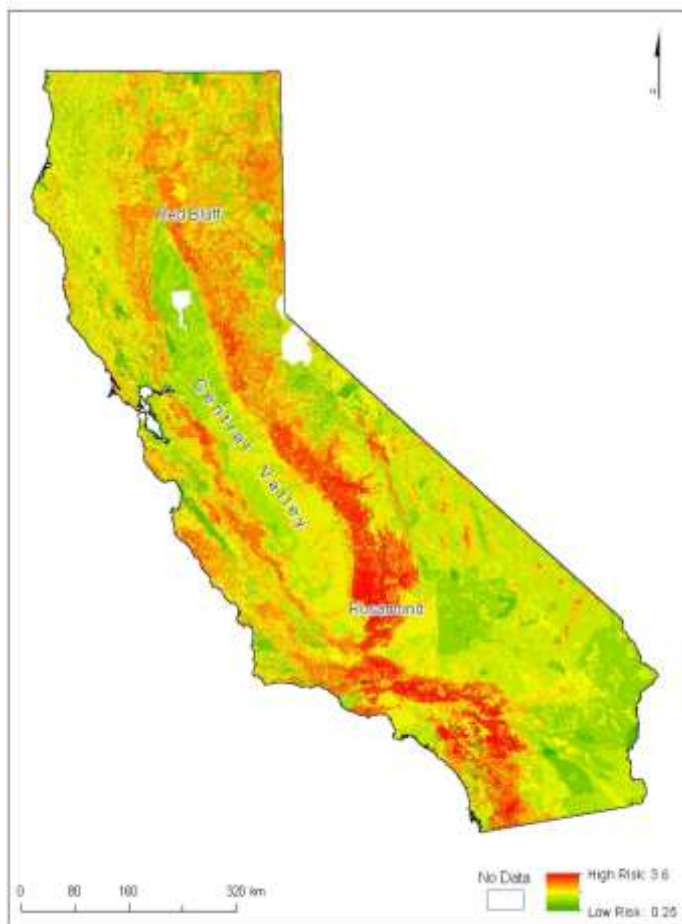


Figure 3. Overall High Environmental Hazard Risks Areas with Low Income in California

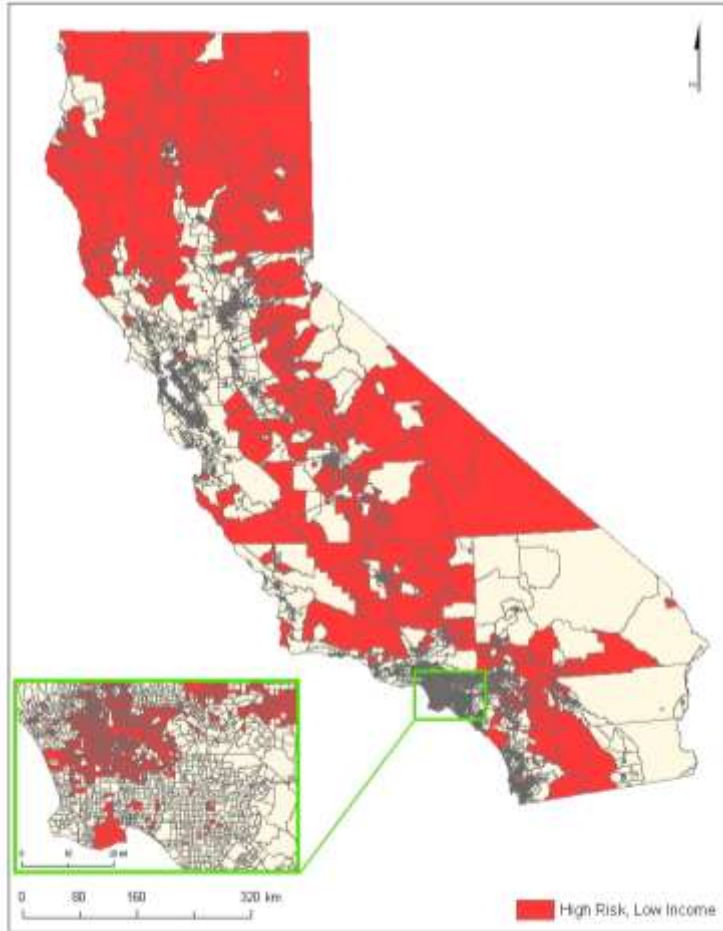


Figure 4. Scatterplots of Relationship Between Income and the Four Environmental Hazard Risks of Flood, Fire, Landslide, and Air Pollution.

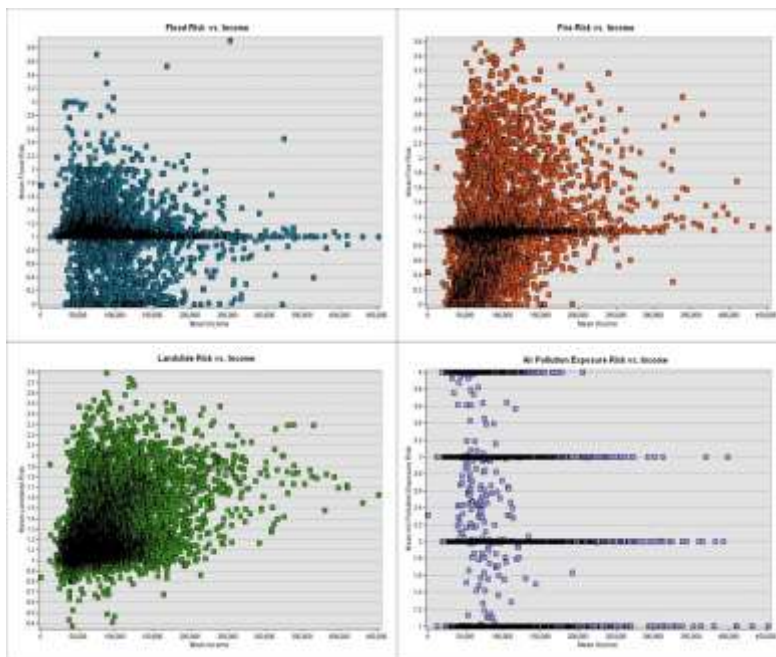
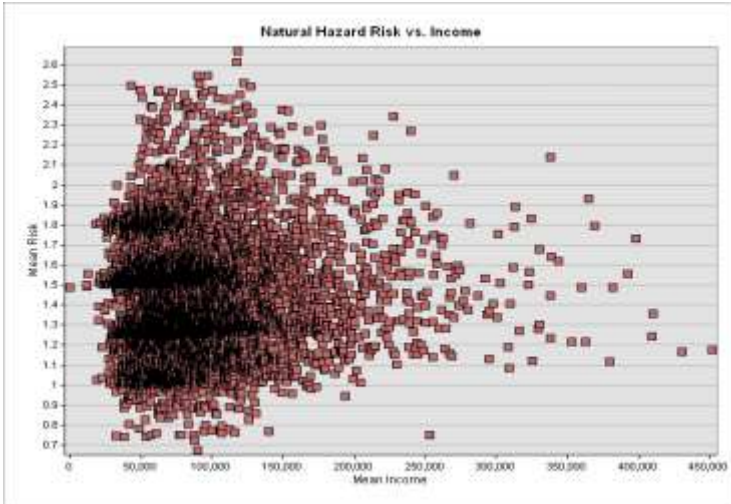


Figure 5. Scatterplot of Relationship Between Income and Overall Natural Hazard Risk from Flooding, Fires, Landslides, and Air Pollution.



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**Law's Racism: The Perpetuation of Settler Colonialism in
Ktunaxa v. British Columbia**

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Abstract: In considering the nexus between law, religion, and settler colonialism, I considered a case in which an Indigenous freedom of religion claim under section 2(a) of the Canadian *Charter of Rights and Freedoms* was ruled by the majority of Supreme Court of Canada as not being a valid freedom of religion claim. In examining this decision, I constructed an analytical framework through which I examined the decision in a way that considered the legal system in which it occurred, that legal system's culture, and the relevance of land in this case. Using this analytical framework, I teased out why the *Ktunaxa* decision occurred in the way that it did, drawing on the discourse of both the majority and concurring arguments. I argued that the Supreme Court of Canada restricting what may validly be claimed as an infringement on the Charter's guarantee to freedom of religion was an example of continuing settler colonialism that occurs within a political culture that, superficially, placed great emphasis on reconciliation with the Indigenous peoples that resided within its political-geographical confines.

Keywords: religious freedom, Indigenous people, *Ktunaxa v. British Columbia*, land, legal culture, Canada

Introduction

By considering the nexus between law, religion, and settler colonialism, this paper embarked on an analysis of *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*, hereafter “*Ktunaxa*.” *Ktunaxa* was a case brought on by Indigenous peoples contesting a freedom of religion claim under section 2(a) of the Canadian *Charter of Rights and Freedoms*. This claim, however, was ruled by the majority in the Supreme Court of Canada as not infringing on the Ktunaxa Nation’s freedom of religion. In examining this Supreme Court decision, the motivations of this paper were twofold. The first was to construct an analytical framework through which I examined *Ktunaxa* in a way that considered the legal system in which it occurred, that legal system’s culture, and the relevance of land in this case. Second, using this analytical framework, I teased out *why* the *Ktunaxa* decision occurred in the way that it did, drawing on the discourse of both the majority and concurring arguments. In doing so, I argued that the Supreme Court’s decision of what may validly be claimed as an infringement on the *Charter*’s guarantee to freedom of religion reflected a legal system that divides suffering into that which was socially acceptable and that which was not; a process that reflected dominant social and legal cultural beliefs and values. In light of this, I also argued that the expansive approach taken by the Court to freedom of religion in *Amselem v. Syndicat Northcrest* should not be restrained. These were relevant conclusions for a multitude of reasons. Beyond exposing how the machinations of the Canadian legal system produced this decision, it also spoke more broadly about

Canadian political culture. Though I did not discuss this in detail in this paper, this case provided an example of continuing settler colonialism that occurred within a political culture that, superficially, placed great emphasis on reconciliation with the Indigenous peoples that reside within its geopolitical confines.

Ktunaxa v. British Columbia: A Case Brief

Due to lengthy history of *Ktunaxa*, I have not recounted every detail of the case but rather provided an overview of the key components. According to the Supreme Court, the basic issues regarding the case, at paragraph 57, are as follows: 1) did British Columbia's Minister of Forests' decision to allow the Jumbo Valley Ski Hill development infringe upon the Ktunaxa's section 2(a) freedom of religion and conscience?; and 2) did the Minister's consultation with the Ktunaxa meet the requirements of s. 35 of the *Constitution Act, 1982*?⁶

The decision of the majority, at paragraph 75, found that the Ktunaxa's claim did not fall within the scope of section 2(a) of the *Charter*. Further, at paragraph 115, the Court found that the Minister's consultation efforts with the Ktunaxa were not unreasonable. The minority, led by Mr. Justice Moldaver, concurred in part with the majority, but found that the Ktunaxa did have a valid freedom of religion claim under section 2(a) of the *Charter*, but that

⁶ Section 35 states that “[t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.”

this claim was justifiably infringed upon under section (1) of the *Charter*, which allowed for infringements of rights and freedoms in such a way that was justifiable in a free and democratic society.

Constructing a Theoretical Framework

Before considering *Ktunaxa* itself, I have laid out the analytic means through which the case was analyzed. I accomplished this by conducting a review of relevant literature on the legal system itself, the act of “law doing,” and the importance of land in this case. In doing so, I created a means by which to analyze the Court’s holding and *ratio* in *Ktunaxa* and examine the implications of how the decision was reasoned. This was not for the purpose of determining what is the *right* or *wrong* way to conduct an analysis in this case but, rather, to tease out why the ruling occurred as it did.

To determine the court’s reasoning, I selected the following academic sources from the literature, which I briefly preface here. In my review of the literature, I took a top-down approach, beginning with the legal system as a whole and narrowing my analytic focus as I moved through sources. As such, I began with Louis Wolcher’s (2006) conceptualization of the legal system as one that produced a “Universal Human Suffering” and in which suffering was divided into that which is just, and that which is unjust. Having situated those reading this paper in “the ultimate goal” of our legal system and considered the unintended consequences of how it operates, I next considered an article titled “Racism and the Innocence of Law,” by Patrick Fitzgerald (1987). Fitzgerald (1987) analyzed the Western

liberal legal system itself and considered the unintended reproductions of racism and inequality through its reliance on presuppositions of equality and individualism. Following this, I considered how the legal system itself constructed religion within its confines, drawing on the writings of Benjamin Berger (2010). Finally, I considered the issue of land, which was at the heart of *Ktunaxa*, by examining conceptualizations of ongoing colonization and how land was at “the crux” of this process.

In concluding this section, I drew upon these modes of analysis and unified them into a single paradigmatic model through which I was able to embark upon an analysis of *Ktunaxa* itself. In doing so, I recognized the risk of flattening the deep and insightful works of the theorists that I have mentioned. However, I hoped to preserve the essential qualities of the works that I drew upon in my analytical model to fully capture what it is to “do law” in the context of *Ktunaxa*.

“Law-Doing” and the Division of Sorrows

In his article, Wolcher (2006:364) puts forth a model of “Universal Human Suffering,” pictured below:



While Wolcher (2006) spoke in his article about Universal Human Suffering, specifically regarding human rights, this mode of analysis has been adapted to cases⁷ concerning Indigenous issues in Canada. I would here like to focus on the suffering identified as “Rejected by Law as a Basis for Legal Remediation” in Wolcher’s (2006) typology. Wolcher (2006:393) said that “[l]aw-doers divide people’s suffering into two parts: suffering that is regarded as socially acceptable and suffering that is not.” He expanded on this central tenet of his essay by explaining that only those whose suffering was recognised by law-doers have the right to have their suffering taken seriously (Wolcher 2006:393).

In creating this distinction, Wolcher (2006:361) was answering his own guiding question: “what is the ultimate task of the law.” This was an important conclusion to consider in this paper and beyond, but it also put forth the question: what is the nexus between law and society’s dominant cultural norms that created such a division

⁷ See Hadley Friedland’s “Tragic Choices and the Division of Sorrows.”

of suffering? In order to answer this question, I considered the “culture” of the legal community and law itself in the next two articles.

The Liberal Legal System and the Reproduction of Racism

In his article, Fitzgerald told us that “[i]n liberal views of the world, law is manifestly incompatible with racism” (1987:119), and that “[l]aw is radically separate from 'material life’” (1987:121). Fitzgerald (1987:121) went on to say that self-interest, in a liberal system of law, must be constrained by universalistic legal and motivational structures. Setting aside for a moment the liberal legal system as a reproducer of racism, this act of situating his article within this perception was important. By doing so, Fitzgerald (1987) was pointing out a paradox within liberal legal systems: that despite discourses of universalism, equality under the law, and even a direct incompatibility with racism, law could and did reproduce racism. It was for this reason that the discourse of judicial decision makers became important, as it allowed for the breaking down and teasing out of racism. While such racism may not be intended, it was then of even greater importance to unmask these unintended and racist consequences of law doing.

In considering “what” racism was in liberal and legal terms, Fitzgerald (1987:123-124) conceptualized racism as the “intentional wrongdoing inflicted by one individual on another.” Through his examination of the British *Race Relations Act* of 1976, Fitzgerald (1987:122) contended that “positive law acquires identity by taking elements of racism into itself and shaping them in its own terms.” In

his analysis of adjudications made under that *Act*, Fitzgerald (1987:128) stated that “[j]udges relate to the overall ordering ethos of community in such ultimate and revealing terms as what is ‘sensible’ and ‘reasonable,’ what conforms to ‘the fitness of things’ and to ‘common sense.’” It was in this way that a universalistic system that operated on the foundation of equality of the individual was constrained: in the adjudication of disputes on the legal community’s ethos of what conforms to the “fitness of things.”

To, perhaps, dilute Fitzgerald’s (1987) argument into a form suitable for this paper, the adjudication of disputes, even when concerning legislation with the express interest of combating racism, took into itself racism in that decisions were made on the basis of the perceptions of the adjudicators. This has the effect, as Fitzgerald (1987:131) noted, of reflecting the community of law’s evocation and reliance on a “racially-conceived society and nation.”

Constitutional Horizons: Law’s Religion

In the context of “law’s religion,” Berger (2010:35) conceptualized “constitutional horizons” as the means by which a concept (such as religion) was processed. For Berger (2010:35), these means were the values and assumptions of Canadian constitutionalism. In this way, Berger (2010:35-36) understood “that religion never appears to the law on its own cultural terms but, rather, is always rendered through the lens of the culture of the constitutional rule of law.” Expanding upon this, Berger (2010:36) contended that in this culturally defined conception of religion, it attracted the

protection of the law under certain conditions, those being that a religious claim concerns a private belief that impacts the autonomy and choice of individuals.

This answers the question that I posed in the section considering Wolcher's (2006) Universal Human Suffering theory concerning a nexus between law and culture in the division of suffering. This also expanded upon such an idea in a uniquely Canadian and religious context, by relating what form of law's religion attracts legal protection in the case *Alberta v. Hutterian Brethren of Wilson Colony*. In doing so, Berger (2010:36) said that "the Court cements the centrality of choice in the logic of the constitutional protection of religion." Berger's analysis of culture's law was thus two pronged. First, law processed concepts (including religion) through the values, assumptions, and meaning giving of Canadian constitutionalism. Second, and in light of the first prong, religious claims in particular focused on the individualistic and agency-oriented idea of choice: that if a person is able to choose to believe and manifest that belief, freedom of religion has been afforded to that individual or collective of individuals.

The Importance of the (Settler Colonial) Construct of Land

Land has long been recognized as central to the process of colonization. Joyce Green, an Indigenous political scientist, noted that colonization was a two-part process. It consisted of the physical occupation of someone else's land, while simultaneously appropriating political authority, cultural self-determination, and

economic capacity (Green, 2003:52). Likewise, in an editorial on Settler Colonial Studies, Rowe and Tuck (2017:5) explained the significance of land in relation to colonialism in saying the following:

Land is at the crux of the relationships between Indigenous peoples and settlers in settler societies. Ongoing occupation and settler pursuits of land are often made natural, logical, or invisible in settler societies. Settler societies often regard land only in the constructs of property or natural resource. Indigenous understandings of land predate and have codeveloped alongside and in spite of settler constructions of property. For Indigenous societies, land is peoplehood, relational, cosmological, and epistemological. Land is memory, land is curriculum, land is language. “Land” also refers to water, sky, underground, sea.

Two things were apparent in this conceptualization of land. First, there was a disconnect between settler and Indigenous conceptualizations of land. Second, land clearly permeated the settler-Indigenous relationship. Though this paper focuses on the religious freedom aspect of the *Ktunaxa* decision, land was both inextricably linked to the settler-Indigenous relationship and was an issue before the Supreme Court in this case. While the Court separated the issues into two distinct analyses, they were intertwined, and land became a consideration in the making of a religious claim.

A Paradigm to Analyze Ktunaxa

In combining the analytical frameworks above I was, again, cognizant of the dangers of flattening the work done by scholars in order to create a unified means of analysis for this case. In my review of literature, I began with Wolcher's (2006) *Universal Human Suffering*: suffering is divided into that which is societally acceptable and that which is not. Following this, I examined Fitzgerald's (1987) "Innocence of Law," in which Fitzgerald (1987) concluded that adjudicators practice law in a way that reflected the way adjudicators think things ought to be and, in doing so, adopted racism into law's identity. I then considered Berger's (2010) constitutional horizon theory in which religion was defined on the basis of cultural values, assumptions, and the meaning-giving of Canadian constitutionalism. Finally, in considering land and processes of colonization, I found that land is at the crux of the settler-Indigenous relationship and permeated said relationship.

In combining the above, I seek to provide myself with a guiding question by which I will analyze *Ktunaxa*: considering that law divided suffering into that which is socially acceptable and that which is not, what are the values, assumptions, and constitutional cultures that inform the Supreme Court's decision in this case and, specifically, what impact does the status of land as property have on the Court's decision?

Ktunaxa v. British Columbia: Analysis

In answering this question, I first considered the values, assumptions, and constitutional culture that informed the Court's decision-making process. On the basis of this, I made a conclusion as to what "religion" and, therefore, what "suffering" the Court reasoned was (un)just. It was at this point that I analyzed, specifically, comments made by Moldaver J in his concurring opinion regarding land and property.

Constitutional Values, Meanings, and Cultures

In Berger's (2010) article on section 1 analyzes, he considered comments made by McLachlin CJ in her opinion in *Alberta v. Hutterian Brethren of Wilson Colony*. While Berger's (2010) analysis was made specifically in relation to section 1 analyses, I believe that the comment of McLachlin CJ spoke to the Court's broader interpretational culture. Berger (2010:36) pointed out that McLachlin CJ, at paragraph 88, listed various *Charter* "values," among which the most important value was liberty: that one can make a choice. This was also reflected in the majority's writing in *Ktunaxa*. In applying case law on freedom of religion to *Ktunaxa*, the majority stated, at paragraph 68, that an applicant must first demonstrate sincere belief in a religious practice, and second that state conduct interfered with the applicant's ability to believe or manifest belief in that practice in a manner that was not trivial or insubstantial (*Ktunaxa v. British Columbia (Forests, Lands and Natural Resource Operations)*, 2017).

In holding that the Ktunaxa Nation’s claim did not trigger section 2(a), the majority wrote at paragraph 70 that an “objective analysis of the interference caused by the impugned state action” must be conducted and that “the Minister’s decision does [not interfere with the Ktunaxa’s ability to believe in the Grizzly Bear Spirit or manifest that belief]” (*Ktunaxa v. British Columbia (Forests, Lands and Natural Resource Operations)*, 2017). In making such an analysis, the Court was essentially duplicating what it did in *Hutterian Brethren*. In *Ktunaxa*, the impugned state action did not manifestly interfere with the Ktunaxa Nation’s ability to *choose* to believe or manifest belief in the Grizzly Bear Spirit. What it did do, however, was make such belief devoid of any subjective meaning, as Moldaver J pointed out at paragraph 133:

If the Ktunaxa’s religious beliefs in Grizzly Bear Spirit become entirely devoid of religious significance, their prayers, ceremonies and rituals in recognition of Grizzly Bear Spirit would become nothing more than empty words and hollow gestures. There would be no reason for them to continue engaging in these acts, as they would be devoid of any spiritual significance (*Ktunaxa v. British Columbia (Forests, Lands and Natural Resource Operations)*, 2017).

The different opinions of the majority and Moldaver J highlighted a cultural rift in the Court that concerned the legal processing and construction of religion. Whereas the majority focused solely on the agency of individuals to believe and manifest belief in determining if a claim triggered section 2(a), Moldaver J considered the subjective

experiences of the individuals who lived this religion in that if the Grizzly Bear was no longer present, their beliefs and practices became “devoid of any spiritual significance.”

Land as Private Property

Though I had no way to determine the personal beliefs of the justices in the majority, it may also have been possible that broader cultural values informed their section 2(a) analysis. As noted in the section on the importance of land in this paper, “[f]or Indigenous societies, land is peoplehood, relational, cosmological, and epistemological. Land is memory, land is curriculum, land is language,” while, generally speaking, settlers conceptualise land as property and natural resources (Rowe and Tuck 2017:5). This settler conceptualization of land was even foregrounded in the analysis of *Moldaver J* under the *Doré* framework. In considering whether or not the State’s infringement of the Ktunaxa Nation’s freedom of religion, *Moldaver J* balanced granting the Ktunaxa the ability to effectively veto land developments versus their religious beliefs. It was not the objective of this paper to take a normative stance regarding the *Doré* analysis of *Moldaver J*, I instead wished to consider what was happening here more broadly.

In essence, at issue here was the conflicting conceptualizations of property. In the analysis of *Moldaver J*, primacy was given to the settler conceptualization of land as property rather than that of something inextricably linked to religion. This was explicitly justified by the statement that a veto over the development

“gives the Ktunaxa the power to exclude others from developing land that the public in fact owns,” at paragraph 150 (*Ktunaxa v. British Columbia (Forests, Lands and Natural Resource Operations)*, 2017). It was important to remember at this point, that despite there being no proven claim, the land on which the development was proposed was unceded territory. This paper made no determination as to whether or not this fact should give the *Ktunaxa* an effective veto over developments, however, the conceptualization by Moldaver J of unceded land as something that the public owns was certainly illuminating in considering the importance of land in this decision.

The Innocent Legal System and Universal Human Suffering

In his article, Fitzgerald (1987:131) stated that adjudicators evoke and rely on a “racially-conceived society and nation” in making decisions. I think, in considering the writing of Berger (2010), that this can be expanded beyond Fitzgerald’s (1987) contextual analysis. As I have highlighted in the previous sections on *Ktunaxa*, legal decisions makers do not merely rely on *racial* conceptions of society and nation, they relied on *dominant* conceptions of society and nation, such as religion and land in this case. It was here that legal decision makers processed religion and land “through the values, assumptions and meaning-giving horizon of Canadian constitutionalism” (Berger 2010:35) and, as a result, suffering was divided into that which is justified and that which is not.

In *Ktunaxa*, this means that not only is the Ktunaxa Nation was denied legal remedy, but they were further denied recognition

that a valid religious claim even exists. This relegated their suffering to the sphere of suffering that was not recognized by society. While this may not have a practical impact in that infringements could still be justified under section 1 of the *Charter*, it certainly has a discursive impact in that the Ktunaxa were not only denied legal remedy, they were told that one did not exist because of an incompatibility between the means by which their belief was manifested and Canadian law's construction of religion as one that was concerned with agency, not subjective practice.

Implications and Conclusion

Berger (2010:31) metaphorically related legal systems to balloons in his article on section 1 analyses: “[l]egal systems are like softly inflated balloons: if you squeeze on one side, you can expect a bulge elsewhere.” This applied to religious freedom claims in the Canadian context in that if many claims pass the section 2(a) test for religious freedom claims, the analytical burden was placed upon section 1 of the *Charter*. It is because of my analysis of *Ktunaxa* in this paper and the reasons detailed here that I disagreed with the notion that placing the analytical burden on section 1 created a process that was excessively nebulous.

As has been shown throughout this paper and specifically in the case of *Ktunaxa*, since the ultimate goal of legal systems was to divide sorrows into those which are socially acceptable and those which are not, and since this process was informed by the legal and broader culture of society, restricting the ability of Indigenous

peoples to make claims under section 2(a) represents what dominant Canadian culture considers religion, thereby excluding claims that do not conform to that view. I argued that at the very least, in discursive sense, a broad and expansive section 2(a) analysis was required. While I recognised that the same dominant cultural understandings of legal issues may impact analyses under section 1, in such a case, at least there is a recognition that there was a valid claim and infringement by state action. In the aftermath of the *Ktunaxa* decision, Ktunaxa Nation Council Chair Kathryn Teneese relayed that “the decision leads First Nations people to feel they are ‘less than’ others in their rights and beliefs” (Harris 2017). While, as in the concurring opinion of Moldaver J, the Court may have held that the Ktunaxa’s religious freedom was proportionately balanced with the statutory objectives that guided the development approval process, at least discursively the Ktunaxa would have had their religious freedom claim legitimated.

The importance of judicial discourse, particularly at the level of the Supreme Court of Canada, was recognized by Emmett MacFarlane in his dissertation on the Supreme Court. MacFarlane (2009:3) asserted that “judicial pronouncements on Charter rights ... play a prominent role in shaping discourse around rights.” If Canada’s highest court could not recognize the suffering experience by the *Ktunaxa* peoples, we could not rely on this court to further reconciliation between the Crown and Indigenous peoples. While it might be argued that this essay nitpicks technical aspect of the Court’s decision, as MacFarlane (2009) posited, what our courts say about

rights influences our discussion of rights and therefore our discussion of who has the right to have their suffering recognized and who does not. This fact was of the utmost importance to reconciliation because not only does the Crown-Indigenous relationship need repair, but so to our relations as various peoples coexisting on the land, however it may be conceptualized in our respective ontologies.

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