NEW MEXICO LAW REVIEW

Volume 49
Issue 2 *Summer*

Summer 2019

The Patent Lawyer's Guide to Fascism

Andrew C. Michaels
University of Houston Law Center

THE PATENT LAWYER'S GUIDE TO FASCISM ON INDIVIDUAL AUTONOMY AND PRIVATE LAW

Andrew C. Michaels*

This essay presents an unusual and potentially valuable way of thinking about the patent system. It is worth considering the ways in which the structure of private law may affect our susceptibility to undesirable forms of societal organization. This essay considers how a well-structured patent system could potentially reduce our susceptibility to fascism by: (1) promoting an ethos of independent creative thought, and (2) facilitating market entry by startups, thereby reducing market concentration and possibly reducing authoritarian hierarchy. One legitimate utilitarian aim of the patent system might be to thus promote horizontal individualism, which could tend to work against fascism's extremely nationalistic vertical collectivism. Promotion of individual autonomy might be an under-recognized benefit of the patent system, suggesting a valuable lens through which to view not only patent law, but also other areas of private law.

I. INTRODUCTION

There is some debate in the current literature about the proper aims of or justifications for intellectual property.[1] Some prominent scholars are concerned about a "retreat from evidence" in IP scholarship.[2] Such scholars point for example to Robert Merges' book *Justifying Intellectual Property*, which grounds IP partially

* Assistant Professor of Law, University of Houston Law Center. Thanks to all those who have provided comments, including Michael Abramowicz, Robert Brauneis, Rochelle Dreyfuss, Adam Mossoff, James Nelson, Sarah Rajec, Joshua Sarnoff, Pierre Schlag, and participants in the 2017 University of Maryland Junior Faculty Workshop, the 2017 Mid-Atlantic Patent Works-in-Progress at American University, the 2017-18 CPIP Thomas Edison Fellowship program at George Mason University (which provided supplemental funding), the 2017 Intellectual Property Scholars Conference at the Benjamin N. Cardozo School of Law, and the 2018 Southeastern Association of Law Schools annual conference. Thanks also to the editors of the New Mexico Law Review, including Angelica Lopez, Jonathan Gray, and Thomas Kricka, for their careful editing work.

1. *Compare* Mark A. Lemley, *Faith-Based Intellectual Property*, 62 UCLA L. REV. 1328 (2015) (arguing that moral justifications for IP are unpersuasive and a step backward in a rational society), *with* Robert P. Merges, *Against Utilitarian Fundamentalism*, 90 ST. JOHN'S L. REV. 681 (2016) (responding that there are many paths to truth, not just pure utilitarianism).

2. Lemley, *supra* note 1, at 1337.

in individual autonomy, drawing, inter alia, on the work of Immanuel Kant.[3] The concerned scholars worry that the "adherents of this new religion" believe "in IP as an end in itself," even though they "don't believe [IP] is better for the world than other systems, or that it encourages more innovation."[4]

However, if the patent system promotes or reinforces individual autonomy, as Professor Merges argues, that could be seen as a utilitarian aim in that it may give us some reason to "think the world will be a better place as a result."[5] The patent system's constitutional objective to "promote the Progress of Science and useful Arts,"[6] need not be viewed in narrow economic terms, and the "Supreme Court has identified several public policy goals beyond technological advancement within the patent system's broad charge to promote progress, such as increasing employment and enhancing social welfare."[7]

The importance of individual autonomy is highlighted by its stark contrast with the high level of conformity and submission required by fascism,[8] a topic of some current concern.[9] The topic is sometimes considered controversial, but that is

3. *See* ROBERT P. MERGES, JUSTIFYING INTELLECTUAL PROPERTY 68 (2011) ("The Kantian concepts I emphasize—individual will, appropriation (or 'possession'), and personal freedom (or autonomy)—are welcome additions to our understanding of the role of property in general.").

4. Lemley, *supra* note 1, at 1337–38.

5. *Id.* at 1328; *cf.* Stephanie Plamondon Bair, *Rational Faith: The Utility of Fairness in Copyright*, 97 B.U. L. REV. 1487, 1490 (2017) ("If consideration of fairness is faith based, then, it is a rational faith, because empirical evidence shows that fairness promotes utilitarian ends."); Peter Lee, *Toward a Distributive Agenda for U.S. Patent Law*, 55 HOUS. L. REV. 321, 354 (2017) ("At a foundational level, the objective of maximizing social utility can require redistribution of resources, particularly given the principle of diminishing marginal utility."); Robert P. Merges, *Autonomy and Independence: The Normative Face of Transaction Costs*, 53 ARIZ. L. REV. 145, 150 (2011) ("[I]f independent production serves important social values beyond efficiency, then we might consider bearing slightly higher transaction costs than might be dictated by a strictly efficiency-based viewpoint.").

6. U.S. CONST. art. I, § 8, cl. 8.

7. Lee, *supra* note 5, at 353; *see also* Dan L. Burk, *Diversity Levers*, 23 DUKE J. GENDER L. & POL'Y 25, 28–29 (2015) ("But the concept of progress need not be confined to utility and might plausibly encompass incommensurables such as human flourishing or dignity.").

8. *See* ROB RIEMEN, TO FIGHT AGAINST THIS AGE: ON FASCISM AND HUMANISM 58 (2018) ("Theodore Adorno: 'The only true counterforce to the phenomenon of Auschwitz is individual autonomy, the capacity for reflection, self-determination, not joining in, not assimilating, and being a man of character, an independent spirit instead of a characterless individual.'"); STEPHANIE M. WALLS, INDIVIDUALISM IN THE UNITED STATES: A TRANSFORMATION IN AMERICAN POLITICAL THOUGHT 16 (2015) ("[A]n authoritarian state of any ilk would neither desire to nor strive to protect the rights of the individual."); John Duckitt, *Authoritarianism and Group Identification: A New View of an Old Construct*, 10 POL. PSYCHOL. 63, 70 (1989) (discussing authoritarianism and "obedience to ingroup leaders and authorities — that is, authoritarian submission."); Markus Kemmelmeier et al., *Individualism, Collectivism, and Authoritarianism in Seven Societies*, 34 J. CROSS-CULTURAL PSYCHOL. 304, 305 (2003) ("[T]he cultural ideology of individualism appears to be diametrically opposed to the notion of conformity to the group and subordination to authority.").

9. *See, e.g.*, HENRY A. GIROUX, AMERICAN NIGHTMARE: FACING THE CHALLENGE OF FASCISM (2018); ALEXANDER REID ROSS, AGAINST THE FASCIST CREEP (2017); JASON STANLEY, HOW FASCISM WORKS: THE POLITICS OF US AND THEM (2018); Pierre Schlag, The American Road to Fascism (Law, Politics, and Decadence) (Nov. 7, 2017) (unpublished manuscript) (on file with The New Mexico Law Review); *cf.* Aziz Huq & Tom Ginsburg, *How to Lose a Constitutional Democracy*, 65 UCLA L. REV. 78 (2018).

not necessarily in itself a good reason to avoid the topic.[10] To be clear, America is thankfully not currently fascist.[11] But a gradual slide in that direction may well be taking place,[12] and there is no guarantee that "it" won't happen here.[13]

In a broader sense then, the thesis of this essay is that the structure of our private law potentially affects our susceptibility to fascism, and that it is worth trying to understand how. This is not a novel idea, "anti-fascism served as a dominant motivation underlying the post-War antitrust regimes in both the United States and Europe."[14] But this essay provides a novel (as far as the author is aware) argument that anti-fascism could be one appropriate goal or benefit of the patent system, and serves as an invitation for legal scholars to resume or conduct similar analyses in other areas of law.

With its vertical collectivist organization,[15] fascism is both a particular form of totalitarianism, and a particular form of authoritarianism. It is authoritarian (and vertical) in a hierarchical "follow the leader" sense, and it is totalitarian (and nationally collectivist) in that requires complete devotion to the State or the *Volk*, leaving no space for individual autonomy.[16] As Robert Paxton explains, this *obligatory* collectivist ultranationalism is a main characteristic of fascism: "the primacy of the group, toward which one has duties superior to every right, whether

---

10. *Cf.* RIEMEN, *supra* note 8, at 18 ("Wise men like Confucius and Socrates knew that to be able to understand something, you had to call it by its proper name. The term *populism*, being the preferred description for a modern-day revolt of the masses, will not provide any meaningful understanding concerning that phenomenon.").

11. *See* Cass R. Sunstein, *It Can Happen Here*, N.Y. REV. BOOKS (June 28, 2018), https://www.nybooks.com/articles/2018/06/28/hitlers-rise-it-can-happen-here/ ("[W]ell, it's not fascism, but the United States has not seen anything like it before."); *cf.* GIROUX, *supra* note 9, at 44 ("[T]he mobilizing ideas, policies, and ruthless social practices of fascism, wrapped in the flag and discourses of racial purity, ultra-nationalism, and militarism, are at the center of power. . . . ").

12. *Cf.* HANNAH ARENDT, THE ORIGINS OF TOTALITARIANISM 440 (new ed. 1966) ("The road to totalitarian domination leads through many intermediate stages. . . . "); Huq & Ginsburg, *supra* note 9, at 168 ("There is a low risk, in our view, of either military coup or the institutionalization of permanent emergency rule. . . . The threat of constitutional retrogression is more substantial, we think, and more insidious.").

13. *See* RIEMEN, *supra* note 8, at 34 ("Camus and Mann certainly weren't the only ones who, once the war was over, quickly realized what we are all too eager to forget: that the fascist bacillus will always remain virulent in the body of mass democracy."); *cf.* ALBERT CAMUS, THE PLAGUE 308 (Stuart Gilbert trans., Vintage Books Int'l 1st ed. 1991) (1947) ("[T]he plague bacillus never dies or disappears for good; that it can lie dormant for years and years in furniture and linen-chests; that it bides its time in bedrooms, cellars, trunks, and bookshelves; and that perhaps the day would come when, for the bane and the enlightening of men, it would rouse up its rats again and send them forth to die in a happy city.").

14. Daniel A. Crane, *Antitrust and Democracy: A Case Study from German Fascism* 19 Law & Econ. Working Papers, Art. 155 2018), https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1266&context=law_econ_current.

15. *See infra* Part III(C).

16. *Cf.* ROBERT O. PAXTON, THE ANATOMY OF FASCISM 217 (2004) (footnote omitted) ("Although authoritarian regimes often trample civil liberties and are capable of murderous brutality, they do not share fascism's urge to reduce the private sphere to nothing. . . . Authoritarians would rather leave the population demobilized and passive, while fascists want to engage and excite the public. Authoritarians want a strong but limited state.").

individual or universal, and the subordination of the individual to it."[17] As such, deeply embedded notions of American "rugged individualism" and self-determination may tend to be defenses against fascism, though on the other hand, there is also a strong conformist aspect to the American ethos.[18]

The patent system is designed in part to encourage creative individuals to think differently and invent something that would not have been obvious.[19] In promoting autonomous thinking by incentivizing entrepreneurial innovation, an effective patent system may tend to make us less susceptible to collectivist totalitarianism, albeit perhaps only marginally. A fascist regime does not want free thinking citizens; Victor Klemperer describes the Third Reich as wanting: "to strip everyone of their individuality, to paralyze them as personalities, to make them into unthinking and docile cattle in a herd driven and hounded in a particular direction, to turn them into atoms in a huge rolling block of stone."[20] A society with a greater number of entrepreneurial inventors who think for themselves would seemingly tend to be less prone to complete uniform devotion to a nationalistic vision.[21]

At the least, these sorts of effects seem worth thinking about for patent law, and *a fortiori* for private law in general.[22] How might private law be structured so as to promote individual autonomy? What are the effects of private law on market concentration? How does the promotion of autonomy, or the extent of market concentration, affect our potential susceptibility to fascism? The goal of this essay is not necessarily to provide definitive answers but rather to demonstrate the importance of these sorts of questions and the potential value of further inquiry along these lines. The argument here is not that a well-structured patent system can serve as an absolute barrier to fascism, nor is the claim that a country without a patent system will necessarily be fascist. The patent system is but one factor amongst many, but its effects are nevertheless worthy of consideration. Though the effects on societal levels of individual autonomy attributable to the structure of patent law alone

17. *Id.* at 219; *see also* ROSS, *supra* note 9, at 7 ("The other side of the paranoid specter of the parasite or the cancer is the national community as an organic body—whether based on biological race theory or cultural-linguistic ethnocentrism.").

18. *See, e.g.*, BARBARA EHRENREICH, BRIGHT-SIDED: HOW THE RELENTLESS PROMOTION OF POSITIVE THINKING HAS UNDERMINED AMERICA 55 (2009) ("What has changed, in the last few years, is that the advice to at least act in a positive way has taken on a harsher edge. The penalty for nonconformity is going up. . . . ").

19. *See* 35 U.S.C. § 103 (2012); *infra* Part II(A).

20. JASON STANLEY, HOW PROPAGANDA WORKS 2 (2015) (quoting VICTOR KLEMPERER, THE LANGUAGE OF THE THIRD REICH (Martin Brady trans., Bloomsbury Publishing PLC. 1975) (1947)); *see also infra* Part II(B).

21. *Cf.* Justin N. Kaushall, *Can Art Fight Fascism?*, 129 PHILOSOPHY NOW 14, 16 ("This brings me to the final reason why art may resist fascism. Art is able to critically think about society, and so indicate a better one, because it is partially *autonomous* from society and history."); Phil Treagus, *Brad Evans: A World Without Books is a World Foreclosed*, READING LISTS (June 1, 2017), www.thereadinglists.com/brad-evans-reading-list/ ("Every great tyranny begins by declaring a war upon the imagination and the appropriation or imprisonment of those deemed to be its most creative.").

22. *See* Pierre Schlag, *The Knowledge Bubble—Something Amiss in Expertopia*, *in* SEARCHING FOR CONTEMPORARY LEGAL THOUGHT 428 (Justin Desautels-Stein & Christopher Tomlins eds., 2017) (arguing in favor of greater focus on macro effects of law in general).

might be relatively minor, the effects of private law as a whole may well be quite significant.[23]

The effects of public law (governing vertical interactions between citizens and the State),[24] on political organization and individual autonomy are, to be sure, also important. For example, a larger estate tax on the wealthy might tend to work against authoritarianism by reducing entrenched hierarchy in society.[25] Moreover, those at the bottom of a highly unequal society, without other prospects for creating meaningful lives, might tend to rally around an ultranationalistic (or racist) worldview, forming the unthinking and loyal "mob" required for totalitarianism.[26] But the point in this essay is that the effects of private law (governing horizontal interactions between citizens) on individual autonomy, while perhaps less obvious, should not be overlooked.

Aside from encouraging an ethos of independent creative thought, in a more tangible economic sense, there is considerable evidence that the economic rewards protected by the patent system tend to facilitate market entry by startups, at least in certain sectors.[27] By working against market concentration, a functional patent system may enhance autonomy by giving technology sector employees more choice as to where to work.[28] Because of the societal benefits of a less concentrated marketplace, the effects of the patent system on market concentration, often overlooked and under-appreciated,[29] are worthy of more attention.

History has shown that a patent system may be corrupted and used as a propaganda tool to further a fascist regime.[30] Thus while an ideal patent system may tend to work against fascism, it is essential to protect the integrity and openness of

---

23. *Cf.* Adam J MacLeod, *Strategic and Tactical Totalization in the Totalitarian Epoch*, 5 BRIT. J. AM. LEGAL STUD. 57, 73 (2016) (arguing that that private law is "necessarily at odds with totalitarian rule," in part because "totalitarian governments cannot let freethinking citizens and institutions flex their practical-reasoning muscles on questions of civic importance").

24. The distinction between public and private law is notoriously fuzzy and difficult, but in this essay private law is used to mean law that primarily defines "the rights and duties private individuals and associations owe each other," as opposed to public law, which "regulates the internal conduct of government and government's relationship to private parties." Paul A. Diller, *The City and the Private Right of Action*, 64 STAN. L. REV. 1109, 1116 (2012). A patentee's rights to exclude other private parties from infringing the patent, then, would be private law in this sense. Martha Chamallas, *Beneath the Surface of Civil Recourse Theory*, 88 IND. L.J. 527, 530 (2013) ("[T]he rhetoric of civil recourse theory downplays the significance of the state and casts private individuals as the primary actors.").

25. *Cf.* Åsbjørn Melkevik, *A Tax Dead on Arrival: Classical Liberalism, Inheritance, and Social Mobility*, 22 CRITICAL REV. INT'L SOC. & POL. PHIL. 200, 202 (2019) ("advocating for an inheritance tax that is calibrated to the inheritor's wealth to limit the growth of fortunes and further equality of opportunity from a classical liberal perspective").

26. *Cf.* ARENDT, *supra* note 12, at 107 ("[T]he mob will always shout for the 'strong man,' the 'great leader.' For the mob hates society from which it is excluded, as well as Parliament where it is not represented.").

27. *See infra* Part III(A).

28. *See infra* Part III(B).

29. *See, e.g.*, Lucas S. Osborn et al., *A Case for Weakening Patent Rights*, 89 ST. JOHN'S L. REV. 1185 (2015) (recommending that the patent system should be weakened by twenty-five to fifty percent, without considering market concentration effects).

30. *See infra* Part II(C).

the patent system, and be wary of the introduction into patent law of considerations of the inventor's nationality or personal characteristics.

Part II contrasts fascism with the notions of individualism reflected in the patent system. Part III discusses how patents can also promote autonomy in an economic sense by reducing market concentration.

II - PHILOSOPHICAL

A. Patents and Individual Autonomy

In *Justifying Intellectual Property*,[31] Robert Merges makes a strong case for grounding intellectual property partially in the autonomy interest of the inventor or creator. According to Professor Merges, a "personal, autonomous, and active" will, which is "highly individual," is "an essential aspect of what [Kant] thought it means to be human,"[32] such that "the essence of property for Kant is this: other people have a duty to respect claims over objects that are bound up with the exercise of an individual's will."[33] For Hegel as well, "property enables the abstract person to develop individuating characteristics that enable her to engage in intersubjective relations."[34] Property is necessary to allow the Kantian autonomous will to flourish, and Merges argues that this justification of property extends to intellectual property rights as well. The ability of an inventor to express her Kantian autonomous will by transforming "off-the-shelf materials into prototypes, rough designs, and finished products," deserves respect, and "stable possession is required for a creator to fully work his will on a found object."[35]

As Professor Merges explains, "Michelangelo's rights over a block of marble must include continuing access while he is working on it," and "might very well include the right to control what happens to the statue after he finishes it," so as to "further his purpose or goal in carving the statue, that is, the end to which he

---

31. MERGES, *supra* note 3.

32. *Id.* at 76. Kant is of course far from the only important philosopher to have highly valued the autonomous individual will. *See, e.g.*, SIMONE DE BEAUVOIR, THE ETHICS OF AMBIGUITY 138 (Bernard Frechtman trans., 4th paperbound ed. 1968) (1948) ("[A]s Kant would say, the value of an act lies not in its *conformity* to an external model, but in its internal truth."); BERTRAND RUSSELL, POLITICAL IDEALS 77 (Prometheus Books, Great Books in Philosophy Series, 2005) (1917) ("To preserve and strengthen the impulse that makes individuality should be the foremost object of all political institutions."); JEAN-PAUL SARTRE, EXISTENTIALISM IS A HUMANISM 23 (John Kulka ed., Carol Macomber trans., Yale Univ. Press 2007) (1947) ("[T]he first effect of existentialism is to make every man conscious of what he is, and to make him solely responsible for his own existence.").

33. MERGES *supra* note 3, at 72.

34. Stewart E. Sterk, *Intellectualizing Property: The Tenuous Connections Between Land and Copyright*, 83 WASH. U. L.Q. 417, 424 (2005).

35. MERGES *supra* note 3, at 76. This notion of stability and individual labor is also grounded in Locke's labor theory of value. *Id.* at 34 ("Locke establishes the essential foundation of a system of private property rights—a one-to-one mapping between individual people and discrete economic resources."); *see also* Adam Mossoff, *Introduction* to EDWARD ELGAR, INTELLECTUAL PROPERTY AND PROPERTY RIGHTS xv–xvi (Adam Mossoff ed., 2013), http://ssrn.com/abstract=2466479 ("Lockean labor-desert theories can justify patent doctrines and have in fact played a determinative role in the formation and evolution of these doctrines.").

applies his will."[36] This purpose "includes a desire to develop his talent, to earn a reputation as an artist, and ultimately to make a living as an artist," so as to "fully reflect and encourage an expansive sense of the creator's autonomy."[37] Patents may similarly be seen as supporting inventor autonomy, by granting inventors the extended possession which protects the "mental toil and perspiration" that is required for an inventive vision to be had or to be realized in the world.[38] Additionally, it has been argued that "inventors have a strong personhood stake in their inventions and in the inventive process," and an inventor has "autonomy over her own inventiveness," which patents help to protect.[39]

A patentable invention is in some sense, by definition, a result of autonomous creative thinking that would not have been obvious even to one of ordinary skill in the relevant art.[40] One way of tailoring the patent law to better promote individualism, then, might be to strengthen the non-obviousness requirement, i.e., require a greater "inventive step" beyond the prior art in order to receive a patent. Other commentators have already argued in favor of this sort of heightened bar to patentability, pointing out that a "low obviousness requirement can 'stifle, rather than promote, the progress of the useful arts.'"[41] Requiring a greater inventive step might tend to incentivize individuals and or small groups (such as startups) to think more creatively, aiming for major breakthroughs as opposed to mere marginal improvements over the prior art. Although this would result in a reduction of the number of patents granted, it would not necessarily work against the market dispersing benefits of patents discussed in Part III, given that startups tend to be disproportionately creative and particularly well suited to fundamental breakthrough innovation, rather than mere marginal improvements.[42] Requiring a larger inventive step could result in fewer patents granted, but it would also strengthen enforceability and restore some public confidence in the patent system by ensuring that only true inventions receive patents.

According to economic historian Professor Zorina Khan, the "fuel of interest" supplied by the U.S. patent system has "induced growing numbers of people

---

36. MERGES, *supra* note 3, at 81.

37. *Id.*

38. *Id.* at 79.

39. Steven Cherensky, Comment, *A Penny for Their Thoughts: Employee-Inventors, Preinvention Assignment Agreements, Property, and Personhood*, 81 CALIF. L. REV. 595, 648, 52 (1993); *see also* Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982).

40. *See* 35 U.S.C. § 103 (2012).

41. Ryan Abbott, *Everything is Obvious*, 66 UCLA L. REV. 2, 47 (2018) (quoting KSR Int'l Co. v. Teleflex Inc., 550 U.S. 398, 427 (2007)); *see also* DAN L. BURK & MARK A. LEMLEY, THE PATENT CRISIS AND HOW THE COURTS CAN SOLVE IT (2009).

42. *See* John Freeman & Jerome S. Engel, *Models of Innovation: Startups and Mature Corporations*, CAL. MGMT. REV., Fall 2007, at 94, 117 ("Where innovations are most disruptive of existing markets, organizational structures, and management processes, existing mature corporations find innovation especially challenging. . . . Such factors slow the innovation process in mature corporations, opening a window in time for entrepreneurs to start and grow new companies."); *see also* E.F. SCHUMACHER, SMALL IS BEAUTIFUL: ECONOMICS AS IF PEOPLE MATTERED 229 (Harper & Row 1975) (1973) ("[T]he specific danger inherent in large-scale organisation is that its natural bias and tendency favour order, at the expense of creative freedom."); Lee, *supra* note 5, at 364 ("Numerous studies reveal that small entities are disproportionately innovative relative to large corporations.").

to invest more in inventive activity and innovation," and has been "instrumental in directing the efforts of a diverse array of individuals toward extracting returns from their improvements."[43] The fundamental spirit of the patent law is thus in part one of Kantian *sapere aude* – of daring to think for oneself – antipodal to the "follow the leader" style anti-intellectualism of fascism.[44]

B. Fascism and Individual Autonomy

Fascist philosophy could fairly be characterized as consisting of extreme nationalism and racism.[45] In discussing more elaborate characterizations, the purpose here is certainly not to give fascism more credit than it deserves; rather, it is to understand the state-wide totalitarian nationalistic collectivism of fascism, so as to consider how private law (including patent law) might tend to work against preconditions for fascism by promoting individualism. That the Kantian autonomy ideally reflected in and promoted by the patent system is antithetical to the philosophy of fascism can be seen, for example, in the words of Giovanni Gentile:

The Fascist State, in order to penetrate and direct the consciousness of its citizens, wishes to organize them in national unity; a unity possessed of a soul. That unity would manifest itself as a unitary being, possessed of powerful will, and a consciousness of its own ends.[46]

This idea of a unity, or "unitary being" possessed of a will is somewhat reminiscent of, but very different from, Kant's notion of the *Wille*, the universal, rationalizing will or collective sense of reason, (as opposed to the "personal will," or *Willkur*).[47] Gentile holds, unlike Kant, that the personal will is entirely eclipsed or subsumed by the will of the unitary being such that: "My will is not my own; it is a universal will."[48] Drawing on the work of Gentile, Joseph Verbovszky elaborates on

43. ZORINA KHAN, THE DEMOCRATIZATION OF INVENTION 107 (2005); *see also infra* Part III.

44. *See* PAXTON, *supra* note 16, at 139 ("Since leaders supposedly had superhuman mental powers, fascist militants preferred to settle intellectual matters by a *reductio ad ducem*."); *cf.* RUSSELL, *supra* note 32, at 20 ("In every walk of life, independence of mind is punished by failure, more and more as economic organizations grow larger and more rigid. Is it surprising that men become increasingly docile, increasingly ready to submit to dictation and to forego the right of thinking for themselves?").

45. *Cf.* TONY JUDT WITH TIMOTHY SNYDER, THINKING THE TWENTIETH CENTURY 159 (2012) ("The fascists don't really have concepts. They have attitudes."); ROSS, *supra* note 9, at 331 ("Fascism is fidelity to inequality and brutality.").

46. GIOVANNI GENTILE, ORIGINS AND DOCTRINE OF FASCISM 72 (A. James Gregor ed., A. James Gregor Trans., Routledge 2017) (1932); *see also* PAXTON, *supra* note 16, at 17 ("Only in 1932, after he had been in power for ten years, and when he wanted to 'normalize' his regime, did Mussolini expound Fascist doctrine, in an article (partly ghostwritten by the philosopher Giovanni Gentile) for the new *Enciclopedia italiana*.").

47. In *Justifying Intellectual Property*, Merges speaks primarily of the personal Kantian will, or *Willkur*. *See* MERGES, *supra* note 3, at 338 n.24. The Kantian universal rationalizing *Wille* could perhaps be analogized to the legal community's collective sense of reason, something akin to "thinking like a lawyer."

48. GENTILE, *supra* note 46, at 84; *cf.* CAMUS, *supra* note 13, at 167 ("No longer were there individual destinies; only a collective destiny, made of plague and the emotions shared by all.").

the idea of the fascist state or group as "unitary being" (or *Volk*), and argues that fascism should be seen as "an ethos, a philosophy, a way of thought."[49]

According to Verbovszky, fascists begin with the conception of life as a struggle, where the only way to survive "is to be stronger than one's adversary."[50] The way to make it in this cruel world, for fascists, is to band together into a *Volk*, where the "family is grafted out of its purely domestic role and onto the national stage."[51] The *Volk* is Gentile's "unitary being," a meta-person, it is "an impersonal individual who possesses a separate and transcendent will made from the collective wills of all the people in a society."[52]

Similarly, Roger Griffin finds that fascism "tends to be associated with a concept of the nation as a 'higher' racial, historical, spiritual or organic reality which embraces all the members of the ethical community who belong to it."[53] Thus the people in a fascist society (or State)[54] are all part of a "collective consciousness, a 'hive-mind' so to speak, that has its own consciousness and will, functioning as an individual person," such that for fascists, "the only real concern of a person's life should be that he directs himself according to the will of the *Volk*."[55] Verbovzky claims that history has shown fascists individually to be "quite unafraid of death" (citing for example the Japanese Kamakazi),[56] which would be in accord with the idea that a fascist society tends to view itself as a single unitary being.[57]

The fascist requirement of complete devotion to a unitary being identified with the State is quite incompatible with individual autonomy.[58] Whereas the subject of a liberal (limited) state is sovereign and individual,[59] the subject of a totalitarian

---

49. Joseph Verbovszky, The Nature of Fascist Thought 1 (unpublished manuscript) (on file with the New Mexico Law Review).

50. *Id.* at 3.

51. *Id.* at 5; *see also* TIMOTHY SNYDER, BLACK EARTH: THE HOLOCAUST AS HISTORY AND WARNING 11–28 (2015) (describing Hitler's collectivist version of Social Darwinism).

52. Verbovszky, *supra* note 49, at 5.

53. ROGER GRIFFIN, THE NATURE OF FASCISM 37 (Routledge 1993) (1991).

54. *See* Verbovszky, *supra* note 49, at 17 ("This is what the Italian Fascists conceived of as the Italian *Volk*, even though Gentile refers to it as 'The *State*.' This reveals the fact that each form of Fascism conceives of itself differently, in its own peculiar way. The Italian *State* functions in its capacity as a *Volk*.").

55. *Id.* at 7 (emphasis added).

56. *Id.* at 4; s*ee also id.* at 37 ("[T]he imperial Japanese sought to forge a warrior mentality across all of Japan, a warrior mentality which valued sacrifice and, through certain tenets of Zen Buddhism allowed for willful acceptance of death and self-annihilation which eventually represented itself in the famous Kamikaze in the latter portion of the war.").

57. *Cf.* RICHARD DAWKINS, THE SELFISH GENE 172 (30th anniversary ed. 2006) ("Kamikaze behaviour and other forms of altruism and cooperation by workers are not astonishing once we accept the fact that they are sterile. . . . The death of a single sterile worker bee is no more serious to its genes than is the shedding of a leaf in autumn to the genes of a tree.").

58. *See* CHRIS HEDGES, EMPIRE OF ILLUSION 112 (2009) ("The single most important quality needed to resist evil is moral autonomy."); PAXTON, *supra* note 16, at 40 ("Fascisms seek out in each national culture those themes that are best capable of mobilizing a mass movement of regeneration, unification, and purity, directed against liberal individualism and constitutionalism and against Leftist class struggle.").

59. *See* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness."); MILTON FRIEDMAN,

fascist state must be entirely or religiously devoted to the *Volk*.[60] According to Robert Paxton, "fascist leaders enjoyed a kind of supremacy," which "rested on *charisma*, a mysterious direct communication with the *Volk* or *razza* that needs no mediation" and "resembled media-era celebrity 'stardom,' raised to a higher power by its say over war and death."[61]

The fascist hive-mind or unitary being is of course never fully realized in practice,[62] but fascist societies attempt to move in this direction by developing methods of "differentiating who is and who is not part of the *Volk*."[63] The "*Volk*, although based on the concept of ethnicity and race ultimately sets its own parameters of belonging,"[64] that is, the methods of differentiation may be rooted primarily in ethnicity, as in the case of Nazis, or may instead be rooted more in citizenship, as in the case of the Italian fascists.[65] In fascist societies, individuals who refuse to assimilate or conform to the requirements of the State "must be expelled from the society or eradicated to preserve the organic unity of the *Volk*," because "conflicting identities interfere with the general interest of the *Volk* and result in something quite unacceptable to Fascists, a pluralistic society."[66] For example, in 1937, "Himmler wished to enlarge the 'group of enemies of the people' to include those who, although not politically active, had come to notice through 'a typically Jewish behavior that was damaging to the German People (*Volk*).'"[67]

Liberalism, Old Style (1955), *reprinted in* THE INDISPENSABLE MILTON FRIEDMAN (Lanny Ebenstein ed., 2012) ("Liberalism, as it developed in the seventeenth and eighteenth centuries and flowered in the nineteenth, puts major emphasis on the freedom of individuals to control their own destinies. Individualism is its creed; collectivism and tyranny its enemy."); John Finnis, *Liberalism and Natural Law Theory*, 45 MERCER L. REV. 687, 687 (1994) ("[G]overnment and law should be *limited* in their range of application. . . . ").

60. *See* STANLEY G. PAYNE, A HISTORY OF FASCISM 1914–1945, at 200 (1995) ("There is no question that Hitler intended the Aryan racial ideology to fulfill a kind of religious function; the liturgical character of Nazi public rituals was pronounced."); Verbovszky, *supra* note 49, at 40 (alteration in original) ("The Japanese traditionally had a very strong conception of a *Volk*. This was provided historically by the state Shinto religion which Nitobe Inazo describes in his work *Bushido*: 'Its [Shinto] nature-worship endeared the country to our inmost souls, while its ancestor worship, tracing from lineage to lineage, made the Imperial family the fountainhead of the whole nation.'" (quoting NITOBE INAZO, BUSHIDO 57 (Sweetwater Press (2006))).

61. PAXTON, *supra* note 16, at 126.

62. GRIFFIN, *supra* note 53, at 41 ("[F]ascism must always in the last analysis be imposed by an elite in the name of a national community *yet to be realized*, and whose realization, even once the movement is installed in power, will initially (and in practice indefinitely) involve re-education, propaganda and social control on a massive scale.").

63. Verbovszky, *supra* note 49, at 6 (emphasis added); *see also* PAXTON at 216 (explaining that fascism finds a technique to channel citizens' "passions into the construction of an obligatory domestic unity around projects of internal cleansing and external expansion").

64. Verbovszky, *supra* note 49, at 17.

65. *Id.* ("[U]nlike the Nazi racial state that the term *Volk* infers; the Italian State was of a much more cosmopolitan character, its basis being rooted in the citizenship of the Italian people, similar to Roman custom, rather than phenotypic standards.").

66. *Id.*

67. MARTIN DEAN, ROBBING THE JEWS: THE CONFISCATION OF JEWISH PROPERTY IN THE HOLOCAUST, 1933–1945, at 39 (2008).

Fascism is facially inconsistent with Kantian individual autonomy, or Kant's "Kingdom of Ends," which posits that "all people should be treated as 'ends in themselves.'"[68] The patent system provides one potential means of promoting or reinforcing such individual autonomy, albeit a rather minor one, though the effects of private law as a whole may well be more than minor.

C. Patents and Propaganda

But the patent system must remain objectively focused on technology and innovation; if it loses its integrity it may be turned into a propaganda tool for fascism.[69] Something of this sort appears to have happened in Nazi Germany, where the patent system (along with the economy in general) was "Aryanized," in that new patents were only to be submitted if sponsored by an Aryan and German citizen (not by foreigners or Jews), and important patents were to be transferred to "non-Jewish control."[70] This was in part a way to promote Hitler's vision of the inventor as Aryan hero, highlighting the supposed inventive superiority of the Aryan *Volk*.[71]

The Nazi patent code "made it a special point to protect the inventor against exploitation and abuse," but also "the inventor had a duty to grant the state special powers when that was in the national interest," so overall the "new code adhered to the party line" as regards to the "basic principle that the interests of the people and the state come before the special interests of the individual."[72] Thus, wrote some of the drafters, the "creative forces of technological progress serve to the honor of *Volk* and the State," and the "interests of the *Volk* and the State come before those of the creator of the work."[73] Similarly, scholars studying contract law under National Socialism have found that "fascist theory was based on the predominance of State

68. Merges, *supra* note 1, at 709.

69. ARENDT, *supra* note 12, at 341 ("Only the mob and the elite can be attracted by the momentum of totalitarianism itself; the masses have to be won by propaganda.").

70. *See* DEAN, *supra* note 67, at 111–113; *Deutsches Patent - und Markenamt*, WIKIPEDIA, https://en.wikipedia.org/wiki/Deutsches_Patent-_und_Markenamt (last visited Apr. 6, 2019).

71. *See* KEES GISPEN, POEMS IN STEEL: NATIONAL SOCIALISM AND THE POLITICS OF INVENTING FROM WEIMAR TO BONN 45 (Berghahn Series, Monographs in German History Vol. 6, 2002); Avraham Barkai, *Aryanization*, *in* HOW WAS IT POSSIBLE?: A HOLOCAUST READER 148 and n.17 (Peter Hayes ed., 2015); *cf.* Robert O. Paxton, *The Cultural Axis*, N.Y. REV. BOOKS (Oct. 26, 2017), https://www.nybooks.com/articles/2017/10/26/nazi-fascist-cultural-axis/ ("Germany dominated the world of science before 1933. . . . Far from capitalizing on this major soft power asset, Hitler destroyed it by imposing ideological conformity and expelling Jewish scientists such as the talented nuclear physicist Lise Meitner.").

72. GISPEN, *supra* note 71, at 205 (quotingFranz Schlegelberger, *Die Grundlagen des neuen Patentrechts*, BERLINER BÖRSEN-ZEITUNG, Oct. 30, 1935 (morning edition)); s*ee also* PETER BALDWIN, THE COPYRIGHT WARS 179, 191–92 (2014)("Nazi ideology regarded creativity as possible only within its social setting. It turned society into the author's equal in the creative endeavor. . . . ").

73. GISPEN, *supra* note 71, at 193–94 (quoting Memorandum from Karl Riemschneider & Kurt Waldmann to Akademie für Deutsches Recht (1934)); *cf.* Paxton, *supra* note 71, ("At a Nazi Party Congress on Culture in September 1933 [Hitler] promised that the Nazi state would intervene more actively in cultural matters than the Weimar Republic had done, in order to make art an expression of the 'hereditary racial bloodstock' and to transform artists into defenders of the German *Volk*.").

will over private will rather than manifesting any intention to protect the interests of a particular party."[74]

In the years leading up to this Aryanization of the patent system, there was a push for legal protection and economic realization of "German intellectual matter, free from Jewish greed, borne by national pride and braced by the motto: 'German creations for the Germans first!'"[75] Jewish patent attorneys were expelled from the profession, so as to "clean up the invention-promotion business."[76] While certainly not rising to this level, the fact that the U.S. State Department was recently considering "public diplomacy" efforts using the hashtag "#MostAmericanIP," is not reassuring.[77] What exactly would it mean for a patent to be more or less American? Referencing this incident, Sapna Kumar has observed that "[t]he government's commitment to promoting innovation can, at times, border on propaganda."[78]

The Aryanization of the German patent system could be seen as an example of the "friend/enemy distinction" creeping into the patent law. This friend/enemy distinction is a hallmark of fascist legal thought, as seen in the work of the famous Nazi legal theorist Carl Schmitt,[79] who offered "that distinction as crucial to the intelligibility and practice of politics (in the same way, as he put it, that good/evil is key to morality or beautiful/ugly is key to aesthetics)."[80] Schmitt was the "Crown Jurist of the Third Reich."[81] He was a critic of rule of law and the liberal state, and argued "that the decision of a people regarding its own political form and destiny outlines a level of deep legitimacy that is more important than legality."[82] In a fascist state, it is ultimately The Leader that decides who is friend and who is enemy, and

---

74. P. G. Monateri & Alessandro Somma, *The Fascist Theory of Contract*, CARDOZO ELECTRONIC L. BULL., 2009 at 20.

75. GISPEN, *supra* note 71, at 173 (quoting Memorandum from Konrad Pfreundner to Reichsregierung (May 1, 1933)).

76. *Id.* at 214.

77. *See* David Kravets, *State Department concocting "fake" intellectual property "Twitter feud,"* ARS TECHNICA (Jul. 6, 2017, 1:41 PM), https://arstechnica.com/tech-policy/2017/07/state-department-concocting-fake-intellectual-property-twitter-feud/ ("Our public diplomacy office is still settling on a hashtag and a specific moment that will be unique to the State Department, but then we invite you to respond with your own #MostAmericanIP, or #BestIPMoment." (quoting E-mail from U.S. State Dep't to Mark A. Lemley, Dir. of the Stan. Program in Law, Sci., and Tech., Stan. L. Sch.)).

78. Sapna Kumar, Innovation Nationalism, 51 CONN. L. REV. (manuscript at 25) (forthcoming 2019), https://ssrn.com/abstract=3134106; *cf.* Andrei Iancu, Dir., U.S. Patent & Trademark Office, Remarks delivered at the Eastern District of Texas Bar Association Inaugural Texas Dinner (Oct. 18, 2018) (available at https://www.uspto.gov/about-us/news-updates/remarks-director-iancu-eastern-district-texas-bar-association-inaugural-texas) ("Born of our Constitution and steeped in our glorious history, the American patent system is a crown jewel; a gold standard. Stop attacking it.").

79. CARL SCHMITT, THE CONCEPT OF THE POLITICAL (George Schwab trans., Rutgers Univ. Press 1976) (1927).

80. Schlag, *supra* note 9, at 4.

81. Charles E. Frye, *Carl Schmitt's Concept of the Political*, 28 J. POL. 818, 818 (1966).

82. Carlo Galli, *Carl Schmitt's Antiliberalism: Its Theoretical and Historical Sources and Its Philosophical and Political Meaning*, 21 CARDOZO L. REV. 1597, 1601 (2000); *see also* Eric A. Posner & Adrian Vermeule, *Demystifying Schmitt* 8(Chi. Pub. Law & Legal Theory Working Paper Series, Paper No. 333, 2011) (alteration in the original) ("Schmitt famously declared that '[s]overeign is he who decides on the exception.'" (quoting CARL SCHMITT, POLITICAL THEOLOGY 5 (1985)).

"justice" thus lies in The Leader's hands, rather than those of the law.[83] Unifying the people (or the *Volk*) against "the enemy," helps to create or stoke the ultranationalist collectivism required for fascism.[84]

With respect to patent law, then, the law should remain objectively focused on technological merits, rather than the nationality or personal characteristics of the inventors; the patent system should not become a tool for nationalistic propaganda.

III - ECONOMIC

An effective patent system may tend to promote or protect autonomy in a more tangible economic sense, by decreasing market concentration. The effects of the patent system on market concentration seem to depend on the industrial sector, varying based on industry characteristics such as the importance of network effects, and the size of initial research and development costs versus the costs of copying for particular technologies.[85] Given the importance of market concentration to individual autonomy,[86] the effects are worth considering, not only for patent law but for other areas of private law as well, including antitrust. This part first considers the evidence suggesting that a functional patent system may reduce market concentration in certain sectors; second considers how reduced market concentration may promote autonomy; and third considers how market structure may tend to affect our susceptibility to fascism.

A. Market Concentration and Patents

Professor Merges finds that the "general policy suggested by Kant's writings has to do with encouraging a larger number of smaller creative entities, as opposed to a smaller number of larger ones."[87] He argues that intellectual property can further this general policy, for example, property rights covering inputs (such as a touchscreen for cell phones) "allow the makers of the input to set themselves up as a separate, independent firm," which "gives them more say over their work, more control over their professional fate—more autonomy."[88] Perhaps in part because of

---

83. *Cf.* Schlag, *supra* note 9, at 4 ("Trump is an expert at making clear who is friend and who is enemy."); C.J. Polychroniou, *Blueprint for a Progressive US: A Dialogue with Noam Chomsky and Robert Pollin*, TRUTHOUT (Oct. 17, 2017), https://truthout.org/articles/blueprint-for-a-progressive-us-a-dialogue-with-noam-chomsky-and-robert-pollin/ ("Chomsky:. . . . The figure in charge, though often ridiculed, has succeeded brilliantly in his goal of occupying media and public attention while mobilizing a very loyal popular base — and one with sinister features, sometimes smacking of totalitarianism, including adoration of The Leader.").

84. *Cf.* RIEMEN, *supra* note 8, at 83 ("But fascist techniques are identical everywhere: the presence of a charismatic leader; the use of populism to mobilize the masses; the designation of the base group as victims (of crises, of elites, or of foreigners); and the direction of all resentment toward an 'enemy.'").

85. *See infra* Part III(A); *cf.* Dan L. Burk, *Law and Economics of Intellectual Property: In Search of First Principles*, 8 ANN. REV. L. & SOC. SCI. 397, 411 (2012) ("[I]t seems likely that exclusive rights are performing different roles in different economic sectors."); Lemley, *supra* note 1, at 1334 ("The relationship between patents and innovation seems to depend greatly on industry. . . . ").

86. *See infra* Part III(B)–(C).

87. MERGES, *supra* note 3, at 81.

88. *Id.* at 83.

this enhanced autonomy, "[n]umerous studies reveal that small entities are disproportionately innovative relative to large corporations."[89]

The 2008 Berkeley Patent Survey showed, according to Merges, a "resurgence of small companies as a major source of new technologies," and that for "creative scientists, engineers, and inventors of all stripes, this has meant new opportunities to own and participate in small companies," with patents being "one key to the success of these companies."[90] That survey also showed that "the holding of patents by technology-based startups is even more widespread than previously believed,"[91] and that a primary reason startups patent "is to prevent others from copying the startup's products and services."[92]

Similarly, a 2017 study finds evidence that, at least in the IT sector, patents may be particularly valuable for startups.[93] A startup with patent protection may specialize in a narrow product or service, instead of trying to compete directly with the integrated technology behemoths.[94] This suggests that in the absence of a functional patent system, there would be a more concentrated technology marketplace, particularly in spaces with significant network effects such as software and information technology,[95] as large companies would be undeterred from using their vast resources to copy or reverse engineer the products and services offered by successful startups.[96] The large would-be infringers could then integrate their knockoff versions into their existing networked suites of products and services, a potentially insurmountable marketplace advantage.[97]

Patents do not necessarily prevent such integration (which may be beneficial to consumers) but they do protect the inventive efforts of startups in the

---

89. Lee, *supra* note 5, at 364.

90. MERGES, *supra* note 3, at 212 (citing Stuart J.H. Graham et al., *High Technology Entrepreneurs and the Patent System: Results of the 2008 Berkeley Patent Survey*, 24 BERKELEY TECH. L.J. 1255 (2009)).

91. *Id.* at 384 n.31.

92. Graham et al., *supra* note 90, at 1297.

93. Joan Farre-Mensa et al., *What is a Patent Worth? Evidence from the U.S. Patent "Lottery"* 4 (Nat'l Bureau of Econ. Research Working Paper Series, Working Paper 23268, 2017).

94. *See* David J. Teece, *Capturing Value from Technological Innovation: Integration, Strategic Partnering, and Licensing Decisions*, INTERFACES, May–June 1988, at 46, 46–47, 49–53, 55; GARY P. PISANO, SCIENCE BUSINESS: THE PROMISE, THE REALITY, AND THE FUTURE OF BIOTECH (2006).

95. *See* Jonathan M. Barnett, *Three Quasi-Fallacies in the Conventional Understanding of Intellectual Property*, 12 J.L., ECON. & POL'Y 1, 5 (2016) ("With the exception of the biopharmaceutical industry, large integrated technology firms tend to resist expansions of the patent system, both today and in the past.").

96. *See* MERGES, *supra* note 3, at 212 ("[L]arger trading partners may sometimes copy new technologies, and without patents the smaller company has little effective recourse."). While such a possibility might seem to be in tension with the conception of a patent as a government sanctioned monopoly, the fact is that in "most situations, a patent holder does not hold a 'monopoly' over a relevant technology market." David J. Teece & Edward F. Sherry, *On Patent "Monopolies": An Economic Re-Appraisal*, ANTITRUST CHRON., Spring 2017, at 19, 20.

97. *See* Tim Wu, Blind Sport: The Attention Economy and the Law (2017) (unpublished manuscript) (on file with The New Mexico Law Review) ("The media and technology industries are now dominated by large companies like Facebook, Google, and the media conglomerates that both rely on the Attention Broker business model and are also engaged in a near-constant series of mergers and acquisitions.").

sense that, in order to integrate the startup's invention, an incumbent must at least either buy the startup,[98] or potentially face an infringement lawsuit.[99] Such a suit could be brought directly by the startup, but a startup might prefer to sell its patents to a non-practicing assertion entity (sometimes called a "patent troll") thereby avoiding the risk and distraction of a lawsuit, as well as generating immediate revenue that could help keep the startup afloat. The existence of this possibility could encourage a large incumbent to buy a startup instead of simply infringing secure in the knowledge that the startup likely lacks the resources and will to engage in the protracted litigation necessary to enforce patent rights. Without patent protection, some innovative startups might not receive the funding necessary to get off the ground, for as Peter Menell has observed: "Without the potential for a large reward, inventors contemplating innovative new platforms might not be willing to make the substantial, risky R&D and marketing investments needed to challenge, and hopefully leapfrog, the incumbent platform."[100]

Patent protection in this way facilitates the ability of startups to obtain the financing and investment (often in the form of venture capital) necessary to enter the market, at least in certain important sectors outside of pharmaceuticals, such as software, information technology, and biomedical devices.[101] In other words, "patents are powerful antimonopoly weapons—the vital slingshots 'Davids' use to

98. *Cf.* Stuart J.H. Graham & Ted Sichelman, *Why Do Start-Ups Patent?*, 23 BERKELEY TECH. L.J. 1063, 1077 (2008) ("[S]ome scholars have demonstrated that intensive patenting by acquisition targets produces upward adjustments in purchase prices."); Andres Sawicki, *Buying Teams*, 38 SEATTLE U. L. REV. 651, 654 (2015) (patents play an underappreciated role in protecting teams during "acqui-hires," that is, transactions "in which a large technology company (the buyer) purchases a start-up with the primary purpose of employing the start-up's engineers"); Gustavo Grullon et al., Are US Industries Becoming More Concentrated? 25 (October 2016) (unpublished manuscript) (on file with The New Mexico Law Review) ("[A]dvances in technology have made innovation more resource-consuming, thus essentially creating entry barriers to new firms, and encouraging them to sell their inventions to larger corporations at early stages of development.").

99. *Cf.* B. Zorina Khan, *Trolls and Other Patent Inventions: Economic History and the Patent Controversy in the Twenty-First Century*, 21 GEO. MASON L. REV. 825, 835 (2014) ("[T]echnology markets provide ample evidence that intermediaries benefited creative individuals, since patentees who licensed or assigned their rights to such 'trolls' were typically the most productive and specialized inventors.").

100. Peter S. Menell, *Economic Analysis of Network Effects and Intellectual Property*, *in* 1 RESEARCH HANDBOOK ON THE ECONOMICS OF INTELLECTUAL PROPERTY LAW (Ben Deporter & Peter S. Menell, eds., forthcoming Aug. 2019) (manuscript at 14) (on file with the New Mexico Law Review); *see also* Brief of Amici Curiae US Inventor, Inc. et al. in Support of Petitioner at 3–4, Oil States Energy Servs., LLC v. Greene's Energy Group, LLC, 138 S. Ct. 1365 (2018) (No. 16-712) ("Reducing the value of patents affects the ex ante calculation of all investors, throughout the economy. This in turn reduces the availability of start-up capital. Only incumbent large companies benefit from such a state of affairs."); *id.* at 9–10 (discussing as an example, *Tinnus Enters., LLC v. Telebrands Corp.*, 846 F.3d 1190 (Fed. Cir. 2017)).

101. *See*Xuan-Thao Nguyen & Jeffrey A. Maine, *Acquiring Innovation*, 57 AM. U. L. REV. 775, 784 (2008) ("The value of a startup company is often dependent on its patent portfolios."); Farre-Mensa et. al., *supra* note 93 ("[W]e find that [a patent grant] increases a startup's chances of securing funding from VCs over the next three years by 47%, and of securing a loan by pledging the patent as collateral by 76%."); *cf.* Graham & Sichelman, *supra* note 98, at 1078 ("[S]cholars have found that increased patenting by venture-backed companies in the software and biotech industries is significantly correlated with total investment. . . . ").

take on 'Goliaths.'"[102] As such, proposals that have been advanced (generally under the auspices of economic efficiency) "to maintain the patent system on drugs and a few other products that are expensive to innovate and cheap to copy, and eliminate patents on everything else,"[103] could have the undesirable (and probably unintended) effect of increasing market concentration by maintaining patents only in those sectors where patents tend to benefit incumbents rather than new entrants. Thus without patents, the "winner-take-all" nature of many technology markets,[104] could become even more pronounced.[105]

Reducing market concentration is in accord with the patent system's goals; though this purpose is not as prominent in the more modern jurisprudence. Supreme Court decisions in cases such as *Kewanee*,[106] and *Bonito Boats*,[107] placed a striking emphasis on the patent systems role in fostering a competitive marketplace and protecting the rights of smaller businesses.[108]

The theory that patents facilitate market entry and reduce technology market concentration also finds some support in "[the] historical lobbying behavior in the patent context, which shows that small inventors (or investment entities that fund small inventors) tend to promote strong intellectual property coverage while large technology-dependent firms (outside of pharmaceuticals and chemicals) tend to promote moderate and sometimes even weak or zero levels of intellectual property coverage," as Jonathan Barnett has noted.[109] More recently, Professor Barnett has argued that "reducing IP rights can increase costs for users while raising entry barriers."[110] According to Professor Barnett, the support of pharmaceutical industry incumbents "for strong patents can be explained by the exceptionally large difference between the R&D, testing, and marketing costs borne by a first-mover innovator and

---

102. Stephen H. Haber et al., *On the Importance to Economic Success of Property Rights in Finance and Innovation*, 26 WASH. U. J.L. & POL'Y 215, 222 (2008); *see also* Picard v. United Aircraft Corp., 128 F.2d 632, 643 (2d Cir. 1942) (Frank, J., concurring) ("The threat from patent monopolies in the hands of such 'outsiders' may create a sort of competition—a David versus Goliath competition—which reduces the inertia of some huge industrial aggregations that might otherwise be sluggish.").

103. Khan, *supra* note 99, at 827 (quoting Gary Becker, *Reforming the Patent System Toward a Minimalist System-Becker*, BECKER-POSNER BLOG (Sept. 30, 2012), https://www.becker-posner-blog.com/2012/09/reforming-the-patent-system-toward-a-minimalist-system-becker.html).

104. *See* Om Malik, *In Silicon Valley Now, It's Almost Always Winner Takes All*, NEW YORKER (Dec. 30, 2015) ("Most competition in Silicon Valley now heads toward there being one monopolistic winner."), https://www.newyorker.com/tech/annals-of-technology/in-silicon-valley-now-its-almost-always-winner-takes-all.

105. *See* Ted Sichelman & Sean O'Connor, *Patents as Promoters of Competition: The Guild Origins of Patent Law in the Venetian Republic*, 49 SAN DIEGO L. REV. 1267, 1279 (2012) ("The adoption of the patent system in Venice allowed in many senses for a 'democratization' of invention, diminishing the power of guilds and increasing the power of independent inventors.") (citing KHAN, *supra* note 43).

106. Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470 (1974).

107. Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141 (1989).

108. *See, e.g.*, *id.* at 151 ("[T]he ultimate goal of the patent system is to bring new designs and technologies into the public domain through disclosure."); *Kewanee*, 416 U.S. at 486 (showing concern for "[s]maller companies" and the "innovative entrepreneur with limited resources" in discussing the interaction between trade secret law and patent law).

109. Jonathan M. Barnett, *Is Intellectual Property Trivial?*, 157 U. PA. L. REV. 1691, 1729 (2009).

110. Barnett, *supra* note 95, at 43.

the far smaller costs borne by any second-mover entrant."[111] An additional factor might be the relative lack of alternative (non-patent) means of investment protection for pharmaceutical incumbents.

There is thus reason to think that "small, specialized technology companies are especially reliant on IP rights because, compared to larger companies, they have fewer ways to capitalize on research and development investments."[112] Although there are certainly other factors at play, the general weakening of the patent system over the past decade or so,[113] has coincided with an increase in the concentration of markets.[114] Moreover, some of the recent changes to patent law, such as the move to first-to-file as opposed to first to invent, may provide advantages to larger entities who tend to be less constrained in their ability to bear the costs of filing for patents.[115] Programs at the USPTO to reduce fees and provide pro bono representation for smaller entity patent filers may help to offset such costs, and should be encouraged.[116]

B. Market Concentration and Individual Autonomy

Given that patents may tend to reduce concentration in certain technology markets, this section considers the relationship between market concentration and autonomy. A precondition for personal autonomy is that one must have a sufficient number of options to choose among for the choice to be meaningful.[117] By facilitating

---

111. *Id.* at 32.

112. MERGES, *supra* note 3, at 212. *See generally* Ashish Arora & Robert P. Merges, *Specialized Supply Firms, Property Rights and Firm Boundaries*, 13 INDUS. & CORP. CHANGE 451 (2004); Robert P. Merges, *A Transactional View of Property Rights*, 20 BERKELEY TECH. L.J. 1477 (2005).

113. *See, e.g.*, eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388 (2006) (making it more difficult for patentees to obtain a permanent injunction upon winning an infringement lawsuit); Clark D. Asay, *Patenting Elasticities*, 91 S. CAL. L. REV. 1, 41 (2017) ("Over the last decade in particular, patent law has experienced some of the most far-reaching changes in some sixty years."); Peter Lee, *The Supreme Assimilation of Patent Law*, 114 MICH. L. REV. 1413, 1422 (2016) ("In many ways, the Supreme Court's recent decisions have reined in patent rights that had become quite expansive under Federal Circuit jurisprudence.").

114. *See, e.g.*, Grullon et al., *supra* note 98, at 2 ("In real terms, the average publicly-traded firm is three times larger today than it was twenty years ago. Lax enforcement of antitrust regulations and increasing technological barriers to entry appear to be important factors behind this trend. Overall, our findings suggest that the nature of US product markets has undergone a structural shift that has weakened competition.").

115. *See* David S. Abrams & R. Polk Wagner, *Poisoning the Next Apple? The America Invents Act and Individual Inventors*, 65 STAN. L. REV. 517, 521 (2013); Asay, *supra* note 113, at 55 ("The worry with the AIA's new priority rules is that large companies will often receive patents—even when resource-constrained parties were the first to invent—simply because the larger companies' superior resources enable them to file patent applications more quickly.").

116. *See* Lee, *supra* note 5, at 341; Osborn et al., *supra* note 29, at 1247 (proposing an increase in maintenance fees, but maintaining reduced fees for small and micro entities, so as to benefit individual inventors and small businesses).

117. *See* JOSEPH RAZ, THE MORALITY OF FREEDOM 374 (1986); s*ee also* 2 JOHN FINNIS, INTENTION AND IDENTITY: COLLECTED ESSAYS 9–10 (2011) ("[I]f the substance is not merely organically developing, as animals do, but has self-mastery that is entailed by being able to make *free* choices, choices made and carried out not by one's being acted upon but on one's own initiative and intention and responsibility, then we have that more special and perfect kind of substance that we call a *person*.").

a less concentrated, more diverse marketplace of firms, a functional patent system could increase autonomy by giving technology sector employees more possible places to work or more choice, as has been observed:

> In an industry with many employers, a worker looking for a job has a variety of prospects. If one employer is a bad fit, a worker might find a better spot somewhere else. Someone who feels unappreciated can look elsewhere. This kind of diversity is a meaningful component of freedom in modern society. When industries become consolidated, individual freedom is diminished.[118]

A more diffuse marketplace, by allowing citizens more opportunity to pursue their interests, with less pressure to conform to the demands of a few large potential employers, may thus foster a more innovative society, thereby promoting progress in science and the useful arts.[119] The desirability of employee mobility in terms of promoting autonomy may also provide another reason for restrictions on the enforceability of non-compete agreements.[120]

Patents probably do not do much, if anything, to protect the autonomy of the poor,[121] and this essay is certainly not meant to suggest that the patent system is some sort of elixir to all that ails our society. But by reducing market concentration, a functional patent system may promote and protect the individual autonomy of parts of the middle classes, employees in the technology sector, which matters in part because recruitment (or destruction) of the middle classes is an important if not essential condition for fascism to take hold.[122] And the technology sector is not a trivial part of the U.S. economy, by one measure, the software industry alone accounted for 2.6 percent of U.S. GDP in 2012, and 2.2 percent of U.S. jobs in 2014.[123] By helping to maintain a less concentrated labor market, an effective patent

---

118. Carl T. Bogus, *The New Road to Serfdom: The Curse of Bigness and the Failure of Antitrust*, 49 U. MICH. J.L. REFORM 1, 10 (2015).

119. *Cf.* BERTRAND RUSSELL, *The Role of Individuality*, *in* AUTHORITY AND THE INDIVIDUAL 37 (1949) ("[A] community needs, if it is to prosper, a certain number of individuals who do not wholly conform to the general type. Practically all progress, artistic, moral, and intellectual, has depended upon such individuals. . . . ").

120. *Cf.* Bruce Fallick et al., *Job Hopping in Silicon Valley: Some Evidence Concerning the Micro-Foundations of a High Technology Cluster* Abstract (Nat'l Bureau of Econ. Research, Working Paper No. 11710, 2005) ("Outside of California, employers can use non-compete agreements to inhibit mobility, but these agreements are unenforceable in California. Using new data on labor mobility we find higher rates of job-hopping for college-educated men in Silicon Valley's computer industry than in computer clusters located out of the state."); Fallick et al., *supra*, at 20 ("[F]requent job-hopping facilitates the rapid reallocation of resources towards firms with the best innovations.").

121. *But see* KHAN, *supra* note 43, at 106 ("[I]nventive activity also would increase the welfare of all citizens regardless of social class.").

122. *See* PAXTON, *supra* note 16, at 210 ("In Lipset's formulation, fascism is an 'extremism of the center' based on the rage of once-independent shopkeepers, artisans, peasants, and other members of the 'old' middle classes now squeezed between better-organized industrial workers and big businessmen, and losing out in rapid social and economic change." (quoting SEYMOUR MARTIN LIPSET, POLITICAL MAN, 127–182 (Anchor Books ed. 1963))).

123. ROBERT J. SHAPIRO, THE U.S. SOFTWARE INDUSTRY AS AN ENGINE FOR ECONOMIC GROWTH AND EMPLOYMENT 2 (2014).

system may prevent the depression of wages and thereby protect and reinforce important parts of the middle class.[124]

A less concentrated marketplace also increases the number of individuals who have top-level leadership positions, furthering individual autonomy in this way as well, for "[e]very time an independent firm is swallowed by a corporate behemoth, top executives—the chief executive, operating, and financial officers; the general counsel; division and department heads; and so on—suffer demotions in authority and self-image."[125] In other words, "someone who was previously a chief executive officer and captain of his or her ship became a mere member of the crew in a corporate bureaucracy."[126] As Woodrow Wilson put it, "when you are the servant of a corporation," and "have in no instance access to the men who are really determining the policy of the corporation . . . [y]our individuality is swallowed up in the individuality and purpose of a great organization."[127] A less concentrated market with a larger number of smaller firms provides a degree of autonomy by allowing more people to be (or have more access to) those top executives who are determining the policy of the corporation.

C. National Vertical Collectivism

The form of market concentration that has advanced under neoliberalism,[128] can also increase cynicism about democracy when behemoths leverage their vast economic power to influence the State and benefit from corporate welfare and rent seeking.[129] Robert Reich points out that it is "perhaps no accident that those who argue most vehemently on behalf of an immutable and rational 'free market' and

---

124. José Azar et al., Labor Market Concentration 1 (Dec. 2017) (unpublished manuscript) (on file with The New Mexico Law Review) ("[W]e find that labor market concentration in the average market is high, and higher concentration is associated with significantly lower posted wages. Given high concentration, mergers have the potential to significantly increase *labor* market power.").

125. Bogus, *supra* note 118, at 9–10.

126. *Id.* at 2.

127. WOODROW WILSON, THE NEW FREEDOM: A CALL FOR THE EMANCIPATION OF THE GENEROUS ENERGIES OF A PEOPLE 5–6 (1913); *see also* Harry First, *Woodstock Antitrust*, ANTITRUST CHRON. at 57, 58 (Apr. 2018) (discussing the "fear that powerful institutions —government and business — had grown too large and threatened personal freedom," that is, "the freedom to make personal choices not controlled by big institutions.").

128. *See* David Singh Grewal & Jedediah Purdy, *Introduction: Law and Neoliberalism* 77 LAW & CONTEMP. PROBS. 1, 1 (2014) ("'Neoliberalism' refers to the revival of the doctrines of classical economic liberalism, also called laissez-faire, in politics, ideas, and law. These revived doctrines have taken new form in new settings: the 'neo-' means not just that they are back, but that they are also different, a new generation of arguments.").

129. *See* Citizens United v. FEC, 558 U.S. 310, 470 (2010) ("A Government captured by corporate interests, [citizens] may come to believe, will be neither responsive to their needs nor willing to give their views a fair hearing. The predictable result is cynicism and disenchantment. . . . ") (Stevens, J., concurring in part and dissenting in part); Bogus, *supra* note, 118 at 12 ("Perhaps the greatest problem resulting from gigantic corporate size and high industry concentration is the political power of corporations."); Cedric E. Dawkins, *Corporate Welfare, Corporate Citizenship, and the Question of Accountability*, 41 BUS. & SOC'Y 269, 282–83 (2002) (determining that larger companies are significantly more likely to receive corporate welfare).

against government 'intrusion' are often the same people who exert disproportionate influence over the market mechanism."[130]

A highly concentrated or monopolized market would also tend to be more susceptible to capture by or merger with the State. Indeed, the Weimar Republic German economy was highly concentrated when fascism took hold,[131] it had no antitrust law and "the historical record suggests that the presence of a highly concentrated industrial sector facilitated Hitler's rapid consolidation of political control in Germany during the mid-1930s."[132] As Milton Friedman has put it: "Let both economic and political power be in the same hands and the only protection of political freedom is the good will of those in power—a frail recourse particularly in view of the corrupting influence of power and the talents that make for political survival."[133] If large corporations become so powerful as to effectively capture the State, Freidman's observation may counsel in favor of structuring private law in ways that tend to restrain (rather than augment) the power of large corporations.[134] By weakening or reconfiguring the state to serve the interests of wealthy private market actors, neoliberalism's agenda moves us toward this sort of inversion.[135]

The neoliberal program has also involved a deliberate and troubling attempt to shape the American mind,[136] in ways that make the American people more

130. ROBERT REICH, SAVING CAPITALISM: FOR THE MANY, NOT THE FEW 11 (2015).

131. *See* JEREMY LEAMAN, THE POLITICAL ECONOMY OF WEST GERMANY, 1945–85: AN INTRODUCTION 50–51 (1988) ("Despite attempts at legal control in the Weimar Republic, Germany remained the 'land of cartels', of price-fixing and monopoly power. . . . Under 'national socialism', private monopoly power was the main organisational principle within each branch of the economy, where 'mandatory cartelisation' subordinated smaller agents of production to the authority of dominant firms in each branch. . . . "); MARK STEINER, ECONOMICS IN ANTITRUST POLICY: FREEDOM TO COMPETE VS. FREEDOM TO CONTRACT 21 (2007) ("By 1905, there were 385 cartels involving [12,000] firms, and the number increased steadily, reaching [1,500] cartels in 1923, and climbing further to [3,000] or [4,000] by the end of the Weimar Republic in 1933.").

132. Crane, supra note 14, at 15. "Prior to reconstruction under the Allies, Germany had no antitrust law—at least none that would be recognizable under contemporary global standards." *Id.* at 16.

133. FRIEDMAN, *supra* note 59, at 14; *see also* RUSSELL, *supra* note 32, at 76 (explaining that "[h]uge organizations, both political and economic," ought "to leave as large a share of control as possible in the hands of individuals and small groups," and "[i]f this is not done, the men at the head of these vast organizations will infallibly become tyrannous through the habit of excessive power, and will in time interfere in ways that crush out individual initiative").

134. *Cf.* BERTRAND RUSSELL, FREE THOUGHT AND OFFICIAL PROPAGANDA 43–44 (photo. reprt. 1974) (1922) ("The growth of monopolies is introducing in America many of the evils associated with state socialism as it has existed in Russia. From the standpoint of liberty, it makes no difference to a man whether his only possible employer is the State or a trust."); Peter S. Menell, *2014: Brand Totalitarianism*, 47 U.C. DAVIS L. REV. 787 (2014).

135. *See* Schlag, *supra* note 9, at 11 (footnote omitted) ("Neoliberalism involves the reconfiguration of the state to service the various interests of powerful market actors in civil society. It is a kind of inversion in which various actors in civil society refashion the state in their own image, idioms, modes of management.").

136. *See, e.g.*, Lewis F. Powell, Jr., *The Powell Memorandum: Attack on American Free Enterprise System*, SCHOLARLY COMMONS, 21 (Aug. 23, 1971), https://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1000&context=powellmemo ("The national television networks should be monitored in the same way that textbooks should be kept under constant surveillance."); Schlag, *supra* note 9, at 63 ("Justice Powell wants to intervene in the culture industry–to win hearts and minds by deliberate intervention in and capture of public institutions.").

subservient to corporate power, and also potentially more amenable to authoritarian or hierarchical societal organization.[137] Professor Schlag describes neoliberalism as having matured into "an effort to fashion the individual liberal subject as a particular kind of self—one disciplined for market governance and market functions," by refashioning moral, cultural, and political discourse "in instrumentalized market terms," such that "community becomes *networking*," "knowledge becomes *expertise*," and "scholars become *thought-leaders*."[138] As Henry Giroux puts it, "shaping the neoliberal framing of public and higher education is a corporate-based ideology," where there is little talk of "educating students as critical citizens rather than potential employees of Walmart."[139] This trend away from any thoughtful form of civic discourse is disturbing, as Hannah Arendt recalls that "[n]othing proved easier to destroy than the privacy and private morality of people who thought of nothing but safeguarding their private lives."[140]

Although the competitive ethos of neoliberalism might facially seem to promote individuality, there is a distinction between "the psychological concept of vertical individualism (VI) [which] values competition and outperforming others," and "horizontal individualism (HI) [which] characterizes the desire to be unique and different from equal others."[141] The American neoliberal form of competitive individualism is far more vertical than horizontal.[142] While both forms of individualism may tend to work against pure fascism, (as they are both somewhat inconsistent with the concept of a national collective *Volk*), vertical (or competitive) individualism is more compatible with authoritarianism in general.[143]

A diverse marketplace of technology firms with varying cultures may tend to cultivate a more horizontal individualism, fostering differences by allowing employees more opportunity to find the right fit.[144] Conversely, when individuals

---

137. *Cf.* EHRENREICH, *supra* note 18, at 44 (describing "an ideological force in American culture . . . that encourages us to deny reality, submit cheerfully to misfortune, and blame only ourselves for our fate"); STANLEY, *supra* note 20, at 7 ("[I]nequality tends to lead to epistemic barriers to the acquisition of knowledge, ones that imperil democracy.").

138. Schlag, *supra* note 9, at 63–64; *see also* HENRY A. GIROUX, NEOLIBERALISM'S WAR ON HIGHER EDUCATION 87 (2014) ("Not only does neoliberalism undermine civic education and public values as well as confuse education with training, it also treats knowledge as a product. . . . "); John Mixon, *Neoclassical Economics and the Erosion of Middle-Class Values: An Explanation of Economic Collapse*, 24 NOTRE DAME J.L., ETHICS & PUB. POL'Y 327 (2010).

139. GIROUX, *supra* note 138, at 137; *see also* WENDY BROWN, UNDOING THE DEMOS 10 (Zone Books Near Future Series, No. 1, 2015) ("[T]oday's *homo oeconomicus* is an intensely constructed and governed bit of human capital tasked with improving and leveraging its competitive positioning and with enhancing its (monetary and nonmonetary) portfolio value across all of its endeavors and venues.").

140. ARENDT, *supra* note 12, at 338.

141. Kemmelmeier et al., *supra* note 8, at 312.

142. *See* Theodore M. Singelis et al., *Horizontal and Vertical Dimensions of Individualism and Collectivism: A Theoretical and Measurement Refinement*, 29 CROSS-CULTURAL RES. 240, 244 (1995) ("Some individualists (e.g., Americans) link self-reliance with competition; others do not.").

143. Kemmelmeier et al., *supra* note 8, at 312 (citation omitted) ("[T]here is considerable evidence that authoritarians prefer competition to cooperation and believe in natural hierarchies and the 'survival of the fittest.'").

144. *Cf.* JOHN STUART MILL, ON LIBERTY 67 (Alburey Castell ed., Harlan Davidson, Inc. 1947) (1859) ("Human beings are not like sheep; and even sheep are not undistinguishably alike.").

cannot find belonging in a community, they may be more susceptible to extreme nationalism, identifying with a collectivist and nationalistic State.[145] In this regard, going too far in the direction of individual isolation could be problematic and make a society more susceptible to fascism.[146] The desirable middle ground is to foster an environment with a variety of diverse communities (with corporations being one aspect) where individuals have some autonomy and choice as to which communities they associate with.[147] This would seem to allow individuals more opportunity to productively cultivate their lives and selves in diverse ways, instead of by identifying with an ultranationalistic State or *Volk*.

Fascism constructs its ideology and program opportunistically,[148] and an American variant of fascism might attempt to take advantage of and integrate the prevailing neoliberal ethos of vertical individualism; it could perhaps look something like a nationwide corporation (or consolidated group of large corporations), where citizens look something like at will employees.[149] A citizen who refuses to fall in line could be "fired" and for example denied healthcare, with nowhere else to turn. Citizens would then have no choice but to obey the national or corporate authorities – which due to market concentration coupled with neoliberal corruption, may be effectively one and the same.

Citizens in such a society might be characterized by a *vertical collectivism*, where "the individual sees the self as an aspect of an in-group, but the members of the in-group are different from each other, some having more status than others," and

145. *Cf.* GRIFFIN, *supra* note 53, at 188 ("In the case of fascism, its core myth of the regenerated national community led by a revolutionary elite calls *a priori* for an act of identification, a neurologically based mischannelling of the human drive for self-transcendence."); FRANZ NEUMANN, *Notes on the Theory of Dictatorship*, *in* THE DEMOCRATIC AND THE AUTHORITARIAN STATE 233, 244–45 (Herbert Marcuse ed.,1957) (describing "totalitarian social controls," as including the "atomization and isolation of the individual, which involves . . . the imposition of huge and undifferentiated mass organizations which leave the individual isolated and more easily manipulable").

146. *Cf.* ARENDT, *supra* note 12, at 317 ("[T]he masses grew out of the fragments of a highly atomized society whose competitive structures and concomitant loneliness of the individual had been held in check only through membership in a class."); PAXTON, *supra* note 16, at 50 ("[T]hose already deeply engaged, from generation to generation, in the rich subculture of socialism, with its clubs, newspapers, unions, and rallies, were simply not available for another loyalty.").

147. *Cf.* RUSSELL, *supra* note 119, at 59 ("Where art has flourished in the past it has flourished as a rule amongst small communities which had rivals among their neighbors, such as the Greek City States, the little Principalities of the Italian Renaissance, and the petty Courts of German eighteenth-century rulers.").

148. *See* Schlag, *supra* note 9, at 11 n.20; *see also* PAXTON, *supra* note 16, at 10 (explaining that early on, "fascist movements flaunted their contempt for bourgeois values and for those who wanted only 'to earn money,'" and "attacked 'international finance capitalism,'" though once in power "they did nothing to carry out these anticapitalist threats"); RIEMEN, *supra* note 8, at 81–82 ("[F]ascism would take on different forms in different countries because there were no ideas and no single universal value underlying fascism's credo. . . . [T]he sole reason for their existence was power for power's sake. . . . ").

149. *Cf.* Ewan McGaughey, *Fascism-Lite in America (or the Social Ideal of Donald Trump)*, 7 BRIT. J. OF AM. LEGAL STUD. 291, 310 (2018) ("Politically, Trump's strong businessman image is consistent with key elements of fascist behavior.").

"sacrificing for the in-group is an important aspect of this pattern."[150] This vertical collectivism seems to fairly describe "in-groups" such as the employees of a corporation, but in fascism, the "in-group" is the State or the *Volk*, so if the State were to begin to look like one large corporation, then we would seem, on a national level, to be shifting from vertical individualism to vertical collectivism, and trending towards fascism.[151] Fascism is characterized in part by "the right of the chosen people to dominate others without restraint from any kind of human or divine law, right being decided by the sole criterion of the group's prowess within a Darwinian struggle."[152] Communism is theoretically characterized by a horizontal collectivism, as opposed to fascism's vertical collectivism, but both are collectivist on a national and totalitarian level.[153]

While "find another job" might be an appropriate response to a disobedient employee, "find another country" is not an appropriate state response to a peacefully dissenting citizen.[154] The actions of the (liberal democratic) state "must respect democracy and the rule of law," though the "persons and practices comprising civil society" are not necessarily required to "observe those commitments in their dealings with each other."[155] Corporations fairly demand a certain degree of conformity, and "Americans can be fired for [almost] anything, such as failing to generate positive vibes."[156] This is relatively unproblematic so long as association with the corporation

150. Singelis, *supra* note 142; *see also* ALEXANDER J. DE GRAND, FASCIST ITALY AND NAZI GERMANY 47 (2d ed. 2004) (ebook) (explaining that fascist economic policies generally protect inequality).

151. *Cf.* HOWARD J. WIARDA, CORPORATISM AND COMPARATIVE POLITICS 12 (1997) ("[I]n the 1920s and 1930s such fascists and semifascists as Mussolini in Italy, Hitler in Germany, Franco in Spain, and Salazar in Portugal used, in part, a corporatist system of organizing their economies and political systems.").

152. PAXTON, *supra* note 16, at 220.

153. *See* Singelis, *supra* note 142, at 246 ("Thus extreme H-C is the pattern of theoretical communism. . . . Extreme V-C is the case of Nazi Germany. . . . "). In this regard, it is pertinent to note that China did not have a patent law while deeply in the grips of communism. *See, e.g.*, Bonan Lin et al., Overview of Chinese Patent Law 2 (Oct. 19–22, 2004) (unpublished manuscript) (on file with The New Mexico Law Review) ("The leaders of the country had never been bothered by the question of whether to have a patent system or not in China until the end of the 'Culture Revolution'. Eventually, the first patent legislation was initiated by the end of the 1970's.").

154. *See, e.g.*, W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) ("[N]o official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."); *cf.* FRIEDMAN, *supra* note 59, at 11 ("The state exists to protect individuals from coercion by other individuals or groups and to widen the range within which individuals can exercise their freedom; it is purely instrumental and has no significance in and of itself. . . . Nations may be convenient administrative units; nationalism is an alien creed."); Sean Sullivan, *Trump slams Colin Kaepernick*, WASH. POST (Aug. 29, 2016), https://www.washingtonpost.com/news/post-politics/wp/2016/08/29/trump-slams-colin-kaepernick-maybe-he-should-find-a-country-that-works-better-for-him/?utm_term=.53a93d859cf0 (when an NFL quarterback, as a political statement against oppression, refused to stand during the national anthem, then candidate Donald Trump's response was, "Maybe he should find a country that works better for him").

155. Schlag, *supra* note 9, at 19.

156. EHRENREICH, *supra* note 18, at 54.

is voluntary in that there are a sufficient variety of corporations to choose from.[157] But when the market is highly concentrated, the few consolidated employers have more power to impose conformity and obedience in whatever ways they see fit. As Joseph Raz explains, it is "not number but variety" that matters, as a "choice between hundreds of identical and identically situated houses is no choice, compared with a choice between a town flat and a suburban house, for example."[158] To the extent that a functional patent system facilitates market entry, working against market concentration and increasing the variety of options for technology sector employees, it may tend to work against fascism by promoting a more horizontal form of individualism.

CONCLUSION

The promotion of individual autonomy provides a different and potentially important lens through which to view the patent system. Viewing the patent system in this way allows us to appreciate certain under-recognized benefits of the patent system and suggests potential tweaks to further accentuate such benefits. Philosophically, by encouraging diverse non-obvious innovative thinking, the patent system may tend to make certain sectors of the population less susceptible to the group conformity and authoritarian submission required under oppressive authoritarian or fascist regimes. The non-obviousness standard serves to ensure that only true inventions receive patents, and a stricter standard may desirably encourage inventors to aim for major innovative breakthroughs rather than mere marginal improvements over the prior art. It is also important that the patent system retain its technological objectivity and not become a tool for propaganda. Economically, by reducing market concentration in certain technology sectors, the patent system may promote individual autonomy by giving employees more choice as to where to work, and more opportunity to potentially influence the culture and direction of their organizations. A less concentrated market is also less susceptible to capture by, or merger with, the State. Recognizing reduced market concentration as a benefit of the patent system suggests that we may want to expand patent programs designed to benefit startups and smaller entities, and provides a counter to arguments for weakening the patent system in certain sectors that have been advanced from an economic efficiency perspective.

This essay is not meant to serve as the last word on these issues, but rather to stimulate discussion, and has endeavored to demonstrate how the effects of private law on individual autonomy, market concentration, and our susceptibility to oppressive regimes, may be worthy of further inquiry.

157. *See* RAZ, *supra* note 117, at 373 ("[T]o be autonomous a person must not only be given a choice but he must be given an adequate range of choices.").

158. *Id.* at 375.