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We welcome contributions from undergraduate students, as well as recent graduates, from any University of California campus. Students may submit any upper division coursework, independent research, or theses that pertain to legal matters. For more information, please refer to the submission guidelines for contributions at the end of this issue.

Review Process

We follow a double-blind review process. To ensure a fair and objective review, we remove identifying information from all submissions, and submissions are rated along predetermined guidelines by multiple editors.

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Letter from the Editor

Dear Reader,

In these pandemic times, we hope this edition finds you well. Throughout the past year, a virus has spread across the world, upending our way of life and causing great suffering. As governments across the globe have sought to respond, many of us have debated how states should operate in times like these. With our society facing increasing sectarianism, chronic racial injustice and violence, gender inequality, income inequality, voter suppression, and environmental disaster, our reflections on the role and form of government are ever more important. Given this, we adopted an edition theme that relates to all of these issues: democracy.

What constitutes a democracy is a question with no simple answer. We accepted submissions relating to any element of democracy, including, but not limited to, racial equality, gender equality, income inequality, environmental justice, human and constitutional rights, civil liberties, voting and elections, and fair and equal representation. We were humbled and inspired by the number and variety of submissions we received, a selection of which we have included in this year's edition.

We are delighted to share a thesis paper on the American unconscionability doctrine, a paper on gender based violence and political representation in Guatemala, an essay on implicit bias among poll workers, a paper on sousveillance and policing, and a piece on the importance of inclusive political processes. In addition to carrying out our mission of supporting and showcasing undergraduate research from across the University of California system, we hope these papers invite reflection on the state of our democracy or lack thereof.

I'd like to extend a special thanks to all the editors and contributors for their commitment to the journal, especially in these often challenging times. We all hope you enjoy reading the first ever fully digital publication of the California Legal Studies Journal!

Good reading,

Rosie Alexandra Ward
Editor-in-Chief

Social Contracts: Unconscionability, Vulnerability, and Other Sociopolitical Constructions of the Judicial Imagination

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Abstract

This thesis combines qualitative and normative analysis to explain the way the concept of vulnerability may operate within the unconscionability doctrine (UD), an American legal doctrine which permits courts the authority to invalidate whole or partial contracts they perceive as unfair. In this thesis, I seek to explain whether, how, and the extent to which judges presume or incorporate a conception of vulnerability when adjudicating cases involving the UD. This means investigating (1) who is often included and who is often excluded from the protections offered by the UD, (2) the formal or informal criteria and characteristics, if any, upon which judges base their considerations of vulnerability, and (3) the potentially racialized, gendered, classed, or religious components of the defendant's or plaintiff's identity which may factor into these judicial determinations. A 25% random sample of legal opinions in Alabama, Mississippi, and Arkansas involving unconscionability was systematically coded through qualitative content analysis. Findings reveal that despite being heralded as "the Law of the Poor", among the three poorest states in the U.S., a large majority of rulings favored business interest. Additionally, vulnerability is shown here to function as an integral component in the conceptualization of fairness and at times its administration with state-by-state analysis, suggesting both conceptual and practical tension between competing notions of vulnerability.

Introduction

Does the unconscionability doctrine (UD) function the way we think it does? Perhaps more importantly, does the UD function the way we think it should? Whereas most scholarship considers and critiques the UD according to how the doctrine operates conceptually, the important question of how the UD operates empirically has been left largely unanswered. This thesis blends qualitative and normative analysis to systematically evaluate and reappraise the UD, not just as an idea, but as a matter of public policy.

The doctrine of unconscionability, as stated in Section 2-302 of the U.C.C., permits courts to invalidate whole contracts, or particular provisions in contracts, they find fundamentally unfair. A classic example of the UD at work is the case of *Williams v. Walker-Thomas Furniture Co.* (1964). Ora Lee Williams was approached in 1957 by a door-to-door sales person with the Walker Thomas Furniture Co. The sales person offered Williams an assortment of goods on credit. Williams had only received an 8th grade education, was raising seven children through a combination of work and welfare benefits, and was geographically isolated from other purchasing options due to housing segregation in the District of Columbia. When Williams missed a payment some years later, the Walker-Thomas Furniture Co. filed an order with the Marshall to repossess all goods leased since their first encounter. When brought to the D.C. Circuit Court, the UD was applied. The terms of the pro rata¹ contracts produced by the Walker-Thomas Furniture Co. were determined to be unconscionable. Williams was compensated by Walker-Thomas Furniture Co. for the goods the company had wrongly sold and taken from her.

The case of Williams illustrates how the UD can operate as a way for courts to protect vulnerable parties. Many have considered the UD especially useful for protecting economically vulnerable parties, sometimes even going as far as to call the doctrine the “Law of the Poor” (Flemming 2014). Moreover, the UD is believed to be especially useful for protecting parties’ belonging to marginalized racial groups, since groups’ economic vulnerability frequently track minority status. This case also illustrates how determinations of unconscionability can sometimes involve an embodied conception of vulnerability. The details of this particular case demonstrate how the formulation of this notion can involve appeals to racialized, gendered, and classed attitudes and beliefs. At one point, a pivotal question before the court was whether or not Mrs. Williams was a legitimately vulnerable party (Zalenese 2013). During the trial, the prosecution argued that, as a single mother on welfare, she had no business buying a stereo from their business, and for that reason, she ought to be considered a careless and irresponsible mother, rather than a victim of an excessively unfair contract. Though this argument was unpersuasive to the D.C. Circuit Court, such a racialized, gendered, and classed accusation could carry significantly more weight before another court tasked with assessing the vulnerability of Mrs. Williams or any other party seeking the defense of the UD. In this thesis, I move beyond a purely

¹ “*Williams’s payments would be applied to all outstanding balances in proportion to the amount still owed on the purchases, rather than to retiring the oldest debts first or even pro rata in proportion to the original purchase price. In effect, Williams would never pay off any individual item until she paid off the entire debt owed to Walker-Thomas Furniture*” (Flemming 2014).

theoretical appraisal of the UD to investigate how the empirical operation of the UD validates or undermines the way we theorize justice.

In this thesis, I seek to explain whether, how, and the extent to which judges presume or incorporate a conception of vulnerability when adjudicating cases involving the UD. This means investigating (1) who is often included and who is often excluded from the protections offered by the UD, (2) the formal or informal criteria and characteristics, if any, upon which judges base their considerations of vulnerability, and (3) the potentially racialized, gendered, classed, or religious components of the defendant's or plaintiff's identity which may factor into these judicial determinations.

American Unconscionability

Historically, the roots of the UD in the U.S. are based in the English common law of equity. The first case alluding to the policy dates back to the 15th century, while some scholars speculate about possible connections to Roman law (Svensson 2010). The doctrine was first used exclusively in the context of bargains and sales as an opportunity for a court to nullify heavy-handed deals. The doctrine would later expand to deals not only involving the sale or trade of goods, but it would remain bound to situations of which material interests are concerned (Leff 1970, McCullough 2016). Following the American Revolution, the common law of England became the basis of the American legal system, and thus many courts in the United States adopted the doctrine of unconscionability (Svensson 2010, Flemming 2014). The first recorded instance of the UD's application in the states was in antebellum Tennessee to the defense of a freed "Negro woman, ignorant, old, addicted to drunkenness, then in bad health, and necessarily imbecile" (King v. Cohorn 1834).

The next development of note was the adoption of the UD into the Uniform Commercial Code (U.C.C). First proposed in 1940, the U.C.C. 2-302 was ratified in 1957, extending the UD to more substantive applications as opposed to the primarily procedural contexts concerning fraud, duress, or mutual assent which dominated the English common law tradition of unconscionability (Svensson 2010). The section provides that:

If the court as a matter of law finds the contract or any clause in the contract to have been unconscionable at the time the contract was made the court can refuse to enforce the contract, or it may enforce the remainder of the contract, without the unconscionable clause, or it may so limit the application of any unconscionable clauses to avoid any unconscionable result. (U.C.C. 2-302)

All 50 states and the District of Columbia at least partially adopted the UD. During the welfare rights movement of the 1960s, the UD allowed judges to protect consumers by refusing to enforce economically exploitative contracts (Caplovitz 1967). These consumer protections were later codified through subsequent legislative action in concert with the courts. The UD has been alleged by some to undermine legislative action through judicial activism, but as Flemming (2014) has argued, a political analysis of the UD reveals a symbiotic relationship between legal and political change in which the UD is a catalyst. This thesis is reaffirmed by the scholarship revealing the resurgence of the UD as a rebuttal to the proliferation of arbitration clauses (Stempel 2004). The UD has been called a “signaling device by which courts identify instances where lawmakers should take corrective action” (Knapp 2013).

All the while, the UD has been the subject of vigorous philosophical concern. The earliest critics of the UD cautioned against its seemingly amorphous quality. The UD did not operate the way many legal scholars traditionally thought about contract law. The UD provided “no concrete guidelines” to deal with what were “essentially problems of social policy” (Leff 1967). The distinction was then proposed to best understand the UD as a standard as opposed to a rule (Ellinghaus 1969). Introduced by this distinction is the normative dimension of the UD which many jurists enter when tasked with navigating the moral grey area surrounding “the mixed question of fact and law” (State v. R&A Inc. 1999). This moral dimension of the UD required moral adjudication among the parties involved. Additionally, this moral adjudication requires an assessment of the parties involved, often considering capability and power, what this thesis calls “vulnerability”.

Theories of Unconscionability: Trap, Tool, or Trick?

To meaningfully contribute to the way we think about unconscionability in the United States, I here outline some theories of law before considering how these paradigms might understand the UD. This exercise is not to volunteer a definitive guide to how the UD ought to be understood, but instead set up several concepts integral to the interpretation of the data I will collect. A brief outline of theory is also essential in considering how the data here speaks to the utility and disutility of these competing perspectives of law, society, and justice. Three theories will serve as the foundation of my analysis of the UD -- Marxist theory, liberal democratic theory, and Critical Race Theory. Though liberal democratic theory is the only of the three which has directly grappled with the legal and normative questions posed by the UD, I will begin with Marxist theory since Marxism sets up some foundational concepts of political economy from

which many liberal democratic theorists base their assessments of political and legal justice. I will next visit the liberal tradition to trace a theory of economic justice from Marx to a liberal democracy before turning to the Critical Race tradition for insights into the operation of power and race in modern social economies. The theories I will highlight are by no means an exhaustive inventory of the philosophical landscape, nor even of each camp, but taken together, they present an accurate picture of key themes at the heart of the UD, such as freedom and power; democracy and inequality; and paternalism and racism.

Freedom and Power

Though Marxism has yet to analyze the UD specifically, as understood in the context of this thesis, Marxist theory provides a clear critique of political economic theories that emphasize a freedom-centered sanctity of contract. As Marx pointed out, the stage on which a contract is signed is presumed by this view to be defined by “freedom, equality,...and Bentham” (273). The contract is thought to be the product of freewill, not coercion. Both stand equal before the law. Both are pursuing their private self-interest (much like nineteenth century political philosopher Jeremy Bentham presumed). According to this freedom-centered outlook, to nullify a contract would break the “joint-will” forged by the parties involved, thereby compromising their freedom, equality, and self-interest.

Marxist theory pushes against this conception by insisting that the concept of freedom has no meaning outside of the context of power relations. As H.L.A Hart once famously mused, can it legitimately be called an act of “free will” for one to turn over their wallet to an armed robber (Hughes 1962)? Furthermore, equality as a basis from which to exercise freedom means very little if one ignores the unequal power relations that define the dynamics prior to and following a transaction. As Marx noted, though the site of contract seems level in the imagination, the buyer of labor “now strides in front as capitalist; the possessor of labor-power follows as his laborer” (273). Any illusion of genuine equality evaporates in the daylight of real world power-relations. And lastly, private self-interest seems a fraudulent concept in the face of power. It is in both the laborer’s and the capitalist’s self-interest to see to their material needs; however, both possess radically different means to do so and as a result pursue their so-called “self-interest.” The laborer can only pursue their “self-interest” by selling the only commodity they have — their labor. The capitalist, on the other hand, pursues their self-interest exclusively by buying and then manipulating labor to produce and sell new commodities. With power in mind, since all laborers and capitalists pursue their “self-interests” in the same way,

“self-interest” amounts to “class interest.” Given notions of superstructure, many Marxists insist that law, politics, and culture are controlled by the ruling class so reform from within legal systems seems moot (Stone 1985). These concerns applied here could form the basis of a criticism of how the UD may not meaningfully address the power inequities central to contract.

Democracy and Inequality

Concerned for how power inequalities can warp important democratic values such as freedom, many liberal democratic theorists understand institutions like the UD as a means to level the scales. Disagreement and debate, however, encompasses much of the liberal democratic conception of unconscionability. An argument originating with John Stuart Mill alleges that part of freedom entails having the right to make bad decisions (Mill 1859). Nullifying “unfair” contracts seems, from this point of view, to usurp the will as expressed by free choice. Though some see no irreconcilable differences between liberalism and paternalism, others defend against allegations of paternalism by discussing the nuance of its application and its operation in democracy (Posner 1995, Shiffrin 2000). Of all of the breeds of the paternalist critique, the deontological carries the most weight among democratic theorists. Paternalism is an attitude of judgmental superiority, and for that reason, it is damaging to the dignity of a rational being (Shiffrin 2000).

Shiffrin argues that the UD can be applied paternalistically, but is not inherently paternalistic. When a court nullifies a contractual provision, it is not out of pity or concern for the disadvantaged party but is instead related to the state’s refusal to participate in abhorrent practices (Shiffrin 2000). This relates to a central value at the heart of the liberal democratic tradition concerning democratic legislation — the law is authored, enforced, and interpreted by the people (Shapiro 2016). Similarly, people see themselves reflected in the law (Shiffrin 2000). The bargains of private parties enter the public realm when a contract beckons the force of the state to enforce the terms of the deal. However, to call on the powers of the state is to summon the will and consciousness of the people who compose such a political unit and with it a right of refusing to enforce legal protections of unconscionable agreements. This notion of a political community and complicity in public affairs is central to the liberal project generally and the UD specifically. It is largely for this reason that democratic liberal theorists such as Shapiro (2016) find in liberal democracy the most robust existing model by which to oppose domination.

Paternalism and Racism

Though paternal governance seems inconsistent with the ethos of liberalism, governance through racial bifurcation, according to the many Critical Race theorists, is not. In fact, the limited cases in which paternalism is justified by the liberal project seem to align with the project of racial injustice. As John Stuart Mill considered the question of governing “barbarians,” a Euro-centric imperial project seemed the only solution (Jahn 2005). For this reason, many Critical Race theorists are skeptical of liberal doctrines like the UD for what seems to be disingenuity in its declaration of universal and egalitarian rights which are then seldom extended to women, people of color, and other marginalized groups. The liberal project is thought by some to operate via dynamic conceptions of personhood and sub-personhood (Mills 1997). Descriptively, the exclusion of specific groups is believed to be made by design, not error. Normatively, exclusivity is central to liberalism, not peripheral. The operation of personhood and sub-personhood involves the social construction, teaching, learning, and performance of racialized scripts of whiteness and non-whiteness (Gomez 2012, Carbado & Gulati 2013). Race, therefore, operates in a way largely undetected in law to maintain power inequities (Bell 1994, Katsely 1994, Mills 1997, Carbado & Gulati 2013, Zalesne 2013). Accordingly, the UD could itself operate as an instrument of racialization through the perpetual reformulation and enforcement of black/white binary and meta-blindness about racial differences (Medina 2013). To many Critical Race theorists, a color-blind approach to unconscionability could perpetuate systemic injustice through both the informal and formal denial of legal remedy.

Method

This thesis seeks to explain judicial behavior and how these behaviors embody, complicate, and potentially undermine notions of justice. Since the nature of the question at the center of this thesis is as much empirical as it is normative, the methods used here blur the lines dividing the sociology and philosophy of law. Legal theory here is fashioned to operate as social theory in how the concepts outlined earlier will serve as a basis to interpret the data collected. The data, though legal in its nature, is taken to mean more about society, politics, and power than codified legal doctrine. With sociopolitical legal culture at its heart, the “analysis [to follow] is not an experimental science in search of law but an interpretive one in search of meaning” (Geertz 1973). Accordingly, qualitative content analysis is here used to discern meaning, identify patterns, and interpret phenomena. The data will then reflexively allow for a sociologically based reappraisal of legal theory.

Legal Opinion as Data

For data, I have collected a random sample of legal opinions that invoke the unconscionability doctrine. I use qualitative content-coding to examine whether and how judges determine who is vulnerable and thus deserving of UD protection. Systematically examining judicial decisions promised the most reliable insight into the practical operational dynamics of the UD. The writings of the judiciary present the formal rationalizations of the court while also offering evidence of informal considerations which undergird the logic and rationale of judges. Interviews with judges or individuals affiliated with the court may promise useful information in understanding the way the UD operates, but this approach also presents considerable problems. In considering interview-based methodology, recall bias presents an important threat to the reliability of judges' testimony in discussing the way they may evaluate and understand vulnerability. Accordingly, interview-based methods are non-ideal in the context of this thesis – one studying social forces such as identity and the law. Plaintiffs, defendants, and other individuals affiliated with the court proffered similar concerns. Since systematic examinations of formal court documents associated with cases involving the UD allows for the formal empirical analysis of how the doctrine functions, content coding was selected as the most appropriate methodology.

Sampling

I have limited my examination to a collection of legal opinions in 3 states – Alabama, Mississippi, and Arkansas. These three states were selected because they are among the poorest states in the United States. Since the UD is commonly believed to be the “law of the poor”, observing how the UD operates in the poorest states in the union seems a fruitful exercise in trying to understand how the doctrine most representatively operates. Reason holds that, since the doctrine supports the rights of the poor, the doctrine's utility in these states ought to be well illustrated. Furthermore, since each state perhaps incorporates the UD into their law differently, including cases from each state will provide a robust view into how the doctrine works. Though understanding how the UD operates in each state specifically is worthwhile in and of itself, a look at all three offers a better picture of the doctrine itself as opposed to an idiosyncratic state-specific policy tradition.

I have collected cases at the state court level. I used the Westlaw database to collect electronic copies of case briefs, rulings, and judicial opinions. For each of the 3 states involved in my study, I extracted a random 25% sample of cases that invoke the UD. In the Westlaw database, there are 166 cases listed that invoke UD in Alabama, 99 cases in Mississippi, and 54 cases in Arkansas. Given that the universe I am interested in studying consists of 319 cases, a 25% sample involved the in-depth coding and analysis of 79 cases – 41 from Alabama, 24 from Mississippi, and 14 from Arkansas. I randomly selected these cases from each state by arranging each sub-universe chronologically. I then selected a random number between one and five as my first case. I then collected additional cases by selecting an appropriate interval from which to systemically draw a chronologically representative sample. This method allowed me to examine trends over time. At times, this allowed the testing of whether or not a given feature of the data was related to a particular event or historical moment.

In the event that I collected a case which used the phrase unconscionability outside of a legal context (i.e. that outfit is unconscionable), I removed the case and replaced it with the following case chronologically. This method allows for the universe to be feasibly examined and for my study to be easily reproduced.

Content-Analysis

After reading all materials related to cases which invoke the UD, I systematically coded all information used to describe characteristics of the defendant and plaintiff. My codebook included a collection of terms related to race, ethnicity, sex, gender, class, religion, age, marital status, and education (the primary independent variables of this project). I recorded the outcome of each case and when possible analyzed how desired legal outcomes track the characteristics of the parties involved. At times, I could not record some characteristics. Most legal opinions made no mention of race. In such circumstances I drew conclusions based on suggestions in the facts, but at times, I deemed some characteristics undeterminable, such as race/ethnicity.

I also coded for any mention or consideration of vulnerability. Vulnerability is a useful concept in this study and will be operationalized largely through examining and identifying discussions of unfairness, exploitation, oppression, and one-sidedness. The operative concept at the core of unconscionably is the conscience – sensitive to inequality, inequity, and wrongness. I coded the way the court documents identified, understood and discussed these normative considerations. In this study, vulnerability was largely understood in relation to the character and essence of the wronged party. Since in the evaluation of wrong there is a consideration of

victimhood and perpetration of wrong, each of these sub-considerations were noted in the terms described by the courts.

Limitations

Limitations of the study include the inability of generalizing results beyond the three states I studied. The three states I have purposely selected are not perfectly representative of the entire United States, so the trends and dynamics I identify may not mirror other parts of the country. However, my study offers a reliable, in-depth look into how the UD operates in very poor parts of the US. This is incredibly important and meaningful since the doctrine is commonly believed to be a policy which protects the rights of poor Americans, yet this has not been tested empirically until this point. And though my findings may not be able to speak to national trends or phenomenon, since the cases I examined apply the UD as it was designed to operate, my data speaks to operative dynamics which are central to the nature of the UD. Some of these dynamics are related to issues of identity, but my ability to make identity-based comparisons is limited. I have not in every case been able to determine the race, ethnicity, sex, gender, class, religion, age, marital status, and education of the plaintiff or defendant. I am thus unable to speak with certainty about how often some groups are treated in this way or that way, offered this opportunity, or denied that remedy and so on. I am able to compare and analyze all explicit and desirable characteristics in light of positive and negative legal outcomes. However small the sample, appropriately curated, my data elucidates trends and dynamics of meaningful importance.

Findings

My analysis of the legal materials at the base of this critical analysis reveals two empirical trends. First, despite being heralded as “the Law of the Poor,” among the random samples of cases spanning the three poorest states in the country, a majority of rulings favored business interests. Second, this study demonstrates how vulnerability operates as an implicit and explicit standard in a substantial share of rulings with state-by-state analysis, suggesting both conceptual and practical tension between competing notions of vulnerability.

Business Interests v. Non-Business Interests

Most cases which summoned the doctrine of unconscionability involved commercial interests (see figure 1). Of the 79 cases studied, 74 cases involved commercial law, which includes real estate, health insurance, and general business dealings. This proportion is roughly the same across all three states. No state contributed more than 2 non-commercial cases to the sample. The total 5 non-commercial cases within the sample were family law cases: four divorces and a will. Of the commercial law cases, across all three states, contractual arbitration clauses were the most frequently disputed of all legal issues.

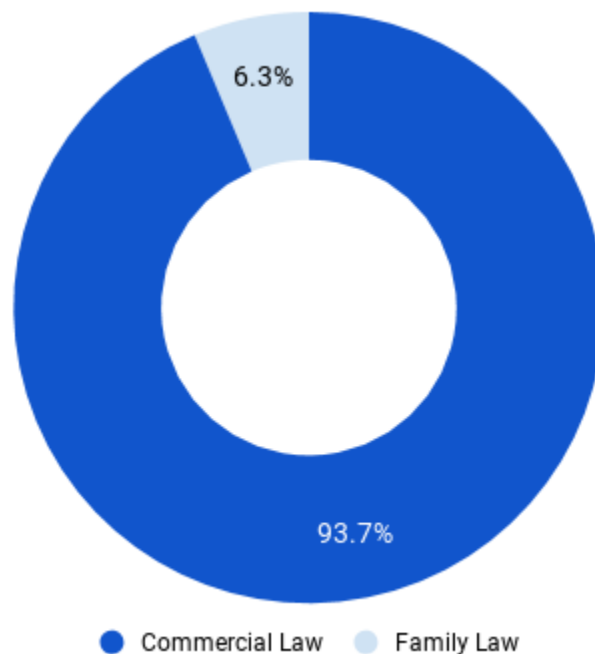


Figure 1. Field of Law

Most cases which summoned the doctrine of unconscionability favored business interests (see figure 2). Only 19 of the 74 commercial cases sided with non-business interests — individual consumers seeking the defense of the UD. I was interested in whether or not the courts perhaps have ruled differently across time, so I reexamined the legal opinions chronologically. I detected some variation. Rulings between 1968 and 1988 favored business interests roughly as

frequently as non-business interests, but from 1988-2018, courts were 50% more likely to rule in favor of business in comparison to non-business.

An example of a court ruling in which business interests were favored is that of *Newell v. SCI Alabama Funeral Services, LLC* (2017). The day of his wife's passing, Robert Newell asked that his spouse be cremated as soon as possible and returned to him (estimated to take 5-10 days). A month later, Newell, concerned over the status of his wife's remains, learned that she had not even been cremated yet. This especially disturbed Newell since he had not asked for her to be embalmed as he was under the impression that the cremation would be prompt (as agreed). When he sought legal remedy, Newell was reminded of the arbitration clause he signed on the day of his wife's death. This clause denied Newell the right to sue. Newell alleged that such a clause was unconscionable. Newell argued that SCI Funeral Services had "overwhelming bargaining power over him" as "he was distraught and grieving" (*Newell v. SCI Alabama Funeral Services, LLC* 2017). It seemed deeply unfair to "require a grieving family member to "shop around" for a funeral home that does not require the execution of an arbitration agreement" according to Newell. The Alabama court, however, ruled that if one could not "shop around," perhaps UD protections could be granted, but to prove that, one must demonstrate an attempt to "shop around" and fail (*Newell v. SCI Alabama Funeral Services, LLC* 2017). The court therefore favored business.

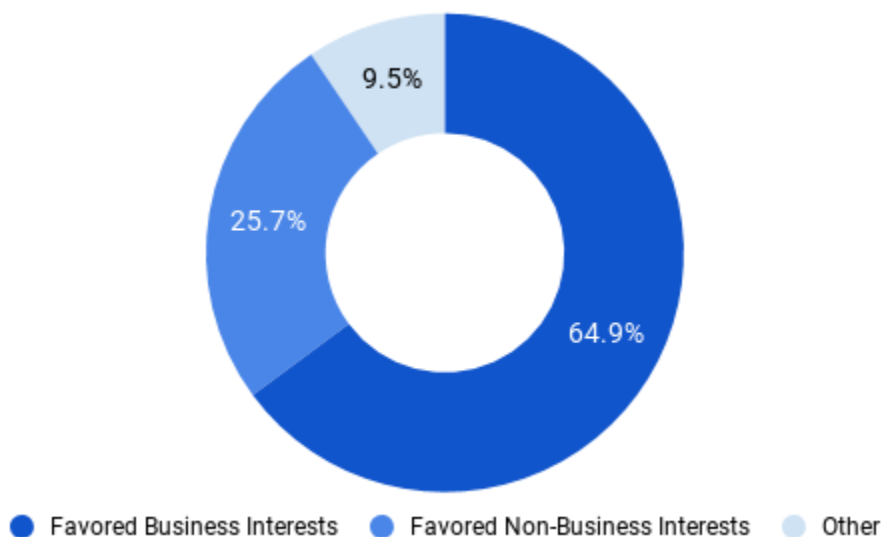


Figure 2. Commercial Legal Outcomes

Of note, almost 10 percent cannot be said to either favor or disfavor business, since both parties involved were businesses. This is a surprising phenomenon, since no previous analysis, normative or empirical, has considered the potential circumstance of the UD being invoked in an exclusively commercial context.

Consider the case of *Advertiser Co. v. Electric Engineers Inc.* (1988). Advertiser Co. produced and sold background music. Electric Engineers Inc. was a global franchise which purchased music rights to play in their many stores. When Electric Engineers Inc. wanted to include music from Advertiser Co. on their “on-hold” phone lines, they entered a five-year contract, which Electric Engineers broke. Whether the contract was broken was not at issue before the courts. The issue at hand was a claim of unconscionability made by Electric Engineers. Electric Engineers alleged that the adhesion clause of the contract (the requirement to use the music exclusively for 5-years) was not understood upon signing and, even if understood, was excessively unfair. The court ruled against Electric Engineers Inc., stating that “the defendant in this case is a relatively large corporation” and “can hardly be heard to complain” that they were “unduly surprised by such a provision” (*Advertiser Co. v. Electric Engineers Inc.* 1988). Ultimately, they were considered by no means a “vulnerable party”, a concept I will explore at greater length later.

But can a larger corporation be considered deserving of UD protections? The case of *Associated Press v. Southern Arkansas Radio* (1991) suggests that such circumstances are more than purely hypothetical. In a case disputing contractual profit shares, unequal bargaining power was the central legal issue. Since of the two media groups, Associated Press had more power over production and distribution, Southern Arkansas Radio claimed that the heavy handed terms of their agreement were only entered into via extreme market-based pressure – a sink or swim form of duress against which the radio station sought relief. Remedy was granted in the dissolution of the contract (*Associated Press v. Southern Arkansas Radio* 1991). Southern Arkansas Radio escaped what could have been thousands of dollars in debts by successfully identifying as a vulnerable party to a multi-million dollar media agreement (*Associated Press v. Southern Arkansas Radio* 1991). This phenomenon was most prominent in Arkansas (see figure 3).

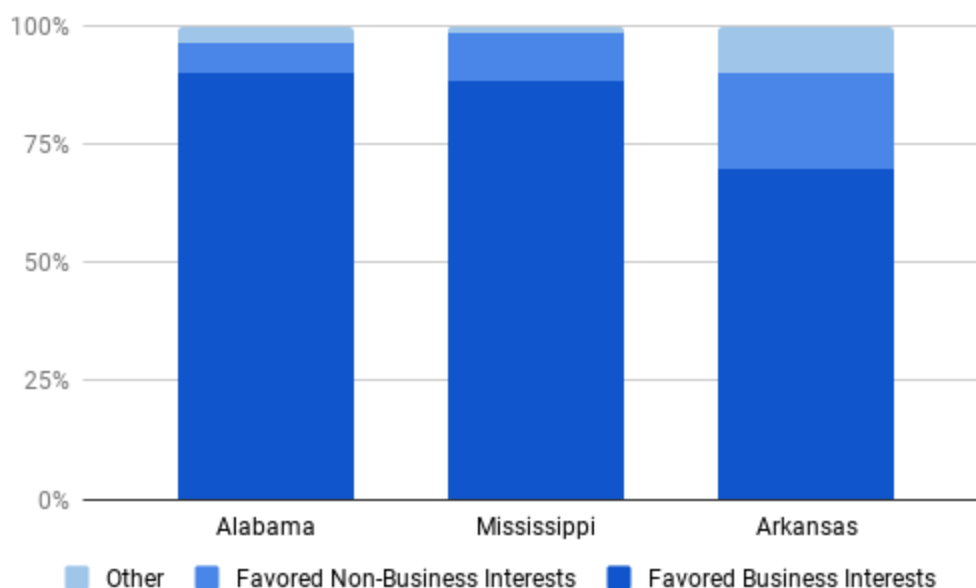


Figure 3. State-by-State Commercial Legal Outcomes

Another trend unique to Arkansas is how frequently Arkansas favored non-business interests. Though the state did not favor non-business interests as frequently as business interests, it is noteworthy that Arkansas deviates so dramatically from Alabama and Mississippi in this respect. Looking again first for chronological anomalies (i.e. a particular governorship or change in the judiciary), no historical spikes were discerned. To understand why Arkansas differs from the other states in this study, I turn to an analysis of vulnerability.

Physical Vulnerability v. Economic Vulnerability

The data show vulnerability as an implicit and explicit standard in a substantial share of rulings. State-by-state case analysis suggests both conceptual and practical tension between competing notions of vulnerability. The most significant difference Arkansas presents is an understanding of economic vulnerability among the judiciary – recognition that imbalances of economic power may undermine one’s capacity to resist an unfair deal. This understanding is missing in the legal accounts of Alabama and Mississippi, which instead endorse a narrow theory of physical vulnerability. These courts would only recognize imbalances of physical power, such

as a disability, when determining whether or not one's capacity to enter a fair contract was undermined.

Alabama and Mississippi cases invoking the UD provided protections exclusively to those who were physically unable to enter the contracts they contested. Many examples include people who were unable to read or understand the contracts in question. One defendant who was “elderly, [did] not have Internet access or an e-mail address, and [did] not know how to use online banking” was relieved of an arbitration clause uploaded to his online banking portal (Moore-Dennis v. Franklin 2016). Another defendant, who “was 77 years old, did not finish high school, had poor eyesight, had difficulty reading, and could not read small print”, was granted UD protections from an arbitration clause on a mobile home insurance policy (Ex Parte Napier 1998). The protections of the UD were awarded with great reluctance, only to those who demonstrate physical disabilities. This narrow understanding of vulnerability excludes those who are simply poor.

Alabama and Mississippi rejected all claims of unconscionability made on the grounds of poverty-related power inequality. In one case, a car buyer sought UD protections as “she cannot afford to pay arbitration fees” (*Fleetwood Enterprises, Inc. v. Bruno* 2000). The court, however, rejects Bruno’s appeal, citing in response another case (*Green Tree Financial Corp. of Alabama v. Wampler* 1999). The court quotes the standard of Alabama that “on grounds of financial hardship, [the court] cannot allow a party's poverty...to justify a finding of unconscionability” (*Fleetwood Enterprises, Inc. v. Bruno* 2000). Furthermore, in another case, an uneducated man “traveled to the Burke car dealership in a taxicab, for which a Burke salesman paid the fare, and would have had no transportation home if he had not purchased a vehicle from Burke” (*Jim Burke Automotive, Inc. v. Murphy* 1999). Murphy pleaded to the court to free him from an arbitration clause he neither freely entered nor understood, but the court rejected his claim by saying that “the mere fact that Murphy did not have a motor vehicle... is insufficient” to establish unconscionably (*Jim Burke Automotive, Inc. v. Murphy* 1999).

In contrast, the Arkansas judiciary operationalizes a notion of economic vulnerability that includes poverty-related power inequalities. Take for instance the case of *Gulfco of Louisiana, Inc. v. Brantley* (2013). Pamela and McArthur Brantley struggled to make ends meet. Pamela cleaned houses while McArthur moved boxes – neither had more than a high school education. When Pamela began suffering from medical problems, the two sought the services of a loan agent with Gulfco, a company rumored to provide “easy money, fast” regardless of income (*Gulfco of Louisiana, Inc. v. Brantley* 2013). In declining health, the Brantley family took out a loan for \$1,500 and agreed to pay the loan back on a monthly basis (roughly a hundred dollars a

month). Soon, the monthly payments became incredibly difficult to manage in light of a decline in business for McArthur. The Brantley family shared these concerns with a loan agent, only to be offered an additional loan for \$3,000, along with advice to “purchase a logging truck” so McArthur could go into business for himself (a suggestion of the lending agent) (*Gulfco of Louisiana, Inc. v. Brantley* 2013). This venture soon failed, and as result, the family returned to Gulfco seeking help. This time, they are given a \$4,000 loan to cover their previous debts. The Brantley family puts their home up as collateral. When they once again defaulted, Gulfco moved to take their home. The Arkansas courts stopped this by ruling that “Gulfco took advantage of their lack of sophistication and induced them to mortgage their home with knowledge that they did not have stable, full-time employment.” The court granted the Brantley family UD protections because “despite the Brantley's demonstrated inability to pay, Gulfco continued to loan them money” (*Gulfco of Louisiana, Inc. v. Brantley* 2013). In the eyes of the court, Gulfco took full advantage of Pamela and McArthur’s economic vulnerability – their poverty and employment prospects.

The tension between competing visions of vulnerability within the states studied here may explain why the business-favorable ruling trends differ across states. Because the conception of vulnerability envisioned by Alabama and Mississippi excludes power inequities rooted in poverty, the judiciary may restrict UD protections to the physically vulnerable. In contrast, the understanding of economic inequality as a source of social and legal inequality outlined by the Arkansas courts may explain why non-business interests are more frequently given UD protections.

Discussion

Based on the data gathered here, the explanatory power of Marxism, liberal-democratic theory, and Critical Race theory would benefit from reconsideration. Reflection on the way these theories explain the findings of this thesis promise a richer understanding of each theory and the operation of the UD. Based on a Marxist perspective of law, concerns over the UD’s alleged cosmetic nature are supported by the finding that the economically vulnerable are less likely to have their interests advanced by the UD compared to business-interests. While advancing the interests of some economically disadvantaged individuals, the findings of this study do not support the UD as a systemic antidote to gross power asymmetries. Just as the Marxist perspective warned, the UD operates much like a mascot of the legal order, lauding the value of fairness, but ultimately doing little substantively to rectify the structural dynamics at work.

Members of the legal community can gesture to the UD as an example of remedy in cases of gross injustice; however, the UD operates practically more as an opiate to the casualties of the capitalist legal order, rather than a cure.

The liberal-democratic reply might rebut by qualifying the role of the judiciary in the project of designing a just society. As the judiciary is conceived as the interpreter of law rather than its author in a democratic society, the function of the courts in the context of the UD is not intended to be systematic. As Knapp (2013) noted, as opposed to rectifying wrong, the UD largely functions as a signaling device to invite legislative reform. Furthermore, the UD as stated in the U.C.C. appears to invite a consideration of fairness in contract, but does not require such an assessment in every case of unfair contract, therefore shifting the burden of systematic rectification from the courts' shoulders.

One problem with the liberal interpretation has to do with the complicated mandate/permissions offered by the UD as stated in the U.C.C. and implemented by the state courts in this study. While the UD as outlined in the U.C.C. does not speak to a systemic mandate to correct for each and every unfair contract, the UD as stated in the U.C.C. does not require a reading of the law within the context of either party's vulnerability. Yet, vulnerability has been shown here to function as an integral component of both the formal and informal application of the UD. The Arkansas State Supreme Court put it well that "a consideration of unconscionability is a necessarily mixed question; one of both law and fact" (*Gulfo of Louisiana, Inc. v. Brantley* 2013). In other words, to determine whether or not a given contract is unconscionable, one must consider the facts of the case, not just the text of the contract. The identity of the parties, whether or not one is a multimillion dollar corporation, or a resident of a nursing facility, makes a world of difference to a court tasked with the question of whether a contractual provision is fair. A deep rooted fear of gross power inequality informs the UD. Therefore, in practice, noting power is mandatory. Since the power at play is more frequently cloaked within contractual terms rather than openly articulated, a consideration of both parties' initial position, bargaining powers, and capabilities require review. This dimension of the UD seems to align with a liberal democratic vision of a lawful society, but at the same time opens the door for positionality to play a large role in jurisprudence.

A consideration of unconscionability without a consideration of positionality is generally desirable, according to some liberal democratic theorists, but is ultimately not possible. Fears around the incorporation of identity in adjudication are based in concerns over paternalism. The definition of paternalism that Shiffrin (2000) outlines draws a distinction between pitying parties and refusing to be complicit in bad practices. While this distinction may operate effectively on

the realm of theory, the two are collapsed in practice. As illustrated by the cases at the center of this thesis, the very understanding of whether or not a given practice is unconscionable depends on the positionality of the parties involved. For instance, in the online-banking case discussed earlier, the defendant's age and ability to access/utilize technology was an integral element of understanding the moral quality of the banking practice in question. If the defendant had been less vulnerable, the contested arbitration clause would not have been considered unfair.

This case is not the UD being applied paternalistically, as Shiffrin (2000) warned. Rather, this case perfectly fits the definition of an anti-paternalistic use Shiffrin outlines. She condemned judges using the UD to impose their "judgmental superiority" upon autonomous citizens (Shiffrin 2000). In other words, paternal pity usurps the legitimate will of a free people. The UD must therefore only be used to restrain the state complicity in immoral dealings that violate the values of our political community. Accordingly, in the online-banking case, the judiciary should not invalidate the arbitration clause out of concern for the wellbeing of a particular party. Instead, the court ought to first assess the moral quality of the practice in question and then decide whether lending legal authority to such a practice would make the court complicit in a deeply immoral arrangement. As my thesis shows, before the courts can assess the moral quality of a practice, the courts must assess the wellbeing of the parties involved.

The liberal democratic debate around the dangers of paternalism neglects the fact that an assessment of the circumstances surrounding a practice is required to speak to the moral quality of such a practice largely due to the social quality of justice. Justice only exists within the context of two or more actors. Justice concerns the collective project of individual agents. Political "oughts and ought-nots" only exist between members of civil society. Citizens are of varying capabilities and powers. In other words, members of the body-politic are of varying vulnerabilities. Changes in the capabilities and powers of the parties involved can transform the moral character of a given act. Positionality is an important part of the question of justice. An act done to one party, sufficiently vulnerable, could in respect to the afflicted party's lack of capacity or power, evoke an injustice claim. The practice of slicing the flesh of another can transform the action from a morally abhorrent act to a laudable practice depending on the positionality of the primary actor — sadist or surgeon.

In the case analyzed here, this is evident. Parties were considered vulnerable in respect to their lack of capacity or power, though defined differently by the jurisdictions analyzed here. This understanding of vulnerability allowed judges to determine whether an injustice had occurred, and which party was in the wrong. In the electronic media groups suing one another, neither party was deemed vulnerable, so the UD was not applied. Then, in the online banking

case, the elderly customer was considered vulnerable because of his lack of familiarity with the technologies used to inform him of the contractual term by which he was bound. If, hypothetically, the elderly customer had been younger, more tech-savvy, and equipped with legal counsel during the drafting of the contract, the courts likely wouldn't have considered the defendant a vulnerable party. As a result, the courts would not have deemed the contract unfair – siding instead with the bank. The positionality of the parties involved in UD cases is a crucial component of the moral deliberation and adjudication required by the unique quasi-legal/quasi-moral questions evoked by the UD.

One could call the vulnerability considerations required in the process of moral deliberation a thin-theory of paternalism. As opposed to a thick-theory of paternalism, which asserts an attitude of judgmental superiority in the process of decision-making, a thin-theory of paternalism requires a reflective deliberation of fairness among parties of varying capability, power, and vulnerability. This phenomenon is embodied in how the jurists studied here took on responsibilities, not so much of mechanical appliers of law, but rather deliberators of the good. This moral dimension of the work, at times explicitly mentioned, is an essential quality of the UD. While I cannot speak for other legal doctrines, a purely doctrinal approach to applying the UD is not possible descriptively, nor is it desirable normatively. The fears of paternalism are much to do with the thick approach, not the thin. Judgmental superiority is not asserted by the court, but rather the state is partially entering an otherwise private moral deliberation. Shiffrin (2000) insists that the state is not getting involved in the affairs of an exploitative contract by nullifying a clause; they are rather refusing to get involved actually since the enforcement of such a provision would require their power. This is not an accurate consideration. In applying the UD, the state is involved. The state ought not to be involved as an explicit advocate for one side, though that does in fact occur, as that would breathe life into a thick-theory of paternalism inconsistent with a liberal scheme of rights and autonomy. However, the state is not authentically refusing involvement by applying the UD. However briefly, the state enters the moral deliberation of contract to assess the situation and judge whether an unjust practice is in fact transpiring. This thin-theory of paternalism includes the state in a position of moral judgment involving others but concerning only itself. This is a complex relationship, but a relationship none-the-less. Moreover, this is a relationship of paternalistic involvement (thin) which is not inconsistent with a liberal theory of rights and autonomy.

Conclusion

Based on my empirical examination of judicial opinions in Alabama, Mississippi, and Arkansas involving unconscionability via qualitative content-analysis, this thesis finds that among these states, a large majority of rulings favored business interest. Furthermore, though all states favored business more often than non-business, Arkansas stands out as an outlier as being more sympathetic to non-business interests. State-by-state analysis shows both conceptual and practical tension between competing notions of vulnerability among states. This analysis suggests that Arkansas' unique judicial rulings may be related to a unique judicial culture or history which is worthy of further study. Moreover, the findings of this thesis motivate several additional inquiries in both the domain of legal philosophy and sociology.

In the realm of legal philosophy, original Neo-Marxist and Critical Race assessments of unconscionability would productively exercise and test such theories, while additional normative analysis of what I call here a thin-theory of paternalism also has merit. A rigorous neo-Marxist analysis of the UD would be a fruitful scene within which to test and potentially extend many Marxist notions of law and society. The concepts of class, superstructure, and hegemony are but a limited set of potential inquiry points regarding the alleged cosmetic nature of the UD. Another valuable future inquiry should focus on the notion of normative bourgeois behavior as assessed by the judiciary. Many of the legal opinions discussed here outline a picture of vulnerability and sympathy aligned with class. The courts seem to at times presume an attitude of classed judgment – concern for the industrious, shrewd, and careful business owner who is bedeviled by the lazy and undeserving consumers who willfully practice poor decision making. This dynamic of judgement could also extend to new areas of Critical Race analysis focusing on the erasure of race from considerations of vulnerability or the assertion of race as conflated with assessments of moral character.

Lastly, in the realm of legal sociology, the phenomenon of businesses interests using the UD to sue one another is of significant value. While the identification of this trend is a contribution to legal scholarship, a sustained inquiry into “corporate unconscionability” or how business-interests transformed “fairness” into profitability would enormously contribute to our collective understanding of law and society. The phenomenon of business fashioning the UD to further their economic interests is an exciting phenomena which embodies many Marxist concerns over law, power, and capital.

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The Civil War that Never Ended: Gender-Based Violence in Guatemala

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Abstract

Guatemala has attempted to pass reforms with the efforts of improving women's political representation, but minimal improvement has been seen. One of the biggest obstacles for representation in Guatemala is that the normalized gender-based violence derived from the Guatemalan civil war has instilled the notion of women as inferior and therefore incapable of being politically active. Institutional reforms have not changed the society of Guatemala and the culture that allows for open suppression of women. In this article, I argue that the normalization of violence against women reinforces patriarchal ideals and constitutes one of the biggest barriers to women's political representation. First, I offer background information on two prominent political factors in Guatemala: the electoral system and the history of military involvement in political affairs. Next, I look at the theoretical argument regarding how the Guatemalan civil war and lack of prosecutions led to the normalization of violence. Finally, I examine the accuracy of the normalization of violence theory and how it has enabled discriminatory narratives in the political realm.

Introduction

In Guatemala, one in three women suffer from violence in some form of its variations: physical, economic, sexual, or more (Musalo, Pellegrini, Roberts 166). Violence against women has become mundane in the daily lives of Guatemalan citizens. Although many cases go unreported, Guatemala still ranks third in the rankings of killings worldwide (Cosgrove & Lee 313). Policy efforts to pacify this gender based violence have fallen short. The fear of violence in itself is a huge barrier to the wellbeing of women, and it also holds severe consequences for the political representation of women in Guatemalan politics. The amended Guatemalan Constitution lays out equality guarantees for female representation. In actuality, the number of women in political power is very small and decreasing. Minimal representation can be seen in the fact that

only 1 out of 6 Congress members are women, and this number is shrinking. In this paper, I argue that the normalization of violence, as a consequence of the Guatemalan civil war, is one of the biggest barriers to women's representation because it enforces the patriarchy and the notion of women as insignificant.

Many Latin American countries suffer similar patterns of gender based violence and have advocated for an increase in women's representation in political institutions in efforts to eliminate a barrier for women. Latin American states have been pursuing the inclusion and expansion of women's representation for the past 25 years (Barnes & Cordova 1). Policies and institutional reforms have been implemented and altered in various Latin American states to help increase the number of women holding political power. Mexico, Argentina, and Peru are all examples of countries that have implemented a mechanism to increase gender parity in the political field, including by utilizing gender quotas. In many of these countries these reforms have led to a substantial increase in female representation. Five of the top ten countries in the world in terms of women's representation in the legislative branch are all from Latin America: Cuba, Bolivia, Nicaragua, Costa Rica, and Mexico (Schwindt-Bayer & Senk).

Institutional reforms, however, are not yet enough to reverse the patriarchal values embedded into Latin America and its machismo culture. The machismo culture entails strict gender roles with men having hypermasculine traits that normalize the notion of women as inferior (Walters & Valenzuela). Latin America is plagued with a commonality of gender-based violence. As seen in Figure 1, intrafamilial violence against women is the most damaging violence and the second most frequent type of violence to haunt Latin American countries.



Figure 1. Types of violence more damaging and more frequent from Lagos, Marta. "Informe Latinobarómetro 2018." Latinobarómetro Opinión Pública Latinoamericana.

Guatemala has attempted to pass reforms with the goal of improving women's equality but with little avail. In actuality, gender-based violence against women seems to be worsening with time instead of recovering. Institutional reforms have not changed the culture that allows for open suppression of women. In this article, I argue that the normalization of violence against women reinforces patriarchal ideals and constitutes one of the biggest barriers to women's representation. First, Section II will offer background information of two prominent political factors in Guatemala: the electoral system and the history of military involvement in political affairs. Section III will lead to the theoretical argument regarding how the Guatemalan civil war and lack of prosecutions led to the normalization of violence. Section IV will then be looking at the accuracy of the normalization of violence theory and how it has enabled discriminatory narratives in the political realm.

Political Factors in Guatemala (Background)

Electoral Systems

Electoral systems in Guatemala appear "free and fair" at first glance. Guatemala's electoral system is a "mix of the majority system for 91 seats and the proportional representation system for 22 seats with closed party lists" (Nakaya 466). El Congreso de la República (Congress of the Republic) is composed of department-level and national-level representatives who are elected through a closed-list proportional representation system with four year terms. Presidential candidates are also elected by an absolute majority through a two-round system to serve a 4-year term (ElectionGuide). Elections display democratic measures, but corruption is embedded into Guatemala's political institutions. The disparity between electoral law and actual political practice in Guatemala is extremely wide. The electoral laws are violated, evaded, or occasionally, just ignored (Sloan 81). Many of these democratic measures are weakly enforced and not practiced in actuality. Voters of a 1916 presidential election in a small village were "handed a ballot bearing the statement: 'I hereby give my vote for the Licenciado Don Manuel Estrada Cabrera for President of the Republic for the term 1917-1923.' Voters then signed their ballots or made their marks and filed past the election urns, depositing their votes" (Sloan 81). Corruption not only delegitimizes the fair and free elections, but it also poses a huge barrier to women's political representation.

The number of women succeeding in Guatemala's electoral system is slight and decreasing. Representation in Parliament is less than 10%, at approximately 3% (Nakaya

466; Flores, Ruano & Funchal 43). Equal political participation is recognized in the Guatemalan constitution, but the constitution does not guarantee gender equality due to an abundance of obstacles for the full participation of women and other marginalized groups (Ogrodnik & Borzutzky 58). As discussed above, corruption hinders women's participation. There are continual accusations of manipulation by district representatives to hinder inclusivity in political representation (Flores, Ruano & Funchal 43)

The proportion of elected women has decreased from 13.8 percent in the 1995 elections, to 11.5 percent in the 1999 elections, and to 8.9 percent in the 2003 elections. The number of women candidates remained almost the same in the three elections (Ogrodnik & Borzutzky 58). In other words, although the number of women running in electoral campaigns, there is a significant decline in elected women.

Military Involvement

Military interference is another significant component of Guatemalan politics. Throughout history, the military have been a powerful force in the election and success of several presidents, including the rise and overthrow of President Jacobo Arbenz in the 1940s and the election of high-ranking military leaders, including General Miguel Ydígoras Fuentes during the 1960s. (Sloan 80). Military involvement intensified during the Guatemalan Revolution (1944-1945), in which a United States-backed military coup overthrew the democratically elected President Jacobo Arbenz.

When studying Guatemalan politics, it is essential to analyze the presence of the military as well because of their heavy involvement and because of the long term consequences of the Guatemalan Civil War. The internal conflict will be discussed in greater detail in Section III, but it is vital to acknowledge that the Guatemalan military were responsible for the destruction and terror of using gender-based and sexual violence against women, especially Mayan women.

Not only were women violently targeted during the civil war, the Guatemalan army belittled the legitimacy of some women leaders in the rival political party of the war, the Guatemalan National Revolutionary Unity (URNG). Ending the civil war, the Guatemalan army actually refused to recognize the Guatemalan National Revolutionary Unity as a legitimate partner in negotiation due to the women that were given power in the URNG during the conflict (Nakaya 471). In other words, the military holds a significant amount of power that needs to be acknowledged to understand the dynamics of women in politics.

The Role of the Guatemalan Civil War

The Guatemalan Civil War (1960-1996), also called “La Violencia”, was an internal conflict between national army forces fighting guerilla forces, but the Guatemala army turned to sponsoring violence against Mayan communities in order to find opposition within the community (Cosgrove & Lee 315). Guatemalan military forces relied on brutal violence and openly used sexual violence in order to terrorize communities. Violence of extremely brutal forms became integrated into the Guatemalan military.

This internal conflict normalized gendered violence to the extent that many now recognize Guatemala as suffering from a full-fledged femicide epidemic (Ochoa 1337). Femicide is the motivated killing due to the gender of the victim (Musalo, Pellegrin & Roberts 173). Proving femicide is complex due to the requirement of proof that the murder was a result of gender, but one key piece of evidence is the brutality depicted upon the victim. Brutality levels are typically used to prove that the murder was gender-based by identifying the presence of mutilation, sexual violence, or any feature indicating excessive force (Musalo, Pellegrini, Roberts 173). Throughout the violent conflict, the Guatemalan military employed mass public rapes, mutilation of female sexual organs, and they publicly exposed mutilated female bodies with signs of rape (Musalo, Pellegrini, Roberts 181). The majority of Guatemalan military soldiers that committed these horrendous crimes were not prosecuted. As a result of the wartime violence, normalization of violence against women is embedded into Guatemalan society.

By 2011, there were approximately 20,398 cases filed reporting violence against women, and this does not even take into consideration the innumerable amount of unreported cases (Cosgrove & Lee 313). By relying on sexual violence against women to terrorize Mayan societies, Guatemala normalized and systemized violence against women (Cosgrove & Lee 315). Women that were active in opposing these forms of violence or sought justice for other family members victimized during the conflict also faced a higher likelihood of murder (Paz & Bailey 97). The Guatemalan government’s reliance on gender based violence during the conflict enabled the engravement of sexism into future generations of Guatemalan values and mentalities. Gender based violence included extrajudicial executions, illegal detentions, disappearances, torture, internal displacement, rape, sexual slavery, forced unions with captors, and more (Paz & Bailey 140). Relying on these violent means ensured that gender based violence was culturally acceptable because “violence is the principal means of resolving

conflicts" (Musalo, Pellegrini, Roberts 182).

Normalization of Gendered Violence in Guatemala

Gender-Based Violence without Consequences

The United Nations Populations Fund Executive Director, Dr. Babatunde Osotimehin, once said, “today there is no country, not one, where women and girls live free from violence.” (UNFPA, 2014). Gender-based violence haunts nations around the globe. The United Nations Declaration on the Elimination of Violence against Women (1993) officially defines gender-based violence as “any act of gender-based violence that results in physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivations of liberty, whether occurring in public or in private life” (Health and Human Rights Info 2014). Violence towards women and other marginalized groups makes up the majority of world history, but in the past few centuries, there has been active advocacy for an expansion of human rights for traditionally oppressed groups. Expanding human rights, however, largely relies on the efficiency and advocacy on the behalf of the government of the State. Political advocacy and grassroots movements also play a significant role, but the efficiency of long term human rights rely on the structure and prioritization of the government itself. The role of the government would be to prosecute perpetrators that violate human rights and advocate on behalf of the marginalized group.

The current femicide problem in Guatemala can be connected to the failure of authorities to punish and prevent gender based violence (Godoy-Paiz 92). In many cases, perpetrators and beneficiaries of gendered violence continued to live nearby their victims, which contributed to the silencing of women’s stories (Crosby & Lykes 462). Not actively fighting against this gender-based violence enforces the Guatemalan government as a complicit partner to the crimes. Government-condoned violence leads to a climate of impunity that increases and normalizes the violent murders of women (Musalo, Pellegrini, Roberts 171). Not punishing the crimes that subordinate women and create fear of being politically active makes Guatemala complicit in the current femicide.

Gender-based violence revolves around the sexist stigma of women as subordinate and men as the dominant bodies. Women’s bodies being perceived as subordinate allows for government institutions to belittle and dismiss accusations of assault and violence. Patriarchal values encompass men as the dominant gender and, as a result of the Guatemalan civil war violence, that violence can be used if needed. By not prosecuting these crimes, it allows for the

hyper-sexist narrative that all women, including women politicians, endure. This narrative allows for microaggressions, negative public opinions, and blatant violence toward women politicians.

Advancements for Women (Empirical Analysis)

Protections for Political Representation and its Limitations

Political representation for women significantly declined as the years progressed, despite the approximately same number of women candidates, highly correlates with an increase in cases of gender-based violence. Institutional reforms at attempts to improve gender equality have had significant obstacles. Take into consideration the Committee on Women's Affairs in the Guatemalan Congress which has been interrupted and backslid so much that for the first time this committee is chaired by a man (Montenegro 94). It has already been discussed that women are not being elected at a higher rate in recent years and now women affairs, that are intended to increase women participation, are being controlled by men. Gender parity cannot be fully achieved until institutions that are created to achieve equality are free from corruption and removed from the obstacles that the institution was created to eliminate.

Policy efforts for gender parity resemble the same obstacles that institutional reforms have. The Belém do Pará Convention (1994) aimed at resolving violence against women amongst many Latin American countries. Despite the well-intentioned efforts, the years after the adoption of the Belém do Pará actually led to a skyrocketing of rates of femicide (Ochoa 1351). The frequency of efforts to reduce gender-based violence leading to an increase in reported cases of violence offers a notion that institutional reform or policy change has adequately resolved the patriarchal culture.

Attitudes Toward Women Politicians

The patriarchal ideals that fuel gender-based violence can be seen through the scrutiny that women politicians endure. Deriving from the Guatemalan civil war, many women were violently targeted if they were caught being politically active because they would be “breaking gender norms by having ‘dared’ to intervene in the political realm” and would be considered enemies of the state (Paz & Bailey 97). Patriarchal views that deem women as not belonging to the political field lead to excessive criticism of many women pursuing political careers. Even for the women that are already in politics, there is evidence that the women politicians are

underrepresented in party structures (Musalo, Pellegrini, Roberts 198). During an electoral cycle, women candidates are targeted for their personal lives and appearance rather than policy. A candidate running for the mayor of a certain municipality had her entire personal private material distributed on social media (Recinos & Pastor). Personal attacks toward women are typically for the purpose of tearing down their integrity and installing fear of further repercussion. In another electoral circle, one of the former presidential candidates was criticized for having multiple marriages throughout her life, and another woman in the same race was attacked for having an “ugly” appearance (Recinos & Pastor).

Institutional efforts to improve gender parity are insufficient without the social change that advocates for women’s representation. Many Guatemalan citizens remain skeptical of female politicians. The bottom left chart on Figure 2 illustrates that a significant amount of Guatemalan citizens believe that men are better at handling economic hardships than their female counterparts (Setzler 205).

Figure 2. The Marginal Effects of Hardship on the Belief that Male/Female Politicians are Less Corrupt and Better Economic Managers.

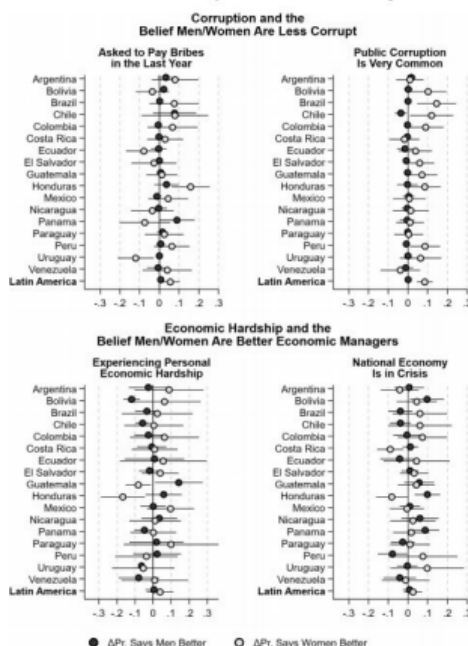


Figure 2. The Marginal Effects of Hardship on the Belief that Male/Female Politicians are Less Corrupt and Better Economic Managers from Setzler, Mark. “Adversity, Gender Stereotyping, and Appraisals of Female Political Leadership: Evidence from Latin America.” *The Latin Americanist*.

The labeling of male politicians as better capable of handling economic problems, and the labelling of female politicians as better suited to handling social issues, reinforces the perception of gender roles in the political field. Women being attacked for their personal lives, rather than their policies, is another example of gender roles playing a significant role in Guatemala's political attitudes. Although gender roles are a significant barrier to female representation, it is important to acknowledge that the normalization of violence is what openly enables these perceptions about gender to exist. Gender-based violence may not immediately correspond with political attitudes at first glance, but violence against women continuously reinforces the notion that women bodies are subordinate and not dominant enough to maintain themselves in the political field.

The stigma against women as inferior in the political realm derives from the same mentality that enabled the gender based violence against women without any consequence. The Guatemalan civil war set a national sentiment that held female bodies as weak and disposable.

Conclusion

Guatemala is a country of beauty but atrocious pain. In this article, I discussed how the long term consequences of the Guatemalan Civil War enabled the normalization of violence which haunts modern day Guatemala. Military leaders' reliance on gender-based violence not only led to the deaths of many women but also installed the notion that women's bodies are too weak to be of importance, so their perpetrators do not need to be held accountable, and these women should not be in the political field. Women's representation is not being protected by institutional reforms and is rapidly decreasing. Guatemala and all of the complexities of its traumatic past can not be discussed in a single paper, but it is important to discuss the long term consequences of such a prominent civil war. There is no clear-cut answer to promoting gender equality in the minds of Guatemalan citizens, but it is obvious that social change is needed.

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The Implicit Threat Undermining Democracy

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Abstract

A polling area is an optimal region for implicit bias to take place. Poll workers deal with large masses of people, make quick decisions, and are given legal discretion with limited information, admitting unconscious bias as a hindrance to fair decision making. Federal oversight acted to limit the adverse effects of voting bias, but the ruling of *Shelby v. Holder* emphasized decentralization and reverted the progress made for equal voting. Prior to voting day, county officials are tasked with locating precincts; empirical evidence shows that environmental cues can prime an individual and skew voting behavior. Thus, the discretion of the official can be a tool of manipulation. At the voting poll, trouble arises with conforming voter IDs to registration ballots. Time pressures and cross-racial identification stress the limbic system from concluding accurate and fair results on whose ballot is legitimate and who deserves more assistance to submit an acceptable ballot.

Introduction

Election workers are the guides of democracy. When millions of Americans drive to their nearest precinct to exercise their right to vote, interracial interactions enable a plethora of barriers to a free and equal ballot box. The phenomenon of implicit bias subconsciously undermines our actions and decision-making through categorization that leads to unintentional animosity towards other races or ethnicities perceived as “out-groups’.” Social cognition theory uncovers three normative functions of categorization: all humans think through stereotypes, stereotypes operate as social schemas that bias how one interprets, encodes, stores, and retrieves data, and categorization occurs without the actor’s consciousness (Krieger, 1995). Polling operations provide insight of how subliminal bias issues, an often undetected and therefore unaddressed threat, combined with intentional discrimination is used to maintain political power, disparately impacting minority voter turnout.

Although the circumstances vary depending on location, most poll workers often work

long hours — 7 A.M. until long past 8 P.M. Prior to election day, poll workers must attend training sessions in preparation to properly carry out their duties: setting up voter equipment, ballot distribution, management of voter registration information, and the overall maintenance of an orderly and secure polling place. Because first-time workers will have to manage their roles without assistance, the quality of training is crucial for the effectiveness of polls on voting day; however, the episodic nature of the job limits the efficacy of training, accountability for ill-judgements, and incentives for high performance. Additionally, time constraints, cognitive overload, discretion, ambiguous criteria, and incomplete data directs a polling arena to implicit bias. A closer examination of the geographical location of polls, the allocation of poll resources, and the quality of pollster-voter interactions suggests that this decentralization is the source of errors that inhibit the electoral process' success.

A Short-lived Victory for Voting Rights

Section 5, the heart of the 1965 Voting Rights Act (VRA), was one of the strongest protections instituted to combat implicit bias. It subjected 16 states with a history of voting discrimination to the jurisdiction of preclearance. Preclearance utilized the U.S. Department of Justice's federal oversight powers to mandate all changes relating to the voting process to pass a "retrogression test" that denied the enactment of changes with malicious effects on minority enfranchisement, subtle or overt (Ang., 2019). However, *Shelby v. Holder* (2013) overturned preclearance as the Supreme Court ruled historic, rather than contemporary, analysis of discrimination as unconstitutional, allotting state and local authorities greater jurisdiction over electoral proceedings. The opinion, written by Chief Justice Roberts, held that the disparate treatment of states "based on the impact of 40 year-old facts having no logical relationship to the present day" ignores the success the VRA has made in reducing overt displays of racism (Newkirk, 2018). Taking away this blanket protection not only fails to mitigate implicit bias, it also risks increasing displays of intentional discrimination.

Polling Location Matters: Environmental Priming

The 2016 presidential primary indicated that election officials opted to reduce the number of polling locations, previously protected by Section 5, by over 70 percent, causing up to five-hour long wait times in certain precincts. In California, a 2003 lawsuit was filed in response to voting machines in counties with over 81% African American and 69% Latino populations being twice as prone to error than newer machines located in white neighborhoods (Gordon &

Rosenberg, 2015). A nationwide survey from the 2008 general election found that Latinos and African Americans were mandated more often than white voters to show identification before voting (Gordon & Rosenberg, 2015). These empirical findings display disproportionate racial impacts resulting from county officials' decisions on poll locations and the unequal distribution of resources as a cause of overall infringement on minority voting capacity. However, importance lies not only in the abundance of polls but also in the environmental cues found in the setting of polls. Berger and colleagues tested the relationship of environmental priming and subconscious stimulus activation within a school setting to find the degree of these factors' influence on voters' rule in favor of Proposition 301, funding for schools. They conclude that locating polls on school campuses increased support for school funding, one could argue the same implication for different polling locations; voting at precincts located in churches could influence voter decisions regarding stem cell funding or policies advocating for LGBTQ+ rights (Berger, Meredith, & Wheeler, 2008). The discreet influence of polling stations have, set at the will of the county official, suggest that implicit bias is a factor that alters election outcomes.

Influences on the Poll Worker

Similarly, the discretion, time constraints, lack of information, work overload, and ambiguous guidelines experienced by poll workers may cause biased judgment even if they share egalitarian desires. An ambiguous rule in Indiana allows voters a three- minute time period in a primary election, and two-minute time period in a general election to cast their votes (Page & Pitts, 2009). However, with no real enforcement, pollsters' decisions on when to enforce this could be subconsciously determined. Research done in employment could explain why. A study conducted on racial differences in resumes found that white applicants with stereotypical white names got a callback for every 10 applications sent, while black applicants needed to send 15. Additionally, the home address of the applicants was manipulated to represent socioeconomic status. More affluent home addresses increased white applicants' chances for callbacks but did not provide any advantage for African Americans from similar neighborhoods (Mullainathan & Bertrand, 2004). This study implies that African Americans are evaluated more harshly, and negative associations hold greater weight than positive ones. One of the main tasks for poll workers is to process applications, absentee ballot requests, and other necessary documentation (photo identification conformity, for example) with limited knowledge based on the voter's name, address, and (often) the inference of their race. Immediately, an automatic "in-group/out-group" association is made causing the election official to unequally weigh mistakes, such as using "street" instead of "avenue" or omitting a suffix in a name, that may

reject one's right to vote. Evidence from *Windy Boy v. Horn County* demonstrates that such scenarios are not mere hypotheticals: "[county officials] became hypertechnical... and looked for minor errors in [Native American] registration applications and used them as an excuse to refuse to allow registration." (Gordon & Rosenberg, 2009).

Currently, twenty-four states require some form of identification at the polls. While seven states require photo identification, Indiana has a strict requirement of an active government-issued photo ID. In *Crawford v. Marion County*, the courts recognized the burden this imposed on eligible voters who lack photo ID but insisted that its intended purpose, to combat potential voter fraud, outweighed the possible disenfranchisement of those unable to obtain their birth certificate, gather the necessary documents, or dedicate the time and effort to obtain a proper ID that might still get rejected at the polls. Poll workers work at their discretion when determining whether the name on IDs match those in poll book or ballots, where a nickname, initial, or other disparity could invalidate the individual's vote. With names as proxies of race, the judgment of conformity could unconsciously be altered without the evaluator's knowledge, finding less matches in applicants outside of the evaluator's own group. Furthermore, dependent on the race of the evaluator and subject in the photo, the phenomenon of cross-race effect changes the cognitive process of encoding and storing information (Hourihan, Fraundorf, & Aaron, 2013). In-group members are more easily able to characterize and differentiate physical features than a member of an out-group, or different race. Thus, even a poll worker trying their best to accurately carry out their job may have trouble confirming an ID image of an out-group member, causing the worker to struggle to make fair judgment calls on its validity.

On election day, poll workers may vary their degree of assistance based on the race of those they are aiding. Research in housing discrimination reveals that minorities are more likely to be denied information about availability, denied the opportunity to visit units, veered towards minority-based communities, offered worse financial terms, and receive unequal assistance and information overall in comparison to their white counterparts (Anderson & Plaut, 2012). Such disparities go beyond the arena of property. A busy election day means time is of the essence. Whereas poll workers could put in effort to explain the legalities of what form of ID is acceptable, call other polling locations to find any missing information, and supply suitable assistance for disabled or ESL individuals, the fast-paced environment simply does not allow for this, leaving workers to subconsciously pick and choose who to help and to what extent. People are capable of countering their own inner prejudice when they have time to think. Neurological science shows that brief images of African American faces automatically

trigger a portion of the limbic system triggered by fear, but the longer the display time, the longer the prefrontal cortex can combat that trigger (Page & Pitts, 2009). Bennett and Plaut further investigated the impact of race on amygdala activity as a byproduct of cultural norms learned from a young age. The amygdala showed greater activity resembling its reaction to threat during out-group interactions than in-group interactions (Bennett & Plaut, 2018). With poll workers being disproportionately female and older than the average American, the likelihood of them assisting an out-group individual—someone younger, of different ethnicity, and sex—is high. Thus, with limitations of time and the influence of cultural norms, who a poll worker is more likely to assist is dependent on many uncontrollable, racially influenced factors.

Conclusion

Shelby v. Holder opened the floodgates of implicit bias within the voting process by reverting the federal check over state adjudicated guidelines. With different regulations varying from precinct to precinct, standardizing election day polling and collecting data to analyze the strengths and weaknesses of polling operations has been seemingly difficult. Large levels of discretion and political incentives of county officials, including their power to delegate poll clerks, allocation of resources, and location of polls, makes even the impartial leader vulnerable to their inner racist thoughts, as has been visible with many ill-made decisions in previous primaries and general elections. With poll workers at the front lines of democracy, there can be no room for ambiguity, incomplete information, time pressures, cognitive overload, or a lack of incentives that affect accessibility to voting and the number of barriers marginalized groups must surpass in order to exercise their rights.

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Sousveillance: A New Form of Resistance

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Abstract

Surveillance, defined as to watch from above, is a power historically monopolized by the State and used against its citizens for discipline. Sousveillance, "to watch from below" (Mann 332), is a power that can be used by citizens to challenge the power of the State. The proliferation of smartphones and social media has increased the accessibility of sousveillance power, as evident through the increasing protests of the last decade within the United States against police brutality. Sousveillance exposes the public displays of terror committed by the police and sanctioned by the State towards people of color. This exposure is to white Americans and middle-class Americans, those who are privileged to be removed from such displays. The power of sousveillance enables citizens to challenge the traditional asymmetry of power held by the State over surveillance, which delegitimizes the State's power to commit "ritualized displays of terror" (Parenti 134) against African Americans and people of color more broadly. The evidence of this exposure and the unprecedented power returned to citizens is captured both in the data of convictions and the diversity and size of protests over the last decade increasing in parallel to smartphone and social media ownership. Therefore, sousveillance has increased the momentum of the movement towards abolition, which is part of a much longer legacy led by African Americans.

Introduction

Since 2009, cellphone videos circulating on social media platforms have incited resistance and provided proof of the long history of police brutality towards African Americans and people of color. Surveillance has always been necessary to enforce discipline, prevent resistance in the United States, and reinforce asymmetrical power between the police and citizens. However, the proliferation of smartphones in the United States has disrupted this historical asymmetry of surveillance power and has enabled citizens the power of sousveillance. While surveillance can be defined as "watching over," in this case by the State of its citizens to enforce discipline and threaten punishment, sousveillance is defined as "watching from below",

where citizens can surveil the higher authority that is surveilling and punishing them (Mann 332). Today, 81 percent of Americans own smartphones, and it is evident that through the increased ownership of smartphones and use of social media, resistance against the police and the State have increased in parallel (Pew Research 2019). In this paper, I will argue that sousveillance, through increased smartphone ownership, acts as a new form of resistance against the police, a new form of resistance that can be categorized within a longer legacy. Furthermore, sousveillance acts reflexively against the State's power of surveillance or the Panopticon, therefore exposing and weakening the power of the State and increasing widespread resistance and movement towards abolition.

Theoretical Basis

According to the theory of Panopticism by social theorist Michel Foucault, capitalism necessitates discipline and punishment; however, this discipline shifted from public displays of punishment in the pre-modern era to prisons in the postmodern era (Foucault 6). Foucault invokes Jeremy Bentham's panopticon prison for his theory of the State, where the State has an asymmetrical surveillance power over the citizenry. The idea of the prison is that prisoners know they are being observed, but cannot see who is observing them and when they are being observed, therefore training the mind and body to be disciplined (Foucault 5). Thus, for Foucault, the post-modern state and its asymmetrical power of surveillance acts as the observer, and the citizen acts with a consciousness that it is always being surveilled, thus disciplining themselves. Foucault states the Panopticon "is a diagram of a mechanism of power reduced to its ideal form....it is, in fact, a figure of political technology"(Foucault, 9). Therefore, Foucault argues that the post-modern world no longer necessitates citizens to witness public punishments to ensure order and discipline. It is the fear of surveillance and the unknown of the prison that conforms the social body to discipline and keeps people productive.

Christian Parenti, the author of *Lockdown America*, argues Foucault's theory only explains a Eurocentric view of the necessitated discipline by the State; however, Parenti argues that, in the United States, the era of public punishment has not ended. The shift in capitalism in the U.S. from industrial capitalism to neoliberal capitalism bifurcated a disciplinary system in the 1970s. Parenti argues that, although the middle-class continues to be disciplined by surveillance, meaning the constant regulation of the State of the social body, poor people and people of color are subjected to "ritualized displays of terror" which are "built into American policing" (134), as well as being overly surveilled. The act of policing by the police is a

racemaking act, where the power of police is delineated to white people as protection and targets people of color through public punishment and extreme surveillance (Gamal 979).

Police in the United States diverge their power based on race, where heightened surveillance and control is committed to those who are marginalized people of color, while advantaged white people have access to State protection (Gamal 982). This disparity in protection makes policing a power dynamic, determined by the color of one's skin, which governs their proximity to police power. As the author Simone Brown states, "surveillance aims to keep people of color in a state of permanent illumination" (Brown 67). Through asymmetrical power of "illumination" by surveillance and public punishment, the State has always had its privileged narrative and the ability to protect whatever violence is witnessed by the widespread public as legitimate. It is this privileged narrative of legitimacy that is disrupted once smartphone usage is proliferated. As the "ritualized displays of terror" which are not witnessed or experienced by the middle class and white people are being surveilled and released to the public, the State's narrative is countered, and evidence is provided that these public punishments are still very much in practice.

The new form of resistance through sousveillance challenges the police's ability to respond to resistance with increased power through their monopoly of surveillance and legitimate violence. "Sousveillance" is central to a theory created by Steven Mann, a professor at the University of Toronto, whereupon sousveillance is the "inverse panopticon from the French word 'sous' (below) and 'veillor' (to watch)" (Mann 332). Mann theorizes that sousveillance is a way to "challenge and problematize" the State as a panopticon (Mann 332). His assertion is based upon observing the extreme escalation of surveillance by the United States government of its citizens following the September 11th attacks in 2001, and how much of this surveillance power is conducted by local police and state military controlled by the federal government. Furthermore, he discusses the idea of sousveillance as "reflectionism"; where technology can "mirror and confront" bureaucratic organizations, it obstructs the asymmetrical power relationship between bureaucracies and citizens (Mann 333). Additionally, the act of reflecting, Mann argues, can "uncover the panopticon, undercutting its primacy and privilege" (Mann 333). Therefore, in understanding sousveillance through the lens of the United States police system within its history, those that are oversurveilled and under-protected by the police are people of color. The act of sousveillance in the U.S falls into a larger historical context of African Americans bearing the burden of surveillance and using the technology of each generation to challenge the privileged narrative of the State.

Historical Background

Alissa Richardson elaborates on the social context in which smartphones operate in carrying out sousveillance. In her book, *Bearing Witness While Black: African Americans, Smartphones, & the New Protest*, Richardson contextualizes the larger legacy of which sousveillance by smartphones is a part. Richardson defines the action of “bearing witness” by African Americans in the United States as challenging the privileged narrative and authority by witnessing each event, presenting the truth, and categorizing it into a larger historical saga of violence by the State against African Americans (Richardson 20). Due to their historic monopoly over surveillance, the police, acting for the State, control the narrative of their actions, therefore legitimizing their violence. As Richardson argues, African Americans have always countered this by using whatever media and technology are available at the time, to challenge the “permanent illumination” that they are subjected to through surveillance (Richardson 52). Additionally, when a counter-narrative is shown to middle-class white people who are not experiencing these “ritualized displays of terror,” massive resistance occurs. Thus, the use of media by African Americans as a type of proof of the brutality by the State threatens the State’s power and ability to be seen as legitimate. Richardson begins this timeline with Frederick Douglass, who released his experience of being enslaved in a newspaper bringing the terrors of slavery to the North, and she finishes her analysis in 2020, citing events such as Mamie Till’s release of photos of Emmett Till, the Watts Riots in 1965, the 1992 Rodney King Riots, and the 2014 Ferguson resistance (Richardson 62-69). Therefore, although the widespread use of smartphones is new, the act of resistance through bearing witness is part of a long history and reflects the act of permanent illumination of those who have had a historical monopoly on it.

Witnessing and publicizing police brutality has proven to work in regards to expanding national awareness; however, it has resulted in increased surveillance before the 21st century. In response to massive rebellions throughout the history of the United States, the police have responded with force. Yet in the 20th century, the response to rebellions, beginning with Watts and ongoing through Ferguson, has led to a highly militarized police, subsequently increasing their ability to suppress and surveil rather than to respond to the issues of police brutality that the rebellions are fighting against (Gamal 988). Building on the theory that the police’s main goal is to suppress rebellion, surveillance then is necessary to suppress growing rebellion. Militarization in response to these rebellions was a factor that made the U.S. into a carceral state, making it difficult for even the most momentous movements to not be squashed. In the past, “cop-watching groups” who were conducting rebellions against the State by “bearing witness” to police brutality, have shown promise in their ability to realize change but due to their inability to

widely show the brutality they witness in order to gain support, the State responded with increased surveillance and the groups were unable to sustain. This is evident both in the State's response to Watts and the Black Panther Party of Self-Defense. Both movements are deeply embedded in the witnessing of police brutality and in bringing to light a counter-narrative of these "ritualized displays of terror". The State responded by creating a Special Weapons And Tactics unit (SWAT), and through increased surveillance by the Federal Bureau of Investigations (FBI), categorizing The Black Panther Party as an "internal threat" (Parenti 23).

Evidentiary Support

Sousveillance through smartphones and the ability of social media to reach a wider audience has led to increasing pressure to convict police officers. Between 2011 and 2019, smartphone ownership increased from 35 percent ownership to 81 percent, and in the last 15 years, social media use has increased by 67 percent, where 70 percent of Americans use Facebook (Parker). Since 2015, police have on average killed 1,000 people in the U.S a year (Dewan), and since 2005, only 121 police officers have been arrested on murder or manslaughter charges. Of those 121 police officers, only 44 of the 95 who went to trial were convicted (Dewan). However, in a comparison between 2005 to 2015, only 11 had been convicted. As broader calls for police reform increase in the U.S, although slowly, so do indictments and convictions. The direct effect of smartphone videos released on social media platforms to gain a wider, diverse audience has shown to be increasing the likelihood of convictions. As video sousveillance has increased, so has the use of sousveillance evidence to challenge the police's narrative. For example, in the 2015 shooting of Walter Scott in South Carolina, Officer Michael Slager had said that he shot Walter Scott because Scott had reached for his taser. However, a bystander by the name of Feidin Santana filmed the interaction on his smartphone, capturing Scott running away from Slager when Slager shot Scott in the back. This video was used as evidence in the trial and helped convict Slager to 20 years in prison for voluntary manslaughter (Lee). This can be juxtaposed to 2020 when Garrett Rolfe shot Rayshard Brooks on June 12, 2020, amidst the Black Lives Matter protests. It was reported that Brooks reached for Rolfe's taser before being shot; however, Rolfe was immediately fired and indicted, and although in the year 2020 he was released on bond, he is facing 11 charges, including felony murder, showing that these calls for change are having some impact on the response by local governments (Brumback). Smartphone videos and social media have now become a way to document and produce a timeline and make patterns evident that have become harder to deny. The disseminated use

of smartphones and social media have both increased convictions and calls for abolition; this is evident in the increasing protests of the past decade.

Unlike previous rebellions, the longevity and diversity of the last decade of protests show the unprecedented power of sousveillance as a way to obstruct the historical asymmetry of power between the police and citizens. In the late 1960s and early 1970s, massive resistance against systemic racism, particularly police brutality, was a central issue in the U.S.; in the mid-1960s, 163 cities in the U.S saw uprisings (Sugrue). However, the protests in 2020 are very different due to the role of sousveillance, as illustrated by the release of the video of Officer Chauvin murdering George Floyd. Between May 25, 2020, and June 11, 2020, 450 protests occurred nationally, and 25 million U.S citizens reported taking part in the demonstrations (Sugrue). The protests of the Black Lives Matter movement in 2020 were the most racially diverse and decentralized protests in American history (Sugrue). The widespread access to videos of the murder of George Floyd and other people of color, along with the constant feed of videos within the protests of police brutality against peaceful protestors, galvanized those that are not exposed to “ritualized displays of terror” and whose policing is mainly in the form of surveillance. According to Pew Research, 43 percent of Americans in 2014 believed that murder by the police was a sign of a broader problem; in 2020, 73 percent of Americans now believe it is a systemic issue (Pew Research Center). The protests of 2020 hastened the momentum of the movement through an accumulation of over 10 years of widespread footage of the hideous asymmetry of power by the police.

Admonition

It should also be emphasized that the assumed necessity for continued proof for white Americans and middle-class Americans to be incentivized to act is amoral and brutal in itself. As a consequence, this assumed necessity of proof creates both physical and epistemic violence. Data regarding police and systemic violence towards African Americans and people of color more broadly is provided through cultural receipts that have been available for centuries, as noted previously through their “bearing witness.” However, not until 2020 has this collection of evidence activated a multi-racial and multi-class resistance through its widespread availability with the rise of smartphones and social media. The access of these videos and personal testimonies, through the proliferation of smartphones and social media, has quickly advanced the momentum of the movement towards abolition and against police brutality. However, the aspect of police brutality and murder by police of people of color as going “viral” is reminiscent

of public lynchings and brutality towards African Americans in the past. The continual posting of people of color being brutally beaten and murdered by police in order to incite these conversations and movements comes at the cost of the basic privacy and mental health of people of color in the United States. Therefore, although sousveillance, as this paper emphasizes, challenges the asymmetrical power of surveillance by the State through its reflectionism (Mann 333), the need to post videos of brutality against people of color in order to convince those who are privileged to fight against “ritualized displays of terror” counteracts the resistance that sousveillance provides. Once the “ritualized displays of terror” are made evident to those not regularly exposed to it, it should no longer be necessary to see proof but should instead incite others to use their access to smartphones to challenge the State and commit it to transparency by keeping the State under “permanent illumination”. Without resistance, smartphones and social media become nothing more than another platform for the State to enact public displays of terror. If not used for resistance, the use of social media and smartphones could become collaborative with the State and co-opted to continue the hyper surveillance of people of color, meaning that those that hit record become pseudo actors of the State.

Conclusion

In conclusion, sousveillance is part of a long legacy of witnessing by citizens against police brutality, the intention of which is to equalize the asymmetrical power between police and its citizens. Evidence of the effect of sousveillance can be seen in increasingly diverse and widespread protests against police brutality and in the slow uptick in convictions of police officers. As the use of social media platforms and ownership of smartphones proliferate, the monopoly over surveillance by the police weakens. Mobile applications available to smartphones, such as Mobile Justice and Obscura Cam, make it easier for sousveillance witnesses to keep their anonymity, once again obstructing the asymmetrical power of the police. However, it is not necessary to provide any more cultural receipts of police brutality towards people of color, and could contort the power of sousveillance back to the State if the continued push for videos of people of color being brutalized goes unobserved. The extensive video footage of police brutality, particularly in 2020, has incited a much larger resistance that, in the understanding of it being a part of a much longer legacy, should keep its momentum.

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Democracy: A Discourse of a Fair and Just Society

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Abstract

Our democracy faces major issues of inclusion when social and political institutions fail to protect the life prospects and livelihoods of all individuals, regardless of their sex, ethnicity, race, gender identity, and/or sexual orientation. Research illustrates that both minorities and LGBTQ+ folks have been excluded from the same protection of the law to pursue an education, to have a right to a fair trial, and to be able to express oneself freely without the fear of retaliation of others. This paper, through the application of political theories that lay the foundation to an inclusive democracy, strives to analyze democratic processes, such as laws, lawsuits, and the implementation of reforms, as a way to illustrate the importance of inclusion and justice within our democracy. In this paper, the analysis of university admission rates, data, and case studies also shows the importance of inclusion, justice, and a strong democratic government that can provide equal and fair treatment to all individuals. The results of this paper indicate that our democracy has all the tools and resources to uphold inclusion and justice within our social and political institutions, and the law is a way to promote fair and equal due process.

Introduction

Democracy is a social and political system that allows the demos (the people) of a nation to become active state participants, regardless of their identity. The purpose of democracy is to allow the people to reform or add policies by considering the rights of all individuals, thus promoting social and racial equality and the civil liberties of all citizens, regardless of sex, race, ethnicity, gender identity, and sexual orientation. By illustrating how some of the issues in our democracy can be fixed by utilizing a broad interpretation of Robert Dahl's *Democracy and its Critics* (1989) argument for inclusion, in accordance with the Strong Principle of Equality and John Rawls' two principles of Justice as stated in *A Theory of Justice* (1999), I intend to argue that, in order to uphold the rights of citizens, democracy requires the demos to include all citizens, regardless of their identity markers. The sole purpose of this paper is to explore how our democracy has overcome issues that are rooted at the core of our democratic values in order to

have a fairer and more inclusive democracy that protects every individual under the law. Namely, progress towards democracy can be seen in a) the Supreme Court's inclusive decision in the LGBTQ+ Discrimination in the Workplace Docket (2020), b) the call for Affirmative Action in California as a solution that could help fight some of the inequalities of minorities, c) the backlash against the The LGBTQ+ Panic Defense, and d) the use of "expressive" punishment in the case of hate crimes against the LGBTQ+ community.

The LGBTQ+ Employment Discrimination Docket and Democracy through Inclusion

The Supreme Court of the United States' decision in the LGBTQ+ Employment Discrimination Docket No. 17-1618 involving Title VII: *Altitude Express v. Zarda* (2020) and *R.G. & G.R. Harris Funeral Homes v. EEOC* and *Aimee Stephens* (2020) is a perfect example of a case for Dahl's principle of equality and inclusion as characteristics that define our democracy. This was evident in *Bostock v. Clayton County, Georgia* 140 S. Ct. 1731 (2020), when Justice Gorsuch delivered the majority opinion (6-3) which broadened the definition of sex in the Civil Rights Act of 1964 to include LGBTQ+ citizens (Gorsuch). Gorsuch argued that discrimination in the workplace should not be permitted because "the limits of the drafters' imagination supply no reason to ignore the law's demands" (Gorsuch). This illustrates how democracy can be strengthened by inclusion of all peoples. There is a need to expand the interpretation of democratic processes and philosophies, such as the role of the judicial branch and textualism, to further equality, as was done by expanding the Civil Rights Act of 1964 to protect LGBTQ+ citizens.

Court decisions such as expanding the Civil Rights Act also contribute to building a more just society by promoting the values of a democratic process. Dahl discusses the concept of inclusion for promoting democratic values and processes in *Democracy and its Critics* (1989), entitled "Chapter 9: The Problem of Inclusion". He writes about inclusion as involving two issues: a) the type of people that have a right to be included as part of the people and b) the role that they ought to take in order to have any "authority" in our democracy (Dahl 119). As Dahl suggests, inclusion is vital to democratic processes, and democratic principles require us upholding the freedoms and the rights of all people. To promote democracy, the rights of all people must be upheld; individuals should not be fired for the perceived sex, gender identity or sexual orientation of a worker.

Affirmative Action

Affirmative Action is an inclusive proposition that is intended to help a state improve the educational and employment opportunities of minorities who have historically been excluded. Supporters have argued that Affirmative Action can even the playing field by helping minorities overcome historic barriers to realizing opportunities in higher education and the workplace. According to an article by Ballotpedia, entitled “*Affirmative Action in California*”, California placed a ban on Affirmative Action in 1996 when Proposition 209 was passed with “over 850,000 votes” (American Politics). However, recently in 2020, California voters voted against an attempt to repeal Proposition 209, which was intended to help resolve the social and racial inequalities that minorities deal with. The case was brought by scholars who argued that affirmative action is a solution which would allow disadvantaged communities the same access to opportunities as other communities. The merits of this proposition align with Dahl’s idea when he makes the argument that a democracy needs to be inclusive in nature. This was evident in “*Democracy and its Critics*” (1989) when Dahl stated, “Experience has shown that any group of adults excluded from the demos—for example, women, artisans and laborers, the unpropertied, racial minorities—will be lethally weakened in defending its interests” (Dahl 129). In other words, Dahl is arguing that democracy and its function depend on the inclusion of citizens because history has taught us that the exclusion of a community deprives those individuals of the same rights guaranteed under a democracy. Affirmative Action would allow states to uphold individual’s civil liberties and human and constitutional rights as a matter of law.

Affirmative action also concerns John Rawls’ two principles of justice as defined in *A Theory of Justice* (1999) which state that:

- (1) Each person is to have an equal right to the most extensive scheme of equal basic liberties compatible with a similar scheme of liberties for others.
- (2) Social and economic inequalities are to be arranged so that they are both reasonably expected to be to everyone’s advantage (The Difference Principle) and attached to positions and offices open to all (also known as Fair Equality of Opportunity) (Rawls 53).

Rawls would concur with Dahl and argue that Affirmative Action is needed because it would allow every adult in the demos to have the same opportunities to achieve their life prospects and goals. However, California's Proposition 209 has prevented four year universities from considering race and ethnicity in admission processes. One can see the impact of Proposition 209 in the admission rates of minorities to UC campuses. The Guardian Newspaper entitled “*California weighs overturning 24-year ban on Affirmative Action*” (2020) by Mario Koran,

revealed that before proposition 209 was passed, the admission rates of black students were “six percentage points below the average admission rate for all students” and “Latinos were admitted at higher than average rates”, whereas after proposition 209, “UC admission rates are 16 points below average for black students, and six points below average for Latinos” (Koran). This suggests that the failure of California voters to repeal the ban on affirmative means a) the demos are not ready for the progressive change that is needed to finally address the social and racial inequality that exists in our society and b) there is a need for inclusion and diversity in universities because both Black and Latinos are a majority of high school graduates in California. We need to even the playing field for minorities because higher education defines the life prospects and goals of an individual. If we fail to do so, we will fail to uphold the inalienable rights of life, liberty, and the pursuit of happiness, granted under the Declaration of Independence.

The LGBTQ+ Panic Defense

Upholding democracy requires us to dismantle legal defenses of violence against LGBTQ+ folk, such as the LGBTQ+ panic defense. The National LGBT Bar Association in “*LGBTQ+ Panic Defense*” define this defense as “a legal strategy that asks a jury to find that a victim’s sexual orientation or gender identity/expression is to blame for a defendant’s violent reaction, including murder” (The National LGBT Bar Association). This defense has often been used as a) “a defense of insanity or diminished capacity”, b) “defense of provocation”, and c) “defense of self-defense” (The National LGBT Bar Association). The use of the LGBTQ+ Panic Defense allows individuals to justify the murders of LGBTQ+ folks by excusing the perpetrator's violent actions because of the victim’s gender identity or perceived sexual orientation. According to data from *Trans Respect Versus Transphobia*, there have been “3314 murders of trans and gender-diverse people” worldwide between January 2008 and September 2019 (Berredo). An example is a case known as *People v. Daniel James White*, 117 Cal. App. 3d 270 (1981), where Mr. White killed both the mayor of San Francisco and Harvey Milk, the first LGBTQ+ elected official, who was serving as a San Francisco board supervisor (Justia). White claimed to have diminished mental capacity in what would later be known as the “Twinkie defense” as stated by Cornell Law School in “Twinkie Defense” (Justia). Mr. White was paroled after serving 5 years of a 7 year sentence in jail for two murders (Justia). The handling of this case created outrage, which would later be part of the reason why California removed the use of diminished mental capacity as a defense to gain a lesser sentence (Justia).

This case brought forward a question of justice regarding what is owed to the individual and what types of punishments are proportionate to the level of severity in these cases where there is gendered violence. Mr. White's use of the LGBTQ+ panic defense allowed him to get away with a lesser sentence than someone who killed two individuals (a max sentence of life is 25 years to life under California's Proposition #7) (Justia). Justice cannot exist if it ignores the violence and killings that occur within its society; social institutions like the law are actively failing to provide legal protection of the law to all individuals regardless of their sex, gender identity, or sexual orientation. The cases surrounding the LGBTQ+ panic defense deprived individuals of rights, equal protection under the law, and equal opportunities and life prospects such as freedom of expression, pursuing a career (like Harvey) or the pursuit of happiness under John Rawls' principles of justice, "natural duties", and freedom of the person (Rawls 94).

Fair and Effective Punishment and Retribution

Punishment and retribution can help promote justice; namely, the "expressive form of punishment" can dismantle negative social attitudes, stigma, and biases on hate crimes committed against women and LGBTQ+ folks. According to Jared Smith in *Retributivism, Proportionality, and Fairness*, punishment is defined by four justifications of punishment: retribution allows the offender to be punished as a form of payback for their actions, retribution and rehabilitation teach the offender how to correct their behavior in society in order to prevent them from committing the same act, retribution helps prevent people who are a danger to others from hurting others, and retribution deters people from committing actions that are not desirable in a public platform (Smith). The expressive function of punishment is a necessary condition to prevent hate crimes because it protects the equal liberties under John Rawls' first principle of justice, issues a justified punishment in accordance to the four justifications, and also attempts to issue justice by sending messages through punishments that hate crimes against an individual's sex, gender identity, and sexual orientation are not tolerated. Jeffrie Murphy in *Kant's Theory of Criminal Punishment* (1979) focuses on Immanuel Kant's thought experiment known as "*The Last Murderer*", which begins with a society that has decided "to dissolve itself with the consent of all its members" (Murphy 82). However, before they can carry out this "resolution", Kant argues that "the last murderer lying in the prison ought to be executed...in order that every one may realize the desert of his deeds, and that blood-guiltiness may not remain upon the people...otherwise they might all be regarded as participators in the murder as a public violation of justice" (Murphy 82).

This thought experiment mirrors an incident that occurred in LA where bystanders failed to help three trans women who were being harassed, assaulted, and beaten, instead yelling their own transphobic insults. According to the Washington Post article entitled “*L.A. Officials Blast 'Callous' Bystanders Who Filmed Attack on Trans YouTube Star and Her Friends*”, the incident was worsened by bystanders who engaged with the same verbal and physical assaults, even mocking the pleas for help from these trans women (Peiser). This suggests that our society requires an expressive function of punishment. Furthermore, the city of Los Angeles released a message that “The Los Angeles Police Department stands fully in support of your rights, your dignity and respect each of you as individuals”, but just recently, the DA who was handling this case sent the case back to the LAPD based on a “lack of evidence” (Pesier). Kant would argue that this failure to punish both the assaulter (murderer) and the bystanders condones these types of hate crimes as an acceptable behavior.

Failure to punish perpetrators and bystanders also sends a message to LGBTQ+ folks that it is admissible to violate the freedom of the person by denying the same equal protection of the law surrounding crimes that occur based on sex, gender, or sexual orientation. Every individual has a right to be protected from violent assault, battery, and violation of their basic liberties of Rawls’ first principle known as freedom of the person. On the other hand, Dahl would argue that the laws that rule the demos should be inclusive in order to have an equality that protects the interests of all. LGBTQ+ folks are citizens, and they have the same right to any civil liberties as their straight counterparts, and hence these rights should not be negotiable in a democracy. Democracy must include every individual regardless of their sex, gender identity, and/or sexual orientation. Justice and a sense of inclusion in a democratic state is important in sending a message of hope to future generations of LGBTQ+ folks.

Conclusion

Democracy requires us to consider the individual, social institutions, and the ways that these interact and promote the roles of every individual in our society as a means to creating a more just society for both women and LGBTQ+ folks. This paper uses John Rawls’ *A Theory of Justice* (1999) as the foundation to argue the importance of applying justice in democratic processes to uphold basic liberties, fair equality of opportunity (FEOP), and the Difference principle in order to prevent inequalities that exist in our society. John Rawls describes these principles as:

- (1) Each person is to have an equal right to the most extensive scheme of equal basic

liberties compatible with a similar scheme of liberties for others (Equal Liberties Principle). (2) Social and economic inequalities are to be arranged so that they are both reasonably expected to be to everyone's advantage (The Difference Principle) and attached to positions and offices open to all (Fair Equality of Opportunity) (Rawls 53).

Rawls' principles are vital to Dahl's principle of inclusion because democratic processes need inclusive court decisions like the LGBTQ+ Employment Discrimination Docket as seen in *Bostock v. Clayton County* (2020) in order to dismantle inequalities that undermine our democratic values and liberties as citizens. The principles of Rawls' and Dahl's inclusion are key to the argument against defenses like the LGBTQ+ Panic defense because it undermines the right to a fair trial to the victims of hate crimes. These defenses should also not be tolerated because every individual has a right not to be mentally, physically, or emotionally oppressed in any way because democratic processes like criminal trials can allow perpetrators of hate and gender violence to escape by means of a loophole.

Instead, hate crimes should have a severe punishment that is proportional to the crime committed in order to send a message that can deter people using this defense for a lesser sentence. Hate crimes against a person's perceived sex, gender identity, and/or sexual orientation should be considered a serious offense because it prevents individuals from enjoying the liberties under the equal liberties principle and FEOP. The reality is that this society requires time to fully dismantle the ongoing issues that it has, such as how social institutions treat individuals based on their sex, gender identity, and sexual orientation. There is a sense of loss in the justice system for allowing people within our society to get away with killing another human being based on their perceived identity marker. We must attempt to punish these individuals in order to prevent more innocent lives from being taken away.

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Submission Guidelines for Contributions

We welcome contributions from undergraduate students, as well as recent graduates, from any University of California campus. Students may submit any upper division coursework, independent research, or theses that pertain to legal matters. This year, we encouraged submissions relating to the journal theme of democracy. We will decide next year's theme later this year.

For future submissions, please refer to the detailed submission guidelines and instructions below:

Submission Requirements

- Submissions should be selected from your upper-division courses or independent studies
- Papers must be a minimum of 5 pages and should include an abstract
- Submissions must follow the MLA style of formatting
- Submissions should relate, at least tangentially, to the journal theme
- Submissions must have not been published elsewhere

Submission Instructions

- Send your submissions to berkeleylegals@gmail.com by January 31st 2022
 - In the subject line, write "2022 Journal Submission - First Name Last Name"
 - Please attach your paper as a PDF and as a DOCX
- In your email, please also include
 - Your contact information (email, phone number)
 - The term when the paper was written
 - Your graduation year
 - Your program of study