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SOC 477

The Role of Law in Naturalizing Unnatural Social Phenomena

In order to survive, every society must have a set of institutionalized rules which maintain social order. The means through which these rules are institutionalized varies from society to society, but their goals are believed to remain the same: to provide a framework by which individuals behave and can expect others to behave. In certain societies, including the U.S., these rules constitute a phenomenon known as 'law.' In an ideal world, the law would outline and differentiate acceptable from unacceptable behavior, as well as violations of social norms from criminal behavior. Laws would reflect a set of agreed-upon norms deemed important enough for society to protect their integrity with its legal institutions. Yet, an observable disconnect between the law in theory and the law in practice is as stark as ever in our contemporary moment. The law is certainly not living up to its theoretical ideal. Today, the law functions as a bureaucratic institution that attempts to systematize legal procedure, side-steps necessary oversight, and perpetuates existing institutional arrangements which favor those in power.

Most every form of social organization is founded upon a perceptual legitimacy in the eyes of its subjects; otherwise, it would have no authority over them. In "Legitimate Order" (1928), Max Weber outlines three types of authority, each corresponding to a form of social organization or leadership. Each type of authority suggests that members of a society comply with orders, either conventions or laws, for various reasons. A convention or law is considered to

be legitimate on the basis of "affectual" authority the resulting societal compliance with its orders shows "emotional surrender" (Weber 33). More broadly, affectual authority is characteristic of social orders whose legitimacy in the eyes of its subjects is based on emotional and faith-based ties (i.e. a religiously-based society). Moreover, a social order which is ascribed legitimacy on the grounds of "that which has always been" is said to have "traditional authority" (Weber 36). The third type of authority, which Weber calls "value-rational," is observed in social orders whose subjects share a collective "belief in [its] absolute validity… as an expression of [their] ultimate views" (33). Such a society has a legal system which is composed of clearly defined laws designed to accurately reflect societal beliefs, values, and norms which are held in common among members of a given society. In this way, value-rational systems pose certain democratic advantages since a consensus among members as to which common beliefs, values, and norms ought to be reflected in the law is foundational to the legitimacy of this order. Theoretically speaking, Weber might characterize the U.S. today as a "value-rational" society because citizens elect lawmakers and public officials which are designated the responsibility to advocate on behalf of their constituents.

Yet, although most forms of social order exhibit some type of legitimate authority, not every social order can be described as *law.* For Weber, law differs from mere convention only if its orders are "externally guaranteed by the probability that physical or psychological coercion will be applied by a *staff* of people in order to bring about compliance or avenge violation" (34). Whereas with convention, each member of society has the ability to enforce norms and punish violators, law may only be enforced by a staff with a "specialized function of maintaining enforcement of the order" (Weber 34). For instance, Weber does not consider International Law to be *law,* as it lacks a specialized enforcement staff whose job is to ensure compliance with its

orders. With law, enforcement staff includes judges, prosecutors, administrative personnel, public defenders, and the police. These actors enforce compliance in accordance with an authority considered legitimate by their subjects (Weber 36). Indeed, law must not only have an enforcement staff behind it, but this staff must also be perceived as legitimate by society writ large.

Specialized enforcement staff are frequently believed to maintain social order in the face of dangerous behavior and criminal activity, the existence of which is fundamental to how the law is enacted and enforced. In his work, "On the Normality of Crime" (1965), Emile Durkheim posits the universal phenomenon of crime as intrinsic to human society. He defines "crime" as those acts which offend "certain very strong collective sentiments" shared among the collective members in a given society (872). According to this definition, a society without crime is impossible: *each and every one of its members* would have to display identical beliefs about what their society should consider acceptable and unacceptable behavior. Durkheim emphasizes the inevitability of individual variation and diversity for collective life. This individual variation in the "consciousnesses" of members makes criminal behavior inevitable, since there will always be those individuals who differ in terms of their beliefs, morals, and social values (Durkheim 872). Thus, the normality of crime as an inherent organizing force of collective, social life.

Despite these inevitable differences between members in a society, Durkheim argues that law serves to differentiate "crime" from mere deviance based on the degree to which an action offends collective sentiments. This differentiation provides the basis for law and is an indication for Durkheim that crime serves a social function. Criminal behavior is not intrinsically so. Rather, it is the "definition which the collective conscience" ascribes to particularly deviant acts that renders those acts criminal behavior (Durkheim 873). The concept of the "collective

conscience" is best described as an aggregation of the different values and beliefs present among the members of a given society. This aggregation is necessary due to the inevitability of individual variation, and the notion that, ideally, the law is to reflect the collective sentiments of society writ large. To represent each and every different value held by its individual members would be a very difficult task, if not an impossibility. Instead, the law invokes the collective conscience in order to hierarchize criminal behavior. Based on this hierarchy, the law punishes and sanctions these behaviors not as mere deviance, but as crimes.

Moreover, both the law and the collective sentiments underpinning should ideally be amendable to innovation and progress. According to Durkheim, crime is "indispensable to the normal evolution of morality and law" (873). Standards for determining what constitutes criminal behavior vary between different societies as well as within a single society over a period of time. This variation and fluidity over times exemplify the social function of crime. For instance, in primitive, premodern societies, the act of murder was far less criminalized than in contemporary societies today. The former relatively deemphasized the political ideal which argues that violations of individual freedom and dignity ought to be punished; such an ideal is foundational to why the U.S., for example, criminalizes murder. Nowadays, we live in a world where murder is legally defined as a crime in most places and punished accordingly, making it difficult to imagine a society in which members could freely murder one another. Our squeamishness towards such a possibility is indicative of the recursive relationship between society's collective sentiments and the laws themselves.

Marxist theory captures the ways in which capitalism organizes society not only economically, but socially and politically, as well. Economically, societies under capitalism are buttressed by market activity, including exchanges and transactions, between free and willing

participants. Moreover, markets serve as the most "salient points of social contact" as they lay a foundation for how different classes of people relate to one another and to themselves (Reiman 217). Politically, it is this sort of understanding of one's "social being that determines their consciousness" (Reiman 218). In other words, markets constitute the arena where individuals' values, morals, and political preferences are crafted and shaped through social interaction. Since capitalism posits economic markets as sites of "social contact", individuals subconsciously accept its underlying ideologies without question.

That individuals subconsciously accept the ideology of capitalism has important implications for what the law is designed to achieve. Namely, its purpose is to protect the existence of market activity. By design, the law aims to achieve this goal by creating and upholding the norms which structure these markets. Market norms portray an idealized vision of market activity, the "average core of [economic] exchange" which the law "in general" endeavors to protect (Reiman 222). In turn, individuals expect that contracts be dependably upheld and that they themselves are protected from violence and fraud by other economic actors.

Further, it criminalizes and punishes certain acts depending on the extent to which they violate market norms which protect the average core of exchange. Civil law responds to less serious violations, mostly behaviors which undermine the legitimate expectations of parties involved in an exchange without threatening its existence in the first place (Reiman 223). Criminal law, on the other hand, is tasked with reacting to more egregious violations which seriously hinder and threaten market activity. Given its aims, the law under capitalism criminalizes acts which constitute a violation of individual property rights – i.e., violence, theft, and fraud – and tends to not criminalize deviant behaviors without identifiable victims, like morals offenses (Reiman 223).

These definitions of crime continue the existing economic arrangements which favor those who own the modes of production. Market exchanges and transactions are considered "acts of the free will" assuming there is no "overt" violence being threatened or used by one party against the other (Reiman 221). Consider Marx's explication of the economic relations inherent in capitalist labor markets. Within these markets, the working class appears to be free and willing to sell labor-power to the capitalist class in return for a substandard wage, notwithstanding that the market requires them to do so in order to obtain work. That the capitalist class cannot be prosecuted for devaluing the labor-power of the working class suggests that the goal of law is not to ensure fair and equal market activity, but rather to facilitate "free" economic exchanges which sustain the flow of capital from laborers to the wealthy.

Jeffery Reiman, in "The Rich Get Richer and the Poor Get Prison" (2007), contends that the U.S. criminal justice system strategically presents the public with a distorted image of the reality of crime. This image is comprised of two parts. Firstly, it portrays the "typical" criminal as a young, black male from an urban neighborhood. Secondly, it portrays the "typical" crime as a one-on-one interaction in which a criminal intends to harm their victim. The resulting "harm" of the typical crime is conceptualized as *direct,* such as physical injury or loss of property (Reiman 74). Criminal law is meant to define crime in terms of those societal threats which are sufficiently large and dangerous enough to warrant invoking the criminal justice system in order to secure protection from them (Reiman 66). Since the public is narrated a story which casts violent street crime as the leading character, it is highly likely that the average American perceives it as the biggest threat not only to themselves, but to society as a whole. Law enforcement, judges, lawyers, and law makers alike are all socialized into legal institutions which have a vested interest in maintaining this particular image of crime, for it fosters a

perception of the institutions themselves as 'legitimate.' Images of crime are bolstered by the real decisions made by these folks every step of legal procedure (Reiman 68). These institutions are not seen as legitimate because they correctly represent the societal values or collective sentiments of the public; rather the public takes it for granted that the law is there to protect maintain public safety against the biggest dangers in society.

In combination with an image of crime which generates legitimate authority, the legal institutions which comprise our criminal justice system rely on the complicity and willingness of legal and non-legal actors to promulgate its underlying bureaucratic structure. In "The Practice of Law as a Confidence Game" (1967), Abraham Blumberg examines the role of the public defense lawyers in bureaucratized legal institutions. In theory, the public defense lawyer strives to fulfill their constitutional obligation to defend their client, using all resources at their disposal. However, in *practice,* Blumberg contends that the "institutional setting" of the courtroom largely shapes their role (Blumberg 18). Public defense lawyers operate as "double agents" whose "delicate mission" requires them to appear to be of genuinely defending their client while simultaneously upholding the bureaucratic priorities of the court (Blumberg 28). The plea bargaining process is an essential arena in which public defense lawyers must "collapse the resistance" of their client, convincing and manipulating them to accept a plea bargain offered by prosecutors (Blumberg 23). To do this, public defense lawyers must shape their client's conception of themselves in relation to their charges; i.e., the client of his own volition must declare himself guilty. Moreover, the client must convince the courtroom and outside observers that this declaration is genuine and un-coerced. A successful plea bargain reduces time and effort the court must spend adjudicating a trial and sentencing a defendant. This sort of desire to

maximize courtroom efficiency and minimize the duration of legal procedure for each individual client is a top bureaucratic priority for the court.

In a similar vein, Peter Manning, in “The Police: Strategies, Mandate, Appearance” (1978), describes the police as a self-justifying bureaucracy whose contrived legitimate authority is founded upon strategic law enforcement techniques and institutional norms. Similar to Blumberg, Manning analyzes how the bureaucratization of this particular legal institution shapes the roles and duties of police. The societal role of police, their “occupational mandate”, is explained by Manning as the “efficient, apolitical, and professional enforcement of the law” (Manning 8). Notwithstanding the impossibility that police ever fulfill such a broad mandate, as they are a reactionary rather than a preventative agency, the police widely exercise discretion in their decisions to enforce certain laws, arrest certain people, and let others off the hook. Discretion constitutes a useful tactic used by police to maintain “institutional professionalism”, a norm under which the mere survival of the bureaucratic structure of law supersedes all other interests, including public safety (Manning 22). Institutional professionalism is particularly concerned with the commitment of legal actors within institutions to prioritize the integrity of their respective organizational and occupational norms (Manning 22). For instance, this norm may be upheld by keeping police practices shrouded in “secrecy” in order to minimize public knowledge of its internal operations and, more importantly, of its shortcomings (Manning 22). Such strategic secrecy insulates this entire legal institution from government and public oversight. It is pursuant to these goals that the police present a contrived image of their legitimate authority as specialized enforcement staff, and this legitimacy becomes difficult to question or refute.

Maintaining legitimate authority and upholding bureaucratic norms like as institutional professionalism requires that legal institutions foster mutually-dependent, symbiotic relationships between one another based on their shared interests. Relations between the police and the courts is particularly important for the bureaucratization of law. In terms of arrests, Manning contends that the practice of discretion increases their chances of picking the "good pinch" – the arrest most likely to result in a criminal conviction by a judge (Manning 27). Concurrently, the courts depend on good pinches to process cases with maximum efficiency and minimal organizational cost. As Blumberg echoes, maintaining its image as an efficient and legitimate legal authority to the public is crucial to courtroom bureaucracy. When a police's decision to arrest aligns with a judge's decision to convict, both institutions appear to be legitimately exercising their authority as specialized enforcement staff. Ultimately, these sorts of symbiotic relationships perpetuate the bureaucratization of law in the legal system writ large.

However, the ways in which the law defines crime, coupled with bureaucratic norms and priorities within its legal institutions renders our criminal justice system ineffective in identifying, prosecuting, and protecting society writ large from its largest criminal threats. As argued by Reiman, "typical" crimes and "typical" criminals are overrepresented in public, widespread images of criminal activity. These images, propped up by the law, obscure the seriousness and ubiquity of *white-collar crime*: criminal activity committed by wealthy, corporate, and elite professionals during the course of their occupations (Reiman 118). Conservative estimates of the financial losses incurred by the U.S. due to white collar crime total *$456 billion,* a figure which far exceeds the estimated $14.3 billion lost to *all* reported property crimes in 2014 (Reiman 119).

Unless white-collar crime becomes codified in law as "criminal," laws and regulations designed to govern financial markets will fail to deter white-collar crime. Regulatory agencies are simply not given the resources necessary to investigate or prosecute white-collar crimes that other legal agencies are given – i.e. the police – to fight smaller-scale, less sophisticated street crime (Reiman 124). Many regulatory agencies also lack the authority to initiate criminal investigations in the first place. In their piece, "The Causes of Fraud in the Financial Crisis of 2007 to 2009" (2016), Neil Fligstein and Alexander Roehrkasse set out to identify how financial markets foster opportunities for powerful financial firms to commit large-scale financial fraud. They endeavor to figure out why the law failed to target opportunities for crime which ultimately catalyzed the great recession. In part, the law took for granted that vertical integration, the combination of multiple stages of production within a single firm, would naturally prevent fraud through increasing surveillance and monitoring of corporate practices (Fligstein 618). However, the vast majority of fraud, predation, and deception was committed by vertically integrated firms (Fligstein 635). The deregulated and complex nature of the mortgage-backed securities industry greatly "expand[ed] perceived opportunities for undetected malfeasance" (Fligstein 635). These findings warn us of the consequences for society when its criminal justice system over-focuses on prosecuting "typical" crimes and "typical" criminals.

Further, many laws and regulations have been proven effective for white-collar criminals in *avoiding* conviction. For instance, the 1995 Private Securities Litigation Reform Act shielded wealthy corporations from facing any liability charges following the 2008 recession. The 2002 Sarbarnes-Oxley Act makes it more difficult to convict wealthy corporations and their executives of fraud; it changed the legal standard required to hold defendants liable from "reckless" to "knowing" (Reiman 144). It also allows corporate executives who *knew* about misconduct to

keep their profits, even when they failed to report misconduct. Initially, the bill was intended to increase Congressional oversight of publicly traded companies and impose harsher fines and sentences for corporations and executives convicted of white-collar crime. Evidently, the intention of laws or regulations matters little in the face of wealthy corporations and firms who have the political influence necessary to shape the very laws designed to govern and constrain their behavior.

In light of the 2008 recession, it seems logical to strengthen market regulation and government intervention to prevent future economic catastrophes; however, Esther Sullivan's comparative study of mobile-home eviction proceedings calls into question the efficacy of intervention in and regulation of capitalist markets. In her work, "Displaced in Place: Manufactured Housing, Mass Eviction, and the Paradox of State Intervention" (2017), Sullivan compares eviction proceedings under Texas and Florida's different regulatory-schemes. Florida's robust regulations incentivize contractual relationships between parks and private moving companies hoped to expedite the process; there was no such scheme in Texas.

Sullivan's study finds that Florida's regulatory-scheme only further disempowered residents during eviction and relocation processes. They "lacked the basic clout a consumer can mobilize to get things done (Sullivan 259). Consequently, companies freely ignored residents' wishes and prioritized their own economic concerns. Companies relocated residents in accordance with their own "relocation timeline" over which residents had no say; moreover, economic efficiency and minimal costs were prioritized over helping residents move as quickly and as painlessly as possible. For example, companies preferred to prepare, relocate, and certify mobile-homes in bulk because it was cheapest and easiest for them (Sullivan 259). This strategy alone meant that some residents waited over two months before returning home and extended the

relocation process as a whole by one full year (Sullivan 260). Conversely, residents in Texas described their moving process as "temporally limited" (Sullivan 258). Residents were able to join together to exercise their power as consumers. Their efforts culminated in more agreeable contract with a single moving company at a discounted rate. They were better able to determine which relocation timeline worked best for their circumstances.

The negative outcomes of market regulation and government intervention in Florida are indicative of the inevitable bureaucratization of law under capitalism. Florida' state government jettisoned its obligation to ensure the stability and welfare of its citizens. In contracting out private moving companies, its authority over the eviction, relocation, and certification processes was decentralized and spread out between multiple economic actors. Sullivan argues that capitalism produces favorable conditions these sort of public-private partnerships "in which the state not only defers to market actors but underwrites the services they provide" (Sullivan 262). In this way, law constitutes a method for the state to decentralize its enforcement authority.

Furthermore, the bureaucratization of law naturalizes capitalist ideology, causing capitalism itself as well as its underlying principles seem rational. As Marxist theory argues, the primary goal of the law under capitalism is to prevent violations of market norms which undermine the very structure of markets. Given that legal and regulatory structures undergird capitalist markets, the law itself buttresses and legitimizes capitalism and its principles. This recursive process, "ideological conception," rationalizes capitalism both as an economic system and as a method of social organization (Reiman 213). Moreover, the process by which capitalism is propped up through legal and regulatory schemes has certain implications for law enforcement.

Contrary to what Weber believes counts as enforcement staff, nonspecialized economic actors, like moving companies, are liable to become agents of the law. In case of mobile-home evictions, Florida's regulatory structure grants privately owned moving companies the legitimate authority to decide how to enforce and execute a legal process. They performed the role of a benevolent caregiver of mobile-home residents, and in exchange they were granted legitimacy in their eyes. Their "performance of benevolence", Sullivan argues, caused the companies to be perceived as symbolic custodians of state aid (Sullivan 260). When Florida handed down its duties to private companies, it authorized certain practices which reduced residents "from citizens, to consumers, to *forms of currency themselves"* (Sullivan 264). The companies could pretend that *they* were the ones who put together the "relocation package" for residents – a claim that is patently false. As economic actors, these companies were seen as beacons of generosity and helpfulness when, in fact, they disregarded what was best for Floridian residents. Sullivan's findings call into question how the U.S. as a capitalist society ought to structure its social welfare system. Especially if the goal of such a system is to protect vulnerable, low-income individuals and families, economic actors should not be given the legitimate authority of specialized enforcement staff.

Of course, capitalism has not always been the dominant economic ideology in the U.S. At its inception, it was not nearly as powerful, pervasive, or praised as an economic system as it is today. This is in part because the law had to grow and transform alongside the development of capitalism. As capitalism grew in scale and in influence, and as markets transformed into increasingly salient sites of social contact, it became clearer to lawmakers that the law must impose certain restrictions on individual and collective behavior within them. Today, we can

observe how U.S. law and legal institutions structure society in ways which legitimize and rationalize capitalism as a method of social organization.

Similarly, U.S. law and legal institutions structure society in ways which ideologically support racial categorization as a framework for understanding, organizing, and navigating collective life. The U.S. in particular exhibits a long, complex, and confusing history of ways in which its laws and legal institutions construct(ed) race. In his book, White by Law, Ian Haney-López contends that race is legally constructed in three primary ways. Firstly, the law creates variation in individuals' physical appearances. The law during some historical periods has been used as a tool of maintaining racial purity – e.g. sanctioning legal union and procreation among across racial lines. Secondly, the law ascribes racialized meanings to individuals' physical appearances and ancestry. Haney-López points to the historical racial prerequisite cases as an example of this particular method of construction. The court granted immigrants U.S. citizenship *only if* they proved themselves to be a member of the African American or white race.

Insofar as the concept of race is subjective, it shifts alongside social context and across time. The racial prerequisite cases are among the first significantly consequential events in the legal construction of race. They are significant not because of their respective verdicts, but because of the legal rationales established and created by the courts categorizing someone as a member of a particular racial group. Judges presiding over these cases principally relied on four distinct legal rationales: common knowledge, scientific evidence, congressional intent, and legal precedent. Often, judges arrived at different verdicts as to the race of an immigrant using the same rationale. Early racial categories thus fluctuated in tandem with social, economic, and political change.

Thirdly, the law legitimizes racial categories as a method of social organization and renders them salient through a process of "reification": the process by which the law "translates ideas about race into the material societal conditions that confirm and entrench" racial categories (Lopez 14). Jim Crow laws and other laws criminalizing racial integration are among the most clear-cut examples of such a process, as black Americans historically denied equal access to the material and societal arenas that white Americans inhabited. The lived experiences of African Americans, in turn, diverged considerably from white Americans'. Similarly, the disproportionate rate at which minority populations experience poverty is a consequence of the reification process. Poverty is an instance where reification may be visibly apparent; i.e., dilapidated housing, broken windows, and police presence in one's neighborhood.

Ultimately, the legal construction of race through reification insidiously shapes and determines the relationship between citizens, the law, and legal institutions. In reifying the material and societal conditions which delineate racial categories, the law and legal institutions have established and prop up an Us vs. Them dichotomy between citizens and specialized enforcement staff. This shapes individuals' perceptions of the law and legal institutions in complex ways. Even an individual's relationship to the law and perception of legal institutions constitute material conditions which differentiate folks based on racial categories. For instance, Monica Bell's ethnographic study, "Situational Trust: How Disadvantaged Mothers Reconceive Legal Cynicism" (2016), identifies commonalities among the attitudes of poor, black mothers towards legal institutions and law enforcement. The neighborhoods of Washington, D.C. in which participants live exhibit significant rates of "legal cynicism," a general distrust in the law and legal institutions. Bell is interested in finding out their legal cynicism affected how often they called the police or used the law to achieve a certain end. Most of Bell's interviewees

perceived the institution of police as racist and classist, "nonchalant" about the well-being of black communities writ large (Bell 327). One respondent very explicitly outlined her distrust of the police: *"You have to know your rights, because if you don't know your rights, the police will get over on you"* (Bell 330). Others conceptually separated police as an institution from individual officers and expressed, at least, neutral attitudes towards them: *"They're pretty good. I mean, the ones that ain't doing crooked stuff...A lot of them because we've always got them on the news doing stuff"* (Bell 328). What Bell terms "officer exceptionalism" refers to respondents' simultaneous yet contradictory attitudes towards the institution versus officers (Bell 327). Such attitudes indicate reification, as they are facilitated by increased police presence and surveillance in low-income minority neighborhoods, a *material condition* which residents learn to navigate through individual interactions with the police. However, even positive interactions with individual officers evidently do not translate into a broader trust of the police as an institution or of the law more generally. The poor black mothers included in Bell's study experience material conditions of race in their neighborhoods which overwhelm the law's legitimate authority.

Additionally, Nicole Gonzales Van Cleeve's ethnographic study, *"Crook County: Race and Injustice in America's Largest Criminal Court"* (2016), is chalk-full of examples which illustrate how this dichotomy operates. In the Cook County court house, race constitutes a "basic division…delineating the professionals from the public, the "insiders" from the "outsiders" (Van Cleeve 23). Similarly, Haney-López contends that the law defines racial categories in terms of separation (Haney-López 84). It is worth noting that courtroom professionals look *nothing* like the public they serve: 84% of state's attorneys, 74% of judges, and 69% of public defenders in Cook County Court are white; 69% of felony defendants were black, while 17% were white (Van Cleeve 17). On face, racial categories set up the broader *symbolic* boundaries between

professionals and the public inside Cook County Court. This naturalizes racial categories by as white professionals appear to be arbiters of the law, while people of color appear to always be on the receiving end of legal punishment. In this way, "racial differences seem fundamental, immutable, real, and self-evident, confirming not only the existence of races, but also every negative suspicion about racial characteristics" (Haney-López 93). Race is further reified through *physical* boundaries in Cook County Court. In waiting areas, professionals and the public are separated by bulletproof glass, creating hostility between professionals and the public. More importantly, such an intense physical separation creates the perception that courtroom professionals face a constant threat of violence from the public, thus reifying racialized notions of criminality and victimization.

The "Us vs. Them" dichotomy via reification is also palatable in the demeanor of courtroom professionals towards the public and defendants. It goes without saying that in a courtroom so obviously divided along racial lines, being white automatically grants one "insider" status (Van Cleeve 23). Such a status grants insiders certain privileges and allows them to access certain that are unavailable to outsiders. One such privilege, observed frequently by Van Cleeve, is called "Currency of Time," which refers to a heightened sense of respect and duty of courtroom staff towards insiders relative to outsiders (Van Cleeve 23). She describes the general demeanor of courtroom staff to be nonchalant and unpredictable: defendants were kept in the dark as to when their case would be called, judges often showed up for court at different times depending on the day and their mood, and uncertainty loomed as to whether or not the judge would grant a defendant's case adequate time to be adjudicated and fairly sentenced. It is hard to write off this behavior as accidental, given that defendants are largely aware that their time does not matter in the eyes of the court: *"They think we have nothing better to do than sit in court all*

day on those hard benches. I don't want to wait through trials and eat their dog-ass food" (Van Cleeve 30). Contrary to the popular, democratic notion that legal institutions are meant to serve the public, these behaviors make clear that courtroom staff believe they are doing defendants a favor by even giving them the time of day. Whether or not they are missing work, family obligations, or simply wasting their entire day waiting for their trial to finally be called, is irrelevant to courtroom staff. Ultimately, such observable disrespect and carelessness towards the public entrench racial tension in legal institutions.

The U.S. presents a particularly interesting case study illustrating how, in practice, the law and legal institutions buttress hegemonic ideologies of capitalism and racial categorization. Through the bureaucratization of the law, legal institutions emulate capitalist ideals of maximum efficiency and minimal cost. Legal procedure has been systematized and depersonalized so as to achieve such ideals, undermining citizens' constitutional rights to due process and equal protection under the law. Moreover, the law and legal institutions serve to organize society along racial lines. Not only do they naturalize and legitimize racial categorization as a method of social organization, but they even further undermine citizens' constitutional rights. In theory, the law ought to only distinguish between criminals versus non-criminals in order to protect society; however, in practice, the law separates and treats citizens differentially based on their social location and proximity to power.

The Fundamental Problem of Law

The most pressing issue pertaining to law is the existence of pervasive, enduring, and systemic inequalities in legal outcomes which significantly affect the life course of individuals. As the bureaucratization of law systematizes legal procedure, it also depersonalizes legal institutions such that specialized enforcement staff are limited in their capacity to genuinely

address the needs of all its constituents. Consequently, some inequality is inevitable; however, we must minimize the instances in which law disproportionately affects particular groups of citizens. The reform strategy proposed below is a conglomeration of individual policy actions which, together, will produce a ripple effect throughout the entire legal system and catalyze a massive structural overhaul.

The Failure of Procedural Justice as a Stand-Alone Framework

Currently, the law prioritizes procedural justice in order to maintain its legitimate authority in the eyes of the public. Robert J. MacCoun, in his piece "Voice, Control, and Belonging: The Double-Edged Sword of Procedural Fairness", reviews a litany of sociological literature demonstrating that public attitudes towards the law and legal institutions are largely influenced by standards set forth by procedural justice as a framework (MacCoun 182). Fair procedure constitutes an important factor in citizens' attitudes towards legal institutions because a fundamental tenant of U.S. law is equality and universality. Procedural justice is an organizing principle of the law and legal institutions which is primarily concerned with the fairness of legal procedure. Procedure is deemed to be "fair" when individuals are treated with dignity and respect during legal proceedings. Fair treatment also requires that every individual is given the same opportunity to have their story heard and listened to by decision makers. Procedural justice, theoretically, minimizes the effect of individual bias on decision making processes and guarantees a neutral decision maker.

The law is hyper-focused on maintaining the impression of procedural justice at the expense of individuals. All levels of its enforcement staff have a stake in maintaining such an image. Blumberg's examination of public defenders as double agents points to the prevalence of impression management in their daily operations: "…all law practice involves a manipulation of

the client and a stage management of the lawyer-client relationship so that at least an *appearance* of help and service will be forthcoming" (Blumberg 26). Manning's work also examines the stake that the police have in maintaining a certain image of fairness and equal treatment when interacting with citizens. When enforcement staff are dedicated to projecting a certain image to the public in order to maintain legitimate authority, the law does not live up to the ideals of equality and universality.

Inequalities resulting from the plea bargaining process, for example, are a product of seemingly "fair" legal procedure. Unfortunately, criminal defendants play an integral role in the law's impression management strategy and image projection. Blumberg explains that, during the "Cop Out" ceremony, defendants must convincingly preform guilt and acquiesce to create an *impression* for both the public and the courtroom that no coercion was involved during the plea bargaining process. Although the vast majority of criminal convictions are the result of plea bargaining, very few criminal defendants who plead guilty appear to think of themselves as "guilty" after the "Cop Out" ceremony (Blumberg 33). The law's strategic impression management sweeps substantively biased outcomes under the rug and shields both legal institutions and their staff from oversight or scrutiny (MacCoun 189). One study of 700,000 criminal cases found that white defendants received better plea bargains than black and Hispanic defendants accused of similar crimes and with similar records (Haney-López 98). When presented with this finding, only a mere 11% of judges and 9% of prosecutors attributed the discrepancy to racial bias (Haney-López 98). Nevertheless, the "Cop Out" ceremony maintains the perceived legitimacy of courtroom procedure.

Like the plea bargaining process, other standard courtroom operations pass the test of procedural justice, even when they are proven to produce substantively biased outcomes. Legal

institutions are ought to play an active role in monitoring and correcting each other's behavior. When legal outcomes seem suspiciously skewed, institutional action is a desirable remedy; however, the status quo framework of procedural justice stifles institutional capacity to detect, investigate, and remedy substantively biased outcomes.

We must ensure *both* fair procedure and fair outcomes in order to solve the fundamental problem with law. The U.S. government should create a more effective mechanism of regulatory oversight whose primary concern is ensuring *both* procedural and distributive justice for all. To do this, we must shift our legal understanding of what constitutes "justice." According to this principle, justice requires fair legal outcomes for everyone. Procedural justice as a framework is ill-equipped to identify racially discriminatory sentencing procedure. As Haney-López describes, enforcement staff are "simultaneously ignorant and informed participants in the construction of races" (94). As the law is an important agent of social knowledge production, it socializes its enforcement staff into a culture in which racial images and categories, imbedded into the law itself, are normalized and believed to reflect social reality (Haney-López 87). Enforcement staff cannot be expected to effectively monitor or sanction the discriminatory actions of legal institutions when they believe such actions are justified by a capital "T" truth about race. By definition, a procedural justice framework alone cannot prevent substantively biased outcomes because it does not hold social knowledge to be a relevant, evaluative criteria for the legal system.

Increasing Public Oversight and Scrutiny

Procedural justice in and of itself is not the ideal which our legal system should strive for; rather, it is a means for achieving distributive justice (MacCoun 182). The status quo proves that this is, in fact, not the case. Procedural justice as a standard for evaluating and monitoring legal

institutions has empirically failed those who it is supposed to protect. Legal institutions and enforcement staff must be made to genuinely care about their constituents, and that means carefully considering how legal outcomes will shape their future circumstances. A focus on distributive justice is needed to identify and sanction manipulative or discriminatory behavior that effects legal outcomes, as it would create a new definition of justice which emphasizes future rehabilitation and opportunity. An agency comprised of both legal experts and ordinary citizens would increase external, public oversight of legal procedure and outcomes. This agency would continuously evaluate individual actions as well as legal outcomes so that enforcement staff and legal institutions are held accountable for producing the best outcomes for individuals.

Additionally, this agency must be diverse in order to include a range of different perspectives, especially from individuals who are skeptical or critical of how the law is currently functioning. Both MacCoun's and Bell's research indicates that citizens have varying opinions of the law and legal institutions which correlate with social location. In particular, black citizens are twice as likely as their white counterparts to have low confidence in legal institutions and see them as having low ethical standards (MacCoun 187). Since social location shapes individual experiences with the law, involving citizens who are disproportionately subject to unfair treatment and sub-par legal outcomes would increase the efficacy of public oversight and scrutiny.

This agency must also work to detect and identify instances of unconscious bias in law enforcement staff. Haney-López's characterization of these actors' points to the difficulty in solving the fundamental problem of law: they are both ignorant *and* informed participants in the legal construction of race, and it is not always immediately obvious how enforcement staff are operating in any given moment. Moreover, sentencing disparities in part stem from the decisions

of enforcement staff, regardless of intent, to misapply facially neutral laws in ways that are discriminatory or arbitrary. This particular combination of phenomena means that, when legal institutions attempt to sanction one another and mandate procedural fairness, such efforts are doomed to fail. One of the first tasks of the agency proposed should careful observation and evaluation of enforcement staff behavior during legal procedure. This must be done in a covert manner so as not to change how staff behave while under observation (Van Cleeve). Those staff who are found to be behaving in unfair, discriminatory, and inappropriate ways must be quickly replaced.

Lessons from the Voting Rights Act: Using Distributive Justice to Correct Sentencing Procedure

Distributive Justice must be coupled with an effective sanctioning process in order to produce genuine, substantive change. This has been accomplished in the past, and an agency ought to be created that models the statutory framework of empirically successful civil rights law. In their article, "From Legal Doctrine to Social Transformation? Comparing U.S. Voting Rights, Equal Employment Opportunity, and Fair Housing Legislation," Nicholas Pedriana and Robin Stryker examine the efficacy of the Voting Rights Act of 1965 compared to other civil rights legislation enacted around the same time period.

They attribute the success of the VRA to its "group-centered effects" framework embedded into its statutory design. The principles of the GCE framework stand in contrast to the principles under which our current legal institutions operate, implicitly underscoring the fundamental problem with law (Pedriana and Stryker 101). Firstly, a GCE framework views legal discrimination not as an isolated or intentional incident, but rather as a routine and systematic feature of social life. Likewise, it holds that systemic discrimination is identifiable by

observing broader patterns of jurisprudence, including both legal procedure and outcomes. Thirdly, a GCE framework endorses group remediation as an alternative to procedural justice; rather than merely holding legal institutions to the standards of fair procedure, a GCE framework focuses on ameliorating negative legal outcomes for particular, marginalized groups. Lastly and as a result of its emphasis on group-centered effects, the framework endorses class action lawsuits as a method of doing away with individual claims of discrimination. Coupled with distributive justice, the law and legal institutions should be rearranged in accordance with these principles.

The status quo lacks an effective method of sanctioning legal institutions. In their work, "Arbitrariness and Discrimination under Post-Furman Capital Statutes," William J. Bowers and Glenn L. Pierce evaluate the efficacy of the Supreme Court's 1972 ruling in *Furman v. Georgia*; the Court found that states were applying and enforcing the death penalty in arbitrary and discriminatory ways, rendering their laws unconstitutional (Bowers and Pierce 41). The Court mandated remedial action requiring states to reform their capital punishment laws such that discretion would be minimized, and arbitrary enforcement hindered. The authors highlight two basic approaches undertook by state legislatures. One approach was to eliminate discretion totally, through laws which specify a mandatory death sentence for certain crimes. The other, to "guide" sentencing decisions through laws outlining explicit judicial standards. So-called "guided discretion" statutes also designated separate phases of trial to determine guilt and punishment, and allowed for automatic appellate review of each and every death sentence (Bowers and Pierce 36). Yet, the Supreme Court – supposedly the ultimate oversight mechanism existing today – refuses to hear constitutional challenges to sentencing outcomes without proof of purposeful discrimination, even those pertaining to capital punishment.

Even in instances like *Furman v. Georgia* where the Supreme Court upheld a constitutional challenge to sentencing outcomes, it attempted to remedy discrimination through the lens of fair procedure, furthering substantively biased outcomes. The Court's ruling in *Furman v. Georgia* represents an attempt to correct legal institutions by enforcing standards of procedural justice; minimizing prosecutorial and judicial discretion during the sentencing process would ideally ensure neutrality and, thus, a fair outcome. Such a remedy ignores that enforcement staff, no matter the degree of discretion they are conferred, will never be perfectly neutral decision makers.

Upon examination of data from four specific states implicated in *Furman v. Georgia* – Florida, Georgia, Texas, and Ohio – Bowers and Pierce conclude that there remain very stark differences in sentencing outcomes. Differences are clearly cut along racial lines, despite guided discretion designed to make procedure fairer: "Among felony killings, for which the death penalty is more apt to be used, race of victim is the chief basis of differential treatment" (54). For capital homicide cases generally, race of the victim is a more determinative factor than race of the defendant. In Florida, for example, defendants who are black are still *forty times* more likely to receive a death sentence if their victim was white, as opposed to if their victim was also black (Bowers and Pierce 49). Disparities based on race also extend beyond the white/black dichotomy: prosecutors seek the death penalty against Latinx defendants four times more than white defendants (Haney-López 97). Such enduring, resilient racial disparities are indicative of how a procedural justice framework fails to capture the ways in which legal institutions produce substantively biased outcomes.

In light of Bowers and Pierce's analysis casting doubt on the efficacy of fair procedure to remedy racial disparities even when it matters most – i.e., life or death – a GCE framework is

especially important for solving the fundamental problem with law. Sentencing procedure constitutes a "prime legal mechanism for the maintenance of racial hierarchy" and must be subject to constant monitoring and scrutiny (Haney-López 99). Broadly speaking, an oversight mechanism should emulate the statutory structure of the VRA. It should regulate sentencing procedure outcomes using methods similar to how the VRA regulated and sanctioned states' electoral procedure and outcomes. A "statistical trigger" included in the VRA's statutory design automatically deemed states as being in violation of the law (Pedriana and Stryker 102). It thereby put the onus on the states to justify substantively unequal and biased electoral outcomes; in the status quo, the onus is put on individuals to prove that legal institutions *intended* to discriminate against them by handing down a certain sentence. The VRA jettisoned preexisting jurisprudence which required proof of discriminatory intent and replaced it with a statistical trigger designed to detect and identify discriminatory effects of the law. Unlike the ways in which states remedied capital punishment laws after *Furman v. Georgia* which only addressed fair procedure, the VRA forced states to undergo legislative reform to guarantee fair *outcomes.*

Conclusion

Solving the fundamental problem with law requires that the U.S. create an agency tasked with expanding public oversight, increasing public scrutiny, and sanctioning legal procedure and outcomes antithetical to the social function of law. Including folks who are outside the legal institutions themselves, as opposed to enforcement staff who may have hidden agendas, is foundational to successfully enforcing compliance with the standards of its GCE framework and distributive justice. Of course, this proposal should not be the end-all-be-all of legal reform; however, it would be a productive and worth-while step towards forcing the law to perform the social functions it is ideally and theoretically intended to achieve.

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