Critical Issues in Justice and Politics

Copyright © 2012 Critical Issues in Justice and Politics

Editorial Contents – The contents of each article are the views, opinions, or academic inferences of the individual article author. Publication of each article may not reflect the views or positions of the journal, the department, or Southern Utah University. All material is published within the spirit of academic freedom and the concepts of free press.

Critical Issues in Justice and Politics

Volume 5 Number 1   May 2012   ISSN 1940-3186

Contents

Articles

Critical Issues in Justice and Politics is a refereed (peer-reviewed) journal which contributes to the theoretical and applied nature of justice and politics. We are a scholarly journal which requires all articles to undergo an extensive review process for both content and format. Our emphasis is on the exchange of qualified material in order to generate discussion and extend the often limited boundaries of scholarly exchange.

Critical Issues in Justice and Politics is sponsored by the Department of Political Science and Criminal Justice at Southern Utah University. The editorial board is comprised of faculty from the department as well as select faculty and practitioners from around the United States.

Published twice a year (March and September) *Critical Issues in Justice and Politics* focuses on emerging and continuing issues related to the nature of justice, politics, and policy. A special emphasis is given to topics such as policy, procedures and practices, implementation of theory, and those topics of interest to the scholar and practitioner alike.

Nature of Electronic Publication:

Critical Issues in Justice and Politics is considered a serials publication under definitions by the Library of Congress and the International Standard Serial Number (ISSN) system. The ISSN number, along with identifying information for the serial publication, appears on all copies of the journal. The journal may be obtained online or through many of the traditional research databases in academia.

Because we publish online we provide a wider audience than most small, scholarly journals. The cost of other journals can be restrictive; often making purchase and use of the journal difficult for

the average faculty member. With our electronic format we provide access to the journal at no cost to qualified subscribers. This provides a larger audience with increased opportunity for those who wish to publish.

Copies are distributed via email and online access to subscribers first. Authors receive access to the electronic copy and may purchase print copies.

We are an electronic journal which is published using the Portable Document Format (PDF).

Submission Guidelines

Critical Issues in Justice and Politics welcomes submissions from anyone who can write a high quality scholarly article. We are especially interested in scholarly, critical, and constructive articles which focus on an emerging or continuing issue is justice and politics. We also seek review essays (reviews of recent literature on a given topic), reports of significant justice or political issues, book reviews, and position papers worthy of scholarly review and comment.

It is the editorial policy of *Critical Issues in Justice and Politics* to accept submissions from all disciplines so long as the material relates to justice and politics. We also encourage submissions from practitioners, students, and others who have an interest in the topics.

Simultaneous Submissions

We prefer manuscripts which are not under review by other journals or publications. We endeavor to review all manuscripts in a timely fashion, so simultaneous submissions are not usually necessary. Refereed submissions are submitted within forty-eight hours of acceptance and we generally ask reviewers to complete their

assignment within 10 working days. In most instances an editorial decision may be reached within a month of submission.

Non-refereed materials usually receive attention within the first week of submission. An initial editorial decision is often made within 5 business days.

All papers submitted for refereed publication will be sent to at least two reviewers. We use a blind-review process which submits papers in anonymous format. If there is a clear split between the reviewers then a third reviewer may be used when necessary for clarification or additional comment. We do rely very heavily on our reviewers for insight and recommendations. All of our reviewers hold the appropriate degree and experience to qualify them for the particular project.

Reviewers are asked to evaluate manuscripts on the basis of their scholarly competence as well as the potential contribution to appropriate theory or related areas. Authors may not contact reviewers during the process, and reviewer names are not disclosed unless the reviewer agrees for such disclosure.

Authors who dispute the findings or suggestions of a reviewer may submit their response in writing. Final decisions on publication remain the domain of the editorial board.

For more information or to submit an article or other material for review please see our webpage.

Journal Webpage: http://www.suu.edu/hss/polscj/CIJP.htm

From the Associate Editor

As we enter year five of publication, we present the reader with a dynamic mix of ideas; military-trained gang members, confidence in the US Supreme Court, the issue of secession in the US, and justices from social conflicts.

We would like to take this opportunity to thank, once again, our readers and contributors for making our journey to this point enjoyable and enlightening, all the while encouraging us to go forward.

Gang Investigators' Perceptions of
Military-Trained Gang Members (MTGM)

Carter F. Smith
Austin Peay State University

Yvonne Doll
Northcentral University

Communities everywhere have experienced the negative effects of street gangs. The presence of military-trained gang members (MTGMs) in the community increases the threat of violence to citizens. The problem addressed in this study was the apparently growing presence of military-trained gang members in civilian communities. The purpose of the study was to determine the perceived presence of military-trained gang members and to examine whether there was a relationship between the perceptions of gang investigators regarding the presence and the size of their jurisdictions, the proximity of their jurisdictions to a military installation, and the extent to which investigators participate in anti-gang activities. The statistical analyses used to test the hypotheses in this study were Pearson and Spearman Correlation Coefficients, independent means *t* tests, and Ordinary Least Squares (OLS) Regression analysis. Respondents reported a mean of 11% of the gang members in their jurisdictions were MTGMs. The Army, Army National Guard, and Army Reserve were identified as the largest sources of MTGMs and the Bloods, Crips, and Gangster Disciples were the gangs most represented. Recommendations included all branches of the military therein should adopt a uniform definition of gangs. Military leaders should acknowledge the increase in gang-related crime affecting the military and address the problems caused for both military and civilian communities without attempting to quantify the threat level. Military leadership should continuously examine the activities of all suspected military gang members to determine active gang affiliation for retention purposes while evaluating any gang affiliation for security clearances. Military Law Enforcement liaison for recruiters should develop effective communication with local, state, and federal law enforcement agencies to assist with information sharing.

Introduction

> *"The greatest concern is gang members in the military recruiting new members, and using military services (weapons, armor, training material, supplies, access to security levels, and personal access to soldiers private data) to further their roles and purposes. Not only are they being deployed into combat, but they are also learning new tactics and weapons specializations that were unseen in the streets until the last couple of years. Those*

Dr. Carter F. Smith (J.D., Ph.D.) is an assistant professor in the Criminal Justice Administration department at austin Peay State University. He is a retired Army CID special agent and was instrumental in identifying the growing gang problem at Fort Campbell, KY in the 1990s, earning the 1994 CID Command Special Agent of the Year award for his efforts. His research includes a variety of gang issues, and topics related to effectively teaching criminal justice students.

Dr. Yvonne Doll (D.M.) is a retired Army Military Police Officer with assignments as CID Commander for Hawaii and the Pacific Region and Operations Officer for the United States Disciplinary Barracks, Fort Leavenworth, KS. In October 2010, she retired from her associate professor of military leadership position at the Command and General Staff College and she currently works as an adjunct professor for Northcentral University, Prescott Valley, AZ.

tactics and training are now showing up in home invasions and ambush style shootings." Tennessee Gang Investigators' Association member, May 2010.

Communities everywhere have experienced the negative effects of street gangs, with many communities experiencing an increase in the number of gang members. The proliferation of gangs in our society has led to an increase in destructive crimes (Egley & O'Donnell, 2009). Roughly 80% of all crimes in communities throughout the United States were committed by criminal gang members (National Gang Intelligence Center [NGIC], 2009). In 2008, there were roughly one million gang members in the United States (NGIC, 2009). How many of those gang members have had military training?

The number of crimes committed by gang members who were current or former members of the military has increased in the United States (U.S. Army Criminal Investigations Command; CID, 2009). The most common gang-related crimes involved drug trafficking, aggravated assaults, housebreaking and larceny, attempted homicides, and sexual assaults (CID, 2009). Most military and civilian community members are unaware of the existence of Military-trained Gang Members (MTGM) (NGIC, 2007). The threat to communities continues to increase because all MTGMs were or will be discharged from the military at some point, either due to inappropriate activity (e.g. conduct contrary to military discipline, criminal actions) or because their commitment to military service was satisfied. The presence of MTGMs has increased throughout the country while advanced combat tactics and advanced military weapons and equipment have become more available to gang members (NGIC, 2007).

To some extent, the proliferation of MTGMs is associated with military deployments and the transfer of soldiers to geographic areas with no prior MTGM problems (NGIC, 2007). Gang members from the military entered civilian communities and introduced military tactics and training to local gang members (NGIC). The practice created an increase in the level of gang violence within the community. Law enforcement officials with little or no training on countering military tactics are at great risk of harm (NGIC). Leaders of law enforcement agencies need to reassess their response to local gang activity and gang-related crimes committed within their jurisdictions (NGIC, 2009; Witkowski, 2004).

Background

Gang membership in the United States is growing. A 2009 report by the National Gang Intelligence Center (NGIC) reported the number of gang members in the United States was conservatively estimated at 1,000,000 as of

September 2008. The 2009 NGIC estimate represented 212,000 more gang members (26% higher) than the 2007 report. The estimate was 215,000 (28%) higher than the number of gang members reported by the National Youth Gang Center in 2006 (Egley & O'Donnell, 2008). The estimate was also 200,000 (25%) higher than the 800,000 gang members reported by the Federal Bureau of Investigation's Deputy Director Pistole (2008) in March of 2008.

Gang membership has historically been treated as a youth problem. Street gangs were often considered youth-oriented, and were seen as distinctly different from adult criminal organizations (Klein, 2005). The traditional parameters for gang membership were between 12 and 30 years old, averaging about 20 years old (Klein, 1995). A recent study found a significant increase in the average age of gang members in Wichita, KS (Etter & Swymeler, 2008). In a comparative study of police-identified active gang members in 1996 and 2006, membership of adults in the Crips, Bloods, Folk (Gangster Disciples) and People (Vice Lords) gangs and each of the independent local gangs studied showed increases in the number of older members. The finding indicated that older members were providing an adult perspective to a traditionally youth-oriented problem (Etter & Swymeler).

The average age of gang members in the study increased from 20.03 to 26.59 from 1996 to 2006. Along with the age increase, the study revealed that approximately 34.87 % of the gang members remained active in the gang for ten years or more (Etter & Swymeler, 2008). The increased average ages may indicate not only an aging of the gang population, but also an increased emphasis in the recruiting of older gang members.

Military-trained Gang Members

In 1996, members of a Department of the Army investigative task force reported that gang-related activities were pervasive in the Army (U.S. Department of Defense [DoD], 1996). In 1998, DoD leaders directed a follow up study to the task force report. Flacks and Wiskoff (1998) conducted the study and reported that gang members adversely affected the military in a variety of distinct ways. While there was no official accounting of the scope and nature of the problem, leaders of the individual branches of the military thought the problem was significant enough to publish gang identification manuals (Flacks & Wiskoff). Recruiters and other relevant personnel were in need of better guidance on gang identifiers and the policies that guided decisions to allow gang members to enlist. The goal was to eliminate the possibility that gang members can enlist in the military (Flacks & Wiskoff). In addition, due to a decline in optimal quality and quantity of enlistees due to variables that included a decline in entry-level pay, record lows in the unemployment rate, a rise in college

attendance, a rise in family income, recruiters in the military had more of a propensity to recruit from the less-desired population, of which gang members were a part (RAND, 2004).

Flacks and Wiskoff (1999) also recommended that Tierney's (1998) research on gang members and military acculturation be expanded to include non-incarcerated personnel. Tierney examined self-identified gang members in military prisons. The interviews focused on reasons the gang members enlisted in the military and included: truthfulness with recruiters regarding prior arrests and criminal convictions, links to gangs and extremist groups, and reasons for lack of assimilation and acculturation in the military (Tierney, 1998). The top reason (37.1%) given for enlisting in the military was to get a better life or get out of the current environment. Other reasons included avoiding death or jail as a result of the gang lifestyle, providing for family, and getting job experience (Tierney). None of the military gang members seemed to have had patriotism among their reasoning for enlisting in the military.

Regarding their truthfulness with recruiters, many of the interviewees (over 50%) had prior arrests, including those sealed by juvenile courts. Other military gang members reported that their recruiter encouraged them to conceal their arrest record (Tierney, 1998). For those who had criminal records, a moral waiver was sought and granted (Tierney). Many of the interviewees without criminal records admitted to pre-service involvement in criminal activity that was undetected by law enforcement. Most of the interviewees were incarcerated for a crime that was not considered gang-related (Tierney).

Gang activity is still a problem in the military. According to the 2009 Army CID assessment, members of Los Zetas, Surenos, Bloods, Insane Clown Posse, Crips, Latin Kings, Gangster Disciples, and Bloods were identified during inquiries and investigations. Members of nearly every major street gang have been documented on military installations both domestically and internationally (NGIC, 2007). Gang members were present in most branches and across all ranks of the military, but were most common among the junior enlisted ranks. The Army, Army Reserves, and Army National Guard were the most likely to have gang members in their ranks (NGIC).

The authors of the 2006 CID assessment reported an increase in both gang-related investigations and incidents in 2006 over previous years. The most common gang-related crimes involved drug trafficking, with 31% of the gang-related felony offenses reported for the year (CID, 2006). Assaults, homicides, and robberies were also reported as gang-related crimes (CID). In the assessment for 2009, the authors reported the most common gang-related crimes involved drug trafficking, with 33% of the reported felonies that year (CID).

Aggravated assaults, housebreaking and larceny cases, attempted homicides, and sexual assault investigations were also reported (CID).

Agents of the Air Force Office of Special Investigations (AFOSI) prepared an unclassified report (2007) to document their efforts at intelligence collection to determine if Air Force personnel or resources were adversely affected by gang activity. The agents reported that gang members joining the military were a problem over the previous decade (AFOSI, 2007). The agents reported that gang members were becoming increasingly more sophisticated in their recruitment of young people, including military dependents, using popular hip hop culture, websites, and chat rooms as methods to recruit young military members. Gang members may seek to join the military for weapons training, and use of combat tactics such as evasive skills and cover and concealment techniques (AFOSI, 2007). The training could prove problematic for law enforcement personnel, if the MTGM employed combat tactics in the commission of a crime or passed such training knowledge on to fellow gang members.

The presence of gang members in the military ranks may result in a disruption of command, low morale, disciplinary problems, and a broad range of criminal activity. "Gang-affiliated military personnel . . . facilitate crime on and off military installations, and are at risk of transferring their weapons and combat training back to the community to employ against rival gang members and law enforcement officers" (NGIC, 2007, p. 5). Gang members serving in the military have committed crimes such as murder, racketeering, and drug distribution (NGIC). Gang members have enlisted in the military as an alternative to incarceration. Others joined the military to recruit members into their gang, obtain access to weapons, and learn how to respond to hostile gunfire (NGIC).

While the presence of gang members in the military is not new, their numbers have risen and have recently caught the attention of political leaders. As a result, legislative efforts against those individuals attempting to join the military were recently added to a defense-spending bill (National Defense Authorization Act [NDAA], 2008). The legislation, Public Law 110-181, included the directive that the Secretary of Defense, "prescribe regulations to prohibit the active participation by members of the Armed Forces in a criminal street gang" (NDAA, 2008, Sec. 544). The bill was passed by both houses of Congress and signed by the President in January 2008. Department of Defense (DoD) Instruction 1325.6 was drafted in response, and required military personnel to reject active participation in criminal gangs, apparently attempting to limit the activity of MTGMs by using anti-gang prohibitions. At the time this article was written, no policy had been designed by any of the military branches to address this guidance.

Conflicting Loyalties

Military members with simultaneous membership in a street gang have a dilemma. On the one hand, they are expected to (and swore that they would) support and defend the Constitution of the United States and obey the orders of the President and officers appointed over them (U.S. Department of Defense, 2007). Simultaneously, leaders of their street gang require a sworn oath to the beliefs and laws of the members of their street gang (Knox, 2006). Gang members in the military demonstrated a unique condition of deviance: "someone who literally marches under two sets of colors and to two different drummers, one legitimate (the military) and one illegitimate (the gang)" (Knox, p. 225).

The gang allegiance may include retaliation against members of a rival gang. Many gang members had a dismissive attitude towards authority, and the presence of gangs have affected all branches of the military (Valdez, 2009).

The ability to justify or rationalize conflicting loyalties (membership in both the military and a gang) were explained by the theories of differential identification and organizational commitment. Differential identification allows individuals to model behavior that others expected; rationalizing behavior when role conflicts existed (Glaser, 1956). Organizational commitment examined an individual's dedication to the organization's purposes and values and his role in the organization, and indicated that when a member of an organization had a psychological attachment or otherwise identified with the organization, separation from the organization was difficult (Mowday, Porter, & Steers, 1982).

The authors of the 2009 NGIC report observed "gang members with military training posed a unique threat to law enforcement personnel" (p. 13). The threat posed to law enforcement was even more significant if MTGMs trained other gang members in weapons, tactics, and planning (NGIC, 2009). Whether trained in combat arms, logistics, finance, or other military occupational specialties, the gang member with military experience should be considered more advanced and dangerous than the gang member without military experience, and the potential threat that MTGMs pose to law enforcement is significant (NGIC).

All facets of the criminal justice system throughout the United States (police, courts, and corrections) at the local, state, and federal level have the potential to encounter MTGMs. The military experience added a dangerous dimension to the gang member that was not seen in those without military training.

Research Method and Design

The study was designed to examine a specific type of gang member that had been neglected in gang research: military-trained gang members (MTGMs). The problem the study addressed was the apparently growing presence of

MTGMs in civilian communities. The purpose of the study was to determine the perceived presence of MTGMs and examine whether there was a relationship between the perceptions of gang investigators regarding the presence and the size of their jurisdictions, the proximity of their jurisdictions to a military installation, and the extent to which investigators participate in anti-gang activities.

Because only limited research existed with regard to gang-related variables, the study used the web-based, researcher-developed Military Gang Perception Questionnaire (MGPQ) to collect data. The questionnaire was reviewed by an expert group, pilot tested by gang investigators, and subjected to statistical analysis to confirm validity and reliability (Smith, 2011). The independent variables in the study were the size of the gang investigators' jurisdiction, the extent to which gang investigators participated in anti-gang activities, and the proximity of the gang investigators' jurisdiction to a military installation. The dependent variables were *MTGM Presence Based on Ratings*, the sum of seven of the questions from the MGPQ, and *Percent Presence,* which measured the investigators' perceptions of the percentage of gang members in their jurisdiction who were MTGMs. Other variables (i.e., anti-gang experience, age, race, and military experience) were assessed as control variables.

The MGPQ (Smith, 2011) was used to collect responses from the 260 active members of the Tennessee Gang Investigators Association (TNGIA). Members of the TNGIA primarily included male and female adults who worked in or were affiliated with the State of Tennessee in police, courts, corrections, and related fields who joined the association to address the problems seen with the increased presence of street gangs and other organized criminal operations (TNGIA, 2009).

The survey instrument contained indicators that demonstrated investigator perceptions of MTGM presence within their jurisdictions. The survey questions specifically referred to the use of military weapons, equipment, and tactics used by gang members in the respondents' jurisdictions. The respondents were also asked about the unexplained appearance of new gang members or gangs that may indicate a military-assisted migration, and their knowledge and sources of knowledge regarding MTGMs in their jurisdictions. Data were sought from the population of 260 members of the TNGIA. The final sample consisted of $N = 119$ participants who answered all or almost all of the questions on the survey. The survey for the research study was developed for online distribution.

A power analysis was conducted to estimate the sample size needed. Using an online sample size calculator (Creative Research Systems, 2009), a confidence level of 95%, and a desired precision of ± 5% for a population of 260 gang investigators in the TNGIA, the required sample was 155. An additional

sample size calculation was computed for a multiple regression analysis involving seven predictors, a significance level of .05, a power of 80%, and a medium effect size ($f^2 = 0.15$). That power analysis indicated that $N = 103$ was sufficient to detect the size of effect.

MTGM presence based on ratings. The first measure of MTGM presence was *MTGM Presence Based on Ratings*, a dependent variable. The answers provided in questions 4, 5, 6, 9, 10, 12, and 13 were summed into an interval-level index score that was used to measure the perceptions of MTGM presence. Those seven items were chosen because (a) they all assessed MTGM presence, (b) when factor analysis was applied across the Likert items using the pilot study data, those items formed one factor on which they all displayed factor loadings greater than .50, and (c) they demonstrated a very good internal consistency reliability (Cronbach's alpha = .88).

Percent presence. The second measure of MTGM presence was *Percent Presence*, a dependent variable. This second dependent variable measured the investigators' perceptions of the percentage of gang members in their jurisdiction who were MTGMs. That was measured by question number 24 on the survey and consisted of a ratio-level measurement ranging from 0 – 100%. Because the area of research was new and the survey was being developed by the researcher, using two different operationalizations of the dependent variable allowed for a more thorough exploration of MTGM presence, validity of measures, and assessment of the variables related to the dependent variables.

The statistical analyses used to test the hypotheses were Pearson Product Moment Correlation Coefficients, independent means *t* tests, or Ordinary Least Squares (OLS) regression analysis. Those approaches assumed a normal distribution of the variables, linear relationships between the variables, no multi-collinearity between independent variables, and no heteroskedasdicity. Tests were undertaken to assure that all of those assumptions were met by the data. Pearson Correlation Coefficients allowed the researcher to determine the strength and direction of the relationship between the independent and dependent variables, and whether the relationship was statistically significant. Pearson Correlation Coefficients were measured on a scale of -1 to +1, such that scores with absolute values closest to 1 indicated the strongest relationship. Independent samples *t* tests were appropriate for comparing the means between two independent groups of subjects. Additionally, multicollinearity was assessed since there may be collinearity between variables included in the analysis, particularly between age, anti-gang experience, and anti-gang activities.

Study Respondents

The majority of the respondents were Police (61.5%), followed by Corrections (21.4%). Social work, Courts, and Fire investigation had the fewest respondents. Each of those categories had 0.9%. The majority of respondents (72 out of 116) did not have a working relationship with military investigators (62.1%). Most of the respondents were Caucasian (78.6%), followed by African-American (12.0%), Hispanic (7.7%), and Asian (.9%). A minority of respondents had served in the military (35.9%). Additionally, of those reporting prior military service, the branch most represented was the Army (32.6%), followed by the Marine Corps (23.3%), the Navy (14.0%), and the Air Force (11.6%). The majority of respondents worked for city or town police agencies (33.9%). County Sheriff's Departments (24.6%) and State corrections (15.3%), followed. Federal law enforcement was the employing agency for 7.5% of respondents.

Study Findings and Discussion

The Army (43%), Army National Guard (38%), and Army Reserve (32%) were identified as the largest sources of MTGMs in Tennessee communities. The finding was similar to observations by Knox (2006) and the NGIC (2007) authors. The Bloods, Crips, and Gangster Disciples were the gangs most represented by MTGMs in Tennessee. The finding was similar to the representation of subjects in gang-related felony investigations in the Army since 2006 (CID, 2007; CID, 2008; CID, 2009). Drugs (40%), Robberies (38%), and Assaults (34%) were the crimes most often committed by MTGMs in Tennessee. The finding was also similar to the recent data from Army CID investigators (2009). It was estimated that more than 1 in 10 (11.10%) of the gang members in the respondents jurisdictions were MTGMs.

Descriptive Statistics. Table 1 presents descriptive statistics for the MTGM presence sum score as well as all other continuously measured variables assessed in the study. To assess the normality of each measure in Table 1, measures of skewness and kurtosis were computed for each measurement. Five out of the nine variables presented in Table 1 had skewness, kurtosis, or both skewness and kurtosis scores that fell outside of the acceptable range for normality. Those variables consisted of MTGM presence percent score, proximity to closest military installation (from survey), distance from closest military installation (computed), age, and number of employed officers. Those measures showed deviations from normality and were thus not appropriate for the application of parametric statistics. Solutions to the issue will be discussed in turn.

Table 1
Descriptive Statistics for Interval and Ratio Scale Variables

	N	M	SD	Range	Skewness	Kurtosis
MTGM presence sum score	110	20.42	5.49	9 - 34	0.28	-0.52
MTGM presence percent score	81	11.10	11.98	0 - 50	1.75	2.85
County size	105	325489.12	265006.76	12967-920232	0.54	-0.88
Anti-gang activities	118	40.04	33.72	0 - 100	0.60	-1.09
Proximity to closest military (survey)	117	27.06	41.44	0 - 230	2.87	9.45
Distance from closest military (computed)	105	14.78	22.02	0 - 102	1.80	3.09
Anti-gang experience	119	6.47	5.28	0 - 25	1.19	1.41
Age	116	39.49	8.48	25 -79	0.99	2.87
Number of employed officers	114	411.00	1133.42	0 - 11500	8.54	82.63

Table 2 presents both Pearson and Spearman Correlations between Dependent Variables and Independent/Control Variables. Pearson Correlations were the planned method of computation. Spearman correlations were computed in addition to the Pearson correlations because several of the variables were not normally distributed (see Table 1).

Table 2
Pearson and Spearman Correlations between Dependent Variables and Independent/Control Variables

	DV 1 = MTGM presence sum (Pearson r)	DV 1 = MTGM presence sum (Spearman r)	DV 2 = MTGM presence percent (Pearson r)	DV 2 = MTGM presence percent (Spearman r)
County size (H1)	-.01	-.02	.29*	.24*
Anti-gang activity (H2)	.02	.08	-.05	-.08
Proximity to closest military (survey; H3)	-.09	-.00	.06	.28*
Distance from closest military (computed;H3)	-.06	-.03	-.06	.02
Anti-gang exp. (H4)	-.01	.01	-.10	-.21
Age (H5)	-.05	-.04	-.11	-.11

*p < .05.

There was a statistically significant positive relationship between gang investigators' perceptions of the presence of MTGMs in their jurisdictions and the size of their jurisdictions when MTGM presence was measured as a percentage. The findings indicated that respondents from more populated counties were more likely to perceive the presence of MTGMs in their jurisdictions. Larger jurisdictions were appropriate locations in which MTGMs were able to find other gang members with whom to associate. The finding supported research suggesting the presence of street gangs was concentrated in medium and large cities (Wells & Weisheit, 2001).

There was not a statistically significant positive relationship between the gang investigators' perceptions of the presence of MTGMs in their jurisdictions and the gang investigators' level of participation in anti-gang activities. No prior studies directly examined percentage of time spent on anti-gang activities as a variable. Though police, especially gang units, play a central role in community gang reduction efforts (Katz & Webb, 2006), the study was unable to show a relationship between those efforts and the perception of gang investigators regarding MTGMs in their jurisdictions. As many MTGMs were thought to be in the 2nd and 3rd Generation (Sullivan & Bunker, 2007), they may not be as easily detected by gang investigators, regardless of the percentage of time the investigators are able to commit to anti-gang activities. With the experience of concealing their gang affiliation in the military, MTGMs in civilian communities would be experienced in avoiding detection in the presence of gang investigators. The indicators and effects of MTGMs may need to be incorporated into gang investigator training programs.

There was a statistically significant positive relationship between gang investigators' perceptions of the presence of MTGMs in their jurisdictions and the proximity of the gang investigators' jurisdiction to a military installation when MTGM presence was measured as a percentage and proximity was computed by the researcher. The finding supported McMaster's (1994) finding that many (30.5%) communities on or near military installations have gang members. No statistically significant difference was seen between communities on base and those inhabited by members of the military living off-base (presumed to be in close proximity to the installation). The present study tended to support Knox's (2006) finding that the strength of the relationship between the gang member and the gang was stronger than the relationship between the gang member and his employer. The finding also supported the AFOSI (2007) study concluding that the proliferation of gang activity in communities adjacent to military installations made it impossible to totally shield the military community.

There was not a statistically significant positive relationship between the gang investigators' perceptions of the presence of MTGMs in their jurisdictions

and the control variable of anti-gang experience. No prior studies directly examined anti-gang experience as a variable. With many MTGMs having membership in 2nd and 3rd Generation Gangs (Sullivan & Bunker, 2007), MTGMs may not be as easily detected as individuals by gang investigators, regardless of their experience. Decker, Bynum, and Weisel (2001) found a high degree of sophistication for some gang members including political activity, strategic relationships with other gangs, and relationships with neighborhood businesses. That same sophistication could be expected to help conceal the identities of MTGMs in the community.

There was not a statistically significant positive relationship between the gang investigators' perceptions of the presence of MTGMs in their jurisdictions and the control variable of age. None of the literature addressed the ages of gang investigators as a variable. Valdez (2009) reported that age was not relevant for gang member classification. The majority of suspects identified in CID (2009) reports were males of the ages 18-24. The youngest was 16, the oldest was 38, and the average was 25.

There was not a statistically significant difference in gang investigators' perceptions of the presence of MTGMs in their jurisdictions by the control variable of race. Tierney (1998) found that of the military prisoners who self-reported as gang members and agreed to be interviewed, the largest percentage (46.1%) was black. Hispanics in Tierney's study were included in the white category. The CID reports included in the assessment (2009) had more (49%) African-Americans as subjects of gang investigations. The next highest race represented was Whites with 30%. Decker et al. (2001) found race was the most unifying factor for prison gangs.

There was not a statistically significant difference in gang investigators' perceptions of the presence of MTGMs in their jurisdictions by the control variable of military experience. Many of the self-identified military prisoners Tierney (1998) interviewed reported they were able to conceal prior arrests and gang affiliation from their recruiters. Others reported their recruiters were aware of their arrests and gang affiliation. Some required moral waivers, though the information regarding arrests and gang affiliation was not passed on to the receiving unit leadership or the military police in the community (Tierney). Consequently, it was unlikely that gang investigators with military experience would have developed expertise at identifying gang members while in the military. Valdez (2009) observed that gang members in the military who do their job well are often not identified as gang members.

Among the findings not necessarily addressed by the variables were the presence of adult gang members and the use of military tactics by gang members. The percentage of respondents who agreed or strongly agreed that there were a

higher percentage of adult gang members in their jurisdiction was 40.2% and a majority (53.4%) disagreed with the statement that adult gang members were more dangerous. Also noteworthy was the apparent conflict between agreement that gang members in their jurisdiction used military-type tactics (22.5%) and the percentage reporting agreement that gang members in their jurisdictions committed home invasions (77.6%) and bank robberies (80.2%). A majority of respondents (83.1%) agreed that MTGMs posed more danger to police and most (93.1) agreed that active gang members should not be allowed to join the military.

Recommendations

Recommendations for government leaders. Legislative efforts (NDAA, 2008) resulted in Department of Defense (DoD) Instruction 1325.6 (U.S. Department of Defense, 2009). At the time this article was written, no policy had been designed by any of the military branches to address this guidance. Compliance with the instruction by Congress to Robert M. Gates, the Secretary of Defense to prohibit members of the Armed Forces to actively participate in criminal street gangs should be completed using penalties with a foundation in criminal law and not civil law or international political or national security issues.   This research has identified the presence of MTGMs in civilian communities that can be addressed by preventive action by government leaders in the form of military policy. Though an evaluation of the propriety of the use of the DoD instruction was beyond the scope of the research, it was noted that there may be legal problems linking the instruction, and the directive before it, to active membership in street gangs because of the history of the legislation, which initially prohibited communist groups from infiltrating the military and the United States (Executive Order 10450, 1953). More effort than simply issuing an order should be invested by government leaders to identify useful methods to address the presence of street gang members in the military, as more than 1 in 10 of the gang members in the respondents jurisdictions were MTGMs. This recommendation originated in the literature review, and was supported by findings in this research, specifically those regarding the relationship between gang investigators' perceptions of the presence of MTGMs in their jurisdictions and the size of their jurisdictions.

The federal government and all branches of the military therein should adopt a uniform definition of gangs. This was previously proposed without public response (CID, 2009; GAO, 2009; NGIC, 2007), but the absence of action should not delay the addressing of other recommendations. The NGIC offered NAGIA's proposed definition: A gang is a formal or informal group or association of three or more persons with a common identifying sign, symbol, or

name who individually or collectively engage in criminal activity that creates an atmosphere of fear and intimidation (NAGIA, 2005; NGIC, 2009). This definition roughly parallels criminal conspiracy law, which was more applicable in criminal gang investigations and was likely the criterion used by survey respondents when completing their surveys. This research has identified the presence of MTGMs in civilian communities that can be addressed by preventive action by government leaders by identifying a common definition for military leaders and investigators. This recommendation originated in the literature review, supported by the findings in this research, especially those regarding relationship between gang investigators' perceptions of the presence of MTGMs in their jurisdictions and the size of their jurisdictions.

Recommendations for military commanders. Military leaders should acknowledge the increase in gang-related crime affecting the military and address the problems caused for both military and civilian communities without attempting to quantify the threat level. This was especially advised because of the high percentage of felony drug investigations (CID, 2006; CID, 2009; NAGIA, 2005; NGIC, 2009) and the high percentage involvement of MTGMs in drug crime reported in the study. Drugs were the crimes most often committed by MTGMs in Tennessee. Commanders should consider treating all drug trafficking cases as if gang members were in some way connected, whether in manufacturing or distribution. This recommendation originated with the literature review, supported by findings in this research, specifically those regarding relationship between gang investigators' perceptions of the presence of MTGMs in their jurisdictions and the size of their jurisdictions and proximity to a military installation.

Military leadership should continuously examine the activities of all suspected military gang members to determine active gang affiliation for retention purposes while evaluating any gang affiliation for security clearances. Current guidance, specifically DoD Instruction 1325.6, prohibits active gang membership, yet the primary determination of such activity appears to be the presence of a criminal record. Not all gang members are caught by law enforcement each time they commit a crime. As was learned in this study, the proliferation of gang activity in communities adjacent to military installations has made it impossible to totally shield the military community. For those service members requiring a security clearance, any recent past gang affiliation should be prohibited, even passive or associate membership, unless accompanied by a complete, public renunciation of the gang and follow up evaluation by representatives of the appropriate medical authority. This recommendation came from the literature review, supported by but not originating in the findings in this

research, specifically those regarding relationship between gang investigators' perceptions of the presence of MTGMs in their jurisdictions and the size of their jurisdictions and proximity to a military installation.

      Recommendations for law enforcement. Military Law Enforcement liaison for recruiters should develop effective communication with local, state, and federal law enforcement agencies to assist with information sharing. This was not intended to suggest, as was recommended by authors of the CID assessment (2007), that recruiters be encouraged to "use local law enforcement agencies to help determine gang affiliation and agendas, as well as to determine an applicant's record" (p. 12). Military recruiters should not attempt to coordinate directly with local police in an attempt to gather information about a prospective recruit. Instead, military recruiters should have, and contact, their military law enforcement liaison to coordinate with the local police. Members of law enforcement are unlikely to release criminal intelligence (useful in background investigations) to recruiters. Law enforcement records supervisors will likely only release criminal (conviction) records of potential enlistees in response to traditional recruiter inquiries. This recommendation came from the literature review, supported by but not originating in the research findings, especially when dealing with large and medium-sized cities where more gang members reside and from which recruiters draw a large number of recruits.

Summary

      Ultimately, the goal of the study was to assist agencies specializing in countering gang-related activities with developing training for law enforcement agencies across the country to assist them with increasing their awareness and safety when they encounter MTGMs. The study has provided the foundation for this, and the findings are being disseminated throughout the law enforcement committee using a variety of methods and venues. Recommended training notes and topics are being made available to gang investigators that may encounter MTGMs.

      Results of the survey indicated there was a statistically significant positive correlation between MTGM presence percent score and county (jurisdiction) size and between MTGM presence percent score and the distance from the nearest military installation (computed). The respondents did not equate gang-related activity like home invasion and bank robbery with military-type tactics, though the majority of respondents reported gang members in their community committed home invasions (77%) and bank robberies (80%). The majority (93.1%) of respondents were of the opinion that active gang members should be prohibited from military service, as were most of Knox's (2006)

respondents. Many respondents (47%) felt anti-gang prohibitions would limit the activity of MTGMs, indicating recent federal legislation might prove effective if properly implemented. Few (4.2%) respondents reported notification by military representatives when gang members were discharged from the military, though they reported a mean of 11% of the gang members in their jurisdictions were MTGMs.

References

Air Force Office of Special Investigations (2007). *AFOSI criminal analysis assessment: The threat of street gangs on/near USAF installations.* Unclassified report. On file with author.

Decker, S. H., Bynum, T. & Weisel, D. (2001). A tale of two cities: Gangs as organized crime groups. In J. Miller, C. L. Maxson, & M. W. Klein (Ed.). *The Modern Gang Reader.* Los Angeles, CA: Roxbury Publishing, p. 73-93.

Egley, A. Jr. & O'Donnell, C. E. (2008). *Highlights of the 2006 National Youth Gang Survey.* Washington, DC: U.S. Department of Justice, Office of Juvenile Justice and Delinquency Programs.

Egley, A. Jr., & O'Donnell, C. E. (2009). *Highlights of the 2007 National Youth Gang Survey.* Washington, DC: U.S. Department of Justice, Office of Juvenile Justice and Delinquency Programs.

Etter, G. W. & Swymeler, W. G. (2008). Examining the demographics of street gangs in Wichita, Kansas. *Journal of Gang Research, 16*(1), 1-12.

Executive Order 10450 (1953). *Security requirements for government employment.* National Archives. Retrieved from http://www.archives.gov/federal-register/codification/executive-order/10450.html

Flacks, M., & Wiskoff, M. (1998). *Gangs, extremists groups, and the military: Screening for service.* Retrieved from http://stinet.dtic.mil/oai/oai/

Glaser, D. (1956). Theories and behavioral images. *The American Journal of Sociology. 61*(5) 433-444. doi:10.1086/221802

Katz C. M. & Webb, V. J. (2006). *Policing gangs in America.* New York: Cambridge University Press.

Klein, M. W. (1995). *The American street gang: Its nature, prevalence, and control.* New York: Oxford University Press.

Klein, M. W. (2005). The value of comparisons in street gang research. *Journal of Contemporary Criminal Justice, 21*(2), 135-152. doi:10.1177/1043986204272911

Knox, G. W. (2006). *An introduction to gangs* (6th ed.). Peotone, IL: New Chicago School Press.

McMaster, K. J. (1994). *An analysis of the "our gang" syndrome on a military base community and implications for educational leaders.* Unpublished doctoral dissertation, The University of Arizona.

Mowday, R. T., Porter, L. W., & Steers, R. M. (1982). *Organizational linkages: The psychology of commitment, absenteeism, and turnover.* San Diego, CA: Academic Press.

National Alliance of Gang Investigator Associations. (2005). *National gang threat assessment.* Retrieved from http://www.nationalgangcenter.gov/threatassessments.cfm

National Defense Authorization Act (2008). (Pub. L. No. 110-181. 122 Stat. 117). Retrieved from http://www.govtrack.us/congress/billtext.xpd?bill=h110-4986 .

National Gang Intelligence Center [NGIC]. (2007). *Intelligence assessment: Gang-related activity in the US armed forces increasing*. Crystal City, VA: National Gang Intelligence Center.

National Gang Intelligence Center [NGIC]. (2009). *National gang threat assessment - 2009.* Washington, DC: National Gang Intelligence Center.

Pistole, J. S. (2008, March 3). *Speech for 2nd Los Angeles IACP summit on transnational gangs, Los Angeles, California*. Retrieved from http://www.fbi.gov/pressrel/speeches/pistole030308.htm

RAND Corporation. *Have Improved Resources Increased Military Recruiting and Retention?* RAND National Defense Research Institute (2004). Retrieved from http://www.rand.org/pubs/research_briefs/RB7556.html

Smith, C. F. (2011). Documenting the pilot: The military gang perception questionnaire (MGPQ). *Journal of Gang Research*, 18(4) 1-17 (Summer 2011).

Sullivan, J. P., and Bunker, R. J. (2007). Third generation gang studies: An introduction. *Journal of Gang Research*, *14*(4), 1-10. Chicago, IL: National Gang Crime Research Center.

Tennessee Gang Investigators Association. (2009). *TNGIA Homepage*. Retrieved from http://www.tn-gia.org/

Tierney, K. E. (1998). *Study of Navy and Marine Corps prison inmates affiliated with gangs and extremist groups: Trends and issues for enlistment screening*. Retrieved from http://stinet.dtic.mil/oai/oai?&verb=getRecord&metadataPrefix=html&identifier=ADA343571

U.S. Army Criminal Investigations Command. (2006). *Summary report gang activity threat assessment fiscal year 2006: A review of gang activity affecting the Army*. Retrieved from http://militarytimes.com/static/ projects/pages/ 2006_CID_Report.pdf

U.S. Army Criminal Investigations Command. (2007). *Summary report gang activity threat assessment fiscal year 2007: A review of gang activity affecting the Army*.

U.S. Army Criminal Investigations Command. (2008). *Summary report gang activity threat assessment fiscal year 2008: A review of gang activity affecting the Army*.

U.S. Army Criminal Investigations Command. (2009). *Summary report gang activity threat assessment fiscal year 2009: A review of gang activity affecting the Army*.

U.S. Department of Defense. (1996). *Army task force report on extremist activity*. Retrieved from http://www.defenselink.mil/releases/release.aspx? releaseid=793

U. S. Department of Defense (2007). Enlistment/reenlistment document. *Armed Forces of the United States: DD Form 4/1*. Retrieved from http://www.dtic.mil/whs/directivesinfomgt/forms/eforms/dd0004.pdf

U. S. Department of Defense. (2009). *Handling dissident and protest activities among members of the Armed Forces. DoD Instruction 1325.6.* Retrieved from http://www.dtic.mil/whs/directives/corres/pdf/132506p.pdf

Valdez, A. (2009). *Gangs Across America: History and Sociology*. San Clemente, CA: LawTech

Wells, L. E. & Weisheit, R. A. (2001). Gang problems in nonmetropolitan areas: A longitudinal assessment. *Justice Quarterly, 18*(4), 791-823. doi:10.1080/07418820100095101

Witkowski, M. J. (2004). The gang's all here. *Security Management*, *48*(5), 95-105.

Changing Public Confidence in the Supreme Court during Confirmations: 1971-2007

Shauna Reilly
Northern Kentucky University

This paper looks to expand Supreme Court approval literature by looking at the effect Supreme Court nominees have on confidence in the Court. Previous literature has looked at the impact of Court decisions, approval of other branches, and political events on confidence. Taking this research further, this paper investigates Supreme Court nominations and what effect they have on approval of the Court. Furthermore, this analysis looks at controversy and ideology's impact on Court confidence. The findings show that controversial nominees have a negative impact on confidence in the Court and that, consistent with previous literature, ideology of the nominee and ideological change in the Court affect confidence in the Court as a whole.

Introduction

How does the nomination of a controversial nominee impact public confidence in the court? Further, is this a constant effect or does the controversy of the nominees affect the public's support for the Court? Research on nominees and confirmations has mainly focused on the impact that these events have on the executive and legislative branches, but research has not focused on the role that nominees and the confirmation process have on support for the Court. Nominations of Supreme Court justices bring increased attention, speculation about senate votes, and potential future nominees. The nomination and eventual confirmation process increases the visibility of the Court and leads to questions about whether increased public awareness of judicial nominees has any impact on public opinion. The confirmation process has historically been a low-salience issue. However, the increase in television coverage since the confirmation of Sandra Day O'Connor and the more open debate of nominees has increased the salience of the nomination process in the American public (Frankovic and Gelb 1992; Mansbridge and Tate 1992; Sinclair 1992; Gimpel and Ringel 1995; Caldeira and Smith 1996; Gerber 1996). The increase in visibility increases public knowledge of the Court and the new justices and can result in changes in satisfaction with the Court (Caldeira and Gibson 1992; Hibbing and Theiss-Morse 1995).

While the exact amount of increased exposure is unknown, even if this affects some citizens and has an impact on their support for the Court, the effect of these nominations should be examined. Increased knowledge of an institution leads to changes in trust and civic literacy because citizens are more aware of policy choices, the connection of the institution to their own beliefs, and characteristics of justices (Milner 2002). Controversial nominees are more visible and far more likely to impact changes in the support than the mere presence of judicial nominees. Therefore, I predict that the increase in visibility and dissemination of information during the nomination and confirmation process (particularly with a controversial nominee) will lead to changes in overall support for the Supreme Court.

Previous research on public opinion toward the Supreme Court has focused on durability (Caldeira 1977), trends in support[1] (Caldeira 1986; Durr, Martin, and Wolbrecht 2000), and the impact of the confirmation process on public opinion for a single justice or for a grouping of justices (Gimpel and Ringel 1995; Gimpel and Wolpert 1996; Gibson et al 2003). However, one of the more salient periods for the Supreme Court justices is the nomination and confirmation process that nominees go through to be appointed (Gimpel and Wolpert 1996). Yet, changes in support for the Court, in response to nominations and confirmations, have been significantly under-researched. I test changes in confidence in response to the nomination and confirmation process of new Supreme Court justices.

Other Branches

Previous work on nominations demonstrates the impact confirmations have on confidence and support for the Senate and the president (Cameron, Cover and Segal 1990; Overby et al. 1992; Lanier 1995; Moraski and Shipan 1999; Segal, Timpone and Howard 2000). Congressional approval research on confirmations finds that Senators are keenly aware of constituent preferences in regards to judicial nominees (especially Thomas) and that these preferences have influenced senators' subsequent reelections (Cameron, Cover and Segal 1990; Overby et al. 1992). Presidential approval research also indicates that the president's strategy influences the confirmation (Maraski and Shipan 1999) and that presidents can achieve policy goals by appointing members to the Supreme Court (Segal, Timpone and Howard 2000). Thus, the other two branches are keenly aware of the importance of nominations and the impact that confirmations can have on approval and policy goals. This work seemingly acknowledges that

---

[1] For the purposes of this analysis several terms are used interchangeably: support, confidence, and legitimacy (Caldeira and Gibson 1992)

there is a relationship between the approval and the confirmation process for the other two branches; thus, the natural extension of this work is to explore the impact of confirmations on the Supreme Court.

Explaining Support

There has been a decline in trust for all institutions and the American political system (Hibbing and Theiss-Morse 1995). While much of this distrust is focused on Congress and the presidency due to higher visibility, the Court is also a focus of this distrust. The decline in trust is a response to changes in society and a response to political activities (Norris 1999), such as Supreme Court nominations. Public negativity towards the political process (particularly Congress) is considered a result (in part) of public perception of governmental process (Hibbing and Theiss-Morse 1995). Nominations and confirmations of new justices are part of these processes; Supreme Court justices are not elected, and therefore the period of time when the public has access to information about these justices is during their nomination and confirmation. The public's response to these nominees decreases their support for the Court is response to the public's increased opportunity to evaluate nominees and the Court as a whole. Thus, looking at support in the nomination process is tantamount to looking at how the public views electoral candidates.

Media Coverage and the Nomination Process

The Supreme Court is not prominently covered in the media, and the judges themselves are not usually media seekers; hence, the knowledge surrounding the Supreme Court is somewhat limited without some precipitating event, such as a nomination. As a result, when the public makes determinations about the Court, it is usually based on ideological frameworks (Caldeira 1986; Hoekstra 2000). The nomination and confirmation of new justices is a salient issue in the media and one of the more public events of the Court (Slotnick and Segal 1998). For that reason, the nomination and confirmation process exposes beliefs towards government institutions, as well as the nominees, and leads to changes in public support for the Court as an institution. Thus, the study of these events and their impact on the Court is crucial to a more complete vision of the public and the Court. Therefore, it is expected that ideological frameworks will influence the positive or negative change in support.

There are substantial implications to changes in public support for the Court. While there is a certain durability of opinion based on socialization (Caldeira 1977), the changes in these opinions must come from some stimulus. The nomination process provides a stimulus for change in support levels because of the salience of nominations. With lifetime tenure for justices, public opinion

during the confirmation process is the primary opportunity that the public has to judge and to influence change (through support for or opposition to the confirmation) in the Court.

To adjudicate whether the public's support changes because of the nominee, it is important to look at whether the public pays attention to the nomination of justices. Then it is vital to evaluate the differences in attention across nominations. This attention and these differences are demonstrated in

Table 1
Attention to Media Coverage of Supreme Court Confirmation

Nominee	Very Closely	Fairly Closely	Not Too Closely	Not At All
Bork	14	40	32	14[2]
	15	51	25	8[3]
Souter	15	30	26	28[4]
	16	27	27	29[5]
Thomas	30	47		23[6]
	41	34	15	9[7]
Ginsburg	18	30	27	24[8]
Roberts	18	41	22	18[9]
	26	33	18	22[10]
Miers	22	33	21	23[11]
Alito	14	20	31	32[12]
	18	45	23	14[13]

Table 1 demonstrates the public's attentiveness to the Court from 1986-2006.[14] Evidently there is some variation in nominee salience. Table 1 shows

---

[2] ABC News/Washington Post, Oct 13-14, 1987: Sample 1,006
[3] ABC News/Washington Post, Sept. 17-23, 1987: sample 2,116
[4] Princeton Survey Research Associates, Oct 4-7, 1990: sample 1,213
[5] Princeton Survey Research Associates, Aug 9-12, 1990: sample 1,213
[6] Gallup Organization, Oct. 10-13, 1991: sample 1,000
[7] Times Mirror, Oct. 3-6, 1991: sample 719
[8] Times Mirror, July 29-Aug. 1, 1993: sample 1,203
[9] Gallup/CNN/USA Today, Aug. 28-30, 2005: sample 1,007
[10] Henry J. Kaiser Family Foundation, Oct. 4-9, 2005: sample 1,200
[11] Princeton Survey Research Associates, Oct. 6-10, 2005: sample 1,500
[12] Gallup/CNN/USA Today, Jan. 6-8, 2006: sample 1,003
[13] Pew Research Center for the People and Press, Dec. 7-11, 2005: sample 1,502
[14] Polls for attention to media coverage of Breyer and Kennedy nominations and confirmations are not available.

that controversial nominees get more attention from the public and that there is a trend towards amplified attention for recent nominees. This displays the role that media has had in creating a more salient nomination and confirmation process for more recent nominees. This attention to, and subsequent knowledge of, the Court should affect approval of the institution. Respondents who are more aware of the activities of the Court are more likely to apply this knowledge to their evaluations of the Court. When looking at nominees and the Supreme Court, it is not only important to investigate nominee impact but also the nominees' characteristics that influence this change, as there are connections between personal traits of nominees and support for the Court (Hetherington 2005).

Nominees and Confirmation Processes

The nomination and confirmation procedures of new Supreme Court justices increase media coverage and public attention to the Court and the activities of Congress (Gimple and Wolpert 1996). News coverage of Senate investigations and the questioning of nominees is increasingly popular, often providing direct coverage of testimony during the confirmation hearings. The confirmation process varies for each justice in length, controversy, and coverage; nonetheless, the media coverage of this process is one of the major sources of information for the public on the nominees' backgrounds, views, and credentials. Mass media is one of the primary links between the public and government, providing political information to the American people (Slotnick and Segal 1998). Thus, this coverage of an individual justice's nomination and confir-mation process should influence public opinion of the Court.

The Nominee

Recent literature has started to look at the public attitudes toward individual Supreme Court nominees (Gimpel and Ringel 1995; Gimpel and Wolpert 1996; Gerber 1996). This study of individual nominees demonstrates that there are characteristics about individual nominees that drive changes in public opinion. There has been little work on the impact of Supreme Court nominations on the public opinion of the Court as a whole. Numerous factors, such as the president and his approval rate, the composition of the Senate, and the nominee's qualification, complicate the nomination process (Caldeira 1986). Ideology can play a role; however, specific issues and perceived competence are often cited as explanations for supporting a nominee (Gimpel and Ringel 1996). This shows that the public makes judgments about the nominee, and while this is the outcome of many factors, it may influence public support for the Court as a

whole. Furthermore, it seems that the public considers more than just ideology when evaluating nominees to the Court.

Controversy

The impact of controversial nominees on public approval of the Court is different from other nominees. Gimpel and Ringel say that the more the public "knows about a [controversial] nominee, the more one is likely to disapprove of him or her" (1995: 146). Gimpel and Ringel's statement about individual controversial nominees may not apply to the Court as an aggregate. I posit that the confirmation process changes public support for the institution, as the public tends to only think about the Court when it is highlighted by something like a confirmation process, and since so much media coverage is focused on controversy, the public comes away feeling less positive about the Court as an institution. Consequently, the Court will experience changes in support with each nominee, and depending on the qualifications, characteristics and ideology of each nominee these will affect public opinion differently. When solely looking at controversial nominees, it is expected that there will be a negative shift in public opinion. This is a result of increased news coverage as well as the consequences of the potential addition to the Court.

Ideology

Adjudication of nominees has been measured in terms of ideology and the impact of this ideology on Court decisions and appointments and confirmations to the Court (Segal, Timpone and Howard 2000; Durr, Martin and Wolbrecht 2000, Segal and Spaeth 2002). Furthermore, nominees are judged in terms of their quality (Comiskey 2004; Epstein and Segal 2005) or greatness (Asch 1971; Bradley 1993). The next logical step in adjudicating nominees is to look at public opinion of these nominees, and several scholars have undertaken this task by looking at one or two justices (typically the more controversial nominations of Bork and Thomas) and the public approval of these justices (Gimpel and Ringel 1995; Gerber 1996; Caldeira and Smith 1996; Gimpel and Wolpert 1996). This study hopes to extend these evaluations of the nominees to approval levels of the Court as a whole.

Theory

Previous literature has offered explanations of public opinion of the Court based on decisions by, job approval of, and influences on Senators during the confirmation vote. Nevertheless, researchers have not fully explored the impact of the nomination process on the public support for the Court. Research on confidence in the Court and nominees leads to two theoretically relevant and

connected hypotheses (detailed below) regarding the relationship between Supreme Court approval and nominees to the Court. These hypotheses build on previous research and explain the differences in public approval over time.

Research demonstrates the impact of nominations on support for other levels of government, which implies that approval of the Supreme Court should change with new additions and the publicity surrounding their nominations to the Court. Media coverage of the Court at this time often reflects different decisions the Court has made over the years and speculates as to how the new nominee will vote on cases that come before him or her. As the public becomes more aware of the activities of the Court, there are several changes that could result from this awareness.

Hypothesis 1: Increased salience of nominations leads to decreased support for the Supreme Court.

The mere presence of nominees will decrease support for the Court because this is when the Court is highly visible and there is a similar decrease in support for other branches of government when they are more visible (Durr, Gilmour and Woldbrecht 1997; Durr, Martin, and Wolbrecht 2000). The Court in itself does not encourage attention through interviews or television coverage of news, and when Americans do see justices during confirmation hearings, it is fairly argumentative and there is usually conflict surrounding these proceedings—even for the most qualified and accepted nominees. This conflict during the nomination process will affect the public's support for the Court.

During confirmations, there will be more media coverage of the Court and elites will provide more opinion cues for citizens (Zaller 1992). Thus, public opinion will change because of exposure to and acceptance of the cues provided by other politicians, news broadcasters and opinion elites. This means that there will be increased attention to the confirmations that will result in a change in support for the Court. Regardless of ideological predispositions, citizens will become more knowledgeable about the Court through the confirmation process and we expect citizens will be unhappy with the potential change because there is always someone closer to their own ideological position than the nominee. However, not all nominees are going to be treated the same, and this is addressed in the next hypothesis.

Hypothesis 2: Controversial nominees decrease public support for the Court.

The public's approval of the Court is further shaken when confronted with controversial nominees. The characteristics of the nominee such as controversy or ideology will further decreases support for the Court because controversy and ideological change (in the Court) will incur more distrust in the

Court. This is one of the most public aspects of the Court and causes significant problems with the public's perception of it. This controversy is explored in the literature to find that controversial nominees have an impact on Senatorial votes and presidential approval (Gimpel and Ringel 1995; Gimpel and Wolpert 1996; Gerber 1996); thus, the extension to Court is the next logical step.

The effect of the decrease in the support for the Supreme Court will be stronger for controversial nominees. Controversial nominees exacerbate public attention due to longer confirmation hearings and increased conflict, which will have a larger effect on support for the Court. Controversial nominees receive higher levels of media attention and the public receives partisan cues from members of Congress about these nominees. Controversial nominees have negative effects on presidential approval; thus, it is expected that the effect on approval of the Court (particularly when the nominee is confirmed to the Court) will also be negative.

Methods
Measuring Support for the Court

Scholars who study public opinion of the Court often note that there are problems with measuring public support and must deal with survey questions that are administered infrequently and inconsistently and typically in response to some extraneous activity (Caldeira 1986; Durr, Martin and Wolbrecht 2000). Thus, it is essential to look at a combination of public opinion research over time to analyze changes in Court approval. Public opinion of the Supreme Court is difficult to measure because of the inconsistent use of public opinion tools and because the judicial branch is very different from the executive or legislative branches. Approval research has focused on different issues when looking at the different branches; when looking at Congress, much of the literature and public opinion surveys examine the approval of the institution itself. Support for Congress varies on different actions, scandals, and the ideological composition of the body and this leads to difficulty in the measurement of approval (Hibbing and Theiss-Morse 1995; Durr, Gilmour and Wolbrecht 1997). In determining presidential approval, most work revolves around individual presidents. There has been no definitive measure for looking at the institution of the presidency, as public opinion polls look at the White House, the executive branch, or the cabinet (Hibbing and Theiss-Morse 1995). Furthermore, public approval of the presidency is a growing industry, with scholars and public opinion research firms measuring the approval of the president frequently and in regards to numerous activities.

The research on approval of the different branches of government provides some insight into the complications of dealing with public opinion data

but also provides some insight into what may drive support for the Supreme Court. The Supreme Court is covered far less in the media than either the executive or the legislative branches; therefore, information on the Court comes from precipitating events, such as nominations or Court decisions. Outside of these events, there is little knowledge of the Supreme Court and many Americans rely on cues such as partisanship when asked to provide opinions on the Court (Caldeira 1986).

The hypotheses of this paper are tested by conducting time series regressions in which the dependent variable is support of the Supreme Court between 1971 and 2007. This measure is calculated by using Stimson's dynamic algorithm to create a quarterly approval level in the Supreme Court from 1971 (third quarter) to 2007 (second quarter) using polls from the Roper Center for Public Opinion Research archives. In this analysis, 18 different survey items administered nearly 150 times are used to produce a quarterly measure of Supreme Court support from the third quarter of 1971 to the second quarter of 2007. Stimson's algorithm allows us to connect several unconnected questions into predicted general confidence over time.

This methodology requires creating a single score for each poll from the respondents. These scores are derived from the following equation. For each question on confidence in the Supreme Court (as detailed in the appendix), the number of responses for each category (i.e. a great deal of confidence, some confidence, very little confidence) are multiplied by an ordinal assignment.

$$X= \frac{\text{Sum (Responses x Ordinal assignment)}}{\text{Number of Responses}}$$

For a question with three response categories, the respondents with the highest confidence is multiplied by three, the second highest by two, and the lowest confidence by one. When "No Confidence" was included as a category, the number of respondents was multiplied by zero to create a measure of no confidence and included in the number of responses in the denominator. These category results were summed and divided by the number of respondents. The resulting percent is the score for each poll. Figure 1 is a graphical representation of the dependent variable of approximately 150 polls administered between 1971 and 2007. There are several expected variations in the dependent variable for a variety of events, court cases, and several nominees. Table 2 provides the descriptive statistics for this variable.

Figure 1: Supreme Court Confidence Measure, 1971–2007
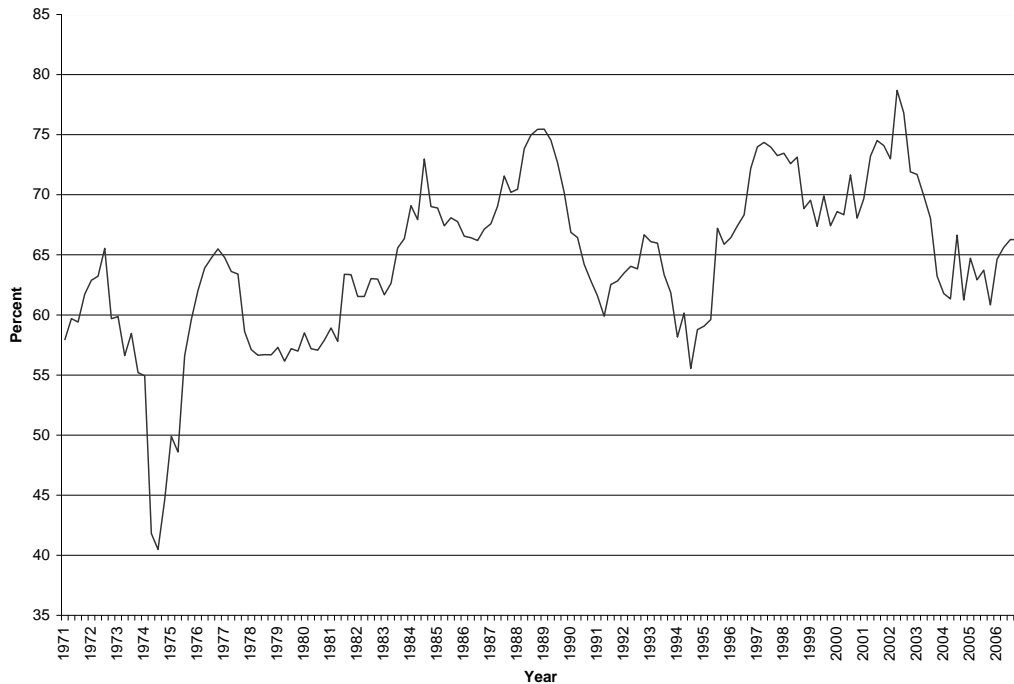
Table 2
Descriptive Statistics of Confidence Variable

Mean	64.49
Standard Deviation	6.66
Min	40.48
Max	78.68
Observatios	144

Confidence levels in the Supreme Court are used in this analysis because they tap into short-term evaluations of the Court without destroying previous longer-term evaluations (Gibson, Caldeira and Spence 2003). This project does not intend to look at institutional legitimacy but rather at overall support for the Supreme Court by analyzing confidence of the American public. In using confidence in instead of approval of the Court, the number of survey items is limited for this measure and taps into a narrower area of opinion change. However, expanding the measure to include approval of the Court is a less precise measurement of the public's *belief* in the Court. Confidence measures engage larger satisfaction issues than a general measure of approval would

(Gibson, Caldeira and Spence 2003), and these are important considerations when evaluating the impact of nominations on the Court.

Table 3
Supreme Court Nominations and Confirmations Dates

Justice	Nomination Date	Confirmation Date
Powell	October 22, 1971	December 6, 1971
Rehnquist	October 22, 1971	December 10, 1971
Stevens	November 28, 1975	December 17, 1975
O'Connor	August 19, 1981	September 21, 1981
Rehnquist*	June 20, 1986	September 17, 1986
Scalia	June 24, 1986	September 17, 1986
Bork	July 1, 1987	October 23, 1987[†]
Kennedy	November 30, 1987	February 3, 1988
Souter	July 25, 1990	October 2, 1990
Thomas	July 8, 1991	October 15, 1991
Ginsberg	June 14, 1993	August 3, 1993
Breyer	May 17, 1994	July 29, 1994
Roberts	July 29, 2004	September 6, 2004[‡]
Roberts*	September 6, 2005	September 29, 2005
Miers	October 7, 2005	October 28, 2004[‡]
Alito	November 10, 2004	January 31, 2006

*Denotes Chief appointment
[†]Not Confirmed
[‡]Withdrawn

The dataset is more expansive than previous aggregate studies (Caldiera 1986; Mondak and Smithey 1997; Durr, Martin, and Wolbrecht 2000) and builds on studies of individual and groups of justices (Gimpel and Wolpert 1995; Caldeira and Smith 1996). This dataset includes 16 nominees to the Court over a period of 36 years as detailed in Table 3. This is an excellent cross-section of the judiciary because of the wide variety of characteristics of nominees such as controversial, unconfirmed, Chief, withdrawn, and female nominees.

The key independent variable is *nominee*, which indicates whether there is currently a nominee to the Supreme Court. This analysis also includes independent variables accounting for other reasons for changes in confidence in the Court. An additional key independent variable is a binary variable for controversial nominees. The *controversial nominees* for this analysis between 1971 and 2007 include Meirs, Thomas, and Bork. These nominees are defined as controversial by evaluating ABA qualification scores, rejections, and

withdrawals. Thomas and Miers had the lowest perceived qualification scores in this time period (Epstein et al 2007). Bork was the only nominee not to be confirmed whose nomination went to a vote during this study. Bork and Thomas also received non-unanimous qualification votes by the ABA ratings. While Meirs withdrew her nomination prior to confirmation hearings, the media coverage of her nomination demonstrates how salient her nomination was with the public. Rehnquist's Chief Justice nomination is not included because of the difference in judicial rank and the fact that he was an already a seated justice.[15]

Independent variables also include ideological leanings of individual justices (*Segal/Cover Scores*) of the Court as a whole and the difference between the previous justice and the new justice's Segal/Cover Score. The liberalness and conservativeness of the judicial nominee is calculated using the Segal/Cover scores (Segal and Cover 1989; Segal et al 1995). Additionally, a *qualifications* variable represents how qualified the media believed an individual nominee was before he or she was confirmed to the bench. The Segal/Cover scores of the nominee's perceived ideology and perceived qualifications were derived from content analysis of editorials in the *New York Times, Washington Post, Chicago Tribune,* and *Los Angeles Times* (Segal and Cover 1989; Epstein and Segal 2005).[16] These variables are included in the analysis because not only are these important measures of ideology, but also because this uses information sources that are available to the public through the media and affect public opinions of the Court. Additional variables to look at are ideology and its impact on confidence during the confirmation period, referred henceforth as *Court ideology,* (the sum of Segal/Cover scores for the entire Court) and the *change in ideology* based on change of Court ideology with the addition of this new nominee.

Stimson's (1999) public mood measure depicts national political mood because partisan loyalties can influence support for the Court (Kessell 1966: 179). Stimson has developed these measures on a quarterly basis during the period of 1952 to 2004 from policy preferences of the public in the same manner as the confidence measure used here. Additional control variables include Court

---

[15] I do include a variable representing Chief Justices in the second part of this analysis and being nominated for Chief does not have a significant impact on confidence in the Court. When creating a dummy variable for Rhenquist's Chief nomination – it does not impact the value or significance of the other variables and is not significant itself. Many might also suggest that Alito would be a controversial nominee; however, Meirs nomination was far more controversial and because of the proximity of the two nominations, Alito is far less controversial than Meirs and thus, his nomination is negated in the dataset.

[16] Nominee ideology: 1 = most liberal, -1 = most conservative; Nominee qualifications: 1= most qualified, 0 = least qualified.

decisions and political events (such as *Watergate* and *Bush v. Gore*) because of previous findings that these influence general confidence in the Court (Caldeira 1986; Nicholson and Howard 2003). Supplementary variables such as *presidential year* and *divided government* are included to account for different political contexts that may change confidence in institutions.

Another fruitful area of research in terms of the public's support for the Court comes from the discussion of specific case decisions and their impact on public opinion (Hoekstra and Segal 1996; Hoekstra 2000), and several salient Court cases are included in the model. Supreme Court decisions affect the public's support for the Supreme Court. The salience of these issues changes public opinion much like a nomination can change opinions. Thus, it can be suggested that while there is often little attention paid to the Court, the activities of the Court do influence public opinions on issues as well as the on the Court itself.

The qualifications variable reports at the perception of qualifications of nominees. These, like the Segal/Cover ideological scores, are derived from content analysis of editorials (Epstein et al 2007a). The use of these editorials for these two measurements is ideal for this study because they are available to the public as well. Thus, the news coverage in the papers and the editorial content reach the public and are measures of the candidate that are standard and are developed out of publicly accessed information.

As indicated in the first section of this paper, when looking at nominees there is a relationship between branches because of the role that each branch has in the process. Thus there are several variables that need to be included to acknowledge this relationship, such as whether there is divided government and whether the nomination is in a presidential year. Divided government affects the type of nominee as well as the success of a nomination process. Further, support for the Court like the other branches may be affected by the gridlock or moderation of policies. Presidents are acutely aware of how nominations can affect campaigns and there is increased attention to all branches of government (even non-elected ones) during this period.

When looking at Supreme Court confidence levels, evaluations of the Court (especially during nomination periods) are partially a function of the presidential approval ratings (Caldeira and Smith 1996). Congressional approval measures are included in the analysis to determine the influence Congressional approval levels have on confidence levels for the Court, as demonstrated in previous literature (Durr, Martin, and Wolbrecht 2000).[17] The measures of

---

[17] Mark Ramirez of Texas A&M University has expanded the Durr, Gilmour and Wolbrecht (1997) data set to 2005 and his expanded version of the data is used in this analysis. Consult

presidential and congressional approval used in this paper come from previous analysis using public opinion questions and estimate quarterly values using the Stimson algorithm (1999).   Figure 2 is the graphical representation of the three branches' approval ratings.

Figure 2
Public Support for All Three Branches
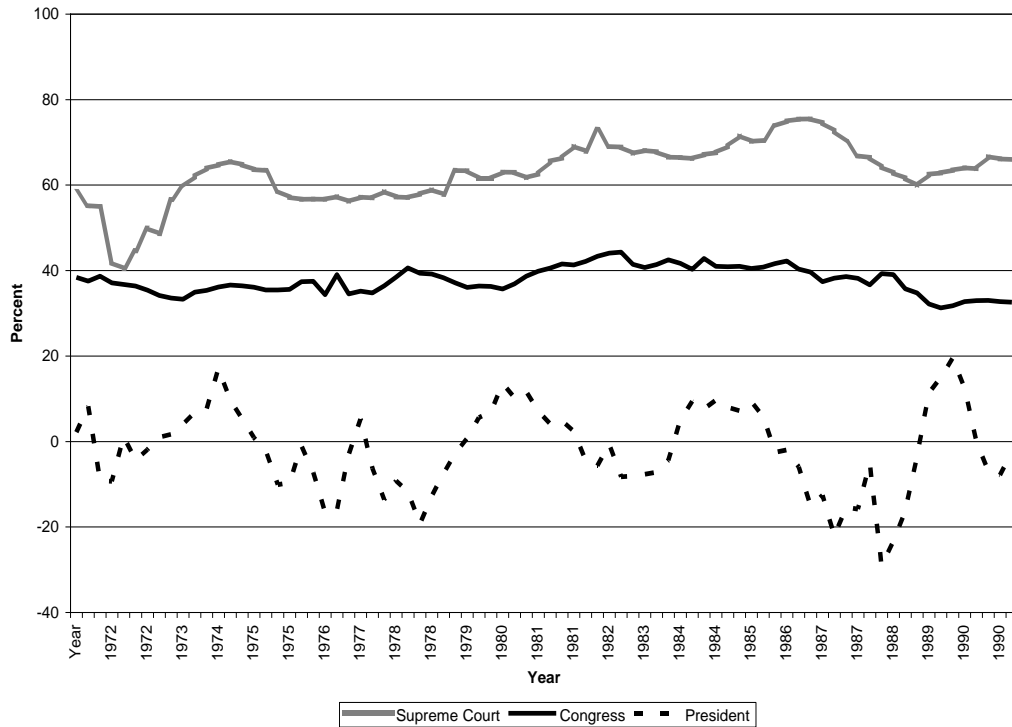
Analysis

Table 4 presents the general influences in confidence levels of the Supreme Court.   These models are time series regressions including key independent variables (nominee, controversial nominee, and ideology) as well as congressional and presidential approval levels, salient Court decisions, political events, and public mood.   The findings indicate that consistent with the expectations of this paper, public opinion of the other government branches has a significant impact on confidence in the Supreme Court.

Durr, Gilmour and Wolbrecht (1997) for methodological details.   The limitation of the date on approval of other branches, necessarily limits the analysis of this paper, in order to account for this, different models are included to examine this relationship.

Table 4
Time Series Regression of Supreme Court Confidence Levels

Independent Variables	Supreme Court Confidence	
	Model 1	Model 2[18]
Confidence $_{(t-1)}$	-.499***	-.457***
	(.072)	(.092)
Nominee	-.238	3.12***
	(.559)	(.751)
Controversial Nominees	-5.20***	-2.93**
	(1.51)	(.927)
Congressional Approval	1.10***	1.03***
	(.051)	(.089)
Presidential Approval		.123***
		(.028)
Presidential Year	-.249	.612
	(.322)	(.539)
Watergate	-.162	1.61
	(.698)	(2.91)
Roe v. Wade	1.01	—
	(2.16)	
Miller v. California	-1.38	—
	(.936)	
Bakke	1.48	.986
	(10.05)	(4.12)
Planned Parenthood v. Casey	-1.60	-2.63
	(7.20)	(2161213)
Texas v. Johnson	16.20*	20.05**
	(8.16)	(7.66)
Bush v. Gore	-8.09	—
	(11.13)	
Mean Court Ideology	-30.23***	-24.92**
	(1.18)	(1.86)
Public Mood	.232***	.173
	(.054)	(.061)
Divided Government	.928**	-.810
	(.306)	(.782)
Constant	1.18	8.48
	(3.30)	(4.71)
N	133	80
Wald Chi^2	2242.25***	339.05**
Durbin-Watson	.592	.269
First-Order Arch	1.41***	.804*

*p<.05   **p<.01   ***p<.001   Robust Standard Errors are included in the brackets

---

[18] Model 2 only contains data from 1974 to 1993 because of the availability of the Presidential approval measure, excluding more recent nominees. Three salient Supreme Court decisions are dropped from Model 2 due to colinearity.

Many of the politically salient events and important court cases are not significant, which is in direct contrast to previous findings (Caldeira 1986).[19] However, this may be explained by the difference in between 1971 and 2007. Models 1 and 2 in Table 4 cover different time spans. Model 2 contains data from 1974 to 1993 because of the availability of the presidential approval measure (Durr, Gilmour and Wolbrecht 1997), whereas Model 1 includes all data from 1971 to 2007.

The differences in these two models are most evident on the key independent variable (nominee), which represents the presence of a nominee and the ensuing confirmation process. In Model 2, there is not only a change in direction but also a change in significance for this variable. Model 2 is positive and significant, and Model 1 is negative but insignificant. The differences between these models can be explained by the addition of nominees and changes in nominations post-1993.   Table 4 also provides a look at controversial nominees; in both models, this variable is negative and significant, confirming the findings of Gimpel and Ringel (1996) that knowledge of a controversial nominee leads to decreased support.

The significance of Model 2's nomination variable and the significance of controversial nominees indicate further variations among nominees that need to be investigated. Because of the inconsistencies of the findings for the nomination variable, the first hypothesis cannot be confirmed. However, controversial nominees are consistently significant, indicating that controversial nominees have a negative impact on confidence in the Court, confirming the second hypothesis. It can lead to the development of a third hypothesis.

Hypothesis 3: Ideological change in the Court will decrease support for the Court.

Previous studies have found that ideology is an important indicator of whether the public supports nominees (Gimpel and Ringel 1995; Gimpel and Wolpert 1996; Gerber 1996; Caldeira and Smith 1996). Ideology is an easy way for the public to evaluate the Court since this is one of the more evident perspectives of justices. Regardless of a personal ideology or the justices

---

[19] This paper attempts to explain changes in public opinion by examining the impact of the nomination and confirmation process on confidence in the Supreme Court. While this paper has focused primarily on public opinion surveys and the public during these confirmation periods it is important to note that there are other considerations for public opinion changes in the Supreme Court – such as case outcomes. This paper does not intend to minimize the impact of Supreme Court decisions and includes a very random sample of major decisions (recognizing that not every important decision was included); rather this paper seeks to add to the explanations of changes in confidence in the Supreme Court because of the nomination and confirmation process.

ideology, ideological change in the Court will result in a decrease in satisfaction with the Court because the public will not be completely satisfied with the ideological composition. Conservatives want more conservative justices, and liberals want more liberal justices, so ideological change, even when consistent with ideology of the respondent, will have a negative impact on approval of the Court because it will highlight the ideological composition of the Court. Therefore, by looking at characteristics such as the ideology of the justice and the Court, there should be some decrease in support.

Additional independent variables are needed to fully explore the individual characteristics of nominees, these include *female* for female nominees, *chief* for Chief Justice nominees, and *joint* when there is more than one nominee going through the confirmation period at the same time. Female variables are included to account for the inclusion of women to the Court, a new phenomena included in this data set and while O'Connor and Ginsberg were very qualified and needed to balance genders on the Court, it is important to include these as a variable to determine the impact that future female nominees may have on the Court. Additionally, chief and joint are included because these may be nominations that are more salient and thus, a higher expectation that these may change public confidence in the Court. Another indicator that may lead to increased public opinion is the percentage of Senators who support the candidate in their confirmation vote. This variable is used as a proxy for congressional support of the candidate. While the vote happens at the end of the confirmation period, it is still evidence of congressional opinion of the nominee. This percentage comes from the Epstein et al (2007b) U.S. Supreme Court Justices Database. The number of hearing days can provide insight into the controversy over the judicial candidate in Congress. The length of these confirmation hearings indicates not only the judicial character but also the number of days that the public is exposed to hearings about the Supreme Court nominee (Epstein et al 2007b). Further, a *post-Thomas* variable is included to determine if the unusual amount of media coverage and tension surrounding the Thomas nomination has contributed to confidence in the Court when new nominees are introduced.

Court ideology has a consistent and negative impact on confidence in the Court, indicating the ideological composition of the Court negatively impacts confidence. This ideological impact requires a closer look to investigate if it is the change in the Court or the ideology in the Court that makes a difference in the confidence level. Table 5 looks at characteristics of individual nominees and their impact on public confidence during the nomination period. The confidence level remains as the dependent variable.

Table 5
Time Series Regression of Confidence Levels and Nominee Characteristics

Independent Variables	Model 3	Standard Errors
Confidence $_{(t-1)}$	-1.42**	.327
Joint	8.22	6.06
Chief	-2.23	4.85
Female	-5.56	3.38
Segal/Cover	1.40	4.65
Difference in Segal Cover	-4.16	3.90
Court Ideology	-45.19*	15.78
Change in Court ideology	50.40*	15.10
Qualifications	1.18	6.16
Senate Support	.164	.154
Days of Hearings	.357	.613
Post Thomas	-8.84	4.58
Constant	38.24*	12.48
N	18	
R^2	.94**	
Durbin-Watson	1.57	

*p<.05   **p<.01
Robust Standard Errors

The time-series regression results displayed in Table 5 show that an important consideration of confidence levels is the ideology of the Court. Two significant variables of interest are *court ideology* that has a negative effect on confidence levels in the Court and the *change in court ideology* that increases confidence levels for the Supreme Court. Initially this is a puzzling finding. However, there are two explanations for the results. First, despite the democratic nature of confirmation hearings, much of the discourse has become ideological in nature, so it is natural that the public uses ideology to evaluate new nominees. Second, this supports previous findings that ideology does matter in determining support for the Court (Caldeira 1986; Gimpel and Wolpert 1996; Durr, Martin and Wolbrecht 2000) and Court ideology has a negative impact on confidence in the Court.

As individuals, all the justices (with the exception of Ginsburg) have a negative Segal/Cover score, and when looking at the changes in the ideology of the Court, many of these justices are more liberal than their predecessors. Consequently, while individual nominees may have a negative impact on Court confidence, the change that is made in the composition of the Court has a positive impact on confidence, meaning that the public has more confidence in

the Court when new nominees are more liberal than their predecessors. Therefore, individual characteristics of nominees as well as changes in the Court as a whole are responsible for changes in the confidence rather than the mere presence of a nominee.

The inclusion of female justices in this analysis does not have a positive impact on confidence in the Court. This is explained as a further function of ideology, and since the two confirmed female justices are of significantly different ideologies, the differences are addressed through the ideological variables. It is evident from Table 5 that more research needs to be done on the impact of individual characteristics of nominees on confidence levels, but the initial findings show that ideology can help explain impact of nominations and confirmations on confidence in the Supreme Court (Caldeira 1986; Gimpel and Wolpert 1996; Durr, Martin and Wolbrecht 2000).

Discussion and Conclusion

Several conclusions can be drawn from this analysis. First, the presence of a nominee does not result in a consistent negative impact on confidence in the Court, which means that there are some underlying characteristics of nominees that can drive support for the Court. Second, controversial nominees have a negative impact on confidence in the Court, supporting the second hypothesis and demonstrating that care and consideration must be taken when selecting a new nominee. This is important not only because of the impact that these nominees can have on the Court's support (despite only one of them being confirmed to the Court), but also because of its impact on the executive and legislative branches and their role in the nomination and confirmation process. Additionally, this paper evaluates the impact of ideology on confidence in the Court, finding that the liberal change in the Court over the past 36 years has lead to an increase in satisfaction—demonstrating ideological preferences and a consistency with public mood over time. This sends an important message to the executive branch, as its choice of nominee not only affects popularity ratings but also impacts the public support for the Supreme Court. Further, it demonstrates the importance of judicial characteristics, such as ideology and controversy, and how these influence the approval of the judicial branch of government.

On first glance, the results may not seem surprising. When a branch of our government gets more attention, of course we expect there to be some impact on approval ratings. However, this paper provides some insight into what drives those changes in confidence levels. When we look at the impact of controversial nominees on approval levels, these three nominees have had a substantial impact on support for the Court. This means that political leaders need to acknowledge the desired or undesired impact that their nominees have on approval levels;

when Justices are appointed there are several consequences and we need to weigh the positive and negative influences of each nominee.   Further, the finding public support goes up when new nominees are more liberal than their predecessors is rather surprising, especially as this is not correlated with public mood.   This finding illustrates that ideology has a larger effect on approval ratings than the literature had previously acknowledged.   These contributions create a deeper understanding and approach to the public's opinion of the Court and illustrates that nominations have far deeper implications and effects on the support for government branches and this deserves further research.

Bibliography

Caldeira, Gregory. 1986. "Neither the Purse nor the Sword: Dynamics of Public Confidence in the Court" American Political Science Review 80(4): 1209-1125.

Caldeira, Gregory A. 1977. "Children's Images of the Supreme Court: A Preliminary Mapping." Law and Society Review 11(3): 851-871.

Caldeira, Gregory A., and James L. Gibson. 1992. "The Etiology of Public Support for the Supreme Court." American Journal of Political Science 36(3):635-664.

Cameron, Charles, Albert D. Cover and Jeffrey A. Segal. 1990. "Senate Voting on Supreme Court Nominees: A Neoinstitutional Measure" *American Political Science Review* 84(2): 525-534.

Comiskey, Michael. 2004. *Seeking Justices: the Judging of Supreme Court nominees.* Lawrence, Kan.: University Press of Kansas.

Durr, Robert H., Andrew D. Martin, and Christina Wolbrecht. 2000. "Ideological Divergence and Public Support for the Supreme Court" *American Journal of Political Science* 44(4): 768-776.

Durr, Robert H., John B. Gilmour and Christina Wolbrecht. 1997. "Explaining Congressional Approval" *American Journal of Political Science* 41(1): 175-207.

Epstein, Lee, Jeffrey A. Segal, Harold J. Spaeth and Thomas G. Walker. 2007a. *The Supreme Court Compendium: Data, Decisions & Developments.* 4th ed. Congressional Quarterly.

Epstein, Lee, Thomas G. Walker, Nancy Staudt, Scott Hendrickson, and Jason Roberts.(2007b). "The U.S. Supreme Court Justices Database." Chicago, IL: Northwestern University School of Law, March 8. At: http://epstein.law.northwestern.edu/research/justices data.html

Flemming, Roy B., John Bohte and B. Dan Wood. 1997. "One Voice among Many: The Supreme Court's Influence on Attentiveness to Issues in the United States, 1947-1992" *American Journal of Political Science* 41(4): 1224-1250.

Frankovic, Kathleen and Joyce Gelb. 1992. "Public Opinion and the Thomas Nomination" *PS: Political Science and Politics* 25(3): 481-484.

George, Tracey E. and Lee Epstein. 1992. "On the Nature of Supreme Court Decision Making" *American Political Science Review* 86: 323-37.

Gibson, James L., Gregory A. Caldeira, and Lester Kenyatta Spence. 2003. "Measuring Attitudes toward the United States Supreme Court" *American Journal of Political Science* 47(2): 354-367.

Gimpel, James G. and Robin M. Wolpert. 1996. "Opinion-Holding and Public Attitudes toward Controversial Supreme Court Nominees" *Political Research Quarterly* 49(1): 163-176.

Gimpel, James G. and Lewis S. Ringel. 1995. "Understanding Court Nominee Evaluation and Approval: Mass Opinion in the Bork and Thomas Cases" *Political Behavior* 17(2), 135-153.

Grosskopf, Anke, and Jeffery J. Mondak. 1998. "Do Attitudes Toward Specific Supreme Court Decisions Matter? The Impact of Webster and Texas v. Johnson on Public Confidence in the Supreme Court" *Political Research Quarterly* 51(3): 633-654.

Hetherington, Marc J. 2005. *Why Trust Matters: Declining Political Trust and the Demise of American Liberalism.* Princeton, NJ: Princeton University Press.

Hibbing, John R. and Elizabeth Theiss-Morse. 1995. *Congress As a Public Enemy: Public Attitudes toward American Political Institutions.* New York: Cambridge University Press.

Hoekstra, Valerie J. 2000. "The Supreme Court and Local Public Opinion" *American Political Science Review* 94(1): 89-99.

Hoekstra, Valerie J. and Jeffrey A. Segal. 1996. "The Shepherding of Local Public Opinion: The Supreme Court and Lamb's Chapel" *Journal of Politics* 58(4): 1079-1102.

Kessel, John H. 1966. "Public Perception of the Supreme Court" *Midwest Journal of Political Science* 10(2): 167-191.

Lanier, Drew Noble. 1995. "The Supreme Court Nomination Process: Logit and Scobit Analyses in Two Neoinstitutional Contexts" Presented at the annual meeting of the Southern Political Science Association, Tampa, Florida, November 1-4.

Mansbridge, Jane, and Katherine Tate. 1992. "Race Trumps Gender: The Thomas Nomination and the Black Community" *PS: Political Science and Politics* 25: 488-91.

Milner, Henry. 2002. *Civic Literacy: How Informed Citizens make Democracy Work.* Hanover: University Press of New England.

Mondak, Jeffery J., and Shannon Ishiyama Smithey. 1997. "The Dynamics of Public Support for the Supreme Court." *Journal of Politics* 59(4): 1114-42.

Nicholson, Stephen P. and Robert M. Howard. 2003. "Framing Support for the Supreme Court in the Aftermath of Bush v. Gore" *Journal of Politics* 65(3): 676-695.

Norris, Pippa. 1999. *Critical Citizens: Global Support for Democratic Government.* Oxford: Oxford University Press.

Overby, L. Marvin, Beth M. Henschen, Michael H. Walsh and Julie Strauss. 1992. "Courting Constituents? An Analysis of the Senate Confirmation Vote of Justice Clarence Thomas" *American Political Science Review* 89(4): 997-1003.

Segal, Jeffery A., Lee Epstein, Charles Cameron, and Harold Spaeth. 2002. "Ideological Values and the Votes of U.S Supreme Court Justices Revisited" *Journal of Politics* 57(3): 812-23.

Segal, Jeffery A., Richard J. Timpone and Robert Howard. 2000. "Buyer Beware? Presidential Success through Supreme Court Appointments" *Political Research Quarterly*, Vol. 53, No. 3, 557-573.

Segal, Jeffery A. and Harold Spaeth. 1993. *The Supreme Court and the Attitudinal Model.* New York: Cambridge University Press.

Segal, Jeffery A. and Albert D. Cover. 1989. "Ideological Values and the Votes of the U.S. Supreme Court Justices" *The American Political Science Review* 83(2): 557- 565.

Slotnick, Elliot E. and Jennifer A. Segal. 1998. *The Television News and the Supreme Court: All the News that's Fit to Air?* New York: Cambridge University Press.

Sinclair, Barbara. 1992. "Senate Process, Congressional Politics, and the Thomas Nomination" *PS: Political Science and Politics* 25: 477-80.

Stimson, James A. 1999. *Public Opinion in America: Moods, Cycles, and Swings, Updated Data.*
    2nd Ed. Boulder: Westview Press.

Should They Stay or Should They Go?
Comparing Modern Clashes over Secession

John Howell
Southern Utah University

Luke Perry
Utica College

This research examines modern secessionist movements in two states that differ geographically, culturally, and ideologically, Texas and Vermont. The following question was addressed: How similar are the understandings and approaches to secession undertaken in Texas and Vermont? The thesis presented is that contrary to conventional thinking that a red state and a blue state would have little ideological cohesion, several similarities exist in how both Texas and Vermont conceptualize and articulate advocacy for secession. To measure this hypothesis two case studies were performed and then compared. The article is organized into five main sections: 1) discussion of secession in America; 2) review of relevant scholarship; 3) case study of secession in Texas; 4) case study of secession in Vermont; and 5) a discussion and suggestions for future scholarship.

Secession from an American Perspective

With youth comes inexperience and uncertainty. That is true for human beings, and it is true for countries. Such was the case with America. The new country took on the responsibility of self-governance after General Washington's defeat of Lord Cornwallis at the Battle of Yorktown in 1781 and the 1783 Treaty of Paris that officially ended the American Revolution. With the memory of King George III so fresh in the nation's collective memory, it was understandable that America's first national government was a confederation. The Articles of Confederation granted sovereignty mostly to states. The national government had narrowly defined authority. States guarded their independence jealousy. According to Article II of the Articles, every state retained its sovereignty, freedom, and independence. Shays' Rebellion in 1786 provided compelling evidence that a confederation did not provide a sufficiently strong federal government for a nation as large as the United States. American leaders agreed to meet in Philadelphia in 1787 to discuss revisions to the Articles of Confederation. This meeting quickly turned into a more extensive overhaul of the national government.

John Howell is an Assistant Professor of Political Science at Southern Utah University. He holds a master's degree from the Lyndon B. Johnson School of Public Affairs and a Ph.D. from Louisiana State University. He teaches courses in political science and in the MPA program at Southern Utah University. His research interests include constitutional issues, environmental policy, immigration policy, and political participation.

Luke Perry, Ph.D., is Associate Professor of Government at Utica College in New York.

When the Constitution was signed in 1787, a good deal had already been decided. Benjamin Franklin told a woman who asked what form of government had been achieved, "A republic, madam, if you can keep it." There was general agreement on the republican form of government instead of the democratic form that had been disparaged by the ancient Greeks as little more than rule by the poor. (Aristotle, The Politics) There was general agreement on increasing the authority of the national government beyond what had been held by the Articles of Confederation, with the new government being a federation instead of a confederation. There was also agreement on James Madison's idea, inspired by the French political philosopher Charles-Louis de Secondat Montesquieu, for a government with three branches, each with separate and conjoining powers. The Founders understood that much had been left undecided, and that it would be up to future leaders of the state and national governments to work out those problems.

The question of secession became a central cause of the Civil War. The Constitution does not directly address whether admission to the Union was permanent. Article IV, Section 3, addresses the issue of admission of new states, guaranteeing that "no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of any other State." States are also guaranteed a republican form of government. Divergent opinions on the secession issue arose soon after the Constitution was ratified, falling mainly along geographic and slavery lines. Northern states saw the Union as permanent and inviolable while southern states reserved the right to secede. South Carolina, led by nullification advocate John C. Calhoun, threatened to secede in 1832 over the contentious issue of tariffs A notable exception to the geographic focus of secessionist sentiment was New England. According to Donald Livingston (2011), a modern advocate of Vermont secession, "Leaders in New England seriously considered secession in 1804 over the Louisiana Purchase; in 1808 over Jefferson's Embargo of their trade; and most seriously in 1814, over issues surrounding 'Mr. Madison's War of 1812.'" Representatives from each New England state met at what became known as the Hartford Convention. While stopping short of calling for secession, the Hartford Convention did result in seven suggested constitutional amendments that would have bolstered states' rights at the expense of national government authority. (Amendments to the Constitution Proposed by the Hartford Convention, 2008)

Many Americans assume that the question of secession was definitively settled with the Union's victory in the Civil War. Others are not so certain, citing the lack of constitutional language on the subject. The question of whether secession is a state right becomes an open one if the subject is viewed as a matter of constitutional interpretation. America has seen numerous changes in how the

Constitution is interpreted. Examples include the rejection of the Plessy v. Ferguson (1896) doctrine of "separate but equal" by Brown v. Board of Education (1954) and the creation of the basis for a right to privacy in Griswold v. Connecticut (1965). Some states, such as Utah, have a state constitutional provision that prohibits secession. Accepting the concept of the Constitution as a "living document," laws and constitutional interpretations have and will continue to change. Based on these assertions, secession is highly unlikely, but not out of the realm of possibility.

American secession scholarship has primarily been conducted from a historical perspective and has typically focused on the experiences of individual states (Moore 1986). These studies are most interested in Southern states, such as West Virginia (Link 2009, MacKenzie 2010, Zimring 2009). National studies have typically focused on federalism (Anderson 2004, Belz 1996), in particular, the impact of the Civil War on related political thought and the impact of the institutional setting in which perceptions of secession as a viable response to grievances are developed. This research employed a comparative approach to understanding secession within the American political context. A comparison of two very different states, Texas and Vermont, was conducted to better understand similarities and differences in how secession is understood and approached by advocates. Previous studies have neglected to examine contemporary ideological platforms for advocating secession among various American states.

Texas and Vermont were once independent countries. Texas is politically conservative, whereas Vermont is politically liberal. Interestingly, both have active secessionist movements, which provides a unique opportunity to examine and compare arguments for secession from two very different political subcultures. A content analysis of statements and literature provided on the websites of all secessionist organizations in Texas and Vermont with a viral presence was conducted to understand the ideological platforms of secessionists in each state. Focus on the web context is pertinent and insightful to understanding modern secessionist movements because of the timeliness of the information provided and the deliberate use of websites to articulate secessionist positions and connect with potential supporters. The following sections will provide case studies of Texas and Vermont, followed by a discussion of the similarities and differences in the ideological perspectives and approaches to secession undertaken in each state.

Methodology

The methodology employed in this research is a comparison of two related case studies. Many states with active secessionist movements were

research and considered for inclusion. Texas and Vermont were chosen due to their past histories as independent nations, the extensive volume of information available from secessionist organizations operating in those states, and their apparent extreme differences in culture, population, and ideology.

Information was gathered, mostly from internet sources, from secessionist organizations in Texas and Vermont. In both states, numerous organizations exist that promote secession. Several were chosen from each state due to the available information on their activities, goals, and methods. Efforts were made to contact officials within the movements, with little success. The legal rationale and motives for wanting to secede were then compared and contrasted. Similarities and differences in approaches and motives are listed and discussed in the final portion of the research.

The Lone Star State's Case

Texas declared its independence from Mexico on March 2, 1836, but similar to the United States, was not truly independent until the victorious end of a war with the former mother country. The Texas Revolution ended with the Battle of San Jacinto on April 21, 1836. The Republic of Texas existed as an independent country from 1836 until American annexation on December 29, 1845, when it became the 28th state. There are four prominent secession organizations in Texas today: 1) The Republic of Texas; 2) The United Republic of Texas; 3) New Revolution Now; and 4) Texas Nationalist Movement.

Texas Nationalist/The Republic of Texas

Texas Nationalist, formerly named "The Republic of Texas," (ROT) is a prominent secessionist organization that advocates Texas secession. The organization also claims that Texas is already independent, citing illegalities in the 1845 annexation to the United States. Proponents raise several questions. First, there is the question of whether Texas President Anson Jones had the authority to call a ratifying convention and whether Texas could join the United States without the approval of all three branches of Texan government. Second, there is the question of the makeup of the ratifying convention, which critics claim was composed of only thirteen delegates from Texas and forty-four from the United States. Third, there is the contention that annexation can only come through a treaty, which requires a two-thirds majority of the national Senate, and that the annexation of Texas was undertaken through a joint resolution that required only a simple majority in both houses.

ROT has the distinction of coming to armed conflict against the State of Texas. In April 1997, after a lengthy battle over efforts to seize ROT internet records, members took two hostages in Fort Davis, Texas. The hostages were

seized after Texas officials arrested two members of ROT. Jo Ann Turner of Austin and Robert Scheidt of Fort Davis were arrested after ROT flooded state courts with thousands of false liens against private citizens and Governor George W. Bush. On April 19, ROT leader Richard McLaren issued a declaration of war against the United States. McLaren's declaration included a demand for $92 trillion in war reparations from the United States based upon the illegal 1845 annexation. McLaren was eventually arrested by the Texas Rangers after releasing the hostages and participating in a military-style ceremony in which they laid down their arms (Verhover 1997). McLaren was convicted and sentenced to ninety-nine years in prison for his role in the kidnappings of hostages and his associate, Robert Otto, received a fifty year sentence (Montes 1997).

McLaren considers himself a political prisoner, refers to himself as "Hostage No. 802782," and continues to insist that Texas is a sovereign nation. "We didn't start it," McLaren said of the weekend standoff that ended May 3, 1997. "We're just the keepers of the 1836 constitution." McLaren believes a two-page "cease-fire" agreement struck with Texas Rangers to end the siege duped authorities into opening the door for Texas independence. "It's a done deal. It's over with," said McLaren, who is scheduled for release from a Texas state prison in 2090 (Babineck 2007).

United Republic of Texas

United Republic of Texas (URT), an offshoot of the aforementioned Texas Nationalist, has sought to unify peaceful factions within the movement. The organization formed in 2006 with a founding convention, a tradition that became annual in 2007. The goal of URT is "to rediscover, reclaim, and restore the free country which Texas was before several events occurred which were illegal or otherwise invalid (such as the 1845 annexation and the 1865 conquest and occupation) and caused the Republic of Texas to be 'covered up' by the governments which call themselves the STATE OF TEXAS and the UNITED STATES and which pretend to be Texas and America while they have abandoned not only Texas's and America's principles but also their Constitutions and laws and have illegally taken over the country." URT asks people to take note that "unlike the various militant RT (Republic of Texas) factions, we are not trying to 'take over' Texas, as we realize that most people are unaware of our true history and either support the statist quo or just don't care." The group is willing to share jurisdiction and wants each Texan to have their individual choice of where they get their government services, the United States or other entities. This desire for peaceful coexistence is symbolized in the organization's flag, which seeks to combine the Lone Star Flag with the Bonnie Blue flag, the latter

of which briefly was adopted by the Republic of West Florida and served as a symbol for the Confederacy.

URT emphasizes that its group members are not terrorists. The organization explicitly rejects the prospect of illegal and violent overthrow of existing free governments as well as subversion of these governments. URT instead prefers "to make arrangements with them (e.g. by treaty) so that those of their people that really want and are truly ready for freedom can have it and be left alone by those governments." The long term vision is to develop an association of free governments led by the URT. The organization aspires to help restore the American dream and assist other countries whose freedom was taken over either illegally or improperly by another country or from within.

URT's website provides a link that explains "how to free a country." This process consists of a two-pronged approach. In the short term, citizens are encouraged to create a virtual country within their existing country. It is unnecessary "to abolish the existing governments of the occupying *de facto* regimes; just declare independence from them and create the new free countries as virtual countries within the same area, consisting of those people who want to be free." As members of the Association of Free Countries, these entities "would be required to include the common AFC Bill of Rights in their Constitutions." The second prong of the approach is "to research, identify, and reactivate the original legitimate governments of those formerly free countries (by electing new people to replace the effectively vacated offices), picking up where they left off just before they went astray, incorporate the few good (pro-freedom) things the occupation governments have done since then, and avoid doing any of the bad (anti-freedom) things." Constitutions would then be amended to become aligned with the constitutions developed in the first prong and governments would be restructured accordingly.

The current status of the URT is one of bureaucratic development, as more elected offices have been created, and more amendments have been added to the Constitution. For example, the position of "Protector" was added "to help us make sure that our government never violates the rights of the people, regardless of whether our Constitution otherwise has enough safeguards in it." The organization seeks more "libertarian/ancap/Objectivist/NAP-orientated responsible people" to assist in their work, particularly the development of a marketing strategy. Religious and ethnic minorities are specifically welcomed, but "no socialists, communists, nazis, fascists, criminals, or terrorists, please," because "they already have most of the rest of the world, so they don't need us anyway."

New Revolution Now

New Revolution Now (NRN), a new secessionist organization in Texas, has spun off from the Texan variant of the Tea Party movement. NRN is a self-described "non-profit, party-agnostic organization created to support political candidates for state and national office who adhere to core foundational principles." The organization's vision is to "harness the core conservative values of mainstream Americans to elect the state and the US congressional representatives who will return the country to its founding values of limited government, low taxation, states' rights, and constitutional constructionism." The organization "performs educational activities, outreach and organizing, legislative activism and endorsement." NRN views itself as a grassroots organization designed to "internalize the statist message from elected politicians and to revoke their right to loot the treasury, ignore the constitution, and usurp the States' rights, through activist support of conservative ideas and candidates at the State and National level."

The mission of NRN is to "act as the funnel that conservative Texans can trust to support conservative candidates for office." The group endeavors to enlighten the electorate about conservative values and self-evident truths, empower the people to preserve liberty, and engage the public through political action to restore government to its original intent. Members are described as a "small group of strong conservatives from the grassroots patriotic movement, which consist of Tea Party organizers, 9/12ers, and conservative bloggers. Four unpaid volunteers are listed as directors, who have various backgrounds, with descriptors including stay-at-home mom, astrologer, high-tech CEO, free market environmentalist, and small business owner, among other things. The organization is funded without party, corporate, or religious support, by "our own bank accounts and donations from like-minded patriots."

Texas Governor, Rick Perry, generated controversy surrounding secession at an April 2009 anti-tax, Tea Party rally where Perry stated: "When we came into the Union in 1845, one of the issues was that we would be able to leave if we decided to do that. We've got a great union. There's absolutely no reason to dissolve it. But if Washington continues to thumb their nose at the American people, you know, who knows what might come out of that? But Texas is a very unique place, and we're a pretty independent lot to boot." (McKinley 2009)

Perry was actively courting conservative voters leading up to a difficult re-election campaign in which Perry sought to portray himself as the a defender of state sovereignty in the Republican primary, as opposed to Kay Bailey Hutchison, who Perry sought to portray as a moderate Washington insider. Critics of Perry, such as Representative Jim Dunnam, the Democratic leader of

the Texas House, claimed that "that talk of secession is an attack on our country" because "it's the ultimate anti-American statement." (McKinley 2009), In 2009, the Texas legislature pased Concurrent Resolution HCR 50 that sought to affirm the state's claim to sovereignty under the 10th Amendment and designated that "all compulsory federal legislation that requires states to comply under threat of civil or criminal penalties, or that requires states to pass legislation or lose federal funding, be prohibited or repealed." In support of the bill, Governor Perry stated his belief that "our federal government has become oppressive in its size, its intrusion into the lives of our citizens, and its interference with the affairs of our state," which "is why I am here today to express my unwavering support for efforts all across our country to reaffirm the states' rights affirmed by the Tenth Amendment to the U.S. Constitution. I believe that returning to the letter and spirit of the U.S. Constitution and its essential 10th Amendment will free our state from undue regulations, and ultimately strengthen our Union." (Office of the Governor)

Texas Nationalist Movement

A fourth secessionist organization in Texas is the Texas Nationalist Movement (TNM). TNM's mission is "to secure and protect the political, cultural, and economic independence of the nation of Texas and to restore and protect a constitutional Republic and the inherent rights of the people of Texas." TNM's vision seeks to fulfill this mission in three main areas. Politically, TNM seeks to:

1. identify, communicate with, and organize Texans who seek independence;
2. increase the number of Texans who support independence by actively educating them on the benefits of Texas independence;
3. support and field candidates to support Texas independence and the ideals of Texas nationalism;
4. affect an internationally recognized referendum on Texas independence for the people of Texas; and
5. hold government officials accountable to current laws and the Constitution.

Culturally, TNM seeks to preserve, educate, celebrate, defend, and improve Texan history and culture. Economically, TNM seeks to promote the purchase of Texas goods, connect Texas businesses with skilled Texas workers, foster the Texas entrepreneurial spirit, and promote fair trade between Texans and other nations.

The organization hosts local "meet-ups" in several areas throughout the state and regularly conducts on-line discussions and forums through the TNM's website, external blogs and radio websites. One of the unique aspects of TNM's website is the "FedWatch" section that posts relevant articles that pertain to the potential expansions of the federal government. Some articles are infused with outside visual images. For example, an excerpt and a link of Robert Pear's article "Obama Returns to End of Life Plan That Caused Stir" in *The New York Times* was provided.

The president of the TNM is Daniel Miller. The "Featured" section of the organization's website emphasizes the publication of Miller's book entitled *Line in the Sand*, which was released in March of 2011. The book's title references a legend relating to Col. William Travis, who supposedly asked the defenders of the Alamo to cross a line in the sand that he drew with a saber if they were willing to stand with him and face near certain death. Miller argues that his efforts are not intended to re-live the past. Rather, "the Texas Nationalist Movement is a non-aligned political organization which exists to secure and protect the political, cultural and economic independence of the nation of Texas and to restore and protect a constitutional Republic and the inherent rights of the people of Texas."

Vermont – The Green Mountain State's Case

Vermont shares with Texas a legacy as an independent country. Vermont seceded from Great Britain in 1777 and remained independent until becoming the 14th state in 1791. Several secessionist organizations are active in Vermont today. Leaders have different viewpoints on strategies and approaches, but strive to work together amicably toward the goal of Vermont independence. Similar to Texas, there are four prominent secessionist organizations: 1) Second Vermont Republic; 2) Vermont Commons; 3) Middlebury Institute; and 4) Free Vermont. Second Vermont Republic is the primary advocacy organization of Vermont's secession movements. Vermont Commons is the primary media organization. The Middlebury Institute is the primary research organization of the movement. Free Vermont serves as an on-line network that fosters political organization toward the cause of secession.

Second Vermont Republic

The Second Vermont Republic (SVR) was founded in 2003 by Thomas Naylor, Professor Emeritus of economics at Duke University. The organization defines itself as "a nonviolent citizens' network and think tank opposed to the tyranny of Corporate America and the U.S. government, and committed to the return of Vermont to its status as an independent republic and more broadly to

the dissolution of the Union." (Second Vermont Republic) Dr. Naylor (Ketcham 2010) describes SVR as "left-libertarian, anti-big government, anti-empire, antiwar, with small is beautiful as our guiding philosophy."

Eight principles inform the organization's work. The primary objective is the peaceful achievement of political independence from the United States. The second principle and third principle, "human scale" and "sustainability," relate to the organization's worldview and understanding of social responsibility. SVR believes that organized human activity functions best in small and humane forms, such as family-owned farms and businesses that produce healthy products in an environmentally sustainable manner. In policy terms, this translates to energy independence being viewed as an essential component of sustainability. The fourth principle, "economic solidarity," builds on this worldview by encouraging Vermonters to buy locally from small merchants.

The fifth principle and sixth principle, "power sharing" and "equal opportunity," reflect a political ideology that values Vermont's democratic tradition of town meetings and seeks to promote equal access to quality education, health care, housing and employment, for all Vermonters. The final two principles, "tension reduction" and "mutuality," reflect an ethical paradigm that values non-violence, refuses to condone state-sponsored violence, and believes that citizens and neighbors should be treated with mutual respect. In policy terms, the advocacy of non-violence prompts SVR members to seek the end of overseas deployments for the Vermont National Guard in the war on terror. SVR's gubernatorial candidate Dennis Steele describes the situation this way:

"People in Vermont in general are very antiwar, and all their faith was in Obama to end the wars. I ask the people, 'Did you get the change you wanted?' They can't even look you in the eyes. We live in a nation that is asleep at the wheel and where the hearts are growing cold like ice." (Ketcham 2010)

Vermont Commons

Other secessionist organizations emphasize Vermont's history as an independent Republic from 1777 to 1791 in arguing that Vermont should be independent again. Ian Baldwin, publisher of the Vermont Commons, and Frank Bryan, a Political Science professor at the University of Vermont, describe Vermont as economically conservative, socially liberal; a place where "the love of freedom runs deep in its psyche (Baldwin & Bryan 2007)." Vermont Commons: Voices of Independence (VC) was founded in 2005 as a "solutions-orientated, non-partisan" news journal "interested in promoting ongoing and

vigorous debate about a more sustainable future for the once and future republic of Vermont, and the world." VC is available in print and online. Six print editions are published statewide per year.

VC is funded through individual donations, subscriptions, and advertising from Vermont businesses and nonprofits. Writings engage the notion of Vermont independence from political, economic, social, and spiritual dimensions. VC sees themselves as "an essential public service for the citizens of Vermont" by being a statewide, multimedia, nonprofit "coffeehouse" in "an era of corporate consolidation." VC views the United States as an immoral and essentially ungovernable empire. Working with neighbors and the world, Vermont "may better be able to feed, power, educate and care for its citizens as an independent 21st century commonwealth than as one of fifty states within the U.S. empire." Localism and decentralization are believed to be two central goals toward this end.

Like the Second Vermont Republic, energy is a major concern. VC understands the war on terror as an endless quest for control of the world's remaining fossil fuels. In contrast to Second Vermont Republic, some of the writers for VC advocate nonviolent secession, while others do not. There are five main reasons VC advocates secession. First, American imperialism has created a state of suffering where the nation is politically, economically, agriculturally, socially, culturally and environmentally unsustainable. Second, Vermonters are finding it increasingly difficult to protect themselves from efforts of big business, big agriculture, big markets, and big government to remake them in their image. Third, American government lost its moral authority over Vermont when it became dominated by multinational corporations. Fourth, American foreign policy seeks global dominance and in turn, is immoral, illegal, and unconstitutional. Finally, Vermonters experience limited civil liberties, risk of terrorist attack, and the possibility of military conscription as long as it remains part of the United States.

VC believes that secession is legal. The Declaration of Independence is the premise of this position: "whenever any form of government becomes destructive, it is the right of the people to alter or abolish it, and to institute new government." VC makes practical appeals regarding membership in a collective entity. "Just as a group has a right to form," VC argues, "so too does it have a right to disband, to subdivide itself, or withdraw from a larger unit." Constitutional arguments are engaged through the tenth amendment, which VC interprets to mean that states have a constitutional right to secede because the Constitution does not forbid secession and powers that are not expressly prohibited by the Constitution are reserved for the states.

The Middlebury Institute

The Middlebury Institute (MI) has more of a research focus than Second Vermont Republic and Vermont Commons. The organization grew out of The Middlebury Declaration, which was written by Kirkpatrick Sale in November of 2004. The Declaration inaugurates a "campaign to monitor, study, promote, and develop agencies of separatism." Separatism is defined as "all the forms by which small political bodies distance themselves from larger ones, as in decentralization, dissolution, disunion, division, devolution, or secession, creating small and independent states that rule themselves."

Historically, the Declaration links their activities in Vermont to a larger global movement of separatism and self-determination since the end of World War II in which the number of independent nations has grown from 51 to 193. The core impetus for separatism is the American empire, which is so spread internationally that implosion has become an immediate danger. This presents an opportunity for Vermonters to remake themselves as a genuine democracy premised upon popular participation.

According to Kirkpatrick Sale, MI's director, it has become increasingly obvious "that the United States is a deeply divided nation that doesn't function well as a totality." During an interview in 2008, Sale stated that "every day the Bush cronies' bumbling and illegal antics in service to the empire make secession more attractive and the desire to leave this corrupt system stronger." Changing the party in power is insufficient because "any reforms by the Democrats would do nothing to substantially change the system" in a way that effectively promotes genuine, local democracy (Levine 2008). The hope is that a careful campaign that explains why independence is desired and builds substantial public support will make it politically impossible for government to feel threatened and respond with force.

Sale describes himself as an "anarchocommunalist." This is an anarchist who aspires for society to be organized in small self-determining communities, which Sale views as the basic principle of secession. Dehumanization is the central concern and obstacle to independence. Sale explains:
"In my day job as a clinical psychologist I see many people who have remained with uncaring, cruel, and dishonest spouses or employers – this resulting in a loss of self-respect that renders them too weak to extricate from these abusive relationships. Similarly, I've found that many people already know the truth that they are living in a dehumanizing society that cares nothing for autonomy, community, and meaningfulness, but that they are too weakened to take any kind of direct action." (Levine 2008)

MI's website provides links to papers, articles, and declarations related to the work of the organization. MI participated in three North American Secessionist Conventions that produced three relevant declarations. The locations of these conventions were Vermont in 2006 (Burlington Declaration), Tennessee in 2007 (Chattanooga Declaration), and New Hampshire in 2008 (Manchester Declaration). The Burlington Declaration identified five principles agreed upon by the convention. The first principle states that all political entities have the right to separation. The second principle asserts the right to rebellion established in the Declaration of Independence. The third principle asserts that powers not delegated to federal governments in constitutions are reserved for the states. The fourth principle states that nations should engage in peace, commerce, good-will, and honest friendship with other nations and not engage colonial dominance or entangling relationships. The fifth principle asserts that small, direct democracy is the most desirable form of government.

The Chattanooga Declaration provided seven truths agreed upon by the convention. The first truth is that the deepest questions surrounding liberty and government in our time extend beyond the traditional left/right dynamic of the political spectrum. The second truth is that private corporations have acquired so much privilege and power from government that it has destroyed self-government in America. The third truth is that corporate power endangers liberty as much as government power. The fourth truth is that liberty can only survive if it is returned to local communities and states. The fifth truth is that the American empire has become tyrannically aggressive abroad and despotic at home. The sixth truth is that states should be free and self-governing. The final truth is that liberty and self-government are unsustainable without secession.

The Manchester Declaration did not provide a list of principles or truths, in contrast to the previous two declarations. Rather, the document criticizes the 2008 election for perpetuating a two party system that promotes the interests of corporate and financial elites. The trillion-dollar bailout in the face of the economic meltdown is put forth as evidence of Wall Street's domination over American politics, through which "the rich get richer and the rest get nowhere." These two developments, coupled with decades of previous abuses and usurpations, highlight how America is bankrupt in every way- economically, politically, socially, academically, militarily, spirituality, and morally.

The MI provides a more global perspective toward secession compared to the other Vermont secessionist organizations. The written works of the institute attempt to situate contemporary secessionist movements throughout America in a larger political and historical trend of self-determination. For example, the break up of the Soviet Union is provided as a prominent example of how an empire can reconstitute itself in a more democratic manner. Like SVR

and VC, MI believes that secession is constitutional and favors a more localized form of democracy less beholden to corporate interests. Unlike SVR and VC, energy policy is noticeably absent from the reasoning provided in favor of secession.

Free Vermont

Free Vermont (FV) is a website forum that defines itself as "a self-organizing network built of, by, and for Vermonters of all political persuasions interested in advocating Vermont's peaceable secession from the U.S. Empire through the annual town meeting process." FV is currently promoting a petition for independence, which states: "this is a petition to collect signatures of all those supporting Vermont seceding from the United States and becoming an independent and sovereign nation." The petition can be signed on-line. The stated goal is 100,000 signatures with a stated deadline of November 8, 2008. 2,495 people have signed the petition as of June, 2010. Despite the deadline, it is still possible to sign the petition, and read the names and hometown of the people who signed. Many of the people listed are not residents of Vermont.

FV is also working on a project called the 200 Towns Campaign. FV is seeking to recruit citizens to collect signatures in each of 200 Vermont towns to introduce a town meeting resolution. The purpose of the meeting is "to call on our Vermont state legislature to convene a special session to debate the question of Vermont peaceably seceding from the United States." FV hopes that Vermonters will organize grassroots support for this campaign over the next several years. As a social network, FV does not have the structural or ideological development evident in the other three secessionist organizations. For example, FV's website has no "about us" section, no statement of principles, and no mention of organizational leadership.

Discussion

The understandings and approaches to secession in Texas and Vermont shared six major similarities: 1) shared emphasis on related histories as independent republics; 2) shared emphasis on grass-roots democratic reform in pursuing secession; 3) shared ideological value of promoting and protecting individual freedom; 4) shared ideological value of ensuring limited governance and favoring local control over federal political supremacy; 5) shared focus among organizational leaders on writing extensively about the topic of secession; and 6) shared focused on producing and promoting electoral candidates that share their perspectives. The understandings and approaches to secession in Texas and Vermont shared four major differences: 1) varying impacts of the annexation process; 2) varying experiences with, and attitudes toward, the use of

violence; 3) differing prioritization of current political and economic issues; and 4) varying levels and forms of education among secessionist leaders.

Vermont secessionists emphasize Vermont's history as an independent republic, similar to organizations in Texas. At the same time, the Texas secession movement is more heavily influenced by disputed understandings of the annexation of the state. The Republic of Texas, for example, argues that Texas was illegally annexed and is currently independent. These beliefs help explain their willingness in the past to use violence in resolving conflicts with state authorities. Vermont has no such organization or experience in their secessionist movement. Violence is not a major theme in the Vermont secessionist movement. In fact, the use of force abroad by the U.S. military, as dictated by civilian control within the federal government, is a major point of contention. Overseas deployment of the Vermont National Guard in the war on terror is a primary example. Vermont secessionists share the perspective that America has become a militant empire that exercises its hard power imprudently and immorally. Furthermore, Vermonters are deeply concerned about the number of military bases America operates around the globe and the misguided quest for fossil fuels. Taking up arms against the empire is not a default reaction, nor a prominent component of addressing their grievances. Rather, grass-roots democratic reform is the preferred means for enacting desired political change at home. These means are now widely supported by the Texas secessionist movement as well.

Ideologically, foreign policy is a major focus of the Vermont secessionist movement, whereas the Texas secessionist movement is heavily, if not exclusively, focused on domestic issues and concerns. Both secessionist movements share an expressed affection for individual freedom. Threats to individual freedom from a Vermont perspective include government and economic forces. Politically, Vermont secessionists prefer smaller forms of political organization, such as states and localities, over the centralized power of the federal government, emphasize the right to self-determination and advocate participatory democracy fostered through town hall meetings, an honored New England tradition. This position echoes earlier concerns stated by the Anti-Federalists during the development and ratification process of the federal constitution. Economically, Vermont secessionist organizations prefer producing and buying local goods over corrupt and oppressive multinational corporations. This is summed up well by Thomas Naylor who draws a sharp contrast between Wal-Mart and Vermont. Wal-Mart is "too big, too powerful, too intrusive, too mean-spirited, too materialistic, too dehumanizing, too undemocratic, too environmentally insensitive, and too unresponsive to the social, cultural, and economic needs of individual and small communities." Vermont is "smaller,

more rural, more democratic, less violent, less commercial, more egalitarian, and more independent" than other states (Kauffman 2005).

Threats to individual freedom from a Texas perspective are more focused on the expansion of the federal government in domestic policy making. There is greater discussion of the founding and related values, including limited government, low taxation, states' rights, and strict constructionism. Texas secessionists emphasize individual choice, particularly in regard to the use of social services, and work with the Tea Party movement. The Texas narrative includes the conception of an American dream that has been challenged or lost as the federal government has grown throughout American history. In part, this parallels Vermont secessionists, who also criticize the growth of the federal government. At the same time, reclaiming the American dream is not part of the Vermont secessionist tradition, which typically laments the loss of important aspects of the New England political tradition, not national politics or identity. Texas secessionists incorporate some aspects of regional tradition into their advocacy. This tends to take a symbolic form in relation to honoring the Confederacy.

Most secessionist organizations in both Texas and Vermont explicitly promote peaceful means for achieving independence. Peaceful means focus on generating awareness and public support through social networking, holding conventions, running news organizations, issuing declarations, public speaking, writing articles, developing petitions, and operating websites. Though lobbying is relatively limited, both movements have focused on enhancing this activity and have even begun fielding their own candidates in some cases. Noticeably absent from these peaceful efforts is non-violent direct action, which is surprising given the reverence for Henry David Thoreau exhibited by Vermont secessionist organizations.

Prominent leaders of the Vermont movement are well educated. One example is Frank Bryan, a Political Scientist at the University of Vermont, who co-authored the influential secessionist book *The Vermont Papers*. A second example is Thomas Naylor, a Professor Emeritus of economics at Duke University, who founded The Second Vermont Republic. A third example is Kirkpatrick Sale, who earned an undergraduate degree from Cornell University, and has worked as in the publishing industry as an author, journalist, and editor. Secessionist organizations in Texas are less influenced by prominent academics. Rick McLaren, the most prolific secessionist in Texas over the last two decades, was a Missouri native, who relocated to West Texas, and engaged in what Texan authorities described as "paper terrorism." McLaren's formal education cultiminated in graduating from high school in Wilmington, Ohio (Verhovek 1997). McLaren authored auto-mobile manuals and worked as an insurance

salesman. (Foer 1997). More recently, Daniel Miller, the founder of the Texas National Movement, has appeared on political television programs, such as The Glenn Beck Show, and recently published *Line in the Sand* on his beliefs regarding secession. Miller's professional and educational credentials are not provided on the organization's website.

Secession is possible, but unlikely. This point of view is not conventional wisdom, because many believe the question of secession was settled with the Civil War, and that it is now a closed question. Proceeding from the assumption that America remains a free society, the subject of secession cannot be considered a closed one. The subject continues to be discussed, as evident in this study of secessionist movements in Texas and Vermont. Neither modern secessionist movement has come close to persuading a significant minority of its state's population to favor leaving the United States, yet both remain a vocal and vibrant component of private sector groups highly critical of the federal govenrment. Contrary to conventional thinking that a red state and a blue state would have little ideological cohesion, this research found that several similarities exist in how both Texas and Vermont conceptualize and articulate advocacy for secession. The major limitation of this research is the exclusive focus on web expressions of secessionist advocacy. This work would be enhanced by engaging in survey research of the leaders of the secessionist movements in Texas and Vermont to better understand their motivations, beliefs, and political attitudes, and expanding the scope of this analysis to incorporate other states with active secessionist movements, such as Alaska and Hawaii.

References

Amendments to the Constitution Proposed by the Hartford Convention. (2008). Retrieved October 12, 2011, from Avalon Project: http://avalon.law.yale.edu/19th_century/hartconv.asp

Anderson, L. 2004. The institutional basis of secessionist politics: federalism and secession in the united states. 34 (2), 1-18.

Aristotle. (1986). *The Politics.* New York: Penguin Books.

Babineck, M. (2007, May 3). Texas separatist still believes cause will succeed. *Houston Chronicle*. (On-Line) Retrieved April 22, 2011 from http://www.chron.com/disp/story.mpl/headline/metro/4770542.html

Baldwin, I. & Bryan, F. (2007, April 1). The once and future republic of Vermont.*The Washington Post*. (On-line) Retrieved December 12, 2010 from http://www.washingtonpost.com/wpdyn/content/article/2007/03/30/AR2007033002076.html

Belz, H. 1996. Secession, revolution, and social contract theory in American political thought. *The Good Society*. 6 (3), 11-15.

Breton, M. and S. Weber. The art of making everybody happy; how to prevent secession. *IMF Papers.* 50 (3), 403-435.

Bryan, F. and J. McClaughry. 1989. *The Vermont Papers: Recreating Democracy on a Human Scale*. Chelsea, Vermont: The Chelsea Green Publishing Company.

Buenger, W. 1983. Texas and the riddle of secession. *The Southwestern Historical Quarterly.* 87 (2), 151-182.

Farley, C., Gwyne S.C., & Hylton, H. (1997, May 12). Remember the Texas embassy?*Time*. (On-line) Retrieved on March 8, 2011 from http://www.time.com/time/magazine/article/0,9171,986325-2,00.html

Foer, F. (1997, May 4). The republic of Texas. *Slate.* (On-line) Retrieved March 8, 2011 from http://www.slate.com/id/1057

Free Vermont. (On-line) Retrieved on November 23, 2010, from http://freevermont.net/

Levine, B. (2008, March 12). Secession and sanity. *Vermont Commons.* Retrieved on November 15, 2010 from http://www.vtcommons.org/journal/2008/03/%20secession-and-sanity-bruce-levine-interviews-kirkpatrick-sale

Kauffman, B. (2005, December 19). Free Vermont: green mountain boys ponder secession. *American Conservative*. (On-line) Retrieved on December 12, 2010 from http://www.amconmag.com/article/2005/dec/19/00016/

Ketcham, C. (2010, January 31). The secessionist campaign for the republic of Vermont," *Time*. (On-line) Retrieved March 2, 2011 from http://www.time.com/time/nation/article/0,8599,1957743,00.html

Link, W. 2009. This bastard new virginia: slavery, west virginia exceptionalism and the secession crisis. *West Virginia History: A Journal of Regional Studies*, 3 (1), 37-56.

Livingston, D. The New England secession tradition. (On-line) *Vermont Commons.* Retrieved February 24, 2011, from http://www.vtcommons.org/files/Livingston%20PDF%20%289%20pt%29.pdf

MacKenzie, S. 2010. The slaveholders' war: the secession crisis in Kanawha country, western Virginia, 1860-1861. *West Virginia History*, 4 (1), 33-57.

McKinley, J. (2009, April 18). Texas governor's secession talk stirs furor. (On-line) Retrieved February 27, 2011, from http://www.nytimes.com/2009/04/18/us/politics/18texas.html?_r=1&pagewanted=print

Montes, E. (1997, November 5). McLaren gets 99 year sentence; Otto, 50 years. (On-line) Retrieved October 15, 2010, from www.texnews.com:http://www.texnews.com/texas97/rot110597.html

Moore, J. 1986. Secession and the states: a review essay. *The Virginia Magazine of History and Biography.* 94 (1), 60-96.

New Revolution Now. (On-line) Retrieved February 27, 2011, from http://www.newrevolutionnow.org/about.php

Office of the Governor Rick Perry. Gov. Perry backs resolution affirming Texas' sovereignty under 10th Amendment." (On-line) Retrieved February 27, 2011, from http://governor.state.tx.us/news/press-release/12227/

Second Vermont Republic. (On-line) Retrieved December 1, 2010, from http://vermontrepublic.org/

Texas Legislature Online. (On-line) Retrieved February 27, 2011, from http://www.legis.state.tx.us/BillLookup/history.aspx?LegSess=81R&Bill=HCR50

United Republic of Texas. (On-line) Retrieved February 24, 2011, from http://www.texas.freecountries.org/

Verhovek, S. H. (1997, May 2). Before armed standoff, Texan waged war on neighbors. *The New York Times.* (On-line) Retrieved March 8, 2011 from http://www.nytimes.com/

1997/05/02/us/before-his-armed-standoff-texan-waged-war-on-neighbors-in-court.html?ref=richardmclaren

Verhovek, S.H. (1997, May 5). Seperatist end Texas standoff as 5 surrender. *The New York Times.* (On-line) Retrieved February 15, 2011 from http://www.nytimes.com/1997/05/04/us/separatists-end-texas-standoff-as-5-surrender.html

Zimring, D. 2009. Secession in favor of the constitution: how west virginia justified separate statehood during the civil war. *West Virginia History: A Journal of Regional Studies.* 3 (2), 23-51.

Justice from Injustices through Social Conflicts

Leonard Mazzone
University of Studies of Florence

This paper tries to stimulate the debate within political philosophy about the concept of justice by adopting a critical perspective towards social phenomena implying conditions of domination. Despite the undervaluation of this category in political philosophy's field, the goal to prevent and to avoid social conditions implying domination should be conceived as one of the fundamental parts of a (negative) theory of justice.

This negative approach to the concept of justice is suggested by a double impasse, coming from the weakness of political philosophy in understanding social feelings and judgements about the illegitimacy of certain policies. and, secondly, from the main goal of a critical theory of society. That is, in my account, the presentation of a theoretical framework within which the possibility of emancipation from social conditions of domination is directly related to the experience of subordinate social groups and to their capacity to overcome them. In this sense, a critical theory of society should connect the normative role played by the concept of justice with the immanent character of a social diagnosis about contemporary social pathologies (Honneth A., 1994; Pulcini E., 2009; Renault E., 2008).

Moreover, this perspective would allow political philosophy not only to use some theoretical and political criteria to assess contemporary societies, but also to understand people's motivations in lasting conflicts and to value the rightness of their goals.

Introduction

In this paper I will try to clarify the meaning and the practical consequences of a "negative theory of justice", whose conceptual frame would provide the theoretical coordinates in light of which its pre-theoretical interest for emancipation of human beings could be coherently pursued. According to this goal, this paper tries to stimulate the debate within political philosophy about the concept of justice by adopting a critical perspective towards social phenomena implying conditions of domination.

Despite the undervaluation of this category in political philosophy's field, the goal to prevent and to avoid social conditions implying domination should be conceived as one of the fundamental parts of a (negative) theory of justice, since the source of its criticism has nothing to do with transcendental or external arguments: according to this perspective, the elimination and the prevention of any condition of domination should be assumed as the main premise to talk seriously about the concept of justice. Such perspective would allow political

Leonard Mazzone graduated at the University of Studies of turin with a dissertaiton of political philosophy about contemporary theories of social justice. At the moment, he is attending the third year of the Doctoral School in Philosophy at the University of Studies of Florence. His research project concerns current developments of the critical theory of society and, more specifically, the topicality of elias Canetti's conceptionof Crowds and Power in this fields.

philosophy to directly face the sense of injustice of people involved in asymmetrical relations of power, rather than continuing not to keep it intIn this paper I will try to clarify the meaning and the practical consequences of a "negative theory of justice", whose conceptual frame would provide the theoretical coordinates in light of which its pre-theoretical interest for emancipation of human beings could be coherently pursued. According to this goal, this paper tries to stimulate the debate within political philosophy about the concept of justice by adopting a critical perspective towards social phenomena implying conditions of domination.

Despite the undervaluation of this category in political philosophy's field, the goal to prevent and to avoid social conditions implying domination should be conceived as one of the fundamental parts of a (negative) theory of justice, since the source of its criticism has nothing to do with transcendental or external arguments: according to this perspective, the elimination and the prevention of any condition of domination should be assumed as the main premise to talk seriously about the concept of justice. Such perspective would allow political philosophy to directly face the sense of injustice of people involved in asymmetrical relations of power, rather than continuing not to keep it into account simply because it is not involved or justified by already institutionalised norms. Moreover, this perspective would allow political philosophy not only to use some theoretical and political criteria to assess contemporary societies, but also to understand people's motivations in lasting conflicts and to value the rightness of their goals. Indeed, a negative theory of justice tries to provide a theoretical frame to join social claims coming from subordinate groups involved in material dimension of domination: its criticism of normative validation of this material dimension of domination encourages subordinate people to ask for the overcoming of dominant conditions and for their progressive reduction itself, when the balance of power within society does not allow them to directly ask for the overcoming.

By pursuing these goals, this article proposes a theoretical alternative to the "ideal" or "positive" conceptions of justice usually supported in political philosophy's field. First of all, this goal is suggested by empirical reasons: the great number of "theories of justice" presented in the last years is inversely proportional to the real changes inspired by their normative principles within the complex contest of today western societies. Despite their noble intentions, the positive theories of justice have been not able to convince the public sphere of today democracies in choosing certain policies rather than other ones. Moreover, the recent eclipse of welfare State, like the so-called "new spirit of capitalism", have been justified by recalling into mind the arguments used by twentieth century's social movements and by criticisms directed to capitalist structure

itself. In light of the last consideration, it is possible to say that dominant assets of power have been able to do what social and political theorists did not.

A negative approach to the concept of justice is suggested by a double impasse, coming from the weakness of political philosophy in understanding social feelings and judgements about the illegitimacy of certain policies and, secondly, from the main goal of a critical theory of society: that is, in my account, the presentation of a theoretical framework within which the possibility of emancipation from social conditions of domination is directly related to the experience of subordinate social groups and to their capacity to overcome them. In this sense, a critical theory of society should connect the normative role played by the concept of justice with the immanent character of a social diagnosis about contemporary social pathologies (Honneth A., 1994; Pulcini E., 2009; Renault E., 2008). On my view, of the most evident paradoxes consists in the repulsiveness of dominant relations of power to be called with their own name. Not casually, the so-called *Zeitgeist* of today is usually referred to the end of any great narration: after all, this belief represents a great narration in turn. The same rests valid for the presumed end of ideologies: this diffused belief represents an ideological "image of the world" too, since that dominant representation of alternative ways to conceive social relationships accuses them of being "ideological" for their critical potential towards our contradictory world.

By giving priority to dominant relations of power, a negative theory of justice intends to call things with their own name, in the hope that the accuse of "ideology" could be send back to its sender. o account simply because it is not involved or justified by already institutionalised norms. Moreover, this perspective would allow political philosophy not only to use some theoretical and political criteria to assess contemporary societies, but also to understand people's motivations in lasting conflicts and to value the rightness of their goals. Indeed, a negative theory of justice tries to provide a theoretical frame to join social claims coming from subordinate groups involved in material dimension of domination: its criticism of normative legitimation of this material dimension of domination encourages subordinate people to ask for the overcoming of dominant conditions and for their progressive reduction itself, when the balance of power within society does not allow them to directly ask for the overcoming.

By pursuing these goals, this article proposes a theoretical alternative to the "ideal" or "positive" conceptions of justice usually supported in political philosophy's field. First of all, this goal is suggested by empirical reasons: the great number of "theories of justice" presented in the last years is inversely proportional to the real changes inspired by their normative principles within the complex contest of today western societies. Despite their noble intentions, the positive theories of justice have been not able to convince the public sphere of

today democracies in choosing certain policies rather than other ones. Moreover, the recent eclipse of welfare State, like the so-called "new spirit of capitalism", have been justified by recalling into mind the arguments used by twentieth century's social movements and by criticisms directed to capitalist structure itself. In light of the last consideration, it is possible to say that dominant assets of power have been able to do what social and political theorists did not.

A negative approach to the concept of justice is suggested by a double impasse, coming from the weakness of political philosophy in understanding social feelings and judgements about the illegitimacy of certain policies and, secondly, from the main goal of a critical theory of society: that is, in my account, the presentation of a theoretical framework within which the possibility of emancipation from social conditions of domination is directly related to the experience of subordinate social groups and to their capacity to overcome them. In this sense, a critical theory of society should connect the normative role played by the concept of justice with the immanent character of a social diagnosis about contemporary social pathologies (Honneth A., 1994; Pulcini E., 2009; Renault E., 2008). On my view, of the most evident paradoxes consists in the repulsiveness of dominant relations of power to be called with their own name. Not casually, the so-called *Zeitgeist* of today is usually referred to the end of any great narration: after all, this belief represents a great narration in turn. The same rests valid for the presumed end of ideologies: this diffused belief represents an ideological "image of the world" too, since that dominant representation of alternative ways to conceive social relationships accuses them of being "ideological" for their critical potential towards our contradictory world.

By giving priority to dominant relations of power, a negative theory of justice intends to call things with their own name, in the hope that the accuse of "ideology" could be send back to its sender.

Inside or Beyond the Conception of Justice as Fairness?

As noticed by Norberto Bobbio (Bobbio N., 1976, p. I), justice deserves particular attention among the recurrent ideas investigated by political philosophy (intended as the doctrine of the "best republic"). Not casually, its most fortunate works can be conceived as attempts to achieve a good society through an ideal model of state, grounded on some ultimate ethical postulates, regardless its fulfilment. Among these works, political philosophy cannot but be confronted with *A Theory of Justice* (Rawls J., 1971), which is commonly considered as one of the most systematic philosophical attempts to determine the conditions under which it is possible to obtain a fair social cooperation. Without any exaggeration, one of the strictest critics of *A Theory of Justice* – Robert Nozick – argued that, after its publication, all political philosophers should work

inside the Rawlsian conception of "justice as fairness" or they have to explain why they choose not to do so (Nozick R., 1974). The first part of the paper will briefly focus the attention on the main, unresolved, ambiguities of the Rawlsian conception of "justice as fairness." Among these, it is worthy to be mentioned Rawls' aim to construct an *ideal* theory of justice (Rawls J., 1971, pp. 243-261). Indeed, idealism of Rawlsian conception of justice as fairness creates a lot of difficulties in understanding the interplay between norms and conflicts and their role in promoting more just societies (Honneth A., 1992).

In *A Theory of Justice* the "original position" takes place of the classic social contract elaborated, differently, by Hobbes, Locke and Rousseau.[1] In this imagined condition of primordial equality, principles of justice result from an agreement between free and rational people, interested in conciliating the pursuing of their interests with a fair distribution of social resources by the basic structure. The parties involved in the original position do not know anything about their personal identities or interests; moreover, their representatives have to choose under an imagined state of selective ignorance, the so called "veil of ignorance."[2] Together with this "device of representation", circumstances of justice,[3] formal constraints of the concept of right[4] and rationality of contracting parties[5] describe the contractual conditions of the original position. Moreover, these conditions limit the range of admissible *conceptions* which compete each with each other to highlight the closest *concept* of justice (Hart H. L. A., 1961)

---

[1] Rawls J., 1971, p. 12: . In justice as fairness the original position of equality corresponds to the state of nature in the traditional theory of social contract. This original position is not, of course, thought of as an actual historical state of affairs, much less as a primitive condition of culture. It is understood as a purely hypothetical situation characterized so as to lead to a certain conception of justice.

[2] Rawls J., 1971, 17-22. . [...] no one knows his place in society, his class position or social status, nor does any one know his fortune in the distribution of natural assets and abilities, his intelligence, strength and the like. [...] the parties do not know their conceptions of the good or their special psychological propensities, Rawls J., 1971, p. 12.

[3] Objective circumstances of justice are related with any aspect of human life and make human cooperation both possible and necessary; on the other hand, subjective circumstances of justice have to do with different conceptions of good believed by people: "For simplicity I often stress the condition of moderate scarcity (among the objective circumstances), and that of mutual disinterest, or individuals taking no interest in one another's interests (among the subjective circumstances)." Rawls J., 1971, p. 119.

[4] A conception of right is a set of principles, *general* in form and *universal* in application, that is to be *publicly* recognized as a *final court of appeal ordering the conflicting claims* of moral persons, Rawls J., 1971, p. 124 (cursive in the text is mine).

[5] This condition of original position consists in the envy's absence and in the reciprocal disinterest between contracting people. Moreover, sense of justice of contracting parties ensures that, once chosen in the original position, the principles of justice will be observed. See Rawls J., 1971, pp. 130-132.

to the criteria of the contractual procedure.[6] According to Rawls, the coexistence of these conditions would determine the choice of contracting people in favour of two principles of justice, at first intuitively explained in the second chapter of *A Theory of Justice*[7] and, subsequently, compared with alternative conceptions.

This short summary evidences a fundamental aim of Rawls' constructivism. *A Theory of Justice* presents two principles of justice obtained through a contractual procedure which is disinterested in natural and social factors without any moral relevance and, therefore, morally arbitrary.   In this respect, the proposal of *A Theory of Justice* consists in providing a neutral concept of justice, different from any other conception of the same topic, as required by a complex society shot through by identity and conflicts of interests between its members because of their reciprocal advantage derived from social cooperation. According to the first principle, all people should enjoy a fully adequate scheme of rights and basic liberties, whereas the second one guarantees that all should enjoy fair equality of opportunities and, through the so called "principle of difference," prohibits any inequality which does not benefit the worse off members of society. In addition, the lexical priority of the first principle of justice categorically forbids us to sacrifice the listed liberties in order to achieve bigger social and economical advantages.

Despite of the complex and rigorous structure of the Rawlsian speech about justice, some critics have evidenced some ambiguities linked with the lexical priority of the first principle (Hart H. L. A., 1973) and the set of basic goods[8]. In order to eliminate these ambiguities, the second edition of *A Theory of Justice* emphasized the importance of the two moral powers held by the contracting parties, the capacity to have sense of justice and to have a certain *conception of the good* (Rawls J., 1999). Linked to these two capacities are so many qualities of the contracting

---

[6]   Rawls turns to the notion of "pure procedural justice" because it transfers its fairness to its effects or results, once it has been lead to the end: indeed there is not any independent criterion in light of which it would be possible to gain a certain result, see Rawls J., 1971, pp. 85-86. Rawls calls "perfect procedural justice" that procedure which distributes resources on the ground of external criterion to the same procedure. Again, in the case of "imperfect procedural justice", distributive procedures can provide a just procedural model without ensuring its realization.

[7]   See Rawls J., 1971, pp. 48-51. This first step of Rawlsian argumentation is made possible by the "reflective equilibrium", through which contracting parties can obtain the coherence between their believes and principles of justice in the original position.

[8]   In the second part of the second principle of justice (principle of difference), Rawls judges the opportunities that people have through the means they possess, without taking seriously the variations they have in being able to convert primary goods into good living. A. K. Sen has focused his attention on this criticism in various works: at this regard, see Sen A. K., 1980; Id., 1992 and, finally, Id., 2010. The conversion of primary goods into the capability to do various things that a person may value doing can vary enormously with differing inborn characteristics (for example, propensities to suffer from some inherited diseases), as well as disparate acquired features or the divergent effects of varying environmental surroundings (for example, living in a neighbourhood with endemic presence, or frequent outbreaks, of infectious diseases). There is, thus, a strong case for moving from focusing on primary goods to actual assessment of freedoms and capabilities, Id., 2010, p. 66.

parties, who are *rational* in choosing the best means to pursue their ends and *reasonable* in understanding and applying the principles of justice through which a fair cooperation is ensured.

One of the most important criticisms advanced against *A Theory of Justice* concerns the original position's neutrality. In this regard, critics of the Rawlsian theory of "justice as fairness" have argued that the two principles of justice would not *respect* plural identities shared by individuals belonging to different cultures. Individualism of the Rawlsian conception of "justice as fairness" would fail to recognize people's belongings to their social, cultural or ethnic groups and would disrespect them (Sandel M., 1982; Taylor C., 1992a, 1992b). At this regard, the individualistic perspective adopted by Rawls in his description of the original position would not ensure *fairly* the initial *fairness* of the contracting people (Nagel T., 1973).

In *Political Liberalism*, Rawls admitted the comprehensive nature of his previous Kantian constructivism and elaborated a political – not moral – conception of liberalism, in order to achieve an overlapping consent among irreducible but reasonable comprehensive doctrines within a certain society (the so called "fact of reasonable pluralism"). Indeed, the fact of pluralism requires us to distinguish the reasonableness of an overlapping consent from the rationality of a mere *modus vivendi* (Rawls J., 1993), so that modern democratic and constitutional states are beginning to look like "well-ordered societies." Not justifiable by any substantive conception of the good – which could not be shared by all the citizens – the content of the overlapping consent has to be neutral and impartial between such conceptions of the good, in order to attract their common agreement, even though for different motives. The political conception of the person implies people's double capacity of being rational and reasonable at the same time. In this way, political liberalism ensures that every reasonable doctrine proposes and accepts principles needed for social equal cooperation, without renouncing to its rationality, that is, to its conception of the good. Citizens should regard themselves as free – not only capable of having conceptions of the good, but as self-authenticating sources of valid norms – and equal, according to citizens' capacity to reciprocally recognize their moral powers of rationality and reasonableness.

Nevertheless, in *Justice as Fairness. A Restatement* Rawls admitted that the original position does not ensure a unique emergence of a given set of principles of justice that together identify the institutions needed for the basic structure of the society (Rawls J., 2001, pp. 132.134).[9] The comparison between the two principles of justice and other alternatives in *A Theory of Justice* could not be valued as complete, since some variants of utilitarianism could be chosen in the original position as well as the two principles of justice. Institutional

---

[9]   Rawls J., 2001, pp. 133-134: "...there are indefinitely many considerations that may be appealed to in the original position and each alternative conception of justice is favoured by some consideration and disfavoured by others. [...] The balance of reasons itself rests on judgment, through judgment informed and guided by reasoning."

approach of the Rawlsian conception of justice as fairness, I think, undermines his political liberalism too. Indeed, in order to define some conceptions of the good as reasonable – other than rational – it is necessary to define the political principles of justice that these conceptions should share.[10] The impossibility to gain a unique set of principles of justice through the original position does not seem only hit at the roots of the moral constructivism of *A Theory of Justice*, but also *Political Liberalism*'s ones.

I think that these problems concerning the theoretical development of the conception of justice as fairness are due to the idealistic approach adopted by Rawls. Indeed, he divided his theory of "justice as fairness" in two parts. The first, called "ideal theory," had to provide the principles of justice in light of which it could be possible to face the other, "not ideal" part, of the same theory. As the entire history of idea of justice shows, also its Rawlsian account reduced the injustice to a mere contradiction of the basic structure requested by the ideal norms. This way of conceiving injustice as a simple opposite-notion of some "normal" or ideal conception of justice did not allow philosophy to take seriously the victims – often silent – of material and symbolic violence (Shklar J. N., 1990). Moreover, despite the characterization of perfectly just institutions has become the central exercise in the modern theories of justice (Sen A. K., 2010, p. 8), their idealistic approach to this topic seems not to fully recognize the role played by legal norms on people's sense of injustice (Boudon R., 1995) and, therefore, its relevance in promoting social conflicts (Honneth A., 1990).

Taking Humiliation Seriously

Besides the idealistic perspective adopted by Rawls – as by the majority of political philosophers focusing on the topic of justice (i.e. Nozick R., 1974; Ackerman B., 1980) – there is an alternative way – which I will call "critical" – to contextualize the notion of justice in present societies. As Amartya Sen recently argues in his last book, *The Idea of Justice*, this concept seems to attract our interest when it is conceived as the practical negation of injustice, rather than as the description of the best society. In this sense, injustice is not reducible to a mere contradiction of the institutionalized or "ideal" norms. Social claims for

---

[10]   See also Rawls J., 1999, pp. 137: "The content of public reason is given by a family of political conceptions of justice, and not by a single one. There are many liberalisms and related views, and therefore many forms of public reason specified by a family of reasonable political conceptions. Of these, justice as fairness, whatever its merits, is but one." I tried to summarize the problems and the unsolved contradictions of Rawlsian thought across all his works and articles in my Master Degree Dissertation, *Beyond Domination, before Justice.   A Draft of a Negative Theory of Political Justice*, available on http://www.tesipub.it/search.html after have been inserted the dissertation's Italian title, *Oltre il dominio, prima della giustizia*.

ending it have to be read as demands for *more* just – not for perfect – societies. According to Sen, it is possible to make an example at this regard, with reference to the history of the abolition of slavery: it was the diagnosis of an intolerable injustice in slavery that made abolition an overwhelming priority, and this did not require the search for a consensus on what a perfectly just society would look like (Sen A. K., 2010, p. 21).

Just by recovering the Hegelian dialectic of Master/Slave struggle, Avishai Margalit has shown that the experience of humiliation embodied in such an asymmetrical relation of power can indirectly give the concept of human dignity a minimal meaning, able to attract the consent of different conceptions of social justice and different conceptions of the "good life." According to Margalit, to take humiliation seriously would allow us to do the same with the concept of equal respect. No Master could humiliate his servant if he could not recognize him as a human being able to admit his own inferiority and Master's superiority. In this regard, the Master's humiliating intentions concretely testify the importance of human dignity in human interactions. Without the consciousness of his servant's humanity, the Master could not intentionally humiliate him.

Nevertheless, a critical theory of society has to face also unintentional conditions of humiliation. Apart from the present discussion, what Margalit names a "sceptical" justification not to humiliate human beings,[11] he has focused his attention on a negative justification which could morally ground the duty not to humiliate people. Since no one argument could provide any good reason to justify humiliating acts or conditions, according to Magalit we should get rid of cruelty first, as advocated by Judith Shklar (Shklar J. N., 1984); humiliation is a close second. A decent society is one whose institutions do not humiliate people, that is, give people good reasons to consider their self-respect to be injured, since the ability of individuals to respect themselves is dependent on their social and political circumstances (Margalit A., 1996).

In Margalit's standpoint, people who feel their self-respect injured would have good reasons to feel humiliated, especially if the received injuries were caused by a member of the inclusive group to which the presumed victim belongs. This kind of argument would not be able to explain another phenomena of humiliation, which do not have direct bearing on people's cultural belongings. For example, Margalit's perspective about the good reasons that people have to demonstrate their self-respect as injured does not apply to the experience of workers' exploitation. In this regard, workers could not demonstrate that the

---

[11]   According to this kind of justification, what justifies our experience of respect for humans (or other beings) as grounds for an obligation is its coherence with our other moral beliefs: our attitude respecting people gives respect its proper meaning.

exploitative conditions they suffer would be equally felt as such if they were caused by colleagues' behavior, just because the social function played by factory owners and by workers are not interchangeable. These problems concerning Margalit's argument are due to his distinction between intrinsic and indirect humiliation. The first one would apply to forced-labor, whereas the second one would concern the exploitation in the workplace. Margalit traces this distinction because a decent society should guarantee an equal (and intrinsic) not-humiliation to all human beings. Humiliation would have to do with human dignity, which would not depend on distribution of social resources, but directly on human identity moulded by interactions between individual and their social groups of reference.[12]

Nevertheless, Margalit's perspective is not able to explain that the analytical difference between intrinsic and indirect humiliation is only the result of historical conflicts, which materially extended the meaning of human dignity – formally ensured by the modern law – by obtaining the abolition of slavery. Historically, with the birth of the modern state, equal respect progressively substituted the role previously assumed by social status, transforming honor owed to certain people[13] in unconditional respect owed to everyone. In recent years, Axel Honneth has tried to elaborate a social and normative theory in which inter-subjective relationships and requests for recognition are essential preconditions of socialization and individualization processes. Honneth focuses his theory of social criticism on the way people's self-respect and self-identity necessarily depend on the recognition of others and, as such, are vulnerable of being ignored both by social institutions and in interpersonal interactions (Honneth A., 1992). In particular, what is of interest to us about Honneth's critical theory are the thin boundaries that he traces between two modern spheres of recognition, the law and solidarity. By reacting to moral issues coming from civil society, the first one implies the modern notion of equal respect, generalizing both the whole of recipients to which rights apply and the material contents of the rights themselves (Honneth A., 2001).

---

[12] According to Margalit, the concept of self-respect is essential for examining the oppression of women, people of colour, gays and lesbians, and other groups that are marginalized, stigmatized, or exploited by the dominant culture, identifying ways in which oppressive institutions, images, and actions can prejudice the self-respect of members of these groups: according to this perspective, second class citizenship, unemployment, snobbish institutions, and violations of privacy are practical examples of humiliating policies.

[13] See Darwall S., 1977: another significant distinction worth to be underlined is between respect and honour: in the pre-modern world, honour acted as an intermediary in attributing value to people in relation to their social status hierarchically differentiated.

Honneth's model allows us to conceive the notion of an equal not-humiliation dynamically, not only regarding the past, but, more importantly, the present and the future of this concept. As such as equal respect took the place of honor in distributing consideration and, through it, social goods with the modernity (Walzer M., 1983), we could conceive the recognition-respect of tomorrow as the overcoming of today humiliations, if we could render account of better "good reasons" than those presented by Margalit to assess the legitimacy of people's judgements about their received injuries. In this perspective, we could accept the negative perspective adopted by Margalit *to justify the priority assumed by the political goal of an equal not-humiliation due to every human being, without delimiting it to a decent society*. Such perspective would allow political philosophy to directly face the sense of injustice of people involved in asymmetrical relations of power, rather than continuing not to keep it into account simply because it is not involved or justified by already institutionalized norms. In order to demonstrate the reliability of this hypothesis, it is necessary to follow Judith Shklar's invitation to recognize the sense of injustice experienced by the victims, independently from what justice prescribes (Shklar J. N., 1990). In this way, the sense of injustice is distinguished from a simple negation or omission of the duties required by the current model of justice.

Nevertheless, since that not every sense of injustice can testify to a real injustice, a negative theory of justice has to determine what social conditions are humiliating, even though they have not been publicly recognized as such as a consequence of social conflicts. For now, it is enough to consider that, as humiliation is prior to respect for cognitive, logical and moral reasons, the same happens in the case we compare the negative category of domination with justice's one. By taking root in situations of asymmetrical relations of power between people, their hierarchical character seems to make the condition of domination more recognizable than the actualization of any positive idea of justice; besides this cognitive argument, the elimination and the prevention from any condition of domination seems to be morally prior to the promotion of "justice." It is enough to consider that the most systematic work in political philosophy, *A Theory of Justice*, does not take seriously into account the problems linked with handicap iniquities, transnational redistribution of resources, violence towards animals (Nussbaum M. C., 2006) and gender inequalities (Okin S. M., 1989), besides indirectly justifying degrading acts towards foreign people.[14] Finally, differently from the notion of justice, which

---

[14] Margalit's attention to the experience of humiliation shows another critical aspect of the two principles of justice defined by Rawls: in a Rawlsian sense, just societies should guarantee equal basic liberties and distribute social and economical disadvantages in favour of the least advantaged people who

denotes a state that is essentially a *by-product*, domination can be directly faced by subordinate groups through social conflicts. The overcoming of any condition of domination can be pursued by preventing any condition of asymmetrical relation of power which does not reduce or eliminate the asymmetry itself.

From Domination to Justice, through Social Conflicts

By renouncing to derive the source of its criticism from a transcendental or external argument, this critical conception of social justice conceives the elimination and the prevention of any condition of domination as the main premise to talk seriously about the concept of justice (Goth R., Dumouchel P., 2009). Like the positive concept of justice defended by Rawls and great part of philosophical tradition, this negative conception tries to obtain an overlapping consent on the same topic. Nevertheless, the subject of this overlapping consent does not concern any principle of justice, but rather the refuse of any condition of domination, worthy to be defined as unjust in light of its humiliating implications. Indeed, we can have a strong sense of injustice on many different grounds, and yet not agree on one particular ground as being the dominant reason for the diagnosis of injustice (Sen A. K., 2010, p. 2). This means that every condition of domination gives people – who feel their self-respect has been injured– optimal reasons for the feeling at issue. This critical approach allows political philosophy to question the already institutionalized values delegated to legitimate asymmetrical relations of power. Instead of starting from an ideal theory of justice, this approach starts from the social reality itself, so that its present injustices can be directly faced by oppressed groups (Honneth A., 2008; Renault E., 2004).

At this respect, it is needed to distinguish between cruelty or physical coercion and domination, both implying asymmetrical relations of power among their members, but differing from each other because of the contingent character of the former and the structural nature of the latter. Indeed, a lot of social

---

are recognized *as full title* citizens of these societies. Such principles of justice could be coherent with humiliating treatments or conditions against human people not fully recognized as citizens. Should we accept indecent policies – Margalit asks in his book – toward people not recognized as citizens in a certain society? Another question is more noteworthy still: should we continue to describe similar societies as just ones? Indeed, if a fair society is not decent as well, it could tolerate degrading acts towards some people. The critical point focused by Margalit brings us in front of two possible alternatives: should we integrate the Rawlsian conception of "justice as fairness" with the negative duty not to humiliate any person – as Margalit argues – explaining in negative terms the meaning of the concept of respect; or the possibility that a just society (in a Rawlsian sense) could deny human dignity suggests to apply the features of a decent society' s model to a just society too, analysing in a different way the concept of justice, without ever omitting the reference to not humiliating institutions?

relations within which one or more members actually threaten the use of the force to determine others social partners' behaviour, can do without any validation. It is the case of a robbery, where the thief does not need the consent of other people – who obviously would not consent to be robbed. In such cases, the threat of the force defines the core meaning of the notion of power: here the force is not potential but actual, and it does not need the consent of the least favored members of the relation (Pettit P., 1997, pp.44). Just this uselessness of any kind of validation makes these relations unacceptable, since that their more powerful members can quietly do without the other people' s consent. As Judith Shklar argued, violence – together with cruelty – is the first phenomenon every society should avoid in order to protect people's physical integrity (Shklar J. N., 1984). Rather than being immoral, coercion is simply not-moral, since its use represents a clear refusal of any argument acceptable by other social partners.

Nevertheless, physical coercion does not represent the unique significant part of inter-subjective relations and institutional policies. In order to persist, the majority of asymmetrical relations of power need the threat of the force dissimulated through social norms. Their stability requires them to legitimate the asymmetry of these relations. In such social conditions, power cannot directly and commonly recur to the use of the force, in order to avoid that ruled people oppose the ruling ones.   In this regard, Canetti's words are worthy to be mentioned:

When force lasts a long time, it becomes power; but in the sharpest moment, which will arrive suddenly, it will be again pure force (Canetti E., 1981, p. 333).

In few words, *social power needs recognition.*[15]   As highlighted by Max Weber, any power tries to excite and to cultivate the confidence in its legitimacy (Weber M., 1922, chap. I, §16 and chap. III, § 1).[16] Otherwise, it should always worry about its stability by showing the force and it would be condemned to the instability due to permanent social conflicts. Not casually, along history ruling people had to legitimize their power in order to avoid the danger represented by the potential resistance of ruled ones.[17]

---

[15]   As Honneth evidences, . no one relation of recognition – neither the past ones within which subjects looked themselves as unequal – can do without the prerequisite of a norm accepted by all (Honneth A., 2010, p. 30).

[16]   Weber does not conceive the power as the mere might, consisting in any possibility to exercise influence among other humans, but he defines it as the *possibility*, for certain commands, to find obedience on the side of a determined group of humans.

[17]   Even though I have not space enough to deepen its reliability, this historical and sociological assumption suggest that domination progressively substituted the mere use of the force in mediating asymmetrical relations of power when the actual use of the force risked not to be a monopoly of ruling

In this sense, the category of social domination joins both a symbolic and a material dimension. With the word "domination" we can mean those social conditions that, in order to persist, imply both asymmetrical relations of power and their validation, in order to attract the (silent) assent of people involved in them. Indeed, I use the category of domination to refer to those social conditions implying asymmetrical relations of power validated in light of values or principles, that – being prerogative of social groups already benefiting of them –, claim to equally guarantee every social member's rights of a certain community. From the last considerations, it should be sufficiently clear that every condition of domination implies a double level. The first one is *normative* and it has to do with social norms – above all, in modern societies, legal ones – and the second level is *material.* In turn, the latter implies both an asymmetrical status' recognition and an asymmetrical distribution of economical resources.

About the normative dimension of domination, social norms have always had a constitutive role for every social context as such. With an oxymoron, we could say that *normativity* embodied in social norms is essential for the existence and the reproduction of social *reality* (Searle J., 1995). In this passage of the paper, I suggest only that historically there have been different types of validation for the asymmetrical relations of power inside every society. As already remembered, modernity has ratified the end of any condition of social asymmetry as the only admissible justification for asymmetrical relations of power themselves. In this sense, the *promise of the modernity* can be expressed in the following terms: asymmetrical relations of power can be justified if and only if the asymmetry between dominant and dominated people is temporary and its goal consists in putting an end to the asymmetry itself. This promise depends on the modern idea according to which no *difference* between people is so relevant to justify the *superiority* of one of them on the other ones. No human being can be considered as inferior to another one just for his religious belief, race, or another natural and social aspect of his life-history. In this sense, modern law seems to have changed the quality of validation needed for the

---

people. My assumption is that the ideological form of domination grows up with the overcoming of its material dimension. The historical assumption, here, is that more social norms overcome conditions of domination, more yet existent asymmetrical relations of power need to be dissimulated by social norms: otherwise, social norms would appear in reciprocal contradiction. If social history can confirm this assumption, then it remains to question social norms which emancipate social conditions from domination in their empirical aspect, by focusing the attention in the maintaining of their promises. That means that historically the normative component of social domination should grow up with the reduction of its empirical part, which has to do with asymmetrical relations of power mediated by unequal distribution of economical resources and by cultural exclusion of social actors.

stability of asymmetrical relations of power.[18] All the promises of justice which formally contradict the promise of modernity are the cultural translation, through social norms, of unjustifiable conditions implying an asymmetrical status' recognition and an asymmetrical distribution of economical resources. On the other hand, all promises formally coherent with the promise of modernity have to be analyzed in their empirical satisfaction. When they do not maintain what they promise, they are playing an ideological function towards the material dimension of domination, implying asymmetrical status' recognition and an asymmetrical distribution of economical resources. Rather than being simply contradictory, the last form of normative promise seems to look like what Hartmann and Honneth name a *paradoxical contradiction*. A contradiction is paradoxical when, just through the attempted realization of a certain intention, it diminishes the probability to realize this intention itself (Hartmann M., Honneth A., 2004, p. 63).

In this regard, Marxian criticism of the notion of justice can be very useful to obtain an internal – rather than immanent – source of criticism about social arrangements (Honneth A., 2008, p. 27).[19]. After all, the topicality of ideal models of justice along the history of philosophy is probably explicable in these terms. Taking no interest in the more or less actualization of their principles of justice, these theories authorize themselves to ignore social conditions in light of which contemporary demands of justice continue to claim meaning. As Norman Geras writes in *Literature of Revolution*,

> The contemporary discussion of precisely justice provides ample illustrative material, in the several conceptions of just social arrangements proffered in conjunction with more or less nothing, sometimes actually nothing, on how these might conceivably be achieved. The last and the largest paradox here is that Marx, despite everything, displayed a greater commitment to the creation of a just society than many more overtly interested in analysis of what justice is. (Geras N., 1986, p. 57)

---

[18] The end of asymmetry does not coincide with an egalitarian ideal, but only with the idea of equal respect due to every human being; neither we have to do with a mere example of the Rawlsian difference principle, since that it does not matter if the least favoured people receive more benefits from their being part of the social relation than if they were not.

[19] Honneth A., 2008, p. 27: . Differently from the external criticism, an immanent form of criticism presupposes […] that we can find a criterion, which is intrinsic to criticized relationship themselves as justified rational claim.

Focusing on the not-maintained promises of justices embodied in legal – but also moral, religious and traditional – norms, Marxian criticism of the concept of justice provides a good starting point for a negative theory of justice (Marx K., 1978). Marx's criticism of capitalism' s contradictions seems to derive its validity apart from the over-discussed problem about his reference to a non-capitalistic principle of justice.[20] Indeed, Marxian interpretation of ideology gives back to critical theory of modern societies the possibility to criticize its arrangements in light of contradictions met by its principles of justice and rights themselves. Since these principles and rights do not ensure the just conditions they pretend to protect or gain,[21] the source of social criticism can be found in an internal point of view. According to this interpretation, the judgement of capitalism as unjust because of its exploitative mode of production does not require any positive principle of justice, since it is worthy of criticism in light of ideological justifications provided by it in order to legitimize the subsistence of exploitation itself.[22] As appointed by Allen Buchanan,

> ...to criticise the slave-holder by attacking his false beliefs
> about the natural differences between slaves and free men is to
> employ what I have called an internal critique. For such a critique

---

[20]   In this regard, I cannot agree with Elster's and Cohen's interpretation, according to which Marx would think that capitalism is unjust, even if only implicitly and according to a non capitalistic conception of justice (see Cohen G. A., 1983, pp. 440-445): according to this interpretation, the contribution principle . serves as a criterion of justice that condemns capitalist exploitation as unjust. Looked at from the vantage point of fully developed communism, it is itself condemned as inadequate by the higher standard expressed in the needs principle, Elster J., 1985, p. 228. Another way to interpret Marx's account of justice is to say that his condemn of capitalism was grounded on values different from justice itself: according to this interpretation, "Marx bases his critique of capitalism on the claim that it frustrates many important non-moral goods: self-actualization, security, physical health, comfort, community, freedom, Wood A., 2004, p. 129. Nevertheless, the latter interpretation seems not to take seriously into account that, in Marx's standpoint, communist society can be conceived as a human community which is beyond justice itself: since that justice is a bourgeois concept, useful to legitimize the presence and the subsistence of material conditions of exploitation, it would become absolutely meaningless in a communist society, whose advent would sanction the overcoming of every exploitation as such. In this sense, the dissolution of the possibility itself of being exploited eliminates the possibility of justice itself: . A society "beyond justice" is one where no concept of justice applies. […] Only where there is justice is there injustice. If there were no injustice, there would be no justice either. If we opt for a society where there is no injustice at all, and where there cannot be, we opt for a society without justice, for the notion "justice" would no longer make sense. Thus we would opt for a society beyond justice." Heller A., 1987, p. 223.

[21]   Buchanan A. E., 1982, p. 71: […] one of Marx's internal criticism of capitalism is that, in the wage-relation, it violates its own principle that exchanges are to be free exchanges between equals.

[22]   Not casually, the new "spirit of capitalism" (Boltanski L., Chiapello È., 1999) shows that capitalistic practises need a justification, since that considered alone they are not able to mobilise sufficient motivational resources (Hartmann M. Honneth A., 2004, p. 61).

does not depend upon any juridical conceptions other than those already dominant in slave-holding society. The abolitionist need not appeal to a new concept of justice. He or she need only point out that the old concept of justice is being grossly misapplied as a result of socially reinforced false empirical beliefs about the range of individuals to which the concept of a human being, or a full-fledged juridical person, applies. (Buchanan A. E., 1982, p. 56)

Social norms are just one part of the components of domination, which is also composed by asymmetrical status' recognition and an asymmetrical distribution of economical resources. First of all, it is necessary to specify that the asymmetrical distribution of economic resources does not concern only the redistributive field, but also the productive one (Weil S., 1951; Marzano M., 2008), just because also the property of the means of production is the outcome of redistributive processes. Indeed, besides *distributable resources* – whose pluralism of spheres requires one to avoid dominant redistribution assets (Walzer M., 1983) –, *production relations* deserve particular attention too. Indeed, they require the updating of the semantic meaningfulness of the typical categories of "alienation" and "reification" (Nussbaum M., 1995; Honneth A., 2005). The same applies to asymmetrical *status' recognition* produced by the institutionalization of social stigma applied against the inclusive groups which mold human life in every political community (Young I. M. 1990, Renault E., 2000). The proposal of a two-dimensional conception of social justice presented by Nancy Fraser provides a useful analytical tool to start an interdisciplinary comparison to study the empiric relationship among economical and cultural resources made subject of asymmetrical relations of power, whose ideological validation through norms assigns them the name of conditions of domination (see Honneth and Fraser 2003).

In this sense, a negative theory of justice should put the attention, first of all, on those social relations which cannot do without values or principles in order to justify the asymmetrical relations of power between people involved in them. Then, this theoretical perspective denounces as unjust those norms which are incompatible with the modernity's promise or do not maintain it. Oppressed people's standpoint should be considered as the first index of these disregarded promises. In this regard, it is essential that people's standpoint can be freely expressed. The impossibility that the least advantaged people can express their feelings in front of the most advantaged people of the same relationship – without incurring in worse consequences – testifies a minimal (but essential) proof of the existence of a condition of domination. This is the reason in light of which a critical perspective about justice cannot accept that any people involved

in asymmetrical relation of power do not feel him/herself protected in expressing his/her sense of injustice.

This kind of domination is specific of the *political* sphere (Fraser N., 2009). By representing the public space within which ruling and subordinate people's standpoint meet each other, the political sphere is the only one which can better defend and, at the same time, react against conditions of domination. Bigger is the disparity between ruling people and subordinate ones and its discretion, bigger is the tendency of subordinated to assume a stereotypical attitude. In other words, the more power is threatening, the more the mask is impenetrable. It is possible to imagine, in the context at issue, a wide range of situations going from the dialogue between friends having equal condition and power, on one part, to the concentration camp on the other one, within which the public transcript of the victim brings the mark of a mortal fair (Scott J. C., 1990, p. 16). The bigger the distance is between the hidden and the public transcript of domination, the bigger the domination itself is. On the ground of this theoretical framework, it could be possible to say that societies wherein there is a low level of social conflict are those within the level of political domination is higher.[23]

A critical theory of society has to look at the hidden transcript of subordinate groups in order to know their opinion about asymmetrical relations of power within which they are involved. To take only into account the public transcript of power relations and the social conflicts between subordinate groups and a ruling one would be a unilateral explanation of domination' s conditions. A negative theory of justice tries to provide a theoretical frame to join social claims coming from subordinate groups involved in material dimension of domination. Its criticism of normative validation of this material dimension of domination encourages subordinate people to ask for the overcoming of dominant conditions and for their progressive reduction itself, when the balance of power within society does not allow them to directly ask for the overcoming.[24] In this regard, rather than answering the question "Why ruled people should obey to rulers" (Bobbio N., 1999), this paper has tried to answer to another question: "Why ruled people should continue to obey to rulers?," since that they are not satisfied by the way they are treated and, above all, ill-treated by the rest of society.

---

[23]   As James Scott shows in *The Art of Domination and Resistance*, these societies are those within the hidden transcript of domination rarely meets the public one, which consists in the patent interaction between subordinated people and ruling one. This explains why public transcript of domination is not able to render account of the entire history of power relationships and why it is not able to represent subordinate people's opinion.

[24]   As explained by Scott, tactical prudence imposes that only rarely subordinate groups directly work off their hidden transcript (Scott. J. S., 1990, p. 29).

By themselves, social conflicts decide about what can or cannot *materially* be qualified as unjust, once they have attracted the general aversion against conditions of domination within which conflicting people are involved. Not casually – maybe implicitly – a lot of social conflicts have a prominent role in *renaming* social reality. This is the case of every significant social transformation, in light of which the adjective of "unjust" is generally recognized as the more relevant to describe certain social conditions, which previously were only partially contested.[25] Not casually, the *political* struggle to attribute and to maintain a certain definition to an action is often as important as the action itself (Scott J. S., 1990, p. 271).

Bibliography

Ackerman, B. (1980). *Social Justice in the Liberal State*, New Haven: Yale University Press.

Bobbio, N. (1976). *La teoria delle forme di governo nella storia del pensiero politico*, Torino: Giappichelli.

Bobbio, N. (2009). *Teoria generale della politica*, Torino: Einaudi.

Boltanski, L., Chiapello, È. (1999). *Le nouvel esprit du capitalisme*, Paris: Gallimard.

Boudon, R. (1995). À propos des sentiments de justice: nouvelles remarques sur la théorie de Rawls. *L'Année sociologique*, 2, 273-295.

Buchanan, A.E. (1982). *Marx and Justice. The radical Critique of Liberalism*, London: Methuen.

Canetti, E. (1960). *Masse und Macht*, Hamburg: Claassen Verlag.

Cohen, G. A. (1983). Review of Allen Wood's Karl Marx. *Mind*, 92, 440-445.

Darwall, S. (1977). Two Kinds of respect. *Ethics*, 88, 39-49.

Elster, J. (1985). *Making Sense of Marx*, Cambridge: Cambridge University Press.

Fraser, N. (2009). *Scales of Justice. Re-imagining Political Space in a Globalizing World*, New York: Columbia University Press.

Geras, N. (1986). *Literature of Revolution. Essays on Marxism*, London: Verso.

Goth, R., Dumouchel, P. (Eds.) (2009). *Against Injustice*, New York: Cambridge University Press.

Hart, H. L. A. (1961). *The Concept of Law*, Oxford: The Clarendon Press.

Hart, H. L. A. (1973). Rawls on Liberty and its Priority. *University of Chicago Law Review*, 40, 534-555.

Heller, A. (1987). *Beyond Justice*, Oxford: Oxford Blackwell.

Honneth, A. (2008). *Das Gewebe der Gerechtigkeit. Über die Grenzen des zeitgenössischen Prozeduralismus*, Berlin: Suhrkamp.

---

[25] "To determine the ideological content of recognition's forms becomes increasingly a difficult task, all the more we let us down into the dominant historical-cultural premises of periods took into account. It is only when interested parties themselves revolt against a dominant practise of recognition that we have a reference that allow us to call mere ideology about that period. Generally, this difficulty of evaluation becomes less problematic when temporal gap separating us from cases at issue grows up: more historical distance increases, more we have generally shared criteria that allow us to trace, retrospectively, a distinction between recognition forms that are morally claimed and ideological ones." (Hartmann M., Honneth A., 2004, p. 80-81).

Honneth, A. (1990). Integrität und Mißachtung. Grundmotive einer Moral der Anerkennung. *Merkur*, 501, 1043-1054.

Honneth, A. (1992). *Kampf um Anerkennung. Grammatik sozialer Konflikte*, Frankfurt am Main: Suhrkamp Verlag.

Honneth, A. (2001). *Leiden an Unbestimmtheit. Eine Reaktualisierung der Hegelschen Rechtphilosophie*, Stuttgart: GmbH & Co.

Honneth, A. (1994). *Pathologien den Sozialen. Die Aufgabe der Sozialphilosophie*, Frankfurt a. M.: Fischer.

Honneth, A. (2005). *Verdinglichung*, Frankfurt am Main: Suhrkamp Verlag.

Honneth, A., Fraser, N. (2003). *Umverteilung oder Anerkennung?*, Frankfurt am Main: Suhrkamp Verlag.

Margalit, A. (1996). *The Decent Society*, Cambridge: Harvard University Press.

Marx, K. (1978). *Critique of the Gotha Programme*, Moscow: Progress Publishers.

Nagel, T. (1973). Rawls on Justice. *Philosophical Review*, 83, 220-234.

Nozick, R. (1974). *Anarchy, State and Utopia*, New York: Basic Books.

Nussbaum, M. (1995). Objectification. *Philosophy and Public Affairs*, 4, 249–291.

Okin, S. M. (1989). *Justice, Gender and the Family*, New York: Basic Books.

Pulcini, E. (2009). *La cura del mondo*, Torino: Bollati Boringhieri.

Rawls, J. (1971), *A Theory of Justice*, Cambridge: Harvard University Press.

Rawls, J. (1999). *A Theory of Justice*, Oxford: Oxford University Press.

Rawls, J. (2001). Justice as Fairness. A Restatement, Cambridge: Harvard University Press.

Rawls, J. (1999). The Law of Peoples, Cambridge: Harvard University Press.

Renault, E. (2004). *L'expérience de l'injustice. Reconnaissance et clinique de l'injustice*, Paris: La Découverte.

Renault, E. (2000). *Mépris social. Etique et politique de la reconnaissance*, Paris: Éditions du Passant.

Renault, E. (2008), *Souffrances Sociales. Sociologie, psychologie et politique*, Paris: La Découverte.

Sandel, M. (1982). *Liberalism and the Limits of Justice*, Cambridge: Cambridge University Press.

Scott, J. (1990). *Domination and the Art of Resistance*, New Haven: Yale University Press.

Searle, J. (1995). *The Construction of Social Reality*, New York: The Free Press.

Shklar, J. N. (1984). *Ordinary Vices*, Cambridge: Harvard University Press.

Shklar, J. N. (1990). *The Faces of Injustice*, London: Yale University Press.

Sen, A. (1980). Equality of What?. In Mc Murrin S. (Ed.), *Tanner Lectures on Human Values*, (pp. 195-220). Salt Lake City: University of Utah Press.

Sen, A. (1992). *Inequality Re-examined*, Oxford: Oxford University Press.

Sen, A. (2010). *The Idea of Justice*, London: Penguin.

Taylor, C. (1992a). *Sources of the Self. The Making of Modern Identity*, Cambridge: Harvard University Press.

Taylor, C. (1992b). *The Politics of Recognition*, Princeton: Princeton University Press.

Young, I. M. (1990). *Justice and the Politics of Difference*, Princeton: Princeton University Press.

Walzer, M. (1983). *Spheres of Justice: A Defence of Pluralism and Equality*, New York: Basic Books.

Weber M. (1922). *Wirtschaft und Gesellschaft*, Tübingen: Mohr.

Wood, A. (2004). *Karl Marx*, London: Routledge.