

PROCEDURAL JUSTICE, LEGAL ESTRANGEMENT, AND THE
BLACK PEOPLE’S GRAND JURY

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INTRODUCTION

In recent years, increased attention has been drawn to the violence and oppression communities of color experience at the hands of police. This is most evident when looking at the rise of Black Lives Matter. Despite historically going unnoticed, the movement has catapulted police killings of Black people into the spotlight. Due to the actions of dedicated activists, the names of Michael Brown, Eric Garner, Philando Castile, Alton Sterling, Freddie Gray, Sandra Bland, and many others have appeared in the news and on social media timelines, forcing society at large to become acutely aware of the atrocities committed by the police against people of color.

While there has been increased debate and scrutiny concerning the actions of police officers, there has been little in the way of justice or remedies. Black communities have watched time and time again as the police who killed Brown, Garner, Gray, and so many others have evaded justice.

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Police who kill Black civilians are rarely convicted for their actions.¹ This has led to frustration on the part of Black communities, who have expressed disdain for the current system, which they do not believe will treat them fairly.² This is particularly evident in Ferguson, Missouri, following the death of a Black teenager named Michael Brown, at the hands of White police officer Darren Wilson.³ Brown's death resulted in social unrest, not only in the city of Ferguson but throughout the country.⁴ This tension was exacerbated after the grand jury failed to indict Wilson.⁵ Two months later, activists associated with the International People's Democratic Uhuru Movement ("Uhuru Movement") convened the "Black People's Grand Jury" ("BPGJ") in Ferguson, Missouri.⁶ The BPGJ was a response to the non-indictment of Wilson for the death of Brown.⁷ In stark contrast to the institutional grand jury, the BPGJ was composed of jurors chosen by the community, had proceedings that were open to the public, and provided a historical analysis for contextualizing Michael Brown's death as a systematic occurrence.⁸

Omali Yeshitela, one of the organizers of the BPGJ, situated the symbolic action as a testimony to the lack of power afforded to Black civilians through the justice system.⁹ Of the action, Yeshitela stated:

¹ Madison Park, Police Shootings: Trials, Convictions Are Rare for Officers, CNN (Oct. 3, 2018, 4:41 PM), <https://www.cnn.com/2017/05/18/us/police-involved-shooting-cases/index.html> [<http://perma.cc/KXK7-S3C5>].

² Monica Anderson, Vast Majority of Blacks View the Criminal Justice System as Unfair, Pew Research Ctr. (Aug. 12, 2014), <http://www.pewresearch.org/fact-tank/2014/08/12/vast-majority-of-blacks-view-the-criminal-justice-system-as-unfair/> [<http://perma.cc/LX2L-ZZ-ET>].

³ Camille Phillips, African Liberation Group Plans to Convene 'Black People's Grand Jury' Against Darren Wilson, St. Louis Pub. Radio (Dec. 12, 2014), <http://news.stlpublicradio.org/post/african-liberation-group-plans-convene-black-peoples-grand-jury-against-darren-wilson> [<http://perma.cc/H3ZA-JSB9>].

⁴ Jessica Ravitz & John Blake, Protests Spread Far Beyond Ferguson, CNN (Nov. 25, 2014, 7:32 AM), <http://www.cnn.com/2014/11/24/us/national-ferguson-protests/index.html> [<http://perma.cc/XYP4-R289>] (detailing protests in New York, Philadelphia, Oakland, and elsewhere).

⁵ Monica Davey & Julie Bosman, Protests Flare After Ferguson Police Officer Is Not Indicted, N.Y. Times (Nov. 24, 2014), <https://www.nytimes.com/2014/11/25/us/ferguson-darren-wilson-shooting-michael-brown-grand-jury.html> [<http://perma.cc/T3C8-7XXK>].

⁶ Phillips, *supra* note 3.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

What it does is educate and inform our people that two bodies came together, examined the same set of evidence and were able to come to different conclusions. Therefore the only thing standing between us being able to carry out the will of the people is to change this relationship that exists between us and the armed state apparatus that controls us.¹⁰

Activists associated with the BPGJ—and Black community members in Ferguson more broadly—continuously expressed sentiments of both procedural injustice¹¹ and legal estrangement,¹² which are two prominent theories that have emerged to explain how communities of color come to see formal legal structures as illegitimate. The critiques lodged by Black activists and residents of Ferguson were not limited solely to police-community relations: they expressed a specific contempt for the legal system,¹³ which was situated as a separate structure from policing as a whole.

By utilizing Ferguson as a case study, this Article seeks to provide an understanding of courts as important and central actors that produce and legitimize police misconduct, thus contributing to a sense of exclusion for communities of color. This entails a theoretical framework that does not assume courts are simply one entity of a broader legal system but, instead, seeks to situate courts as an integral body and state institution that legitimizes police violence against communities of color.

This Article also serves as an expansion of existing theoretical frameworks accounting for the fraught relationship between communities of color and formal legal structures.¹⁴ This analysis also acknowledges the

¹⁰ *Id.*

¹¹ See Jason Sunshine & Tom R. Tyler, *The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing*, 37 *L. & Soc'y Rev.* 513, 534–36 (2003). The authors conceptualize procedural justice theory as an assertion that people are more swayed by whether they perceive the procedures to be fair, rather than the outcome of the conflict itself. *Id.* at 535. Within a procedural justice framework, police-community relations can be best improved if engagement is rooted in dignity and respect. *Id.* at 536. When this is achieved, procedural justice theorists assert, communities will perceive police institutions as legitimate. *Id.* at 514. This will lead to a greater willingness to adhere to orders or assist police. *Id.* at 516–17.

¹² See Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 *Yale L.J.* 2054, 2083 (2017) (defining “legal estrangement” as “a marginal and ambivalent relationship with society, the law, and predominant social norms that emanates from institutional and legal failure”).

¹³ Tina Susman, *Skepticism Greeted Start of Grand Jury Case in Michael Brown's Death*, *L.A. Times* (Aug. 20, 2014, 6:48 PM), <http://www.latimes.com/nation/la-na-0821-ferguson-grand-jury-20140821-story.html> [<http://perma.cc/4F4P-VN3R>].

¹⁴ Tom R. Tyler & Yuen J. Huo, *Trust in the Law: Encouraging Public Cooperation with the Police and Courts* 141 (2002) (citing numerous studies accounting for the perception of

agency demonstrated by the BPGJ, which emerged as a remedy for the community's disillusionment with a formal legal structure that it felt was unjust. By developing a Critical Race approach that is attentive to notions of legal estrangement, procedural justice, and social movement theories, this Article develops an epistemological framework for understanding how communities of color, when faced with perceived illegitimate structures, seek to create their own. While the BPGJ had no legal standing, it would be a missed theoretical opportunity to not interrogate how it served as not only an indictment of Darren Wilson but, more importantly, as an indictment of the police, the courts, and—by extension—the legal system as a whole.

Part I of this Article provides an overview of procedural justice, which has arisen as the leading theoretical framework for understanding the relationship between the police and marginalized communities. Part II explores the limitations of procedural justice, as described by Professor Monica Bell. Part III analyzes specific Supreme Court decisions, such as *Tennessee v. Garner*¹⁵ and *Scott v. Harris*,¹⁶ in order to understand the specific role the judicial system plays in justifying police misconduct, contributing to a sense of alienation for Black communities.

Part III furthers this theoretical framework by analyzing both the actions of the Ferguson Grand Jury and the response of community residents to showcase how those residing in Ferguson voiced alienation and frustration toward the court system, as separate from police-community misconduct. This case study will showcase how communities come to view the courts as a separate legal structure, working in conjunction with, albeit separate from, the institution of policing.

Part IV situates the BPGJ as a legal protest, embodying the agency and resilience of Black activists and community members who were disheartened by the Grand Jury's failure to indict Darren Wilson. Part V concludes this Article with recommendations for both legal scholars and

injustice African Americans have toward law enforcement); Sara Sternberg Greene, Race, Class, and Access to Civil Justice, 101 Iowa L. Rev. 1263, 1266–67 (2016) (utilizing empirical data to find that low-income communities of color are less likely to call on the *civil* justice system for assistance because those communities perceive the *criminal* justice system as unjust); Robert J. Sampson & Dawn J. Bartusch, Legal Cynicism and (Subcultural?) Tolerance of Deviance: The Neighborhood Context of Racial Differences, 32 L. & Soc'y Rev. 777, 800 (1998) (showing that poor, inner-city communities of color have higher levels of dissatisfaction with police, which negatively impacts their trust in the legal system more broadly).

¹⁵ 471 U.S. 1 (1985).

¹⁶ 550 U.S. 372 (2007).

practitioners attempting to understand the impact and consequences of communities alienated from existing structures. Instead of a “top-down” approach, in which solutions are sought in the very institutions being called into question, this analysis advocates for a “bottom-up” approach, in which communities are situated as agents already creating change.

I. PROCEDURAL JUSTICE AND POLICING

Procedural justice has played an important role in shaping understandings of policing, particularly with regard to how police interact with communities of color.¹⁷ This approach argues that legitimacy is determined by how the public judges the fairness of the processes utilized by police officers when making decisions and exercising their authority.¹⁸ This entails a focus on how the police treat people as a determinant for people's acceptance of police legitimacy.¹⁹

Procedural justice has four major factors that can determine whether someone perceives their interaction with police to be just. Civilians should feel that they have been treated with dignity and respect; they should feel that police have trustworthy motives for the interaction, are neutral in their decision making, and provide opportunities for community members to voice their concerns and participate in policy-making.²⁰ As Professor Tracey Meares states, “We can summarize these ideas colloquially in this way: in their interactions with legal authorities, people want to believe that the authority with whom they are dealing with believes ‘that they count.’ And, people make this judgment based on how they are treated, as they cannot usually read minds.”²¹

Procedural justice theorists maintain that an adherence to these tenets can lead to a sense of legitimacy,²² which acts as a determining factor for whether people will align their behavior with the interests of authorities.²³ This concept of legitimacy establishes the focus of procedural justice as ensuring that the public complies and cooperates with police efforts.²⁴

¹⁷ Bell, *supra* note 12, at 2073.

¹⁸ See Sunshine & Tyler, *supra* note 11, at 535–36.

¹⁹ *Id.*

²⁰ See Lorraine Mazerolle et al., *Procedural Justice and Legitimacy in Policing* 3 (2014).

²¹ Tracey Meares, *Policing and Procedural Justice: Shaping Citizens' Identities to Increase Democratic Participation*, 111 Nw. U. L. Rev. 1525, 1531–32 (2017) (footnote omitted).

²² Mazerolle et al., *supra* note 20, at 3.

²³ Sunshine & Tyler, *supra* note 11, at 514.

²⁴ *Id.* at 514–16.

There are four key assumptions underlying the procedural justice approach to policing, two of which will be focused on here. The first is that, in terms of ensuring compliance with the law, people's perceptions of police are equally as important—or even more important than—the risk of being punished for a crime.²⁵ The second assumption is that a focus on legitimacy will provide a better understanding of whether communities will cooperate with police.²⁶

Procedural justice presumes that if people perceive the police to be legitimate, they will feel more inclined to obey, making cooperation voluntary. Leading theorists Jason Sunshine and Professor Tom Tyler state, “When people view the police as legitimate, they are more likely to call them to report crimes or volunteer their time to work with them in their communities.”²⁷ This understanding also extends to the third assumption, which asserts that if people view the police as legitimate, they will empower the police to exercise authority and perform their duties.²⁸

Procedural justice has been promoted as a remedy for addressing tensions between police and ethnic minority groups, who tend to be more distrustful of police.²⁹ The distrust that communities of color have toward police has a long, sordid history. According to Sunshine and Tyler, “Since the establishment of the first formal full-time police force in the United States circa 1837, the police have endured numerous challenges to their legitimacy as an institution of social control.”³⁰

Theorists have suggested that communities of color value procedural justice when interacting with police, which can then shape how legitimate they view the police to be.³¹ Of this phenomenon, Professor Lorraine Mazerolle and her co-authors state that procedural justice “may be the most

²⁵ *Id.* at 523.

²⁶ *Id.* at 523–24.

²⁷ *Id.* at 524.

²⁸ *Id.*

²⁹ Numerous studies have found that Black communities are more likely to express discontent with police, especially with respect to the use of force and mistreatment. See, e.g., David Cole, *No Equal Justice: Race and Class in the American Criminal Justice System* 10–11 (1999) (discussing Black communities' mistrust of police and comparing it to that of White communities); W.S. Wilson Huang & Michael S. Vaughn, *Support and Confidence: Public Attitudes Toward the Police*, in *Americans View Crime and Justice: A National Public Opinion Survey* 31, 32 (Timothy J. Flanagan & Dennis R. Longmire eds., 1996) (discussing that African Americans “view the police more antagonistically than do whites”) (citation omitted); Sunshine & Tyler, *supra* note 11, at 523 (discussing that Black and Latino communities have less trust and confidence in the police, as well as courts and the legal system more broadly).

³⁰ Sunshine & Tyler, *supra* note 11, at 515.

³¹ Mazerolle et al., *supra* note 20, at 7.

important first step that police can take toward building trust, garnering cooperation, eliciting compliance, and generally building rapport with otherwise disenfranchised groups of people in largely disadvantaged communities.”³²

II. LEGAL ESTRANGEMENT AND THE LIMITATIONS OF PROCEDURAL JUSTICE

In many ways, “legal estrangement”³³ can be seen as a corrective measure to the limitations of the procedural justice theory. Scholars and policymakers working within a procedural justice framework have concluded that a “legitimacy deficit” is responsible for the “frayed relationship” between police and people of color.³⁴ Due to procedural justice’s focus on whether communities view police as legitimate state actors,³⁵ it does not fully encapsulate or conceptualize the deleterious relationship that exists between police and communities of color.

For one, this approach assumes that policing only serves to reduce and respond to crime.³⁶ This limited perception of policing does not acknowledge the historical, and much more insidious, role police have and continue to play in socially controlling marginalized groups.³⁷ With this understanding, it becomes clearer as to how increasing compliance and cooperation with police officers does not just operate to reduce crime, but becomes a tool to make communities of color recognize the authority of police. This ensures that policing, as an institution, can more

³² *Id.*

³³ See Bell, *supra* note 12, at 2100. Professor Bell conceptualizes “legal estrangement” to account for the alienation and marginalization that disenfranchised communities experience due to institutional and legal failures. *Id.* Bell identifies three contributors to legal estrangement theory, the first being procedural injustice, which can “create[] and reinforce[] legal estrangement.” *Id.* at 2100–04. The second is vicarious marginalization, which seeks to capture how other people’s negative interactions with police can lead to a cultural sense of estrangement. *Id.* at 2104. The last component of legal estrangement is structural exclusion, which offers a critique of seemingly race-and-class-neutral policies that distribute policing resources to disadvantaged communities in a manner where they receive lower quality policing than White and more affluent neighborhoods. *Id.* at 2114. The result is a sense of lawlessness, in which poor communities of color are “harshly policed yet underprotected.” *Id.* at 2115.

³⁴ According to Bell, the “legitimacy deficit” framework assumes that communities of color “do not trust the police or believe that they treat them fairly, and that therefore these individuals are less likely to obey officers’ commands or assist with investigations.” *Id.* at 2058.

³⁵ *Id.* at 2059.

³⁶ Some scholars argue that policing has dual purposes: “crime response and reduction” and “management and control of disfavored groups.” *Id.* at 2061.

³⁷ *Id.*

effectively control and alienate communities of color.³⁸ As a result, procedural justice concerns itself with “whether and how the state maintains and exercises its power.”³⁹

The “legitimacy deficit” school of thought is pervasive within criminal justice reform,⁴⁰ despite its limited portrayal of police functions. This prevailing focus has led to ineffective and misguided attempts⁴¹ to bridge the relationship between police and the communities they are supposedly serving. Such attempts situate obedience to police officers by communities of color as the ultimate goal,⁴² effectively recasting communities of color as the “problem” and placing the onus upon them to alter their perceptions and beliefs of police.⁴³

This is a sentiment expressed in key resources for academics, criminologists, and police departments on how to incorporate procedural justice

³⁸ Bell, *supra* note 12, at 2061.

³⁹ *Id.* at 2087.

⁴⁰ Bell cites the Final Report of the President’s Task Force on 21st Century Policing, which was produced in 2015. *Id.* at 2058–59 (citing President’s Task Force on 21st Century Policing, Final Report of the President’s Task Force on 21st Century Policing 9–11 (2015)). This widely circulated and influential report situated building trust and legitimacy between police and communities of color as the ultimate goal of police reform. *Id.* In doing so, Bell asserts that the report, and policies for police reform more generally, essentially conflate trust with legitimacy. *Id.*

⁴¹ According to Bell, procedural justice has been widely cited as the appropriate response to strained relationships between the police and communities of color. *Id.* at 2077–79. The result has been the adoption by many police departments of trainings to ensure that officers behave in a procedurally just manner in order to promote legitimacy. *Id.* at 2081. Procedural justice policing also advocates for internal department policies that “motivate police to treat the public fairly.” *Id.* at 2078. According to Bell, the procedural justice approach—and the recommendations that descend from it—are widespread, yet heavily flawed. She characterizes these reforms as being easy-to-implement, inexpensive, and noncontroversial, but not adequately addressing the “collective estrangement” of communities of color. *Id.* at 2081–82. Further, Bell warns that focusing on the perception of law enforcement, as entailed by a procedural justice approach, can actually increase the violation of rights communities of color are already subjected to. *Id.* at 2082 & n.110 (citing Paul Butler, *The System Is Working the Way It Is Supposed To: The Limits of Criminal Justice Reform*, 104 *Geo. L.J.* 1419, 1468 (2016)). She suggests that the approaches implicit within procedural justice can placate citizens’ concerns, leading them to feel that policing has improved, even as police violence, misconduct, and unconstitutional actions remain rampant. *Id.* at 2082–83.

⁴² *Id.* at 2059.

⁴³ *Id.* at 2061 (“Deploying legitimacy theory and procedural justice as a diagnosis and solution to the current policing crisis might even imply, at some level, that the problem of policing is better understood as a result of African American criminality than as a badge and incident of race- and class-based subjugation.”).

into their agendas.⁴⁴ But such sentiments obscure the circumstances that have created a sense of distrust for police amongst communities of color, essentially removing a history of unjust practices by law enforcement as an institution from the discussion.

A shift from procedural justice to legal estrangement can provide a more encompassing understanding of just how devastating perceptions of procedural injustice can be for communities of color. At the root of legal estrangement is the situating of the legal system as a tool for creating a cohesive and inclusive society. The theory contextualizes the legal system within a broken social order that leaves some people without resources; thus, the system denies them “full social membership”⁴⁵ and “can operate to effectively banish whole communities from the body politic.”⁴⁶

In order to fully grasp this phenomenon, the theory of legal estrangement should be placed in conversation with the concept of “legal cynicism,”⁴⁷ which legal estrangement attempts to incorporate and expand upon.⁴⁸ This more encompassing focus allows for a better understanding

⁴⁴ See Mazerolle et al., *supra* note 20, at 7 (“Policing ethnic minority groups poses specific challenges for police because minorities tend to be both less trusting of police and less likely to engage in collaborative crime control than nonminority groups. . . . Because ethnic minority groups can present challenges to police, [procedural justice] may be an ideal tool to help improve relationships between police and ethnic minority groups.”).

⁴⁵ Bell, *supra* note 12, at 2083–84.

⁴⁶ *Id.* at 2067.

⁴⁷ See *id.* at 2066–67. Bell asserts that the theory of “legal cynicism” was developed by Professors Robert J. Sampson and Dawn J. Bartusch to account for 1) the subjective “cultural orientation” that communities have toward law enforcement and the state more generally and 2) the objective, structural conditions that create the subjective orientation, rooted in distrust. *Id.* Professors Sampson and Bartusch suggest that poor inner-city communities of color show higher levels of dissatisfaction with police, which can then impact how much they trust the legal system more broadly. Sampson & Bartusch, *supra* note 14, at 800. According to their theory of legal cynicism, the tension between police and communities of color is not simply about mistrust but is actually a sense of social estrangement, meaninglessness, and powerlessness amongst marginalized communities that is the result of structural instability. *Id.* at 782–83. The authors incorporate Durkheim’s theory of “anomie”—“a state of normlessness in which the rules of the dominant society (and hence the legal system) are no longer binding in a community or for a population subgroup”—which the authors apply to poor communities of color who, due to powerlessness, do not feel that the rules of the dominant society, including the legal system, apply to them. See *id.* at 782–84; see also Bell, *supra* note 12, at 2084 (discussing Sampson and Bartusch’s framework and incorporation of Durkheim’s theory).

⁴⁸ Bell expands on Sampson and Bartusch’s findings by focusing in depth on the role of police in creating a sense of “anomie,” in order to capture the real problem of policing while simultaneously explaining the consequences of the structural conditions that produce community-police relations. This interpretation rests on the assumption that, even if groups accept mainstream cultural norms and goals, they are prevented from enacting or obtaining these norms and goals. This is a break from the theory of “legal cynicism” developed by Sampson

of how Black communities, even in situations where they do view law enforcement officials as legitimate, “are nonetheless structurally ostracized” through the law.⁴⁹

III. THE ROLE OF COURTS IN LEGAL ESTRANGEMENT

The courts play an essential role in either ensuring or dispelling a sense of anomie for those who do not trust the police. When the legal system dictates which police actions are constitutionally acceptable, they are not solely ruling on police conduct. These decisions have established the “modern constitutional landscape”⁵⁰ for not only how excessive force claims are characterized, but for the “program” of policing as a whole.⁵¹ Court rulings, in turn, impact communities’ perceptions of both the police and the state at large.⁵²

When the legal system fails to indict or convict police officers who kill and injure Black civilians or renders court decisions that allow for increased violence against communities of color at the hands of the police, the judiciary is effectively sending messages to communities of color. These messages convey that these communities are socially and

and Bartusch. According to Bell, “cynicism” situates the attitudes communities have towards police as the central interest, instead of the structural occurrences that have led to community distrust. Bell, *supra* note 12, at 2084–85.

⁴⁹ *Id.* at 2086.

⁵⁰ See Osagie K. Obasogie & Zachary Newman, *The Futile Fourth Amendment: Understanding Police Excessive Force Doctrine Through an Empirical Assessment of *Graham v. Connor**, 112 *Nw. U. L. Rev.* 1465, 1465 (2018) (referring to the “modern constitutional landscape” for understanding the impact courts have on defining, redefining, and legitimizing police violence against communities of color).

⁵¹ See Tracey L. Meares, *Programming Errors: Understanding the Constitutionality of Stop-and-Frisk as a Program, Not an Incident*, 82 *U. Chi. L. Rev.* 159, 162 (2015), in which the author asserts that discriminatory policing practices, such as stop-and-frisk, do not exist as individual isolated incidents. Instead, Meares asserts that when police engage in systematic discriminatory behavior, they create a “program” that creates the fabric of community-police relationships. *Id.* at 162–63. The pervasiveness of individual actions by police officers engaging in racially discriminatory and unconstitutional behavior creates an entire perception of the illegitimacy of the policing “program” within marginalized communities. Bell expands on this analysis by interjecting the role that courts play in furthering and legitimizing this “program” of policing. Bell, *supra* note 12, at 2139. As Bell suggests, the “program” of policing is much more than individual incidents of stop-and-frisk, but actually encompasses all aspects of policing, from serving warrants to deciding which calls for assistance to respond to. *Id.* at 2139–40.

⁵² Bell, *supra* note 12, at 2139–43.

politically excluded⁵³ and that they are not entitled to the same level of state protection afforded to White civilians.⁵⁴

Over the last three decades, the Supreme Court has made a variety of decisions that allow for police to brutalize communities of color with impunity. The first of these cases was *Tennessee v. Garner*, which concerned police officer Elton Hymon's decision to shoot and kill a Black teenager named Eugene Garner when he attempted to flee from a suspected robbery.⁵⁵ Garner's family sued the State of Tennessee for a violation of Garner's Fourth Amendment rights, since state law at the time authorized Hymon's actions.⁵⁶

The Supreme Court ruled 6-3 that the Tennessee statute authorizing deadly force to prevent the fleeing of a suspected felon was unconstitutional as applied.⁵⁷ While this Supreme Court ruling, on its surface, seemed to curtail police brutality, it did allow for one important caveat. The Justices ruled that the use of deadly force was permissible if the suspect were believed to pose a threat to the safety of police officers or others.⁵⁸ The Supreme Court, however, did not provide a precise definition for what constitutes a "threat," effectively leaving it up to police discretion. The impact of this case is undeniable. Former Tennessee Assistant Attorney General Jerry L. Smith, who helped present the case to the Supreme Court, stated, "You will note that in any police shooting, in almost every law enforcement shooting now, the police defense is either that the person was posing a danger to [the officer], or to bystanders That's exactly the language that comes from the case."⁵⁹

⁵³ Bell, *supra* note 12, at 2140 ("Because of the longstanding social, cultural, and symbolic meaning of the police among African Americans and in racially and socioeconomically marginalized communities, policing cases—more than others—send messages to groups about social inclusion and, indeed, social citizenship.").

⁵⁴ See Jasmine B. Gonzales Rose, *Racial Character Evidence in Police Killing Cases*, 2018 *Wis. L. Rev.* 369, 385 (2018); Andrew E. Taslitz, *What Feminism Has to Offer Evidence Law*, 28 *Sw. U. L. Rev.* 171, 215 (1999).

⁵⁵ 471 U.S. 1, 3–4 (1985).

⁵⁶ *Id.* at 4–5.

⁵⁷ *Id.* at 11–12, 22.

⁵⁸ *Id.* at 11 ("Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or others, it is not constitutionally unreasonable to prevent escape by using deadly force.").

⁵⁹ Stacey Barchenger, *How a Tennessee Case Forever Changed Police Shootings*, *The Tennessean* (Aug. 23, 2015, 11:04 PM), <https://www.tennessean.com/story/news/2015/08/21/how-tennessee-case-forever-changed-police-shootings/31848333/> [<http://perma.cc/D78L-ZK4G>].

The deferral to police discretion in defining what constitutes a threat, as established through *Garner*, was solidified by *Graham v. Connor*.⁶⁰ In this case, Dethorne Graham, in the midst of diabetic shock, was stopped by police officers who perceived him to be acting irrationally.⁶¹ During the encounter, Graham became unconscious.⁶² When he awoke, he was handcuffed, lying face down on the ground, surrounded by four other officers who had arrived on the scene.⁶³ Eventually, the officers realized that Graham was not guilty of any wrongdoing, and he was released.⁶⁴ During the encounter, however, Graham sustained a broken foot, numerous cuts on his body, and an injured shoulder.⁶⁵ Graham claimed, under 42 U.S.C. § 1983, that the excessive force he had been subjected to deprived him of his constitutional rights under the Fourteenth Amendment.⁶⁶

At the Supreme Court, the case centered on whether the proper constitutional claim had been brought against the officers.⁶⁷ Within their ruling, the Supreme Court rejected the substantive due process claim and, instead, held that the “reasonableness standard” embedded within the Fourth Amendment is the proper unit of analysis for excessive force claims.⁶⁸ This was an attempt to move toward a more objective standard for assessing police brutality claims by looking at events that transpire from the perspective of a “reasonable officer.”⁶⁹ But the Court’s failure to define “reasonableness” allowed for a very broad understanding of what constitutes reasonable behavior, which is often defined by officers themselves and, as Professor Osagie Obasogie and Zachary Newman acknowledged, “insulates’ officers from liability.”⁷⁰

Another case was *Scott v. Harris*, which centered around a Black man named Victor Harris, who sued Deputy Timothy Scott.⁷¹ Harris claimed that Scott violated his Fourth Amendment rights by using excessive force

⁶⁰ 490 U.S. 386 (1989).

⁶¹ *Id.* at 388–89.

⁶² *Id.* at 389.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.* at 390.

⁶⁶ 490 U.S. at 390.

⁶⁷ *Id.* at 388.

⁶⁸ *Id.* at 393–95.

⁶⁹ *Id.* at 396.

⁷⁰ See Obasogie & Newman, *supra* note 50, at 1480 (quoting John P. Gross, Judge, Jury, and Executioner: The Excessive Use of Deadly Force by Police Officers, 21 *Tex. J. C.L. & C.R.* 155, 165 (2016)).

⁷¹ 550 U.S. 372, 375–76 (2007).

to ram him off the road during a high-speed chase, rendering him a quadriplegic.⁷² The Supreme Court ruled 8-1 that Scott's actions were not a violation of the Fourth Amendment's prohibition against unreasonable seizures.⁷³

With this case, the Supreme Court relied on faulty logic to curtail police accountability. The Court's majority justified the use of excessive force—even when police have non-lethal options at their disposal—as a reasonable response to a high-speed pursuit. This effectively swung the pendulum of what is considered to be “reasonable” force in favor of excessive, even deadly, force.⁷⁴ As a result, this decision affords police more protection from lawsuits, even when they have less lethal options at their disposal.⁷⁵

An overview of these cases shines better light on the role the judicial system plays in condoning the police “program.” The concept of court decisions as an essential component for allowing police violence against communities of color provides a better understanding for why marginalized communities protest the police and the courts simultaneously, seeing both as essential entities to a larger system that attempts to exclude and isolate them from society. This will be explored in the next Section with a case study of Ferguson, Missouri.

A. Community Responses to the Death of Michael Brown

On August 9, 2014, White police officer Darren Wilson shot and killed an unarmed Black teenager named Michael Brown in Ferguson, Missouri.⁷⁶ His death sparked protests in Ferguson and across the country.⁷⁷

⁷² *Id.*

⁷³ *Id.* at 386; see *id.* at 389 (Stevens, J., dissenting).

⁷⁴ See Forrest Plesko, (Im)Balance and (Un)Reasonableness: High-Speed Police Pursuits, the Fourth Amendment, and *Scott v. Harris*, 85 *Denv. U. L. Rev.* 463, 463 (2007). Plesko asserts that the Court determined that Scott's actions constituted a reasonable threat and, thus, an appropriate response was excessive force. *Id.* at 469–70. But, in doing so, Plesko states that the Court ignored other possible remedies that do not cause bodily harm, such as “stopsticks,” documenting the suspect's license plate for locating him at a later time, or providing a warning to Harris over a loudspeaker. *Id.* at 464.

⁷⁵ See Bill Mears, Court: High-Speed Chase Suspects Can't Sue Police, CNN: Law Ctr. (Apr. 30, 2007, 6:12 PM), <http://www.cnn.com/2007/LAW/04/30/scotus.chase/index.html> [<http://perma.cc/4KGU-PJ8V>].

⁷⁶ Ferguson Unrest: From Shooting to Nationwide Protests, BBC News (Aug. 10, 2015), <https://www.bbc.com/news/world-us-canada-30193354> [<http://perma.cc/8BRH-QM7W>] [hereinafter Ferguson Unrest].

⁷⁷ *Id.*

The St. Louis County Grand Jury convened after the shooting in order to determine whether Darren Wilson would be charged with murder.⁷⁸ The Grand Jury was composed of twelve jurors, picked at random, nine of whom were White and three of whom were Black.⁷⁹ They heard testimony from numerous witnesses, as well as forensic and medical experts.⁸⁰ The Grand Jury ultimately declined to indict.⁸¹

There were numerous criticisms lodged against the Grand Jury convened in St. Louis. In an unusual move, county prosecutor Robert McCulloch did not recommend any charges against Wilson to the Jury.⁸² This caused many community members to feel that McCulloch was unwilling to prosecute.⁸³ Wilson was also not cross-examined when he testified to the Grand Jury, allowing his version of the story to remain unchallenged.⁸⁴ There were also concerns over McCulloch's neutrality, particularly due to his close working relationship with the local police force because of his role as a prosecutor.⁸⁵

Furthermore, the Grand Jury was removed from the Ferguson community and convened in the Whiter, more affluent neighboring town of Clayton, Missouri.⁸⁶ According to the Census Bureau, Ferguson is approximately 66% Black and 30% White.⁸⁷ Additionally, over 20% of the Ferguson population lives in poverty.⁸⁸ Clayton, on the other hand, is almost 80% White and less than 9% Black.⁸⁹ Approximately 9% of the Clayton population lives in poverty.⁹⁰

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² Ferguson Unrest, *supra* note 76.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ Nikole Hannah-Jones, School Segregation, the Continuing Tragedy of Ferguson, *ProPublica* (Dec. 19, 2014), <https://www.propublica.org/article/ferguson-school-segregation> [<http://perma.cc/6KMR-7JX4>].

⁸⁷ QuickFacts: Ferguson City, Missouri, U.S. Census Bureau (July 1, 2017) <https://www.census.gov/quickfacts/fergusoncitymissouri> [<http://perma.cc/Z2L6-DKPL>] (last visited Jan. 19, 2019).

⁸⁸ *Id.*

⁸⁹ 2010 Census Summary: Race and Hispanic or Latino Origin, U.S. Census Bureau, https://factfinder.census.gov/bkmk/table/1.0/en/DEC/10_SF1/QTP3/1600000US2914572 (last visited Jan. 15, 2019).

⁹⁰ 2012–2016 American Community Survey 5-Year Estimates, Selected Economic Characteristics, U.S. Census Bureau, <https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=CF> (last visited Jan. 15, 2019).

The grand jury process was also criticized because of the secrecy surrounding it. Proceedings were not initially open to the public, supposedly to protect the integrity of the case.⁹¹ But in cases in which police officers are not indicted, this has the impact of leaving communities with no justification or explanation for why charges are not brought. Remarking about this phenomenon, former state prosecutor Brittany N. O'Neil stated, "This secrecy continues to foster an environment of distrust resulting in an 'us versus them' relationship between various communities, police officers and the criminal justice system."⁹² After mounting criticisms of an unfair process in favor of Wilson, the prosecutor made the Grand Jury documents public.⁹³

As stated before, communities of color conceptualize the courts as an illegitimate structure that operates separately from the institution of policing as a whole.⁹⁴ In the specific case of Ferguson, residents did not come to see the court as illegitimate because of its mere proximity to police within the state apparatus. Instead, Ferguson community members embodied an ethos of legal estrangement by expressing disdain and resentment for the court system, which they saw as an autonomous body furthering an agenda entrenched within White supremacy.

The large-scale uprising following the Grand Jury's decision also fulfills a key component of "legal estrangement," which extends from individual beliefs to community sentiments.⁹⁵ Following the Grand Jury's decision, hundreds of activists flooded the streets of Ferguson to protest the injustice. In doing so, they expressed an understanding of the legal system's failure to indict as a systematic denial of rights to the entire Black community of Ferguson, instead of just Michael Brown as an individual. One protester stated, "The system failed us again," expressing both a

⁹¹ Michael Brown: The Workings of the Grand Jury Explained, BBC News (Nov. 25, 2014), <https://www.bbc.com/news/world-us-canada-30042638> [<http://perma.cc/HTP9-QL7M>]; see also Brittany N. O'Neil, End Grand-Jury Secrecy in Police Shootings, Orlando Sentinel (Jan. 7, 2016, 8:54 PM), <https://www.orlandosentinel.com/opinion/os-ed-grand-jury-secrecy-010816-20160107-story.html> [<http://perma.cc/J28S-Q8RB>].

⁹² O'Neil, *supra* note 91.

⁹³ Eyder Peralta & Krishnadev Calamur, Ferguson Documents: How the Grand Jury Reached a Decision, NPR News (Nov. 25, 2014, 6:41 AM), <https://www.npr.org/sections/thetwo-way/2014/11/25/366507379/ferguson-docs-how-the-grand-jury-reached-a-decision> [<http://perma.cc/A9SS-N5JC>].

⁹⁴ See *supra* notes 12–13 and accompanying text.

⁹⁵ Bell, *supra* note 12, at 2058.

sense of system failure and an extrapolation of this social breakdown to the marginalization of an entire community.⁹⁶

Remarking on the Grand Jury outcome, attorney Benjamin Crump, who represented the Brown family, said, “This process is broken.”⁹⁷ His sentiment situates the non-indictment of Darren Wilson within a larger structural and historical narrative concerning Black communities, policing, and the judicial system. His reference to the “process” extrapolates the outcome of this case to the entire legal system and, thus, demonstrates a pattern of unencumbered police violence against Black communities, sanctioned through the courts.

Some Ferguson residents, expressing legal cynicism, were skeptical of the Grand Jury before a decision was even reached. During a protest outside of the Clayton courtroom while the Grand Jury was convening, protestor Gwen Stewart stated, “It doesn’t make any difference what the grand jury says The prosecuting attorney can override them. The prosecuting attorney *is* the grand jury. He favors the Police Department because he *is* the Police Department.”⁹⁸ Her statements simultaneously highlight how integral the judicial system is to the “program of policing,” in which the prosecutor’s actions can excuse police violence.

Further, Stewart’s words portray a sense of legal estrangement by highlighting the pervasive messages the legal system sends to marginalized communities, in which supposed judicial safeguards, such as the grand jury system, are already situated as being against them. Stewart’s criticism also echoes frustrations with the role of the prosecutor, who is situated as having ominous power with little restraint. This, too, is an indirect critique of the court system, which has afforded prosecutors increased immunity.⁹⁹ Similar to the Supreme Court’s trend of granting more leniency

⁹⁶ Monica Davey & Julie Bosman, Protests Flare After Ferguson Police Officer Is Not Indicted, N.Y. Times (Nov. 24, 2014), <https://www.nytimes.com/2014/11/25/us/ferguson-darren-wilson-shooting-michael-brown-grand-jury.html> [<http://perma.cc/5N5Z-PWL6>].

⁹⁷ Ferguson Unrest, *supra* note 76.

⁹⁸ Susman, *supra* note 13.

⁹⁹ See Malia N. Brink, A Pendulum Swung Too Far: Why the Supreme Court Must Place Limits on Prosecutorial Immunity, 4 Charleston L. Rev. 1, 6 (2009). In this text, the author claims prosecutorial power was solidified through a series of Supreme Court cases spanning three decades. *Id.* at 2. The first was *Imbler v. Pachtman*, which granted prosecutors immunity for acts that were “intimately associated with” the judicial process. 424 U.S. 409, 430 (1976). But *Imbler* did leave open the ability for prosecutors to be held accountable when they were acting as an administrator or investigative officer and not an advocate for the court. *Id.* at 430–31. This delineation between officer and advocate proved to be a murky one that was left unaddressed for over thirty years before the Court addressed it in *Van de Kamp v. Goldstein*.

for police misconduct, the Court's actions have effectively allowed for less oversight and accountability for prosecutorial actions.

The implications of this are not limited to what happens at trial but have created an atmosphere in which prosecutors have free reign to decide what charges (if any) will be brought. Most importantly for this analysis, the level of discretion granted to prosecutors has afforded them complete control over the grand jury process, in which they can decide how the grand jury will be comprised and which witnesses will be called during proceedings. The prosecutor also provides recommendations and interpretations of the law for the grand jury.¹⁰⁰ Echoing Stewart's sentiments, this does not simply grant prosecutors the ability to direct outcomes, but rather, it effectively creates a situation in which the prosecutor "is the grand jury."¹⁰¹

IV. THE BLACK PEOPLE'S GRAND JURY

On January 3, 2015, the Uhuru Movement convened what it termed the "Black People's Grand Jury."¹⁰² The Grand Jury was composed of twelve Black members from the Ferguson community, including teachers, artists, a social worker, and a business consultant.¹⁰³ After two days, they decided, 11-1, to indict Wilson for first-degree murder.¹⁰⁴ They heard evidence from the Darren Wilson case, including video clips of Dorian Johnson, who was present during the death of Michael Brown, and Cyril

555 U.S. 335, 343 (2009). This case centered around questions of administrative acts in which prosecutors did not disclose vital information to the defense counsel due to inadequate trainings and procedures that inhibited proper communication channels. *Id.* at 339–40. Disagreeing with the lower courts that granted the prosecutors qualified immunity, the Supreme Court ruled that these actions were integral to the trial process and, thus, the prosecutors entitled to absolute immunity. *Id.* at 344.

¹⁰⁰ See Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 *Fordham L. Rev.* 13, 22 (1998).

¹⁰¹ See Susman, *supra* note 13.

¹⁰² Jessica Chasmar, *Ferguson Mock 'Grand Jury' Indicts Former Officer Darren Wilson for First-Degree Murder*, *Wash. Times* (Jan. 6, 2015), <https://www.washington-times.com/news/2015/jan/6/ferguson-mock-grand-jury-indicts-former-officer-da/> [http://perma.cc/HY7A-VZF8]; Glen Ford, *Black People's Grand Jury Indicts Cop for First Degree Murder of Michael Brown*, *Black Agenda Rep.* (Jan. 8, 2015), <https://www.blackagendareport.com/node/22218> [http://perma.cc/K6CX-HACJ].

¹⁰³ Penny, Omali Yeshitela *Convenes Black People's Grand Jury*, *Uhuru Tours & Speakers Bureau: Blog* (Jan. 28, 2015), <http://uhurutours.com/?p=323> [http://perma.cc/8NCZ-SZGH].

¹⁰⁴ Chasmar, *supra* note 102; Penny, *supra* note 103.

Wecht, who was a forensic pathologist in the case.¹⁰⁵ Wilson and McCulloch were both subpoenaed but did not appear.¹⁰⁶

The BPGJ arose as a response to what community members viewed as a failure within the traditional legal system. Activists established the BPGJ in direct contrast to the legal system, which they saw as inherently unjust. A press release concerning the act of resistance stated that “[t]he purpose of the Black People’s Grand Jury was not to indict Darren Wilson. It was an indictment on the grand jury process led by the imperialist State.”¹⁰⁷ The BPGJ presented itself as a democratic process, and it appointed several prosecutors from several regions, which Missouri Governor Jay Nixon had refused to do in the state-sponsored grand jury.¹⁰⁸ In stark contrast to the state-sponsored grand jury, the BPGJ allowed jurors to cross-examine witnesses and made all proceedings public online.¹⁰⁹

The BPGJ also presented evidence and testimony in order to contextualize Brown’s death within a historical pattern of police violence enacted on Black communities in the St. Louis area.¹¹⁰ Expert witnesses, including a former police officer, a clinical psychologist, and a retired St. Louis Health Department official, all testified to the strained relationship between the police and the Black community.¹¹¹ Testimony from other Ferguson residents who had experienced police harassment and from the family members of other Black individuals murdered by the police was presented in order to establish that Brown’s murder was not an isolated incident, but part of a much wider systemic regime that has historically enacted violence on Black bodies.¹¹²

¹⁰⁵ Black People’s Grand Jury Indicts Darren Wilson for 1st Degree Murder of Mike Brown!, *The Burning Spear* (Feb. 10, 2015), <http://www.theburningspear.com/2015/02/black-people-s-grand-jury-calls-for-organized-black-community-control-of-the-police> [<http://perma.cc/9VWB-SAYW>] [hereinafter BPGJ Indicts].

¹⁰⁶ *Id.*

¹⁰⁷ “We Intend to Govern”: Black People’s Grand Jury an Example of Dual and Contending Power, *The Burning Spear* (Apr. 6, 2015), <http://www.theburningspear.com/2015/04/we-intend-to-govern-black-people-s-grand-jury-an-example-of-dual-and-contending-power> [<http://perma.cc/5BXC-7LGD>].

¹⁰⁸ *Id.*

¹⁰⁹ BPGJ Indicts, *supra* note 105; *Burning Spear Audio/Visual Team Shines at Black People’s Grand Jury in St Louis*, *The Burning Spear* (Feb. 22, 2015), <http://www.theburningspear.com/2015/02/burning-spear-audio-visual-team-shines-at-black-people-s-grand-jury-in-st-louis> [<http://perma.cc/9WC8-BJKS>].

¹¹⁰ BPGJ Indicts, *supra* note 105.

¹¹¹ *Id.*

¹¹² *Id.*

This approach is drastically different than that adopted by the courts, which commonly rely on the Fourth Amendment to determine whether police brutality has occurred. Through the pivotal case mentioned earlier, *Graham v. Connor*, the Supreme Court established the Fourth Amendment as the sole avenue for plaintiffs seeking relief from police brutality.¹¹³ As a consequence, police brutality has been seen solely as an individual issue as opposed to a structural one.¹¹⁴ One of the reasons why the Fourth Amendment is not apt for assessing police brutality claims is its individualistic nature,¹¹⁵ which divorces police brutality from a systemic analysis.¹¹⁶ By contextualizing Brown's death within a historical trend of police brutality against the Black community in Ferguson, the BPGJ challenged the traditional grand jury, which otherwise forecloses a systemic analysis of police abuse.

The BPGJ also resisted any distinction between the courts and police, instead situating each within a larger institutional structure that seeks to marginalize communities of color. In press releases, the organization identified the Grand Jury as another institution of the state that ensures coercion and oppression of the marginalized.¹¹⁷ The Uhuru Movement adopted an understanding of state-sponsored law as inherently oppressive and, therefore, beyond the possibility of reform.¹¹⁸ This, according to them, is why the BPGJ was necessary. The lead prosecutor for the BPGJ,

¹¹³ See *supra* note 68 and accompanying text.

¹¹⁴ See Obasogie & Newman, *supra* note 50, at 1469 (arguing that this shift has operated to “depoliticize, deracialize, decontextualize, and ahistoricize” judicial understandings of excessive force against communities of color).

¹¹⁵ See Scott E. Sundby, *The Rugged Individual's Guide to the Fourth Amendment: How the Court's Idealized Citizen Shapes, Influences, and Excludes the Exercise of Constitutional Rights*, 65 *UCLA L. Rev.* 690, 692–94 (2018) (suggesting that, with *Mapp v. Ohio*, 367 U.S. 643 (1961), the Supreme Court situated the “rugged individual” archetype as the ideal body for which Fourth Amendment claims can rest). During her police interaction, Mapp refused entry to the police and asked to see a warrant, all of which were ignored by police, who not only forced their way into her home, but acted violently towards her. *Mapp v. Ohio*, 367 U.S. 643, 644–45 (1961). Mapp's actions showcased her knowledge of her rights, as well as her willingness to exert these rights to the intruding officers. The individualism now embedded in judicial understandings of the Fourth Amendment has placed the burden on civilians to be aware of their rights and actively stand up to the police in order to assert said rights, as Mapp herself did. See Sundby, *supra*, at 694.

¹¹⁶ Obasogie & Newman, *supra* note 50, at 1469.

¹¹⁷ Omali Yeshitela, *Statement at the Black People's Grand Jury in St. Louis, Missouri* (Jan. 3–4, 2015), *as reprinted in* *The Black People's Grand Jury Is a Contest for State Power!*, *The Burning Spear* (Mar. 23, 2015), <http://www.theburningspear.com/2015/03/the-black-people-s-grand-jury-is-a-contest-for-state-power> [<http://perma.cc/552J-X46X>].

¹¹⁸ See *id.*

Omali Yeshitela, further stated, “Black people must take control of our lives. We cannot trust our children, the future of our community, in the hands of this establishment that has proven to us over and over again its disregard for black life.”¹¹⁹

An analysis of the BPGJ can provide further insight into how communities seek to rectify the injustices they are subjected to at the hands of the legal system. While the grand jury had no legal standing, it did provide the Black community with its own outlet for seeking justice. While theorists have suggested remedies for the strained relationship between police and communities of color,¹²⁰ few acknowledge the vital role communities can play in challenging the legal estrangement to which they are subjected.

By interjecting the BPGJ into the legal estrangement and procedural justice framework, I attempt to provide a nuanced understanding of how communities actively challenge the injustices they are subjected to. The BPGJ provides an example of how when communities are essentially excluded from traditional avenues of justice, they seek to create their own. This is evident when assessing the words of the Chairman of the African People’s Socialist Party (“APSP”), Omali Yeshitela, who also served as lead prosecutor for the BPGJ. He stated that “the Black People’s Grand Jury puts the power in the hands of the African community and removes us from the passive position of helplessness in the face of decisions made against our interests by instruments of U.S. colonial State power.”¹²¹

This quote situates the BPGJ as an active response on the part of communities of color to challenge legal estrangement. Activists involved with the BPGJ did not seek to “correct” the existing legal system; they actually sought to create an entirely new system. This arose as the only alternative out of an understanding that the current system was not designed to favor communities of color and could not be reformed to do so.¹²² The APSP

¹¹⁹ Chris Regnier, “Black People’s Grand Jury” Indicts Officer Darren Wilson, FOX2 News (Jan. 5, 2015, 6:10 PM), <https://fox2now.com/2015/01/05/black-peoples-grand-jury-indicts-officer-darren-wilson/> [<http://perma.cc/ASU4-5THV>].

¹²⁰ Bell, *supra* note 12, at 2128 (using federal tools to alter local police departments); *id.* at 2131 (increasing police salaries); *id.* at 2136 (reorganizing the police by consolidating police departments); *id.* at 2139 (suggesting a revised interpretation of the Fourth Amendment); *id.* at 2143 (democratizing the police); *id.* at 2147 (shrinking the role of police in society).

¹²¹ Black People’s Grand Jury to Convene in Ferguson, MO, *The Burning Spear* (Dec. 27, 2014), <http://www.theburningspear.com/2014/12/black-people-s-grand-jury-to-convene-in-ferguson-mo> [<http://perma.cc/DX2A-854B>].

¹²² *Id.*

stated, "Our grand jury would give the black community confidence that we can deliver a more democratic process than the State."¹²³

The statements voiced by those associated with the BPGJ, as well as Black Ferguson residents, display a legal consciousness¹²⁴ that situates them as existing "against the law."¹²⁵ As stated before, the activists commonly situated the legal system as unjust and conceptualized the BPGJ as a form of resistance.¹²⁶ In doing so, BPGJ participants did not seek to evade justice, as is commonly associated with an "against the law" consciousness.¹²⁷ Instead, they saw the possibilities of law (that is, an indictment for the killing of Black youth) as desirable, yet unattainable due to the legal marginalization they were subjected to.¹²⁸

In this sense, their resistance situated them as existing against formal legal structures, while simultaneously seeking and enacting a form of justice these very legal structures were positioned to provide. As a remedy for an "against the law" consciousness, the symbolic resistance of the BPGJ served as an iconoclastic act,¹²⁹ in which the unjust grand jury

¹²³ Aaron O'Neal, *Black August: Two Years Ago Today, Mike Brown Was Murdered and Africans in Ferguson Resisted!*, *The Burning Spear* (Aug. 9, 2016), <http://www.theburningspear.com/2016/08/Black-August-African-resistance-erupts-in-Ferguson-following-the-police-murder-of-Mike-Brown> [<http://perma.cc/E7YN-PP5M>].

¹²⁴ See Susan Silbey, *Legal Consciousness*, in *The New Oxford Companion to Law* 695, 695–96 (Peter Cane & Joanne Conaghan eds., 2008). Professor Susan Silbey defines legal consciousness as encompassing the ways that people participate, sustain, reproduce, and/or amend law. *Id.* Silbey identifies the purpose of legal consciousness theory as attempting to explain how law retains its institutional power, even amidst its limitations. *Id.* She states, "Researchers theorize that law is a durable and powerful human invention because a good part of legality invisibly suffuses everyday life so much so that, where there is a rule of law, legal authority is normally uncontested, or challenged primarily within the legally provided channels for dispute." *Id.* at 695.

¹²⁵ An "against-the-law" consciousness has been characterized as a form of legal consciousness, in which individuals (or, I would argue, entire communities) come to view law as dangerous, oppressive, and constraining, leading to evasion and resistance. See Kathleen E. Hull, *Legal Consciousness in Marginalized Groups: The Case of LGBT People*, 41 *L. & Soc. Inquiry* 551, 552 (2016).

¹²⁶ Yeshitela, *supra* note 117.

¹²⁷ See Hull, *supra* note 125, at 552.

¹²⁸ This is a phenomenon first explored by Professor Kathleen Hull, who detailed the "against-the-law" consciousness of LGBTQ activists seeking marriage equality. *Id.* at 558. According to Hull, these activists challenge the framework provided by Professors Patricia Ewick and Susan Silbey, in which those who are "against-the-law" seek to evade what is perceived to be an unjust system. *Id.* Instead, the activists Hull discusses existed "against the law" of the legal marginalization to which they were subjected but saw legality itself as desirable. *Id.* This is a framework that I think is helpful for understanding the BPGJ.

¹²⁹ Professor Jennifer Van Horn utilizes the term "iconoclastic acts" to characterize the transformative acts undertaken by enslaved African Americans to challenge the dehumanizing

process was transformed into a community-led, democratic state institution. This transformation allowed the BPGJ to serve as both a protest against the failure of the state apparatus to provide justice and also as a “collective community construction,”¹³⁰ in which activists provided a form of justice foreclosed upon by the state.

The BPGJ served as an extralegal¹³¹ space and legal framework, thus challenging the assumption that the state is the only entity that can provide for its people.¹³² The BPGJ can be understood as a direct challenge to the hegemony of the state over marginalized people and an outlet for envisioning new ways of self-governance and autonomy, albeit on a small scale.¹³³ This is a sentiment voiced by many of the activists associated with the BPGJ, who situated the endeavor as both a commentary and challenge to the illegitimate state structure.¹³⁴

On the surface, the BPGJ appears to be an unsuccessful community intervention. Darren Wilson was never formally indicted for Michael Brown’s death and the grand jury process remains prevalent for police-brutality cases, despite its repeated failure to hold police officers accountable. But this only provides a limited evaluation of the various roles the BPGJ played for the Ferguson community. In many ways, the BPGJ was emblematic of an activist tradition connecting political protest, legal

material and visual culture of slave owners (such as artwork). Jennifer Van Horn, “The Dark Iconoclast”: African Americans’ Artistic Resistance in the Civil War South, 99 *Art Bull.* 133, 133 (2017). Horn situates these actions as a form of resistance, in which dehumanizing artifacts were transformed by enslaved peoples into tools of resilience for their own identity-making process. *Id.*

¹³⁰ I borrow this term from Dr. Erin Araujo, who uses “collective community construction” to refer to social movements—such as the Zapatistas in Chiapas, Mexico, the Unemployed Workers Movement in Argentina, and the Landless Peasants Movement in Brazil—that provide services that are often associated with the state. See Erin Araujo, *What Do We Resist When We Resist the State?*, in *Theories of Resistance: Anarchism, Geography, and the Spirit of Revolt* 79, 88 (Marcelo Lopes de Souza et al. eds., 2016).

¹³¹ See *id.* at 90 (referencing legal spaces in which people govern themselves that exist outside of the realm of the state).

¹³² *Id.* at 88–89 (asserting that organizations partaking in a “collective community construction” are enacting a form of anti-state protest by challenging the misconception that the state is the only entity that can provide essential services, or that people must submit themselves to state control, where all actions must be condoned by a legal framework institutionalized by government bodies).

¹³³ Araujo states that these forms of “anarchist resistance” are often undertaken on a small scale but still provide a direct challenge to state authority. *Id.* at 89. She further states that “even at a small scale these practices amplify the landscape of multiple forms of governance.” *Id.*

¹³⁴ Yeshitela, *supra* note 117.

resistance, and performance.¹³⁵ The BPGJ not only served as an outlet for Ferguson residents to voice their displeasure, it was also a public demonstration of protest directed toward city and state officials, and perhaps even a national audience.

V. RECOMMENDATIONS

An analysis of the BPGJ can offer a new perspective for social movement literature, which centers the voices and actions of the most marginalized. This is particularly timely due to the shift in legal scholarship, which now acknowledges the central role social movements play in affecting change.¹³⁶ As a seemingly contemporary progressive legal canon¹³⁷ emerges, the BPGJ can provide important insights. As theorists begin to transform their conceptions of social movement literature, particularly in response to important social movements, such as Black Lives Matter, the BPGJ can help to decenter the role of lawyers and courts for a more community-focused understanding of what constitutes and leads to social change.

This research can also fill in gaps concerning legal consciousness theory, which has been critiqued for losing its critical edge¹³⁸ by falsely assuming that people do not resist legal structures and, therefore, that law must be completely hegemonic.¹³⁹ An analysis of the BPGJ can address these limitations by providing a different understanding for what constitutes “resistance.”

While legal theorists have often defined resistance within the context of using the law to ensure change, the BPGJ can provide an understanding

¹³⁵ See La Donna L. Forsgren, *Black Folks's Theatre to Black Lives Matter: The Black Revolution on Campus*, 36 *Theatre Hist. Stud.* 301, 301–03 (2017) (suggesting that performance is not limited to theatrical or musical productions but includes the dissemination of knowledge and public proclamations of injustices as a tool for garnering rights).

¹³⁶ Scott L. Cummings, *The Puzzle of Social Movements in American Legal Theory*, 64 *UCLA L. Rev.* 1554, 1556 (2017).

¹³⁷ See Scott L. Cummings, *Law and Social Movements: Reimagining the Progressive Canon*, 2018 *Wis. L. Rev.* 441, 441 (developing the theory of a “progressive canon,” from which I borrow my terminology).

¹³⁸ According to Professor Susan Silbey, the theory's founder, recent work on legal consciousness has two shortcomings: research has paid little attention to institutional processes, and studies have used an overly descriptive portrayal of legal consciousness, as opposed to a fruitful analytic take on the process and reasonings that develop one's legal consciousness. See Hull, *supra* note 125, at 552–53.

¹³⁹ See George I. Lovell, *The Myth of the Myth of Rights*, 59 *Stud. L., Pol., & Soc'y* 1, 1, 5, 19–20 (2012).

of how resistance can flourish when one is “against the law.” In this instance, resistance took the form of recreating the very oppressive legal structures being resisted in a way that was more beneficial to those most marginalized. This provides a new understanding of what constitutes a “weapon[] of the weak,”¹⁴⁰ in which resistance exists in a nominal space that is neither the everyday nor a large uprising.

Further, research concerning how marginalized populations come to resist often relies on a faulty cost-benefit analysis, which assumes that these communities do not resist because of the limited chance of success.¹⁴¹ However, the BPGJ has the ability to challenge this assumption by redefining what entails success. In the case of this resistance, success, at least as defined by legal interventions, was futile. The activists were not going to arrest or prosecute Darren Wilson. However, the action did give community members the chance to express their discontent with the existing system.

As legal theorists, it is important not to assume that marginalized communities are simply receivers of state-sponsored interventions, which they have no avenue for challenging. It is important not to situate state institutions as the only bodies that can affect and enact change. Interjecting a movement such as the BPGJ into discussions concerning how marginalized communities interact with the law can provide a framework for extending the analysis of what constitutes resistance.

The BPGJ can also serve as an important therapeutic intervention for communities subjected to the most egregious forms of police brutality. The performative aspects of the BPGJ can also be interpreted as providing a space for voicing grievances and injustices. Through this action, activists highlighted the injustices they were being subjected to through the legal system by reimagining what the system could, but would not, provide. This situates “mock grand juries” as potentially powerful activist tools to challenge the limitations of the very judicial system that is being embodied.

¹⁴⁰ James C. Scott, *Weapons of the Weak: Everyday Forms of Peasant Resistance*, at xv–xvi (1985).

¹⁴¹ Hull, *supra* note 125, at 553–54 (referring to the legal consciousness scholarship of George Lovell).

CONCLUSION

In this Article, I have sought to provide an overview of various theories that attempt to understand the strained relationship between police and communities of color. Over the last few decades, procedural justice has been established as the most dominant theory. This has led to an understanding of police-community relations that is rooted in legitimacy, authority, and submission. According to Professor Monica Bell, this is not an extensive enough framework for understanding the extensive impact police misconduct has on communities of color. She provides “legal estrangement” as a more encompassing theory for understanding this relationship, which suggests that police interactions with communities of color have the effect of rendering the marginalized into a state of anomie.

The social exclusion that communities of color experience does not lend itself to the remedies procedural justice provides. In order to better understand the impact of procedural justice and legal estrangement, I assert that the BPGJ provides an essential understanding of how communities of color seek to challenge anomie by situating the marginalized as actors who affect change. This is an attempt to correct the assumed passivity of communities of color that both Bell and Tyler assume.