

The shaping of legal consciousness through the experience of short-term incarceration

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Introduction: Background and Rationale

South Africa's status as a constitutional democracy forms the crux of the post-apartheid political order. The legal system plays an important role in ensuring that the struggles and demands for services are met by the state, that the vital freedoms needed for the survival of civil society are protected, and that some of the most vulnerable members of our society are able to find relief. In this light, the legal system is part of the lifeline of South Africa's democratic dispensation and is the foundation upon which it depends. However, the criminal justice system in South Africa has gradually succumbed to the ever-increasing pressures to be tough on crime, while the system struggles to cope with the growing backlogs of cases, chronic understaffing and a policing system described by many as being in a state of crisis (Newham 2013; Muntingh and Dereymaeker 2013). From the numerous reports of police brutality and corruption to issues of prison overcrowding and the poor conditions, it becomes apparent that there is a gap. There is a gap between, on the one hand, what the law is and our normative expectations of it and on the other hand, the day-to-day lived experiences and encounters with the law and its key institutions. This gap has provided the impetus for this entire study.

What ordinary members of South African society experience of the law varies on the basis of multiple factors. Who you are and who you know, like in the recent incidents involving the former Deputy Minister of Education, Mduzuzi Manana and the Zimbabwean First Lady Grace Mugabe are incredibly important factors. Where you are from, what you look like, and what languages you can speak, as in the police killing of the 26-year-old Mozambican taxi driver in 2013, Mido Macia proved to be fatally important issues. How much money you have and what your socio-economic background are central to the case of Marikana are evident even your own encounters with traffic roadblocks. Where you happen to run into the law, and how you run into the law are also crucially defining questions. These present a very complex and yet fascinating snapshot of some experiences of the law in post-apartheid South

Africa. And yet this same South Africa is home to one of the most progressive Constitutions in the world. These varied experiences are what make up the very fabric of South Africa's vigorous political order.

In spite of the above – a complex range of what we could experience of the law – everyone ascribes to some notion of an official legal framework, resulting in at least some compliance with the law in this country. For most of society, how people feel about the system rarely results in our deliberate and open defiance of the law and when people do, very often they find that there are consequences to which they are then subject. This points to the complex nature of legitimacy, authority, and hegemony.

In an attempt to understand how the law in South Africa maintains its claim to legitimacy, this study looks at how ordinary members of South African society experience and understand the law. This project examines how legal consciousness is developed and shaped but also how the law maintains its hegemonic status in society. This study focuses more specifically on the experiences of individuals who find themselves within the clutches of the criminal justice system. The apparent gap between what the law says and what one could experience of the law when subjugated to it (in the form of arrest and detention) is the primary basis of this study. This asks how the experience of short-term incarceration could shape one's legal consciousness.

This research looks at the experiences of three groups in and around Johannesburg, whose relationship with the law can be described as contentious: community activists, student activists and migrants. These groups of people share the experience of having been arrested and personally entangled in the criminal justice system, although through different pathways and under very different circumstances. I view these groups of people as operating from positions of deliberate confrontation (as with the student and community activists through their activism around social issues) or involuntary entanglement with the law (as with most migrants in South Africa).

Community and student activists organize and protest around socio-economic and socio-political issues and are typically quite aware of the law as it pertains to their protest activity. They deliberately assert their rights and often organize on the basis of the state's negation of its legal obligations. Such has been the case for service delivery protests across the country that have steadily increased over the years (Mkhize 2015; Von Holdt 2013; Lancaster 2016; Cilliers and Aucoin 2016). In sharp contrast to this is the experience of migrants living in

South Africa – and here I refer to migrants who are black and brown and typically live in the poorer urban areas in South Africa. They find that the law plays a dominant and pervasive role in their lives and yet they live their lives in an effort to avoid the law as best they can (D. M. Engel 1998; Abrego 2011).

All three of these groups report experiences of mistreatment by the police and bear witness to the law apparently working against them through either trumped-up charges, excessive bail hearing postponements, and constant harassment. While community and student activists use the law to assert their demands, migrants try to avoid direct confrontations with the law where possible. These identities fundamentally shape the position from which they encounter the law in South Africa. While the legal system provides an important avenue for civil society to engage the state, it is also one of the most powerful expressions of the state's power in society. Foucault argues that the Prison constitutes the final institution of a wider system of discipline, and criminal justice systems around the world are part of how the law performs and asserts the power and authority of the state (Foucault 1977).

The concept of legal consciousness emerged out of law and society scholarship. It forms part of a long tradition within socio-legal studies that is concerned with the relationship between law and its place *within* society. It has served as a tool for investigating how the legal hegemony is maintained despite the apparent gap between the “law on the books” and the “law in action” by looking beyond legal institutions and actors and turning to ordinary members of society instead (Silbey 2005). A large portion of these studies has tended to focus on civil cases with financial implications. This literature has not been taken up in the context of criminal cases and the criminal justice system. While subsequent works have taken up legal consciousness in other social contexts around the world (Nielsen 2000; Cowan 2004; Hertogh 2004; Hull 2016; D. Engel and Engel 2010; Abrego 2011; Kubal 2013), no such study has been applied to the South African context.

A lot of the work on South Africa's criminal justice system takes an intimate look at the penal institution as well as the implications of the various transformational efforts it has undergone through its history (Gillespie 2008; Muntingh 2008, 2009; Dissel and Ellis 2002; Gould 2009). The literature that specifically looks at prisons in South Africa has tended to focus on long-term incarceration whilst overlooking short-term incarceration in the jails, holding cells, deportation centers and the 'transitional' sections of prisons. As such, our knowledge of the ways in which members of society experience the law through their

encounters with the criminal justice system remains limited insofar as those perspectives are not taken into account. And as highlighted by some of the work on legal consciousness, contrary to a lot of our own perceptions, the legal system is not designed to have every case reach trial (Feeley 1992; Ewick and Silbey 1998). Therefore the largest portion of encounters with the law, predominantly short-term in nature, is unaccounted for.

More of society is likely to encounter the criminal justice system and short-term incarceration, either personally or through the experiences of acquaintances than they would encounter long-term imprisonment resulting from an actual conviction. As such this research attempts to fill this literary gap by focusing on the 'pre-emptive' punishment that characterizes the more transitory experiences of South Africa's criminal justice system. Without this shift in focus, a limited view and interpretation of South Africa's criminal justice system and experiences of the law will persist.

According to Amanda Dissel and Stephen Ellis, the sharp rise in the prison population since the end of apartheid has served to thwart many of the improvements resulting from the reform initiatives of the penal system (Dissel and Ellis 2002; Gillespie 2008; Gordon 2009). The number of inmates in the South African penal system in 1994 was 113 856 and by December 2000, that number had increased to 170 328, representing a 30 percent increase in the prison population. By 2005, the number had grown beyond 180 000, representing a total increase of 50 percent since 1994 (Dissel and Ellis 2002; Muntingh 2009).

Of the total prison population, the un-sentenced or remand prisoner population rose from 23 783 in 1995 to 57 811 in 2000 (Dissel and Ellis 2002; Muntingh 2009). For this period, the un-sentenced prison population represented 20 percent of the total prison population (Muntingh 2009). According to the Department of Correctional Services' *Annual Report 2015/2016*, from the 2010/2011 to 2015/2016 financial years the average population including remand population has ranged between 152 553 and 161 096 (Department of Correctional Services 2016, 32). According to these figures, during this time, the un-sentenced population has constituted between 26.6 and 29.6 percent highlighting a significant increase from the figures for 1994 to 2000 (Department of Correctional Services 2016, 32). Because these are average figures, it is important to note however for individual institutions, the figures have reached "critical levels" where the awaiting trial detainees have represented 52 percent of the prison population (Ballard 2011, 5). The greatest concern regarding remand detention is the amount of time that one could spend in detention under poor conditions and

without access to some of the programs available to sentenced inmates- a problem that disproportionately affects the poor (Ballard 2011). By the end of 2008, almost 45 percent of the remand population had been in custody for 3 months or longer and 26 percent of this category had been in custody for longer than 6 months (Muntingh 2009). For 2010, 45 percent of the remand population had spent longer than 3 months in custody, roughly 14 percent had been held for over 12 months while approximately 4 percent had spent over 2 years in detention (Ballard 2011, 5). Clare Ballard emphasizes the implications of remand detention:

Literally, thousands of people in South Africa spend long stretches of their lives in conditions frequently described as "inhumane," and without access to educational or rehabilitative programs. More than half of those in remand detention will be released due to acquittal or their charges being withdrawn or struck off the roll (2011, 5).

These figures also provide a snapshot of the growing labyrinth to be encountered by any member of society who may happen to run into the law for whatever reason. The legal process leading to a presumably innocent individual's freedom is one that can grow murkier from the moment of arrest depending more and more on a multitude of factors. Some of these are factors specific to the legal system, but as many would assume, extra-legal factors like one's financial means or even social status could also fundamentally shape that legal pathway to freedom, presuming that one is indeed innocent. The time spent in jail before a trial, if the case reaches trial, could be anything from a few hours to months and even years.

The objective of this study is two-fold. It takes an in-depth look at what some people experience of the criminal justice system and what they understand of law through that experience. It applies the concept of legal consciousness to the South African context as a way of understanding some of the ways in which legal hegemony is maintained within a post-apartheid and democratic framework by looking specifically at the criminal justice system. This study enquires about the experiences of ordinary people relating to the law and imprisonment – an experience of 'pre-emptive' punishment in South Africa. And by using the framework of legal hegemony, this study sheds light on the inner-workings of South Africa's political order.

***For this presentation, what follows is an overview of the theoretical underpinnings of the study and some of my preliminary findings with excerpts from the interviews. Here, I must

emphasize that this study is a work in progress and what I share here are some of my very early thoughts that will develop with time.***

Legal consciousness, penal consciousness: a theoretical framework

Legal consciousness: Background

The perceptions of the law in South Africa vary depending on whom one speaks to and about what aspects of the law. However, across these different views, what one is most likely to find is some kind of acceptance of the law and the value of its place in providing protection, maintaining order or even holding the state accountable. The same argument would apply to South Africa's criminal justice system: that while it may be overburdened, prone to malfunction, and generally, easily corruptible, there remains a commitment to the 'inescapable' social project and 'burden' of punishing deviance and wrongdoing. The extent to which these views vary, how they develop and on what basis they do is where the intervention of legal consciousness is particularly useful.

Legal consciousness refers to the ways in which people understand the law (Merry 1990, 5). This study draws its theoretical thrust from the field of socio-legal studies where legal consciousness has emerged as a concept and theoretical tool. Law and society scholarship has its roots set as far back as the early 1900s with Roscoe Pound's *Law in Books and Law in Action* (1910) and Eugene Ehrlich's *Die Erforschung des lebenden Rechts* (Research on Living Law) (1911). Without referring explicitly to the concept of 'legal consciousness', the issues that Pound and Ehrlich were concerned with have since laid the foundations of what the American and European strands of legal consciousness have, respectively, become (Hertogh 2004, 472).

Ehrlich's notion of 'living law' looked at "people's own ideas about law, regardless of any 'official' laws" because, he argued, this type of law "dominate[d] life itself even though it ha[d] not been posited in legal propositions" (Ehrlich as cited by Hertogh 2004, 473). This differs fundamentally from Pound's idea of the 'law in action' which he distinguished from the 'law in books' (Hertogh 2004, 465; Silbey 2005, 324). For Pound, there was a difference between "the rules that purport to govern the relations of men... and those that actually govern them" (Pound as cited by Hertogh 2004, 465). For Pound, legal practitioners – judges, lawyers and others – needed to actively apply the law to confront social conflicts that arise

from the gap between the two lives of the law (Hertogh 2004, 465). This view rested on the argument that the law was not a framework of rules that functioned autonomously from society and that it served as an important instrument for “social control” (Hertogh 2004, 465).

These two strands are fundamentally different because Pound’s American strand of socio-legal studies, concerned itself with understanding *how people experience the law*, making the law an independent variable (Hertogh 2004, 460). Ehrlich’s European conception of legal consciousness, however, looks at *what people experience as the law*, to begin with, taking up law as a dependent variable instead. While the American conception takes the law to be *official* law, the European conception leaves the question of *what* law is to the study itself (Hertogh 2004, 460). It seems, however, that Pound’s strand has dominated law and society scholarship as most of it continued to take up his project, focusing more on what the law *does*, than what it *is* (Hertogh 2004, 471; Silbey 2005, 324).. While Erlich’s conception of living law is instructive, it is Pound’s ‘law in action’ that lends itself more for this study. I ask what it is that these groups experience of South African law and its criminal justice system, as opposed to what they experience as law in South Africa. Indeed, this study draws heavily from the American canon socio-legal scholarship

Law and society scholarship of the mid-century to the 1970s focused on the systems and outcomes of the administration as well as the implementation of the law as a way of accounting for the gap referred to in Pound’s work (Silbey 2005, 324). Susan Silbey describes the range and outcomes of this research as follows:

[S]ocio-legal research depicted how power is instantiated in all sorts of legal relations and demonstrated not only that social organization matters but also how it matters. In almost every piece of empirical research on law, the insight was confirmed. In historical studies of litigation, in studies of policing, in studies of the legal profession, in histories of how particular legal doctrines and offices developed, in studies of court cultures and judicial biographies, in studies of the regulation of business, and in the extensive literature on crime control, research showed that organization, social networks, and local cultures shaped the uses and consequences of law (2005, 324).

According to David Engel, this phase of law and society scholarship began to explore notions of legal competence and knowledge of the law, which can be understood to be the antecedent to legal consciousness (1998, 122). This grew out of the concern, expressed much earlier by Pound, with how different groups in society get different treatment and experiences of the

law despite the law's assertions of equality before the law and the primacy of due process (Silbey 2005, 325; Galanter 1974). The studies relied on large statistical surveys that would often be used to also draw deductions about the relationship between legal competence and causes of crime (Hertogh 2004, 461). These studies treated the levels of legal competence as "social facts" that could be uncovered through research and studied as quantifiable data that could then be assessed in relation to laws, policies, and provisions (Hertogh 2004, 461).

An example of one such study is Marc Galanter's 1974 study titled, *Why the "haves" come out ahead: Speculation on the Limits of Legal Change* (1974; Silbey 2005, 325). Galanter argued that the repeat interactions with law and litigation (civil cases in particular and not necessarily criminal cases) counted in the favour of "repeat players" because they allow for people to develop their knowledge of the law (Silbey 2005, 325). They are able to learn about the strategies that are successful and those that are not and ultimately, they become well-versed with process and language (Silbey 2005, 325). The structural advantage of repeat interactions with the law enjoyed by repeat players, he argued, was created by "systemic organizational litigation" because it naturally tended to privilege the party that was more knowledgeable and legally competent (Silbey 2005, 325; Galanter 1974).

Legal consciousness as perception and understanding of the law has been taken up by the more contemporary socio-legal scholarship of the 1980s and 1990s (Hertogh 2004, 461; Silbey 2005, 323). This strand of legal consciousness has emerged largely out of a growing dissatisfaction with the ways in which studies of legal competence position the law and legal systems as "social facts acting upon society" and therefore autonomous and independent of society (Hertogh 2004, 461). Studies of legal consciousness have therefore moved away from seeing the law as external to society, towards the view of the law as a social construct and force competing among other social forces *within* society (Halliday and Morgan 2013, 2–3; Silbey 2005, 327). According to Engel, this conception of legal consciousness broadens the research agenda to include "meanings and practices related to any number of state institutions or other symbolically important sources of power... and influences in society" (D. M. Engel 1998, 120). These studies involve exhaustive ethnographic observations of 'legal spaces' such as the courts and lawyers' offices in order to uncover the understandings of the law that have been shaped by their subjective experiences of it in their given contexts (Hertogh 2004, 461).

This methodological shift speaks to the critical move away from the "law first approach" that had up until this phase dominated socio-legal studies. The departure away from the emphasis on official, legal actors, and legal institutions made room for the prioritization of the ordinary processes and events of everyday life in the study of legal consciousness (Silbey 2005, 327). Silbey describes this contemporary but especially critical project of legal consciousness that emerged in the 1980s and 1990s:

Thus, in documenting a gap between the law on the books and the law in action, and in specifying how social organization and legal procedures reproduced structured inequalities rather than equal treatment, law and society research produced a significant critique of the justice possible through law. By relying on ordinary social logics, local cultural categories and norms, the research had shown that legal action both reflected and reproduced other features and institutions of social life where power and prejudice were where power and prejudice were unconfined by the techniques of legal procedure (Silbey 2005, 325).

As such, law and society scholars employed legal consciousness to understand the ways in which legal hegemony was able to sustain itself despite the gap between the law in theory, or 'the law on the books' and the actual administration and application of the law in reality, also referred to as 'the law in action' (Silbey 2005, 323). Legal consciousness studies turned their focus to the narratives expressed by ordinary members of society of their experiences and understandings of the law as a different way of understanding not only the gap but also the sustained power enjoyed by the law in spite of this gap.

The 'empirical gap' and legal hegemony

The rise of legal consciousness (1980s and 1990s) is the latest form of a much older tradition that emerges to further the critical project of understanding legal hegemony (Silbey 2005). These studies depart from the older socio-legal studies because, methodologically, they have insisted on the 'de-centring' the law by deliberately looking beyond formal and official law, its institutions, and legal professionals (Halliday and Morgan 2013, 4). Ewick and Silbey describe this process as follows:

We seek access to the meaning of law in the lives of ordinary citizens - the ways in which commonplace transactions and relationships come to assume or not to assume a legal character, and the ways in which the shape of everyday life is informed by law. Studies of legal culture and consciousness attempt to address these questions about the place and meaning of law in the

lives of ordinary citizens (Ewick and Silbey 1991, 738).

Since then, studies have done this by moving the study of legal consciousness to very common and everyday spaces like social movements, the workplace, harassment in the streets, welfare offices, and amongst marginalized groups like migrants and sexual minorities (Hull 2016; Halliday and Morgan 2013).

The problem with a lot of these studies that sought to broaden the scope of legal consciousness, according to Silbey, is that they have privileged “track[ing] what individuals think and do” at the expense of understanding legal hegemony by “explaining how the different experience[s] of law become synthesized into a set of circulating, often taken-for-granted understandings and habits” (2005, 324). In this critique of the progression of legal consciousness, titled *After Legal Consciousness*, she goes on to argue that

Recent studies of legal consciousness have both broadened and narrowed the concept's reach while sacrificing much of the concept's critical edge and theoretical utility... [b]ecause the relationships among consciousness and processes of ideology and hegemony often go unexplained, legal consciousness as an analytic concept is domesticated within what appear to be policy projects; making specific laws work better for particular groups or interests (2005, 324).

Silbey therefore cautions against providing more of a descriptive analysis without sufficient theorizing. Echoing Silbey's sentiments, Halliday and Morgan, discuss the scholarly challenge for socio-legal scholars:

... the capacity of the law to maintain the faith of society despite, at best, its failure to deliver on its many justice promises and, at worst, its oppression of many within society has been, in part at least, an empirical puzzle. How can [socio-legal scholars] theorize about the law's hegemonic power until we find out exactly what society does think, feel, and do about the law? (Halliday and Morgan 2013, 3)]

This study does, however, draw from a lot of the studies that Silbey would argue have lost the critical edge of legal consciousness. Their application of the concept to specific contexts and special groups in society are in fact instructive. For Kathleen Hull, focusing on the legal consciousness of marginalized groups is critical because understanding their experiences still sheds light on the ways in which the law works but it also offers insights into the very specific ways that marginalization produces particular types of legal consciousness (Hull

2016, 555). This particular study of legal consciousness of groups who have had difficult encounters and relationships with the law and their experiences of short-term incarceration is as concerned with understanding legal hegemony in South Africa as the older and more general, open-ended studies of legal consciousness, like Ewick and Silbey's seminal piece, *The Common Place of Law*. For Laura Beth Nielson, who explores the development of legal consciousness of victims of public offensive speech, in relation to their race, gender and class, Ewick and Silbey's study does not shed much light on how "the experience with law translates into attitudes and opinions about other areas of the law that are not commonly encountered" (2000, 1061). While Ewick and Silbey offer critical insights, I argue that my analysis of legal consciousness in the context of the penal system asks how the legal consciousness of these groups who have been subjected to the *force* of the law (the criminal justice system) helps to reinforce legal hegemony in South Africa.

In *The Common Place of Law*, Ewick and Silbey explore the ways in which people experience and interpret the law in the context of their daily lives (1998). For them, consciousness is a cultural practice that provides a middle ground between 'attitude' (which stresses the role of agency) and 'epiphenomenon' (which stresses the role of structure) (Ewick and Silbey 1998, 33). Legal consciousness is, therefore, the participation in the process of fashioning legality (Ewick and Silbey 1998, 45). Their methodology emphasizes the role of narrative in conducting and presenting their research. The stories shared by their 430 interviewees offer a lens to study the law in their daily lives (Ewick and Silbey 1998, 29). They share their stories of events, relationships and lived experiences emerges the story of the law (Ewick and Silbey 1998, 29). From these Ewick and Silbey draw out three types of consciousness: '*before* the law', '*with* the law' and '*against* the law' (Ewick and Silbey 1998, 224). They argue that each form of legal consciousness "expresses different explanations for legal action; each locates legality differently in time and space; and each positions the speaker differently in relation to law and legality (supplicant, player, or resister) (Ewick and Silbey 1998, 224). As mentioned earlier, while my study is not as extensive, wide-ranging or general in terms of people included in the study, Ewick and Silbey's study serves as an essential foundation precisely because of the comprehensive range in experiences and views captured. The types of legal consciousness that identify also offer as interpretative lens through which my data can be analysed.

Austin Sarat looks at the ways in which the 'welfare poor' make use of and understand the law through their use of the welfare system (Sarat 1990). His research is based on an

ethnographic observation of legal services offices in two cities and interviews with 38 welfare recipients. Sarat introduces the ways in which the legal consciousness of the ‘welfare poor’ is in many ways shaped by the omnipresence of the law in their everyday lives, particularly because of their relative dependence on welfare (Sarat 1990). From his engagements with the welfare poor, he suggests that their legal consciousness is one that is based on power and dominance whereby the crux is dependency and “a consciousness of resistance, in which welfare recipients assert themselves and demand recognition of their personal identities human needs” (Sarat 1990, 344). He goes on to argue that their legal consciousness differs substantially from other groups in society for whom the law is less visible (Sarat 1990, 344). For the welfare poor, the law plays an especially dominant role in their lives through ordinary, regular encounters that are also responsible for determining the ‘if’s’ and ‘how’s’ of some of their needs (Sarat 1990, 344). The image of the law as pervasive and all encompassing is an especially useful particularly in the context of the criminal justice system. As such Sarat’s study provides insight into the views and responses of people who are typically subjected to this particular experience of the law. How migrants, community activists and student activists respond to their subjection to the law through incarceration needs to be understood not only in terms of their subjection but as active agents interacting with the law.

Both these pieces of work draw attention to a type of legal consciousness espoused by members of society who are deemed marginalized and powerless. For people who occupy the fringes of society, encounters with the law characterize a contestation of some kind. In fact prior to the book referred to above, Ewick and Silbey published an article (*Conformity, Contestation, and Resistance: An Account of Legal Consciousness*) that deals exclusively with this form of legal consciousness. Ewick and Silbey, like Sarat, refer the works of to Michel de Certeau, look at Erving Goffman and James Scott. These works study how individuals deemed powerless in society make use of certain ‘tactics’ that form part of contestation against and “maneuvers within a terrain organized and imposed by a foreign power” (Ewick and Silbey 1991). By referring to de Certeau, Goffman and Scott, the authors seek to uncover the legal consciousness of individuals through their own understandings of their struggles when they encounter the law – a space in which they are viewed as relatively powerless. The models and theories made available through the works of de Certeau, Goffman and Scott, specifically, redirect the focus to the various modes and maneuvers used by the powerless in their encounters with the law. These contributions draw attention the role

of identity and position in society as a contributing factor to the shaping of legal consciousness.

Penal Consciousness

In contrast to the abovementioned projects, Lori Sexton examines prisoners' notions of punishment in order to look into their own interpretations and understandings of punishment and being imprisoned (Sexton 2015). She uses the framework of legal consciousness to develop a model of 'penal consciousness' in order to account for the gap between "punishment of the books" and "punishment in action" where prisoner experiences and perspectives of punishment sometimes differ from punishment as conceived by lawmakers (Frederique and Sexton 2014). In her study *Penal subjectivities: Developing a theoretical framework for penal consciousness*, she finds that the severity and salience of the punishment, as articulated by the prisoners, exist on a continuum. Severity, how intensely the punishment is experienced, ranges from "extremely low to unbearably high" and salience, how prominently the punishment features in the mind and life of the prisoner, ranges from "imperceptibly low to strikingly high" (Frederique and Sexton 2014). Sexton determines the salience of the punishment by looking at what she calls the "punishment gap" – the distance between what prisoners expect and what punishment the prisoner actually experiences as part of incarceration (Sexton 2015, 128). She describes the relationship between severity and salience as follows:

The data reveal that salience of punishment is related to the severity of punishment in a complex way—a relationship that hinges upon prisoners' expectations of punishment. The experience of punishment is structured, like any phenomenon in the social world, by the collision of expectation and reality (Sexton 2015, 128).

This framework emphasizes the role that subjectivity plays in experiences like punishment. As such, penal consciousness provides a method for better conceptualizing the delineations of punishment as something that is not merely done but rather, "it is done *to* people and experienced *by* people" (Sexton 2015, 115). Sexton notes that punishment is experienced by more than just convicted prisoners because the prison industrial complex encompasses "probationers and parolees...[as well as] pre-trial or immigrant detainees who have yet to be convicted of a crime or legally sanctioned" but still experience punishment even if it is only temporary and transitory in its nature. This study focuses especially on these groups.

This study is located at the intersection of legal and penal consciousness. I look into short-term incarceration as an experience and narrative that reveals the various meanings ascribed to these experiences of subjection to the law. These experiences are often highly politicized and especially contentious, more so than experiences of other areas of law where in fact the law isn't always as visible. These reveal paradoxically interesting images of how the legal and political order in South Africa is able to exert itself as it encounters these various groups who encounter the law from opposite sides of the fence: community and student activists on the one side, and migrants on the other. My selection of the groups included in the study was based on this idea expressed much earlier: our experiences of the law differ on the basis of our various identities. This study privileges the political identities of the groups and argues that their encounters with the law and the criminal justice system are fundamentally influenced by these particular political identities insofar as the arrests and short-term incarceration stem directly out them.

The shaping of legal consciousness in Johannesburg

In order to look at how members of South African society experience and understand the law based on their experiences of short-term incarceration, I look at three groups of people: community activists, student activists, and migrants who have all been arrested and held in custody for varying amounts of time. While some have spent a few hours in custody, others have spent months either in remand detention or immigration detention. The student and community activists included in this study have been chosen because they have all been arrested and jailed (later to be released on bail) as a result of their protest activity and in some cases, *perceived* protest activity. Some of the students and community members arrested in the contexts of protest activity were not actually apart of the protests themselves but because of their proximity to the activity, are arrested and subjected to short-term incarceration. For the migrants I include in this study, who I argue, try as best as possible to live in the “shadows of the law”, their arrests and experiences of short-term incarceration are all related in some way to their identities as migrants (Abrego 2011).

Short-term incarceration is a term that I use to refer to the time spent in custody before the time spent resulting from a conviction. Most of these arrests and detainments result in acquittals, withdrawn charges, or having their cases being struck off the roll. And in the cases of migrants who are remanded to the Lindela Repatriation Centre, many are eventually

released instead of deported. In light of the wide range of experiences, the amount of time spent in detention ranged from a few of hours to a few months in custody. The core data of this study are the interviews that I conducted with 24 individuals – 8 individuals from each group.

I conducted in-depth, semi-structured interviews in person. These interviews consisted of 3 parts in which I looked at their background where I sought to get an overview of their life histories. I then turned to the specific incident that led to their arrest and detainment (focusing on one in particular if the individual had multiple experiences of arrest) and finally, the interview turned towards a ‘reflection’ of their experience(s) of the criminal justice system. The questions in the final section attempted to elicit some of their thoughts and opinions of the law in general and as it related to what they had personally experienced. What follows are some excerpts from some the interviews that I conducted along with some preliminary comments on some of my findings.

What has been most striking about the interviews has been the different and fascinating ways in which some of the interviewees would rationalize their experiences of punishment through interesting logics or frameworks. These methods of rationalization reveal a startling acceptance and embrace of their experiences in spite of the gross injustices that accompanied their arrests and detainment.

One such example is that of a 23-year-old male student [S1] who was arrested during the #FeesMustFall protests around late October 2016. He recounts his arrest as follows:

Ok, so basically...uh... in 2016 I had... no school so I was looking for a school... I went to UJ looking for forms and basically, researching on what they offer. After UJ, I came to Wits. When I came to Wits I had no, there were no problems with entering the premises although there was a lot of police presence due to the protests, the *FeesMustFall* protests, I was directed to use the back entrance of the Senate House and when I entered the Senate House, did everything, got what I needed, got the prospectus, got everything... just when I was about to exit, I was taken in. [interview with S1]

He spent 2 days in jail before being released on bail. His charges were finally withdrawn during this year upon his completion of a diversion programme. The diversion programme consists of 6 to 8 weekly ‘classes’ or sessions that are about 2 hours long each. When I asked him about what he thought of his experience in jail he responded with: “I think it’s an

experience that I needed to go through”. When I asked why particularly because he was not even involved in the protests, he replied:

S1: Ja. I believe that in life, to truly, to truly appreciate the good times, you need to go through the bad.

Thato: Even if they’re unjustified?

S1: Ja. [interview with S1]

A 45-year-old Nigerian male [M2] expressed a similar view when asked about what he thought about his arrest:

You know, in general, it’s an eye-opener. I don’t regret it even though I was wrongly accused and arrested but at the other side, I will be honest to you, I learned a lot, which I wouldn’t have learned if I’m never been arrested... I’m much better than others because...it’s like their justice system have its work. Once you are right here, once you know the right thing to do, when you get arrested, know your rights then. Before, we don’t know all these things so it give me more insight into the justice system in South Africa because without me being arrested, I wouldn’t have known a lot of things...[Interview with M2]

Both interviewees surprisingly find consolation in what were fairly bleak experiences. One could suggest that their views speak to a light-hearted kind of resignation to the might of the law and its ability to “make right” (Ewick and Silbey 1998, 189). Ewick and Silbey argue that for those whose legal consciousness takes the form of being “against the law”, the law is typically viewed and understood in terms of “power as producing the normative grounds upon which power is exercised” (Ewick and Silbey 1998, 189). However such an interpretation is complicated particularly by the migrant’s perspective that interprets his experience of the South African criminal justice system in relation to his experiences of the Nigerian criminal justice system as can be seen below. This particular experience of short-term incarceration is viewed in light of past experiences, making this one seem much better and even fruitful:

The law of South Africa now, I think, I still believe that it’s fair because it’s a law a common man can find hope and it’s a law that it can both reach the rich and the poor, both big and small. It’s one thing I like about South Africa. No matter how big, how wide you are, you have to face the law. Unlike Nigeria, they can abuse that law... You feel that that law is useless to me because I can’t even have access to that law but here in South Africa, you make it that it’s balanced, that both rich and poor, big and small will

have access to that law so it's fair. I love it. I won't lie to you. Believe me, that's one thing that I love about South Africa. [Interview with M2]

When I asked him about how he understood the purpose of jail he reiterated the idea that it provides one with the opportunity to learn a lot, particularly about the legal system itself. He was wrongfully arrested after the police searched his home and found nothing but insisted on accusing him of being a drug dealer. As such, the experience of punishment and subjection to the criminal justice system are rationalized in terms of lessons learnt and meaningfully gained information.

You know, like what I told you, I was wrongly accused but at the end of the day, I been declared innocent. I never been convicted for any crime. Do you get my point? So, but it make me learn a lot concerning the law and the courts. I learned more than some of my mates. So, you know, when they call it Correctional Services, not actually correcting, it's more like an institute you can learn a lot. Learn what is right and wrong. So prison here in South Africa, when I see here, I say no. It's a rehab. It change you whether you feel that "I am right, I am not wrong." It can change you for something you are not arrested for. Do you get my point? You can look at other charges, someone next to you. You see how long, what their charge is, he explain everything to you, you learn from him. Even you never been charged for that thing. No one ever accused for such a thing but you already know, "I already know one, two, three because I've been in jail. I already know those people. I see what they pass through them" ... [Interview with M2]

M2 describes how his time in jail, while being in injustice, he was offered the opportunity to learn about the law and the criminal justice system. In his view, fellow inmates jailed for very different reasons become valuable sources of information that may prove useful in future. Learning for the legal journeys that others take becomes an important part of the jail experience whether one's incarceration is lawful or not.

The role of religion as a rationalizing framework also featured quite strongly, particularly within the testimonies of migrants. Faith becomes a text according to which one's life experiences can be interpreted and understood. It offers a sense of comfort derived from its ability to provide meaning for all life experiences. In the following excerpt he explains how his experience formed part of a plan determined by God for him to learn about how law in South Africa works:

I am a Christian- I do pray but when I think about those things, I say, "Thank God. God, You opened my eyes and showed me something I didn't

know.” Because even though I was wrongly arrested, I learned a lot, which I wouldn’t have learned so when I look back there, I say “Hey! God, You just want to show me how South African law work, that’s why you make me arrested for nothing and I came out” You get my point? So... sometimes, I say “Thank God, I got arrested” because I learned a lot even though it’s a painful situation but when you think back what you learn, do you get my point? From their system, from their law, you learn, you say, “Wow. I learn a lot.” Unlike other prison, that you will be thinking, “Oh God. I survived my life there” but here I learned a lot.

Another Nigerian migrant, 36 years of age [M8], expressed a similar perspective. He was wrongfully arrested and eventually charged in a drug related matter that took place with 3 months of his arrival in South Africa. He ended up spending 3 years and 10 months in prison, including the 7 months that he spent in remand detention and later during his trial. In response to what his thoughts were when he looked back on his time in jail, he said:

When I think of my time in jail, you see, it’s like God, he want to save my life inside there, you understand. Because, even some people who I know outside before I go, before I come back, some of them is dead, you understand? You understand? And it’s like God save my life, you understand? He want to just let me see how South Africa be before I come out, and learn how people live, you understand. Because you can see many character and many tribe, you see. How Zimbabwe, when Zimbabwean talk now, I know it’s a Zimbabwean. When I see a Zulu man, I know it’s a Zulu man. When I see a Xhosa man, I know it’s a Xhosa man, you understand. I know everybody behave, you understand... [Interview with M8]

Like M2, M8 interprets his experience according to his Christian faith. According to his experience of arriving in South Africa, back in 2007, and his arrest and incarceration within 3 months of his arrival, going to jail formed part of God’s plan to protect him. In addition to offering him protection, his time in jail served as a ‘crash course’ on South African cultures, which prepared him for life upon release. In his view, his time in jail, so soon after he arrived in South Africa, served as a ‘buffer zone’ that was more than just a rude-awakening because he learned, upon his release that some of the few people he knew at the time of his arrest were dead. Because he arrested so soon after he arrived in South Africa, his time in jail protected him from death but also served as a period in which he learned about South African and prison culture in sometimes very violent ways. Here the experiences of being in jail/prison are rationalized through the lens of faith and divine intervention. These notions of

lessons learnt, supported by either faith or past experiences of jail, are very intriguing ways of rationalizing unwarranted punishment. They offer insights into the possible ways in which legal hegemony is maintained insofar as people rationalize their experiences in ways that almost justify their unjust experiences. It is then possible to see how such rationalizations contribute to the reinforcement and deeper entrenchment of this particular legal system.

Another form of rationalization that I found interesting comes from an interview with a 28-year-old community activist [C3] who was also wrongfully arrested and accused of being a part of a protest that had turned violent when she was in fact on her way to visit a friend in hospital who had recently been hit by a car. In the course of the interview she explains how because of that experience, she now takes part in the protests in her community as an activist for which she has also been arrested for. When I asked her about what purpose jail served in the context of political protests, she replied:

Lapho angifuni ukuqamba amanga, sisuke siboshelwa ini ngoba silwela amalungelo ethu. Ngeke uyeke ukuyovalala amarobot ufuna into eright. Ufuna indlu, ufuna i-electricity ngoba if uzolight amakhandlela mina ngingalwa futhi namanje nje sengiyazi ukuthi ngilwe ngoba ngalimala kube kungenaparaffin or khandlela ngabe ngisaseright. Bengingeke ngizengilimale. Besilwela amalungelo ethu.

I don't want to lie, what are we being arrested for really because we are fighting for our rights. There's no way you'll stop going to close the robots when you want what is right. You want a house, you want electricity because if you're going to light candles I would fight back. Even now I know I must fight because I got seriously hurt and if there hadn't been any paraffin or candle I would still be ok. I never would've gotten hurt. We were just fighting for our rights. [Interview with C3]

And when I enquired further about arrests at the protests she has witnessed, she argues that they are the result of incorrect methods of protest:

Kukhona abaphula umthetho abamoshe izinto zabantu. Like that is why maybe like sometimes abantu, ngokubona kwami ngibona ukuthi that is why like siboshwa. Kube like siprotest kahle, singa...sivala siblock amarobot singamoshi imoto zabantu, kungamoshwa into zabantu maybe bekungeke...siprotest kahle nje. The way kumele siprotest ngakhona, bekungeke siboshwe.

There are those that break the law and damage people's property. Like that is why maybe like sometimes people, in my opinion, I think that is why we are arrested. Like if we were protesting nicely, we'll block the robots and

not damage people's cars or their property maybe we wouldn't...if we just protested nicely. The way we are supposed to protest, we wouldn't be arrested. [Interview with C3]

While notions of resistance are apparent in the earlier response, the response that follows illustrates an internalized rationale for her arrest. Seeing herself as part of the community even when this particular arrest was wrongful, the community activist understands that her arrest is the result of simply not following the rules and that if her community protests 'better' perhaps they would not be arrested. It must be highlighted, though, that such interesting paradoxes come up in different ways across the interviews. Often resistance emerges alongside submission. Whether or not this would be the case if a different part of the law were to be examined is unclear, however, viewing these perspectives in light of this very particular experience of the law is very important. The criminal justice system, in the context of protest activity around service delivery and similar issues, is both heavily politicized and incredibly violent. And when arrested under such circumstances, when the law is enforced with intensity as the state seeks to not only discipline but also to punish as a restoration of its might, submission may very well become the strange bedfellow to resistance.

The flipside to the above versions of rationalization is a type of rationalization that distinguishes between the law and the injustice meted out by very specific people in the system. Here, the police, immigration officers, and poor legal representatives are part of the reasons why gross injustice is experienced at the hands of the law. This was the case in the views expressed by some of the migrants I spoke to. A 42-year-old man from the Democratic Republic of Congo (DRC) [M1] shared that he was arrested at Home Affairs when he had gone to renew his paperwork for his stay in South Africa. He viewed his entire experience as a gross injustice. And when I asked him about what he expected from the law he put it as follows:

I can say like this: there is some people who's working in South Africa, they don't know the law. Like immigration officer. Most of the immigration people they don't know the law. So I didn't study law but actually, I can discover the law of South Africa is talking about another things but people who's working, they are not doing the way the law is talking... I am expecting the law to protect people... to protect like in South Africa, err... South Africa is talking "If you are in South Africa, you belong to South Africa." I want to belong to South Africa. I want to have everything like a South African people because I've been in South Africa actually, since 2006

until today, something like eleven years but you can go somewhere, they treating you like a foreigner, “You are foreigner, you are *makwerekwere*, *makwerekwere*.” Even in Lindela, “You are *makwerekwere*!” Do you see? The law is not talking like this but you can go somewhere but other people, they are talking like this [Interview with M1]

Not only does he highlight the very gap that legal consciousness seeks to account for, but for him professionals within the criminal justice system are to blame because of their lack of expertise, as he put it, as well as much deeper xenophobic and discriminatory sentiments. Another man from the (DRC) who was 47 years old [M3], echoed similar views when I asked him the same question. His arrest was very similar to the previous interviewee’s.

La loi est bonne mais sauf que ceux dont on a mis pour pratiquer cette loi en faveur des étrangers, ils ne le font pas. Ils font souvent des sentiments. Des sentiments xénophobiques, des sentiments autochtones et des originals de ce pays. Ils privilègent, ils donnent des privilèges plus aux enfants de leur pays, au lieu de considérer les étrangers. Quand les sud-africains sont aussi des étrangers dans autres pays, on les traite comme il faut. Mais pourquoi ici, ils maltraitent les étrangers ?

The law is good but those put in place to implement the law in favour of foreigners, they don’t do it. They harbour feelings. Xenophobic feelings, feelings for natives and the originals of this country. They favour, they prioritise children of their country more instead of considering foreigners. When South Africans are also foreigners in other countries, they are treated as need be. But why is it that here, they mistreat foreigners? [Interview with M3]

For some of the migrants that I spoke to like M1 and M3, how they experienced the law was unfair because of their migrant identities. They would emphasize that they appreciated the law in South Africa. And a lot of this, as with the earlier migrant interviewee, has to do with their past experiences of the law in their home countries. The gap between the law of the books and the law in action is a result of those who are responsible for administering the law. For migrants, very often, immigration officers are the gatekeepers that stand between them and a legal stay in South Africa. It is because of them, as M1 argued in his interview, that they are forced into a precarious existence where they have to live in the shadows of the law. This type of rationalization leaves legal hegemony intact but attacks those that administer it. Here, their punishment is understood in terms of an injustice carried out by people.

DRAFT: ***This is a work in progress and is part of my MA Dissertation***

A 27-year-old male student [S3] who was arrested because of his involvement in the #FeesMustFall protests highlighted the same gap as a way of rationalizing the way he and his comrades were treated during his time and jail:

[The law in South Africa] is just, there and there but most of the time, as I say, like the police officers, they do what they do only to serve their own purposes not because they like the job, like most of them, when I look at them now, I would say that they joined the police force not because they wanted to be police officers but because they just wanted a job, just to get employed and work to be able to provide for their families, not necessarily because they wanted to become police officers. So hence, most of them they don't do what's right, they just do what they're required to do not because they, themselves they believe in the law. [Interview with S3]

continues

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