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

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Supervised by Dr Julian Brown

This dissertation is submitted in partial fulfillment of the requirements for the degree of Master of Arts in Politics to the University of the Witwatersrand's Faculty of Humanities.

March 2018

DECLARATION

I declare that this dissertation is my own, unaided work. I also declare that any quotation or paraphrase from the published or unpublished work of another person has been duly acknowledged. This dissertation is being submitted for the degree of Master of Arts in Political Studies at the University of the Witwatersrand, Johannesburg. It has not been submitted before for any other degree or examination at any other university.

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Puleng Thato Masiangoako

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Date

ABSTRACT

While being home to one of the greatest constitutions in the world, South Africa is also notorious for brutal policing practices, endemic corruption, and an overstrained criminal justice system. This apparent gap between the normative conceptions of the law and the actual experiences of being subjected to the criminal justice system forms the crux of this study. This study explores how community activists, student activists, and migrants in Johannesburg, who rely on the law for protection and effective political expression and participation, understand the law through their experiences of arrest and short-term incarceration. This work introduces the concept of legal consciousness to the South African context, whilst also drawing heavily from South African literature of the law and criminal justice system. This research is grounded in the experiences of arrest and pre-trial and immigration detention shared by these individuals, which are used to develop a rich account of legal consciousness in South Africa. It also sheds light on some of the ways in which the criminal justice system sustains its legitimacy within a post-apartheid framework despite the gaps between what the law *ought to be* and what the law *actually is*. Very broadly, the study argues that these groups experience and understand the law in terms of their socio-political identities. Furthermore, their efforts to rationalize their experiences of arrest and detention serve to reconcile the gap between what the law *is* and what the law *should be*, thus unintentionally contributing to the reinforcement of legal hegemony. These experiences of the law and criminal justice system call into question the core constitutional values of equality and dignity.

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INTRODUCTION

> *South Africa's Constitution stands as a monument in the world […] The magnitude of its vision and ambition is unprecedented. Coming after centuries of settler exploitation and apartheid racism, retribution is not its animating theme. South Africa belongs to all, it proclaims. The state must facilitate economic justice, the Constitution mandates. The judiciary must protect the Bill of Rights, enforce its promises and monitor the conduct of government. Yet, despite the admiration of the world, many of the promises contained in the Constitution remain a hollow hope […] Does South Africa really belong to all? […] some ask whether the constitutional framework was, in fact, the correct response to colonialism and apartheid. […] Law was not always and exclusively an expression of colonial oppression. Sometimes it was an antidote to it, as it is true today. Whether law can be an instrument of justice is debatable, with a singularly important factor being the agency of the actors.*
>
> (Ngcukaitobi 2018)

Experiences and perceptions of the law in South Africa vary depending on whom one speaks to and about what aspects of the law. Take, for example, many of South Africa's poor and black protesting communities: what does the law mean to the ones who end up getting arrested after a service delivery protest that turns violent? What does the law mean to these communities who have felt forced to protest after years of trying to engage their local representatives to no avail? Or perhaps the students who have demanded that the government take greater responsibility for providing meaningful access to higher education, especially for those who have continued to be disadvantaged by historical disadvantage. What does the law mean to the ones who have ended up getting arrested and have had to appear in court – many for the first time? Or even foreign nationals, for example. What does the law mean to the ones who have had their documentation destroyed by the police and always need to have some cash in hand (as a rule of thumb) in case they run into any trouble – the kind that a life of precarity invites? What does the law mean to them when they have been detained in Lindela for months, only to be released with no means of securing any kind of documentation the 'right way'?

These examples are evidently different from the 2014 high-profile trials of Oscar Pistorius and Shrien Dewani, in which each of the men were accused of murdering their partners (Hopkins 2014). Other examples include the more recent physical abuse incidents that took place in August 2017. One involved the former Deputy Mister of Education, Mduduzi Manana while the other involved the former Zimbabwean First Lady, Grace Mugabe (Simelane 2017). The contrasting examples

highlight that equality before the law on paper seems to be just that for many in South Africa. This is particularly so if one does not enjoy vast wealth, privilege, and power. Therefore', our experiences and perceptions of the law may vary on the basis of factors such as race, socio-economic class, gender, nationality, and even status, to name but a few. And as a result, the promises of the law on paper often stand at odds with the actual lived experiences of the law and criminal justice system.

The criminal justice system offers an example of the discrepancy between ideal and actual experiences of the law. Policing has succumbed to the ever-increasing pressures to be tough on crime. This has contributed to the justice system's struggle to cope with the growing backlogs of cases as well as the penal system's struggles with issues of chronic overcrowding, understaffing and poor facility condition. This was evidenced by the Chief Justice Mogeong Mogoeng's plea for the police to avoid effecting arrests prior to sufficient investigation because of the impact that it has on the court system (Karrim 2017b). Meanwhile, the former Minister of Police, Fikile Mbalula, encouraged the police to "break the law progressively a let [him] worry about court cases" (Karrim 2017b). The reputation of the police has often been compromised by the numerous reports of excessively violent policing, endemic corruption, and widespread misconduct (Newham 2013; Muntingh and Dereymaeker 2013).

These challenges, however, do not detract from the criminal justice system's role as a fundamental part of the idea of the rule of law. Even across the different perceptions and experiences of the law, there is still an overwhelming acquiescence to the idea of the law and an acceptance of its power. There is a general commitment to the law's authority, its capacity to provide protection, maintain order, and to even hold the state accountable. Even though South Africa's criminal justice system is overburdened, prone to malfunction, and is seemingly corruptible, there remains a socially held commitment to the 'inescapable' responsibility to punish deviance and wrongdoing and to uphold the rule of law. It is, in fact, difficult to imagine what the law would be without its authority and capacity to punish.

South Africa's social and political order is based on a normative conception of the law. We know that this conception of the law draws a significant portion of its legitimacy from the Constitution and the history that necessitated its birth. It is, after all, regarded as one of the most progressive constitutions in the world. Another source of its legitimacy has been the law's long history of allowing some room for

challenging that which is unjust, even under apartheid, but also much earlier (Abel 1995; D. Gordon 2009; Klaaren 2011; Ngcukaitobi 2018). In many ways, South African contemporary society is fundamentally characterized by this long and rich history of a persistent commitment to the rule of law during struggles for equality and justice. However, what accounts for the law's legitimacy in South Africa, despite its inability to live up to its own standards? How does the law in South Africa continue to enjoy its hegemonic status despite the gap between the standards of the law that are guided by the principles enshrined in the constitution, on the one hand, and the day-to-day lived experiences and actual encounters with the law, on the other? It is precisely this gap that has provided the impetus for this research.

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 particularly through their encounters with the criminal justice system. The study explores how the law is able to maintain its hegemonic status in South Africa's social and political order by looking at the ways in which legal consciousness may be shaped by experiences and encounters with the criminal justice system. This study asks two questions: how do people experience the law in South Africa and how do people understand and perceive the law in light of those experiences. To answer these questions, this study looks at the experiences of three groups who have found themselves within the clutches of the law through their experiences of arrest and detention. These arrests rarely resulted in actual convictions. Community activists, student activists, and migrants have typically been subjected to the law because of their socio-political identities. This study looks at how their experiences shape their understandings and meanings of the law in South Africa and what can that tell us about the various ways in which legal hegemony is sustained and undermined.

This study argues that these groups experience and understand the law in terms of their socio-political identities. The individuals from these groups believed that the ways that they were treated were based on their identities as either community activists, student activists or migrants. Some participants tried to rationalize their experiences by interpreting them while others did not. These efforts of rationalization help to reconcile the gap between what the law is and what the law should be, and thereby unintentionally contribute to the reinforcement of legal hegemony. For those who rejected any effort to rationalize their experiences, this gap remains

irreconcilable, however, they too unknowingly sustain legal hegemony. They unintentionally entrench legal hegemony despite their staunch refusals to acknowledge the law's authority. Their collective experiences of the law and criminal justice system call into question the core constitutional values of equality and dignity.

As groups that organize and protest around socio-economic and socio-political issues, community and student activists 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, which have steadily increased over the years (Mkhize 2015; Von Holdt 2013; Lancaster 2016; Cilliers and Aucoin 2016). However, migrants[1] in South Africa do not have the same history of political mobilization and collectively organizing (Klaaren 2011; Polzer and Segatti 2011). Instead, their experiences of the law are often concentrated around their encounters with the Department of Home Affairs (Klaaren 2011, 144). As such, migrant encounters with the law are less confrontational or purposeful, but they are nonetheless obligatory, unlike the encounters of activists. While activists typically intentionally mobilize the law through their collective organizing, migrants are generally more suspicious of the law because of the dominant and pervasive role that it plays in their lives.

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 by law enforcement. While community and student activists use the law to assert their demands, migrants try to avoid direct confrontations with the law wherever possible. These socio-political 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.

The experiences of these groups make up the receiving end of the 'gap' in the law. As such, this study asks what do the individuals from these groups believe to be true about the law in South Africa and how do their experiences inform those beliefs?

[1] In this study, the use of the term migrant will be used to refer to broadly to migrants who are black and brown and typically live in the poorer urban areas in South Africa. The migrants included in this study are all from African countries.

In other words, how do these groups understand the law in South Africa, in light of their encounters with it? Based on the experiences drawn from these examples, it is reasonable to expect that their perceptions of the law to be negative. From the perspectives of these groups, it is reasonable to also expect the legitimacy of the law to be severely weakened. However, this study finds this is not necessarily the case. It appears that rather than being undermined or weakened, legal hegemony in South Africa is actually strengthened by the multiplicity in experiences and perceptions of the law.

Significance of research

By shedding light on the ways that legal hegemony in South Africa is sustained despite its shortcomings, we are able to develop a complex and nuanced account of the ways in which power is encountered and responded to within South Africa's legal system. We also stand to gain a deeper understanding of the law's place within South Africa's social and political order. Without a holistic understanding of the different ways that the law and criminal justice system are experienced and perceived by various groups in society, our efforts to reduce the gap between what the law is and what the law should be would run the risk of being misguided.

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 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 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 portions of encounters with the law, those that are predominantly short-term in nature, remain unaccounted for. However, Brandon Bodenstein's (2017) recent study of South Africa's Legal Aid system begins to make a valuable contribution in this regard. In fact, according to Clare Ballard, 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). She goes on to describe and highlight the significance of remand detention in South Africa as an experience for those who are subjected to it:

> 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 (2011, 5).

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 these perspectives are not taken into account. This study, therefore, contributes to our knowledge on the experiences 'pre-emptive' punishment that characterizes the more transitory encounters with 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.

Research methodology and Ethical considerations

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. The study uses legal consciousness and its concept of legal hegemony as a theoretical framework in order to better understand the inner-workings of South Africa's political order and the law's place within it.

This study draws from the primary data collected from the in-depth semi-structured interviews that I conducted with the community activists, student activists, and migrants. Ethical clearance was sought and granted to conduct the interviews with these groups who are considered to be vulnerable in the sense that the interviews could inflict some harm such as triggering painful and traumatic experiences or collecting information about legal proceedings. In order to protect the identities of the participants of in this study, code pseudonyms are used throughout this study. The code pseudonyms consist of a letter followed by a number. The letters 'C', 'S' and 'M' each stand for community activist, student activist, and migrant, respectively. The numbers range from 1 to 24 and indicate when the interview was conducted within the series, ranging from the first interview conducted to the last interview conducted. The logic here is that each interview conducted impacted on the one that followed.

I conducted 27 interviews in total, however, this study only draws from 24 of the interviews with eight individuals from each group.[2] I made an effort to ensure that the interviews in the languages that the participants expressed comfort with. This would be arranged beforehand in order to organize the logistics involved. Because language is such an important aspect of expression, this was especially important for this research. The study relied on the shared experiences and perceptions that covered very personal and sometimes sensitive subject matter. As such, six of the interviewees preferred to conduct the interview in languages other than English and therefore these were carried out with the support of Wits postgraduate linguistic student interpreters. They are bound by the ethics that guide their interpretations services as well as the general university standard of ethics that guided this study. The languages included

[2] Three interviews have been excluded from this study. Two of the interviews were excluded for language reasons. They involved one student activist and one migrant. Although these participants had indicated that they were comfortable with conducting the interviews in English, the participants ended up using IsiZulu and Lingala. During the interviews, individuals known to the participants who were present during the interviews would often step in, informally, to help with the translation and interpretation. It due time constraints, I was unable to conduct those interviews again with formal interpretations. The other interview excluded from the study was one conducted with a migrant who was arrested and convicted in Kimberly. This was not known before hand therefore because my studies were limited to experiences of arrest and detention in the area of Johannesburg, I had to exclude the interview from the study. The excluded interviews were insightful and also consistent with the other interviews from their respective groups.

isiZulu, Setswana, Sesotho, and French. The interviews were carried out in a place that was of most convenient for the participants. All of the interviews were audio recorded and then later transcribed. I transcribed all of the interviews that were conducted exclusively in English and the respective interpreters transcribed the interviews that were conducted in different languages.

Once the interviews were all conducted, I created a database of all the pieces of information about the participants as well as their experiences. These included demographic factors such as age, race, gender, highest level of occupation, current occupation, where they resided and where they originally came from. The other factors pertaining to their experience, perceptions, and expectations of the law were captures. These included details of the current encounter, duration of detention, reason for the arrest, previous encounters, vicarious encounters or friends or family, expectations of police, legal representation and the law, perceptions of the police and the law, and treatment. I was able to get a comprehensive snapshot of the information gathered from the interviews. I then analyzed the data collected from the interviews by using thematic analysis by going through the interviews multiple times in order to tease out some of the main themes that emerged.

Since this study is most interested in the experiences and perceptions of the interviewees, the use of in-depth, semi-structured interviews was the most suitable methodological tool that was able to draw out very useful and rich data. In their discussion on methods, Ewick and Silbey aptly note that the key strength of interviews is their capacity to capture the breath that surveys produce as well as the depth that months and years of observations are able to provide (Ewick and Silbey 1998, 24). As such, the interviews allowed me to strike a balance between the broad snapshots of the groups and the rich and specific details shared by each participant. They also allowed me to structure the interview in a way that allowed the allowed me to direct the conversation without constricting the freedom of the interviewees to share as much as they were comfortable to share. Drawing from the Ewick and Silbey as well as Sexton, I organized the interview in such was that it eased into the sensitive subject matter.[3]

To identify and recruit potential participants, I used a combination of purposive and snowballing. I contacted organizations that often worked with the

[3] See Appendix for the interview structure.

target groups. This allowed me to get in touch with some of the initial potential participants. I then used the snowballing method of sampling to get in touch with more participants until the target sample size was satisfied. The African Diaspora Forum (ADF), the Socio-economic Rights Institute (SERI), and the Thembelihle Crisis Committee (TCC) proved to be invaluable resources in this regard. Through them, I was able to get in touch with community activists and migrants. The student activists were recruited in slightly differently. As a student myself, I was able to reach out to some of the students who had been arrested during the 2015 and 2016 waves of the #FeesMustFall protests. In my informal capacity as a fellow student was able to accompany one student some of his hearings where I was able to get in touch with others who were still appearing in the Magistrates Court. The sessions of accompanying the various students who agreed to take part in this study afforded me the opportunity to informally get a look at the life of the Magistrates Court from the perspectives of those who are brought before the law. It provided me with valuable insight into the legal proceedings and provided me with a glimpse of what appearing before the courts entail. Because of this mixture of sampling methods and focus of this study, the experiences of the participants included in this particular study may not necessarily be representative of the categories the participants form part of. Furthermore, the chosen groups that participants are a part of are also are not broadly representative of the remand or immigration detention populations in South Africa.

Structure of Study

This study is organized into five sections. Chapters 1 and 2 cover two sets of literature. Chapter 1 covers the literature on legal consciousness, penal consciousness. It also looks at the some of the South African literature that deals with some of the issues that legal consciousness does. This literature critically engages with the idea of the law in South Africa and some of the experiences of the law under a post-apartheid democratic framework. This particular set of literature also begins to contextualize the criminal justice system in South Africa. This chapter provides maps out the theoretical framework that underpins this study. Chapter 2 covers the literature on South Africa's criminal justice system and it includes historical and contemporary pieces. The chapter contextualizes experiences and encounters with the law by sharing a brief history of the country's criminal justice, policing practices, and penal

development. This is followed by a look at the post-1994 transformational efforts and the impact that they have had on these areas of the criminal justice system.

Chapters 3 through 5 turn to experiences and perceptions of the community activists, student activists, and migrants that took part in this study. Chapter 3 provides introduces the participants and later shares their experiences of the criminal justice system. Their experiences of arrest and detention are presented in comparison to the actual standards procedure for arrests and detention. The chapter also discusses the very specific aspects of going through the legal system that felt like especially like punishment. Chapter 4 turns to the ways in which expectations about the criminal justice system were shaped by a combination of what I refer to as descriptive/ prescriptive expectations and normative expectations of the law. These expectations influenced the ways that the participants responded to various aspects of the criminal justice system, such as the way that they were treated, they modified their behavior or understood the various processes.

Chapter 5 turns to an analysis of the ways that the experiences of the arrest and short-term incarceration contribute to shaping legal consciousness in South Africa. Furthermore, this chapter also discusses the striking and unexpected ways that the interviewees unintentionally sustain legal hegemony in South Africa based on the different ways that they would make sense of their experiences of getting arrested and detained as well as how they now perceive the law in South Africa. This is followed by a discussion of some the implications of this study and suggestions for future research.

CHAPTER 1: THEORETICAL FRAMEWORK

The aim of this study is to explore some of the experiences of arrest and detention and the ways in which these experiences of the criminal justice system shape perceptions of the law in South Africa. The purpose of this chapter is to provide a critical discussion of two main bodies of literature drawn upon by this study: the first being the literature on legal consciousness and penal consciousness and the second being the accounts that deal with South Africa's post-apartheid legal order and penal system in particular.

The chapter proceeds in two sections that deal with each body of literature separately. The first section of the review deals with the development of legal consciousness as an area of study within socio-legal studies concerned with the place of the law *within* society. It critically discusses some of the main arguments and debates within the legal consciousness scholarship that have shaped the direction of this study. This section also briefly discusses penal consciousness and the similar accounts of penal subjectivity. The literature on legal and penal consciousness is particularly important in that they influence both the methodology and theoretical framework of this study.

The second section covers a diverse range of works that share both instructive and critical accounts of how the law and the penal system in South Africa are experienced today. These accounts document the realistic and imperfect experiences of the law and by doing so, they shed light on the nature of the gap between the *law of the books* and *the law in action* – the impetus for legal consciousness scholarship. Most importantly, this section of the review begins to contextualize the law and criminal justice system explored in this study.

Legal Consciousness

Legal consciousness scholarship emerged from socio-legal studies and has become a theoretical tool used to explore the relationship between the law and its place in society. Its roots can found in the works of Roscoe Pound's *Law in Books and Law in Action* (1910) and Eugene Ehrlich's *Die Erfoschung des lebenden Rechts (Research on Living Law)* (1911). Without referring explicitly to the concept of 'legal consciousness', Pound and Ehrlich were concerned with socio-legal issues that have

since laid the foundations of what the American and European strands of legal consciousness have become (Hertogh 2004, 472).

Ehrlich's notion of 'living law' (which has been foundational to the European strand of legal consciousness) 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 1911; Hertogh 2004, 473). This differs from Pound's ideas (which has been foundational to the American strand of legal consciousness) because he distinguished his notion of 'law in action' from his notion of 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 1910; Hertogh 2004, 465). For Pound, the law was not a framework of rules that functioned autonomously from society and that it actually served as an important instrument for "social control" (Hertogh 2004, 465). As such, Pound and Erlich's styles of exploring the idea of law and its place in social life differed. Erlich's enquiries were concerned with understanding *how people experience the law*, making the law an independent variable (Hertogh 2004, 460). Conversely, Pound's enquiries were more concerned with *what people experience as the law*, to begin with, taking up law as a dependent variable instead.

Despite Hertogh's (2004) compelling argument for the using both strands in his study of the redevelopment of an area in the town of Zwolle, Netherlands, this study takes the South African legal order as it is and is concerned with how people experience and understand it. I ask what it is that these groups (community activists, student activists, and migrants) experience of South Africa's criminal justice system, as opposed to what they experience as law in South Africa. Therefore, while Erlich's conception of living law is instructive, it is Pound's notion of the 'law in action' that lends itself more to this study because it focuses more on what the law *does* than what it *is* (Hertogh 2004, 471; Silbey 2005, 324). Most of the subsequent socio-legal scholarship that later takes up legal consciousness (mostly American scholarship) continues to take up the Pound's strand of the tradition.

It is only in the 1980s and 1990s that legal consciousness actually appears as a concept and theoretical tool (Hertogh 2004, 461; Silbey 2005, 323). Until then, studies were exploring the social implications of the law but would do so in ways that held the law as somehow external and completely independent of society (Hertogh

2004, 461). Legal consciousness scholarship, therefore, began to move away from that presumption towards a view of the law as both a social construct and force within society competing among other social forces (Halliday and Morgan 2013, 2–3; Silbey 2005, 327).

Legal consciousness scholarship set out to study the gap between the law on the books and the law in action by exploring how, at best, the law fails to deliver on its promises such as fairness and equality, and at worst, it results in the oppression of many in society, often harming the most socially marginal and vulnerable (Halliday and Morgan 2013, 3). In exploring this gap, legal consciousness scholars intended to understand how, despite the gap, the law was able to wield hegemonic power and generate compliance within society (Halliday and Morgan 2013, 3). Some of the most influential of these studies, particularly for this study, include works by Sally Engle Merry (1990, 1992), Patricia Ewick and Susan Silbey(1992, 1998), and Austin Sarat (Sarat 1990). These works are particularly instructive for the different ways that they explore legal consciousness and engage with the problem of legal hegemony.

The concept of legal consciousness lacks a universal definition, however, there is broad consensus in what it constitutes. In Sally Engle Merry's book, *Getting Justice and Getting Even: Legal consciousness among working-class Americans*, a seminal contribution to the scholarship, she succinctly defines legal consciousness as "the ways in which people understand and use the law" (1990, 5). In a later article, Merry expands her definition of the legal consciousness to include people's understandings of "the way [the law] affects their lives and defines their relationships" (1992, 210). For Merry, legal consciousness comprises of what people expect from the law, their senses of "legal entitlement', as well as their ideas of 'rights' (1992, 210).

Set in eastern Massachusetts, the book provides a very detailed account of the ways in which the legal consciousness of the people that make up her study is shaped through their encounters with the lower courts. As people seek recourse through the courts by bringing their problems and disputes, the courts respond by redefining the problems and disputes as something other than 'serious legal cases'. As plaintiffs bring issues that they define in legal terms, the various legal actors of the courts classify the problems as either "marital, neighbourhood, boyfriend/girlfriend, roommate or stranger cases" (Merry 1990, 36). These classified problems and disputes are redefined as interpersonal problems, and through this redefinition, the

courts reframe them through a discourse of 'morality or treatment' (1990, 11). As such the court provides a remedy that redirects away from a trial and instead offers or in some cases pressure conflicting parties to settle through mediation (1990, 36). She describes this process as follows:

> In the lower court, the judge, district attorney, or clerk, talk about the need for neighbours to learn to live together, the need for a young man to leave a young woman alone when her parents oppose the relationship, and the duty of mothers to stay home with their children instead of going to bars. Talk of laws, of what constitutes a crime, of penalties for particular offenses is here too. But when problems involve families, neighbourhoods, friendships, or romances, the talk is more often help, treatment, and duty than of legal rules and procedures (1990, 12).

The court uses its authority and exercises cultural domination by redefining the problems that plaintiffs bring before the court and instead offering the recourse that they deem fit. Through this interaction between plaintiffs and the courts, the legal consciousness of those encountering the legal system is shaped as they mobilize the law and resist the law's power (in the form of 'authoritative definitions of problems') (1990, 11). This interactive production of legal consciousness continues as people readjust their expectations and ideas about the law through their interactions with the law as well as with each other.

Ewick and Silbey offer a similar definition by simply defining it as the way people "interpret and make sense of the law" (1998, 17). In their pivotal study, *The Common Place of Law*, they explore the ways in which people experience and interpret the law in the contexts of their daily lives (Ewick and Silbey 1998). Much like Merry, they argue that legal consciousness is the active "participation in the process of constructing legality" (1998, 17). They use the term legality to refer to a broader range of actors and institutions that go beyond the 'official' such as the courts, lawyers, judges, police etc. (Ewick and Silbey 1998, 45). For Ewick and Silbey, legality serves as both an 'interpretative framework' and 'a set of resources' that the social world is comprised of and produced by. In their study 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).

For them, legal consciousness is not merely the opinions that people have of the law but rather an active and collective process of constructing "legal meanings, actions, practices and, institutions" within the constraints of available within a culturally and historically specific time and place (Ewick and Silbey 1998, 247). Legal consciousness is about taking part in the construction of legality through what is thought, said, and done (Ewick and Silbey 1998, 45). They describe the process of constructing legality or legal consciousness as follows:

> As individuals express or enact their consciousness, they draw from and contribute to legality. As persons appropriate from the common repertoire of legal schemas and resources, they are constrained by what is available, by legality as it has been previously enacted by others. Thus, the stories of law are not infinitely various; each person does not invent an independent and unique conception of legality (1998, 247).

This is, therefore, a reciprocal and collective process of meaning-making in which people's interpretations of the social world "become patterned, stabilized, and objectified" (Ewick and Silbey 1998, 39). For Ewick and Silbey, it is "always a collective construction that simultaneously expresses, uses, and creates publicly exchanged understandings [or] schemas" (Ewick and Silbey 1998, 46).

Their methodology emphasizes the role of narrative in conducting and presenting their research. Their study draws upon the data from 430 interviews, which contain stories of the life events, relationships, disputes, that contain stories about the law (Ewick and Silbey 1998, 29). The stories shared in the interviews offer a lens for studying the place of the law in the daily lives of Americans by paying attention to both its presence as well as its absence (Ewick and Silbey 1998, 29). While Merry offers a discussion of legal consciousness that emerges from people's experiences of taking various disputes to court, Ewick and Silbey identify three forms of legal consciousness that go beyond the courtroom. These three forms or legal consciousness or stories of legality are: '*before* the law', '*with* the law' and '*against* the law'. They emerged from what people said about their use of the law, and their avoidance of the law (Ewick and Silbey 1998, 224). For Ewick and Silbey, where and when the law appeared in their interviews was equally as important as when and where the law did not appear or when people were silent about it.

The first form of legal consciousness (before the law) reinforces the liberal legal ideological image of the law as impartial, timeless, transcendent, and objective (Ewick and Silbey 1998, 224). The second form of legal consciousness (with the law) views the law as a game. Here the law cannot be impartial because it is a ground for 'strategic engagements' in which self-interested individuals navigate the law by using their resources and skills (Ewick and Silbey 1998, 224). Individuals can get better at the game through repeated encounters with the law (Ewick and Silbey 1998, 224). This image of the law is the opposite of 'before the law' in that it views the law as partial. The third form of legal consciousness (against the law') views the law as a pervasive and powerful force that colonizes time and space and renders its subjects as less powerful. They find that this story of the law was shared almost exclusively by the most marginal members of society who would tell stories of the law that were both painful but also stories of the law were they would various tactics to resist the law's power. This form of legal consciousness views the law as an all-encompassing structure that they are 'trapped within'. This form of consciousness is one of resistance (Ewick and Silbey 1998, 184).

In a slightly earlier study, *The Law is all over: Power, Resistance, and Legal Consciousness*, Austin Sarat looks at the experiences of the welfare poor in two in New England cities in the US. His study is based on an ethnographic observation of legal services offices as well as interviews with 38 welfare recipients who share their experiences of navigating the welfare bureaucracy that forms such a central part of their lives. From them, he describes how the legal consciousness of the 'welfare poor' shaped by the pervasive presence of the law in their everyday lives. For the welfare poor, the law plays a dominant role in their lives through ordinary encounters with the welfare bureaucracy that is also responsible for determining the "if's" and "how's" of some of their most essential needs such as food and shelter (Sarat 1990, 344). He argues that their legal consciousness is one that is based on power, dominance, and dependency. The welfare recipients develop "a consciousness of resistance, in which [they] assert themselves and demand recognition of their personal identities human needs" (Sarat 1990, 344). He stresses that their legal consciousness is substantially different from other groups in society for whom the law is less visible or ubiquitous (Sarat 1990, 344).

Both Sarat and Ewick and Silbey's accounts make an explicit effort to 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. And as Sarat demonstrates, marginalized groups make an effort to assert themselves and their dignity even under humiliating and compromising circumstances. Merry, Sarat, Ewick and Silbey all draw from Michel de Certeau, Erving Goffman and James Scott, whose works study how individuals deemed powerless in society make use of tactics to contest and resist power and control exerted upon and "maneuver within a terrain organized and imposed by a foreign power" (Ewick and Silbey 1992). By referring to de Certeau, Goffman and Scott, the authors explain how legal consciousness is an open-ended interactive process that comes out of encounters with the law, but also how these encounters with the law involve a negotiation with the law as a hegemonic force. In the same way, Marshall and Barclay (2003) argue that although the law is pervasive resistance is possible because the law is not entirely determinant. Therefore how migrants, community activists, and student activists respond to their subjection to the law needs to be understood not only in terms of their subjection to but in terms of their agency as the interacting and respond to the law.

Sarat presents an image of the law that has a powerful presence in the lives of welfare recipients while Ewick and Sibley present multiple expressions of the law as all-powerful for some, God-like to some, but also as a game to be played for others. The complex nature of the law depicted in these studies is relevant to this study because of its relevance to the multiple faces of the law that may be present in the context of criminal justice. For example, the police, prosecutors, magistrates, and lawyers may represent these different aspects of the law and could, therefore, be perceived differently. So this study explores this by asking how do community activists, student activists, and migrants experience, perceive and understand the law based on their encounters with the multiple aspects of the criminal justice. If Sarat's study reveals that the legal consciousness of welfare recipients is influenced by their regular encounters with the welfare bureaucracy then how may legal consciousness be shaped by an experience of forceful and involuntary subjection to the law? This study is concerned with how experiences of the law (that are geared towards punishment) may contribute to a broader understanding of the law.

Since this wave of legal consciousness scholarship, scholars have broadened the use of the concept and applied it to a wider range of contexts and social groups (Nielsen 2000; Marshall and Barclay 2003; Cowan 2004; Hertogh 2004; D. Engel and

Engel 2010; Wilson 2011; Abrego 2011; Hull 2016). These studies apply the concept of legal consciousness to different parts of the world and use it to understand the experiences of different and sometimes marginal groups. Silbey has, however, critiqued the broadened application of legal consciousness, arguing that it has compromised the critical purpose of legal consciousness to account for legal hegemony. She argues that these studies privilege "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" (Silbey 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 (Silbey 2005, 324).

Silbey therefore cautions against providing more of a descriptive analysis without sufficient theorizing. For Silbey (2005), the purpose of legal consciousness scholarship is, as she puts it, 'to trace the hegemonic power of law' by:

> … search[ing] for the forms of participation and interpretation through which actors construct, sustain, reproduce, or amend the circulating (contested or hegemonic) structures of meanings concerning law [because] legal consciousness cannot be understood independently of its role in the collective construction of legality – how forms of consciousness combine to constitute ideological or hegemonic legality (2005, 334).

I would, however, argue that while Silbey's critique is useful, legal consciousness scholarship has grown in richness from this expansion. These studies, which have applied the concept to new contexts and focused on special groups in society are in fact instructive, offering creative ways of understanding the law's place in social life. 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). But also, as David Engel highlights, "different substantive areas of the law represent different kinds of actors, procedures, and institutions. Law may matter more for consciousness associated with some [areas of substantive law] than others" (1998, 140).

Therefore, by focusing on the South African context and asking, firstly, what certain groups experience of the criminal justice system when they are arrested and detained, and secondly, how do these experiences of arrest and short-term incarceration contribute to shaping their legal consciousness, this study contributes to a better understanding of South Africa's political order while expanding our conception of legal consciousness. Because many legal consciousness studies have tended to focus on experiences of civil litigation, covering a broad range of issues brought before the courts, this study contributes to the field by looking at how the legal consciousness of 'differently situated' groups within society that encounter the law differently may develop through their particular experiences of the criminal justice system (D. M. Engel 1998, 133).

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 studies of legal consciousness. 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" (Nielsen 2000, 1061). This study takes up legal consciousness and its analytical concern for legal hegemony, as a way of understanding South Africa's current political order by exploring and the place of law in it as understood by those who are subject to it the form of arrest and detention.

Penal Consciousness

This brings me to the concept of penal consciousness. Using the framework legal consciousness, Lori Sexton develops 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). Sexton (2015) examines prisoners' notions of punishment in order to look into their own interpretations and understandings of punishment and being imprisoned. 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 between 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 carried out but rather, as something that "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 and the 'pre-emptive' forms of punishment that they are subjected to.

Within our legal order and the commitment to the 'rule of law', there lies a commitment to the notion of punishment. A breach of the law demands the immediate enforcement of the law. After apartheid, South Africa attempted to shift its carceral

system from being punitive to rehabilitative, however, punishment is still an important part of our conception of justice. When crime takes centre-stage of public discourse it is often accompanied by widespread calls for harsher policing and the occasional call for the return of the death penalty (Hornberger 2013, 600; Super 2014, 11; Comaroff and Comaroff 2016, 52). While the issue of the death penalty was constitutionally settled in *S. v. Makwanyane and Another* (1995), the consequences of harsher policing can and often does make its way into legislation. As such, experiences of punishment are by extension, experiences of the law and the state's power. This study, therefore, takes up legal and penal consciousness as conceptual tools for understanding how experiences of 'pre-emptive' punishment and experiences the criminal justice system shape our broader perceptions of the law.

This project is concerned with the ways that different groups in South Africa may experience the law during their encounters with the criminal justice system. This study is interested in the ways that individuals who are forcefully and violently subjected to the law may perceive and understand the law, in light of such subjection. The experiences of arrest and short-term incarceration provide the first level for analysis, and the broader perceptions and understandings of the law (in light of these experiences) provide the second level for analysis.

The law and criminal justice in South Africa

This section of the literature review first looks at a general criticism of the law in post-apartheid South Africa as shared by Joel Modiri, then it turns to Khunou's account of some of specific courtroom encounters, then it turns to a general engagement with detention and imprisonment in South Africa. Although legal consciousness as a concept has not been expressly taken up in the South African context, these accounts provide some engagement with some of the issues raised by legal consciousness scholarship, for the South African context. These studies explore some of the experiential consequences and encounters with the law in South Africa and engage with the law beyond the 'ideal'. They, therefore, provide indispensable knowledge of the idea of the law's 'lived experiences' in South Africa.

One key scholar looks at post-apartheid jurisprudence from a critical perspective. Modiri uses Critical Legal Studies (CLS) and primarily Critical Race Theory (CRT) – which stemmed from CLS - to develop jurisprudential critiques of

the law in South Africa. He looks at the ways in South Africa's history of racial discrimination continues to impact the administration of justice the narrow and excessively formalistic judgments that stifle the opportunities for transformation under South Africa's Constitution. As a theoretical position, he rejects notions of the law as "objective, neutral and apolitical". He draws from the CRT and CLS critiques of the law in the U.S. to show how the law in South Africa is implicated in the protection and maintenance of "existing power relations and social arrangements" because of South Africa's long history of racial discrimination and oppression that served to maintain white supremacy and white privilege (Modiri 2012, 408).

In his articles, *The colour of law, power, and knowledge: Introducing Critical Race Theory in (post-) apartheid South Africa* (Modiri 2012) and *Race as/and the trace of the ghost: Jurisprudential escapism, horizontal anxiety and the right to be racist in BoE Trust Limited* (Modiri 2013), Modiri systematically and judiciously critiques the arguments and interpretations in the legal judgments of cases in which race features. He finds that some judgments are at worst, too narrow to even deal with racism in any meaningful way or, at best, in their acknowledgment of racism, they simply fall short of doing enough to radically confront racism. He argues that post-apartheid jurisprudence needs to be deliberate in its application of race-conscious legal reasoning and interpretations in order to fully realize the transformative and progressive potential of the Constitution (Modiri 2013, 434).

Modiri's analyses of post-apartheid jurisprudence instructively paint a realistic image of the ways in which the law operates in contemporary South Africa. From a legal perspective, his analyses give credence to the inarticulable unfairness or injustices that many experience at the hands of the law. By so doing, he inadvertently contributes to the work of legal consciousness scholarship by laying the socio-politically and historically-embedded nature of the law bare and thereby accounting for the empirical gap. Because of the objectives of CRT, such an account is unable to engage with the issue of legal hegemony raised by legal consciousness scholarship. By asking how individuals perceive the law in light of their experiences of the criminal justice system, this study benefits from Modiri's rich analyses of contemporary jurisprudence and post-apartheid constitutionalism. However, this study explicitly departs from Modiri's (along with CRT's) centrality of race in the law because this study (in line with legal consciousness tradition) asks *how people experience the criminal justice system as opposed to seeking out the ways in which*

their experiences may be racialized. The study places the perceptions and interpretations of ordinary individuals who are on the receiving end of criminal justice procedures and legal judgments at the centre of its analysis.[4] While race may emerge as an important part of their experiences, leaving it open will allow for multilayered and complex experiences to emerge.

Some scholars have looked at the differences that people encounter the law in contemporary South Africa. Grace Khunou's work on masculinities and fatherhood, very aptly illustrates how fathers' and mothers' experiences of the maintenance courts and South Africa's laws on maintenance are gendered. Her research draws upon at some of the court records for the Johannesburg Maintenance Court and uses in-depth interviews with mothers and fathers to provide a rich and nuanced account of the maintenance system and the ways in motherhood and fatherhood are actively constituted through the disputes. In another study, *Fathers don't stand a chance: experiences of custody, access, and maintenance*, Khunou problematizes the stereotypes around fatherhood by providing sharing the perspectives of fathers as they navigate the maintenance system while simultaneously reasserting their roles as fathers, despite the 'father-unfriendly' position of the Courts (2006, 265). Although her work places emphasis on gender, she meticulously lays out the ways that class and race also shape the experiences of South Africa's maintenance system (Khunou 2008, 2006). Part of her research finds that there is an inconsistency between "the aspirations of the state as captured in the Maintenance Act and practice as seen through the disparities in the process of claiming maintenance and the general accessibility of the system" (Khunou 2008, 147).

As with most criticisms of the police, Khunou's research also highlights the role played by the police and shows how their failure to do their jobs effectively significantly impacts the entire process of bringing a claim to the courts. The misuse of discretion, corruption and, malpractice all contribute to undermining the efficient administration of the maintenance system. With these challenges, as Khunou's study shows, repeated engagements with the system (on the part of complainants) is an uphill battle and are because of sheer determination and assertion of one's rights to use the system (Khunou 2008, 208). The net result is that some simply withdraw from

[4] From a methodological perspective, a study of legal consciousness (and the objectives it sets out to achieve) is deductive by its very nature. It relies on data collected to then decipher the law's place in society and the ways in which its power is engaged. Therefore, the insertion of race (or even gender, age, nationality and various other forms of identity) would amount to superimposing the terms for interpreting experiences of arrest and detention onto the participants in this study.

the process without getting maintenance because of their experiences of the system bear costs that make the process no longer worth it. The criminal justice system suffers from the same issues that often spiral out from the police service. Unlike the women who can simply give up claiming maintenance, the option to withdraw from a struggle with(in) the system for those arrested and detained is often typically restricted to a struggle for one's freedoms. This is made evident made the widespread challenges of the criminal justice system and the challenges of pre-trial detention in particular.

There is also a wide range of studies that deal with South Africa's penal system. This literature has tended to focus on the longer-termed experiences of the criminal justice system. More of this literature is looked at in the following chapter. This study focuses on the experiences of the criminal justice system that come before sentencing or conviction. Remand or pre-trial detention refers to the time spent in custody while awaiting legal proceedings (Gordin and Cloete 2011, 1168). Those held in custody during this period can also be referred to untried, unconvicted or awaiting trial detainees (Gordin and Cloete 2011, 1168). In this study, I use the terms short-term incarceration and detention interchangeably to refer to this form of imprisonment.[5] This period commences from the moment that one is arrested and can range between a few hours and a few years, as seen in some of the most extreme cases (Hopkins 2014; Ballard 2011, 5).

The number of remand detainees rose from 23 783 in 1995 to 57 811 in 2000, and it accounted for approximately 20 percent of the total prison population(Dissel and Ellis 2002; Muntingh 2009). However, this portion has since increased to approximately 30 percent of the prison population. This is according to the Department of Correctional Services' *Annual Report 2015/2016*, which shows that for 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). Because these are average figures, it is important to note that for individual institutions, figures have reached "critical levels" where the awaiting trial detainees have represented 52 percent of the prison population (Ballard 2011, 5).

Although the above figures fall in line with global figures, the Department of Correctional Services regards the awaiting trial detainees as the key component to the

[5] This study includes experiences of both criminal and immigration-related arrests and detention. The terms short-term or detention will be used interchangeably to include the immigration-related detention carried out at Lindela Repatriation Centre.

problem of overcrowding because it feels a greater obligation towards its sentenced prison population (Muntingh 2009). In fact, during their time in prison as awaiting trial detainees, they are only entitled to the very basic of services and are denied access to some of the programs available to sentenced prisoners (Muntingh 2009; Ballard 2011). 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 as follows:

> 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).

This form of detention can be considered to be a much harsher experience of the criminal justice system in comparison to detention following a conviction. The Constitutionally enshrined belief in the presumption of innocence until one is proven guilty is severely undermined by the experiences of excessively long periods of time languishing in prison without a conviction. This is a problem that disproportionally affects the poor as argued by Jeremy Gordin and Ingrid Cloete,

> The South African Constitution also provides for a general right to be released on bail. However, in South Africa, about a third of all remand prisoners who are granted bail are unable to afford the amount set, effectively excluding people from being released on bail on grounds of poverty (2011, 1169).

From this perspective, the issue of short-term incarceration strikes at the heart of the crisis in the criminal justice system. Ruth Hopkins (2014) powerfully illustrates this in an article by juxtaposing the high-profile Oscar Pistorius and Shrien Dewani cases with some of the more common experiences of South Africa's criminal justice system. In it, she illustrates how most people are subjected to poor and dragged out investigations and perpetually postponed hearings and trials. They usually have to rely on legal aid or they are forced to pay exorbitantly high fees for the best legal representation they can afford. Without wealth and privilege, the legal system is an incredibly complex structure to navigate and the experience of being detained for long

periods of time has dire socio-economic consequences. These sentiments are echoed by Brandon Bodenstein (Bodenstein 2017) who argues that there remains a gap between the provision of access to justice – mostly through Legal Aid South Africa (LASA) – and *meaningful* access to justice. Foreign Nationals who end up within the clutches of the law for either criminal or immigration-related issues are also victims of the poorly functioning frameworks that oversee both matters.

Conclusion

This chapter discussed the literature that frames this study. They are legal consciousness, penal consciousness, and the South African scholarship on the various aspects of the criminal justice system. This study sets out to introduce the concept of legal consciousness to the South African context in order to understand how the law is experienced and understood by South African society. Until now, the concept of legal consciousness has largely been limited to the American and European accounts of the law. However, as shown in this chapter, there is a diverse body of South African scholarship that already engages with some of the questions raised by legal consciousness. Therefore this study provides a new angle for looking at experiences of the law in South Africa by expanding the application of legal consciousness to the South African contexts.

I argue that a study of short-term incarceration and the impact it has on shaping the legal consciousness of individuals in South Africa, has a contribution to make to the scholarship on legal consciousness and to our understanding the criminal justice system and the ways in which the law is both experienced and perceived. This study is grounded in the experiences of arrest and short-term incarceration shared by community activists, student activists, and migrants. These experiences of the criminal justice system and the interviewees' rationalization of these experiences are then used to develop an account of the ways in which legal consciousness is shaped by particular experiences of the law. This study also sheds light on how South Africa's legal system's hegemony is sustained through our perceptions and ideas about the law. The chapter that follows discussed the state of criminal justice in South Africa. It takes a closer look at the various institutions that make up the criminal justice system, their brief histories, the transformations, and their current status.

CHAPTER 2: THE STATE OF CRIMINAL JUSTICE IN SOUTH AFRICA

> *Today, however, we have to say that a state is a human community that (successfully) claims the monopoly of the legitimate use of physical force within a given territory […] Specifically, at the present time, the right to use physical force is ascribed to other institutions or to individuals only to the extent which the state permits it. The state is considered the sole source of the 'right' to use violence. Hence, 'politics' for us mean striving to share power, either among states or among groups within a state […] Like the political institutions historically preceding it, the state is a relation of men dominating men, a relation supported by the means of legitimate (i.e. considered to be legitimate) violence. If the state is to exist, the dominated must obey the authority claimed by the powers that be. When and why do men obey? Upon what inner justifications and upon what external means does this domination rest? […] there is domination by virtue of 'legality', by virtue of the belief in the validity of legal statute and functional 'competence' based on rationally created rules. In this case, obedience is expected in discharging statutory obligations. This is domination exercised by the modern 'servant of the state' and by all those bearers of power who in this respect resemble him.*
>
> (Weber 1958, 78–79)

Number Four is the name of one of the most notorious prisons in South Africa's history. It formed part of the racially segregated Old Fort Prison Complex in, which served as Johannesburg's main prison eight decades until it was finally closed down in 1983 (Madikida, Segal, and Berg 2008, 18). Number Four was named after the prison's notorious section Four which housed the prison's black male prisoners. This prison is a vivid example of the deleterious, disproportionately overcrowded, and barbarous conditions of imprisonment under apartheid and even earlier. Today, Number Four is a part of a heritage site, Constitution Hill, attracting visitors from all over the world. It also sits next to South Africa's Constitutional Court, which was intentionally located at the site a physical promise and perpetual reminder, for South Africans to never return to the haunting past housed by the former prison complex.

South Africa's transitional period of the early 1990s was a time of widespread contestation around the new path that the country would pursue. The deeply entrenched institutions that once served some of the darkest parts of South Africa's history could now be reimagined as part of completely new and different future. The country's courts, penal institutions and police that were once "brutal instruments of state repression" would need to be transformed in order to form part of South Africa's new political order (D. Gordon 2009, 5). In fact, a significant part of the new order's legitimacy depended (and still depends) on the transformation and functioning of

these institutions. After all, as argued by Diana Gordon, "[c]riminal justice institutions are more than reflections of the state, they are emanations of its character" (2009, 4). For Gordon, the "core authority of the state – central power to guide and command – rests on its enforcement capabilities", meaning that the functioning of the criminal justice system lies at the heart of the state's ability to effectively layout and uphold a particular order.

South Africa's construction of a new social and political order based on the constitutional values of dignity, equality, and freedom provided the new framework for the criminal justice system. It also helped to legitimize the image of these institutions in the eyes of most South Africans that had previously only known them in terms of their oppressive and discriminative capacities (D. Gordon 2009, 6; Steinberg 2012, 487; Hodgson 2015, 195). A change in regime demanded a decisive shift away from the past through various transformative and legitimating efforts. In terms of the new state's ability to govern with authority and legitimacy as opposed to ruling through sheer force, as with the old order: South Africa's constitution established the foundation upon which the new order would be built. The constitution would form the basis of what Weber refers to as 'legality' in South Africa, and through it, the state would be able to generate compliance and submission in addition to its "monopoly of the legitimate use of physical force" (Weber 1958, 78).

This chapter discusses the development of South Africa's criminal justice system. In an effort to contextualize the experiences of arrest and detention, it begins by providing a brief history of South Africa's criminal justice system. The chapter then discusses the transformative efforts of post-1994 context.

Criminal Justice in South Africa: A brief history

Some of the main institutions that make up the criminal justice system include the courts, the police service, the prosecuting authorities, and the carceral institutions (comprised of prisons and holding facilities at police stations). Immigration detention is generally not included in studies of the criminal justice system, however, they too are institutions of carrying out punishment (Frederique and Sexton 2014). The Lindela Repatriation Centre, which was established in 1996, has played an important part in South Africa's management of its migrant population. This study shows that migrants that were detained at Lindela experienced their detention as a kind of

punishment. Their descriptions of detention at Lindela were not distinguishable from descriptions of remand detention. In both contexts of criminal justice and immigration policing, the state expressly asserts itself in the name of order and metes out punishment in the in name of the sovereign.

Some of the institutions and processes involved in punishment form part of a framework inherited from South Africa's past. Their foundations are set as far back settlement in the 1600s (D. Gordon 2009, 27). Any attempt to understand the current processes and procedures of punishment as well as the challenges within the criminal justice system would need to see them as products of South Africa's history (Brewer 1994). While this section is unable to do this long and complex history true justice, this section does attempt to provide a brief historical contextualization of criminal justice in South Africa.

Pre-1948 criminal justice

The relationship between criminal justice (law and its enforcement) and its utility for the entrenchment of racial domination, disenfranchisement, and securing and exploiting cheap black labour amongst other things, has been fairly transparent throughout most of South Africa's history (D. Gordon 2009, 24). This relationship dates back to slavery in the Cape and gradually intensified during apartheid. By the time apartheid was implemented, the wheels for an "all-encompassing system of racial regulation and repression" were already in motion (D. Gordon 2009, 50). According to Gordon, prior to 1948, the criminal justice system served as a tool for controlling labour and race relations, however, this intensified as the criminal justice system became the "monolithic source of unbridled state power" (D. Gordon 2009, 51). As such, criminal justice did not radically depart from the practices and logics that preceded the National Party's election in 1948. Speaking about policing specifically, Brewer makes a similar argument by describing the differences in policing under segregation and apartheid as "differences of degree" and opposed to "differences of quality" (Brewer 1994, 222). Given that principal role of the police, dating back to the 1930s, was to control the "social, political, and economic boundaries between the races", Brewer argues that under apartheid, this was carried out "with a level of systemic inhumanity which was not known before" (Brewer 1994, 222).

Prior to 1948, the law and the use of criminal justice functioned to entrench the racial hierarchy that was necessary for the institution of slavery (which was abolished by the British in 1807), labour exploitation and the dispossession that marked colonial rule and segregation (D. Gordon 2009, 24). According to Gordon, three phases in South African history have provided a complex and devolved influence on apartheid criminal justice: from Dutch settlement to British occupation (1652-1795), then the "period of inland expansion and colonization" until the end of the South African War (1795-1902), and then the period from the establishment of the Union of South Africa until 1948 (1910-1948), when apartheid was institutionalized (D. Gordon 2009).

During the first two phases (1652-1795 and 1795-1902) prior to the establishment of the Union in 1910, criminal justice lacked consistency (D. Gordon 2009, 25). The inconsistencies in criminal justice depended on the place it was and the ruling group in that particular area. Although the British, Dutch and later the Afrikaners shared the objective of using criminal justice as a means of social control, their strategies differed. Under the Dutch, criminal justice was described as cruel and harsh and was based on informal and private justice which functioned alongside the courts that practiced Roman-Dutch law (D. Gordon 2009, 29; Alexander and Kynoch 2011, 399). Punishment included torture, beheading, mutilation, and flogging which was disproportionately carried out against slaves, the indigenous, and black people. According to Shanta Singh's rich study, the history of prisons in South Africa reveals that penal practices in South Africa have largely been in line with the global trajectories and trends shared by Michel Foucault (1977) and Vivien Stern (1988).[6] Singh encapsulates the system of punishment in the Cape as follows:

> The full panoply of penalizing measures was presented as a brutal and public demonstration […] The kind of punishment used for offended was directed at the body-public executions by firing squads and public crucifixion […] Convicted persons were occasionally held in chains in the Butch East India Company's slave lodge and made to labour in public works… An attempt was made to extract labour from convicts deported to Robben Island. Deportation

[6] Foucault's *Discipline and Punish: The Birth of the Prison* (1977) documents the emergence of prisons as the result of a shift in punishment. Punishment in Europe 1500s to 1700s is characterised as a public spectical of violence primarliy enacted on the body of the punished whereas punishment in modern society is carried out through imprisonment and forms part of the modern practice of power. Stern (1988) shows how prisons emerge as a result of John Howard's Penetentiary Act of 1779 and Jeremy Bentham's model of the Panopticon. Britain took up the prison as tt moved away from the older practice of 'transporting' convicted criminals outside of British society.

> removed the criminal from a society which did not have much interest in his welfare (Singh 2005, 17).

Under the British, following their arrival in the late 1700s and late 1800s, Roman-Dutch law was retained and British Criminal law was introduced in the Cape. They attempted to rule the Cape in line with their commitment to liberalism. For the first time, slaves and the Khoikhoi, who had previously had almost no recourse, even in the courts, could now bring their masters before the law for brutal treatment and other grievances (D. Gordon 2009, 32). This, however, was different from their style of rule in Natal, Britain's second colony in South Africa, where the British used traditional African customary law (D. Gordon 2009, 37). The use of customary law formed part of Britain's segregationist strategy, which resembled its use of indirect rule in its other colonies across the continent. Under this system, some black South Africans were excluded from Roman-Dutch and British law and were subject to customary law which was administered by local chief's who were subject to the British governor and thus "Supreme Chief" (D. Gordon 2009, 37). This system – according to Britain's secretary of native affairs, Theophilus Shepstone – fulfilled the object of "keeping the natives under their own law […] to ensure control of them (D. Gordon 2009, 37).

The initial attempt of the British to incorporate black South Africans under one shared law soon gave way to the politics surrounding Afrikaner expansion into the interior and their own colonial interests. Once the British withdrew and reached an agreement with the Afrikaners which contained no protections for black South Africans, essentially amounting to what Leonard Thompson described as "an alliance with independent white communities against their black neighbours" (as cited by D. Gordon 2009, 36). However, irrespective of these inconsistencies between Afrikaner and British styles of criminal justice, they all contributed to a trajectory that culminated in the form of criminal justice enacted under apartheid (D. Gordon 2009, 49). Gordon aptly summarizes the implications of the various historical forms of criminal justice as follows:

> Both the superficially rights-oriented British governments and the more blatantly repressive Afrikaner administrations made clear that the fundamental task of police and courts was to establish and maintain the racial subjugation that was at the heart of all South African political communities from the time

> slaves were first imported in 1658. The role included putting down resistance to the humiliations suffered by blacks and sending an unyielding symbolic message of invincible white authority. Perceived deviations from that assignment were generally met with (white) public scorn (D. Gordon 2009, 26).

Throughout the 1800s across the four territories (the Afrikaner-ruled Orange Free State and the Transvaal, and the British Cape and Natal colonies) statutory offences that especially targeted black South Africans, became the latest form of enforcement that ensured suppression in ways that were similar to slavery (D. Gordon 2009, 39). These included the Masters and Servants Act, pass laws, taxes, and liquor laws and would be definitions and punishments would differ according to various districts. According to Gordon, violations of the Masters and Servants Act in the Cape resulted in mandatory imprisonment whereas in Natal it would result in flogging (D. Gordon 2009, 39). These laws and forms of punishment continued to be used after the Union in 1910, during the segregationist period. They were retained and proved to be increasingly important tools of criminal justice in South Africa as the demand for cheap labour rose with the discovery of diamonds in 1867 and gold in 1886 (D. Gordon 2009, 41).

The South African Police (SAP) was formed in 1913 and became a national symbol for the new Union (Brewer 1994, 14). Prior to unification, the four territories had relied on their own police forces and laws to enforce the order. In the rural British territories, the police were militarized and were modeled after 'the early Irish Constabulary' whereas, in the urban areas of the British colonies, the police were modeled after the London Metropolitan Police (Brewer 1994, 16). The rural police were a colonial force charged with enforcing British rule, protecting the territory against the Afrikaners, alongside monitoring ordinary crimes (Brewer 1994, 20). Given that the population in urban areas was predominantly white (British or European), the police there were civil police forces that were modern trained and focused on crime prevention (Brewer 1994, 21). The Afrikaner policing style drew from earlier traditions from Dutch settlement where a *geweldiger* was responsible for dealing with crime as well as policing race (Brewer 1994, 15). Policing in the Afrikaner territories resembled the British rural-urban distinction because in the rural areas policing was paramilitary in style and it focused on defending settler territory as well as policing black-white interactions (Brewer 1994, 15). Brewer describes the

policing structure as "*ad hoc* commando-type units made up of armed local citizens" who would exert their control over the black population through displays of superior force and brutality" (Brewer 1994, 16). In their urban areas or towns, civil policing would focus on crime and while harassing the black population that would come into the towns (Brewer 1994, 16).

The SAP was a combination the British colonial model and Afrikaner traditions of policing which were fairly compatible and similar (Brewer 1994, 14). However, the police force struggled with integrating the policemen from the former British and Afrikaner territories given the Boer wars of 1880-1881 and 1899-1902 (Brewer 1994, 45). This tension was also pronounced with World War II when some police officers volunteered to fight in the war while others abstained (Brewer 1994, 152). Volunteering for the war was understood to signal both support for the war and loyalty to General Smuts and the government whereas abstaining signaled support for Afrikaner nationalism (Brewer 1994, 151).

Ultimately, the initial compatibility between the British and Afrikaner policing styles was not enough to create a truly 'unified' police force. Throughout the period between 1910 and 1948, the newly formed police force battled with the conflict between colonial and civil police traditions, which also mirrored the broader tension in state-police relations (Brewer 1994, 101). This was a tension between being a modernizing civil police force that was decentralized and being a highly centralized colonial police force carrying out government orders to police race relations (Brewer 1994, 101). Ultimately, the police gradually moved towards the colonial model as its core duties continued to be narrowed to race policing with an increased focus on controlling the black population until 1948 (Brewer 1994, 166). Therefore, like earlier periods, the issue of race and the increasing need for cheap, exploitable labour became the 'unifying' force within the SAP and the defining feature of criminal justice in South Africa.

South Africa's prisons emerged in the 1800s when many of the earliest prisons were built (Singh 2005). The penal system developed alongside the developments in policing and the laws that governed the period. In the same way that the laws were developed to primarily satisfy the need for cheap labour and enforcing racial domination so too was the use of the prison. According to Singh, penal policy developed in the Cape following the abolition of slavery precisely because until then, slavery fulfilled the provided labour (2005, 18). The British occupation of the Cape

shifted punishment away from "physical harm" towards "incarceration for a fixed period proportionate to the heinousness of the offence", however, corporal punishment was used (2005, 18). Without slavery, labour suffered so penal policy ensured that the penal system neatly responded to the need for cheap labour. After 1902, with the British occupation of the Transvaal and Orange Free State, the penal systems were reformed to fall in line with the British style that characterized imprisonment in the Cape and Natal (Singh 2005, 20). In the 1880s racial and gender segregation was implemented (Singh 2005, 18).

Criminal Justice under apartheid

Apartheid, according to Shearing, was "both an order and the policing that secures that order" (1986 as cited by Brogden and Shearing 2005, 15). The prison system, the police, and the military were the most visible and brutal instruments of the apartheid state that people encountered on a regular basis (D. Gordon 2009, 4; Steinberg 2012, 493; Hodgson 2015, 195). However, the law and the courts are viewed more complexly. On the one hand, the courts and the legal system were vilified because through them, in many ways, apartheid came to life. Apartheid relied on the law to enforce discrimination and repression. Laws would be passed through the legislature and the courts would enforce the laws that the executive would implement. In fact, according to Gordon, "[t]he Appellate Division of the 1980s also expanded on apartheid policies [by] filling in the gaps left by the legislative process and thereby furthering the repression, reinforcing extreme brutality" (D. Gordon 2009, 82). On the other hand, opponents of apartheid used the law as a form of politics and through their struggles, some victories would be won and some dignities restored (Klaaren 2011, 141). Some judges and magistrates tried to resist the state through their efforts to narrowly interpret some oppressive laws (D. Gordon 2009, 74). For the most part, however, apartheid was carried and sustained partly through its laws because they controlled all aspects of life, ranging from the public to the private, politicizing everything in its path. For Hodgson, the memory of the pervasive nature of the law and its all-encompassing place in the lives of all South Africans, impacting black people the most, has produced a gap between the law in South Africa and most people (2015, 194).

The duty of the police has always been to uphold the law and maintain order and ultimately, their role is to implement the regime's interests. For the apartheid state, a significant part of that demanded violent and hostile paramilitary policing practices (Bruce 2002; Spuy 2013). As defiance against the regime intensified, so too did the state repression. The powers of the police were often expanded to allow gross violations that all aimed to suppress the growing movement of dissent. This was further supported by the two States of Emergency (1985 and 1986), which ultimately helped to sanction the rampant and 'lawless' behavior of the police and other parts of the criminal justice system.

The expansions in the powers of the criminal justice system were especially important for the suppressing the growing anti-apartheid struggle. According to Gordon, the distinction between 'high' and 'low' policing is important for understanding how the criminal justice system operated during apartheid. 'High' policing focused on public order confrontations and 'low' policing focused on common crime in black areas of living (Brewer 1994, 195; D. Gordon 2009, 59). As Gordon shows, the use of low policing served as a "screen for high policing" and this would often be used as an excuse to detain political activists. The prioritizing of high policing over low policing and securing white areas over policing black areas often meant that black areas would often get leave criminal activity unattended to (D. Gordon 2009, 60). This is echoed by Steinberg who has argued that black urban South African's often relied on a multitude ways to provide protection either through ethnic associations or through actors like wealthy underground business owners and off-duty police officers (Steinberg 2012, 488). This history continues to shape current police interactions with many communities in South Africa.

Black people also encountered the police for administrative offenses primarily drawn from the policing of black people in white areas (Brewer 1994, 195). As highlighted by Brewer, these areas of policing were not new under apartheid. However, they were fundamentally changed under apartheid policy as administrative regulations controlling the black population increased, enforcement became more stringent, and as he puts it, "police increased their penetration into the ordinary lives of Blacks" (Brewer 1994, 195). Under apartheid the offenses for which people could be punished for increased with the 'revised list of crimes' that came into force in 1949 (Brewer 1994, 197). This brought more and more black people before the courts for

offenses like drunkenness, pass law violations, and curfew regulations (Brewer 1994, 197). And it contributed to the sharp increase in the prison population.

Singh notes that the establishment of the new Prisons Act No of 1959 was particularly significant because it provided for the strongest entrenchment of apartheid policies within the prison system (2005, 24). By this, she argues that in addition to the racial segregation in prisons, black prisoners needed to be separated further according to ethnicity (Singh 2005, 24). Given the vulnerability and insecurity of the apartheid socio-political order, the policing of political activity became a leading priority for the apartheid state as social unrest intensified. The legislation effectively criminalized domestic public protests, including banning the Pan African Congress (PAC), the African National Congress (ANC) and other related organizations, as well as the imprisonment of the movements' leaders (Brown 2015, 34; Brogden and Shearing 2005, 65; Rauch and Storey 1998). Repression intensified alongside intensifying dissent and with that penal system overflowed, following Sharpeville in 1961 and then later with particularly in the youth uprisings of 1976-1977 and 1980 (Singh 2005, 26). From then on, prisons became an important system for dealing with political activists and internal threats to the regime.

In the 1970s and 1980s, state security legislation intensified the criminalization efforts (Brogden and Shearing 2005, 66). During this period of intense unrest, the South African Police (SAP) created Anti-Riot Units across the country to deal with crowd control (Rauch and Storey 1998). In 1984, army troops were brought into townships to crush protests (Rauch and Storey 1998). Even though protest policing was always brutal, the use of the military set a new standard for heavy-handed methods of dealing with black protest (Rauch and Storey 1998).

According to Singh, the "overload to the correctional system" caused by the increased political unrest, a number of improvements were made. A number of legislative amendments were passed and some of the key laws were struck down such as the pass laws (Singh 2005, 27). However, during this period of many of these changes were short-lived because of the announced State of Emergency of 1985 and again in 1986. During the states of emergency, the repressive powers of the police were expanded. According to Brewer, this vast expansion increased the offences that could be punishable by up to 10 years in prison to include the following:

> […] verbally threatening harm to another person; preparing, printing,

> publishing, or possessing a threatening document; hindering officers in the course of their duty; destroying or defacing any notice of the emergency regulations; disclosing the name or identity of anybody arrested under the regulations before their name had been officially confirmed; causing fear, panic and alarm or weakening public confidence; and advising people to stay away from work or to dislocate industry (1994, 299).

The criminal justice system has always played an important role in cementing the dispossession and marginalization of black people in South Africa. Policing and imprisonment played a central role in apartheid politics. The law also played an important role in also widening the scope of what could be considered criminal however, the law was still used by opponents to challenge apartheid and to restore some of the dignities that could be secured through the mobilization of the law.

Post-1994 criminal justice transformation

The changes that were made to the prison system continued into the early 1990s, as apartheid drew to a close. Some of these political changes had direct implications for the prison system to be carried forward into post-1994 South Africa because these changes included the removal of racial segregation and the recognition of prisoner's civil rights (Singh 2005, 28). The post-1994 transformative efforts directed at the criminal justice system are discussed in the following subsection.

The early 1990s was a period in which most of the major transformative efforts aimed at the criminal justice system. South Africa's prisons, policing system, and legal order need to be transformed in order for them to fall in line with the change in regime. Reforming the law and the police became essential parts of facilitating regime change in South Africa and establishing the legitimacy of the new order through these key institutions.

To symbolize the shift from apartheid to democracy, the South African Police was renamed the South African Police Service (SAPS) and its new mandate endorsed democratic principles (McMichael 2014, 9). The separate police administrations across the country were brought together under the National Safety Services of the SAPS (Rauch and Storey 1998). The South African Police Service Act (No. 68 of 1995) was introduced to stipulate the legal restraints of the new police force (Lever and Van der Spuy 2000, 204). The new Act is in line with the constitutional mandate of the police:

> to prevent, combat and investigate crime' maintain public order; to protect and secure the inhabitants of the Republic and their property; and to uphold and enforce the law" (*The Constitution of the Republic of South Africa* 1996, 112)

The ANC-led government rolled out community policing model which required all police station commanders to develop forums in for police and civilians to interact (Steinberg 2012, 487). The idea behind the effort has been to facilitate and the relationship between the police and the police that is able to help both better deal with crime in the community amongst other challenges faced by communities (D. Gordon 2009, 217). This effort was especially important for changing the perception of the police amongst South African communities, and building the legitimacy and transforming the image of the Service particularly for black people who had experienced policing as cruel and oppressive.

However, many of these have been 'rolled back' resulting in an increasingly hostile criminal justice system and excessively violent policing practices. Scholars have attributed this to a series of legislative and executive decisions (Tait and Marks 2011; Hornberger 2013; McMichael 2014; Redpath 2014; Steinberg 2014; Marks and Bruce 2016). According to Gordon, South Africa's policy has taken a "get-tough" approach to crime, which has overtaken the "democratic idealism" that characterized the early post-apartheid style of governance (D. Gordon 2009, 16). This has been evident in policing through general crime policing as well as public order policing.

The changes in public order policing are a case in point. Public Order Police (POP) units were established in 1995 to deal with protests in accordance with the Constitution and shifted the mentality from 'crowd control' to 'crowd management' (Rauch and Storey 1998). Police conduct during protests is also governed by SAPS Standing Order No. 262 (2004), which states that officers must avoid the use of force and must show "the highest degree of tolerance" (Iwu and Iwu 2016, 544). Monique Marks' ethnographic study of the Durban POP Unit during the late 1990s offers insight into the early phases of policing following the implementation of the post-1994 reforms (2005). She found that while there were some noticeable changes within the Unit, such as adhering to the minimum use force, racial representation etc., some 'sub-groups' within the SAPS resisted change and maintained older perceptions of dealing with crowds, which resulted in spurts of older apartheid policing habits (Marks 2005, 245). According to Marks and Bruce, this period (1995-2001)

comprised of the SAPS's 'golden years' when specific training and new policies for the public order police were implemented (2016, 212). POP units moved towards highly professional crowd management techniques that relied on careful planning, stakeholder negotiations and the use of appropriate and adequate equipment (Marks and Bruce 2016, 212). While not entirely perfect, this period represented the highest quality of policing that South Africa had experienced.

Between 2002 and 2009, under the then SAPS National Commissioner, Jackie Selebi, the POP Units were restructured and renamed numerous times – to Area Crime Combating Units in 2002, Crime Combating Units (CCUs) in 2006 when 20 of the 43 units were closed (Tait and Marks 2011, 19). These units, now responsible for crime prevention and protests, have been grossly "understaffed, undertrained and ill-equipped" (Marks and Bruce 2016, 215). Later on, in 2011, the CCU's get renamed POP once again in an attempt to restore the initial purpose of crowd management (Tait and Marks 2011, 19). Police reliance on force escalated between 2009 and 2011 under the leadership of the then Minister of Police, Nathi Mthethwa, and newly appointed SAPS Commissioner, Bheki Cele, who became known for his 'shoot-to-kill' philosophy (Marks 2005, 215; McMichael 2014, 9). The SAPS reintroduced the military ranking system as a method to restore discipline (Mkhize 2015, 196). Tactical Response Teams/Units (TRTs/TRUs) were trained for medium to heavy risk crime operations and were entrusted with the *secondary* duty to "restore public order" in instances of unrest (Marks and Bruce 2016, 216). These new changes have fostered a culture of overly aggressive, reckless policing practices that have embodied a general disregard for human rights. According to the Independent Complaints Directorate (ICD), complaints of police brutality for public order related incidents rose from 6 in 2005, to 16 in 2007, to 59 in 2009 (Tait and Marks 2011, 16).

Every time the police make headlines for their excessive use of violence their actions are often and understandably compared to order apartheid-era policing (Petrus 2014; Dixon 2015). However, Jonny Steinberg (2011) and Julia Hornberger (2013) have both argued that these arguments tend to overlook the newer developments that are specific to post-apartheid South Africa. In Steinberg's study of the 2008 xenophobic violence, he argues that the mob violence was partly facilitated by the change in a "toxic relationship" between the SAPS and citizens (Steinberg 2011, 13). Similarly, Hornberger argues that the post-apartheid transformative efforts have had important ramifications for changing the interaction between communities and the

police (Hornberger 2013, 599). The apartheid-like features of policing "are being called on in the service of a very different kind of authority [and…] not in the name of a minority or elite kind of authority" (Hornberger 2013, 599). According to Hornberger, this shift in policing can be understood as a popular desire for more violent and punitive policing that can provide personal protection and deliver "immediate violence, punishment, and justice" (Hornberger 2013, 608).

The most striking outcome of this process, particularly for this study, is the law takes on a life of its own as it is moulded by the popular interests and demands (Hornberger 2013, 600). What emerges from Hornberger's study is that a part of the reason for these demands by members of society is because of their disappointment in the criminal justice system (Hornberger 2013, 610). This sheds light on view of the courts and South Africa's justice system. The Constitution has been the foundation of the political and legal order of South Africa. Being the supreme law in the land, it is the standard according to which all conduct and relations are measured against. Through its commitment to civil, political and socio-economic rights and its affirmation of the values of human dignity, equality, and freedom, the Consitution serves as a framework and beacon that guides the country towards a transformed future.

Kelly Gillespie describes the significance of the transformational period as follows: "South Africa in the 1990s marked a moment in which the plausibility of the prison as a ubiquitous feature of state control could seriously be questioned" (Gillespie 2008). However, according to Gillespie, South Africa chose to use the opportunity to 'improve' upon the existing infrastructure. Important pieces of legislation and important amendments have definitely humanized the prison system in South Africa today.

The 1994 White Paper on the Policy of the Department of Correctional Services set out to bring South Africa's penal system in line with the constitutional state that South Africa was moving towards. It found that transformation in the penal system should include demilitarization, significant changes in the representativeness of personnel, to bring the system in line with international standards, and the establishment of independent inspecting mechanisms (Singh 2005, 31). The 1993 case of *Minister of Justice v. Hofmeyer* (1993), the court held that prisoners retain "all personal rights except those abridged by law, and that the extent and content of such rights should be determined by reference not only to the legislation but also to the

common-law rights of prisoners" (Dissel and Ellis 2002). Under the Interim Constitution of 1993, the Constitutional Court declared the death penalty to be unconstitutional in its first decision, *S. v Makwanyane and Another* (1995). That decision affirmed that prisoners do not lose their right to dignity upon entering the criminal justice system. In the final Constitution, Section 35 (2) stipulates the rights and standards for the arrest and detention in South Africa by including the right to "conditions of detention that are consistent with human dignity; including at least exercise and the provision at state expense, of adequate accommodation, nutrition, reading material and medical treatment" (Dissel and Ellis 2002; Singh 2005, 31). In 1999, the Constitutional Court affirmed the civil and political right of prisoners to vote in *August and Another v Electoral Commission and Others* (1999). From this perspective, South Africa has emphasized its commitment to human rights. It has consistently reiterated its commitment to the protecting the rights of all prisoners.

Nevertheless, South Africa has remained the most aggressive incarcerators on the African continent and has remained one of the countries with the highest incarceration rates in the world (Gillespie 2008; Schönteich 2008, 100). South Africa's prisons have continued to battle with the challenge of overcrowding, which violence, corruption, gang activity, poor health care and a general safety are attributed to (Dissel and Ellis 2002; De Vos 2005; Steinberg 2005; Buntman 2009). Prison, therefore, remained an important policy issue that has driven the establishment of various frameworks, legislative amendments, and strategic plans.[7]

In a study entitled *Moralizing Security: 'Corrections' and the Post-Apartheid Prison*, Gillespie argues that the South African government used apolitical concepts of morality and family, as well as the discourse of prison reform and rehabilitation as a means legitimizing the prison system particularly in response to the 'crime wave' (2008). Lucas Muntingh, however, asserts that the entrenched place of the prison in South African society lies in its symbolic and pragmatic value for political and private sector interests (Muntingh 2008). He argues that this value has been able to overcome the growing evidence that shows that prisons fail to effectively deter potential transgressors, successfully rehabilitate transgressors, or to even provide society with safety and security as an institution that physically removes transgressors from

[7] For comprehensive overviews of the various prison reform efforts, see Singh 'The historical development of prisons in South Africa: a penological perspective (2005); Dissel and Ellis 'Reform and Stasis: Transformation in South African Prisons' (2002); Department of Correctional Services 'History of Transformation of the Correctional System' (n.d.)

amongst society (Muntingh 2008). Both Muntingh and Gillespie have, in different ways, helped us understand the current place of the prison within contemporary South African society. From their accounts, we are able to critically understand the prison's currency as an area that the state is able to assert its power expand and deepen its punishing capacity through the discourse of reform, rehabilitation, safety, and security. Through this process, the prison and its place in criminal justice are transformed while carrying with it, its long and complex history.

Conclusion

For many people living in South Africa, there is a gap between the promises in the constitution and the lived reality and experiences in South Africa. As this study explores, there are also gaps in experiences of law. Jackie Dugard has argued that the judiciary has failed to promote transformative justice and that while everyone has 'access' to justice, it does not translate into meaningful access (Dugard 2008, 216). Accessing the courts is frustrated by the alienating complexity of the process and the exorbitant costs of legal representation, particularly in civil cases for which Legal Aid is not made available (Dugard 2008, 216). For Dugard, "the judiciary's failure to advance transformative justice has contributed to the current predicament in which it remains institutionally remote from the majority of South African lives" (Dugard 2008, 238). In this criticism, Durgard also points out the Constitutional Court practices "judicious avoidance" by failing to take on opportunities to take on and to decisively advance South Africa's socio-economic rights jurisprudence (Dugard 2008, 237).

A similar argument, referred to earlier, is made by Modiri who also argues that the Constitutional Court has taken a similar position on race (Modiri 2012).[8] For Modiri, the judicial system has not been immune to having South Africa's past continue to shape the law in a democratic South Africa. By looking at South Africa's post-apartheid jurisprudence, Modiri finds that conservative and excessively formalistic interpretations of some judges constrain the transformative potential of South Africa's new legal framework. Both Dugard and Modiri suggest that there are some continuities in the practices that, although under a new political order, continue

[8] It should be noted however that since Modiri's article, the Constitutional Court's unanimous judgment for the matter concerning *South African Revenue Service v Commission for Conciliation, Mediation and Arbitration and Others*, takes a very strong position on the issue of racism (2017)

to shape and distort experiences of the law in the criminal justice system. In the same ways that the police and prison system have inherited and continue to be shaped by South Africa's past practices of criminal justice, so too is the judicial system.

Similarly, Tim Hodgson argues that transformative constitutionalism demands a deliberate and active bridging of the gap that exists between the people and the law (Hodgson 2015). South Africa's current social and political order is largely characterized by the distance between what South Africa is today, because of its history, and what it wants to become. Our efforts to bridge the gaps between the law and the people, as Hodgson argues, or the gap between within the law itself, requires a greater understanding of that spaces that currently occupy those gaps. This study makes an effort to do this by looking into the experiences and perceptions that people in South Africa have of the law.

CHAPTER 3: PROCESS AND PROCEDURE: THE PUNISHMENT OF ARREST AND DETENTION

Experiences of the law in South Africa are both vast and complex. How we understand the law is fundamentally related to our experiences of the law as it features in multiple facets of our lives. This project focuses on the criminal justice system and asks how three specific groups of people experience it through their arrests and detention. Their encounters with the criminal justice system are typically violent and politicized because of their socio-political group identities. They are either vulnerable and/or have thorny interactions with law enforcement. The data presented in this chapter is drawn from the interviews that I conducted with these groups: community activists, student activists, and migrants. These groups were chosen because of the different positions they occupy in relation to law enforcement and the broader legal system. The interviews were carried out with the objective of uncovering their experiences of the criminal justice system under the circumstances that these individuals were arrested and detained for. This chapter looks into the different experiences of arrest and detention encountered by these groups of people.

In order to better understand the nature of the law in South Africa, as experienced by members of society, this study asks two questions: how do people experience the law in South Africa and how do they understand the law in South Africa. Attempts to look at the criminal justice system have tended to focus more on the experiences of prison, looking at the experiences and conditions of 'doing the time' for a conviction. As such, studies that focus particularly on the processes and procedures before the 'conviction period' are limited. Experiences of the criminal justice system in South Africa stand at odds with what is actually expected of the law. This 'gap' between what we expect to experience of the law and what we actually experience is typically based on who we are, the circumstances around our arrest and detention, and how the law views us, amongst many other factors.

The interviews

To answer explore the ways in which the law is experienced in South Africa, I narrowed my focus to community activists, student activists, and migrants and asked them how they experienced and understood the criminal justice system and the law,

more broadly, in South Africa. I selected these three groups because of the significance of their 'socio-political' identities. In some instances, these identities may simply be based on how they were perceived at the time of their arrest and detention[9]. The notion of *perceived* identity is especially significant for this study because identity functions as both a product of how one identifies themselves as well as how they are identified socially. And as this chapter will look at how the interviewees perceived that the police and other actors perceived them proved to be very important and often definitive of their experiences of arrest and detention.

The rise of social movements and service delivery protests, the history of student protests around the country, and the persistent anti-migrant sentiment in South Africa find their way into the news every now and then. Sometimes these stories are considered 'newsworthy', especially gripping, and are able to attract a lot of attention but at other times, and in fact very often, they are the stories that are viewed as commonplace. Very often, they fall into the background, making up the periphery of South African politics because that is where the poor and vulnerable in South Africa live. These stories document the experiences of community activists, student activists, and migrants, which reveal that they are often subject to abuse, although to varying degrees. Many of these stories are reports of mistreatment by the police where these groups bear witness to failings of the criminal justice system through trumped-up charges, protracted court postponements, excessive violence, extortion and constant harassment at the hands of law enforcement.

These stories and the varied experiences of the law motivated my selection of groups. All three of these groups share unique but difficult and arduous encounters with law enforcement and the law, by extension. They operate from social positions of involuntary entanglement (as with most migrants in South Africa) or from positions of 'voluntary' engagements with the law (as with the student and community activists through their activism around social issues). While community and student activists use the law to assert their demands, migrants try to avoid direct encounters with the law wherever possible. These are not necessarily fixed binaries but rather broad categories that I have used to distinguish between the groups. This

[9] By perceived, I refer to the reasons surrounding their arrests. Some of the interviewees were arrested because of their *perceived* activity and by extension, their *perceived* sociopolitical identities of either being community activists, student activists of migrants. In such cases, these interviewees made it explicitly clear that at the time of the arrest and detention, their arrests were wrongful in that they were not involved in activities that they were arrested for, e.g. protest activity or drug-dealing. In this study, I included them according to these perceived identities.

research finds that the socio-political identities of these groups mattered in terms of how it influenced the ways in which they experienced the criminal justice system through their arrests and detention.

All of the people included in this study experienced arrest and different durations of detention (including remand and immigration). The student and community activists included in this study were all arrested and held in detention (who were released on bail, had charges withdrawn or cases struck from the roll) as a result of their protest activity and as mentioned above, in some cases, *perceived* protest activity. Some of the students and community members were arrested in the context of protest activity even though they were not actually a part of the protests themselves. In those instances, they were arrested and subjected to short-term incarceration simply as a result of their proximity to the activity, as well as their perceived identities as community and student activists. The migrants included in this study were all arrested and subjected to short-term incarceration as a result of their migrant identities or even *perceived* migrant identities. They were held in either remand or immigration detention (Abrego 2011).

This chapter focuses on these experiences of the law while the next looks at their interpretations and understandings of these experiences of the law. The findings presented here are drawn from the core data of this study: 24 semi-structured in-depth interviews conducted in person (eight individuals from each of the groups). These interviews consisted of three parts. The first looked at their personal backgrounds where I sought to get a brief overview of their life histories. The second turned to the incident that led to their arrest and detainment. In the instance where participants had multiple experiences of arrest and short-term incarceration, I asked them to select one, in particular, that would be the focus of the interview and the other experiences would be included in the third and final part of the interview. The final part of the interview turned towards a 'reflection' on their experience(s) of the criminal justice system. The questions asked 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. It also made room for vicarious experiences of the law to feed into this part of the interview.

The experiences of these particular groups of people provide a complex, textured and alternative view of the law in South Africa. By looking into these experiences (which are encounters with the criminal justice system that are typically

more politicized and violent experiences of the law in South Africa) this study provides a unique account of how these experiences and perceptions of the law are interlaced with experiences of imprisonment and punishment. This punishment is pre-emptive in its very nature because a conviction does not always follow the arrest, because what the experiences reveal is that law enforcement often uses this time to punish and 'teach lessons' to arrestees. Here, these experiences reveal how these groups are viewed by the law and law enforcement, and how that shapes the way they are treated and how they experience the law in South Africa. I argue here, that the socio-political identities of the participants play an important role in determining their experiences of the law and that because of this, the notion of equality before the law remains an elusive principle with a fleeting presence in the lives of most. What the experiences below highlight is a multiplicity of journeys through the criminal justice system, all starting at different points. The participants all navigate the complexities of the legal system and simultaneously deal with a unique subjection to the law that stands in sharp contrast to the constitutional ideal of equality.

The Community Activists

The community activists whose stories are included in this study were all approached because of their political activity around service delivery for Thembelihle. It is a small informal settlement in the south of Johannesburg that is home to over 7000 households (Clark 2014). When traveling to Thembelihle, one finds large and modest houses that make up the suburb of Lenasia, surrounding an enclave of shacks that was formed in the 1980s. Thembelihle is a community that has a long history of service delivery protests dating back to 2001 (Clark 2014, 12). Since then, the community has struggled with the City of Johannesburg over forced evictions and relocations due to claims that the land upon which the settlement is located is dolomitic (Clark 2014, 15). As a result, the community of Thembelihle came together in 2001 to form the Thembelihle Crisis Committee (TCC), which is a community-based organization (Clark 2014, 12). Since its formation, the body has worked to continue the community's resistance against forced removals and relocations and has tirelessly advocated for socio-economic services such as electricity, water, and state-subsidized housing through protest activity, petitioning and various other efforts to engage the City (Clark 2014, 15).

I was put in touch with some of the members and allies of the TCC through the Socio-Economic Rights Institute (SERI) and used the sampling method of snowballing to get in touch with more until the target size of my sample was met. Because of Thembelihle's long and protracted history of organized community protest, it has become the target of frequent, violent, and heavy-handed policing. Its community leaders are usually victims of targeted harassment, victimization, and criminalization and because of this, SERI has worked very closely with the community of Thembelihle. SERI has represented many of its community members who have been arrested and detained because of the protest and politics of Thembelihle over the past few years. The support and representation provided by SERI came up often in the interviews. The individuals I spoke to were all arrested on different occasions because of the protest activity within the community. As a result of this long history, the community activists that I interviewed for this study were able to refer to multiple incidents of arrest and detention, representing the nature and extent of their encounters with the criminal justice system and law enforcement.

I interviewed eight individuals, two of whom were females. Seven of the interviewees were residents of Thembelihle and one was a member of an affiliate organization, Operation Khanyisa Movement (OKM), who was also arrested during a protest in Thembelihle. As such, the interviews conducted with the seven community members were conducted in Thembelihle, whereas the other took place at the workplace of the interviewee, which will not be disclosed for reasons of anonymity. The length of time spent in custody ranged from three days to six weeks. Of the eight participants interviewed, four of the interviewees spent five days in police custody. In terms of the reasons and contexts of the arrests and detention, two of the participants interviewed were arrested because of their perceived involvement in protest activity (C10 2017, 10; C14 2017, 14). According to these two participants, their arrests were wrongful in that they were not a part of the protest activity for which they were ultimately arrested.[10] Each of the interviewees was later released without a conviction for the incidents they were arrested for, with seven of the participants reporting that they had legal representation for that particular incident.

[10] The two interviewees, do however site other incidents and experiences of arrest some of which includes community protests.

The Students Activists

The experiences of the students included in this study present some stimulating similarities and disparities to the experiences of community activists. The students that participated in this study were all arrested and held in detention in relation to the waves of the #FeesMustFall student protests that took place between 2015 and 2017 across the country's university campuses. While the protest activities on university campuses date much further back, the #FeesMustFall protests were unique in their widespread and seemingly coordinated nature and were successful in drawing nationwide attention to the issues of university funding, decolonisation of the academic curricula, the university's use of outsourcing, and transformation around the advancement and professional progression of academics on the basis of race and gender.

The main response to the protest activity, on the part of University management and government, has been to criminalize the protests and to use violence and intimidation through private security and the police. They also turned tp the courts for interdicts that sought to thwart student involvement in the protests that were taking place. Hundreds of students were arrested and detained for varying amounts of time and many were victims of assault and widespread violence. This study limits itself to the students who were arrests around the University of the Witwatersrand (Wits).

As mentioned earlier, it should be emphasized that these participants and what they experienced should not be seen as representative of all students arrested and detained during the #FeesMustFall protests. The police responses to protests at the different university campuses were different in terms of harshness and even the media attention afforded to the various universities was not the same. Typically, the historically black institutions were subject to much harsher, more violent policing. Some of the prominent student leaders from those universities that got arrested spent much longer periods of time in remand detention.

I met the participants through an academic colleague who was also arrested and detained during the protests (and is also included in the study). I met the other participants at his related court appearance and through the sampling process of snowballing until the target sample size was reached. Two of the eight interviewees were female. The length of detention ranged from a few hours to one week – less time

in comparison to the experiences of the community activists. Two of the participants recalled their arrests as being the result of their perceived involvement in the protest activity that surrounded their arrests. Each of the interviewees was later released without conviction and all of them recalled that they were all legally represented.

The Migrants

Much like the way I got in touch with the community activists included in this study, I identified and recruited the migrants through the African Diaspora Forum (ADF) and through the subsequent use of snowballing. The ADF is a community-based non-profit organization that advocates for the rights of migrants, social integration, and works for the eradication of xenophobia and other forms of discrimination facing the migrant community in South Africa. The organization was established in 2008, in the aftermath of that year's xenophobic attacks. Although they have always been located in and around the Yeoville area, the work that they do for the migrant community has its reach across the country. As a result of their advocacy and reach, they have become both well known and trusted within the migrant community. Aligning myself with the organization proved to be an essential part of gaining access to especially vulnerable and isolated members of the migrant community: those with the experience(s) of arrest and detention.

Through the ADF, I was able to speak to eight migrants. The reasons for their arrests and detention varied. Three of the migrants experienced immigration detention in connection to their immigration status while others were arrested and detained for criminal charges. Two were arrested and detained on robbery charges, another two were arrested and detained on drug dealing and possession accusations and one was arrested and detained for a clash with the police around the closure of a refugee camp in 2008. All of the migrants I spoke to were all male. The detention time for this group ranged from eight to 16 weeks in custody. Three migrants spent eight weeks in detention; another three spent 12 weeks, while another two spent 16 weeks in detention. In comparison to the community and student activists included in this study, it is clear that migrants experienced significantly longer periods of detention and were the most vulnerable of the three groups in terms of violations and abuses. Only one of the participants included in this study ended up being convicted of a drug-related offence while the other seven participants were all released from

immigration detention and remand detention and most were recalled that they were legally represented. The chapter now turns to the formal and ideal processes and procedures of arrest and detention. It will then turn to the actual experiences.

The legal procedures of arrest and detention

The process of getting arrested and detained should ideally follow the following procedure: The person being arrested needs to be promptly informed of the arrest as well as the reason for the arrest (Hodgson and Clark 2017, 57). They then need to be brought under the physical control of the police usually by handcuffing and then being placed in the transporting vehicle (Hodgson and Clark 2017, 57). This is all in order for the arrest to be affected. Once the person is arrested, they are transported to a police station where they are processed by having their identity verified and are given a formal notice of their arrest and their rights (in terms of section 35 of the Constitution) (Hodgson and Clark 2017, 60). The arrested person is then put in a holding cell where they may be held for up to 48 hours (excluding weekends and public holidays). During this time, the arrested person may be interrogated and questioned by the police, regarding the crime(s) for which they have been arrested (Hodgson and Clark 2017, 61). They also need to be formally charged for the crime(s) after which they wait until they may appear in court for bail if they were unable to apply for police or prosecutorial bail (Hodgson and Clark 2017, 61).

According to Section 35 of the Constitution, the arrested person has the right "to be released from detention if the interests of justice permit, subject to reasonable conditions" and this is through the granting of bail or being released on warning (Republic of South Africa 1996). Bail is an amount of money that the accused person pays to the police or to the court for their release, and it is charged as a way of ensuring that the accused person returns to court for their trial (Hodgson and Clark 2017, 63). Bail may be granted with a set of conditions that the accused must comply with. The bail money paid by the accused is refunded only if the accused returns for the trial. Therefore, should the accused fail to appear in court for the trial, the bail money is forfeited and the court issues a warrant for their arrest (Hodgson and Clark 2017, 63). The rules that regulate the provision and conditions of bail are found in the Criminal Procedure Act of 1977. In order to determine whether the granting of bail is in the interests of justice, a number of aspects must be taken into consideration. These

include: the length of detention thus far; likely duration of detention until the completion of the trial; any reasons for the possible delay in the trial; any reasons why denying bail may delay the accused in getting legal representation or preparing their defence; the health of the accused; the financial loss to be incurred if bail is not granted; whether or not the accused has "a fixed residential address"; good character of the accused (as supported by statements of from those who can attest to the good character of the accused); and any previous criminal convictions (Hodgson and Clark 2017, 64). The accused's personal circumstances, amongst other things, are taken into consideration when the price of bail is determined in court.

In the same breath, there are instances in which the granting of bail would not serve the interests of justice. To determine this, the following circumstances are taken into consideration: the likelihood of the accused being a flight risk; the likelihood of the accused being dangerous and likely to commit additional crimes upon their release; the likelihood of the accused interfering the case against him or her by intimidating witnesses; the likelihood of the accused jeopardising the criminal justice system; and existence of exceptional circumstances in which the granting of bail would "undermine public peace or security" or "will disturb the public order" (Hodgson and Clark 2017, 65). In the event that the accused is granted bail but cannot afford to pay it, the court can reach a non-financial agreement with the accused. As Hodgson and Clark put it, "this means that the accused would have to give up some other guarantee that he or she will appear for his or her trial." (Hodgson and Clark 2017, 66).

Migrants may be arrested for reasons related to the purposes of deportation and for criminal matters. In the instance that a foreign national is apprehended and arrested for the purposes of immigration detention, such an arrest and detention can be effected without a warrant if a police or immigration officer finds "reasonable grounds to believe that the person is an illegal foreigner" (Legal Resources Centre 2015, 2). As with regular arrest circumstances, the arrested migrant may not be held for longer than 48 working hours for identification. During this time an investigation into the immigration status is conducted. This period may be extended for a period that does not exceed 90 days if the investigation takes longer, however the period of 'detention without a warrant' may not exceed 30 days (Republic of South Africa 2002). If the legality of the arrested person's status cannot be determined then process for deportation commences during which the arrested person must be notified of their rights. They must also be notified in writing of the decision to be deported. The

process is described in the Legal Resources Centre's (LRC) Immigration Detention guide as follows:

> Throughout the detention process, the illegal foreigner is usually transferred from police holding cells to a prison and then transported to an immigration detention centre. At present, the Lindela Repatriation Centre in Gauteng Province is the only such facility in South Africa. Illegal foreigners from neighbouring countries apprehended close to the borders, are not necessarily detained at Lindela and are deported directly. An illegal foreigner may be detained for a maximum period of 120 days. Immigration detention exceeding 120 days is unlawful and the foreigner has the right to be released. This time period starts from the time that the foreigner is first arrested and includes any time spent in police or other detention. The detention may only be extended by court order every 30 days (Legal Resources Centre 2015, 3).

For criminal matters, an arrested foreign national will go through the criminal justice system and the procedure described above. The same procedure for bail applications is followed except in this context, the legality of their immigration status will form part of the criteria for bail.

Irregular Procedure: The processes and practices of punishment

The experiences of community activists, student activists, and migrants who get arrested are often very different from the procedural norms described above. The interviews that I had with the 24 participants reveal intriguing and worrying departures from the standard procedure. The encounters with the criminal justice system through their arrests, detention, and their experiences leading to release (where some involve court appearances and others do not) highlight the 'gap' experienced with the law. This section looks into the nature and extent of the distance between how they should be treated according to the law and they are treated in reality.

The community and student activists included in this study were all arrested during and around protest activity. A growing significant feature of protest activity in South Africa has been the prevalence of violence. Over the past five years, public protest activity has risen dramatically (Brown 2015, 14). According to the SAPS's annual report for 2015, the number of crowd-related events to which the police were dispatched was 14,740 between April 2014 and March 2015, making it approximately

40 gatherings per day (Lancaster 2016, 3). For 2009/2010 and 2010/2011 periods, the figures were 8,905 and 12,654, respectively (Lancaster 2016, 3). As the number of protests has increased, so too has the excessively violent and militarised policing response. A number of scholars have noted that the violent policing has consistently played a crucial role in heightening the likelihood of protests turning violent, both rapidly and rampantly (Tait and Marks 2011; McMichael 2014; Mkhize 2015). Very often tyre-burning, road-blockading, property destruction, and guerrilla-like combat between public order policing units and protestors is what protests often become. This is the typical context in which community and student activists are arrested and later detained. Under such circumstances, the police often arrest bystanders and unfairly target leaders. Very often, physical and verbal abuses are part and parcel of how arrests are effected.

A common thread that emerges from the interviews is the brute and often excessive use of force experienced during the process of arrest. A 28-year old female community activist [C14] explained how she was arrested as a bystander and was accused of being a part of the protests that took place in Thembelihle in 2015. She was arrested on her way to visit a friend who was in a hospital after being hit by a car. Later the police accused her of being a part of the protests and claimed to have seen her putting rocks in the street. She described her treatment as follows:

> *iTraffic cop vele alizange ling'phathe kahle. Ling'thukile. Umasifika epolice steshi ling'thuke phakathi epolice steshi lathi "uyisfebe awunalawyer". Uyisfebe awunayo nelawyer. Ngathi "wazi kanjani?" Wathi "ungabanelawyer uhlala emkhukhwini?"*
>
> The traffic cop didn't treat me well. He swore at me. When we got to the police station he swore at me inside the police station and said, "… you're a bitch and you don't even have a lawyer." So I said, "how do you know?" Then he said "How can you have a lawyer when you live in a shack?" (C14 2017).

From what the police officer said to her, one gets the sense that they treated her the way that they did because of who she was and what she represented to them: a poor shack-dweller. In addition, her status as a community member of an informal settlement meant that it was unlikely that she would have private legal representation that could defend her in the face of arbitrary arrest and ill-treatment. A 28-year-old male Masters student at Wits [S3] also describes his arrest as violent and also draws

attention to the different ways the police treat different protestors. He argued that when he was arrested along with a fellow student activist, they experienced both physical and verbal abuse. He described the physical violence that he experienced during his arrest as follows:

> What sticks out is they kept on asking me if I was high or on drugs. And the general violence, I would say, from the police officers. They were very- but it was also very sneaky kind of violence. Like, the way, this may be similar for other people but even when they try and hit you, they'll stomp on your feet or they'll hit you where they can't leave marks, kind of thing. It's like sneaky stuff [laughs]. Ja, and they kept on swearing (S3 2017).

Being a white male, he also pointed out that he believed that the severity of the violence they experienced as student activists varied in terms of race as the fellow student activist he was arrested with was black. In describing the difference in treatment, he explained:

> When we kept asking questions, they resorted with, with violence, more so, I would say towards [name withheld] than me. I mean they even asked him about me and when he replied, "You can ask him yourself." One police officer threatened to assault him again. They were very rough (S3 2017).

In another interview, a 21-year-old male Honours student at Wits [S6] also remembered his arrest to be a 'violent experience'. At the time that he was arrested, the police explained that it was for his contravention of a court order and for carrying a dangerous weapon, a weapon he argued was 'very small'. When I asked him about how he was arrested and the way he was treated, he responded as follows:

> Umm, it was a, it was just a violent encounter from the time the police came in to the questions they were asking me, you know, and how they ask them and then, umm… And *ja* [yes]. It was just violent. And when they came, they came like they were ready, you see, for whatever they were doing. So they were heavily armoured and *ja* [yes], they just grabbed me, *nje* [just] (S6 2017).

In addition to the violent treatment, he notes above, is his implicit perception of the police's intentions when they responded to the student protests. With the kind of public order policing that has developed over recent years, the response that most

activists have grown to expect is the excessive use of force embodied in heavy armour and equally heavy vehicles and visible artillery. As noted by many scholars, police violence at protests occurs so often that it has come to characterize public order policing in South Africa (Mkhize 2015, 197; McMichael 2014, 4).

As shown in the account of a 43-year-old male activist from Thembelihle [C17], sometimes the violence and force exerted by the police are viewed as both excessive and unreasonable. In an incident he describes, the police protestors were given 10 minutes to disperse from K53, the main road in the area, and instead return to Park Station where they had congregated, to begin with. As it turns out, the protestors were relocated in order to be arrested and by that time, most of the protestors were subdued and seated:

> *... ke nako e leng hore ba thoma ho tshwara* [that's the time when they started to arrest] each and everyone and because we were not fighting by that time and *ha ba re tshwara* [when they arrested us] most *ya batho ne ba dutse mo fatshe* [most of the people were sitting down]. You see, if ever of you get someone *o tshwara motho* [you arrest someone] or *o shapa motho a dutse mo fatshe a isitse matsogo* [beating someone while they are sitting down with their hands] on the ground, you see, then *ba re tshwere byalo* [that's how they arrested us] and *ba re raga ha re kena mo dikoloing tse tsa bona* [they kicked us when we got into their cars]…
>
> [...] that's the time when they started to arrest each and everyone and because we were not fighting by that time and when they arrested us most of the people were sitting down. You see, if ever of you get someone you arrest someone or you beating someone while they are sitting down with their hands on the ground, you see, then that's how they arrested us and kicked us when we got into their cars […] (C17 2017)

The experiences relayed by the migrants I spoke to surprisingly made minimal references to violent experiences of arrest. Instead, for those arrested with criminal charges, widespread corruption and gross misconduct characterized most of their experiences of arrest and detention. One of the migrants I spoke to, a 45-year-old Nigerian male who is an immigration consultant [M4], was wrongly arrested for drug dealing after the police searched his home and found nothing. He recalls being arrested and then on his way to the police station, the police stopped at another house in his neighborhood for the same search that he was just subjected to. When the police

returned to the police car, they returned with two other Nigerian men whom they also arrested for drugs. He then overheard the police deciding to share the drugs that they had found during this last search, amongst all of the arrested men. That night he was approached for a bribe but he could not afford the price set by the police officer. However, there were other Nigerian men at the police station who were, in fact, drug dealers and could afford to bribe their way out of jail. He described the incident and his subsequent frustration as follows:

> I feel a pain. The night that I got arrested, when we get to Booysen Police Station, they ask me that if I can give them R2000-00 that I will be released. I told them, "To be honest, I don't have that kind of money. I have only have R900-00." … So there's other Nigerian guy there, we are arrested like 4 Nigerians. He called his boss, his boss is a big drug dealer in Turfontein. The police officer knows the guy! You know that is one of my pains that I have! You know the real drug dealer, he came, the boss, they arrest his boys, *ne*? In front of me, the police officer, on the guy's phone, give him his phone and say, "No. Call your boss! Tell him to come with R4000-00!" (M4 2017).

The above account of the brazen corruption displayed by the police officers was especially frustrating for M4 because, in his view, the fact that the police in the area were so well acquainted with the actual drug dealers highlighted the sheer injustice of his wrongful arrest. In a similar account, a 40-year-old Nigerian male who works as a bar manager [M20] recalls his experience. He was also wrongfully arrested at the police station, where he went to visit a friend and colleague who was wrongfully arrested for robbery. To his surprise, he too was arrested for the same case, along with four of his colleagues. He describes what he suspected to be corruption and malpractice as follows:

> … So, all of a sudden they said 5 of us that came later, all of us are under arrest. I asked them, "for?", they said, "for robbing this young man"… then to my greatest surprise, they opened a case of robbery against us, ok. I've not seen when it happens before, after policeman open a case against somebody and he goes home with the dockets. I don't know why he leaves with the dockets. He left to his home with the dockets. Because when the senior officers… heard of what happened, they want to see the docket and see the type of case we have, the docket is nowhere to be found. That is why I said he left with the docket…. (M20 2017).

The interactions and treatment from police

The police and other officials like prison warders and immigration officers are probably the most prominent and visible agents of the criminal justice system. They are the ones who do the apprehending and arresting. They exercise a lot of power and are important figures in the interview accounts of the community activists, student activists, and migrants. All of the interviews make some reference to the interaction with and treatment from the various law enforcement officials. Their role is important as it makes up a significant part of the experience of being in custody. Many of the interviewees pointed out that the treatment varied from official to official. These sentiments were evident in the interviews conducted with C10 and C16. C10 is a 56-year-old male community activist and academic and C16 is a 43-year-old male community activist who is unemployed. What was particularly striking about the interview with C10 is that even though his general and overarching perception of the police is negative, he was still able to point out that not all of the police are the same. In the following quote, C10 very clearly draws out the multifaceted nature of one's interaction with the police and the way that it develops during one's experience of detention. In response a question about whether or not the police were ever a source of information in his experience, he responded:

> Umm, it's possible. *Ja*, it's possible. Hey, they are not all the same, you know [laughs]. Err, and also, umm, ok after a while, you know, umm a kind of relationship develops, ja. So that's the other thing about police, they are also opportunists. *Ja*, so- ok firstly they are human, we must grant them that, they are not just evil but also- so this is how the law works, this is how power works: power exerts itself when it senses weakness [laughs] you know, *ja* and then if it faces resistance or what it thinks is equal power or possibly bigger power, then it retreats and then tries to compromise, and have a negotiation. *Ja*, so they might push everyone around but treat you special or they might treat you all bad but if the issue is raised, then they change because now you're aware, *ja*, *ja*. So they like that, they like that. But some, you know, some are nice, like we know that the night officer would smuggle things in for us, which were denied during the day, *ja*. Although we gave him a cut, I don't know what we gave him [laughs], so there was corruption (C10 2017).

For C16, the difference in the way some police officers treated them could be because of where they came from. He argued that for those who also came from the same

community, better treatment could be expected from them, in contrast to those who came from elsewhere. In response to a question about the way he was treated in jail, he responded:

> …you know the treatment will always be different, it will depend from one … officer to another. Some, they do know us from… this place, because we all live here so those who know us, when they see us inside, they will treat us in a good way but those who do not know you, maybe from- those who are living in Soweto, other areas, you know, they will not giving you that treatment that you were getting from the one that you know. Ja, so it differ from one officer to another (C16 2017, 1).

For many of the students, this different 'side' to the police came in the form of familial or parental advise about protesting and their political grievances. For S6, who was taken to two police stations during his detention, where he spent two nights and was released on the third day, the police officers at Hillbrow police station treated him and his fellow student activist differently to the police officers at Cleveland Police Station. He described the treatment from the officers at Hillbrow in familial terms. In his interview, he said, "…the police officers spoke to us like fathers, you know, or like mothers… like "…'yabo…ukuphapha [you see…being forward]'" whereas the officers at Cleveland were different because, as he put it, "…they were sympathizing with us. They kept coming into the cell and kept asking about the movement basically…". During the student protests, most students who were arrested from Wits were taken to Hillbrow Police Station whereas Cleveland was a much quieter police station. This may partly explain the differences between the way that the officers from the different stations treated them.

Most of the student activists spoke positively about this informal and relatable side to the police, while one 21-year-old female student [S9] pointed out a discomfort and disapproval of the friendlier and familial treatment. For her, the familial treatment from the police undermined the sincerity of the claims made by the student movement but it also had the potential of putting women detainees in compromising positions. She explained this when describing how she was treated:

> Ok… the ill-treatment of police officers and… most important, the undermining. So you're not necessarily treated as, I'd say, a citizen. You're treated as a child… even when we had arrived at the police station when,

> instead of [being] treated like a particular accused, in the senses that, ok, "this is what you do x-y-z. may we please have your fingerprints, your address and what-not." This police officer's explaining to me why I shouldn't be doing what I'm doing, why I shouldn't be protesting for what I'm protesting for- I mean, that isn't what's supposed to be happening, if anything, as with the police officer and myself, we should have had a legal conversation and not a political conversation. Furthermore, not even a personal conversation, right, because I think that's also how some umm, some violations tend to happen because you find police officers that are now crossing over the line so *ja*...(S9 2017, 9)

In these accounts, the unofficial and very human interactions with law enforcement present a stimulating and contrasting side to the image that usually makes up our perceptions of these officials. This is to say that the widespread image of misconduct in the police service, for example, is accompanied by accounts of sympathetic and protective police officers, reminding us of the human aspect of these experiences of arrest and 'short-term' incarceration. The encounters shared by the participants interviewed for this study present multiple and paradoxical experiences of the criminal justice system. These paradoxes and complexities all form part of the broader perception of the law and thus contribute to shaping their legal consciousness in interesting ways.

Similarities and differences in the experiences or arrest and detention

Whether it is experiences of violence or corruption at the hands of law enforcement, community activists', student activists' and migrants' experiences of arrest undoubtedly colour their encounters with the criminal justice system. Their experiences all display significant departures from the formal procedure of arrests as described above. The use of force can be expected during arrests, particularly in the contexts of protest activity, and 'physical control' of the arrested person is necessary for an arrest to be affected. However, the experiences of community and student activists emphasize that the extent of violence and abuse of power displayed by the police during arrests is often clearly excessive. The instances of corruption shown in the experiences of migrants are both a departure from standard procedure and a widespread feature of policing in South Africa.

The experiences of detention and the broader criminal justice system navigated until release present some interesting and noteworthy differences from what

should be the standards of arrest. As shown above, for community and student activists, the experiences of arrest were a lot more violent. This is different for migrants who had very little to say about experiences of violence during their arrests. For the migrants interviewed, their experiences of detention presented more encounters with violence, presenting a peculiar inversion of experiences in comparison to the community and student activists. Migrants usually experienced more violence during their detention rather than during their arrests whereas community activists and student activists experienced more violence during their arrests as opposed to their detention. This is especially the case for the migrants that were held at the Lindela Repatriation Centre for immigration detention.

Amongst all of the groups interviewed for this study, student activists' experiences of detention displayed the least forms of irregularities in terms of procedure. This, I would argue, has a lot to do with the fact that the student protests for which they were all arrested attracted much media attention. Journalists reported from university campuses and followed protest activities very closely over the most eventful periods of the protests. This is very different for community activists like those in Thembelihle, whose protests do not always make the news and attract much attention from the rest of the country. The protests and struggles of South Africa's poor do not always make it into mainstream media. Even though some of Thembelihle's protests have been reported on, they certainly did not and currently cannot attract the same attention that the #FeesMustFall protests have. This study finds that migrants spent the longest amounts of time in detention while student activists spent the least. Community activists and migrants experienced the most delays in their legal proceedings and were treated far more harshly than student activists. This is evidenced by the significantly longer periods of detention.

The chapter now turns to a discussion of the specific the differences similarities that emerged from the interviews. In all of the interviews conducted, the notion of punishment emerged as a crucial aspect of how short-term incarceration was experienced, either explicitly or implicitly. In the absence of explicit reference to punishment, different aspects of the experience were described as 'sore-points' or as especially difficult.

For many, time emerged as a significant feature of how punishment was experienced. Different aspects of time stood out as representing the penalty endured as part of the experience. For some, it was the excessive period of time spent in

remand due to unnecessary delays in the criminal justice system. For others, it was the 'expansion' of time, feelings of losing time, and feeling of time not longer being their own that was the most difficult to grapple with. As noted by many scholars, the criminal justice system has become a tool for the police and legal actors like prosecutors and magistrates.[11] With it, groups deemed as 'troublesome' or even 'undesirable' are 'taught a lesson' or simply 'punished' as part of a wider repertoire of harassment.

This was the case for a 47-year-old man [C12] who became a prominent community activist in Thembelihle. He was arrested during one of the earliest protests in Thembelihle, back in 2001. And as mentioned earlier, the community sought to protest the forced evictions ordered by the City because the land on which Thembelihle had been built was dolomitic (Brown 2015, 88; Clark 2014, 13). These were the earliest protests in the community and as a by-standing community member, he recalled deciding to intervene as a mediator when he saw that the tension between the community and the police rapidly escalating. While speaking to a journalist reporting at the scene, but at some distance from the commotion, he was struck by a rubber bullet in the mouth, ripping his lips apart and causing him to lose a few teeth. He then went to the hospital where he received stitches and decided to open a case against the police. Later on, in the early hours of the morning on the next day, the police went to his home and asked him to come with them. He was unaware that he was, in fact, being arrested because while this was not made clear to him, he was under the impression that the police needed more details about what happened to him, for his case. Needless to say, the trip with the police that morning resulted in his detention for five days. He was never charged and did not appear in court for bail. During this time, he was not allowed any visitors and was also denied access to medication. He described the five days as follows:

> It's like, it will be- a day, it will be like 3 days, you know, an hour would be like 5 hours because time doesn't move when we are there. You know- and anxiously so, one wants to go to court to prove he's innocent, you know, so by so saying, it even adds to this issue of saying, "here I am, I don't know why I'm here." So it adds up to the time factor to say, "eish! *Aikhona*, an hour turns to hours."(C12 2017, 12)

[11] See the following: (Kollapen et al. 1999; McKinley and Veriava 2005; Clark 2014; Hodgson and Clark 2017; Duncan 2013)

His experience serves as a classic example of ways in which the police are able to act with no regard for the rights of people. For C12, his experience was a form of punishment for opening a case against the police for the injury that he sustained. Because of that, he was arrested and held in detention, where his time was taken away. In addition to the expansion of time that he describes, is the anxiety and hope that also lies in the courts, as a space of redemption and even relief from such gross violations. This is a sentiment that comes up often in the interviews that I conducted: that during detention, when time conspires with anxieties, multiplying on itself, they still looked forward to the opportunity of being heard in the courts.

For many, their perceptions of time in custody was often expressed when I asked them about how long they expected to spend in jail before being released. However, even in response to different questions, the experience of time would be brought up. The student activist [S3], referenced above also described his experience of time in relation to his experience of the entire process as follows:

> […] for the first period we were waiting to be released. We thought it was just gonna be a quick thing. We were even joking about how it messes with you psychologically. Like in the beginning, whenever you hear those massive doors open, you get excited because you think "ah, maybe somebody's here and we're gonna be released." But then towards the end of the first night, you start hating those doors because you realize [laughs] you not leaving yet […] (S3 2017).

When referring a lot more to the broader process of going to jail and the administrative aspect of going to jail, he described it as follows:

> […] I must say, I thought it would go much quicker or smoother. I mean I get law is about processing, the processing of bodies but you think it goes way quicker than it actually does [laughs]. It goes very slow (S3 2017).

From his account, we are able to see how the feeling of 'time expanded' is a result of a gap between what he expected and what he actually underwent. During his interview, he explained that he thought that he would be released on the same day because many fellow student activists who had previously been arrested were usually

released on the same day. However, this was not the case for him. He ended up spending two nights in jail and was released on the third day.

For migrants that experienced remand detention, it was not uncommon to be repeatedly sent back to prison after appearing in court. For those who were lucky enough to have it explained to them, the verification of their immigration status was cited as the reason for the delays, however, for most, it was never explained. In an interview with a 41-year-old Nigerian male who works as a trader and was also a part of the group wrongly accused of robbery, he expressed his frustration with the excessive delays which he described as the "way [they were] remanding, remanding, remanding". In his words, "I do appear for good ten times before I was released…" (M21 2017). For migrants that were held at Lindela for deportation, what they experienced was often at odds with what they expected in terms of duration. In an interview I conducted with a 47-year-old male migrant [M13] from the Democratic Republic of Congo, he described it as follows:

> *Moi, quand j'étais entre le 17 Novembre 2011, je croyais que je pourrais faire un jour. Je croyais que je pourrais faire une semaine. Je croyais que je pourrais faire deux semaines. Mais entrer là-bas les jours passaient, les semaines passaient, jusqu'à faire 4 mois…*
>
> Me, when I entered 17 November 2011, I thought I would spend one day. I thought I would spend one week. I thought I would spend two weeks. But since arriving there, days went by, weeks went by, until it was 4 months…(M13 2017).

His accounts effectively emphasized the notion of time that passes by beyond one's control. This too, speaks to the ways in which time functions as a form of punishment during detention. However, to present this story of time as the only experience of short-term incarceration would overlook the moments where time was actively reappropriated[12] through delaying tactics that emerged in the accounts of community and student activists.

[12] See references to Michel de Certeau (1987) and (1984) in (Sarat 1990, 348; D. M. Engel 1998, 131)

Conclusion

To be arrested and detained assumes not only a breach of the law but also an infringement on the state's authority, on the part of the arrested and detained. These groups were arrested because of their perceived disruptions of the prevailing order and their supposed transgressions of the law. For the community and student activists, it is unsanctioned or disruptive protest activity and for migrants, it is their perceived involvement in illegality. In some of the cases, illegality can either be related to their immigration status or in other cases, illegal activity.

The Weberian notion of modern statehood rests on the idea that the state exercises the right to claim the "monopoly of the legitimate use" of violence. The police exercise this authority because policing forms an important part of its expression of statehood and its governance practices. The entire process of arresting and detaining, therefore, is an embodiment of the state reasserting its power and authority. This reassertion must be understood in terms of the symbolic and instrumental purposes that it serves. The experiences of arrest and detention that I shared in this study need to be understood in terms of this confinement and subjection to the weight of the state's total might.

This chapter looked at the various aspects of arrest and detention that emerged as key parts of what the community activists, student activists, and migrants experienced in the criminal justice system. Time was one of the aspects of arrest felt was especially punishing. The participants highlighted that when subjected to the criminal justice system, the experiences of losing control of their time and having the criminal justice system determine all aspects of their time was particularly difficult. However, although being arrested and detained involves experiences of powerlessness, the interviews also revealed the participants were not rendered entirely powerless. Some of these responses are taken up in the chapter that follows.

CHAPTER 4: LEGAL CONSCIOUSNESS SHAPED THROUGH EXPECTATIONS AND RESPONSES

One of the interviews that I conducted was with a student from Wits who was arrested for his involvement in protest activity at the university in 2017. He spent 3 days in custody at a Police Station and then he spent an additional four days in custody at Sun City, after being denied bail because of an alleged pending case from the #FeesMustFall protests of 2015/2016. In describing his experience of getting arrested and being held in custody for a week, S8 explained how he cooperated with the police because of their valid warrant of arrest. He also when on to explain how his experience of short-term incarceration was made a lot more bearable because of his own ability to interact with the police and other inmates. He argued that he was not subjected to ill-treatment because of the important role of his conduct during his interactions with the police. As he put it, "I think it depends on how you also appear to the police. If you appear like a criminal, like a savage, they will give you the same treatment… So for me, whenever I conducted myself, it was in a way which was always going to be favourable for everyone… I always demanded the right treatment because I gave them the same treatment.

However, later on in our conversation, S8 laughed off the criminal justice system as a "money-laundering scheme". He went to describe a complex understanding of the legal system and the way that it works:

> *I think, in a legal system, or in any system actually, in South Africa, for it to stand strong and to survive, there has to be a space for corruption. If there is no corruption in the police service, I'm telling you, people would be shot at for nothing because they, themselves are not earning enough. They are not receiving any benefits even after working- some of them have worked from the apartheid era until today and I think for them to survive, they have to eat out of it, and that's what… the actual legal [system] exists for: it eats out of the people, the criminals – because … If you don't have a legal representative, you are bound to your bail money being more than R3000 and if you don't have that: it's not about whether you are innocent or you are guilty, you are going to go down to prison for some time and those who have money are always able to escape it. You can [see] …more especially in Hillbrow. Anyone can be bought: from the cop to the magistrate.*

At this point, I began to think that his views on the legal system and what he experienced of seemed to be at odds. On the one hand, he acknowledged and fully submitted to the authority of the police and the law when he was arrested. Unlike the experiences of the other students I spoke to, he was not beaten or mistreated when he was arrested. On the other hand, his perception of the legal system is cynical and derisive which would seem to contradict his earlier 'acceptance' of the law. In between his momentary submission and his disparaging view of the South African criminal justice system, there is also room for determining one's own experience of

detention through the negotiation of one's own conduct. In that space that he believes exists within the system is the room for agency. In that space, he was able to navigate his interactions with the police and prison warders by appealing to their 'humanness' as a way of asserting his own.

No one in his family had ever been involved with the law. However, S8 was able to draw from personal past experiences of the criminal justice system to navigate this experience. This knowledge allowed S8 to make shrewd decisions. He was able to manage the way that he behaved. From this interview, it became evident that as a politically active student with a sophisticated consciousness of racial, social, and class relations. He had very strong opinions about the law and its place in society. However, within the context of arrest and detention, S8 tactfully and deliberately made an effort to ensure that his experience was as smooth as circumstances would allow. To do this S8 made sure to interact with the police and prison wardens respectfully, and befriend fellow detainees.

(Interview with S8 2017)

This chapter looks at the different ways that expectations contribute to shaping legal consciousness and how they shaped the different ways that the interviewees responded to their experiences of getting arrested and detained. Some had previous experiences while for others, this incident was their first encounter with the criminal justice system. Some people knew people who had been arrested and detained before, while others only knew of some people's experiences. This chapter is essentially about where people find their ideas about the law and criminal justice system and how do these ideas inform the ways the people would respond in the event that they did run into the law? And when forming our expectations, do we draw more from what the law should be in theory, or are our expectations based more on the pragmatic and realistic expectations of what the law is in practice?

Developing a dialectic of expectations: Descriptive/Predictive vs. Normative Expectations

Sally Engle Merry defines legal consciousness as the ways in which people understand the law (Merry 1990, 5). Similarly, Ewick and Silbey use the term to refer to how people interpret and make sense of the law (Ewick and Silbey 1998, 17). For Ewick and Silbey, it is the active "participation in the process of constructing legality" (Ewick and Silbey 1998, 45). Instead of referring to the law, they use the term legality to refer a broader range of actors and institutions that go beyond the 'official' like the courts, lawyers, judges, police etc. because they argue that the term

captures a wider range of active participants (ordinary members of society) that also contribute to the meaning-making processes around the law. Legality serves as both an "interpretative framework" and "a set of resources" that the social world is comprised of and produced by. They go on to argue that legal consciousness is not merely the opinions that people have of the law but rather an active and collective process of constructing "legal meanings, actions, practices and, institutions" and participation through what is thought, said, and done (Ewick and Silbey 1998, 247). They describe the process as follows:

> As individuals express or enact their consciousness, they draw from and contribute to legality. As persons appropriate from the common repertoire of legal schemas and resources, they are constrained by what is available, by legality as it has been previously enacted by others. Thus, the stories of law are not infinitely various; each person does not invent an independent and unique conception of legality (Ewick and Silbey 1998, 247).

This is, therefore, a reciprocal and collective process of meaning-making in which people's interpretations of the social world "become patterned, stabilized, and objectified." (Ewick and Silbey 1998, 39). This stabilization and objectification render these meanings and interpretations institutionalized, forming part of the 'discursive systems' that then set up the boundaries of future processes of meaning-making (Ewick and Silbey 1998, 39). Through an existing and collectively developed repertoire of "cultural modes, vocabularies of motive, logics, hierarchies of value, and conventions…", the society determines the possibilities of thought and action (Ewick and Silbey 1998, 39). These are what Ewick and Silbey refer to as schemas, which they go on to describe as follows:

> Schemas are transposable; they can be invoked in many settings. By applying schemas from one setting in another, people are able to make familiar what may be new and strange; moreover, they can appropriate the legitimacy attached to the familiar to authorize what is unconventional. In this way, the concept of the schema points to the power of naming as a fundamental aspect of social action (Ewick and Silbey 1998, 40).

Schemas together with resources give life to one another and without the other, schemas and resources dissolve (Ewick and Silbey 1998, 41). Resources provide the materials that sustain power through schemas that are held up and together, resources and schemas make up social structure. Ewick and Silbey overcome the age-old structure-agency debate by arguing that both structure and agency are mutually constitutive insofar as structures regulate social practice but are also dependent on it (Ewick and Silbey 1998, 41). Structures are therefore constantly being constructed. Social structures are schemas and resources and therefore determine "expectations, limits, and contingencies for human thought and action." (Ewick and Silbey 1998, 42). Legality, as defined above, comprises of schemas and resources because it is a structural element of society. It is always used and invoked by members of society and is therefore constantly reproduced and sustained as a structural feature in society. This process of creating legality is legal consciousness (Ewick and Silbey 1998, 45). The construction of legality is evident in every invocation of legal imagery and with it comes the sustenance of the law's power and authority to continue to determine social relations (Ewick and Silbey 1998, 45).

For Ewick and Silbey, legal consciousness is made evident in the things that are said and done and consciousness, more broadly speaking, is conversationally revealed through the ordinary reflections on the mundane activities that make up our daily lives. But it is also implicitly carried out as part of social action. (Ewick and Silbey 1998, 46) It is, however, "always a collective construction that simultaneously expresses, uses, and creates publicly exchanged understandings [or] schemas." (Ewick and Silbey 1998, 46). And even though "legal consciousness is emergent, complex, and moving, it nonetheless has shape and pattern…" (Ewick and Silbey 1998, 46). As such, from the hundreds of interviews that make up their data, Ewick and Silbey identify three forms of legal consciousness: 'before the law', 'with the law', and 'against the law'. These are comparable along four dimensions, namely: normativity, capacity, constraint, and time-space. These are, as they put it, "analytically distinguishable aspects of social action…[and] should be understood as axes of interpretation that provide alternative vantage points from which to view legality" (Ewick and Silbey 1998, 82).

This study finds that the expectations of interviewees are predominantly based on two forms of expectations. They are 'predictive expectations' and 'normative expectations'. The concepts are drawn from philosophy and marketing scholarship

that looks at consumer satisfaction/dissatisfaction. According to Bradley Barbeau, the terms predictive and normative expectations are used to determine how consumers may respond to a product or service. He defines the terms as follows:

> Predictive expectations are generally conceptualized as being produced by prior experience with the product and other information about how the product will perform such as advertising, salesperson claims, and word of mouth from other persons who have used the product […] Normative expectations imply a standard against which the product will be judged, which may be independent of the particular brand or product (Barbeau 1985, 27).

Patricia Greenspan's chapter, entitled *Unfreedom, and Responsibility*, unpacks the philosophical concern with psychological compulsion. In a hypothetical example that he uses, she makes a distinction between types of expectations in her study:

> If someone is known to be unusually lazy, say, or simply to dislike a certain kind of action – cleaning up, for instance – it might not be reasonable for us to "expect" that person to perform it, in the sense of predicting that he will; but it might still be reasonable to think that the person ought to perform it – to expect it of him, in the sense of holding him to a standard which requires it." (Greenspan 1987, 72).

The concepts are applicable to this study because they can be used to classify expectations of experiences. Here, the expectations about products and behaviour can are substituted for expectations about experiences of the law and criminal justice system.

Predictive expectations are informed by depictions, shared perceptions, and experiences of the law that can be both personal and vicarious. Normative expectations are drawn from morally or ethically based idealized ideas of the law. Normative expectations are based on the images that the law projects of itself, such as objectivity and justice. These source of expectations are highly influential and extremely pervasive and because of this, legal consciousness is actively shaped as people draw upon them. I argue that these sources of expectations form part of what Ewick and Silbey's describe as the common repertoire of shared meanings and ideas.

I argue that a heavier emphasis on normative expectations is likely to produce a disposition that displays a general acceptance of the law or a resignation to the law.

Whereas a heavier emphasis on perceptions and experiences is likely to produce the dispositions of manoeuvring and negotiating with(in) the law for some and defiance or resistance against the law, for the others. This is because the experiences and perceptions of the law shared in the interviews typically stood at odds with the expressed normative expectations of the law and thus resembles a 'gap' between what people believe the law is and what the law ought to be. This gap reflects that 'empirical gap' that exists between the 'law of the books' and the 'law in action' identified by socio-legal scholars (Silbey 2005; Hertogh 2004; Halliday and Morgan 2013).

This study finds that in response to the actual experiences of getting arrested and detained, there forms or expressions of legal consciousness. They are an 'acceptance and resignation to the law', 'manoeuvring and negotiating with(in) the law', and 'defiance and resistance against the law'. These forms of legal consciousness embody the physical restraint of thoughts and actions experienced in the area of focus taken up in this study: past experiences of arrest and detention and by extension, experiences of the criminal justice system in South Africa. How participants responded to and interacted with the criminal justice system was naturally constrained by the physical space of being in detention. Furthermore, their options and possibilities were severely limited and determined by the loss of power with within the clasps of the law. Instead of seeking out the law's place in the mundane, and taken-for-granted contexts of everyday life as Ewick and Silbey do, I focused on a particular experience and context of the law.

Normative Expectations

The normative expectations of the law and the criminal justice system, more specifically, are developed and sustained through the collectively held views of the way the law should work and how one should be treated in instances of contact and engagement with the law. There are socially held and sustained ideas about how the police should behave, how the courts should work, and how the law should function. These are informed by patchy bits of knowledge about the Constitution and other pieces of the law, but also by taken-for-granted shared logics and meanings that have developed through time. These are the widespread beliefs in the values that people believe should inform the law such as notions of fairness, equality, and justice. Very

often the participants would refer explicitly to the general and morally informed sense of 'right and wrong', which they believe should influence how the law works. In the interviews, these notions presented themselves when I would ask questions around what should the law do and how should the police conduct themselves, as well as through the interpretations that participants shared of their own experiences.

In the interviews, I asked the participants what they expected from the law in terms of their normative expectations. The responses varied along the lines of justice and fairness, equality, thorough investigation, protection, and efficiency – to name a few. At no point did I refer explicitly and specifically to the criminal justice system. Instead, I asked of the law generally. Examples of these sentiments are revealed in the following quotes taken from the interviews:

> I expect justice out of the law. Err, the law should, we should be treated the same you see. Err, *ja*, *ja* we should be the same. Everyone should be equal before the eyes of the law [C16].

> Well, *ja*, I expect, you know equal treatment, you know, treating people the same, a bit of affirmative action for those who are weak, you know, redress, you know, umm rolling back certain legacies of the past, you know, this is what I expect, *ja*, [C10].

> Umm. Not only on me, for other people as well, the law is not in respect of any person. Like I said before, if somebody's has been arrested, the investigation should carry on. If that person commits the crime, the law should take it's course. Nobody is above the law [M20].

> *Normalement la loi doit protéger. La loi doit sécuriser. La loi doit garder. La loi doit étudier les cas. Mais mon cas n'a pas été bien étudié.*
> Usually the law is supposed to protect. The law is supposed to secure. The law is supposed to look after [you]. The law is supposed to study cases. But my case was not studied well [M13].

> I expect the law to be, to serve the interests of justice, to be objective and to be fair in its application. *Ja* [S6].

> In all truth and honesty, I expect the law to be- to serve justice more than anything else, to advocate for equity and equality. I think that we're so fixated on equality that we forget that we don't understand that equality in itself can

> be very unequal, right. Ummm, *ja* so *ja*. I mean in an ideal world, I would look for justice and equity…[S11].

> Protection from both the law and those outside the law. So basically, if I, myself have no knowledge of the law, I expect the law to protect me from itself. For example: Many people don't know that you cannot be charged, it's basically illegal to be held in a holding cell for more than 48 hours. So I expect the law, people of the law to explain that to me if I do not know. So I expect the law to protect me from the law [S2].

These views all speak to the expectations of the way we expect and want the law to be carried out. The experiences of wrongful arrest, abuse at the hands of the police, and other forms of harassment experienced through the criminal justice system did not inhibit participants from still expressing the ideals that they held about the law. They expressed these sentiments in spite of what many of their experiences exhibited. These sentiments are important because they serve to mould expectations of the law including those that lie beyond the criminal justice system. Even though we know that these are expressions of ideals that may not be reflected in some of our experiences, we still hold on to these ideals. The participants all appealed to the ideas of the law as just and fair, or as a source of protection. Some referred to the law as a resource like those who protested for specific issues or even concerned with their immigration status.

Predictive Expectations: depictions, perceptions, and experiences

The interviewees' expectations were informed by a mixture of popular representations and depictions of the criminal justice system that appear in television shows, movies, and documentaries. Images of the law and the criminal justice system that are shown in the news are also an important source of information that shapes expectations. In addition to these, are the circulated perceptions and experiences of those around them, both near and far. For example, community activists' perceptions of the police and court processes were informed by what they have seen other community activists go through either through hearsay and shared experiences within the community or through the images depicted in the news. The migrants that I spoke to also come from a fairly close community and the various experiences of harassment and abuse form part of the regular conversations that they would have

amongst themselves. News of those arrested spreads through these channels of communication in the same way that stories after release are spread. Similarly, during the height of the #FeesMustFall protests, news of arrests and experiences with the police were spread through the various social media channels, the regular news updates and the conversations and hearsay amongst students themselves. These communities of people identify with the experiences of others within their socio-political group and what they perceive of the criminal justice system is therefore informed by the various experiences of it that are both near and far.

The perceptions, derived from sources like popular representations in the media, the news and shared experiences that are spread through stories within the 'community', operate in a similar fashion to personal and vicarious experiences of the criminal justice system. Past personal experiences, as well as the lived experiences of family, friends, and acquaintances all, play a critical role in shaping one's understanding of the law. These form an inventory of images that one draws upon to navigate current encounters with the law. People use these memories to make informed calculations and often base their expectations on them. While these expectations may differ from what they end up experiencing, they shape the various actions and interactions with the legal system and its different agents.

From the interviews, expectations and perceptions of their experiences would be expressed when I specifically asked participants to share their views of their arrests and detention. Participants would explain their expectations of arrest and detention in terms of what their perceptions of the law were. These perceptions, as explained earlier, are drawn from multiple sources that are used as justification. An example of this is the responses to a question about the expectations of what jail or detention would be like. Only students would refer to collectively held perceptions and popular depictions of jail (either in television, movies, news etc.) as sources against which their experiences could be compared. During an interview with S5, a 27-year-old male Wits student, he described his expectations of being in jail as follows:

> Ok. I know from documentaries how jail is and you know, like, not being-being on the outside, you don't take it that serious but the minute you get there you start seeing reality as it is and it's not fun. It's not fun at all (S5 2017).

This response came just after he just revealed that he recently learned of the passing of a childhood friend who died in prison. He did not know the details and circumstances around his friend's passing or even the exact reason behind his incarceration as he had lost contact with him over the years. Even though he does not cite this as a source that may have informed his expectations of jail, one can see how the very lack of details surrounding his friend's passing simply leaves the causes open to speculation, thereby tacitly raising fears around the realities of prison life. He refers to documentaries, which do, however, depict South African prisons as some of the most dangerous in the world. They inform the popular depictions of prisons as sites of gross over-crowding, rampant corruption, excessive violence, with very limited access to basic resources such as healthcare (Steinberg 2005; Muntingh 2008; Hopkins 2014). Nevertheless, even though the documentaries were able to shed light on possible processes and experiences of being in jail, they still did not quite match up to the lived experience of a holding cell, which, probably differed significantly from actual prison and are often regarded as far worse. Other students also referenced popular depictions of jail as ideas informing what they could expect. S6 found that his expectations, as depicted on television, were confirmed by what he experienced during his time in jail. He responded as follows:

> Umm, I expected it to be a very lonely, hostile environment. Umm, from you know, what we read in the news, what we see on TV or hear from people basically. I expected it to be a very hostile and ja, isolated environment, and ja (S6 2017).

For others, what they expected from the depictions that they refer to differed in the sense that they expected the experience of being in jail to be a lot harsher and more difficult than what they found. For S11, a 22-year-old female student activist, this was the case. Her response to what she expected the experience of being in jail to be like was:

> I think, I thought they would be a little more harsh, like not allow us to eat our own food or even keep our gadgets upon arrival. I thought we'd be with other- I hate to use this word, in inverted commas "criminals", you know, that's what I thought would be the interaction right? Because, I mean, South African television has portrayed jails like that, you know (S11 2017).

A significant part of S11's reflection is that her experience as a Wits student activist was one that was quite different from other ordinary members of society. By comparing her treatment to the treatment of others during the hours that she spent in custody, she found that her treatment was not as bad as those around her but it was also not as bad as she personally expected it to be. In fact, at some point during the interview, she refers explicitly to her experience of the criminal justice system as one of privilege. S11 shared two separate stories of how other people were treated based on what she witnessed during her time in custody. One of the stories was of a seemingly homeless man who as brought into the police station as they waited to be processed and the other was of a young woman, whom they found in the holding cell that they were assigned to. How these people were treated as well as what she had expected of jail as depicted in television, served as stark contrasts to what she found. S3's experiences echoed those of S11 insofar as his expectations were met with a significantly different reality:

> So surprisingly, for us it was our first experience so we thought – and probably having watched too many movies, or whatever – we thought it was going to be hardcore but I must say, there's almost like a, amongst the actual prisoners, there's a sense of comradeship. People are generally friendly. It's not really violent but where the violence comes from, I would say, is the police, like the way they treat you (S3 2017).

These ideas of jail in South Africa informed their expectations of being in jail. Some ideas and expectations were confirmed by what they experienced while others were surprised to have their perceptions and expectations shifted by their experiences of jail and detention. During the interview with S9, she shared her experience of getting arrested and detained and expressed a combination of confusion and frustration that she felt during her arrest because of the arresting officer's refusal to share the reason of their arrests. While relaying her story, in passing, she jokingly compared her arrest to the popular depictions of arrests that we have all seen in the movies:

> I remember we were actually seated down- so we're seated down, a few of us had, like, placards and, umm, the one police- so after he had greeted us, ok, we

> greet back and he says, "may you please get into the van" and we're like, "umm, that's not how an arrest goes about [laughs], like aren't we supposed to be … stated …your crime and then explained your rights and then thereafter, umm, get it in handcuffs or whatever?", you know how it happens in movies [laughs] but anyway… I'm also just a bit, like, confused at this point so um, we're like, "So what's the arrest for?..." And of course, with complete arrogance the police officer's just like, "I asked you to step into the van." And we're just like, "*Hawu*, but also [laughs] … can we at least, you know, have an understanding of what's going on?", (S9 2017).

Her reference to "the way it happens in the movies" is important because it provided her with an idea of the procedures around arrests. Of course, not all that is depicted in films and television is a reliable source of information because they usually depict exaggerated or romanticized abstractions of reality. However, in S9's incident, her expectations offered her grounds for opposition to the manner in which she was arrested because they are in fact, supported by constitutionally enshrined the laws around arrests of people. She later shared, that her objections were justified when their lawyers confirmed that their arrests were unlawful insofar as the police failed to share their reasons for arresting the student activists. Most of the students displayed a combination of acceptance and negotiation with the law.

Personal and vicarious experiences of the criminal justice system are also critical sources of information that inform the more realistic expectations of the system. This came across in the interviews I had with the community activists and migrants. They often referred to either personal past experiences of getting arrested and being in jail or they used the experiences of family, friends, and comrades to inform their own expectations of arrest and brief detention. Every community activist that I spoke to had either been arrested before or knew somebody close to them who had. C10, who was the first community activist that I interviewed, explained that he had a long history of community activism and because of that, he had been arrested on two other occasions (excluding an arrest during his adolescent years of growing up) prior to the incident that becomes the focus of our interview. Because of all of his past experiences, as he would often point out in the interview, he often knew what to expect, particularly in terms of the treatment from the police and the various strategies that they would use to prolong the time that they were kept in custody. When I asked him about what his expectations for being in jail were, he replied in the following way:

> *Hor*, ok. So I- because I've been in jail many times for protest, you know…so I knew what to expect, you know. I know their nonsense, you know. I knew from day 1 they gonna try and- because it's Thursday, I knew they were gonna try and keep us until Monday, you know. So that's why from Day 1… I was speaking about this to the police, like telling them, like "no! We have to get out tomorrow! You have to process us now! What's wrong with you?!" you know… I knew they were gonna charge us with public violence. I knew they were gonna find a way of taking us to Sun City, you know. I knew they would refuse us to have visitors- (C10 2017).

As the quote reveals, C10 was able to use his past experiences as the reasons for his forceful and defiant approach towards the entire experience, and particularly the police. Similarly, C14 had been arrested on multiple occasions before the incident that she shared in the interview. As the owner of a *shebeen* [tavern], C14 explained that her previous arrests were the result of her selling alcohol without the necessary liquor licence. Because she had been arrested a few times for this reason, she had grown accustomed to the processes around that particular violation, which were that she would be released almost immediately upon paying a fine. However, she did not know what to expect when she was arrested and detained for protest activity for five days. She explained that the police would scare and threaten them by telling them that they would be sentenced to 15 years. She accepted this and feared a lengthy sentence because she had no other previous experiences to draw on except for her own.

Others relied on the experiences of those that are close to them. They used those experiences to shed light on what they could possibly expect if they were arrested and held in custody. C12, who was arrested on 7 more occasions since the incident that formed the focal point of the interview with him, shared that he had no personal experiences to draw upon when he got arrested for the first time. Prior to that arrest, however, he had a brother in prison that he visited every weekend over the course of eight years. Sun City is a notorious prison and until then, all that he knew about the prison was learned from what he had heard about the prison. However, while his brother's experience did not actively dispel some of the rumours, he was able to see the prison from a different light. He explained the influence that this had on shaping his own expectations of being held at Sun City:

> ... I used to visit him every weekend, every weekend for that past 8 years because I used to sell your cold-drinks and what-not, a small business that I was running- a tuckshop, so I will even buy for him to sell in prison because he was living in a single cell because of good his behaviour so I would bring all the stuff, but… for me, to be there visiting my brother, I was feeling the pain more than him because like, you know like, I've been told how Johannesburg Prison or Sun City, how it's all about. For me, it was like "Ey! My brother, you are here in this place, ey! I can hear people are being raped, people are being, you know, there's gangsterism and what-not" *ja*. So the experience for me was like when is this man coming out of this place? Even if you could see from him that he was- "no, no, there's no problem. It's better because I'm living by myself." He was training boxers in, you know, in prison. *Ja*, so *ja* (C12 2017).

What he saw through his brother's experience was that it did not have to be an unbearable place. In his interview, he discussed some of the subsequent arrests and what becomes apparent is that his experiences also give off the idea that his experiences are better than most. During his interview, he goes on to explain that because of his frequent arrests, none of which he has ever been convicted for, he was highly respected and became popular among the inmate population at Sun City because of his community activism. As a result, he would get treated really well by the inmates, thereby subverting the idea and experience of punishment.

C15, who is a 39-year-old female and one of the prominent community activists in Thembelihle, had never been arrested before the incident that comes up in her interview. Because of her involvement within the community and the TCC, she learned from the experiences of her fellow comrades. When I asked her about what she expected her experience of jail to be, she explains that from the experiences of her comrades, her biggest concern was being detained at Sun City. She explained this as follows:

> Normally, we do talk *nabantu ababoshiwe* [with people who are imprisoned] as much *ngisho ukuthi ngisemzabalazweni, i-part engangisaba, yayingithusa, yanginikeza i-stress* [I say I'm part of the struggle, the part that I was afraid of, that scared me, that stressed me out] is the part of going to court, from court maybe *bathi kumele uzokwenza i-application yebail* [they say you must do a bail application.] Then I know I have to go to Sun City and *laphaya eSun City bayakhuluma bathi akukho right, bayagwajisana, izinto ezinjengalezo* [there at

> Sun City they talk and say that it's not great, they scare you, you know things like that]. So that was the only fear ebenginayo [that I had] but laphayana [there] despite lamachallenges engwashilo amancane, bengifeel ukuthi kuright kunokuthi ngye eSun City. And *bese ngizitshelile ukuthi uma ngifika laphayana eSun City* [the small challenges that I mentioned I felt that it was better than going to Sun City. And I'd told myself that if I get to Sun City] I have to declare *ukuthi* who I am so that *ngizokwazi ukuthi ngiyiswe kusection engcono* [I can be taken to a better section], *uke wabona* [You know?] Rather than *ukuthi ngimixwe nanomubani* [be mixed with anyone and everyone] because I was the only person *bekaboshiwe* [who was arrested] then from *amacomrade* [the comrades] but if *bekuwukuthi mhlawumbe [*maybe] there were 10 female comrades] including myself, *bengingeke ngize ngi-declare* [I wouldn't have declared at all]. I would just go with them, same cell, or *bayasi-divide* [they divide us], at least I know I'll be having that four or five with me. So *ya i-fear yami bekukuya eSun City* [my fear was going to Sun City]. *Ja* so *ngangokuthi besengizitshela ukuthi ngizodeclare ukuthi* [to the extent that I'd told myself I was going to declare that] I'm a councillor from which organisation and then *bazonginikeza abantu abazo…* [they'd put me with people that I can…] *engizohlala nabo lapho. Abazo, yabo* […live with. That are going to, you know]
>
> Normally, we do talk with people who are imprisoned as much. I say I'm part of the struggle, the part that I was afraid of, that scared me, that stressed me is the part of going to court. From court maybe, they say you must do a bail application. Then I know I have to go to Sun City there at Sun City, they talk and say that it's not great. They scare you, you know, things like that. So that was the only fear that I had but, despite the small challenges that I mentioned, I felt that it was better than […] And I'd told myself that if I get to Sun City, I have to declare who I am so that I can be taken to a better section, you know? Rather than be mixed with anyone and everyone because I was the only person who was arrested then from the comrades but [if] maybe there were 10 female comrades, including myself I wouldn't have declared at all. I would just go with them, same cell, they divide us, at least I know I'll be having that four or five with me. So *ja,* my fear was going to Sun City, to the extent that I told myself I was going to declare that I'm a councillor from which organisation and they'd put me with people that I can live with. That are going to, you know] (C15 2017, 15).

What C15 reveals in her response is an account of how the experiences of her fellow comrades gave her an idea of what to expect in jail and what to expect at Sun City, if she were to be sent there, pending bail. Based on these expectations, she then maps

out an overview of the possible actions that she would take in order to effectively adapt to what she describes as an intimidating situation. Much like C15, C17, who is a 43-year-old male community activist also from Thembelihle, explained that his expectations of jail (and Sun City in particular) were also informed by the things that he had been told. Based on this, he expected physical violence to form part of his experience of short-term incarceration. This was confirmed by what he ultimately experienced. An interview with a 45-year-old male migrant from Kinshasa in the D.R.C. [M22] provides another example of this. When I asked what he expected to experience in detention, he responded:

> Before to go there? So, err… I can't expect something nice there because the way you are maybe you are listen to another people when is coming out there, even myself I'm scared to do something wrong to go there. Because I know that side is not alright for a human being to be there. Ja (M22 2017, 22).

He was arrested and then later taken to Lindela where he was held for deportation in 2011 for 3 months only to later be released. As mentioned earlier regarding the close-knit nature of the migrant community, stories of arrest and harassment are shared amongst the community and as such, they inform the expectations of migrants who find themselves in similar situations.

Another prominent part of the experiences that informed the expectations of migrants was the comparisons between the South African criminal justice system and that of their home countries. These experiences did not necessarily have to be personal or even through those of friends or family, but rather a general knowledge and perception of the criminal justice system of their home country. These ideas and experiences were drawn upon to shape expectations but they also formed the backdrop against which the South African experience was ultimately compared to. M13 was also arrested and sent to Lindela for the purpose of deportation and was held for "4 months and 12 days" as he put it. When I asked him about what he expected, he responded as follows:

> *La vie de la prison de l'Afrique du Sud est meilleure. Elle est bonne. Ils respectent les gens. Y a de la considération pour la vie humaine. Mais au Congo, c'est la tracasserie: on te tape, on peut même tirer sur toi avec une arme. Faire tout ce qu'on veut. Là-bas il n'y a pas la loi.*

> Prison life in South Africa is better. It is good. They respect people. There is consideration of human life. But in Congo, it's a hassle: they beat you, they can even shoot you with a gun. They do whatever they want. There is no law there (M13 2017).

Although his response reveals a slightly different interpretation to the question I asked him, it is still clear from his response that what he did ultimately experience in detention stood at odds with what he had known from previous experiences and general knowledge of the treatment one experiences in detention in the D.R.C. He does not reveal explicitly what he expected, but through his commentary on the treatment that he received while in detention, we can deduce that he expected worse. Echoing the same sentiments, M4 compares his experiences to those in Nigeria and like M13, the expectations are revealed:

> You know, I'm expecting a hell-fire [laughs]. I'm telling you the truth. You know, let me be honest… I was so scared, I won't lie to you, when I came here for issue of drugs. So when they charge me for that thing, I'm feeling this pain because before, I say, "Actually, Ok they gonna leave me because they don't find any drug", but that night, when those police brought those drug, divide it for each of us, you know, that's when I'm feeling half-dead because I'm expecting maybe- I don't expect something like a bail even though I couldn't get a bail that time… I'm expecting maybe, something like 15 years, something like 21 years. That's all we know in some foreign country from Nigeria, when they arresting for drug, we are looking up the sentence. Some are 14 years, 15 years so I'm starting to imagine that: "Are they gonna sentence me 15 years, 21years? [laughs]." That's my fear. That's my worry that time. Even at the end of the day, I'm out of the whole thing, but that's my expectation when I got arrested that time (M4 2017).

His response reveals his expectations around being charged for drug-related crimes. M4 explains how his past knowledge of sentences for drug-related crimes are often very harsh, "in foreign countries" as he put it. Being a migrant in South Africa and with that perception, he expected the worst possible scenario.

Conclusion

The law and our experiences of it are multiple and complex. Legal consciousness cannot be assumed to exist as rigid and self-contained because they often exist alongside each other to form the complex and interwoven perspectives on how the law functions in terms of experiences, perceptions and normative expectations of the South African criminal justice system. And as suggested by Ewick and Silbey, counter-narratives and competing experiences of the law represent the maintenance of the gap between what it is and what it should be (Ewick and Silbey 1998, 230). This gap is taken up in much greater detail in the following chapter that discusses the forms of legal consciousness and their active maintenance of legal hegemony.

Together, the predictive expectations (made up of depictions, perceptions and, experiences) and the normative expectations make up a collaborative understanding of the law. Collectively, they contribute to shaping the legal consciousness exhibited by the participants of this study, however, the gap exhibited between the normative expectations, on the one hand, and the predictive expectations on the other, is the space in which the legal hegemony of the South African legal system is preserved and sustained. What one believes to be true of the law in South Africa stands at odds with what ought to be true about the law in South Africa, but the two both interact to inform all encounters with the law, whether voluntary or involuntary. The hegemonic status enjoyed by the South African legal system is sustained through the gap between what it is (in terms of what individuals experiences of it) and what it ought to be (in terms of the normative expectations of it) because the gap is rationalized through diverse rationalizing frames that include interpretations through religion, ideas around fate or perceived value of the experience, failures that are attributed to individual actors, and tangible outcomes from the experience.

I would argue that in comparison to the community activists, as a group, the student activists had a lot less experience with the law and the criminal justice system, particularly through activism. The #FeesMustFall protests are fairly recent. Although they were very critical of the law, most of the student activists knew when to tow the line. Even in incidents where they would try to resist, the police were always able to reassert their authority as both ‘parents’ and officials of the law. The community activists’ responses varied from resistance, negotiation, and resignation to the law.

Resistance, however, emerged as the strongest. I believe that has a lot to do Thembelihle's long a protracted history of struggle. The migrants were least likely to respond defiantly. From their interviews, they were overwhelmingly accepting and resigned to the authority of the law. I would attribute this the vulnerability of migrants living in South Africa. These responses to arrest and detention do not necessarily correspond with the perceptions and rationalizing frames shared but the interviewees. The following chapter turns to the ways in which the particulars frameworks help to reconcile the gap between the normative expectations and the actual experiences of the law, most of which displayed gross ineptitude and inadequacy, in ways that unintentionally reinforce the authority of the law and maintain its hegemonic status in society.

CHAPTER 5: LEGAL CONSCIOUSNESS AND LEGAL HEGEMONY

> *Most men have a strong sense of justice, at least with regard to their own interests. If the law is evidently partial and unjust, then it will mask nothing, legitimize nothing, contribute nothing to any class's hegemony. The essential precondition for the effectiveness of the law, in its function as ideology, is that it shall display an independence from gross manipulation and shall seem to be just. It cannot seem to be so without upholding its own logic and criteria of equity; indeed, on occasion, by actually being just. And furthermore it is not often the case that a ruling ideology can be dismissed as a mere hypocrisy; even rulers find need to legitimize their power, to moralize their functions, to feel themselves to be useful and just. In the case of an ancient historical formation like the law, a discipline which requires years of exacting study in order to master, there will always be some men who actively believe in their own procedures and in the logic of justice. The law may be rhetoric, but it need not be empty rhetoric.*
>
> (Thompson 2015, 263)

This study provides an account of the ways in which legal consciousness is moulded in South Africa. But more specifically, it explores the ways in which the unique and often traumatizing experiences of arrest and detention contribute to shaping legal consciousness. This chapter now turns to the second question asked by this study: *how do people understand the law in South Africa in light of their experiences of 'short-term' incarceration?* This chapter, therefore, deals more intimately with the actual sculpting of legal consciousness by drawing upon the detailed experiences of short-term incarceration (laid out in Chapter 3) as well as the argument (laid out in Chapter 4) about how perceptions, experiences, and normative expectations collectively contribute to shaping legal consciousness.

In this chapter, I look at what the interviewees said about their arrests and detention and the ways that they recalled responding to the various processes and procedures. I look at the various ways in which they made sense of those experiences and how they reflect on them. I also look at their perceptions of the law in South Africa and how they believe the law works. From these three strands, I weave an account of how legal consciousness may be shaped and how legal hegemony in South Africa is paradoxically reinforced. I argue that understandings of the law are based on the relative emphasis placed on either predictive expectations of the law (made up of perceptions and experiences of the law) or normative expectations of the law (as discussed in Chapter 4). Understandings that are based more on perceptions and experiences of the law tend to produce a pessimistic view of the law. Understandings

of the law that are based more on normative expectations tend to produce a more optimistic view of the law.

In the third part of the interviews that I conducted, I asked questions that got the interviewees to reflect on their experiences of arrest and detention and to share their perceptions of the law in light of those experiences. As mentioned in the discussion on methods, this part of the interview was shifted from recalling the experience to reflecting on it and the law, more broadly. Some of the questions I asked in this part of the interviews included what they thought of their experience(s) of arrest and detention now that they were looking back and how they viewed the law in South Africa now. For some, the experiences took place years earlier while for others, predominantly the student activists, the experiences were much more recent.[13] From this part of the interview, I was able to draw out some of the meanings that were now attached to their experiences of arrest and detention. But most importantly, I was able to see how their experiences featured in their broader perceptions and views about the law in South Africa i.e. their legal consciousness. From analyzing the interviews, with a particular focus on these responses, I am able to share what I argue is the way that the interviewees understand the law in light of their experiences of short-term incarceration.

The chapter divided into two sections: the first discusses the interviewees' perceptions of the law in South Africa where I analyze how their experiences and interpretations of short-term incarceration have informed their understandings. The second section deals with the question of legal hegemony and here, I look at the ways that these perceptions of the law and the rationalizing frames of short-term incarceration help to unintentionally reinforce legal hegemony.

LEGAL CONSCIOUSNESS & THE RATIONALIZING FRAMES OF PUNISHMENT

The South African Constitution of 1996 is the foundational document that forms the crux of the political and legal order. It is an internationally acclaimed for being one of the most progressive in the world (Hodgson 2015, 195; Crush 2001, 104). It is a document that embodies South Africa's commitment to a transformational project that "guarantee[s] social, economic, civil, and political rights…[forbidding] discrimination" (Brown 2015, 36). The rights enshrined in the Constitution,

[13] This was something that I could not mitigate against while conducting this research, however, when analyzing the interviews, it was something that I had to be aware of.

particularly its foundational values of dignity, equality, and freedom, occupy an interesting place in the perceptions of many. On the one hand, they are principles and entitlements that we hold on to because they provide a standard for what a decent life in South Africa should look like, while on the other hand, they remain distant, elusive and unenforceable in the day-to-day lives of people. The experiences of the criminal justice system discussed in Chapter 4 capture, quite simply, the gap between the constitutionally bound laws around arrest and detention and the lived experiences of the individuals interviewed. Their narratives reveal the various ways in which processes of arrest and detention are either intentionally instrumentalised to administer punishment or how they result in undue punishment because of the various problems within the system.[14]

What the interviewees shared regarding how they perceive and understand the law can only provide a glimpse into a very complex and ongoing process from which legal consciousness is shaped. This study uses experiences of short-term incarceration to provide an account of how these perceptions and ways of understanding may be derived. In the third 'reflective' part of the interview, I asked the interviewees how they viewed the law in light of their experiences. I used the responses to this question together with all the other things that they would say about the law throughout the interview to get an overall sense of their perception and understanding of the law. The various ways that the interviewees qualified their statements revealed perceptions of the law that often went beyond just their experiences of the criminal justice system.[15]

The interviews reveal that the community activists and student activists shared overwhelming negative perceptions of the law in South Africa. In fact, only one of the community activists and one of the student activists I spoke to shared a mixed image of the law. These negative views presented images of the law in South Africa as impartial, oppressive, overwhelmingly corrupt, and beneficial to the powerful, wealthy and privileged. The responses of the migrants were predominantly neutral in that they were a mixture of positive and negative qualifications that would

[14] See for example Hopkins 'Broken beyond imagination: South Africa's justice system' (2014); Ballard 'Research Report on Remand Detention In South Africa: An Overview Of The Current Law And Proposals For Reform' (2011); Karrim 'To grant bail or not to grant bail' (2017) and Gordin and Cloete 'Imprisoned before being found guilty: remand detainees in South Africa ' (2011)

[15] At no point throughout the interview did I specify whether I was referring to a particular part of the law, such as the criminal law. I believed this specification would unnecessarily limit the responses that I would get. In some of the interviews, interviewees would elaborate and expand on their views by sharing examples of other experiences of the law that were not necessarily limited to their experiences of arrest and detention. For the migrants whose experiences were immigration status related, a large part of their experiences included their experiences of the Department of Home Affairs.

acknowledge the successes and failures of the law in South Africa. These views included images of the law as pragmatic, imperfect, corruptible, but largely well functioning. Of the eight migrants I spoke to, one had a negative view of the law and two had very positive and optimistic views of the law, which shared an image of the law that it would express of itself: fair, just, and impartial. Given the complex and fluid nature of legal consciousness, I view perceptions of the law as existing on a continuum with the most idealistic perceptions on one end and the most pessimistic perceptions on the other. And through encounters with the law and exchanges about the law, perceptions can be situationally shifted. As argued by Merry, legal consciousness is interactively derived as people encounter the law but also as they share their experiences (Merry 1992, 211–13).

Perceptions from 'within': Community activists & Student Activists

The idea of operating from 'within' or from 'without' out the law has been the way that I conceptually distinguish the groups in this study. It has been useful in that the data has complicated but also reinforced the distinction in fascinating ways. I viewed the community and student activists as operating from an assumed 'protection' and 'security' of the law in South Africa. This is based on the rights as South African citizens but also on their socio-political identities of being activists. Their involvement with the law, and by extension their participation in this study, stemmed from their activism and (perceived) involvement in protest activity. Thembelihle has a long and rich history of protest activity.[16] The #FeesMustFall protests are the most recent wave of a much longer history of students protesting around issues of funding, accommodation, workers rights, amongst other issues.[17] These protests form part of South Africa's political order as being a 'country of protest' (Brown 2015, 16).

As "part of a broader repertoire of political expression […] protests can be differentiated from other forms of political expression because they are always contentious and conflictual" (Brown 2015, 19). Protests are some of the ways in which these particular activists have chosen to politically and publically express their

[16] See Clark ' An Anatomy of Dissent and Repression: The Criminal Justice System and the 2011 Thembelihle Protest' (2014); Moeti ' Thembelihle and the Criminalisation of Dissent' (2014); and Right2Know 'Thembelihle's stories' (2015).
[17] See Naidoo 'We shall not be moved or led astray: The emergence of the 2015 student movement' (2016) and Naicker ' From Marikana to# feesmustfall: The Praxis of Popular Politics in South Africa' (2016) amongst many others.

concerns, make demands, and pursue claims. These protests are a way of engaging the state, but what they often entail is a confrontation with the police. Through the confrontations between protestors and police, the law is often invoked on both sides. For some protestors, there is even just a basic belief in a right to protest, translated in Section 17 of the Constitution as the 'right to peacefully and unarmed, to assemble, to demonstrate, to picket and present petitions' (1996). For others, their awareness of the law includes their knowledge of laws such as The Regulation of Gathering Act stipulates the bounds and limits of protest activity (Brown 2015, 78). Protestors sometimes also have an idea of what to expect in the event of an arrest. As discussed in Chapter 5, a lot of what is known of the law comes from shared stories about experiences with the law. But as this study highlights, these personal experiences of arrest and detention now make up a significant part of their perceptions and judgments of the law in South Africa.

One of the strongest criticisms expressed of about the law that came out of the interviews was that the law in South Africa is partial and that the way that one is treated is determined by who they are. It came up over and over again: their experiences and the treatment that they received from the various actors that make up the criminal justice system were based on how they were seen by these actors. One of the two women activists that I spoke to [C14] explained how she was arrested even though she was not involved in the protests that she was arrested for. She described her feelings of disbelief when she was finally released after being held in custody for five days. However, she had also resigned herself to a future of further arrests because she came from Thembelihle: a poor informal settlement well known for their protests for service delivery and the like:

> *... bengingabelieve but manje senginayo leyo-experience yokuthi vele kumele uma uhlala la eThembelihle, kumele uma uhlala lana, wazi ukuthi uhlala endaweni eso kumele nje kuphela uhlale wazi ukuthi uzohlal' uboshwa.*
>
> [I don't believe it, I didn't believe it but now I have that experience that if you live here in Thembelihle, that if you live here, you must know that living in a place like this, you must always know that you're going to get arrested often](C14 2017)

Her perspective is supported by C12's description of the law: "It serves the few. It's for the few. It's for the rich. It's not for us. It's not- I mean, it 's not for us as poor people. It doesn't serve us." He argued that for him, this was evidenced by Marikana, which, for him, also resembled that lack of transformation in policing:

> It's only a change of the leadership, the colour because when you watch the 1960 massacre, there were more white policemen, you watch Marikana, there were more black policemen so it's a continuation. It's a continuation of oppressing people, the black people who are the working class. Ja. (C12 2017).

From some time spent with C12, one really gets the sense that his role as a community activist is an important part of his identity. On the day that I had met him in Thembelihle for our interview, he wore a t-shirt that said 'Remember the slain of Marikana'. The day marked the fifth year since the tragedy. At various points in the interview, he would reference his belief in the law's partiality in relation the various ways that he saw the treatment other struggles that he identified with like the striking miners of Marikana and the protesting students of #FeesMustFall:

> … Because the state, the system […] it does oppress especially- you know, they will have a lenient hand on criminals and use a very oppressive system on activists. Ja. You check your #FeesMustFall, ja. The brutality on those students, it was a matter of saying we are going to clamp down on those activists... (C12 2017).

Some of the students also believe that the criminal justice system is partial because of their experiences of arrests and detention. Even though most of the students experienced the least deviatory experience of the three groups, they still believed that the treatment was based on their identities. A student activist, [S6] shared how he believes the law works based on identity:

> [M]y experience […] didn't match what I expect the law to be because […] the way they applied [the law] depends on who you are and who you- where you come from, you know, your race, you know: I'm black and I'm anti- you know, the ruling party, so the law takes a different turn when you in that position I think (S6 2017)

On the other side of the law's harsh treatment of protestors, or the poor lies its preferential treatment of the powerful and privileged. A number of interviewees used such examples as evidence and support for their criticisms of the law. C16 shared his perceptions of the law by citing one such example:

> … We are not equal before the eyes of the law. It depends. I mean, there is a case now […] Ms Mugabe's case, the First Lady of Zimbabwe. She hitted a lady there, with electrical cord […] now […] they talk about the diplomatic what-what, I don't know […] there's no justice in the law (C16 2017).

C12 also referenced some of the high-profile incidents that illustrate the different ways that the criminal justice system privileges some and not others:

> I mean I've heard even on an advert on TV saying, we are all equal before the law. We are not. We are not! It cannot be, we are all equal. Currently, if you look at the case of the Deputy Minister of Higher Education, Manana, *ja*. Was he arrested? No. He was not arrested. He went to hand over himself to wherever he was handing over himself to. He appeared before the court. He was given a bail. He went home. He sleep at home. Zuma's rape case, same applies. He went to, you know, the station, police station or to the court. He appeared before the magistrate- so even if you check in Johannesburg Prison… you can see that the poor and the working class in this country we are not equal before the law. You find there's someone who's been arrested for- I remember this young man that I went with when I was appearing for the fifth time, the 2011 one, he was arrested for stealing a liquid soap at Shoprite. I went with that young man to Johannesburg Prison. (C12 2017).

These high-profile assault cases are only some of the examples that have contributed to these perceptions of the law in South Africa as being biased and skewed in favour of those with wealth, privilege, and power (Hopkins 2014; Simelane 2017; Lubisi 2017). C12's quote draws our attention to the centrality of bail in the legal process and the ways in which it often disempowers and disadvantages the poor. The formal criteria (discussed earlier) used to determine whether or not accused individuals are awarded bail is fairly clear. However, in addition to the cost that many of South Africa's poor cannot afford, courts rely on some proof address as a way of gauging whether the accused poses a flight risk (Chaskalson and De Jong 2009, 91; Gordin and Cloete 2011, 1169). Bodenstein's study of legal aid lawyers and their

work the Magistrate Court informatively shows how the practical administering of bail works. In one of his observations, a lawyer warned a client as follows that "[m]agistrates do not like to give bail to people who live on the street and don't have a registered address. They think […] that you will not appear in court on a later date" (Bodenstein 2017, 67). For S8 learnt from his own experience when he was denied bail on the same grounds. He no longer had a proof address at the time because the University suspended him. He was then transferred to Sun City where he spent an additional four days in custody. In his instance, the bail process served as a form of punishment for both the university and the police who wanted to suppress the protests and to discourage other students from taking part in the protests (Hodgson and Clark 2017).

The abuse of the bail process by the prosecutors and the police support the criticism of partiality. For most community leaders and student leaders, their arrests are sometimes a result of being targeted by law enforcement. The arrests are often accompanied by trumped-up charges, protracted legal processes, and in the instances when bail is awarded, extremely restrictive conditions come attached in order to discourage further participation in protest activity (Brown 2015, 105; Clark 2014, 57). For others who are simply arbitrarily arrested, often without their actual involvement like C14 and S2, the law is experienced as neither legitimate nor just.

The idea of legal bias and the benefit of privilege has played itself out within the student protests and in fact, some of the students self-reflexively brought up their own experiences of privilege. S3, a white male student referred to earlier on the study expressed that he believed that although his experience of arrest was violent and traumatic, he was still treated better than the other black students he was arrested with. For S11, one of two of the women protestors I was able to interview, she also believed that her experience of the criminal justice system was somewhat aided by the fact that she was a student from Wits - an institution that she argued was able to afford her some form of preferential treatment. She and her fellow comrades were allowed to use 'special' bathrooms inside the police station during the processing time before they were assigned to cells, however, as mentioned earlier, a homeless man was forced to use the bathroom outside. She felt that the police responded to protestors differently. Unlike the young women they had found in the cell that they were assigned to or the homeless man, she and her comrades were released within a

few hours. She argued that from her experiences, she had witnessed how arrested students from the 'formerly' black institutions were treated more harshly, while those from the 'formerly' white institutions, with the help of media attention, were able to get somewhat better treatment. As she put it:

> […] Having dealt with that, you know, I then knew that the law will always be in favour of those with power and my experience of being arrested in Hillbrow is a living testimony of that, you know. How? Because I was associated with a particular institution, which meant I had a higher social status right?
> […] I mean, having been a national #FeesMustFall student activist, national in the sense that I've worked with several other universities, I've also see how […] their experiences of the law have differed in comparison to coming from Wits and the implications that's had [...] (S11 2017).

Another prominent a perception shared by community and student activists is that the criminal justice system, particularly the police, is corrupt and severely hampered by incompetence and poor administration. These perceptions were also accompanied by an image of the law as instrumentalized and weaponized. The university and the government, under the leadership of the African National Congress (ANC), were charged with turning to the law to suppress protests. In Thembelihle, where a distinction between law and politics would be especially questionable, some community activists view their treatment as politically motivated. When I asked C18 how he perceived the law in light of his experiences, he simply felt that the law had never been acceptable particularly because of the ANC. I asked him to elaborate and he explained it as follows:

> *Because ntho e nngwe le e nngwe ke ANC, everything ke ANC, ha o hlaha ka mo ke ANC, o ka se tle ho utlwa hothwe ehh..OKM or TCC, no ANC ke yona number 1. Yah.*
> Because everything is the ANC, when you come this way, it's ANC, you would never hear of OKM or TCC, no, ANC is number 1. Yah. (C17 2017)

Earlier in his interview, he would often refer to the ANC's power and influence. In fact, he believed that the police officer who was in charge of his case was an ANC member and this meant that he was directly influenced to possibly manipulate the processes. C15 and C12 were both arrested for allegedly threatening

the former ward councilor. Although C15 was only arrested much later and held in custody for 2 days, C12 ended up spending approximately three months in prison awaiting trial before being released. Here, we see clearly how arrest and detention and the legal process are manipulated and used to punish those who challenge the power of the ANC.

For the students, the experience of short-term incarceration was often explained as a tool that the university and the government used to punish them or teaching them and the overcome the student protests. S6 explained how, as one of the earliest to have been arrested during the 2016 protests, the impact of further arrests successfully derailed the student movement. He argues as follows:

> [I]t was a tactic for both Wits University and the State to suppress the movement, you know, of which they successfully did, because I after […] me and my co-accused to get arrested […] the movement sort of focused all it's energies on bailing people out, mobilizing lawyers, and so whatever that was happening on campus stopped for that particular time, '*yabo'* [you see] so my arrest, I still feel it was unnecessary, just a tactic. But it worked for them: Wits and the State (S6 2017).

For many students, the university and the government shared the interest of restoring order by suppressing the student protests. The excessive use of force and the high numbers of arrests confirmed what many students perceived to be a gross abuse of power and the weaponization of the law. Protest activity was criminalized through various court interdicts and the police as well as private security enforced this.

Some of this criticism of the law bordered on extreme pessimism and presented the law completely dysfunctional and unenforceable. C16 went as far as denying the existence of the law, by saying: "There is no law in my country. South Africa is the lawlessness country. Ja. Everyone can do everything he or she likes at any time" (C16 2017). For C19, the law "completely out of control" (C19 2017) and when I asked C17 about the law in South Africa, he replied: "Law? No… our South African law is disgusting […] Serious, I can say there is no law in South Africa" (C17 2017). One of the students put it this way:

> Hey, there's no law. We are literally in a 'Banana Republic'. Like, there is no law. I mean there are people who, I mean, Zuma's got rape charges, he's not set a foot in a jail, you know. There is no law in South Africa. It's literally just

> *choosa-maskhethela* [chose what you like]. Like, if I want to take you to jail, I can take you to jail. Simple. If I want to take you out of jail, I can take you out of jail. And the problem is a lot of fairness gets lost in the process cause there are people who deserve, you know, to be in jail- I'm not saying that people don't deserve to be in jail. There are people who intentionally and repeatedly violate other people and they should be in jail but, I mean, that doesn't happen, you know [...] there's nothing fair about this, the legal system of South Africa (S7 2017).

The irony, however, is glaring: having gone through the process of being arrested, detained, and ultimately released (with the assistance of legal representation) has to be evidence of there being some sort of a functioning system. These criticisms do, however, raise the issue of legitimacy. S7's response started as cynical but quickly became a very passionate argument about impunity and its erosion of legitimacy.

If these individuals, who have been subjected to the law in the form of the criminal justice system scoff at its very core: the concept of authority and the presumption of its legitimacy, then does this say about the state and the stability of South Africa's political order? If Weber's argument about obedience and its converse, domination, being possible "by virtue of 'legality', by virtue of belief in the validity of legal statute and functional 'competence' based on rationally created rules" then how do we make sense of the authority's abuse of these rules?

Perceptions from 'without': Migrants

The conceptual understanding of the migrant community as being 'without' the law speaks to the relationship between migrants and the South African state. In a compelling argument, Klaaren and Ramji suggest that South Africa, mainly through its migration policing policy and immigration legislation, "produces the 'illegal immigrant"(2001). Here, the 'illegal immigrant' is constituted as being both beyond and in opposition to the law. This argument has been taken up through the use of Agamben's 'state of exception' (Mosselson 2010, 643; Sutton and Vigneswaran 2011, 628). Through this framework, the policing and government that oversees the lives of migrants in South Africa perceive them as a threat to the sovereign power of the state and the 'community', thus allowing for "the suspension of the legal order" (Mosselson 2010, 642). Under such conditions, the South African state deals with migrants extra-legal mechanisms that allow it to exert power over the migrant

population in the name of 'social cohesion' and the 'restoration of order' (Mosselson 2010, 643). As argued by Steinberg, migration policing is often used by the state to 'perform' its duties and as a way of bolstering its own image within society (Steinberg 2011, 12; Klaaren and Ramji 2001, 44). In addition to a predominantly hostile bureaucracy, migrants in South Africa are confronted with an intolerant society in which xenophobic sentiments are circulated between the state and society (Crush 2001; Klaaren 2011; Monson 2011).

In contrast to the confrontational political expression used by community and student activists, migrants are 'without' and external to the law in the sense that they "by and large, do not organize collectively, but instead deal with the Department of Home Affairs on an individual level" (Klaaren 2011, 144). Polzer and Segatti's findings actually reveal that sustained political mobilization around migrancy has largely been limited even after the xenophobic attacks of 2008 (2011, 220–21). Therefore, while migrants have the capacity to be more politically expressive, most encounters with the law are on an individual basis, as Klaaren notes. Furthermore, these encounters with the law are largely necessitated by need or they are involuntary, resulting in them being caught in a web of criminal or immigration status-related issues. The police and the DHA (among others) have been afforded sweeping discretionary powers that have left migrants vulnerable to deportation or various forms of discrimination and harassment (Steinberg 2011; Klaaren and Ramji 2001).

Of the migrants that I interviewed, most shared mixed perceptions of the law in South Africa. Surprisingly, only one had a negative perception of the law and two had a very positive perception of the law in South Africa. A striking feature of the interviews that I conducted with the migrants was that when they would criticize the law, such criticism would often be accompanied by praise. As such the main criticisms discussed below will be accompanied by some of the praises and qualifiers shared. The notion of the externality to the law, described above, was shared as part of the perceptions that migrants had of the law in South Africa. Migrants expressed how their experiences of the law remind them of their 'foreignness' because of the way that they are treated and how they end up involved with the law. From the narratives shared, it became clear that their identities as foreigners was either the cause of their arrest and detention because of how they were perceived by law enforcement. That is to say that being foreign becomes a matter of law but also a matter of prejudice. An example of such a perspective comes from M13's account:

> *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? (M13 2017).

M13 was arrested for deportation but was later released after spending approximately four months in detention at Lindela. For him the law in South Africa is legitimate, however, as he argues, it is negatively impacted by the administration of the law carried out through state officials. For him, they hold xenophobic sentiments that influence how they do their jobs. Being on the receiving end of such sentiments, M13 was made to feel external and unwanted through the ways that he was treated. M20, who was arrested and detained for eight weeks after being wrongfully accused of robbery, shared similar sentiments:

> Er, the law in South Africa, apart from what the politicians are doing, the law in South Africa is ok. But the police, they have to step up a bit by treating one another equal. You don't have to look at somebody's background, where he come from, who he is. Maybe he don't have money to give you as a token, then he has to go to jail [...] So many of us came out, we are not doing business. That's what led me not to be a trader anymore because my things were sold to be paid- to use the money to pay the lawyer then when I come out, I wouldn't be stranded on the street, I have to look for another house to stay so I had to sell my clothes and go back to life. That's what makes me go out of the street now. To look for a place where I will work and being get paid and eat as a human being. Yes (M20 2017).

In his interview, M13 lamented the fact that his arrest was both arbitrary and unnecessary. He perceived the experience to be the police's fault for not investigating

and for what he believed was corruption. Implicit in his critique is an account, is the fact that he was treated the way that he was treated because of his identity as a foreign national and his refusal to bribe the police in other to get out of jail. M13 and M20 are from the DRC and Nigeria respectively. Their perceptions of the law both reveal an acceptance and acknowledgment of the law's place in society while at the same time, sharing valid criticisms of the law because of their experiences of law.

M13 and M20 do not provide reasons for their perception of the law as 'good' or 'ok', and while this can be read as an effort to perhaps appease me, the researcher who is seemingly South African. This could also be read the need they may feel to present a moderate perspective that can be representative of other migrants. Some of the other migrants interviewed perceived the law in South Africa in a positive light because they would juxtapose it to the law in their respective home countries. M4, one of the migrants who spoke very passionately about the law in South Africa, often referenced his experiences of the law in Nigeria as a way of explaining how the law in South Africa is much better. When I asked him about how he viewed the law, he responded as follows:

> The law of South Africa now […] 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 (M4 2017).

Another migrant from Nigeria [M24], who also perceived the law in South Africa positively, shared similar sentiments:

> I say it's nice now, you see, *ja*, it's nice because it's not like err…their law is bad, you understand, because we got a corrupt government in Nigeria. It's not like in Nigeria, you understand. South Africa here, when they come, they search you, search you, if they didn't find anything from you, you can go you see? It's not like that time again. Now everything is nice you understand?

M24 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. He explains how, despite his unjust experience of the law in

South Africa, he still views the processes as legitimate. Not only that but that he also views the law in South Africa as better than the law in Nigeria. Although M1 perceived the law in South Africa negatively, he too noted that his experience of the police and later the immigration officials at Lindela was a better experience than when he was arrested by the military in the DRC before he fled for South Africa. He said:

> That time it was so hard because it was beating us. You can see people was bleeding, like myself, I was bleeding. So they didn't give me any Panado, they didn't give me any tablets so it was tough for me. It was tough. Then in Lindela, it's the deportation centre. So some times they give us Panado. You can find something to drink like, for coughing. It's better (M1 2017).

Some of the other migrants would specify, like M1, what things, in particular, made their experience of the law in South Africa a significantly better experience than previous experiences in their home Countries. Their perceptions do not change the widespread criticisms that have been leveled at Lindela and the criminal justice system. However, such perspectives cannot be taken for granted in so far as they reveal the ways that migrants experience and perceive the law in South Africa. These perspectives add nuance to what could otherwise be single and simple narrative of migrants' experiences of the law as no more than gloom. The danger, however, is that such 'nuance' could be mistaken for a celebration of policing and the bureaucracy that governs the lives of migrants – both of which are still ridden with challenges. Such perspectives, along with the various ways that the experiences were rationalized according to different frames, reinforce the law's power in interesting ways. The following section takes up this discussion.

ON LEGAL HEGEMONY…

Antonio Gramsci's use of the term hegemony rested on what he viewed as the interplay between coercion or force and consent (Gramsci 1999a, 248). For Gramsci, the flow of power within a parliamentary regime depends on a careful balance between force and consent, "without force predominating excessively over consent" and that where force is used, it appears "to be based on the consent of the majority" (Gramsci 1999a, 248). Weber's conception of rule based on legitimacy echoes a

similar sentiment: the state's domination is based not only on its claim of the "monopoly of the legitimate use of physical force", but also on its ability to derive obedience on the basis of "domination by virtue of legality" (Weber 1958, 78–79). As mentioned above, this is essentially owed to a belief in the legitimacy of the laws and practical capability founded on "rationally created rules" (Weber 1958, 78–79). This encapsulates the consent that Gramsci writes of. This helps us to begin accounting for the ways in which hegemony or dominance (based on some kind of legal order) is sustained at the outset.

Legal consciousness scholarship helps us to understand how hegemony (of the law in particular, and of legality in the broader sense) is sustained at a social level in much greater detail. It also extends our understanding beyond the initial 'moment' at which consent is reached, by leading us towards a narrative of legal hegemony's place with within society and the inner workings of its daily and commonplace preservation at the social level from a regular. For Ewick and Silbey, legal hegemony lies within the contradictions that exist between the forms of legal consciousness they identify (before, with, and against the law). These contradictory images of law collectively "constitute a hegemonic conception of law" (Ewick and Silbey 1998, 231). As they put it:

> Empirically, the threads we analytically describe as independent schemas (before and with) require each other in order to be intelligible and thus not separable, Challenges to the legality for being only a game, or a gimmick, can be repulsed by invoking legality's transcendent reified character. Similarly, dismissals of law for being irrelevant to daily life can be answered by invoking its gamelike purposes. Through these forms of consciousness (and opposition between them), legality can be an uncontested and unrecognized power that sustains every day life… [I]t is precisely because the law is what it is and what it is not, both general and particular, both here and not here, sacred and profane, something to stand before and the play with, that it is hegemonic (Ewick and Silbey 1998, 231–33).

The various images of the law and the multiplicity of ideas and perceptions that are held of the law all contribute to maintaining its hegemonic status. The fact that the law can be many things at once in various places encompassing almost every aspect of life itself allows for its power is reinforced. As such, for Ewick and Silbey, the law's hegemonic status rests on its commonplace existence in everyday life. This

account presents an intentional bottom-up understanding of the law's power by rejecting a top-down or even 'law first' analysis of the law's place in society.

This understanding of the law and its power is reiterated by Sarat's account of legal consciousness amongst welfare recipients, in which he quotes Barbara Yngvesson's instructive analysis of legal hegemony:

> [T]he spirit of the law', while embodying the concerns of a powerful and dominant professional elite, is not simply invented at the top but is transformed, challenged and reinvented in local practices that pro- duce a plural legal culture in contemporary America. Recognition of plurality [or difference] does not eclipse the reality of pervasive cultural understandings and values . . . Hegemony assumes plurality: '[It] does not just passively exist as a form of dominance. It has continually to be renewed, recreated, defended, and modified. It is also continually resisted, limited, altered, challenged by pressures not at all its own.' . . . The interpretation of key symbols . . . is contested, while the dominance of a particular structure of differences in society is left unquestioned. Only by viewing legal culture in this dynamic way can we explain popular consciousness as a force contributing to the production of legal order rather than as simply an anomaly or a pocket of consciousness 'outside' of law, irrelevant to its maintenance and transformation (Yngvesson 1989, 1693 as cited by Sarat 1990, 377).

For Sarat, the experiences of the welfare poor show that they too challenge and contest the "legitimizing symbols of the law" such as the ideas of the law as objective and rule-bound (Sarat 1990, 377). Like those who viewed themselves as 'against the law' in Ewick and Silbey's account, the welfare poor in Sarat's account understand the law beyond its idealized image. They understand the law as imperfect and therefore, and Sarat puts it, "they have a realistic, if not cynical, view [of the law]" because of their experiences and regular encounters with the law through the welfare bureaucracy.

The multiple perceptions of the law that emerged from the interviews with the community activists, student activists, and migrants reflect the complexity and multiplicity that emerges from these works. And as highlighted by Ewick and Silbey, no one image of the law prevails. Multiple, paradoxical, and inconsistent accounts of the law are often shared by the same person, speaking directly to the multifarious nature of the legality (Ewick and Silbey 1998, 51). It is precisely this complexity

within and between the various perceptions of the law in South Africa that the law or legality can sustain its hegemonic position within South Africa's political order.

Throughout the interviews, there are multiple forms of legal consciousness that were expressed both explicitly and implicitly. How they remembered going through and responding to their experiences of getting arrested and then detained revealed different forms of legal consciousness. During their arrests and detention, their responses ranged from being accepting and resigned to the law and its procedures, or they tried to negotiate and manoeuver within the law, or they expressed resistance and defiance and defiance against the law and the way that they were being treated. In a way, this is an account of how they experienced being subjected to the law's power, and more specifically, how distinct parts of the processes and procedures of being arrested and detained were experienced as a form of punishment.
Their expectations of arrest and detention were informed by a variety of sources. There were two forms of expectations that emerged from the interviews: predictive expectations and normative expectations. The predictive expectations included various perceptions, depictions, and experiences of the criminal justice system that could be both personal and/or vicarious. The normative expectations were based on the collectively held ideas that are either legally based or morally and ethically based. These expectations were informed prior to these particular experiences of getting arrested and then detained. Retrospectively enquiring about these expectations as I did through the interviews, it becomes clear that they helped to shape the ways that the different interviewees responded to the various processes and procedures of arrest and detention. From this perspective, these expectations and their influence on their actual responses to the law resemble being brought 'before the law' but also their responses to being 'within the law' and actually encountering the law.

The ultimate perceptions shared by the interviewees are forms of legal consciousness that a drawn from having reflected on these experiences of the law. These perceptions were either predominantly negative (as shared by the community and student activists) or predominantly mixed (as shared by the migrants). These perceptions, I argue resemble forms of legal consciousness that expresses how these groups feel about the criminal justice system and the law more generally. These forms of legal consciousness are therefore a general idea about what is believed to be true about the law in South Africa in light of these experiences of the criminal justice system as either a community activist, student activist, or migrant. This perception

and form of legal consciousness are based on a particular experience of the law and while it may not present a complete account of their legal consciousness, we are still able to learn from these perceptions. However, some of the rationalizing frames that some of the interviewees used to make sense of their experience present unexpected and surprising narratives of how they have come to understand and reflect on their experiences with implications for the ways in which legal hegemony is sustained.

These narratives are especially powerful because they are stories that share some of the ways that people have come to dealing with feelings of shame, humiliation, and regret that are associated with experiences of getting arrested and detained. While these feeling do not disappear, these narratives show that they could be accompanied by feelings of pride, even gratitude, remarkably. These narratives are interpretations that I refer to as 'rationalizing frames'. When I asked how they now viewed their experiences of arrest and detention, some of the interviewees justifiably viewed their experiences nothing beyond an account of injustice. However, others interpreted their experiences differently. These interpretations saw their experiences as more than simply miscarriages of justice. These rationalizing frames feature as the stories that the interviewees share about how their encounter(s) with the criminal justice system and how they fit into their broader archive of life experiences. They help in our understanding of the ways that experiences of short-term incarceration may contribute to the shaping of legal consciousness but also how they contribute to reinforcing legal hegemony.

From the various responses that the interviewees gave, I was able to identify four frames of rationalization. They are: (1) injustices highlight the 'gap'; (2) perceived the personal value of experience; (3) perceived outcomes from experience; and (4) injustices attributed to individual actors. These frames of rationalization are important because firstly, they show that people do not experience and rationalize punishment or injustice in the same way. Secondly, their significance for legal consciousness is that they serve as a bridge between experiences of the law and our broader perceptions of the law. Thirdly, and perhaps most importantly, these rationalizing frames inadvertently reconcile the gap between what was experienced of the law and what was normatively expected of the law.

The irreconcilable gap: Injustices highlight the 'gap'

The first rationalizing frame not only reiterates the injustice of their experiences as examples of the gap between the law of the books and the law in action, but they also highlight the experience as a failure that is attributed to the legal system in South Africa. The interviewees that used this frame to interpret their experiences and as shown above, they had the most critical and pessimistic view of the law in South Africa. These perceptions scoffed at the very idea of there being a functioning legal system in South Africa. These perceptions draw attention to the various examples of the how the law has failed themselves as well as many others as evidence for their criticisms of the law. For the most part, their normative expectations of the law were predominantly positive apart from two student activists (S7 and S8) whose expectations and perceptions of the law in South Africa were both derisive and pessimistic. The expectations were positive in that they all circled around ideas of fairness, protection, historical redress and service delivery, equal and impartial treatment amongst many others. All three groups expressed these ideas.

Although S7 and S8 expressed an awareness of some of the normative expectations expressed by the other interviewees, they based their expectations of the law in South Africa on their predictive expectations. When I asked S8 argued that he had no expectations of the law in South Africa because for him the law was nothing but "an oppressive system" and "money-laundering" scheme that had the power to exploit both victims and perpetrators (S8 2017). For S8 black and poor people suffered the most under South Africa's legal system and his experience of the criminal justice system confirmed the equally negative perceptions that he held of the law. Similarly, when I asked S7 what he expected of the law he replied quite simply: "Nothing. In South Africa? I expect absolutely nothing" (S7 2017, 7). These perceptions, along with those expressed by some of the community activists (C16, C17, and C19), present criticisms of the law that challenge the idea of there being a functioning legal system in South Africa. These accounts, therefore, seem to even lack a frame of rationalization because these perceptions are a rejection of any attempt to 'make sense out of nonsense'. In fact, some of the interviewees suggested developing a completely new legal system because of how far gone they believed this one is.

These overly cynical accounts, however, get away with more than their willingness to acknowledge. They overlook their own implicit commitment and subscription so some kind of legal system in South Africa by virtue of the socio-political identities of being student and community activists. The work of activists assumes a belief in rights and entitlements. Politically organizing around particular objectives and demands, implicitly believes in the possibility of achieving some form of relief that is often provided through legal means. And in fact, South Africa has a long and rich history of victories that come through the legal system. And at the very least, a commitment to the rights to freely organizing and protesting, although heavily frustrated by the growing anti-protest responses of the government, is expressed through actually taking part in the activity. Therefore, through their very activism, the supremacy of the law as the final arbiter and protector is sustained. Legal hegemony is reinforced even when its power is deliberately resisted.

Reconciling the gap: the remaining frames of rationalization

Conversely, the other three rationalizing frames reveal that although the interviewees recognized and understood their experiences as cases where the law did not work, the law had failed them, or that power was abused etc. they now shared interpretations that attached meaning to these experiences and these meanings, inadvertently help to reconcile the gap between the various injustices that they experienced and the normative expectations of the law that they also expressed. This, I argue, helps to reinforce legal hegemony. It is reinforced through a framing of the experience as a failure that is not entirely attributed to the legal system as a whole. The interviewees that used these frames displayed different forms of legal consciousness (in their responses to arrest and detention and in their overall perceptions of the law). Some viewed it as an imperfect and flawed framework while others maintained negative views of the law.

All three frames express some attempt to reconcile the gap although they also unintentionally reassert the law's power in interesting ways. And here Robert Gordon's (R. Gordon 1982) interpretation of Gramsci's notion of hegemony is particularly apt:

> … Antonio Gramsci's notion of "hegemony," i.e., the most effective form of domination takes place when both the dominant and the dominated classes

> believe that the existing order […] is satisfactory, or at least represents the most that anyone could expect, because things pretty much have to be the way they are (R. Gordon 1982; Crenshaw 1995, 108).

These frames of rationalization represent what Crenshaw, quoting Gordon again, describes as "the many thoughts and beliefs that people have adopted which [may] limit their ability 'even to imagine that life could be different and better'" (Crenshaw 1995, 108). These three frames ultimately reassert the law's dominant and hegemonic status within society.

The perceptions that rationalized the experiences of arrest and detention according to some kind of perceived personal value of the experience, expressed surprising positive reflections on the experience. This frame reveals a startling acceptance and embrace of their experiences in spite of the gross injustices that accompanied their arrests and detainment. They were generally a positive outlook that included ideas around religion and divine intervention, lessons learned and the benefits of the experience. M24, who was wrongfully arrested and eventually charged with a drug-related matter that took place within three months of his arrival in South Africa, described his experience as follows:

> 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… (M24 2017).

M4 shared similar sentiments that also included a religious outlook on his time in detention:

> 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. (M4 2017)

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. For M4 and to some extent M24, their experiences formed part of a divine plan for them to learn about how the law in South Africa works. From M24’s account, we learn how in light of his experience of arriving in South Africa back in 2007 and his arrest and subsequent 3 years spent in incarceration within 3 months of his arrival formed part of God’s plan to protect him. 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 learned, 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.

The community activists rationalized their experiences of arrest and detention in terms of the tangible outcomes. These came in the form of Thembelihle now receiving various socio-economic services from the government. For other activists, Thembelihle’s continued existence and resistance of the removal was a victory in and of itself. These activists made sense of their arrests and detention by attributing these tangible outcomes to their experiences because they form part of their struggle for Thembelihle. When I asked what they made of their arrests and time in detention some of the responses reflected these sentiments:

> When I look back we usually make joke out of it when we are together because it is through those kinds of actions that makes Thembelihle today to be as it is today because the aim of the authorities was to take Thembelihle out of here, to somewhere else so we had to resist against that so we sometimes make joke out of it, say *ja*, that is our sweat, you know, that is how we went through (C16 2017).
>
> Well today [my arrest is] a badge of honour [laughs], you know […] ok, when it happens it's hard for those arrested and everyone is unhappy including those who are outside feeling bad, trying to get you out and then there's a real possibility of being convicted, you know? You can get 2 years, 5 years, you know, it's not a joke. *Ja*. But when it's all over, then it's viewed more heroically […] And in any case, after that protest, the government relented and granted Thembelihle rights [to get services] because the [plan] was to relocate them and that went on for 12 years (C10 2017).

> […] *Ha ke sana taba because le today ke nna mo Thembelihle, ke na le motlakase, ho na le ntho tse ngata, ho na le dichanges tse ntjha tse ntseng di tla because of nna le macomrade a mang. Ke a di thabela, ehh..ha se hore ke moo ke fellang teng, ke santsane ke ya pele.*
>
> […] I do not care because I`m still here in Thembelihle today, I have electricity, a lot of things, new changes are coming because of me and other comrades. I`m happy with them, and it's not like it ends there, I'm still moving forward (C18 2017)

The quotes highlight the meaning that these outcomes have attached to the very long history of protest and struggle. For the activists of Thembelihle, the harassment that they described, the grievous wounds that some had suffered, and the desolate and punishing experiences of arrest and detention take on a greater significance and inadvertently contribute to generating some of the successes won by the movement. Such an account leaves hegemony untouched because although their experiences epitomize the ways that the law has failed them, their victories are often secured through winning legal battles. The various services that they receive and their ability to resist the government's effort to relocate the community has partly been the result of winning arduous and protracted battles. Even their eventual releases following their arrests are also the result of securing legal representatives such as SERI, Centre for Applied Legal Studies (CALS), and other pro-bono legal support. As such, the law can be both predator and saviour. Through these victories, the law is vindicated and its power is sustained.

Some of the interviewees rationalized their experiences by attributing the injustices that they experienced to individual actors. Here, the police, immigration officers, and poor legal representatives are part of the reasons why gross injustice was experienced at the hands of the law. For M1 and M13, both of whom were arrested and taken to Lindela, the Home Affairs officials and Immigration officials held expressed xenophobic sentiments and treated them as such. They put it as follows:

> […] 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. […] 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 (M1 2017)

> *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? (M13 2017, 13)

For them, 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. Not only were their experiences uniquely a result of their migrant identities, but their experiences highlight that very often, immigration officers are the gatekeepers that stand between them and a legal stay in South Africa. In fact, M1 argued in his interview, that he believed migrants in South Africa are forced into

a precarious existence where they have to live in the shadows of the law – a sentiment argued.

Others attributed a lot of the criminal justice system's failure and their unfortunate experiences to police conduct. For M20 and M21, they argued that they recognized the legitimacy of the law, however, the police corruption and incompetence resulted in their prolonged stay in remand detention. S2 put his criticism as follows:

> The law and people that work for the law are different. The people that work for the law are not fair but the law is fair. The law enforcers are not fair but the law is fair. The law allows for me to lay charges against those people for beating me up, in that it is fair but the enforcement, after I lay those charges, the enforcers won't take those charges seriously because they'll be protecting each other (S2 2017).

In accounting for the way that he and his comrades were treated, S5 described the police and their attitude towards their work as follows:

> […] 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 (S5 2017).

This rationalizing frame reinforces the legal hegemony by refusing to see the misconduct of officials and legal personnel as part of a systemic problem. The law maintains its legitimacy because individuals are responsible for their unjust experiences. Therefore, we can assume that without these particular individuals, the participants may believe that their experiences of the law would have been different and possibly much closer aligned to their normative expectations.

CONCLUSION

This study found that that the community activists, student activists, and migrants experienced and understand the law in terms of their sociopolitical identities. The interviews revealed that they believed that the ways that they were treated and even arrested, to begin with, had a lot to do with the socio-political identities. These experiences of arrest and detention contributed to shaping their legal consciousness through the ways that either tried to make sense of the experiences or not. For the interviewees who made an effort to rationalize their experience, those frames of rationalization helped to bridge the gap between their experiences of the law and the ideal and normative expectations of the law. These participant's efforts to attach meanings to the experiences unexpectedly contributed to sustaining legal hegemony in South Africa. For those who made not effort attach any meaning or to rationalize their experiences, the gap between what the law *is* and what the law *ought to be*. These participants, therefore, refused to actively reconcile the gap in the law. These participants, however, unknowingly also contribute to sustaining legal hegemony, because of their everyday interactions with the law that lie beyond their exceptional experiences of arrest and detention.

As shown by Ewick and Silbey, legal hegemony derives its power from the commonplace of the law. The multiple perceptions and experiences of the law all contribute to reinforcing the power of the law precisely because it is able to be more that one thing. Areas in which the law is noted to have failed, like in the experiences of my participants, are not definitive of the laws complete failure and irrelevance. All the other common and taken-for-granted areas in which the law does work, help to restore the law's image. Therefore, examples of when the law has broken down are manipulated by those in power, or when the law is unfairly applied, are only part of the law's story. The other part is made up of stories that redeem and uphold the law's hegemonic status.

The forms of legal consciousness that emerged throughout the interviews resemble the multitude of the participants' responses to their realities of arrest and short-term incarceration. Their responses included a recollection of what they did, thought, and said in the moment but also the more ripened reflections that have had enjoyed the benefit of time to be refined and revisited. The forms of legal consciousness that I identified are an effort to classify some of the broader ideas and

perceptions that we may have of the law and at any given moment in time. I believe that how the community activists, student activists, migrants perceived the law during their experiences of arrest and detention as well as the broader forms of legal consciousness that emerged from my interviews with them are not necessarily unique to the socio-political groups included in this study. But most importantly, no single form of legal consciousness is a complete and self-contained story of the law, as highlighted by Ewick and Silbey (Ewick and Silbey 1998, 228).

In the context of arrest and short-term incarceration, the participants sometimes described their reactions at the time in ways that displayed either their 'acceptance' or 'resignation' to the law. They would describe moments of mere acceptance of their unfortunate circumstances, or simply shrug off obvious and gross violations because of their helplessness in the face of great power and dominance. Some would also describe their engagements with the criminal justice system as efforts and attempts to 'negotiate' with the system or 'manoeuver' within it. These engagements were characterized by efforts to interact with the police "as people" or to stall the formal processes in an effort to 'buy' more time. Others would share their various moments of 'defiance' and 'resistance' against what they viewed as unjustified and excessive abusive within the criminal justice system and at the hands of different officials within the system. Here, participants reflected on the moments when they felt the courage to speak up for themselves when they felt they needed to or the various actions that reflected defiance and an assertion of their perspectives. As mentioned earlier, these moments of either acceptance and resignation, negotiation and manoeuvring, or defiance and resistance need to be appreciated and understood in terms of a context of power and domination. The criminal justice system is that context of power and domination. The holding cells at police stations, the courts in which participants would appear in and the prisons that they were remanded to are all sites of this power and domination.

All of the interviews with the community activists, student activists and migrants highlighted this idea of their experiences of being confronted with the dominance and power of the criminal justice system. Their responses to this reality were varied and incredibly complex. While some participants expressed their disapproval of the unfair treatment they were given, they would find it necessary to emphasize their belief in the rule of law. Others would acknowledge the legitimacy of their arrests, while at the same time mocking the idea of a justice system when

contrasted with the widespread misconduct and abuse of power that they witnessed within the system. As such, it becomes especially important to emphasize here, that no expression of legal consciousness should be seen as one form of legal consciousness over another. The expressions of legal consciousness that I have shared in this study are not self-contained, complete or even exhaustive. It is possible and very likely that while one may display an overall resistance to the law as they experience it (in a particular context and at a particular time), they may also make efforts to negotiate, or resign themselves to submitting to the law's authority, or even resisting it.

Furthermore, the forms of legal consciousness described as three distinct forms must be understood to be open and to exist alongside side each other. As participants shared their experiences with me, they narrated stories that they actively curated. The interviews are therefore ridden with contradictions, silences, and exclamations about the law, the police, the courts, and their politics. Most of the interviews presented all three strands of legal consciousness, complexly woven together to present a momentary image of what these groups of people believe about the law in South Africa.

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APPENDIX

Potential Participant Information Sheet

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

Dear Potential Participant,

My name is Thato Masiangoako. I am a student at the University of the Witwatersrand, doing a Masters degree in Political Studies.

I am carrying out a study to learn more about the experiences of short-term incarceration and how the law in South Africa is understood in relation to those experiences. In order to carry out this research I will be conducting interviews with individuals who have had the experience of short-term incarceration. I am asking you to be part of the study by allowing me to interview you about your experience(s).

I have approached you because you have had the experience of being incarcerated on a 'short-term' basis. This can include being held in a police station before being charged, or held in jail before trial, or possible deportation.

I would like to interview you about your experience of incarceration. This interview will focus on your own experiences of the jail environment, the legal system, and your interaction with legal personnel (both your legal team and police officers). I would also like to learn of your life history as you choose to share it. The interview may take 1 to 2 hours.

I would also appreciate your consent to record our interview with an audio recorder. The audio will later be transcribed and referred to in the findings. The interview will take place at a time and place convenient and safe for both of us.

If your case is ongoing, the interviews will be conducted in a way that ensures that no information related to your case is in included and shared. The interview is completely voluntary on your part and there no advantages or disadvantages to taking part in this study. The information obtained from the interview will be treated with the strictest confidentiality and will only be used for the purpose of this research project. Your identity will be protected through the use of a pseudonym.

If you are willing to take part in this study, please reach me by phone or email in order for us to arrange for the interview to be conducted. Please feel free to contact my supervisor or me at any time for any queries or concerns.

With warm thanks,

Thato Masiangoako
(cell.) 078 107 2083 (email) 563498@students.wits.ac.za

Dr. Julian Brown
(tel.) 011 717 4308 (email) Julian.brown@wits.ac.za

Participation Consent Form

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

I, _____

have had the research explained to me and I understand the following:

I understand that the study's purpose is to learn more about how experiences of short-term incarceration and how the law in South Africa is understood in relation to such experiences. Yes□/No□

I understand that this study is not concerned with the outcome of any cases that I have or may have been involved in. Yes□/No□

I understand that if my case is currently ongoing, I will not, to the best of my ability, disclose any information related specifically to the details of the case. Yes□/No□

I understand that in order for this research to be conducted, interviews will be conducted and audio-recorded and notes will be taken during the interview. The audio will then be transcribed. Yes□/No□

I understand that the information provided in the interview will be treated with the strictest confidentiality and that anonymity will be ensured. Yes□/No□

I understand that the findings of this study may be used in academic presentations and may be published in academic journals; however, my identity will remain protected. Yes□/No□

I understand that my participation in the interviews is completely voluntary. Yes□/No□

Information about the availability of counseling services has been shared with me. Yes□/No□

And I also understand that I am free to ask questions relating to the study at any time. Yes□/No□

I, _____ therefore agree to be part of this research. I also Agree □ / Disagree □ to having the interviews audio recorded.

_____ _____

Signed Date

Interview



Part 1: Life History

First I'd like to begin by asking you some questions about you and your background.

1. Name:
2. Gender:
   Male Female
3. Age:
4. Where do you currently live?
5. Where are you from? *Where is your family from? Nationality?*
    a. When did you come to South Africa?
    b. Why did you leave your home country?
    c. What were your hopes/expectations for life in South Africa?
6. Current occupation(s)? *What are you currently doing?*
7. Can you tell be a bit about your upbringing?

    a. Where were you raised?
    b. How many people lived in your household(s)?
    c. Describe the economic position of your household/family?
    d. What type of an area did you grow up in?
    e. What is your educational background?

Part 2: The experience of short-term incarceration

Now, I'd like to hear about your experience of short-term incarceration.

1. Can you take us back to the day you got arrested and the incident that led to your arrest? So if you can, please describe the circumstances around your arrest? *Why did you get arrested?*

2. When did you get arrested/detained?

3. How long did you spend in jail before you were released?

4. How were you arrested? *Can you describe how you were treated and the process?*

5. Can you describe the conditions?

    a. *Facilities and layout? General description? Please describe it in as much detail as possible*
    b. *What did you do during your time there? If you spent days, please describe a typical day? If it was some hours, how did you spend your time?*

6. How were you treated in jail/detention?

7. Can you describe the process that led to your release? *How did you end up getting released? What were the conditions of your release?*

8. What was your interaction like with the police?

9. If you had legal representation, what was your interaction and relationship like with them?

Part 3: Reflection (Legal Consciousness)

Now, I'd like to turn to your experience of the law in light of this experience but also just your general thoughts on the law and how you understand and experience it. I am interested in the ways you experience and understand the law.

1. Prior to this experience, had you ever had any encounters with the law/courts/jail/ the police?

2. Do you know of anyone close to you who has?

3. With/without past experiences/stories of past experiences, what were your expectations of being in jail?

4. How did your experience differ from your expectations, if at all? *Similarities and differences?*

5. How long did you think you would be in jail?

6. Looking back, what do you think of your arrest?

7. What do you think of your time and experience in jail?

8. What did you think of the entire legal process? *From arrest to release and the conditions of your release*

9. Did you understand the process?
    a. Yes?
        i. *From personal knowledge/experience?*
        ii. *Or was this explained to you? By who?*
    b. No? *Why not?*

10. What do you expect from the law in general?

11. What do you expect from the law in South Africa?

12. Are these consistent? *Why or Why not?*

13. How does your experience relate to these expectations? *Did your experience match with your ideas of what the law should be like? Why or why not?*

14. What do you understand the duty of the police to be in relation to you and your short-term incarceration?

15. What do you understand the duty of your legal representatives to be in relation to you and your short-term incarceration?

16. Given your experience in jail, what purpose do you understand it to serve? *What is jail for?*

17. How do you the view law in South Africa now, in light of your experience of having been in jail?