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Establishing Legitimacy Through Inclusive Re-Formation: The Necessary Process for Re-Forming the Seattle Police Department

Becky Fish*

I. INTRODUCTION

People across Seattle expressed outrage a young White Seattle Police Officer, Ian Birk, shot and killed an elderly Native American woodcarver, John T. Williams, on August 30, 2010.¹ Mr. Williams was partially deaf and had been standing alone on a street corner holding a piece of wood and a small carving knife.² Almost six months later, King County Prosecuting Attorney Dan Satterberg held a press conference to announce his decision not to charge Mr. Birk for homicide. Mr. Satterberg pointed to Washington's statute providing police officers an affirmative defense to

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¹ See, e.g., Calry Flandro, *Vigil, March Protests Police Violence*, SEATTLE TIMES, Sep. 7, 2010, http://seattletimes.com/html/localnews/2012834472_rally08m.html; Julianne Hing, *Seattle Demands Answers After Cop Shoots Native American Man*, COLORLINES (Sep. 8, 2010, 1:22 PM EST), http://colorlines.com/archives/2010/09/seattle_demands_answers_after_cop_shoots_native_american_man.html; *Responses to Shooting of Street-Carver John T. Williams*, SEATTLE TIMES, Sep. 3, 2010, http://seattletimes.com/html/northwestvoices/2012790412_responsestoshootingofstreetcarverjohntwilliams.html; CNN Wire Staff, *Seattle to Pay \$1.5 Million to Kin of Man Fatally Shot by Police*, CNN JUSTICE (Apr. 30, 2011, 9:36 AM EDT), <http://www.cnn.com/2011/CRIME/04/30/seattle.police.shooting/>.

² Casey McNerthney, *Family: Man Shot by Police Was Deaf in Left Ear*, SEATTLE POST INTELLIGENCER, (Aug. 31, 2010, 10:00 PM), <http://www.seattlepi.com/local/article/Family-Man-shot-by-police-was-deaf-in-left-ear-885252.php>;

homicide charges so long as they do not act with malice.³ Seattleites met this announcement with protest.⁴ Mr. Birk's killing of Mr. Williams—along with other highly-publicized incidents of Seattle Police Department (SPD) officers using excessive force against People of Color, sometimes even accompanied by racial slurs⁵—prompted the US Department of Justice (DOJ) to conduct an investigation of the SPD and initiate litigation against the City of Seattle.⁶

The City of Seattle entered a settlement agreement with the DOJ in 2012 that required reformulation of the SPD's use of force, bias-free policing, and accountability standards. A court-appointed monitor, with input from a newly-formed Community Police Commission (CPC), was assigned to oversee the settlement.⁷ A survey conducted as part of this SPD oversight agreement revealed significantly worse experiences with, and opinions of, the SPD among African-American and Latino residents and a general

³ See, e.g., Julianne Hing, *Seattle Cop Resigns After Native American Man's Killing Ruled Unjustified*, COLORLINES, (Feb. 17, 2011, 11:51 AM EST), http://colorlines.com/archives/2011/02/seattle_cop_resigns_after_native_american_carvers_killing_ruled_unjustified.html; Jonathan Martin, *Why Is it so Hard to Prosecute a Cop? A Question of Malice*, SEATTLE TIMES, Feb. 16, 2011, http://seattletimes.com/html/localnews/2014248676_shootinglaw17m.html; WASH. REV. CODE § 9A.16.040 (2014).

⁴ Seattle Times Staff, *Anti-Police Protesters Return to Seattle Streets*, SEATTLE TIMES, Feb. 18, 2011, http://seattletimes.com/html/localnews/2014271817_protests19m.html.

⁵ Komo Staff, *City to Settle 'Mexican Piss' Civil Rights Lawsuit for \$150,000*, KOMO NEWS (Jun. 27, 2012, 6:24 PM PDT), <http://www.komonews.com/news/local/City-will-settle-Mexican-piss-civil-rights-lawsuit-160550515.html>; Steve Miletich & Jennifer Sullivan, *Seattle Police to Review Tactics, Officer's Conduct After Videotaped Punch*, SEATTLE TIMES, Jun. 15, 2010, http://seattletimes.com/html/localnews/2012122660_coppunch16m.html; Mike Carter, *No Federal Civil-Rights Charges for Former SPD Officer Ian Birk*, SEATTLE TIMES, Jan. 13, 2012, http://seattletimes.com/html/localnews/2017233847_birk14m.html.

⁶ Martin Kaste, *Faith in Seattle Police 'Shaken' by DOJ Investigation*, NATIONAL PUBLIC RADIO (Apr. 6, 2012, 4:49 PM ET), <http://www.npr.org/2012/04/06/150128344/faith-in-seattle-police-shaken-by-doj-investigation>.

⁷ Settlement Agreement and Stipulated Order of Resolution, *U.S. v. City of Seattle*, No. 12-1282 (W.D. Wash. Sep. 19, 2012).

majority opinion that the SPD discriminates based on race.⁸ This evidence suggests that the people of Seattle believe that the SPD does not serve or respond to the needs of all of Seattle—specifically, that the SPD does not serve People of Color.

The ongoing SPD reform process has been riddled with highly-publicized arguments between the mayor, city attorney, US attorney, and CPC over who, if anyone, actually represents the people of Seattle. As agreements and plans for the SPD reform process began, then Mayor Mike McGinn and City Attorney Pete Holmes argued over the City Attorney's role—namely whether the City Attorney represents the people of Seattle or the Seattle City Government.⁹ Subsequently, the DOJ fought the CPC's request to intervene in the litigation as an independent party representing the people and communities of Seattle.¹⁰ US District Court Judge James L. Robart ultimately denied the CPC's request to intervene.¹¹ Prior to Judge Robart's decision, US Attorney Jenny Durkan told the CPC that its role was important but limited and that the DOJ would fight to limit the settlement agreement to two parties (the DOJ and the City of Seattle), adding “[y]ou

⁸ John Anzalone & Brian Stryker, *Memorandum re: Seattle Police Community Survey Findings*, ANZALONE LISZT GROVE RESEARCH 1, (September 18, 2013), available at http://media.wix.com/ugd/c4876a_3d7c39eeafea860592d8d44c3244d4c3.pdf.

⁹ See, e.g., Steve Miletich, *Mayor Clashes with City Attorney over Police-Reform Oversight*, SEATTLE TIMES, Feb. 26, 2013, http://seattletimes.com/html/localnews/2020439359_monitorplanxml.html; Daniel Jack Chasan, *Why Seattle Mayor vs. Attorney Battle Will Likely Return*, CROSSCUT, (March 11, 2013) <http://crosscut.com/2013/03/11/seattle-city-hall/113382/seattles-mayor-vs-attorney-battle-will-return/>; Cienna Madrid, *City Attorney Refuses Mayor's Request to Recuse Himself from Police Reform Negotiations*, THE STRANGER, SLOG, Feb. 27, 2013, <http://slog.thestranger.com/slog/archives/2013/02/27/city-attorney-refuses-mayors-request-to-recuse-himself-from-police-reform-negotiations>.

¹⁰ United States' Combined Response to the CPC's Motion to Partially Intervene and to the City and the CPC's Motions to Extend Certain Deadlines (Document 96), U.S. v. City of Seattle (No. 12-1282) 2013 WL 6185219.

¹¹ Steve Miletich, *Judge Denies Citizen Commission Formal Role in SPD Reforms*, SEATTLE TIMES, Nov. 26, 2013, <http://blogs.seattletimes.com/today/topic/community-police-commission/>.

don't own the community . . . [a]nd you are not the only people getting community input."¹² In response, then CPC Co-Chair Diane Narasaki argued that the community is cynical about the reform efforts because of the widely-held perception that many communities do not have an opportunity to be heard.¹³ These disagreements highlight not only the limitations of relying on existing forms of representative democracy but also the desire of reform leaders to include the people of Seattle in the SPD reform process.

The abuse of power that led to the DOJ litigation, the lack of public trust in the SPD, and the uncertainty about the role and representation of community members in the reform process are symptoms and causes of a deeper problem. The SPD is facing a crisis of legitimacy. To become a truly legitimate police force, the SPD and the City of Seattle must change not only the policies and practices of the SPD but also the process by which those policies and practices are formed.

The SPD, like executive agencies generally, on paper, derives its power from the consent of the governed¹⁴—meaning that the people over whom the SPD exercises authority have agreed to delegate law enforcement power to the SPD. While foundational documents (the Washington Constitution and the Seattle City Charter) declare that the SPD's power derives from the

¹² Mike Carter, *Durkan Tells Citizens Panel that Its Police-Reform Role Is Limited*, SEATTLE TIMES, Dec. 11, 2013, http://seattletimes.com/html/localnews/2022445270_durkanpcxml.html (quoting US Attorney Jenny Durkan).

¹³ *Id.*

¹⁴ WASH. CONST. art. I, § 1 (“All political power is inherent in the people, the governments derive their just powers from the consent of the governed, and are established to protect and maintain individual rights”); Charter of the City of Seattle, Preamble (2007) (“Under authority conferred by the Constitution of the State of Washington, the People of the City of Seattle enact this Charter as the Law of the City for the purpose of protecting and enhancing the health, safety, environment, and general welfare of the people; to enable municipal government to provide services and meet the needs of the people efficiently; to allow fair and equitable participation of all persons in the affairs of the City; to provide for transparency, accountability, and ethics in governance and civil service; to foster fiscal responsibility; to promote prosperity and to meet the broad needs for a healthy, growing City”).

consent of the governed, subsequent legislation relating to the SPD largely places limits on police authority or enshrines the rights of police officers as employees, but does not grant specific powers to the police vis-à-vis the people.¹⁵ The Washington public authority defense statute that shielded Mr. Birk from criminal prosecution,¹⁶ as well as similar provisions in the Seattle Municipal Code authorizing police officers to discharge their firearms under certain circumstances,¹⁷ seems to be a rare positive grant of power to the SPD. However, the Washington statute that shielded Mr. Birk was originally enacted to limit the scope of the public authority defense in response to the US Supreme Court's decision in *Tennessee v. Garner*,¹⁸ and the Seattle City ordinances related to the SPD essentially assign standards for when use of force is reasonable. Thus, those rare laws that seem to be positive grants of power to the SPD are meant to limit rather than grant police authority. Thus, the SPD's legal authority still rests textually in the consent of the people subjected to its authority.

The SPD is facing a crisis of legitimacy because the reality of how the SPD was formed, how its policies are determined, and how it is held accountable do not conform to the theory that the SPD derives its power from the consent of the governed. This article will examine how the SPD may be re-formed as a legitimate police force charged with keeping peace in the City of Seattle. First, both popular and legal theories of legitimacy emphasize the necessity of political participation by people most burdened

¹⁵ See WASH. REV. CODE §§ 43.43.010, 43.43.030, 43.101.095, 10.93.070; SEATTLE, WASH., MUNICIPAL CODE § 3.28.

¹⁶ WASH. REV. CODE § 9A.16.040(3).

¹⁷ SEATTLE, WASH., MUNICIPAL CODE § 3.28.115.

¹⁸ WASH. REV. CODE § 9A.16.040; 1986 c 209 § 3 note (“The legislature recognizes that RCW 9A.16.040 establishes a dual standard with respect to the use of deadly force by peace officers and private citizens, and further recognizes that private citizens’ permissible use of deadly force under the authority of RCW 9.01.200, 9A.16.020, or 9A.16.050 is not restricted and remains broader than the limitations imposed on peace officers”); *Tennessee v. Garner*, 471 U.S. 1, 11 (1985); Martin, *supra* note 3.

by the exercise of government power in order for such power to be legitimate. Second, the SPD was textually formed under a theory that the people consented to its power; however, current and historical restrictions on political participation by People of Color and other oppressed groups undermine the validity of this “consent.” Third, the SPD’s racially discriminatory exercise of power and the political and economic disempowerment of people with criminal convictions further undermine the SPD’s legitimacy. Fourth, Seattleites have demanded limitations on or revocation of SPD power by litigation, public protest, and noncooperation. Thus, in order to establish true legitimacy in the SPD re-formation process, current SPD powers must be presumed illegitimate and people most burdened by the exercise of SPD powers must be specifically empowered in the re-formation process.

II. THEORIES OF LEGITIMACY

The first step in determining the legitimacy of a government or government exercise of power is to analyze what mechanisms or processes of formation and accountability legitimize government power. If the SPD derives its power from the consent of the governed, we must determine what modes of popular consent are legitimate in order to determine whether the SPD does, in fact, have the consent of the governed to exercise any power and, if so, to what power the people have consented.

A. Popular Theories: Critiques from Black Critics Confronting the Legal System

Throughout US history, scholars and theorists not rooted in the US legal system, so not dependent on Anglo-American texts,¹⁹ have concluded that

¹⁹ The US legal system is rooted in constitutions (federal and state) proposed by a small group of White men and courts that depend on precedent decided overwhelmingly by a narrow segment of White men. Over 80 percent of judges that have served on the federal bench are White men. See FEDERAL JUDICIAL CENTER, HISTORY OF THE FEDERAL

the US criminal punishment system is illegitimate.²⁰ These scholars and theorists propose theories that, in many ways, have been mirrored by the legally-based theories of democracy and legitimacy articulated by legal scholars (discussed in section B). The US criminal punishment system developed to oppress Black Americans following the formal abolition of slavery and evolved to continue oppressing People of Color.²¹ Throughout this evolution, Black activists and scholars in particular have confronted this system and advocated disregard for the authority of the US criminal punishment system because it targeted and oppressed Black people without justification while simultaneously denying Black people full citizenship or the ability to participate in the formation of the law.²²

Ida B. Wells, a prominent anti-lynching activist in the late nineteenth and early twentieth centuries,²³ exposed the falsity of any criminal justice argument for lynchings.²⁴ Wells critiqued the rhetoric used to defend lynchings, often perpetrated by mobs of White men, that Black men raped White women, arguing “the South is shielding itself behind the plausible screen of defending the honor of its women. This, too, in the face of the fact that only *one-third* of the 728 victims to mobs have been *charged* with rape, to say nothing of those of that one-third who were innocent of the charge.”²⁵ Wells further argued that the law refused to protect Black men, so Black men should arm and defend themselves.²⁶ Wells’s advocacy exposed the use of the criminal punishment system to create narratives that could justify

JUDICIARY: BIOGRAPHICAL DIRECTORY OF FEDERAL JUDGES, 1789–PRESENT, <http://www.fjc.gov/history/home.nsf/page/judges.html> (last visited Jun. 15, 2014).

²⁰ See *infra* notes 23–49.

²¹ See generally, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW; MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 20–58 (New Press 2012).

²² See *infra* notes 23–49.

²³ See Richard Wormser, *Ida B. Wells*, PBS, http://www.pbs.org/wnet/jimcrow/stories_people_wells.html (last visited Mar. 12, 2014).

²⁴ See generally PAULA J. GIDDINGS, *IDA: A SWORD AMONG LIONS* (Amistad 2008).

²⁵ *Id.* at 61 (emphasis in original).

²⁶ *Id.* at 70.

horrific violence against Black people, a function the criminal punishment system continues to perform today.

Hubert Harrison, founder of the New Negro Movement and organizer in the Socialist Party of New York in the early twentieth century,²⁷ also argued that a government that oppresses people is owed no respect by the oppressed. He explained,

[A] subject is one “who owes allegiance to a government, its laws and officials without having, as a right, the power to make or remake that government or those laws,” while a citizen is “the source of that government” to whom allegiance is owed.²⁸

Thus, a person is not a citizen unless she or he is the source of her or his government’s power and is also able to check that power. Harrison further argued that the law does not respect or protect Black people, so Black people do not need to respect the law and thus must personally defend themselves as necessary.²⁹ Harrison articulated clearly that denial of democratic power, and thus denial of the ability to check or consent to government power, is a denial of citizenship.

Doctor Martin Luther King Jr. similarly articulated the position that people should not be bound by discriminatory laws when they were also excluded from the political process that created the laws. He explained, “an unjust law is a code which the majority inflicts upon the minority, which that minority had no part in enacting or creating, because that minority had no right to vote in many instances, so that the legislative bodies that made

²⁷ See *Hubert H. Harrison Papers, 1893–1927; Biographical Note*, COLUMBIA UNIVERSITY LIBRARIES RARE BOOK & MANUSCRIPT LIBRARY, http://www.columbia.edu/cu/lweb/archival/collections/ldpd_6134799/ (last visited Mar. 12, 2014).

²⁸ JEFFREY B. PERRY, *HUBERT HARRISON: THE VOICE OF HARLEM RADICALISM, 1883–1918*, 28 (Columbia University Press, 2008) (quoting Hubert Harrison).

²⁹ *Id.* at 299–306.

these laws were not democratically elected.”³⁰ Dr. King further declared that “we will not obey unjust laws or submit to their unjust practices.”³¹ Though Dr. King is often remembered for his role in challenging cultural racism, he also exposed the illegitimacy of laws that imposed an unjust burden on a minority of the people while simultaneously denying that minority an opportunity to shape those laws. This theory was mirrored decades later in John Hart Ely’s political process theory of constitutional review (discussed in Section B).

The Black Panther Party, formed in Oakland, California, in the late 1960s, argued that police were illegitimate because of their oppressive practices. The Party demanded “an immediate end to police brutality and murder of Black people, other People of Color, [and] all oppressed people inside the United States,” and also declared the right of such oppressed people to defend themselves against this illegitimate institution.³² The Party’s first point in its platform, however, was a demand for true democratic power: “We believe that Black and oppressed people will not be free until we are able to determine our destinies in our communities ourselves, by fully controlling all the institutions which exist in our communities.”³³ These driving principles of the Black Panther Party articulate a theory that a police force that discriminates and oppresses people is not legitimate and is owed no deference.

³⁰ MARTIN LUTHER KING JR., *LOVE, LAW, AND CIVIL DISOBEDIENCE* (1961), reprinted in *A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING, JR.*, 43, 49 (James M. Washington ed., HarperOne 2003).

³¹ Martin Luther King Jr., *The Case Against Tokenism* (1962), reprinted in *id.* at 106, 110.

³² Black Panther Party, *Ten Point Platform*, Point 7, DR. HUEY P. NEWTON FOUNDATION, available at <http://blackpanther.org/TenPoint.html> (last visited Jun. 15, 2014).

³³ *Id.* at Point 1.

Assata Shakur, an exiled political prisoner and former member of the Black Panther Party and the Black Liberation Army,³⁴ further emphasized both the current and historical illegitimacy of the US government.³⁵ Shakur argued that democratic representation was a farce,

Those who believe that the president or the vice-president and the congress and the supreme kourt run this country are sadly mistaken. The almighty dollar is king; those who have the most money control the country and, through campaign contributions, buy and sell presidents, congressmen, and judges, the ones who pass the laws and enforce the laws that benefit their benefactors.³⁶

In her “To My People” speech recorded from prison, Shakur further criticized the hypocrisy of the history of the United States that criminalizes acts of poverty and resistance by People of Color while refusing accountability for the White people in power who “stole millions of Black people from the continent of Africa,” who “rob[bed] and murder[ed] millions of Indians by ripping off their homeland,” and who “murder[ed] over two hundred fifty unarmed Black men, women, and children, or wound[ed] thousands of others in the riots they provoked during the sixties.”³⁷ Shakur’s critique emphasized both the current problem of political exclusion of People of Color as a source of institutionalized racism and the historical foundation of the United States and its institutions.

Though himself a legal scholar, Paul Butler, a civil rights and criminal law scholar and professor of law at Georgetown University,³⁸ draws on critiques of the US criminal punishment system in hip-hop music and

³⁴ See, e.g., Mychal Denzel Smith, *Assata Shakur Is Not a Terrorist*, THE NATION, May 7, 2013, <http://www.thenation.com/blog/174209/assata-shakur-not-terrorist#>.

³⁵ See generally ASSATA SHAKUR, ASSATA (Zed Books, Ltd. 1987).

³⁶ *Id.* at 139.

³⁷ Assata Shakur, *To My People*, Speech Recorded in Prison (Jul. 4, 1973) *reprinted in id.* at 49–53.

³⁸ See Paul Butler, GEORGETOWN LAW, <https://www.law.georgetown.edu/faculty/butler-paul.cfm> (last visited Mar. 12, 2014).

culture to find a legitimate theory of criminal justice that “would enhance public safety and treat all people with respect.”³⁹ Butler argues that hip-hop is the medium that best represents the interests of people burdened and harmed by the criminal justice system, as “[m]any people in the hip-hop nation have been locked up or have loved ones who have been.”⁴⁰ Butler argues that criminal justice theories proposed by hip-hop artists are more legitimate because they come from the people most bearing the burden of the system: “These voices are worth listening to; they evaluate criminal justice from the bottom up. Our current punishment regime has been designed from the top down, and that, in part, explains why many perceive it to be ineffective or unfair.”⁴¹ In summary, Butler proposes that those targeted or burdened by the criminal justice system must contribute to the system’s formation in order for the system to be trusted.

Butler explains that hip-hop respects “African-American and Latino men. It rejects the stigma that the criminal justice system puts on them.”⁴² Rather than stigmatizing the prisoners, “prison, according to the artists, stigmatizes the government.”⁴³ Butler made this idea concrete, explaining “[w]e are supposed to be disgusted with the people the law labels as criminals, but that would mean we are disgusted with one in three black men.”⁴⁴ In other words, Butler suggests that hip-hop encourages society not to lose respect for or disempower people labeled as criminals, but rather to lose respect for and disempower a system that labels so many Men of Color as criminals. He explains that hip-hop “champions the human rights of those that society chooses to call criminals as enthusiastically as the rights of the falsely

³⁹ PAUL BUTLER, *LET’S GET FREE; A HIP-HOP THEORY OF JUSTICE* 123 (New Press 2009).

⁴⁰ *Id.* at 124.

⁴¹ *Id.* at 134.

⁴² *Id.* at 131.

⁴³ *Id.*

⁴⁴ *Id.*

accused.”⁴⁵ In many ways hip-hop champions the rights of people convicted and imprisoned in the criminal justice system in the way that legal scholar William J. Stuntz (discussed in Section B) argues courts should.⁴⁶ Butler suggests that hip-hop’s vision of a better criminal justice system comes close to the Rawlsian theory that “the law is most just when it is made by people who don’t know how they will fare under it.”⁴⁷ This theory supposes that lawmakers would be incentivized to improve the status of the least well off if they may themselves end up in the position of the least well off.

Butler further highlights hip-hop’s argument that prisons are a means of political oppression rather than just and humane punishment. He quotes Robin Kelley, scholar of African-American and African Diaspora and professor of history at the University of California at Los Angeles,⁴⁸ to say “[p]rison is not designed to discipline but to corral bodies labeled menaces to society; policing is not designed to stop or reduce crime in inner city communities but to manage it.”⁴⁹ Hip-hop traces both the under-policing of wealthy people and corporations and the over-filling of prisons with poor people and People of Color to the exaggerated political influence of corporate wealth.⁵⁰ Thus, hip-hop traces the failures and illegitimacy of the criminal punishment system to corruption of the democratic process by the outsized influence of money.

⁴⁵ *Id.* at 144.

⁴⁶ See generally William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780, 781 (2006).

⁴⁷ BUTLER, *supra* note 39, at 133 (citing JOHN RAWLS, *A THEORY OF JUSTICE* (Belknap Press of Harvard University Press 1971)).

⁴⁸ Robin D.G. Kelley, UCLA DEPARTMENT OF HISTORY, <http://www.history.ucla.edu/people/faculty/faculty-1/faculty-1?lid=6785> (last visited Mar. 12, 2014).

⁴⁹ BUTLER, *supra* note 39, at 143 (quoting Robin D.G. Kelley, *Kickin’ Reality, Kickin’ Ballistics: Gangsta Rap and Postindustrial Los Angeles*, in *DROPPIN’ SCIENCE: CRITICAL ESSAYS ON RAP MUSIC AND HIP-HOP CULTURE* 118 (William Eric Perkins ed., Temple University Press 1996)).

⁵⁰ *Id.* at 139–40, 143–44.

These popular theories of policing and criminal justice argue that the legitimacy of any policing policy or system depends on the process by which it was formed and the outcomes it produces. Specifically, these theories argue that the current US criminal punishment regime is illegitimate because it was formed by a process that excluded People of Color and it functions to target and oppress People of Color. These theories offer guidance for evaluating the legitimacy of existing SPD policies and for determining the process by which the SPD should be re-formed.

B. Legal Theories: Critiques from Scholars Working Inside the Legal System

Legal scholars have also proposed theories of democracy and popular sovereignty that mirror the popular theories discussed in the previous section. Their analyses, like the US legal system, rest in Anglo-American texts, and are thus limited as representations of the understanding of democracy held by the multi-racial and multi-cultural US population. Nonetheless, legal scholars have developed legal theories of political legitimacy that recognize this limitation and find protection for the rights and voices of excluded groups in these Anglo-American texts.

It is important to remember that the ideas of the “founders” or the words in the texts establishing government in the United States are not the only—or the best—sources for rules to determine the legitimacy of government bodies or actions. Reflecting on the celebrations planned in 1987 for the bicentennial anniversary of the US Constitution, Justice Thurgood Marshall explained,

I do not believe that the meaning of the Constitution was forever “fixed” at the Philadelphia Convention. Nor do I find the wisdom, foresight, and sense of justice exhibited by the Framers particularly profound. To the contrary, the government they devised was defective from the start, requiring several amendments, a civil war, and momentous social transformation to attain the system of

constitutional government, and its respect for the individual freedoms and human rights, we hold as fundamental today.⁵¹

Justice Marshall continued to note that “We the People,” in the minds of the framers of the Constitution, categorically excluded Black people and women.⁵² Justice Marshall noted that “We the People” has become more inclusive, and that the United States has ended slavery, one of the most despicable institutions preserved by the framers. Justice Marshall argued, however, that the credit for these improvements “does not belong to the Framers. It belongs to those who refused to acquiesce in outdated notions of ‘liberty,’ ‘justice,’ and ‘equality,’ and who strived to better them.”⁵³

As Justice Marshall argued, legitimate and just government may be best achieved by recognizing the limitations and hypocrisies of the ideas and texts upon which the US government is founded. Justice Marshall additionally suggested that, rather than celebrating the original creation of the US Constitution by exalting the framers, “[s]ome may more quietly commemorate the suffering, struggle, and sacrifice that has triumphed over much of what was wrong with the original document, and observe the anniversary with hopes not realized and promises not fulfilled.”⁵⁴ Justice Marshall’s suggestion emphasizes the importance of looking beyond the legal establishment for the true drivers of legitimate and just government—namely, looking to the people who bear the burden of government policies and institutions.

⁵¹ Justice Thurgood Marshall, Remarks at the Annual Seminar of the San Francisco Patent and Trademark Law Association (Maui, HI, May 6, 1987), *available at* http://www.thurgoodmarshall.com/speeches/constitutional_speech.htm.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

The political process theory of constitutional interpretation proposed by respected constitutional law scholar John Hart Ely⁵⁵ emphasizes the same two-prong analysis—examining both the process by which policies are formed and disparities in the application of those policies—that Black activists and scholars articulated to critique the criminal punishment system (as discussed in the previous section). Ely credited the Warren Court, which ruled on many precedent-setting criminal procedure cases, with acting on a theory of constitutional interpretivism that prioritized an inclusive democratic process for the first time in the Court’s history.⁵⁶ Ely found the first reference, though not application, of such a theory in a famous footnote in the Court’s 1936 decision in *United States v. Carolene Products*.⁵⁷ In that footnote, the Court questioned whether legislation that “restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation” and that involves “prejudice against discrete and insular minorities” loses its presumption of legitimacy just as it would if it contradicted a specific prohibition of the Constitution.⁵⁸

Exploring the implications of this footnote, Ely argued that “popular control” and “egalitarianism” are both concerns about democratic participation.⁵⁹ He suggested that constitutional interpretation should “focus not on whether this or that substantive value is unusually important or fundamental, but rather on whether the opportunity to participate either in the political processes by which values are appropriately identified and accommodated, or in the accommodation those processes have reached, has

⁵⁵ See Adam Liptak, *John Hart Ely, a Constitutional Scholar, Is Dead at 64*, NEW YORK TIMES, Oct. 27, 2003, <http://www.nytimes.com/2003/10/27/us/john-hart-ely-a-constitutional-scholar-is-dead-at-64.html>.

⁵⁶ JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 73–75 (Harvard University Press 1980).

⁵⁷ *United States v. Carolene Products*, 304 U.S. 144, 152 at n.4 (1938).

⁵⁸ ELY, *supra* note 56, at 75–76 (quoting *Carolene Products*, 304 U.S. at 152 at n.4).

⁵⁹ *Id.* at 76–77.

been unduly constricted.”⁶⁰ Thus, Ely’s political process theory narrowed in on the same signs of illegitimate government—political exclusion and discrimination/disparate treatment—identified by the Black theorists and activists discussed in the previous section. While Ely himself suggested that political process theory may serve as a better check on racism and abuse in policing and criminal justice,⁶¹ legal scholars have since applied his political process theory to the problem of racist and abusive policing. The suggestions resulting from these scholars’ applications of political process theory vary depending on their underlying assumptions.

Dan M. Kahan and Tracey L. Meares, criminal law scholars and professors of law at Yale University,⁶² suggest that political process theory should replace existing criminal procedure jurisprudence, which applies heightened scrutiny to any police policy implicating constitutional rights.⁶³ Kahan and Meares argue that current criminal procedure jurisprudence, pioneered by the Warren Court, is premised on “the effective exclusion of African-Americans from the political process and the systematic use of law-enforcement resources to suppress them,” which have since abated.⁶⁴ Though, as will be discussed in Section IV, the validity of the assumption that racial oppression has abated is dubious, Kahan and Meares’s proposal to apply political process theory to policing programs offers a somewhat less paternalistic and more populist approach to criminal procedure than the current use of strict scrutiny.

⁶⁰ *Id.* at 77.

⁶¹ *Id.* at 172–77.

⁶² See Dan M. Kahan, YALE LAW SCHOOL, <http://www.law.yale.edu/faculty/DKahan.htm> (last visited Mar. 12, 2014); Tracey L. Meares, YALE LAW SCHOOL, <http://www.law.yale.edu/faculty/TMeares.htm> (last visited Mar. 12, 2014).

⁶³ See generally Dan M. Kahan & Tracey L. Meares, *Foreword: The Coming Crisis of Criminal Procedure*, 86 GEO. L. J. 1153, 1172 (1998).

⁶⁴ *Id.* at 1173, 1184.

Their approach would allow the court to independently evaluate a police policy where the costs are borne by a powerless minority⁶⁵ but would not second guess policies where the costs are borne generally—i.e. the courts would defer to a community’s desired police policy if the entire community internalized the burden of that policy.⁶⁶ They argue that this theory would likely vindicate most community policing initiatives, though it would still invalidate those that effectively burden a disempowered minority.⁶⁷

However, as will be discussed, Kahan and Meares do not fully account for the interests of people who may be found guilty of breaking the law as a result of a particular policing policy. While people bearing a heightened risk of criminal victimization due to ineffective policing policies or lax enforcement, including Communities of Color, certainly bear the burden of policing policies for the purposes of political process analysis,⁶⁸ people who are arrested, charged, and/or convicted and punished because of policing policies also bear the burden of these policies. Though Kahan and Meares note that Communities of Color tend to have more concern for and feel a “linked fate” with the People of Color who are punished as lawbreakers than do White communities,⁶⁹ they fail to include the people

⁶⁵ *Id.* at 1172 (citing Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 VA. L. REV. 747, 747, 754–55, 760–61 (1991)).

⁶⁶ *Id.* at 1172 (citing ELY, *supra* note 56, at 83; *South Carolina State Highway Dep’t v. Barnwell Bros.*, 303 U.S. 177, 184 n.2 (1938); *Employment Div. v. Smith*, 494 U.S. 872 (1990)).

⁶⁷ *Id.* at 1174–75.

⁶⁸ *Id.* at 1177.

⁶⁹ *Id.* at 1165 (citing Tracey L. Meares, *It’s a Question of Connections*, 31 VAL. U. L. REV. 579, 588–89 (1997); Tracey L. Meares, *Social Organization and Drug Law Enforcement*, 35 AM. CRIM. L. REV. 191, 211–17 (1998); Mary Patillo, *Sweet Mothers and Gangbangers: Managing Crime in a Black Middle-Class Neighborhood*, 76 SOCIAL FORCES 747 (1998) (explaining that gang members and drug dealers are incorporated into networks of law-abiding kin); Sudhir Alladi Venkatesh, *Cleaning Up Chicago’s Public Housing: A Critique of “Sweeps” and Enforcement-based Approaches*, in Eighth Annual International Conference on Drug Policy Reform, *The Crucial Next Stage: Health Care & Human Rights* (1994); Sudhir Alladi Venkatesh, *The Social Organization of Street Gang*

who are punished as “lawbreakers” in their vision of community and in their analysis of whether the interests of such “lawbreakers” have adequate representation in the political process.

Analyzing the influence that theories of democracy and government legitimacy have had on criminal procedure, David Alan Sklansky, a criminal procedure scholar and professor of law at the University of California at Berkeley,⁷⁰ argues that unwarranted disparate treatment actually impedes political participation.⁷¹ In other words, Sklansky argues that the second prong of political process theory (a discrete minority bearing the burden of policing) actually creates the first prong of political process theory (that discrete minority is discouraged and excluded from the democratic process). He criticizes Kahan and Meares, as well as originalist constitutional law scholar Akhil Reed Amar⁷² who finds support for a theory that government in the United States derives its power from the consent of the governed,⁷³ for failing to account for the problem of unwarranted disparate treatment.⁷⁴ The version of democracy proposed by Amar, Kahan, and Meares, and found in the criminal procedure opinions of Justices Antonin Scalia and Clarence Thomas, views judicially made rules “as the abrupt imposition of a decision from above[,] . . . the polar opposite of democracy.”⁷⁵ However, Sklansky suggests that this vision of democracy

Activity in an Urban Ghetto, 103 AM. J. SOC. 82-111 (1997) (noting the complex nature of mutual reliance between street gangs and the communities in which they are located)).

⁷⁰ David A. Sklansky, BERKELEY LAW, <http://www.law.berkeley.edu/php-programs/faculty/facultyProfile.php?facID=4878> (last visited Mar. 12, 2014).

⁷¹ See generally David Alan Sklansky, *Police and Democracy*, 103 MICH. L. REV. 1699 (2005).

⁷² See Akhil Reed Amar, YALE LAW SCHOOL, <http://www.law.yale.edu/faculty/AAmar.htm> (last visited Mar. 12, 2014).

⁷³ See generally Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L. J. 1425 (1987); Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131 (1991).

⁷⁴ *Id.* at 1808.

⁷⁵ *Id.* at 1791.

that vests legitimacy in popular participation in the formation of laws and government must be balanced by a vision of democracy that prioritizes “opposition to entrenched patterns of unjustified inequality.”⁷⁶

Sklansky cites political science scholar Ian Shapiro’s⁷⁷ theory of the “spirit of democratic oppositionalism” to explain the importance of police practices in understanding democracy.⁷⁸ Unjustified inequality, such as racial profiling in policing, undermines the legitimacy of government “[b]y insulting its targets, undermining their trust in law enforcement, and giving them a sense of second-class citizenship.”⁷⁹ Racial profiling and other practices of unwarranted disparate treatment “reentrench patterns of social hierarchy”⁸⁰ by disproportionately imprisoning, bringing under state control, and impeding the social and political participation of People of Color.⁸¹ He explains,

[these practices also train] members of minority groups in patterns of public subservience . . . [and encourage them] to adopt roles of exaggerated deference and severely diminished self-agency—roles that can easily carry over to other arenas of social life.⁸²

⁷⁶ *Id.* at 1808.

⁷⁷ *Ian Shapiro*, YALE UNIVERSITY DEPARTMENT OF POLITICAL SCIENCE, <http://political.science.yale.edu/people/ian-shapiro> (last visited Mar. 12, 2014).

⁷⁸ Sklansky, *supra* note 71, at 1808 (citing Ian Shapiro, *Three Ways to Be a Democrat*, 22 POL. THEORY 124, 138 (1994)).

⁷⁹ *Id.* at 1815–16.

⁸⁰ *Id.* at 1816.

⁸¹ *Id.* at 1816 (citing Bernard E. Harcourt, *Rethinking Racial Profiling: A Critique of the Economics, Civil Liberties, and Constitutional Literature of Criminal Profiling More Generally*, 71 U. CHI. REV. 1275 (2004); Richard Banks, *Beyond Profiling: Race, Policing, and the Drug War*, 56 STAN. L. REV. 571, 594–97 (2003); Dorothy E. Roberts, *Foreword: Race, Vagueness, and the Social Meaning of Order-Maintenance Policing*, 89 J. CRIM. L. & CRIMINOLOGY 775, 815–16, n.143 (1999)).

⁸² *Id.* at 1816 (citing Devon W. Carbado, *(E)racing the Fourth Amendment*, 100 MICH. L. REV. 946, 974–134 (2002); IAN F. HANEY LÓPEZ, *RACISM ON TRIAL: THE CHICANO FIGHT FOR JUSTICE* (2003)).

Finally, these practices also confirm “racial stereotypes: suggesting, through higher rates of arrest, prosecution, and incarceration, that the profiled groups really are more prone to crime.”⁸³ Sklansky’s analysis emphasizes the persistent oppression and political disempowerment of People of Color by means of disproportionate policing and criminalization. This reality must be taken into account when evaluating the legitimacy of policing policy.

William J. Stuntz, a criminal justice scholar and former professor of law at the University of Virginia and Harvard University,⁸⁴ further criticizes the problem of political disempowerment by policing and criminalization.⁸⁵ He argues that inadequate representation of criminalized people (people convicted of crimes) in the political branches, combined with the Supreme Court’s focus on front-end criminal procedure (policing and adjudication) over back-end punishment and substantive criminal law (crime definition and sentencing), have left rights and interests of criminalized people unprotected.⁸⁶ He argues that this dynamic has exacerbated racism in the US criminal punishment system.⁸⁷ While he advocates for the use of political process theory for constitutional review,⁸⁸ Stuntz argues that interventionist judicial review of criminal procedure precludes legislatures from deciding certain procedural rights vis-à-vis police and so precludes them from appreciating police racism and abuse.

Stuntz argues that because constitutional law jurisprudence most strictly regulates policing, then adjudication, then punishment, legislatures regulate inversely, where they have room—spending and legislating most on

⁸³ *Id.* at 1816 (citing Richard Banks, *Beyond Profiling: Race, Policing, and the Drug War*, 56 STAN. L. REV. 571, 577–78, 598 (2003)).

⁸⁴ See Douglas Martin, *W.J. Stuntz, Who Stimulated Legal Minds, Dies at 52*, NEW YORK TIMES, Mar. 20, 2011, <http://www.nytimes.com/2011/03/21/us/21stuntz.html>.

⁸⁵ Stuntz, *supra* note 46, at 781 (2006).

⁸⁶ *Id.* at 783.

⁸⁷ *Id.* at 781.

⁸⁸ *Id.* at 818.

prisons, then criminal adjudication, then police.⁸⁹ However, suspects, who get the most constitutional protection from state action, have the most political power while convicted criminals, who get the least constitutional protection, have the least. Stuntz explains,

Tens of millions of mostly innocent criminal suspects can win political battles, at least sometimes. Two million mostly guilty felony defendants will find those battles harder to win. Several hundred thousand already-convicted prisoners may find victory impossible. To put the point in concrete terms, abused suspects like Rodney King^[90] have a lot more political appeal than prisoners like Willie Horton^[91]—and the Kings outnumber the Hortons by a considerable margin.⁹²

This observation is compounded by the political disempowerment people suffer simply by virtue of being suspected of a crime. While Rodney King undoubtedly had more political appeal than Willie Horton, he was famously not vindicated by the court battle to hold the Los Angeles Police

⁸⁹ *Id.* at 783–84.

⁹⁰ Rodney King, a Black man, was the victim of a beating at the hands of a group of White Los Angeles police officers in 1991, the videotape of which was widely publicized. The acquittal of the officers who beat King sparked massive riots and discussion about racism in policing. *See, e.g.*, Jennifer Medina, *Rodney King Dies at 47; Police Beating Victim Who Asked ‘Can We All Get Along?’*, NEW YORK TIMES, Jun. 17, 2012, <http://www.nytimes.com/2012/06/18/us/rodney-king-whose-beating-led-to-la-riots-dead-at-47.html?pagewanted=all>; Seth Mydans, *Seven Minutes in Los Angeles – A Special Report; Videotaped Beating by Officers Puts Full Glare on Brutality Issue*, NEW YORK TIMES, Mar. 18, 1991, <http://www.nytimes.com/1991/03/18/us/seven-minutes-los-angeles-special-report-videotaped-beating-officers-puts-full.html>.

⁹¹ Willie Horton was a Black man who was convicted of armed robbery and rape while on temporary release from his life sentence for murder as part of a Massachusetts weekend furlough program. In 1988, an attack ad featuring Horton was launched against Massachusetts Governor Michael Dukakis who was running for president. *See, e.g.*, David A. Love, *The Willie Horton Ad Revisited 25 Years Later*, MSNBC THE GRIO (Oct. 21, 2013, 10:33 AM), <http://thegrio.com/2013/10/21/the-willie-horton-ad-revisited-25-years-later/>; Eric Benson, *Dukakis’s Regret*, NEW YORK MAGAZINE (Jun. 17, 2012), <http://nymag.com/news/frank-rich/michael-dukakis-2012-6/>.

⁹² Stuntz, *supra* note 46, at 783.

Department accountable for brutally beating him.⁹³ Nonetheless, criminal suspects still could represent a powerful political interest group as they are great in number and mostly innocent of any serious wrongdoing.⁹⁴

Stuntz argues that the Warren Court's criminal procedure decisions, including those related to police conduct under the Fourth and Fifth Amendments, exhibited Justice Warren's belief "that elected legislators would never adequately protect the interests of criminal suspects and defendants."⁹⁵ However, such constitutional rules incentivize legislators to focus their energy on crime definition and sentencing rather than on policing.⁹⁶ Stuntz argues that this incentive to focus on criminal convicts and defendants rather than suspects, combined with the racism that permeates the criminal justice system, actually exacerbates racism through "tough on crime" policies. He explains that legislators follow their instincts and "[o]ften, what comes naturally is racism."⁹⁷ Stuntz suggests that racism is reinforced in the minds of legislators by the removal of their power to make rules controlling policing that encourages them to ignore the many People of Color who are entirely innocent but still targeted, and often abused, by police—"If black suspects and crime victims were as politically

⁹³ See, e.g., Karen Grigsby Bates, *Perspective on the Rodney King Verdict: Dashing the Possibility of Trust: Until There Are Great Changes in the LAPD, People of Color Can Hardly Tell Their Children that Police Are Friends*, L.A. TIMES, Apr. 30, 1992, http://articles.latimes.com/1992-04-30/local/me-1700_1_rodney-king-verdict.

⁹⁴ Stuntz, *supra* note 46, at 795 (citing U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2002, at 195 tbl.309 (2003), available at <http://www.census.gov/prod/2003pubs/02statab/law.pdf>, at 21, 195 tbl.309; Janice Nadler, *No Need to Shout: Bus Sweeps and the Psychology of Coercion*, 2002 SUP. CT. REV. 153, 208-13; BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS - 2003, at 353 tbl.4.6 (Kathleen Maguire & Ann L. Pastore eds., 2004), available at <http://www.albany.edu/sourcebook>).

⁹⁵ *Id.* at 791-92.

⁹⁶ *Id.* at 783-84.

⁹⁷ *Id.* at 806.

visible as black criminals, we might see more politicians willing to be tough on both crime and racism.”⁹⁸

Unlike Kahan and Meares’s application of political process theory, Stuntz’s application of political process theory accounts for the persistence of racial oppression and the importance of political representation of criminalized people. He argues that “[t]he proper role of constitutional law is to reject that majoritarian preference, to ensure that all parts of the citizenry live by the same rules and bear the same punishments when those rules are violated.”⁹⁹ He suggests the use of citizen review boards and similar institutions to provide popular regulation of police power.¹⁰⁰

Stuntz’s analysis highlights the hierarchy of political influence wielded by criminal suspects, criminal defendants, and criminal convicts. This analysis is important in identifying what groups are excluded from or severely limited in the political process. Recognition of this hierarchy of political influence should inform the efforts of the CPC and other bodies involved in the SPD re-formation.

While both the popular and legal theories discussed in this section largely offer means to determine the legitimacy of existing policies, they also offer guidance for the formation of legitimate new policies. The City of Seattle should draw on these theories not only in evaluating the current legitimacy of the SPD but also in re-forming its police force and policies. Traditional models for reform typically seek to change only policies or practices that are causing problems so as not to reinvent the wheel. However, this is not

⁹⁸ *Id.* at 806–07 (citing *United States v. Locascio*, 6 F.3d 924 (2d Cir. 1993); Michael Cooper, *Officers in Bronx Fire 41 Shots, and an Unarmed Man Is Killed*, NEW YORK TIMES, Feb. 5, 1999, at A1; Stephen L. Carter, *When Victims Happen to Be Black*, 97 YALE L.J. 420 (1988); and Randall L. Kennedy, *McCleskey v. Kemp: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388 (1988)).

⁹⁹ Stuntz, *supra* note 46, at 821 (citing ERIC FONER, RECONSTRUCTION 251–61 (1988)).

¹⁰⁰ *Id.* at 833.

the best approach for the SPD. Unlike the proverbial wheel, both the invention and the functionality of the SPD are deeply flawed.

III. THE FORMATION OF THE SPD

To apply these theories to the SPD's legitimacy crisis, the texts and history surrounding the SPD must be examined. Like government powers generally, the SPD's powers are textually derived from the consent of the governed. The Washington State Constitution and the Seattle City Charter both contain declarations to this effect, and courts have interpreted such declarations as enshrining the power of the people over their government. Subsequent legislation has largely been enacted to limit rather than to grant authority to the SPD. Thus, the SPD's power rests in a general idea that the people of Seattle have consented to the SPD's authority to keep peace and arrest law-breakers. However, just as Justice Marshall emphasized in relation to the US Constitution,¹⁰¹ the "people" has historically included only a small subset of the people actually subjected to these government authorities and has excluded or ignored People of Color, women, and other marginalized groups.

A. Textual Formation and Regulation of the SPD

The United States government was formed under a theory of consent of the governed. As provided in the Declaration of Independence, "Governments are instituted among Men, deriving their just powers from the consent of the governed."¹⁰² This proposition is further embodied by the familiar preamble to the US Constitution, which declares,

WE THE PEOPLE of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and

¹⁰¹ See Marshall, *supra* note 51.

¹⁰² THE DECLARATION OF INDEPENDENCE (U.S. 1776).

secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this CONSTITUTION for the United States of America.¹⁰³

In the nineteenth century case of *McCulloch v. Maryland*, the US Supreme Court held that the people created both the state and federal governments in concluding that a part of the people (a state government) cannot tax or be supreme over the whole of the people (the federal government).¹⁰⁴ The formations of the State of Washington and the City of Seattle were premised on the same notion that legitimate government is created by the consent of the governed—by a delegation of power from the people governed to the government that will govern them.

The Washington State Constitution begins with the assertion that “[a]ll political power is inherent in the people, the governments derive their just powers from the consent of the governed, and are established to protect and maintain individual rights.”¹⁰⁵ This assertion is bolstered by other provisions of the state constitution noting that “the people of the State . . . ordain this constitution,”¹⁰⁶ and that the legislature cannot irrevocably grant authority to any person or body.¹⁰⁷

The Washington Supreme Court has interpreted these constitutional provisions as preserving ultimate sovereignty in the people rather than in the institutions of government.¹⁰⁸ The court held the people could limit their government’s power to levy taxes explaining,

[U]nder our form of government, ultimate sovereignty, so far as the state is concerned, rests in its people, and so long as the

¹⁰³ U.S. CONST. pmb1.

¹⁰⁴ *McCulloch v. Maryland*, 17 U.S. 316, 435–36 (1819).

¹⁰⁵ WASH. CONST. art I, § 1.

¹⁰⁶ WASH. CONST. pmb1.

¹⁰⁷ WASH. CONST. art I, § 8 (“No law granting irrevocably any privilege, franchise, or immunity, shall be passed by the legislature.”).

¹⁰⁸ *See, e.g., Love v. King Cnty*, 44 P.2d 175, 177 (1935); *Martin v. Tollefson*, 163 P.2d 594, 596 (1945).

government established by them exists, that sovereignty remains with them, except in so far as they have expressly surrendered it to a higher sovereignty.¹⁰⁹

In resolving a question of state versus municipal government authority, the Court asserted that “[t]he people, under our system of government, are the source of all governmental power, and they adopted the constitution for the purpose of creating certain agencies through which that power should be exercised.”¹¹⁰ These interpretations by the court affirm that government institutions in Washington State do not have irrevocable power, but rather they may exercise power to which the people of Washington State consent.

Taking an originalist approach, former Washington State Supreme Court Justice Richard B. Sanders¹¹¹ proposes that state constitutions function as contracts by which people delegate power to state governments.¹¹² He argues that the history and philosophy underlying the drafting of the US and state constitutions support the conclusion that these constitutions were meant to grant a limited number of specified, rather than many general, powers to the newly formed governments.¹¹³ Whenever state governments

¹⁰⁹ *Love*, 44 P.2d at 177.

¹¹⁰ *Martin*, 163 P.2d at 596.

¹¹¹ As a side note, Washington voters removed Justice Sanders from the Court in 2010 following his comment that “‘certain minority groups’ are disproportionately represented in prison because they have a crime problem.” Steve Miletich, *Two State Supreme Court Justices Stun Some Listeners with Race Comments*, SEATTLE TIMES, Oct. 21, 2010, http://seattletimes.com/html/localnews/2013226310_justices22m.html (quoting Richard B. Sanders).

¹¹² Richard B. Sanders & Barbara Mahoney, *Restoration of Limited State Constitutional Government: a Dissenter’s View*, 59 N.Y.U. ANN. SURV. AM. L. 269 (2003).

¹¹³ *Id.* at 272 (“Indeed, Federalist Number 48 warns: ‘It will not be denied that power is of an encroaching nature and that it ought to be effectually restrained from passing the limits assigned to it.’ Similarly, Hamilton warned: ‘Nothing is more common than for a free people, in times of heat and violence, to gratify momentary passions, by letting into the government principles and precedents which afterwards prove fatal to themselves.’ Why would the people who were so protective of their liberty confer upon their own state government the virtually unlimited power of the British Parliament? Given the preoccupation with the corruptive influence of power in the eighteenth and nineteenth

exercise powers “beyond those necessary to protect and maintain individual rights, courts must look for specific manifestations of the people’s consent that evidence constitutional grants of that authority.”¹¹⁴

Similarly, the Seattle City Charter, the establishing document for municipal power, begins with the proposition that “the People of the City of Seattle enact this Charter as the Law of the City for the purpose of protecting and enhancing the health, safety, environment, and general welfare of the people.”¹¹⁵ The charter further aims “to allow fair and equitable participation of all persons in the affairs of the city.”¹¹⁶ With these purposes, the charter declares that the Chief of the SPD

shall be the chief peace officer of the City . . . shall maintain peace and quiet of the City . . . [and] shall have like powers and responsibilities as the Sheriff of King County in similar cases, and shall perform such other duties as may be imposed by ordinance.¹¹⁷

The charter authorizes police officers to “make arrests for any crime or violation of the laws of the state or any ordinance of the City committed within the City,” and requires the SPD to maintain records of such arrests.¹¹⁸ Although the charter authorizes the SPD to generally keep peace and make arrests for criminal violations, it does not authorize specific procedures or practices by which the SPD may do so.

Legislation relating to the SPD largely functions to limit the SPD’s authority. Washington statutes have established a process for police officer certification¹¹⁹ and placed limitations on the availability of affirmative

centuries, when most of our state constitutions were drafted, is it not more likely the powers conferred upon the state were few and surrendered reluctantly?”).

¹¹⁴ *Id.* at 269.

¹¹⁵ Charter of the City of Seattle, preamble (2007).

¹¹⁶ *Id.*

¹¹⁷ Charter of the City of Seattle, art. VI, § 5 (2007).

¹¹⁸ *Id.*

¹¹⁹ WASH. REV. CODE § 43.101.095.

defenses to homicide for police officers.¹²⁰ The latter statute was originally proposed to limit the scope of acceptable police homicide—in other words, to limit rather than grant police authority, in response to the US Supreme Court’s decision in *Tennessee v. Garner*.¹²¹ However, the bill “was amended during debate to grant wider protections for use of force by police.”¹²² One of the bill’s sponsors, former State Senator and Washington Supreme Court Justice Phil Talmedge, noted that the originally proposed bill was “roundly criticized by law enforcement.”¹²³ Just as it was did in the case of Mr. Birk’s shooting of Mr. Williams, the statute as enacted functions to protect, or almost authorize, police officers in Washington State to commit homicide in certain circumstances.¹²⁴

Municipal, rather than state, legislation contains the majority of regulations pertaining to the SPD. The Seattle Municipal Code regulates how the SPD may dispose of unclaimed property,¹²⁵ what fees the SPD may charge for records,¹²⁶ and what identification SPD officers must display when wearing an SPD uniform.¹²⁷ The Seattle Municipal Code also establishes an Office of Professional Accountability¹²⁸ and a Police

¹²⁰ WASH. REV. CODE § 9A.16.040(3).

¹²¹ WASH. REV. CODE § 9A.16.040, 1986 c 209 § 3 (“The legislature recognizes that RCW 9A.16.040 establishes a dual standard with respect to the use of deadly force by peace officers and private citizens, and further recognizes that private citizens’ permissible use of deadly force under the authority of RCW 9.01.200, 9A.16.020, or 9A.16.050 is not restricted and remains broader than the limitations imposed on peace officers”); Martin, *supra* note 3; *Tennessee v. Garner*, 471 U.S. 1, 11 (1985) (declaring that “[t]he use of deadly force to prevent the escape of all felony suspects, whatever circumstances is constitutionally unreasonable. . . . A police officer may not seize an unarmed, nondangerous suspect by shooting him dead”).

¹²² Martin, *supra* note 3.

¹²³ *Id.* (quoting Phil Talmedge).

¹²⁴ *Id.*

¹²⁵ SEATTLE, WASH., MUNICIPAL CODE § 3.28.010 (2014).

¹²⁶ *Id.* §§ 3.28.070–090.

¹²⁷ *Id.* § 3.28.040.

¹²⁸ *Id.* §§ 3.28.800–920.

Officers' Bill of Rights.¹²⁹ However, none of this legislation, including the Police Officers' Bill of Rights, grants powers to the SPD vis-à-vis the people. The Office of Professional Accountability was created to “to receive and investigate complaints of misconduct by Seattle Police Department personnel,”¹³⁰—to be a mechanism for the people to check the authority of the SPD. The Police Officers' Bill of Rights functions to protect SPD officers as employees by requiring certain notice and investigation procedures when an officer is accused of misconduct.¹³¹

The Seattle Municipal Code does contain two specific grants of authority to the SPD. First, SPD officers are specifically authorized to enter premises and kill a dog who has bitten a person.¹³² Second, SPD officers are specifically authorized to discharge a firearm at another person when necessary for self-defense, defense of others, to apprehend or prevent escape of a person who has committed a serious felony, or to apprehend an escaped felon.¹³³ However, SPD officers are not allowed to use a firearm “unless all other reasonable alternatives have been exhausted or would appear to a reasonable police officer to be ineffective under the particular circumstances.”¹³⁴ Though these provisions are phrased as grants of authority, they function to limit the circumstances under which certain violent actions by the SPD are authorized to keep the peace.

B. Historical Formation and Regulation of the SPD

As the textual basis for the SPD's authority to keep peace and make arrests rests in the consent of the governed,¹³⁵ evaluation of the SPD's

¹²⁹ *Id.* §§ 3.28.320–380.

¹³⁰ *Id.* § 3.28.800.

¹³¹ *Id.* §§ 3.28.320–380.

¹³² *Id.* § 3.28.030.

¹³³ *See id.* § 3.28.115.

¹³⁴ *Id.*

¹³⁵ WASH. CONST. art I, § 1 (“All political power is inherent in the people, the governments derive their just powers from the consent of the governed, and are

legitimacy depends on a determination of who consented to this authority and how. This determination requires examination of the history surrounding the incorporation of the City of Seattle and the formation of the SPD, as well as examination of the history surrounding the formation of police policy in the United States generally. This examination reveals that the “consent” to grant power to the SPD is not legitimate as to the entirety of “the people,” because large segments of the population, particularly those bearing the burden of criminal punishment and policing polices, were historically and continue presently to be excluded from the political process that checks government power.

Like the United States generally, the City of Seattle was founded as a government by White settlers who drove out the Native people who had previously occupied the area.¹³⁶ Similarly, the State of Washington “was founded through the displacement of its native peoples by legal and extralegal means.”¹³⁷ In response to the “agreements” proposed by Seattle’s White settlers, the city’s namesake, Chief Sealth of the Duwamish Tribe, expressed disbelief that, given their differences, the White settlers could or would protect his people:

established to protect and maintain individual rights”); Charter of the City of Seattle, Preamble (2007) (“Under authority conferred by the Constitution of the State of Washington, the People of the City of Seattle enact this Charter as the Law of the City for the purpose of protecting and enhancing the health, safety, environment, and general welfare of the people; to enable municipal government to provide services and meet the needs of the people efficiently; to allow fair and equitable participation of all persons in the affairs of the City; to provide for transparency, accountability, and ethics in governance and civil service; to foster fiscal responsibility; to promote prosperity and to meet the broad needs for a healthy, growing City”).

¹³⁶ Greg Lange, *Seattle and King County’s First White Settlers*, HISTORYLINK.ORG (Oct. 15, 2000), http://www.historylink.org/index.cfm?DisplayPage=output.cfm&file_id=1660 (internal citations omitted).

¹³⁷ Research Working Group Task Force on Race, the Criminal Justice System, *Preliminary Report on Race and Washington’s Criminal Justice System*, 35 SEATTLE U. L. REV. 623, 632–33 (2012) [hereinafter Task Force] (citing HUBERT HOWE BANCROFT, HISTORY OF WASHINGTON, IDAHO, AND MONTANA 1845-1889 (1890)).

Our good father in Washington . . . sends us word that if we do as he desires he will protect us. . . . Then in reality he will be our father and we his children. But can that ever be? Your God is not our God! Your God loves your people and hates mine! He folds his strong protecting arms lovingly about the paleface and leads him by the hand as a father leads an infant son. But, He has forsaken His Red children, if they really are His. . . . The white man's God cannot love our people or He would protect them.¹³⁸

Chief Sealth's speech decried the harm that White settlers had vested upon the Native Americans who had lived on the land that is now Seattle and expressed the lack of trust he had in a government formed by these settlers.¹³⁹

Among the earliest legislation that the SPD was authorized to enforce were ordinances targeting Native Americans. Under the first town charter of 1865,¹⁴⁰ the territorial White government adopted ordinances aimed at preventing the sale of alcohol to Native Americans, removing Native Americans "to points outside of the town limits," and punishing "those who might harbor them."¹⁴¹ As it expanded and incorporated as a City, Seattle formally created the SPD with an elected chief of police. Seattle was incorporated as a City in 1869 with a charter establishing a marshal as one of the City's officers.¹⁴²

Seattle's early electoral politics reveal a pattern by which the actions and power of the SPD were controlled, or at least heavily influenced, by the limited voting franchise of the time. The City was initially known as an "open town" where "extravagance ran riot, debauchery and crime were

¹³⁸ Chief Seattle's 1854 Oration, available at <http://suquamish.org/HistoryCulture/Speech.aspx> (2013).

¹³⁹ See *id.*

¹⁴⁰ See CLARENCE B. BAGLEY, SEATTLE; FROM THE EARLIEST SETTLEMENT TO THE PRESENT TIME 545 (Chicago: The S.J. Clarke Publishing Company, 1916).

¹⁴¹ *Id.* at 545.

¹⁴² *Id.* at 546–47.

almost unchecked. . . . Gambling of every known variety flourished openly as did harlotry and drunkenness, under the fostering eyes of the police.”¹⁴³ Seattle’s first brothel prostituted Native American women to White men as there were few women in Seattle’s White population.¹⁴⁴ Though there was a brief crackdown on such activities resulting from popular demand and electoral replacement of the city’s government, with the Klondike gold rush of 1897, “Seattle again became a ‘wide-open town,’ the same as it had been ten years earlier.”¹⁴⁵ Seattle’s mayoral politics in the early twentieth century continued to revolve around the city’s policing system—voters expressed disapproval of the SPD’s tolerance of brothels and gambling and perceived collusion “with promoters of vice and crime.”¹⁴⁶

Though this history may be seen as an example of the governed exercising control over their government, the franchise during this time was limited to male, English-speaking US Citizens aged 21 or older who met a residency requirement and explicitly excluded Native Americans not taxed by the State.¹⁴⁷ The franchise was expanded to women in 1910¹⁴⁸ and to people aged 18 or older in 1974.¹⁴⁹ The prohibitions on voting by Native Americans not taxed by the State and by non-English-speakers were also eventually removed in 1974.¹⁵⁰ However, to this day, people convicted of an “infamous crime” are barred from voting until and unless their civil rights

¹⁴³ *Id.* at 549.

¹⁴⁴ Priscilla Long, *John Pinnel Builds Seattle’s First Brothel in 1861*, HISTORYLINK.ORG (January 1, 2000), http://www.historylink.org/index.cfm?DisplayPage=output.cfm&file_id=2738; MURRAY MORGAN, *SKID ROAD: AN INFORMAL PORTRAIT OF SEATTLE 59-61* (New York: The Viking Press, 1951); KING COUNTY CENSUS: 1870 U.S. CENSUS AND 1871 TERRITORIAL CENSUS FOR KING COUNTY, WASHINGTON TERRITORY 33 (Seattle: Marjorie Rhodes ed., 1993).

¹⁴⁵ BAGLEY, *supra* note 140, at 552.

¹⁴⁶ *Id.* at 549–55.

¹⁴⁷ WASH. CONST. art. VI, § 1, original text, amend. 2 (1896).

¹⁴⁸ WASH. CONST. art VI, § 1, amend. V (1910).

¹⁴⁹ WASH. CONST. art VI, § 1, amend. LXIII (1974).

¹⁵⁰ *Id.*

are affirmatively restored.¹⁵¹ Thus, the franchise was historically limited to a small subset of the people who are now and were then still subjected to the authority of the government and so of the police.

The franchise that influenced Seattle's policing policy was further dependent on the franchise recognized by the federal government.¹⁵² Amar observes that the consensus "that the People were sovereign and that governments were therefore necessarily limited . . . existed, of course, among a very limited set of prominent white male property owners."¹⁵³ He further criticizes the hypocrisy of the framers of the US Constitution who preached legitimacy by popular political participation while denying rights of political participation and the basic humanity of People of Color, women, and the poor:

In several crucial respects, the Federalist Constitution seemed to fall short of perfecting the sovereignty of the People of America. To begin with, many persons, slaves being the most obvious example, found themselves excluded from 'the People' by a definitional fiat that seriously eroded the moral force of the Federalist vision of popular sovereignty.¹⁵⁴

In addition, Amar recognizes that "[i]ndians, women, and the poor also faced barriers to equal political participation."¹⁵⁵ Though himself an originalist, Amar recognizes the serious problems with and limitations of reliance on the United States' foundational texts and ideas.

Dr. King also criticized the hypocrisy of textual declarations that the United States was committed to equality when the country did not respect

¹⁵¹ WASH. CONST. art VI, § 3 (1896).

¹⁵² See WASH. CONST. art. VI, § 1, amend. II (1896) (requiring that voters must be US citizens).

¹⁵³ Amar, *Of Sovereignty and Federalism*, *supra* note 73, at 1451 n.101.

¹⁵⁴ *Id.* at 1463.

¹⁵⁵ *Id.* at 1463, n.164.

the basic rights of People of Color. In his iconic speech delivered at the 1963 March on Washington, Dr. King declared,

[W]e've come to our nation's capital to cash a check. When the architects of our Republic wrote the magnificent words of the Constitution and the Declaration of Independence, they were signing a promissory note to which every American was to fall heir. This note was a promise that all men—yes, black men as well as white men—would be guaranteed the unalienable rights of life, liberty and the pursuit of happiness. It is obvious today that America has defaulted on this promissory note insofar as her citizens of color are concerned. Instead of honoring this sacred obligation, America has given the Negro people a bad check, a check which has come back marked "insufficient funds."¹⁵⁶

Just as Dr. King's analogy to a bounced check exposed the falsity of the declaration that all people would be treated equally in the United States, declarations that the United States, the State of Washington, or the City of Seattle derive their powers from the consent of the governed are similarly false.

Even though the SPD was textually empowered by the consent of the governed, history reveals that only a small subset of the governed actually participated in delegating authority to the SPD. This history limits the legitimacy of the SPD, and modern policing and criminal punishment regimes further limit legitimacy by unjustifiably targeting People of Color who were historically excluded from the formation of government and by specifically disempowering people targeted and burdened by the criminal justice system.

¹⁵⁶ Martin Luther King, Jr., I Have a Dream, March on Washington (August 28, 1963) (transcript available in the National Archives, 1–2, *available at* <http://www.archives.gov/press/exhibits/dream-speech.pdf>).

IV. LIMITATIONS ON THE LEGITIMACY OF THE SPD

The SPD's legitimacy is undermined both by its politically exclusive formation and by ongoing systems exclusion. The SPD fares poorly under political process theory,¹⁵⁷ as the people most burdened and targeted by the SPD are excluded from the political process that can hold the SPD accountable. The SPD has a well-documented history of racially discriminatory practices, and this discrimination is further compounded by other criminal punishment institutions (state prosecutors, courts, and prisons), as discussed in Section A. Thus, the SPD targets groups that were excluded from "the people" when the SPD was formed. Further, Washington State specifically disempowers people targeted by the criminal justice system by revoking political participation rights and impeding economic opportunities, so those bearing this burden continue to be excluded from the political process.

A. Racial Discrimination by the SPD and the Criminal Punishment System Generally

Racial discrimination in Washington's criminal justice system and particularly by the SPD has been well-documented in connection with policy-making and with litigation aiming to expose and end these practices. These analyses reveal that the SPD disproportionately targets, arrests, and uses force against People of Color and that People of Color subsequently receive worse treatment than similarly situated White people in Washington's criminal punishment system. The Washington State Task Force on Race and the Criminal Justice System (formed in response to the 2010 comments by two sitting Washington Supreme Court Justices hypothesizing that racial minorities were over-represented in Washington prisons because they committed more crimes)¹⁵⁸ found that "race and racial

¹⁵⁷ See generally ELY, *supra* note 56.

¹⁵⁸ Task Force, *supra* note 137, at 626–27.

bias matter in ways that are not fair, that do not advance legitimate public safety objectives, that produce disparities in the criminal justice system, and that undermine public confidence in our legal system.”¹⁵⁹

Katherine Beckett, a sociologist at the University of Washington,¹⁶⁰ conducted an in-depth analysis of SPD drug arrests in order to determine whether drug laws were selectively enforced against Black people, in connection with selective enforcement litigation brought against the City by the American Civil Liberties Union and The Defender Association Racial Disparity Project.¹⁶¹ In 2000, the arrest rate for Black Seattle residents was 10.2 times the arrest rate for White Seattle residents; this arrest rate ratio was larger than all other mid-sized US cities, including Detroit, Baltimore, and Portland.¹⁶² In 2006, Seattle had the second-highest (after Minneapolis) Black/White drug arrest rate ratio among mid-sized US Cities; Black Seattle residents were arrested for drug offenses 13.57 times as often as White residents.¹⁶³ From 1999–2001, “a majority of users of serious drugs, with the possible exception of crack cocaine, [were] white,” and most needle exchangers in Seattle reported obtaining their drugs from a White person; however, “64.2 percent of those purposefully arrested for delivery of serious drugs . . . were black.”¹⁶⁴

Ethnographical observations of two well-known open air drug markets (at Third Avenue and Pike Street Downtown and at Broadway and Denny Way in Capitol Hill) conducted in connection with this analysis indicated that

¹⁵⁹ *Id.* at 629.

¹⁶⁰ See Katherine Beckett, UNIVERSITY OF WASHINGTON, LAW, SOCIETIES & JUSTICE, <http://depts.washington.edu/ljweb/katherine-beckett/> (last visited Mar. 13, 2014).

¹⁶¹ KATHERINE BECKETT, RACE & DRUG LAW ENFORCEMENT IN SEATTLE; REPORT PREPARED FOR THE ACLU DRUG LAW REFORM PROJECT & THE DEFENDER ASSOCIATION (2008), available at https://www.aclu.org/files/assets/race20and20drug20law20enforcement20in20seattle_20081.pdf.

¹⁶² *Id.* at 9 (internal citations omitted).

¹⁶³ *Id.* at 56 (internal citations omitted).

¹⁶⁴ *Id.* at 11 (internal citations omitted).

54.4 percent of those buying drugs in the downtown market were White while 80 percent of those buying drugs in the Capitol Hill market were White.¹⁶⁵ Further, 56.8 percent of those observed delivering (“dealing”) drugs at both markets combined were White, though 49.5 percent of those delivering drugs at the downtown market were White compared to 83.6 percent of those at the Capitol Hill market.¹⁶⁶ Nonetheless, in the Capitol Hill market, “9.1 percent of the observed deliverers were black, but 30 percent of the delivery arrestees were black. . . . [T]his comparison indicates that blacks are 3.9 times more likely to be arrested for delivery of a serious drug in Capitol Hill than Whites engaging in the same behavior.”¹⁶⁷

Beckett further compared these racial disparities in arrest rates with multiple public health and population surveys, which revealed that People of Color neither use nor sell drugs at higher rates than White people.¹⁶⁸ Beckett gathered data from federal research of Seattle residents, surveys of public school students, reports from the Medical Examiner’s Office, surveys of needle exchange participants, drug treatment program admissions information collected by the state, and the observational study of two of Seattle’s open air drug markets to get an accurate picture of Seattle’s drug markets and of actual conduct, rather than arrests, by people of different races.¹⁶⁹

For example, the federal Substance Abuse and Mental Health Services Administration (SAMHSA) survey of Seattle residents indicated that White Seattle residents use serious drugs (18.6 percent reporting serious drug use in the past year, 7.9 percent in the past month) at approximately the same

¹⁶⁵ *Id.* at 36–39 (citing KRIS NYROP, STREET OUTREACH SERVICES, DEMOGRAPHIC COMPARISONS OF TWO PUBLIC VENUE DRUG MARKETS IN SEATTLE (2003), available at <https://www.kcba.org/druglaw/pdf/ethnographicstudy.pdf>).

¹⁶⁶ *Id.* at 44.

¹⁶⁷ *Id.* at 70.

¹⁶⁸ *Id.* at 21, 24, 30–31, 93–94 (internal citations omitted).

¹⁶⁹ BECKETT, *supra* note 161, at 17.

rates as the Seattle population as a whole (18.5 percent reporting serious drug use in the past year, 8.5 percent in the past month).¹⁷⁰ A similar SAMHSA study revealed that public school students reported drugs at roughly the same rates across races.¹⁷¹ Further, White Seattle residents reported selling illegal drugs more frequently than Seattle residents as a whole (5.2 percent of White Seattle residents reported selling illegal drugs in the past year, compared to 4.7 percent of all Seattle residents); 76.1 percent of those who sell illegal drugs in Seattle are White.¹⁷² Thus, Beckett's analysis demonstrates that differential arrest rates by race cannot be attributed to differential behavior across races. Rather, the SPD's disproportionately high arrest rates of People of Color represent racially discriminatory policing.

While the DOJ did not make a "finding" of discriminatory policing in its recent investigation of the SPD, possibly due to the difficulty of proving an Equal Protection claim,¹⁷³ it expressed concern about the SPD's treatment of People of Color.¹⁷⁴ Over half of the cases that the DOJ determined to be "unnecessary or excessive uses of force" involved People of Color.¹⁷⁵ The DOJ's analysis further indicated that the SPD's inappropriate pedestrian encounters (so-called "social" contacts treated as *Terry* stops) disproportionately involve Youth of Color, and that SPD officers "may stop a disproportionate number of people of color where no offense or other police incident occurred."¹⁷⁶ The investigation further revealed a troubling

¹⁷⁰ *Id.* at 21 (internal citations omitted).

¹⁷¹ *Id.* at 24 (internal citations omitted).

¹⁷² *Id.* at 41.

¹⁷³ See UNITED STATES ATTORNEY'S OFFICE WESTERN DISTRICT OF WASHINGTON, UNITED STATES DEPARTMENT OF JUSTICE CIVIL RIGHTS DIVISION, INVESTIGATION OF THE SEATTLE POLICE DEPARTMENT 25 (2011), available at http://www.justice.gov/crt/about/spl/documents/spd_findletter_12-16-11.pdf [hereinafter DOJ INVESTIGATION].

¹⁷⁴ *Id.* at 6.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

pattern of SPD officers using and tolerating racially-charged language.¹⁷⁷ The DOJ explained,

[A] number of individuals reported incidents in which racial epithets were used or minorities were singled out for harsh treatment. We also reviewed the video of the notorious incidents involving an officer's threat to "beat the f'ing Mexican piss" out of a suspect. It is troubling that the use of this racial epithet failed to provoke any of the surrounding officers to react, suggesting a department culture that tolerates this kind of abuse. Of greatest concern, neither of the two supervisors present admonished the officer at the scene. Nor did anyone report the incident to OPA until a third-party video of the incident was posted publicly. The number of people present, the failure to correct the officer, and the failure to immediately report the conduct all could be seen as a reflection of a hardened culture of accepting racially charged language.¹⁷⁸

These examinations of the SPD reveal racially discriminatory practices that are not justified by policy or behavior. This racial disparity in treatment is exacerbated by subsequent parts of the criminal justice system.

The racial disparities found in arrests and other police encounters are also present in subsequent stages of the criminal justice system, for example, in charging decisions and sentencing. In response to a 1980 report that revealed that Washington had the highest rate of disproportionate minority representation in prisons of any state,¹⁷⁹ the Washington Courts formed the Minority and Justice Task Force. The Task Force found that "bias pervades the entire legal system in general and hence [minorities] do not trust the court system to resolve their disputes or administer justice

¹⁷⁷ *Id.* at 28.

¹⁷⁸ *Id.* at 27.

¹⁷⁹ Task Force, *supra* note 137, at 627 (citing Scott Christianson, *Corrections Law Developments: Racial Discrimination and Prison Confinement—A Follow-Up*, 16 CRIM. L. BULL. 616, 617 (1980)).

evenhandedly.”¹⁸⁰ For example, a 1995 study found “prosecutors were 75 [percent] less likely to recommend alternative sentences for black defendants than for similarly situated white defendants.”¹⁸¹ Though ultimately insufficient to invalidate Washington’s felon disenfranchisement law under the Voting Rights Act (VRA) on rehearing, the United States Court of Appeals for the Ninth Circuit recognized data regarding search, arrest, and imprisonment disparities between races as “compelling circumstantial evidence of discrimination in Washington’s criminal justice system.”¹⁸²

In the Task Force on Race and the Criminal Justice System’s preliminary report, the Task Force found racial discrimination in policing,¹⁸³ and also in prison sentences¹⁸⁴ and imposition of Legal Financial Obligations (LFOs).¹⁸⁵ The imposition of LFOs can leave people in significant debt,

¹⁸⁰ *Id.* at 635 (quoting CHARLES Z. SMITH, WASH. STATE MINORITY & JUSTICE TASK FORCE, WASH. STATE SUPREME COURT, FINAL REPORT 10 (1990), available at <http://www.courts.wa.gov/committee/pdf/TaskForce.pdf>).

¹⁸¹ *Id.* at 647 (citing ROBERT D. CRUTCHFIELD ET AL., WASHINGTON STATE MINORITY & JUSTICE COMM’N, A STUDY ON RACIAL AND ETHNIC DISPARITIES IN THE PROSECUTION OF CRIMINAL CASES IN KING COUNTY WASHINGTON: FINAL REPORT (1995), available at <http://www.courts.wa.gov/committee/pdf/November%201995%20Report.pdf>).

¹⁸² *Farrakhan v. Gregoire*, 590 F.3d 989, 1009–11 (9th Cir. 2010), *rev’d on question of law by rehearing en banc*, 623 F.3d 990 (9th Cir. 2010).

¹⁸³ Task Force, *supra* note 137, at 657–58 (citing J. Mitchell Pickerill et al., *Search and Seizure, Racial Profiling, and Traffic Stops: A Disparate Impact Framework*, 31 LAW & POL’Y 1, 13, 15 (2009)).

¹⁸⁴ *Id.* at 648 (citing Rodney L. Engen et al., *Discretion and Disparity Under Sentencing Guidelines: The Role of Departures and Structured Sentencing Alternatives*, 41 CRIMINOLOGY 99, 116–17 (2003); see also CRUTCHFIELD, *supra* note 181, at 32, 34, 72 tbl.13b; Kenneth E. Fernandez & Timothy Bowman, *Race, Political Institutions, and Criminal Justice: An Examination of the Sentencing of Latino Offenders*, 36 COLUM. HUM. RTS. L. REV. 41, 63, 66–68 (2004); Sara Steen et al., *Images of Danger and Culpability: Racial Stereotyping, Case Processing, and Criminal Sentencing*, 43 CRIMINOLOGY 435, 451 (2005)).

¹⁸⁵ *Id.* at 649 (citing KATHERINE A. BECKETT ET AL., WASH. STATE MINORITY & JUSTICE COMM’N, WASH. STATE SUPREME COURT THE ASSESSMENT AND CONSEQUENCES OF LEGAL FINANCIAL OBLIGATIONS IN WASHINGTON STATE, 23–25 (2008), available at http://www.courts.wa.gov/committee/pdf/2008LFO_report.pdf).

even after decades of making regular payments,¹⁸⁶ and, until recently, this legal debt barred people from restoring their civil rights (including the right to vote).¹⁸⁷ In 2009, Washington made progress on this issue in 2009 by passing a law that provisionally restores the right to vote once a person with a felony conviction is no longer under the authority of the Department of Corrections; however, a person's right to vote may still be revoked if she or he does not make adequate payments toward her or his LFO debt.¹⁸⁸

The Task Force explained why such disparities undermine the legitimacy of Washington's criminal justice system: "Put simply, we have found disparity and mistrust. Together, we must fix it for the sake of our democracy."¹⁸⁹ Unjustified different treatment by government institutions, such as the SPD, indicates that such institutions cannot be trusted by the people they govern and thus cannot be legitimate.

B. Systemic Exclusion of People Burdened by Policing from the Political Process

While many people bear the burden of SPD practices—including people wrongly suspected and harassed by police and people left unprotected by police—those who are actually criminalized (arrested, charged, and convicted) may bear the greatest burden of SPD practices. As discussed above in Section A, the SPD has a record of disproportionately targeting People of Color for minor drug crimes. Those targeted by the SPD are subjected to the burdens imposed by the criminal punishment system, which

¹⁸⁶ *Id.* (citing Alexes Harris et al., *Drawing Blood from Stones: Legal Debt and Social Inequality in the Contemporary United States*, 115 AM. J. SOC. 1753, 1756, 1773-82 (2010); WASH. REV. CODE § 10.82.090 (Supp. 2011)).

¹⁸⁷ WASH. CONST. art. VI, § 3 (1896); Beckett, *supra* note 161, at 5–6 (citing ACLU 2004; JEFF MANZA & CHRISTOPHER UGGEN, *LOCKED OUT: FELON DISENFRANCHISEMENT & AMERICAN DEMOCRACY* Table A3.3 (New York: Oxford University Press 2006)).

¹⁸⁸ See Voting Rights—Restoration—Felons, Ch. 325, 2009 Wash. Sess. Laws 1–9.

¹⁸⁹ Task Force, *supra* note 137, at 671.

may include large monetary fines or restriction of liberty achieved by threat or use of physical violence.

The political and economic oppression of people with criminal convictions—particularly felony convictions—is a problem throughout the United States. In her bestseller *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*, Michelle Alexander, a civil rights and criminal law scholar and professor of law at The Ohio State University,¹⁹⁰ examines how the US criminal punishment system is used as a tool of racial oppression.¹⁹¹ She explains,

[o]nce a person is labeled a felon, he or she is ushered into a parallel universe in which discrimination, stigma and exclusion are perfectly legal, and privileges of citizenship such as voting and jury service are off-limits. . . . [People convicted even of a drug felony are] [b]arred from public housing by law, discriminated against by private landlords, ineligible for food stamps, forced to “check the box” indicating a felony conviction on employment applications for nearly every job, and denied licenses for a wide range of professions.¹⁹²

Alexander argues, “[t]hese restrictions amount to a form of ‘civic death’ and send the unequivocal message that ‘they’ are no longer part of ‘us.’”¹⁹³ People with felony convictions face both legal and economic barriers, which impede their abilities to support themselves and their families and prevent their participation in the political process.¹⁹⁴

As in the United States generally, people with felony convictions in Washington are subjected to these “collateral” consequences. Like most

¹⁹⁰ See Michelle Alexander, THE OHIO STATE UNIVERSITY, MORITZ COLLEGE OF LAW, <http://moritzlaw.osu.edu/faculty/professor/michelle-alexander/> (last visited Mar. 13, 2014).

¹⁹¹ ALEXANDER, *supra* note 21.

¹⁹² *Id.* at 94.

¹⁹³ *Id.* at 142.

¹⁹⁴ See generally *id.* at 140–77 (ch. 4, *The Cruel Hand*).

states, Washington restricts the civil rights of and imposes LFOs and other economic hardships on people with felony convictions. Beyond the harshness of such consequences, political and economic restrictions on people with felony convictions undermine the legitimacy of the criminal justice system's policies and institutions because the people who bear its consequences are politically disempowered.

Washington law creates barriers for people with felony convictions to hold accountable the institutions that convicted them by restricting convicted felons' abilities to vote and serve on juries. The Washington State Constitution provides that "[a]ll persons convicted of infamous crime unless restored to their civil rights and all persons while they are judicially declared mentally incompetent are excluded from the elective franchise."¹⁹⁵ Similarly, Washington restricts people with felony convictions from participating in jury service until their rights are restored: "[a] person shall be competent to serve as a juror in the state of Washington unless that person . . . [h]as been convicted of a felony and has not had his or her civil rights restored."¹⁹⁶

However, Washington has begun to roll back these barriers to formal political participation by people with felony convictions. Washington law provides some mechanisms by which people with felony convictions may restore their rights to vote and to serve on juries. Recent legislation provides that the right to vote is provisionally restored once a person convicted of a felony in Washington State is no longer "under the authority of the department of corrections," or once a person convicted of a felony in another state is no longer incarcerated.¹⁹⁷ Washington law provides additional mechanisms through which rights may be restored by the

¹⁹⁵ WASH. CONST. art. VI, § 3 (1896).

¹⁹⁶ WASH. REV. CODE § 2.36.070(5) (2013).

¹⁹⁷ *Id.* § 29A.08.520.

Governor,¹⁹⁸ the Indeterminate Sentence Review Board,¹⁹⁹ or the sentencing court.²⁰⁰ Further, Washington has somewhat decreased the exclusion of jurors based on felony conviction by drawing juries from a list that merges the list of all registered voters with a list people holding drivers licenses and/or identicards²⁰¹ in each county.²⁰² Despite these mechanisms for restoring civil rights, many people with felony convictions are still barred from political participation.

Washington law allows people with felony convictions to restore these rights while they are still paying their LFOs, however, the sentencing court may revoke this provisional restoration if the person “has willfully failed to comply with the terms of his or her order to pay legal financial obligations,” and the prosecutor “shall seek” such revocation if the person has failed to make three payments in a year toward his or her LFOs.²⁰³ LFOs thus bar many people from restoring their rights of political participation. One examination of the effect of LFOs found that “[a]s a result [of the previous requirement to pay off LFOs before civil rights are restored], an estimated 3.6 percent of the adult population and 17.2 percent of all adult African American men living in Washington State were disenfranchised at the end of 2004.”²⁰⁴ While the 2009 legislation allowing provisional restoration of civil rights before LFOs are paid in full likely lessens this effect, many people with felony convictions, as discussed below, are kept out of jobs and may be unable to make the required consistent monthly payments to

¹⁹⁸ *Id.* § 9.96.010.

¹⁹⁹ *Id.* § 9.96.050.

²⁰⁰ *Id.* §§ 9.94A.637, 9.92.066.

²⁰¹ An identicard is a form of photo identification used when an individual does not hold a valid driver’s license. *See* WASH. REV. CODE § 46.20.117(1) (2012).

²⁰² WASH. REV. CODE §§ 2.36.010(8), 2.36.054 (2013).

²⁰³ *Id.* § 29A.08.520.

²⁰⁴ Beckett, *supra* note 161, at 5–6 (citing ACLU 2004; JEFF MANZA & CHRISTOPHER UGGEN, LOCKED OUT: FELON DISENFRANCHISEMENT & AMERICAN DEMOCRACY Table A3.3 (2006)).

maintain their civil rights. Further, people are certainly barred by Washington law from voting or serving on juries while they are in prison or under state supervision (including probation).

Economic disempowerment of people with felony convictions also impedes their ability to participate in the political process. As Alexander explains, people with felony convictions face legal and systemic, rather than incidental or extralegal, discrimination in finding work, finding housing, and accessing government support.²⁰⁵ These barriers are just as present in Seattle as they are in the rest of the country. For example, it is very difficult for young people with only minor juvenile felony convictions to find work, even at fast food restaurants.²⁰⁶ It similarly became harder for people with felony convictions to gain skills and qualifications that may help them find work when the University of Washington rolled out its plan to ask applicants about criminal convictions in the fall of 2013.²⁰⁷ In addition, legal debt is a huge economic burden and barrier. A 2004 sample of people convicted of crimes were on average required to pay \$11,471 in LFOs over their lifetime, with Washington charging 12 percent interest on unpaid LFOs; so, even if making consistent \$50 monthly payments, an average person with a criminal conviction would still carry LFO debt after 30 years of making payments.²⁰⁸

This economic disempowerment translates to political disempowerment. The US Supreme Court held in *Citizens United v. Federal Election*

²⁰⁵ ALEXANDER, *supra* note 21, at 140–77 (ch. 4, *The Cruel Hand*).

²⁰⁶ Claudia Rowe, *For Teen Felons, Hardest Job Is Finding Honest Work*, SEATTLE POST-INTELLIGENCER, February 21, 2008, <http://www.seattlepi.com/default/article/For-teen-felons-hardest-job-is-finding-honest-1265166.php>.

²⁰⁷ Patricia Murphy, *University of Washington Will Consider Criminal History in Application Process*, KUOW; NATIONAL PUBLIC RADIO (July 18, 2013), <http://kuow.org/post/university-washington-will-consider-criminal-history-application-process>.

²⁰⁸ Task force, *supra* note 137, at 649 (citing Alexes Harris et al., *Drawing Blood from Stones: Legal Debt and Social Inequality in the Contemporary United States*, 115 AM. J. SOC. 1753, 1756, 1773–82 (2010); WASH. REV. CODE § 10.82.090 (Supp. 2011)).

Commission, that a prohibition on corporate independent expenditures on political advertisements was a ban on speech.²⁰⁹ The Court's holding that the manner in which a corporation spends its money is a form of speech implies that money is, at the least, a means of amplifying political speech. Though the decision was controversial, the dissent primarily took issue with other aspects of the decision (e.g., the status afforded to corporations and whether disproportionate political influence should be limited) and did not quibble with the proposition that money translates to or amplifies political influence.²¹⁰ Thus, when the system of collateral consequences of criminal convictions (legalized employment discrimination, LFOs, etc.) impoverishes people with felony convictions and their families by extension, it impedes their abilities to make their voices heard in the current political system.

Without money to contribute to political campaigns or to distribute political speech and without the right to vote or to serve on juries, people with felony convictions are left with little, if any, voice in the political system. Thus, the people most burdened by policing practices and the criminal justice system are also unable to hold their government accountable.

V. POPULAR EXPRESSIONS OF PROTEST AND REVOCATIONS OF CONSENT

Despite the disempowerment of many who are swept into the criminal justice system by the SPD, people have expressed disapproval of the SPD's exercise of authority through means other than formal elections, arguably revoking their consent to be governed. People in Seattle have attempted to limit or revoke the power of the SPD through litigation, public protest, and non-cooperation.

²⁰⁹ *Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 339 (2010).

²¹⁰ *Id.* at 393–479.

In 2005, The Defender Association, a King County public defender organization representing indigent defendants, brought a selective enforcement lawsuit against the SPD demonstrating racial bias in SPD arrest practices.²¹¹ This lawsuit led to voluntary SPD policy changes for drug arrests in Seattle's West Precinct (the site of many of the discriminatory arrests).²¹² The 2012 DOJ litigation argued that the SPD has a pattern or practice of using excessive force and raised concern about the SPD's discriminatory policing, leading to an ongoing agreement for SPD reform and oversight.²¹³ Though this latter litigation by the federal government may not obviously seem like an expression of the people of Seattle, the federal government, like the state government, may act as an agent of the people. As Amar explained, "federalism enabled the American People to conquer government power by dividing it. Each government agency, state and national, would have incentives to win the principal's affections by monitoring and challenging the other's misdeeds."²¹⁴ However, as evidenced by turmoil in the execution of the consent decree, not all people agree that the DOJ is a representative of the people of Seattle.²¹⁵

Additionally, groups of Seattleites have convened public protests of the SPD both in response to general SPD policies and practices and in response to specific incidents. The Seattle chapter of the Black Panther Party (BPP) protested SPD practices both by their existence and publications and by

²¹¹ State v. Johnson, 125 Wash. App. 1040 (2005) (unpublished opinion).

²¹² See LAW ENFORCEMENT ASSISTED DIVERSION, <http://leadkingcounty.org/> (last visited June 27, 2014); The Defender Association, Selective Enforcement Litigation, RACIAL DISPARITY PROJECT, <http://rdp.defender.org/projects> (last visited June 26, 2012).

²¹³ Settlement Agreement and Stipulated Order of Resolution, U.S. v. City of Seattle, No. 12-1282 (W.D. Wash. Sep. 19, 2012).

²¹⁴ Amar, *Of Sovereignty and Federalism*, *supra* note 73, at 1450.

²¹⁵ See, e.g., *supra* notes 9–13.

public rallies and demonstrations.²¹⁶ The Seattle chapter of the October 22nd Coalition demonstrates annually in protest of police brutality and over-criminalization.²¹⁷ Public rallies and protests have also followed incidents of egregious SPD violence, such as the SPD's response to the World Trade Organization protesters in 1999,²¹⁸ and the killing of John T. Williams in 2010.²¹⁹

Finally, Seattleites have refused to recognize the authority of the SPD by non-cooperation and direct action. Following the 1965 killing of a Black man by allegedly drunk, off-duty, White SPD officers for which the officers involved were punished only by short suspensions, Black and civil rights community groups called for civilian oversight of the SPD.²²⁰ When elected officials ignored these demands, the Central Area Civil Rights Committee (CACRC), with support from the Congress of Racial Equality (CORE) and

²¹⁶ See generally UNIVERSITY OF WASHINGTON HISTORY DEPARTMENT, SEATTLE BLACK PANTHER PARTY HISTORY AND MEMORY PROJECT, <http://depts.washington.edu/civilr/BPP.htm> (last visited July 6, 2014); *Seattle Rally Protests Black Panther's Arrest*, SEATTLE TIMES, Aug. 9, 1968, available at http://depts.washington.edu/civilr/display.cgi?image=bpp/news/ST_Aug9-68-p8.jpg; BLACK GROUP DEMANDS CHARGES AGAINST 5 OFFICERS, SEATTLE POST-INTELLIGENCER, Sept. 21, 1968, available at http://depts.washington.edu/civilr/display.cgi?image=bpp/news/PI_sept21-68-p4.jpg; *Rally Criticizes Police, Mayor and Prosecutor*, SEATTLE POST INTELLIGENCER, Oct. 22, 1968, available at http://depts.washington.edu/civilr/display.cgi?image=bpp/news/PI_Oct22-68-13.jpg.

²¹⁷ Akil Al-Jundi, Carl Dix & Sheba Haven, *History and Background of October 22*, OCTOBER 22ND COALITION, available at <http://www.october22.org/HistoryBackground.html>; Kathleen Miles, *Demonstrators Across U.S. Protest 'Epidemic of Police Brutality'*, HUFFINGTON POST, October 23, 2013, 12:25 PM EDT, http://www.huffingtonpost.com/2013/10/23/protests-police-brutality_n_4151085.html?ir=Los+Angeles.

²¹⁸ Kit Oldham, WASHINGTON HISTORYLINK (Nov. 13, 2009), http://www.historylink.org/index.cfm?DisplayPage=output.cfm&file_id=9213.

²¹⁹ Carly Flandro, *Vigil, March Protests Police Violence*, SEATTLE TIMES, Sept. 22, 2010 http://seattletimes.com/html/localnews/2012834472_rally08m.html.

²²⁰ Jennifer Taylor, *The 1965 Freedom Patrols and the Origins of Seattle's Police Accountability Movement*, SEATTLE CIVIL RIGHTS & LABOR HISTORY PROJECT (2006), available at http://depts.washington.edu/civilr/freedom_patrols.htm (last visited Jun. 16, 2014).

advice from the ACLU, formed “Freedom Patrols,” where community volunteers peacefully followed and monitored the actions of the SPD in the Central Area.²²¹

The Seattle BPP opted out of protection from or authority of the SPD, and responded to the lack of protection and excessive intrusion by the SPD, by developing independent self-defense and survival programs to protect Black Seattleites.²²² As one of the Seattle BPP founders, Elmer Dixon, explained,

We [black Americans] were no longer going to be hosed by police, bitten by police dogs, bombed in our churches. . . . We were a symbol. The impression we wanted to give was that we were not cowards. We were men. . . . We were not going to beg for our rights. . . . We were trying to forge change by whatever means we could.²²³

Additionally, the BPP conducted its own reviews of killings of Black people by White SPD officers as official inquests too readily found such killings “justified.”²²⁴

Further, many individuals have refused to cooperate with the SPD. Individuals in the anti-authoritarian Occupy and Anarchist movements in Seattle have refused to comply with police limits and to participate in grand

²²¹ *Id.*

²²² Kurt Schaefer, *The Black Panther Party in Seattle, 1968-1970*, in SEATTLE BLACK PANTHER PARTY HISTORY AND MEMORY PROJECT (2005), available at http://depts.washington.edu/civilr/Panthers1_schaefer.htm (last visited July 6, 2014) (internal citations omitted); see also, generally, AARON DIXON, *MY PEOPLE ARE RISING: MEMOIR OF A BLACK PANTHER PARTY CAPTAIN* (Haymarket Books 2012).

²²³ Elmer Dixon quoted in Kurt Schaefer, *The Black Panther Party in Seattle, Part 2: Seattle Panthers*, SEATTLE CIVIL RIGHTS & LABOR HISTORY PROJECT (2005), available at http://depts.washington.edu/civilr/Panther2_schaefer.htm (last visited Jun. 16, 2014) (quoting Judith Blake, *Panthers' Progress*, SEATTLE TIMES at E6 (Oct. 24, 1986)).

²²⁴ See Taylor, *supra* note 220 (citing *Blacks Set Own Probe of Killing*, available at http://depts.washington.edu/civilr/display.cgi?image=bpp/news/ST_oct18-69-p35.jpg (last visited July 6, 2014)).

jury investigations.²²⁵ Finally, columnist Larry Mizell Jr.²²⁶ and singer Choklate Moore²²⁷ explained that many young People of Color, who have only experienced neglect or abuse from police, avoid police or do not cooperate with police.²²⁸ Butler advocates such non-cooperation as a mechanism for democratic accountability, noting “[w]hen the law is selectively applied, or doesn’t serve to make communities safer, providing information about lawbreakers is not a virtue.”²²⁹

Thus, despite the legal disempowerment of people bearing the brunt of the burden of SPD practices, Seattleites nonetheless have expressed their disapproval of or desire to revoke SPD authority. These popular expressions of discontent, in their own right, challenge the legitimacy of the SPD’s authority. Further, applying political process theory, the discriminatory outcomes of the SPD’s exercise of power and the political disempowerment of the people most burdened by the SPD’s exercise of power seriously undermine the legitimacy of SPD authority.

²²⁵ Paula Wissel, *Remnant of Last Year’s May Day Riots: Grand Jury Resisters*, KPLU, April 29, 2013, <http://www.kplu.org/post/remnant-last-years-may-day-riots-grand-jury-resisters>; KOMO Staff, *Seattle Police Arrest Occupy Seattle Protesters, Tear Down Tent*, KOMO NEWS, Oct 13, 2011, 11:35 PM PDT, <http://www.komonews.com/news/local/131844143.html>.

²²⁶ *Larry Mizell Jr.*, THE STRANGER, AUTHOR ARCHIVE, <http://www.thestranger.com/seattle/larry-mizell-jr/Author?oid=18608> (last visited Mar. 13, 2014).

²²⁷ *Choklate*, REVERBNATION, <http://www.reverbnation.com/choklate> (last visited Mar. 13, 2014); Charles Mudede, *Seattle Soul Sister; Choklate Brings New Blood to R&B*, THE STRANGER, Aug. 18, 2005, <http://www.thestranger.com/seattle/seattle-soul-sister/Content?oid=22651>.

²²⁸ Larry Mizell & Choklate Moore, interviewed by Steve Scher, *Seattle Asks for Help on Public Safety*, Weekday, KUOW NATIONAL PUBLIC RADIO, (originally broadcast March 8, 2012), available at <http://www2.kuow.org/program.php?id=26195>.

²²⁹ BUTLER, *supra* note 39, at 99.

VI. THE NECESSARY PROCESS FOR RE-FORMING THE SPD TO ESTABLISH LEGITIMACY

In order to legitimize the SPD's power, the SPD must truly be re-formed with input from the entire population, particularly those bearing the burdens of police and criminal punishment policies. The re-form effort must be premised on two propositions: (1) current SPD policies and power afforded to the SPD must be presumed illegitimate; and (2) people actually bearing the brunt of the burden of the SPD's exercise of power (people punished based on SPD arrests and investigations) must be specifically empowered in the re-formation of the SPD.

A. The SPD's Current Powers Must be Presumed Illegitimate

First, as discussed previously, the SPD was formed by a subset of the people subjected to its authority,²³⁰ and those most harmed by the SPD's exercise of power, those punished and labeled as felons, have been politically disempowered.²³¹ Further, the SPD has exercised its power in a way that discriminates against People of Color,²³² who were and are excluded from the political electorate that empowered the SPD. Finally, Communities of Color and anti-authoritarian activists have expressed disapproval of the SPD's exercise of power via litigation, public protest, and noncooperation.²³³ Both analyzing whether the SPD has the consent of the governed and applying political process theory to this history and system leads to the conclusion that the SPD does not legitimately have the power to govern or police the people of Seattle, particularly Communities of Color.

²³⁰ See generally *supra* notes 136–56.

²³¹ See generally *supra* notes 190–210.

²³² See generally *supra* notes 158–89.

²³³ See generally *supra* notes 211–29.

It may be argued that, as its formation is enshrined in the Seattle City Charter, the SPD cannot be “illegitimate” absent some legal or political action declaring it so (e.g., a court ruling that the SPD has no authority, a legislative amendment to the city charter revoking the SPD’s power, or a voter initiative disbanding the SPD). However, as Justice Marshall argued, the real value of formative texts like the Constitution (or the Seattle City Charter) does not come from literal, deferential interpretation but from modern interpretation that strives for substantive justice, equality, and legitimacy.²³⁴ The textual declaration that the SPD derives its power from the consent of the governed must be read with an acknowledgement that many people were and are excluded from giving or revoking consent to the SPD’s authority through the formal political process. Substantive legitimacy through consent requires recognition of the many ways people voice consent or disapproval (protest, noncooperation, etc.).

In the case of the SPD, not only have groups organized to specifically voice disapproval of SPD exercises of power, but 65 percent of people in Seattle believe the SPD does not treat people of all races equally and 45 percent believe the SPD often uses excessive force.²³⁵ Although the burden of SPD actions may be concentrated, the population at large perceives serious problems. Particularly in light of the ways in which People of Color, women, and others were excluded from the political process that formed the SPD,²³⁶ the re-formation effort should respect and respond to widespread concern about the SPD’s exercise of power rather than continue to recognize the power granted by a very limited franchise a very long time ago.

Thus, in the re-formation process, any current authority exercised by the SPD must be presumed illegitimate. Both legal and popular theories of

²³⁴ See Marshall, *supra* note 51.

²³⁵ Anzalone & Stryker, *supra* note 8, at 1.

²³⁶ See generally *supra* notes 136–56.

democracy require that government power must be accountable to those most burdened by it and that it must not be exercised in a way that discriminates against a disempowered minority.²³⁷ As the SPD has exercised its power in a way that discriminates against People of Color, and those who are punished and labelled as felons because of the SPD's exercise of power are disempowered politically, the SPD is not a legitimate democratic institution and does not have the consent of the people it governs.

Rather than revising or removing those policies or practices of the SPD that the DOJ has identified as problems, the re-formation process should start from scratch and build a new conception of what, if any, powers we the people wish to delegate to a police force. Such a presumption will likely not lead to violence or lawlessness. For example, British Police generally do not carry lethal weapons, and British society has not descended into chaos.²³⁸ A presumption of illegitimacy is important to ensure that the Anglo-American culture and ideas that originally formed the SPD do not continue to control and exclude other voices from the re-formation process. Such a presumption may allow greater space for more voices that would otherwise be silenced because they do not fit within the narrow areas that the DOJ has identified as problematic.

Though a presumption of illegitimacy may be protested by existing police officers, this consequence has been realized even with the limited changes that the DOJ has sought to implement, and the result has not been a catastrophe or a total loss of social order. Some within the SPD have responded to the changes resulting from the Consent Decree by so-called "de-policing," and by filing lawsuits to attempt to block new policies.

²³⁷ See generally *supra* notes 19–100.

²³⁸ Jon Kelly, *Why British Police Don't Have Guns*, BBC NEWS MAGAZINE, Sep. 19, 2012, <http://www.bbc.co.uk/news/magazine-19641398>.

A May 2014 report to the CPC indicated that SPD enforcement of low-level infractions and misdemeanors dropped dramatically in recent years, though there is no agreed upon explanation for the drop.²³⁹ Though often criticized, this “de-policing” may be part of the necessary process for effective reform. If the drop in enforcement of low-level crimes stems from the SPD’s doubt about all formerly-used practices, this drop in enforcement may represent a presumption or fear by SPD officers that formerly-used practices are unauthorized or illegitimate. If the prior policing regime is presumed illegitimate, we must “de-police” (abandon that regime) before we can build a new, legitimate policing regime in its place. However, the drop in enforcement may instead stem from a frustration with the reform process or a desire to create obstacles to or protest the intervention and changes to SPD policies. If the latter is true, this may signal a potentially soon-to-come shift in the institutional culture, or at least personnel, of the SPD.

Additionally, on May 28, 2014, 126 SPD Officers filed a lawsuit against the DOJ, the City, and the court-appointed monitor overseeing the consent decree (among other defendants), alleging that the newly implemented use of force policy violates their constitutional rights and puts them in unreasonable danger.²⁴⁰ US Attorney Durkan criticized the lawsuit as an

²³⁹ See Steve Miletich, *Report Cites Plunge in SPD Enforcement of Low-Level Crime*, SEATTLE TIMES, May 14, 2014, http://seattletimes.com/html/localnews/2023610869_policingdeclinexml.html (citing BOB SCALES, INITIAL DATA ON SPD ENFORCEMENT PATTERNS (May 14, 2014), available at <https://www.documentcloud.org/documents/1159989-initial-data-on-spd-enforcement-patterns.html>).

²⁴⁰ See generally Civil Rights Complaint Under 42 U.S.C. § 1983 and 28 U.S.C. § 1331, Mahoney et al. v. Holder et al., No. CV-14-0794 MJP (USDC W.D. Wash., filed May 28, 2014); see also Dominic Holden, *Ugh. Seattle Cops Sue to Block Rules Intended to Stop Excessive Force*, SLOG (May 28, 2014, 6:38 PM), <http://slog.thestranger.com/slog/archives/2014/05/28/ugh-seattle-police-sue-to-block-rules-intended-to-stop-excessive-force> (summarizing the lawsuit brought by SPD officers); Steve Miletich, Mike Carter, & Jennifer Sullivan, *Seattle Cops Sue Over DOJ Reforms*, SEATTLE TIMES, May 28, 2014, http://seattletimes.com/html/localnews/2023717834_spdofficerslawsuitxml.html.

attempt by some SPD officers to hinder reform efforts, and declared a message for SPD officers, “[r]eform is on the way. Get on the train, or leave.”²⁴¹ Further, Monitor Merrick Bobb noted his concern in a recent report that “the internalization of the objectives and goals of the Consent Decree by the SPD will require a redoubling of additional, focused efforts.”²⁴² There is, at least, a sizeable contingent of SPD officers resisting reform efforts. Such resistance may be a positive sign for meaningful change as it may portend an exodus of those in the SPD who are resistant to new policies and ideas. However, depending on the magnitude of this resistance, it may instead represent an institutional culture within the SPD that will defeat the current reform efforts.

However, a recent rejection of a lawsuit by the Seattle Police Management Association (the union for management-level SPD officers) to block a 2014 city ordinance allowing the chief to hire from outside the SPD to fill management positions²⁴³ may pave way for a necessary shift in the institutional culture of the SPD. The presumption of illegitimacy necessary for meaningful re-formation must be internalized and embraced by the SPD. To further this goal, SPD officers should be included, certainly, as community members, in the re-formation effort, but should be included on the same footing as other community members. SPD officers’ input should be shared publicly and weighted equally with other input. Further, the end

²⁴¹ Mike Carter & Christine Clarridge, *U.S. Attorney: SPD Officers’ Lawsuit ‘Without Merit,’* SEATTLE TIMES, May 29, 2014, 1:47 PM, <http://blogs.seattletimes.com/today/2014/05/u-s-attorney-durkan-spd-officers-lawsuit-without-merit/> (quoting US Attorney Jenny Durkan).

²⁴² SEATTLE POLICE MONITOR, THIRD SEMI-ANNUAL REPORT 7 (June 2014), available at <https://www.documentcloud.org/documents/1198401-third-semiannual-report-final-embargoed-until-6.html>; see also Steve Miletich, *Monitor: SPD Improves on Paper, but Rank-and-File Not All on Board*, SEATTLE TIMES, Jun. 16, 2014, http://seattletimes.com/html/localnews/2023859867_monitorreportxml.html.

²⁴³ See Steve Miletich, *Bid to Block SPD Chief From Hiring Outside Aides Hits Snag*, SEATTLE TIMES, Jun. 3, 2014, http://seattletimes.com/html/localnews/2023759752_laborcomplaintxml.html.

or reduction of the immunity from prosecution and serious punishment and the preferential promotions that SPD officers have been afforded in the past may help cement the understanding among SPD officers and management that the SPD must be accountable to the people of Seattle for its actions. If SPD officers or management are not willing to work in a police force that is truly accountable to the people it polices, then they are not well-suited to be part of a legitimate police force.

B. Those Most Harmed by the SPD's Exercise of Power Must be Specifically Empowered in the Re-Formation Process

Second, those most burdened and harmed by the SPD's current exercise of power must be empowered and must have a controlling role in the re-formation process. This proposition flows from the political process theory of legal or constitutional legitimacy that views as suspect government action or policy formed with constraints on political participation and resulting in unequal treatment of a minority group,²⁴⁴ and from the demands of Black activists and theorists whose communities have been harmed and oppressed by police power.²⁴⁵ This may be accomplished by the CPC both taking a more central and controlling role in the re-formation process and reaching out to and specifically empowering prisoners and people with criminal convictions (whose opportunities for political participation are generally limited) in the re-formation process.

The CPC, formed as part of the 2012 settlement agreement between the City of Seattle and the DOJ, aimed to include people with criminal histories, but is largely made up of representatives of people bearing the burdens of SPD policy (i.e., Communities of Color and criminal defendants), alongside police and business representatives.²⁴⁶ However,

²⁴⁴ See generally ELY, *supra* note 56.

²⁴⁵ See generally *supra* notes 19–50.

²⁴⁶ OFFICE OF THE COMMUNITY POLICE COMMISSION, Commissioners, <http://www.seattle.gov/policecommission/> (last visited June 28, 2014).

even the CPC was denied formal power in the re-formation process; it was allowed to continue to “comment” on the process but not to “delay” the process to ensure its voice was heard by the Court overseeing the SPD re-formation.²⁴⁷

Such limitation of power in the re-formation process to the DOJ and/or the City government will not truly give the SPD legitimacy as these agents are not representative of the people subjected to SPD power because they are elected by a franchise that disempowers people with felony convictions. The City of Seattle is the party that will be held liable in litigation concerning SPD conduct and thus has financial interest in denying the claims of SPD abuse from the people of Seattle. The DOJ also relies on the SPD in many of the criminal cases it prosecutes and has even partnered with the SPD in an initiative to curb gun violence.²⁴⁸ Thus, not only is the DOJ limited in its representative capacity, it also has an interest in denying claims against the SPD.

Although the CPC may not be the “only one” getting input from the community,²⁴⁹ the CPC has made a concerted effort to empower in the re-formation process large numbers of Seattleites and particularly Communities of Color and other groups disproportionately targeted by the SPD. In prefacing its policy recommendations, the CPC explained that despite its own diversity, the CPC did extensive outreach to better represent Seattle’s many communities. The CPC noted,

²⁴⁷ Steve Miletich, *Judge Denies Citizen Commission Formal Role in SPD Reforms*, SEATTLE TIMES, Nov 26, 2013, 11:21 AM, <http://blogs.seattletimes.com/today/2013/11/judge-denies-citizen-commission-formal-role-in-spd-reforms/>.

²⁴⁸ See, e.g., Press Release, U.S. Attorney Jenny A. Durkan, Law Enforcement Targets Gun Crime with Federal Penalties (June 18, 2012), <http://www.justice.gov/usao/waw/press/2012/June/gunviolence.html>; *Feds Warn of Crackdown on Seattle Gun Violence*, CBS SEATTLE, June 19, 2012, <http://seattle.cbslocal.com/2012/06/19/feds-warn-of-crackdown-on-seattle-gun-violence/>.

²⁴⁹ Mike Carter, *Durkan Tells Citizens Panel that Its Police-Reform Role Is Limited*, SEATTLE TIMES, Dec. 11, 2013, http://seattletimes.com/html/localnews/2022445270_durkancpc.xml.html.

[it] was particularly interested in gaining an understanding of the views of people in Seattle who have traditionally not had a voice and who may have substantial concerns with police practices, including communities of color, people who are homeless, immigrants and refugees, youth, people who are mentally ill, persons with substance abuse problems and members of the LGBT community.²⁵⁰

This outreach included holding over 140 meetings across the city and collecting 2,952 surveys from individuals.²⁵¹

This effort by the CPC recognizes the deficiencies in the traditional political process and, in so doing, aims to assess what SPD power the people of Seattle actually consent to, rather than what SPD power the political system will recognize. Despite Judge Robart's denial of the CPC's motion to intervene (to gain status as an independent party), the parties involved in the re-formation process have committed to working with the CPC, with Ron Ward, the assistant monitor,²⁵² expressing the hope that the CPC would be assertive, as "[w]ithout that assertiveness, I don't think we will get real change."²⁵³ Due to this buy-in from other parties, the CPC may still exercise a controlling role in the re-formation process with its status as amicus curiae only. However, as the body that best remedies the democratic deficiencies of the past and of the political process, the CPC's consent

²⁵⁰ SEATTLE COMMUNITY POLICE COMMISSION, POLICY RECOMMENDATIONS 3 (Nov. 15, 2013), available at <https://www.seattle.gov/policeCommission/documents/CPC%20Policy%20Report%2011-15-13.pdf>.

²⁵¹ *Id.*

²⁵² See, e.g., Mike Carter & Steve Miletich, *Federal Judge Approves Blueprint for Seattle Police Reforms*, SEATTLE TIMES, Mar. 12, 2013, http://seattletimes.com/html/localnews/2020543230_monitorrobartxml.html; Mike Carter, *Durkan Tells Citizens Panel That Its Police-Reform Role Is Limited*, SEATTLE TIMES, Dec. 11, 2013, http://seattletimes.com/html/localnews/2022445270_durkancpexml.html; Monitoring Plan for the First Year (Document 59) at 18, U.S. v. City of Seattle, (No. 12-1282), 2013 WL 6185219, also available at http://www.parc.info/client_files/The%20Monitoring%20Team/Seattle%20Monitoring%20Plan%20Final.pdf.

²⁵³ Carter & Miletich, *supra* note 252.

should be necessary for any new policy to be approved. In other words, even though he is not legally obligated to do so, Judge Robart should grant the CPC formal party status to ensure, as much as possible, that the SPD is re-formed with the substantive, rather than merely textual, consent of the governed.

In its recently announced recommendations for changes to the SPD's accountability structure, the CPC emphasized that "[c]ivilian oversight of police accountability must be robust because, in the end, the police are answerable to the public for upholding [the values of Constitutional policing and the protection of civil rights]."²⁵⁴ The CPC recommended increasing independence and transparency (including clearer names for the offices) of the existing SPD accountability offices in addition to a continued role for the CPC itself in overseeing the accountability process.²⁵⁵ Further, in this recommendation, the CPC emphasized that the majority of its members should be "drawn specifically from communities that have had difficulties in their interactions with SPD."²⁵⁶ While the CPC specifically identified the need to include representation from different racial groups, youth, LGBT communities, and people experiencing homelessness, mental illness and substance abuse disorders,²⁵⁷ it did not specifically identify the need for representation of people who are criminalized and incarcerated (although the initial membership included representatives for these groups).

The CPC should further improve its own democratic representation by specifically empowering and seeking input from people with felony convictions and prisoners. As Stuntz argued, in the spectrum of people who

²⁵⁴ COMMUNITY POLICE COMMISSION, COMMUNITY POLICE COMMISSION ACCOUNTABILITY SYSTEM STRUCTURE RECOMMENDATIONS 1 (Apr 30, 2014), <http://www.seattle.gov/Documents/Departments/CommunityPoliceCommission/CPC-AccountabilityStructureRecommendations.pdf>.

²⁵⁵ *Id.* at 2–4.

²⁵⁶ *Id.* at 5.

²⁵⁷ *Id.*

bear the burden of police action, people convicted of crimes hold the least political capital.²⁵⁸ Additionally, people convicted of crimes (where such convictions result from and depend on police action, such as investigation) bear possibly the most profound burden of police action as they may lose their liberty and are economically and often politically disempowered for years following their convictions. The CPC is well-positioned to empower people with criminal convictions in the SPD re-formation process, and was formed with a desire to do so. Existing prisoners' groups, such as the Black Prisoners Caucus (who have organized to analyze and address problems with incarceration and the criminal justice system),²⁵⁹ as well as other prisoners who wish to participate, should have a central role in SPD reform.

These two steps are necessary to ensure that the SPD's power is authorized by the consent of the governed not only textually but substantively. Just as Dr. King argued that the promise in the Constitution and the Declaration of Independence that all people would be treated equally was a bounced check, both the terms "consent" and "the governed" in the Seattle City Charter are promises waiting to be fulfilled. By affording the CPC not only an advisory role but a determinative role (i.e., veto power) in the re-formation process, Judge Robart can facilitate a process by which the community's consent is truly the source of the SPD's power. By specifically including people who have been historically excluded from the political process and who, likely not coincidentally, are most burdened by the SPD's exercise of power, the CPC can be a body that truly represents "the governed." The CPC can promote substantive legitimacy by

²⁵⁸ See generally Stuntz, *supra* note 46, at 80–84, 87, 89–91, 94–97.

²⁵⁹ BLACK PRISONERS CAUCUS, WHAT WE DO, available at <http://www.blackprisonerscaucus.org/whatwedo>; Carol Estes & Catherine Bailey, *SIDEBAR: From the Other Side of The Bars*, YES MAGAZINE, Feb. 12, 2007, available at <http://www.yesmagazine.org/issues/is-the-u.s.-ready-for-human-rights/sidebar-from-the-other-side-of-the-bars>; Andy Rathbun, *Court Decision Encourages Monroe Prisoners Eager for Right to Vote*, THE HERALD OF EVERETT, WASHINGTON, January 11, 2010, available at <http://www.heraldnet.com/article/20100111/NEWS01/701119932>.

acknowledging that “the governed” includes all people subject to the SPD’s authority, not only those who are socially desirable, easy to reach, or politically powerful.

VII. CONCLUSION

Currently, the SPD exercises power, including violent force, over the people of Seattle even though those most burdened by this exercise of power never consented to such power and continue to be excluded from the political process. Black activists and scholars have long identified such a dynamic as rendering police power illegitimate, and even legal theories, which are rooted in or deferential to Anglo-American texts, recognize the democratic problems with this dynamic. The SPD is not unique in its formation by an exclusive franchise and subsequent discrimination against excluded groups—particularly against People of Color. In the current SPD re-formation process, Seattle is well-positioned to serve as an example to other cities and to develop a truly legitimate police force. To do this, current SPD powers must be presumed illegitimate and people most burdened by the exercise of SPD powers, namely people punished or labeled as felons by SPD arrests or investigations, must be specifically empowered in the re-formation process.