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“The Fire [This] Time”: Ferguson, Implicit Bias, and the Michael Brown Grand Jury

Nickolas Kaplan

America has continued to witness countless police and vigilante killings of young, unarmed black men in the last decade.¹ Each killing, acquittal, and non-indictment renews scrutiny over America’s violent racial oppression in the “postracial” 21st century.^{2,3} Even when community activism yields prosecutorial action, implicit biases and representation concerns in juries further hamper the deliverance of justice to victims’ families.

On August 20, 2014, St. Louis County prosecutor Bob McCulloch convened a grand jury to decide whether charges should be brought against Officer Wilson for the fatal shooting of Michael Brown.⁴ The 12-person grand jury, impaneled three months earlier, had three black jurors (one man, two women) and nine white jurors (six men, three women),⁵ reflecting the county’s racial demographics (24 percent black, 68 percent white),⁶ but far removed from that of Ferguson (67 percent black, 29 percent white).⁷ The grand jury’s composition thus raised concerns in light of structural representation issues in

¹ Tina Susman, *Before Ferguson: Deaths of other black men at hands of police*, LOS ANGELES TIMES, 13 August 2014, available at <http://www.latimes.com/nation/nationnow/la-na-nn-police-deaths-20140813-story.html>.

² Kara Brown, *This Is Why We’re Mad About the Shooting of Mike Brown*, JEZEBEL, 11 Aug. 2014, available at <http://jezebel.com/this-is-why-were-mad-about-the-shooting-of-mike-brown-1619522935>.

³ Ta-Nehisi Coates, *Barack Obama, Ferguson, and the Evidence of Things Unsaid*, THE ATLANTIC, 26 Nov. 2014, available at http://www.theatlantic.com/politics/archive/2014/11/barack-obama-ferguson-and-the-evidence-of-things-unsaid/383212/?single_page=true.

⁴ Lauren Raab, *Grand Jury Starts on Michael Brown Case: What You Need to Know*, LOS ANGELES TIMES, 20 Aug. 2014, available at <http://www.latimes.com/nation/nationnow/la-na-nn-grand-jury-ferguson-michael-brown-20140820-story.html>.

⁵ *Grand Jury in Michael Brown Case: 3 Black Members, 9 White*, ST. LOUIS POST-DISPATCH, 22 Aug. 2014, available at http://www.stltoday.com/news/local/crime-and-courts/grand-jury-in-michael-brown-case-black-members-white/article_6bbba56c-e28a-53d0-8b85-b20c36810fbd.html.

⁶ *Id.*

⁷ Jeff Smith, *In Ferguson, Black Town, White Power*, THE NEW YORK TIMES, 17 Aug. 2014, available at <http://www.nytimes.com/2014/08/18/opinion/in-ferguson-black-town-white-power.html>.

municipalities like Ferguson and the county's stark divide on whether "race had nothing to do with the shooting."⁸

This article examines juror bias and jury selection considerations vis-à-vis the St. Louis County grand jury that refused to indict Officer Darren Wilson for the fatal shooting of Michael Brown.

IMPLICIT BIAS IN THE JURY SYSTEM

Jurors' implicit bias often corresponds with whether a case is "race[-]salient," where "everyone on the jury is on the alert that their decisions about race are being observed."⁹ The most bias emerges where the defendant (or, the victim) "happens to be" a person of color.¹⁰ When a case is not apparently related to race, jurors are "unaware of the fact that their racial biases need to be checked".¹¹ Consequently, implicit biases in race often fill in evidentiary gaps.¹² Yet the presence of even one juror of color in such cases can "underscore the importance of being fair" to other white jurors,¹³ alerting individual jurors to consciously check their implicit biases.

A majority-white jury composition has significant bearing on jurors' interpretive capacity in cases involving interactions between white police and persons of color in racially and socioeconomically stratified counties.¹⁴ According to Illinois federal defender Geoffrey Meyer, "For [jurors] from more affluent communities, their interactions could be when the police visit their children's school or they get a traffic ticket—minor encounters. Whereas in other communities, there can be a much more antagonistic relationship."¹⁵ Meyer identifies that challenge as one of "communicat[ing] what life might be like for

⁸ Jamelle Bouie, *Tale of Two Fergusons*, SLATE MAGAZINE, 16 Sept. 2014, available at http://www.slate.com/articles/news_and_politics/politics/2014/09/st_louis_blacks_and_white_disagree_on_michael_brown_s_killing_hold_almost.html.

⁹ Douglas Keene, *Does the Prosecution Want African-American Jurors for the Trayvon Martin Case?*, THE JURY ROOM RSS, 12 June 2013, available at <http://keenetrials.com/blog/2013/06/12/does-the-prosecution-want-african-american-jurors-for-trayvon-martin-case/>.

¹⁰ *Id.*

¹¹ *Id.*

¹² Lecia Brooks, *Putting Implicit Racial Bias to the Test*, THE HUFFINGTON POST, 14 Oct. 2014, available at http://www.huffingtonpost.com/lecia-brooks/implicit-racial-bias_b_5966872.html.

¹³ *Id.*

¹⁴ Derrick Clifton, *There's Already a Serious Problem With the Michael Brown Trial*, MIC, 26 Aug. 2014, available at <http://mic.com/articles/97232/there-s-already-a-serious-problem-with-the-michael-brown-trial>

¹⁵ Telephone Interview with Geoffrey Meyer, Staff Attorney at Illinois Federal Public Defender's Office (Nov. 13, 2014).

someone who is not of their race, because this can color the way actions taken by the police or the defendant are interpreted.”¹⁶

THE “TWO FERGUSONS”

Power structures in suburbs that transitioned to majority-black populations remain overwhelmingly white. Ferguson, for instance, has a white mayor, a 6-white-1-Hispanic school board that recently suspended a black superintendent, one black City Council member, and a six percent black police force.¹⁷ This is compounded by a municipal revenue scheme over-reliant on traffic citations by mostly white officers against black drivers: 86 percent of stops, 92 percent of searches, and 93 percent arrests in 2013 were of black drivers.¹⁸ The grand jury thus replicates Ferguson’s demographic power imbalance.

More striking, though, is the diametric racial divide between the 604 St. Louis County residents polled on the Michael Brown case by the local Remington Research Group. While 64 percent of blacks agreed that Brown was “targeted because of his color,” 77 percent of whites disagreed.¹⁹ And while 71 percent of blacks believed that Wilson should be arrested and charged with a crime, 72 percent of whites believed he should not be.²⁰ Protest perceptions also foster this divide. Political science research suggests that blacks “are much less likely to blame the black protesters for what transpires [while] whites are less likely to blame the white police,”²¹ even “where police were calm and protesters, orderly.”²²

GRAND JURY SELECTION & PROCEDURE

Moreover, jury selection was not conducted in light of the case’s specific procedural and bias concerns, but rather, via ordinary summons²³ that, according to federal defender Meyer, is prone to selection bias.²⁴ “Not everyone regis-

¹⁶ *Id.*

¹⁷ Smith, *supra* note xi.

¹⁸ *Id.*

¹⁹ Bouie, *supra* note xii.

²⁰ *Id.*

²¹ Christian Davenport, *Seeing Contention in Black and White: Protest and Protest Policing*, POLITICAL VIOLENCE @ A GLANCE, 7 Aug. 2014, available at <http://politicalviolenceataglance.org/2014/08/17/seeing-contention-in-black-and-white-protest-and-protest-policing/>.

²² Bouie, *supra* note xii.

²³ Greg Botelho and Jean Casarez, *Michael Brown Shooting: What to Expect, What to Know as Grand Jury Takes Case*, CNN, 20 Aug. 2014, available at <http://www.cnn.com/2014/08/20/justice/missouri-shooting-grand-jury/>.

²⁴ Meyer, *supra* note xiii.

ters to vote and not everyone has a driver's license or state ID," Meyer observes.²⁵ "There's a parallel [as it relates to] voter ID laws in this country. [P]eople of lower-economic means may not have the same access or necessity for state ID's or identification cards. . . [impeding on the] possib[ility] at the jury selection stage to get a fair representation."²⁶ Insofar as this summons procedure was consistent with that of Missouri state courts²⁷, the grand jury selection was not preliminarily safeguarded against racial compositions under-representative of the community where the alleged criminal conduct occurred.

The grand jury required nine out of twelve jurors to find that the weight of the evidence showed "probable cause," or reasonable grounds that the officer *could have* committed manslaughter or second-degree murder.²⁸ Yet McCulloch's "avalanche"-like disclosure of conflicting evidence and witness testimony,²⁹ which rendered the grand jurors trial-level fact finders, was delivered in the absence of an adversarial process that could advocate for Brown.³⁰ "Probable," then, proved fitting for an outcome so systemically entrenched.³¹ The living histories of redlining, police repression, and disinvestment endemic to St. Louis County are inseparable from the fate of Michael Brown and the officer-shooter.³²

²⁵ *Id.*

²⁶ *Id.*

²⁷ *A Guide to Missouri Jury Service: Glossary for Jurors*, YOUR MISSOURI COURTS HOME, accessed 26 Oct. 2014, available at <http://www.courts.mo.gov/osca/index.nsf/0/194d02cc2e5505ab8625697c00516148?OpenDocument>: "Potential jurors are selected randomly from the voter registration list and the department of revenue's driver's license records and . . . property tax rolls."

²⁸ Ben Casselman, *It's Incredibly Rare For A Grand Jury To Do What Ferguson's Just Did*, DATALAB, 24 Nov. 2014, available at <http://fivethirtyeight.com/datalab/ferguson-michael-brown-indictment-darren-wilson/>.

²⁹ Bryan Monroe, *The Great Ferguson Okey-Doke*, HUFFINGTON POST, 28 Nov. 2014, available at http://www.huffingtonpost.com/bryan-monroe/the-great-ferguson-okeydo_b_6237942.html.

³⁰ Marjorie Cohn, *Prosecutor Manipulates Grand Jury Process to Shield Officer*, TRUTHOUT, 28 Nov. 2014, available at <http://truth-out.org/news/item/27699-prosecutor-manipulates-grand-jury-process-to-shield-officer>.

³¹ John Powell, *A Response to Ferguson: Systemic Problems Require Systemic Solutions*, THE BERKELEY BLOG, 25 Nov. 2014, accessible at <http://blogs.berkeley.edu/2014/11/25/a-response-to-ferguson-systemic-problems-require-systemic-solutions/>.

³² Chuck Raasch, *Scholar Blames Ferguson Shooting on History of Government Segregation Policies*, ST. LOUIS POST-DISPATCH, 13 Nov. 2014, accessible at http://www.sltoday.com/news/local/crime-and-courts/scholar-blames-ferguson-shooting-on-history-of-government-segregation-policies/article_5fe91ffa-9f0d-5e05-98d5-af979ad5f901.html.

CONCLUSION

Ferguson revived a national dialogue on systemic racism in policing, the justice system, media discourse, and social institutions.³³ A justice system where “reasonable fear and suspicion” are squarely vested in “the eyes of the beholder”³⁴ continues to be prone to the derivative biases of the shooters.³⁵ Grand jury proceedings must elicit inquiry into racial representation and implicit bias in jury selection and integrate the experiences of Americans of color into courtroom deliberations. The perpetuation of more Michael Browns requires nothing less.³⁶

³³ Michael P. Jeffries, *Ferguson must force us to face anti-blackness*, THE BOSTON GLOBE, 28 Nov. 2014, available at <https://www.bostonglobe.com/opinion/2014/11/28/ferguson-must-force-face-anti-blackness/pKVMpGxwUYpMDyHRWPln2M/story.html>.

³⁴ Potts, *supra* note xxi.

³⁵ Khalil Gibran Muhammad, *Darren Wilson: America's 'Model Policeman'*, THE NATION, 29 Nov. 2014, available at <http://www.thenation.com/article/191673/darren-wilson-americas-model-policeman>.

³⁶ Nina Storchlic, *The 14 Teens Killed by Cops Since Michael Brown*, THE DAILY BEAST, 25 Nov. 2014, available at <http://www.thedailybeast.com/articles/2014/11/25/the-14-teens-killed-by-cops-since-michael-brown.html>