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## Race and Police Power

Jamila Jefferson-Jones

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# INTRODUCTION TO SYMPOSIUM ISSUE: RACE AND POLICE POWER

Jamila Jefferson-Jones\*

In the nearly three years that have passed since the shooting of Michael Brown in Ferguson, Missouri, activists, reformers, politicians, legal commentators, and the general public are still grappling with the question of what progress, if any, has been made to address issues of race and police misconduct. This symposium issue explores the topic of race and police power in the aftermath of both the Brown killing and of a spate of high-profile, police-involved shootings of unarmed African-Americans across the county. Our contributing authors' articles span a diversity of topics – including the role of the law in combating racism, police reform efforts, citizen unrest, proper remedies for police misconduct, and racial profiling – and aim to address the areas of concern that are most critical in advancing civil rights and appropriate policing and instilling accountability into the criminal justice system.

This symposium issue begins with *Predatory Policing*, an essay by Devon Carbado. This essay paints a backdrop of the policing environment in which many members of the African-American community find themselves – one in which both “mass criminalization”<sup>1</sup> and “predatory policing”<sup>2</sup> are the norm. The themes touched upon by Carbado’s essay reverberate throughout the other articles that composed this symposium issue. These articles variously (1) use the killing of Michael Brown as a point of departure for the larger discussion of entrenched injustice in the criminal justice system; and (2) describe the various negative impacts that disproportionate, abusive, and predatory policing have on minority communities and that propose innovative solutions to those problems.<sup>3</sup>

## Backdrop: Mass Criminalization and Predatory Policing

Devon Carbado sets the tone of this symposium issue with his essay, *Predatory Policing*, in which he argues that the “‘front end’ police contact” with African-Americans that has been incentivized by police departments, such as the one in Ferguson, Missouri,<sup>4</sup> often results in “‘backend’ police violence against

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\* Associate Professor, University of Missouri Kansas City School of Law.

<sup>1</sup> Carbado defines “mass criminalization” as “the criminalization of relatively non-serious behavior or activities and the multiple ways in which criminal justice actors, norms, and strategies shape non-criminal welfare state processes and policies, including the governance and administration of schools.” Devon W. Carbado, *Predatory Policing*, 85 UMKC LAW REV. 548 (2017).

<sup>2</sup> Devon Carbado coined the term “predatory policing” to describe “the direct targeting of vulnerable groups by way of arrests or the issuance of citations, or the use of civil asset forfeiture to effectuate promotions and pay increases for particular officers or generate revenue for the city or the police department.” *Id.* at 548.

<sup>3</sup> Except for the leading essay written by Devon Carbado, my discussion of the articles that appear in this issue does not necessarily treat them in the order in which they appear in this issue, but instead gives an overview of them by their topical groups.

<sup>4</sup> *Investigation of the Ferguson Police Department*, DEP’T OF JUSTICE 1, 4 (Mar. 4, 2015), <https://www.justice.gov/sites/default/files/opa/press->

African Americans.<sup>5</sup> Contact between African-Americans and the police has been normalized, which is a direct result of mass criminalization. Carbado argues that incentivized, predatory policing, coupled with mass criminalization, works to structure a system that increases African-Americans' contact with the police and, thus, puts them in peril of being the victims of police violence. Finally, both a primary and secondary market for police violence is created by the mass criminalization/predatory policing dichotomy. In the primary market, African-Americans encounter the police because of mass criminalization. The secondary market then consists of police efforts to enforce warrants based upon citations that resulted from the initial primary-market encounter. The cycle then continues with increased instances of African-American/police contact and increased chances for those instances of contact to devolve into violent and potentially deadly encounters. This is the milieu in which the killing of Michael Brown occurred.

### The Killing of Michael Brown as a Point of Departure

Blanche Bong Cook focuses specifically on Michael Brown and his killing, using his death as a point of departure for a critical analysis of policies and jurisprudence that she argues denies the humanity of Black<sup>6</sup> people. Cook's article, *Biased and Broken Bodies of Proof: White Heteropatriarchy, the Grand Jury Process, and Performance on Unarmed Black Flesh*, encourages us to look beyond the events leading up to the actual shooting of Michael Brown or even the shooting itself. Rather, Cook causes the reader to harken to memories of Michael Brown's body lying in the road in Ferguson and the importance of focusing on the Black body's role in the criminal justice system. She notes that, in order to understand that which arose after Brown's killing, it is necessary to consider the effect of "systemic practices in the investigations and grand jury proceedings surrounding cases of excessive police force involving black bodies."<sup>7</sup> Cook argues that these investigative systems "exemplify white heteropatriarchal performance on

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releases/attachments/2015/03/04/ferguson\_police\_department\_report.pdf [https://perma.cc/QY5N-XETW].

<sup>5</sup> Carbado, *supra* note 1 at 565.

<sup>6</sup> I use the capitalized term "Black" when referring to people of African descent individually or collectively because "Blacks, like Asians, Latinos, and other 'minorities,' constitute a specific cultural group and, as such, require denotation as a proper noun." Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1332 n.2 (1988). It follows then that I do not capitalize "white" when referring to people of European descent because "white" "is not a proper noun, since whites do not constitute a specific cultural group." Kimberlé Williams Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1244 n.6 (1991). I do, however, preserve the capitalization choices of the other authors whom I quote. I also distinguish between "Black" – a term referring to all people of African descent and "African-American," which refers only to U.S. Blacks.

<sup>7</sup> Blanche Bong Cook, *Biased and Broken Bodies of Proof: White Heteropatriarchy, the Grand Jury Process, and Performance on Unarmed Black Flesh*, 85 UMKC L.REV. 567 (2017)

vulnerable bodies.”<sup>8</sup> Cook draws upon the previous work of Anthony Farley, which posits that Black bodies are the very material upon which and in opposition to which “whiteness” is formed and performed.<sup>9</sup> This positioning of the Blacks and Black bodies as “Other,”<sup>10</sup> Cook argues, “inverts” the investigative process when a police officer – especially a white police officer – kills a Black person – especially a Black male: “The black body itself becomes proof of criminality,” thus this inversion results in the Black victim, rather than the accused officer, being “tried” before the grand jury.<sup>11</sup>

Cook’s initial centering of Michael Brown’s story helps us to better understand the larger picture of the criminal justice abuses visited upon Blacks in the U.S. This big-picture vantage point is further explored by Mikah Thompson, Leland Ware, Kendra Brumfield, Scott Holmes and Darrell Jackson who each explore the ways in which the African-American community and its members have interacted with the police historically, the negative impact of these interactions, and new lenses through which to envision solutions to these problems.

### Community Impacts and Solutions for the Community

In her article, *A Culture of Silence: Exploring the Impact of the Historically Contentious Relationship between African-Americans and the Police*, Mikah Thompson seeks to bring attention to the intersection between African-American cultural norms and the adverse impact that the criminal justice system’s ignorance of those norms has on African-American defendants. She does so by delving into the “pervasive intergenerational fear and distrust of the police”<sup>12</sup> that affects members of African-American communities. The resulting dysfunctional relationship between the communities and the police, Thompson notes, is the product of both the historical use of the police to enforce discriminatory laws and the present-day practice of the over-policing of minority communities (which, presumably, includes “mass criminalization,” as noted by Carbadó). This poisoned relationship has resulted in “cultural norms” of police distrust within the African-American community that have been “passed down from generation to generation.”<sup>13</sup> One emblem of this cultural norm is a reluctance to cooperate with police investigations, which often manifests itself as silence in the face of

<sup>8</sup> *Id.* at 567.

<sup>9</sup> See Anthony Paul Farley, *The Black Body as Fetish Object*, 76 OR. L. REV. 457 (1997).

<sup>10</sup> “The process of othering defines membership in a group and reinforces the norms of the group, and being the Other is only possible in relation to such a group.” Carlo Pedrioli, *Constructing the Other: U.S. Muslims, Anti-Sharia Law, and the Constitutional Consequences of Volatile Intercultural Rhetoric*, 22 S. CAL. INTERDISC. L. J. 65, 71 (2012) (citations omitted). Othering by groups, however, is rarely a neutral construction of the Self/Other dichotomy. Rather, one group’s othering of another affirms the Other as “inferior to the ‘gold standard’ of one’s own culture or group.” *Id.* at 70-71.

<sup>11</sup> Cook, *supra* note 7 at 568.

<sup>12</sup> Mikah Thompson, *A Culture of Silence: Exploring the Impact of the Historically Contentious Relationship between African-Americans and the Police*, 85 UMKC LAW REV. 699 (2017).

<sup>13</sup> *Id.* at 701.

questioning by law enforcement. Thompson argues that, given this cultural norm of silence, courts must reconsider how they view “adoptive admissions” under Federal Rule of Evidence 801(d)(2)(B) (“FRE 801(d)(2)(B)”) <sup>14</sup> – a hearsay exception that allows the admission of a defendant-witness’ silence in the face of accusations by the police to impeach her later explanatory statements at trial. In other words, the rule punishes African-American defendant-witnesses for acting in accordance with cultural norms by attributing consciousness of guilt to those norms.

The prevailing application of this evidentiary provision is an example of the workings of the “transparency of whiteness,” <sup>15</sup> which posits whiteness, and thus white cultural norms, as not only normative/normal, but as good, while those cultural norms of the non-white Other are inherently evil – or in the case of the FRE 801(d)(2)(B), show evidence of the harboring of consciousness of guilt rather than a mere adherence to non-white cultural norms. This result is what cognitive psychologists refer to as “fundamental attribution error” – “[t]he error of ignoring situational factors and overconfidently assuming that distinctive behaviour or patterns are due to an agent’s distinctive character traits,” <sup>16</sup> such as race. The practical effect is that, unmodified, FRE (d)(2)(B) can be used to criminalize an entire community. Further, because police can be assured of courts’ interpreting the silence of African-Americans as admissions of guilt, they will not be motivated to work with the community to improve relations, alleviate fears of communicating with the police – efforts that could ultimately change the culture of silence to one of partnering with law enforcement in order to achieve safer communities. Instead, police and many African-American communities will remain in an adversarial stance.

The “othering” of African-American communities and community members identified by Thompson’s work (and discussed earlier with regard to Cook’s piece) is also a result of implicit bias. <sup>17</sup> Such bias makes African-

<sup>14</sup> This rule states that a statement is not hearsay if it “is offered against an opposing party and . . . is one the party manifested that it adopted or believed to be true.” FED. R. EVID. 801(d)(2)(B).

<sup>15</sup> The “transparency phenomenon” immunizes whites from having to confront whiteness as race. Instead non-whiteness stands in opposition to whiteness, which itself is a proxy for a raceless norm. Race, therefore becomes the “problem” of nonwhites: “White people externalize race. For most whites, most of the time, to think or speak about race is to think or speak about people of color, or perhaps, at times to reflect on oneself (or other whites) in relation to people of color.” Barbara Flagg, “*Was Blind, But Now I See*”: *White Race Consciousness and the Requirement of Discriminatory Intent*, 91 Mich. L. Rev. 953, 970 (1993).

<sup>16</sup> Gilbert Harmon, *Moral Philosophy Meets Social Psychology: Virtue Ethics and the Fundamental Attribution Error*, 99 PROCEEDINGS OF THE ARISTOTELIAN SOCIETY 315 (1999). The idea of the “fundamental attribution error” was first noted by social psychologist Lee Ross. See, Lee Ross, *The Intuitive Psychologist and His Shortcomings*, in 10 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 895 (ed. L. Berkowitz) (1977).

<sup>17</sup> “[T]he term implicit racial biases . . . refer[s] both to unconscious stereotypes (beliefs about social groups) and attitudes (feelings, either positive or negative, about social groups). Implicit stereotypes and attitudes result from the practice we get associating groups (e.g., blacks) with traits (e.g., criminality). This practice stems from repeated exposures to cultural stereotypes that are ubiquitous

Americans vulnerable to being caught in the web of the criminal justice system for conduct that may not be similarly criminalized when committed by whites. In *Discriminatory Discipline: The Racial Crisis in America's Public Schools*, Leland Ware and Kendra Brumfield examine the effect of implicit bias on one of the most vulnerable segments of the African-American community – its children. Ware and Brumfield examine public school student discipline, noting, as have other scholars, that African-American students face disproportionate discipline in schools. Ware and Brumfield then reason that one cause of this disparity is implicit racial bias. Moreover, they argue that, as a result of this bias-influenced discipline, schools that engage in disproportionate discipline are in violation of Title VI of the Civil Rights Act of 1964<sup>18</sup> and the African-American children subject to this discipline are deprived of equal educational opportunities. These students are also placed into the school-to-prison pipeline, which Carbado identified as a result of mass criminalization as it is practiced in the school setting.

Whereas Thompson, Ware and Brumfield address some of the problems that African-Americans face because of their status as “Others” when interacting with police and school disciplinary officers, Scott Holmes and Darrell Jackson take on police culture. In particular, they examine both the ways in which police culture affects African-American communities and propose solutions to reform that culture. Holmes’s *Resisting Arrest and Racism – The Crime of “Disrespect”* tackles the police culture of using the charge of “resisting arrest” to enforce racial dominance and oppressive social control. Holmes reminds us that, historically, African-Americans have suffered violence when they have been perceived to have “disrespected” white authority – whether that violence be by beatings or lynchings perpetrated by civilians or by unjustified force during arrest by law enforcement agents. The examples made of “disrespectful” individuals were meant as a cautionary tale for all members of the African-American community – that they should stay in their place and not assert their rights, not insist upon equality, or challenge the authority of whites. Holmes, who is a clinical law professor, uses his day-to-day experience in both legal academia and legal practice to introduce strategies that can be used by lawyers who are defending clients charged with resisting arrest. Thus, this article marries theory with readily-available practice in an attempt to confront this systemic problem.

Darrell Jackson also provides the reader with a practical instrument that community organizations can use to challenge the current policing culture as it is applied to members of African-American communities. In particular, Jackson takes on the culture of African-American/police contact by making the novel proposal that a key to changing this culture is to “flip” this paradigm “on its head.” In *Profiling the Police: Flipping 20 Years of Whren on its Head*, Jackson gives new meaning to the Supreme Court’s decision in *Whren v. United States*,<sup>19</sup> which

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within a given society.” L. Song Richardson and Phillip Atiba Goff, *Implicit Racial Bias in Public Defender Triage*, 122 YALE L.J., 2626, 2630 (2013) (citations omitted).

<sup>18</sup> 42 U.S.C. § 2000d.

<sup>19</sup> 517 U.S. 806 (1996).

effectively held that traffic stops predicated on racial profiling were not unconstitutional.<sup>20</sup> Jackson aims to adapt profiling, which law enforcement argues is a policing tool, as a tool that can be used to “police the police,”<sup>21</sup> or as Jackson puts it, to “profile the police.”<sup>22</sup> Arguing that “what’s good for the goose is good for the gander,”<sup>23</sup> Jackson posits that historically marginalized communities should demand that individual police be “profiled” in order to root out those who infringe upon community members’ rights. The result that Jackson calls for would apply *Whren*, and the policies and policing techniques used by police in compliance with *Whren*, to individual police officers. Such an application would help communities collect data that could be used to determine which officers are “high risk” and should either not be employed by a police department or whose employment should impose heightened liability upon a department if and when that officer interacts in an unduly violent manner with members of the community.

### Conclusion

The contributors to this symposium issue each frame the question of race and police power in different, but complimentary manners. Each strives to identify a piece of the puzzle that can be used to reform the policies and practices that were highlighted by the killing of Michael Brown in Ferguson, Missouri, and in other police-involved killings of unarmed Blacks. Their work represents important contributions to both the theoretical discourse in this area and to the quest for practical solutions to ensuring that communities of color are protected by, rather than preyed upon by, those entrusted with policing.

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<sup>20</sup> *Id.* at 819 (holding that “[f]or the run-of-the-mine case, . . . probable cause justifies a search and seizure” even in instances where race is also a predicate for the underlying traffic stop.) Thus, upholding the use of racial profiling in policing.

<sup>21</sup> Darrell D. Jackson, *Profiling the Police: Flipping 20 Years of Whren on its Head*, 85 UMKC Law Rev. 671 (2017).

<sup>22</sup> *Id.* at 671.

<sup>23</sup> *Id.* at 674 (citations omitted).