

FOREWORD: RACE AND CRIMINAL JUSTICE

ELLEN S. PODGOR* & BERNADETTE HARTFIELD**

The focus of this program may have eluded some, but it is clearly Race and Criminal Justice. No colon. No question mark. No elaborate title. Just plain and simple—Race and Criminal Justice. But as you might suspect, it is not so simple.

The speakers, presenting papers at this jointly sponsored program of the Criminal Justice and Minority Group Sections of the 1999 Association of American Law Schools ("AALS") Conference, covered an array of topics. What might appear as a haphazard quilting of topics, in fact presents three themes that predominate this discussion of Race and Criminal Justice—pervasiveness, power and prediction.

In examining Race and Criminal Justice, one first notes that its scope knows few boundaries. Essentially, it is a discussion of inequality in the judicial system, but the pervasiveness of the topic extends much further. The papers present topics such as hate crimes,¹ "Driving While Black,"² a comparison of the investigation and prosecution of African Americans to the investigation of President Clinton³ and an examination of the language used and voices heard in the discussion.⁴ One paper focuses on crimes being prosecuted,⁵ while another on crimes being considered.⁶ Race and Criminal Justice has both domestic and international implications.⁷

* Professor of Law, Georgia State University College of Law, Chair, Criminal Justice Section (1999 Program). B.S., 1973, Syracuse University; J.D., 1976, Indiana University School of Law at Indianapolis; M.B.A., 1987, University of Chicago; L.L.M., 1989, Temple University School of Law.

** Associate Professor of Law, Georgia State University College of Law, Program Chair, Minority Group Section (1999 Program). B.A., 1971, Spelman College; J.D., 1977, University of California at Berkeley.

¹ See Andrew Taslitz, *Condemning the Racist Personality: Why the Critics of Hate Crimes Legislation Are Wrong*, in this issue, at 739.

² See Kathryn K. Russell, "Driving While Black": Corollary Phenomena and Collateral Consequences, in this issue, at 717. "Corollary Phenomena" include "Walking While Black," "Idling While Black," "Standing While Black" and "Shopping While Black."

³ See Paul Butler, *Starr Is to Clinton As Regular Prosecutors Are to Blacks*, in this issue, at 705.

⁴ See Jody David Armour, *Bring the Noise*, in this issue, at 733.

⁵ See Russell, *supra* note 2.

⁶ See Taslitz, *supra* note 1.

⁷ Elizabeth M. Iglesias, who participated in the conference, addressed international criminal law with a focus on ecocide and critical race theory.

These papers present but a few of the multitude of issues encompassed within this topic. One could easily have limited the panel to the race issues in *Terry v. Ohio*.⁸ The impact of race on any one of a number of concerns such as selective prosecution,⁹ Fourth Amendment protections¹⁰ and Sentencing Guidelines,¹¹ could likewise have been the exclusive focus of a panel or an entire conference. When considering Race and Criminal Justice, the list of subtopics is endless. As the array of papers presented here exemplify the pervasiveness of this topic, they demand that issues of race be considered when discussing any and all aspects of criminal justice.

Another common theme in these discussions is power. What laws are enacted¹² and how they are enforced present starting points for the issues being considered. In his piece on hate crimes legislation, Professor Taslitz traces the power imbalance in the slave-master relationship to the contemporary opposition to hate crimes legislation.¹³ He argues that "[t]o tolerate [racially motivated] violence is to let the seeds of slavery in fact, if not in law, take root."¹⁴ His discussion of hate crimes legislation exposes power struggles that extend far beyond the political struggle to determine whether such proposals will become law.

Equally important in looking at power is the way the issue is framed and how it is later examined. The power of the decision-maker to influence all aspects of the discussion is apparent.¹⁵ But power is not limited to the individual who frames the questions and votes on them, it also encompasses the institutional norm and sensibility that forms the context for these questions. The group dynamic cannot be over-

⁸ 392 U.S. 1 (1968); see Tracey Maclin, *Terry v. Ohio's Fourth Amendment Legacy: Black Men and Police Discretion*, 72 ST. JOHN'S L. REV. 1271 (1998). The articles within that issue of the *St. John's Law Review* commemorated the 30th anniversary of the Supreme Court's "most important and controversial constitutional criminal procedure decision, *Terry v. Ohio*." Charles S. Bobis, *Foreword*, 72 ST. JOHN'S L. REV. 721, 721 (1998).

⁹ See, e.g., Drew S. Days, III, *Race and the Federal Criminal Justice System: A Look at the Issue of Selective Prosecution*, 48 ME. L. REV. 179 (1996); Richard H. McAdams, *Race and Selective Prosecution: Discovering the Pitfalls of Armstrong*, 73 CHI.-KENT L. REV. 605 (1998).

¹⁰ See David A. Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment*, 1997 SUP. CT. REV. 271.

¹¹ See, e.g., Kristen L. Holmquist, *Cultural Defense or False Stereotype? What Happens When Latina Defendants Collide with the Federal Sentencing Guidelines*, 12 BERKELEY WOMEN'S L.J. 45 (1997); Charles J. Ogletree, *The Significance of Race in Federal Sentencing*, 6 FED. SENT. R. 229 (1994).

¹² See Taslitz, *supra* note 1.

¹³ See *id.*

¹⁴ *Id.* at 781.

¹⁵ See Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13 (1998).

looked. Professor Butler's juxtaposition of President Clinton and African Americans as targets of selective prosecution, abuse of prosecutorial discretion and overly zealous demands for punishment shows that the majority of Americans easily grasp the wrongfulness of this conduct and oppose it when the target is a powerful white man. Yet, the racial critique of the same misconduct has received little support when the target has been African Americans.¹⁶ Indeed, Professor Russell's examination of "Driving While Black" reveals a reluctance of those wielding political power to enact legislation designed merely to gather statistics on the extent of the problem of racial targeting. This reluctance persists despite considerable anecdotal evidence that it is ubiquitous and harmful to society.¹⁷ Power is without doubt a common denominator in all discussions on Race and Criminal Justice.

A final theme in examining Race and Criminal Justice is prediction. Admittedly, there is no crystal ball to foretell the future of this topic. The predictions stated or implied in the papers presented here represent an expansive range of views between pessimism and optimism, as to whether we will ever resolve the racial inequities in the criminal justice system.¹⁸ Interestingly, two of the presenters shared that their positions on the pessimism/optimism scale changed as they prepared for the AALS program. Professor Butler moved to optimism because the public's ability to condemn prosecutorial misconduct in the context of impeachment could portend a broader understanding of the racial critique and a desire to remedy the problems it reveals.¹⁹ Professor Armour, on the other hand, moved from "inveterate" optimism to pessimism that the inability to overcome the "us" and "them" dooms efforts to achieve racial justice.²⁰ It is important to consider where we have been, where we are going and how things can be changed, if we want to achieve a better system of justice. Professor Armour reminds us of the necessity to listen to all the voices in the discussion.²¹ His recognition of rap and hip-hop artists as prophets

¹⁶ See Butler, *supra* note 3.

¹⁷ See Russell, *supra* note 2, at 726-27. The consequences of failing to address the "Driving While Black" issue include opposition to seatbelt enforcement because, rather than promote safety, increased enforcement could "result in increased racial profiling." *Id.* at 729.

¹⁸ Professors Russell and Taslitz appear to be somewhere in the middle of the continuum. Neither expresses hopelessness; but both can be read to predict negative outcomes if the issues they raise are not addressed. See Russell, *supra* note 2, at 730-31; Taslitz, *supra* note 1, at 760, 765, 781.

¹⁹ See Butler, *supra* note 3.

²⁰ See Armour, *supra* note 4.

²¹ See *id.* at 736-37.

commands our attention.²² Listening from new and different perspectives offers hope for correcting injustice.²³

The themes of pervasiveness, power and prediction could be said to tie any group of papers together. In the case of Race and Criminal Justice, however, these themes take on new dimensions that are, at once, compelling, revolting and challenging. Hopefully those hearing and reading these papers will be challenged to continue the discussion so that issues of race in criminal justice become significant considerations in everyone's scholarship, teaching and law reform activities.

²² See *id.* Professor Armour's rap performance as part of his presentation was undoubtedly a first in AALS history.

²³ See *id.*