

INTRODUCTION TO SPECIAL ISSUE

Ralph Richard Banks¹

The killing of George Floyd prompted a racial reckoning in American society, as people of all races became outraged by the persistence of racism, especially with respect to policing. Policing practices are unquestionably central to the maintenance of racial injustice. Law enforcement officers channel people into a criminal justice system that compounds racial inequities. And policing practices too often embody the narratives of criminality that have long demonized African Americans, men in particular.

The articles in this special issue offer distinct perspectives on the problems that the death of George Floyd embodies. In her article, “Abolish Carceral Logic,” Christy Lopez situates the issue of race and policing in the broader context of the movement to abolish mass incarceration. She describes policing and incarceration alike as being animated by a “carceral logic” that fuels the faith in both as a means of furthering public safety. Policing practices not only fuel mass incarceration; they are also, in Lopez’s view, an expression of the same sort of commitment to coercive social control that underlies the system of mass incarceration. Further, carceral logic, Lopez argues, is intertwined with racist assumptions, like the belief that black people are dangerous, and thus that the role of the police is to protect other people from black people. Given this framing, defunding the police becomes a logical outgrowth of the movement for prison abolition and, more fundamentally, of the need to abandon carceral logic.

In their contribution, Daniel Richman and Sarah Seo lay the groundwork for an increased role for state legislators and regulation in policing the police. Debates about police reform often focus on either the federal government or local governments, with states conspicuously absent. In “How Federalism Built the FBI, Sustained Local Police, and Left Out the States,” Richman and Seo trace the marginal role of state governments in regulating policing to the historical relationship between the FBI and local police forces. In their fascinating account, they show how the Federal Bureau of Investigation formed symbiotic or cooperative relationships with local police departments during the early and middle decades of the 20th century, which both bolstered the reach of the FBI (and by extension the federal government) and also furthered the autonomy of local police departments. In bypassing state government, these relationships created norms that diminished the role of states in regulating local law enforcement agencies.

Whereas Richman and Seo support an increased role for state regulation of the police, David Owens focuses on suing the police, and more particularly on one of the

¹ Jackson Eli Reynolds Professor of Law at Stanford Law School, co-founder and Faculty Director of the Stanford Center for Racial Justice, and Professor, by courtesy, at the Stanford Graduate School of Education.

impediments to doing so successfully. His contribution, “Violence Everywhere: How the Current Spectacle of Black Suffering, Police Violence and the Violence of Judicial Interpretation Undermine the Rule of Law,” links the doctrine of qualified immunity to the persistence of police violence. The stream of videos capturing horrific acts by police officers has also converted police violence into a public performance of sorts, a spectacle, in Owens’s view, that enacts the political expression of power through the use of sovereign authority. Owens extends the idea of spectacle from actual acts of police violence to the rendering of the judicial decisions, and in particular the invocation of qualified immunity, that endorse such acts. Officers will be judged immune from liability so long as they have not done precisely what a court has previously declared unconstitutional.² The application of the doctrine of qualified immunity, in insulating cops from liability even when they have violated the applicable constitutional law, thus becomes a form of violence itself, compounding the physical violence of police officers.

In contrast to the focus on reform by Richman and Seo and by Owens, Sheila Bedi builds the case for police defunding or abolition through examining some of the misconceptions that animate the carceral logic that Lopez identifies. In “The Myths of Effective Law Enforcement and the Demand to Defund the Police,” Sheila Bedi unpacks a constellation of myths about policing. Drawing on the insights of hip hop artists, Bedi argues that the tendency of courts to defer to supposed police expertise is “simply not grounded in the realities of policing because it fails to consider the significant risk of harm police officers pose to community members and the minimal public safety benefits derived from the police.”³ She notes, for example, the “limited, reactive role police play in creating safe communities.”⁴ Bedi draws on empirical evidence to support the counterintuitive claim that police don’t catch violent criminals nearly as often as one might believe; nor do they prevent or deter crime to the extent one might expect. The benefits of policing are, in Bedi’s view, quite overstated by courts and, presumably, politicians as well.

So too do courts deny the inevitability of the harms of policing. Bedi contends that policing in American society simply cannot be colorblind. Race is so intertwined, psychologically and culturally, with beliefs about crime and criminals, that police officers will inevitably filter their perceptions and judgments through a racial lens that will distort their treatment of the individuals with whom they come into contact. This critique might extend to the criminal justice system as a whole.

The final contribution to this special issue features an interview by the issue editors with Miski Noor and Kandace Montgomery, who are leaders of Black Visions, a

² The standard is that for an officer to be held individually liable, they must not only have violated the law, they must have also violated a clearly established constitutional prohibition. The courts have interpreted the “clearly established” requirement to practically require the same set of facts as an earlier case where the challenged behavior was judged unconstitutional.

³ *Infra* at 501.

⁴ *Id.*

Minneapolis-based non-profit. They advocate for the defunding of the police, contending that “we spend too much money on police [and that] money [should] go toward things that actually do make people more safe.”⁵

Noor and Montgomery highlight the need to supplement the focus on judicial decision-making and legislative action with a role for ordinary people. They recognize that the political will to make change will wax and wane, and is unlikely to be sustainable, unless the people who bear the brunt of the harms of policing practices are enabled to play a role in the implementation and maintenance of change. Given how longstanding the problems of policing are, new laws or judicial decisions are unlikely, by themselves, to result in long term change. Communities need to play a role as well to ensure that governmental structures and actors, including law enforcement, are responsive to the aspirations and needs of community members.

While these articles complement each other well, and exemplify some shared values, they also highlight at least two tensions. The contributions by Richman and Seo and by Owens consider the prospect of police reform, while the articles by Bedi and by Lopez and the leaders of Black Visions advocate for the defunding or abolition of the police. These approaches are potentially in tension. Reform efforts, if successful, may diminish the desire to abolish the police by lessening the perceived need to do so. More concretely desirable reforms (e.g. de-escalation training, which has been shown to be effective) may entail increased police funding, which is flatly incompatible with an agenda of defunding. The agendas of reform and defunding may thus push in opposite directions.

There is another tension as well. In arguing that policing always has been and necessarily will be detrimental to the interests of African Americans, advocates of defunding or abolition may seem to voice the concerns of the black community. Noor and Montgomery, for instance, emphasize the importance of black community members playing an active role in the on-going process of police abolition. But what if, as many surveys increasingly show, most African Americans do not support the idea of defunding the police? Can we serve community interests by disregarding community preferences? The tension between the abolition-defunding agenda and the preferences of African Americans will likely grow more intense if rates of violent crime increase, as they seem to be doing in cities throughout the nation.

The tension between the perspectives reflected in these articles is one of their strengths. Collectively, these articles exhibit possibilities that are at the heart of current efforts to grapple with the longstanding pathologies of law enforcement, and in particular police violence. This special issue will become indispensable to efforts to chart the path forward.

⁵ *Infra* at 550.