

Fall 2015

Ferguson: Footnote or Transformative Event?

S. David Mitchell

Follow this and additional works at: <https://scholarship.law.missouri.edu/mlr>



Part of the [Law Commons](#)

Recommended Citation

S. David Mitchell, *Ferguson: Footnote or Transformative Event?*, 80 Mo. L. REV. (2015)

Available at: <https://scholarship.law.missouri.edu/mlr/vol80/iss4/5>

This Conference is brought to you for free and open access by the Law Journals at University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Missouri Law Review by an authorized editor of University of Missouri School of Law Scholarship Repository. For more information, please contact bassettcw@missouri.edu.

MISSOURI LAW REVIEW

VOLUME 80

FALL 2015

NUMBER 4

Symposium:

Policing, Protesting and Perceptions: A Critical Examination of the Events in Ferguson

Ferguson: Footnote or Transformative Event?

*S. David Mitchell**

Hands to the Heavens, no man, no weapon
Formed against, yes glory is destined
Every day women and men become legends
Sins that go against our skin become blessings
The movement is a rhythm to us
Freedom is like religion to us
Justice is juxtaposition in us
Justice for all just ain't specific enough
One son died, his spirit is revisitin' us
Truant livin' livin' in us, resistance is us
That's why Rosa sat on the bus
That's why we walk through Ferguson with our hands up
When it go down we woman and man up
They say, "Stay down" and we stand up
Shots, we on the ground, the camera panned up
King pointed to the mountain top and we ran up¹

* S. David Mitchell is the Associate Dean of Academic Affairs and an Associate Professor of Law at the University of Missouri School of Law. He served as the faculty coordinator of the 2015 *Missouri Law Review* Symposium, "Policing, Protesting, and Perceptions: A Critical Examination of the Events in Ferguson."

1. JOHN LEGEND, *Glory*, on SELMA SOUNDTRACK (Columbia Records 2014) (a collaborative track with rapper Common from the soundtrack of the 2014 film SELMA (Paramount Pictures (2014))).

I. INTRODUCTION

“Ferguson.” No longer does this name simply represent the geographical boundaries of a city in St. Louis County formed initially by white flight from St. Louis City² and that has become increasingly African American over time. It has come to represent so much more.

For some, it symbolizes another U.S. jurisdiction in which an unarmed African American,³ more often than not young and male,⁴ but not exclusive-

2. See Rigel C. Oliveri, Assoc. Dean for Research and Faculty Dev., 2009–2015, Univ. of Mo. Sch. of Law, Panel Presentation at the University of Missouri Law Review Symposium: Policing, Protesting, and Perceptions: A Critical Examination of the Events in Ferguson (Feb. 27, 2015) (discussing housing patterns, housing discrimination, and how Ferguson as a suburb of St. Louis came into existence); see also Rigel C. Oliveri, *Setting the Stage for Ferguson: Housing Discrimination and Segregation in St. Louis*, 80 MO. L. REV. 1053 (2015). See Tanzina Vega & John Eligon, *Deep Tensions Rise to Surface After Ferguson Shooting*, N.Y. TIMES (Aug. 16, 2014), <http://www.nytimes.com/2014/08/17/us/ferguson-mo-complex-racial-history-runs-deep-most-tensions-have-to-do-police-force.html> (discussing the underlying racial tensions that erupted with the death of Michael Brown); Bryan Jack, “*A Northern City With Southern Characteristics*”: *Ferguson And The History Of Race Relations In The St. Louis Region*, U.S. STUD. ONLINE (Oct. 1, 2014), <http://www.baas.ac.uk/usso/the-ferguson-protests-and-the-racial-environment-of-the-st-louis-region/> (“St. Louis has a long history of racial and economic inequality, exhibited through slavery, de jure, and de facto segregation. Ferguson and other communities in the region are products and producers of this history, and the anger expressed by the African American community go beyond the issue of Michael Brown’s death. There are grievances against the deep-seated systemic inequalities present in greater St. Louis, an area acknowledged as one of the most hypersegregated areas of the country since 1980.”).

3. See *National Trends*, MAPPING POLICE VIOLENCE, <http://mappingpoliceviolence.org/nationaltrends/> (last visited Mar. 8, 2016). This interactive map shows the number of African Americans killed by police in 2015 compared to others. *Id.* At least 1152 people were killed by police in 2015. *2015 Police Violence Report*, MAPPING POLICE VIOLENCE, <http://mappingpoliceviolence.org/2015/> (last visited Mar. 8, 2016). 336 (twenty-nine percent) were black. *Police Violence Map*, MAPPING POLICE VIOLENCE, <http://mappingpoliceviolence.org/> (last visited Mar. 8, 2016). At least 102 unarmed black people were killed by police in 2015. *Police Killed More than 100 Unarmed Black People in 2015*, MAPPING POLICE VIOLENCE, <http://mappingpoliceviolence.org/unarmed/> (last visited Mar. 8, 2016). See Kimberly Kindy et al., *A Year of Reckoning: Police Fatally Shoot Nearly 1000*, WASH. POST (Dec. 26, 2015), <http://www.washingtonpost.com/sf/investigative/2015/12/26/a-year-of-reckoning-police-fatally-shoot-nearly-1000/> (“Although black men make up only 6 percent of the U.S. population, they account for 40 percent of the unarmed men shot to death by police this year, The Post’s database shows.”).

4. See Nina Strohlic, *The 14 Teens Killed by Cops Since Michael Brown*, DAILY BEAST (Nov. 25, 2014, 4:45 PM), <http://www.thedailybeast.com/articles/2014/11/25/the-14-teens-killed-by-cops-since-michael-brown.html#> (identifying the teens killed since Michael Brown’s death).

ly,⁵ was killed by a police officer. For some, it has come to symbolize the repression of peaceful protests that seek to call attention to the loss of African-American life at the hands of police officers.⁶ For some, it has come to represent a criminal justice system that is flawed in the manner in which it pursues justice for African-American victims that are killed or harmed by police officers.⁷ For some, it symbolizes the lack of consistency in the office

5. See Evette Dionne, *Police Kill Black Women All The Time, Too — We Just Don't Hear About It*, BUSTLE (Dec. 8, 2014), <http://www.bustle.com/articles/52433-police-kill-black-women-all-the-time-too-we-just-dont-hear-about-it> (discussing the fact that African-American girls and women are also victims of police violence, however, their stories are not as well publicized as the deaths of African-American boys and men: “But one of the largest injustices is how little we collectively discuss the many women of color who are also killed by police. Take Aiyana Jones, 7, who was killed by a Detroit police officer as she slept on her father’s couch. Or Rekia Boyd, 22, whose life ended in Chicago when she was killed by a police officer. Or Yvette Smith, 48, who was unarmed when she was killed by a police officer in Texas. Or Pearlie Smith, 93, who was fatally shot in her home. Or Tarika Wilson, 26, whose one-year-old son was also injured when she was killed by a [sic] Ohio police officer. Or Tyisha Miller, 19, who was killed by a police officer in Los Angeles. Or Kathryn Johnson, 92, who was killed by a police officer in Atlanta. Or Gabriella Nevarez, 22, who was killed by a Sacramento police officer. Or Eleanor Bumpurs, 66, who was killed by a police officer in the Bronx. I could go on and on, but you still probably wouldn’t recognize their names.”).

6. CIVIL RIGHTS DIV., U.S. DEP’T OF JUSTICE, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 27–28 (Mar. 4, 2015), http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf.

The Ferguson Police Department’s infringement of individuals’ freedom of speech and right to record has been highlighted in recent months in the context of large-scale public protest. . . . [Ferguson Police Department’s] suppression of speech reflects a police culture that relies on the exercise of police power—however unlawful—to stifle unwelcome criticism. Recording police activity and engaging in public protest are fundamentally democratic enterprises because they provide a check on those “who are granted substantial discretion that may be misused to deprive individuals of their liberties.”. . . Ideally, officers would not encounter verbal abuse. Communities would encourage mutual respect, and the police would likewise exhibit respect by treating people with dignity. But, particularly where officers engage in unconstitutional policing, they only exacerbate community opposition by quelling speech.

Id. (quoting *Glik v. Cunniffe*, 655 F.3d 78, 82 (1st Cir. 2011)).

7. See Yishai Schwartz, *Don't Blame the Grand Jury for Not Indicting Darren Wilson. Blame the Law*, NEW REPUBLIC (Nov. 25, 2014), <http://www.newrepublic.com/article/120408/ferguson-grand-jury-didnt-indict-darren-wilson-good-legal-reasons> (arguing that the lack of an indictment is attributable to the legal system: “[T]he substantive issues raised by this case [*State v. Darren Wilson*] have been buried under an avalanche of vitriol directed against the grand jury, McCulloch, and Wilson—criticism that misunderstands the criminal justice system, and which obscures the deeper legal and structural injustices that ought to be the focus of our attention. For months, most observers have realized that given the law and evidence, con-

of the prosecuting attorney by failing to recommend charges to the grand jury,⁸ and by providing an overwhelming amount of evidence through which the grand jury had to sift through to determine whether the probable cause standard had been satisfied.⁹ For some, it represents the poor planning of local officials who elected to announce the no bill on an indictment at night without regard for the potential result of violence, even though citizens had asked that the decision be made during the day.¹⁰ For some, it sparked discussions about the militarization of local law enforcement agencies¹¹ and about economic policing.¹² From the events in Ferguson, a new language of

victing Wilson would be unlikely. Nevertheless, many expected—and demanded—an indictment as a potent symbol that a black victim’s blood is no less valuable than a white one’s. Monday night’s decision therefore feels like a monumental betrayal.”).

8. Tom Nolan, *Prosecutor Used Grand Jury to Let Darren Wilson Walk*, DAILY BEAST (Nov. 28, 2014, 5:45 AM), <http://www.thedailybeast.com/articles/2014/11/28/prosecutor-used-grand-jury-to-let-darren-wilson-walk.html> (“St. Louis County Prosecutor Bob McCulloch’s announcement of his failure to secure the indictment of Officer Darren Wilson in the Aug. 9 shooting death of unarmed teen Michael Brown has openly and shamelessly mocked our criminal justice system and laid bare the inequality that is emblematic of criminal jurisprudence in the United States.”).

9. *Id.*

10. Monica Davey & Julie Bosman, *Protests Flare After Ferguson Police Officer Is Not Indicted*, N.Y. TIMES (Nov. 24, 2014), <http://www.nytimes.com/2014/11/25/us/ferguson-darren-wilson-shooting-michael-brown-grand-jury.html> (“[M]any . . . questioned why the authorities would announce the decision in the evening, rather than waiting for daylight hours. Furious, sometimes violent, demonstrations and tense clashes with the police took place late into the night for several weeks in August, and some law enforcement officers had urged a daytime announcement. Over a period of weeks, many leaders here had suggested that a Sunday morning announcement would be best, but the grand jury, which had been meeting on the case since Aug. 20, finished its work on Monday. Asked about the timing, Mr. Nixon said it had been the choice of Mr. McCulloch.”).

11. See Jake Grovum, *Can States Slow the Flow of Military Equipment to Police?*, PEW CHARITABLE TRUSTS (Mar. 24, 2015), <http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2015/3/24/can-states-slow-the-flow-of-military-equipment-to-police> (discussing the acquisition of military equipment by police: “[Militarization of police has] been ongoing for more than a decade, but rarely grabbed the nation’s attention until civil unrest erupted in Ferguson, Missouri, last August after the killing of Michael Brown, an unarmed black teenager shot by a white police officer.”).

12. *Development in the Law of Policing: Chapter One Policing and Profit*, 128 HARV. L. REV. 1723, 1724–25 (2015) (quoting Jelani Cobb, *What I Saw in Ferguson*, NEW YORKER (Aug. 14, 2014)), <http://www.newyorker.com/news/news-desk/saw-ferguson> (“Widespread hostility toward Ferguson’s municipal court is the tinder that helped set the town on fire after Michael Brown was killed. Professor Jelani Cobb visited the town just after the shooting and saw this hostility as one of the ‘intertwined economic and law-enforcement issues underlying the protests.’”); Jeff Smith, Opinion, *In Ferguson, Black Town, White Power*, N.Y. TIMES (Aug. 17, 2014), <http://www.nytimes.com/2014/08/18/opinion/in-ferguson-black-town-white-power.html> (“With primarily white police forces that rely disproportionately on traffic

protest and resistance was born. The events gave voice to a new generation of protesters under the banner of slogans and hashtags such as “Hands Up! Don’t Shoot!”¹³ and “#Black Lives Matter.”¹⁴ Ferguson has become a part of the cultural and popular lexicon referenced in popular song.¹⁵ And yet, the reactions of “some” are but one perspective when Ferguson is mentioned. For others, there is a different and altogether contrary response.

For others, Ferguson represents a rush to judgment to convict a police officer who reasonably feared for his life.¹⁶ For others, it was a situation where the use of force by the police officer was not excessive but was justi-

citation revenue, blacks are pulled over, cited and arrested in numbers far exceeding their population share, according to a recent report from Missouri’s attorney general. In Ferguson last year [2013], 86 percent of stops, 92 percent of searches and 93 percent of arrests were of black people — despite the fact that police officers were far less likely to find contraband on black drivers (22 percent versus 34 percent of whites). This worsens inequality, as struggling blacks do more to fund local government than relatively affluent whites.”); Sarah Stillman, *The Economics of Police Militarism*, NEW YORKER (Aug. 15, 2014), <http://www.newyorker.com/news/news-desk/economics-police-militarism> (“The crisis of criminal-justice debt is just one of the many tributaries feeding the river of deep rage in Ferguson. But it’s an important one—both because it’s so ubiquitous and because it’s easily overlooked in the spectacular shadow of tanks and turrets. . . . I [reported] on the rise of profiteering in American courts, which happens by way of the proliferation of fees and fines for very minor offenses—part of a growing movement toward what’s known as offender-funded justice. Private companies play an aggressive role in collecting these fees in certain states. (Often, this tactic is aimed at the poor with unpaid traffic tickets.) The reports from Ferguson raise questions about how militarization and economic coercion feed a shared anger.”).

13. See Jonathan Constante, *Creator Of ‘Hands Up, Don’t Shoot!’ Slogan Lands Government Job*, OPPOSING VIEWS (Dec. 11, 2014), <http://www.opposingviews.com/i/society/creator-hands-dont-shoot-slogan-lands-government-job> (“When the media asked Johnson for his account of the encounter between Wilson and Brown, he told them that Brown was shot from behind and then shot again while surrendering with his hands up. This is when he coined the popular ‘Hands Up, Don’t Shoot!’ slogan seen in many of the Ferguson demonstrations around the country.”). *But see* Jonathan Capehart, *‘Hands Up, Don’t Shoot’ Was Built On a Lie*, WASH. POST (Mar. 16, 2015), <http://www.washingtonpost.com/blogs/post-partisan/wp/2015/03/16/lesson-learned-from-the-shooting-of-michael-brown/> (stating that the slogan was founded upon a lie). And yet, the poignancy of the slogan for the lack of mistrust between African Americans and the police is still relevant.

14. Jessica Guynn, *Meet The Woman Who Coined #BlackLivesMatter*, USA TODAY (Mar. 4, 2015, 4:16 PM), <http://www.usatoday.com/story/tech/2015/03/04/alicia-garza-black-lives-matter/24341593/>.

15. See LEGEND, *supra* note 1.

16. See Russell Berman, *Paul Ryan Warns Against ‘Rush to Judgment’ on Ferguson*, WIRE (Aug. 19, 2014), <http://www.thewire.com/politics/2014/08/paul-ryan-warns-against-rush-to-judgment-on-ferguson/378804/>; Joe R. Hicks, *Why the Rush to Judgment in Ferguson?*, RIGHT WING NEWS (Sept. 11, 2014), <http://rightwingnews.com/column-2/rush-judgment-ferguson/> (discussing the rush to judgment in Ferguson).

fied because of the perceived threat to his safety.¹⁷ For others, it symbolizes the lawlessness of looters who violated the rule of law, engaging in conduct that endangered lives and resulted in the destruction of property.¹⁸ For others, it indicates misplaced sympathy and empathy for an alleged criminal who attacked a police officer.¹⁹ For others, it represents the danger that law enforcement faces when trying to respect the rights of protesters and remain safe in an unsettling and dangerous combination of events.²⁰ And still, for others, it has been invoked to distinguish events in other jurisdictions from the actual shooting itself to the response of law enforcement and local authorities to such events.²¹ Because Ferguson represents so much more than a

17. Ginger Adams Otis, *Ferguson Cop Darren Wilson Feared for His Life During Michael Brown Shooting: Report*, N.Y. DAILY NEWS (Oct. 18, 2014, 1:51 AM), <http://www.nydailynews.com/news/national/ferguson-darren-wilson-feared-life-michael-brown-shooting-report-article-1.1978804> (stating that Darren Wilson reported that he feared for his life).

18. See Ron Christie, *It's Time to Hold Protesters Accountable*, DAILY BEAST (Dec. 4, 2014, 5:58 AM), <http://www.thedailybeast.com/articles/2014/12/04/it-s-time-to-hold-protesters-accountable.html> (“The eyes of Lady Justice are intentionally covered to provide equal treatment under the law for all. Justice should not be selective to fit a political narrative when the facts and evidence prove otherwise. Those advocating justice should first obey the rule of law themselves. Burning, rioting, and looting are disgraceful—particularly when done by those seeking to aggrieve a racial affront when evidence indicates race had nothing to do with Brown’s tragic death.”).

19. Compare Julia Ioffe, *White St. Louis Has Some Awful Things to Say About Ferguson*, NEW REPUBLIC (Aug. 15, 2014), <http://www.newrepublic.com/article/119102/what-white-st-louis-thinks-about-ferguson> (The statements of several white residents of St. Louis who declined to identify themselves revealed their belief that Michael Brown had a criminal record: “‘The kid wasn’t really innocent,’ chimed in a woman . . . (they all declined to give their names). ‘He was struggling with the cop, and he’s got a rap sheet already, so he’s not that innocent.’ (While the first point is in dispute, the second isn’t: The police have said that Michael Brown had no criminal record.)”), with Redditt Hudson, *I’m a Black Ex-cop, and This is the Real Truth About Race and Policing*, VOX (May 28, 2015), <http://www.vox.com/2015/5/28/8661977/race-police-officer> (discussing policing from the perspective of a former police officer and offering five points for the public to know and understand about police departments). Redditt Hudson was also one of the participants on the Policing panel at the Symposium. Redditt Hudson, NAACP, Panel Presentation at the University of Missouri Law Review Symposium: Policing, Protesting, and Perceptions: A Critical Examination of the Events in Ferguson (Feb. 27, 2015).

20. See Sunil Dutta, *Hey Ferguson Protesters: Police Brutality is Not the Problem*, WASH. POST (Dec. 30, 2014), <http://www.washingtonpost.com/posteverything/wp/2014/12/30/hey-ferguson-protesters-police-brutality-is-not-the-problem/> (“Officers have a unique and difficult job. Even when cops show perfect judgment, use of force is ugly. In the worst moments, when human lives are taken because officers must shoot, the ugliness is amplified and tragic. Let’s build neighborhoods where cops are needed less. Only then will we cut down on violence engendered during police-community interactions and allegations of police brutality.”).

21. See Walker Moskop, *Berkeley Mayor: We are Not Ferguson*, ST. LOUIS POST-DISPATCH (Dec. 25, 2014, 12:15 AM), <http://www.stltoday.com/news/local/>

geographical location on a map, it was selected as the topic of the 2015 *Missouri Law Review* Symposium, “Policing, Protesting and Perceptions: A Critical Examination of the Events in Ferguson.”

The purpose and goal of the Symposium was to continue the dialogue of the many issues that surfaced with respect to Ferguson and to take a critical look at the aftermath of the tragic event and the civil unrest that followed.²² Each panel on February 27, 2015, along with the Works-in-Progress Conference the preceding day and the Student Writing Competition, was designed to consider one of the many aspects of the complex issues surrounding the events in Ferguson.²³ At the end of the Symposium and over a year later, there remains a question to be answered: What will be the impact of Ferguson? Or, simply, will Ferguson be a footnote or a transformative event?

crime-and-courts/berkeley-mayor-we-are-not-ferguson/article_4acbf91b-d129-5cec-b481-b60b6122075a.html (“There is a vast difference, [Hoskins] said, between the details of a shooting that took place late Tuesday night at a Berkeley convenience store and other recent police killings — including the fatal shooting of Michael Brown in Ferguson and the chokehold death of Eric Garner in New York. ‘You can’t even compare this to Ferguson or the Garner case in New York,’ he said. . . . [M]ore broadly, he discouraged comparisons between his city and its neighbor to the east, where Brown was killed by officer Darren Wilson on Aug. 9. ‘We are different from the city of Ferguson,’ Hoskins said.”); Steve Inskeep, *Baltimore Is Not Ferguson. Here’s What It Really Is*, NPR (Apr. 29, 2015, 5:03 AM), <http://www.npr.org/2015/04/29/402971487/residents-disappointed-at-how-rioters-tore-up-baltimore> (discussing why Baltimore, which is questioning police conduct in the death of Freddie Gray, is unlike Ferguson: “I was about to call Freddie Gray’s death the latest in a string of high-profile deaths of African-American men involving police. But that’s not quite right. And that’s the point. Each incident of the past year was a particular story in a particular place, which became clear as soon as we arrived in the very particular place that is Baltimore.”); Jill Disis, *‘We are Not a Ferguson,’ Indy Black Leaders Say*, INDY STAR (Nov. 26, 2014, 7:59 PM), <http://www.indystar.com/story/news/2014/11/26/urban-league-holding-forum-ferguson/19518511/> (“‘We are not a Ferguson,’ said Chrystal Ratcliffe, president of the NAACP’s local branch, ‘and we are not looking forward to being a Ferguson.’ . . . Wednesday’s forum wasn’t the first time community leaders in Indianapolis have drawn comparisons — or created distance — between Indianapolis and the troubled St. Louis suburb.”); Danny Westneat, *We’re No Better Than Ferguson; Maybe Worse*, SEATTLE TIMES (Nov. 25, 2014, 10:02 PM), <http://www.seattletimes.com/seattle-news/wersquare-no-better-than-ferguson-maybe-worse/> (discussing the Mayor’s comments that Seattle was not Ferguson and commenting on the reality that police officers are rarely charged); Adam Chandler, *Madison, Wisconsin, Is Not Ferguson, Missouri*, ATLANTIC (Mar. 9, 2015), <http://www.theatlantic.com/national/archive/2015/03/tony-robinson-death-ferguson-and-madison-matt-kenny/387301/> (noting that the response of city officials to the death of Tony Robinson in Madison, Wisconsin, was different than what occurred in Ferguson).

22. See Appendix I, *infra* p. 959.

23. For full information on the 2015 *Missouri Law Review* Symposium, see *Policing, Protesting, and Perceptions: A Critical Examination of the Events in Ferguson*, U. MO. SCH. L., <http://law.missouri.edu/faculty/category/mo-law-review/15-symposium/> (last visited Oct. 26, 2015).

II. A FOOTNOTE OR A TRANSFORMATIVE EVENT?

In considering whether Ferguson is a footnote or a transformative event, it is necessary to begin with the triggering event.

A. *The Tragic Event and the Aftermath*

On Saturday, August 9, 2014, Michael Brown, an unarmed black teenager, was shot and killed by Darren Wilson, a white police officer, in Ferguson, Missouri, a suburb of St. Louis. The circumstances of Michael Brown's death were disputed. Earlier reports indicated that Wilson initially approached Brown for jaywalking, and the interaction escalated into an altercation. Ferguson police state that Brown was shot while leaning into Wilson's car and struggling for the officer's gun. Some witnesses maintained that Brown's hands were raised, indicating surrender, when Wilson fired the fatal shots.²⁴

The killing resulted in a series of protests throughout the community, both peaceful and violent.²⁵ In addition to outrage over Brown's death, local and county police were widely criticized for a forceful and militarized response to the protests, including the use of armored vehicles, smoke canisters, and tear gas to dispel the crowds.²⁶

With the ongoing investigation, Prosecuting Attorney Robert P. McCullough, in what many characterized as an unusual move,²⁷ provided the grand jurors with an unprecedented amount of evidence to sift through during the process. Moreover, the prosecuting attorney did not recommend any

24. Larry Buchanan et al., *What Happened in Ferguson?*, N.Y. TIMES, <http://www.nytimes.com/interactive/2014/08/13/us/ferguson-missouri-town-under-siege-after-police-shooting.html> (last updated Aug. 10, 2015).

25. Yamiche Alcindor et al., *Hundreds of Peaceful Protestors March in Ferguson*, USA TODAY (Aug. 19, 2014, 11:37 AM), <http://www.usatoday.com/story/news/nation/2014/08/14/ferguson-missouri-police-clashes-shooting-anonymous/14046707/>.

26. Marisol Bello & Yamiche Alcindor, *Police in Ferguson Ignite Debate about Military Tactics*, USA TODAY (Aug. 19, 2014), <http://www.usatoday.com/story/news/nation/2014/08/14/ferguson-militarized-police/14064675/>.

27. David A. Lieb, *Ferguson Grand Jury Unusual in Many Ways*, YAHOO NEWS (Nov. 22, 2014, 12:45 PM), <http://news.yahoo.com/ferguson-grand-jury-unusual-many-ways-170714950.html> ("Not much is normal about the Missouri grand jury responsible for deciding whether to charge a suburban St. Louis police officer for fatally shooting Michael Brown. Not the length of deliberations, not the manner in which it has heard evidence, not the way in which its work could be made public. Then again, the case itself is unusual."). *But see* Monica Davey, *St. Louis County Prosecutor Says Actions on Ferguson Were Correct*, N.Y. TIMES (Dec. 19, 2014), <http://www.nytimes.com/2014/12/20/us/st-louis-county-prosecutor-says-actions-on-ferguson-were-correct.html> (McCullough states that his actions regarding the grand jury process in the case were correct).

charges.²⁸ Furthermore, in another extraordinary turn of events, the defendant, Darren Wilson, elected to testify before the grand jury.²⁹ Having received a wealth of information and no direct guidance from the prosecuting attorney, the grand jury returned a *no bill* of indictment for Darren Wilson.³⁰ The grand jury found that the evidence, as presented by the State, failed to satisfy the probable cause standard to issue an indictment.³¹

Following Michael Brown's death, and concurrently with the State's investigation, the Federal Bureau of Investigation and the Civil Rights Division of the U.S. Department of Justice ("DOJ") launched a criminal investigation into alleged civil rights violations surrounding the shooting.³² On September 4, 2014, after nearly a month of protests and heightened police responses, U.S. Attorney General Eric Holder announced that he would launch a separate investigation into the conduct of the Ferguson, Missouri, and St. Louis County police departments.³³ The investigation reviewed complaints involving the police and how the department operated.³⁴ During Attorney General Holder's press conference, he cited an overwhelming amount of mistrust between the Ferguson community and law enforcement officials, as well as the lack of diversity on the police force.³⁵ The City of Ferguson, a majority African-American suburb,³⁶ has only three African-American officers out of fifty-

28. Julie Bosman et al., *Amid Conflicting Accounts, Trusting Darren Wilson*, N.Y. TIMES (Nov. 25, 2014), <http://www.nytimes.com/2014/11/26/us/ferguson-grand-jury-weighed-mass-of-evidence-much-of-it-conflicting.html>.

29. *See id.*

30. *See id.*

31. Eyder Peralta & Krishnadev Calamur, *Ferguson Documents: How The Grand Jury Reached A Decision*, NPR (Nov. 25, 2014, 6:41 AM), <http://www.npr.org/sections/thetwo-way/2014/11/25/366507379/ferguson-docs-how-the-grand-jury-reached-a-decision>.

32. St. Louis Div., FBI, *Justice Officials Announce Next Steps in Federal Civil Rights Investigation in Ferguson, Missouri*, FBI (Aug. 15, 2014), <http://www.fbi.gov/stlouis/press-releases/2014/fbi-justice-officials-announce-next-steps-in-federal-civil-rights-investigation-in-ferguson-missouri>.

33. Office of Pub. Affairs, *Attorney General Holder Announces Next Steps to Address Concerns Regarding the City of Ferguson and St. Louis County Police Departments*, U.S. DEP'T JUST. (Sept. 4, 2014), <http://www.justice.gov/opa/pr/attorney-general-holder-announces-next-steps-address-concerns-regarding-city-ferguson-and-st>.

34. *See id.*

35. Office of Pub. Affairs, *Attorney General Holder Delivers Remarks at Press Conference Announcing Pattern or Practice Investigation into Ferguson Police Department*, U.S. DEP'T JUST. (Sept. 4, 2014), <http://www.justice.gov/opa/speech/attorney-general-holder-delivers-remarks-press-conference-announcing-pattern-or-practice>.

36. According to the U.S. Census Bureau, the racial breakdown of the residents of the City of Ferguson is as follows: African Americans make up a little more than sixty-seven percent (67.4%); whites are a little more than twenty-nine percent (29.3%); and all other races are less than two percent (2%). *See Ferguson (city)*,

three members of the department.³⁷ At the conclusion of the investigation, the DOJ issued a scathing report criticizing the Ferguson Police Department and the municipal court system in Ferguson,³⁸ as well as provided recommendations for reform.³⁹ The question, however, is whether the report and the responses to the unrest will result in profound changes and lessen the mistrust between citizens and police or will merely be ignored.

B. Ferguson – A Footnote?

From the outset, it is important to state unequivocally that a discussion of whether Ferguson will be relegated to a footnote in history does not trivialize the fact that Michael Brown needlessly lost his life. If Ferguson is relegated to a footnote in history, then it is important to examine the reasons why it would be regarded in that way.

The first reason, and one which has been remarked upon repeatedly since Michael Brown's death, is the number of African Americans that have either been killed, injured, or subjected to excessive use of force by police.⁴⁰ And, as one report has indicated, many of those have been unarmed.⁴¹ Some of these events have garnered similar high-profile attention as that of Michael Brown's death, such as Eric Garner in Staten Island,⁴² Tamir Rice in Cleveland, Ohio,⁴³ or Samuel DuBose of Cincinnati, Ohio.⁴⁴ The reality, however,

Missouri, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/29/2923986.html> (last revised Sept. 24, 2015).

37. Alice Sperti, *Justice Department Launches Civil Rights Investigation of Ferguson Police*, VICE NEWS (Sept. 4, 2014, 4:20 PM), <https://news.vice.com/article/justice-department-launches-civil-rights-investigation-of-ferguson-police>.

38. See CIVIL RIGHTS DIV., *supra* note 6, at 2–3.

39. See *id.* at 90–102.

40. See *National Trends*, *supra* note 3. See also Carol Cole-Frowe & Richard Fausset, *Jarring Image of Police's Use of Force at Texas Pool Party*, N.Y. TIMES (June 8, 2015), <http://www.nytimes.com/2015/06/09/us/mckinney-tex-pool-party-dispute-leads-to-police-officer-suspension.html> (discussing an incident of excessive use of force by police at a pool party in Houston, Texas).

41. See Rich Juzwiak & Aleksander Chan, *Unarmed People of Color Killed by Police, 1999–2014*, GAWKER (Dec. 8, 2014, 2:15 PM), <http://gawker.com/unarmed-people-of-color-killed-by-police-1999-2014-1666672349>; Jon Swaine, Oliver Laughland & Jamiles Lartey, *Black Americans Killed by Police Twice as Likely to be Unarmed as White People*, GUARDIAN (June 1, 2015), <http://www.theguardian.com/us-news/2015/jun/01/black-americans-killed-by-police-analysis>.

42. Roger Parloff, *Two Deaths: The Crucial Difference Between Eric Garner's Case and Michael Brown's*, FORTUNE (Dec. 5, 2014, 5:15 PM), <http://fortune.com/2014/12/05/two-deaths-the-crucial-difference-between-eric-garners-case-and-michael-browns/> (discussing the facts of the Eric Garner case and comparing it to the case of Michael Brown).

43. Shaila Dewan & Richard A. Oppel Jr., *In Tamir Rice Case, Many Errors by Cleveland Police, Then a Fatal One*, N.Y. TIMES (Jan. 22, 2015), <http://www.nytimes.com/2015/01/22/us/police/tamir-rice-cleveland-police.html>.

is that the death of African-American males by police officers, and the readily overlooked death of African-American females by police officers as well, is neither unique nor uncommon.⁴⁵ Furthermore, the death of African Americans in this way is also not a recent phenomenon. And while the empirical data fails to provide an exact accounting, the stories and the numbers can no longer be discounted as either anecdotal or anomalies. Ferguson is merely the next chapter of an old story.⁴⁶ And so, because it appears that nothing has changed, it leaves the impression that Ferguson too will be forgotten. Once these investigations have concluded and the media has moved on to other topics, Ferguson, as a symbol for so many things, will fade from the public consciousness.⁴⁷ However, there is a belief that Ferguson is the genesis of a new civil rights era or a re-genesis of the civil rights movement as the façade of a post-racial society is dismantled.⁴⁸ And yet, Ferguson may be more than

nytimes.com/2015/01/23/us/in-tamir-rice-shooting-in-cleveland-many-errors-by-police-then-a-fatal-one.html (discussing the events of the day when Tamir Rice was shot and killed by a Cleveland Police Officer).

44. See Jacob Koffler, *University of Cincinnati Cop Indicted in Killing of Unarmed Black Man*, TIME MAG. (July 29, 2015, 4:24 PM), <http://time.com/3976976/samuel-dubose-footage/>.

45. Compare National Trends, *supra* note 3, with Valerie Richardson, *Police Kill More Whites than Blacks, but Minority Deaths Generate More Outrage: Analysis Contradicts Widespread Views about Racial Targets*, WASH. TIMES (Apr. 21, 2015), <http://www.washingtontimes.com/news/2015/apr/21/police-kill-more-whites-than-blacks-but-minority-d/#ixzz3cTx6dQo> (attempting to refute claims that African Americans are killed by police officers at higher rates than whites).

46. See U.S. COMM'N ON CIVIL RIGHTS, WHO IS GUARDING THE GUARDIANS?: A REPORT ON POLICE PRACTICES (Gloria Izumi & Bonnie Mathews eds., 1981) (the Commission produced this study in 1981 on police practices suggesting and recommending many of the reforms that have been proposed today); U.S. COMM'N ON CIVIL RIGHTS, REVISITING WHO IS GUARDING THE GUARDIANS?: A REPORT ON POLICE PRACTICES & CIVIL RIGHTS IN AMERICA (2000), <http://www.usccr.gov/pubs/guard/main.htm> (discussing police practices following the initial research in 1981, and continuing to make similar suggestions and recommendations on reform).

47. One year removed from the shooting death of Michael Brown, Ferguson still remains a topic of conversation. The one-year anniversary of Michael Brown's death was marred by violence from non-protesters, as well as insensitive counter-protests that proclaimed the anniversary of the day that Michael Brown died as "Darren Wilson Day." See Yamiche Alcindor, *Shots Ring Out as Ferguson Protesters Mark Anniversary of Shooting*, USA TODAY (Aug. 11, 2015, 4:46 PM), <http://www.usatoday.com/story/news/nation/2015/08/09/flowers-protest-mark-first-anniversary-ferguson-shooting/31372699/>; Jessica Chasmar, *Missouri Police Union Announces 'Darren Wilson Day' on Anniversary of Michael Brown's Death*, WASH. TIMES (Aug. 11, 2015), <http://www.washingtontimes.com/news/2015/aug/11/missouri-police-union-announces-darren-wilson-day/>.

48. See Danielle Allen & Cathy Cohen, *The New Civil Rights Movement Doesn't Need an MLK*, WASH. POST (Apr. 10, 2015), https://www.washingtonpost.com/opinions/the-new-civil-rights-movement/2015/04/10/e43d2caa-d8bb-11e4-ba28-f2a685dc7f89_story.html.

a mere footnote. It may be a transformative event with a long-lasting and profound impact.⁴⁹

C. Ferguson – A Transformative Event?

Throughout history, transformative events have had a profound effect on the evolution of the United States and on advancing issues of social justice and equality. A transformative event is defined as an event that “change[s] (something) completely and usually in a good way.”⁵⁰ This definition is subjective and is dependent on the perspective from which the event is being viewed. Another way to put it is that one’s perceptions will determine whether the event is transformative. For African Americans, and in actuality the nation, there are some readily identifiable transformative events that have resulted in significant and long-term reform; or at least, the event caused the nation a moment of pause to reflect upon the injustice that existed and persisted.⁵¹ For example, the death of Emmett Till – another event memorialized in the song of revolution of the time⁵² – caused the world to take note of white supremacy in the United States and the absurdity of a criminal justice system that tried the defendants before an all-white jury.⁵³ Or, the day that Rosa Parks decided to sit down on a bus in Montgomery, Alabama.⁵⁴ Or, the deaths of Schwerner, Goodman, and Cheney that catapulted the issue of voting rights into the public’s consciousness.⁵⁵ These events, mired in tragedy and defiance, resulted in positive change for the African-American communi-

49. See Reuben A. Shelton, *Ferguson United*, MO. B. (Feb. 10, 2015), <http://www.mobar.org/Media-Center/News-Blog/President-s-Page--Ferguson-United/> (“The importance of Ferguson, Missouri is simple. What happened there in August 2014 is transformative and has the potential to change, in part, our nation’s judicial system forever. What happened in Ferguson has ignited a debate that is born from tragedy and sorrow but could lead to phenomenally positive cooperation and unity – now and for future generations.”).

50. See *Transform*, MERRIAM-WEBSTER (last visited Oct. 3, 2015), <http://www.merriam-webster.com/dictionary/transformative>.

51. See *Civil Rights Martyrs*, S. POVERTY L. CTR. (last visited Oct. 3, 2015), <http://www.splcenter.org/civil-rights-memorial/civil-rights-martyrs> (listing the martyrs of the Civil Rights Movement).

52. BOB DYLAN, *The Death of Emmett Till, on THE BOOTLEG SERIES, VOL. 9: THE WITMARK DEMOS 1962–1964* (Columbia Records 2010).

53. Allan Jalon, *1955 Killing Sparked Civil Rights Revolution: Emmett Till: South’s Legend and Legacy*, L.A. TIMES (Oct. 7, 1985), http://articles.latimes.com/1985-10-07/news/mn-16511_1_emmett-till-s-name (discussing how the killing of Emmett Till sparked the Civil Rights revolution).

54. *Id.*

55. *The Murder of Chaney, Goodman, and Schwerner*, MISS. CIV. RTS. PROJECT (last visited Oct. 3, 2015), http://mscivilrightsproject.org/index.php?option=com_content&view=article&id=312:the-murder-of-chaney-goodman-and-schwerner&Itemid=58.

ty and for the realization by the nation of the words in its founding documents.⁵⁶

The reality of Ferguson is that the simple geographical designation or municipal label has become quite complex, and it needs to be disentangled to its transformative potential. The first aspect of Ferguson is the death of Michael Brown. With his death, the world became aware of the unofficial rules of engagement that most, if not all, African-American families communicate to their children, especially to their sons.⁵⁷ For many white parents, there are no cautions or warnings given to their children on how to successfully survive an encounter with a police officer. And, the reality is clear that such discussions can mean the difference between life and death.⁵⁸ Yet, African-American parents, in the wake of what happened, introduced the world to their fears and the precautions that they take to keep their children safe.⁵⁹ The hope being that others would soon value the life of their sons as well.⁶⁰

56. See Jalon, *supra* note 53.

57. See Yesha Callahan, *Don't Know What to Tell Your Children to Do if They're Stopped by Police? Watch 'Get Home Safely: 10 Rules of Survival,'* ROOT (Feb. 4, 2015, 9:54 AM), http://www.theroot.com/blogs/the_grapevine/2015/02/don_t_know_what_to_tell_your_children_to_do_if_stopped_by_police_watch_get.html (listing the rules of surviving a police encounter for African-American children); James E. Causey, Opinion, *What We Tell Our Sons So They Don't Get Shot By Police*, HARTFORD COURANT (Aug. 15, 2014, 6:53 PM), <http://www.courant.com/opinion/op-ed/hc-op-what-black-parents-tell-sons-20140815-story.html> (same).

58. See Charles Blow, *Library Visit, Then Held at Gunpoint*, N.Y. TIMES (Jan., 26, 2015), <http://www.nytimes.com/2015/01/26/opinion/charles-blow-at-yale-the-police-detained-my-son.html> (Charles Blow recounts how his son survived an encounter on the Yale University campus by remembering the rules told to him by his parents about such encounters); Kimberly Norwood, *Why I Fear for My Sons*, CNN (Aug. 25, 2014, 5:04 PM), <http://www.cnn.com/2014/08/25/opinion/norwood-ferguson-sons-brown-police/> (discussing the fear that African-American parents have for their children, especially their sons). See also *2015 Law Review Symposium*, YOUTUBE, <https://www.youtube.com/watch?v=7lXQt40BZ78> (last visited Oct. 3, 2015) (Penny Marshall's presentation starting at 6:06:50, retelling her encounter with law enforcement).

59. Kimberly Jade Norwood, *The Far-Reaching Shadow Cast by Ferguson*, 46 WASH. U. J.L. & POL'Y 1, 11 (2014) ("This Essay is an expansion of a piece I originally published on CNN.com at the end of August. That earlier essay attempted to explain to the world that walking around in America and simply living one's daily life has starkly different stresses, worries, and fears, depending on the color of one's skin. I can relate to the *dis*-ease, the frustrations, and fears of the residents of Ferguson and other brown people throughout our nation whose skin color regularly draws scorn, hatred, and mistrust. Some say I cannot. I am a professor. I live in an ivory tower. I am so-called privileged and therefore cannot possibly relate. My response? Not true.").

60. Jon Swaine, *Michael Brown's Parents to Testify Before UN About Ferguson Police Violence*, GUARDIAN (Nov. 10, 2014), <http://www.theguardian.com/us-news/2014/nov/10/michael-brown-parents-un-police-target-human-rights> (presenting to the

Another impact of Ferguson as a transformative event is the renewed discussion about the expanded use of body cameras as a means to protect both citizens and police officers.⁶¹ The idea is that there would be greater accountability and transparency. And yet, with the outcome of the Eric Garner case, also a no bill to indict, a renewed sense has begun to emerge from the community that it is simply business as usual. The community has, however, been provided some hope that the criminal justice system does care about the lives of African Americans lost at the hands of law enforcement after the indictment of the officer who killed him.⁶²

Third, there has been increased discussion about changing the demographics not only of the Ferguson Police Department, but also other police departments to reflect the communities that are being served. The effort is aimed at changing what has become a siege mentality on the part of residents who feel as though they are being occupied. Fourth, the DOJ reported on the economic policing. The DOJ determined that the municipal authorities had relied heavily on traffic citations as a means to increase the city's coffers and had demanded that the police engage in more stops. The effect was that police officers disproportionately stopped African Americans.⁶³ Fifth, Ferguson has forced an examination of the municipal court system.⁶⁴ And sixth, the criminal justice system is confronted with having to address race earlier in the process, thereby recognizing how it shapes perceptions.⁶⁵ A number of dis-

United Nations about the violence of Ferguson police and the death of their son, Michael).

61. Michael Bragg, *Are Body-Mounted Cameras the Answer for Transparency in Police Departments?: Despite Increased Interest in the Technology, State Public Records Laws Could Shield Footage from the Public*, STUDENT PRESS L. CTR. (Mar. 12, 2015, 12:40 PM), <http://www.splc.org/article/2015/03/body-mounted-cameras> (discussing whether body cameras will increase transparency given state laws that may prevent disclosure of footage).

62. See Richard Pérez-Peña, *University of Cincinnati Officer Indicted in Shooting Death of Samuel Dubose*, N.Y. TIMES (July 29, 2015), <http://www.nytimes.com/2015/07/30/us/university-of-cincinnati-officer-indicted-in-shooting-death-of-motorist.html>.

63. See CIVIL RIGHTS DIV., *supra* note 6, at 64–66; *2014 Vehicle Stops Executive Summary*, MO. ATT'Y GEN., <https://www.ago.mo.gov/home/vehicle-stops-report/2014-executive-summary> (last visited Oct. 3, 2015). The annual report shows an overall increase in the stops of African-American drivers from 2013 to 2014. *Id.* The data for Ferguson shows a slight decrease in the disparity index from 1.37 to 1.30. *Id.*

64. *Missouri Supreme Court Names Panel to Recommend Changes to Municipal Courts*, ST. LOUIS POST-DISPATCH (May 14, 2015, 6:28 PM), http://www.stltoday.com/news/local/crime-and-courts/missouri-supreme-court-names-panel-to-recommend-changes-to-municipal/article_09544849-7717-506a-ae7-2e397d81ac03.html (discussing the newly appointed committee to review the municipal court system).

65. Patrick C. Brayer, *Hidden Racial Bias: Why We Need To Talk With Jurors About Ferguson*, 109 NW. U. L. REV. 163 (2015) (“This essay discusses our obligation as judges, academics, and practitioners to understand how unconscious racial bias

cussions have emerged from the events in Ferguson in the hopes that reform of police tactics will occur, as well as a change in the way that communities of color interact with police officers.

III. CONCLUSION

The killing of Michael Brown by Police Officer Darren Wilson touched off a series of events and raised a host of questions about policing, protesting, and the perceptions of police in communities of color, as well as revealed the perception that police also have of those communities.⁶⁶ It highlighted long-held and deep-seated feelings of mistrust between communities of color, especially African-American communities, and police. It raised questions about the militarization of local law enforcement agencies and questioned

exists in the hidden belief systems of many, if not all, jurors. . . . [A]ttorneys must concede hidden bias in themselves before fully comprehending the devastating impacts of racial biases. The events of the last four months in Ferguson, Missouri have exposed potential jurors to experiences dominated by issues of race. The opinions, beliefs, and prejudices of future fact-finders will be greatly shaped by how they perceive these events and interpret the issues.”).

66. James B. Comey, Dir., FBI, Remarks at Georgetown University: *Hard Truths: Law Enforcement and Race* (Feb. 12, 2015), <http://www.fbi.gov/news/speeches/hard-truths-law-enforcement-and-race>. Director Comey discussed the cynicism or bias that officers may have and that may develop when dealing with African-American citizens:

[S]omething happens to people in law enforcement. Many of us develop different flavors of cynicism that we work hard to resist because they can be lazy mental shortcuts. For example, criminal suspects routinely lie about their guilt, and nearly everybody we charge is guilty. That makes it easy for some folks in law enforcement to assume that everybody is lying and that no suspect, regardless of their race, could be innocent. Easy, but wrong.

Likewise, police officers on patrol in our nation’s cities often work in environments where a hugely disproportionate percentage of street crime is committed by young men of color. Something happens to people of good will working in that environment. After years of police work, officers often can’t help but be influenced by the cynicism they feel.

A mental shortcut becomes almost irresistible and maybe even rational by some lights. The two young black men on one side of the street look like so many others the officer has locked up. Two white men on the other side of the street—even in the same clothes—do not. The officer does not make the same association about the two white guys, whether that officer is white or black. And that drives different behavior. The officer turns toward one side of the street and not the other. We need to come to grips with the fact that this behavior complicates the relationship between police and the communities they serve.

Id.

whether surplus military grade weapons and equipment should be in the hands of local law enforcement.⁶⁷ Moreover, it forced the City of Ferguson, St. Louis County, the State of Missouri, and the United States to take a critical look at citizen-police interactions and forced those in positions of power to increase transparency and accountability. But will the changes, the answers to those questions, provide solace to a community that has observed such conduct in the past, or will this time be different? Regardless of whether agreement lies with the perspectives of some or of others, there is one indisputable and sad fact that remains – a young man is dead, and his family continues to mourn. It is hoped that his death will not be in vain and that the events that transpired will serve as an impetus to change the way citizens and police interact.

The Symposium sought to continue the dialogue around the topic of excessive use of force, interactions with law enforcement, and the historical narrative of how African Americans perceive their treatment at the hands of law enforcement. With each panel and presentation, there was an opportunity to engage and ask questions and provided a glimmer of hope that the tragic lesson of that day in August would open up discourse among those who disagree. As I returned to my office, an anonymous author placed the edited Symposium brochure against my office door.⁶⁸ This anonymous act was one of cowardice that speaks volumes about the inability for true discourse to occur. Ferguson may simply be footnote that is a lightning rod when referenced, but nothing more because for it to be a transformative event, the conversation must be a public one.

67. Mary L. Dudziak, *War and Peace in Time and Space*, 13 SEATTLE J. FOR SOC. JUST. 381 (2014) (discussing the proliferation of military equipment in local law enforcement); Jeffrey A. Endebak, Comment, *More Bang For Their Buck: How Federal Dollars Are Militarizing American Law Enforcement*, 47 J. MARSHAL L. REV. 1479 (2014) (same).

68. Appendix I, *infra* p. 959.

