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A Culture of Silence: Exploring the Impact of the Historically Contentious Relationship Between African-Americans and the Police

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A CULTURE OF SILENCE: EXPLORING THE IMPACT OF THE HISTORICALLY CONTENTIOUS RELATIONSHIP BETWEEN AFRICAN-AMERICANS AND THE POLICE

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A legacy of biased police discretionary decision-making persists beyond the demise of *de jure* racial discrimination, perpetuating a relationship between the police and racial minorities that is primarily authoritarian, regulatory, and punitive in character. Further, contemporary policy decisions at the federal, state, and local levels continue to perpetuate a contentious relationship between the police and racial minorities based on social control rather than public service imperatives.[1]

INTRODUCTION

Recently, my family and I had dinner with two of our Caucasian friends, Janet and Phil, who are husband and wife and also police officers in the mid-sized Midwestern city where I reside. During dinner, our conversation turned to a homicide investigation Janet was handling. An unknown assailant had killed an African-American man, and Janet was tasked with visiting the deceased man's home to interview his family. Janet stated that when she arrived at the man's home, his family members greeted her not with gratitude and cooperation, but with anger and vitriol. The family members called Janet a "pig", told her she was not welcomed in their home, and demanded that she leave. Janet left the man's home to avoid further confrontation, but she was clearly upset about the way she had been treated. Janet felt the family's reaction was a direct result of several highly publicized officer-involved shootings of African-Americans,[2] but she stated that she is always fair to the people with whom she interacts and is not a racist. She simply could not understand why the deceased man's family, who should have been welcoming and supportive of her investigative efforts, had rejected her attempt to gather information that might lead to an arrest.

I believe the family's reaction to Janet is evidence of the strained relationship between African-Americans and the police. As the introductory quote from researcher Sandra Bass states, the relationship between African-

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[1] Sandra Bass, *Policing Space, Policing Race: Social Control Imperatives and Police Discretionary Decisions*, 28 SOC. JUST. SOCIAL JUSTICE 156, 158-59 (2001).

[2] *See infra* Part III.B.4 and accompanying notes (describing recent shootings).

Americans and the police has traditionally been focused on authority, control, and the enforcement of laws we now acknowledge were racially discriminatory.[3] This historical relationship, when combined with a modern-day narrative that the police disproportionately stop, arrest, and utilize deadly force against African-Americans, has resulted in pervasive, inter-generational fear and distrust of the police. Most African-Americans view police officers not as the heroic protectors they can call upon when in need of help or the hard-hitting investigators they would trust to look into a family member's murder. Instead, many African-Americans believe police officers have bought into the stereotype of black criminality, and, as a result, will not hesitate to make an arrest without probable cause or kill an unarmed black person. Indeed, I believe feelings of distrust and fear of the police are so prevalent in the African-American community that they have become cultural norms passed down from generation to generation.

Now, consider the impact on law and policy if we accept the premise that distrust and fear of the police are cultural norms in the African-American community. If it is true that the law should mirror norms and expectations regarding behavior, then the law should recognize that most African-Americans fear and do not trust law enforcement. Enter Federal Rule of Evidence 801(d)(2)(B), which allows for the admissibility of "adoptive admissions" against a party-opponent.[4] The rule states that a statement is not hearsay if "[t]he statement is offered against an opposing party and . . . is one the party manifested that it adopted or believed to be true."[5] In essence, the adoptive admissions rule allows the statements of others to be admitted against a party-opponent if the party-opponent has in some way adopted the statement as his or her own. The adoptive admissions rule is often used to admit evidence of a criminal defendant's silence in response to an accusation by law enforcement.[6] The theory is that the defendant's failure to deny the accusation has some probative value in establishing the truth of the allegation.[7] Additionally, courts have admitted evidence of silence to impeach a defendant-witness on the theory that the defendant-witness' failure to respond to accusations by law enforcement calls into question any explanatory statements offered by the defendant at trial.[8] While I have argued that silence in response to an accusation by law enforcement generally lacks any probative value regardless of whether the silence happens prior to or after the reading of Miranda rights,[9] such silence is particularly irrelevant when the defendant is African-American. Indeed, if it is true that

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[3] *See* Bass *supra* note 1.
[4] *See* FED. R. EVID. 801(d)(2)(B).
[5] *Id.*
[6] *See infra* Part I.
[7] *See id.* at I.B.
[8] *See id.* at I.C.2.
[9] *See generally* Mikah K. Story Thompson, *Methinks the Lady Doth Protest Too Little: Reassessing the Probative Value of Silence*, 47 U. LOUISVILLE L. REV. 21 (2008).

distrust and fear of law enforcement are cultural norms in the African-American community, a group disproportionately involved in the criminal justice system in the United States,[10] then an African-American's decision to remain silent may reflect these cultural norms rather than consciousness of guilt or dishonesty.

This Article will explore whether common perceptions of law enforcement have risen to the level of cultural norms in the African-American community and consider the effect the existence of such norms should have on the admissibility of silence. Part I of this Article will examine the traditional evidentiary uses of silence as well as commentary concerning the probative value of silence. Part II will define the transparency phenomenon, a term coined by Professor Barbara Flagg. Flagg theorizes that many facially neutral norms and expectations are actually White-specific and the application of those White-specific norms to people of color often results in racial discrimination. Part III will make the case that fear and distrust of the police are African-American cultural norms while trust and reliance upon the police are White-specific cultural norms. Part III will describe the history of police interactions with African-Americans, from slavery to the present day. Stories of negative interactions between the police and African-Americans, which are often passed down from generation to generation, are the genesis of the distrust and fear that African-Americans hold today. Part III will also highlight modern-day events that reinforce African-Americans' historical perceptions of law enforcement and explore polling data and research establishing the prevalence of fear and distrust of the police in the Black community and trust and reliance upon the police in the White community. Part IV will review research showing that silence, which is a useful tool for those who are fearful and distrustful, has taken on special significance for African-Americans who find themselves interacting with the police in any manner. Part V will conclude by advocating for the exclusion of evidence of African-American criminal defendants' silence in response to accusations by law enforcement.

I. THE EVIDENTIARY USES OF SILENCE[11]

At the outset, it is important to describe what constitutes silence. Merriam-Webster's Dictionary of Law defines silence as "forbearance from speech or comment."[12] Likewise, the Ninth Circuit defines silence as "the fact of abstaining from speech."[13] For purposes of this Article, "silence" refers to a

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[10] *See infra* Part III.B.2.

[11] Portions of this section originally appeared in Thompson, *supra* note 9.

[12] MERRIAM-WEBSTER'S DICTIONARY OF LAW, http://search.credoreference dictionary. reference.com.proxy.library.umkc.edu/content/title/mwdlaw?alpha=S&offset=195/browse/silence (last visited Dec. 13, 2016).

[13] United States v. Velarde-Gomez, 269 F.3d 1023, 1031 (9th Cir. 2001) (quoting THE NEW SHORTER OXFORD DICTIONARY 2861 (4th ed. 1993)).

defendant's failure to speak. The failure to speak can arise in several situations. It could arise in response to an accusation of criminal conduct. Additionally, it could arise where a defendant fails to report a crime or offer an exculpatory statement to law enforcement upon arrest. Typically, the government uses a criminal defendant's silence in one of the following ways: (1) to establish a non-hearsay adoptive admission in an effort to prove the defendant's guilt; or (2) to impeach the defendant's credibility as a witness.

A. Silence as Substantive Evidence of Guilt

Federal Rule of Evidence 801(d)(2)(B) allows for the admissibility of "adoptive admissions" against a party-opponent. The rule indicates that a statement is not hearsay if "[t]he statement is offered against an opposing party and . . . is one the party manifested that it adopted or believed to be true."[14] In essence, the rule allows the statements of others to be admitted against a party-opponent if the party-opponent has in some way adopted the statement as his or her own. For example, the First Circuit found an adoptive admission where a defense attorney admitted in open court that the defendant knew an accomplice had deposited a gun in the defendant's car.[15] The court found the attorney's admission attributable to the defendant because the defendant stated during the same hearing that he agreed with the statements his attorney made.[16] Although adoptive admissions technically satisfy the definition of hearsay,[17] the drafters of the Federal Rules of Evidence determined that adoptive admissions, like all other admissions, should be excluded from the definition of hearsay "on the theory that their admissibility in evidence is the result of the adversary system rather than satisfaction of the conditions of the hearsay rule."[18]

While several types of verbal and nonverbal conduct may constitute proof of a party-opponent's acquiescence or manifestation of belief in someone else's statement,[19] a party-opponent's silence or failure to deny a statement may

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[14] *See supra* note 4.
[15] *See* United States v. Negron-Narvaez, 403 F.3d 33, 38-39 (1st Cir. 2005).
[16] *Id.*
[17] *See supra* note 4.
[18] FED. R. EVID. 801(d)(2) Advisory Committee's Note to Subdivision (a).
[19] *See, e.g.*, United States v. Beckham, 968 F.2d 47, 52 (D.C. Cir. 1992) ("When [defendant's accomplice] told [an undercover officer] that he could get another rock of crack from 'my buddy,' [defendant] immediately got up from his chair, walked over to a stash of crack that was packaged for distribution, and began to open it. By that action, [defendant] indicated his endorsement of [the accomplice's] statement."); United States v. Marino, 658 F.2d 1120, 1124-25 (6th Cir. 1981) (finding that defendant's possession of an airline ticket was an admission that defendant had traveled in interstate commerce because "possession of a written statement becomes an adoption of its contents"); Wickliffe v. Duckworth, 574 F. Supp. 979, 984 (N.D. Ind. 1983) ("The record is clear that petitioner adopted the admissions . . . . [H]e demonstrated his agreement by laughing, slapping hands with [the declarant] and nodding.").

also qualify as proof that the party has adopted the statement.[20] According to the Advisory Committee Notes following Rule 801(d)(2)(B), "[w]hen silence is relied upon, the theory is that the person would, under the circumstances, protest the statement made in his presence, if untrue. The decision in each case calls for an evaluation in terms of probable human behavior."[21] When silence is entered into evidence as an adoptive admission pursuant to Rule 801(d)(2)(B), it is offered for its truth. Thus, when the government offers such evidence in a criminal case, it is offered as substantive evidence of the defendant's guilt.[22]

B. Silence as Impeachment Evidence

Federal Rule of Evidence 613 allows for the impeachment of trial witnesses through prior inconsistent statements.[23] Where a witness's trial testimony is inconsistent with a prior statement made by the witness, opposing counsel may cross-examine the witness regarding the inconsistency or introduce actual proof of the prior inconsistency.[24] This line of questioning is not used to demonstrate the truth of the prior statement,[25] but to show the witness's lack of credibility. As the First Circuit Court of Appeals has stated:

> In our view, Rule 613(b) applies when two statements, one made at trial and one made previously, are irreconcilably at odds. In such an event, the cross-examiner is permitted to show the discrepancy by extrinsic evidence if necessary-not to demonstrate which of the two is true but, rather, to show that the two do not jibe (thus calling the declarant's credibility into question).[26]

The Supreme Court has held that a defendant's silence can be used as impeachment evidence and may sometimes qualify as a prior inconsistent

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[20] *See* FED. R. EVID. 801(d)(2)(B).

[21] *Id.*

[22] *See generally* JOHN HENRY WIGMORE, EVIDENCE § 1042, 3 (Chadbourn rev. 1970) (displaying many cases were evidence offered by the government is used to establish guilt).

[23] *See* FED. R. EVID. 613(b).

[24] *See id.*

[25] In order to use a prior inconsistent statement for its truthfulness, the proponent of the evidence must satisfy Federal Rule of Evidence 801(d)(1)(A), which excludes from the definition of hearsay prior inconsistent statements "given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition."

[26] *See* United States v. Winchenbach, 197 F.3d 548, 558 (1st Cir. 1999); *see also* 1 JOHN W. STRONG ET AL., MCCORMICK ON EVIDENCE § 34, at 126 (5th ed. 1999) ("The attack by prior inconsistent statement is not based on the theory that the present testimony is false and the former statement is true but rather upon the notion that talking one way on the stand and another way previously is blowing hot and cold, raising a doubt as to the truthfulness of both statements.").

statement. In *Raffel v. United States*,[27] the Court held that a defendant who invoked his privilege against self-incrimination in his first trial, yet chose to take the stand during his second trial, could be impeached with his prior failure to testify.[28] During Raffel's first trial for conspiracy to violate the National Prohibition Act, he listened to testimony by a prohibition agent that Raffel admitted owning a bar that served alcohol. Raffel did not testify during that trial, and the jury deadlocked.[29] During Raffel's second trial, the same prohibition agent testified regarding Raffel's admission, and Raffel took the stand and testified that he had never made such a statement.[30] On cross-examination, the court asked Raffel why he failed to take the stand in his own defense during the first trial.[31] Raffel was convicted following the second trial.[32] On appeal, the Court held that the prosecutor's questions were permissible.[33] The Court found that by taking the stand, Raffel opened himself up to cross-examination and impeachment.[34] The Court also noted that Raffel's cross-examination may have been probative of his credibility "if the cross-examination had revealed that the real reason for the defendant's failure to contradict the government's testimony on the first trial was a lack of faith in the truth or probability of his own story."[35] Thus, the Supreme Court found that under certain circumstances, a defendant's silence may be inconsistent with claims of innocence made at trial.

The Court has not always found silence to qualify as a prior inconsistent statement. In *Grunewald v. United States*,[36] the Court held that a defendant's invocation of his Fifth Amendment privilege during grand jury proceedings could not be used to impeach his trial testimony.[37] In *Grunewald*, the Court failed to see how the defendant's silence during the grand jury hearing was contradictory to his trial testimony proclaiming his innocence.[38] Indeed, the Court found the defendant's silence to be "wholly consistent with innocence."[39] In distinguishing its holding in *Grunewald* from its holding in *Raffel*, the Court found that the *Raffel* decision did not concern itself with the probative value of the impeachment evidence. Rather, *Raffel* focused on the constitutionality of impeaching a defendant regarding his prior silence.[40] The *Grunewald* Court held that although the line of questioning regarding the defendant's grand jury silence

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[27] *See generally* 271 U.S. 494 (1926).
[28] *See id.* at 497.
[29] *See id.* at 495.
[30] *See id.*
[31] *See id.*
[32] *See id.*
[33] *See id.*
[34] *See id.* at 497.
[35] *Id.* at 498.
[36] *See generally* Grunewald v. United States, 353 U.S. 391 (1957).
[37] *See id.* at 424.
[38] *See id.* at 421-22.
[39] *Id.* at 421.
[40] *See id.* at 420.

was constitutional, it was not probative on the issue of the defendant's credibility and was therefore inadmissible.[41] In accord with the *Grunewald* holding, subsequent decisions regarding the admissibility of silence to impeach a defendant-witness's credibility have turned on whether the courts found the silence to have some probative value as a statement inconsistent with the defendant's trial testimony.[42] As the Supreme Court has noted, "[i]f the Government fails to establish a threshold inconsistency between silence at the police station and later exculpatory testimony at trial, proof of silence lacks any significant probative value and therefore must be excluded."[43]

C. Commentary on the Admissibility of Silence

Although the federal courts and forty-three states admit silence as either an adoptive admission or impeachment evidence in criminal cases,[44] many judges and scholars have questioned the probative value of silence, especially in response to accusations by law enforcement.[45] The criticism has focused on the

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[41] *See id.* at 421.

[42] *See* United States v. Hale, 422 U.S. 171, 179-80 (1975) ("Petitioner here had no reason to think that any explanation he might make would hasten his release. . . . In light of the many alternative explanations for his pretrial silence, we do not think it sufficiently probative of an inconsistency with his in-court testimony to warrant admission of evidence thereof."). *But see* Doyle v. Ohio, 426 U.S. 610, 621-22 (1976) (Stevens, J., dissenting) ("If defendants had been framed, their failure to mention that fact at the time of their arrest is almost inexplicable; for that reason, under accepted rules of evidence, their silence is tantamount to a prior inconsistent statement and admissible for purposes of impeachment."); United States v. Strother, 49 F.3d 869, 874 (2d Cir. 1995) ("Under certain circumstances, a witness's prior silence regarding critical facts may constitute a prior inconsistent statement where failure to mention those matters . . . conflict[s] with that which is later recalled." (internal quotations omitted)); Dennis v. United States, 346 F.2d 10, 17-18 (10th Cir. 1965), *rev'd on other grounds*, Dennis v. United States, 384 U.S. 855 (1966) ("In determining variances or inconsistencies we should remember that flat contradictions are not the only test of inconsistency. Omissions of fact . . . may be relevant to the process of testing credibility of a witness'[s] trial testimony.").

[43] Hale, 422 U.S. at 176.

[44] *See* Bret Ruber, *Adoptive Admissions and the Duty to Speak: A Proposal for an Appropriate Test for the Admissibility of Silence in the Face of an Accusation*, 36 CARDOZO L. REV. 299, 314-17 (2014) (citing cases and noting that Alabama, Michigan and Pennsylvania do not allow adoptive admissions by silence into evidence under any circumstances while Georgia, Iowa, Minnesota and Oregon prohibit the use of adoptive admissions by silence in criminal cases).

[45] *See infra* Part I.C.2. Critics have also argued that the admissibility of silence infringes upon an individual's Fifth Amendment privilege against self-incrimination. *See, e.g.*, Cameron Oakley, *You Might Have the Right to Remain Silent: An Erosion of the Fifth Amendment with the Use of Pre-Arrest Silence*, 49 CREIGHTON L. REV. 589, 608-09 (2016). These critics argue that allowing a criminal defendant's silence into evidence essentially forces the defendant to testify to explain his or her reasons for remaining silent. *See* Anna Strandberg, *Asking for It: Silence and Invoking the Fifth Amendment Privilege against Self-Incrimination after Salinas v. Texas*, 8 CHARLESTON L. REV. 591, 630 (2014) (stating that if evidence of silence is admitted at trial, "the defendant has no choice but to involuntarily testify against himself."). While this Article will not debate the constitutional concerns that arise at the intersection of silence as evidence, the Fifth Amendment

varied reasons one might remain silent in response to questioning by the police and ultimately concludes that the assumptions underlying the admissibility of silence are quite weak.

1. The "Probative Value" of Evidence

Before exploring commentary on the admissibility of silence, it is important to review the test for relevant evidence articulated in the Federal Rules of Evidence. Rule 401 states that "[e]vidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence, and (b) the fact is of consequence in determining the action."[46] Section (a) of the test considers the probative value of the evidence while section (b) considers its materiality.[47]

The Advisory Committee Notes following Rule 401 state that courts must assess whether a particular item of evidence possesses sufficient probative value to justify placing it before the jury.[48] Importantly, the Advisory Committee states that judges should draw upon experience and/or science in making this assessment.[49] Where evidence has limited probative value, courts are empowered to consider risks such as unfair prejudice, confusion of issues, and misleading the jury, among others, and may exclude the evidence pursuant to Rule 403 if its probative value is substantially outweighed by any of these risks.[50] As Mueller and Kirkpatrick note, "[T]he effect of Rule 401 and 403 is to set a standard of pragmatic relevancy under which probative worth is a primary concern, but even evidence that is probative may be excluded if it is more trouble than it is worth."[51]

Mueller and Kirkpatrick argue that probative value is rarely an issue when a party offers direct evidence. For example, to prove the terms of a contract, the document itself is direct evidence obviously possessing some probative value.[52] Similarly, eyewitness testimony describing an incident is clearly probative to establish what occurred.[53] On the other hand, Mueller and Kirkpatrick note that the probative value of indirect or circumstantial evidence is

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privilege against self-incrimination, and the existence and/or reading of *Miranda* warnings, I do believe that criminal defendants' understanding of their right to remain silent reduces its probative value.

[46] FED. R. EVID. 401.

[47] *See* CHRISTOPHER B. MUELLER & LAIRD C. AND KIRKPATRICK, 1 FEDERAL EVIDENCE § 4.2 (4th ed. 2016).

[48] *See* FED. R. EVID. 401 Advisory Committee's Note.

[49] *See id.*

[50] *See* FED. R. EVID. 403.

[51] MUELLER & KIRKPATRICK, *supra* note 47.

[52] *See id.*

[53] *See id.*

frequently an issue that courts must resolve.[54] They define circumstantial evidence in the following way:

> Circumstantial evidence means proof that does not actually assert or describe the point or proposition to be proved, but asserts or describes something else, from which the trier may either reasonably infer the truth of the proposition . . . or reasonably infer an increase in the probability that a proposition that matters in the case is true.[55]

The probative value of a piece of circumstantial evidence is affected by the strength (or reasonableness) of the inferences the jury must make to utilize the evidence. If the inferences are faulty, then the probative value of the evidence is reduced. Thus, for our purposes, if the inference underlying the use of silence as proof of guilt or dishonesty is faulty (the inference being that people dispute or object to accusations made against them that are false, even when the accuser is a member of law enforcement), then the probative value of the evidence comes into question. As Mueller and Kirkpatrick note, "[c]ircumstantial evidence that fails the relevancy standard may be excluded simply because it requires inferential leaps that are too speculative."[56]

This Article posits that the inferential leap between silence in the face of an accusation by law enforcement and guilt or dishonesty is too speculative when offered against most people, but especially African-Americans, who often have a negative perception of law enforcement affected by both historical and modern-day experiences. Before demonstrating that the probative value of such silence is incredibly weak when offered against African-Americans, this Article will review more general criticism concerning the probative value of silence.

2. Questions Concerning the Probative Value of Silence

Prior to enactment of the Federal Rules of Evidence in 1975,[57] state and federal courts allowed the admissibility of silence pursuant to the tacit admission rule.[58] In *Commonwealth v. Dravecz*, a 1967 Pennsylvania Supreme Court decision, the Court defined the tacit admission rule in the following way:

> The rule of evidence is well established that, when a statement made in the presence and hearing of a person is incriminating in character and naturally calls for a denial but is not challenged or

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[54] *See id.*
[55] *Id.*
[56] *Id.*
[57] *See generally* FED. R. EVID. (enacted on January 2, 1975 and taking effect on July 1, 1975).
[58] *See* Commonwealth v. Dravecz, 227 A.2d 904, 906 (Pa. 1967).

> contradicted by the accused although he has opportunity and liberty to speak, the statement and the fact of his failure to deny it are admissible in evidence as an implied admission of the truth of the charges thus made.[59]

In *Dravecz*, the defendant was charged with burglary, larceny and receiving stolen goods. He was found guilty on all three charges.[60] On appeal, Dravecz argued that evidence of his silence during police questioning should have been excluded at trial. The evidence established that Dravecz voluntarily visited police headquarters and submitted himself for questioning after learning that police had discovered stolen equipment on his parent's farm.[61] During Dravecz's visit with police, he denied stealing the equipment. Thereafter, the officer questioning Dravecz read a witness statement indicating that Dravecz had visited the witness' residence with the stolen equipment and requested that the witness sell the equipment for him.[62] Dravecz made no comment in response to the statement. The witness' statement and Dravecz's failure to deny the accusations in the statement were admitted at trial.[63]

The Court overturned Dravecz's conviction, finding that evidence of his silence should not have been admitted.[64] The Court also repudiated the tacit admission rule, finding that a party's silence in the face of accusations is unhelpful in establishing the truth of the accusations.[65] First, the Court questioned the assumption that certain accusations naturally call for a response or denial by the accused: "Who determines whether a statement is one which 'naturally' calls for a denial? What is natural for one person may not be natural for another."[66] Second, the Court argued that the tacit admission rule is based on a false premise. According to the Court, the rule "rests on the spongy maxim, so many times proven unrealistic, that silence gives consent."[67] Finally, the Court noted that the tacit admission rule allows for the admissibility of otherwise excludable hearsay. The statement read to Dravecz constituted inadmissible hearsay on its own; however, because Dravecz was silent following the reading of the statement, the jury was made aware of both the statement and Dravecz's silence. Thus, the tacit admission rule "invests hearsay with evidentiary authority which is not recognized in any of the exceptions to the hearsay rule."[68]

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[59] *Id.* (quoting Commonwealth v. Vallone, 32 A.2d 889, 890 (Pa. 1943)).
[60] *See id.* at 905.
[61] *See id.*
[62] *See id.*
[63] *See id.*
[64] *See id.* at 909.
[65] *See id.*
[66] *Id.* at 906.
[67] *Id.*
[68] *Id.* at 908.

Following *Dravecz*, courts continued to question the validity of the tacit admissions rule, especially when accusations by law enforcement were at issue.[69] In 1975, the U.S. Supreme Court issued *U.S. v. Hale*, which further legitimized criticism of the rule.[70] In *Hale*, the defendant was arrested for assault and robbery and advised of his right to remain silent just prior to being searched and questioned by the police.[71] The police discovered $158 in Hale's possession and asked him where he got the money.[72] In response, Hale said nothing. At trial, Hale testified in his own defense and explained why he was in possession of the money at the time of his arrest.[73] On cross-examination, the prosecution attempted to impeach Hale's testimony by asking why he did not provide the same exculpatory explanation to the police when he was arrested.[74] Hale testified that he did not think an explanation was necessary at the time.[75] The trial court instructed the jury to disregard the question and Hale's answer but refused to declare a mistrial.[76] Hale was later convicted of robbery.[77]

The U.S. Court of Appeals for the District of Columbia found that the prosecution's line of questioning regarding Hale's silence following his arrest infringed upon his Fifth Amendment right to remain silent;[78] however, the Supreme Court ruled that it need not reach the constitutional question.[79] Instead, the Court held that the very limited probative value of Hale's silence in response to the police officer's question was substantially outweighed by the danger of unfair prejudice.[80]

The Court found that silence in the face of an accusation carries some probative value where it would be natural for an innocent person to proclaim his or her innocence;[81] the Court noted, however, that silence may be the natural response to an accusation by law enforcement. Indeed, the Court found that, during police questioning, "innocent and guilty alike – perhaps particularly the

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[69] *See, e.g.*, U.S. ex rel. Staino v. Brierly, 387 F.2d 597, 600 (3d Cir. 1967) (stating that although "the sole justification for the tacit admission doctrine is the psychological premise that, normally, an innocent person confronted with a charge of wrongdoing will be strongly impelled to utter a spontaneous denial". . . . "one's normal response to hearing derogatory statements about himself is substantially inhibited by the very fact that he his under arrest on a criminal charge and is being questioned by police officers in an obvious effort to substantiate that charge.").

[70] *See generally* 422 U.S. 171 (1975).

[71] *See id.* at 174.

[72] *See id.* The alleged victim of the assault claimed his attackers stole $96 from him. *Id.* at 173.

[73] *See id.* at 174.

[74] *See id.*

[75] *See id.*

[76] *See id.* at 172-73.

[77] *See id.* 172.

[78] *See id.* at 173.

[79] *See id.* at 173.

[80] *See id.* The Court applied a balancing test, codified in Federal Rule of Evidence 403, a rule that went into effect just eight days after Hale was decided. *See generally* FED. R. EVID. (effective July 1, 1975).

[81] *See id.* at 176.

innocent – may find the situation so intimidating that they may choose to stand mute."[82] The Court went on to list a number of reasons an innocent person might remain silent in the face of an accusation by law enforcement. According to the Court, those reasons include confusion, failure to hear or fully understand the question, a belief that there is no need to reply, fear, unwillingness to implicate others, and a reaction to the inherent pressures of police interrogation.[83] Additionally, the Court noted that Hale's silence may have indicated his reliance upon his right to remain silent, which had just been communicated to him by the police.[84] Turning to its assessment of the prejudice associated with the evidence, the Court found that evidence of silence carries a strong risk for unfair prejudice because a jury may place too much weight on the defendant's failure to deny an accusation by law enforcement.[85] Ultimately, the Court concluded that the trial court committed a prejudicial error by allowing Hale to be cross-examined regarding his silence, thus entitling him to a new trial.[86]

Although Hale was a post-*Miranda* silence case, the Court's rationale is also helpful in assessing the probative value of pre-*Miranda* silence whether it is used as impeachment evidence or substantive evidence of the defendant's guilt. As Justice Marshall noted, arrestees may know of their right to remain silent even before they are advised of their Miranda rights, especially where they have previously been arrested.[87] *Hale* is also helpful in addressing the varied reasons an individual may remain silent in the face of accusations by law enforcement. Reasons such as fear and intimidation are especially compelling for African-Americans, whose distrust of police has become a cultural norm.

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[82] *Id.* at 177.

[83] *See id.*

[84] *See id.* One year later, the Court would find the admissibility of a defendant's silence following the reading of Miranda warnings to be unconstitutional. *See* Doyle v. Ohio, 426 U.S. 610, 617, 619-20 (1976) (finding the use of post-Miranda silence to be a violation of the defendant's 14th Amendment due process rights, but also stating, "[s]ilence in the wake of these warnings may be nothing more than the arrestee's exercise of these Miranda rights. Thus, every post-arrest silence is insolubly ambiguous because of what the State is required to advise the person arrested.").

[85] *See id.* at 180.

[86] *See id.* at 181.

[87] *See* Jenkins v. Anderson, 447 U.S. 231, 247 (1980) (Marshall, J., dissenting) ("Since we cannot assume that in the absence of official warnings individuals are ignorant of or oblivious to their constitutional rights, we must recognize that petitioner may have acted in reliance on the constitutional guarantee. In fact, petitioner had most likely been informed previously of his privilege against self-incrimination, since he had two prior felony convictions."). *See also* Thompson, *supra* note 9, at 38 (2008) ("The statement of rights has become so ubiquitous that many Americans can probably recite the Miranda warnings from memory. To be sure, citizens' knowledge of their constitutional right to remain silent without the necessity of a warning from law enforcement is a good thing; however, this widespread knowledge undermines the major premise that innocent people always proclaim their innocence."). *But see* Brecht v. Abrahamson, 507 U.S. 619, 628 (1993) (finding that pre-Miranda silence, even after arrest, carries some probative value).

Despite criticism of the tacit admission doctrine, Congress codified the rule when it enacted the Federal Rules of Evidence in 1975.[88] Rule 801(d)(2)(B) remains in effect today, but the Advisory Committee recognized concerns regarding the use of silence as an adoptive admission in criminal cases:

> [T]roublesome questions have been raised by decisions holding that failure to deny is an admission: the inference is a fairly weak one, to begin with; silence may be motivated by advice of counsel or realization that "anything you say may be used against you"; unusual opportunity is afforded to manufacture evidence; and encroachment upon the privilege against self-incrimination seems inescapably to be involved. However, recent decisions of the Supreme Court relating to custodial interrogation and the right to counsel appear to resolve these difficulties. Hence the rule contains no special provisions concerning failure to deny in criminal cases.[89]

Even though the Advisory Committee acknowledged some of the innocuous reasons an individual may remain silent, it determined that any concerns about the constitutionality of the rule had been addressed by the courts; however, the Advisory Committee offered nothing to remedy the weak inferential link between silence and consciousness of guilt or dishonesty.[90]

The Advisory Committee acknowledged that the adoptive admission rule is based on the theory that "the person would, under the circumstances, protest the statement made in his presence, if untrue."[91] This Article questions the premise that it is normal or natural for an individual to respond to an accusation by law enforcement and argues that it actually may be more normal or natural for an African-American to remain silent in the face of such an accusation. The next section will define transparency phenomenon, which theorizes that many norms and expectations that appear to be facially neutral are actually White-specific norms that people of color should not be expected to follow.

II. TRANSPARENCY THEORY[92]

"Transparency theory" or transparency phenomenon, a term coined by Professor Barbara Flagg, a Caucasian woman, is defined as "the tendency of

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[88] *See generally* FED. R. EVID.
[89] FED. R. EVID. 801(d)(2)(B) Advisory Committee's Note.
[90] *See* FED. R. EVID. 801(d)(2)(B) (a statement made against an opponent is not hearsay if the party making the statement believes it to be true).
[91] FED. R. EVID. 801(d)(2)(B) Advisory Committee's Note.
[92] Portions of this section originally appeared in Mikah K. Thompson, *Blackness as Character Evidence*, 20 MICH. J. RACE & L. 321 (2015).

whites not to think about whiteness, or about norms, behaviors, experiences, or perspectives that are white-specific."[93] Flagg, a leading scholar on white race consciousness, argues that Whites possess a significant societal privilege in that they do not often have to think of themselves in terms of their race.[94] Instead, Whites externalize race, only reflecting on their Whiteness when comparing themselves to people of color.[95] Flagg posits that Whites are usually unconscious of their Whiteness because it is the racial norm, while people of color are racially distinctive, and therefore a departure from the norm.[96] Flagg states that, "[T]o be white is not to think about it."[97] For these reasons, Whiteness is "a transparent quality when whites interact with whites in the absence of people of color."[98]

To prove that Whites see their Whiteness as the racial norm and therefore transparent, Flagg poses a series of questions for Whites to consider:

"In what situations do you describe yourself as white?"[99]

"Would you be likely to include 'white' on a list of three adjectives that describe you?"[100]

"Do you think about your race as a factor in the way other whites treat you?"[101]

"Are you conscious of yourself as white when you find yourself in a room occupied only by white people? What if the room is mostly nonwhite?"[102]

"Do you attribute your successes or failures in life to your whiteness?"[103]

"Do you reflect on the ways your educational and occupational opportunities have been enhanced by your whiteness?"[104]

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[93] Barbara J. Flagg, "*Was Blind, but Now I See": White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 957 (1993).
[94] *See id.*
[95] *See id.* at 970.
[96] *Id.* at 970-71.
[97] *Id.* at 969.
[98] *Id.* at 970.
[99] *Id.* at 973.
[100] *Id.*
[101] *Id.* This question aligns closely with one of the daily effects of white privilege. Peggy McIntosh, *White Privilege: Unpacking the Invisible Knapsack*, PEACE AND FREEDOM MAGAZINE 10 (Jul./Aug. 1989), http://nationalseedproject.org/white-privilege-unpacking-the-invisible-knapsack ("If a traffic cop pulls me over or if the IRS audits my tax return, I can be sure I haven't been singled out because of my race.").
[102] Flagg, *supra* note 93, at 973.
[103] *Id.*
[104] *Id.*

"Imagine that I am describing to you a third individual who is not known to you. I say, for example, 'She's good looking, but rather quiet,' or 'He's tall, dark and handsome.' If I do not specify the race of the person so described, is it not culturally appropriate, and expected, for you to assume she or he is white?"[105]

At first glance, it would seem that Whites' failure to recognize their Whiteness should be of no consequence to African-Americans; however, Flagg's next proposition should create great concern for African-Americans. According to Flagg, because Whites are not conscious of their Whiteness in most circumstances, they are similarly not conscious of certain White-specific norms that they (and society as a whole) impose upon non-Whites.[106] Whites mistakenly believe these White-specific norms are racially neutral and will accordingly make decisions and judgments based on non-Whites' ability or willingness to assimilate to these norms.[107] When non-Whites fail to act in accordance with these White-specific norms, they may face discrimination at the hands of well-intentioned Whites.[108] Flagg notes that "[t]ransparency operates to require black assimilation even when pluralism is the articulated goal; it affords substantial advantages to whites over blacks even when decision-makers intend to effect substantive racial justice."[109]

Flagg provides an example of the application of the transparency phenomenon: she describes a real-life story of a Black woman seeking a seat on the Board of Directors of a public interest organization.[110] The woman has owned her own business for eleven years, and it grosses $700,000 annually.[111] She employs ten people in addition to herself.[112] The woman dropped out of high school at the age of sixteen and later obtained her high school equivalency diploma.[113] She did not attend college but instead started her own business.[114] The committee considering the woman's candidacy is predominantly White.[115] During the woman's interview with the committee members, several of them question the woman about her decision not to attend college.[116] They also question whether she will feel comfortable serving on a board where most of the

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[105] *Id.* at 974.
[106] *See* Flagg, *supra* note 93, at 973.
[107] *See id.* at 975-76.
[108] *See id.*
[109] *See id.* at 957.
[110] *See id.* at 974-79.
[111] *See id.* at 974.
[112] *See id.*
[113] *See id.*
[114] *See id.*
[115] *See id.*
[116] *See id.* at 974.

directors have obtained college degrees.[117] The woman responds, somewhat defensively, that she does not believe her past educational history is as relevant as her professional experience, and that she feels comfortable interacting with individuals with college degrees.[118] The interview ends on a tense note.[119] The committee forwards the woman's name to the full board but notes that they found her to be "quite hostile."[120] They also conclude that she might be disruptive at board meetings.[121]

Flagg argues that certain elements involved in the committee's decision-making process reflect the transparency phenomenon.[122] She notes that the committee's questions about the woman's choices with regard to education reflect White-specific norms: "Anyone smart enough to attend college surely would do so, they might assume."[123] Flagg notes that this assumption fails to consider the woman's experience with inner-city schools or the reasons for her decision to drop out of high school.[124] The assumption also fails to consider the cost-benefit analysis the woman may have engaged in when deciding whether to go to college. Flagg notes that the woman's analysis of the costs and benefits of a college education may have been quite accurate considering the success of her business.[125] Flagg argues that the committee failed to appreciate the woman's decision to fully devote herself to her business rather than dividing her time between her college education and the business.[126] Instead, transparency theory caused the committee to judge the woman for failing to follow their White educational norm.[127]

Flagg also notes the committee's description of the woman as "hostile" is another reflection of the transparency theory.[128] While the adjective "hostile" appears to be race-neutral, Flagg argues it is actually race-specific because it rests upon certain race-specific norms concerning appropriate behavior.[129] The term "hostile" implies that the woman's behavior was somehow inappropriate, and such a determination reflects what is appropriate based on a White experience.[130] Flagg states that the committee members failed to recognize that the woman's responses to their questions may have been appropriate for an African-American, especially considering that she may have believed the

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[117] *See id.*
[118] *See id.*
[119] *See id.*
[120] *Id.* at 975.
[121] *See id.*
[122] *See id.* at 975-76.
[123] *Id.* at 976.
[124] *See id.*
[125] *See id.*
[126] *See id.*
[127] *See id.*
[128] *See id.*
[129] *See id.*
[130] *See id.*

committee members' questions were a reflection of their racial bias against African-Americans.[131] Because Whites do not contend with racial stereotypes on a daily basis, the committee members did not understand the reason for the woman's so-called hostility.[132]

Flagg argues that transparently White decision-making is a form of institutional racism.[133] She defines institutional racism as any institutional practice systematically creating or perpetuating racial advantage or disadvantage.[134] Importantly, Flagg states that individuals often perpetuate systems of institutional racism without any discriminatory animus toward people of color.[135] Instead, "even seemingly 'benign' participation in racially unjust institutions fully implicates individuals in the maintenance of white supremacy."[136] Flagg posits that Whites who wish to dismantle systems based on institutional racism must recognize their own nonracist White identity and challenge transparently White decision-making.[137]

Flagg's transparency framework is an extremely effective tool for analyzing the admissibility of silence. The adoptive admission rule is based on the theory that it is natural or normal for a person to deny any untrue accusations made in that person's presence. The next section will show that while it may be "normal" or "natural" for Whites to deny accusations made by law enforcement (although the theoretical underpinnings of this premise are suspect),[138] the relationship between African-Americans and the police, based on both historical and modern-day narratives, suggests it may not be normal, natural or even safe to speak to law enforcement or specifically deny accusations made by police officers.

III. FEAR AND DISTRUST OF THE POLICE AS AFRICAN-AMERICAN CULTURAL NORMS

My mother often tells the story of her first interactions with the police while she was growing up in Greenwood, Mississippi in the 1950s. She recalls a particular incident where she was awakened by police officers after midnight when she eight years old. The police had entered my grandparents' home without permission and sought to take my mother's older brother, John, to the police

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[131] *See id.*
[132] *See id.*
[133] *See id*. at 960.
[134] *Id*.
[135] *See id.*
[136] *Id.*
[137] *See id.* Flagg offers several strategies for challenging transparently White decision-making. She encourages Whites to view ostensibly race-neutral decision-making criteria with a healthy dose of skepticism. *See id.* at 974. She also advocates for Whites to utilize a more pluralistic approach when developing decision-making criteria by seeking input from non-Whites. *See id.* at 979.
[138] *See supra* Part I.C.2.

station for questioning. Apparently, someone had stolen money from a White business owner earlier that day, and the officers suspected John, who was 17 years of age at the time. John had committed a theft or two in the past, providing the police with reason to suspect him in this case. My grandmother protested that John had been at home with her all day, but the police took John to the station anyway. My mother recalls the fear she felt at that moment. She believed her brother was innocent, and she was afraid the officers would beat John, as police brutality was a fairly common occurrence in 1950s Mississippi. My mother recalls that John did not return home that night or the next. He was gone for approximately three days, leaving my grandparents and mother to believe he might be dead. But, after those three long days, John walked through the front door with fresh bruises. He reported that the police concluded that someone else committed the theft and let him go. Although my mother was relieved her big brother had returned, her fear of the police entering her home and harming her family would not leave her. Throughout John's late teens and early twenties, he would be taken from my grandparents' home on several occasions and held for days, only to be released without any criminal charges being filed against him.

There is little doubt that John's perceptions of the police were colored by the interactions he had with them as a young man, but John's interactions with the police also affected my entire family's perception of the police. My grandmother believed the officers used John's prior thefts as a license to harass him whenever anything was discovered missing in Greenwood. She believed John had no rights once he became a suspect. She also felt powerless to help him because she realized she could be arrested or beaten if the police perceived her as being too defiant. And for my mother, a very young girl at the time, John's interactions taught her that the police were not her protectors. They were the people who terrorized her and members of her household. She learned the police were to be feared and never to be trusted. Those feelings of fear and distrust persist today, and as my mother watches current news coverage of the many killings of Black men and women by police officers, she is reminded of her childhood.

My mother passed John's story down to my brothers and me as a cautionary tale about the attention and care we should use if we ever find ourselves interacting with the police, and I will pass the story down to my sons, along with many other stories about the African-Americans who have lost their lives at the hands of police or found themselves serving prison time for crimes they did not commit.[139] This section will describe the history of police interactions with the African-American community and also highlight modern-day events that reinforce African-Americans' historical perceptions of law

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[139] This conversation between Black parents and children has come to be known as "The Talk." *See infra* Part IV.B.

enforcement. This section will also explore polling data and research showing the pervasiveness of fear and distrust of the police in the Black community.

A. The Historical Relationship between African-Americans and the Police

The institution of slavery and the period of de jure racism following its abolition are perhaps the two most significant reasons for the African-American community's negative perceptions of law enforcement. Modern-day stories of police brutality only confirm the historical narrative that law enforcement exists to control, rather than protect, African-Americans.

1. Slave Patrols

Prior to the Civil War, slave patrols emerged as an organized method for protecting Whites from the slave population. Slaves often fought against their bondage, and they typically did so by running away, committing criminal acts, and participating in revolts or uprisings.[140] White Southerners, who were often outnumbered by the slave population, were most fearful of organized slave revolts.[141] As a result, Southern lawmakers set out to pass laws allowing for greater control over the slave population.

Legislative attempts to control the slave population were initially informal in nature. In the late 1600s and early 1700s, Southern lawmakers passed laws allowing any White person to apprehend and punish a runaway slave without fear of criminal prosecution.[142] As the slave population grew and Whites began to fear their slaves, Southern lawmakers determined a more formal system of patrolling was necessary.[143]

In the mid-1700s, lawmakers began establishing slave patrol units for the stated purpose of controlling the slave population.[144] For example, the preamble of a 1740 South Carolina law stated: "FOREASMUCH as many late horrible and barbarous massacres have been actually committed and many more designed, on the white inhabitants of this Province, by negro slaves, who are generally prone to such cruel practices, which makes it highly necessary that constant patrols

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[140] *See* Philip L. Reichel, *Southern Slave Patrols as a Transitional Police Type*, 7 AM. J. POLICE 51, 55 (1988). While running away was the slave population's most common form of resistance, they also engaged in other more nefarious criminal acts of resistance, including theft, arson, crop destruction, and the poisoning of their masters and other Whites. *See id.*

[141] *See id.*

[142] *See id.* at 57 (citing a 1686 South Carolina law stating that anyone could apprehend and chastise a slave found away from his plantation without permission, as well as a 1705 Virginia law making it legal for any person to kill runaway slaves).

[143] *See id.*

[144] *See id.* at 57.

should be established."[145] Similarly, the preamble of a 1757 Georgia law establishing slave patrols stated: "[I]t is absolutely necessary for the Security of his Majesty's Subjects in this Province, that Patrols should be established under proper Regulations in the settled parts thereof, for the better keeping of Negroes and other Slaves in Order and prevention of any Cabals, Insurrections or other Irregularities amongst them."[146]

In South Carolina and Tennessee, district and county commissioners appointed slave patrollers, while judges and justices of the peace appointed slave patrollers in North Carolina, Louisiana, Georgia, Missouri, and Arkansas.[147] In Mississippi, boards of county police appointed slave patrol leaders.[148]

Slave patrols wielded significant power and authority in an effort to control the slave population. South Carolina slave patrols had search and seizure power as well as the right to administer up to twenty lashes.[149] Similarly, Georgia slave patrols were obligated to visit each plantation in their district at least once each month in search of runaway slaves, weapons, ammunition, and stolen goods.[150] One scholar described the power of slave patrols in the following manner:

> Patrols had full power and authority to enter any plantation and break open Negro houses or other places where slaves were suspected of keeping arms; to punish runaways or slaves found outside of their masters' plantations without a pass; to whip any slave who should affront or abuse them in the execution of their duties; and to apprehend and take any slave suspected of stealing or other criminal offense, and bring him to the nearest magistrate.[151]

Considering the power Southern legislatures conferred on slave patrols, it is no surprise that slaves feared and resented their patrollers.[152] Even free Blacks came under the ire of slave patrollers, who were also empowered to whip free

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[145] *See id.* at 55 (quoting COOPER, T. (ed.) (1837) STATUTES AT LARGE OF SOUTH CAROLINA, Vol. 2, Part 1. Columbia, SC; A.S. Johnson).

[146] *Id.* at 55-56 (quoting CANDLER, A. (ed.) (1910) THE COLONIAL RECORDS OF THE STATE OF GEORGIA, Vol. 18, Atlanta, Ga: Chas. P. Byrd, State Printer).

[147] *See id.* at 67.

[148] *See id.*

[149] *See id.* at 60 (citing COOPER, T. (ed.) (1838) STATUES AT LARGE OF SOUTH CAROLINA, Vol. 3, Part 1. Columbia, SC; A.S. Johnson).

[150] *See id.* at 61. Interestingly, Georgia patrollers were also empowered to apprehend disorderly Whites and Whites suspected of violating vagrancy laws. *Id.* (citing CANDLER, A. (ed.) (1911) THE COLONIAL RECORDS OF THE STATE OF GEORGIA, Vol. 19, Part 2, Atlanta, Ga: Chas. P. Byrd, State Printer).

[151] *Id.* at 62.

[152] *See id. See also* Bass, *supra* note 1, at 159 ("Patrollers were widely feared by slaves, since whippings and other extremely violent actions were not uncommon." (internal citations omitted)).

Blacks who could not prove they were free.[153] White slave owners also took issue with the severity of punishment administered by slave patrollers. "The slaves were, after all, an expensive piece of property which owners did not want damaged."[154] Slaves engaged in various acts of resistance against slave patrollers such as building trap doors in their cabins to allow for escape, tying ropes across roads to trip slave patrollers' horses, and fighting to escape patrollers.[155]

Many scholars have argued that slave patrols were the precursor to modern-day policing organizations.[156] Criminologist Philip Reichel states that slave patrols were more organized than informal policing units, which are characterized by community members working together to maintain order, but less organized than modern policing organizations.[157] He argues that slave patrols were a transitional police type that bridged informal and modern police organizations and demonstrated some characteristics of each.[158] As such, the widespread existence of slave patrols in the South must be considered alongside the development of modern policing organizations in the North when describing the evolution of American law enforcement.[159]

Similarly, legal historian Sally Hadden describes many similarities between slave patrols and modern-day policing organizations. First, she notes that some of the terminology used by modern-day police departments was originally used by slave patrols. The "beat", which has become a common term to describe the territory covered by a police officer, was originally used to describe the area covered by slave patrollers.[160] Second, she states that many techniques used in modern policing originated with slave patrols, including systematic surveillance methods such as "stakeouts".[161] Hadden also notes that until the implementation of greater due process protections in the 1960s, "policemen had great latitude to confine, question, brutalize and release suspects without recourse to more formal judicial settings, just as slave patrollers had done on their nightly rounds for the sake of racial control."[162]

The abolition of slavery in the United States eliminated the need for slave patrols, but as some have argued, the work of controlling African-

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[153] *See* Reichel *supra* note, 140 at 63.

[154] *Id.* at 65.

[155] *See id.* at 62.

[156] *See, e.g.*, K.B. Turner et al., *Ignoring the Past: Coverage of Slavery and Slave Patrols in Criminal Justice Texts*, 17 J. CRIM. JUST. EDUC. 181, 186 (2006) ("The similarities between the slave patrols and modern American policing are too salient to ignore. Hence, the slave patrol should be considered a forerunner of modern American law enforcement."); *Southern Slave Patrols as a Transitional Police Type*, *supra* note 138, at 66-71.

[157] *See* Reichel, *supra* note 140, at 52, 65.

[158] *See id.* at 52-53.

[159] *See id.* at 68.

[160] *See* SALLY E. HADDEN, SLAVE PATROLS: LAW AND VIOLENCE IN VIRGINIA AND THE CAROLINAS 219 (2001).

[161] *See id.*

[162] *Id.*

Americans then shifted from slave patrollers to Klansmen and police officers, for "[a]lthough slavery had died, the white community's need for racial dominance lived on."[163]

2. De Jure Segregation and Jim Crow

In the mid-1800s, formal police organizations began forming in the Northeast in an effort to maintain order and enforce the law in an increasingly diverse America.[164] These organizations were different from slave patrols in that they employed full-time officers.[165] New York established its full-time, paid police force in 1845, and over the next few years, similar full-time police forces were developed in all large American cities.[166]

While modern police forces were forming throughout the country, Southern states were implementing measures aimed at controlling the newly free Black population.[167] These measures included the enactment of the Black Codes.[168] The Black Codes, which were first enacted in Mississippi and South Carolina in 1865, required African-Americans to provide annual evidence of employment to the government and prohibited African-Americans from engaging in various "disorderly offenses", which included such things as "using insulting gestures or language, engaging in malicious mischief, preaching the Gospel without a license, or taking on employment other than as farmers or servants without paying an annual tax."[169] One of the most controversial Black Codes implemented a structure of "apprenticeship" wherein Black orphans and other Black children whose parents were deemed unable to care for them were matched with White landowners.[170] The minors worked as unpaid laborers for the landowners, no consent from the parents was required, and moderate "corporal chastisement" was allowed.[171] African-Americans who violated the Black Codes faced punishment such as fines, serving on a chain gang, or performing

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[163] *Id.* at 220.

[164] *See* David S. Cohen, *Official Oppression: A Historical Analysis of Low-Level Police Abuse and a Modern Attempt at Reform*, 28 COLUM. HUM. RTS. L. REV. 165, 174-75 (1996); *see also* BRYAN VILA ET AL., THE ROLE OF POLICE IN AMERICAN SOCIETY 26 (1999).

[165] *See* VILA ET AL., *supra* note 164.

[166] *See id.*

[167] *See* Bass, *supra* note 1, at 160. Bass notes that Southern Whites were faced with a unique dilemma: "On the one hand, the slave-owning class was dependent on black labor to sustain the largely agricultural economy. On the other hand, ensuring the social and political subordination of newly manumitted slaves was essential if the ideology of white supremacy were to continue to reign." *Id.*

[168] *See id.*

[169] *See id.* (internal citations omitted).

[170] *See* Hubert Williams et al., *The Evolving Strategy of Police: A Minority View*, *in* THE POLICE AND SOCIETY 27, 37 (VICTOR E. KAPPELER ed., 2d ed. 1999).

[171] *See id.* at 37-38.

involuntary labor on a plantation.[172] Southern states called upon their militias and volunteer patrols to enforce the Black Codes, which faced significant legal challenges and were ultimately struck down by Congress in 1867.[173]

During the period of Reconstruction, Southern cities began forming their own police forces. These forces utilized the patrolling techniques of slave patrols as well as the military training techniques of the Confederate Army.[174] Hadden argues these more sophisticated and disciplined police forces were successful in fostering racial oppression while also abiding by the law.[175]

Racial segregation laws represented another method for controlling the African-American population. In the Southern states, racial segregation was enforced through "Jim Crow" laws.[176] As Bass notes, "[t]he intent of Jim Crow was to continually reaffirm and remind the black population of their lesser status or 'place' in the larger society."[177] To that end, Jim Crow laws limited social interactions between Blacks and Whites, created nearly impossible barriers for Blacks who sought to vote, and regulated nearly every aspect of African-Americans' public life.[178]

Jim Crow-era police officers, as enforcers of the law, were responsible for ensuring continued racial segregation.[179] Bass argues that the police stood not only for law and order, "but also for white supremacy and a whole set of social customs associated with the concept."[180] Police officers frequently used violence to punish African-Americans suspected of criminal activity and failed to protect Blacks against acts of violence by others, including the Ku Klux Klan.[181] Similarly, following the Great Migration of Blacks to Northern cities,[182] police

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[172] *See* Bass, *supra* note 1, at 160.

[173] *See* Reichel, *supra* note 140, at 199-201.

[174] *See id.* at 202.

[175] *See id.*

[176] *See* Bass, *supra* note 1, at 160. Jim Crow was a 19th-Century minstrel figure who came to represent the system of racial segregation in the South. *See* ISABEL WILKERSON, THE WARMTH OF OTHER SUNS: THE EPIC STORY OF AMERICA'S GREAT MIGRATION 10 (2010).

[177] *Id.* at 161.

[178] *See id.*

[179] *See id.* ("Formal police organizations under this system were responsible for upholding the formal and informal social order.").

[180] *Id.* (internal quotations omitted).

[181] *See id*; *See also* Reichel, *supra* note 140, at 216 (noting that Southern police officers refused to arrest or prosecute Klan members). The Ku Klux Klan began as a vigilante group of Whites who believed they should take the law into their own hands in defiance of the Union army. *See id.* at 207. In addition to patrolling freedmen, the early Klan would dress as ghosts in order to scare and play pranks on former slaves. They would often ride on horseback and disrupt social and religious gatherings of free Blacks. The Klan quickly moved toward more violent activity and terrorized African-Americans in a number of ways, including beating, lynching and shooting. *See id.*

[182] *See* WILKERSON, *supra* note 176, at 8-9. Between 1915 and 1970, approximately six million African-Americans fled the Jim Crow South and relocated to large urban centers, including Chicago, Philadelphia, and Los Angeles as well as smaller cities such as Newark, Milwaukee, and Gary. *See id.* at 9.

officers failed to properly respond to acts of violence committed by Whites against Blacks.[183]

Police officers' past failure to protect and value Black life, together with a legacy of control, subordination and racial discrimination sanctioned and enforced by law enforcement, planted the seeds of a narrative pitting African-Americans against police officers. This narrative, which suggests that law enforcement exists to control Blacks rather than protect them,[184] has been reinforced by modern-day stories of injustice, both real and perceived, at the hands of police officers.

B. Modern-Day Stories of African-Americans and the Police

From the period of the Civil Rights Movement until today, African-Americans and police officers have found themselves on opposite sides during several very high-profile events that have shaped our country's modern history.

1. The Civil Rights Movement and Race Riots

The Civil Rights Movement in the 1950s and 1960s was marked by protests and demonstrations by African-Americans and others fighting for racial equality.[185] Non-violent protestors frequently sought to provoke a police response in hopes of gaining publicity and sympathy for their cause.[186] Police officers were expected to maintain order and arrest those who broke the law; however, if they responded to protestors with too much force, they would play into the hands of protestors. Many police officers furthered the cause of civil rights protestors by brutalizing them with police dogs and high-pressure fire hoses as America watched.[187] For example, in May of 1963, President Kennedy acknowledged the city of Birmingham's use of fire hoses and police dogs on protestors was a

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[183] *See* Bass, *supra* note 1, at 162 (stating that Northern police officers frequently allowed Whites to terrorize Black homeowners).

[184] *See* Williams, *supra* note 170, at 28-29 (stating that the historical relationship between African-Americans and police has set a pattern that includes the idea that "minorities have fewer civil rights, that the task of the police is to keep them under control, and that the police have little responsibility for protecting them from crime within their communities.").

[185] *See* VILA ET AL., *supra* note 164, at 173.

[186] *See id. See also* Barbara Reynolds, *I Was a Civil Rights Activist in the 1960s. But It's Hard for Me to Get behind Black Lives Matter*, WASH. POST (Aug. 24, 2015), https://www.washingtonpost.com/posteverything/wp/2015/08/24/i-was-a-civil-rights-activist-in-the-1960s-but-its-hard-for-me-to-get-behind-black-lives-matter/?postshare=5221440433170944 ("In the 1960s, activists confronted white mobs and police with dignity and decorum, sometimes dressing in church clothes and kneeling in prayer during protests to make a clear distinction between who was evil and who was good.").

[187] *See An Ugly Situation in Birmingham, 1963*, PBS, http://www.pbs.org/wgbh/amex/eyesontheprize/sources/ps_c.html (last visited Aug. 7, 2016) (The transcript of President John F. Kennedy's Press Conference Concerning Birmingham Protests).

"spectacle" that damaged the reputation of Birmingham and the United States.[188] Countless images of non-violent Black protestors being attacked by law enforcement officers fueled frustration and anger as many African-Americans came to see police officers as symbols of the system of racial oppression they were fighting against.[189]

Tensions between African-Americans and the police came to a boiling point in the mid to late 1960s as a series of race riots erupted in several American cities. By one estimate, there were more than 750 race riots between 1964 and 1971, resulting in the deaths of 228 people and injuries to nearly 13,000.[190] With an estimated 15,000 separate incidents of arson during these riots, many African-American neighborhoods were destroyed.[191]

Lawmakers in various cities and even President Johnson commissioned studies to determine the root causes of the riots.[192] Those commissions determined that police conduct frequently sparked the riots.[193] The Kerner Commission, created by President Johnson, found that police insensitivity and sometimes outright brutality often precipitated the riots.[194] Similarly, the McCone Commission, created by the governor of California following the 1965 Watts riots, determined that of the seven riots occurring in Northern U.S. cities in 1964, each was started following an incident with police.[195] Although the arrestees involved in the Watts incident were found to have resisted arrest, possibly triggering the need for the arresting officers' use of force, the McCone Commission determined this incident fed into longstanding criticism that the Los Angeles Police Department was unfairly violent toward Blacks.[196] Similarly, Kerner Commission found that African-Americans felt hostility and cynicism toward law enforcement based on a widespread belief that police officers were not willing to ensure protection and justice for Blacks. The Kerner Commission concluded that the police officer is a symbol of American law enforcement and criminal justice, a system that allowed racial discrimination against Blacks to persist for centuries.[197]

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[188] *See id.*

[189] *See* Williams, *supra* note 170, at 45.

[190] *See* Virginia Postrel, *The Consequences of the 1960s Race Riots Come into View*, N.Y. TIMES (Dec. 30, 2004) http://www.nytimes.com/2004/12/30/business/the-consequences-of-the-1960s-race-riots-come-into-view.html?_r=0).

[191] *See id.*

[192] *See, e.g.*, Williams, *supra* note 170, at 45 (stating that President Johnson appointed the National Advisory Commission on Civil Disorder, known as the Kerner Commission, to investigate the cause of the riots and recommend solutions); VILA ET AL., *supra* note 164, at 176 (stating that the Governor of California appointed a commission to study the causes of the 1965 Watts riots).

[193] *See* Williams *supra* note 170, at 46.

[194] *See id.*

[195] *See* VILA ET AL., *supra* note 164, at 177 (quoting Governor's Commission on the Los Angeles Riots, VIOLENCE IN THE CITY: AN END OR A BEGINNING? 27-37 (1965)).

[196] *See id.*

[197] *See* Williams *supra* note 170, at 46.

The Kerner Commission made five suggestions later adopted by many police departments in an effort to prevent additional riots. Those recommendations included greater oversight over officer conduct to prevent abuse, providing adequate police protection to the residents of inner cities, creating a grievance system for citizens to complain about police treatment, producing policies that prohibit certain police behavior, and developing community support for law enforcement through the hiring of more racially diverse police officers and organizing neighborhood groups to assist the police in performing their duties.[198] Scholars note that although a great amount of progress has been achieved since the Kerner Commission recommendations, law enforcement organizations must do much more to "totally bridge[ ] the chasm that has separated them from minorities – especially blacks, for over 200 years."[199]

2. The War on Drugs

Despite efforts by some police forces to move toward a community policing model, the so-called "war on drugs" fostered even greater hostility toward the police in the Black community. In October 1982, President Ronald Reagan declared a war on drugs, using a phrase that was coined by President Richard Nixon in 1971.[200] During his weekly radio address, President Reagan pledged to win the war against all drugs by increasing anti-drug spending and the number of federal drug task forces.[201] The Reagan administration also launched a public relations campaign aimed at educating the public about the perils of drug use.[202] Presidents Bush and Clinton continued Reagan's war on drugs, and Bush created a national office of drug policy and appointed the nation's first "drug czar".[203]

In order to enforce the stricter drug policies implemented as a part of the war on drugs, police officers used techniques such as serving "no knock" warrants, raiding suspected drug houses, and utilizing battering rams to forcibly enter crack houses.[204] These paramilitary techniques reinforced the perception that African-Americans were living in a police state.[205] Police officers were at times quite careless and disrespectful in carrying out their duties during the war on drugs. For example, in 1988, 80 Los Angeles police officers raided four

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[198] *See id.*

[199] *Id.* at 47.

[200] *See* Kenneth B. Nunn, *Race, Crime and the Pool of Surplus Criminality: Or Why the "War on Drugs" Was a "War on Blacks"*, 6 J. GENDER RACE & JUST. 381, 386-87 (2002).

[201] *See id.* at 387.

[202] *See id.* Nancy Reagan's famous "Just Say No to Drugs" slogan was the most well-known part of the campaign. See *id.* at 427 n. 360.

[203] *See id.* at 387.

[204] *See* Bass, *supra* note 1, at 164.

[205] *See id.*

apartments where drug activity was suspected.[206] The officers seized small amounts of cocaine and marijuana but also committed 127 separate acts of vandalism during the raid.[207] The officers smashed doors, walls, and cabinets and even broke a piggy bank.[208] One officer swung an ax so wildly during the raid that other officers believed he might hurt them or himself.[209] Although 33 people were taken into police custody following the raid, just one was charged with drug possession.[210] Aggressive policing techniques such as the ones described herein have caused some scholars to ponder whether police officers used the war on drugs as a license to intentionally target African-Americans.[211] Regardless of their motivations, it is clear that police officers often focused their efforts on apprehending drug offenders in Black neighborhoods.[212]

The laws, policies, and policing practices implemented as a part of the war on drugs resulted in the mass incarceration of African-Americans. Black men were imprisoned for drug offenses at extremely high rates during the war on drugs.[213] Although Blacks made up just 12 percent of the U.S. population in 2000, they comprised 46 percent of the state and federal prison population.[214] By the end of the 1990s, more than 500,000 African-American men and women occupied state and federal prisons.[215] As of 2000, African-American males were 7.7 times more likely to be imprisoned than white males.[216] The federal sentencing disparity between crack cocaine and powder cocaine, which was 100 to 1,[217] meant that African-Americans, who were more likely to use crack, received significantly longer prison sentences.[218] Other sentencing measures inspired by the war on drugs, such as three strikes laws, habitual offender laws, and enhancements for the possession of weapons, had the effect of increasing prison sentences for African-American drug offenders.[219]

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[206] *See id.*

[207] *See id.*

[208] *See id.*

[209] *See id.*

[210] *See id.*

[211] *See, e.g.*, Nunn, *supra* note 200, at 382-83.

[212] *See id.* at 383.

[213] *See id.* at 391.

[214] *See id.* at 392 (citing U.S. Census Bureau, *Race-Universe: Total Population*, CENSUS 2000 tbl.P3, http://factfinder.census.gov).

[215] *See id.* (citing Allen J. Beck & Paige M. Harrison, *Prisoners in 2000*, BUREAU OF JUSTICE STATISTICS 1, 11 (2001)).

[216] *See id.*

[217] *See id.* at 396 (citing 21 U.S.C. § 841(b)(1)(A) (1994)). In 2010, President Obama signed an amendment into law that reduced the disparity from 100 to 1 to 18 to 1. *See Obama Signs Bill Reducing Cocaine Sentencing Gap*, CNN (Aug. 3, 2010), http://www.cnn.com/2010/POLITICS/08/03/fair.sentencing/.

[218] *See* Nunn, *supra* note 200, at 396-97.

[219] *See id.* at 398-99.

The nation's drug policy in the 1980s and 1990s undoubtedly had a devastating effect on Black families and communities. Moreover, the tactics used by law enforcement as a part of the war on drugs reinforced the feelings of fear and distrust that African-Americans have toward police officers.[220]

3. Driving While Black & The Rodney King Incident

Another product of the war on drugs was an increase in the practice of racial profiling by police officers. "Racial profiling initially referred to the police practice of conducting traffic stops for petty offenses under the pretext that individuals stopped are likely involved in more serious criminal activity."[221] The U.S. Drug Enforcement Agency is credited with introducing race-based profiles of drug offenders.[222] Law enforcement's practice of racially profiling, stopping and detaining Black motorists without probable cause or reasonable suspicion came to be known as "Driving while Black".[223]

Researchers have gathered statistics on traffic stops to determine whether the "Driving while Black" phenomenon actually exists. Research from the state of New Jersey in the 1990s found that even though Blacks made up just 13.2 percent of motorists on the New Jersey turnpike and Blacks and Whites violated traffic laws at approximately the same rates, Blacks made up 73.2 percent of total arrests.[224] Similarly, research from the state of Maryland found that 72 percent of motorists stopped were Black even though they made up just 17.5 percent of total drivers.[225]

African-Americans are aware of the Driving while Black phenomenon, and, unlike Whites, believe that race has an effect on the likelihood of being stopped by the police. A 2014 Washington Post study of motorists ticketed by police found that 32.5 percent of the African-Americans surveyed believed they were unfairly stopped while just 16.4 percent of Whites believed they were unfairly pulled over by police.[226] The Post study concluded, "Overall, these numbers shed some light on how black and white communities can have starkly different views of the law enforcement agencies that serve them."[227] Ultimately the study found that racial disparities persist in traffic stops. African-American

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[220] *See id.* at 385.

[221] Bass, *supra* note 1, at 164.

[222] *See id.*

[223] *See* Nunn, *supra* note 200, at 401.

[224] *See* David A. Harris, *The Stories, The Statistics, and the Law: Why "Driving While Black" Matters*, 84 MINN. L. REV. 265, 277-85 (1999).

[225] *See id.*

[226] *See* Christopher Ingram, *You Really Can Get Pulled Over for Driving While Black, Federal Statistics Show*, WASH. POST (Sept. 9, 2014), https://www.washingtonpost.com/news/wonk/wp/2014/09/09/you-really-can-get-pulled-over-for-driving-while-black-federal-statistics-show/.

[227] *Id.*

drivers are 31 percent more likely to be pulled over and more than twice as likely to be searched by police when as compared to White motorists.[228] Additionally, Black drivers are twice as likely to not be given a reason for the traffic stop.[229]

Arguably, the most infamous incident involving a Black motorist and police officers occurred in March of 1991.[230] Motorist Rodney King was pulled over by police officers after first leading them on a high-speed chase.[231] During King's interaction with the police, he was severely beaten by multiple officers.[232] King's beating was recorded by a bystander and shown repeatedly on national television.[233] King suffered significant injuries as a result of the beating, including a broken leg, a broken cheekbone, and 11 broken bones in his skull. [234] Four of the officers involved in the beating were charged with assault with a deadly weapon and the excessive use of force by police officers.[235]

Outrage spread quickly regarding the beating of Rodney King, and the nation paid close attention to the trial of the four officers, which was moved from Los Angeles to the predominately White and conservative city of Simi Valley.[236] After a trial lasting several weeks, all four officers were acquitted.[237]

Rioting and looting ensued in Los Angeles soon after the verdicts were read, and the riots lasted for five days.[238] Many buildings were burned and several individuals in the area near the rioting, including motorist Reginald Denny, were physically attacked.[239] During the riots, the California National Guard and the U.S. Marines were deployed to keep the peace, and the Mayor of Los Angeles established a curfew and declared a state of emergency.[240] More than 50 people died during the Los Angeles riots, and the resulting property damage was estimated to be $1 million.[241]

The Rodney King beating and the acquittals of the officers who assaulted him sent a message to Black America that even when videotaped evidence

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[228] *See id.*

[229] *See id.*

[230] *See* Abraham L. Davis, *The Rodney King Incident: Isolated Occurrence or a Continuation of a Brutal Past?*, 10 HARV. BLACK LETTER J. 67, 67 (1993).

[231] *See id.*

[232] *See id.*

[233] *See id.*

[234] *See The Rodney King Affair*, THE L.A. TIMES (Mar. 24, 1991), http://articles.latimes.com/1991-03-24/local/me-1422_1_king-s-injuries-officer-laurence-m-powell-beating.

[235] *See* Davis, *supra* note 230, at 67.

[236] *See id.*

[237] *See id.*

[238] *See The L.A. Riots: 4 Years Later*, THE L.A. TIMES (Apr. 28, 2016), http://timelines.latimes.com/los-angeles-riots/.

[239] *See id.* Denny's beating was video-recorded by a news camera in the area. Denny was pulled from his truck and beaten with a tire iron, a fire extinguisher, and a brick. He was eventually rescued by four strangers. *See id.*

[240] *See id.*

[241] *See id.*

appears to show excessive force, police officers will not be punished or held accountable for their mistreatment of African-Americans.

C. Stories of Death and Injury at the Hands of the Police

If the Driving while Black phenomenon and the Rodney King incident strengthened negative perceptions of police officers among African-Americans, then the recent spate of high-profile officer-involved shootings has brought the long-standing conflict between African-Americans and police to a fever pitch.

Tensions between African-Americans and the police rose to levels reminiscent of the Civil Rights era when 18 year-old Michael Brown was killed by a police officer in Ferguson, Missouri.[242] On August 9, 2014, Ferguson police officer Darren Wilson stopped Brown and a friend as they were walking down the street. While there are varied accounts regarding what occurred during the stop, it is undisputed that Wilson shot Brown to death.[243] Brown was unarmed at the time he was shot, and his autopsy found that he was shot six times.[244] Reports indicate that Brown's lifeless body lay in the street where he was shot for some four hours before being taken away by the medical examiner.[245]

As word spread of Brown's death, protestors gathered in the streets of Ferguson.[246] The protests lasted for weeks and were marked by many confrontations between police officers and the protestors, who were mostly African-American.[247] Law enforcement officers used tear gas and rubber bullets to control protestors, and Governor Jay Nixon called up the Missouri National Guard to assist local officers during the unrest.[248] While the protests subsided after several weeks, unrest returned to the streets of Ferguson when a grand jury decided against indicting Wilson in the death of Brown.[249] Protestors threw objects at police officers who were dressed in riot gear, set vehicles on fire, and set fire to at least 12 buildings in Ferguson.[250]

Although no criminal or federal civil rights charges were filed against Wilson, the Justice Department found widespread abuse and discrimination

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[242] *See* Larry Buchanan et al., *What Happened in Ferguson?* N.Y. TIMES (Aug. 10, 2015), http://www.nytimes.com/interactive/2014/08/13/us/ferguson-missouri-town-under-siege-after-police-shooting.html.
[243] *See id.*
[244] *See id.*
[245] *See* Julie Bosman et al., *Timeline for a Body: 4 Hours in the Middle of a Ferguson Street*, N.Y. TIMES (Aug. 23, 2014), http://www.nytimes.com/2014/08/24/us/michael-brown-a-bodys-timeline-4-hours-on-a-ferguson-street.html.
[246] *See* Buchanan, *supra* note 242.
[247] *See id.*
[248] *See id.*
[249] *See id.*
[250] *See id.*

during its investigation of the Ferguson Police Department.[251] The Department of Justice found that the Ferguson police officers engaged in a pattern of unconstitutional and racially discriminatory behavior toward African-Americans.[252] The report stated that African-Americans were more likely to be stopped by police and have force used against them.[253] Importantly, the report also found that the disparate treatment of African-Americans in Ferguson was motivated, at least in part, by intentional discrimination in violation of the Constitution.[254] Following issuance of the report, the sitting police chief resigned.[255]

Since the death of Michael Brown, the deaths of many African-Americans, either at the hands of the police or while in police custody, have received widespread coverage in the media. African-Americans Eric Garner,[256] Tamir Rice,[257] Walter Scott,[258] Freddie Gray,[259] John Crawford III,[260] Sandra

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[251] *See Investigation of the Ferguson Police Department*, U.S. DEPT. OF JUSTICE CIVIL RIGHTS DIVISION, (Mar. 4, 2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf.

[252] *See id.* at 15-89.

[253] *See id.* at 62.

[254] *See id.* at 63.

[255] *See* Buchanan, *supra* note 242.

[256] *See* Al Baker et al., *Beyond the Chokehold: The Path to Eric Garner's Death*, N.Y. TIMES (June 13, 2015), http://www.nytimes.com/2015/06/14/nyregion/eric-garner-police-chokehold-staten-island.html. In July 2014, Garner was choked to death by police during an arrest for the illegal sale of cigarettes. *Id.* A bystander video-recorded Garner's death, and the recording was made available to the media. A grand jury declined to indict the officer who killed Garner. *Id.*

[257] *See* Sean Flynn, *The Tamir Rice Story: How to Make a Police Shooting Disappear*, GQ (July 14, 2016), http://www.gq.com/story/tamir-rice-story. Rice, a 12 year-old boy, was killed by police in November of 2014. Rice was playing with a toy gun that police officers believed was real. The shooting was recorded by a surveillance camera in the area. A grand jury declined to indict the officer who shot Rice. *Id.*

[258] *See* Michael S. Schmidt et al., *South Carolina Officer Is Charged with Murder of Walter Scott*, N.Y. TIMES (Apr. 7, 2015), http://www.nytimes.com/2015/04/08/us/south-carolina-officer-is-charged-with-murder-in-black-mans-death.html. Scott was shot while fleeing an officer during a traffic stop in April of 2015. The officer's account that he shot Scott in self-defense was disproven by a bystander video-recording showing that Scott was shot in the back as he ran away from the officer. *Id.* The officer was charged with murder; however, in December 2016, a South Carolina judge declared a mistrial after the jury reported that it could not reach a verdict in the case. Darren Simon et al., *Judge Declares Mistrial in Michael Slager Trial*, CNN (Dec. 6, 2016), http://www.cnn.com/2016/12/05/us/michael-slager-murder-trial-walter-scott-mistrial/.

[259] *See* Kevin Rector, *Charges Dropped, Freddie Gray Concludes with Zero Convictions against Officers*, THE BALTIMORE SUN (July 27, 2016), http://www.baltimoresun.com/news/maryland/freddie-gray/bs-md-ci-miller-pretrial-motions-20160727-story.html. Gray died of severe neck injuries suffered while he was shackled and handcuffed in the back of a police van. *Id.* Six police officers were charged in Gray's death. Three of the officers were tried and acquitted, and the state's attorney dropped the charges against the other three officers prior to trial. *Id.*

[260] *See* Elahe Izadi, *Ohio Wal-Mart Surveillance Video Shows Police Shooting and Killing John Crawford III*, WASH. POST (Sept. 25, 2014), https://www.washingtonpost.com/news/post-nation/wp/2014/09/25/ohio-wal-mart-surveillance-video-shows-police-shooting-and-killing-john-

Bland,[261] Philando Castile,[262] Alton Sterling,[263] Laquan McDonald,[264] and Paul O'Neal,[265] among many others, have been killed by police or died while in police custody.

The perception that African-Americans are more likely to be killed by the police has some statistical support. The Washington Post tracked fatal police shootings between January 1, 2015 and July 11, 2016 and found that of the 1,502 people shot and killed by on-duty police officers, 732 were White, 381 were Black, and 382 were of another or unknown race.[266] Whites constitute 62 percent of the U.S. population but just 49 percent of those killed by police whereas Blacks make up 13 percent of the population but account for 24 percent of those killed by police.[267] According to the Washington Post, "[T]hat means black Americans are 2.5 times as likely as white Americans to be shot and killed by

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crawford-iii/?utm_term=.e8f6cb5522a3. Crawford was killed by police in August 2014 at a Wal-Mart Store. At the time he was shot, Crawford was holding an air rifle he had picked up from a shelf in the store. Wal-Mart's video surveillance camera recorded the shooting. A grand jury failed to indict the officer who killed Crawford. *Id.*

[261] *See* Dana Ford et al., *Grand Jury Decides against Indictments in Sandra Bland's Death*, CNN (Dec. 23, 2015), http://www.cnn.com/2015/12/21/us/sandra-bland-no-indictments/index.html. Bland was jailed following a traffic stop in July 2015. She was found dead in her jail cell three days later. *Id.* Law enforcement officials reported that Bland hanged herself with a plastic bag, but Bland's family disputes this account. *Id.* A grand jury declined to indict any officers in Bland's death but did indict her arresting officer on a charge of perjury. *See* David Montgomery, *Texas Trooper Who Arrested Sandra Bland Is Charged with Perjury*, N.Y. TIMES (Jan. 6, 2016), http://www.nytimes.com/2016/01/07/us/texas-grand-jury-sandra-bland.html?_r=0.

[262] *See* David Chanen, *Philando Castile Had Permit to Carry Gun*, THE STAR TRIBUNE (July 9, 2016), http://www.startribune.com/philando-castile-had-permit-to-carry-gun/386054481/. Castile was killed by police during a traffic stop in July 2016. He was in possession of a licensed firearm at the time. *Id.* Castile's girlfriend livestreamed a portion of the incident on Facebook. *Id.*

[263] *See* Richard Fausset et al., *Alton Sterling Shooting in Baton Rouge Prompts Justice Dept. Investigation*, N.Y. TIMES (July 6, 2016), http://www.nytimes.com/2016/07/06/us/alton-sterling-baton-rouge-shooting.html. Sterling, who was armed, was shot and killed in July 2016 during an encounter with police officers. A bystander recording showed that the officers had pinned Sterling to the ground at the time of the shooting. *Id.*

[264] *See* Annie Sweeney et al., *A Moment-by-Moment Account of What The Laquan McDonald Video Shows*, THE CHICAGO TRIBUNE (Nov. 25, 2015), http://www.chicagotribune.com/news/ct-chicago-cop-shooting-video-release-laquan-mcdonald-20151124-story.html. McDonald, a 17 year-old boy, was killed while attempting to flee police officers in October 2014. *Id.* McDonald's death was recorded on a dash cam. *Id.* The officer who killed McDonald has been charged with first-degree murder. *Id.*

[265] *See Paul O'Neal Shooting Videos Addressed by Chicago's Top Cop*, CBS NEWS (Aug. 6, 2016), http://www.cbsnews.com/news/paul-oneal-shooting-videos-chicago-police-eddie-johnson/. In July 2016, O'Neal was shot by police officers as he fled in a stolen car. The officers' body cameras recorded some portions of the incident. *Id.*

[266] *See* Wesley Lowery, *Aren't More White People Killed Than Black People by Police? Yes, but No*, WASH. POST (July 11, 2016), https://www.washingtonpost.com/news/post-nation/wp/2016/07/11/arent-more-white-people-than-black-people-killed-by-police-yes-but-no/?utm_term=.0786a96f7877.

[267] *See id.*

police officers." [268] Moreover, the Post found that unarmed African-Americans are five times as likely as unarmed Whites to be killed by law enforcement.[269]

The widespread media coverage of the deaths of African-Americans at the hands of police has sparked additional discussion about racially biased policing.[270] One group that has organized protests around the country focusing on the issue of police brutality is the Black Lives Matter Movement. The Black Lives Matter Movement was founded by three African-American women following the killing of Black teenager Trayvon Martin by George Zimmerman.[271] The Movement grew significantly following its organized protests in Ferguson.[272] In August of 2016, the Black Lives Matter Movement added its support to a seven-part platform calling for an end to the war on Black people.[273] Two of the Movement's suggested methods for ending the war relate specifically to the relationship between African-Americans and the police. The Movement has demanded an end to the criminalization and dehumanization of Black youth as well as the demilitarization of law enforcement.[274] Following the shootings of Philando Castile and Alton Sterling, police officers in Dallas and Baton Rouge were gunned down by individuals seeking to avenge the deaths of African-Americans at the hands of police.[275] While the Black Lives Matter Movement has been criticized by some as a racist organization advocating for the killing of police officers, [276] the Movement disputes this characterization.[277]

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[268] *Id.*

[269] *See id.*

[270] *See, e.g.*, *Paul O'Neal Shooting Video, supra* note 265 (describing protests in Chicago following O'Neal's death); Tom Liddy, *Protests Erupt in Chicago after Video of Laquan McDonald Being Shot by Police Released*, ABC NEWS (Nov. 24, 2015), http://abcnews.go.com/US/protests-erupt-chicago-video-laquan-mcdonald-shot-police/story?id=35403774.

[271] *See A HerStory of the #BlackLivesMatter Movement*, http://blacklivesmatter.com/herstory/ (last visited Aug. 8, 2016).

[272] *See id.*

[273] *See End the War on Black People*, https://policy.m4bl.org/end-war-on-black-people/ (last visited Aug. 8, 2016).

[274] *See id.*

[275] *See* Claire D. Cardona, *Baton Rouge Shooter, Who May Have Been in Dallas after Ambush, Was 'Seeking out' Police*, THE DALLAS MORNING NEWS (July 18, 2016), http://www.dallasnews.com/news/crime/headlines/20160717-baton-rouge-shooter-who-may-have-been-in-dallas-after-ambush-was-seeking-out-police.ece.

[276] *See* Naomi Lin, *Rudy Giuliani: Black Lives Matter "Inherently Racist"*, CNN (July 11, 2016), http://www.cnn.com/2016/07/11/politics/rudy-giuliani-black-lives-matter-inherently-racist/ (arguing that the movement is racist because it promotes black lives over the lives of others and does not protest black-on-black crime); Danielle Diaz, *African-American Professor Carol Swain Slams Black Lives Matter*, CNN (July 9, 2016), http://www.cnn.com/2016/07/09/politics/carol-swain-black-lives-matter-smerconish/index.html?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+rss%2Fcnn_allpolitics+(RSS%3A+CNN+-+Politics) (arguing that Black Lives Matter is a Marxist organization that is taking advantage of African-Americans); Jessica Lussenhop, *How Black Lives Matter Was Blamed for Killing of U.S. Police Officers*, BBC NEWS MAGAZINE (Sept. 14, 2015), http://www.bbc.com/news/world-us-canada-34135267.

The debate that pits Black Lives Matter and African-Americans against the police is all too familiar when viewed in its proper historical context. Since the founding of America, Black people and police officers have been on opposite sides in times of serious racial conflict. This opposition was present in the pre-Civil War era when the slave population was at odds with slave patrollers, and in the Jim Crow era when police officers were expected to enforce racially discriminatory laws and look the other way when African-Americans were terrorized by Whites. The battle between African-Americans and the police continued through the Civil Rights Movement when Black protestors took on police officers in furtherance of their cause and during the tense period in our history when race riots were common. This same struggle was present when the Reagan administration declared a war on drugs, a war that disproportionately focused on Black people, and it continues today as our country grapples with racial profiling and the killings of African-Americans by police officers.

D. Differences in the Perception of Law Enforcement Based on Race

After considering the troubling historical relationship between African-Americans and law enforcement, it makes sense that feelings of distrust and fear of the police have become cultural norms in the African-American community. Empirical research studying perceptions of law enforcement based on race demonstrate that Whites and Blacks have very different views of the police.

For decades, researchers have studied whether Americans' perceptions of the police are affected by race. A 1968 study reviewing children's perceptions of the police found that Mexican-American and Black children had negative feelings toward the police.[278] The study also concluded that the children's perceptions were likely a reflection of their parents' attitudes toward police.[279] Other studies from the 1970s and 1980s confirmed that African-Americans are more critical in their evaluation of police performance.[280]

Stark differences remained as the country entered the 21st Century. In a 2002 study, sociologists surveyed nearly 1,800 U.S. residents to determine whether they perceived the criminal justice system as fair and impartial.[281] The researchers found that the citizens' perceptions divided along the lines of race:

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[277] *See 11 Major Misconceptions about the Black Lives Matter Movement*, http://blacklivesmatter.com/11-major-misconceptions-about-the-black-lives-matter-movement/ (last visited Aug. 9, 2016).

[278] *See* Robert L. Derbyshire, *Children's Perceptions of the Police: A Comparative Study of Attitudes and Attitude Change*, 59 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 183, 188 (1968).

[279] *See id.*

[280] *See* Thomas B. Priest et al., *Evaluations of Police Performance in an African American Sample*, 27 J. CRIM. JUSTICE 457, 458 (1999) (describing studies).

[281] *See* Ronald Weitzer et al., *Racially Biased Policing: Determinants of Citizen Perceptions*, 83 SOC. FORCES 1009, 1012 (2005).

[B]lacks and Hispanics are also much more likely than whites to believe police prejudice is a problem. Three times as many blacks as whites believe police prejudice is "very common" throughout the U.S., and blacks are about six times as likely as whites to believe it is very common in their own city.[282]

In contrast, the researchers found more than seventy-five percent of Whites surveyed believe the American criminal justice system is impartial.[283] In another study, researchers found that race was a very strong predictor of attitudes toward law enforcement even when factoring in class. The study concluded that middle-class and more highly educated Blacks are more critical of criminal justice agencies when compared to lower-class Blacks.[284]

A pair of 2009 studies found that although juveniles' attitudes toward the police were divided along racial lines, they were also affected by vicarious experiences.[285] Researchers found that juveniles who had witnessed or heard about others being mistreated by police had very negative attitudes, prompting the researchers to warn that "[p]olice officers should be mindful of how secondhand reports of their undesirable interactions with youths can diffuse through the community and imbue young residents with a sense of embitterment and distrust toward police."[286]

Following the Michael Brown shooting in 2014, several polling organizations conducted surveys to measure attitudes toward the police. An August 2014 Gallup poll found that African-Americans have a significantly lower level of confidence in the police, with 59 percent of White respondents and just 37 percent of Black respondents state that they have a great deal or quite a bit of confidence in the police.[287] The Gallup poll also found that 59 percent of Whites say that the honesty and ethics of police officers is high or very high compared with just 45 percent of Blacks.[288] Polls taken after two grand juries

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[282] *Id.* at 1017.

[283] *See id.* at 1025.

[284] *See* Ronald Weitzer et al., *Race, Class and Perceptions of Discrimination by the Police*, 45 CRIME & DELINQUENCY 494, 502 (1999). The researchers argued that middle-class African-Americans are more critical of law enforcement because they "are acutely aware of race-based discrimination due to an expectation that class position should shield middle-class Blacks from mistreatment." *Id.*

[285] *See* Jamie L. Flexon et al., *Exploring the Dimensions of Trust in the Police among Chicago Juveniles*, 37 J. CRIM. JUSTICE 180, 188 (2009); Bradley T. Brick et al., *Juvenile Attitudes towards the Police: The Importance of Subcultural Involvement and Community Ties*, 37 J. CRIM. JUSTICE 488, 493 (2009).

[286] *See* Flexon, *supra* note 285, at 188. Researchers noted, on the other hand "positive interactions between police and individual Black citizens have the potential of providing positive collateral consequences, as these experiences may be shared within Black communities." *See* Brick, *supra* note 285, at 493.

[287] *See* Frank Newport, *Gallup Review: Black and White Attitudes toward Police*, GALLUP (Aug. 20, 2014), http://www.gallup.com/poll/175088/gallup-review-black-white-attitudes-toward-police.aspx.

[288] *See id.*

failed to indict officers in the deaths of Eric Garner and Michael Brown found that 82 percent of African-Americans believe that the police apply different standards based on race, while just 50 percent of Whites agreed.[289] Also, while 79 percent of Whites stated that they have a great deal or a fair amount of confidence that the police officers in their community will not use excessive force on suspects, just 43 percent of African-Americans agreed.[290] The polls showed that while approximately 60 percent of Whites have confidence that police officers treat people of all races equally, just 20 percent of African-Americans are confident that the police treat African-Americans and Whites equally.[291]

One group of researchers has offered helpful insight regarding the reasons African-Americans have a more negative opinion of police officers. They argue that African-Americans' historical experiences with the police are the likely source of their negative evaluations of police performance.[292] Additionally, the researchers suggests, "the cynicism has probably been passed from generation to generation."[293]

IV. WHAT SILENCE MEANS IN THE AFRICAN-AMERICAN COMMUNITY

I have previously explored the many possible meanings of an individual's silence in response to accusations by law enforcement.[294] Social scientists and communications scholars have found that a person may remain silent for any of the following reasons: (1) to show agreement or assent; (2) because the person believes it would be pointless and/or unhelpful to respond; (3) to avoid becoming confused and falsely confessing; (4) to assert the person's power; (5) because the person is angry or afraid; or (6) because the person does not know how to respond.[295] These potential reasons for silence demonstrate the poor probative value of the silence generally; however, this Article argues that based on the historical relationship between African-Americans and law enforcement, an African-American's decision to remain silent is even less

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[289] *See* Carrie Dann, *Polls Show Deep Racial Divide in Confidence in Law Enforcement*, NBC NEWS (Dec. 7, 2014), http://www.nbcnews.com/meet-the-press/poll-shows-deep-racial-divide-confidence-law-enforcement-n263041.

[290] *See id.*

[291] *See* Dan Balz et al., *On Racial Issues, America is Divided Both Black and White and Red and Blue*, WASH. POST (Dec. 27, 2014), https://www.washingtonpost.com/politics/on-racial-issues-america-is-divided-both-black-and-white-and-red-and-blue/2014/12/26/3d2964c8-8d12-11e4-a085-34e9b9f09a58_story.html.

[292] *See* Priest, *supra* note 280, at 463.

[293] *Id.*

[294] *See* Thompson, *supra* note 9, at 38-50.

[295] *See id.* (citing research).

probative. This Section will explore two reasons for silence that arguably have become a part of African-American culture.

A. The "No Snitching" Mantra

"Snitching" is defined in pop culture parlance as reporting criminal activity, providing information to the police, or testifying as a witness at a criminal trial.[296] In 2004, a rapper named Skinny Suge released a video entitled "Stop Snitching" that sparked a national conversation about cultural expectations regarding cooperation with the police.[297]

Sociologists Racheal Woldoff and Karen Weiss have studied the prevalence of the "No Snitching" campaign in urban African-American communities.[298] Woldoff and Weiss argue that hip-hop music and culture have played a significant role in defining the "snitch" in a negative way.[299] They reference a 2007 television interview featuring rapper Cam'ron where he states that anyone who cooperates with the police violates a code of ethics in the African-American community.[300] Cam'ron stated that even if a serial killer were living next door to him, he might move away but would not contact the police.[301] The "No Snitching" mantra eventually became a part of urban culture, with clothing stores in major U.S. cities selling shirts that displayed messages such as "Stop Snitchin", "Snitches Get Stitches", "Street Code #1: Never Snitch!", and "You Have the Right to Remain Silent".[302] Additionally, hip-hop music promoted an anti-snitching message, and its artists were very open about accepting jail or prison time rather than cooperating with police.[303]

Woldoff and Weiss argue the "No Snitching" message has resonated with African-American youth due to a "theme of police distrust" especially prominent in Black communities.[304] They note, "Black music, television and film are the media outlets that also contain some of the most extreme manifestations of an anti-snitch message, reflecting the often antagonistic relations between police and young black males."[305] Woldoff and Weiss state that the "No Snitching" mantra may be the African-American community's attempt to protest

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[296] *See* Susan Clampet-Lundquist et al., *The Slide Scale of Snitching: A Qualitative Examination of Snitching in Three Philadelphia Communities*, 30 SOCIOLOGY FORUM 265, 265 (2015).

[297] *Id.*

[298] *See* Racheal A. Woldoff et al., *Stop Snitchin': Exploring Definitions of The Snitch and Implications for Urban Black Communities*, 17 J. CRIM. JUSTICE & POP. CULT. 184 (2010).

[299] *See id.* at 188-192.

[300] *See id.* at 189.

[301] *See id.*

[302] *Id.* at 189-90.

[303] *Id.* at 190-91. The researchers note that rapper Lil' Kim served jail time to avoid snitching on a friend while rapper Busta Rhymes refused to provide information to police concerning the murder of his friend and bodyguard. *See id.*

[304] *Id.* at 192.

[305] *Id.* (internal citations omitted).

unjust policing practices by encouraging a "collective silence" within the community.[306] Despite any altruistic motivations, the "No Snitching" mantra has created an atmosphere where police are seen as the enemy and criminal activity persists without punishment.[307]

It is important that the power of the "No Snitching" narrative be considered as a potential reason for an African-American's silence in the face of an accusation by law enforcement. Equally important are the instructions African-Americans provide to their children regarding the appropriate way to interact with police.

B. The Talk

African-American parents have recently disclosed to the larger society the talk they are required to have with their children as they become teenagers. This conversation has come to be known as "The Talk."[308] The conversation centers on how African-Americans should behave while in the presence of the police.[309] Black parents report that having the conversation is incredibly emotional and burdensome, but they believe they must convince their children to heed their warnings to avoid being killed by the police.[310] African-American parents report that the most difficult part of The Talk is explaining to their children that they must live by a different set of rules, and that as they grow into adults, some people will be in fear of them simply because of the color of their skin.[311]

The Talk includes directions concerning what African-Americans should do if stopped by the police. For example, one Black parent disclosed that her instructions include the following statements: "Don't wear a hoodie. Don't try to break up a fight. Don't talk back to cops. Don't ask for help."[312] She stated that her instructions are all variations of a single theme: "Don't give them an excuse to kill you."[313] One writer reports that, in her experience, The Talk has included the following instructions:

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[306] *See id.* at 204 (internal citations omitted).

[307] *See id.* at 205.

[308] *See "The Talk": How Parents Of All Backgrounds Tell Kids About The Police*, NPR (Sept. 5, 2014), http://www.npr.org/2014/09/05/346137530/the-talk-how-parents-of-all-backgrounds-tell-kids-about-the-police; Jazmine Hughes, *What Black Parents Tell Their Sons about the Police*, GAWKER (Aug. 21, 2014), http://gawker.com/what-black-parents-tell-their-sons-about-the-police-1624412625.

[309] *See* Hughes, *supra* note 308.

[310] *See id.*

[311] *See* Rheana Murray, *The Conversation Black Parents Have with Their Kids about Cops*, ABC NEWS (Dec. 8, 2014), http://abcnews.go.com/US/conversation-black-parents-kids-cops/story?id=27446833.

[312] *See* Hughes, *supra* note 308.

[313] *Id.*

> If you are stopped by a cop, do what he says, even if he's harassing you, even if you didn't do anything wrong. Let him arrest you, memorize his badge number, and call me as soon as you get to the precinct. Keep your hands where he can see them. Do not reach for your wallet. Do not grab your phone. Do not raise your voice. Do not talk back. Do you understand me?[314]

New York City Mayor Bill de Blasio acknowledged that he has had The Talk with his biracial son.[315] De Blasio summarized the advice he has given to his son since he was a young child: "[V]ery early on with my son, we said, look, if a police officer stops you, do everything he tells you to do, don't move suddenly, don't reach for your cellphone, because we knew, sadly, there's a greater chance it might be misinterpreted if it was a young man of color."[316]

As a part of the The Talk, some parents have advised their children to avoid making any statements to the police. One parent described the advice she provided to her son in the following way:

> Once my son and I were getting out the car at the shopping mall, the police approached him and asked him: "Did you just leave the mall?" I intervened. I instructed my son to "never, ever answer a question from the police." Ask the police: "Am I free to go?" Do not answer any questions. Be polite. Be cordial. But never answer any questions. Keep asking: "Am I free to go?" "Am I under arrest?" "What are the charges?" "May I make a phone call?"[317]

Another African-American parent recounted The Talk his mother gave to him and his siblings when they were children: "Look, stay away from cops. They are not your friends. You answer their questions if they ask you with 'yes sir' and 'no ma'am' unless it is incriminating, then you exercise your right to be silent.[318]

In fact, a widely circulated list entitled "Get Home Safely: 10 Rules of Survival If Stopped by The Police" advises African-Americans that they should not make any statements to police until they are able to meet with an attorney.[319]

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[314] *See* Jeannine Amber, *The Talk: How Parents Raising Black Boys Try to Keep Their Sons Safe*, TIME (July 29, 2013), http://content.time.com/time/magazine/article/0,9171,2147710-1,00.html.

[315] *See* Hughes, *supra* note 308.

[316] *Id.*

[317] *See* Hughes, *supra* note 308.

[318] *See id.*

[319] *See Get Home Safely: 10 Rules of Survival*, PBS, http://www.pbs.org/black-culture/connect/talk-back/10_rules_of_survival_if_stopped_by_police/ (last visited Aug. 8, 2016). The other rules advise African-Americans to be polite and respectful to police, remember that the goal is to get home safely, do not argue with police, keep hands in plain sight, avoid sudden movements or

The instructions parents give to their children during The Talk may reduce the likelihood that African-Americans will deny accusations made by police. The "No Snitching" mantra and the instructions included in "The Talk" are unique to Black culture and further chip away at the probative value of silence.

V. CONCLUSION

This Article has established that silence in the face of an accusation by law enforcement carries very little probative weight for the public at large considering the numerous potential meanings for silence. The Advisory Committee to the Federal Rules of Evidence acknowledged the weakness of the inference required to make silence relevant but still chose to codify the tacit admission rule without appropriate limitations.[320] The probative value of silence is especially weak in establishing the guilt or dishonesty of African-Americans based on the historical conflict between Blacks and the police. The inferential leap is simply too great in this context. Moreover, evidence of silence carries a significant risk of unfair prejudice as juries are likely to give it too much weight.[321]

Part III of this Article demonstrates that fear and distrust of the police are so prevalent in the African-American community that they have become cultural norms. Thus, the continued admissibility of silence against African-Americans in the context of a police interaction is an obvious example of Flagg's transparency theory. The admissibility of such evidence applies a norm that appears to be racially neutral – that individuals will dispute false allegations made against them by law enforcement; however, researchers have established that perceptions of trust and confidence in the police are affected by race. By allowing for the admissibility of silence against African-Americans in this context, the courts and the drafters of the Federal Rules of Evidence are applying a White-specific norm that fails the recognize the history of discrimination Blacks have faced at the hands of law enforcement. Application of this particular White-specific norm to African-Americans qualifies as an example of systemic race discrimination. In order to dismantle the system of institutionalized racism embedded in the Federal Rules of Evidence, courts and lawmakers must take action.

For these reasons, I am advocating for a blanket exclusion of all evidence of a criminal defendant's silence in response to an accusation by law enforcement, following the lead of the state courts that have implemented restrictions on admissions by silence.[322] In the alternative, evidence of African-

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physical contact with police, do not run from the police, do not resist arrest, and stay calm and in control. *Id.*

[320] *See supra* Part I.C.2.

[321] *See id.*

[322] *See supra* Part I.C.

American criminal defendants' silence in the face of law enforcement accusations should be excluded as any remaining probative value collapses under the weight of the historical and modern-day conflict between African-Americans and the police.

Although the primary purpose of this Article is to demonstrate the incredibly weak probative value of silence when offered against African-Americans accused of wrongdoing by law enforcement, I cannot conclude without advocating for a true community policing model that could bridge the divide between African-Americans and the police. The community policing model calls for law enforcement to work with the communities they serve "to target the specific needs of the community and, perhaps more importantly, establish trust built on working relationships."[323] One initiative that has been very successful is the "PhillyRising" Collaborative in Philadelphia. The Collaborative brings together city agencies, including the police department, and residents to improve crime-ridden neighborhoods.[324] In the first neighborhood to be targeted by the PhillyRising initiative, vacant buildings were demolished, a community center was re-opened, a Police Athletic League was established, and a computer lab was opened.[325] Although these efforts do not directly reduce crime in the traditional sense, they "play an important role in decreasing neighborhood disorder and increasing the ability of community residents to work alongside police officers to cut down on street crime."[326] Indeed, even small actions, like police departments participating in the latest hip-hop dance challenge,[327] have some impact on the perceptions of police.

The history of negative interactions between African-Americans and law enforcement since the founding of our country continues to show effects today. Until we can appreciate the full impact of this legacy, we will be unable to begin anew. Rather than ignoring this past, the law must recognize and seek to overhaul systems founded on institutional racism in order to allow our country to bridge the divide that continues to plague us today.

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[323] *See* Clampet-Lundquist et al., *supra* note 296, at 282.

[324] *See PhillyRising*, http://www.phila.gov/phillyrising/index.html (last visited Aug. 8, 2016).

[325] *See* Clampet-Lundquist et al., *supra* note 296, at 282.

[326] *Id.*

[327] *See A Definitive Ranking of All the Police "Running Man Challenge" Videos for Your Viewing Pleasure*, MASHABLE.COM, http://mashable.com/2016/05/10/running-man-police/#7W8wInJlaOqF (last visited Aug. 8, 2016); Melissa Locker, *Kansas City Cop Starts a Dance-off with Kids*, TIME (Aug. 14, 2014), http://time.com/3111392/kansas-city-police-officer-dance-off-with-kids-video/ (noting the officer's response when asked why he started the dance-off: "I feel like if we build rapport with them, then they're more likely to call us when they need us.").