It's Not Just About Race, It's About Power

Rethinking policing after the deaths of Eric Garner and Michael Brown

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On December 2, Attorney General Eric Holder, the top law enforcement official in the country, went to Atlanta's Ebenezer Baptist Church to announce that the Justice Department would soon "institute rigorous new standards-and robust safeguards-to help end racial profiling, once and for all."

Neither time nor place was accidental. Ebenezer was the home church of civil rights hero Rev. Martin Luther King. And December 2 was one week after a grand jury in Ferguson, Missouri, opted to not indict Officer Darren Wilson in the shooting death of Michael Brown. Two days after the speech, a Staten Island grand jury would also decline to indict Officer Daniel Pantaleo in the choking death of Eric Garner. In both cases, the cops were white, the victims black. Both decisions touched off nationwide protests that were largely about race, with demonstrators consistently making the basic point that "black lives matter."

So in one sense Holder, the country's first African-American attorney general, was simply responding to the Zeitgeist of the moment, much the same way President Barack Obama did a day earlier at a White House summit meeting announcing a new task force to improve the relationship between police and communities of color. "[We need] to begin a process in which we're able to surface honest conversations with law enforcement, community activists, academics, elected officials, the faith community, and try to determine what the problems are and, most importantly, try to come up with concrete solutions that can move the ball forward," the president said.

But by focusing on the role of race to the exclusion of other contributing factors in these cases, both the powerless in the streets and the powerful in the suites were letting an important culprit off the hook: power itself.

Start with the grand jury process that produced both non-indictments. "The system is under the complete control, under the thumb, of prosecutors," Cato Institute Criminal Justice Director Tim Lynch told CBS News in December. "If they want an indictment they are going to get an indictment. If they don't want an indictment it won't happen."

This is an exact perversion of the grand jury's initial intent, as enshrined in the Fifth Amendment to the Constitution. "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury," the provision reads. Grand juries, composed as they are from local citizens outside the criminal justice system, were supposed to impose a civilian check on potential prosecutorial overreach. But a design flaw was soon baked into the process: This alleged check on prosecutorial power depends absolutely on the contributions of the prosecutor himself.

"As a practical matter, the prosecutor calls the shots and dominates the entire grand jury process," Lynch and two co-authors wrote in a 2003 Cato paper on the grand jury system. "The prosecutor decides what matters will be investigated, what subpoenas will issue, which witnesses will testify, which witnesses will receive 'immunity,' and what charges will be included in each indictment. Because defense counsel are barred from the grand jury room and because there is no judge overseeing the process, the grand jurors naturally defer to the prosecutor since he is the most knowledgeable official on the scene."

Ken White, a libertarian attorney who runs the caustic blog Popehat, presented several cases to grand juries during his stint as a federal prosecutor in Los Angeles. "That experience," White wrote in a February 2014 post, "did not inspire confidence in the process. Rather, it taught me that the adage that a grand jury will indict a ham sandwich is an understatement. A better description would be that the prosecution can show a grand jury a shit sandwich and they will indict it as ham without looking up from their newspapers."

White continues: "The notion that the Supreme Court relies upon-that the grand jury has a 'historical role of protecting individuals from unjust persecution'-is not a polite fiction. A polite fiction would have some grounding in reality. It's an offensive fiction."

In practice, the only class reliably protected by grand juries is people that the local prosecutors don't actually want to prosecute. Namely, cops. The conflicts of interest here are beyond blatant: Prosecutors absolutely depend on the work and testimony of police to send defendants to jail. Grand juries absolutely depend on prosecutors to present information and guidance on whether to indict. There is no impartial judge, no adversarial check on the power of law enforcement.

So when protesters focus on the racial composition of grand juries that deliver results they don't agree with, it's a bit like complaining about the way a Great White Shark looks at you before biting off your leg. We cannot measure or re-engineer what lies in human hearts, but we can identify the criminal justice system's broken structures, perverse incentives, and wholly disproportionate tools.

Eric Garner was stopped on the street by cops looking to enforce New York's insanely high cigarette taxes. The city's notorious "stop and frisk" program, ostensibly justified by the need to

enforce gun laws, is actually a method by which police harass residents of crime-ridden neighborhoods-which tend to be more poor and nonwhite-using drug laws as the legal weapon of choice. Police departments everywhere, of all racial compositions, have financial incentives to rack up low-level arrests and keep the low-hanging fruit of petty street violators in the revolving door of court appearances, fines, and late fees.

When you add into the mix the noxious and federally driven practice of civil asset forfeiture, whereby cops are allowed to seize and pocket the property of people who aren't even charged with a crime, then you can begin to understand how the citizens that police are supposed to protect begin looking more like marks that they are empowered to shake down.

Which is why the words of Obama and Holder ring so hollow. "Racial profiling," with very rare exception, does not describe a deliberate police policy of directing extra law enforcement at people based on skin pigment-that's already plenty illegal, due to federal civil rights law and the 14th Amendment, and it's also contrary to the basic mores of a modern America racially enlightened enough to elect an unimpressive black president twice. Instead, the term has become a catchall to bemoan the disproportionate racial impact of policing. You could just as easily use "racial profiling" to describe the disparate impacts of eminent domain seizures or bad public education policies.

The president says he wants "to try to determine what the problems are," but we know what many of them are already: a drug war that criminalizes victimless behavior and creates a black market economy, a judicial system that gives prosecutors and police a near blanket level of immunity for wrongdoing, a forensics system riddled with conflicts of interest and pseudoscience, a federal criminal code that has grown so large that people don't even know when they're breaking some dumb law. These critiques are not obscure; many of them have emanated from within the government itself.

America will always be having a "conversation about race," and rightly so, given our poisoned history. But by overracializing the cases drawing most attention, we quickly arrive at a wearying impasse, with Al Sharpton shouting on one side and Rudy Giuliani barking on the other.

There's a perhaps simpler way of looking at things, one that gets you more quickly to actual solutions instead of cud-chewing task forces. And that is: When you give government a powerful tool, the powerless will feel it first. Absolute power will be felt absolutely. How do we roll that back? Let's have a conversation.