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ESSAY

BLUE LIVES & THE PERMANENCE OF RACISM

India Thusi[†]

In true dystopian form, the killing of unarmed Black people by the police has sparked a national narrative about the suffering of police officers. “Blue Lives Matter” has become the rallying call for those offended by the suggestion that we should hold police officers accountable for killing unarmed Black people. According to a December 2016 poll, 61% of Americans believed that there was a “war on police,” and 68% of Whites had a favorable view of the police as compared to 40% of Blacks. Lawmakers around the country have been proposing Blue Lives Matter laws that make it a hate crime to kill or assault police officers. This strange twist of events is perverse given the social context. Why should the police be viewed as victims in need of additional protection at precisely the same moment that many have questioned their victimization of Black communities? This Essay considers this question and argues that “Blue Lives Matter” is evidence of the permanence of racism as a juridical and discursive matter in this country.

INTRODUCTION

It was fifteen years after the second millennium, and civil unrest rocked our nation’s cities following the police shootings of several unarmed Black people.¹ Protestors were demanding respect for the lives of Black people and chanting, “Black lives matter,” in cities such as New York, Detroit, Baltimore, and

[†] I. India Thusi. Associate Professor of Law, California Western School of Law. For generous feedback and helpful suggestions, I thank Justin Hansford, Daniel Yeager, and Leslie Culver. For thoughtful and thorough editorial support, I thank the editors of the *Cornell Law Review*.

¹ See Justin Hansford & Meena Jagannath, *Ferguson to Geneva: Using the Human Rights Framework to Push Forward a Vision for Racial Justice in the United States After Ferguson*, 12 HASTINGS RACE & POVERTY L.J. 121, 122 (2015) (“Largely to the credit of young organizers of color that have arisen as leaders in this moment in history, this dialogue has surfaced the extent to which the civil rights reforms of the 1960s left intact the structures that produced and now perpetuate a racial caste system in the United States. The movement’s rallying cry of ‘Black Lives Matter’ boldly highlights exactly where Black individuals fall in this caste system.” (footnote omitted)).

Ferguson.² New technology enabled Black communities to record and broadcast police treating their bodies as strange fruit to be thrown away.³ Armed with smart phones that function as guerilla film equipment, marginalized communities were able to instantly document and broadcast the pain of police violence.⁴ But make no mistake; this pain was not new. Black communities have long complained about police violence in their communities.⁵ In the late 1960s, there was civil unrest in Los Angeles, Detroit, Newark, and Harlem following the police harassment of Black communities.⁶ The National Advisory Commission on Civil Disorders (the Kerner Commission) noted, “Almost invariably the incident that ignites disorder arises from police action. Harlem, Watts, Newark and Detroit—all the major outbursts of recent years—were precipitated by routine arrests of Negroes for minor offenses by white police.”⁷

But now, these displays of police violence were finally being documented and broadcast for all to see.⁸ With this fresh evidence in hand, Black communities were able to visually prove the unjust policing that they have experienced since this nation’s founding. Previously, many media outlets depicted

² See *id.*; Fred O. Smith, Jr., *Abstention in the Time of Ferguson*, 131 HARV. L. REV. 2283, 2358 (2018) (arguing that there should be an exception to the *Younger* abstention doctrine to prevent the criminalization of poverty as occurred in Ferguson, Missouri) (“Americans who are in this cycle are lifting their voice and singing by way of the vociferous chants and marches that seem to erupt each summer in cities from Ferguson to Baltimore to Baton Rouge.”).

³ Justin Hansford, *The Whole System Is Guilty as Hell: Interrupting a Legacy of Racist Police Culture Through a Human Rights Lens*, 21 HARV. J. AFR. AM. PUB. POL’Y 13, 13 (2015) (“The picture of Mike Brown’s dead body, his blood on the concrete in a long red line. It made me sick to my stomach. My mind started playing the song ‘Strange Fruit’ by Billie Holliday, ‘Blood on the leaves . . . Black bodies swinging in the southern breeze.’ . . . Teenager Mike Brown—stopped for jaywalking, unsubmitive, killed, body left on display for over four hours The devaluing of his life was a devaluing of my own life, the offense to his dignity an offense to my own dignity, the attack on him an attack on the entire community. It was a fresh cut in an old wound.”).

⁴ See Caren Myers Morrison, *Body Camera Obscura: The Semiotics of Police Video*, 54 AM. CRIM. L. REV. 791, 836 (2017) (describing the limitation of video recordings of police violence).

⁵ See generally Devon W. Carbado, *Blue-on-Black Violence: A Provisional Model of Some of the Causes*, 104 GEO. L.J. 1479, 1484 (2016) (examining several of the causes of police violence in Black communities).

⁶ Lonnie T. Brown, Jr., *Different Lyrics, Same Song: Watts, Ferguson, and the Stagnating Effect of the Politics of Law and Order*, 52 HARV. C.R.-C.L. L. REV. 305, 332 (2017).

⁷ *Id.*

⁸ See *supra* note 4 and accompanying text.

police violence as exceptional incidents done by bad apples⁹ and the Black victims of police violence as subhuman creatures in need of taming.¹⁰ The string of cellular videos from 2014 to 2017 challenged these portrayals.¹¹ Americans literally witnessed these killings, either through recorded cellular videos or live broadcast through social media platforms. Upon witnessing these incidents of police violence, all Americans could unite in collective action to ensure that Black souls would feel the protection of the law, not just the violence of it.¹² Witnessing the despair prompted by police killings should be enough to generate empathy, right? Americans could no longer continue to tolerate the killing of Black people at the hands of the police, right?

Surprisingly, the killing of unarmed Black people by the police has sparked a national narrative about the suffering of police officers.¹³ In true dystopian form, police officers killing unarmed Black people has inspired the return of legal lynchings¹⁴ and the perception that police are the real victims of inequality. While protestors demanded more police accountability and chanted that we need to recognize that “Black Lives Matter,” counterprotestors responded “Blue Lives

⁹ See Myriam E. Gilles, *Breaking the Code of Silence: Rediscovering “Custom” in Section 1983 Municipal Liability*, 80 B.U. L. REV. 17, 31 (2000) (“Municipalities generally write off the misconduct of an individual officer to the ‘bad apple theory,’ under which municipal governments or their agencies attribute misconduct to aberrant behavior by a single ‘bad apple,’ thereby deflecting attention from systemic and institutional factors contributing to recurring constitutional deprivations.”).

¹⁰ See, e.g., Jody D. Armour, *Race Ipsa Loquitur: Of Reasonable Racists, Intelligent Bayesians, and Involuntary Negrophobes*, 46 STAN. L. REV. 781, 785 (1994) (discussing how one of the police officers charged with violating Rodney King’s rights “testified that King was ‘a monster-like figure akin to a Tasmanian devil’”).

¹¹ See *supra* note 4 and accompanying text.

¹² Cynthia Lee, *Reforming the Law on Police Use of Deadly Force: De-Escalation, Preseizure Conduct, and Imperfect Self-Defense*, 2018 U. ILL. L. REV. 629, 633–34 (2018) (describing the modest reforms to policing, including an “increase in the number of officer-involved homicide prosecutions over the last several years” and increasing usage of body-worn cameras and dash cameras).

¹³ See Deborah Tuerkheimer, *Criminal Justice and the Mattering of Lives*, 116 MICH. L. REV. 1145, 1160 (2018); Savannah Walker, *Policing Hate: The Problematic Expansion of Louisiana’s Hate Crime Statute to Include Police Officers*, 78 LA. L. REV. 1413, 1414 (2018).

¹⁴ See Jamilah King, *One of the Leaders of the #BlackLivesMatter Movement Has Been Charged with Lynching*, MIC NEWS (June 2, 2016), <https://mic.com/articles/145118/one-of-the-leaders-of-the-Black-lives-matter-movement-has-been-charged-with-lynching#.aCq70NZU2> [<https://perma.cc/E3KB-Q9XP>].

Matter.”¹⁵ “Blue Lives Matter” has become the rallying call for those offended by the suggestion that we should hold the State accountable for killing civilians. According to a December 2016 poll, 61% of Americans believed that there was a “war on police,” and 68% of Whites had a favorable view of the police as compared to 40% of Blacks.¹⁶ In fact, lawmakers around the country have been proposing Blue Lives Matter laws that make it a hate crime to kill or assault police officers.¹⁷ This strange twist of events is perverse given the social context. Why should the police be viewed as victims in need of additional protection at precisely the same moment that many have questioned their victimization of Black communities? This Essay considers this question and argues that “Blue Lives Matter” is evidence of the permanence of racism as a juridical and discursive matter in this country.

A. The Permanence of Racism

The litany of videos of unarmed Black people dying avoidable deaths at the hands of law enforcement officers sparked hope that the nation would be motivated to reform policing practices in a meaningful way. Campaign Zero, a small group of protestors from the Ferguson uprising, developed a set of policy demands that articulated a new vision for policing in the United States.¹⁸ Some of their demands include increasing community oversight of the police, ending broken windows policing, and requiring the police to use body worn cameras.¹⁹ The Movement for Black Lives, a coalition of organizations central to the Black Lives Matter movement, shared a list of policy demands that reimagines the

¹⁵ See Lisa A. Kloppenberg & Wesley H. Dodd, *Justice for All: A Role for ADR Educators*, 32 OHIO ST. J. ON DISP. RESOL. 665, 673–74 (2017) (“[A] counter-protest movement called Blue Lives Matter spread rapidly across the country following attacks on police by former U.S. Army member Micah Xavier Johnson during a Black Lives Matter Protest in Dallas, killing five officers.”).

¹⁶ Emily Ekins, *Policing in America: Understanding Public Attitudes Toward the Police. Results from a National Survey*, CATO INST. (Dec. 7, 2016), <https://www.cato.org/survey-reports/policing-america> [<https://perma.cc/3ESW-N5MR>].

¹⁷ See Lisa M. Olson, *Blue Lives Have Always Mattered: The Usurping of Hate Crime Laws for an Unintended and Unnecessary Purpose*, 20 SCHOLAR: ST. MARY’S L. REV. ON RACE & SOC. JUST. 13, 14–15 (2017) (discussing the increasing use of sentencing enhancements to penalize crimes against law enforcement officers).

¹⁸ CAMPAIGN ZERO, <https://www.joincampaignzero.org/> [<https://perma.cc/X5G3-2ZNS>] (last visited Nov. 10, 2019).

¹⁹ *Id.*

relationship between Black people and the State.²⁰ The platform is a bold vision for empowering Black people and calls for the government to stop the war on Black lives.²¹ The American public appeared poised to support policies that would increase police accountability: 79% of Americans supported the use of external review of law enforcement misconduct according to a 2016 public opinion poll.²² This moment should have been the ideal time to pass measures that improve the relationship between communities of color and the police.

President Obama initiated the President's Task Force on 21st Century Policing, which developed a set of recommendations to improve procedural justice in police-citizen interactions and enhance the perceived legitimacy of the police.²³ The purpose of the Task Force was to decrease discriminatory policing and to move us toward equal justice.²⁴ The Task Force recommended additional accountability for police officers and more respectful interactions between the police and the community, the collection of data on officer-involved shootings, additional officer training, and the adoption of body-worn cameras.²⁵

Nevertheless, change was slow. The Task Force published a follow-up report stating that nine states and cities around the country adopted its recommendations.²⁶ While this indicates some movement to improve the relationship between the police and the community, there are in total 18,000 police departments in this country.²⁷ Congress did not pass new

²⁰ *A Vision for Black Lives*, MOVEMENT FOR BLACK LIVES, <https://blacklivesmatter.com/about/> [https://perma.cc/C87W-D9DC] (last visited Nov. 10, 2019).

²¹ *Id.*

²² Emily Ekins, *79% Want Police Misconduct Investigated by Independent Agencies*, CATO INST. (Jan. 5, 2017, 12:14 PM), <https://www.cato.org/blog/79-want-police-misconduct-investigated-independent-agency> [https://perma.cc/RZW2-YVHY].

²³ PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING, U.S. DEP'T OF JUSTICE, FINAL REPORT OF THE PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING (2015), http://www.cops.usdoj.gov/pdf/taskforce/taskforce_finalreport.pdf [https://perma.cc/FA8N-U2FA].

²⁴ *Id.*

²⁵ *Id.*

²⁶ Maya Rhodan, *Why President Obama's Police Reform Is a Work in Progress*, TIME (July 8, 2016), <http://time.com/4398392/obama-police-reform-report-task-force-on-21st-century-policing/> [https://perma.cc/RFS6-5MRT].

²⁷ U.S. DEP'T OF JUSTICE, NATIONAL SOURCES OF LAW ENFORCEMENT EMPLOYMENT DATA (2016), <https://www.bjs.gov/content/pub/pdf/nsleed.pdf>

legislation to incentivize police departments to improve accountability and transparency following the shooting of unarmed Black people.²⁸ President Obama expressed frustration about the slow pace of change and stated, “Change has been too slow and we have to have a greater sense of urgency about this.”²⁹ In 2016, Black people were more likely than Whites to view the criminal legal system as biased: 72% of Blacks perceived the criminal system to be biased in favor of Whites as compared to 40% of Whites who viewed the system as biased.³⁰

INSERT FIGURE 1 HERE

Ironically, the protest movement to realize a new reality for those who suffer at the hands of police violence inspired a countermovement to empower the police. Police advocates successfully argued that they were under attack and in need of additional protection. Most police officers believed that the protests were motivated by a longstanding bias against the police.³¹ Once Donald Trump was elected president, the Fraternal Order of the Police, the largest national organization representing police unions, requested that Trump “[d]eprioritize implementation of some or all of the recommendations made by the President’s Task Force on 21st Century Policing.”³²

In December 2014, four New York police officers founded the Blue Lives Matter organization in response to the killing of two New York City police officers.³³ The founders were concerned with the unfavorable portrayals of law enforcement

[<https://perma.cc/8XJT-ZK27>].

²⁸ See Kanya Bennett, *Congress Wants More Protections for Cops While Ignoring Police Reform*, ACLU BLOG (May 17, 2018, 2:00 PM), <https://www.aclu.org/blog/criminal-law-reform/reforming-police-practices/congress-wants-more-protections-cops-while> [<https://perma.cc/UPZ3-7M32>] (noting that the U.S. House Working Group on Policing Strategies, which was formed because “our nation’s conscience has been rocked by a series of tragic events that has resulted in the loss of too many lives” has failed to advance a single piece of meaningful policing reform).

²⁹ Rhodan, *supra* note 26.

³⁰ Ekins, *supra* note 16.

³¹ Rich Morin et al., *Behind the Badge: Police, Fatal Encounters and Ensuing Protests*, PEW RESEARCH CTR. (Jan. 11, 2017), <https://www.pewsocialtrends.org/2017/01/11/police-fatal-encounters-and-ensuing-protests/> [<https://perma.cc/3NEZ-CLCT>].

³² *THE TRUMP ADMINISTRATION: The First 100 Days*, NAT’L FRATERNAL ORDER OF POLICE, <https://fop.net/CmsDocument/Doc/TrumpFirst100Days.pdf> [<https://perma.cc/P4ES-JBS9>] (last visited Nov. 10, 2019).

³³ BLUE LIVES MATTER NYC, <https://bluelivesmatternyc.org/pages/frontpage> [<https://perma.cc/5VYV-JXE4>] (last visited Nov. 10, 2019).

in the media. The mission of the organization is to “[t]o raise awareness and enlist the public’s aid for the needs of Police Officers,” “[t]o help Police Officers and assist each other,” and “[t]o provide a Police Officer[’s] family with comfort and support as they go through hard times.”³⁴ The organization hosts an annual gala and has been successful at mobilizing the perception of the police as victims.³⁵ The flag for Blue Lives Matter was designed by University of Michigan student Andrew Jacobs, and is a portrayal of the American flag with Black stripes instead of red stripes and a thin blue line drawn in the middle to represent the thin line that police hold to maintain order and civility in society.³⁶ White nationalists embraced the Blue Lives Matter flag during the Charlottesville race riot,³⁷ and the flag represents the role that police play in protecting the American public from threats. It is a very thin line that can easily result in chaos if the public does not stand behind the police. The flag is a response to the Black Lives Matter movement and suggests that the uprisings in many cities in response to police violence are threats to be eliminated.³⁸ The Blue Lives Matter movement appears to be strong, and its Facebook page has over 2.2 million likes³⁹ compared with the approximately 329,000 likes that the Black Lives Matter Facebook page has.⁴⁰

So, why is there a movement to empower police officers in response to the demand that we hold police accountable when they kill unarmed Black people? Derrick Bell argued that there can never be a widely endorsed movement to support the political, social, and economic rights of Black people unless there is interest convergence.⁴¹ Interest convergence requires

³⁴ *Id.*

³⁵ *Id.*

³⁶ Jeff Sharlet, *A Flag for Trump’s America*, HARPER’S MAG., July 2018, <https://harpers.org/archive/2018/07/a-flag-for-trumps-america/> [https://perma.cc/YKM3-MZ36].

³⁷ Michael I. Niman, *This is a Racist Symbol*, PUBLIC (June 26, 2018, 4:00 PM), <http://www.dailypublic.com/articles/06252018/racist-symbol> [https://perma.cc/9DEJ-E39V].

³⁸ Caitlin G. Lynch, *Don’t Let Them Kill You on Some Dirty Roadway: Survival, Entitled Violence, and the Culture of Modern American Policing*, 21 CONTEMP. JUST. REV. 33 (2018).

³⁹ Blue Lives Matter, FACEBOOK <https://www.facebook.com/bluematters/> [https://perma.cc/U8DW-MHUS] (last visited Nov. 10, 2019).

⁴⁰ Black Lives Matter, FACEBOOK <https://www.facebook.com/BlackLivesMatter/> [https://perma.cc/54KC-PF8F] (last visited Nov. 10, 2019).

⁴¹ *See generally* DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE*

that the interests of white elites align with the interests of marginalized groups for white elites to support racial justice causes.⁴² An appeal to morality and equality is simply inadequate to achieve racial equity. White elites must experience some material benefit from supporting causes that would advance the position of Blacks in this country.⁴³ For example, the civil rights era is often romantically portrayed as a moment of inevitable and progressive movement toward our nation's ideals. The American people collectively realized this nation's shortcomings, and it was only a matter of time for them to overcome the vestiges of racism.⁴⁴ The nation would slowly but surely progress toward racial justice. All that was required was patience, commitment, and clever legal strategies. Jim Crow was a stain on this nation's legacy and equality, justice, and due process for all would soon be realized.

Derrick Bell argued that this story about the progressive realization of racial equality is a fiction. "Rather, racism is a principal stabilizing force in a nation of varied people whose opportunities and status are wildly disparate, and are likely to remain so."⁴⁵ The achievements of the civil rights era were the result of international pressure to live up to the nation's role as a leader of human rights, which was impossible while permitting legalized racial segregation.⁴⁶ The Communist Party was actively recruiting Black activists during the Cold War era, and the U.S. government was concerned with the growing influence of communism in the global South.⁴⁷ The U.S. Department of Justice cited these foreign policy concerns in its amicus curiae brief to the Supreme Court in *Brown v. Board of Education*.⁴⁸ The convergence of white elites' foreign policy interests and Black people's interests in obtaining political and

PERMANENCE OF RACISM (1992) (arguing that racism is a permanent feature of American society and that racial progress only occurs when it is consistent with the interests of white elites).

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ Derrick Bell, *The Permanence of Racism*, 22 SW. U. L. REV. 1103, 1105 (1993).

⁴⁶ See Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 524 (1980).

⁴⁷ *Id.*

⁴⁸ Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61, 117–18 (1988) ("The desegregation cases came before the Court at a time when the sanctity of American democracy had tremendous implications for U.S. foreign policy interests.").

social rights converged to create a mutually beneficial alliance. Interest convergence is a necessary piece of any recipe for meaningful reform.

But what do you have when there is no interest convergence? What happens where there is no material benefit to white elites in doing the right thing? Is moral judgment and proof of wrongdoing that comes for video evidence enough to motivate comprehensive legal reforms? The proliferation of Blue Lives Matter bills suggests that in the absence of interest convergence, we will only be reminded of the permanence of racism in this country.⁴⁹ Blue Lives Matter policies that aim to protect police officers are not facially racist. But, as part of discourse about the need for police accountability when Black bodies are on the line, they are racist in context. They have been adopted as a response to the demand that the State value Black bodies, and they are a discursive tool for silencing these calls by making a claim of perceived superiority.

The lack of interest convergence is the reason calls to respect Black bodies after police violence were met with calls for police empowerment. There was no compelling interest that motivated policymakers to support increased police accountability, other than moral duty. The Movement for Black Lives has been successful as a cultural and democratic project that centers the importance of Black humanity.⁵⁰ But the law has been slow to address the harms the movement seeks to address. The videos of Black lives dying were disarming, but they were not enough to generate the political will to address the legal harm through legislation. The videos were a sad reminder about the harsh conditions Black people experience and the ways that police discriminate against them.⁵¹ But, because there is complacency with the undying nature of racial inequality in this society, racial inequality feels unfortunate but inevitable. The collective American conscience is upset by racial inequality and opposed to its

⁴⁹ Cf. BELL, *supra* note 41 (outlining the permanence of racism in American life).

⁵⁰ Frank Leon Roberts, *How Black Lives Matter Changed the Way Americans Fight for Freedom*, ACLU (July 13, 2018, 3:45 PM), <https://www.aclu.org/blog/racial-justice/race-and-criminal-justice/how-black-lives-matter-changed-way-americans-fight> [https://perma.cc/493R-3J97] (discussing the successes of the Movement for Black Lives and the Black Lives Matter organization).

⁵¹ Laura Goolsby, *Why International Law Should Matter to Black Lives Matter: A Draft Petition to the Inter-American Commission on Human Rights on Behalf of the Family of Eric Garner*, 21 U. PA. J.L. & SOC. CHANGE 29, 37 (2018).

most abhorrent displays, but it is also accustomed to it.⁵² The response following the report of the President's Task Force is indicative of the inability to realize change on purely moralistic grounds. As Derrick Bell predicted, the collective conscience simply is not enough.

In fact, there is a material interest in emboldening police to regulate Black communities harshly: the myth of Black criminality, a defining feature of American life. According to the racial threat hypothesis, Whites are more likely to support increased social control of Blacks in more diverse communities because they view Blacks as potential criminal, political, or economic threats.⁵³ W.E.B. Du Bois recognized that Blacks are often “accused and taunted with being criminals.”⁵⁴ James Baldwin reflected on civil disobedience in response to the police violence against Blacks:

[T]hose pious calls to “respect the law,” always to be heard from prominent citizens each time the ghetto explodes, are so obscene. The law is meant to be my servant and not my master, still less my torturer and my murderer. To respect the law, in the context in which the American Negro finds himself, is simply to surrender his self-respect.⁵⁵

The American public has long treated Black people as a violent threat to civility, and the police are the last line of defense to squash Black rebellion.⁵⁶ Triggering the perception of Blacks as criminal threats to the community in the absence of harsh police tactics undermines arguments to recognize Black humanity.

Police defenders have couched their critiques of policing reform in racially coded language to incite the anxieties of white people. President Trump campaigned on restoring “law and order” following the protests to respect Black lives and

⁵² See *id.*; Lani Guinier, *Admissions Rituals as Political Acts: Guardians at the Gates of Our Democratic Ideals*, 117 HARV. L. REV. 113, 197 (2003).

⁵³ See, e.g., David Eitle et al., *Racial Threat and Social Control: A Test of the Political, Economic, and Threat of Black Crime Hypotheses*, 81 SOC. FORCES 557, 559 (2002) (discussing studies focused on the social controls imposed on Blacks and the different manners in which Whites and the state view the size of Black populations as a threat).

⁵⁴ AN ABC OF COLOR, W.E.B. DUBOIS 166 (1969) (quoting W.E.B. DuBois, *Courts and Jail*, 39 CRISIS (1932)).

⁵⁵ James Baldwin, *A Report from Occupied Territory*, NATION (July 11, 1966), <https://www.thenation.com/article/report-occupied-territory/> [<https://perma.cc/G6QD-U2Z9>].

⁵⁶ See, e.g., Armour, *supra* note 10, at 785 (discussing the treatment of Rodney King by the LAPD and those involved in the trial of King's assailants).

described protestors as “thugs.”⁵⁷ Former FBI Director James Comey claimed that the close scrutiny of police officers following the killing of unarmed Black people contributed to an “uptick” in crime.⁵⁸ He described it as the “Ferguson effect.”⁵⁹ He warned that police were the only thing keeping us safe from imminent disorder and incivility:

In today’s YouTube world, are officers reluctant to get out of their cars and do the work that controls violent crime? Are officers answering 911 calls but avoiding the informal contact that keeps bad guys from standing around, especially with guns? I spoke to officers privately in one big city precinct who described being surrounded by young people with mobile phone cameras held high, taunting them the moment they get out of their cars. They told me, “We feel like we’re under siege, and we don’t feel much like getting out of our cars.”⁶⁰

He supported the idea that the increases in crime rate were the direct result of calls for police accountability.⁶¹ The regard for Black bodies or Black lives was absent. It was a call to those in the public that might be upset by the police killings but are more threatened by the possibility of an uncontrollable Black population that may create disorder in their communities. Heather Mac Donald warned, “unless the demonization of law enforcement ends, the liberating gains in urban safety over the past 20 years will be lost.”⁶² These responses are effective

⁵⁷ See Megan Ming Francis, *Donald Trump Is No Friend to Black Activists. They Should Engage Him Anyway.*, WASH. POST (Aug. 13, 2017, 6:00 AM), <https://www.washingtonpost.com/news/made-by-history/wp/2017/08/13/abandoning-the-federal-government-would-be-the-wrong-move-for-black-activists/> [https://perma.cc/98YF-38US] (discussing President Trump’s statement to law enforcement officers: “When you see these thugs thrown into the back of a paddy wagon, you just see them thrown in—rough—I said, ‘Please don’t be too nice.’”).

⁵⁸ Julian Hattam, *FBI Head Doubles Down on ‘Ferguson Effect,’* HILL (Nov. 13, 2015, 2:15 PM), <https://thehill.com/policy/national-security/260080-fbi-head-doubles-down-on-ferguson-effect> [https://perma.cc/A6DB-TQRF].

⁵⁹ *Id.*

⁶⁰ James Comey, Dir., FBI, Remarks at the University of Chicago Law School: Law Enforcement and the Communities We Serve: Bending the Lines Toward Safety and Justice (Oct. 23, 2015) (transcript available at <https://www.fbi.gov/news/speeches/law-enforcement-and-the-communities-we-serve-bending-the-lines-toward-safety-and-justice> [https://perma.cc/FR8E-SFR5]).

⁶¹ See Ronald T. Hosko, *Through Police Eyes—The Ferguson Effect Scare*, 23 BERKELEY J. CRIM. L. 9, 19 (2018).

⁶² Heather Mac Donald, *The New Nationwide Crime Wave*, WALL ST. J. (May 29, 2015, 6:27 PM), <https://www.wsj.com/articles/the-new-nationwide-crime-wave-1432938425> [https://perma.cc/28AD-TBLR].

means for triggering the racial threat and suggesting that there is a material benefit in allowing police to adopt aggressive tactics against Black people.

Initially, the media depicted the Movement for Black Lives as dangerous. The popular media sensationalized poor Black people looting from honest merchants in response to the police killings.⁶³ The victims of police violence were criminals, who needed to be disciplined. And the police were the line of defense that stood between these criminals and white elites. Blue Lives Matter is recognition of the material benefit of maintaining unjust conditions against Blacks. Commentators often cited “Black-on-Black crime” as a distraction from the call for police accountability.⁶⁴ This rhetorical tool suggests, “if Blacks cannot value their own lives, why should we?” It reinforces the notion that the Black body is not worthy of special protection. Black lives don’t matter, but blue lives do.

B. Racialized Discourse & Blue Lives

In the postcolonial context, Gayatri Spivak has described the use of discourse to marginalize colonized people as epistemic violence.⁶⁵ Epistemic violence strips an outsider group of basic humanity and justifies their existence in the margins of society.⁶⁶ Epistemic violence produces knowledge about the out-group that focuses on their difference from the mainstream.⁶⁷ It relies on narratives and signs that reinforce the out-group’s inferiority and ignore their perspectives. It relies on language and produces knowledge about the “common sense.”⁶⁸ Epistemic violence is relevant in the

⁶³ See Bryan Adamson, “Thugs,” “Crooks,” and “Rebellious Negroes”: *Racist and Racialized Media Coverage of Michael Brown and the Ferguson Demonstrations*, 32 HARV. J. RACIAL & ETHNIC JUST. 189, 191 (2016) (“[T]he media committed itself to perpetuating both racialized and racist constructions of Blacks—even those engaged in legitimate dissent. That framework constructed Brown and the protestors as thugs, with the demonstrators bent on creating chaos and disorder. The media hewed to a pro-majoritarian orthodoxy that privileged stability over dissent, and allowed audiences to ignore the role structural racism and bias may have played in Brown’s death and the grievances demonstrators sought to surface.” (footnote omitted)).

⁶⁴ Michael Harriot, *Why We Never Talk About Black-on-Black Crime: An Answer to White America’s Most Pressing Question*, ROOT (Oct. 3, 2017, 10:00 AM), <https://www.theroot.com/why-we-never-talk-about-black-on-black-crime-an-answer-1819092337> [<https://perma.cc/YD8A-V6E3>].

⁶⁵ Gayatri Chakravorty Spivak, *Can the Subaltern Speak?*, in CAN THE SUBALTERN SPEAK? REFLECTIONS ON THE HISTORY OF AN IDEA 21, 21 (1988).

⁶⁶ See *id.*

⁶⁷ See *id.*

⁶⁸ See Ian F. Haney Lopez, *The Social Construction of Race: Some*

context of the Blue Lives Matter countermovement. The movement has adopted similar language to the advocates of the Black Lives Matter movement, co-opting the message of Black Lives Matter activists to advocate for something entirely different. The adoption of “Blue Lives Matter” language can only be understood as a response to Black Lives Matter:

A text is meaningful only within the pattern (or social configuration) it forms at a specific time and place with other pieces of language, as well as with specific thoughts, words, deeds, bodies, tools, and objects. And this pattern or configuration—this specific social action—is itself meaningful only within a specific Discourse or at the intersection of several Discourses.⁶⁹

“Blue Lives Matter” is part of a dialogue with “Black Lives Matter.”⁷⁰ “Blue Lives Matter” as a response reveals a desire to undermine attempts to empower Black bodies by limiting an unconditional recognition of Black humanity. It suggests that “Black Lives Matter” requires qualification. Responding to the declaration that “Black Lives Matter” by claiming that “Blue Lives Matter” attempts to negate the former statement. It is analogous to responding to the refrain “Black Lives Matter” with “All Lives Matter” in its failure to recognize that the former is not a limiting statement about the latter. But, “Blue Lives Matter” is even more problematic than the statement “All Lives Matter” because it is not merely attempting to whitewash claims for racial equality through a veneer of race neutrality. “Blue Lives Matter” claims that the challenges of the oppressors supersede the claims of the oppressed. In fact, the mere act of questioning the oppressor is enough to trigger the vulnerability of the oppressor.

The adoption of this language is a form of epistemic violence against Black people through its attempts to silence the legitimate concerns that Black people have about their

Observations on Illusion, Fabrication, and Choice, 29 HARV. C.R.-C.L. L. REV. 1, 7 (1994) (“[R]ace remains common sense today only to the extent we continue to invest our morphology with racial meaning.”).

⁶⁹ JAMES PAUL GEE, *SOCIAL LINGUISTICS AND LITERACIES: IDEOLOGY IN DISCOURSES* 182 (3d ed. 2008).

⁷⁰ See Robert Rubinson, *The Polyphonic Courtroom: Expanding the Possibilities of Judicial Discourse*, 101 DICK. L. REV. 3, 7–8 (1996) (“[A]ll understanding is dialogic because understanding is by its nature responsive; we elaborate meaning by ‘lay[ing] down a set of our own answering words’ in response to the words of others. This dialogic process not only describes social discourse, but also how we elaborate meaning in our own individual consciousness. In this sense, dialogue is not merely a way to understanding, but *is* understanding.” (emphasis added)(footnotes omitted)).

treatment in a racist society.⁷¹ “Blue Lives Matter” attempts to silence calls for accountability by focusing on worthy victims—fallen police officers. Organizing to support police officers and their families is not problematic in and of itself. In fact, such organizing should be encouraged. However, when it is done in conversation with calls for police accountability and the recognition of Black humanity, developed during counterprotests for police accountability, it is an attempt to qualify the recognition of Black worth.⁷² It is a statement about why “Black Lives Matter” should not be prioritized and why blue lives should matter more. “Blue Lives Matter” discounts the corporeal value of Black bodies and suggests that respect for Black life requires qualification.

C. Civil Rights as the Tools of the Oppressors

Audre Lorde famously stated, “For the master’s tools will never dismantle the master’s house. They may allow us temporarily to beat him at his own game, but they will never enable us to bring about genuine change.”⁷³ Blue Lives Matter is not only a cooption of a rallying cry of an oppressed group. It is a mobilizing tool for adopting a civil rights strategy to represent a group that often violates civil rights. The Blue Lives Matter movement has expanded beyond a rhetorical device for advancing a narrative about police vulnerability. Blue Lives Matter activists have been advocating for the adoption of civil rights protections that recognize police officers are a class needing special protections from hate crimes.⁷⁴ The Blue Lives Matter movement is a clear example of the ways that the “master’s tools,” in this case federal laws and enhanced penalties to protect special classes of people, will ultimately serve the master. The Executive Director of the Fraternal

⁷¹ See ANNE MCCLINTOCK, *IMPERIAL LEATHER: RACE, GENDER AND SEXUALITY IN THE COLONIAL CONTEST* 16 (1995) (describing how legal institutions support epistemic violence).

⁷² See Elizabeth Mertz, *Language, Law, and Social Meanings: Linguistic/Anthropological Contributions to the Study of Law*, 26 *LAW & SOC’Y REV.* 413, 414 (1992) (discussing how use of the term “Blue Lives Matter” illustrates how language can be used to “forge, renew, shift, and break social bonds”); see also GEE, *supra* note 69, at 182 (“Language is but a ‘piece of the action,’ and a social action is constituted as a social practice with value and meaning only in and through the Discourse of which it is a part . . .”).

⁷³ AUDRE LORDE, *The Master’s Tools Will Never Dismantle the Master’s House*, in *SISTER OUTSIDER* 110, 112 (1984).

⁷⁴ See Jessica A. Clarke, *Protected Class Gatekeeping*, 92 *N.Y.U. L. REV.* 101, 152–53 (2017) (mentioning how the Louisiana legislature recognized “blue lives” as a protected class).

Order of Police, James Pasco, equated skin color with police officers' uniform and has stated, "We feel it's inappropriate to target people because of the color [of] their skin and it's inappropriate to target people because of the color of their uniform."⁷⁵

Blues Lives Matters activists have advocated for legislation that would make assaults and killings of police officers hate crimes. Lawmakers in at least fourteen states have proposed Blue Lives Matter bills that would treat assaults against police officers like hate crimes.⁷⁶ Legislators have passed laws in Louisiana, Kentucky, Mississippi, Arizona, and Oklahoma.⁷⁷ Police officers often use force during the course of their duties, especially when effectuating arrests. These laws have the potential of transforming a hostile arrest into a hate crime. One police chief in Louisiana acknowledged this possibility and stated, "Resisting an officer or battery of a police officer was just that charge, simply But now, Gov. [John Bell] Edwards, in the legislation, made it a hate crime now."⁷⁸ There have been at least thirty-two Blue Lives Matter bills in fourteen states.⁷⁹

The federal government is also considering Blue Lives Matter legislation. The U.S. House of Representatives overwhelmingly passed the Protect and Serve Act in 2018, which aims to create enhanced penalties to "[w]hoever, in any circumstance described in subsection (b), knowingly assaults a law enforcement officer causing serious bodily injury."⁸⁰ Enhanced penalties are a typical feature of hate crimes laws that provide an enhanced penalty for assaulting individuals

⁷⁵ See Tierney Sneed, *Hate Crime Experts Skeptical of Call for Cops to be Covered by Federal Law*, U.S. NEWS & WORLD REP. (Jan. 8, 2015, 2:40 PM), <https://www.usnews.com/news/articles/2015/01/08/hate-crime-experts-skeptical-of-call-for-cops-to-be-covered-by-federal-law> [<https://perma.cc/RN3H-PCFA>].

⁷⁶ See Olson, *supra* note 17, at 14–15.

⁷⁷ *Id.*

⁷⁸ Julia Craven, *Louisiana Police Chief Shows Why the State's 'Blue Lives Matter' Law is So Dangerous*, HUFFINGTON POST (Jan. 23, 2017, 5:53 PM), https://www.huffingtonpost.com/entry/blue-lives-matter-law-louisiana_us_588653dde4b0e3a7356ae3ae [<https://perma.cc/336P-4FEC>].

⁷⁹ Julia Craven, *32 Blue Lives Matter Bills Have Been Introduced Across 14 States This Year*, HUFFINGTON POST (Mar. 1, 2017, 5:47 AM), https://www.huffingtonpost.com/entry/blue-Black-lives-matter-police-bills-states_us_58b61488e4b0780bac2e31b8 [<https://perma.cc/8HEG-VV3Y>].

⁸⁰ Protect and Serve Act of 2018, H.R. 5698, 115th Cong., 2d Sess. (2018) <https://www.congress.gov/bill/115th-congress/house-bill/5698/text> [<https://perma.cc/Z2QK-S7XG>].

because of their race, ethnicity, gender, or sexuality. Notably, the House of Representatives did not pass legislation to implement the findings of the President’s Task Force on 21st Century Policing, nor did it work to make policing fairer in response to outrage over the killing of unarmed Black people.⁸¹ A national coalition of civil rights organizations opposed the bill and noted, “This bill is being contemplated at a time when our country is in the throes of a national policing crisis, with a never-ending stream of police shootings of unarmed African Americans captured on video.”⁸² The U.S. Senate’s bill is even more expansive than the bill in the House. It provides enhanced penalties to anyone who “knowingly causes bodily injury to any person, or attempts to do so, because of the actual or perceived status of the person as a law enforcement officer.”⁸³ The language of “perceived status of the person” mirrors language in the federal hate crime law.⁸⁴

The move to pass these laws at the federal level is notable because Congress does not have jurisdiction to address these crimes against police officers in most contexts given the clear federalism concerns.⁸⁵ This conduct would typically involve state citizens interacting with state officials without the interstate element required for federal subject matter jurisdiction.⁸⁶ Yet, members of Congress have galvanized around these bills because they are a discursive statement about which bodies society values.⁸⁷ They allow congressional members to lend support, even if it is merely symbolic, in favor of law enforcement in response to Black activists.⁸⁸ It is a

⁸¹ See Bennett, *supra* note 28.

⁸² Letter from 28 Civil Rights, Civil Liberties, Faith-Based, and Government Accountability Organizations to the U.S. House of Representatives (May 15, 2018),

https://www.aclu.org/sites/default/files/field_document/protect_and_serve_ho_use_floor_sign_on_0.pdf [<https://perma.cc/5WE4-N2JP>].

⁸³ Protect and Serve Act of 2018, S. 2794, 115th Cong., 2d Sess. (2018), <https://www.congress.gov/bill/115th-congress/senate-bill/2794/text?r=97> [<https://perma.cc/7VUC-9GXW>].

⁸⁴ Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 280003, 108 Stat. 1796 (1994).

⁸⁵ Ilya Somin, *The ‘Protect and Serve Act’ is Both Unnecessary and an Assault on Federalism*, VOLOKH CONSPIRACY (May 12, 2018, 12:24 PM), <https://reason.com/volokh/2018/05/12/the-protect-and-serve-act-is-both-unnece> [<https://perma.cc/JSG6-M959>].

⁸⁶ *Id.*

⁸⁷ See generally MICHEL FOUCAULT, *DISCIPLINE & PUNISH: THE BIRTH OF THE PRISON* (Alan Sheridan trans., Pantheon Books 1977) (arguing that discourse is a site for the production of knowledge and power).

⁸⁸ See *id.*

reinforcement of who matters.⁸⁹ It signals to state governments that this type of legislation is favorable, and that perceived threats to law enforcement do not require the same careful deliberation that they claim is required for legislation to respect Black lives.

CONCLUSION

The influence of “Blue Lives Matter” is a referendum on Black political opportunity in the United States. When Black people assert their humanity and demand accompanying rights, there will likely be a competing claim to undermine these assertions in the absence of a material benefit to white elites. Policing activists have cried, “Black Lives Matter,” only to hear the response, “Blue Lives Matter.” While both claims are true, the response of Blue Lives Matter is intended to qualify and negate the concerns of Blacks Lives Matter activists. It is a form of epistemic violence that relies on the myth of Black criminality to justify the need for aggressive policing. It is a reminder that evidence of racial injustice is not enough to promote meaningful change in this country. In the absence of interest convergence, we are simply reminded about the permanence of racism in this society.

⁸⁹ See Daniel Yeager, *Cop Killers*, 48 CRIM. L. BULL. 428, 473 (2012) (noting that the public defers to police judgments even when the police officers make vague claims about fearing for their lives).