



WHO'S AFRAID
OF
CRITICAL RACE THEORY?

The Center on Race, Law and Justice *presents*

Who's Afraid of Critical Race Theory?

March 25, 2021
4 p.m. - 5:30 p.m. EDT
Zoom Webinar

CLE COURSE MATERIALS



FORDHAM UNIVERSITY
THE SCHOOL OF LAW

Table of Contents

1. Speaker Biographies (view in document)
2. CLE Materials

Who's Afraid of Critical Race Theory?

Panel Discussion

Wing, Adrien K. *Is There a Future for Critical Race Theory?* (2016) (view in document)

Thusi, India. *Essay. Blue Lives & The Permanence of Racism.* (view in document)

Who's Afraid of Critical Race Theory? March 25, 2021

Speaker Bios

Khiara M. Bridges

Khiara M. Bridges is a professor of law at UC Berkeley School of Law. She has written many articles concerning race, class, reproductive rights, and the intersection of the three. Her scholarship has appeared or will soon appear in the Harvard Law Review, Stanford Law Review, the Columbia Law Review, the California Law Review, the NYU Law Review, and the Virginia Law Review, among others. She is also the author of three books: *Reproducing Race: An Ethnography of Pregnancy as a Site of Racialization* (2011), *The Poverty of Privacy Rights* (2017), and *Critical Race Theory: A Primer* (2019). She is a coeditor of a reproductive justice book series that is published under the imprint of the University of California Press.

She graduated as valedictorian from Spelman College, receiving her degree in three years. She received her J.D. from Columbia Law School and her Ph.D., with distinction, from Columbia University's Department of Anthropology. While in law school, she was a teaching assistant for the former dean, David Leebron (Torts), as well as for the late E. Allan Farnsworth (Contracts). She was a member of the Columbia Law Review and a Kent Scholar. She speaks fluent Spanish and basic Arabic, and she is a classically trained ballet dancer.

Robert Chang

Robert S. Chang is a Professor of Law and Executive Director of the Fred T. Korematsu Center for Law and Equality. He has also previously served as Associate Dean for Research and Faculty Development. He joined the School of Law from Loyola Law School in

Los Angeles, where he was Professor of Law and J. Rex Dibble Fellow. A graduate of Princeton and Duke Universities, he writes primarily in the area of race and interethnic relations. He is the author of *Disoriented: Asian Americans, Law and the Nation-State* (NYU Press 1999), co-editor of *Minority Relations: Intergroup Conflict and Cooperation* (University Press of Mississippi 2017), and more than 50 articles, essays, and chapters published in leading law reviews and books on Critical Race Theory, LatCrit Theory, and Asian American Legal Studies. He is currently working on two books, one on the political and legal struggle over Mexican American Studies in Arizona (with Nolan Cabrera), the other, *The United States Supreme Court and White Social Dominance* (with Carlton Waterhouse, Michalyn Steele, and Tanya Hernandez, under contract with Cambridge University Press).

He has received numerous recognitions for his scholarship and service. He was the 2009 co-recipient of the Clyde Ferguson Award, given by the Minority Groups Section of the Association of American Law Schools, which is "granted to an outstanding law teacher who in the course of his or her career has achieved excellence in the areas of public service, teaching and scholarship." He became an elected member of the American Law Institute in 2012, and he was the co-recipient of the 2014 Charles A. Goldmark Distinguished Service Award from the Legal Foundation of Washington for his leadership role in a statewide task force on race and the criminal justice system. The Society of American Law Teachers recognized him in 2018 with the M. Shanara Gilbert Human Rights Award for his work as co-counsel in taking to

trial, successfully, a constitutional challenge to the enactment and enforcement of a facially neutral law that was used to terminate the Mexican American Studies Program at the Tucson Unified School District.

For several years, he has been serving as co-counsel in two cases in Alaska challenging the involuntary psychiatric hospitalization and forced psychotropic medication of Native foster children. Students from his Civil Rights Clinic have assisted on these and other cases.

Tanya K. Hernandez

Tanya Katerí Hernández is the Archibald R. Murray Professor of Law at Fordham University School of Law, where she teaches Anti-Discrimination Law, Comparative Employment Discrimination, Critical Race Theory, The Science of Implicit Bias and the Law: New Pathways to Social Justice, and Trusts & Wills. She received her A.B. from Brown University, and her J.D. from Yale Law School, where she served as Note Topics Editor of the Yale Law Journal.

Professor Hernández is an internationally recognized comparative race law expert and Fulbright Scholar who has visited at the Université Paris Ouest Nanterre La Défense, in Paris and the University of the West Indies Law School, in Trinidad. She has previously served as a Law and Public Policy Affairs Fellow at Princeton University, a Faculty Fellow at the Institute for Research on Women at Rutgers University; a Faculty Fellow at the Fred T. Korematsu Center for Law and Equality, and as a Scholar in Residence at the Schomburg Center for Research in Black Culture. Professor Hernández is a Fellow of the American Bar Foundation, the American Law Institute, and the Academia Puertorriqueña de Jurisprudencia y Legislación. Hispanic Business Magazine selected her as one of its annual 100 Most

Influential Hispanics. Professor Hernández serves on the editorial boards of the *Revista Brasileira de Direito e Justiça/Brazilian Journal of Law and Justice*, and the *Latino Studies Journal* published by Palgrave-Macmillan Press.

Professor Hernández's scholarly interest is in the study of comparative race relations and anti-discrimination law, and her work in that area has been published in numerous university law reviews like Cornell, Harvard, N.Y.U., U.C. Berkeley, Yale and in news outlets like the New York Times, among other publications including her books *Racial Subordination in Latin America: The Role of the State, Customary Law and the New Civil Rights Response* (including Spanish and Portuguese translation editions), *Brill Research Perspectives in Comparative Law: Racial Discrimination*, and *Multiracials and Civil Rights: Mixed-Race Stories of Discrimination*. Beacon Press is publishing her forthcoming book *On Latino Anti-Black Bias: "Racial Innocence" and The Struggle for Equality*.

India Thusi

Professor Thusi is an Associate Professor of Law at Delaware Law School. Her research examines racial and sexual hierarchies as they relate to policing, race, and gender. Her articles and essays have been published or are forthcoming in the *Harvard Law Review*, *NYU Law Review*, *Northwestern Law Review*, *Georgetown Law Journal*, *Cornell Law Review Online*, and *Utah Law Review*.

Thusi's research is inextricably connected to her previous legal experience at organizations like the American Civil Liberties Union, Human Rights Watch, the Center for Constitutional Rights, and—most recently—The Opportunity Agenda, a social justice communication lab that collaborates to effect lasting policy and culture change. She served as a federal law clerk to two

social justice giants: the Honorable Robert L. Carter, who sat on the U.S. District Court for the Southern District of New York and was the lead counsel for the NAACP in *Brown v. Board of Education*; and the Honorable Damon J. Keith, who sits on the U.S. Court of Appeals for the Sixth Circuit and is lauded for his prominent civil rights jurisprudence. She also clerked for Justice van der Westhuizen at the Constitutional Court of South Africa, the country's highest court.

Among other acknowledgements throughout her career, Thusi was selected as a Fulbright U.S. Global Scholar for 2020-2022. Her paper "Reality Porn" was selected for the 2020 Stanford/Harvard/Yale Junior Faculty Forum, and she was recognized as a Top 40 Rising Young Lawyer by the American Bar Association in 2019. Thusi has received a W.E.B. Dubois Fellowship at Harvard University, the Andrew W. Mellon Doctoral Fellowship in the Humanities, and was named a Next Generation African Scholar by the Social Science Research Council. She recently drafted a discussion guide for the "American Son" play, starring Kerry Washington, which was featured on the Tonight Show and provides guidance for talking about race and policing; and her criminal justice policy report *Transforming the System* was recognized as a must-read about policing by the Obama Foundation.

Gerald Torres

Gerald Torres is Professor of Environmental Justice at the Yale School of the Environment, with a secondary appointment as Professor of Law at the Law School.

A pioneer in the field of environmental law, Torres has spent his career examining the intrinsic connections between the environment, agricultural and food systems, and social justice. His research into how race and ethnicity impact

environmental policy has been influential in the emergence and evolution of the field of environmental justice. His work also includes the study of conflicts over resource management between Native American tribes, states, and the federal government.

Previously, Torres taught at Cornell Law School, the University of Texas Law School, and the University of Minnesota Law School, serving as an associate dean at both. He is also a former president of the Association of American Law Schools and served as deputy assistant attorney general for the Environment and Natural Resources Division of the U.S. Department of Justice during the Clinton administration.

Torres's past work has examined how U.S. regulations have created racially or ethnically marginalized communities that bear a disproportionate share of environmental burdens and also has focused on developing strategies to improve governmental decision-making. He is also a leading scholar in critical race theory — a theoretical framework that examines questions of race and racism from a legal standpoint. His book *The Miner's Canary: Enlisting Race, Resisting Power, Transforming Democracy*, coauthored with Lani Guinier, was described as "one of the most provocative and challenging books on race produced in years."

Adrien Wing

Adrien Wing is the Associate Dean for International and Comparative Law Programs and the Bessie Dutton Murray Professor at the University of Iowa College of Law, where she has taught since 1987. Additionally, she serves as the Director of the University of Iowa Center for Human Rights, as well as Director of the France Summer Abroad Program. She has previously served as the Associate Dean for Faculty Development and the on-site Director

for the London Law Consortium semester abroad program. She has been, in addition, a member of The University of Iowa's interdisciplinary African Studies faculty and North Africa/Middle East faculty groups. During fall 2002, she was a visiting professor at the University of Michigan Law School. During fall 2011, she was the Bette and Wylie Aitken Distinguished Visiting Professor at Chapman Law School.

After receiving her Bachelor of Arts degree from Princeton with high honors in 1978, Professor Wing earned her Master of Arts degree in African studies from UCLA in 1979. She obtained her Doctorate of Jurisprudence degree in 1982 from Stanford Law School, and was awarded the Stanford African Student Association Prize. While in law school, she served as an editor of the Stanford Journal of International Law, as an intern with the United Nations Council on Namibia, and as Southern Africa Task Force Director of the National Black Law Students Association.

Prior to joining the College of Law faculty in 1987, Professor Wing spent five years in practice in New York City with Curtis, Mallet-Prevost, Colt & Mosle; and with Rabinowitz, Boudin, Standard, Krinsky & Lieberman, specializing in international law issues regarding Africa, the Middle East, and Latin America. She also served as a representative to the United Nations for the National Conference of Black Lawyers.

Professor Wing has advised the founding fathers and mothers of three constitutions: South Africa, Palestine, and Rwanda. She organized an election-observer delegation to South Africa, and taught at the University of Western Cape for six summers. She also advised the Eritrean Ministry of Justice on human rights treaties.

Having studied French, Portuguese, and Swahili, she served on delegations to many nations including Angola, Cuba, Egypt, Grenada, Israel, Jordan, Kenya, Lebanon, Mozambique, Namibia, Nicaragua, Palestine, Panama, Sudan, Tanzania, and Zimbabwe. She has conducted additional research in China, France, Hong Kong, Brazil, London, and Tunisia.

Further, Wing has held leadership positions in various organizations. She currently serves on the: International Law Student Association Board of Directors; Blacks of the American Society of International Law Task Force; Law & Society Diversity Committee (Chair); American Journal of Comparative Law Board of Editors, and as a law school inspector for the American Bar Association.

She has been: Vice President of the American Society of International Law; Blacks of the American Society of International Law Task Force Co-Chair; American Bar Association Section of Legal Education Accreditation Committee member; American Society of International Law Executive Council; American Association of Law Schools Recruitment and Retention of Minority Law Professors Committee member; Stanford Law School Board of Visitors member; Association of American Law Schools Minority Section Chair; AALS Membership Review Committee Chair; American Bar Association Middle East/North Africa Law Council member; Human Rights Watch Africa Division Advisory Committee member; American Friends Service Committee, Middle East Programs Board member; Princeton Class of 1978 Foundation President; Princeton African American Studies Advisory Council member; Princeton Alumni Council member; Princeton Board of Trustees nominee; Association of Black Princeton Alumni Board member; UI Center for Human Rights Board member; Iowa Peace Institute Board member;

Iowa City Foreign Relations Council Board member; National Conference of Black Lawyers International Section Chair; and TransAfrica Forum Scholars Council member. Iowa Governor Vilsack appointed Professor Wing to the Commission on the African American Prison Population as well.

Author of more than 140 publications, Wing is the editor of *Critical Race Feminism: A Reader* and *Global Critical Race Feminism: An International Reader*, both from NYU Press, as well as co-editor of the Richard Delgado Reader. Her US-oriented scholarship has focused on race and gender discrimination, including autobiographical narratives and such topics as Critical Race Feminism and poverty, and the future of Critical Race Theory. Her international scholarship has emphasized two regions: Africa, especially South Africa; and the Middle East, in particular the Palestinian legal system. International law and Feminism, International law and Race, and the Arab world and women's rights are among the topics of articles.

Is There a Future for Critical Race Theory?

Adrien K. Wing

Introduction

We all know that the legal academy is in a crisis that does not appear to have an end in sight. As many law school enrollments plummet, some institutions may even face closure or merger. As experiential requirements increase but resources do not, some may query whether many schools should just ensure that their students can meet all the requirements to graduate and pass a bar. As faculty size needs to shrink even more, some may wonder whether some schools will have to increase teaching loads beyond nine to twelve units to meet the demands. In such a world, is legal scholarship a luxury we can no longer afford?

Many years ago, D.C. Circuit Judge Harry T. Edwards pointed out that what professors produced was of little relevance to the bench, legislators, or the bar.¹ If eliminating legal scholarship altogether is going too far, should we at least focus it on the required curriculum and in the subjects necessary for bar passage? In this world, is there any room for “frills”? Some people would say critical race theory (CRT) is just such a frill, since it is not a required course in any school and not on the bar as a unified subject. When I told people I was doing this article, some thought that CRT is of historic interest only and is already dead. This article makes the case that CRT is not a frill, from either a teaching or a scholarly perspective. It is not dead at all and has vibrant aspects not known to most members of the academy.

I rarely come to Boston, and as I was preparing to attend the symposium on the *Future of Legal Scholarship* to present this article, I thought of an event relating to race that happened 40 years ago that April. I fear that many people have forgotten what happened; our current students were not yet born. I am

Adrien K. Wing is the Bessie Dutton Murray Professor of Law and the Associate Dean for International and Comparative Law Programs at the University of Iowa College of Law. A.B. *magna cum laude*, Princeton University, 1978, M.A. UCLA, 1979, J.D. Stanford Law School, 1982. Special thanks to the JOURNAL OF LEGAL EDUCATION and Northeastern University School of Law for hosting the conference on *The Future of Legal Scholarship* and to my research assistants Dagmawi Getachew, Evan Saunders, and Ephraim Hintz.

1. See Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992). This article was highly cited. See Fred Shapiro & Michelle Pearse, *The Most-Cited Law Review Articles of All Time*, 110 MICH. L. REV. 1483, 1492, 1493, 1501 (2012).

thinking of an iconic picture taken on April 5, 1976,² the year of the American bicentennial. Stanley Forman, a photographer with the now-defunct Boston Herald American, took the horrific image. It shows black attorney Ted Landsmark in a three-piece suit being speared with an American flag by an angry white teenager named Joseph Rakes. The issue? Boston was in turmoil over court-ordered busing in an effort to racially diversify schools. Landsmark remembers the leaders had already passed by, but some decided to attack him and shouted: “There’s a nigger, kill him!”³ As a college student at the time, I very clearly got the message: White people—even in the North, in the cradle of liberty—still did not want to go to school with my kind.

Today, I wonder if the black children in Boston are getting a better education today than they did 40 years ago. It appears not. It is even hard to analyze the segregation patterns in the schools, since even though whites make up half the city, they are only fourteen percent of the school system.⁴ In the 1960s, they were sixty-eight percent.⁵

Many people thought with the 2008 election of the first black president, Barack Obama, that we would be in a postracial era⁶—that racist incidents like the one on April 5, 1976, were suddenly in the past. Perhaps the 1963 words of Dr. Martin Luther King, Jr., would become true: People would be judged by the content of their character rather than the color of their skin.⁷ And over the two terms of the president, look at all the amazing things that have happened. We have had two black attorneys general, Eric Holder and Loretta Lynch; forty-plus black members of Congress, including Sens. Mo Cowan, Cory Booker, and Tim Scott; black governors like Deval Patrick; and a black woman serving as chairwoman of Xerox, Ursula Burns, as well as black heads of other corporations. We have black people who are deans of law schools, chaired professors, provosts, and college presidents.

2. Stanley J. Forman, *The Soiling of Old Glory*, STANLEY FORMAN PHOTOS (Apr. 5, 1976), <http://stanleyformanphotos.com/images/OldGlory.jpg> (last visited July 10, 2016).
3. Jack Encarnacao, *History Lesson, That’s Me in the Picture, Ted Landsmark Looks Back at the Chilling Moment in Busing Crises*, BOS. HERALD (Mar. 21, 2016), http://www.bostonherald.com/news/local_coverage/unfiltered/2016/03/history_lesson_ted_landmark_looks_back_at_chilling_moment.
4. Evan Horowitz, *If Segregation Ended 60 Years Ago, How Come It’s Getting Worse?*, BOS. GLOBE (May 19, 2014), <https://www.bostonglobe.com/news/politics/2014/05/19/segregation-ended-years-ago-how-come-getting-worse/qbvuyMoyLcWrNOBVIMC6zH/story.html>.
5. *Id.*
6. See BARACK OBAMA AND THE MYTH OF A POST-RACIAL AMERICA (Mark Ledwidge, Kevern Verney & Inderjeet Parmar eds., 2013); Touré, *No Such Place as “Post-Racial America,”* N.Y. TIMES: CAMPAIGN STOPS (Nov. 8, 2011, 1:48 PM), http://campaignstops.blogs.nytimes.com/2011/11/08/no-such-place-as-post-racial-america/?_r=0.
7. Martin Luther King, Jr., *Address at the March on Washington: I Have a Dream* (Aug. 28, 1963).

Yet as the late CRT founder and Professor Derrick Bell said, WE ARE NOT SAVED.⁸ Think of the following issues: racial profiling; hate speech on campus and in jobs; the biggest wealth disparities between rich and poor in our history; opposition to affirmative action; the disproportion of black lawyers (four percent) to black prisoners (forty percent); police department corruption and racism; white privilege and the denial that it could exist; the University of Missouri campus actions, including those of the football team that led to the toppling of the Chancellor; the nine in Charleston who died while in church, killed by a young white supremacist; Confederate flags and monuments as symbols; and the debate over “black lives matter” versus “all lives matter.” The Black Lives Matters movement has highlighted the long list of unknown and now well-known names of blacks who have lost their lives: Trayvon Martin; Mike Brown of Ferguson, Missouri; Sandra Bland; Freddie Gray; Tamar Rice; and many more.

In 1944 my father, John E. Wing, Jr., went to UCLA, which had very few blacks. I remember him telling me how he would be chased off the campus by white students who did not think blacks belonged there. I went to UCLA for a master’s degree in 1978 and there were many blacks at the time. I wondered how my dad, by then deceased, would have appreciated that progress in a generation. When my sons were potentially interested in UCLA at the turn of the twenty-first century, I ruled out my alma mater. Because of Proposition 209,⁹ which forbids affirmative action, I did not want them to go to a UCLA whose demographics were closer to those of their grandfather’s era. Today, UCLA has four percent black enrollment.¹⁰

I think of the nature of the 2016 presidential election from the Republican side: anti-immigrant, anti-black, anti-Latino, Islamophobic, homophobic, sexist, building walls and not bridges. Will this be the face we present to a diverse world in the next four years?

Given these realities, my conclusion is—yes, there is a future for CRT, now more than ever! In this piece, I will give a brief overview of CRT. Then I will discuss areas where it is vibrant now. Finally, I will conclude with what we need to do in the future.

8. DERRICK A. BELL, *AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE* (1989).

9. Proposition 209 was passed by California voters in November, 1996, and is now codified in the California Constitution. CAL. CONSTIT. art. 1 § 31(a).

10. See *Enrollment Demographics, Fall 2015*, UCLA ACAD. PLANNING & BUDGET, http://www.aim.ucla.edu/tables/enrollment_demographics_fall.aspx.

CRT Overview¹¹

Critical race theory emerged within the legal academy as a self-conscious entity in 1989. It was affiliated with the progressive critical legal studies (CLS) movement, itself influenced by European postmodernism.¹² CRT's intellectual foundations can be found in the early works of Derrick Bell,¹³ Richard Delgado,¹⁴ and other scholars from the mid-1970s and onward. Its pathbreaking scholars have included Chuck Lawrence,¹⁵ Mari Matsuda,¹⁶ Neil Gotanda,¹⁷ Lani Guinier,¹⁸ Kimberlé Crenshaw,¹⁹ Angela Harris,²⁰ Frank Valdes,²¹ Jerome Culp,²² Cheryl Harris,²³ and Patricia Williams,²⁴ to mention a few.

CRT challenges conventional strategies of pursuing social and economic justice. CRT addresses relevant and dynamic socio-legal racial issues such as affirmative action in education and employment, hate speech, criminal justice, immigration, and federal Indian law.

11. For more detail on CRT, see Kimberlé Crenshaw, *Introduction to CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT* xix (Kimberlé Crenshaw et al. eds., 1996); RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY: AN INTRODUCTION* 7-9 (2001); CROSSROADS, DIRECTIONS AND A NEW CRITICAL RACE THEORY (Francisco Valdes, Jerome McCristal Culp & Angela Harris eds., 2002).
12. See, e.g., *CRITICAL LEGAL STUDIES* (James Boyle ed., 1992); *CRITICAL LEGAL STUDIES* (Peter Fitzpatrick & Alan Hunt eds., 1987); *CRITICAL LEGAL STUDIES* (Alan Hutchinson ed., 1989); MARK KELMAN, *A GUIDE TO CRITICAL LEGAL STUDIES* (1987).
13. See, e.g., *THE DERRICK BELL READER* (Richard Delgado & Jean Stefancic eds., 2005).
14. See, e.g., *THE LAW UNBOUND!: A RICHARD DELGADO READER* (Adrien K. Wing & Jean Stefancic eds., 2007).
15. See, e.g., Charles R. Lawrence III, *The Id, The Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 *STAN. L. REV.* 317 (1987).
16. See, e.g., CHARLES R. LAWRENCE III & MARI MATSUDA, *WE WON'T GO BACK: MAKING THE CASE FOR AFFIRMATIVE ACTION* (1997).
17. See, e.g., Neil Gotanda, *A Critique of "Our Constitution Is Color Blind"*, 44 *STAN. L. REV.* 1 (1991).
18. See, e.g., LANI GUINIER & GERALD TORRES, *THE MINER'S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY* (2002).
19. See, e.g., Kimberlé Crenshaw, *Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 *HARV. L. REV.* 1331 (1988).
20. See, e.g., Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 *STAN. L. REV.* 581 (1989-90).
21. See, e.g., Francisco Valdes, *Unpacking Hetero-Patriarchy: Tracing the Conflation of Sex, Gender and Sexual Orientation to Its Origins*, 8 *YALE J.L. & HUMAN.* 161 (1996).
22. See, e.g., Jerome McCristal Culp, *Autobiography and Legal Scholarship and Teaching: Finding the Me in the Legal Academy*, 77 *VA. L. REV.* 539 (1991).
23. See, e.g., Cheryl Harris, *Whiteness as Property*, 106 *HARV. L. REV.* 1707 (1993).
24. See, e.g., PATRICIA WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS: THE DIARY OF A LAW PROFESSOR* (1991).

CRT focuses on anti-subordination and the unveiling of white privilege as a means to design solutions that will strive for racial justice. In such a scenario, Band-Aids will not work on the cancer of racism.

I will mention several of CRT's basic tenets. A central premise is that racism is a normal and ordinary part of our society, not an aberration. Our world is color-conscious, not colorblind,²⁵ and thus the law must be, as well. Race is a social construct and is not a fixed or biological reality.²⁶ There is a "unique voice of color" among groups who have faced oppression,²⁷ but a number of non-CRT scholars have contested this claim, including other people of color.²⁸ The power existing within the white-over-color hierarchy is a critical aspect of how our society develops both psychologically and materially.

CRT endorses the CLS notion that legal rights are indeterminate, but it vehemently disagrees that rights are therefore not important.²⁹ In fact, CRT considers the struggle to attain human rights a critical step for American minorities. CRT focuses on interest convergence, in the words of the late Derrick Bell, or the concept that people in power do not do anything unless it is in their self-interest.³⁰ Bell also thought that racial progress is cyclical and that racism might be permanent.³¹ CRT looks to the bottom, in the words of Mari Matsuda—to the plight of the oppressed.³² CRT also developed intersectionality theory as a means of analysis, most well-known in the work of Kimberlé Crenshaw.³³

CRT endorses a multidisciplinary approach to scholarship and can be found in several other disciplines.³⁴ This approach considers the law as insufficient in and of itself to formulate solutions to racial dilemmas. CRT believes in

25. Gotanda, *supra* note 17.

26. For example, I have written on how I am viewed in the United States as black, in South Africa as a so-called Coloured, and in Brazil as white. See *CRITICAL RACE FEMINISM: A READER* (Adrien K. Wing ed., 2d ed. 2003).

27. See, e.g., MARI MATSUDA, *WHERE IS YOUR BODY?: AND OTHER ESSAYS ON RACE, GENDER, AND THE LAW* (1996).

28. See, e.g., Randall L. Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745 (1989).

29. See Patricia Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401 (1987).

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

31. See DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* (1992).

32. See Mari Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987)[hereinafter Matsuda, *Looking to the Bottom*].

33. See Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139.

34. See, e.g., *CRITICAL RACE THEORY IN EDUCATION: ALL GOD'S CHILDREN GOT A SONG* (Adrienne D. Dixson & Celia K. Rousseau eds., 2007).

both theory and praxis.³⁵ This approach acknowledges that we as scholars cannot afford to adopt the classic detached, ivory tower model of scholarship when so many are suffering, sometimes in our own extended families.³⁶ This praxis may take many forms—such as: working with various public interest and nongovernmental organizations; engaging in law reform both domestically and internationally; building coalitions; and engaging in political activism. Some CRT authors use the controversial narrative technique³⁷ attacked by conservative commentators.³⁸

The CRT genre has led to a growing set of related networks, including LAT-CRIT, which emphasizes Latinos and Latinas;³⁹ AsianCrit;⁴⁰ QueerRaceCrit;⁴¹ critical race feminism,⁴² which focuses on women of color; and critical white studies,⁴³ which reveals the way whiteness functions as a social organizing principle. There have even been a few articles in what could be called IndianCrit.⁴⁴

Well, you might say, all this was very interesting, but the citations are old, and what has CRT done lately? Is it not dead now, with the classical pieces of mere historical interest?

35. See, e.g., Adrien K. Wing, *Brief Reflections Toward a Multiplicative Theory and Praxis of Being*, 6 BERKELEY WOMEN'S L.J. 181 (1990-91).
36. See, e.g., Matsuda, *Looking to the Bottom*, *supra* note 32.
37. For examples of the narrative technique, see, for example, the works of Derrick Bell, such as AND WE ARE NOT SAVED, *supra* note 8; and RICHARD DELGADO, THE RODRIGO CHRONICLES (1995).
38. See, e.g., Richard Posner, *Daniel A. Farber & Suzanna Sherry's Beyond All Reason: The Radical Assault on Truth in American Law*, NEW REPUBLIC, Oct. 13, 1997, at 40 (book review).
39. See, e.g., Symposium, *Lawyering in Latina/o Communities: Critical Race Theory and Practice*, 9 LA RAZA L.J. (1996); Symposium, *Lat-Crit Theory: Naming and Launching a New Discourse of Critical Legal Scholarship*, 2 HARV. LATINO L. REV. (1997); Colloquium, *International Law, Human Rights and LatCrit Theory*; 28 U. MIAMI INTER-AM. L. REV. 177 (1997).
40. See, e.g., Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 CALIF. L. REV. 1244 (1993).
41. See, e.g., Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83 CALIF. L. REV. 3 (1995); Elvia Arriola, *Gendered Inequality: Lesbians, Gays, and Feminist Legal Theory*, 9 BERKELEY WOMEN'S L.J. 103 (1994).
42. See CRITICAL RACE FEMINISM: A READER, *supra* note 26, and GLOBAL CRITICAL RACE FEMINISM: A READER (Adrien K. Wing ed., 2001); Mari Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 11 WOMEN'S RTS. L. REP. 1 (1989).
43. See, e.g., CRITICAL WHITE STUDIES: LOOKING BEHIND THE MIRROR (Richard Delgado & Jean Stefancic eds., 1998).
44. See, e.g., Robert Williams, *Vampires Anonymous and Critical Race Practice*, 95 MICH. LAW REV. 741 (1997); Robert Williams, *Columbus's Legacy: Law As An Instrument of Racial Discrimination Against Indigenous Peoples' Rights of Self-Determination*, 8 ARIZ. J. OF INT'L & COMP. L. 51 (1992).

CRT Is Alive and Well Today

In this section, I will illustrate how CRT is alive and well. First, in addition to individual scholarly articles by brilliant prolific young people like my Iowa colleague Angela Onwuachi-Willig,⁴⁵ a number of symposia are continuing to be held. In 2009, for example, the University of Iowa College of Law sponsored a twentieth-anniversary CRT conference that drew nearly 300 people,⁴⁶ and the articles were published in two journals.⁴⁷ CRT continues to generate a variety of other symposia as well. For example, the *Ohio State Journal of Criminal Law* 2014 symposium was titled *Twenty-Plus Years of Critical Race Theory*

45. See the work of Angela Onwuachi-Willig, such as Anthony V. Alfieri & Angela Onwuachi-Willig, *Next Generation of Civil Rights Lawyers: Race and Representation in the Age of Identity Performance*, 122 *YALE L.J.* 1484 (2013); Amber Fricke & Angela Onwuachi-Willig, *Do Female “Firsts” Still Matter?: Why They Do for Women of Color*, 2012 *MICH. ST. L. REV.* 1529; Emily Houh, Angela Onwuachi-Willig & Mary Campbell, *Cracking the Egg: Which Came First—Stigma or Affirmative Action?*, 96 *CALIF. L. REV.* 1299 (2008); William C. Kidder & Angela Onwuachi-Willig, *Still Hazy After All These Years: The Lack of Empirical Evidence and Logic Supporting Mismatch*, 92 *TEX. L. REV.* 895 (2014) (reviewing RICHARD H. SANDER & STUART TAYLOR, JR., *MISMATCH: HOW AFFIRMATIVE ACTION HURTS STUDENTS IT’S INTENDED TO HELP, AND WHY UNIVERSITIES WON’T ADMIT IT* (2013)); Alexander Nourafshan & Angela Onwuachi, *From Outsider Status to Insider and Outsider Again: Interest Convergence and Normalization of LGBT Politics*, 42 *FLA. ST. U. L. REV.* 521 (2015); Angela Onwuachi-Willig, *The Admission of Legacy Blacks*, 60 *VAND. L. REV.* 1141 (2007); Angela Onwuachi-Willig, *Another Hair Piece: Exploring New Strands of Analysis Under Title VII*, Angela Onwuachi-Willig, *A Beautiful Lie: Exploring Rhinelander v. Rhinelander as a Formative Lesson on Race, Identity, Marriage, and Family*, 95 *CALIF. L. REV.* 2393 (2007); Angela Onwuachi-Willig & Mario L. Barnes, *By Any Other Name?: On Being “Regarded As” Black, and Why Title VII Should Apply Even If Lakisha and Jamal Are White*, 2005 *WIS. L. REV.* 1283; 98 *GEO. L.J.* 1079 (2010); Angela Onwuachi-Willig & Amber Fricke, *Class, Classes, and Classic Race Baiting: What’s in a Definition?*, 88 *DENV. U. L. REV.* 807 (2011) (invited response to Professor Richard Sander of UCLA Law School in symposium issue); Angela Onwuachi-Willig, *Complimentary and Complementary Discrimination in Faculty Hiring*, 87 *WASH. U. L. REV.* 763 (2010); Angela Onwuachi-Willig, Erwin Chemerinsky & Mario Barnes, *Judging Opportunity Lost: Assessing the Viability of Race-Based Affirmative Action After Fisher v. University of Texas, Austin*, 62 *UCLA L. REV.* 272 (2015); Angela Onwuachi-Willig, *Just Another Brother on the SCT?: What Justice Clarence Thomas Teaches Us About the Influence of Racial Identity*, 90 *IOWA L. REV.* 931 (2005); Angela Onwuachi-Willig & Mario Barnes, *The Obama Effect: Specialized Meanings in Anti-discrimination Law*, 87 *IND. L.J.* 325 (2012); Angela Onwuachi-Willig, *The Return of the Ring: Welfare Reform’s Marriage Cure as the Revival of Post-Bellum Control*, 93 *CALIF. L. REV.* 1647 (2005); Angela Onwuachi-Willig, *This Bridge Called Our Backs: An Introduction to “The Future of Critical Race Feminism”*, 39 *U.C. DAVIS L. REV.* 733 (2006); Angela Onwuachi-Willig, *Undercover Other*, 94 *CALIF. L. REV.* 873 (2006); Angela Onwuachi-Willig, *Volunteer Discrimination*, 40 *U.C. DAVIS L. REV.* 1895 (2007); Angela Onwuachi-Willig, *Using the Master’s “Tool” to Dismantle His House: Why Justice Clarence Thomas Makes the Case for Affirmative Action*, 47 *ARIZ. L. REV.* 113 (2005).
46. News Release, Univ. of Iowa, Law School Conference Commemorates Twenty Years of Critical Race Theory (March 24, 2009), http://news-releases.uiowa.edu/2009/march/032409conference_crt.html. See also the website for the conference, *CRT 20: Honoring Our Past; Charting Our Future*, UNIV. OF DENV. STURM COLL. OF LAW, <http://www.law.du.edu/index.php/crt-20> (last visited July 10, 2016) (the Univ. of Denv. Sturm Coll. of Law hosted the website for the Law School Conference).
47. See, e.g., Adrien K. Wing, *Space Traders for the Twenty-First Century*, 11 *BERKELEY J. AFR.-AM. L. & POL’Y* 49 (2009); Angela Onwuachi-Willig, *Celebrating Critical Race Theory at 20*, 94 *IOWA L. REV.* 1497 (2009).

and *Criminal Justice: Looking Backward, Looking Forward*.⁴⁸ It featured presentations with such provocative titles as: *Nigga Theory: Contingency, Irony, and Solidarity in the Substantive Criminal Law*, by Jody Armour; *Stop and Frisk and Torture-Lite: Police Terror of Minority Communities*, by Paul Butler; and *(E)Racing Trayvon Martin*, by Cynthia Lee.⁴⁹

Yale has held a number of relevant conferences, including one this year titled *Race (In)Action*.⁵⁰ Topics included education, policing, social movements, and intersectionality. Quite poignantly, the organizing material says: “This Conference also fills an important curricular void for students. Only a handful of law schools have permanent Critical Race Theorists on their faculty. Yale, and many others, do not. For many students, this conference will offer a perspective on race, law, and society that is not available at their academic institutions.”⁵¹

UC Davis hosted the *2016 Conference of Asian Pacific American Law Faculty* (CAPALF) which included Angela Harris among its keynote speakers.⁵² Its panels included: *BlackLivesMatter and Asian Pacific Americans?*; *Neo Pariah: Studies in the Emerging Academic Caste System in Higher Education*; and *Islamophobia & the Lost Legacy of Korematsu; Asian Pacific Americans and College Admissions*.⁵³

In addition to traditional conferences, UCLA has developed a critical race studies program,⁵⁴ the only one of its kind in the United States. Its mission is to “*think* new ideas, *teach* future leaders and scholars and *transform* racial justice advocacy.”⁵⁵ It is anchored by the incredible CRT scholars at UCLA including Kim Crenshaw, Cheryl Harris, and Devon Carbado.⁵⁶ Students can take the CRS specialization, and the program also runs research colloquia, symposia, interdisciplinary collaborations, and community partnerships in order to integrate theory and practice.⁵⁷ The 2015 CRS symposium focused on *Race and*

48. See Symposium, *Twenty-Plus Years of Critical Race Theory and Criminal Justice: Looking Backward, Looking Forward*, 12 OHIO ST. J. CRIM. L. 1 (2014).

49. *Id.*

50. See *2016 Critical Race Theory Conference: Race (In)Action*, YALE LAW SCH., <https://www.law.yale.edu/yls-today/conferences/1516/crt> (last visited July 10, 2016).

51. *Id.*

52. See *CAPALF 2016 at UC Davis School of Law*, U.C. DAVIS SCH. OF LAW FACULTY BLOG (Apr. 8, 2016), <http://facultyblog.law.ucdavis.edu/post/capalf-2016-at-uc-davis-school-of-law.aspx>.

53. *Id.*

54. See *About the Critical Race Studies Program*, UCLA LAW, <https://law.ucla.edu/centers/social-policy/critical-race-studies/about/> (last visited July 10, 2016).

55. *Id.*

56. See *Who We Are—Critical Race Studies Program*, UCLA LAW, <https://law.ucla.edu/centers/social-policy/critical-race-studies/who-we-are/> (last visited July 10, 2016).

57. *Critical Race Studies Specialization*, UCLA LAW, <https://law.ucla.edu/academics/degrees-and-specializations/specializations/critical-race-studies/curriculum/> (last visited July 10, 2016).

Resistance: Against Police Violence.⁵⁸ A law teaching fellowship is also offered for a UCLA Law School graduate interested in pursuing a career in law teaching.⁵⁹

Besides UCLA's program are centers based heavily on CRT—including the Aoki Center for Critical Race and Nation Studies at UC Davis School of Law, which honors the life and work of the late Professor Keith Aoki.⁶⁰ Keith contributed to critical theory, race, and immigration issues, and the Center encourages scholarship in these areas and also inspires students to develop their interests in critical theory.

In addition to programs and centers are entities such as LATCRIT—Latino critical theory, which has a 501(c)(3) status and is now more than twenty years old.⁶¹ It has the twin goals of developing a critical, activist and interdisciplinary discourse on law and policy toward Latinas/os, and of fostering both the development and practice of coalitional theory. It has always had a global emphasis as well. Among its greatest scholarly contributions have been nearly twenty conferences that have attracted a wide range of contributors. Themes of some of its recent conferences have included *The Color of the Economic Crisis: Exploring the Downturn from the Bottom Up* (2010),⁶² and *Global Justice* (2011).⁶³ The twentieth-anniversary *Conference LatCrit 2015* focused on *Critical Constitutionalism*.⁶⁴

A very new development for CRT is critical race theory and empirical methods (“eCRT”). One of the critiques of CRT has been that it did not focus on evidentiary support for some of its claims, and that the reliance on narrative in many cases left anecdotes to stand in for broader proof. eCRT started in 2010 by those, including many junior scholars, who believed that scholarship on race could benefit from intersecting sophisticated social science research methods with CRT. The eCRT scholarship has been broadly interdisciplinary—at the nexus of CRT and sociology, social psychology, anthropology, economics, law, psychology, business, and political science. The *Wisconsin Law Review* published a symposium on critical race theory and

58. *Eighth Annual CRS Symposium: “Race and Resistance: Against Police Violence”*, UCLA LAW, <https://www.law.ucla.edu/centers/social-policy/critical-race-studies/events/1693/2015/10/16/Eighth-Annual-CRS-Symposium-c--Race-and-Resistance-c--Against-Police-Violence/> (last visited July 10, 2016).

59. *About the Critical Race Studies Program*, UCLA LAW, <https://law.ucla.edu/centers/social-policy/critical-race-studies/about/> (last visited July 10, 2016).

60. *See Aoki Center for Critical Race and Nation Studies*, U.C. DAVIS SCH. OF LAW, <https://law.ucdavis.edu/centers/critical-race/> (last visited July 10, 2016).

61. *See LAT CRIT*, <http://latcrit.org/index/> (last visited July 10, 2016).

62. *LatCrit XV Symposium: The Color of the Economic Crisis: Exploring the Downturn from the Bottom Up*, 14 HARV. LATINO L. REV. 243 (2011).

63. *LatCrit XVI, Global Justice: Theories, Histories, Futures*, LAT CRIT, <http://latcrit.org/content/conferences/latcrit-biennial-conferences/latcrit-xvi-annual-conference-2011/> (last visited July 10, 2016).

64. *Critical Constitutionalism: LatCrit 2015: Twentieth Anniversary Conference*, LAT CRIT <http://www.latcrit.org/content/conferences/latcrit-biennial-conferences/latcrit-2015/> (last visited July 10, 2016).

empirical methods in 2015.⁶⁵ Panels ranged from *Rethinking Public Health Law: Race, Science and Health Disparities* to *BlackWisconsinLivesMatter: What Can eCRT Add to the Movement?* to a *Roundtable on Diversifying the Relationship Between Critical Theory and Social Science Methods: Gender, Sexuality and Class*.⁶⁶ In the same year, *Fordham Law Review* also did a symposium titled *Critical Race Theory and Empirical Methods*.⁶⁷ My brilliant young Iowa colleague Paul Gowder presented *Critical Race Science and Critical Race Philosophy of Science*.⁶⁸

Finally, CRT has jumped the national barriers and has produced both international and comparative law perspectives. Articles include: *Justice in Whose Eyes? Why Lawyers Should Read Black Australian Literature*;⁶⁹ *Bringing Critical Race Theory to Europe: The Case of Immigrant Women*;⁷⁰ and *Rethinking Baker: A Critical Race Feminist Theory of Disability*,⁷¹ a Canadian case. CRT is also linked to another jurisprudential trend in international and comparative law known as TWAIL—Third World approaches to international law and postcolonial theory.⁷²

The Future

Clearly, CRT is needed more than ever. We have not solved any of our racial dilemmas despite individual cases of success and the election of our first black president. We need more people of color who desire to become lawyers, professors, and judges, even in times when our profession is under duress. We need more programs like the series of Lutie Lyttle workshops, which celebrated ten years this summer as a forum for black women professors—some

65. See *Critical Race Theory and Empirical Methods: Wisconsin Law Review Symposium and Institute for Legal Studies Research Workshop*, UNIV. OF WIS. LAW SCH., <http://law.wisc.edu/ils/2015lawreviewsymposium/index.html> (last visited July 10, 2016).

66. *Id.*

67. *Critical Race Theory and Empirical Methods Conference*, FORDHAM LAW REVIEW, <http://fordhamlawreview.org/symposiumcategory/critical-race-theory-and-empirical-methods-conference/> (last visited July 10, 2016).

68. See Paul Gowder, *Critical Race Science and Critical Race Philosophy of Science*, 83 FORDHAM L. REV. 3155 (2015).

69. Nicole Watson, *Justice in Whose Eyes? Why Lawyers Should Read Black Australian Literature*, 23 GRIFFITH L. REV. 44 (2014).

70. Fulvia Staiano, *Bringing Critical Race Theory to Europe: The Case of Immigrant Women*, 8 EUR. J. LEGAL STUD. 73 (2015).

71. Alyssa Clutterbuck, *Rethinking Baker: A Critical Race Feminist Theory of Disability*, 20 APPEAL 51 (2015).

72. For more about TWAIL, see James Thuo Gathii & Henry J. Richardson, *Introduction to the Symposium on TWAIL Perspectives on ICL, IHL, and Intervention*, AJILUNBOUND (Mar. 17, 2016, 11:25 AM) <https://www.asil.org/blogs/introduction-symposium-twail-perspectives-icl-ihl-and-intervention>.

of whom produce CRT scholarship.⁷³ More than 120 women came to Iowa this July. The University of Miami School of Law hosted the Seventh John Mercer Langston Writing Workshop for black male faculty at the same time as the Lutie conference took place.⁷⁴ The papers published in these conferences have been major generators of considerable critical scholarship and have helped scholars of color become professors, win promotions, and get tenure.⁷⁵ In an era when many schools will lack a dedicated CRT course, there will continue to be a need to integrate the material into all relevant courses. We need more programs like UCLA's, more empiricism, more intersectionality.

We need more of us willing to engage in praxis like Kim Crenshaw's *African American Forum* (AAPF).⁷⁶ Founded in 1996, AAPF was developed as part of an ongoing effort to promote women's rights in the context of struggles for racial equality. It serves as an information clearinghouse that works to bridge the gap between scholarly research and public debates on questions of inequality, discrimination, and injustice. It is dedicated to advancing and expanding racial justice, gender equality, and the indivisibility of all human rights, both in the U.S. and internationally. It is linked to Black Lives Matter and is on the front line of efforts to center the struggles of women of color to achieve justice.⁷⁷

Conclusion

My oldest grandson is about to start college. Can he forget that race matters and just take a history course on the subject? Will any of my grandchildren be able to forget that race matters? The youngest is just a baby—what will be the reality in eighteen years for her when she starts college? We must all work to make a more just world for our children and grandchildren, and CRT can be one aspect of that important mission.

73. See, e.g., *Ninth Annual Lutie Lytle Black Women Law Faculty Writing Workshop: Advance Your Agenda, Build Your Brand and Chart Your Career*, VANDERBILT LAW SCH. <http://law.vanderbilt.edu/academics/scholarly-events/lutie-lytle-black-women-law-faculty-writing-workshop/> (last visited July 10, 2016).

74. *Writing Workshop for Black Male Law Profs*, LEGAL SCHOLARSHIP BLOG, <http://www.legalscholarshipblog.com/2016/03/17/writing-workshop-for-untured-black-men-coral-gables-fl/>.

75. See Rachel Anderson, Lutie A. Lytle Black Women Law Faculty Writing Workshop, UNLV William S. Boyd School of Law, Aug. 6, 2013, https://law.wisc.edu/ils/2014lytleworkshop/boyd_memo_on_lutie_a_lytle_history.pdf [<https://perma.cc/E4AZ-BHGC>].

76. See AFRICAN AM. POLICY FORUM, <http://www.aapf.org/> (last visited July 10, 2016).

77. *Id.*

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).