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## COP FRAGILITY AND BLUE LIVES MATTER

Frank Rudy Cooper\*

*There is a new police criticism. Numerous high-profile police killings of unarmed blacks between 2012–2016 sparked the movements that came to be known as Black Lives Matter, #SayHerName, and so on. That criticism merges race-based activism with intersectional concerns about violence against women, including trans women.*

*There is also a new police resistance to criticism. It fits within the tradition of the “Blue Wall of Silence,” but also includes a new pro-police movement known as Blue Lives Matter. The Blue Lives Matter movement makes the dubious claim that there is a war on police and counter attacks by calling for making assaults on police hate crimes akin to those addressing attacks on historically oppressed groups.*

*Legal scholarship has not comprehensively considered the impact of the new police criticism on the police. It is especially remiss in attending to the implications of Blue Lives Matter as police resistance to criticism. This Article is the first to do so.*

*This Article illuminates a heretofore unrecognized source of police resistance to criticism by utilizing diversity trainer and New York Times best-selling author Robin DiAngelo’s recent theory of white fragility. “White fragility” captures many whites’ reluctance to discuss ongoing racism, or even that whiteness creates a distinct set of experiences and perspectives. White fragility is based on two myths: the ideas that one could be an unraced and purely neutral individual—false objectivity—and that only evil people perpetuate racial subordination—bad intent theory.*

*Cop fragility is an analogous oversensitivity to criticism that blocks necessary conversations about race and policing. Blue Lives Matter exemplifies false objectivity when it asserts that police should be their own*

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*judges of what is appropriate in law enforcement. Likewise, Blue Lives Matter relies on bad intent theory when it implies that only a few “bad apples” create racial disparities. Cop fragility is dangerous because it blames the victims of police misconduct, constructs a false victim status for the police, and undermines civil rights.*

*Racial minority communities will only give police the cooperation they need if they perceive the police to be listening to them. This Article’s specific proposal is for police departments to hold mediated listening sessions with the new police critics based on a proven methodology for mediating difficult conversations. The goal is to identify reforms that would rebuild community trust of the police. These listening sessions hold the potential to turn police resistance to criticism into meaningful cooperation.*

#### TABLE OF CONTENTS

I.	INTRODUCTION .....	623
II.	CRITIQUE AND BACKLASH .....	627
	A. <i>The New Police Criticism</i> .....	628
	B. <i>The Blue Lives Matter Response</i> .....	633
	1. <i>A Social Movement Built on White Backlash</i> .....	634
	2. <i>The Legal Movement</i> .....	637
III.	WHITE FRAGILITY AND COP FRAGILITY .....	639
	A. <i>White Fragility Theory</i> .....	640
	1. <i>Defining White Fragility</i> .....	640
	2. <i>Debunking the Myth of the Objective Individual</i> .....	640
	3. <i>Uncoupling Racism from Bad Intent</i> .....	643
	B. <i>Blue Lives Matter as Demonstrating Cop Fragility</i> .....	646
	1. <i>The Police as Omniscient Observers</i> .....	647
	2. <i>Bad Apples Theory</i> .....	648
	C. <i>Negative Effects of Cop Fragility</i> .....	649
	1. <i>Blaming the Victim</i> .....	650
	2. <i>Shifting the Focus to the Police as Victims</i> .....	651
	3. <i>Emptying Civil Rights of Content</i> .....	653
	D. <i>Other Explanations for Police Resistance to Criticism</i> .....	654
IV.	PROPOSALS .....	656
	A. <i>Reject Blue Lives Matter Bills</i> .....	656
	B. <i>Mediated Listening Sessions</i> .....	657
	1. <i>Why the Conversations?</i> .....	658
	2. <i>A Method for Difficult Conversations</i> .....	659
	3. <i>Some Limits on These Conversations</i> .....	660
V.	CONCLUSION .....	661

## I. INTRODUCTION

The starting point for understanding cop<sup>1</sup> fragility is recognition that there is a new police criticism.<sup>2</sup> Numerous high-profile killings of unarmed blacks between 2012–2016 sparked, then fanned the flames of, the movements that came to be known as Black Lives Matter, #SayHerName, and so on. Those movements are characterized by confrontational methods and deep critiques of the status quo.<sup>3</sup> Professor Amna Akbar and others have thus written eloquently about the way recent Black Lives Matter proposals set up a space of radical contestation.<sup>4</sup> The new police criticism is also unique in its intersectional focus on women of color, including trans women.<sup>5</sup> One question this contestation provokes is, how have the police and their supporters responded to the new police criticism?

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1. Even the use of the term “cop” may trigger sensitivity.

2. On Black Lives Matter in general, see Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405, 406–21 (2018) (laying foundation for understanding movement’s radical critique); Bridgette Baldwin, *Black, White, and Blue: Bias, Profiling, and Policing in the Age of Black Lives Matter*, 40 W. NEW. ENG. L. REV. 431, 431–32 (2018) (tracing Black Lives Matter movement to unjust policing); Melissa Brown et al., #SayHerName: A Case Study in Intersectional Social Media Activism, 40 ETHNIC & RACIAL STUDS. 1831 (2017); Osagie K. Obasogie & Zachary Newman, *Black Lives Matter and Respectability Politics in Local News Accounts of OfficerInvolved Civilian Deaths: An Early Empirical Assessment*, 2016 WIS. L. REV. 541, 542; 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. RACE & SOC. JUST. 13, 49 (2017) (summarizing development of Black Lives Matter movement); Beverly Daniel Tatum, *Community or Chaos? Dialogue As Twenty-First Century Activism*, 49 U. MEM. L. REV. 285, 290 (2018) (“The repeated failure of the justice system to hold the killers accountable for these deaths gave momentum to the ‘Black Lives Matter’ movement, protesting state-sponsored violence . . . .”); see also Justin K. Reichman, *Police Reform As Preventative Medicine: Reframing Police-Community Violence As A Public Health Law Issue*, 22 QUINNIPIAC HEALTH L.J. 289, 300 (2019) (“Over a dozen states have passed ‘Blue Lives Matter’ laws, making any assault or murder against a police officer result in harsher sentences.”). On #SayHerName, see, for example, Michelle S. Jacobs, *The Violent State: Black Women’s Invisible Struggle Against Police Violence*, 24 WM. & MARY J. WOMEN & L. 39, 42 (2017). For an analysis of how police violence against blacks predicts Black Lives Matter protests, see Vanessa Williamson, Kris-Stella Trump & Katherine Levine Einstein, *Black Lives Matter: Evidence that Police-Caused Deaths Predict Protest Activity*, 16 PERSPECTIVES ON POLITICS 400, 400–15 (2018). On the deep nature of the new police criticism, see generally Monica C. Bell, *Police Reform and the dismantling of Legal Estrangement*, 126 YALE L.J. 2054 (2017) (calling police treatment of black communities a contributor to their “legal estrangement”).

3. The radicality of these movements is seen in both their tactics and the nature of their critiques. See Akbar, *supra* note 2, at 409 (connecting tactics and deep critique).

4. See *id.* (discussing movement’s attempt to reimagine the state); Baldwin, *supra* note 2, at 433 (contending Black Lives Matter movement addresses overcriminalization of blacks). See generally Obasogie & Newman, *supra* note 2 (discussing Black Lives Matter as challenge to respectability politics).

5. Preminent sociologist of race and gender Patricia Hill Collins defines intersectionality as “the critical insight that race, gender, sexuality, ethnicity, nation, ability, and age operate not as unitary, mutually exclusive entities, but as reciprocally constructing phenomena that in turn shape complex social inequalities.” Patricia Hill Collins, *Intersectionality’s Definitional Dilemmas*, 41 ANN. REV. SOC. 1, 2 (2015). In an article about violence against women of color, intersectionality theory’s founder described her project as expanding upon an anti-essentialist approach to identity. Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1242 (1991) (“Although racism and sexism readily intersect in the lives of real people, they seldom do in feminist and antiracist practices. And so, when the practices expound identity as woman or person of color as an either/or proposition, they relegate the identity of women of color to a location that resists telling.”). For use of intersectionality methodology to identify the appropriate size and composition of a social group in a given analysis, see Ann C. McGinley & Frank Rudy Cooper, *Intersectional Cohorts, Dis/ability, and Class Actions*, 47 FORDHAM URBAN L.J. (forthcoming 2020) (coining

They have responded not with reform, but with resistance. A prime example is the way the Blue Lives Matter movement counter-attacks on the issue of civil rights.<sup>6</sup> Blue Lives Matter began as a media company on Facebook in 2014 when two police officers were ambushed and murdered.<sup>7</sup> Blue Lives Matter complains about the treatment of police in general and calls for making assaults on police hate crimes akin to those addressing attacks on historically oppressed groups such as African-Americans,<sup>8</sup> Jewish people,<sup>9</sup> and sexual orientation minorities.<sup>10</sup> Making assaulting police officers a hate crime seems to be more of an abuse of civil rights discourse than a bid for reform.<sup>11</sup>

Legal scholarship has hardly addressed the general impact of police criticism on the police.<sup>12</sup> This Article provides a new perspective on the effects of criticism of the police on the police by applying diversity trainer and New York Times best-selling author Robin DiAngelo's recent theory of white fragility to the Blue Lives Matter response.<sup>13</sup> The concept of white fragility is just starting

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"intersectional cohorts" to explain why Black and Latinx inner-city students in Compton disabilities suit deserve class certification).

6. See Olson, *supra* note 2, at 50 ("Backlash to [Black Lives Matter] generated its own countermovement . . .").

7. James Alexander McVey, *Policing the Post-Racial: Visual Rhetorics of Racial Backlash*, at 50 (2018) (unpublished Ph.D. dissertation, University of North Carolina, Chapel Hill) (on file with ProQuest, Number 10790539).

8. See JUAN F. PEREA ET AL., RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA 104–32 (3d ed. 2014) (summarizing eighteenth- and nineteenth-century legal and social rationale for chattel bondage in the United States).

9. Jews were long oppressed in Europe, then were subject to a murderous genocide, and are still subject to anti-Semitic tropes. See Kate Sullivan et al., *Omar: "I Unequivocally Apologize after Backlash over New Israel Tweets"*, CNN (Feb 12, 2019 6:25AM), <https://www.cnn.com/2019/02/11/politics/ilhan-omar-aipac-backlash/index.html>.

10. On the development of the hate crimes movement, with a focus on sex orientation minorities, see Terry A. Maroney, *The Struggle Against Hate Crime: Movement at a Crossroads*, 73 NYU L. REV. 564, 569–85 (1998) (tracing movement's development).

11. See generally Olson, *supra* note 2 (criticizing amendment of hate crimes to include police).

12. But see the literature on a related topic: Whether the police are "depolicing" racial minority communities in response to criticism that they are racial profiling. See also William J. Bratton & Jon Murad, *Precision Policing: A Strategy for the Challenges of 21st-Century Law Enforcement*, in URBAN POLICY 2018 21, 21 (William J. Bratton et al. eds., 2018) (Manhattan Institute), <https://www.manhattan-institute.org/urban-policy-2018> (assuming Ferguson Effect); Paul Cassel & Richard Fowles, *What Caused the 2016 Chicago Homicide Spike?*, 2018 U. ILL. L. REV. 1581, 1649–60 (trying to argue an "ACLU Effect" hampers policing); Frank Rudy Cooper, *Understanding "Depolicing": Symbiosis Theory and Critical Cultural Theory*, 71 UMKC L. REV. 355 (2002) (explicating depolicing phenomenon); Alberto R. Gonzalez & Donald Q. Cochran, *Police-worn Body Cameras: An Antidote to the "Ferguson Effect?"*, 82 MO. L. REV. 299, 300–306 (2018) (discussing meanings of "Ferguson Effect"); Ronald T. Hosko, *Through Police Eyes—The Ferguson Effect Scare*, 23 BERKELEY J. CRIM. L. 9, 12 (2018) (describing Ferguson as "a fork in the road of the relatively smooth road of citizen and police relations in recent decades"); WILLARD M. OLIVER, *DEPOLICING: WHEN POLICE OFFICERS DISENGAGE* (2019) (discussing the phenomenon and its impacts); Stephen Rushin & Griffin Edwards, *De-Policing*, 102 CORNELL L. REV. 721, 732–35 (2017) (discussing depolicing); Scott E. Wolfe, *The Alleged "Ferguson Effect" and Police Willingness to Engage in Community Partnership*, 40 LAW & HUM. BEHAV. 1, 3 (2015) (reviewing literature related to Ferguson Effect). See generally Cooper, *supra* (coining the term "depolicing"); John A. Shjarback et al., *De-policing and Crime in the Wake of Ferguson: Racialized Changes in the Quantity and Quality of Policing Among Missouri Police Departments*, 50 J. CRIM. JUST. 42, 42 (2017).

13. See generally ROBIN DIANGELO, *WHITE FRAGILITY: WHY IT'S SO HARD FOR WHITE PEOPLE TO TALK ABOUT RACISM* (2018) (discussing white resistance to acknowledging their own race and racism).

to make its way into legal scholarship.<sup>14</sup> DiAngelo's core assertion is that, in general, white people are resistant to the suggestion their experiences and worldviews are influenced by their race, let alone that they benefit from racism.<sup>15</sup> Many whites are thus fragile in conversations about race; they resist having such discussions and exit them as soon as possible.

The two primary defensive mechanisms of white fragility match up well with police methods of resisting the new police criticism. First, DiAngelo points to some whites' false assumptions that they can be objective individuals.<sup>16</sup> Thinking one can be purely objective and completely individualistic hides race from whites when they evaluate whether their experiences and worldviews are as influenced by their group status as are those of people of color.<sup>17</sup> Likewise, police officers often claim a false objectivity by arguing they are the best and only judges of what criminal prevention requires.<sup>18</sup> This assumes the police can be the objective arbiters on their own behavior; no one else can or should watch the watchmen. Holding that sense of self, the police have their very identity disrupted by the new police criticism.

Second, DiAngelo points to bad intent theory as making it seem to whites as if only morally bad people could be racists.<sup>19</sup> This is the notion that you can only be racist if you have the goal of hurting racial minorities.<sup>20</sup> In fact, racism is structural and a wide range of people are implicitly biased, including many racial minorities.<sup>21</sup> The police analogue of bad intent theory is "bad apple" theory, in which it is conclusively presumed that only a small percentage of police officers are misbehaving.<sup>22</sup> The burden of disproving "bad apple" theory is

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14. For discussions of the theory, see generally Trina Jones & Kimberly Jade Norwood, *Aggressive Encounters and White Fragility: Deconstructing the Trope of the Angry Black Woman*, 102 IOWA L. REV. 2017, 2021 (2017) (applying white fragility to reveal aggressiveness toward black women is masked by Angry Black Woman stereotype); Caroline Mala Corbin, *Justice Scalia, The Establishment Clause, and Christian Privilege*, 15 FIRST AMEND. L. REV. 185, 192 (2017) (applying white fragility to First Amendment law).

15. See DIANGELO, *supra* note 13, at 100 (detailing reasons whites resist suggestion of racial privilege).

16. See *id.* at 9 (criticizing notions of individualism and objectivity).

17. See *id.* at 7 (using self as example, saying "I was not taught to see myself in racial terms").

18. See generally Brian F. Kingshott, *Police Culture, Ethics and Entitlement Theory*, 17 CRIM. JUST. STUD. 187 (2004); David H. Bayley, *Police Reform: Who Done It?*, 18 POLICING & Soc'y 7 (2008).

19. DIANGELO, *supra* note 13, at 9 (calling intentional discrimination theory "simplistic").

20. See *Washington v. Davis*, 426 U.S. 229, 239 (1976) (requiring "purpose" to discriminate); *McCleskey v. Kemp*, 481 U.S. 279, 292, (maintaining "purposeful" intent requirement) (1987). *But see* Charles Lawrence, *The Id, the Ego, and Equal Protection: Reckoning With Unconscious Racism*, 39 STAN. L. REV. 317, 319 (1987) (criticizing purposeful intent standard for discrimination).

21. On structural racism, see, for example, Christopher J. Tyson, *From Ferguson to Flint: In Search of an Antisubordination Principle for Local Government Law*, 34 HARV. J. RACIAL & ETHNIC JUST. 1, 50 (2018) (analyzing structural racism in municipal law); William M. Wiecek, *Structural Racism and the Law in America Today: An Introduction*, 100 KY. L.J. 1, 5 (2012) (defining eight characteristics of structural racism). On implicit bias, see PROJECT IMPLICIT, <https://implicit.harvard.edu/implicit/> (last visited Jan. 31, 2020) (documenting implicit bias); Gregory S. Parks & Jeffery J. Rachlinski, *Implicit Bias, Election '08, and the Myth of Post-Racial America*, FLA. ST. U. L. REV. 659 (2010) (analyzing implicit attitudes about Obama).

22. See Devon W. Carbado, *Blue-on-Black Violence: A Provisional Model of Some of the Causes*, 104 GEO. L.J. 1479, 1517 (2016) ("The more law enforcement agencies respond to acts of violence as a problem that derives from "bad apple" police officers, the less successful they will be at diminishing dimensions of police violence that are structural and endemic to police culture."); see also Myriam E. Gilles, *Breaking the Code of Silence: Rediscovering "Custom" in Section 1983 Municipal Liability*, 80 B.U. L. REV. 17, 31 (2000) (discussing

placed on minority civilians under the increasingly deferential standards set by the police in conjunction with a complicit judicial branch.<sup>23</sup>

This Article is the first comprehensive study of the police's inability to truly hear criticism about their treatment of racial minorities. The primary problem revealed is that racial minority communities will not perceive the police as legitimate unless they genuinely listen to communities. If the police are seen as illegitimate, they will not receive much needed cooperation in identifying crime and pursuing its perpetrators.<sup>24</sup> Unfortunately, Blue Lives Matter advocates sometimes strike a hysterical tone in their denial that the police should reform.<sup>25</sup> That makes it difficult for them to adopt effective reforms that can heal their relations with racial minority communities.

This Article's specific proposal is for police departments to hold mediated listening sessions with the new police critics with the goal of identifying reforms that would rebuild community trust of the police on the community's terms.<sup>26</sup> It turns out there is a well-studied method for having difficult conversations like these. The Article thus recommends that the Department of Justice and/or state attorneys general hold regular sessions with law enforcement in racial minority communities based on the practices detailed in the negotiation classic, *Difficult Conversations: How to Discuss What Matters Most*.<sup>27</sup>

The Article proceeds in three substantive parts. Part II discusses the new police criticism and the backlash thereto implied by the Blue Lives Matter movement. Part III explicates DiAngelo's white fragility thesis, analogizes it to cop fragility, and identifies cop fragility's detrimental effects. Part IV proposes the mediated listening strategy and considers potential objections and identifies future applications of cop fragility theory. The Article then briefly concludes.

Before beginning the substance of this Article, a few caveats will be helpful. First, it is true that not all police officers are white. To highlight the argument that resistance to the new police criticism operates like white resistance to race-

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"bad apple" theory); Jonathan Masur & Richard H. McAdams, *Police Violence in the Wire*, 2018 U. CHI. LEGAL F. 139, 153 (2018) (criticizing "bad apple" theory).

23. See Frank Rudy Cooper, *A Genealogy of Programmatic Stop and Frisk: The Discourse-to-Practice-Circuit*, 73 U. MIAMI L. REV. 1, 36 (2018) (contending police misconduct doctrine flawed because "police departments are actually driving the doctrine that is supposedly constraining them").

24. See, e.g., Jacinta M. Gau & Rod K. Brunson, *Procedural Justice and Order Maintenance Policing: A Study of Inner-City Young Men's Perceptions of Police Legitimacy*, 27 JUST. Q. 255, 272 (2010) (considering effects of police delegitimacy).

25. See, e.g., Hosko, *supra* note 12 (seemingly denying any wrongdoing in police slayings of Michael Brown, Freddie Gray, or Eric Garner). *But cf.* MATT TAIBBI, *I CAN'T BREATHE: A KILLING ON BAY STREET* (2017) (detailing choking of Eric Garner).

26. One approach to rebuilding community trust in black communities would be to have black police officers take a lead role in communicating between the police and black communities. There may be movement in this direction. See e.g., JAMES FORMAN JR., *LOCKING UP OUR OWN* 78–115 (2017) (providing historical context for the rise of African American police); Taylor Hosking, *The Long History of Black Officers Reforming Policing From Within*, THE ATLANTIC (Dec. 5 2017), <https://www.theatlantic.com/politics/archive/2017/12/the-long-history-of-black-officers-reforming-policing-from-within/547457/> (considering black police officers' role in police reform).

27. DOUGLAS STONE, BRUCE PATTON & SHEILA HEEN, *DIFFICULT CONVERSATIONS: HOW TO DISCUSS WHAT MATTERS MOST* (10th Anniversary ed. 2010).

based criticism, though, it makes sense to treat the police as though they were a mostly white<sup>28</sup> and almost always white-controlled institution.<sup>29</sup> Second, while many white police officers abhor explicit racial bias, racism is often structural or implicit, so the objection that most police officers do not intend to be racist does not clear them of perpetuating racial inequality.<sup>30</sup> Finally, the assertion of cop fragility is a claim that police officers are oversensitive to criticism that they perpetuate racism. That claim may seem extreme, even unpatriotic, but please consider the argument herein before rejecting the cop fragility framework. The overall goal of this Article is to help the police and their communities by showing what might be blocking police from understanding their critics. The police cannot gain the trust of black and Latinx communities unless they hear and address racial criticism. Calling out cop fragility may seem like tough medicine, but it is designed to help the police by getting to the source of their resistance.

## II. CRITIQUE AND BACKLASH

New York City provides a powerful example of cop fragility. Hundreds, maybe even thousands, of New York Police Department (NYPD) officers have turned their backs on New York City Mayor Bill de Blasio on at least three occasions at funerals for slain police officers. The Guardian newspaper reported that NYPD union head Patrick Lynch “said he [de Blasio] had blood on his hands, because of comments made by de Blasio in relation to protests in the city last month over the death of Eric Garner, a Staten Island man, at the hands of police in July.”<sup>31</sup> Time magazine explains, “The strained relationship dates back to de Blasio’s campaign, when he pledged to reform the city’s stop-and-frisk practices, which the police credited for a decrease in crime but detractors decry as institutionalized racial profiling.”<sup>32</sup> Whether you agree with the police on this point or not, consider the gravity of what happened here: hundreds of those

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28. See *Police Officers*, DATA USA, <https://datausa.io/profile/soc/333050/#demographics> (last visited Feb. 26, 2019) (providing racial demographics); GOVERNING, *DIVERSITY ON THE FORCE: WHERE POLICE DON’T MIRROR COMMUNITIES* (2015) (discussing racial demographics); OFFICE OF JUST. PROGRAMS, U.S. DEPT. OF JUST., BULLETIN: LOCAL POLICE DEPARTMENTS 2013: PERSONNEL, POLICIES, AND PRACTICES (May 2015) (noting racial demographics).

29. See *Data Collection: Law Enforcement Management and Administrative Statistics (LEMAS)*, BUREAU OF JUST. STAT., <https://www.bjs.gov/index.cfm?ty=dcdetail&iid=248> (last visited Mar. 4, 2020); Kevin Stark & Darnell Little, *More African-American Apply to Become Cops, But Few Make it to Finish Line*, CHICAGO REPORTER (Feb. 2, 2018), <https://www.chicagoreporter.com/more-african-americans-apply-to-become-cops-but-few-make-it-to-finish-line/> (demonstrating white control of hiring and promotion).

30. See *supra* note 21 (documenting structural racism and implicit bias).

31. Amanda Holpuch, *Police Turn Backs on de Blasio at Funeral of NYPD officer Rafael Ramos*, GUARDIAN (Dec. 27, 2014, 1:45 PM), <https://www.theguardian.com/us-news/2014/dec/27/funeral-nypd-officer-rafael-ramos>.

32. Alex Altman, *Why New York Cops Turned Their Backs on Mayor de Blasio*, TIME (Dec. 22, 2014), <http://time.com/3644168/new-york-police-de-blasio-wenjian-liu-rafael-ramos/>.

whose police cruiser doors bear the words, “Courtesy, Professionalism, Respect”<sup>33</sup> very publicly expressed “a sign of disrespect”<sup>34</sup> for the civilian leader of their department. There have been many, many more examples of police attempts to suppress criticism of their behaviors.<sup>35</sup> In the eyes of the police, it seems, race-based criticism is grounds for counter-attacks.

This part of the Article sets up later discussion of the phenomenon of cop fragility by tracing the developments of the new police criticism and the Blue Lives Matter response thereto.

### A. *The New Police Criticism*

One way of thinking about cop fragility is that it is a response to the new police criticism. African American criticism of the police, which dates back to the beginning of policing, was largely ignored until the mid-1960s.<sup>36</sup> After all, the political context involved apartheid in the South and marginalization of racial minorities in most other places.<sup>37</sup> Even though the Civil Rights uprisings of the late 1960s were often sparked by police shootings, they too were not effective at summoning reform.<sup>38</sup> That is because President Nixon easily twisted Civil

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33. Sean Basinski, *Where's the Courtesy, Professionalism, and Respect?*, HUFFPOST, [https://www.huffpost.com/entry/how-not-to-show-courtesy-\\_b\\_4082231](https://www.huffpost.com/entry/how-not-to-show-courtesy-_b_4082231) (last updated Dec. 11, 2013); *see also* *Missions*, NYPD, <https://www1.nyc.gov/site/nypd/about/about-nypd/mission.page> (last visited Feb. 14, 2020) (declaring the NYPD's mission).

34. Holpuch, *supra* note 31.

35. For example, the St. Louis Police Officers Association publicly called for the punishment of five St. Louis Rams players who protested the non-prosecution of Darren Wilson for slaying Michael Brown. *See, e.g.,* Cindy Boren, *St. Louis Police Group Demands Punishment for Rams Players in Ferguson Protest*, WASH. POST (Dec. 1, 2014), *cited in* Rob Kahn, *Three First Amendment Puzzles Raised by the Police Union Response to Speech Criticizing Police Conduct in Ferguson and New York City*, 8 ALA. C.R.-C.L. L. REV. 163, 166 n.12 (2017). Here is another example: Apparently, police officers from Baltimore really did publicly complain about how they were represented in a Saturday Night Live skit. *See* Tony Maglio, *The Baltimore PD Isn't Happy With This 'SNL' Sketch: 'Not Humor at All' (Video)*, THE WRAP, (Oct. 18, 2018, 12:16 PM), <https://www.the-wrap.com/baltimore-pd-snl-traffic-stop-video/> (depicting police as bumbling and abusive). A Washington Post column noted the following comment on the police-authored letter objecting to the depiction: “Tell your membership to stop planting evidence, and stop beating people and then maybe we can talk about how SNL hurt your feelings . . .” *See* Theresa Vargas, *Why No One is Laughing in Baltimore*, WASH. POST (Oct. 19, 2018), [https://www.washingtonpost.com/local/why-no-one-is-laughing-in-baltimore/2018/10/19/8a41e7ba-d39c-11e8-8c22-fa2ef74bd6d6\\_story.html?noredirect=on&utm\\_term=.8042017b4e64](https://www.washingtonpost.com/local/why-no-one-is-laughing-in-baltimore/2018/10/19/8a41e7ba-d39c-11e8-8c22-fa2ef74bd6d6_story.html?noredirect=on&utm_term=.8042017b4e64). The police response to the SNL sketch is a small manifestation of the fragility that the police and their supporters often feel about this group. A third example of police sensitivity criticism is the phenomenon of depolicing. *See generally* Cooper, *supra* note 12 (defining depolicing). Police officers generally depolice as a reaction to criticism that they are racially biased. *See* sources cited *supra* note 12 (defining depolicing and connecting it to alleged “Ferguson Effect”); *infra* Section III.A (discussing scholarship on “Ferguson Effect”). A further example: *see* <https://www.wbur.org/news/2018/10/30/new-mass-police-organization-head-writing> (discussing police officer's newsletter calling for “violence” in response to new police critics).

36. *See, e.g.,* Bryan Stevenson, *A Presumption of Guilt: The Legacy of America's History of Racial Injustice*, in POLICING THE BLACK MAN 3 (Angela Davis ed., 2018) (detailing history of police targeting of black men).

37. *See* Thomas J. Sugrue, et al., *Northern Lights: The Black Freedom Struggle Outside the South*, 26 OAH MAGAZINE OF HISTORY 9, 15 (2012) (noting segregation in North during Jim Crow).

38. *See* Lieberman, et al., *The Precipitants and Underlying Conditions of Race Riots*, 30 AMERICAN SOCIOLOGICAL REVIEW 887, 888 (1965) (identifying police shootings as sources of riots). I am aware of the Kerner



Rights riots into a rationale for draconian policing under the slogan, “law and order.”<sup>39</sup>

The first major, sustained, and effective black criticism of the police came in the mid-1990s, with the challenge to racial profiling. By the end of 2000, that criticism had yielded a broad consensus against racial profiling.<sup>40</sup> That consensus was exemplified by the fact that Republican President George Bush spoke out against racial profiling.<sup>41</sup> But September 11, 2001 took much of the wind out of reformers’ sails.<sup>42</sup> Although the critique of racial profiling continued, it failed to really grab the public’s attention.

Then came the Ferguson, Missouri uprising.<sup>43</sup> Ferguson is where people responded to Darren Wilson’s slaying of unarmed black teen Michael Brown and the police decision to leave the body uncovered in the hot sun for several hours by rising up against a host of racial disparities in the town.<sup>44</sup> The events in Ferguson had been preceded by public outcry about George Zimmerman’s stalking and shooting of an unarmed black youth, Trayvon Martin, which was at the center of national news.<sup>45</sup> When Zimmerman was acquitted, and several more high-profile shootings of unarmed blacks occurred, the stage was set for an expanded

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Commission proposed reforms, but they only stripped the top layer off of police mistreatment of African-American and Latinx communities. See Mary Ellen Gale, *Calling in the Girl Scouts: Feminist Legal Theory and Police Misconduct*, 34 LOY. L.A. L. REV. 691, 746 n.136 (2001) (comparing various commissions aimed at reforming policing of racial minorities); see also Report of the National Advisory Commission on Civil Disorders 206, 301–07 (New York Times Co. ed., 1968) (publishing Report calling for police reforms).

39. See MICHAEL W. FLAMM, *LAW AND ORDER: STREET CRIME, CIVIL UNREST, AND THE CRISIS OF LIBERALISM IN THE 1960s* 179–186 (2005) (discussing development of this narrative).

40. See generally Angela Davis, *Race, Cops, and Traffic Stops*, 51 U. MIAMI L. REV. 425 (1997) (revealing and criticizing racial profiling); David A. Harris, *Driving While Black and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops*, 87 J. CRIM. L. & CRIMINOLOGY 544 (1997) (challenging abuse of Terry-stop power to racial profile); David Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment*, 1997 SUP. CT. REV. 271 (1997) (debating legitimacy of doctrine allowing pretextual stops to racial profile); Anthony Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956 (1999) (connecting abuse of Terry-stops to stereotyping); see also Sheri Lynn Johnson, *Race and the Decision to Detain a Suspect*, 93 YALE L.J. 214 (1983) (lodging early critique of using profiles).

41. See *Text of President Bush’s 2001 Address to Congress*, WASH. POST (Feb. 27, 2001), <http://www.washingtonpost.com/wp-srv/onpolitics/transcripts/bushtext022701.htm> (reporting Bush criticizing racial profiling).

42. See Sam Howe Verhovek, *A Nation Challenged: Civil Liberties; Americans Give in to Race Profiling*, N.Y. TIMES, at A1 (Sept. 23, 2001) <https://www.nytimes.com/2001/09/23/us/a-nation-challenged-civil-liberties-americans-give-in-to-race-profiling.html> (reporting increased public support for racial profiling); Henry Weinstein et al., *Racial Profiling Gains Support as Search Tactic*, L.A. TIMES, at A22 (Sept. 24, 2001) <http://articles.latimes.com/2001/sep/24/news/mn-49203> (demonstrating effect of the September 11, 2001 attacks on public perception of racial profiling).

43. I use the term “uprising” to describe moments of social unrest that are precipitated by perceived acts of injustice. To call these “riots” demeans the participants motives and makes the cries for justice easy to dismiss. See Akbar, *supra* note 2, at 406 n.1 (eschewing “riot”).

44. See Corinthia A. Carter, *Police Brutality, the Law & Today’s Social Justice Movement: How the Lack of Police Accountability Has Fueled #hashtag Activism*, 20 CUNY L. REV. 521, 536–37 (2017) (describing incident and underlying complaints).

45. See Greg Botelho, *What happened the night Trayvon Martin died*, CNN (May 23, 2012, 10:48AM), <https://www.cnn.com/2012/05/18/justice/florida-teen-shooting-details/index.html>, (reporting on media coverage of Martin slaying).

criticism of the police. Since Ferguson, the police have faced much more frequent and more withering criticism than they were used to.

If just one event sparked the Black Lives Matter movement, it was Zimmerman's slaying of Martin.<sup>46</sup> Just mentioning Skittles will remind many of the controversy. Meanwhile, Sandra Bland,<sup>47</sup> Michael Brown,<sup>48</sup> Philando Castille,<sup>49</sup> Alexia Christian,<sup>50</sup> Eric Garner,<sup>51</sup> Freddie Gray,<sup>52</sup> Mya Hall,<sup>53</sup> Walter Scott,<sup>54</sup> and many others have become synonymous with the perception that law enforcement kills blacks with impunity.<sup>55</sup> More than any other factor, the lack of justice for victims of police killings is what continues to motivate the Black Lives Matter movement.<sup>56</sup>

One of the differences between Black Lives Matter and the civil rights advocacy of the 1980s, 1990s, and 2000s is the tactics used. Black Lives Matter

46. For legal scholarship on this event, see Ann C. McGinley & Frank Rudy Cooper, *How Masculinities Distribute Power: The Influence of Ann Scales*, 91 DENV. U. L. REV. 187, 204 (2013) (detailing Zimmerman's slaying of Martin). See generally Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in a Not Yet Post-Racial Society*, 91 N.C. L. REV. 1555 (2013) (describing incident); Angela Onwuachi-Willig, *Policing the Boundaries of Whiteness: The Tragedy of Being out of Place from Emmett Till to Trayvon Martin*, 102 IOWA L. REV. 1113 (2017) (connecting Zimmerman to earlier racist killers).

47. For the story, see Ray Sanchez, *What we know about the controversy in Sandra Bland's death*, CNN (July 22, 2015), <https://www.cnn.com/2015/07/21/us/texas-sandra-bland-jail-death-explain/index.html> (describing pretextual stop for *de minimis* traffic violation, officer's verbal confrontation with Bland, and her being found dead in her cell).

48. For the story, see Matt Pearce, *Back Story: What happened in Michael Brown shooting in Ferguson, Mo.?*, LA TIMES (Nov. 24, 2014, 6:29 PM), <https://www.latimes.com/nation/la-na-back-story-ferguson-shooting-story.html> (relating story of Brown's police slaying and the police leaving his body uncovered in the street for hours).

49. For the story, see Madison Park, *The 62-second encounter between Philando Castile and the officer who killed him*, CNN (May 30, 2017, 12:10 PM), <https://www.cnn.com/2017/05/30/us/philando-castile-shooting-officer-trial-timeline/index.html> (reporting on live shared police slaying of black man who was trying to reveal he had a licensed firearm).

50. For the story, see Max Blau, *Fatal police shooting of Atlanta mother triggers transparency concerns*, GUARDIAN (May 8, 2015, 8:00 AM), <https://www.theguardian.com/us-news/2015/may/08/fatal-police-shooting-atlanta-mother-triggers-transparency-concerns> (discussing incident).

51. For the story, see TAIBBI, *supra* note 25, at 112–15, 118–22 (detailing the police killing of Eric Garner by chokehold as he cried “I Can't Breathe”).

52. For the story, see Peter Hermann & John Woodrow Cox, *A Freddie Gray primer: Who was he, how did he die, why is there so much anger?*, WASH. POST (April 28, 2015), [https://www.washingtonpost.com/news/local/wp/2015/04/28/a-freddie-gray-primer-who-was-he-how-did-he-why-is-there-so-much-anger/?utm\\_term=.015b90745575](https://www.washingtonpost.com/news/local/wp/2015/04/28/a-freddie-gray-primer-who-was-he-how-did-he-why-is-there-so-much-anger/?utm_term=.015b90745575) (providing details on police “rough ride” that killed Gray).

53. For the story, see Peter Hermann, *Baltimore's Transgender Community Mourns One of Their Own, Slain By Police*, WASH. POST (Apr. 3, 2015), [https://www.washingtonpost.com/local/crime/baltimores-transgender-community-mourns-one-of-their-own-slain-by-police/2015/04/03/2f657da4-d88f-11e4-8103-fa84725dbf9d\\_story.html?utm\\_term=.d8eb455b3d8d](https://www.washingtonpost.com/local/crime/baltimores-transgender-community-mourns-one-of-their-own-slain-by-police/2015/04/03/2f657da4-d88f-11e4-8103-fa84725dbf9d_story.html?utm_term=.d8eb455b3d8d) (explaining transgender community's mourning over police slaying).

54. See Phil Hesel, *Walter Scott Death: Bystander Who Recorded Cop Shooting Speaks Out*, NBC NEWS (Apr. 9, 2015, 11:54 AM), <https://www.nbcnews.com/storyline/walter-scott-shooting/man-who-recorded-walter-scott-being-shot-speaks-out-n338126> (relating story of officer's unprovoked slaying and framing of middle-aged African-American man), in Mary D. Fan, *Democratizing Proof: Pooling Public and Police Body-Camera Videos*, 96 N.C. L. REV. 1639, 1680 (2018).

55. Deborah Tuerkheimer, *Criminal Justice and the Mattering of Lives*, 116 MICH. L. REV. 1145, 1151 (2018) (declaring police killings of blacks happening “with impunity”).

56. See Shjarback et al., *supra* note 12, at 50 (“In response, we have seen the growth of the Black Lives Matter movement . . .”).

often uses aggressive, disruptive methods, such as shutting down bridges and highways or occupying buildings.<sup>57</sup> These rebellious activities are often maligned by the mainstream public, but they have been effective at garnering attention. Had there been no uprisings in Ferguson (and Baltimore), there would have been much less attention paid to why black people are so angry about policing.<sup>58</sup>

Despite the fact that Black Lives Matter “is not an anti-law enforcement group and does not promote violence,” it has violated the norms of our most honored civil rights movements.<sup>59</sup> Acting aggressive, disruptive, and even riotous, tends to upset the mainstream. A “respectability” politics would say “minorities can best respond to structural racism by individually behaving in a respectable manner that elicits the esteem of whites.”<sup>60</sup> Black Lives Matter gives respectability politics the finger.<sup>61</sup>

Another way that Black Lives Matter differs from prior civil rights movements is its dedication to social media. The movement sprung from a twitter hashtag. Further, the related cause of paying specific attention to violence against black women has its own hashtag, #SayHerName. Scholars define #SayHerName as an “intersectional mobilization” in social media.<sup>62</sup> #SayHerName is taken from the title of a report issued by the African American Policy Forum, which is headed by the creator of intersectionality theory, Kimberle Crenshaw.<sup>63</sup> The death of Sandra Bland, who died in custody after being arrested by a white police officer who tailed her and then took offense at her degree of deference to the officer, sparked the report and the twitter movement.<sup>64</sup>

In fact, the social media roots of Black Lives Matter illustrates the intersectional nature of this movement, as its hashtag was created by four black women, one of whom is gender diverse. Intersectionality theory—the recognition that unique self-identities and attributed identities form at the places where different aspects of identity meet<sup>65</sup>—is a core part of the new police criticism. These

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57. Akbar, *supra* note 2, at 409.

58. See Debo P. Adegbile, *Policing Through an American Prism*, 126 YALE L.J. 2222, 2225–26 (2017) (“The topic of policing in America draws new urgency and attention due to viral video clips of individual police encounters and police reform movements such as Black Lives Matter.”).

59. Olson, *supra* note 2, at 50.

60. Obasogie & Newman, *supra* note 2, at 543.

61. Cf. Shankar Vedantam et al., *Voting With a Middle Finger: Two Views on the White Working Class*, NATIONAL PUBLIC RADIO: HIDDEN BRAIN (Oct. 15, 2018, 4:26 PM) <https://www.npr.org/2018/10/15/657547685/voting-with-a-middle-finger-two-views-on-the-white-working-class> (discussing why Trump’s core voters have stayed with him).

62. Brown et al., *supra* note 2, at 1833; see also Veronica Terriquez, *Intersectional Mobilization, Social Movement Spillover, and Queer Youth Leadership in in the Immigrants’ Rights Movement: Table 1*, 62 Soc. PROBS. 343, 345 (2015) (utilizing term “intersectional mobilization”).

63. See Brown et al., *supra* note 3, at 1833.

64. See *id.* (detailing development of movement); see also MALCOLM GLADWELL, *TALKING TO STRANGERS* (2019).

65. See Frank Rudy Cooper, *Against Bipolar Black Masculinity: Intersectionality, Assimilation, Identity Performance, and Hierarchy*, 39 U.C. DAVIS L. REV. 853, 904 (2006) (“Identity performance theory relies on distinctions between the components of self-identity and attributed identity on the one hand and the process of identity negotiation on the other.”); see also Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259, 1264–65, 1268 (explicating relationship between sense of self, stereotypes, and identity performance); Patricia Hill Collins, *Intersectionality’s Definitional Dilemmas*, 41 ANN. REV. SOCIOLOGY 1, 14 (2015)

groups emphasize that they are concerned with sub-groups within black identity well beyond the “straight cis black men” whose members and concerns have usually dominated black civil rights movements.<sup>66</sup>

Black Lives Matter’s assertive methods highlight the extent of the anger over and depth of the critique of policing. The Vision for Black Lives platform is dense with ideas.<sup>67</sup> The Vision’s basic claim is that policing is “a historical and violent force in Black communities.”<sup>68</sup> Its goal is to draw attention to the historic formation of police forces for the purposes of patrolling for runaway slaves,<sup>69</sup> imprisoning and re-enslaving black men after the Civil War,<sup>70</sup> and keeping blacks from moving beyond the boundaries of segregated communities.<sup>71</sup> Moreover, police violence is seen as “endemic to the state.”<sup>72</sup> Here, the point is that the state upholds racial capitalism by reproducing relations of production<sup>73</sup> in which racial minorities are subordinated and exploited as surplus labor<sup>74</sup> or undervalued labor.<sup>75</sup>

Law professor Amna Akbar’s analysis of the Black Lives Matter movement shows its radical potential for reimagining policing. She demonstrates that The Vision for Black Lives can help legal scholars take a broader lens on the problems related to policing and propose more fundamental transformation of the relationships between the entirety of the state, not just law, as well as the market and society.<sup>76</sup> She points out that Black Lives Matter is not so interested in police

(“Individuals and groups differentially placed within intersecting systems of power have different points of view on . . . others’ experiences . . .” that are highly influenced by “their social locations within power relations.”); see generally Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color*, 43 STANFORD LAW REVIEW 1241 (1991) (defining aspects of intersectionality theory).

66. See Brown et al, *supra* note 2, at 1833 (discussing #SayHerName’s focus on black women of all types); see generally, e.g. Devon W. Carbado, *Straight Out of the Closet*, 15 BERKELEY WOMEN’S L.J. 76 (2000) (critiquing historic straight male dominance of black civil rights).

67. Akbar, *supra* note 2, at 409 (describing the Vision for Black Lives as the most thorough policy proposals affiliated with Black Lives Matter); see also *Platform*, MOVEMENT FOR BLACK LIVES, <https://policy.m4bl.org/platform/> (last visited Feb. 14, 2020).

68. Akbar, *supra* note 2, at 410.

69. See, e.g., Olson, *supra* note 2, at 34 (rooting policing in control of bondspersons).

70. See, e.g., DOUGLAS A. BLACKMON, *SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II* (2009); Olson, *supra* note 2, at 35 (discussing use of vagrancy laws to re-enslave).

71. See generally Bennett Capers, *Policing, Race, and Place*, 44 HARV. C.R.-C.L. L. REV. 43, 44 (2009) (describing policing of race).

72. Akbar, *supra* note 2, at 417.

73. These are the social relationships between people in society that uphold the hierarchical relationship between capital and labor.

74. “Surplus labor” is people who are not needed during a normal economy, but can be drawn upon as employees if the economy heats up or strike-breakers are needed. See, e.g., Kenneth B. Nunn, *Race, Crime and the Pool of Surplus Criminality: Or Why the “War on Drugs” Was A “War on Blacks”*, 6 J. GENDER RACE & JUST. 381, 439 (2002).

75. Think here of the fact that, today, Asian-Americans have moved from surplus labor in the late Nineteenth century to the most highly educated segment of the labor force today. Yet, Asian-Americans pay more in degrees for equal pay with less educated whites. See generally, e.g., Chang Hwan Kim & Arthur Sakamoto, *Have Asian American Men Achieved Labor Market Parity with White Men?*, 75 AM. SOC. REV. 934 (2010) (discussing subtle economic inequality affecting Asian-American men).

76. Akbar, *supra* note 2, at 415.

reforms like body cameras or effective misconduct law, as it is in completely reimagining the relationships between the state, the market, and law so as to shift powers of self-determination to black communities.<sup>77</sup>

The new police criticism constitutes a thoroughgoing challenge to the legitimacy of the police. In retrospect, then, we should have expected that the new police criticism would provoke an aggressive response from law enforcement and its supporters.

### B. *The Blue Lives Matter Response*

Having considered the nature of the new police criticism, we should ask, how have the police and their supporters responded to that challenge? Certainly, some departments have responded by reforming in various ways.<sup>78</sup> This might include a renewed emphasis on positive community relations.<sup>79</sup> It might also involve greater cooperation with protestors.<sup>80</sup> And it encompasses requirements for body cameras and strengthened use of force policies.<sup>81</sup> But the predominant response to the new police criticism has been resistance.

The resistance to Black Lives Matter movements has coalesced around the Blue Lives Matter movement. Hence, Criminal Justice professor Lisa M. Olson declares that Blue Lives Matter is a “backlash” to Black Lives Matter.<sup>82</sup> Blue Lives Matter’s declared mission is simply to give voice to the police perspective.<sup>83</sup> Their main message, though, is that there is a “war on police.”<sup>84</sup> And they spend a great deal of energy claiming that Black Lives Matter is anti-police.<sup>85</sup> Moreover, some believe they are seeking to “silence those speaking out against

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77. *Id.* at 408.

78. See Jack Crowe, *Black Lives Matter to Contribute to Chicago Police-Reform Plan*, THE NATIONAL REVIEW (March 21, 2018 3:31 PM) <https://www.nationalreview.com/2018/03/black-lives-matter-to-contribute-to-chicago-police-reforms/> (discussing Black Lives Matter’s involvement with Chicago reforms); Jerry Abramson, *10 Cities Making Real Progress Since the Launch of the 21st Century Policing Task Force*, THE WHITE HOUSE: PRESIDENT BARACK OBAMA (May 18, 2015, 7:26 PM), <https://obamawhitehouse.archives.gov/blog/2015/05/18/10-cities-making-real-progress-launch-21st-century-policing-task-force> (providing examples of police reform).

79. See, e.g., Anisha Nandi, *Neighborhood Policing Program Builds Relationships To Cut Crime*, CBS NEWS (Mar. 27, 2018, 11:55 AM), <https://www.cbsnews.com/news/nypd-community-policing-lower-crime/> (extolling virtues of neighborhood policing).

80. Alan K. Chen, *Rights Lawyer Essentialism and the Next Generation of Rights Critics*, 111 MICH. L. REV. 903, 921 (2013) (noting success of disruptive civil rights protests); see also Alafair Burke, *Policing, Protestors, and Discretion*, 40 FORDHAM URB. L.J. 999, 1016 (2013) (describing positive police coordination with protestors).

81. See 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, 633–36 (2018) (proposing revising police use of force legislation); see also Mary D. Fan, *Camera Power: Proof, Policing, Privacy, and Audiovisual Big Data* (forthcoming 2019) (discussing potential and problems with body cameras).

82. Olson, *supra* note 2, at 50.

83. *Id.*

84. *Id.* at 51.

85. *Id.* at 50–51.

the structural racism espoused and protected by law enforcement.”<sup>86</sup> Accordingly, this part of the Article considers the Blue Lives Matter movement as a response.

1. *A Social Movement Built on White Backlash*

The Blue Lives Matter movement is probably better known for its symbol than its agenda. At least since Roland Barthes 1957 book, *Mythologies*, we have recognized that images, especially those about race and nation, can be powerful.<sup>87</sup> Hence, we should begin consideration of the Blue Lives Matter movement by noting the implicit racial message in its image. A google search for “Blue Lives Matter Flag” yields this image:<sup>88</sup>



The first thing to note is that the multicolored flag has been made less colorful by reducing the blue and erasing the red. At a subconscious level, whether intended or not, this flag sends the message that there is a crisis because it goes from colorful to dark-toned.<sup>89</sup> Moreover, the blue line in the image is one that would otherwise be white. This might send the message that the police are white. Given that the flag is often called the “thin blue line,” it might also be a message that the police are patrolling the boundaries between black and white.

Second, note the way a seller of thin blue line paraphernalia describes the image in nationalist terms:

The Thin Blue Line American Flag serves as a testament to the fallen and living law enforcement officers across the country. . . . It is perfect for showing your support to our brothers and sisters in blue. By displaying this

86. *Id.* (citing *Our Mission*, Blue Lives Matter, <https://bluelivesmatternyc.org/pages/frontpage> (last visited Mar. 4, 2020)).

87. For a quick look at Barthes famous analysis of the image of a black soldier in France, see *Roland Barthes: Mythologies*, PARIS MATCH, <https://courses.nus.edu.sg/course/elljwp/parismatch.htm> (last visited Mar. 4, 2020).

88. See e.g., *Search: Blue Lives Matters Flag*, GOOGLE, <https://www.google.com/search?q=blue+lives+matter+flag&ie=&oe=> (last visited Feb. 2, 2020).

89. Or, it could be a subtle advocacy for removing the color from the country.

memento outside your home, you are showing the utmost respect and honor to the law enforcement officers who serve this country.<sup>90</sup>

Here we see a strong connection between police officers and nationalism. One might argue that cop fragility is about white anxiety over the changes in the racial demographics of the nation. Specifically, we will soon be a majority-minority nation.<sup>91</sup> Hence, a crucial take-away from this discussion of the Blue Lives Matter image is that it is a social movement that is ripe with the potential to be a repository of white resentment of black and brown progress.<sup>92</sup>

Beyond the danger of the Blue Lives Matter image as repository of white resentment is the clear appropriation of the black civil rights narrative implied in the group's very title. Many scholars have noted that the Blue Lives Matter movement is a direct response to the Black Lives Matter movement. For instance, Communications scholar James Alexander McVey declares that "[t]he Blue Lives Matter movement also became a particularly powerful nodal point within the constellation of conservative discourse in retaliation against both the Black Lives Matter movement and the Barack Obama presidency."<sup>93</sup> Later, this Article will discuss the Blue Lives Matter movement as a victim blaming response to the Black Lives Matter movement.<sup>94</sup> First, though, a few words about how Obama spawned Blue Lives Matter.

For some whites, Obama's rise was a sign they were losing power in society. Even before he was the Democratic nominee for President, he was publicly associated with monkeys.<sup>95</sup> Early in his presidency, a Congressman broke decorum by interrupting the President's State of the Nation speech with the statement, "you lie!"<sup>96</sup> So, perhaps notorious white supremacist David Duke was right to say that Obama served as a "visual aid" for whites to believe they had lost *their* country.<sup>97</sup>

Numerous scholars assert that a grievance politics has emerged amongst conservative whites. Rhetoric scholar Patricia G. Davis thus describes "[w]hiteness as an aggrieved subjectivity."<sup>98</sup> Scholar Matthew W. Hughey goes further, saying, many whites believe their grievances as the victims of "reverse racism"

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90. *Thin Blue Line American Flag-3 By 5 Foot Flag with Grommets*, THIN BLUE LINE SHOP, <https://thinbluelineshop.com/products/tbl-american-flag> (last visited Feb. 2, 2020).

91. See William Frey, *The U.S. Will Become Minority White in 2045*, *Census Projects*, March 14, 2018 <https://www.brookings.edu/blog/the-avenue/2018/03/14/the-us-will-become-minority-white-in-2045-census-projects/> (discussing Census prediction of loss of white majority in 2045).

92. See McVey, *supra* note 7, at 50 (arguing Blue Lives Matter is a "site of online white victimization").

93. *Id.* at 50.

94. See *infra* Section III.C.i (applying blaming the victim thesis).

95. See Associated Press, *Political T-shirts Draw Racism Charge*, YOUTUBE (May 14, 2008) <https://www.youtube.com/watch?v=rbZp17h19tY> (describing shirts animalizing Obama).

96. See ABC News, *GOP Rep. to Obama: 'You Lie!'*, YOUTUBE, Sep. 9, 2009) <https://www.youtube.com/watch?v=qgce06Yw2ro> (depicting interruption).

97. *White Supremacists See Hope In Obama Win*, CBS NEWS (Aug. 8, 2008, 7:39 AM) <https://www.cbsnews.com/news/white-supremacists-see-hope-in-obama-win/>, quoted in McVey, *supra* note 7, at 9.

98. Patricia G. Davis, *Reversal of Injury in the Obama Era: Shelby County v. Holder, Resentment, Moral Authority, and the Discursive Construction of White Victimhood*, 36 RHETORIC REVIEW 320, 321 (2017).

provide them with a “white badge of courage.”<sup>99</sup> McVey says this grievance politics helped reality television star Donald Trump become President.<sup>100</sup>

Conservatives also linked Obama’s blackness to a hatred of police. According to McVey, conservatives saw Obama as hating the police.<sup>101</sup> But they likely did so based on the historic “metonymic linkage between blackness and a perceived anti-police radicalism.”<sup>102</sup> Seeing that Obama is black, they assume he is anti-police.

A moment early in Obama’s presidency helps explain how conservatives forged the link in the minds of some conservative and Alt-right whites between fear of loss of power in general and fear of a “war on the police.”<sup>103</sup> Those groups strongly criticized Obama for saying “the Cambridge police acted stupidly” in arresting Harvard Professor Henry Louis Gates for disorderly conduct when Gates was loud upon being questioned about the ownership of his home.<sup>104</sup> President Obama’s acknowledgement of longstanding criticism of the police within black communities, though “tepid,” was sufficient to convince conservative and Alt-White critics that he was anti-police.<sup>105</sup> It was against the Obama-thus-Race-thus-Police backdrop that Blue Lives Matter became the response of the police and their mostly white supporters to the new police criticism.<sup>106</sup> As a social movement, therefore, Blue Lives Matter represents resistance to the racial challenge presented by both general demographic change and specific new police critics. Just the fact of racial minorities’ increased power to have their criticisms heard may pose a racial threat to some whites.

Moreover, the Blue Lives Matter movement’s attempts to make assaults on the police hate crimes reveals a fragility about being criticized. While this Article will discuss cop fragility more fully later, we need to mark the fact that Blue Lives Matter resists change. When Black Lives Matter movements say, “you need to stop disproportionately killing people of color,” Blue Lives Matter responds, “no, the real problem is you assaulting us.” This attempt to invert the critique is a way of shooting the messenger.

We see that inversion most clearly in the fact that Blue Lives Matter takes laws that are meant to protect oppressed minorities—hate crimes—and seeks to make them about protecting the police. This move is a statement that although

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99. Matthew W. Hughey, *White Backlash in the “Post-Racial” United States*, 37 *ETHNIC & RACIAL STUDS.* 721, 727 (2014).

100. McVey, *supra* note 7, at 57.

101. *Id.* at 12.

102. *Id.* at 12–13.

103. *See id.* at 12–13 (discussing narrative that Obama was anti-police).

104. *See generally* Frank Rudy Cooper, *Masculinities, Post-Racialism and the Gates Controversy: The False Equivalence between Officer and Civilian*, 11 *NEV. L.J.* 1 (2010) (discussing arrest and its legal and social implications).

105. McVey, *supra* note 7, at 13.

106. There are some hints that Blue Lives Matter is a white-led, white-oriented movement. See Carrie L. Rosenbaum, *The Natural Persistence of Racial Disparities in Crime-Based Removals*, 13 *U. ST. THOMAS L.J.* 532, 538 (2017) (“The “Blue Lives Matter” movement’s de-legitimization and demonization of communities of color, sanctioned by the then president-elect . . .”).



hate crime laws usually target racism or anti-Semitism, the police and their advocates are the “real victims.” The comparison between survivors of apartheid or the Holocaust and the police might be deemed offensive as a substantive matter.<sup>107</sup> What it certainly does is shift the topic from the civil rights of oppressed minorities to the rights of a group that has been privileged: the police. To see police privilege today, one need only consider the way they are lionized as “first responders.”<sup>108</sup> The history of the police also reveals a little bit of public criticism and a lot of public plaudits.<sup>109</sup>

## 2. *The Legal Movement*

Blue Lives Matter’s legal argument is that we need to make attacking the police a hate crime. The laws are ostensibly created to protect police officers from harm. The basic rationale is that if penalties for assaulting the police increase, criminals’ willingness to harm cops will decrease.

The law this movement is based upon, Louisiana’s, amends the hate crime statute to include law enforcement. It adds the language “actual or perceived employment as a law enforcement officer or firefighter.”<sup>110</sup> Among the many crimes that qualify for a sentence enhancement are assault and battery. One Louisiana police chief thus claimed the statute made resisting arrest a hate crime.<sup>111</sup> If trying to push an officer away from you is now a hate crime, *a fortiori*, actual attempts to harm officers are hate crimes. By going on the offense against potential criminals through hate crime legislation, Blue Lives Matter bills seek to thereby protect the police from harm.

We can make four observations about the success of Blue Lives Matter as a legal movement. First, perhaps in a sign that calls for Blue Lives Matter laws were a brief trend, most states and the federal government proposed extra protection for the police in 2016, 2017, or 2018, but then did not enact such bills.

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107. See Olson, *supra* note 2, at 15–16 (criticizing analogy between police and historically oppressed minorities).

108. Cf. House passes bill to reauthorize funding for 9/11 victims, 2019 WL 3049191 (“The first responders who rushed into danger on September 11th, 2001, are the very definition of American heroes and patriots.”) (quoting Sen. Mitch McConnell (R-KY)).

109. See Samuel Vincent Jones, *Police, Heroes, and Child Trafficking: Who Cries When Her Attacker Wears Blue?*, 18 NEV. L.J. 1007, 1008 (2018) (referring to “Our nation’s perennial allegiance to the idea of police officers as national heroes . . .”).

110. See Olson, *supra* note 2, at 14 (citation omitted).

111. See Julla 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.huffpost.com/entry/blue-lives-matter-law-louisiana\\_n\\_588653dde4b0e3a7356ae3ae](https://www.huffpost.com/entry/blue-lives-matter-law-louisiana_n_588653dde4b0e3a7356ae3ae) (reporting on comments).

As of December 2018,<sup>112</sup> those states includes Arkansas,<sup>113</sup> California,<sup>114</sup> Connecticut,<sup>115</sup> Delaware,<sup>116</sup> Florida,<sup>117</sup> Illinois,<sup>118</sup> Kansas,<sup>119</sup> Maine,<sup>120</sup> Maryland,<sup>121</sup> Massachusetts,<sup>122</sup> Missouri,<sup>123</sup> New Jersey,<sup>124</sup> New Mexico,<sup>125</sup> New York,<sup>126</sup> North Carolina,<sup>127</sup> Pennsylvania,<sup>128</sup> Rhode Island,<sup>129</sup> South Carolina,<sup>130</sup> Vermont,<sup>131</sup> Virginia,<sup>132</sup> Washington,<sup>133</sup> and Wisconsin.<sup>134</sup> That is 22 states, plus the federal government, that considered Blue Lives Matter bills but did not see them through to laws. Those states are not unified in their character.

Second, in a sign that there remains a substantial interest in Blue Lives Matter bills across the nation, the following states had recently adopted some form of extra protection for police officers as of December 2018: Arizona,<sup>135</sup>

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112. Special thanks to my research librarian, Liz Manriquez, for preparing the chart upon which these statements are based.

113. See H.B. 1578, 91st Gen. Assemb., Reg. Sess. (Ark. 2017).

114. See 2017 Bill Text CA A.B. 2, 2017 Gen. Assemb., Reg. Sess. (Cal. 2017) (“This bill would make any criminal act, except the crime of resisting, delaying, or obstructing an officer, committed in whole or in part because of the victim’s status as a peace officer, as defined, a hate crime.”)

115. See, e.g., H.B. 5297, 2017 Gen. Assemb., Reg. Sess. (Conn. 2017); H.B. 7215, 2017 Gen. Assemb., Reg. Sess. (Conn. 2017).

116. S.B. 263, 148th Gen. Assemb. Sess. (Del. 2016) (adding a criminal penalty for offenses against emergency personnel, including law enforcement officers).

117. S.B. 96, 2019 Fla. S., Reg. Sess. (Fla. 2019) (adding protections for police and fire canines).

118. See, e.g., H.B. 1801, 100th Gen. Assemb., Reg. Session (Ill. 2017) (trying to define hate crime to include peace officers and other emergency services personnel).

119. See generally, S.B. 1, 2015 Legis. Sess. (Kan. 2015).

120. L.R. 49, 128th Legis., 1st Reg. Sess. (Me. 2017).

121. See, e.g., S.B. 42, 2017 Gen. Assemb., Reg. Sess. (Md. 2017) (adding law enforcement to a protected class under hate crimes).

122. For an example, see S.B. 1377, 190th Gen. Ct., Reg. Sess. (Mass. 2017) (trying to add attacks on police officers under the definition of a hate crime).

123. See, e.g., H.B. 607, 99th Gen. Assemb., 1st Reg. Sess. (Mo. 2017) (adding additional penalties for attacks on law enforcement).

124. S.B. 1686, 217th Legis. (N.J. 2017) (expanding bias intimidation to include offenses against law enforcement).

125. H.B. 95, 52nd Legis., 2nd Reg. Sess. (N.M. 2017) (addressing hate crimes against law enforcement).

126. S.B. 8212, 239th Legis. Sess. (N.Y. 2016) (attempting to amend the law to include law enforcement officers).

127. See generally S.B. 109, 2017 Gen. Assemb., Reg. Sess. (N.C. 2017).

128. S.B. 1383, 200th Gen. Assemb., Reg. Sess. (Penn. 2016).

129. H.B. 5208, 2017-2018 Legis. Sess. (R.I. 2017) (proposing the death penalty in situations where emergency personnel are murdered by an ambush).

130. See H.B. 3184, 122nd Gen. Assemb., 1st Reg. Sess. (S.C. 2017).

131. H.B. 212, 74th Biennial Sess. (Vt. 2017) (attempting to add penalties for killing law enforcement dog).

132. See generally H.B. 1398, 2017 Gen. Assemb. Sess. (2017).

133. See, e.g., H.B. 1986, 65th Legis., Reg. Sess. (Wash. 2017).

134. Assemb. B. 48, 2017 Legis. (Wisc. 2017) (trying to expand the definition of hate crimes).

135. See S.B. 1366, 53rd Legis., 1st Reg. Sess. (Ariz. 2017) (adding an aggravating factor if there is evidence an officer was attacked because of employment).

Arkansas,<sup>136</sup> Georgia,<sup>137</sup> Idaho,<sup>138</sup> Kentucky,<sup>139</sup> Louisiana,<sup>140</sup> Mississippi,<sup>141</sup> Nevada,<sup>142</sup> Oklahoma,<sup>143</sup> Tennessee,<sup>144</sup> Texas,<sup>145</sup> Utah,<sup>146</sup> and West Virginia.<sup>147</sup> That makes 13 states that enacted Blue Lives Matter laws between 2016–2018. These states are heavily Southern and represent a significant swath of the non-coastal United States.

Third, of the remaining jurisdictions, most appear to have declined to initiate Blue Lives Matter bills, but a few may have considered them under unusual language.

Finally, the Blue Lives Matter movement is not done calling for these laws, so the question of their social and legal impact remains an important one.

### III. WHITE FRAGILITY AND COP FRAGILITY

The last Part of the Article described a new critique of the police and the backlash that it sparked. To explain the relationship between the new police criticism and Blue Lives Matter, we need a theory of why people respond to racial criticism in particular ways. Robin DiAngelo's white fragility theory looks at why some whites are unwilling to engage in meaningful conversations about race. DiAngelo uses critical race theory to argue that many whites will go to great lengths to avoid talking about race. Such recalcitrance echoes Blue Lives Matter resistance to the new police criticism. Hence, this Part of the Article proposes that there is a "cop fragility" afoot, which helps explain the Blue Lives Matter countermovement. This Part first explicates white fragility theory and then details the analogous trend of cop fragility.

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136. H.B. 1578, 91st Gen. Assemb., Reg. Sess. (Ark. 2017) (creating a misdemeanor offense for individuals who obstruct first responder performance).

137. See S.B. 160, 154th Gen. Assemb., Reg. Sess. (Ga. 2017) (creating the Back the Badge Act of 2017).

138. See, e.g., S.B. 1313, 64th Legis., 2nd Reg. Sess. (Idaho 2018).

139. See H.B. 14, 2017 Gen. Assemb., Reg. Sess. (Ky. 2018) (adding employment as a peace officer or emergency medical services to the list of profession protected against hate crimes).

140. H.B. 953, 2016 Legis., Reg. Sess. (La. 2016) (amending hate crimes to include crimes against law enforcement).

141. See, e.g., S.B. 2376, 2017 Legis., Reg. Sess. (Miss. 2017) (creating the "Blue, Red and Med Lives Matter Act of 2017").

142. S.B. 541, 79th Gen. Assemb., Reg. Sess. (Nev. 2017) (enhancing criminal penalties for crimes against first responders).

143. See S.B. 362, 55th Legis., 1st Sess. (Okla. 2015).

144. See, e.g., S.B. 1342, 110th Gen. Assemb., Reg. Sess. (Tenn. 2017) (detailing offenses committed against uniformed personnel).

145. H.B. 2908, 85th Legis., Reg. Sess. (Tex. 2017).

146. See, e.g., H.B. 433, 62nd Legis., Gen. Sess. (Utah 2017) (creating a penalty for targeting law enforcement).

147. S.B. 578, 82nd Legis., 2nd Sess. (W. Va. 2017).

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A. *White Fragility Theory*

DiAngelo says that whites are tender about discussing race, but this is not a sign of weakness. Rather, refusing to discuss race prevents social change, locking in white privilege.

1. *Defining White Fragility*

DiAngelo, who is white, discovered white fragility through her work as a diversity trainer.<sup>148</sup> She was curious why talking about racism, or even race alone, triggered defensive responses from many whites. She observes the following about most white people she encountered in trainings:

Socialized into a deeply internalized sense of superiority that we are either unaware of or can never admit to ourselves, we become highly fragile in conversations about race. . . . The smallest amount of racial stress is intolerable—the mere suggestion that being white has meaning often triggers a range of defensive responses.<sup>149</sup>

So, white fragility is a frailty in terms of the stamina to have constructive conversations about race and a tendency to react negatively to the assertion that racism continues.<sup>150</sup> DiAngelo found that white participants in diversity training often shut down or became downright aggressive<sup>151</sup> when confronted with the ideas that whites' race matters, that we live in a white supremacist society, or that whites are privileged by racism.<sup>152</sup>

What fragile whites do not see, according to DiAngelo, is the way two beliefs prevent them from understanding racism. First, belief in the possibility of being an objective individual leads them to believe that their experiences and world views are somehow sealed off from the social processes of racial formation and racism.<sup>153</sup> Second, belief that only bad people can be racist renders invisible the mechanisms that actually do most of the work of perpetuating racism.<sup>154</sup>

2. *Debunking the Myth of the Objective Individual*

A fundamental barrier to the recognition of racism is the problem that white people tend to see themselves as just individuals, unmarked by group status.<sup>155</sup> Whites are “taught not to see [themselves] in racial terms.”<sup>156</sup> Whites' social

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148. See DIANGELO, *supra* note 13, at 2–3 (summarizing experiences during diversity training).

149. *Id.* at 2.

150. *Id.*

151. In the policing context, incidents such as the NYPD's turning of backs on de Blasio, see *supra* notes 32–36 and accompanying text, and threats of depolicing, see Cooper, *supra* note 12, at 363, are examples of aggressive responses to civil rights complaints that suggest the police are going on the attack because they've been criticized.

152. See DIANGELO, *supra* note 13, at 2–3 (summarizing experiences during diversity training).

153. *Id.* at 3.

154. *Id.*

155. *Id.* at 9.

156. DIANGELO, *supra* note 13, at 7.

position means that as they go through life, their race is unremarkable.<sup>157</sup> Because whites are the unstated norm for our social world—the “nude” in nude stockings,<sup>158</sup> the “flesh” in flesh-colored emoji’s,<sup>159</sup> etc.—whites tend to ignore the fact that their ways of seeing the world are white-specific.<sup>160</sup> In this sense, whiteness is solipsistic; whites tend to see their perspective as the universal reference point.<sup>161</sup>

Relatedly, individualism is a false narrative that suggests that identity characteristics such as race, class, and gender are irrelevant, at least in whites, the middle-class, and men.<sup>162</sup> The error of claims to be “just a person” without a race is seen in the fact that people in this society automatically notice other people’s phenotypical characteristics.<sup>163</sup> For instance, when people cannot pinpoint someone’s race, they often spend great energy on “where are you really from?” questions. This is the problem of imputed permanent foreignness of Asian-Americans and Latinx.<sup>164</sup> Given constant attempts to assign people to a race, one can be an individual as a matter of self-identity; as a matter of how others view an individual, everyone has a race.<sup>165</sup>

Further, we all intuitively understand that there are binary oppositions amongst race, gender, sex orientation, and so on, that privilege one group and denigrate others.<sup>166</sup> Whites are privileged over non-whites, men are privileged over other genders, and straights are privileged over sexual minorities. To ignore the fact of identity hierarchies is to be blind to the reality that we all learn about the meanings of our own and other people’s identities through popular culture.<sup>167</sup>

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157. See *id.* at 52 (describing DiAngelo’s experience of race).

158. See William M. Wiecek & Judy L. Hamilton, *Beyond the Civil Rights Act of 1964: Confronting Structural Racism in the Workplace*, 74 LA. L. REV. 1095, 1123 (2014).

159. See Robinson Meyer, *Finally, Emoji People of Color*, THE ATLANTIC (Feb. 23, 2015), <https://www.theatlantic.com/technology/archive/2015/02/finally-emoji-people-of-color/385843/>.

160. See Corbin, *supra* note 14, at 44 (quoting Barbara J. Flagg, “*Was Blind, but Now I See*”: *White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 957 (1993). Understanding racial formation reveals that whiteness is in fact a racial lens through which whites see the world; whiteness is a particular perspective on the world. *Id.* at 44; DIANGELO, *supra* note 13, at 11.

161. See Corbin, *supra* note 14, at 44–45 (providing examples of white solipsism).

162. DIANGELO, *supra* note 13, at 10; see also *id.* at 10 (“Individualism is a story line . . .”).

163. See Jacques-Corey Cromier, *The Influence of Phenotypic Variation on Criminal Judgement*, (June 2012) (unpublished M.S. thesis, Georgia Southern University) (on file with Georgia Southern University Libraries).

164. See, e.g., Robert S. Chang & Neil Gotanda, *The Race Question in LatCrit Theory and Asian American Jurisprudence*, 7 NEV. L.J. 1012, 1023 (2007) (discussing Asian-Americans permanent foreignness); Francisco Valdez, *Latino/a Ethnicities, Critical Race Theory, and Post-Identity Politics in Postmodern Legal Structure: From Practices to Possibilities*, 9 LA RAZA L.J. 1, 18–19 (1996) (discussing presumptions Latinx are foreign).

165. See Frank Rudy Cooper, *We Are Always Already Imprisoned: Hyper-Incarceration and Black Male Identity Performance*, 93 B.U. L. REV. 1185, 1189 (2013) (distinguishing self-identity, attributed identity, and identity negotiation).

166. DIANGELO, *supra* note 13, at 10–11. DiAngelo adds that “we also know that it is ‘better’ to be in one of these groups than to be in its opposite—for example, to be young rather than old, able-bodied rather than have a disability, rich rather than poor.” *Id.* at 10.

167. *Id.* at 10.

The impossibility of being racially objective is highlighted by the fact that scholars are now clear that race is both scientifically meaningless and highly socially relevant. On the one hand, there is no such thing as race, given that there is more biological difference within “races” than between them.<sup>168</sup> Because race is socially constructed, no racial group in this country, including whites, can stand outside of the social processes of racial formation. As DiAngelo notes, “If group membership is relevant then we don’t see the world from the universal human perspective but from the perspective of a particular kind of human.”<sup>169</sup> “Racial formation” describes the ways the meanings of races are formed over time through social acts, rather than being grounded in nature.<sup>170</sup> DiAngelo summarizes how racial formation has operated in the U.S. in a brief recounting of Supreme Court interpretations of the meaning of whiteness:

For example, Armenians won their case to be reclassified as white with the help of a scientific witness who claimed they were scientifically “Caucasian.” In 1922, the [S]upreme Court ruled that the Japanese could not be legally white because they were scientifically classified as “Mongoloid.” A year later, the [C]ourt stated that Asian Indians were not legally white, even though they were also scientifically classified as “Caucasian.” To justify these contradictory rulings, the [C]ourt stated that being white was based on the common understandings of the white man.<sup>171</sup>

The meanings of races have always come from such social constructions, not scientific difference.

On the other hand, race matters, for racial formation affects both the distribution of material resources and the structure of interpersonal behaviors.<sup>172</sup> Meanwhile the wealth gap is largely unchanged in the last forty years and employers still discriminate against racial minorities.<sup>173</sup> Being white usually allows you to avoid the heightened scrutiny of law enforcement.<sup>174</sup> It makes it much

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168. See, e.g., Trina Grillo, *Anti-Essentialism and Intersectionality: Tools to Dismantle the Master’s House*, 10 BERKELEY WOMEN’S L.J. 16, 24 (1995) (explaining that race is social construct, not biological); Kimani Paul-Emile, *The Regulation of Race in Science*, 80 GEO. WASH. L. REV. 1115, 1130–31 (2012) (showing race is a “genetically meaningless construct” as all humans are 99.9% genetically identical); Audrey Smedley & Brian D. Smedley, *Race as Biology is Fiction, Racism as a Social Problem is Real: Anthropological and Historical Perspectives on the Social Construction of Race*, 60 AM. PSYCHOLOGIST 16 (2005) (explaining racial distinctions are not genetically discrete, reliably measured, or scientifically meaningful).

169. DIANGELO, *supra* note 13, at 11.

170. See Michael Omi & Howard Winant, *Blinded by Sight: The Racial Body and the Origins of the Social Construction of Race*, 41 LAW & SOC. INQUIRY 1062, 1064 (2016).

171. DIANGELO, *supra* note 13, at 17.

172. Frank Rudy Cooper, *Our First Unisex President?: Black Masculinity and Obama’s Feminine Side*, 86 DENV. U. L. REV. 633, 643 (2009). As DiAngelo notes, “[b]eing perceived as white . . . is a social and institutional status and identity imbued with legal, political, economic, and social rights and privileges that are denied to others.” DIANGELO, *supra* note 13, at 24.

173. See Robert Manduca, *Income Inequality and the Persistence of Racial Economic Disparities*, 5 Soc. SCI. 182, 187–88 (2018).

174. See, e.g., Norma M. Riccucci et al., *Representative Bureaucracy, Race, and Policing: A Survey Experiment*, 28 J. PUBLIC ADMIN. RES. & THEORY 506, 508–09 (2018); Christine Hauser & Jacey Fortin, *‘We Only Kill Black People,’ Police Officer Says During Traffic Stop*, N.Y. TIMES (Aug. 31, 2017), <https://www.nytimes.com/2017/08/31/us/black-kill-police-georgia.html>.

more likely that your interests will be accounted for by elected officials.<sup>175</sup> Finally, whites are simply treated better socially than racial minorities.

The consequence of the social significance of race is that no member of this society can truly be just an individual. The myth of the un-raced individual has been debunked. A sub-part of this problem, then, is that whites have been trained to believe in objectivity.<sup>176</sup>

“Objectivity” says “it is possible to be free of all bias.”<sup>177</sup> When whites assume they can be individualistic and objective, they blind themselves to racism. Constitutional law scholar Caroline Mala Corbin points out that whites are generally “unaware of the unconscious racism that gives whites a boost in supposedly objective evaluations.”<sup>178</sup> Likewise, in DiAngelo’s trainings, people often insisted that they could be free from bias as long as they treated everyone the same.<sup>179</sup> Such a blind person is said to have been objective because they ignored the race of the people they were dealing with. This is the idea of “colorblindness.”

DiAngelo does not believe in colorblind objectivity.<sup>180</sup> And rightly so, as critical theorists have long destroyed the idea that there could be a “view from nowhere” that is not influenced by one’s particular social position.<sup>181</sup> Because we are members of socially constructed groups that have significant material consequences, our statuses matter to our experiences and worldviews.<sup>182</sup>

### 3. *Uncoupling Racism from Bad Intent*

The key problem with many whites’ views on racism is that they think they are not part of the problem as long as they are not themselves immoral actors committing intentional acts.<sup>183</sup> Bad intent theory says that one is only racist if one consciously desires to harm racial minorities specifically because they are racial minorities.<sup>184</sup> Under that theory, the only people who can be recognized as contributing to or benefitting from racism are those who are morally “bad.”<sup>185</sup> This reasoning prevents whites from seeing structural or implicit forms of bias.

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175. See generally TERRY SMITH, BARACK OBAMA, POST-RACIALISM, AND THE NEW POLITICS OF TRIANGULATION (2012) (analyzing race and voting).

176. See Corbin, *supra* note 14, at 47.

177. DIANGELO, *supra* note 13, at 8.

178. Corbin, *supra* note 14, at 47.

179. DIANGELO, *supra* note 13, at 9.

180. *Id.* at 11.

181. See generally Thomas Nagel, *The View From Nowhere* (1996) (critiquing notion of philosophical objectivity); see also Introduction, in CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT, at xiii-xxxii (Kimberle Crenshaw et al. eds., 1995) (describing and extending Critical Legal Studies’ critique of objectivity).

182. See DIANGELO, *supra* note 13, at 11 (“If group membership is relevant than we don’t see the world from the universal human perspective but from the perspective of a particular kind of human.”).

183. *Id.* at 9.

184. See *id.* at 4 (describing beliefs that make it hard to see racism); see also sources cited *supra* note 20 (noting case law constructing purposeful intent standard).

185. *Id.* at 31 (debunking notion racism about “‘good people’ versus ‘bad people’”); see also Corbin, *supra* note 14, at 47 (challenging idea that “race discrimination always has a bad actor.”).

DiAngelo agrees with critical race theorists of law that racism is structural. She defines mere prejudice as the simple pre-judging of people based on their group status.<sup>186</sup> DiAngelo acknowledges that all people make such pre-judgments, but that still leaves open the question of how certain social groups get categorized in negative ways. The answer is that racial categories were created in order to justify unequal treatment of Native Americans, blacks, once-and-present-Mexicans, Asian-Americans, and so on.<sup>187</sup> This explanation of racial prejudice is in keeping with critical race theorists such as Jerry Kang, who says that local media is a “trojan horse” that spreads implicit bias against racial minorities in the guise of news.<sup>188</sup> So, prejudices stem from prevalent cultural messages. Prejudice is created by our culture, but can exist at the level of implicit, as opposed to explicit, thought. Hence, even many black people evidence implicit bias against black people in measures of subconscious prejudice.<sup>189</sup>

Prejudice is always ripe with the possibility that someone will discriminate against particular people based on those cultural messages. For DiAngelo pre-judgment becomes “discrimination” only when we *act* on the basis of prejudice.<sup>190</sup> Even race-based discriminatory acts fall short of racism, she says, if they are not part of structurally-supported discrimination.<sup>191</sup>

In DiAngelo’s view, racism occurs only when prejudice turns to racial discrimination backed by social force. Racism is a state of affairs wherein one social group’s collective prejudice against another social group or groups is made effective by the first group’s control of social institutions.<sup>192</sup> The ideology of white supremacy, which is just a particular worldview, can influence the distribution of material goods and affect social interactions because it exerts social force.<sup>193</sup> For instance, whites’ control of the media, in conjunction with the power of popular culture to influence people, means their prejudice dictates what most people, including racial minorities, will believe about racial minorities.<sup>194</sup> “This authority and control,” says DiAngelo, “transforms individual prejudices into a far-reaching system that no longer depends on the good intentions of individual actors.”<sup>195</sup> In short, the system of racism is self-reinforcing. That is why the question of individual bad intent is irrelevant.

Not seeing racism unless you see bad intent keeps many whites blissfully unaware of racism. As DiAngelo says, “our simplistic definition of racism—as

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186. DIANGELO, *supra* note 13, at 19.

187. DIANGELO, *supra* note 13, at 16.

188. See Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1549–57 (2005).

189. See <https://www.bbc.com/news/magazine-40124781> (citing Project Implicit).

190. See generally DIANGELO, *supra* note 13.

191. *Id.*

192. DIANGELO, *supra* note 13, at 20; see also *id.* at 83 (“[I]n the U.S. and other white/settler nations, only white people are in the position to oppress people of color collectively and throughout the whole of society.”).

193. See *id.* at 21.

194. *Id.* at 90 (“[W]e live in a culture that circulates relentless messages of white superiority . . .”); see also Lawrence, *supra* note 20, at 322 (declaring “this cultural belief system has influenced all of us, we are all racists”).

195. DIANGELO, *supra* note 13, at 21.



intentional acts of racial discrimination committed by immoral individuals—engenders a confidence that we are not part of the problem and that our learning is thus complete.”<sup>196</sup> So, if whites do not intend to be racist, there is to be no further consideration of whether racism is operating in the context. Put another way, DiAngelo sees a white assumption that “my not having intended racism cancels out the impact of my behavior.”<sup>197</sup> There is certainly something to the idea that we are more socially condemning of intended harm. But even in Criminal Law, and certainly in Torts law, having a degree of desiring the harm short of the purpose to bring it about still suggests moral responsibility for one’s actions.<sup>198</sup>

DiAngelo wants us to understand that the overwhelming control that whites have over important social, economic, and political institutions means this is “not a matter of ‘good people’ versus ‘bad people.’”<sup>199</sup> Rather, the disparities represent “power and control by a racial group that is in the position to disseminate and protect its own self-image, worldview, and interests across the entire society.”<sup>200</sup> This structural aspect of racism, not to mention the possibility that implicit bias may motivate action, means that bad intent theory fails to understand the problem. But many whites are in denial about these nonindividualistic/non-intended forms of racism.

Laboring under a false theory that there must be bad intent for there to be racism, whites may hear the claim that race affected a situation as a claim that they themselves are morally bad. The danger here is that a white person who is told that they have benefitted from their race or contributed to racism will feel they are being accused of being a bad person.<sup>201</sup> Ironically, “white people’s moral objection to racism increases their resistance to acknowledging their complicity with it.”<sup>202</sup> Precisely because they know racism is bad, whites often exert great effort to find that it is not present. Hence, any discussion of race or racism can lead to virulent resistance. Sometimes this takes the form of refusing to participate in the discussion.<sup>203</sup> Other times, it takes the form of an accusation that the person who discussed race is doing violence to the listener.<sup>204</sup>

Bad intent theory leads to white fragility. Whites often consider “a challenge to our racial worldviews as a challenge to our very identities as good, moral people.”<sup>205</sup> If being a racist only happens to bad people, then one will fight tooth and nail to defend one’s reputation as a nonracist. White fragility protects whites

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196. *Id.* at 9.

197. *Id.* at 121.

198. *See generally* CYNTHIA LEE & ANGELA P. HARRIS, *CRIMINAL LAW: CASES AND MATERIALS* 201–48 (3d ed. 2014) (discussing criminal law mens rea requirements).

199. DIANGELO, *supra* note 13, at 31.

200. *Id.* at 31.

201. *Id.* at 72; Corbin, *supra* note 14, at 47.

202. DIANGELO, *supra* note 13, at 108.

203. *Id.* at 112 (describing white fragility as bullying).

204. *Id.* at 110.

205. *Id.* at 2.

from that accusation: the hearer of an accusation of racism, or even that whites' race matters, feels justified in bullying the offender out of discussing race.<sup>206</sup>

*B. Blue Lives Matter as Demonstrating Cop Fragility*

Before discussing cop fragility, it is important to acknowledge this is not necessarily an approved use of DiAngelo's theory.<sup>207</sup> DiAngelo says the term "is intended to describe a very specific white phenomenon."<sup>208</sup> Indeed, she limits the term by saying it is "not applicable to other groups who may register complaints or otherwise be deemed difficult (e.g., 'student fragility')."<sup>209</sup> Cop fragility still is a fair use of white fragility, for it is no ordinary sensitivity and is linked to whiteness.

Further, this Article's assertion of cop fragility does not ignore the fact that many things legitimately make police officers vulnerable. But to consider whether police officer vulnerability justifies cop fragility, it is necessary to ask, is the risk of harm significant enough that police fears warrant silencing critics? Probably not. Professor Olson notes the national homicide rate is 4.9 per 100,000 people.<sup>210</sup> In 2016, officers were killed at a rate of 5.5 per 100,000.<sup>211</sup> But from 2006–2015, which includes post-Ferguson years, police officers were killed at a rate of 4.1 per 100,000.<sup>212</sup> That is a lower death rate than for the average civilian.<sup>213</sup> While one peace officer life lost to violence is too many, those statistics do not indicate there is a rash of homicidal assaults on police officers.

This could be put another way. The Bureau of Justice statistics reports that in 2012 there were over 750,000 sworn law enforcement officers in the U.S.<sup>214</sup> If the number of sworn officers merely stayed in the range of 2012 and we used the recent high of police deaths from 2016, there would be something like a 0.0007 chance that an officer is killed during the year. There are three zeros before the first number. An infinitesimal chance. All life is invaluable, so, this chance is not an unimportant chance. But it is a very, very small chance.

The disconnect between the low chance of harm to police and the high anxiety it generates is explained by two factors: the high magnitude of the harm and high self-esteem. First, even if one has a low chance of dying, she is going to rate that risk to herself as unacceptably high. Second, if one holds oneself in high esteem, she will believe she deserves to avoid the risk of dying by any means

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206. *Id.* at 112.

207. In the famous phrasing, "the word in language is half someone else's." MIKHAIL BAKHTIN, *THE DIALOGIC IMAGINATION* 294 (Michael Holquist & Caryl Emerson ed. & trans.) (1981).

208. DIANGELO, *supra* note 13, at 113.

209. *Id.*

210. Olson, *supra* note 2, at 24.

211. *Id.*

212. *Id.* at 25.

213. Olson, *supra* note 2, at 25.

214. See DEP'T OF JUST., NATIONAL SOURCE OF LAW ENFORCEMENT DATA (2016), <https://www.bjs.gov/content/pub/pdf/nsleed.pdf> (Table 1).

necessary. Cop fragility converts police officers' real and felt vulnerability into an unwillingness to accept any criticism of the police.

### 1. *The Police as Omniscient Observers*

Blue Lives Matter arguments mirror white fragility's myth of the objective individual. While police officers do not usually cite the abstract concepts of individualism and objectivity, they do seem to assert their omniscience about crime. Ron Hosko, the President of the Law Enforcement Legal Defense Fund (which mimics the name of the black civil rights organization the NAACP Legal Defense Fund), illustrates how this perfect vision contends there is "widespread resentment against law enforcement."<sup>215</sup> He later stretches such sentiment into "broad attacks on law and order in America amounting to a 'war on cops.'"<sup>216</sup> He further complains that it has "become socially acceptable, in the post-Ferguson environment, to challenge and discredit the actions of law enforcement."<sup>217</sup> People have a *right* to challenge the actions of the police. This is not a new right, but one enshrined by the Founders in the First Amendment's free speech clause, the Fourth Amendment requirement that law enforcement seizures and searches be "reasonable," and the Fifth and Fourteenth Amendment requirements of Due Process.<sup>218</sup>

Hosko's unfortunate word choice seems to be representative of police thinking. All sides seem to agree the police are depolicing racial minority communities because they feel criticized. Hence Bratton and Murad link the Ferguson Effect of depolicing racial minority communities in response to criticism to "heightened public and media scrutiny of police."<sup>219</sup> They, like many police advocates, appear to believe it is offensive to film the police when they perform their public duties in our name.<sup>220</sup> This assumption that nobody should watch the watchmen is obviously undemocratic.

Police sensitivity to criticism, like that displayed by the NYPD's turning of backs on Mayor de Blasio, suggests a belief that only the police can judge the police. After all, de Blasio's original sin was to campaign against the NYPD's aggressive use of programmatic stop and frisks in black and Latinx neighborhoods.<sup>221</sup> De Blasio's argument was consistent with that of a federal district court that found the NYPD's racial profiling was unconstitutional.<sup>222</sup> Police resistance to the Mayor and the courts gives the appearance the police believe that even the

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215. *Id.* at 16.

216. *Id.* at 18.

217. *Id.* at 24.

218. U.S. CONST. AMEND. I; U.S. CONST. AMEND. IV; U.S. CONST. AMEND. V; U.S. CONST. AMEND. XIV.

219. Bratton & Murad, *supra* note 12, at 21.

220. *See id.* at 30 (decrying use of cell-phone cameras).

221. *See* Altman, *supra* note 32 (reporting strained relationship between de Blasio and police); notes 32–36, *supra* and accompanying text (describing incidents).

222. *See generally* Floyd v. New York City, 959 F. Supp. 2d 540 (S.D.N.Y. 2013), *appeal dismissed*, Sept. 25, 2013 (concluding that NYPD's programmatic stop and frisk practices violated *Terry* doctrine and Equal Protection doctrine).

department's civilian bosses cannot question them. That is troubling because it assumes the police, and the police alone, may judge their practices.

The notorious police "code of silence" also suggests the police believe they are above criticism. Criminologists Sonya Kutnjak Ivkovic, Maki Haberfeld, and Robert Peacock have recently verified the existence of the code and that it prevents the public from holding the police accountable for misconduct.<sup>223</sup> They found that one of the most prominent factors leading to police reporting of misconduct is the individual officer's assessment of the seriousness of the misconduct.<sup>224</sup> At first glance, this might seem promising. But we should worry that police officers are only being judged by one another, and with a default of no reporting. Worse yet in terms of cop fragility, police comfort with making their own judgments about reporting misconduct is likely to make them hostile to public criticism that threatens to disrupt this cushy system.

In believing that the police are their own judges, the police and their advocates assume the possibility of, and role of, the objective observer. The objective officer is less prone to listen to criticism of his or her views or actions because he or she has it all figured out herself. The code of silence prevails because of a belief that only the police can judge the police. Such resistance to outside perspectives is a hallmark of cop fragility.

## 2. *Bad Apples Theory*

Cop fragility is also seen in the analogy between white fragility's bad intent theory and police use of a "bad apples" defense. Legal scholar Chiraag Bains recently defined bad apples theory in police misconduct cases as the assumption that all misconduct is "isolated and the product of individual rogue actors, not widespread or the product of flawed or biased systems."<sup>225</sup> Just so we are clear, the "bad apples" are not rare enough to militate in favor of assuming the vast majority of officers would never commit misconduct.<sup>226</sup> Consider the existence of the code of silence. The felt need for the code implies the number of incidents of misconduct is large enough to evoke an institution-wide response.

Former police chief William Bratton and Jon Murad utilize a variation on the bad apples theory when they argue it is wrong to treat the police as a class when demonstrating over police shootings of civilians.<sup>227</sup> Yet it is easy to understand why a racial minority community might view the police as a class: They wear the same uniform as other officers who have racial profiled members of

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223. See Sonya Kutnjak Ivkovic, Maki Haberfeld & Robert Peacock, *Decoding the Code of Silence*, 29 CRIM. JUST. POL'Y REV. 172, 173 (2018) (noting consequences of strong code of silence).

224. See *id.* at 175–76 (finding perceived seriousness of misconduct to be key factor in reporting).

225. Chiraag Bains, "A Few Bad Apples": *How the Narrative of Isolated Misconduct Distorts Civil Rights Doctrine*, 93 IND. L.J. 29, 30 (2018) (arguing lenient police misconduct standards stem from "few bad apples" narrative); see also Michael C. Dorf, *Iqbal and Bad Apples*, 14 LEWIS & CLARK L. REV. 217, 218–19 (2010) (critiquing use of bad apples narrative in *Iqbal v. Ashcraft*).

226. See Shaun King, *An Annotated Guide to Racist Police Officers: More Than a Few Bad Apples and Not Just in the South*, DAILY KOS, Sept. 8, 2015 (detailing examples).

227. See Bratton & Murad, *supra* note 12, at 30 (listing effects of demonstrations).

community and they have a collective code of silence about police misconduct. The code of silence is particularly indicative of department-wide complicity in individual police misconduct. Bratton and Murad even acknowledge that the sheer extent of racially targeted *Terry* stops offends black and Latinx communities.<sup>228</sup> Their response is the police's long-standing claim that the reason they disproportionately stops blacks and Latinx is that those groups are more crime prone.<sup>229</sup> Even if race made one crime prone, that would not change the identity of the people doing the stops, the police. Racial minority communities thus see patterns in police behavior that lead them to view police misconduct as part of a group behavior.

Since the police do often act as a class toward racial minority communities, bad apples theory can also hide the structural dimensions of racism. Take white police officer Michael Slager's shooting of middle-aged black man Walter Scott and then planting false evidence next to him.<sup>230</sup> If Slager was just one unusual case, one wonders, where did he learn that technique? Sadly, there is evidence from across the nation that police officers have developed many ways of planting evidence on suspects.<sup>231</sup> The passing down of techniques for planting evidence demonstrates that bad apples grow from apple trees.

### C. *Negative Effects of Cop Fragility*

Again, cop fragility requires the conceits that the police can be objective arbiters of whether disparate profiling and shootings are necessary and that any misconduct only amounts to a few "bad apples." Here, the police assert a superior right to judge the necessity of their disparate profiling and killing of racial minorities. Simultaneously, the police and their supporters minimize the incidence of police misconduct and attribute any such events to purportedly unusual intentional racists. Depolicing and Blue Lives Matter bills are thus products of police oversensitivity to criticism. Cop fragility not only takes away the police's ability to listen to criticism, it also has several deleterious effects.

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228. *See id.* at 26–28 (identifying programmatic stop and frisk as a source of a crisis in police legitimacy).

229. *See id.* at 26–28 (identifying programmatic stop and frisk as a source of a crisis in police legitimacy).

230. *United States v. Slager*, 912 F.3d 224, 236 (4th Cir.), *cert. denied*, 139 S. Ct. 2679, 204 L. Ed. 2d 1080 (2019) ("In this case, the district court did not reversibly err in determining that the facts supported a finding of malice").

231. *See, e.g.*, Jessica S. Henry, *Smoke But No Fire: When Innocent People Are Wrongly Convicted of Crimes That Never Happened*, 55 AM. CRIM. L. REV. 665, 670–71 (2018) (describing ways police may plant evidence).

### 1. *Blaming the Victim*

Blue Lives Matter partakes of the Blame the Victim phenomenon.<sup>232</sup> The definition of blaming the victim is “justifying inequality by finding defects in the victims of inequality.”<sup>233</sup> A classic example of blaming the victim is the cultural norm of asking what a sexual assault victim was wearing.<sup>234</sup> Here, the police response to criticism for disparate profiling and shooting of people of color is that such criminals are especially dangerous. It is not hard to see that blackness is associated with criminality in this country.<sup>235</sup> Likewise, Trump supporters are currently reinvesting in longstanding associations of Mexicans in particular and Latinx in general as criminals.<sup>236</sup> So, the focus on police vulnerability to criminals stands in for a suggestion that police are vulnerable to blacks and Latinx. For example, the Blue Lives Matter response to Black Lives Matter’s assertion that the police are disproportionately shooting blacks because they are biased is to say that police are disproportionately shooting blacks because blacks have a “culture of depravity.”<sup>237</sup> That blames the victims for getting themselves shot.

It is common for police advocates to suggest that overpolicing of racial minority communities and disproportionate killings of unarmed racial minorities are the fault of those people being criminals. For instance, even in a relatively measured book chapter, Bratton and Murad associate blacks and Latinx with crime. They write:

The fact that blacks and Hispanics are the victims as well as the perpetrators of violent crime at rates that far exceed their representation in the city’s population—rates even greater than the rate at which blacks and Hispanics were stopped—was obscured by the massive tide of stops and a profound sense that they were not applied equally.<sup>238</sup>

This claim that blacks and Latinx are disproportionately violent is strangely unadorned with a citation. This despite the fact that overpolicing has surely resulted

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232. See generally WILLIAM RYAN, *BLAMING THE VICTIM* (rev. ed. 1976); see also Obasogie & Newman, *supra* note 2, at 543 (characterizing such blame as saying, “[r]esponsibility for the violent encounters—or at least a missed opportunity to mitigate the possibility for harm—lies with the victim’s dress and behavior . . .”).

233. See generally RYAN, *supra* note 232, at xiii (rev. ed. 1976) (defining and explaining term).

234. See e.g., Lindsay Kahle, Jill Leslie & Sanna King, *Examining the Intersections of Gender and Sexual Orientation Within the Discipline: A Case for Feminist and Queer Criminology*, in *THE HANDBOOK OF RACE, ETHNICITY, CRIME, AND JUSTICE* 303 (Ramiro Martinez, Jr., Meghan E. Hollis & Jacob I. Stowell eds. 2018) (“The everyday language and discussion about women needing to protect themselves . . . is victim-blaming and perpetuated through rape culture.”).

235. See, e.g., Dorothy E. Roberts, *Democratizing Criminal Law as an Abolitionist Project*, 111 NW. U. L. REV. 1597, 1600 (2017) (arguing criminal justice system reinforces criminalization of blacks).

236. Melissa Vargas Lopez, *The Supreme Court’s Reinforcement of the Invisibility of Mexicans*, 38 U. LA VERNE L. REV. 272, 284 (2017) (“Trump made the conscious decision to label all Mexican immigrants as ‘rapists’ and ‘criminals.’”).

237. Elizabeth Brown, *Race, Urban Governance, and Crime Control: Creating Model Cities*, 44 LAW & SOC’Y REV. 769, 772 (2010) (“When ‘governing through crime,’ words like *street*, *inner city*, *violence*, and *depravity* provide social and cultural referents to neighborhoods of color (Herbert 1996; Keith 1993; Kobayashi & Peake 2000). Fleury-Steiner et al. (2009:8) describe this as a ‘moral cartography,’ where ‘the “war” must be aggressively waged against the threatening outsiders (poor, non-whites) and their disorderly territories (ghettos, barrios, etc.)’”).

238. Bratton & Murad, *supra* note 12, at 28.

in disproportionate statistics under *some* definition of violent crime. But maybe it does not need a citation for their audience for it is a fundamental precept of conservatives that racial hierarchy in policing is the result of racial minority misbehavior. Bratton and Murad essentially say this in a later, similarly unadorned declaration: “minorities--now and for the foreseeable future--will be disproportionately the victims and perpetrators of violent crime.”<sup>239</sup> It should be no surprise, then, that conservative police reform seeks to put a kinder face on “focused enforcement”--the continued scrutiny of particular racial minorities.<sup>240</sup>

Implicitly associating blacks with danger also rationalizes police violence against blacks. “If they are bad,” says DiAngelo of white victim blaming of blacks, then marginalizing and even slaying them “isn’t unfair. In fact, it is *righteous*.”<sup>241</sup> Since Black Lives Matter’s new police criticism emerges from police shootings, Blue Lives Matter justifies those shootings. Seemingly all of them, and seemingly reflexively. You would be hard pressed to find mention of Slager’s shooting Scott and then planting false evidence next to him in the pro-police literature.<sup>242</sup>

A sense of righteousness in disproportionately investigating, arresting, and shooting blacks would explain the emotional valence of the Blue Lives Matter response. They seem to be angry that Black Lives Matter is challenging their authority, let alone criticizing their actions. This is the heart of cop fragility: “We are the real victims here.” It is thus no wonder that police respond to the new police criticism by de-policing racial minority communities. The excusal of police slayings of racial minorities on grounds of racial minorities’ purported greater proneness to crime undoubtedly feels like a victim-blaming attack to the new police critics. Cop fragility means such arguments feel like mere self-defense to the police and their supporters.

## 2. *Shifting the Focus to the Police as Victims*

That the Blue Lives Matter movement is anti-black is amply demonstrated by the fact that it was a response to Black Lives Matter. The fact that Blue Lives Matter is a reaction to Black Lives Matter is seen in the titles of the groups. As Olson notes, “pro-law enforcement groups co-opted the name of the [Black Lives Matter] movement.”<sup>243</sup> Hence, a fundamental problem with cop fragility is the way it responds to calls for attention to a subordinated group by wrenching attention over to a privileged group.

The first way that Blue Lives Matter shifts the focus away from the new police criticism to the police is through the act of switching only the colors in the titles of the groups. The Black Lives Matter movement contends that police are currently acting out bias against racial minorities. Since the Blue Lives Matter

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239. *Id.* at 36–37.

240. *Id.* at 36.

241. DIANGELO, *supra* note 13, at 94 (emphasis in original).

242. *See, e.g.*, Henry, *supra* note 231.

243. Olson, *supra* note 2, at 50.

Movement maintains the color metaphor of Black Lives Matter, its response likens police officers to racial minorities. That false equivalence suggests that Blue Lives Matter, like Black Lives Matter, is claiming its community is subject to abuse.

The analogy between black lives and blue lives is arguably offensive, though. As a group, blacks have been historically subordinated through chattel bondage, Jim Crow segregation, and ongoing negative stereotypes.<sup>244</sup> Police officers cannot be similarly defined as a historically oppressed minority. But that is indeed what the analogy implies.

Blue Lives Matter also implicitly shifts the focus from identity based on race to identity based on role. There are good reasons to be more concerned about race than role. It is understandable that police officers feel that they are vulnerable to harm because they might well be ambushed by criminals. But likening that role vulnerability to racial vulnerability does not work. Police take on danger as part of their paying job; black civilians' vulnerability stems from their identity status.

The ultimate effect of shifting the focus from potential police racism to the plight of those in blue is to spotlight white concerns about "law and order" and conceal black concerns about selective enforcement. When whites respond to Black Lives Matter by saying "All Lives Matter" or "Blue Lives Matter," some hear them as saying "White Lives Matter." As journalist John Halstead said in a perceptive HuffPost article, "when white people think about 'all lives,' we automatically think about 'all white lives.'"<sup>245</sup> This does not make such a thought a reflection of explicit racism in the bad intent sense. After all, the point of implicit bias theory is that we are all steeped in a culture that normalizes whiteness, and must thus remain alert to the possibility of automatic negative associations.<sup>246</sup> The shift from Black Lives Matter to Blue Lives Matter may often be nonracist at the explicit level, but it still spotlights a perspective held mostly by whites and erases one mostly held by nonwhites. Indeed, Professor Corbin sees the erasure of black claims as the very point of shifting the focus back to whites.<sup>247</sup>

Likewise, cop fragility necessarily shifts who is to be deemed vulnerable to harm. Whereas Black Lives Matter asserts that black people are vulnerable to disproportionate and unjustified harm from police, Blue Lives Matter is about

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244. See Geiza Vargas-Vargas, *White Investment in Black Bondage*, 27 W. NEW ENG. L. REV. 41, 53–54 (2005) (contending Jim Crow was another way to sanction White discriminatory practices against Black Americans); *id.* at 59–60 (describing black bondage as tradition since slavery); see also Sheryll Cashin, *Shall We Overcome?: "Post-Racialism" and Inclusion in the 21st Century*, 1 ALA. C.R. & C.L. L. REV. 31, 36–37 (2011) (describing how anti-Black bias can perpetuate negative Black stereotypes).

245. John Halstead, *The Real Reason White People Say 'All Lives Matter'*, HUFFPOST, [https://www.huffpost.com/entry/dear-fellow-white-people-\\_b\\_11109842](https://www.huffpost.com/entry/dear-fellow-white-people-_b_11109842) (last updated July 26, 2017).

246. Jonathan P. Feingold, Evelyn R. Carter, *Eyes Wide Open: What Social Science Can Tell Us About the Supreme Court's Use of Social Science*, 112 NW. U. L. REV. 1689, 1707 (2018) ("Although there has been an observable shift toward egalitarian norms and commitments, American society remains defined by socially salient stereotypes and attitudes that privilege and normalize Whiteness.").

247. See Corbin, *supra* note 14, at 199 (contending that white fragility is meant to erase blacks' claims); see also Paul Sehgal, *First Words: Fighting 'Erasure'*, N.Y. TIMES (Feb. 2, 2016), <https://www.nytimes.com/2016/02/07/magazine/the-painful-consequences-of-erasure.html>.



policing being a dangerous job. Specifically, Blue Lives Matter emphasizes that police officers are subject to violence from criminals. Shifting the vulnerability in this way suggests that police vulnerability trumps black vulnerability.

Further, Blue Lives Matter's slight variation in titles makes it clear it is a solipsistic "put the focus back on us" move. When Black Lives Matter criticized policing as biased, the police responded by saying, "no, we are the ones that matter." This return of focus is especially seen in the fact that Blue Live Matter developed out of the All Lives Matter response to Black Lives Matter.<sup>248</sup> Blue Lives Matter represents a move from broadening whose lives matter through the phrase All Lives Matter to narrowing the focus to police lives mattering. Blue Lives Matter thus impliedly asserts that police lives matter more than lives in general or black lives in particular.

### 3. *Emptying Civil Rights of Content*

The move from Black Lives Matter to Blue Lives Matter reminds us that the idea of conservatives occupying civil rights discourse in order to empty it of meaning is not new. For example, Martin Luther King's "I Have a Dream Speech" has been severed from its context—it was during a March on Washington *for Jobs and Freedom*, not colorblindness—by means of a myopic focus on a conservative reading of the idea that his children should "not be judged by the color of their skin but by the content of their character."<sup>249</sup> Whereas King had a thoroughgoing critique of the use of race to promote economic inequality, all of that gets read out of the speech. When Chief Justice Roberts says, "the way to stop discriminating on the basis of race is to stop discriminating on the basis of race," he is obviously not marching the path that King would have taken.<sup>250</sup> And yet, Roberts wraps himself in the ambiguity of the *Brown* opinion and a simplified version of King's rhetoric as though he were seeking to promote substantive equality for racial minorities. Instead he is occupying civil rights discourse in order to lay waste to its goals.<sup>251</sup>

When we consider the way conservatives have used the black civil rights movement, it is not surprising that Blue Lives Matter mimics Black Lives Matter. That struggle has a gravitas in the popular mind that lends weight to conservative

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248. Reichman, *supra* note 2, at 300 ("In response, police and their supporters fought back with their own rhetoric of "Blue Lives Matter" and "All Lives Matter."); Tatum, *supra* note 2, at 290 ("Those critical of the protestors responded with the slogan, "All Lives Matter,"<sup>19</sup> or in support of police officers, "Blue Lives Matter," dismissing the shootings as defensible actions by frightened officers or as isolated incidents rather than evidence of systemic racism.").

249. See 'I Have a Dream,' *Address Delivered at the March on Washington for Jobs and Freedom*, KING INSTITUTE, <https://kinginstitute.stanford.edu/king-papers/documents/i-have-dream-address-delivered-march-washington-jobs-and-freedom> (last visited Feb. 2, 2020) (displaying poster for the March).

250. See Girardeau A. Spann, *Good Faith Discrimination*, 23 WM. & MARY BILL RTS. J. 585, 630 (2015) (noting that Roberts may have felt Sotomayor was mocking him when connecting present "colorblind" actions to past invidious discrimination).

251. Richard Delgado, *White Interests and Civil Rights Realism: Rodrigo's Bittersweet Epiphany*, 101 MICH. L. REV. 1201, 1219 (2003) ("It's just another way in which civil rights law and discourse safeguard the comfort and good reputation of whites.").

causes.<sup>252</sup> This mimicry also allows Blue Lives Matter to occupy civil rights discourse in order to empty it of the substantive meaning of its content.

Conservatives wrap themselves in a selective reading of civil rights rhetoric for at least three reasons. First, this appropriation disarms their opponents, who can hardly disavow icons from their own movements. Second, conservatives cannot usually (legitimately) claim the moral high ground of being from a group subject to widespread oppression, so they borrow from the moral force of those who can. Third, this occupation of the civil rights discourse allows them to claim the role of the new “victim.” This last move to reposition police officers, and whites in general, as the new victims is a crucial one, for there is no fury like that of a privileged class that has had equality imposed upon it. Consequently, white backlash better explains Blue Lives Matter’s self-defense perspective than does the vulnerability of police officers to attack.

#### *D. Other Explanations for Police Resistance to Criticism*

Before moving on, it is important to note that police resistance to criticism could be described in other ways. First, it could be a legitimate response to invalid criticism. Some police may contend there is no racial profiling and no racially disparate police violence.<sup>253</sup> Any such disparities would be described as the result of disparate black and Latinx propensities to crime.<sup>254</sup>

This Article’s response to the crime propensity argument is threefold. Initially, the idea that black and Latinx civilians are more prone to crime is dubious. It doesn’t make logical sense that such a propensity would be biological. Meanwhile, a nurture argument cuts both ways. Poverty and racial hierarchy might lead some people to be more crime prone, but then it would make some of that crime justifiable or excusable. Additionally, the statistics cited for the crime propensity thesis are questionable. If arrests are used as support, we must consider the ratchet effect whereby seeking crime in black and Latinx neighborhoods leads to a higher rate of arrest in those neighborhoods, which in turn is used to rationalize more racial targeting.<sup>255</sup> Rather than answering the question, arrest statistics confound the causation analysis. Finally, the use of policing as social

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252. See E. PATRICK JOHNSON, *APPROPRIATING BLACKNESS: PERFORMANCE AND THE POLITICS OF AUTHENTICITY* 180 (2003), quoted in McVey, *supra* note 7, at 56 (discussing Blue lives Matter’s appropriation strategies).

253. *Floyd v. City of New York*, 959 F. Supp. 2d 540, 617 (S.D.N.Y. 2013), [subsequent history], (“Moreover, when confronted with evidence of unconstitutional stops, the NYPD routinely denies the accuracy of the evidence, refuses to impose meaningful discipline, and fails to effectively monitor the responsible officers for future misconduct.”).

254. William M. Carter, Jr., *Whren’s Flawed Assumptions Regarding Race, History, and Unconscious Bias*, 66 CASE W. RES. L. REV. 947, 955–56 (2016) (“It is unlikely that law enforcement officials are immune from cultural biases that one’s status as a racial minority is probative of her propensity to engage in crime . . .”).

255. Bernard E. Harcourt, *Rethinking Racial Profiling: A Critique of the Economics, Civil Liberties, and Constitutional Literature, and of Criminal Profiling More Generally*, 71 U. CHI. L. REV. 1275, 1279 (2004) (“A ratchet effect occurs when racial profiling produces a supervised population disproportionate to the distribution of offending by racial group.”).

control better explains the targeting of racial minorities than disproportionate offending. Nixon's drug war was admittedly intended to criminalize blacks.<sup>256</sup> Reagan's drug war also had that purpose.<sup>257</sup> Instead, the alleged crime propensity may be the false rationale for policing that is designed to explain and maintain ongoing racial hierarchy.<sup>258</sup>

A better explanation for police resistance to criticism than a racial minority propensity for crime can be found in masculinities theory. As sociologist Michael Kimmel and others have demonstrated, masculinities are fragile. They are built upon a constant need to prove oneself to be the alpha male, with loss of masculine esteem as the consequence of falling short.<sup>259</sup> Yet, all men fail this test.<sup>260</sup> No man stays the most accomplished, most virile, and richest forever. Hence, the very structure of masculinities leads to a sense of fragility.

The tenets of the hegemonic U.S. masculinity support a cop fragility thesis. Men are not supposed to show physical or emotional vulnerability and are supposed to respond to challenges.<sup>261</sup> The need to prove that one is not weak is built into police masculinity.<sup>262</sup> Police departments train their officers to always manifest command presence, or control over an incident and the people involved.<sup>263</sup> Police officers yell, threaten, and physically abuse in order to meet this requirement in many situations where they should use verbal persuasion.<sup>264</sup>

For these purposes, then, masculinities operate like and accentuate cop fragility. The police perceive both mouthy suspects and the new police critics as challenges. They need to appear strong, to protect their masculinities and/or their sense of racial innocence. Rather than engage at the level of ideas, they quickly progress along a force continuum based in a perceived need for self-defense.<sup>265</sup>

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256. See Cooper, *supra* note 104, at 48–49 (quoting Nixon aide John Ehrlichman saying, “[w]e knew we couldn’t make it illegal to be either against the war or black, but by getting the public to associate the hippies with marijuana and blacks with heroin, and then criminalizing both heavily, we could disrupt those communities”).

257. See Kenneth B. Nunn, *Race, Crime and the Pool of Surplus Criminality: Or Why the War on Drugs Was a “War on Blacks”*, 6 J. GENDER RACE & JUST. 381, 381–86 (2002) (arguing war on drugs targeted blacks).

258. See Frank Rudy Cooper, *A Genealogy of Programmatic Stop and Frisk: The Discourse-to-Practice-Circuit*, 73 U. MIAMI L. REV. 1, 26 (2018) (defining social control as “pervasive, targeted coercion of particular social groups”).

259. See Frank Rudy Cooper, “*Who’s the Man?*”: *Masculinities Studies, Terry Stops, and Police Training*, 18 COLUM. J. GENDER & L. 671, 671–72 (2009) (“We gain our masculine esteem and relative masculine stature from other men’s acknowledgements of our masculinity.”).

260. Michael S. Kimmel, *Masculinity as Homophobia: Fear, Shame, and Silence in the Construction of Gender Identity*, in *THE GENDER OF DESIRE: ESSAYS ON MALE SEXUALITY* 25, 31 (2005).

261. Cooper, *supra* note 259, at 691 (noting that “a man’s reputation depends on his posing a credible threat of harm to anyone who challenges him”); see also Dov Cohen & Joe Vandello, *Meanings of Violence*, 27 J. LEGAL STUD. 567, 570–71 (1998) (describing vestigial effects of U.S.’s “culture of honor”).

262. Cooper, *supra* note 259, at 693 (arguing “the main component of police officer masculinity is an emphasis on demonstrating the aggressive demeanor known as command presence”).

263. *Id.* at 693–95 (describing common police requirement of demonstrating “command presence”).

264. *Id.* at 698–701 (contending hegemonic masculinity leads police to seek “masculinity contests” with civilians).

265. See Cooper, *supra* note 259, at 694 (“An emphasis on command presence has been linked to incidents of excessive force in both Cincinnati and Los Angeles.”); see also Cooper, *supra* note 12 (coining “depolicing” to describe police withdrawal from racial minority communities after being criticized for racial profiling).

In the case of Blue Lives Matter, this means defending themselves against an alleged war on police and going on the offensive through corrosive civil rights measures. Hence, though Blue Lives Matter is based in a sense of racial threat, the masculinities explanation is fully consistent with the cop fragility thesis.

#### IV. PROPOSALS

Cop fragility is motivated by officers' fear of being harmed, of being criticized, or both.<sup>266</sup> The question is, how do we separate legitimate fears from illegitimate ones? Fear of getting shot is legitimate, but its low probability should prevent it from leading to widespread depolicing. Instinctive resistance to criticism is not legitimate and should not be the basis for depolicing. Public criticism of the police is both a democratic imperative and a means for the police to learn how to repair their fractured relations with racial minority communities.

Unfortunately, there seems to be a tendency for the police and their advocates to brand criticism of the police as a sign of hatred of the police.<sup>267</sup> This Article's criticism of the police functions like dissent does for the nation; it is patriotic because it makes us better.<sup>268</sup> The goal here is to help the police see why they may have had a hard time hearing critics. If they hear better, they might perform better. Certainly, better police-community relations cannot come without listening.

In light of its analysis of cop fragility, this Article has two proposals. One is simple: stop advancing Blue Lives Matter legislation. The second is simple in form but will be difficult to execute: have the police listen more carefully to the criticisms of racial minority communities. This Part of the Article briefly sketches the reasoning behind each proposal.

##### A. *Reject Blue Lives Matter Bills*

There is a law review article that criticizes Blue Lives Matter amendments to hate crime legislation, but it is not focused on *why* police advocates seek such laws, let alone cop fragility.<sup>269</sup> In her article, *Blue Lives Have Always Mattered: The Usurping of Hate Crimes laws for an Unintended and Unnecessary Purpose*, Olson identifies the beginnings of the Blue Lives Matter movement's attempt to add police to hate crimes in the passage of a Louisiana Blue Lives Matter law.<sup>270</sup> She traces the history and purposes of traditional hate crime legislation.<sup>271</sup> She argues that the police are not the appropriate subject of such laws because they

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266. See Oliver, *supra* note 12, at 159–60 (discussing motivations for depolicing racial minority communities).

267. See, e.g., McVey, *supra* note 7, at 12–13 (discussing conservative criticism of the new police criticism).

268. Editorial, *Dissent Is Patriotic*, WASH. POST, July 1, 2005, at A24.

269. See generally Olson, *supra* note 2 (critiquing the analogy between hating historically oppressed groups and assaulting police).

270. *Id.* at 14.

271. See generally *id.*

are not currently marginalized, nor historically oppressed, nor targeted for characteristics beyond their control.<sup>272</sup> Moreover, almost any kind of homicide of a cop already gets “some of the harshest punishments allowed under American law, specifically due to the fact that the victim was a police officer.”<sup>273</sup>

What we need is not more protections for the police, but less policing. As Shjarback et al. say, “de-policing may be a necessary outcome of a true democratic police function.”<sup>274</sup> The evidence shows that depolicing leads to more effective policing in terms of hit-rates, but not to increased crime.<sup>275</sup> That fact argues against Blue Lives Matter laws.

The police ought to have fewer encounters, particularly in overpoliced racial minority communities. Depolicing would reduce encounters, which would make the police safer.<sup>276</sup> It would also obviate the necessity of increasing the power to punish assaults on police by means over and above the current panoply of “contempt of cop” weapons.<sup>277</sup> So, depolicing could mean greater safety for the police without Blue Lives Matter bills.

### B. Mediated Listening Sessions

The mass turning of backs on Mayor de Blasio mentioned earlier in this Article is understandable, but not helpful.<sup>278</sup> We can have empathy for the fact the police were mad that they did not feel unequivocally supported at a time when police officers were being killed. But their action was resistance, not reform. It did not make them safer from harm, and thus was not based in a legitimate fear. Rather it was based in an illegitimate fear of public criticism.<sup>279</sup> Again, criticism of the police is democratically mandated.<sup>280</sup> For the sake of their legitimacy and effectiveness, the police need to learn from the criticism of racial minority communities. This will be a difficult conversation, but this Section discusses a means of starting it.

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272. *Id.* at 16.

273. *Id.* at 27.

274. Shjarback et al., *supra* note 12, at 50.

275. *Id.* at 43, 48–49.

276. *See id.* at 46, 50 (contending reducing encounters raises hit rates, supports democracy).

277. *See* Eric J. Miller, *Encountering Resistance: Contesting Policing and Procedural Justice*, 2016 U. CHI. LEGAL F. 295, 313 (2016) (revealing ephemeral nature of “free to leave” doctrine).

278. *See supra* notes 31–35 and accompanying text (describing incidents).

279. *See* Eric J. Miller, *Challenging Police Discretion*, 58 HOW. L.J. 521, 542 (2015) (“Many police departments lack strong channels of communication to and from the communities they police or are attitudinally impervious to community-generated criticism of their values or practices.”).

280. *See generally* Editorial, *supra* note 268 (agreeing with this principle).

1. *Why the Conversations?*

The reduced effectiveness of the police because of their resistance to criticism is seen in the “stop snitching” movement. In many racial minority communities, cooperating with the police is severely frowned upon.<sup>281</sup> That attitude does not come from nowhere. Rather, aggressive police tactics targeting racial minority communities have been a hallmark of the war on crime started in the Nixon administration.<sup>282</sup> Those communities often see the police as an occupying army that abuses them.<sup>283</sup> As a result, they often refuse to cooperate with police investigations. This leads to more unsolved crimes and may lead to more crime overall.<sup>284</sup> Police resistance to criticism thus bears a heavy cost. If the police were able to listen to racial minority community demands to stop over-policing them, they would gain legitimacy, and thus cooperation.

A galling statement by Hosko helps explain why the police are not hearing racial minority critics. He tells us that “[e]vents in Ferguson over three years ago were a fork in the relatively smooth road of citizen and police relations in recent decades.”<sup>285</sup> What planet has he been living on? Is he unaware of long-standing racial minority complaints about racial profiling?<sup>286</sup> Does he think racial minority communities did not notice shootings of unarmed blacks before Ferguson?

Hosko’s statement reflects police resistance to criticism. He clearly has not been listening to racial minority communities, for he would not have been able to describe the relations between the Rodney King era police and racial minorities as smooth.<sup>287</sup> That lack of listening is akin to the attitude of Blue Lives Matter as a whole. When black and Latinx communities say they are being overpoliced, Blue Lives Matter responds with a movement making themselves the victims. Then they wonder why there is a “stop snitching” movement. Accordingly, this Article calls for mediated listening sessions between the police and the new police critics.

The federal government has experimented with a version of a listening session. The U.S. Department of Justice Community Relations Service (CRS) has a program called Strengthening Policing and Community Partnerships. The program “convenes law enforcement and diverse community leaders” for “problem-

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281. See Alexandra Natapoff, *Snitching: The Institutional and Communal Consequences*, 73 U. CIN. L. REV. 645, 646 (2004) (“Snitches . . . threaten social organization, interpersonal relationships, and socio-legal norms in their home communities . . .”).

282. See generally Jamie Masten, “Aint No Snitches Ridin Wit Us”: *How Deception in the Fourth Amendment Triggered the Stop Snitching Movement*, 70 OHIO ST. L.J. 705 (2009).

283. See TA NEHISI COATES, *BETWEEN THE WORLD AND ME* 78–83 (2015) (describing negative relations between blacks and the police as part of story of slaying of his friend, Prince Jones).

284. See generally Natapoff, *supra* note 281 (discussing costs of secret informants).

285. Hosko, *supra* note 12, at 12.

286. See *supra* notes 40–42 and accompanying text (identifying scholarly critiques of racial profiling).

287. See, e.g., *READING RODNEY KING/READING URBAN UPRISING* (Robert Gooding-Williams ed. 1993) (collecting essays discussing LAPD beating of Rodney King and subsequent uprising); see also Report of the National Advisory Commission on Civil Disorders, 206 (The New York Times Ed., 1968); April Walker, *Racial Profiling-Separate and Unequal Keeping the Minorities in Line-the Role of Law Enforcement in America*, 23 ST. THOMAS L. REV. 576, 587 (2011) (“Unfortunately, most of the findings in the Kerner Report, a study published 40 years ago, in 1968, still holds true today.”).

solving discussions focused on improving public safety by increasing trust and developing partnership.”<sup>288</sup> This program should be improved upon in several ways.

## 2. *A Method for Difficult Conversations*

The book *Difficult Conversations* provides a means of negotiating around cop fragility and provides a framework for deciding how to transform the relationship between police and racial minority communities. This Article will not detail the nature of the conversation that needs to happen. That will be the task of a follow up Article. This Article simply explicates the principles for overcoming cop fragility.<sup>289</sup>

At the outset, it should be obvious that the conversation between the police and racial minority communities is a difficult one. Mediation scholars Stone, Patton, and Heen describe a difficult conversation as happening “[a]nytime we feel vulnerable or our self-esteem is implicated, when the issues at stake are important and the outcome is uncertain, when we care deeply about what is being discussed or about the people with whom we are discussing it.”<sup>290</sup> Here, police departments feel challenged by the assertion they are racist and racial minority communities feel challenged by the assertion they are culturally deprived. The issues of racial profiling and crime control are manifestly important. And while the parties care deeply about the issues, each side doubts the other side cares about it. However, recognizing these parties are in a difficult conversation is not sufficient, they must find a means of transforming their relationship.

The first principle of having a difficult conversation is to recognize that there are actually three conversations happening in the heads of the parties.<sup>291</sup> These are the “what happened” conversation, the “feelings conversation,” and the “identity” conversation. The what happened conversation involves the parties’ stories about “truth, intentions, and blame.”<sup>292</sup> The police and protestors have different understandings of the facts that lead them to doubt the very validity of the others’ positions.

The second conversation is the implied internal conversation of each party based on the emotions the issue or conversation creates. As Stone, Patton, and Heen reveal, “[t]he question is not whether strong feelings will arise, but how to handle them when they do.”<sup>293</sup> Here, emotions abound, as the new police critics

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288. See *Community Relations Service*, DEP’T OF JUST., <https://www.justice.gov/ers> (last visited Feb. 2, 2020) (describing CRS).

289. It is possible, though, that the conversation between the police and racial minority communities is a rare one where no mutually satisfactory result can be reached. See *id.* at xxxi (discussing limits of method for having difficult conversations).

290. See STONE, PATTON & HEEN, *supra* note 27, at xxvii (defining a difficult conversation).

291. See *id.* at 7 (“In studying hundreds of conversations of every kind, we have discovered that there is an underlying structure to what’s going on . . .”).

292. *Id.* at 9.

293. *Id.* at 12.

feel pushed to adopt more aggressive techniques and this leads the police and their supporters to retreat further into backlash.

The last conversation concerns what the situation means to each party about who they are as a person. The identity conversation involves each side's implicit question, "what does it say about me that I am involved in this conflict?"<sup>294</sup> For the new police critics this dispute is about affirming their dignity and autonomy,<sup>295</sup> for the police it is about denying an implicit critique of them as racist and asserting their own worldview that racially disparate policing is a product of racial minority communities' cultural depravity.<sup>296</sup>

The key difference in a successful difficult conversation is to move from proving one's side is right to understanding both parties' "perceptions, interpretations, and values."<sup>297</sup> The parties must go from a "message delivery stance" to a "learning stance."<sup>298</sup> The parties usual reason for entering a difficult conversation is often just to prove they are right, but they must adopt the perspective of mutual desire to understand each other's understanding of what happened, feelings, and identity.<sup>299</sup> Only then do they move to a "learning conversation" that can help mediate the conflict.

The Difficult Conversations method is merely a framework for discussion. It does not provide a clear idea of what would resolve the conflict between the police and racial minority communities. Consequently, this Article proposes mediated listening sessions on this model, albeit with a few divergent principles that are laid out in the next Section.

### 3. *Some Limits on These Conversations*

The goal of these mediated listening sessions needs to be to have the police understand the criticism of racial minority communities from the point of view of those communities. Democratic legitimacy requires that the police listen to those they serve and protect. More importantly, though, no police-imposed reform will be effective. Further, the reforms that come out of these mediated listening sessions will only be effective if supported by the effected communities.

While this is just a tentative proposal, a couple of necessary components stand out. The analysis of cop fragility in this Article demonstrates that the police will have a hard time volunteering to hear race-based criticism. Hence, such conversations may have to be mandated by civil authorities and police leadership.<sup>300</sup>

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294. *Id.* at 15.

295. *See supra* notes 76–77 and accompanying text (discussing new police critics' desire to fundamentally restructure racial capitalism).

296. *See supra* notes 94–109 and accompanying text (detailing police responses to new police criticism).

297. *See* STONE, PATTON & HEEN, *supra* note 27, at 10.

298. *Id.* at xxxii.

299. *Id.* at 16–17.

300. This might require police union cooperation, which is another fraught topic of its own. *See* Catherine L. Fisk & L. Song Richardson, *Police Unions*, 85 GEO. WASH. L. REV. 712 (2017) (discussing potential and problems of police unions for promoting reform).



Cop fragility may also make it hard for the police to hear their underlying concerns. That means the listening sessions will have to be mediated by professionals. As the analysis of white fragility has shown, those mediators cannot ever be purely neutral and objective.<sup>301</sup> Nonetheless, they must be seen as professional enough to fairly communicate the interests of all parties.

Lastly, one should note that the police should expect the community to argue against their favored tool of proactive policing. As legal scholar James Forman has demonstrated, black communities tried the law and order approach in response to the crack crisis.<sup>302</sup> As legal scholar Michelle Alexander has shown, black communities came to see those draconian approaches as a continuation of police enforcement of racial hierarchy.<sup>303</sup> As sociologist Loic Wacquant has illustrated, aggressive policing greatly accelerated the destabilization of racial minority communities already left behind by the economy.<sup>304</sup> So the police must accept that mediated listening sessions will result in a transformation from proactive policing.

## V. CONCLUSION

We all want the police to be effective at fighting crime. It is impossible for them to be maximally effective when they are perceived as illegitimate. Cop fragility exacerbates that problem by leading the police to be particularly resistant to race-based criticism. If the assertive methods and tone of the new police criticism are irritating to the police, that is understandable. But Blue Lives Matter's turning of backs on the criticism surely will not help. Listening harder might do so.

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301. See *supra* notes 160–66 and accompanying text (discussing falsity of objectivity).

302. See JAMES FORMAN, JR., *LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA*, 39–43 (2017) (telling story of black clergy preventing decriminalization of marijuana).

303. See generally MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010) (connecting Wars on Crime and Drugs to preservation through transformation of racial hierarchy).

304. See generally LOIC WACQUANT, *PUNISHING THE POOR: THE NEOLIBERAL GOVERNMENT OF SOCIAL INSECURITY* (2009) (arguing Western governments are managing the social costs of rolling back to social safety net by incapacitating the poor); see also Kaaryn Gustafson, *CHEATING WELFARE: PUBLIC ASSISTANCE AND THE CRIMINALIZATION OF POVERTY* (2012) (criticizing criminalization of poor women).

