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## Blackness and Existential Crimes in the Modern Racial State

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## Essay

### Blackness and Existential Crimes in the Modern Racial State

NATALIE P. BYFIELD

*This Essay presents the concept of “existential crime.” It argues that our notion of crime has conflated acts that challenge the racial premise on which a state is founded with acts that breach what Karim Murji (2009) calls “norms of propriety.”<sup>1</sup> It argues that the conflation of these different types of social acts into our conceptualization of crime is a problem because this unnecessary and deliberate synthesis (1) privileges Western liberal philosophies that presume justice for everyone is achievable in states that were originally built on criteria for racial inclusion/exclusion, e.g., racial domination of one group over others; and (2) makes it difficult for social and legal scholars to posit states not founded on these Western liberal conceptualizations, but instead on “justice for everyone,” that is, a multi-racial democratic state. This Essay uses examples from contemporary events such as the January 6, 2021, attempted coup in the United States and Black Lives Matter protests, along with data on N.Y.P.D. Stop and Frisk practices from 2002 to 2013, to assess the need to distinguish between “existential crimes” and violations of “norms of propriety.” The assessment is contextualized in an analysis of U.S. discourses about crime, criminality, and criminalization, critiquing these so-called race-neutral discourses that normalized whiteness in the racialization processes that shaped the United States and other modern nation-states. The assessment reveals that the literature surrounding our definitions of crime, criminality, and criminalization does not challenge the centralization of racial formation in the definitions, classifications, and categorizations of what*

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<sup>1</sup> See Karim Murji, *Enacting the Sacred: Nation and Difference in the Comparative Sociology of the Police*, 7 J. TRANSATLANTIC STUD. 23, 28 (2009) [hereinafter Murji, *Enacting the Sacred*] (defining a “norm of propriety” as an act determined by a society to be acceptable or prohibitive based on shared understanding by all the society’s members).

*constitutes a crime. This Essay argues that teasing out and abolishing from our criminal codes and procedures those acts that constitute existential crimes are important steps in challenging white supremacy in the social and legal systems and increasing the likelihood of moving toward a truly democratic state.*



## ESSAY CONTENTS

INTRODUCTION .....	623
I. POLICING AND THE EXISTENTIAL THREAT IN A (WHITE) RACIAL STATE.....	626
II. TRADITIONAL SCHOLARSHIP & ITS PROBLEMATIC APPROACH TO RACIAL JUSTICE .....	634
III. WHAT TYPE OF CRIME DO THESE ACTS REPRESENT? .....	637
IV. ABOLITION OF EXISTENTIAL CRIMES .....	642



# Blackness and Existential Crimes in the Modern Racial State

NATALIE P. BYFIELD \*

## INTRODUCTION

I develop the concept of existential crime here to highlight a possible omission in the theorizing about the ontology of crime in Western settler societies. Using an approach grounded in decolonization criminology, Africana philosophy, and cultural studies as an intervention, my goal is to address this gap that exists in traditional criminology and may also exist in legal scholarship.<sup>2</sup> This Essay problematizes the ways in which the traditional approaches in these areas of scholarship engage the relationship between race and crime.<sup>3</sup> That is, these dominant methods do not critique how whole groups of people belonging to nonwhite races come to be defined as a threat to the societies in which they live and are associated with criminality, e.g., Black people in the United States. Karim Murji points out that Stuart Hall recognized how race and policing studies concerned “more than ‘just race’ and law and order;” they also implicated “law, history, society, class, nation, [and] empire.”<sup>4</sup> This Essay seeks a path for including all those factors in our understanding of crime and criminality in a settler society and disrupting the fact that “under the colonial situation, the native<sup>5</sup>

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<sup>2</sup> The argument made by Gregory Jones supports my assertion that a gap exists in legal scholarship about the ideas and issues that shape what we consider a crime, particularly a crime in a settler society. Gregory Jones, Note, *Over-Criminalization and the Need for a Crime Paradigm*, 66 RUTGERS L. REV. 931 (2014). Jones argues here that there is no existing paradigm that helps us, within the context of legal scholarship, to define what the term “crime” means. *Id.* at 933–34. He examines the paradigm-of-crime issue in the context of an examination of over-criminalization. *Id.* He suggests that we could address the over-criminalization problem, as well as the desire to inoculate a broader sense of justice into the system, if a paradigm for crime were developed. *Id.* at 935. Jones argues that we could do the following: “Define crime. Define it in a way that puts a meaningful limit on the *malum prohibitum* acts that can be criminally punished, and define it in a way that disambiguates the *Mens Rea* requirement as applied to those surviving *malum prohibitum* crimes.” *Id.* at 973. I highlight this here because some of the arguments made in this Essay tackle the issue of creating a new category of crime and consider the criminalization of certain acts. Since there is no paradigm for crime (or determining that an act represents a crime), on a prima facie level, the crime classification I suggest should not be automatically dismissed.

<sup>3</sup> For examples of critiques of this traditional scholarship, see Karim Murji, *Stuart Hall as a Criminological Theorist-Activist*, 24 THEORETICAL CRIMINOLOGY 447 (2020) [hereinafter Murji, *Stuart Hall*]; BIKO AGOZINO, COUNTER-COLONIAL CRIMINOLOGY: A CRITIQUE OF IMPERIALIST REASON 1–12 (2003) [hereinafter AGOZINO, COUNTER-COLONIAL CRIMINOLOGY]; LEWIS R. GORDON, BAD FAITH AND ANTIBLACK RACISM 1–6 (1995).

<sup>4</sup> Murji, *Stuart Hall*, *supra* note 3, at 449.

<sup>5</sup> Meaning nonwhite.

is synonymous with the offender.”<sup>6</sup> The “native,” it seems, commits a crime simply by existing.

Two presuppositions are accepted as I begin this intervention. First, that white supremacy, typically enacted through the violently enforced normalization of whiteness, is an inherent quality in all racial states, i.e., all western state formations since the advent of the Age of Exploration.<sup>7</sup> Second, the process of normalizing whiteness in these states is embedded in the entirety of socio-political, economic, and legal systems.<sup>8</sup> In this process, whiteness is equated with “humanness” and the rest of humanity is otherized, rendering those individuals “less than human,” or animals.<sup>9</sup> As such, when whites, through colonial conquest, committed acts of genocide, rape, and dispossession, these acts were not part of the conceptualization of crime and criminality.<sup>10</sup> Likewise, the victimization that all otherized groups of people suffered at the hands of Europeans when they committed those crimes has not been factored into the system of justice.<sup>11</sup>

The work of this Essay is to establish the efficacy of developing the term “existential crime,” meaning an act that violates the racial order of a state or disrupts other structures through which state power is “articulated,”<sup>12</sup> e.g., class, gender, systems of production, or geographical divisions. For the purposes of this Essay, I discuss the likely reality of existential crimes in the

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<sup>6</sup> AGOZINO, COUNTER-COLONIAL CRIMINOLOGY, *supra* note 3, at 18. See Judith Butler, *Endangered/Endangering: Schematic Racism and White Paranoia*, in *READING RODNEY KING/READING URBAN UPRISING* 15, 17 (Robert Gooding-Williams ed., 1993) (noting that the visual field of whites “is not neutral to the question of race”). The determinations that people make about the meaning of an individual’s act are contingent on race.

<sup>7</sup> See DAVID THEO GOLDBERG, *THE RACIAL STATE* 11–19 (2002) (suggesting “that the deeply racial character of the modern state from the moment of its emergence is a response to a dilemma that is as much the mark as the product of the modern moment”); Gerald Horne, *The Apocalypse of Settler Colonialism*, *MONTHLY REV.* (Apr. 1, 2018), <https://monthlyreview.org/2018/04/01/the-apocalypse-of-settler-colonialism> (remarking that “‘modernity’ is marked with the indelible stain” of the slavery, white supremacy, and capitalism that began during settler colonialism).

<sup>8</sup> George Lipsitz, *The Possessive Investment in Whiteness: Racialized Social Democracy and the “White” Problem in American Studies*, 47 *AM. Q.* 369, 370 (1995); GOLDBERG, *supra* note 7, at 109.

<sup>9</sup> Lipsitz, *supra* note 8, at 370.

<sup>10</sup> AGOZINO, COUNTER-COLONIAL CRIMINOLOGY, *supra* note 3, at 4; Biko Agozino, *Editorial: What is Criminology? A Control-Freak Discipline!*, 4 *AFR. J. CRIMINOLOGY & JUST. STUD.* i, iv (2010) [hereinafter Agozino, *What is Criminology?*]; Robin D.G. Kelley, *Introduction: A Poetics of Anticolonialism* to AIMÉ CÉSAIRE, *DISCOURSE ON COLONIALISM* 7, 19–21, 27 (Joan Pinkham trans., Monthly Review Press 2000) (1955).

<sup>11</sup> AGOZINO, COUNTER-COLONIAL CRIMINOLOGY, *supra* note 3, at 146, 148; Agozino, *What is Criminology?*, *supra* note 10, at v–ix.

<sup>12</sup> Stuart Hall, *Race, Articulation and Societies Structured in Dominance*, in *SOCIOLOGICAL THEORIES: RACE AND COLONIALISM* 305, 309, 320–22, 340 (1980) (identifying expressions of race (including racial ordering) that are produced from “things” that are “joined together” in the moment, e.g., elements from the dominant economic sphere, dominant cultural practices, and dominant political voices). See also Murji, *Stuart Hall*, *supra* note 3.

context of the current articulation of racial domination.<sup>13</sup> The other job this Essay performs is to reveal the role of race in classifying an act as a crime.<sup>14</sup> To accomplish this, it is important to tease out for examination the past and continued presence of the role of race when posed as an existential threat in determining whether an act constitutes a crime. Parts II and III of this Essay fulfill that role.

In the context of colonial and/or settler states, existential crimes are those acts that, based on their perception as a violation of the racial order, are declared crimes. Existential crimes, by virtue of their ontology, are liminal. Their visibility depends on how the body of the alleged perpetrator is read and the significance of that reading to the racial order. In other words, the alleged offender's features (in this case, racial) determine whether or not the act committed by that person could be perceived as a crime, one I classify as existential.<sup>15</sup> I argue here that, much in the way the state of mind (intent/*mens rea*) is read to determine whether or not one has committed a crime, disrupting the racial order—an existential threat—is factored in when determining whether or not one has violated a legal code.

We know definitions of crime and criminality are based, in part, on what is policed in a society. In early colonial America, policing focused on protecting European settlers from indigenous people, dispossessed from their land and enslaved, and from the kidnapped Africans, brought to these shores for enslavement for the exploitation of their labor.<sup>16</sup> While it was not a crime for Europeans to wreak death and destruction onto indigenous people and Africans, it was a crime for the indigenous and Africans to defend

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<sup>13</sup> See *id.* at 308, 326 (noting that race is not a transtemporal phenomenon that exists in the same way across differing periods of time and space but is articulated differently by socio-economic, cultural, and political structures and processes during specific moments in time and in particular spaces).

<sup>14</sup> Legal scholars and social theorists have different approaches to studying this topic. Regardless, both perspectives reveal how socio-economic and political systems articulate race. I try to employ elements of both those methods here.

<sup>15</sup> Judith Butler discusses the “visual field” used to understand a person’s actions. Butler, *supra* note 6, at 17. The example that Butler uses is the 1991 Rodney King case. In that case, a nearby person captured on video four white police officers beating King senseless with their batons as King hunched on all fours on the ground on the side of the highway, trying to avoid the blows. *Id.* at 15. The four officers were charged with using excessive force but were acquitted by an all-white jury based on the police defense that King posed a threat to them. Butler notes:

The video shows a man being brutally beaten, repeatedly, and without visible resistance; and so the question is, How could this video be used as evidence that the body being beaten was *itself* the source of danger, the threat of violence, and, further, that the beaten body of Rodney King bore an intention to injure, and to injure precisely those police who either wielded the baton against him or stood encircling him?

*Id.*

<sup>16</sup> See generally GEORGE F. COLE, CHRISTOPHER E. SMITH & CHRISTINA DEJONG, *THE AMERICAN SYSTEM OF CRIMINAL JUSTICE* (15th ed. 2017). The earliest Europeans in the American settler colony shared the responsibility for public safety by using a community-based “watch system” to protect themselves from external threat and internal crime. The external threat was defined as Native Americans who resisted their encroachment and rebellious enslaved Africans. *Id.* at 179.

themselves. The white gaze used to determine the criminal nature of an act was built into this system at its inception. The role of whiteness in the U.S. racial state has been that of the purveyor of extensive surveillance and over-policing of Blackness, indigeneity, and other categories of nonwhite life.<sup>17</sup>

Thus, creating this new classification of criteria for establishing a crime requires making visible the role of race. In this current articulation of white racial domination—e.g., systemic racism<sup>18</sup> and colorblind racism<sup>19</sup>—the visibility of the role of race in racially disparate outcomes is challenging. Those upholding the structures and practices in this current mainstream articulation of white supremacy deny the existence of a racial hierarchy. This work seeks to make the role of race visible, for that would increase the likelihood of eradicating these types of crimes. The continued consideration of such criteria in determining the existence of a violation contributes to racist exclusion.

#### I. POLICING AND THE EXISTENTIAL THREAT IN A (WHITE) RACIAL STATE

In many instances, the police are the first to determine whether or not a crime has been committed. Generally speaking, the role of policing policies and practices is to maintain public safety and the codified social order as determined by that society's or culture's collective consciousness. In racial states like the United States, policing policies and practices enforce a social order that is also the racial order. Thus, in racial states, police are regularly sorting out acts that violate the collective consciousness/"norms of propriety"<sup>20</sup> and acts that violate the racial order. The possibility exists that acts can violate both "norms of propriety" and the racial order, i.e., be an existential crime.<sup>21</sup> To do this sorting, policing work requires a closeness to

<sup>17</sup> GOLDBERG, *supra* note 7, at 264–65; Lipsitz, *supra* note 8, at 371. See generally SIMONE BROWNE, *DARK MATTERS: ON THE SURVEILLANCE OF BLACKNESS* (2015).

<sup>18</sup> See generally JOE R. FEAGIN, *RACIST AMERICA: ROOTS, CURRENT REALITIES, AND FUTURE REPARATIONS* (3d ed. 2014) (defining systemic racism—a system based on white supremacy—which serves as the foundational pillar in the development of the United States, including in the creation of the U.S. Constitution, which has "openly racist provisions" that "have not been deleted").

<sup>19</sup> EDUARDO BONILLA-SILVA, *RACISM WITHOUT RACISTS: COLOR-BLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN THE UNITED STATES 2* (2d ed. 2006) (defining colorblind racism as a denial of the existence of racism and/or racist practices and "explain[ing] contemporary racial inequality as the outcome of nonracial dynamics").

<sup>20</sup> Murji, *Enacting the Sacred*, *supra* note 1, at 28.

<sup>21</sup> A slave revolt, in which white people are killed, could be an example of acts that violate both "norms of propriety" and the racial order. Natalie P. Byfield, *Race Science and Surveillance: Police as the New Race Scientists*, 25 *SOC. IDENTITIES* 91, 92 (2019). Historical and contemporary acts that I read as existential crimes include: violating the 19<sup>th</sup> century anti-miscegenation law; a person of color overstaying their visa in the United States in the 21<sup>st</sup> century; and, under the Trump Administration's immigration practices, a person of color seeking refugee status at the U.S. border. In the examples just cited, please note the following: (1) race is written into the violation of an anti-miscegenation law; (2) a person of color overstaying their visa disrupts the racially hierarchical practices in the immigration statutes (note President Trump's desire to privilege immigrants from European nations); and (3) the

the dominant community that allows it to maintain the legitimacy and authority to do this type of criminalizing.<sup>22</sup> This kind of policing requires large amounts of acceptance within the collective consciousness of foundational values.

In the simplest terms, every crime consists of an act and the state of mind of the perpetrator.<sup>23</sup> Of course, there is also the victim(s). Acts that are classified as crimes are thought of as behaviors that violate our collective understanding of our society's or culture's norms of propriety. For example, acts like murder, rape, arson, treason, insurrection, sedition—like those committed at the U.S. Capitol on January 6, 2021<sup>24</sup>—are crimes that reflect a community's collective consciousness about such doings. Murji<sup>25</sup> argues that it is the *closeness of thought* between the community and the policing agencies—the people charged with maintaining community members' common understanding of propriety—that, at times, gives the policing forces the quality of “sacredness” that they hold in many societies.<sup>26</sup> For consideration of the sacred status of police in U.S. society, I suggest reflecting on laws that incorporate greater penalties for the killing of a police officer or the Blue Lives Matter laws that make police killing a hate crime.<sup>27</sup>

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Trump Administration, flouting international law, incarcerated refugee seekers at the southern border, who were primarily from Central America. It is likely that

[s]ome crimes can violate both ‘norms of propriety’ and the state’s existence as a racial state, e.g. a runaway slave in the nineteenth century commits an existential crime by depriving his/her ‘owner’ of their value while simultaneously assuming the rights of a free person where those rights do not exist for the enslaved.

*Id.* While it might be easier to see how existential crimes were prosecuted during the periods of slavery or even the *Jim Crow* era, in this era of colorblind racism, it is more challenging to see the role of race in those determinations because laws are presented as and treated as race-neutral.

<sup>22</sup> Murji, *Enacting the Sacred*, *supra* note 1, at 29.

<sup>23</sup> 21 AM. JUR. 2D *Criminal Law* § 112 (2020).

<sup>24</sup> Ted Barrett, Manu Raju & Peter Nickeas, *US Capitol Secured, 4 Dead After Rioters Stormed the Halls of Congress to Block Biden’s Win*, CNN POL. (Jan. 7, 2021, 3:33 AM), <https://www.cnn.com/2021/01/06/politics/us-capitol-lockdown/index.html>.

<sup>25</sup> Murji, *Enacting the Sacred*, *supra* note 1.

<sup>26</sup> *Id.* at 23–24, 27–29. Murji makes this case in an exploration of Michael Banton’s seminal 1964 work *The Policeman in the Community*, one of the first sociological studies of policing. *Id.* at 23. That work compares policing in Edinburgh City, in homogeneous Scotland, with urban areas in the United States. *Id.* at 27. Murji argues that, given the work that police do, the position they hold in society can be sacred. However, as everyone in a nation does not share in this sense of sacredness—due to diversity in the population, among other things—police work can also represent the profane. *Id.* at 27, 29.

<sup>27</sup> See Mareta McDonald, *Blue Lives Matter: Police Protection or Countermovement*, in *PROTECTING WHITENESS: WHITELASH AND THE REJECTION OF RACIAL EQUALITY* 210, 219 (Cameron D. Lippard, J. Scott Carter & David G. Embrick eds., 2020) (revealing that the laws that incorporate greater penalty for killing police reveal the strength of the political organizing taking place in various white communities. This is an indicator that the upholding of police as a special category of people is part of the collective consciousness of whiteness.); Frank Rudy Cooper, *Cop Fragility and Blue Lives Matter*, 2020 U. ILL. L. REV. 621, 637–39 (2020). Cooper contends that the Blue Lives Matter laws that position assault on police as a hate crime are extremely problematic. Cooper finds that these laws represent a type of police “resistance to criticism.” Cooper’s methodology reveals that this resistance denies the existence of racism in policing and paints the police as victims. This ultimately, Cooper contends, undermines the civil rights of member of the public particularly Black communities who suffer

Police officers clearly stand for something more than the people occupying the roles.

Murji interrogated the nature of the sacred/profane dichotomy used to analyze police-community relationships in a prior study; his work is instructive. Murji forces us to consider what allows a community to view its policing forces as sacred or profane, meaning more common and less worthy of prestige. Most important, Murji's research reveals what the status of policing agencies in a community tells us. This attribute of sacredness, Murji contends, is likely more prominent in homogeneous societies where there is less diversity (of race, class, and other features),<sup>28</sup> and it is more likely to occur in places where police behaviors are guided primarily by their role, as opposed to individual expression.<sup>29</sup> He also noted that this characteristic of sacredness is less likely to be in evidence in settler societies, of which the United States is one.

However, the level of sacredness affixed to police in the United States is much more nuanced than what the homogeneous/diverse poles in the sacred/profane dichotomy implies. Degrees of diversity may not be the issue, as Murji's research initially suggests.<sup>30</sup> In the United States, bestowing sacredness onto law enforcement bodies occurs more regularly in this element of our social arrangements than Murji's characterization implies. Despite the racial diversity of the United States,<sup>31</sup> and possibly due to the high levels of residential racial segregation, the quality of "sacredness" is

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from acts of brutality and loss of life due to police misconduct. *See also* Blue Lives Matter Act of 2016, H.R. 4760, 114th Cong. (2016), <https://www.congress.gov/bill/114th-congress/house-bill/4760>.

Blue Lives Matter bills requiring greater penalty for harming police are deemed unnecessary by opponent, who argue that the toughest penalties already exist for harming police officers. *See* Natasha Lennard, *Call Congress's "Blue Lives Matter" Bills What They Are: Another Attack on Black Lives*, INTERCEPT (May 19, 2018, 9:00 AM), <https://theintercept.com/2018/05/19/blue-lives-matter-bill-police-brutality/>. In 2018, a similar bill (The Protect and Serve Act of 2018) passed in the House and was introduced in the Senate. *H.R. 5698 (115<sup>th</sup>): Protect and Serve of 2018*, GOVTRACK (June 13, 2018), <https://www.govtrack.us/congress/bills/115/hr5698/summary>. In 2020, it was re-introduced in the House. *S. 4605 (116<sup>th</sup>): Protect and Serve Act of 2020*, GOVTRACK (Sept. 17, 2020), <https://www.govtrack.us/congress/bills/116/s4605>.

<sup>28</sup> Murji, *Enacting the Sacred*, *supra* note 1, at 31.

<sup>29</sup> *Id.* at 29.

<sup>30</sup> *Id.* at 29–31. While Murji does not use the term "degrees" to discuss the homogeneity/diverse polarity of difference between the Scottish and the American examples to help us understand how the sacred/profane dichotomy is applied to police relationships with the communities they serve, degrees of difference is one of the meanings suggested. Another suggested meaning could be that greater amounts of diversity simply make it easier for the symbolic role of the police to move from sacred to profane. Thus, in the case of the United States, where there is so much residential segregation by race and class, we may need to view the "sacred/profane" dichotomy as contingent and/or situationally dependent on the racial and class makeup of the community when it is applied to the role of police.

<sup>31</sup> Whites still maintain a population majority in the United States, although that percentage is declining. According to 2019 data from the United States Census Bureau, non-Hispanic whites make up 60.1% of the population, Hispanics 18.5%, Blacks 13.4%, Asians 5.9%, and Native Americans 1.3%. *QuickFacts: United States*, U.S. CENSUS BUREAU (July 1, 2019), <https://www.census.gov/quickfacts/FACT/table/US/PST045219>.

imparted a lot to policing agencies. However, it is typically bestowed to police by white communities whose members enjoy the privileged, historic position of settler status, when only the European settler had membership rights. These rights distinguished them from all other groups: the indigenous Native Americans, Africans, Asians, and Latinos. In order to preserve white supremacy, the status of settler would have to be maintained. The police and the white communities who venerate them together continue this “possessive investment in whiteness,” that is, maintaining the elevated status of the European settler.<sup>32</sup> The practice of investing in whiteness has been built into this nation; it maintains the criteria through which an act can be determined to be an existential threat.

Such practices established a cross-class alliance between and among European settlers, who bonded on the basis of “racial identity politics”—that is, “whiteness” and “white supremacy”—and the looting of all those not so endowed. This practice extended to 1776 and its aftermath, and arguably had its latest expression, at least in terms of underlying premise and intent, in the United States in November 2016.<sup>33</sup>

The 2014 formation of a largely white countermovement that calls itself “Blue Lives Matter” provides one such example of the importance in white communities of shoring up white supremacy by way of designating the status of sacredness onto policing forces to protect whiteness. Blue Lives Matter originated as a media company on Facebook.<sup>34</sup> Both Frank Rudy Cooper and Maretta McDonald define it as a countermovement because it began as a way to make “counterclaims” and “invalidate” the concerns of the initial movement, Black Lives Matter (“BLM”).<sup>35</sup> McDonald found that, in mainstream media representations, “Blue Lives Matter was rarely mentioned without Black Lives Matter. The movement and countermovement are presented as moral and ideological opposites with equal ethical and moral value.”<sup>36</sup> Such media presentations of Blue Lives Matter and BLM thus reinforce the idea that these groups represent people who stand as equals in society. They, in effect, hide the possibility that the white gaze—shaped by the dominant group’s collective consciousness about how an alleged perpetrator’s body is read—can criminalize an act.

The power differential between Blue Lives Matter and BLM makes it

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<sup>32</sup> Lipsitz, *supra* note 8, at 371.

<sup>33</sup> GERALD HORNE, *THE APOCALYPSE OF SETTLER COLONIALISM: THE ROOTS OF SLAVERY, WHITE SUPREMACY, AND CAPITALISM IN SEVENTEENTH-CENTURY NORTH AMERICA AND THE CARIBBEAN* 150 (2017).

<sup>34</sup> Cooper, *supra* note 27, at 624; Jake Offenhartz, *Inside the Seething White Heart of the Blue Lives Matter Movement*, *GOTHAMIST* (Aug. 19, 2020, 3:46 PM), <https://gothamist.com/news/inside-seething-white-heart-blue-lives-matter-movement>.

<sup>35</sup> Cooper, *supra* note 27, at 624; McDonald, *supra* note 27, at 218.

<sup>36</sup> McDonald, *supra* note 27, at 215.

inappropriate to advance a comparison of the two groups based on equity. BLM is engaged in liberatory politics for the lives of Black people in all the arenas of the society in which Black lives are at risk. The Blue Lives Matter movement fights for a type of necropolitics,<sup>37</sup> the right to totally dominate Black lives, even to the point of eradication. BLM challenges the systemic racism and oppression under capitalism, meted out by this settler state in various manifestations, such as state violence in the forms of over-policing, police brutality, and mass incarceration, among others.<sup>38</sup> As Amna Akbar argues, the goals of the BLM movement are much more expansive than the singularity of focus on policing many imagine:

Legal scholars often assume the movement's fight is over policing: indictments for police killings, independent prosecutors to investigate police shootings, better training and supervision for police, more diverse police forces, and so on. But, as Hayes suggested, the most imaginative voices within contemporary racial justice movements are fighting for much more than body cameras and police convictions.

The movement is focused on shifting power into Black and other marginalized communities; shrinking the space of governance now reserved for policing, surveillance, and mass incarceration; and fundamentally transforming the relationship among state, market, and society.<sup>39</sup>

The BLM movement arose in 2013 after the acquittal of George Zimmerman for killing<sup>40</sup> an unarmed Black teenager, 17-year-old Trayvon Martin, in Sanford, Florida. Zimmerman, a participant in a neighborhood watch/civilian policing group, claimed to feel threatened by Martin's presence in the gated community in which they lived.<sup>41</sup> His pursuit of

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<sup>37</sup> Achille Mbembe, *Necropolitics*, 15 PUB. CULTURE 11 (2003) (defining necropolitics as the "contemporary forms of subjugation of life to the power of death" which "profoundly reconfigure the relations among resistance, sacrifice, and terror").

<sup>38</sup> Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405, 407–08, 453 (2018); *About*, BLACK LIVES MATTER, <https://blacklivesmatter.com/about/> (last visited Apr. 3, 2021).

<sup>39</sup> Akbar, *supra* note 38, at 408 (footnotes omitted).

<sup>40</sup> I use the term "killing" here and not "murder" simply because a court of law acquitted Zimmerman. When police initially arrived on the scene after Martin's death, Zimmerman invoked the Florida Stand Your Ground law, which apparently recognized only Zimmerman's right to stand his ground, not Martin's. Matt Shafran, *What Is Florida's Stand Your Ground Law?*, WEINSTEIN LEGAL (Oct. 20, 2020, 7:19 PM), <https://www.weinsteininjurylawyer.com/florida-stand-your-ground-law/>. Initially, Zimmerman was not prosecuted. He would later be charged with murder. Lizette Alvarez & Cara Buckley, *Zimmerman Is Acquitted in Trayvon Martin Killing*, N.Y. TIMES (July 13, 2013), <https://www.nytimes.com/2013/07/14/us/george-zimmerman-verdict-trayvon-martin.html>.

<sup>41</sup> Alvarez & Buckley, *supra* note 40; Edward J. Blakely, *In Gated Communities, Such as Where Trayvon Martin Died, a Dangerous Mind-Set*, WASH. POST (Apr. 6, 2012), <https://www.washingtonpo>

Martin—who was unarmed and walking with a bag of Skittles—against police instructions led to the altercation in which Zimmerman shot Martin to death.<sup>42</sup> Would the life of a white teen walking in this community be at risk because their body would be read as a threat, a crime suspect? The visibility of BLM expanded globally in 2014 after the Ferguson, Missouri uprising against what BLM social justice activists found to be the illegal/unjustified police killing of unarmed, 18-year-old African American Michael Brown by police officer Darren Wilson, who responded to reports of Brown allegedly having stolen cigars from a local convenience store.<sup>43</sup> Would a police call about a white teen stealing a cigar lead to the suspect's death? The initial set of protests against Wilson's killing of Brown lasted for more than two weeks and drew the world's attention to a largely white, over-militarized police force—complete with tanks, combat gear, and assault rifles—that routinely abused its power to oppress the Black residents of Ferguson.<sup>44</sup>

In the wake of the upheaval in Ferguson, the federal Department of Justice (“DOJ”) investigation found that the Ferguson Police Department (“FPD”) used aggressive law enforcement as a revenue-generating tactic; regularly engaged in practices of unconstitutional detainment and arrests that disproportionately impacted Blacks; and commonly used excessive force against Blacks.<sup>45</sup> The FPD was forced into a consent decree with the DOJ, the goal of which was to improve the relationship between the police and the community and “to ensure protection of the constitutional and other legal rights of all members of the community.”<sup>46</sup> Such decrees come across as hollow in the context of the BLM movement. For the BLM movement,

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st.com/opinions/in-gated-communities-such-as-where-trayvon-martin-died-a-dangerous-mind-set/2012/04/06/gIQAwwG8zS\_story.html.

<sup>42</sup> Alvarez & Buckley, *supra* note 40. George Zimmerman was found not guilty of the murder charge. *Id.*

<sup>43</sup> Wesley Lowery, *Black Lives Matter: Birth of a Movement*, GUARDIAN (Jan. 17, 2017, 1:00 AM), <https://www.theguardian.com/us-news/2017/jan/17/black-lives-matter-birth-of-a-movement>. A grand jury declined to indict Wilson in the killing of Michael Brown. Erik Eckholm & Matt Apuzzo, *Darren Wilson Is Cleared of Rights Violations in Ferguson Shooting*, N.Y. TIMES (Mar. 4, 2015), <https://www.nytimes.com/2015/03/05/us/darren-wilson-is-cleared-of-rights-violations-in-ferguson-shooting.html>. Likewise, a federal civil rights investigation found no wrongdoing in Wilson's actions. *Id.*

<sup>44</sup> C.R. DIV., U.S. DEP'T OF JUST., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 2 (2015); Janelle Richards, *Five Years After the Ferguson, Missouri, Police Shooting of Michael Brown Jr., Residents Still Seeking Change*, NBC NEWS (Aug. 9, 2019, 2:56 PM), <https://www.nbcnews.com/news/us-news/five-years-after-ferguson-missouri-police-shooting-michael-brown-jr-n1040226>; Niraj Chokshi, *Militarized Police in Ferguson Unsettles Some; Pentagon Gives Cities Equipment*, WASH. POST (Aug. 14, 2014), [https://www.washingtonpost.com/politics/militarized-police-in-ferguson-unsettles-some-pentagon-gives-cities-equipment/2014/08/14/4651f670-2401-11e4-86ca-6f03cbd15c1a\\_story.html](https://www.washingtonpost.com/politics/militarized-police-in-ferguson-unsettles-some-pentagon-gives-cities-equipment/2014/08/14/4651f670-2401-11e4-86ca-6f03cbd15c1a_story.html).

<sup>45</sup> C.R. DIV., U.S. DEP'T OF JUST., *supra* note 44, at 2.

<sup>46</sup> Amended and Restated Consent Decree at 1, *United States v. Ferguson*, No. 4:16-cv-000180-CDP (E.D. Mo. Nov. 15, 2018).

leaders call for an end to what they term “a war on Black people.”<sup>47</sup> While policing has been identified as a major conduit through which this war against Blacks in this racial state is conducted, the BLM movement sees policing as only one arm in that war. The movement seeks an eradication of the value systems on which this nation has been built—including colonization, racism, ableism, eugenics, capitalism, and heteropatriarchy—and a transformation in the values and operations of the institutions that dominate the lives of Black people.<sup>48</sup> The BLM movement’s list of demands includes the following: an end to the war on Black youth; Black communities; Black women; Black trans, gender nonconforming, and intersex people; Black health and Black disabled people; and Black migrants. The movement also calls for an end to all jails, prisons, and immigration detention; the death penalty; the war on drugs; the surveillance of Black communities; pretrial detention and money bail; militarization of law enforcement; and the use of past criminal history.<sup>49</sup>

After the Ferguson unrest, former and active law enforcement officers formed Blue Lives Matter, garnering support from elected officials and, primarily, members of white communities. While organization representatives describe themselves as race-neutral, Blue Lives Matter was created to oppose what members term the disrespect shown to police officers and the supposed endangerment of police lives that the BLM movement created.<sup>50</sup> Research by both Cooper and McDonald contends that the BLM movement has not added to the jeopardy placed on the lives of police.<sup>51</sup>

Like most countermovements, Blue Lives Matter has an adversarial relationship with Black Lives Matter. In the first real study of media representations of Blue Lives Matter, McDonald notes:

Countermovements are often composed of groups located in higher positions in the social hierarchy than participants of the initial social movement. [Countermovements] often have access to resources not available to social movements, allowing [countermovements] to be more influential. Countermovements can also be reactionary and tend to

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<sup>47</sup> *Policy Platform: End the War on Black People*, MOVEMENT FOR BLACK LIVES, <https://m4bl.org/policy-platforms/end-the-war-on-black-communities/> (last visited Apr. 29, 2021). The Movement for Black Lives (M4BL) operates as a type of institutional coordinating community for many of the people and organizations that participate in the Black Lives Matter movement. *About Us*, MOVEMENT FOR BLACK LIVES, <https://m4bl.org/about-us/> (last visited Apr. 29, 2021).

<sup>48</sup> See *Interrupting Criminalization: Research in Action*, BARNARD CTR. FOR RSCH. ON WOMEN, <http://bcrw.barnard.edu/fellows/interrupting-criminalization-research-in-action/> (last visited Jan. 29, 2021) (showing the Barnard Center for Research on Women as an organization with research addressing some of the concerns of the BLM movement).

<sup>49</sup> *Policy Platform: End the War on Black People*, *supra* note 47.

<sup>50</sup> Offenhartz, *supra* note 34; McDonald, *supra* note 27, at 210; Cooper, *supra* note 27, at 624.

<sup>51</sup> See *supra* note 27.

concentrate their collective efforts on government and society instead of the movement they precede.

The interplay between social movements and countermobilizations is another important component in understanding adversarial movements. A dialectical relationship exists between oppositional movements. The battle between movements is fought in a public arena (the media, courts, or the legislative body) until a winner is declared. If the social movement is victorious, the countermovement takes the battle to a different arena.<sup>52</sup>

Blue Lives Matter positions itself as a bulwark against the threat it presumes BLM represents. This police-based countermovement presents BLM as an adverse group, spreading and embedding in the system the danger Blacks/Blackness represents. This threat perceived by the Blue Lives Matter group is not presented as a political challenge, but as the spread of criminality and lawlessness. At a July 25, 2020 Blue Lives Matter rally at Eisenhower Park in Long Island, New York, one of the most segregated suburban areas in the United States, 1,000 people gathered for the Blue Lives Matter event.<sup>53</sup> Large numbers of New York Police Department (“NYPD”) members attended, and speakers included Long Island Republican Congressman Peter King.<sup>54</sup> Representative King has a long history of siding with white supremacy, articulating anti-Blackness and Islamophobia.<sup>55</sup> A reporter filing from the scene onto his Twitter feed noted a statement by one of the presenters, “‘Theres already a civil war, we just haven’t gotten to guns yet,’ Jonathan Gillia[m], a former NAVY Seal and frequent [Sean] Hannity guest,<sup>56</sup> tells the crowd. ‘You are living in a war zone.’”<sup>57</sup>

Despite its origin and such references to “civil war,” Blue Lives Matter organizers argue that their organizing is race-neutral and that the crowd is there to provide support for police officers, who they view as needing more public respect for the difficult jobs they have fighting crimes, which are typically attributed to Black people.<sup>58</sup> The following statement made by one of the Capitol insurgents on January 6th captured the sense of colonial justice that is still prevalent in the collective consciousness of white communities. Many in these communities continue to expect the police to

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<sup>52</sup> McDonald, *supra* note 27, at 212 (citations omitted).

<sup>53</sup> Offenhardt, *supra* note 34.

<sup>54</sup> *Id.*

<sup>55</sup> See, e.g., Arun Venugopal, *Peter King’s Problematic Legacy with American Muslims*, WNYC (Nov. 12, 2019), <https://www.wnyc.org/story/peter-kings-problematic-legacy-american-muslims/> (comparing King’s committee hearings on “the radicalization of American Muslims” to a witch hunt).

<sup>56</sup> A reference to the Fox News commentator’s program “Hannity” on cable television. *Hannity*, FOX NEWS, <https://www.foxnews.com/shows/hannity> (last visited Apr. 3, 2021).

<sup>57</sup> Offenhardt, *supra* note 34.

<sup>58</sup> *Id.*

determine when an act violates the law based on this logic. A reporter from *The Nation* documented the woman's shock that some police shot at them as they stormed the Capitol: "'This is not America,' a woman said to a small group, her voice shaking. She was crying, hysterical. 'They're shooting at us. They're supposed to shoot BLM, but they're shooting the patriots.'"<sup>59</sup>

## II. TRADITIONAL SCHOLARSHIP & ITS PROBLEMATIC APPROACH TO RACIAL JUSTICE

As a social/political movement, BLM highlights the normalization of biopower within our socio-economic and political system and, even more importantly, within our system of knowledge. The BLM movement resists the expectation that we must view policing as having the same history in all communities. Historically, racist policing, incarceration policies, and racist social science have naturalized an association between Blacks and crime in the United States.<sup>60</sup> Part II of this Essay mentions the slave patrols. After slavery, this association continued via data collected on the arrests and incarceration of Blacks as a result of the convict-lease system and the Black codes, in particular the vagrancy laws.

By the 1980s, after a decade and a half of presidential administrations creating crime wars legislation to supposedly battle high rates of crime, the contemporary discourse reinscribing a relationship between race/Blackness and crime was again set in place. Many historians and social scientists have contended that these crime wars represent a pushback against the democratizing forces of the civil rights movement.<sup>61</sup>

Scholars who challenge the normalized association between race and criminalization typically must face down a buffeting by the crime statistics presented through traditional social science approaches used to make these

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<sup>59</sup> Andrew McCormick, *Madness on Capitol Hill*, NATION (Jan. 7, 2021), <https://www.thenation.com/article/politics/capitol-trump-insurrection-explosions/>.

<sup>60</sup> See ELIZABETH HINTON, FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA 18–21 (2016) (showing how, under the Nixon administration, the reorganizing of federal public safety monies for their dispersal in state and local agencies contributed to transforming the federal government's role in crime-fighting, in particular the new ways in which it managed Black urban crime and revealing how Black urban crime became the *cri de Coeur* of the conservative movement helped along by race-based theories of Black criminality); KHALIL GIBRAN MUHAMMAD, THE CONDEMNATION OF BLACKNESS: RACE, CRIME, AND THE MAKING OF MODERN URBAN AMERICA 1–14 (2010) (detailing the history of statistically driven racist social science that created an association between blackness and criminality based on data collected from the 1890 census which included the criminalizing of Black people in the post-slavery era due to the Black codes); NAOMI MURAKAWA, THE FIRST CIVIL RIGHT: HOW LIBERALS BUILT PRISON AMERICA 27–37 (2014) (revealing how throughout important periods in the 20<sup>th</sup> century, e.g., the civil rights era, the federal government uses legislation to tie issues of race to crime, specifically Black crime and illustrating how in past eras, the Democrats, the more liberal of the political parties, felt the need to pass conjoined-type legislations that both addressed racial/social justice and the Black "crime problem").

<sup>61</sup> MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 11–12 (2010); HINTON, *supra* note 60, at 32; MURAKAWA, *supra* note 60, at 3–4.

claims. “After Reconstruction, scholars, policymakers, and reformers analyzed the disparate rates of black incarceration in the North as empirical ‘proof’ of the ‘criminal nature’ of black Americans.”<sup>62</sup> The contemporary crime statistics often cited to support the crime-fighting agendas of policing organizations typically point to crimes that appear to be violations of all communities’ “norms of propriety.” I would suggest here, as an example, the crimes referred to as the seven major felony offenses, including murder and non-negligent manslaughter, rape, robbery, felony assault, burglary, grand larceny, and grand larceny of a motor vehicle.<sup>63</sup> It has long been argued that Blacks are overrepresented as violators of those laws.<sup>64</sup> Joan Petersilia noted that, by the early 1980s, Blacks made up twelve percent of the U.S. population, but arrest and incarceration data suggests they were responsible for forty-eight percent of crimes committed.<sup>65</sup> The same point still holds: if Blacks experience biased treatment at each stage in the system, then they will be overrepresented in the data.

Ultimately, this data is illegitimate; it is based on the presumption that the considerations about the criminality of an act are subject to identical criteria regardless of the features—e.g., race, class, gender, and geography—of the subject/perpetrator. Historically and contemporarily, acts have not been given equal consideration to determine criminality.<sup>66</sup> In colonial times, “the bureaucratisation of justice was the primary goal of every colonial administration as it codified the law and *tried to appear* neutral in the adjudication of cases between European exploiters and the victimised.”<sup>67</sup>

By the end of the 20<sup>th</sup> and the beginning of the 21<sup>st</sup> centuries, the inadequacies of traditional criminology were that much more pronounced. In her examination of the War on Drugs, Michelle Alexander points out that the courts’ failure to recognize cultural racism and the court-supported infusion of discretion in many levels of the criminal justice system are some of the reasons (she lists a multitude) for the disparate treatment and outcomes for Blacks in the criminal justice system.<sup>68</sup> For example,

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<sup>62</sup> ELIZABETH HINTON, LESHAE HENDERSON & CINDY REED, *VERA INST. OF JUST., AN UNJUST BURDEN: THE DISPARATE TREATMENT OF BLACK AMERICANS IN THE CRIMINAL JUSTICE SYSTEM* 3 (2018).

<sup>63</sup> Shane DiMaio, *NYPD to Post Crime Data on the Web for 7 Major Felonies*, STATEN ISLAND ADVANCE (Jan. 3, 2019), [https://www.silive.com/news/2015/12/nypd\\_to\\_release\\_incident-level.html](https://www.silive.com/news/2015/12/nypd_to_release_incident-level.html).

<sup>64</sup> JOAN PETERSILIA, *NAT’L INST. OF CORR., U.S. DEP’T OF JUST., R-2947-NIC, RACIAL DISPARITIES IN THE CRIMINAL JUSTICE SYSTEM* 1 (1983).

<sup>65</sup> *Id.*

<sup>66</sup> See ALEXANDER, *supra* note 61, at 138–39. Alexander points out that people from Black and Latinx hyper-policed communities are far more likely to face criminalization and harsher punishments for acts that are not criminalized as often among whites, e.g., the use of illegal drugs and the participation in the illegal drug trade.

<sup>67</sup> AGOZINO, *COUNTER-COLONIAL CRIMINOLOGY*, *supra* note 3, at 23 (emphasis added). The emphasis here is mine to accentuate the point Agozino makes later: While traditional criminology is presented as a scientific model, its failure to incorporate the barbarities of slavery and colonialism renders it inadequate as a foundation for theorizing the judicial process.

<sup>68</sup> ALEXANDER, *supra* note 61, at 185–87.

Alexander notes that “[i]mmunizing prosecutors from claims of racial bias and failing to impose any meaningful check on the exercise of their discretion in charging, plea bargaining, transferring cases, and sentencing has created an environment in which conscious and unconscious biases are allowed to flourish.”<sup>69</sup> Other scholars have also addressed the biased treatment Black people face in the legal system: “Bias by decision makers at all stages of the justice process disadvantages black people. Studies have found that they are more likely to be stopped by the police, detained pretrial, charged with more serious crimes, and sentenced more harshly than white people.”<sup>70</sup>

The BLM movement and other critics of the criminal justice system have noted the long history of laws, policing, and court policies and practices that have disadvantaged Blacks.<sup>71</sup> Thus, policing represents something other than the sacred in Black communities. Historically, law enforcement policies and the ways in which police have enacted them in Black communities have been profane.<sup>72</sup>

Contemporarily, the growing number of killings of Black people—particularly of unarmed Black people—when in police custody or in police interaction has been a central concern of the BLM movement.<sup>73</sup> The names abound: Trayvon Martin, Michael Brown, Eric Garner, Walter Scott, Tamir Rice, Freddie Gray, Sandra Bland, Tanisha Anderson, Yvette Smith, Miriam Carey, Breonna Taylor, George Floyd, Daunte Wright, and Ma’Khia Bryant.<sup>74</sup> Overall, the BLM movement contests all forms of white supremacy<sup>75</sup> and identifies a historical through-line between the contemporary criminal justice system and the institutions, laws, and

<sup>69</sup> *Id.* at 117.

<sup>70</sup> HINTON ET AL., *supra* note 62, at 1.

<sup>71</sup> See NAZGOL GHANDNOOSH, THE SENTENCING PROJECT, BLACK LIVES MATTER: ELIMINATING RACIAL INEQUITY IN THE CRIMINAL JUSTICE SYSTEM 15–18 (2015) (noting that four features have created an unequal justice system: (1) “[d]isparate racial impact of ostensibly race-neutral policies and laws”; (2) “[r]acial bias among criminal justice professionals”; (3) “[r]esource allocation decisions that disadvantage low-income people”; and (4) “[c]riminal justice policies that exacerbate socioeconomic inequalities”).

<sup>72</sup> HINTON ET AL., *supra* note 62, at 1. See also *id.* at 7 (explaining that “[b]eyond laws and policies that disparately impact black people, the bias of individual actors in the criminal justice system—*police*, prosecutors, judges, and juries—can further disproportionately involve black people . . . .”) (emphasis added).

<sup>73</sup> See John Eligon, *Black Lives Matter Grows as Movement While Facing New Challenges*, N.Y. TIMES (Sept. 3, 2020), <https://www.nytimes.com/2020/08/28/us/black-lives-matter-protest.html> (noting that “[t]he speed at which the protests . . . have spread and the scale of support they have received speak to the foundation that the Black Lives Matter movement has laid over the past several years,” particularly following the killings of Trayvon Martin and Michael Brown).

<sup>74</sup> Samuel Sinyangwe, *Police Violence Map*, MAPPING POLICE VIOLENCE, <https://mappingpoliceviolence.org> (last updated Apr. 21, 2021). The Mapping Police Violence database includes data on incidents in which people are “fatally shot by on-duty police,” as well as killings through police “use of a chokehold, baton, taser or other means” and “killings by off-duty police.” *About the Data*, MAPPING POLICE VIOLENCE, <https://mappingpoliceviolence.org/aboutthedata> (last visited Apr. 30, 2021).

<sup>75</sup> *About*, BLACK LIVES MATTER, *supra* note 38.

practices that created and upheld slavery,<sup>76</sup> such as the slave patrols. Members of the slave patrols joined with other militia during the Reconstruction Era and afterwards to form the Ku Klux Klan.<sup>77</sup> These slave patrols were the foundation of 19<sup>th</sup> century police departments in the southern United States.<sup>78</sup> For the BLM movement, the relationship between policing, in its current configuration, and white supremacy has been and continues to be a very close one.<sup>79</sup>

One of the historic functions U.S. police officers carry out in their roles is maintaining the boundaries between whiteness and others—namely, Blacks and Indigenous.<sup>80</sup> To fulfill this function, the policies and practices instituted in policing since the colonial period include legal and extrajudicial suppression of people of color.<sup>81</sup>

### III. WHAT TYPE OF CRIME DO THESE ACTS REPRESENT?

As the attempted coup unfurled at the U.S. Capitol on January 6, 2021, live television captured the insurrection against the U.S. government, specifically the U.S. Congress.<sup>82</sup> The charging, violent, angry crowd seemed intent on overturning the results of the November 2020 election in which President-elect Joseph Biden and Vice President-elect Kamala Harris were declared the victors, having secured about 80 million votes.<sup>83</sup> On that day, two weeks before the planned inauguration, the insurgents appeared intent on stopping the final process in formalizing the Biden-Harris victory. The scene of a largely white mob—hundreds, perhaps even thousands, strong—with many individuals carrying weapons and flags<sup>84</sup>—Blue Lives Matter<sup>85</sup>

<sup>76</sup> See Charles R. Lawrence III, *The Fire This Time: Black Lives Matter, Abolitionist Pedagogy and the Law*, 65 J. LEGAL EDUC. 381, 404 (2015) (asserting that Black Lives Matter activists “must know that Black Lives Matter is about saving all of our lives, about reconstituting our nation, by creating a revolution against law and culture that value property over humanity”).

<sup>77</sup> Chelsea Hansen, *Slave Patrols: An Early Form of American Policing*, NAT’L L. ENF’T MUSEUM (July 10, 2019), <https://lawenforcementmuseum.org/2019/07/10/slave-patrols-an-early-form-of-american-policing/>.

<sup>78</sup> See *id.* (“After the Civil War, Southern police departments often carried over aspects of the [slave] patrols. These included systematic surveillance, the enforcement of curfews, and even notions of who could become a police officer.”).

<sup>79</sup> *About*, BLACK LIVES MATTER, *supra* note 38.

<sup>80</sup> Byfield, *supra* note 21, at 94.

<sup>81</sup> AGOZINO, COUNTER-COLONIAL CRIMINOLOGY, *supra* note 3, at 214.

<sup>82</sup> Aaron C. Davis, *Timeline: How Law Enforcement and Government Officials Failed to Head Off the U.S. Capitol Attack*, WASH. POST (Jan. 22, 2021, 5:13 PM), <https://www.washingtonpost.com/graphics/2021/national/national-security/capitol-response-timeline/>.

<sup>83</sup> Kate Sullivan & Jennifer Agiesta, *Biden’s Popular Vote Margin Over Trump Tops 7 Million*, CNN POL. (Dec. 4, 2020, 10:27 AM), <https://www.cnn.com/2020/12/04/politics/biden-popular-vote-margin-7-million/index.html>.

<sup>84</sup> Jason Hanna, Katelyn Polantz & Marshall Cohen, *Key Arrests So Far from the Capitol Riot*, CNN POL. (Jan. 15, 2021, 11:07 PM), <https://www.washingtonpost.com/graphics/2021/national/national-security/capitol-response-timeline/>.

<sup>85</sup> See Cooper, *supra* note 27, at 624 (explaining the origins of the Blue Lives Matter movement, as well as the complaints it emphasizes). Blue Lives Matter flags have become a recurring symbol at events

flags, U.S. flags, and a Confederate flag—converging on the U.S. Capitol for this purpose transfixed the world.<sup>86</sup> Never before had a Confederate flag been flown in the U.S. Capitol.<sup>87</sup> The fact that the mob was likely incited by a speech they just heard from the outgoing President of the United States, Donald Trump,<sup>88</sup> made the scene that much more stunning.

Videos show Capitol police moving barricades to allow the throngs of people to flow past them.<sup>89</sup> Hundreds broke in through windows and doors, with some using wood and some using police shields to force their way in.<sup>90</sup> The legislators in the Capitol went into hiding, fearing for their lives.<sup>91</sup> The crowd that breached the Capitol dispersed through the byzantine hallways<sup>92</sup> and went on the hunt for legislators to possibly harm? Possibly kidnap? Possibly kill? The investigations will sort that out, hopefully. Videos capture some of the mob taking selfies with members of the Capitol police.<sup>93</sup> Did they receive help from the inside, as some legislators now charge?<sup>94</sup> The upcoming investigations will determine that, as well.

As we all watched and listened in real time, reports came in about Molotov cocktails and bombs being found by the Republican National Committee headquarters and the Democratic National Committee headquarters, as the Capitol succumbed to the wall of people.<sup>95</sup> The Capitol

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organized by white supremacists, like the “Unite the Right” rally in Charlottesville, Virginia from August 11, 2017, through August 12, 2017. Mary Tyler March, *Barring of ‘Thin Blue Line’ Flag Display Stirs Controversy in Montgomery County*, NPR (Nov. 4, 2019), <https://www.npr.org/local/305/2019/11/04/76060800/barring-of-thin-blue-line-flag-display-stirs-controversy-in-montgomery-county>.

<sup>86</sup> Rachel Chason & Samantha Schmidt, *Lafayette Square, Capitol Rallies Met Starkly Different Policing Response*, WASH. POST (Jan. 14, 2021), <https://www.washingtonpost.com/dc-md-va/interactive/2021/blm-protest-capitol-riot-police-comparison/>.

<sup>87</sup> Maria Cramer, *Confederate Flag an Unnerving Sight in Capitol*, N.Y. TIMES (Jan. 14, 2021), <https://www.nytimes.com/2021/01/09/us/politics/confederate-flag-capitol.html> (quoting Professor William Blair as saying, “The Confederate flag made it deeper into Washington on Jan. 6, 2021, than it did during the Civil War”).

<sup>88</sup> Davis, *supra* note 82 (quoting former President Trump’s speech in which he said, “We’re going to the Capitol . . . [w]e’re going to try and give them the kind of pride and boldness that they need to take back our country”).

<sup>89</sup> *Brittany Packnett Cunningham: Pro-Trump Mob a ‘Literal Example of White Supremacy’* (MSNBC television broadcast Jan. 7, 2021), <https://www.msnbc.com/msnbc/watch/brittany-packnett-cunningham-pro-trump-mob-a-literal-example-of-white-supremacy-99020357837> [hereinafter MSNBC broadcast].

<sup>90</sup> Davis, *supra* note 82.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> MSNBC broadcast, *supra* note 89.

<sup>94</sup> Josh Gerstein, *Lawmakers Who Conspired with Capitol Attackers in Legal Peril*, POLITICO (Jan. 14, 2021, 7:38 PM), <https://www.politico.com/news/2021/01/14/lawmakers-capitol-attackers-legal-459519> (reporting that some Democratic lawmakers have alleged that the Capitol tours given on January 5, 2021, by Republican Congressmen may be related to the attack that occurred the very next day).

<sup>95</sup> Katie Benner, Maggie Haberman & Michael S. Schmidt, *Pipe Bomb Found and Destroyed at R.N.C.: D.N.C. Is Evacuated*, N.Y. TIMES (Jan. 6, 2021), <https://www.nytimes.com/2021/01/06/us/politics/pipe-bomb-rnc.html>; Davis, *supra* note 82.

police claimed to be as shocked as members of the audience to the unfolding scene.<sup>96</sup> But that professed shock would later be challenged by reports of warnings from the FBI delivered the afternoon before the breach:

An explicit warning from an FBI office in Virginia reaches the FBI Field Office in Washington. It states that extremists from at least four states are preparing to travel to Washington to commit violence and “war,” according to an internal document reviewed by The Post. Agents write that in an online thread they were monitoring, they observed this message: “Congress needs to hear glass breaking, doors being kicked in, and blood from their BLM and Pantifa slave soldiers being spilled. Get violent. Stop calling this a march, or rally, or a protest. Go there ready for war. We get our President or we die. NOTHING else will achieve this goal.”<sup>97</sup>

Five people died as a result of the confrontation.<sup>98</sup> Capitol Police Officer Brian Sicknick died of the injuries he sustained at the hands of the mob.<sup>99</sup> Also among the dead were four from the mob, one of whom was shot by a Capitol officer.<sup>100</sup> Additionally, several dozen police officers were injured.<sup>101</sup>

Police have been heavily criticized for the way they handled the insurrection. Brittany Packnett Cunningham, a former member of the Obama Policing Task Force, noted:

Law enforcement . . . did not just stand by while these things happened and provided as what’s said an unprofessional response. We have video of several law enforcement officers actually encouraging . . . and permitting these activities, opening barricades, taking selfies with these insurrectionists . . . It wasn’t just that the police stood by and did nothing. It’s that some of them actually encouraged and participated in activity that was a direct violation of the Constitution and was a clear example of domestic terrorism.<sup>102</sup>

In the days after the breach, the media reported that laptops with national

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<sup>96</sup> Shaila Dewan, Neil MacFarquhar, Zolan Kanno-Youngs & Ali Watkins, *Police Failures Spur Resignations and Complaints of Double Standard*, N.Y. TIMES (Jan. 20, 2021), <https://www.nytimes.com/2021/01/07/us/Capitol-cops-police.html> (reporting that some people in law enforcement insist “that the president’s encouragement of the mob could not have been anticipated”).

<sup>97</sup> Davis, *supra* note 82.

<sup>98</sup> Jack Healy, *These Are the 5 People Who Died in the Capitol Riot*, N.Y. TIMES (Jan. 16, 2021), <https://www.nytimes.com/2021/01/11/us/who-died-in-capitol-building-attack.html>.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> Chason & Schmidt, *supra* note 86.

<sup>102</sup> MSNBC broadcast, *supra* note 89.

security secrets were stolen.<sup>103</sup> Numerous members of police forces across the nation were identified as participating in the Capitol breach.<sup>104</sup> In the first law enforcement press briefing after the siege on January 12th, the FBI reported that it had about 100,000 pieces of evidence.<sup>105</sup>

From the moment of the breach, comparisons were made between the treatment the insurrectionists received from police, from the start of the breach until those in the Capitol walked out, and the way in which Black Lives Matter protesters were handled by police on June 1, 2020 at the behest of President Trump.<sup>106</sup> By the evening of January 6th, CNN reported that D.C. police arrested sixty-one people.<sup>107</sup> By the end of the June 1, 2020 BLM demonstration in Lafayette Square, opposite the White House, 316 protesters were arrested.<sup>108</sup>

BLM demonstrators gathered in Lafayette Square to protest the police murder of forty-six-year-old George Floyd in May 2020 in Minneapolis, Minnesota.<sup>109</sup> Police murdered Floyd while taking him into custody.<sup>110</sup> A convenience store employee called the police to the scene, claiming Floyd allegedly passed a counterfeit \$20 bill.<sup>111</sup> Within seventeen minutes of the police arriving and attempting to put him in custody, Floyd died.<sup>112</sup> During the detainment of Floyd, he complained of anxiety and claustrophobia.<sup>113</sup> In the process of restraining Floyd, Officer Derek Chauvin kneeled on Floyd's neck for eight minutes and forty-six seconds.<sup>114</sup> Floyd expired at the scene,

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<sup>103</sup> Chris Cameron, *Prosecutors Mull Charges for Theft of National Security Information After Laptops and Documents Are Stolen in Capitol Siege*, N.Y. TIMES (Jan. 10, 2021, 2:34 PM), <https://www.nytimes.com/2021/01/10/us/politics/stolen-items-prosecutors-charges.html>.

<sup>104</sup> Tom Porter, *31 Police Officers are Under Investigation over Their Suspected Involvement in the Capitol Riot, as Departments Face Pressure to Weed out White Nationalists*, BUS. INSIDER (Jan. 25, 2021, 8:38 AM), <https://www.businessinsider.com/31-police-officers-investigated-suspected-capitol-riot-involvement-report-2021-1>.

<sup>105</sup> *FBI Assistant Director in Charge Steven M. D'Antuono's Remarks at Press Briefing Regarding Violence at U.S. Capitol*, FBI WASH., OFF. PUB. AFFS. (Jan. 12, 2021), <https://www.fbi.gov/contact-us/field-offices/washingtondc/news/press-releases/fbi-assistant-director-in-charge-steven-m-dantuonos-remarks-at-press-briefing-regarding-violence-at-us-capitol-011221>.

<sup>106</sup> Casey Tolan, *DC Police Made Far More Arrests at the Height of Black Lives Matter Protests than During the Capitol Clash*, CNN (Jan. 9, 2021, 4:28 PM), <https://www.cnn.com/2021/01/08/us/dc-police-arrests-blm-capitol-insurrection-invs/index.html>.

<sup>107</sup> Elliott C. McLaughlin, *On These 9 Days, Police in DC Arrested More People than They Did During the Capitol Siege*, CNN (Jan. 12, 2021, 11:21 AM), <https://www.cnn.com/2021/01/11/us/dc-police-previous-protests-capitol/index.html>.

<sup>108</sup> *Id.*

<sup>109</sup> Chason & Schmidt, *supra* note 86.

<sup>110</sup> Evan Hill, Ainara Tiefenthäler, Christiaan Triebert, Drew Jordan, Haley Willis & Robin Stein, *How George Floyd Was Killed in Police Custody*, N.Y. TIMES (Nov. 5, 2020), <https://www.nytimes.com/2020/05/31/us/george-floyd-investigation.html>.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

calling for his mother.<sup>115</sup> Floyd was killed in front of a group of people, pleading for his life.<sup>116</sup> A video of the murder, taken by a teenager and posted online, went viral.<sup>117</sup> Worldwide protest erupted against police brutality and lack of accountability.<sup>118</sup> The treatment the BLM protesters received presents a stark contrast to that of the insurrectionists.

The three days that preceded it were largely peaceful by day and pocked by violence and destruction at night, with law enforcement chasing rioters through the capital's streets. Trump grew more insistent that if local leaders couldn't reclaim the city, he would. His administration ordered up an outsize and militarized response, with law enforcement swelling from a host of federal agencies, some with no identifying insignia, and National Guard from the District and 12 states.

In the early evening, shield-bearing riot officers and mounted Park Police brutally routed those gathered, apparently without provocation or audible warning as required by law. Shortly after, Trump strode through the cleared park with military leaders at his side to pose at a church whose leaders didn't want him there.<sup>119</sup>

The FBI has noted that they expect the number of cases resulting from the Capitol insurrection to grow into the hundreds.<sup>120</sup> However, prosecuting those cases will be challenging for those not caught on videotape. The initial charges range from simple trespass, theft of mail and electronic devices, assault of an officer, and felonious possession of weapons, to murder.<sup>121</sup> In its press briefing, the FBI also claimed to be looking at additional felony cases tied to sedition and national security conspiracy with prison terms of up to twenty years.<sup>122</sup> Cases with multiple offenses and multiple perpetrators often pose a challenge for identifying who committed what act. These investigations will use the same process to determine which of those acts

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<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> Audra D.S. Burch & John Eligon, *Bystander Videos of George Floyd and Others are Policing the Police*, N.Y. TIMES (May 29, 2020), <https://www.nytimes.com/2020/05/26/us/george-floyd-minneapolis-police.html>.

<sup>118</sup> *Protests Across the Globe After George Floyd's Death*, CNN (June 13, 2020, 3:22 PM), <https://www.cnn.com/2020/06/06/world/gallery/intl-george-floyd-protests/index.html>.

<sup>119</sup> Chason & Schmidt, *supra* note 86.

<sup>120</sup> David Lauter, *Officials Eye Sedition, Conspiracy Charges as Investigation of Capitol Riot Expands*, L.A. TIMES (Jan. 12, 2021, 3:57 PM), <https://www.latimes.com/politics/story/2021-01-12/federal-prosecutors-examining-sedition-charges-in-capitol-assault>.

<sup>121</sup> Press release, U.S. Dep't of Just., *Thirteen Charged in Federal Court Following Riot at the United States Capitol* (Jan. 8, 2021), <https://www.justice.gov/opa/pr/thirteen-charged-federal-court-following-riot-united-states-capitol>.

<sup>122</sup> Lauter, *supra* note 120.

constitutes a violation of the codes in question. Despite complaints about the paucity of domestic terrorism laws, during the press conference, the FBI made a point of saying that there are enough laws on the books to address these acts.<sup>123</sup>

How will the bodies and the acts be read in determining the crimes committed? We have other examples of policing and its role in criminalization. One of the most severe is stop and frisk. In New York City, at the height of the stop and frisk program under the Bloomberg Administration between 2002 and 2013, police made about five million stops.<sup>124</sup> The vast majority of those stops were of Blacks and Latinos.<sup>125</sup> In making the decision to detain these pedestrians, officers used a variety of acts to identify suspicious behaviors. Examples of acts that were deemed suspicious and justified detainment included, among other things, a furtive glance, changing directions at the sight of an officer, and clothing inappropriate for the weather.<sup>126</sup> For Blacks, a furtive glance could warrant a detainment that could lead to their death. For whites, a siege on the Capitol could get police support to carry out their acts.

#### IV. ABOLITION OF EXISTENTIAL CRIMES

This Essay argues that existential crimes exist. It contends that in a racial state teasing out and abolishing acts that constitute existential crimes from our criminal codes and procedures are important steps in challenging white supremacy in the social and legal systems and increasing the likelihood of moving toward a truly democratic society. The process of determining that an act represents an existential crime is related to who commits the act and the significance of the act to disrupting the racial order. In other words, the white gaze, which is built into the law enforcement system and used to decide the criminal nature of an act, determines that an act represents an existential crime if the act undermines the racial order. Similar to Michele Goodwin's argument that we must shine a light on the Jane Crow or new reproductive politics that has grown pervasive in the law enforcement system, existential crimes must be surfaced in order to be properly addressed. Existential violations, like Jane Crow laws are based on legal principles that claim to do one thing but does another because the underlying reason for the law or violation is hidden behind the rationale of crime. We have yet to see how the legal system will prosecute all the Capitol

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<sup>123</sup> *Id.*

<sup>124</sup> Byfield, *supra* note 21, at 99–100.

<sup>125</sup> *Id.*

<sup>126</sup> Avdi S. Avdija, *Police Stop-and-Frisk Practices: An Examination of Factors That Affect Officers' Decisions to Initiate a Stop-and-Frisk Police Procedure*, 16 INT'L J. POLICE SCI. & MGMT. 26, 29 (2014).

insurrection cases. However, if there is to be any equity across all segments of our diverse society, the criminalization process cannot privilege whiteness in this case, which is one many have termed domestic terrorism.

At minimum, for us to start to infuse equity into the system, identifying when an act has been determined to be an existential crime may create a platform to push for remedies, including the abolition of existential crimes. Some of Michelle Alexander's observations come to mind. Courts must be forced to recognize cultural racism.<sup>127</sup> This will move society toward ceasing to immunize prosecutors from claims of racial bias. This could also prohibit the transfer of cultural biases to the artificial intelligence technologies being incorporated into all arenas of law enforcement. In addition, as stop and frisk practices have revealed, to stop the prosecution of acts determined to be existential crimes, we must limit police discretionary power, one of the most significant sources of cultural bias in the law enforcement system.

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<sup>127</sup> ALEXANDER, *supra* note 61, at 122.

