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## **Blackness as Fighting Words**

Etienne C. Toussaint

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## *ESSAY*

### BLACKNESS AS FIGHTING WORDS

*Etienne C. Toussaint\**

“It’s in they job description to terminate the threat / So 41 shots to the body is what he can expect.” — Talib Kweli, *The Proud*<sup>1</sup>

“I believe that this nation can only heal from the wounds of racism if we all begin to love blackness. . . . That which is best within us, . . . that which is faltering, which is wounded, which is contradictory, incomplete.” — bell hooks<sup>2</sup>

#### INTRODUCTION

Where I grew up, the wrong words could turn an innocent sparring match of playground taunts and after-school gibes into a full-out asphalt brawl. Naïve boys enacting popular tropes of Black hypermasculinity,<sup>3</sup>

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<sup>1</sup> Talib Kweli, *The Proud*, *on Quality* (Rawkus Records 2002).

<sup>2</sup> Melvin McLeod, “There’s No Place To Go But Up”—bell hooks and Maya Angelou in Conversation, *Lion’s Roar* (Jan. 1, 1998), <https://hlionsroar.com/theres-no-place-to-go-but-up/> [<https://perma.cc/K5Y3-HXQE>].

<sup>3</sup> See, e.g., LL Cool J, *Mama Said Knock You Out* (Def Jam 1990) (“I’m rocking my peers / Puttin’ suckers in fear / Makin’ the tears rain down like a monsoon / Listen to the bass go boom.”).

we would often form a circle around the contenders, laughing as they hurled jokes back and forth about athletic ability or sneaker selection or skin color into the cypher. “You so stupid you tried to save a fish from drowning.” “You so ugly even Hello Kitty said goodbye.” “You so black you gotta wear white gloves to eat chocolate.” But inevitably, as soon as someone uttered that dreaded phrase—“Yo mama”—the playful exchange always took a turn for the worse. We all knew there was no turning back at that point. In the South Bronx, those were fighting words.

As a Black youth roaming New York City’s urban metropolis in the 1990s, mastering the nuances of fighting words was critical to maintaining close friendships and keeping potential enemies at bay. However, in the age of Donald Trump, fighting words have taken on new meaning. In response to sharp critiques of his political agenda—from assertions that his tax reforms benefit the wealthy, to contentions that his Muslim bans have incited political Islamophobia, to revelations that his trade manipulations influence immigration policy<sup>4</sup>—Trump’s brazen rhetorical style has transformed the bully pulpit into a stage for bullying.<sup>5</sup> Whereas the fighting words of my youth reflected bruised egos and shallow differences of opinion, the fighting words of Donald Trump have normalized “racist, sexist, homophobic, and xenophobic rhetoric” from the leader of the United States that too often has fanned the flames of racial violence.<sup>6</sup> With the emergence of the COVID-19 pandemic,

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<sup>4</sup> See, e.g., Khaled A. Beydoun, “Muslims Bans” and the (Re)making of Political Islamophobia, 2017 U. Ill. L. Rev. 1733, 1768 (defining political Islamophobia as “a strategy to garner votes, particularly among disaffected segments of the electorate who take to bigoted and xenophobic messaging”); see also Jeff Ernsthausen & Justin Elliott, Billionaires Keep Benefiting from a Tax Break To Help the Poor. Now, Congress Wants To Investigate., ProPublica (Nov. 8, 2019, 5:00 AM), <https://www.propublica.org/article/billionaires-keep-benefiting-from-a-tax-break-to-help-the-poor-now-congress-wants-to-investigate> [<https://perma.cc/33BD-AE76>] (describing criticism of the Trump administration’s handling of tax “opportunity zones”); Felicia Sonmez & David J. Lynch, Trump’s Erratic Policy Moves Put National Security at Risk, Experts Warn, Wash. Post (June 23, 2019, 8:15 PM), [https://www.washingtonpost.com/politics/trumps-erratic-policy-moves-put-national-security-at-risk-experts-warn/2019/06/23/9cfae958-95d2-11e9-830a-21b9b36b64ad\\_story.html](https://www.washingtonpost.com/politics/trumps-erratic-policy-moves-put-national-security-at-risk-experts-warn/2019/06/23/9cfae958-95d2-11e9-830a-21b9b36b64ad_story.html) [<https://perma.cc/KCR3-9ZMX>] (noting the Trump administration’s manipulation of trade negotiations to influence immigration policy).

<sup>5</sup> See Heather Digby Parton, Trump Has Used the “Bully Pulpit” More than Any President in History—and That’s Terrifying, Salon (Apr. 8, 2020, 1:35 PM), <https://www.salon.com/2020/04/08/trump-has-used-the-bully-pulpit-more-than-any-president-in-history--and-thats-terrifying/> [<https://perma.cc/F47B-PVQ6>]; Atiba R. Ellis, Normalizing Domination, 20 CUNY L. Rev. 493, 493 (2017).

<sup>6</sup> Ellis, *supra* note 5, at 493.

coupled with a new onslaught of citizen murders at the hands of police officers, Donald Trump's presidency—one marred by impeachment proceedings on charges of abuse of power and obstruction of Congress<sup>7</sup>—has devolved into social unrest, nationwide uprisings, and the unraveling of law and order.<sup>8</sup>

The resurgence of worldwide protests by racial justice activists has ushered in a global reckoning with the meaning of this generation's rallying cry—"Black Lives Matter."<sup>9</sup> As cities emblazon their streets with this expression in massive artistic murals,<sup>10</sup> the Trump administration has responded with the militarized policing of non-violent public demonstrations, revealing not merely a disregard for public safety, but far worse, a concerted dismantling of protestors' First Amendment rights.<sup>11</sup> Yet despite a surging pandemic, Black Lives Matter ("BLM") protests have persisted.<sup>12</sup> Accordingly, this Essay considers the implications of

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<sup>7</sup> See Lili Loofbourow, *Impeachment Is a Permanent Stain on Trump's Presidency*, *Slate* (Dec. 18, 2019, 8:44 PM), <https://slate.com/news-and-politics/2019/12/impeachment-impact-trump-presidency-clinton.html> [<https://perma.cc/2XHX-9X7Z>]; Nicholas Fandos & Michael D. Shear, *Trump Impeached for Abuse of Power and Obstruction of Congress*, *N.Y. Times* (Dec. 18, 2019), <https://www.nytimes.com/2019/12/18/us/politics/trump-impeached.html> [<https://perma.cc/2RZN-TX2W>].

<sup>8</sup> See Stephen Collinson, *While Trump Shelters in the White House, America Cries out for Leadership*, *CNN* (June 1, 2020, 9:50 AM), <https://www.cnn.com/2020/06/01/politics/trump-white-house-racial-unrest-leadership/index.html> [<https://perma.cc/3HKU-PMDN>].

<sup>9</sup> See generally Christopher J. LeBron, *The Making of Black Lives Matter: A Brief History of an Idea* (2017) (positioning Black Lives Matter within the historical Black intellectual tradition); Jen Kirby, "Black Lives Matter" Has Become a Global Rallying Cry Against Racism and Police Brutality, *Vox* (June 12, 2020, 7:30 AM), <https://www.vox.com/2020/6/12/21285244/black-lives-matter-global-protests-george-floyd-uk-belgium>.

<sup>10</sup> See Leah Asmelash, *Washington's New Black Lives Matter Street Mural Is Captured in Satellite Image*, *CNN* (June 6, 2020, 4:03 PM), <https://www.cnn.com/2020/06/06/us/black-lives-matter-dc-street-mural-space-trnd/index.html> [<https://perma.cc/68B7-6AK5>]; Wyatt Grantham-Philips, *Powerful Photos Show 'Black Lives Matter' Painted Across Streets Nationwide*, *USA Today* (June 19, 2020), <https://www.usatoday.com/story/news/-nation/-2020/06/17/black-lives-matter-painted-city-streets-see-art-nyc-washington/3204742001/> [<https://perma.cc/V6MQ-KKP5>].

<sup>11</sup> See Garrett Epps, *Trump's Grotesque Violation of the First Amendment*, *Atlantic* (June 2, 2020), <https://www.theatlantic.com/ideas/archive/2020/06/trumps-grotesque-violation-first-amendment/612532/> [<https://perma.cc/T776-XVE6>]; Katie Bo Williams, *Trump, GOP Allies Reach for Military Response to Domestic Protests*, *Defense One* (June 1, 2020, 11:21 PM), <https://www.defenseone.com/threats/2020/06/trump-and-allies-reach-military-response-domestic-protests/165819/> [<https://perma.cc/H9KZ-45ZB>].

<sup>12</sup> See Larry Buchanan, Quoc Trung Bui & Jugal K. Patel, *Black Lives Matter May Be the Largest Movement in U.S. History*, *N.Y. Times* (July 3, 2020), <https://www.nytimes.com/>

this generation's acclamation of Black humanity amidst the social tensions exposed during the age of COVID-19. What does the Trump administration's militarized response to BLM protests mean in a world mutilated by the scars of racial oppression, a wound laid bare by America's racially biased, aggressive, and supervisory culture of policing?

In response, this Essay suggests and defends a singular contention: Black identity itself, or "Blackness"<sup>13</sup>—whether articulated by the pure speech of racial justice activists who affirm Black humanity, or embodied by the symbolic speech of Black bodies assembled in collective dissent in the public square—has become "'fighting' words" in the consciousness of America, a type of public speech unprotected by the Constitution.<sup>14</sup>

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[interactive/2020/07/03/us/george-floyd-protests-crowd-size.html](https://perma.cc/LE73-BV5Q) [https://perma.cc/LE73-BV5Q].

<sup>13</sup> Articulating a robust definition of "Blackness" is beyond the scope of this Essay, but a few points are noteworthy. First, this dialogue does not presume an a priori concept of Blackness, that is, one divorced from the discourses and embedded interests that seek to name it. Second, there is a subtle distinction between "Black" and "Blackness"—while Black is a racial identity that generally "implies the presence of a significant amount of melanin in one's skin," the term Blackness implies something else, "a shared set of historical, social, and cultural mores[,] . . . a sociocultural marker indicating that one acts in culturally specific ways." Rone Shavers, *Fear of a Performative Planet: Troubling the Concept of "Post-Blackness"*, in *The Trouble with Post-Blackness* 81, 82 (Houston A. Baker Jr. & K. Merinda Simmons eds., Colum. Univ. Press 2015). As a result, Blackness is a contested concept. Many performative markers of Blackness do not originate from Black culture, but they instead are imposed upon it, imbuing the concept of Blackness with both a masking and revelatory nature. See *id.* at 84. Third, notwithstanding the contested nature of Blackness as a sociocultural concept that defines both ethnic and racial identity, this Essay embraces the notion of Blackness evoked by Paul Gilroy as a "'changing' same." Paul Gilroy, *Sounds Authentic: Black Music, Ethnicity, and the Challenge of a Changing Same*, 11 *Black Music Rsch. J.* 111, 111 (1991). While the performative aspects of Blackness are always evolving, Blackness continues to reflect the unwavering tradition of freedom struggle in response to the enduring mythologies of white supremacy. See *id.* at 113, 122–23, 134–35 (arguing against essentialism in Black cultural analysis, but concluding that concepts of Blackness, particularly as expressed in music, can authentically change over time and diversify, even if rooted in similar stories and the same history).

<sup>14</sup> See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) ("'[F]ighting' words . . . [are] those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."); see also *Feiner v. New York*, 340 U.S. 315, 320 (1951) (holding similarly that "breach[es] of the peace" are not protected by the First Amendment because "[w]hen clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order, appears, the power of the State to prevent or punish is obvious" (quoting *Cantwell v. Connecticut*, 310 U.S. 296, 308 (1940))).

The very utterance of the phrase “Black Lives Matter” tends to incite imminent violence and unbridled rage from police in city streets across America. Discussions of “Black Lives Matter” by pundits tend to conjure images of subversion, disorder, and looting, the racialized narratives of social unrest commonly portrayed by the media.<sup>15</sup> Yet the words “Black Lives Matter” and the peaceful assembly of Black protestors also encapsulate the righteous indignation burning in the hearts of minoritized citizens. Discussions of “Black Lives Matter” by activists and scholars evoke what Cornel West calls the “prophetic pragmatism” of the Black radical tradition, a historic commitment to the democratic ideals of equality and liberty amidst entrenched systems of racial subordination.<sup>16</sup>

This dynamic reflects unresolved tensions in the First Amendment’s treatment of racial relations in America, a wrenching of the spirit that Critical Race Theorists Richard Delgado and Jean Stefancic argue “lies at the heart of two of our deepest values—civil rights and equal respect, on the one hand, and freedom of speech on the other.”<sup>17</sup> While the First Amendment is often heralded as an exemplar of American legal exceptionalism,<sup>18</sup> in practice it has become, as Justin Hansford declares, “a racial project.”<sup>19</sup> Similar to Cheryl Harris’s *Whiteness as Property*,

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<sup>15</sup> See Paul Farhi & Elahe Izadi, ‘Carnage,’ ‘Radicals,’ ‘Overthrow the Government’: How Fox and Other Conservative Media Cover the Protests, *Wash. Post* (June 2, 2020, 1:59 PM), [https://www.washingtonpost.com/lifestyle/media/heres-how-fox-news-and-other-conservative-media-are-covering-the-protests-and-violence-following-the-george-floyd-killing/-2020/06/02/c0dd4458-a4de-11ea-bb20-ebf0921f3bbd\\_story.html](https://www.washingtonpost.com/lifestyle/media/heres-how-fox-news-and-other-conservative-media-are-covering-the-protests-and-violence-following-the-george-floyd-killing/-2020/06/02/c0dd4458-a4de-11ea-bb20-ebf0921f3bbd_story.html) [https://perma.cc/R7JS-HS4Y].

<sup>16</sup> See Cornel West, *Keeping Faith: Philosophy and Race in America* 139 (1993) (describing prophetic pragmatism as a creative appropriation of the philosophical tradition of pragmatism from the perspective of the oppressed, and as a practice that “analyzes the social causes of unnecessary forms of social misery, promotes moral outrage against them, organizes different constituencies to alleviate them, yet does so with an openness to its own blindneses and shortcomings”).

<sup>17</sup> Richard Delgado & Jean Stefancic, *Understanding Words That Wound* 2, 6 (2004); see also Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 *Duke L.J.* 431, 434 (discussing the nuances of protecting racist speech under the First Amendment); Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim’s Story*, 87 *Mich. L. Rev.* 2320, 2320, 2322 (1989) (discussing the victims of hate speech protected under the First Amendment); Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 *Harv. C.R.-C.L. L. Rev.* 133, 134 (1982) (arguing for a new tort for victims of racial insults).

<sup>18</sup> See Frederick Schauer, *The Exceptional First Amendment*, in *American Exceptionalism and Human Rights* 31 (Michael Ignatieff ed., 2005).

<sup>19</sup> Justin Hansford, *The First Amendment Freedom of Assembly as a Racial Project*, 127 *Yale L.J.F.* 685, 690 (2018); see also Devon W. Carbado & Cheryl I. Harris, *The New Racial*

which unmasked the way race neutrality in law and public policy rationalizes the “property” rights of white privilege,<sup>20</sup> this Essay exposes how seemingly neutral constitutional constructs rationalize “the ‘iron fist’ of the penal state” in response to both traditional violent crime and peaceful public protest, smothering the constitutional rights of Black and Brown citizens by legitimating “the extra-penological functions of penal institutions.”<sup>21</sup> As Devon Carbado explains, police officers routinely use violence in Black and Brown communities not to quell social disruption but rather to reinforce social control.<sup>22</sup> Such discretionary measures, as Dorothy Roberts clarifies, pave the way for police abuse of order-maintenance policies that, similar to vague loitering laws that the Supreme Court has ruled unconstitutional, “give police a wide net to trap citizens who look dangerous” and “also allow police to discriminate against citizens based on personal prejudices.”<sup>23</sup> Building upon such scholarship, this Essay provides three contributions to the ongoing discourse on policing in America.

First, it reveals how racial tensions in the First Amendment—focusing specifically on ambiguities in the fighting-words doctrine—perpetuate

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Preferences: Rethinking Racial Projects, *in* *Racial Formation in the Twenty-First Century* 183, 183 (Daniel Martinez HoSang, Oneka LaBennett & Laura Pulido eds., 2012).

<sup>20</sup> Cheryl I. Harris, *Whiteness as Property*, 106 *Harv. L. Rev.* 1707, 1709 (1993); see also *id.* at 1715 (arguing that “Whiteness as property has taken on more subtle forms, but retains its core characteristic—the legal legitimation of expectations of power and control that enshrine the status quo as a neutral baseline, while masking the maintenance of white privilege and domination”).

<sup>21</sup> Loïc Wacquant, *The Punitive Regulation of Poverty in the Neoliberal Age*, *openDemocracy* (Aug. 1, 2011), <https://www.opendemocracy.net/en/5050/punitive-regulation-of-poverty-in-neoliberal-age/> [<https://perma.cc/AH9C-7RZC>]; see also *id.* (noting “that, in the wake of the race riots of the 1960s, the police, courts and prison have been deployed to contain the urban dislocations wrought by economic deregulation and the implosion of the ghetto as an ethno-racial container, and to impose the discipline of insecure employment at the bottom of the polarizing class structure”).

<sup>22</sup> See Devon W. Carbado, *Blue-on-Black Violence: A Provisional Model of Some of the Causes*, 104 *Geo. L.J.* 1479, 1482–83, 1515 (2016) (“Approaches to policing that are designed to signal to lay people that police officers are in charge of or ‘own’ the community they police encourage police officers to employ policing as a source of governance strategy to socially control communities.”); Devon W. Carbado, *Predatory Policing*, 85 *UMKC L. Rev.* 545, 563 (2017) (noting that “[t]he relationship among social control policing, mass criminalization, and arrest likely shaped policing dynamics in Ferguson”); cf. L. Song Richardson, *Police Use of Force*, *in* 2 *Reforming Criminal Justice* 185, 194–95 (2017) (describing how police’s “racial anxiety may cause officers to enact command presence when it is unnecessary,” which can lead to violence).

<sup>23</sup> Dorothy E. Roberts, *Foreword: Race, Vagueness, and the Social Meaning of Order-Maintenance Policing*, 89 *J. Crim. L. & Criminology* 775, 777, 789–90 (1999).

the racially biased, aggressive, and supervisory culture of American policing,<sup>24</sup> an approach to law enforcement that Paul Gowder calls the “command model” due to its arbitrary usage of commands to organize and control social space.<sup>25</sup> Such tensions are laid bare when peaceful assemblies of BLM protestors who petition the government for redress of racial grievances are deemed disturbances of the peace by police officers and met by violent police force, actions that implicate the fighting-words doctrine and call into question the contours of unprotected speech. Importantly, such discretionary authority reveals the misplaced focus of the fighting-words doctrine on the inability of the recipient of fighting words to restrain themselves from violence and not on the actual substance of the words spoken. This framing renders the police officer as judge, jury, and executioner when it comes to interpreting the meaning of Black protest speech.<sup>26</sup>

Second, this Essay analyzes how such racial tensions in the First Amendment—as conveyed by a racially biased and aggressive police culture—cast a dark shadow over the liberty of Black and Brown citizens who experience racism at the hands of police yet avoid acts of protest for fear of bodily harm or arrest, resulting in a chilling effect on free speech.<sup>27</sup> To be sure, the fighting-words doctrine has garnered limited attention in legal scholarship,<sup>28</sup> and it might even be deemed inconsequential, as courts have narrowed its applicability to verbal disputes between citizens

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<sup>24</sup> See, e.g., Vesla Weaver, Gwen Prowse & Spencer Piston, *Withdrawing and Drawing in: Political Discourse in Policed Communities*, *J. Race Ethnicity & Pol.* 1, 3 (2020) (examining “how black participants in poor and working-class neighborhoods co-construct meaning around state authority in conversation with one another, given their unique experience with state violence, surveillance, and discipline, and police as enforcers of racial order”).

<sup>25</sup> See Paul Gowder, *A Rule of Law Case for Police Abolition 8* (July 24, 2020) (unpublished manuscript) (on file with author).

<sup>26</sup> See, e.g., *Stamm v. Miller*, 14-cv-11951, 2015 WL 13047103, at \*1, \*3 (E.D. Mich. Apr. 27, 2015) (noting, in a wrongful death case for unlawful use of deadly force, the defendant officer’s psychological evaluations in which he “described the role of the police as ‘judge, jury, and executioner’”), *aff’d*, 657 F. App’x 492 (6th Cir. 2016).

<sup>27</sup> See, e.g., Matthew Desmond, Andrew V. Papachristos & David S. Kirk, *Police Violence and Citizen Crime Reporting in the Black Community*, 81 *Am. Socio. Rev.* 857, 858 (2016) (revealing how high-profile cases of police violence and misconduct against unarmed citizens, especially in low-income Black neighborhoods, can undermine the legitimacy of legal authority and suppress police-related 911 calls).

<sup>28</sup> See Stephen W. Gard, *Fighting Words as Free Speech*, 58 *Wash. U. L.Q.* 531, 535 (1980); see also Mark Pearlstein, *Constitutional Law—The “Fighting Words Doctrine” Is Applied to Abusive Language Toward Policemen*, 22 *DePaul L. Rev.* 725 (1973); Burton Caine, *The Trouble with “Fighting Words”*: *Chaplinsky v. New Hampshire* Is a Threat to First Amendment Values and Should Be Overruled, 88 *Marq. L. Rev.* 441 (2004).



and police officers.<sup>29</sup> Indeed, modern courts rarely enforce convictions based upon the usage of “fighting words” to disturb the peace.<sup>30</sup> Notwithstanding, this Essay accomplishes important philosophical work, framing foundational constitutional constructs in the context of Black lived experience, which raises disconcerting questions about the American democratic project. Does the existence of a legal regime that threatens to criminalize anti-racist public speech if it harms its target and incites an immediate breach of the peace (even if such arrests are routinely unenforced by courts) constitute a culture of suppression that silences dissent with fear of police retaliation? A rule of law driven by fear of the police not only distorts the ideal of liberty that underscores liberal democracy, but it also is eerily reminiscent of the culture of slave patrols that threatened the lives of defiant Black Americans in Antebellum America.<sup>31</sup>

Third, by highlighting racial tensions in the fighting-words doctrine, this Essay illuminates the embeddedness of racism in American policing culture more generally. This culture not only constructs and reconstitutes the social order by perpetuating stereotypes of minoritized communities as sites of disorder that require constant supervision, but it also degrades the dignity of Black and Brown Americans by treating them as second-class citizens unworthy of private autonomy, while hindering the broader policing goal of minimizing crime.<sup>32</sup> Perhaps this explains why some people choose to run at the very sight of police officers. Collectively, these insights lend support toward recent demands for police abolition from activists and legal scholars,<sup>33</sup> which build upon a rich tradition of

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<sup>29</sup> See *infra* note 106.

<sup>30</sup> See *infra* note 106.

<sup>31</sup> See *infra* Part II.

<sup>32</sup> See, e.g., Rod K. Brunson, Protests Focus on Over-Policing. But Under-Policing Is Also Deadly, *Wash. Post* (June 12, 2020, 9:10 AM), [https://www.washingtonpost.com/outlook/underpolicing-cities-violent-crime/2020/06/12/b5d1fd26-ac0c-11ea-9063-e69bd6520940\\_story.html](https://www.washingtonpost.com/outlook/underpolicing-cities-violent-crime/2020/06/12/b5d1fd26-ac0c-11ea-9063-e69bd6520940_story.html) [https://perma.cc/EL36-JP4J] (“The result is that many black and brown communities now suffer from the worst of all worlds: over-aggressive police behavior in frequent encounters with residents, coupled with the inability of law enforcement to effectively protect public safety.”).

<sup>33</sup> See, e.g., Derecka Purnell, How I Became a Police Abolitionist, *Atlantic* (July 6, 2020), <https://www.theatlantic.com/ideas/archive/2020/07/how-i-became-police-abolitionist/613540/> [https://perma.cc/S6AB-6QK2]; Zak Cheney-Rice, Why Police Abolition Is a Useful Framework—Even for Skeptics, *N.Y. Mag.* (June 15, 2020), <https://nymag.com/intelligencer/2020/06/police-abolitionist-lessons-for-america.html>; V. Noah Gimbel & Craig Muhammad, Are Police Obsolete? Breaking Cycles of Violence

abolition scholarship from Angela Davis, Ruth Wilson Gilmore, Mariame Kaba, and others.<sup>34</sup>

Part I of this Essay offers a retrospective on the Author's personal discovery of the nature of *Blackness as fighting words* through the story of Amadou Diallo in the Bronx, New York. Then, Part II discusses how America's legacy of white supremacy has infringed upon the First Amendment rights of Black and Brown citizens, including during the presidential administration of Donald Trump. Next, Part III explores the origins of the fighting-words doctrine and highlights its inconsistent treatment among courts, which has inspired ambiguity regarding its present-day meaning. Part IV then reveals how such inconsistencies and ambiguities raise important questions about the limits of constitutional protection for Black and Brown citizens who encounter racism at the hands of police while engaging in acts of protest. Finally, Part V suggests that the ambiguities surrounding the Constitution's protection (or lack thereof) of anti-racist speech that incites violence and disturbs the peace explains why some police officers believe they are authorized to use force in response to non-violent BLM protests.

Taken together, this Essay contends that until we as a nation wrestle with the racial subtext of modern policing—a culture woven into law that not only silences the legitimate public protests of minoritized citizens in violation of their First Amendment rights but also rationalizes callous violence at the hands of law enforcement—Black America will remain at peril to the veil of white supremacy that looms over the American constitutional order. Importantly, this is not a call to transgress race or usher in an era of post-Blackness. In other scholarship, I note the importance of embracing the cultural specificity of Blackness to dislodge the perceived neutrality of Whiteness.<sup>35</sup> Nor is this an attempt to

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Through Abolition Democracy, 40 Cardozo L. Rev. 1453, 1458–59 (2019); Alex S. Vitale, The End of Policing 228 (2017).

<sup>34</sup> See, e.g., Angela Y. Davis, Are Prisons Obsolete? 9–10 (2003); Eduardo Mendieta, Introduction, in *Abolition Democracy: Beyond Empire, Prisons, and Torture* 7, 16 (2005); Ruth Wilson Gilmore, Golden Gulag: Prisons, Surplus, Crisis, and Opposition in Globalizing California 242 (2007); Rachel Kushner, Is Prison Necessary? Ruth Wilson Gilmore Might Change Your Mind, N.Y. Times Mag. (Apr. 17, 2019), <https://www.nytimes.com/2019/04/17/magazine/prison-abolition-ruth-wilson-gilmore.html> [<https://perma.cc/6NVJ-A6PA>]; Mariame Kaba, Yes, We Mean Literally Abolish the Police, N.Y. Times (June 12, 2020), <https://www.nytimes.com/2020/06/12/opinion/sunday/floyd-abolish-defund-police.html> [<https://perma.cc/R6AQ-RL8Z>].

<sup>35</sup> See Etienne C. Toussaint, Dismantling the Master's House: Toward a Justice-Based Theory of Community Economic Development, 53 U. Mich. J.L. Reform 337, 407–08 (2019)

essentialize Black identity or Black performativity as something to be pitied. As Imani Perry eloquently retorted, “I must turn the pitying gaze back upon any who offer it to me, because they cannot understand the spiritual majesty of joy in suffering.”<sup>36</sup> Rather, and simply, this Essay bears witness to the absurdity and perversity of state-sponsored violence at any and all affirmations of Black humanity, and beckons America to a moral reckoning.

### I. LIVING IN YOUR AMERICAN SKIN

I was thirteen years old when I first learned that sometimes “fighting words” don’t require any words at all. I didn’t realize when I got off the public bus on my way home from school that the crowd of people gathered in the street near the barbershop were protestors. I didn’t know on that February afternoon why my neighbors were so angry, jumping up and down like a Sunday morning choir, each person echoing the words of a heavysset Black preacher who barked lyrics into a megaphone on an elevated platform, his permed hair waving in the wind.<sup>37</sup> I didn’t know why the mother at the front of the pack was howling, nor why the neighborhood kids hovered nearby on Huffly bikes like anxious pups learning how to hunt. I didn’t know what was happening until later that night because it was the year 1999; our modern culture of camera phones and citizen recordings of police interactions had not yet been invented. The nightly news would have to suffice.

After sneaking another Little Debbie Fudge Round from the kitchen cabinet, I learned on the Channel 4 News that the crowd of people gathered three blocks from my home were angry about an incident involving a twenty-three-year-old Black man named Amadou Diallo.<sup>38</sup> I

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(“Viewing CED through a justice-based lens urges us to embrace a *collective* democratic responsibility to resolve our country’s legacy of institutional racism and economic segregation through law reform.”).

<sup>36</sup> Imani Perry, *Racism Is Terrible. Blackness Is Not.*, Atlantic (June 15, 2020), <https://www.theatlantic.com/ideas/archive/2020/06/racism-terrible-blackness-not/613039/> [https://perma.cc/G63D-TDMU].

<sup>37</sup> See Kit R. Roane, *Sharpton Among 28 Arrested in Rally on Diallo Killing*, N.Y. Times (Mar. 4, 1999), <https://www.nytimes.com/1999/03/04/nyregion/sharpton-among-28-arrested-in-rally-on-diallo-killing.html> [https://perma.cc/WX34-HZ9B]; Ese Olumhense, *20 Years After the NYPD Killing of Amadou Diallo, His Mother and Community Ask: What’s Changed?*, N.Y. Mag. (Feb. 1, 2019), <https://nymag.com/intelligencer/2019/02/after-the-nypd-killing-of-amadou-diallo-whats-changed.html>.

<sup>38</sup> *Trial by Media: 41 Shots Killed Him*, N.Y. Times (July 19, 2019),

learned that four New York City plainclothes police officers had fired forty-one copper-jacketed bullets from 9mm Glock semi-automatic guns at Amadou in front of his apartment house doorway, not too far from the corner store bodega where I often purchased Sour Power Strawberry Straws.<sup>39</sup> I learned that the police officers claimed to have mistaken Amadou for a serial rape suspect from one year prior.<sup>40</sup> I learned that Amadou was possibly reaching for his wallet, perhaps to show his ID, when the police officers started shooting.<sup>41</sup> I learned that Amadou was shot before he even told the officers his name,<sup>42</sup> before he had the chance to defend his honor as a man with a mother and father who cared.<sup>43</sup> I learned that Amadou was simply a West African immigrant street peddler of bootlegged tapes and cheap tube socks, perhaps hoping to avoid another run-in with the law.<sup>44</sup> I learned that when the officers searched Amadou's perforated body for a gun, they found only a black wallet and a shattered beeper covered with blood.<sup>45</sup> I learned that at least one of the officers wept.<sup>46</sup> I learned facts that many Americans would not, not due to their apathy, but instead to sheer ignorance. After all, although Amadou's murder sparked local unrest, it took place well before the

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<https://www.nytimes.com/2019/07/19/nyregion/amadou-diallo-mother-eric-garner.html> [https://perma.cc/HKD8-2JG4].

<sup>39</sup> Red, *supra* note 38; Tom Hays, NY Officers Acquitted in Diallo Case, *Wash. Post* (Feb. 25, 2000, 5:45 PM), [https://www.washingtonpost.com/wp-srv/aponline/20000225/aponline-174509\\_000.htm](https://www.washingtonpost.com/wp-srv/aponline/20000225/aponline-174509_000.htm) [https://perma.cc/N2XZ-NCQC]; Michael Grunwald, Immigrant Killed by Police Mourned, *Wash. Post* (Feb. 13, 1999), <https://www.washingtonpost.com/wp-srv/national/daily/feb99/bronx13.htm> [https://perma.cc/9U7L-X3EM]; Heather Mac Donald, Diallo Truth, Diallo Falsehood, *City J.* (Summer 1999), <https://www.city-journal.org/html/diallo-truth-diallo-falsehood-12011.html> [https://perma.cc/K7XL-VDP4].

<sup>40</sup> See Police Fired 41 Shots when They Killed Amadou Diallo. His Mom Hopes Today's Protests Will Bring Change, *CBS News* (June 9, 2020, 11:11 PM), <https://www.cbsnews.com/news/amadou-diallo-kadiatou-protests-george-floyd-police/> [https://perma.cc/5GC8-VV52].

<sup>41</sup> Grunwald, *supra* note 39.

<sup>42</sup> Mac Donald, *supra* note 39.

<sup>43</sup> In April 2000, Amadou Diallo's mother and father filed a \$61 million wrongful death lawsuit against the officers and the city. See Diallo's Parents File \$61 Million Lawsuit Against New York Police and City, *CNN* (Apr. 18, 2000), <https://www.cnn.com/2000/US/04/18/diallo.lawsuit/index.html> [https://perma.cc/7J7H-KNQ8]. In 2004, Kadiatou Diallo, Amadou's mother, published a memoir about her life and the loss of her son. See Kadiatou Diallo & Craig Wolff, *My Heart Will Cross This Ocean: My Story, My Son, Amadou* (2004).

<sup>44</sup> Mac Donald, *supra* note 39.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

advent of Twitter and YouTube and Facebook, tools that might have propelled his name into the national consciousness.

That night, lying in bed below our popcorn ceiling as the sound of the Six Train thumped in the distance, I realized two truths and one lie about my South Bronx. Truth number one: in some neighborhoods, being Black could get you killed for living in your American skin.<sup>47</sup> Truth number two: in some neighborhoods, Black people and police officers exist in an inescapable Hobbesian state of nature, a world seemingly ruled by lawlessness, mistrust, and unchecked violence.<sup>48</sup> Here's the lie: my neighborhood was not one of those neighborhoods.

I wanted to believe my lie, but my precocious mind had already deduced the logical truth about my world's state of nature. I concluded that the police would be waiting outside to greet me on my way to school with a nod and bid me farewell on my return home with a wave. I concluded that in my hood, between the corner store bodega and the barbershop, Black men and police officers exist in a never-ending cypher where taunts and gibes are traded back and forth on the asphalt until someone takes it too far. I concluded that, in my South Bronx, fighting words don't require a joke about someone's mother or, quite frankly, any words at all; being Black is more than enough.

## II. THUGS AND VERY GOOD PEOPLE

In 1989, U.S. Supreme Court Justice William Brennan declared in *Texas v. Johnson* that “[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or

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<sup>47</sup> Others realized too. Bruce Springsteen wrote a song reflecting on the story of Amadou Diallo that later sparked controversy. See Bruce Springsteen, *American Skin (41 Shots)*, *on Live in New York City* (Columbia Records 2001); Julian E. Barnes, *Springsteen Song About Diallo Prompts Anger from Police*, *N.Y. Times* (June 13, 2000), <https://www.nytimes.com/2000/06/13/nyregion/springsteen-song-about-diallo-prompts-anger-from-police.html> [<https://perma.cc/M2TR-MUH8>]. Other artists similarly reflected upon the tragedy of Diallo's murder. See, e.g., Wyclef Jean, *Diallo*, *on The Eclectic: 2 Sides II a Book* (Columbia Records 2000) (“Have you ever been shot forty-one times? Have you ever screamed, and no one heard you cry? . . . Who'll be the next to fire forty-one shots by Diallo's side?”); Trivium, *Contempt Breeds Contamination*, *on The Crusade* (Roadrunner 2006) (“The four protectors fired forty-one shots / Hitting him nineteen times / Searching the body, there were no weapons found / He lies with all who died in vain.”).

<sup>48</sup> See Raff Donelson, *Blacks, Cops, and the State of Nature*, 15 *Ohio St. J. Crim. L.* 183, 183–84 (2017).

disagreeable.”<sup>49</sup> This ethic has guided a longstanding protection afforded to citizens who engage in public acts of protest. In response to Anti-Federalists who sought specific guarantees of a bill of rights against the far reaches of national governmental power,<sup>50</sup> James Madison drafted the First Amendment to the U.S. Constitution in the late eighteenth century as a declaration of the people’s freedom of speech, freedom to peaceably assemble, and freedom to petition the government.<sup>51</sup> As a result, since 1791, white citizens of America have been empowered to peacefully march and demonstrate on public lands to petition the government for redress of grievances.

However, the Constitution and its Bill of Rights have maintained a complex relationship with Black America, beginning with the Africans who were enslaved as the chattel of many of the Constitution’s writers, and continuing with their descendants (including the Black descendants of the Constitution’s writers)<sup>52</sup> who frequently live as nominally free but substantively second-class citizens.<sup>53</sup> Indeed, the Constitution’s declaration of free speech for “We the People” was not drafted with Black Americans in mind; they were deemed merely three-fifths of a human during its passage.<sup>54</sup> As a result, prior to the Civil War, enslaved Africans

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<sup>49</sup> 491 U.S. 397, 414 (1989).

<sup>50</sup> See generally Donald L. Horowitz, *The Federalist Abroad in the World*, in *The Federalist Papers* 502, 509 (Ian Shapiro ed., 2009); see also *The Federalist* No. 84 (Alexander Hamilton), in *The Federalist Papers*, supra, at 431 (describing the objection that the Constitution did not have a bill of rights).

<sup>51</sup> See Noah Feldman, James Madison’s Lessons in Racism, *N.Y. Times* (Oct. 28, 2017), <https://www.nytimes.com/2017/10/28/opinion/sunday/james-madison-racism.html> [<https://perma.cc/THD6-2W44>]; U.S. Const. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”).

<sup>52</sup> See, e.g., Annette Gordon-Reed, *The Hemingses of Monticello: An American Family* 24–26 (2008).

<sup>53</sup> See generally Ira Berlin, *Many Thousands Gone: The First Two Centuries of Slavery in North America* 12–13, 360–61 (1998) (tracing the history of slavery in the United States and showing that even freed slaves continued to be subject to pervasive subjugation); Nathan Irvin Huggins, *Black Odyssey: The Afro-American Ordeal in Slavery*, at xii–xiii (1977) (documenting slavery in America and focusing on the lived experiences of enslaved Africans); Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* 1–2 (2012) (explaining how mass incarceration in modern America perpetuates the legacy of Jim Crow); Michael Kent Curtis, *Reflections on Albion Tourgée’s 1896 View of the Supreme Court: A “Consistent Enemy of Personal Liberty and Equal Right”?*, 5 *Elon L. Rev.* 19, 34 (2013) (discussing the Black Codes passed by Southern states during Reconstruction).

<sup>54</sup> U.S. Const. pmbl.; see id. art. I, § 2, cl. 3 (establishing that slaves only counted as three-fifths of a citizen for purposes of determining congressional representation). See generally

were prohibited from assembling for education,<sup>55</sup> for leisure,<sup>56</sup> for worship,<sup>57</sup> or for collective expressions of dissent.<sup>58</sup> Slave patrols, precursors to modern American policing that comprised “white men deputized to prevent rebellions by stopping any enslaved people who happened to be on the roads, searching them, and preventing them from congregating,” enforced these Slave Codes.<sup>59</sup> When uprisings of the enslaved occurred, driven by a collective moral dissent to the brutal institution of slavery itself, Black men and Black women were met with lashings, lynchings, and ultimately legal holdings that sought to perpetuate and justify the debasement of Black lives.<sup>60</sup>

Yet even after slavery was abolished by the Thirteenth Amendment, Black Codes were enacted across the United States to restrict the freedom

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David Waldstreicher, *Slavery’s Constitution: From Revolution to Ratification* 4–5 (2009) (noting explicitly that the three-fifths clause applies to slaves); Feldman, *supra* note 51.

<sup>55</sup> See, e.g., An Act Respecting Slaves, Free Negroes, Mulattoes, and Mestizoes, for Inflicting the More Punctual Performance of Patrol Duty, and To Impose Certain Restrictions on the Emancipation of Slaves, 1800 S.C. Acts 36–38 (codifying “[t]hat . . . all assemblies and congregations of slaves, free negroes, mulattoes, and mestizoes, whether composed of all, or any of the above description of persons, or of all or any of the above described persons, and of a proportion of white persons, assembled or met together for the purpose of *mental instruction*, in a confined or secret place of meeting . . . is hereby declared to be an unlawful meeting . . . and the officers and persons so dispersing such unlawful assemblage of persons, shall, if they think proper, impose such corporal punishment, not exceeding twenty lashes, upon such slaves, free negroes, mulattoes, or mestizoes, as they may judge necessary for deterring them from the like unlawful assemblages in future” (emphasis added)).

<sup>56</sup> See, e.g., An Act Further Declaring What Shall Be Deemed Unlawful Meetings of Slaves [Passed January 24, 1804], ch. 119, § 1, 1804 Va. Acts 89 (“[T]hat all meetings or assemblages of slaves, at any meeting house or houses, or any other place or places, in the night . . . shall be deemed and considered as an unlawful assembly, and any justice of the county . . . may issue his warrant . . . to inflict corporal punishment on the offender or offenders . . . not exceeding twenty lashes.”).

<sup>57</sup> See, e.g., An Act Concerning Free Persons of Colour, Their Guardians, and Coloured Preachers, § 5, 1833 Ga. Laws 226–28 (“That no person of colour, whether free or slave, shall be allowed to preach to, exhort or join in any religious exercise, with any persons of colour, either free or slave, there being more than seven persons of colour present. . . . Any free person of colour offending against this provision, to be liable on conviction . . . to imprisonment at the discretion of the court . . . . [I]f this is *insufficient*, he shall be sentenced to be whipped and imprisoned at the discretion of the court . . . .”).

<sup>58</sup> See, e.g., An Act To Punish the Crimes Therein Mentioned, and for Other Purposes, § 1, 1830 La. Acts 96 (“That whosoever shall write, print, publish or distribute, any thing having a tendency to produce discontent among the free coloured population of the state, or insubordination among the slaves therein, shall . . . be sentenced to imprisonment at hard labour for life or suffer death, at the discretion of the court.”).

<sup>59</sup> See Hansford, *supra* note 19, at 692.

<sup>60</sup> See *Scott v. Sandford*, 60 U.S. (19 How.) 393, 406–07 (1857).

of Black citizens, from restrictions on their right to assemble for leisure<sup>61</sup> to restrictions on their right to assemble for protest.<sup>62</sup> Although Black Americans were granted access to the Constitution's Bill of Rights during the Reconstruction era, the rise of racial terrorists in the form of the Ku Klux Klan, coupled with the refusal of law enforcement to protect Black lives from the Klan's vicious acts of racial violence, stifled the First Amendment rights of an oppressed people.<sup>63</sup> Not only have Critical Race Theorists critiqued the failure of courts to regulate "the racist message of segregation" and other forms of hate speech, but they have also revealed the subordination of Black dignity interests by courts to the freedom of speech interests of white supremacists.<sup>64</sup> Accordingly, America's modern system of law enforcement, as Brandon Hasbrouck explains, emerges as a "badge[] and incident[]" of slavery, calling into question the constitutionality of contemporary policing culture under the Thirteenth Amendment.<sup>65</sup> From racial profiling to stop and frisk, pretextual stops, and the usage of excessive force—what Paul Butler has called police superpowers<sup>66</sup>—American policing perpetuates a system of racial oppression that overwhelms Black and Brown lives.<sup>67</sup>

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<sup>61</sup> See, e.g., An Act To Amend the Vagrant Laws of the State, § 2, 1865 Miss. Laws 90–91 (“[A]ll freedmen, free negroes and mulattoes in this State, over the age of eighteen years, found on the second Monday in January, 1866, or thereafter, with no lawful employment or business, or found unlawfully assembling themselves together either in the day or night time . . . shall be deemed vagrants, and on conviction thereof, shall be fined in the sum of not exceeding, in the case of a freedman, free negro or mulatto, fifty dollars . . . and imprisoned at the discretion of the court . . .”).

<sup>62</sup> See, e.g., Black Code of St. Landry's Parish, Louisiana, 1865, in *The Columbia Documentary History of Race and Ethnicity in America* 295, 295–96 (Ronald H. Bayor ed., 2004) (“*Be it further ordained*, That no negro shall be permitted to preach, exhort, or otherwise declaim to congregations of colored people, without a special permission in writing from the president of the police jury. Any negro violating the provisions of this section shall pay a fine of ten dollars, or in default thereof shall be forced to work ten days on the public road, or suffer corporeal punishment as hereinafter provided.”).

<sup>63</sup> See generally James Gray Pope, *Snubbed Landmark: Why United States v. Cruikshank* (1876) Belongs at the Heart of the American Constitutional Canon, 49 *Harv. C.R.-C.L. L. Rev.* 385, 394–405 (2014) (describing the Ku Klux Klan's rise during Reconstruction, including its unchecked violence against Black Americans).

<sup>64</sup> Lawrence, *supra* note 17, at 462–66; see Hansford, *supra* note 19, at 693–94.

<sup>65</sup> Brandon Hasbrouck, *Abolishing Racist Policing with the Thirteenth Amendment*, 68 *UCLA L. Rev. Discourse* 200, 217 (2020).

<sup>66</sup> See generally Paul Butler, *Chokehold: Policing Black Men* 1–9 (2017) (documenting the extreme disparities in policing as applied to Black Americans).

<sup>67</sup> Hasbrouck, *supra* note 65, at 212–13.



In the age of Trump, little has changed as the constitutional rights of Black and Brown protestors have increasingly come under attack. Following the murders of several Black citizens—jogger Ahmaud Arbery in broad daylight after being hunted down by white vigilantes,<sup>68</sup> George Floyd under the knee of a callous white police officer on suspicion of forgery;<sup>69</sup> Breonna Taylor in her apartment (in the dead of the night) during a mistaken drug raid;<sup>70</sup> and countless others<sup>71</sup>—frustrated and angry Americans have taken to the streets in cities across the country, from New York to Chicago to Los Angeles.<sup>72</sup> Reminiscent of the uprisings that erupted after the killings of Trayvon Martin in 2012 and Michael Brown in 2014, tragedies that birthed the Black Lives Matter movement, such protesters—Black and non-Black alike—have been met by aggressive and violent policing tactics for affirming Black humanity, from tear gas to rubber bullets to vicious beatings.<sup>73</sup> In contrast, and to underscore the singularity of Blackness as fighting words in the eyes of

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<sup>68</sup> See Dakin Andone, Angela Barajas & Jason Morris, A Suspect in the Killing of Ahmaud Arbery Was Involved in a Previous Investigation of Him, Recused Prosecutor Says, CNN (May 9, 2020, 7:18 AM), <https://www.cnn.com/2020/05/08/us/ahmaud-arbery-mcmichael-arrests-friday/index.html> [<https://perma.cc/5T8N-NJ5N>].

<sup>69</sup> See Erin Donaghue, Four Minneapolis Police Officers Fired After Death of Unarmed Man George Floyd, CBS News (May 28, 2020, 6:54 AM), <https://www.cbsnews.com/news/four-minneapolis-police-officers-fired-george-floyd-death-video/> [<https://perma.cc/JH5Z-FG8U>].

<sup>70</sup> See Darcy Costello & Tessa Duvall, Who Was Breonna Taylor? What We Know About the Louisville ER Tech Fatally Shot by Police, Courier J. (May 12, 2020, 6:25 AM), <https://www.courier-journal.com/story/news/local/2020/05/12/breonna-taylor-case-what-know-louisville-emt-killed-cops/3110066001/> [<https://perma.cc/398F-KXW8>].

<sup>71</sup> See Mohammed Haddad, Mapping US Police Killings of Black Americans, Al Jazeera (May 31, 2020), <https://www.aljazeera.com/indepth/interactive/2020/05/mapping-police-killings-black-americans-200531105741757.html> [<https://perma.cc/M6L7-US28>] (“The number of police killings in the US disproportionately affects African Americans. Despite only making up 13 percent of the US population, Black Americans are two-and-a-half times as likely as white Americans to be killed by the police.”).

<sup>72</sup> See Richard Luscombe, Chris McGreal, Sam Levin, Julia Carrie Wong & David Smith, George Floyd: Protests and Unrest Coast to Coast as US Cities Impose Curfews, Guardian (May 31, 2020, 3:42 PM), <https://www.theguardian.com/us-news/2020/may/30/george-floyd-protests-saturday-curfews-minneapolis> [<https://perma.cc/EYR4-UKBF>].

<sup>73</sup> See generally Barbara Ransby, *Making All Black Lives Matter: Reimagining Freedom in the Twenty-First Century* 5–6 (2018) (tracing the origins of the Black Lives Matter movement); Jennifer E. Cobbina, *Hands Up, Don’t Shoot: Why the Protests in Ferguson and Baltimore Matter, and How They Changed America* 2–3 (2019) (describing the uprisings in Ferguson and Baltimore); Hansford, *supra* note 19, at 690 (“For example, antiracist protesters from Selma to Ferguson to Mizzou have generally faced harsh sanctions through the use of tear gas, tanks, physical threats, and economic threats.”).

police officers, white protestors decrying racial justice activism are often met with law enforcement support.<sup>74</sup>

To be sure, one could argue that Donald Trump's presidency has merely perpetuated the militarization of policing that followed the uprising in Ferguson, Missouri, after the killing of Michael Brown, perhaps part and parcel of Trump's authoritarian yet fundamentally neoliberal panache.<sup>75</sup> However, since Trump's election, a surge of anti-protest legislation has been passed in various states that empower police to arrest people for encouraging "violence" through traditionally protected forms of speech.<sup>76</sup> Although first introduced during the Obama administration, before President Trump took office, these bills have become increasingly commonplace since Trump's inauguration. Further, President Trump has endeavored to cement Black identity—whether evoked by public speech or embodied by free assembly—as a kind of unprotected free speech. Indeed, the violent police responses to Black Lives Matter activists, whom President Trump referred to as "THUGS,"<sup>77</sup> stand in sharp contrast to the relatively passive law enforcement response to armed right-wing protestors during COVID-19's anti-lockdown

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<sup>74</sup> See, e.g., Mara Hvistendahl & Alleen Brown, *Armed Vigilantes Antagonizing Protesters Have Received a Warm Reception from Police*, Intercept (June 19, 2020, 1:55 PM), <https://theintercept.com/2020/06/19/militia-vigilantes-police-brutality-protests/> [<https://perma.cc/J56B-XXBX>]; Jack Brewster, *Report: Trump Officials Were Directed To Defend Kyle Rittenhouse Publicly*, Documents Show, Forbes (Oct. 1, 2020, 10:20 AM), <https://www.forbes.com/sites/jackbrewster/2020/10/01/report-trump-officials-were-directed-to-defend-kyle-rittenhouse-publicly-documents-show/#2b19c84f6eeb> [<https://perma.cc/5D-HB-JG45>] ("Department of Homeland Security officials were told to express public comments that would portray Kyle Rittenhouse—the 17-year-old charged with shooting three people, two of them fatally, at a protest during a standoff between militia members and protesters in Kenosha, Wisconsin—in a positive light . . .").

<sup>75</sup> See Eliav Liebllich & Adam Shinar, *Police Militarization in the Trump Era*, Just Sec. (Feb. 1, 2017), <https://www.justsecurity.org/37125/police-militarization-trump-era/> [<https://perma.cc/F3RA-KNBS>]; Jonathan Chait, *Trump Is Failing at Governing but Winning at Authoritarianism*, N.Y. Mag. (May 20, 2020), <https://nymag.com/intelligencer/2020/05/trump-authoritarian-democracy-barr-justice.html>.

<sup>76</sup> Olivia Rosane, *3 States Pass Anti-pipeline Protest Bills in Two Weeks*, EcoWatch (Mar. 30, 2020, 8:58 AM), <https://www.ecowatch.com/anti-pipeline-protest-bills-2645583954.html?rebellitem=1#rebellitem1> [<https://perma.cc/TE52-EE9A>]; Alleen Brown, *A Powerful Petrochemical Lobbying Group Advanced Anti-protest Legislation in the Midst of the Pandemic*, Intercept (June 7, 2020, 9:11 AM), <https://theintercept.com/2020/06/07/-pipeline-petrochemical-lobbying-group-anti-protest-law/> [<https://perma.cc/G3D5-UCUM>].

<sup>77</sup> Nick Visser, *Trump Calls George Floyd Protesters 'THUGS,' Threatens Violent Intervention in Minneapolis*, Huffington Post (May 29, 2020, 3:03 AM), [https://www.huffpost.com/entry/trump-minneapolis-thugs-george-floyd\\_n\\_5ed0a6cac5b6ebd583bed6be?guccounter=2](https://www.huffpost.com/entry/trump-minneapolis-thugs-george-floyd_n_5ed0a6cac5b6ebd583bed6be?guccounter=2) [<https://perma.cc/2GHU-EJYB>].

demonstrations, whom President Trump called “very good people.”<sup>78</sup> During the summer of 2020, the Trump administration introduced policing tactics in response to peaceful BLM protests, including the emergence of secret police employed by the Department of Homeland Security who refuse to identify themselves, snatch protestors off the street, detain protestors in unmarked vans without issuing formal charges, and drive protestors to undisclosed locations to further undisclosed ends.<sup>79</sup> And most recently, during 2020’s first presidential debate, President Trump ignored a request to publicly decry the Proud Boys, a white supremacist right-wing militia group, stating instead, “Proud Boys? Stand back and stand by.”<sup>80</sup> Simply put, the Trump era transcends the neoliberal politics of days past in ways that frighten ordinary sensibilities.

### III. FREE SPEECH AND FIGHTING WORDS

Perhaps it is important to remember that the rights granted by the First Amendment to the Constitution are not unconditional. Certainly, James Madison argued against the narrow conception of free speech and assembly that existed under English law.<sup>81</sup> Under the British Riot Act of

<sup>78</sup> Caleb Ecarma, Of Course Trump Called Armed, Right-Wing Protesters “Very Good People”, *Vanity Fair* (May 1, 2020), <https://www.vanityfair.com/news/2020/05/donald-trump-called-armed-right-wing-protesters-good-people> [https://perma.cc/DFH2-5KWK]; see Dartunorro Clark, Hundreds of Protesters, Some Carrying Guns in the State Capitol, Demonstrate Against Michigan’s Emergency Measures, *NBC News* (Apr. 30, 2020, 3:30 PM), <https://www.nbcnews.com/politics/politics-news/hundreds-protest-michigan-lawmakers-consider-extending-governors-emergency-powers-n1196886> [https://perma.cc/23DP-KA5Y]; see also T.C. Sottek, Caught on Camera, Police Explode in Rage and Violence Across the US, *Verge* (May 31, 2020, 11:46 AM), <https://www.theverge.com/2020/5/31/2127-6044/police-violence-protest-george-floyd>.

<sup>79</sup> See Igor Derysh, “They’re Kidnapping People”: “Trump’s Secret Police” Snatch Portland Protesters into Unmarked Vans, *Salon* (July 17, 2020, 4:05 PM), <https://www.salon.com/2020/07/17/theyre-kidnapping-people-trumps-secret-police-snatch-portland-protesters-into-unmarked-vans/> [https://perma.cc/7BMB-VBWG]; David A. Graham, America Gets an Interior Ministry, *Atlantic* (July 21, 2020), <https://www.theatlantic.com/ideas/archive/2020/07/americas-interior-ministry/614389/> [https://perma.cc/3LST-VL5U]; Jonathan Levinson & Conrad Wilson, Federal Law Enforcement Use Unmarked Vehicles To Grab Protesters off Portland Streets, *OPB* (July 16, 2020, 5:45 PM), <https://www.opb.org/news/article/federal-law-enforcement-unmarked-vehicles-portland-protesters/> [https://perma.cc/4NNS-F5RK].

<sup>80</sup> Caleb Ecarma, Trump’s Proud Boys “Stand By” Debate Moment Is Snowballing, *Vanity Fair* (Sept. 30, 2020), <https://www.vanityfair.com/news/2020/09/donald-trump-proud-boys-debate-moment-snowballing> [https://perma.cc/4YAS-TBGN].

<sup>81</sup> See generally Wendell Bird, *Press and Speech Under Assault: The Early Supreme Court Justices, the Sedition Act of 1798, and the Campaign Against Dissent*, at xxi (2016).

1714, groups of twelve people or more could be forcefully dispersed, even to the point of death, if deemed to be “unlawfully, riotously, and tumultuously assembled together.”<sup>82</sup> While elements of the British Riot Act were incorporated into the Militia Acts enacted by the second United States Congress in 1792 to enable the president to suppress insurrections during a time of frequent social unrest,<sup>83</sup> the Supreme Court affirmed free speech principles in *Edwards v. South Carolina* (1963), declaring:

[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. . . . There is no room under our Constitution for a more restrictive view.<sup>84</sup>

Whereas the Federalist Party of President John Adams enacted the Sedition Act in 1798 to ban speech directed at overthrowing the government,<sup>85</sup> the Supreme Court maintained in *Brandenburg v. Ohio* (1969) that such speech is protected by the First Amendment, so long as it is not “directed to inciting or producing imminent lawless action” and

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(describing the history of the limited conception of free speech under English common law); Michael Kahn, *The Origination and Early Development of Free Speech in the United States—A Brief Overview*, 76 Fla. Bar J. 71, 72–73 (2002) (mentioning James Madison’s expansive initial draft of the First Amendment); Letter from James Madison to Thomas Jefferson (Jan. 18, 1800), in 6 *The Writings of James Madison, 1790–1802*, at 347, 384–87 (Gaillard Hunt ed., 1906) (writing how the narrow British conception of free speech is incompatible with the nascent American democracy).

<sup>82</sup> The Riot Act 1714, 1 Geo. c.5, § 1.

<sup>83</sup> The Riot Act of 1714, entitled *An Act for Preventing Tumults and Riotous Assemblies, and for the More Speedy and Effectual Punishing the Rioters*, was passed by the Parliament of Great Britain to respond to “many rebellious riots and tumults” and disturbances of the peace that were deemed to “alienate the affections of the people from his Majesty.” *Id.*; see also *id.* (“That if any persons to the number of twelve or more, being unlawfully, riotously, and tumultuously assembled together, to the disturbance of the publick peace . . . and being required or commanded by any one or more justice or justices of the peace . . . to disperse themselves, and peaceably to depart to their habitations . . . remain or continue together by the space of one hour after such command or request made by proclamation . . . shall suffer death as in case of felony without benefit of clergy.”). The First Militia Act of 1792, entitled *Act To Provide for Calling Forth the Militia, To Execute the Laws of Union, Suppress Insurrections, and Repel Invasions*, similarly granted the President the power to issue a proclamation “in case of an insurrection in any state . . . [to] command such insurgents to disperse, and retire peaceably to their respective abodes, within a limited time.” *Act To Provide for Calling Forth the Militia, To Execute the Laws of Union, Suppress Insurrections, and Repel Invasions*, ch. 28, 1 Stat. 264 (repealed 1795).

<sup>84</sup> 372 U.S. 229, 237–38 (1963) (quoting *Terminiello v. Chicago*, 337 U.S. 1, 4–5 (1949)).

<sup>85</sup> See *Sedition Act*, ch. 74, 1 Stat. 596 (1798).

is not “likely to incite or produce such action.”<sup>86</sup> However, while the federal government cannot generally regulate speech based on its content, it can enact reasonable, content-neutral restrictions on its time, place, and manner.<sup>87</sup> Additionally, some categories of speech are given limited or no protection under the First Amendment.<sup>88</sup> For example, some kinds of speech are considered so harmful, so injurious by themselves, their very utterance tending to incite an immediate retaliation or breach of the peace, that they are deemed outside of the Constitution’s protection. Such words are called “fighting words.”<sup>89</sup>

The fighting-words doctrine originated in 1942 in *Chaplinsky v. New Hampshire*.<sup>90</sup> Mr. Chaplinsky, a Jehovah’s Witness, drew several complaints from the residents of Rochester, New Hampshire, after defaming various religious sects while proselytizing. After calling the city marshal “a God damned racketeer” and “a damned Fascist,” Chaplinsky was arrested and convicted under a state law that made it a crime to “address any offensive, derisive, or annoying word to any other person who is lawfully in any street or other public place, nor call him by any offensive or derisive name.”<sup>91</sup> Chaplinsky appealed his conviction and challenged the law, arguing that the city ordinance violated his freedom

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<sup>86</sup> 395 U.S. 444, 447–48 (1969).

<sup>87</sup> See *Ward v. Rock Against Racism*, 491 U.S. 781, 787, 796 (1989) (holding that a requirement to use sound amplification equipment and a sound technician provided by the city due to persistent noise complaints from nearby residents was a content-neutral and reasonable regulation of the place and manner of protected speech); *United States v. O’Brien*, 391 U.S. 367, 377 (1968) (upholding a restriction on expressive content and demonstrating that content-neutral restrictions may be upheld when the government has a compelling interest). The time, place, and manner restrictions imposed on the freedom to speak and assemble differ based upon the nature of the speaker’s chosen forum, which the Supreme Court has divided into three categories: traditional public forums, designated public forums, and nonpublic forums. When reviewing the constitutionality of government restrictions on speech in public and designated forums, courts use strict scrutiny. Under strict scrutiny, restrictions on free speech must further a “compelling state interest” and must be narrowly tailored to meet the goals of that interest. *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983).

<sup>88</sup> See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942) (“[I]t is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or ‘fighting’ words.”).

<sup>89</sup> *Id.* at 572.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 569. But see Robert M. O’Neil, *Rights in Conflict: The First Amendment’s Third Century*, 65 *Law & Contemp. Probs.* 7, 17 (2002) (noting that Mr. Chaplinsky “maintained that he had firmly but politely informed the officer that ‘You, sir, are damned in the eyes of God’ and ‘no better than a racketeer’”).

of speech under the First Amendment.<sup>92</sup> However, in a unanimous opinion, the Supreme Court held that Chaplinsky's "fighting words" incited an immediate breach of the peace,<sup>93</sup> and consequently, they were deemed unprotected speech under the First Amendment's freedom of speech clause.<sup>94</sup> Rather than evoking the Holmesian marketplace of ideas,<sup>95</sup> the Court instead considered Chaplinsky's words "of such slight social value . . . that any benefit that may be derived from them [was] clearly outweighed by the social interest in order and morality."<sup>96</sup> As the Court explained, Chaplinsky's epithets were "likely to provoke the average person to retaliation, and thereby cause a breach of the peace."<sup>97</sup>

Although *Chaplinsky* has never been overruled, the Supreme Court narrowed its scope in later decisions. For example, in 1949 in *Terminiello v. Chicago*, the Supreme Court overturned the conviction of Mr. Terminiello, an ex-Catholic priest who had been convicted of breach of the peace after delivering an anti-Semitic speech to the Christian Veterans of America.<sup>98</sup> The Supreme Court reasoned that not only was the city ordinance not limited to unprotected fighting words, but it also considered whether Terminiello had invited dispute or brought about conditions of unrest, rendering the ordinance overly broad.<sup>99</sup> Justice Douglas famously declared that "a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger."<sup>100</sup>

The Court reached a similar result in 1971, at the height of the Vietnam War. In *Cohen v. California*, the Supreme Court overturned the conviction of Paul Cohen for disturbing the peace in violation of

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<sup>92</sup> See *Chaplinsky*, 315 U.S. at 569.

<sup>93</sup> See *id.* at 573–74.

<sup>94</sup> See Note, The Demise of the *Chaplinsky* Fighting Words Doctrine: An Argument for Its Interment, 106 Harv. L. Rev. 1129, 1129–30 (1993).

<sup>95</sup> See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.").

<sup>96</sup> *Chaplinsky*, 315 U.S. at 572.

<sup>97</sup> *Id.* at 574.

<sup>98</sup> See *Terminiello v. Chicago*, 337 U.S. 1, 1–3, 6 (1949).

<sup>99</sup> See *id.* at 4–5.

<sup>100</sup> *Id.* at 4.

California law by wearing a jacket displaying the words “Fuck the Draft” in a Los Angeles courthouse.<sup>101</sup> The Court noted that the words on Cohen’s jacket were not a direct personal insult aimed at a specific person and thus could not be deemed fighting words.<sup>102</sup> Justice Harlan concluded, “one man’s vulgarity is another’s lyric. . . . [T]he Constitution leaves matters of taste and style so largely to the individual.”<sup>103</sup> Some argue that an underlying tension between *Chaplinsky* and *Cohen*—the former punishing public vulgarities and the latter allowing them—has bred confusion on “defining the line between protected speech and unprotected epithets.”<sup>104</sup> Nevertheless, the fighting-words doctrine has repeatedly been invoked in state courts, particularly following tempestuous encounters between citizens and the police.<sup>105</sup>

#### IV. POLICE OFFICERS AND BLACK BODIES

In matters involving public protests toward the perceived racist actions of police officers, the fighting-words doctrine raises important questions about the limits of constitutional protection for Black and Brown citizens. Cases like *Lewis v. City of New Orleans* (1974) and *City of Houston v. Hill* (1987), which both overturned convictions based upon local laws prohibiting the interruption of policing work with offensive language,<sup>106</sup>

<sup>101</sup> 403 U.S. 15, 16 (1971).

<sup>102</sup> See *id.* at 20.

<sup>103</sup> *Id.* at 25.

<sup>104</sup> O’Neil, *supra* note 91, at 16.

<sup>105</sup> See *infra* note 106.

<sup>106</sup> *City of Houston v. Hill*, 482 U.S. 451, 451 (1987); *Lewis v. City of New Orleans*, 415 U.S. 130, 130 (1974); see also *Swartz v. Insogna*, 704 F.3d 105, 111 (2d Cir. 2013) (flashing “the finger” at a police officer not deemed probable cause for a disorderly conduct arrest); *Posr v. Court Officer Shield # 207*, 180 F.3d 409, 415 (2d Cir. 1999) (stating to a police officer, “One day you’re gonna get yours,” unaccompanied by any other action, would not rise to the level of fighting words); *Buffkins v. City of Omaha*, 922 F.2d 465, 472 (8th Cir. 1990) (calling a police officer an “asshole” did not constitute fighting words); *Duran v. City of Douglas*, 904 F.2d 1372, 1377 (9th Cir. 1990) (delivering rude gestures and cursing at a police officer in Spanish not deemed fighting words); *R.I.T. v. State*, 675 So. 2d 97, 100 (Ala. Crim. App. 1995) (uttering “fuck you” to a police officer did not rise to the level of fighting words); *In re. Welfare of S.L.J.*, 263 N.W.2d 412, 419–20 (Minn. 1978) (reversing conviction for yelling to police, “fuck you pigs”); *Brendle v. City of Houston*, 759 So. 2d 1274, 1276, 1284 (Miss. Ct. App. 2000) (reversing conviction for violating statute prohibiting “public profanity” by stating, “I’m tired of this God d— police sticking their nose in s— that doesn’t even involve them”); *Harrington v. City of Tulsa*, 763 P.2d 700, 700–02 (Okla. Crim. App. 1988) (reversing conviction of defendant who stated to police officers, “You’re such an ass” and “You mother f—ers, you can’t—you’re not brave enough to go out and catch murders and robbers. You are a couple of pussies”).

affirm a sense that “the First Amendment protects a significant amount of verbal criticism and challenge directed at police officers.”<sup>107</sup> In fact, many courts have argued that police officers should be held to a higher standard when exercising their policing power against those merely speaking. In *Marttila v. City of Lynchburg* (2000), a Virginia Court of Appeals overturned the conviction of a defendant who called police officers “fucking pigs” and indicated they “should be at a fucking donut shop.”<sup>108</sup> The court declared that “the First Amendment requires properly trained police officers to exercise a higher degree of restraint when confronted by disorderly conduct and abusive language.”<sup>109</sup>

Some state and local governments have responded to such concerns by simply limiting the range of public speech that can be criminalized to only include “fighting words,” effectively granting police officers discretionary authority to determine what kinds of activities or public speech amount to criminal conduct. In other words, legislatures have bypassed wrestling with the underlying racial tensions between law enforcement and minoritized communities by avoiding acknowledging the prevalence of implicit racial bias among police officers altogether.<sup>110</sup> Rather than question why police officers routinely use pepper spray, tear gas, rubber bullets, and other violent policing tactics in response to peaceful public protest about racial injustice, the doctrine threatens to punish people who anger police officers with their free speech.<sup>111</sup> As a

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<sup>107</sup> *Hill*, 482 U.S. at 461.

<sup>108</sup> 535 S.E.2d 693, 693, 695 (Va. Ct. App. 2000).

<sup>109</sup> *Id.* at 697–98 n.5.

<sup>110</sup> See Lois James, *The Stability of Implicit Racial Bias in Police Officers*, 21 *Police Q.* 30, 47 (2018) (demonstrating through empirical analysis that “[a]lthough officers did tend to either moderately or strongly associate Black Americans with weapons, implicit racial bias varied significantly within the same officers over time,” which “suggests that implicit racial bias is not a stable trait . . . [and] training designed to reduce bias is not doomed to failure”).

<sup>111</sup> *Sottek*, *supra* note 78 (noting several examples of police brutality: “A New York City police officer tore a protective mask off of a young black man and assaulted him with pepper spray while the victim peacefully stood with his hands up[.] . . . San Antonio Police used tear gas against people. So did Dallas police. So did Los Angeles police. So did DC police. . . . MSNBC host Ali Velshi says he was shot after state police fired unprovoked into a peaceful rally”); *Black Lives Matter Protests: Mapping Police Violence Across the USA*, Amnesty Int’l, <https://www.amnesty.org/en/latest/news/2020/06/usa-unlawful-use-of-force-by-police-at-black-lives-matter-protests/> [<https://perma.cc/TFB2-PU6T>] (“Amnesty International has documented 125 separate incidents of police violence against protesters in 40 states and the District of Columbia between 26 May and 5 June 2020. These acts of excessive force were committed by members of state and local police departments, as well as by National Guard troops and security force personnel from several federal agencies.”).



result, a sense of confusion remains, especially regarding public speech that decries racism at the hands of the police. Could the phrase “Black Lives Matter” and similar expressions that either affirm the dignity of Black lives or decry the injustice of institutional racism be deemed “fighting words” by police officers?

Some courts have held that public expressions of dissent to law enforcement can constitute fighting words.<sup>112</sup> For example, in *State v. Clay* (1999), the Minnesota Court of Appeals affirmed a conviction for disorderly conduct under Minnesota law based upon “fighting words” directed toward police officers.<sup>113</sup> Minnesota police officers identified Nathan Webb Clay as a suspect in a local fight.<sup>114</sup> After approaching and questioning Mr. Clay, the suspect proceeded to call one officer a “white racist motherf\*\*ker” and accused another of racism before telling both officers “that he wished their mothers would die.”<sup>115</sup> The officers arrested Clay, and the district court found him guilty of disorderly conduct.<sup>116</sup> The court of appeals examined whether Clay’s speech, viewed in light of the surrounding circumstances (including the fact that it was Mother’s Day weekend), would likely provoke retaliatory violence by police officers.<sup>117</sup> The court ultimately held that Clay’s speech did in fact rise to the level of fighting words, stating that “appellant’s language was directed at the officers and was not merely the expression of a controversial opinion; while calling the officers ‘white racist motherf\*\*kers’ may be protected, wishing death upon an officer’s mother is not.”<sup>118</sup>

Critical Race Theorists have argued that such tensions in the implications of verbal expressions between officers and citizens reflect “the cultural structures of masculinity in the contemporary Anglo-

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<sup>112</sup> See, e.g., *State v. Griatzky*, 587 A.2d 234, 238 (Me. 1991) (holding that “abusive language challenging the officer’s authority and implicitly exhorting the assembled group to join in that challenge and to resist the order to disperse . . . presented a clear and present danger of an immediate breach of the peace even when directed toward a police officer”); *State v. York*, 732 A.2d 859, 861–62 (Me. 1999) (holding that calling court security officers “fucking assholes” and preparing to spit on the officer would “have a direct tendency to cause a violent response by an ordinary person”).

<sup>113</sup> See *State v. Clay*, No. CX-99-343, 1999 WL 711038, at \*3 (Minn. Ct. App. Sept. 14, 1999) (“The district court found that . . . the appellant’s words were sufficiently egregious to provoke retaliatory police violence.”).

<sup>114</sup> See *id.* at \*1.

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

<sup>116</sup> See *id.*

<sup>117</sup> See *id.* at \*2–3.

<sup>118</sup> *Id.* at \*3.

American world,” causing “[m]en disempowered by racial or class status” to seek “ways of proving their manhood,” in some instances with violence.<sup>119</sup> According to Angela P. Harris, among the men who predominate crime, criminal justice, and policing, “violent acts are . . . sometimes[] the result of the character of masculinity itself as a cultural ideal . . . [where] men use violence or the threat of violence . . . when they perceive their masculine self-identity to be under attack.”<sup>120</sup> Some scholars argue that such identity performance theories of American masculinity find roots in the “culture of honor” among white males in the American South,<sup>121</sup> where an “ethic of self-protection” among early frontier herdsman in an atmosphere of lawlessness made it “important to establish one’s reputation for toughness—even on matters that might seem small on the surface.”<sup>122</sup>

Such “culture-of-honor norms” are not only embodied in the laws and public policies of the American South,<sup>123</sup> but they have also influenced police departments across the country. Law enforcement officers who pledge an oath of honor often enact a “hypermasculine” cultural image of policing embodied by the man who is “tough and violent, yet heroic, protective, and necessary to society’s very survival.”<sup>124</sup> As Frank Rudy Cooper further explains, the working-class status of many male police officers catalyzes their hypermasculinity with efforts to mitigate their subordinate class status through aggressive, authoritative, and even violent policing.<sup>125</sup>

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<sup>119</sup> Angela P. Harris, *Gender, Violence, Race, and Criminal Justice*, 52 *Stan. L. Rev.* 777, 780 (2000).

<sup>120</sup> *Id.* at 781.

<sup>121</sup> Dov Cohen, Richard E. Nisbett, Brian F. Bowdle & Norbert Schwarz, *Insult, Aggression, and the Southern Culture of Honor: An “Experimental Ethnography”*, 70 *J. Personality & Soc. Psych.* 945, 946 (1996) (“White male homicide rates of the South are higher than those of the North, and the South exceeds the North *only* in homicides that are argument- or conflict-related, not in homicides that are committed while another felony, such as robbery or burglary, is being performed. Such findings are consistent with a stronger emphasis on honor and protection in the South.”).

<sup>122</sup> *Id.* at 946; see also *id.* (“In the Old South, allowing oneself to be pushed around or affronted without retaliation amounted to admitting that one was an easy mark and could be taken advantage of.”).

<sup>123</sup> *Id.*; see also *id.* (this culture is “reflected in looser gun control laws, less restrictive self-defense statutes, and more hawkish voting by federal legislators on foreign policy issues”).

<sup>124</sup> See Harris, *supra* note 119, at 793.

<sup>125</sup> Frank Rudy Cooper, “Who’s the Man?”: Masculinities Studies, *Terry* Stops, and Police Training, 18 *Colum. J. Gender & L.* 671, 691–92 (2009); Harris, *supra* note 119, at 794 (“Beat

One might conclude that it was therefore a performative culture of hypermasculinity that provoked the police officers in *Clay*, and not the underlying racial tensions stoked by Mr. Clay's proclamation that the officers were "white racist motherf\*\*kers."<sup>126</sup> Perhaps yelling "yo mama" to a police officer, or in Mr. Clay's case, calling for an officer's mother's death, should appropriately be deemed fighting words because "street policing is deeply steeped in a masculine culture" and "violence is always just below the surface."<sup>127</sup> However, Angela P. Harris argues that racial, ethnic, and class divides trigger different expressions of masculinity that reflect power struggles among men and mediate conflicts in social life.<sup>128</sup> Policing—even when characterized by expressions of hypermasculinity—"follows the vectors of power established in the larger society in which white dominates nonwhite and rich dominates poor."<sup>129</sup> Further, "the instability of masculine identity," due to a racialized yet amorphous societal power structure, renders the prospect of violence between citizens and police as an ever-present defense mechanism.<sup>130</sup> Accordingly, clarifying when anti-racist speech that provokes retaliatory violence should be protected, and when such speech should be viewed as mere contestations of gender performativity, would help to make sense of the racial coordinates that comprise society's vectors of power.

By ignoring these underlying questions of agency and ascription in racial identity—how one *chooses* to perform their racial and gender identity versus how their identity performance is *perceived*—courts have published seemingly inconsistent conclusions about the meaning of fighting words. Unlike *Clay*, some courts have held expressions of dissent

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cops tend to be working-class men, men denied the masculinity of wealth, power, and order giving.").

<sup>126</sup> *State v. Clay*, No. CX-99-343, 1999 WL 711038, at \*3 (Minn. Ct. App. Sept. 14, 1999).

<sup>127</sup> Harris, *supra* note 119, at 794, 796.

<sup>128</sup> See *id.* at 784 ("The relations between white and black men, then, are more complex than 'dominant' and 'subordinate'; men divided by racial power may look at one another with admiration, envy, or desire.").

<sup>129</sup> *Id.* at 797.

<sup>130</sup> Camille Gear Rich, Angela Harris and the Racial Politics of Masculinity: Trayvon Martin, George Zimmerman, and the Dilemmas of Desiring Whiteness, 102 *Calif. L. Rev.* 1027, 1039 (2014); see Harris, *supra* note 119, at 788 ("Men must constantly defend themselves against both women and other men in order to be accepted as men; their gender identity, crucial to their psychological sense of wholeness, is constantly in doubt. . . . [U]nder these circumstances, gender performance frequently becomes gender violence.").

to law enforcement during policing encounters tinged by acts of racial bias as *not* constituting fighting words.<sup>131</sup>

In the case of *Johnson v. Campbell* (2003), the Third Circuit reversed a lower court's finding that the arrest of an African American man for disorderly conduct was constitutional.<sup>132</sup> Mr. Steven Johnson was a high school basketball coach who was staying in a motel with his team in Delaware before the start of a tournament.<sup>133</sup> Johnson was reported to Delaware police by a motel employee for flipping through free newspapers in the motel's guest office.<sup>134</sup> The employee explained that Mr. Johnson made her nervous because the motel had been robbed five months prior by two young Black men.<sup>135</sup> According to the employee, "the way [Mr. Johnson] was walking and pacing around the office and his body language" scared her.<sup>136</sup> Upon arrival, a police officer located Mr. Johnson reading a newspaper inside of a parked car outside of the motel and attempted to detain him.<sup>137</sup> Mr. Johnson did not comply with requests to show identification, and after calling the police officer a "son of a bitch," Mr. Johnson was placed under arrest for his use of profane language and disturbance of the peace.<sup>138</sup> The court of appeals held that Mr. Johnson's constitutional rights had been violated because his words did not amount to fighting words, explaining that "Johnson's words were unpleasant, insulting, and possibly unwise, but they were not intended to, nor did they, cause a fight."<sup>139</sup>

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<sup>131</sup> See, e.g., *Johnson v. Campbell*, 332 F.3d 199, 201 (3d Cir. 2003) (explaining that the plaintiff "brought an action under 42 U.S.C. § 1983 against the arresting officer, Officer Erik Campbell, asserting that Campbell had violated his constitutional rights by detaining and arresting him without cause and due to his race"); *Cornelious v. Brubaker*, No. 01CV1254, 2003 WL 21511125, at \*2, \*9 (D. Minn. June 25, 2003) (after yelling "'fuck you all' to Officer Brubaker and Anaya, who were across the street from him[,] . . . Cornelious was called a 'nigger' while he was hit and kicked on the ground by Officer Brubaker, Gardner, and Anaya"); *United States v. McDermott*, 971 F. Supp. 939, 943 (E.D. Pa. 1997); *Brendle v. City of Houston*, 759 So. 2d 1274, 1284 (Miss. Ct. App. 2000).

<sup>132</sup> *Johnson*, 332 F.3d at 215; see also *id.* at 213 (explaining that "swear words, spoken to a police officer, do not provide probable cause for an arrest for disorderly conduct because the words, as a matter of law, are not 'fighting words'").

<sup>133</sup> See *id.* at 201–02.

<sup>134</sup> See *id.* at 202.

<sup>135</sup> See *id.*

<sup>136</sup> *Id.*

<sup>137</sup> See *id.* at 203.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 213–15.

The difficulty that courts have faced in determining whether the Constitution protects public protests of perceived racist policing suggests that the notion of anti-racist speech as fighting words is still up for debate. Perhaps one reason for such ambiguity arises from the very concept of *disorderly* conduct, an inherently racially biased idea.<sup>140</sup> In many Black and Brown communities, police supervision has become a part of everyday life, whether employed to threaten misbehaving students in school,<sup>141</sup> marginalize Black girls in the classroom,<sup>142</sup> or reprimand homeless people sleeping on the street.<sup>143</sup> As Paul Gowder explains, citizen acts that undermine the command mode of police authority—or the social *order*—become a threat to order-maintenance policing—or an instance of social *disorder*.<sup>144</sup> When anti-racist speech threatens the commonplace nature of police supervisory authority—even when delivered in response to unjustified, yet ubiquitous, police aggression—it is reasonable to presume that police officers will perceive such language as “fighting words” that incite an immediate breach of the hierarchical social order.

Another reason for the ambiguity of anti-racist speech as fighting words arises from the criminalization of disobedience to police orders. Not only do citizens struggle to determine when policing tactics are

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<sup>140</sup> See Jamelia N. Morgan, Rethinking Disorderly Conduct, *Calif. L. Rev.* (forthcoming 2021) (manuscript at 20) (on file with author).

<sup>141</sup> See Julie Kiernan Coon & Lawrence F. Travis III, The Role of Police in Public Schools: A Comparison of Principal and Police Reports of Activities in Schools, 13 *Police Prac. & Rsch.* 15, 18 (2012); Jason P. Nance, Students, Police, and the School-to-Prison Pipeline, 93 *Wash. U. L. Rev.* 919, 922 (2016) (“For example, police officers stationed at schools have arrested students for texting, passing gas in class, violating the school dress code, stealing two dollars from a classmate, bringing a cell phone to class, arriving late to school, or telling classmates waiting in the school lunch line that he would ‘get them’ if they ate all of the potatoes.”).

<sup>142</sup> See Erica L. Green, Mark Walker & Eliza Shapiro, ‘A Battle for the Souls of Black Girls’, *N.Y. Times* (Oct. 1, 2020), <https://www.nytimes.com/2020/10/01/us/politics/black-girls-school-discipline.html> [<https://perma.cc/Y4AT-7UQH>] (“A New York Times analysis of the most recent discipline data from the Education Department found that Black girls are over five times more likely than white girls to be suspended at least once from school, seven times more likely to receive multiple out-of-school suspensions than white girls and three times more likely to receive referrals to law enforcement.”).

<sup>143</sup> See Maria Foscarinis, Kelly Cunningham-Bowers & Kristen E. Brown, Out of Sight—Out of Mind?: The Continuing Trend Toward the Criminalization of Homelessness, 6 *Geo. J. on Poverty L. & Pol’y* 145, 146–47 (1999).

<sup>144</sup> See Gowder, *supra* note 25, at 13–14.

lawful,<sup>145</sup> but they also face the risk of bodily harm, or even worse, death, if they disobey a police order to challenge perceived unlawful conduct.<sup>146</sup> Further, civil rights lawsuits alleging violations of constitutional rights by police officers must confront the blue wall of silence,<sup>147</sup> the weaponry of indemnification policies<sup>148</sup> and police unions,<sup>149</sup> and the protective shield of the qualified-immunity defense.<sup>150</sup> The doctrine of qualified immunity protects police officers from suit unless the aggrieved party can show that the officer violated “clearly established statutory or constitutional rights of which a reasonable [police officer] would have known.”<sup>151</sup> Following the Supreme Court’s ruling in *Pearson v. Callahan* (2009), which held that courts can first decide whether a constitutional right was “clearly established” at the time of the alleged misconduct before determining whether the alleged facts constitute a violation of a constitutional right,<sup>152</sup> it seems that courts can simply rule that a police officer did not violate a “clearly established” constitutional right by arresting a citizen for anti-racist speech that disturbs the peace. If courts dismiss a suit on such grounds, the underlying question of whether such anti-racist speech is protected under the First Amendment remains unresolved.

Put another way, when investigating police officer liability for a claimed violation of First Amendment rights, courts do not have to resolve whether anti-racist speech unjustifiably become “fighting words”

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<sup>145</sup> Orin Kerr, Sandra Bland and the ‘Lawful Order’ Problem, *Wash. Post* (July 23, 2015, 11:57 AM), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/07/23/sandra-bland-and-the-lawful-order-problem/> [<https://perma.cc/WM4K-GGG8>].

<sup>146</sup> See Rachel A. Harmon, *Why Arrest?*, 115 *Mich. L. Rev.* 307, 315–16 (2016).

<sup>147</sup> See Gabriel J. Chin & Scott C. Wells, *The “Blue Wall of Silence” as Evidence of Bias and Motive To Lie: A New Approach to Police Perjury*, 59 *U. Pitt. L. Rev.* 233, 237–40 (1998).

<sup>148</sup> See Joanna C. Schwartz, *Police Indemnification*, 89 *N.Y.U. L. Rev.* 885, 890 (2014) (“Police officers are virtually always indemnified.”).

<sup>149</sup> See Catherine L. Fisk & L. Song Richardson, *Police Unions*, 85 *Geo. Wash. L. Rev.* 712, 747–58 (2017).

<sup>150</sup> See, e.g., *Purtell v. Mason*, 527 F.3d 615, 621, 626 (7th Cir. 2008) (holding that the defendant officer was entitled to qualified immunity because his violation of the plaintiff’s First Amendment constitutional rights was a “reasonable mistake”); *Carbado*, *supra* note 22, at 1519–23.

<sup>151</sup> *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Some argue that such protections trace their origin to the Casual Killing Act of 1669, a Virginia law that exempted slave masters and those under their instruction from the charge of murder, if their slaves were killed during the administration of extreme punishment, because malice could not be presumed. See *An Act About the Casuall Killing of Slaves, in 2 The Statutes at Large; Being a Collection of All the Laws of Virginia, from the First Session of the Legislature, in the Year 1619*, at 270, 270 (William Waller Hening ed., 1823).

<sup>152</sup> 555 U.S. 223, 244–45 (2009).

in the minds of officers who suppress such speech or retaliate with violence. Courts can simply assert that anti-racist protest speech is not a clearly established form of protected speech under the Constitution because some citizens, including some police officers, might reasonably interpret them—e.g., protestors shouting “Black Lives Matter”—as harmful words that provoke an immediate breach of the peace. To be sure, a rich legacy of white supremacist ideology woven into the fabric of American culture underscores the “reasonableness” of perceiving anti-racist *pure* speech—spoken or written words—as a threat to the status quo, especially a status quo typified by order-maintenance policing. Even more, history reveals that the unconstrained Black body in the public square is often perceived as a threat to white supremacy, rendering Blackness itself a kind of *symbolic* speech that becomes “fighting words” in the minds of some citizens. The caricature of the Black American man as a “brute” provides but one example.

While enslaved Africans were typically portrayed as childlike and docile to assuage the moral angst of their white masters, free Black citizens were thought to be driven by animalistic tendencies and savage instincts. Not only were Black Americans after the abolition of slavery characterized as “lazy, thriftless, intemperate, insolent, dishonest, and without the most rudimentary elements of morality,”<sup>153</sup> but Black men in particular were deemed brutes—a man “lurking in the dark, a monstrous beast, crazed with lust. His ferocity is almost demoniacal.”<sup>154</sup> In fact, the claim that Black men were brutally raping white women was used to justify their torture and lynching during the Reconstruction era and well into the twentieth century. According to Barbara Holden-Smith, victims of public lynching by mobs “were tied to trees and while the funeral pyres were being prepared, they were forced to hold out their hands while one finger at a time was chopped off. The fingers were distributed as souvenirs.”<sup>155</sup>

The racist culture of characterizing Black men as criminal and savage brutes to justify their harsh treatment and public lynching persists to this

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<sup>153</sup> Thomas Nelson Page, *The Negro: The Southerner’s Problem* 80 (1910).

<sup>154</sup> George T. Winston, *The Relations of the Whites to the Negroes*, 18 *Annals Am. Acad. Pol. & Soc. Sci.* 105, 109 (1901).

<sup>155</sup> Barbara Holden-Smith, *Lynching, Federalism, and the Intersection of Race and Gender in the Progressive Era*, 8 *Yale J.L. & Feminism* 31, 31 (1996) (quoting *Lynched Negro and Wife Were First Mutilated*, *Vicksburg (Miss.) Evening Post*, Feb. 8, 1904, in Ralph Ginzburg, *100 Years of Lynching* 62–63 (1969)).

day. For example, in 2014, Officer Darren Wilson described the eighteen-year-old Michael Brown as a superhuman “demon” that looked “aggressive” and “hostile” to clarify why he shot the Black teenager after Brown had been suspected of stealing a box of Swisher Sweets from a convenience store.<sup>156</sup> Perhaps Brown’s unconstrained and dignified Black body became symbolic speech in defiance of Wilson’s command mode of police authority and consequently was deemed a threat to Wilson’s social status.<sup>157</sup> Is it no wonder that Amadou Diallo was shot at forty-one times on suspicion of rape without uttering a single word?<sup>158</sup>

Perhaps this line of reasoning has an atmosphere of conjecture. After all, charges for crimes like disturbing the police, interfering with public officials, or inciting a riot are rarely decided by invoking the fighting-words doctrine. But maybe the threat of conviction for speaking one’s mind is more than enough to sustain the racial status quo. Why else would Black and Brown parents teach their children to passively comply with police officer demands, even in the face of racially biased, aggressive, and supervisory behavior?<sup>159</sup> Why else would so many Black and Brown Americans avoid the police altogether, even when the police are Black?<sup>160</sup> As Vesla Weaver explains, the prospect of being reprimanded for peaceful protests against unlawful police behavior turns the criminal justice system into “a site of racial learning” where minoritized citizens are socialized into the extant racial social order.<sup>161</sup> Unfortunately, when citizens remain silent to racist policing out of fear for their safety, they

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<sup>156</sup> Jamelle Bouie, *Michael Brown Wasn’t a Superhuman Demon*, *Slate* (Nov. 26, 2014, 12:07 AM), <https://slate.com/news-and-politics/2014/11/darren-wilsons-racial-portrayal-of-michael-brown-as-a-superhuman-demon-the-ferguson-police-officers-account-is-a-common-projection-of-racial-fears.html> [<https://perma.cc/6H33-2F56>] (quoting Wilson’s grand jury testimony and his interview with police).

<sup>157</sup> As Angela P. Harris explains, the stereotypical savage Black male can be perceived as a threat to the masculinity of white police officers. See Harris, *supra* note 119, at 798–99.

<sup>158</sup> New York City is no stranger to the culture of violent policing of Black and Brown citizens. See, e.g., Marilyn Johnson, *Street Justice: A History of Police Violence in New York City 18–19* (2003).

<sup>159</sup> See Tracy R. Whitaker & Cudore L. Snell, *Parenting While Powerless: Consequences of “the Talk”*, 26 *J. Hum. Behav. Soc. Env’t* 303, 304 (2016).

<sup>160</sup> See Weaver et al., *supra* note 24, at 13–14; German Lopez, *How Systemic Racism Entangles All Police Officers—Even Black Cops*, *Vox* (Aug. 15, 2016, 9:35 AM), <https://www.vox.com/2015/5/7/8562077/police-racism-implicit-bias> (revealing that a Black police officer admitted “that after decades of working at the Baltimore Police Department and Maryland State Police, he harbored a strong bias against young black men”).

<sup>161</sup> Vesla M. Weaver, *Black Citizenship and Summary Punishment: A Brief History to the Present*, 17 *Theory & Event* (2014).



not only waive Fourth and Fifth Amendment rights, but they also experience a deprivation of liberty that degrades their citizenship by robbing them of agency to define their own identity performativity.<sup>162</sup> Yet when citizens protest aggressive policing, such as those who march in BLM protests to decry the brutal police killings of George Floyd and Breonna Taylor and so many others, they risk their Blackness being perceived as a threat and inducing a violent police response. This lose-lose situation, which undoubtedly will trigger a chilling effect on constitutional free speech,<sup>163</sup> perhaps explains why protestors who shout “Black Lives Matter” in affirmation of Black humanity are quickly met by heavily armed police officers ready for a fight.<sup>164</sup> Their Blackness is deemed fighting words.

To be sure, there are myriad reasons why anger might surface at the mere sound of BLM protestors marching down the street. In his treatise on the art of persuasion, *Rhetoric*, Aristotle defines anger as “desire, accompanied with pain, for conspicuous revenge for a conspicuous slight that was directed against oneself or those near to one, when such a slight is undeserved.”<sup>165</sup> Perhaps when white citizens or white police officers find themselves as the subject of an injustice that sits in the belly of American history, far beyond their reach, some perceive an undeserved “slight,” a disregard for and deprivation of their moral desert that is painful because it undermines their moral worth.<sup>166</sup> Perhaps from such

<sup>162</sup> See Toussaint, *supra* note 35, at 380 (noting that “political equality requires not only civil rights protecting one’s freedom from interference, but even more, it calls for public autonomy—freedom from domination”); Angela P. Harris, *Theorizing Class, Gender, and the Law: Three Approaches*, 72 *Law & Contemp. Probs.* 37, 43 (2009).

<sup>163</sup> See Leslie Kendrick, *Speech, Intent, and the Chilling Effect*, 54 *Wm. & Mary L. Rev.* 1633, 1650 (2013) (“[T]he government is under a duty not only to refrain from regulating protected expression but also to promote it. At the same time, freedom of expression is also a *preferred value*, such that, when it conflicts with other state values—such as the interest in regulating unprotected expression—it must receive more weight.” (footnotes omitted)).

<sup>164</sup> An online spreadsheet reveals more than 1000 videos of recent instances of police brutality directed against non-violent protesters. T. Greg Doucette & Jason E. Miller, *GeorgeFloyd Protest—Police Brutality Videos on Twitter*, Google Docs, [https://docs.google.com/spreadsheets/u/1/d/1YmZeSxpz52qT-10tkCjWOWOGkQql7Wd1P7ZM1wM-W0E/htmlview?pru=AAABcql6DI8\\*mIHYeMnoj9XWUp3Svb\\_KZA#](https://docs.google.com/spreadsheets/u/1/d/1YmZeSxpz52qT-10tkCjWOWOGkQql7Wd1P7ZM1wM-W0E/htmlview?pru=AAABcql6DI8*mIHYeMnoj9XWUp3Svb_KZA#) [<https://perma.cc/-2V8R-BXGL>] (last visited Oct. 17, 2020).

<sup>165</sup> Aristotle’s *Rhetoric*, *Stan. Encyclopedia of Phil.* (Feb. 1, 2010), <https://plato.stanford.edu/entries/aristotle-rhetoric/index.html> [<https://perma.cc/N358-A2Z6>].

<sup>166</sup> Aristotle, *Rhetoric* bk. II, ch. 2 (J.H. Freese ed. & trans., Harvard Univ. Press 1926), <http://www.perseus.tufts.edu/hopper/text?doc=Aristot.+Rh.+2.2&fromdoc=Perseus-%3Atext%3A1999.01.0060> [<https://perma.cc/4NS9-5JB7>] (“Slighting is an actualization of opinion in regard to something which appears valueless; for things which are really bad or

pain arises a hasty and irrational desire for revenge, for a rectificatory justice that remedies a seemingly unequal distribution of harm caused by the follies of our ancestors. Yet when neither the perceived offender nor the recipient of the perceived undeserved slight is the source of the injustice that animates their despair, the resulting brawl only deepens the wounds they share. Rather than inflict the specific pain of regret in the body of the other, such acts of revenge in response to anti-racist speech simply deepen the wounds of racial division resonant in the body politic.

At this point in the analysis, an underlying and unresolved tension in the First Amendment's treatment of racial issues remains unanswered—is the phrase *Black Lives Matter* or its symbolic representation in the bodies of Black protestors lining the streets of America unprotected public speech? Is *Blackness* “fighting words”? Perhaps the inconsistency among courts on the meaning of fighting words, coupled with the protections afforded police officers by the qualified immunity doctrine, explains why George Floyd's protest against the brutal policing tactics of Officer Derek Chauvin while lying on a Minnesota street—Mr. Floyd declaring with muffled voice, “Please, please, please, I can't breathe”—was met by Officer Chauvin's knee pressed ever more firmly upon Mr. Floyd's neck for eight minutes and forty-six seconds.<sup>167</sup> Perhaps Mr. Floyd's plea for dignity as a Black man under arrest in America was simply deemed the fighting words of an American brute.<sup>168</sup>

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good, or tend to become so, we consider worthy of attention, but those which are of no importance or trifling we ignore. Now there are three kinds of slight: disdain, spitefulness, and insult.”)

<sup>167</sup> Elisha Fieldstadt, ‘I Can't Breathe’: Man Dies After Pleading with Officer Attempting To Detain Him in Minneapolis, NBC News (May 26, 2020), <https://www.nbcnews.com/news/us-news/man-dies-after-pleading-i-can-t-breathe-during-arrest-n1214586> [https://perma.cc/ZF7S-XJT7]. This time (eight minutes and forty-six seconds) is disputed. See Evan Hill et al., How George Floyd Was Killed in Police Custody, N.Y. Times (May 31, 2020), <https://www.nytimes.com/2020/05/31/us/george-floyd-investigation.html> [https://perma.cc/Y3YT-N5JL].

<sup>168</sup> Although beyond the scope of this Essay, this argument also suggests an underexplored tension between (a) the First Amendment's lack of protection for “fighting words” that threaten harm to their target and an imminent breach of the peace, and (b) the Fourth Amendment's permission of deadly force by police officers in response to an imminent threat of serious bodily harm to themselves or others. See, e.g., *Nieves v. Bartlett*, 139 S. Ct. 1715, 1723 (2019) (holding that the presence of probable cause for an arrest defeats a First Amendment retaliatory arrest claim as a matter of law).

## V. BLACK LIVES AND IMMINENT LAWLESSNESS

Unfortunately, Justice William Brennan got it wrong in *Texas v. Johnson* when he said that “the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”<sup>169</sup> The government *does* prohibit the free expression of certain ideas that society finds offensive or disagreeable. Maybe this explains why federal and local governments, and their police officers, have silenced protestors with curfews and threats of arrest,<sup>170</sup> all while onlookers yell in retort, “All Lives Matter.”<sup>171</sup> Maybe this explains why the very idea of liberty and equality for Black and Brown Americans,<sup>172</sup> the very notion of Black lives deserving human moral dignity,<sup>173</sup> the very suggestion of a Black feminist lens to critique socioeconomic injustice,<sup>174</sup>

<sup>169</sup> 491 U.S. 397, 414 (1989).

<sup>170</sup> See Devlin Barrett, Cities Increasingly Turn to Curfews Hoping To Subdue Violence, Retake Control of the Streets, Wash. Post (June 1, 2020, 6:40 PM), [https://www.washingtonpost.com/national-security/curfew-george-floyd-protests-minneapolis-washington-new-york/2020/06/01/0d58b638-a44d-11ea-b619-3f9133bbb482\\_story.html](https://www.washingtonpost.com/national-security/curfew-george-floyd-protests-minneapolis-washington-new-york/2020/06/01/0d58b638-a44d-11ea-b619-3f9133bbb482_story.html) [<https://perma.cc/7ZWD-PQUU>]; Mark Berman & Emily Wax-Thibodeaux, Police Keep Using Force Against Peaceful Protesters, Prompting Sustained Criticism About Tactics and Training, Wash. Post (June 4, 2020, 1:02 PM), [https://www.washingtonpost.com/national/police-keep-using-force-against-peaceful-protesters-prompting-sustained-criticism-about-tactics-and-training/2020/06/03/5d2f51d4-a5cf-11ea-bb20-ebf0921f3bbd\\_story.html](https://www.washingtonpost.com/national/police-keep-using-force-against-peaceful-protesters-prompting-sustained-criticism-about-tactics-and-training/2020/06/03/5d2f51d4-a5cf-11ea-bb20-ebf0921f3bbd_story.html) [<https://perma.cc/YT8B-GQ7D>]; Alex Woodward, Louisville Police Threaten Protesters with Arrests, Tear Gas in Wake of Breonna Taylor Grand Jury, Independent (Sept. 23, 2020, 11:33 PM), <https://www.independent.co.uk/news/world/americas/breonna-taylor-protests-louisville-grand-jury-teargas-latest-b559656.html> [<https://perma.cc/AF6L-Q3RF>]; Natasha Lennard, The President’s War on Dissent Is Using Trumped-Up Federal Charges, Intercept (Oct. 31, 2020, 8:00 AM), <https://theintercept.com/2020/10/31/protests-federal-charges-trump/> [<https://perma.cc/FT74-P469>].

<sup>171</sup> Daniel Victor, Why ‘All Lives Matter’ Is Such a Perilous Phrase, N.Y. Times (July 15, 2016), <https://www.nytimes.com/2016/07/16/us/all-lives-matter-black-lives-matter.html> [<https://perma.cc/BKW9-A95F>].

<sup>172</sup> See Stokely Carmichael & Charles V. Hamilton, *Black Power: The Politics of Liberation in America* 77 (1992) (“The [American] Creed is supposed to contain considerations of equality and liberty, at least certainly equal opportunity, and justice. The fact is, of course, that these are simply words which *were not even originally intended* to have applicability to black people . . .”).

<sup>173</sup> See Austin Channing Brown, *I’m Still Here: Black Dignity in a World Made for Whiteness* 79–80 (2018) (“We must remind ourselves and one another that we are fearfully and wonderfully made, arming ourselves against the ultimate message of whiteness—that we are inferior.”).

<sup>174</sup> See Patricia Hill Collins, *Fighting Words: Black Women and the Search for Justice*, at xvi (1998) (“Despite long-standing claims by elites that Blacks, women, Latinos, and other similarly derogated groups in the United States remain incapable of producing the type of

is often suppressed in mainstream discourse as the ideas of a lunatic fringe. Maybe it is the very idea of Blackness as something *other* than property that becomes fighting words in the eyes of American exceptionalism; a type of symbolic speech so harmful to white supremacy, so capable of inciting imminent lawless action, so disruptive of order-maintenance policing, that it is deemed a peril to the veil of white supremacy that looms over the American constitutional order, and consequently, is prohibited from the public square. Maybe this explains why police officers arrive to BLM protests with guns and tanks and shields and gas, long before the first stone has been thrown or the first rallying cry has been sung.

Maybe it is *Blackness as fighting words* that explains why some police officers believe they are authorized to use brutal force when citizens “insult” them with anti-racist rhetoric. Officer Sunil Dutta declared in a *Washington Post* opinion editorial in 2014, “[I]f you don’t want to get shot, tased, pepper-sprayed, struck with a baton or thrown to the ground, just do what I tell you.”<sup>175</sup> Such statements are not viewed as irrational articulations of implicit bias and deeply harbored racist ideas in policing culture, but instead they are deemed rational responses to disorderly behavior that reassert police authority,<sup>176</sup> limit resistance to law and order,<sup>177</sup> and instill fear among the citizenry that deters criminal activity. Yet Daria Roithmayr argues that such rationality is dubious; aggressive policing weakens community trust and undermines police legitimacy,

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interpretive, analytical thought that is labeled theory in the West, powerful knowledges of resistance that toppled former structures of social inequality repudiate this view.”).

<sup>175</sup> Sunil Dutta, *I’m a Cop. If You Don’t Want To Get Hurt, Don’t Challenge Me.*, *Wash. Post* (Aug. 19, 2014, 6:00 AM), <https://www.washingtonpost.com/posteverything/wp/2014/08/19/im-a-cop-if-you-dont-want-to-get-hurt-dont-challenge-me/> [https://perma.cc/JWR2-DC4B].

<sup>176</sup> See, e.g., Paul J. Hirschfield & Daniella Simon, *Legitimizing Police Violence: Newspaper Narratives of Deadly Force*, 14 *Theoretical Criminology* 155, 155 (2010) (noting how newspapers often “cast victims of police killings as physical and social threats and situate [police-perpetrated homicides] within legitimate institutional roles”); Jasmine R. Silver, Sean Patrick Roche, Thomas J. Bilach & Stephanie Bontrager Ryon, *Traditional Police Culture, Use of Force, and Procedural Justice: Investigating Individual, Organizational, and Contextual Factors*, 34 *Just. Q.* 1272, 1275 (2017) (“Officers may also feel a desire to ‘maintain the edge’ against citizens by refusing to back down, even in response to verbal resistance, by demonstrating their authority whenever possible.” (citations omitted)).

<sup>177</sup> See, e.g., Paul K. Huth, *Deterrence and International Conflict: Empirical Findings and Theoretical Debates*, 2 *Ann. Rev. Pol. Sci.* 25, 26–27 (1999).

provoking dissent that merely leads to further aggression by police officers, a vicious cycle.<sup>178</sup>

Maybe it is *Blackness as fighting words* that explains why some protests seem to inevitably devolve into the socially destructive and self-defeating act of rioting—“[a]n unlawful disturbance of the peace by [a crowd].”<sup>179</sup> To be sure, in many instances, it is extremists who seek to exploit peaceful protests for their own political ends.<sup>180</sup> But maybe, in other cases, America has simply failed to hear Black America speak. Maybe, as Martin Luther King, Jr., suggested in 1967,

It has failed to hear that the plight of the Negro poor has worsened over the last few years. It has failed to hear that the promises of freedom and justice have not been met. And it has failed to hear that large segments of white society are more concerned about tranquility and the status quo than about justice, equality, and humanity.<sup>181</sup>

After all, America boasts a rich legacy of violating the First Amendment rights of Black protestors. During the height of the Civil Rights Movement, across the segregated South, thousands of Black protestors were jailed for peacefully marching in dissent to a state-sponsored system of racial oppression.<sup>182</sup> Indeed, Martin Luther King, Jr., was arrested and jailed in Birmingham, Alabama, in April 1963 for engaging in coordinated non-violent marches, sit-ins, and prayers in defiance of nationwide policies of racial segregation.<sup>183</sup> While imprisoned, King wrote the Letter from Birmingham Jail, in which he famously declared, “We know through painful experience that freedom is never voluntarily given by the oppressor; it must be demanded by the oppressed.”<sup>184</sup> However, before a demand can be answered, it must be heard.

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<sup>178</sup> See Daria Roithmayr, *The Dynamics of Excessive Force*, 2016 U. Chi. Legal F. 407, 424–26.

<sup>179</sup> Riot, *Black’s Law Dictionary* (11th ed. 2019).

<sup>180</sup> See Neil MacFarquhar, *Many Claim Extremists Are Sparking Protest Violence. But Which Extremists?*, N.Y. Times (May 31, 2020), <https://www.nytimes.com/2020/05/31/us/george-floyd-protests-white-supremacists-antifa.html> [<https://perma.cc/RY2Y-9NXP>].

<sup>181</sup> Martin Luther King, Jr., *The Other America*, Address at Stanford University (Apr. 14, 1967), <https://www.crmvet.org/docs/otheram.htm> [<https://perma.cc/QJ9E-FMBL>].

<sup>182</sup> See generally Taylor Branch, *Parting the Waters: America in the King Years, 1954–63* (1988) (describing challenges that protestors endured during the Civil Rights Movement between the years 1954 and 1963).

<sup>183</sup> *Id.* at 730–31.

<sup>184</sup> Martin Luther King, Jr., *Letter from a Birmingham Jail* 5 (Apr. 16, 1963).

We've been told that to be Black and poor in America is to speak the language of the unheard. But maybe not. Maybe to be Black and poor in America is to merely represent a subset of a larger faction of citizens whose identity is altogether silenced, a faction of citizens whose speech is deemed unworthy of constitutional protection because it will undeniably stir a fight in the heart of white supremacy. Maybe to be Black and poor in America is to have one's voice, one's protests, one's identity be given such slight social value as to always be outweighed by the immediate threat and direct harm to the preservation of the racial status quo, the privileges and "qualified immunities" of whiteness.<sup>185</sup> Indeed, even if one believes that the First Amendment, in theory, protects the free speech of Black citizens, the discretionary power granted to police officers to adjudicate such rights, in practice, renders freedom of speech in America a sham.

If we truly believe that Black Lives Matter, we must reckon with the anguish and guilt borne from America's legacy of racial oppression, rival emotions that have shaped a toxic relationship between Black Americans and the police.<sup>186</sup> Assertions of Black humanity have long ignited the rage of the patrol. And assemblies in defiance of white supremacy have long triggered breaches of the peace. Even more, we must protest the inequities that a racist color-consciousness has forged across the American landscape. We must embrace the human moral dignity of Black lives, even if it provokes anger in the heart of the privileged.<sup>187</sup> While some argue that such public displays of emotion are futile, undermining progress by "introducing or reinforcing divisions, hierarchies, and forms of neglect or obtuseness,"<sup>188</sup> Audre Lorde clarifies the moral utility of anger, declaring,

[A]nger between peers births change, not destruction, and the discomfort and sense of loss it often causes is not fatal, but a sign of

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<sup>185</sup> See generally Timothy C. Shiell, *African Americans and the First Amendment: The Case for Liberty and Equality* 33 (2019) (analyzing American suppression of dissent against the status quo); see also Hansford, *supra* note 19, at 688 ("When ideas on race that would disrupt the racial hierarchy of white over Black emerge, the First Amendment is disproportionately applied to trample that dissent.").

<sup>186</sup> See Girardeau A. Spann, *Race Ipsa Loquitur*, 2018 Mich. St. L. Rev. 1025, 1052 (pointing out that "the United States criminal justice system is characterized by racial disparities that are stark, pervasive, intentional, and often fatal").

<sup>187</sup> See Alexander, *supra* note 53, at 12–13; Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 Stan. L. Rev. 317, 387 (1987).

<sup>188</sup> Martha C. Nussbaum, *Political Emotions: Why Love Matters for Justice* 2 (2013).

growth. My response to racism is anger. . . . It has served me as fire in the ice zone of uncomprehending eyes . . . [that] see in my experience and the experience of my people only new reasons for fear or guilt.<sup>189</sup>

In other words, anger confers a sense of power and agency to harmed citizens as they wade through a messy and uncertain world. Our challenge lies not in squelching anger but in channeling such power toward constructive ends.

Finally, we must wrestle with the unresolved racial subtext of modern policing, a culture that exploits the ambiguities of the First Amendment to silence the legitimate public protests of minoritized citizens. Too often, police officers appear as mere instruments of the state when they respond to collective moral dissent with brutal violence.<sup>190</sup> Rather than stand idle or encourage protestors to retreat in fear of their safety, we must learn to embrace the pain of America's past as a catalyst for collective healing, "a tension in the mind" that can help us rise "from the dark depths of prejudice and racism to the majestic heights of understanding and brotherhood."<sup>191</sup> In other words, if Blackness has in fact become fighting words, then we must fight back.

#### CONCLUSION

I learned at the age of fourteen that the police officers who killed Amadou Diallo were all acquitted after three days of deliberation, a cruel reminder of the power of whiteness in America.<sup>192</sup> And I recently learned that in 2015, one of Amadou's killers was promoted to the rank of sergeant, despite objections from Amadou's mother.<sup>193</sup> Perhaps they

<sup>189</sup> Audre Lorde, *The Uses of Anger*, 9 *Women's Stud. Q.* 7, 9 (1981).

<sup>190</sup> See generally Harry Kalven, Jr., *The Negro and the First Amendment* (1966) (describing how the policing of protests during the Civil Rights Movement impacted the concept of free speech in America); Derrick A. Bell, Jr., *Race, Racism and American Law* 477–78, 653–54 (4th ed. 2000) (an analysis of the role of race in American law and society, including discussion on racial protests and police brutality); Jules Boykoff, *Beyond Bullets: The Suppression of Dissent in the United States* 10–11 (2007) (revealing the tools used by government to marginalize and suppress dissent, including violence at the hands of the police).

<sup>191</sup> King, *supra* note 184, at 4.

<sup>192</sup> See Jane Fritsch, *The Diallo Verdict: The Overview; 4 Officers in Diallo Shooting Are Acquitted of All Charges*, *N.Y. Times* (Feb. 26, 2000), <https://www.nytimes.com/2000/02/26/nyregion/diallo-verdict-overview-4-officers-diallo-shooting-are-acquitted-all-charges.html> [<https://perma.cc/XCQ6-RFK7>].

<sup>193</sup> See Dean Meminger, *NYPD Officer Involved in Death of Amadou Diallo Promoted*, *Spectrum News* (Dec. 18, 2015, 2:46 AM), <https://www.ny1.com/nyc/all>

never heard her protest after the street brawl had come to an end. After all, when Amadou was killed, his mother did not have the modern megaphone of Twitter to amplify her son's name and mobilize the masses.

As for the protests currently making their way across the landscape, some have argued that they are merely reflective of American history—from the Boston Tea Party to the Revolutionary War to the Civil Rights Movement.<sup>194</sup> Notwithstanding, despite a history of racial oppression that stands alongside the transformative power of collective dissent, maybe in today's America, the phrase “Black Lives Matter” and other forms of public speech that affirm Black humanity have simply turned into fighting words. If that is indeed the case, maybe we should reconsider the utility of a policing culture that reinforces white privilege while promoting Black subjugation. Maybe police abolition is in fact the answer. To be sure, police abolition will likely occur as a gradual process of reform within the context of rethinking the entire criminal justice system.<sup>195</sup> But the weight of history suggests that police reform may not be enough.<sup>196</sup>

In my view, one thing remains clear: if Blackness is fighting words, then we should heed the words of Frederick Douglass preached at Canandaigua, New York, on August 3, 1857:

If there is no struggle there is no progress. Those who profess to favor freedom and yet depreciate agitation are men who want crops without plowing up the ground, they want rain without thunder and lightning. They want the ocean without the awful roar of its many waters. This struggle may be a moral one, or it may be a physical one, and it may be both moral and physical, but it must be a struggle.<sup>197</sup>

In other words, until that day of moral reckoning, until the majority of Americans come to understand the reasonableness of a call to affirm

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boroughs/news/2015/12/16/police-officer-involved-in-death-of-amadou-diallo-promoted [https://perma.cc/QW7C-YHPY].

<sup>194</sup> See Kellie Carter Jackson, *The Double Standard of the American Riot*, Atlantic (June 1, 2020), <https://www.theatlantic.com/culture/archive/2020/06/riots-are-american-way-george-floyd-protests/612466/> [https://perma.cc/D6JC-PU8Z].

<sup>195</sup> See Mariame Kaba, *Police “Reforms” You Should Always Oppose*, Truthout (Dec. 7, 2014), <https://truthout.org/articles/police-reforms-you-should-always-oppose/> [https://perma.cc/7WB6-PT3J].

<sup>196</sup> See Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. Rev. 405, 406 (2018) (arguing that “policing as we now know it cannot be fixed”).

<sup>197</sup> Frederick Douglass, *Two Speeches by Frederick Douglass; One on West India Emancipation, Delivered at Canandaigua, Aug. 4th, and the Other on the Dred Scott Decision, Delivered in New York 22 (1857)*.



2020]

*Blackness as Fighting Words*

163

Black humanity amidst the perpetual and unjustified assault on Black lives, until the rain and thunder and lightning agitate a wounded American consciousness and fragile American soul, folks who react to the words “Black Lives Matter” with retaliatory violence can, as they say in the South Bronx, “catch these hands.”