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## THREE FIRST AMENDMENT PUZZLES RAISED BY THE POLICE UNION RESPONSE TO SPEECH CRITICIZING POLICE CONDUCT IN FERGUSON AND NEW YORK CITY

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I. INTRODUCTION: POLICE UNIONS, PROTESTS AGAINST POLICE SHOOTINGS AND FREEDOM OF SPEECH.....	164
A. <i>Football Players, a Big City Mayor, and a Police Union         Crackdown</i> .....	166
B. <i>American First Amendment Values and Bollinger’s Tolerant         Society Model</i> .....	171
C. <i>Three Puzzles Raised by the Police Union Response</i> .....	174
II. SHOULD POLICE UNIONS EVER TAKE PART IN SPEECH CONTROVERSIES? .....	176
III. POLICE UNIONS, INSULTING SPEECH AND POLITICAL CORRECTNESS ..	182

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IV. PUNISHING “FALSE NARRATIVES” ABOUT FERGUSON .....	187
V. CONCLUSION: IS THE FIRST AMENDMENT COLORBLIND? .....	194

*Abstract*

*In December 2014 the St. Louis Police Officers Association called on the National Football League to fine five St. Louis Rams players who entered the game against the visiting Oakland Raiders in the “hands up, don’t shoot” posture. A few days later Patrick Lynch, of the New York Patrolmen’s Benevolent Association castigated New York City Mayor Bill de Blasio and threatened a slow down after Mayor de Blasio suggested that his mixed-race son Dante needed to take special care when dealing with the police. In this essay, I conclude that these responses, while formally protected by the First Amendment, are out of character with the “tolerant society” Lee Bollinger claims the First Amendment has created in many areas of American life. In particular, police unions are too ready to jump into free speech controversies, too sensitive when it comes to insulting speech, and too wedded to an ineffectual patrolling of false narratives, one better suited to Europe, where many countries punish genocide denial, than the United States, which is much more reluctant to assume speech is harmful merely because it is false. From a broader perspective, these incidents raise questions about the extent to which the First Amendment is genuinely colorblind.*

I. INTRODUCTION: POLICE UNIONS, PROTESTS AGAINST POLICE SHOOTINGS AND FREEDOM OF SPEECH

In August 2014 Michael Brown, an African-American man, was shot and killed by Ferguson, Missouri police officer Darren Wilson.<sup>1</sup> The shooting of Brown, the November 2014 refusal of a Missouri grand jury to indict Wilson,<sup>2</sup> and the subsequent protests surrounding both events have generated a national discussion about policing, race relations, and implicit bias<sup>3</sup>—a

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1. For a general overview of the key developments in the case, *see Q & A: What Happened in Ferguson?*, N.Y. TIMES (Aug. 10, 2015), <http://www.nytimes.com/interactive/2014/08/13/us/ferguson-missouri-town-under-siege-after-police-shooting.html>.

2. *Id.*

3. *See, e.g.*, Gene Demby, *The Butterfly Effects of Ferguson*, NAT’L PUB. RADIO (Aug. 11, 2016), <http://www.npr.org/sections/codeswitch/2016/08/11/489494015/the-butterfly-effects-of-ferguson> (describing how Ferguson has “changed the dynamics and tenor of the conversation for race and policing”).

discussion reinforced by the tragic incidents in Baton Rouge, Louisiana,<sup>4</sup> Falcon Heights, Minnesota,<sup>5</sup> and Dallas, Texas in July 2016.<sup>6</sup> Has there been a “Ferguson effect,” as some allege, according to which the protests and the media attention on the police led to more cautious policing and an increase in crime?<sup>7</sup> Or have the protests brought important issues to the surface, such as racial bias in police departments, lack of adequate training,<sup>8</sup> and a tendency of the police to shoot first and ask questions later?<sup>9</sup>

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4. See Christopher Brennan et al., *Alton Sterling Shot, Killed by Louisiana Cops During Struggle After He Was Selling Music Outside Baton Rouge Store*, N.Y. DAILY NEWS (July 6, 2016), <http://www.nydailynews.com/news/national/la-cops-shoot-kill-man-selling-music-baton-rouge-store-article-1.2700548> (describing videotaped arrest and shooting by police of an African-American man selling CDs outside a convenience store).

5. Tim Harlow, *Philando Castile Shooting: What We Know So Far*, MINNEAPOLIS STAR TRIB. (July 8, 2016), <http://www.startribune.com/philando-castile-shooting-what-we-know-so-far/385838921/#1> (describing shooting of African-American man at traffic stop who was legally carrying a concealed weapon, informed the police of this, and complied with police orders). In November 2016, Jeronimo Yanez, the officer who shot Castile, was charged with second degree manslaughter. Christina Capecchi & Mitch Smith, *Officer Who Shot Philando Castile is Charged with Manslaughter*, N.Y. TIMES (Nov. 16, 2016), <http://www.nytimes.com/2016/11/17/us/philando-castile-shooting-minnesota.html>.

6. Manny Fernandez et al., *Five Dallas Officers Were Killed as Payback, Police Chief Says*, N.Y. TIMES (July 8, 2016), <https://www.nytimes.com/2016/07/09/us/dallas-police-shooting.html> (describing ambush attack that left five police officers dead by suspect upset at prior police attacks on African-Americans).

7. See Richard Rosenfeld, *Ferguson and Police Use of Deadly Force*, 80 MO. L. REV. 1077, 1096-97 (2015) (calling for more research and concluding that any increase in crime resulting from Ferguson was limited to property offenses); Scott E. Wolfe & Justin Nix, *The Alleged “Ferguson Effect” and Police Willingness to Engage in Community Partnership*, 40 LAW & HUM. BEHAV. 1, 8 (2016) (concluding that the “Ferguson effect” has not impacted community partnership and that was too early to venture a judgment about the impact, if any, of Ferguson on crime rates).

8. Training has become an issue in the Castile case because the officer involved attended a “warrior” training class. See Mitch Smith & Timothy Wilson, *Minnesota Police Officer’s “Bulletproof Warrior” Training is Questioned*, N.Y. TIMES (July 14, 2016), [http://www.nytimes.com/2016/07/15/us/minnesota-police-officers-bulletproof-warrior-training-is-questioned.html?\\_r=0](http://www.nytimes.com/2016/07/15/us/minnesota-police-officers-bulletproof-warrior-training-is-questioned.html?_r=0) (discussing difference between “warrior” and “guardian” models of police training).

9. See Barry Friedman & Maria Ponomarenko, *Democratic Policing*, 90 N.Y.U. L. REV. 1827, 1832 (2015) (concluding that “it is both unacceptable and

My area of expertise is freedom of speech. As the controversy unfolded, I expected that, regardless of the position one took on the Ferguson events (and police shootings more generally), given the widespread protection of freedom of speech in the United States,<sup>10</sup> everyone involved would share a respect for First Amendment values. And while the debate over Ferguson and police shootings has generally been “uninhibited, robust and wide-open,”<sup>11</sup> a pair of puzzling incidents from late 2014 involving police unions have called this view into question.

*A. Football Players, a Big City Mayor, and a Police Union Crackdown*

First, in the immediate aftermath of the Ferguson grand jury decision, the St. Louis Police Officers Association (SLPOA) called on the National Football League (NFL) to discipline five St. Louis Rams players.<sup>12</sup> Their “crime” was to protest the Ferguson grand jury ruling by posing with their hands up as they ran onto the playing field for the Rams at the November 30, 2014, game versus the visiting Oakland Raiders.<sup>13</sup> Ferguson protesters have used the hands up gesture to make the point that, according to some witnesses, Michael Brown had his hands up and was trying to surrender when Officer Wilson shot him.<sup>14</sup> The SLPOA also demanded “a very public apology” from

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unwise for policing to remain aloof from the democratic processes that apply to the rest of agency government”); Zach Newman, *Hands Up, Don’t Shoot, Policing, Fatal Force, and Equal Protection in an Age of Colorblindness*, 43 HASTINGS CONST. L. Q. 117, 151, 160 (2015) (calling for “narrow legal reforms” and “a broader conversation about racism, policing, and the criminal justice system as a whole”).

10. Floyd Abrams, *On American Hate Speech Law*, in 12 THE CONTENT AND CONTEXT OF HATE SPEECH: RETHINKING REGULATION AND RESPONSES 116, 117 (Michael Herz & Peter Molnar eds., 2014) (noting that “[l]imitations on political speech based on its content cannot be constitutionally sanctioned unless narrowly tailored to a compelling governmental interest, if ever.”).

11. *N.Y. Times v. Sullivan*, 376 U.S. 254, 279 (1964) (describing the nature of public debate in a democracy).

12. Cindy Boren, *St. Louis Police Group Demands Punishment for Rams Players in Ferguson Protest*, WASH. POST (Dec. 1, 2014), <https://www.washingtonpost.com/news/early-lead/wp/2014/12/01/st-louis-police-group-demands-punishment-for-rams-players-in-ferguson-protest/>.

13. *See St. Louis Rams’ Hands-Up Gesture Animates Ferguson Protests*, DENVER POST (Dec. 1, 2014), <http://www.denverpost.com/2014/12/01/st-louis-rams-hands-up-gesture-animates-ferguson-protests>.

14. *Id.* There is some question as to whether Michael Brown actually was surrendering when Officer Wilson shot him. Michelle Ye Han Lee, *Hands Up*,

the NFL and warned the NFL not to perpetuate a “disproven” narrative about the Ferguson shooting.<sup>15</sup>

The second incident began when New York City Mayor Bill de Blasio spoke at a press conference after a New York grand jury refused to indict police officers responsible in the choking death of Eric Garner, an African-American man from Staten Island, as he was being arrested for selling loose cigarettes.<sup>16</sup> At the press conference, de Blasio commented that he worried about the safety of his mixed race son Dante at the hands of law enforcement and warned his son to “take special care” when dealing with the police.<sup>17</sup> In response, Patrick Lynch, president of the New York Patrolmen’s Benevolent Association (NYPBA), accused the mayor of throwing police officers “under the bus,” adding that “if the mayor . . . wants us to stand down against crime,” the mayor should “say that.”<sup>18</sup> After two New York City police officers were

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*Don’t Shoot” Did Not Happen in Ferguson*, WASH. POST (Mar. 15, 2015), <https://www.washingtonpost.com/news/fact-checker/wp/2015/03/19/hands-up-dont-shoot-did-not-happen-in-ferguson/> (noting that neither the grand jury testimony nor the Department of Justice Report could corroborate that Brown had his hands up or said “don’t shoot”). Despite this, the phrase became a metaphor for police brutality against African-Americans. *Id.*; see also Nick Wright, “*Hands Up Don’t Shoot” is Bigger Than Ferguson and Bigger Than the Rams*, VICE SPORTS (Dec. 2, 2014), [https://sports.vice.com/en\\_us/article/hands-up-dont-shoot-is-bigger-than-ferguson-and-bigger-than-the-rams](https://sports.vice.com/en_us/article/hands-up-dont-shoot-is-bigger-than-ferguson-and-bigger-than-the-rams) (placing the hands up gesture in a larger context of police brutality targeted at African-Americans).

15. Jimmy Bernhard, *SLPOA Condemns Rams Display*, KSDK (Dec. 7, 2014), <http://www.ksdk.com/news/local/slpoa-condemns-rams-display/278759364> [hereinafter *SLPOA Statement*].

16. Ray Sanchez & Shimon Prokupecz, *Protests after N.Y. Cop Not Indicted in Chokehold Death; Feds Reviewing Case*, CABLE NEWS NETWORK (Dec. 4, 2014), <http://www.cnn.com/2014/12/03/justice/new-york-grand-jury-chokehold/> (describing case and comparing it to the killing of Michael Brown).

17. Sally Goldenberg, *In Discussing Garner, de Blasio Invokes Dante*, POLITICO (Dec. 3, 2014), <http://www.politico.com/states/new-york/city-hall/story/2014/12/in-discussing-garner-de-blasio-invokes-dante-017904>.

18. *New York — PBA Chief Blasts De Blasio for Message in Chokehold Death*, VIN NEWS (Dec. 5, 2014), <http://www.vosizneias.com/186537/2014/12/05/new-york-pba-chief-blasts-de-blasio-for-message-in-chokehold-death/>. Two weeks later, Lynch told officers to use “extreme discretion” in “every encounter” — language Lynch insisted was not meant to encourage a work slowdown. Azi Paybarah, *At Private Meeting, Union Head Tells Officers to Use ‘Extreme Discretion,’* POLITICO (Dec. 18, 2014), <http://www.politico.com/states/new-york/city-hall/story/2014/12/at-private-meeting-union-head-tells-officers-to-use-extreme-discretion-018392>.

later killed during an ambush attack,<sup>19</sup> Lynch’s rhetoric escalated. Lynch claimed that Black Lives Matter protesters were responsible for the officers’ killings.<sup>20</sup> Meanwhile, an anonymous memo—possibly from the police union—said that Mayor de Blasio’s hands were “literally dripping with our blood because of his words[,] actions and policies,” adding that, for the first time in years, the NYPD had become “a ‘wartime’ police department.”<sup>21</sup>

In July 2016, a milder version of the same type of controversy arose in Minnesota where Minnesota Lynx players wore warm up T-shirts for their game against the Dallas Wings with the words “Change Starts With Us” on the front.<sup>22</sup> On the back, the names of recent shooting victims Alton Sterling and Philando Castile, along with the Dallas Police Department emblem and the words “Black Lives Matter.”<sup>23</sup> In response, four off-duty police officers providing security for the game walked off the job.<sup>24</sup> In doing so, they were commended by Lt. Bob Kroll, president of the Minneapolis Police Federation, who referred to what he called the “false narratives” of earlier police shooting incidents.<sup>25</sup> Unlike Lynch or the SLPOA, Kroll did not call for the WNBA to punish the Lynx players or threaten a work stoppage.<sup>26</sup> After a rebuke from the Minneapolis Mayor Betsy Hodges and Minneapolis Police Chief Janeé Harteau, Kroll and the Lynx mended fences: Kroll wished the team well, although he insisted that professional athletes do not know a great deal about policing.<sup>27</sup>

Finally, in August 2016, San Francisco 49ers quarterback Colin Kaepernick became the center of attention after he refused to stand for the

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19. Benjamin Mueller & Al Baker, *2 N.Y.P.D. Officers Killed in Brooklyn Ambush; Suspect Commits Suicide*, N.Y. TIMES (Dec. 20, 2014), <http://www.nytimes.com/2014/12/21/nyregion/two-police-officers-shot-in-their-patrol-car-in-brooklyn.html>.

20. Christopher Robbins, “*Blood on Many Hands:*” *Police Unions Blame de Blasio for the Death of 2 Cops*, GOTHAMIST (Dec. 21, 2014), [http://gothamist.com/2014/12/21/cops\\_shot\\_nyc\\_nypd.php#photo-1](http://gothamist.com/2014/12/21/cops_shot_nyc_nypd.php#photo-1).

21. *Id.*

22. Randy Furst, *Minnesota Cops Working Lynx Game Walk Out Over Player Comments, Warm-up Jerseys*, MINNEAPOLIS STAR TRIB. (July 12, 2016, 12:52 PM), <http://www.startribune.com/minneapolis-cops-working-lynx-game-walk-out-over-player-comments-warm-up-jerseys/386373171/>.

23. *Id.*

24. *Id.*

25. *Id.*

26. Peter Cox, *Police Back on Lynx Duty Following T-shirt Flap*, MPR NEWS (July 15, 2016), <https://www.mprnews.org/story/2016/07/15/lynx-tshirts-police>. Kroll referred to the team’s “pathetic” attendance, which led Minneapolis Mayor Betsy Hodges to call Kroll’s comments “jackass remarks.” *Id.*

27. *Id.*

national anthem at the start of NFL pre-season games.<sup>28</sup> Kaepernick stated that he was “not going to stand up to show pride in a flag for a country that oppresses black people and people of color.”<sup>29</sup> In response, Martin Halloran, the president of the San Francisco Police Officers Association (SFPOA), wrote a letter to NFL Commissioner Roger Goodell and Jed York, president of the San Francisco 49ers, calling on them to “denounce [Kaepernick’s] foolish statements” and “separate [themselves] from his actions.”<sup>30</sup> Meanwhile, the Santa Clara Police Officers Association—Levi Stadium, where the 49ers play, is in Santa Clara, a San Francisco suburb—threatened to boycott home games.<sup>31</sup>

At the same time, the tone of the police unions changed—the SFPOA letter, while still harshly critical of Kaepernick,<sup>32</sup> placed a greater emphasis on the First Amendment. After acknowledging that Kaepernick had a “[F]irst [A]mendment right” to make his statements, the SFPOA letter called on the NFL and the 49ers to use that same right to denounce Kaepernick.<sup>33</sup> While the letter built on the “false narrative” theme seen in the St. Louis police statement,<sup>34</sup> the emphasis changed. Instead of viewing the false narrative as a threat to the police,<sup>35</sup> the letter treated Kaepernick’s supposed reliance on a false narrative as a source of embarrassment to himself, his team, and the

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28. For an overview, see Mark Sandritter, *A Timeline of Colin Kaepernick’s National Anthem Protest and the Athletes Who Joined Him*, SB NATION (Nov. 6, 2016, 6:47 PM), [http://www.nytimes.com/2016/11/17/us/philando-castile-shooting-minnesota.html?\\_r=0](http://www.nytimes.com/2016/11/17/us/philando-castile-shooting-minnesota.html?_r=0).

29. *Id.*

30. Letter from the San Francisco Police Officers Association to Jed York, 49ers President, and Roger Goodell, NFL Commissioner (Aug. 29, 2016), available at [http://tmz.vo.llnwd.net/o28/newsdesk/tmz\\_documents/0829-Letter%20to%20NFL%20Commissioner%20and%20SF49er%20President-CEO.pdf](http://tmz.vo.llnwd.net/o28/newsdesk/tmz_documents/0829-Letter%20to%20NFL%20Commissioner%20and%20SF49er%20President-CEO.pdf) [hereinafter SFPOA Letter to 49ers].

31. *Police Officers Threaten Boycott over Colin Kaepernick National Anthem Flap*, L.A. TIMES (Sept. 4, 2016, 7:10 AM), <http://www.latimes.com/local/lanow/la-me-ln-kaepernick-anthem-20160904-snap-story.html> [hereinafter *Police Officers Threaten Boycott*].

32. SFPOA Letter to 49ers, *supra* note 30 (describing how Kaepernick showed “an incredible lack of knowledge” about officer involved shootings and a “total lack of sensitivity toward police officers”).

33. *Id.*

34. See *SLPOA Statement*, *supra* note 15.

35. *Id.*

NFL.<sup>36</sup> Meanwhile, the Santa Clara police officers backed away from their plan to boycott 49ers games.<sup>37</sup>

While these incidents may seem isolated, the issues they raise are not. Most of my academic career has been in the fields of hate speech and Holocaust denial regulation, with a focus on Europe.<sup>38</sup> In that capacity, I have become familiar with European arguments for restricting both types of speech. As the aftermath of the Ferguson grand jury ruling was unfolding, I was struck by how the arguments of the St. Louis and New York police unions mirrored European arguments in favor of banning hate speech.<sup>39</sup> As someone who has spent a fair amount of time trying to explain European hate speech laws to Americans,<sup>40</sup> I found the police union approach—at least in the December 2014 incidents—to be puzzling.<sup>41</sup>

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36. SFPOA Letter to 49ers, *supra* note 30.

37. A.J. Perez, *Police Union Rescinds Boycott Threat of 49ers Games Over Kaepernick Protests*, USA TODAY (Sept. 9, 2016, 8:36 PM), <http://www.usatoday.com/story/sports/nfl/49ers/2016/09/07/colin-kaepernick-police-boycott-san-fransico-49ers-games/89983326/>.

38. See, e.g., ROBERT A. KAHN, HOLOCAUST DENIAL AND THE LAW: A COMPARATIVE STUDY (2004) (examining litigation against Holocaust deniers in Germany, France, and Canada) [hereinafter KAHN, HOLOCAUST DENIAL]; Robert A. Kahn, *Why Do Europeans Ban Hate Speech? A Debate Between Karl Loewenstein and Robert Post*, 41 HOFSTRA L. REV. 545 (2013) (comparing American and European approaches to hate speech regulation) [hereinafter Kahn, *Why Do Europeans Ban Hate Speech?*].

39. To be fair, not all Europeans support bans on hate speech or genocide denial. See ULADZISLAU BELAVUSAU, FREEDOM OF SPEECH: IMPORTING EUROPEAN AND US CONSTITUTIONAL MODELS IN TRANSITIONAL DEMOCRACIES 167-200 (2013) (opposing bans on genocide denial); ERIC HEINZE, HATE SPEECH AND DEMOCRATIC CITIZENSHIP 9 (2016) (opposing hate speech bans in longstanding, stable, prosperous democracies) [hereinafter HEINZE, HATE SPEECH].

40. See Kahn, *Why Do Europeans Ban Hate Speech?*, *supra* note 38, at 557-68 (discussing Karl Loewenstein's role in bringing the European Militant Democracy approach to the United States).

41. The superficially more tolerant attitude of the police unions toward Colin Kaepernick itself is something of a puzzle. Some of this might relate to his status as a star quarterback who led the 49ers to the Super Bowl in 2013. Louis Bien, *Super Bowl XLVII: Colin Kaepernick Shines in Losing Effort*, SB NATION (Feb. 4, 2013, 12:45 PM), <http://www.sbnation.com/nfl/2013/2/4/3949488/super-bowl-2013-colin-kaepernick-49ers>. Or it might owe something to the way Kaepernick himself helped defuse the controversy by explaining his actions at an Aug. 28, 2016 press conference. See Sandritter, *supra* note 29. The Dallas police shootings appear to have played a role as well—the SFPOA letter asked Kaepernick to “comment on the murder of 40 police officers in the United States in the past few months.” SFPOA Letter to 49ers, *supra* note 30. Finally, the shift in tone should not be overstated; the

*B. American First Amendment Values and Bollinger's Tolerant Society Model*

I found the police union's approach puzzling because the prevailing view in the United States, unlike Europe, forbids content-based restrictions on speech that is part of the public discourse.<sup>42</sup> To be sure, scholars debate what is public,<sup>43</sup> and the limited scope of exceptions to the First Amendment protection of most political speech.<sup>44</sup> According to public discourse scholars like Robert Post however, punishing public speech has no place in the U.S. or any other democracy worthy of the name.<sup>45</sup> For that reason, the U.S.—unlike many countries around the world, including many European

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Santa Clara police officers conditioned covering 49ers games on the organization disciplining Kaepernick—language similar to the St. Louis Police Officers Association in the wake of Ferguson. *See Police Officers Threaten Boycott, supra* note 31.

42. *See* Robert Post, *Racist Speech, Democracy, and the First Amendment*, 32 WM. & MARY L. REV. 267, 280-84, 289, 301 (opposing speech restrictions in the public discourse) [hereinafter Post, *Racist Speech*]. Writing from a global perspective, Eric Heinze reaches a similar conclusion. *See* HEINZE, HATE SPEECH, *supra* note 40, at 15 (2016) (arguing that speech restrictions are not legitimate in longstanding, stable, prosperous democracies).

43. For example, Post is open to the possibility of speech in educational and workplace settings. Post, *Racist Speech, supra* note 42, at 289 (workplace restrictions), 324 (educational restrictions).

44. The main limit on speech is the incitement doctrine, which allows the punishment of speech that risks “incitement to imminent lawless action.” *See* *Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969) (per curiam). Other exceptions include the fighting words doctrine, *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (First Amendment does not cover words “that by their very utterance inflict injury or tend to incite an immediate breach of the peace), and the “true threats” doctrine, *Watts v. United States*, 394 U.S. 705, 706 (1969) (per curiam) (introducing the “true threats” doctrine and distinguishing between true, prosecutable threats and those made in jest).

45. Here Post is equivocal, at one moment sympathetic to the idea of judging countries based on their own contexts and at other times, more willing to challenge the democratic legitimacy of any state that punishes hate speech. For more, *see* Kahn, *Why Do Europeans Ban Hate Speech, supra* note 38, at 582-83 (describing Post's desire to take a cosmopolitan approach to hate speech regulation in his 2012 interview with Peter Molnar).

countries—does not ban hate speech.<sup>46</sup> In explaining why the U.S. does not have such laws, Americans fall back on a variety of reasons. Those reasons include the wording of the First Amendment, which does not carve out any exceptions,<sup>47</sup> assertions about how the U.S. has a speech-friendly political culture, unlike the old aristocratic states of Europe,<sup>48</sup> and the reality that in much of the world democracy is new, developing, partial, or insecure—circumstances that might justify greater regulation of speech.<sup>49</sup>

From the view of cultural analysis, the legal protection of most political speech since the 1960s has generated in the U.S. what Lee Bollinger calls a tolerant society, in which thick-skinned citizens learn to respond to offensive speech with self-restraint.<sup>50</sup> One sees evidence of Bollinger's tolerant society in many places. One sees it in Justice Harlan's statement in *Cohen v. California*, a case involving a jacket with the words "Fuck the Draft" written on it, declaring that free expression is "powerful medicine" and "a sign of strength" in a diverse society.<sup>51</sup> One sees it in the ACLU's defense of the right of Nazis to march in Skokie, Illinois.<sup>52</sup> One sees it in

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46. For an overview of the Euro-American debate over hate speech bans, see Eric Heinze, *Wild-West Cowboys versus Cheese-Eating Surrender Monkeys: Some Problems in Comparative Approaches to Hate Speech*, in *EXTREME SPEECH AND DEMOCRACY* 182, 182 (Ivan Hare & James Weinstein eds., 2009) [hereinafter Heinze, *Comparative Approaches to Hate Speech*].

47. See, e.g., Kathleen Maloney et al., *Language as Violence v. Freedom of Expression: Canadian and American Perspectives on Group Defamation*, 37 *BUFF. L. REV.* 337, 345 (1989) (panel discussion) (describing how Section 1 of the Canadian Charter of Rights and Freedoms, which subjects rights to reasonable limits, requires a balancing approach to speech questions missing in the United States).

48. See Robert Post, *Hate Speech*, in *EXTREME SPEECH AND DEMOCRACY*, 123, 137-38 (Ivan Hare & James Weinstein eds., 2009) [hereinafter Post, *Hate Speech*]. But see HEINZE, *HATE SPEECH*, *supra* note 40, at 12-13.

49. See HEINZE, *HATE SPEECH*, *supra* note 40, at 79 (giving India and Israel as examples of democracies entitled to adopt hate speech laws because of their inability to offer "reliable material protections for the vulnerable[.]").

50. LEE BOLLINGER, *THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA* 242 (1986) (describing freedom of speech "as a context in which ... general biases arise and can efficiently be highlighted through a practice of extraordinary restraint").

51. 403 U.S. 15, 16, 24-25 (1971).

52. For an overview of the controversy, which involved the attempt of a group of neo-Nazis to march through a town with a high proportion of Holocaust survivors, see DONALD ALEXANDER DOWNS, *NAZIS IN SKOKIE: FREEDOM, COMMUNITY AND THE FIRST AMENDMENT*, 30-32 (1985). While the ACLU's actions were controversial at the time, the Skokie affair has become a symbol of the breadth of speech protection in the U.S. See, e.g., BOLLINGER, *supra* note 50, at 38 (describing

*Texas v. Johnson*, where a divided Supreme Court, including the late, conservative Justice Antonin Scalia, held that the First Amendment protects flag burning.<sup>53</sup> One sees it in *Snyder v. Phelps*, in which the Roberts Court upheld the right of the Westboro Baptist Church to picket the funeral of a fallen gay soldier with signs reading “God hates fags” and “Thank God for Dead Soldiers,” because “the overall thrust and dominant theme” of the protest “spoke to broader public issues.”<sup>54</sup> Finally, one sees it in the reaction to real and perceived instances of political correctness, especially on college campuses.<sup>55</sup>

While there are instances where speech is still punished, especially in regards to fighting words, cyberbullying and stalking,<sup>56</sup> the general picture is clear. The U.S. protects a great deal of speech that some members of society find offensive. Given this, one would expect “tolerant society” to apply to all public discourse in American life, especially in regards to police shootings which, in the wake of Ferguson, Baton Rouge, and Falcon Heights, are clearly a subject of public concern.

Some police supporters have stated that the response to the players is merely the exercise of speech from an opposing view. As Jeff Roorda, the SLPOA spokesperson, said in his statement calling for the NFL to punish the Rams players, “Cops have First Amendment rights too.”<sup>57</sup> Moreover, the behavior of the St. Louis and New York police in criticizing the protesters is most likely itself protected speech;<sup>58</sup> and the Rams players or Mayor de

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Skokie as a moment in which the U.S. “stands virtually alone in the degree to which it...tolerate[s] racist rhetoric”).

53. 491 U.S. 397, 414 (1989).

54. 562 U.S. 443, 448, 454 (2011).

55. See, e.g., Greg Lukianoff & Jonathan Haidt, *Coddling of the American Mind*, ATLANTIC (Sept. 2015), <http://www.theatlantic.com/magazine/archive/2015/09/the-coddling-of-the-american-mind/399356/> (criticizing the movement to create safe spaces on college campuses).

56. See HEINZE, HATE SPEECH, *supra* note 40, at 28 (excluding from the sphere of public discourse “individually targeted stalking, trespass, assault, harassment, [and] ‘fighting words’ situations”).

57. *SLPOA Statement*, *supra* note 15.

58. But see Robin D. Barnes, *Blue by Day and White by [K]night: Regulating the Political Affiliations of Law Enforcement and Military Personnel*, 81 IOWA L. REV. 1079, 1155-57 (1996) (arguing that “agents charged with operating our civilian and military systems of justice are subject to much stricter standards [of speech regulation]”).

Blasio, as a result of the police actions, have not suffered a formal restriction of their freedom of speech such as a fine or criminal charges.

That said, the gestures by Rams players and Mayor de Blasio's statements are tame when compared to other speech the First Amendment has historically protected.<sup>59</sup> If Bollinger is correct that the protection of offensive speech has had any impact on creating a more tolerant, thick-skinned culture,<sup>60</sup> one might expect it to cover the mild-mannered, public-directed speech acts at issue here. Furthermore, the reluctance of the police unions to tolerate mild protests about African-American suffering at the hands of the police raises a troubling question: are First Amendment values "colorblind," or is freedom of speech simply another area where African-Americans get the short end of the stick?<sup>61</sup>

### C. *Three Puzzles Raised by the Police Union Response*

Specifically, this essay explores three puzzles raised by the response of the SLPOA and NYPBA. Part II asks whether police unions should play any role in telling third parties to punish speakers. While police have "First Amendment rights too," they also make a great deal of discretionary decisions when it comes to charging citizens with crimes, some of which have First Amendment implications.<sup>62</sup> Does this power come with a corresponding duty of neutrality, at least when it comes to calling for others to be punished?

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59. Compare, for example, a hands up gesture, or Mayor de Blasio's heartfelt warning to his son with the sign reading "God hates fags" at issue in *Snyder v. Phelps*.

60. BOLLINGER, *supra* note 50, at 242.

61. See, e.g., Juan F. Perea, *Doctrines of Delusion: How the History of the G.I. Bill and Other Inconvenient Truths Undermine The Supreme Court's Affirmative Action Jurisprudence*, 75 U. PITT. L. REV. 583, 590-603 (2014) (describing how redlining and segregation limited the gains African-Americans made from the housing and educational benefits from the G.I. Bill, intended to help soldiers returning from World War II). Knoll D. Lowney, *Smoked not Snorted: Is Racism Inherent in Our Crack Cocaine Laws*, 45 WASH. U. J. URB. & CONTEMP. L. 121, 123 (1994) (concluding that the war on drugs, and crack cocaine penalties in particular discriminate against African-Americans); Aubrey Cohen, *Car Insurance Rates Far Higher in African-American Areas, Study Finds*, HUFF. POST (Nov. 30, 2015), [http://www.huffingtonpost.com/nerdwallet/car-insurance-rates-far-h\\_b\\_8684592.html](http://www.huffingtonpost.com/nerdwallet/car-insurance-rates-far-h_b_8684592.html) (citing Consumer Federation study that found car insurance rates were \$400 higher in predominantly African-American areas).

62. For example, most disorderly conduct statutes are open ended, requiring the arresting officer and the courts to flesh out terms like "abusive language," which in turn gives officer a great deal of discretion in deciding which speech acts are arrest

Part III looks at the speech acts in question through the lens of insult. Some other societies punish insulting speech, including speech that insults professional groups (such as police officers);<sup>63</sup> but the U.S. does not, at least when the insult is not defamatory to an individual police officer.<sup>64</sup> Given this context, should the SLPOA, the NYPBA and other police unions seek to punish insulting speech outside the legal system? Even if they might legitimately do so in some particularly severe circumstances, does such a category cover the hands up gesture of the Rams players and Mayor de Blasio's warning to his son?<sup>65</sup>

Part IV shifts from insult to the consequentialist fear that censorship is necessary because the Rams players, the Lynx players, Mayor de Blasio or Colin Kaepernick, are spreading a false narrative. This approach raises several questions. First, what is the narrative the police unions are trying to stop? Is it the narrow claim that a given victim—Michael Brown, Alton Sterling or Philando Castile—was unjustifiably killed by a police officer? Or a broader claim that police profile African-Americans and/or act through unconscious (or conscious) bias? Second, while some European countries ban genocide denial, these laws are not generally justified as countering false narratives—instead, most supporters of Holocaust denial bans take this position because they see denial as a form of anti-Semitism.<sup>66</sup> Yet, even in Europe, these laws have been opposed on the ground that they create an

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worthy. *See, e.g.*, N.Y.P.L. § 240.20(3) (punishing “abusive or obscene language” made in a public place).

63. For example, Section 185 of the German Penal Code is titled “Insult” (*Beliedigung*). *See* Robert A. Kahn, *Cross-Burning, Holocaust Denial, and the Development of Hate Speech Law in the United States and Germany*, 83 U. DET. MERCY L. REV. 163, 181-84 (1986) (describing German insult law) [hereinafter Kahn, *Cross-Burning & Holocaust Denial*].

64. While the Supreme Court upheld a group libel law in *Beauharnais v. Illinois*, 343 U.S. 250 (1952), the consensus is that *Beauharnais* is no longer good law. *See* Kahn, *Cross-Burning & Holocaust Denial*, *supra* note 63, at 167.

65. *See infra* Part III.

66. *See* ROBERT A. KAHN, GENOCIDE DENIALS AND THE LAW, 75, 94-103 (Ludovic Hennebel & Thomas Hochmann eds., 2011) (describing the view that Holocaust denial is a form of past hate speech) [hereinafter KAHN, GENOCIDE DENIALS]; Aleksandra Gliszynska-Grabias, *Memory Laws or Memory Loss? Europe in Search of its Historical Identity through National and International Law*, 14 POLISH YEARBOOK OF INT’L L. 171 (2014) (describing Holocaust denial as a form of anti-Semitism).

“official history.”<sup>67</sup> Are the SLPOA’s concerns about protecting the narrative of Ferguson open to similar criticisms?<sup>68</sup>

The Conclusion touches on normative and descriptive concerns. From a normative perspective, if one takes Bollinger’s argument in *The Tolerant Society* seriously, there are good reasons to hold police unions, and all of us, to a higher standard of toleration and self-restraint, one that does not punish speech based on the color of the speaker or the people it describes. Moreover, allowing Mayor de Blasio, the St. Louis Rams players, and the Minnesota Lynx players to protest will contribute to a robust discussion of the issues involved rather than intimidating those with opposing views.

From a descriptive perspective, what do the police union statements say about the nature of race relations in the United States? The re-emergence of David Duke and the Ku Klux Klan over the past year<sup>69</sup>—along with President Donald Trump’s initial failure to distance himself meaningfully from them during his campaign<sup>70</sup>—makes it hard to argue that the United States is “colorblind” or “post racial,” and the harsh treatment of speech calling attention to police shootings of African-Americans strikes me as a particularly poignant reflection of how much work we as a country have to do in this area.

## II. SHOULD POLICE UNIONS EVER TAKE PART IN SPEECH CONTROVERSIES?

The SLPOA justified its call for the Rams players to be punished with the argument that “cops have First Amendment rights too.”<sup>71</sup> Let’s assume for argument’s sake that they are correct.<sup>72</sup> On this view, the officers are free

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67. See BELAVUSAU, *supra* note 39, at 167-200 (opposing genocide denial bans).

68. See *infra* Part IV.

69. See Lisa Mascaro, *David Duke and Other White Supremacists See Trump’s Rise as Way to Increase Role in Mainstream Politics*, L.A. TIMES (Sept. 29, 2016), <http://www.latimes.com/politics/la-na-pol-trump-david-duke-20160928-snap-story.html>.

70. See Eric Bradner, *Donald Trump Stumbles on David Duke and KKK*, CNN (Feb. 29, 2016), <http://www.cnn.com/2016/02/28/politics/donald-trump-white-supremacists/>.

71. *SLPOA Statement*, *supra* note 15.

72. As noted above, because police officers serve the state, they can be subject to additional First Amendment restrictions. See Barnes, *supra* note 58, at 1157. Interestingly, these restrictions often come from the police departments, which require that officers behave with decorum and civility when dealing with the general public. See *id.* at 1160, n. 518 (describing how Tennessee required that police

as private citizens to say what they wish. In this regard, they are no different from the local bar which, after the Ferguson protest, switched off the Rams game in favor of the cross state rivals, the Kansas City Chiefs.<sup>73</sup> Moreover, police unions, like the SLPOA and NYPBA, have every right to take positions on issues of the day, be they questions of working conditions, or more controversial issues, such as the death penalty.<sup>74</sup> For example, the SLPOA website had, as of July 16, 2016, a statement calling for its members to mourn the fallen Dallas police officers, a homicide study report from the National Institute of Justice, and a call from the International Brotherhood of Teamsters to boycott Schnucks, a company that, according to the post, had “turned its backs on the middle class.”<sup>75</sup> In the sidebar of the website, the reader is directed to links for the SLPOA’s Political Action Committee and “Legislators in the Spotlight” section.<sup>76</sup>

Indeed, police unions are free to downplay the issue of police brutality and implicit violence toward African-Americans. While there may be questions about whether such positions are wise, in the long-term best interests of the police, or helpful to the larger debate in society over race and policing, neither the First Amendment nor the governing public discourse rationale for freedom of speech requires that a police officer or police union take a “politically correct” stance on the issues of the day.<sup>77</sup>

Difficulties arise when a police union calls on a citizen or group of citizens to be “disciplined,” as the SLPOA did in its condemnation of the Rams players who marched onto the field with their hands up.<sup>78</sup> Because disciplining people is what police officers do for their day jobs, the call for

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officers be “courteous and civil, quiet and orderly” while refraining from using “coarse, profane, or insolent language toward any citizen”).

73. Jason McKee, *St. Louis Bar Now Backs Chiefs After Rams Players’ “Hands Up” Protest*, KAN. CITY STAR (Dec. 2, 2014), <http://www.kansascity.com/sports/spt-columns-blogs/red-zone/article4242171.html>.

74. See Gerda Ray, *Police Militancy*, 7 CRIME AND SOC. JUST. 40, 44 (1977) (describing history of police associations lobbying for the death penalty and against civilian review boards).

75. SAINT LOUIS POLICE OFFICERS’ ASSOCIATION, <http://www.slpoa.org/>, (accessed July 16, 2016) (copy of screen printout on file with the author).

76. See *id.*

77. To give one example, Heinze argues that the state has the liberty to enforce liberal values in non-viewpoint punitive ways—for example, through anti-discrimination laws. HEINZE, HATE SPEECH, *supra* note 40, at 22. If the state has this privilege, one would assume that police unions would as well.

78. *SLPOA Statement*, *supra* note 16.

the NFL to punish the five players has an element of intimidation missing from the calls for removal of a liberal judge or the return of the death penalty. Roorda, in drafting the statement, appears to recognize this, because he goes to great lengths to suggest that it is more than the police behind the statement.<sup>79</sup> For instance, he refers to the “cops and the good people of St. Louis” who, unlike the “violent thugs burning down buildings,” buy the products the Rams’ advertisers sell.<sup>80</sup> The same distancing may explain the SLPOA statement’s use of football language, as when it calls the Rams players’ protests “out-of-bounds” and calls for someone “to throw a flag on this play.”<sup>81</sup>

To my mind, the call for punishment changes things, even if the statement refers to “good people” along with the police. For one thing, it distinguishes the police union example from the garden variety American case in which a group opposes a speech act they do not like.<sup>82</sup> For example, the Catholic League website on July 7, 2016, featured an article headlined “Philly Mayor is Un-American.”<sup>83</sup> The blog post described how Philadelphia Mayor Jim Kenney called Philadelphia Archbishop Charles Chaput “not Christian.”<sup>84</sup> It explained that Mayor Kenney had even tweeted after a papal visit to Philadelphia: “Pope Francis needs to kick some ass here!”<sup>85</sup> Based on these examples, the blog post concluded: “The mayor is demonstrably un-American in misusing his public office to conduct his personal war on the Catholic Church.”<sup>86</sup>

One may disagree with the Catholic League’s characterization of Mayor Kenney, or its conclusion that he is “demonstrably un-American.” One could even interpret his post as a call for Philadelphia voters to “discipline” Mayor Kenney if and when he runs for re-election. But neither the Catholic League, nor its president Bill Donohue, embody the coercive power of the state. While the Catholic League website contains many

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79. *Id.*

80. *Id.*

81. *Id.*

82. It also distinguishes SLPOA from NFL referees who punish players for inappropriate behavior in the end zone, *see generally id.*, and NFL commissioners who punish players for allegedly tampering with footballs and destroying their cell phones, not that Deflategate was a shining moment in NFL history. *See* Rich Levine, *Roger Goodell Still Looks Worse than Tom Brady*, BOSTON.COM (July 17, 2016), <https://www.boston.com/sports/new-england-patriots/2016/07/16/roger-goodell-still-looks-worse-tom-brady>.

83. Bill Donohue, *Philly Mayor is Un-American*, CATH. LEAGUE (July 7, 2016), <http://www.catholicleague.org/philly-mayor-is-un-american/>.

84. *Id.*

85. *Id.*

86. *Id.*

testimonials to its mission to “safeguard both the religious freedom rights and the free speech rights of Catholics whenever and wherever they are threatened,” the group ultimately relies on persuasion, not force.<sup>87</sup> As a result, however sharp the Catholic League’s criticism may be for Mayor Kenney, the actual chill of his speech was minimal. This would be true even if the Catholic League added a call for discipline. Simply put, the Catholic League, and most other groups, lacks the power to impose its wishes on society.

The power of the police comes in part from their mission. Unlike the Catholic League, SLPOA members have the right to use force, sometimes lethal, as part of their job. Moreover, as Patrick Lynch of the NYPBA has not hesitated to point out, citizens have a duty to comply with police orders even if they disagree with them.<sup>88</sup> Added to this, the police often have to use their power in a discretionary way. This is even truer with offenses like resisting arrest and disorderly conduct where officers must determine when language is “abusive or obscene,”<sup>89</sup> especially when courts sometimes uphold convictions involving speech that does not objectively seem that offensive.<sup>90</sup>

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87. *About Us*, CATH. LEAGUE, <http://www.catholic-league.org/about-us/> (last visited Jan. 25, 2017). For example, Archbishop Chaput praised the group’s willingness to “speak up candidly and forcefully for the Church;” Seán Cardinal O’Malley, Archbishop of Boston, tied the group’s activities to “the mission of the Church” which involves teaching “the hard truths of the Gospel in season and out of season.” *Id.*

88. Responding to Mayor de Blasio’s comments about Dante, Lynch said: “We have to teach our children, our sons and our daughters, no matter what they look like, to respect New York City police officers, [and] teach them to comply with New York City police officers even if they think it’s unjust.” *PBA President: Police Officers ‘Thrown Under The Bus’ By De Blasio In Wake Of Eric Garner Grand Jury Decision*, CBS N.Y. (Dec. 4, 2014), <http://newyork.cbslocal.com/2014/12/04/pba-president-police-officers-thrown-under-the-bus-by-de-blasio-in-wake-of-eric-garner-grand-jury-decision/> [hereinafter *PBA President: Police Officers ‘Thrown Under The Bus’*].

89. N.Y. PENAL LAW § 240.20(3) (2014).

90. For example, in *State v. Semple*, the court held that defendant’s statement that the arresting officer was “probably on the take” satisfied the fighting words standard read into Ohio’s disorderly conduct statute. 568 N.E.2d 750, 751 (Ohio Ct. App. 1989) (per curiam) (citing OHIO REV. CODE ANN. § 2917.11(A)(2) (LexisNexis 2002)). While there was a dissent, *id.* at 752 (Gorman, J., dissenting), and other cases have thrown out disorderly conduct convictions on First Amendment grounds, *see, e.g., State v. Robinson*, 614 N.E.2d 1109, 1110 (Ohio Ct. App. 1992) (holding that cursing at police officers absent incitement will not normally constitute

Added to this are situations where police officers have retaliated against citizens for complaining about police practices. For example, in *Ford v. City of Yakima*,<sup>91</sup> a motorist at a heated, cross-racial traffic stop in Yakima, Washington, was told by the officer: “If you cooperate, I may let you go with a ticket today. If you run your mouth, I will book you in jail for it. Yes I will, and I will tow your car.”<sup>92</sup> At trial, the officer testified that he arrested the motorist under a city noise violation that gave him the discretion to “if I feel like it.”<sup>93</sup> Given these facts, the Ninth Circuit denied the officer’s motions for summary judgment and qualified immunity, concluding that the officer should have known that his discretion to book or release the motorist was limited by the First Amendment.<sup>94</sup>

The discretionary power given police officers—even if sometimes checked by the courts—gives a threatening cast to the SLPOA demand for discipline and a very public apology. The Yakima, Washington, motorist was arrested for “running his mouth”<sup>95</sup>—would the Rams players, or their supporters suffer the same fate? If the SLPOA can demand discipline of the Rams, what might happen to other, less famous opponents of the grand jury verdict? The test for chilled speech in the police retaliation context is whether the retaliatory act would chill “a person of ordinary firmness” from engaging in First Amendment activity.<sup>96</sup> After the SLPOA statement, one of the five Rams players, tight end Jared Cook, received threats.<sup>97</sup> In response, Cook emphasized that he did not intend to disrespect the police and backed away from any suggestion that the “hands up, don’t shoot” gesture was about Michael Brown.<sup>98</sup> Maybe Cook’s statements were the right thing to do, a noble attempt to deescalate the situation. But one can also read it as reaction to the SLPOA statement and the threats it engendered.

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disorderly conduct), *Semple* shows how a momentary decision by a police officer can lead to a criminal conviction that is affirmed on appeal.

91. 706 F.3d 1188 (9th Cir. 2013).

92. *Id.* at 1190-91 (quoting officer).

93. *Id.* at 1191 (quoting officer).

94. *Id.* at 1196. The dissent would have granted summary judgment because the plaintiff could not show that the police officers lacked probable cause to stop the motorist for a noise violation. *Id.* at 1199-1202 (Callahan, J., dissenting).

95. *Id.* at 1190-91 (majority opinion).

96. *Id.* at 1193.

97. Jill Martin, *Rams Player Says He Received Threats After ‘Hands Up, Don’t Shoot’ Protest*, CNN (Dec. 4, 2014), <http://www.cnn.com/2014/12/04/us/rams-threats-ferguson/>.

98. Cook said that the gesture “is not just a Ferguson thing,” but something people were doing in New York, Florida, and the West Coast. *Id.* It was, according to Cook, “a message worldwide that for young adults that you can protest and you can do things peacefully without getting out of line.” *Id.*

One sees a similar chilling effect on the St. Louis Rams organization as a whole. After the SLPOA statement, Kevin Demoff, the Rams executive vice president, told a local newspaper that he “regretted any offense [the] officers may have taken” from the protest.<sup>99</sup> While Demoff told the *St. Louis Post-Dispatch* that “he did not apologize for the players’ actions,” St. Louis Police Chief Jon Belmar treated the statements as an apology, especially since according to Belmar, Demoff had mentioned “the outstanding work that police officers and departments carry out each and every day.”<sup>100</sup>

The Rams decision to offer at least a partial apology to the St. Louis Police officers might be a reaction to Roodra’s comment in the SLPOA statement that “[a]ll week long, the Rams and the NFL were on the phone with the St. Louis Police Department asking for assurances that the player and the fans would be kept safe from the violent protesters who had rioted, looted, and burned buildings in Ferguson.”<sup>101</sup>

This statement feeds into fears that the police officers were unwilling to do their jobs—something also present in the NYPBA’s response to Mayor de Blasio’s remarks and the actions of the four Minneapolis police officers who stopped providing off-duty security for the Lynx after they saw the team’s warm-up jerseys. Speaking about the need to keep neo-Nazis and Klan members out of the police and military, Robin Barnes raised this very issue: “Under life-threatening circumstances, Klan-cops and fire fighters have shown a willingness to kill and maim rather than serve and protect.”<sup>102</sup> While no one is suggesting that the police unions in St. Louis, New York, or Minneapolis were threatening to “kill and maim” in response to the protests described above, given the “life threatening circumstance” involved with police work, the threat not to “serve and protect” can be almost as serious.<sup>103</sup> A police officer or department that responds to what is perceived as an offensive speech act by threatening to not come into work also runs the risk of chilling speech.

In this regard, the Minnesota Lynx example is enlightening. Unlike the threat—real or imagined—of the NYPBA to respond to Mayor de Blasio’s comments with a work stoppage, the Minneapolis officers were not

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99. Lindsay H. Jones, *Rams, Police Differ on Apology Story for Players’ Ferguson Protest*, USA TODAY (Dec. 2, 2014), <http://www.usatoday.com/story/sports/nfl/rams/2014/12/01/st-louis-rams-kevin-demoff-apologizes-ferguson-protest-police/19764087/>.

100. *Id.*

101. *SLPOA Statement*, *supra* note 15.

102. Barnes, *supra* note 59, at 1167.

103. *Id.*

on duty when they walked off the job during the Lynx game. This action, which was commended by police union head Bob Kroll, might seem less threatening since the police officers were still busy at their day jobs. But given the role of the Minnesota Lynx in the revitalization of downtown Minneapolis, the city might have an interest in having off-duty police officers comply with their contractual obligations, even if as Kroll pointed out, there were extra security officers present for the game so nobody was ever at risk.<sup>104</sup> This may be why Mayor Betsy Hodges responded so strongly to Kroll's statements, the Lynx chose not to wear the jerseys after the police walk out, and the Lynx, city, and police union made peace with one another.<sup>105</sup>

Before moving to the next section, let me reiterate that police behavior is a First Amendment *puzzle*. I am not suggesting that police unions can never express their opinion on protests like the ones made by the Rams players, Mayor de Blasio, or the Minnesota Lynx players. Allowing police unions to express their opinions is consistent with Lee Bollinger's vision of a tolerant society. When, however, the expression of opinion is accompanied by a call for discipline or a work stoppage, the calculus should shift given the power and responsibility police officers exercise in the day to day course of their job.

### III. POLICE UNIONS, INSULTING SPEECH AND POLITICAL CORRECTNESS

Assume police officers and unions can respond to some speech acts, gestures, and clothing critical of the police. If so, are there any limits to the police response? Part II argues that police unions should never, or almost never, respond to anti-police speech with their own threats. Parts III and IV, by contrast, assume a sliding scale where, in some instances, the police are allowed to respond to offensive speech with treats and work stoppages, but this activity can only be in response to something. Part III addresses one possible reason for a militant police response, that the speech act in question insults the police.

On one level, the insult argument is a hard sell. Group libel laws have been out of fashion in the United States for around 50 years.<sup>106</sup> While

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104. Jana Shortal, *Lynx, Union, Mayor Sound Off on BLM Jerseys*, KARE 11 (July 12, 2016), <http://www.kare11.com/entertainment/television/programs/breaking-the-news/lynx-union-mayor-sound-off-on-blm-jerseys-/270965366>.

105. See Jace Frederick, *Lynx Encourage Conversation in Aftermath of Falcon Heights Shooting*, TWIN CITIES PIONEER PRESS (July 14, 2016), <http://www.twincities.com/2016/07/14/lynx-encourage-conversation-in-aftermath-of-falcon-heights-shooting/>.

106. See Kahn, *Cross-Burning & Holocaust Denial*, *supra* note 63, at 167.

individual libel remains a possibility, in most instances, police officers will be seen as “public figures,” meaning that to prevail in court, a defamed police officer would have to show “actual malice” which requires a showing that speaker knew the statements in question were false or acted with “reckless disregard.”<sup>107</sup> Moreover, while there are laws that protect police officers, these laws focus on violence against police, rather than insulting behavior. For example, in 2016, Louisiana passed a “Blue Lives Matter” law that extends the protections of hate crimes laws to people who attack police officers.<sup>108</sup> Likewise, the mandatory minimum sentencing law proposed in response to the Dallas killings by Texas Senators Ted Cruz and John Cornyn focused on people who harm police officers.<sup>109</sup> The limited scope of these “Blue Lives Matter” laws reflects the truism that in the United States, speech is not generally the target of the criminal law.

The same libertarian approach to speech is reflected in the debates over Ferguson and political correctness taking place outside the legal system. Bollinger’s call for thick-skinned toleration,<sup>110</sup> and the current moral panic<sup>111</sup> over the growth of political correctness,<sup>112</sup> suggest the continuing resonance of the childhood rhyme: “Sticks and stones will break my bones but names will never hurt me.” In a society accustomed to decrying safe spaces on

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107. *Geertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974).

108. Elah Izadi, *Louisiana Is the First State to Offer Hate Crime Protections to Police Officers*, WASH. POST (May 26, 2016), [https://www.washingtonpost.com/news/post-nation/wp/2016/05/26/louisianas-blue-lives-matter-bill-just-became-law/?utm\\_term=.76d4e638b1ba](https://www.washingtonpost.com/news/post-nation/wp/2016/05/26/louisianas-blue-lives-matter-bill-just-became-law/?utm_term=.76d4e638b1ba).

109. Karoun Demirjian, *After Dallas, GOP Senators Launch Bid to Punish Those Who Target Officers*, WASH. POST (July 13, 2016), <https://www.washingtonpost.com/news/powerpost/wp/2016/07/13/after-dallas-texas-senators-launch-bid-to-punish-those-who-target-cops/>.

110. BOLLINGER, *supra* note 50, at 242.

111. “The moral panic is a scare about a threat or supposed threat from deviants” who “are blamed for menacing a society’s culture, way of life, and central values[]” in a way that is “out of proportion to the actual threat that is claimed.” ERICH GOODE & NACHMAN BEN-YEHUDA, *MORAL PANICS: THE SOCIAL CONSTRUCTION OF DEVIANCE*, 2 (2d ed. 2009) (emphasis in original).

112. For example, see Lukianoff & Haidt, *supra* note 55. In language recalling Karl Marx’s *The Communist Manifesto*, the authors open their article by noting that: “Something strange is happening at America’s colleges and universities. A movement is arising, undirected and driven largely by students, to scrub campuses clean of any words, ideas, and subjects that might cause discomfort or give offense.” *Id.*

college campuses,<sup>113</sup> it is hard to imagine carving out safe spaces for police officers.

On the other hand, if one looks outside of the United States, especially to the period before the 1960s, there is some support for punishing insults directed at police officers. For example, the Penal Code enacted in 1871 in imperial Germany banned insulting behavior.<sup>114</sup> This law was borne out of a desire to discourage dueling.<sup>115</sup> During the imperial period (1871-1918), the law was used to cover conservative pillars of the order, a category that included judges, large landowners and the military.<sup>116</sup> German legal commentators referred to these groups as “insult-capable” a turn on the phrase “satisfaction-capable” used to describe those worthy of participating in a duel.<sup>117</sup>

While neither the SLPOA nor the NYPBA invoked dueling, they sought to highlight their professional status. For instance, the SLPOA statement refers to the “hands up” gesture as something “police officers around the nation” found offensive and, as noted earlier, placed police officers on the side of the “good people” of St. Louis.<sup>118</sup> Another tactic was to contrast the professionalism of the police with the behavior of the other side. In taking this approach, the police unions continued a practice dating back to the early twentieth century of differentiating the police from the largely working class communities they patrol.<sup>119</sup> For example, the SLPOA statement makes repeated references to “violent protesters” and “violent thugs burning down buildings,”<sup>120</sup> while NYPBA President Lynch claimed Mayor de Blasio acted “more like the leader of ‘a fucking revolution’ than a city.”<sup>121</sup> This framing allows police officers to cast themselves as vulnerable

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113. According to Advocates for Youth, a safe space is “[a] place where anyone can relax and be fully self-expressed without fear of being made to feel uncomfortable;” it is also a place where “the rules guard each person’s self-respect and dignity and strongly encourage everyone to protect others.” *Glossary*, ADVOCATES FOR YOUTH, <http://www.advocatesforyouth.org/index.php>.

114. Kahn, *Cross-Burning & Holocaust Denial*, *supra* note 65, at 181.

115. *Id.* For more, see James Q. Whitman, *Enforcing Civility and Respect: Three Societies*, 109 YALE L.J. 1280 (2002).

116. Kahn, *Cross-Burning & Holocaust Denial*, *supra* note 65, at 182.

117. *Id.*

118. *SLPOA Statement*, *supra* note 15.

119. Ray, *supra* note 76, at 40.

120. *SLPOA Statement*, *supra* note 15.

121. Paybarah, *supra* note 18.

without engaging in the rhetoric of neediness associated with political correctness.<sup>122</sup>

Assuming, however, one buys the argument that the police can—at least in some circumstances—respond to insults, in what way are the particular words and actions of the St. Louis Rams players, the Minnesota Lynx players and Mayor de Blasio insulting? Some insults are easy to identify: “Group X smells,” “Group Y are a bunch of criminals” or “Let’s deport members of Group Z.” But none of the protesters in these controversies have made this type of statement. The gesture of the Rams players is the hardest to view as this type of a direct insult. The raised hands by themselves signify nothing.<sup>123</sup> While the SLPOA viewed the gesture as support for the argument that Michael Brown was shot with his hands up, there are alternative meanings of the gesture, including Jared Cook’s claim that holding hands up signals a willingness to engage in non-violent protest.<sup>124</sup> Even if the gesture is viewed as spreading a false narrative, an issue discussed in Part IV, the SLPOA statement describes the gesture as “tasteless, offensive and inflammatory.”<sup>125</sup> Yet, it does not provide anything other than falsity as a basis for its ability to insult.<sup>126</sup> The same vagueness about what constitutes the insult is true of Bob Kroll’s objections to the Minnesota Lynx warm up jerseys.<sup>127</sup>

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122. Instead of expressing themselves, as one might do in a safe space, *see* Advocates for Youth, *supra* note 115, the police officers are creating a safe space for the community by defending it against thugs and violent protesters.

123. In this regard, they differ from the raised middle finger, which has had a well-known symbolic meaning for a very long time. *See* Ira P. Robbins, *Digitus Impudicus: The Middle Finger and the Law*, 41 U.C. DAVIS L. REV. 1403, 1413 (2008) (tracing the middle finger gesture back 2,500 years).

124. Martin, *supra* note 97.

125. *SLPOA Statement*, *supra* note 15.

126. The SLPOA statement might have said that the gesture implies that police officers are racist, engage in racial profiling, and routinely use excessive force against African-Americans. At best, the references to “violent protesters” and “thugs” might suggest that Rams players were somehow connected with the protests, or supported them. Even when it describes the protests, the SLPOA seems primarily concerned with the supposedly false narrative perpetuated in their name.

127. Kroll focused his comments on the false narrative point, but added that—in the Philando Castile case—the Lynx players were wrong to “prejudge.” Sarah Horner, *Minneapolis Mayor Blasts Police Union Head Over ‘Jackass’ Remarks*, TWIN CITIES PIONEER PRESS (July 12, 2016), <http://www.twincities.com/2016/07/12/minneapolis-chief-doesnt-condone-mn-lynx-police-left-security-job-black-lives-matter-tshirts/>. Like the SLPOA, he did not focus on how the jerseys were

On the other hand, Pat Lynch was much more explicit in viewing Mayor de Blasio's comments as an insult. According to Lynch, the mayor threw the police "under the bus" by telling an audience that he and his wife worry about his son's safety at the hands of the police and that they advise him to "take special care."<sup>128</sup> On one level, Lynch has a case: the argument that police officers are harming the very citizens they are meant to protect could well be insulting—even if the Mayor genuinely felt what he was saying. The charge that the police who serve and protect do not always do this is a serious one; although even conceding this point, it is hard to see how this comment leaves Mayor de Blasio with "blood on his hands."<sup>129</sup>

Furthermore, when viewed in context, it is hard to see how any workable definition of "insult" could include Mayor de Blasio's comment. Reflecting on the Eric Garner grand jury decision, the mayor spoke about how he viewed "this crisis through a very personal lens" because he and his wife Chirlane "have had to talk with Dante about the dangers that he may face."<sup>130</sup> Describing his son as a good man "who never would think to do anything wrong," the Mayor reflected about how "because of a history that still hangs over us . . . we've had to literally train him as families have all over this city for decades in how to take special care in any encounter he has with the police officers who are there to protect him."<sup>131</sup>

Mayor de Blasio did not call the police racist, nor did he blame his need to warn Dante of the NYPD. Instead, he referred to "a history that still hangs over us." (Here, the mayor appeared to be employing exactly the type of safe, politically-correct language opponents of safe spaces on college campuses like to decry).<sup>132</sup> But any attempt to view Mayor de Blasio's language as insulting faces an additional hurdle: the mayor's instruction to Dante to obey police officers and treat them with respect is precisely what Pat Lynch and the NYPBA want citizens of all backgrounds to do—obey the commands of police officers, even if they disagree.<sup>133</sup> It is hard to base an insult claim on a statement that says in effect "X is a difficult character, so

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insulting to the police. Interestingly, he made no mention of the words "Black Lives Matter" on the back of the jerseys.

128. *PBA President: Police Officers 'Thrown Under The Bus,' supra* note 88.

129. Mueller & Baker, *supra* note 19.

130. Goldenberg, *supra* note 17.

131. *Id.*

132. Glenn Reynolds, *Glenn Reynolds: How PC Culture is Killing Higher Education*, USA TODAY (Mar. 28, 2016), <http://www.usatoday.com/story/opinion/2016/03/28/emory-university-student-activists-trump-2016-chalk-free-speech-column/82322316/>.

133. *PBA President: Police Officers 'Thrown Under The Bus,' supra* note 88.

treat him nicely”—all the more so if the United States is a tolerant society in which everyone has freedom of speech because they also have a thick skin.

To sum up, while one can find places—like Imperial Germany—where police officers, as well as other professional groups, were insulated by the law from insulting behavior, this way of viewing the world is out of place in current day America, especially to the extent one opposes political correctness. Moreover, neither the SLPOA nor Lt. Bob Kroll actually make a compelling argument that gestures and jerseys of the Rams and Lynx are *per se* insulting—the concern instead is with perpetuating a false narrative. While NYPBA President Pat Lynch does make a claim of insult, it is blown out of proportion (does Mayor de Blasio actually have blood on his hands?) and fails to recognize that the mayor’s message (obey the police) is what Lynch claims he wants to hear.

#### IV. PUNISHING “FALSE NARRATIVES” ABOUT FERGUSON

For the St. Louis and Minneapolis police, the true offense from the “hands up” gesture and the Lynx warm-up jerseys is not insult; rather, it is the message these speech acts appear to send. The message, according to the SLPOA, is a false one.<sup>134</sup> Written less than a week after the grand jury convened—and the release of documents that would allow anyone other than the grand jurors to assess the evidence in the case—the SLPOA statement asserted that it was “unthinkable” that anyone would “so publicly perpetuate a narrative that has been disproven over-and-over again.”<sup>135</sup> Lt. Kroll made a similar point: the story that Michael Brown had his hands up was “inaccurate,” “fueled racial tensions,” and “made it more difficult for police nationwide to do their jobs.”<sup>136</sup>

As a preliminary matter, it is worth identifying the narrative that the police unions find harmful. Here, the SLPOA statement is a bit inconsistent. At one point it describes the falsity as claiming that Officer Wilson “gunned [Brown] down in cold blood;” a few sentences later, however, the statement refers to the grand jury which concluded that “no probable cause existed that Wilson engaged in any wrongdoing,” a slightly broader formulation, one which brings up claims about Wilson’s handling of the entire incident.<sup>137</sup> Finally, the statement describes how police officers worked overtime to

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134. *SLPOA Statement, supra* note 15.

135. *Id.*

136. Horner, *supra* note 127.

137. *SLPOA Statement, supra* note 15.

“defend this community from those on the streets that perpetuate this myth that Michael Brown was executed by a brother police officer,”<sup>138</sup> language that suggests that anyone participating in the protest was perpetuating a false narrative—and that those who perpetuated that narrative, in turn, were the very people who “rioted, looted, and burned buildings in Ferguson.”<sup>139</sup>

The scope of the falsity at issue matters because the U.S. Department of Justice report<sup>140</sup> that exonerated Officer Wilson also sharply critiqued law enforcement practices in Ferguson. To the extent the false narrative the SLPOA and Lt. Kroll want to protect narrowly concerns Officer Wilson and Michael Brown, the police unions may have a point—although the DOJ report, like the grand jury, did not affirmatively conclude that Michael Brown never had his hands up, only that there was no evidence to prove that he did.<sup>141</sup> But, to the extent the gestures and warm-up jerseys symbolize a broader culture in which police profile African-Americans and use excessive force against them in disproportionate numbers, which is how many of the protesters now view the “hands up, don’t shoot” gesture,<sup>142</sup> the DOJ report confirmed their suspicions. In particular, the report found evidence of “systemic racial discrimination” by the Ferguson Police Department.<sup>143</sup> Nor do adherents of the “false narrative” position take into account the pragmatic choices that go into a decision to charge someone with a crime, which some commentators believe were in play in the DOJ’s decision not to charge Wilson.<sup>144</sup>

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138. *Id.*

139. *Id.*

140. U.S. DEP’T OF JUSTICE, DEPARTMENT OF JUSTICE REPORT REGARDING THE CRIMINAL INVESTIGATION INTO THE SHOOTING DEATH OF MICHAEL BROWN BY FERGUSON, MISSOURI POLICE OFFICER DARREN WILSON (Mar. 4, 2015), *available at* [https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/doj\\_report\\_on\\_shooting\\_of\\_michael\\_brown\\_1.pdf](https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/doj_report_on_shooting_of_michael_brown_1.pdf)

141. *See* Ye Han Lee, *supra* note 14.

142. *Id.* Ye Han Lee lists quotes of member of the Congressional Black Caucus at a hearing held on Dec. 1, 2014, which show that, even in the immediate aftermath of the grand jury verdict, none of the members present referred to the gesture as a “factual analysis” of the Michael Brown case. *Id.*

143. Jeremy Diamond, *What the Department of Justice Ferguson Report Says About “Hands Up, Don’t Shoot,”* CNN (Mar. 5, 2015), <http://www.cnn.com/2015/03/05/politics/ferguson-report-hands-up-michael-brown-darren-wilson/>.

144. *See* Christian Farias, “*Hands Up, Don’t Shoot*” Was Not Built on a Lie, NEW REPUBLIC (Mar. 18, 2015), <https://newrepublic.com/article/121322/doj-ferguson-report-doesnt-mean-hands-dont-shoot-was-lie> (suggesting that charging decision was based on prosecutorial discretion and outdated laws rather than the Justice Department acceptance of the argument that Wilson fired in self-defense).

Let's assume for argument's sake that the "hands up, don't shoot" gesture is in some way built on a lie. Even then, why is spreading a false narrative necessarily harmful or a reason to suppress speech? Consider the O.J. Simpson case. The 1994 murder of Nicole Brown Simpson and Ronald Goldman split the country along racial lines—most whites thought O.J. was guilty and, until recently, most African-Americans thought O.J. was innocent.<sup>145</sup> The nation has been able to get along with the state of affairs without much difficulty, even though by definition one side or the other is holding onto a "false" narrative. In part, this is because it is difficult to imagine the harm caused by the fact that someone has the wrong view of the Simpson case.<sup>146</sup>

To the police unions, however, the Darren Wilson case is very different. It matters; the question is why. While the SLPOA focuses a great deal on Officer Wilson himself, "a now-exonerated officer" who is called a "murderer,"<sup>147</sup> Lt. Kroll may have hit closer to the truth when, in explaining his objections to the Lynx warm-up jerseys, he said that the false narrative made it harder for the police to do their jobs nationwide<sup>148</sup>—this, however, only makes sense if Kroll has in mind the "big" narrative about policing, race, and excessive force, rather than the "small" narrative about whether Darren

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145. Carl Bialik, *Most Black People Now Think OJ Was Guilty*, FIVETHIRTYEIGHT (June 9, 2016), <http://fivethirtyeight.com/features/most-black-people-now-think-oj-simpson-was-guilty/>.

146. See Wane J. Pitts et al., *The Legacy of the O.J. Simpson Trial*, 10 LOY. J. PUB. INT. L. 199, 215 (concluding that the "cultural legacy" of the trial was "quite limited"). However, the recent development of "fake news" may change this, especially when false rumors lead to violent acts—as when rumors of child abuse led a North Carolina man to travel to a Washington, D.C. pizzeria and open fire. See Faiz Siddiqui & Susan Svrluga, *N.C. Man Told Police He Went to D.C. Pizzeria with Gun to Investigate Conspiracy Theory*, WASH. POST (Dec. 5, 2016), [https://www.washingtonpost.com/news/local/wp/2016/12/04/d-c-police-respond-to-report-of-a-man-with-a-gun-at-comet-ping-pong-restaurant/?utm\\_term=.c33a8141205f](https://www.washingtonpost.com/news/local/wp/2016/12/04/d-c-police-respond-to-report-of-a-man-with-a-gun-at-comet-ping-pong-restaurant/?utm_term=.c33a8141205f). At the same time, however, some observers of fake news consume it knowing that it is false. See Sabrina Tavernise, *As Fake News Spreads, More Readers Shrug at the Truth*, N.Y. TIMES (Dec. 6, 2016) <http://www.nytimes.com/2016/12/06/us/fake-news-partisan-republican-democrat.html> (describing the how some viewers of "fake news" treat it as entertainment). To the extent people view fake news as entertainment, the police union's concerns about false narratives might remain out of step with the mainstream approach to speech issues in the U.S. that do not involve people of color.

147. *SLPOA Statement*, *supra* note 15.

148. Horner, *supra* note 127.

Wilson shot Michael Brown “in cold blood.”<sup>149</sup> To the extent this is true, however, one must ask whether the refusal to bring charges against Wilson makes that “big” narrative false, especially in light of the Department of Justice Report.

In addition, falsity is not generally a reason to suppress speech in the United States. In 2012, the Supreme Court held that a statute which banned lying about military medals was unconstitutional.<sup>150</sup> In reaching this conclusion, Justice Kennedy rejected “the notion that false speech should be in a general category that is presumptively unprotected.”<sup>151</sup> He conceded that the government raised weighty concerns, including the possibility that false statements would devalue “rare acts of courage” and offend current medal holders.<sup>152</sup> But the government could not show “a direct causal link between the restriction imposed and the injury to be prevented.”<sup>153</sup> Justifying his conclusion, Justice Kennedy noted: “The remedy for speech that is false is speech that is true. This is the ordinary course in a free society.”<sup>154</sup> In other words, “Truth needs neither handcuffs nor a badge for its vindication.”<sup>155</sup>

Just as in *Alvarez*, the remedy for “false speech” about Darren Wilson, or policing more generally, is “true speech” about the same subjects. If “truth” does not need “handcuffs” or a “badge,” it can probably also survive without police unions walking off the premises or demanding that the NFL punish players who have the “wrong” view of the facts. It is worth noting, moreover, that the statute at issue in *Alvarez* concerned people who deliberately lied about not having a medal—unlike the Rams and Lynx players who, even if they are wrong about the Michael Brown case, most likely are honest in their beliefs.<sup>156</sup>

Justice Kennedy’s concern about the lack of a link between the “restriction imposed” and the “injury to be prevented”<sup>157</sup> raises an additional difficulty with the SLPOA argument. As noted above, the hands up gesture

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149. *SLPOA Statement*, *supra* note 15.

150. *United States v. Alvarez*, 132 S. Ct. 2537 (2012).

151. *Id.* at 2546-47.

152. *Id.* at 2548.

153. *Id.* at 2549.

154. *Id.* at 2551.

155. *Id.*

156. *Id.* at 2549. The honesty of their beliefs also distinguish the Rams and Lynx players—and Colin Kaepernick—from people who deliberately spread false news either to achieve a political end, or simply to attract internet hits. *See e.g.*, Angie Drobnic Holan, *2016 Lie of the Year: Fake News*, POLITIFACT (Dec. 13, 2016), <http://www.politifact.com/truth-o-meter/article/2016/dec/13/2016-lie-year-fake-news>.

157. *Id.*

by itself signifies nothing. If this is true, how would suppressing this protest by punishing the Rams players (or leaving one's off-duty security post at a Lynx game) combat the harm caused by the false view that Michael Brown was murdered by Darren Wilson or that the police engage in racial profiling and use excessive force against African-Americans? Indeed, the approach taken by the police unions strikes me as rather counterproductive. If the "Black Lives Matter" perspective on Ferguson and other police killings is wrong—and according to Lt. Kroll causes problems with policing—isn't the best approach more debate? And, more generally, if the goal of the police unions is to foster respect for the rigors of the job, wouldn't that be best achieved by rejecting globalizing narratives—such as the argument that police work is always "outstanding" and that any killing committed by a police officer of a civilian is an unfortunate accident?<sup>158</sup>

Be that as it may, let me address a second point. The policing of false narratives is not a novel idea; in fact, it is quite common in Europe where Germany, France, and a number of other countries have laws banning Holocaust denial.<sup>159</sup> The basis of these laws is that denial—Holocaust denial, or denial of other genocides—is harmful either because it directly affronts survivors or because it targets the group that went through the genocide (for

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158. Here, it is interesting to note what happens when the police shoot someone who is not African-American. In February 2016, police in Roseville, Minnesota, — a Minneapolis suburb that borders on Falcon Heights,—shot a 52-year-old white man after he lashed out at a police dog with a knife during a police call to his home. See Marino Eccher, *Roseville Fatal Shooting: A Disturbance, A Warrant, and a Police Dog Stabbed*, TWIN CITIES PIONEER PRESS (Feb. 11, 2016), <http://www.twincities.com/2016/02/11/roseville-police-fatally-shoot-man-stabbed-police-dog/>. While the officers were not charged criminally, even though they sent the dog into a closet to get the man to come out, the response in the media focused on the need for more training in dealing with people with mental illness. See also Jennifer Bjorhus, *Grand Jury Clears Roseville Officers in February Shooting*, MINNEAPOLIS STAR TRIB. (July 7, 2016), <http://www.startribune.com/grand-jury-clears-roseville-officers-in-february-shooting/385905311/>; Kelly Smith, *Family of Slain Man Urges Better Mental Health Training*, MINNEAPOLIS STAR TRIB. (Mar. 30, 2016), <http://www.startribune.com/family-of-slain-man-urges-better-police-mental-health-training/373933351/>.

159. For a list of countries with Holocaust denial bans see Kahn, *Holocaust Denial and Hate Speech*, *supra* note 67 at 104.

example, Holocaust denial targets Jews).<sup>160</sup> Most notably, the rationale for opposing genocide denial, and criminalizing it, is more than simply falsity.<sup>161</sup> Instead, opponents fear that denying a genocide is the first step to its recurrence or, with Holocaust denial, the sense that Holocaust denial has become a symbol of global anti-Semitism, much as the burning cross has become a symbol of racism in the United States.<sup>162</sup>

When compared to the case for banning genocide denial, the SLPOA concerns about false Ferguson narratives seem flimsy. For instance, the Dallas shootings, while tragic, were committed by a lone gunman who had issues that go beyond frustrations at the treatment of African-Americans in the United States.<sup>163</sup> Even if one attributed the Dallas shootings to the persistence of a false narrative about police relations with the African-American community (it would have to be the “big” narrative in play here, as it is hard to imagine a single killing igniting a massacre), these killings pale in magnitude before the acts of genocide whose denial is banned in Europe.

Finally, it is worth noting that genocide denial laws and laws regulating historical memory more generally<sup>164</sup> are not universally popular in

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160. Robert A. Kahn, *Can Law Understand the Harm of Genocide Denial?*, in DENIALISM AND HUMAN RIGHTS, 215, 219-23; 224-26 (Roeland Moreland, Hans Nelen, & Jan Willems eds., 2016).

161. *Id.* at 231-33. For an interesting attempt to make a limited argument along these lines, see Frederick Schauer, *Social Epistemology, Holocaust Denial and the Post-Millian Calculus*, in RETHINKING THE CONTENT AND CONTEXT OF HATE SPEECH: REGULATIONS AND RESPONSES, 129, 140 (Michael Herz & Peter Molnar eds., 2012) (suggesting there may be some role for limiting falsity given the survival of falsehoods in popular culture “despite their demonstrated falsity;” as examples, Schauer gives (among others) “astrology,” the belief that President Obama was born in Kenya, and “the vast sums earned by those who promote...diet slippers and diet earrings as surefire cures for obesity.”). As noted above, the emergence of fake news may give Schauer’s argument a new relevance—especially if one can make an argument that fake news helped elect Donald Trump. See Craig Timberg, *Russian Propaganda Helped Spread “Fake News” During Donald Trump’s Election Victory*, *Say Experts*, INDEPENDENT (Nov. 25, 2016), <http://www.independent.co.uk/news/world/politics/russia-putin-fake-news-rt-donald-trump-president-facebook-a7438331.html>.

162. Kahn, *Cross-Burning & Holocaust Denial*, *supra* note 63, at 185.

163. See, e.g., Chris Danner, *Dallas Shooter Seemed Delusional, May Have Been Planning Larger Attack*, N.Y. MAGAZINE (July 10, 2016), <http://nymag.com/daily/intelligencer/2016/07/dallas-shooter-may-have-planned-larger-attack.html>.

164. France has enacted laws recognizing the Armenian Genocide, banning denial of the rigors of the Atlantic slave trade and punishing denial of the benefits of French colonial rule in Algeria. See Robert A. Kahn, *Does It Matter How One*

Europe. In response to a series of “memory laws” enacted in France, a group of historians formed a group called *Liberté pour l’Histoire* (Liberty for History) based on the premise that attempts to establish an official state-enforced history are illegitimate in a free state.<sup>165</sup> The group has been quite successful and has taken credit for reducing the scope of memory laws in France.<sup>166</sup> From their perspective, the SLPOA statement may well be seen as an attempt to create an official truth—albeit one enacted by a police organization rather than by the state. While there are aspects of *Liberté* discourse that may mesh with the SLPOA’s goals, especially the concern about victimization and the creation of history for the vanquished groups,<sup>167</sup> in general the police unions appear to be moving in the direction of greater censorship and policing at the very moment that Europeans appear to be moving in the opposite direction.

Quite frankly, the SLPOA focus on controlling the historical narrative of Ferguson strikes me as odd.<sup>168</sup> A society may restrict speech for a variety of reasons, but the goal of the SLPOA seems to reach into the realm of beliefs. Simply put, the SLPOA appears to be upset that many people, despite the acquittal of Officer Wilson, still believe that something is wrong with what happened in Ferguson, and something is wrong with how the police treat African-Americans. Moreover, their response is not to engage with “more speech” as Justice Brandeis advised,<sup>169</sup> but to shut down any attempt to promote the “disproven” narrative, even though ironically the end result of

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*Opposes Memory Bans: A Commentary on Liberté’ Pour l’Histoire*, 15 WASH U. GLOBAL. STUD. L. REV. 55, 61-64 (2016).

165. *Id.* at 64.

166. For an overview of the rise of *Liberté*’s accomplishments, *see id.* at 64-67.

167. *Id.* at 82-84 (describing the claim of *Liberté* president Pierre Nora that new group have distorted the past).

168. One might, however, relate it to the broader trend across societies to publicly define memory, something attributable to the rise of an educated middle class (who take an interest in debates about memory) and the development of information technology (which makes it easier to come across, and try to police, divergent forms of memory). *See* Jay Winter, *Notes on the Memory Boom: War, Remembrance and the Uses of the Past*, in *MEMORY, TRAUMA AND WORLD POLITICS: REFLECTIONS ON THE RELATIONSHIP BETWEEN PAST AND PRESENT* 54, 67-70, 72 (Duncan Bell ed., 2006).

169. *See* *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) (“If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.”).

their efforts might be to make the “hands up” gesture an even stronger symbol of the view the officers detest.<sup>170</sup>

#### V. CONCLUSION: IS THE FIRST AMENDMENT COLORBLIND?

This essay raises concerns about the way police unions respond to those who criticize them. The SLPOA’s call for the NFL to punish the St. Louis Rams players for using the “hands up” gesture crosses a line, given the power the police exercise during their daily activities. Unless police unions are willing to avail themselves of the rhetoric of political correctness, it is hard to see how any of the comments or actions of the Rams players, the Lynx players, Mayor de Blasio, or Colin Kaepernick, constituted insults worthy of threats of work stoppages or disciplinary fines. Finally, the focus on combating what the police unions see as a “false narrative” takes them out of the American and perhaps even the European mainstream when it comes to protecting freedom of speech.

On a broader level, my conclusions are both descriptive and normative. From a descriptive perspective, this essay shows how the police union response to the speech acts of the Rams players, Mayor de Blasio, and the Lynx players falls outside the First Amendment mainstream. I am open to competing explanations about why this is the case—the police are not the only group that has condemned speech it does not like. But it is worth noting that the tolerant society envisioned by Bollinger<sup>171</sup> has not come to pass in this particular context. Given how Ferguson and other, more recent police shootings shine a light on implicit bias, it is worth exploring whether such bias also extends to the speech we as a society feel is worth protecting.

In other words, is the First Amendment—or to be more precise, the First Amendment values that we share—colorblind?<sup>172</sup> While it is impossible

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170. As a thought experiment, imagine what would have happened had the SLPOA, instead of calling for the NFL to fine the Rams players, had simply ignored the gesture.

171. See BOLLINGER, *supra* note 50, at 248 (“When we hear people speak of free speech as embodying ideas like “having respect for other people’s opinions” we know that the legal principle is functioning as a general social ethic . . .”). The examples raised in this article suggest that we have not yet reached this goal.

172. I recognize the limitations of the phrase “colorblind,” especially in the context of affirmative action. See Cedric Merlin Powell, *Rhetorical Neutrality: Colorblindness, Frederick Douglass and Inverted Critical Race Theory*, 56 CLEVE. STATE L. REV. 824, 894 (2008) (concluding that: “We must dismantle colorblind constitutionalism and reject the allure of neutrality”). In very large part, this essay is dedicated to showing how First Amendment culture in the United States, at least when seen from the vantage point of police unions, is not “neutral.”

to give a definitive answer based on a few isolated instances, when one juxtaposes the wide ranging Supreme Court First Amendment jurisprudence,<sup>173</sup> to the single-mindedness with which the police unions sought to stamp out the view that Darren Wilson deliberately killed Michael Brown, it is hard to avoid concluding that implicit racial bias informs attitudes toward free expression.

From a normative perspective, the robust condemnations (and chilling) of speech critical of police shootings are counter-productive. In the aftermath of the shootings in Baton Rouge, Falcon Heights, and Dallas, there is a need for a national dialogue on questions of the police training, race relations, gun ownership, and a variety of other issues.<sup>174</sup> These discussions will be more useful if everyone is allowed to participate—even those who, according to the police unions, are perpetuating a “false narrative.” Furthermore, to the extent freedom of speech is seen as a marker of democratic legitimacy—in other words, to the extent freedom of speech is required for a society to be democratically legitimate—the focus on condemning African-American perspectives on the Ferguson shooting raise troubling parallels with other ways African-Americans are excluded from our society.<sup>175</sup>

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173. See, e.g., *Snyder v. Phelps*, 562 U.S. 443 (2016); *Texas v. Johnson*, 491 U.S. 397 (1989); Lukianoff & Haidt, *supra* note 55.

174. See *Week of Violence Sparks National Dialogue on Race and Policing*, PBS NEWSHOUR (July 16, 2016), <http://www.pbs.org/newshour/bb/week-of-violence-sparks-national-dialogue-on-race-and-policing/>; *USCCB President Calls for “Moment of National Reflection,”* AMERICA: THE NAT’L CATHOLIC REV. (July 12, 2016), <http://americamagazine.org/issue/usccb-president-calls-moment-national-reflection> (quoting Pittsburgh Bishop David A. Zubik calling for “us to reach out to each other in kindness and with respect”).

175. These broader issues have led Eric Heinze to ask, when comparing the democratic heritage of the United States and Europe: “Is democracy in Alabama or Mississippi something other than a ‘newcomer’? Do the histories of Denmark or the Netherlands’ reveal a ‘less democratic cast’ than the histories of Texas or Georgia, or indeed of Connecticut or Illinois?” HEINZE, HATE SPEECH, *supra* note 40, at 12-13.