

## BLACK SPEECH MATTERS

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On Memorial Day 2020, Minneapolis police killed George Floyd, an unarmed African-American man suspected of paying for groceries with a counterfeit \$20 bill.<sup>1</sup> Two officers held Floyd face down on the ground, while another officer pinned Floyd's head against the ground by forcefully placing a knee onto his neck for nearly ten minutes.<sup>2</sup> Several months earlier, Louisville police shot and killed Breonna Taylor—an unarmed African-American woman and an EMT—in her home during the overnight execution of a no-knock search warrant.<sup>3</sup> Around the same time, prosecutors and police in south Georgia conspired to allow three white men who trapped and killed Ahmaud Arbery—another unarmed African-American man—to go uncharged.<sup>4</sup> These three killings brought racism—specifically racist policing—to the forefront of the American consciousness.<sup>5</sup>

The events of the summer of 2020 have only intensified this discourse. For instance, video of George Floyd's death taken by bystanders<sup>6</sup> sparked revelations of the use of similarly dangerous arrest tactics utilized by police officers elsewhere. Subsequently, recordings surfaced of other individuals

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<sup>1</sup> See Evan Hill, Ainara Tiefenthäler, Christiaan Triebert, Drew Jordan, Haley Willis & Robin Stein, *How George Floyd Was Killed in Police Custody*, N.Y. TIMES (May 31, 2020, 12:10 PM), <https://www.nytimes.com/2020/05/31/us/george-floyd-investigation.html> [https://perma.cc/36AY-XDF7].

<sup>2</sup> See *id.*

<sup>3</sup> Richard A. Oppel Jr., Derrick Bryson Taylor & Nicholas Bogel-Burroughs, *What We Know About Breonna Taylor's Case and Death*, N.Y. TIMES (Oct. 2, 2020), <https://www.nytimes.com/article/breonna-taylor-police.html> [https://perma.cc/Z6W8-6STH].

<sup>4</sup> See Christina Carrega, *Timeline: Events Leading up to The Arrests of 3 Men in the Murder of Ahmaud Arbery*, ABC NEWS (May 21, 2020 7:27 PM), <https://abcnews.go.com/US/events-leading-arrest-men-murder-ahmaud-arbery/story?id=70576804> [https://perma.cc/R35T-HVQC].

<sup>5</sup> See Brakkton Booker, *Thousands Gather for March on Washington to Demand Police Reform and Racial Equality*, NPR (Aug. 28, 2020, 4:13 PM), <https://www.npr.org/2020/08/28/905914974/thousands-gather-for-march-on-washington-to-demand-police-reform-and-racial-equ> [https://perma.cc/AG25-7EV3].

<sup>6</sup> For video footage of Floyd's murder, see "Not The America That We Want to Live In," *Says St. Paul Mayor of George Floyd's Death*, PBS NEWSROOM (May 26, 2020, 6:45 PM), <https://www.pbs.org/newshour/show/st-paul-mayor-says-treatment-of-george-floyd-not-the-america-that-we-want-to-live-in> [https://perma.cc/EDH5-2VQZ].

previously killed by police in similar situations.<sup>7</sup> Names like Elijah McClain, who died after being held in a chokehold and injected with the powerful sedative ketamine,<sup>8</sup> and Daniel Prude, who died after police placed a bag over his head and pinned him to the ground, became part of the common parlance.<sup>9</sup> Nonetheless, police shootings of unarmed black men continued, even in the wake of mounting calls by activists to reduce police department funding and to terminate those responsible for racist practices.<sup>10</sup> For example, Jacob Blake was shot seven times in the back by a Kenosha, Wisconsin police officer as Blake was entering a vehicle occupied by his three young children.<sup>11</sup> Remarkably, Blake survived, but is reportedly paralyzed.<sup>12</sup> In the case of Deon Kay, Washington, D.C. police fatally shot him as he was running away and after he had dropped a gun on the ground.<sup>13</sup> In the case of Treyford Pellerin, police fatally shot him eleven times in the back as he walked to the entrance of a convenience store.<sup>14</sup>

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<sup>7</sup> Laura Kusisto & Dan Frosch, *George Floyd Protests Prompt Looks at Older Cases of Police Violence*, WALL ST. J. (July 7, 2020, 5:30 AM), <https://www.wsj.com/articles/george-floyd-protests-prompt-looks-at-older-cases-of-police-violence-11594114202> [<https://perma.cc/AST2-Q37R>].

<sup>8</sup> Erik Ortiz, *Elijah McClain Was Injected With Ketamine While Handcuffed. Some Medical Experts Worry About its Use During Police Calls.*, NBC NEWS (July 3, 2020, 8:20 PM), <https://www.nbcnews.com/news/us-news/elijah-mcclain-was-injected-ketamine-while-handcuffed-some-medical-experts-n1232697> [<https://perma.cc/46SG-VKAF>].

<sup>9</sup> Taylor Romine, Benjamin Norbitz & Madeline Holcombe, *7 Rochester Police Officers Suspended Over Daniel Prude's Death, Mayor Says*, CNN (Sept. 4, 2020, 3:21 AM), <https://www.cnn.com/2020/09/03/us/rochester-police-daniel-prude-death/index.html> [<https://perma.cc/J7V2-HWST>].

<sup>10</sup> See Li Cohen, *It's Been Over 3 Months Since George Floyd Was Killed by Police. Police are Still Killing Black People at Disproportionate Rates.*, CBS NEWS (Sept. 10, 2020, 4:39 PM), <https://www.cbsnews.com/news/george-floyd-killing-police-black-people-killed-164/> [<https://perma.cc/F4AY-2V3U>].

<sup>11</sup> Elliott C. McLaughlin & Amir Vera, *Wisconsin Police Shoot a Black Man as His Children Watch From a Vehicle, Attorney Says*, CNN (Aug. 24, 2020, 10:14 PM), <https://www.cnn.com/2020/08/24/us/kenosha-police-shooting-jacob-blake/index.html> [<https://perma.cc/U2V6-U35E>].

<sup>12</sup> Victoria Albert, *Jacob Blake Paralyzed after He Was Shot by Wisconsin Police, Family Attorney Says*, CBS NEWS (Aug. 26, 2020, 7:11 AM), <https://www.cbsnews.com/news/jacob-blake-paralyzed-shooting-kenosha-wisconsin-police/> [<https://perma.cc/LZ3G-Z9JT>].

<sup>13</sup> See *D.C. Police Bodycam Video Shows Fatal Shooting of 18-Year-Old Deon Kay During Pursuit*, CBS NEWS, (Sept. 4, 2020, 5:33 AM), <https://www.cbsnews.com/news/deon-kay-shooting-dc-police-body-camera-video-shows-black-man-had-gun-before-shot-fired/> [<https://perma.cc/93E7-UP4L>]. Interestingly, body-camera footage from the officer who shot Deon Kay was promptly released to the public in accordance with a new District of Columbia law passed in the wake of George Floyd's death. See *Body Camera Footage in Police Killing of Deon Kay to Be First Released in Line with New 5-Day Law*, NBC NEWS (Sept. 3, 2020, 11:34 AM), <https://www.nbcwashington.com/news/local/body-camera-footage-in-police-killing-of-deon-kay-to-be-first-released-in-line-with-new-5-day-law/2409367/> [<https://perma.cc/5D28-KHKE>].

<sup>14</sup> Associated Press, *Aunt, Grandmother Came on Scene of Fatal Shooting of Black Man in Louisiana by Chance*, CHI. TRIB. (Aug. 23, 2020, 8:05 PM), <https://www.chicagotribune.com/nation-world/ct-nw-lafayette-louisiana-police-shooting-trayford-pellerin-20200823-6pfryjd2h5bezeio73vjuttdo4-story.html> [<https://perma.cc/9358-MWP4>].

In the wake of these shootings, peaceful protests arose nationwide, calling attention to the problem of police murdering innocent black people.<sup>15</sup> During the summer of 2020, virtually every city in America became a host to protests of varying size and duration, speaking out against racist police tactics and in favor of black liberation.<sup>16</sup> Some of these protests included, invited, or became intertwined with acts of violence and property damage.<sup>17</sup> As a result, almost immediately public officials at all levels of government began associating the Black Lives Matter protests with vandalism and crime in their rhetoric.<sup>18</sup> In addition, government agencies employed a variety of techniques intended to suppress messages denouncing racist police practices.<sup>19</sup> These tactics ranged from measures designed to criminalize protests—like curfews banning gatherings at certain times and in certain areas<sup>20</sup>—to responses that, in essence, punished and deterred peaceful

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<sup>15</sup> Harmeet Kaur, *About 93% of Racial Justice Protests in the US Have Been Peaceful, a New Report Finds*, CNN (Sept. 4, 2020, 6:45 AM), <https://www.cnn.com/2020/09/04/us/blm-protests-peaceful-report-trnd/index.html> [<https://perma.cc/P5QC-DXDE>].

<sup>16</sup> Audra D. S. Burch, Weiyi Cai, Gabriel Gianordoli, Morrigan McCarthy & Jugal K. Patel, *How Black Lives Matter Reached Every Corner of America*, N.Y. TIMES (June 13, 2020), <https://www.nytimes.com/interactive/2020/06/13/us/george-floyd-protests-cities-photos.html> [<https://perma.cc/ND63-8Z3F>] (plotting locations of protests from May 26 to June 9, 2020).

<sup>17</sup> *Violent Protests Escalate in Minneapolis Over George Floyd's Death*, NBC NEWS (May 29, 2020, 9:59 AM), <https://www.nbcnews.com/slideshow/peaceful-minneapolis-protests-over-george-floyd-s-death-turn-violent-n1216521> [<https://perma.cc/3APU-D8JF>] (depicting protest-related property damage in George Floyd's hometown of Minneapolis).

<sup>18</sup> Caitlin Oprysko, *Trump Threatens to End Protests with Military*, POLITICO (June 1, 2020, 9:25 PM), <https://www.politico.com/news/2020/06/01/trump-slams-governors-as-weak-crackdown-on-protests-294023> [<https://perma.cc/5TN6-C9VH>]. President Trump, for example, denounced the violence stemming from some protests as “domestic acts of terror.” *Id.* This sentiment was echoed by a number of government officials on the local level. *See, e.g.*, Nolan Clay, *Two More Charged with Terrorism*, OKLAHOMAN (July 11, 2020, 1:05 AM), <https://oklahoman.com/article/5666525/two-more-charged-with-terrorism> [<https://perma.cc/3XHC-2YXH>].

<sup>19</sup> *ACLU Seeks Information on Government's Aerial Surveillance of Protesters*, ACLU (Aug. 4, 2020, 3:00 PM), <https://www.aclu-mn.org/en/news/aclu-seeks-information-governments-aerial-surveillance-protesters> [<https://perma.cc/PJ2B-JW37>].

<sup>20</sup> *See, e.g.*, Cincinatti, Ohio, Emergency Order of Cincinatti Mayor (May 31, 2020). The text of the Cincinatti curfew order read:

Upon consultation with and at the request of the City Manager and Chief of Police, and based upon the emergency declaration currently existing in the City of Cincinatti, which declaration pursuant to Article III of the City Charter was approved by the City Council, and pursuant to Article XVIII of the Administrative Code of the City of Cincinatti, I hereby order the implementation of a curfew from 9 p.m. to 6 a.m. in the City of Cincinatti. The need for this order arises from destruction and violence in several areas of the City of Cincinatti, on May 29, 2020 through May 31, 2020; the threat of continued and escalating violence; the need for security and enforcement support for the Cincinatti Police Department; and the need to protect the City's first responders from the spread of COVID-19. These conditions presently constitute a clear and present danger to the health, safety, and property of the citizens of Cincinatti and may require enhanced enforcement authority and security resources to protect the lives and

expression with the use of tear gas, rubber bullets, and other weaponized projectiles.<sup>21</sup> The state of Tennessee even made it a felony to camp on public property for free speech purposes after Black Lives Matter protestors gathered at all hours of the day and night on the statehouse grounds.<sup>22</sup>

A close examination of governmental responses to the summer 2020 Black Lives Matter protests reveals significant observations about current First Amendment jurisprudence and its inability to fully address the constitutionality of speech regulations that intersect with race. First, governmental regulation of Black Lives Matter protests exposes a faulty dichotomy in the First Amendment tests that apply to content-motivated time, place, and manner restrictions on speech.<sup>23</sup> Often it is the case that when the government restricts protests in support of black liberation, it does so based on its assertion that curtailing speech is necessary to prevent or apprehend crime.<sup>24</sup> Governments frequently assert either a compelling government interest—in the case of content-based restrictions—or a substantial government interest—in the case of time, place, and manner regimes—in promoting public safety and preventing the vandalism and violence it associates with the Black Lives Matter movement.<sup>25</sup> Governments also argue

property of those who live, work, and do business in Cincinnati. Individuals are prohibited from appearing in the public spaces of the City of Cincinnati during the period of the curfew. This order is inapplicable to City of Cincinnati officials, members of the public safety forces, emergency personnel, health care professionals, essential workers, people experiencing homelessness, and local government officials engaged in their lawful duties.

This order shall be effective at 1 p.m. on this 31st day of May, 2020, and shall terminate at 6 a.m. on the 2nd day of June, 2020. This order shall be issued to the news media for the widest possible dissemination to the citizens of Cincinnati.

<sup>21</sup> See, e.g., Tom Gjelten, *Peaceful Protestors Tear-Gassed to Clear Way for Trump Church Photo-Op*, NPR (June 1, 2020, 11:50 PM), <https://www.npr.org/2020/06/01/867532070/trumps-unannounced-church-visit-angers-church-officials> [https://perma.cc/YW37-FSND].

<sup>22</sup> See S.B. 05, 111th Gen. Ass., 2d Extraordinary Sess. (Tenn 2020); Kelly Mena, *New Tennessee Law Penalizes Protestors who Camp on State Property with Felony and Loss of Voting Rights*, CNN (Aug. 22, 2020, 8:50 PM), <https://www.cnn.com/2020/08/22/politics/tennessee-felony-camping-law-right-to-vote/index.html> [https://perma.cc/WN28-JR9V].

<sup>23</sup> See *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 542 U.S. 640, 647–48 (1981) (holding that, to be constitutional, a time, place, and manner restriction must: (1) be content-neutral; (2) be supported by a substantial government interest; (3) be narrowly tailored to that interest; and (4) leave open ample alternative avenues of communication).

<sup>24</sup> See, e.g., Brief of Plaintiff at 29, *State v. Oden*, (Hamilton Cty. Mun. Ct. 2020) (No. 20/CRB/10093) (on file with author) (“There is no question that the Emergency Curfew Orders were effective as a public safety measure . . . The size of the crowd and the number of individuals engaged in criminal activity made [] attempts at individualized criminal enforcement not only impractical, but impossible in most circumstances. The disorderly crowds exceeded the number of officers on duty, at time[s] by eight to ten times the number of available officers.”).

<sup>25</sup> See *id.* at 30 (“[An] attempt to arrest the offender who tried to steal an officer’s bike on Saturday

they cannot effectively identify and apprehend the individuals responsible for such violence when peaceful protestors are in the way.<sup>26</sup> This argument, in essence, places speech and safety in direct opposition to one another and relegates speech to a lesser role than the preservation of public order. However, as this Article will discuss, this conclusion turns the First Amendment on its head, a particularly problematic outcome given the fundamental nature of the right of free speech.<sup>27</sup> The Constitution affords speech greater protection in its hierarchy of values than it credits the need to solve crime, and municipalities harm the normative significance of the First Amendment when they view it as a distraction to police functions.<sup>28</sup>

What is worse, current governmental attempts to suppress speech by and in support of the Black Lives Matter movement also illustrate a significant gap in First Amendment jurisprudence. More specifically, existing free speech jurisprudence fails to explicitly account for governmental regulations of expression that are not on their face content-based, but are *content-motivated* by a prohibited racial animus.<sup>29</sup> Under the Fourteenth Amendment's Equal Protection clause, governmental actions are unconstitutional when they are motivated by invidious racial intent and impose racially disparate outcomes.<sup>30</sup> However, under the First Amendment, the government's motivation in adopting a speech restriction is not necessarily relevant so long as the restriction on its face does not categorize speech based on its content.<sup>31</sup> As a result, the government can engage in censorship of speech based on disagreement with messages of racial equality or its misguided association of black speech with crime, so long as it does so

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is one example of the practical limitations of individual criminal enforcement with a disorderly crowd. Officers attempted to pursue an individual offender who admitted she attempted to steal a police officer's bike. Nonetheless, when officers attempted to arrest her, the crowd refused to disperse and allow officers to make the arrest, requiring officers to force their way in to apprehend the offender. Such situations create the potential for harm for all parties involved. Further, many of the non-lethal options used to safely apprehend offenders, such as TASERS, are useless in a crowd. Consequently, officers must use physical force to subdue, which inevitably leads to injuries to officers and offenders. *This incident, and those like it, demonstrates that the crowds were, at times, active participants in the disorder.*" (emphasis added).

<sup>26</sup> *Id.*

<sup>27</sup> *See, e.g.,* Ashcroft v. Free Speech Coal., 535 U.S. 234, 254–55 (2002) ("The argument, in essence, is that protected speech may be banned as a means to ban unprotected speech. This analysis turns the First Amendment upside down.").

<sup>28</sup> *See id.* ("The prospect of crime, however, by itself does not justify laws suppressing protected speech.") (citing *Kingsley Int'l Pictures Corp. v. Regents of Univ. of N.Y.*, 360 U.S. 684, 689 (1959)).

<sup>29</sup> *See Reed v. Town of Gilbert*, 576 U.S. 155, 163–64 (2015) (describing method of analysis for determining when a regulation is impermissibly content-based in violation of the First Amendment).

<sup>30</sup> *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977).

<sup>31</sup> *See Reed*, 576 U.S. at 165 (observing that "illicit legislative intent is not the *sine qua non* of a violation of the First Amendment") (citations omitted).

in a content-neutral way.<sup>32</sup> This outcome exposes an innate tension between the First and Fourteenth Amendments that courts should reconcile. This Article explores that tension in three parts.

Part I of this Article discusses the origins of the Black Lives Matter movement and its reliance upon activities—such as rallies, marches, protests, and social media posts—that are protected by the First Amendment. Part II discusses the events of the summer of 2020 and the various ways in which governmental agencies have punished, silenced, and chilled speech related to the Black Lives Matter movement. Using cities like Portland, Columbus, and Cincinnati as well as the State of Tennessee as examples, this section of the Article exposes the ways in which governmental regulation of the Black Lives Matter movement has been content-motivated and targeted to silence speech from, by, and about black people. In Part III, this Article explores the intersection of the First Amendment right of free speech and the Fourteenth Amendment’s prohibition on racial discrimination by the government. More specifically, Part III focuses on gaps in First Amendment jurisprudence in addressing regulations that are content-motivated, rather than content-based, and exposes the false assumptions leading municipalities to subjugate speech to the prevention of crime.

This article reaches the conclusion that many of the speech-suppression techniques utilized by cities to silence—and, in some instances, criminalize—the Black Lives Matter movement depart in fundamental ways from the values the First Amendment is intended to serve. As a result, this Article argues that Fourteenth Amendment racial animus theory should be imported into First Amendment doctrine to prohibit governmental regulation of speech based on race when the restriction is content-motivated.

## I. THE HISTORY OF THE BLACK LIVES MATTER MOVEMENT

The Black Lives Matter movement arose in response to police brutality against black people, and young black men in particular.<sup>33</sup> In fact, the correlation between police violence against black individuals and the presence of Black Lives Matter protestors is so strong that a violent police episode empirically predicts a subsequent Black Lives Matter organized protest.<sup>34</sup> Several well-publicized incidents of police violence and white-on-

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<sup>32</sup> See *id.* at 163–64.

<sup>33</sup> See Bridgette Baldwin, *Black, White, and Blue: Bias, Profiling, and Policing in the Age of Black Lives Matter*, 40 W. NEW ENG. L. REV. 431, 431–32 (2018) (tracing the origins of Black Lives Matter movement to unjust policing practices).

<sup>34</sup> Vanessa Williamson, Kris-Stella Trump & Katherine Levine Einstein, *Black Lives Matter: Evidence that Police-Caused Deaths Predict Protest Activity*, 16 PERSP. ON POL. 400, 401 (2018).

black violence—such as the Ferguson, Missouri shooting of Michael Brown, and George Zimmerman shooting a teenage Trayvon Martin—initially sparked the mass uprisings that have now come to be known as Black Lives Matter protests.<sup>35</sup> Black Lives Matter followed on the heels of the Occupy Wall Street (Occupy) movement—a decentralized, grassroots, leaderless coalition which focused on changing politics through visible gatherings in public places.<sup>36</sup>

While the concept of popular uprising associated with the Black Lives Matter movement had its roots in Occupy, the term “Black Lives Matter” has a much more specific and personal origin.<sup>37</sup> It is derived from a series of social media posts penned by a woman named Alicia Garza.<sup>38</sup> Moved by the jury’s acquittal of George Zimmerman in the Trayvon Martin case and the resulting demoralization, dejection, and pain experienced by black people across America, Garza began publishing a series of social media posts she named “A Love Letter to Black People.”<sup>39</sup> In one post, Garza expressed: “I continue to be surprised at how little Black lives matter.”<sup>40</sup> Her final post in the series, penned on July 13, 2013, simply stated: “[B]lack people. I love you. I love us. Our lives matter.”<sup>41</sup>

Garza’s posts—and her coining of the phrase “Black Lives Matter”—gained traction through grassroots social media channels.<sup>42</sup> Garrett Chase eloquently recounts the viral spread of the term:

Garza’s close friend, Patrisse Cullors, saw the post and recognized the significance of its message. Cullors then posted on her own Facebook page a message that reflected an angrier feeling of discontent, sparked by the verdict, “declaration: black bodies will no longer be sacrificed for the rest

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<sup>35</sup> Frank Rudy Cooper, *Cop Fragility and Blue Lives Matter*, 2020 U. ILL. L. REV. 621, 629–30 (2020). Cooper argues that, “[i]f just one event sparked the Black Lives Matter movement, it was Zimmerman’s slaying of Martin.” *Id.* at 630. See also Beverly Daniel Tatum, *Community or Chaos? Dialogue As Twenty-First Century Activism*, 49 U. MEM. L. REV. 285, 290 (2018) (“The repeated failure of the justice system to hold the killers accountable for these deaths gave momentum to the ‘Black Lives Matter’ movement, protesting state-sponsored violence . . .”).

<sup>36</sup> See Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405, 416–18 (2018) (providing a general history of the Black Lives Matter movement and its connection to Occupy Wall Street).

<sup>37</sup> Garrett Chase, *The Early History of the Black Lives Matter Movement, and the Implications Thereof*, 18 NEV. L.J. 1091, 1094–96 (2018).

<sup>38</sup> Jessica Guynn, *Meet the Woman Who Coined #BlackLivesMatter*, USA TODAY (Mar. 4, 2015, 1:50 AM) <http://www.usatoday.com/story/tech/2015/03/04/alicia-garza-black-livesmatter/24341593> [https://perma.cc/3HMT-ZFUA].

<sup>39</sup> Chase, *supra* note 37, at 1095.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> See *id.* at 1098–99.

of the world's enlightenment. i am done. i am so done. trayvon, you are loved infinitely. #blacklivesmatter.” Two days after the Zimmerman verdict, and Garza’s first post, Cullors posted another message on Facebook. This time, Cullors posted a direct call to action and became the first to characterize Black Lives Matter as a movement.<sup>43</sup>

Since its inception, the Black Lives Matter movement has been associated with peaceful protests and other popular uprisings challenging racist police and governmental practices.<sup>44</sup> However, at its core, it is an expression of black worthiness, a symbol of the resilience of black voices, and a tribute to what Alicia Garza initially expressed as a love letter to her people.<sup>45</sup>

## II. GOVERNMENTAL RESPONSES TO THE SUMMER 2020 BLACK LIVES MATTER PROTESTS

The killings of George Floyd,<sup>46</sup> Breonna Taylor,<sup>47</sup> and Ahmaud Arbery<sup>48</sup> during the early months of 2020, as well as the shooting of Jacob Blake<sup>49</sup> later in the summer, re-ignited the Black Lives Matter movement and sparked widespread protests throughout the United States.<sup>50</sup> While some police departments seized the opportunity to express solidarity with members of the black community,<sup>51</sup> many cities and local law enforcement agencies met the protests with resistance.<sup>52</sup> These enforcement agencies employed a range of tactics that either have the impact of criminalizing peaceful protesting, or expressly punish and inflict harm upon protestors, thereby chilling other like-minded people from joining the movement.<sup>53</sup> Governmental responses to the

<sup>43</sup> *Id.* at 1095–96.

<sup>44</sup> Tabatha Abu El-Haj, *Defining Peaceably: Policing the Line Between Constitutionally Protected Protest and Unlawful Assembly*, 80 MO. L. REV. 961, 961–62 (2015).

<sup>45</sup> Chase, *supra* note 37, at 1094–95.

<sup>46</sup> Hill et al., *supra* note 1.

<sup>47</sup> Oppel Jr. & Taylor, *supra* note 3.

<sup>48</sup> Carrega, *supra* note 4.

<sup>49</sup> McLaughlin & Vera, *supra* note 11.

<sup>50</sup> Burch et al., *supra* note 16.

<sup>51</sup> See, e.g., Caitlin O’Kane, *Michigan Sheriff Takes Off Helmet and Joins Protestors Marching for George Floyd*, CBS NEWS (June 1, 2020, 12:03 PM), <https://www.cbsnews.com/news/michigan-sheriff-chris-swanson-joins-george-floyd-protest-march/> [<https://perma.cc/DTR8-LZFW>].

<sup>52</sup> Mark Berman & Emily Wax-Thibodeaux, *Police Keep Using Force Against Peaceful Protesters, Prompting Sustained Criticism About Tactics and Training*, WASH. POST (June 4, 2020, 10:02 AM), [https://www.washingtonpost.com/national/police-keep-using-force-against-peaceful-protesters-prompting-sustained-criticism-about-tactics-and-training/2020/06/03/5d2f51d4-a5cf-11ea-bb20-ebf0921f3bbd\\_story.html](https://www.washingtonpost.com/national/police-keep-using-force-against-peaceful-protesters-prompting-sustained-criticism-about-tactics-and-training/2020/06/03/5d2f51d4-a5cf-11ea-bb20-ebf0921f3bbd_story.html) [<https://perma.cc/Y7QM-UKL5>].

<sup>53</sup> Michael Sainato, *‘They Set Us Up’: US Police Arrested Over 10,000 Protesters, Many Non-Violent*, THE GUARDIAN (June 8, 2020), <https://www.theguardian.com/us-news/2020/jun/08/george-floyd-killing-police-arrest->

summer 2020 protests can be categorized as either: (1) *crime-creating*, meaning the government actually creates crime out of non-violent political expression and expressive conduct; or (2) *speech-punishing*, meaning the government, in the absence of criminal prosecution, engages in punitive measures against protestors.<sup>54</sup>

In many instances, both forms of response were markedly different from the individual jurisdictions' tolerance of protests motivated by other messages.<sup>55</sup> In Cincinnati, Ohio, for example, the mayor issued a curfew order in response to the George Floyd protests which banned appearance in public places, and police deployed projectiles into crowds to force protestors to disperse.<sup>56</sup> In contrast, when Cincinnati experienced large crowds for its popular, illuminated art festival Blink,<sup>57</sup> and when Tea Party gatherings resulted in a large turnout in a cramped downtown square,<sup>58</sup> no such measures were used. As a result, there is an inference that the *crime-creating* and *speech-punishing* measures implemented by cities across the country were motivated—at least in part—by perceptions about the Black Lives Matter movement and its message.<sup>59</sup>

### A. Crime-Creating Responses to the Black Lives Matter Protests

#### 1. Curfew Laws

Many cities responded to the protests by enacting and enforcing overnight curfews that prohibited people from gathering in public or

non-violent-protesters [https://perma.cc/JW2D-8FKM].

<sup>54</sup> See discussion *infra* Part II.A. & Part II.B.

<sup>55</sup> Compare *supra* note 20 (highlighting the Emergency Order instituted by the Mayor of Cincinnati which mandated curfews in response to Black Lives Matters protests) with *infra* note 58 (highlighting how no such measures were taken when Tea Party protestors gathered in public).

<sup>56</sup> See Emergency Order, *supra* note 20; see also Bob Strickley, Deon J. Hampton & Cameron Knight, *Cincinnati Protests Day 2: Police Deploy Tear Gas; Several Arrested Near UC; Bullet Hits Officer's Helmet*, CINCINNATI ENQUIRER (May 30, 2020, 10:04 PM), <https://www.cincinnati.com/story/news/2020/05/30/live-updates-police-deploy-tear-gas-and-advance-protesters-otr/5296396002/> [https://perma.cc/DL9W-HM4G].

<sup>57</sup> See *BLINK 2019 Was Largest Event in Region's History, Organizers Say*, WLWT5 (Oct. 16, 2019, 4:30 PM), <https://www.wlwt.com/article/blink-was-largest-event-in-cincinnati-area-history-organizers-say/29491583#> [https://perma.cc/HX5D-XE54].

<sup>58</sup> *Thousands Join "Tea Party" on Fountain Square*, FOX19 (Mar. 16, 2009), <https://www.fox19.com/story/10011261/thousands-join-tea-party-on-fountain-square/> [https://perma.cc/5XJZ-M7X3].

<sup>59</sup> See Berman & Wax-Thibodeaux, *supra* note 52 (describing police actions against Black Lives Matter protests); see also Sainato, *supra* note 53 (describing police use of force against protestors); Micah Lee, *How Northern California's Police Intelligence Center Tracked Protests*, THE INTERCEPT (Aug. 17, 2020, 8:20 AM), <https://theintercept.com/2020/08/17/blueleaks-california-ncric-black-lives-matter-protesters/> [https://perma.cc/QD2H-Y8R4] (describing police intelligence center emails monitoring protest activity).

engaging in collective free speech.<sup>60</sup> The Cincinnati curfew, for example, was initially issued for downtown portions of the city and then later expanded to include the entire city limits between the hours of 9:00 pm and 6:00 am.<sup>61</sup> As grounds for the order, the mayor cited “the threat of continued and escalating violence; the need for security and enforcement support for the Cincinnati Police Department; and the need to protect the City’s first responders from the spread of COVID-19.”<sup>62</sup> Notably, the curfew order exempted a laundry list of speakers who were permitted to remain in public after 9:00 pm for expressive purposes.<sup>63</sup> That list included government officials, people experiencing homelessness, and members of the news media deemed “essential workers.”<sup>64</sup> All of these individuals were permitted to engage in constitutionally-protected expression during the curfew hours while people protesting the murder of George Floyd were not.<sup>65</sup>

Curfew laws were then utilized to arrest those merely engaged in peaceful, constitutionally-protected expression.<sup>66</sup> In New York City, for example, more than 200 individuals were reportedly arrested on a single night for being present in public after curfew.<sup>67</sup> In Minneapolis—the epicenter of protest activity following George Floyd’s death there—more than 130 people were arrested after a curfew was imposed.<sup>68</sup> Police in Cincinnati conducted mass arrests of protestors who were out after curfew.<sup>69</sup> In many of these

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<sup>60</sup> See, e.g., Kanishka Singh & Ann Maria Shibu, *Minneapolis Under Curfew, State of Emergency After Black Homicide Suspect’s Death*, REUTERS (Aug. 27, 2020, 5:01 AM), <https://www.reuters.com/article/us-global-race-minneapolis/minneapolis-under-curfew-state-of-emergency-after-black-homicide-suspects-death-idUSKBN25N14X> [<https://perma.cc/C2AK-D7BV>].

<sup>61</sup> See Emergency Order, *supra* note 20; Scott Wartman, *Cincinnati Curfew Extended Through the Weekend, But Will Be 11 p.m.*, CINCINNATI ENQUIRER (June 3, 2020, 12:17 PM), <https://www.cincinnati.com/story/news/2020/06/03/cincinnati-curfew-mayor-john-cranley-extends-through-weekend/3134792001/> [<https://perma.cc/WJ6A-JWNV>].

<sup>62</sup> See Emergency Order, *supra* note 20.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

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

<sup>66</sup> *Id.*

<sup>67</sup> Debora Fougere, *NYPD Gets Tough on George Floyd Protestors Defying Curfew*, SPECTRUM NEWS NY1 (June 5, 2020, 7:45 AM), <https://www.ny1.com/nyc/all-boroughs/news/2020/06/04/protests-curfew-new-york-city-thursday#:~:text=NEW%20YORK%20%2D%20Police%20again%20cracked,the%20death%20of%20George%20Floyd.&text=The%20NYPD%20says%20more%20than%20200%20people%20were%20taken%20into%20custody.&text=More%20arrests%20in%20Midtown%20were%20spotted%20after%2010%20p.m> [<https://perma.cc/MVZ4-L63U>].

<sup>68</sup> Jeffrey Martin, *Over 130 People Arrested Around Minneapolis During Protests, Looting as Mayor Imposes City Curfew*, NEWSWEEK (Aug. 27, 2020, 8:47 PM), <https://www.newsweek.com/over-130-people-arrested-around-minneapolis-during-protests-looting-mayor-imposes-city-curfew-1528201> [<https://perma.cc/7BFZ-HF5G>].

<sup>69</sup> Segann March, Scott Wartman, Dan Horn, Sarah Brookbank & Sarah Haselhorst, *Recap From Day 3: Police Conduct Mass Arrest in OTR*, CINCINNATI ENQUIRER (June 1, 2020, 12:19 AM),

cases, those arrested were not accused of any crime outside of simply being present in public or continuing to express political perspectives in a public place.<sup>70</sup>

By declaring a curfew and arresting those in violation of it, lawmakers have transformed otherwise constitutionally-protected political expression into criminal activity. First Amendment case law is clear that public protests on matters of political and social concern is deserving of the utmost protection.<sup>71</sup> As a result, municipalities cannot make the protests themselves a crime.<sup>72</sup> Instead, they broaden the scope of their legislative authority by creating crime out of the simple act of gathering in a public place.<sup>73</sup>

## 2. The Tennessee Law Prohibiting Camping

Governmental responses to the summer 2020 protests were not limited to the imposition of criminal penalties associated with curfew orders. In an even more egregious example of the crime-creating techniques employed to quell the Black Lives Matter movement, the Tennessee legislature adopted a bill that makes camping on the statehouse grounds a felony.<sup>74</sup> Following the death of George Floyd, protestors maintained a 24/7 presence on the grounds of the state capitol for two straight months, demanding to meet with the governor on topics related to racial inequality and criminal justice reform.<sup>75</sup> Commentary by the state legislators in the drafting process made clear that the law was intended to specifically target these protestors and to exclude those who might be napping in a park or enjoying a family picnic.<sup>76</sup> While earlier drafts of the bill made camping on capital grounds a misdemeanor, the Tennessee Senate insisted on elevating the crime to a felony for the explicit purpose of deterring Black Lives Matter protests.<sup>77</sup> This was despite the fact

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<https://www.cincinnati.com/story/news/2020/05/31/cincinnati-protests-george-floyd-live-updates/5300281002/> [<https://perma.cc/24JL-VB2G>].

<sup>70</sup> *Supra* notes 54–56.

<sup>71</sup> *See, e.g.,* *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 152 (1969).

<sup>72</sup> *See id.* at 159. (holding a city ordinance making protest a crime was unconstitutional because it was “administered so as, in the words of Chief Justice Hughes, ‘to deny or unwarrantedly abridge the right of assembly and the opportunities for the communication of thought . . .’”).

<sup>73</sup> *See* Karen J. Pita Loor, *When Protest is the Disaster: Constitutional Implications of State and Local Emergency Power*, 43 SEATTLE U. L. REV. 1, 5 (2019) (discussing executive emergency responses to protest activity).

<sup>74</sup> *See* S.B. 05, 111th Gen. Ass., 2d Extraordinary Sess. (Tenn. 2020); Mena, *supra* note 22.

<sup>75</sup> Natalie Allison, *Tennessee Legislature Cracks Down on Protestors, Making it a Felony to Camp Overnight Outside Capitol*, NASHVILLE TENNESSEAN (Aug. 12, 2020, 8:38 PM), <https://www.tennessean.com/story/news/politics/2020/08/12/tennessee-passes-law-targeting-protesters-makes-capitol-camping-felony/3354879001/> [<https://perma.cc/L4B6-XZVJ>].

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

that no one could identify a single injury or act of violence arising from the months-long campout by activists.<sup>78</sup>

Like the curfew measures employed in cities across the United States, the Tennessee law transforms what is otherwise innocuous expressive activity<sup>79</sup> into a serious criminal offense. However, unlike some curfew orders—which were ostensibly passed to preserve public order—the Tennessee law was intended to silence a particular message, namely that of black liberation.<sup>80</sup> It was therefore clearly content-motivated and based on legislative intent to silence messages of racial equality.

### *B. Speech-Punishing Responses to the Black Lives Matter Protests*

In addition to criminalizing speech associated with the Black Lives Matter movement, governmental actors also engaged in punitive measures that inflicted physical, mental, and financial harm on protestors.

#### 1. Militarized Police Tactics

Throughout the summer of 2020, police in various jurisdictions made widespread use of militarized weapons against Black Lives Matter protestors.<sup>81</sup> Protestors were frequently tear-gassed by police, at times after curfews had gone into effect, and at other times for seemingly no reason at all.<sup>82</sup> Police also shot rubber bullets and other projectiles into crowds of protestors, sometimes causing serious physical injuries.<sup>83</sup> While these tactics were seemingly used to cause crowds to disperse and the expressive message of protests to cease, individual police officers also engaged in more micro-

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<sup>78</sup> Tim Elfrink, *Protestors Have Camped for Months at Tennessee's Capitol. So Lawmakers Made it a Felony*, WASH. POST (Aug. 13, 2020, 5:27 AM), <https://www.washingtonpost.com/nation/2020/08/13/tennessee-camping-felony-capitol/> [https://perma.cc/9CHK-8PDP].

<sup>79</sup> See Wartman, *supra* note 61. It is true that the act of camping on government property, even for expressive purposes, has been deemed not to constitute protected expression in the context of the First Amendment. See *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 298–99 (1984). In *Clark*, however, the Supreme Court recognized that the act of camping in order to call attention to a social issue may have expressive qualities, even though that expressive character may be insufficient to trigger constitutional protection. *Id.* at 291–92 (referring to tents erected in public parks as “symbolic tents” that “demonstrate[ed] the plight of the homeless”).

<sup>80</sup> See Allison, *supra* note 75.

<sup>81</sup> See *id.*; see also USA: *Law Enforcement Violated Black Lives Matter Protesters' Human Rights, Documents Acts of Police Violence and Excessive Force*, AMNESTY INT'L, (Aug. 4, 2020), <https://www.amnesty.org/en/latest/news/2020/08/usa-law-enforcement-violated-black-lives-matter-protesters-human-rights/> [https://perma.cc/VME4-7JYU].

<sup>82</sup> See Allison, *supra* note 75; see also AMNESTY INTERNATIONAL, *supra* note 81.

<sup>83</sup> Liz Szabo et al., *Fractured Skulls, Lost Eyes: Police Often Break Own Rules Using 'Rubber Bullets,'* KAISER HEALTH NEWS (June 19, 2020), <https://khn.org/news/rubber-bullets-protesters-police-often-violate-own-policies-crowd-control-less-lethal-weapons/> [https://perma.cc/Z2LQ-BTMH].

level acts of aggression against specific protestors.<sup>84</sup> In Buffalo, police pushed down an elderly man, causing him to fall backwards onto the concrete and split his head open.<sup>85</sup> In Houston, a horse-mounted police officer trampled protestors to the ground.<sup>86</sup> In Minneapolis, police arrested a CNN journalist as he was live on the air reporting the events of the day.<sup>87</sup>

### **Columbus, Ohio**

One jurisdiction that heavily employed militarized policing tactics during the George Floyd protests was Columbus, Ohio. There, police routinely made use of dangerous chemical agents and deployed wooden bullets and other harmful projectiles against protestors, reportedly without any provocation or justification whatsoever.<sup>88</sup> One eyewitness to the police response—a Methodist minister—reported acts of “sudden aggression” by police in SWAT gear toward protestors.<sup>89</sup> The violent response by Columbus police is currently under investigation by a former United States Attorney and the Ohio State University’s public policy department.<sup>90</sup>

### **Portland, Oregon**

Perhaps no other city has been the host of greater violence and unrest than Portland, Oregon. There, daily peaceful protests have been met with either a strong militarized response by law enforcement agencies, or an absence of police presence, allowing violent counter-protestors to threaten and attack those engaged in peaceful expression.<sup>91</sup> Portland is unique for two reasons. First, protestors there have attempted to establish autonomous zones

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<sup>84</sup> See Allison, *supra* note 75; see also *id.*

<sup>85</sup> Phil Helsel, *Man, 75, Shoved to Ground by Buffalo Police During Protest is Released from Hospital*, NBC NEWS (July 1, 2020, 2:56 AM), <https://www.nbcnews.com/news/us-news/man-75-shoved-ground-buffalo-police-during-protest-released-hospital-n1232630> [https://perma.cc/4KN7-SP54].

<sup>86</sup> *Houston Mayor Apologizes to Protestor Trampled by Officer on Horse*, ABC13 (June 1, 2020), <https://abc13.com/hpd-uns-over-girl-police-on-horse-tramples-protester-george-floyd/6223240/> [https://perma.cc/T54M-2PN2].

<sup>87</sup> Jason Hanna & Amir Vera, *CNN Crew Released From Police Custody After They Were Arrested Live on Air in Minneapolis*, CNN (May 29, 2020, 8:19 PM), <https://www.cnn.com/2020/05/29/us/minneapolis-cnn-crew-arrested/index.html> [https://perma.cc/LP5Z-MSVL].

<sup>88</sup> See Bill Bush, *Columbus Police Weapons, Tactics under Review*, COLUMBUS DISPATCH (Aug. 10, 2020, 9:54 AM), <https://www.dispatch.com/news/20200810/columbus-police-weapons-tactics-under-review> [https://perma.cc/6WCF-TK3C].

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

<sup>90</sup> Bethany Bruner, *Columbus Police Protest Response to be Reviewed by Former US Attorney, Ohio State*, COLUMBUS DISPATCH (July 22, 2020 12:11 PM), <https://www.dispatch.com/news/20200722/columbus-police-protest-response-to-be-reviewed-by-former-us-attorney-ohio-state> [https://perma.cc/QNR2-X2ML].

<sup>91</sup> See Jason Wilson, *Portland Suffers Serious Street Violence as Far Right Return ‘Prepared to Fight,’* THE GUARDIAN (Aug. 28, 2020), <https://www.theguardian.com/us-news/2020/aug/28/portland-violence-far-right-protests-police> [https://perma.cc/8CVT-4BPV].

within city parks, where individuals would self-govern and where police would agree not to come.<sup>92</sup> Second, as has been widely reported, federal law enforcement officials have engaged in undercover arrests of protestors absent coordination with local and state agencies.<sup>93</sup>

The federal governmental presence in Portland and its actions in surreptitiously arresting protestors have resulted in a number of lawsuits.<sup>94</sup> The first such legal action was filed by Ellen Rosenblum, the Attorney General for the State of Oregon.<sup>95</sup> Rosenblum's suit accuses several federal agencies—including the Department of Homeland Security, Customs and Border Protection, the U.S. Marshals Service, and the Federal Protection Service—of unlawful enforcement.<sup>96</sup> Additionally, Rosenblum also alleges that the federal government violated Oregonians' civil rights by seizing and detaining them without probable cause during protests against police brutality.<sup>97</sup>

Before the state-initiated suit began, a separate lawsuit was filed by six journalists and legal observers against the city of Portland, requesting Portland police stop preventing news reporters, photojournalists, and legal observers from documenting the violent response to protests.<sup>98</sup> Once the federal agents arrived in Portland, the lawsuit was expanded to include the U.S. Department of Homeland Security and the U.S. Marshals Service.<sup>99</sup> A U.S. District Court Judge issued a temporary restraining order, barring federal agents from arresting, threatening to arrest, or using physical force against those known or reasonably considered to be journalists or legal observers.<sup>100</sup>

A third Portland case focuses on the Tenth Amendment, relaying that every power the Constitution does not specifically grant to the federal

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<sup>92</sup> *Portland Protestors Create Short-Lived 'Autonomous Zone,'* KIRO 7 (Jun. 18, 2020, 6:51 AM), <https://www.kiro7.com/news/local/portland-protesters-create-short-lived-autonomous-zone/35XX7RX6L5HKL OGDUBHIOVBGGI/> [<https://perma.cc/MS92-QCVU>].

<sup>93</sup> Mike Baker, Thomas Fuller & Sergio Olmos, *Federal Agents Push Into Portland Streets, Stretching Limits of Their Authority*, N.Y. TIMES (July 31, 2020), <https://www.nytimes.com/2020/07/25/us/portland-federal-legal-jurisdiction-courts.html> [<https://perma.cc/6DZ9-8C4E>].

<sup>94</sup> *Id.*

<sup>95</sup> Complaint at \*1, *Rosenblum v. John Does 1–10*, 2020 U.S. Dist. Ct. LEXIS 132517 (2020) (No. 2:20-cv-01161-MO). The Oregon Attorney General has the power to appear for the State of Oregon and its agencies, pursuant to ORS 180.060 and common law, and for its citizens under the doctrine of *parens patriae*. *Id.* at \*2.

<sup>96</sup> *Id.* at \*10.

<sup>97</sup> *Id.* at \*4.

<sup>98</sup> *Index Newspapers LLC v. City of Portland*, No. 3:20-cv-1035-SI, 202 U.S. Dist. LEXIS 152131, at \*3–4 (D. Or. Aug. 20, 2020).

<sup>99</sup> *Id.* at \*3.

<sup>100</sup> *Id.* at \*7–8.

government (or forbid from the states) is reserved to the states and to the people.<sup>101</sup> The plaintiffs in that suit claim the deployment of federal law enforcement infringes on the power of Oregon citizens to hold state and local police accountable, pointing out that whether and how to police is left to the states and their municipalities.<sup>102</sup> Those bringing the suit—which include the First Unitarian Church of Portland—say their religious practice includes activism and protest in the face of injustice, and believe this right to be violated by the presence of the federal government.<sup>103</sup>

A fourth and final lawsuit—against the Department of Homeland Security, the U.S. Marshals Service, and the city of Portland—comes from street medics who tended to injured protestors.<sup>104</sup> In this suit, the plaintiffs contend that volunteer medics were brutally attacked by police and federal agents, violating their First and Fourth Amendment rights. They seek damages for injuries to the medics, as well as an order preventing law enforcement from further targeting and attacking medics.<sup>105</sup>

At the time of this Article’s publication, all four of these lawsuits are still pending.

## 2. Billing Protest Organizers for Police Costs

Another method used by cities to punish protestors has been the shifting of financial costs associated with policing the events.<sup>106</sup> In New Jersey, the city served a teenager who organized a local protest in support of Black Lives Matter with a \$2,500 invoice for police overtime in covering the event.<sup>107</sup> In the face of mounting criticism, the mayor who issued the invoice attempted to characterize it as a fee and not a fine, although he ultimately rescinded the bill.<sup>108</sup> Similarly, a Wisconsin city levied a fine against a protest organizer for bills associated with “officers having to direct traffic and enlist the help of other agencies because of the protest.”<sup>109</sup> The practice of shifting, or

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<sup>101</sup> Complaint for Injunctive and Declaratory Relief at 1, *Western States Center, Inc. v. U. S. Dep’t of Homeland Sec.*, 2020 WL 4226726 (D. Or. July 21, 2020) (No. 3:20-cv-01175).

<sup>102</sup> *Id.* at 6.

<sup>103</sup> *Id.* at 3–4.

<sup>104</sup> *Wise v. City of Portland*, No. 3:20-CV-01193-IM, 2020 WL 5231486, at \*1 (D. Or. Sept. 2, 2020).

<sup>105</sup> *Id.*

<sup>106</sup> See Anthony G. Attrino, *N.J. Teen Who Held Black Lives Matter Protest Gets Hit With \$2,500 Bill for Police Overtime*, NJ.COM (Aug. 29, 2020), <https://www.nj.com/bergen/2020/08/nj-teen-who-held-black-lives-matter-protest-gets-hit-with-2500-bill-for-police-overtime.html> [<https://perma.cc/GG74-XVBD>].

<sup>107</sup> *Id.*

<sup>108</sup> Associated Press, *A Mayor Tried to Bill a Teen Protest Organizer for Police Overtime. He’s Now Rescinded It*, WLKY (Aug. 30, 2020, 12:53 PM), <https://www.wlky.com/article/a-mayor-tried-to-bill-a-teen-protest-organizer-for-police-overtime-hes-now-rescinded-it/33842730#> [<https://perma.cc/7TE6-MZA6>].

<sup>109</sup> Tia Johnson, *Woman Receives Fine, Citation from Howard for Black Lives Matter Protest*,

threatening to shift, the costs associated with policing protests serves to reinforce the notion that black speech is not valued and provides no benefit outside of the black community.<sup>110</sup>

### 3. Surveillance of Activists

Even prior to summer 2020 protests, Black Lives Matter leaders in certain communities were subjected to invasive and pervasive surveillance by law enforcement.<sup>111</sup> This phenomenon is well-documented by Professor Anna Toor in her article, “‘Our Identity is Often What’s Triggering Surveillance’: How Government Surveillance of #BlackLivesMatter Violates the First Amendment Freedom of Association.”<sup>112</sup> As Professor Toor reports, protest leaders have not only been followed through traditional surveillance tactics but also frequently have their social media accounts and other interpersonal communication traced through the use of law enforcement surveillance software.<sup>113</sup>

Surveillance of protestors poses serious risks under the First Amendment. First, when protestors are aware that they are being followed and watched by police, surveillance is likely to be a deterrent to legitimate political activism.<sup>114</sup> Surveillance therefore imposes a chilling effect on both the target and on other putative speakers who censor themselves to avoid being surveilled.<sup>115</sup> Second, and of perhaps greater concern, is the impact of covert surveillance, which, like so many other governmental responses to the Black Lives Matter movement, “risks equating political protest [and] criminal activity.”<sup>116</sup> Covert surveillance sends a message to those in law enforcement and other governmental and non-governmental agencies that protestors are dangerous and that their activities should be monitored.<sup>117</sup>

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WBAY.COM (Aug. 29, 2020, 6:00 PM), <https://www.wbay.com/2020/08/29/woman-receives-fine-citation-from-howard-for-black-lives-matter-protest/> [<https://perma.cc/F59C-FDUV>].

<sup>110</sup> *See id.*

<sup>111</sup> Anna Toor, Note & Comment, “*Our Identity is Often What’s Triggering Surveillance*”: How Government Surveillance of #BLACKLIVESMATTER Violates the First Amendment Freedom of Association, 44 RUTGERS COMPUTER & TECH. L.J. 286, 291 (2018).

<sup>112</sup> *Id.* at 312.

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

<sup>114</sup> Farrah Bara, Note, *From Memphis, with Love: A Model to Protect Protestors in the Age of Surveillance*, 69 DUKE L.J. 197, 202 (2019).

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

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

<sup>117</sup> *See id.*

### III. THE FIRST AMENDMENT IMPLICATIONS OF THE BLACK LIVES MATTER MOVEMENT

Crime-creating and speech-punishing responses to civil rights protests are not a new phenomenon. For more than fifty years, cities and states across America have attempted to criminalize speech by, and in support of, black liberation.<sup>118</sup> Like no other political movement, the fight for racial equality has led to disproportionate arrests, police-initiated violence,<sup>119</sup> and widespread attempts to silence protests and mass gatherings.<sup>120</sup> This is why so many seminal cases addressing the right to protest and be critical of the government arise out of the civil rights movement. For example, in *Shuttlesworth v. City of Birmingham*, the Supreme Court declared unconstitutional an ordinance requiring a permit to conduct a parade after Reverend Shuttlesworth was arrested for leading a peaceful march out of a church and into the street.<sup>121</sup> In *NAACP v. Button*, a Virginia statute was struck down that prohibited the NAACP from political advocacy.<sup>122</sup> Additionally, the Court in *N.Y. Times Co. v. Sullivan* found a newspaper advertisement denouncing racist policing practices in Alabama to be protected from civil liability under the First Amendment.<sup>123</sup>

The First Amendment lessons these cases impart are of ongoing importance today. *Shuttlesworth*, for example, teaches that public safety does not provide a constitutionally sufficient basis for suppressing protected political expression.<sup>124</sup> More specifically, the Supreme Court remarked in *Shuttlesworth*:

It is argued, however, that what was involved here was not “pure speech,” but the use of public streets and sidewalks, over which a municipality must rightfully exercise a great deal of control in the interest of traffic regulation and public safety. That, of course, is true . . . “Governmental authorities have the duty and responsibility to keep their streets open and available for movement.” But our decisions have also made clear that picketing and parading may nonetheless constitute methods of expression, entitled to First

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<sup>118</sup> See generally Chris Robé, *Criminalizing Dissent: Western State Repression, Video Activism, and Counter-Summit Protests*, 57 FRAMEWORK: J. CINEMA & MEDIA 161, 163–64 (2016) (describing the history and evolution of police responses to incidents of social protest).

<sup>119</sup> See, e.g., *Cox v. Louisiana*, 379 U.S. 559, 575–76 (1965) (Black, J., dissenting) (describing police use of tear gas to break up nonviolent civil rights protest).

<sup>120</sup> *Id.* at 561 (describing statutes enacted by different states that restricted peaceful assembly in certain circumstances).

<sup>121</sup> See *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 159 (1969).

<sup>122</sup> *NAACP v. Button*, 371 U.S. 415, 444 (1963).

<sup>123</sup> *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 292 (1964).

<sup>124</sup> *Shuttlesworth*, 394 U.S. at 1523.

Amendment protection. “Whenever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions . . .”

*Even when the use of its public streets and sidewalks is involved, therefore, a municipality may not empower its licensing officials to roam essentially at will, dispensing or withholding permission to speak, assemble, picket, or parade according to their own opinions regarding the potential effect of the activity in question on the “welfare,” “decency,” or “morals” of the community.*<sup>125</sup>

In *N.Y. Times Co. v. Sullivan*, the Court reiterated the idea that the protection of free speech on matters of political concern actually forestalls crime and disorder by providing a lawful path for democratic participation, an idea advanced by Professor Thomas Emerson in his seminal writings on the First Amendment one year earlier.<sup>126</sup>

*Cox v. Louisiana*, a case decided fifty-five years ago, is particularly instructive now.<sup>127</sup> In *Cox*, a group of students marched from a university campus to the town courthouse to protest the arrest of individuals who picketed stores with segregated lunch counters.<sup>128</sup> One of the march’s organizers was charged with disturbing the peace because the students failed to disperse when ordered to leave the streets by police officers.<sup>129</sup> The law with which the organizer was charged labeled congregating with other people after being told to disperse by a police officer as a criminal offense.<sup>130</sup> As applied to the speech in question, the Court held that the statute violated the First Amendment because it was used to silence protected expression.<sup>131</sup> In doing so, the Court observed that “the opinions which the students were peaceably expressing were sufficiently opposed to the views of the majority

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<sup>125</sup> *Id.* at 152–53 (emphasis added) (internal citations omitted).

<sup>126</sup> See *N.Y. Times*, 376 U.S. at 270 (citing *Whitney v. California*, 274 U.S. 357, 375–76 (1927) (Brandies, J., concurring)) (“Those who won our independence believed . . . that public discussion is a political duty . . . [T]hey knew that *order cannot be secured merely through fear of punishment for its infraction*; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that *the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies . . .*) (emphasis added); Thomas Emerson, *Toward a General Theory of the First Amendment*, 72 *YALE L.J.* 877, 884–45 (1963) (“[R]esistance to the political order is unlikely to reach the stage of disorder unless a substantial section of the population is living under seriously adverse or discriminatory conditions.”).

<sup>127</sup> *Cox v. Louisiana*, 379 U.S. 536 (1965).

<sup>128</sup> *Id.* at 538–39.

<sup>129</sup> *Id.* at 543–44.

<sup>130</sup> *Id.* at 544.

<sup>131</sup> *Id.* at 552.

of the community to attract a crowd and necessitate police protection,” and that any police response was necessitated not by virtue of the protests, but instead because of “hostility” to its message.<sup>132</sup> In other words, *Cox* stands for the proposition that speech cannot be silenced merely because its opponents may react negatively or violently, a point that is particularly true in cases involving racial dynamics.<sup>133</sup>

### A. The False Speech-Crime Dichotomy

Current governmental attempts to criminalize and punish protestors must be viewed against our country’s long-standing history of passing laws and arresting individuals aligned with the civil rights movement. In each of the instances discussed in Part II of this article, the government does not dispute—nor could it—that its actions are being applied to criminalize those individuals engaged in peaceful protest and to silence and chill their expression. In fact, with respect to the Tennessee law at least, the government has been forthcoming with its specific intent to silence voices in support of black liberation.<sup>134</sup>

One justification the government consistently advances when criminalizing or punishing expression associated with the Black Lives Matter movement is public safety. It argues that protests should be silenced because they are a distraction for law enforcement officers trying to arrest a very small number of individuals engaged in property damage.<sup>135</sup> In advancing this interest, cities contend that the presence of protestors engaged in constitutionally-protected expression thwarts their ability to locate and arrest people committing crimes.<sup>136</sup> Stated another way, by silencing those engaged in political expression and sending them home, law enforcement alleges it will have an easier time identifying the small minority of people who engage in vandalism in addition to peaceful protesting.<sup>137</sup>

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<sup>132</sup> *Id.* at 551.

<sup>133</sup> *See id.*

<sup>134</sup> *See supra* Section II(A)(2).

<sup>135</sup> *See, e.g.*, Brief of Plaintiff at 29, *State v. Oden*, (Hamilton Cty. Mun. Ct. 2020) (No. 20/CRB/10093).

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

<sup>137</sup> *Id.* This argument ignores the fact that, for some individuals, vandalism and other destruction of property is itself a form of protest. It is a statement that peaceful attempts to call attention to the pervasive problem of racism and racist policing have fallen on deaf ears. It conveys a message of frustration, disenfranchisement, oppression, and marginalization. In many ways, throwing a brick through a window or lighting a fire speaks louder than a slogan on a poster. It causes observers otherwise inclined to ignore peaceful pleas for change to stop and turn their heads for the first time. In the words of Dr. Martin Luther King, Jr., “a riot is the language of the unheard.” *See September 27, 1966: MLK—A Riot is the Language of the Unheard*, 60 MINUTES (Mar. 15, 2018), [https://www.youtube.com/watch?v=\\_K0BWXjv5s](https://www.youtube.com/watch?v=_K0BWXjv5s)

This hierarchical value judgment—in which protected free speech is subjugated to arresting those accused of crime—runs exactly opposite of the First Amendment, which places core political expression at the point of highest protection in our constitutional framework.<sup>138</sup> Case after case—including those involving the exact kind of political protests at issue here—makes clear that the government’s generic interest in promoting public safety and preventing crime takes a backseat to the fundamental right of free speech protected by the First Amendment.<sup>139</sup> Without a doubt, political expression and democratic debate are deserving of the most fundamental and stringent protection the Constitution affords.<sup>140</sup> As a result, the government cannot silence protected expression because it makes punishing crime more difficult or complicated for law enforcement.<sup>141</sup> The government, however, argues the opposite: that speech must be silenced so that crime can be stopped.<sup>142</sup> The First Amendment unquestionably rejects this approach.<sup>143</sup>

Thus, while it is true the government retains a generalized interest in promoting public safety, it is not the case that its interest in preventing and punishing crime supports the criminalization and suppression of speech. Rather, a more narrowly tailored solution to the problem of isolated crime occurring within the context of a protest would be to enforce existing criminal laws targeting that criminal behavior.<sup>144</sup> Moreover, to the extent cities desire to reduce crime and promote public safety by enacting and enforcing curfews, their actions in criminalizing protest activities accomplish the exact opposite outcome.<sup>145</sup> By criminalizing the protests and arresting those who protest, cities across America have actually *increased* rather than prevented crime.<sup>146</sup>

As the Supreme Court counseled in *Cox* and *Free Speech Coalition*, the government cannot transform lawful, constitutionally-protected expression into a crime merely because of the risk that other criminal activity may be

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[<https://perma.cc/D28E-2RDN>] (cataloging Dr. King’s statements on violence by civil rights protestors).

<sup>138</sup> Elvin Egemenoğlu, First Amendment, CORNELL L. SCH., [https://www.law.cornell.edu/wex/first\\_amendment](https://www.law.cornell.edu/wex/first_amendment) [<https://perma.cc/6FE8-AL25>] (last updated Mar. 2020).

<sup>139</sup> See, e.g., *Shuttlesworth v. City of Birmingham*, 394 U.S. at 153 (“Even when the use of its public streets and sidewalks is involved, therefore, a municipality may not empower its licensing officials to roam essentially at will, dispensing or withholding permission to speak, assemble, picket, or parade.”).

<sup>140</sup> *Id.*

<sup>141</sup> See *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 254–55 (2002) (“The argument, in essence, is that protected speech may be banned as a means to ban unprotected speech. This analysis turns the First Amendment upside down.”).

<sup>142</sup> *Id.* at 252–53.

<sup>143</sup> *Id.* at 254.

<sup>144</sup> See *id.* 250–53.

<sup>145</sup> See *supra* notes 68–70 (documenting hundreds of arrests in various cities for individuals violating curfew laws at Black Lives Matter protests).

<sup>146</sup> See *supra* notes 68–70.

hard to police or may go unapprehended.<sup>147</sup> Contrary to the crime-creating and speech-punishing measures imposed during the summer of 2020, the First Amendment recognizes that, “[T]he path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies . . . .”<sup>148</sup> Whatever interest state and local governments may have with respect to the summer 2020 protests, it does not support converting the fundamental right of free speech into a crime.

### B. First and Fourteenth Amendment Tension

One additional problem presented by governmental regulation of the Black Lives Matter protests is the lack of consideration given to content-motivated restrictions on black expression.<sup>149</sup> This problem is certainly not new. Scholars have written for years about whether and why the First Amendment should embody the equality principle advanced by the Fourteenth Amendment’s Equal Protection clause.<sup>150</sup> These scholars, however, argue the Fourteenth Amendment should be employed as a method of enabling governmental restrictions on speech which advocates for or would advance the kind of racial inequality prohibited by the notion of equal protection.<sup>151</sup> The equality principle they advance focuses on limiting speech, rather than limiting acts of government.<sup>152</sup>

The Fourteenth Amendment, however, can also be viewed as a limitation on governmental regulation of speech based on race. Where speech limitations are motivated by a desire to suppress content based on the racial identity of the speaker or the advocacy of racial equality, the Equal Protection Clause boosts the constitutional protection afforded to the underlying expression.<sup>153</sup> The Supreme Court suggested as much in *Reed v. Town of Gilbert*, when it observed that facially neutral speech regulations may reflect an unconstitutional content preference by favoring certain speakers over

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<sup>147</sup> See *Cox v. Louisiana*, 379 U.S. 559, 574 (1965); see also *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 255 (2002).

<sup>148</sup> *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandies, J., concurring).

<sup>149</sup> See, e.g., John A. Powell, *Worlds Apart: Reconciling Freedom of Speech and Equality*, 85 KY. L.J. 9, 11–12 (1996–97).

<sup>150</sup> *Id.* at 81–83.

<sup>151</sup> *Id.* at 54–55; see also Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 442–43 (1990) (arguing that the Fourteenth Amendment limits the First Amendment right to engage in racist speech).

<sup>152</sup> Lawrence, *supra* note 151 (arguing that “white supremacists’ . . . speech is forbidden by the equal protection clause”).

<sup>153</sup> See *Reed v. Town of Gilbert*, 576 U.S. 155, 169–70 (2015).

others.<sup>154</sup> Indeed, “[S]peech restrictions based on the identity of the speaker are all too often simply a means to control content.”<sup>155</sup>

Content-motivated regulations—like those employed by cities across the country in response to the summer 2020 protests—place marginalized speakers at further risk of racial discrimination. In these instances, the government’s racial animus removes these regulations from the realm of legitimacy and violate both the First and Fourteenth Amendments.

#### IV. CONCLUSION

Alicia Garza’s love letter to black people spoke poignantly to the inherent value of black lives. Her phrase “Black Lives Matter” has had such enduring power that it has come to define the nearly decade-long movement that has touched practically every city in America and has spoken powerfully and consistently against the problem of police brutality. Its roots are in language, and its power is in communication to vast audiences around the world.

If Black Lives Matter, and they do, it stands to reason that black speech also matters. Far too often in our nation’s history, speech by, about, and in support of black people has been the subject of governmental interference, censorship, and criminalization. The events of the summer of 2020 have added a new chapter to the longstanding suppression of black perspectives on matters of social injustice. These events have brought into focus the need for legal reform, not only in how our police encounter black individuals, but also in how our First Amendment jurisprudence both embraces and excludes racial equality. Speech is not a crime, and the First Amendment ought to explicitly say so. As a matter of constitutional values, speech is more important than solving crime, a principle the First Amendment clearly embodies. Black speech—like so many other aspects of black existence—is particularly susceptible to governmental suppression and criminalization, in violation of both the First and Fourteenth Amendments. As a starting point for black liberation, our constitutional doctrine should embrace the notion that black speech matters too.

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<sup>154</sup> *Id.* at 170.

<sup>155</sup> *Id.*