

The First Amendment Freedom of Assembly as a Racial Project

Justin Hansford

ABSTRACT. Beginning with the author's own experience of being arrested as a legal observer during a 2014 protest in Ferguson, Missouri, this Essay explores the fragile protection provided by the freedom of assembly for those who fight for racial justice. The Essay rejects free speech proponents' reliance on the First Amendment's ostensibly instrumental role during the civil rights movement to protect hate speech today. Instead, it demonstrates how authorities have always chilled civil rights speech more than white supremacist speech, contextualizing cases from the civil rights era as examples of occasional exceptions made during short intervals of interest convergence. The Essay then goes on to examine the contemporary administration of freedom of assembly norms, asserting that law enforcement continues to undermine the rights of racial justice protesters on the street and through surveillance, in contrast to its response to white nationalist speech and movements. The Essay calls for a more nuanced approach to freedom of assembly issues that both moves beyond interest convergence and considers human rights standards that affirm both the First and Fourteenth Amendment values of human dignity, public safety, and freedom of expression.

The 2014 protests in Ferguson, Missouri, ushered in our contemporary racial justice movement. I was living in Saint Louis during Ferguson October,¹ providing legal support to the protesters. On October 13, 2014, while serving as

1. Ferguson October is the umbrella term for a series of activist-organized actions intended to show solidarity with those who had been arrested in the city for noncompliance with St. Louis's Police Department. Many had come to see the city's police as morally compromised in the months following the death of Michael Brown. See Jelani Cobb, *Ferguson October: A Movement Goes on Offense*, NEW YORKER (Oct. 15, 2014), <http://www.newyorker.com/news/news-desk/ferguson-october> [<http://perma.cc/U5Z8-YPN6>].

a legal observer during the protests for John Crawford, a twenty-two year old Black man² who had been killed at a Walmart just two months prior, I was arrested.³

Earlier that summer, a frightened Walmart shopper called 911 after seeing Crawford pick up a BB gun off the rack.⁴ The police arrived within minutes and shot Crawford on sight.⁵ Though the police said that they had given Crawford multiple warnings before opening fire, Walmart refused to release the security surveillance footage for weeks. When the video was finally released, it revealed that the police gave no warning.⁶ No charges were brought against the police officers who killed Crawford.⁷

Crawford's story poked at my gut. At the protest for Crawford, I wore a neon green hat labeled with the words "legal observer" and had my phone on re-

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2. As with the names for other cultures, ethnicities, and groups of people, I capitalize "Black" when referring to people of the African diaspora. See generally Lori L. Tharps, *The Case for Black with a Capital B*, N.Y. TIMES (Nov. 18, 2014), <http://www.nytimes.com/2014/11/19/opinion/the-case-for-black-with-a-capital-b.html> [<http://perma.cc/34RG-63D9>] (arguing for the capitalization of the B in "Black").
 3. Nisha Chittal, *Cops Shoot and Kill Man Holding Toy Gun in Wal-Mart*, MSNBC (Aug. 9, 2014, 5:16 PM), <http://www.msnbc.com/msnbc/cops-shoot-and-kill-man-holding-toy-gun-walmart> [<http://perma.cc/7UK2-FGL7>].
 4. Elahe Izadi, *Ohio Wal-Mart Surveillance Video Shows Police Shooting and Killing John Crawford III*, WASH. POST (Sept. 25, 2014), <http://www.washingtonpost.com/news/post-nation/wp/2014/09/25/ohio-wal-mart-surveillance-video-shows-police-shooting-and-killing-john-crawford-iii> [<http://perma.cc/SN42-NE26>].
 5. *Id.*
 6. See *Ohio Walmart CCTV Captures John Crawford Shooting – Video*, GUARDIAN (Sept. 24, 2014, 8:03 PM), <http://www.theguardian.com/world/video/2014/sep/25/ohio-shooting-walmart-video> [<http://perma.cc/K2UL-SMRR>]. Soon after, the police questioned Crawford's girlfriend Tasha Thomas. They threatened her with jail time, and suggested that she was high on drugs. After the detectives reduced her to tears they replied to her inquiry about her loved one's whereabouts, stating, "As a result of his actions, he is gone." Thomas then fell into her chair and wept. Jon Swaine, *Video Shows John Crawford's Girlfriend Aggressively Questioned After Ohio Police Shot Him Dead*, GUARDIAN (Dec. 14, 2014, 2:42 PM), <http://www.theguardian.com/us-news/2014/dec/14/john-crawford-girlfriend-questioned-walmart-police-shot-dead> [<http://perma.cc/F9L6-58W7>]. A month later, she also passed away, after riding in a car that struck a pole at high speed on New Year's Day. Jon Swaine, *Girlfriend of John Crawford, Man Killed by Police in Walmart, Dies in a Car Crash*, GUARDIAN (Jan. 2, 2015, 1:42 PM), <http://www.theguardian.com/us-news/2015/jan/02/girlfriend-john-crawford-dies-car-crash-tasha-thomas> [<http://perma.cc/3JCU-F7M7>].
 7. Associated Press, *John Crawford III Case: Feds Announce No Charges for Officer in Fatal 2014 Shooting*, NBC NEWS (July 12, 2017, 9:40 AM), <http://www.nbcnews.com/news/us-news/john-crawford-iii-case-feds-announce-no-charges-officer-fatal-n782091> [<http://perma.cc/98AX-2XDS>].

ording mode.⁸ Shortly after the police arrived, the manager of the 24-hour Walmart closed the store. Simply by standing in the store after it was closed, we became “trespassers” in the eyes of the law. Immediately, a police officer came up behind me, jerked my arms behind my back, and handcuffed me. I asked, “What did I do?” the officer replied, “Shut up!” He then shoved me out of the store and headfirst into the squad car, the metal handcuffs pinching my wrists. There were other legal observers also standing next to me in the store, but I was the only Black one, and I was the only one that was arrested. I sat inside the squad car bent sideways and sitting on one leg as the protesters outside continued to chant, beat their drums, and take camera phone pictures. The cop looked at me in the rearview mirror with indifference. The legal observer hat that was supposed to serve as my armor against arrest had fallen off and was lost.

I spent the night in jail, and I was released in time to teach my torts class the following day. While I had already found community and solidarity among the Ferguson protesters, after my arrest, I became even more personally involved in the movement.

In the aftermath of my arrest, I received a number of hateful and offensive messages from people around the country who opposed the Black Lives Matter protests. I received suspicious packages, threatening calls, and social media harassment, particularly after I spoke out in support of the Ferguson protesters while appearing on Fox News.⁹ The FBI paid an unannounced visit to my office, and I began to take up the habit of keeping my office door closed and locked in case someone entered the building with a weapon. In the fall of 2014, my tenure review had not yet been completed, so I feared my professional career and progress towards tenure would be adversely affected.

The entire protest had been livestreamed, leaving few facts in doubt. The initial recommended plea offer from the prosecutor for our trespass indictment was two years of probation and a lifetime ban from all Walmart stores around the country. Alternatively, if we went to trial, we faced a not-insignificant amount of jail time. Ultimately, confronted with the prospect of a prison sen-

8. “Legal observers” are typically members of the legal community who volunteer to observe events and activities in which citizens are exercising their rights to protest under the First Amendment. The role of the legal observer is to record any incidents of unconstitutional interference or practices by the police during such activities. Information that is gathered is submitted to volunteer attorneys who can advocate on behalf of any persons that may have been arrested or otherwise treated unlawfully. The Legal Observer program was developed by the National Lawyers Guild and utilizes neon-green hats as their signature identifier. *Legal Observer Training Manual*, NAT’L LAW. GUILD 1, 3 (2003), http://www.sds-1960s.org/sds_wuo/nlg/LO_Manual.pdf [<http://perma.cc/77FD-5GGR>].

9. *Ferguson Community Braces for Grand Jury Decision*, FOX BUS. (Nov. 20, 2014, 5:49 PM), <http://video.foxbusiness.com/v/3900628559001> [<http://perma.cc/8JZM-FW3F>].

tence if convicted, I, along with the other protesters, chose to accept a further negotiated plea of community service. I remain ambivalent about our choice.¹⁰

In addition, my experience with law enforcement revealed the unequal protections of the First Amendment. With respect to hate speech, critical race theorists Richard Delgado and Jean Stefancic have stated that the First Amendment “has sparked continual interest because it lies at the heart of two of our deepest values—civil rights and equal respect, on the one hand, and freedom of speech on the other.”¹¹ I emerged from Ferguson with less confidence in our society’s willingness to justly balance these values under the First Amendment. While my experience of challenging police violence increased my admiration for the political dissidents and racial justice protestors who stared down greater risks than I did—and who did so with more courage than I exhibited.¹² Before Ferguson, I had criticized twentieth-century African-American civil rights advocates for failing to take full advantage of the Holmesian “marketplace of ideas,”¹³ particularly as it pertained to their unsavory and even complicit behavior in the face of the state suppression of Pan-African social movements, most notably the activism of Marcus Garvey.¹⁴ But the three years since my arrest have exposed my naiveté. No such marketplace of ideas on race exists. When ideas on race that would disrupt the racial hierarchy of white over Black emerge, the First Amendment is disproportionately applied to trample that dissent.

Critical race theory scholars have long articulated the First Amendment’s extraordinarily blunt and hypocritical approach to addressing racial issues.¹⁵

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10. I often wonder whether going to trial and further politicizing Wal-Mart’s complicity in shielding law enforcement from accountability in John Crawford’s case would have facilitated a boycott or another significant conversation about corporate America’s complicity in racialized state violence.
 11. RICHARD DELGADO & JEAN STEFANCIC, *UNDERSTANDING WORDS THAT WOUND* 2 (2004).
 12. *Cf.* CHRISTOPHER HITCHENS, *LETTERS TO A YOUNG CONTRARIAN* 1 (2001) (“The noble title of ‘dissident’ must be earned rather than claimed; it connotes sacrifice and risk rather than mere disagreement, and it has been consecrated by many exemplary and courageous men and women.”). Nelson Mandela is perhaps the exemplar in terms of political prisoners who, in the service of the struggle for racial justice, went to jail for time periods measured in years and decades, not hours.
 13. *See* *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (“But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.”).
 14. *See* Justin Hansford, *Jailing a Rainbow: The Marcus Garvey Case*, 1 *GEO. J.L. & MOD. CRIT. RACE PERSP.* 325, 333-35 (2009).
 15. *See, e.g.*, Richard Delgado, *Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 *HARV. C. R.-C. L. L. REV.* 133 (1982) (arguing that despite the obstacles

They have demonstrated that the courts protect racially discriminatory hate speech while denying similar protection to hate speech that harms the powerful. For example, courts have allowed tort libel claims to succeed against speech that harms the reputation of the wealthy who can afford to bring a civil suit,¹⁶ while, with few exceptions, blocking tort libel claims for racial epithets and slurs against the racially subordinated.¹⁷ This Essay will demonstrate this same pattern extends to the enforcement of the First Amendment freedom of assembly.

To many, the First Amendment stands out as the central example of American legal exceptionalism, the foundation for all our other freedoms.¹⁸ If so, perhaps what the First Amendment suggests about American identity should not inspire us, but rather outrage us.

The First Amendment in the popular imagination purports to protect almost all species of dissent, irrespective of political content. Purportedly, protestors in both Charlottesville¹⁹ and Ferguson enjoy its protections. A University of Florida gathering organized by Richard Spencer supporting racial hierarchy can lay claim to the same First Amendment freedom of assembly protections as a University of Missouri gathering by #ConcernedStudents1950 demonstrators in opposition to racial hierarchy.²⁰ This doctrine seems impartial in theory. In

created by *Skokie*, courts should create a new tort for victims of hate speech); Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431 (rejecting full protection of racist speech under the First Amendment and discussing how other constitutional values require the regulation of racial epithets); Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989) (arguing that the First Amendment doctrine protection of hate speech selectively considers the speaker's story at the expense of the speech's victims).

16. See, e.g., Amanda Ciccateci, *6 Most Successful Celebrity Libel and Slander Cases*, LAW.COM (Nov. 18, 2014), <http://www.law.com/insidecounsel/2014/11/18/6-most-successful-celebrity-libel-and-slander-case> [<http://perma.cc/4UTL-F9KG>].
17. For a discussion of this topic, see Martha Chamallas, *Discrimination and Outrage: The Migration from Civil Rights to Tort Law*, 48 WM. & MARY L. REV. 2115 (2007) (describing the historically ambivalent and contemporarily mixed stance of courts on the issue of labeling racial slurs as outrageous enough to qualify as intentional infliction of emotional distress).
18. See, e.g., Richard Delgado, *About Your Masthead: A Preliminary Inquiry into the Compatibility of Civil Rights and Civil Liberties*, 39 HARV. C.R.-C.L. L. REV. 1, 5 (2004) ("Occasionally, one hears that it is the First Amendment that makes America the most prosperous, freest, most generous country in the world . . ."); Frederick Schauer, *The Exceptional First Amendment*, in AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS 29 (Michael Ignatieff ed., 2005).
19. Richard Fausset & Alan Feuer, *Far-Right Groups Surge into National View in Charlottesville*, N.Y. TIMES (Aug. 13, 2017), <http://www.nytimes.com/2017/08/13/us/far-right-groups-blaze-into-national-view-in-charlottesville.html> [<http://perma.cc/Y34D-C3S6>].
20. Anemona Hartocollis, *University of Florida Braces for Richard Spencer*, N.Y. TIMES (Oct. 17, 2017), <http://www.nytimes.com/2017/10/17/us/florida-richard-spencer.html> [<http://perma.cc/YS26-PTTM>]; Elahe Izadi, *The Incidents That Led to the University of Missouri President's*

practice, speakers who have opposed racial hierarchy have faced harsher treatment from authorities than those who have supported it. I argue therefore that the First Amendment is a racial project²¹: it results in predictable racialized outcomes that redistribute resources along racial lines. I do not base this claim on cynicism or disillusionment; the conclusion follows logically from a cold analysis of the history and the jurisprudence.

For example, antiracist protesters from Selma to Ferguson to Mizzou have generally faced harsh sanctions through the use of tear gas, tanks, physical threats, and economic threats.²² Meanwhile, from Skokie to Charlottesville to the university campuses that have recently hosted events featuring speakers such as Richard Spencer and Milo Yiannopoulos, we see authorities providing expensive accommodation to white supremacists, eagerly or reluctantly—even if they come heavily armed with guns and other weapons and espouse violence in the city square, even if security costs balloon into the hundreds of thousands of dollars.²³ No law has limited how much universities and cities spend to accommodate hate speech, or what precise level of danger outweighs their per-

Resignation, WASH. POST (Nov. 9, 2015), <http://www.washingtonpost.com/news/grade-point/wp/2015/11/09/the-incidents-that-led-to-the-university-of-missouri-presidents-resignation> [http://perma.cc/BH87-2WRV].

21. For more on racial projects, see Devon W. Carbado and Cheryl I. Harris, *The New Racial Preferences: Rethinking Racial Projects*, in RACIAL FORMATION IN THE TWENTY-FIRST CENTURY 183 (Daniel Martinez HoSang, Oneka LaBennet, and Laura Pulido eds., 2012).
22. See, e.g., Tyler Kingkade, *Missouri Lawmakers Push to Punish Mizzou Because Students Protested*, HUFFINGTON POST (Feb. 12, 2016, 3:40 PM), http://www.huffingtonpost.com/entry/missouri-lawmakers-mizzou-student-protest_us_56be1eb4e4b08ffac124ff95 [http://perma.cc/U82K-CGW9]; Roy Reed, *Alabama Police Use Gas and Clubs to Route Negroes*, N.Y. TIMES, Mar. 8, 1965, at A1.
23. On the police responses to protests, see Ron Grossman, ‘Swastika War’: *When the Neo-Nazis Fought in Court To March in Skokie*, CHI. TRIB. (Mar. 10, 2017, 1:01 PM), <http://www.chicagotribune.com/news/opinion/commentary/ct-neo-nazi-skokie-march-flashback-perspec-0312-20170310-story.html> [http://perma.cc/WHF4-5GED]; Michael D. Regan, *White Nationalists Return to Protest at Charlottesville Park*, PBS (Oct. 8, 2017, 2:03 PM), <http://www.pbs.org/newshour/rundown/white-nationalists-return-protest-charlottesville-park-scene-august-violence> [http://perma.cc/BPU2-G9XH]; *Richard Spencer Speech at Florida Campus Sparks Mass Protest*, BBC NEWS (Oct. 20, 2017), <http://www.bbc.com/news/world-us-canada-41683713> [http://perma.cc/27KM-6KAK]. On the costs of these protest responses, see Jennifer Calfas, *How Much White Nationalist Richard Spencer Is Costing the University of Florida*, MONEY (Oct. 18, 2017), <http://time.com/money/4987460/how-much-white-nationalist-richard-spencer-is-costing-the-university-of-florida> [http://perma.cc/B3MC-GHPS]; Vernon Freeman, Jr., *Charlottesville Police Response to KKK Rally Cost City Nearly \$30,000*, CBS 6 NEWS (Aug. 2, 2017), <http://wtvr.com/2017/08/02/Charlottesville-police-response-to-kkk-rally-cost-city-nearly-33000> [http://perma.cc/YZM8-9RFT]; Aaron Hanland, *What Stunts Like Milo Yiannopoulos’s ‘Free Speech Week’ Cost*, N.Y. TIMES (Sept. 24, 2017), <http://www.nytimes.com/2017/09/24/opinion/milo-yiannopoulos-free-speech-week-berkeley.html> [http://perma.cc/7SCM-57AZ].

ceived need to accommodate hate speech. In fact, the state and university decisions to provide heightened protection for racist speech and not for antiracist speech sends a message in and of itself.²⁴ My concern is that the First Amendment as applied today will do worse than bankrupt the wallets of our cities and universities – it stands to bankrupt our souls.

In this Essay, I explore the de facto racial inflection of the First Amendment’s limited protection of the freedom of assembly. In Part I, I provide a counter to the stock narrative of the First Amendment in the twentieth century, demonstrating how – rather than playing a completely supportive role during civil rights protests – the First Amendment typically did not provide as much protection to racial dissent as it did to white supremacist gatherings. In other words, civil rights speech has always been chilled by authorities more than white supremacist speech, with only short intervals of interest convergence²⁵ providing an occasional exception. In Part II, I contextualize and compare the contemporary administration of the First Amendment, reviewing in Section II.A both the street level enforcement of unlawful assembly laws in Ferguson and the FBI decision to engage in surveillance of protesters under the “Black Identity Extremist” (BIE) designation. In Section II.B, I contrast the treatment of antiracist speech in II.A to the First Amendment protections asserted for Unite the Right in Charlottesville and Milo Yiannopoulos’s Free Speech Week. In Part III, I search for solutions that may provide a way forward, arguing that by applying a more nuanced approach to freedom of assembly issues that evolves beyond interest convergence and considers human rights standards that affirm the values of human dignity, public safety, and freedom of expression, we might have a better hope of creating a healthy, pluralist, and egalitarian society in which our highest angels of free speech do not fall prey to our lowest demons of racial oppression.

I. THE HISTORICAL APPROACH TO FREEDOM OF ASSEMBLY AND RACE

The First Amendment, incorporated to the states by the Fourteenth Amendment, provides that “Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble, and to petition the Government for a

24. Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim’s Story*, in *WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT* 48 (Mari J. Matsuda et al. eds., 1993) (“[T]olerance and protection of hate group activity by the government is a form of state action . . . to provide police protection and access to public facilities, streets, and college campuses for such a group means that the state is promoting racist speech.”).

25. For a discussion on interest convergence, see *infra* note 37 and accompanying text.

redress of grievances.”²⁶ As this Part demonstrates, the First Amendment freedom of assembly has historically been denied to Blacks, both in a de facto and de jure manner. First Amendment jurisprudence is perhaps best understood through the lens of the realpolitik of the moment, revealing that the goals and rhetorical stances of the protests play an important role in helping to predict the response of the courts, the police, and other legal actors.

We know well that the drafters of the Constitution did not view Black Americans as part of “We the People” at the time of the First Amendment’s drafting. So it is not surprising that prior to the Civil War, the assembly of Blacks was highly regulated, if not completely restricted. As early as the seventeenth century, enslavers enacted “slave codes,” laws designed to stifle the ever-present fear of an uprising by eliminating any notion of the freedom of assembly for the enslaved. A 1680 Virginia law stated, “[N]o Negro or slave may carry arms . . . nor go from his owner’s plantation without a certificate and then only on necessary occasions; the punishment twenty lashes on the bare back, well laid on.”²⁷ These slave codes were enforced by slave patrols, white men deputized to prevent rebellions by stopping any enslaved people who happened to be on the roads, searching them, and preventing them from congregating; some consider these slave patrols to be the precursor to modern American policing.²⁸ Despite these literal roadblocks, enslaved people constantly escaped and rebelled, facing merciless and violent punishment when caught.²⁹ This violence included techniques such as branding, maiming, and castration.³⁰

After the uprising led by Nat Turner, perhaps the most famous of the slave insurrections, many states enacted laws forbidding Blacks to possess or read any books, own any weapons, hold any religious meetings, or to attend any gatherings whatsoever, upon threat of lashings, hangings or torture.³¹ After Turner was apprehended on October 30, 1831, hundreds of innocent Blacks were tortured and murdered in retaliation for the revolt, while Turner was

26. U.S. CONST. amend. I.

27. A. LEON HIGGINBOTHAM, JR., IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS 39 (1978) (quoting Act X, 1680).

28. See generally, PAUL BUTLER, CHOKEHOLD: POLICING BLACK MEN (2017); Victor E. Kappeler, *A Brief History of Slavery and the Origins of American Policing*, E. KY. UNIV. POL’Y STUD. ONLINE (Jan. 7, 2014), <http://plsonline.eku.edu/insideloook/brief-history-slavery-and-origins-american-policing> [<http://perma.cc/72SY-8VJP>].

29. Howard Zinn, *1619-1741: Slavery and Slave Rebellion in the US*, LIBCOM.ORG (Feb. 21, 2011, 3:09 PM), <http://libcom.org/history/1619-1741-slavery-slave-rebellion-us> [<http://perma.cc/HN2Z-5N2C>].

30. HIGGINBOTHAM, JR., *supra* note 27, at 177.

31. See HERBERT APTHEKER, AMERICAN NEGRO SLAVE REVOLTS 308-324 (3d ed. 1974).

hanged, skinned, and beheaded.³² Fugitive slave laws contributed to the Supreme Court's declaration that Black Americans had no constitutional rights in the infamous *Dred Scott* case, argued on the trial level about twenty minutes away from Ferguson in downtown St. Louis.³³ All of these laws, in effect during the seventeenth, eighteenth, and nineteenth centuries, explicitly infringed on Blacks' freedom of assembly.

Post-Civil War, all Americans qualified for de jure First Amendment protections. However, the founding of the Ku Klux Klan, the constant specter of lynchings, and the refusal of law enforcement officials to protect Black citizens from these acts of terror ensured that the newly freed would have little opportunity to exercise their First Amendment rights.³⁴ As the twentieth century reached the halfway mark, the landmark case *Brown v. Board of Education* promised to alter the racial landscape by providing a tangible improvement in access to rights for Blacks, including those rights guaranteed by the First Amendment. Critical race theorist Charles R. Lawrence III would later argue that *Brown v. Board of Education* itself was a First Amendment "group defamation" case,³⁵ essentially taking the position that the intervention of *Brown* was to regulate the racist speech of segregation itself. The Court, in the tradition of *Beauharnais v. Illinois*,³⁶ essentially acknowledged that the hate speech message of segregation was so stigmatizing to Black children that southern schools did not have the right to engage in it. This interpretation could have been extended to protect all people of color from racial slurs. Instead, *Brown* came to represent a First Amendment freedom more honored in the breach. As nullification and interposition spread, frustrated Blacks began to organize the burgeoning civil rights movement against the enduring hate speech of segregation. Due to the legacy of disregarding Blacks' First Amendment rights, the civil rights movement could not simply seek protection of an already equally applied First Amendment. Instead, the civil rights movement

32. See SCOT FRENCH, *THE REBELLIOUS SLAVE: NAT TURNER IN AMERICAN MEMORY* 81-86, 278-79 (2004); see also NAT TURNER, *THE CONFESSIONS OF NAT TURNER, THE LEADER OF THE LATE INSURRECTION IN SOUTHAMPTON, VIRGINIA* (Thomas R. Gray ed., Univ. of N.C. Press 2011) (1831) (recounting the interview of Turner while in jail by wealthy Southern slaveowner Thomas R. Gray).

33. *Scott v. Sandford*, 60 U.S. 393 (1857); see *The Dred Scott Case*, NAT'L PARK SERV., <http://www.nps.gov/jeff/planyourvisit/dredscott.htm> [<http://perma.cc/6843-9KTN>] (noting that *Dred Scott* was held in St. Louis' Old Courthouse).

34. For a description of legal denial of this protection, see James Gray Pope, *Snubbed Landmark: Why United States v. Cruikshank (1876) Belongs at the Heart of the American Constitutional Canon*, 49 HARV. C.R.-C.L. L. REV. 385, 394-405 (2014).

35. See Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 462-66.

36. Matsuda, *supra* note 24, at 75.

can be re-understood as an effort to have the First Amendment equally applied for the first time, as Blacks sought protection from segregation's hate speech in a manner that balanced dignity and freedom of speech interests.

The theory of interest convergence explains why the Supreme Court seemed amenable to employing limited non-First Amendment protections to civil rights protesters during the 1950s and 60s.³⁷ Derrick Bell, the founder of critical race theory, influentially hypothesized that *Brown* itself occurred not because the Court suddenly changed positions on race issues,³⁸ but because of the Cold War competition with communism “for the loyalties of the uncommitted Third World,”³⁹ and concerns that “it would ill serve the U.S. interest if the world press continued to carry stories of lynchings, racists sheriffs, or murders like that of Emmett Till.”⁴⁰ Bell's thesis helps to explain why, in the aftermath of *Brown*, protester efforts to implement the decision in the face of interposition found resonance and resulted in decisions that favored protesters. The interests converged. And not only did desegregation make sense from the realpolitik perspective, but the civil rights movement's activism overlapped with the Court's imperative to have its rulings respected. This dynamic emerged as early as 1956 in *NAACP v. Alabama ex rel. Patterson*, when the Court, in full knowledge of the NAACP's mission to enforce *Brown*, reaffirmed the “close nexus between the freedoms of speech and assembly,” ruling that it would be a denial of the freedom of association rights of the NAACP members to unmask their names and addresses to the State of Alabama.⁴¹ The Court continued to

37. The theory of interest convergence argues that civil rights advances for Blacks have always occurred alongside the promotion of the self-interest of white elites. Derrick A. Bell Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980).

38. First Amendment scholars have tended to follow the early example of Harry Kalven's *The Negro and the First Amendment* in asserting that the Warren Court “protected the civil liberties of free speech and association to promote the civil rights of racial equality.” Lillian R. BeVier, *Intersection and Divergence: Some Reflections on the Warren Court, Civil Rights, and the First Amendment*, 59 WASH. & LEE L. REV. 1075, 1075 (2002); see also HARRY KALVEN, JR., *THE NEGRO AND THE FIRST AMENDMENT* (1966) (describing the impact of the Civil Rights Movement on the First Amendment). This analysis does not adequately account for how the Court's jurisprudence turned after the mid-1960s. For extensive histories of the Civil Rights Movement, see TAYLOR BRANCH, *PARTING THE WATERS: AMERICA IN THE KING YEARS 1954–63* (1988); DAVID J. GARROW, *BEARING THE CROSS: MARTIN LUTHER KING, JR., AND THE SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE* (1986); EYES ON THE PRIZE: *AMERICA'S CIVIL RIGHTS YEARS: A READER AND GUIDE* (Clayborne Carson et al. eds., 1987).

39. Richard Delgado, *Explaining the Rise and Fall of African American Fortunes—Interest Convergence and Civil Rights Gains*, 37 HARV. C.R.-C.L. L. REV., 369, 372 (2002).

40. RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY: AN INTRODUCTION* 19 (2001).

41. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460, 466 (1958).

rule in support of the NAACP in *Bates v. City of Little Rock*,⁴² which again upheld the right of civil rights protesters to associate privately, and in *Shelton v. Tucker*,⁴³ which held an Arkansas law that mandated that all teachers file an affidavit enumerating the organizations to which they belonged over the last five years (another effort to unmask civil rights protesters) to be unconstitutional.⁴⁴

In February 1960, Black students launched a sit-in movement at a Greensboro, North Carolina lunch counter.⁴⁵ The protest tactic had already exhibited a history of success that dated at least as far back as the “ride-ins” designed to protest segregation in trains and public transit in the late nineteenth century (before *Plessy v. Ferguson* declared segregation constitutional).⁴⁶ The twentieth-century version of the sit-in protesters “attracted shouted curses and whispered support from white bystanders. Arrests and prosecutions followed . . .”⁴⁷ Protesters were arrested for trespass and unlawful assembly, the same charges that Ferguson protesters would face two generations later. The Supreme Court found methods of reversing these convictions on a range of non-First Amendment grounds; as Bell perceived in his flagship textbook *Race, Racism and American Law*, the Supreme Court’s protest decisions were “quite narrow decisions that offered little precedent or encouragement for future protest.”⁴⁸ The first sit-in case to reach the Supreme Court, *Boynnton v. Virginia*,⁴⁹ provides an example. The case involved a Black law student who had been convicted for trespass when he refused to leave the white section of a restaurant in the Richmond, Virginia, Trailways Bus Terminal.⁵⁰ The Court overturned the convic-

42. 361 U.S. 516 (1960).

43. 364 U.S. 479 (1960).

44. *Id.* at 490 (1960); see also L. Darnell Weeden, *Fifty Plus Years After the Start of the Civil Rights Movement: A Contextual Analysis of the Freedom of Association for the National Association for the Advancement of Colored People’s Pursuit of Reforming the Law*, 12 FLA. COASTAL L. REV. 337, 351-54 (2011) (explaining that the Court in *Shelton* grounded freedom of association in due process, rather than the First Amendment).

45. Michele Norris, *The Woolworth Sit-In that Launched a Movement*, NPR (Feb. 1, 2008, 4:00 PM ET), <http://www.npr.org/templates/story/story.php?storyId=18615556> [<http://perma.cc/Q52N-J8XL>].

46. Cheryl I. Harris, *The Story of Plessy v. Ferguson: The Death and Resurrection of Racial Formalism*, in CONSTITUTIONAL LAW STORIES 187 (Michael C. Dorf ed., 2009); see also Blair L.M. Kelley, *Right To Ride: African American Citizenship and Protest in the Era of “Plessy v. Ferguson”*, 41 AFR. AM. REV. 347 (2007) (examining the protests against segregated transportation at the turn of the twentieth century).

47. DERRICK BELL, *RACE, RACISM, AND AMERICAN LAW* 545 (5th ed. 2004).

48. *Id.* at 546.

49. 364 U.S. 454 (1960).

50. *Id.* at 455-56.

tion not by upholding Boynton's First Amendment rights, but on public accommodation grounds, arguing that "if the bus carrier has volunteered to make terminal and restaurant facilities and services available to its interstate passengers as a regular part of their transportation . . . the terminal and restaurant must perform these services without discriminations prohibited by the [Interstate Commerce] Act."⁵¹ Cases like *Edwards v. South Carolina*,⁵² and summary orders like *Fields v. South Carolina*⁵³ and *Henry v. City of Rock Hill*,⁵⁴ followed this trend of overturning civil rights protester convictions without tangibly expanding First Amendment freedom of assembly rights.

This is how the Court managed to aid the protests without significantly expanding the scope of the freedom of assembly. We would have more protections today if the Court had overturned a conviction like Boynton's on freedom of assembly grounds. The turning point came six years after *Boynton*, in *Adderley v. Florida*,⁵⁵ when the Court began to affirm trespass convictions for racial justice protests. Petitioner Harriett Louise Adderley and thirty-one other Florida A&M University students marched to the local jail to protest racial segregation in the jail and the previous day's arrests of other protesting students.⁵⁶ The Supreme Court upheld their convictions.⁵⁷

Adderley marks an important transition, demonstrating a shift in the Court's approach to these cases. The case raised the question of whether the First Amendment freedom of assembly should provide a higher level of protection when civil disobedience is limited to laws that are themselves wrong, like segregation laws. Such a view is expressed in Justice Douglas's dissent, which seemed to assert that the protest march fell under the First Amendment's purview, regardless of the arresting charges or nature of the protest. He argues, "We do violence to the First Amendment when we permit this 'petition for redress of grievances' to be turned into a trespass action."⁵⁸

Two years later, Justice Fortas, who joined the dissent in *Adderley*, reconsidered this question. He reasoned that civil disobedience "is never justified in our nation where the law being violated is not itself the focus or target of the protest."⁵⁹ Fortas's change of heart was a synecdoche for the Court's. He now took

51. *Id.* at 460.

52. 372 U.S. 229 (1963).

53. 375 U.S. 44 (1963).

54. 376 U.S. 776 (1964).

55. 385 U.S. 39 (1966).

56. *Id.* at 40.

57. *Id.* at 48.

58. *Id.* at 52 (Douglas, J., dissenting).

59. ABE FORTAS, CONCERNING DISSENT AND CIVIL DISOBEDIENCE (1968).

the stance that he would have violated segregation laws in the South, but he would not have been willing to “sit in” and trespass in a restaurant that maintained segregated seating by custom, but not by law. Fortas justified this on the grounds that maintaining respect for the rule of law was central to avoid people disrespecting other laws. In response, Howard Zinn noted that “Fortas is left in the position of failing to distinguish between important and unimportant laws, between trivial and vital issues, because the distinction between legal and illegal seems far more important to him.”⁶⁰ Zinn continues, “What if some terrible grievance is represented not by an evil law, but by a failure on the part of the government to enforce a good law,” such as the enforcement of civil rights regulations or laws against police brutality?⁶¹ Or what if an immoral situation, like housing segregation, continues to exist without an immoral law being used to enforce it? “If a law has been passed registering what is wrong, you may violate it as a protest; if no law has been passed, but that same wrong condition exists, you are left without recourse”⁶² Zinn exposes the inconsistency in Fortas’ position by analogizing it to a doctor who fails to inject a needle in an uninjured portion of the patient’s body in order to cure a severe illness on the unreasonable ground that medicine should only be applied directly to the injury or not applied at all.⁶³ Perhaps Zinn failed to consider that Fortas’ position on freedom of assembly had more to do with the shifting sands of realpolitik than abstract principles.

Perhaps in light of the changed tenor of racial justice protests, Justice Fortas looked at the issue through new eyes. *Adderley* signals the end of the Court’s interest convergence with civil rights protesters. Harry Kalven and other First Amendment scholars have asserted that the Warren Court “protected the civil liberties of free speech and association to promote the civil right of racial equality.”⁶⁴ This analysis does not adequately account for the turn in the Court’s jurisprudence in the late 1960s. In *Adderley*, the Florida A&M students jettisoned the approach of prayerfully singing “we shall overcome” and instead decided to march with fists raised. After *Adderley*, protests took on a more militant “Black Power” orientation that included uprisings in major cities and aggressive condemnation of police brutality. This eviscerated the sympathy of white liberals like the Supreme Court Justices who supported desegregation goals, but per-

60. HOWARD ZINN, *DISOBEDIENCE AND DEMOCRACY: NINE FALLACIES ON LAW AND ORDER* 35 (1968).

61. *Id.*

62. *Id.* at 36.

63. *Id.* at 37.

64. Lillian R. BeVier, *Intersection and Divergence: Some Reflections on the Warren Court, Civil Rights, and the First Amendment*, 59 WASH. & LEE L. REV. 1075, 1075 (2002); KALVEN, *supra* note 38.

haps not other goals like police reform.⁶⁵ In fact, as opposed to the warm rhetoric exhibited during the interest convergence period, the United States government would demonstrate antipathy towards the rise of the paradigmatic Black Power organization, the Black Panthers, through violently suppressing it.⁶⁶ With the Civil Rights Act and Voting Rights Act passed by 1965 and putatively securing formal desegregation through the law, in hindsight *Adderley* signaled the passing of the interest convergence moment, construing the remaining protesters as anti-authoritarian rascals. The jurisprudence towards these protesters shifted with the protestors' newfound Black radical goals and tactics.

We should remember, however, that the shift was in many ways dictated to the activists; it was not simply a change of disposition. For example, the focus on policing reflected the new reality for Black Americans. As other formal segregation tools disappeared, the capacity of white vigilantes to enforce racial terrorism—a capacity which had existed from the slave patrols through the widespread unprosecuted lynchings lasting well into the mid-twentieth century—suddenly eroded, leaving police and law enforcement as one of the last bastions of unmitigated racial discipline. Law enforcement and police explicitly used racial profiling,⁶⁷ racially segregated prisoners,⁶⁸ and defended the disgrace of practically all-white police departments patrolling majority minority communities and ruling those spaces with a stern punitiveness.⁶⁹ As some members of the community began to see law enforcement as an amalgam of past forms of

65. DERRICK BELL, *RACE, RACISM, AND AMERICAN LAW* 549 (5th ed. 2004) (“During this period, the nonviolent, prayer oriented southern protests of the early 1960s were becoming more militant, and the North was experiencing a succession of urban race riots.”); *id.* at 555 (“From the viewpoint of a great many whites, there really were no peaceful, nondisruptive civil rights protests. Each represented a most threatening challenge to an important aspect of the local status quo.”).

66. See Winston A. Grady-Willis, *The Black Panther Party: State Repression and Political Prisoners*, in *THE BLACK PANTHER PARTY [RECONSIDERED]* 373 (Charles E. Jones ed., 1998).

67. Although not formally enshrined in doctrine until *Whren v. United States*, 517 U.S. 806, 819 (1996), which held that a traffic violation established probable cause to conduct a vehicle search, despite allegations that the pretextual stop was based on selective racial enforcement, these practices endured from the beginning. For an illustration, see James Baldwin, *A Report from Occupied Territory*, *NATION* (July 11, 1966), <http://www.thenation.com/article/report-occupied-territory> [<http://perma.cc/ZKM9-KYPX>].

68. *Johnson v. California*, 543 U.S. 499, 502, 515 (2005) (applying strict scrutiny to an unwritten policy of racial segregation of inmates); *Washington v. Lee*, 263 F. Supp. 327, 333 (M.D. Ala. 1966), *aff'd* 390 U.S. 333 (1968) (striking down an Alabama statute requiring racial segregation of inmates as unconstitutional).

69. Jeremy Ashkenas & Haeyoun Park, *The Race Gap in America's Police Departments*, *N.Y. TIMES* (Apr. 8, 2015), <http://www.nytimes.com/interactive/2014/09/03/us/the-race-gap-in-americas-police-departments.html> [<http://perma.cc/BWL8-SK9Q>].

racial terrorism, law enforcement began to see itself as the target of protests. Incidentally, the Black Panther Party for Self Defense, which made opposition to police brutality a core aspect of its platform,⁷⁰ was formed the same year as the *Adderley* decision.⁷¹ Although these movements often targeted the system that allowed for police abuses without necessarily accusing individual officers of racist intent, police still sought retribution since they often took the protests personally, failing to see these systemic arguments.⁷² Unsurprisingly, the jarring closure of the brief window of freedom of assembly for racial justice protesters only intensified in the coming years of “law and order” rhetoric, with protester convictions often being upheld or denied review.⁷³

Ferguson protesters perhaps unknowingly stepped into this narrative two generations later. They did not prayerfully seek integration goals in the civil rights tradition, but instead angrily denounced police brutality in the Black power tradition. For those in Ferguson, the existential crisis went beyond an end to police brutality—some wanted to abolish prisons and the police entirely.⁷⁴ In the interim, some called for the end of the Supreme Court’s endowment of police with what legal scholar Paul Butler has called “super powers.”⁷⁵ These super powers include giving police full authority to racially profile,⁷⁶ use deadly force even for small infractions,⁷⁷ take a person’s life based on subjective and

70. See Univ. of Cal., *The Black Panther Party’s Ten-Point Program*, UNIV. CAL. PRESS BLOG, <http://www.ucpress.edu/blog/25139/the-black-panther-partys-ten-point-program> [http://perma.cc/GKQ7-3YNA]. (“We want an immediate end to police brutality and murder of Black people.”).

71. See JOSHUA BLOOM & WALDO E. MARTIN, JR., *BLACK AGAINST EMPIRE: THE HISTORY AND POLITICS OF THE BLACK PANTHER PARTY* 413 n.95 (2013).

72. The response to Detroit, Michigan’s 1967 12th Street Riot demonstrates how police personally responded to protesters’ claims, and is most viscerally manifested in the riot’s infamous Algiers Motel incident. For a film depiction of these events, see *DETROIT* (Anapurna Pictures 2017), a film directed by Academy Award-winning director Kathryn Bigelow.

73. See, e.g., *NAACP v. Overstreet*, 142 S.E.2d 816 (Ga. 1965), *reh’g denied*, 384 U.S. 981 (1966); *S. Christian Leadership Conference, Inc. v. A.G. Corp.*, 241 So.2d 619 (Miss. 1970). Perhaps the most consequential case denied review was *NAACP v. Overstreet*, in which a Mississippi judge instructed a jury that it could hold both the local and national NAACP branch liable for economic damages and loss of store profit from a picketing campaign, totaling over \$85,000 including punitive damages. *Overstreet*, 142 S.E.2d at 827.

74. For information on this movement, see, for example, ANGELA DAVIS, *ARE PRISONS OBSOLETE?* (2003); ALEX VITALE, *THE END OF POLICING* (2016); Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156 (2015).

75. Paul Butler, *The System Is Working the Way It Is Supposed To: The Limits of Criminal Justice Reform*, 104 GEO. L.J. 1419, 1446 (2016).

76. *Id.* at 1453.

77. *Id.* at 1454.

often irrational and race-based fears,⁷⁸ and receive elaborate procedural protections when they face suspicion that everyday citizens do not enjoy.⁷⁹ This system has contributed not only to disproportionate deaths in police custody, but also to the structure of mass criminalization that has devastated our communities.⁸⁰ With such an agenda, no clear convergence of interests has emerged between today's activists and the Supreme Court.

II. THE CONTEMPORARY APPROACH TO FREEDOM OF ASSEMBLY AND RACE

The exigency of an unlawful assembly means that the social control resulting from dispersals and arrests may often be more important to authorities than a successful prosecution. This concern is plausibly heightened when the purpose of the assembly is to protest the very authorities who have the power to order its dispersal [T]hose charged with policing the assembly may be incentivized to diminish its expressive function because the core of that expression challenges the legitimacy of their authority or their own individual actions.

—John Inazu⁸¹

When Ferguson protesters took to the streets chanting “hands up, don’t shoot!,” few of us had studied the history of civil rights jurisprudence and the Court’s constriction of freedom of assembly rights for racial justice protesters. Nevertheless, we would reap the fruit of the seeds sown by the Court’s post-*Adderley* turn as law enforcement continued to take our protests personally, and courts, constrained by the Supreme Court precedent that gave police “super powers,” could do little until after police had already applied brutal tactics. By 2014, freedom of assembly doctrine had, from my perspective, returned to its roots, reconstructed to leave those of us who would dare ‘take it to the streets’ to protest racial injustice completely vulnerable to repression. Section II.A describes how law enforcement imposes its own will on protestors with little in-

78. *Id.* at 1452.

79. Brandon E. Patterson, *9 Ways Police Have More Protections Than You Do When They’re Arrested*, MOTHER JONES (Dec. 17, 2015 11:00 AM), <http://www.motherjones.com/politics/2015/12/police-contract-protections-interrogation-chicago> [<http://perma.cc/UBK3-XGA8>].

80. For the most widely-cited example of how police superpowers can result in mass arrest and jailing for minor offenses, see U.S. DEPARTMENT OF JUSTICE CIVIL RIGHTS DIVISION, *Investigation of the Ferguson Police Department* (March 4, 2015), http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf [<http://perma.cc/44C8-NNEV>].

81. John Inazu, *Unlawful Assembly as Social Control*, 64 UCLA L. REV. 2, 34 (2017).

terference from the courts until after the fact. In Section II.B, I contrast the Ferguson example to law enforcement’s approach to white supremacist marches. This comparison further demonstrates that the First Amendment as applied is best understood as a racial project.

A. Policing Antiracist Assemblies

After my arrest, I became involved in some of the litigation seeking to challenge policing tactics in Ferguson.⁸² In addition to trespass charges like the one that I received, many Ferguson protesters were summarily teargassed or arrested on the grounds that they “failed to disperse,” per Missouri’s “[r]efusal to disperse” statute. The statute provides that, “A person commits the crime of refusal to disperse if, being present at the scene of an unlawful assembly, or at the scene of a riot, he or she knowingly fails or refuses to obey the lawful command of a law enforcement officer to depart from the scene of such unlawful assembly or riot.”⁸³ An “unlawful assembly” is when a person “knowingly assembles with six or more other persons and agrees with such persons to violate any of the criminal laws of this state or of the United States with force or violence.”⁸⁴

Some of the people teargassed or arrested lived near the scene of the protests and were simply trying to get home from work.⁸⁵ Others who did come to exercise their freedom of assembly rights in Ferguson found that law enforcement concocted schemes designed to deny their First Amendment rights.⁸⁶ In one case that was litigated in federal district court, the police admitted to adopting a strategy of telling protesters in Ferguson that they had to keep mov-

82. ADVANCEMENT PROJECT, *Demonstrators File Suit Challenging Police Overreach and Misuse of Tear Gas* (Dec. 9, 2014), <http://www.advancementproject.org/news/entry/demonstrators-file-suit-challenging-police-overreach-and-misuse-of-tear-gas> [<http://perma.cc/E28L-837K>].

83. MO. ANN. STAT. § 574.060 (2017).

84. *Id.* § 574.040 (2017).

85. See, e.g., WESLEY LOWERY, “THEY CAN’T KILL US ALL”: FERGUSON, BALTIMORE, AND A NEW ERA IN AMERICA’S RACIAL JUSTICE MOVEMENT 57 (2016).

86. Many reports and statements have documented these abuses, which number in the hundreds. See, e.g., Justin Hansford & Meena Jagannath, *From Ferguson to Geneva: Using the Human Rights Framework to Push Forward a Vision for Racial Justice in the United States after Ferguson*, 12 HASTINGS RACE & POVERTY L.J. 121 (2015); *On the Streets of America: Human Rights Abuses in Ferguson*, AMNESTY INTERNATIONAL (2014), <http://www.amnestyusa.org/files/onthestreetsofamericaamnestyinternational.pdf> [<http://perma.cc/KXR4-WS6L>]; *Press Freedom Under Fire in Ferguson*, PEN AMERICAN CENTER (Oct. 27, 2014), http://pen.org/sites/default/files/PEN_Press-Freedom-Under-Fire-In-Ferguson.pdf [<http://perma.cc/RDF9-9TA4>].

ing and could not stand still on the sidewalks while protesting.⁸⁷ The court found that the policy was “communicated to the officers at the regular roll calls, and the officers were told to use discretion, but were not told any particular circumstances or factors that they should consider in using that discretion.”⁸⁸ Although the overwhelming majority of the protesters were found to be completely peaceful, many were arrested and almost all were threatened with arrest for unlawful assembly or failure to disperse, unless they moved constantly while protesting. After protesters brought a case against the police seeking a preliminary injunction from the “keep moving” order, the district court concluded that plaintiffs were likely to succeed on their First Amendment claims.⁸⁹

Unfortunately, the ruling had little practical effect, because, in the eyes of the police, they had already achieved their goal. The illegal “keep moving” practice played a pivotal role in fatiguing the protesters before the case went to court, curbing the most highly active protesting period.⁹⁰ By the time that the courts fully litigated the matter, many of those arrested on these charges had already been taken to jail, and their desire to engage in First Amendment speech had already been chilled by the intimidation of arrest, threats, and rough handling by police officers. In that sense, the subsequent court rulings discussing First Amendment violations were mostly theoretical; in practice, the police successfully suppressed the height of the Ferguson protests through the “keep moving” tactic.

When the most active protests began to ebb in Ferguson, the potential for future protests and assemblies were chilled through more surreptitious tactics. The term “repression” frequently describes state-sponsored direct force against people who contest existing power arrangements.⁹¹ However, a pure focus on government efforts to curb dissent through the use of direct force like assassination, torture, or physical coercion would provide an incomplete picture. A more complete view that speaks to contemporary scenarios would include government suppression of social movements by either raising the costs associated with the movement or by minimizing the perceived benefits of movement work, such as by arresting people en masse for failing to keep moving while protesting,⁹² employment deprivation, or surveillance.⁹³

87. *Abdullah v. Cty. of St. Louis*, 52 F. Supp. 3d 936, 940-41 (E.D. Mo. 2014).

88. *Id.* at 941.

89. *Id.* at 946-47.

90. *Id.* at 942. Evidence cited in the opinion showed that Ferguson police continued this practice as late as September 27, 2014.

91. See generally David Snyder, *Theoretical and Methodological Problems in the Analysis of Governmental Coercion and Collective Violence*, 4 J. POL. & MIL. SOC. 277 (1976).

92. JULES BOYKOFF, *BEYOND BULLETS: THE SUPPRESSION OF DISSENT IN THE UNITED STATES* 11-12, 35-36 (2007).

In an intelligence assessment published in August 2017, the FBI explained that it now had identified “Black Identity Extremists” as an emerging domestic terror threat sweeping the nation.⁹⁴ Such identification began in Ferguson in September 2015 in an update to a review of intelligence assessments.⁹⁵ The document links the attacks committed by Micah Johnson, Zale Thompson, and other Moorish Sovereign Citizen extremists to “BIE ideology”⁹⁶ and predicts that “perceptions of unjust treatment of African-Americans and the perceived unchallenged illegitimate actions of law enforcement will inspire premeditated attacks against law enforcement.”⁹⁷

This is fiction. When Congresswoman Karen Bass questioned Attorney General Jeff Sessions in a congressional hearing—asking, “Could you name an African-American organization that has committed violence against police officers? . . . Can you name one today that has targeted police officers in a violent manner?”—the Attorney General could not name one.⁹⁸ One striking passage of the memo is the argument that “BIE violence peaked in the 1960s and 1970s in response to changing socioeconomic attitudes and treatment of blacks . . . BIE groups, such as the Black Liberation Army (BLA) . . . engaged in murders, bank robberies, kidnappings, racketeering, possession of explosives, and weapons smuggling.”⁹⁹ Not only did the FBI create an entire movement based on race and give it a moniker that has only ever been used by law enforcement,¹⁰⁰ it had to reach forty years into the past to connect its

93. *Id.* at 35-36.

94. This interpretation of the FBI memo is inspired in part by an op-ed I co-authored in the *New York Times*. Khaled A. Beydoun & Justin Hansford, *The F.B.I.’s Dangerous Crackdown on “Black Identity Extremists,”* N.Y. TIMES (Nov. 15, 2017), <http://www.nytimes.com/2017/11/15/opinion/black-identity-extremism-fbi-trump.html> [<http://perma.cc/GF2H-3AGE>].

95. COUNTERTERRORISM DIV., FED. BUREAU OF INVESTIGATION, INTELLIGENCE ASSESSMENT: BLACK IDENTITY EXTREMISTS LIKELY MOTIVATED TO TARGET LAW ENFORCEMENT OFFICERS (2017) [hereinafter FBI MEMO], <http://assets.documentcloud.org/documents/4067711/BIE-Redacted.pdf> [<http://perma.cc/7CG3-9BE5>]; see also Jana Winter & Sharon Weinberger, *The FBI’s New U.S. Terrorist Threat: “Black Identity Extremists,”* FOREIGN POLICY (Oct. 6, 2017, 11:42 AM) <http://foreignpolicy.com/2017/10/06/the-fbi-has-identified-a-new-domestic-terrorist-threat-and-its-black-identity-extremists> [<http://perma.cc/PR89-H4MW>].

96. FBI MEMO, *supra* note 95, at 4.

97. *Id.* at 7.

98. Sarah K. Burris, *Rep. Karen Bass Blasts Jeff Sessions over Justice Department Report on “Black Identity Extremists,”* RAW STORY (Nov. 14, 2017 1:22 PM), <http://www.rawstory.com/2017/11/rep-karen-bass-lights-up-jeff-sessions-over-justice-department-report-on-black-identity-extremists> [<http://perma.cc/5NZY-PDPX>].

99. FBI MEMO, *supra* note 95, at 6.

100. See Winter & Weinberger, *supra* note 95 (noting that the document appears to be the first known reference to “black identity extremists”).

fictional movement to the Black Liberation Army, the organization connected to Assata Shakur. By linking the Black Liberation Army with the BIE designation, the FBI fuels law enforcement's longstanding obsession with the widely admired and controversial figure, who has been designated by the FBI as a wanted terrorist.¹⁰¹

In addition to the inaccuracy of the label, the FBI's suggestion that people with extreme Black identities may attack law enforcement officers authorizes and incentivizes the agency to surveil, monitor, and deploy informants to gain intelligence on individuals and groups that it believes to be Black Identity Extremists. This could chill and criminalize activists and protesters in ways that have terrifying echoes of the FBI's infamous Cointelpro program,¹⁰² which investigated and intimidated a number of groups and resulted in the assassination of Black Panther Party leaders and playing a major role in the destruction of that organization.¹⁰³ Perhaps even more effective than curbing freedom of assembly on the streets is destroying these civil society organizations from the inside so that no one is organized enough to take to the streets to begin with.

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101. Assata Shakur was involved in both the Black Panther Party and the Black Liberation Party. In 1973, a stop by the New Jersey police left one cop and two of Shakur's companions dead. Shakur was convicted for the murder of the state officer, but she later escaped prison and sought asylum in Cuba. In recent years, the United States has continued to pressure for Shakur's extradition. Bin Adewumni, *Assata Shakur: From Civil Rights Activist to FBI's Most-wanted*, *GUARDIAN* (July 13, 2014, 1:00 PM), <http://www.theguardian.com/books/2014/jul/13/assata-shakur-civil-rights-activist-fbi-most-wanted> [<http://perma.cc/CP3P-9PPW>]. In 1998, the New Jersey State Police asked Pope Jean Paul II to call for her extradition during his visit to Cuba. Krissah Thompson, *Assata Shakur was Convicted of Murder. Is She a Terrorist?*, *WASH. POST* (May 8, 2013), http://www.washingtonpost.com/lifestyle/style/Assata-shakur-was-convicted-of-murder-is-she-a-terrorist/2013/05/08/69acb602-b7e5-11e2-aa9e-a02b765ff0ea_story.html [<http://perma.cc/7WNA-VXQG>]. In 2013, she was the first woman on the FBI's most wanted terrorists list, offering a \$1 million federal reward. The following year, the superintendent of the New Jersey State Police called Shakur a "domestic terrorist" and offered an additional \$1 million reward for her capture. See Adewumni, *supra*.
102. For a general overview complete with contemporary implications, see Amna A. Akbar, *Policing Black Radicalism*, *JACOBIN* (August 17, 2016), <http://www.jacobinmag.com/2016/08/cointelpro-fbi-black-panther-party-young-lords-hoover> [<http://perma.cc/T9E3-WXDS>].
103. See, e.g., Winston A. Grady-Willis, *The Black Panther Party: State Repression and Political Prisoners*, in *THE BLACK PANTHER PARTY RECONSIDERED* 373 (Charles E. Jones ed., 1998) (detailing the night Fred Hampton, a Black Panther leader, was killed); Rupert Cornwell, *Geronimo Pratt: Black Panther Leader Who Spent 27 Years In Jail For A Crime He Did Not Commit*, *INDEPENDENT* (June 14, 2011, 11:00 PM, BST), <http://www.independent.co.uk/news/obituaries/geronimo-pratt-black-panther-leader-who-spent-27-years-in-jail-for-a-crime-he-did-not-commit-2297384.html>. [<http://perma.cc/64FZ-CLQD>] (noting how the FBI had "launched the infamous COINTELPRO programme to infiltrate and destroy the [Black Panther] movement").

This policy of characterizing protest as ultraviolent will not stay isolated to Black protesters. Over two hundred protesters at President Trump's inauguration have been charged with felonies, whether they sought to promote women's rights, immigration rights, or other issues.¹⁰⁴ Without lawful oversight, it is not difficult to imagine the FBI manufacturing another movement to justify future investigations into these other protests.

B. The Protection and Legitimation of White Supremacist Assemblies

Coextensive with the criminalization of racial justice protesters is the long history of state noninterference with the assembly rights of white supremacist actors. On August 8, 1925, while J. Edgar Hoover oversaw the prosecution and deportation of Marcus Garvey,¹⁰⁵ at least 50,000 Ku Klux Klan members marched through Washington, DC.¹⁰⁶ During the global recession that followed World War I, "fear and anxiety were widespread among native-born white Protestants that the country they had known and been accustomed to dominating was coming undone."¹⁰⁷ The Klan's platform "advocated the restoration of 'true Americanism'" and "demonized [B]lack, Catholics, Jews, Mexicans, Asians, and any other non-white ethnic immigrants."¹⁰⁸ However, even in light of the well-known acts of terrorism and vigilante violence by the Klan,¹⁰⁹ we have little evidence of a campaign by the FBI against the organization during that era that matched the effort against Garvey.

A century later, we see a similar dynamic unfold. For example, in May 2017, a Black Bowie State University senior, Richard Wilbur Collins III, was fatally stabbed by a white University of Maryland student while he waited for an Uber. The white student was a member of a Facebook group called "Alt-Reich Na-

104. See Keith L. Alexander, *Prosecutors File Additional Charges Against Inauguration Protestors*, WASH. POST (April 28, 2017) http://www.washingtonpost.com/local/public-safety/prosecutors-file-additional-charges-against-inauguration-protestors/2017/04/27/2c7eca62-2b96-11e7-a616-d7c8a68c1a66_story.html [<http://perma.cc/T6VA-CXQZ>].

105. See Akbar, *supra* note 102.

106. Joshua Rothman, *When Bigotry Paraded Through the Streets*, ATLANTIC (Dec. 4, 2016) <http://www.theatlantic.com/politics/archive/2016/12/second-klan/509468> [<http://perma.cc/QJM6-VBYV>].

107. *Id.*

108. *Id.*

109. See, e.g., *id.* ("In 1921, a newspaper exposé detailed more than 100 acts of Klan-sponsored vigilante violence and prompted a congressional investigation.")

tion.”¹¹⁰ It is in this atmosphere of fear and violence that the Attorney General of the United States recently delivered an address at Georgetown University Law Center, which was widely understood to be a defense of White Nationalist speech on college campuses. He argued that free speech was under attack by “an echo chamber of political correctness” on college campuses and decried the “fragile egos” of college students.¹¹¹ Recent media reports have also revealed that the FBI has lessened its focus on white nationalists generally,¹¹² just as the number of these groups on college campuses increases. When Milo Yiannopoulos planned his “free speech week” at the University of California, Berkeley,¹¹³ and white supremacist Richard Spencer spoke at the University of Florida,¹¹⁴ the two universities spent over half a million dollars on security in order to provide protection for advocates of racial hierarchy, perhaps to avoid claims of political correctness. Meanwhile, when Black students on college campuses across the country sought to speak out about the hostile racial climate that has reemerged,¹¹⁵ they often experienced surveillance,¹¹⁶ harsh punishment,¹¹⁷ and

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110. Yasmeen Serhan, *A Possible Hate Crime at the University of Maryland*, ATLANTIC (May 22, 2017), <http://www.theatlantic.com/news/archive/2017/05/a-possible-hate-crime-at-the-university-of-maryland/527583> [<http://perma.cc/HW3L-V5KU>].
111. Tara Isabella Burton, *Sessions Decries “Fragile Egos” on College Campuses, Defends Trump on NFL*, VOX (Sept. 26, 2017, 4:10 PM ET), <http://www.vox.com/policy-and-politics/2017/9/26/16368982/sessions-free-speech-college-campuses-trump-on-nfl> [<http://perma.cc/J6SD-PDDJ>].
112. Dara Lind, *Trump Says He’s Committed To Fighting White Supremacy. His Policies Say Otherwise*, VOX (Aug. 14, 2017, 2:40 PM EDT), <http://www.vox.com/policy-and-politics/2017/8/14/16144598/trump-white-terrorism> [<http://perma.cc/8ZVE-ZZ9J>].
113. Emily Deruy et al., *Milo Yiannopoulos’ 15 Minutes in Berkeley Cost University \$800,000*, MERCURY NEWS (San Jose, Cal.) (Sept. 25, 2017, 8:14 AM), <http://www.mercurynews.com/2017/09/24/update-barricades-ring-sproul-plaza-as-berkeley-braces-for-milo-yiannopoulos> [<http://perma.cc/W7K6-TGDU>].
114. Jennifer Calfas, *How Much White Nationalist Richard Spencer Is Costing the University of Florida*, TIME: MONEY (Oct. 18, 2017), <http://time.com/money/4987460/how-much-white-nationalist-richard-spencer-is-costing-the-university-of-florida> [<http://perma.cc/5MFT-ZLD7>].
115. Scott Jaschik, *Epidemic of Racist Incidents*, INSIDE HIGHER ED (Sept. 26, 2016), <http://www.insidehighered.com/news/2016/09/26/campuses-see-flurry-racist-incidents-and-protests-against-racism> [<http://perma.cc/C799-5668>].
116. Steve Annear, *Harvard Law Students Say They Found Recording Device Hidden Under Table*, BOS. GLOBE (Apr. 8, 2016) <http://www.bostonglobe.com/metro/2016/04/08/harvard-law-students-say-they-found-recording-device-hidden-under-table/zEYhdU8kguV6xGE1HMCQ8J/story.html> [<http://perma.cc/G8J6-Q8RK>].
117. See Martin Slagter, *EMU Faculty, Students Protest University’s Discipline of Student Activists*, MLIVE (Nov. 18, 2016, 4:06 PM) http://www.mlive.com/news/ann-arbor/index.ssf/2016/11/new_emu_protest_post.html [<http://perma.cc/8LGF-9WYB>]; Laura Krantz, *Boston College Students Face Discipline over Protests*, BOS. GLOBE (Dec. 19, 2016) <http://www>

even arrest,¹¹⁸ and when racist vigilantes targeted them,¹¹⁹ we do not have any similar record of large sums being spent for their protection.

Going from the campus to the streets, white supremacists and Neo-Nazis demonstrated at the “Unite the Right” protest against the removal of the Robert E. Lee monument in Charlottesville, Virginia. Neo-Nazi protesters carried semi-automatic weapons and yelled anti-Semitic slogans.¹²⁰ One of the protesters drove a car into a crowd of people, killing counter protester Heather Heyer and seriously injuring dozens of others. Meanwhile, many lawmakers continue to promulgate the passage of “Blue Lives Matter” bills, and bills which would provide immunity to drivers who hit protesters demonstrating on the street.¹²¹ The Neo-Nazis and white nationalists brutally beat one counter-protester with poles,¹²² and at least one white nationalist shot at counter-

.bostonglobe.com/metro/2016/12/19/students-face-boston-college-discipline-over-protests/tqGhO7TuiGJaTeutLxFLK/story.html [http://perma.cc/9XFF-URT5].

118. Matt Vasilogambros, *Five Arrested in Clemson University Racism Protests*, ATLANTIC (Apr. 15, 2016) <http://www.theatlantic.com/national/archive/2016/04/clemson-university-arrests/478455> [http://perma.cc/Q6VX-GPLL]; *UNC Student Arrested after Hundreds Protest at UNC-Chapel Hill Silent Sam Monument*, WRAL (Aug. 22, 2017) <http://www.wral.com/unc-student-arrested-after-hundreds-protest-at-unc-chapel-hill-silent-sam-monument/16898155> [http://perma.cc/74TW-4MWP].
119. Holly Yan & AnneClaire Stapleton, *University of Missouri Students Report Threats; Police Quell KKK Rumors*, CNN (Nov. 11, 2015, 11:45 PM ET), <http://www.cnn.com/2015/11/11/us/university-of-missouri-racism-protest/index.html> [http://perma.cc/JE3R-KVAT].
120. See, e.g., Dahlia Lithwick & Mark Joseph Stern, *The Guns Won: Charlottesville Showed that our First Amendment Jurisprudence Hasn't Reckoned with our Second Amendment Reality*, SLATE (Aug. 14, 2017, 7:34 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2017/08/the_first_and_second_amendments_clashed_in_charlottesville_the_guns_won.html [http://perma.cc/XL74-VFAZ]; Seth Millstein, *The Difference Between Charlottesville & Ferguson Could Be Part of a Sickening Double Standard*, BUSTLE (Aug. 3, 2017), <http://www.bustle.com/p/this-difference-between-charlottesville-ferguson-could-be-part-of-a-sickening-double-standard-76288> [http://perma.cc/T2HW-K36G]; Yan & Stapleton, *supra* note 119; Yair Rosenberg, “*Jews Will Not Replace Us*”: *Why White Supremacists Go After Jews*, WASH. POST (Aug. 14, 2017, 7:34 PM), <http://www.washingtonpost.com/news/acts-of-faith/wp/2017/08/14/jews-will-not-replace-us-why-white-supremacists-go-after-jews> [http://perma.cc/B79R-YH2X].
121. Jessica Corbett, *After Charlottesville, Republicans Defend Bills to Protect Drivers Who Hit Protesters*, COMMON DREAMS (Aug. 17, 2017), <http://www.commondreams.org/news/2017/08/17/after-charlottesville-republicans-defend-bills-protect-drivers-who-hit-protesters> [http://perma.cc/SA3L-4YG3] (detailing “proposals that critics say offer immunity from liability to drivers who run down protestors”); Julia Craven, *32 Blue Lives Matter Bills Have Been Introduced Across 14 States This Year*, HUFFINGTON POST (Mar. 1, 2017), http://www.huffingtonpost.com/entry/blue-black-lives-matter-police-bills-states_us_58b61488e4b078obac2e31b8 [http://perma.cc/JY98-ZB89] (discussing the “Blue Lives Matter” bills, which propose that “members of law enforcement be included in hate crime protections”).
122. Loulla-Mae Eleftheriou-Smith, *Charlottesville: Black Protester Deandre Harris “Beaten with Metal Poles” by White Supremacists*, INDEPENDENT (Aug. 15, 2017, 7:48 AM), <http://www>

protesters.¹²³ The “Unite the Right” protesters were never teargassed. No tanks appeared. None were shot with rubber bullets. Very few were arrested compared to the counter-protesters.¹²⁴ There seemed to be no assumption that the “Unite the Right” protesters would be violent, even as they walked down the street with guns in their holsters. In fact, Deandre Harris, a young Black man who was beaten with a pole at a Charlottesville protest, was himself charged with a felony.¹²⁵ President Trump commented that some of those “Unite the Right” protesters were “very fine people.”¹²⁶

Surveying the aftermath, the mayor of the city of Charlottesville seemed genuinely nonplussed as he asked the question that perhaps may guide this discussion for years to come, “How do you reconcile public safety and the First Amendment?”¹²⁷ One operative factor, however, remains to articulate in this dynamic: how do you balance public safety and freedom of assembly while considering the added factor of race?

III. A FUTURE APPROACH TO FREEDOM OF ASSEMBLY AND RACE

Although a more lengthy, thorough review remains to be done, this Essay has provided a brief overview of the law’s response to racial dissent over the last hundred years as interpreted by the courts during the civil rights movement, legislated by local legislatures using “trespass,” “unlawful assembly,” and “Blue Lives Matter” statutes, and administered by law enforcement agencies, includ-

.independent.co.uk/news/world/americas/charlottesville-deandre-harris-black-protester-white-supremacists-beat-metal-poles-neo-nazis-a7894916.html [http://perma.cc/U7Q5-MJXP].

123. Evan Simko-Bednarski, *Man Arrested for Firing Gun at Charlottesville Rally*, CNN (Aug. 28, 2017, 9:08 AM), <http://www.cnn.com/2017/08/27/us/man-arrested-gun-charlottesville-rally/index.html> [http://perma.cc/P35H-JWEA].
124. See Millstein, *supra* note 120; A.C. Thompson, *Police Stood By as Mayhem Mounted in Charlottesville*, PROPUBLICA (Aug. 12, 2017, 11:00 PM), <http://www.propublica.org/article/police-stood-by-as-mayhem-mounted-in-charlottesville> [http://perma.cc/DDL4-72G2].
125. Petula Dvorak, *A Black Man Charged in His Own Beating, and Charlottesville’s Lasting Hatred*, WASH. POST (Oct. 12, 2017), http://www.washingtonpost.com/local/a-black-man-charged-in-his-own-beating-and-charlottesvilles-lasting-hatred/2017/10/12/ba474e5a-af5d-11e7-a908-a3470754bbb9_story.html [http://perma.cc/WJ73-4S7R].
126. Z. Byron Wolf, *Trump’s Defense of the “Very Fine People” at Charlottesville White Nationalist March Has David Duke Gushing*, CNN (Aug. 15, 2017, 8:23 PM), <http://www.cnn.com/2017/08/15/politics/donald-trump-david-duke-charlottesville/index.html> [http://perma.cc/5JKS-LX45].
127. Laurel Wamsley, *Charlottesville Violence Highlights Cities’ Struggle to Balance Rights and Safety*, NPR: THE TWO-WAY (Aug. 14, 2017, 6:43 PM), <http://www.npr.org/sections/the-two-way/2017/08/14/543462419/charlottesville-violence-highlights-cities-struggle-to-balance-rights-and-safety> [http://perma.cc/F4YR-MR42].

ing local police and federal investigatory organizations. I cannot avoid the conclusion that those who would exercise their First Amendment right to assembly and who hope to petition the government for their racial grievances have reason for skepticism. This is because the First Amendment's past and present has proven that it is a racial project that redistributes the freedom of assembly to whites and away from Blacks, and although not proven here, we can surmise also that the freedom of assembly has been redistributed away from other people of color as well, including Native Americans,¹²⁸ Muslims,¹²⁹ and others. If the jurisprudence and administration of the First Amendment were to stay the same for the foreseeable future, those who want to create racial harmony should not expect the same amount of protection from the First Amendment that white supremacists enjoy.

But the jurisprudence does not have to remain the same. With regard to the regulation of hate speech, the widespread uncritical embrace of free speech absolutism in the United States makes the country an outlier.¹³⁰ Many other countries around the world weigh dignity and racial justice more heavily in the balance. In Canada, nations throughout Europe, and other countries, hate speech regulations have not backfired against minorities or propelled society on a "slippery slope" towards authoritarianism. In fact, the press and media in these countries seem no less free than their United States' counterparts.¹³¹

The ACLU has argued that regulations limiting hate speech like the measures called for by the mayor in Charlottesville in the days leading up to the "Unite the Right" gathering are a bad idea for four main reasons: (i) hate speech acts as a "pressure valve," allowing racists to "blow off steam" to keep

128. See Amy Goodman, *Standing Rock Sioux Chairman Calls for Investigation of Dog Attacks on Native American Protesters*, DEMOCRACY NOW! (Sept. 6, 2016), http://www.democracynow.org/2016/9/6/standing_rock_sioux_chairman_calls_for [<http://perma.cc/A73G-EK8V>]; Wes Enzinna, *I Witnessed Cops Using Tear Gas, Rubber Bullets, and Sound Cannons Against Anti-Pipeline Protesters*, MOTHER JONES (Oct. 31, 2016), <http://www.motherjones.com/politics/2016/10/standing-rock-protests-pipeline-police-tasers-teargas> [<http://perma.cc/R3FU-335E>]; Alleen Brown, *Leaked Documents Reveal Counterterrorism Tactics Used At Standing Rock to "Defeat Pipeline Insurgencies"*, INTERCEPT (May 27, 2017), <http://theintercept.com/2017/05/27/leaked-documents-reveal-security-firms-counterterrorism-tactics-at-standing-rock-to-defeat-pipeline-insurgencies> [<http://perma.cc/7TYC-XW3A>].

129. See, e.g., Avi Asher-Shapiro, *Court Rules that Muslims Can Sue the NYPD for Spying on Them*, VICE NEWS (Oct. 14, 2015), <http://news.vice.com/article/court-rules-that-muslims-can-sue-the-nypd-for-spying-on-them> [<http://perma.cc/PT4G-8A2S>]; For an effective analysis of the case see Faiza Patel, *What the Third Circuit Said in Hassan v. City of New York*, JUST SECURITY (Oct. 14, 2015), <http://www.justsecurity.org/26827/circuit-hassan-v-city-york> [<http://perma.cc/WDE7-2RAP>].

130. DELGADO & STEFANCIC, *supra* note 11, at 199.

131. *Id.*

them from becoming violent later on;¹³² (ii) free speech is a “best friend” and a “potent weapon” for people of color that we should take care not to burden;¹³³ (iii) “more speech” and “talking back to the aggressor” is a remedy for bad speech;¹³⁴ and (iv) limits on free speech will be turned around in “reverse enforcement” practices that will inevitably be enforced against people of color, rather than against white supremacists.¹³⁵

These reasons fall short in the hate speech context. First, the “pressure valve” approach has not worked, as rather than allowing white supremacists to blow off steam, their assemblies further publicize their cause and show them and their allies that their beliefs have more mainstream currency than they had imagined.¹³⁶ Second, the “best friend” argument seems completely ahistorical in light of this Essay’s revisionist understanding of the civil rights movement’s impact on the Court and American law. Instead of the First Amendment as a constant ally of civil rights protesters, it has served as a fickle friend. With the premise of the argument no longer supported by a full understanding of the facts, the conclusion cannot follow. Third, the “more speech” argument fails in the real world, where a number of systemic inequities create a power imbalance, ensuring that people of color will have a less robust platform for the distribution of their messages. Also, Stefancic and Delgado point out that “hate speech is rarely an invitation to dialogue . . . the idea that talking back to the aggressor is wise, sensible, or even safe lacks a sense of reality.”¹³⁷ Fourth, the specter of “reverse enforcement” seems less intimidating in light of the understanding that the First Amendment already has “boomeranged” against minorities—rather than working as a tool for minority protection, it historically has and currently is a racial project that has disproportionately redistributed the freedom to speech to white supremacists. If further disproportionate application ensues, perhaps the cumulative effect may even provide a sufficient evidence to prove discriminatory intent in the application of the First Amendment.

Casting these four main arguments aside, free speech absolutists would advocate for the protection of hate speech on the grounds that it is precisely our ability to tolerate that speech that ensures the rights of autonomy, freedom, and

132. *Id.* at 35 (2004).

133. *Id.*

134. *Id.*

135. *Id.*

136. Bob Moser, *Richard Spencer Wins Again*, (Oct. 20, 2017) THE NEW REPUBLIC, <http://newrepublic.com/article/145402/richard-spencer-wins> [<http://perma.cc/DY3X-RKP9>].

137. DELGADO & STEFANCIC, *supra* note 11, at 207.

liberty.¹³⁸ However, our First Amendment jurisprudence already limits free speech for defamation, obscenity, copyright, fraud, and perjury.¹³⁹ If we believe that the dignity interests of human beings can justify the curbing of defamation, then why does racist hate speech not qualify as a similar assault on dignity?

Returning to our present discussion of the freedom of assembly, if public safety is a value we must weigh, why does the *stated desire* to incite violence or to promote ideas that reify the racial hierarchy not play a role in the state's response to a planned public assembly? The ACLU had to ask itself these difficult questions in the face of its relationship to the incidents in Charlottesville. The organization came under fire for representing the organizer of the "Unite the Right" March when Charlottesville sought to move the march to location where it could be more effectively policed.¹⁴⁰ In the aftermath, Waldo Jacquith resigned from his post as a member of the board of the ACLU of Virginia, tweeting "What's legal and what's right are sometimes different. I won't be a fig leaf for Nazis," and later, "We need the ACLU. We need it so much. But we also need it to change, just a tiny bit: don't defend Nazis to allow them to kill people."¹⁴¹ Legal scholar K-Sue Park also sharply criticized the ACLU, noting "[t]he danger that communities face because their speech isn't equal," and that antiracist activists must contend with a number of barriers that those on the right do not, including racialized surveillance.¹⁴² In addition, outrage grew as people pointed to the fact that the ACLU raised over \$80 million between November 2016 and March 2017, in part based on the impression many donors had that their money would be used to oppose white supremacists, not to represent them.¹⁴³

In response, the ACLU shifted its long-held policy on representation of purveyors of hate speech. In light of the "Unite the Right" protest, the Executive Director of the ACLU encouraged authorities, police chiefs, and legal

138. See, e.g., *id.* at 34-35 (describing the absolutist position adopted by the ACLU).

139. STEVEN H. SHIFFRIN, *WHAT'S WRONG WITH THE FIRST AMENDMENT?* 41 (2016).

140. Dahlia Lithwick, *What the ACLU Should Stand for in Trump's America*, SLATE (Sept. 8, 2017, 2:58 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2017/09/what_the_aclu_should_stand_for_in_trump_s_america.html [<http://perma.cc/E34M-LP9V>].

141. *Id.* (emphasis removed).

142. K-Sue Park, *The A.C.L.U. Needs to Rethink Free Speech*, N.Y. TIMES (Aug. 17, 2017), <http://www.nytimes.com/2017/08/17/opinion/aclu-first-amendment-trump-charlottesville.html> [<http://perma.cc/TL2J-XKWS>].

143. Laurel Wamsley, *Gun-Toting Protesters Create 'Tricky' Question for ACLU*, NPR: THE TWO-WAY (Aug. 18, 2017 5:56 PM), <http://www.npr.org/sections/thetwo-way/2017/08/18/544521100/gun-carrying-protesters-create-tricky-question-for-aclu> [<http://perma.cc/9WF6-62YD>].

groups to “look at the facts of any white supremacist protest with a much finer comb.”¹⁴⁴ He further explained the ACLU’s change in position, stating that “[i]f a protest group insists, ‘No, we want to be able to carry loaded firearms,’ well, we don’t have to represent them. They can find someone else.”¹⁴⁵ The ACLU’s migration on this issue is instructive—it decided to embrace nuance instead of reflexively chanting shibboleths. The ACLU will now ask a series of questions before representing an organization that plans to hold a rally: Will those assembled plan to carry weapons? Have they specifically advocated for violence against a group based on an immutable characteristic?

In the past, critical race theorists have argued that those defining hate speech should consider a number of factors—the amount of authority the speaker holds, whether the speech is in written or spoken form, and how immutable the characteristic is that the hate speech isolates for denigration.¹⁴⁶ Those authorities should consider expanding the contextual approach to freedom of assembly issues as well.

A second core question is that if we believe the dignity interests of human beings can justify limiting defamation, then why does racist speech not qualify as a similar assault on dignity? It does in essentially every other country in the world.¹⁴⁷ The United States indeed seems to be an outlier in its absolutist approach to free speech and hesitancy to confront hate speech. The Convention to End all Forms of Racial Discrimination, an international treaty that the United States signed in 1966 and ratified in 1994,¹⁴⁸ takes the position that member nations must punish “all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group or persons of another colour or ethnic origin.”¹⁴⁹ After Charlottesville, the Committee that implements the convention issued an “early warning” to the United States, a special procedure rarely implemented (it had not happened to the United States since

144. *U.S. Rights Group Rethinks Defending Hate Groups Protesting with Guns*, REUTERS (Aug. 17, 2017 9:38 PM), <http://www.reuters.com/article/us-virginia-protests-aclu/u-s-rights-group-rethinks-defending-hate-groups-protesting-with-guns-idUSKCN1AY06L> [<http://perma.cc/2VDX-CMBU>].

145. *Id.*

146. DELGADO & STEFANCIC, *supra* note 11, at 11-12.

147. Kevin Boyle, *Hate Speech – The United States Versus the Rest of the World?*, 53 ME. L. REV. 487, 493-94 (2001).

148. International Convention on the Elimination of All Forms of Racial Discrimination, Nov. 20, 1994, S. TREATY DOC. NO. 95-18, 660 U.N.T.S. 195; *see also The CERD Treaty and U.S. Civil Rights Law*, U.S. HUM. RTS. NETWORK (June 26, 2011), <http://www.ushrnetwork.org/resources-media/cerd-treaty-us-civil-rights-law> [<http://perma.cc/5XD7-P6QW>].

149. *Id.* at 660 U.N.T.S. 220.

2006).¹⁵⁰ In that warning, the Committee included the recommendation that the United States

ensure that the rights to freedom of expression, association and peaceful assembly are not exercised with the aim of destroying or denying the rights and freedoms of others, especially the right to equality and non-discrimination, and . . . provide the necessary guarantees so that such rights are not misused to promote racist hate speech and racist crimes.¹⁵¹

In determining how to address the freedom of assembly in the context of hate speech, why can't we discuss whether a planned activist will harm our dignity? For example, the stated objectives of the Nazis, if fulfilled, would harm our dignity as a community. Such harm would be apparent if we account for historical context and affirm that we have a core interest of the values of the Fourteenth Amendment, including equal justice under law. Law scholar Steven Shiffrin has thus suggested, "[I]f it is attractive to maintain an American identity placing emphasis on free speech, it is also attractive to foster an American identity of racial equality and an antiracist public morality."¹⁵² Investing an equal or even greater amount of financial resources into promoting ideas of antiracism as authorities currently invest into fostering free speech would both move the United States closer to agreement with the international community's human rights standards and promulgate a strong position against our nation's historical stance of racial hierarchy and white over non-white ideology.

CONCLUSION

When I set out to serve as a legal observer on October 13, 2014, I had no idea that I was embarking on an experience that would exemplify the core contradictions of the First Amendment's freedom of assembly doctrine. I just wanted to help my people get free, a perhaps delusional and lofty dream that I hoped a few minutes of legal observing on an autumn evening would contribute to. I chastised the cynical voice in my head that reminded me that, as the

150. *Early-Warning Measures and Urgent Procedures*, COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION (Nov. 3, 2005), <http://www.ohchr.org/EN/HRBodies/CERD/Pages/EarlyWarningProcedure.aspx> [<http://perma.cc/N9T6-3J9M>].

151. *Prevention of Racial Discrimination, Including Early Warning and Urgent Action Procedures, Decision 1*, COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION (Aug. 18, 2017), http://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/USA/INT_CERD_EWU_USA_8285_E.pdf [<http://perma.cc/8FSH-FMML>].

152. SHIFFRIN, *supra* note 139, at 42.

only Black legal observer, I would be the first one arrested, if it came to that. I used the language of liberation, but I did not know about the long tradition of the First Amendment's use as a racial project dating back to the seventeenth century, a time when my ancestors' freedoms were completely nonexistent. I did not warn protesters that yelling "hands up, don't shoot!" associated them with a history that would become a contributing factor to their criminalization.

But that day reminded me in a visceral way of my history and my responsibility to change things. It forever altered my mentality. I hope that readers have found their own inspirations. I hope you seek and nurture those passions, and find solace in the knowledge that, regardless of the First Amendment's posture towards your endeavor, by taking the risk of racial dissent you secure your own place among those who have engaged in a wrestling match with racial injustice and the First Amendment.

Justin Hansford is an Associate Professor at Howard University School of Law, Director of the Howard University School of Law Civil and Human Rights Clinic, Executive Director of the Thurgood Marshall Center for Civil Rights, Co-Chair of Society of American Law Teacher Human Rights Committee, and a Member of the Board of Directors for the Michael O.D. Brown We Love Our Sons and Daughters Foundation. Special thanks to Jennifer Breaux and Richard Marsico for research assistance, and to the editors of the Yale Law Journal Forum for helping to enrich this Essay with challenging and insightful feedback, which helped my thinking to evolve throughout the writing process.

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