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# Defining *Peaceably*: Policing the Line Between Constitutionally Protected Protest and Unlawful Assembly

Tabatha Abu El-Haj\*

## I. INTRODUCTION

The current wave of civil rights demonstrations in response to police killings began on August 9, 2014, after Darren Wilson, a white police officer, fatally shot Michael Brown, an unarmed African-American eighteen-year-old, in Ferguson, Missouri.<sup>1</sup> Outraged by the incident and by the fact that the body was left on the street for four-and-a-half hours – an image that went viral on social media – members of the community took to the streets.<sup>2</sup> They went out without securing the necessary permits and without visible connection to established local civil rights organizations. The mainstream media quickly framed the events in Ferguson as yet another urban riot in the face of perceived police abuses.<sup>3</sup> The story told over social media by those on the streets painted a much more complicated picture.<sup>4</sup> The mainstream press eventually caught on, and the once unknown City of Ferguson became a household word.

While the events in Ferguson were the starting point, it was the failure of a New York City grand jury to indict the police officer responsible for the death of Eric Garner that ultimately galvanized a movement, after sparking

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1. Jay Caspian Kang, “*Our Demand Is Simple: Stop Killing Us*,” N.Y. TIMES (May 4, 2015), <http://www.nytimes.com/2015/05/10/magazine/our-demand-is-simple-stop-killing-us.html>.

2. *Id.*

3. *E.g.*, Elliot C. McLaughlin, *Fatal Police Shooting in Missouri Sparks Protests*, CNN (Aug. 11, 2014), <http://www.cnn.com/2014/08/10/justice/missouri-police-involved-shooting>; Maya Srikrishnan, *Looting, Vandalism Follow Vigil for Dead Missouri Teenager*, L.A. TIMES (Aug. 10, 2014), <http://www.latimes.com/nation/nationnow/la-na-nn-missouri-police-shooting-20140810-story.html>; *see also* Thomas B. Edsall, Opinion, *Ferguson, Watts and a Dream Deferred*, N.Y. TIMES (Aug. 19, 2014), <http://www.nytimes.com/2014/08/20/opinion/thomas-edsall-ferguson-watts-and-a-dream-deferred.html>.

4. *See, e.g.*, Kang, *supra* note 1 (reporting that soon-to-emerge activist DeRay Mckesson got into his car and drove to Ferguson because “[h]e was struck by the distance between the sensational accounts of rioting he saw on television and the reports he was reading on Twitter from people in Ferguson, who claimed that the cops had been firing tear gas and rubber bullets into crowds of peaceful protestors”).

demonstrations in New York City and solidarity protests around the nation.<sup>5</sup> Eric Garner, like Michael Brown, was an unarmed black man who died at the hands of police; Garner's tragic death resulted from a police chokehold that was caught on videotape.<sup>6</sup> Among the many slogans to come out of those protests, the phrase "Black Lives Matter" has come to define the movement.<sup>7</sup>

Since the incident in Ferguson, Black Lives Matter activists have publicized on social media the deaths of people of color at the hand of police officers in city after city, and each incident has triggered protests – a few large, many unpermitted.<sup>8</sup> Most recently, the death of Freddie Gray, a twenty-five-year-old black man who died after suffering fatal injuries while in police custody, led to large demonstrations in Baltimore.<sup>9</sup> The city was put under a curfew for over a week after the governor of Maryland declared a state of emergency and called out the National Guard in response to riots that convulsed the city for several days.<sup>10</sup>

While there is no question that some of the participants in the Baltimore crowds, like those in Ferguson, crossed the line between constitutionally protected and unlawful assembly, angry and leaderless crowds that form to respond to perceived abuses of governmental power are always disruptive.<sup>11</sup>

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5. See John Zangas, *Tens of Thousands Surge Through Manhattan, Decry Police Violence*, POPULAR RESISTANCE (Dec. 15, 2014), <https://www.popularresistance.org/tens-of-thousands-surge-through-manhattan-decry-police-violence/> (noting that the permitted march was followed by a spontaneous march to Brooklyn over the Brooklyn Bridge, which ended ten hours after the permitted march began).

6. Joseph Goldstein & Marc Santora, *Staten Island Man Died from Chokehold During Arrest, Autopsy Finds*, N.Y. TIMES (Aug. 1, 2014), <http://www.nytimes.com/2014/08/02/nyregion/staten-island-man-died-from-officers-chokehold-autopsy-finds.html>.

7. The slogan "Black Lives Matter" was coined on social media in 2013 in response to the nonindictment of George Zimmerman, a civilian responsible for the death of Trayvon Martin, another young black man. *About the Black Lives Matter Network*, BLACK LIVES MATTER, <http://blacklivesmatter.com/about/> (last visited Oct. 8, 2015).

8. Massive demonstrations in Missouri also followed the failure of a grand jury to indict Officer Wilson. Kris Hermes, *Supporting Resistance to Police Violence in Ferguson*, 39 GUILD NOTES 13 (2014), <https://www.nlg.org/sites/default/files/Guild%20Notes%20Winter%202014%20WEB.pdf> (noting, further, that solidarity demonstrations took place in 170 cities around the nation).

9. Kang, *supra* note 1. The six officers involved with Freddie Gray were charged with various crimes, including misconduct in office and second-degree murder, on May 1, 2015. *Id.*

10. Krishnadev Calamur, *Maryland Governor Lifts State of Emergency in Baltimore*, NPR (May 6, 2015, 12:43 PM), <http://www.npr.org/sections/thetwo-way/2015/05/06/404675117/maryland-governor-lifts-state-of-emergency-in-baltimore>.

11. *Cf.* Martin J. McMahon, *What Constitutes Sufficiently Violent, Tumultuous, Forceful, Aggressive, or Terrorizing Conduct to Establish Crime of Riot in State Courts*, 38 A.L.R. 4th 648 §§ 18–19 (1985) (reviewing cases illustrating that violence against either persons or property is sufficient to transform a political demonstration

More importantly, the Founders fully understood this when they singled out assembly for First Amendment protection.

The Black Lives Matter movement, therefore, provides a unique opportunity to revisit the Constitution's protection of a "right of the people peaceably to assemble."<sup>12</sup> Even more than the Occupy movement, the recent protests against the frequency with which unarmed African Americans die as a result of police officers' actions illustrate the serious consequences that flow from the Supreme Court's failure to appreciate that the First Amendment identifies a particular form of conduct – public assembly – for separate constitutional protection.<sup>13</sup> The fact that the Black Lives Matter protests often bear little resemblance to our idealized conceptions of public discourse – as reasoned disquisitions on difficult choices of public policy – underscores why the Founders recognized the need for a separate clause to protect assembly and the process of redressing grievances. It illustrates why the Supreme Court's contemporary jurisprudence, which collapses the right of assembly into the freedom of speech, is thoroughly misguided – leaving protestors feeling that First Amendment protections are weak and lower courts confused about how to decide what level of public disruption the Constitution requires officials to tolerate. In sum, the recent protests provide a unique opportunity to consider why outdoor assembly remains a valuable form of political participation, even in the digital age, and why it deserves more robust constitutional protections.

## II. THE LIVED EXPERIENCE OF THE RIGHT OF ASSEMBLY

Anyone who has sought solidarity with others as they protest the shooting of civilians by police will have noticed that protestors have little control over the time, place, and manner of their assemblies. Forced to navigate a wide array of hurdles to gain permission to be out in public legally and faced with police officers routinely handing out citations, at their discretion, for a variety of minor public order offences, protestors often experience their First Amendment right to peaceably assemble as somewhere between weak and nonexistent.

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into a riot); accord Margot E. Kaminski, *Incitement to Riot in the Age of Flash Mobs*, 81 U. CIN. L. REV. 1, 10 (2012) ("A law that bans large assemblies that are physically harmful or destructive is likely constitutional.").

12. U.S. CONST. amend. I.

13. The fall of 2011 saw the emergence in the United States of a series of mass demonstrations followed by occupations of prominent spaces in urban centers – starting with Wall Street – in an effort to call attention to economic inequality and the pervasive influence of special interests in politics. See Mark Engler & Paul Engler, *The Recipe For A Successful Protest Movement*, IN THESE TIMES (Dec. 11, 2014), [http://inthesetimes.com/article/17440/what\\_makes\\_protest\\_movements\\_explode](http://inthesetimes.com/article/17440/what_makes_protest_movements_explode). The Occupy movement's most distinctive practice was a nightly assembly in which participants debated and addressed pressing political, strategic, and administrative concerns. *Id.*

This is because, while the Supreme Court has held that the First Amendment means, at the very least, that individuals are entitled to assemble in traditional public fora, such as public streets and parks, it has also held that cities may pass ordinances – permanent and temporary – to manage the time and location of demonstrations.<sup>14</sup> Indeed, the Supreme Court has held that permit requirements for public assemblies are presumptively constitutional.<sup>15</sup> Moreover, law enforcement routinely uses low-level criminal law to manage the disruptiveness of protests, with judicial approval.<sup>16</sup> Taken together, these two sources of law – municipal rules governing access to public space and criminal law (local, state, and federal) – render protestors supplicant to the authorities they are challenging.

Unsurprisingly, law enforcement sees the matter quite differently. From their point of view, outdoor assemblies pose substantial risks to public safety.<sup>17</sup> The specter of disorder and violence may be greatest when the people

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14. *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939); see also Tabatha Abu El-Haj, *The Neglected Right of Assembly*, 56 UCLA L. REV. 543, 553 (2009) [hereinafter Abu El-Haj 2009] (summarizing current doctrine).

15. *Cox v. New Hampshire*, 312 U.S. 569, 576 (1941) (holding that the government can constitutionally predicate the lawfulness of an assembly on obtaining advance permission in cases involving no record evidence of official discrimination); accord *Gregory v. City of Chicago*, 394 U.S. 111, 118 (1969) (Black, J., concurring) (“Plainly, however, no mandate in our Constitution leaves States and governmental units powerless to pass laws to protect the public from the kind of boisterous and threatening conduct that disturbs the tranquility of spots selected by the people either for homes, wherein they can escape the hurly-burly of the outside business and political world, or for public and other buildings that require peace and quiet to carry out their functions, such as courts, libraries, schools, and hospitals.”).

16. Tabatha Abu El-Haj, *All Assemble: Order and Disorder in Law, Politics, and Culture*, 16 U. PA. J. CONST. L. 949, 961–62 (2014) [hereinafter Abu El-Haj 2014] (using the Occupy movement’s experiences to illustrate the frequency with which police resort to arrests for minor crimes to control protests and the lower courts uphold those practices).

17. Cf. Luke Broadwater, *Baltimore Preparing for Protests During Next Week’s Hearing in Freddie Gray Case*, BALT. SUN (Aug. 26, 2015), <http://www.baltimoresun.com/news/maryland/freddie-gray/bs-md-ci-prepare-20150826-story.html>; Ray Sanchez, *Across U.S., Protesters and Police Prep for Ferguson Grand Jury Decision*, CNN (Nov. 17, 2014), <http://www.cnn.com/2014/11/17/us/ferguson-national-demonstrations-police/>; see also Scott Neuman, “Occupied” Cities Becoming A Big Problem For Mayors, NPR, (Nov. 7, 2011), <http://www.npr.org/2011/11/07/142102081/occupy-presents-big-problems-for-big-city-mayors>; Cara Buckley & Matt Flegenheimer, *At Scene of Wall St. Protest, Rising Concerns About Crime*, N.Y. TIMES, (Nov. 8, 2011), <http://www.nytimes.com/2011/11/09/nyregion/at-occupy-wall-street-protest-rising-concern-about-crime.html>. These order management concerns have largely resonated with the public, especially when the morning news includes dramatic images of angry bands out at night looting and burning police cars. See, e.g., Polly Mosendz et al., *Public Emergency Declared After Baltimore Rioters Burn Police Cars, Loot Stores Following Freddie Gray Funeral*, NEWSWEEK (Apr. 27, 2015, 4:28 PM), <http://www.newsweek.com/protesters->

taking to the street are disgruntled and insist on staying out into the night, but some risk of violence to persons and property is always present, arising as it does out of the very nature of assembly – a crowd out of doors being policed by government officials.<sup>18</sup> Moreover, all outdoor assemblies, however peaceful, are inconvenient in modern cities.

Policing the line between constitutionally protected protests and unlawful assemblies is unquestionably a very difficult task. The Black Lives Matter protests that have occurred since Ferguson vividly highlight that outdoor assemblies exist on a continuum from peaceful to disruptive, and further, that disruption can range from illegal acts that are principally inconvenient to violent acts against other individuals.

Unfortunately, cities routinely do a remarkably imperfect job of distinguishing between the peaceful, angry, and violent elements of an assembly, particularly when these forms of crowd behavior are present in a single demonstration. Thus, even where their behavior has been nonviolent and would traditionally have been understood to be peaceable, participants in the Black Lives Matter movement have frequently been charged with various misdemeanors, from disorderly conduct and breach of the peace to trespass and disobeying lawful police orders.

Ferguson provides a good illustration of this point. On the one hand, there is no question that aspects of the policing of the protests in Ferguson were both atypical and unconstitutional. For example, not only did the city regularly deploy tear gas and other chemical agents to disperse largely peaceful crowds without warning, its high-level officials formally encouraged individual officers to order demonstrators to walk at all times if they wished to

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baltimore-throw-rocks-bottles-police-following-freddie-grays-325771. Even during the Occupy movement, whose encampments were primarily inconvenient rather than violent, public sympathy toward government efforts to manage the inconvenience and disorder generally ran high. See, e.g., Marisol Bello, *Poll: 6 in 10 Indifferent About Occupy Movement*, USA TODAY (Nov. 21, 2011) (reporting that a Gallop poll found that between October and late November the percentage of Americans who disapproved of the way the movement was being conducted rose from twenty percent to thirty-one percent), <http://usatoday30.usatoday.com/news/nation/story/2011-11-21/occupy-wall-street-poll/51338920/1>; Larry Copeland et al., *Wall Street Protesters Find Cities' Patience Wearing Thin*, USA TODAY (Oct. 27, 2011), <http://usatoday30.usatoday.com/news/nation/story/2011-10-26/occupy-wall-street-oakland/50922286/1>; see also Abu El-Haj 2014, *supra* note 16, at 967–68. As I have argued elsewhere, while Americans today value individual freedom far more than previous generations and are willing to tolerate much more religious and artistic expression, we tend to harbor much more fear of outdoor gatherings and the disorder that they sometimes produce. See Abu El-Haj 2014, *supra* note 16, at 950. Thus, the public has largely been complaisant, as police officers, local governments, and courts routinely undermine the right of assembly. See *id.* at 1034.

18. Cf. Mahon, *supra* note 11, at § 20 (reciting case after case where riot conviction was based on the crowd's violent response to efforts by police to contain or disperse an originally peaceful crowd).

avoid arrest for failing to move on.<sup>19</sup> On the other hand, the resort by law enforcement in Ferguson to enforcing an array of nonviolent misdemeanors, such as disorderly conduct and trespass to control and disperse crowds, is quite typical.<sup>20</sup> Between August and mid-September, by some reports, over 200 arrests were made – the vast majority of which were for failure to disperse or resisting arrest.<sup>21</sup>

Courts, meanwhile, routinely uphold municipal efforts to circumscribe, control, and disperse crowds in the name of public order.<sup>22</sup> As I have argued elsewhere, they do so because they have fundamentally misunderstood the reasons that the Founders singled out public assembly for explicit constitutional protection.<sup>23</sup>

The result is that today, a citizen's right to come out to protest – or merely express solidarity with others – in response to a current event depends significantly on local officials' tolerance for inconvenience and disorder. While some cities tend to crack down hard on spontaneous or disruptive assemblies, others, like Philadelphia in recent years, are more tolerant.<sup>24</sup> Tolerance can come from high up or from low down – from ignoring missing permits or from refraining from arresting for minor offenses.

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19. *Abdullah v. Cty. of St. Louis*, 52 F. Supp. 3d 936 (E.D. Mo. 2014) (enjoining police from preventing peaceful demonstrators from standing still when challenged by an ACLU observer, whose primary role in the demonstrations was to talk to protestors about their rights); Order Granting Temporary Restraining Order, *Templeton v. Dotson*, No. 4:14-CV-2019 (E.D. Mo. Dec. 11, 2014) (temporarily restraining practice and requiring the issuance of clear and unambiguous warnings in advance of any use of chemical agents to allow peaceful demonstrators time to disperse without harm). In March 2015, St. Louis City and County police departments, as well as the Missouri State Highway Patrol, settled with the plaintiffs in *Templeton*, agreeing to the permanent adoption of the policy set in place by the temporary restraining order and to three years of ongoing supervision by the federal court. Angela Bronner Helm, *Ferguson Area Police Agree Not to Use Tear Gas Against Protesters*, NEWSONE (Mar. 26, 2015), <http://newsone.com/3102255/ferguson-area-police-agree-not-to-use-tear-gas-on-peaceful-protesters/>.

20. See, e.g., Abu El-Haj 2014, *supra* note 16, at 961–62 (noting that during Occupy, police regularly “dispersed [protestors] for actual or anticipated disorder, including obstructions of vehicular or pedestrian traffic” and arrested them for “trespass, disorderly conduct, and unlawful assembly”).

21. Posting of Kris Hermes, *Legal Update from St. Louis/Ferguson*, legal-workervp@nlg.org, to massdefense@nationallawyersguild.org (Sept. 17, 2014) (on file with author) (reporting around thirty-five arrests for more serious charges, such as felony burglary and misdemeanor theft).

22. See *id.* at 958–67 (describing how cities were able to disperse the Occupy encampments relatively easily, with the approval of federal courts, when they became increasingly inconvenient).

23. Abu El-Haj 2009, *supra* note 14, at 588–89 (laying out some distinctions between the two rights).

24. Dana DiFilippo, *Will Philly Police Pass the Protest Test?*, PHILLY (Apr. 9, 2015), [http://www.philly.com/philly/news/20150408\\_Will\\_Philly\\_police\\_pass\\_the\\_protest\\_test\\_.html#cv3kqq6u2bbZHtcS.03](http://www.philly.com/philly/news/20150408_Will_Philly_police_pass_the_protest_test_.html#cv3kqq6u2bbZHtcS.03).

### III. THE RIGHT OF THE PEOPLE TO *PEACEABLY* ASSEMBLE

The text of the First Amendment articulates two distinct rights: the freedom of speech and “the right of the people to *peaceably* assemble.”<sup>25</sup> Now one might wonder how efforts to manage disorderly crowds could constitute an infringement of a right to peaceably assemble? The answer is that, like most terms in our Constitution, *peaceably* is not self-defining.

The central interpretive question, therefore, has always been where to draw the line between a constitutionally protected assembly and a criminally punishable mob. While riots and unlawful assemblies have always been understood to fall outside of constitutional protection, what constitutes a riot or unlawful assembly is much less clear.<sup>26</sup> More specifically, the uncertainty “revolves around how violent or disorderly a crowd may be before it loses First Amendment protection.”<sup>27</sup>

There is little question that setting objects on fire renders an assembly unlawful, but it is less clear that blocking a highway should count as *unpeaceable* for First Amendment purposes. Meanwhile, the stickiest question today is whether engaging in illegal but nonviolent acts should render an assembly *unpeaceable*? The issue is particularly difficult where the nonviolent illegal act is trespass.

These are not hypothetical questions, as the Black Lives Matter movement makes all too evident. Since August 2014, “People across th[e] country [have] found different ways . . . to protest against the deaths of unarmed black men at the hands of police. They [have] stormed restaurants. They [have] blocked interstates. . . . And in Ferguson, Missouri, some [have] also set things on fire.”<sup>28</sup> Black Lives Matter protestors have also repeatedly created inconvenience by staging four-and-a-half minute “die-ins” to represent the four-and-a-half hours that Michael Brown’s body lay on the street in Ferguson.<sup>29</sup> These die-ins have not infrequently taken place in shopping areas, which provide a unique opportunity to get the attention of the wider public.<sup>30</sup>

25. U.S. CONST. amend. I (emphasis added).

26. For further elaboration of this point, see Abu El-Haj 2014, *supra* note 16, at 1035–36.

27. Kaminski, *supra* note 11, at 4.

28. Latoya Dennis, *Milwaukee Group Teaches Protesters Civil Disobedience Tactics*, NPR (Jan. 16, 2015, 5:10 AM), <http://www.npr.org/2015/01/16/377635594/milwaukee-group-teaches-protesters-civil-disobedience-tactics>.

29. See Micah Luxen, *When Did ‘Die-Ins’ Become A Form of Protest?*, BBC NEWS (Dec. 9, 2014), <http://www.bbc.com/news/blogs-magazine-monitor-30402637>.

30. Michael Paulson, *Martin Luther King’s Birthday Marked by Protests Over Deaths of Black Men*, N.Y. TIMES (Jan. 19, 2015), <http://www.nytimes.com/2015/01/20/us/king-holiday-events-include-air-of-protest-over-deaths-of-black-men.html> (reporting that “[i]n New York, there was a ‘die-in’ outside Bloomingdale’s, in the heart of an upscale shopping area, while in Boston, similar ‘die-ins’ took place on streets between Boston Common and the Public Garden and then in front of the Statehouse”).



The movement specifically organized many disruptive actions on Martin Luther King Day with the goal of drawing attention to those aspects of the civil rights movement that remain incomplete.<sup>31</sup> In Atlanta, about 200 young demonstrators sat down in the middle of Peachtree Street, briefly disrupting a parade that had started at nearby Ebenezer Baptist Church to commemorate King's work.<sup>32</sup> In St. Louis, "[A] group of protesters rushed the stage at a prayer service, bringing the event to a halt until the police arrived."<sup>33</sup>

Municipalities have not been shy about arresting and prosecuting disruptive protestors. In one instance, Missouri police arrested as many as thirty-six protestors on charges, among other things, of unlawful assembly for blocking a freeway – an action that, while no doubt illegal and inconvenient to motorists, was not violent.<sup>34</sup> The City of Bloomington, Minnesota, filed charges against the organizers of the die-in at the Mall of America.<sup>35</sup> Those charges included not only trespass and disorderly conduct, but also unlawful assembly.<sup>36</sup>

Although many assume that the right of assembly *cannot* protect participation in the Mall of America die-in or in protests that similarly involve crimes against private property, even that assumption is far from obvious.<sup>37</sup> The Boston Tea Party, one should remember, is so-named because the crowd threw private property into Boston Harbor. While the British certainly thought the crowd constituted a mob, notwithstanding the fact there was no damage to the ships, it is equally clear that the Americans understood their actions differently, and it is their views that have informed our understanding of the Boston Tea Party.<sup>38</sup>

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31. *Id.*

32. *Id.*

33. *Id.*

34. Posting of Kris Hermes, *supra* note 21 (describing the work of Missourians Organizing for Reform and Empowerment).

35. Complaint, State v. Levy-Pounds, No. CR-2015-114 (Minn. Dist. Ct. Jan. 9, 2015), 2015 WL 243617.

36. *Id.* The Occupy movement similarly found itself frequently struggling with the tension between private property and First Amendment rights. See Abu El-Haj 2014, *supra* note 16, at 960 n.42.

37. It is of some note, though of no legal significance under current doctrine, that the taxpayers of Minnesota contributed millions of dollars to help build and expand the Mall of America. See John Tevlin, *Does Bloomington Attorney Work for the City or the Mall of America?*, STAR TRIB. (Jan. 8, 2015, 6:22 AM), <http://www.startribune.com/tevlin-does-bloomington-attorney-work-for-the-city-or-the-mall-of-america/287863681/>; see also Steven P. Aggergaard, *When "Public Space" Isn't Public*, BENCH & B. OF MINN. (June 9, 2015), <http://mnbenchbar.com/2015/06/when-public-space-isnt-public/>.

38. For more on how the colonists distinguished between lawful and unlawful mobs, see JOHN PHILLIP REID, IN A DEFIANT STANCE: THE CONDITIONS OF LAW IN MASSACHUSETTS BAY, THE IRISH COMPARISON, AND THE COMING OF THE AMERICAN REVOLUTION (1977) and PAULINE MAIER, FROM RESISTANCE TO REVOLUTION: COLONIAL RADICALS AND THE DEVELOPMENT OF AMERICAN OPPOSITION TO BRITAIN,

The bottom line is that disruptive, angry demonstrations are no less part of the venerable American tradition of public protest from the Boston Tea Party to the recent Occupy movement than the nonviolent marches led by Martin Luther King that we have come to idealize, many of which also included moments of rioting. It is not a gross exaggeration to suggest that “[t]he United States was born amid a wave of rioting.”<sup>39</sup> As Revolutionary crowds subsided, the new nation soon faced Anti-Federalist crowds angered by the ratification of the Constitution – most famously in Carlisle, Pennsylvania.<sup>40</sup> During the controversy over the Jay Treaty, which would ultimately bring Thomas Jefferson and the Democratic-Republicans into power, mobs formed in Philadelphia and Boston.<sup>41</sup> In the 1830s, as President Jackson campaigned against the Second United States Bank, bank failures triggered a number of riots.<sup>42</sup>

While early American crowds generally avoided violence against persons, it was not uncommon for them to destroy property or engage in activities that would make the public wary today – for example, burning officials in effigy.<sup>43</sup> Raucous crowds were accepted, if ambivalently, as an extreme but constitutional mechanism for citizens to register dissent.<sup>44</sup> Even the destruction of private property did not necessarily render a gathering outside constitutional protection. As historian Paul Gilje comments, while “[r]ioting never became completely legitimate,” and in almost all incidents someone considered the mob action unlawful, “what stands out in examining eighteenth-century popular disorder is not the doubts and threats it posed; instead, it is the general acceptance of the mob as a quasi-legitimate part of the standing

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1765–1776 (1972). John Phillip Reid specifically notes that during the Revolutionary period in Boston, the Riot Act was never read by magistrates, who understood the political aims of the revolutionary crowds. REID, *supra*, at 90.

39. PAUL A. GILJE, *RIOTING IN AMERICA 1* (Harvey J. Graff ed., 1996).

40. For more on the Carlisle Riot of 1781, see SAUL CORNELL, *THE OTHER FOUNDERS: ANTI-FEDERALISM AND THE DISSENTING TRADITION IN AMERICA, 1788–1828* 109–20 (1999).

41. GILJE, *supra* note 39, at 2.

42. *Id.* at 72.

43. *E.g., id.* at 1–11. Some historians challenge this rosy account arguing that revolutionary and early American crowds both threatened and inflicted violence against persons in their efforts to humiliate and punish. See Thomas J. Humphrey, *Crowd and Court: Rough Music and Popular Justice in Colonial New York*, in *RIOT AND REVELRY IN EARLY AMERICA* 107, 111–14 (William Pencak et al. eds., 2002); see Susan E. Klepp, *Rough Music on Independence Day: Philadelphia, 1778*, in *RIOT AND REVELRY IN EARLY AMERICA*, *supra*, at 156, 161. While they may not have killed their victims, they tarred and feathered them, stripped them down, and often threatened much more. *Id.*

44. MARY RYAN, *CIVIC WARS: DEMOCRACY AND PUBLIC LIFE IN THE AMERICAN CITY DURING THE NINETEENTH CENTURY* 131 (1997) (“[A] riot was not so much a breakdown of democratic process as its conduct by another means. . . . It was a congregation in open space to publish the collective opinion of a distinctive group.”).

social and political order.”<sup>45</sup> Out on the streets, Americans often claimed their constitutional right to disorderly protest. For instance, in the early 1840s, participants in protests against the railroad companies in Pennsylvania carried banners that read: “‘NO MONOPOLY’ . . . [and] ‘THE CONSTITUTION PROTECTS THE PEOPLE IN THE USE OF THEIR HIGHWAYS.’”<sup>46</sup>

The point of discussing these early American views and practices is certainly not to advocate a return to constitutional protection for violent mobs.<sup>47</sup> The modern state’s monopoly on the use of legitimate violence is a definite advance on earlier forms of political ordering.

Rather, the point is to situate the actions of the Black Lives Matter movement in a thoroughly American tradition of protest. Only when the discomfiting, even threatening and violent, aspects of the movement are situated in this tradition can we begin to have a more thoughtful and nuanced debate about whether the contemporary interpretation of the right of peaceable assembly is sufficiently protective of this important form of politics that the Founders singled out for protection. Contextualizing the Black Lives Matter movement in this broader history creates an opportunity to discuss the ways that our current approach to the regulation of outdoor assembly, as sanctioned

45. GILJE, *supra* note 39, at 20–21.

46. *Id.* at 71–72; *see also* Abu El-Haj 2014, *supra* note 16, at 971–93 (providing similar examples from later in the nineteenth century).

47. There was even a view at the time that mobbing (i.e., crowd violence) could be constitutional. This view came out of an English Whig tradition that held that when governments acted contrary to fundamental law, the people could legitimately “withhold support from measures that ‘Breach the *Constitution*.’” LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 24 (2004). Among the people’s legitimate forms of dissent was “crowd action[,] represent[ing] a direct expression of popular sovereignty.” *Id.* at 27. Thomas Jefferson, for example, in 1787, noted that mobs tended to hold rulers accountable to the true principles of their institutions and to provide medicine necessary for the sound health of government. MAIER, *supra* note 38, at 24. Meanwhile, members of the British House of Lords seriously argued that “rioting is an essential part of our constitution.” *Id.* (noting further that “even the conservative Thomas Hutchinson remarked in 1768 that ‘Mobs, a sort of them at least, are constitutional’”). However, mobbing could only be resorted to when nonviolent mechanisms for resisting had been exhausted. KRAMER, *supra*, at 25. This view was premised on a number of related shared understandings that no longer apply today. First, in the eighteenth century, law was understood to be objective. *See, e.g.*, Christine A. Desan, *The Constitutional Commitment to Legislative Adjudication in the Early American Tradition*, 111 HARV. L. REV. 1381, 1470–71 (1988). This lent support to the view that all entities within the polity could interpret it, including lay people. *Id.* Second, society at the time was viewed as a single organic entity. *See* KRAMER, *supra*, at 24–25. This made it possible to believe that there could be a consensus among the people as to when a breach of fundamental law was taking place. *Id.* Finally, it was thought that the masses would not revolt without good cause. *Id.*

by judicial doctrine, stands in stark contrast to the views of prior generations of Americans.

Until the late nineteenth century, American law narrowly defined the crimes of riot, rout, and unlawful assembly by requiring an immediate and serious risk of violence.<sup>48</sup> Americans accepted that acting illegally was not the same as acting violently and that citizenship, initially English but later American, included a right to peaceably assemble that protected a great deal of disorder short of violence.<sup>49</sup>

During the colonial period, a riot was defined as three or more persons engaged in an “unlawful act of violence.”<sup>50</sup> A local magistrate would literally read the crowd the Riot Act.<sup>51</sup> Once it had been read, members of the group had one hour to disperse.<sup>52</sup> Thereafter, they could be charged with rioting or unlawful assembling if they were found to have attempted a riot.<sup>53</sup> A riot became an act of treason where the target was public.<sup>54</sup> Insofar as it required a community *posse* to enforce the constable’s order, in practice there had to be some consensus that the rebellion was unwarranted to suppress the crowd.<sup>55</sup>

Even as Americans became more wary of mobs after the republic was established, they understood that acting illegally was not the same as acting violently and that the constitutional right of assembly protected disorder short of violence. Nineteenth-century American law was highly tolerant of the disorder associated with outdoor assemblies, only interfering when they descended into disorder just short of violence.<sup>56</sup> Indeed, until the late nineteenth century, cities and states did not regulate public gatherings in advance.<sup>57</sup> The law only sanctioned interference with public assemblies that were actually disruptive and only after they had begun.<sup>58</sup>

This broad conception of the right of assembly explains why the state supreme courts to first confront the constitutionality of municipal laws requiring permits prior to assembling or parading in public streets and parks balked at the suggestion that general permit requirements were reasonable efforts to

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48. See REID, *supra* note 38, at 77; see also Abu El-Haj 2014, *supra* note 16, at 953.

49. Abu El-Haj 2009, *supra* note 14, at 578.

50. MAIER, *supra* note 38, at 19, 24–25 (discussing practice in the colonies between 1722–1774 and noting a tradition of enacting Riot Acts for a limited duration – one to three years – in response to specific crises).

51. REID, *supra* note 38, at 77.

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.* at 77–78.

56. Abu El-Haj 2014, *supra* note 16, at 968–71.

57. *Id.* at 970.

58. Abu El-Haj 2009, *supra* note 14, at 561–69 (describing law governing public assemblies through late nineteenth century).

regulate street gatherings.<sup>59</sup> It also explains why, outside of court, Americans repeatedly defended their right to assemble in public free from prior constraints, even when the risk of violence was very real.<sup>60</sup>

#### IV. THE REDEFINITION OF *PEACEABLY* IN CONTEMPORARY LAW

In myriad ways, the definition of what constitutes a peaceable assembly has been narrowed since the late nineteenth century.<sup>61</sup> The result is that the current level of protection for outdoor assemblies is akin to the level of protection for speech in the early twentieth century, when the Court routinely upheld the suppression of speech so long as the government could show the speech had a so-called bad tendency to produce lawlessness or violence.<sup>62</sup> This is true despite the fact that states vary in their definitions of unlawful assembly and riot – with some retaining the nineteenth-century approach – and despite the Supreme Court’s efforts in the mid-twentieth century to narrowly circumscribe the use of criminal law in the context of activities protected by the First Amendment. These high points are undermined both by the widespread acceptance of municipal permit requirements and the criminal consequences of that acceptance for protestors and by the wide discretion that police officers exercise on the ground.

A number of states that have experienced Black Lives Matter protests, including Missouri and Maryland, continue to hew closely to the nineteenth-century common law, in which the crimes of unlawful assembly and riot were limited to situations of violence or threatened violence. Maryland is one of a handful of states in which riot remains a common law offense.<sup>63</sup> Maryland’s highest court has only had three occasions to review the elements of riot; nevertheless, in 2005, it clarified that violence against persons or property is an essential element of the crime.<sup>64</sup>

In Missouri, the crimes are set out in a statute passed in 1978.<sup>65</sup> Missouri’s unlawful assembly statute criminalizes an assembly of “six or more other persons,” which intends “to violate any of the criminal laws of this state

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59. *Id.* at 569–83 (examining the state supreme court decisions reviewing these newly adopted laws and highlighting how these courts explicitly invoked American traditions of political parades and assemblies and the customary, constitutional right inherited from English law that protected them).

60. *See* Abu El-Haj 2014, *supra* note 16, at 968–93, 1037 (recounting various controversies that illustrate both public support for a robust right of assembly and public tolerance of the associated disorder).

61. *Id.* at 1029.

62. *Id.* at 1034.

63. *Schlamp v. State*, 891 A.2d 327, 330 (Md. 2006).

64. *Id.* at 330–33 (noting further that the four cases in the Court of Special Appeals also all involved acts of violence).

65. MO. REV. STAT. § 574.040 (2000).

or of the United States *with force or violence*.”<sup>66</sup> Moreover, Missouri case law makes clear that an assembly is not unlawful until it undertakes “actions that make it reasonable for rational people in the area ‘to believe the assembly will *cause injury to persons or damage to property* and will interfere with the rights of others by committing disorderly acts.”<sup>67</sup> A riot, meanwhile, does not exist unless the group “actually violate[s] criminal laws *with force or violence*.”<sup>68</sup> Missouri’s “refusal to disperse” statute is especially protective of protestors insofar as it is explicit that an order to disperse is only lawful if given during an unlawful assembly or riot.<sup>69</sup>

Missouri and Maryland are not outliers in this regard. Many states, as a matter of black letter law, define the crimes of unlawful assembly and riot narrowly. The Supreme Court of California, for example, has held that the First Amendment’s guarantee of a right to assemble peaceably mandates that an assembly only becomes unlawful where there is violence or a clear and present danger of imminent violence.<sup>70</sup> In doing so, it specifically noted that public apprehension of “large, noisy” assemblies, “particularly . . . [those] that espouse[] an unpopular idea . . . does not warrant restraints on the right to assemble unless the apprehension is justifiable and reasonable *and the assembly poses a threat of violence*.”<sup>71</sup>

Unfortunately, officers regularly make arrests for these crimes in situations that could not result in a conviction. While it is likely that those participating in both the burning down of businesses and the looting in Ferguson, in August 2014, did engage in behavior that met Missouri’s statutory definitions of unlawful assembly and riot, it is equally clear that law enforcement in Missouri regularly arrests individuals for unlawful assembly and riot in situations where “force or violence” is absent. Missouri officials, for instance, arrested twenty people for participating in “a sit-in at the Quick Trip gas station in the Shaw area of St. Louis” and then more than one hour later, arrested a National Lawyers Guild (“NLG”) Legal Observer who was on site for unlawful assembly.<sup>72</sup> The NLG Legal Observer certainly should not have been arrest-

66. *Id.* (emphasis added); *see also* State v. Mast, 713 S.W.2d 601, 602 (Mo. Ct. App. 1986).

67. Abdullah v. Cty. of St. Louis, 52 F. Supp. 3d 936, 953 (E.D. Mo. 2014) (emphasis added) (quoting *Mast*, 713 S.W.2d at 603–04).

68. *Id.* at 953 (emphasis added). Missouri’s “refusal to disperse” statute is particularly protective of protestors insofar as it makes clear that the lawful order must be given during an unlawful assembly or riot. *See* MO. REV. STAT § 574.050.

69. MO. REV. STAT § 574.060.1 (“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 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.”).

70. *In re Brown*, 510 P.2d 1017, 1021 (Cal. 1973) (en banc) (interpreting the elements of unlawful assembly).

71. *Id.* (emphasis added).

72. Posting of Kris Hermes, *Ferguson October: Legal Update*, legal-workervp@nlg.org, to massdefense@nationallawyersguild.org (Oct. 15, 2014) (on

ed for unlawful assembly, but depending on the circumstances, it is not even clear that the participants in the sit-in were engaged in an unlawful assembly under Missouri law.

From the perspective of the First Amendment, the fact that state courts would be likely to dismiss charges or overturn convictions provides little comfort. Such arrests take protestors off the streets, rendering their formal constitutional rights meaningless. Overcharging is a substantial problem for protestors. As a practical matter, it does not matter if one could not be successfully indicted or convicted of the crime for which one was arrested.

In other states, the black letter law, with respect to unlawful assembly and riot, criminalizes a wider swath of disruptive assembly. New York, for instance, has redefined unlawful assembly and riot such that engaging in violent behavior is no longer a necessary element of the crime. Instead, causing public consternation is generally enough. This is because, starting in 1968, New York's penal code distinguishes between riot in the first degree and riot in the second degree.<sup>73</sup> Riot in the first degree comports with the nineteenth-century conception of the right of assembly discussed earlier: it requires that the assembly engage in "tumultuous and violent conduct," but also that a third party "suffers physical injury" or that there is substantial damage to property.<sup>74</sup> By contrast, riot in the second degree requires only that one person in a group of four or more publicly "engage in tumultuous and violent conduct and thereby intentionally or recklessly cause or create a *grave risk* of causing public *alarm*."<sup>75</sup> New York's highest court has been unequivocal that "[t]he phrase 'tumultuous and violent conduct' . . . means much more than mere loud noise or ordinary disturbance[, and] . . . [']is designed to connote frightening mob behavior involving ominous threats of injury, stone throwing or other such terrorizing acts."<sup>76</sup> Nevertheless, violence to persons or property is no longer an element of the crime. Instead, the second element of the crime requires only intentional or reckless causing of "a grave risk of . . .

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file with author) (noting that the police justified the arrests on the basis that the Quick Trip was located near the scene of a killing by an off-duty police officer the previous week).

73. N.Y. PENAL LAW § 240.06.1 (McKinney 2015).

74. *Id.* (emphasis added) ("A person is guilty of riot in the first degree when he . . . [s]imultaneously with ten or more other persons, engages in tumultuous and violent conduct and thereby intentionally or recklessly causes or creates a grave risk of causing public alarm, and in the course of and as a result of such conduct, a person other than one of the participants suffers physical injury or substantial property damage occurs[.]"). New York also criminalizes Inciting to Riot. See *People v. Tolia*, 214 A.D.2d 57, 63–64 (N.Y. App. Div. 1995) (construing statute, in light of the First Amendment, to require proof that the accused "intended to incite violence" and that there was a "clear and present danger" that violence would ensue).

75. N.Y. PENAL LAW § 240.05 (emphasis added).

76. *People v. Morales*, 601 N.Y.S.2d 261, 262 (N.Y. Crim. Ct. 1993) (quoting William C. Donnino, Practice Commentary, N.Y. PENAL LAW § 240.05 (McKinney) (holding that shouting obscenities was not sufficient to establish participation in riot even where others at scene were pushing and fighting)).

. public alarm.”<sup>77</sup> Equally importantly, the crime of unlawful assembly was rewritten to track the language of the lesser of the two riot offenses and thus, no longer requires an imminent threat of violence to persons or property.<sup>78</sup>

In effect, New York has narrowed the definition of what constitutes a peaceable assembly by defining certain disruptive but nonviolent crowds as outside constitutional protection. With the introduction of riot in the second degree, New York significantly contracted the number of disruptive assemblies that will be deemed peaceable and thus constitutionally protected.<sup>79</sup> As the Practice Commentary explains, riot in the second degree “shift[s] the emphasis from commission of some other crime to ‘tumultuous and violent conduct’ causing, or intended or calculated to cause, ‘public alarm.’”<sup>80</sup>

A number of other states have similarly narrowed their definitions of peaceable assembly through changes in the criminal law.<sup>81</sup> In 1963, Minnesota revised its unlawful assembly statute such that it is sufficient to convict a person, gathered with at least two others, of unlawful assembly if “the partic-

77. N.Y. PENAL LAW § 240.05.

78. *Id.* § 240.10 (emphasis added) (“A person is guilty of unlawful assembly when he assembles with four or more other persons for the purpose of engaging or preparing to engage with them *in tumultuous and violent conduct likely to cause public alarm*, or when, being present at an assembly which either has or develops such purpose, he remains there with intent to advance that purpose.”); *see also* Donnino, *supra* note 76, at § 240.010 (noting that unlawful assembly “is an inchoate crime to the crime of ‘riot in the second degree’”).

79. N.Y. PENAL LAW § 240.30. Although the unlawful assembly statute has not been before the New York Court of Appeals since its revision in 1967, at least one lower court has held that to be consistent with federal precedent “before an individual may be charged with unlawful assembly, his actions must constitute an incitement which is both directed towards and likely to produce imminent violent and tumultuous conduct.” *People v. Biltsted*, 574 N.Y.S.2d 272, 278 (N.Y. Crim. Ct. 1991).

80. Donnino, *supra* note 76.

81. *See, e.g.*, 18 PA. CONS. STAT. ANN. § 5501 (West 2015) (“A person is guilty of riot, a felony of the third degree, if he participates with two or more others in a course of disorderly conduct:

- (1) with intent to commit or facilitate the commission of a felony or misdemeanor;
- (2) with intent to prevent or coerce official action; or (3) when the actor or any other participant to the knowledge of the actor uses or plans to use a firearm or other deadly weapon.”);

OHIO REV. CODE ANN. § 2917.03(A)(1)–(3) (West 2015) (defining riot as disorderly conduct engaged in with a group of four or more with the purpose, *inter alia*, of “commit[ing] or facilitat[ing] the commission of a misdemeanor, other than disorderly conduct; . . . intimidat[ing] a public official or employee into taking or refraining from official action, or with purpose to hinder, impede, or obstruct a function of government; . . . hinder[ing], imped[ing], or obstruct[ing] the orderly process of administration or instruction at an educational institution, or to interfere with or disrupt lawful activities carried on at such institution.”).



ipants . . . conduct themselves in a disorderly manner [so] as to disturb or threaten the public peace,” even in the absence of an unlawful purpose.<sup>82</sup> The Minnesota Supreme Court has interpreted the statute to “prohibit[] three or more assembled persons from conducting themselves in such a disorderly manner as to threaten or disturb the public peace *by unreasonably denying or interfering with the rights of others to peacefully use their property or public facilities without obstruction, interference, or disturbance*” and further that “such disorderly conduct or activity may also take the form of uttering fighting words.”<sup>83</sup> In doing so, it further held that the statute did not “impermissibly infringe on the[] constitutional rights of speech and assembly” of the defendant protestors in light of the evidence that they obstructed vehicular and pedestrian traffic and that their behavior lacked “a semblance of decorum or regard for public order.”<sup>84</sup> Minnesota also criminalizes presence at an unlawful assembly.<sup>85</sup> Its riot statute continues to require acts of force or violence against persons or property.<sup>86</sup>

Another dynamic that undermines the right of assembly today – though it is likely that this dynamic was also present in the nineteenth century – is the overuse of broad, catchall crimes, such as disorderly conduct. It is the broad definitions of such crimes that make them particularly useful tools for order maintenance in the context of demonstrations. Even in states like Missouri and Maryland, which narrowly define unlawful assembly and riot, the right of assembly does not immunize a defendant from other misdemeanor charges, such as disorderly conduct, breach of the peace, and refusing to comply with a lawful order. In Missouri, for instance, a person is guilty of disturbing the peace, a misdemeanor, where “[h]e is in a public place or on private property of another without consent and purposely causes inconvenience to another person or persons by unreasonably and physically obstructing: (a) Vehicular or pedestrian traffic; or (b) The free ingress or egress to or from a public or private place.”<sup>87</sup> In New York, similarly, the crime of disorderly conduct is

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82. MINN. STAT. ANN. § 609.705 (West 2015).

83. *Minnesota v. Hipp*, 213 N.W.2d 610, 614 (Minn. 1973) (upholding the statute as constitutional on its face).

84. *Id.* at 615–16 (upholding constitutionality as applied to protestors by citing evidence, *inter alia*, that the demonstrators had “impeded all vehicular traffic in the area in addition to completely blocking the private property of the Red Barn and preventing pedestrians from using the public sidewalk fronting the restaurant”).

85. MINN. STAT. ANN. § 609.715 (“Whoever without lawful purpose is present at the place of an unlawful assembly and refuses to leave when so directed by a law enforcement officer is guilty of a misdemeanor.”).

86. *Id.* § 609.71 (requiring “an intentional act or threat of unlawful force or violence to person or property” as a necessary element of the crime).

87. MO. REV. STAT. § 574.010 (2000) (noting that on third offense a person may be subject to \$1000–\$5000 fine).

broad enough to encompass a range of activities frequently associated with a peaceful public assembly, especially blocking traffic.<sup>88</sup>

In the 1960s, the Supreme Court repeatedly held that it is unconstitutional for government officials to use crimes such as disorderly conduct, breach of the peace, or obstructing public passage to suppress constitutionally protected assemblies.<sup>89</sup> Nevertheless, these crimes are routinely used to manage and contain the disorder associated with outdoor political protests.<sup>90</sup> Equally importantly, as previously discussed, it does not necessarily matter whether charges will ultimately hold up in court if frontline law enforcement arrests large numbers of protestors for such crimes.

Aware of this tension, some state courts have tried to address it independently. New York's highest court, for example, has long tried to limit the definition of disorderly conduct in ways that do not undermine the right of assembly. Faced with a case in which two individuals were arrested and charged with disorderly conduct in relation to their leafleting and picketing on the sidewalk in front of the United Nations in 1957, the Court of Appeals explained that "something more than a mere inconveniencing of pedestrians

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88. N.Y. PENAL LAW § 240.20 (McKinney 2015) (emphasis added) ("A person is guilty of disorderly conduct when, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof: 1. He engages in fighting or in violent, tumultuous or threatening behavior; or 2. He makes unreasonable noise; or 3. *In a public place, he uses abusive or obscene language, or makes an obscene gesture*; or 4. Without lawful authority, he disturbs any lawful assembly or meeting of persons; or 5. *He obstructs vehicular or pedestrian traffic*; or 6. *He congregates with other persons in a public place and refuses to comply with a lawful order of the police to disperse*; or 7. He creates a hazardous or physically offensive condition by any act which serves no legitimate purpose.").

89. *Brown v. Louisiana*, 383 U.S. 131, 133 (1966) (Fortas, J., plurality opinion) (noting that the Court was rejecting for "the fourth time in little more than four years" the application of Louisiana's breach of the peace statute "for alleged violations, in a civil rights context"); *Cox v. Louisiana*, 379 U.S. 536, 552, 558 (1965) (holding that the State infringed appellant's rights of free speech and free assembly by convicting him of breaching the peace and obstructing passages while participating in a peaceful march and demonstration against segregation); *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963) (holding that a conviction for breach of the peace, where defendants were marching peacefully to publicize dissatisfaction with racial segregation, "infringed [their] constitutionally protected rights of free speech, free assembly, and freedom to petition for redress of their grievances"); see also *Gregory v. City of Chi.*, 394 U.S. 111, 112 (1969) (reversing conviction for disorderly conduct where petitioners engaged in peaceful and orderly march).

90. See, e.g., Mariah Stewart & Ryan J. Reilly, 'Everybody' Arrested In Ferguson Last August Is Being Charged, *Lawyers Say*, HUFFINGTON POST (Aug. 18, 2015 08:52 PM), [http://www.huffingtonpost.com/entry/st-louis-county-charges\\_55d38848e4b0ab468d9eaf9f](http://www.huffingtonpost.com/entry/st-louis-county-charges_55d38848e4b0ab468d9eaf9f); Abu El-Haj 2014, *supra* note 16, at 961–62 (discussing pattern with respect to Occupy and citing a study of the N.Y.P.D.'s in this regard).

is required to support a conviction” for disorderly conduct.<sup>91</sup> Its efforts, however, have not been entirely successful insofar as the lower courts tend to apply the rule quite differently.<sup>92</sup> Moreover, the New York Court of Appeals has sent lower courts mixed messages by holding, in a recent case, that where disruptions to traffic are caused by large groups and where the groups in question are specifically seeking to draw attention to themselves by being disruptive, its prior precedent is satisfied and demonstrators may be convicted for disorderly conduct.<sup>93</sup>

The final significant barrier to a robust right of assembly is the fact that cities have overlaid the criminal law with a host of administrative regulations of outdoor gatherings. Although Justice Harlan took the position that permitting requirements must allow for spontaneous outpourings into the streets, the Supreme Court has never adopted his view,<sup>94</sup> and ordinances in many cities do not explicitly provide exemptions for responses to current events.<sup>95</sup>

As a result, to lawfully demonstrate, parade, or make a speech in public today, a person or organization must generally obtain a permit from government officials – often well in advance.<sup>96</sup> Municipal permit processes are generally elaborate and often involve fees, sometimes even requiring liability insurance.<sup>97</sup> In New York City, a permit is required for any procession through the city’s streets; the application must be submitted at least thirty-six

91. *People v. Carcel*, 144 N.E.2d 81, 84 (N.Y. 1957); *accord* *People v. Johnson*, 9 N.E.3d 902, 903 (N.Y. 2014) (“We have made clear that evidence of actual or threatened public harm (‘inconvenience, annoyance or alarm’) is a necessary element of a valid disorderly conduct charge” and as such “[i]t is not disorderly conduct . . . for a small group of people . . . to stand peaceably on a street corner.”).

92. *Compare* *People v. Pesola*, 950 N.Y.S.2d 260, 263–64 (N.Y. Crim. Ct. 2012) (finding evidence insufficient to sustain charge of disorderly conduct where defendant was “standing on a public sidewalk, congregating with others and jumping up and down” during an Occupy protest), *with* *People v. James*, 793 N.Y.S.2d 871, 874 (N.Y. Crim. Ct. 2005) (upholding charge of disorderly conduct where protestors “conduct caused a public inconvenience by obstruct[ing] pedestrian and vehicular traffic”).

93. *People v. Jones*, 878 N.E.2d 1016, 1017 (N.Y. 2007).

94. *See* *Shuttlesworth v. City of Birmingham*, 394 U.S. 148, 163 (1969) (Harlan, J., concurring) (justifying his view on the basis that “timing is of the essence in politics” and “when an event occurs, it is often necessary to have one’s voice heard promptly, if it is to be considered at all”).

95. *See* Abu El-Haj 2009, *supra* note 14, at 548–54 (reviewing details of permit requirements in twenty American cities).

96. *Id.*

97. The Supreme Court has held that it is not *per se* unconstitutional for a city to charge a fee to use its streets and parks so long as fees are not correlated to the message of the assembly or left to the whim of an administrator. *Compare* *Cox v. New Hampshire*, 312 U.S. 569, 577 (1941) (upholding fee that merely recouped expenses incident to maintaining order and processing permit), *with* *Forsyth Cty. v. Nationalist Movement*, 505 U.S. 123, 133–34 (1992) (striking down statute where determination of fee was largely left to administrator’s discretion and depended on likelihood of hostile audiences).

hours in advance of the proposed procession; and the application must be denied where there is “good reason to believe that the proposed procession . . . will be disorderly in character or tend to disturb the public peace.”<sup>98</sup> Municipalities, moreover, frequently use the permitting process to exact compromises from organizers – such as changing the routes or times.

As previously discussed, while the Supreme Court has held that the First Amendment guarantees that individuals are entitled to assemble in public streets and parks,<sup>99</sup> it has rejected the notion that permit requirements constitute a prior restraint on protected First Amendment conduct.<sup>100</sup> Instead, it has sanctioned the ability of cities to pass both temporary and permanent regulations designed to manage the place, time, and form of outdoor gathers.<sup>101</sup>

The Court has placed only limited constraints on cities. Permitting regimes must provide guidelines to limit official discretion.<sup>102</sup> Their regulation may not be content-based and must be “narrowly tailored to serve a significant government interest” while “leav[ing] open ample alternative channels for communication.”<sup>103</sup>

The result is that cities today are able to regulate virtually all outdoor assemblies in advance through an array of complicated and convoluted regulations. Lower courts, meanwhile, uphold virtually all means that government officials devise to quash the disruptive elements of assemblies, so long as the government refrains from content or viewpoint discrimination. They rarely scrutinize the means-ends fit carefully, and they willingly accept virtually any interest the government offers as substantial enough to suppress the disorder and inconveniences associated with demonstrators. Even ordinances prohibiting the blocking of streets and sidewalks are typically not considered infringements on the right of assembly.<sup>104</sup>

Combine these administrative requirements with the opportunity to use both violations of them and the criminal law to control crowds when they are out on the streets, and it becomes clear why the current level of protection for outdoor assemblies is akin to the level of protection for speech in the early twentieth century when the Court routinely upheld the suppression of speech

98. N.Y.C. ADMIN. CODE § 10-110. Both the State of Missouri and the City of Ferguson have similar requirements. See MO. REV. STAT. § 300.325 (2000); FERGUSON, MO. MUN. CODE §§ 30-31, 44-316 (2015) (requiring permits for assemblies in parks and processions in streets, respectively).

99. *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939).

100. *Thomas v. Chi. Park Dist.*, 534 U.S. 316, 322–23 (2002).

101. For a detailed account of the development of this jurisprudence, see Abu El-Haj 2009, *supra* note 14, at 583–85.

102. *Thomas*, 534 U.S. at 323 (explaining that the licensing official must not “enjoy[] unduly broad discretion in determining whether to grant or deny a permit”).

103. *Forsyth Cty. v. Nationalist Movement*, 505 U.S. 123, 130 (1992).

104. *City of Cleveland v. Anderson*, 234 N.E.2d 304, 306 (Ohio Ct. App. 1968) (noting that “[f]reedom of assembly . . . can be limited by a local legislative authority through the legitimate use of its police powers” such as “riot acts, unlawful assembly laws, and ordinances prohibiting the blocking of sidewalks”).

that had the (bad) tendency of producing lawlessness or violence.<sup>105</sup> Those who have come out to protest the frequency with which police officers shoot and kill unarmed black men, women, and children are not mistaken in feeling that the First Amendment affords them only weak protection in their political protest:

Today . . . we have a right to assembly on the streets, *so long as* we obtain a permission from officials (if that is required), abide by the terms of the permit issued, *and* are peaceable. Moreover, the definition of peaceable has been narrowed: An assembly may be dispersed for actually or potentially obstructing traffic (including pedestrian traffic), even where no permit is required.<sup>106</sup>

In sum, the level of protection afforded by current interpretations of the First Amendment is too weak.<sup>107</sup> The Supreme Court has created a doctrinal structure that, as a practical matter, means that the First Amendment protects orderly expression but not disorderly conduct. This is because, as I have argued elsewhere, the Supreme Court inadvertently collapsed the right of peaceable assembly into the freedom of speech in the early twentieth century. This would not be a problem but for the fact that disruption is often central to the political efficacy of public protest, especially for those in our society who are otherwise politically marginalized. While the Founders understood this when they singled out public assembly as a particular form of conduct worthy of constitutional protection, our speech focused doctrine regularly fails as it tries to fit public assemblies into the sub-doctrine of expressive conduct, developed to address contexts such as flag burning.<sup>108</sup>

## V. THE UNIQUE ATTRIBUTES OF OUTDOOR ASSEMBLY AS A FORM OF POLITICS

Demonstrations on the streets are not a thing of the past. Even in the era of Facebook and Twitter, Americans have not given up on the power of pouring out into the streets, as evidenced by both the Black Lives Matter protests

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105. Abu El-Haj 2014, *supra* note 16, at 1034–35.

106. Abu El-Haj 2009, *supra* note 14, at 587 (contrasting the current interpretation of the right with the much stronger right that existed for about a hundred years after the Founding).

107. Cf. Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1771 (2004) (defining “coverage” as going to “scope--whether the First Amendment applies at all” to categories of speech acts such as copyright, commercial speech, securities regulation whereas *protection* speaks to the “strength” or “the degree of protection that the First Amendment offers” to covered speech).

108. See, e.g., *Wisconsin v. Crute*, 860 N.W.2d 284 (Wis. Ct. App. 2015); *Occupy Bos. v. City of Bos.*, No. SUCV201104152G, 2011 WL 7460294, at \*4 (Mass. Supp. Nov. 17, 2011).

and the Occupy movement before it. Reflecting on why Americans have not abandoned public assembly as a form of politics might help us better understand both why the Founders singled out this form of political conduct for protection and why the current level of protection afforded to public assemblies is problematic.

Outdoor assembly has unique attributes as a form of political participation, even in the twenty-first century.<sup>109</sup> Elections are limited both as civic experiences and as vehicles for political change. Nowhere is this political fact better understood than in the poor, urban communities that have largely been the epicenters of the Black Lives Matter protests. Communities in which black men have a thirty percent lifetime risk of imprisonment and where rates of felon disenfranchisement run high are well aware of the many limits of voting.<sup>110</sup> If anything, such communities probably underestimate the value of voting and are overly skeptical of legislative and administrative reform. Outdoor assemblies can compensate for the limits of electoral politics.

Congregating outdoors for political ends also provides a uniquely face-to-face experience of citizenship. Walking and talking with others similarly affected enables one to process difficult events in ways that many other forms of political action do not. This dynamic was particularly evident in the Occupy movement with its signature General Assembly, which involved nightly debates about both political demands and administrative concerns associated with the tent cities, amplified through a ritualized human chorus.<sup>111</sup> This social quality of outdoor assemblies, also evident in many reports about Ferguson and other cities, makes them particularly likely to generate in individuals a sense of political agency and a long-term commitment to civic and political engagement.

Organizing and participating in protests and demonstrations tends to create and strengthen exactly the sort of social ties that encourage additional civic and political engagement.<sup>112</sup> Ideas and political commitment alone turn out to be poor motivators of political engagement. Political participation is driven by relationships, especially those formed in civic experience and groups.

Individuals are much more likely to become and remain politically active if they have had collective political experiences, such as marching to-

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109. See Abu El-Haj 2014, *supra* note 16, at 1030–36 (further explaining the importance of outdoor assembly as a political practice today, including citations to support various propositions).

110. *Fact Sheet: Trends in U.S. Corrections*, SENT’G PROJECT 5, [http://sentencingproject.org/doc/publications/inc\\_Trends\\_in\\_Corrections\\_Fact\\_sheet.pdf](http://sentencingproject.org/doc/publications/inc_Trends_in_Corrections_Fact_sheet.pdf) (last updated Nov. 2015).

111. Abu El-Haj 2014, *supra* note 16, at 957.

112. For a summary of the social science literature supporting the propositions in this paragraph and the next, see Tabatha Abu El-Haj, *Friends, Associates and Associations: Theoretically and Empirically Grounding the Freedom of Association*, 56 ARIZ. L. REV. 53 (2014).

gether – even being arrested together.<sup>113</sup> The profiles of the social media coordinators of the Black Lives Matter protests hew closely to this account of political activism. DeRay Mckesson, a graduate of Bowdoin College and former “education executive with a six-figure salary,” recently explained to a reporter how he was radicalized by his first night on the streets of Ferguson.<sup>114</sup> After that night, he made a commitment to document and disseminate on social media what was going on there:

“I just couldn’t believe that the police would fire tear gas into what had been a peaceful protest. . . . I was running around, face burning and nothing I saw looked like America to me.” He also noticed that his account of that night’s tear-gassing . . . had brought him quite a bit of attention on Twitter. . . . He quickly grasped that a protester’s effectiveness came mostly from his ability to be present in as many places as possible: He had to be on West Florissant when the police rolled up in armored vehicles; inside the St. Louis coffee shop MoKaBe’s, a safe haven for the protesters in the city’s Shaw neighborhood, when tear gas started to seep in through the front door. . . . Mckesson eventually returned to Minneapolis, but by then he had committed himself to the protests. He started travelling down to St. Louis every weekend.<sup>115</sup>

Later, his tweets also became a source of information about where and when new protests would take place.<sup>116</sup>

Finally, outdoor protests provide a way to shift the political debate without the Koch brothers’ money.<sup>117</sup> Without the Occupy movement, we would not be talking about the ninety-nine percent and the one percent, and Republican presidential candidates would be unlikely to be discussing the problem of income inequality in the United States. Without the protests in Ferguson, St. Louis, New York, Baltimore, and Cleveland, it is unlikely that the public would know the names of Michael Brown, Eric Garner, or Tamir Rice and that Hilary Clinton would be talking about the importance of black lives and the need to reform policing in the United States, let alone that President Obama would give a speech about the need for comprehensive criminal justice reform to the NAACP in Philadelphia.

The First Amendment protects the right of the people to assemble in recognition of these unique attributes. Disruptiveness, however, is an essential attribute of peaceable assembly, especially for marginalized groups. While many of the social media activists of the movement are college-

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113. Abu El-Haj 2014, *supra* note 16, at 1030–32.

114. Kang, *supra* note 1.

115. *Id.*

116. *Id.*

117. Dave Levinthal, *Spreading the Free-Market Gospel*, ATLANTIC (Oct. 30, 2015), <http://www.theatlantic.com/education/archive/2015/10/spreading-the-free-market-gospel/413239/>.

educated black professionals, the power of their commentary derives from the images of thousands pouring out into the streets in city after city in response to one killing after another.<sup>118</sup>

Indeed, disruption is frequently central to the efficacy of public protest. The ability to bring a city to a standstill is the ability to make both the public and the government take notice. It forces recognition and compels attention. A central strategy of the recent protests has been to “prick[] the consciousness of whites and the political establishment, [by] using confrontational tactics to make it clear that the lives of African Americans must be protected.”<sup>119</sup> Activist DeRay Mckesson explained to a reporter that

the heart of the movement is in the actions. It’s in shutting down streets, shutting down Walmarts, shutting down any place where people feel comfortable. We want to make people feel as uncomfortable as we feel when we hear about Mike, about Eric Garner, about Tamir Rice. We want them to experience what we go through on a daily basis.<sup>120</sup>

Tweets, he explained, are “mostly [about] preaching to the choir.”<sup>121</sup>

The problem of racialized policing, as many have noted, is not new.<sup>122</sup> It is the protests that are making the longstanding crisis finally visible to mainstream policymakers and the public. Speech may galvanize the choir, even clarify its positions and the demands; public assemblies are the way to be noticed by a public that is otherwise oblivious to the issue. It is why the four-and-a-half minute die-in has been so important to the movement. It explains the decision by activists to choose one of the busiest shopping days of the year, December 20, for their 1000 plus person die-in at the Mall of America.

To serve its unique function in our democracy, outdoor assembly must be allowed to be disruptive. Even where participants’ express purposes are neither radical nor angry, congregating on the streets and parks disturbs traffic patterns, tramples grass, and is often noisy. Especially in busy cities, large outdoor assemblies are never convenient.

118. See generally Brandon Griggs et al., *The Disruptors*, CNN, <http://www.cnn.com/interactive/2015/08/us/disruptors/> (last visited Oct. 9, 2015).

119. Sandhya Somashekhar, *Ferguson Protest Organizers: ‘I sleep, eat and breathe this,’* WASH. POST (Nov. 11, 2014), [http://www.washingtonpost.com/politics/ferguson-protest-organizers-i-sleep-eat-and-breathe-this/2014/11/11/a404fcc2-6457-11e4-836c-83bc4f26eb67\\_story.html](http://www.washingtonpost.com/politics/ferguson-protest-organizers-i-sleep-eat-and-breathe-this/2014/11/11/a404fcc2-6457-11e4-836c-83bc4f26eb67_story.html).

120. Kang, *supra* note 1.

121. *Id.*

122. In fact, while recently reading Richard Powers’s *The Time of Our Singing*, I was struck by the fact that almost every urban “riot” that he refers to in his epic novel about an interracial family in twentieth-century America was triggered by police violence. See RICHARD POWERS, *THE TIME OF OUR SINGING* (2003).



The tendency to disorder is greatest when crowds take to the streets spontaneously in response to current events, yet such gatherings are at the core of what the right of peaceable assembly protects. Disruption certainly does not require violence or the threat of violence. In fact, some of the most striking protests have been nothing but peaceful. My personal favorite example in this regard was a flash mob incident at the St. Louis Symphony in October 2014, in which right before the end of an intermission, “two audience members stood up and began singing ‘Which Side Are You On?’ to the stunned attendees.”<sup>123</sup> The symphony was about to perform Johannes Brahms’s *Requiem*.<sup>124</sup> As the protestors left, they released “paper hearts inscribed with ‘Requiem for Michael Brown, May 20, 1996 – August 9[,] 2014’” while chanting “Black Lives Matter.”<sup>125</sup>

As we have seen, however, the contemporary right of peaceable assembly does not protect such disruptive, yet nonviolent protests. Participants in the Mall of America incident were initially charged with unlawful assembly, among other things.<sup>126</sup> While the unlawful assembly and disorderly conduct charges were ultimately dismissed, the district court preserved the possibility that the participants could be found guilty of misdemeanor trespass and obstructing legal process by interfering with police officers.<sup>127</sup> Meanwhile, the City of Bloomington and the Mall of America are seeking \$65,000 in total in restitution for the die-in at the Mall of America.<sup>128</sup>

If we want to preserve the unique functions of outdoor assembly as a form of politics – and I think we do – we need to reconcile ourselves to the fact that we must increase our tolerance of the disorder and disruption associ-

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123. Tom Boggioni, *Ferguson Flash Mob Interrupts St. Louis Symphony with Requiem for Michael Brown*, RAW STORY (Oct. 5, 2014, 4:50 PM), <http://www.rawstory.com/rs/2014/10/watch-ferguson-flash-mob-interrupts-st-louis-symphony-with-requiem-for-michael-brown/>.

124. *Id.*

125. *Id.*

126. Lee Fang, *Why was an FBI Joint Terrorism Task Force Tracking a Black Lives Matter Protest*, INTERCEPT (Mar. 12, 2015), <https://theintercept.com/2015/03/12/fbi-appeared-use-informant-track-black-lives-matter-protest/>.

127. Order & Mem. Op., *State v. Montgomery*, 27-CR-15-1304 (Minn. Dist. Ct., Hennepin Cty. 4th Div., Nov. 10, 2015) (order and memorandum opinion on motions to dismiss filed by twenty-nine defendant protestors); see also Mike Mullen, *Black Lives Matter Leaders Cleared of Dumb Charges in Mall of America Case*, CITY PAGES (Nov. 11, 2015), <http://www.citypages.com/news/black-lives-matter-leaders-cleared-of-dumb-charges-in-mall-of-america-case-7825208>.

128. Fang, *supra* note 126 (reporting that they city is seeking restoration of “\$25,000 in police costs” and that “the Mall of America [is] seeking \$40,000 for mall security costs”). While still atypical, there is some evidence that seeking restitution is on the rise as a prosecutorial strategy. See, e.g., Steven Wishnia, *That Free Speech Will Cost You \$70,000*, DEFENDING DISSENT FOUND. (Jan. 15, 2015), <http://www.defendingdissent.org/now/news/that-free-speech-will-cost-you/> (reporting that Oakland is seeking \$70,000 in restitution to cover police and emergency services in relation to a chain-in at a BART station in November 2014).

ated with it. Some municipalities already do this, as a matter of discretion. A Minnesota State Patrol Captain recently decided, along with Minneapolis police, not to arrest participants in a Black Lives Matter march following the grand jury's decision not to indict Eric Garner. They did this despite the fact that 150 demonstrators took to the local freeway en route to City Hall and effectively shut the freeway down for an hour.<sup>129</sup> Minneapolis is not alone; a remarkable thing about the Occupy movement was how many city officials used their discretion to allow the occupations, at least initially.<sup>130</sup>

## VI. ENVISIONING A ROBUST RIGHT OF PEACEABLE ASSEMBLY

Implementing a more robust right of assembly does not entail as radical a transformation as one might imagine. To be certain, the public would be asked to tolerate a lot more than it currently does. On the other hand, some cities, as a matter of discretion, already allow more spontaneous and disruptive crowds than they are strictly required to by contemporary constitutional doctrine. Essentially, the transformation would require enshrining those best practices in law.

While violent acts against persons and property by protestors obviously must be addressed, the First Amendment should be interpreted such that non-violent, illegal action does not render an assembly outside of constitutional protection. Authorities should be constitutionally required to focus their order maintenance efforts on addressing violence to person and property, and only when the risks are substantial and immediate. Courts should defer less to justifications proffered for suppressing the inconvenience and irritation associated with demonstrations. States and municipalities, meanwhile, should amend their statutes accordingly.

Courts should also demand that law enforcement scale back its enthusiasm for charging protestors with various minor breaches of public order or the catchall crime of disobeying a lawful order. Crimes of disorderly conduct and the like should be narrowly construed when applied to protected conduct. Even trespass, especially where the private property is otherwise open to the public, such as a shopping mall, should be narrowly construed when nonviolent political protest is at issue.<sup>131</sup> Meanwhile, front-line police officers should be trained to abide by black letter constructions for, as we have seen, police officers' arrest patterns can nullify the protections offered to those exercising their constitutional right to assemble peaceably.<sup>132</sup>

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129. Eric Golden, *Police Made On-The-Spot Decision Not to Arrest Protestors*, POPULAR RESISTANCE (Dec. 15, 2014), <https://www.popularresistance.org/police-made-on-the-spot-decision-not-to-arrest-protesters/> (noting that Minneapolis's written policy on demonstrations is "keep the peace and don't interfere unless a crime has been committed").

130. See Abu El-Haj 2014, *supra* note 16, at 958–59 (offering examples of municipal tolerance of Occupy).

131. See *id.* at 1038–40.

132. See *id.* at 1014.

States and municipalities should also explore limiting permit requirements to places where overuse is real. Fifth Avenue in Manhattan clearly requires some system for allocating access to the much sought after parade route. Cities like Philadelphia and Minneapolis might well get by without elaborate regulation of their streets and parks. In fact, Minneapolis does not require a permit prior to gathering for political ends on its public streets or sidewalks.<sup>133</sup> As in international law, the default rule for managing potential disorder should be a notice requirement. Courts, meanwhile, should significantly step up their scrutiny of the applications of time, place, and manner regulations, focusing in particular on the adequacy of available alternatives to gather. Unfortunately, it is not uncommon for courts to merely ask whether the group has an adequate alternative means of communicating its message.

All of this is, at bottom, a call to expand our definition of “peaceable” in the First Amendment. It is a call to move closer to the late nineteenth-century approach and the current approach under international law, where the regulation of outdoor assemblies is limited to policing those that are no longer peaceable. In light of the unique value of outdoor assembly as a form of politics, we need to focus on situations where the risk of violence to persons or property is real and tolerate those situations that are merely disruptive and inconvenient.

My hope is that we will come to recognize the past year as a critical moment when citizens came together outdoors to register opposition to perceived abuses of governmental power, and that recognition will enable us to notice the continuing value of public protest in the digital era. For until we acknowledge the continued importance of public assembly as a political practice, all of us – law enforcement and lay people, lawyers, and judges – will be unable to appreciate its relationship to disruptiveness or the importance of having a robust constitutional right to protect it. In the meantime, lawyers, especially those who defend protestors, must commit to trying to chip away at the Supreme Court’s unthinking decision to collapse the right of assembly into the right of speech. They must begin to explicitly and separately invoke the First Amendment’s right of peaceable assembly in their legal arguments.

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133. See *Street Use Permits*, MINNEAPOLIS, MINN., [http://www.minneapolismn.gov/publicworks/permits/public-works\\_pw-streetuse-permits](http://www.minneapolismn.gov/publicworks/permits/public-works_pw-streetuse-permits) (last updated Jan. 15, 2014).