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## Foreword

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## FOREWORD

A. BENJAMIN SPENCER\*

I was honored and humbled to be asked to pen a foreword to this special issue of the *William & Mary Journal of Race, Gender, and Social Justice*. I do so as a relatively new member of this community, having assumed my position as Dean during the summer of 2020. And what a summer that was.

I was appointed Dean just around the time of the murder of George Floyd. Because I was becoming the first Black person ever to have served as the Dean of any school at William & Mary, I felt a unique responsibility to respond to that killing and to the calls for racial justice that followed. But I wanted to respond in a tangible way, not just with words. Thus was born our *Why We Can't Wait* set of initiatives, which identified concrete steps that we would take as a law school to advance equity and justice in the world.<sup>1</sup> As an institution focused on training what we call “citizen lawyers,”<sup>2</sup> it is vital that we not only talk the talk, but walk the walk.

This issue of the *Journal of Race, Gender, and Social Justice* is part of that effort. Bringing scholars together to identify and discuss the legal lessons of the Black Lives Matter Movement is important work. It is only if we as lawyers understand how the law has helped or hindered the progress we seek that we will be able to harness and navigate it to pursue change. Such an examination is also key to uncovering what reforms need to be made in the law. That is the important work that the authors of the articles you will find in this issue of the *Journal* have undertaken.

Tabatha Abu El-Haj casts a critical eye on the unduly weak protections that the First Amendment’s right of assembly afforded to protesters who came together in the summer of 2020 to advocate for Black lives and racial justice. As she puts it, “The First Amendment failed to show up for those seeking an end to police violence and a reckoning against the continued prevalence of racial bias and

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1. A. Benjamin Spencer, *Why We Can't Wait: An Agenda for Equity & Social Justice*, WM. & MARY L. SCH., <https://law.wm.edu/about/equity-inclusion-belonging-at-wmlawschool/why-we-cant-wait/index.php> [<https://perma.cc/WR9T-KWUW>] (last visited Nov. 4, 2021).

2. *Today's Citizen Lawyer: Leading Toward Justice For All*, WM. & MARY L. SCH., <https://law.wm.edu/about/wmcitizenlawyer/index.php> [<https://perma.cc/U7PU-TGNC>] (last visited Nov. 4, 2021).

systemic racism . . . .”<sup>3</sup> In her recounting of the tale of these protests and the violent police response, Professor Abu El-Haj lays bare the fact that our society does not take kindly to public displays of protest in favor of equal justice for Black people. Thus, the promise of the First Amendment—that collective dissent voiced through demonstrations by assemblages of people will be protected—is a tenuous one, leaving such protestors possessed of nothing more than “a feeble right.”<sup>4</sup> Particularly noteworthy is Professor Abu El-Haj’s observation that peaceable assembly in favor of racial justice is not only weakly protected, it is subjected to a backlash that characterizes it as a criminal threat that is un-American, when in fact nothing could be more American than unapologetically assembling to demand the recognition of equal rights.

At bottom then, we see a hypocrisy that renders this aspect of our Constitution duplicitous, proclaiming values that are not universally upheld or affirmed, a truth that causes the phrase “with liberty and justice for all” to ring hollow for many. By highlighting the instances in which lawful peaceable assembly did not receive adequate protection by police or by the courts, Professor Abu El-Haj lays the groundwork for the development of a more robust doctrine of peaceable assembly under the First Amendment that will equip lawyers and courts with the tools they need to give protestors the protection that they deserve. As importantly, strengthening the doctrine to fulfil the promise of the First Amendment will enable advocates to forestall impending legislative efforts to curtail peaceable assembly rights, efforts that tepid judicial responses to protester challenges have only emboldened.

In her piece, our own Professor Vivian Hamilton highlights and analyzes the backlash against the calls for racial justice that ensued after the murder of George Floyd. As the movement for Black lives pressed for antiracist reforms across society—including in education—many people and legislators pushed back against the notion that the educational system should engage in teaching that examined the role of race and white privilege in our society. This manifested itself in calls to prohibit the teaching of Critical Race Theory (CRT), although as Professor Hamilton rightly indicates, what has been attacked is a caricature of what CRT truly entails: “State legislatures successfully wielded a specter of CRT bearing only a passing resemblance to the academic discipline as a divisive and dangerous threat to rush through legislation aimed at suppressing education

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3. Tabatha Abu El-Haj, *Breathing Room for the Right of Assembly*, 28 WM. & MARY J. RACE, GENDER & SOC. JUST. 29, 31 (2021).

4. *Id.* at 31.

about the racial history of the United States, and its legacy.”<sup>5</sup> Part of Professor Hamilton’s contribution here is a helpful explication of what CRT actually is and its lineage from and relation to legal theories that preceded it.

After laying out the retrenchment that has occurred under the guise of anti-CRT efforts at both the federal and state levels, Professor Hamilton smartly analyzes this retrenchment through an actual CRT lens. A key insight of CRT is that law can be a tool for entrenching racial inequality; as Professor Hamilton illuminates, the current effort to enact legal measures that prohibit all teaching of ideas surrounding institutionalized racism and the role of race in our society is simply the latest exhibit confirming the validity of that insight. That irony—that the very people who denounce CRT are engaged in erecting and enshrining the institutional racism they seek to deny and conceal—is a tragic one, for it reveals how challenging it will continue to be to move the national conversation forward to a place of acknowledgment, healing, and reform.

The contribution by Professors Williams, Mezey, and Singh is particularly apt, as the fruits of protest ultimately must be concrete, positive change. Their piece, *#BlackLivesMatter: From Protest to Policy*, looks at this question specifically as it pertains to the impact of the online social media movement of #BlackLivesMatter. Although it is clear that “BLM has already defied the odds of online movements with its ability to inspire a massive online discussion and then mobilize that social media conversation into significant activism offline,” the question their piece addresses is whether meaningful social and political change have occurred as a result.<sup>6</sup> They find that there indeed have been tangible impacts in the spheres of individual accountability and justice for victims as well as institutional change in the form of some police reform in various places across the country. Efforts at systemic reform can take many forms; it is useful to know whether and to what extent the contributions of social media activists are making a positive difference, insight that can inform such efforts going forward.

Finally, Professor Loor shines a light on the practice of mass arrests that we witnessed during the 2020 protests, with a focus on Los Angeles. As her piece observes, “[P]eople were arrested routinely for failure to obey a police order or curfew violations. . . . LAPD

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5. Vivian E. Hamilton, *Reform, Retrench, Repeat: The Campaign Against Critical Race Theory, Through the Lens of Critical Race Theory*, 28 WM. & MARY J. RACE, GENDER & SOC. JUST. 61, 65 (2021).

6. Jamillah Bowman Williams, Naomi Mezey, & Lisa Singh, *#BlackLivesMatter: From Protest to Policy*, 28 WM. & MARY J. RACE, GENDER & SOC. JUST. 103, 105 (2021).

tactics made it often impossible to comply with curfews and police orders to disperse. Rather, police tactics seemed explicitly designed to trap not only activists, but anyone in the vicinity of the protests.”<sup>7</sup> After doing the important work of documenting and critiquing this phenomenon, Professor Loor articulates a broad vision of the Fourth Amendment that seeks to offer some protection for protesters against such a police response. This broader vision is that there is an expressive component of the Fourth Amendment that privileges the facilitation of protest activity, which should chasten police enforcement activities in the protest context. As Professor Loor puts it, “This translates to a concomitant duty for police officers to protect freedom of expression, in addition to their traditional duty to maintain public safety.”<sup>8</sup>

Through each of these contributions, the authors have given us all much food for thought and impetus for change. The tasks of the legal scholar are to explain, critique, describe and prescribe in service of improving the human condition. By taking this multifaceted look at what occurred in the wake of the murder of George Floyd, this issue of the *William & Mary Journal of Race, Gender, and Social Justice* truly showcases scholars fulfilling that role. I hope you are as enriched by this collection of works as I have been.

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7. Karen J. Pita Loor, “Hey, Hey! Ho, Ho! These Mass Arrests Have Got to Go”: *The Expressive Fourth Amendment Argument*, 28 WM. & MARY J. RACE, GENDER & SOC. JUST. 5, 11 (2021).

8. *Id.* at 26.