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# Disruption of Business as Usual: Protest Rights and Public Policy Challenges in 2017

*By Benjamin Feist and Teresa Nelson*

In recent years, protest movements around the nation have included communities of color organizing and demanding racial justice and equality. Many prominent protests have been in response to high-profile police shootings of unarmed black men. In order to draw sustained attention to these issues, organizers often use disruptive tactics inconveniencing travelers and other members of public.

Particularly since 2014, a number of individuals from across the country have tragically become household names: Michael Brown, Eric Garner, Jamar Clark, and Philando Castile, to name just a few. The events leading to their deaths sparked spontaneous and prolonged demonstrations. This article discusses the issues involved in these

demonstrations, current law around the right to protest, and recent efforts at the Minnesota Legislature to respond.

## **The Role of Protest in American Life**

Acts of civil disobedience are common throughout American history. One of the most famous was the Boston Tea Party. Of course, public protests involving anti-slavery, universal suffrage, civil rights, anti-war, LGBTQ rights, and various foreign policy positions continued in that mode. Although those historical protests may not have garnered universal public support at the time, we now celebrate many of them as important historical turning points. More recently, Black Lives Matter and Standing Rock have brought people together in protest.

## **Recent Protests in Minnesota**

Minnesota has seen an historic amount of activism and protest in the last several years.

Many of these demonstrations have been led by and in support of marginalized communities of color. The most notable protests, until the inauguration of President Donald Trump and the resulting Women's March, have been in response to acts of police violence.

## **Minnesota Protests in 2014**

On November 25, 2014, a grand jury decided not to indict the officer who shot Michael Brown, leading to protests in Minnesota and many other states. Hundreds of protesters spontaneously blocked Highway 55 in Minneapolis to bring prolonged attention to the issue. Despite heightened emotions, the protest was peaceful and did not result in any arrest.

Only a week later, a grand jury in New York refused to indict the officer involved in the killing of Eric Garner, another unarmed black man. Outrage over both grand jury decisions led to a Black Lives Matter rally and peaceful protest that blocked Interstate 35W in Minneapolis for



over an hour. State Patrol squad cars kept traffic at bay and, again, nobody was arrested.

Days before Christmas in 2014, Black Lives Matter organized a demonstration of roughly 2,000 people at the Mall of America (MOA) in Bloomington. The demonstration disrupted holiday shopping as mall authorities decided to close stores in one part of the mall. The MOA maintained that it is a private property with a policy against any demonstration or protest. Organizers and participants insisted that demonstrating, even if it created an inconvenience to shoppers, was necessary to draw attention to the issue of police violence that inconveniences communities of color across America. Protesters demonstrated for a half-hour in the rotunda before Bloomington Police (along with police officers from numerous other agencies), clad in riot gear, dispersed the crowd, arresting 25 people.

The city of Bloomington prosecuted a number of organizers and participants in the MOA demonstration. Prosecutors targeted 11 organizers with misdemeanor charges of aiding and abetting trespass, aiding and abetting unlawful assembly, and aiding and abetting disorderly conduct. Nearly a year later, Hennepin County Chief Judge Peter Cahill dismissed all charges against the organizers, leaving minor trespass charges against just 17 individual protesters.<sup>1</sup>

### Protests in Response to the Shooting of Jamar Clark

Minnesota saw its next round of high-profile protests in response to the shooting death of Jamar Clark by Minneapolis Police in November 2015. This shooting sparked additional controversy because it was witnessed by several members of the public and was at least partially captured on video by a number of sources. Several witnesses claimed Clark was handcuffed and not struggling with the officers

when he was shot. However, the officers argued that Clark was not handcuffed at the time of the incident and that he had grabbed a gun during the scuffle.

The day after Clark's death, around 300 protesters spontaneously shut down Interstate 94 in Minneapolis for several hours. The demonstrators sought "Justice for Jamar" and immediate release of any video of the incident. The Minnesota State Patrol arrested and booked 42 people, including eight juveniles, after they refused to clear the area. This group received misdemeanor citations for unlawful assembly and obstructing the freeway.

Meanwhile, protesters set up an encampment in front of the Minneapolis Police Department's Fourth Precinct in North Minneapolis, which lasted for 18 days. The protesters sought release of the video and prosecution of the officers involved in the shooting. From time to time, tensions peaked and protesters clashed with officers in riot gear who used pepper spray to disperse the crowd. Police Chief Janeé Harteau claimed that the weeks of protest caused thousands of dollars' worth of damage and cost the Minneapolis Police Department \$750,000 in overtime pay. On December 3, the site was cleared by the police. While most protesters left peacefully, eight people were arrested without incident for not complying with the order.

Later in December, Black Lives Matter announced it was planning a demonstration at the MOA for the second year in a row. The notice drew immediate criticism and an unsuccessful legal action by the MOA in an effort to prevent the demonstration from happening.<sup>2</sup> On December 23, hundreds of protesters arrived at the MOA; however, most quickly exited and headed to the nearby Minneapolis-St. Paul International Airport. There, protesters disrupted light rail traffic to the terminals and blocked freeway access in front of the airport. Fifteen people were arrested at either the mall or the airport for trespassing or obstruction of justice.

### Protests in Response to the Shooting of Philando Castile

On July 5, 2016, Philando Castile was fatally shot by St. Anthony police officer, Jeronimo Yanez, during a traffic stop in Falcon Heights. Castile's fiancé, Diamond Reynolds, was in the car with her 4-year-old daughter and live-streamed the immediate aftermath on Facebook, drawing national outrage over the incident. Days later, approximately 300 protesters shut down Interstate 94 west of downtown St. Paul for several hours to draw attention to the shooting and continuing racial injustice in Minnesota. Early in the protest, officers diverted traffic off I-94 at Lexington Avenue. After a few hours of peaceful protest, police reported some of the protesters began to throw bottles, rocks, and fireworks. Black Lives Matter organizers stated that the aggressors were not affiliated with the group. Dozens of officers in riot gear used smoke bombs, tear gas, and pepper spray to eventually disperse the crowd. St. Paul Police stated that approximately 21 officers were injured in the event.<sup>3</sup> The police eventually arrested 102 people who were involved in the incident, and 47 of them were charged with third-degree riot, a gross misdemeanor, as well as misdemeanor public nuisance and unlawful assembly. In January 2017, Ramsey County Judge Tony Atwal threw out the riot charges based on a lack of probable cause.<sup>4</sup>

Protesters also camped out in front of the Governor's Mansion on Summit Avenue in St. Paul for several weeks after the Castile shooting. The police eventually arrested over 70 demonstrators for allegedly blocking traffic and refusing to leave the area.

## PROTEST IN

#### November 25, 2014

A grand jury decides not to indict the officer who shot Ferguson, Missouri, teenager Michael Brown. Hundreds of protesters block Highway 55 in Minneapolis. This peaceful protest did not result in any arrests.

2014

#### December 4, 2014

A grand jury refuses to indict a New York City police officer in the death of Eric Garner. A Black Lives Matter (BLM) rally shuts down I-35W in Minneapolis. No arrests were made.

2014

#### December 20, 2014

A BLM protest with about 2,000 people demonstrates at the Mall of America. Twenty-five people were arrested, but most charges were later dropped.

2014

#### November 2015

Over 300 protesters shut down I-94 in response to the shooting of Jamar Clark. Forty-two people were given misdemeanor citations.

2015

#### November 2015

Dozens of protesters set of an encampment outside of the Fourth District police precinct in north Minneapolis for 18 days. Eight people were arrested for not complying with a police order.

2015

## Women's March

The day after the inauguration of President Trump, millions of protesters across the United States and all over the world rallied together in the Women's March. It is estimated that 90,000 to 100,000 protesters attended the march in St. Paul that ended at the Minnesota Capitol. By all accounts, the police response to the Women's March was accommodating and respectful, despite the enormous scale of the event, which vastly exceeded the organizers' expectations (and most likely the permits). The sheer number of protesters in attendance caused a major disruption of traffic and light rail transit in St. Paul as protesters spilled out across the rail tracks and blocked transit platforms. However, unlike the Black Lives Matter protests, the Women's March was attended by a largely white crowd and its anger was directed at the recently elected President rather than at law enforcement's treatment of communities of color.

## Current Laws Relating to Protests

The right to free speech is a cornerstone of our democracy. Free speech often involves protest, and it can include raised voices, anger, and the airing of grievances. The Constitution firmly protects protests even when—and especially when—they stir anger, question preconceptions, challenge government policy, and induce dissatisfaction with the status quo. America's robust tradition of free speech allows us all to effect change by making our voices heard. In fact, law enforcement agents have an affirmative duty to ensure that the rights of protesters and the press are protected.

## Permits and Permissible Restrictions

Cities, counties, and the state of Minnesota all have the ability to enact regulations governing speech and protest activities. Although not required, most jurisdictions have enacted "time, place, and manner" regulations that include advance permit requirements applying to all but small demonstrations that do not block roads or sidewalks. For example, in Minneapolis, a demonstration or march of any size that stays on the sidewalks and does not interfere with traffic can proceed without a permit.<sup>5</sup> In contrast, the city of St. Paul requires any demonstration of more than 25 people to obtain a permit.<sup>6</sup>

The First Amendment allows the government to establish narrowly drawn "time, place, and manner" restrictions on the exercise of First Amendment rights.<sup>7</sup> Those restrictions must be content neutral and must not operate in a manner that allows a permit to be denied because the event is controversial or will express unpopular views.<sup>8</sup> The government must also ensure that the restrictions are tied to a significant government interest, and they must not grant unbridled discretion to government officials and police to decide what conditions to impose on protest. Consequently, time, place, and manner regulations requiring advance permitting must include "narrow, objective, and definite standards to guide the licensing authority."<sup>9</sup>

## Right to Spontaneous Demonstrations

The First Amendment would be meaningless if it did not allow people to freely demonstrate or protest in an immediate reaction to current news. As Justice John M. Harlan II noted, "It is often necessary to have one's voice heard promptly, if it is to be considered at all."<sup>10</sup> Courts have repeatedly held that regulations, including advanced permitting requirements for marches and demonstrations, must include an exception

for this type of "spontaneous" demonstrations held in reaction to current events.<sup>11</sup>

## Liability for the Crimes of Others

Because "[t]he right to associate does not lose all constitutional protection merely because some members of the group may have participated in conduct or advocated doctrine that itself is not protected,"<sup>12</sup> demonstrators should not face criminal charges for the acts of others or based on their proximity to or association with others who have committed or threaten to commit acts of violence. Where acts of violence happen in proximity to constitutionally protected activity, precision is necessary to ensure that only those responsible for the violence are held accountable for it. Put simply, the government may not restrict protected speech of a person not shown to have committed any unlawful conduct.

## Vagueness and Overbreadth

The right to due process requires prohibitions on speech to be clearly defined or they are void for vagueness. The statute must provide an individual with "fair notice that his contemplated conduct is forbidden by the statute" and must not afford the police "unfettered discretion" which "encourages arbitrary and erratic arrests and convictions."<sup>13</sup> When criminal penalties are associated with speech and expressive conduct, clarity is even more critical so as to minimize the risk of self-censorship and to prevent officials from enforcing criminal laws on demonstrators in an ad hoc fashion.

In addition, regulations on speech may not "burden substantially more speech than is necessary to further the government's legitimate interests."<sup>14</sup> The U.S. Supreme Court has made it clear that burdens on protected speech should be avoided, even if that means that some unprotected speech goes unpunished.<sup>15</sup> Thus, a law that is intended to ban unprotected speech is not valid if it applies so broadly that it prohibits or chills a substantial amount of protected speech.

# MINNESOTA

### December 23, 2015

Black Lives Matters announces plans to again protest at the Mall of America. However, hundreds of protesters quickly exited and headed towards the Minneapolis-St. Paul International airport to continue protesting. Fifteen people were arrested either at the mall or airport.

### July 2016

Protestors camped out in front of the Governor's mansion for several weeks. Over 70 protesters were arrested for blocking traffic and refusing to leave the area.

### July 5, 2016

In response to the shooting of Philando Castile, over 300 protesters shut down I-94 west near St. Paul. Police reported that the protest turned violent, while organizers said the aggressors were not part of the group. Over 100 people were arrested and 47 were charged with third-degree riot. In January 2017, charges were thrown out on lack of probable cause.

### January 21, 2017

Over 90,000 protesters gathered in Saint Paul for one of several Women's Marches across the country. The protest was a majority white crowd and peaceful. No arrests were made.

2015

2016

2016

2017

**“IN SHORT, THE BILL GIVES THE GOVERNMENT THE ABILITY TO DISTINGUISH BETWEEN FAVORED SPEECH AND DISFAVORED SPEECH BY IMPOSING CIVIL PENALTIES BASED SOLELY ON THE CONTENT AND VIEWPOINT OF A PERSON’S SPEECH AND/OR THE IDENTITY OF THE SPEAKER.”**

## **Pending State Legislation Targeting Protesters**

Several bills were introduced during the 2017 Minnesota legislative session in response to the Black Lives Matter protests discussed above. These bills are part of a national trend to push back against rising activism across the country, or at least recoup the public expense of accommodating free speech. At the time of this writing, two types of legislation, one allowing the government to sue protesters for the response costs of policing demonstrations and another increasing existing criminal penalties for obstructing transit ways, have received committee hearings and are moving through the legislative process.

## **Civil Liability for Unlawful Assembly**

House File 322 would allow cities to sue protesters who are convicted of unlawful assembly or public nuisance for the cost of the police response to the demonstration.<sup>16</sup> Similar bills seeking to penalize protesters have been introduced in at least seven other states.<sup>17</sup> The House Civil Law Committee heard the bill on January 26. While the bill has 28 Republican authors, only its chief author, Rep. Nick Zerwas (R-Elk River) spoke in support. He argued cities should not have to pay the costs associated with responding to protests that become unlawful and hoped this bill would create a deterrence, referring explicitly to actions taken by the Black Lives Matter movement in the last few years. Representatives of Minnesota’s state agencies, cities, or counties who could use this new law to sue protesters in civil court did not take a public position on the bill.

Opponents, on the other hand, testified regarding their concerns that the bill was an attack on free speech and protest rights. The American Civil Liberties Union of Minnesota (ACLU-MN) argued that the bill is likely unconstitutional because it amounts to an impermissible content- and viewpoint-based restriction on speech and it would have a chilling effect on the exercise

of constitutionally protected speech. The bill gives the government absolute discretion on whether to bring an action to recover costs, and, in situations where multiple people are charged and convicted of being present at an unlawful assembly, it allows the government to pick and choose

which of those individuals to sue. In short, the bill gives the government the ability to distinguish between favored speech and disfavored speech by imposing civil penalties based solely on the content and viewpoint of a person’s speech and/or the identity of the speaker.

The ACLU-MN also argued that a court could easily find H.F. 322 unconstitutionally overbroad and that it would have an unjustified chilling effect on the exercise of free speech. The specter of jail time and crushing monetary liability would likely discourage people from participating in demonstrations even if they have no intention of participating in or being present at an unlawful assembly.

Despite concerns from advocates and members of the community, the bill passed the committee on a party-line vote with Republican support and DFL opposition. The hearing then ended abruptly after many in the audience began yelling and chanting in spontaneous protest of the committee’s action. The bill was re-referred to the House Public Safety and Security Finance and Policy Committee, where it did not receive a hearing before the policy committee deadlines. Its Senate companion, S.F. 678, has not received a hearing in the Senate Judiciary and Public Safety Finance and Policy Committee.

## **Increased Penalties for Obstructing Access to Highways, Airports, or Public Transit**

Both H.F. 390, authored by Rep. Nick Zerwas (R-Elk River), and H.F. 1066, authored by Rep. Kathy Lohmer (R-Stillwater), would increase fines and potential jail time for protesters who obstruct access to major transit ways. House Speaker Kurt Daudt (R-Crown) emphasized during a recent press conference that cracking down on protests obstructing highways is a priority for the Republican majority in 2017.

H.F. 390 would increase current penalties from a misdemeanor to a gross misdemeanor for those who “intentionally obstruct traffic that is

entering, exiting, or on a trunk highway or that is entering or exiting an airport.”<sup>18</sup> It similarly creates a gross misdemeanor for acts that restrict passenger access to a transit vehicle. H.F. 1066 would amend Minnesota’s public nuisance law by making obstruction of a controlled access highway or public highway within airport property a gross misdemeanor.<sup>19</sup>

Both bills were heard in the Public Safety and Security Finance and Policy Committee on February 22, 2017. The bills’ authors argued the increased penalties were necessary to protect public safety and to make sure that our roads and transit lines are kept clear. They also argued increased penalties would act as a deterrent to stop protesters from demonstrating on highways, which inconveniences drivers and could hypothetically slow public safety response vehicles. Neither law enforcement representatives nor concerned members of the public testified in support of either bill.

The ACLU-MN joined other organizations and several members of the public in opposition to the bills, arguing that the bills could cause a major chilling effect on the exercise of constitutionally protected speech and create punishments disproportionate to the offense. While on their faces, these bills are aimed at what can be described as criminal conduct, they are aimed at conduct closely linked with expressive speech and conduct. The ACLU-MN also argued that these bills are unnecessary to protect public safety and clear highways because Minnesota already has ample laws on the books to address demonstrations that get out of hand, including existing criminal charges of unlawful assembly, public nuisance, and riot.<sup>20</sup>

Lastly, the ACLU-MN argued that these bills prescribe punishments vastly out of proportion to the conduct at issue. Obstruction of highways and airport roads and interfering with passenger access to a transit vehicle are actions primarily resulting in inconvenience to travelers. Punishing this conduct with a gross misdemeanor penalty seems disproportionate given that Minnesota has the same level of punishment for someone found guilty of fifth-degree assault, domestic assault, false imprisonment, fifth-degree criminal sexual conduct, and malicious punishment of a child.<sup>21</sup>

Despite opposition from a number of entities and DFL committee members, H.F. 390 and H.F. 1066 both passed on a 10-6 party line vote. The bills currently await a vote on the House floor.

The Senate companions, S.F. 676, authored by Sen. Bill Ingebriksen (R-Alexandria) and S.F. 918, authored by Sen. Karin Housley (R-St. Mary’s Point), respectively, received a hearing in the Judiciary and Public Safety Finance and Policy Committee on the same day as the

House bills. The two Senate bills were combined through an author's amendment to S.F. 676. The amended bill differed from the wording in the House companions in that it would be a gross misdemeanor for "a person to interfere with or obstruct traffic that is entering, exiting, or on a freeway or entering, exiting, or on a public roadway within the boundaries of airport property with the intent to interfere with, obstruct, or otherwise disrupt traffic."<sup>22</sup> The bill passed the committee to the Senate Floor on a nearly party-line vote of 7-2.<sup>23</sup>

If passed by the Republican-controlled legislature, these bills will go to the desk of DFL Gov. Mark Dayton. While Dayton has stated he generally supports protesters' First Amendment rights, he has also expressed concerns about demonstrations on highways. Accordingly, it is unclear whether Governor Dayton would veto this legislation should it make it to his desk.

### Conclusion

The uptick in protest activity to highlight issues of racial injustice and inequality is national in scope and is likely to continue in Minnesota, absent significant policy changes by law enforcement and the Minnesota Legislature. The right to free speech, including the right to protest against the authorities who police our communities,

is fundamental to our democracy. How the Legislature and the Governor respond to this recent public restlessness can demonstrate how some of our elected officials strike the balance between free speech and the costs it inherently imposes on society.

<sup>1</sup> See John Reinan and Rochelle Olson, *Judge dismisses charges against organizers of Black Lives Matter protest at MOA*, STAR TRIBUNE (Nov. 11, 2015).  
<sup>2</sup> See Nick Woltman, *Black Lives Matter planning another Mall of America protest*, PIONEER PRESS (Dec. 21, 2015).  
<sup>3</sup> See Josh Verges and Mara H. Gottreid, *How the I-94 takeover became a "full-scale riot"*, PIONEER PRESS (July 15, 2016).  
<sup>4</sup> See Dave Orrick, *Riot charges thrown out in Philando Castile protests*, PIONEER PRESS (Jan. 12, 2017).  
<sup>5</sup> Minneapolis City Code Chapter 447.  
<sup>6</sup> St. Paul City Code Chapter 366A.  
<sup>7</sup> *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).  
<sup>8</sup> *Forsyth City, Ga. v. Nationalist Movement*, 505 U.S. 123, 130 (1992).  
<sup>9</sup> *Id.*  
<sup>10</sup> *Shuttlesworth v. City of Birmingham, Ala.*, 394 U.S. 147, 163 (1969) (Harlan, J., concurring).  
<sup>11</sup> See, e.g., *Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022, 1047 (9th Cir. 2006).  
<sup>12</sup> *N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886, 908 (1982).  
<sup>13</sup> *Papachristou v. Jacksonville*, 405 U.S. 156, 162, 168 (1972).  
<sup>14</sup> *Ward v. Rock Against Racism*, 491 U.S. 781, 798-99 (1989).  
<sup>15</sup> *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 255 (2002).  
<sup>16</sup> See H.F. 322 (as introduced), 90th Minn. Legislature (2017-18).  
<sup>17</sup> See Randy Furst, *Bill to crack down on Minnesota protesters appears to be national trend*, STAR TRIBUNE (Jan. 24, 2017).  
<sup>18</sup> See H.F. 390 (as introduced), 90th Minn. Legislature (2017-18).  
<sup>19</sup> See H.F. 1066 (as introduced), 90th Minn. Legislature (2017-18).  
<sup>20</sup> See Minn. Stat. § 609.705, Minn. Stat. § 609.74, Minn. Stat. § 609.71.  
<sup>21</sup> See Minn. Stat. § 609.224, Minn. Stat. § 609.2242, Minn. Stat. § 609.255, Minn. Stat. § 609.345L, Minn. Stat. § 609.377.  
<sup>22</sup> See S.F. 1066 (1st Engrossment), 90th Minn. Legislature (2017-18).  
<sup>23</sup> Sen. Ron Latz (DFL-St. Louis Park) voted in favor of the bill along with all six Republicans on the committee.



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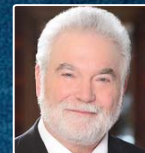
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