Justice's Vision: Historicizing Black Lives Matter as the Modern Abolition Movement

Justice is blind—this is perhaps the most ironic platitude which people still find value in uttering. It may be more accurate to say that justice *should be* blind. At present, justice is far from blind, and justice's sight—20/20—has resulted in a great number of injustices. Justice is carried out by people; people, consciously or not, consider many things that are extralegal when making legal decisions. The reduction of justice to a statue with a blindfold may make individuals feel secure in trusting that the legal system operates fairly, but such security is a farce—a particularly dangerous one. It inspires complacency and passivity rather than the vigilance one needs to ensure that they do not actively or tacitly support injustice. Many people feel more than comfortable in pointing out the wrongs committed by the legal system in the past, but few take the extra step of comparing where it stands now versus where it has stood previously. Such an endeavor is necessary for any society which seeks to ensure that the law is created and applied judiciously. The rise of protests concerning police brutality and inequity in the legal system demonstrate yet again that such endeavors have not been undertaken with the seriousness that such a matter requires. Understanding the obligations that citizens have to one another—such as the obligation to support the protesting of unjust actions—in addition to historicizing the current protests can serve to elucidate why these protests have come to be as well as what actions they can take to achieve their aims.

Origins of Civic Duty

In order to understand the types of actions that one is obligated to take, the origin of the obligation must first be rooted out. In general, obligations can be derived from moral, religious, contractual, or legal principles, though this enumeration is certainly not considered to be

exhaustive. Considering the focus here is on civic duty, the principles which will be of import are moral and, in some sense, contractual in nature. In particular, consideration of the obligations that compatriots have to one another—and to their state more broadly—will be elucidative. In this aim, contractarian philosophy offers useful insights.

The first to explicate the nature of the social contracts that bind individuals to their state was Sir Thomas Hobbes (Lloyd & Sreedhar, 2020). His conclusion, resting on the idea that the duty of a sovereign is only to protect its constituents from invaders as well as each other, was that citizens have an obligation to dutifully obey the decrees of the sovereign without exception (Lloyd & Sreedhar, 2020).While useful for justifying the actions of a monarch, Hobbes's formulation of the social contract does not explain the obligations that citizens have to one another. Even if given the presence of that explanation, Hobbes's conceptualization of political legitimacy is abhorrent because it allows for the sovereign to take virtually any action it pleases with no allowance for citizens to check the actions being taken. In essence, it relegates the citizenry to slavery.

In contrast to the Hobbesian view of the social contract, John Locke forwarded a conceptualization that persists today. Asserting that the state of nature would be relatively peaceful, that humans are born with certain natural rights (namely life, liberty, and property), and that governments are formed as a result of individuals ceding some of their natural rights in exchange for security, Locke argued that the people ultimately determine the legitimacy of the government (Uzgalis, 2020). Locke went further than many of his contemporaries, concluding that revolution against the standing government can be a legitimate action if that government proves to be illegitimate (Uzgalis, 2020). Locke's criteria for an illegitimate government are that it either fails to protect the rights to life, liberty, and property or—much worse—it actively

asserts that it possesses the ability to deny those rights of its citizens (Uzgalis, 2020). Though Locke never articulated an obligation for one to act against their government, those that founded their principles upon his writings—Thomas Jefferson in The Declaration of Independence as a chief example (US 1776)—came to the conclusion that the emergence of an illegitimate government, becoming so designated as a result of repeated offenses against the rights of its constituents, creates a *duty* to revolt (O'Tolle, 2011). Here, in the original writings of the nation's founding, the kind of civic duty that U.S. citizens are endowed with can be seen clearly. The citizenry comprises the government, giving that body its power with the sole intention being that that power be used to protect the natural rights of the people. As such, compatriots, being bound together by their collective inclusion in the granting of legitimacy to the government, are obligated to ensure, at all times, that the government they have ceded power to is abiding by the creed which it was given. Rejection of this duty is tacit support of tyranny. Should a compatriot, or group of compatriots, be unjustly denied the rights enumerated in the nation's creed, refusal to act on the duty to aid them only ensures that, given enough time, one's own rights will be denied as well. Thus, it can be seen that both the moral and rational actor must be vigilant in the defense of their fellow citizens.

To what courses of action are citizens obligated?

Understanding the nature of the civic duty of U.S. citizens, the question turns to what exactly are citizens obligated to do? They may have a general obligation to act against an oppressive government, but what means of redress does their duty call for them to employ? Answering of this question is aided by consideration of the general categories that action against a government can fall into: legal protest, radical protest, revolution, and civil disobedience. Particular emphasis

is given to civil disobedience due to its long history of use in the pursuit of justice as well as its tendency to be portrayed as the pinnacle of acceptable means by which to attain political change. Its position at the end of this analysis results from the need to contextualize it in terms of, and in contrast to, the other means of resistance.

Legal Protest:

Legal protest comprises precisely what one may expect. Deciding to make one's opposition to a particular government action known via means that fall within the realms of the law is the constitutive characteristic of a legal protest (Brownlee, 2017). Examples of this form of resistance are found in the gatherings of people at the doorstep of their government (the Capitol, for instance) and the boycotting of goods controlled by the government.

Radical Protest:

Radical protest, in keeping with its name, takes a radical departure from legal protest. Viewing swift change of the present government as an issue of paramount importance, those engaged in radical protest do not view adherence to the law or principles of non-violence as useful guiding tenets for their movement (Brownlee, 2017). The radical protester may find it prudent to engage in acts of terrorization, in some cases harming innocent compatriots in the process. The radical protester, however, views such acts to be inconsequential in comparison to the harm they believe is being done by the present system that they seek to be rid of.

Revolution:

Revolution finds itself situated in a position just bordering radical protest on the spectrum of resistance. Both means of seeking change overtly proclaim nonadherence to the law while also asserting that violence may be necessary to achieve their aims. The first point at which the two may be distinguished is that revolution does not necessarily involve violence, although violence

usually follows revolutionary action (Brownlee, 2017). The second point which gives some distinction between the two is that revolutionaries have the specific aim of instituting a new government while radical protesters are often characterized by a lack of clear proposals (Brownlee, 2017).

Civil Disobedience:

'Civil Disobedience' was coined by Henry David Thoreau as a form of resistance that violated standing law in order to express moral opposition to government actions (Thoreau, 1963). He derived the idea that citizens have the moral right to practice civil disobedience from his assertion that citizens must act in accordance with their consciences in order to ensure that the government is adhering to the will of the people (Thoreau, 1963). Thoreau felt that disobeying one's conscience resigned them to the status of servant while the adherence to one's conscience was the best means of participating in the political process (Thoreau, 1963). After all, a government cannot commit a nation to war if the soldiers, acting in accordance with their consciences, refuse to take up arms.

While Thoreau was the progenitor of this term, his conceptualization of civil disobedience is not the only one. While he characterized civil disobedience as a non-violent refusal to participate in aiding the government (in his case, paying taxes), others have argued against this notion (Brownlee, 2017). Explained by thinkers following Thoreau, there are two clear characteristics which define civil disobedience and a third one which is disputed.

John Rawls in *Political Liberalism* argues that civil disobedience is grounded by the conscientiousness of those committing the act (Rawls, 2005). Conscientiousness, in this context, refers to the holding of a considered opinion, in terms of justice and morality, regarding the present state of affairs (Rawls, 2005). The second constitutive characteristic is that the act must

be communicative with the central aim of the communication being the expression of disapproval of past/current government actions and the call to prevent such actions from occurring again (Brownlee, 2004). The third, disputed characteristic is the adherence to non-violence. While authors such as Thoreau and Rawls asserted that one cannot reasonably act violently while expressing disapproval regarding the violation of rights, others, such as Joseph Raz, argued that the distinction between violence and non-violence is moot. Raz offered the case of a strike organized by ambulance operators (Raz, 1979). They certainly are not committing an act of violence, but their protest undoubtedly has the result of great harm. Such a case makes it seem reasonable to conclude that acts such as vandalism can be justified as well.

There is also an assumption made by authors such as Rawls which distorts the question of whether violence can be a part of civil disobedience, namely that the government of a liberal democracy acts nearly justly. If we grant, however, that a government may engage in violence against its citizens from time to time, then it seems more reasonable to conclude that a civil disobedient may find themselves resisting such violence against them by themselves engaging in violent acts. The distinction between the civil disobedient and the radical protester in this case is that the civil disobedient has not abandoned nor obscured their political aims by engaging in violence; they simply find themselves continuing their communicative act via resisting the violence of the state. Their aim is not to incite terror, but rather to prevent further terrorization by the state. They cannot be said to be engaging in legal protest as they are obviously violating standing law, but they can also not be said to be engaging in radical protest because they do not share the methodology of that form of resistance either. Thus, it seems to be the case that the civil disobedient, while starting from a position of peace, may find themselves involved in violence to no fault of their own. It would not be a cogent argument to assert that these resistors

are no longer civil disobedients simply because they did not accept violence against their protest any more than they accepted the government actions which inspired the protest in the first place.

Understanding the methods that a citizen could employ to act in accordance with their duty against an unjust government, the question falls to which methods ought to be used. This discussion will concern those methods which seek change within the law or government rather than a usurpation of the standing government, as revolution is not pertinent to the goal of this essay. In a mostly free society, such as the one that seems to be present in the U.S. today, the rational progression of action in the seeking of redress for wrongs committed by the state is, in my estimation, as follows. First, legal protest in conjunction with the pursuance of implementing presented policy changes should be the principal step in any movement which seeks legitimacy in the eyes of the people. Demonstration of a willingness to work within the realm of the law is essential for showing that if the proposed changes are made, then the protesters will continue to respect the law. Beginning from any other starting point allows critics to point to a fundamental disrespect for the law as the motivating factor behind the movement, thus degrading its persuasion. If the movement is ignored and the perceived misdeeds continue to occur, then civil disobedience becomes a rational course of action (Rawls, 2005). Such disobedience proves itself more useful than the previous methods because the public tends to pay more attention to sensationalized acts, such as those that fall outside of legal means (Mills, 1859; Russell, 1967). This is the point at which the underlying justification of the resistance becomes of great import. If there is no response to civil disobedience, the question of what action to take next is dependent upon the severity of perceived wrongs. If it seems, by the judgement of the protesters' consciences, that the natural rights of citizens are suffering too greatly to justify standing down, then it may be justifiable to resort to small acts of violence—vandalism and resisting the

enforcement of unjust laws by police officers, as examples—in order to seek redress (Raz, 1979). This essay does not provide a line as to when violence in this case is justified because the pluralistic nature of morality and justice obscures such a line; however, this obscurity cannot be allowed to prevent people from acting in opposition to unconscionable deeds perpetrated against their compatriots. No one in the U.S. today would argue that the revolutionaries of 1776 acted in poor fashion.

Abolition, a Case Study of the Pursuance of Justice

Many historical cases of government resistance find themselves following, more or less, the progression of actions that I have proposed. Of particular interest, though, is the abolition movement of the United States. This interest stems from the historical significance of the movement and the similarities it shares to the titular movement. The focus here will be to analyze the means used by abolitionists—both by the oppressed and those seeking to lift their shackles—and view the justification of their actions in the context of their civic duty.

The American Creed is that set of principles of which the government of the United States has been charged with both following and defending. First formulated by Thomas Jefferson in The Declaration of Independence, the American Creed read:

> "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness" (US 1776).

The defense of and adherence to the principles outlined in this writing being the ultimate duty of the U.S. government, the violation of this creed is the ultimate call for resistance of the government. Such violation, perhaps the most egregious violation that has yet been seen, was the

instigator of the abolitionist movement. The continued legality of slavery, as eloquently pointed out by David Cooper in his essay *A SERIOUS ADDRESS TO THE RULERS OF AMERICA*, was a clear signal to the world that the newly formed United States of America did not, in actuality, believe that men were born equal; rather, the statement was merely one used to attempt justification for their own escape from tyranny (Cooper, 1783). Those that found it right to fight against their tyrant claimed to find themselves in a situation where they could not justify the freeing of those that they themselves were tyrants over. Such hypocrisy served as the primary fuel for the arguments proffered by abolitionist groups (Tsesis, 2009).

Despite the evil nature of the institution of slavery and the incredible means by which the American revolutionaries achieved *their* freedom, the abolitionist movement started peacefully. Abolitionists articulated their repulsion to slavery via accepted modes of communication, many resembling the scathing critique offered by David Cooper. Among these peaceful activists was Frederick Douglas, though he is retrospectively viewed as an inflammatory figure (Rice, 2012). The non-violent starting point of the abolitionist movement is, and was, commendable. The aim was to legitimize the freeing of slaves such that it could be wholly eradicated in a lasting way; the use of violence was thought to be a sort of hypocrisy akin to the hypocrisy of allowing slavery to continue in the first place (Rice, 2012). They reasoned, much like Rawls would later explicate, that a demonstration of willingness to abide by the law while arguing for its change was a necessary first—and hopefully only—step in the pursuit of justice.

While many held the view that non-violence coupled with adherence to the law was the only just means of protest, one figure arose publicly to denounce such a notion. Henry David Thoreau posited that adherence to the law, in some cases, made one a tacit supporter of the law which they purported to find unconscionable (Thoreau, 1963). In his case, the protest was against both

the war with Mexico and the continuation of slavery. His argument was that he could not, in accordance with his conscience, continue to pay taxes which he knew would be used in support of the government committing the acts he found to be dastardly (Thoreau, 1963). Thoreau's viewpoint marked a transition in public abolitionist thought away from the assumption that one must act in accordance with the law. Even this shift, however, would not prove sufficient enough to sway the public. Thoreau himself did not rule out the possibility that violence may be a necessary measure in the pursuit of justice (CRF, 2020).

While well-intentioned, the peaceful means proved insufficient. Repeated calls for redress were answered with silence and, in many cases, contempt. The transition to justifying violence did not occur without incitation, however. A critical turning point in abolitionist thought occurred as a result of the Christiana Incident (Rice, 2012). While accounts of the incident do not converge into a single, clear story, what is known is that a southern slave owner, Edward Gorsuch, attempted to recapture runaway slaves, ultimately resulting in his death by the hands of the slaves he intended to capture (Rice, 2012). An interesting point to note is that the man aiding the runaways, William Parker, made a point to—in the middle of the whole ordeal—engage in a moral and theological debate with Gorsuch (Rice, 2012). Thus, it appears that not only was there an intention to avoid engaging in violence, but that there was also an intention to communicate the abolitionist position. While Gorsuch had the legal ability to demand the runaways be released back to him—he had a federal marshal in his party, after all—the runaways and their allies, being in the free state of Pennsylvania, refused his demands, opting to use whatever means necessary to prevent the subjugation of their compatriot (Rice, 2012).

It seems doubtful that anyone, looking back at these events with the knowledge they possess today, could reasonably conclude that the escaped slaves acted immorally. Indeed, even the jury

tasked with determining the guilt of those involved in the incident, being charged with treason for violating the Fugitive Slave Act, took only fifteen minutes to render a verdict of not guilty (Rice, 2012). In fact, here is a case that demonstrates, in my view, that in the face of unquestionable injustice, individuals are obligated—or at the very least determine themselves to be obligated—to act against the force which is presently encroaching upon justice. The runaways and their aids undoubtably acted in a manner consistent with civil disobedience; not only did they violate the law, but they also used their resistance to the enforcement of that law to communicate to their would-be captors, and eventually the wider public, their considered opinion of the morality of that law. The other participants in the incident, members of a local defense force, recognized their obligation to aid the runaways despite the Fugitive Slave Act. Further, the jury which elected to acquit the accused recognized the need to act in accordance with their conscience as opposed to standing federal statutes; many later stated that they intended to acquit the accused even before the defense began to speak (Rice, 2012). The ultimate result of the disobedience which abounded in the Christiana incident was the turning of public opinion, a result which had not yet resulted from repeated use of peaceful, lawful means.

The publicity of the Christiana incident put the question of the justifiability of violent resistance to slavery into public discourse (Rice, 2012). While some still clung to non-violence, hoping that further demonstrations of their principled position would eventually prove persuasive, others turned their position, ultimately concluding that violence may be the only means by which to effectively demonstrate the firmness with which they clung to their position. One notable example of this shifting of opinion is Frederick Douglas. Douglas, like many of his contemporaries, saw his advocation of non-violence deteriorate as repeated attempts to sway public opinion proved fruitless; the Christiana incident served as a vehicle for his transition to

militant resistance (Katz, 1845). Douglas was not alone. While historians argue about the Union's motivations in fighting the civil war, what is certain is that abolitionists, particularly black abolitionists, viewed the civil war as a fight to end slavery; they ultimately swayed Lincoln to this position in the later years of the conflict (Sinha, 2019). The final measure employed by the abolitionists in the long fight for justice, then, can be seen as unequivocally violent. Attempts at using legal forms of protest and acting civilly disobedient proved ineffectual, leaving only one measure by which to secure their aim.

It is easier to look at the cause of abolition in retrospect and conclude that the methods were justly executed than it is to determine the justifiability of modern movements. Our thinking is aided by over a century of progress that informs us that the cause of slavery was categorically immoral; however, no such information on modern movements is clearly available. As such, I implore the reader to reflect on the cause of abolitionists, on their methods, and on their frustration when confronting the question of the justifiability of modern protests. I cannot compel such reflection by the reader, but—recognizing the virtue of epistemic humility—I utilize the lessons given by the abolitionists.

Black Lives Matter, the Modern Abolition Movement

In 2012, Trayvon Martin was fatally shot by George Zimmerman, an event that would, over the course of the next year, incite critical reflection into the state of racial issues within the United States (Munro, 2015). The ultimate result of the death of Trayvon Martin and the subsequent trial of George Zimmerman was the formation of a movement which now possesses tremendous influence in public discourse: Black Lives Matter (BLM, 2020). To avoid trivializing the impact of the movement, it will not be reduced to the organization which goes by the name

Black Lives Matter (BLM); rather, it will be inclusive of all of the actions associated with the movement started by the organization. The movement, seeking reformation of both the law and law enforcement, has helped organize Americans against actions which result from, as well as cause, the persistence of racial disparities in the legal system. Recently, the movement found its high point—its point of greatest notoriety—in the protests following the death of George Floyd in Minneapolis, Minnesota; there were over 2,000 protests held across all 50 states over the course of just two weeks (Eligon, 2020). Not everyone is on board with the movement, however. Some, particularly members of the political right, have expressed disapproval of the movement for various reasons, some of which include acts of violence that have occurred during protests (Eligon, 2020). The opposition to the movement has even raised concerns amongst Democratic Party leaders that the proliferation of BLM protests will swing the November election (Eligon, 2020). This issue is not of concern here, however. The question that, in my mind, is of more importance is not who will win the election but rather is there a moral stain left on the tapestry of the United States that requires remedy? The former question, if answered first, may incite some to inaction in the face of an injustice in the name of a political victory; it is time for what is politically expedient to be cast aside in favor of critically questioning where our morals presently stand.

To answer, I turn again to the guidance of the American Creed. There are two key points that are useful to analyze the justification of the BLM movement: the inalienability of the rights to life, liberty, and the pursuit of happiness as well as the assertion of equality amongst all men. On the former, BLM has made it abundantly clear that these rights are not, at present, treated as wholly inalienable. While the framers, following the lead of John Locke, would argue that it is not expected that citizens today maintain all of these rights wholly due to their ceding of some of

those rights to the government, they would also undoubtedly rally with those pointing out that these rights are being unnecessarily infringed in the process of enforcing the law. In 2016 alone, 1,093 people were killed by police in the United States (Guardian, 2016). 170 of those people were unarmed and 20 were under the age of 18 (Guardian, 2016). In 2019, the total was 1,004 (Statista, Jul. 2020). These numbers are stark on their own, painting a bleak picture of the present state of police brutality in the United States; the image only gets worse with inclusion of the racial disparities.

Following the lead of the statistics outlined above, it can be seen that those numbers do not apply proportionately to all groups. The per capita rate of fatal police shootings is 32 per million among the black population while it stands at only 13 per million among the white population, with Hispanics falling between the two at 24 per million (Statista, Aug. 2020). The carceral nature of this nation showed itself clearly in 2008 when the United States hit a rate of 1 in every 100 citizens being incarcerated (Pew, 2008); this rate of incarceration, however, also does not fall evenly amongst the population. While black Americans make up only 12% of the U.S. population, they comprise 33% of the prison population (Gramlich, 2020). A popularly forwarded argument attempting to explain these different rates is the presence of differential crime rates among racial groups. Applying scrutiny to this argument reveals two things: crime rates *do* differ among racial groups, but the differences in crime rates *are not enough* to explain the observed differences in incarceration rates (Sentencing, 2018). A cogent example is the disproportionate rate of drug use versus drug charges. A result of escalation in the "War on Drugs", drug arrest rates increased from 1980 to 2000; however, the increase was from 6.5 to 29.1 arrests per 1,000 among the black community while it was only 3.5 to 4.6 per 1,000 among the white population (Sentencing, 2018). Surveying of drug usage among secondary school

students conducted between 1975 and 2011 shows that while white students were more likely to have used an illegal substance, black students were arrested on drug charges at a rate twice that of white students (Sentencing, 2018). The disparities do not end at arrest rates. Members of the black community receive sentences that are an average of almost 10% longer than white individuals for the same crime, even accounting for differences in criminal records (Starr & Rehavi, 2014). A 2003 analysis by the Bureau of Justice Statistics reported that one in three black men born in 2001 in the U.S. can expect to be incarcerated during their lives while that rate is only 11% among the general male population, though the author of the analysis has said more recently that the changing of incarceration rates likely brings that number to 1 in 4 black men (Bonczar, 2003; Kessler, 2015).

The non-fatal disparities have indirect effects on individual liberty as well. Firstly, the higher incarceration rate among the black community translates to increased felon disenfranchisement; this affects the black voting age population at a rate of 7.4% while affecting the white voting age population at a rate of only 2.5% (Sentencing, 2016). While this disenfranchisement is impactful on its own, racial disparities in police encounters furthers weakens political participation by the black community. Any encounters with the state – from police questioning to incarceration – deceases the likelihood that an individual will vote (Weaver & Lerman, 2010). Further, increased interaction with the state, such as serving longer prison sentences, decreased the likelihood of voting even more (Weaver & Lerman, 2010). Considering that members of the black community make up a disproportionate component of the prison population and serve longer average sentences for the same crimes as white individuals, the negative correlation between carceral contact and voting likely impacts the black community disproportionately as well. The ultimate result is a decreased ability for members of the black community to express their voices in

governance, thus obstructing their ability to fully engage in the political process; this is an egregious restriction of individual liberty in any democratic society. Jefferson's words in justifying the departure from monarchal rule in The Declaration of Independence can thus be situated in the context of BLM: "In every stage of these Oppressions We have Petitioned for Redress in the most humble terms: Our repeated Petitions have been answered only by repeated injury" (US 1776).

Given the encroachment upon the rights enumerated in the American Creed, it seems that the BLM movement grounds itself in a similar vein to the abolitionist movement. A telling similarity between how the two justify themselves is their public appeal to the American Creed. Just as abolitionists sought to reason with their peers by pointing to the ideals espoused in that statement, BLM activists use it to explain their discontent with the status quo. An apt example comes from a statement given by Dr. Nikki Taylor, Chair of the Department of History at Howard University:

> "I am floored by how Americans do not even seem to believe Black people even deserve the right to pursue happiness…When we do just that — barbecuing, jogging, walking through parks, driving through our neighborhoods, walking to the corner store — we are targeted by not just the police, but our neighbors and fellow citizens who believe that Black people doing these activities is not us pursuing our own happiness, but 'suspicious'" (Kramer, 2020).

Further than simply appealing to the same set of principles, the two movements converge, in general, on their methodologies. Like the abolitionists, BLM activists have focused their efforts on nonviolent means of communicating their views on current law and law enforcement practices: social media activism, protests, and conversing with law

makers about policy reform (BLM, 2017). Of particular note, they have practiced civil disobedience in a clear form, the blocking of roads (Jilani, 2017). While seemingly benign in effect, the act is impactful in that it demonstrates the protesters' frustrations with current policies call them to act outside of strictly legal means. Recent violent incidents resulting from protests, though not the first to be criticized, have caused some to levy condemnation against the movement as a whole (Kass, 2020; Wax-Thibodeaux, Elfrink, Amus, & Peiser, 2020). This broad attribution of violence to the BLM movement is ill-founded, however. Recent analysis has shown that fully 93% of protests/demonstrations related to the BLM movement involve no incidents of violence or vandalism (ACLED, 2020).

A particularly important note is that many of the violent instances are not incited by the protesters, or at least not solely by them. Nine percent of BLM demonstrations occurring from May to August have been disrupted by government intervention, with 54% of those interventions involving use of force, including tear gas, rubber bullets, pepper spray, or batons (ACLED, 2020). This adds up to 5% of BLM protests being met with force compared to less than 1% for all other protests (ACLED, 2020). Former NYPD officer and Burlington chief of police Brandon del Pozo, analyzing a riot police encounter with protesters in Seattle, showed exactly how easy it is for a protest to turn violent as a result of the police response (del Pozo, 2020). He argues that simply suiting up officers in riot gear is enough to sow the seeds of conflict because protesters can feel that the police intent is escalation (del Pozo, 2020). An officer simply tugging at a protester's umbrella can lead nearby officers to respond with force, ultimately resulting in the deployment of flashbangs, pepper spray, and tear gas; in such a tense situation, one

officer taking action is all it takes for the rest to follow suit, turning a peaceful demonstration into a large-scale conflict between civilians and the police (del Pozo, 2020). He further points out that the same scale of protest in the same location occurring after the officer response was scaled back resulted in no use of force (del Pozo, 2020).

A useful parallel to draw here is that instances of violence occurring in response to use of force by police are similar in kind to the violence that occurred at Christiana. While perhaps seemingly disparate at first glance, some analysis demonstrates key similarities between the two. Civil disobedience is followed by an attempt to stop the violation, ultimately resulting in violence by the protester. In the case of Christiana, the civil disobedience was violation of the fugitive slave act, the attempt to stop the violation was the Gorsuch search party attempting to 'reclaim' the runaway slaves, and the retaliatory violence was the killing of Gorsuch. In the case of BLM protests, the civil disobedience is the obstruction of traffic, the attempt to stop the violation is police intervention, and the retaliatory violence is the resulting acts committed by protesters in response to police intervention. While the events themselves are certainly dissimilar, the motivations are not. Just as the civil disobedients at Christiana found themselves being provoked by the very people they sought to protest, so too are BLM activists confronted by the faces of what they seek to protest. It seems expected, if not reasonable, for the protesters in both cases – finding their repeated calls for change unanswered – to act by whatever means necessary in the defense of themselves as well as their cause. Submission in either case would result in their calls going unheard yet again. Similar to the abolitionist response to Christiana, the violence erupting at some BLM protests has indeed sparked some to argue

that perhaps violence will be necessary to bring the desired changes; however, this sentiment has not yet reached the level that it did among the abolitionists (Lopez, 2020).

Subverting the Master's Tools

> **"**For the master's tools will never dismantle the master's house. They may allow us temporarily to beat him at his own game, but they will never enable us to bring about genuine change" (Lorde, 1984).

Audre Lorde's statement has rung throughout the hearts and minds of an entire generation of scholars. Her essay *The Master's Tools Will Never Dismantle the Master's House* was a powerful condemnation of the failings of a feminist conference wherein the organizers sought fit to only include black feminists and lesbians in a single panel, in effect stating that such women could not speak on any of the other topics discussed by the other panels (1984). Many individuals, however, have taken her famous statement to mean that political action is ineffective. Such an interpretation is not only unsupported by the rest of the text from which the statement is excerpted, but it is also disempowering. Lorde speaks about engaging the political various times throughout the essay. A key example comes after her famous statement:

> "In a world of possibility for us all, our personal visions help lay the groundwork for political action. The failure of academic feminists to recognize difference as a crucial strength is a failure to reach beyond the first patriarchal lesson. In our world, divide and conquer must become define and empower" (Lorde, 1984).

Lorde does not, as some assert, suggest that we ought to abandon the political in pursuit of meaningful change; rather, she argues that we must not allow the present dominating ideologies to stunt our pursuit of political change. The information she gives the BLM movement, then, is

that they must pursue political change without allowing unimportant distinctions—political leanings, religious beliefs, and income, for example—to divide their movement.

While BLM has had some instances of violence, their approach is still predominantly peaceful. In fact, their persistent protests have recently led to meaningful changes resulting from increased public attention (Blackwell-Pal, 2020). Whereas arrests of police officers involved in civilian deaths was hard to come by previously, the movement has successfully pushed for the arrest and prosecution of numerous high-profile police officers (Blackwell-Pal, 2020). Further, numerous city councils have voted to disband or defund police departments in line with the requests of many activists (Blackwell-Pal, 2020). While these achievements are substantial ones, they should not be allowed to be the only outcomes of this movement. Protesters should stand by their convictions with further persistence. At the present moment, their holding of public attention gives them more political agency than has been afforded to them before. In line with Lorde's advice, the shared vision of BLM can now be used to incite change within the standing legal structure. Here, I argue that the focus should be on *subverting* the master's tools, specifically those tools within the legal arena that have allowed the carceral state to continuously subjugate people of color.

Reformation of the Qualified Immunity Doctrine:

The tool which is most often pointed to as a means of oppression, in the context of police brutality, is qualified immunity. The doctrine is not a result of legislative action but rather of judicial decisions. The court established the entitlement to qualified immunity of federal officials in *Harlow v. Fitzgerald* (1982), citing the need to protect officials that must exercise discretion in the discharge of their duties. *Saucier v. Katz* (2001) created the "clearly established" question in determining if an official is entitled to qualified immunity; this meant that even if an official

violated the rights of a citizen, they could not be made to stand trial if they prove that the rights were not clearly established. While the Supreme Court argued in *Pearson v. Callahan* (2009) that the test defined in *Saucier* did not need to be strictly followed, the court continued to use the "clearly established" question in both *Safford Unified School Dist. #1 v. Redding* (2009) and *Luna v. Mullenix* (2015), though the former focused on a school official rather than a police officer. The ultimate result of the Supreme Court's rulings on qualified immunity is the presence of what is, in effect, unconditional immunity for police officers (Nemeth, 2019).

The courts have made it clear that, absent a change in standing law, qualified immunity will remain a fixture of the legal system (Ehrlich, 2020; Schnurer, 2020). Fortunately, recent BLM protests and social media activism have resulted in two separate bills—one in the House of Representatives and one in the Senate—being proposed that would put an end the doctrine's use (Ehrlich, 2020). Despite broad support by the Democratic members of Congress, the Republican side of the isle, which currently holds a majority in the Senate as well as the presidency, has signaled that a complete gutting of qualified immunity would be a non-starter, citing the need to prevent frivolous lawsuits against officials (Ehrlich, 2020; Fitzpatrick, 2020). This doesn't mean, however, that further activism seeking reform to the doctrine will necessarily be fruitless. Republicans have admitted that reforming qualified immunity is an option that they are leaving on the table (Fitzpatrick, 2020). This is welcome news as reforming qualified immunity can increase officer accountability while also avoiding the damages caused by frivolous lawsuits being filed against officers.

Brian Fitzpatrick, law professor at Vanderbilt Law School, points out that simply ending qualified immunity would indeed result in an influx of frivolous lawsuits against public officials due to the use of one-way fee shifting in civil rights litigations (2020). Essentially, if the plaintiff

wins, then the government must pay the plaintiff's attorney fees; however, if the government wins, then the plaintiff is not forced to pay the government's fees. This is a system in which there is an incentive for lawyers to seek out frivolous suits since, in the absence of qualified immunity, there would be a lot of potential gain with little potential cost (Fitzpatrick, 2020). The solution, Fitzpatrick asserts, is to eliminate qualified immunity with the exception of application to the determination of the paying of attorney fees. Essentially, individuals could sue officials anytime they violated the law, but they could get the government to pay their attorney fees if they further won that the law was "clearly established" (Fitzpatrick, 2020). For BLM, this move would be advantageous to their cause because it would not only discourage malfeasance by police officers, but it would also incentivize law enforcement agencies to implement more stringent hiring practices, better training, and more strict punishments for officers. The result would be a system that does not allow the egregious violation of rights by police officers that we see at present.

Jury Nullification as a Moral Measure:

While the reformation of qualified immunity is a useful means to reduce the efficacy of the tools with which citizens of color can be oppressed, there always remains the possibility that the legal system will force jurors to decide between upholding the law in a case with racial motivations and siding with their convictions. While traditional ideology would suggest that the jurors must decide the case based on the facts presented, standing laws, and the instructions of the judge, I argue that jurors must not allow the law to be the sole definer of justice. Following the rules laid out in instances where clear misconduct has occurred—such as racial profiling, disproportionate application of the law, and excessive use of force—would be to employ the master's tools in the miscarriage of justice. This power of the jury, known as jury nullification, is

a consequence of both the inability to punish jurors for a wrong decision and the restriction of double jeopardy set out in the Fifth Amendment (Duvall, 2012). Today, this idea may seem radical. Indeed, the present tendency of the legal system is to disallow the informing of jurors that they have the power to decide not only the facts of the case, but also the laws in question (Portman, 2018). The present view does not ground itself in the original view of a jury's duty, however. Many of the Founding Fathers expressed explicitly that jurors not only have the right, but also the duty to judge the morality of the law (Vasylyk, 2019). As an example, Founding Father and first Chief Justice of the Supreme Court, John Jay, stated that jurors have "a right ... to determine the law as well as the fact in controversy" (Liberty, 2001). The advocation of jurors following their consciences, then, is not advocation of an abandonment of foundational principles of the legal system but rather a plea to return to those foundational principles. Such principles have been acted upon in the past; for instance, the jury who acquitted the accused in the Christiana incident chose not to uphold the Fugitive Slave Act, the same option taken by many other juries asked to decide whether those who violated that law ought to be punished (Rice, 2012; Scheflin & Van Dyke, 1980). The duty for jurors to nullify unjust laws can be seen by considering the mutual obligation that citizens have to one another. If jurors see that the legal system is not upholding the American Creed, thus restricting the natural rights of the defendant, then the jurors must deny the government's use of the power that the jurors, along with the rest of the citizenry, ceded to the government in the first place.

I argue that BLM activists should both consider the employment of this power when they find themselves on a jury and educate others on its existence. While the latter can be considered illegal as a result of standing precedent (Portman, 2018), its employment is a profound act of civil disobedience. The advertisement of this power would be an incredibly strong subversion of

the ability for the legal system to commit injustices against people of color. The present system would have jurors believe that they must actively support clear injustices in the name of the rule of law; such a system cannot be just. Any system which asks citizens to ignore their consciences is one that does not abide by the will of the people. In fact, asking them to toss aside their sense of morality is an explicit avoidance of hearing the will of the people. Juries should not be allowed to become another arm of the state. They are meant to be the voice of the people within the courtroom, a body which enforces the laws that the people agree ought to be enforced while also assuring that no citizen is punished for acts which the people believe one ought not be punished for. Laws do not always account for changing circumstances, but juries can, and should, remedy that.

In the case of a black juror considering nullification, an extra consideration arises. Historically, the court system has employed black jurors as a means of attempting to legitimize the results of the judicial system (Butler, 1995). While it is certainly true that having diversity within a jury is desirable, black jurors sometimes are employed in order to legitimize injustices (Butler, 1995). If a black juror votes guilty in a case where a black defendant is facing a non-violent, drug-related offense, they can be pointed to as a reason to accept the results of the trial; in essence, the black juror is being used to justify yet another instance of the carceral state claiming a black citizen's freedom (Butler, 1995). In such a case, the choice to vote "not guilty" is not only a means by which the juror can prevent another instance of the legal system working against black citizens, but it is also a means for the juror to signal to the legal system that they do not find the system to be legitimate, that they refuse to be used as a means for the legal system to justify itself (Butler, 1995).

The argument that jury nullification undermines the rule of law is a patently absurd reason to reject the practice because the rule of law, as we conceive of it, is already undermined on a daily basis. First, analysis of jury selection shows that racial bias still plays a significant role in the selection process, resulting in all-white juries trying defendants of color in counties that have a majority person of color population (EJI, 2010). Second, the pluralistic nature of the legal system makes it such that judges can reach nearly any conclusion in any given case, meaning that it is probable that racial influences play a factor in many decisions (Butler, 1995). Third, the disproportionate application of the law described earlier means that people of color are more likely to find themselves being on trial. Ultimately, the legal system, as it currently stands, does not operate equally for everyone. Jury nullification, then, should be thought of as a means for the people to rectify this injustice.

Conclusion:

Perhaps, as Martin Luther King Jr. put it, "the arc of the moral universe…bends towards justice," (1968) but history shows that it does not bend by its own volition. The phrase is often quoted but rarely qualified. It is likely that the arc is not a smooth curve but rather one with many directional changes that averages, over time, towards justice. We must endeavor to bend the arc whenever we can lest it turn its course. We cannot use these powerful words to feel secure in inaction, just as we cannot assert that justice is blind while ignoring the many instances in which it isn't. We must recognize our civic duty to uphold justice for not only ourselves, but also our compatriots. Existing in the present may make it difficult to determine if our actions are indeed bending the arc of the

moral universe in the direction that we think they are, but historicizing our actions brings us closer to the answer.

Supreme Court Decisions:

1: *Harlow* v. *Fitzgerald,* 457 U. S. 800 (1982)

2: *Saucier* v. *Katz,* 533 U. S. 194 (2001)

3: *Pearson* v. *Callahan,* 555 U. S. 223 (2009)

4: *Safford Unified School Dist. #1* v. *Redding,* 557 U. S. 364 (2009)

5: *Mullenix* v. *Luna,* 577 U. S. 7 (2015) *(per curiam)*

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