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## Note

### **OVERBEY V. MAYOR OF BALTIMORE: THE COST OF SILENCE AND THE IMPACT OF RESTRICTING SPEECH IN POLICE BRUTALITY SETTLEMENTS**

DELANEY E. ANDERSON\*

Can the government purchase silence from a someone who its agents beat, shocked with a stun gun, and ridiculed?<sup>1</sup> According to Supreme Court precedent and the United States Court of Appeals for the Fourth Circuit, no.<sup>2</sup> In *Overbey v. Mayor of Baltimore*,<sup>3</sup> the Fourth Circuit answered the important question of whether the government may impose content-specific speech restrictions in the context of settlement agreements.<sup>4</sup> Implicit in the court's reasoning is the underlying goal of self-fulfillment in First Amendment speech protections.<sup>5</sup> Through an analysis of First Amendment precedent, the court accurately captured the importance of protecting speech describing an individual's personal experience of government abuse.<sup>6</sup>

In *Overbey*, the court analyzed whether the use of a non-disparagement clause, prohibiting Ashley Overbey from speaking about her experience of police brutality, was an enforceable waiver of her First Amendment rights.<sup>7</sup>

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1. See *Overbey v. Mayor of Baltimore*, 930 F.3d 215, 220 (4th Cir. 2019) (presenting these facts).

2. *Id.* at 226.

3. 930 F.3d 215, 220 (4th Cir. 2019).

4. See *infra* Section IV.A. A settlement agreement occurs when a defendant offers something (usually monetary compensation) to a plaintiff so that the plaintiff "agrees not to disclose evidence that could establish the [defendant's] liability to others." Alan E. Garfield, *Promises of Silence: Contract Law and Freedom of Speech*, 83 CORNELL L. REV. 261, 271 (1998). Ultimately, the defendant "seeks to suppress information that could expose it to civil liability." *Id.* A content-specific speech restriction is when the government seeks to silence certain speech based on the content expressed by the speech. See Rebecca A. Taylor, *The First Amendment*, AM. BAR ASS'N: GPSOLO EREPORT, July 2014, [https://www.americanbar.org/groups/gpsolo/publications/gpsolo\\_ereport/2014/july\\_2014/the\\_first\\_amendment/](https://www.americanbar.org/groups/gpsolo/publications/gpsolo_ereport/2014/july_2014/the_first_amendment/).

5. See *infra* Section IV.C.

6. See *infra* Section IV.C.

7. *Overbey*, 930 F.3d at 221–22.

In effect, the government sought to purchase silence to prevent critique from reaching the public consciousness with “hush money.”<sup>8</sup> While an individual may waive a constitutional right, that waiver is not enforceable unless strong public policy interests support its enforcement.<sup>9</sup> The court correctly held that the foundational public policy interests in open public debate and government mistrust were superior to the government’s interest in efficiency and minimizing critique.<sup>10</sup> The court’s reasoning was consistent with the Supreme Court’s protective First Amendment jurisprudence, and the court, by implication, affirmed the importance of protecting the speech of marginalized individuals that is critical of the government, especially experiences of police brutality.<sup>11</sup>

Expanding on the court’s correct decision and the resulting implications, this Note will analyze the case, the underlying precedent, the court’s reasoning, and the court’s application of relevant precedent and First Amendment theory.<sup>12</sup> Part I of this Note will describe the case before the Fourth Circuit, including Overbey’s experience, Baltimore City’s response, and the United States District Court for the District of Maryland’s decision.<sup>13</sup> Part II will then discuss the relevant legal precedent underlying the court’s decision.<sup>14</sup> This Part will explore the First Amendment jurisprudence related to content-specific speech restrictions on speech that is critical of the government, the supremacy of First Amendment interests over competing interests, and the free speech jurisprudence related to self-fulfillment and self-respect.<sup>15</sup> Part III will follow the court’s reasoning that led to its conclusion that the non-disparagement agreement was an unconstitutional waiver of Overbey’s First Amendment right, as well as Judge Quattlebaum’s dissenting opinion.<sup>16</sup> Finally, Part IV will explore the relationship between the court’s decision and government-critical speech protections, the policies underlying the First Amendment, and the freedom of speech of marginalized communities.<sup>17</sup>

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8. *Id.* at 226.

9. *Id.* at 223.

10. *Id.* at 224, 226.

11. *See infra* Part IV.

12. *See infra* Parts I–IV.

13. *See infra* Part I.

14. *See infra* Part II.

15. *See infra* Part II.

16. *See infra* Part III.

17. *See infra* Part IV.

## I. THE CASE

In April 2012, police officers from the Baltimore City Police Department physically attacked, degraded, and arrested Ms. Ashley Overbey, all because she called 911 fearing someone had burglarized her home.<sup>18</sup> Unfortunately, this fear was not assuaged by police presence.<sup>19</sup> Instead of the protection Overbey anticipated, the police physically assaulted and arrested Overbey.<sup>20</sup> Overbey sued the City to recover for her mistreatment and its impact on her livelihood.<sup>21</sup> As a result of her arrest, Overbey was unable to find a job, pay her bills, or maintain housing for her and her children.<sup>22</sup> In the interest of a prompt conclusion to this traumatic incident, Overbey agreed to a settlement of \$63,000 with a caveat in the form of a non-disparagement clause that prevented her from speaking about “‘any opinions, facts or allegations in any way connected to’ her case.”<sup>23</sup> If Overbey discussed her experience with Baltimore Police Department, she would be required to remit half of her settlement back to the City.<sup>24</sup> The City, however, remained free to speak about the case, Overbey, and her claims.<sup>25</sup>

While the settlement was pending approval by the City, a news article from *The Baltimore Sun* released information about the settlement and Overbey.<sup>26</sup> The article quoted the City Solicitor describing Overbey as “hostile” with police and suggesting that she caused her own mistreatment.<sup>27</sup> Internet commenters made many negative and disparaging comments on the article about Overbey.<sup>28</sup> The internet commenters, following the City Solicitor’s sentiment and utilizing racist rhetoric, accused Overbey of

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18. Brief for Petitioner at 4, *Overbey v. Mayor of Baltimore*, 930 F.3d 215 (4th Cir. 2019) (No. 17-2444).

19. *Id.*

20. *Overbey*, 930 F.3d at 220.

21. *Id.*

22. *Id.*

23. *Id.* The settlement agreement included Overbey, the three officers who physically assaulted and arrested her, and the City. *Id.* The City’s use of non-disparagement clauses in police misconduct settlements required claimants “promise not to speak to the media about either their underlying allegations or the settlement process” and were included in ninety-five percent of the City’s police misconduct settlement agreements. *Id.* at 219–20.

24. *Id.* at 220.

25. *Id.*

26. *Id.*; see Luke Broadwater, *City to Pay \$63K to Woman Police Shocked with Taser*, BALTIMORE SUN (Sept. 15, 2014), <https://www.baltimoresun.com/news/crime/bs-xpm-2014-09-15-bal-city-to-pay-63k-to-woman-police-shocked-with-taser-20140909-story.html>. This article has been edited since its original posting and all comments have been turned off. *Id.*

27. *Overbey*, 930 F.3d at 220; see Brief for Petitioner, *supra* note 18, at 8 (“Accompanying the information about her settlement was an explanatory statement by the City Solicitor that, in substance, pinned blame for Ms. Overbey’s altercation with the police on Ms. Overbey herself, characterizing her disposition as ‘hostile’ to the responding police officers.”).

28. *Overbey*, 930 F.3d at 220.

instigating the altercation to gain a settlement from the police.<sup>29</sup> Overbey responded to some comments to defend herself and explained how the police harmed her.<sup>30</sup> The City then provided Overbey with only half of her settlement, withholding the other half as “liquidated damages” for her violation of the settlement agreement’s non-disparagement provision.<sup>31</sup> In response to this penalization, Overbey filed another action arguing that the non-disparagement clause violated her First Amendment right to free speech.<sup>32</sup> The City moved to dismiss the charges, or alternatively sought summary judgment.<sup>33</sup> Despite not having completed any discovery, the United States District Court for the District of Maryland granted the City’s motion for summary judgment.<sup>34</sup> The district court upheld the non-disparagement clause, reasoning that Overbey entered into the settlement voluntarily and that the agreement was not contrary to public policy.<sup>35</sup> On appeal, the Fourth Circuit reviewed the order to resolve whether the non-disparagement clause violated Overbey’s First Amendment rights and was therefore void.<sup>36</sup>

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29. *Id.* (“The *Sun*’s story accumulated several anonymous, race-inflected comments implying that Overbey had initiated a confrontation with the police in hopes of getting a payout from the City.”). Examples of the language used by commenters include: “[Y]ou never touch a police officer . . . I would rather be shot by a Taser, then [sic] a bullet. I can’t [sic] wait until you need their help in the future. Enjoy the money!!” and “So, OK, I can call the cops, assault one of them, get tased and get paid! Sounds like a plan!” Brief for Petitioner, *supra* note 18, at 9–10.

30. *Overbey*, 930 F.3d at 220. Examples of Overbey’s comments responses include:

I am the woman who this article is talking about AND THE POLICE WERE WRONG!! This article doesn’t come close to WHAT REALLY HAPPENED or tell how three men over 200 lbs each beat me (115 lbs) bruises all over my body a black eye AND tased twice all in front my 2 yr old daughter so before you decide to put ur [sic] MEANINGLESS opinion in on something FIND OUT THE FACTS FIRST! IF I were wrong my charges wldntve [sic] ben [sic] thrown out and i wldntve [sic] received a dime.

and

AND THIS WAS ALL AFTER I CALLED THEM FOR HELP AFTER MY HOME HAD BEEN BURGULARIZED WHILE I WAS AT WORK!! SO ANYONE WHO HAS ANYTHING TO SAY (NEGATIVITY) YOU CAN TAKE UR [sic] OPINION AND SHOVE IT!!

Brief for Petitioner, *supra* note 18, 9–10.

31. *Overbey*, 930 F.3d at 220. The City claimed that the liquidated damages provision allowed the City to withhold half of Overbey’s settlement amount due to her violation of the non-disparagement clause and the City’s supposed injury by Overbey’s conduct. *Id.*

32. *Id.* at 221. The *Baltimore Brew*, a local news organization that investigates police misconduct, joined Overbey’s suit and argued that the non-disparagement clause similarly violated the news organization’s First Amendment “interest in newsgathering.” *Id.*

33. *Id.*

34. *Id.*

35. *Id.* The district court also granted the City’s motion for summary judgment against the *Brew* by concluding that the *Brew* lacked standing. *Id.*

36. *Id.* The Fourth Circuit also resolved whether the *Brew* had standing in order to bring a claim against the City and the Baltimore City Police Department. *Id.* at 230.

## II. LEGAL BACKGROUND

The First Amendment guarantee of free speech reads simply, “Congress shall make no law . . . abridging the freedom of speech.”<sup>37</sup> Since the adoption of the Bill of Rights, the Court has sought to interpret how far that freedom of speech extends.<sup>38</sup> The Court’s First Amendment jurisprudence reveals a strong commitment to uninhibited speech, especially when that speech is used by individuals to critique the government.<sup>39</sup> In reviewing the relevant jurisprudence underlying the Fourth Circuit’s decision and its implications, Section II.A reviews the Court’s approach of content-specific speech restrictions, including speech that is critical of the government.<sup>40</sup> Section II.B then examines the superiority of the First Amendment right over competing interests.<sup>41</sup> Section II.C finally explores the Court’s discussion of the overlap between First Amendment freedom of speech and its relation to individual autonomy.<sup>42</sup>

### A. First Amendment and Content-Specific Speech Restrictions

Since the 1960s, the Court has repeatedly struck down content-specific speech protections in favor of a jurisprudence that is protective of the freedom of speech.<sup>43</sup> A unanimous Court in *New York Times Co. v. Sullivan*<sup>44</sup> announced the modern day First Amendment jurisprudence around content-specific speech restrictions.<sup>45</sup> Content-specific speech restrictions refer to state-imposed restrictions that prohibit speech based on the subject that the speech addresses.<sup>46</sup> The Court articulated a strong basis for the

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37. U.S. CONST. amend. I. The First Amendment right to freedom of speech was incorporated against the states through the Due Process Clause of the Fourteenth Amendment. *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (“[F]reedom of speech . . . [is] among the fundamental personal rights and ‘liberties’ protected by the due process clause of the Fourteenth Amendment from impairment of the States.”).

38. *See infra* Sections II.A–C.

39. *See infra* Sections II.A–C.

40. *See infra* Section II.A.

41. *See infra* Section II.B.

42. *See infra* Section II.C.

43. *See infra* notes 44–63 and accompanying text.

44. 376 U.S. 254 (1964).

45. *See id.* at 270. The Court’s approach to the First Amendment became increasingly protective of free speech following *New York Times Co.* Compare *id.* (noting that the Court considered the case in light of a “profound national commitment” to public debate that may include “vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials”), with *Abrams v. United States*, 250 U.S. 616, 623 (1919) (holding that the use of “disloyal and abusive language” about the government during war was properly silenced by government because the purpose was to “excite” and “embarrass[]” the military overseas).

46. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 380–82 (1992) (holding that an ordinance that prohibited cross burning specifically rooted in causing anger based on certain characteristics was invalid because “[c]ontent-based regulations are presumptively invalid”).

importance of First Amendment protections when balanced against government-critical speech.<sup>47</sup> In *New York Times Co.*, the Court evaluated the constitutionality of a state law on libel actions brought by public officials and established a required showing of “actual malice.”<sup>48</sup> The libel action related to a newspaper advertisement that detailed efforts in the Civil Rights Movement and the police response to stifle the movement with “intimidation and violence.”<sup>49</sup> The Court described the important interest underlying freedom of speech and the First Amendment, stating “we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”<sup>50</sup> The unanimous decision in *New York Times Co.* established that First Amendment speech rights are subject to significantly high protection in the interest of the “interchange of ideas.”<sup>51</sup>

Soon after *New York Times Co.*, the Court in *Brandenburg v. Ohio*<sup>52</sup> again emphasized the importance of protecting content-specific speech by setting out a narrow test for speech that is not protected.<sup>53</sup> In *Brandenburg*, the Court stated that a constitutional right to free speech, “do[es] not permit a State to forbid or proscribe advocacy of the use of force . . . except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”<sup>54</sup> The Court showed the great deference given to freedom of speech and the sharp limits of states that try to curtail it.<sup>55</sup> The Court’s reasoning in both *New York Times Co.* and

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47. *N.Y. Times Co.*, 376 U.S. at 270.

48. *Id.* at 279–80 (“The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with ‘actual malice’—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.”).

49. *Id.* at 257–58.

50. *Id.* at 270. The Court more recently expressed its continued opinion that government-critical speech may not be prohibited by the government. *Hartman v. Moore*, 547 U.S. 250, 256 (2006) (“[T]he First Amendment prohibits government officials from subjecting an individual to retaliatory actions . . . for speaking out . . .”).

51. 376 U.S. at 269 (“The constitutional safeguard, we have said, ‘was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.’” (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957))).

52. 395 U.S. 444 (1969).

53. *Id.* at 447 (noting that the Court’s decisions stand for the principle that the government’s ability to interfere with free speech is limited to very special circumstances).

54. *Id.* *Brandenburg* concerned a Ku Klux Klan rally where the speakers stated that if the government did not address the “suppress[ion] of whites,” there would be a “possible . . . revengeance.” *Id.* at 446. The rally was subsequently played on television because the organizers invited a reporter to attend. *Id.* at 446–47.

55. *Id.* at 448.

*Brandenburg* reveals its disapproval for state challenges to free speech at the expense of open dialogue and debate.<sup>56</sup>

Following this progression, the Court in *Police Department of Chicago v. Mosley*<sup>57</sup> held that restricting peaceful picketing based on content violated the First Amendment, noting that “above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”<sup>58</sup> Similarly, in *Simon & Schuster, Inc. v. Members of New York State Crime Victims Board*,<sup>59</sup> the Court explored whether governments can impose financial burdens on individuals based on the content of their speech.<sup>60</sup> The Court reasoned, “the government’s ability to impose content-based burdens on speech raises the specter that the government may effectively drive certain ideas or viewpoints from the marketplace.”<sup>61</sup> Applying strict scrutiny, the Court found that the state did have a compelling interest but that its means of achieving that compelling interest were not narrowly tailored.<sup>62</sup> The Court affirmed limiting content-specific speech was “beyond the power of the government” because the Constitution envisions a “political system” that rests upon “individual dignity and choice” in “the arena of public discussion.”<sup>63</sup>

More recent precedent also expanded on interests at issue in content-specific speech restrictions.<sup>64</sup> In *Citizens United v. Federal Election Commission*,<sup>65</sup> the Court stated that the First Amendment is premised on a “mistrust of governmental power” and the dangers of content control.<sup>66</sup> In its reasoning, the Court noted that regulating content leads to unacceptable results, stating:

By taking the right to speak from some and giving it to others, the Government deprives the disadvantaged person or class of the right to use speech to strive to establish worth, standing, and respect for

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56. See *supra* notes 44–55 and accompanying text.

57. 408 U.S. 92 (1972).

58. *Id.* at 95, 97–98. The ordinance at issue limited peaceful picketing unrelated to picketing schools involved in labor disputes. *Id.* at 93.

59. 502 U.S. 105 (1991).

60. *Id.*

61. *Id.* at 116 (citing *Leathers v. Medlock*, 499 U.S. 439, 448–49 (1991)).

62. *Id.* at 120–21, 123. The New York law at issue was a *Son of Sam* law concerning publishing books based on criminal acts that required “any entity contracting with an accused or convicted person for a depiction of the crime to submit a copy of the contract to respondent New York State Crime Victims Board . . . and to turn over any income under that contract to the Board.” *Id.* at 109.

63. *Id.* at 116 (citing *Leathers*, 499 U.S. at 448–49).

64. See *infra* note 65 and accompanying text.

65. 558 U.S. 310 (2010). The Court addressed the constitutionality of a statute that prohibited corporations from using funds to advocate for particularly political candidates. *Id.* The Court found that the statute suppressed political speech and an “essential mechanism of democracy.” *Id.* at 339.

66. *Id.* at 340.



the speaker's voice. The Government may not by these means deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration.<sup>67</sup>

The Court affirmed that content restrictions that suppress political speech are contrary to the functioning of a democracy.<sup>68</sup>

### *B. First Amendment Superiority over Challenges*

In addition to guarding against content-specific speech restrictions, the Court also continues to find that the interests underlying freedom of speech are superior to almost all other competing interests.<sup>69</sup> All content-specific speech restrictions are subject to a strict scrutiny analysis.<sup>70</sup> Any content-based restriction on speech by the state must “further[] a compelling [state] interest” and be “narrowly tailored to achieve that interest.”<sup>71</sup> Content-specific speech restrictions are presumptively unconstitutional unless the state meets this high burden, even when an individual chooses to waive their First Amendment right.<sup>72</sup>

In light of this analysis, over time, the Court has prioritized the interests underlying First Amendment rights over competing interests.<sup>73</sup> In 1919, the Supreme Court decided *Abrams v. United States*<sup>74</sup> and concluded that the Espionage Act of 1917 was constitutional.<sup>75</sup> However, since its *Abrams* decision, the Court has repeatedly found that, when the freedom of speech has been curtailed by a government entity, the interest in protecting the First Amendment far outweighed any competing interest.<sup>76</sup> For instance, as explained in the previous Section, the Court in *New York Times Co.* protected

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67. *Id.* at 340–41.

68. *Id.* at 339.

69. *See infra* notes 70–101 and accompanying text.

70. *See Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2231 (2015) (noting that “[b]ecause the Town’s Sign Code imposes content-based restrictions on speech, those provisions can stand only if they survive strict scrutiny”).

71. *Citizens United*, 558 U.S. at 340 (citation omitted).

72. *Reed*, 135 S. Ct. at 2226.

73. *See infra* notes 76–94 and accompanying text.

74. 250 U.S. 616 (1919).

75. *Id.* at 616–17. The Espionage Act sought to limit government critique during World War I. *Id.* The charges brought against the petitioners were for “disloyal, scurrilous and abusive language about the . . . Government of the United States,” “language ‘intended to bring the form of Government of the United States into contempt, scorn, contumely, and disrepute,’” “language ‘intended to incite, provoke and encourage resistance to the United States in said war,’” and “that the defendants conspired ‘when the United States was at war . . . unlawfully and willfully, by utterance, writing, printing and publication, to urge, incite and advocate curtailment of production of things and products . . . necessary and essential to the prosecution of the war.’” *Id.* (quoting Espionage Act of Congress (§ 3, Title I, of Act approved June 15, 1917, as amended May 16, 1918, 40 Stat. 553)).

76. *See infra* notes 77–94 and accompanying text.

free speech over the state's interest in preventing attacks on government officials and damage to professional reputation.<sup>77</sup> Although not at issue in *New York Times Co.*, the Court also examined the history of the Sedition Act of 1798 that penalized "malicious" speech about the government and noted that "[a]lthough the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history."<sup>78</sup> The Court emphasized that the Sedition Act of 1798 surpassed the allowances under the First Amendment in its restriction on speech.<sup>79</sup> This sentiment is echoed in other sources throughout both the country's and the Court's history.<sup>80</sup>

In *Wooley v. Maynard*,<sup>81</sup> the Court affirmed an individual's right not to speak or express the state's motto on a license plate at the compulsion of the government.<sup>82</sup> The Court again found the interests underlying the First Amendment more compelling than the state's purported interests in the restriction.<sup>83</sup> Particularly, the Court noted, "where the State's interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message."<sup>84</sup> The Court rejected the State's asserted interest in efficiency and compliance as insufficient to "stifle fundamental personal liberties."<sup>85</sup>

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77. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 273 (1964) ("Criticism of their official conduct does not lose its constitutional protection merely because it is effective criticism and hence diminishes their official reputations.").

78. *Id.* at 273-74, 276 ("That statute made it a crime, punishable by a \$5,000 fine and five years in prison, 'if any person shall write, print, utter or publish . . . any false, scandalous and malicious writing or writings against the government of the United States . . . with intent to defame . . . or to bring them . . . into contempt or disrepute.'). The Court provided examples supporting the conclusion that the Sedition Act was not valid, despite never being challenged in the Court, nothing that those convicted under the act were pardoned, fines were repaid by Congress because they were unconstitutional, a senate report noted the invalidity of the Act, and repeatedly assumed invalid by the Court. *Id.* at 276

79. *Id.*

80. *See Abrams v. United States*, 250 U.S. 616, 630-31 (Holmes, J., dissenting) (noting that the constitutionality of the Sedition Act of 1798 has since been rejected, indicated by repaying fines); *see also* 4 ELLIOT'S DEBATES, VIRGINIA RESOLUTIONS OF 1798, 553-554 (2d ed., 1836) ("[T]he General Assembly doth particularly PROTEST against the palpable and alarming infractions of the Constitution, in the two late cases of the 'Alien and Sedition Acts,' . . . and . . . [the other provision] exercises . . . a power not delegated by the constitution, but on the contrary, expressly and positively forbidden by one of the amendments thereto; a power, which more than any other ought to produce universal alarm, because it is levelled against the right of freely examining public characters and measures, and of free communication among people thereon, which has ever been justly deemed the only effectual guardian of every other right.").

81. 430 U.S. 705 (1977).

82. *Id.* at 717 ("We conclude that the State . . . may not require appellees to display the state motto upon their license plates . . . ." (footnote omitted)).

83. *Id.* at 717.

84. *Id.* (footnote omitted).

85. *Id.* at 716.

More recently, the Court in *Houston v. Hill*<sup>86</sup> opined on the constitutionality of an ordinance that criminalized the act of interrupting a police officer performing their duties.<sup>87</sup> In concluding that the ordinance was overly broad, the Court stated that “the First Amendment protects a significant amount of verbal criticism and challenge directed at police officers.”<sup>88</sup> The Court affirmed the importance of provocative and challenging speech, so long as it does not evoke a clear and present danger.<sup>89</sup>

The Court’s protection of First Amendment interests has withstood many challenged interests, expressing superiority over verbal attacks of government officials,<sup>90</sup> criticism of government during war time under the auspices of national security,<sup>91</sup> both practical ease of regulation and promoting a state ideology,<sup>92</sup> and verbal interference with police.<sup>93</sup> The Court’s only meaningful restriction on free speech is on speech that advocates for the use of force only when that advocacy is both directed at and likely to cause that force to occur.<sup>94</sup>

The Fourth Circuit has also opined on balancing First Amendment interests when individuals choose to waive their First Amendment rights.<sup>95</sup> Waivers of constitutional rights are not always enforceable, and, as with the cases discussed above, the analysis requires balancing interests.<sup>96</sup> The Fourth Circuit adopts common law contract principles to determine whether waivers of constitutional rights are enforceable, but the analysis requires a higher level of scrutiny “because the law does not presume the waiver of

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86. 482 U.S. 451 (1987).

87. *Id.* at 453. The specific speech act at issue was an individual shouting at a police officer making an arrest. *Id.* at 453–54.

88. *Id.* at 461.

89. *Id.* (quoting *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949)); see *Lewis v. City of New Orleans*, 415 U.S. 130, 133–134 (1974) (“[T]he transcendent value to all society of constitutionally protected expression is deemed to justify allowing ‘attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity’ . . . This is deemed necessary because persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions provided by a statute susceptible of application to protected expression.” (quoting *Gooding v. Wilson*, 405 U.S. 518, 520–21 (1972))).

90. See *supra* note 77 and accompanying text.

91. See *supra* notes 78–80 and accompanying text.

92. See *supra* notes 81–85 and accompanying text.

93. See *supra* notes 86–89 and accompanying text.

94. See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). The Court does not prohibit speech that advocates the use of force, but merely the type of force that meets the requirements put forth in the statute. *Id.* at 448. Otherwise the restriction would condemn speech “which our Constitution has immunized from governmental control.” *Id.*

95. See *infra* notes 96–100 and accompanying text.

96. *Lake James Cmty. Volunteer Fire Dep’t, Inc. v. Burke Cty.*, 149 F.3d 277, 280 (4th Cir. 1998).

constitutional rights.”<sup>97</sup> Relying on Supreme Court precedent, the Fourth Circuit reasoned that in order to enforce waivers of constitutional rights, a waiver must be knowing, voluntary, and “not undermine the relevant public interest.”<sup>98</sup> The Fourth Circuit in *Pee Dee Health Care, P.A. v. Sanford*<sup>99</sup> held that a constitutional waiver clause is unenforceable “if the interest in its enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement.”<sup>100</sup>

The protection of the First Amendment has withstood challenges from many competing interests, and even when an individual chooses to waive their constitutional right, the enforcement is still subject to a heightened analysis to determine if the interest is sufficient to justify overcoming a constitutional right.<sup>101</sup>

### C. First Amendment and Individual Autonomy

The Supreme Court’s discussions about policies underlying the First Amendment are restricted to specific cases or controversies.<sup>102</sup> It has at times elaborated on how freedom of speech is linked to individual autonomy and the separation of individual speech from the government.<sup>103</sup> While the Court in *Abrams v. United States* upheld the Espionage Act’s prohibition on government-critical speech, it is Justice Holmes’ dissent that laid a crucial foundation for the Court’s First Amendment jurisprudence.<sup>104</sup> In his dissent, Justice Holmes identified the marketplace of ideas concept, stating:

But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.<sup>105</sup>

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97. *Id.*; see *Ohio Bell Tel. Co. v. Pub. Utils. Com.*, 301 U.S. 292, 307 (1937) (“We do not presume acquiescence in the loss of fundamental rights.”).

98. *Lake James Cmty. Volunteer Fire Dep’t*, 149 F.3d at 280.

99. *Pee Dee Health Care, P.A. v. Sanford*, 509 F.3d 204 (4th Cir. 2007).

100. *Pee Dee Health Care, P.A.*, 509 F.3d at 212 (quoting *Newton v. Rumery*, 480 U.S. 386, 392 (1987)).

101. See *supra* notes 69–100 and accompanying text.

102. See *Doremus v. Bd. of Ed.*, 342 U.S. 429, 434 (1952) (“But, because our own jurisdiction is cast in terms of ‘case or controversy,’ we cannot accept as the basis for review, nor as the basis for conclusive disposition of an issue of federal law without review, any procedure which does not constitute such.”).

103. See *infra* notes 107–114 and accompanying text.

104. See *infra* notes 105–106 and accompanying text.

105. *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting).

Holmes' marketplace of ideas continues to provide an important consideration in more recent First Amendment decisions.<sup>106</sup>

In 1949, the Court in *Terminiello v. Chicago*<sup>107</sup> addressed the importance of protecting freedom of speech and stated that “[t]he vitality of civil and political institutions in our society depends on free discussion” and that our freedom of speech separates us from “totalitarian regimes.”<sup>108</sup> Censoring speech absent a clear and present danger would “lead to the standardization of ideas either by the legislatures, courts, or dominant political or community groups.”<sup>109</sup>

The Court similarly discussed the importance of the First Amendment for individual autonomy in *Virginia v. Hicks*.<sup>110</sup> In *Hicks*, the Court analyzed the enforceability of a no-trespassing policy.<sup>111</sup> In its opinion, the Court noted a concern for the burden that individuals may face in attempts to assert their freedom of speech when challenged by the government.<sup>112</sup> The burden to challenge speech restrictions not only harms the person whose rights have been violated, but also “society as a whole, which is deprived of an uninhibited marketplace of ideas.”<sup>113</sup> The Court’s opinion emphasized the risk posed by state restrictions on the First Amendment—that restrictions disproportionately affect individuals who are unable to take on the “considerable burden (and . . . risk)” to challenge the infringement.<sup>114</sup> These examples illustrate the Court’s concern about the marketplace of ideas, individual autonomy, and how the First Amendment protects against silencing voices at the behest of the government.<sup>115</sup>

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106. See, e.g., *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 340 (2010) (discussing the “integrity of the marketplace of political ideas”); *Virginia v. Hicks*, 539 U.S. 113, 119 (2003) (discussing society’s need for an “uninhibited marketplace of ideas”); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964) (discussing the necessity of “unfettered interchange of ideas”).

107. 337 U.S. 1 (1949).

108. *Id.* at 4. The Court noted that the First Amendment should only be restricted when balanced against a clear and present danger that extends beyond dispute, unrest, or inconvenience. *Id.* (citation omitted). *Terminiello* concerned a man leading a meeting charged with breach of the peace because he harshly criticized outside protesters, leading to disturbances that police could not control. *Id.* at 3.

109. *Id.* at 4–5.

110. 539 U.S. 113 (2003).

111. *Id.* at 115–16. The trespassing policy a particular housing development for low-income residents that implemented an ordinance that closed the streets to public to address “rampant crime and drug dealing” and allowed police to “serve notice” to any person in violation who could not demonstrate a “legitimate business or social purpose.” *Id.* (emphasis excluded). *Hicks*, having been convicted of trespass, challenged the ordinance as “unconstitutionally overbroad and void for vagueness.” *Id.* at 117.

112. *Id.* at 119.

113. *Id.*

114. *Id.*

115. See *supra* notes 103–114 and accompanying text.

## III. THE COURT'S REASONING

With Judge Floyd writing for the 2-1 majority, the United States Court of Appeals for the Fourth Circuit held that the inclusion of a non-disparagement clause in a settlement agreement with a victim of police brutality constituted a waiver of the victim's First Amendment rights.<sup>116</sup> This case arose on appeal of the district court's grant of summary judgment for the City.<sup>117</sup> The court reasoned that the public interest in protecting Overbey's First Amendment rights outweighed the City's countervailing interests.<sup>118</sup> Therefore, the agreement to waive her First Amendment rights was void.<sup>119</sup>

The court first concluded that the settlement agreement, including a non-disparagement provision restricting Overbey's communications with the public, constituted a waiver of her First Amendment rights.<sup>120</sup> The court rejected the City's argument that the non-disparagement provision was enforceable because Overbey was merely exercising her right not to speak when she agreed to the settlement.<sup>121</sup> The court explained that the right not to speak originated to prevent compulsion of individual speech by the government.<sup>122</sup> In Overbey's case, the non-disparagement clause "curb[ed] her voluntary speech to meet the City's specifications" which constituted a waiver of her protections under the First Amendment.<sup>123</sup> The court emphasized that there are compelling public interests contrary to the agreement and rejected the City's argument that this was an exercise of Overbey's right not to speak.<sup>124</sup>

Having established that the non-disparagement clause waived Overbey's First Amendment rights, the court then evaluated the policy interests in favor and opposed to enforceability of the settlement provision.<sup>125</sup> First, the court identified two strong public policy interests at the core of the First Amendment that show the provision is contrary to public interest: (1)

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116. *Overbey v. Mayor of Baltimore*, 930 F.3d 215, 222 (4th Cir. 2019).

117. *Id.* at 219.

118. *Id.* at 226.

119. *Id.* at 222.

120. *Id.*

121. *Id.* at 222–23.

122. *Id.* at 223.

123. *Id.*

124. *Id.*

125. *Id.* In assessing the enforceability of a waiver of Overbey's First Amendment rights, the Court looked to (1) whether she entered with contract knowingly and voluntarily and (2) whether there were competing interests in favor of enforcing the waiver of her First Amendment rights that were not overpowered by a "relevant public policy that would be harmed by enforcement" of the waiver. *Id.* The court addressed only the second factor in this assessment because it was "decisive as a matter of law." *Id.*

commitment to open debate on public issues and (2) individual speech about mistrust of governmental power.<sup>126</sup> In assessing both of these interests, the government's use of the non-disparagement provision to curb Overbey's speech "was contrary to the citizenry's First Amendment interest in limiting the government's ability to target and remove speech critical of the government from public disclosure."<sup>127</sup>

The court then evaluated each interest asserted by the City in favor of enforcing the waiver.<sup>128</sup> The City claimed a public interest in efficiency—to settle cases quickly and not spend money on litigation.<sup>129</sup> The court reasoned that efficiency is not a sufficiently compelling interest to overcome the waiver of a constitutional right.<sup>130</sup> The City asserted further that the officers had an interest in clearing their names of Overbey's accusations and that the City had an interest in avoiding harmful publicity.<sup>131</sup> The court rejected each of these arguments by noting that protecting public officials from criticism is not sufficiently compelling to override First Amendment rights, and further, the non-disparagement clause does not serve the interest of allowing the officers to clear their names.<sup>132</sup> Finally, the City argued that even if the court found that the settlement constituted a waiver of her rights, the provision was still enforceable because Overbey had the option to "buy [her rights] back" by forfeiting half of the settlement.<sup>133</sup> The court rejected this argument, stating that "[w]e have never ratified the government's purchase of a potential critic's silence merely because it would be unfair to deprive the government of the full value of its hush money."<sup>134</sup> The court concluded by finding that the City's interests were not sufficient to justify enforcing a

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126. *Id.* at 224.

127. *Id.* at 224–25.

128. *Id.* at 225–26.

129. *Id.* at 225.

130. *Id.* The court similarly responded to an argument by the City that Overbey merely exercised her right not to speak in accepting the settlement terms. *Id.* The court again emphasized that the right not to speak was intended to protect individual voices from compulsion of speech by governments. *Id.*

131. *Id.* at 225–26.

132. *Id.* at 226 ("Enforcing a waiver of First Amendment rights for the very purpose of insulating public officials from unpleasant attacks would plainly undermine that core First Amendment principle.").

133. *Id.* (citing Brief for Appellees at 39, *Overbey v. Mayor of Baltimore*, 930 F.3d 215 (4th Cir. 2019) (No. 17-2444)).

134. *Id.* ("We are not eager to get into that business now.").

provision that waived Overbey's First Amendment rights.<sup>135</sup> As such, the court reversed and remanded the matter to the district court.<sup>136</sup>

In his dissent, Judge Quattlebaum diverged from the majority's reasoning in favor of the City.<sup>137</sup> Judge Quattlebaum reasoned that, based on the limited impairment of the public policy interests and the City's compelling interests, the non-disparagement provision should be upheld.<sup>138</sup> In assessing the impact of the non-disparagement clause, Judge Quattlebaum relied predominantly on four factors: (1) the narrow impact of the restriction on Overbey's First Amendment rights, (2) Overbey's ability to speak freely should she forgo half of her settlement, (3) the public's existing awareness of the police misconduct and settlement, and (4) Overbey's right not to speak.<sup>139</sup>

Judge Quattlebaum then assessed the City's interest in enforcing the agreement and found them compelling.<sup>140</sup> Judge Quattlebaum stressed that the finality and certainty of contracts are strong and compelling interests, especially considering the City forwent an "opportunity for vindication by a judge or jury" in favor of settlement.<sup>141</sup> Judge Quattlebaum concluded that the majority erred in its balancing of the relevant policies and stated that the district court's dismissal ought to have been affirmed.<sup>142</sup>

#### IV. ANALYSIS

In *Overbey v. Mayor of Baltimore*, the United States Court of Appeals for the Fourth Circuit held that Baltimore City's use of non-disparagement clauses in their settlements with victims of police brutality violated the victims' First Amendment right to free speech.<sup>143</sup> This Part argues first that the case was correctly decided because the court's reasoning was consistent with the protective First Amendment jurisprudence.<sup>144</sup> This Part next argues that the court's holding affirms the importance of protecting speech that is critical of the government.<sup>145</sup> The importance of protecting speech is further

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135. *Id.* The court continued with an analysis of standing for the *Baltimore Brew* based on "whether the Brew's plausible allegations in the Amended Complaint, taken as true, are enough to give the Brew constitutional standing." *Id.* at 227. The court ultimately concluded that the Brew plead sufficiently to meet the standing requirement. *Id.* at 230.

136. *Id.* at 230.

137. *Id.* (Quattlebaum, J., dissenting).

138. *Id.* Judge Quattlebaum began his dissent by noting that the freedom to contract is a "bedrock principle[] of our country." *Id.*

139. *Id.* at 232–33.

140. *Id.* at 233.

141. *Id.*

142. *Id.* at 234.

143. *Id.* at 226 (majority opinion).

144. *See infra* Section IV.A.

145. *See infra* Section IV.B.



supported by the various goals underlying the First Amendment—the goals of truth, self-governance, and self-fulfillment.<sup>146</sup> Finally, this Part argues that the court’s holding supports an important implication in application of government-critical speech protections to victims of police brutality, most often individuals in marginalized communities.<sup>147</sup> Therefore, the court’s correct decision plays an important role in affirming the First Amendment jurisprudence and its application to government efforts to silence specific individuals, most often people of color, from sharing their experiences in public discourse.<sup>148</sup>

*A. The Court Correctly Decided Overbey v. Mayor of Baltimore in Light of First Amendment Jurisprudence*

In assessing whether the waiver of Overbey’s right to free speech was enforceable, the court correctly balanced the interest in affirming Overbey’s First Amendment right with the City’s asserted interest in enforcing the non-disparagement clause of the agreement.<sup>149</sup> This assessment addressed the argument that Overbey voluntarily chose to waive her right to free speech and therefore the court should not intervene.<sup>150</sup> Relying on *Pee Dee Health Care v. Sanford*, the court showed that a waiver of Overbey’s free speech right was only enforceable if the interest was not outweighed by a countervailing public policy.<sup>151</sup> In analyzing the public policy interests, the court correctly identified open debate and mistrust of the government as important public policy interests underlying the importance of Overbey’s First Amendment right to free speech.<sup>152</sup> The court relied on *New York Times Co. v. Sullivan* in finding that there was a “profound” commitment to open debate on public issues and *Citizens United v. Federal Elections Commission* to identify a strong interest in mistrust of government power.<sup>153</sup> Police

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146. *See infra* Section IV.B.

147. *See infra* Section IV.C.

148. *See infra* Section IV.A–C.

149. *Overbey v. Mayor of Baltimore*, 930 F.3d 215, 226 (4th Cir. 2019).

150. *Id.* at 225. *But see id.* at 230 (Quattlebaum, J., dissenting) (“One of the bedrock principles of our country is the freedom of parties, public and private, to enter into agreements without fear that courts will re-write them if one side has a change of heart.”).

151. *Id.* at 223; *see also* *Pee Dee Health Care, P.A. v. Sanford*, 509 F.3d 204, 212 (4th Cir. 2007).

152. *Overbey*, 930 F.3d at 224; *see supra* Section II.A–B.

153. *Overbey*, 930 F.3d at 223; *see* *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270–71 (1964) (“Thus we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials. The present advertisement, as an expression of grievance and protest on one of the major public issues of our time, would seem clearly to qualify for the constitutional protection.” (citations omitted)); *see also* *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 340 (2010). The court

brutality, at issue in *Overbey*, is a public policy issue that should be subject to open debate, as discussed in *New York Times Co.*<sup>154</sup> The current social consciousness around police use of force, particularly against Black individuals in Baltimore City, leaves little doubt that experiences of police brutality raise important public issues, and the government seeks to minimize critiques by compelling silence from victims of police brutality.<sup>155</sup>

In its defense, the City asserted three interests—efficiency, the opportunity for officers to clear their names, and curtailment of harmful publicity.<sup>156</sup> According to the both the Supreme Court and the Fourth Circuit, none of these concerns are sufficiently compelling to overcome *Overbey*'s individual interest in free speech or society's interest in the free exchange of ideas.<sup>157</sup> The Court in *Wooley v. Maynard* explicitly rejected that state administration and efficiency is a compelling public policy.<sup>158</sup> Further, *New York Times Co.* and the Court's critique of the Sedition Act shows that attacks on government officials and the concern of government attacks raising national security issues are not sufficient to curtail speech.<sup>159</sup> If national security and public condemnation of public officials based on false information are not sufficiently compelling to impose a restriction on government-critical speech, then concern about harmful publicity is hardly enough.<sup>160</sup>

The Court has described the outer limits of the First Amendment and the greatest restriction, per *Brandenburg v. Ohio*, is action that is directed toward effectuating imminent lawless action.<sup>161</sup> Absent such a compelling policy, the state may not restrict a person's right to free speech, especially

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also affirmed the importance of protecting speech regardless of content, as seen in *Simon & Schuster, Inc. v. Members of New York State Crime Victims Board* and *Police Department of Chicago v. Mosley*. *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105 (1991); *Police Dep't of Chi. v. Mosley*, 408 U.S. 92 (1972).

154. See *N.Y. Times Co.*, 376 U.S. at 270.

155. See CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, INVESTIGATION OF THE BALTIMORE CITY POLICE DEPARTMENT 1, 3 (2016), <https://www.justice.gov/crt/file/883296/download>. The U.S. Department of Justice investigated the Baltimore City Police Department and found a pattern of "(1) making unconstitutional stops, searches, and arrests; (2) using enforcement strategies that produce severe and unjustified disparities in the rates of stops, searches and arrests of African Americans; (3) using excessive force; and (4) retaliating against people engaged in constitutionally-protected expression." *Id.*

156. *Overbey v. Mayor of Baltimore*, 930 F.3d 215, 225–26. (4th Cir. 2019).

157. *Id.*; see *supra* Section II.B.

158. 430 U.S. 705, 716 (1977).

159. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 274–76 (1964). In *New York Times Co.*, the information shared criticizing the government official was found to be factually false, and it was still not sufficient to restrict the speech. *Id.* at 258.

160. See *id.* at 273–76.

161. 395 U.S. 444, 447–48 (1969).

when that person is speaking critically about the government.<sup>162</sup> Therefore, because of the important interests underlying Overbey’s First Amendment rights and the lack of compelling state interests, the restriction of Overbey’s speech was an unconstitutional restriction of her First Amendment free speech right.<sup>163</sup>

*B. The Court’s Holding Affirmed the Importance of Government-Critical Speech Protections Consistent with Policies Underlying the First Amendment*

The importance of protecting speech that criticizes the government is one of the foundations of democracy—without it, the government would be a “totalitarian regime.”<sup>164</sup> The Supreme Court in *New York Times Co.*, *Citizens United*, and *Houston v. Hill* emphasized the importance of protecting government critique and verbal attacks of government officials.<sup>165</sup> In *Houston*, the Court restricted the ability of the state to punish a party for verbally interfering with police.<sup>166</sup> The Court reasoned that “[t]he freedom of individuals verbally to oppose or challenge police action . . . is one of the principal characteristics by which we distinguish a free nation from a police state.”<sup>167</sup> The Court’s jurisprudence illustrates that the government cannot dictate belief and speech, nor are the government’s interest entitled to greater weight than individual speech.<sup>168</sup>

The importance of protecting government-critical speech is also emphasized by multiple foundational theories of the First Amendment.<sup>169</sup>

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162. *Id.*

163. *See supra* notes 149–162 and accompanying text.

164. *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949) (“Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute . . . is nevertheless protected against censorship or punishment . . .” (citation omitted)).

165. *See Houston v. Hill*, 482 U.S. 451, 461 (1987) (addressing the state’s inability to limit critical speech in an engagement with police); *supra* notes 152–160 and accompanying text.

166. *Houston*, 482 U.S. at 461.

167. *Id.* at 462–63.

168. *See supra* 164–167 and accompanying text; *see also* *Overbey v. Mayor of Baltimore*, 930 F.3d 215, 225–26. (4th Cir. 2019).

169. *See* Alexander Tthesis, *Free Speech Constitutionalism*, 2015 U. ILL. L. REV. 1015, 1016–17 (2015) (“Three competing free speech theories dominate U.S. judicial and scholarly discourse. Proponents of the first theory claim that the purpose of protecting free speech is to further democratic institutions. Those of the second school conceive the constitutional commitment to personal autonomy to be the reason why courts and society at large diligently safeguard and treasure free speech. And those of the third persuasion connect the high regard for free speech to the advancement of knowledge. All three of these approaches recognize that careful judicial scrutiny of speech regulations is essential to prevent government intrusions into private and political lives . . . . The Supreme Court has been inconsistent in its application, and, indeed, has never definitively adopted one over the others.” (footnotes omitted)).

While the Court has never explicitly adopted a single theory underlying the First Amendment, it has utilized a number of different theories at the core of the First Amendment in its reasoning.<sup>170</sup> Three theoretical foundations underlying the First Amendment are (1) the search for truth, (2) the goal of self-governance, and (3) the goal of self-fulfillment and personal autonomy.<sup>171</sup>

First, the theory that free speech is essential in the search for truth is often referred to as the “marketplace of ideas.”<sup>172</sup> The marketplace of ideas theory is rooted in the ideology of John Stuart Mill.<sup>173</sup> In Mill’s text, *On Liberty*, he noted:

[T]he peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error.<sup>174</sup>

Mill’s theory states that truth will be discovered when society has access to all opinions on the matter.<sup>175</sup> Mill’s theory also addresses concerns about when those opinions are silenced, noting that authorities that deny the truth of statements are not infallible and do not have the authority to decide truth for the whole community.<sup>176</sup> Silencing opinions is an act of power, according to Mill and the marketplace of ideas.<sup>177</sup>

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170. *Id.*

171. GEOFFREY R. STONE, ET AL., CONSTITUTIONAL LAW 1014–15, 1017 (8th ed. 2018); *see also* Tesis, *supra* note 169, at 1017 (“My claim is that First Amendment doctrine should reflect a general theory of constitutional law that protects individual liberty and the common good to open society.”).

172. STONE ET AL., *supra* note 171, at 1014.

173. *Id.*

174. JOHN STUART MILL, ON LIBERTY 14 (Kathy Casey ed., Dover Thrift Edition 2002) (1859).

175. *Id.*

176. *Id.* at 14–15 (“[T]he opinion which it is attempted to suppress by authority may possibly be true. Those who desire to suppress it, of course deny its truth; but they are not infallible. They have no authority to decide the question for all mankind, and exclude every other person from the means of judging. To refuse a hearing to an opinion, because they are sure that it is false, is to assume that *their* certainty is the same thing as *absolute* certainty. All silencing of discussion is an assumption of infallibility.”).

177. *Id.* The marketplace of ideas as a search for truth was introduced to the Court’s jurisprudence through Justice Holmes’ dissent in *Abrams v. United States*, with Holmes stating that the “best test of truth is the power of thought to get . . . accepted in the competition of the market.” 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). The importance of free speech as it relates to ideas and the function of democracy was again echoed by the Court in *Terminiello v. Chicago* and its prohibition against silence “provocative” or “challenging” speech. 337 U.S. 1, 4 (1949) (“The right to speak freely and to promote diversity of ideas and programs is therefore one of the chief distinctions that sets us apart from totalitarian regimes.”); *see also* *Davis v. Fed. Election Comm’n*,

The court's decision in *Overbey* is consistent with the search for truth.<sup>178</sup> The City's practice of requiring non-disparagement provisions in their settlement agreements applies regularly to Baltimore City Police brutality settlements.<sup>179</sup> Under a theory of the marketplace of ideas, the City's restriction of Overbey's speech (and the speech of others like her) prohibited her from offering a different opinion in a community conversation.<sup>180</sup> With her speech, Overbey offered her experience to promote truth.<sup>181</sup> To "attempt[] to suppress" her speech is to "deprive[] . . . the opportunity of exchanging error for truth."<sup>182</sup> In upholding Overbey's First Amendment speech right, the court supported the search for truth by allowing Overbey to share her experience in the marketplace of ideas.<sup>183</sup>

Second, the court's decision is also consistent with underlying theory of the First Amendment that free speech is crucial to self-governance.<sup>184</sup> Alexander Meiklejohn promoted this idea in his book *Free Speech and Its Relation to Self-Government*.<sup>185</sup> He stated, "[Citizens] may not be barred [from speaking] because their views are thought to be false or dangerous . . . when men govern themselves, it is they—and no one else—who must pass judgment on the unwisdom and unfairness and danger."<sup>186</sup> Speech cannot be restricted because it is crucial to the function of a democracy.<sup>187</sup> This

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554 U.S. 724, 755–56 (2008) (Stevens, J., concurring in part and dissenting in part) ("[I]t is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail . . ." (quoting *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969))).

178. See *infra* notes 179–183 and accompanying text.

179. *Overbey v. Mayor of Baltimore*, 930 F.3d 215, 220 (4th Cir. 2019).

180. See *id.*; *Terminiello*, 337 U.S. at 4 ("The vitality of civil and political institutions in our society depends on free discussion . . . [I]t is only through free debate and free exchange of ideas that government remains responsive to the will of the people and peaceful change is effected." (citation omitted)). Overbey responded to internet commenters that accused her of lying to coerce a settlement from the Baltimore City Police Department. Brief for Petitioner, *supra* note 18, at 9. The sentiment that she was to blame for the police officers' use of violence resulted in part from the City Solicitor describing her as "hostile" and noting that she had to be "Tased in order to calm down" when discussing her settlement. Broadwater, *supra* note 26; see also *Overbey*, 930 F.3d at 220.

181. See *MILL*, *supra* note 174, at 14 ("If the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error.").

182. *Id.*

183. See *supra* notes 172–182 and accompanying text.

184. *STONE ET AL.*, *supra* note 171, at 1015.

185. *Id.* at 1016 (quoting ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 15–16, 24–27, 39 (1948)).

186. *Id.*

187. *Id.*; see Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 255 (1961) ("We, the people who govern, must try to understand the issues which, incident by incident, face the nation. We must pass judgment upon the decisions which our agents make upon those issues. And, further, we must share in devising methods by which those decisions can be made wise and effective or, if need be, supplanted by others which promise greater wisdom and

philosophy was presented in *Terminiello v. Chicago*, which warned of a totalitarian regime should the court allow speech to be silenced.<sup>188</sup> The State should not be allowed to dictate ideology by silencing voices.<sup>189</sup>

The Fourth Circuit's decision to not allow the waiver of Overbey's free speech rights promotes the goal of self-governance in a functioning democracy.<sup>190</sup> Specifically, the court's protection of criticism of a government actor is crucial.<sup>191</sup> Through the use of the non-disparagement clause, the City prohibited an experience from being shared with the public.<sup>192</sup> Overbey's experience was one of government agents beating her for no reason (other than arguably her race and gender)<sup>193</sup> and represents a major political issue both nationally and within Baltimore City in particular.<sup>194</sup> To deny that content from reaching the public, by silencing an individual's voice, is contrary to the goal of self-governance.<sup>195</sup> It bars Overbey, or anyone who experiences police brutality, from bringing truth to the public on a major social and political issue.<sup>196</sup>

Third, the court's decision strongly upholds the theory that the First Amendment is necessary for self-fulfillment and personal autonomy.<sup>197</sup> Personal autonomy refers to an individual's capacity to "pursue successfully the life she endorses."<sup>198</sup> One scholar noted that autonomy requires that a person has the right to make decisions about themselves through self-

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effectiveness. Now it is these activities, in all their diversity, whose freedom fills up 'the scope of the First Amendment.' These are the activities to whose freedom it gives its unqualified protection. And it must be recognized that the literal text of the Amendment falls far short of expressing the intent and the scope of that protection.").

188. *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949).

189. *Id.*

190. See Meiklejohn, *supra* note 187, at 255 ("The First Amendment does not protect a 'freedom to speak.' It protects the freedom of those activities of thought and communication by which we 'govern.' It is concerned, not with a private right, but with a public power, a governmental responsibility.").

191. *Overbey v. Mayor of Baltimore*, 930 F.3d 215, 226 (4th Cir. 2019) ("Enforcing a waiver of First Amendment rights for the very purpose of insulating public officials from unpleasant attacks would plainly undermine that core First Amendment principle.").

192. *Id.* at 220.

193. See *id.* ("Ashley Overbey sued three officers of Baltimore Police Department (BPD), alleging that the officers had beaten, tased, verbally abused, and needlessly arrested her in her own home after she called 911 to report a burglary.").

194. *Id.* See generally David A. Graham, *The Horror of the Baltimore Police Department*, ATLANTIC (Aug. 10, 2016), <https://www.theatlantic.com/news/archive/2016/08/the-horror-of-the-baltimore-police-department/495329/>; Jenavieve Hatch, *How 2020 Contenders Are Approaching Police Brutality and Criminal Justice Reform*, HUFFINGTON POST (Jun. 22, 2019), [https://www.huffpost.com/entry/2020-democrats-police-brutality\\_n\\_5d0d079ae4b07ae90d9c99d5](https://www.huffpost.com/entry/2020-democrats-police-brutality_n_5d0d079ae4b07ae90d9c99d5).

195. STONE ET AL., *supra* note 171, at 1016 (citing ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 15–16, 24–27, 39 (1948)).

196. *Id.*; see *Overbey*, 930 F.3d at 220.

197. STONE ET AL., *supra* note 172, at 1017.

198. C. Edwin Baker, *Autonomy and Free Speech*, 27 CONST. COMMENT. 251, 253 (2011).

expression, like a right to “persuade or unite or associate with others—or to offend . . . them.”<sup>199</sup> The notion of personal autonomy and self-fulfillment is inextricably linked to notions of self-respect.<sup>200</sup>

Further expanding on why First Amendment free speech is crucial to self-fulfillment, David A. J. Richards notes:

The idea here is that people are not to be constrained to communicate or not to communicate, to believe or not to believe, to associate or not to associate. The value placed on this cluster of ideas derives from the notion of self-respect that comes from a mature person’s full and untrammelled exercise of capacities central to human rationality. Thus, the significance of free expression rests on the central human capacity to create and express symbolic systems, such as speech . . . intended to communicate in determinate, complex and subtle ways. Freedom of expression permits and encourages the exercise of these capacities: it supports a mature individual’s sovereign autonomy in deciding how to communicate with others. . . . In so doing, it nurtures and sustains the self-respect of the mature person.<sup>201</sup>

To restrict liberties would be to deny someone the ability to nurture their basic sense of self and the autonomy and integrity of their personhood.<sup>202</sup>

A number of the Supreme Court’s opinions have echoed the notion that free speech is crucial to self-fulfillment.<sup>203</sup> In *Terminiello*, the Court was concerned that restricting freedom of speech would lead to a standardization of ideas where dominant political or community groups dictate truth and opinion.<sup>204</sup> Similarly, in *Virginia v. Hicks*, the Court emphasized that speech restrictions are dangerous because many people would not “undertake the considerable burden” to challenge the restriction and would instead just choose silence.<sup>205</sup> Finally, in *Citizens United*, the Court also emphasized concern about efforts to silence and disadvantage specific voices.<sup>206</sup> The Court noted that “[b]y taking the right to speak from some and giving it to

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199. *Id.* at 254 (“In the formal conception, autonomy consists of a person’s authority (or right) to make decisions about herself—her own meaningful actions and usually her use of her resources—as long as her actions do not block others’ similar authority or rights. This formal autonomy in relation to one’s self does not include any right to exercise power over others. It does, however, encompass self-expressive rights that include, for example, a right to seek to persuade or unite or associate with others—or to offend, expose, condemn, or disassociate with them.”).

200. David A. J. Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45, 62 (1974).

201. *Id.*

202. *Id.*

203. *See infra* notes 204–214 and accompanying text.

204. *Terminiello v. Chicago*, 337 U.S. 1, 4–5 (1949).

205. *Virginia v. Hicks*, 539 U.S. 113, 119 (2003).

206. *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 340 (2010).

others, the Government deprives the disadvantaged person or class of the right to use speech to strive to establish worth, standing, and respect for the speakers voice.”<sup>207</sup>

The notion of self-respect is also consistent with the court’s rejection of the City’s argument that Overbey was exercising her right not to speak.<sup>208</sup> The right not to speak is rooted in protection from government compulsion of speech, as the court noted, and therefore is not applicable when the government entices an individual to silence.<sup>209</sup> Here, the City’s offered “option” to not speak did not protect Overbey from government pressure to speak something she did not believe.<sup>210</sup> Instead, the City sought to compel Overbey’s silence to limit her critique of the City itself, the exact concern raised in *Citizens United*.<sup>211</sup> By maintaining Overbey’s right to free speech, the Court rooted its concern for her First Amendment right in the societal interest in “individual freedom of mind.”<sup>212</sup>

Beyond the importance of freedom of speech in the functioning of democracy, the court’s reasoning also emphasized a danger posed by the use of non-disparagement clauses in police brutality statements.<sup>213</sup> The danger alluded to by the court is the danger that arises from governments using their power to limit critiques by silencing individuals.<sup>214</sup>

*C. The Court’s Opinion Affirmed the Importance of Government-Critical Speech Protections for Individuals from Marginalized Communities*

The court’s emphasis on protecting government-critical speech and the emphasis on principles of personal autonomy and self-fulfillment underlying the First Amendment have major implications on speech protections for members of marginalized communities.<sup>215</sup> The court’s decision comes while the United States is in the midst of a social movement to address systematic

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207. *Id.* at 340–341 (noting that “the Government may commit a constitutional wrong when by law it identifies certain preferred speakers”).

208. *Overbey v. Mayor of Baltimore*, 930 F.3d 215, 222–23 (4th Cir. 2019)

209. *Id.*

210. *Id.*

211. *Id.*; *Citizens United*, 558 U.S. at 340–41.

212. *Overbey*, 930 F.3d at 225.

213. *See Richards, supra* note 200, at 60 (stating that the moral theory underlying the First Amendment includes “[t]he central intuitive features of morality are mutual respect—treating others as you would like to be treated in comparable circumstances; universalization—judging the morality of principles by the consequences of their universal application; and minimization of fortuitous human differences, like clan, caste, ethnicity, and color, as a basis for differential treatment.” (footnotes omitted)).

214. *See id.*

215. *See id.*



racism and police brutality against Black individuals.<sup>216</sup> While these issues were not collectively before the court as it decided *Overbey*, its reasoning will hold important implications as it relates to free speech and identity.<sup>217</sup> As asserted in the previous section, the goal of individual autonomy underlies freedom of speech protections, yet non-disparagement agreements in police brutality settlements impede on individual autonomy.<sup>218</sup> The non-disparagement clauses for police brutality interfere with individual autonomy in two significant ways: They (1) like in sexual harassment settlements, prevent individuals from sharing experiences and (2) disproportionately impact historically underprivileged populations and minimize their autonomy when at odds with government power.<sup>219</sup>

First, government speech restrictions are at odds with the First Amendment's goal of self-fulfillment and personal autonomy because they silence someone from sharing negative experiences when their rights have been violated.<sup>220</sup> Free speech should not be constrained by whether it is to be believed or associated with, because "the notion of self-respect that comes from a mature person's full and untrammelled exercise of capacities" is "central to human rationality."<sup>221</sup> Non-disclosure agreements in sexual harassment settlements present a parallel to their use in police brutality settlements.<sup>222</sup> While different in scope, non-disparagement clauses have been recently criticized in the context of sexual harassment.<sup>223</sup> Similar to the

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216. See Niraj Chokshi, *How #BlackLivesMatter Came to Define a Movement*, N.Y. TIMES (Aug. 22, 2016), <https://www.nytimes.com/2016/08/23/us/how-blacklivesmatter-came-to-define-a-movement.html> ("The hashtag had a small, but sustained increase in use in the summer of 2014, when Michael Brown and Eric Garner died in encounters with the police, focusing a national discussion on race and policing and elevating a phrase that would define a movement.").

217. See *infra* notes 218–262 and accompanying text.

218. Richards, *supra* note 200, at 60, 62.

219. See *infra* notes 239–262 and accompanying text.

220. See Richards, *supra* note 200, at 62 ("Freedom of expression . . . supports a mature individual's sovereign autonomy in deciding how to communicate with others . . . [and] disfavors restrictions on communication imposed for the sake of the distortion rigidities of the orthodox and the established.").

221. *Id.*; see Baker, *supra* note 198, at 254 (stating that autonomy encompasses the right to "seek to persuade or united or associate with other—or to offend, expose, condemn, or disassociate with them").

222. See Hoffman & Lampmann, *Hushing Contracts*, 97 WASH. U. L. REV. 165, 167–68 (2019) (discussing the impact of the #MeToo movement on "hush contracts"). Notably, concern over hush contracts in sexual harassment contexts may also be impacted by the court's reasoning in *Overbey* because of the City's use of non-disparagement agreements in sexual harassment settlements. *Forced Silence Condone Police Violence*, ACLU MD. (accessed Nov. 17, 2019), <https://www.aclu-md.org/en/campaigns/forced-silence-condones-police-violence> ("This is a systemic problem in Baltimore City that deeply harms women and communities of color.").

223. See, e.g., Hoffman & Lampmann, *supra* note 222, at 169 ("After collecting information from a variety of sources and disciplines, we argue that not only do hush contracts encourage specific acts of repeated (and spiraling) misconduct, but also they can corrupt entire organizations and communities." (footnotes omitted)); Vasundhara Prasad, *If Anyone Is Listening, #MeToo:*

current public discourse around police brutality, the country is also in the midst of the #MeToo social movement.<sup>224</sup> The #MeToo movement has raised awareness about the different types of sexual violence, including sexual harassment, that (predominantly) women experience.<sup>225</sup> #MeToo has come up significantly in employment cases where women claim they have been sexually harassed by their usually male employers.<sup>226</sup> A number of scholars have raised concerns about the use of non-disparagement clauses in settlements for sexual harassment.<sup>227</sup> For instance, one scholar identified that, while non-disparagement clauses may have beneficial purposes, they can be “incredibly pernicious contracts” in the context of sexual violence.<sup>228</sup> In the context of sexual violence, these contracts require oversight because they raise considerable public policy concerns over the freedom of speech and “the public’s interest in knowing about these repeat sexual offenders.”<sup>229</sup> These “contracts of silence” are concerning when used to silence individuals from sharing their experiences.<sup>230</sup> Another scholar noted that, given the current social moment, “[p]ublic disclosures of contractual secrets are giving breach a good name.”<sup>231</sup>

A number of states have proposed legislation to protect individuals impacted by sexual harassment who must choose between settlement and sharing their experiences.<sup>232</sup> A New York bill prohibited non-disclosure agreements in sexual harassment settlements unless it was the complainant’s preference.<sup>233</sup> A California bill made it unlawful for employers to use non-disclosure clauses in sexual harassment settlements.<sup>234</sup> Concerns about silencing contracts reflect the existing concern that someone with great power may demand silence and force an individual with less power to choose

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*Breaking the Culture of Silence Around Sexual Abuse Through Regulating Non-Disclosure Agreements and Secret Settlements*, 59 B.C. L. REV. 2507, 2509 (2018) (“[B]ecause the most egregious offenders of sexual assault and sexual harassment prohibit victims from speaking out through the brazen use of NDAs, courts should take a heightened role in determining whether such agreements are enforceable as a matter of law.”).

224. See, e.g., Hoffman & Lampmann, *supra* note 222, at 167–68; Prasad, *supra* note 223, at 2508–09.

225. Prasad, *supra* note 223, at 2510–11.

226. *Id.*

227. See *infra* note 228–231 and accompanying text.

228. Prasad, *supra* note 223, at 2508.

229. *Id.* at 2508–09.

230. See *supra* note 225 and accompanying text.

231. Hoffman & Lampmann, *supra* note 222, at 167.

232. *Id.* at 168, 188.

233. *Id.* at 168.

234. *Id.* at 188.

between silence and speech.<sup>235</sup> For this reason, the concern over silence in sexual harassment settlements should extend to the settlements over police brutality.<sup>236</sup> Police brutality settlements are arguably even more concerning because the entity silencing speech is the government itself.<sup>237</sup> The government eliminates criticism from the community and limits an individual's opportunity for self-fulfillment.<sup>238</sup>

Second, the City's use of non-disparagement clauses in settlements for police brutality, as indicated by the court's reasoning, will further silence and deny self-fulfillment to members of marginalized communities.<sup>239</sup> Concerns about personal autonomy and silencing speech are supported by the disproportionate impact of police use of force on minorities and the struggle of marginalized individuals to assert their rights.<sup>240</sup> Research shows that police misconduct disproportionately impacts Black community members.<sup>241</sup> Black individuals are overpoliced, more likely to experience force from police, and more likely to be killed by police.<sup>242</sup> A 2015 survey found that unarmed Black individuals were more than two times as likely as white individuals to be killed by police.<sup>243</sup> Beyond killings, Black individuals are

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235. See Prasad, *supra* note 223, at 2510 (noting the "public scrutiny over the widespread use of NDAs by individuals in positions of power to silence the victims they have sexually abused or sexually harassed" (footnote omitted)).

236. See *id.*

237. See *Overbey v. Mayor of Baltimore*, 930 F.3d 215, 224 (4th Cir. 2019) (noting that speech protection is warranted here "because the non-disparagement clause is a government-defined and government-enforced restriction on government-critical speech").

238. Richards, *supra* note 200, at 62.

239. See Richards, *supra* note 200, at 60 ("The central intuitive features of morality are mutual respect treating others as you would like to be treated in comparable circumstances; universalization judging the morality of principles by the consequences of their universal application; and minimization of fortuitous human differences, like clan, caste, ethnicity, and color, as a basis for differential treatment." (footnotes omitted)).

240. See *infra* notes 241–251 and accompanying text.

241. See generally Radley Balko, *There's Overwhelming Evidence That the Criminal-Justice System is Racist. Here's the Proof*, WASH. POST (Sept. 18, 2018), <https://www.washingtonpost.com/news/opinions/wp/2018/09/18/theres-overwhelming-evidence-that-the-criminal-justice-system-is-racist-heres-the-proof/>.

242. See *id.* (compiling research on the ways Black individuals are more often impacted by policing and profiling); ELIZABETH DAVIS ET AL., U.S. DEP'T OF JUSTICE, CONTACTS BETWEEN POLICE AND THE PUBLIC, 2015, at 1, 17 (2018), <https://www.bjs.gov/content/pub/pdf/cpp15.pdf> (finding that Black individuals were more likely to experience use of force than white individuals); Frank Edwards et al., *Risk of Being Killed by Police Use of Force in the United States by Age, Race-Ethnicity, and Sex*, 116 PROC. NAT'L ACAD. SCI. U.S.A., 16793, 16794 (2019) (finding that Black men and boys had the highest rates of being killed by police).

243. Jon Swaine et al., *Black Americans Killed by Police Twice as Likely to Be Unarmed as White People*, GUARDIAN (June 1, 2015), <https://www.theguardian.com/us-news/2015/jun/01/black-americans-killed-by-police-analysis> (finding that that thirty-two percent of Black people were unarmed when killed by police, making them two times more likely to be unarmed than white people).

more likely to experience the threat or use of physical force by police than white individuals, with the majority perceiving the threat or use of force to be excessive.<sup>244</sup> Individuals experiencing excessive police force described being pushed, grabbed, kicked, and targeted with a gun.<sup>245</sup>

When police impose speech restrictions on Black individuals who have been subject to this brutality, their voices are silenced.<sup>246</sup> Black experiences are eliminated from public discourse.<sup>247</sup> As Richards noted on self-fulfillment, “people are not to be constrained to communicate or not to communicate” and self-respect is only achieved with “a mature person’s full and untrammled exercise of capacities central to human rationality.”<sup>248</sup>

Society requires basic opportunities and an equal distribution of rights for all individuals to fully embrace the liberties linked with personal autonomy and self-respect.<sup>249</sup> Therefore, when speech is restricted in a way that disproportionately impacts individuals who have been denied equal rights in other respects, there is even greater concern about the impact on personal autonomy.<sup>250</sup> Use of non-disparagement clauses by police to prevent Black community members from sharing the ways their rights have been violated continues to subjugate these community members and deny them the opportunity for self-fulfillment through representation in the political and societal discourse.<sup>251</sup>

The concern over non-disparagement clauses in police settlements and their impact on marginalized communities is further exacerbated by the problem noted by the Court in *Hicks*.<sup>252</sup> In *Hicks*, the Court emphasized the burden in attempting to assert one’s rights can be substantial.<sup>253</sup> There is an even greater burden for marginalized individuals.<sup>254</sup> Non-disparagement clauses make it even harder for marginalized individuals to share their experiences.<sup>255</sup> Individuals who have the least power to challenge

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244. Davis et al., *supra* note 242, at 17.

245. *Id.* at 16.

246. See Garfield, *supra* note 4, at 264 (noting with concern that “[c]ontracts of silence are being used effectively to keep relevant and possibly important information out of the public domain”).

247. *Id.*

248. Richards, *supra* note 200, at 62.

249. *Id.* at 63.

250. See *id.* at 62 (“The value placed on this cluster of ideas derives from the notion of self-respect that comes from a mature person’s full and untrammled exercise of capacities central to human rationality.”).

251. See *id.*

252. *Virginia v. Hicks*, 539 U.S. 113, 119 (2003).

253. *Id.*

254. *Id.*

255. *Id.*; see also *Risk of Being Killed by Police Use of Force in the United States*, *supra* note 243 (“Baltimore City officials require victims of police brutality to sign ‘gag orders’ banning them from telling their own stories in order to resolve their cases.”).

restrictions to their free speech are those most unable to take on the “considerable burden” when their rights are challenged.<sup>256</sup> This burdening problem was plainly evidenced by Overbey’s own experience of being physically violated and charged with committing a crime.<sup>257</sup> Afterwards, she was unable to find a job because of the criminal charge on her record and became homeless.<sup>258</sup> When the City made its settlement offer, Overbey was in a position of having to settle on their terms or face an even greater burden to challenge the terms.<sup>259</sup> With Black community members more likely to experience police violence, they are then subject to an ongoing cycle that requires they meet a heavy burden to assert rights.<sup>260</sup> For that reason, they may choose not to assert their rights or choose to settle and waive their rights out of necessity.<sup>261</sup> But, in the process, the City deprives its community members of self-fulfillment and autonomy.<sup>262</sup>

The court’s decision addressed this impact on self-fulfillment.<sup>263</sup> In its reasoning, the court shows that personal autonomy and free speech are more important than the government’s interest in protecting itself from criticism.<sup>264</sup> Thus, while the case was rightly decided according to Supreme Court precedent, the relevance of this opinion extends far beyond a correct holding.<sup>265</sup> The *Overbey* opinion highlights that the First Amendment operates as a safeguard when the government attempts to use its power to silence marginalized populations who choose to share their negative experiences with the government publicly.<sup>266</sup>

## V. CONCLUSION

In *Overbey v. Mayor of Baltimore*, the Fourth Circuit held that the City of Baltimore could not enforce non-disparagement clauses in settlements for

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256. *Hicks*, 539 U.S. at 119.

257. *See Overbey v. Mayor of Baltimore*, 930 F.3d 215, 220 (4th Cir. 2019) (noting that Overbey was “needlessly” charged with a crime, spent two years trying to have her case remedied, struggled to find work with the arrest record, and “she and her children became homeless”).

258. *Id.*

259. *Id.*

260. *See supra* note 255–256 and accompanying text.

261. *See supra* note 257 and accompanying text.

262. Richards, *supra* note 200, at 62.

263. *Overbey*, 930 F.3d at 224 (“Indeed, when the government (1) makes a police-misconduct claimant’s silence about her claims a condition of settlement; (2) obtains the claimant’s promise of silence; (3) retains for itself the unilateral ability to determine whether the claimant has broken her promise; and (4) enforces the claimant’s promise by, in essence, holding her civilly liable to itself, there can be no serious doubt that the government has used its power in an effort to curb speech that is not to its liking.”).

264. *See id.*

265. *See supra* notes 197–264 and accompanying text.

266. *See supra* notes 197–264 and accompanying text.

police brutality.<sup>267</sup> The court correctly analyzed the balance of First Amendment interests underlying free speech with the City's asserted interests in favor of enforcing the agreement.<sup>268</sup> The court relied on commitments to open debate on public issues and mistrust of government as significantly protected interests within the First Amendment.<sup>269</sup> The interests in freedom of speech have long prevailed over other asserted interests.<sup>270</sup> The court's decision was also consistent with the theoretical foundations of the First Amendment—the goals of truth, self-governance, and self-fulfillment.<sup>271</sup> In particular, the goals of self-fulfillment and personal autonomy were served when the court refused to enforce a settlement to purchase silence from a victim of police brutality.<sup>272</sup> By using non-disparagement clauses in police brutality settlements, cases most often impacting marginalized community members, the City is effectively silencing its own critics and denying their humanity in the process.<sup>273</sup> The court's decision to reject this practice sends a clear message: Governments cannot silence an individual's experience to save its own reputation.<sup>274</sup>

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267. *Overbey*, 930 F.3d at 226.

268. *See supra* Section IV.A.

269. *See supra* Section IV.A.

270. *See supra* Section IV.A.

271. *See supra* Section IV.B.

272. *See supra* Section IV.C.

273. *See supra* Section IV.C.

274. *See supra* Section IV.C.