

THE CHILLING CYCLE OF POLICE VIOLENCE AND BLACK CIVIL RIGHTS PROTEST

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“The very utterance of the phrase ‘Black Lives Matter’ tends to incite imminent violence and unbridled rage from police in city streets across America.” – Etienne C. Toussaint¹

I. INTRODUCTION

The year 2020 will forever be synonymous with public health crises and protest. As the novel coronavirus became a global pandemic,² the largest protests in American history³ erupted following a resurgence of outrage over another deadly and longstanding public health problem.⁴ When Americans were forced into quarantine in March, facing uncertainty and indefinite disruption of life as they knew it, news consumption increased by over 200% on mobile devices alone.⁵ This near-obsessive news consumption may have been the catalyst for what

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¹ Etienne C. Toussaint, *Blackness as Fighting Words*, 106 VA. L. REV. 124, 128 (2020).

² *A Timeline of Covid-19 Developments in 2020*, AJMC (Jan. 1, 2021), <https://www.ajmc.com/view/a-timeline-of-covid19-developments-in-2020> (noting that the virus infected over twenty million Americans and claimed nearly two million lives globally in 2020 alone).

³ Larry Buchanan et al., *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020),

<https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html> (stating that, according to four polls, from June 6 and July 3, 2020, between 15 and 26 million people participated in demonstrations over the death of George Floyd in the United States).

⁴ See Georges C. Benjamin, *APHA Calls Out Police Violence as Public Health Crisis*, AM. PUB. HEALTH ASS’N (June 4, 2020), <https://www.apha.org/news-and-media/news-releases/apha-news-releases/2020/apha-calls-out-police-violence>; John M. MacDonald et al., *The Effect of Less-Lethal Weapons on Injuries in Police Use-of-Force Events*, 99 AM. J. PUB. HEALTH 2268, 2268 (2009) (“Injury from police use-of-force incidents continues to be a public health problem affecting tens of thousands of people in the United States each year.”); see also Michael A. Robinson, *Black Bodies on the Ground: Policing Disparities in the African American Community—An Analysis of Newsprint From January 1, 2015, Through December 31, 2015*, 48 J. BLACK STUD. 551, 552 (2017) (“The death of unarmed Black men at the hands of law enforcement in the United States is not a recent phenomenon and can be traced back as early as 1619 when the first slave ship, a Dutch Man-of-War vessel landed in Point Comfort, Virginia.”).

⁵ *COVID-19: Tracking the Impact on Media Consumption*, NEILSEN (June 16, 2020), <https://www.nielsen.com/us/en/insights/article/2020/covid-19-tracking-the-impact-on-media-consumption/>.

some have called a Racial Reckoning.⁶ Everyone was paying attention when a bystander filmed Officer Derek Chauvin kneeling on George Floyd's neck, suffocating him until he died,⁷ and when police officers barged into Breonna Taylor's home during a botched drug raid, fatally shooting her five times.⁸

Millions of Americans joined in protest, shouting a phrase coined after the 2012 murder of Trayvon Martin, an unarmed Black teenager: Black Lives Matter.⁹ As they marched for justice and demanded accountability for the Black lives lost to police violence, police attacked indiscriminately. Police sprayed children with mace,¹⁰ pushed elderly people to the ground and left them bleeding,¹¹ and tased students and dragged them from their cars.¹² Though the 2020 Black Lives Matter protests were the largest in history, they are hardly the first of their kind.¹³ Likewise, police officers' absolute disregard for Black lives, safety, and constitutional rights can be traced back to the origins of American law enforcement.¹⁴

⁶ Buchanan, *supra* note 3; Maneesh Arora, *How the Coronavirus Pandemic Helped the Floyd Protests Become the Biggest in U.S. History*, WASH. POST (Aug. 5, 2020), <https://www.washingtonpost.com/politics/2020/08/05/how-coronavirus-pandemic-helped-floyd-protests-become-biggest-us-history/>; Michele L. Norris, *Don't Call it a Racial Reckoning. The Race Toward Equality Has Barely Begun.*, WASH. POST (Dec. 18, 2020), https://www.washingtonpost.com/opinions/dont-call-it-a-racial-reckoning-the-race-toward-equality-has-barely-begun/2020/12/18/90b65eba-414e-11eb-8bc0-ae155bee4aff_story.html.

⁷ Buchanan, *supra* note 3.

⁸ Richard A. Oppel Jr. et al., *What to Know About Breonna Taylor's Death*, N.Y. TIMES (Apr. 26, 2021), <https://www.nytimes.com/article/breonna-taylor-police.html>.

⁹ See *Black Lives Matter: From Hashtag to Movement*, ANTI-DEFAMATION LEAGUE, <https://www.adl.org/education/educator-resources/lesson-plans/black-lives-matter-from-hashtag-to-movement> (June 2, 2020) ("Since 2014, other high-profile deaths [at the hands of police] include Tamir Rice (2014), Laquan McDonald (2014), John Crawford (2014) Freddie Gray (2015), Walter Scott (2015), Alton Sterling (2016), Philando Castile (2016), Terence Crutcher (2016), Antwon Rose (2018) . . . Sandra Bland (2015), Deborah Danner (2016), Atatiana Jefferson (2019) and Breonna Taylor (2020).").

¹⁰ See Liz Brazile, *He Captured Footage of a Child Pepper Sprayed During a Seattle Protest. Then He was Arrested*, KUOW (June 18, 2020, 5:00 PM), <https://www.kuow.org/stories/he-captured-footage-of-child-pepper-sprayed-during-seattle-protest-then-was-arrested>.

¹¹ Neil Vigdor et al., *Buffalo Police Officers Suspended After Shoving 75-Year-Old Protester*, N.Y. TIMES, <https://www.nytimes.com/2020/06/05/us/buffalo-police-shove-protester-unrest.html> (Feb. 23, 2021); cf. Shaliea Dewan & Mike Baker, *Facing Protests Over Use of Force, Police Respond with More Force*, N.Y. TIMES, <https://www.nytimes.com/2020/05/31/us/police-tactics-floyd-protests.html> (June 2, 2020).

¹² See Dewan & Baker, *supra* note 11.

¹³ See *infra* Part II.C.

¹⁴ Robinson, *supra* note 4; see *infra* Parts II.B–C.

This Note will argue that the historical pattern of law enforcement abusing and murdering Black people, coupled with the patterned displays of violence in response to Black civil rights protests, have created an inherent chilling effect on the free speech of Black protestors where police are present. Part II will examine the deep roots of white supremacy and Black subjugation in the United States, how policing emerged in response to this racial hierarchy, and the treatment of Black civil rights protests by law enforcement, legislators, and courts. Part III will discuss the First Amendment right to protest, as well as the standards for restraining and protecting that right, while also noting that the breadth of this right is significantly rooted in judicial deference to white supremacist actors. Part IV will consider the chilling effect doctrine and options for redress through the courts, as well as the significant obstacles to police accountability. Finally, Part V will examine the 2020 protests and the many lawsuits concerning police responses.

II. HISTORY

The brutalization of Black bodies is more deeply rooted in American history than the U.S. Constitution. Kidnapped Africans built this country, fought for independence, and were excluded from the rights and freedoms white, European colonists gained. American history is marked by a pattern of whitelash; at every point of progress in the fight for Black equity, there has been a violent attempt to maintain white supremacy.¹⁵ This Part will discuss the parallel histories of Black Americans, policing, and law enforcement's treatment of Black protest, illustrating how law enforcement has functioned for centuries as a means of preserving Black subjugation and white supremacy.

A. *Nation Built by Slaves*

In August of 1619, the first kidnapped Africans were brought to the colony of Virginia and enslaved.¹⁶ As Europeans migrated to the "New World" throughout the 17th and 18th centuries,

¹⁵ *Whitelash*, DICTIONARY, <https://www.dictionary.com/browse/whitelash> (last visited Oct 23, 2021).

¹⁶ Crystal Ponti, *America's History of Slavery Began Long Before Jamestown*, HIST., <https://www.history.com/news/american-slavery-before-jamestown-1619> (Aug. 26, 2019) (explaining that captive Africans were likely brought to this region as early as 1526); *see generally* Robinson, *supra* note 14.

they brought millions of Africans against their will.¹⁷ The forced labor of these kidnapped Africans quite literally laid the foundation that this nation rests upon.¹⁸

The legalization of slavery was one of the first legislative actions taken by New England colonists, codified by the Massachusetts Body of Liberties in 1641.¹⁹ Through state-sanctioned enslavement and brutality, colonists established themselves in the New World, gaining power, agency, and awareness of their oppression at the hands of the British Monarchy.²⁰ During the Revolution, an estimated 5,000 Black soldiers and slaves fought alongside colonists, gaining independence for a new world where whiteness was a prerequisite for freedom.²¹ Fittingly, one of the first colonists to die in the fight for American independence was Crispus Attucks, an escaped African slave.²² In many cases, the enlistment bonuses and military wages paid to Black soldiers were given directly to their masters.²³

As the white colonists began to draft the laws governing their newly independent nation, they ensured that Black subjugation would remain a bedrock principle of this country. The U.S.

¹⁷ See *Slavery in America*, HIST., https://www.history.com/topics/black-history/slavery#section_2 (Aug. 23, 2021).

¹⁸ See *The Missing Pieces of America's Education*, WASH. POST (Aug. 28, 2019), <https://www.washingtonpost.com/education/2019/08/28/historians-slavery-myths/>.

¹⁹ *Massachusetts Body of Liberties*, MASS.GOV, <https://www.mass.gov/service-details/massachusetts-body-of-liberties> (last visited Oct 13, 2021); see also *Slavery and the Making of America: The Law Steps I - 1641*, THIRTEEN, <https://www.thirteen.org/wnet/slavery/timeline/1641.html> (last visited Aug. 19, 2021).

²⁰ See *Slavery and the Making of America: Racial Oppression is Law - 1705*, THIRTEEN, <https://www.thirteen.org/wnet/slavery/timeline/1705.html> (last visited Aug. 19, 2021) (showing that throughout the early 1700s, the colonies enacted laws defining enslaved Africans as property, forbidding them from bearing arms, marrying, and even acquitting white owners who murdered their slaves as punishment.); see also *Slavery in America*, HIST., https://www.history.com/topics/black-history/slavery#section_2 (last visited Aug. 19, 2021).

²¹ See *African Americans and the End of Slavery in Massachusetts – Revolutionary Participation*, MASS. HIST. SOC'Y, https://www.masshist.org/features/endofslavery/rev_participation (last visited Oct 13, 2021).

²² Attucks fell victim to the same brand of militarized police violence that Black protestors continue to suffer almost three hundred years later—he was killed in the Boston Massacre when British soldiers opened fire onto a crowd of protesting colonists. See *id.*; see also *Slavery and the Making of America: Seeds of Revolution - 1739*, THIRTEEN, <https://www.thirteen.org/wnet/slavery/timeline/1739.html> (last visited Aug. 19, 2021).

²³ *Black Soldiers in the Revolutionary War*, U.S. ARMY (Mar. 4, 2013), https://www.army.mil/article/97705/black_soldiers_in_the_revolutionary_war.

Constitution introduced the three-fifths compromise, solidifying the government's power to treat Black people as less than human.²⁴ Though the Fourteenth Amendment officially repealed this clause,²⁵ it remains written in this country's most important governing document. Likewise, the notion that Black people are not deserving of the freedoms and protections afforded to white people continues to be reaffirmed by government actors.²⁶

B. Policing in America: The Original Whitelash

American policing began as early as 1636 and was formalized for the first time in 1838.²⁷ Since their creation, American police forces have characterized colored persons as “internal enemies and as volatile threats to state authority and established social orders.”²⁸ By the 1880s, there were municipal police forces in every major U.S. city.²⁹ Though all police forces were structurally similar, the “Slave Patrols” of the south were distinct in their overt racism.³⁰

Slave Patrols emerged in the early 1700s³¹ to apprehend runaway slaves, deter slave revolts through force and terror, and discipline slaves through extralegal means.³² Black Codes and Jim Crow laws,³³ created after the Thirteenth Amendment outlawed slavery in 1865, further emboldened the Slave

²⁴ U.S. CONST. art. I, § 2, cl. 3; see *supra* note 17 (noting that though the three-fifths compromise does not specifically mention race, the term “other persons” is recognized as a euphemism for Black slaves).

²⁵ U.S. CONST. amend. XIV.

²⁶ See *infra* Parts II.D. and V; see *infra* notes 33–34 and accompanying text; see Tommy Beer, *Trump Called BLM Protesters ‘Thugs’ But Capitol-Storming Supporters ‘Very Special’*, FORBES, <https://www.forbes.com/sites/tommybeer/2021/01/06/trump-called-blm-protesters-thugs-but-capitol-storming-supporters-very-special/?sh=1ac67c693465> (Jan. 6, 2021) (discussing former-President Trump’s derogatory statements about Black civil rights protestors and supportive comments about white insurrections and other white supremacist protestors).

²⁷ Informal night watches began in 1636. Boston created the first Police force in 1838. Early police forces were publicly funded, bureaucratic, and accountable to the government, much like modern police. See Gary Potter, *The History of Policing in the United States, Part 1*, E. KY. UNIV. POLICE STUD. ONLINE (June 25, 2013), <https://plsonline.eku.edu/insidelook/history-policing-united-states-part-1>.

²⁸ See Elizabeth Hinton & DeAnza Cook, *The Mass Criminalization of Black Americans: A Historical Overview*, 4 ANN. REV. CRIMINOLOGY 261, 263 (2021).

²⁹ See Potter, *supra* note 27.

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ Jim Crow laws were a method of maintaining racial segregation and white supremacy, including measures denying Black Americans the right to vote, equal use of public and private accommodation, and relegating them to a lower-caste status. RICHARD ROTHSTEIN, *THE COLOR OF LAW* 40 (1st ed. 2017).

Patrols.³⁴ Patrollers “worked only at night, riding from plantation to plantation, stopping Black people, searching their homes for contraband and whipping any enslaved African caught traveling without a written pass.”³⁵

Other early police forces often worked alongside white supremacist and racial terror groups.³⁶ The most significant of these is the Ku Klux Klan (KKK), a hate group dedicated to preserving white supremacy and destroying any threat to this cause.³⁷ The KKK has burned homes and buildings, whipped, flogged, branded, mutilated, shot, hanged, and drowned their victims in pursuit of this mission.³⁸ They believe the U.S. Constitution “fundamentally protect[s] white rule, most centrally the power to rule over Africans held in bondage.”³⁹ Like the police today, the KKK understands their terrorism and murder as heroic, patriotic service in pursuit of law and order.⁴⁰

Black Americans were tortured, lynched, and murdered across the American South by the KKK and others who sought to reinforce racial subjugation and segregation.⁴¹ Between 1877 and 1950, there were over 4,000 racial terror lynchings.⁴² Many are attributed to the KKK,⁴³ though law enforcement was involved in as many as 75% of these incidents.⁴⁴ Close ties to law enforcement and government officials shielded the KKK from accountability for their violence, making it difficult to identify

³⁴ MICHELLE ALEXANDER, *THE NEW JIM CROW* 35 (2010).

³⁵ Christian Parenti, *Policing the Color Line*, *THE NATION* (Sep. 13, 2001), <https://www.thenation.com/article/archive/policing-color-line/>.

³⁶ Jared A. Goldstein, *The Klan's Constitution*, 9 *ALA. C.R. & C.L.L. REV.* 285, 358 (2018). Alabama officials, Eugene “Bull” Connor and James Clark, discussed in Part I.C., worked closely with the KKK in their efforts to suppress Black voting and labor rights. See *infra* notes 71–79 and accompanying text; see generally *In re Courier-Journal v. Marshall*, 828 F.2d 361 (6th Cir. 1987); *Marshall v. Bramer*, 828 F.2d 325 (6th Cir. 1987).

³⁷ Jeff Wallenfeldt, *Ku Klux Klan*, *ENCYC. BRITANNICA* (Jul. 29, 2021), <https://www.britannica.com/topic/Ku-Klux-Klan/Revival-of-the-Ku-Klux-Klan>.

³⁸ Goldstein, *supra* note 36, at 340–41.

³⁹ *Id.* at 308. This notion was validated by the Supreme Court in *Dred Scott v. Sandford*, when the Court declared slaves were property, and the Black descendants of kidnapped Africans could not be considered citizens or access the federal courts. 60 U.S. 393 (1857).

⁴⁰ Goldstein, *supra* note 36, at 341.

⁴¹ EQUAL JUSTICE INITIATIVE, *LYNCHING IN AMERICA* 3 (3d ed. 2017), <https://eji.org/reports/lynching-in-america/>.

⁴² *Id.* at 4.

⁴³ *Id.*

⁴⁴ Jesse Carr, *History of Police Involvement with Lynching*, *STATE SANCTIONED*, <https://statesanctioned.com/history-of-police-involvement-with-lynching/> (last visited Nov. 21, 2021).

the number of murders committed by Klan members, but some estimates are as high as 50,000.⁴⁵

As policing modernized, attempts to preserve the subjugation of Black Americans became coordinated and sophisticated. The Black Panther Party (“BPP”), an organization dedicated to advancing Black interests, was targeted by federal, state, and local law enforcement,⁴⁶ who vilified the organization through absurd propaganda campaigns⁴⁷ and violently attacked BPP members.⁴⁸ The BPP, founded by Huey P. Newton and Bobby Seale in 1966, was rooted in Black nationalism, socialism, and armed self-defense in response to anti-Black aggression.⁴⁹ Seale and Newton compiled a “Ten Point Platform and Program,” which served as “the foundation” of the BPP.⁵⁰ BPP members organized neighborhood patrols to monitor police activity and social aid programs that worked to address the needs of their community.⁵¹

Through COINTELPRO, a covert, nationwide mission to disrupt communist activity in the United States,⁵² the FBI framed the BPP as a terror organization and brutally murdered their

⁴⁵ JOHN EDWARD BRUCE, *THE BLOOD RED RECORD: A REVIEW OF THE HORRIBLE LYNCHINGS AND BURNING OF NEGROES BY CIVILIZED WHITE MEN IN THE UNITED STATES, AS TAKEN FROM THE RECORDS* 20 (1901).

⁴⁶ John Kifner, *F.B.I. Sought Doom of Panther Party*, N.Y. TIMES (May 9, 1976), <https://www.nytimes.com/1976/05/09/archives/fbi-sought-doom-of-panther-party-senate-study-says-plot-led-to.html>.

⁴⁷ See Erin Blakemore, *How the Black Panthers’ Breakfast Program Both Inspired and Threatened the Government*, HIST., <https://www.history.com/news/free-school-breakfast-black-panther-party> (Jan. 29, 2021).

⁴⁸ See Kifner, *supra* note 46.

⁴⁹ *The Black Panther Party*, NAT’L ARCHIVES (Mar. 22, 2021), <https://www.archives.gov/research/african-americans/black-power/black-panthers#bpintro>.

⁵⁰ *Id.* (The Ten Points are “[1] We want freedom. [2] We want power to determine the destiny of our Black Community. [3] We want full employment for our people. [4] We want an end to the robbery by the Capitalists of our Black Community. [5] We want decent housing, fit for shelter of human beings. We want education for our people that exposes the true nature of this decadent American society. We want education that teaches us our true history and our role in the present day society. [6] We want all Black men to be exempt from military service. [7] We want an immediate end to POLICE BRUTALITY and MURDER of Black people. [8] We want freedom for all Black men held in federal, state, county and city prisons and jails. [9] We want all Black people when brought to trial to be tried in court by a jury of their peer group or people from their Black Communities, as defined by the Constitution of the United States. [10] We want land, bread, housing, education, clothing, justice and peace.”).

⁵¹ See Blakemore, *supra* note 47.

⁵² COINTELPRO, FED. BUREAU OF INVESTIGATION, <https://vault.fbi.gov/cointel-pro> (last visited Nov. 22, 2021).

leaders.⁵³ COINTELPRO's goal was "to expose, disrupt, misdirect, discredit, or otherwise neutralize the activities of black nationalists,"⁵⁴ primarily the BPP.⁵⁵ Disruption efforts were not limited to their efforts against police brutality; the FBI also deployed agents in response to the Party's essential social programs.⁵⁶ FBI head, J. Edgar Hoover, referred to the Free Breakfast for Children program, which fed tens of thousands of hungry children in just over a year,⁵⁷ as "potentially the greatest threat to efforts by authorities to neutralize the BPP and destroy what it stands for."⁵⁸

C. Black Civil Rights Protest and the Promise of Police Violence

The fight for Black civil rights precedes American independence by at least a century.⁵⁹ All-Black slave revolts were recorded as early as 1678, and demonstrations against segregation, racial animus, and widespread lynching emerged during the Jim Crow Era as early as 1906.⁶⁰ The widespread violence enacted during this period motivated Black Americans

⁵³ In 1969, 14 Chicago police officers, working in concert with the FBI, broke into the home of 21-year-old Party leader Fred Hampton as he slept, firing 90 shots and killing both Hampton and Party member Mark Clark. See *Police Kill Two Members of the Black Panther Party*, HIST., <https://www.history.com/this-day-in-history/police-kill-two-members-of-the-black-panther-party> (Dec. 3, 2020).

⁵⁴ *COINTELPRO Black Extremists*, FED. BUREAU OF INVESTIGATION, <https://vault.fbi.gov/cointel-pro/cointel-pro-black-extremists/cointelpro-black-extremists-part-01-of/view> (last visited Nov. 22, 2021).

⁵⁵ The FBI has record of 295 actions taken against alleged "Black Nationalist Hate Groups" through COINTELPRO; nearly 80% were specifically directed against the BPP. See *COINTELPRO*, PBS, https://www.pbs.org/hueypnewton/actions/actions_cointelpro.html (last visited Nov. 21, 2021).

⁵⁶ See Blakemore, *supra* note 47 ("FBI agents went door-to-door . . . telling parents that BPP members would teach their children racism. In San Francisco . . . parents were told the food was infected with venereal disease; sites in Oakland and Baltimore were raided by officers who harassed BPP members in front of terrified children, and participating children were photographed by Chicago police. "The night before [the first breakfast program in Chicago] was supposed to open . . . the Chicago police broke into the church and mashed up all the food and urinated on it.").

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ See Erin Blakemore, *Why America's First Colonial Rebels Burned Jamestown to the Ground*, HIST., <https://www.history.com/news/bacons-rebellion-jamestown-colonial-america> (Aug. 8, 2019); Evan Andrews, *7 Famous Slave Revolts*, HIST., <https://www.history.com/topics/black-history/slavery-iv-slave-rebellions> (Apr. 21, 2021).

⁶⁰ TODD SHAW ET. AL, *UNEVEN ROADS: AN INTRODUCTION TO U.S. RACIAL AND ETHNIC POLITICS* 107 (2015); see also Cara Caddoo, *The Birth of a Nation, Police Brutality, and Black Protest*, 14 J. GILDED AGE & PROGRESSIVE ERA 608, 608 (2015); see also Cara Caddoo, *The Birth of a Nation's Long Century*, IND. UNIV., <https://iu.pressbooks.pub/thebirthofanation/chapter/birth-of-a-nations-long-century/> (last visited Nov. 21, 2021) [hereinafter Caddoo, *Long Century*].

to organize and demand action from courts and legislatures through protest, lobbying, and litigation.⁶¹

The 1950s and 1960s—known as the Civil Rights Era or Second Reconstruction—are emblematic of improved racial equity and extreme displays of violence against Black protestors.⁶² The imagery of violent and inhumane dispersion tactics—such as mass arrest, police dog attacks, high-powered fire hoses, and beatings⁶³ employed against both adults and children⁶⁴—rests firmly in our collective conscious. Though discrimination persisted, and police brutality remained widespread, organizations like the NAACP's affiliate Legal Defense Fund (LDF) opened the door to previously inaccessible legal recourse.⁶⁵

Wherever government officials and law enforcement attempted to suppress demonstrations, the LDF and their collaborators stepped in.⁶⁶ The LDF sought Temporary Restraining Orders (TROs) and injunctions to prevent protest interference,⁶⁷ protected the legitimacy of the NAACP and

⁶¹ See Caddoo, *Long Century*, *supra* note 60. The Springfield Race Riot of 1908, in which a white mob burned Black owned businesses, Black neighborhoods, and lynched and mutilated two Black community leaders, inspired the founding of the NAACP. See Roberta Senechal, *The Springfield Race Riot of 1908*, 3 ILL. HIST. TCHR. 22 (1996), <https://www.lib.niu.edu/1996/iht329622.html>.

⁶² Clayborne Carson, *American Civil Rights Movement*, ENCYC. BRITANNICA, <https://www.britannica.com/event/American-civil-rights-movement> (Oct. 14, 2021).

⁶³ See Katie Nodjimbadem, *The Long, Painful History of Police Brutality in the U.S.*, SMITHSONIAN MAG., <https://www.smithsonianmag.com/smithsonian-institution/long-painful-history-police-brutality-in-the-us-180964098/> (May 29, 2020).

⁶⁴ Jay Smith, *Bull Connor, Martin Luther King Jr. and the Labor Movement*, AFL-CIO (Aug. 1, 2017), <https://aflcio.org/2017/8/1/bull-connor-martin-luther-king-jr-and-labor-movement>; Alexis Clark, *The Children's Crusade: When the Youth of Birmingham Marched for Justice*, HIST., <https://www.history.com/news/childrens-crusade-birmingham-civil-rights> (Jan. 28, 2021).

⁶⁵ See *Our History*, NAACP, <https://naacp.org/about/our-history> (last visited Dec. 20, 2021). See generally *Shelley v. Kraemer*, 334 U.S. 1 (1947); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); *Cooper v. Aaron*, 358 U.S. 1 (1958); *NAACP v. Alabama*, 357 U.S. 449 (1958).

⁶⁶ See SHAW, *supra* note 60, at 110–14; see also Hugh Davis Graham, *Review of Crusaders in the Courts: How a Dedicated Band of Lawyers Fought for the Civil Rights Revolution*, 79 GA. HIST. Q. 749–751 (1995).

⁶⁷ See *Cottonreader v. Johnson*, 252 F. Supp. 492 (M.D. Ala. 1966); *Williams v. Wallace*, 240 F. Supp. 100 (M.D. Ala. 1965); *U.S. v. Clark*, 249 F. Supp. 720 (S.D. Ala. 1965); *NAACP v. Thompson*, 357 F.2d 831 (5th Cir. 1966).

identity of their members,⁶⁸ and defended demonstrators subjected to unlawful arrests.⁶⁹

The utility of the LDF, and legal tools like TROs, was felt strongly in Alabama during the fight for voting rights.⁷⁰ Sherriff James Clark of Dallas County, Alabama—who ordered mass arrests and the use of whips and electrified cattle prods against demonstrators⁷¹—was the subject of TROs sought by both protestors⁷² and the federal government.⁷³

In one incident, at Clark’s instruction, 50–65 officers responded to a “Negro mass meeting,” deploying tear gas and clubbing participants and bystanders.⁷⁴ Later, “upon the picketing of the county courthouse by three young Negroes with signs urging persons to register to vote, Sheriff Clark ordered the mass arrests of all [Black people] in the area.”⁷⁵ The court later granted an injunction stating that “Sheriff Clark, his deputies, posse members and others acting in concert with him” were prohibited from any “coercion, punishment, intimidation or harassment of [Black citizens] or others acting with them in their exercise or attempts to exercise their constitutional rights under Title II of the Civil Rights Act of 1964 and 42 U.S.C. § 1971(b).”⁷⁶

On “Bloody Sunday,” John Lewis and Hosea Williams led over 600 activists from Selma to Montgomery, seeking to secure Black Americans’ right to vote.⁷⁷ When protestors reached the Alabama River, police attacked, using tear gas, clubs, whips, and tubing wrapped in barbed wire.⁷⁸ Granting another injunction

⁶⁸ See *NAACP v. Alabama*, 377 U.S. 288 (1964); see also *Ealy v. Littlejohn*, 569 F.2d 291 (5th Cir. 1978).

⁶⁹ See *Hamm v. City of Rock Hill*, 379 U.S. 306 (1964); *Hughley v. City of Opelika*, 251 F. Supp. 566 (M.D. Ala. 1965); *Edwards v. South Carolina*, 372 U.S. 229 (1963).

⁷⁰ Adam Bernstein, *Ala. Sheriff James Clark; Embodied Violent Bigotry*, WASH. POST (June 7, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/06/06/AR2007060602455.html>.

⁷¹ *Williams v. Wallace*, 240 F. Supp. 100, 104 (M.D. Ala. 1965).

⁷² See *id.*

⁷³ See *U.S. v. Clark*, 249 F. Supp. 720 (S.D. Ala. 1965).

⁷⁴ *Id.* at 725.

⁷⁵ *Id.*

⁷⁶ *Id.* at 730 (discussing their rights under Title II of the Civil Rights Act of 1964 and 42 U.S.C. § 1971(b)).

⁷⁷ Christopher Klein, *How Selma’s ‘Bloody Sunday’ Became a Turning Point in the Civil Rights Movement*, HIST., <https://www.history.com/news/selma-bloody-sunday-attack-civil-rights-movement> (Jul. 18, 2020).

⁷⁸ *Williams v. Wallace*, 240 F. Supp. 100, 104 (M.D. Ala. 1965).

against Clark, the court reasoned that “the extent of the right to assemble, demonstrate and march peaceably along the highways and streets in an orderly manner should be commensurate with the enormity of the wrongs that are being protested and petitioned against.”⁷⁹

Though the Bloody Sunday march was technically successful,⁸⁰ militarized violence against Black protestors continued on a national scale during the “Long Hot Summer of 1967.”⁸¹ When protests against systemic racial discrimination emerged, persisting across 34 states,⁸² police responded with militarized police force comparable to that used during the BLM protests of 2020.⁸³ Though 75% of protests during the Long Hot Summer were minor in damage and violence, and the “overwhelming majority” of deaths and injuries reported were Black civilians.⁸⁴

In Newark, a protest began after police beat a Black cab driver to death during a traffic stop.⁸⁵ In just five days, “26 people were killed, more than 700 were injured, and more than 1,000 residents were arrested.”⁸⁶ Protestors in Detroit, outraged by the mass arrest of 82 people celebrating the safe return of two Black soldiers, were met by 9,000 National Guardsmen, 5,000 paratroopers, and 800 state policemen.⁸⁷ By the end, 33 Black residents were dead, 1,200 people were injured, and 7,200 were arrested.⁸⁸ The Civil Rights Era was more than fifty years ago, but the patterns and injustices remain: police brutalize and unlawfully arrest Black Americans, protests emerge, and police respond with more brutality, arrest, and murder.

⁷⁹ *Id.*

⁸⁰ The Voting Rights Act of 1965 was passed shortly after these events, providing legal protection for voters, banning poll taxes, literacy tests, and other attempts at voter disenfranchisement. Pub. L. No. 89-110, 79 Stat. 437 (codified in 42 U.S.C. §§ 1973–1973aa-6).

⁸¹ The Long Hot Summer was a period of protest in reaction to police brutality and the systemic exclusion of Black Americans from employment, housing, and services. See *The Riots of the Long, Hot Summer*, ENCYC. BRITANNICA [hereinafter *The Riots of the Long, Hot Summer*], <https://www.britannica.com/story/the-riots-of-the-long-hot-summer> (last visited Oct 13, 2021).

⁸² Ricky Riley, *The Long, Hot Summer Redux*, ROSA LUXEMBURG STIFTUNG (Sept. 20, 2020), <https://www.rosalux.de/en/news/id/43054/the-long-hot-summer-redux?cHash=0654edf64419710efdf3c3de8e0ee6b>.

⁸³ *Id.*

⁸⁴ NAT'L. ADVISORY COMM'N ON CIV. DISORDERS, THE KERNER REPORT 3 (1967).

⁸⁵ See *The Riots of the Long Hot Summer*, *supra* note 81.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

D. Modern Protests, Modern Weaponry, Modern White Supremacy

The cycle of gratuitous police violence against Black Americans, especially where they protest their mistreatment, is a centuries-old American tradition, used to maintain white supremacy.⁸⁹ The American South went from whipping slaves to brutalizing Black “criminals” without missing a beating—police murder more Black people in counties that had higher rates of lynching from 1877–1950.⁹⁰ Police violence continues to be a leading cause of death among young American men, though Black men are 2.5 times more likely to be killed by police than their white counterparts.⁹¹ Federal policy concerning police use of deadly force did not exist until 1985.⁹² Though use of force by law enforcement must be reasonable and proportionate under the circumstances,⁹³ police have consistently demonstrated their inability to meet this standard.⁹⁴ Further, where their use of force is clearly unreasonable, police are rarely disciplined.⁹⁵

⁸⁹Cara Caddoo, *The Birth of a Nation, Police Brutality, and Black Protest*, 14 J. GILDED AGE & PROGRESSIVE ERA 608, 608–11 (2015).

⁹⁰Jhacova Williams & Carl Romer, *Black Deaths at the Hands of Law Enforcement are Linked to Historical Lynchings*, ECON. POL'Y INST.: WORKING ECON. BLOG (June 5, 2020, 2:42 PM), <https://www.epi.org/blog/black-deaths-at-the-hands-of-law-enforcement-are-linked-to-historical-lynchings-u-s-counties-where-lynchings-were-more-prevalent-from-1877-to-1950-have-more-officer-involved-killings/>.

⁹¹Christopher Ingraham, *Police Shootings are Leading Cause of Death for Young American Men, New Research Shows*, WASH. POST (Aug. 8, 2019), <https://www.washingtonpost.com/business/2019/08/08/police-shootings-are-leading-cause-death-young-american-men-new-research-shows/>. In addition to a higher likelihood of being killed by police, Black men are also disproportionately likely to be subjected to displays of force in general. For example, in Minneapolis, Minnesota, where police murdered George Floyd, less than 20% of the residents are Black. However, 62% of incidences where police used force of any sort involved a Black person. AMNESTY INT'L, USA THE WORLD IS WATCHING: MASS VIOLATIONS BY U.S. POLICE OF BLACK LIVES MATTER PROTESTERS' RIGHTS 1, 14 (2020), <https://www.amnesty.org/en/documents/amr51/2807/2020/en/>.

⁹²Robert J. Duran, *No Justice, No Peace*, 13 DU BOIS REV. SOC. SCI. RSCH. ON RACE 61, 63 (2016); see *Tennessee v. Garner*, 471 U.S. 1, 3 (1985). This standard was created in response to the murder of an unarmed Black eighth grader by police. See *Garner*, 471 U.S. at 4 n.2.

⁹³John Dehn, *The U.S. Constitution and Limits on Detention and Use of Force in Handling Civil Unrest*, JUST SEC. (June 3, 2020), <https://www.justsecurity.org/70535/the-u-s-constitution-and-limits-on-detention-and-use-of-force-in-handling-civil-unrest/> (stating that the Fourth Amendment's protection against unreasonable searches includes a prohibition against unreasonable force against people).

⁹⁴See *supra* Part II.C.; see also *infra* Part V.

⁹⁵Shaila Dewan, *Few Police Officers Who Cause Deaths are Charged or Convicted*, N.Y. TIMES (Sept. 4, 2020), <https://www.nytimes.com/2020/09/24/us/police-killings-prosecution-charges.html>.

Protests with predominately Black demonstrators are more likely to draw police presence and police violence than their white counterparts.⁹⁶ Police are three times more likely to respond to Black Lives Matter protests specifically, despite findings that these protests are overwhelmingly peaceful.⁹⁷ The crowd control tactics police are permitted to use are violent and dangerous, and are deployed with startling frequency.⁹⁸ Currently, police can utilize “less lethal” weapons such as impact projectiles like rubber bullets, chemical irritants such as pepper spray and tear gas, water cannons, flash-bang grenades, and batons in response to protestors.⁹⁹ However, police departments nationwide have been criticized for the indiscriminate use of these weapons and failure to train officers to use them properly.¹⁰⁰ Though these weapons are intended to be a “less-lethal” method of de-escalating crowds, they have been found to

⁹⁶ Christian Davenport et al., *Protesting While Black? The Differential Policing of American Activism, 1960 to 1990*, 76 AM. SOCIO. REV. 1, 152 (2011) (claiming the increased violence and aggression directed toward Black protestors has been thought to be a result of perceived weakness, suggesting that police may respond more violently when they can get away with it). However, this research suggests that authorities may react more violently because they perceive Black protestors as more threatening, both in general and at specific events. *Id.*

⁹⁷ ROUDABEH KISHI ET AL., A YEAR OF RACIAL JUSTICE PROTESTS: KEY TRENDS IN DEMONSTRATIONS SUPPORTING THE BLM MOVEMENT, ARMED CONFLICT LOCATION & EVENT DATA PROJECT 1 (2021), <https://acleddata.com/2021/05/25/a-year-of-racial-justice-protests-key-trends-in-demonstrations-supporting-the-blm-movement/>; Sanya Mansoor, *93 % of Black Lives Matter Protests Have Been Peaceful, New Report Finds*, TIME (Sept. 5, 2020), <https://time.com/5886348/report-peaceful-protests/>.

⁹⁸ On July 17, 2014, Police placed Eric Garner, a 43-year-old Black father of six, in a chokehold, in violation of NYPD rules, killing him. A New York court held that the NYPD’s use of military-grade long-range acoustic devices—known to cause permanent hearing damage—against those protesting Garner’s murder neither chilled their First Amendment rights nor violated their Due Process rights. *Edrei v. City of New York*, 254 F. Supp. 3d 565, 578 (S.D.N.Y. 2017), *aff’d sub nom. Edrei v. Maguire*, 892 F.3d 525 (2d Cir. 2018); *Eric Garner Dies in NYPD Chokehold*, HIST., <https://www.history.com/this-day-in-history/eric-garner-dies-nypd-chokehold> (July 15, 2020). In Ferguson, Missouri, after a grand jury refused to indict the officer who murdered Michael Brown, an unarmed Black teenager, police “blocked the roads and dispersed protesters . . . with military-grade equipment, including body armor, rifles, tear gas, rubber bullets, and even armored, mine-resistant vehicles that are basically tanks.” German Lopez, *What Happened in Ferguson, Missouri, Following the Shooting and Grand Jury Decision?*, VOX (Jan. 27, 2016, 6:19 PM), <https://www.vox.com/2015/5/31/17937880/ferguson-missouri-2014-protests-riots-police>.

⁹⁹ *See generally Lethal in Disguise*, INT’L NETWORK OF C.L. ORGS., <https://www.inclo.net/pdf/lethal-in-disguise.pdf> (last visited Apr. 15, 2021) (discussing the use of various crowd control tactics).

¹⁰⁰ Kim Barker et al., *In City After City, Police Mishandled Black Lives Matter Protests*, N.Y. TIMES (Mar. 20, 2021), <https://www.nytimes.com/2021/03/20/us/protests-policing-george-floyd.html>.

cause permanent injury, disability, and death,¹⁰¹ and, when deployed, often escalate or fail to reduce tensions.¹⁰²

Black Americans experience a constant threat of unjustified police violence, often solely in reaction to their skin color. This threat looms regardless of the behavior of Black protestors or whether they are protesting at all; it is equally imminent whether they are shouting, marching, sitting silently, lying down, or playing violins.¹⁰³ The patterned anti-Black violence perpetuated by American law enforcement, and their disparate responses to Black protest, is plainly racist—and possibly unconstitutional.

III. The Right to Protest

The right to protest against government actions, like patterned police brutality against Black Americans, *should* be protected with vigor so long as such actions are peaceful.¹⁰⁴ The right to protest, conferred through the rights of assembly and petition, has been held equally fundamental to the rights explicitly guaranteed in the First Amendment.¹⁰⁵ Any restriction on protest must be content-neutral, narrowly tailored to a specific government interest, and must leave open alternative options for expression.¹⁰⁶ Further, the government is required to protect our right to protest, and by extension, protect citizens when they are engaged in protected expression,¹⁰⁷ such as lawful protest.¹⁰⁸ Courts have been repeatedly forced to restate this duty to protect in cases where police have stood by watching as members of the

¹⁰¹ Donovan Slack, *Less-Lethal Weapons Blind, Maim and Kill. Victims Say Enough is Enough*, KAISER FAM. FOUND. (Jul. 24, 2020), <https://khn.org/news/less-lethal-weapons-blind-maim-and-kill-victims-say-enough-is-enough/>; see also Kelsey D. Atherton, *What 'Less Lethal' Weapons Actually Do*, SCI. AM. (June 23, 2020), <https://www.scientificamerican.com/article/what-less-lethal-weapons-actually-do/>; see Knvul Sheikh & David Montgomery, *Rubber Bullets and Beanbag Rounds Can Cause Devastating Injuries*, N.Y. TIMES (June 12, 2020), <https://www.nytimes.com/2020/06/12/health/protests-rubber-bullets-beanbag.html>.

¹⁰² Barker, *supra* note 100.

¹⁰³ *Minter v. City of Aurora*, No. 20-CV-02172-RM-NYW, 2021 WL 735910, at *1 (D. Colo. Feb. 25, 2021).

¹⁰⁴ *Keating v. City of Miami*, 598 F.3d 753, 766 (11th Cir. 2010).

¹⁰⁵ *De Jonge v. Oregon*, 299 U.S. 353, 364 (1937).

¹⁰⁶ See generally *Ward v. Rock Against Racism*, 491 U.S. 781 (1989) (holding that the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions are content-neutral and narrowly tailored to a specific government interest).

¹⁰⁷ See *Hague v. Comm. for Indus. Org.*, 307 U.S. 496 (1939); *Kelly v. Page*, 335 F.2d 114 (5th Cir. 1964); *Downie v. Powers*, 193 F.2d 760 (10th Cir. 1951); *United States v. U.S. Klans, Knights of Ku Klux Klan, Inc.*, 194 F. Supp. 897 (M.D. Ala. 1961).

¹⁰⁸ *Klans*, 194 F. Supp. at 942.

Ku Klux Klan, American Nazi Party, and government officials violently attacked civil rights protestors.¹⁰⁹

The government cannot restrict protests on the basis of their subject matter or viewpoint but may impose limitations on the time, place, and manner of protest.¹¹⁰ Government actors typically impose these limitations by mandating permits or licenses, but these must be applied uniformly and without discrimination.¹¹¹ Despite this, municipalities have attempted to suppress Black protests through restrictions on parades, picketing, and public meetings, and police have attempted to criminalize clearly peaceful conduct by Black protestors.¹¹² This Part will examine treatment of restrictions on “place” and “manner” of protest by the courts, as these are the primary areas of contention where the rights of Black protestors are concerned.

A. *Place of Protest*

In *Press-Enterprise II*, the Supreme Court provided a two-part test to determine whether a right to access a public place to protest exists under the First Amendment.¹¹³ A court must first determine that the place or process has historically been open to the general public, then assess whether public access would play a “significant positive role in the functioning of the particular process in question.”¹¹⁴ The right of public access primarily comes into question where the location of a protest is not within a proper public forum.

Where protests occur in traditional public fora, they will generally meet the first element of the *Press-Enterprise II* test. “The defining characteristic of a designated public forum is that it's

¹⁰⁹ See *Waller v. Butkovich*, 584 F. Supp. 909, 920, 943 (1984); see also *Williams v. Wallace*, 240 F. Supp. 100 (M.D. Ala. 1965) (noting their patterned harassment and brutal treatment, Alabama officials were restrained and enjoined failing to protect Selma protestors); *Klans*, 194 F. Supp. 897 (M.D. Ala. 1961) (concluding that Montgomery police failed to protect a bus of Black college students from KKK violence); *Kelly v. Page*, 335 F.2d 114 (5th Cir. 1964) (holding that lawful protest against racial discrimination is a right, and those engaged in this protected activity are entitled to protection).

¹¹⁰ *Cox v. Louisiana*, 379 U.S. 536, 558 (1965).

¹¹¹ *Id.*

¹¹² See, e.g., *Edwards v. South Carolina*, 372 U.S. 229 (1963); see also *Chase v. McCain*, 220 F. Supp. 407, 408 (W.D. Va. 1963), *vacated sub nom. Baines v. City of Danville*, 337 F.2d 579 (4th Cir. 1964), *on reh'g in part*, 357 F.2d 756 (4th Cir. 1966), *cert. granted, judgment aff'd sub nom. Baines v. City of Danville*, 384 U.S. 890 (1966).

¹¹³ *Press-Enter. Co. v. Superior Ct. of California for Riverside Cnty.*, 478 U.S. 1, 8 (1986).

¹¹⁴ *Id.* at 8–9.

open to the same indiscriminate use, and almost unfettered access that exists in a traditional public forum.”¹¹⁵ The public streets have been called the “quintessential traditional public fora,”¹¹⁶ along with sidewalks, parks, and other places that “have immemorially been held in trust for the use of the public and . . . used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.”¹¹⁷

Different standards apply to public property that is not traditionally used as a public forum.¹¹⁸ In these “limited public forums,” as long as public officials do not suppress the expression merely because they disagree with the content, the state may reasonably restrict the designated public forum to use for its “intended purposes.”¹¹⁹ Courts have held that places such as USPS mailboxes,¹²⁰ public university campuses,¹²¹ county courthouses,¹²² courthouse restrooms,¹²³ certain areas surrounding statues at county courthouses,¹²⁴ grounds of state capitol buildings, and city halls¹²⁵ are limited public forums.

B. Manner of Protest

Peaceful conduct is a critical element of the right to protest.¹²⁶ The government can stop or restrict protests when they present a “clear and present danger” of violence or “immediate threat to public safety, peace, or order.”¹²⁷ However, “[n]either energetic, even raucous, protesters who annoy or anger audiences, nor

¹¹⁵ *Young Am.'s Found. v. Napolitano*, No. 17-cv-02255-MMC, 2018 WL 1947766, at *3 (N.D. Cal. Apr. 25, 2018) (quoting *Seattle Mideast Awareness Campaign v. King Cty.*, 781 F.3d 489, 496 (9th Cir. 2015)).

¹¹⁶ *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 676 (1992); *see also Hurley v. Irish-Am. Gay, Lesbian and Bisexual Grp. of Boston*, 515 U.S. 557, 579 (1995).

¹¹⁷ *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983) (quoting *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939)).

¹¹⁸ *Id.* at 46.

¹¹⁹ *See U.S. Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 131 (1981).

¹²⁰ *See, e.g., id.*

¹²¹ *See, e.g., Young Am.'s Found. v. Kaler*, 482 F. Supp. 3d 829 (2020).

¹²² *See, e.g., Muhammad v. Bethel-Muhammad*, No. 11-0690-WS-B, 2013 WL 5531397, at *5 (S.D. Ala. Oct. 7, 2013) (finding that county courthouse is not a “place of public accommodation” under Civil Rights Act of 1964).

¹²³ *See, e.g., Poor and Minority Just. Ass'n, Inc. v. Judd*, No. 8:19-CV-T-2889-02TGW, 2020 WL 7128948 (M.D. Fla. Dec. 4, 2020).

¹²⁴ *See, e.g., NAACP v. Peterman*, 479 F. Supp. 231, 236 (M.D.N.C. 2020).

¹²⁵ *See, e.g., Parks v. Finan*, 385 F.3d 694, 695–96, 699 (6th Cir. 2004); *Miller v. City of Cincinnati*, 622 F.3d 524, 540 (6th Cir. 2010).

¹²⁶ U.S. CONST. amend. I.

¹²⁷ *Cantwell v. Connecticut*, 301 U.S. 296, 308 (1940).

demonstrations that slow traffic or inconvenience pedestrians, justify police stopping or interrupting a public protest.”¹²⁸

The Supreme Court considered the “clear and present danger” standard in 1961 after the arrest of 187 Black students who gathered to protest racially discriminatory legislation at the South Carolina State House.¹²⁹ Testimony “made clear that nobody among the crowd actually caused or threatened any trouble.”¹³⁰ After officers ordered the protestors to disperse, they “engaged in . . . ‘boisterous,’ ‘loud,’ and ‘flamboyant’ conduct,” including “loudly singing ‘The Star Spangled Banner’ and other patriotic and religious songs.”¹³¹

In considering the decision to arrest these protestors for breach of the peace,¹³² the Supreme court found no evidence of fighting words.¹³³ In a rare display of deference to Black protesters, the Court stated

[A] function of free speech . . . is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger . . . There is no room under our Constitution for a more restrictive view.¹³⁴

However, the Supreme Court has also held that speech *intended* to incite violence may be limited.¹³⁵

Brandenburg v. Ohio, a landmark decision by Supreme Court that refused to uphold a statute restricting Klan activity, created the modern test for restricting public advocacy.¹³⁶ In *Brandenburg*, the Court held that statutes punishing the mere advocacy of violence were not constitutional, but the First Amendment does not protect advocacy that sought to incite “imminent lawless action.”¹³⁷ The *Brandenburg* test requires specific intent that imminent lawless action will occur in response to an expression,

¹²⁸ Jones v. Parmley, 465 F.3d 46, 58 (2d Cir. 2006).

¹²⁹ Edwards v. South Carolina, 372 U.S. 229, 230 (1963).

¹³⁰ *Id.* at 231.

¹³¹ *Id.* at 233.

¹³² *See id.* at 234.

¹³³ *Id.* at 236.

¹³⁴ Terminiello v. City of Chicago, 337 U.S. 1, 4 (1949).

¹³⁵ Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

¹³⁶ *Id.* at 447–48.

¹³⁷ *Id.* at 447.

coupled with a “high probability” that incitement would occur.¹³⁸

The *Brandenburg* test¹³⁹ has been applied to protests by several circuit courts analyzing charges under the Anti-Riot Act.¹⁴⁰ White supremacist defendants argued the act violated the First Amendment after the 2019 “Unite the Right” rally in Charlottesville, Virginia.¹⁴¹ The Fourth Circuit, opining that parts of the Anti-Riot Act were unconstitutionally vague, found that speech “encouraging,” “promoting,” or “urging” others to riot was not sufficient incitement.¹⁴² However, the court upheld the portions of the statute criminalizing “organizing” or “instigating” riots.¹⁴³ The Ninth Circuit reasoned that “organizing” fell short of criminalizing speech that was clearly protected under *Brandenburg*¹⁴⁴ and interpreted imminence to mean “violence or physical disorder in the nature of a riot” resulting from the speech.¹⁴⁵

Where Black protests are concerned, we must consider the intent prong in light of *who* may be incited by their expressions. The First Amendment is rooted in our “profound national commitment”¹⁴⁶ to preserving uninhibited debate on public issues, even where it includes “vehement, caustic, and sometimes unpleasantly sharp attacks on government and public

¹³⁸ Emerson J. Sykes, *In Defense of Brandenburg: The ACLU and Incitement Doctrine in 1919, 1969, and 2019*, 85 BROOK. L. REV. 15, 24–25 (2019). This “likelihood” requirement has been subject to discussion in recent cases alleging “negligent protest” that will be discussed later in this article. See *Doe v. McKesson*, 945 F.3d 818 (5th Cir. 2019), *vacated*, *McKesson v. Doe*, 141 S. Ct. 48 (2020).

¹³⁹ See *Brandenburg*, 395 U.S. at 447–48.

¹⁴⁰ 18 U.S.C. § 2101 (“(a) Whoever travels in interstate or foreign commerce or uses any facility of interstate or foreign commerce, including, but not limited to, the mail, telegraph, telephone, radio, or television, with intent—(1) to incite a riot; or (2) to organize, promote, encourage, participate in, or carry on a riot; or (3) to commit any act of violence in furtherance of a riot; or (4) to aid or abet any person in inciting or participating in or carrying on a riot or committing any act of violence in furtherance of a riot; and who either during the course of any such travel or use or thereafter performs or attempts to perform any other overt act for any purpose specified . . . shall be fined or . . . imprisoned . . .”).

¹⁴¹ *United States v. Miselis*, 972 F.3d 518, 525 (4th Cir. 2020).

¹⁴² *Id.* at 540.

¹⁴³ *Id.* at 537–38.

¹⁴⁴ *United States v. Rundo*, 990 F.3d 709, 717 (9th Cir. 2021) (holding that because *Brandenburg* concerned an “organizers’ meeting” and the speech was protected, this provision of the statute was unconstitutional).

¹⁴⁵ *White v. Lee*, 227 F.3d 1214, 1228 (9th Cir. 2000).

¹⁴⁶ See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (citing *Terminiello v. Chicago*, 337 U.S. 254, 270 (1949)); see also *De Jonge v. Oregon*, 299 U.S. 353, 365 (1937).

officials.”¹⁴⁷ *Brandenburg* considered speech by a KKK leader who intended to advocate the use of violence by his own group against those who did not fit the Klan’s image of racial purity.¹⁴⁸ This is distinct from the use of phrases like “Black Lives Matter,” “All Cops Are Bastards,” and demands for police accountability. Though the risk of violence may be imminent, the intent of these expressions is the opposite.

While police violence may be a likely response when they are criticized, the application of the “fighting words” doctrine suggests that the importance of our right to criticize police outweighs their desire to defend their egos. Fighting words must be inherently likely to provoke violence from an ordinary citizen.¹⁴⁹ However, some courts hold police to a higher standard, and expect the police to exercise a greater level of restraint than an ordinary citizen.¹⁵⁰ Though some courts hold that threatening insults toward a police officer can constitute fighting words,¹⁵¹ others argue that their training should enable them to diffuse violent situations without retaliation.¹⁵² Part IV will evaluate potential remedies where police are unable to control their emotions or utilize their weaponry in a reasonable manner, as well as the immunity shield that often makes civil remedies inaccessible.

IV. Constitutional Remedies and The Immunity Obstacle

For centuries, the unspoken policy of responding to Black protest with force, and law enforcement’s passion for murdering Black people, has created an unchecked barrier to the First Amendment. Black protestors are often restricted improperly, while courts and police grant white supremacists broad

¹⁴⁷ *Sullivan*, 337 U.S. at 270.

¹⁴⁸ See *Brandenburg v. Ohio*, 395 U.S. 444, 444–45 (1969).

¹⁴⁹ *Cannon v. City & Cnty. of Denver*, 998 F.2d 867, 873 (10th Cir. 1993).

¹⁵⁰ *State v. Liebeguth*, 250 A.3d 1, 14 (Conn. 2020); see also *Lewis v. City of New Orleans*, 415 U.S. 130, 135 (1974) (Powell, J., concurring).

¹⁵¹ See, e.g., *State v. Griatzky*, 587 A.2d 234, 238 (Me. 1991) (holding that “abusive language challenging the officer’s authority and implicitly exhorting the assembled group to join in that challenge and to resist the order to disperse . . . presented a clear and present danger of an immediate breach of the peace even when directed toward a police officer”); *State v. York*, 732 A.2d 859, 861–62 (Me. 1999) (holding that calling court security officers “fucking assholes” and preparing to spit on the officer would “have a direct tendency to cause a violent response by an ordinary person”); See *State v. Clay*, No. CX-99-343, 1999 WL 711038, at *3 (Minn. Ct. App. Sept. 14, 1999) (“The district court found that . . . the appellant’s words were sufficiently egregious to provoke retaliatory police violence.”).

¹⁵² *H.N.P. v. State*, 854 So. 2d 630, 632 (Ala. Crim. App. 2003).

leeway.¹⁵³ Black civil rights actions have been sanctioned as acts of sedition, insurrection, and anti-government protest¹⁵⁴ while racial terrorists and white supremacists have gone unpunished.¹⁵⁵

The events discussed in Part II reveal that to be Black and in protest is to be perceived as a violent threat. To shout, “Black Lives Matter” seems akin to fighting words, nearly guaranteed to elicit a violent response from police.¹⁵⁶ But to place responsibility for the violent conduct on Black protestors or Black people is to blame the victims; a reasonable person, police or civilian, should not become inflamed with rage upon the sight of dark skin or the assertion that Black lives have value.

Existing First Amendment jurisprudence may protect Black protestors' rights through the chilling doctrine and subsequent First Amendment retaliation claims. Due to the patterned abuse of Black Americans by police since the inception of policing, the mere presence of law enforcement at Black protests may cause an unconstitutional chilling effect. This chill could give rise to a First Amendment retaliation claim¹⁵⁷ when police deploy violence in response to peaceful protestors' expressions. Further, many of the actions taken by law enforcement, coupled with governmental support of their actions, represent an unconstitutional “Heckler’s Veto.”¹⁵⁸ However, even if courts

¹⁵³ See *Brandenburg v. Ohio*, 395 U.S. 444 (1969); *Edwards v. South Carolina*, 372 U.S. 229, 229–35 (1963); see also *Virginia v. Black*, 538 U.S. 343 (2003).

¹⁵⁴ See *Black Panther Party v. Smith*, 661 F.2d 1243 (D.C. Cir. 1981), *cert. granted*, *judgment vacated sub nom. Moore v. Black Panther Party*, 458 U.S. 1118 (1982), and *cert. granted, judgment vacated*, 458 U.S. 1118 (1982).

¹⁵⁵ Angela A. Allen-Bell, *The Incongruous intersection of the Black Panther Party and the Ku Klux Klan*, 39 SEATTLE U. L. REV. 1157, 1180–81 (2016); see also James Forman Jr., *Juries and Race in the Nineteenth Century*, 113 YALE L.J. 895, 921–22 (2004). The Forman article reveals a pattern of KKK members openly utilizing their role as jurors to shield each other from criminal consequence. Noting the failure to punish violence against Black Americans, a North Carolina Judge stated “[t]he defect lies not so much with the courts as with the juries. You cannot get a conviction; you cannot get a bill found by the grand jury; or, if you do, the petit jury acquits the parties.” Senator John Sherman explained this phenomenon as a result of grand jurors’ biases, “[i]n nine cases out of ten the men who commit the crimes constitute or sit on the grand jury, either they themselves or their near relatives or friends, sympathizers, aiders, or abettors; and if a bill is found it is next to impossible to secure a conviction upon a trial at the bar. I have heard of no instance in North Carolina where a conviction of that sort has taken place.”

¹⁵⁶ See Toussaint, *supra* note 1, at 128, 143–61.

¹⁵⁷ See 42 U.S.C. § 1983.

¹⁵⁸ Patrick Schmidt, *Heckler’s Veto*, FIRST AMEND. ENCY., <https://www.mtsu.edu/first-amendment/article/968/heckler-s-veto> (last visited Dec. 21, 2021) (“A heckler’s veto occurs when the government accepts restrictions on speech because of the anticipated or actual reactions of opponents of the speech. .

find that police have violated Black protestors' First Amendment rights, police may be shielded by qualified immunity.¹⁵⁹ Part VI will address the potential for recourse under these doctrines and the obstacles put in place to prevent accountability and justice when police inevitably fail to utilize their power and authority properly.

A. *The Chilling Effect Doctrine*

Though the Supreme Court has applied the “chilling effect” doctrine to many other Constitutional rights, they have yet to fully extend this analysis to freedom of assembly and the right to protest.¹⁶⁰ Law enforcement is not permitted to arrest individuals to thwart their attempt to express First Amendment rights.¹⁶¹ Police cannot arrest protestors for disorderly conduct where they have not been disorderly, nor can protestors be blamed for the unruly behavior of onlookers.¹⁶² Mere threats, without any action, have been held to chill First Amendment rights,¹⁶³ including mere threats of criminal sanctions or arrest.¹⁶⁴

In order to succeed in any claim alleging a violation of First Amendment rights, there must be an injury in fact as a result of the defendant's actions.¹⁶⁵ The loss of “First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.”¹⁶⁶ The Supreme Court has clarified that abstract injuries are insufficient, stating, “[t]he plaintiff must show that he ‘has sustained or is immediately in danger of sustaining some direct injury’ as the result of the

. . . [T]he Constitution requires the government to control the crowd . . . rather than to suppress the speech. . . . [T]he Supreme Court has tended to protect the rights of speakers against such opposition[,] . . . finding hecklers' vetoes inconsistent with the First Amendment.”)

¹⁵⁹ See generally *Pearson v. Callahan*, 555 U.S. 223 (2009); *Corbitt v. Vickers*, 929 F.3d 1304 (11th Cir. 2019); *Nelson v. City of Battle Creek*, 802 F. App'x. 983 (6th Cir. 2020).

¹⁶⁰ Kia Rahnama, *How the Supreme Court Dropped the Ball on the Right to Protest*, POLITICO (Aug. 17, 2020, 5:28 PM), <https://www.politico.com/news/magazine/2020/08/17/portland-crackdown-freedom-of-assembly-supreme-court-397191>.

¹⁶¹ *Kelly v. Page*, 335 F.2d 114, 119 (5th Cir. 1964).

¹⁶² *Gregory v. City of Chicago*, 394 U.S. 111, 112 (1969).

¹⁶³ *Brodheim v. Cry*, 584 F.3d 1262, 1270 (9th Cir. 2009).

¹⁶⁴ *NAACP v. Button*, 371 U.S. 415, 433 (1963) (holding that the First Amendment is so delicate that a mere threat of criminal sanctions may deter the exercise of this right almost as much as actual sanctions).

¹⁶⁵ Michael N. Dolich, *Alleging a First Amendment “Chilling Effect” to Create a Plaintiff's Standing: A Practical Approach*, 43 DRAKE L. REV. 175, 176 (1994).

¹⁶⁶ *Associated Press v. Otter*, 682 F.3d 821, 826 (9th Cir. 2012) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)).

challenged official conduct and the injury or threat of injury must be ‘real and immediate,’ not ‘conjectural’ or ‘hypothetical.’”¹⁶⁷

The Court has indicated that a “subjective” chilling effect that does not allege “specific present objective harm” or a threat of specific future harm is insufficient.¹⁶⁸ Where protesters are concerned, First Amendment violations have been found where a police power, such as warning, citation, or arrest, was used to prevent or deter protestors protected political expression, and deterrence was a motivating factor in law enforcement conduct.¹⁶⁹

Threats must be imminent, but they need not be explicit.¹⁷⁰ Implicit threats to expressive freedoms, causing an individual to be deterred from exercising their rights, can be sufficient to show a First Amendment violation.¹⁷¹ Based on this precedent, the pattern of law enforcement response to Black protest may constitute an implicit threat to First Amendment rights. Many law enforcement groups have substituted reason for implied, if not explicit, racism when determining the appropriate use of force.¹⁷²

In analyzing police force in response to protest, Amnesty International contends that “[u]sing heavy-duty riot gear and military-grade weapons and equipment to police largely peaceful demonstrations intimidates protesters exercising their right to peaceful assembly.”¹⁷³ Lawmakers also have expressed concern that police use of surveillance technologies—like facial recognition software to identify protestors—will also cause a chill, noting that the goal of surveillance systems is to make an adversary feel that he “‘is constantly looking over his shoulder, sure he is being watched, followed, tracked, and heard.’”¹⁷⁴

¹⁶⁷ *City of Los Angeles v. Lyons*, 461 U.S. 95, 101–02 (1983).

¹⁶⁸ *See Laird v. Tatum*, 408 U.S. 1, 13–14 (1972).

¹⁶⁹ *See Mendocino Env’t Ctr. v. Mendocino Cnty.*, 192 F.3d 1283, 1300 (9th Cir. 1999); *see also Sloman v. Tadlock*, 21 F.3d 1462, 1469 (9th Cir. 1994).

¹⁷⁰ *See Levin v. Harleston*, 966 F.2d 85, 89–90 (2d. Cir. 1992).

¹⁷¹ *Id.*

¹⁷² *See AMNESTY INT’L*, *supra* note 91, at 6.

¹⁷³ *Id.* at 24.

¹⁷⁴ Letter from Anna G. Eschoo, Member of Congress, et al., to the Private and Civil Liberties Oversight Board 5 (Oct. 15, 2020) (quoting ARTHUR HOLLAND MICHEL, EYES IN THE SKY: THE SECRET RISE OF GORGON STARE AND HOW IT WILL WATCH US ALL 204 (2019)), <https://eshoo.house.gov/sites/eshoo.house.gov/files/Eshoo-Rush-Wyden%20ltr%20to%20PCLOB%20re%20protests%20-%2010.15.20.pdf>.

Black Americans and non-Black people who want to protest for Black civil rights must choose between silence and the nearly inevitable risk of police violence. Based on the historical relationship between police and Black Americans, police presence alone—even without military vehicles and weaponry—is enough to impermissibly chill the rights of Black protestors, especially when protesting police actions. Where the fear alone is not enough to stifle the invocation of their First Amendment rights, police retaliate, punishing protestors with violence and arrest.¹⁷⁵

B. First Amendment Retaliation

Protestors who have been treated unconstitutionally by police *because* of their protected expressions also have the option of suing for First Amendment Retaliation or a § 1983 claim.¹⁷⁶ Public officials, including law enforcement, are prohibited from retaliating against those who criticize them.¹⁷⁷ Where law enforcement is clearly restricting speech because they are personally offended, protestors may be able to seek civil remedies.¹⁷⁸

A valid First Amendment Retaliation claim must show that the activities were constitutionally protected, the actions taken by the defendant(s) would have a “chilling effect” on a person of ordinary firmness in the continuation of these protected activities, and the defendant’s actions were motivated by the protected activities.¹⁷⁹ “‘Ordinary firmness’ is an objective standard that will not ‘allow a defendant to escape liability for a First Amendment violation merely because an unusually determined plaintiff persists in his protected activity.’”¹⁸⁰ Courts have held that even where protestors continue to protest despite

¹⁷⁵ See generally, *People v. City of New York*, No. 21-CV-322, 2021 WL 141595 (S.D.N.Y. Jan. 14, 2021); see also *supra* Part I.C; see *infra* Part V.

¹⁷⁶ 42 U.S.C. § 1983 (“Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress[.]”); see *Pinard v. Clatskanie Sch. Dist.* 6J, 467 F.3d 755, 770 (9th Cir. 2006).

¹⁷⁷ *Trulock v. Freeh*, 275 F.3d 391, 405–06 (4th Cir. 2001).

¹⁷⁸ *Id.*

¹⁷⁹ *Pinard*, 467 F.3d at 770.

¹⁸⁰ *Index Newspapers v. City of Portland*, 480 F. Supp. 3d 1120, 1142 (D. Or. 2020) (quoting *Mendocino Env’t. Ctr. v. Mendocino County*, 192 F.3d 1283, 1300 (9th Cir. 1999)).

the excessive use of force by police, a chilling effect can still exist.¹⁸¹

C. *Hecklers in Blue*

When police are both the audience offended by protestors' speech and the government actors charged with maintaining peaceful protest, overzealous reactions by police may act as an impermissible "Heckler's Veto." The "Heckler's Veto" occurs where speech is restricted or punished because the content *may* offend the audience or invoke a violent response from a "hostile mob" of hecklers.¹⁸² The government cannot censor speech "unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest."¹⁸³ It seems that restricting protestors' speech because the police are likely to become violent in response would misplace the blame, allowing the hecklers to use the veto.

This concept was considered recently in *McKesson v. Doe*,¹⁸⁴ following a protest in response to the 2016 murder of Alton Sterling by police.¹⁸⁵ Protestors assembled at Baton Rouge City Hall, where police responded with militarized force.¹⁸⁶ One activist, DeRay McKesson, was later sued by a police officer who claimed that he "negligently staged the protest in a manner that caused him to be assaulted by a third party."¹⁸⁷

The Fifth Circuit held that although there is no general duty to protect others from the criminal acts of third parties, McKesson breached his "duty not to negligently precipitate the crime of a third party" because "a violent confrontation with a police officer was a foreseeable effect of negligently directing a protest."¹⁸⁸ The Supreme Court invalidated the Fifth Circuit's ruling before considering First Amendment implications.¹⁸⁹

¹⁸¹ See, e.g., *Downes-Covington v. Las Vegas Metro. Police Dep't*, No. 220CV01790GMNDJA, 2020 WL 7408725, at *7 (D. Nev. Dec. 17, 2020).

¹⁸² *United States v. Rundo*, 990 F.3d 709, 719 (9th Cir. 2021); see also *Bennett v. Metro. Gov't of Nashville & Davidson County*, 977 F.3d 530, 544 (6th Cir. 2020).

¹⁸³ *Terminello v. Chicago*, 337 U.S. 1, 4 (1949) (applying the "Clear and Present Danger" test presented in *Schenck v. United States*, 249 U.S. 47, 52 (1919), to a heckler's veto).

¹⁸⁴ 141 S. Ct. 48 (2020).

¹⁸⁵ Tasnim Motala, "Foreseeable Violence" & Black Lives Matter, 73 STAN. L. REV. 61, 65–67 (2020).

¹⁸⁶ *Id.* at 65–66 (noting that the city ultimately paid cash settlements to 92 protestors who were unconstitutionally and often violently arrested).

¹⁸⁷ *McKesson*, 141 S. Ct. at 49.

¹⁸⁸ *Id.* (quoting *Doe v. McKesson*, 945 F.3d 818, 827 (5th Cir. 2019)).

¹⁸⁹ *Id.* at 51.

Though *McKesson* has yet to be revisited by the Fifth Circuit, this case illuminates the frightening possibility that protestors may be liable for injuries that result from violent interactions with police that are deemed “foreseeable.” As illustrated in Parts II and III, police violence is a foreseeable result of Black protests, but the “negligent protest” standard misplaces the blame. Any protestor engaging in constitutionally protected expression that offends police would risk liability, while police remain cloaked in immunity, even where they cause the most harm.

D. Qualified Immunity and Monell Liability

Protestors who seek civil remedies against law enforcement must defeat the incredible barrier of qualified immunity. Qualified immunity shields government officials from civil liability unless their actions have clearly violated a constitutional right.¹⁹⁰ Courts must consider “(1) whether the facts alleged or shown by the plaintiff establish a constitutional violation and (2) whether the right at issue was clearly established at the time” in determining whether qualified immunity applies.¹⁹¹

In cases involving police, the Supreme Court has instructed that “[t]he relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.”¹⁹² Courts can determine whether a constitutional right has been “clearly established” before even reviewing the facts of the case.¹⁹³ This bar is incredibly high and has allowed police officers to evade consequences for horrendous conduct, like shooting a ten-year-old accidentally while attempting to shoot an unthreatening dog¹⁹⁴ and shooting a fourteen-year-old child who had just dropped a BB gun and raised his hands.¹⁹⁵

Further, under the *Monell* doctrine, government employers cannot be held liable for their employees’ actions unless they result from an official government policy or custom.¹⁹⁶ Since governments are unlikely to have official policies condoning

¹⁹⁰ 42 U.S.C.A. § 1983.

¹⁹¹ *Saucier v. Katz*, 533 U.S. 194, 201 (2001).

¹⁹² *Id.*

¹⁹³ *See Pearson v. Callahan*, 555 U.S. 223, 245 (2009).

¹⁹⁴ *See Corbitt v. Vickers*, 929 F.3d 1304, 1323 (11th Cir. 2019).

¹⁹⁵ *See Nelson v. City of Battle Creek*, 802 F. App’x. 983, 992 (6th Cir. 2020).

¹⁹⁶ *See Monell v. Dep’t. of Soc. Servs.*, 436 U.S. 658, 690 (1978).

police misconduct and brutality, this standard is limiting. Courts have also construed the “custom” qualification narrowly.¹⁹⁷ The plaintiff must show that there was a persistent pattern of unconstitutional activity rooted in either official or de facto policy, that the municipality was aware and approved of this activity, or that their deliberate indifference amounted to approval, and that the municipalities’ apparent custom was the “moving force” behind the constitutional violation.¹⁹⁸

The Sixth Circuit recently applied *Monell* after nineteen-year-old Darius Stewart was shot and killed by a white police officer in Memphis.¹⁹⁹ The Court held that Memphis could not be held responsible for Stewart’s death and that excessive force was not used often enough to demonstrate a custom of tolerance.²⁰⁰ While excessive force, in general, may not have been customary, data indicates that Memphis police were seven times more likely to use deadly force against Black citizens than their white counterparts.²⁰¹

V. Black Lives Matter Protests in 2020

Worldwide protests against police brutality began in May of 2020, after a Minneapolis police officer murdered George Floyd, continuing in some cities for months.²⁰² Police arrived *en masse* to the protests armed with riot gear, shields, and batons as a “first level of response,” not in reaction or proportion to any specific violence.²⁰³ Several organizations released Safe Protest Guides throughout the summer because “incidents of police brutality are common and often targeted or unprovoked.”²⁰⁴ In the first ten

¹⁹⁷ *Id.* at 691.

¹⁹⁸ *Thomas v. City of Chattanooga*, 398 F.3d 426, 429 (6th Cir. 2005) (quoting *Doe v. Claiborne Cnty.*, 103 F.3d 495, 508 (6th Cir. 1996)).

¹⁹⁹ *Stewart v. City of Memphis*, 788 F. App’x. 341, 342 (6th Cir. 2019).

²⁰⁰ *Id.* at 347.

²⁰¹ *Memphis Police Department*, POLICE SCORECARD, <https://policescorecard.org/tn/police-department/memphis> (last visited Oct 25, 2021).

²⁰² Ashley Westerman, *In 2020, Protests Spread Across The Globe With A Similar Message: Black Lives Matter*, NPR (Dec. 30, 2020, 5:04 AM), <https://www.npr.org/2020/12/30/950053607/in-2020-protests-spread-across-the-globe-with-a-similar-message-black-lives-matt>.

²⁰³ AMNESTY INT’L, *supra* note 91, at 23.

²⁰⁴ Courtney Lindwall, *How to Protest Safely*, NRDC (Nov. 5, 2020), <https://www.nrdc.org/stories/how-protest-safely>. See *Safety Tips for Protesters*, STUDENT LIFE DEAN OF STUDENTS UNIV. OF MICH., <https://deanofstudents.umich.edu/article/safety-tips-protesters> (last visited Nov. 19, 2021); *Protests Tips and Resources*, NYU LAW,

days, Amnesty International recorded 125 incidents of police violence against peaceful protestors, journalists, and bystanders across the United States;²⁰⁵ after five months, there were at least 950.²⁰⁶

This Part will examine lawsuits filed in response to police misconduct during the 2020 protests. The initiation of and response to Black Lives Matter protests mirrors the historical struggle for Black civil rights: a cycle of violence by government actors, protest, more violence, incremental progress, and retraction. The treatment of the protestors and these cases, by both the police and the courts, makes one thing clear: our nation's commitment to the First Amendment is far weaker than her commitment to oppressing Black citizens and protecting those who murder them.

A. In Re: New York City Policing During Summer 2020

In just the first month of protests, 1,646 allegations of police misconduct were reported in New York City.²⁰⁷ Police beat protestors to the point of nerve damage in some cases, and arrested thousands on minor charges such as “failing to disperse.”²⁰⁸ The city's Civilian Complaint Review Board recommended discipline or termination of 65 officers.²⁰⁹ In response, the president of NYPD's most prominent union complained that dozens of cops were injured and were being made into scapegoats.²¹⁰

Several § 1983 suits were filed, against the city and several officials, claiming that “the NYPD used excessive force to subdue protesters and observers and executed mass arrests without probable cause” in reaction to the content of protesters’

<https://www.law.nyu.edu/centers/race-inequality-law/protest-tips> (last visited Nov. 19, 2021); *Tips for Protesting Safely During a Pandemic*, GOOP, <https://goop.com/wellness/health/how-to-protest-safely-during-a-pandemic/> (last visited Nov. 19, 2021).

²⁰⁵ AMNESTY INT'L, *supra* note 91, at 6.

²⁰⁶ Tobi Thomas et al., *Nearly 1,000 Instances of Police Brutality Recorded in US Anti-racism Protests*, THE GUARDIAN (Oct. 29, 2020, 11:00 PM), <https://www.theguardian.com/us-news/2020/oct/29/us-police-brutality-protest>.

²⁰⁷ *Id.*

²⁰⁸ Derek Hawkins, *Dozens of NYPD Officers Should be Disciplined for Misconduct at George Floyd Protests, Watchdog Says*, WASH. POST (Oct. 19, 2021), <https://www.washingtonpost.com/nation/2021/10/19/nypd-officers-george-floyd-protests-discipline/>.

²⁰⁹ *Id.*

²¹⁰ *Id.*

speech.²¹¹ In anticipation of a *Monell* defense, plaintiffs alleged that these violations resulted from official city customs and policies.²¹²

Though this case is still developing at the time of publication, the court has found support for the allegation that the use of excessive force and mass arrest was part of the NYPD's de facto policies.²¹³ In refusing to dismiss these claims, the court referenced nearly identical NYPD responses to protests from 2000–2011 and significant documentation of their misconduct during the 2020 protests.²¹⁴ In addition, because this behavior was persistent and long-standing, the Mayor and NYPD officials could be imputed with constructive knowledge.²¹⁵

Further, the court found failures to train or discipline police and statements by Mayor De Blasio and Commissioner Shea condoning the NYPD's misconduct, both historically and during the 2020 protests, supported a finding of deliberate indifference.²¹⁶ However, considering the evidence informing the denial of the same claim in *Stewart v. City of Memphis*,²¹⁷ this could be a Pyrrhic victory.

In *Stewart*, the selective application of force against Black citizens was insufficient to show a custom of excessive force in general.²¹⁸ Here, it appears the custom was imputed by evidence of excessive force applied to protestors regardless of race. For example, in 2004, while serving as a deputy chief, Terrence Monahan directed the use of excessive force and baseless arrest against mostly white protestors during the Republican National Convention.²¹⁹ Instead of being disciplined, Monahan was promoted to Chief of the department and used the same tactics

²¹¹ This case was a combination of six actions filed against the NYPD, Police Commissioner Dermot Shea, NYPD Police Chief Terence Monahan, Mayor Bill DeBlasio, and the City of New York. Excessive force claims included Kettling, which involves police surrounding and trapping protestors without providing warnings or opportunities to disperse, and beating protestors with batons, shoving and pinning them to the ground with bicycles, and use of force to arrest innocent bystanders. *In re New York City Policing During Summer 2020 Demonstrations*, 548 F.Supp.3d 383, 394-95 (S.D.N.Y. 2021).

²¹² *Id.* at 400-07.

²¹³ *Id.* at 400-01.

²¹⁴ *Id.* at 402.

²¹⁵ *Id.*

²¹⁶ *Id.* at 402-05.

²¹⁷ See *supra* notes 199–201 and accompanying text.

²¹⁸ See *supra* notes 199–201 and accompanying text.

²¹⁹ *In re: New York City Policing*, 548 F.Supp.3d at 405.

in 2020, resulting in the case at hand.²²⁰ Courts have yet to identify a demonstrable pattern of racially-biased police behavior as a “custom” for *Monell* purposes.

B. Black Lives Matter Seattle-King County v. City of Seattle

Protests in Seattle began just four days after George Floyd’s murder.²²¹ Both the participants and police agree that these protests were largely peaceful.²²² Still, “less than lethal” crowd control tactics were employed to a shocking degree.²²³ One Seattle police officer was recorded kneeling on a protestor’s neck, the same technique that killed Floyd.²²⁴ Footage showed another officer spraying a seven-year-old boy with mace.²²⁵ Police later arrested the bystander who filmed the incident.²²⁶

On June 5, the Seattle Police Department (SPD) banned tear gas, though officers violated this ban within days.²²⁷ One protestor attempted to speak with police officers to de-escalate tensions on June 7 and was shot in the chest by a flash grenade while kneeling twenty feet away.²²⁸ When she was brought into an aid station, clearly marked by red crosses and signs, police fired tear gas, more flash grenades, and pepper balls inside.²²⁹

In a series of suits filed against the city of Seattle and SPD by Black Lives Matter Seattle-King County, plaintiffs sought TROs to prevent the use of violent crowd control tactics and accountability where police violate those orders.²³⁰ In *Black Lives Matter Seattle-King County v. City of Seattle I*, plaintiffs filed suit

²²⁰ *Id.*

²²¹ Black Lives Matter Seattle-King Cnty. v. City of Seattle I, 466 F. Supp. 3d 1206, 1211 (W.D. Wash. 2020).

²²² *Id.*

²²³ Vanessa Romo, *Seattle Police Ruled in Contempt for Firing Less Lethal Weapons at BLM Protesters*, NPR (December 8, 2020 10:38 PM), <https://www.npr.org/2020/12/08/944479936/seattle-police-ruled-in-contempt-for-firing-less-lethal-weapons-at-blm-protester>.

²²⁴ Ed Mazza, *Police Caught on Camera Pressing Knee Into Neck During Seattle Arrest*, HUFFPOST (June 1, 2020, 4:20 AM), https://www.huffpost.com/entry/seattle-police-knee-in-neck_n_5ed4763cc5b6c0af65e7e0bc.

²²⁵ Brazile, *supra* note 10.

²²⁶ *Id.*

²²⁷ Black Lives Matter Seattle-King Cnty. v. City of Seattle I, 466 F. Supp. 3d 1206, 1211 (W.D. Wash. 2020).

²²⁸ AMNEST INT’L., *supra* note 91, at 22 (reporting that a student, Aubreanna Inda, suffered multiple cardiac arrests, and needed to be resuscitated multiple times in the field and later in the hospital).

²²⁹ *Black Lives Matter Seattle-King Cnty. I*, 466 F. Supp. 3d at 1211.

²³⁰ *Id.*; Benton v. City of Seattle, No. 2:20-cv-01174-RA, 2020 WL 4584214, at *1 (W.D. Wash. Aug. 10, 2020).

claiming that due to SPD's actions, they were deprived of the right to protest free from excessive force in violation of the First and Fourth Amendments.²³¹ Video evidence showed that protestors were engaged in constitutionally protected activities, such as the peaceful protest against police brutality conducted within the public fora.²³² Plaintiffs sought to enjoin the use of "less-lethal" weapons as methods of crowd control, including pepper spray, tear gas, rubber bullets, and flash-bang grenades.²³³

The court agreed that public interest was strongly in favor of the TRO.²³⁴ However, the court's order permitted officers to take "necessary, reasonable, proportional, and targeted action to protect against a specific imminent threat of physical harm" or "to respond to specific acts of violence or destruction of property."²³⁵ This holding left incredible discretion in the hands of individual officers, much like standards for use of force.²³⁶

In *Benton v. City of Seattle*, the same plaintiffs sought to hold SPD in contempt for violating the TRO when they "suddenly and without warning" fired less-lethal projectiles into a crowd shortly after the TRO was granted.²³⁷ The plaintiffs also requested an outright ban on the use of certain less lethal crowd control measures.²³⁸ The court denied this motion, stating that after the TRO granted *Black Lives Matter v. City of Seattle I*, the plaintiffs have more safeguards, thus diminishing the necessity of relief.²³⁹ However, the court did amend the TRO to include specific protections for journalists, medics, and legal observers.²⁴⁰

Following further displays of excessive force during protests, four in August in September, the plaintiffs filed suit claiming First Amendment retaliation and excessive force, again seeking

²³¹ *Black Lives Matter Seattle-King Cnty.*, 466 F. Supp. 3d at 1211.

²³² *Id.* at 1213 ("The video evidence reveals that many of these protests occurred on Seattle streets, often right outside the police precinct on Capitol Hill On this record, their protests have been passionate but peaceful, and they must thus be protected even if they stand in opposition to the police.").

²³³ *Id.*

²³⁴ *Id.*

²³⁵ *Id.* at 1216.

²³⁶ For a discussion of discretion in the use of force context, see Dehn, *supra* note 93.

²³⁷ *Benton v. City of Seattle*, No. 2:20-cv-01174-RA, 2020 WL 4584214, at *2 (W.D. Wash. Aug. 10, 2020).

²³⁸ *Id.* at *4.

²³⁹ *Id.*

²⁴⁰ *Id.* at *3-4.

to hold SPD in contempt for violating the TRO.²⁴¹ The City claimed the court should apply *Monell* standards to shield them from liability for officers' contempt.²⁴² In assessing the City's motion, the court disagreed, reasoning that both the City and officers were subject to the TRO, and therefore the officers' actions could not be attributed to city policy.²⁴³ The court ultimately found clear and convincing evidence of contempt, but only in four of the many alleged instances.²⁴⁴ In one incident, an officer sprayed OC for "no apparent reason" at a protestor with their back turned.²⁴⁵ In the three others instances, officers indiscriminately threw blast balls into the crowd, and in two cases, those officers did not account for their uses of force in their reports.²⁴⁶

C. Detroit Will Breathe v. City of Detroit

As in Seattle, protests began in Detroit days after Floyd's murder and continued for months.²⁴⁷ The protests were described as rarely violent by both observers and Detroit's Chief of Police,²⁴⁸ yet police responded with shocking displays of force, such as driving a police SUV through a crowd, injuring several demonstrators.²⁴⁹ During another event that included speakers, a DJ, and a march, police descended in riot gear, arresting 44 individuals because the participants "failed to disperse."²⁵⁰ After

²⁴¹ Black Lives Matter Seattle-King Cnty. v. City of Seattle II, 505 F. Supp. 3d 1108, 1112 (W.D. Wash. 2020).

²⁴² *Id.* at 1116.

²⁴³ *Id.* at 1117.

²⁴⁴ *Id.* at 1118–20, 1122–24 (finding four instances of contempt, noting that several other instances were "arguable," though insufficient for the "clear and convincing" standard).

²⁴⁵ *Id.* at 1119–20.

²⁴⁶ *Id.* at 1123.

²⁴⁷ Ryan Garza, *We've Had 100 Days of Detroit Protests. And it's 'Just the Beginning.'*, DETROIT FREE PRESS, <https://www.freep.com/in-depth/news/2020/09/04/detroit-protests-police-brutality-george-floyd/3450280001/> (Sept. 5, 2020, 3:26 PM).

²⁴⁸ Samuel Dodge, *Michigan's Summer of Protests was Often Tense and Tumultuous, But Rarely Violent*, MLive Analysis Shows, MLIVE, <https://www.mlive.com/public-interest/2020/10/michigans-summer-of-protests-was-often-tense-and-tumultuous-but-rarely-violent-mlive-analysis-shows.html> (Oct. 12, 2020, 9:45 AM).

²⁴⁹ *Id.*

²⁵⁰ M.L. Eric & Meredith Spelbring, *Detroit Police Arrest 44 During Downtown Protests After Weeks of Calm*, DETROIT FREE PRESS, <https://www.freep.com/story/news/local/michigan/detroit/2020/08/23/detroit-protest-downtown-police-arrests/3423820001/> (Aug. 24, 2020, 6:22 PM) (showing a photo of three officers holding one protestor down while another sprayed their face with an aerosol substance.).

more than a year, only two individual Detroit Police Department (DPD) officers have faced consequences for their actions.²⁵¹

In *Detroit Will Breathe v. City of Detroit*, Detroit protestors sought a TRO against the crowd control tactics employed by police and asserted that actions by police constituted First Amendment Retaliation and several Fourth Amendment violations.²⁵² Plaintiffs alleged that police responded to peaceful demonstrations with “beatings, tear gas, pepper spray, rubber bullets, sound cannons, flash grenades, chokeholds, and mass arrests without probable cause.”²⁵³

The court found that plaintiffs were likely to succeed on the merits of their retaliation claim.²⁵⁴ The protestors were engaged in a constitutionally protected activity, and at least one Plaintiff stated that “they have been deterred from attending further demonstrations . . . after being beaten and detained while acting as a medic at a protest,” creating a strong likelihood that an impermissible chill occurred.²⁵⁵ Further, the court held that the indiscriminate use of tear gas and violence alone may be enough to support an inference that officers were motivated by the protected activity, though statements by police such as “stop protesting or we will f**k you up” removed any need to infer.²⁵⁶

The court granted a TRO, enjoining the police from participating in conduct harmful to peaceful protestors’ constitutional rights,²⁵⁷ and expressly prohibited DPD from “ramming with a vehicle any individual attending a demonstration,” and “arresting any demonstrators *en masse* without probable cause.”²⁵⁸ Yet again, police attempted to modify the TRO because they felt these limitations had

²⁵¹ Phil Mayor, *This Video Shows Shocking Scenes of Police Violence During Last Year’s Protests*, DETROIT FREE PRESS (Oct. 2, 2021, 8:00 AM), <https://www.freep.com/story/opinion/contributors/2021/10/02/detroit-will-breathe-black-lives-matter-police-reform/8245032002/> (noting that one officer faced consequences for shooting identified reporters with rubber bullets, and another faced consequences for using bad language while spraying a woman in the face with pepper spray; the officer was not punished for the use of pepper spray).

²⁵² *Breathe v. City of Detroit*, 484 F. Supp. 3d 511, 515 (E.D. Mich. 2020).

²⁵³ *Id.* at 515.

²⁵⁴ *Id.* at 518.

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ *Id.* at 520.

²⁵⁸ *Id.*

“emboldened” protestors to use violence.²⁵⁹ In denying this request, the court noted that they had cited only two examples of “violence” that occurred after the TRO was issued: protestors spray painted a statute and chanted on a restaurant patio.²⁶⁰

D. Portland, Oregon

The Department of Homeland Security (DHS) secretly deployed 755 federal agents into Portland, Oregon under the mission “Operation Diligent Valor” in response to BLM protests.²⁶¹ The Mayor of Portland decried this deployment as an abuse of federal power and stated that it would escalate the situation further.²⁶² Videos of protestors being forced into unmarked vehicles by officers without badges or identifying uniforms were widely shared.²⁶³ Of the 100 people reportedly arrested by federal agents, 74 were charged—42 of those charges were misdemeanors, and 11 were mere citations.²⁶⁴

In *Index Newspapers v. Portland*, Plaintiffs filed a class-action suit against the city of Portland, DHS, and U.S. Marshals alleging First Amendment retaliation, Fourth Amendment violations and sought a preliminary injunction.²⁶⁵ Defendants

²⁵⁹ *Breathe v. City of Detroit*, No. 20-12363, 2020 WL 8575150, at *1 (E.D. Mich. Sept. 16, 2020).

²⁶⁰ *Id.*; see also *Breathe v. City of Detroit*, 524 F. Supp. 3d 704, 709–11 (E.D. Mich. 2021). The City of Detroit later filed an unsuccessful counterclaim for civil conspiracy, alleging protestors “conspired with one another with the intent to and for the illegal purpose of disturbing the peace, engaging in disorderly conduct, inciting riots, destroying public property, resisting or obstructing officers in charge of duty, and committing acts of violence against” DPD officers. Unsurprisingly, the activities of the protestors did not amount to civil conspiracy, and the court held that the City failed to establish any essential element of their claim. *Breathe*, 524 F. Supp. 3d at 710–11.

²⁶¹ OFF. OF THE INSPECTOR GEN., DHS HAD AUTHORITY TO DEPLOY FEDERAL LAW ENFORCEMENT OFFICERS TO PROTECT FEDERAL FACILITIES IN PORTLAND, OREGON, BUT SHOULD ENSURE BETTER PLANNING AND EXECUTION IN FUTURE CROSS-COMPONENT ACTIVITIES 6–9 (2021), <https://www.oig.dhs.gov/sites/default/files/assets/2021-04/OIG-21-31-Mar21.pdf>; see also Gabriella Borter, *Court Documents Reveal Secretive Federal Unit Deployed for “Operation Diligent Valor” in Oregon*, REUTERS (July 22, 2020, 4:05 PM), <https://www.reuters.com/article/us-global-race-portland-valor-idUSKCN24N2SH>.

²⁶² Borter, *supra* note 261.

²⁶³ *Id.*

²⁶⁴ Ryan Lucas, *Review of Federal Charges in Portland Unrest Shows Most are Misdemeanors*, NPR (Sept. 5, 2020), <https://www.npr.org/2020/09/05/909245646/review-of-federal-charges-in-portland-unrest-show-most-are-misdemeanors>.

²⁶⁵ *Index Newspapers v. City of Portland*, 480 F. Supp. 3d 1120, 1124 (D. Or. 2020); see also *Rosenblum v. Does 1-10*, 474 F. Supp. 3d 1128 (D. Or. 2020). In this case, Oregon Attorney General Ellen Rosenblum also filed suit against the DHS alleging

conceded that the Plaintiffs, as clearly identifiable news personnel and legal observers documenting the protests, were engaged in activities protected by the First Amendment for the purposes of a retaliation claim.²⁶⁶ Though the Defendants claimed that no chilling effect occurred because the Plaintiffs intended to continue reporting on protests, the court held that subjective persistence does not defeat the objective chilling requirement,²⁶⁷ especially where some stated that they did not return due to fear for their personal safety.²⁶⁸

In holding the final element of a retaliation claim was likely met, the court stated that the Plaintiff's conduct likely motivated the improper force, due to substantial evidence that the police specifically targeted non-participant bystanders.²⁶⁹ Police shot one member of the press, standing far away from the protestors, after he repeatedly identified himself.²⁷⁰ After officers fired a less-lethal munition, an officer fired another munition directly at a journalist recording the events.²⁷¹ In another incident, a federal officer sprayed mace in the faces of clearly identified legal observers from just a few feet away.²⁷²

Defendants, alluding to *Monell*, claimed to have a formal policy of supporting First Amendment Rights,²⁷³ though even their own witnesses testified that their conduct and use of force was inappropriate.²⁷⁴ The court did not address *Monell* directly but held that the Defendants could not hide behind a formal policy they clearly do not conform to in practice.²⁷⁵ Ultimately,

that the fear of being kidnapped by unidentified federal agents created a chilling effect on citizens' First Amendment Rights, but the court held that she lacked standing. *Does 1-10*, 474 F. Supp. 3d at 1137.

²⁶⁶ *Index Newspapers*, 480 F. Supp. 3d at 1142; see also *United States v. Sherman*, 581 F.2d 1358, 1360 (9th Cir. 1978).

²⁶⁷ *Index Newspapers*, 480 F. Supp. 3d at 1142.

²⁶⁸ *Id.* at 1143 (commenting on the situation, one reporter noted "I do not intend to continue covering the protests in Portland after tonight, in part because I am fearful that federal agents will injure me even more severely than they did on the night of July 19 and morning of July 20 when they intentionally shot at my face, twice, when I was not even near any protestors. . . . Because of how federal agents treated me, I have stopped covering the Portland protests.").

²⁶⁹ *Id.*

²⁷⁰ *Id.*

²⁷¹ *Id.*

²⁷² *Id.* at 1142–43.

²⁷³ *Id.* at 1145.

²⁷⁴ *Id.*

²⁷⁵ *Id.*

the court granted a lengthy yet limited injunction protecting the legal observers and press and the right to public access.²⁷⁶

The injunction was abruptly appealed by federal officials, claiming that First Amendment rights were not violated, protestors activities were not a motivating factor in their use of force, and that legal observers have no right of access to the streets and sidewalks where protests are staged if Federal Defendants order their dispersal.²⁷⁷ The court held that based on “powerful evidence of the Federal Defendants’ ongoing, sustained pattern of conduct that resulted in numerous injuries to members of the press,” the Plaintiffs’ First Amendment rights were violated.²⁷⁸ Further, the court noted that the breadth of evidence that many plaintiffs were standing nowhere near protestors, clearly marked as “Press,” and observing and recording the Federal Defendants when police deployed excessive force, the Plaintiffs were likely to succeed in alleging First Amendment Retaliation.²⁷⁹

Applying *Press-Enterprise II*, the court found that the right of access is wholly unrelated to an individual’s occupation and that to exclude the media from public fora is especially hazardous to the public interest.²⁸⁰ The court astutely set this situation in context, noting that “the public became aware of the circumstances surrounding George Floyd’s death because citizens standing on a sidewalk exercised their First Amendment rights and filmed a police officer kneeling on Floyd’s neck until he died,” further underscoring the importance of access to this type of public space.²⁸¹

VI. Conclusion

The 2020 Black Lives Matter protests—and every Black civil rights protest in our history—have made one thing abundantly obvious: police presence and police behavior has an inherent chilling effect on the First Amendment Rights of Black Americans. It is important to recall that continued protest does

²⁷⁶ See *id.* at 1155–56.

²⁷⁷ *Index Newspapers v. United States Marshals Serv.*, 977 F.3d 817, 825 (9th Cir. 2020).

²⁷⁸ *Id.* at 826.

²⁷⁹ *Id.* at 829.

²⁸⁰ *Id.* at 830.

²⁸¹ *Id.* at 830–31.

not negate a claim that a chilling effect exists;²⁸² the fact that Black Americans continue protesting police injustice despite decades of violent police responses does not mean their rights were not chilled. Black Lives Matter protests have enraged and inflamed law enforcement so intensely that “militarized police response . . . has now become predictable, it is emblematic of how police generally respond to Black communities.”²⁸³ The fact that continuous police violence has necessitated continuous protest does not mean that their rights have been preserved or protected.

While a wider application of the chilling doctrine may be a remedy for protestors, further reform is necessary to prevent the murder and abuse of Black Americans by police in general.²⁸⁴ Some are calling for police departments to be defunded altogether.²⁸⁵ Amnesty International has demanded an end to the qualified immunity doctrine and demilitarization of police forces.²⁸⁶ Congress has heard legislative proposals seeking to limit qualified immunity and create a national police misconduct registry,²⁸⁷ and setting federal standards for the use of deadly force,²⁸⁸ though they have yet to become law.

Racist police violence against protestors, and Black Americans in general, continues despite decades of protest²⁸⁹ and international outrage.²⁹⁰ Though some have referred to the 2020

²⁸² *Index Newspapers v. City of Portland*, 480 F. Supp. 1120, 1142 (D. Or. 2020) (“‘Ordinary firmness’ is an objective standard that will not ‘allow a defendant to escape liability for a First Amendment violation merely because an unusually determined plaintiff persists in his protected activity.’” (quoting *Mendocino Env’t. Ctr. v. Mendocino County.*, 192 F.3d 1283, 1300 (9th Cir. 1999))).

²⁸³ Motala, *supra* note 185, at 72.

²⁸⁴ See *Solutions*, CAMPAIGN ZERO,

<https://campaignzero.org/solutions.html#solutionsoverview> (last visited Nov. 21, 2021).

²⁸⁵ *The Time Has Come to Defund the Police*, M4BL, <https://m4bl.org/defund-the-police/> (last visited Oct 25, 2021); Sam Levin, *These US Cities Defunded Police: “We’re Transferring Money to the Community,”* THE GUARDIAN (Mar. 11, 2021, 11:03 AM), <http://www.theguardian.com/us-news/2021/mar/07/us-cities-defund-police-transferring-money-community> (noting that several cities have answered the call to defund police, either reducing, reallocating, or eliminating the funding for their police departments.)

²⁸⁶ See *infra* note 290.

²⁸⁷ See George Floyd Justice in Policing Act, H.R. 1280, 117th Cong. (2021).

²⁸⁸ See Police Exercising Absolute Care with Everyone Act, H.R. 4359, 116th Cong. (2019).

²⁸⁹ See *supra* Parts II.C–D, V.

²⁹⁰ See *USA: End Unlawful Police Violence Against Black Lives Matter Protests*, AMNESTY INT’L (June 23, 2020, 9:30 AM), <https://www.amnesty.org/en/latest/news/2020/06/usa-end-unlawful-police->

protests as a “Racial Reckoning,” other believe this term is inaccurate because we have merely acknowledged – but have yet to address – these problems.²⁹¹ Through legislation and litigation, we may be able to end this chilling cycle, but if we are truly going to hold ourselves out as a nation committed to our constitutional principles, we must work toward a future where we are more consistent in our protection of principles than our racism.

violence-against-black-lives-matter-protests/; see also *Human Rights Council Calls on Top UN Officials to Take Action on Racist Violence*, U.N. NEWS (June 19, 2020), <https://news.un.org/en/story/2020/06/1066722>.

²⁹¹ Norris, *supra* note 6.