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TEAR GAS + WATER HOSES + DISPERSAL ORDERS: THE FOURTH AMENDMENT ENDORSES BRUTALITY IN PROTEST POLICING

KAREN J. PITA LOOR*

ABSTRACT

Thirty years ago, in Graham v. Connor*, the Supreme Court determined that excessive-force claims against police should proceed via the Fourth Amendment, which theoretically protects an individual against unreasonable siezures. However, the Court showed extreme deference to law enforcement's use of force by using a permissive reasonableness analysis that bestows on police great leeway to make quick split-second decisions in tense and rapidly evolving circumstances. The result is a test that, from its inception, has been too forgiving of police violence and misconduct. This lax reasonableness standard, along with qualified immunity principles, has shielded police from § 1983 civil rights litigation in excessive-force cases. However, the obstacles to relief are worse when the victim is not an individual in a regular street encounter but rather an activist during a protest—particularly an activist of color.*

This Essay explores this phenomenon through the lens of the Dundon v. Kirchmeier *litigation that stemmed from the 2016 police assault on indigenous protestors opposing the Dakota Access Pipeline. The encounter left 200 activists injured after law enforcement blasted them overnight with tear gas, special impact munitions, and fire hoses to remove them from the area. In refusing to enjoin the police's use of these weapons against water protectors, the judge questioned whether the Fourth Amendment even protected activists since police sought to disperse them, instead of arrest them. The judge then reasoned that even if the Fourth Amendment applied, the police use of force was reasonable considering the volatility of the crowd despite information that the plaintiffs themselves were peaceful—thus attributing the conduct of the entire group to the plaintiffs and erroneously amplifying the threat to law enforcement. Both lines of reasoning threaten the safety of protestors. The first removes from Fourth Amendment protection the emblematic protest scenario where police use*

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force to disperse protestors. The second turns the Constitution on its head, foregoing traditional Fourth Amendment analysis, which inquires whether the government intrusion is reasonable in light of the individual's actions, not the actions of the whole group in proximity to the individual. This is most dangerous to activists of color who are most likely to be perceived as threatening by police and to be the subject of their ire.

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INTRODUCTION

On November 20, 2016, members of the Oceti Šakowiŋ tribe and others stood on top of the Backwater Bridge together in prayer and protest in opposition to the construction of a 1172-mile-long pipeline that would transfer fuel from North Dakota to Illinois.[1] The water protectors[2] opposed the pipeline for both spiritual and environmental reasons.[3] They were unarmed.[4] Still, police descended upon the activists like a military unit—aboard armored vehicles and fully loaded with special impact munitions,[5] tear gas, water cannons, and fire hoses—to clear them from the area.[6] In the evening and early morning, law enforcement blasted activists with weapons and sprayed them with water for several hours in freezing temperatures.[7] At the conclusion of this assault, more than two hundred water protectors were injured,[8] including twenty-six who required hospitalization.[9] Injuries ranged from loss of vision and broken bones to hypothermia.[10]

This aggression was not aberrational or unique to indigenous protests of the Dakota Access Pipeline ("DAPL"). Just in the last five years, a sampling of protests by activists of color outraged by police killings of black men in Baltimore, Baton Rouge, and Ferguson prompted similarly violent, excessive,

[1] First Amended Civil Rights Class Action Complaint for Damages & Injunctive & Declaratory Relief at 2, 7-8, Dundon v. Kirchmeier, No. 1:16-cv-00406 (D.N.D. Feb. 27, 2018) [hereinafter *Dundon* Amended Complaint].

[2] Activists termed themselves "water protectors" instead of protesters. *See* Iyuskin American Horse, '*We Are Protectors, Not Protesters': Why I'm Fighting the North Dakota Pipeline*, THE GUARDIAN (Aug. 18, 2016, 11:06 AM), https://www.theguardian.com/us-news/2016/aug/18/north-dakota-pipeline-activists-bakken-oil-fields [https://perma.cc/5UM3-NZNV]; *see also Dundon* Amended Complaint, *supra* note 1, at 9.

[3] Lauren Donovan, *Sioux Spirit Camp to Protest Dakota Access Pipeline*, BISMARCK TRIB. (Mar. 29, 2016), https://bismarcktribune.com/news/state-and-regional/sioux-spirit-camp-to-protest-dakota-access-pipeline/article_4773fba1-f3bb-599d-96a4-7d1ddf30690e.html.

[4] *Dundon* Amended Complaint, *supra* note 1, at 3.

[5] *See* Dave Young, *Definition and Explanation of Less-Lethal*, POLICEONE.COM (Nov. 28, 2004), https://www.policeone.com/corrections-training/articles/94021-Definition-and-explanation-of-less-lethal/ [https://perma.cc/7W58-EPBE].

[6] *Dundon* Amended Complaint, *supra* note 1, at 1-2, 14.

[7] *Id.* at 3, 14-15, 38.

[8] *Id.* at 3. One police officer also reported a minor injury. *Id.* at 15.

[9] Julia Carrie Wong, *Dakota Access Pipeline: 300 Protesters Injured After Police Use Water Cannons*, THE GUARDIAN (Nov. 21, 2016, 5:07 PM), https://www.theguardian.com/us-news/2016/nov/21/dakota-access-pipeline-water-cannon-police-standing-rock-protest [https://perma.cc/G5FE-23HD].

[10] *Dundon* Amended Complaint, *supra* note 1, at 16, 22-24, 26-28, 30 (alleging plaintiffs suffered head wounds, concussions, lasting pain, difficulty walking, chemical burns, and broken bones).

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and militaristic law enforcement responses.[11] Protests by whites are treated differently. For example, one may recall the restrained law enforcement response to white, antigovernment militiamen who seized federal lands and property in Nevada and Oregon.[12] This disparate treatment is unfortunately in line with abusive and brutal policing in minority communities and with law enforcement officers' predisposition to view people of color—and consequently activists of color—as threatening or dangerous.[13] It is also nothing new. The American "system of free speech" has historically treated activists of color with hostility.[14] "In the 1960s, minorities sat in, were arrested and convicted[,] . . . demonstrated, sang 'We Shall Overcome,' and were arrested and convicted."[15] In his last speech before his assassination, Dr. Martin Luther

[11] *See* OFFICE OF CMTY. ORIENTED POLICING SERVS., U.S. DOJ, AFTER-ACTION ASSESSMENT OF THE POLICE RESPONSE TO THE AUGUST 2014 DEMONSTRATIONS IN FERGUSON, MISSOURI, at xvi, 53-60 (2015) [hereinafter DOJ FERGUSON REPORT], https://www.policefoundation.org/wp-content/uploads/2018/08/After-Action-Assessment-of-the-Police-Response-to-the-August-2014-Demonstrations-in-Ferguson-Missouri.pdf [https://perma.cc/DLV7-WZPF] (assessing police response in Ferguson and identifying themes that "permeated all aspects of the police response"); Conor Friedersdorf, *Police Face Civilian Protesters—Dressed for Military Combat*, THE ATLANTIC (Aug. 12, 2014), https://www.theatlantic.com/national/archive/2014/08/ferguson-police-face-civil-rights-protest-dressed-for-military-combat/375962/ (describing photograph of armed police in camouflage uniforms in Ferguson "squaring off against a nonviolent protestor in a t-shirt and jeans with both of his hands raised over his head"); Maya Lau, *Helping or Hurting? Police Deploy Military-Style Gear at Alton Sterling Protests in Baton Rouge*, THE ADVOCATE (July 11, 2016, 8:50 PM), https://www.theadvocate.com/baton_rouge/news/article_5b4c6f61-632a-5824-b271-38b2e2eda7ae.html [https://perma.cc/B7UJ-6MM8]; Collier Meyerson, *Protesters Against Police Violence Risk the Very Thing They're Fighting*, THE NATION (Dec. 1, 2017), https://www.thenation.com/article/protesters-against-police-violence-risk-the-very-thing-theyre-fighting/ (describing trauma caused by police response in Baton Rouge).

[12] *See* RYAN LENZ & MARK POTOK, S. POVERTY LAW CTR., WAR IN THE WEST: THE BUNDY RANCH STANDOFF AND THE AMERICAN RADICAL RIGHT 5, 9-11 (Heidi Beirich ed., 2014), https://www.splcenter.org/sites/default/files/d6_legacy_files/downloads/publication/war_in_the_west_report.pdf [https://perma.cc/7W8B-FP8N] (describing how officers withdrew without engaging in violence); Jennifer Williams, *The Oregon Militia Standoff, Explained*, VOX (Jan. 26, 2016, 10:30 PM), https://www.vox.com/2016/1/3/10703712/oregon-militia-standoff [https://perma.cc/7DHX-F4SB] (describing response to militia seizure of federal wildlife refuge in Oregon); *see also* Justin Hansford, *The First Amendment Freedom of Assembly as a Racial Project*, 127 YALE L.J.F. 685, 707-08 (2018).

[13] *See* LESLEY J. WOOD, CRISIS AND CONTROL: THE MILITARIZATION OF PROTEST POLICING 41-42 (2014) ("Police and intelligence agents are much more likely to label protesters from poor or racially marginalized communities, ideologically oriented protesters, and youthful protesters [as uncooperative or threatening].").

[14] RICHARD DELGADO & JEAN STEFANCIC, UNDERSTANDING WORDS THAT WOUND 207, 221 (2004).

[15] *Id.* at 207.

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King Jr. recalled confronting police water hoses and dogs in Birmingham, Alabama:

> And we just went on before the dogs and we would look at them; and we'd go on before the water hoses and we would look at it, and we'd just go on singing "Over my head I see freedom in the air." And then we would be thrown in the paddy wagons . . . .[16]

The pervasive problem of violent protest policing of activists of color has the same root causes as generalized police violence in communities of color and deserves similar attention. It is a vital line of inquiry for critical race theorists. The right to express dissent unhampered by the fear of police retribution and violence, like the right to walk the streets unharmed by the government, is an element of equal membership in a democracy. It is not the right of a privileged group. However, the freedom to complain and express opposition is elusive for activists of color, and courts unfortunately reinforce this condition through their treatment of mass protests. As Dr. King noted wistfully in that same last speech,

> But somewhere I read of the freedom of assembly. Somewhere I read of the freedom of speech.
>
> Somewhere I read of the freedom of press. Somewhere I read that the greatness of America is the right to protest for right. And so just as I say, we aren't going to let dogs or water hoses turn us around . . . . We are going on.[17]

Nevertheless, minority protesters and their allies are still the more likely victims of militarized and violent protest policing. Such was the case at the Backwater Bridge in North Dakota.

The confrontation on Backwater Bridge is the subject of the *Dundon v. Kirchmeier*[18] class action lawsuit. In their complaint, the plaintiffs—indigenous water protectors—alleged that police used excessive force in contravention of the Fourth and Fourteenth Amendments, chilled their First Amendment expression, and violated their equal protection rights.[19] Although the matter is still pending, early in the case the district judge refused to enjoin police from using these less-than-lethal weapons against water protectors, and the Eighth Circuit affirmed.[20] In ruling against the injunction on the police's use of force, the district judge began by querying how the Fourth Amendment may apply to

[16] Martin Luther King Jr., *Martin Luther King's Final Speech: 'I've Been to the Mountaintop'—The Full Text*, ABC NEWS (Apr. 3, 2013, 3:19 PM), https://abcnews.go.com/Politics/martin-luther-kings-final-speech-ive-mountaintop-full/story?id=18872817 [https://perma.cc/4ZB4-LEVU].

[17] *Id.*

[18] *Dundon* Amended Complaint, *supra* note 1, at 2.

[19] *See id.* at 38-39.

[20] Dundon v. Kirchmeier, No. 1:16-cv-00406, 2017 WL 5894552, at *20 (D.N.D. Feb. 7, 2017), *aff'd mem.*, 701 F. App'x 538 (8th Cir.) (per curiam).

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police action.[21] This is because thirty years ago, in *Graham v. Connor*,[22] the Supreme Court determined that excessive-force claims should proceed via the Fourth Amendment.[23] This ruling has led to the evisceration of the overwhelming majority of excessive-force claims in one-on-one civilian-police encounters and to the evaluation of police brutality through a too-narrow and individualistic lens.[24] The district judge's treatment of the Fourth Amendment in *Dundon* led him to conclude that the plaintiffs were unlikely to succeed on the merits.[25]

The *Dundon* case demonstrates how claims of excessive police force during protests are even more challenging for plaintiffs than when asserted during regular street interactions between police and civilians. Part I of this Essay describes the *Graham* case and the manner in which the cabining of excessive-force analysis within the Fourth Amendment, together with qualified immunity doctrine, acts as a nearly impenetrable bar to § 1983 litigation against police officers generally. Part II demonstrates that, just like police are more likely to violently target people of color in street encounters, law enforcement is more likely to confront activists of color violently. Thus, the rights and safety of people of color are particularly at risk during protests. Part III uses the district court opinion denying an injunction in *Dundon* to show how *Graham* interacts with other Fourth Amendment doctrine to make matters worse for individuals seeking relief from police-excessive-force cases in the emblematic protest scenario where force is used to disperse activists rather than to detain them.

[21] *Id.* at *18-19.

[22] 490 U.S. 386 (1989).

[23] *Id.* at 388 (holding that excessive-force claims are "properly analyzed under the Fourth Amendment's 'objective reasonableness' standard, rather than under a substantive due process standard").

[24] *See, e.g.*, Brandon Garrett & Seth Stoughton, *A Tactical Fourth Amendment*, 103 VA. L. REV. 211, 216 (2017) ("[I]ll-considered statements in *Graham* and other decisions reinforce a 'split-second' theory of policing that sets the wrong constitutional floor."); Osagie K. Obasogie & Zachary Newman, *The Futile Fourth Amendment: Understanding Police Excessive Force Doctrine Through an Empirical Assessment of* Graham v. Connor, 112 NW. U. L. REV. 1465, 1497 (2018) ("The Fourth Amendment, as interpreted post-*Graham*, simply operates at the wrong level; its individualist nature cannot address a fundamentally structural problem.").

[25] *Dundon*, 2017 WL 5894552, at *19 (finding that no reasonable juror could conclude that force used by police at Backwater Bridge was "objectively unreasonable"). Chief Judge Hovland further denied the injunction based on the plaintiffs' Fourteenth Amendment claim, stating that the police conduct did not "shock[] the conscience." *Id.* (quoting Wilson v. Spain, 209 F.3d 713, 716 (8th Cir. 2000)). The judge also ruled that the plaintiffs were trespassing on property closed to the public and therefore had no right to engage in First Amendment activity. *Id.* at *20. In their Amended Complaint, the plaintiffs later highlighted that they were situated in a location open to the public. *Dundon* Amended Complaint, *supra* note 1, at 2, 12. The judge further ruled that any equal protection claim was dependent on the outcome of the excessive-force and First Amendment claims. *Dundon*, 2017 WL 5894552, at *16.

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I. *GRAHAM* AND LIMITS OF FOURTH AMENDMENT ANALYSIS ON POLICE-EXCESSIVE-FORCE CASES

Over thirty years ago, the Supreme Court in *Graham v. Connor* considered the manner in which excessive-force claims against police should proceed.[26] Before *Graham*, lower courts were split as to what legal standard to apply to a claim of police excessive force in interactions with civilians during investigatory stops or arrests. The majority of courts applied Fourteenth Amendment due process, requiring plaintiffs to demonstrate that the officer had subjective malicious intent, while other courts applied the Fourth Amendment and required plaintiffs to show that the officer's conduct failed to meet the "objective reasonableness" standard.[27]

The facts of *Graham* were as follows: Mr. Dethorne Graham, a black man,[28] was in the midst of a diabetic crisis and was searching for orange juice when police officers observed him enter and quickly leave a convenience store, get into his friend's car, and drive away.[29] With no additional information, Charlotte Police Officer M.S. Connor stopped the car and, despite explanations from both the driver and Mr. Graham that the latter was having a diabetic reaction, ordered them both to wait while he investigated what had occurred at the store.[30] Mr. Graham then exited the car and ran around it twice. He then sat on the sidewalk and began talking to his friend, the driver.[31] Additional police arrived in response to Connor's request for backup. Ignoring the driver's pleas for candy or juice for his friend, police pushed the driver aside, rolled Mr. Graham on his belly, and handcuffed his hands behind his back.[32] At some point, Mr. Graham passed out. He regained consciousness after officers lifted him and placed him face down on the hood of the police car.[33] Officers told Mr. Graham to "shut up" and pushed his face against the car when he asked them to look in his wallet for his diabetic card. The officers then threw Mr. Graham "headfirst into the police car" and refused to allow him to have the juice his friend brought to the car.[34] Finally, the officers heard back that there was no incident at the store, drove Mr. Graham

[26] *Graham*, 490 U.S. at 388.

[27] *Id.* at 392-93.

[28] Brief for the Petitioner at 3, *Graham*, 490 U.S. 386 (No. 87-6571), 1988 WL 1025786, at *3 [hereinafter *Graham* Petitioner Brief].

[29] *Graham*, 490 U.S. at 388-89.

[30] *Id.* at 389.

[31] *Id.*

[32] *Id.* (reporting that one officer stated: "I've seen a lot of people with sugar diabetes that never acted like this. Ain't nothing wrong with the M. F. but drunk. Lock the S. B. up").

[33] *Id.*

[34] *Id.*

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home, and released him.[35] Mr. Graham sustained injuries as a result of the police officers' conduct, including a permanent ringing in his ear.[36]

The civil rights lawsuit proceeded to trial in the District Court for the Western District of North Carolina.[37] Before a jury verdict, the district judge granted the defendant's motion for a directed verdict on the issue of excessive force, applying the existing test for substantive due process, which consisted of the following factors:

(1) The need for the application for the force.

(2) The relationship between the need and the amount of the force that was used.

(3) The extent of the injury inflicted.

(4) Whether the force was applied in a good faith effort to maintain and restore discipline or maliciously and sadistically for the very purpose of causing harm.[38]

The judge ruled that the force was "appropriate under the circumstances," the victim was not injured, and the officer acted in good faith "to maintain or restore order in the face of a potentially explosive situation" and not "maliciously or sadistically."[39] The Fourth Circuit affirmed the trial court's decision using the same due process analysis.[40]

In his brief to the Supreme Court, Graham argued that a Fourteenth Amendment substantive due process analysis was inappropriate and that the Fourth Amendment should be applied to the excessive-police-force claims.[41] Graham emphasized that the Fourth Amendment applied because he was clearly seized by the police officers.[42] The Supreme Court agreed and reversed the trial court's decision, thereby settling the split among lower courts as to whether to apply the Fourth or Fourteenth Amendment. Reasoning that the Fourth Amendment protects against unreasonable seizures, the Court held that where "the excessive force claim arises in the context of an arrest or investigatory stop of a free citizen, it is most properly characterized as one invoking the protections of the Fourth Amendment."[43] The Court stated that "*all* claims that law enforcement officers have used excessive force . . . in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under

[35] *Id.*

[36] *Id.* at 390 (noting that, in total, Graham claimed to have sustained broken foot, cuts on wrists, bruises on forehead, injured shoulder, and ringing in right ear).

[37] Graham v. City of Charlotte, 644 F. Supp. 246, 248 (W.D.N.C. 1986), *aff'd*, 827 F.2d 945 (4th Cir. 1987), *vacated*, 490 U.S. 396 (1989).

[38] *Id.* (citing King v. Blankenship, 636 F.2d 70, 73 (4th Cir. 1980)).

[39] *Id.*

[40] *Graham*, 490 U.S. at 391.

[41] *Graham* Petitioner Brief, *supra* note 28, at 8.

[42] *Id.* at 10.

[43] *Graham*, 490 U.S. at 394, 396.

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the Fourth Amendment and its 'reasonableness' standard."[44] Relevant for later discussion, the *Graham* Court defined a seizure, pursuant to *Terry v. Ohio*,[45] as "when government actors have, 'by means of physical force or show of authority, . . . in some way restrained the liberty of a citizen.'"[46] Although Graham advocated for the application of the Fourth Amendment, the Court defined "reasonableness" in a manner that was problematic for future plaintiffs—including Mr. Graham, who lost in his post-remand trial.[47] In its customary display of colorblindness, the Court failed to state Mr. Graham's race.

In *Graham*, the Court defined the "calculus of reasonableness" in a manner that immunizes aggressive police misconduct post-*Graham* and provides excessive deference to law enforcement, who the Court bemoaned are "often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving."[48] The application of this version of reasonableness to post-*Graham* excessive-force cases has left civilians with no recourse against violent police conduct and arguably has allowed police to get away with murder.[49]

There are two federal vehicles for either the government or individual plaintiffs to seek remediation for violent police misconduct. Under 18 U.S.C. § 242, the federal government—via the Department of Justice ("DOJ")—can prosecute a police officer who has violated an individual's constitutional rights "on account of such person being an alien, or by reason of his color, or race."[50] Under 42 U.S.C. § 1983—the Civil Rights Act—an individual plaintiff can bring a civil lawsuit asserting that a police officer violated their constitutional rights.[51] For example, § 1983 was the vehicle for the lawsuit in *Graham*.[52] In view of *Graham*, courts have consistently cabined excessive-force analysis within the Fourth Amendment in both § 242 cases and § 1983 cases.

In § 242 criminal prosecutions, despite the *Graham* language that the due process test requirement of malicious intent "is incompatible with a proper Fourth Amendment analysis,"[53] the government must prove "evil motive"

[44] *Id.* at 395.

[45] 392 U.S. 1 (1968).

[46] *Graham*, 490 U.S. at 395 n.10 (alteration in original) (quoting *Terry*, 392 U.S. at 19 n.16).

[47] *See id.* at 396; Alice Ristroph, *The Constitution of Police Violence*, 64 UCLA L. REV. 1182, 1207 (2017).

[48] *Graham*, 490 U.S. at 397.

[49] *See* Erwin Chemerinsky, Editorial, *How the Supreme Court Protects Bad Cops*, N.Y. TIMES, Aug. 27, 2014, at A23.

[50] 18 U.S.C. § 242 (2018).

[51] 42 U.S.C. § 1983.

[52] *Graham*, 490 U.S. at 388.

[53] *Id.* at 397.

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beyond a reasonable doubt for a conviction.[54] Specifically, the prosecutor must show that the officer knew that their conduct was a violation of the victim's constitutional rights and that the officer committed the act for that purpose.[55] Thus, scholars have asserted that *Graham* ultimately did nothing to dispel the intent requirement for civil rights prosecutions.[56] This is evidenced in the DOJ's decision not to prosecute Police Officer Darren Wilson, having concluded it could not show that Officer Wilson acted willfully to violate Michael Brown's constitutional rights when he shot the teenager between six and eight times.[57] What's more, even without this "evil motive" requirement, the DOJ would have decided not to prosecute because it concluded, citing the deferential language of *Graham*, that the "shots fired by Wilson were [not] objectively unreasonable."[58] Although Officer Wilson claimed that he mistakenly believed that Michael Brown had a gun when he fired, the DOJ Report clearly states that even if Officer Wilson knew that Brown was walking toward him unarmed and with his hands up, *Graham*'s progeny establishes that the officer can shoot him and the officer's

[54] Screws v. United States, 325 U.S. 91, 101 (1945) ("An evil motive to accomplish that which the statute condemns becomes a constituent element of the crime.").

[55] *See id.* (interpreting statutory requirement of "willful"); *see also* U.S. DOJ, REPORT REGARDING THE CRIMINAL INVESTIGATION INTO THE SHOOTING DEATH OF MICHAEL BROWN 85-86 (2015) [hereinafter DOJ MICHAEL BROWN REPORT], https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/doj_report_on_shooting_of_michael_brown_1.pdf [https://perma.cc/YZ83-YUSA] (concluding that in Michael Brown shooting, DOJ did not think it would have been able to prove willfulness beyond reasonable doubt); *Law Enforcement Misconduct*, U.S. DOJ, https://www.justice.gov/crt/law-enforcement-misconduct [https://perma.cc/YNP2-KH69] (last updated Feb. 25, 2019) (describing necessary steps for successful prosecution under statute).

[56] *See* Jill I. Brown, Comment, *Defining "Reasonable" Police Conduct:* Graham v. Connor *and Excessive Force During Arrest*, 38 UCLA L. REV. 1257, 1260 (1991) ("When courts require proof of subjective intent or significant injury, they effectively convert the fourth amendment inquiry into a due process test, depriving civil rights plaintiffs of *Graham*'s benefit.").

[57] DOJ MICHAEL BROWN REPORT, *supra* note 55, at 11-12, 85-86. The DOJ investigations into the police-involved deaths of Eric Garner and Freddie Gray reached the same conclusion not to prosecute. *See* Bobby Allyn, *NYPD Officer Will Not Face Federal Criminal Charges in Eric Garner's Death*, NPR (July 16, 2019, 10:47 AM), https://www.npr.org/2019/07/16/742186042/nypd-officer-wont-face-federal-criminal-charges-in-eric-garner-s-death-sources-s [https://perma.cc/24UU-HA2Y]; Alvin Bragg, Opinion, *Eric Garner Is Proof That We Need to Reform Laws on Excessive Force*, WASH. POST (July 17, 2019, 5:55 PM), https://www.washingtonpost.com/opinions/2019/07/17/eric-garner-is-proof-that-we-need-reform-laws-excessive-force/; Press Release, Office of Pub. Affairs, U.S. DOJ, Federal Officials Decline Prosecution in the Death of Freddie Gray (Sept. 12, 2017), https://www.justice.gov/opa/pr/federal-officials-decline-prosecution-death-freddie-gray [https://perma.cc/5VB2-V3NU].

[58] DOJ MICHAEL BROWN REPORT, *supra* note 55, at 7, 10, 85.

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actions must be deemed reasonable and not excessive.[59] Essentially, the law will excuse an officer's use of deadly force in an interaction with a civilian as long as the individual has not already surrendered.[60] This result demonstrates how inconsistent the Fourth Amendment analysis under § 242 is with any manner in which individuals assess reasonableness in regular parlance.

Alternatively, § 1983 of the Civil Rights Act is the vehicle for individual and class action suits for excessive police force.[61] However, *Graham*, together with qualified immunity principles, has blunted the utility of § 1983 actions to counteract excessive police force. In addition to the Court's lax "reasonableness" standard, qualified immunity allows a police officer to avoid liability unless they know that their action is unlawful before acting. The qualified immunity doctrine has developed such that police officers can avoid suit unless the plaintiff can point to a preceding case in which a police officer acted in a factually analogous manner and the court found that his conduct violated the Fourth Amendment.[62] Otherwise, the lawsuit will be dismissed. This barrier from suit not only shields the police officer but also prevents the law from developing further. As a result, courts will rarely have to grapple with the question of whether a police officer's conduct was unconstitutional. This may be why representatives of decedents in police-killing cases routinely sue via wrongful death instead of § 1983.[63] The families of Michael Brown, Eric Garner, and Freddie Gray obtained recovery via settlement of their wrongful death actions.[64]

[59] *Id.* (finding sufficient evidence that Wilson reasonably believed that Brown posed deadly threat, and that use of deadly force was therefore not unreasonable).

[60] *Id.* at 12, 84-85 (citing Loch v. City of Litchfield, 689 F.3d 961, 966 (8th Cir. 2012) (finding officer's use of deadly force was not unreasonable even where victim's arms were above his head and he was slowly advancing toward the officer)).

[61] 42 U.S.C. § 1983 (2018).

[62] *See* Karen J. Pita Loor, *When Protest Is the Disaster: Constitutional Implications of State and Local Emergency Power*, 43 SEATTLE U. L. REV. 1, 65 (2019); *see also* Avidan Y. Cover, *Reconstructing the Right Against Excessive Force*, 68 FLA. L. REV. 1773, 1789 (2016) (describing how qualified immunity "stagnat[es] constitutional development"); Diana Hassel, *Excessive Reasonableness*, 43 IND. L. REV. 117, 124-29 (2009) (discussing how courts merge Fourth Amendment inquiry and qualified immunity question in excessive-force cases); Tahir Duckett, Note, *Unreasonably Immune: Rethinking Qualified Immunity in Fourth Amendment Excessive Force Cases*, 53 AM. CRIM. L. REV. 409, 411 (2016) (evaluating "intersection of the reasonableness inquiry at the center of Fourth Amendment excessive-force claims, and the reasonable person standard of the qualified immunity defense").

[63] *See* Steven H. Steinglass, *Wrongful Death Actions and Section 1983*, 60 IND. L.J. 559, 561 (1985).

[64] David Carson, *Michael Brown's Family Received $1.5 Million Settlement with Ferguson,* NBC NEWS (June 23, 2017, 9:58 AM), https://www.nbcnews.com/storyline/michael-brown-shooting/michael-brown-s-family-received-1-5-million-settlement-ferguson-n775936 [https://perma.cc/HT26-HLPS]; Julia Marsh, *City Approves $4M Payment to Eric Garner's Family*, N.Y. POST (Aug. 2, 2017, 7:28 PM), https://nypost.com/2017/08/02

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Despite the preceding discussion's focus on tragic police killings of African Americans, it is vital to note that black men are not the only people of color who are the persistent victims of police violence. Latinx people likewise die at the hands of police at an alarming rate,[65] and law enforcement kill indigenous peoples at a higher rate than any other group.[66] Furthermore, while the most serious cases of police brutality lead to certain death for some civilians, for others—particularly people of color—violent police interactions can cause a dignitary "death by a thousand cuts." Victims of these violent police encounters likewise find no solace in § 1983 actions and have no cause of action for wrongful death. Scholars have indicted *Graham* on various fronts: how its "split second" language focuses courts on the exact moment of violence and ignores how police could have been trained to de-escalate instead of escalate violence,[67] how it interacts with qualified immunity to shield violent and dangerous police misconduct from court oversight,[68] and how it facilitates courts ignoring and overlooking the race of victims and perpetrators of police violence.[69]

/city-approves-4m-payment-to-eric-garners-family/ [https://perma.cc/48NY-JG7C]; Yvonne Wenger & Mark Puente, *Baltimore to Pay Freddie Gray's Family $6.4 Million to Settle Civil Claims*, BALT. SUN (Sept. 8, 2015, 10:01 PM), https://www.baltimoresun.com/news/crime/bs-md-ci-boe-20150908-story.html.

[65] Kenya Downs, *Why Aren't More People Talking About Latinos Killed by Police?*, PBS NEWSHOUR (July 14, 2016, 1:21 PM), https://www.pbs.org/newshour/nation/black-men-werent-unarmed-people-killed-police-last-week [https://perma.cc/M22F-TTJ4] (noting that Latinos made up 16% of police killings in 2016).

[66] Stephanie Woodard, *The Police Killings No One Is Talking About*, IN THESE TIMES (Oct. 17, 2016), https://inthesetimes.com/features/native_american_police_killings_native_lives_matter.html [https://perma.cc/SC8X-EYNA].

[67] *See, e.g.*, Cover, *supra* note 62, at 1823 (arguing that generic due process right against excessive force could "help guard against pardoning biases . . . that may infect police behavior as products of 'split-second judgments'"); Garrett & Stoughton, *supra* note 24, at 223-24 (arguing that *Garner* reasonableness test fails to address "totality of the circumstances" because it does not take into account officer preparation, training, or tactics prior to use of force).

[68] *See, e.g.*, Cover, *supra* note 62, at 1784-87; Hassel, *supra* note 62, at 124-29; Duckett, *supra* note 62, at 424-25.

[69] *See, e.g.*, Devon W. Carbado, *Blue-on-Black Violence: A Provisional Model of Some of the Causes*, 104 GEO. L.J. 1479, 1486, 1489 n.41, 1500 (2016) (describing racialized "broken windows" policing and pretextual stops that go unchecked by courts); Christian M. Halliburton, *Race, Brain Science, and Critical Decision-Making in the Context of Constitutional Criminal Procedure*, 47 GONZ. L. REV. 319, 332-35 (2011) (addressing "negative association" with people of color that lead police to assume "heightened propensity for violence and criminality in black men" that courts do not consider in reasonableness calculation); Obasogie & Newman, *supra* note 24, at 1470 ("[T]he Fourth Amendment is an area of constitutional law that is structurally unsuited to address racialized group harm—an evaluation that is necessary for understanding the nature of police violence today.").

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II. ACTIVISTS OF COLOR ARE THE MORE LIKELY VICTIMS OF VIOLENCE IN PROTEST POLICING

Graham, as previously discussed, excuses police violence through a permissive reasonableness test. As will be discussed in Part III, *Graham* coalesces with other Fourth Amendment doctrine to make matters worse for victims of violent and militaristic protest policing. This is of particular import to activists of color whose protest activities are more likely to be targets of excessive police attention and force. It aggregates with the high policing and surveillance in communities of color to create or aggravate racialized police violence.[70]

Legal scholars have given well-deserved attention to the unequal treatment and targeting of people of color during regular policing.[71] The manner in which police engage aggressively with civilians of color as they walk the streets or drive in their vehicles has been closely examined.[72] How law enforcement engages with protesters of color deserves similar attention and study in the legal academy and among critical race scholars. Like in regular street encounters between police and individuals of color, the racial identity of protesters affects the police response.

Certain social scientists who have examined this problem naturally have extrapolated from existing research demonstrating that police are more likely to believe that people of color carry guns[73] and behave violently or criminally.[74] In

[70] *See* Zach Newman, Note, *"Hands up, Don't Shoot": Policing, Fatal Force, and Equal Protection in the Age of Colorblindness*, 43 HASTINGS CONST. L.Q. 117, 151-53 (2015).

[71] *See* JEROME H. SKOLNICK, JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN A DEMOCRATIC SOCIETY 45-48 (1966) (discussing how implicit racial biases can lead to police shorthand that signals potential danger based solely on race); I. Bennett Capers, *Policing, Race, and Place*, 44 HARV. C.R.-C.L. L. REV. 43, 43-48 (2009) (discussing policing and race as they relate to institutional housing segregation); Elizabeth E. Joh, *Discretionless Policing: Technology and the Fourth Amendment*, 95 CALIF. L. REV. 199, 208 (2007) (describing difficulties that arise due to police assumption that "racial minorities are more likely to be engaged in criminal behavior").

[72] Bennett Capers, *supra* note 71, at 60-62; *see also* THE SENTENCING PROJECT, REPORT OF THE SENTENCING PROJECT TO THE UNITED NATIONS SPECIAL RAPPORTEUR ON CONTEMPORARY FORMS OF RACISM, RACIAL DISCRIMINATION, XENOPHOBIA, AND RELATED INTOLERANCE 3-5 (2018), https://www.sentencingproject.org/publications/un-report-on-racial-disparities/ [https://perma.cc/9HRL-RMEC]; Carbado, *supra* note 69, at 1486, 1489, 1500.

[73] Anthony G. Greenwald, Mark A. Oakes & Hunter G. Hoffman, *Targets of Discrimination: Effects of Race on Responses of Weapons Holders*, J. EXPERIMENTAL SOC. PSYCHOL., Oct. 2003, at 399, 399-405 (analyzing "signal detection theory" as method of evaluating racial biases in weapons holders).

[74] *See generally* ELIJAH ANDERSON, STREETWISE: RACE, CLASS, AND CHANGE IN AN URBAN COMMUNITY (1990); *see also* Jon Hurwitz & Mark Peffley, *Public Perceptions of Race and Crime: The Role of Racial Stereotypes*, 41 AM. J. POL. SCI. 375, 380 (1997) ("[O]ne of the most popular negative beliefs expressed about 'most' blacks is that they are 'violent and aggressive.'").

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other words, police view people of color as more threatening in day-to-day interactions. This research translates to how police perceive protesters of color versus white protesters. Just like they do during routine policing, law enforcement view people of color as more threatening and dangerous than whites during protests.[75] This translates to more vigilant and aggressive policing of nonwhite protesters.

A study that examined over fifteen thousand American protests during a thirty-year period found that during many of those years there was a "protesting while black" effect—although admittedly the effect was not constant during the entire period.[76] It is important to note that study did not take into account protests in the last three decades. Still, the study found that African American protests are consistently more likely to draw police presence and vigilance than are white protests.[77] This is unsurprising considering that protesters of color are viewed by police as threatening. Once police are present—in some of the years studied although not all—police are then more likely to make arrests and use force and violence against African American activists.[78] This "protesting while black" effect was most salient in the years leading to the enactment of civil rights legislation.[79] I will engage in some speculation and hypothesize that police—as state actors—engaged abusively with protesters of color prior to this legislation because they perceived true challenges to the status quo that they were trained to summarily quash. After all, police are trained to protect the existing hierarchical boundaries within our society.[80] To the degree that police again perceive protests by activists of color as truly threatening current hierarchies and the status quo, they may again react increasingly aggressively and violently to these protests.

The increasing use of militarized strategies and easy access to military tools and weapons multiplies the expanse and violence of police force. While militarized strategies are not always used, they are most likely to be used when law enforcement perceive protesters as dangerous.[81] Militarization thus intersects with protesters' racial identity. Police's use of military vehicles, water

[75] *See* WOOD, *supra* note 13, at 41-42 (describing increase of SWAT teams throughout United States, particularly at protests); *see also* Christian Davenport, Sarah A. Soule & David A. Armstrong II, *Protesting While Black? The Differential Policing of American Activism, 1960 to 1990*, 76 AM. SOC. REV. 152, 168-69 (2011) (finding that predominantly African American protests had higher likelihood of police presence and police action).

[76] Davenport, Soule & Armstrong, *supra* note 75, at 169 (analogizing to "driving while black" phenomenon).

[77] *Id.* (theorizing that systematic racism causes state authorities to treat African American protesters more aggressively so as to maintain status quo).

[78] *Id.* at 166-68.

[79] *Id.* at 168.

[80] *See* CATHY LISA SCHNEIDER, POLICE POWER AND RACE RIOTS: URBAN UNREST IN PARIS AND NEW YORK 255 (2014).

[81] WOOD, supra note 13, at 41 (stating that specialized units used for predominantly black protests were also used for armed standoffs or the "War on Drugs").

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cannons, fire hoses, and special impact munitions against indigenous water protectors in the *Dundon* lawsuit evidences a militarized police response.[82] In a prior article, I examined the police response to the pipeline protests and Ferguson protests and accounted for how, particularly in Ferguson, military police response was swift and unparalleled.[83] People in Ferguson described feeling that police were invading the neighborhood.[84] Further, the eventual discovery of communications between National Guard troops labeling Ferguson protesters a hate group[85] demonstrates that the classification of minority activists as dangerous extended beyond the state police and local police. In contrast, the police response to a white nationalist protest in Charlottesville over the removal of a Confederate monument did not involve military vehicles, weapons, or tactics.[86] Observers criticized law enforcement for failing to police the protests.[87] If police did not view the "Unite the Right" protesters as dangerous, they were wrong. A white nationalist ran his car into a crowd, killing one counterprotester and injuring several more.[88] Another counterprotester was brutally beaten with a metal pole and then arrested by police.[89]

However, law enforcement's fear of protesters of color is reinforced by the federal government's unwarranted historical and current preoccupation with racial justice movements. Hearkening back to the 1950s and '60s, the FBI's targeting of African American activists is well documented in the agency's own records. Stolen and subsequently leaked FBI headquarter documents revealed the persistent infiltration, surveillance, and harassment of groups termed "Black Extremists" from 1956 to 1971.[90] According to the FBI operation

[82] *Dundon* Amended Complaint, *supra* note 1, at 1-2.

[83] Pita Loor, *supra* note 62, at 26-29 (detailing use of SWAT teams, armored vehicles, and military tactics in response to protests).

[84] *Id.* at 27.

[85] Barbara Starr & Wesley Bruer, *Missouri National Guard's Term for Ferguson Protesters: 'Enemy Forces,'* CNN (Apr. 17, 2015, 6:36 PM), https://www.cnn.com/2015/04/17/politics/missouri-national-guard-ferguson-protesters/index.html [https://perma.cc/94H5-AW7A].

[86] Hansford, *supra* note 12, at 707-08.

[87] Joe Heim et al., *Charlottesville Protest Takes a Deadly Turn*, WASH. POST, Aug. 13, 2017, at A14; *see also* HUNTON & WILLIAMS, FINAL REPORT: INDEPENDENT REVIEW OF THE 2017 PROTEST EVENTS IN CHARLOTTESVILLE, VIRGINIA 126-27 (2017), https://www.hunton ak.com/images/content/3/4/v2/34613/final-report-ada-compliant-ready.pdf [https://perma.cc/5V7C-ZQRQ].

[88] Hansford, *supra* note 12, at 707-08; Heim et al., *supra* note 87, at A14.

[89] Hansford, *supra* note 12, at 707-08; *see also* Loulla-Mae Eleftheriou-Smith, *Charlottesville: Black Protester Deandre Harris 'Beaten with Metal Poles' by White Supremacists*, THE INDEPENDENT (Aug. 15, 2017, 4:48 PM), http://www.independent.co.uk/news/world/americas/charlottesville-deandre-harris-black-protester-white-supremacists-beat-metal-poles-neo-nazis-a7894916.html.

[90] *See FBI Records: The Vault, COINTELPRO: Black Extremist*, FBI, https://vault.fbi.gov/cointel-pro/cointel-pro-black-extremists [https://perma.cc/WTM9-

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COINTELPRO, black extremists included Martin Luther King Jr. and supporters as well as leaders of the Black Panther Party.[91] The now-unclassified documents reveal multiple and serious FBI abuses, including that its agents attempted to convince King to commit suicide by threatening to reveal evidence of extramarital affairs gathered through illegal surveillance, and that they infiltrated the Black Panther Party and used information learned to conduct a raid of its leader Fred Hampton's home, which resulted in his shooting and death.[92] COINTELPRO provided a clear and scary picture of a federal law enforcement agency intent on watching and targeting movements seeking racial justice and using the rhetoric of radicalization to justify its efforts.[93] After COINTELPRO was exposed, the FBI terminated the operation in 1971.[94]

FBI focus on the activities of activists of color did not end with COINTELPRO; the FBI's monitoring of movements by people of color is alive and well today. Data shows that from 2010 to 2019, the FBI has persistently surveilled racial justice activists.[95] A leaked 2017 FBI intelligence report constructs, or perhaps revives, so-called "black extremists" as a terrorism threat—now termed "Black *Identity* Extremist."[96] The report states that these

YJ3R] (last visited Mar. 31, 2020) [hereinafter *FBI Records: The Vault*]; *see also* Allan M. Jallon, *A Break-In to End All Break-Ins*, L.A. TIMES, Mar. 8, 2006, at B13 (describing break-in of FBI office revealing documents detailing surveillance of black activist groups).

[91] *See* BETTY MEDSGER, THE BURGLARY 342-48 (2014); Jallon, *supra* note 90, at B13; *FBI Records: The Vault*, *supra* note 90.

[92] Jallon, *supra* note 90, at B13 (describing illegal tape created and sent by FBI to King urging him to commit suicide); *see also* MEDSGER, *supra* note 91, at 342-48 (stating that FBI claimed credit for murdering Hampton in leaked internal documents); Ursula Wolfe-Rocca, *COINTELPRO: Teaching the FBI's War on the Black Freedom Movement*, RETHINKING SCHOOLS, https://www.rethinkingschools.org/articles/cointelpro-teaching-the-fbi-s-war-on-the-black-freedom-movement [https://perma.cc/MJ9J-UGVD] (last visited Mar. 31, 2020) (discussing FBI's involvement in death of Black Panther Leader Fred Hampton).

[93] Bryan Schatz, *A Former FBI Whistleblower Explains Why the Federal Government Is Failing on Domestic Terrorism—and How to Fix It*, MOTHER JONES (Aug. 7, 2019), https://www.motherjones.com/politics/2019/08/a-former-fbi-whistleblower-explains-why-the-federal-government-is-failing-on-domestic-terrorism-and-how-to-fix-it/ [https://perma.cc/K7Q7-Q9X3] (interviewing former FBI agent on his duties to infiltrate groups deemed to be dangerous by FBI).

[94] Jallon, *supra* note 90, at B13 (discussing leak of FBI documents as end of COINTELPRO).

[95] CHIP GIBBONS, DEFENDING RIGHTS & DISSENTS, STILL SPYING ON DISSENT: THE ENDURING PROBLEM OF FBI FIRST AMENDMENT ABUSE 6-8 (2019), https://rightsanddissent.org/fbi-spying/ [https://perma.cc/BU8Z-6WE7] (detailing FBI's monitoring activity of civil rights groups, such as By Any Means Necessary ("BAMN")).

[96] COUNTERTERRORISM DIV., FBI, (U//FOUO) BLACK IDENTITY EXTREMISTS LIKELY MOTIVATED TO TARGET LAW ENFORCEMENT OFFICERS 2-4 (2017) [hereinafter FBI COUNTERTERRORISM REPORT], https://privacysos.org/wp-content/uploads/2017/10/FBI-BlackIdentityExtremists.pdf [https://perma.cc/678E-G8EC] (reporting incidents of violence against police officers as reason to watch "Black Identity Extremists" more closely); *see also*

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Black Identity Extremists are a threat to law enforcement because their mission is to avenge the deaths of victims of police violence by killing officers.[97] The FBI's conclusion that this brand of terrorists exists is unfounded, dangerous, and paranoid, with former federal agents asserting that the label simply stands for "black people who scare [the FBI]"[98] and that the classification simply allows government surveillance of "basically anyone who is black and politically active."[99] It conflates groups that protest racial injustice in various forms and that predominantly have African Americans as members into one single classification with a frightening goal. The FBI report lists six unconnected instances of planned or executed civilian violence against police from 2014 to 2016 as proof of a manufactured sinister goal of various predominantly African American groups.[100] This is despite the fact that these assailants are best described as lone actors.[101] In a hearing before Congress in July 2019, the FBI Director asserted that the agency was no longer investigating Black Identity Extremists.[102] However, additional documents that were leaked later suggest that while the label may have changed, the investigative protocol remained and included the Iron Fist Program with the goal of "proactively address[ing] this priority domestic terrorism target by focusing FBI operations via enhanced

Khaled A. Beydoun & Justin Hansford, Opinion, *The F.B.I.'s Dangerous Crackdown on 'Black Identity Extremists*,*'* N.Y. TIMES (Nov. 15, 2017), https://www.nytimes.com /2017/11/15/opinion/black-identity-extremism-fbi-trump.html (analyzing history of COINTELPRO in connection with FBI decision to create label of "Black Identity Extremists"); Miriam Zoila Pérez, *What Does the FBI's New 'Black Identity Extremist' Label Really Mean to Black Organizing*, COLORLINES (Oct. 25, 2017, 12:26 PM), https://www.colorlines.com/articles/what-does-fbis-new-black-identity-extremist-label-really-mean-black-organizing [https://perma.cc/9ALL-C72L] (comparing FBI's "Black Identity Extremist" label to COINTELPRO operations in 1960s).

[97] FBI COUNTERTERRORISM REPORT, *supra* note 96, at 2 ("The FBI assesses it is very likely Black Identity Extremist (BIE) perceptions of police brutality against African Americans spurred an increase in premeditated, retaliatory lethal violence against law enforcement and will very likely serve as justification for such violence." (footnotes omitted)).

[98] Beydoun & Hansford, *supra* note 96.

[99] Kate Irby, *Protesters Are Increasingly Being Labeled Domestic Terrorist Threats, Experts Worry*, IMPACT2020 (Oct 27, 2017, 5:53 PM), https://www.mcclatchydc.com/news /nation-world/national/article181358311.html [https://perma.cc/R66Y-KP5W].

[100] FBI COUNTERTERRORISM REPORT, *supra* note 96, at 4-6; *see also* GIBBONS, *supra* note 95, at 7-11 (detailing FBI's sometimes violent responses to those labeled BIEs).

[101] *See* FBI COUNTERTERRORISM REPORT, *supra* note 96, at 4-6 (finding no connection between attackers and any racial justice groups); Beydoun & Hansford, *supra* note 96 ("[The FBI Report] links incidents of violence by a handful of individual citizens . . . to 'B.I.E. ideology . . . .'").

[102] Byron Tau, *FBI Abandons Use of Term 'Black Identity Extremism*,*'* WALL STREET J. (July 23, 2019, 10:33 PM), https://www.wsj.com/articles/fbi-abandons-use-of-terms-black-identity-extremism-11563921355 ("We only investigate violence. We don't investigate extremism. We don't investigate ideology.").

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intelligence collection efforts."[103] The facts should lead the FBI to concentrate its intelligence efforts elsewhere. The data show that when police need protection, it is from white extremists—not activists of color. Between 2001 and 2017, of the forty-five police officers tragically killed by domestic extremists, thirty-four were killed by right-wing white extremists.[104] A 2009 Department of Homeland Security ("DHS") report noted the dangerous rise of this trend and warned of right-wing extremism.[105] While this report was harshly criticized by conservative politicians and subsequently disavowed by then-DHS Secretary Janet Napolitano, its predictions have come to fruition in the form of multiple deadly attacks not only on police but also on civilians by white nationalists and so-called "sovereign citizens" who oppose any government authority.[106]

African Americans are not the only minority targets of federal law enforcement surveillance. In 2018, the ACLU obtained government documents suggesting that police were being trained with counterterrorism strategies to police indigenous protests of the Keystone pipeline.[107] The same documents link

[103] Patrick G. Eddington, *Constitution Day 2019: The Hidden Domestic Surveillance Crisis*, CATO INST. (Sept. 17, 2019), https://www.cato.org/publications/commentary/constitution-day-2019-hidden-domestic-surveillance-crisis [https://perma.cc/6UJE-3TFV]; Ken Klippenstein, *FBI's Document: Iron Fist Focuses on 'Black Identity Extremist' Movement*, POPULARRESISTANCE.ORG (Aug. 24, 2019), https://popularresistance.org/fbis-document-iron-fist-focuses-on-black-identity-extremist-movement/ [https://perma.cc/3CLY-NQA8]; s*ee also* Letter from MediaJustice to Elijah Cummings, Chairman, U.S. House Oversight & Reform Comm., Jerry Nadler, Chairman, U.S. House Judiciary Comm., & Bennie G. Thompson, Chairman, U.S. House Homeland Sec. Comm. (Sept 17, 2019), https://mediajustice.org/wp-content/uploads/2019/09/ProtectBlackDissent-Response-Letter-1.pdf [https://perma.cc/WM9V-RP5Y] (citing leaked documents in urging House to take action against FBI's ongoing use of BIE label under different term).

[104] J. Oliver Conroy, *They Hate the US Government, and They're Multiplying: The Terrifying Rise of 'Sovereign Citizens,'* THE GUARDIAN (May 15, 2017, 6:00 AM), https://www.theguardian.com/world/2017/may/15/sovereign-citizens-rightwing-terrorism-hate-us-government [https://perma.cc/3MH2-97WQ].

[105] OFFICE OF INTELLIGENCE & ANALYSIS, U.S. DEP'T OF HOMELAND SEC., IA-0257-09, (U//FOUO) RIGHTWING EXTREMISM: CURRENT ECONOMIC AND POLITICAL CLIMATE FUELING RESURGENCE IN RADICALIZATION AND RECRUITMENT 1, 3, 8 (2009), https://fas.org/irp/eprint/rightwing.pdf [https://perma.cc/Y4BT-9TK4].

[106] Conroy, *supra* note 104.

[107] Will Parrish & Sam Levin, *'Treating Protest as Terrorism': US Plans Crackdown on Keystone XL Activists*, THE GUARDIAN (Sept. 20, 2018, 4:00 AM), https://www.theguardian.com/environment/2018/sep/20/keystone-pipeline-protest-activism-crackdown-standing-rock [https://perma.cc/BDJ5-5G97] (referencing training on mass-arrest protocol, riot-control formations, and crowd-control procedures); *see also* Sam Levin, *Revealed: FBI Terrorism Taskforce Investigating Standing Rock Activists*, THE GUARDIAN (Feb. 10, 2017, 6:00 AM), https://www.theguardian.com/us-news/2017/feb/10/standing-rock-fbi-investigation-dakota-access [https://perma.cc/Z7J6-LWXN] (detailing similar techniques used against Standing Rock activists).

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DAPL indigenous water protectors to "environmental rights extremists."[108] As a matter of fact, an FBI antiterrorism task force worked with police to investigate opponents of the DAPL.[109] Notably, in 2004 and 2005, the FBI considered environmental extremists the number one "domestic terrorism threat" despite the fact that there were no deaths associated with environmentalist actors.[110] Just like the "black extremist" label, that of "environmental extremist" justifies government surveillance, government interference, and ultimately government violence to suppress protest activity of indigenous activists.[111] Within the last decade, the FBI has engaged in persistent investigation of environmentalists, just as it has of racial justice activists.[112] Either coincidentally or by design, this results in the targeting of indigenous activists whose interests intersect with environmental justice. During this time of intense FBI focus on black and environmental activists, the FBI has dropped the category of white supremacist violence as a basis for investigation, making it increasingly difficult to assess the threat of white supremacy and the extent of government efforts to investigate it.[113]

Sadly, like law enforcement, white civilians have also historically viewed activists of color negatively—and still currently do. In the '60s, whites were likely to view civil rights protests as violent and harmful, while African Americans saw them as peaceful and productive.[114] In 1966, 85% of whites polled thought that demonstrations by African Americans hurt the movement for civil rights, while a 1969 survey found that 70% of Blacks believed the

[108] *See* OFFICE OF INTELLIGENCE & ANALYSIS, U.S. DEP'T OF HOMELAND SEC., FIELD ANALYSIS REPORT: (U//FOUO) TTPS USED IN RECENT US PIPELINE ATTACKS BY SUSPECTED ENVIRONMENTAL RIGHTS EXTREMISTS 2 (2017); *see also* Alleen Brown, *The Green Scare: How a Movement That Never Killed Anyone Became the FBI's No. 1 Domestic Terrorism Threat*, THE INTERCEPT (Mar. 23, 2019, 8:32 AM), https://theintercept.com/2019/03/23/ecoterrorism-fbi-animal-rights/ [https://perma.cc/3YAH-VA5W] (detailing Homeland Security's shift to focusing on environmental rights activists as potential terrorist threats).

[109] Levin, *supra* note 107 (reciting accounts of three individuals approached by FBI due to their connection with Standing Rock water protector movement).

[110] Irby, *supra* note 99.

[111] *See id.* (finding that such surveillance could lead to asset seizure without a hearing); *see also* Parrish & Levin, *supra* note 107 (noting Keystone Pipeline activists' preparation for police violence during peaceful protest).

[112] GIBBONS, *supra* note 95, at 6-12 (analyzing FBI activity in connection with racial justice protests and environmental protests).

[113] Sandra Fulton, Opinion, *FBI Must Come Clean on Targeting Racial-Justice Activists Before Sweeping Surveillance Powers Are Renewed*, THE HILL (Sept. 17, 2019, 6:30 PM), https://thehill.com/blogs/congress-blog/civil-rights/461822-fbi-must-come-clean-on-targeting-racial-justice-activists [https://perma.cc/RN34-JSRE] ("[T]he bureau has dropped white-supremacist violence as a category at a time when hate crimes targeting communities of color are on the rise.").

[114] Mora A. Reinka & Colin Wayne Leach, *Race and Reaction: Divergent Views of Police Violence and Protest Against*, 73 J. SOC. ISSUES 768, 774 (2017).

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demonstrations helped.[115] Despite the passage of time and at least theoretical progress in racial relations, views on protests still differ by racial lines. Statistically, whites' views of protests vary based on the purported race of the protesters. Thus, 67% of whites see protests as useful in achieving social change, unless protesters are characterized as black, in which case the number drops to 45%.[116] Whites are also more likely to justify violence perpetrated by police during protests. Only 33% of whites believed police violence in the Ferguson protests was unjustified, while 65% of African Americans found it unjustified.[117] Yet whites are less forgiving of violence by protesters in predominantly black protests. For example, 68% of whites thought activists who acted aggressively during protests of the police killing of Freddie Gray were "opportunistic criminals," while 55% of African Americans saw violent acts by protesters as caused by "legitimate outrage."[118]

III. PROTEST CASES AS A SOURCE OF INQUIRY FOR CRITICAL RACE THEORISTS

Knowing that protests are no different than regular street encounters in that people of color are more likely to experience police violence, the doctrinal impediments that aggregate to facilitate police abuse of protesters should concern critical race theorists. The Fourth Amendment sets particular impediments in the emblematic protest scenario, where police use force to disperse instead of detain activists. As a threshold matter, courts may find that the Fourth Amendment does not apply where police were using force not to arrest but to disperse activists. This ends the possibility of any Fourth Amendment redress.[119] Even if a court finds that the Fourth Amendment does apply, the court may utilize a collective lens in mass protests and evaluate the constitutionality of an officer's conduct in light of the conduct of the crowd instead of the conduct of the individual plaintiff. This approach is contrary to traditional Fourth Amendment analysis and dilutes any protection the Fourth

[115] Elahe Izadi, *Black Lives Matter and America's Long History of Resisting Civil Rights Protesters*, WASH. POST: THE FIX (Apr. 19, 2016, 7:00 AM), https://www.washingtonpost.com/news/the-fix/wp/2016/04/19/black-lives-matters-and-americas-long-history-of-resisting-civil-rights-protesters/.

[116] Reinka & Leach, *supra* note 114, at 774.

[117] *Id.* (discussing 2014 Pew poll that highlighted this difference in opinion).

[118] *Id.* (citation omitted).

[119] When the Court finds that the Fourth Amendment does not apply, it often finds that there was no due process violation either because that requires the plaintiff to meet the high burden of showing that the police conduct "shocks the conscience." *See* Chavez v. Martinez, 538 U.S. 760, 775 (2003) (describing unconstitutional police conduct under due process clause as "egregious" or "conscience shocking"); County of Sacramento v. Lewis *ex rel.* Estate of Lewis, 523 U.S. 833, 846 (1998) ("To this end, for half a century now we have spoken of the cognizable level of executive abuse of power as that which shocks the conscience.").

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Amendment provides. Returning to the pipeline protests, the district court's first ruling in *Dundon v. Kirchmeier*—denying the plaintiffs' motion to enjoin police from using less-than-lethal weapons and water hoses to confront water protectors[120]—demonstrates how the Fourth Amendment can fail activists of color in dispersal cases.

A. *Due to Troubling Developments in Court Doctrine, the Fourth Amendment Arguably Does Not Apply in the Emblematic Protest Scenario Where Police Use Force to Disperse Protesters*

In his Fourth Amendment analysis of the excessive-force claim in *Dundon*, Chief Judge Daniel Hovland reasoned that the Fourth Amendment may not even apply because activists were never arrested or affirmatively detained by police.[121] This argument was advanced by the defendants in their Motion to Dismiss, where they relied on Fourth Amendment precedent to argue that because the police did not intend to detain the water protectors, they were never seized and thus the Fourth Amendment could not even apply.[122] This is because the Supreme Court in *California v. Hodari D.*[123] concluded that a person is seized either when being physically touched by police or when submitting to state authority.[124]

The Supreme Court greatly limited Fourth Amendment protection when it defined a seizure narrowly in *Hodari D*. Hodari D. argued that the Fourth Amendment protected him when he saw police chasing him and knew that he was not free to leave.[125] However, the majority—via Justice Scalia—engaged in a literal analysis stating that "[t]the word 'seizure' readily bears the meaning of a laying on of hands or application of physical force."[126] Post-*Hodari D.*, the Fourth Amendment does not apply unless a police officer physically touches the individual or the individual submits to a government show of authority.[127] In his

[120] Dundon v. Kirchmeier, No. 1:16-cv-00406, 2017 WL 5894552, at *20 (D.N.D. Feb. 7, 2017), *aff'd mem.*, 701 F. App'x 538 (8th Cir.) (per curiam) ("[T]he Court finds no reasonable juror could conclude the level of non-lethal force used by law enforcement officers during the chaos on November 20, 2016, at the Backwater Bridge was objectively unreasonable.").

[121] *Id.*

[122] Memorandum of Law in Support of Defendants Kyle Kirchmeier et al. Motion to Dismiss at 39, Dundon v. Kirchmeier, No. 1:16-cv-00406 (D.N.D. Feb. 6, 2017), 2017 WL 3071655 [hereinafter *Dundon* Defendants' Motion to Dismiss] ("The Supreme Court subsequently clarified the termination or restraint upon a person's freedom of movement must be through 'means intentionally applied' to constitute a 'seizure'—an unintentional act cannot result in a seizure." (citing Brendlin v. California, 551 U.S. 249, 254 (2007))).

[123] 499 U.S. 621 (1991).

[124] *Id.* at 627-28; *see also* Renée Paradis, Note, *Carpe Demonstratores: Towards a Bright-Line Rule Governing Seizure in Excessive Force Claims Brought by Demonstrators*, 103 COLUM. L. REV. 316, 318 (2003).

[125] *Hodari D.*, 499 U.S. at 627-28.

[126] *Id.* at 626.

[127] *Id.*

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dissent, Justice Stevens—joined by Justice Thurgood Marshall—criticized this narrowing as inconsistent with the goal of deterring police misconduct because it determined whether the Fourth Amendment applied to the interaction based on how the civilian responded, not on how the police behaved.[128] Unless the person gives into police force, there is no literal seizure. It does not matter if the show of force is unwarranted, violent, or unsupported by probable cause. The dissent focused on how this limiting of the seizure—and, therefore, of the application of the Fourth Amendment—ignores the "coercive and intimidating" effects of police conduct.[129] Justice Stevens worried that "[i]t [was] too early to know the consequences of [*Hodari D.*'s] holding. If carried to its logical conclusion, it will encourage unlawful displays of force that will frighten countless innocent citizens into surrendering whatever privacy rights they may still have."[130]

Fast forwarding from *Hodari D.* to *Dundon*, Chief Judge Hovland reasoned that since there was no physical laying of hands (and no arrests), the water protectors were not seized and the Fourth Amendment did not apply at all to any of the police conduct.[131] According to the judge, the water protectors could have just complied with police orders to disperse.[132] This conclusion ignored the plaintiffs' reports that some were "locked in by [tear] gas, and also blinded and gagging," decked to the ground by the force of the water, and that about two hundred were physically injured.[133] Moreover, as mentioned in prior discussion, the *Graham* Court defined a seizure as some sort of restraint on personal liberty pursuant to *Terry v. Ohio*.[134] Further and consistent with the *Hodari D.* dissent, doing away with Fourth Amendment concerns simply by concluding that there was no seizure completely discounts how the police behaved in the confrontation. This limiting of Fourth Amendment protection fails to deter police violence and militaristic responses to activists. In *Dundon*, this limitation allowed the district judge's easy denial of the injunction, thereby permitting law enforcement to continue this manner of assault on water protectors, which included blasting them for hours with water cannons, tear gas, concussion and other grenades, rubber bullets, and bean bag projectiles.[135] A more protective Fourth Amendment analysis would not necessitate a literal seizure but would

[128] *Id.* at 646 (Stevens, J., dissenting) ("The deterrent purposes of the exclusionary rule focus on the conduct of law enforcement officers and on discouraging improper behavior on their part, and not on the reaction of the citizen to the show of force." (footnote omitted)).

[129] *Id.* at 645-46.

[130] *Id.* at 646-47.

[131] Dundon v. Kirchmeier, No. 1:16-cv-00406, 2017 WL 5894552, at *18 (D.N.D. Feb. 7, 2017), *aff'd mem.*, 701 F. App'x 538 (8th Cir.) (per curiam).

[132] *Id.*

[133] *Id.* at *4-5 (citations omitted); *Dundon* Amended Complaint, *supra* note 1, at 3.

[134] *See supra* note 46 and accompanying text.

[135] *See Dundon*, 2017 WL 5894552, at *3 (listing various responses of law enforcement to protests).

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instead exalt the liberty rationale of the Fourth Amendment. As the dissent in *Hodari D.* stated, *Terry* expanded the ambit of Fourth Amendment seizures to interactions that did not amount to arrests—to "restraint[s] of an individual's personal liberty '*in some way*.'"[136] In *Dundon*, police intruded not only on the water protectors' right to be left alone but importantly also on their right to protest, object to, and dissent from the construction of DAPL. Thus, the court should have exalted the water protectors' liberty interests instead of discounting them because they had not been arrested or told that they could not leave.[137] The proper balance may be that where the liberty interest involves First Amendment conduct, the court must more scrupulously examine the government's intrusion.[138] In other words, where law enforcement seeks to police or regulate expression—not criminal conduct—the *Graham* reasonableness test must be adapted to protect the expressive conduct.

Other courts are divided regarding how the Fourth Amendment applies to dispersal cases.[139] A court could just assume that the police conduct implicates the Fourth Amendment. This was the district judge's approach in *Lamb v. City of Decatur*,[140] where police used pepper spray against a group of protesters.[141] However, it is unclear from the opinion whether the defendants made the argument that there was no seizure. In *Marbet v. City of Portland*,[142] the City and the police officers contended that the Fourth Amendment did not apply to their use of pepper spray and rubber bullets or to their act of physically moving activists who were protesting the Bush presidency.[143] The factual narrative suggests that the plaintiffs were not arrested.[144] The court disagreed with the defendants and had no problem finding that a seizure occurs when police use "physical force to restrain movement, even when it is ultimately unsuccessful."[145] The *Marbet* judge found that the attempt to control the activists' movement was determinative of the case's outcome.[146]

[136] California v. Hodari D., 499 U.S. 621, 637 (1991) (Stevens, J., dissenting) (quoting Terry v. Ohio, 392 U.S. 1, 19 n.16 (1968)).

[137] *See Dundon*, 2017 WL 5894552, at *18 ("Plaintiffs have neither alleged they were arrested or detained by law enforcement officials . . . nor alleged they were informed by law enforcement officers they were not free to leave and walk away.").

[138] *See* Zurcher v. Stanford Daily, 436 U.S. 547, 564 (1978) ("Where the materials sought to be seized may be protected by the First Amendment, the requirements of the Fourth Amendment must be applied with 'scrupulous exactitude.'" (quoting Stanford v. Texas, 379 U.S. 476, 485 (1965))).

[139] *See* Paradis, *supra* note 124, at 334-41 (describing uncertainties that exist in Fourth Amendment case law regarding public protests and dispersal).

[140] 947 F. Supp. 1261 (C.D. Ill. 1996).

[141] *Id.* at 1263.

[142] No. 1:02-cv-01448, 2003 WL 23540258 (D. Or. Sept. 8, 2003).

[143] *Id.* at *10.

[144] *Id.* at *1.

[145] *Id.* at *10.

[146] *Id.*

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This focus on the police conduct is useful when at least part of the objective is to deter police violence. In *Quraishi v. St. Charles County*,[147] the district court again focused on the actions of law enforcement, ruling that journalists in the streets of Ferguson reporting on the police shooting of Michael Brown were seized when the police sprayed them with tear gas.[148] The judge stated that "[f]iring tear gas, pepper spray, or other chemical agents at someone can constitute a seizure under the Fourth Amendment."[149] In direct contrast, in the case of *Ellsworth v. City of Lansing*,[150] the judge did not engage in any Fourth Amendment analysis when police teargassed protesters. In support of this conclusion, the judge cited *County of Sacramento v. Lewis*[151] and stated parenthetically, without any further discussion, that "where no seizure occurs, [a] claim of excessive force is analyzed under the substantive due process standard, rather than [the] Fourth Amendment reasonableness standard."[152] Likewise, in a lawsuit surrounding a protest of the police involved in the killing of Eric Garner, the judge concluded that law enforcement's use of long-range acoustic devices ("LRADs") against activists did not implicate the Fourth Amendment.[153] The judge stated that "[a]n officer's request to leave an area, even with use of force, is not a seizure unless 'accompanied by the use of sufficient force intentionally to restrain a person and gain control of his movements.'"[154]

Also, another district court stated that, when assessing whether to evaluate the police conduct pursuant to the Fourth Amendment, a court may differentiate between protesters depending on where each was situated and make judgments regarding who was able to escape the scene and who was essentially captured

[147] No. 4:16-cv-01320, 2019 WL 2423321 (E.D. Mo. June 10, 2019), *appeal docketed*, No. 19-2462 (8th Cir. July 12, 2019).

[148] *Id.* at *8-9.

[149] *Id.* at *9 (citation omitted).

[150] 34 F. Supp. 2d 571 (W.D. Mich. 1998), *aff'd*, 205 F.3d 1340 (2000).

[151] 523 U.S. 833, 846-48 (1986).

[152] *Ellsworth*, 34 F. Supp. 2d at 580-81 (concluding that police conduct did not shock conscience and therefore did not violate due process).

[153] Edrei v. City of New York, 254 F. Supp. 3d 565, 574 (S.D.N.Y. 2017), *aff'd sub nom.* Edrei v. Maguire, 892 F.3d 525 (2d Cir. 2018).

[154] *Id.* (quoting Salmon v. Blesser, 802 F.3d 249, 255 (2d Cir. 2015)). Interestingly, however, the Second Circuit subsequently held that even though the Fourth Amendment did not apply, the plaintiffs had asserted a sufficient substantive due process claim for excessive force. *Maguire*, 892 F.3d at 529 ("[W]e hold that purposefully using a LRAD in a manner capable of causing serious injury to move non-violent protesters to the sidewalks violates the Fourteenth Amendment under clearly established law."). The Second Circuit based this conclusion on what the court perceived as a new articulation of due process excessive-force claims that essentially uses the same tests for excessive force under the Fourth and Fourteenth Amendments. *See id.* at 534-38.

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by chemical agents.[155] This type of plaintiff-by-plaintiff analysis is not helpful in terms of regulating police conduct or in terms of decreasing the likelihood of the aggressive use of chemical agents by law enforcement when responding to protesters. Again, this is because such analysis defines whether the Fourth Amendment offers protection based on how the police aggression affected the victims and not based on whether the conduct was wrongful and excessive in the first place.

Thus, for some courts, the Supreme Court precedent defining seizure has arguably removed Fourth Amendment protections from the typical protest scenario, in which law enforcement use militaristic force and military grade weapons to disperse protesters.[156] Section 1983, by its own language, is a tool to "redress" violations of individual's constitutional rights by any person acting on behalf of the government.[157] A literal interpretation of the Fourth Amendment seizure language in the context of dispersal cases therefore violates the remedial purposes of the Act. The vehicle that the Court has determined will vindicate victims' rights is arguably not available in a swath of protest cases.[158]

B. *Protesters as Unit*

Even when a court finds that the Fourth Amendment applies to the police conduct, the court may use a distorted lens to assess civilian behavior that unduly amplifies the threat protesters pose to officer and public safety. Because the Fourth Amendment excessive-force analysis involves balancing to assess "reasonableness," a miscalculation of protesters' conduct leads to a miscalculation of the degree of police force that is reasonable.

The question in excessive-force cases is theoretically a balancing between the conduct of the target and the response of police. The court engages in this

[155] Buck v. City of Albuquerque, No. 1:04-cv-01000, 2007 WL 9734037, at *30-32 (D.N.M. Apr. 11, 2007) (stating that seizure "depend[s] on a Plaintiff's location" and whether "a reasonable person could have concluded that he or she was not free to leave the area or otherwise terminate the encounter," while considering seizure by chemical agents and physical contact separately).

[156] *See* Pita Loor, *supra* note 62, at 26-27; *see also* Dundon v. Kirchmeier, No. 1:16-cv-00406, 2017 WL 5894552, at *18 (D.N.D. Feb. 7, 2017), *aff'd mem.*, 701 F. App'x 538 (8th Cir.) (per curiam); WOOD, *supra* note 13, at 41-42.

[157] *See* 42 U.S.C. § 1983 (2018).

[158] The *Dundon* defendants also reasoned that any Fourteenth Amendment due process claim would be more challenging for plaintiffs because the requirement that conduct "shock the conscience" is a more burdensome standard than an "objective reasonableness" analysis. *Dundon* Defendants' Motion to Dismiss, *supra* note 122, at 51. Although the language of both the due process test and the Fourth Amendment test would suggest that this is a reasonable inference, there might not be an actual difference in terms of plaintiffs' likelihood of success because both constitutional provisions require a showing of bad motive. *See* Brown, *supra* note 56, at 1274 ("Whether analyzing the use of force under the fourth amendment or the fourteenth, most courts find a constitutional violation only when the defendants have acted unreasonably *and with improper motivation*.").

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balancing by evaluating: (1) the severity of the crime, (2) whether there is an immediate threat, and (3) whether the target is resisting arrest or trying to flee.[159] As discussed in Part I, *Graham*'s permissive language about the "split-second decisions" police must make provides too much deference to aggression by law enforcement.[160] This deference sets a low bar for police aggression because judges attribute mistakes in police judgments to "tense, uncertain, and rapidly evolving" circumstances.[161] In the protest scenario, courts further compound the assessment of the threat that police face by weighing the actions of the crowd of protesters in conjunction with the actions of the individual plaintiff-protesters. This is contrary to traditional Fourth Amendment analysis, which inquires whether the government intrusion is reasonable in light of the individual's actions—not the actions of those in proximity or even of his associates.[162] Just like a police officer should not be able to arrest someone in proximity to a lawbreaker, the officer should not be able to use force against someone in proximity to a lawbreaker. After all, police are permitted to use force as justified by their official duties—not because they have some natural right to use force against the general public. If the court considers the actions of the crowd as a unit versus the actions of an individual plaintiff-protester, then the threat calculus is off balance and the court will justify what would otherwise be unconstitutional police violence.

The *Dundon* defendants advocated for this mode of analysis before the district court. Even though there was no allegation that the *Dundon* plaintiffs were anything other than peaceful, the defendants argued that police force was reasonable because the plaintiffs were part of a unit that was behaving unlawfully. In their motion to dismiss, the defendants stated that the plaintiffs "were intermingled [with others who] were engaged in removing and attempting to remove government property from Law Enforcement's barricade prior to force allegedly being applied to them. The only reasonable inference is [that] the unlawful conduct of the protesters . . . motivated Law Enforcement's alleged use

[159] *See* Graham v. Connor, 490 U.S. 386, 396 (1989) ("Because '[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application,' . . . its proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." (first alteration in original) (citation omitted) (quoting Bell v. Wolfish, 441 U. S. 520, 559 (1979))).

[160] *See supra* notes 48-49 and accompanying text (arguing that such a permissive standard effectively immunizes large swath of aggressive police conduct).

[161] *Graham*, 490 U.S. at 397.

[162] *See* Ybarra v. Illinois, 444 U.S. 85, 91 (1979) ("[A] person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person. Where the standard is probable cause, a search or seizure of a person must be supported by probable cause *particularized with respect to that person*." (emphasis added) (citation omitted)).

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of force."[163] The defendants further cited *Carr v. District of Columbia*[164] for the proposition that a "requirement that the officers verify that each and every member of a crowd engaged in a specific riotous act would be practically impossible in any situation involving a large riot."[165] Thus, the defendants argued that the use of force was reasonable to control the crowd or unit rather than to control the plaintiffs specifically.[166]

The *Dundon* defendants' reference to *Carr* is significant because the concept of unit probable cause was initially adopted by the court in that case.[167] In that case, the D.C. District Court had ruled that the plaintiff protesters' arrests violated the Fourth Amendment because the police could not establish that each of the people they arrested was engaged in the crime of rioting.[168] The D.C. Circuit reversed, holding that the police need only show a "reasonable belief that the entire crowd is acting as a unit and therefore all members of the crowd violated the law."[169] The D.C. Circuit accepted the risk that an innocent protester could be swept up in the arrest highlighting that the question was one of probable cause, not final conviction.[170] However, this language minimizes how far of a departure this type of group analysis is from the probable cause requirement of individualized suspicion. In the protest scenario, it also ignores how this group analysis harms activists' right to express dissent—thus undervaluing protest activity. This concept of unit probable cause espouses guilt by association and thus dilutes the Fourth Amendment beyond recognition. The rights of activists who participate in mass protests are in particular danger in jurisdictions that adopt this group analysis.

Returning to *Dundon*, the district judge referenced the "chaotic scenario"[171] and the "sizeable minority of protesters . . . [whom he] categorized as a group of unlawful and violent agitators" when he denied the injunction.[172] The judge ruled that if the Fourth Amendment applied, no reasonable juror could find that

[163] *Dundon* Defendants' Motion to Dismiss, *supra* note 122, at 2.

[164] 587 F.3d 401, 408 (D.C. Cir. 2009).

[165] *Dundon* Defendants' Motion to Dismiss, *supra* note 122, at 27 (quoting Bernini v. City of St. Paul, 665 F.3d 997, 1003 (8th Cir. 2012)).

[166] *Id.* at 28-32; *id.* at 31 ("Regardless, *Bernini* establishes the use of non-lethal munitions upon an unruly crowd, which officers reasonably believe is acting as a unit, to prevent the crowds unlawful access to property and to restore order, is objectively reasonable as a matter of law.").

[167] *Id.* at 27-28 (citing *Bernini*, 665 F.3d at 1003).

[168] *Carr*, 587 F.3d at 405-06.

[169] *Id.* at 408.

[170] *Id.* ("Probable cause only requires a reasonable belief of guilt, not a certitude." (citing Brinegar v. United States, 338 U.S. 160, 175 (1949))).

[171] Dundon v. Kirchmeier, No. 1:16-cv-00406, 2017 WL 5894552, at *19 (D.N.D. Feb. 7, 2017), *aff'd mem.*, 701 F. App'x 538 (8th Cir.) (per curiam).

[172] *Id.* at *8.

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the force was unreasonable.[173] The judge focused on the overall scene and volatility of the crowd—instead of the specific acts of the plaintiffs—suggesting that he was persuaded by the defendants' reference to *Carr* and to a group/unit analysis.

Since *Carr* was decided in 2009, various jurisdictions have progressively embraced this Fourth Amendment unit analysis in protest cases. The *Dundon* defendants were well situated because the Eighth Circuit had already adopted group probable cause in *Bernini v. City of St. Paul*.[174] In *Bernini*, the court found that police did not violate the Fourth Amendment when arresting a large group of protesters at the Republican National Convention, even though the officers were unable to articulate probable cause for each person arrested. Citing *Carr*, the court determined that

> [w]hat is reasonable in the context of a potential large-scale urban riot may be different from what is reasonable in the relative calm of a tavern with a dozen patrons. . . . [T]he Fourth Amendment "is satisfied if the officers have grounds to believe all arrested persons were a part of the *unit* observed violating the law."[175]

In another Eighth Circuit case, the court applied group probable cause to Ferguson protesters.[176] The court concluded that the plaintiffs' arrests for failure to disperse were reasonable because they "chose not to disassociate" themselves from the group throwing debris at police and instead continued to walk while "in the vicinity of a violent crowd" toward the line of police shooting rubber bullets at them.[177] Thus, the proximity of the plaintiffs to an unlawful crowd justified the police's violent conduct.

As an example of the growing acceptance of this looser, group probable cause standard for protests, courts within the Second Circuit—courts that previously rejected group probable cause—are increasingly embracing it for mass protests. In a pre-*Carr* decision, the Second Circuit ruled in *Papineau v. Parmley*[178] that police violated the Fourth Amendment when they beat and violently arrested indigenous protesters indiscriminately.[179] Because the police admitted that they could not identify whether any of the plaintiffs were actually blocking the roadway—which was necessary for a disorderly conduct arrest—the court ruled

[173] *Id.* at *19.

[174] 665 F.3d 997, 1001 (8th Cir. 2012) (emphasis added) (considering mass arrests of approximately one hundred protesters surrounding Republican National Convention).

[175] *Id.* at 1003 (quoting *Carr*, 587 F.3d at 407).

[176] White v. Jackson, 865 F.3d 1064, 1069 (8th Cir. 2017) (considering claims by six sets of plaintiffs arrested during protest).

[177] *Id.* at 1075-79.

[178] 465 F.3d 46 (2d Cir. 2006).

[179] *Id.* at 53 (describing violent police action including "beating [protesters] with their riot batons, dragging them by their hair and kicking them," choking a praying man, manhandling both an eleven-year-old girl and an elderly medicine woman, and "even toss[ing] an infant in a double leg cast from his stroller").

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that the police could not have reasonably believed that the mass arrest was justified because a few protesters had violated the law.[180] The court further articulated how a rule that would permit the unlawful actions of some to be attributed to the whole group would affect the First Amendment in that "we see little that would prevent the police from ending a demonstration without notice for the slightest transgression by a single protester."[181]

Post-*Carr*, in *Dinler v. City of New York*,[182] the defendants cited group probable cause pursuant to *Carr*, arguing that police could arrest the entire group "where it reasonably appears to the police that a large group is engaging in unlawful conduct."[183] A judge in New York's Southern District, citing the principle of individualized probable cause espoused in *Ybarra v. Illinois*,[184] rejected the defendants' arguments that they possessed probable cause to arrest Republican National Convention protesters for obstruction of traffic and defying a police order to disperse.[185] However, the judge did not specifically reject *Carr*'s reasoning, stating that *Carr* did not really promulgate a new probable cause standard but instead "stand[s] for the unremarkable proposition that, where a group of individuals is acting in concert such that a reasonable officer could conclude that every member of the group violated the law, that officer would be justified in arresting every member of the group."[186] Calling the *Carr* proposition "unremarkable" in the realm of probable cause is a mischaracterization because it deviates from individualized suspicion.

The same year and in the same district, in *Garcia v. Bloomberg*,[187] another judge rejected the defendants' arguments to treat seven hundred Occupy Wall Street marchers as a group because even if not all protesters heard the police warnings to avoid the street, some did, and law enforcement could then arrest all of them for disorderly conduct pursuant to *Carr*.[188] The district judge distinguished *Carr* by differentiating between violent rioters and peaceful protesters.[189] However, the Second Circuit sitting en banc reversed without mentioning *Carr*, instead highlighting the "confused and boisterous situation confronting the officers" and noting that some protesters were able to hear the

[180] *Id.* at 59.

[181] *Id.* at 57.

[182] No. 1:04-cv-07921, 2012 WL 4513352 (S.D.N.Y. Sept. 30, 2012).

[183] *Id.* at *4 (quoting Defendant's Memorandum of Law in Support of Their Motion for Summary Judgment to Dismiss the False Arrest Claims of Plaintiffs Arrested on East 16th Street at 9, *Dinler*, 2012 WL 4513352 (No. 1:04-cv-07921)).

[184] 444 U.S. 85 (1979).

[185] *Dinler*, 2012 WL 4513352, at *5.

[186] *Id.*

[187] 865 F. Supp. 2d 478 (S.D.N.Y. 2012), *aff'd sub nom.* Garcia v. Does, 764 F.3d 170 (2d Cir. 2013), *rev'd en banc*, 779 F.3d 84 (2d Cir. 2015).

[188] *Id.* at 489-90 (finding that protesters were nonviolent and therefore did not receive fair warning prior to their arrest).

[189] *Id.*

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police warning yet made no attempts to disperse.[190] This was sufficient for the Second Circuit to conclude that there was probable cause to arrest all protesters for disorderly conduct.[191] While the Second Circuit did not allude to group probable cause in *Garcia*, the ruling that failure of some protesters to heed police orders was sufficient to result in the arrest of seven hundred individuals demonstrates that the court allowed the actions of some activists to be attributed to the entire group.

This looser probable cause standard means that police can easily justify the indiscriminate use of violent tactics and less-than-lethal weapons when they assert that violent protesters were in the vicinity. This standard substantially deviates from and is inconsistent with traditional individualized determinations of suspicion.

CONCLUSION

Police officers' targeting of protesters of color is unlikely to end considering that it dates back to the beginning of the American republic. Whether quelling slave rebellions,[192] cracking down on a Mexican American rally against Chicano casualties in the Vietnam War,[193] or suppressing civil rights marchers in Selma,[194] government authorities have consistently responded brutally to dissent from people of color. When nonwhite activists challenge the status quo, law enforcement reacts with military-grade force to quash protests. Protesters of color have few allies because the white majority—which benefits from the status quo—sees these protest movements as generally corrosive to society and to progress.[195] The courts are not allies either. Instead, harmful Fourth Amendment doctrines coalesce to facilitate police abuse of activists of color.

This Essay demonstrates how the Fourth Amendment fails to provide protection in the emblematic protest scenario, in which law enforcement employs brutal and often militaristic force to disperse protesters. Simultaneously, the Fourth Amendment also fails its own roots, deviating from the principle of individualized suspicion in favor of group suspicion. This

[190] Garcia v. Does, 779 F.3d 84, 93-94 (2d Cir. 2015) (en banc).

[191] *Id.* at 94-96.

[192] Stephen L. Carter, Opinion, *Policing and Oppression Have a Long History*, BLOOMBERG OPINION (Oct. 29, 2015, 6:19 PM), https://www.bloomberg.com/opinion/articles/2015-10-29/policing-and-oppression-have-a-long-history [https://perma.cc/H4XN-74JB]; Chelsea Hansen, *Slave Patrols: An Early Form of American Policing*, NAT'L L. ENFORCEMENT MUSEUM: ON THE BEAT (July 10, 2019), https://lawenforcementmuseum.org/2019/07/10/slave-patrols-an-early-form-of-american-policing/ [https://perma.cc/89CX-86DC].

[193] Mario T. García, *An Important Day in U.S. History: The Chicano Moratorium*, NAT'L CATH. REP.: NCR TODAY (Aug. 27, 2015), https://www.ncronline.org/blogs/ncr-today/important-day-us-history-chicano-moratorium [https://perma.cc/3FKH-PELU].

[194] *March 7, 1965: Civil Rights Marchers Attacked in Selma*, N.Y. TIMES: LEARNING NETWORK (Mar. 7, 2012, 4:07 AM), https://learning.blogs.nytimes.com/2012/03/07/march-7-1965-civil-rights-marchers-attacked-in-selma/.

[195] *See* Izadi, *supra* note 115.

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analysis suggests that courts should recalibrate their treatment of police-excessive-force claims in mass protest cases in order to reign in law enforcement abuse and to be more protective of activists' rights to dissent. An alternative analysis should elevate protest rights and apply a more rigorous Fourth Amendment review when the police seek to control expressive conduct.

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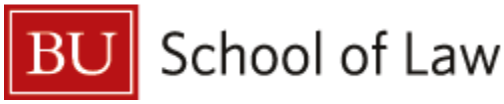

THE EXPRESSIVE FOURTH AMENDMENT

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THE EXPRESSIVE FOURTH AMENDMENT

KAREN J. PITA LOOR*

INTRODUCTION

On May 26, 2020, the world witnessed via an eight minute and forty-six second viral video the life being choked out of yet another Black man - George Floyd – by Minneapolis Police Officer Derek Chauvin while other members of his department kept watch.[1] Across the nation, the streets erupted in protests as people expressed their disdain for the persistent police brutality against BIPOC.[2] Three days later, Police Officer Tommy McClay posted on Instagram a photo of himself and two other officers in riot gear, ready to head into Denver protests, with the caption "Let's start a riot."[3] When a protester asked a different Denver police officer during the same protest what will happen once the protest curfew arrived, the officer – gripping his baton – firmly replied "What's going to happen is we are going to beat the fuck out of you."[4] And they did. Denver police intentionally aimed and shot munitions at activists' heads and groins.[5] Videos show people bleeding from the eyes as the result of rubber bullets or sponge grenades.[6] Further footage exposes Denver police shooting munitions, tear gassing, and pepper spraying people that are protesting, holding signs, chanting, taking photos, and, in some cases, merely observing – as well as in retribution spraying a protester who is screaming at police.[7] These atrocities did not only happen in Denver. In Minneapolis, the site of George Floyd's murder, police shot with rubber bullets, tear gassed, pepper sprayed, arrested, and threatened protesters, as well as the journalists who sought to document

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[1] Derrick Bryson Taylor, *George Floyd Protests: A Timeline,* N.Y. TIMES (July 10, 2020), https://perma.cc/CJR8-SXTF.

[2] BIPOC stands for "black, Indigenous and people of color" and is intended to be inclusive of racially and ethnically marginalized groups in the United States. *See* Sandra Garcia, *Where Did BIPOC Come From?*, N.Y. TIMES (June 17, 2020), https://perma.cc/CV7N-YNJH. The BIPOC Project's mission statement explains that the term BIPOC "highlight[s] the unique relationship to whiteness that Indigenous and Black (African American) people have, which shapes the experiences of and relationship to white supremacy for all people of color within a U.S. context." THE BIPOC PROJECT (last visited August 2, 2020), https://perma.cc/54EJ-NKGF.

[3] Class Action Complaint and Demand for Jury Trial at 3, Abay et. al. v. City of Denver, Case 1:20-cv-01616-RBJ (June 4, 2020) (hereinafter Denver Complaint). Officer McClay was terminated by the Denver Police Department as a result of the post. *Id.* at 4.

[4] *See* Denver Complaint at 5 with video of incident, https://perma.cc/5SYN-VBEZ.

[5] *Id*. at 11.

[6] *Id*.

[7] *Id*. at 5.

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the protests and ensuing police violence.[8] The scenes of police brutality in Denver and Minneapolis were replicated throughout protest sites across the country.[9]

Responding to these and similar instances, protesters and their advocates sued to remedy and prevent future police officer use of excessive force, invoking the Fourth Amendment. These lawsuits are still in their nascent stages, but a review of the orders where courts have preliminarily reached the merits show judges applying a police-deferential Fourth Amendment analysis to protesters' excessive force claims.[10] This deferential standard in excessive force jurisprudence emerged primarily from courts' analyses of cases involving one-on-one street encounters where a police officer claims they[11] suspected criminal activity and engaged with the suspect aggressively in the course of a criminal investigation or arrest.[12] However, police violence is not limited to one-on-one encounters during routine policing, but extends to activism as the public recently witnessed in the 2020 racial justice protests. Violent confrontations between police and activists have landed in the courts not only during the George Floyd protests, but for decades, with protest plaintiffs claiming that the police violated their Fourth Amendment rights by employing excessive force.[13] But the Fourth Amendment jurisprudence has not developed to differentiate between how police officers can reasonably treat a protester versus how police officers can reasonably treat a criminal suspect. When the courts analyze whether force in the protest context is "reasonable," they treat *expressive conduct*[14] no differently than any other conduct in the typical, criminal context. In these protest cases, courts are missing the *expressive* component of Fourth Amendment protections.

Per *Graham v. Connor*, the constitutionality of police use of force under the Fourth Amendment is primarily a question of whether the use of force was reasonable in the totality of the circumstances.[15] Courts take into

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[8] Class Action Complaint, Williams v City of Minneapolis, Case 0:20-cv-01303 (D. MN. June 2, 2020) (hereinafter Williams Complaint); Class Action Complaint and Demand for Jury Trial, Goyette v. City of Minneapolis, Case 0:20-cv-01302 (D. MN. June 2, 2020) (hereinafter Goyette Complaint).

[9] Taylor, *supra* note 1.

[10] *See infra* Part II B (2) discussing protesters' excessive force claims in litigation associated with the George Floyd protests.

[11] I use "they/them" pronouns throughout this article to be inclusive of all gender identities. *See* Jacob Tobia, *Everything You Ever Wanted to Know About Gender-Neutral Pronouns,* TIME (2016), https://perma.cc/JXW4-YWEX; Marriott Marquis, *2015 Word of Year is Singular "They,"* AMERICAN DIALECT SOCIETY (2016), HTTPS://PERMA.CC/R8P9-CQS9.

[12] *See infra* Part II discussing *Graham v. Connor*, its critiques and its current application to excessive force claims in protest cases.

[13] *See infra* Part II discussing prior protest litigation.

[14] The Supreme Court recognizes that conduct "expressing certain views is the type of symbolic act" that is "closely akin to 'pure speech' which ... is entitled to comprehensive protection under the First Amendment." Tinker v. Des Moines Ind. Comty. Sch. Dist, 393 U.S. 503, 505-6 (1969).

[15] Graham v. Connor, 490 U.S. 386 (1989).

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account the policed person's conduct, the threat to police and public, and whether the policed person attempted to flee or resist arrest.[16] However, they generally have not taken into account a signature feature of protests. Protests involve *expressive* conduct and therefore present a very different, and important set of interests, compared to one-on-one criminal suspect cases.

In this article, I argue that courts should recognize the expressive component of Fourth Amendment protections – the expressive Fourth Amendment – and apply those protections scrupulously to excessive force claims in protest cases. Courts should rein in police discretion and shift their Fourth Amendment query from what government actions are reasonable under *Graham v. Connor* to what government actions are "reasonable in light of freedom of expression."[17] This means that in the Fourth Amendment balance of the totality of the circumstances, plaintiff activists' engagement in protest activity would weigh positively for their case. This critique is distinct from the scholarship that focuses on how courts handle the protesters' *First Amendment* claims that police are chilling their speech.[18] Much scholarly attention has been paid to whether police violate protesters' First Amendment freedom of expression, but there has been strikingly little[19] scholarly attention to how the fact that protesters are engaged in socially important and desirable expressive behavior, rather than suspected criminal activity, changes the Fourth Amendment reasonableness equation.[20] This article is

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[16] *Id*. at 396; *see also infra* Part IIA discussing application of *Graham* test.

[17] *Roaden v. Kentucky*, 413 U.S. 496, 504 (1973).

[18] *See* Ronald J. Krotoszynski, Jr, THE DISAPPEARING FIRST AMENDMENT (Cambridge University Press 2019) (arguing free speech rights have restricted in areas where First Amendment claims require open-ended balancing of the interests of speakers and the government); Kevin Francis O'Neill, *Privatizing Public Forums to Eliminate Dissen*t, 5 FIRST AMEND. L. REV. 201 (2007) (critiquing deference to police in nonpublic forums on First Amendment protest claims); Daniel Markovits, *Democratic Disobedience*, 114 YALE L.J. 1897, 1898 (2005) ("Political protesters sometimes break the law … In such cases, disobedience is not guided by greed or self-dealing but by principal, and it is therefore not criminal in any ordinary sense ...."); Bruce Ledewitz, *Civil Disobedience, Injunctions and the First Amendment*, 19 HOFSTRA L. REV. 67 (1990) (arguing that First Amendment protection should extend to situations of civil disobedience).

[19] *See* Karen J. Pita Loor, *Tear Gas + Water Hoses Dispersal Orders: The Fourth Amendment Endorses Brutality in Protest Policing*, 100 B.U. L. REV. 817 (2020) (hereinafter *Water Hoses*); Karen J. Pita Loor, *When Protest is the Disaster: Constitutional Implications of State and Local Emergency Power*, 43 SEATTLE U. L. REV. 1 (2019) (hereinafter *When Protest is the Disaster*); *see also* Alicia A. D'Addario, *Policing Protest: Protecting Dissent and Preventing Violence Through First and Fourth Amendment Law*, 31 N.Y.U. REV. L. & SOC. CHANGE (2006).

[20] *See* Crystal Abbey, Note, *Agents of Change: How the Police and the Courts Misuse the Law to Silence Mass Protests,* 72 NAT'L LAW. GUILD REV. 81, 98 (2015) (noting international law against use of chemical agents more restrictive than domestic laws protecting protesters); D'Addario, *supra* note 19, at 101 ("explor[ing] the manner in which lower federal courts have applied the First and Fourth Amendments to protesters and argu[ing] that courts have failed to consider the interaction of the two amendments"); Renee Paradis, *Carpe Demonstratores: Toward a Bright-Line Rule Governing Seizure in Excessive Force Claims Brought by Demonstrators*, 103 COLUM. L. REV. 316 (2003) (arguing that the

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the first to name and deeply probe the expressive component of Fourth Amendment protections in the context of protest activity, and examining the history of Fourth Amendment doctrine involving freedom of expression, finds that the framers and early Court understood the Fourth Amendment to extend special protection to expressive conduct. The Court has recognized that the Fourth Amendment has an expressive component and affords special protection to expression in cases involving searches of books and papers, and now that special protection must be recognized when an individual's conduct is expressive, such as when activists are embroiled in protest. The expressive Fourth Amendment likely has implications beyond these paper search cases and protests, but I will limit my exploration in the context of the latter, saving other possibilities for future work.

Evidence of the historical context surrounding the drafting of the Bill of Rights demonstrates that the very concept of the Fourth Amendment derives in part not just from a concern of government intrusion, but of the power of that intrusion to quell political thought. Freedom of expression was very much in the framers' minds when constructing these first ten amendments, and its protection was not just encapsulated within the First Amendment but also within the Fourth Amendment.[21] The Supreme Court has recognized the relevance of this historical context when evaluating whether government searches of books, papers and other materials violate the Fourth Amendment.[22] The Court's search analysis long held that the Fourth Amendment provides special protection for "papers"[23] precisely *because* papers are communicative in nature and may contain the type of political speech that might be targeted by police authorities. However, courts have generally not applied this facet of Fourth Amendment jurisprudence to seizures of the person. They should.

Justice Thurgood Marshall remarked, "To protest against injustice is the foundation of American democracy."[24] The freedom to gather and express dissent is central to a democratic government,[25] but this freedom is elusive when militarized law enforcement descend aggressively on

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seizure requirement of the Fourth Amendment should apply to all protesters "constructively seized by [police] force" in order to facilitate § 1983 suits).

[21] *See infra* Part IIIA(1) discussing framing of Fourth Amendment.

[22] *See infra* Part IIIA(2) discussing the Supreme Court's paper cases.

[23] By papers, I am referring not only to written materials, but videos, newspapers, and other materials recognized as expressive by the Court. In *Roaden v. Kentucky*, 413 U.S. 496, 504 (1973), analyzed *infra*, the Court found that "the prior restraint of the right of expression, whether by books or films [or other expressive material], calls for a higher hurdle in the evaluation of reasonableness." This standard thus applies to all "paper cases" regardless of medium.

[24] *Dallas Police Brutality Lawyers & Non-Violence Arrests Attorneys Broden & Mickelsen*, ASSOCIATED PRESS (June 28, 2021), https://perma.cc/8S6M-G2QK. The exact source of this quote is unknown, but is widely accredited to Justice Marshall. *Id*.

[25] *See* Whitney v. California, 274 U.S. 357, 375–76 (1927) (Brandeis, J., concurring) ("[F]reedom to think as you will and to speak as you think are indispensable to the discovery and the spread of political truth; [ ] without free speech and assembly, discussion would be futile . . . the greatest menace to freedom is an inert people . . .").

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protesters. The current reasonableness analysis ignores the revered position that protest activity has in our system of government and, by doing so, ignores the historical underpinning of the Fourth Amendment and important Fourth Amendment doctrine. Reasonableness is a sliding scale,[26] and thus to properly value expressive freedom, it is insufficient to simply consider protest activity the same as any other noncriminal activity because it devalues individual expressive rights protected by the First Amendment. I propose a doctrinal shift in the manner that jurists evaluate the reasonableness of police force pursuant to the expressive Fourth Amendment – grounded in history and precedent – which safeguards freedom of expression by mitigating police discretion and considering the political value of protest activity. This doctrinal shift is urgent as we stand in the midst of the largest protest movement in American history.[27]

I recognize that a shift in how courts evaluate protesters' excessive force claims is not, by any means, a complete fix to the problem of violent protest policing. A multi-pronged approach is needed to fix the problem. I have previously suggested a bureaucratic solution at the state and local level that would direct and rein in law enforcement and executive emergency management response to mass protests.[28] Moreover, I acknowledge that even on the judicial front there is an additional "elephant in the room" type of barrier to plaintiffs' recovery in these lawsuits, namely qualified immunity.[29] Qualified immunity is a serious challenge to excessive force

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[26] *See* Terry v. Ohio, 392 U.S. 1, 18 (1968) ("[T]he central inquiry under the Fourth Amendment [is] the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security. 'Search' and 'seizure' are not talismans. We therefore reject the notions that the Fourth Amendment does not come into play at all as a limitation upon police conduct if the officers stop short of something called a 'technical arrest' or a 'full-blown search.'"); Camara v. Municipal Court, 387 U.S. 523, 536-47 (1967) ("[T]here can be no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails.")
see also Eric Muller, *Hang onto your hats! Terry Into the Twenty-First Century*, 72 ST. JOHN'S L. REV. 1114, 1141 (1998) (taking "the central idea of *Terry* to be its refreshing flexibility: Its willingness to break from the rigidity of the probable cause requirement, and to recognize that police officers interact with citizens in many more ways."); Christopher Slobogin, *World Without a Fourth Amendment*, 39 UCLA L. REV. 1, 68, 70 (1991) (arguing that a "sliding scale approach" to Fourth Amendment reasonableness analysis is "deeply inimical to both individual and state interests.")

[27] *See* Larry Buchanan, Quoctrung Bui and Jugal K. Patel, *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), https://perma.cc/4TM9-F8AA (mapping number of protests nation-wide during summer 2020).

[28] *See* Karen Pita Loor, *When Protest is the Disaster*, *supra* note 19 (recommending that states and localities establish a council of experts, activists and community members to guide emergency response when the perceived crisis is prompted by protest activity).

[29] The doctrine of qualified immunity guards a government actor from lawsuit even when they act unconstitutionally or unlawfully as long as any reasonable official would not have understood that the conduct was in violation of a clearly established law. *Hunter v. Bryant*, 502 U.S. 224, 227 (1991). "The qualified immunity standard 'gives ample room for mistaken judgments' by protecting 'all but the plainly incompetent of those who knowingly

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litigation which other scholars have expertly battled.[30] At this time, I will stay out of that fray. Nevertheless, although the judicial shift I suggest will not serve as a complete fix to the litigation problem, it is not only a step in the right direction but the correct doctrinal step considering the expressive component of the Fourth Amendment.

The first part of the article provides a recent history of police brutality against racial justice activists in the protests over the murder of George Floyd. The second part of this article discusses how courts currently evaluate the Fourth Amendment reasonableness of police force pursuant to *Graham v. Connor* by reviewing circuit court opinions from the last three decades and district court injunctions from the George Floyd protest litigation. The third part of this article argues that the Fourth Amendment mandates that courts evaluate the reasonableness of protest policing in light of freedom of expression. This reframing of reasonableness is supported by historical evidence of the framer's intent and the Supreme Court jurisprudence on searches of books, papers, and other expressive materials when such items arguably deserve First Amendment protection. The fourth part discusses the difference an expression-specific Fourth Amendment – the *expressive Fourth Amendment* – reasonableness test would have made in a protest case.

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violate the law.'" *Id*. at 229 (quoting *Malley v. Briggs*, 475 U.S. 335, 343 (1986)). In some jurisdictions, courts have interpreted the "clearly established law" principle to mean that there must be a precedential case on point that has determined similar conduct not deserving of qualified immunity. *See* John P. Gross, *Qualified Immunity and the Use of Force: Making the Reckless into the Reasonable*, 8 ALA. C.R. & C.L. L. REV. 67, 78-79 (2017) ("The requirement that the law be *clearly established* before a government official can be held liable for damages almost certainly contributes to the spread of practices that are eventually deemed unlawful. There is very little incentive to litigate when the state of the law is arguably unclear") (*emphasis added*). The Supreme Court has stated that it "do[es] not require a case directly on point ... existing precedent must have placed the statutory or constitutional question beyond debate." *Ashcroft v. al-Kidd,* 563 U.S. 731, 735 (2011). In addition, since the doctrine acts to immunize government actors from suit instead of being a defense during trial, the Supreme Court has "repeatedly [ ] stressed the importance of resolving immunity questions at the earliest possible stage in the litigation." *Id.* at 227. Thus, qualified immunity prevents most §1983 lawsuits against government actors in early stages of litigation. Diana Hassel, *Excessive Reasonableness*, 43 IND. L. REV. 117, 124-29 (2009). Of course, plaintiffs can also appeal a dismissal due to qualified immunity; however, I have excluded Circuit cases where immunity is the only issue.

[30] *See, e.g*., Marcus Nemeth, *How was that Reasonable? The Misguided Development of Qualified Immunity and Excessive Force by Law Enforcement Officers,* 60 B.C. L. REV. 989, 994 (2019) ("[Qualified immunity] is increasingly used as a shield for police officers who forcibly violate constitutional rights"); Tahir Duckett, *Unreasonably Immune: Rethinking Qualified Immunity in Fourth Amendment Excessive Force, Cases*, 53 AM. CRIM. L. REV. 409, 411 (2016) (arguing that "qualified immunity standards have begun to set longstanding Fourth Amendment precedents adrift, skewing and minimizing courts' oversight of police departments' use of force"); Philip Sheng, *An "Objectively Reasonable" Criticism of the Doctrine of Qualified Immunity in Excessive Force Case Brought Under 42 U.S.C. § 198*3, 26 BYU J. PUB. L. 99 , 100 (2011) ("The only solution appears to be eliminating qualified immunity from excessive force cases altogether.")

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I. CURRENT HISTORY OF POLICE BRUTALITY DURING DEMONSTRATIONS OVER GEORGE FLOYD'S MURDER

The summer of 2020 will live in infamy for two reasons. One is the daily monitoring and ticking up of death rate numbers due to COVID-19.[31] Another is the reckoning on the streets after the murder of George Floyd and how it exposed two simultaneous crises: the brutality of police against BIPOCs both during everyday encounters and the brutality against activists during protest policing. The discussion below provides an account of the latter.

On May 25, 2020, Minneapolis Police Officer Derek Chauvin killed George Floyd on video.[32] The 8-minute and 46 seconds video shows Officer Chauvin suffocating Mr. Floyd by kneeling on the back of his neck with the full weight of his body as other police officers stand guard. Officer Chauvin's hands are in his pockets. Observers plead in desperation with Officer Chauvin to get off Mr. Floyd's neck. Bystanders try to engage the other officers to stop Chauvin. The observers caution that Chauvin is killing Mr. Floyd. Officers ignore the pleas and keep observers from intervening. Mr. Floyd gasps several times that he can't breathe. He ultimately calls out for his mother. He loses consciousness. The video stops.

After the video of George Floyd's murder went viral,[33] cities across the country erupted in mass protests with people outraged by the death of another Black person at the hands of police.[34] The streets were flooded for months with activists and community members of all races[35] marching, screaming, and demonstrating against police brutality and for racial justice.[36] Police – like warriors against enemy forces – confronted overwhelmingly peaceful protesters with militarized violence and force.[37] While there were some places where police reacted in solidarity with racial justice protesters, for

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[31] Jason Slotkin, *COVID-19 Daily Cases On The Rise In Nearly Half Of U.S. States*, NPR (Sept. 26, 2020, 6:59 P.M. ET), https://perma.cc/M4E4-N3KV.

[32] *See* Evan Hill, *How George Floyd Was Killed in Police Custody*, N.Y. TIMES (July 28, 2020), https://perma.cc/HF6Q-EB5T, for a compilation of the body camera and street footage video of George Floyd's murder.

[33] *See* Nicholas Bogel-Burroughs, *8 Minutes, 46 Seconds Became a Symbol in George Floyd's Death. The Exact Time Is Less Clear*, N.Y. TIMES (June 18, 2020), https://perma.cc/H2QX-EST3.

[34] There were even international protests in solidarity of the United States protests, from England to Japan to Kenya. *How George Floyd's Death Sparked Protests Across the World*, WASH. POST (June 10, 2020), https://perma.cc/FVF2-X552.

[35] Amy Harmon & Sabrina Tavernise, *supra* note 7; *see also* Class Action Complaint and Demand for Jury Trial at 7, *Anti-Police Terror Project et al. v. City of Oakland*, Case 3:20-cv-03866 (June 11, 2020) (hereinafter Oakland Complaint) (noting that "[t]he demographics of the [Oakland] demonstrators included people of all different heritages and ages.")

[36] *See e.g.,* justiceforgeorgenyc, INSTAGRAM, https://perma.cc/7ZRM-BXWN for daily updates on New York City George Floyd protests.

[37] *See* Loor, *When Protest is the Disaster*, *supra* note 19 (discussing the mechanisms that provide police and the executive the authority and means to respond swiftly and violently to mass protests).

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example kneeling alongside activists,[38] litigation that ensued across metropolitan protest sites recounted persistent violence by law enforcement against protesters.[39] Police outfitted in armor and riot gear[40] – sometimes riding atop military vehicles[41] – deployed a barrage of military grade weapons on activists and journalists alike. Law enforcement sprayed people and crowds with pepper spray, tear gas, blasted them with rubber and sponge bullets, concussion grenades, stun guns, long range acoustic devices, and beat them with batons.[42] There were reports of police using these less lethal weapons[43] indiscriminately, while other officers arguably used them to cause the greatest level of harm.[44] As discussed in the introduction, Denver police's use of less lethal weapons was brutal.[45] Dallas police tear gassed kneeling protesters.[46] Minneapolis police shot a rubber bullet directly at a journalist's face.[47] A journalist covering the Minneapolis protests stated, "I have never been aimed at so deliberately so many times when I was avoiding

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[38] *Police Take a Knee in Solidarity with George Floyd Protesters*, USA TODAY (June 7, 2020), https://perma.cc/5VH5-9E36.

[39] Complaint and Jury Demand, Williams et al v. City of Dallas Texas et al, Case 3:20-cv-01526-L (June 11, 2020) (hereinafter Dallas Complaint); Complaint and Demand for Jury Trial, Ballew v. City of Chicago, Case 1:20-cv-03422 (June 11, 2020) (hereinafter Chicago Complaint); Class Action Complaint, Black Lives Matter Seattle-King County et al v. City of Seattle, Case 2:20-cv-00887-RAJ (June 9, 2020) (hereinafter Seattle Complaint); Class Action Complaint and Jury Demand, Black Lives Matter Los Angeles v. City of Los Angeles, Case 2:20-cv-05027 (June 5, 2020) (hereinafter Los Angeles Complaint); Complaint and Demand for Jury Trial, Don't Shoot Portland et al v. City of Portland, Case 3:20-cv-00917-HZ (June 5, 2020) (hereinafter Portland Complaint); Class Action Complaint and Demand for Jury Trial, Abay et al v. City of Denver, Case 1:20-cv-01616-RBJ (June 4, 2020) (hereinafter Denver Complaint); Oakland Complaint; Williams Complaint; Goyette Complaint; Indianapolis Complaint.

[40] Dallas Complaint at 10; Denver Complaint at 14; Second Amended Complaint at 10, Don't Shoot Portland et al v. City of Portland, Case 3:20-cv-00917-HZ (June 24, 2020) (hereinafter Amended Portland Complaint).

[41] Dallas Complaint at 10.

[42] Indianapolis Complaint at 3–5, 7, 10–12; Amended Class Action Complaint and Jury Demand at 1–7, 13–18, 20, 23, Black Lives Matter Los Angeles v. City of Los Angeles, Case 2:20-cv-05027 (June 21, 2020) (hereinafter Amended Los Angeles Complaint). Amended Portland Complaint at 1–2, 8; Dallas complaint at 1–2, 6–10, 12; Chicago Complaint at 3; Oakland Complaint at 2, 7-8; Denver Complaint at 5–10, 12–13, 15–17; Goyette Complaint at 9–10, 12, 14–15, 17–18.

[43] According to the ACLU, less lethal weapons are "weapons technology for use in situations in which the use of firearms is neither required nor justified [] intended only to incapacitate or restrain a dangerous or threatening person." *Less Lethal Force: Proposed Standards for Massachusetts Law Enforcement Agencies Executive Summary*, ACLU OF MASSACHUSETTS, 1 (2016), https://perma.cc/4M5S-X7TT. Types of less lethal weapons include chemical sprays, pepper spray, impact projectiles, and electroshock weapons. *Id*.

[44] *See e.g.,* Amended Los Angeles Complaint at 23 (describing how officers waited until protestors were kettled and unable to leave before firing teargas).

[45] *See supra* notes 3–7 and accompanying text.

[46] Dallas Complaint at 12; Denver Complaint at 12–13; *see also* Oakland Complaint at 2 (asserting Oakland police engaged in crowd control by "indiscriminately launching tear gas and flashbang into crowds and at individuals, and shooting projectiles at demonstrators.")

[47] Goyette Complaint at 9–10.

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it."[48] In Portland, after the court had initially limited police use of tear gas, law enforcement "escalated its use of rubber bullets, pepper balls, blast balls, flash bangs, and other impact munitions on . . . crowd[s] in an indiscriminate manner."[49] Protesters and journalists were seriously injured by these "less lethal" weapons.[50]

Research demonstrates that these weapons can kill or cause serious injuries and health effects.[51] Pepper spraying people in the face and eyes can also cause serious damage to the cornea and conjunctiva of the eye.[52] Still, a YouTube video surfaced of a New York City police officer tearing off a protester's mask and directly spraying him in the face.[53] Lawsuits reveal evidence of further injuries, including photos of bloody protesters, journalists, and even bystanders.[54] The manner in which police used less lethal weapons – spraying faces, aiming projectiles directly at individuals, and for general crowd control – increased the physical harm to protesters.[55] A Portland police officer shot munitions at a protester filming the protests, ripping her hand open and breaking a bone.[56] In Indianapolis, the police launched tear gas at protestors filming the abuse from the fifth floor of a parking garage.[57] In Minneapolis, a journalist was permanently blinded in

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[48] *Id.* at 12.

[49] Amended Portland Complaint at 8.

[50] *A guide to the less-lethal weapons that law enforcement uses against protesters,* WASH. POST (June 5, 2020), https://perma.cc/344M-LLFS (hereinafter *A guide*).

[51] *See* Rohini J. Haar et al., *Health impacts of chemical irritants used for crowd control: a systematic review of the injuries and deaths caused by tear gas and pepper spray, BMC Public Health* (2017) (finding that at high concentrations, tear gas can cause "permanent injury primarily to the respiratory system" and that due to the "risk of serious injury or death and potential for deliberate misuse, . . . [rubber bullets] do not appear to be an appropriate means of force in crowd control settings."); *see also A guide, supra* note 50.

[52] *Id.*

[53] Erica Byfield, *Protester Speaks Out After Mask Ripped Off by NYPD and Pepper-Sprayed in Brooklyn*, N.Y. POST (June 5, 2020), https://perma.cc/2F3G-7P7L.

[54] Amended Los Angeles Complaint at 2, 10, 12, 13, 15, 18, 19, 20, 25; Dallas Complaint at 8, 13, 15, 22; Denver Complaint at 11; Goyette Complaint at 17, 18.

[55] In *Abay et al v. City of Denver*, the plaintiffs discuss how Denver police routinely pointed and shot rubber bullets, which are supposed to be aimed at the ground, at protesters' bodies to cause the greatest degree of physical harm. Denver Complaint at 12-13. The various complaints describe how law enforcement utilized chemical irritants for crowd control in ways that increased risk of injury. *See, e.g.*, Amended Portland Complaint at 14 ("[T]rapped between walls of gas, a fence, and lines of police officers...[plaintiffs] believed the police were trying to kill them."); Indianapolis Complaint at 11 ("[Officers] threw more tear gas at the protesters who, at this point, were just trying to get away"); Oakland Complaint at 8 ("Many demonstrators were forced to remove their masks due to the chemical irritants clinging to the cloth and in the air, making it hard to breathe... As a result, many demonstrators were involuntarily made more vulnerable and susceptible to COVID-19 infections.")

[56] Amended Portland Complaint at 16.

[57] Memorandum in Support of Motion for Preliminary Injunction, Indy 10 Black Lives Matter v. City of Indianapolis, Case 1:20-cv-01660 (July 10, 2020).

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one eye by a projectile,[58] while in Dallas a protester lost his eye and another had his cheek shattered.[59]

Not only did the police use and misuse of these weapons show a complete disregard to protesters' and journalists' safety, but law enforcement also failed to provide victims with medical attention. In Denver, when law enforcement was notified that an arrested protester was suffering from an asthma attack inside the police van, an officer responded, "if you wanted to breathe, you should have stayed home tonight."[60] Police also targeted individuals providing medical attention to other protesters, including people who were clearly medics.[61] In Dallas, an injured protester was "left bleeding and handcuffed in the middle of a bridge for several hours while suffering from a massive contusion."[62] In Indianapolis, a baby exposed to tear gas was seen "foaming at the mouth."[63]

Ultimately, racial justice protesters and members of the media brought lawsuits in the district courts of Minneapolis, Dallas, Oakland, Seattle, Portland, Denver, Chicago, Los Angeles, and Indianapolis, claiming extreme violence and unlawful and abusive use of less lethal weapons by police during protests.[64] Across these lawsuits, plaintiffs brought their claims against police, their superiors, and the cities themselves under Section 1983 of the Civil Rights Act.[65] Section 1983 is the vehicle whereby an individual is able to sue a government actor for a violation of a constitutional right.[66] To bring a Section 1983 claim, the individual must specify the

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[58] Goyette Complaint at 10.

[59] Dallas Complaint at 13–15.

[60] Denver Complaint at 16.

[61] *Id.* at 15, 17.

[62] Dallas Complaint at 2.

[63] Indianapolis Complaint at 11.

[64] *See supra* note 39. Protesters also brought state law claims of police violence in state courts, but I have excluded these cases from my discussion since the plaintiffs did not argue violations of their Fourth Amendment rights. See, e.g., Complaint, Leggett v. City of Portland, Case 1:20-CV-19842 (June 7, 2020) (tort claims); Complaint, Farley v. City of Portland, Case 1:20-CV-19839 (June 6, 2020) (battery claims); Complaint, Lake v. City of Portland, Case 1:20-CV-19838 (June 6, 2020) (tort claims); Complaint, Elias v. City of Portland, Case 1:20-CV-19783 (June 5, 2020) (battery claims). Litigants also brought other lawsuits challenging other government responses to the protests including curfews. *See, e.g.,* Complaint, Hamilton v. DeBlasio et al, Case 1:20-cv-04300 (S.D.N.Y June 5, 2020); Complaint, Graff et al v. Cincinnati, Case 1:20-cv-00449 (S.D. Ohio Jun 3, 2020); Complaint, Black Lives Matter v. Garcetti, Case 2:20-cv-04940 (W.D. Cal. June 3, 2020). However, I will not discuss this litigation since it is not related to excessive force claims.

[65] 42 U.S.C. §1983 (2018).

[66] Joanna Schwartz, *Constitutional Litigation under Section 1983 and the Bivens Doctrine in the October 2008 Term*, 26 (9) TOURO L. REV. 531, 532 (2010).

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constitutional right that was violated.[67] Each constitutional violation constitutes a separate claim.[68]

In the George Floyd lawsuits, plaintiffs alleged that police use of excessive force amounted to a violation of their Fourth Amendment rights.[69] These same plaintiffs also filed motions to restrict law enforcement's use of various less lethal weapons.[70] In Part IIB, I will discuss the district courts' preliminary analysis of the merits of Fourth Amendment excessive force claims in some of these George Floyd lawsuits to demonstrate the voluminous evidence plaintiffs needed to provide under the current Fourth

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[67] Plaintiffs are not able to bring a claim solely under Section 1983. Osagie K. Obasogie, *More than Bias: How Law Produces Police Violence*, 100 B.U. L. Rev. 771, 776 (2020) ("Section 1983 provides a private cause of action for victims to sue state actors who deprive them of constitutional rights"); Adam Lourie, *Ganging Up on Police Brutality, Municipal Liability for the Unconstitutional Actions of Multiple Police Officers under 42 U.S.C. § 1983*, 21 CARDOZO L. REV. 2087, 2103 (2000) ("To establish liability, therefore, it is almost necessary for the plaintiff to show a policy or custom of violating the Constitution"); Kit Kinports, *Supervisory Liability in Section 1983 Cases*, 15 TOURO L. REV. 1657, 1657 (1999) ("The language of Section 1983 creates a cause of action against anyone acting under color of state law who subjects another person to a constitutional violation, or who causes that person to be subjected to a constitutional violation.")

[68] *See Graham*, 490 U.S. at 394 ("The validity of the claim must ... be judged by reference to the specific constitutional standard which governs that right."); *see also* Jack M. Beermann, *The Unhappy History of Civil Rights Legislation, Fifty Years Later*, 34 CONN. L. REV. 981, 1005 (2002) ("Section 1983 now provides an action against many state and local violations of the federal Constitution, including, but not limited to, police brutality, unlawful searches and seizures, censorship, unconstitutional prison conditions, procedurally defective denial and termination of government benefits, licenses, permits and government employment, interference with the free exercise of religion, threats of prosecution under unconstitutional criminal laws, and administrative and legislative violations of equal protection.")

[69] Amended LA Complaint at 50–52; Indianapolis Complaint at 16–17; Dallas Complaint at 37–45; Seattle Complaint at 24; Portland Complaint at 13-15; Oakland Complaint at 15; Denver Complaint at 21–23; Williams Complaint at 9; Goyette Complaint at 37. Plaintiffs also asserted that the police chilled their First Amendment rights, which while critical for obtaining further relief from the courts, is not the subject of this article. *See* Amended LA Complaint at 50–52; Indianapolis Complaint at 16–17; Dallas Complaint at 35–37; Seattle Complaint at 23–24; Portland Complaint at 15; Chicago Complaint at 5–6. Oakland Complaint at 15; Denver Complaint at 23–24; Williams Complaint at 9; Goyette Complaint at 35.

[70] Ex Parte Application for Temporary Restraining Order and Motion for Preliminary Injunction, Black Lives Matter Los Angeles v. City of Los Angeles, Case 2:20-cv-05027 (June 24, 2020) (hereinafter Los Angeles TRO Motion); Motion for Preliminary Injunction, Indy 10 Black Lives Matter v. City of Indianapolis, Case 1:20-cv-01660 (June 18, 2020) (hereinafter Indianapolis PI Motion); Motion for Temporary Restraining Order, Black Lives Matter Seattle-King County et al v. City of Seattle, Case 2:20-cv-00887-RAJ (June 9, 2020) (hereinafter Seattle TRO Motion); Motion for Temporary Restraining Order, Don't Shoot Portland et al v. City of Portland, Case 3:20-cv-00917-HZ, Case 3:20-cv-00917-HZ (June 5, 2020) (hereinafter Portland TRO Motion); Motion for Temporary Restraining Order, Abay et al v. City of Denver, Case 1:20-cv-01616-RBJ (June 5, 2020) (hereinafter Denver TRO Motion); *see also* Oakland Complaint at 17; Williams Complaint at 10; Goyette Complaint at 41.

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Amendment reasonableness framework for district courts to enjoin police violence.

Below, I discuss the courts' excessive force analysis. I first discuss the general framework for analyzing the reasonableness of police force, as set forth in the 1989 case *Graham v. Connor*. Then, I turn to a critical analysis of courts' application of this framework to the excessive force cases emanating from protests both before and during the 2020 demonstrations for racial justice.

II. LITIGATION OVER POLICE BRUTALITY AGAINST PROTESTERS: PAST DECADES AND CURRENT CASES

A. The Graham v. Connor excessive force test and its discontents

About three decades ago, in *Graham v. Connor*, the Supreme Court established that whether police engaged in unlawful excessive force with an individual was a Fourth Amendment question.[71] Mr. Dethorne Graham was a Black man[72] whom police wrongfully suspected of shoplifting for simply entering and leaving a store.[73] Still, they suspected *criminal* activity.[74] After stopping the car Mr. Graham was riding in, Mr. Graham became agitated, ran out of the car, and sat on the sidewalk.[75] His companion explained to police that Mr. Graham was not engaging in any criminal activity but was having a diabetic episode.[76] The police did not listen to Mr. Graham's companion as he tried to explain that Mr. Graham was acting strangely because he was suffering from a "sugar reaction."[77] Multiple police arrived in response to a call for back-up as Mr. Graham passed out on the sidewalk.[78] Police officers turned over an unconscious Mr. Graham, handcuffed his hands tightly behind his back, and threw him face down on the hood of his friend's car.[79] Mr. Graham regained consciousness, and police officers shoved his face into the hood of the car while warning him to "shut up" as he pleaded with them to check his wallet for his medical card.[80] Police then "threw him headfirst into the police car."[81] Mr. Graham suffered serious long-term injuries as a result of this police violence.[82] Mr. Graham was never charged with any criminal

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[71] *Graham*, 490 U.S. at 396.

[72] As usual, the Supreme Court opinion is completely devoid of any mention of Mr. Graham's race. However, documents filed by his counsel reveal that Mr. Graham was African-American. Brief for the Petitioner at 3, *Graham v. Connor*, 1988 WL 1025786 (1988).

[73] *Graham*, 490 U.S. at 389.

[74] *Id.* at 388–89.

[75] *Id.* at 389.

[76] *Id.* at 388.

[77] *Id.* at 389.

[78] *Id.*

[79] *Id*.

[80] *Id.*

[81] *Id.*

[82] *Id.* at 390.

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conduct. He sued the police in a Section 1983 civil rights action arguing their use of force violated the Fourth Amendment prohibition against unreasonable seizure.[83]

After deciding that the Fourth Amendment was the appropriate avenue for review, the Court articulated a new balancing test to assess whether the police actions were reasonable.[84] Fourth Amendment reasonableness would be determined by the totality of the circumstances, including: (1) the severity of the crime, (2) whether there was an immediate threat to the police or others, and (3) whether the suspect was resisting arrest or trying to flee.[85] The Court further found that because law enforcement are "often forced to make split-second judgments – in circumstances that are tense, uncertain and rapidly evolving", review of police conduct should be deferential and avoid the "20/20 vision of hindsight."[86] This deferential review set up most plaintiffs for failure in subsequent Section 1983 actions.[87] As a matter of fact, after the Supreme Court remanded his case so the lower court could apply the proper Fourth Amendment analysis, Mr. Graham lost at re-trial – the jury determined that the police had acted "reasonably."[88]

Scholars have waged significant critiques of how the *Graham v. Connor* deferential analysis of reasonableness has left the public with little recourse against police violence, and has even resulted in officers literally

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[83] *Id.*

[84] *Id.* at 396.

[85] *See id.* ("Because '[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application,' . . . its proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.")

[86] *Id.* at 396–97.

[87] *See, e.g., The Endogenous Fourth Amendment, supra* note 12, at 1467 ("[P]olice officers' use of excessive force that maims and kills …. remain staggering even after the massive outpouring of activism and discussion over the past few years); Diana Hassel, *Excessive Reasonableness*, 43 IND. L. REV. 117 (2009) ("When these two [§ 1983 and qualified immunity] doctrines converge, an almost impenetrable barrier to liability results."); Jeremy R. Lacks, *The Lone American Dictatorship: How Court Doctrine and Police Culture Limit Judicial Oversight of the Police Use of Deadly Force*, 64 N.Y.U. ANN. SURV. AM. L. 391, 428 (2008) (arguing that "the federal judiciary, as a consequence of a unique combination of the doctrinal features of § 1983 suits and the characteristics of contemporary police culture, has substantially relinquished its ability to oversee the police use of deadly force"); *see also* Cara McClellan, *Dismantle the Trap: Untangling the Chain of Events in Excessive Force Claims*, 8 COLUM. J. RACE & L. 1 (2017) (arguing the proximate cause requirement for a § 1983 suit sets a high bar to liability in excessive force cases) (*citing Murray v. Earle,* 405 F.3d 278, 290 (5th Cir. 2005) ("Section 1983 ... require[s] a showing of proximate causation, which is evaluated under the common law standard.")).

[88] *See* Alice Ristroph, *The Constitution of Police Violence*, 64 UCLA L. REV. 1182, 1207 (2017) ("Graham's lawsuit was remanded for consideration under the Fourth Amendment standard, and though there is no opinion entered after the remand, Graham apparently lost at retrial, too.")

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getting away with murder.[89] They have rightfully indicted *Graham v. Connor* and its progeny for how the leeway it provides law enforcement discourages police departments from having to train their officers to respond calmly to tense situations;[90] how it leads judges to ignore any police misconduct or escalation leading up to the use of force;[91] and how it facilitates courts ignoring and overlooking the race of both the victims and perpetrators of police brutality.[92]

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[89] *See* Erwin Chemerinsky, Editorial, *How the Supreme Court Protects Bad Cops*, N.Y. TIMES, Aug. 27, 2014, at A23; *see also* Aya Gruber, *Policing and "Bluelining*," 58(2) HOUS. L. REV. (forthcoming 2021) (manuscript at 135) (on file with author) (arguing that "[t]he law encourages brutality in these policed spaces by conferring on officers a near absolute power to physically dominate the individuals—Black or white—they encounter on the street ... [as courts] consider only whether the officer acted reasonably (had reasonable fear) in the "split-second" moment when he pulled trigger.");; John Gross, *Judge, Jury, and Executioner: The Excessive Use of Deadly Force by Police Officers*, 21 TEX. J. CIV. LIBERTIES & CIV. RTS. 155, 161 (2016) (arguing Supreme Court's deference to law enforcement is based on inaccurate assumptions regarding reasonableness of their actions); Gregory Howard Williams, *Controlling the Use of Non-Deadly Force: Policy and Practice*, 10 HARV. BLACKLETTER J. 79, 95 (1993) ("[T]he basic problem with *Graham* is the fantasy of the Fourth Amendment 'reasonableness' test and the so called balancing analysis 'Reasonableness' is never truly defined, and unfortunately the balance rarely weighs in favor of the citizen.").

[90] *See, e.g.*, Nemeth, *supra* note 30, at 1020 (arguing law enforcement training "practices and misconceptions led to what Justice Sotomayor labeled a 'shoot first, think later approach' adopted by police officers, which has abolished Fourth Amendment rights for anyone harmed by police officers"); Brandon Garrett & Seth Stoughton, *A Tactical Fourth Amendment,* 103 VA. L. REV. 211, 293–299 (2017) (arguing that *Graham* does not take into account officer preparation, training, or tactics prior to use of force); Avidan Y. Cover, *Reconstructing the Right Against Excessive Force*, 68 FL. L. REV. 1773, 1805 (2016) ("[Graham's] emphasis--whether accurate or not--on the compressed time frame and uncertainty facing officers also risks legitimizing as "reasonable" police officers' use of force that is influenced by racial stereotypes").

[91] *See, e.g.,* Lacks, *supra* note 87, at 428 ("[T]he temporal focus in many circuits on the moment of decision to shoot in assessing an officer's reasonableness, as opposed to also analyzing pre-seizure conduct which may exacerbate the necessity to employ deadly force"); *See, e.g,*; Brandon Garrett & Seth Stoughton, *A Tactical Fourth Amendment*, 103 VA. L. REV. 211, 216 (2017) ("[I]ll-considered statements in *Graham* and other decisions reinforce a 'split-second' theory of policing that sets the wrong constitutional floor"); Aaron Kimber, *Righteous Shooting, Unreasonable Seizure? The Relevance of an Officer's Pre-Seizure Conduct in an Excessive Force Claim*, 13 WM. & MARY BILL RTS. J. 651, 653 (2004) (arguing that unlike Supreme Court precedent, courts must consider pre-seizure context as "the determination of whether a use of force is excessive cannot be made by looking at the application of physical force in a vacuum").

[92] *See, e.g.,* Osagie K. Obasogie & Zachary Newman, *The Futile Fourth Amendment: Understanding Police Excessive Force Doctrine Through an Empirical Assessment of Graham v. Connor*, 112 NW. U. L. REV. 1465, 1470 (2018) ("[T]he Fourth Amendment is an area of constitutional law that is structurally unsuited to address racialized group harm—an evaluation that is necessary for understanding the nature of police violence today"); Devon W. Carbado, *Blue-on-Black Violence: A Provisional Model of Some of the Cause*s, 104 Geo. L. J. 1479, 1489 (2016) n. 41 (describing how racialized "broken windows" policing and pretextual stops go unchecked by courts); Christian M. Halliburton, *Race, Brain Science, and Critical Decision-Making in the Context of Constitutional*

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These critiques are insightful and well-founded. However, in the context of protests, there is more to be said. First, courts' deferential review in the criminal context is inapposite to the *expressive* protest context. The Supreme Court's rationale for providing deferential review to police officers as they engage with a criminal suspect forcefully is police officer safety.[93] The Court considers people potentially engaged in *criminal* activity dangerous to police. The officer safety rationale does not exist when the policed person is involved in *expressive* protest activity, instead of potentially criminal activity, and thus that degree of court deference should not exist either when law enforcement engages with a protester.

Second, these critiques miss an important aspect of the *Graham* framework that is of critical importance to protesters: *Graham* explicitly invites courts to look at the nature of the policed person's *underlying conduct*. Because *Graham v. Connor* arose in the context of suspected criminal activity and most excessive force cases arise in that context, this focus on conduct becomes a question of the nature of the suspected crime and how that might affect the Fourth Amendment balance of interests when police officers use force. Thus, where the suspected crime in minor, police are *less* justified in using force than when the suspected crime is, for example, a violent felony.[94] This inquiry about the policed person's underlying

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Criminal Procedure, 47 GONZ. L. REV. 319, 332–35 (2011) (addressing "negative association" with people of color that lead police to assume "heightened propensity for violence and criminality in black men" that courts do not consider in reasonableness calculation).

[93] *Graham*, 490 U.S. at 396 (considering "whether the suspect poses an immediate threat to the safety of the officers or others"); *see also* Tennessee v. Garner, 471 U.S. 1, 11 (1984) ("Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force."); *id.* at 26-27 (O'Connor, J., dissenting) (noting that the "reasonableness of police decisions made in uncertain and often dangerous circumstances" with "harsh potentialities for violence" "preclude characterization ... as innocuous, inconsequential, minor, or 'nonviolent.'"). It is worth mentioning that this concern over police officer safety during encounters with criminal suspects might not be in line with the data. See Jordan Blair Woods, *Policing, Danger Narratives and Routine Traffic Stops,* 117 MICH. L. REV. 635, 635 (2019) (finding rate of violence against officers at traffic stops extremely low as compared to officer's use of force).

[94] *See, e.g.,* Hupp v. Cook, 931 F.3d 307, 322 (4th Cir. 2019) ("First, the severity of the crime for which she was arrested is slight: obstruction is a misdemeanor ... When the offense is a 'minor one,' we have found 'that the first Graham factor weighed in plaintiff's favor.' ... We see no reason to find otherwise here." (citations omitted)); Cugini v. City of New York, 941 F.3d 604, 613 (2nd. Cir. 2019) ("We conclude that each of the Graham factors weighs decidedly in the plaintiff's favor here. First, the crime at issue was a relatively minor one: the misdemeanor offense of stalking and harassing a family member from whom she was estranged."); Trammell v. Fruge, 868 F.3d 332, 340 (5th Cir. 2017) ("As an initial matter, public intoxication is a Class C misdemeanor, ... and thus is a minor offense militating against the use of force."); Yates v. Terry, 817 F.3d 877, 885 (4th Cir 2016) ("In addition, the driving without a license offense that was the basis for Terry initially detaining Yates constitutes only a misdemeanor under South Carolina law. When the offense

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conduct should not fall away when police use force, not against criminal suspects, but against protestors. Protestors' underlying conduct is not bad or even minor like a misdemeanor; it is good and valuable. It is politically *expressive* conduct that is potentially protected by the First Amendment. Thus, if being a suspected misdemeanant versus felon makes a difference to the police's ability to use force, so to should the fact that protesters' underlying conduct is protected expression. And yet, as we will see, courts have not applied this reasoning in Fourth Amendment excessive force cases involving protests. This critique and analysis are the primary subjects of this paper.

B. Graham v. Connor and protest cases

1. Excessive force against protesters prior to the Floyd protests

A review of all federal appellate cases where courts apply the *Graham v. Connor* framework to claims of police excessive force during protest demonstrates that courts fail to consider how the value of activists' expressive conduct affects the reasonableness calculus.[95] During my research across federal cases, I only encountered one district court case,

committed is a minor one, 'we have found that the first Graham factor weigh[s] in plaintiff's favor.'" (citations omitted)); Jarrett v. Town of Yarmouth, 331 F.3d 140, 150 (1st Cir. 2003) ("The third Graham factor (the severity of the crime at issue) slightly undermines the objective reasonableness of McClelland's actions. At the time McClelland released Shadow, he knew with certainty only that Jarrett had committed several minor traffic infractions.")

[95] *See* Felarca v. Birgeneau, 891 F.3d 809 (9th Cir. 2018); White v. Jackson, 865 F.3d 1064 (8th Cir. 2017); Dundon v. Kirchmeier, 701 Fed. App'x. 538 (8th Cir. 2017); Westfahl v. District of Columbia, 75 F.Supp.3d 365 (D.C. Cir. 2014); Moss v. United States Secret Serv., 711 F.3d 941 (9th Cir. 2013); Bernini v. City of St Paul, 665 F.3d 997 (8th Cir. 2012); Acosta v. City of Costa Mesa, 718 F.3d 800, 825 (9th Cir. 2012); Oberwetter v. Hilliard, 639 F.3d 545 (D.C. Cir. 2011); Crowell v. Kirkpatrick, 400 Fed. App'x. 592 (2d Cir. 2010); Buck v. City of Albuquerque, 549 F.3d 1269 (10th Cir. 2008); Fogarty v. Gallegos, 523 F.3d 1147 (10th Cir. 2008); Papineau v. Parmley, 465 F.3d 46 (2d Cir. 2006); Amnesty Am. v. Town of W. Hartford, 361 F.3d 113 (2d Cir. 2004); Headwaters Forest Def. v. County of Humboldt, 276 F.3d 1125 (9th Cir. 2002); Cyr v. City of Dallas, 1997114 F.3d 1180 (5th Cir. 1997); Barlow v. Ground, 943 F.2d 1132 (9th Cir. 1991). There are also a slew of cases where the plaintiffs are not protesters themselves, but somehow caught up in protests either on purpose as journalists, medical personnel, or legal observers or inadvertently. *See* Douglas v. City of New York, 730 Fed. App'x. 12 (2d Cir. 2018) (legal observer); Brown v. City of New York, 862 F.3d 182 (2d Cir. 2017) (restroom seeker); Wilkerson v. Warner, 545 Fed. App'x. 413 (6th Cir. 2013) (doctor); Liiv v. City of Coeur D'Alene, 130 Fed. App'x. 848 (9th Cir. 2005 (videographer); Durruthy v. Pastor, 351 F.3d 1080 (11th Cir. 2003) (freelance cameraman). I am not considering in my analysis cases where a jury verdict was reached. Morales v. Fry, 873 F.3d 817, 826-27 (9th Cir. 2017); Valiavicharska v. Tinney, 562 Fed. App'x. 562 (9th Cir. 2014); Davis v. Yovella, 110 F.3d 63 (6th Cir. 1997); Forrester v. City of San Diego, 25 F.3d 804 (9th Cir. 1994). I am also excluding from my analysis protest cases which do not apply *Graham*. Lash v. Lemke, 971 F. Supp. 2d 85 (D.C. Cir. 2015); Singleton v. Darb*y*, 609 Fed. App'x. 190 (5th Cir. 2015); Am. Fed. of Labor and Congress of Indus. Org'n v. City of Miami, FL, 637 F.3d 1178 (11th Cir. 2011); Snell v. City of York, PA, 564 F.3d 659 (3rd Cir. 2009); Darrah v. City of Oak Park, 255 F.3d 301 (6th Cir. 2001); Katz v. United States, 194 F.3d 962 (9th Cir. 1999).

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Lamb v. City of Decatur, where the court suggests that plaintiffs' engagement in protest activity instead of suspected criminal activity presents an unique factual scenario warranting heightened judicial review.[96] However, the court did not elaborate what was required under heightened review. Moreover, in every other case, courts' failure to consider how activists' expressive conduct should influence the reasonableness analysis leads to several problems.

First, courts are not mitigating the deference they provide to police in excessive force cases to account for expressive conduct. This is a problem both because in the protest context unabridged police authority can curtail – even unintentionally – protected expressive activity and because the police officer safety rationale[97] for providing police deference to contend with (from the courts' perspective) dangerous criminals is not present in the protest scenario.

Second, in terms of the factor-by-factor analysis, courts do not positively weigh the protesters' underlying *expressive* conduct. By underlying conduct, I mean the conduct that leads to the interaction between police and the policed person – which during protests is expressive activity. Instead, courts' inquiries are limited to whether activists were compliant[98] or resisted in any

[96] Lamb v. City of Decatur, 947 F. Supp. 1261, 1265 (C.D. Ill. 1996)

[97] *See supra* note 93.

[98] *See Moss*, 711 F.3d at 966 (finding no "indication that [the protestors] were disobeying the commands of the officers or resisting in any way"); *Westfahl*, 75 F. Supp. 3d at 374 (finding that "[s]triking a passive arrestee to compel affirmative compliance is a clearly established constitutional violation" so as to preclude finding of qualified immunity under *Graham* excessive force claims).

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way,[99] whether they were peaceful[100] or somehow disorderly or agitated,[101] and whether they engaged in criminal or noncriminal activity. Now while these characteristics are important and relevant to the reasonableness calculus, it is even more critical for the Court to consider the overarching principle that protesters are engaged in expressive conduct that the Fourth Amendment protects. Protest activity itself should factor positively in the reasonableness sliding scale and result in increased police reticence to use force. After all, it is the government's duty via the Fourth Amendment – not just the First Amendment – to safeguard freedom of expression. The government does not have a concomitant duty to safeguard criminal activity. The discussion below of a sampling of circuit court cases elucidates this mode of analysis.

The circuit courts have reached seemingly unharmonious results in a sampling of cases where police officers have used force to remove activists engaging in sit-ins or refusing to leave in protest. These courts, however, have been consistent in their failure to account for plaintiffs' engagement in politically expressive conduct in the Fourth Amendment reasonableness calculus. The Ninth Circuit, in *Headwaters Forest Defense v. County of Humboldt*, considered environmental activists' claims that police used

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[99] *See Felarca,* 891 F.3d at 815 (finding "legitimate" use of force against protestors who "directly interfered with officers' attempt to enforce university policy by linking arms to block officers' access to the tents); *Crowell*, 400 Fed. App'x. at 595 (finding use of force reasonable where protestors were "actively resisting their arrest at the time they were tased by the officers in this case, having chained themselves to a several hundred pound barrel drum and having refused to free themselves."); *Bernini*, 665 F.3d at 1006 (finding "reasonable for the officers to deploy non-lethal munitions" against "noncompliant crowd" to keep them moving); *Acosta*, 718 F.3d at 825 (find no excessive force where officers grabbed protestor's arms and placed him in an upper body control hold to forcibly remove him from podium at city hall meeting where protestor "did not leave the podium when first asked to step down and … did not leave the podium immediately."); *but see contra*, *Barlow*, 943 F.2d at 1136 (finding at summary judgment stage that "a reasonable jury could conclude … [officers] applied excessive force. Throwing down a sign is not a severe crime and [protestor's] actions in self-defense did not pose a threat to the officers until after they placed the "pain compliance" hold on him.)

[100] *See Moss*, 711 F.3d at 966 ("their protest was entirely peaceful"); *Papineau*, 465 F.3d at 52 (precluding summary judgment in favor of officers on basis of qualified immunity in excessive force claim where officers "assault[ed]" protesters who "were at all times orderly and peaceful and did not disturb nor harass neighbors, motorists or passersby who witnessed the demonstration" and no dispersal order was given). *See also Cyr*, 114 F.3d at 1180 (affirming summary judgment for officers finding that using mace against anti-abortion protestors who "dropped to the floor and refused to stand and walk out of the clinic" was not excessive force); *but see Amnesty Am.*, 361 F.3d at 123 (reversing grant of summary judgment in finding issues of material facts remained whether police officers' forceful removal of "passive" anti-abortion protestors who bound themselves together in front of abortion clinic amounted to excessive force).

[101] *Oberwetter,* 639 F.3d at 555 (finding use of force reasonable against dancing protestor who refused to stop dancing); *Bernini*, 665 F.3d at 1002 (describing protestors as chanting "various profanities"); *Acosta*, 718 F.3d at 808 ("[V]ideo recordings show that he was visibly emotional and agitated.")

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excessive force by using pepper spray to compel the activists to release themselves from lock-down devices as they sat linked together in three separate protests against the logging of the Headwaters Forest.[102] Two of the protests occurred inside and outside of the offices of a lumber company, and the third occurred at a legislator's office.[103] After warnings, police applied pepper spray with Q-tips and later with spray bottles when activists refused to release themselves from the lock-down devices.[104] The Court agreed with the protesters that police officer defendants were not entitled to summary judgment on their excessive force claims.[105] In its opinion, the Ninth Circuit focused on the environmental activists' passive conduct as police attempted to get them to leave the area and that they were at most engaged in misdemeanor trespass.[106] The Court categorized plaintiffs' conduct as "sitting peacefully, . . . easily moved by police, and . . . not threaten[ing] or harm[ing] the officers" and "nonviolent."[107]

Unlike *Headwaters*, the Fifth Circuit found that the defendant police officers were entitled to summary judgment in *Cyr v. City of Dallas*, concluding that they acted reasonably by using mace on plaintiff protesters who sat, handcuffed by police, but who refused police commands to stand and walk out of a clinic where abortions were performed.[108] Like in *Headwaters*, the police officers had warned the protesters that they would use mace if they did not voluntarily leave the clinic.[109]

In another anti-abortion protest case however, *Amnesty America v. Town of West Hartford*, the Second Circuit held that summary judgment for police officers was not warranted when the officers removed activists from a clinic at two separate demonstrations using pain-inducing methods such as applying pressure to wrists and fingers, as well as dragging and throwing plaintiffs against the ground or the wall and placing a knee on a plaintiff's neck.[110] In addition to being uncooperative during arrests by going limp and refusing to respond to police questions, some activists also chained themselves to each other or covered their limbs with maple syrup to make arrest more difficult.[111] The Second Circuit in *Amnesty America* stated that it was for the jury to determine whether there was excessive force and stated that the factfinders should take into account plaintiffs' conduct at the clinic

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[102] *Headwaters*, 276 F.3d at 1130.
[103] *Id.* at 1128-29.
[104] *Id.* at 1128.
[105] *Id.* at 1130.
[106] Headwaters Forest Def. v. County of Humboldt, 240 F.3d, 1185, 1204 (9th Cir. 2000), *vacated by* 534 U.S. 801 (2001). These facts come from a previous Ninth Circuit Appeal, denying summary judgement to the officers as to the excessive force claims, that was vacated and remanded by the Supreme Court to reconsider the qualified immunity analysis under *Saucier v. Katz*, 533 U.S. 194 (2001).
[107] *Id.* at 1130.
[108] 114 F.3d 1180 (5th Cir. 1997).
[109] *Id.* at 1180.
[110] 361 F.3d 113, 123 (2d Cir. 2004).
[111] *Id.* at 124.

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which included blocking access to medical areas and situating themselves throughout the clinic.[112]

The Fifth Circuit in *Cyr* also focused on plaintiffs' similar conduct. While the *Cyr* plaintiffs were only arrested for trespassing, the Fifth Circuit highlighted that before their arrest, plaintiffs had walked around the clinic and caused upheaval – screaming and scaring patients, blocking access to the surgical area, and trying to gain access to offices.[113] Despite the fact that once arrested and handcuffed, the plaintiffs were no longer causing a disturbance but just refusing to follow police commands to leave, the *Cyr* Court still concluded that no reasonable juror could decide that police used excessive force by firing mace on uncooperative seated plaintiffs.

Harmonizing these cases to find a clear rule about how courts handle police use of force to remove activists refusing to be moved is challenging. After all, Fourth Amendment reasonableness balancing is, by its very nature, a fact-specific and highly contextual inquiry. The degree of police force in each case ranges from a burst of mace, to pepper spray applied directly to the eyes and face, to pain inducing techniques and blows.[114] However, what is clear is that the courts do consider the policed person's conduct at various stages. The policed person's conduct matters in terms of how they resist arrest and whether they have committed a crime, i.e. trespassing in these three cases.[115] Furthermore, in both *Cyr* and *Amnesty America*, the two courts discuss the relevance of the plaintiffs' conduct in the clinic, the site of the protest activity, before any interaction with police to both the court's and the jury's analysis. However, missing from the assessment of plaintiffs' conduct is how its nature as *expressive* influences the courts' reasonableness analysis.

Beyond sit-ins, again and again, the courts' prevailing Fourth Amendment reasonableness pays no attention to the underlying expressive conduct in protest cases. In *Felarca v. Birgeneau,* the Ninth Circuit concluded that riot gear clad police did not use excessive force when they repeatedly struck four Occupy protesters with batons as they forcefully removed their encampment from the University of California, Berkeley campus.[116] Police struck protesters multiple times on their arms, thighs, ribs,

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[112] *See id.*(" In evaluating plaintiffs' allegations, the factfinder will have to judge the officers' actions in light of the situation as it appeared at the time. *Graham*, 490 U.S. at 396. Plaintiffs conducted their demonstration in a manner calculated to prevent patients and doctors from obtaining access to the clinic.")

[113] *Cyr*, 114 F.3d at 1180

[114] *See also* Crowell v Kirkpatrick, 400 Fed. App'x. 592 (2d Cir. 2010). In *Crowell v. Kirkpatrick*, the Second Circuit dealt with a case where police officers tased protesters to get them to release themselves from barrel drums they were chained to. *Id.* at 594. The Court distinguished the case from *Amnesty America v. Town of West Hartford* by differentiating the level of violence police used in the preceding case. *Id.* at 595.

[115] Both *Cyr* and *Headwaters* mention that plaintiffs are trespassing. *See Headwaters*, 276 F.3d at 1130; *Cyr*, 114 F.3d at 1180. In *Amnesty America*, plaintiffs are likely also trespassing since they are refusing to leave the clinic. *See Amnesty Am.*, 361 F.3d at 123.

[116] *Felarca*, 891 F.3d at 818–19.

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legs, collarbone, back, face, and neck.[117] Most of the strikes were in the form of baton jabs, but police struck one of the protesters with an overhand baton strike.[118] These "metal"[119] batons inflict "a type of force capable of causing serious injury."[120]

The Ninth Circuit did consider attributes of the protesters' underlying conduct, noting that the plaintiffs were not engaged in felonies, but misdemeanors.[121] However, it characterized activists as yelling at and "physically provoking" police.[122] To be sure, there is much to criticize in the Court's description of the Occupy protesters. The "physically provoking" acts amounted to a single plaintiff shaking his fist and throwing leaves at an officer's face.[123] There was some evidence that these same activists and others may have also grabbed at a police baton and kicked at officers, but the District Court found,[124] and the Circuit Court recognized, that these actions were at most an attempt to defend against ongoing police assault.[125]

The court articulated the Ninth Circuit's practice of considering threat as the most important factor in the *Graham* analysis.[126] The court recognized that the tents posed no threat and, again, activists' most serious crimes were misdemeanors.[127] Still, the court characterized the Occupy activists as "lawbreakers" and their protest activity as "organized lawlessness" that the university and police need not tolerate and were thus entitled to quell with force due to safety concerns.[128] In concluding that the "the government had a 'safety interest in controlling a mass of people,'" the court analogized the protesters to a plaintiff who encountered police force while drinking in a park

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[117] *Id.*; *see also* Felarca v. Birgeneau, 216 WL 32435, at *12 n. 14 (N.D. Cal. 2016), *rev'd*, 891 F.3d 809 (9th Cir. 2018); (describing officer's swings as "hitting so hard that a soda can in [protestor's] backpack burst").

[118] *Felarca*, 891 F.3d at 818.

[119] *Id.* at 823 (Watford, J. concurring).

[120] *Id*. at 817 (quoting Young v. Cty. of Los Angeles, 655 F.3d 1156, 1162 (9th Cir. 2011)).

[121] *Id.* at 818; *see also Felarca*, 216 WL 32435, at *13 ("[T]heir arrests were all for misdemeanor violation of California Penal Code section 148(a)(1), willfully resisting, delaying, or obstructing any police officer 'in the discharge or attempt to discharge any duty of his or her office or employment.'").

[122] *Id*. at 818–19.

[123] *Id*.

[124] *See Felarca*, 216 WL 32435, at *12 n. 16 ("When the use of force is excessive, persons subjected to it are not, in all instances, required to submit to that force and refrain from actions to protect themselves from injury").

[125] *See Felarca*, 891 F.3d at 818 ("[T]he district court found that some of Uribe's actions may have been defensive").

[126] *Id.* at 817 (citing S.B. v. County of San Diego, 864 F.3d 1010, 1013 (9th Cir. 2017)); see *also Moss,* 711 F.3d at 966 ("most important single element of the *Graham* framework is whether the suspect poses an immediate threat to the safety of officers or others.").

[127] *Id.* at 817-18.

[128] *See Felarca*, 891 F.3d at 817-18 ("While the tents themselves posed no threat and the protesters appeared guilty only of misdemeanors, the university was not required to permit the 'organized lawlessness' conducted by the protesters.")

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with friends and relatives.[129] Say what one will about the virtues of drinking in the park, the framers and Supreme Court do not consider such activities to be particularly socially valuable or entitled to special protection from governmental intrusion. Using criminal suspect cases as a reference in evaluating the reasonableness of police force in expressive protest cases is problematic because there is no comparable constitutional right to engage in criminal or even in noncriminal, public drinking.[130]

The last circuit court case I will discuss here is *White v. Jackson*.[131] This is an Eighth Circuit case where the Court assessed whether police used excessive force against multiple plaintiffs – including Dwayne Matthews – in the 2014 Ferguson protests following Michael Brown's murder.[132] I will focus on the Court's discussion and conclusion regarding Mr. Matthews' excessive force claim against police officers. I provide only a brief account here of the Court's reasoning since I will return to this case in Part IV of this article when I will predict how the Court's reasoning and some of its conclusions would change in recognition of an expressive Fourth Amendment which protects Mr. Matthews' freedom of expression.

In *White v. Jackson*, police officers shot less lethal weapons at Mr. Matthews who was walking – with his hands up – towards a line of police in military uniforms and gas masks after police told him to turn around.[133] The officers' shooting caused Mr. Matthews to fall, hit his head, and end up face down on the street ditch which was filled with 2-3 feet of water.[134] The officers went over, and rather than summoning medical attention, held his head underwater for a few seconds until Mr. Matthews felt like they were trying to "drown" him, then lifted him out of the water and slammed his face

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[129] *See id.* at 818 (analogizing case to Jackson v. City of Bremerton, 268 F.3d 646, 649–50 (9th Cir. 2001), where plaintiff alleged that police used excessive force when arresting her at a park during a gathering). As will be discussed, this is far from the only instance the Circuit Courts have analogized to non-protest cases to reach their conclusion. *See infra* text accompanying note 109; *see also Westfal*, 75 F. Supp. 3d at 374 (analogizing case to Johnson v. District of Columbia, 528 F.3d 969, 974–75 (D.C. Cir .2008), where off-duty police officer was kicked in groin during encounter with another officer); *Acosta*, 718 F.3d at 825 (also analogizing to Jackson v. City of Bremerton, 268 F.3d 646, 649–50 (9th Cir. 2001)); *Oberwetter,* 639 F.3d at 555 (analogizing case to Wasserman v. Rodacker, 557 F.3d 635 (D.C. Cir. 2009), where individual was forcefully arrested while walking his dog in violation of a leash law); *Crowell*, 400 Fed. App'x. at 595 (citing Brooks v. City of Seattl*e*, 599 F.3d 1018, 1027 (9th Cir. 2010), where officer used taser against arrestee who refused to leave her vehicle); *Amnesty Am.*, 361 F.3d at 124 (analogizing case to Robison v. Via, 821 F.2d 913, 924 (2d Cir. 1987), where officer "yanked" woman out of her car during child sexual assault investigation).

[130] In *Headwaters*, The Court states that the facts in the case are indistinguishable from *Lalonde v. County of Riverside*, 204 F.3d 947, 961 (9th Cir. 2000), where the police is investigating a neighbor complaint of a disturbance. *See id*. at 1131

[131] *White*, 865 F.3d at 1069.

[132] *Id.* at 1069, 1072-73.

[133] *Id.* at 1072.

[134] *Id.* at 1072–73*; see also* White v. Jackson, 2016 WL 8674192, at *9 (E.D. MO 2016). ("culvert that had probably two or three feet of water").

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onto the street.[135] While he was face down on the pavement one officer pressed his knee with his full body weight onto Mr. Matthews' back, and other officers pepper sprayed him and beat him anywhere from for two to three minutes, while calling him racially derogatory names.[136] The Court did find that holding Mr. Matthews' head under water, pepper spraying him while he was under police control, and continuing to beat him, could amount to excessive force, just the same as with a criminal suspect arrestee.[137] However, it found that the rest of the police violence was not unreasonable.

To begin with how police officers encountered Mr. Matthews, police were on the scene to disperse the *crowd*, as the Court referred to people on the streets.[138] The Court concluded that it was not excessive force for police officers to fire bean bags and rubber bullets at Mr. Matthews as he walked alone towards the line of riot clad police after he did not follow their commands to turn and walk away.[139] According to the Court, police could have reasonably believed that Mr. Matthews was a member of the "assembly."[140] Despite Mr. Matthews walking alone with his hands up, since he was heading from – what the opinion describes as – the "vicinity of a violent crowd of people," the court ruled that the officers' force was not excessive.[141] It reasoned that "a reasonable officer could have concluded that Mr. Matthews was part of the violent crowd, that his advances towards the [police] line posed a threat to officer safety, and that he disobeyed officer orders to stop" and thus found that the police did not use excessive force.[142] Other than the perceived threat, the court did not discuss any other *Graham* factor in evaluating the reasonableness of the police shooting bean bags and rubber bullets at Mr. Matthews.[143]

On the later part of the encounter after Mr. Matthews had fallen on the ground, the Court held that a police officer did not use excessive force when the officer forcefully slammed Mr. Matthews' face onto the pavement after lifting him from the ditch and placed a knee of Mr. Matthews' back to handcuff him.[144] The Court reasoned that in prior cases, including *Graham*

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[135] *White*, 2016 WL 8674192, at *6.

[136] *Id.*

[137] *White,* 865 F.3d at 1080. The court analogized the facts to *Krout v. Goemmer*, 583 F.3d 557, 561 (8th Cir. 2009), the case of a motorist who was hit several times by the officer as he lay on the ground neither moving nor resisting. *Id.* The court stated that "the alleged facts [in *White v. Jackson*] are almost identical to those in *Krout*." *Id.*

[138] *White,* 865 F.3d at 1072.

[139] *Id.* at 1080.

[140] *Id.* at 1079.

[141] *Id.*

[142] *Id.* The Court did not demand individualized suspicion when evaluating the reasonableness of the police's actions as traditional Fourth Amendment precedent requires. In a prior article, I argue that treating perceived protesters as an unit for the purposes of the reasonableness calculus is unfaithful to traditional Fourth Amendment analysis that should focus on individualized and particularized suspicion pursuant to *Ybarra v. Illinois*, 444 U.S. 85, 91 (1979). *See* Loor, *Water Hoses, supra* note 19, at 844–47.

[143] *White,* 865 F.3d at 1079.

[144] *Id*. at 1080.

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v. Connor, courts determined that "some degree of physical coercion or threat threreof" is simply part of an arrest.[145] As previously mentioned, the Court did take issue with what it perceived as "gratuitous force" which included holding Mr. Matthews' head underwater, pepper spraying him and beating him for 2-3 minutes while he was under police control.[146]

The presence of Mr. Matthews at the scene of "demonstrations" did not weigh positively in the Court's reasonableness analysis. Rather, it hurt Mr. Matthews' case since the Court concluded that it was reasonable for police officers to see Mr. Matthews as a threat because he was in the vicinity of a "violent crowd."[147]

2. *Graham v. Connor* in current George Floyd litigation

Following this overview of how circuit courts have evaluated Fourth Amendment claims of excessive force in protest cases, I now return to the summer 2020 George Floyd protests and resulting litigation. This litigation is in its nascent stage. As of January 2021, no case has reached the trial stage, but is instead at some level of pretrial litigation.[148] It is too early to know the outcome of each case. However, the district judges in Denver, Portland and Seattle did engage in some preliminary assessment of the merits of the Fourth Amendment claims for purposes of ruling on plaintiffs' requests for injunctions. In deciding to grant a preliminary injunction, the judge must decide the likelihood of movant's success on the merits,[149] which necessitates the judge's assessment of the substance of the claims. These

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[145] *Id*. (citing *Graham* and *Cavataio v. City of Bella Vista*, 570 F.3d 1015, 1020 (8th Cir. 2009)), where plaintiff was arrested for failure to comply with a city ordinance regarding debris removal from her residence); *see also Oberwetter*, 639 F.3d at 545 (discussing in police seizure context that "[n]ot every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates a prisoner's constitutional rights." (quoting Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir. 1973)).

[146] *White*, 865 F.3d at 1080.

[147] *Id.*

[148] Williams et. al. v. City of Dallas Texas et al, Case 3:20-cv-01526-L (June 11, 2020) (jury trial scheduled for Feb. 7, 2022); Anti-Police Terror Project et al. v. City of Oakland, Case 3:20-cv-03866 (June 11, 2020) (jury trial scheduled for May 24, 2022); Black Lives Matter Seattle-King County et al v. City of Seattle, Case 2:20-cv-00887-RAJ (June 9, 2020) (bench trial scheduled for July 26, 2021); Black Lives Matter Los Angeles v. City of Los Angeles, Case 2:20-cv-05027 (June 5, 2020) (assigned to mediation); Don't Shoot Portland et al v. City of Portland, Case 3:20-cv-00917-HZ (June 5, 2020) (pre-trial motion hearings held); Abay et al v. City of Denver, Case 1:20-cv-01616-RBJ (June 4, 2020) (pre-trial motion hearings held); Williams v City of Minneapolis, Case 0:20-cv-01303 (D. MN. June 2, 2020) (pre-trial motion hearings held); Goyette v. City of Minneapolis, Case 0:20-cv-01302 (D. MN. June 2, 2020) (pre-trial motion hearings held); Several cases have been since dismissed. Stipulation to Dismiss, Ballew v. City of Chicago, Case 1:20-cv-03422 (Oct. 21, 2020) ("this matter has been settled by the parties"); Order Directing Filing of Documents Authorizing Dismal, Indy 10 Black Lives Matter v. City of Indianapolis, Case 1:20-cv-01660 (Oct. 5, 2020) ("Court has been advised by counsel that a settlement has been reached in this action.")

[149] Winter v. Natural Resources Defense Council, Inc., 555 US 7, 20 (2008) (citing Munaf v. Geren, 553 U.S. 674, 689–90 (2008)).

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courts' discussions of the likelihood of success of plaintiffs' Fourth Amendment excessive force claims provide insight into how trial courts are currently evaluating the reasonableness of police force in protest cases.

In the Denver, Seattle and Portland district court cases, *each* judge began by extolling the importance of the right to protest, especially when critiquing the government.[150] In the earliest of the three court orders, U.S. District Court Judge R. Brooke Jackson in Denver wrote, "I wish to make certain things perfectly clear, as I did during the hearing held earlier this evening. First, people have an absolute right to demonstrate and protest the actions of governmental officials, including police officers."[151] Both the Portland and the Seattle orders articulated the same core principle that people have a right to protest[152] but even more relevant to this discussion, they added that that right finds protection in the First and *Fourth* Amendments. U.S. District Court Judge Marco A. Hernández from Portland wrote, "This right is enshrined in the First and Fourth Amendments of the Constitution," and District Court Judge Richard A. Jones from Seattle reaffirmed this principle, stating "Their right to do so, without fear of government retaliation, is guaranteed by the First and Fourth Amendments."[153]

At first reading, the Portland and Seattle district court judges' assertion[154] that the right to protest is specifically entitled to Fourth Amendment protection could have signaled a novel approach in these new protest cases that, I argue, is consistent with the design of the Fourth Amendment. However, each court tempered these assertions by expressing its appreciation for law enforcement's "difficult and often thankless,"[155] "dangerous, and often traumatic jobs"[156] which places them "often while in harm's way."[157] Neither court inquired whether the fact that police officers were confronting people involved in expressive conduct, instead of people suspected of criminal activity, should affect the court's concern over police safety and resulting deference. Furthermore, the district courts'

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[150] *See* Denver TRO Order at 4; Portland Injunction Order at 4 ("[A]s Judge Jackson noted in resolving a similar motion just days ago in [*Abay*], people have a right to demonstrate and protest the actions of governmental officials, including police officers, without fear for their safety."); Seattle TRO Order at 4 ("[A]s other courts have recently expressed, people have a right to demonstrate and protest government officials, police officers being no exception." (citing *Abay* and *Don't Shoot Portland*)).

[151] Denver TRO Order at 4 .

[152] Portland Injunction Order at 4 ("[A]s Judge Jackson noted in resolving a similar motion just days ago in [*Abay*], people have a right to demonstrate and protest the actions of governmental officials, including police officers, without fear for their safety."); Seattle TRO Order at 4 ("[A]s other courts have recently expressed, people have a right to demonstrate and protest government officials, police officers being no exception." (citing *Abay* and *Don't Shoot Portland*)).

[153] Portland Injunction Order at 4; Seattle TRO Order at 4.

[154] I recognize that it is possible that these judges were independently stating that the First Amendment protects expression and the Fourth Amendment protects from unreasonable seizure, but the phrasing suggests the alternative I propose.

[155] Denver TRO Order at 4.

[156] Portland Injunction Order at 4.

[157] Seattle TRO Order at 4.

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reasonableness analysis failed to treat protest conduct differently than any other noncriminal conduct. For example, in *Black Lives Matter Seattle-King County v. City of Seattle*, Judge Jones analogized police's use of less lethal weapons to disperse protesters to law enforcement's wrongful use of tear gas to disperse college partygoers.[158] Protesters deserve more Fourth Amendment protection than college partiers.

In the Denver, Seattle and Portland cases, the district judges concluded that the plaintiffs were likely to succeed on the merits of their Fourth Amendment claims, not because they valued the underlying expressive conduct any differently than other conduct in the reasonableness calculus, but because substantial video footage essentially turned the judges into eye witnesses to extensive police abuse of overwhelmingly docile and often compliant protesters.[159] This degree of police violence should not be a prerequisite to establishing a Fourth Amendment violation when plaintiffs engage in expressive activity.

III. THE REASONABLENESS TEST IN LIGHT OF THE EXPRESSIVE FOURTH AMENDMENT

The Fourth Amendment provides special and heightened protection to expressive content across various contexts, including protests. While the Supreme Court has recognized this special protection in the context of searches of materials which are expressive, namely books and papers,[160] it has failed to do so in other contexts, including in protest cases. Courts correctly think of the Fourth Amendment protecting bodily integrity and privacy of items people conceal from public view, but largely ignore the expressive realm of Fourth Amendment protection. This expressive realm of Fourth Amendment protection is what I am calling the *expressive Fourth Amendment*.[161] While this expressive Fourth Amendment surely has

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[158] See Seattle TRO Order at 8 (referencing Nelson v. City of David, 685 F.3d 867, 884-87 (9th Cir. 2012)).

[159] *See* Denver TRO Order at 2 ("The Court has reviewed video evidence of numerous incidents in which officers used pepper-spray on individual demonstrators who appeared to be standing peacefully, some of whom were speaking to or yelling at the officers, none of whom appeared to be engaging in violence or destructive behavior."); Portland Injunction order at 5 ("Plaintiffs provide video evidence and declarations documenting the use of tear gas against protestors ... [T]here is no dispute that Plaintiffs engaged only in peaceful and non-destructive protest."); Seattle TRO Order at 5 ("The video evidence reveals that ...their protests have been passionate but peaceful.")

[160] *See* Maryland v. Macon, 472 U.S. 463 (1985); Roaden v. Kentucky, 413 U.S. 496 (1973); Stanford v. Texas, 379 U.S. 476 (1965); Marcus v. Search Warrant, 367 U.S. 717 (1961).

[161] Professor Akhil Amar has likewise argued that we must consider how First Amendment concerns impact Fourth Amendment analysis of reasonableness. *See* Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757 (1994) (hereinafter *Fourth Amendment First Principles*). However, he has taken a different path to this conclusion asserting that Fourth Amendment "constitutional reasonableness" is informed by various protections in the Bill of Rights. *Id*. at 805. I make a different argument in this article

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implications beyond the protest context that I will uncover in future work, in this article I will focus on how this special protection should affect the reasonableness analysis in protest cases since courts currently fail to do so.[162]

A doctrinal shift consistent with an expressive Fourth Amendment is necessary in the manner that courts evaluate claims of police excessive force in protest cases. Thus far, courts' analysis has discounted an individual's right to engage in dissent.[163] This is a result of courts retrofitting protest cases with the framework of one-on-one investigative cases like in *Graham v. Connor*, where the underlying conduct is suspected to be criminal or undesirable. In *Graham*, the Court had no reason to query how the reasonableness analysis should change in cases involving desirable, constitutionally elevated, expressive conduct.

When confronted with an excessive force challenge to protest policing, courts must reframe and refocus the inquiry to protect the right to express dissent. The court must decide what principles do not fit the reasonableness analysis when the conduct being policed is expressive instead of merely criminal – such as judicial deference to police decision-making[164] – and ask, "what is reasonable government conduct in light of freedom of expression?" This new query is justified by the historical underpinnings of the Fourth Amendment which demonstrate it was enacted to protect freedom of expression – in addition to an individual's bodily integrity and privacy in the items that the individual conceals – and by Supreme Court caselaw which constrains broad searches of expressive materials.

A. History and Supreme Court precedent support an expressive Fourth Amendment.

The *Graham v. Connor* doctrine, as applied to protest policing, does not take into account the historical underpinning of the Fourth and First Amendments. In this section, I provide a brief sketch – that I will build upon

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and assert instead that the Fourth Amendment was designed to safeguard freedom of expression specifically. Beyond the First Amendment, in Professor Amar's "model of constitutional reasonableness, Fourth Amendment doctrine must be crafted to safeguard basic constitutional values such as free expression, privacy, property, due process, equality, demographic participation, and the like." Akhil Reed Amar, *Terry and Fourth Amendment First Principles*, 72 ST JOHNS L. REV. 1097, 1119 (1998). Professor Amar views his "constitutional reasonableness" is the "vehicle for [ ] integration" of "First Amendment concerns explicitly into the Fourth Amendment analysis." *Fourth Amendment First Principles* at 806. I view history and Supreme Court precedent as the basis for the expressive Fourth Amendment's protection of expression. This is likewise distinct from "constitutional borrowing" which Professors Nelson Tebbe and Robert Tsai identified and described as the practice of drawing on distinct constitutional domains "in order to interpret, bolster, or otherwise illuminate another domain." Nelson Tebbe & Robert Tsai, *Constitutional Borrowing*, 108 MICH L REV. 459, 463 (2010).

[162] *See supra* Part II.

[163] *See* Candice Delmas, A DUTY TO RESISTS: WHEN DISOBEDIENCE SHOULD BE UNCIVIL 3-4, 87, 91 (2018) (arguing that practices of uncivil disobedience may be justified using the same principles as civil disobedience).

[164] *See infra* note 249-250 and accompanying text.

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in future work – of how these two amendments were meant to work together to protect new Americans' freedom of thought and expression from government intrusions. The Supreme Court found no need to recognize this interaction in *Graham v. Connor* because that case dealt with a Fourth Amendment intrusion in the context of a typical criminal investigation. However, the Court has recognized this relationship when the government seeks to execute a search warrant on materials that might be subject to First Amendment protection. In these search contexts, the Court reviews the Fourth Amendment intrusion with "scrupulous exactitude" since the government action might also implicate materials afforded First Amendment protection.[165] This carefully searching review results from the Court's acknowledgement that an individual's right to privacy under the Fourth Amendment extends to privacy of thought and expression from government discovery and interference. The search warrant cases have mostly involved investigations for suspected obscene materials,[166] but also searches connected with news activity[167] and controversial political materials.[168] In these *expressive* cases, the Court has specifically inquired whether the government acted reasonably and consistent with the Fourth Amendment "in light of the values of freedom of expression."[169]

1. The historical underpinnings of the Fourth Amendment

The history of the centuries-long legal scandal in Great Britain between the press, the British government, and the Crown, and its effect on the development of political thought in the early Americas, demonstrates that the drafters of the Bill of Rights intended to protect expressive freedom through the Fourth Amendment, in addition to the First. Thus, part of the purpose of the Fourth Amendment is the protection of political dissent from government intrusion.

About three decades *before* the Bill of Rights was ratified in 1791, a British anti-government newspaper, *The North Briton*, published an article denouncing the Prime Minister George Grenville and King George III as corrupt.[170] The British Attorney General and Solicitor General condemned the authors and publishers as guilty of seditious libel, a crime eventually defined under the Sedition Act of 1798 as "writings that defamed, brought into contempt or disrepute, or excited the hatred of the people against the government."[171] In response, the British Secretary of State signed a general

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[165] *See* Maryland v. Macon, 472 U.S. 463, 468 (1985); Zurcher v Stanford Daily, 436 U.S. 537, 564 (1978); Roaden v. Kentucky, 413 U.S. 496, 504 (1973); Stanford v. Texas, 379 U.S. 476, 511 (1965); Marcus v. Search Warrant, 367 U.S. 717, 729 (1961).

[166] *See Macon,* 472 U.S. at 463 (pornographic films from adult bookstore); *Roaden*, 413 U.S at 501 (film in commercial theater).

[167] *See Zurcher*, 436 U.S. at 564 (photographs of protests seized in newsroom).

[168] *See Stanford*, 379 U.S. at 485 (communist papers seized from plaintiff's home).

[169] *Roaden*, 413 U.S. at 504.

[170] WILLIAM J. CUDDIHY, THE FOURTH AMENDMENT: ORIGINS AND ORIGINAL MEANING 602- 1791 440 (2009).

[171] 1 Stat 596 (1798); *see also* Cuddihy, *supra* note 170, at 440.

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warrant directing the King's messengers to find the culprits and bring them to justice.[172] However, the King's messengers had no leads on *The North Briton*'s contributors and did not know where to search.[173] This was not an impediment to the issuance of the warrant because there was no requirement that the government specify where to search, what to seize, or even the justification or rationale for the search.[174] The general warrant's duration was also not circumscribed and could even be indefinite.[175] "Following precedent, the warrant specified nothing beyond the [newspaper] printer's name; its bearers were free to search, seize, and arrest as their whims dictated."[176] Thus general warrants granted broad powers to British government actors and the King's messengers exploited these powers in the pursuit of the critics of the King.

Once the King's messengers armed themselves with rumors and conjecture, they took off on a searching and ransacking spree through many homes, collecting all sorts of personal effects and papers.[177] "One of the searchers later testified that blanket confiscations of personal papers were typical when the political targets were sufficiently prominent."[178] At the end of the spree, the King's messengers also arrested forty-nine people.[179] Those arrested included not only suspects tangentially related to the newspaper – even if not the seditious edition – but also their family members and workers.[180]

This troubling series of events led to several lawsuits initiated by the various victims of the searches and arrests against all those involved in the issuance and execution of the general warrant. The cases focused specifically on the issue of the government's search and seizure power, and how its broad government-deferential nature enabled repressions of political speech.[181] The cases led to varying results;[182] however, the press coverage of the litigation was intense on both sides of the Atlantic and revealed the expansiveness and abusive power of general warrants.[183] Periodicals

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[172] Cuddihy, *supra* note 170, at 440.

[173] *Id.*

[174] *Id.* at 548 ("writs of assistance were of a more pernicious nature than general warrants, for by them officers who had not charged a particular crime and had no suspicion could cause the doors and locks of any man to be broke open, . . . enter his most private cabinet, and there . .. take and carry away whatever he shall in his pleasure deem uncustomed goods") (internal quotations omitted).

[175] *Id.* at 440–41.

[176] *Id.*

[177] *Id.* at 441–43

[178] *Id.* at 443.

[179] *Id.*

[180] *Id.* at 441–43.

[181] *Id*. at 443.

[182] *Id.*

[183] *Id.* at 443 ("In a crescendo of civil libertarianism, England's highest common law judges progressively attacked promiscuous arrests, general searches, and, finally, categorical seizures of personal papers. This *en echelon* invalidation of the general warrant's features was a diagram for disestablishing that warrant in favor of the specific warrant, an intellectual roadmap to the ideas that the Fourth Amendment embodied three decades later.")

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acclaimed that the legal challenges "vindicated 'the liberty, property, domestic quiet and security of every Englishman'" and "affected [their] most sacred and involatile rights and liberties," and denounced general warrants as an "unconstitutional practice."[184] Journalists' impassioned critiques reached and convinced not only British and American intellectuals, but also the general public, of the evils of general warrants.[185] "By 1769, the unacceptability of general warrants pervaded feelings as well as thoughts."[186] Memories of the abusive searches and indiscriminate arrests associated with the investigation into the contributors to the forty-fifth edition of *The North Briton* were fresh in the mind of the drafters of the Bill of Rights.[187] The very idea of restraints on search and seizure originated in the principle that broad government investigative powers posed a threat to free expression and political criticism. In fact, these concerns about expressive conduct lay at the very heart of the Fourth Amendment.

2. The Supreme Court paper cases

The Supreme Court has pointed to the relationship between the Fourth Amendment and the First Amendment when the government seeks to search materials, namely papers, that may deserve First Amendment protection. Just like the Fourth Amendment guarantees people the right "to be secure in their person," by protecting them against unreasonable force, detention, or searches, it protects the right for them to be secure in their "houses, papers, and effects" against unreasonable searches.[188] The Court has treated searches of papers – as well as other expressive items such as videos and films – differently and more stringently than searches of "ordinary" effects. This is because in these paper search cases the Court has recognized the special protection the Fourth Amendment affords to expression. In these cases, the Court has often recalled the Crown's attempts to suppress the dissenting views contained in *North Briton* No. 45 via abusive searches and arrests and recognized that, mindful of this history, the founders drafted the Fourth Amendment to safeguard against government intrusion that seeks to quell dissent.

Contrary to how most think about the Fourth Amendment as limited to protecting bodily integrity and the privacy of one's home and the items one conceals from public view, the Fourth Amendment also protects privacy of thought and expression. As such, its purview of protection extends beyond protecting the individual who is the target of a criminal investigation to protecting the individual whose thoughts and expression are the target of government intrusion. Justice William Douglas asserted that "[t]he Court

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[184] *Id.* at 459.
[185] *Id.* at 463.
[186] *Id.* at 464.
[187] *See* Frank v. State of Maryland, 359 US 360, 277 (1959) (Douglas, J., dissenting) (asserting that the history of warrants was "fresh in the memories of those who achieved our independence and established our form of government.")
[188] U. S. CONST. amend. IV.

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misreads history when it relates the Fourth Amendment primarily to searches for evidence to be used in criminal prosecutions. . . . [I]t was the search for the nonconformist that led British officials to ransack private homes."[189] "The Fourth Amendment thus has a much wider frame of reference than criminal prosecutions."[190] More holistically, "knowledge that unrestricted power of search and seizure could also be an instrument for stifling liberty of expression" permeated and guided the drafting of the Bill of Rights.[191] As Justice Potter Stewart stated, the Fourth and First Amendment, together with the Fifth, "are indeed closely related, safeguarding not only privacy and protection against self-incrimination but 'conscience and human dignity and freedom of expression as well'"[192] The Fourth Amendment – like the First Amendment – protects those who engage in expression, and most particularly those who seek to express politically unpopular antigovernment views.

The Court has established that pursuant to the Fourth Amendment, it must pay special attention and more strictly review searches of papers or other expressive materials.[193] This is founded on an understanding that protecting freedom of expression was an antecedent rationale for the creation of the Fourth Amendment. The Court has confronted this issue in search warrant cases and has reviewed searches for expressive materials such as books, magazines, documents, and videos, more stringently that searches for non-expressive materials such as contraband, weapons, or implements of a crime.[194] In the cases of expressive materials, the Court has not just inquired what government intrusion is reasonable, but instead what government intrusion is reasonable in light of freedom of expression.[195] Such special Fourth Amendment review is necessary to provide expression "breathing space to survive."[196]

Because of concerns about suppression of ideas, thought, and expression, the Court has, during searches for expressive materials, reined in police who, in their zeal to execute the government's interest, may act carelessly -- similar to the King's messengers in their search for the author of *North Briton* No. 45.[197] The Court has found that individual police

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[189] *Frank*, 359 U.S. at 376.

[190] *Id.* at 377.

[191] *Stanford*, 379 U.S. at 484.

[192] *Id.* (quoting *Frank*, 359 U.S. at 376.).

[193] *Id.* at 486 ("The point is that it was not any contraband of that kind which was ordered to be seized, but literary material ... The indiscriminate sweep of that language is constitutionally intolerable. To hold otherwise would be false to the terms of the Fourth Amendment, false to its meaning, and false to its history.")

[194] *Id.*

[195] *Roaden,* 413 U.S. at 504.

[196] *See In re Grand Jury Subpoena: Subpoena Duces Tecum*, 829 F.2d 1291 at 1298–99 (where the Fourth Circuit, in deciding whether to quash a broad subpoena for obscene video materials, expressed concern for the chilling of freedom of expression and called for a more delicate tool that provides freedom of expression "breathing space to survive." (quoting NAACP v. Button, 371 U.S. 413, 433 (1963)).

[197] *Marcus*, 364 U.S. at 722-24; *see also* Part IIIA(2) for discussion of North Briton No. 45.

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officers, not strictly bound by sufficiently specific judicially approved directives, lack guidance on how the differentiate between protected and non-protected expressive materials or act too broadly, sweeping up in their searches protected expressive materials.[198] Beginning with the Warren Court[199] in *Marcus v. Search Warrant Property*, a case involving the search for obscene materials, and *Stanford v. Texas*, a case involving the search for communist materials, to five years post-Warren in a case involving the seizure of an allegedly obscene film, *Roaden v. Kentucky*, the Court elucidated that the Fourth Amendment review of a government intrusion is heightened when the items to be seized are expressive in nature.

In *Marcus v. Search Warrant Property*, the Supreme Court found the search unreasonable when police executed a search warrant for obscene materials in plaintiff's newsstands. Because the case was litigated before *Mapp v. Ohio* was decided,[200] plaintiffs challenged the constitutionality of the Kansas City police officers' search under the due process clause of the Fourteenth Amendment.[201] Post *Mapp*, plaintiffs would have challenged this search pursuant to the Fourth Amendment. The plaintiffs did not assert a First Amendment challenge to the police actions. The Court found the process used – in accordance with the Missouri statute – to obtain the search warrant and then collect the materials was "inimical to protected expression" and thus unconstitutional under the Fourteenth Amendment.[202] The procedures included the judicial issuance of a search warrant after a police officer filed with the court an *ex parte* complaint swearing on an affidavit, upon personal belief, that plaintiff's newsstands had obscene publications for sale.[203] Before the issuance of the search warrant, the complainant police officer conducted an investigation which included purchasing from plaintiff's newsstands particular magazines which the plaintiff had admitted

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[198] *Marcus*, 364 U.S. at 722-30.

[199] The period where Justice Earl Warren led the Supreme Court – from 1953 to 1969 – is widely recognized as a critical "constitutional revolution" where the "discourse of rights [emerged] as a dominant constitutional mode." Morton J. Horwitz, *The Warren Court and the Pursuit of Justice*, 50(1) WASH & LEE L. REV. 4, 5 (1993).

[200] *Mapp v. Ohio*, 367 U.S. 643 (1961), extended Fourth Amendment protections and the exclusionary rule, which establishes that courts should suppress evidence obtained resulting from an unreasonable search, from the federal government to the states. Before *Mapp v. Ohio*, individuals challenged unreasonable searches by state actors under the Fourteenth Amendment due process clause. *See* Elkins v. United States, 364 U.S. 206, 2014 (1960) ("Federal Constitution, by virtue of the Fourteenth Amendment, prohibits unreasonable searches and seizures by state officers.") Rochin v California, 342 U.S. 165, 168 (1952)(deciding bodily intrusion by officers was unreasonable under the Due Process Clause of the Fourteenth Amendment); Weeks v. United States, 232 U.S. 383, 399 (1914) (finding claim of unreasonable searches and seizures by federal authorities but not state actors to be analyzed under the Fourth Amendment.")

[201] *Marcus*, 364 U.S. at 718.

[202] *Id.* at 729–30; *see also id*. at 731 ("We believe that Missouri's procedures as applied in this case lacked the safeguards which due process demands to assure nonobscene material the constitutional protection to which it is entitled.")

[203] *Id*. at 719–720.

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selling.[204] The judge did not examine the magazines to reach an independent determination of obscenity or provide plaintiff an opportunity to contest allegations of obscenity before issuing the search warrant.[205] The search warrant described the items to be seized from plaintiff's newsstands broadly as obscene materials.[206] The police officer who obtained the warrant was not involved in the search; instead, four other police officers executed the search warrant – using their own judgment to decide which materials were obscene – and seized about 11,000 magazines in total from various publications, as well as books and photos.[207]

The Court found the search and the process of obtaining and executing the warrant unconstitutional for several reasons which I will discuss. However, the Court began its discussion by harkening back to the 1500s in England and the unbounded power of the Crown to search "any place, shop, house, chamber, or building" within the English empire "for any books or things printed, or to be printed" which are against "any statute, act, or proclamation, made or to be made" and take them, burn them or use them properly.[208] The Court continued this historical account of how this unbounded power of search and seizure was reaffirmed throughout the sixteenth and seventeenth century, time and time again, explaining that "[e]ach succeeding regime during the turbulent Seventeenth Century England used the search and seizure power to suppress publications."[209] The publications targeted included those that the government deemed "scandalous and lying," "heretical . . . offensive to the state."[210] The Court ended its historical account with the scandal of *The North Briton* No. 45 searches and arrests, which it credited with resulting in the ultimate judicial condemnation of such unbounded warrants.[211] The Court remarked that "[t]his history was, of course, part of the intellectual matrix within which our own constitutional fabric was shaped. The Bill of Rights was fashioned against the background of knowledge that unrestricted power of search and seizure could also be an instrument of stifling freedom of expression."[212] Interestingly, as the forthcoming discussion will show, the Court held that special protection applied to searches of expressive materials – like the magazines in this case – and did not limit heightened protection to expression that is political and critical of the government, like *The North Briton* incident. The Court's discussion of this history also demonstrates that at the heart of an expressive Fourth Amendment is the protection of political expression, particularly anti-government political expression. This means that the protections of the expressive Fourth Amendment are at their zenith when

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[204] *Id*. at 722.
[205] *Id.*
[206] *Id*. at 724.
[207] *Id*. at 722–23.
[208] *Id*. at 724–25.
[209] *Id*. at 725.
[210] *Id*. at 725–26.
[211] *Id*. at 728.
[212] *Id.* at 729.

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political expression is involved. Against this historical background, the Court in *Marcus* then turned its attention to the controversy surrounding the search and seizure of the obscene materials.

Obscenity is not protected by the First Amendment, but it is a form of expression, thus adjacent to protected speech, meaning that expressive materials that are not obscene are likely protected First Amendment expression. As a result of the fine line between unprotected obscene materials and First Amendment protected materials, government power to police obscenity and prevent its distribution is circumscribed and "limited by the constitutional protections of free expression."[213] "The existence of the State's power to prevent the distribution of obscene matter does not mean that there can be no constitutional barrier to any form of practical exercise of that [government] power."[214] This limitation is necessary to prevent government suppression of other materials which are not obscene.[215] The *Marcus* Court explained that because of this concern, the government cannot police obscenity in the same manner that it polices other contraband like gambling implements or liquor.[216] This is because in policing and seizing those items of contraband or other nonexpressive items, the government is not likely to sweep up items deserving First Amendment protection.[217] The Court urged that "sensitive tools" were required to draw the line between speech that the government may regulate or suppress as illegitimate (like obscenity) and speech upon which the government may not intrude since it is constitutionally guaranteed.[218] The Court warned that "[p]rocedures that sweep too broadly and with so little discrimination are obviously deficient in techniques required . . . to prevent erosion of constitutional guarantees."[219] In the *Marcus* case, the Missouri statute's procedures for obtaining the warrant and executing the search did not require the level of judicial scrutiny or narrow the scope of police officer authority sufficiently to protect freedom of expression.[220]

In *Marcus v. Search Warrants of Property*, the Court was concerned about both the process for obtaining the search warrant and the process for executing the warrant. Regarding how the warrant was obtained, the Court found problematic that the complainant police officer was able to make conclusory statements about his belief of the existence of obscene materials without providing any such materials to the judge for his independent judicial

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[213] *Id*. at 730.

[214] *Id*. (internal quotations omitted) (quoting Roth v. United States, 354 U.S. 476, 485 (1957)).

[215] *Id*.

[216] *Id*. at 731.

[217] *Id.*

[218] *Id*.

[219] *Id*. at 733.

[220] *See id*. at 718-20.

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assessment.[221] The Court was also concerned that the plaintiff was unable to challenge the issuance of the warrant or the search before it occurred and the materials were seized.[222] In terms of how the search warrant was executed, the Court emphasized that the warrant simply stated that officers should seize obscene materials, without any further elaboration. This was insufficient guidance and left the officers to use their own judgment to decide which matters were obscene and thus to be seized. "[E]ach officer actually made ad hoc decisions on the spot."[223] "They were provided with no guide to the exercise of informed discretion, because there was no step in the procedure before the seizure designed to focus searchingly on the question of obscenity."[224] The Court pointed out the sheer number of magazines that were seized and that only a third of those were ultimately ruled as obscene after judicial examination.[225] For the Court, this reinforced the "conclusion that discretion to seize allegedly obscene materials cannot be confided to law enforcement officials without greater safeguards than were here operative."[226] In the eyes of the justices in *Marcus v. Search Warrants of Property*, the deference provided to officers' discretion was improper in the arena of expressive materials.

The Court again confronted a search for expressive materials, but this time in the political context, in *Stanford v. State of Texas*.[227] The case dealt with the search of a private home for communist materials under the Texas Suppression Act.[228] Since *Stanford* was decided post-*Mapp*, the Court first clearly stated that it was engaging in a Fourth Amendment analysis.[229] The Court's subsequent language suggests that Fourth Amendment protections of expressive materials is at its zenith when the materials are political in nature. After recounting the history of Crown's suppression of anti-government

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[221] *Id.* at 731–32. *See also* Lee Art Theatre, Inc. v. Virginia, 392 U.S. 636 (1968) (where the Court found that movies were unconstitutionally seized when they were collected pursuant to a judicial search warrant issued based on a police officer's affidavit that included the name of the films and his statement that after viewing the films and the movie theatre billboard he determined the films were obscene).

[222] *Marcu*s, 364 U.S. at 732.. This does not create a *per se* rule that an adversarial hearing is required before a judicial officer can issue a search warrant for alleged obscene materials as clarified by the Court in *Heller v. New York*, 413 U.S. 483 (1973), finding constitutional the seizure of a film pursuant to a search warrant and the arrest of theatre staff showing the film pursuant to the judge's signed arrest warrant where the judge had watched the film in advance of his issuance of all warrants. S*ee also New York v. P.J. Video*, 475 U.S. 868, 873 (1986) (where the Court concluded that while courts afford "special [Fourth Amendment] protection . . . to ensure that First Amendment interests are not impaired by the issuance and execution of warrants authorizing the seizure of books or films," there is not heightened standard to probable cause judicial officers must use to review warrant applications for the seizure of books or papers).

[223] *Id.*

[224] *Id.*

[225] *Id.*

[226] *Id.*

[227] 379 U.S. 476 (1965).

[228] *Id*. at 477.

[229] *Id.* at 481.

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journalism through searches and seizure and its connection to the Fourth Amendment and referencing *Marcus v. Search Warrant Property*, the Court declared "what this history indispensably teaches is that the constitutional requirement that warrants must particularly describe the 'things to be seized' is to be accorded the *most scrupulous exactitude* when the 'things' are books, and the basis of their seizure is the *ideas* they contain. No less standard could be faithful to First Amendment freedoms."[230]

In *Stanford*, the judge issued a search warrant after receiving an application from a police officer stating that he had received information from two "credible persons," namely two Texas attorney generals, that the premises contained "books and records of the Communist Party."[231] The application included sworn affidavits from the two attorney generals referencing recent pro-Communist mailings from the premises and "other information received in the course of investigation."[232] The warrant described the items to be seized as "books, records, pamphlets, cards, receipts, lists, memoranda, pictures, recordings, or other written instruments concerning the Communist party of Texas, and the operations of the Communist Party in Texas."[233] Police officers, accompanied by the two signatory attorney generals, executed the search warrant and seized half the books in the home – about 300 titles – as well as pamphlets, magazines and personal papers.[234] The Court concluded that the items to be seized were not identified with particularity and this requirement must be adhered to scrupulously when the government is seizing materials containing ideas.[235] The Court further critiqued the freedom provided to police officers as they engaged in the search and seizure of expressive materials, stating "[t]he constitutional impossibility of leaving the protection of such materials to the whim of officers charged with executing a warrant is dramatically underscored by [the voluminous materials] the officers saw fit to seize under the warrant in this case."[236] Altogether, the police officers had carried away fourteen cartons of materials.[237]

Eight years later, the Court confronted again the question of the seizure of expressive (nonpolitical) materials, but this time for a seizure incident to arrest, in *Roaden v. Kentucky*.[238] In that case, the county sheriff and a prosecutor attended a movie at a drive-in theatre.[239] After watching the movie, the sheriff concluded that it was obscene and arrested the theatre

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[230] *Id.* at 485.
[231] *Id.* at 478.
[232] *Id.*
[233] *Id.*at 479.
[234] *Id.*
[235] *Id.* at 484.
[236] *Id.* at 485.
[237] *Id.* at 480.
[238] 413 U.S. 496 (1973).
[239] *Id.* at 497.

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manager.[240] Thereafter, he seized the film.[241] The validity of a search and seizure of contraband incident to arrest is a well-settled exception to the Fourth Amendment warrant requirement.[242] However, the Court declined to extend that exception to the seizure of allegedly obscene materials, meaning that police needed a warrant to seize the film. The Court concluded that to extend the doctrine of seizure of contraband and instrumentalities of the crime incident to arrest to the warrantless seizure of allegedly obscene materials would be to improperly read Fourth Amendment protections "in a vacuum. A seizure reasonable as to one kind of material in one setting may be unreasonable in a different setting or with respect to a different type of material."[243] The Court in *Roaden v. Kentucky* stated that in the circumstances where the government seizes materials that are arguably within the ambit of First Amendment protection, courts should "examine what is 'unreasonable' in light of freedom of expression" and impose a "higher hurdle" particularly when such seizures amount to a prior restraint on expression.[244]

About a decade after *Roaden v. Kentucky*, in his dissent in *Maryland v. Macon*, Justice William Brennan asserted that these same more stringent requirements for searches of expressive obscene should also apply to the seizure of an individual charged with the distribution of such expressive allegedly obscene materials.[245] Justice Brennan stated that the same difficulties endemic to the warrantless seizure of allegedly obscene materials apply to the warrantless arrest of a person for distribution of such materials and therefore those arrests must only occur pursuant to a proper judicial warrant.[246] Just as the task of differentiating between unprotected obscene and protected non-obscene materials should not be left to the individual officer who in their "zeal to enforce the law will lead to erroneous judgments," neither should the task of deciding whether there is probable cause to arrest an individual for distribution of allegedly obscene materials.[247] "Permitting this investigative practice threatens to restrain the

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[240] *Id.*

[241] *Id.* at 497–98.

[242] *See* United States v. Robinson, 414 U.S. 218, 236 (1973) (citations omitted) ("The search of respondent's person ... and the seizure from him [of contraband] were permissible under established Fourth Amendment law. ... [s]ince it is the fact of custodial arrest which gives rise to the authority to search.")

[243] *Roaden*, 413 U.S. at 501.

[244] *Id*. at 504.

[245] 472 U.S. at 473 (Brennan, J., dissenting). The majority in *Maryland v. Macon* did not decide whether the warrantless arrest of the bookstore's attendant, after an undercover police officer purchased two magazines which he and two other officers judged as obscene, was unconstitutional. *Id*. at 471. Instead, the majority only focused on the question of whether the magazines that the undercover officer purchased were admissible at trial. *Id.* at 464–71.
was constitutional

[246] *Id*. at 473–74.

[247] *Id.*

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liberty of expression in the same way that the seizure of presumptively protected material does."[248]

Justice Brennan recognized that the risks to freedom of expression associated with zealous individual police officers making ad hoc judgments about whether certain expression is legitimate and constitutionally protected – without substantial scrutiny and clear direction of a neutral magistrate – were not unique to government intrusions on effects and papers but applied to government intrusions on the person. In *Heller v. State of New York*,[249] the only case where the Supreme Court had previously confronted the arrest of people for crimes associated with the distribution of obscene materials, a judicial officer had issued the arrest warrants after himself watching the film in the theatre.

Through his dissent in *Maryland v. Macon*, Justice Brennan connected the dots in Fourth Amendment doctrine from expressive materials and papers to expressive conduct and concluded that in both contexts the courts need to scrupulously review government conduct and rein in police discretion to afford due protection to freedom of expression. "A warrantless arrest involves the same difficulties and poses the same risks as does a warrantless seizure of books, magazines or films."[250] "The disruptive potential [on the First Amendment] of an effectively unbounded [Fourth Amendment] power to arrest should be apparent."[251] He called for an absolute requirement of a prior judicial determination of probable cause – a strict arrest warrant requirement – when police effectuate an arrest related to expressive obscene materials and for invalidation of any conviction resulting from a warrantless arrest.[252] Although Justice Brennan recognized invalidation of the conviction is not the usual remedy according to Fourth Amendment precedent, he argued against the "mechanical application of precedents" "[w]hen First Amendment values are at stake."[253] He recognized that invalidating an arrest may "interfer[e] with the public interest of having the guilty come to book," but asserted that "an additional and countervailing public interest in ensuring the broad exercise of First Amendment freedoms must enter the calculus."[254] He asserted that only invalidating the conviction would provide the necessary deterrent effect to protect expression.[255] He also articulated his concern over how warrantless wrongful arrests would chill others' protected expression, stating that "the consequences of illegal use of power to arrest fall not only upon the specific victims of abuse of that power but also upon all of those who, for fear being

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[248] *Id*. at 474.
[249] *Heller*, 413 U.S. at 483; *see also supra* note 222.
[250] *Macon,* 472 U.S. at 473-74 (Brennan, J. dissenting).
[251] *Id.* at 474.
[252] *Id.* at 475.
[253] *Id.*
[254] *Id.* at 476.
[255] *Id.* at 476.

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subjected to official harassment, steer far wider from the forbidden zone than they otherwise would."[256]

Justice Brennan acknowledged that Fourth Amendment special safeguards for freedom of expression are not limited to just the seizure of expressive materials but also apply to seizures of the person for expressive activities -- in the case of *Maryland v. Macon*, an allegation of distribution of obscene materials.[257] This is a logical reading of the historical foundations of the Fourth Amendment considering *The North Briton* scandal concerned not only the indiscriminate seizure of books and documents, but also indiscriminate arrests.

B. The query for the expressive Fourth Amendment is what is reasonable in light of freedom of expression?

The preceding account of the historical background of the Fourth Amendment and the Supreme Court's paper cases provide critical lessons, which courts have missed, about how jurists must analyze the reasonableness of police force in the protest context. Courts must shift their inquiry to whether a police officer's use of force was reasonable *in light of freedom of expression* when the policed target is engaged in expressive protest activity. To date, no court has meaningfully engaged in this inquiry in excessive force protest cases.[258] Inquiring whether a police officer's use of force is reasonable in light of freedom of expression has ramifications for the overall balancing and the factor-by-factor excessive force weighing. In terms of the overall balancing, courts' deference to police must be reduced when expressive conduct is involved. In terms of the factor-by-factor weighing, courts must weigh positively underlying expressive conduct by activists and no other factor can be determinative for the reasonableness analysis.

Instead of affording deference to police decision making, courts must review Fourth Amendment excessive force claims during protests with "scrupulous exactitude" to minimize intrusion on First Amendment activity.[259] The prevailing deference encourages police officers to make *ad hoc* decisions about how to use force with activists engaged in expressive activity. This *ad hoc* decision-making is unacceptable when potentially

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[256] *Id.*

[257] *See id.* at 464-65.

[258] As previously mentioned, the district court in *Lamb* recognized that a court should apply heightened Fourth Amendment review when plaintiffs are engaged in protest instead of criminal conduct. *See Lamb*, 947 F. Supp. at 1265*; see also supra* note 96, and accompanying text.

[259] Stanford v. Texas, 379 U.S. 476, 511 (1965). Other scholars have previously suggested that courts should apply a more exacting standard to protest situations. *See, e.g.,* D'Addario, *supra* note 18, at 97 ("Even when protesters raise only Fourth Amendment claims, the First Amendment is still implicated but usually ignored. Some courts have not even applied the Fourth Amendment strictly or 'with scrupulous exactitude' as the Supreme Court has required"); *Fourth Amendment First Principles*, *supra* note 161, at 806 ("Under this approach, First Amendment concerns could well trigger special Fourth Amendment safeguards.")

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protected expression is the target. Out of concern for zealous police officers sweeping too broadly during searches of expressive materials, the Court has limited police discretion.[260] This same concern is present when zealous police officers exert force on protesters, which may inadvertently or purposefully (depending on your view of protest policing) sweep within its reach activists engaged in protected protest activity. This is the story of indiscriminate (or some would assert malicious) police use of force during the George Floyd protests.

To guard against this overzealous and unrestrained policing of expressive materials, the Court in its paper cases has demanded that a neutral magistrate engage searchingly in the fraught business of differentiating between materials that are protected and those that are unprotected by the First Amendment and only then, when appropriate, issue a warrant that describes with sufficient particularity the items to be seized to avoid individual police officers' seizure of materials duly protected by freedom of expression. Requiring a neutral magistrate pursuant to the Fourth Amendment to sign an arrest warrant before a police officer can arrest or use force with someone engaging in First Amendment activity during protests would likewise be more protective of their freedom of expression. Justice Brennan's argument in his dissent from *Macon v. Maryland* that the warrantless arrest of an individual for distribution of obscene materials violated the Fourth Amendment supports this view.[261] Justice Brennan asserted that "[t]he disruptive potential [on the First Amendment] of an effectively unbounded power to arrest should be apparent."[262] The public bore witness to this unbounded power not only to arrest, but also to use force, in the George Floyd protests.

Despite Justice Brennan's insightful argument against warrantless arrests in the context of distribution of expressive allegedly obscene materials, a strict warrant requirement before a police officer can engage with a protester is likely unrealistic, although this discussion does challenge what now has become the norm. Warrantless arrests have become the norm, largely as a result of courts carving out exceptions to the warrant requirement

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[260] *See, e.g., Roaden,* 413 U.S. at 504 ("[T]he material seized fell arguably within First Amendment protection, and the taking ... by a police officer, without the authority of a constitutionally sufficient warrant, is plainly a form of prior restraint and is, in those circumstances, unreasonable under Fourth Amendment standards."); *Marcu*s, 364 U.S. at 729 ("This history was, of course, part of the intellectual matrix within which our own constitutional fabric was shaped ... For the serious hazard of suppression of innocent expression inhered in the discretion confided in the officers authorized to exercise the power."); *see also id.* at 732-33 ("The fact that only one-third of the publications seized were finally condemned strengthens the conclusion that discretion to seize allegedly obscene materials cannot be confided to law enforcement officials without greater safeguards than were here operative.")

[261] *See Macon,* 472 U.S. at 474 (Brennan, J. dissenting).

[262] *Id.*

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to provide police officers leeway to control criminal activity.[263] However, when police officers engage in the regulation of protest rather than crime control, it problematizes the carving out of such an exception. Even if not adhering to a strict warrant requirement, courts must do away with principles of police deference because they do not sufficiently safeguard protest activity and because courts developed those principles in the context of crime control and its attending circumstances, including concerns over police officer safety.

On the factor-by-factor analysis, courts must also weigh positively an activist's underlying expressive conduct. The rightfulness, wrongfulness, or suspiciousness of the conduct of the policed individual is part of any Fourth Amendment reasonableness assessment of law enforcement conduct.[264] In the same vein, when the policed person's conduct is expressive protest activity, courts should not ignore it but instead consider it favorably in the reasonableness calculus. The nature of the policed person's protest conduct should mitigate against law enforcement's use of force. The *Graham* balancing is between the "the nature and the quality of the intrusion on the individual's Fourth Amendment interests against the countervailing government interests at stake."[265] In protest cases, the governmental intrusion on the individual's interests is great since the intrusion is on likely protected expressive political activity – the kind which the Fourth Amendment was constructed to safeguard. Furthermore, the countervailing government interest is complicated because the government has an interest in valuable protest activity, in addition to an interests in maintaining order and police officer and public safety. As Justice Brennan asserted, there is a "public interest in ensuring the broad exercise of First Amendment freedoms [which] must enter the calculus."[266] Justice Brennan raised these arguments in the context of an arrest for distribution of expressive potentially obscene materials, not political materials. However, Fourth Amendment protection of expressive materials and conduct should be at its zenith when political expression is involved.[267] After all, the *North Briton* scandal that inspired

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[263] *See* Amar, *supra* note 259, at 770 (listing "at least eight historical and commonsensical exceptions to the so-called warrant requirement"); MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 3 (AM. LAW. INST. 1970)("[T]he evidence on hand . . . compel[s] the conclusion that warrants have played a comparatively minor part in law enforcement."); *see also* Atwater v. Lago Vista, 532 U.S. 318, 354 (2001) ("If an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender."); United States v. Watson, 423 U.S. 411, 419 (1976) (creating warrantless arrest in public for felonies exception, reasoning that at common law, the "due apprehension of criminals, charged with heinous offences, imperiously require[d] that such arrests should be made without warrant by officers of the law.")

[264] *See supra* Part IIA, discussing reasonableness analysis under *Graham* generally, and Part II, discussing reasonableness analysis in protest excessive force cases.

[265] (internal quotations omitted) *Graham*, 490 U.S. at 396.

[266] *Macon,* 472 U.S. at 476 (Brennan, J. dissenting).

[267] *See supra* notes 227-230 and accompanying text, discussing implications of *Stanford v. Texas* on heightened constitutional protection of political expression.

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the Fourth Amendment centered around government's use of its power of search and seizure in an attempt to ransack the homes, seize the papers, and harass and arrest anti-government dissidents and their families, friends and associates. Therefore, especially in the context of politically expressive conduct, courts should apply all factors in the Fourth Amendment balance in a manner that provides freedom of expression the "breathing space to survive."[268]

To provide freedom of expression such breathing space, the government and its police actors must adopt a tolerant attitude towards protest activity. Courts should recognize that protests are by their nature not orderly events, and therefore should not allow the police to extort order through the unrestrained use of weapons and force. Generalized concerns of "lawlessness" or disorder are insufficient to justify police force.[269] Courts should rule that police use of force is unreasonable in light of freedom of expression unless it is necessary to counteract protester violence or property damage. When police use force, it must be limited to the individual activist who is engaging themselves in violence or damaging property.[270] The Court must ensure that police officers use their best efforts to not curtail the entire protest when dealing with individual incidents of violence by one or few protesters. Police may properly use force to stop an individual who seeks to incite imminent violence or unlawful activity since that expression is not protected.[271]

While a police officer may generally intervene when a protester engages in criminal activity, the type of criminal activity alleged is also important to the court's analysis.[272] If the conduct amounts to a

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[268] *See In re Grand Jury Subpoena: Subpoena Duces Tecum*, 829 F.2d 1291 at 1298–99 (where the Fourth Circuit, in deciding whether to quash a broad subpoena for obscene video materials, expressed concern for the chilling of freedom of expression and called for a more delicate tool that provides freedom of expression "breathing space to survive.")

[269] *See contra Felarca*, 891 F.3d at 817-18 (justifying use of force against Occupy protestors due to their "organized lawlessness"); *Oberwetter,* 639 F.3d at 555 (finding use of force reasonable against dancing protestor who refused to stop dancing); *Crowell*, 400 Fed. App'x. at 595 (finding use of force reasonable where protestors "chained themselves to a several hundred pound barrel drum and having refused to free themselves.").

[270] I have discussed the justification for not viewing protestors as a unit in a prior article. *See Water Hoses*, *supra* note 19, at 843-48.

[271] *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (recognizing "principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.")

[272] I expect to contend with the question of how the reasonableness analysis should change when a protester claims they were arrested in violation of the expressive Fourth Amendment in later work. It is worth mentioning here, however, that the Supreme Court has allowed expressive albeit illegal activity to persist in cases where First Amendment values prevail. *Compare* Texas v. Johnson, 491 U.S. 397 (1989) (invalidating criminal prohibition against flag burning) *with United States v. O'Brien*, 391 U.S. 367 (1968) (allowing criminal prohibition against draft card burning).

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misdemeanor or is only criminal because there is a protest, the court should be guard against the use of police force. There is certain conduct that would, under regular circumstances, not be criminal at all such as violating a curfew instituted in response to protests. Also, there are other crimes, such as disorderly conduct and failure to disperse, that police exploit during these events to effectuate mass arrests of protesters and quash the protest.[273] Courts should view this weaponizing of criminal law to suppress protest activity unfavorably and not give credence to these government allegations of illegality.

Regarding the question of whether the individual is resisting arrest, police should not be able to counter nonviolent resistance with violence.[274] In other words, refusal to answer questions, stand up, facilitate handcuffing, and otherwise cooperate during an arrest should not serve as a justification for force when a protester is the target. Beyond just common sense principles of proportionality, these behaviors – sitting, kneeling, binding arms together, lying on the ground as if shot – are often themselves part of the protest activity. Furthermore, categorical rules about the permissibility of force during arrest should not be applicable when the arrestee is engaged primarily in protest activity, as opposed to criminal activity.

Courts must also verify that police officers' use of force is politically neutral. To the concern of many, police officers are increasingly likely to abuse the deference provided by the current *Graham* analysis when racist and violent policing is the target of the protests. My account of the various acts of indiscriminate violence perpetrated by police against racial justice protesters during the summer of 2020 demonstrates this. Further, news stories, like the ones of the January 2021 Trump loyalists' assault on the Capitol, and data suggest that far-right activists have received a much more restrained, and at times even friendly, reception by law enforcement than left leaning activists, including racial justice protesters.[275] This politically targeted use of the power of search and seizure is precisely the government conduct that the framers sought to protect against when drafting the Fourth Amendment.

Finally, courts evaluating police excessive force claims during protests must not elevate the threat factor above all others. Considering that Fourth Amendment analysis is about balancing the totality of the

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[273] *See* Loor, *When Protest is the Disaster*, *supra* note 19, at 38–43.

[274] *See, e.g., Amnesty Am.*, 361 F.3d at 123 (where the court considered the fact that plaintiffs were only engaged in passive resistance when assessing whether the police engaged in excessive force). In both the *BLM Seattle* injunction and the *Don't Shoot Portland* injunction, the courts restrict the amount of force police can employ when individuals are passively resisting. *See* Seattle TRO Order at 8; Portland Additional TRO at 2.

[275] Lois Beckett, *US Police Three Times as Likely to Use Force Against Leftwing Protesters, Data Finds*, GUARDIAN (Jan. 14, 2021), https://perma.cc/NY5N-7YTR; Karen J. Pita Loor, *Of Course The Mob That Stormed the Capitol Wasn't Afraid*, WBUR (Jan. 11, 2021), https://perma.cc/7EWG-XBSM; Adam Rogan, *Police in Kenosha shared water, said they 'appreciate' armed group before two killed*, J. Times (Aug. 26, 2020), https://perma.cc/V6CU-FVQR

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circumstances, no single factor should be determinative. This is particularly so, however, when expressive protest activity is the target of policing. First, elevating the threat factor conversely devalues expressive activity. Second, courts elevate this factor due to concerns over the dangers associated with police's crime control function. Crime fighting is not police officers' predominant function when engaged in protest policing, so the rules that have developed through the crime control frame are not analogously transferrable in the protest control context.

IV. A CASE REIMAGINED IN LIGHT OF THE EXPRESSIVE FOURTH AMENDMENT

In this last Part, I show what difference an expressive Fourth Amendment makes in protest cases. To do this, I revisit *White v. Jackson*, the Eighth Circuit case set in the midst of the 2014 Ferguson protests.[276] In *White v. Jackson*, making no adaptations in light of freedom of expression to the *Graham v. Connor* paradigm, the Court concluded that police officers did not use excessive force when they shot bean bags and rubber bullets at Dwayne Matthews as he walked unarmed through tear gas in the direction of a police "skirmish line," and when, during his subsequent arrest for refusal to disperse, police slammed his face against the pavement and placed a knee and body weight on his back.[277] As a reminder, there was no suggestion that police thought Mr. Matthews was armed in any way; that he charged the police line; or that he was walking with others when police saw him approach.[278] Mr. Matthews walked alone with his hands up towards the police.[279] At one point, he held a bus pass in one hand, but otherwise his hands were empty.[280] Like in all other excessive force cases in the protest context, Mr. Matthews' presence at the Ferguson protests, or police officer's belief that he was one of the protesters, did not matter to the Court, except to weaken his excessive force claim because the Court found that police officers were reasonable in believing that he posed a threat when he walked from the area of a "violent crowd."[281] The underlying expressive conduct was of so little relevance to the Court's analysis that it only used the word "protesters" once and never in connection to the analysis. Throughout the rest of the

[276] *White*, 865 F.3d at 1069; Brief of St. Louis County Appellees, White v. Jackson, No. 16-3897 (8th Cir. filed Jan. 30, 2017) (hereinafter St. Louis County Brief).

[277] *White,* 865 F.3d at 1080. The Court did conclude that defendant police officers were not entitled to summary judgment on the excessive force claims related to police officers holding Mr. Matthews' head underwater and then macing him and beating him when he was already under the control of police. *Id.*; *see also supra* Part IIB(1), discussing *White*.

[278] *White,* 865 F.3d at 1080.

[279] *Id.*

[280] White v. Jackson, 2016 WL 8674192, at *6 (E.D. MO 2016).

[281] *Id.* at 1079.

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opinion, the Court referred to the protesters as the *crowd* [282] and to the protest as *unrest*.[283]

Below I imagine the Eight Circuit rehearing *en banc* of *White v. Jackson*, now analyzing Mr. Matthews' excessive force claims in light of the expressive Fourth Amendment. When the Eighth Circuit recognizes that the Fourth Amendment has an expressive component, in other words that it is meant to protect expressive conduct in addition to bodily integrity, the Court's analysis of Mr. Matthews' excessive force claims leads to the conclusion that the police officers are not entitled to summary judgments on any of Mr. Matthews's excessive force claims.[284] Circuit Court Judge Diana E. Murphy writes again for the Court but her opinion now is markedly different:[285]

MURPHY, Circuit Judge.

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, effects, against unreasonable searches and seizures."[286] In addition, "no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."[287] As we have long understood, the Fourth Amendment protects bodily integrity from unreasonable government intrusion.[288] In addition, we now acknowledge that in the context of protests, the Fourth Amendment is also meant to protect freedom of expression. This means that there is an expressive component to Fourth Amendment protections. The expressive Fourth Amendment, which has been applied in the context of searches for materials that are expressive in nature, must also be applied to conduct that is expressive in nature.

As the Supreme Court has already recognized in the context of searches for papers, books publications, and videos, the Fourth Amendment

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[282] *See id.* at 1069 ("large crowds gathered in Ferguson"); *id.* ("crowds were largely peaceful"); *id.* at 1070 ("A crowd of approximately one hundred people was assembled"); *id.* ("made announcements to the crowd to disperse") *id.* at 1072 ("police ordered the crowd to disperse"); *id.* at 1079 ("police then issued several orders to the crowd to disperse.")

[283] *See id.* at 1069 ("[t]he epicenter of this unrest"); *id.* ("[i]n response to the civil unrest").

[284] Under an expressive Fourth Amendment analysis, the Court might also conclude that the police officers were not entitled to summary judgment on Mr. Matthews' false arrest claim, but I will leave the discussion of arrests for a future piece.

[285] I acknowledge that in this reimagined opinion I do not deal with how quailed immunity will affect the expressive Fourth Amendment analysis. *See supra* note 29-30 and accompanying text conceding that qualified immunity is outside the scope of this article.

[286] U. S. CONST. amend. IV.

[287] *Id.*

[288] Mapp v. Ohio, 367 U.S. 643, 660 (1961) (recognizing that the "right to privacy embodied in the Fourth Amendment is enforceable against the States, and that the right to be secure against rude invasions of privacy by state officers is, therefore, constitutional in origin"); *see also* Schmerber v. California, 384 U.S. 757, 767 (1966) ("The overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State.")

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provides special safeguards to materials that are expressive in nature.[289] *In these paper cases, the Supreme Court has recalled the colonial history of abusive searches and arrests by the British King's messengers in search for the author of an anti-government publication,* North Briton No. 45.[290] *This history was fresh in the framers' minds as they drafted the Fourth Amendment.*[291] *As the Supreme Court stated in a case involving the search for communist materials in a home, "[t]he Bill of Rights was fashioned against the background of knowledge that unrestricted power of search and seizure could also be an instrument for stifling liberty of expression. . . . [The First, Fourth and Fifth] [A]mendments are closely related, safeguarding not only privacy and protection against self-incrimination, but conscience and human dignity and freedom of expression as well."*[292] *Furthermore, Fourth Amendment protections for freedom of expression are at their pinnacle when the expression is political in nature, considering it was political expression that the Crown sought to suppress in its abusive arrests and searches.*[293] *In terms of the Fourth Amendment analysis of government searches for expressive materials, the expressive Fourth Amendment has the following consequences: The court must engage in heightened review of these searches, and the court must rein in police discretion in these searches.*[294] *These expressive Fourth Amendment principles must apply with the same force when the government intrusion is on a person engaged in expressive activity, as during a government search for expressive items. After all, the Fourth Amendment protects against not only unreasonable searches, but also unreasonable seizures,*[295] *which Mr. Matthews here claims. Justice Brennan drew this connection when he argued for curtailment of police authority to arrest, via a strict warrant requirement, for distribution of allegedly obscene expressive materials.*[296] *"The disruptive potential of an effectively unbounded power to arrest should be apparent."*[297]

The next step is to analyze how, if at all, the expressive Fourth Amendment should change the Graham v. Connor *reasonableness analysis*

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[289] *See* Roaden v. Kentucky*,* 413 U.S. 496 (1973); Stanford v. Texa*s*, 379 U.S. 476 (1965); Marcus v. Search Warrant, 367 U.S. 717 (1961).

[290] *See Stanford*, 379 U.S. at 481-84; *Marcus*, 367 U.S. at 724-25.

[291] *See Stanford*, 379 U.S. at 484; *Marcus*, 367 U.S. at 724.

[292] *Stanford*, 379 U.S. at 484-85.

[293] *Id.*

[294] *See Roaden* , 413 U.S. at 504-5 (finding common theme among obscenity cases to be the need to review expressive material "arguably within First Amendment protection" with "scrupulous exactitude due to "[t]he constitutional impossibility of leaving the protection of those freedoms to the whim of the officers charged with executing the warrant"); *Stanford*, 379 U.S. at 486 (engaging with "scrupulous exactitude" the review of a search warrant for communist materials so "nothing is left to the discretion of the officer executing the warrant."); *Marcu*s, 364 U.S. at 730 (finding that "discretion to seize allegedly obscene materials cannot be confided to law enforcement officials without greater safeguards")

[295] U. S. CONST. amend. IV.

[296] *See Macon,* 472 U.S. at 473-724 (Brennan, J. dissenting).

[297] *Id.* at 724.

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of excessive force claims in the context of protests. To begin, the principles of Graham v. Connor *arose in the context of a criminal investigation where police suspected (albeit wrongfully) Mr. Graham of shoplifting.*[298] *The fact that the police officer was confronting a potential criminal mattered to the Court and it fashioned a test that provided police with extreme deference to "make split-second judgments – in circumstances that are tense, uncertain and rapidly evolving."*[299] *The Court warned against reviewing police officers' actions with "20/20 vision of hindsight."*[300]

Deferential review has no place when police officers regulate protest activity. To begin with, concerns about police officer safety are simply not present in the protest context to the degree that they are in the crime control context. The overwhelming majority of protests are peaceful. Recent data demonstrates that 93 percent of protests involve no violence at all, and in the 7 percent of protests where there is some violence, civilians, not police, are often the ones injured.[301] *Evidence suggests that violence is typically a result of police instigating or escalating the situation.*[302] *In addition, deference to police* ad hoc *judgments is not appropriate when expressive conduct is involved. Providing deference to an individual officer's ad hoc decisions is dangerous to freedom of expression because in their zeal to enforce order, an officer may curtail protected expressive activity.*[303] *Therefore, instead of affording deference to police decision making, we must review claims of government excessive force with "scrupulous exactitude" when they arise in the midst of protest activity. Considering that the Fourth Amendment balancing is between "the nature and the quality of the intrusion on the individual's Fourth Amendment interests against the countervailing government interest at stake,"*[304] *we must consider as part of the government's public interest not only its interest in ensuring safety of people and property, but also in facilitating protest activity. By the same token, the individual's interest to bodily integrity is augmented by their interest to*

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[298] *Graham*, 490 U.S. at 389.

[299] *Id.* at 396.

[300] *Id.* at 396–97.

[301] Roudabeh Kishi and Sam Jones, *Demonstrations & Political Violence in America: New Data for Summer 2020*, ACLED (2020), https://perma.cc/6WCX-L8JB "*Violent demonstrations* refer to demonstration events in which the demonstrators themselves engage in violently disruptive and/or destructive acts targeting other individuals, property, businesses, other rioting groups, or armed actors ... This category also includes events where violence may have been initially instigated by police or other actors engaging demonstrators associated with the BLM movement." *Id.*

[302] *See* Talia Buford, Lucas Waldron, Moiz Syed, and Al Shaw, *We Reviewed Police Tactics Seen in Nearly 400 Protest Videos. Here's What We Found*, PROPUBLICA (July 16, 2020) (finding that "while the weapons, tactics and circumstances varied from city to city, what [the experts[saw in one instance after another was a willingness by police to escalate confrontations" and "cause considerable injury to protesters"]

[303] *See Marcu*s, 364 U.S. at 732 (finding search unreasonable where "each officer actually made ad hoc decisions on the spot" so that "each decision was made with little opportunity for reflection and deliberation" with "no guide to the exercise of informed discretion.")

[304] *Graham*, 490 U.S. at 396.

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engage in expressive political protest. Considering Graham v. Connor's *factor-by-factor analysis, since one of these specified factors is the policed person's conduct,*[305] *we must weigh positively an individual's involvement in protest activity in the reasonableness calculus.*

We now turn to Mr. Matthews claims of excessive force in violation of the Fourth Amendment and reverse our prior judgment that that the police officers were entitled to summary judgments on any of the excessive force claims. We previously held that it was excessive force for police officers to submerge Mr. Matthews head underwater and to mace him and punch and kick him while he was already under police control.[306] *We find no need to disturb those findings at this time.*[307] *Instead, we turn our focus to our rulings that police officers were entitled to summary judgment when they shot bean bags and rubber bullets at Mr. Matthews as he walked with his hands up in the direction of the police skirmish line and when they slammed his head on the ground and kneed him on the back during the arrest process.*[308]

The last time we considered these excessive force claims, we did not consider how Mr. Matthews' presence at the Ferguson protests should influence our analysis. We admittedly ignored how any plaintiffs' involvement in expressive protest activity should affect the Fourth Amendment reasonableness analysis. We did not identify the relevance of the papers search line of cases discussed above. Of course, neither appellants nor appellees raised this issue in any of their briefs.[309] *As far as this Court can assess from its research, one federal district court judge has previously suggested in the context of a protest "[w]here activities under the First Amendment are involved, 'the requirements of the Fourth Amendment must be applied with scrupulous exactitude.'"*[310] *In* Lamb v. City of Decatur*, Illinois District Court Judge Harold Baker recognized that the case of a labor protest demonstration presented an unique factual scenario for the court since it was "not the typical excessive force case where the police were struggling with a fleeing felon or a rebellious prisoner. Instead, the police*

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[305] *See id.* (discussing "severity of the crime at issue").

[306] *White,* 865 F.3d at 1080.

[307] This Court recognizes that it might reach its conclusions differently pursuant to the expressive Fourth Amendment, but does not find it necessary to engage in that analysis at this time. The reasonableness calculation where protest activity is concerned leads to heightened review of the government's action, so excessive force under *Graham* as we have traditionally understood it, is almost certainly excessive force under the heightened standard we articulate today.

[308] *See White,* 865 F.3d at 1080. We recognize that Mr. Matthews also asserts that the police officers violated his Fourth Amendment rights through false arrest. We deal with that claim in a separate opinion.

[309] *See* Appellant's Brief, White v. Jackson, No. 16-3897 (8th Cir. filed Nov. 21, 2016) (hereinafter Appellant's Brief); Appellee's Brief, White v. Jackson, No. 16-3897 (8th Cir. filed Jan 25, 2017) (hereinafter Appellant's Brief); St. Louis County Brief; Appellant's Reply Brief, White v. Jackson, No. 16-3897 (8th Cir. filed Feb. 23, 2017) (hereinafter Appellant's Reply Brief).

[310] Lamb v. City of Decatur*,* 947 F. Supp. 1261, 1263 (C.D. Ill. 1996), quoting Zurcher v. Stanford Daily, 436 U.S. 547, 564 (1978).

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were monitoring a peaceful, lawful and constitutionally protected demonstration."[311] *However, beyond recognizing this important distinction and articulating that heightened review should apply, Judge Baker did not provide additional analysis of how the* Graham v. Connor *analysis should be adapted or what heightened review means.*

The threshold question is whether the surrounding facts suggest that the government intruded on expressive conduct. Protest activity is expressive conduct. Thus, when the plaintiff is a protester and the government uses its search or seizure power and intrudes on protest activity, it implicates the expressive Fourth Amendment. This threshold question is somewhat challenging in this instance because Mr. Matthews stated that he was not a protester, but instead had just arrived by bus to the area and was walking towards his mother's house when he was confronted by police.[312] *However, a police officer at the scene would reasonably believe that Mr. Matthews was a protester engaged in expressive activity. In evaluating the reasonableness of police conduct, the question for the court is what a reasonable police officer at the scene would have thought.*[313] *Moreover, the nature of the protest scene changes the context of police action and intrusion and how carefully a court must scrutinize it. We must curtail the discretion and leeway our Fourth Amendment analysis traditionally provides police as they interact not only with protesters but with observers, medical personnel, legal observers, journalists and people going on about their daily lives amidst the protests, like Mr. Matthews.*

We now discuss the police officers' deployment of less lethal weapons against Mr. Matthews. We previously ruled that police were justified in shooting at Mr. Matthews because they reasonably believed that "his advances towards the skirmish line posed a threat" since he approached from "the vicinity of a violent crowd of people."[314] *In their brief, appellees also argued that "[p]laintiff remained a threat to the officers, even with his hands up."*[315] *To support this reasoning, appellees analogize Mr. Matthews to a suspect of domestic violence in* Smith v. City of Minneapolis.[316] *As appellee asserts in his brief, in* Smith *we concluded that it was "reasonable for officers to hit a suspect who approached with palms open in front of his face [because t]he officers there did not know whether a weapon was accessible in the plaintiff's waistband."*[317] *In his reply brief, appellant distinguished* Smith *by highlighting that police was at the scene pursuant to a 911 call for help for a woman whose armed boyfriend had just returned from jail on a domestic violence charge involving the same woman.*[318]

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[311] *Lamb*, 947 F. Supp. at 1265.

[312] *White,* 865 F.3d at 1072.

[313] *See Graham*, 490 U.S. at 396 ("The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene.")

[314] *White,* 865 F.3d at 1079.

[315] St. Louis County Brief at 56.

[316] *Id*. at 55 (citing Smith v. City of Minneapolis, 754 F.3d 541(8th Cir. 2014)).

[317] *Id*.

[318] Appellants Reply Brief at 23-24.

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Recognizing the validity of appellant's argument, nevertheless these two cases must be distinguished at a more fundamental level. Smith *concerned a criminal investigation of the type that the* Graham v. Connor *analysis was developed to confront.*[319] *There was no alleged government intrusion on plaintiffs' expressive conduct. Excessive force cases concerning criminal suspects provide little guidance here where police are regulating protest activity instead of policing suspected criminal activity.*

Appellees also argued that even if Mr. Matthews was "waving a flag of surrender" by walking towards police with his hands up, "not all surrenders are genuine, and police officers are entitled to err on the side of caution when faced with an uncertain or threatening situation."[320] *This deference to a police officer's judgment out of concern for their safety is emblematic of the* Graham v. Connor *analysis in the criminal context. However, this deference to individual police officer decision-making is insufficiently protective of freedom of expression because officers may inadvertently suppress protected expressive activity in their zeal to enforce order. Furthermore, this intensified concern for police officer safety is just not present in the protest scenario. In the same vein, we must guard against elevating any one factor of the* Graham *analysis, including the threat factor, in these cases.*

Thus, carefully scrutinizing the government intrusion as required by the expressive Fourth Amendment, we conclude that the defendants are not entitled to summary judgment on the excessive force claim related to the use of less lethal weapons against Mr. Matthews. We weigh positively for Mr. Matthews his underlying conduct of being in the midst of expressive protest activity. Furthermore, if Mr. Matthews was engaged in any criminal conduct, it was along the lines of refusal to disperse.[321] *This is relevant for two reasons. First, refusal to disperse is a misdemeanor.*[322] *Second, the crime of refusal to disperse is often incidental to protest activity. It is not an independent crime like robbery or burglary that has no relation to expressive activity. To provide the First Amendment with necessary "breathing space",*[323] *we must be more tolerant of alleged criminal activity when it is related to the protest activity, nondestructive, and nonviolent. Regarding the threat factor, we now find that an unarmed man walking alone with his hands up towards a line of armed riot police poses no threat to them or to the general public. In terms of* Graham*'s third flight or resistance factor, Mr. Matthews was doing neither when police shot him with less lethal weapons.*

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[319] *See Smith*, 754 F.3d.

[320] *Id*. at 55 (citing *Johnson v. Scott,* 576 F.3d 658, 69 (7th Cir. 2009)).

[321] *White,* 865 F.3d at 1079.

[322] MO. REV. STAT. § 574.060.2 ("The offense of refusal to disperse is a class C misdemeanor.")

[323] *S*ee *In re Grand Jury Subpoena: Subpoena Duces Tecum*, 829 F.2d 1291 at 1298–99 (where the Fourth Circuit, in deciding whether to quash a broad subpoena for obscene video materials, expressed concern for the chilling of freedom of expression and called for a more delicate tool that provides freedom of expression "breathing space to survive.")

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We previously ruled that the arrest tactics which included forcefully slamming Mr. Matthews' face against the pavement and then placing a knee with the officer's body weight on his back to handcuff him did not amount to excessive force because some degree of force is endemic to arrest.[324] *However, after carefully scrutinizing the government intrusion as we are required in light of freedom of expression, we now reverse that ruling and hold that police officers are not entitled to summary judgment on the excessive force claim in connection to these arrest tactics. While forceful police tactics may be a part of an arrest in the context of a criminal investigation, Mr. Matthews' arrest was not in that context, but in the context of perceived protest activity. Since freedom of expression requires heightened judicial protection, we cannot summarily apply a categorical rule regarding the propriety of the government's use of force. This is not only critical to Mr. Matthews' case, but critical to the protest as a whole. A violent arrest may not only serve to punish Mr. Matthews for his presence at the protest, but may also intimidate other protesters witnessing the arrests and chill their protest activity. Justice Brennan expressed this concern in the context of arrests for distribution of alleged obscene expressive materials, warning that "the consequences of illegal use of power to arrest fall not only upon the specific victims of abuse of that power but also upon all of those who, for fear being subjected to official harassment, steer far wider from the forbidden zone than they otherwise would."*[325] *We must resist the temptation to apply any categorical rule regarding force during arrest and instead engage in a balancing of the factors in accordance with the expressive Fourth Amendment. Considering Mr. Matthews' perceived protest activity or presence at the protest site, his noncriminal or incidental criminal conduct, the fact that he posed no threat as he lay face down on the street gutter, and the lack of evidence suggesting flight or resistance, we easily conclude that police officers' arrest tactics of slamming Mr. Matthews' face on the ground and kneeing him were unreasonable in light of freedom of expression.*

Before concluding, one more point is worth mentioning. Appellees refer to the Ferguson protests as riots in several places in their brief.[326] *This Court recognizes that protests can turn violent and ultimately become riots. However, this was not the case here. While there were incidents of violence, protesters were "largely peaceful."*[327] *To influence the expressive Fourth Amendment analysis, "riotous conditions," as appellees allege,*[328] *must be established through evidence, not just alleged through conclusory assertions.*

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[324] *White,* 865 F.3d at 1080.

[325] *See Macon,* 472 U.S. at 473-724 (Brennan, J. dissenting).

[326] St. Louis County Brief at 9 ("large assembly of angry protestors and rioting"); *id.* at 51 ("dangerous, riotous conditions); *id.* at 54 ("riotous behavior"); *id.* at 69 ("riotous conditions in Ferguson").

[327] *White,* 865 F.3d at 1080.

[328] St. Louis County Brief at 51.

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For the foregoing reasons, we reverse the trial court's order granting defendants summary judgment and remand this matter to the district court for a trial on the merits of all Dwayne Matthews' excessive force claims.

So ordered.

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