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# THE EXPRESSIVE FOURTH AMENDMENT

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## ABSTRACT

*After the eight-minute and forty-six second video of George Floyd's murder went viral, cities across the United States erupted in mass protests with people outraged by the death of yet another Black person at the hands of police. The streets were flooded for months with activists and community members of all races marching, screaming, and demonstrating against police brutality and for racial justice. Police—like warriors against enemy forces—confronted overwhelmingly peaceful protesters with militarized violence and force. Ultimately, racial justice protesters and members of the media brought lawsuits under section 1983 of the Civil Rights Act 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. The first Part of this Article provides a recent history of this police brutality against racial justice activists in the George Floyd protests. The second Part of this Article reviews circuit court opinions in protest cases from the last three decades and district court injunctions from the George Floyd protest litigation to analyze how courts currently evaluate, in section 1983 Actions, the Fourth Amendment reasonableness of police force pursuant to *Graham v. Connor*. This Part demonstrates that in their Fourth Amendment reasonableness calculus, courts discount plaintiffs' involvement in valuable*

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*politically expressive conduct. The third Part of this Article argues that the Fourth Amendment mandates courts evaluate the reasonableness of protest policing in light of freedom of expression which means they must positively weigh plaintiffs' expressive protest activity. This reframing of reasonableness is supported by historical evidence of the Framers' intent and Supreme Court jurisprudence on searches of books, papers, and other expressive materials when such items arguably deserve First Amendment protection. The fourth Part of this Article discusses the difference an expression-specific Fourth Amendment—the expressive Fourth Amendment—reasonableness test would have made in one of the circuit protest cases.*

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#### 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.<sup>1</sup> Across the nation, the streets erupted in protests as people expressed their disdain for the persistent police brutality against BIPOC.<sup>2</sup> 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.”<sup>3</sup> 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.”<sup>4</sup> And they did. Denver police intentionally aimed and shot munitions at activists’ heads and groins.<sup>5</sup> Videos show people bleeding from the eyes as the result of rubber bullets or sponge grenades.<sup>6</sup> Additional footage shows the Denver police firing munitions, shooting tear gas, and pepper spraying protestors who were merely holding signs, chanting, taking photos, and, in some cases, just observing; one officer sprayed a protestor in retribution for screaming at him.<sup>7</sup> 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 protestors, as well as the journalists who sought to document the protests and ensuing police violence.<sup>8</sup> The scenes of police brutality in Denver and Minneapolis were replicated at protest sites across the country.<sup>9</sup>

Responding to these and similar instances, protestors and their advocates sued to remedy and prevent future police officer use of excessive

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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://www.nytimes.com/article/what-is-bipoc.html> [<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.” BIPOC PROJECT (August 2, 2020), <https://www.thebipocproject.org> [<https://perma.cc/54EJ-NKGF>].

3. Class Action Complaint and Demand for Jury Trial at 3, *Abay v. City of Denver*, No. 1:20-cv-01616 (D. Colo. June 4, 2020) [hereinafter *Denver Complaint*]. Officer McClay was terminated by the Denver Police Department because of the post. *Id.* at 4.

4. See *id.* at 5 with a video of incident, available at <https://www.ascendcounsel.co/exhibita>, [<https://perma.cc/5SYN-VBEZ>].

5. *Id.* at 11.

6. *Id.*

7. *Id.* at 5; Amy Harmon & Sabrina Tavernise, *One Big Difference About George Floyd Protests: Many White Faces*, N.Y. TIMES (June 12, 2020), <https://www.nytimes.com/2020/06/12/us/george-floyd-white-protesters.html> [<https://perma.cc/7LFD-J42A>].

8. Class Action Complaint, *Williams v. City of Minneapolis*, No. 0:20-cv-01303 (D. Minn. June 2, 2020) [hereinafter *Williams Complaint*]; Class Action Complaint and Demand for Jury Trial, *Goyette v. City of Minneapolis*, No. 0:20-cv-01302 (D. Minn. June 2, 2020) [hereinafter *Goyette Complaint*].

9. Taylor, *supra* note 1.

force, invoking the Fourth Amendment. These lawsuits have yet to reach trial, but in their preliminary conclusions on the merits, several courts have applied a police-deferential Fourth Amendment analysis to the plaintiff-protesters' excessive force claims.<sup>10</sup> This deferential standard in excessive force jurisprudence emerged primarily from courts' analyses of types of cases involving one-on-one street encounters in which a police officer claims they<sup>11</sup> suspected criminal activity and, subsequently, engaged aggressively with the suspect in the course of a criminal investigation or arrest.<sup>12</sup> However, police violence is not limited to one-on-one encounters during routine policing but extends to activism, as the public witnessed (and participated) 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.<sup>13</sup> But the Fourth Amendment jurisprudence has not differentiated between how police officers can reasonably treat protestors and how police officers can reasonably treat criminal suspects. When the courts analyze whether force in the protest context is "reasonable," they treat expressive conduct<sup>14</sup> 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.<sup>15</sup> Courts consider the policed person's conduct, the threat to police and public, and the policed person's attempt to flee or resist arrest.<sup>16</sup> 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.

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10. See *infra* Section 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://time.com/4327915/gender-neutral-pronouns> [<https://perma.cc/JXW4-YWEX>]; Marriott Marquis, *2015 Word of Year is Singular "They,"* AM. DIALECT SOC'Y (2016), <https://www.americandialect.org/2015-word-of-the-year-is-singular-they> [<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. Cmty. Sch. Dist.*, 393 U.S. 503, 505–06 (1969).

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

16. *Id.* at 396. See also *infra* Section II.A discussing application of *Graham* test.

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.”<sup>17</sup> 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 cases. This critique is distinct from the scholarship that focuses on how courts handle the protesters’ *First Amendment* claims that police are chilling their speech.<sup>18</sup> Much scholarly attention has been paid to whether certain police actions violate protesters’ First Amendment right to freedom of expression, but there has been strikingly little scholarly attention to how police actions against protestors impinge on their Fourth Amendment rights<sup>19</sup> or to whether the fact that protesters are engaged in socially important and desirable expressive behavior, rather than suspected criminal activity, should change the Fourth Amendment reasonableness equation.<sup>20</sup> This Article is the first to name and deeply probe the expressive component of Fourth Amendment protections in the context of protest activity, yet the history of Fourth Amendment

17. *Roeden v. Kentucky*, 413 U.S. 496, 504 (1973).

18. See Ronald J. Krotoszynski, Jr., *THE DISAPPEARING FIRST AMENDMENT* xiii (Cambridge University Press 2019) (arguing free speech rights have been 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 Dissent*, 5 *FIRST AMEND. L. REV.* 201, 201–02 (2007) (critiquing deference given 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, 69 (1990) (arguing that First Amendment protection should extend to situations of civil disobedience).

19. The following are my prior scholarly pieces addressing the impact of protest policing on activists’ Fourth Amendment rights: Karen J. Pita Loor, *Tear Gas + Water Hoses Dispersal Orders: The Fourth Amendment Endorses Brutality in Protest Policing*, 100 *B.U. L. REV.* 817, 817 (2020) [hereinafter Loor, *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, 22–23 (2019) [hereinafter Loor, *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* 97, 100 (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 that international law against use of chemical agents is more restrictive than domestic laws protecting protesters); D’Addario, *supra* note 19, at 101 (exploring “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, 319 (2003) (arguing that the seizure requirement of the Fourth Amendment should apply to all protesters “constructively seized” by police force in order to facilitate § 1983 suits).

doctrine involving freedom of expression indicates that the Framers and the Supreme 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 same 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 paper search and protests cases, but I will limit my exploration in the context of the latter, saving other possibilities for future work.<sup>21</sup>

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 also of the power of that intrusion to quell political thought. Freedom of expression was very much in the Framers' minds when constructing the Bill of Rights, and its protection was encapsulated within both the First and Fourth Amendment.<sup>22</sup> 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.<sup>23</sup> The Court's search analysis long held that the Fourth Amendment provides special protection for "papers"<sup>24</sup> 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."<sup>25</sup> The freedom to gather and express dissent is central to democratic government,<sup>26</sup> but this freedom is eroded

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21. Karen Pita Loor, "Hey! Hey! Ho! Ho! These Mass Arrests Have Got to Go!" *The Expressive Fourth Amendment Argument*, WM. & MARY (forthcoming Jan. 2022); Karen Pita Loor, *An Argument Against Unbounded Arrest Power: The Expressive Fourth Amendment & Protesting While Black*, MICH. L. REV. (forthcoming June 2022) [hereinafter Loor, *Protesting While Black*].

22. See *infra* Section III.A.1 discussing framing of Fourth Amendment.

23. See *infra* Section III.A.2 discussing the Supreme Court's paper cases.

24. By papers, I am referring to written materials as well as videos, newspapers, and other materials recognized as expressive by the Court. In *Roaden v. Kentucky*, 413 U.S. 496, 504 (1973), analyzed *infra* pp. 1347–48, 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.

25. *Dallas Police Brutality Lawyers & Non-Violence Arrests Attorneys Broden & Mickelsen*, ASSOCIATED PRESS (June 28, 2021), <https://tinyurl.com/2pd8d3r4> [<https://perma.cc/8S6M-G2QK>]. The exact source of this quote is unknown but is widely accredited to Justice Marshall. *Id.*

26. 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

when militarized law enforcement descend aggressively on 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,<sup>27</sup> 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—that will safeguard 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.<sup>28</sup>

I recognize that a shift in how courts evaluate protesters' excessive force claims by no means completely fixes the problem of violent protest policing. A multi-pronged approach is needed. 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 responses to mass protests.<sup>29</sup> 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.<sup>30</sup> Qualified immunity is a serious

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menace to freedom is an inert people . . .").

27. 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.")

28. See Larry Buchanan, Quoc Trung Bui & Jugal K. Patel, *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), <https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html> [<https://perma.cc/4TM9-F8AA>] (mapping the number of protests nationwide during the summer of 2020).

29. See 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).

30. 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

challenge to excessive force litigation which other scholars have expertly battled.<sup>31</sup> 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.

Part I of this Article provides a history of police brutality against racial justice activists in the protests over the murder of George Floyd. Part II of this Article discusses how courts currently evaluate the Fourth Amendment's standard of 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. Part III of this Article argues that the Fourth Amendment mandates that courts evaluate the reasonableness of protest policing in considering the right of freedom of expression that such protest activity implicates. This reframing of reasonableness is supported by historical evidence of the Framers' intent and the Supreme Court jurisprudence on searches of books, papers, and other expressive materials when such items arguably deserve First Amendment protection. Part IV of this Article discusses how an expression-specific Fourth Amendment—the expressive Fourth Amendment—reasonableness test would have made a difference in one of the circuit protest cases.

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incompetent of those who knowingly 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 although 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 “repeatedly [has] stressed the importance of resolving immunity questions at the earliest possible stage in the litigation.” *Hunter*, 502 U.S. 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 in which immunity is the only issue.

31. 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. § 1983*, 26 BYU J. PUB. L. 99, 100 (2011) (“The only solution appears to be eliminating qualified immunity from excessive force cases altogether.”).

## 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 growing death rate numbers due to COVID-19.<sup>32</sup> Another is the reckoning on the streets after the murder of George Floyd that exposed two simultaneous crises: the brutality of police against BIPOCs 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.<sup>33</sup> The eight-minute and forty-six second 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 their pleas and prevent the 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,<sup>34</sup> cities across the country erupted in mass protests with people outraged by the death of another Black person at the hands of police.<sup>35</sup> The streets were flooded for months with activists and community members of all races<sup>36</sup> marching, screaming,

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32. Jason Slotkin, *COVID-19 Daily Cases on the Rise in Nearly Half of U.S. States*, NPR (Sept. 26, 2020, 6:59 PM), <https://www.npr.org/sections/coronavirus-live-updates/2020/09/26/917275615/covid-19-cases-on-the-rise-in-nearly-half-the-u-s> [<https://perma.cc/M4E4-N3KV>].

33. See Evan Hill, *How George Floyd Was Killed in Police Custody*, N.Y. TIMES (July 28, 2020), <https://www.nytimes.com/2020/05/31/us/george-floyd-investigation.html> [<https://perma.cc/HF6Q-EB5T>], for a compilation of the body camera and street footage video of George Floyd's murder. A jury convicted Derek Chauvin of second and third degree murder and second degree manslaughter in April 2021, and a judge sentenced him to twenty-two and a half years in prison. Janelle Griffith, *Derek Chauvin Sentenced to 22.5 Years For The Murder of George Floyd*, NBC NEWS (June 25, 2021), <https://www.nbcnews.com/news/us-news/derek-chauvin-be-sentenced-murder-death-george-floyd-n1272332> [<https://perma.cc/FE2X-QE3G>].

34. 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://www.nytimes.com/2020/06/18/us/george-floyd-timing.html?action=click&module=RelatedLinks&pgtype=Article> [<https://perma.cc/H2QX-EST3>]; see also Angela Onwuachi-Willing, *The Trauma of the Routine: Lessons on Cultural Trauma from the Emmett Till Verdict*, 34 SOC. THEORY 336, 353–54 (2016) (noting that previous videos of police killings and beatings of Black individuals have “deepened the pain of African Americans, but they have also exposed many whites to the overpolicing, the bias, and the tragic killings that African Americans have endured, complained about, and protested for centuries”).

35. There were even international protests in solidarity of the United States protests, from the United Kingdom to Japan to Kenya. *How George Floyd's Death Sparked Protests Across the World*, WASH. POST (June 10, 2020), <https://www.washingtonpost.com/graphics/world/2020/06/10/how-george-floyds-death-sparked-protests-around-world> [<https://perma.cc/FVF2-X552>].

36. Harmon & Tavernis, *supra* note 7; see also Class Action Complaint and Demand for Jury Trial

and demonstrating against police brutality and for racial justice.<sup>37</sup> Police—like warriors against enemy forces—confronted overwhelmingly peaceful protesters with militarized violence and force.<sup>38</sup> Although police reacted in solidarity with racial justice protesters in some places, for example kneeling alongside activists,<sup>39</sup> law enforcement officers persistently committed violence against protestors, as litigation that ensued across metropolitan protest sites shows.<sup>40</sup> Police outfitted in armor and riot gear<sup>41</sup>—sometimes riding atop military vehicles<sup>42</sup>—deployed a barrage of military grade weapons on activists and journalists alike. Law enforcement sprayed people and crowds with pepper spray and tear gas; blasted them with rubber and sponge bullets, concussion grenades, stun guns, long range acoustic devices; and beat them with batons.<sup>43</sup> There were reports of police using these less-lethal weapons<sup>44</sup> indiscriminately, although other officers appeared to

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at 7, *Anti-Police Terror Project v. City of Oakland*, No. 3:20-cv-03866 (S.D. Cal. June 11, 2020) [hereinafter *Oakland Complaint*] (noting that “[t]he demographics of the [Oakland] demonstrators included people of all different heritages and ages”).

37. See, e.g., @justiceforgeogenyc, INSTAGRAM, <https://www.instagram.com/justiceforgeogenyc/?hl=en>, for daily updates on the George Floyd protests in New York City.

38. 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).

39. *Police Take a Knee in Solidarity with George Floyd Protesters*, USA TODAY (June 7, 2020), <https://www.usatoday.com/picture-gallery/news/nation/2020/06/02/police-take-knee-solidarity-george-floyd-protesters/5316495002> [<https://perma.cc/5VH5-9E36>].

40. *Complaint and Jury Demand at 2*, *Williams v. City of Dallas Texas*, No. 3:20-cv-01526 (N.D. Tex. June 11, 2020) [hereinafter *Dallas Complaint*]; *Complaint and Demand for Jury Trial at 3*, *Ballew v. City of Chicago*, No. 1:20-cv-03422 (N.D. Ill. June 11, 2020) [hereinafter *Chicago Complaint*]; *Class Action Complaint at 3–4*, *Black Lives Matter Seattle-King County v. City of Seattle*, No. 2:20-cv-00887 (W.D. Wash. June 9, 2020) [hereinafter *Seattle Complaint*]; *Class Action Complaint and Jury Demand at 5*, *Black Lives Matter Los Angeles v. City of Los Angeles*, No. 2:20-cv-05027 (C.D. Cal. June 5, 2020) [hereinafter *Los Angeles Complaint*]; *Complaint and Demand for Jury Trial at 7*, *Don’t Shoot Portland v. City of Portland*, No. 3:20-cv-00917 (D. Or. June 5, 2020) [hereinafter *Portland Complaint*]; *Denver Complaint, supra*, at 5; *Oakland Complaint, supra* note 35, at 7–8; *Williams Complaint, supra* note 8, at 10–13; *Goyette Complaint, supra* note 8, at 7; *Complaint for Declaratory and Injunctive Relief and Individual Damages at 5*, 12–13, *Indy 10 Black Lives Matter v. City of Indianapolis*, No. 1:20-cv-01660 (S.D. Ind. July 10, 2020) [hereinafter *Indianapolis Complaint*].

41. *Dallas Complaint, supra* note 40, at 10; *Denver Complaint, supra* note 40, at 14; *Second Amended Complaint at 10*, *Don’t Shoot Portland v. City of Portland at 7*, No. 3:20-cv-00917 (D. Or. June 24, 2020) [hereinafter *Amended Portland Complaint*].

42. *Dallas Complaint, supra* note 40, at 10.

43. *Indianapolis Complaint, supra* note 40, 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*, No. 2:20-cv-05027 (C.D. Cal. June 21, 2020) [hereinafter *Amended Los Angeles Complaint*]. *Amended Portland Complaint, supra* note 41, at 1–2, 8; *Dallas Complaint at 1–2*, 6–10, 12; *Chicago Complaint, supra* note 40, at 3; *Oakland Complaint, supra* note 40, at 2, 7–8; *Denver Complaint, supra* note 40, at 5–10, 12–13, 15–17; *Goyette Complaint, supra* note 40, at 9–10, 12, 14–15, 17–18.

44. 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.” ACLU OF MASS., LESS LETHAL FORCE: PROPOSED STANDARDS FOR MASSACHUSETTS LAW ENFORCEMENT AGENCIES EXECUTIVE SUMMARY i (2016), <https://www.aclum.org/sites/default/files/wp-content/uploads/2015/06/reports-less-lethal-force.pdf> [<https://perma.cc/4M5S-X7TT>]. Types of less lethal weapons include chemical sprays, pepper spray, impact projectiles, and

intentionally use them to cause the greatest level of harm.<sup>45</sup> As discussed in the Introduction, Denver police's use of less-lethal weapons was brutal.<sup>46</sup> Dallas police tear gassed kneeling protesters.<sup>47</sup> Minneapolis police shot a rubber bullet directly at a journalist's face.<sup>48</sup> A journalist covering the Minneapolis protests stated, "I have never been aimed at so deliberately so many times when I was avoiding it."<sup>49</sup> In Portland, after a 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."<sup>50</sup> Protesters and journalists were seriously injured by these "less lethal" weapons.<sup>51</sup>

Research demonstrates that these weapons can kill or cause serious injuries and lasting health effects.<sup>52</sup> Pepper spraying people in the face and eyes can cause permanent damage to the cornea and conjunctiva of the eye.<sup>53</sup> 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.<sup>54</sup> Lawsuits reveal evidence of additional injuries, including photos of bloody protesters, journalists, and even bystanders.<sup>55</sup> The manner in which police used less lethal weapons—spraying faces, aiming projectiles directly at individuals,

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electroshock weapons. *Id.*

45. See, e.g., Amended Los Angeles Complaint, *supra* note 43, at 23 (describing how officers waited until protestors were kettled and unable to leave before firing teargas).

46. See *supra* notes 3–7 and accompanying text.

47. Dallas Complaint, *supra* note 40, at 12–13; see also Oakland Complaint, *supra* note 40, 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").

48. Goyette Complaint, *supra* note 40, at 9–10.

49. *Id.* at 12.

50. Amended Portland Complaint, *supra* note 41, at 8.

51. *A Guide to the Less-Lethal Weapons That Law Enforcement Uses Against Protesters*, WASH. POST (June 5, 2020), <https://www.washingtonpost.com/nation/2020/06/05/less-lethal-weapons-protests/?arc404=true> [<https://perma.cc/344M-LLFS>].

52. Rohini J. Haar, Vincent Iacopino, Nikhil Ranadive, Sheri D. Weiser & Madhavi Dandu, *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 PUB. HEALTH, Oct. 2017, at 1, 2 [hereinafter Haa et al., *Health Impacts*] (finding that at high concentrations, tear gas can cause "permanent injury (primarily to the respiratory system)"); Rohini J. Haar, Vincent Iacopino, Nikhil Ranadive, Madhavi Dandu & Sheri D. Weiser, *Death Injury and Disability from Kinetic Impact Projectiles in Crowd Control Settings: A Systematic Review*, BMJ OPEN, Dec. 2017, at 1, 8 (concluding 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 to the Less-Lethal Weapons That Law Enforcement Uses Against Protesters*, *supra* note 51.

53. Haar et al., *Health Impacts*, *supra* note 52, at 9–10.

54. Erica Byfield, *Protester Speaks Out After Mask Ripped Off by NYPD and Pepper-Sprayed in Brooklyn*, N.Y. POST (June 5, 2020), <https://www.nbcnewyork.com/news/local/protester-speaks-out-after-mask-ripped-off-by-nypd-and-pepper-sprayed-in-brooklyn/2448135> [<https://perma.cc/2F3G-7P7L>].

55. Amended Los Angeles Complaint, *supra* note 43, at 2, 10, 12, 13, 15, 18, 19, 20, 25; Dallas Complaint, *supra* note 40, at 8, 13, 15, 22; Denver Complaint, *supra* note 40, at 11; Goyette Complaint, *supra* note 40, at 17–18.

and for general crowd control—increased the physical harm to protesters.<sup>56</sup> A Portland police officer shot munitions at a protester filming the protests, ripping their hand open and breaking a bone.<sup>57</sup> In Indianapolis, the police launched tear gas at protestors filming the abuse from the fifth floor of a parking garage.<sup>58</sup> In Minneapolis, a journalist was permanently blinded in one eye by a projectile,<sup>59</sup> while in Dallas a protester lost his eye and another had his cheek shattered.<sup>60</sup>

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 their 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 is alleged to have responded, "[I]f you wanted to breathe, you should have stayed home tonight."<sup>61</sup> Police also targeted individuals providing medical attention to other protesters, including people who were clearly medics.<sup>62</sup> 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."<sup>63</sup> In Indianapolis, a baby exposed to tear gas was seen "foaming at the mouth."<sup>64</sup>

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.<sup>65</sup> Across these lawsuits, plaintiffs brought their claims

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56. In *Abay v. City of Denver*, the plaintiffs discuss how Denver police repeatedly 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 *supra* note 40, 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, *supra* note 41, 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, *supra* note 40, at 11 ("[Officers] threw more tear gas at the protesters who, at this point, were just trying to get away"); Oakland Complaint, *supra* note 40, 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.").

57. Amended Portland Complaint, *supra* note 41, at 16.

58. Memorandum in Support of Motion for Preliminary Injunction at 9, *Indy 10 Black Lives Matter v. City of Indianapolis*, No. 1:20-cv-01660 (S.D. Ind. July 10, 2020).

59. Goyette Complaint, *supra* note 40, at 10.

60. Dallas Complaint, *supra* note 40, at 13–15.

61. Denver Complaint, *supra* note 40, at 16.

62. *Id.* at 15, 17.

63. Dallas Complaint, *supra* note 40, at 2.

64. Indianapolis Complaint, *supra* note 40, at 11.

65. See *supra* note 40. 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 at 2, *Leggett v. City of Portland*, No. 1:20-CV-19842

against police, their superiors, and the cities themselves under 42 U.S.C. § 1983 (“section 1983”) of the Civil Rights Act.<sup>66</sup> Section 1983 is the vehicle whereby an individual may sue a government actor for a violation of a constitutional civil right.<sup>67</sup> To bring a section 1983 claim, the individual must specify the constitutional right that was violated.<sup>68</sup> Each constitutional violation constitutes a separate claim.<sup>69</sup>

In the George Floyd lawsuits, plaintiffs alleged that the police’s use of excessive force amounted to a violation of their Fourth Amendment rights.<sup>70</sup> These plaintiffs also filed motions to restrict law enforcement’s use of

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(Cir. Or. June 7, 2020) (tort claims); Complaint at 2, *Farley v. City of Portland*, No. 1:20-CV-19839 (Cir. Or. June 6, 2020) (battery claims); Complaint at 2, *Lake v. City of Portland*, No. 1:20-CV-19838 (Cir. Or. June 6, 2020) (tort claims); Complaint at 2, *Elias v. City of Portland*, No. 1:20-CV-19783 (Cir. Or. 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* at 4, No. 1:20-cv-04300 (S.D.N.Y. June 5, 2020); Complaint at 5–8, *Graff v. Cincinnati*, No. 1:20-cv-00449 (S.D. Ohio Jun 3, 2020); Complaint at 23–26, *Black Lives Matter v. Garcetti*, No. 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.

66. 42 U.S.C. § 1983.

67. Joanna Schwartz, *Constitutional Litigation Under Section 1983 and the Bivens Doctrine in the October 2008 Term*, 26 *TOURO L. REV.* 531, 532 (2010).

68. 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.”).

69. *See Graham v. Connor*, 490 U.S. 386, 394 (1989) (“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.”).

70. Amended LA Complaint, *supra* note 41, at 50–52; Indianapolis Complaint, *supra* note 40, at 16–17; Dallas Complaint, *supra* note 40, at 37–45; Seattle Complaint, *supra* note 40, at 24; Portland Complaint, *supra* note 40, at 13–15; Oakland Complaint, *supra* note 40, at 15; Denver Complaint, *supra* note 40, at 21–23; Williams Complaint, *supra* note 40, at 9; Goyette Complaint, *supra* note 40, at 37. Plaintiffs also asserted that the police chilled their First Amendment rights, which while critical for obtaining additional relief from the courts, is not the subject of this Article. *See* Amended LA Complaint, *supra* note 41, at 50–52; Indianapolis Complaint, *supra* note 40, at 16–17; Dallas Complaint, *supra* note 40, at 35–37; Seattle Complaint, *supra* note 40, at 23–24; Portland Complaint, *supra* note 40, at 15; Chicago Complaint, *supra* note 40, at 5–6. Oakland Complaint, *supra* note 40, at 15; Denver Complaint, *supra* note 40, at 23–24; Williams Complaint, *supra* note 40, at 9; Goyette Complaint, *supra* note 40, at 35.

various less lethal weapons.<sup>71</sup> In Section II.B, 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 must provide under the current Fourth Amendment reasonableness framework for district courts to enjoin police violence.

Below, I discuss the courts' current excessive force analysis. I first explain 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

In the 1989 case *Graham v. Connor*, the Supreme Court established that whether police engaged in unlawful excessive force with an individual was a Fourth Amendment question.<sup>72</sup> Plaintiff Mr. Dethorne Graham was a Black man<sup>73</sup> whom the police wrongfully suspected of shoplifting after Mr. Graham had simply entered and left a convenience store.<sup>74</sup> Still, they suspected *criminal* activity.<sup>75</sup> After the police stopped the vehicle that Mr. Graham occupied, he became agitated, ran out of the car, and sat on the sidewalk.<sup>76</sup> The driver, Mr. Graham's companion, explained to police that Mr. Graham was not engaging in any criminal activity but was having a

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71. Ex Parte Application for Temporary Restraining Order and Motion for Preliminary Injunction at 1–2, *Black Lives Matter Los Angeles v. City of Los Angeles*, No. 2:20-cv-05027 (C.D. Cal. June 24, 2020) [hereinafter *Los Angeles TRO Motion*]; Motion for Preliminary Injunction at 1–2, *Indy 10 Black Lives Matter v. City of Indianapolis*, No. 1:20-cv-01660 (S.D. Ind. June 18, 2020) [hereinafter *Indianapolis PI Motion*]; Motion for Temporary Restraining Order, *Black Lives Matter Seattle-King County v. City of Seattle* at 12, No. 2:20-cv-00887 (W.D. Wash. June 9, 2020) [hereinafter *Seattle TRO Motion*]; Motion for Temporary Restraining Order at 9, *Don't Shoot Portland v. City of Portland*, No. 3:20-cv-00917 (D. Or. June 5, 2020) [hereinafter *Portland TRO Motion*]; Motion for Temporary Restraining Order at 1–2, *Abay v. City of Denver*, No. 1:20-cv-01616 (D. Colo. June 5, 2020) [hereinafter *Denver TRO Motion*]; see also *Oakland Complaint*, *supra* note 40, at 17; *Williams Complaint*, *supra* note 40, at 10; *Goyette Complaint*, *supra* note 40, at 41.

72. *Graham*, 490 U.S. at 396.

73. 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*, 490 U.S. 386 (1989) (No. 87-6571), 1988 WL 1025786, at \*3.

74. *Graham*, 490 U.S. at 389.

75. *Id.* at 388–89.

76. *Id.* at 389.

diabetic episode.<sup>77</sup> 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."<sup>78</sup> Multiple police arrived in response to a call for back-up as Mr. Graham passed out on the sidewalk.<sup>79</sup> 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.<sup>80</sup> Mr. Graham regained consciousness, and police officers shoved his face onto the hood of the car while warning him to "shut up" as he pleaded with them to check his wallet for his medical card.<sup>81</sup> Police then "threw him headfirst into the police car."<sup>82</sup> Mr. Graham suffered serious long-term injuries as a result of this police violence.<sup>83</sup> These were the only direct consequences as Mr. Graham was never charged with any criminal conduct. He sued the police in a section 1983 civil rights action, arguing that their use of force violated the Fourth Amendment prohibition against unreasonable seizure.<sup>84</sup>

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.<sup>85</sup> Fourth Amendment reasonableness would be determined by the totality of the circumstances, including: (1) the severity of the crime, (2) the immediacy of the threat to the police or others, and (3) any resistance or attempt to flee by the suspect.<sup>86</sup> The Court also 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."<sup>87</sup> This deferential review set up most plaintiffs for failure in subsequent section 1983 actions.<sup>88</sup> As a matter of fact, after the Supreme

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77. *Id.* at 388.

78. *Id.* at 389.

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.* at 390.

84. *Id.*

85. *Id.* at 396.

86. *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." (quoting *Bell v. Wolfish*, 441 U.S. 520, 559 (1979))).

87. *Id.* at 396–97.

88. *See* Osagie K. Obasogie & Zachary Newman, *The Futile Fourth Amendment: Understanding Police Excessive Force Doctrine Through an Empirical Assessment of Graham v. Connor*, 122 NW. U. L. REV. 1465, 1467 (2018) ("[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

Court remanded his case so the lower court could apply the new proper Fourth Amendment analysis, Mr. Graham lost at retrial, as the jury determined that the police had acted “reasonably.”<sup>89</sup>

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 getting away with murder.<sup>90</sup> These scholars 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;<sup>91</sup> how it leads judges to ignore any police misconduct or escalation leading up to the use of force;<sup>92</sup> and how it

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Hassel, *Excessive Reasonableness*, 43 IND. L. REV. 117, 117 (2009) (“When these two [section 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, 20 (2017) (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.”)) (arguing the proximate cause requirement for a section 1983 suit sets a high bar to liability in excessive force cases).

89. 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.”).

90. 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 HOUS. L. REV. 101, 135 (2021) (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. C.L. & C.R. 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.”).

91. See Nemeth, *supra* note 31, 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, 293–99 (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.”).

92. See Lacks, *supra* note 88, 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.”); Garrett, *supra* note 91, at 216 (“[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?*

facilitates courts ignoring and overlooking the race of both the victims and perpetrators of police brutality.<sup>93</sup>

These critiques are insightful and well-founded. However, in the context of protests, there is much 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 forcefully with a criminal suspect is police officer safety.<sup>94</sup> The Court considers people potentially engaged in *criminal* activity dangerous to police. But the officer safety rationale does not exist when the policed person is involved in expressive protest activity, as opposed to potentially criminal activity, and thus, that degree of judicial 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 consider 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 is minor, police are *less* justified in using force than when the suspected crime is, for

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*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").

93. 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 Causes*, 104 GEO. L. J. 1479, 1489 n.41 (2016) (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 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).

94. *Graham v. Connor*, 490 U.S. 386, 396 (1989) (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).

example, a violent felony.<sup>95</sup> This inquiry about the policed person's underlying 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 a felon makes a difference to the police's ability to use force, so too should the fact that protestors' 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 Article.

## B. *GRAHAM V. CONNOR* AND PROTEST CASES

### 1. Excessive Force Against Protesters Prior to the Floyd Protests

A review of all federal appellate cases in which 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.<sup>96</sup> During my

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95. 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 (2d 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 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.").

96. See *Felarca v. Birgeneau*, 891 F.3d 809, 816 (9th Cir. 2018); *White v. Jackson*, 865 F.3d 1064, 1074 (8th Cir. 2017); *Dundon v. Kirchmeier*, 701 F. App'x 538, 538 (8th Cir. 2017) (unpublished); *Westfahl v. District of Columbia*, 75 F. Supp. 3d 365, 379–80 (D.C. Cir. 2014); *Moss v. United States Secret Serv.*, 711 F.3d 941, 965–66 (9th Cir. 2013); *Bernini v. City of St. Paul*, 665 F.3d 997, 1003 (8th Cir. 2012); *Acosta v. City of Costa Mesa*, 718 F.3d 800, 825 (9th Cir. 2012); *Oberwetter v. Hilliard*, 639 F.3d 545, 555 (D.C. Cir. 2011); *Crowell v. Kirkpatrick*, 400 F. App'x 592, 594 (2d Cir. 2010) (unpublished); *Buck v. City of Albuquerque*, 549 F.3d 1269, 1287–88 (10th Cir. 2008); *Fogarty v. Gallegos*, 523 F.3d 1147, 1159–60 (10th Cir. 2008); *Jones v. Parmley*, 465 F.3d 46, 61 (2d Cir. 2006); *Amnesty Am. v. Town of West Hartford*, 361 F.3d 113, 123–24 (2d Cir. 2004); *Headwaters Forest Def. v. Cnty. of Humboldt*, 276 F.3d 1125, 1129–30 (9th Cir. 2002); *Cyr v. City of Dallas*, No. 96-10937, 1997 U.S. App. LEXIS 43178, at \*3–5 (5th Cir. Apr. 3, 1997) (unpublished); *Barlow v. Ground*, 943 F.2d 1132, 1135–36 (9th Cir. 1991). There is also a slew of cases in which the plaintiffs are somehow caught up in protests either on purpose as journalists, medical personnel, or legal observers or inadvertently, but are not protestors themselves. See *Douglas v. City of New York*, 730 F. App'x 12, 14 (2d Cir. 2018) (legal observer); *Brown v. City of New York*, 862 F.3d 182 (2d Cir. 2017) (restroom

research across federal cases, I only encountered one court case, *Lamb v. City of Decatur*, in which the district court suggested that plaintiffs' engagement in protest activity instead of suspected criminal activity presents an unique factual scenario warranting heightened judicial review.<sup>97</sup> However, the court did not elaborate what was required under this heightened standard. 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 officer safety rationale<sup>98</sup> for providing police deference to contend with (from the courts' perspective) dangerous criminals is not present in the protest scenario.

Second, in terms of *Graham*'s 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<sup>99</sup> or

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seeker); *Wilkerson v. Warner*, 545 F. App'x 413, 416 (6th Cir. 2013) (doctor); *Liiv v. City of Coeur D'Alene*, 130 F. App'x 848, 850 (9th Cir. 2005) (videographer); *Durruthy v. Pastor*, 351 F.3d 1080, 1080 (11th Cir. 2003) (freelance cameraman). I am not considering in my analysis cases in which a jury verdict was reached. See *Morales v. Fry*, 873 F.3d 817, 826–27 (9th Cir. 2017); *Valiavicharska v. Tinney*, 562 F. App'x 562, 563 n.3 (9th Cir. 2014); *Davis v. Yovella*, Nos. 95-5415, 95-5450, 95-6036, 1997 U.S. App. LEXIS 6621, at \*19–21 (6th Cir. Apr. 2, 1997); *Forrester v. City of San Diego*, 25 F.3d 804, 805 (9th Cir. 1994). I am also excluding from my analysis protest cases which do not apply *Graham*. See *Lash v. Lemke*, 971 F. Supp. 2d 85, 98 (D.C. Cir. 2015); *Singleton v. Darby*, 609 F. App'x 190, 196 (5th Cir. 2015); *Am. Fed. of Labor and Congress of Indus. Org'n v. City of Miami*, 637 F.3d 1178, 1191 (11th Cir. 2011); *Snell v. City of York*, 564 F.3d 659, 672–73 (3d Cir. 2009); *Darrah v. City of Oak Park*, 255 F.3d 301, 305–06 (6th Cir. 2001); *Katz v. United States*, 194 F.3d 962, 969 (9th Cir. 1999).

97. *Lamb v. City of Decatur*, 947 F. Supp. 1261, 1265 (C.D. Ill. 1996) (noting that since this was “not a typical excessive force case where the police were struggling with a fleeing felon or a rebellious prisoner [but] [i]nstead, the police were monitoring a peaceful, lawful, constitutionally protected demonstration” then “the court feels that in these unique, hitherto untested circumstances, involving not only Fourth Amendment concerns, but also strong First Amendment concerns, a fact finder must decide . . . whether the force used by the defendants was reasonable under all of the circumstances”).

98. See *supra* note 94.

99. 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).

resisted in any way,<sup>100</sup> whether they were peaceful<sup>101</sup> or somehow disorderly or agitated,<sup>102</sup> 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 courts 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 an array of cases in which 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 excessive force by employing pepper spray to compel the activists to release themselves from lock-down devices as they sat linked together in three

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100. See *Felarca*, 891 F.3d at 815 (finding "legitimate" use of force against protesters who "directly interfered with officers' attempt to enforce university policy by linking arms to block officers' access to the tents"); *Crowell*, 400 F. App'x at 595 (finding use of force reasonable when protesters 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 when 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 *Barlow*, 943 F.2d at 1136 (finding at summary judgment stage that "a reasonable jury could conclude . . . [the 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").

101. See *Moss*, 711 F.3d at 966 ("their protest was entirely peaceful"); *Jones*, 465 F.3d at 52 (precluding summary judgment in favor of officers on basis of qualified immunity in excessive force claim in which 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*, 1997 U.S. App. LEXIS 43178, at \*1, \*6 (affirming summary judgment for officers, finding that using mace against anti-abortion protesters 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 protesters who bound themselves together in front of abortion clinic amounted to excessive force).

102. See *Oberwetter v. Hilliard*, 639 F.3d 545, 555 (D.C. Cir. 2011) (finding the use of force reasonable against dancing protestor who refused to stop dancing); *Bernini*, 665 F.3d at 1002 (describing protesters as chanting "various profanities"); *Acosta*, 718 F.3d at 808 ("[V]ideo recordings show that he was visibly emotional and agitated.").

separate peaceful protests against the logging of the Headwaters Forest.<sup>103</sup> Two of the protests occurred at the offices of a lumber company, and the third occurred at a legislator's office.<sup>104</sup> 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.<sup>105</sup> The court agreed with the protesters that police officer defendants were not entitled to summary judgment on their excessive force claims.<sup>106</sup> 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.<sup>107</sup> The court categorized plaintiffs' conduct as "sitting peacefully, . . . easily moved by police, and . . . not threaten[ing] or harm[ing] the officers" and "nonviolent."<sup>108</sup>

Unlike *Headwaters*, the Fifth Circuit found that the defendant police officers were entitled to summary judgment in *Cyr v. City of Dallas*, concluding that the officers acted reasonably by using mace on plaintiff protesters who sat, already handcuffed by police, but who refused police commands to stand and walk out of a clinic where abortions were performed.<sup>109</sup> Like in *Headwaters*, the police officers had warned the protesters that they would use mace if they did not voluntarily leave the clinic.<sup>110</sup>

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 unwarranted 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.<sup>111</sup> 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

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103. *Headwaters Forest Def. v. Cnty. of Humboldt*, 276 F.3d 1125, 1130 (9th Cir. 2002).

104. *Id.* at 1128–29.

105. *Id.* at 1128.

106. *Id.* at 1130.

107. *Headwaters Forest Def. v. Cnty. 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 judgment 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).

108. *Headwaters*, 240 F.3d at 1130.

109. *Cyr v. City of Dallas*, No. 96-10937, 1997 U.S. App. LEXIS 43178, at \*1 (5th Cir. Apr. 3, 1997).

110. *Id.*

111. *Amnesty Am. v. Town of W. Hartford*, 361 F.3d 113, 123 (2d Cir. 2004).

arrest more difficult.<sup>112</sup> 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, which included blocking access to medical areas and situating themselves throughout the clinic.<sup>113</sup>

The Fifth Circuit in *Cyr* also focused on plaintiffs' similar conduct. While the *Cyr* plaintiffs were arrested only for trespassing, the Fifth Circuit highlighted that before their arrest, plaintiffs had walked around the clinic and caused upheaval by screaming and scaring patients, blocking access to the surgical area, and trying to gain access to offices.<sup>114</sup> Despite the fact that once arrested and handcuffed, the plaintiffs were no longer causing a disturbance but merely 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 at 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 or pepper spray applied directly to the eyes and face to pain-inducing techniques and blows.<sup>115</sup> However, what is clear is that the courts do consider the policed person's conduct at various stages. Their conduct matters in terms of how they resist arrest and whether they have committed a crime, such as trespassing, in these three cases.<sup>116</sup> Furthermore, in both *Cyr* and *Amnesty America*, the court discusses the relevance of the plaintiffs' conduct in the clinic, the site of the protest activity, before any interaction with police. However, missing from the assessment of plaintiffs' conduct is how its nature as expressive influences the courts' reasonableness analysis.

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112. *Id.* at 124.

113. *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.").

114. *Cyr*, 1997 U.S. App. LEXIS 43178, at \*1.

115. *See also* *Crowell v. Kirkpatrick*, 400 F. App'x 592, 595 (2d Cir. 2010) (unpublished). In *Crowell*, the Second Circuit dealt with a case in which police officers tased protesters to get them to release themselves from barrel drums they were chained to. *Id.* 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.*

116. Both *Cyr* and *Headwaters* mention that plaintiffs are trespassing. *Headwaters Forest Def. v. Cnty. of Humboldt*, 276 F.3d 1125, 1130 (9th Cir. 2002); *Cyr*, 1997 U.S. App. LEXIS 43178. In *Amnesty America*, plaintiffs are likely also trespassing since they are refusing to leave the clinic. *See Amnesty Am.*, 361 F.3d at 123.

Beyond sit-ins, again and again, courts' prevailing Fourth Amendment reasonableness analysis 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<sup>117</sup> protesters with batons as they forcefully removed their encampment from the University of California, Berkeley campus.<sup>118</sup> Police struck protesters multiple times on their arms, thighs, ribs, legs, collarbone, back, face, and neck.<sup>119</sup> Most of the strikes were in the form of baton jabs, but police struck one of the protesters with an overhand baton strike.<sup>120</sup> These "metal"<sup>121</sup> batons inflict "a type of force capable of causing serious injury."<sup>122</sup>

The Ninth Circuit did consider attributes of the Occupy protesters' underlying conduct, noting that the plaintiffs were not engaged in felonies, but misdemeanors.<sup>123</sup> However, it characterized activists as yelling at and "physically provoking" police.<sup>124</sup> 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.<sup>125</sup> 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,<sup>126</sup> and the circuit court recognized, that these actions were at most an attempt to defend against ongoing police assault.<sup>127</sup>

The court articulated the Ninth Circuit's practice of considering threat

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116. The Occupy movement began in 2011 "as a small group of protesters camping out in Manhattan's Zuccotti Park" and "ignited a national and global movement calling out the ruling class of elites by connecting the dots between corporate and political power" through protests, sit-ins, and park takeovers that continued for several years. Michael Levitin, *The Triumph of Occupy Wall Street*, ATLANTIC (June 15, 2015), <https://www.theatlantic.com/politics/archive/2015/06/the-triumph-of-occupy-wall-street/395408> [https://perma.cc/8R2R-T6Y5].

118. *Felarca v. Birgeneau*, 891 F.3d 809, 818–19 (9th Cir. 2018).

119. *Id.*; *see also Felarca v. Birgeneau*, No. 11-cv-05719, 2016 U.S. Dist. LEXIS 9797 at \*38 n.14 (N.D. Cal. Jan. 27, 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").

120. *Felarca*, 891 F.3d at 818.

121. *Id.* at 823 (Watford, J., concurring).

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

123. *Id.* at 818; *see also Felarca*, 2016 U.S. Dist. LEXIS 9797, at \*45–46 ("[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.'").

124. *Felarca*, 891 F.3d at 818–19.

125. *Id.*

126. *See Felarca*, 2016 U.S. Dist. LEXIS 9797, at \*42 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.").

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

as the most important factor in the *Graham* analysis.<sup>128</sup> The court recognized that the tents posed no threat and, again, activists' most serious crimes were misdemeanors.<sup>129</sup> 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.<sup>130</sup> 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 with friends and relatives.<sup>131</sup> Say what one will about the virtues of drinking in the park, but 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.<sup>132</sup>

The last circuit court case I will discuss here is *White v. Jackson*.<sup>133</sup> In *White*, the Eight Circuit assessed whether police used excessive force against multiple plaintiffs—including Dwayne Matthews—in the 2014 Ferguson protests following Michael Brown's murder by a police officer.<sup>134</sup> I will

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128. *Id.* at 817 (citing *S.B. v. Cnty. of San Diego*, 864 F.3d 1010, 1013 (9th Cir. 2017)); *see also* *Moss v. United States Secret Serv.*, 711 F.3d 941, 966 (9th Cir. 2013) ("[The] most important single element of the *Graham* framework is whether the suspect poses an immediate threat to the safety of officers or others.").

129. *Felarca*, 891 F.3d at 817–18.

130. *See id.* ("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.").

131. *See id.* at 818 (analogizing case to *Jackson v. City of Bremerton*, 268 F.3d 646, 649–50 (9th Cir. 2001), in which 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 110; *see also* *Westfahl v. District of Columbia*, 75 F. Supp. 3d 365, 374 (D.C. Cir. 2014) (analogizing case to *Johnson v. District of Columbia*, 528 F.3d 969, 974–75 (D.C. Cir. 2008), in which an off-duty police officer was kicked in the groin during an encounter with another officer); *Acosta v. City of Costa Mesa*, 718 F.3d 800, 825 (9th Cir. 2012) (analogizing to *Jackson v. City of Bremerton*, 268 F.3d 646, 649–50 (9th Cir. 2001)); *Oberwetter v. Hilliard*, 639 F.3d 545, 555 (D.C. Cir. 2011) (analogizing case to *Wasserman v. Rodacker*, 557 F.3d 635 (D.C. Cir. 2009), in which an individual was forcefully arrested while walking his dog in violation of a leash law); *Crowell v. Kirkpatrick*, 400 F. App'x 592, 595 (2d Cir. 2010) (unpublished) (citing *Brooks v. City of Seattle*, 599 F.3d 1018, 1027 (9th Cir. 2010), in which an officer used a taser against the arrestee after she refused to leave her vehicle); *Amnesty Am. v. Town of W. Hartford*, 361 F.3d 113, 124 (2d Cir. 2004) (analogizing case to *Robison v. Via*, 821 F.2d 913, 924 (2d Cir. 1987), in which an officer "yanked" a woman out of her car during child sexual assault investigation).

132. 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), in which the police investigate a neighbor's complaint of a disturbance. *See Headwaters Forest Def. v. Cnty. of Humboldt*, 276 F.3d 1125, 1131 (9th Cir. 2002).

133. *White v. Jackson*, 865 F.3d 1069 (8th Cir. 2017).

134. *Id.* at 1069, 1072–73.

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 in which I will predict how the court's analysis 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.<sup>135</sup> The officers' shooting caused Mr. Matthews to fall, hit his head, and end up face down in a street ditch which was filled with two to three feet of water.<sup>136</sup> 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 onto the street.<sup>137</sup> 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.<sup>138</sup> 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.<sup>139</sup> However, it found that the rest of the police violence was not unreasonable.

To begin with how police officers encountered Mr. Matthews, the officers were on the scene to disperse the *crowd* (the court consistently referred to people protesting on the streets as "the crowd" rather than as protestors).<sup>140</sup> 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.<sup>141</sup> According to the court, police could have reasonably believed that Mr. Matthews was a member of the "assembly."<sup>142</sup> Despite Mr. Matthews walking alone with his hands up, since

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135. *Id.* at 1072.

136. *Id.* at 1072–73; *see also* *White v. Jackson*, No. 4:14CV1490, 2016 U.S. Dist. LEXIS 136600, at \*31 (E.D. Mo. Sept. 30, 2016) ("culvert that had probably two or three feet of water").

137. *White*, 2016 U.S. Dist. LEXIS 136600, at \*17.

138. *Id.*

139. *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 a police 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.*

140. *White*, 865 F.3d at 1072.

141. *Id.* at 1080.

142. *Id.* at 1079.

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.<sup>143</sup> 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.<sup>144</sup> Other than the perceived threat, the court did not discuss any *Graham* factors in evaluating the reasonableness of the police shooting bean bags and rubber bullets at Mr. Matthews.<sup>145</sup>

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.<sup>146</sup> The court reasoned that in prior cases, including *Graham v. Connor*, courts determined that “some degree of physical coercion or threat thereof” is simply part of an arrest.<sup>147</sup> 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 two to three minutes while he was under police control.<sup>148</sup>

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.”<sup>149</sup>

## 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

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143. *Id.*

144. *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 a 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.

145. *White*, 865 F.3d at 1079.

146. *Id.* at 1080.

147. *Id.* (citing *Graham* and *Cavataio v. City of Bella Vista*, 570 F.3d 1015, 1020 (8th Cir. 2009)), in which plaintiff was arrested for failure to comply with a city ordinance regarding debris removal from her residence); see also *Oberwetter v. Hilliard*, 639 F.3d 545, 545 (D.C. Cir. 2011) (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))).

148. *White*, 865 F.3d at 1080.

149. *Id.* at 1079.

summer 2020 George Floyd protests and resulting litigation. As of September 2021, no case has reached the trial stage.<sup>150</sup> 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,<sup>151</sup> which necessitates the judge's assessment of the substance of the claims. These 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.<sup>152</sup> 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."<sup>153</sup> Both the Portland and the Seattle orders articulated the same core principle that people

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150. Multiple cases are at some level of pretrial litigation. *Williams v. City of Dallas*, No. 3:20-cv-01526 (N.D. Tex. June 11, 2020) (jury trial scheduled for Feb. 7, 2022); *Anti-Police Terror Project v. City of Oakland*, No. 3:20-cv-03866 (N.D. Cal. June 11, 2020) (jury trial scheduled for May 24, 2022); *Black Lives Matter Seattle-King County v. City of Seattle*, No. 2:20-cv-00887 (W.D. Wash. June 9, 2020) (case stayed pursuant to stipulated clarification of preliminary injunction); *Black Lives Matter Los Angeles v. City of Los Angeles*, No. 2:20-cv-05027 (C.D. Cal. June 5, 2020) (jury trial scheduled for August 30, 2022); *Don't Shoot Portland v. City of Portland*, No. 3:20-cv-00917 (D. Or. June 5, 2020) (pre-trial motion hearings held); *Abay v. City of Denver*, No. 1:20-cv-01616 (D. Colo. June 4, 2020) (pre-trial motion hearings held); *Goyette v. City of Minneapolis*, No. 0:20-cv-01302 (D. Minn. June 2, 2020) (pre-trial motion hearings held). Several cases have been since dismissed. *Order Dismissing Case, Williams v. City of Minneapolis*, No. 0:20-cv-01303 (D. Minn. Sept. 15, 2021) ("Based upon the Parties' Stipulation, the Court hereby orders the case dismissed with prejudice"); *Stipulation to Dismiss, Ballew v. City of Chicago*, No. 1:20-cv-03422 (N.D. Ill. Oct. 21, 2020) ("[T]his matter has been settled by the parties"); *Order Directing Filing of Documents Authorizing Dismissal at 1, Indy 10 Black Lives Matter v. City of Indianapolis*, No. 1:20-cv-01660 (S.D. Ind. Oct. 5, 2020) ("Court has been advised by counsel that a settlement has been reached in this action.").

151. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) (citing *Munaf v. Geren*, 553 U.S. 674, 689–90 (2008)).

152. See *Abay v. City of Denver*, 445 F. Supp. 3d 1286, 1292 (D. Colo. 2020); *Don't Shoot Portland v. City of Portland*, 465 F. Supp. 3d 1150, 1154 (D. Or. 2020) ("[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."); *Black Lives Matter Seattle-King County v. City of Seattle, Seattle Police Department*, 466 F. Supp. 3d 1206, 1212 (W.D. Wash. 2020) ("[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. *Abay*, 445 F. Supp. 3d at 1291.

have a right to protest<sup>154</sup> but even more relevant to this discussion, they added that the 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.”<sup>155</sup>

At first reading, the Portland and Seattle District Court judges’ assertion<sup>156</sup> 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,”<sup>157</sup> “dangerous, and often traumatic jobs,”<sup>158</sup> which places them “often while in harm’s way.”<sup>159</sup> 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’ 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.<sup>160</sup> 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,

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154. *Don’t Shoot Portland*, 465 F. Supp. 3d at 1154 (“[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.”); *Black Lives Matter Seattle-King County*, 466 F. Supp. 3d at 1212 (“[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*)).

155. *Don’t Shoot Portland*, 465 F. Supp. 3d at 1154; *Black Lives Matter Seattle-King County*, 466 F. Supp. 3d at 1212.

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

157. *Abay*, 445 F. Supp. 3d at 1291.

158. *Don’t Shoot Portland*, 465 F. Supp. 3d at 1154.

159. *Black Lives Matter Seattle-King County*, 466 F. Supp. 3d at 1212.

160. See *Black Lives Matter Seattle-King County*, 466 F. Supp. 3d at 1214 (referencing *Nelson v. City of David*, 685 F.3d 867, 884–87 (9th Cir. 2012)).

but because substantial video footage essentially turned the judges into eye witnesses to the extensive police abuse of overwhelmingly docile and often compliant protesters.<sup>161</sup> 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,<sup>162</sup> it has failed to do so in other contexts, including in protest cases. Courts correctly apply the Fourth Amendment to the protection of bodily integrity and privacy of items people conceal from public view, but they 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*.<sup>163</sup> While this expressive Fourth Amendment

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161. See *Abay*, 445 F. Supp. 3d at 1290 (“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.”); *Don’t Shoot Portland*, 465 F. Supp. 3d at 1155 (“Plaintiffs provide video evidence and declarations documenting the use of tear gas against protesters. . . . [T]here is no dispute that Plaintiffs engaged only in peaceful and non-destructive protest.”); *Black Lives Matter Seattle-King County*, 466 F. Supp. 3d at 1213 (“The video evidence reveals that . . . their protests have been passionate but peaceful.”).

162. See *Maryland v. Macon*, 472 U.S. 463, 468 (1985); *Roaden v. Kentucky*, 413 U.S. 496, 504-05 (1973); *Stanford v. Texas*, 379 U.S. 476, 485-86 (1965); *Marcus v. Search Warrants*, 367 U.S. 717, 734-36 (1961).

163. 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, 806 (1994) [hereinafter Amar, *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 and argue 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. JOHN’S L. REV. 1097, 1119 (1998). Professor Amar’s “constitutional reasonableness” is the “vehicle for [the] integration” of “First Amendment concerns explicitly into the Fourth Amendment analysis.” Amar, *Fourth Amendment First Principles*, *supra*, 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); see also Lenese Herbert, *Can’t You See What I Am Saying? Making Expressive Conduct a Crime in High Crime Areas*, 9 GEO. J. ON POVERTY L. & POL’Y 135, 153, 162 (2002) (arguing that in minority communities flight from the police is one of the most effective forms of

surely has 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.<sup>164</sup>

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 have discounted an individual's right to engage in dissent.<sup>165</sup> This is a result of courts retrofitting protest cases with the framework of one-on-one investigative cases like in *Graham v. Connor*, in which 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. Courts 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<sup>166</sup>—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 in future work—of how these two amendments were meant to work together to protect new Americans' freedom of thought and expression from

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dissent, allowing people to “communicate their distaste of the police and to exercise their choice to remove themselves from police presence without compromising the safety of others,” and that such flight should be viewed as “communicative” rather than “criminal” and deserving of both Fourth Amendment protection and First Amendment Protection).

164. See *supra* Part II.

165. 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).

166. See *supra* notes 86–87 and accompanying text for a discussion of how *Graham v. Connor* creates a deferential standard towards the police.

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.<sup>167</sup> 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,<sup>168</sup> but also searches connected with news activity<sup>169</sup> and controversial political materials.<sup>170</sup> 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.”<sup>171</sup>

#### 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 to protect political dissent from government intrusion.

About three decades *before* the Bill of Rights was ratified in 1791, a British antigovernment newspaper, *The North Briton*, published an article in its forty-fifth edition vigorously criticizing King George III’s speech in support of the Treaty of Paris that ended the Seven Years’ War between Great Britain, France, and Spain.<sup>172</sup> The British Attorney General and Solicitor General condemned the authors and publishers as guilty of seditious libel, a crime eventually defined under the Alien and Sedition Act

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167. 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 Warrants*, 367 U.S. 717, 729 (1961).

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

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

170. See *Stanford*, 379 U.S. at 485 (communist papers seized from plaintiff’s home).

171. *Roaden*, 413 U.S. at 504.

172. WILLIAM J. CUDDIHY, *THE FOURTH AMENDMENT: ORIGINS AND ORIGINAL MEANING* 440 (2009).

of 1798 as writings that defamed, brought into contempt or disrepute, or excited the hatred of the people against the government.<sup>173</sup> In response, the British Secretary of State signed a general warrant directing the King's messengers to find the culprits and bring them to justice.<sup>174</sup> However, the King's messengers had no leads on *The North Briton's* contributors and did not know where to search.<sup>175</sup> 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.<sup>176</sup> The general warrant's duration was also not circumscribed and could even be indefinite.<sup>177</sup> "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."<sup>178</sup> Thus, general warrants granted broad powers to British government actors, and the King's messengers exploited these powers in the pursuit of the King's critics.

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.<sup>179</sup> "One of the searchers later testified that blanket confiscations of personal papers were typical when the political targets were sufficiently prominent."<sup>180</sup> At the end of the spree, the King's messengers arrested forty-nine people.<sup>181</sup> Those arrested included not only suspects tangentially related to the newspaper—even if not the seditious edition—but also their family members and workers.<sup>182</sup>

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.<sup>183</sup>

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173. Alien and Sedition Act, 1 Stat. 596 (1798); see also Cuddihy, *supra* note 172, at 440.

174. Cuddihy, *supra* note 172, at 440.

175. *Id.*

176. *Id.* at 548 n.50 ("[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.'").

177. *Id.* at 440–41.

178. *Id.*

179. *Id.* at 441–43.

180. *Id.* at 443.

181. *Id.*

182. *Id.* at 441–43.

183. *Id.* at 443.

The cases led to varying results;<sup>184</sup> 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.<sup>185</sup> Periodicals acclaimed that the legal challenges “vindicated ‘the liberty, property, domestic quiet and security of every Englishman’ ” and “affected [their] most sacred and inviolable rights and liberties,” and denounced general warrants as an “unconstitutional practice.”<sup>186</sup> Journalists’ impassioned critiques reached and convinced not only British and American intellectuals, but also the general public, of the evils of general warrants.<sup>187</sup> “By 1769, the unacceptability of general warrants pervaded feelings as well as thoughts.”<sup>188</sup> 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.<sup>189</sup> 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 lie 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 as the Fourth Amendment guarantees people the right “to be secure in their person,” by protecting them against unreasonable force, detention, or searches, it also protects the right for them to be secure in their “houses, papers, and effects” against unreasonable searches.<sup>190</sup> 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

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184. *Id.*

185. *Id.* (“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.”).

186. *Id.* at 459.

187. *Id.* at 463.

188. *Id.* at 464.

189. *See Frank v. State of Maryland*, 359 US 360, 377 (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”).

190. U.S. CONST. amend. IV.

dissenting views contained in *The 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 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."<sup>191</sup> "The Fourth Amendment thus has a much wider frame of reference than criminal prosecutions."<sup>192</sup> 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.<sup>193</sup> 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.'"<sup>194</sup> 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 to and more strictly review searches of papers or other expressive materials.<sup>195</sup> 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 than searches for nonexpressive materials, such as contraband, weapons, or implements of a

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191. *Frank*, 359 U.S. at 376.

192. *Id.* at 377.

193. *Stanford v. Texas*, 379 U.S. 476, 484 (1965).

194. *Id.* (quoting *Frank*, 359 U.S. at 376).

195. *Stanford*, 379 U.S. 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.").

crime.<sup>196</sup> In the cases of expressive materials, the Court has not just inquired what government intrusion is reasonable, but also what government intrusion is reasonable in light of freedom of expression.<sup>197</sup> Such special Fourth Amendment review is necessary to provide expression “breathing space to survive.”<sup>198</sup>

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 *The North Briton* No. 45.<sup>199</sup> The Court has found that individual police officers, not strictly bound by sufficiently specific judicially approved directives, lack guidance on how to differentiate between protected and nonprotected expressive materials and thus often act too broadly, sweeping up in their searches protected expressive materials.<sup>200</sup> Beginning with the Warren Court<sup>201</sup> in *Marcus v. Search Warrants*, a case involving the search for obscene materials, and in *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, in *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 Warrants*, 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,<sup>202</sup> plaintiffs challenged the constitutionality of the Kansas City

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196. *Id.*

197. *Roaden v. Kentucky*, 413 U.S. 496, 504 (1973).

198. *See In re Grand Jury Subpoena: Subpoena Duces Tecum*, 829 F.2d 1291, 1298–99 (4th Cir. 1987) (quoting *NAACP v. Button*, 371 U.S. 413, 433 (1963)) (holding in which 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”).

199. *Marcus v. Search Warrants*, 367 U.S. 717, 722–24 (1961). *See also infra* Section III.A.2 for discussion of *North Briton* No. 45.

200. *Marcus*, 367 U.S. at 722–30.

201. The period when Justice Earl Warren led the Supreme Court—from 1953 to 1969—is widely recognized as a critical “constitutional revolution” in which the “discourse of rights [emerged] as a dominant constitutional mode.” Morton J. Horowitz, *The Warren Court and the Pursuit of Justice*, 50 WASH. & LEE L. REV. 4, 5 (1993).

202. *Mapp v. Ohio*, 367 U.S. 643, 653–54 (1961), extended Fourth Amendment protections and the exclusionary rule, a doctrine which establishes that courts should suppress evidence obtained resulting from an unreasonable search, from solely 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, 213 (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)

police officers' search under the due process clause of the Fourteenth Amendment.<sup>203</sup> 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.<sup>204</sup> 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.<sup>205</sup> 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 selling.<sup>206</sup> 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.<sup>207</sup> The search warrant broadly described the items to be seized from plaintiff's newsstands as obscene materials.<sup>208</sup> 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.<sup>209</sup>

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.<sup>210</sup> The Court continued this historical account of how this unbounded power of search and seizure was reaffirmed throughout the

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(finding claim of unreasonable searches and seizures by federal authorities but not state actors to be analyzed under the Fourth Amendment”).

203. *Marcus*, 367 U.S. at 718.

204. *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.”).

205. *Id.* at 719–20.

206. *Id.* at 722.

207. *Id.*

208. *Id.* at 724.

209. *Id.* at 722–23.

210. *Id.* at 724–25.

sixteenth and seventeenth century, time and time again, explaining that “[e]ach succeeding regime during the turbulent [s]eventeenth [c]entury England used the search and seizure power to suppress publications.”<sup>211</sup> The publications targeted included those that the government deemed “scandalous and lying,” “heretical . . . [and] offensive to the state.”<sup>212</sup> 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.<sup>213</sup> 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.”<sup>214</sup> 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 antigovernment political expression. This means that the protections of the expressive Fourth Amendment are at their zenith when 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. Because 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.”<sup>215</sup> “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.”<sup>216</sup> This limitation is necessary to prevent government suppression of other materials which are not obscene.<sup>217</sup> The Court in *Marcus* explained that because of this concern, the government

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211. *Id.* at 725.

212. *Id.* at 725–26.

213. *Id.* at 728.

214. *Id.* at 729.

215. *Id.* at 730.

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

217. *Marcus*, 367 U.S. at 730.

cannot police obscenity in the same manner that it polices other contraband like gambling implements or liquor.<sup>218</sup> 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.<sup>219</sup> 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.<sup>220</sup> 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.”<sup>221</sup> 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.<sup>222</sup>

In *Marcus v. Search Warrants*, 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 it 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 assessment.<sup>223</sup> 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.<sup>224</sup> 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

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218. *Id.* at 731.

219. *Id.*

220. *Id.*

221. *Id.* at 733.

222. *See id.* at 718–20.

223. *Id.* at 731–32; *see also* *Lee Art Theatre, Inc. v. Virginia*, 392 U.S. 636, 636–37 (1968) (finding that movies were unconstitutionally seized when they were collected pursuant to a judicial search warrant; the warrant was based on a police officer’s affidavit that included the name of the films and his statement that after he had viewed the films and the movie theatre billboard he determined the films were obscene).

224. *Id.* 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, 488–89 (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 after the judge had watched the film in advance of his issuance of all warrants); *see also* *New York v. P.J. Video*, 475 U.S. 868, 875 (1986) (concluding 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).

hoc decisions on the spot.”<sup>225</sup> “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.”<sup>226</sup> 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.<sup>227</sup> 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.”<sup>228</sup> In the eyes of the justices in *Marcus v. Search Warrants*, 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*.<sup>229</sup> The case dealt with the search of a private home for communist materials under the Texas Suppression Act.<sup>230</sup> Since *Stanford* was decided post-*Mapp*, the Court first clearly stated that it was engaging in a Fourth Amendment analysis.<sup>231</sup> 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 antigovernment journalism through searches and seizure and its connection to the Fourth Amendment and referencing *Marcus*, the Court declared that “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.”<sup>232</sup>

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.”<sup>233</sup> The application included sworn affidavits from the two attorney generals referencing recent pro-Communist mailings from the premises and “other

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225. *Marcus*, 367 U.S. at 732.

226. *Id.*

227. *Id.*

228. *Id.* at 733.

229. *Stanford v. Texas*, 379 U.S. 476, 476 (1965).

230. *Id.* at 477.

231. *Id.* at 481.

232. *Id.* at 485 (emphasis added).

233. *Id.* at 478.

information received in the course of investigation.”<sup>234</sup> 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.”<sup>235</sup> 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.<sup>236</sup> The Court concluded that the items to be seized were not identified with particularity and that this requirement must be adhered to scrupulously when the government is seizing materials containing ideas.<sup>237</sup> The Court further critiqued the freedom provided to police officers as they engaged in the search and seizure of expressive materials, stating that “[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.”<sup>238</sup> Altogether, the police officers had carried away fourteen cartons of materials.<sup>239</sup>

Eight years later, the Court in *Roaden v. Kentucky* confronted again the question of the seizure of expressive (nonpolitical) materials, but this time it was for a seizure incident to arrest.<sup>240</sup> In that case, the county sheriff and a prosecutor attended a movie at a drive-in theatre.<sup>241</sup> After watching the movie, the sheriff concluded that it was obscene and arrested the theatre manager.<sup>242</sup> Thereafter, he seized the film.<sup>243</sup> The validity of a search and seizure of contraband incident to arrest is a well-settled exception to the Fourth Amendment warrant requirement.<sup>244</sup> 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

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234. *Id.*

235. *Id.* at 479.

236. *Id.*

237. *Id.* at 484.

238. *Id.* at 485.

239. *Id.* at 480.

240. *Heller v. New York*, 413 U.S. 483, 496 (1973).

241. *Id.* at 497.

242. *Id.*

243. *Id.* at 497–98.

244. *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. . . . since it is the fact of custodial arrest which gives rise to the authority to search.”).

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.”<sup>245</sup> The Court in *Roaden* stated that in the circumstances in which 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.<sup>246</sup>

About a decade after *Roaden v. Kentucky*, Justice William Brennan asserted in his dissent in *Maryland v. Macon* that these same more stringent requirements for searches of expressive obscene materials should also apply to the seizure of an individual charged with the distribution of such expressive allegedly obscene materials.<sup>247</sup> 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.<sup>248</sup> Just as the task of differentiating between unprotected obscene and protected non-obscene materials should not be left to the individual officer whose “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.<sup>249</sup> “Permitting this investigative practice threatens to restrain the liberty of expression in the same way that the seizure of presumptively protected material does.”<sup>250</sup>

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*,<sup>251</sup> the only case in which the Supreme Court had previously confronted the arrest of people for crimes associated with the distribution of obscene materials, a judicial officer issued the arrest warrants himself after watching

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245. *Roaden v. Kentucky*, 413 U.S. 496, 501 (1973).

246. *Id.* at 504.

247. *Maryland v. Macon*, 472 U.S. 463, 473 (1985) (Brennan, J., dissenting). The majority in *Maryland v. Macon* did not decide whether the warrantless arrest of the bookstore’s attendant, which occurred 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 focused only on the question of whether the magazines that the undercover officer purchased were admissible at trial. *Id.* at 464–71.

248. *Id.* at 473–74.

249. *Id.*

250. *Id.* at 474.

251. *Heller v. New York*, 413 U.S. 483, 483 (1973); *see also supra* note 224.

the film in the theatre.

Through his dissent in *Macon*, Justice Brennan connected the dots in the 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.”<sup>252</sup> “The disruptive potential [on the First Amendment] of an effectively unbounded [Fourth Amendment] power to arrest should be apparent.”<sup>253</sup> 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.<sup>254</sup> 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.”<sup>255</sup> 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.”<sup>256</sup> He asserted that invalidating the conviction was the only means to provide the necessary deterrent effect to protect expression.<sup>257</sup> 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 subjected to official harassment, steer far wider from the forbidden zone than they otherwise would.”<sup>258</sup>

Justice Brennan acknowledged that Fourth Amendment special safeguards for freedom of expression are not limited to the seizure of expressive materials but also apply to seizures of the person for expressive activities.<sup>259</sup> 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.

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252. *Macon*, 472 U.S. at 473–74 (Brennan, J., dissenting).

253. *Id.* at 474.

254. *Id.* at 475.

255. *Id.*

256. *Id.* at 476.

257. *Id.*

258. *Id.*

259. *Id.* at 464–65.

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.<sup>260</sup> 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; no other factor can be determinative for the reasonableness analysis.

Instead of affording deference to police decisionmaking, courts must review Fourth Amendment excessive force claims during protests with "scrupulous exactitude" to minimize intrusion on First Amendment activity.<sup>261</sup> 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 decisionmaking is unacceptable when potentially 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.<sup>262</sup> This same concern is present when militant

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260. 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, but did not articulate a standard of review. See *Lamb v. City of Decatur*, 947 F. Supp. 1261, 1265 (C.D. Ill. 1996); see also *supra* note 97 and accompanying text.

261. *Stanford v. Texas*, 379 U.S. 476, 511 (1965). Other scholars have suggested that courts should apply a more exacting standard to protest situations. See, e.g., D'Addario, *supra* note 19, 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."); Amar, *Fourth Amendment First Principles*, *supra* note 163, at 806 ("Under this approach, First Amendment concerns could well trigger special Fourth Amendment safeguards.").

262. See, e.g., *Roaden v. Kentucky*, 413 U.S. 496, 504 (1973) ("[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."); *Marcus v. Search Warrants*, 367 U.S. 717, 729 (1961) ("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

police officers exert force on protesters, which may inadvertently or purposefully (depending on one's 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 demanded that a neutral magistrate engage searchingly in 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 against someone engaging in First Amendment protest activity 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.<sup>263</sup> Justice Brennan asserted that "[t]he disruptive potential [on the First Amendment] of an effectively unbounded power to arrest should be apparent."<sup>264</sup> 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 has become the norm. Warrantless arrests are now the norm, largely as a result of courts carving out exceptions to the warrant requirement to provide police officers leeway to control criminal activity.<sup>265</sup> 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

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greater safeguards than were here operative.").

263. See *Maryland v. Macon*, 472 U.S. 463, 474 (1985) (Brennan, J. dissenting).

264. *Id.*

265. See Amar, *supra* note 163, at 770 (listing "at least eight historical and commonsensical exceptions to the so-called warrant requirement"); 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").

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.<sup>266</sup> 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 governmental interests at stake."<sup>267</sup> 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 interest in maintaining order and protecting 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."<sup>268</sup> Justice Brennan raised these arguments in the context of an arrest for distribution of expressive potentially obscene, not political materials. However, Fourth Amendment protection of expressive materials and conduct should reach its zenith when political expression is involved.<sup>269</sup> After all, *The North Briton* scandal that inspired 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 antigovernment 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."<sup>270</sup>

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266. See *supra* Section II.A, discussing reasonableness analysis under *Graham* generally, and Part II, discussing reasonableness analysis in protest excessive force cases.

267. *Graham v. Connor*, 490 U.S. 386, 396 (1989) (internal quotations omitted).

268. *Macon*, 472 U.S. at 476 (Brennan, J. dissenting).

269. See generally *supra* notes 229–32 and accompanying text (discussing implications of *Stanford v. Texas* on heightened constitutional protection of political expression).

270. See *In re Grand Jury Subpoena: Subpoena Duces Tecum*, 829 F.2d 1291, 1298–99 (4th Cir. 1987) (expressing concern for the chilling of freedom of expression and calling for a more delicate tool that provides freedom of expression "breathing space to survive" in deciding whether to quash a broad subpoena for obscene video materials).

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.<sup>271</sup> 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.<sup>272</sup> 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 a single or just a 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.<sup>273</sup>

Although a police officer may generally intervene when a protester engages in criminal activity, the type of criminal activity alleged is also important to a court's analysis.<sup>274</sup> If the conduct amounts to a misdemeanor or is only criminal because there is a protest, courts should 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 to effectuate mass arrests of protesters and quash the protest.<sup>275</sup> Courts should view this weaponizing of criminal law to suppress protest activity unfavorably and not give credence to these government allegations of illegality.

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271. See *contra* *Felarca v. Birgeneau*, 891 F.3d 809, 817–18 (9th Cir. 2018) (justifying use of force against Occupy protestors due to their “organized lawlessness”); *Oberwetter v. Hilliard*, 639 F.3d 545, 555 (D.C. Cir. 2011) (finding the use of force reasonable against dancing protestor who refused to stop dancing); *Crowell v. Kirkpatrick*, 400 F. App’x 592, 595 (2d Cir. 2010) (unpublished) (finding the use of force reasonable when protestors “chained themselves to a several hundred pound barrel drum and having refused to free themselves”).

272. I have discussed the justification for not viewing protestors as a unit in a prior article. See *Loor, Water Hoses*, *supra* note 19, at 843–48.

273. 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 when such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action”).

274. 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 previously allowed expressive albeit illegal activity to persist in cases in which First Amendment values prevail. Compare *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (invalidating criminal prohibition against flag burning), with *United States v. O’Brien*, 391 U.S. 367, 382 (1968) (allowing criminal prohibition against draft card burning).

275. See *Loor, Protesting While Black*, *supra* note 21, at Section I.B; *Loor, When Protest Is the Disaster*, *supra* note 19, at 38–43.

Regarding the question of whether the individual is resisting arrest, police should not be able to counter nonviolent resistance with violence.<sup>276</sup> 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. Furthermore, news stories, like the ones of the January 6, 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.<sup>277</sup> 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, when 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 circumstances, no single factor should be determinative. This is particularly so, however, when expressive protest activity is the target of policing. First,

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276. See, e.g., *Amnesty Am. v. Town of W. Hartford*, 361 F.3d 113, 123 (2d Cir. 2004) (considering 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 restricted the amount of force police can employ when individuals are passively resisting. See *Black Lives Matter Seattle-King County v. City of Seattle, Seattle Police Department*, 466 F. Supp. 3d 1206, 1214–15 (W.D. Wash. 2020); *Don't Shoot Portland v. City of Portland*, 465 F. Supp. 3d 1150, 1155 (D. Or. 2020).

277. Lois Beckett, *US Police Three Times as Likely to Use Force Against Leftwing Protesters, Data Finds*, *GUARDIAN* (Jan. 14, 2021), <https://www.theguardian.com/us-news/2021/jan/13/us-police-use-of-force-protests-black-lives-matter-far-right> [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://www.wbur.org/cognoscenti/2021/01/11/mob-capitol-far-right-police-protesters-karen-j-pita-loor> [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://journaltimes.com/news/local/police-in-kenosha-shared-water-said-they-appreciate-armed-group-before-two-killed/article\\_728054b3-363e-50da-9e70-326310588879.html](https://journaltimes.com/news/local/police-in-kenosha-shared-water-said-they-appreciate-armed-group-before-two-killed/article_728054b3-363e-50da-9e70-326310588879.html) [https://perma.cc/V6CU-FVQR].

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.<sup>278</sup> 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.<sup>279</sup> 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.<sup>280</sup> Mr. Matthews walked alone with his hands up towards the police.<sup>281</sup> At one point, he held a bus pass in one hand, but otherwise his hands were empty.<sup>282</sup> 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 what it perceived as a "violent crowd."<sup>283</sup> 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 opinion, the Court referred to the protesters as the

278. *White v. Jackson*, 865 F.3d 1069, 1078 (8th Cir. 2017); Brief of St. Louis County Appellees, *White v. Jackson*, 865 F.3d 1069 (8th Cir. 2017) (No. 16-3897) [hereinafter St. Louis County Brief].

279. *White*, 865 F.3d at 1080. The court concluded 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 choking him and beating him when he was already under the control of police. *Id.*; see also *supra* Section II.B.1 (discussing *White*).

280. *White*, 865 F.3d at 1080.

281. *Id.*

282. *White v. Jackson*, No. 4:14CV1490, 2016 U.S. Dist. LEXIS 136600, at \*16-17 (E.D. Mo. Sept. 30, 2016).

283. *White*, 865 F.3d at 1079.

*crowd*<sup>284</sup> and to the protest as *unrest*.<sup>285</sup>

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.<sup>286</sup> Circuit Court Judge Diana E. Murphy writes again for the court, but her opinion now is markedly different:<sup>287</sup>

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.”*<sup>288</sup> *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.”*<sup>289</sup> *As we have long understood, the Fourth Amendment protects bodily integrity from unreasonable government intrusion.*<sup>290</sup> *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 Fourth Amendment protections have an expressive component. 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 provides*

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284. 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.”).

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

286. 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 critique of arrests without probable cause for a future piece.

287. I acknowledge that in this reimagined opinion I do not deal with how qualified immunity will affect the expressive Fourth Amendment analysis. See *supra* note 30–31 and accompanying text conceding that qualified immunity is outside the scope of this Article.

288. U.S. CONST. amend. IV.

289. *Id.*

290. *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.”).

*special safeguards to materials that are expressive in nature.*<sup>291</sup> *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, The North Briton No. 45.*<sup>292</sup> *This history was fresh in the Framers' minds as they drafted the Fourth Amendment.*<sup>293</sup> *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."*<sup>294</sup> *Furthermore, Fourth Amendment protections for freedom of expression reach their pinnacle when the expression is political in nature, as it was political expression that the Crown sought to suppress in its abusive arrests and searches.*<sup>295</sup> *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.*<sup>296</sup> *These expressive Fourth Amendment principles must apply with the same rigor 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,*<sup>297</sup> *which Mr. Matthews here claims. Justice Brennan drew this connection when he argued for the curtailment of police authority to arrest, via a strict warrant requirement, for distribution of allegedly obscene expressive materials.*<sup>298</sup> *"The disruptive potential of an effectively unbounded power to arrest should be apparent."*<sup>299</sup>

291. See *Roaden v. Kentucky*, 413 U.S. 496, 504 (1973); *Stanford v. Texas*, 379 U.S. 476, 485–86 (1965); *Marcus v. Search Warrants*, 367 U.S. 717, 731–32 (1961).

292. See *Stanford*, 379 U.S. at 481–84; *Marcus*, 367 U.S. at 724–25.

293. See *Stanford*, 379 U.S. at 484; *Marcus*, 367 U.S. at 724.

294. *Stanford*, 379 U.S. at 484–85.

295. *Id.*

296. See *Roaden*, 413 U.S. at 504–05 (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.”); *Marcus*, 364 U.S. at 730 (finding that “discretion to seize allegedly obscene materials cannot be confided to law enforcement officials without greater safeguards”).

297. U.S. CONST. amend. IV.

298. See *Maryland v. Macon*, 472 U.S. 463, 473–74 (1985) (Brennan, J., dissenting).

299. *Id.* at 724.

The next step is to analyze how, if at all, the expressive Fourth Amendment should change the *Graham v. Connor* reasonableness analysis 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 wrongfully suspected Mr. Graham of shoplifting.<sup>300</sup> The fact that the police officer was confronting a potential criminal mattered to the Court, and the Court fashioned a test that provided police with extreme deference to “make split-second judgments in circumstances that are tense, uncertain and rapidly evolving.”<sup>301</sup> The Court warned against reviewing police officers’ actions with “20/20 vision of hindsight.”<sup>302</sup>

Deferential review has no place when police officers regulate protest activity. As a starting point, 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.<sup>303</sup> Evidence suggests that violence is typically a result of police instigating or escalating the situation.<sup>304</sup> 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.<sup>305</sup> Therefore, instead of affording deference to police decisionmaking, we must review claims of government excessive force with “scrupulous exactitude” when they occur in the context 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

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300. *Graham v. Connor*, 490 U.S. 386, 389 (1989).

301. *Id.* at 396.

302. *Id.* at 396–97.

303. Roudabeh Kishi & Sam Jones, *Demonstrations & Political Violence in America: New Data for Summer 2020*, ACLED (2020), <https://acleddata.com/2020/09/03/demonstrations-political-violence-in-america-new-data-for-summer-2020> [<https://perma.cc/6WCX-L8JB>]. “Violent demonstrations denote demonstration events targeting other individuals, property, businesses, other rioting groups, or armed actors.” ACLED, FAQs: US CRISIS MONITOR 10, [https://acleddata.com/acleddatanew/wp-content/uploads/2020/07/US-Crisis-Monitor\\_FAQs\\_August.pdf](https://acleddata.com/acleddatanew/wp-content/uploads/2020/07/US-Crisis-Monitor_FAQs_August.pdf) [<https://perma.cc/WTS9-9GFX>].

304. See Talia Buford, Lucas Waldron, Moiz Syed & Al Shaw, *We Reviewed Police Tactics Seen in Nearly 400 Protest Videos. Here’s What We Found*, PROPUBLICA (July 16, 2020), <https://projects.propublica.org/protest-police-tactics> [<https://perma.cc/866G-V6G8>] (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”).

305. See *Marcus v. Search Warrant*, 367 U.S. 717, 732 (1961) (finding search unreasonable when “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”).

countervailing government interest at stake,<sup>306</sup> we must consider as part of the government's public interest not only its interest in ensuring safety of people and property but also its interest in facilitating protest activity. By the same token, the individual's interest to bodily integrity is augmented by their interest to 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,<sup>307</sup> we must weigh positively an individual's involvement in protest activity in the reasonableness calculus.

We now turn to Mr. Matthews's claims of excessive force in violation of the Fourth Amendment and, applying this heightened standard, reverse our prior judgment 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's head underwater and to mace him, punch, and kick him while he was already under police control.<sup>308</sup> We find no need to disturb those findings at this time.<sup>309</sup> 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 kned him on the back during the arrest process.<sup>310</sup>

The last time we considered these excessive force claims, we did not consider how Mr. Matthews's 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.<sup>311</sup> As far as this court can assess from its research, one federal district court judge has previously

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306. *Graham v. Connor*, 490 U.S. 386, 396 (1989).

307. *See id.* (discussing "severity of the crime at issue").

308. *White v. Jackson*, 865 F.3d 1069, 1080 (8th Cir. 2017).

309. 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.

310. *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.

311. *See* Appellants' Brief, *White v. Jackson*, No. 16-3897 (8th Cir. Nov. 23, 2016) [hereinafter Appellants' Brief]; Brief of Appellees, *White v. Jackson*, No. 16-3897 (8th Cir. Jan. 26, 2017) [hereinafter Appellees' Brief]; Brief of St. Louis County Appellees, No. 16-3897 (8th Cir. Feb. 2, 2017) [hereinafter St. Louis County Appellees' Brief]; Appellants' Reply Brief, *White v. Jackson*, No. 16-3897 (8th Cir. Feb. 24, 2017) [hereinafter Appellants' Reply Brief].

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.’”<sup>312</sup> In *Lamb v. City of Decatur, Illinois District Court Judge Harold Baker* recognized that the case of a labor protest demonstration presented a 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 were monitoring a peaceful, lawful and constitutionally protected demonstration.”<sup>313</sup> 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—via its law enforcement officer—uses its search or seizure power and intrudes on protest activity, the police officer’s actions implicate 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.<sup>314</sup> 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.<sup>315</sup> 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 also 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

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312. *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)).

313. *Lamb*, 947 F. Supp. at 1265.

314. *White*, 865 F.3d at 1072.

315. See *Graham v. Connor*, 490 U.S. 386, 396 (1989) (“The ‘reasonableness’ of a particular use of force must be judged from the perspective of a reasonable officer on the scene.”).

from “the vicinity of a violent crowd of people.”<sup>316</sup> In their brief, appellees also argued that “[p]laintiff remained a threat to the officers, even with his hands up.”<sup>317</sup> To support this reasoning, appellees analogize Mr. Matthews to a suspect of domestic violence in *Smith v. City of Minneapolis*.<sup>318</sup> 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 the] officers there did not know whether a weapon was accessible in the plaintiff’s waistband.”<sup>319</sup> In their reply brief, appellants distinguished *Smith* by highlighting that the police were 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.<sup>320</sup> Although appellants’ argument has validity, 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.<sup>321</sup> There was no alleged government intrusion on plaintiffs’ expressive conduct. Excessive force cases concerning criminal suspects provide little guidance here in which police are regulating protest activity, as opposed to 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.”<sup>322</sup> 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 decisionmaking 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, upon 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

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316. *White*, 865 F.3d at 1079.

317. St. Louis County Appellees’ Brief, *supra* note 311, at 56.

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

319. St. Louis County Appellees’ Brief, *supra* note 311, at 55.

320. Appellants’ Reply Brief, *supra* note 311, at 23–24.

321. *See Smith*, 754 F.3d. at 546.

322. St. Louis County Appellees’ Brief, *supra* note 311, at 55 (citing *Johnson v. Scott*, 576 F.3d 658, 69 (7th Cir. 2009)).

*use of less lethal weapons against Mr. Matthews. We weigh positively for Mr. Matthews the fact that he appeared to be engaging in expressive protest activity at the time of his encounter with the police. Furthermore, if Mr. Matthews was engaged in any criminal conduct, it was along the lines of refusal to disperse.<sup>323</sup> This is relevant for two reasons. First, refusal to disperse is a misdemeanor.<sup>324</sup> 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,”<sup>325</sup> we must be more tolerant of alleged criminal activity when it is related to the protest activity that is 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.*

*We had 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.<sup>326</sup> 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 it may also intimidate other protesters witnessing the arrest 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*

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323. *White v. Jackson*, 865 F.3d 1064, 1079 (8th Cir. 2017).

324. MO. REV. STAT. § 574.060.2 (“The offense of refusal to disperse is a class C misdemeanor.”).

325. See *In re Grand Jury Subpoena: Subpoena Duces Tecum*, 829 F.2d 1291, 1298–99 (4th Cir. 1987) (holding in which 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”).

326. *White*, 865 F.3d at 1080.

who, for fear being subjected to official harassment, steer far wider from the forbidden zone than they otherwise would.”<sup>327</sup> 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 the police officers’ arrest tactics of slamming Mr. Matthews’ face on the ground and kneeling him were unreasonable in light of freedom of expression.

One final point is worth mentioning. Appellees refer to the Ferguson protests as riots in several places in their brief.<sup>328</sup> 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.”<sup>329</sup> To influence the expressive Fourth Amendment analysis, “riotous conditions,” as appellees allege,<sup>330</sup> must be established through evidence, not just alleged through conclusory assertions.

For the foregoing reasons, we reverse the district 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’s excessive force claims.

*So ordered.*

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327. See *Maryland v. Macon*, 472 U.S. 463, 473–74 (1985) (Brennan, J. dissenting).

328. St. Louis County Appellees’ Brief, *supra* note 311, 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”).

329. *White*, 865 F.3d at 1080.

330. St. Louis County Appellees’ Brief, *supra* note 311, at 51.