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ARTICLES

NOTES

IS DEFAMATION LAW OUTDATED? HOW JUSTICE POWELL PREDICTED THE CURRENT CRITICISM

Amy Kristin Sanders & Kirk Von Kreisler*

ABSTRACT

Defamation law has seen no shortage of high-dollar verdicts in recent years, but public attacks from influential public officials, including sitting U.S. Supreme Court justices, on foundational speech protections are just as concerning. That said, they aren't necessarily all that novel. Justice Lewis Powell's personal papers reveal his earlier desire to shift the balance of protection, which had steered heavily toward free speech back in favor of individual reputation. As we've found, many of today's arguments in favor of abandoning the *New York Times* actual malice rule likely draw their inspiration from Justice Powell's desire to fundamentally alter defamation law by re-elevating the state's interest in protecting individuals' reputations—which he articulated in his *Gertz v. Welch* and *Dun & Bradstreet v. Greenmoss Builders* opinions decades ago. Justice Neil Gorsuch's recent criticisms of defamation jurisprudence run parallel to Justice Powell's, and they offer free speech proponents an important opportunity to address these concerns.

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INTRODUCTION

> After observing my colleagues' efforts to stretch the actual malice rule like a rubber band, I am prompted to urge the overruling of *New York Times v. Sullivan*. Justice Thomas has already persuasively demonstrated that *New York Times* was a policy-driven decision masquerading as constitutional law. The holding has no relation to the text, history, or structure of the Constitution, and it baldly constitutionalized an area of law refined over centuries of common law adjudication.[1]

Prominent jurists and government officials have begun to publicly attack powerful precedent that shields the media from frivolous defamation suits. But it is not just about public figures who seek millions of dollars in damages.[2] Undoubtedly, these high-profile lawsuits produce intensified public reactions and draw scorn from those within the industry. Often, journalists see these lawsuits as another attack leveled at the press by those who decry "fake news" rather than as a legitimate form of redress. When the plaintiff seeking the damages is a sitting member of Congress, these concerns become easy to understand.[3] Public attacks on *New York Times v. Sullivan*[4] represent a threat to the very foundation of the First Amendment. It is *Sullivan*'s actual malice standard that permits the press to cover the government and its officials "without fear or favor."[5] As a result, recent calls to overturn a half-century of precedent from some of the most

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[1] Tah v. Glob. Witness Publ'g, Inc., 991 F.3d 231, 251 (D.C. Cir. 2021) (Silberman, J., dissenting) (citation omitted).

[2] *See, e.g.*, Ashley Cullins, *Johnny Depp's Defamation Suit Against Amber Heard Survives Demurrer*, HOLLYWOOD REP. (Mar. 27, 2020, 3:09 PM), https://www.hollywoodreporter.com/business/business-news/johnny-depps-defamation-suit-amber-heard-survives-demurrer-1287171/; *see also* Oliver Darcy, *CNN Settles Lawsuit with Nick Sandmann Stemming from Viral Video Controversy*, CNN BUS. (Jan. 7, 2020, 6:06 PM), https://www.cnn.com/2020/01/07/media/cnn-settles-lawsuit-viral-video/index.html.

[3] *See* Larry Neumeister, *Judge Rejects Rep. Devin Nunes Defamation Suit Against CNN*, AP NEWS (Feb. 19, 2021), https://apnews.com/article/joe-biden-new-york-new-york-city-lawsuits-manhattan-59aefbe9100fcf703335a03f9ccf5d06. Rep. Devin Nunes has filed nine defamation suits since 2019. Three have been dismissed and two voluntarily dropped. Kate Irby, *Devin Nunes Sued Twitter and an Internet Cow 2 Years Ago. Where do His 9 Lawsuits Stand Now?*, FRESNO BEE (Feb. 26, 2021, 8:47 AM), https://www.fresnobee.com/news/california/article249480315.html.

[4] 376 U.S. 254 (1964).

[5] David W. Dunlap, *1896 | 'Without Fear or Favor,'* N.Y. TIMES (Aug. 14, 2015), https://www.nytimes.com/2015/09/12/insider/1896-without-fear-or-favor.html.

influential public officials in the country have the media defense bar and other free speech advocates sounding alarm bells. What started as the grumblings of the late Supreme Court Justice Antonin Scalia[6] has now gained momentum with public support from former president Donald J. Trump,[7] Justice Clarence Thomas,[8] D.C. Circuit Senior Judge Laurence Silberman,[9] and most recently Justice Neil Gorsuch.[10] In a March 2021 dissent, Judge Silberman called *Sullivan*'s actual malice standard "profoundly erroneous," urging that it be overruled.[11] Silberman pointed to Justice Thomas' 2019 dissent in a denial of *certiorari*: "If the Constitution does not require public figures to satisfy an actual-malice standard in state-law defamation suits, then neither should we."[12] The lawyers for Rep. Devin Nunes echoed these sentiments in their attempt to make the press pay, referring to the actual malice rule as "obsolete and unworkable"[13] in a court filing against the *Washington Post*:

> The actual malice rule . . . was judicially-imposed to solve problems peculiar to a bygone era, long-before the Internet and social media took hold of American society. Its justifications rest on incorrect and outdated beliefs about assumed risk and access to methods of mass communication. Not surprisingly, the rule's effects have

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[6] Justice Scalia believed "the Framers would have been appalled" at the decision in *New York Times v. Sullivan*. David G. Savage, *Scalia Criticizes Historic Supreme Court Ruling on Freedom of the Press*, L.A. TIMES (Apr. 18, 2014, 12:00 AM), https://www.latimes.com/nation/la-xpm-2014-apr-18-la-na-nn-scalia-ginsburg-supreme-court-libel-20140418-story.html.

[7] Trump has referred to the protections provided by *Sullivan* as a "sham and a disgrace [that] do not represent American values and American fairness." Brian Naylor, *Trump Again Blasts Libel Laws, Calling Them 'A Sham,'* NPR (Jan 10, 2018, 2:45 PM), https://www.npr.org/2018/01/10/577100238/trump-again-blasts-libel-laws-calling-them-as-a-sham. He has even directly called for Congress to intervene in a tweet. Donald J. Trump (@realDonaldTrump), TWITTER (Sep. 5, 2018, 7:33:18 AM), https://projects.propublica.org/politwoops/user/realDonaldTrump ("Don't know why Washington politicians don't change libel laws?").

[8] McKee v. Cosby, 139 S. Ct. 675, 676 (2019) (Thomas, J., concurring in denial of certiorari) ("*New York Times* and the court's decisions extending it were policy-driven decisions masquerading as constitutional law.").

[9] Tah v. Glob. Witness Publ'g, Inc., 991 F.3d 231, 243 (D.C. Cir. 2021) (Silberman, J., dissenting).

[10] Berisha v. Lawson, 141 S. Ct. 2424, 2428–29 (2021) (Gorsuch, J., dissenting in denial of certiorari).

[11] *Tah*, 991 F.3d at 251.

[12] *McKee*, 139 S. Ct. at 676. Four months after Judge Silberman's dissent and echoing of Justice Thomas's criticisms, Thomas would then cite Silberman's statements in another attack on the *Sullivan* doctrine. *See Berisha*, 141 S. Ct. at 2425 (Thomas, J., dissenting in denial of certiorari) (citing *Tah*, 991 F. 3d at 251).

[13] Memorandum in Opposition to Defendant's Motion to Dismiss at 23, Nunes v. WP Co., 513 F. Supp. 3d 1 (D.D.C. 2020) (No. 20-cv-01403).

> transgressed far afield from its original intended purpose . . . The burden on public figures and government from the wild and unchecked proliferation of defamation on social media and the Internet justifies a thoughtful re-examination of *New York Times v. Sullivan*.[14]

The latest to publicly opine on the subject, Justice Gorsuch has become the second sitting justice to advocate for reconsideration of the doctrine. To Gorsuch, what once "tolerate[d] the occasional falsehood to ensure robust reporting . . . has evolved into an ironclad subsidy for the publication of falsehoods by means and on a scale previously unimaginable."[15] Importantly, these scathing attacks on *Sullivan* and the appeals for a return to the common law tradition are not particularly novel or surprising. But when coupled with a period of seemingly endless technological innovation and the decline of the institutional press, the current attacks calling modern defamation law into question are especially troubling.

For more than three decades, Justice Lewis F. Powell's take on the outer limits of protection for media and non-media defendants has defined defamation jurisprudence—offering up a buffer that allowed members of the press and citizens alike to engage in critical speech about the government and matters of public concern. Perhaps because Powell spent only fifteen years on the Court, his opinions—particularly in *Gertz v. Welch*[16] and *Dun & Bradstreet v. Greenmoss Builders*[17]—rarely receive significant discussion despite their influence. Powell's legal maneuvering shifted the tide of defamation law away from *Rosenbloom v. Metromedia*'s[18] near-absolute press protections and towards a stronger state interest in protecting individual reputations. Given the current cries for reform, this legal maneuvering requires greater attention.

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[14] *Id.* at 22. The lawyers went on to say that "[p]ublic figure defamation plaintiffs should not be subjected to the unwarranted burden of the actual malice rule," *id.* at 23, and that "[t]he continued use of the actual malice rule ignores the existing imbalance between the right to an unimpaired reputation and the need to prevent government suppression of speech." *Id.* at 23–24.
[15] *Berisha*, 141 S. Ct. at 2429.
[16] 418 U.S. 323 (1974).
[17] 472 U.S. 749 (1985) (plurality opinion).
[18] 403 U.S. 29 (1971) (plurality opinion).

The recent concerns run parallel to private concerns Justice Powell shared with his colleagues. An analysis of the oft-overlooked opinions, in conjunction with Justice Powell's personal papers and correspondence, reveals a trail of legal reasoning that foreshadowed today's criticisms, possibly lending credence to jurists' efforts to overturn *Sullivan*. To be sure, those defending *Sullivan* and its progeny cannot afford to dismiss Justice Powell's concerns without serious examination. In this article, we analyze papers from the Powell Archives including correspondence, draft opinions and public decisions alongside current published criticisms of defamation jurisprudence. We conclude with a comparison of the concerns expressed by Justice Powell and Justice Gorsuch, who despite having similar views would take varying approaches to address them.

I. POWELL'S PAPERS: THE STORY BEHIND HIS DEFAMATION DECISIONS

Justice Powell's archives paint a particularly interesting picture of a largely overlooked jurist who served on the Court during an important era.[19] Housed in digital form at Washington and Lee University, they shine a light on many landmark decisions that occurred during Powell's tenure,[20] including *Roe v. Wade*,[21] *Regents of the University of California v. Bakke*,[22] *First National Bank of Boston v. Bellotti*,[23] and *Bowers v. Hardwick.*[24] Despite Justice Powell's seemingly inconspicuous role on the Court, he joined the majority in all these cases, authoring the Court's opinions in *Bakke* and *Bellotti*. Long viewed as the crucial "swing" vote, Justice Powell's papers provide real insight into myriad social issues the Court tackled during his tenure. John Jacob, the archivist for the Washington & Lee University Law Library's Powell Archives, notes:

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[19] *See* John N. Jacob, *The Lewis F. Powell, Jr. Archives and the Contemporary Researcher*, 49 WASH. & LEE L. REV. 3, 4 (1992) ("[W]hile the Powell Papers have found a home in a law school, legal scholars and historians will not be the only users and beneficiaries of this collection. They may, in fact, not even constitute a majority of the researchers.").

[20] The Powell Archives do not stop at maintaining only Justice Powell's papers for these cases, either. Their archivist notes that, in fact, "most of those writing on the Court from Powell's era must pass through this archive, either physically or virtually." John N. Jacob, *The Lewis F. Powell Jr. Archives at Washington and Lee University School of Law*, 17 TRENDS L. LIBR. MGMT. & TECH. 7, 11 (2007).

[21] 410 U.S. 113 (1973).

[22] 438 U.S. 265 (1978).

[23] 435 U.S. 765 (1978).

[24] 478 U.S. 186 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

> [N]o one would deny the evident value of these papers to anyone researching Justice Powell's career, the Supreme Court during his tenure generally, or specific decisions from that time. Other obvious topics of research include the recent history of the American Bar Association; massive resistance to school integration and the desegregation of the Richmond public schools; and the legal services movement of the 1960's. Other subjects that will, no doubt, draw researchers include: Military intelligence and cryptanalysis during World War II; the Richmond Charter Commission; the Virginia Commission on Constitutional Revision; the American College of Trial Lawyers and the American Bar Foundation; the President's Commission on Law Enforcement and Administration of Justice; the President's Blue Ribbon Panel to Study the Defense Department; and the American Chamber of Commerce and the 'attack on American free enterprise system' memo written by Powell in 1971. The list could go on.[25]

When looking at Justice Powell's tenure on the Court, his reach was undeniable. The Justice wrote 500 opinions, more than half of them speaking for the Court.[26] Discounting the two years he lost to illness, Justice Powell claimed to have been in the top three in number of opinions written.[27] As one of Justice Powell's former law partners pointed out, it "is difficult to predict" the long-term impact of any particular justice, but swing voters like Justice Powell and his successor Justice Anthony Kennedy have the potential to significantly influence the Court long after they leave the bench:[28]

> [T]he overriding general conclusion is that while Justice Powell has written what he believes to be relevant today, he has always seen today in the broader context of the past centuries of our Anglo-American history. This combination of realism and historical perspective should keep Justice

[25] Jacob, *supra* note 19, at 3.
[26] George Clemon Freeman, Jr., *Justice Powell's Constitutional Opinions*, 45 WASH. & LEE L. REV. 411, 411 n.2 (1988).
[27] Ray McAllister, *The Southern Gentleman*, 74 A.B.A. J. 48, 51 (1988).
[28] Freeman, *supra* note 26, at 411.

> Powell's opinions alive and relevant for future generations.[29]

Given the current debate surrounding the First Amendment, "fake news," and social media, Powell's papers provide important context for the *Gertz* and *Dun & Bradstreet* decisions—and they provide an interesting point of comparison for today's criticisms.

II. TIMES V. SULLIVAN: THE CONSTITUTIONALIZATION OF LIBEL LAW

Prior to the Supreme Court's landmark 1964 decision in *New York Times v. Sullivan*, the First Amendment provided no protection for defamatory speech. Defamation was governed merely by state law. Although the Court had espoused the importance of the First Amendment's protections for speech and press before,[30] it had provided nothing to protect the press from large libel judgments. Under most state laws, which relied on common law defamation principles, defamation plaintiffs were not required to prove falsity or fault.[31] In many instances, plaintiffs could recover damages simply by proving the publication of a statement that identified them and negatively affected their reputation.[32] The law provided defendants no extra protection when criticizing government officials. As a result, powerful plaintiffs like Montgomery County Commissioner L.B. Sullivan would use state defamation laws to their advantage, especially against a critical press.[33] Threats of costly litigation

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[29] *Id.* at 465.

[30] *See* Near v. Minnesota, 283 U.S. 697, 707 (1931) ("It is no longer open to doubt that the liberty of the press, and of speech, is within the liberty safeguarded by the due process clause of the Fourteenth Amendment from invasion by state action."). But even in *Near*, the Court emphasized that their holding against prior restraint did not impact recovering for defamation, noting that "[t]he law of criminal libel rests upon that secure foundation [of common law]." *Id.* at 715.

[31] *See* WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 763 (3d ed. 1964) ("It is not necessary that anyone believe [the defendant's words] to be true, since the fact that such words are in publication at all concerning the plaintiff must be to some extent injurious to his reputation . . . ."). However, in civil cases, truth was a defense in actions of libel or slander and was so "in the great majority of jurisdictions." *Id.* at 824.

[32] *See id.* at 756 ("Defamation is rather that which tends to injure 'reputation' in the popular sense; to diminish the esteem, respect, goodwill or confidence in which plaintiff is held, or to excite adverse, derogatory or unpleasant feelings or opinions against him.").

[33] L.B. Sullivan sought $500,000 in damages, which Justice Hugo Black criticized as a "technique for harassing and punishing a free press." N.Y. Times Co. v. Sullivan, 376 U.S. 254, 295 (1964) (Black, J., concurring).

from prominent plaintiffs—particularly public officials—naturally imposed a chilling effect on the press, reminiscent of the notorious Sedition Act of 1798.[34] The *Sullivan* decision provided much needed "breathing space"[35] by requiring that public officials prove the publisher acted with "actual malice" to succeed in a defamation claim.[36] This breathing space was deemed necessary to ensure "uninhibited, robust, and wide-open" debate on public issues, regardless of the attacks on public officials it may invite.[37] With the Court's insistence that the First Amendment protected speech concerning public officials who had been elected or appointed to government office, it swiftly transformed the defamation landscape into one that supported the institutional press in its capacity as the Fourth Estate.[38]

The landmark decision in *Sullivan* paved the way for continued expansion of First Amendment protections for freedom of speech, eventually making it nearly impossible for plaintiffs who had to prove actual malice to succeed. Following the Court's unanimous decisions in *Sullivan,* it broadened the application of the actual malice doctrine in *Garrison v. Louisiana* (criminal defamation cases),[39] *Time, Inc. v. Hill* (false light privacy tort),[40] and *Curtis Publishing Co. v. Butts* (public figure defamation plaintiffs).[41] Extending the actual malice rule beyond the realm

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[34] *See, e.g.*, *id.* at 277 (majority opinion) ("The judgment awarded in this case—without the need for any proof of actual pecuniary loss—was one thousand times greater than the maximum fine provided by the Alabama criminal statute, and one hundred times greater than that provided by the Sedition Act.")*; see also* Curtis Publ'g Co. v. Butts, 388 U.S. 130, 153 (1967) (plurality opinion) ("In *New York Times*, we were adjudicating in an area which lay close to seditious libel, and history dictated extreme caution in imposing liability.").

[35] NAACP v. Button, 371 U.S. 415, 433 (1963).

[36] *Sullivan*, 376 U.S. at 279–80.

[37] *Id.* at 270; *see also* Dun & Bradstreet, Inc. v. Greenmoss Builders, 472 U.S. 749, 766 (1985) (White, J., concurring) (citing *Sullivan*, 376 U.S. at 270).

[38] William Hazlitt first used the term 'Fourth Estate' to describe a journalist that "'lays waste' a city orator or Member of Parliament, and bears hard upon the government itself," or more simply a "fearsome and fearless journalist who tore into established powers." William Safire, *The One-Man Fourth Estate*, N.Y. TIMES (June 6, 1982), https://www.nytimes.com/1982/06/06/books/the-one-man-fourth-estate.html.

[39] 379 U.S. 64 (1964) (holding that a criminal libel statute may only criminalize the defamatory statements if they were made with actual malice).

[40] 385 U.S. 374 (1967) (holding that the actual malice standard applies to false light invasion of privacy cases dealing with matters of public concern).

[41] 388 U.S. 130 (1967) (plurality opinion).

of public officials to include public figures[42] required the Court to acknowledge the intertwined, but competing interests:

> These similarities and differences between libel actions involving persons who are public officials and libel actions involving those circumstanced as were Butts and Walker, viewed in light of the principles of liability which are of general applicability in our society, lead us to the conclusion that libel actions of the present kind cannot be left entirely to state libel laws, unlimited by any overriding constitutional safeguard, but that the rigorous federal requirements of *New York Times* are not the only appropriate accommodation of the conflicting interests at stake.[43]

In the years following *Sullivan,* the Court demonstrated a strong commitment to the protection of speech it believed was critical for democratic discourse, and the institutional press—who often footed the bill as defendants in the litigation—no doubt benefited as a result.

A mere seven years after *Sullivan,* the United States reached its high-water mark in the protection of speech. The natural next step seemed to be extending the protections of *Sullivan* to speakers discussing matters of public concern, and a plurality of the Court did so.[44] In the short-lived *Rosenbloom v. Metromedia* decision, four justices believed that private plaintiffs should be required to prove actual malice in defamation cases where the speech at issue relates to a matter of public concern. Justice William J. Brennan, who authored majority opinions in *Sullivan*, *Garrison*, *Hill*, and *Rosenbloom*, opined that "[d]rawing a distinction between 'public' and 'private' figures makes no sense

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[42] *See id.* at 134 ("We brought these two cases here to consider the impact of that decision on libel actions instituted by persons who are not public officials, but who are 'public figures' and involved in issues in which the public has a justified and important interest.") (citation omitted).

[43] *Id.* at 155.

[44] *See* Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 43 (1971) ("If a matter is a subject of public or general interest, it cannot suddenly become less so merely because a private individual is involved, or because in some sense the individual did not 'voluntarily' choose to become involved.").

in terms of the First Amendment guarantees,"[45] and that, when seeking recourse for defamatory statements, "the solution lies in the direction of ensuring their ability to respond, rather than in stifling public discussion of matters of public concern."[46] But with Justice William Douglas not participating, Brennan could not garner a majority in *Rosenbloom,* and the high water quickly receded.

III. JUSTICE LEWIS F. POWELL JOINS THE COURT

The death of Justice Hugo Black marked a changing of the guard at the U.S. Supreme Court—at least as far as the First Amendment is concerned. A staunch advocate of free speech and free press, Black left no questions regarding his First Amendment and defamation law ideologies. In *Sullivan*, Black opined that there was "[a]n unconditional right to say what one pleases about public affairs,"[47] eventually going as far as to say that falsities broadcast with knowledge should be protected in *Rosenbloom*.[48] There was not a circumstance for which Black would change his view. In fact, Black found there to be no qualifications on the right to free speech, arguing the right was at the heart of the Bill of Rights.[49] Combined with consistent support from Justice William O. Douglas, and an often-reliable agreement from Justice Brennan, the trio significantly advanced constitutional protections for freedom of expression. But Justice Black's absolutism was replaced by Justice Lewis F. Powell's more reserved position.

Regarded by many to be the embodiment of the stereotypical "Southern gentleman,"[50] Justice Powell placed a deep significance on the values of personal reputation and community. Powell's former clerks, those who claim to have best

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[45] *Id.* at 45–46. Justice Brennan believed there need not be a distinction between private and public figures because, "[i]f a matter is a subject of public or general interest, it cannot suddenly become less so merely because a private individual is involved, or because in some sense the individual did not 'voluntarily' choose to become involved." *Id.* at 43.

[46] *Id.* at 47.

[47] N.Y. Times v. Sullivan, 376 U.S. 254, 297 (1964) (Black, J., concurring).

[48] *See Rosenbloom*, 403 U.S. at 57 (Black, J., concurring) ("[I]n my view, the First Amendment does not permit the recovery of libel judgments against the news media even when statements are broadcast with knowledge they are false.").

[49] *See* Hugo L. Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865, 880–81 (1960).

[50] The American Bar Association Journal published a profile on retired Justice Lewis Powell, in which the author wrote that Powell had been referred to as the "Southern gentleman" so often that it was almost as if it was a part of his name. *See* McAllister, *supra* note 27, at 48.

known the man behind the robe, have often shared similar sentiments about him. One clerk found his jurisprudence to emphasize the "communal aspects of individual life, the expression of human variety through community."[51] Court of Appeals Judge Harvie Wilkinson III, another former Powell clerk, argued that "[t]hose institutions bearing intimately on the individual's private life" were just as important to Powell as public ones.[52] These beliefs are echoed throughout Justice Powell's writings. He preferred a private life and saw his personal work to be not particularly significant or deserving of acclaim, even considering his legacy as a Supreme Court justice to, at best, find its end in the footnotes of history.[53] Powell, who was known to be "thin-skinned on matters of personal honor or dedication to duty"[54] and "so deeply sensitive to the hurt or embarrassment of another,"[55] emblazoned this reverence for modesty and reputation on his defamation opinions. To Powell, the intensifying concern that the media, including "every scandal monger,"[56] could permanently destroy the reputation of any given individual was omnipresent.

Justice Powell joined the Court almost a decade after the *Sullivan* decision instituted the 'actual malice' rule, but he would only wait a few years before leaving his imprint on defamation law. His intentions in doing so—or more accurately, halting the advancement of the constitutionalization of defamation law—were made plenty clear early on in his tenure when the Court granted *certiorari* in *Gertz v. Welch*:

> I voted to grant cert in this case because I believe the Court has gone too far already in protecting the First Amendment rights of the media as against the individual rights (whether characterized as a right of privacy or the common

[51] Christina B. Whitman, *Individual and Community: An Appreciation of Mr. Justice Powell*, 68 VA. L. REV. 303, 303 (1982).
[52] J. HARVIE WILKINSON, III, SERVING JUSTICE: A SUPREME COURT CLERK'S VIEW 106 (1974).
[53] *See* McAllister, *supra* note 27, at 51.
[54] JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR.: A BIOGRAPHY 278 (1994).
[55] WILKINSON, III, *supra* note 52, at 109–10.
[56] This Article makes several references to notes, letters, and memoranda from the Supreme Court Case Files contained in the Justice Lewis F. Powell Jr. Papers (on file with the Washington and Lee University School of Law in Lewis F. Powell, Jr. Papers, Supreme Court Case Files, Powell Archives, 72-617 Gertz v. Robert Welch, Inc.) [hereinafter *Gertz* File, Powell Papers]. Notes from Justice Powell on Memorandum from Clerk 1 (Feb. 14, 1973), *in Gertz* File, Powell Papers.

> law right not to be defamed) of individuals who may be permanently damaged or quite literally destroyed by the powerful news media.[57]

Justice Brennan's plurality in *Rosenbloom* had pointed the Court's jurisprudence sharply in the direction of protecting more expression by requiring all plaintiffs to prove actual malice in defamation cases involving matters of "public concern."[58] With *Rosenbloom,* the Court drifted away from its interest in protecting individual reputations. But Justice Powell quickly tamped out any momentum that *Rosenbloom* had stirred up.[59] Justice Powell's monumental collection of personal papers, which included everything from memoranda between justices, to notes to his clerks, and red-lined draft opinions, evidenced his grave concern about burgeoning First Amendment protections. Further, Justice Powell was adamant that defamed plaintiffs need to have the ability to recover damages, which his opinions make apparent.

A. Getting Down to Business in Gertz v. Welch

Less than two years after he replaced the Court's renowned guardian of the First Amendment, Justice Powell heard oral argument in *Gertz v. Welch*. The case involved a reputable lawyer, neither a public figure nor a public official as the Court had previously defined them, who had become involved in noteworthy civil litigation. The lower courts both applied the *Sullivan* actual malice standard to Elmer Gertz's defamation claim, citing the Court's holding in *Rosenbloom* and the "public interest" of the situation in which Gertz had inserted himself.[60] For the lower courts, the lawyer's status as a private individual had little relevance to the matter at hand. But Justice Powell's majority decision in the case provided a stiff course correction from *Rosenbloom,* rejecting the idea that the First Amendment required private plaintiffs to prove actual malice. The tension between the unalienable First Amendment free expression rights and the valid state interest in protecting

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[57] Summer Memorandum from Justice Powell 5 (July 6, 1973), *in Gertz* File, Powell Papers, *supra* note 56. It was known where Justice Powell stood on the matter of *Gertz* by the time he wrote his preliminary memo. *See id.* at 5–6.

[58] *See* Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 43 (1971).

[59] Justice Powell even seemed eager to take on and overturn *Rosenbloom*, remarking before the Court granted certiorari, "[i]f 5 judges are willing to reconsider Rosenbloom, I'd certainly join them." Notes from Justice Powell on Memorandum from Clerk 1 (Feb. 14, 1973), *in Gertz* File, Powell Papers, *supra* note 56.

[60] *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 327 (1974).

individual reputations was unavoidable[61] despite the Court's recent decisions consistently reaffirming and extending the *Sullivan* rule.[62] But, to Powell, a more equitable balancing of the interests was long overdue.[63]

In his preliminary memorandum for *Gertz*, Justice Powell showed grave concern over the direction of the Court's defamation jurisprudence, arguing that "the Court has been pursuing its own logic to what may well be the ultimate conclusion of abolishing the law of libel altogether."[64] After the *Rosenbloom* decision, Powell's fears had been greatly escalated.[65] And he was not the only justice to raise concerns about the possible overextension of the *Sullivan* rule.[66] In a reply to Justice Byron White, Powell remarked that, "[t]he one clear impression from my notes and memory is that the Conference wished to disavow the extension of *New York Times* proposed by the

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[61] *See* Summer Memorandum from Justice Powell 5 (July 6, 1973), *in Gertz* File, Powell Papers, *supra* note 56. ("Everyone concedes that there is 'tension'—if not a head-on conflict—between the competing interests and rights, and drawing any rational line has proved so far to be extremely difficult.").

[62] *See, e.g.*, Curtis Publ'g Co. v. Butts, 388 U.S. 130, 152 (1967) (plurality opinion) ("[S]ome antithesis between freedom of speech and press and libel actions persists, for libel remains premised on the content of speech and limits the freedom of the publisher to express certain sentiments, at least without guaranteeing legal proof of their substantial accuracy."); *see also* Rosenblatt v. Baer, 383 U.S. 75, 86 (1966) ("Society has a pervasive and strong interest in preventing and redressing attacks upon reputation. But in cases like the present, there is tension between this interest and the values nurtured by the First and Fourteenth Amendments.").

[63] *See* Summer Memorandum from Justice Powell 6 (July 6, 1973), *in Gertz* File, Powell Papers, *supra* note 56. ("Thus, I want my law clerk (assigned to this case) to endeavor to find a more rational adjustment between the competing interests than has yet been articulated.").

[64] *Id.* at 5.

[65] After reading the briefs for *Gertz*, Justice Powell noted his agreement with Court of Appeals Judge Roger Kiley on how defamation law had extended too far. *See id.* at 6 ("Judge Kiley, concurring in the CA 7 opinion, shares my own concern. He stated his 'fear that we may have in this opinion pushed through what I consider the outer limits of the First Amendment protection against liability for libelous statements and have further eroded the interest of non-public figures in their personal privacy.'").

[66] Justice Powell's notes from a conference on November 14, 1973 discussing *Gertz* shows a shared sense of dislike for the *Rosenbloom* holding, as Justice White "disagree[d] totally with Rosenbloom—as does Potter [Stewart]," who also thought that the "Court ha[d] gone too far in extending N.Y. Times." Judge Powell's Conference Notes (Nov. 14, 1973), *in Gertz* File, Powell Papers, *supra* note 56. Even before *Gertz,* Justice Harlan acknowledged in *Curtis* that, compared to *Sullivan* providing "constitutionally adequate protection only in a limited field," it would be "equally unfortunate" for the *Sullivan* rule to go as "far to immunize the press from having to make just reparation for the infliction of needless injury upon honor and reputation through false publication." *Curtis*, 388 U.S. at 135. Harlan then went on to argue in *Curtis* that considering the *Sullivan* rule "as being applicable throughout the realm of the broader constitutional interest, would be to attribute to this aspect of *New York Times* an unintended inexorability." *Id.* at 148.

Rosenbloom plurality opinion."[67] Justice Brennan, author of the plurality, also joined the discussion when, according to Powell, Brennan said he hoped his past decision would be reversed to better clarify the law for the press.[68] Even with disapproval for *Rosenbloom* brewing in the chambers of the Court, Powell was still forced to temper his own criticisms and compromise to garner the slim 5–4 majority[69]—a challenge he noted to Chief Justice Burger:

> I did find it difficult to reconcile all views and to judge how far a majority of the Court would be willing to go in reversing the strong tide toward near-total abrogation of the individual's opportunity to recover for libel in favor of the stringent demands of the New York Times rule.[70]

Ultimately, Powell's published opinion in *Gertz* represented a "pull-back from the expansive plurality in *Rosenbloom v. Metromedia, Inc.*, which had virtually obliterated the common law of defamation."[71] If *Rosenbloom* were to remain law, Powell believed the doctrine "would destroy entirely the law of libel."[72] But by acknowledging in *Gertz* that private individuals are "more vulnerable to injury" than public officials or public figures,[73] Powell and the Court significantly shifted the momentum in favor of the state's interest in protecting an individual's reputation.[74]

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[67] Letter from Justice Powell to Justice White 2 (Jan. 18, 1974), *in Gertz* File, Powell Papers, *supra* note 56.

[68] *See* Justice Powell's Conference Notes (Nov. 14, 1973), *in Gertz* File, Powell Papers, *supra* note 56.

[69] In a letter to Chief Justice Burger addressing Powell's draft circulation, Powell noted compromising his own views to avoid fragmenting the Court. Letter from Justice Powell to Chief Justice Burger 3 (Jan. 4, 1974), *in Gertz* File, Powell Papers, *supra* note 56. ("I approached the writing of the opinion with a view to what seemed possible in obtaining agreement among five Justices on a coherent theory of the law of libel and the First Amendment. In taking this approach I compromised somewhat my own views in the interest of obtaining a majority opinion rather than continuing the fragmentation of the Court.").

[70] *Id.* at 1.

[71] Michael Hadley, *The Gertz Doctrine and Internet Defamation*, 84 VA. L. REV. 477, 499 (1998).

[72] Letter from Justice Powell to Chief Justice Burger 2 (Jan. 4, 1974), *in Gertz* File, Powell Papers, *supra* note 56.

[73] Gertz v. Robert Welch, Inc., 418 U.S. 323, 344 (1974).

[74] The same day that Powell spoke for the Court in *Gertz*, he delivered a dissenting opinion in *Old Dominion Branch v. Austin*, in which he referred to the Court's holding as "needless denigration of the 'overriding state interest' in compensating individuals for injury to reputation." Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin, 418 U.S. 264, 295 (1974) (Powell, J., dissenting).

B. Dismantling Defamation Protections in Dun & Bradstreet v. Greenmoss Builders

Despite Justice Powell finding *Dun & Bradstreet* to be an undesirable case to address whether to extend *Gertz* to non-media defendants,[75] Powell's plurality opinion further tilted the balance of defamation law toward private plaintiffs and their reputations. From the moment the Court granted *certiorari*, Powell was transparent about his hope of avoiding further "intruding in state law."[76] In correspondence with Justice White addressing White's concerns with one of Powell's draft opinions, Powell did not shy away from the gravity of the situation: "The question of whether the entire law of defamation should be constitutionalized clearly is before us and needs to be decided."[77] Eleven years prior, Powell had used *Gertz* to overturn *Rosenbloom* and stop the Court in its tracks. There, he asserted that the Court would "doubt the wisdom" of leaving the "public concern" test to the conscience of judges, and that such a test "inadequately serves both of the competing values at stake."[78] In Powell's view, any test to determine whether defamatory statements are of public concern would be inherently flawed.[79] The courts would almost always be forced to defer to the institutional press based on the simple fact that the press, through its editorial discretion and agenda-setting function, determines what is newsworthy.[80]

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[75] This Article also makes several references to notes, letters, and memoranda from another case file, 83-18 Dun & Bradstreet v. Greenmoss, within the Supreme Court Case Files contained in the Justice Lewis F. Powell Jr. Papers (on file with the Washington and Lee University School of Law in Lewis F. Powell, Jr. Papers, Supreme Court Case Files, Powell Archives, 83-18 Dun & Bradstreet v. Greenmoss) [hereinafter *Dun & Bradstreet* File, Powell Papers]. Notes from Justice Powell on Preliminary Memorandum from Clerk 1 (Sept. 26, 1983), *in Dun & Bradstreet* File, Powell Papers. ("Deny—not a good case to address Q."). Powell and his clerk both believed that *Gertz* did not apply to this case and, thus, feared that the Court would further constitutionalize defamation law. *See id.* at 1, 4, 6–7.

[76] *Id.* at 8.

[77] Letter from Justice Powell to Justice White (June 18, 1984), *in Dun & Bradstreet* File, Powell Papers, *supra* note 75.

[78] *Gertz*, 418 U.S. at 346.

[79] Justice Powell tasked his clerk to add a footnote to his draft opinion of *Gertz* detailing the "inherent flaw in the *Rosenbloom* test of whether a 'general or public interest' issue is involved," which he referred to as "a strong point in his view." Notes from Justice Powell to Clerk on Draft Opinion 28 (Dec. 13, 1973), *in Gertz* File, Powell Papers, *supra* note 56.

[80] Powell initially raised the question of "[w]hat determines when a matter is of 'public or general' concern" when taking notes on his clerk's brief for *Gertz*. *See* Notes from Justice Powell on Memorandum from Clerk 16 (Sept. 19, 1973), *in Gertz* File, Powell Papers, *supra* note 56. Under the same note, Powell directed his clerk to

Nevertheless, when a credit reporting agency came before the Court seeking to recoup $300,000 in punitive damages, Powell shifted course, favoring an *ad hoc* approach for determining whether such damages were appropriate. This shift would not be immediate, however, with Powell initially pondering voting to dismiss *Dun & Bradstreet* as improvidently granted after his reluctant vote to grant in the first place.[81] It appears to be a suggestion from Justice John Paul Stevens that provided Powell with a glimpse of hope for the case, by stating that the Court "may be able to identify some subclass between the typical media defendant and the common law libel suit between private individuals."[82] Powell emphasized clear differences between Dun & Bradstreet and the typical defamation defendant, finding the former to belong to a "specialized category of disseminators of information."[83] Combining the status of the defendant with the commercial nature of the speech and his hesitancy to overstep state law, Powell saw a tangential constitutional interest and advocated for avoiding further constitutionalization:[84]

> It can be argued quite reasonably that Dun & Bradstreet owes a higher duty than the press. It is in the business—not of serving the need in a democracy for a forum in which issues and ideas may be debated—but of making money by selling sensitive credit information. It would not be irrational at all to hold it to strict liability.[85]

"[Harry] Kalven's comment," *id.*, in which Kalven argued that "the courts will not, and indeed cannot, be arbiters of what is newsworthy." Harry Kalven, *The Reasonable Man and the First Amendment:* Hill*,* Butts*, and* Walker, 1967 SUP. CT. REV. 267, 283–84 (1967). Powell even cited this article in his final opinion, *see Gertz*, 418 U.S. at 336 n.7.

[81] *See* Unsent Letter From Justice Powell to Justice John Paul Stevens & Justice O'Connor 1 (Mar. 23, 1984), *in Dun & Bradstreet* File, Powell Papers, *supra* note 75 ("The discussion this afternoon of the above case suggests that the best solution is to DIG [dismiss as improvidently granted] a case we should not have taken.").

[82] *Id.* Powell went on to emphasize the uniqueness of this case, writing, "the more I think about this case the less willing I am to categorize it as within either of the traditional classifications of libel cases." *Id.*

[83] Letter from Justice Powell to Chief Justice Burger (Mar. 28, 1984), *in Dun & Bradstreet* File, Powell Papers, *supra* note 75.

[84] Letter from Justice Powell to Justice White (June 18, 1984), *in Dun & Bradstreet* File, Powell Papers, *supra* note 75.

[85] Unsent Letter from Justice Powell to Justice John Paul Stevens and Justice O'Connor 1 (Mar. 23, 1984), *in Dun & Bradstreet* File, Powell Papers, *supra* note 75.

But, in another effort to obtain the necessary votes, Powell was forced to back away from his stricter criticisms and preferences. The Court had settled on re-argument after confusion at whether the issue of *Gertz* applying to non-media defendants was squarely in front of them. This time around, Powell was met with opposition from the Chief Justice—a vote Powell needed to obtain a majority—who threatened to write an opinion by himself due to the continued media/non-media distinction in Powell's circulations.[86] Powell's draft the term before had failed to adequately address "whether the constitutional rule applies with equal force regardless of the nature of speech,"[87] so Powell instead refocused on "decid[ing] this case on its facts"[88] and turning the case on "the nature of the speech rather than who the parties are."[89] The question of whether *Sullivan* and *Gertz* "should apply where the speech is of a commercial or economic nature" needed to be addressed directly by the Court,[90] and Powell had already made clear his belief that the First Amendment interest in private speech is naturally lower.[91] Powell once tasked lower courts with determining whether a plaintiff was a public or private figure in *Gertz*, and now he just needed to take one step further with public and private speech. Justice Sandra Day O'Connor laid out the strategy:

> [T]here appears to be possible agreement by you, Byron, the Chief, Bill Rehnquist, and me that the *Gertz* standards apply at most to expression related

[86] Letter from Chief Justice Burger to Justice Powell (Dec. 27, 1984), *in Dun & Bradstreet* File, Powell Papers, *supra* note 75.
[87] Memorandum from Justice Powell to the Conference (June 27, 1984), *in Dun & Bradstreet* File, Powell Papers, *supra* note 75.
[88] Memorandum from Justice Powell to Himself 3 (Mar. 4, 1985), *in Dun & Bradstreet* File, Powell Papers, *supra* note 75.
[89] Letter from Justice Powell to Chief Justice Burger 1 (Dec. 29, 1984), *in Dun & Bradstreet File*, Powell Papers, *supra* note 75.
[90] Memorandum from Justice Powell to the Conference (June 27, 1984), *in Dun & Bradstreet* File, Powell Papers, *supra* note 75. Justice Powell and Justice Brennan came together to suggest this question for the reargument, as well as the question of whether the precedents apply to a non-media defendant that was already included. *See id.* Justice White, Justice O'Connor, and Chief Justice Burger all explicitly agreed to this formulation of questions in letters to Powell. *See* Note from Justice White to the Conference (June 28, 1984), *in Dun & Bradstreet* File, Powell Papers, *supra* note 75; *see* Note from Justice O'Connor to the Conference (June 27, 1984), *in Dun & Bradstreet* File, Powell Papers, *supra* note 75; *see* Note from Chief Justice Burger to the Conference (July 2, 1984), *in Dun & Bradstreet* File, Powell Papers, *supra* note 75.
[91] Memorandum from Justice Powell to Clerks 5 (June 1, 1984), *in Dun & Bradstreet* File, Powell Papers, *supra* note 75. ("The First Amendment interest in protecting private speech is less than in a public speech.").

> to matters of public importance . . . If we were all to agree that the nature of the speech, rather than the nature of the speaker, determines whether *Gertz* applies, I believe we could then also agree this case should be affirmed, at least in part.[92]

Justice Powell's stark change in direction a decade later—from counseling against judges considering the content of speech to advocating for them to consider the type of speech—makes more sense once we take into account the regrets he expressed about *Gertz*. Privately, Powell found his opinion in *Gertz* to be "far too long and unnecessarily broad in its sweep."[93] In a memo to himself, he even admitted that much of his opinion was dicta.[94] An obvious catalyst of Powell's regret was his oft-misunderstood dictum that, "[u]nder the First Amendment there is no such thing as a false idea,"[95] which permeated subsequent court opinions favoring media defendants who faced claims of defamation.[96] Given his concerns about growing press protections, it's clear Powell never intended the statement to be used as a means of protecting defamatory statements. But he acknowledged the inconsistencies in his differing approaches for *Gertz* and *Dun & Bradstreet*,[97] reconciling them by arguing that this distinction, unlike the *Rosenbloom* test, was simple enough for a judge to determine, making it "entirely appropriate" to leave some of defamation law "to case-by-case development."[98] And

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[92] Letter from Justice O'Connor to Justice Powell 1 (Jan. 22, 1985), *in Dun & Bradstreet* File, Powell Papers, *supra* note 75.

[93] Lee Levine & Stephen Wermiel, *The Landmark That Wasn't: A First Amendment Play in Five Acts*, 88 WASH. L. REV. 1, 45 (2013).

[94] *See* Memorandum from Justice Powell to Himself 1–2 (Mar. 4, 1985), *in Dun & Bradstreet* File, Powell Papers, *supra* note 75 ("As I view it now, my opinion in *Gertz* is an example of overwriting a Court opinion. I said much that was unnecessary to a decision of that case. A large part of *Gertz* is dicta.").

[95] Gertz v. Robert Welch, Inc., 418 U.S. 323, 339 (1974).

[96] *See, e.g.*, Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990); *see also* Hustler Magazine, Inc. v. Falwell, 485 U.S. 46 (1988).

[97] *See* POWELL CLERKS, THE POWELL CHAMBERS 52 (1987) ("The Justice was clear that the First Amendment could not be said to protect the credit reporting at issue there [in *Dun & Bradstreet*], but there was language in the Justice's earlier opinion in *Gertz* that seemed to suggest the other result."). Justice Powell even addressed the concerns of a test in *Gertz*'s oral arguments. *See* ELMER GERTZ, GERTZ V. ROBERT WELCH, INC.: THE STORY OF A LANDMARK LIBEL CASE 95 (1992) ("You made a statement that there was no public or general interest in the representation in the civil suit by Mr. Gertz. Who determines whether or not there is a public or general interest in a libelous statement?").

[98] Letter from Justice Powell to Justice White (June 18, 1984), *in Dun & Bradstreet* File, Powell Papers, *supra* note 75. ("Nor do I think the lines between media and nonmedia, and between commercial speech and other speech, would be difficult to

Judge Wilkinson III's recollection of Powell's tenure makes clear that this inconsistency is nothing unique to *Dun & Bradstreet*: "Some of his votes are not easy to reconcile. Some of his theory is not seamlessly consistent. For those who seek a comprehensive vision of constitutional law, Justice Powell will not have provided it."[99] Regardless, Justice Powell's arrival on the Court would dramatically upend the once-consistent direction of libel law.

IV. A PRESCIENT JUSTICE POWELL

The current attacks on *Sullivan*'s actual malice standard demonstrated Justice Powell's clairvoyance. Writing in the 1970s, Powell certainly could not have anticipated the technological developments that have revolutionized modern communication. Today, anyone with access to the internet has the ability to reach millions of people; we are no longer dependent on the institutional press to reach a large-scale audience. Similarly, the shortest viral video has the potential to instantly transform an everyday citizen into an involuntary public figure—one of the key issues that would have been litigated in Covington Catholic High School student Nicholas Sandmann's case had he not agreed to settle his multimillion-dollar defamation lawsuits against CNN and the Washington Post.[100] Cognizant of today's reality, Justice Neil Gorsuch recently shared his concerns, citing lower court decisions deeming as public figures plaintiffs who would otherwise have been private figures save the hands of the internet.[101] But Justice

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draw in most cases. These are not unfamiliar concepts, and there is no reason to think judges would be unable to apply them. It is entirely appropriate that we leave some part of this area of the law to case-by-case development.").

[99] John C. Jeffries, *The Art of Judicial Selection*, *in* AM. COLL. OF TRIAL LAWS. LEWIS F. POWELL, JR. LECTURE SERIES 6, 13 (1993).

[100] *See* Darcy, *supra* note 2.

[101] Berisha v. Lawson, 141 S. Ct. 2424, 2429 (2021) (Gorsuch, J., dissenting from the denial of certiorari) ("But today's world casts a new light on these judgments as well. Now, private citizens can become 'public figures' on social media overnight. Individuals can be deemed 'famous' because of their notoriety in certain channels of our now-highly segmented media even as they remain unknown in most."). *See, e.g.*, Hibdon v. Grabowski, 195 S.W.3d 48, 59, 62 (Tenn. Ct. App. 2005) (holding that an individual was a limited-purpose public figure in part because he "entered into the jet ski business and voluntarily advertised on the news group *rec.sport.jetski*, an Internet site that is accessible worldwide."). Lower courts have even said that an individual can become a limited purpose public figure simply by *defending* himself from a defamatory statement. *See* Berisha v. Lawson, 973 F.3d 1304, 1311 (11th Cir. 2020). Other persons, such as victims of sexual assault seeking to confront their assailants, might choose to enter the public square only reluctantly and yet wind up treated as

Powell's insistence decades ago on shifting the balance back toward the protection of individual reputation offers some semblance of security for private plaintiffs in an era of mass data collection, anonymous trolling, and cheaply made deep fakes.

Although he could not have imagined the impact of the internet on the spread of misinformation and disinformation, Justice Powell anticipated the importance of protecting private figures from the power wielded by today's media institutions. To be fair, Justice Brennan, who championed free expression and wrote for the Court in *Sullivan*, acknowledged these difficulties—decades before the mass adoption of the internet and pervasive use of social media: "[I]t is the rare case where the denial overtakes the original charge. Denials, retractions, and corrections are not 'hot' news, and rarely receive the prominence of the original story."[102] Justice Powell was focused on the press' gate-keeping function when he authored *Gertz,* but his words remain relevant in the social media era: "Public officials and public figures usually enjoy significantly greater access to the channels of effective communication, and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy."[103] Today, the concern is no longer about whether private plaintiffs have the ability to access the media to rehabilitate their reputations—instead, we must worry about whether a truthful response could ever catch up to the defamatory statement.

Powell's archival papers provide valuable insight into the process of formulating his *Gertz* and *Dun & Bradstreet* opinions. Powell's correspondence, memoranda, and the draft opinions he shared among the justices illuminate his concerns about the Court's earlier defamation jurisprudence, precedent he viewed as providing near-total protection for any false statements not made with actual malice. Justice Powell argued from the beginning of *Dun & Bradstreet* that *Gertz* did not apply to non-media defendants.[104] He argued the same position again during the

limited purpose public figures too. *See* McKee v. Cosby, 139 S. Ct. 675, 675 (2019) (Thomas, J., concurring in the denial of certiorari). *Cf.* Amy K. Sanders & Holly Miller, *Revitalizing Rosenbloom: The Matter of Public Concern Standard in the Age of the Internet*, 12 First Amend. L. Rev. 529 (2014).

[102] Rosenbloom v. Metromedia, 403 U.S. 29, 46 (1971).

[103] Gertz v. Robert Welch, Inc., 418 U.S. 323, 344 (1974).

[104] *See* Notes from Justice Powell on Preliminary Memorandum from Clerk 1 (Sept. 26, 1983), *in Dun & Bradstreet* File, Powell Papers, *supra* note 75 ("*Gertz* as written applied only to private defamation suits vs media defendants—a 1st Amend[ment] related decision.").

drafting of his *Gertz* opinion in a letter to Justice White, which foreshadowed his *Dun & Bradstreet* opinion more than a decade later:

> I assumed that we were addressing only First Amendment rights of the press. As I understand New York Times and its progeny, these decisions do not control the application of the law of defamation to libellous [sic] statements made by non-media speakers. The balancing of public and private interests may be different where the defendant may not fairly be deemed a part of the media, especially where the non-media defendant is not a public official or candidate for public office.[105]

When *Dun & Bradstreet* finally came before the Court though, he hoped to convince the rest of the justices that the defendant's status mattered.

V. WHAT JUSTICE POWELL REALLY THOUGHT ABOUT THE FIRST AMENDMENT

It is said you cannot judge a book by its cover, but in this instance, you cannot judge a judge merely by his opinions. Compared to his somewhat neutral Court opinions, Powell's papers reveal much more critical views of the First Amendment's protections for defamation. In a letter to Chief Justice Burger that Powell drafted before the *Dun & Bradstreet* conference, Powell vehemently opposed "choos[ing] this case as a vehicle for constitutionalizing the entire law of libel."[106] In his *Gertz* preliminary memo, Powell even appeared to ponder a return to English common law defamation, praising the English's ability to keep a "vigorous, unfettered press" while retaining "the law of libel in full vigor."[107] Powell's view of the First Amendment stood in stark contrast to his predecessor's. It was Justice Black who famously wrote that the *Sullivan* standard did not go far

[105] Letter from Justice Powell to Justice White 1–2 (Jan. 18, 1974), *in Gertz* File, Powell Papers, *supra* note 56.
[106] Letter from Justice Powell to Chief Justice Burger (Mar. 28, 1984), *in Dun & Bradstreet* File, Powell Papers, *supra* note 75.
[107] Summer Memorandum from Justice Powell 5–6 (July 6, 1973), *in Gertz* File, Powell Papers, *supra* note 56. ("The English—who certainly have a civilized system and a free and vigorous, unfettered press—still retain the law of libel in full vigor, even putting newspaper editors and publishers behind bars.").

enough, noting in *Curtis Publishing* that it "seriously menaces the very life of press freedom."[108] Powell's personal papers leave no doubts where he stood on First Amendment protections for free expression, placing him squarely in opposition to Justice Black's absolutist stance. In Powell's view, Black displayed "[c]onceptual clarity but [was] in total disregard of history + what [the] 1st Amend[ment] meant for more than a century."[109] Interestingly, Powell even distanced himself from Justice Brennan's "middle ground" position.[110] Taken in its context, Powell's swearing-in represented something much more than simply filling a vacant seat on the Court—at least as far as the First Amendment was concerned. Instead, the changing of the guard ushered in a nearly 180-degree pivot in the Court's defamation jurisprudence. After all, the Court had decided *Rosenbloom*—a case that Powell thought "extend[ed] *Sullivan* too far"[111]—just seven months prior to his swearing-in.

Behind closed doors[112] and in both his *Gertz* and *Dun & Bradstreet* opinions, Justice Powell embraced Justice Stewart's concurrence in *Rosenblatt v. Baer*[113] and Justice Harlan's dissent in *Rosenbloom*.[114] Both opinions clearly resonated with Powell. He and his clerks made reference to the opinions multiple times throughout the case deliberations, undoubtedly influencing his

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[108] Curtis Publ'g. Co. v. Butts, 388 U.S. 130, 171 (1967) (Black, J., dissenting and concurring).

[109] Notes from Justice Powell on Memorandum from Clerk 14 (Sept. 19, 1973), *in Gertz* File, Powell Papers, *supra* note 56.

[110] *Id.* at 15 (citing a memo dated less than a week after the *Gertz* oral argument, John C. Jeffries, Powell's clerk on the case, referred to Justice Brennan's defamation jurisprudence as "charting a middle course," but J. Powell wrote "not for me" next to the description).

[111] Notes from Justice Powell on Clerk's Initial Case Brief 1 (Dec. 10, 1972), *in Gertz* File, Powell Papers, supra note 56.

[112] Justice Powell directed his clerks to look into both Stewart's concurrence and Harlan's dissent. *See* Summer Memorandum from Justice Powell 6 (July 6, 1973), *in Gertz* File, Powell Papers, *supra* note 56. Annotating a brief from his clerk on Harlan's opinion, Powell wrote notes signifying his agreement. *See* Notes from Justice Powell on Memorandum from Clerk 18–23 (Sept. 19, 1973), *in Gertz* File, Powell Papers, *supra* note 56. Powell showed the same sense of respect for Stewart's prior opinions in defamation law. *See id.* at 7–8. Powell also instructed his clerks to research Stewart's concurrence in *Rosenblatt*. *See* Summer Memorandum from Justice Powell 6 (July 6, 1973), *in Gertz* File, Powell Papers, *supra* note 56.

[113] *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 341 (1974); *see also* Dun & Bradstreet, Inc. v. Greenmoss Builders, 472 U.S. 749, 757–58 (1985); *see also* Rosenblatt v. Baer, 383 U.S. 75, 91–93 (1966) (Stewart, J., concurring) (concurring that state defamation laws may not be converted into laws against seditious libel, but arguing that is the only situation where the *Sullivan* rule should be applied).

[114] *See Gertz*, 418 U.S. at 338–39, 343. *See* Rosenbloom v. Metromedia, 403 U.S. 29, 62 (1971) (Harlan, J., dissenting) (arguing that states should be able to determine their own libel laws for private plaintiffs).

thoughts on the matter and ultimately his majority opinion. Powell's approach is not particularly surprising given his and Justice Stewart's admiration of Justice Harlan:

> Stewart and Powell even had the same judicial hero. As a junior Justice on the Warren Court, Stewart allied himself with John Harlan. Though Powell never sat with Harlan, he took him as the model of what a judge should be—a fair-minded arbiter of disputes, carefully adapting past precedents to present realities in a process more pragmatic than ideological. This tradition was handed down from Harlan to Stewart to Powell.[115]

As a result, Powell consciously sought to mimic Harlan,[116] attempting to find the right balance in contentious cases by relying upon "a close calculus of competing interests and risks."[117] He followed the so-called "Harlan legacy," crafting a defamation law jurisprudence "devoid of simplistic rules and categorical answers," and instead drawing attention to the rich complexities of the cases.[118] Gerald Gunther, a former professor at Stanford Law, noting the likeness of Harlan and Powell in their work on the Supreme Court and specifically in defamation law, even found that "[i]n no other area has [Powell] demonstrated more persuasively that a balancing approach can provide not only the more intellectually satisfying analysis but also the one most sensitive to individual rights."[119]

Looking closely, it is possible to track the progression of legal thought from Stewart's concurrence in *Rosenblatt* to Harlan's dissent in *Rosenbloom* and on to Powell's decisions in *Gertz* and *Dun & Bradstreet.* Powell shared Stewart's concern for the "protection of private personality" and his acceptance of such

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[115] JEFFRIES, *supra* note 54, at 262–63 (noting that Stewart and Powell both held great admiration for Justice Harlan).
[116] *See id.* at 349 ("[Powell] placed himself in the tradition of John Harlan, a Justice known for craftsmanship, clarity, lawyerly reasoning, and a modest conception of the judicial role . . . . In short, Harlan sought to build on the traditions of societal consensus rather than trying to uproot them. Powell saw himself following in Harlan's footsteps as a careful, restrained, lawyerly judge.").
[117] Kalven, *supra* note 80, at 299.
[118] Gerald Gunther, *In Search of Judicial Quality on a Changing Court: The Case of Justice Powell*, 24 STAN. L. REV. 1001, 1014 (1972).
[119] Gerald Gunther et al., *A Tribute to Justice Lewis F. Powell, Jr.*, 101 HARV. L. REV. 395, 411 (1987).

protection being a "basic concept of the essential dignity,"[120] ultimately using Stewart's *Rosenblatt* concurrence to make his case in *Gertz*.[121] Notably, Stewart's insistence on the social values at the foundation of defamation law, as well as his hesitation in applying *Sullivan* to defamation of private persons,[122] found its way to Powell's writings. Powell's private notations make this emphasis on reputation clear:

> I would like to think that our society places a greater value on the sanctity of an individual's privacy and reputation, and would like to find a rational and principled basis of decision which would protect the obvious and important rights of the media, would prevent the media from feeling inhibited to print legitimate news, and yet at the same time afford some reasonable protection to individual rights.[123]

The similarities for Powell do not end with Stewart, however. Justice Harlan's dissent in *Rosenbloom* may be the most direct influence on Powell's majority opinion in *Gertz*. This was the undeniable reality to Justice Brennan as well, who remarked in *Dun & Bradstreet* that "Justice Harlan's perception formed the cornerstone of the Court's analysis in *Gertz*."[124] It would be far-fetched to think that Harlan, who argued three years prior that

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[120] Rosenblatt v. Baer, 383 U.S. 75, 92 (1966) (Stewart, J. concurring) ("The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself, is left primarily to the individual States under the Ninth and Tenth Amendments. But this does not mean that the right is entitled to any less recognition by this Court as a basic of our constitutional system."). Justice Powell took special note of this quote and Stewart's views. *See* Summer Memorandum from Justice Powell 6 (July 6, 1973), *in Gertz* File, Powell Papers, *supra* note 56; Memorandum from Clerk to Justice Powell and Notes from Powell at 7–8 (Sept. 19, 1973), *in Gertz* File, Powell Papers, *supra* note 56. Powell's clerk wrote early in the course of the case to Powell that "the nascent discontent revealed by Mr. Justice Stewart's concurrence" was the most interesting part of *Rosenblatt* for their purposes. *Id.* at 7.

[121] *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 341 (1974).

[122] *See Rosenblatt*, 383 U.S. at 93 (Stewart, J. concurring) ("That rule should not be applied except where a State's law of defamation has been unconstitutionally converted into a law of seditious libel. The First and Fourteenth Amendments have not stripped private citizens of all means of redress for injuries inflicted upon them by careless liars.").

[123] Summer Memorandum from Justice Powell 5 (July 6, 1973), *in Gertz* File, Powell Papers, *supra* note 56.

[124] Dun & Bradstreet, Inc. v. Greenmoss Builders, 472 U.S. 749, 779 (1985) (Brennan, J., dissenting).

states should be permitted to define their own standards for libel involving private plaintiffs, as long as they "do not impose liability without fault,"[125] was not the catalyst for the Court's holding in *Gertz*.[126]

VI. UNLIKELY ALLIES WITH A COMMON ENEMY: POWELL, GORSUCH AND THE PRESS

Powell's concerns about the private plaintiff ran deep—but they weren't the only motivations behind his First Amendment decisions. Unless the Court reconsidered the *Sullivan* standard, Powell feared the media would be left "free to defame without any referendum" of facts.[127] In Powell's view, private plaintiffs who had been defamed would rarely have sufficient evidence to prove actual malice, allowing no remedy for the reputational damage.[128] He had been adamant about there being "virtually no recourse" for defamatory statements in a 1971 speech, delivered the same year the Court decided *Rosenbloom*.[129] But his fears transcended the individual private plaintiff. Powell also believed the law could force the press to be responsible, specifically noting "that the great benefits of a free and vigilant press might sour without its simultaneous commitment to accuracy and impartiality."[130]

Nearly 50 years later, concerns about the media animate modern criticisms of the Court's defamation jurisprudence. On July 2, 2021, Justice Gorsuch issued a written dissent from the Court's denial of *certiorari* in *Berisha v. Lawson,* suggesting he and Justice Powell shared similar qualms about *Sullivan* and its progeny. It has brought a renewed focus toward one of the myriad recent pleas to reconsider *Sullivan*. Unlike his counterpart Justice Thomas, who attacks more than a half-century of precedent as "policy-driven decisions masquerading as constitutional law,"[131] Justice Gorsuch portends the adequacy of

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[125] Rosenbloom v. Metromedia, 403 U.S. 29, 64 (1971) (Harlan, J., dissenting).
[126] Powell even directly mentions Harlan's dissent. *See Gertz*, 418 U.S. at 338.
[127] Notes from Justice Powell on Memorandum from Clerk 1 (Feb. 14, 1973), *in Gertz* File, Powell Papers, *supra* note 56.
[128] *Id.*
[129] Justice Lewis F. Powell, Jr., Civil Liberties Repression: Fact or Fiction?, Article Prepared for Perpective Section of Richmond Times Dispatch, at 11 (June 28, 1971) (on file with the Washington and Lee University School of Law in Lewis F. Powell, Jr. Papers, Powell Speeches).
[130] WILKINSON, III, *supra* note 52, at 105.
[131] McKee v. Cosby, 139 S. Ct. 675, 676 (2019) (Thomas, J., concurring in denial of certiorari).

the doctrine today. To be clear, Gorsuch agrees with Justice Thomas that *Sullivan* is a "[d]eparture[] from the Constitution's original public meaning."[132] But Justice Gorsuch also believes the Court's decision in *Sullivan* and subsequent decisions were "the product of good intentions."[133] Gorsuch accepts *Sullivan* as once needed to ensure the free flow of public debate,[134] tolerating a few lies to avoid suppressing speech—a "necessary and acceptable cost" to protect speech "vital to democratic self-government."[135] Gorsuch might also have been willing to accept a version of the actual malice standard that was limited in scope to a "small number of prominent government officials."[136] But, according to Gorsuch, times have changed, and these justifications have less weight when "everyone carries a soapbox in their hands."[137] At the time *Sullivan* was decided, he asserts the institutional press maintained safeguards such as editors and fact-checkers to "deter the dissemination of defamatory falsehoods and misinformation"[138] and made their money from truthful reporting. Now though, a cynical Gorsuch writes of a media industry that relies on an entirely new economic model—one that no longer profits off of accurate reporting but instead promotes disinformation and "falsehoods in quantities no one could have envisioned almost 60 years ago."[139] Today's media industry, he believes, has taken far too many liberties with the protections of *Sullivan* and its progeny:[140]

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[132] Berisha v. Lawson, 141 S. Ct. 2424, 2429 (2021) (Gorsuch, J., dissenting in denial of certiorari).

[133] *Id.*

[134] *See id.* at 2427 ("In 1964, the Court may have seen the actual malice standard as necessary 'to ensure that dissenting or critical voices are not crowded out of public debate.'" (citing Brief in Opposition at 22, Berisha v. Lawson, 141 S. Ct. 2424 (2021) (No. 20-1063), 2021 WL 2020775, at *22).

[135] *Id.* at 2428 (citing N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270–72 (1964)).

[136] *Id.* at 2428 ("In 1964, the Court may have thought the actual malice standard would apply only to a small number of prominent governmental officials whose names were always in the news and whose actions involved the administration of public affairs.").

[137] *Id.* at 2427.

[138] *Id.* at 2427–28 ("Surely, too, the Court in 1964 may have thought the actual malice standard justified in part because other safeguards existed to deter the dissemination of defamatory falsehoods and misinformation.").

[139] *Id.* at 2428. Justice Gorsuch specifically points to the *Sullivan* rule as "no longer merely tolerat[ing] but encourag[ing]" such falsehoods. *Id.*

[140] Gorsuch cites survey data from the Media Law Resource Center to show the rarity at which a plaintiff recovers damages for defamation today, then argues that this allows the media to publish without concern for truth. *See id.* ("Statistics show that the number of [defamation] trials involving . . . publications has declined dramatically over the past few decades: In the 1980s there were on average 27 per year; in 2017 there were 3. For those rare plaintiffs able to secure a favorable jury verdict, nearly one out of five today will have their awards eliminated in post-trial

> It seems that publishing *without* investigation, fact-checking, or editing has become the optimal legal strategy . . . Combine this legal incentive with the business incentives fostered by our new media world and the deck seems stacked against those with traditional (and expensive) journalistic standards—and in favor of those who can disseminate the most sensational information as efficiently as possible without any particular concern for truth.[141]

Gorsuch's observation that the composition of the media "has shifted in ways few could have foreseen"[142] since the landmark *Sullivan* decision is certainly accurate.[143] The rise of the internet and the associated ease with which anyone may "publish virtually anything for immediate consumption"[144] carries consequences that Gorsuch believes the Court must address. He acknowledges that First Amendment protections have never solely been provided to those publishing newspapers or periodicals,[145] and he is willing to acknowledge some of the virtues of today's media landscape, mainly its inherent accessibility.

Like Powell, though, Gorsuch's criticism of the doctrine primarily focuses on the plaintiff rather than the defendant. That said, Gorsuch certainly would not consider Powell an ally. Gorsuch questions the applicability of the actual malice rule to the 'limited purpose' or 'voluntary' public figures, as Powell envisioned them in *Gertz*. Recent lower court decisions have

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motions practice. And any verdict that manages to make it past all that is still likely to be reversed on appeal. Perhaps in part because this Court's jurisprudence has been understood to invite appellate courts to engage in the unusual practice of revisiting a jury's factual determinations *de novo*, it appears just 1 of every 3 jury awards now survives appeal.") (citations omitted).

[141] *Id.* at 2428.

[142] *Id.* at 2427. Gorsuch went on to briefly describe the early media landscape, in which "[c]omparatively large companies dominated the press, often employing legions of investigative reporters, editors, and fact-checkers." *Id.*

[143] *See id.* ("No doubt, this new media world has many virtues—not least the access it affords those who seek information about and the opportunity to debate public affairs.").

[144] *Id.*

[145] *See id.* ("But '[t]he liberty of the press' has never been 'confined to newspapers and periodicals'; it has always 'comprehend[ed] every sort of publication which affords a vehicle of information and opinion.'" (quoting Lovell v. City of Griffin, 303 U.S. 444, 452 (1938))).

made the issue difficult to ignore the growing influence of social media and increasing spread of false speech. Although Justice Powell's personal papers show an active concern throughout *Gertz* to limit the Court's expansion of *Sullivan*, Gorsuch argues the decision does the opposite. In fact, Gorsuch characterizes *Gertz* as "cast[ing] the net even wider" by its application of the actual malice standard to the different classifications of public figures.[146] In effect, Gorsuch says *Gertz* extends *Curtis Publishing* in ways that "leave far more people without redress than anyone could have predicted."[147] Although *Sullivan* is the foundation of the modern doctrine, it appears that Gorsuch finds *Gertz* to be the real problem:

> [T]he very categories and tests this Court invented and instructed lower courts to use in this area—"pervasively famous," "limited purpose public figure"—seem increasingly malleable and even archaic when almost anyone can attract some degree of public notoriety in some media segment. Rules intended to ensure a robust debate over actions taken by high public officials carrying out the public's business increasingly seem to leave even ordinary Americans without recourse for grievous defamation. At least as they are applied today, it's far from obvious whether *Sullivan*'s rules do more to encourage people of goodwill to engage in democratic self-governance or discourage them from risking even the slightest step toward public life.[148]

Ultimately, Justice Gorsuch does not "profess any sure answers,"[149] nor does he know the right questions to ask, yet—like Justice Powell—he steadfastly believes the Court overextended *Sullivan* in ways that are detrimental to the private defamation plaintiff. To Gorsuch, *Sullivan*'s actual malice standard is no longer just a heightened standard for plaintiffs to meet, but instead, it has become an "effective immunity from

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[146] *Id.* at 2426. ("Later still, the Court cast the net even wider, applying its new standard to those who have achieved 'pervasive fame or notoriety' and those 'limited' public figures who 'voluntarily injec[t]' themselves or are 'drawn into a particular public controversy.'" (citing Gertz v. Robert Welch, Inc., 418 U.S. 323, 351 (1974))).
[147] *Id.* at 2429.
[148] *Id.*
[149] *Id.* at 2430.

liability."[150] Whether the Court will take a case that allows Justices Gorsuch and Clarence Thomas to realize Justice Powell's vision for protecting private plaintiffs remains to be seen. What is clear is that none of today's justices are the strident proponents of free speech that Justices Black and Douglas were when *Sullivan* was decided.

VII. CONCLUSION

Despite the recent attention being paid to libel law in the United States, the *Sullivan* naysayers are not expressing a particularly novel perspective. Justice Lewis Powell's papers suggest he articulated similar arguments nearly 50 years ago, but he was unable to convince his fellow justices to fully commit to his position. Nonetheless, Powell, who was concerned with private individuals' ability to protect their reputations, deftly used the *Gertz* and *Dun & Bradstreet* opinions to fundamentally alter the course of the Court's defamation jurisprudence—steering them away from the expansive trail Justice Brennan attempted to blaze in *Rosenbloom* and toward a somewhat narrower path.

The continued criticism of American defamation jurisprudence, including Justice Gorsuch's recent statements, suggests free speech proponents need to think strategically about how to best defend the existing protections lest they be retracted by a Supreme Court less willing to empower the institutional press. For decades, the protection of free speech has taken an all-for-one and one-for-all approach, where attorneys who defend the institutional press have found themselves aligned with those who defend neo-Nazi groups seeking permission to march through predominantly Jewish communities. But as Justice Gorsuch points out, the rise of the 24-hour news cycle, the internet and social media have dramatically altered the media landscape. As a result, we've seen the proliferation of misinformation as well as the rise of powerful speakers who trade in intentional falsities. The calls to rein in protections for speech are growing louder, and free speech proponents must realize that today's U.S. Supreme Court hardly resembles the one that crafted *Sullivan* and its progeny.

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[150] *Id.* at 2428.

FREE SPEECH AND ANTISEMITISM: *COLLIN V. SMITH* TODAY

R. George Wright*

INTRODUCTION

The *Skokie*-based *Collin v. Smith* litigation[1] resulted in our law's most significant constitutional response to antisemitic hate speech. The *Skokie* case opinions shed light on how antisemitism was thought of at the time and place in question. More importantly, how we now choose to understand the *Collin v. Smith* cases tells us much about how we conceive of antisemitism and of antisemitic injury today. The argument herein is that our understanding of freedom of speech, and of its value and limits, has significantly evolved over the decades since *Collin v. Smith*. Relatedly, our collective understanding of the harms and injuries inflicted by antisemitic speech has, at the deepest level, been significantly changing as well. In both of these respects, the *Collin v. Smith* litigation has only increased in importance over time.

As a preliminary matter, we adopt herein no particular conception of the meaning of antisemitism. Merely as a point of reference, though, one might usefully think of the phenomenon that is referred to as ressentiment.[2] The philosopher Max Scheler characterizes ressentiment as "a self-poisoning of the mind . . . [involving] the constant tendency to indulge in certain kinds of value delusions and corresponding value judgments. The emotions and affects . . . primarily concerned are revenge, hatred, malice, envy, the impulse to detract and spite."[3] For our

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[1] For our purposes, the most essential case opinions are *Vill. of Skokie v. Nat'l Socialist Party of Am.*, 373 N.E.2d 21 (Ill. 1978) (per curiam); *Collin v. Smith*, 447 F. Supp. 676 (N.D. Ill. 1978); and then, chronologically last but of greatest authority, *Collin v. Smith*, 578 F.2d 1197 (7th Cir. 1978), *cert. denied*, 439 U.S. 916 (1978).

[2] MAX SCHELER, RESSENTIMENT 25–28 (Lewis B. Coser & William W. Holdheim trans., 1994, Marquette Univ. Press ed. 2010) (1915).

[3] *Id.* at 25. Scheler goes on to claim that "[r]essentiment must . . . be strongest in a society like ours, where approximately equal rights (political and otherwise) or formal social equality, publicly recognized, go hand in hand with wide factual differences in power, property, and education. While each has the 'right' to compare himself with everyone else, he cannot do so in fact." *Id.* at 28. Scheler's discussion of ressentiment owes much to, but does not track, the discussion of ressentiment by Friedrich Nietzsche. *See* FRIEDRICH NIETZSCHE, ON THE GENEALOGY OF MORALS 36–39 (Walter Kaufmann & R.J. Hollingdale trans., 1967) (1887).

present purposes, we may think of antisemitism along similar lines. In any event, let us now turn to the reported opinions in the *Collin v. Smith* litigation itself.

I. THE KEY CASES IN THE *COLLIN V. SMITH* LITIGATION

Chronologically first among the most relevant case opinions is that of the Illinois Supreme Court in *Village of Skokie v. National Socialist Party of America*.[4] The court in *Village of Skokie* noted, importantly, that Skokie "has a population of about 70,000 persons of which approximately 40,500 are of 'Jewish religion or Jewish ancestry,' and of this latter number 5,000 to 7,000 are survivors of German concentration camps."[5]

The Illinois Supreme Court then recounted testimony, at the hearing on Skokie's request for an emergency injunction, that the perceived purpose of the proposed National Socialist demonstration in Skokie was to target the Jewish population in general.[6] In particular, the perceived message was "that we are not through with you"[7] and that "the Nazi threat is not over, it can happen again."[8] The opinion was also expressed that if the proposed Nazi demonstration in Skokie took place, the demonstration "would result in violence."[9]

The proposed demonstration itself was to take place on May 1, 1977, in front of the Village Hall, and was to last from its

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As well, consider Andrew Huddleston, *Ressentiment*, 131 ETHICS 670, 677–78 (2021). Simplifying a bit, Huddleston defines ressentiment as a normatively objectionable state of mind involving suffering, anger, and resentment over a perceivably insulting, demeaning, unfair or unjust injury or state of affairs that is thought to have been caused by some specified person or group, prompting an often obsessive desire for vengeance. *See id.* As to the final element, focusing on a desire for vengeance, consider the language of Klan organizer Clarence Brandenburg, as reported in *Brandenburg v. Ohio*, 395 U.S. 444, 446 (1969) (per curiam) ("We're not a revengent organization, but . . . it's possible that there might have to be some revengeance taken.").

It should go without saying that historically, even some of the otherwise most acutely insightful philosophers have not been immune from various forms of antisemitism. *See generally* Harry Redner, *Philosophers and Anti-Semitism*, 22 MOD. JUDAISM 115 (2002); Laurie Shrage, Opinion, *Confronting Philosophy's Anti-Semitism*, N.Y. TIMES (March 18, 2019), https://www.nytimes.com/2019/03/18/opinion/philosophy-anti-semitism.html.

[4] 373 N.E.2d 21 (Ill. 1978) (per curiam).

[5] *Id.* at 22.

[6] *See id.*

[7] *Id.*

[8] *Id.*

[9] *Id.*

3:00 p.m. start time for about 20–30 minutes.[10] The purported intention of the demonstration was to protest Skokie's permit requirement of $350,000 in insurance.[11] The contemplated 30–50 demonstrators were to march in single file, back and forth.[12]

Importantly, the demonstrators "were to wear uniforms which include a swastika emblem or armband. They were to carry a party banner containing a swastika emblem[13] and signs containing such statements as 'White Free Speech,' 'Free Speech for the White Man,' and 'Free Speech for White America.'"[14] The National Socialists represented that they would not attempt to hand out literature, nor make any ethnically or religiously derogatory statements, nor fail to comply with any reasonable police requests.[15]

The Illinois Supreme Court on this basis then addressed the federal constitutional merits of the case. Oddly, the Court focused initially on the anti-military draft jacket case of *Cohen v. California*.[16] Thus, the Court declared that the decisions of the United States Supreme Court, "particularly *Cohen v. California* . . . in our opinion compel us to permit the demonstration as proposed, including display of the swastika."[17]

Consider, though, that Justice Harlan began his opinion in *Cohen* by observing that "this case may seem at first blush too inconsequential to find its way into our books."[18] This is hardly the way any court would begin any opinion addressing the *Skokie* litigation. More substantively, though, the Court in *Cohen* expressly declared that the case did not involve the so-called "fighting words" doctrine.[19] In direct contrast, the Illinois Supreme Court in *Village of Skokie* crucially relied on the scope, and limits, of the "fighting words" doctrine.[20] *Cohen*'s abstract anti-draft message carried essentially nothing of the personal

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[10] *See id.* at 22.
[11] *Id.* This purpose would seem to logically presume some prior, independent purpose in seeking a permit in the first place.
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] *See id.* at 23 (citing Cohen v. California, 403 U.S. 15 (1971)).
[17] *Id.*
[18] *Cohen*, 403 U.S. at 15.
[19] *See id.* at 20.
[20] *See Skokie*, 373 N.E.2d at 23–24. The crucial "fighting words" case is *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

impact of the Skokie demonstration on its intended immediate audience.[21]

On the interpretation of the Illinois Supreme Court, the *Chaplinsky* "fighting words" case permitted the restriction only of "extremely hostile personal communication likely to cause immediate physical response,"[22] or, in other words, speech that has "a direct tendency to cause acts of violence by . . . whom, individually, the remark is addressed."[23]

Considering the testimony as to the likelihood of violence in response to the proposed Skokie demonstration,[24] it was hardly unreasonable for the Illinois Supreme Court to apply the *Chaplinsky* "fighting words" test. Still, a reading of *Chaplinsky*, in the Skokie context, suggests that the Illinois Supreme Court completely overlooked the most profoundly relevant aspect of *Chaplinsky*.

The *Chaplinsky* Court, after all, did not limit fighting words to those words which "tend to incite an immediate breach of the peace."[25] There is, instead, an apparently separate and independent form of "fighting words," however misleadingly labeled. In particular, the *Chaplinsky* Court also allowed, separately, for the prohibition of "[words] which by their very utterance inflict injury."[26]

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[21] *Compare Cohen*, 403 U.S. at 16 (explaining defendant was observed in a Los Angeles County courthouse wearing a jacket with the words, "Fuck the Draft" plainly visible), *with Skokie,* 373 N.E.2d at 23 (describing the planned Nazi rally in the Village of Skokie.).

[22] *Skokie*, 373 N.E.2d at 23.

[23] *Id.* For discussion of the difference between, for example, one-on-one hostile speech, and many-on-many hostile speech that may be beyond the application of the Chaplinsky "fighting words" doctrine, see Carl Cohen, *Free Speech and Political Extremism: How Nasty Are We Free to Be?*, 7 L. & PHIL. 263, 273 (1989). For discussion of similar distinctions between personal and group address in the sexual harassment context, see Eugene Volokh, *One-to-One Speech vs. One-to-Many Speech, Criminal Harassment Laws, and "Cyberstalking,"* 107 NW. U. L. REV. 731 (2013). *See also* Richard Delgado & David H. Yun, *Pressure Valves and Bloodied Chickens: An Analysis of Paternalistic Objections to Hate Speech Regulation*, 82 CALIF. L. REV. 871, 884 (1994). For a useful survey and updating of hate speech theory and case law, with an emphasis on the use and limits of the tort theory of intentional infliction of severe emotional distress, see Tasnim Motala, *Words Still Wound: IIED & Evolving Attitudes Toward Racist Speech*, 56 HARV. C.R.-C.L. L. REV. 115 (2021).

[24] *See Skokie*, 373 N.E.2d at 22.

[25] *Chaplinsky*, 315 U.S. at 572.

[26] *Id.*

It is this prong of the "fighting words" doctrine, left undiscussed by the court in *Village of Skokie*,[27] that seems the more deeply relevant and important. We must think carefully about the nature of the injury inflicted by Nazi speeches, signs, emblems, and insignia, and by the organized Nazi presence in Skokie. Initially, though, it should be clear that there typically is no meaningful possibility of a rebuttal to, or counter speech in response to, the public exhibition, in context, of a swastika.[28]

Instead, though, the Illinois Supreme Court fixated on the branch of *Chaplinsky* that addresses the probability of an immediate violent reaction.[29] Following language in *Cohen*, the court took this form of prohibitable fighting words to involve "those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction."[30]

This understanding of "fighting words" is dubious on several grounds. First, it is doubtful in the extreme that the test should, arguably, exclude words directed toward, say, a small or large group of persons, as distinct from an individual.

Second, it is doubtful that the best way to judicially respond to the possibility of some hypothetical hypersensitive speech addressee is to refer instead "to the ordinary citizen." How disposed is the "ordinary citizen" to react violently to direct, personally abuse language? Does not gender matter? Does not age, or physical ability, matter? What degree of knowledge of the Nazi concentration camps is held by the "ordinary citizen?" How disposed is an essentially featureless "ordinary citizen" to immediately physically retaliate, with violence, against the speaker? And most crucially, why should the law specially and distinctively protect, in this respect, abusive speech targeting persons who cannot fight back?

Third, we must wonder whether the meaning and impact of the public display of a swastika is to be found at the level of some individual person, at whom the display of the swastika is directed. Is the impact of the display of the swastika not instead

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[27] *See generally Skokie*, 373 N.E.2d 21.
[28] *See* Delgado & Yun, *supra* note 23, at 884–85.
[29] *See Skokie*, 373 N.E.2d at 23.
[30] *Id.* Note the sheer oddness of asking whether largely elderly Shoah survivors in particular would be likely to physically attack younger demonstrators. Legally incentivizing the verbal abuse of persons who cannot fight back is especially dubious.

largely a matter of social groups, of social identities, and of collective experiences?

Fourth, any focus on the "imminent violence" aspect of fighting words suggests that, apart from the public-school context,[31] threats of violence in response to speech by opponents of the speech cannot be sufficient grounds for restricting the speech in question. It is thought that incentivizing a violent response to speech would give a speech-repressive "heckler's veto" to opponents of the speech's message.[32] The Court has instead declared that among the legitimate purposes of speech is to stir people to anger.[33] The crucial problem, though, is that anger does not begin to exhaust the typical, and intended, reactions to the public display, by professed Nazi Party members, of swastika emblems.[34]

The Illinois Supreme Court throughout adopts an abstract, disembodied, distanced tone that manifests not an admirably detached judicial impartiality, but a failure to meaningfully distinguish among crucially different circumstances.[35] Hence the Court's oddly inapt references to sensitive viewers;[36] to degrees of squeamishness and distastefulness;[37] to the constitutional requirement of "open debate;"[38] and to freedom of speech as the only path compatible with "individual dignity."[39] The possibility that the dignity associated with open debate, which was of course hardly manifested in the *Skokie* case, could conflict with the individual and collective dignity of the victims of the symbolic speech was not explicitly explored.[40]

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[31] Note the incentivizing of threats of violence in response to disfavored speech, in order to encourage the prohibition, in advance, of the speech in question, in *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513–14 (1969).
[32] *See, e.g.*, Terminiello v. Chicago, 337 U.S. 1, 4 (1949) ("[Speech] may indeed best serve its high purpose when it induces a condition of unrest . . . or even stirs people to anger"). *See also id.* at 5. The Court followed up its general rejection of a "heckler's veto" in traditional public fora in Gregory v. Chicago, 394 U.S. 111, 113–14 (1969).
[33] *See Terminiello*, 337 U.S. at 4.
[34] *See Skokie*, 373 N.E.2d at 24 (noting a swastika display as symbolic, though reprehensible, widely offensive, and abhorrent, political speech).
[35] *See, e.g.*, *id.* ("That the air may at times seem filled with verbal cacophony is, in this sense not a sign of weakness but of strength.").
[36] *See id.*
[37] *See id.*
[38] *Id.*
[39] *Id.* at 23.
[40] *See generally Skokie*, 373 N.E.2d 21.

Similarly, pro-free speech conclusions were then reached shortly thereafter by the local federal district court in the case of *Collin v. Smith*.[41] The district court's opinion here referred, again largely irrelevantly, to the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[42] Of course, the swastikas in the proposed Skokie demonstration were not intended to target government actors and institutions.[43] More fundamentally, the National Socialist Party's demonstration, given its nature and circumstances, was not intended to contribute to a "debate" in the sense of any ongoing dialogic, interactive, reciprocal, discursive inquiry into the merits of antisemitic opinions and policies.[44]

The district court in *Collin* then declared that "the public expression of ideas may not be prohibited merely because the ideas themselves are offensive to some of their hearers."[45] The problem here is that antisemitism that evokes the experience of the Shoah, individually and collectively, is not merely "offensive" in the sense in which we might think of a vulgar comedy monologue, a crude denunciation of the military draft, or even a public act of personal disrespect in general. Referring to distinctively Nazi symbols and language as "offensive," or even as "highly offensive," amounts to what the philosopher Gilbert Ryle referred to as a "category mistake."[46]

The district court then evoked the references in *Cohen* to "direct personal insult,"[47] to "verbal tumult,"[48] to "slurs and insults,"[49] to "verbal cacophony,"[50] and to "open debate."[51] Where these categories are not largely irrelevant to the *Skokie* litigation, they tend at best to mischaracterize, to one degree or

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[41] 447 F. Supp. 676 (N.D. Ill. 1978).
[42] *Id.* at 689 (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)).
[43] *See Skokie*, 373 N.E.2d at 23.
[44] It is hardly an abuse of language or of logic to decline to characterize, say, a swastika display as part of a 'debate' between National Socialists and, say, local survivors of the Shoah and their neighbors.
[45] *Collin*, 447 F. Supp. at 690 (quoting Street v. New York, 394 U.S. 576, 592 (1969)).
[46] *See* Ofra Magidor, *Category Mistakes*, STAN. ENCYC. PHIL. (July 5, 2019), https://plato.stanford.edu/entries/category-mistakes/.
[47] *Collin*, 447 F. Supp. at 690 (quoting *Cohen v. California*, 403 U.S. 15, 20 (1971)).
[48] *Id.* at 691 (quoting *Cohen,* 403 U.S. at 24).
[49] *Collin*, 447 F. Supp. at 691.
[50] *Id.* (quoting *Cohen*, 403 U.S. at 24–25).
[51] *Id.*

another, what is distinctively central to the *Skokie* context and circumstances, and upon which we briefly elaborate below.[52]

More usefully, the district court in *Collin* did refer explicitly to the more relevant "fighting words" prong that addresses words that "by their very utterance inflict injury,"[53] along with providing an extended discussion of the now constitutionally dubious case of *Beauharnais v. Illinois*.[54] *Beauharnais* had, twelve years before the Supreme Court first put constitutional free speech limits on the state tort law of libel,[55] upheld a group of libel statutes that prohibited some portrayals of "depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, color, creed or religion which said [portrayal] exposes the citizens of any race, color, creed or religion to contempt, derision, or obloquy or which is productive of breach of peace or riots . . . ."[56]

Of course, it is questionable whether the point of the efforts to restrict the planned Skokie demonstration was one of "protecting reputations."[57] The relevance of the claim in *Collin* that "[t]here can be no question that races and religions have been and are the subject of legitimate debate"[58] is similarly doubtful. Interestingly, though, in the *Collin* court's view, "[i]t is particularly difficult to distinguish a person who suffers actual[ ] psychological trauma from one who is only highly offended . . . ."[59] The typical judicial emphasis, in all of the *Skokie* cases, on emotion and subjectivity does indeed deserve attention.[60] The overall tendency in the *Skokie* cases is to treat the proposed demonstration as raising a personal "fighting words" issue, with the emphasis being on the breach of the peace, or violent physical response, prong.[61] This is, again, hardly the most insightful or most valuable approach to the *Skokie* cases.

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[52] *See infra* Section III.
[53] *See Collin*, 447 F. Supp. at 689, *see also* Chaplinsky v. New Hampshire, 315 U.S. 568, 562 (1942).
[54] *See Collin*, 447 F. Supp. at 693–98; 343 U.S. 250 (1952).
[55] *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964).
[56] *Beauharnais*, 343 U.S. at 251 (quoting Ill. Rev. Stat. 1949, ch. 38 § 471). For discussion of the case, see Hadley Arkes, *Civility and the Restriction of Speech: Rediscovering the Defamation of Groups*, 1974 SUP. CT. REV. 281 (1974).
[57] *Collin*, 447 F. Supp. at 696.
[58] *Id.* at 697.
[59] *Id.*
[60] *See infra* Section II.
[61] *See Collin*, 447 F. Supp. at 697–99.

As it happened, though, the district court in *Collin* was famously affirmed on appeal by the Seventh Circuit.[62] The Seventh Circuit in *Collin* recognized that the plaintiff-appellees "know full well that, in light of their views and the historical associations they would bring with them to Skokie, many people would find their demonstration extremely mentally and emotionally disturbing, or the suspicion that such a result may be relished by appellees."[63]

In the view of the Seventh Circuit, the defendant Village of Skokie's concession that it did not then anticipate reactive violence at the planned demonstration[64] was of crucial legal import. The Seventh Circuit first said that the absence of expected reactive violence distinguished the case from the classic subversive advocacy case of *Brandenburg v. Ohio*.[65] The problem here is that *Brandenburg* addressed the possibilities of specifically intentional violence, and of likely or probable violence, on the part of the allies of the speaker.[66] *Brandenburg* did not address the question of reactive violence, or of violence on the part of the targets of the speech.[67]

More centrally, though, the Seventh Circuit in *Collin* said that the absence of expected violence in reaction to the speech "eliminates any argument based on the fighting words doctrine of *Chaplinsky v. New Hampshire* . . . ."[68] This is certainly true of the imminent reactive violence prong of *Chaplinsky*, at least at the stage of any prior restraint on the planned demonstration.[69] But the assumed, or actual, absence of any physical violence on anyone's part again does not begin to address the first of the two alternative *Chaplinsky* "fighting words" avenues, that of words

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[62] Collin v. Smith, 578 F.2d 1197 (7th Cir. 1978), *cert. denied*, 439 U.S. 916 (1978). Justices Blackmun and White would have granted certiorari, partly to examine the contemporary status of the Beauharnais group libel case, and partly to examine possible limitations of freedom of speech more broadly. *See* 439 U.S. at 916–19 (Blackmun, J., dissenting from denial of certiorari).

[63] *Collin*, 578 F.2d at 1200.

[64] *See id.* at 1203.

[65] *Id.* ("This confession takes this case out of the scope of Brandenburg v. Ohio . . . ."); 395 U.S. 444, 447 (1969) (per curiam).

[66] *See Brandenburg*, 395 U.S. at 447.

[67] *Cf. Collin*, 578 F.2d at 1203 (discussing the absence of fear on the part of the Village of "responsive" violence). The classic responsive violence case is *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949) (rejecting the application of a "heckler's veto of speech" because of actual or threatened violence by opponents of the speech in question).

[68] *Collin*, 578 F.2d at 1203.

[69] *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

"which by their very utterance inflict injury."[70] Crucially, we should instead consider what kinds of "injuries" may be inflicted in *Skokie*-like cases, and how those kinds of "injuries" should be constitutionally distinguished and addressed.

The Seventh Circuit in *Collin* then declared, revealingly, that "[t]he asserted falseness of Nazi dogma, and, indeed, its general repudiation, simply do not justify its suppression."[71] It is certainly true that the Supreme Court has held that there is free speech value in protecting some statements that are not only clearly false, but which amount to deliberate, calculated, and intentional lies.[72] Classically, John Stuart Mill's defense of freedom of speech encompassed not merely assertedly false, but broadly consensually false, claims.[73] Mill famously argues in particular that even if a popular opinion is entirely true, there can be crucial value in not merely tolerating, but in encouraging, its public challenge.[74] Specifically, unless an entirely true belief is "suffered to be, and actually is, vigorously and earnestly contested, it will, by most of those who receive it, be held in the manner of a prejudice, with little comprehension or feeling of its rational grounds."[75]

The problem here is that the Seventh Circuit in *Collin* opts for a mental model of what is actually taking place in the case that grossly distorts the most crucial realities.[76] The Seventh Circuit adopts here what we might call an otherwise widely appropriate "forensic" view of First Amendment circumstances.[77] At the core of this "forensic" view is the idea of a broad, ongoing, community practice involving the cooperative,

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[70] *See id.*
[71] *Collin*, 578 F.2d at 1203.
[72] *See* R. George Wright, *"What Is That Honor?": Re-Thinking Free Speech in the "Stolen Valor" Case*, 60 CLEV. ST. L. REV. 847 (2012) (discussing United States v. Alvarez, 567 U.S. 709 (2012)).
[73] *See* JOHN STUART MILL, ON LIBERTY 76, 108–09, 116 (Gertrude Himmelfarb ed., 1986) (1859).
[74] *Id.* at 79.
[75] *Id.* at 116. *See also id.* at 98–100 (discussing the distinctive value of sincere, as opposed to mere role-playing, advocacy of an idea).
[76] *See Collin*, 578 F.2d at 1206.
[77] For discussion of the idealized form of "forensic discourse," see generally JURGEN HABERMAS, JUSTIFICATION AND APPLICATION: REMARKS ON DISCOURSE ETHICS (Ciaran D. Cronin trans., reissue ed. 1994). For a condensed version, see R. George Wright, *Civil Disobedience Today: Some Basic Problems and Possibilities*, 51 MEM. L. REV. 197, 218–21 (2020).

competitive, and indeed often fractious mutual discursive exchange of data and opinions.[78]

On this "forensic" model of speech, the logical move is, in accordance with John Stuart Mill's argument,[79] to assume the generally protected status of presumably false and widely rejected Nazi dogma.[80] On this model, the familiar state law tort of the intentional infliction of severe emotional distress[81] raises interesting complications, but any such tort must then be constrained by "forensic" free speech rules.[82] Perhaps a different question would be raised if offensiveness, and even outrageousness, were not to be treated as largely relativist, subjectivist, or inherently contestable. But in our legal culture, they cannot be granted any better-grounded status.[83]

Thus, on the Seventh Circuit's model, the problem with distinguishing *Skokie*-like contexts from other contexts is that all of the cases involve speech that "invite[s] dispute . . . induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger."[84] This language, quoted from the classic "heckler's veto"[85] case of *Terminiello v. Chicago*,[86] was oddly thought by the Seventh Circuit to cover the *Skokie* case.[87]

The alleged indistinguishability of *Terminiello* and the *Skokie* case is, however, difficult to sustain. Merely among the most salient distinctions, for example, is the essentially "neutral" geographical setting in *Terminiello*.[88] Additionally, the speech in *Terminiello* was delivered in a closed auditorium,[89] to invited

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[78] *See* Wright, *supra* note 77, at 218–21.
[79] *See supra* notes 73–75 and accompanying text.
[80] *See Collin*, 578 F.2d at 1203.
[81] *See id.* at 1206 (citing Contreras v. Crown Zellerbach Corp., 565 P.2d 1173 (Wash. 1977) (en banc)).
[82] *See id.* See also, more authoritatively, the military funeral protest case of *Snyder v. Phelps*, 562 U.S. 443, 456–58 (2011) (citing the satiric cartoon case of Hustler Magazine v. Falwell, 485 U.S. 46, 55 (1988)).
[83] *See Collin*, 578 F.2d at 1206 (citing *Contreras*, 565 P.2d 1173); *Snyder*, 562 U.S. at 456–58. See also the relativism and subjectivism of *Cohen v. California*, 403 U.S. 15, 25 (1971).
[84] *Collin*, 578 F.2d at 1206 (quoting Terminiello v. Chicago, 337 U.S. 1, 4 (1949)).
[85] For background, see generally R. George Wright, *The Heckler's Veto Today*, 68 CASE W. RSRV. L. REV. 156 (2017).
[86] *Terminiello*, 337 U.S. at 4.
[87] *See Collin*, 578 F.2d at 1206.
[88] *See Terminiello*, 337 U.S. at 2.
[89] *See id.* at 2–3.

listeners.[90] The many outside protesters of the speech in *Terminiello* would presumably have had to trespass in order to hear or see anything significant.[91] Had the Court in *Terminiello* reached the applicability of the *Chaplinsky* "fighting words" doctrine,[92] the Court's focus would not have been on the "immediate injury" fighting words branch, but on the largely reactive physical violence to the speech.[93]

All of this would presumably be absent from the planned Skokie demonstration, in ways that clearly command a stronger speech-protection argument in *Terminiello* than in *Skokie*. But the Seventh Circuit's forensic model of speech and debate led it to subsume the proposed Skokie demonstration under the categories of merely inviting dispute;[94] stirring to anger;[95] expressing unpopular views;[96] provoking reactive "intolerance or animosity;"[97] or merely offending an audience.[98] All of these categories abstract away from, and implicitly deny, essential elements of the *Skokie* context.[99]

On this basis, then, we can now attend to how cultural developments related to free speech law affect the way in which we most fundamentally understand and value the free speech interests at stake in the *Skokie* litigation.[100] Moreover, we can also attend to how cultural developments have led us to understand the harms and injuries correspondingly at stake.[101]

II. *COLLIN V. SMITH* IN LIGHT OF OUR SHIFTING UNDERSTANDING OF THE UNDERLYING REASONS FOR PROTECTING SPEECH

[90] *See id.*
[91] *See id.*
[92] *See id.* at 3 ("We do not reach that question . . . .").
[93] *See id.* (referring to crowd sizes and uncontrolled violent incidents); Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).
[94] *See* Collin v. Smith, 578 F.2d 1197, 1206 (7th Cir. 1978), *cert. denied*, 439 U.S. 916 (1978).
[95] *See id.*
[96] *See id.*
[97] *Id.* (citing Coates v. City of Cincinnati, 402 U.S. 611, 615 (1971) (addressing a vague regulation of an "annoying" public conduct case)).
[98] *See id.* at 1218. Constraints were also permitted on the focused picketing of a specific residential neighborhood home in *Frisby v. Schultz*, 487 U.S. 474 (1988). But the underlying logic of the Seventh Circuit is largely tracked and validated in crucial cases such as *Snyder v. Phelps*, 562 U.S. 443, 457–58 (2011).
[99] *See infra* Section II. For background, see generally R. George Wright, *Freedom of Speech as a Cultural Holdover*, 40 PACE L. REV. 235 (2020).
[100] *See infra* Section II; Wright, *supra* note 99.
[101] *See infra* Section III.

Today, no less than as of the time of the *Collin v. Smith* litigation, the underlying justifications for constitutionally protecting speech are commonly thought to be plural.[102] As of 1970, for example, the scholar Thomas Emerson identified pursuing truth and knowledge, promoting self-fulfillment or autonomy, and facilitating meaningful democratic participation as crucial values thought to underlie freedom of speech.[103] This cluster of values has received continuing endorsement, along with sundry related values, after *Collin v. Smith*.[104]

Among the most fundamental and ultimately most indispensable of these values has been that of the optimal pursuit of truth.[105] But it is fair to say that for broad cultural reasons, the depth, extent, and the very meaning of the pursuit of truth, as a free speech justification and elsewhere, has noticeably evolved since the time of *Collin v. Smith*.[106] In particular, the idea of truth, and of the meaningful pursuit thereof, is now of clearly diminished status.[107]

Certainly, various forms and depths of truth-skepticism in free speech contexts were available even at the time of *Collin v. Smith*.[108] But the relevant cultural trends and schools of thought have moved in that direction across the intervening decades. As the metaphysical depth and meaning of truth for free speech purposes have gradually eroded, the idea of a "post-truth" culture has gained purchase.[109]

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[102] *See generally* THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 6–7 (1970) (listing several underlying justifications for protecting speech).
[103] *See id.*; *see also* FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY (1982).
[104] *See, e.g.*, Kent Greenawalt, *Free Speech Justifications*, 89 COLUM. L. REV. 119, 130–47 (1989); Alexander Tsesis, *Free Speech Constitutionalism*, 2015 U. ILL. L. REV. 1015, 1016 (2015).
[105] *See, e.g.*, Irene M. Ten Cate, *Speech, Truth, and Freedom: An Examination of John Stuart Mill's and Justice Oliver Wendell Holmes's Free Speech Defenses*, 22 YALE J.L. & HUMAN. 35 (2010). For representative examples of Mill's discussion of the pursuit of truth in the context of freedom of speech, see MILL, *supra* note 73, at 76, 108, 116.
[106] *See, e.g.*, C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 965 (1978); Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 5 (1984); Frederick Schauer, *Reflections On the Value of Truth*, 41 CASE W. RSRV. L. REV. 699, 724 (1991) ("[T]he issue is often power rather than truth.").
[107] *See supra* note 106.
[108] *See supra* note 106.
[109] *See Word of the Year 2016: Post-truth*, OXFORD LANGUAGES, https://languages.oup.com/press/news/2016/12/11/WOTY-16 (last visited Aug. 20, 2021).

Thus, claims as to truth and falsity in political conflict in general are now more frequently thought of as contested social constructs, or as veiled assertions of power, than formerly. Political claims are thus interrogated, rather than examined for any degree of objective insight.[110] At best, truth claims are not merely classically tentative or provisional, but inherently and inescapably linked to some particular adopted perspective.[111]

This trend toward the evacuation of any objective standards for appraising the truth of political and other claims reflects far broader considerations than can be attributed to any movement or school of thought. A leading contemporary philosopher, Professor Simon Blackburn, has argued that "almost all the trends in the last generation of serious philosophy lent aid and comfort to the 'anything goes' climate . . . [and] any hope for a genuine vindication of knowledge and rationality went into retreat."[112] And the modes of thinking at work here clearly extend beyond the realm of not only academic philosophy, but of the academy more broadly.[113]

Of course, the value of the pursuit of truth by itself hardly exhausts the logic of protecting freedom of speech. But it seems unlikely in the extreme that any diminution in the status and coherence of the idea of truth itself can be prevented from similarly affecting any other value that is thought to justify protecting freedom of speech. In this sense, any sensible reason for promoting free speech is inescapably dependent upon current understandings of what the truth can amount to.

In fact, other crucial justifications of free speech have undergone related transformations. The idea of developing meaningful autonomy through free speech[114] illustrates this trend. Classically, we have had available to us the idea of autonomy in a metaphysically robust, undiluted, non-attenuated

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[110] *See, e.g.*, LEE MCINTYRE, POST-TRUTH 125 (2018).
[111] *See, e.g.*, MICHIKO KAKUTANI, THE DEATH OF TRUTH: NOTES ON FALSEHOOD IN THE AGE OF TRUMP 73 (2018).
[112] SIMON BLACKBURN, TRUTH: A GUIDE 139 (2005).
[113] *See* PAUL BOGHOSSIAN, FEAR OF KNOWLEDGE: AGAINST RELATIVISM AND CONSTRUCTIVISM 2 (2006) (discussing that beyond even the academy, and certainly across the liberal arts, "'postmodernist relativism' about knowledge has achieved the status of orthodoxy").
[114] *See supra* notes 102–03.

sense.[115] Autonomy in this sense requires a belief that considerations of reason can be meaningful and effective as exercises of freedom in choosing among actions, apart from deterministic or merely random material causes.[116]

Any such metaphysically ambitious understanding of autonomy—and of the possibilities opened thereby—is increasingly thought to be implausible, and thus somehow unavailable.[117] The neurobiologist Anthony Cashmore thus holds that "as living systems we are nothing more than a bag of chemicals."[118] Or, if one prefers, "[y]ou . . . are in fact no more than the behavior of a vast assembly of nerve cells and their associated molecules."[119] Otherwise put, "we scientists already know (or think we know) that . . . we are simply complex biological machines."[120]

Of course, we can still talk of "autonomy" in some merely attenuated, minimalist, reductive, or fictionalist sense. Thus in the free speech law context, we might today think of autonomy as something like the ability to successfully pursue some life-path we happen to endorse regardless of how causally we came to adopt and endorse that life-path in the first place.[121] The logic of some sort of gradual transition from a robust Kantian dignity[122] and autonomy to a metaphysically less ambitious concern for,

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[115] *See* IMMANUEL KANT, GROUNDWORK OF THE METAPHYSICS OF MORALS 114–16 (Harper ed., H.J. Paton trans. 1964) (1785).
[116] *See id.*; *see also* CHRISTINE M. KORSGAARD, CREATING THE KINGDOM OF ENDS 25 (1996).
[117] *See, e.g.*, Daniel Stoljar, *Physicalism*, STAN. ENCYC. PHIL., https://plato.stanford.edu/entries/physicalism (May 25, 2021).
[118] Anthony R. Cashmore, *The Lucretian Swerve: The Biological Basis of Human Behavior and the Criminal Justice System*, 107 PNAS 4499, 4504 (2010).
[119] FRANCIS CRICK, THE ASTONISHING HYPOTHESIS, THE SCIENTIFIC SEARCH FOR THE SOUL 3 (1995).
[120] JOSHUA D. GREENE, SOCIAL NEUROSCIENCE AND THE SOUL'S LAST STAND, IN SOCIAL NEUROSCIENCE: TOWARD UNDERSTANDING THE UNDERPINNINGS OF THE SOCIAL MIND 263–64 (Alexander Todorov et al. eds., 2011); *see also* ALEX ROSENBERG, THE ATHEIST'S GUIDE TO REALITY: ENJOYING LIFE WITHOUT ILLUSIONS (2011).
[121] *See* C. Edwin Baker, *Autonomy and Free Speech*, 27 CONST. COMMENT. 251, 253 (2011). *But see* Jon Elster, *Sour Grapes: Utilitarianism and the Genesis of Wants*, in UTILITARIANISM & BEYOND 219–38 (Amartya Kumar Sen & Bernard Arthur Owen Williams eds., 1982). Repressive and non-repressive causes of our current life-plans are thus in this respect apparently treated as on a par.
[122] *See generally* THOMAS E. HILL, JR., DIGNITY AND PRACTICAL REASON IN KANT'S MORAL THEORY (1992).

ultimately, an autonomy perhaps merely comprising arbitrary pleasures and pains[123] may increasingly take hold.[124]

Whether we choose to construe autonomy as largely some sort of a calculus of endorsed or unendorsed pleasures and pains or not, any gradual dilution of the idea of autonomy, in the relevant classic sense, tends to similarly dilute the case for freedom of speech on such grounds. As above, the case for free speech is based on the pursuit of meaningful truths.[125] Why should we sacrifice, perhaps quite substantially, for the sake of promoting a merely diluted form of autonomy that is of minimal meaning and value apart from some forms of mere pleasures and pains?

Importantly, the evolution of values such as autonomy and the pursuit of truth since *Collin v. Smith* does not affect merely the free speech elements of the case. Unavoidably, the attenuation of our sense of what truth, autonomy, and dignity can amount to importantly affects the other side of all such cases. We thus turn to consider how the harms and indignities of antisemitic speech can now, in our culture, be most credibly characterized.

III. *COLLIN V. SMITH* IN LIGHT OF OUR SHIFTING UNDERSTANDING OF THE VERY NATURE OF ANTISEMITIC SPEECH INJURIES

In large measure, the costs of antisemitic speech, as in *Collin v. Smith*, involve psychological trauma or other related injury. Such harms are often treated by the courts as forms of pain or suffering, and the emotions related thereto.[126] Herein, we

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[123] For a classic taxonomy, see JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION ch. IV. (1781) (ebook), http://www.utilitarianism.com/jeremy-bentham/index.html (last visited August 20, 2021).

[124] *Id.* Bentham's approach to pains tends to be methodologically individualist, or aggregative, as distinct from recognizing a harm, injury, or pain that is essentially joint, collective, or deeply communitarian in nature, as presumably characterizes some reactions to antisemitic speech.

[125] *See supra* notes 105–13 and accompanying text.

[126] *See, e.g.*, Donald A. Downs, *Skokie Revisited: Hate Group Speech and the First Amendment*, 60 NOTRE DAME L. REV. 629, 634 (1985) (referring to "assaultive speech . . . meant to inflict an emotional injury"); David Goldberger, *Skokie: The First Amendment Under Attack by Its Friends*, 29 MERCER L. REV. 761, 764 (1978) (referring to the anticipation of being "emotionally harmed by the Nazis' appearance in Skokie because it would trigger memories of their terrible war experiences" and thus "inflict

make no pretense to any real understanding of either emotional suffering and trauma itself,[127] or of the range of injuries suffered by the targets of post-Shoah antisemitic speech.

Inescapably, experiences of pain, suffering, trauma, psychological injury, and the associated emotions are of various sorts. Equally important for our purposes, however, is that these phenomena may differ, in any instance, quite substantially in the nature, depth, and character of what we might call their metaphysical presuppositions. Not all such injuries are qualitatively on a par.

Thus, in the simplest Benthamite[128] cases, pain and suffering do not presuppose much in the way of chains of reasoning, or of any metaphysical ambition. Here, we might think of cases such as exposure to cold or heat, or less unequivocally, the most primal reactions to being, say, physically beaten or stabbed. But pain and suffering, of whatever sort, typically involve some more or less elaborate process of reasoning on the part of the sufferer. At a minimum, for example, we may distinguish between being inadvertently tripped, and being deliberately tripped.[129] The injuries in these two circumstances are significantly different.

More elaborately, though, pain and suffering and their related emotions may well be affected by, for example, the perceived nature of the relationship between perpetrator and victim. Perceived betrayal, or ingratitude, for example, attending a physical injury may well affect the victim's response.[130] And the sense of ingratitude must logically depend upon some more or less elaborate chain of reasoning, any step of which, crucially, may be either justified or unjustified.

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emotional trauma"); Mark A. Rabinowitz, *Nazis in Skokie: Fighting Words or Heckler's Veto?*, 28 DEPAUL L. REV. 259, 260 (1979) (focusing on "the recognition that a person's emotional well-being is worthy of greater protection").

[127] *See, e.g.*, O. Giotakas, *Neurobiology of Emotional Trauma*, 31 PSYCHIATRIKI 162 (2020).

[128] *See supra* note 123–24 and accompanying text.

[129] Thus "[a]s Holmes observed, even a dog knows the difference between being tripped over and being kicked." W. PAGE KEETON, DAN B. DOBBS, ROBERT E. KEETON & DAVID G. OWEN, PROSSER AND KEETON ON TORTS § 8, at 33 (5th ed. 1984).

[130] *See, e.g.*, WILLIAM SHAKESPEARE, KING LEAR act 1, sc. 4 (1606) ("How sharper than a serpent's tooth it is to have a thankless child.").

Even more importantly, the reactions of hate speech victims are conditioned not only by the literal assertions made by their tormentors, but by what we might call the metaphysical depth of the speech in question. Mere expressions of subjective distaste do not carry the same weight as condemnation that is supposedly mandated by some objective fundamental principle.

Consider, for example, the widely known hostile speech case involving Victor Hugo's character of Quasimodo.[131] In a grotesque episode, an elaborate parade of various social outcasts is presided over by a contemptuously invested Pope of Fools.[132] Thus "[h]igh upon [a] litter, mitered, coped, resplendent, and carrying a crosier, rode the new Pope of Fools, the bell-ringer of Notre Dame, Quasimodo . . . ."[133]

The target of the Parisian crowd's gleeful mockery—the term 'hathos'[134] is apt—was, however, someone who was unable to appreciate the irony of the circumstances.[135] Thus, according to Victor Hugo:

> It is difficult to give an idea of how much pride and beatific satisfaction was registered on the usually sad and always hideous visage of Quasimodo as he rode . . . . It was the first moment of self-love he had ever enjoyed . . . . Until now he had known only humiliation, disdain for his condition, and disgust for his person . . . . What did it matter if his subjects were a mob of fools . . . . Still they were people and he was their king. He took seriously all the ironical applause, all the mock respect . . . . Only joy filled his heart;

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[131] *See* VICTOR HUGO, THE HUNCHBACK OF NOTRE DAME 69–70 (Walter J. Cobb trans., 1965) (1831).
[132] *See id.*
[133] *Id.* at 69.
[134] "Feelings of pleasure derived from hating someone or something." *Hathos*, URB. DICTIONARY, https://www.urbandictionary.com/define.php?term=hathos (last visited Aug. 25, 2021).
[135] HUGO, *supra* note 131, at 69–70.

> pride showed even in his poor bearing.[136]

Quasimodo's emotionally favorable response to what he fails to recognize as contemptuous hostile speech is clearly amiss. His logical inferences are at points clearly mistaken. The question, though, for detached observers such as ourselves, is how to respond to the overall circumstances, including Quasimodo's own reactions.

A Benthamite utilitarian,[137] for example, would, complications aside, do some sort of overall hedonic calculus, with all relevant pains and pleasures assessed impartially according to the various dimensions of the Benthamite schemata.[138] One would want to account, certainly, for the subtle hedonic effects of intrinsically collective or joint activities; interactive effects between hostile speakers and their uncomprehending target; and such indirect and long-term hedonic effects as one can envision.

Inescapably, the hedonic character of the Pope of Fools episode is overwhelmingly favorable. The gleeful mob has its hathotic delight.[139] Quasimodo's own reaction is both multidimensional and, however mistakenly, of nearly undiluted joy and delight, along several Benthamite dimensions.[140] In a typical hate speech context, there would of course instead be a stark hedonic conflict as between speakers and targets. Here, in Quasimodo's case, the delight of the crowd, which might ordinarily by itself massively outweigh the disutility of a single target, is additively reinforced by Quasimodo's deluded reactions.[141] But are these sorts of calculations, however sophisticated, really the way we are to assess the various circumstances under which hate speech takes place?

Inescapable as well, though, is the broader sense that anything like a Benthamite, or any more sophisticated preference-based, utilitarianism must miss the point. Thus, when Bentham's antithesis Immanuel Kant condemns contemptuous

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[136] *Id.*
[137] *See supra* notes 123–24 and accompanying text.
[138] *Id.*
[139] *See* HUGO, *supra* note 131, at 69.
[140] *Id.*
[141] *Id.*

mockery,[142] he does so not on the grounds of some assessment of pain, or suffering, or trauma, or overall utility.[143] Kant in fact stipulates that "a mania for caustic mockery . . . has something of fiendish joy in it . . . ."[144] For Kant, at least, the "fiendish joy" in caustic mockery "makes it an even more serious violation of one's duty of respect for other human beings."[145] The metaphysics, or the absence thereof, thus matters.

In the context of the *Collin v. Smith* litigation, the question is one of how much metaphysical depth we, as a culture, are now still willing to ascribe to any of the prospective injuries inflicted by antisemitic speech. In particular, are we still open to assigning anything remotely like any version of Kantian-level metaphysical depth to any suffering and any emotional responses to the prospective speech? If, on whatever logic, the idea of the intrinsic and inviolable dignity and respect-worthiness of all persons is no longer credible,[146] this judgment must constrain our reactions to the case. At least in some antisemitic speech cases, there is still some inclination to supplement our concern for suffering, given especially twentieth century historical experience, and both individual and collective memories thereof. Thus, the leading Canadian antisemitic speech case refers not only to "the pain suffered by target group members,"[147] but, as well, to the often more metaphysically ambitious value of the "equality and the worth and dignity of each human person."[148]

Of course, ideas such as the equality and sanctity of persons, the intrinsic worth of the person, and essential human dignity can be redefined in some diluted or attenuated fashion, rejected as metaphysical, or essentially ignored.[149] This option is

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[142] *See* IMMANUEL KANT, THE METAPHYSICS OF MORALS 213 (Mary Gregor trans., 1996) (1797).
[143] *See id.*
[144] *Id.*
[145] *Id.*; *see also id.* at 211; IMMANUEL KANT, LECTURES ON ETHICS 211–12 (Peter Heath trans., reprint ed. 2001) (1785).
[146] *See supra* Section II.
[147] Regina v. Keegstra, [1990] 3 S.C.R. 697 (Can.).
[148] *Id.* at 700.
[149] For a sampling of a range of such approaches, see generally Walter Sinnott-Armstrong, *Moral Skepticism*, STAN. ENCYC. PHIL., https://plato.stanford.edu/entries/skepticism-moral (May 17, 2019); Chris Gowans, *Moral Relativism*, STAN. ENCYC. PHIL., https://plato.stanford.edu/entries/moral-relativism (Mar. 10, 2021); MARK ELI KALDERON, MORAL FICTIONALISM (Peter Ludlow et al. eds., 2005); RICHARD JOYCE, THE MYTH OF MORALITY (2001); J.L.

famously exercised by the American pragmatist philosopher Richard Rorty. Rorty purportedly sets aside questions of metaphysics and, in particular, of the pursuit of any objective truth or falsity in moral contexts.[150]

This means that without endorsing relativism, Rorty is left, ultimately, with the phenomenon of moral disputes among communities that simply cannot be resolved on any supposedly neutral or objectively reasonable basis.[151] There is no "neutral ground on which to stand and argue that either torture or kindness are preferable."[152] This stance presumably encompasses antisemitic encounters.

Rorty, however, then declares that "we liberals cannot tolerate enemies of tolerance beyond a certain point. Our mutual respect does not, and should not, extend to anti-Semitic hate speech."[153] The problem with this otherwise heartening sentiment, however, is that on Rorty's own terms, this belief, however fervent, rises no higher than, and is no more securely grounded than, the mere localized preferences, based largely on the exchange of self-consciously sentimental stories and anecdotes, of the one or more relevant communities with which one chooses to identify.

To the extent that Rorty's, or any other, approach that dilutes, denies, or simply abandons any robust metaethics of dignity and equality has become influential, we are left with, at a minimum, an obvious practical question. Are the harms and injuries imposed by antisemitic speech best addressed by setting aside any aspiration to any objective moral truth or to any other form of any metaphysical ambition? Which approach, we might wonder, would an antisemitic group itself strategically prefer that

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MACKIE, ETHICS: INVENTING RIGHT AND WRONG (1977); SIMON BLACKBURN, ESSAYS IN QUASI-REALISM (1993); J.O. URMSON, THE EMOTIVE THEORY OF ETHICS (1968).

[150] *See* RICHARD RORTY, OBJECTIVITY, RELATIVISM, AND TRUTH: PHILOSOPHICAL PAPERS 21–24 (1991); RICHARD RORTY, TRUTH AND PROGRESS: PHILOSOPHICAL PAPERS 1, 11 (1998) (rejecting the idea that true beliefs correspond to intrinsic reality, as well as, crucially, the idea that some better theory of truth should now be sought). Whether Rorty can or does consistently adhere to his own specified constraints is doubtful.

[151] *See* RICHARD RORTY, CONTINGENCY, IRONY, AND SOLIDARITY 173 (1989).

[152] *Id.* One might prefer kindness, perhaps, on doubtless elaborately articulable grounds, where those grounds are, however, ultimately reducible to an arbitrary preference.

[153] Richard Rorty, *Review of Stanley Fish's The Trouble with Principle*, 82 NEW LEADER 15 (1999).

their opponents adopt and rely upon? Does the abandonment or dilution of the metaphysics of antisemitic harm and injury not amount, in practice, to a form of partial forensic disarmament?

Here, in response, we might think of the words of the earlier American pragmatist William James. James, in his time, argued that

> [i]f this life be not a real fight, in which something is eternally gained for the universe by success, it is no better than a game of private theatricals from which one may withdraw at will. But it *feels* like a real fight,—as if there were something really wild in the universe which we . . . are needed to redeem . . . . For such a half-wild, half-saved universe our nature is adapted.[154]

IV. CONCLUSION

Our collective understanding of the *Collin v. Smith* litigation has evolved over time. Herein, the emphasis has largely been on academic thinking on freedom of speech and on the real nature and depth of the harms suffered by the victims of antisemitic speech. This emphasis tracks the observation of John Maynard Keynes that practical decision makers commonly reflect the sentiments of some earlier "academic scribbler."[155] Thus, we assume, academic trends tend to diffuse throughout layers of practical policymaking, and thus into the broader culture.

Over the most recent decades, the pursuit of truth and of autonomy have gradually lost some of their status, force, and

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[154] WILLIAM JAMES, THE WILL TO BELIEVE 62 (Project Gutenberg Literary Archive Foundation ed. 2009) (1896) (ebook), http://www.gutenberg.org/files/26659/26659-h/26659-h.htm.

[155] JOHN MAYNARD KEYNES, THE GENERAL THEORY OF EMPLOYMENT, INTEREST, AND MONEY 340 (1st ed. 2018) (1938). For an intriguing exploration of the theory of moral responsibility, and of its limits, in the context of antisemitic acts, see generally Paul Zawadzki, *Some Epistemological Issues in the Public Debate on Contemporary Antisemitism in France*, 37 CONTEMP. JEWRY 295 (2017).

cogency in justifying the protection of harmful speech.[156] Not unrelatedly, academic understandings of the nature of the harms associated with antisemitic speech have evolved as well. In some quarters, all versions of ideas such as the intrinsic, perhaps infinite or otherwise incomparable, dignity of the person have been variously rejected, set aside, or diluted. Unsurprisingly, this initially largely academic trend has diffused, in doubtless simplified and otherwise altered forms, into judicial decision making and popular culture as well.[157]

This is hardly to suggest that exponents of these cultural tendencies cannot also oppose antisemitism with intense emotional fervor.[158] The real question is instead whether the proper scope of freedom of speech, as well as the most practically effective case against antisemitism and antisemitic speech, are most likely to be developed and sustained, over the impending decades, by metaphysically ambitious, or instead by metaphysically evacuated, understandings of both the value of free speech and the genuine harms of speech.

In general, any balancing of conflicting interests in free speech cases should recognize the theoretical and very practical differences between an ultimately arbitrary or merely subjective expressed preference for some policy, however emotionally fervent that preference may be, and a policy preference that is intended to reflect the speaker's assessment of the metaethically objective basic interests at stake in the case.

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[156] *See supra* Section II.
[157] *See supra* Section III.
[158] *See, e.g.*, Rorty, *supra* note 153.

NOT CONGRESS, BUT THE JUDICIARY: HOW THE ROBERTS COURT'S RELIGION CLAUSE DECISIONS ARE CREATING AN ESTABLISHMENT OF RELIGION

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The text of the First Amendment states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[1] The first two of these clauses, commonly known as the Establishment Clause and the Free Exercise Clause, deal with freedom of religion. The Establishment Clause reflects the widespread consensus at the time of independence that there should be no nationally established church.[2] The Free Exercise Clause was designed to protect both the beliefs and the actions associated with an individual's religion.[3] Together, these two clauses were intended to guard against religious discrimination and persecution. However, from the very beginning, courts have "struggled to find a balance between the religious liberty of believers, who often claim the right to be excused or 'exempted' from laws that interfere with their religious practices, and the interests of society reflected in those very laws."[4]

This paper will explore the natural tension between the Religion Clauses and how the Supreme Court has succeeded and failed in balancing that tension. Part I will examine the original understanding of the Religion Clauses and what history can tell us about how we should interpret an "establishment of religion." Part II will then trace the Court's Religion Clause jurisprudence from the start of the modern era through the inception of the Roberts Court, attempting to identify a reliable definition of an "establishment." Part III will focus on the Roberts Court's Free Exercise jurisprudence and related case law, arguing that the Court has manipulated this jurisprudence to suit its predominantly conservative Christian leanings. Finally, the

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[1] U.S. CONST. amend. I.

[2] Marci A. Hamilton & Michael McConnell, *The Establishment Clause*, INTERACTIVE CONST., https://constitutioncenter.org/interactive-constitution/interpretation/amendment-i/interps/264 (last visited April 16, 2021).

[3] Frederick Gedicks & Michael McConnell, *The Free Exercise Clause*, INTERACTIVE CONST., https://constitutioncenter.org/interactive-constitution/interpretation/amendment-i/interps/265 (last visited April 16, 2021).

[4] *Id.*

paper will conclude that the current Court's jurisprudence amounts to an inappropriate establishment of religion.

I. HISTORICAL CONTEXT OF THE DRAFTING OF THE RELIGION CLAUSES AND THE INTENT BEHIND THEM

From the moment the first European colonists arrived in the present-day United States, they brought along complicated beliefs about the relationship between government and religion. Many of these colonists came to the new continent to flee religious persecution in Europe, yet established new systems of religious oppression in their new colonies, simply substituting their own religion for the one they had fled.[5] Linking government authority to a specific religion through a state establishment of that religion was a deeply engrained practice for these colonists, as such establishment had been the practice in Europe for centuries.[6] Yet the colonists also had reason to want to eradicate such establishment in their new home: they had witnessed centuries of "violent, destabilizing, and oppressive battles over the relationship between government and religion" that had toppled monarchies and resulted in the death and persecution of an appallingly high percentage of the population.[7] The Virginia Declaration of Rights was a clear example of the tension at the time between claims of religious tolerance and assertions of authority by the religious group in power—in one part, the document declared that "all men are entitled to the free exercise of religion," and then in another it went on to state that all citizens had a duty to "practice *Christian* forbearance, love, and charity towards each other."[8]

In spite of this tension, the overall trend during the period was towards greater religious tolerance and freedom. On the eve of the Revolutionary War, nine of the thirteen colonies had a state establishment of religion.[9] However, the changes brought about by the war led five of those colonies to disestablish "immediately, and with little discussion."[10] By 1800, only three states had established churches remaining.[11] Every one of the

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[5] Vincent J. Samar, *Religion/State: Where the Separation Lies*, 33 N. ILL. U. L. REV. 1, 3–4 (2012).
[6] *See* HOWARD GILLMAN & ERWIN CHEMERINSKY, THE RELIGION CLAUSES: THE CASE FOR SEPARATING CHURCH AND STATE 23–24, 38 (2020).
[7] *Id.* at 21.
[8] Samar, *supra* note 5, at 6 (emphasis added).
[9] John K. Wilson, *Religion Under the State Constitutions, 1776-1800*, 32 J. CHURCH & STATE 753, 754 (1990) (defining establishment of religion in terms of direct tax aid for a church).
[10] *Id.* at 755.
[11] *Id.* at 773.

nineteen state constitutions drafted between 1776 and 1800 included a provision for the protection of religious freedom, and the abundant changes to state constitutions throughout the founding period demonstrated a clear trend of expanding religious liberty.[12]

While the Founders increasingly agreed that there should be no formal establishment of religion in the new nation, discrepancies remained as to what exactly they defined as an establishment and how the line separating government and religion should be drawn. Many of the colonists had fled from a government that appointed and paid religious leaders and passed laws mandating how its subjects worshipped.[13] The Founders viewed varying levels and combinations of these actions as an "establishment," with debates arising over individual components such as financial aid to churches, religious tests for public office, and religious exemptions from public laws and duties such as military service. These debates continued through the drafting of the Bill of Rights and the early years of independence.[14]

Three distinct schools of thought, represented by three of the most relevant and well-known Founders, influenced the drafters of the Bill of Rights with regards to religion.[15] Roger Williams, known as the father of religious freedom in the United States,[16] advocated a view of "positive toleration" which required that the government "foster[] a climate conducive to all religion."[17] His primary concern was that government entanglement with religion would "corrupt and undermine religion."[18] Where Williams saw separation as a means of protecting the church from the state, Thomas Jefferson saw separation as a means of protecting the state from the church.[19] While Jefferson supported freedom and toleration for diverse religious doctrines and exercises, he did not believe that religious practitioners had a right to exemptions from general social

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[12] *Id.* at 768.
[13] GILLMAN & CHEMERINSKY, *supra* note 6, at 23–24.
[14] *Id.* at 36 ("Debates about the proper relationship between church and state continued during the drafting of the Bill of Rights and the early experiences of governing under the new Constitution.").
[15] LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1158–59 (2d ed. 1988).
[16] GILLMAN & CHEMERINSKY, *supra* note 6, at 25.
[17] TRIBE, *supra* note 15, at 1159.
[18] GILLMAN & CHEMERINSKY, *supra* note 6, at 60.
[19] TRIBE, *supra* note 15, at 1159.

duties.[20] James Madison believed that both the church and the state were better off if they were each free of the other's control and influence.[21] He did not give religion a special status, but rather saw religion as one of multiple types of "factions" that needed to be protected, and insisted that "in a free government the security for civil rights must be the same as that for religious rights."[22]

While historical analyses of the First Amendment typically focus on the political leaders of the time, there is, of course, one other powerful group whose ideas influenced the development of the nation: the clergy. As the Founders shaped the new country through the Revolution, the Articles of Confederation, and the Constitutional Convention, many members of the clergy addressed the relationship between religious conviction and the rule of law directly in their sermons.[23] Many modern scholars have pointed to the prominence of Christianity at the time of the drafting of the Constitution as support for their argument that more mandatory religious accommodation is required. However, the accumulated sermons of the time instead show a general belief that true liberty could only be achieved by widespread obedience to democratic laws, and that Christians had a duty to the public good or the good of the whole that must be considered when deciding whether to follow the law.[24]

While it left much open to debate, the disestablishment/free exercise framework that the drafters of the First Amendment ultimately embraced resolved two fundamental issues: (1) it rejected the long-standing European practice of connecting governmental authority to a specific religion, and (2) it maintained that while the government should be secular, the presence of religion in society was beneficial.[25] At face value, the Religion Clauses would therefore seem to work together to accomplish Madison's goal of preserving everyone's civil and religious rights: the Free Exercise Clause preserves individuals' rights to practice a religion if they so choose, while the Establishment Clause prevents the religious majority—via the government—from forcing their beliefs or practices on others.

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[20] GILLMAN & CHEMERINSKY, *supra* note 6, at 40.
[21] TRIBE, *supra* note 15, at 1159.
[22] GILLMAN & CHEMERINSKY, *supra* note 6, at 60–61.
[23] Marci A. Hamilton, *Religion, the Rule of Law, and the Good of the Whole: A View from the Clergy*, 18 J.L. & POLITICS 387, 392 (2002).
[24] *Id.* at 395.
[25] GILLMAN & CHEMERINSKY, *supra* note 6, at 60–61.

However, the Supreme Court has acknowledged that in applying them, it has "struggled to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other."[26] This tension arises between a requirement of government neutrality derived from the Establishment Clause and the idea that under the Free Exercise Clause the government must accommodate some level of religious practice.[27] The Court has often attempted to ease this perceived tension between the clauses by holding that certain accommodations of religious practices mandated by the Free Exercise Clause do not amount to establishing religion in a way that violates the Establishment Clause.[28]

II. THE SUPREME COURT'S ATTEMPTS TO BALANCE THE RELIGION CLAUSES AND DEFINE AN "ESTABLISHMENT OF RELIGION"

While the Court has historically treated the two Religion Clauses independently, developing separate jurisprudence for each, the tension between them makes it impossible to truly interpret one without regard to the other. Defining an improper "establishment of religion" cannot be done in a vacuum—it requires interpreting and balancing both clauses. The Supreme Court's attempts to do so have given us an abundance of case law, but ultimately it is not clear that the Justices have been any more successful in agreeing on a clear, consistent definition of an establishment than the Founders were.

Two primary theories color the Court's Religion Clause jurisprudence.[29] The first is the accommodationist theory. It holds that the Establishment Clause was intended to ensure that religious groups were advanced only by voluntary followers, not by government bolstering or support.[30] Accommodationist theory interprets the Establishment Clause as allowing for religion in government and even government support for religion, so long as the government does not coerce religious

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[26] Walz v. Tax Commission, 397 U.S. 664, 668–69 (1970).
[27] *Amdt1.1.3 Relationship Between Establishment Clause and Free Speech Clause*, CONST. ANNOTATED, https://constitution.congress.gov/browse/essay/amdt1-1-3/ALDE_00001021/#ALDF_00005929 (last visited April 16, 2021).
[28] *Id.*
[29] *See* TRIBE, *supra* note 15, at 1160.
[30] *Id.* at 1160–61 (referring to accommodationism as voluntarism).

participation or favor one religion over another.[31] With regards to the Free Exercise Clause, accommodationist theory supports more exemptions for religious practitioners and is generally associated with the "least restrictive means" or strict scrutiny approach.[32] Thus, the central premise of accommodationist theory has been characterized by some scholars as the idea that "religion is different–that is, better than–other forms of human belief and expression."[33] This seems to directly contradict with Madison's belief that religious rights and other civil rights should be equally protected.

The second theory, separatism, reflects the Madisonian view that "both religion and government function best if each remains independent of the other."[34] It interprets the Establishment Clause as being intended to build a strong wall between church and state, with no government entanglement with religion.[35] However, this does not mean no interaction between government and religion whatsoever, as such strict separationism would be impossible.[36] Rather, scholars have defined separation under the Establishment Clause as requiring that the government not create any religious incentives or effects.[37] With regards to the Free Exercise Clause, it requires that the government "not act with animus toward religion" but does not provide for special religious exemptions to general laws.[38] In particular, it emphasizes that free exercise does not give religious individuals the right to inflict injury on or discriminate against others.[39] Separationist doctrine has interpreted the Religion Clauses as prohibiting favoritism not only of one religion over another, but also of religion over non-religion.[40]

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[31] GILLMAN & CHEMERINSKY, *supra* note 6, at 12.
[32] *Id.* at 14; *see also* Frank S. Ravitch, *A Funny Thing Happened on the Way to Neutrality: Broad Principles, Formalism, and the Establishment Clause*, 38 GA. L. REV. 489, 537 (2004) ("Accommodationist arguments are most common under the Free Exercise Clause. In that context, accommodationism would support exemptions from laws of general applicability.").
[33] Stephen G. Gey, *Why is Religion Special?: Reconsidering the Accommodation of Religion Under the Religion Clauses of the First Amendment*, 52 U. PITT. L. REV. 75, 110 (1990).
[34] TRIBE, *supra* note 15, at 1161.
[35] GILLMAN & CHEMERINSKY, *supra* note 6, at 12.
[36] Ravitch, *supra* note 32, at 535–36.
[37] *See, e.g.*, John H. Garvey, *What's Next After Separationism?*, 46 EMORY L.J. 75, 75 (1997) ("Separationism is a theory about cause and effect. *Lemon v. Kurtzman* states the rule: the government must not cause religious effects." (footnotes omitted)).
[38] GILLMAN & CHEMERINSKY, *supra* note 6, at 13.
[39] *Id.*
[40] *See e.g.*, Everson v. Bd. of Educ., 330 U.S. 1, 15 (1947).

Of course, these theories are an oversimplification, as the interpretations and beliefs of all of the Justices fall on a spectrum, and the modern Court's jurisprudence cannot easily be separated into accommodationist or separationist decisions.[41] The Court has fluctuated between leaning towards one or the other, often falling at various points on the spectrum between them.[42] Further, some scholars have argued that the Court's jurisprudence is best understood by dividing the cases into sub-categories and applying the theories to them individually.[43] For example, under the Establishment Clause, the Court may have taken a strict separationist approach to school prayer cases but an accommodationist approach to governmental regulations.[44] Understanding these theories and tracing how they have been applied is nonetheless important to defining what constitutes an establishment of religion. It helps us draw the line between accommodating free exercise and protecting against unconstitutional establishments and see how that line has moved over time.

In its early religion cases, the Supreme Court leaned towards a separationist approach to both clauses.[45] The Supreme Court decided its first major case on the Free Exercise Clause in 1879.[46] This case, *Reynolds v. United States*,[47] dealt with a member of the Church of Jesus Christ of Latter-Day Saints, commonly known as the Mormon Church, who was charged with violating a federal statute prohibiting polygamy and raised as a defense "that it was an accepted doctrine of [his] church 'that it was the duty of male members of said church, circumstances permitting, to practice polygamy.'"[48] The Court held that under the Free Exercise Clause, "Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were

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[41] *See* GILLMAN & CHEMERINSKY, *supra* note 6, at 15.
[42] *See id.*
[43] *See, e.g.*, William P. Marshall, *"We Know It When We See It:" The Supreme Court Establishment*, 59 S. CAL. L. REV. 495, 540 (1986) ("If establishment cases are divided into the three specific and distinct contexts present in the case law ((1) the public schools, (2) governmental practices and regulatory programs, and (3) aid to parochial education) a relatively clear and defensible jurisprudence emerges."); Ravitch, *supra* note 32, at 536 ("Thus, separation would be used in the school prayer context, the public school curriculum context, and perhaps the direct aid context, but not in equal access or indirect aid cases. This is not too far from the current situation.").
[44] *See* Marshall, *supra* note 43, at 541, 545.
[45] *See* Garvey, *supra* note 37, at 78 ("Separationism was the rule in Establishment Clause cases for three or four decades . . . .").
[46] GILLMAN & CHEMERINSKY, *supra* note 6, at 98.
[47] 98 U.S. 145 (1879).
[48] *Id.* at 161–63.

in violation of social duties or subversive of good order" and unanimously upheld Mr. Reynolds' conviction.[49] In doing so, it cited Thomas Jefferson's statement that the religion clauses "buil[t] a wall of separation between church and State" as "an authoritative declaration of the scope and effect of the amendment."[50] This distinction between belief and action ignored the fact that the text clearly protects religious "exercise" but was a response to the concern that allowing believers to claim religion any time they did not want to obey a general law would undermine the value of a fair government.[51] The Court took some steps in subsequent cases to clarify that while religion did not give a right to be exempted from general social duties, religious disciplines or exercise were protected.[52] However, this approach was not otherwise challenged until the early 1960s.[53]

The first case in modern Establishment Clause jurisprudence was *Everson v. Board of Education*.[54] Justice Black, widely considered one of the main authors of the Court's historical analysis of the Religion Clauses,[55] wrote in *Everson* that "[t]he First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach."[56] However, the Court went on to hold that reimbursements to parents for their children's public transportation fares to and from school were not such a breach, even when that transportation was to and from religious schools.[57] It did so on the ground that the state did not provide money to or in any way support the religious schools, it merely offered "a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools."[58] Nonetheless, the Court in *Everson* exhibited strong separationist ideas, emphasizing that the Establishment Clause prohibits the government not only from aiding one religion or preferring one religion over another, but also from aiding *all* religions.[59]

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[49] *Id.* at 164, 168.
[50] *Id.* at 164.
[51] Gedicks & McConnell, *supra* note 3.
[52] GILLMAN & CHEMERINSKY, *supra* note 6, at 100–02.
[53] *Id.* at 102.
[54] 330 U.S. 1 (1947); County of Allegheny v. ACLU, Greater Pittsburgh Chapter, 492 U.S. 573, 656 (1989) (Kennedy, J., concurring in part) (identifying *Everson* as the first case in the Court's modern Establishment Clause jurisprudence).
[55] *See* TRIBE, *supra* note 15, at 1160.
[56] *Everson*, 330 U.S. at 18.
[57] *Id.* at 3, 18.
[58] *Id.* at 18.
[59] *Id.* at 15.

In the 1960s and 70s, the Court maintained its separationist approach to the Establishment Clause but shifted to applying an accommodationist approach to the Free Exercise Clause, providing more protection for religious exemptions.[60] The seminal Establishment Clause case during this time was *Lemon v. Kurtzman*,[61] in which the Court created a three-part test for Establishment Clause violations. The test was subject to almost immediate scrutiny, but nonetheless remained the dominant rule for Establishment Clause problems for decades,[62] and has been described as "the very symbol of strict separation."[63] It stated that to avoid a violation, a law or government practice must (1) have a secular purpose, (2) neither advance nor inhibit religion, and (3) not create "an excessive government entanglement with religion."[64] This three-part test, which has come to be known as the *Lemon* test, attempted to combine and reconcile three previously distinct approaches to Establishment Clause problems: the secular purpose doctrine originating from *Abington School District v. Schempp*,[65] the principal or primary effects doctrine from *Board of Education v. Allen*,[66] and the excessive entanglement test from *Walz v. Tax Commission*.[67] Applying the new test, the Court struck down two state statutes that provided financial aid to private schools, finding that they created an "excessive entanglement" with religion because they provided direct aid to or operated for the benefit of religious schools.[68]

Two years later, the Court decided *Committee for Public Education and Religious Liberty v. Nyquist*,[69] holding that series of state laws which provided financial aid to private schools through a variety of means violated the effects prong of the

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[60] GILLMAN & CHEMERINSKY, *supra* note 6, at 16; *see also* Garvey, *supra* note 37, at 78 ("Separationism was the rule in Establishment Clause cases for three or four decades . . . .").
[61] 403 U.S. 602 (1971).
[62] Geoffrey McGovern, Lemon v. Kurtzman I (*1971*), THE FIRST AMENDMENT ENCYC., https://mtsu.edu/first-amendment/article/437/lemon-v-kurtzman-i (last visited April 16, 2021).
[63] Douglas Laycock, *The Underlying Unity of Separation and Neutrality*, 46 EMORY L.J. 43, 56 (1997).
[64] *Lemon*, 403 U.S. at 612–13 (quoting Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970)).
[65] 374 U.S. 203 (1963).
[66] 392 U.S. 236 (1968).
[67] 397 U.S. 664 (1970); McGovern, *supra* note 62.
[68] *Lemon*, 403 U.S. at 613–14.
[69] 413 U.S. 756 (1973).

Lemon test.[70] In doing so, it again rejected the accommodationist idea that coercion was a necessary element of an Establishment Clause claim, citing *Abington*.[71]

Meanwhile, the Court made a significant shift towards recognizing and protecting religious exemptions from general laws, thus adopting an accommodationist approach to the Free Exercise Clause.[72] In *Braunfeld v. Brown*,[73] Chief Justice Warren maintained much of the beliefs-not-actions language from *Reynolds* but stated that while laws with an express purpose or effect to advance or oppose a religion are unconstitutional, "if the State regulates conduct by enacting a general law . . . to advance the State's secular goals, the statute is valid despite its indirect burden on religious observances unless the State may accomplish its purpose by means which do not impose such a burden."[74] This language suggested a "least restrictive means" test.[75] Justice Brennan, while dissenting on the result with regards to the Free Exercise Clause, did so by more explicitly laying out "the typical 'strict scrutiny/compelling state interest/least restrictive means' test that is normally associated with the protection of fundamental liberties in the modern era of Supreme Court decision making."[76]

Just two years later, in a majority opinion authored by Justice Brennan, the Court officially adopted this view, holding that any general law imposing an indirect burden on religion was subject to "strict scrutiny."[77] The belief-action distinction was thus replaced by a compelling-interest test, which said that the government could not enforce even a neutral, generally applicable law that interfered with religious exercise unless there was a "compelling" interest at stake.[78] However, the powerful protections suggested by this test never fully materialized,[79] and in 1972, the Court's opinion in *Wisconsin v. Yoder*[80] highlighted a number of problems with this approach.[81]

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[70] *Id.* at 759, 798.
[71] *Id.* at 786 (citing Abington Sch. Dist. v. Schempp, 374 U.S. 203, 222–23 (1963).
[72] *See* GILLMAN & CHEMERINSKY, *supra* note 6, at 16.
[73] 366 U.S. 599 (1961).
[74] *Id.* at 607.
[75] GILLMAN & CHEMERINSKY, *supra* note 6, at 103.
[76] *Id.* at 103–04; *Braunfeld*, 366 U.S. at 610–16 (Brennan, J., dissenting).
[77] GILLMAN & CHEMERINSKY, *supra* note 6, at 104–05; Sherbert v. Verner, 374 U.S. 398 (1963).
[78] Gedicks & McConnell, *supra* note 3.
[79] *Id.*
[80] 406 U.S. 205 (1972).
[81] GILLMAN & CHEMERINSKY, *supra* note 6, at 107.

Yoder dealt with members of the Old Order Amish religion and the Conservative Amish Mennonite Church who refused to send their children to school after they completed the eighth grade and were charged with a violation of Wisconsin's compulsory school attendance law for children under the age of sixteen.[82] Overturning their conviction, the majority opinion found that forcing the Amish community to send their children to two additional years of schooling would have a drastic impact on their religious exercise and emphasized the "independence and successful social functioning of the Amish community" as a reason that compelling the additional schooling was not necessary.[83] This led Justice Douglas to declare in dissent that the "emphasis of the Court on the 'law and order' record of this Amish group of people is quite irrelevant. A religion is a religion irrespective of what the misdemeanor or felony records of its members might be."[84] The *Yoder* opinion thus had "the potential of embroiling the justices in very complicated and controversial assessments of the value of certain religious practices and the importance of various government interests."[85] Nonetheless, the Court continued to apply strict scrutiny for at least sixteen more years.

In the late 1980s and early 90s, the Court's Free Exercise jurisprudence reversed directions, shifting back to a separationist approach.[86] It began with a loosening of the *Sherbert/Yoder* approach in *Lyng v. Northwest Indian Cemetery Protective Association*[87]. In *Lyng*, the Court held that there was no need for a "'compelling justification' when evaluating the 'incidental effects of government programs, which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs.'"[88] This case, which dealt with road construction and timber harvesting in "sacred areas" of a national forest,[89] the destruction of which would "virtually destroy" the ability of certain Native American tribes to practice their religion,[90] represented exactly the sort of circumstances that proponents of the strict scrutiny approach argued it would protect against.

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[82] *Yoder*, 406 U.S. at 207.
[83] *Id.* at 218–19, 226–27.
[84] *Id.* at 246 (Douglas, J., dissenting).
[85] GILLMAN & CHEMERINSKY, *supra* note 6, at 108.
[86] *Id.* at 16.
[87] 485 U.S. 439 (1988).
[88] GILLMAN & CHEMERINSKY, *supra* note 6, at 110 (quoting *Lyng*, 485 U.S. at 450–51).
[89] *Lyng*, 485 U.S. at 442.
[90] *Id.* at 451.

However, by relegating the destruction of these tribes' ability to practice their religion to merely an "incidental effect," the Court failed to do so in this case.

Two years later, the Court officially abandoned the strict scrutiny approach in *Employment Division v. Smith*.[91] In *Smith*, the Court addressed the issue of whether the Free Exercise Clause permits a state "to include religiously inspired peyote use within the reach of its general criminal prohibition on use of that drug, and . . . to deny unemployment benefits to persons dismissed from their jobs because of such religiously inspired use."[92] Upholding the denial of benefits, the Court baldly stated "[w]e have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate."[93] Rather, the Court explained, it had only struck down a neutral, generally applicable law as applied to religiously motivated acts when other constitutional protections—not just the Free Exercise Clause—were also implicated.[94] Although *Smith* did not return to the belief-action doctrine that held sway in Free Exercise cases for nearly a century, it echoed the same concerns that religious exemptions permit an individual "to become a law unto himself."[95]

In 2004 the Court addressed the issue of whether a state, pursuant to its own constitutional provisions, could deny funding for religious instruction that would be permissible under the Establishment Clause without violating the Free Exercise Clause in *Locke v. Davey*.[96] The answer to that question was a resounding yes, with the Court declaring that treating funding for religious education in preparation for ministry differently than education for other professions was not evidence of impermissible hostility towards religion.[97] On the contrary, the Court found that avoiding funding a religious education was a key antiestablishment interest.[98] The case revolved around a state scholarship program that assisted the top students in the state with expenses related to an in-state postsecondary education.[99] Pursuant to a provision of the state constitution, the scholarship

[91] 494 U.S. 872 (1990).
[92] *Id.* at 874.
[93] *Id.* at 878–79.
[94] *Id.* at 879–82.
[95] GEDICKS & MCCONNELL, *supra* note 3 (quoting Reynolds v. United States, 98 U.S. 145 (1879)).
[96] 540 U.S. 712, 719.
[97] *Id.* at 721.
[98] *Id.* at 722.
[99] *Id.* at 715–16.

could not be used to pursue a degree in devotional theology.[100] A student pursuing a devotional theology degree challenged the denial of his scholarship under the Religion and Free Speech Clauses.[101] A panel of the Ninth Circuit concluded that the State had singled out religion for unfavorable treatment, and the exclusion must therefore be narrowly tailored to achieve a compelling state interest.[102] The Ninth Circuit found that the State's interests in not creating an establishment were not compelling, and thus the exclusion of the student from the scholarship program was unconstitutional.[103] The Supreme Court reversed, emphasizing that there are some accommodations for religion which would be permissible under the Establishment Clause but are not required by the Free Exercise Clause.[104]

Although the *Lemon* test remained the dominant rule for Establishment Clause cases throughout the 1990s and early 2000s, a closer look at the way it was applied reflects the start of a shift in this jurisprudence during that time as well. Historically,

> [m]ost Justices have hesitated to pursue a rigorous application of the accommodation principle in the [E]stablishment [C]lause context because it would eviscerate the notion of separation of church and state, which a working majority on the Court has considered central to the [E]stablishment [C]lause ever since [it] was originally articulated in Everson.[105]

However, a minority of Justices began infusing the accommodationist approach into Establishment Clause thinking as early as the 1980s.

At first glance, this rather tumultuous and inconsistent history of Supreme Court jurisprudence seems to give us little guidance on how we should or must define an establishment of religion. Indeed, the Court's Establishment Clause cases in the modern era have been described as "legendary in their

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[100] *Id.*
[101] *Id.* at 718.
[102] *Id.*
[103] *Id.*
[104] *Id.* at 718–19.
[105] Gey, *supra* note 33, at 97.

inconsistencies."[106] However, there are a few not-insignificant themes we can pull from the chaos.

The first is that an establishment involves government action that either creates incentives to conform or causes religious effects. Prior to the Roberts Court's inception, a majority of the Court never favored an accommodationist approach to the Establishment Clause.[107] Rather, the Court has generally followed a separationist approach. As discussed above, a separationist approach to the Establishment Clause focuses on the idea that the government must not cause religious effects.[108] It interprets the Religion Clauses as prohibiting not just favoritism of one religion or another, but also religion over non-religion.

The second is that rights under the Religion Clauses are not absolute. A number of ideas follow from this principle. For one, freedom of religion does not always entail treating religious entities exactly the same as secular entities. Treating religious organizations differently than secular organizations is sometimes necessary to avoid creating an establishment, and thus not inherently impermissible animus to religion. This is particularly true in the context of preventing the key establishment fears of the Founders: sponsorship, financial support, and active involvement of the sovereign in religious activity. Thus, differentiating religious organizations from similar secular organizations with regards to qualifications for receiving grants is not animus to religion, but rather reflects the government's important interest in not providing direct financial support to a religious organization. For another, there are numerous government interests (in addition to not creating an establishment) that must be balanced against accommodation of religion. These interests include the interest in maintaining a peaceful, organized society through generally applicable laws

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[106] Marshall, *supra* note 43, at 495.

[107] *See* County of Allegheny v. ACLU, Greater Pittsburgh Chapter, 492 U.S. 573, 627–28 (O'Connor, J., concurring in part and concurring in the judgment) ("[T]his Court has never relied on coercion alone as the touchstone of the Establishment Clause analysis."); GILLMAN & CHEMERINSKY, *supra* note 6, at 52–54 (stating that under an accommodation/equality approach the government violates the Establishment Clause only if it coerces religious participation, establishes a church, or favors some religions over others, and that Justices O'Connor and Souter in *County of Allegheny v. ACLU, Greater Pittsburgh Chapter* strongly argued that equality alone has never been the Establishment Clause test); Garvey, *supra* note 37 ("Separationism was the rule in Establishment Clause cases for three or four decades . . . .").

[108] Garvey, *supra* note 37 ("Separationism is a theory about cause and effect. *Lemon v. Kurtzman* states the rule: the government must not cause religious effects." (footnotes omitted)).

and the interest in protecting the safety and civil rights of third parties.

From these patterns, we can begin to create a coherent definition of an establishment of religion: an unconstitutional establishment is any government action that causes religious effects by incentivizing a specific religion, or any religion over non-religion. Some religious exemptions may be provided without creating an establishment, but not when they conflict with the public interest or cause broad third-party harms, as this favors religion over non-religion. Further, while express animus towards one religion may create an establishment of another, this does not include treating religious institutions differently in the name of avoiding an establishment.

III. ANALYSIS OF THE ROBERTS COURTS' DECISIONS AS CREATING AN ESTABLISHMENT OF RELIGION

Although the text of the First Amendment provides only that "*Congress* shall make no law respecting an establishment of religion,"[109] the Supreme Court has interpreted the Fourteenth Amendment as extending the First Amendment, including the Religion Clauses, to the states.[110] Subsequently, courts have upheld Establishment Clause challenges against government actions implemented by a wide variety of branches and government actors, ranging from state and federal legislation to policies drafted and implemented by executive branch agencies to courthouse decorations ordered by state justices.[111] Therefore, this section will examine the Roberts Court jurisprudence as law creating an establishment of religion.

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[109] U.S. CONST. amend. I (emphasis added).
[110] Everson v. Bd. of Educ., 330 U.S. 1, 8 (1947).
[111] *See, e.g.*, Lee v. Weisman, 505 U.S. 577 (1992) (finding that a school board policy of allowing principals to invite members of the clergy to offer prayers as part of formal graduation ceremonies violated the Establishment Clause); County of Allegheny v. ACLU, Greater Pittsburgh Chapter, 492 U.S. 573 (finding, *inter alia*, that county violated the Establishment Clause with nativity scene at county courthouse); Lemon v. Kurtzman, 403 U.S. 602 (1971) (finding that state statutes providing financial aid to religious schools violated the Establishment Clause); American Atheists, Inc. v. Duncan, 637 F.3d 1095 (10th Cir. 2010) (finding that state officials who authorized the use of the state highway patrol logo on crosses along the roadway violated the Establishment Clause); Glassroth v. Moore, 335 F.3d 1282 (11th Cir. 2003) (finding against the Chief Justice of the Alabama Supreme Court in an Establishment Clause challenge against his installation of a religious monument in the Alabama State Judicial Building).

In one significant line of cases, the Roberts Court addresses Free Exercise exemptions to general anti-discrimination laws. The first two, *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC.*[112] and *Our Lady of Guadalupe School v. Morrissey-Berru*,[113] use an overbroad interpretation of the Establishment Clause to create an exemption to neutral laws of general applicability even under *Smith*. In *Smith*, the Court held that the Free Exercise Clause did not require religious exemptions to generally applicable laws enacted with a secular purpose, simply because they imposed an incidental burden on religious beliefs.[114] Although its scope has been significantly limited by statutory and judicial carveouts, *Smith* remains the binding precedent in cases decided under the Free Exercise Clause, such as *Hosanna-Tabor* and *Our Lady of Guadalupe*.

The one exception to the rule against religious exemptions is the ministerial exception, which prevents the government from interfering in the hiring, training, or firing of ministers on Establishment Clause grounds.[115] In *Hosanna-Tabor*, the Court drastically expanded this previously narrow doctrine, applying it to an elementary school teacher in a religious school who took a leave of absence after being diagnosed with narcolepsy and was subsequently fired.[116] The teacher filed a charge for wrongful termination in violation of the Americans with Disabilities Act, but the school raised a Free Exercise defense, claiming that she was a minister or "called teacher" who had been fired because "her threat to sue the Church violated [its] belief that Christians should resolve their disputes internally."[117] *Our Lady of Guadalupe* extended this holding to teachers at Catholic elementary schools who had less religious training than the teacher in *Hosanna-Tabor* and did not carry any title that designated them as "ministers" or other than lay teachers.[118] One of these teachers had filed suit under the Age Discrimination in Employment Act, while the other alleged that she was fired because she requested a leave of absence due to a breast cancer diagnosis.[119] Together, these cases take any employer that can claim to be a religious organization outside the realm of neutral anti-discrimination laws and prevent the government from

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[112] 565 U.S. 171 (2012).
[113] 140 S. Ct. 2049 (2020).
[114] Emp. Div. v. Smith, 494 U.S. 872, 878–79 (1990).
[115] *See Hosanna-Tabor*, 565 U.S. at 188.
[116] *Id.* at 190–92.
[117] *Id.* at 178–80.
[118] *Our Lady of Guadalupe*, 140 S. Ct. at 2055.
[119] *Id.* at 2058–59.

protecting any employees of such organizations, no matter what their job description or grievance.

Recently, the Court decided yet another highly contentious Free Exercise case—*Fulton v. City of Philadelphia*.[120] *Fulton* addressed whether the City of Philadelphia violated the Free Exercise Clause by refusing to renew its foster care contract with a private foster care agency, Catholic Social Services (CSS), unless CSS agreed to certify same-sex couples as foster parents.[121] Philadelphia's foster care system relies on its relationships with private foster care agencies like CSS, with whom it enters standard annual contracts.[122] State law grants these agencies the authority to certify prospective foster families and provides statutory criteria which the agencies must consider in certifying families.[123] When the Department of Human Services needs to place a child in foster care, it sends a request to the contracted agencies, who report whether any of their certified families are available, and then places the child with what it views as the most suitable of those available families.[124] After a newspaper quoted a spokesman for the Archdiocese of Philadelphia as saying that CSS would not certify prospective foster parents in same-sex marriages, an inquiry was launched, and the Department stated that it would no longer refer children to CSS because CSS's refusal to certify same-sex couples violated the non-discrimination requirements of its contract with the City and the City's Fair Practices Ordinance.[125]

The District Court held that the non-discrimination requirements of CSS's contract and the Fair Practices Ordinance were neutral and generally applicable under *Employment Division v. Smith* and denied preliminary relief.[126] The Third Circuit affirmed.[127] In petitioning the Supreme Court for certiorari, CSS not only challenged the Third Circuit's holding that the City's actions were permissible under *Smith*, but also asked the Court to reconsider *Smith*.[128] Instead, the six-justice majority held that the case fell outside *Smith* because the policies at issue were not

[120] 141 S. Ct. 1868 (2021).
[121] *Id.* at 1874.
[122] *Id.* at 1875.
[123] *Id.*
[124] *Id.*
[125] *Id.*
[126] *Id.* at 1876.
[127] *Id.*
[128] *Id.*

neutral and generally applicable.[129] It did so by referencing the "most favored nation" approach to religious exemptions, which states that a law cannot be considered neutral and generally applicable if it contains any categorical exemptions that are comparable to the requested religious exemption. This suggests a return to the pre-*Smith* accommodationist approach of broad recognition for religious exemptions, severely limiting the applicability of *Smith* without explicitly overturning it.

In each of these three cases, the Court's decision prioritizes an organization's claimed Free Exercise rights over the rights of individuals to not be discriminated against and the public interest in a more open and accepting society. Such prioritizing runs counter to the Court's precedent and the intentions of the Founders. The Court has declared that it is a "fundamental principle of the Religion Clauses," that the First Amendment "gives no one the right to insist that in pursuit of their own interests others must conform their conduct to his own religious necessities."[130] When examining the pre-Roberts Court Free Exercise jurisprudence, a general pattern of denying religious exemptions is evident. This is true even during the period when the Court followed an accommodationist approach to the Free Exercise Clause and was ostensibly most supportive of religious exemptions.[131] During that period, the Court frequently denied Free Exercise claims by finding that the challenged law served a compelling government interest or that a low standard of scrutiny applied because of the specific context.[132] Thus, the Court has consistently refused to require Free Exercise exemptions to general laws when the law furthers a secular public interest.

Further, prior to the Roberts Court, "the [C]ourt had never approved an exemption that shifted serious burdens onto third parties, with the single exception of a case involving a church's control over its membership."[133] The Court has also explicitly taken notice of the burdens to third parties when determining whether a religious accommodation under the Free Exercise Clause amounts to an establishment of religion. In

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[129] *Id.* at 1877.
[130] Est. of Thornton v. Caldor, Inc., 472 U.S. 703, 710 (1985) (citing Otten v. Baltimore & O.R. Co., 205 F.2d 58, 61 (2d. Cir. 1953)).
[131] Stephen M. Feldman, *Religious Minorities and the First Amendment: The History, The Doctrine, and The Future*, 6 U. PA. J. CONST. L. 222, 265 (2003).
[132] *Id.*
[133] Micah Schwartzman, Richard Schragger, & Nelson Tebbe, *Religious Privilege in Fulton and Beyond*, SCOTUSBLOG (Nov. 2, 2020, 9:29 AM), https://www.scotusblog.com/2020/11/symposium-religious-privilege-in-fulton-and-beyond/.

Estate of Thornton v. Caldor, Inc.,[134] the Court found that a state law which gave all employees an unqualified right to observe a Sabbath any day of the week, regardless of the burden placed on their employer or coworkers, violated the Establishment Clause. The Court emphasized the burden on others in finding that the statute's primary effect was to advance a particular religious practice. In doing so, the Court cited a "fundamental principle of the Religion Clauses," that the First Amendment "gives no one the right to insist that in pursuit of their own interests others must conform their conduct to his own religious necessities." This makes sense, given the widely accepted and longstanding interpretation of the Establishment Clause as prohibiting not only government favoritism for one religion over another, but also favoritism for religion over non-religion.

The Roberts Court has addressed financial aid to religious institutions in two cases, *Trinity Lutheran Church v. Comer*[135] and *Espinoza v. Montana Department of Revenue*[136]. These decisions are in sharp contrast to the pre-Roberts Court precedent in cases such as *Locke v. Davey*,[137] in which a seven-Justice majority held that a government scholarship program's disqualification of students pursuing a devotional theology degree did not violate the Free Exercise Clause, because the State's interest in not providing any aid to religion under their state constitution's anti-establishment clause was a substantial interest.[138] In *Trinity Lutheran*, the Roberts Court attempted to distinguish its predecessor's holding in *Locke* on the basis of practice versus identity.[139] In *Locke*, the Court said, the student could still receive the scholarship without disavowing his religious beliefs; he simply could not use the scholarship to fund his ministerial training.[140] While in *Trinity Lutheran*, the church preschool could not receive a playground grant without disavowing its identity as a church.[141] This distinction was on weak ground, as the law did not prohibit an individual from practicing their religion—rather, it refused to subsidize religious education and practice by providing direct funding to a church.[142]

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[134] 472 U.S. 703 (1985).
[135] 137 S. Ct. 2012 (2017).
[136] 140 S. Ct. 2246 (2020).
[137] 540 U.S. 712 (2004).
[138] *Id.*
[139] *Trinity Lutheran*, 137 S. Ct. at 2019.
[140] *Locke,* 540 U.S. at 725.
[141] *Trinity Lutheran*, 137 S. Ct. at 2023–24.
[142] *See id.* at 2022.

This already weak distinction falls apart in the face of the Court's decision in *Espinoza*. In *Espinoza*, the Court held that the application of a similar state constitution provision to a tax credit for parents who sent their children to private school violated the Free Exercise Clause because it discriminated against parents who sent their children to religious private schools versus those who sent their children to secular private schools.[143] In doing so, the Court incorrectly claimed that the case "turn[ed] expressly on religious status and not religious use."[144] However, much like in *Locke*, the parents or students did not have to disavow their religious beliefs in order to receive a tax credit, they simply could not use the tax credit to fund a religious education.[145] Nonetheless, the majority rejected this obvious comparison to *Locke*, finding that the two cases were distinct.[146] Before *Trinity Lutheran*, the Court had never held that the Free Exercise Clause mandated providing government funding to a religious organization. Yet in *Espinoza*, the Roberts Court effectively declared that a state cannot provide financial support for secular education without providing the same support to religious education.

The argument for these two cases, at its core, is that providing funding to secular institutions while not providing equivalent funding or opportunities to compete for funding to religious institutions constitutes impermissible animus to religion. However, such an argument flies in the face of long-established jurisprudence. Prior to the Roberts Court, it was "well-established that governmental actions primarily aimed at avoiding violations of the Establishment Clause have a legitimate secular purpose,"[147] and that "there is no substantial burden placed on an individual's free exercise of religion where a law or policy merely 'operates to make the practice of [the individual's] religious beliefs more expensive.'"[148] In particular, the Court has taken a strong stance against funding religious education,[149] and has explicitly rejected arguments that funding

[143] Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2254, 2262–63 (2020).
[144] *Id.* at 2256.
[145] *Id.* at 2257, 2261.
[146] *Id.* at 2257–58.
[147] Vernon v. City of Los Angeles, 27 F.3d 1385, 1397 (9th Cir. 1994).
[148] Goodall v. Stafford Cnty. Sch. Bd,, 60 F.3d 168, 171 (4th Cir. 1995) (quoting Braunfeld v. Brown, 366 U.S. 599, 605 (1961) (plurality opinion)).
[149] Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 772 (1973) ("Primary among those evils have been sponsorship, financial support, and active involvement of the sovereign in religious activity." (first citing Walz v. Tax Comm'n, 397 U.S. 664, 668 (1970); and then citing Lemon v. Kurtzman, 403 U.S. 602, 612 (1971)).

of religious schools should be permitted under the Establishment Clause simply because it serves Free Exercise purposes.[150] Further, the Court has summarily rejected claims that the Free Exercise Clause is violated by not funding private religious education as an alternative to public schools[151] and that state constitutional provisions prohibiting any tax dollars from going to funding religious education that will prepare students for the ministry are animus to religion.[152] Additionally, a closer look at the oral arguments in *Locke v. Davey* indicate that the Court's opinion in that case was heavily influenced by a desire to avoid limiting the ability of states to strictly enforce their constitutional prohibitions against religious funding and compelling states to include religious schools in any voucher program[153]—exactly what was done in *Espinoza*.

Moreover, The Roberts Court has shielded its religion decisions through its relevant standing jurisprudence. Standing is the capacity of a party to bring a legal challenge. In 1968, the Supreme Court ruled almost unanimously that because the Establishment Clause effectively acts as a limitation on Congress' exercise of its taxing and spending powers, any federal taxpayer has standing to challenge the expenditure of federal funds to finance instruction in religion.[154] This rule stood for nearly four decades before the Roberts Court denied a taxpayer's right to challenge the Bush administration's federally funded faith-based initiatives.[155] Then four years later, the Court denied a state taxpayer's right to bring an Establishment Clause challenge against tax credits for tuition payments to a religious school.[156] These cases paved the way for *Trinity Lutheran* and *Espinoza*, and significantly limited the likelihood of any party being able to bring an Establishment Clause challenge against government funding of religious institutions.

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[150] *Nyquist*, 413 U.S. at 788–89.
[151] *See, e.g.*, Brusca v. State Bd. of Educ., 405 U.S. 1050 (1972) (mem.), *aff'g* 332 F. Supp. 275 (E.D. Mo. 1971) (affirming a judgment rejecting such claims).
[152] Locke v. Davey, 540 U.S. 712, 725 (2004).
[153] Jason S. Marks, *Spackle for the Wall? Public Funding for School Vouchers After* Locke v. Davey, 61 J. MO. BAR 150, 155-56; Sarah M. Lavigne, Comment, *Education Funding in Maine in Light of* Zelman *and* Locke*: Too Much Play in the Joints?*, 59 ME. L. REV. 511, 526-27 (2007). *See* Transcript of Oral Argument at 4, 7, Locke v. Davey, 540 U.S. 712 (2004) (No. 02-1315), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2003/02-1315.pdf.
[154] Flast v. Cohen, 392 U.S. 83, 88 (1968).
[155] *See* Hein v. Freedom from Religion Found., Inc., 551 U.S. 587, 593 (2007).
[156] Ariz. Christian Sch. Tuition Org. v. Winn, 563 U.S. 125, 129–30 (2011).

Through the cases discussed above, the current Court has eviscerated the Establishment Clause and created a religious privilege for Christians under an overly broad interpretation of the Free Exercise Clause. That privilege demands equal treatment for religious organizations when it comes to receiving funding and benefits but special treatment when it comes to exemptions from general laws. Such a privilege is counter to the Court's precedent that there is "room for play in the joints" between the Religion Clauses and highlights the problems when one or both is "taken to extremes." It also incentivizes individuals and organizations to frame their violation of general laws in terms of religious exercise, particular religious exercise that aligns with the majority, and limits the ability of minority religions to bring claims. Scholars have made compelling arguments that minority religious litigants are more likely to succeed under Establishment Clause claims than Free Exercise Claims.[157]

The empirical data supports this idea that the Roberts Court favors religion, and specifically mainstream Christianity as opposed to the minority religions the Religion Clauses were intended to protect. Under the three previous chief justices, the Court ruled in favor of religion approximately half of the time.[158] As of the 2019 term, the Roberts Court had ruled in favor of religion 83.3% of the time.[159] Notably, all of the pro-religion rulings from the Warren Court benefited minority religious groups, while the Roberts Court heavily favors mainstream Christianity.[160]

Returning the Religion Clauses to their intended function involves reframing the way we think about religion and why the Founders chose to set it apart in the Constitution. Many have pointed to the Religion Clauses as evidence that religious values and beliefs should be valued above secular morals and beliefs. However, this runs counter to the idea that the Establishment Clause prohibits favoring religion over non-religion. I would argue that religion was granted a special status under the Constitution not because of its unique value, but rather because of its unique vulnerability. This is not to say that religion in

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[157] *See, e.g.*, Feldman, *supra* note 131.
[158] The Warren Court ruled in favor of religion 45.5% of the time, the Burger Court 51.4% of the time, and the Rehnquist Court 58.1% of the time. Lee Epstein & Eric A. Posner, *The Roberts Court and the Transformation of Constitutional Protections for Religion: A Statistical Portrait*, 2022 SUP. CT. REV. (forthcoming 2022) (manuscript at 7 fig. 2).
[159] *Id.*
[160] *Id.* at 8.

society is not valuable—if it were not, its vulnerability would not matter and the Founders would not have needed to protect it. However, believing that the Founders set religion apart for its unique value leads to religious privilege and confusing case law, while a viewpoint that religion is unique for its vulnerability to discrimination leads to a narrower interpretation of both clauses and a focus on preventing the evils the Founders feared.

THE CHILLING CYCLE OF POLICE VIOLENCE AND BLACK CIVIL RIGHTS PROTEST

Elise Jamison*

> *"The very utterance of the phrase 'Black Lives Matter' tends to incite imminent violence and unbridled rage from police in city streets across America."* – Etienne C. Toussaint[1]

I. INTRODUCTION

The year 2020 will forever be synonymous with public health crises and protest. As the novel coronavirus became a global pandemic,[2] the largest protests in American history[3] erupted following a resurgence of outrage over another deadly and longstanding public health problem.[4] When Americans were forced into quarantine in March, facing uncertainty and indefinite disruption of life as they knew it, news consumption increased by over 200% on mobile devices alone.[5] This near-obsessive news consumption may have been the catalyst for what

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

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

[3] Larry Buchanan et al., *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html (stating that, according to four polls, from June 6 and July 3, 2020, between 15 and 26 million people participated in demonstrations over the death of George Floyd in the United States).

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

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

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

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

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

[7] Buchanan, *supra* note 3.

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

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

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

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

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

[13] *See infra* Part II.C.

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

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

II. HISTORY

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

A. Nation Built by Slaves

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

[15] W*hitelash*, DICTIONARY, https://www.dictionary.com/browse/whitelash (last visited Oct 23, 2021).
[16] Crystal Ponti, *America's History of Slavery Began Long Before Jamestown*, HIST., https://www.history.com/news/american-slavery-before-jamestown-1619 (Aug. 26, 2019) (explaining that captive Africans were likely brought to this region as early as 1526); *see generally* Robinson, *supra* note 14.

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

The legalization of slavery was one of the first legislative actions taken by New England colonists, codified by the Massachusetts Body of Liberties in 1641.[19] Through state-sanctioned enslavement and brutality, colonists established themselves in the New World, gaining power, agency, and awareness of their oppression at the hands of the British Monarchy.[20] During the Revolution, an estimated 5,000 Black soldiers and slaves fought alongside colonists, gaining independence for a new world where whiteness was a prerequisite for freedom.[21] Fittingly, one of the first colonists to die in the fight for American independence was Crispus Attucks, an escaped African slave.[22] In many cases, the enlistment bonuses and military wages paid to Black soldiers were given directly to their masters.[23]

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

[17] *See Slavery in America*, HIST., https://www.history.com/topics/black-history/slavery#section_2 (Aug. 23, 2021).
[18] *See The Missing Pieces of America's Education*, WASH. POST (Aug. 28, 2019), https://www.washingtonpost.com/education/2019/08/28/historians-slavery-myths/.
[19] *Massachusetts Body of Liberties*, MASS.GOV, https://www.mass.gov/service-details/massachusetts-body-of-liberties (last visited Oct 13, 2021); *see also Slavery and the Making of America: The Law Steps I - 1641*, THIRTEEN, https://www.thirteen.org/wnet/slavery/timeline/1641.html (last visited Aug. 19, 2021).
[20] *See Slavery and the Making of America: Racial Oppression is Law - 1705,* THIRTEEN, https://www.thirteen.org/wnet/slavery/timeline/1705.html (last visited Aug. 19, 2021) (showing that throughout the early 1700s, the colonies enacted laws defining enslaved Africans as property, forbidding them from bearing arms, marrying, and even acquitting white owners who murdered their slaves as punishment.); *see also Slavery in America*, HIST., https://www.history.com/topics/black-history/slavery#section_2 (last visited Aug. 19, 2021).
[21] *See African Americans and the End of Slavery in Massachusetts – Revolutionary Participation*, MASS. HIST. SOC'Y, https://www.masshist.org/features/endofslavery/rev_participation (last visited Oct 13, 2021).
[22] Attucks fell victim to the same brand of militarized police violence that Black protestors continue to suffer almost three hundred years later—he was killed in the Boston Massacre when British soldiers opened fire onto a crowd of protesting colonists. *See id.*; *see also Slavery and the Making of America: Seeds of Revolution - 1739,* THIRTEEN, https://www.thirteen.org/wnet/slavery/timeline/1739.html (last visited Aug. 19, 2021).
[23] *Black Soldiers in the Revolutionary War*, U.S. ARMY (Mar. 4, 2013), https://www.army.mil/article/97705/black_soldiers_in_the_revolutionarly_war.

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

B. Policing in America: The Original Whitelash

American policing began as early as 1636 and was formalized for the first time in 1838.[27] Since their creation, American police forces have characterized colored persons as "internal enemies and as volatile threats to state authority and established social orders."[28] By the 1880s, there were municipal police forces in every major U.S. city.[29] Though all police forces were structurally similar, the "Slave Patrols" of the south were distinct in their overt racism.[30]

Slave Patrols emerged in the early 1700s[31] to apprehend runaway slaves, deter slave revolts through force and terror, and discipline slaves through extralegal means.[32] Black Codes and Jim Crow laws,[33] created after the Thirteenth Amendment outlawed slavery in 1865, further emboldened the Slave

[24] U.S. CONST. art. I, § 2, cl. 3; *see supra* note 17 (noting that though the three-fifths compromise does not specifically mention race, the term "other persons" is recognized as a euphemism for Black slaves).
[25] U.S. CONST. amend. XIV.
[26] *See infra* Parts II.D. and V; *see infra* notes 33–34 and accompanying text; *see* Tommy Beer, *Trump Called BLM Protesters 'Thugs' But Capitol-Storming Supporters 'Very Special'*, FORBES, https://www.forbes.com/sites/tommybeer/2021/01/06/trump-called-blm-protesters-thugs-but-capitol-storming-supporters-very-special/?sh=1ac67c693465 (Jan. 6, 2021) (discussing former-President Trump's derogatory statements about Black civil rights protestors and supportive comments about white insurrections and other white supremacist protestors).
[27] Informal night watches began in 1636. Boston created the first Police force in 1838. Early police forces were publicly funded, bureaucratic, and accountable to the government, much like modern police. *See* Gary Potter, *The History of Policing in the United States, Part 1*, E. KY. UNIV. POLICE STUD. ONLINE (June 25, 2013), https://plsonline.eku.edu/insidelook/history-policing-united-states-part-1.
[28] *See* Elizabeth Hinton & DeAnza Cook, *The Mass Criminalization of Black Americans: A Historical Overview*, 4 ANN. REV. CRIMINOLOGY 261, 263 (2021).
[29] *See* Potter, *supra* note 27.
[30] *Id.*
[31] *Id.*
[32] *Id.*
[33] Jim Crow laws were a method of maintaining racial segregation and white supremacy, including measures denying Black Americans the right to vote, equal use of public and private accommodation, and relegating them to a lower-caste status. RICHARD ROTHSTEIN, THE COLOR OF LAW 40 (1st ed. 2017).

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

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

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

[34] MICHELLE ALEXANDER, THE NEW JIM CROW 35 (2010).
[35] Christian Parenti, *Policing the Color Line,* THE NATION (Sep. 13, 2001), https://www.thenation.com/article/archive/policing-color-line/.
[36] Jared A. Goldstein, *The Klan's Constitution*, 9 ALA. C.R. & C.L.L. REV. 285, 358 (2018). Alabama officials, Eugene "Bull" Connor and James Clark, discussed in Part I.C., worked closely with the KKK in their efforts to suppress Black voting and labor rights. *See infra* notes 71–79 and accompanying text; s*ee generally In re* Courier-Journal v. Marshall, 828 F.2d 361 (6th Cir. 1987); Marshall v. Bramer, 828 F.2d 325 (6th Cir. 1987).
[37] Jeff Wallenfeldt, *Ku Klux Klan*, ENCYC. BRITANNICA (Jul. 29, 2021), https://www.britannica.com/topic/Ku-Klux-Klan/Revival-of-the-Ku-Klux-Klan.
[38] Goldstein, *supra* note 36, at 340–41.
[39] *Id.* at 308. This notion was validated by the Supreme Court in *Dred Scott v. Sanford,* when the Court declared slaves were property, and the Black descendants of kidnapped Africans could not be considered citizens or access the federal courts. 60 U.S. 393 (1857).
[40] Goldstein, *supra* note 36, at 341.
[41] EQUAL JUSTICE INITIATIVE, LYNCHING IN AMERICA 3 (3d ed. 2017), https://eji.org/reports/lynching-in-america/.
[42] *Id.* at 4.
[43] *Id.*
[44] Jesse Carr, *History of Police Involvement with Lynching*, STATE SANCTIONED, https://statesanctioned.com/history-of-police-involvement-with-lynching/ (last visited Nov. 21, 2021).

the number of murders committed by Klan members, but some estimates are as high as 50,000.[45]

As policing modernized, attempts to preserve the subjugation of Black Americans became coordinated and sophisticated. The Black Panther Party ("BPP"), an organization dedicated to advancing Black interests, was targeted by federal, state, and local law enforcement,[46] who vilified the organization through absurd propaganda campaigns[47] and violently attacked BPP members.[48] The BPP, founded by Huey P. Newton and Bobby Seale in 1966, was rooted in Black nationalism, socialism, and armed self-defense in response to anti-Black aggression.[49] Seale and Newton compiled a "Ten Point Platform and Program," which served as "the foundation" of the BPP.[50] BPP members organized neighborhood patrols to monitor police activity and social aid programs that worked to address the needs of their community.[51]

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

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

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

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

[48] *See* Kifner, *supra* note 46.

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

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

[51] *See* Blakemore, *supra* note 47.

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

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

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

The fight for Black civil rights precedes American independence by at least a century.[59] All-Black slave revolts were recorded as early as 1678, and demonstrations against segregation, racial animus, and widespread lynching emerged during the Jim Crow Era as early as 1906.[60] The widespread violence enacted during this period motivated Black Americans

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

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

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

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

[57] *Id.*

[58] *Id.*

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

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

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

The 1950s and 1960s—known as the Civil Rights Era or Second Reconstruction—are emblematic of improved racial equity and extreme displays of violence against Black protestors.[62] The imagery of violent and inhumane dispersion tactics—such as mass arrest, police dog attacks, high-powered fire hoses, and beatings[63] employed against both adults and children[64]—rests firmly in our collective conscious. Though discrimination persisted, and police brutality remained widespread, organizations like the NAACP's s affiliate Legal Defense Fund (LDF) opened the door to previously inaccessible legal recourse.[65]

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

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

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

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

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

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

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

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

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

The utility of the LDF, and legal tools like TROs, was felt strongly in Alabama during the fight for voting rights.[70] Sherriff James Clark of Dallas County, Alabama—who ordered mass arrests and the use of whips and electrified cattle prods against demonstrators[71]—was the subject of TROs sought by both protestors[72] and the federal government.[73]

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

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

[68] *See* NAACP v. Alabama, 377 U.S. 288 (1964); *see also* Ealy v. Littlejohn, 569 F.2d 291 (5th Cir. 1978).
[69] *See* Hamm v. City of Rock Hill, 379 U.S. 306 (1964); Hughley v. City of Opelika, 251 F. Supp. 566 (M.D. Ala. 1965); Edwards v. South Carolina, 372 U.S. 229 (1963).
[70] Adam Bernstein, *Ala. Sheriff James Clark; Embodied Violent Bigotry*, WASH. POST (June 7, 2007), http://www.washingtonpost.com/wp-dyn/content/article/2007/06/06/AR2007060602455.html.
[71] Williams v. Wallace, 240 F. Supp. 100, 104 (M.D. Ala. 1965).
[72] *See id.*
[73] *See* U.S. v. Clark, 249 F. Supp. 720 (S.D. Ala. 1965).
[74] *Id.* at 725.
[75] *Id.*
[76] *Id.* at 730 (discussing their rights under Title II of the Civil Rights Act of 1964 and 42 U.S.C. § 1971(b)).
[77] Christopher Klein, *How Selma's 'Bloody Sunday' Became a Turning Point in the Civil Rights Movement*, HIST., https://www.history.com/news/selma-bloody-sunday-attack-civil-rights-movement (Jul. 18, 2020).
[78] Williams v. Wallace, 240 F. Supp. 100, 104 (M.D. Ala. 1965).

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

Though the Bloody Sunday march was technically successful,[80] militarized violence against Black protestors continued on a national scale during the "Long Hot Summer of 1967."[81] When protests against systemic racial discrimination emerged, persisting across 34 states,[82] police responded with militarized police force comparable to that used during the BLM protests of 2020.[83] Though 75% of protests during the Long Hot Summer were minor in damage and violence, and the "overwhelming majority" of deaths and injuries reported were Black civilians.[84]

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

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[79] *Id.*

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

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

[82] Ricky Riley*, The Long, Hot Summer Redux*, ROSA LUXEMBURG STIFTUNG (Sept. 20, 2020), https://www.rosalux.de/en/news/id/43054/the-long-hot-summer-redux?cHash=0654edf64419710efdf3c3de8e0eee6b.

[83] *Id.*

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

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

[86] *Id.*

[87] *Id.*

[88] *Id.*

D. Modern Protests, Modern Weaponry, Modern White Supremacy

The cycle of gratuitous police violence against Black Americans, especially where they protest their mistreatment, is a centuries-old American tradition, used to maintain white supremacy.[89] The American South went from whipping slaves to brutalizing Black "criminals" without missing a beating—police murder more Black people in counties that had higher rates of lynching from 1877–1950.[90] Police violence continues to be a leading cause of death among young American men, though Black men are 2.5 times more likely to be killed by police than their white counterparts.[91] Federal policy concerning police use of deadly force did not exist until 1985.[92] Though use of force by law enforcement must be reasonable and proportionate under the circumstances,[93] police have consistently demonstrated their inability to meet this standard.[94] Further, where their use of force is clearly unreasonable, police are rarely disciplined.[95]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. The Right to Protest

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

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

[102] Barker, *supra* note 100.

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

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

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

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

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

[108] *Klans*, 194 F. Supp. at 942.

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

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

A. Place of Protest

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

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

[109] *See* Waller v. Butkovich, 584 F. Supp. 909, 920, 943 (1984); *see also* Williams v. Wallace, 240 F. Supp. 100 (M.D. Ala. 1965) (noting their patterned harassment and brutal treatment, Alabama officials were restrained and enjoined failing to protect Selma protestors); *Klans*, 194 F. Supp. 897 (M.D. Ala. 1961) (concluding that Montgomery police failed to protect a bus of Black college students from KKK violence); Kelly v. Page, 335 F.2d 114 (5th Cir. 1964) (holding that lawful protest against racial discrimination is a right, and those engaged in this protected activity are entitled to protection).
[110] Cox v. Louisiana, 379 U.S. 536, 558 (1965).
[111] *Id.*
[112] *See, e.g.*, Edwards v. South Carolina, 372 U.S. 229 (1963); *see also* Chase v. McCain, 220 F. Supp. 407, 408 (W.D. Va. 1963), *vacated sub nom.* Baines v. City of Danville, 337 F.2d 579 (4th Cir. 1964), *on reh'g in part*, 357 F.2d 756 (4th Cir. 1966), *cert. granted*, *judgment aff'd sub nom.* Baines v. City of Danville, 384 U.S. 890 (1966).
[113] Press-Enter. Co. v. Superior Ct. of California for Riverside Cnty., 478 U.S. 1, 8 (1986).
[114] *Id.* at 8–9.

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

Different standards apply to public property that is not traditionally used as a public forum.[118] In these "limited public forums," as long as public officials do not suppress the expression merely because they disagree with the content, the state may reasonably restrict the designated public forum to use for its "intended purposes."[119] Courts have held that places such as USPS mailboxes,[120] public university campuses,[121] county courthouses,[122] courthouse restrooms,[123] certain areas surrounding statues at county courthouses,[124] grounds of state capitol buildings, and city halls[125] are limited public forums.

B. Manner of Protest

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

[115] Young Am.'s Found. v. Napolitano, No. 17-cv-02255-MMC, 2018 WL 1947766, at *3 (N.D. Cal. Apr. 25, 2018) (quoting Seattle Mideast Awareness Campaign v. King Cty., 781 F.3d 489, 496 (9th Cir. 2015)).
[116] Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 676 (1992); *see also* Hurley v. Irish–Am. Gay, Lesbian and Bisexual Grp. of Boston, 515 U.S. 557, 579 (1995).
[117] Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983) (quoting Hague v. Comm. for Indus. Org., 307 U.S. 496, 515 (1939)).
[118] *Id.* at 46.
[119] *See* U.S. Postal Serv. v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114, 131 (1981).
[120] *See, e.g.*, *id.*
[121] *See, e.g.*, Young Am.'s Found. v. Kaler, 482 F. Supp. 3d 829 (2020).
[122] *See, e.g.*, Muhammad v. Bethel-Muhammad, No. 11–0690–WS–B, 2013 WL 5531397, at *5 (S.D. Ala. Oct. 7, 2013) (finding that county courthouse is not a "place of public accommodation" under Civil Rights Act of 1964).
[123] *See, e.g.*, Poor and Minority Just. Ass'n, Inc. v. Judd, No. 8:19-CV-T-2889-02TGW, 2020 WL 7128948 (M.D. Fla. Dec. 4, 2020).
[124] *See, e.g.*, NAACP v. Peterman, 479 F. Supp. 231, 236 (M.D.N.C. 2020).
[125] *See, e.g.*, Parks v. Finan, 385 F.3d 694, 695–96, 699 (6th Cir. 2004); Miller v. City of Cincinnati, 622 F.3d 524, 540 (6th Cir. 2010).
[126] U.S. CONST. amend. I.
[127] Cantwell v. Connecticut, 301 U.S. 296, 308 (1940).

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

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

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

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

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

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

[128] Jones v. Parmley, 465 F.3d 46, 58 (2d Cir. 2006).
[129] Edwards v. South Carolina, 372 U.S. 229, 230 (1963).
[130] *Id.* at 231.
[131] *Id.* at 233.
[132] *See id.* at 234.
[133] *Id.* at 236.
[134] Terminiello v. City of Chicago, 337 U.S. 1, 4 (1949).
[135] Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).
[136] *Id.* at 447–48.
[137] *Id*. at 447.

coupled with a "high probability" that incitement would occur.[138]

The *Brandenburg* test[139] has been applied to protests by several circuit courts analyzing charges under the Anti-Riot Act.[140] White supremacist defendants argued the act violated the First Amendment after the 2019 "Unite the Right" rally in Charlottesville, Virginia.[141] The Fourth Circuit, opining that parts of the Anti-Riot Act were unconstitutionally vague, found that speech "encouraging," "promoting," or "urging" others to riot was not sufficient incitement.[142] However, the court upheld the portions of the statute criminalizing "organizing" or "instigating" riots.[143] The Ninth Circuit reasoned that "organizing" fell short of criminalizing speech that was clearly protected under *Brandenburg*[144] and interpreted imminence to mean "violence or physical disorder in the nature of a riot" resulting from the speech.[145]

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

[138] Emerson J. Sykes, *In Defense of Brandenburg: The ACLU and Incitement Doctrine in 1919, 1969, and 2019*, 85 BROOK. L. REV. 15, 24–25 (2019). This "likelihood" requirement has been subject to discussion in recent cases alleging "negligent protest" that will be discussed later in this article. *See* Doe v. McKesson, 945 F.3d 818 (5th Cir. 2019), *vacated*, McKesson v. Doe, 141 S. Ct. 48 (2020).
[139] *See Brandenburg*, 395 U.S. at 447–48.
[140] 18 U.S.C. § 2101 ("(a) Whoever travels in interstate or foreign commerce or uses any facility of interstate or foreign commerce, including, but not limited to, the mail, telegraph, telephone, radio, or television, with intent—(1) to incite a riot; or (2) to organize, promote, encourage, participate in, or carry on a riot; or (3) to commit any act of violence in furtherance of a riot; or (4) to aid or abet any person in inciting or participating in or carrying on a riot or committing any act of violence in furtherance of a riot; and who either during the course of any such travel or use or thereafter performs or attempts to perform any other overt act for any purpose specified . . . shall be fined or . . . imprisoned . . . .").
[141] United States v. Miselis, 972 F.3d 518, 525 (4th Cir. 2020).
[142] *Id.* at 540.
[143] *Id.* at 537–38.
[144] United States v. Rundo, 990 F.3d 709, 717 (9th Cir. 2021) (holding that because *Brandenburg* concerned an "organizers' meeting" and the speech was protected, this provision of the statute was unconstitutional).
[145] White v. Lee, 227 F.3d 1214, 1228 (9th Cir. 2000).
[146] *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) (citing Terminiello v. Chicago, 337 U.S. 254, 270 (1949)); *see also* De Jonge v. Oregon, 299 U.S. 353, 365 (1937).

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

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

IV. Constitutional Remedies and The Immunity Obstacle

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

[147] *Sullivan*, 337 U.S. at 270.
[148] *See* Brandenburg v. Ohio, 395 U.S. 444, 444–45 (1969).
[149] Cannon v. City & Cnty. of Denver, 998 F.2d 867, 873 (10th Cir. 1993).
[150] State v. Liebenguth, 250 A.3d 1, 14 (Conn. 2020); *see also* Lewis v. City of New Orleans, 415 U.S. 130, 135 (1974) (Powell, J., concurring).
[151] *See, e.g.*, State v. Griatzky, 587 A.2d 234, 238 (Me. 1991) (holding that "abusive language challenging the officer's authority and implicitly exhorting the assembled group to join in that challenge and to resist the order to disperse . . . presented a clear and present danger of an immediate breach of the peace even when directed toward a police officer"); State v. York, 732 A.2d 859, 861–62 (Me. 1999) (holding that calling court security officers "fucking assholes" and preparing to spit on the officer would "have a direct tendency to cause a violent response by an ordinary person"); *See* State v. Clay, No. CX-99-343, 1999 WL 711038, at *3 (Minn. Ct. App. Sept. 14, 1999) ("The district court found that . . . the appellant's words were sufficiently egregious to provoke retaliatory police violence.").
[152] H.N.P. v. State, 854 So. 2d 630, 632 (Ala. Crim. App. 2003).

leeway.[153] Black civil rights actions have been sanctioned as acts of sedition, insurrection, and anti-government protest[154] while racial terrorists and white supremacists have gone unpunished.[155]

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

Existing First Amendment jurisprudence may protect Black protestors' rights through the chilling doctrine and subsequent First Amendment retaliation claims. Due to the patterned abuse of Black Americans by police since the inception of policing, the mere presence of law enforcement at Black protests may cause an unconstitutional chilling effect. This chill could give rise to a First Amendment retaliation claim[157] when police deploy violence in response to peaceful protestors' expressions. Further, many of the actions taken by law enforcement, coupled with governmental support of their actions, represent an unconstitutional "Heckler's Veto."[158] However, even if courts

[153] *See* Brandenburg v. Ohio*,* 395 U.S. 444 (1969); Edwards v. South Carolina, 372 U.S. 229, 229–35 (1963); *see also* Virginia v. Black, 538 U.S. 343 (2003).
[154] *See* Black Panther Party v. Smith, 661 F.2d 1243 (D.C. Cir. 1981), *cert. granted*, *judgment vacated sub nom.* Moore v. Black Panther Party, 458 U.S. 1118 (1982), *and cert. granted*, *judgment vacated*, 458 U.S. 1118 (1982).
[155]Angela A. Allen-Bell, *The Incongruous intersection of the Black Panther Party and the Ku Klux Klan*, 39 SEATTLE U. L. REV. 1157, 1180–81 (2016); *see also* James Forman Jr., *Juries and Race in the Nineteenth Century*, 113 YALE L.J. 895, 921–22 (2004). The Forman article reveals a pattern of KKK members openly utilizing their role as jurors to shield each other from criminal consequence. Noting the failure to punish violence against Black Americans, a North Carolina Judge stated "[t]he defect lies not so much with the courts as with the juries. You cannot get a conviction; you cannot get a bill found by the grand jury; or, if you do, the petit jury acquits the parties." Senator John Sherman explained this phenomenon as a result of grand jurors' biases, "[i]n nine cases out of ten the men who commit the crimes constitute or sit on the grand jury, either they themselves or their near relatives or friends, sympathizers, aiders, or abettors; and if a bill is found it is next to impossible to secure a conviction upon a trial at the bar. I have heard of no instance in North Carolina where a conviction of that sort has taken place."
[156] *See* Toussaint, *supra* note 1, at 128, 143–61.
[157] *See* 42 U.S.C. § 1983.
[158] Patrick Schmidt, *Heckler's Veto*, FIRST AMEND. ENCY., https://www.mtsu.edu/first-amendment/article/968/heckler-s-veto (last visited Dec. 21, 2021) ("A heckler's veto occurs when the government accepts restrictions on speech because of the anticipated or actual reactions of opponents of the speech. .

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

A. The Chilling Effect Doctrine

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

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

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

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

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

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

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

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

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

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

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

challenged official conduct and the injury or threat of injury must be 'real and immediate,' not 'conjectural' or 'hypothetical.'"[167]

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

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

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

[167] City of Los Angeles v. Lyons, 461 U.S. 95, 101–02 (1983).
[168] *See* Laird v. Tatum, 408 U.S. 1, 13–14 (1972).
[169] *See* Mendocino Env't Ctr. v. Mendocino Cnty., 192 F.3d 1283, 1300 (9th Cir. 1999); *see also* Sloman v. Tadlock, 21 F.3d 1462, 1469 (9th Cir. 1994).
[170] *See* Levin v. Harleston, 966 F.2d 85, 89–90 (2d. Cir. 1992).
[171] *Id.*
[172] *See* AMNESTY INT'L, *supra* note 91, at 6.
[173] *Id.* at 24.
[174] Letter from Anna G. Eschoo, Member of Congress, et al., to the Private and Civil Liberties Oversight Board 5 (Oct. 15, 2020) (quoting ARTHUR HOLLAND MICHEL, EYES IN THE SKY: THE SECRET RISE OF GORGON STARE AND HOW IT WILL WATCH US ALL 204 (2019)), https://eshoo.house.gov/sites/eshoo.house.gov/files/Eshoo-Rush-Wyden%20ltr%20to%20PCLOB%20re%20protests%20-%2010.15.20.pdf.

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

B. First Amendment Retaliation

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

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

[175] *See generally,* People v. City of New York, No. 21-CV-322, 2021 WL 141595 (S.D.N.Y. Jan. 14, 2021); *see also supra* Part I.C; *see infra* Part V.
[176] 42 U.S.C. § 1983 ("Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress[.]"); s*ee* Pinard v. Clatskanie Sch. Dist. 6J, 467 F.3d 755, 770 (9th Cir. 2006).
[177] Trulock v. Freeh, 275 F.3d 391, 405–06 (4th Cir. 2001).
[178] *Id.*
[179] *Pinard*, 467 F.3d at 770.
[180] Index Newspapers v. City of Portland, 480 F. Supp. 3d 1120, 1142 (D. Or. 2020) (quoting Mendocino Env't. Ctr. v. Mendocino County., 192 F.3d 1283, 1300 (9th Cir. 1999)).

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

C. Hecklers in Blue

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

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

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

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[181] *See, e.g.*, Downes-Covington v. Las Vegas Metro. Police Dep't, No. 220CV01790GMNDJA, 2020 WL 7408725, at *7 (D. Nev. Dec. 17, 2020).
[182] United States v. Rundo, 990 F.3d 709, 719 (9th Cir. 2021); *see also* Bennett v. Metro. Gov't of Nashville & Davidson County., 977 F.3d 530, 544 (6th Cir. 2020).
[183] Terminello v. Chicago, 337 U.S. 1, 4 (1949) (applying the "Clear and Present Danger" test presented in *Schenck v. United States*, 249 U.S. 47, 52 (1919), to a heckler's veto).
[184] 141 S. Ct. 48 (2020).
[185] Tasnim Motala, *"Foreseeable Violence" & Black Lives Matter,* 73 STAN. L. REV. 61, 65–67 (2020).
[186] *Id.* at 65–66 (noting that the city ultimately paid cash settlements to 92 protestors who were unconstitutionally and often violently arrested).
[187] *McKesson*, 141 S. Ct. at 49.
[188] *Id.* (quoting Doe v. McKesson, 945 F.3d 818, 827 (5th Cir. 2019)).
[189] *Id.* at 51.

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

D. Qualified Immunity and Monell *Liability*

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

In cases involving police, the Supreme Court has instructed that "[t]he relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted."[192] Courts can determine whether a constitutional right has been "clearly established" before even reviewing the facts of the case.[193] This bar is incredibly high and has allowed police officers to evade consequences for horrendous conduct, like shooting a ten-year-old accidentally while attempting to shoot an unthreatening dog[194] and shooting a fourteen-year-old child who had just dropped a BB gun and raised his hands.[195]

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

[190] 42 U.S.C.A. § 1983.
[191] Saucier v. Katz, 533 U.S. 194, 201 (2001).
[192] *Id.*
[193] *See* Pearson v. Callahan, 555 U.S. 223, 245 (2009).
[194] *See* Corbitt v. Vickers, 929 F.3d 1304, 1323 (11th Cir. 2019).
[195] *See* Nelson v. City of Battle Creek, 802 F. App'x. 983, 992 (6th Cir. 2020).
[196] *See* Monell v. Dep't. of Soc. Servs., 436 U.S. 658, 690 (1978).

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

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

V. Black Lives Matter Protests in 2020

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

[197] *Id*. at 691.
[198] Thomas v. City of Chattanooga, 398 F.3d 426, 429 (6th Cir. 2005) (quoting Doe v. Claiborne Cnty., 103 F.3d 495, 508 (6th Cir. 1996)).
[199] Stewart v. City of Memphis, 788 F. App'x. 341, 342 (6th Cir. 2019).
[200] *Id.* at 347.
[201] *Memphis Police Department*, POLICE SCORECARD, https://policescorecard.org/tn/police-department/memphis (last visited Oct 25, 2021).
[202] Ashley Westerman, *In 2020, Protests Spread Across The Globe With A Similar Message: Black Lives Matter*, NPR (Dec. 30, 2020, 5:04 AM), https://www.npr.org/2020/12/30/950053607/in-2020-protests-spread-across-the-globe-with-a-similar-message-black-lives-matt.
[203] AMNESTY INT'L, *supra* note 91, at 23.
[204] Courtney Lindwall, *How to Protest Safely*, NRDC (Nov. 5, 2020), https://www.nrdc.org/stories/how-protest-safely. *See Safety Tips for Protesters*, STUDENT LIFE DEAN OF STUDENTS UNIV. OF MICH., https://deanofstudents.umich.edu/article/safety-tips-protesters (last visited Nov. 19, 2021); *Protests Tips and Resources*, NYU LAW,

days, Amnesty International recorded 125 incidents of police violence against peaceful protestors, journalists, and bystanders across the United States;[205] after five months, there were at least 950.[206]

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

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

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

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

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

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

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

[207] *Id.*

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

[209] *Id.*

[210] *Id.*

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

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

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

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

[211] This case was a combination of six actions filed against the NYPD, Police Commissioner Dermot Shea, NYPD Police Chief Terence Monahan, Mayor Bill DeBlasio, and the City of New York. Excessive force claims included Kettling, which involves police surrounding and trapping protestors without providing warnings or opportunities to disperse, and beating protestors with batons, shoving and pinning them to the ground with bicycles, and use of force to arrest innocent bystanders. *In re* New York City Policing During Summer 2020 Demonstrations, 548 F.Supp.3d 383, 394-95 (S.D.N.Y. 2021).
[212] *Id.* at 400-07.
[213] *Id.* at 400-01.
[214] *Id.* at 402.
[215] *Id.*
[216] *Id.* at 402-05.
[217] *See supra* notes 199–201 and accompanying text.
[218] *See supra* notes 199–201 and accompanying text.
[219] *In re: New York City Policing,* 548 F.Supp.3d at 405.

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

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

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

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

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

[220] *Id.*
[221] Black Lives Matter Seattle-King Cnty. v. City of Seattle I, 466 F. Supp. 3d 1206, 1211 (W.D. Wash. 2020).
[222] *Id.*
[223] Vanessa Romo, *Seattle Police Ruled in Contempt for Firing Less Lethal Weapons at BLM Protesters*, NPR (December 8, 2020 10:38 PM), https://www.npr.org/2020/12/08/944479936/seattle-police-ruled-in-contempt-for-firing-less-lethal-weapons-at-blm-protester.
[224] Ed Mazza, *Police Caught on Camera Pressing Knee Into Neck During Seattle Arrest*, HUFFPOST (June 1, 2020, 4:20 AM), https://www.huffpost.com/entry/seattle-police-knee-in-neck_n_5ed4763cc5b6c0af65e7e0bc.
[225] Brazile, *supra* note 10.
[226] *Id.*
[227] Black Lives Matter Seattle-King Cnty. v. City of Seattle I, 466 F. Supp. 3d 1206, 1211 (W.D. Wash. 2020).
[228] AMNEST INT'L., *supra* note 91, at 22 (reporting that a student, Aubreanna Inda, suffered multiple cardiac arrests, and needed to be resuscitated multiple times in the field and later in the hospital).
[229] *Black Lives Matter Seattle-King Cnty. I*, 466 F. Supp. 3d at 1211.
[230] *Id.*; Benton v. City of Seattle, No. 2:20-cv-01174-RA, 2020 WL 4584214, at *1 (W.D. Wash. Aug. 10, 2020).

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

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

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

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

[231] *Black Lives Matter Seattle-King Cnty.*, 466 F. Supp. 3d at 1211.
[232] *Id.* at 1213 ("The video evidence reveals that many of these protests occurred on Seattle streets, often right outside the police precinct on Capitol Hill . . . . On this record, their protests have been passionate but peaceful, and they must thus be protected even if they stand in opposition to the police.").
[233] *Id.*
[234] *Id.*
[235] *Id.* at 1216.
[236] For a discussion of discretion in the use of force context, see Dehn, *supra* note 93.
[237] Benton v. City of Seattle, No. 2:20-cv-01174-RA, 2020 WL 4584214, at *2 (W.D. Wash. Aug. 10, 2020).
[238] *Id.* at *4.
[239] *Id.*
[240] *Id.* at *3–4.

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

C. Detroit Will Breathe v. City of Detroit

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

[241] Black Lives Matter Seattle-King Cnty. v. City of Seattle II, 505 F. Supp. 3d 1108, 1112 (W.D. Wash. 2020).
[242] *Id.* at 1116.
[243] *Id.* at 1117.
[244] *Id.* at 1118–20, 1122–24 (finding four instances of contempt, noting that several other instances were "arguable," though insufficient for the "clear and convincing" standard).
[245] *Id.* at 1119–20.
[246] *Id.* at 1123.
[247] Ryan Garza, *We've Had 100 Days of Detroit Protests. And it's 'Just the Beginning.'*, DETROIT FREE PRESS, https://www.freep.com/in-depth/news/2020/09/04/detroit-protests-police-brutality-george-floyd/3450280001/ (Sept. 5, 2020, 3:26 PM).
[248] Samuel Dodge, *Michigan's Summer of Protests was Often Tense and Tumultuous, But Rarely Violent, MLive Analysis Shows*, MLIVE, https://www.mlive.com/public-interest/2020/10/michigans-summer-of-protests-was-often-tense-and-tumultuous-but-rarely-violent-mlive-analysis-shows.html (Oct. 12, 2020, 9:45 AM).
[249] *Id.*
[250] M.L. Eric & Meredith Spelbring, *Detroit Police Arrest 44 During Downtown Protests After Weeks of Calm*, DETROIT FREE PRESS, https://www.freep.com/story/news/local/michigan/detroit/2020/08/23/detroit-protest-downtown-police-arrests/3423820001/ (Aug. 24, 2020, 6:22 PM) (showing a photo of three officers holding one protestor down while another sprayed their face with an aerosol substance.).

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

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

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

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

[251] Phil Mayor, *This Video Shows Shocking Scenes of Police Violence During Last Year's Protests,* DETROIT FREE PRESS (Oct. 2, 2021, 8:00 AM), https://www.freep.com/story/opinion/contributors/2021/10/02/detroit-will-breathe-black-lives-matter-police-reform/8245032002/ (noting that one officer faced consequences for shooting identified reporters with rubber bullets, and another faced consequences for using bad language while spraying a woman in the face with pepper spray; the officer was not punished for the use of pepper spray).
[252] Breathe v. City of Detroit, 484 F. Supp. 3d 511, 515 (E.D. Mich. 2020).
[253] *Id.* at 515.
[254] *Id.* at 518.
[255] *Id.*
[256] *Id.*
[257] *Id.* at 520.
[258] *Id.*

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

D. Portland, Oregon

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

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

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

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

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

[262] Borter*, supra* note 261.

[263] *Id.*

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

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

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

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

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

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

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

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

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

[269] *Id.*

[270] *Id.*

[271] *Id.*

[272] *Id.* at 1142–43.

[273] *Id.* at 1145.

[274] *Id.*

[275] *Id.*

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

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

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

VI. Conclusion

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

[276] *See id.* at 1155–56.
[277] Index Newspapers v. United States Marshals Serv., 977 F.3d 817, 825 (9th Cir. 2020).
[278] *Id.* at 826.
[279] *Id.* at 829.
[280] *Id.* at 830.
[281] *Id.* at 830–31.

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

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

Racist police violence against protestors, and Black Americans in general, continues despite decades of protest[289] and international outrage.[290] Though some have referred to the 2020

[282] Index Newspapers v. City of Portland, 480 F. Supp. 1120, 1142 (D. Or. 2020) ("'Ordinary firmness' is an objective standard that will not 'allow a defendant to escape liability for a First Amendment violation merely because an unusually determined plaintiff persists in his protected activity.'" (quoting Mendocino Env't. Ctr. v. Mendocino County., 192 F.3d 1283, 1300 (9th Cir. 1999))).
[283] Motala, *supra* note 185, at 72.
[284] *See Solutions,* CAMPAIGN ZERO, https://campaignzero.org/solutions.html#solutionsoverview (last visited Nov. 21, 2021).
[285] *The Time Has Come to Defund the Police*, M4BL, https://m4bl.org/defund-the-police/ (last visited Oct 25, 2021); Sam Levin, *These US Cities Defunded Police: "We're Transferring Money to the Community*," THE GUARDIAN (Mar. 11, 2021, 11:03 AM), http://www.theguardian.com/us-news/2021/mar/07/us-cities-defund-police-transferring-money-community (noting that several cities have answered the call to defund police, either reducing, reallocating, or eliminating the funding for their police departments.)
[286] *See infra* note 290.
[287] *See* George Floyd Justice in Policing Act, H.R. 1280, 117th Cong. (2021).
[288] *See* Police Exercising Absolute Care with Everyone Act, H.R. 4359, 116th Cong. (2019).
[289] *See supra* Parts II.C–D, V.
[290] *See USA: End Unlawful Police Violence Against Black Lives Matter Protests*, AMNESTY INT'L (June 23, 2020, 9:30 AM), https://www.amnesty.org/en/latest/news/2020/06/usa-end-unlawful-police-

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

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

[291] Norris, *supra* note 6.