

# AN ARGUMENT AGAINST UNBOUNDED ARREST POWER: THE EXPRESSIVE FOURTH AMENDMENT AND PROTESTING WHILE BLACK

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*Protesting is supposed to be revered in our democracy, considered “as American as apple pie” in our nation’s mythology. But the actual experiences of the 2020 racial justice protesters showed that this supposed reverence for political dissent and protest is more akin to American folklore than reality on the streets. The images from those streets depicted police officers clad in riot gear and armed with shields, batons, and “less than” lethal weapons aggressively arresting protesters, often en masse. In the first week of the George Floyd protests, police arrested roughly 10,000 people, and approximately 78 percent of those arrests were for nonviolent misdemeanor offenses or criminal violations. Moreover, troubling figures regarding the racial breakdown of protest-related arrests, along with anecdotes from activists, suggest that just as with routine policing, the experiences of Black and white people differ during protests—even when they protest side by side—with police potentially targeting Black activists for arrest. This Article exposes how police officers’ easy access to a wide arsenal of criminal charges serves to trample on expressive freedoms and explains how a new and clearer understanding of the Fourth Amendment’s application to expressive conduct should curb the police’s seemingly unbounded power to arrest protesters. In Part I of this Article, I revisit and review the roots and rationale of the Expressive Fourth Amendment doctrine, which posits that there is an expressive component to Fourth Amendment protection. In Part II, I discuss the criminal statutes that police often use to make arrests during protests and then focus more narrowly on the arrests in New York City in the early days of the George Floyd demonstrations, including the racial makeup of arrestees. In Part III, I explain how the presiding understanding of the Fourth Amendment places minimal limits on a police officer’s ability to arrest, regardless of an individual’s engagement in expressive political conduct. Thereafter, I describe how the Expressive Fourth Amendment should apply to arrests and serve to curtail an officer’s ability to engage in warrantless arrests of protesters for nonviolent misdemeanors.*

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## INTRODUCTION

Protesting is supposed to be revered in our democracy, considered “as American as apple pie” in our nation’s mythology. But the actual experiences of the 2020 racial justice protesters showed that this supposed reverence for political dissent and protest is more akin to American folklore than reality on the streets. The images from those streets depicted police officers clad in riot gear and armed with shields, batons, and “less than” lethal weapons aggressively arresting protesters, often *en masse*. In the first week of the George Floyd protests, police arrested roughly 10,000 people,<sup>1</sup> and approximately 78 percent of those arrests were for nonviolent misdemeanor offenses or criminal violations.<sup>2</sup> Moreover, troubling figures regarding the racial breakdown of protest-related arrests,<sup>3</sup> along with anecdotes from activists, suggest that just

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1. See Anita Snow, *AP Tally: Arrests at Widespread U.S. Protests Hit 10,000*, AP NEWS (June 4, 2020), <https://apnews.com/article/american-protests-us-news-arrests-minnesota-burglary-bb2404f9b13c8b53b94c73f818f6a0b7> [perma.cc/XN6Z-LB9K]. Within two weeks, the number of arrests reached 17,000. Meryl Kornfield et al., *Swept Up by Police*, WASH. POST (Oct. 23, 2020), <https://www.washingtonpost.com/graphics/2020/investigations/george-floyd-protesters-arrests> [perma.cc/MZ3L-MSBR].

2. See Kornfield et al., *supra* note 1 (finding in a sample of 2,652 protestors from fifteen cities that 2,059 were “accused of nonviolent misdemeanors, most on charges of violating curfew or emergency orders”).

3. I define protest-related arrests here as those that occur when an arrestee is present at a protest and appears to be part of the protest.

like with routine policing,<sup>4</sup> the experiences of Black and white<sup>5</sup> people differ during protests—even when they protest side by side—with police potentially targeting Black activists for arrest. Like other activities, including driving

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4. See Colleen Walsh, *Solving Racial Disparities in Policing*, HARV. GAZETTE (Feb. 23, 2021), <https://news.harvard.edu/gazette/story/2021/02/solving-racial-disparities-in-policing> [perma.cc/ZB8N-EVHD] (“According to historians and other scholars, [racialized policing] is embedded in the story of the nation and its culture. Rooted in slavery, racial disparities in policing . . . are sustained by systemic exclusion and discrimination, and fueled by implicit and explicit bias.”); Emma Pierson et al., *A Large-Scale Analysis of Racial Disparities in Police Stops Across the United States*, 4 NATURE HUM. BEHAV. 736, 736 (2020) (“[B]lack drivers were less likely to be stopped after sunset, when a ‘veil of darkness’ masks one’s race, suggesting bias in stop decisions.”); see also Lenese C. Herbert, *Can’t You See What I’m Saying? Making Expressive Conduct a Crime in High-Crime Areas*, 9 GEO. J. ON POVERTY L. & POL’Y 135, 153 (2002) (arguing that First Amendment expression is implicated during routine policing when suspected individuals flee police in so-called “high-crime areas” as flight is one of the most effective forms of expression for those in minority communities because it allows them to “communicate their distaste of the police and to exercise their choice to remove themselves from police presence without compromising the safety of themselves or others—especially when the speakers perceive disdain by society.”).

5. I have decided to capitalize “Black” and “Brown” but not “white” to reflect the shared identity and history of repression among communities of color. See David Bauder, *AP Says It Will Capitalize Black but Not White*, AP NEWS (July 20, 2020), <https://apnews.com/article/entertainment-cultures-race-and-ethnicity-us-news-ap-top-news-7e36c00c5af0436abc09e051261fff1f> [perma.cc/S5N6-7KTA]; see also Peter Wegner, *Capitalize Brown*, KQED (Aug. 12, 2020), <https://www.kqed.org/perspectives/201601140174/peter-wegnercapitalize-brown> [perma.cc/VFX5-A926] (“Capital B for Black people. Capital B for Brown people. It’s not a revolution, even in the world of typography. It’s incremental, a keystroke’s worth of change. It costs nothing. It is, literally, the least we can do.”). I also use Latine in lieu of “Latinx,” “Latino,” or “Latina” because, as a native Spanish speaker, the “e” at the end of a word is more in line with the language than “x” and already utilized in words that do not ascribe gender.

A growing number of LGBTQ communities [in the United States] and abroad use ‘Latine’ (la-tee-neh). Not only does it sound much less awkward in Spanish than ‘Latinx,’ but the -e can be applied to other words in verbal Spanish very easily, in lieu of the masculine -o or the feminine -a.

See Jose A. Del Real, *‘Latinx’ Hasn’t Even Caught on Among Latinos. It Never Will*, WASH. POST (Dec. 18, 2020), [https://www.washingtonpost.com/outlook/latinx-latinos-unpopular-gender-term/2020/12/18/bf177c5c-3b41-11eb-9276-ae0ca72729be\\_story.html](https://www.washingtonpost.com/outlook/latinx-latinos-unpopular-gender-term/2020/12/18/bf177c5c-3b41-11eb-9276-ae0ca72729be_story.html) [perma.cc/9YRL-UX74]; see also Laysha Macedo, *Latinx, Latine, Hispanic, Latino/a: What Do We Call Ourselves?*, HIPLATINA (Oct. 13, 2021), <https://hiplatina.com/latinx-latino-latina-terms> [perma.cc/7NMF-94H6] (discussing a low prevalence of the use of the word “Latinx” among Spanish-speaking communities and the increase in “Latine” as a “gender neutral [option that] flows more in Spanish in [sic] than ‘Latinx’”).

while Black,<sup>6</sup> sitting in Starbucks while Black,<sup>7</sup> jogging while black,<sup>8</sup> and bird watching while Black,<sup>9</sup> *protesting while Black* may also place Black people in harm's way much more than white people. However, while the sight of Black people engaged in these typical innocuous activities should not spur civilian or police scrutiny or much less aggression, protesting is not just innocuous but constitutionally protected expressive conduct.<sup>10</sup>

This Article exposes how police officers' easy access to a wide arsenal of criminal charges serves to trample on expressive freedoms and explains how a new and clearer understanding of the Fourth Amendment's application to expressive conduct should curb the police's seemingly unbounded power to arrest protesters. I revisit the *Expressive Fourth Amendment* doctrine, which I previously advanced in another article, and where I posited that there is an expressive component to Fourth Amendment protection.<sup>11</sup> Courts have largely ignored or missed this expressive realm of Fourth Amendment protection in most contexts and, therefore, have treated expressive conduct by protesters the same as nonexpressive conduct by criminal suspects. Like other scholars,<sup>12</sup> I maintain that current jurisprudence surrounding arrests of indi-

6. David A. Harris, *Driving While Black: Racial Profiling on Our Nation's Highways*, ACLU (June 1999), <https://www.aclu.org/report/driving-while-black-racial-profiling-our-nations-highways> [perma.cc/EWL2-ZCFQ] (“[P]olice ostensibly looking for drug criminals routinely stop drivers based on the color of their skin. This practice is so common that the minority community has given it the derisive term, ‘driving while [B]lack or [B]rown’—a play on the real offense of ‘driving while intoxicated.’”); see also *Driving While Black: A Curated Collection of Links*, MARSHALL PROJECT (Feb. 22, 2022, 9:25 PM), <https://www.themarshallproject.org/records/1819-driving-while-black> [perma.cc/8F2Q-RB67].

7. Damien Gayle, *Arrest of Two Black Men at Starbucks for ‘Trespassing’ Sparks Protests*, GUARDIAN (Apr. 16, 2018, 8:28 AM), <https://www.theguardian.com/us-news/2018/apr/16/arrest-of-two-black-men-at-starbucks-for-trespassing-sparks-protests> [perma.cc/VM9S-CKLG].

8. Kurt Streeter, *Running While Black: Our Readers Respond*, N.Y. TIMES (May 18, 2020), <https://www.nytimes.com/2020/05/18/sports/running-while-black-ahmaud-arbery.html> [perma.cc/J4XV-XCZS].

9. Joan Walsh, *Birding While Black: Just the Latest Bad Reason for White People to Call Police*, NATION (May 26, 2020), <https://www.thenation.com/article/society/amy-cooper-birding-police> [perma.cc/4CRT-LXKU].

10. The Supreme Court recognizes that conduct “expressing certain views is the type of symbolic act” that is “closely akin to ‘pure speech’ which . . . is entitled to comprehensive protection under the First Amendment.” *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505–06 (1969). Thus, I include not only pure speech but other expressive activity—waving, clapping, chanting, marching—in my expressive conduct definition.

11. Karen J. Pita Loor, *The Expressive Fourth Amendment*, 94 S. CAL. L. REV. 1311 (2021) [hereinafter Loor, *Expressive Fourth*]; Karen J. Pita Loor, “Hey! Hey! Ho, Ho! These Mass Arrests Have Got to Go!”: *The Expressive Fourth Amendment Argument*, 28 WM. & MARY J. RACE, GENDER & SOC. JUST. 5 (2021) [hereinafter Loor, *Mass Arrests*].

12. See Aya Gruber, *Policing and “Bluelining.”* 58 HOUS. L. REV. 867, 902 (2021) (“The law encourages brutality in these policed spaces by conferring on officers near absolute power to physically dominate the individuals—Black or [w]hite—they encounter on the street. . . . [as] courts consider only whether the officer acted reasonably (had reasonable fear) in the ‘split-second’ moment when he pulled the trigger.”); John P. Gross, *Judge, Jury, and Executioner: The*

viduals suspected of nonexpressive illegal conduct provides insufficient protection to be faithful to the Fourth Amendment. However, I contribute here, like in my prior articles, a distinct critique by contending that when the conduct is expressive, courts must provide special protection. Like my prior pieces,<sup>13</sup> this Article fills this gap in Fourth Amendment understanding. Thus, when an individual is engaged in expressive conduct, the Expressive Fourth Amendment mandates that courts review any government intrusion with “scrupulous exactitude,”<sup>14</sup> asking whether a police officer behaved reasonably “in the light of the values of freedom of expression.”<sup>15</sup> The Expressive Fourth Amendment will protect all activists, but naturally, it should particularly benefit those who are the most frequent victims of capricious police arrest power.

In Part I of this Article, I review the Expressive Fourth Amendment, including its roots and rationale. In Part II, I discuss the criminal statutes that police often use to make arrests during protests and then focus more narrowly on the arrests in New York City in the early days of the George Floyd demonstrations, including the racial makeup of arrestees. In Part III, I explain how the general understanding of the Fourth Amendment places minimal limits on a police officer’s ability to arrest, regardless of an individual’s engagement in expressive political conduct. Thereafter, I describe how the Expressive Fourth Amendment should apply to arrests and serve to curtail an officer’s ability to engage in warrantless arrests of protesters for nonviolent misdemeanors.

#### I. REVIEWING THE EXPRESSIVE FOURTH AMENDMENT

Courts should afford protesters enhanced protection in their interactions with police officers in the streets. Putting aside, for purposes of this argument, well-founded objections to courts’ deference to law enforcement during routine police encounters,<sup>16</sup> police officers should not be permitted to treat protesters engaged in expressive political conduct like they treat other individuals whom they suspect of criminal conduct but are not involved in protests. Fourth Amendment protections have an expressive component that jurists have completely missed in protest situations.<sup>17</sup> In this Article, I define protest as a public expression of political dissent or opposition. In my prior article, I

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*Excessive Use of Deadly Force by Police Officers*, 21 TEX. J. C.L. & C.R. 155, 161 (2016) (arguing that the Supreme Court’s deference to law enforcement is based on inaccurate assumptions regarding the reasonableness of their actions); Gregory Howard Williams, *Controlling the Use of Non-Deadly Force: Policy and Practice*, 10 HARV. BLACKLETTER J. 79, 95 (1993) (“[T]he basic problem with *Graham* is the fantasy of the Fourth Amendment ‘reasonableness’ test and the so-called balancing analysis. ‘Reasonableness’ is never truly defined, and unfortunately the balance rarely weighs in favor of the citizen.”).

13. See Loor, *Expressive Fourth*, *supra* note 11; Loor, *Mass Arrests*, *supra* note 11.

14. *Stanford v. Texas*, 379 U.S. 476, 485 (1965).

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

16. See, e.g., Gruber, *supra* note 12, at 902–07.

17. For a full and detailed explication of the doctrine and its foundations, see Loor, *Expressive Fourth*, *supra* note 11.

introduced the Expressive Fourth Amendment in the context of claims of police excessive force and argued that to provide appropriate protection to persons engaged in protest, the analysis should shift from whether the government actor's conduct is reasonable to whether it is reasonable in light of freedom of expression.<sup>18</sup> In the context of excessive force cases, this means that courts should positively weigh activists' expressive conduct in their reasonableness calculus.<sup>19</sup> This rebalancing should result in courts providing less leeway for police officers to use force against protesters than courts provide in cases involving ordinary crimes and nonexpressive disturbances. Here, in this Article, I argue that the Expressive Fourth Amendment also limits how police officers may utilize their arrest power against protesters on the streets, specifically limiting their ability to make warrantless arrests for nonviolent misdemeanors.<sup>20</sup>

I previously supported the contention that the Fourth Amendment is meant to protect freedom of expression in two ways: First, I harkened to the history of the English Crown's abusive use of its search and seizure power to suppress political nonconformists and showed that history was fresh in the Framers' minds when drafting the Fourth Amendment.<sup>21</sup> Second, I demonstrated that the Supreme Court recognized the difference that historical foundations make in cases dealing with searches for expressive materials, such as books, pamphlets, films, and other publications—namely the “papers” cases.<sup>22</sup>

The lessons from a British controversy between the king and the press guided the Framers as they conceived the Fourth Amendment's limitations on the American government's power of search and seizure.<sup>23</sup> In 1763, after the anonymous publication of a critique of the king in an antigovernment English newspaper, prosecutors charged the unknown critics with seditious libel and obtained a warrant directing government officials to locate those connected

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18. See *id.* at Section II.B.

19. See *id.*; see also *Graham v. Connor*, 490 U.S. 386, 396–97 (1989) (setting forth the balancing test for Fourth Amendment excessive force violations).

20. See *infra* Part III. At this time, I leave open the question of how the Expressive Fourth Amendment should apply to arrests for felonies.

21. See *Loor*, *Expressive Fourth*, *supra* note 11, at Section III.A.1.

22. See *id.* at Section III.A.2 (discussing *New York v. P.J. Video, Inc.*, 475 U.S. 868, 873 (1986); *Maryland v. Macon*, 472 U.S. 463, 468 (1985); *Roaden v. Kentucky*, 413 U.S. 496, 504 (1973); *Stanford v. Texas*, 379 U.S. 476, 511 (1965); *Marcus v. Search Warrant*, 367 U.S. 717, 729 (1961)).

23. See WILLIAM J. CUDDIHY, *THE FOURTH AMENDMENT: ORIGINS AND ORIGINAL MEANING* 602–1791, at 440 (2009).

to the libelous publication and arrest them.<sup>24</sup> The warrant did not provide direction regarding where to search or whom to apprehend.<sup>25</sup> Indeed, “[f]ollowing precedent, the warrant specified nothing beyond the [newspaper] printer’s name; its bearers were free to search, seize, and arrest as their whims dictated.”<sup>26</sup> Armed with this expansive warrant, the king’s messengers embarked on a spree, ransacking multiple homes and offices, collecting voluminous papers, and arresting any individual they suspected of being related to the newspaper, including their family members and employees.<sup>27</sup> Victims of these searches brought lawsuits against those involved in the warrant’s issuance and execution, arguing against the English Crown’s broad power to engage in abusive searches and arrests of political dissidents.<sup>28</sup> The controversy and the ensuing lawsuits captured the attention of both the American colonies and the British and engendered a disdain in both for oppressive government searches that persisted in the new nation’s psyche and influenced the Bill of Rights’ drafters.<sup>29</sup>

In a series of cases regarding searches for expressive materials, the Supreme Court explains how this history motivated Fourth Amendment protections.<sup>30</sup> Unlike searches for contraband or other nonexpressive items, the Court reviews searches for expressive materials with “scrupulous exactitude,”<sup>31</sup> providing little deference to individual police officers’ judgments of what items should be seized out of concern that in their zeal to enforce the law, officers may unwittingly sweep up protected First Amendment papers.<sup>32</sup> Applying this reasoning from the papers cases, just like with searches of expressive materials, when the policed person is engaged in expressive protest activity, courts should ask what is reasonable “in the light of the values of freedom of expression”<sup>33</sup> and then review a police officer’s conduct with scrupulous exactitude.<sup>34</sup>

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24. *Id.* at 440–41. Seditious libel is “[a] communication written with the intent to incite the people to change the government otherwise than by lawful means, or to advocate the overthrow of the government by force or violence.” *Seditious Libel*, BLACK’S LAW DICTIONARY (6th ed. 1990).

25. CUDDIHY, *supra* note 23, at 440–41.

26. *Id.*

27. *Id.* at 441.

28. *Id.* at 443.

29. *See id.* at 439–40.

30. *See* *New York v. P.J. Video, Inc.*, 475 U.S. 868, 873 (1986); *Maryland v. Macon*, 472 U.S. 463, 468 (1985); *Zurcher v. Stanford Daily*, 436 U.S. 547, 564 (1978); *Roaden v. Kentucky*, 413 U.S. 496, 504 (1973); *Stanford v. Texas*, 379 U.S. 476, 483–85 (1965); *Marcus v. Search Warrant*, 367 U.S. 717, 729 (1961).

31. *Stanford*, 379 U.S. at 485.

32. *See* *Loor, Expressive Fourth*, *supra* note 11, at Section III.A.2.

33. *Roaden*, 413 U.S. at 504 (finding seizure of an allegedly obscene film to be an unreasonable restraint on Fourth Amendment safeguards absent a warrant).

34. *See* *Loor, Expressive Fourth*, *supra* note 11, at 1349 (discussing *Stanford v. Texas*, 379 U.S. 476 (1965)).

Shifting courts' inquiry to evaluating reasonableness in light of freedom of expression has consequences not only for police officers' use of force during protests<sup>35</sup> but also for how police officers exercise their arrest power during protests—including their ability to make warrantless arrests and engage in pretextual arrests.<sup>36</sup> Concerns over how deference to individual officers searching through expressive materials endangers freedom of expression are present when officers police and arrest protest participants. As Justice William J. Brennan asserted in relation to one of the papers cases, “[t]he disruptive potential [on the First Amendment] of an effectively unbounded power to arrest should be apparent.”<sup>37</sup>

## II. ARRESTS DURING PROTESTS

Part II discusses the wide array of criminal statutes that enable police to effectuate arrests during protests. I list, discuss, and categorize those criminal offenses most frequently employed to arrest protesters. While the list is by no means exhaustive, the expansive range of offenses demonstrates not only the scope of law enforcement arrest power but also that such arrest power is not curtailed during protest. I then turn to the protest-related arrests in New York City during the first week of the George Floyd demonstrations and query whether the racial breakdown of those arrests suggests disparate policing of Black protesters.

### A. *Legal Basis for Arrest Powers During Protests*

Currently, law enforcement officers' power to arrest activists (or anyone) on the streets is largely unbounded. To begin, criminal law provides police officers with a vast array of criminal statutes that they can easily access to arrest protesters. Under prevailing Fourth Amendment doctrine, courts do not differentiate between an individual suspected of criminal conduct but primarily engaged in expressive activity during a protest and one suspected of criminal conduct outside the context of a protest when determining the reasonableness of an arrest.<sup>38</sup> The bar is low for a police officer to effectuate a warrantless arrest at the scene, whether the scenario is a protest or a criminal investigation.

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35. See *id.* at Section II.B.

36. In her article, *Why Arrest?*, Professor Rachel Harmon also argues for limiting the power of police officers to make arrests, but not for constitutional reasons as I do, but for public policy reasons. Specifically, she argues that the overwhelming costs of arrest to the arrestee, their family, officer safety, and society outweigh the minimal benefits of arrest to commencing the criminal process, stopping disorder, gathering evidence, and encouraging deterrence. Rachel A. Harmon, *Why Arrest?*, 115 MICH. L. REV. 307 (2016).

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

38. See Loor, *Expressive Fourth*, *supra* note 11, at 1314.



Further, a law enforcement officer need not be convinced that the government can secure a conviction before effectuating an arrest in either a protest or nonprotest scenario but must only reasonably believe that a crime was or is being committed.<sup>39</sup> Since no warrant is required, an individual police officer's belief that probable cause exists suffices on the streets for purposes of arrest. Even if there is a subsequent judicial ruling that there was no probable cause to support the arrest, that does not prevent the police officer from initially making the arrest. Police can freely effectuate arrests for traditional crimes, for crimes specifically designed to control what government classifies as civil unrest, and for conduct that would not be criminal *but for* the existence of an emergency order proclaimed in response to protests.<sup>40</sup> Thus, already broad and discretionary traditional arrest power is even more expansive during protests.<sup>41</sup>

### 1. Application of Traditional Crimes to Protests

A review of arrests from the 2020 racial justice protests across jurisdictions reveals how the police readily and freely used traditional crimes to arrest activists. I define traditional crimes as criminal statutes that the police utilize during routine policing and that are not specifically designed to respond to perceived civil unrest or emergencies. The traditional crimes discussed here include disorderly conduct, obstruction of public ways, trespass, and burglary. These crimes are weaponized against activists during protests in much the same way that they are weaponized against individuals during traditional policing; however, beyond an individual's right to bodily integrity present during a routine criminal investigation, both the individual and public interests in freedom of expression during protests mandate rebalancing of the courts' reasonableness analysis.<sup>42</sup> It is vital to note that the majority of these crimes, with

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39. See *infra* Part II.

40. See *infra* Section II.A.

41. Although not the subject of this Article, elected officials and lawmakers in various jurisdictions are seeking to further increase police officers' tools to control protests and enhance penalties and collateral consequences against protesters for arrests via various anti-protest laws. See *US Protest Law Tracker*, ICNL (last updated Apr. 25, 2022), <https://www.icnl.org/usprotestlaw-tracker> [perma.cc/36KY-FK4W]. Since the 2020 racial justice protests, at least eighty-one of these laws have been proposed. Reid J. Epstein & Patricia Mazzei, *G.O.P. Bills Target Protesters (and Absolve Motorists Who Hit Them)*, N.Y. TIMES (June 16, 2021), <https://www.nytimes.com/2021/04/21/us/politics/republican-anti-protest-laws.html> [perma.cc/6ARZ-XU9U]; see also Tabatha Abu El-Haj, *Defining Nonviolence as a Matter of Law and Politics*, in *PROTEST AND DISSENT: NOMOS LXII* (Melissa Schwartzberg ed., 2020); Tasnim Motala, Essay, "Foreseeable Violence" & *Black Lives Matter: How Mckesson Can Stifle a Movement*, 73 STAN. L. REV. ONLINE 61 (2020).

42. See *infra* Part III.

the notable exception of burglary, are misdemeanors—more specifically, non-violent misdemeanors.<sup>43</sup> I define nonviolent misdemeanors as offenses that do not include violence or an imminent threat of violence.<sup>44</sup>

To begin, the power to arrest without a warrant for so-called offenses against public order serves as a ready tool for police officers to utilize against protesters. Disorderly conduct is one of these offenses most often weaponized against activists<sup>45</sup> and is appropriately categorized as a traditional crime that is part of routine policing. Moreover, it can either be a misdemeanor or a lesser criminal violation based on the circumstances.<sup>46</sup> Generally, disorderly conduct requires that the individual either intends to or recklessly creates the risk of “public inconvenience, annoyance or alarm” by “(a) engag[ing] in fighting or threatening, or in violent or tumultuous behavior; or (b) mak[ing] unreasonable noise or offensively coarse utterance, gesture or display, or address[ing] abusive language to any person present; or (c) creat[ing] a hazardous or physically offensive condition . . . .”<sup>47</sup> One person can alone act

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43. See *infra* notes 44–81 and accompanying text.

44. A nonviolent misdemeanor would exclude what jurisdictions often define as assault, assault and battery, or battery. See MODEL PENAL CODE § 211.1 (AM. L. INST. Proposed Official Draft 1962) (defining simple assault); see also N.Y. PENAL CODE § 120.0 (defining assault in the third degree). It would also exclude criminal misdemeanor threats against a person. See N.Y. PENAL CODE § 120.15 (defining menacing in the third degree); see also *Lange v. California*, 141 S. Ct. 2011, 2020 (2021) (explaining that “misdemeanors run the gamut of seriousness” from violent misdemeanor assaults to nonviolent disorderly conduct).

45. See, e.g., *Wiles v. City of New York*, 724 F. App’x 52 (2d Cir. 2018) (Occupy Wall Street protesters arrested for disorderly conduct); *Snell v. City of York*, 564 F.3d 659 (3d Cir. 2009) (anti-abortion protester arrested for disorderly conduct); *Egolf v. Witmer*, 526 F.3d 104, 107 (3d Cir. 2008) (anti-Iraq war protesters “wearing only thong underwear” arrested for disorderly conduct); *Papineau v. Parmley*, 465 F.3d 46 (2d Cir. 2006) (members of an Onondaga Nation protest regarding a tobacco tax on private property along the highway arrested for disorderly conduct).

46. MODEL PENAL CODE § 250.2(2) (AM. L. INST. Proposed Official Draft 1962) (“An offense under this section is a petty misdemeanor if the actor’s purpose is to cause substantial harm or serious inconvenience, or if he persists in disorderly conduct after reasonable warning or request to desist. Otherwise disorderly conduct is a violation.”). Violations are less serious offenses than misdemeanors. *Criminal Justice System for Adults in NYS*, N.Y. STATE OFF. MENTAL HEALTH, <https://omh.ny.gov/omhweb/forensic/manual/html/chapter1.htm> [perma.cc/FB6T-MFQN] (“A Violation is an offense other than a traffic infraction for which a sentence to a term of imprisonment of up to 15 days may be imposed. It is the least serious type of proscribed activity and encompasses such offenses as harassment, trespass, and disorderly conduct.” (emphasis omitted) (citation omitted)). I use the Model Penal Code definition for many of the offenses in this Section—particularly those crimes that protesters were arrested for in multiple jurisdictions—with an understanding that the specific elements of the offenses within each jurisdiction likely differ.

47. MODEL PENAL CODE § 250.2(1) (AM. L. INST. Proposed Official Draft 1962). Courts have recognized, to varying degrees, First Amendment limitations on the use of disorderly conduct charges that suppress speech and assembly. See Tabatha Abu El-Haj, *Defining Peaceably: Policing the Line Between Constitutionally Protected Protest and Unlawful Assembly*, 80 MO. L. REV. 961, 977 (2015) (“In the 1960s, the Supreme Court repeatedly held that it is unconstitutional for government officials to use crimes such as disorderly conduct, breach of the peace, or obstructing public passage to suppress constitutionally protected assemblies. Nevertheless, these

in a disorderly manner and thus commit this offense.<sup>48</sup> Because a person can engage in disorderly conduct in several ways that do not include fighting, threatening, or engaging in violent conduct, it constitutes a nonviolent offense. Moreover, the Supreme Court has recently discussed disorderly conduct as a minor and nonviolent offense.<sup>49</sup>

In Chicago, approximately 900 people were arrested for either disorderly conduct or failure to disperse<sup>50</sup> during the first weekend of the George Floyd protests,<sup>51</sup> which amounted to 80 percent of all arrests that weekend.<sup>52</sup> In the New York City George Floyd protests, police officers arrested people *en masse* for disorderly conduct,<sup>53</sup> and in Portland, Oregon, 30 percent of the arrests in the initial five months of the George Floyd protests were for disorderly conduct.<sup>54</sup>

That said, the largest percentage of Portland arrests (38 percent) were for the misdemeanor of interfering with a peace officer,<sup>55</sup> defined as “[i]ntentionally act[ing] in a manner that prevents, or attempts to prevent, a [known] peace officer . . . from performing [their] lawful duties . . . or . . . [r]efus[ing] to obey a lawful order by the peace officer . . . .”<sup>56</sup> Similarly, in the days before

crimes are routinely used to manage and contain the disorder associated with outdoor political protests.”); see also Alicia A. D’Addario, *Policing Protest: Protecting Dissent and Preventing Violence Through First and Fourth Amendment Law*, 31 N.Y.U. REV. L. & SOC. CHANGE 97, 120 (2006).

48. See MODEL PENAL CODE § 250.2(1) (AM. L. INST. Proposed Official Draft 1962).

49. See *Lange*, 141 S. Ct. at 2020.

50. The offense of failure to disperse is discussed in the next section as a protest crime. See *infra* Part II.A.2.

51. See David Eads, Josh McGhee & Matt Chapman, *Chicago Police Arrested More People for Protesting than for Looting in Early Days of Unrest, Contradicting Original Claims*, CHI. REP. (June 16, 2020), <https://www.chicagoreporter.com/chicago-police-arrested-more-people-for-protesting-than-for-looting-in-early-days-of-unrest-contradicting-original-claims> [perma.cc/78Y2-F2KJ]. The Chicago police department initially reported that 699 arrests that weekend were for looting related charges, but that was inaccurate, and the number was actually 213 arrests. *Id.*

52. *Id.*

53. Beth Fertig, *Accused Looters Spark Another Round of Debate on NY’s Bail Law*, GOTHAMIST (June 19, 2020, 9:00 AM), <https://gothamist.com/news/latest-pushback-bail-law-das-want-keep-alleged-looters-jail-until-trial> [perma.cc/G47V-MW79]; JAMES E. JOHNSON, DIRECTING AN ANALYSIS OF FACTORS IMPACTING THE GEORGE FLOYD PROTESTS IN NEW YORK CITY 21–22 (2020), <https://www1.nyc.gov/assets/law/downloads/pdf/ProtestReport-np.pdf> [perma.cc/P5ZN-QUZD].

54. Hannah Ray Lambert, *Policing Portland’s Protests: 1,000 Arrests, Handful of Prosecutions*, KOIN (Nov. 2, 2020, 5:21 PM), <https://www.koin.com/news/protests/policing-portlands-protests-1000-arrests-handful-of-prosecutions> [perma.cc/TF9M-JQ4Y].

55. *Id.*

56. OR. REV. STAT. § 162.247 (2019); cf. *Weed v. Jenkins*, 873 F.3d 1023 (8th Cir. 2017) (highway overpass protesters arrested for Missouri offense of willfully opposing a Missouri State Highway Patrol member); *Oberwetter v. Hilliard*, 639 F.3d 545 (D.C. Cir. 2011) (protesters arrested while dancing inside the Jefferson Memorial, each listening to music on headphones and dancing in place to honor Thomas Jefferson); *Mackinney v. Nielsen*, 69 F.3d 1002, 1004 (9th Cir. 1995) (protester arrested for failure to comply with police orders after writing “[a] police state is more expensive than a welfare state—we guarantee it” with sidewalk chalk on the ground);

a curfew was instituted in Los Angeles, most protest arrestees were charged with the municipal infraction of failure to obey a police officer.<sup>57</sup>

Police also arrested protesters for the public order offense of obstructing highways or streets.<sup>58</sup> This offense is generally defined as the purposeful or reckless obstruction of “any highway or other public passage, whether alone or with others.”<sup>59</sup> That said, “[n]o person shall be deemed guilty . . . solely because of a gathering of persons to hear [them] speak or otherwise communicate, or solely because of being a member of such a gathering.”<sup>60</sup> Refusing to obey a reasonable order to move “to prevent obstruction of a highway or other public passage” also constitutes a violation.<sup>61</sup> While the Model Penal Code suggests that obstructing a highway or street is a criminal violation,<sup>62</sup> lawmakers in various states have categorized it as a criminal misdemeanor instead. In a mass arrest event that took place on June 1, 2020, police arrested almost 700 protesters that marched onto the Margaret Hunt Hill Bridge in Dallas, Texas.<sup>63</sup> After marchers progressed onto the bridge, police blocked their path

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Dinler v. City of New York, No. 04 Civ. 7921, 2012 WL 4513352 (S.D.N.Y. Sept. 30, 2012) (RNC protesters arrested for disobeying a lawful police order); Tabatha Abu El-Haj, *All Assemble: Order and Disorder in Law, Politics, and Culture*, 16 U. PA. J. CONST. L. 949, 951–52 (2014) (using Occupy movement’s experiences to illustrate the frequency with which police resort to arrests for minor crimes, including disobeying a lawful order, to control protests, and the lower courts decisions to uphold those practices in contradiction to history allowing for free assembly).

57. GERALD CHALEFF, AN INDEPENDENT EXAMINATION OF THE LOS ANGELES POLICE DEPARTMENT 2020 PROTEST RESPONSE 22, 46–47 (2021), [http://www.lapdpolicecom.lacity.org/041321/BPC\\_21-067.pdf](http://www.lapdpolicecom.lacity.org/041321/BPC_21-067.pdf) [perma.cc/V2LA-EF4D].

58. Abu El-Haj, *supra* note 56 (collecting stories of arrests for protester blocking rights-of-way to argue that these arrests violate Framers’ principles).

59. MODEL PENAL CODE § 250.7(1) (AM. L. INST., Proposed Official Draft 1962).

60. *Id.*

61. *Id.* § 250.7(2).

62. *Id.*

63. Lynnanne Nguyen, *674 Protesters Detained on West Dallas Bridge Monday Night Before Being Released*, FOX4 (June 2, 2020), <https://www.fox4news.com/news/674-protesters-detained-on-west-dallas-bridge-monday-night-before-being-released> [perma.cc/N376-L3AG]; see also Miles Moffeit, Cassandra Jaramillo & Dianne Solis, *I Felt Like My Chest Was on Fire: Photo Shows Dallas Police Officer Shooting Protester with Pepper-Ball Gun*, DALL. MORNING NEWS (Aug. 9, 2020, 10:00 AM), <https://www.dallasnews.com/news/investigations/2020/08/09/i-felt-like-my-chest-was-on-fire-photo-shows-cop-blasting-a-peaceful-protester-with-a-pepper-ball-gun-at-close-range> [perma.cc/35PZ-NPYX]. In another mass arrest, Atlanta police arrested 194 protesters for obstructing the roadway as they stood on the sidewalk in front of the governor’s mansion chanting, “Our streets!” Greg Bluestein, Jeremy Redmon & Vanessa McCray, *Demonstrators Take to Atlanta Streets for a Second Night*, ATLANTA J.-CONST. (May 30, 2020), <https://www.ajc.com/news/crime-law/protests-take-atlanta-streets-for-second-night/KHJX744f3mwChVehbECiUL> [perma.cc/ND9V-JP6H]; Kornfield et al., *supra* note 1. While, according to Model Penal Code, obstructing a highway is generally defined as a criminal violation, in both Texas and Georgia, obstructing a highway is a misdemeanor. MODEL PENAL CODE § 250.7 (AM. L. INST. Proposed Official Draft 1962); TEX. PENAL CODE § 42.03 (West. 2021); GA. CODE ANN. § 16-11-43 (2018).

on both sides and tear-gassed and fired projectiles at them.<sup>64</sup> Police then ordered the protesters to lie on the ground and arrested them for misdemeanor obstructing a highway.<sup>65</sup> That same month in Louisville, Kentucky, in protests over the killing of Breonna Taylor,<sup>66</sup> police arrested forty-three activists for Kentucky's version of this misdemeanor crime as they hung a banner with her image off the Second Street Bridge.<sup>67</sup>

Beyond public order offenses, police execute warrantless arrests of protesters via traditional property crimes like trespassing.<sup>68</sup> Criminal trespass is generally a misdemeanor defined as “enter[ing] or surreptitiously remain[ing] in any building or occupied structure . . . .”<sup>69</sup> In Nashville, Tennessee, police arrested fifty-five people in one evening for trespassing as they protested on the grounds of the state capitol.<sup>70</sup> In Portland, Oregon, police used criminal trespass to arrest at least several hundred people in the protests over the seventy days after the murder of George Floyd.<sup>71</sup> Returning to demonstrations over Breonna Taylor's shooting, in July 2020, police arrested marchers for trespassing as they stood in front of the Kentucky Attorney General's home

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64. Jack Howland, *Hundreds of George Floyd Protesters Arrested on Margaret Hunt Hill Bridge in Dallas*, FORT WORTH STAR-TELEGRAM (June 4, 2020, 9:46 PM), <https://www.star-telegram.com/news/local/dallas/article243188061.html> (on file with the *Michigan Law Review*).

65. *Id.*

66. Breonna Taylor was shot and killed by police in her own home when they stormed in to effectuate a no-knock search warrant relating to her ex-boyfriend. Richard A. Oppel Jr., Derrick Bryson Taylor & Nicholas Bogel-Burroughs, *What to Know About Breonna Taylor's Death*, N.Y. TIMES (Apr. 26, 2021), <https://www.nytimes.com/article/breonna-taylor-police.html> [perma.cc/TR9W-ZJPK].

67. Lucas Aulbach & Olivia Krauth, *Protest on Louisville's Second Street Bridge Leads to 43 Arrests, 20 Towed Vehicles*, COURIER J. (June 30, 2020, 11:07 AM), <https://www.courier-journal.com/story/news/local/2020/06/29/louisville-protesters-shut-down-clark-memorial-bridge-monday/3278925001> [perma.cc/UQ4T-FRQE]. In Gainesville, Texas, police arrested three organizers leading a protest of a Confederate statute for obstructing a passageway. Erin Corbett, *A Year of Protest: How Police Targeted Activists After George Floyd's Murder*, REFINERY29, (May 25, 2021, 10:30 AM), <https://www.refinery29.com/en-us/2021/05/10485583/george-floyd-protests-police-arrests-aftermath> [perma.cc/Z63D-JXSD]. The organizers were arrested via an arrest warrant executed on Friday, meaning they spent the weekend in jail, and after arraignment were issued \$2,500 bail, which is an extraordinary amount for a misdemeanor offense. *Id.* Obstructing a highway or other public passage is a misdemeanor in Kentucky. KY. REV. STAT. ANN. § 525.140 (West 2014).

68. See MODEL PENAL CODE §§ 220.1–224.14 (AM. L. INST. Proposed Official Draft 1962) (describing traditional offenses against property).

69. *Id.* § 221.2.

70. *THP: 55 'Violators' Arrested for Trespassing at State Capitol*, WJHL (July 5, 2020, 10:16 AM), <https://www.wjhl.com/news/regional/tennessee/thp-55-violators-arrested-for-trespassing-at-state-capitol> [perma.cc/VY24-8LH3].

71. Gillian Flaccus, *Prosecutor Won't Act on Low-Level Portland Protest Arrests*, U.S. NEWS & WORLD REP. (Aug. 11, 2020, 6:09 PM), <https://www.usnews.com/news/politics/articles/2020-08-11/portland-protesters-rally-as-arrest-of-activist-draws-ire> [perma.cc/D6XE-SKD8]; see also Complaint at 20, *Tuck Woodstock v. Portland*, 20-cv-1035 (D. Or. June 28, 2020) [hereinafter Index Newspaper Complaint].

demanding the indictment of the involved police officers.<sup>72</sup> Notwithstanding, police use of criminal trespass to arrest protesters is not unique to the 2020 racial justice protests, with cited incidents spanning back decades.<sup>73</sup>

However, in the demonstration outside the Kentucky Attorney General's home, police also arrested protesters for the felony crime of intimidating a participant in the legal process under the theory that activists "attempt[ed] to influence the decision of the attorney general with their actions."<sup>74</sup> The charge of intimidating a participant in the legal process is intended to address witness or juror intimidation.<sup>75</sup> It requires intimidation by either the "use of physical force or a threat."<sup>76</sup> Its use in the context of demonstrations that seek to persuade a public official to exercise their duties justly is a testament to the expansive and abusive arrest power left in the hands of police. In this context, law enforcement's arrest power only seems limited by their imagination of what charges to concoct.

Burglary, another offense against property,<sup>77</sup> deserves special attention. Unlike most of the crimes that police used to arrest 2020 racial justice protesters and are discussed in this Section, burglary is usually classified as a felony.<sup>78</sup> Notably, and as will be discussed in the next section, in the early days of the George Floyd protests, New York City police arrested a large number of (mostly Black) protesters for burglary in the third degree.<sup>79</sup> The elements of burglary generally include "enter[ing] a building or . . . structure . . . with [the] purpose to commit a crime therein . . ."<sup>80</sup> Burglary's definition largely resembles a trespass but for the requisite intent *to commit a crime therein*. In New York, the underlying crime for burglary in the third degree can include

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72. Billy Kobin, *Celebrities, Rappers, Civil Rights Leaders: Who Was Arrested During Protest at Daniel Cameron's Home?*, COURIER J. (July 28, 2020, 12:18 PM), <https://www.courier-journal.com/story/news/local/2020/07/15/87-people-arrested-kentucky-attorney-general-daniel-cameron-house/5441508002> [perma.cc/95NS-JTML].

73. See, e.g., *Meyers v. City of New York*, 812 F. App'x. 11 (2d Cir. 2020) (Occupy protesters arrested in a park for trespassing); *Mauler v. Arlotto*, 777 F. App'x. 59 (4th Cir. 2019) (transgender protester arrested for trespass for protesting mistreatment of transgender individuals outside board of education's office); *Zalaski v. City of Hartford*, 723 F.3d 382 (2d Cir. 2013) (animal rights activists arrested for criminal trespass while protesting treatment of animals at the circus); *Picray v. Sealock*, 138 F.3d 767 (9th Cir. 1998) (protester arrested for trespass after attempting to enter polling place while wearing a campaign button); *Cyr v. City of Dallas*, No. 96-10937, 1997 WL 255987 (5th Cir. Apr. 3, 1997) (anti-abortion protesters arrested for criminal trespass inside clinic).

74. Kobin, *supra* note 72.

75. See KY. REV. STAT. ANN. § 524.040 (LexisNexis 2021).

76. *Id.*

77. See MODEL PENAL CODE AND COMMENTARIES: PART II DEFINITION OF SPECIFIC CRIMES (AM. L. INST., Official Draft and Revised Comments 1980).

78. See MODEL PENAL CODE § 221.1 (AM. L. INST. Proposed Official Draft 1962) (distinguishing burglary in the second degree and third degree as both felonies).

79. See *infra* Section II.B.

80. See MODEL PENAL CODE § 221.1 (AM. L. INST. Proposed Official Draft 1962).

any crime and need not necessarily be a felony itself.<sup>81</sup> At the scene, a police officer decides whether an arrestee has the requisite intent for burglary. Based on what we understand about the disparate arrests of Black individuals and the open question of whether this pattern is reproduced in protest-related arrests,<sup>82</sup> it is reasonable to wonder whether the burglarious intent is in the eye of the beholder. Outside New York City, police officers in Indianapolis also arrested protestors, and prosecutors charged those same individuals with burglary.<sup>83</sup> According to the Indiana Code, a person has the requisite burglarious intent if they intend to commit either a theft or a felony.<sup>84</sup>

The discussion above focuses on the traditional and mostly misdemeanor crimes police often weaponized against protestors during the 2020 racial justice protests. Beyond traditional crimes, however, law enforcement can employ additional crimes specifically applicable to circumstances that are likely to exist during large protests, where crowds and standing emergency orders are often involved.

## 2. Protest Crimes

This category includes offenses—such as rioting, unlawful assembly, and failure to disperse—specifically designed for the government to respond to perceived civil unrest. These criminal offenses are also part of a police officer's toolkit to confront protestors. Law enforcement perceive protest, particularly by Black activists,<sup>85</sup> as unrest that merits government interference and control.

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81. Compare N.Y. PENAL LAW § 140.20 (McKinney 2021) (“A person is guilty of burglary in the third degree when he knowingly enters or remains unlawfully in a building with intent to commit a crime therein.”) with CAL. PENAL CODE § 459 (West 2021) (“Every person who enters any house . . . with intent to commit grand or petit larceny or any felony is guilty of burglary.”) and MASS. GEN. LAWS ch. 266, § 14 (2020) (“Whoever breaks and enters a dwelling house in the night time, with intent to commit a felony, or whoever, after having entered with such intent, breaks such dwelling house in the night time, any person being then lawfully therein . . .”).

82. See *infra* Section II.B.

83. Fourteen people were charged with burglary in the first weekend of the George Floyd protests. Dwight Adams, *No Charges for 41 Nonviolent Protesters in Indianapolis*, *Marion County Prosecutor Says*, INDYSTAR (June 1, 2020, 4:03 PM), <https://www.indystar.com/story/news/crime/2020/06/01/no-charges-nonviolent-protesters-marion-county-indianapolis-protests/5310288002> [perma.cc/454F-QWE2].

84. IND. CODE § 35-43-2-1 (2017).

85. See *supra* Section II.A; see also Karen J. Pita Loor, *Tear Gas + Water Hoses + Dispersal Orders: The Fourth Amendment Endorses Brutality in Protest Policing*, 100 B.U. L. REV. 817, 830 (2020) (discussing how activists of color are more likely to be victims of police violence). Furthermore, recent data suggest that beyond race, police are more likely to view politically left-leaning activists as violent and thus respond more aggressively to them than to politically right-leaning activists. Lois Beckett, *US Police Three Times as Likely to Use Force Against Leftwing Protesters, Data Finds*, GUARDIAN (Jan. 14, 2021, 1:00 AM), <https://www.theguardian.com/us-news/2021/jan/13/us-police-use-of-force-protests-black-lives-matter-far-right> [perma.cc/W2TU-Q5NH].

While these categories of crimes have existed since the country's founding,<sup>86</sup> American society's demand for order at all times—including during protests—has increased over the centuries and consequently lowered the bar for both the crimes of rioting and unlawful assembly so that now neither requires “an actual and imminent threat of violence.”<sup>87</sup> Similarly, failure to disperse does not require that the conduct of those refusing to leave result in violence; rather, it is enough that it causes “inconvenience, annoyance, or alarm.”<sup>88</sup> But “[n]ineteenth-century Americans had a much higher social and legal threshold for the irritations that come with democracy. . . . [T]he right of assembly . . . was understood to require tolerance for the unruly, uncivil, and incoherent elements of protest.”<sup>89</sup> Unlike today, “[g]overnment officials could not regulate . . . assemblies without showing a breach of the peace, defined in terms of levels of actual violence.”<sup>90</sup>

According to the current Model Penal Code definition, someone

is guilty of riot . . . if [they] participate[] with [two] or more others in a course of disorderly conduct: (a) with purpose to commit or facilitate the commission of a felony or misdemeanor; (b) with purpose to prevent or coerce official action; or (c) when the actor or any other participant to the knowledge of the actor uses or plans to use a firearm or other deadly weapon.<sup>91</sup>

While the Model Penal Code labels rioting as a felony, individual states differ, with some classifying it as a misdemeanor.<sup>92</sup> As evident in the definition and contrary to what lay people may imagine amounts to a riot, rioting does not generally require the participation of a large crowd, property damage, or the

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86. See John Inazu, *Unlawful Assembly as Social Control*, 64 UCLA L. REV. 2, 10 (2017); Abu El-Haj, *supra* note 47, at 967–972 (discussing the historical underpinnings of the unlawful assembly offense). Professor Inazu also discusses the colonial foundations criminalizing the failure to disperse. See Inazu, *supra*, at 11–13.

87. Abu El-Haj, *supra* note 41, at 205.

88. See MODEL PENAL CODE § 250.1(2) (AM. L. INST. Proposed Official Draft 1962).

89. Abu El-Haj, *supra* note 41, at 205 (footnote omitted).

90. *Id.*

91. MODEL PENAL CODE § 250.1(1) (AM. L. INST. Proposed Official Draft 1962). See also Margot E. Kaminski, *Incitement to Riot in the Age of Flash Mobs* 81 U. CIN. L. REV. 1, 17–26 (2012), for a review of the number of people, the type of group conduct, the type of injury or damage, and the type of intent that may constitute a riot in various state jurisdictions' antiriot statutes and laws.

92. MODEL PENAL CODE § 250.1(1) (AM. L. INST. Proposed Official Draft 1962); see, e.g., IDAHO CODE § 18-6402 (2016) (distinguishing misdemeanor and felony riots in Idaho); FLA. STAT. § 870.01 (2021) (distinguishing misdemeanor and felony riots in Florida); N.Y. PENAL LAW § 240.05 (McKinney 2021) (classifying riot in the second degree as a Class A misdemeanor); H.B. 784, 133rd Gen. Assemb., Reg. Sess. (Ohio 2020) (proposing increasing the penalty for riot from misdemeanor to felony).



threat of physical harm.<sup>93</sup> As previously mentioned, there need not be an actual and imminent threat of violence for someone to engage in the crime of rioting. Instead, the crime of riot is expansive, thus providing police wide latitude to arrest.

Furthermore, not only is rioting a crime across states, but, in some states and via federal statute, *incitement to riot* is also a crime and thus presents an additional avenue to arrest.<sup>94</sup> One important note on this latter crime is that in *Brandenburg v. Ohio*, the Supreme Court established that a state may not constitutionally “forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”<sup>95</sup> State statutes vary widely in their definition of incitement for purposes of this offense.<sup>96</sup> As Professor Margot Kaminski has previously noted, some incitement to riot criminal statutes do not include the element of likelihood to incite imminent lawless action, which may present a First Amendment problem.<sup>97</sup> In the first two weeks of the George Floyd protests, people were arrested for riot-related offenses in Miami, Cleveland, Austin, Atlanta, Washington, D.C., Dallas, and Portland.<sup>98</sup> In both Cleveland and Portland, this was the second most frequent crime for which police arrested protesters.<sup>99</sup>

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93. See Kaminski, *supra* note 91, at 9 (“When most of us think of ‘riot,’ we think of large crowds that cause damage . . . . But the statutory and common-law definitions of riot include surprisingly small gatherings that do not cause physical harm at all.”).

94. *Id.* at 10–13. Federal statute makes inciting a riot a felony, 18 U.S.C. § 2102, but it may either be a felony or a misdemeanor state crime depending on the jurisdiction. See, e.g., CAL. PENAL CODE § 404.6 (West 2021) (misdemeanor); CONN. GEN. STAT. § 53a-178 (2021) (Class A misdemeanor); D.C. CODE § 22-1322 (2021) (misdemeanor); FLA. STAT. § 870.01 (2021) (third-degree felony); KAN. STAT. ANN. § 21-6201(b) (2019) (felony); MONT. CODE ANN. § 45-8-104 (2021) (distinguishing misdemeanor and felony incitement); N.C. GEN. STAT. § 14-288.2 (distinguishing misdemeanor and felony incitement); S.C. CODE ANN. § 16-5-130 (2020) (distinguishing felony and misdemeanor classifications based on underlying offense).

95. *Brandenburg v. Ohio*, 395 U.S. 444, 447–48 (1969) (“[T]he mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action.’ A statute which fails to draw this distinction impermissibly intrudes upon the freedoms guaranteed by the First and Fourteenth Amendments.” (quoting *Noto v. United States*, 367 U.S. 290, 297–98 (1961) (citations omitted))).

96. See Kaminski, *supra* note 91, at 10–13. The Model Penal Code does not define Incitement to Riot.

97. See *id.* at 28–29.

98. See Kornfield et al., *supra* note 1; Moffeit et al., *supra* note 63.

99. Kornfield et al., *supra* note 1; cf. *Bernini v. City of St. Paul*, 665 F.3d 997 (8th Cir. 2012) (protesters at the 2008 RNC arrested for rioting); *Carr v. District of Columbia*, 587 F.3d 401 (D.C. Cir. 2009) (between sixty-five and seventy-five protesters marching after an “Anti-Inaugural Concert” carrying handmade torches arrested for parading without a permit and rioting).

Unlawful assembly “criminalizes a group of people who are gathered in a common location and agree to commit some future unlawful act.”<sup>100</sup> California Penal Code Section 407 defines the misdemeanor of unlawful assembly as “[w]henver two or more persons assemble together to do an unlawful act, or do a lawful act in a violent, boisterous, or tumultuous manner.”<sup>101</sup> An imminent threat of violence is not an element of the offense. Also, as the text of the statute conveys, the unlawful act need not precede the arrest. Rather, it is the gathering with the intent to commit such an act that warrants arrest pursuant to unlawful assembly. The statute thus provides extreme leeway to law enforcement judgments about the intent of gathered protesters. Law enforcement’s perceptions of activists’ intent may vary depending on the cause and race of protesters.<sup>102</sup>

In the *Black Lives Matter Los Angeles v. City of Los Angeles* lawsuit regarding the George Floyd demonstrations, activists provided several accounts of Los Angeles Police Department (LAPD) officers in riot gear surrounding large groups of people engaged in lawful protests, declaring an unlawful assembly, and then proceeding to arrest the whole group *en masse*.<sup>103</sup> This conduct was in violation of both a 2005 settlement agreement and a 2007 settlement agreement where the City of Los Angeles agreed that before declaring any unlawful assembly, LAPD would attempt to distinguish individuals engaging in unlawful conduct from law-abiding protesters, separate them, and arrest only those wrongdoers.<sup>104</sup> The settlement agreements resulted from lawsuits brought against LAPD for its egregious policing during prior protests involving the Democratic National Convention and immigrant worker protesters.<sup>105</sup>

Minneapolis police also arrested almost fifty (of 300) protesters who were marching after Derek Chauvin was released on bail pending his trial for the murder of George Floyd for unlawful assembly a group.<sup>106</sup> One “live news feed . . . showed several people being ordered to get down on the ground in

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100. Inazu, *supra* note 86, at 6. The Model Penal Code does not contain a definition of unlawful assembly.

101. CAL. PENAL CODE § 407 (West 2021).

102. See Loor, *supra* note 85, at 830 (discussing how activists of color and left-and right-leaning protesters are treated differently by law enforcement); accord Beckett, *supra* note 85.

103. Complaint at 12–14, 23–24, 26, 28, *Black Lives Matter L.A. v. City of Los Angeles*, No. 20-cv-05027 (C.D. Cal. June 18, 2021) [hereinafter L.A. Complaint].

104. See *id.* at 45–48 (discussing settlement in *National Lawyers Guild v. City of Los Angeles* and *Multi-Ethnic Worker Organizing Network v. City of Los Angeles*); CHALEFF, *supra* note 57, at 17.

105. See CHALEFF, *supra* note 57, at 16–17, apps. 5, 6.

106. Abby Simons, *More than 50 Protesters Arrested During Faceoff with Law Enforcement in Minneapolis After Derek Chauvin Release*, STAR TRIB. (Oct. 8, 2020, 9:46 AM), <https://www.startribune.com/51-arrested-near-fifth-precinct-hq-after-protesting-chauvin-release/572670582/perma.cc/3AEP-N5GP>.

preparation for arrest on suspicion of illegal assembly.”<sup>107</sup> Besides the one person who was arrested for fourth-degree assault, nothing suggests that any of the other protesters were anything but peaceful.<sup>108</sup>

Whether police officers declare an unlawful assembly or not, once officers demand that individuals leave an area, those who remain can be charged with failure to disperse. Again, a threat of violence is not an element of the offense of failure to disperse. Generally, a person can be guilty of the misdemeanor offense of failure to disperse if they are one of three or more persons engaging in “disorderly conduct likely to cause substantial harm or serious inconvenience, annoyance or alarm” and they “refuse[] or knowingly fail[] to obey” a police officer’s lawful order to disperse.<sup>109</sup> Although individuals can be charged with failure to disperse outside the context of a protest, such as sports fans or concertgoers who refuse to leave a venue or area, the offense is frequently used against protesters.<sup>110</sup> As previously mentioned, in the first weekend after George Floyd’s murder, Chicago police arrested 900 people for either failure to disperse or disorderly conduct—accounting for 80 percent of all protest-related arrests.<sup>111</sup> In Los Angeles, approximately 2,500 of the 3,000 arrests in the first week of the George Floyd protests were either for failure to disperse or violation of curfew.<sup>112</sup>

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107. *Id.* Minnesota defines the misdemeanor of unlawful assembly as “[w]hen three or more persons assemble, each participant is guilty . . . if the assembly is: (1) with intent to commit any unlawful act by force; or (2) with intent to carry out any purpose in such manner as will disturb or threaten the public peace; or (3) without unlawful purpose, but the participants so conduct themselves in a disorderly manner as to disturb or threaten the public peace.” MINN. STAT. § 609.705 (2008). Portland police officers also arrested people for unlawful assembly, including a student who started recording officers as they approached the booth where he was handing out medical supplies to protesters. See Lindsay Nadrich, *OHSU Student Arrested Handing Medical Supplies to Protesters*, KOIN (June 18, 2020, 5:14 PM), <https://www.koin.com/news/protests/ohsu-student-arrested-handing-medical-supplies-to-protesters> [perma.cc/NX5E-FYN9]; see also Index Newspaper Complaint, *supra* note 71, at 22; Complaint at 33, *Wise v. City of Portland*, No. 20-cv-01193 (D. Or. July 22, 2020).

108. See Simons, *supra* note 106.

109. MODEL PENAL CODE § 250.1(2) (AM. L. INST. Proposed Official Draft 1962).

110. *E.g.*, *Vodak v. City of Chicago*, 639 F.3d 738, 740 (7th Cir. 2011) (anti-Iraq protest resulting in 900 arrests for refusal to disperse); *Collins v. Jordan*, 110 F.3d 1363, 1366 (9th Cir. 1996) (class action lawsuit following “[f]our hundred to five hundred” arrests for failure to disperse at Rodney King riots in Los Angeles); *Tatum v. Morton*, 562 F.2d 1279, 1280 (D.C. Cir. 1977) (persons arrested for refusal to disperse while they were participating in a peaceful Quaker vigil of prayer). In its investigation of the police’s response to the 2014 Ferguson uprising, the St. Louis County Police Department reported to Amnesty International that 132 protesters were arrested for refusal to disperse in the first twelve days after Michael Brown’s shooting in Ferguson. AMNESTY INT’L, ON THE STREETS OF AMERICA: HUMAN RIGHTS ABUSES IN FERGUSON 8 (2014), <https://www.amnestyusa.org/wp-content/uploads/2017/04/onthestreetsofamericaamnestyinternational.pdf> [perma.cc/A7ST-RX2].

111. Eads et al., *supra* note 51.

112. Justine Coleman, *Thousands of LA Protesters Arrested over Curfew Won’t Be Charged*, HILL (June 8, 2020, 7:45 PM), <https://thehill.com/homenews/state-watch/501752-thousands-of-la-protesters-arrested-over-curfew-wont-be-charged> [perma.cc/X7VE-7TLX]; see also CHALEFF, *supra* note 57, at 10.

### 3. Arrests During a State of Emergency

State and local officials have the authority to declare an emergency in response to a perceived crisis.<sup>113</sup> All state constitutions and statutes provide the governor the power to unilaterally proclaim an emergency either statewide or within a particular area of the state.<sup>114</sup> Local laws also generally provide mayors or the city council with the power to proclaim a local emergency, although a city official's power may have more limitations than that of a governor.<sup>115</sup> Governors and city officials widely used this power to declare emergencies in response to the 2020 racial justice protests.<sup>116</sup> Neither courts nor legislatures provide a sufficient check on a government official's use of emergency power to respond to protests.<sup>117</sup> After declaring a state of emergency, conduct that is lawful—and even constitutionally protected like protest activity—warrants arrest. Furthermore, conduct that is unlawful may be punished more severely during a state of emergency, as in the case of the crime of looting.<sup>118</sup> Failure to abide by an emergency order during a state of emergency is itself an arrestable felony or misdemeanor, depending on the jurisdiction.<sup>119</sup> Emergency declarations and executive orders expand a police officer's power of warrantless arrest.

Once there is a declared emergency, governors and city officials can enact curfews through executive order.<sup>120</sup> A curfew “forbids people (or certain classes of them, such as minors) from being outdoors . . . during specified

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113. Karen J. Pita Loor, *When Protest Is the Disaster: Constitutional Implications of State and Local Emergency Power*, 43 SEATTLE U. L. REV. 1 (2019). In this prior article, I critiqued state and local official's use of emergency powers and the emergency management bureaucracy to respond to protests.

114. *See id.* at Part II.

115. *Id.*

116. Charity L. Scott, *Did the Curfews Work? Experts Aren't So Sure*, WALL ST. J. (June 9, 2020, 8:00 AM), <https://www.wsj.com/articles/did-the-curfews-work-experts-arent-so-sure-11591704005> [perma.cc/87VL-QACQ].

117. Courts will only ask whether there was a good faith basis to declare a state of emergency and will easily find such a basis once the government actor asserts a threat to public safety. Loor, *supra* note 113, at 48. Even when legislators have some authority to limit or terminate the emergency, they do not use this authority to curtail an emergency declaration. *Id.* at 17–19.

118. *See infra* notes 134–140 and accompanying text.

119. *See* Loor, *supra* note 113, at 17 (citing Missouri and North Dakota statutes as examples of jurisdictions where failure to follow an emergency order is classified as a misdemeanor).

120. *See id.* at 16–17. Without a state of emergency, courts will find curfews unconstitutional unless they contain provisions that provide an exemption for First Amendment activity. *Id.* at 47–50.

hours.”<sup>121</sup> In most jurisdictions, violating a curfew is a misdemeanor.<sup>122</sup> During the George Floyd protests, curfews spread like windswept wildfire.<sup>123</sup> Just like curfews ran rampant, so did arrests for curfew violations. The *Washington Post*'s analysis of 2,600 arrests across fifteen cities during the first two weeks of protests disclosed that most individuals were arrested for either violating a curfew or an emergency order.<sup>124</sup> According to the *Washington Post*, this was most clear in Miami, Cleveland, Washington, D.C., and Atlanta.<sup>125</sup> While the *Washington Post*'s analysis did not speak to the voluminous Los Angeles arrests, the L.A. figures now demonstrate that although the city might have been unusual in the sheer number of arrests, it was not anomalous in the type of offenses police weaponized against protesters. The majority of arrests by the

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121. *Curfew*, BLACK'S LAW DICTIONARY (11th ed. 2019). The Model Penal Code does not define the offense of violating a curfew.

122. *See, e.g.*, N.Y.C. ADMIN. CODE § 3-108 (making curfew violation a Class B misdemeanor); S.F. ADMIN. CODE § 7.17(b) (making violation of emergency order, including a curfew, a misdemeanor); H.B. 2, 2022 Leg., Reg. Sess. (Ala. 2021) (proposing an enhanced Class A misdemeanor penalty for curfew violation); DOUGLAS A. DUCEY, DECLARATION OF STATE OF EMERGENCY (2020), <https://azgovernor.gov/sites/default/files/20200531150110495.pdf> [perma.cc/K492-PSW8] (Arizona's executive order imposing Class 1 misdemeanor penalties for curfew violations). The only felony charge for a curfew violation is currently pending in Alabama. As written, the Alabama bill cited previously (13A-11-3.1(a) and (b)) would make aggravated riot, which includes breaking curfew in a riot that causes more than \$2,500 in damage, a class C felony.

123. *See State, Local Curfew Orders*, REPS. COMM. FOR FREEDOM OF THE PRESS (last updated June 12, 2020), [https://docs.google.com/spreadsheets/d/1dVQ\\_pm9U5fxD\\_KT43D9Xy3xOZSA7NeM8FUIGWpWjN0o/edit-gid=0](https://docs.google.com/spreadsheets/d/1dVQ_pm9U5fxD_KT43D9Xy3xOZSA7NeM8FUIGWpWjN0o/edit-gid=0) [perma.cc/U3V8-QJ26] (unpublished spreadsheet). The spreadsheet shows that in most jurisdictions, members of the press were supposed to be exempt from the curfew. *Id.* Curfew orders also exempted legal observers, essential workers, and individuals experiencing homelessness. *See* Katie Warren & Joey Hadden, *How All 50 States Are Responding to the George Floyd Protests, from Imposing Curfews to Calling In the National Guard*, BUS. INSIDER (June 4, 2020, 3:22 PM), <https://www.businessinsider.com/us-states-response-george-floyd-protests-curfews-national-guard-2020-6> [perma.cc/CNY9-32E8]; Jake Offenhartz, "Round Up the Green Hats": NYPD Accused of Deliberately Targeting Legal Observers in Brutal Bronx Mass Arrest, GOTHAMIST (June 8, 2020, 9:13 PM), <https://gothamist.com/news/round-green-hats-nypd-accused-deliberately-targeting-legal-observers-brutal-bronx-mass-arrest> [perma.cc/5AZW-HCJ8]; Benjamin Oreskes, *Confusing Alerts and Nowhere to Go: Homeless Angelenos Exempt from Curfew Struggle Even More*, L.A. TIMES (June 4, 2020, 3:55 PM), <https://www.latimes.com/homeless-housing/story/2020-06-04/homeless-people-suffer-as-a-result-of-curfew-and-unrest> [perma.cc/YZ5V-6BFT]. Despite these expressed limitations, police officers sometimes ignored these exemptions and still arrested these individuals. *See, e.g.*, Complaint, Black Lives Matter L.A. v. Garcetti, No. 20-CV-04940 (C.D. Cal. June 3, 2020) [hereinafter Garcetti Complaint] (alleging arrests of journalists in violation of curfew); Robert Davis, *Homeless Communities Caught in Crossfire During George Floyd Protests*, DENVER VOICE (June 29, 2020), <https://www.denvervoice.org/archive/2020/6/30/homeless-communities-caught-in-crossfire-during-george-floyd-protests> [perma.cc/HA5W-P296].

124. Kornfield et al., *supra* note 1.

125. *See id.*

LAPD were also for curfew violations, as well as failure to obey a police order.<sup>126</sup> While some activists likely intentionally violated the curfew as its own form of protest,<sup>127</sup> compliance with curfew in Los Angeles was challenging, with officials enacting or changing curfews at the last minute and failing to properly communicate curfew information.<sup>128</sup> The LAPD also arrested individuals experiencing homelessness for curfew violations who not only had no way to comply with the orders but were also supposed to be exempt from them.<sup>129</sup> In Los Angeles, police lined up in riot gear several rows deep and proceeded to surround and block crowds and then arrest everyone once the curfew was in effect.<sup>130</sup> In other cities, like San Francisco and Chicago, compliance with curfews was similarly difficult, with mayors “impos[ing] aggressive curfew orders on short notice, leading to hundreds of arrests for failure

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126. See CHALEFF, *supra* note 57, at 10; Garcetti Complaint, *supra* note 123, at 7; see also EXECUTIVE ORDER OF THE CHAIR OF THE COUNTY OF LOS ANGELES BOARD OF SUPERVISORS FOLLOWING PROCLAMATION OF EXISTENCE OF A LOCAL EMERGENCY DUE TO CIVIL UNREST (2020), <https://lacounty.gov/wp-content/uploads/Curfew-order.pdf> [perma.cc/8SME-PGNM] (“Any violation of this Order is a misdemeanor, punishable by a fine not to exceed \$1,000 or by imprisonment for a period not to exceed six months, or both.”).

127. See, e.g., Zeeshan Aleem, *Dozens of Cities Across the Country Are Imposing Curfews. Do They Work?*, VOX (May 31, 2020, 5:20 PM), <https://www.vox.com/2020/5/31/21275996/curfew-george-floyd-protest-los-angeles> [perma.cc/UD58-M87S].

128. See L.A. Complaint, *supra* note 103, at 3–4; Garcetti Complaint, *supra* note 123, at 5–7; see also Erika Martin, *Glendale Curfew Warning Accidentally Sent to All of L.A. County; County-wide Curfew Is Still 6 P.M.*, KTLA (June 1, 2020, 6:05 PM), <https://ktla.com/news/local-news/glendale-curfew-warning-accidentally-sent-to-all-of-l-a-county-countywide-curfew-is-still-6-p-m> [perma.cc/9GYQ-9PLB].

129. L.A. Complaint, *supra* note 103, at 1, 4, 11, 41; Sydney Kalich, *List: Curfews Announced Throughout Southern California*, NBC4 (June 3, 2020, 1:38 PM), <https://www.nbclosangeles.com/news/news-curfews-announced-throughout-the-los-angeles-area/2371629> [perma.cc/J9ZG-T28H]; see also Sheriff Villanueva Orders County-Wide Curfew for Los Angeles County, NIXLE (May 31, 2020, 6:49 PM), <https://local.nixle.com/alert/8026754> [perma.cc/9HTM-XEDQ] (“This order does not apply to . . . people experiencing homelessness and without access to a viable shelter, and individuals seeking medical treatment.”).

130. L.A. Complaint, *supra* note 103, at 9–10; see also Complaint at 3, *Anti-Police Terror Project v. City of Oakland*, No. 20-cv-03866 (N.D. Cal. June 11, 2020) (“Demonstrators who otherwise intended to comply with the curfew were kettled and arrested for being in violation of the curfew.”).

to disperse.”<sup>131</sup> Likewise, in Minneapolis, the overwhelming majority of protesters were charged with curfew violations.<sup>132</sup> In New York City, people were also arrested for curfew violations.<sup>133</sup>

A handful of states have looting laws for property crimes committed during a state of emergency.<sup>134</sup> While these statutes apply in any emergency—not just those proclaimed as a result of so-called “riots” and “mobs” but also due to natural disasters—lawmakers largely passed these laws during the 1960s civil rights era, indicating that they were intended to quash protests.<sup>135</sup> Admittedly, police officers do not arrest activists for looting with the same frequency as they do for the other crimes discussed, yet protesters still face occasional arrests for these crimes. In Los Angeles and Columbia, South Carolina, it is documented that police arrested protesters for the crime of looting during the George Floyd protests.<sup>136</sup>

Moreover, individuals who are charged with these looting crimes—instead of the analogous nonemergency property offenses—may face harsher penalties or mandatory minimum sentences. Thus, in Louisiana, someone charged with looting because of conduct that would otherwise constitute burglary—except for the element that “normal security of property is not present by virtue of [, among other things,] a riot [or] mob”—faces up to fifteen years

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131. See Corbett, *supra* note 67; see also Kiran Misra, *Most of the People Arrested at the Protests Were Black*, CHI. READER (June 30, 2020), <https://chicagoreader.com/news-politics/most-of-the-people-arrested-at-the-protests-were-black> [perma.cc/65EV-GLEF].

132. Data suggests that over 500 people had pending cases about a month and a half after George Floyd’s murder, but 493 of them were charged with just violating curfew or unlawful assembly. Julia Lurie, *Weeks Later, 500 People Still Face Charges for Peacefully Protesting in Minneapolis*, MOTHER JONES (July 15, 2020), <https://www.motherjones.com/crime-justice/2020/07/weeks-later-500-people-still-face-charges-for-peacefully-protesting-in-minneapolis> [perma.cc/5WBB-XHVR]. In Minnesota, violating a curfew is a misdemeanor that can be punished by up to a \$1,000 fine or ninety days in jail. MINN. STAT. § 12.45 (2019). See generally Complaint at 8, *Goyette v. City of Minneapolis*, No. 20-cv-01302 (D. Minn. June 2, 2020) (discussing specific examples of journalists arrested for curfew violations at the protest).

133. See *infra* Part II.B.

134. CAL. PENAL CODE § 463(a) (West 2019); LA. STAT. ANN. § 14:62.5 (2011); MISS. CODE ANN. § 97-17-65 (2020); N.C. GEN. STAT. § 14-288.6 (2020); S.C. CODE ANN. § 16-7-10 (2021).

135. See CAL. PENAL CODE § 463(a) (West 2019) (“resulting from . . . riot”); LA. STAT. ANN. § 14:62.5 (2011) (“by virtue of a riot, mob, or other human agency”); accord MISS. CODE ANN. § 97-17-65 (2020). See also Lisa Grow Sun, *Disaster Mythology and the Law*, 96 CORNELL L. REV. 1131, 1191 (2011), and Roger D. Scott, *Looting: A Proposal to Enhance the Sanctions for Aggravated Property Crime*, 11 J.L. & POL. 129 (1995), for a discussion of the historical foundation of these looting statutes.

136. Hundreds were charged in Los Angeles under burglary and the California looting law during the 2020 George Floyd protests. *AP Tally: Arrests at Widespread US Protests Hit 10,000*, VOA NEWS (June 4, 2020, 8:27 AM), [https://www.voanews.com/a/usa\\_nation-turmoil-george-floyd-protests\\_ap-tally-arrests-widespread-us-protests-hit-1/6190506.html](https://www.voanews.com/a/usa_nation-turmoil-george-floyd-protests_ap-tally-arrests-widespread-us-protests-hit-1/6190506.html) [perma.cc/MN]3-5M5P]. Likewise, nine were charged with looting at the South Carolina George Floyd protests. Bristow Marchant, *Nine Accused of Looting in Columbia Protests*, STATE (June 1, 2020), <https://www.thestate.com/news/local/crime/article243182716.html> [perma.cc/VQ7S-V6XH].

in prison, while burglary alone is punishable by up to twelve years.<sup>137</sup> Further, if the looting occurs during a state of emergency, the person charged faces a mandatory minimum sentence of three years.<sup>138</sup> In Mississippi, the difference between the penalties for looting and the analogous crime of burglary is limited to one more year in prison, but prosecution for looting expressly does not preclude prosecution for other larceny or burglary crimes—suggesting that a person could face concurrent prosecutions for the same conduct under looting and similar nonemergency offenses.<sup>139</sup> In California, someone who commits looting during a “state of emergency” or “local emergency” by engaging in conduct that would amount in a nonemergency to a second degree burglary faces the same potential one-year sentence; however, the person convicted of “looting burglary” has a presumptively mandatory 180-day jail sentence, whereas second degree burglary has no mandatory minimum sentence.<sup>140</sup>

Beyond curfew violations and looting offenses, during a state of emergency, government officials and law enforcement may enact or enforce *ad hoc* emergency rules that attempt to expand police officers’ authority to engage in warrantless arrests.<sup>141</sup> Thus, LAPD officers took into custody people charged with only infractions—namely failure to obey a police officer—in contravention of California law requiring that individuals charged with infractions be released at the scene after being provided with a citation to appear in court at a later date.<sup>142</sup> Considering that failure to obey a police officer was one of the most charged offenses during the George Floyd protests in Los Angeles, a significant number of protesters were wrongfully taken into custody as a result of this LAPD practice.<sup>143</sup> According to plaintiffs in *Black Lives Matter L.A. v. City of Los Angeles*, this was not due to an inadvertent failure by the LAPD to efficiently prepare citation paperwork; instead, officers often completed the citations at the scene, placed the citations in the arrestees’ pockets, and then proceeded to still hold individuals in custody for hours before booking them

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137. LA. STAT. ANN. § 14:62–62.5 (2011).

138. *Id.* § 14:62.5.

139. MISS. CODE ANN. §§ 97-17-6, -33.

140. CAL. PENAL CODE § 463(a) (West 2019) (“Any person convicted under this [looting] subdivision who is eligible for probation and who is granted probation shall, as a condition thereof, be confined in a county jail for at least 180 days, except that the court may, in the case where the interest of justice would best be served, reduce or eliminate that mandatory jail sentence, if the court specifies on the record and enters into the minutes the circumstances indicating that the interest of justice would best be served by that disposition.”); *Id.* § 461(b) (West 2011) (“Burglary in the second degree [is punishable] by imprisonment in the county jail not exceeding one year or imprisonment.”).

141. *See, e.g.*, L.A. Complaint, *supra* note 103, at 4, 11, 15, 31, 33, 36.

142. *See id.* at 4, 11, 15, 31, 33, 36, 39, 49. Failure to obey a police officer is a violation of Los Angeles Municipal Code Section 80.02, which provides that “[n]o person shall willfully fail or refuse to comply with any lawful order, direction or signal of a Police Officer or Traffic Officer. Notwithstanding any other provision of this Code, violation of this Section is an infraction.” L.A. MUN. CODE § 80.02. With very limited exceptions, individuals arrested for infractions are not to be taken into custody. CAL. PENAL CODE § 853.5(a) (West 2021).

143. *See* CHALEFF, *supra* note 57, at 32–33; L.A. Complaint, *supra* note 103, at 1.



at a separate location.<sup>144</sup> In New York City, public defenders brought a lawsuit when arrestee protesters were held in jail for over twenty-four hours without appearing before a judge for arraignment, in blatant contravention of New York constitutional law.<sup>145</sup> A spokesperson for the New York courts disclosed that the delay was due to NYPD officers filing the necessary paperwork for arraignment at a “glacial[ ]” pace.<sup>146</sup>

These arbitrary emergency rules are not unique to the 2020 racial justice protests. During the 2014 Ferguson uprising, police created and applied an *ad hoc* “keep moving” rule to demonstrations, meaning that protesters who stopped moving while on the streets protesting risked being arrested.<sup>147</sup> Of course, standing still was not a crime except when the state of emergency was in effect. However, for five days during the state of emergency in Ferguson, police arrested protesters pursuant to this *ad hoc* rule.<sup>148</sup>

#### B. *Demographics of New York City Arrestees During the 2020 George Floyd Protests*

The number of arrests during the 2020 George Floyd protests was staggering. An investigation by *The Washington Post* disclosed that in the first two weeks of the protests, “17,000 protesters [were] arrested in . . . 50 major cities, [with] an unknown number of demonstrators in smaller cities.”<sup>149</sup> *The Washington Post* also gathered demographic data for about 1,000 arrests and found

144. L.A. Complaint, *supra* note 103, at 11, 17, 28, 31, 33, 34, 36.

145. Madeleine Carlisle, *Hundreds of Protesters Being Detained Illegally in New York City, Lawsuit Against NYPD Alleges*, TIME (June 4, 2020, 9:30 AM), <https://time.com/5847453/protests-illegal-jail-new-york-nypd-george-floyd-coronavirus> [perma.cc/2PBL-NXRS].

146. Rosa Goldensohn, Claudia Irizarry Aponte & Reuven Blau, *Scores Arrested amid Floyd Protests Locked Up for More than 24 Hours in NYC: Lawsuit*, CITY (June 2, 2020, 8:22 PM), <https://www.thecity.nyc/2020/6/2/21278679/george-floyd-death-protesters-locked-up-over-24-hours-in-nyc-lawsuit-says> [perma.cc/EYS4-XAR7]. While not a rule that expanded police officers’ power to arrest, another example of an *ad hoc* rule during a state of emergency was Maryland Governor, Lawrence Hogan’s, executive order suspending Maryland Rule 4-212(f) requiring that arrestees appear before a judge within twenty-four hours of arrest. See Letter from Governor Lawrence J. Hogan to Administrative J. Barbara Baer Waxman, Governor’s Proclamation Suspending Maryland Rule 4-212(f) (Apr. 28, 2015) (on file with the *Michigan Law Review*). As a result of this executive order, approximately 100 people were held in excess of twenty-four hours until public defenders filed *habeas corpus* petitions demanding their release from custody. Oliver Laughland, Paul Lewis, Jon Swaine & Ben Jacobs, *Baltimore: Hail of Habeas Corpus Petitions Leads to Release of Riot Suspects*, GUARDIAN (Apr. 30, 2015, 1:46 AM), <https://www.theguardian.com/us-news/2015/apr/30/baltimore-hail-of-habeas-corpus-petitions-leads-to-release-of-riot-suspects> [perma.cc/L94]-W54]; see also Petition for Writ of Habeas Corpus at 4, 11, Carrie v. Scruggs, No. 24H15000166 (Cir. Ct. Balt. City Apr. 29, 2015).

147. See Loor, *supra* note 113, at Section III.E (discussing Ferguson’s “keep moving” order).

148. *Id.* The “keep moving” strategy was challenged in *Abdullah v. County of St. Louis* and eventually found to violate the Fourth and First Amendment and due process. *Abdullah v. County of Saint Louis*, 52 F. Supp. 3d 936, 946–47 (E.D. Mo. 2014).

149. Kornfield et al., *supra* note 1.

that about half of the arrestees were identified as white and the other half as Black.<sup>150</sup> Black people do not compose even close to half of the U.S. population, so if the protests were as racially diverse as many remarked,<sup>151</sup> protest-related arrests should have been similarly diverse. Yet there were accounts of Black people being arrested at rates higher than their overall representation in the general area population in places as varied as Chicago, Illinois,<sup>152</sup> Portland, Oregon,<sup>153</sup> and Louisville, Kentucky.<sup>154</sup>

Adding to these statistics about the apparently lopsided racial breakdown of arrests are individual anecdotes of the targeting of Black protesters.<sup>155</sup> Louisville activists have pointed to the arrests of two video livestreamers as an example of discriminatory policing.<sup>156</sup> On June 30, 2020, police arrested both Chea Woolfolk, a Black woman, and Jason Downey, a white man, in the Jefferson Square Park area.<sup>157</sup> Both “were standing near each other on the sidewalk when they were taken into custody, [but] each was issued different charges: misdemeanor failure to disperse for Downey and felony rioting for

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150. *Id.*

151. See *Quick Facts: United States*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/US/RHI225219#RHI225219> [perma.cc/63Q3-XWL8] (finding 13.4 percent of reporting United States population identified as Black); Melissa Chan, *These Black Lives Matter Protesters Had No Idea How One Arrest Could Alter Their Lives*, TIME (Aug. 19, 2020, 10:15 AM), <https://time.com/5880229/arrests-black-lives-matter-protests-impact> [perma.cc/XV6S-9E3H].

152. The weekend after George Floyd’s murder, Chicago police arrested 2,172 people during protests. Misra, *supra* note 131. Over 70 percent of those arrested were Black, despite 32 percent of the city’s population being Black. *Id.* The largest racial group in Chicago is white. *Id.* Furthermore, police abuse of activists was widely reported at these protests, with accounts of police escalation, excessive force, and unlawful arrests, resulting in 162 complaints filed regarding police misconduct against protesters. *Id.*

153. In Portland, Oregon, reports suggest that Black people were nearly twice as likely to be arrested as white people at the summer 2020 protests. Karina Brown, *Black People Nearly Twice as Likely as Whites to Be Arrested at Portland Protests*, COURTHOUSE NEWS SERV. (Aug. 21, 2020), <https://www.courthousenews.com/black-people-nearly-twice-as-likely-as-whites-to-be-arrested-at-portland-protests> [perma.cc/UCM6-3SAF].

154. Data for three months following the murder of George Floyd show that Black people were overrepresented in arrests during protests. Bailey Loosemore, *‘It’s by Design’: Black People Most Often Charged with Felonies amid Louisville Protests*, COURIER J. (Jan. 22, 2021, 8:44 PM), <https://www.courier-journal.com/story/news/local/2020/10/29/breonna-taylor-protests-black-people-most-often-charged-with-felonies/6040250002> [perma.cc/9J35-9VZZ]. Black activists accounted for 53 percent of arrests generally and 69 percent of felony arrests, although they account for 23.6 percent of the overall population in Louisville. *Id.*; *QuickFacts: Louisville/Jefferson County Metro Government (Balance), Kentucky*, U.S. CENSUS BUREAU (July 1, 2021), <https://www.census.gov/quickfacts/fact/table/louisvillejeffersoncountymetrogovernmentbalancekentucky/PST045219> [perma.cc/99GP-R627].

155. Due to the increase in the availability of video recordings, these anecdotes are increasingly conspicuous. See Harmon, *supra* note 36, at 364 (highlighting that “through videos, the risks of violent confrontations during arrests are more visible than ever” and that “now is the moment to reconsider arrests rather than continue to take this widespread form of state coercion for granted.”).

156. *Id.*

157. See Loosemore, *supra* note 154.

Woolfolk.”<sup>158</sup> On May 30, 2020, in Jacksonville, Florida, police pushed past her white companion to arrest Black protester and Marine veteran, Coricia Campbell, who was sitting on the sidewalk wearing a pink T-shirt that said, “I CAN’T BREATHE JUSTICE 4 GEORGE.”<sup>159</sup> Ms. Campbell was the only person arrested and brought to the precinct among the people protesting with her. She shared a jail cell with eight other protesters—only one was white.<sup>160</sup> This information, along with what we know about law enforcement officers’ disparate treatment of Black people during traditional policing, poses the question of whether this pattern of disparate traditional policing is replicated during protest policing. To wade through this question, I briefly review current information about the disparate policing of Black people and then query how information about the demographics of arrests in New York City during the first few days of the George Floyd protests might provide insight into this matter.

It is well-known that Black people are treated differently during routine policing. This conclusion endures whether the police-civilian encounter occurs while walking down the street or driving a vehicle. In terms of traffic stops, in a recent study, researchers examined 95 million traffic stops across state and local jurisdictions from 2011 through 2018 and found that Black motorists were less likely to be stopped after dusk when police officers were unable to identify their race, thus suggesting racial bias in the initial decision to effectuate a stop.<sup>161</sup> The same study found that once stopped, the vehicles of Black and Latine drivers were twice as likely to be searched by police officers.<sup>162</sup> Both of these racial minority groups “were searched on the basis of less evidence than white drivers.”<sup>163</sup> In the context of street encounters, Professor Jeffrey Fagan examined data of police stops from 2004 through 2009 by the NYPD under the department’s infamous “stop and frisk” practice.<sup>164</sup> The research was compiled in the “Fagan Report,” which the Center for Constitutional Rights (CCR) successfully used to invalidate the NYPD stop-and-frisk practice as racially discriminatory and unconstitutional in *Floyd v. City of New*

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158. *Id.*

159. Chan, *supra* note 151.

160. *Id.*

161. Emma Pierson et al., *A Large-Scale Analysis of Racial Disparities in Police Stops Across the United States*, 4 NATURE HUM. BEHAV. 736 (2020). Researchers did not evaluate how this protective “veil-of-darkness” affected the stops of Latine motorists “because the ethnicity of Hispanic drivers is not always apparent, even during daylight hours.” *Id.* at 737.

162. *Id.* at 739. See *supra* note 5 for an explanation of why I use the term “Latine” instead of “Latinx,” “Latino,” or “Latina.”

163. *Id.* at 736.

164. Report of Jeffrey Fagan, Ph.D. at 6, *Floyd v. City of New York*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013) (No. 08 Civ. 01034) [hereinafter Fagan Report].

York.<sup>165</sup> The Fagan Report found that Black and Latine individuals were significantly more likely to be stopped than white individuals.<sup>166</sup> NYPD officers were also more likely to use force when engaging with Black and Latine suspects.<sup>167</sup> Once a police officer decided that the stopped individual had engaged in criminal conduct, regardless of the nature of the crime, Black and Latine individuals were more likely to be arrested.<sup>168</sup> Another study examined the “race effect” on the decision to arrest and concluded, after conducting a meta-analysis of quantitative research on police practices and arrest decisions in the United States from 1966 through 2004, that a minority suspect is 30 percent more likely to be arrested than a white suspect, even when controlling for multiple other variables that might otherwise influence the likelihood of arrest.<sup>169</sup> By age twenty-three, 49 percent of Black men have been arrested compared to 38 percent of white men.<sup>170</sup>

A recent study comparing youth surveys conducted in 1979 to those conducted in 1997 found alarming results suggesting that arrests may increasingly be “decoupled” from criminal activity.<sup>171</sup> This “decoupling” is significantly

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165. 959 F. Supp. 2d 540 (S.D.N.Y. 2013); *Floyd, et al. v. City of New York, et al.*, CTR. FOR CONST. RTS., <https://ccrjustice.org/home/what-we-do/our-cases/floyd-et-al-v-city-new-york-et-al> [perma.cc/J599-ZJP2].

166. Fagan Report, *supra* note 164, at 4. The statistics were particularly stark for the last full year of the study—2009—showing that 87 percent of people stopped were Black and Latine. CTR. FOR CONST. RTS., STOP-AND-FRISK: FAGAN REPORT SUMMARY 2 (2010), <https://ccrjustice.org/sites/default/files/assets/Fagan%20Report%20Summary%20Final.pdf> [perma.cc/X753-2X4S].

167. Fagan Report, *supra* note 164, at 4. Another study examining data from approximately 44 million surveys of civilian contact with police nationwide in 2002, 2005, 2008 and 2011 found that even though white people were more likely to have contact with police officers, Black people were more than twice as likely to experience police force than white people. SHELLEY HYLAND, LYNN LANGTON & ELIZABETH DAVIS, U.S. DEP'T OF JUST., BUREAU OF JUST. STATS., POLICE USE OF NONFATAL FORCE, 2002–11 (2015), <https://bjs.ojp.gov/content/pub/pdf/punf0211.pdf> [perma.cc/U8QY-FCRA]. See generally Lynn Peeples, *What the Data Say About Police Brutality and Racial Bias—and Which Reforms Might Work*, NATURE (May 26, 2021), [https://www.nature.com/articles/d41586-020-01846-z?utm\\_source=Nature+Briefing&utm\\_campaign=761bed091d-briefing-dy-20200622&utm\\_medium=email&utm\\_term=0\\_c9dfd39373-761bed091d-44992633](https://www.nature.com/articles/d41586-020-01846-z?utm_source=Nature+Briefing&utm_campaign=761bed091d-briefing-dy-20200622&utm_medium=email&utm_term=0_c9dfd39373-761bed091d-44992633) [perma.cc/5GF5-KB2H] (discussing fatal police force and police brutality more generally). The difference between the incidence of police force between Latine and white people was more subtle. HYLAND ET AL., *supra*.

168. Fagan Report, *supra* note 164, at 4.

169. Tammy Rinehart Kochel, David B. Wilson & Stephen D. Mastrofski, *Effect of Suspect Race on Officers' Arrest Decisions*, 49 CRIMINOLOGY 473, 479–81, 498 (2011). The other variables the studies controlled for included suspect's “demeanor, offense severity, presence of witnesses, quantity of evidence at the scene, the occurrence or discovery of a new criminal offense during the encounter, the suspect being under the influence of drugs or alcohol, prior record of the suspect, or requests to arrest by victims.” *Id.* at 498.

170. Naomi F. Sugie & Kristin Turney, *Beyond Incarceration: Criminal Justice Contact and Mental Health*, 82 AM. SOCIO. REV. 719, 721 (2017).

171. Vesla M. Weaver, Andrew Papachristos & Michael Zanger-Tishler, *The Great Decoupling: The Disconnection Between Criminal Offending and Experience of Arrest Across Two Cohorts*, 5 RUSSELL SAGE FOUND. J. SOC. SCIS., Feb. 2019, at 89, 91.

more pronounced for Black men.<sup>172</sup> In the surveys, men were asked to report whether they had been involved in criminal activity and whether they had been arrested.<sup>173</sup> In the 1979 surveys, men who did not report engaging in criminal activity also did not generally report being arrested.<sup>174</sup> The result was the same whether the person was Black or white, with a slightly more likelihood of Latine men being arrested without having reported engaging in criminal conduct that year.<sup>175</sup> The situation worsened in 1997 for all men—regardless of race, all reported arrests with greater frequency without reporting any criminal conduct.<sup>176</sup> Yet this alarming “increase [was] much more pronounced among [B]lack[ ]” men than white, and, to a lesser degree, Latine men.<sup>177</sup>

While these findings are disconcerting overall, they also reveal that the irrationality of the criminal system of policing and arrest exerts the heaviest tax on Black individuals. Even arrests without convictions inflict serious harm on individuals. Pertinent to this Article, an arrest effectively terminates an individual’s protest activity, thereby curtailing their freedom of expression.<sup>178</sup> Aware that arrests are an effective strategy to halt protests, police officers may employ arrests, not to stop criminal activity, but to control protesters, and some (including this author) suggest “squelch dissent.”<sup>179</sup> Police may employ this strategy disproportionately on Black, Brown, and Latine activists, stripping them even further than their white counterparts of the right to express dissent. More generally, an arrest initiates a series of personal intrusions: arrestees are subject to searches of themselves and their belongings; their property is taken away during detention; they can be held in custody up to forty-eight hours before a judicial officer will be required to determine whether they will be released; they are held in cramped conditions along with others (which is particularly dangerous during the COVID-19 pandemic); and they are left with an arrest record.<sup>180</sup> For many individuals arrested in the New York City protests, these intrusions were further aggravated by arrest conditions and

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172. *Id.* at 89.

173. *See id.* at 95.

174. *Id.* at 91.

175. *Id.* at 90–91, 105 fig.4.

176. *Id.* at 91, 104.

177. *Id.* at 105 fig.4, 109.

178. *See* discussion *infra* Section III.

179. *E.g.*, Neil MacFarquhar, *Why Charges Against Protesters Are Being Dismissed by the Thousands*, N.Y. TIMES (Feb. 11, 2021), <https://www.nytimes.com/2020/11/19/us/protests-law-suits-arrests.html> [perma.cc/5QPU-55F6]; Tom Perkins, *Most Charges Against George Floyd Protesters Dropped, Analysis Shows*, GUARDIAN (Apr. 17, 2021, 8:00 AM), <https://www.theguardian.com/us-news/2021/apr/17/george-floyd-protesters-charges-citations-analysis> [perma.cc/LG5Z-GWLJ]; *see also* Loor, *supra* note 113, at 25–26 (discussing catch-and-release tactics during Ferguson protests).

180. *See* *Atwater v. City of Lago Vista*, 532 U.S. 318, 364–65 (2001) (O’Connor, J., dissenting).

prolonged detention.<sup>181</sup> In addition to these immediate consequences, arrests exact collateral harm. An arrest record acts as a barrier to securing employment, public housing and sometimes private tenancy, public benefits, educational access, and various professional licenses.<sup>182</sup> Studies have also shown that arrests are associated with poor mental and physical health.<sup>183</sup> Furthermore, these collateral consequences disparately affect Black populations.<sup>184</sup>

Considering what we already know about disparate policing and specifically arrests of Black individuals, it is not only logical but critical to consider whether this pattern is reproduced in protest policing and protest-related arrests. Here, I focus on available information about NYPD arrests in the first

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181. In New York City, more than 100 arrestees were held without arraignment for over twenty-four hours in violation of New York law. See Press Release, Legal Aid Soc’y, Legal Aid Files Emergency Lawsuit to Free 108 New Yorkers Illegally Detained Pre-Arraignment by NYPD (June 2, 2020), <https://legalaidnyc.org/wp-content/uploads/2020/06/06-02-20-LAS-Files-Emergency-Lawsuit-To-Free-108-New-Yorkers-Illegally-Detained-Pre-Arraignment-By-NYPD-.pdf> [perma.cc/LG6N-54LE]. A journalist reported being held for two days after a disorderly conduct arrest. She described the deplorable conditions of her holding cells, including vomit and cockroaches everywhere. Pereira & Hogan, *infra* note 224; see also Complaint at 4, *Sow v. City of New York*, No. 21-cv-00533 (S.D.N.Y. Mar. 6, 2021) (“Protesters were physically restrained with flex-cuffs in such a manner that caused them unnecessary pain and suffering and, in some cases, possible serious and long-term nerve damage. They were also subjected to lengthy and unnecessary arrest processing that put them in dangerously close quarters, all at the height of the global COVID-19 pandemic.”).

182. Benjamin D. Geffen, *The Collateral Consequences of Acquittal: Employment Discrimination on the Basis of Arrests Without Convictions*, 20 U. PA. J.L. & SOC. CHANGE 81, 81, 85–88 (2017) (analyzing case studies to find “employers’ widespread use of non-convictions . . . to reject job applicants or fire employees”); U.S. COMM’N ON CIVIL RIGHTS, COLLATERAL CONSEQUENCES: THE CROSSROADS OF PUNISHMENT, REDEMPTION, AND THE EFFECTS ON COMMUNITIES 9 (2019) (hereinafter CIVIL RIGHTS COMM’N REPORT) (finding barriers to “education, employment, professional licensing, housing, and receipt of public benefits” when having a non-conviction criminal record); see also Tracy WP Sohoni, *The Effect of Collateral Consequence Laws on State Rates of Returns to Prisons* 6 (2013) (Ph.D. dissertation, University of Maryland) (on file with the *Michigan Law Review*) (“Many collateral consequences do not require that a person serve time in prison or jail, but can be activated for an arrest (such as restrictions on public housing)”).

183. See Sugie & Turney, *supra* note 170, at 719 (finding that “arrest is deleteriously associated with mental health, and arrest accounts for nearly half of the association between incarceration and poor mental health.”); see also April D. Fernandes, *How Far Up the River? Criminal Justice Contact and Health Outcomes*, 7 SOC. CURRENTS 29, 40 (2020) (“[A]ny level of exposure to the criminal justice system that can either create stress-related illnesses or exacerbate existing physical and mental health conditions.”).

184. See Sugie & Turney, *supra* note 170, at 723 (“Arrest, conviction, and incarceration are concentrated among lower-status groups such as racial/ethnic minorities. Racial/ethnic minorities experience more social and economic disadvantages than do their counterparts, and this accumulation of disadvantages, in combination with the primary stressors of criminal justice contact, may be especially consequential for mental health.”); CIVIL RIGHTS COMM’N REPORT, *supra* note 182, at 3, 42, 67 (considering the disparate impact of collateral consequences on access to employment, housing, education, and public benefits for Black and Latine men who are more likely to have criminal records than their white and Asian counterparts); Geffen, *supra* note 182, at 102 (“These phenomena combine to make a minor brush with the law a lasting impediment to economic self-sufficiency, most strikingly for African Americans and low-income people.”).

week of the George Floyd protests. While I do not have sufficient information or the tools to conclude that the NYPD disproportionately arrested Black activists, the arrest numbers at least suggest that this is a viable hypothesis. Although the actual racial breakdown of protesters during the first week of the New York City demonstrations is unknown, the demographic breakdown of the city can serve as a useful marker to consider the racial breakdown of protest-related arrests. The three largest racial and ethnic groups in New York City are as follows: white at 41.3 percent, Latine at 28.9 percent, and Black at 23.8 percent.<sup>185</sup> In comparison to this marker, the arrest numbers in New York City during the first six days of the protests—May 28 through June 4—show Black people potentially being overrepresented in arrests to varying degrees, with the starkest overrepresentation in the two days when the largest volume of arrests is reported.<sup>186</sup> After those two days, the racial breakdown of arrests shifts, and Black people appear as potentially underrepresented in arrests.<sup>187</sup> Table 1 below demonstrates the percentage and number of protest-related arrests for these three racial groups:

TABLE 1: PERCENTAGE OF PROTEST-RELATED ARRESTS IN NEW YORK CITY  
ACROSS RACIAL GROUPS

Date <sup>188</sup>	Arrests	Black	white	Latine
May 28	75	27% or 20	47% or 35	17% or 13
May 29	218	30% or 66	56% or 121	12% or 26
May 30	321	34% or 110	53% or 169	10% or 32
May 31	325	65% or 212	18% or 60	13% or 42
June 1	643	62% or 190	19% or 57	17% or 52
June 2	290	32% or 94	51% or 149	12% or 34
June 3	244	19% or 37	64% or 123	11% or 21
June 4	278	18% or 49	66% or 185	14% or 38
Total arrests	2,394	32% or 778	38% or 899	11% or 258

185. *QuickFacts: New York City, New York*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/newyorkcitynewyork> [perma.cc/U44C-FS85].

186. N.Y.C. DEP'T INVESTIGATION, INVESTIGATION INTO NYPD RESPONSE TO THE GEORGE FLOYD PROTESTS 9 (2020) [hereinafter NYC DOI REPORT].

187. *Id.* at 16–22.

188. *Id.* at 8–22.

Notably, compared to the documented percentage of Latine people in New York City, Latine individuals appear underrepresented in arrests. While it is possible that Latine people did not attend the protests or attended but were not arrested, these arrest rates for Latine individuals might be based on confusion related to how police officers reported an arrestee's race. Police officers chose between "white Hispanic" or "white," among other race classifications, when filling out the arrest paperwork.<sup>189</sup> Where a police officer listed the race as "WH," it is unclear whether their intent was to categorize the arrestee as white or white Hispanic.<sup>190</sup> Therefore, some arrestees categorized as white may be Latine individuals classified as "WH."<sup>191</sup> Thus, it is difficult to read much from the low reported numbers of Latine arrests. It also sheds doubt on the accuracy of the number of arrests of white people because it may be overinclusive of white Hispanics.

Focusing on reported Black arrests, on the initial date of protest when police made few protest-related arrests, the percentage of Black arrestees is fairly consistent with the relevant marker—the percentage of Black individuals in the New York City population. Twenty-seven percent of arrestees are Black, and approximately 24 percent of documented New York City residents are Black.<sup>192</sup> In the days following, arrests of Black people comprise larger percentages of total protest-related arrests in New York City, with a sharp increase on the two days with the greatest number of arrests.<sup>193</sup> On those two dates, Black people account for 65 percent and 62 percent of total protest-related arrests.<sup>194</sup> By contrast, on those same dates, white people account for a relatively small percentage of arrests at 18 percent and 19 percent (that percentage is even lower if those arrests include Latine people categorized as "WH").<sup>195</sup>

While the volume of arrests is important, so are the crimes for which individuals were arrested and were ultimately arraigned. From May 28 through May 30, individuals were mostly arrested for the violation of disorderly conduct, misdemeanor unlawful assembly, or misdemeanor obstructing governmental administration.<sup>196</sup> On May 31 and June 1—the dates on which the arrests of Black people constituted their largest percentage of total arrests—protesters were arrested and ultimately arraigned for more serious property offenses like felony burglary.<sup>197</sup> However, from June 2 through June 4, people were mostly arrested for misdemeanor curfew violations.<sup>198</sup> In other words,

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189. *See id.* at 9 n.7.

190. *Id.* at 9 n.7.

191. *Id.*

192. *Id.* at 9; *QuickFacts: New York City, New York*, *supra* note 185.

193. NYC DOI REPORT, *supra* note 186, at 9–18

194. *Id.* at 14, 16.

195. *Id.*

196. *Id.* at 9.

197. *See id.* at 9–22.

198. *Id.* at 16–21.



the NYPD made more serious protest-related arrests on the two dates when Black people comprised the largest percentage of total arrests.

The next question is what happened to those arrested. Many of the arrests occurred in Manhattan.<sup>199</sup> The Manhattan District Attorney's Office arraigned 484 people between May 28 and June 4 for protest-related cases.<sup>200</sup> No one was arraigned for violating curfew, the crime for which most protesters were arrested from June 2 through June 4. Only ten people were arraigned in total for disorderly conduct, unlawful assembly, and obstructing governmental administration, the offenses that account for almost all arrests between May 28 and May 30 and about half the arrests on June 1. Four hundred and thirty-one of the total arraignments in Manhattan were for felonies. Of those 431 felonies, 372 were for burglary, with the most frequent category—accounting for 356 arraignments—being burglary in the third degree.<sup>201</sup> As a reminder, police officers arrested people in large numbers for property offenses like burglary on May 31 and June 1, the two days when Black people accounted for over 60 percent of arrests.<sup>202</sup> At the end of those six days, 71 percent of the people arraigned for protest-related cases in Manhattan were Black, and 6 percent were white.<sup>203</sup>

All this being said, studies finding that police are more likely to stop, arrest, and use force against Black (and Brown) individuals during routine policing and the, albeit limited, information about protest-related arrests of Black people in New York City hint that protest policing—like traditional policing—disparately harms Black people and that such harms result in Black individuals enjoying an unequal (in)ability to express and practice dissent.

### III. APPLYING THE EXPRESSIVE FOURTH AMENDMENT TO PROTEST-RELATED ARRESTS

Pursuant to the Expressive Fourth Amendment, courts should not treat expressive protest conduct like nonexpressive conduct, including in the context of arrests. Evaluating police officers' conduct against protesters through

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199. N.Y. STATE OFF. OF THE ATT'Y GEN., PRELIMINARY REPORT ON THE NEW YORK CITY POLICE DEPARTMENT'S RESPONSE TO DEMONSTRATIONS FOLLOWING THE DEATH OF GEORGE FLOYD 14, 16 (2020).

200. Manhattan District Attorney, Summary Stats—Arrested Protest and “Looting” Related Cases (June 2020) [hereinafter Summary Stats] (unpublished data set) (on file with the *Michigan Law Review*) (compiling Manhattan District Attorney data on the number of reported arrests in its jurisdiction from May 28, 2020 through June 4, 2020). I was provided this data by Vice reporter, Carter Sherman, whose article, *Black and Brown Protesters in New York Were Jailed Longer and Punished More Harshly than White, Data Indicates*, was very helpful to this work. Carter Sherman, Neda Toloui-Semnani & Joe Hill, *Black and Brown Protesters in New York Were Jailed Longer and Punished More Harshly than White, Data Indicates*, VICE (June 17, 2020, 4:05 PM), <https://www.vice.com/en/article/akz3z4/black-and-brown-protesters-in-new-york-were-jailed-longer-and-punished-more-harshly-than-white> [perma.cc/T4GG-JKRT].

201. Summary Stats, *supra* note 200.

202. NYC DOI REPORT, *supra* note 186, at 13–16.

203. Summary Stats, *supra* note 200.

the framework of the Expressive Fourth Amendment better guards activists' rights to express dissent and may particularly protect Black activists. In this Article, I focus on the manner that courts should constrain police officers' arrest power by limiting the crimes for which they can make a warrantless arrest.<sup>204</sup> Providing police officers with an unbounded power to execute warrantless arrests when an individual is primarily engaged in expressive activity—such as protest—is unreasonable in light of freedom of expression. Here, I review the limitations of current Fourth Amendment challenges to all arrests and then discuss how courts should evaluate a warrantless arrest when an arrestee is engaged in expressive protest activity.

A. *Limits of Current Fourth Amendment Challenges to Protest-Related Arrests*

The presiding understanding of the Fourth Amendment, which in the context of arrests professes to guard bodily integrity—not freedom of expression—leaves protesters on the streets, and potentially disproportionately Black protesters, largely unprotected against police officers' expansive arrest power. The Fourth Amendment is intended to protect individuals from “unreasonable [governmental] searches and seizures.”<sup>205</sup> However, scholars have rightfully recognized that courts have rendered the prohibition on unreasonable police action toothless and instead have consistently characterized clearly unfair, unacceptable, and even pretextual arrests as reasonable.<sup>206</sup> Furthermore, despite the Fourth Amendment's textual assertion that “no Warrants shall issue, but upon probable cause, supported by Oath or affirmation,”<sup>207</sup> courts' loose reading of this warrant language in the context of seizures of criminal suspects has resulted in widespread warrantless arrests—whether for felonies or misdemeanors.<sup>208</sup>

Without a warrant requirement for arrests or any limitation based on the seriousness or dangerousness of the crime, all an officer needs to arrest a criminal suspect is probable cause. This is already problematic in the non-protest

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204. The Expressive Fourth Amendment may have further implications on law enforcement's arrest power, including curtailing officers' ability to make pretextual arrests. However, this argument is beyond the scope of this Article, and I will develop it in future work.

205. U.S. CONST. amend. IV.

206. See, e.g., Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 591 (1999) (critiquing the amount of discretion afforded to officers under the courts' broad interpretations of the Fourth Amendment's reasonableness clause); David O. Markus, *Whren v. United States: A Pretext to Subvert the Fourth Amendment*, 14 HARV. BLACKLETTER L.J. 91, 91–92 (1998) (analyzing “why the Court has undermined the Fourth Amendment” in *Whren v. United States*'s allowance for pretextual stops where objective probable cause could be found).

207. U.S. CONST. amend. IV.

208. See *United States v. Watson*, 423 U.S. 411, 419 (1976); see also *Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001). This power arguably extends to infractions and violations as well. See *id.* at 372 (O'Connor, J., dissenting).

context because it insufficiently protects bodily integrity,<sup>209</sup> but the issue becomes even worse in the context of protesters because it also fails to protect freedom of expression. Arrests take a particularly high toll on activists because they not only impact their bodily integrity but also foreclose their expressive rights by immediately thwarting their protest activity when police sweep them up. Since protesters are treated no differently than non-protesters in terms of warrantless arrests, a police officer only needs to allege probable cause for one of an expansive, but nonexhaustive, list of crimes (like those discussed Part II.A) to detain and arrest an activist on the streets and thus immediately curtail their protest activity.<sup>210</sup> Even if there is no probable cause for the offense for which a protester was actually arrested, as long as there is probable cause as to any offense, their arrest does not violate the Fourth Amendment.<sup>211</sup>

Probable cause is a low bar and does little to curb police officer conduct. The Court has established probable cause as “a fluid concept—turning on the assessment of probabilities in particular factual contexts.”<sup>212</sup> Generally, there is probable cause when a court finds that a reasonable person would believe that any crime had been committed or was being committed.<sup>213</sup> *Any crime* will suffice since it need not ultimately be the crime for which the individual was arrested. Even if the arrestee did not actually commit the crime, it does not mean the arrest was without probable cause or unlawful. Indeed, “[t]he validity of the arrest does not depend on whether the suspect actually committed a

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209. See Paul Ohm, *Probably Probable Cause: The Diminishing Importance of Justification Standards*, 94 MINN. L. REV. 1514, 1515 (2010) (“In increasingly common situations, whenever the police have any suspicion at all about a piece of evidence, they almost always have probable cause and can meet the highest level of justification.”); see also Cynthia Lee, *Probable Cause with Teeth*, 88 GEO. WASH. L. REV. 269 (2020); Harmon, *supra* note 36; Erica Goldberg, *Getting Beyond Intuition in the Probable Cause Inquiry*, 17 LEWIS & CLARK L. REV. 789 (2013).

210. See *Atwater*, 532 U.S. at 354 (“If an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender.”).

211. See *Devenpeck v. Alford*, 543 U.S. 146, 153 (2004); see also *Brown v. City of New York*, 798 F.3d 94, 99 (2d Cir. 2015) (“[T]he probable cause inquiry is not necessarily based upon the offense actually invoked by the arresting officer but upon whether the facts known at the time of the arrest objectively provided probable cause to arrest.” (quoting *Jaegly v. Couch*, 439 F.3d 149, 153 (2d Cir. 2006))); *Mauler v. Arlotto*, 777 F. App’x 59, 61 (4th Cir. 2019) (“The Supreme Court has rejected any requirement that the offense for which the officer had probable cause be the same as or closely related to the offense identified by the officer at the time of arrest.”).

212. *Illinois v. Gates*, 462 U.S. 213, 232 (1983).

213. See *Wong Sun v. United States*, 371 U.S. 471, 479 (1963) (“The quantum of information which constitutes probable cause [is] evidence which would ‘warrant a man of reasonable caution in the belief that a felony has been committed . . . .’” (quoting *Carroll v. United States*, 267 U.S. 132, 162 (1925))); *Brinegar v. United States*, 338 U.S. 160, 175 (1949) (“In dealing with probable cause, however, as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.”).

crime”<sup>214</sup> since probable cause is “more than bare suspicion” but “less than evidence which would justify condemnation.”<sup>215</sup> Thus, police officers can engage in mass arrests during protests or even prosecutions that ultimately do not result in convictions, and their arrests are not considered unconstitutional as long as there is probable cause. Moreover, as will be shortly discussed, frequently, there is no judicial determination of probable cause for arrests since most of these protest-related arrests are never arraigned, or cases are dismissed before such a determination is required.

Still, when assessing the existence of probable cause, courts will afford significant deference to the judgments of police officers on the scene. Courts are cautioned against engaging in 20/20 hindsight when evaluating a police officer’s decision to arrest (and to use force) because judges perceive the circumstances surrounding police work as “tense, uncertain, and rapidly evolving.”<sup>216</sup> This credo provides police with wide latitude in judging whether the totality of the circumstances<sup>217</sup> justifies an arrest. Furthermore, courts consider the reasonableness calculus an objective one that focuses on what a so-called reasonable police officer would have done.<sup>218</sup> Courts do not consider the actual intent of the police officer as relevant to the constitutionality of their conduct.<sup>219</sup> Judges will disregard claims that a specific police officer is using arrest

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214. *Michigan v. DeFillippo*, 443 U.S. 31, 36 (1979); *see also* *Wilson v. Jean*, 661 F. App’x 234, 235 (3d Cir. 2016) (where individual was only briefly detained and then released for disorderly conduct but never charged); *Egolf v. Witmer*, 526 F.3d 104, 108 (3d Cir. 2008) (where the individuals were held for two hours after arrest before being released, and “[t]hree months later, the . . . District Attorney announced that he had withdrawn the disorderly conduct charges because he doubted that the Commonwealth could successfully prosecute the matter.”).

215. *See Brinegar*, 338 U.S. at 175 (quoting *Locke v. United States*, 11 U.S. (7 Cranch) 339, 348 (1813)).

216. *Graham v. Connor*, 490 U.S. 386, 397 (1989); *see also* *Nieves v. Bartlett*, 139 S. Ct. 1715, 1725 (2019) (“Police officers conduct approximately 29,000 arrests every day—a dangerous task that requires making quick decisions in ‘circumstances that are tense, uncertain, and rapidly evolving.’” (quoting *Graham*, 490 U.S. at 397)); *Paff v. Kaltenbach*, 204 F.3d 425, 436 (3d Cir. 2000) (“While probable cause to arrest requires more than mere suspicion, the law recognizes that probable cause determinations have to be made ‘on the spot’ under pressure and do ‘not require the fine resolution of conflicting evidence that a reasonable doubt or even a preponderance standard demands.’” (quoting *Gerstein v. Pugh*, 420 U.S. 103, 121 (1975))).

217. *See Zalaski v. City of Hartford*, 723 F.3d 382, 393 (2d Cir. 2013) (“[W]e consider the totality of the circumstances at the time of the challenged arrests.”); *Lorenzo v. City of Tampa*, 259 F. App’x 239, 242 (11th Cir. 2007) (“In order for probable cause to exist, ‘an arrest [must] be objectively reasonable under the totality of the circumstances.’” (citing *Rankin v. Evans*, 133 F.3d 1425, 1435 (11th Cir. 1998)); *Dubner v. City and County of San Francisco*, 266 F.3d 959, 966 (9th Cir. 2001) (“Probable cause exists when, under the totality of the circumstances known to the arresting officers (or within the knowledge of the other officers at the scene), a prudent person would believe the suspect had committed a crime.”).

218. *See Maryland v. Macon*, 472 U.S. 463, 470–71 (1985).

219. *See Whren v. United States*, 517 U.S. 806, 813 (1996) (“[T]hese cases foreclose any argument that the constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers involved.”).

authority pretextually and with malicious intent—such as to suppress expression—if any reasonable police officer at the scene would have probable cause for an arrest.<sup>220</sup> Thus, a court will not inquire into a police officer’s intent for making an arrest when evaluating probable cause.<sup>221</sup> I will leave for another day the question of how the Expressive Fourth Amendment should impact a police officer’s ability to make a pretextual arrest. Here, I concentrate on how it should constrain warrantless arrests for misdemeanors.

With an understanding of the few limitations that the presiding probable cause doctrine places on a police officer’s arrest power, the next question is how the doctrine operates in practice in protest-related arrests. Counterintuitively, criminal cases are not good vehicles to evaluate this question. A judicial officer will make a probable cause determination in a nominal number of protest-related arrests. In misdemeanor cases, a court generally does not make a probable cause determination until late in the pretrial stage.<sup>222</sup> Before a felony case proceeds to trial, either a grand jury or a court will determine whether there is probable cause to support a felony indictment; however, this probable cause determination does not usually occur at the initial court appearance but rather later in the life of the case.<sup>223</sup> Most protest-related arrests do not reach the pretrial, trial, or much less the appellate stage. This is the trend generally with protest-related arrests.<sup>224</sup> One year after George Floyd’s murder, about

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220. See *id.* at 809, 819 (“[T]he District Court found that the officers had probable cause to believe that petitioners had violated the traffic code. That rendered the stop reasonable under the Fourth Amendment.”); see also *Nieves*, 139 S. Ct. at 1725 (“To ensure that officers may go about their work without undue apprehension of being sued, we generally review their conduct under objective standards of reasonableness.”).

221. See, e.g., *Oberwetter v. Hilliard*, 639 F.3d 545, 554 (D.C. Cir. 2011) (finding that since “[the officer’s] motive would not affect the existence of probable cause,” there was no need to analyze whether officer acted out of “malice”); *Martin v. Gentile*, 849 F.2d 863, 869 (4th Cir. 1988) (“Subjectively bad intentions on the part of the individual officer will not make a constitutional violation out of an otherwise reasonable seizure.”).

222. For instance, in New York, probable cause to justify a warrantless arrest is not determined until the pre-trial “*Dunaway* Hearing,” which only occurs after the proper motions and memoranda of law have been filed pursuant to CPL § 710.60. See *Dunaway v. New York*, 442 U.S. 200 (1979); see also N.Y. CRIM. PROC. LAW § 710.60 (McKinney 2019). Of course, speedier determinations of probable cause are mandated where the government seeks pre-trial detention. See *Gerstein v. Pugh*, 420 U.S. 103, 124–26 (1975) (holding a “prompt” probable cause hearing was required to continue detainment following a warrantless arrest); see also *County of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991) (establishing forty-eight hours as the outer boundary of the *Gerstein* promptness requirement).

223. See, e.g., N.Y. CRIM. PROC. LAW § 200.10 (McKinney 2019) (outlining New York’s indictment process, which requires grand jury proceedings, unless waived, followed by a second arraignment).

224. Abu El-Haj, *supra* note 41, at 215; see also MacFarquhar, *supra* note 179 (stating that “judges would toss out most cases [against Occupy Wallstreet protesters] or impose small sentences.”); Sydney Pereira & Gwynne Hogan, *NYPD’s Historic Mass Arrest Campaign During George Floyd Protests Was Mostly for Low-Level Offenses*, GOTHAMIST (June 10, 2020, 8:05 PM) <https://gothamist.com/news/nypds-historic-mass-arrest-campaign-during-george-floyd-protests-was-mostly-low-level-offenses> [perma.cc/274X-WFGG] (93 percent of arrests related to Occupy Wall Street protests were dismissed).

90 percent of protest-related arrests had yet to be arraigned or were dismissed prior to trial.<sup>225</sup>

Consequently, federal civil rights actions are a better vehicle to evaluate how the presiding Fourth Amendment understanding operates for protest-related arrests. The federal Civil Rights Act, 42 U.S.C. § 1983 (Section 1983), provides individuals a private right to sue government actors who violate their constitutional rights.<sup>226</sup> In a § 1983 lawsuit, plaintiffs can recover damages and obtain injunctive relief against future unconstitutional conduct.<sup>227</sup> Thus, § 1983 should act as a mechanism to ensure that government actors, including police, do not overreach by trampling on individuals' constitutional rights. Pursuant to § 1983, individuals can bring claims that police violated their Fourth Amendment rights to be free from unreasonable search and seizure because of an unlawful detention or arrest.<sup>228</sup> This route is available whenever an individual is arrested, whether in the context of a criminal investigation or in the context of protests.

Yet, currently, § 1983 lawsuits have their own limitations. A plaintiff in a § 1983 lawsuit against a police officer cannot challenge the constitutionality of a statute or rule via the Fourth Amendment. The unlawfulness of a rule may be a defense in a criminal case, but in a § 1983 lawsuit, that rule can be challenged via the First Amendment, and, even when it violates the First Amendment, it does not establish a Fourth Amendment claim unless the defendant officer should have known the rule was invalid.<sup>229</sup> Again, a showing of probable cause as to any crime—not necessarily the one for which a protester is arrested—is a complete defense to a § 1983 unlawful arrest claim.<sup>230</sup>

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225. Perkins, *supra* note 179.

226. 42 U.S.C. § 1983.

227. See *Ex parte* Young, 209 U.S. 123 (1908) (authorizing injunctive suits); Carey v. Piphus, 435 U.S. 247 (1978) (recognizing damages).

228. Albright v. Oliver, 510 U.S. 266, 275 (1994) (affirming the dismissal of an unlawful arrest challenge brought under § 1983 that should have been brought under the Fourth Amendment rather than Fifth Amendment); accord Manuel v. City of Joliet, 137 S. Ct. 911 (2017); see also Dubner v. City and County of San Francisco, 266 F.3d 959, 964 (9th Cir. 2001) (“A claim for unlawful arrest is cognizable under § 1983 as a violation of the Fourth Amendment, provided the arrest was without probable cause or other justification.”); Joseph v. Rowlen, 402 F.2d 367, 370 (7th Cir. 1968). Protesters can also bring Fourth Amendment claims for other reasons, including claims of excessive force. See Loor, *Expressive Fourth*, *supra* note 11; Loor, *supra* note 85, at 283.

229. Ryan v. County of DuPage, 45 F.3d 1090, 1094–95 (7th Cir. 1995); see also Reza v. Pearce, 806 F.3d 497, 508 (9th Cir. 2015) (“[T]he existence of a statute or ordinance authorizing a particular conduct is a factor which militates in favor of the conclusion that a reasonable official would find the conduct constitutional.” (quoting Grossman v. City of Portland, 33 F.3d 1200, 1209 (9th Cir. 1994))).

230. See Lorenzo v. City of Tampa, 259 F. App'x 239, 241 (11th Cir. 2007) (“[P]robable cause constitutes an absolute bar to . . . § 1983 claims alleging false arrest.” (quoting Rankin v. Evans, 133 F.3d 1425, 1435 (11th Cir. 1998))); see also Meyers v. City of New York, 812 F. App'x 11, 14 (2d Cir. 2020) (“Probable cause is a complete defense to a constitutional claim of false arrest”); Fenn v. City of Truth or Consequences, 983 F.3d 1143, 1150 (10th Cir. 2020); Swagler

It is therefore unsurprising that § 1983 Fourth Amendment claims by protesters fare poorly. By this, I do not mean to suggest that individuals bringing § 1983 claims against police because of their treatment during a criminal investigation, unrelated to protest activity, fare better.<sup>231</sup> However, I zone in on § 1983 claims by protesters because the Expressive Fourth Amendment doctrine applies specifically to people engaged in expressive activity, as opposed to suspects police encounter during regular policing.<sup>232</sup> Reviewing all sixty-two circuit cases since § 1983's enactment where individuals engaged in expressive protest activity brought unlawful detention or arrest claims against law enforcement, only five cases<sup>233</sup> survived dismissal and made it to trial. An additional ten cases<sup>234</sup> were settled before trial, with some plaintiffs receiving

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v. Neighoff, 398 F. App'x 872, 881 (4th Cir. 2010); Lyons v. City of Seattle, 214 F. App'x 655, 656 n.2 (9th Cir. 2006); Currier v. Baldrige, 914 F.2d 993, 996 (7th Cir. 1990).

231. See Julianne N. Zilahy, *One for All, or All for One: The Circuit Split on the Probable Cause Element of a § 1983 Malicious Prosecution Claim*, 43 AM. J. TRIAL ADVOC. 383, 413–14 (2020) (arguing that the split circuit probable cause requirement for false arrest § 1983 claims “mutates [the doctrine] from a police safety measure into a shield of unchecked power, allowing officers’ vengeance, racism, bias, or even laziness free to infringe upon an arrestee’s liberty,” which “create[s] an impossibly high bar for plaintiffs to surpass.”); Diana Hassel, *Excessive Reasonableness*, 43 IND. L. REV. 117, 117 (2009) (“When these two [§ 1983 and qualified immunity] doctrines converge, an almost impenetrable barrier to liability results.”); Jeremy R. Lacks, Note, *The Lone American Dictatorship: How Court Doctrine and Police Culture Limit Judicial Oversight of the Police Use of Deadly Force*, 64 N.Y.U. ANN. SURV. AM. L. 391, 393 (2008) (arguing that “the federal judiciary, as a consequence of a unique combination of the doctrinal features of § 1983 suits and the characteristics of contemporary police culture, has substantially relinquished its ability to oversee the police . . .”).

232. See Loor, *Expressive Fourth*, *supra* note 11.

233. See Tatum v. Morton, 562 F.2d 1279, 1285 (D.C. Cir. 1977) (affirming jury finding in favor of protesters); *but see* Zalaski v. City of Hartford, 723 F.3d 382, 394–95 (2nd Cir. 2013) (affirming directed verdict on qualified immunity grounds to officer); Fogarty v. Gallegos, No. 05-cv-00026 (D.N.M. 2009) (jury finding in favor of defendant officers upon remand after denial of summary judgment to officers); Mackinney v. Nielsen, 152 F.3d 927(9th Cir. 1998) (unpublished table decision) (affirming bench verdict in favor of defendants); Posr v. Doherty, No. 87-cv-06575 (S.D.N.Y. Dec. 31, 1991) (settled for \$75,000 plus attorney’s fees after appellate court ordered malicious prosecution claim to be retried).

234. See Toole v. City of Atlanta, No. 16-cv-02909 (N.D. Ga. Jul. 2, 2020) (“Plaintiff’s claim has been compromised and settled in full between the parties”); Mauler v. Arlotto, No. 18-cv-01445 (D. Md. Dec. 9, 2019) (settlement order); Davidson v. City of Stafford, No. 14-CV-03596 (S.D. Tex. Feb. 1, 2018) (notice of settlement); Douglas v. City of New York, No. 14-cv-08124 (S.D.N.Y. Oct. 23, 2018) (settlement order for \$35,000.00 plus \$110,000.00 in attorney’s fees); Swagler v. Harford County, No. 08-cv-02289 (D. Md. Apr. 23, 2012) (“Each side shall bear their own costs”); Beal v. City of Chicago, No. 04-cv-02039, 2012 WL 9503972 (N.D. Ill. May 6, 2012) (consolidating plaintiffs’ claims to settle for \$1,135,000.00); Carr v. District of Columbia, No. 06-cv-00098 (D.D.C. Oct. 27, 2011) (notice of dismissal); Baribeau v. City of Minneapolis, No. 06-cv-04953, 2010 WL 3591489 (D. Minn. Aug. 20, 2010) (settlement order for \$165,000); Hankin v. City of Seattle, No. 00-cv-01672 (W.D. Wash. Oct 26, 2007) (order granting final approval of class settlement); Dubner v. City and County of San Francisco, No. 98-cv-01075 (N.D. Cal. Nov. 27, 2001) (stipulation and order). In addition, Harcz v. Boucher, No. 17-cv-00112 (W.D. Mich. Feb. 3, 2017) is awaiting a second appeal after the district court granted the defendant’s summary judgment motion in part, and after the Sixth Circuit allowed the plaintiffs to proceed past the

modest compensation. In the vast majority of cases, plaintiffs lost at the motion to dismiss or the motion for summary judgment phase, and they received nothing. Among these, courts found that qualified immunity insulated officers from suit in two cases at the motion to dismiss stage<sup>235</sup> and in an additional twenty-five cases at summary judgment.<sup>236</sup> Moreover, courts ruled that police officers had probable cause to arrest activists in seven cases at the motion to dismiss phase<sup>237</sup> and in nine cases at summary judgment.<sup>238</sup> These overwhelming losses for plaintiffs suggest that Fourth Amendment precedent and qualified immunity principles coalesce to provide police extreme discretion to effectuate warrantless arrests—often for nonviolent and minimally offensive crimes as described in Part I. Although a discussion of qualified immunity is beyond the scope of this Article, in the next section, I discuss how a clearer understanding of the protections of the Expressive Fourth Amendment should affect courts' analysis of protest-related warrantless arrests.

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motion to dismiss stage in the first appeal. *See* *Harcz v. Boucher*, 763 F. App'x 536, 545 (6th Cir. 2019).

235. *See* *Marcavage v. Nat'l Park Serv.*, 666 F.3d 856, 860 (3rd Cir. 2012); *Battiste v. Sheriff of Broward Cnty.*, 261 F. App'x 199, 203 (11th Cir. 2008).

236. *See* *Skovgard v. Pedro*, 448 F. App'x 538, 546 (6th Cir. 2011); *Norse v. City of Santa Cruz*, 629 F.3d 966, 978 (9th Cir. 2010); *Rosebrock v. Perez*, 829 F. App'x 212, 216 (9th Cir. 2020); *Thames v. City of Westland*, 796 F. App'x 251, 263 (6th Cir. 2019); *Berg v. Kelly*, 897 F.3d 99, 112 (2d Cir. 2018); *Wiles v. City of New York*, 724 F. App'x 52, 54 (2d Cir. 2018); *Taylor-Williams v. Rembert*, 712 F. App'x 960, 962 (11th Cir. 2017); *White v. Jackson*, 865 F.3d 1064, 1076 (8th Cir. 2017); *Weed v. Jenkins*, 873 F.3d 1023, 1029 (8th Cir. 2017); *Panagacos v. Towery*, 692 F. App'x 330, 333 (9th Cir. 2017); *Wilson v. Jean*, 661 F. App'x 234, 238 (3d Cir. 2016); *Brown v. City of New York*, 798 F.3d 94, 99 (2d Cir. 2015); *Thayer v. Chiczewski*, 705 F.3d 237, 251 (7th Cir. 2012); *Joyce v. Crowder*, 480 F. App'x 954, 960 (11th Cir. 2012); *Bernini v. City of St. Paul*, 665 F.3d 997, 1005 (8th Cir. 2012); *Acosta v. City of Costa Mesa*, 718 F.3d 800, 825–26 (9th Cir. 2013); *Moran v. Cameron*, 362 F. App'x 88, 94 (11th Cir. 2010); *Cross v. Mokwa*, 547 F.3d 890, 896 (8th Cir. 2008); *Egolf v. Witmer*, 526 F.3d 104, 109 (3d Cir. 2008); *Bennett v. Schroeder*, 99 F. App'x 707, 715 (6th Cir. 2004); *Frye v. Kan. City Mo. Police Dep't*, 375 F.3d 785, 792 (8th Cir. 2004); *Paff v. Kaltenbach*, 204 F.3d 425, 437 (3d Cir. 2000); *Picray v. Sealock*, 138 F.3d 767, 772 (9th Cir. 1998); *Habiger v. City of Fargo*, 80 F.3d 289, 297 (8th Cir. 1996); *Johnston v. City of Houston*, 14 F.3d 1056, 1061 (5th Cir. 1994).

237. *See* *Meyers v. City of New York*, 812 F. App'x 11, 14 (2d Cir. 2020); *Garcia v. Bloomberg*, 662 F. App'x 50, 53–54 (2d Cir. 2016); *Dukore v. District of Columbia*, 799 F.3d 1137, 1142 (D.C. Cir. 2015); *Oberwetter v. Hilliard*, 639 F.3d 545, 554 (D.C. Cir. 2011); *Ryan v. County of DuPage*, 45 F.3d 1090, 1094 (7th Cir. 1995); *Currier v. Baldrige*, 914 F.2d 993, 996 (7th Cir. 1990); *Carvalho v. City of New York*, 732 F. App'x 18, 22 (2d Cir. 2018).

238. *See* *Fenn v. City of Truth or Consequences*, 983 F.3d 1143, 1150 (10th Cir. 2020); *Asprey v. N. Wyo. Cmty. Coll. Dist.*, 823 F. App'x 627, 634 (10th Cir. 2020); *Hartman v. Thompson*, 931 F.3d 471, 482 (6th Cir. 2019); *Reza v. Pearce*, 806 F.3d 497, 508 (9th Cir. 2015); *Blomquist v. Town of Marana*, 501 F. App'x 657, 659 (9th Cir. 2012); *Lorenzo v. City of Tampa*, 259 F. App'x 239, 242 (11th Cir. 2007); *Lyons v. City of Seattle*, 214 F. App'x 655, 657 (9th Cir. 2006); *Mims v. City of Eugene*, 145 F. App'x 194, 196 (9th Cir. 2005); *Mangieri v. Clifton*, 29 F.3d 1012, 1018 (5th Cir. 1994). One case did not find probable cause to arrest at the summary judgment stage, but litigation is still ongoing. *See* *Quraishi v. St. Charles County*, 986 F.3d 831, 836 (8th Cir. 2021). Another older case did not find probable cause to arrest at the summary judgment stage, but there is no available record of subsequent district court proceedings. *See* *Buck v. City of Albuquerque*, 549 F.3d 1269, 1286–87 (10th Cir. 2008).



### B. Expressive Fourth Amendment Challenges to Protest-Related Arrests

Courts' reasonableness analysis of protest-related arrests fails to protect freedom of expression because it treats expressive protest conduct like ordinary conduct. This is contrary to the purpose of the Fourth Amendment, which was *designed* to protect freedom of expression and bodily integrity. The presiding Fourth Amendment analysis provides too much deference to police when freedom of expression is on the line and disregards how an individual's participation in expressive protest activity should change the reasonableness calculus. Perhaps if existing Fourth Amendment jurisprudence more effectively safeguarded bodily integrity, this intervention would not be necessary to protect activists' expressive freedoms. However, such is not the existing state of affairs. Thus, as I previously argued in the context of protesters' claims of police excessive force,<sup>239</sup> courts should evaluate whether an arresting police officer's conduct is reasonable in light of freedom of expression. While reasonableness in light of freedom of expression is still a question of balancing the totality of the circumstances,<sup>240</sup> an individual's engagement in expressive activity should change the balance. Pursuant to this rebalancing, courts should rule that warrantless arrests for nonviolent misdemeanors<sup>241</sup> are unreasonable. In the George Floyd protests, activists were overwhelmingly arrested for nonviolent misdemeanors.<sup>242</sup> The Expressive Fourth Amendment balance is off when courts allow police to engage in warrantless arrests of peaceful protesters for minor nonviolent crimes.

The Supreme Court dealt with the question of the constitutionality of warrantless arrests of criminal suspects for misdemeanors punishable only via fine in *Atwater v. City of Lago Vista*.<sup>243</sup> In *Atwater v. City of Lago Vista*, the Court concluded, in the context of a misdemeanor traffic offense, that “[i]f an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender.”<sup>244</sup> The *Atwater* majority recognized that at common law, the practice regarding warrantless misdemeanor arrests was not uniform.<sup>245</sup> Nevertheless, the Court arrived at its holding by relying on the presiding state practice allowing for warrantless misdemeanor arrests and its interpretation that Supreme Court precedent—primarily *Whren v.*

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239. See Loor, *Expressive Fourth*, *supra* note 11.

240. See *Tennessee v. Garner*, 471 U.S. 1, 8–9 (1985); *Illinois v. Gates*, 462 U.S. 213, 230–31 (1983); *United States v. Cortez*, 449 U.S. 411, 417–18 (1981).

241. See sources cited *supra* note 44 (discussing the definition of nonviolent misdemeanors).

242. See *supra* Section II.B (discussing common protest-related arrests, most of which lack a requirement of violence).

243. 532 U.S. 318, 354 (2001).

244. *Id.*; see also Harmon, *supra* note 36, at 323 (“*Atwater v. City of Lago Vista* permits custodial arrests for fine-only offenses, for which public safety arguments for custody are at their weakest.”).

245. *Atwater*, 532 U.S. at 327–33.

*United States*—mandated a categorical and easily administrable approach to Fourth Amendment questions instead of a case-by-case analysis.<sup>246</sup> Regarding the state practices, the Court took a *no harm, no foul approach*, highlighting that at oral argument, Atwater’s attorney could only present one other instance, besides the instant scenario, of “foolish, warrantless misdemeanor arrests.”<sup>247</sup> This served as proof for the *Atwater* majority that “surely the country is not confronting anything like an epidemic of unnecessary minor-offense arrests.”<sup>248</sup> *Atwater* was decided in 2001. Recent scholarship suggests that, contrary to the majority’s contention, we might in fact be experiencing epidemic misdemeanor arrests with devastating consequences.<sup>249</sup> Nevertheless, *Atwater* established that a police officer could arrest an individual—with no warrant—for a misdemeanor crime where the accused can only receive a fine and not jail time.<sup>250</sup>

The majority’s decision in *Atwater* was close and thus not uncontroverted among the Justices. Justice Sandra Day O’Connor penned a powerful dissent, which was joined by Justices John Stevens, Ruth Bader Ginsburg, and Stephen Breyer.<sup>251</sup> Justice O’Connor also concluded that the common law history was inconclusive, but thereafter her agreement with the majority ended.<sup>252</sup> Justice O’Connor asserted that since the status of the common law regarding warrantless arrests for misdemeanors was unclear, the next appropriate step was

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246. See *id.* at 352–53 (“[S]ignificantly, under current doctrine the preference for categorical treatment of Fourth Amendment claims gives way to individualized review when a defendant makes a colorable argument that an arrest, with or without a warrant, was ‘conducted in an extraordinary manner, unusually harmful to [his] privacy or even physical interests.’” (quoting *Whren v. United States*, 517 U.S. 806, 818 (1996))). In *Whren*, the Court held that the subjective intent of officer’s is of no consequence so long as they have probable cause to stop and arrest. 517 U.S. 806. See also Harmon, *supra* note 36, at 323 (“*Whren v. United States* allows pretextual arrests in which the government may have no legitimate interest in arresting the suspect.”).

247. *Atwater*, 532 U.S. at 353.

248. *Id.*

249. See ISSA KOHLER-HAUSMANN, MISDEMEANORLAND: CRIMINAL COURTS AND SOCIAL CONTROL IN AN AGE OF BROKEN WINDOWS POLICING 43–44 fig.1.4 (2018) (documenting the rise of misdemeanor arrests under broken windows policing in New York from approximately 160,000 summons issued in 1993 to over 600,000 in 2005); Megan Stevenson & Sandra Mayson, *The Scale of Misdemeanor Justice*, 98 B.U. L. REV. 731, 737 (2018) (“[W]e estimate that there are 13.2 million misdemeanor cases filed in the United States each year”).

250. See *Atwater*, 532 U.S. at 325, 369 (allowing arrest where the maximum penalty is a \$25–\$50 fine); *Arkansas v. Sullivan*, 532 U.S. 769, 773 (2001) (Ginsburg, J., concurring) (“[*Atwater*] recognized no constitutional limitation on arrest for a fine-only misdemeanor offense.”); *Chortek v. City of Milwaukee*, 356 F.3d 740, 742 (7th Cir. 2004) (upholding an arrest where penalty was “a fine plus the costs of prosecution”); see also *Vargas v. City of New York*, 56 N.Y.S.3d 438, 440 (2017) (upholding a warrantless arrest where the defendant was sentenced to four days of community service and a \$120 surcharge). While arresting for a crime for which there is no jail penalty may violate state law—like plaintiffs alleged in *Black Lives Matter L.A. v. City of Los Angeles*—it does not violate the U.S. Constitution. See *supra* note 103 and accompanying text.

251. Her dissent was joined by three other justices to make this a narrow 5–4 case.

252. See *Atwater*, 532 U.S. at 364 (O’Connor, J., dissenting).

for the Court to wrestle with the Fourth Amendment question by weighing the government's interest against the intrusion upon the individual.<sup>253</sup> Based on this balancing, she classified the warrantless arrest for a fine-only traffic offense as constitutionally unreasonable and “def[y]ing any sense of proportionality,” finding that the government interest in enforcing a minor traffic law is insufficient to satisfy the intrusion of a full custodial arrest, regardless of the existence of probable cause.<sup>254</sup> She distinguished *Atwater* from *Whren* by highlighting the more serious intrusion and harm of an arrest as opposed to a simple traffic stop.<sup>255</sup> Justice O'Connor remarked that “[b]ecause a full custodial arrest is such a severe intrusion on an individual's liberty, its reasonableness hinges on the ‘degree to which it is needed for the promotion of legitimate governmental interests.’”<sup>256</sup> She further asserted that “[g]iving police officers constitutional *carte blanche* to effect an arrest whenever there is probable cause to believe a . . . misdemeanor has been committed is irreconcilable with the Fourth Amendment's command that seizures be reasonable.”<sup>257</sup>

I agree with Justice O'Connor's dissent. *Atwater* was wrongfully decided. The *Atwater* rule is flawed for the reasons expressed by the dissent and has been rightfully critiqued.<sup>258</sup> Allowing police to execute warrantless custodial arrests for all misdemeanors, including those punishable only via fine, fails to safeguard bodily integrity as required by the Fourth Amendment. What's more, in the context of protests, an arrest intrudes not only on an individual's liberty and privacy rights but vitally also on their expressive rights. Thus, when an arrest would affect bodily integrity and expressive freedoms, such as when the target is a protester, the Court must wrestle with the Fourth Amendment question, recalibrating the calculus, and ask whether a warrantless misdemeanor custodial arrest is reasonable in light of freedom of expression. Providing police constitutional *carte blanche* to execute warrantless arrests for all types of misdemeanors is unacceptable when freedom of expression is at stake. As in cases involving searches for papers, courts should review protest-related arrests with scrupulous exactitude and rein in police discretion be-

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253. *Id.* at 362–63.

254. *Id.* at 363–64.

255. *Id.* at 364.

256. *Id.* at 365 (quoting *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999)).

257. *Id.* at 365–66.

258. See, e.g., Wayne A. Logan, *Reasonableness as a Rule: A Paean to Justice O'Connor's Dissent in Atwater v. City of Lago Vista*, 79 MISS. L. J. 115, 117 (2009) (“Justice O'Connor's *Atwater* dissent, wise when offered almost a decade ago, and prescient in light of subsequent events, is deserving of a place in the pantheon of the Court's great Fourth Amendment dissents”); Jason A. Katz, Note, *Atwater v. City of Lago Vista: Buckle-Up or Get Locked-Up: Warrantless Arrests for Fine-Only Misdemeanors Under the Fourth Amendment*, 36 AKRON L. REV. 491 (2003); Lisa Ruddy, Note, *From Seat Belts to Handcuffs: May Police Arrest for Minor Traffic Violations?*, 10 AM. U. J. GENDER SOC. POL'Y & L. 479 (2002).

cause, in their zeal to enforce the law, officers may inadvertently (or purposefully) arrest protesters engaged in lawful protest activity.<sup>259</sup> Although Atwater's counsel did not make a sufficient case to satisfy the majority that there was "an epidemic of unnecessary minor-offense arrests" worth addressing,<sup>260</sup> the voluminous protest-related arrests from 2020 do amount to an epidemic that courts should not ignore.

Courts should recognize that the interests change in the reasonableness calculus when the policed person is engaged in expressive protest activity. First, both the individual and public interest in freedom of expression must affect the reasonableness calculus.<sup>261</sup> While an individual protester has their own interest in freedom of expression, which will be discussed shortly, there is also a "public interest in ensuring the broad exercise of First Amendment freedoms [that] must enter the calculus."<sup>262</sup> This public interest in expressive freedom exists because "the consequences of illegal use of the power of arrest" extend beyond just the arrestee to both those who will be intimidated and thereby deterred from engaging in expressive protest activity and to those "who would [have] otherwise receive[d] such expression."<sup>263</sup> Valuing freedom of expression in this reasonableness calculus reaffirms its centrality within our democratic society and system of government.<sup>264</sup> This is distinct from *Atwater*, where there was no analogous public interest in the motorist's operation of her motor vehicle.

On the government's side of the reasonableness equation, public safety concerns are lessened in the context of protests versus a criminal investigation. Courts give deference to officers' judgments because they view criminal police work as dangerous;<sup>265</sup> however, that concern is not present in the same manner when officers engage in the policing of protests as opposed to a criminal investigation.<sup>266</sup> Protests generally do not present the same dangers to police and the public as those courts attribute to criminal policing.<sup>267</sup>

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259. See Loor, *Expressive Fourth*, *supra* note 11, at Section III.A.2. On the issue of the purposeful use of arrest power to squelch dissent, I plan to grapple with how the Expressive Fourth Amendment applies to pretextual arrests in future work.

260. See *supra* notes 247–249—and accompanying discussion.

261. See *Maryland v. Macon*, 472 U.S. 463, 475–476 (1985) (Brennan, J., dissenting).

262. *Id.* at 476.

263. See *id.*

264. See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (Brandeis, J., concurring) ("Those who won our independence believed . . . that public discussion is a political duty; and that this should be a fundamental principle of the American government." (quoting *Whitney v. California*, 274 U.S. 357, 375 (1927))).

265. See *Graham v. Connor*, 490 U.S. 386, 397 (1989) (recognizing circumstances of police encounter as "tense, uncertain, and rapidly evolving"); see also sources cited *supra* note 216.

266. See Loor, *Expressive Fourth*, *supra* note 11, at Section III.B (discussing how courts should view police engagement with protesters).

267. In fact, the overwhelming majority of 2020 racial justice protesters were found to be peaceful. Erica Chenoweth & Jeremy Pressman, *This Summer's Black Lives Matter Protesters Were*

Considering this reduced public safety concern, the next question is whether some circumstance or factor suggests a safety concern. Nonviolent misdemeanors do not present such safety concerns. Thus, if a police officer observes a protester engaged in a nonviolent misdemeanor, without more,<sup>268</sup> that should not raise a public safety concern sufficient to justify a warrantless arrest considering the countervailing public interest in freedom of expression and, as will be discussed, a protester's augmented interest. The government maintains an interest in enforcing the law during protests. However, such interest can be satisfied with the issuance of a citation or summons.<sup>269</sup>

On the individual's side of the reasonableness calculus, the policed person's interest extends beyond bodily integrity to their freedom of expression. Here, courts must positively weigh an individual's expressive political activity.<sup>270</sup> This expressive activity deserves more protection than the realm of non-expressive activities, and courts should not equate them in their balancing. In other words, an individual has an interest in bodily integrity pursuant to the Fourth Amendment, which is implicated whenever a government actor detains or arrests them. However, when an individual participates in expressive protest activity, their interest is not only based on their right to bodily integrity but is augmented by their right to freedom of expression. Thus, the protester's implicated interest against government intrusion is greater than the interests of an individual not engaged in expressive activity. This augmented individual interest and concomitant public interest in protected expression—along with reduced officer and public safety concerns—mitigate against the latitude provided to police by a broad power to execute warrantless arrests for any crime. When a police officer witnesses an activist engaging in conduct that amounts to a nonviolent misdemeanor, the officer should detain that individual only for the time reasonably necessary to gather name and contact information and provide them with a summons to appear in court at a later date. Thereafter, the activist should be allowed to continue protesting.

The government interest in effectuating a warrantless arrest may arguably change when the alleged crime is either a felony or even when it is a misdemeanor that includes violence (such as battery or assault) or an imminent

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*Overwhelmingly Peaceful, Our Research Finds*, WASH. POST (Oct. 16, 2020), <https://www.washingtonpost.com/politics/2020/10/16/this-summers-black-lives-matter-protesters-were-overwhelming-peaceful-our-research-finds> [perma.cc/F3VA-57MC].

268. The "more" that would justify a warrantless arrest may be circumstances, demonstrated by the police officer, that suggest an actual and viable threat of imminent bodily harm or some threshold degree of property damage. However, I expect to delve into this question further in future research.

269. See Harmon, *supra* note 36, at 337, 339–40 (arguing that in most situations, law enforcement should issue citations and summons as most people would likely still come to court in light of advancing technology to hold them accountable).

270. See Loor, *Expressive Fourth*, *supra* note 11, at Section III.B.

threat of such violence. Felonies are considered more serious than misdemeanors and therefore carry harsher penalties,<sup>271</sup> and courts also consider felons to be more dangerous than misdemeanants.<sup>272</sup> Therefore, all things being equal and neutral, the government may have a more serious interest in providing police the authority to arrest, without a warrant, protesters accused of committing felonies. However, this distinction between felony and misdemeanor may be more fiction than fact if the protesters' race impacts what crime a police officer chooses to charge. As a reminder, the two days when Black people accounted for over 60 percent of protest-related arrests in New York City were the days when NYPD arrested protesters for felony property offenses instead of misdemeanor offenses.<sup>273</sup> Moreover, after a stop, police are more likely to arrest Black individuals than white individuals.<sup>274</sup> To be blunt, if police officers know they can only arrest—without warrants—activists for felonies and violent misdemeanors, courts should be wary that police may be more likely to arrest Black activists than white activists for these more serious and readily arrestable offenses.

#### CONCLUSION

*"I love America more than any other country in the world, and, exactly for this reason, I insist on the right to criticize her perpetually."*

—James Baldwin, *Notes of a Native Son*<sup>275</sup>

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271. See *What Happens in a Felony Case*, U.S. ATTORNEY'S OFFICE N.D. OF ILL. (July 24, 2015), <https://www.justice.gov/usao-ndil/programs/vwa-felony> [perma.cc/4LM4-UQJ7] ("Any offense punishable by death or imprisonment for more than one year is called a felony. Felonies are the most serious crimes. The prosecutors and the courts handle felony cases differently from misdemeanor cases (cases that have shorter possible sentences).").

272. See *Carroll v. United States*, 267 U.S. 132, 157 (1925) ("The reason for arrest for misdemeanors without warrant at common law was promptly to suppress breaches of the peace, while the reason for arrest without warrant on a reliable report of a felony was because the public safety and the due apprehension of criminals charged with heinous offenses required that such arrests should be made at once without warrant.") (internal citation omitted); see also *Lange v. California*, 141 S. Ct. 2011 (2021) (distinguishing misdemeanors from felonies for purposes of warrantless home entry under hot pursuit doctrine as "[s]tates tend to apply the misdemeanor label to less violent and less dangerous crimes."); *Welsh v. Wisconsin*, 466 U.S. 740, 752 (1984) ("[C]ourts have permitted warrantless home arrests for major felonies if identifiable exigencies, independent of the gravity of the offense, existed at the time of the arrest. . . . But of those courts addressing the issue, most have refused to permit warrantless home arrests for nonfelonious crimes.") (citations omitted); but see *Tennessee v. Garner*, 471 U.S. 1, 2, 14 (1985) (arguing that "[m]any crimes classified as misdemeanors, or nonexistent, at common law are now felonies" and that "[t]hese changes have . . . made the assumption that a 'felon' is more dangerous than a misdemeanant untenable," especially when considering that "numerous misdemeanors involve conduct more dangerous than many felonies").

273. See *supra* notes 172–174.

274. See *supra* notes 164–168 (discussing the Fagan Report).

275. James Baldwin, *NOTES OF A NATIVE SON* 9 (2012) (emphasis added).

The Expressive Fourth Amendment demands that when an individual is engaged in expressive political conduct such as protest, courts review a governmental intrusion with scrupulous exactitude and evaluate whether the intrusion is reasonable in light of freedom of expression. Exacting judicial review is necessary to protect activists' expressive rights from capricious police action. The deluge of mass arrests during the 2020 racial justice protests is evidence of caprice, and the potential targeting of Black protesters retells a story of race-based policing that is unfortunately all too familiar. Courts must rein in arrest authority meaning that, at the very least, officers should not have the power to effectuate a custodial arrest without a warrant when a protester's alleged conduct amounts to a nonviolent misdemeanor. It is an open question where the line should lie otherwise for warrantless arrests during protests, but the move must be toward contraction considering freedom of expression is at stake.