

SHOT IN THE STREETS, BURIED IN COURTS: AN ASSAULT ON PROTESTER RIGHTS

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I. INTRODUCTION

As a result of exasperated citizens' ongoing crusade against police-related killings, 2020 witnessed the eruption of protests and civil unrest throughout the country, leaving dried blood, empty tear gas canisters, demolished storefronts, and ultimately, a divided nation in its wake. Pictures and videos of devastated cities and businesses—as well as reports of injuries that protesters, journalists, and even police officers sustained—leave unclear who should be held responsible for the violence and destruction. Liability allocation becomes especially obscure when unaffiliated opportunists, such as white supremacists, take advantage of civil unrest, or an otherwise peaceful protest, to engage in violent behavior. A prime example of such an event occurred during the 2020 George Floyd protests.¹

According to reports, the Minneapolis protests were relatively peaceful before an unaffiliated and unknown white nationalist, dubbed the “Umbrella Man,” smashed the windows of a Minneapolis shop.² Many originally suspected Umbrella Man to be a St. Paul police officer, but the Minneapolis Police Department identified him as a white supremacist affiliate intending to incite violence.³ Peaceful protesters attempted to stop Umbrella Man, but he continued vandalizing the building until he later turned around and left the scene.⁴ Not long after Umbrella Man's vandalism, others began looting the same building and ultimately set it on fire.⁵ This destruction quickly spread throughout the

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¹ Jaclyn Peiser, ‘Umbrella Man’ Went Viral Breaking Windows at a Protest. He Was a White Supremacist Trying to Spark Violence, Police Say, WASH. POST (July 29, 2020), <https://www.washingtonpost.com/nation/2020/07/29/umbrella-man-white-supremacist-minneapolis/>.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

relatively peaceful Minneapolis protests and resulted in the Minneapolis Fire Department responding to approximately thirty fires the following day.⁶ One commentator speculated that Umbrella Man incited the first building fire that “set off a string of fires and looting throughout the precinct and the rest of the city.”⁷

In the aftermath of the Minneapolis riots, police officers arrested and charged at least three men, who were unaffiliated with protest organizers, with aiding and abetting arson.⁸ But this does not address the question of liability, nor does it sufficiently redress the injuries and damages sustained resulting from the riots or any of the many other violent protests that plagued the nation during 2020. A relatively recent case stemming from protests of yet another police-related killing purported to answer this question by shifting liability to unsuspecting protest organizers.⁹ This Comment analyzes the United States Court of Appeals for the Fifth Circuit’s decision in *Doe v. McKesson*,¹⁰ which perpetuates a possible First Amendment issue, the Supreme Court’s subsequent vacating and remanding of the case for state certification, and its implications on protester rights.

This Comment will outline legislators’ and police officers’ systematic curtailment of protester rights, as well as explore the Fifth Circuit’s *Doe v. McKesson* decision and its possible chilling effect on the fundamental right to protest. Part II surveys recent protests and riots resulting from police-involved killings, as well as the broad turmoil and damage left in the aftermath of clashes between protesters and law enforcement agencies. Part III differentiates between lawful and unlawful protests or assembly and draws from key case law to explore the extent to which an individual actor’s unlawful behavior affects the legality of an otherwise lawful assembly. Part III demonstrates how social movements within the United States have historically relied upon so-called “unlawful protests” to advance social justice, particularly when met with government opposition. Part IV lays out various responses to the myriad of protests in recent years, including the resignation of officials due to mounting pressure from protesters, as well as, and with emphasis on, the backlash to legislative and political efforts to curtail protester rights.

⁶ *Id.*

⁷ Peiser, *supra* note 1.

⁸ Farah Stockman, *They Have Lost Control: Why Minneapolis Burned*, N.Y. TIMES (July 3, 2020), <https://www.nytimes.com/2020/07/03/us/minneapolis-government-george-floyd.html>.

⁹ *See generally* *Doe v. McKesson*, 945 F.3d 818 (5th Cir. 2019).

¹⁰ *Id.*

2022]

COMMENT

1571

Part V details the facts and procedural history of *McKesson* and critiques the Fifth Circuit's reasoning. Part VI discusses the Supreme Court's response to the Fifth Circuit's *McKesson* decision and the possible directions which the case may lead. Part VII concludes by highlighting what is at stake and tying together how police respond to protesters, legislative attempts to criminalize protest tactics, and how judicial responses such as *McKesson* threaten to perpetuate systemic oppression of the marginalized.

II. RECENT CIVIL UNREST FOLLOWING WRONGFUL SLAYINGS

The violence and destruction that has and continues to unfold over the past two years contextualize the issue of protest organizer liability. On May 25, 2020, an employee at a Minneapolis convenience store called 911 and reported that a 46-year-old black man named George Floyd purchased cigarettes with a counterfeit twenty dollar bill.¹¹ A combination of video footage from bystanders and security footage revealed that a white police officer, Derek Chauvin of the Minneapolis Police Department, knelt on George Floyd's neck while he was pinned to the ground.¹² Officer Chauvin continued to kneel on Mr. Floyd's neck for approximately eight minutes as Mr. Floyd warned that he could not breathe and pleaded for his life.¹³ Officer Chauvin "did not remove his knee even after [George] Floyd lost consciousness and for a full minute and [twenty] seconds after paramedics arrived . . ."¹⁴ George Floyd showed no sign of life when the paramedics arrived at the scene, and was later pronounced dead.¹⁵

The videos of the George Floyd murder on May 25 would come to affect the political, legal, and social justice landscape of the nation.¹⁶ In one day, videos stormed the internet and major social media platforms.¹⁷ On May 26, protesters filled the streets, and police officers

¹¹ Evan Hill et al., *How George Floyd Was Killed in Police Custody*, N.Y. TIMES (May 31, 2020), <https://www.nytimes.com/2020/05/31/us/george-floyd-investigation.html>.

¹² *Id.*

¹³ Jason Silverstein, *Three of the Four Officers Charged in George Floyd's Death Are Now Out on Bond*, CBS NEWS (July 5, 2020, 7:33 PM), <https://www.cbsnews.com/news/three-of-the-four-officers-charged-in-george-floyds-death-are-now-out-on-bond/>.

¹⁴ Hill et al., *supra* note 11.

¹⁵ Yaron Steinbuch, *First Responders Tried to Save George Floyd's Life for Almost an Hour*, N.Y. POST (May 28, 2020, 7:36 AM), <https://nypost.com/2020/05/28/george-floyd-showed-no-signs-of-life-en-route-to-hospital/>.

¹⁶ See Derrick Taylor, *George Floyd Protests: A Timeline*, N.Y. TIMES (Nov. 5, 2021), <https://www.nytimes.com/article/george-floyd-protests-timeline.html>.

¹⁷ *See id.*

met them with tear gas in an effort to disperse them.¹⁸ On May 27, protests erupted in major cities across the United States.¹⁹ Just three days after George Floyd's murder, businesses and buildings throughout the city of Minneapolis became engulfed in raging flames.²⁰ A video circulated showing the Minneapolis Police Department's Third Precinct ablaze as officers fled the burning building.²¹ In this video, rioters can be heard shouting in celebration as they launched incendiaries at fleeing officers and patrol vehicles.²² On the night of May 28, The National Guard and State Police were called to suppress the chaos, but they instead protected firetrucks, the Federal Reserve, and Nicollet Mall ("an upscale shopping area downtown").²³ People vandalized, looted, or set buildings and local businesses on fire.²⁴ The Minneapolis riots reportedly destroyed more than five hundred shops and restaurants.²⁵ Owners and insurance experts estimated that the cost of property damage exceeded five hundred million dollars, making it the second-costliest civil disturbance in United States history (second to the infamous Los Angeles race riots of the 1990s).²⁶ Major news networks reported that even police officers sustained injuries.²⁷

Officer Chauvin's knee on a black man's neck, while he was handcuffed, bloodied, and pinned to the pavement, is the visualization of black systemic oppression in American history. It became the detonating spark to the longstanding bomb of American racial tension. "Eight minutes and forty-six seconds" (the suspected time that Chauvin

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *See id.*

²¹ Sophia 'Dimensional Merger' Narwitz, (@SophNar0747), TWITTER (May 28, 2020, 11:44 PM), <https://twitter.com/SophNar0747/status/1266213707027283968>; Angela Caputo et al., 'The Precinct Is on Fire,' APM REPS. (June 30, 2020), <https://www.apmreports.org/story/2020/06/30/what-happened-at-minneapolis-3rd-precinct>.

²² Sophia 'Dimensional Merger' Narwitz, (@SophNar0747), TWITTER (May 28, 2020, 11:41 PM), <https://twitter.com/SophNar0747/status/1266213127189905410>.

²³ Stockman, *supra* note 8.

²⁴ *See id.*

²⁵ Jeffrey Meitrodt, *For Riot-Damaged Twin Cities Businesses, Rebuilding Begins with Donations, Pressure on Government*, STAR TRIB. (June 6, 2020, 8:03 PM), <https://www.startribune.com/twin-cities-rebuilding-begins-with-donations-pressure-on-government/571075592/>.

²⁶ *Id.*

²⁷ *Minneapolis Police: 2 Officers Injured During Wednesday Night Unrest, 1 Incident Caught on Video*, FOX 9 (Aug. 27, 2020, 12:06 PM), <https://www.fox9.com/news/minneapolis-police-2-officers-injured-during-wednesday-night-unrest-1-incident-caught-on-video>.

2022]

COMMENT

1573

knelt on Floyd's neck) became a national battle cry against police brutality.²⁸

The Minneapolis riots are just one of many recent incidents of violent civil unrest stemming from protests of police brutality and racism. The 2017 Charlottesville, Virginia, protest is one of the many recent protests resulting in severe injuries. There, white nationalists and counter-protesters clashed, leading a Neo-Nazi extremist to drive a Dodge Challenger through a crowd of counter-protesters, killing one and injuring dozens of others.²⁹ More recently, protesters traveled over three hundred miles to Glynn County, Georgia, and demanded justice for Ahmaud Arbery, a twenty-five-year-old black man who was shot and killed by a white father-son duo while jogging on February 23, 2020.³⁰ On March 13, 2020, police officers executing a controversial no-knock warrant shot and killed Breonna Taylor, a twenty-six-year-old black woman and EMT, in her home in Louisville, Kentucky.³¹ During the Breonna Taylor protests, police officers arrested numerous demonstrators and shot and killed a photographer named Tyler Gerth and a cook named David McAtee.³² After a grand jury failed to charge officers for their role in Taylor's death, dismay filled the streets.³³

Less than three weeks after Mr. Floyd's killing, violence and destruction erupted in Atlanta following the police killing of Mr.

²⁸ Hill et al., *supra* note 11.

²⁹ Andrew Katz, *Unrest in Virginia: Clashes Over a Show of White Nationalism in Charlottesville Turn Deadly*, TIME, <https://time.com/charlottesville-white-nationalist-rally-clashes/> (last visited Apr. 21, 2022); Debbie Lord, *What Happened at Charlottesville: Looking Back on the Rally That Ended in Death*, ATLANTA]-CONST. (Aug. 10, 2018), <https://www.ajc.com/news/national/what-happened-charlottesville-looking-back-the-anniversary-the-deadly-rally/fPpnLrbAtbxSwNI9BEy93K/>; Laurel Wamsley & Bobby Allyn, *Neo-Nazi Who Killed Charlottesville Protester Is Sentenced to Life in Prison*, NAT'L PUB. RADIO (June 28, 2019, 2:40 PM), <https://www.npr.org/2019/06/28/736915323/neo-nazi-who-killed-charlottesville-protester-is-sentenced-to-life-in-prison>.

³⁰ Sabina Ghebremedhin & Christina Carrega, *Ahmaud Arbery Protesters Demand the Resignation of 2 Local Prosecutors*, ABC NEWS (May 16, 2020, 6:24 PM), <https://abcnews.go.com/US/ahmaud-arbery-protesters-demand-resignation-local-prosecutors/story?id=70707316>; Jason Riley, *Louisville Mayor Suspends Controversial 'No-Knock' Warrants Used by Police*, WDRB.COM (May 29, 2020), https://www.wdrb.com/community/louisville-mayor-suspends-controversial-no-knock-warrants-used-by-police/article_d0558720-a1bd-11ea-bab9-0b381bddc1ac.html.

³¹ *Breonna Taylor: What Happened on The Night of Her Death?*, BBC NEWS (Oct. 8, 2020), <https://www.bbc.com/news/world-us-canada-54210448>.

³² *Id.*; Associated Press, *A Timeline of Events Related to the Killing of Breonna Taylor*, L.A. TIMES (Sept. 24, 2020, 9:23 AM), <https://www.latimes.com/world-nation/story/2020-09-24/timeline-of-events-death-of-breonna-taylor>.

³³ *Id.*

Rayshard Brooks, a twenty-seven-year-old black man, in a Wendy's parking lot on June 12, 2020.³⁴ The following day, protesters and angry demonstrators blocked roads and an interstate near a Wendy's restaurant and reportedly set it on fire.³⁵ According to news reports, police officers utilized "tear gas and flash grenades to disperse the crowd."³⁶ On August 15, 2020, Pasadena police officers killed Anthony McClain during a traffic stop.³⁷ These slayings of black men and women, among countless others, prompted citizens to call for reforming and defunding police departments across the country.³⁸ From burning the Atlanta CNN building,³⁹ to police officers shoving and injuring a seventy-five-year-old protester in Buffalo,⁴⁰ violence amidst protests was the theme for the year 2020.⁴¹

³⁴ Richard Fausset, Johnny Diaz & Nicholas Bogel-Burroughs, *Atlanta Police Chief Resigns After Officer Shoots and Kills a Black Man*, N.Y. TIMES (June 13, 2020), <https://www.nytimes.com/2020/06/13/us/atlanta-police-shooting-rayshard-brooks.html>.

³⁵ *Id.*

³⁶ *Id.*

³⁷ Richard Winton, *Pasadena Chief Names Officer Who Fatally Shot Anthony McClain; Autopsy Shows Victim Was Struck Twice*, L.A. TIMES (Sept. 11 2020, 11:53 AM), <https://www.latimes.com/california/story/2020-09-11/pasadena-police-chief-confirms-identity-of-officer-who-fatally-shot-anthony-mcclain>.

³⁸ MAPPING POLICE VIOLENCE, <https://mappingpoliceviolence.org/> (last visited Apr. 21, 2022); Dionne Searcey, *What Would Efforts to Defund or Disband Police Really Mean?*, N.Y. TIMES (Aug. 4, 2020), <https://www.nytimes.com/2020/06/08/us/what-does-defund-police-mean.html>.

³⁹ Fernando Alfonso III, *CNN Center in Atlanta Damaged During Protests*, CNN (May 29, 2020, 11:03 PM), <https://www.cnn.com/2020/05/29/us/cnn-center-vandalized-protest-atlanta-destroyed/index.html>.

⁴⁰ *Two Buffalo Policemen Charged for Shoving 75-Year-Old Protester*, BBC NEWS (June 6, 2020), <https://www.bbc.com/news/world-us-canada-52952237>.

⁴¹ See Lia Eustachewich, *Minneapolis Police Officer Struck With Garbage Can Lid, Knocked to Ground*, N.Y. POST (Aug. 28, 2020), <https://nypost.com/2020/08/28/video-minneapolis-police-officer-struck-with-garbage-can-lid/>; Amir Vera, *2 Atlanta Officers Fired After Video Shows Them Tasing Man And Using 'Excessive Force' on Woman, Mayor Says*, CNN (June 4, 2020), <https://www.cnn.com/2020/06/01/us/atlanta-cops-fired-excessive-force/index.html>; Jay Croft, *Portland Braces For its 100th Night of Protests*, CNN (Sept. 5, 2020), <https://www.cnn.com/2020/09/05/us/portland-protests-100-nights/index.html> (explaining that Portland has witnessed 100 days of intense confrontation between protesters and law enforcement); Larry Celona & Vincent Barone, *Black Lives Matter Protesters Riot in Manhattan, Cause \$100,000 Damage: NYPD*, N.Y. POST (Sept. 5, 2020), <https://nypost.com/2020/09/05/black-lives-matter-protesters-riot-in-manhattan-cause-100000-damage/>; Erik Ortiz, *NYPD Officer Appears to Brandish Gun at Protesters; Mayor Calls it 'Absolutely Unacceptable'*, NBC NEWS (June 1, 2020), <https://www.nbcnews.com/news/us-news/nypd-officer-appears-brandish-gun-protesters-mayor-says-absolutely-unacceptable-n1221141>; Anthony Fisher, *The Police Rioted, And There Was a Lot of Video*, BUS. INSIDER (July 16, 2020),

2022]

COMMENT

1575

The George Floyd killing served as the catalyst for a string of protests that surged over the nation during the summer of 2020. Indeed, from May 26th to August 22nd, the Armed Conflict Location and Event Data Project (ACLED) recorded more than 7,750 demonstrations linked to the Black Lives Matter (BLM) movement across 2,440 locations throughout the nation.⁴² Of the approximately 10,600 demonstrations throughout 2020, approximately 570 resulted in violence.⁴³ While black people are disproportionately more likely to be killed by police than white people,⁴⁴ only 5 percent of protests against police killings involve demonstrators engaging in violence.⁴⁵ A prime example of such a peaceful protest occurred in Newark, New Jersey, a city familiar with police misconduct and still recovering from its deadly 1960's riots.⁴⁶ The twelve thousand person protest marched alongside Newark Mayor Ras Baraka and resulted in no violence or arrests.⁴⁷ This was a sharp contrast from its neighbor's protest in New York City and other major cities, including Washington D.C., Chicago, Minneapolis, and Atlanta.⁴⁸

III. A BRIEF SURVEY OF PROTESTER RIGHTS

The surge of protests and civil unrest has made the question of First Amendment protections for demonstrators all the more urgent. While it has long been clear under First Amendment jurisprudence that riotous demonstrations are unprotected, several new questions have surfaced, including whether a lawful and peaceful demonstration becomes unlawful when subsections of unaffiliated persons engage in unprotected activity and whether organizers assume liability for said

<https://www.businessinsider.com/nypd-police-rioted-george-floyd-protests-video-prove-it-2020-7>; Teo Armus, Mark Berman & Griff Witte, *Before a Fatal Shooting, Teenage Kenosha Suspect Idolized the Police*, WASH. POST (Aug. 27, 2020) <https://www.washingtonpost.com/nation/2020/08/27/kyle-rittenhouse-kenosha-shooting-protests/> (profiling Illinois teen Kyle Rittenhouse's fascination with police prior to fatally shooting two and injuring another at the Kenosha, Wisconsin protests).

⁴² *Demonstrations & Political Violence in America: New Data For Summer 2020*, ARMED CONFLICT LOCATION & EVENT DATA PROJECT, <https://acleddata.com/2020/09/03/demonstrations-political-violence-in-america-new-data-for-summer-2020/> [hereinafter ACLED] (last visited Apr. 21, 2022).

⁴³ *Id.*

⁴⁴ MAPPING POLICE VIOLENCE, *supra* note 38.

⁴⁵ ACLED, *supra* note 42.

⁴⁶ Tracey Tully & Kevin Armstrong, *How a City Once Consumed by Civil Unrest Has Kept Protests Peaceful*, N.Y. TIMES (June 1, 2020), <https://www.nytimes.com/2020/06/01/nyregion/newark-peaceful-protests-george-floyd.html>.

⁴⁷ *Id.*

⁴⁸ *Id.*

unlawful activity. This Part briefly describes the law governing the First Amendment Right to free speech and peaceful assembly.

A. *First Amendment Right to Free Speech and Peaceful Assembly*

It is certainly unlawful to engage in riotous behavior such as burning property, looting, or engaging in other violent or unlawful behavior, whether for protest purposes or otherwise.⁴⁹ But it can sometimes be difficult to distinguish between peaceful and unlawful protests.⁵⁰ This is especially true when considering that a large demonstration can contain peaceful, angry, and violent demonstrators in the same vicinity resulting in indiscriminate and excessive law enforcement to all demonstrators.⁵¹ Although the Constitution provides for freedom of assembly, that right is not absolute, as governments may impose various restrictions on it.⁵² Governments have discretion to impose regulations as to the time, place, and manner of protected activity so long as the regulations are content-neutral and narrowly tailored to serve a substantial government interest.⁵³ For example, a government may require advance notification for public gatherings.⁵⁴ Additionally, a citizen's privilege to use venues such as streets and parks

⁴⁹ See *Nat'l Ass'n for the Advancement of Colored People v. Claiborne Hardware Co.*, 458 U.S. 886, 916 (1982) ("The First Amendment does not protect violence.").

⁵⁰ See Tabatha Abu El-Haj, *Defining Peaceably: Policing the Line Between Constitutionally Protected Protest and Unlawful Assembly*, 80 Mo. L. REV. 961, 965 (2015) ("[C]ities routinely do a remarkably imperfect job of distinguishing between the peaceful, angry, and violent elements of an assembly, particularly when these forms of crowd behavior are present in a single demonstration.").

⁵¹ *Id.*

⁵² *E.g.*, John Bourdeau et al., § 290 *Limitation on Constitutional Right of Assembly*, 13 CAL. JURIS. CONST. L. § 290 ("The constitutional guarantee of freedom of assembly is not absolute but is subject to limitations."); see, *e.g.*, *Cantwell v. Connecticut*, 310 U.S. 296, 308 (1940) (stating that the state has power to prevent or punish when there is "clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order appears").

⁵³ *E.g.*, *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (A government may impose reasonable restrictions on the time, place, and manner of protected speech, so long as the restriction makes no reference to the content of the speech, and is narrowly tailored to serve a significant government interest. The main inquiry in determining content neutrality "is whether the government has adopted a regulation of speech because of disagreement with the message it conveys . . . [a] regulation that serves purposes unrelated to the content of expression is deemed neutral . . .").

⁵⁴ See, *e.g.*, *Sullivan v. City of Augusta*, 511 F.3d 16, 38 (1st Cir. 2007) ("...[A] municipality may require some short period of advance notice so as to allow it time to take measures to provide for necessary traffic control and other aspects of public safety, the period can be no longer than necessary to meet the City's urgent and essential needs of this type.").

2022]

COMMENT

1577

to express views may be regulated because that privilege is not absolute, but relative, and “must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order[.]”⁵⁵ Governments are nevertheless prohibited from abridging or denying those rights, such as free speech or assembly, under the guise of regulation.⁵⁶ As one legal scholar has recognized:

[W]hile the Supreme Court has held that the First Amendment means, at the very least, that individuals are entitled to assemble in traditional public fora, such as public streets and parks, it has also held that cities may pass ordinances - permanent and temporary - to manage the time and location of demonstrations. Indeed, the Supreme Court has held that permit requirements for public assemblies are presumptively constitutional. Moreover, law enforcement routinely uses low-level criminal law to manage the disruptiveness of protests, with judicial approval. Taken together, these two sources of law - municipal rules governing access to public space and criminal law (local, state, and federal) - render protestors supplicant to the authorities they are challenging.⁵⁷

While the right to assemble is indeed a fundamental right, it is subject to various government limitations and requires careful examination.

B. Defining ‘Lawful Protest’

An unlawful protest or assembly is most precisely defined as a situation in which a group of individuals, typically three or more as defined by states,⁵⁸ gathers with a common intent to accomplish an unlawful purpose.⁵⁹ The act of unlawful assembly is complete *without* the need for an overt act and thus allows government officials to act upon the inference of *possible* future illegal activity.⁶⁰ That is, even

⁵⁵ *E.g.*, *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515–16 (1939).

⁵⁶ *Id.*

⁵⁷ El-Haj, *supra* note 50, at 964 (citations omitted).

⁵⁸ “Many statutes defining unlawful assembly also require an assemblage of at least three persons, although some require only two. However, under both common law and statute, less than three persons may be convicted of unlawful assembly.” J.P. Ludington, *What Constitutes Offense of Unlawful Assembly*, 71 A.L.R.2d 875, § 3 (citations omitted).

⁵⁹ *Id.* at § 2

⁶⁰ “Because unlawful assembly focuses on an agreement that *precedes* an unlawful act, law enforcement can intervene prior to that act actually occurring. In other words, as with other inchoate crimes, government officials are forced to rely on judgments and inferences about future acts.” John Inazu, *Unlawful Assembly as Social Control*, 64 UCLA L. REV. 2, 6–7 (2017). “[I]n the absence of tumult or terror, an assembly

without presence of riotous or tumultuous behavior, officials may disperse an assembly of protesters if the officials anticipate minor injuries or slight property damages.⁶¹ Legislators in some jurisdictions are able to define unlawful assembly in a broader context, and, in effect, offer narrower protection to protesters in contrast to other states.⁶² The Supreme Court of California held that the First Amendment right to peacefully assemble mandates that “an assembly only becomes unlawful where there is violence or clear and present danger of imminent violence.”⁶³ Additionally, that court stated that mere apprehension, absent reasonableness or justifiableness, is insufficient to render an assembly unlawful.⁶⁴

In 1982, the Supreme Court addressed the question of whether the unlawful acts of certain participants could render an entire boycott unlawful.⁶⁵ The landmark case, *NAACP v. Claiborne Hardware Co.*, involved a seven-year NAACP boycott of white merchants by black citizens of Claiborne County, Mississippi, in efforts to demand equality and racial justice from white civic and business leaders.⁶⁶ The boycott was largely peaceful but included incidents of violence.⁶⁷ Some of the merchants allegedly affected by the boycotts brought a lawsuit against organizers, participants, and supporters seeking redress.⁶⁸ A chancery court found in favor of the merchants and imposed a judgment of over \$1,250,000 against 130 petitioners finding, based on common law theory, the *entire* boycott liable because certain participants engaged in physical force, violence, and intimidation to achieve the desired results.⁶⁹ The Mississippi Supreme Court upheld the imposition of liability on the basis of the common law tort theory.⁷⁰ The Supreme Court reversed and held that the nonviolent elements of the boycott’s activities were entitled to First Amendment protection, and the

could conceivably be dispersed if officials anticipated even minor injuries or slight property damage that accompanied a large crowd engaged in a peaceful march.” *Id.* at 27.

⁶¹ *Id.* at 27.

⁶² *See id.* at 18–19 (comparing and contrasting Missouri’s and Wisconsin’s unlawful assembly statute).

⁶³ *See* El-Haj, *supra* note 50, at 973.

⁶⁴ *Id.* at 1024.

⁶⁵ *See* Nat’l Ass’n for the Advancement of Colored People v. Claiborne Hardware Co., 458 U.S. 886, 888–89 (1982).

⁶⁶ *Id.* at 886.

⁶⁷ *Id.* at 904–05.

⁶⁸ *Id.* at 886.

⁶⁹ *Id.* at 893, 895.

⁷⁰ *Id.* at 894.

2022]

COMMENT

1579

judgment thus unconstitutionally penalized protected activity.⁷¹ It further maintained that while states may legitimately “impose damages for the consequences of violent conduct, [they] may not award compensation for the consequences of nonviolent, protected activity.”⁷²

Writing for the Court, Justice Stevens reasoned that “[t]he right to associate does not lose all constitutional protection merely because some members of the group may have participated in conduct . . . that itself is not protected.”⁷³ Justice Stevens also noted that “[t]he taint of violence colored the conduct of some of the petitioners” and those petitioners may be held liable for the consequences of their actions.⁷⁴ He added, however, that “[t]he burden of demonstrating that it colored the entire collective effort . . . is not satisfied by evidence that violence occurred or even that violence contributed to the success of the boycott.”⁷⁵

Following *Claiborne*, the First Amendment indisputably protects the right of every American to condemn police misconduct. A citizen protestor is protected against not only criminal penalty, but civil liability as well.⁷⁶ Read fairly, *Claiborne* held that “the First Amendment prohibits punishing a person who, or organization that, has done nothing more than engage in protected activity (e.g., a lawful boycott) and advocate the efficacy of unlawful conduct in an abstract, provocative way.”⁷⁷ *Claiborne* “rejected the notion that isolated violent acts by individuals involved in the boycott could taint the entire effort and thereby subject all involved to liability.”⁷⁸

In 2001, almost twenty years after *Claiborne*, the California Court of Appeals in *Lam v. Ngo* applied the Supreme Court’s approach and added that “there must be some evidence of authorization, direction, or ratification of ‘specific’ constitutionally unprotected tortious activity by the organizer of a protest before the organizer can be held responsible for the consequences of the activity.”⁷⁹

⁷¹ Nat’l Ass’n for the Advancement of Colored People v. Claiborne Hardware Co., 458 U.S. 886, 915, 921 (1982).

⁷² *Id.* at 887.

⁷³ *Id.* at 908.

⁷⁴ *Id.* at 933.

⁷⁵ *Id.*

⁷⁶ *See, e.g., id.* at 920.

⁷⁷ Laurance J. Eisenstein & Steven Semeraro, *Abortion Clinic Protest and the First Amendment*, 13 ST. LOUIS U. PUB. L. REV. 221, 246–47 (1993).

⁷⁸ George C. Covington, Note, *Constitutional Law – The First Amendment and Protest Boycotts: NAACP v. Claiborne Hardware Co.*, 62 N.C.L. REV. 399, 403 (1984).

⁷⁹ *Lam v. Ngo*, 111 Cal. Rptr. 2d 582, 592 (Cal. Ct. App. 2011).

C. Civil Unrest/Disobedience as a Vehicle for Progress

Most, if not all, notable American protests that moved the nation forward involved some form of illegality or civil disobedience. Americans have utilized civil disobedience and protests as a vehicle to propel society, legislature, and politics since the eighteenth century when colonial America used public discourse as a means to emancipate itself from oppressive British rule.⁸⁰ Specifically, in 1765, nearly every member of colonial Virginia and even the Founding Fathers expressed their frustration with British control.⁸¹ 1765 and 1766 witnessed “a swirl of colonial protest against the British Stamp Act of 1765,”⁸² the Townshend Acts and the Tea Act, which eventually led to the Boston Tea Party where colonists boarded British tea ships and dumped 342 chests of tea into the harbor.⁸³ The Boston Tea Party “provoked heightened tensions between Britain and the colonies,” perpetuated more “wide-ranging boycotts, and eventually the American Revolutionary War.”⁸⁴

Fast forward almost two hundred years into the racially segregated 1960s, where African Americans engaged in civil disobedience purposed at desegregation and racial equality by organizing and engaging in sit-ins⁸⁵ and marches. For example, the March on Washington led by Dr. Martin Luther King included thousands of protesters, some of which obstructed traffic.⁸⁶ This post-World War II era, known as the Civil Rights Movement, resulted in the invalidation of the Jim Crow Laws.⁸⁷ More recently, we have had instances of more

⁸⁰ Baylen J. Linnekin, “*Tavern Talk*” and the Origins of the Assembly Clause: Tracing the First Amendment’s Assembly Clause Back to Its Roots in Colonial Taverns, 39 HASTINGS CONST. L.Q. 593, 598 (2012).

⁸¹ *Id.* at 605.

⁸² *Id.*

⁸³ Note, *Boycotting a Boycott: A First Amendment Analysis of Nationwide Anti-Boycott Legislation*, 70 RUTGERS U. L. REV. 1301, 1306 (2018); *The Boston Tea Party*, HISTORY.COM (Nov. 24, 2009), <https://www.history.com/this-day-in-history/the-boston-tea-party>.

⁸⁴ *Boycotting a Boycott: A First Amendment Analysis of Nationwide Anti-Boycott Legislation*, *supra* note 83, at 1306.

⁸⁵ “University students who entered university building to assemble together in ‘sit-in’ activity after building was closed and after they were ordered to leave was activity in violation of statute, and they were guilty of unlawful assembly.” Ludington, *supra* note 58, at *8 (citing *In re Bacon*, 240 Cal. App. 2d 34 (1966)).

⁸⁶ See Rachel Jones, ‘*A Fractured and Traumatized Nation*’ Marches On, 57 Years Later, NAT’L GEOGRAPHIC (Aug. 29, 2020), <https://www.nationalgeographic.com/history/2020/08/fractured-traumatized-nation-marches-washington-57-years-later/> (Indiana State Police arrested March on Washington protester and co-organizer for allegedly blocking traffic.).

⁸⁷ *Jim Crow Laws*, HISTORY.COM (Feb. 28, 2018) https://www.history.com/topics/early-20th-century-us/jim-crow-laws#section_11.

2022]

COMMENT

1581

clearly unlawful assembly, such as the removal of confederate statues throughout the nation.⁸⁸ Other protest tactics in which the lines between lawful and unlawful protests are blurred include a peaceable St. Louis sit-in protest, which led to the arrest of twenty people for unlawful assembly.⁸⁹

From the British monarch's reign over colonial America, to the Civil Rights Movement during the Jim Crow Era, and now the age of the prominent Black Lives Matter movement against police brutality, civil disobedience has been a means of propelling this nation forward. Similar to British opposition to colonial defiance and water hoses and police dogs set loose on Civil Rights protesters, the growing Black Lives Matter social justice movement against police brutality has been met with legislative opposition and curtailment.⁹⁰

IV. EFFORTS TO CURTAIL PROTESTER RIGHTS

Legislators and political leaders have been taking major steps—some positive and others seeking to quash protests—in response to the rally call for action to suppress the 2020 social justice movements and civil unrest. Shake-ups at large police departments across the nation ensued, including Atlanta's police Chief resigning following the shooting of Rayshard Brooks.⁹¹ In Portland, Chief Jami Reschstepped down in the summer of 2020, stating she wanted a top black lieutenant to replace her.⁹² The mayor of Louisville terminated the city's police chief after his officers were among those who fired at the black owner of a barbecue restaurant.⁹³ Most recently, New York City announced plans to launch a pilot program in which dispatchers will “send out emergency medical services and mental health crisis workers” to deal with mental health-

⁸⁸ Michael Shear, *Trump Issues Executive Order Targeting Vandalism Against Monuments*, N.Y. TIMES (June 26, 2020), <https://www.nytimes.com/2020/06/26/us/politics/trump-monuments-executive-order.html>.

⁸⁹ El-Haj, *supra* note 50, at 973.

⁹⁰ Am. C.L. Union, *Anti-Protest Bills Around the Country*, ACLU.ORG, [hereinafter *Anti-Protest Bills*] <https://www.aclu.org/issues/free-speech/rights-protesters/anti-protest-bills-around-country>(last visited Apr. 21, 2022).

⁹¹ Fausset, *supra* note 34.

⁹² Jorge Fitz-Gibbon, *Portland Police Chief Quits and Makes Black Cop Her Replacement*, N.Y. POST (June 8, 2020), 5:06 PM), <https://nypost.com/2020/06/08/portland-police-chief-jami-resch-quits-taps-black-cop-as-replacement/>.

⁹³ See Abigail Hauslohner & Kim Bellware, *Louisville Police Chief Fired After Law Enforcement Kills Local Restaurant Owner*, WASH. POST (June 1, 2020), <https://www.washingtonpost.com/nation/2020/06/01/louisville-police-chief-fired/>.

related calls as opposed to sending police officers.⁹⁴ These widespread systematic changes are arguably the direct result of protesters exercising their rights. States across the country continue to propose and enact changes aimed at showing demonstrators that their concerns are being heard.⁹⁵ Nevertheless, protestors continue to face legislative pushback.

A. *Anti-Protest Legislation*

In 2017, legislators across nearly twenty states pushed for bills that sought to limit protester rights, many of which were struck down as unconstitutional.⁹⁶ Arkansas, Georgia, North Dakota, Oklahoma, and South Dakota were among the many states that sought to pass chilling anti-protest laws in 2017.⁹⁷ Some of the failed proposals went as far as attempting to “reduce[] penalties for motorists who strike protesters with their vehicles⁹⁸—an undoubtedly chilling thought considering the unfortunate events that took place in the 2017 Charlottesville protests where Heather Heyer was killed by a white Neo-Nazi extremist who plowed through a crowd of protesters.⁹⁹ None of the legislation passed, but several states have pushed for similar bills, including Florida, North Carolina, Rhode Island, Tennessee, and Texas.¹⁰⁰ By granting civil immunity to drivers who strike protesters blocking highways,

⁹⁴ Fola Akinnibi, *NYC Pilot Tries Mental Health Responders in Place of Police*, BLOOMBERG (Nov. 13, 2020, 7:13 AM), <https://www.bloomberg.com/news/articles/2020-11-13/nyc-pilot-sends-health-workers-in-place-of-police>.

⁹⁵ For more examples of police related changes across the United States, see Paresh Dave, *Factbox: What Changes Are Governments Making in Response to George Floyd Protests?*, REUTERS (June 10, 2020, 8:27 PM), <https://www.reuters.com/article/us-minneapolis-police-protests-response/factbox-what-changes-are-governments-making-in-response-to-george-floyd-protests-idUSKBN23I01D>.

⁹⁶ *Anti-Protest Bills*, *supra* note 90.

⁹⁷ *States Rush to Pass Anti-Protester Laws*, FIRST AMEND. WATCH, <https://firstamendmentwatch.org/deep-dive/states-rush-to-pass-anti-protestor-laws/> (last visited Apr. 21, 2022).

⁹⁸ Heidi Przybyla, *Report: ‘Anti-Protester’ Bills Gain Traction in State Legislatures*, USA TODAY (Aug. 29, 2017, 6:00 AM), <https://www.usatoday.com/story/news/politics/2017/08/29/report-anti-protester-bills-gain-traction-state-legislatures/608609001/>.

⁹⁹ Wamsley & Allyn, *supra* note 29.

¹⁰⁰ Kriston Capps, *The States Trying to Pass Laws Protecting Drivers Who Hit Protesters*, BLOOMBERG (Aug. 16, 2017, 8:00 AM), <https://www.bloomberg.com/news/articles/2017-08-16/gop-lawmakers-defend-civil-immunity-laws>; Dakin Andone, *These States Have Introduced Bill to Protect Drivers Who Run Over Protesters*, CNN (Aug. 19, 2017, 3:36 AM), <https://www.cnn.com/2017/08/18/us/legislation-protects-drivers-injure-protesters/index.html> (noting that “[n]one of the legislation has been enacted so far”).

2022]

COMMENT

1583

legislators are causing some protesters to fear that they are pushing for bills that implicitly condone—rather than admonish—violence against protesters so long as the driver did not act willfully.¹⁰¹ A Texas state representative defended Texas’s version of the bill by stating that they seek to protect protesters since “demonstrations on highways are dangerous for both protesters and impartial drivers caught up in a tense or confusing situation.”¹⁰²

In Virginia, the Governor vetoed a bill that sought to criminalize anti-police protests.¹⁰³ A proposed Missouri bill carried a seven-year prison sentence for unlawfully obstructing traffic, while a Minnesota bill aimed to “criminalize peaceful protesters for participating in demonstrations that subsequently turned violent.”¹⁰⁴ In Pennsylvania, legislators proposed a bill that would make protesters “liable for police overtime, medical and emergency response, and other ‘public safety response costs’ if they are convicted of a felony or misdemeanor stemming from the demonstration.”¹⁰⁵ In Arizona, a proposed bill that sought to make rioting a racketeering offense “would have allowed police to arrest organizers prior to a protest, or subject them to liability for damages caused by others.”¹⁰⁶ More specifically, the Arizona bill, which was struck down, would have allowed prosecutors to seize a protest organizer’s property.¹⁰⁷

Recently, public officials, such as former Attorney General William Barr, have pushed for more draconian tactics by suggesting that federal

¹⁰¹ Capps, *supra* note 100; Sarah Macaraeg, *As Vehicle Attacks on Protests Mount, Tennessee Reckons With Legacy of Driver Immunity Bill*, MEM. COM. APPEAL (July 20, 2020, 7:00 AM), <https://www.commercialappeal.com/story/news/local/2020/07/20/driving-cars-through-protesters-grows-with-demonstrations/5322616002/> (A protester who had been struck by a driver while protesting stated “[p]oliticians have been laying the ground work to give citizens the green light to enact violence against protesters . . .”).

¹⁰² Capps, *supra* note 100.

¹⁰³ *States Rush to Pass Anti-Protester Laws*, *supra* note 97.

¹⁰⁴ Tom Miles, *U.N. Experts See ‘Alarming’ U.S. Trend Against Free Speech, Protest*, REUTERS (Mar. 30, 2017), <https://www.reuters.com/article/us-usa-rights-un/u-n-experts-see-alarming-u-s-trend-against-free-speech-protest-idUSKBN1712SG> (Synonymous with Justice Stevens *Claiborne* opinion, United Nation experts on freedom of peaceful assembly and expression responded that one individual’s violent behavior “does not strip other protesters of their right” to peacefully assemble.).

¹⁰⁵ John Loranger, *The First Amendment & Current State-Level Legislative Repression*, 21 CUNY L. REV. F. 19, 26 (2018).

¹⁰⁶ *Id.*

¹⁰⁷ Antonia Farzan, *‘Plan A Protest, Lose Your House’ Bill, SB 1142, Killed by Arizona House*, PHX. NEW TIMES (Feb. 27, 2017), <https://www.phoenixnewtimes.com/news/plan-a-protest-lose-your-house-bill-sb-1142-killed-by-arizona-house-9121181>.

charges should be brought against protesters.¹⁰⁸ Tennessee Governor Bill Lee signed into law a bill that makes it a felony for protesters to camp overnight on state property.¹⁰⁹ The newly classified “Class E Felony” will carry a sentence of up to six years imprisonment, as well as loss of voting rights and the right to carry a gun.¹¹⁰ Prior to the law’s enactment, protesters demonstrated day and night sleeping outside of the state capitol, and demanding an audience with Governor Bill Lee to discuss police brutality and defunding the police.¹¹¹ Lee defended the law by stating an interest in protecting property,¹¹² once again reminding us that the government values property more than it does black lives.¹¹³ Florida Governor Ron DeSantis recently tweeted his “bold” anti-protest legislation.¹¹⁴ The new Florida anti-protest legislation called “Combatting Violence, Disorder and Looting and Law Enforcement Protection” reads:

- I. New Criminal Offenses to Combat Rioting, Looting and Violence
 - A. Prohibition on Violent or Disorderly Assemblies: 3rd degree felony when 7 or more persons are involved in an assembly and cause damage to property or injury to other persons.
 - B. Prohibition on Obstructing Roadways: 3rd degree felony to obstruct traffic during an unpermitted protest, demonstration or violent or disorderly assembly; driver is NOT liable for injury or death caused if fleeing for safety from a mob.

¹⁰⁸ Michael Balsamo, Alanna D. Richer & Colleen Long, *Sedition Charge May Apply to Protest Violence; From the Courts*, ASSOCIATED PRESS (Sept. 17, 2020), <https://apnews.com/article/state-courts-violent-crime-arson-violence-crime-cbca8672a70f9f170a086a7a252a751e> (last visited Apr. 21, 2022).

¹⁰⁹ Sanya Mansoor, *New Tennessee Law Severely Sharpens Punishments for Some Protesters, Potentially Endangering Their Voting Rights*, TIME (Aug. 23, 2020), <https://time.com/5882735/tennessee-law-protest-voting-rights-felony/>.

¹¹⁰ Kerri Bartlett, *Lee Sign Protest Bill in Law Despite Pushback Over Increased Penalty for Camping*, TENNESSEAN (Aug. 21, 2020), <https://www.tennessean.com/story/news/2020/08/21/lee-signs-protest-bill-into-law-despite-pushback/3409670001/>.

¹¹¹ Mansoor, *supra* note 109.

¹¹² *Id.*

¹¹³ The officer responsible for the shooting of Breonna Taylor during the execution of a “no-knock” warrant, which was intended for a narcotics raid, was charged. However, the officer was not charged with Ms. Taylor’s death; he was instead charged with “wanton endangerment” for firing into the neighboring apartment. *Breonna Taylor: Police Officer Charged But Not Over Death*, BBC NEWS (Sept. 23, 2020), <https://www.bbc.com/news/world-us-canada-54273317>.

¹¹⁴ Ron DeSantis (@GovRonDeSantis), TWITTER (Sept. 21, 2020, 1:29 PM), <https://twitter.com/GovRonDeSantis/status/1308095991183220736>.

2022]

COMMENT

1585

- C. Prohibition on Destroying or Toppling Monuments: 2nd degree felony to destroy public property during a violent or disorderly assembly.
- D. Prohibition on Harassment in Public Accommodations: 1st degree misdemeanor for a participant in a violent or disorderly assembly to harass or intimidate a person at a public accommodation, such as a restaurant.
- E. RICO Liability: RICO liability attaches to anyone who organizes or funds a violent or disorderly assembly.

II. Increased Penalties

- A. Mandatory Minimum Jail Sentence: Striking a law enforcement officer (including with a projectile) during a violent or disorderly assembly = 6 months mandatory minimum jail sentence.
- B. Offense Enhancements: Offense and/or sentence enhancements for: (1) throwing an object during a violent or disorderly assembly that strikes a civilian or law enforcement officer; (2) assault/battery of a law enforcement officer during a violent or disorderly assembly; and (3) participation in a violent or disorderly assembly by an individual from another state.

III. Citizen and Taxpayer Protection Measures

- A. No "Defund the Police" Permitted: Prohibits state grants or aid to any local government that slashes the budget for law enforcement services.
- B. Victim Compensation: Waives sovereign immunity to allow a victim of a crime related to a violent or disorderly assembly to sue local government for damages where the local government is grossly negligent in protecting persons and property.
- C. Government Employment/Benefits: Terminates state benefits and makes anyone ineligible for employment by state/local government if convicted of participating in a violent or disorderly assembly.
- D. Bail: No bond or bail until first appearance in court if charged with a crime related to participating in a violent or disorderly assembly; rebuttable presumption against bond or bail after first appearance.¹¹⁵

¹¹⁵ *Id.*; Governor Ron DeSantis Announces The "Combating Violence, Disorder And Looting And Law Enforcement Protection Act," FLA. GOVERNOR, <https://www.flgov.com/2020/09/21/governor-ron-desantis-announces-the-combating-violence-disorder-and-looting-and-law-enforcement-protection-act/> (last visited Apr. 2, 2022).

DeSantis tweeted that the law creates new criminal offenses and increases penalties for protest “*violence*.”¹¹⁶ Section I-B “Prohibition on Obstructing Roadways” makes it a felony to “obstruct traffic during an unpermitted protest” or demonstration,¹¹⁷ neither of which indicate a requirement of violence. The law instead purports to make it a felony to simply demonstrate on roadways.¹¹⁸ Among other things, the legislation seeks to immunize drivers who cause “injury or death” when “fleeing for safety from a mob.”¹¹⁹ This is an appalling move when considering the events that took place in the 2017 Charlottesville protests.¹²⁰ Furthermore, Section I-E extends RICO liability to protest organizers and funders.¹²¹ This Section ignores the possibility that protest organizers or funders intend to organize a peaceful protest that instead turns violent, perhaps due to violent law enforcement responses or unaffiliated third-party instigators, such as the case with Umbrella Man in Minneapolis.¹²² Additionally, the legislation also appears disapproving of local government attempts to “defund the police.”¹²³ DeSantis has received considerable pushback and condemnation, not just from groups such as the American Civil Liberties Union¹²⁴ but also from Florida law enforcement.¹²⁵ In fact, the new anti-protest laws by DeSantis are being dubbed the harshest in the United States.¹²⁶

Perhaps the most alarming of the recent legislative restraints on protester rights is a growing dialogue encouraging the application of

¹¹⁶ DeSantis, *supra* note 114.

¹¹⁷ *Supra* note 115.

¹¹⁸ *See id.*

¹¹⁹ *Id.*

¹²⁰ Wamsley & Allyn, *supra* note 29.

¹²¹ *Supra* note 115.

¹²² Peiser, *supra* note 1.

¹²³ *Supra* note 115.

¹²⁴ Am C.L. Union, *ACLU of Florida Condemns Gov. DeSantis' Proposed Anti-Protest Bill*, ACLU FLA. (Sept. 21, 2020), <https://www.aclufl.org/en/press-releases/aclu-florida-condemns-gov-desantis-proposed-anti-protest-bill>.

¹²⁵ Jack Evans, Kathryn Varn, Tony Marrero & Dan Sullivan, *DeSantis' Protest Bill Questioned by Tampa Bay's Top Cops, Not Just 'Far Left'*, TAMPA BAY TIMES (Sept. 23, 2020), <https://www.tampabay.com/news/crime/2020/09/23/desantis-protest-bill-questioned-by-tampa-bays-top-cops-not-just-far-left/>.

¹²⁶ Desiree Stennett, Monivette Cordeiro, Katie Rice & Grace Toohey, *Florida Protest Laws Could Be Harshest in Nation Under DeSantis Proposal*, ORLANDO SENTINEL (Sept. 23, 2020), <https://www.orlandosentinel.com/news/florida/os-ne-desantis-protest-bill-opposition-20200923-ihsipkhwdncorouj4whycypss4-story.html>.

2022]

COMMENT

1587

sedition charges to protesters.¹²⁷ On a recent call with federal prosecutors, Attorney General Barr asked prosecutors to explore charging protesters with sedition,¹²⁸ amongst a list of other charges such as assaulting a federal officer, rioting, use of explosives, and racketeering.¹²⁹ Charging protesters with federal crimes, which transitions protesters from litigating liability in state courts to federal courts, has been described as an “attempt to intimidate” demonstrators and “to silence them.”¹³⁰

Federal and state level legislators are not the only ones impeding protester rights—protesters also find themselves restricted by city and local level officials. A protest permit ordinance in the city of Graham, North Carolina, sought to make protests on public property unlawful if organizers failed to obtain a permit, but also allowed high ranking law enforcement officers to deny said permit.¹³¹ The United States District Court for the Middle District of North Carolina granted a temporary restraining order suspending an anti-protest ordinance after civil rights groups, such as the ACLU and NAACP, filed a lawsuit arguing that the ordinance “violates the First Amendment’s prohibition against unreasonable and content-based time, place and manner restrictions,” as well as for being void for vagueness.¹³² The ACLU (North Carolina) specifically challenged the ordinance for placing “extreme burdens on the right to protest, including requiring a permit for all protests of two or more people, and placing restrictions on the ability of minors to protest.”¹³³

These are only a few examples of the most notable anti-protest bills as there are many more anti-protest bills that aim to diminish protester rights. The United States Protest Law Tracker lists a comprehensive

¹²⁷ Balsamo, *supra* note 108; Aruna Viswanatha & Sadie Gurman, *Barr Tells Prosecutors to Consider Charging Violent Protesters with Sedition*, WALL ST. J. (Sept. 17, 2020), https://www.wsj.com/articles/barr-tells-prosecutors-to-consider-charging-violent-protesters-with-sedition-11600276683?mod=hp_lead_pos7.

¹²⁸ See 18 U.S.C. § 2384.

¹²⁹ Katie Benner, *Barr Told Prosecutors to Consider Sedition Charges for Protest Violence*, N.Y. TIMES (Sept. 16, 2020), <https://www.nytimes.com/2020/09/16/us/politics/william-barr-sedition.html>.

¹³⁰ Balsamo, *supra* note 108.

¹³¹ Cole Villena, *Graham’s Anti-Protest Ordinance Temporarily Suspended after Civil Rights Groups File Lawsuit*, INDY WEEK (July 6, 2020, 2:31 PM), <https://indyweek.com/news/northcarolina/federal-judge-strikes-down-graham-anti-protest-ordinance/>.

¹³² *Id.*

¹³³ Citlaly Mora, *Court Blocks Enforcement of Graham’s Protest Ban Ordinance*, ACLU N.C. (July 6, 2020), <https://www.acluofnorthcarolina.org/en/press-releases/court-blocks-enforcement-grahams-protest-ban-ordinance>.

report of enacted state laws inhibiting various types of protests by creating or expanding liability.¹³⁴

B. *Trump Tweets Threats*

Legislators around the nation are not the only political leaders attempting to penalize Americans for exercising their fundamental right to protest. Former President Donald J. Trump has led the charge to criticize, threaten, and attempt to intimidate protestors. Time after time, Trump has spoken against the Black Lives Matter movement¹³⁵ and referred to the anti-police brutality movement—especially those in protest-heavy Seattle—as “domestic terrorists”¹³⁶ and “ugly anarchists,”¹³⁷ among other gross mischaracterizations.¹³⁸ Trump went as far as threatening to take control if Washington leaders failed to regain control of the area from protesters.¹³⁹ Since George Floyd’s death in May 2020, the former Trump administration’s crackdown on protesters led to more than 300 arrests for federal crimes, some of which were criticized as “politically motivated effort[s] to stymie demonstrators.”¹⁴⁰ In April 2017, President Trump issued Executive Order 13809¹⁴¹ that militarized local police departments with riot gear by revoking President Obama’s Executive Order 13688.¹⁴² A clear

¹³⁴ *US Protest Law Tracker*, ICNL.ORG, <https://www.icnl.org/usprotestlawtracker/?location=&status=enacted&issue=&date=&type=legislative> (last visited Apr. 21, 2021) (providing a comprehensive list of recently enacted, defeated, and pending laws that inhibit protester rights).

¹³⁵ See Phillip Bump, *Over and Over, Trump Has Focused on Black Lives Matter as a Target of Derision or Violence*, WASH. POST (Sept. 1, 2020, 4:22 PM), <https://www.washingtonpost.com/politics/2020/09/01/over-over-trump-has-focused-black-lives-matter-target-derision-or-violence/>.

¹³⁶ Benner, *supra* note 129.

¹³⁷ See Oliver Milman, *Trump Complains About ‘Ugly Anarchists’ as Police Continue Aggression on US Protesters*, GUARDIAN (June 11, 2020), <https://www.theguardian.com/us-news/2020/jun/11/trump-seattle-threats-protests-twitter-complaints>.

¹³⁸ See Bill Hutchinson, *Turning Point: Black Lives Matter Organizers Say Right-Wing Backlash Was Expected as Movement Grew*, ABC NEWS (Oct. 25, 2020, 10:00 AM), <https://abcnews.go.com/US/turning-point-black-lives-matter-organizers-wing-backlash/story?id=72863444> (referring to “BLM protesters as ‘terrorists,’ ‘Marxists,’ ‘left-wing radicals’ bent on destroying the country”).

¹³⁹ Milman, *supra* note 137.

¹⁴⁰ Balsamo, *supra* note 108.

¹⁴¹ See Exec. Order No. 13809, 82 Fed. Reg. 41499 (Aug. 28, 2017), <https://www.govinfo.gov/content/pkg/DCPD-201700590/pdf/DCPD-201700590.pdf>.

¹⁴² *Id.*; Exec. Order No. 13688, 80 Fed. Reg. 3451 (Jan. 16, 2015), <https://www.govinfo.gov/content/pkg/DCPD-201500033/pdf/DCPD-201500033.pdf>; See Eliav Lieblich & Adam Shinar, *The Case Against Police Militarization*, 23 MICH. J. RACE & L. 106, 124–125 (2017/2018).

2022]

COMMENT

1589

example of the grave impact of Trump's Executive Order 13809 was demonstrated in Portland, where one reporter who documented "violent and militarized police responses to protests in Portland for more than four years" noted that Portland Police met protester demands with "violent attempts to silence the protests."¹⁴³

Backed by anti-protest laws and ordinances, law enforcement officers are able to act with impunity and meet protesters, journalists, and observers with indiscriminate violence rather than the de-escalation methods utilized in Newark during its 2020 protests.¹⁴⁴ Some courts, including the Fifth Circuit in *Doe v. McKesson*, have proved to further curtail protester rights.¹⁴⁵

V. THE 5TH CIRCUIT'S *DOE V. MCKESSON* DECISION

When considering heightened legislative efforts to increase the criminal liability of protesters, the possibility to charge them with federal crimes like sedition, and officers acting with impunity to enforce those laws and ordinances that work against protesters, protesters often find themselves funneled into the federal court system to defend themselves.¹⁴⁶ *Doe v. McKesson* is the manifestation of such a scheme and further exemplifies negative blowback to protester rights.

On July 9, 2016, hundreds of protesters led by a Black Lives Matter organizer, Deray McKesson, took to the streets to protest the police shooting and killing of Alton Sterling, a black resident of Baton Rouge, Louisiana.¹⁴⁷ As a result of this protest, law enforcement officers in riot gear arrived on the scene to make arrests.¹⁴⁸ The tension escalated and led to protesters throwing water bottles and other objects at police officers.¹⁴⁹ "[A]n unidentified individual picked up a piece of concrete," or a similarly hard object, and threw it at officers on the scene.¹⁵⁰ The

¹⁴³ Doug Brown, *A Constitutional Crisis in Portland*, ACLU: NEWS & COMMENTARY (July 18, 2020), <https://www.aclu.org/news/criminal-law-reform/a-constitutional-crisis-in-portland/>.

¹⁴⁴ Vera Eidelman & Carl Takei, *The Response to Protest Against Police Brutality is Not More Brutality*, ACLU: NEWS & COMMENTARY (Jan. 3, 2020), <https://www.aclu.org/news/criminal-law-reform/the-response-to-protests-against-police-brutality-is-not-more-brutality/>.

¹⁴⁵ *See, e.g., Doe v. McKesson*, 945 F.3d 818 (5th Cir. 2019).

¹⁴⁶ Balsamo, *supra* note 108.

¹⁴⁷ Vaidya Gullapalli, *Decades-Old Protections for Protesters Are in Jeopardy*, APPEAL (Dec. 11, 2019), <https://theappeal.org/decades-old-protections-for-protesters-are-in-jeopardy/>.

¹⁴⁸ *McKesson*, 945 F.3d at 822.

¹⁴⁹ *Id.* at 823.

¹⁵⁰ *Id.*

concrete-like object struck an officer's face, causing him to sustain severe health problems including loss of teeth, a jaw injury, a head and brain injury, as well as lost wages and other compensable damages.¹⁵¹ The police officer ("Officer Doe") brought a lawsuit against the hashtag #BlackLivesMatter, Black Lives Matter, and the organizer of the protest, McKesson, alleging civil conspiracy, vicarious liability, and negligence.¹⁵²

The United States District Court for the Middle District of Louisiana dismissed Officer Doe's lawsuit on First Amendment grounds, concluding that the complaint failed to state a claim because Officer Doe failed to allege facts demonstrating that the defendant organizer "authorized, directed, or ratified specific tortious activity."¹⁵³ On appeal, however, the Fifth Circuit rejected the district court's conclusion and held that the officer's injuries were a foreseeable consequence stemming from an unlawful protest that would lead to an inevitable confrontation between protesters and police officers.¹⁵⁴ That holding contrasts with the long-standing Supreme Court precedent from *NAACP v. Claiborne Hardware Co.*, which held that First Amendment defenses to torts may be defeated only when the injuries sustained are the consequence of tortious activity authorized, directed, or ratified by the defendant in violation of a duty of care.¹⁵⁵

The logical implications of the Fifth Circuit's approach lead to the conclusion that organizers of a social justice protests may be held accountable for the tortious acts of unaffiliated individuals who are seemingly participating in protests, irrespective of their incongruent agendas. The possibility of unsuspecting protest organizers assuming such liability leads to the inference that organizers may be less likely to exercise their fundamental right to peacefully protest due to fear of liability for the actions of unknown antagonists. Given the recent social justice climate pertaining to police-related shootings of black and brown citizens as well as the immeasurable damages and injuries sustained in the summer of 2020 alone, as detailed above in Part II, this is an incredible cause for concern.

¹⁵¹ *Id.* For a definition of compensatory damages, see *Legal Information Institute*, CORNELL UNIV., https://www.law.cornell.edu/wex/actual_damages (last visited Apr. 21, 2022).

¹⁵² *Doe v. McKesson*, 945 F.3d 818, 824–25 (5th Cir. 2019).

¹⁵³ *Id.* at 828.

¹⁵⁴ *Id.* at 827.

¹⁵⁵ *Nat'l Ass'n for the Advancement of Colored People v. Claiborne Hardware Co.*, 458 U.S. 886, 915, 927 (1982).

2022]

COMMENT

1591

McKesson tackled the question of whether the actions of Deray McKesson, the protest organizer at the Baton Rouge protests, were protected by the First Amendment or whether he could be held liable under Louisiana tort law for injuries to an officer sustained during the protest.¹⁵⁶ The district court explained that the First Amendment prohibits a tort plaintiff from recovering damages from a defendant simply because of his or her association with another individual.¹⁵⁷ The district court ultimately dismissed Officer Doe's claims of liability because the Officer did not plead any facts that took McKesson's behavior outside the bounds of the protected First Amendment right to speech and association.¹⁵⁸

On appeal, a three-judge panel of the Fifth Circuit reversed,¹⁵⁹ concluding that McKesson was negligent by organizing and leading the demonstration because "he knew or should have known that the demonstration would turn violent."¹⁶⁰ The Court listed the elements of Louisiana's negligence law as including (1) plaintiff injury; (2) duty of care owed by defendant to plaintiff; (3) breach of said duty by the defendant; (4) defendant's conduct was a cause-in-fact; and (5) risk of harm was within the scope of duty breached.¹⁶¹ The Court then started its analysis by inferring McKesson's breach by stating that "[b]locking a public highway is a criminal act under Louisiana law."¹⁶² It then explained that Louisiana recognizes "a duty not to negligently cause a third party to commit a crime that is a foreseeable consequence of negligence" and found such a duty applicable.¹⁶³

¹⁵⁶ See *McKesson*, 945 F.3d at 825 (stating that the court would address all of officer Doe's theories of liability to determine which would take McKesson out of the purview of the First Amendment).

¹⁵⁷ *Doe v. McKesson*, 272 F. Supp. 3d 841, 847 (M.D. La. 2017) (quoting *Nat'l Ass'n for the Advancement of Colored People v. Claiborne Hardware Co.*, 458 U.S. 886, 918–19 (1982)).

¹⁵⁸ *Id.* at 853–854.

¹⁵⁹ *Doe v. McKesson*, 945 F.3d 818, 824–26 (5th Cir. 2019). The court concluded that Officer Doe's vicarious liability claim failed under Louisiana Civil Code article 2320, reasoning that Doe did not allege facts sufficient to support an inference that the unknown assailant performed continuous service for McKesson or was subject to his control. Doe's conspiracy claim similarly failed because Louisiana law requires an agreement between the parties and Doe did not plead facts sufficient to show McKesson colluded with the unknown assailant or knew of the attack and ratified it.

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 826.

¹⁶² See *id.* at 827 (citing to La. R.S. § 14.97 "Simple obstruction of a highway of commerce").

¹⁶³ *Id.* (finding that "McKesson owed Doe a duty not to negligently precipitate the crime of a third party").

The Fifth Circuit found that “a jury could plausibly find that a violent confrontation with a police officer was a foreseeable effect of negligently directing a protest.”¹⁶⁴ The Court explained that the intentional lawlessness of the demonstration should have apprised McKesson “that leading the demonstrators onto a busy highway was likely to provoke a confrontation between police and the mass of demonstrators.”¹⁶⁵ The Court explained that McKesson ignored the foreseeable risks of violence that his actions created and thus “failed to exercise reasonable care in conducting his demonstration.”¹⁶⁶ The Court continued that although “it may have been an unknown demonstrator who threw the object at Officer Doe,” McKesson’s actions in leading the demonstration “were the ‘but for’ causes of Officer Doe’s injuries.”¹⁶⁷ While it is foreseeable that police would be called to the scene because obstructing a highway under Louisiana law is a criminal act, it is arguably a stretch of foreseeability to find that violating the Louisiana law would lead to a *violent* confrontation, whereby a lone and unknown individual assaults an officer. Such an application of Louisiana’s highway obstruction law is similar to many of the proposed state laws aimed at curtailing protester rights.¹⁶⁸ Once the Fifth Circuit concluded that Officer Doe raised a plausible claim for relief under Louisiana’s negligence law, it turned to the district court’s conclusion that McKesson was protected by the First Amendment.¹⁶⁹

Citing *Claiborne*, the Court reasoned that “the First Amendment does not protect violence.”¹⁷⁰ The Court reasoned that McKesson’s First Amendment defense could be countered at the pleading stage simply by Officer Doe alleging “his injuries were one of the ‘consequences’ of ‘tortious activity,’ which itself was ‘authorized, directed, or ratified’ by McKesson in violation of his duty of care.”¹⁷¹ In other words, all Officer Doe needed to do was allege that his injuries resulted from McKesson

¹⁶⁴ *Id.* at 828.

¹⁶⁵ *Doe v. McKesson*, 945 F.3d 818, 827 (5th Cir. 2019).

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 828.

¹⁶⁸ *See, e.g., US Protest Law Tracker*, *supra* note 134.

¹⁶⁹ *McKesson*, 945 F.3d at 828.

¹⁷⁰ *Id.* (citing *Nat’l Ass’n for the Advancement of Colored People v. Claiborne Hardware Co.*, 458 U.S. 886, 916 (1982)).

¹⁷¹ *Id.* at 829 (citing *Nat’l Ass’n for the Advancement of Colored People v. Claiborne Hardware Co.*, 458 U.S. 886, 927 (1982)).

2022]

COMMENT

1593

leading people to obstruct the highway, which the Court stated it had already addressed under the negligence claim.¹⁷²

Despite McKesson's argument that this theory would hold him liable for acts of others even though he himself did not support the resulting violence, the Court found no First Amendment problem with holding McKesson "liable for injuries caused by a combination of his negligent conduct" and violent acts of others "that were foreseeable" because of the negligent conduct.¹⁷³ In doing so, the Court reasoned that it found no indication in *Claiborne* or any subsequent Supreme Court decisions that the Supreme Court intended to eliminate state negligence liability.¹⁷⁴ The Court ultimately concluded that the First Amendment did not bar Doe's negligence theory on the pleadings.¹⁷⁵ When considering the norms and values which may have influenced its decision, it does not come as a surprise that the Fifth Circuit ruled the way it did as it is arguably the most conservative appellate court in the country.¹⁷⁶ Moreover, Fifth Circuit judges are reportedly "more likely to prioritize police power over citizens' rights and liberties."¹⁷⁷

The three-judge panel did not come to a unanimous decision. In his dissent, Judge Don Willet—nominated by Donald J. Trump¹⁷⁸—pointed out that he originally agreed with the court's opinion but had a "judicial

¹⁷² *Id.* at 829 ("Our discussion above makes clear that Officer Doe's complaint does allege that McKesson directed the demonstrators to engage in the criminal act of occupying the public highway, which quite consequentially provoked a confrontation between the Baton Rouge police and the protesters, and that Officer Doe's injuries were the foreseeable result of the tortious and illegal conduct of blocking a busy highway.").

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Doe v. McKesson*, 945 F.3d 818, 832 (5th Cir. 2019).

¹⁷⁶ *See, e.g.*, Madison Alder, *Seat on Conservative Fifth Circuit Tough for Trump to Fill*, BLOOMBERG L. (May 20, 2020, 4:50 AM), <https://news.bloomberglaw.com/us-law-week/seat-on-conservative-fifth-circuit-tough-for-trump-to-fill> (stating that "[t]he Fifth Circuit, which covers Mississippi, Louisiana, and Texas, is often considered one of the most conservative courts in the country"); Andreas Broscheid, *Comparing Circuits: Are Some U.S. Courts of Appeals More Liberal or Conservative Than Others?*, 45 LAW & SOC'Y REV. 171, 172 n.1 (2011) (noting that the perception that different circuits represent different political/legal cultures may be related to geographic location and that the Fifth Circuit Court of Appeals is located in the Deep South).

¹⁷⁷ *See, e.g.*, Andrew Chung et al., *Special Report: Shot by Police, Thwarted by Judges and Geography*, REUTERS (Aug. 25, 2020, 6:24 PM), <https://www.reuters.com/article/us-usa-police-immunity-variations-specia/special-report-shot-by-police-thwarted-by-judges-and-geography-idUSKBN25L168> (stating that judges on the Fifth Circuit "habitually follow precedent that favor police").

¹⁷⁸ Federal Judicial Center, *Willet, Don R.*, <https://www.fjc.gov/history/judges/willet-don-r> (last visited Apr. 21, 2022).

change of heart.”¹⁷⁹ Judge Willett doubted that Louisiana law imposed a duty of care on McKesson¹⁸⁰ “to protect him from the criminal acts of others.”¹⁸¹ He further stated that he would have certified this “threshold—and potentially dispositive—issue to the Supreme Court of Louisiana,” as the United States Supreme Court later did.¹⁸² Judge Willett explained that if Louisiana state law does not impose liability and there is no negligence, then there is no case and the First Amendment is not implicated.¹⁸³ Alternatively, he explained that “[e]ven assuming that McKesson could be sued under Louisiana law for ‘negligently’ leading a protest at which someone became violent,” *Claiborne* stipulated that his “‘negligent’ speech is also constitutionally protected” under the First Amendment absent a clear intent and likelihood to spark immediate violence.¹⁸⁴ Judge Willett concluded that the “novel ‘negligent protest’ theory of liability seems incompatible with the First Amendment.”¹⁸⁵

The case proved even more contentious when McKesson petitioned for an en banc rehearing as the court was deadlocked at eight judges in favor of rehearing and eight against.¹⁸⁶ Similar to Judge Willett’s dissenting opinion, Judge James Ho’s concurring opinion in the denial of en banc rehearing indicated that Officer Doe, in his official capacity as a law enforcement officer, assumed the risk of injury.¹⁸⁷ Judge Ho further noted that *had* McKesson raised the Professional Rescuer Doctrine,¹⁸⁸ the court would not have had to address the First Amendment issue.¹⁸⁹ The Fifth Circuit’s *Doe v. McKesson* decision has

¹⁷⁹ *McKesson*, 945 F.3d at 835 (Willett, J., dissenting).

¹⁸⁰ *Id.* at 835–37.

¹⁸¹ *Id.* at 835–36.

¹⁸² *Id.* at 836, 839; *infra*, note 204.

¹⁸³ *Doe v. McKesson*, 945 F.3d 818, 838 (5th Cir. 2019).

¹⁸⁴ *Id.* at 840.

¹⁸⁵ *Id.* at 842.

¹⁸⁶ *See Doe v. McKesson*, 947 F.3d 874, 875 (5th Cir. 2020) (en banc rehearing).

¹⁸⁷ *Id.* at 875 (Ho, J., concurring in the denial of rehearing en banc) (stating “police officers . . . assume the risk that they may be injured in the line of duty.”); *see also McKesson*, 945 F.3d at 846 (Willett, J., dissenting) (stating “Officer Doe put himself in harm’s way to protect his community . . .”).

¹⁸⁸ *See, e.g., Scivicque v. Sunshine State Dairy Farms, LLC*, No. 11-1883, 2012 U.S. Dist. LEXIS 45765, at *7–8 (E.D. La. Mar. 28, 2012) (“The professional rescuer doctrine, sometimes referred to as the ‘fireman’s rule,’ states that a professional rescuer who is injured in the performance of his duties assumes the risk of such injury and is thus not entitled to damages.”).

¹⁸⁹ *McKesson*, 947 F.3d at 876 (en banc rehearing) (“Had McKesson raised this doctrine at an earlier stage in the suit, there would have been no need to answer the more challenging First Amendment questions that now animate his petition for rehearing en banc. But he did not.”).

2022]

COMMENT

1595

since received a considerable amount of attention for fear of its potential major implications on protester rights and on the Black Lives Matter movement.¹⁹⁰

VI. U.S. SUPREME COURT ON *DOE V. MCKESSON* & IMPLICATIONS ON PROTESTER RIGHT

McKesson petitioned the Supreme Court for certiorari on the central argument that “[t]he Fifth Circuit’s rule defies *Claiborne* and contravenes bedrock First Amendment principles.”¹⁹¹ On November 2, 2020, the U.S. Supreme Court granted certiorari and reviewed the Fifth Circuit’s *McKesson* decision.¹⁹² The Court specifically addressed the question of whether “the theory of personal liability adopted by the Fifth Circuit violates the First Amendment.”¹⁹³ The Supreme Court ultimately vacated the Fifth Circuit’s judgment as well as remanded the case for further proceeding after explaining that the Court of Appeals should have certified the dispositive questions for state court review.¹⁹⁴ Similar to Judge Willett’s dissent, the Court reasoned that the constitutional issue is only implicated “if Louisiana law permits recovery under these circumstances in the first place.”¹⁹⁵

The Court explained that the state law is too uncertain to address the questions presented and offered two reasons why the state certification is appropriate.¹⁹⁶ The first pertains to the duty element under negligence, which the Court noted requires consideration of “various moral, social, and economic factors” as well as “fairness,” “historical development of precedent,” and the evolution of society and its institutions.¹⁹⁷ The Court indicated that such considerations, which are meant for the states, are “particularly gratuitous” when rendered by a federal court.¹⁹⁸ The second reason the Court emphasizes that state

¹⁹⁰ See, e.g., Adam Liptak, *Violent Protests and Free Speech: Who’s to Blame for an Officer’s Injuries?*, N.Y. TIMES (Dec. 9, 2019), <https://www.nytimes.com/2019/12/09/us/politics/supreme-court-deray-mckesson.html> (stating that the Fifth Circuit’s decision alarmed civil rights lawyers and experts on free speech); see generally Tasnim Motala, *‘Foreseeable Violence’ & Black Lives Matter: How McKesson Can Stifle a Movement*, 73 STAN. L. REV. ONLINE 61 (2020).

¹⁹¹ Brief for Petitioner at 13, *McKesson v. Doe*, 141 S. Ct. 48 (2020) (No. 19-1108), 2020 U.S. LEXIS 5192.

¹⁹² See generally *McKesson v. Doe*, 141 S. Ct. 48 (2020).

¹⁹³ *Id.* at 50.

¹⁹⁴ *Id.* at 50–51.

¹⁹⁵ *Id.* (emphasis added).

¹⁹⁶ *Id.* at 50–51.

¹⁹⁷ *Id.* at 51.

¹⁹⁸ *McKesson v. Doe*, 141 S. Ct. 48, 51 (2020).

court certification is appropriate is that it would “ensure that any conflict in this case between state law and the First Amendment is not purely hypothetical.”¹⁹⁹ The Court’s opinion, admonishing the Fifth Circuit’s expansion of state tort law without first knowing whether the state court would want its tort law read so expansively,²⁰⁰ can be fairly read as a way to avoid the First Amendment issues. The Court left open the First Amendment question but vacated the Fifth Circuit’s judgment and remanded for further proceeding.²⁰¹

By vacating the Fifth Circuit’s *Doe v. McKesson* decision, the Supreme Court avoided a decision that many feared could “have dismantled civil rights era Supreme Court precedent safeguarding the First Amendment right to protest.”²⁰² Representatives of the ACLU and McKesson’s legal team credited the Supreme Court with recognizing the important First Amendment issues at stake.²⁰³ But, as the Court recognized in its decision, state certification procedures can “prolong the dispute and increase the expenses incurred by the parties” thus signaling that possible challenges may lie ahead.²⁰⁴ Accordingly, it is important that a final decision is rendered sooner than later, if not in consideration of the parties interests, then certainly because there are great factors implicated by the uncertainty of whether the state tort law inhibits fundamental rights to protest within the Fifth Circuit.²⁰⁵

In accordance with the Supreme Court’s decision, it is likely that the Fifth Circuit will certify a question regarding the application of the state tort law, and the Louisiana Supreme Court will rule on whether its

¹⁹⁹ *Id.* (warning that heightened attention is warranted when a federal court is asked to invalidate a state’s law).

²⁰⁰ *See id.* (“[T]he Fifth Circuit should not have ventured into so uncertain an area of tort law—one laden with value judgments and fraught with implications for First Amendment rights—without first seeking guidance on potentially controlling Louisiana law from the Louisiana Supreme Court.”).

²⁰¹ *Id.* at 51; *see also* Brent Kendall & Jess Bravin, *U.S. News: Court Throws Out Prison, Protest Cases*, WALL ST. J., Nov. 3, 2020, at A3, <https://plus.lexis.com/document?crd=5e2a4aa6-69dd-478f-b692-e3adb3013af9&pddocfullpath=%2Fshared%2Fdocument%2Fnews%2Furn%3AcontentItem%3A616R-DHB1-JC1X-701M-00000-00&pdcontentcomponentid=280015&pdalertresultid=3036908265&pdalertprofileid=0ca96667-1e4c-4408-b2de-fc9e2702f491&pdmfid=1530671&pdisurlapi=true&cbc=0> (stating the court avoided the First Amendment issue).

²⁰² *SCOTUS Vacates Decision Holding Protest Organizer Liable for Injuries Caused by Unidentified Attendees in First Amendment Case*, AM. C.L. UNION (Nov. 2, 2020), <https://www.aclu.org/press-releases/scotus-vacates-decision-holding-protest-organizer-liable-injuries-caused-unidentified>.

²⁰³ *Id.*

²⁰⁴ *McKesson v. Doe*, 141 S. Ct. 48, 51 (2020).

²⁰⁵ *See id.*

2022]

COMMENT

1597

law permits liability under such circumstances. If the Louisiana Supreme Court takes an expansive view similar to the Fifth Circuit ruling that there can be liability in this area, McKesson could challenge such a ruling, and potentially go back to the U.S. Supreme Court and argue that such a decision violates the First Amendment. If the Louisiana Supreme Court disagrees with the Fifth Circuit's interpretation of its tort law, the Fifth Circuit will most likely affirm the state court's decision as federal courts are to defer to state court interpretation of state laws. It is important to note, however, as the Supreme Court did, that "[c]ertification is by no means 'obligatory' merely because state law is unsettled."²⁰⁶ Despite the many uncertainties in this case, what is certain is that—against the backdrop of widespread protests following the killing of George Floyd and others, statutes and ordinances enacted in response to limit protester rights across the nation, and even more recent bizarre protests on Capitol Hill²⁰⁷—the Fifth Circuit's *Doe v. McKesson* decision promises to spur similar litigation in the future.²⁰⁸

If the Fifth Circuit's decision is reinstated and the same or similar issue arises in another jurisdiction, which is particularly likely because of the laws that have been enacted over the summer to limit protester rights, such a decision could serve as guidance for other courts. The ACLU's Legal Director, David Cole, expressed concerns about the Fifth Circuit's decision by stating that "[i]f the law had allowed anyone to sue leaders of social justice movements over the violent actions of others . . . there would have been no civil rights movement."²⁰⁹ Umbrella Man, an individual unaffiliated with the BLM movement seeking to incite violence at protests, is just one of many unaligned riot inciters²¹⁰ who threaten to turn otherwise peaceful protests violent. Conversely, absent

²⁰⁶ *Id.* at 50–51 (citing *Lehman Brothers v. Schein*, 416 U. S. 386, 391 (1974)). The Court interpreted LA. SUP. CT. R. 12, §§ 1–2 (2019) to authorize federal courts of appeals the discretion to “certify dispositive questions of Louisiana law on their own accord or on motion of a party” where there is absence of clear controlling precedents.” *Id.*

²⁰⁷ See generally Tina Nguyen & Daniel Lippman, *How a Sparse Protest Became a Capitol Hill Riot*, POLITICO (Jan. 6, 2021, 7:52 PM), <https://www.politico.com/news/2021/01/06/how-capitol-hill-riots-started-455654>.

²⁰⁸ First Amendment advocates and the ACLU “assert that upholding the Fifth Circuit could result in chilling the right to assemble and petition by opening the door to nuisance lawsuits against protest leaders for injuries they did not cause.” Tony Mauro, *Nationwide Protests May Resound in Supreme Court First Amendment Case*, NAT'L. L. J. (June 9, 2020, 1:15 PM), <https://www.law.com/nationallawjournal/2020/06/09/nationwide-protests-may-resound-in-supreme-court-first-amendment-case/?slreturn=20201015000400>.

²⁰⁹ Liptak, *supra* note 190.

²¹⁰ See, e.g., Hutchinson, *supra* note 138 (citing story of apparently white women amidst a peaceful protest dressed in black and tagging “BLM” on storefronts).

the Fifth Circuit's *McKesson* decision, perhaps the implications of *not* disincentivizing protesters or organizers from engaging in certain activities lead to possible riot-like behavior similar to the recent riot and storming of Capitol Hill.²¹¹

VII. CONCLUSION

The U.S. Supreme Court's ruling on the matter tips the balance in favor of protecting First Amendment rights as it pertains to protesters and protest organizers, but much work remains to be done in the legal system to wipe the blood of slain lives from the pavement. Painting major city streets in yellow paint reading "BLACK LIVES MATTER" is preferable to painting those same streets with black blood. However, more systemic changes are needed—as opposed to performative acts—to address legislative curtailment of protester rights, law enforcement acts of impunity, and to provide proper judicial recourse rather than courts unjustly placing liability on unsuspecting protest organizers. *McKesson* highlights how tort law and criminal law can be weaponized to perpetuate systemic inequalities.²¹² One may assume *McKesson* would apply equally to *any* protest violence, whether it be a BLM or MAGA protest, but the reality is socio-economic barriers play a role in a protester's decision about whether he or she is willing to risk the cost of downstream liability.²¹³

U.N. experts have said there was "no such thing as a violent protest, only violent protesters."²¹⁴ Independent U.N. experts on freedom of peaceful assembly and expression have stated that "[o]ne person's decision to resort to violence does not strip other protesters of their right to freedom of peaceful assembly . . ."²¹⁵ It is imperative that the judicial system treats *McKesson* with the appropriate level of gravity as it threatens to hinder protester rights—a vehicle historically used as a means of social and political reform, not to mention it threatens to

²¹¹ See generally Nguyen, *supra* note 207.

²¹² See Motala, *supra* note 190, at 75 ("[F]rom police officers who brutalize members of the Black community, to state legislators who pass legislation to criminalize protest tactics, to law enforcement officers who again employ military weapons and brutal force against predominantly Black protesters because they are opposed to their message and perceive them as a threat. And now *McKesson* introduces an additional element, where police officers and third parties can further sanction protesters, holding them liable for simply being at a protest where someone was harmed.").

²¹³ See *id.* at 76. (stating that "the costs of an open-ended liability regime that could potentially bankrupt individuals and organizations might be too high for protesters, particularly groups that are already under-resourced").

²¹⁴ Miles, *supra* note 104.

²¹⁵ *Id.*

2022]

COMMENT

1599

further marginalize and oppress those in society who are most vulnerable. As explained above in Part III, progress has historically required social upheaval that calls out injustice, and thus, future progress necessitates freedom of expression, *not* stifling such an expression. As one legal scholar sagaciously expressed, “allowing dissidents to expound their views . . . results in a release of energy, a lessening of frustration, and a channeling of resistance into courses consistent with law and order. It operates, in short, as a catharsis throughout the body politic.”²¹⁶

²¹⁶ Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 885 (1963).