POLICING PROTEST: PROTECTING DISSENT AND PREVENTING VIOLENCE THROUGH FIRST AND FOURTH AMENDMENT LAW

ALICIA A. D'ADDARIO*

I.
INTRODUCTION

In 1999, clashes between police and protesters at the World Trade Organization (WTO) meetings in Seattle made national news with images of tear gas and smashed windows.[1] Seattle police tried to maintain order by establishing no-protest zones, forcefully dispersing protesters, and conducting mass arrests.[2] These law enforcement tactics were reminiscent of notorious police excesses against protesters during the 1960s, when dogs and fire hoses were turned on civil rights demonstrators in the South, and of the Chicago police's attack against demonstrators and bystanders alike during the 1968 Democratic Convention.[3] The Seattle events marked the beginning of the newest chapter of increasingly harsh police responses to protesters.

In the years since the Seattle demonstrations, violent clashes between police and antiglobalization demonstrators have continued. Perhaps the worst abuses occurred at the 2003 Free Trade Area of the Americas ministerial conference in Miami.[4] Police dispersed demonstrators by firing tear gas, rubber bullets, and concussion grenades; randomly arrested people who simply looked like protesters; and generally harassed and intimidated demonstrators.[5] One Miami judge who attended the protests commented that he saw police commit at least twenty felonies.[6]

---

* New York University Fellow, Equal Justice Initiative of Alabama. J.D., New York University School of Law, 2005. I would like to thank Naomi Sunshine, Mari Bonthuis, Sam Brooke, and Sarah MonPere for their insightful and helpful comments on various drafts, and also the entire editorial staff of the *New York University Review of Law & Social Change* for their hard work on this article.

1. *See, e.g.*, David Postman, Jack Broom & Warren King, *Clashes, Protests Wrack WTO*, SEATTLE TIMES, Nov. 30, 1999, at A1.

2. *See id.*; Duff Wilson, *Free-Speech Rights vs. Protest Ban*, SEATTLE TIMES, Dec. 1, 1999, at A15.

3. Todd Gitlin, *From Chicago to Seattle*, NEWSWEEK, Dec. 13, 1999, at 2.

4. *See NOW with Bill Moyers: Criminalizing Dissent—Aftermath of free trade protests in Miami* (PBS television broadcast Feb. 27, 2004), *available at* http://www.pbs.org/now/transcript/transcript309_full.html.

5. *Id.*; Carolyn Salazar, *Find Truth About Police, Panel Told*, MIAMI HERALD, Jan. 16, 2004, at 3B.

6. Amy Driscoll, *Judge: I Saw Police Commit Felonies*, MIAMI HERALD, Dec. 20, 2003, at

The events in Seattle and Miami show the significant tension that can arise in policing a democratic society. Police are expected to balance two potentially conflicting goals while monitoring demonstrations—protecting protesters' right to freedom of expression, while simultaneously maintaining order for the safety of the protest targets and society as a whole. Police may face hostility from demonstrators who are suspicious about the role that law enforcement plays at protests. The police themselves may also view demonstrators with hostility, both because the protesters' views are often outside the mainstream and because protesters may make maintaining order more difficult.[7]

In contrast to the tumultuous protests in Seattle and Miami, a large antiwar rally held in New York on March 20, 2004 encountered few problems.[8] Police

---

1B. In addition to the incidents in Seattle and Miami, two prominent examples of problems with protest policing have occurred recently in New York City. As the second war in Iraq approached, an antiwar protest movement emerged in cities around the world. While antiwar demonstrations in most cities did not encounter any harsh police response, New York City police were frequently less accommodating to dissent. *See, e.g.*, CHRISTOPHER DUNN, ARTHUR EISENBERG, DONNA LIEBERMAN, ALAN SILVER & ALEX VITALE, N.Y. CIVIL LIBERTIES UNION, ARRESTING PROTEST 1, 23–24 (2003) [hereinafter ARRESTING PROTEST] (describing NYCLU legal challenges to police's pre-demonstration containment tactics and constraints during antiwar rally). During an antiwar rally that took place on February 15, 2003, police did not allow demonstrators to march anywhere in the city, which created tension with demonstrators. *Id.* at 3–6, 25. On the day of the event, protesters had difficulty traveling to or from the rally site because many streets were closed by police. *Id.* at 7–10. Once at the demonstration site, police rigidly used metal barricades to enforce restrictions on movement. The police also used horses, batons, and pepper spray to disperse crowds of demonstrators. *Id.* at 11–16, 19–20. As a result, thousands did not even make it to the demonstration, and some were injured or arrested while attempting to get there. *Id.* at 1, 11–16.

More recently, hundreds of thousands of people attended protests against the policies of President Bush's administration during the Republican National Convention in New York City at the end of August 2004. Tom Robbins & Jennifer Gonnerman, *Streets of Rage*, VILLAGE VOICE, Sept. 7, 2004, at 20. While the vast majority of demonstrations occurred without incident, police at times employed indiscriminate mass arrest tactics against peaceful protesters, which swept up demonstrators and bystanders alike. *See id.* at 28–29. *See also* Robert Polner, *Cuffed Bystanders: We're Not Criminals*, NEWSDAY, Sept. 4, 2004, at A6 (featuring individual protesters' stories of arrest). Many of these people were held for excessive periods of time, effectively preventing them from participating in other demonstrations until the Convention was over. Susan Saulny & Diane Cardwell, *Facing Fine, City Frees Hundreds of Detainees*, N.Y. TIMES, Sept. 3, 2004, at P1. After finding that the demonstrators were detained for excessively long periods, a state judge ordered the city to release them, and then held the city in contempt when it did not comply. *Id.* Of the 169 people who provided information to the New York Civil Liberties Union regarding how long they were detained, 111 were held longer than the twenty-four hours permitted under New York law, and fifty-eight were held over forty hours. CHRISTOPHER DUNN, DONNA LIEBERMAN, PALYN HUNG, ALEX VITALE, ZAC ZIMMER, IRUM TAQI, STEVE THEBERGE & UDI OFER, N.Y. CIVIL LIBERTIES UNION, RIGHTS AND WRONGS AT THE RNC: A SPECIAL REPORT ABOUT POLICE AND PROTEST AT THE REPUBLICAN NATIONAL CONVENTION 34 (2005).

7. *See* Donatella della Porta & Herbert Reiter, *Introduction: The Policing of Protest in Western Democracies* [hereinafter della Porta & Reiter, *Introduction*], *in* POLICING PROTEST: THE CONTROL OF MASS DEMONSTRATIONS IN WESTERN DEMOCRACIES 1, 14 (Donnatella della Porta & Herbert Reiter eds., 1998) [hereinafter POLICING PROTEST] ("The need to take on-the-spot decisions about whether to intervene or not makes policemen develop stereotypes about people and situations perceived as creating trouble or representing a danger. . . . [These stereotypes] become a kind of guideline for police intervention.").

8. *See* Stauber v. City of New York, No. 03 Civ. 9162, 2004 WL 1593870, at *7 (S.D.N.Y.

negotiated with demonstrators beforehand to try to take both parties' goals into account[9]; demonstrators' freedom of movement was relatively unrestricted[10]; police made only four arrests[11]; and both organizers and police viewed the event as a success.[12] This example shows that by adopting a style of policing that emphasizes accommodation and flexibility over rigid enforcement, police can create a more favorable atmosphere for interacting with protesters.

In order to influence police to adopt less confrontational tactics, demonstrators often employ constitutional law.[13] Police tactics at the 1999 WTO protests in Seattle, as well as at numerous other protests, have been the subject of legal challenges.[14] While the law's ability to influence police behavior on the

---

July 16, 2004).

9. *Stauber*, 2004 WL 1593870, at *7.

10. *Id.*

11. Shaila K. Dewan, *After Gentler Tactics, A Peaceful Antiwar Protest*, N.Y. TIMES, Mar. 22, 2004, at B3 [hereinafter Dewan, *After Gentler Tactics*].

12. *Id.*

13. Other legal restrictions on police exist. Internal police regulations are much more detailed than constitutional principles, but these rules are shaped mainly by constitutional law on the one hand and the best interests of the police department on the other. Civilian complaint review boards also review accusations of police misbehavior. However, the sanctions available under either of these systems are usually merely internal ones. Statutory restrictions on police behavior also exist, but because of the political popularity of being tough on crime, these are not likely to be very restrictive. General state tort law, particularly negligence, may sometimes be employed, but is always subject to a defense of legal justification because of the special powers given to police. *See* ISIDOR SILVER, POLICE CIVIL LIABILITY § 1.07[5], at 1–53 (2003) (explaining the justification defense as one where "the law grants a certain authority or privilege to the police to arrest, to detain for a short period, and to commit technical batteries to facilitate an arrest or to perform other functions") (internal citations omitted). Constitutional law provides many bedrock restrictions on police action and, because of limitations on other remedies, will continue to be the main restriction on police behavior. *See* Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 379–80 (1974) (arguing that subconstitutional law cannot provide adequate restraints on police behavior); MICHAEL AVERY, DAVID RUDOVSKY & KAREN M. BLUM, POLICE MISCONDUCT: LAW AND LITIGATION § 6:22 (3d ed. 1996) (noting that negligence can sometimes be easier to prove than a constitutional tort).

14. The Seattle protest has been the subject of a class action. *See* Complaint, Hickey v. Seattle, No. C00-1672P (W.D. Wash. Apr. 12, 2001), http://www.tlpj.org/briefs/wto_amended_complaint.pdf. In December 2003, a district court judge ruled that police had no probable cause to arrest 150 people outside the "no protest zone." *See* Order on Cross Motions for Summary Judgment at 2, Hickey v. Seattle, No. C00-1672P (W.D. Wash. Dec. 29, 2003), http://www.tlpj.org/briefs/hickey_ruling_122103.pdf [hereinafter *Hickey* Order]. The constitutionality of the "no protest zone" is being appealed to the Ninth Circuit. *See* Plaintiffs-Appellants' Opening Brief, Hickey v. Seattle, No. 02-36027 (9th Cir. Jan. 6, 2003), http://www.tlpj.org/briefs/wto_brief_1-6-03.htm [hereinafter *Hickey* Brief]. The New York protest gave rise to civil actions seeking damages and injunctive relief based on specific police department tactics. *See* Complaint at 3, Conrad v. New York, No. 03 Civ. 9163 (S.D.N.Y. Nov. 19, 2003), http://www.nyclu.org/rnc_complaint_con_111903.html; Complaint at 3, Gutman v. New York, No. 03 Civ. 9164 (S.D.N.Y. Nov. 19, 2003), http://www.nyclu.org/rnc_complaint_gut_111903.html; Complaint at 3, Stauber v. New York, No. 03 Civ. 9162 (S.D.N.Y. Nov. 19, 2003), http://www.nyclu.org/rnc_complaint_stb_111903.html. In July 2004, a district court judge ruled that three of those four tactics are unconstitutional. *Stauber*, 2004 WL 1593870, at *33 (granting injunctive relief to enjoin police from (1) closing streets at demonstration sites without providing information about alternate means of access, (2) using "pens" to restrict access to demonstrations, and (3) searching

ground has limits, legal restrictions—derived from constitutional protections and enforced by courts—can increase the need to account for police's actions, thereby raising the cost of the challenged practice both to individual officers and the police department as a whole.[15] To the extent possible, the legal limits on police actions at demonstrations should encourage a style of policing that is less likely to lead to violent confrontations. While police need discretion to make on-the-spot determinations about what actions are necessary, it is essential for our democracy that protecting protesters' free speech is a prominent part of this calculation.

Current jurisprudence does not accomplish these goals. Legal challenges to protest policing often include First[16] or Fourth Amendment[17] claims. The First Amendment embodies a strong protection of free speech and a concern for the chilling effect that police tactics can have on speech.[18] The Fourth Amendment generally protects citizens from aggressive police tactics by placing limitations on when it is permissible for police to use force or make arrests.[19] These amendments should work together to protect demonstrators, but instead the case law demonstrates a profound tension between them. Courts have generally treated the two amendments in isolation, often ignoring First Amendment analysis in favor of Fourth Amendment analysis. While police engaged in criminal law enforcement generally have wide discretion under the Fourth Amendment, the First Amendment protection of speech makes such discretion problematic in the protest context. In this article, I argue that in order to encourage less confrontational policing styles at demonstrations and protect the right to dissent, legal analysis of police actions at public protests should not be limited to the Fourth Amendment. Instead, the analysis must include robust consideration of the First Amendment values involved, especially the chilling effect that such conduct can have on the free exercise of political expression.

---

demonstrators' bags without individualized suspicion). There are already two lawsuits regarding police tactics at the Republican National Convention protests, which challenge the mass arrests, length and conditions of detention, and fingerprinting of protesters during that event. *See* First Amended Complaint at 5, Schiller v. City of New York, 04 Civ. 07922 (S.D.N.Y. Oct. 7, 2004), http://www.nyclu.org/pdfs/rnc_lawsuit_complaints_WTC.pdf; Complaint at 3, Dinler v. City of New York (S.D.N.Y. Oct. 7, 2004), http://www.nyclu.org/pdfs/RNC_lawsuit_complaint2.pdf.

15. *See* P.A.J. Waddington, *Controlling Protest in Contemporary Historical and Comparative Perspective, in* POLICING PROTEST, *supra* note 7, at 119 (distinguishing between "on-the-job trouble"—the difficult encounters or incidents police often face—and "in-the-job trouble"—the need to justify actions to the police or the criminal justice system—and noting that police generally seek to avoid both kinds of trouble).

16. "Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble . . . ." U.S. CONST. amend I.

17. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend IV.

18. *See infra* Part II.

19. *See infra* Part III.

In Part II, I examine the protection of political dissent under the First Amendment and the problem of chilling effects. In Part III, I discuss the limitations placed on police by the Fourth Amendment in the context of protests and conclude that the Fourth Amendment allows police significant discretion, which has proven inadequate to protect the free speech interests of demonstrators. In Part IV, I analyze the ways in which the Supreme Court has treated the interaction of the First and Fourth Amendments, including the deterioration of the requirement that the Fourth Amendment be applied with "scrupulous exactitude" when First Amendment concerns are implicated. In Part V, I explore the manner in which lower federal courts have applied the First and Fourth Amendments to protesters and argue that courts have failed to consider the interaction of the two amendments. In Part VI, I suggest a model for a legal analysis of protest cases that takes into account both the First Amendment and the Fourth Amendment. Finally, in Part VII, I examine two styles of protest policing—negotiated management and escalated force—and conclude that negotiated management is preferable for both speech and policing because it is less likely to lead to violence. Thus, I conclude that a jurisprudence that encourages less confrontational policing by considering the First and Fourth Amendments in concert would also have positive practical consequences.

II.
PROTECTION OF POLITICAL SPEECH UNDER THE FIRST AMENDMENT IS VERY BROAD AND INCORPORATES CONCERN ABOUT CHILLING EFFECTS

The constitutional protection of freedom of speech provides an important reason to adopt a less confrontational style of policing demonstrations. The First Amendment embodies both a strong protection of freedom of speech and a concern about chilling effects on speech. These concerns do not disappear when demonstrators engage in illegal acts.

In *Mills v. Alabama*,[20] Justice Black noted that "[w]hatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs."[21] This protection is not limited to uncontroversial speech that has no possibility of leading to conflict or even violence; rather, it extends to offensive language[22] and also to flag burning,[23] despite the

20. 384 U.S. 214 (1966).

21. *Id.* at 218 (1966). Although one could argue that some demonstrations are not political speech—for example, those against corporations or other private groups—a full exploration of this topic is outside the scope of this article. Since most demonstrations focus on matters of public concern, they generally are considered political speech.

22. *See* Cohen v. California, 403 U.S. 15 (1971).

23. *See* Texas v. Johnson, 491 U.S. 397 (1989) (upholding flag burning as protected by the First Amendment).

fact that this speech may deeply upset listeners. It even extends to speech advocating the violent overthrow of the government, provided that there is no imminent danger and there is time to rebut the speech in the normal course of political debate.[24]

Constitutional protection of speech that advocates illegal activity is governed by the "clear and present danger" test, which requires that before speech can be criminalized, it must create an *imminent danger* of *grave harm* which *cannot be rebutted* in the normal course of debate.[25] The reasoning behind this test was best articulated by Justice Brandeis in *Whitney v. California*[26] and later adopted by a majority of the Court in *Brandenburg v. Ohio*[27]: the Founders protected subversive advocacy because they believed that the goal of government was to allow people to develop to their full potential; that freedom of expression was essential to the search for political truth; and that public discussion would provide enough protection from harmful speech.[28] Irrational fear could never be enough to justify repression of speech because that would defeat the point of the protection; instead, any suppression must be based on a reasonable belief of serious, imminent harm.[29] Freedom of speech was so important that even a reasonable fear of harm to society could not justify restrictions if the harm was relatively trivial: "The fact that speech is likely to result in some violence or in destruction of property is not enough to justify its suppression. There must be the probability of serious injury to the State."[30] Crime should be prevented through "education and punishment for violations of the law" rather than restrictions on free speech.[31] Minor incidents of lawlessness—such as civil disobedience or vandalism by a small number of demonstrators—fall within the harms described by Brandeis. In such situations, making mass arrests or using force to disperse protesters, rather than focusing on individual perpetrators of crimes, arguably violates the First Amendment.

It is reasonable to give protest such strong protection because public protest is a crucial aspect of a democratic society, particularly in the United States.

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

25. *See id.* at 447.

26. 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

27. *Brandenburg*, 395 U.S. at 447.

28. *Whitney*, 274 U.S. at 375 (Brandeis, J., concurring).

29. *Id.* at 376. This also implies that the post-September 11 fear of terrorism cannot be allowed to affect protest rights, as some have suggested. There is absolutely no empirical connection between protest and terrorism. The fact that some police may irrationally believe otherwise is a political obstacle that makes the interference of courts all the more necessary. A substantive analysis of antiterrorism and free speech is outside the scope of this paper, but for a more complete discussion see Anthony D. Romero, *In Defense of Liberty at a Time of National Emergency*, 29 HUM. RTS. 16 (2002).

30. *Whitney*, 274 U.S. at 378 (Brandeis, J., concurring).

31. *Id.*

Much of the progress toward social justice made over the past century has been associated with protest movements.[32] Perhaps the most notable example is the civil rights movement, but the women's rights movement, the gay rights movement, the peace movement, and many others have employed protest to make their concerns heard.[33]

The strong protection of free speech also reflects concern for the chilling effect that prohibitions aimed at subversive advocacy have on legitimate political debate, a particularly resonant concern in the protest context. The chilling effect doctrine was first articulated by Justice Frankfurter in *Wieman v. Updegraff*.[34] As one commentator summarized, "A chilling effect occurs when individuals seeking to engage in activity protected by the [F]irst [A]mendment are deterred from doing so by government regulation not specifically directed at that protected activity."[35] In other words, the government violates the First Amendment when it prevents protected speech, but the state also chills some protected speech when it bars unprotected speech or action that is close to the line. For example, if police arrest a demonstrator who temporarily obstructs the sidewalk, this may deter lawful protesters from attending other demonstrations because they are uncertain whether they might also be subject to arrest, particularly where the reason for the arrest is unclear to the crowd of demonstrators who witness it. This is part of the reason why the clear and present danger test protects speech that leads to minor incidents of lawlessness.

The chilling effects doctrine has been a major force in the development of free speech jurisprudence both explicitly and implicitly.[36] It represents a concern for error in the litigation process, and a desire to deflect that error in favor of too much speech protection rather than too little.[37] For example, the clear and present danger test acknowledges the difficulty of distinguishing between incitement and mere advocacy; in other words, we must allow some speech that is

32. *See* HOWARD ZINN, A PEOPLE'S HISTORY OF THE UNITED STATES: 1492–PRESENT, at 442–59, 474–88, 497–500, 516–26, 589–617 (rev. and updated ed. 1995) (1980).

33. *Id. See also* "TAKIN' IT TO THE STREETS": A SIXTIES READER, 17–38, 226–27, 242–58, 428–32, 481–84, 574–99 (Alexander Bloom & Wini Breines eds., 1995).

34. 344 U.S. 183, 195 (1952) (Frankfurter, J., concurring).

35. Frederick Schauer, *Fear, Risk and the First Amendment: Unraveling the "Chilling Effect"*, 58 B.U. L. REV. 685, 693 (1978).

36. *See, e.g.*, Ashcroft v. ACLU, 542 U.S. 656, 667–71 (2004) (expressing concern that the Child Online Protection Act may have chilling effect on protected speech by requiring speakers to restrict access by children); Nike, Inc. v. Kasky, 539 U.S. 654, 664 (2003) (Stevens, J. concurring) (noting that prevention of chilling effects justifies protecting some false speech by corporate entities); Virginia v. Hicks, 539 U.S. 113, 119 (2003) ("[T]he threat of enforcement of an overbroad law may deter or 'chill' constitutionally protected speech."); Reno v. ACLU, 521 U.S. 844, 871–72 (1997) (explaining that the vagueness of content-based regulation of speech raises First Amendment concerns because of the potential chilling effect); Hustler Magazine v. Falwell, 485 U.S. 46, 52 (1988) (holding that strict liability for false factual statements would chill free debate because "[f]reedoms of expression require 'breathing space'") (internal citations omitted).

37. Schauer, *supra* note 35, at 688, 694–701.

very close to incitement in order to prevent chilling advocacy.[38] The overbreadth and vagueness doctrines are other prominent examples of the use of chilling effects test in free speech jurisprudence.[39] These doctrines create breathing room for the core speech necessary to our democracy by invalidating restrictions on certain unprotected speech as well.

In the context of demonstrations, chilling effects are especially relevant because any police action directed against one protester is likely to be witnessed by a large number of other people, who will have to consider the possibility that they may be treated the same way either during that demonstration or the next one. Many of these people will not have complete information about police and protester actions or about the legal outcome of the situation that they witnessed, which will make their risk assessments of whether to remain at this protest or whether to attend the next one even more difficult. The concern that the Supreme Court has shown for chilling effects in the First Amendment context indicates that these risk assessments should be of serious concern in evaluating the constitutionality of police tactics at protests.[40]

There are good reasons to believe that even speech involving technically illegal action may have redeeming social value and thus is worthy of First Amendment protection. For example, in democratic societies, nonviolent civil disobedience reaffirms the dignity of the person by demonstrating the individual power to stand up for justice.[41] Civil disobedience reminds people of a central tenant of American democracy: governmental power is limited.[42] It also provides a way for those who feel marginalized to sway the political process, and thus serves as a release valve for discontent.[43] Although police may legitimately intervene to maintain order when demonstrators engage in civil disobedience, the way the police treat these demonstrators still has First Amendment implications.[44]

Even if some demonstrators engage in illegal activities, those who do not retain complete protection under the First Amendment. In *NAACP v. Claiborne*

38. *See id.* at 724–25.

39. These doctrines expand standing to permit plaintiffs to challenge speech restrictive statutes on their face, instead of as applied to their conduct. As Justice Brennan argued in *Gooding v. Wilson*, "[t]his is deemed necessary because persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions provided by a statute susceptible of application to protected expression." 405 U.S. 518, 521 (1972).

40. *See supra* note 36 and accompanying text.

41. Mark Edward DeForrest, *Civil Disobedience: Its Nature and Role in the American Legal Landscape*, 33 GONZ. L. REV. 653, 666 (1997).

42. *Id.* at 667.

43. *Id.*

44. Being arrested is arguably part of the expression involved in civil disobedience, which creates some tension with the notion the police should be tolerant of dissent and restrained in making arrests. However, it would be paradoxical if this tension were allowed to undermine arguments for less repressive treatment of dissenters.

Hardware Co.,[45] the Supreme Court held that, although isolated acts of violence had been carried out by boycott participants, the boycott of Claiborne businesses at issue was still legal.[46] The Court stated that "'guilt by association alone, without [establishing] that the individual's association poses the threat feared by the Government,' is an impermissible basis upon which to deny First Amendment rights."[47] Thus, demonstrators do not lose their right to free speech because other demonstrators participate in illegal activities. This is especially relevant to the constitutional analysis of mass arrest situations or cases in which the police use force to disperse a group of protesters. Since those who have not engaged in illegal activity retain constitutional protection for their expression, police must treat protesters as individuals, not as a group.

The robust First Amendment protection of speech indicates that any police interference with protest that is not objectively necessary to prevent grave and imminent harm raises serious constitutional concerns. Even when some protesters engage in illegal activity, police intervention may chill the protected speech of others. The First Amendment implies that police should use arrests and force minimally, and limit these tactics to only those who have seriously threatened the maintenance of order.

III.
THE FOURTH AMENDMENT LIMITATIONS ON ARRESTS AND USE OF FORCE LEAVE POLICE WITH LARGE AMOUNTS OF DISCRETION, WHICH IS PROBLEMATIC IN THE PROTEST CONTEXT

Two specific policing tactics that may have a chilling effect on political protests are arrests and use of force. Both of these tactics are governed by Fourth Amendment standards that often leave the police with a large amount of discretion. In this part, I review the discretion the courts have allowed police in making arrests and using force, and argue that this discretion is inappropriate in the protest context because of the additional First Amendment interests that are implicated.

A. Police Have Discretion to Arrest Whenever There is Probable Cause to Believe There Has Been a Violation of the Law, No Matter How Minor

Police have considerable discretion in deciding whether to make arrests, particularly for minor crimes. An officer confronted with a minor violation, such as jaywalking, has a large range of options: she can look the other way, issue a warning, write a citation, or make a full scale arrest.[48] There are virtually

45. 458 U.S. 886 (1982).

46. *Id.* at 920.

47. *Id.* at 919 (quoting Healy v. James, 408 U.S. 169, 186 (1972)) (alterations in original).

48. *See, e.g.*, N.Y. CRIM. PROC. §§ 140.05–.15 (McKinney 1999) (authorizing warrantless arrests and use of justifiable physical force to effect such arrests).

no legal limitations on this decision. However, this discretion is inappropriate in the protest context because of the First Amendment interests implicated when protesters are arrested.[49]

The Supreme Court has consistently held that the Fourth Amendment requires arrests to be based on probable cause that the individual has committed a crime.[50] The legal test for whether an officer has probable cause to arrest is based on the "totality of the circumstances."[51] This test involves analyzing the information available to the police to determine whether there is a fair probability that the individual has committed a crime.[52] This very fact-specific test[53] gives individual police officers a significant amount of discretion. In addition, provided the arrest takes place in public (as is usually the case at demonstrations) a warrant is not necessary,[54] although a nonadversarial hearing is required within forty-eight hours to determine whether probable cause for the arrest existed.[55]

Even when probable cause clearly exists, the Supreme Court has affirmed the vast amount of discretion that police officers have in deciding whether to arrest for minor offenses. In *Atwater v. City of Lago Vista*,[56] the Court created a bright-line rule that allows police to arrest when they have probable cause to believe the arrestee has committed any crime in their presence, including a minor traffic violation.[57] In contrast, the dissent would have treated arrests for fine-

49. The issue of the legality of arrests at demonstrations tends to arise in two contexts: mass arrests of all demonstrators in a particular location and targeting of particular individuals. Mass arrests took place at the Seattle demonstrations against the WTO in 1999; the Washington, D.C. demonstration against the IMF and World Bank in 2002; the New York antiwar demonstration against the Carlyle Group in 2003; and the Republican National Convention demonstrations in 2004. *See* David Postman, Jack Broom & Florangela Davila, *Police Haul Hundreds To Jail: National Guard On Patrol; 1,000 Protesters Enter Restricted Zone*, SEATTLE TIMES, Dec. 1, 1999, at A1 (Seattle demonstrations); Manny Fernandez & David A. Fahrenthold, *Police Arrest Hundreds in Protests: Anti-Capitalism Events Cause Few Disruptions*, WASH. POST, Sept. 28, 2002, at A1 (Washington, D.C. protest); Shaila K. Dewan, *Police Crossed the Line by Arresting Onlookers, Antiwar Protesters Say*, N.Y. TIMES, Apr. 8, 2003, at D4 (New York antiwar demonstrations); Graham Rayman, *Hundreds of Protesters Arrested*, NEWSDAY (New York), Sept. 1, 2004, at W06 (Republican National Convention protests). In 2003, targeted arrests occurred at antiwar demonstrations in New York and at protests against the Free Trade Area of the Americas in Miami. See Complaint at 1–3, Conrad v. New York, No. 03 Civ. 9163 (S.D.N.Y. Nov. 19, 2003), http://www.nyclu.org/rnc_complaint_con_111903.html; Lisa Arthur & Amy Driscoll, Activists Say Many Arrests Were Unlawful, MIAMI HERALD, Nov. 22, 2003, at 24A.

50. Johnson v. U.S., 333 U.S. 10, 15–17 (1948); Whiteley v. Warden, 401 U.S. 560, 564–66 (1971). *See also* Hayes v. Florida, 470 U.S. 811, 816 (1985) (invoking "the traditional rule that arrests may constitutionally be made only on probable cause" against warrantless seizure of suspect from his home).

51. *See* Illinois v. Gates, 462 U.S. 213, 230–32 (1983).

52. *Id.* at 231–32.

53. *See* Ohio v. Robinette, 519 U.S. 33, 39 (1996).

54. United States v. Watson, 423 U.S. 411, 414–24 (1976). Though the Court emphasized that an arrest in this case was justified by a federal statute authorizing warrantless arrest, it also discussed precedents for finding that warrantless arrests did not violate the Fourth Amendment.

55. County of Riverside v. McLaughlin, 500 U.S. 44, 56–58 (1991).

56. 532 U.S. 318 (2001).

57. *Atwater*, 532 U.S. at 354. Under the facts of the case, the driver failed to wear a seatbelt

only offenses as presumptively unreasonable and thus as violations of the Fourth Amendment.[58] The dissent recognized that some limitation on discretion was necessary, because, in cases like Atwater's, there is no conceivable state interest that outweighs the individual privacy interest in avoiding a full custodial arrest.[59] Nevertheless, because the majority preferred to create a bright-line rule, it declined to encourage officers to issue summonses or citations where possible, leaving the decision to arrest to the complete discretion of the officer.

A hearing forty-eight hours after the arrest is generally considered sufficient to protect the Fourth Amendment interests of the arrestee.[60] However, in the case of minor offenses, the hearing may not be sufficient because even a brief custodial arrest substantially intrudes on the individual's liberty and privacy.[61] When one adds to these invasions the fact that the arrest also deprives the arrestee of any meaningful ability to exercise her First Amendment right to free speech, this questionably adequate level of Fourth Amendment protection becomes utterly insufficient. If an arrest is made at a demonstration, the individual has to wait forty-eight hours for a determination of whether there was probable cause. Even if she is released following the hearing, the protest is over and the arrestee has been deprived of the ability to make her voice heard in concert with others. In addition, the arrestee will be discouraged from attending future demonstrations out of fear of being subjected to the same degrading experience. It may also chill the speech of others who witnessed or heard about the arrest.

In the protest context, the existence of probable cause is often contested. Particularly in mass demonstrations, there is a serious danger that arrests will be

---

and to secure her children riding in the front seat, a misdemeanor under Texas state law. *Id.* at 323–24.

58. *See id.* at 365–67 (O'Connor, J., dissenting).

59. *Id.* at 365–66.

60. *McLaughlin*, 500 U.S. at 56–58.

61. As Justice O'Connor noted in her dissent:

> A custodial arrest exacts an obvious toll on an individual's liberty and privacy, even when the period of custody is relatively brief. The arrestee is subject to a full search of her person and confiscation of her possessions. If the arrestee is the occupant of a car, the entire passenger compartment of the car, including packages therein, is subject to search as well. The arrestee may be detained for up to 48 hours without having a magistrate determine whether there in fact was probable cause for the arrest. Because people arrested for all types of violent and nonviolent offenses may be housed together awaiting such review, this detention period is potentially dangerous. And once the period of custody is over, the fact of the arrest is a permanent part of the public record.

Atwater, 532 U.S. at 364–65 (citations omitted). Other indignities can accompany arrest—for example, strip searches or body cavity searches. *See, e.g.*, Evans v. City of Zebulon, 351 F.3d 485, 488–89 (11th Cir. 2003). For members of minority groups, arrest may also entail discriminatory harassment; for immigrants, arrest may lead to problems with immigration. *See, e.g.*, *id.* at 488–89 (describing post-arrest strip search during which police made racially derogatory remarks and prodded plaintiffs with metal rods); National Lawyers Guild New York City Chapter, Know Your Rights!, *available at* http://www.nlgnyc.org/MDC/downloads/KYR2006.pdf (advising immigrants to carry work authorization papers to protests in case of arrest).

made solely for the purpose of crowd control, with no intention of future prosecution. If the police do not face any negative consequences, then they may view mass arrests as a useful technique to clear the streets.[62] Furthermore, arrests at demonstrations, even with probable cause, have significant First Amendment implications because of the chilling effect such arrests have on speech and the perceived connection between the message of the protesters and the arrest. In these situations, normal Fourth Amendment remedies are especially likely to be inadequate because of the distinctive First Amendment harms.

B. Police Have Not Been Required to Use the Minimum Force Necessary Against Demonstrators

Another police tactic frequently employed at demonstrations is the use of force. Police use force whenever they use physical power to compel compliance, which could include anything from grabbing a protester's arm to firing a gun. Police use of force is presently governed by two constitutional provisions: the Fourth Amendment prohibition of unreasonable seizures and the due process protections of the Fifth[63] and Fourteenth Amendments.[64] The discretion left to police under each of these standards does not provide adequate protection for the First Amendment interests of demonstrators. In the protest context, force is generally employed either in making arrests or dispersing crowds.[65] Most force used by the police at protests is nondeadly.[66] In *Graham v. Connor*,[67] the Supreme Court held that the use of nondeadly force in the course of arrests is governed by the Fourth Amendment standard of reasonableness.[68] The majority explained that, "[d]etermining whether the force used . . . is 'reasonable' requires a careful balancing of 'the nature and quality of the intrusion on the individual's Fourth Amendment interests' against the countervailing governmental interests

62. While it is generally possible only to speculate at police motives for mass arrests, one example of police using the arrests for clearance purposes may be *Hickey v. Seattle*, where the police made no attempt to assert individualized probable cause. *See Hickey* Order, *supra* note 14, at 15–21.

63. "No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. V.

64. "[N]o state [shall deprive] any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV, § 1.

65. For example, at the February 2003 antiwar demonstrations in New York, force was used both to disperse demonstrators and to arrest specific individuals. *See* Complaint at 29–38, 40, Conrad v. New York, *supra* note 14.

66. Despite the upsurge in violence at demonstrations noted in the introduction to this Article, *supra* notes 3–6 and accompanying text, no demonstrators have been killed in the United States in recent years. However, the death of protesters at the hands of police is not a remote possibility—for example, Italian police shot and killed an antiglobalization demonstrator in 2001. *See* John Hooper, *Police On Trial Over G8 Summit Beatings*, GUARDIAN (London), June 26, 2004, at 15. This Article focuses on the more common nondeadly police force at demonstrations.

67. 490 U.S. 386 (1989).

68. *Id.* at 388.

at stake."[69] The Court suggested some factors that should be considered in determining reasonableness—including the severity of the crime, the threat posed by the suspect, and whether the suspect is actively resisting or attempting to flee—but this list was not meant to be exhaustive.[70] Moreover, the standard is objective—in other words, the officer's intentions are not relevant to determining reasonableness.[71] Lower courts have held that reasonableness under the Fourth Amendment does not require using the minimum force necessary.[72] Of course, determining what level of force is reasonable is fact-specific and relatively ambiguous,[73] leaving significant discretion in the hands of officers on the scene.

Not all force at demonstrations is governed by this Fourth Amendment standard; where there is no seizure, the only constitutional limitation on the use of force is the due process protection under the Fifth and Fourteenth Amendments. The Supreme Court in *California v. Hodari D.*[74] defined seizure for the purpose of determining the scope of arrests under the Fourth Amendment.[75] Justice Scalia distinguished between two types of seizures: those that involve a physical touching of the suspect by the officer, which is always a seizure, and a nonphysical show of authority, which only constitutes a seizure if the individual submits.[76] Since tear gas or other less-lethal police weapons used in dispersal can be used from a distance, they do not involve physical touching by officers and submission is not an expected or likely response. Thus, under the *Hodari* test, it appears the type of force most commonly used to disperse demonstrators will not generally be subject to the restraints of the Fourth Amendment.[77]

Where the Fourth Amendment does not apply, the constitutional standard is whether the police action violated due process, which is measured by whether it "shocks the conscience."[78] This is a much higher standard that requires the officer have the subjective intent to injure the individual.[79] Because it is more

69. *Id.* at 396 (citations omitted).

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

71. *Id.* at 397.

72. *See, e.g.*, Marquez v. City of Albuquerque, 399 F.3d 1216, 1222 (10th Cir. 2005); Forrester v. City of San Diego, 25 F.3d 804, 808 (9th Cir. 1994); Martin v. Gentile, 849 F.2d 863, 870 (4th Cir. 1988).

73. *See* Ohio v. Robinette, 519 U.S. 33, 39 (1996).

74. 499 U.S. 621 (1991).

75. *Id.* at 625–26.

76. *Id.* at 626.

77. *See, e.g.*, Ellsworth v. Lansing, No. 99-1045, 2000 WL 191836, at *4 (6th Cir. Feb. 10, 2000) (applying due process analysis to use of tear gas to disperse demonstrators).

78. *See* County of Sacramento v. Lewis, 523 U.S. 833, 846 (1998) (describing the Supreme Court's application of "shock the conscience" standard) (internal citations omitted).

79. *Id.* at 849. *See also* Renée Paradis, *Carpe Demonstratores: Towards a Bright-Line Rule Governing Seizure in Excessive Force Claims Brought by Demonstrators*, 103 COLUM. L. REV. 316, 326–27 (2003).

difficult to prove subjective intent, this test leaves officers with even more discretion than the reasonableness standard, and leaves protesters with almost no protections from police dispersal techniques.

The "shocks the conscience" standard is a high burden for protesters to meet, and greatly hinders the protection of their First Amendment interests against excessive force. Yet dispersal of protesters through force raises many First Amendment concerns. Because force is largely applied indiscriminately to groups, it may sweep in many people who have not committed a crime and who have a legitimate right to express their views at that location. In addition, since assembly is critical to the speech rights involved, dispersal directly suppresses these rights.

Furthermore, any use of force during demonstrations is likely to have a chilling effect on speech because of the intensive violations of personal integrity that it necessarily involves. A protester who is trampled by horses when police attempt to disperse a crowd will be less likely to come to the next demonstration because of fear the same thing may happen again. Others who witnessed the incident may also choose to stay away out of fear of getting hurt.

The protections of the Fourth Amendment alone may be inadequate to protect the free speech interests that are implicated when demonstrators come into contact with police. In ordinary criminal cases, balancing the state's interests in criminal law enforcement and police safety against the privacy interest of suspected criminals may support the Fourth Amendment reasonableness standard. However, rote application of this balancing test to protesters fails to adequately address the demonstration context, where an additional set of constitutional concerns lie on the individual's side of the scale. Therefore, it fails to adequately protect First Amendment interests.

IV.
THE SUPREME COURT HAS PREVIOUSLY RECOGNIZED THE HISTORICAL CONNECTION BETWEEN THE FIRST AND FOURTH AMENDMENTS

The previous parts have shown the robust protection of speech under the First Amendment and the failure of the Fourth Amendment to provide adequate protection to these First Amendment interests when demonstrators interact with police. I posit that the solution to this problem is to develop a Fourth Amendment jurisprudence that takes into consideration First Amendment values. This part shows that older Supreme Court precedents support the consideration of First Amendment interests when evaluating Fourth Amendment claims, although more recent case law has moved away from this approach.

Despite the fact that they were introduced as two separate amendments, the Founders intended the First and Fourth Amendments to augment each other.[80]

80. *See* Stanford v. Texas, 379 U.S. 476, 484–85 (1965) (describing First, Fourth, and Fifth Amendments as "closely related").

Among the worst abuses that the Fourth Amendment was intended to prevent was the use of searches and seizures to repress expression and dissemination of dissenting views.[81] Part of the history behind the adoption of the Bill of Rights was a "conflict between the Crown and the press . . . [over] enforcing the laws licensing the publication of literature."[82] It was in "prosecutions for seditious libel that general warrants were systematically used [and] officers of the Crown were given roving commissions to search where they pleased in order to suppress and destroy the literature of dissent."[83] As I will show, the Supreme Court has acknowledged this history, but its recent jurisprudence involving the two amendments has moved away from recognizing their important interconnection.

In the 1960s, the Warren Court articulated a strong connection between the First and Fourth Amendments. In *Stanford v. Texas*,[84] the Supreme Court recognized that where a search implicates First Amendment protections, the Fourth Amendment must be applied with "scrupulous exactitude."[85] The case concerned a search warrant for books, records, or other materials related to the operation of the then-outlawed Communist Party in Texas. The items seized in the search of the individual's home included over 300 different books, a marriage license, and household bills.[86] In a unanimous opinion by Justice Stewart, the Court held that the warrant was invalid for lack of particularity because it gave executing officers far too much discretion as to what they could seize.[87]

In the opinion, Justice Stewart emphasized the history of conflict between the government and the press in England that served as a background to the Fourth Amendment. He noted that the First, Fourth, and Fifth Amendments "are indeed closely related, safeguarding not only privacy and protection against self-incrimination but 'conscience and human dignity and freedom of expression as well.'"[88] While the warrant may have satisfied constitutional muster had it specified "weapons, narcotics or 'cases of whiskey,'" the fact that it ordered the seizure of "literary material" made the "indiscriminate sweep of that language . . . constitutionally intolerable."[89] Although the Court did not explicitly hold that a higher Fourth Amendment standard applies in cases implicating the First Amendment, at a minimum, the Court made clear that it would closely scrutinize searches and seizures involving materials protected under the First Amendment.

---

81. *See Stanford*, 379 U.S. at 482–85.
82. *Id.* at 482.
83. *Id.*
84. 379 U.S. 476 (1965).
85. Id. at 485.
86. *Id.* at 476–77, 480.
87. *Id.* at 486.
88. *Id.* at 485 (citing Frank v. Maryland, 359 U.S. 360, 376 (1959) (dissenting opinion)).
89. *Stanford*, 379 U.S. at 486.

The Supreme Court also noted the use of general warrants in England to suppress dissent in *Marcus v. Search Warrants of Property at 104 East 10th Street, Kansas City, Missouri.*[90] The Court held that the seizure of large quantities of magazines, without a prior judicial determination that they were obscene, violated the Due Process Clause of the Fourteenth Amendment.[91] The Court reasoned that a procedure that did not focus on the question of obscenity prior to seizure posed too great a danger of suppressing speech protected under the First Amendment.[92] Justice Brennan, writing for the majority, noted, "The Bill of Rights was fashioned against the background of knowledge that unrestricted power of search and seizure could also be an instrument for stifling liberty of expression."[93] The Court emphasized that the foundation of the protections of the First and Fourth Amendments could be found in English case law declaring the use of a general warrant to seize books and papers contrary to the common law.[94] In *Quantity of Copies of Books v. Kansas*,[95] the Court clarified its position in *Marcus* by holding that an adversary hearing on the question of obscenity was required before allegedly obscene materials could be seized.[96] Together, these cases indicate that the Court will grant greater protection under the Fourth Amendment where First Amendment interests are also implicated.

Although not explicitly, the Supreme Court has also extended First Amendment protection in contexts where Fourth Amendment privacy concerns are implicated. In *Stanley v. Georgia*,[97] the Court held that the First Amendment protected against criminalizing the private possession of obscene materials in one's home, despite the fact that obscenity is generally not entitled to First Amendment protection.[98] In concurrence, Justice Stewart emphasized that the materials involved in the prosecution had also been obtained in violation of the Fourth Amendment.[99] The focus on the privacy of the home in the majority opinion indicates that Fourth Amendment values animated this First Amendment decision.[100] Collectively these decisions illustrate that the Supreme Court has allowed the First and Fourth Amendments each to inform the analysis of the other.

Since the 1960s, the Supreme Court has continued to emphasize the historic connection between the First and Fourth Amendment in upholding general

90. 367 U.S. 717, 724–29 (1961).
91. *Marcus*, 367 U.S. at 738.
92. *Id.* at 732.
93. *Id.* at 729.
94. *Id.* at 728 (citing Entick v. Carrington, (1765) 19 Howell's State Trials 1029).
95. 378 U.S. 205 (1964).
96. *Id.* at 209–11.
97. 394 U.S. 557 (1969).
98. *Stanley*, 394 U.S. at 568.
99. *See id.* at 569–72 (Stewart, J. concurring).
100. *See id.* at 564–65 (majority opinion).

Fourth Amendment principles in the First Amendment context, but it has declined to require any special protections when the two amendments are both implicated. The Court emphasized the First Amendment concerns in several cases disputing the need for a warrant, but merely upheld the general Warrant Clause jurisprudence.[101] In *Heller v. New York*,[102] the Court restricted the adversarial hearing required in *Quantity of Books* to seizures that completely suppressed the materials, providing no additional protection where there were possible avenues of continued expression prior to the hearing.[103] This and subsequent cases show a gradual decrease in the Court's willingness to see the interaction of the First and Fourth Amendments as providing additional protections of individual liberty.

In *Zurcher v. Stanford Daily*,[104] the Supreme Court refused to provide special protections under the Fourth Amendment where First Amendment interests were at stake.[105] The case involved a search of a newspaper office for photographs of a demonstration where there had been a violent confrontation with the police.[106] The newspaper argued that to protect freedom of the press under the First Amendment, subpoenas should be used instead of warrants when the government wanted to obtain materials from newspapers, and that only on a showing that a subpoena would not be effective should a search be authorized.[107] The Court declined, however, to extend any special protection to newspapers from searches under the Fourth Amendment; as long as there is probable cause that evidence may be found, no further analysis need be undertaken.[108] The Court reaffirmed that where a search might endanger First Amendment interests, the Fourth Amendment should be applied with "particular exactitude," but noted that "the prior cases do no more" in terms of imposing special requirements.[109] The Court insisted that the normal Fourth Amendment procedures, developed without reference to the First Amendment, provided sufficient protection: "[N]o more than this is required where the warrant requested is for the seizure of criminal evidence reasonably believed to be on the premises occupied by a newspaper."[110]

---

101. *See* United States v. U.S. Dist. Ct., 407 U.S. 297, 314–16 (1972); Roaden v. Kentucky, 413 U.S. 496, 503–05 (1973); Walter v. United States, 447 U.S. 649, 655–56 & n.6 (1980) (plurality opinion).

102. 413 U.S. 483 (1973).

103. *Id.* at 488. Three justices—including Justice Stewart, the author of *Stanford*—dissented because they thought New York's obscenity law was unconstitutionally overbroad; they did not reach the Fourth Amendment issue. *Id.* at 494–95.

104. 436 U.S. 547 (1978).

105. *Id.* at 563–66.

106. *Id.* at 551.

107. *Id.* at 552.

108. *Heller*, 436 U.S. at 565–67.

109. *Id.* at 565.

110. *Id.*

On the rare occasions where the Supreme Court has considered the application of the Fourth Amendment to protesters, it has ignored the connection between the Fourth and First Amendments that has been recognized in other types of cases. For example, in *Saucier v. Katz*,[111] the Court found that an officer was entitled to qualified immunity against a claim under the Fourth Amendment for the use of excessive force against a demonstrator at a speech by Vice President Al Gore.[112] Since the demonstrator apparently did not raise a separate First Amendment claim, the Court chose not to address the First Amendment implications of the arrest at all, assuming instead that there was no First Amendment violation.[113] The idea that the First Amendment might require an even stricter adherence to the Fourth Amendment, let alone a higher standard, is entirely absent from the opinion. This approach leaves police with the same broad discretion they exercise in criminal law enforcement contexts that do not implicate First Amendment concerns. The resulting discretion leaves enormous possibilities for chilling speech.

V.
LOWER FEDERAL COURTS HAVE GENERALLY FOCUSED EXCLUSIVELY ON THE FOURTH AMENDMENT IN EVALUATING POLICE ACTIONS IN THE PROTEST CONTEXT, DESPITE FIRST AMENDMENT CONCERNS

The Supreme Court's decreased emphasis on the connection between the First and Fourth Amendments has resulted in a jurisprudence that is unsuited to the demonstration context. This section will show that the lower federal courts have often mechanically applied general Fourth Amendment principles to arrest or excessive force claims in the protest context. Often the Fourth Amendment analysis is treated as controlling; in other words, where the plaintiff is unable to make out a Fourth Amendment claim, the case is dismissed without any consideration of the First Amendment issues at stake. Where both First and Fourth Amendment claims are considered, the analysis is frequently compartmentalized, with no interaction between the two—the First Amendment is not extended to any illegal actions and the Fourth Amendment is applied as though no First Amendment interests were present. This type of analysis short-changes the interests protected by both amendments.

111. 533 U.S. 194 (2001).

112. *Id.* at 205–06 (clarifying the standard for qualified immunity in Fourth Amendment cases by distinguishing reasonableness under the Fourth Amendment, a factual issue, from reasonableness for qualified immunity, a legal issue).

113. *Id.* at 207. By contrast, in *Stanford*, the Court, while recognizing the interaction between the two amendments, rested the holding on the Fourth Amendment only. Stanford v. Texas, 379 U.S. 476, 480 (1965). In *Marcus*, the Court found the procedures at issue provided insufficient protection for expression without needing to address directly the Fourth Amendment. Marcus v. Search Warrants of Property at 104 East 10th Street, Kansas City, Missouri, 367 U.S. 717, 738 (1961).

A. Courts Considering Both First and Fourth Amendment Claims Have Failed to See the Connection Between the Two

The Sixth Circuit has rigidly separated the First and Fourth (or Fourteenth) Amendment inquiries. In *Ellsworth v. City of Lansing*,[114] the court considered whether the use of tear gas to disperse picketers blocking egress from an industrial plant violated the First or Fourteenth Amendments.[115] On the First Amendment claim, the court concluded that since blockage of the plant's gate was illegal, it was not protected by the First Amendment.[116] Therefore, no amount of force used to remove the demonstrators could violate the First Amendment.[117] Given the facts of the case, this First Amendment analysis fails to leave adequate breathing room for protected speech in order to prevent chilling effects. Although the leaders of this legal demonstration were told they needed to move away from the gate, apparently no general announcement to move was made.[118] The use of tear gas without warning could certainly discourage people from attending the next rally and thus chill speech, but the court completely ignored this First Amendment implication.

The court analyzed the excessive force claim under the Fourteenth Amendment's Due Process Clause instead of the Fourth Amendment because the force was used to effect dispersal rather than to make arrests.[119] The court found that the actions of the police did not shock the conscience and, therefore, did not violate due process.[120] Since the court had found no First Amendment violation, it expressly declined to take into account the First Amendment interests in the due process analysis.[121]

The Third Circuit also separated the First and Fourth Amendment analyses in *Paff v. Kaltenbach*[122] and thus failed to properly see the relationship between the two. The case involved a group of protesters distributing leaflets outside the post office on April 15, the filing deadline for federal income tax returns.[123] The protesters had researched the law beforehand and believed they had a First Amendment right to be there.[124] They had even written to the Postmaster in advance to inform him of their intentions and to ask whether he had a contrary view of the law, but they did not receive a response.[125] When, during their leaf-

114. No. 99-1045, 2000 WL 191836 (6th Cir. Feb. 10, 2000).

115. *Id.* at *1.

116. *Id.* at *3.

117. *Id.*

118. *Ellsworth*, 2004 WL 191836, at *2.

119. *Id.* at *4.

120. *Id.* However, the court did concede that "[t]he police may have overreacted, and there may have been some miscommunication with the crowd." *Id.*

121. *Id.*

122. 204 F.3d 425 (3d Cir. 2000).

123. *Id.* at 428–29.

124. *Id.* at 428.

125. *Id.*

leting, the protesters were asked to leave the post office grounds, they responded that they believed they had a right to be there.[126] No evidence was presented that they were actually causing any disruption, but because they refused to leave, they were arrested for trespass.[127]

The protesters raised claims under both the First and Fourth Amendments. The court held that the arresting officer had qualified immunity from the protesters' First Amendment claim.[128] The court reasoned that given the state of the law at the time, it was not unreasonable for the officer to conclude that the demonstrators had no First Amendment right to distribute literature in this non-public forum if the Postmaster determined that the distribution would impede access.[129]

In analyzing the demonstrators' claim that there was no probable cause for their arrest, the Third Circuit considered only the technical requirements of the statute under which they were arrested.[130] It did not consider the First Amendment interests, nor did it assess whether the arrest was reasonable.[131]

Treating the two amendments separately is untenable when each in fact is intended to reinforce the protections of the other. This approach under-protects expression and fails to adequately address the chilling effects of the police actions at issue.

B. Courts Considering Only Fourth Amendment Claims Have Failed to Take First Amendment Interests into Account

Even when protesters raise only Fourth Amendment claims, the First Amendment is still implicated but usually ignored. Some courts have not even applied the Fourth Amendment strictly or "with scrupulous exactitude"[132] as the Supreme Court has required. This treatment completely ignores the difference between demonstrations and typical law enforcement.

The Ninth Circuit has treated the reasonableness of the use of force in the arrest of passively resisting demonstrators as solely a Fourth Amendment question with no consideration of the First Amendment. In *Forrester v. City of San Diego*,[133] police used pain-compliance techniques to remove Operation Rescue protesters blocking access to an abortion clinic.[134] When arrested, demon-

126. *Id.* at 429.

127. *Paff*, 204 F.3d at 428–30.

128. *Id.* at 434–35.

129. *Id.* at 430–35.

130. The dissent observed that leafleting was not actually prohibited under the post office regulations, even if there was constitutional authority to do so. *Id.* at 437–38 (Cowen, J., dissenting). Yet the majority found, without addressing the lack of statutory authority, that there was probable cause for the arrest. *Id.* at 435–37 (majority opinion).

131. Paff v. Kaltenbach, 204 F.3d 245, 435–37 (3d Cir. 2000).

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

133. 25 F.3d 804 (9th Cir. 1994).

134. *Id.* at 805. The techniques included wrist- and arm-twisting, and pressure point holds.

strators would "go limp" in an attempt to force officers to carry them to police vehicles.[135] Instead of carrying demonstrators, officers used nonchakus[136] to twist their wrists, inflicting pain to coerce them to walk with the arresting officer. One demonstrator's wrist was broken, another suffered a pinched nerve, and all complained of some degree of wrist injury.[137] The trial judge granted summary judgment to the defendants and found that the pain compliance policy was constitutional, but allowed the case to go to the jury on the question of whether individual uses of force at the demonstration violated the Fourth Amendment.[138] The jury found that the use of force against all the protesters was reasonable.[139]

In upholding the jury's verdict as supported by sufficient evidence, the Ninth Circuit inquired into "whether the force used was reasonable in light of *all* the relevant circumstances."[140] The court considered that the "nature and quality of the intrusion upon the arresters' personal security was less significant than most claims of force" because the police did not threaten or use deadly force and did not deliver physical blows or cuts.[141] Another factor the court considered was the city's interest in quickly dispersing and removing the demonstrators.[142]

While these are all appropriate considerations in determining reasonableness, entirely missing from the court's analysis was the fact that these individuals were engaged in political expression through nonviolent civil disobedience and thus had First Amendment interests at stake that are not present in ordinary criminal law enforcement. By considering the intrusion on the demonstrators' interests to be relatively minor, the court ignored the First Amendment implications of inflicting significant pain—including a broken wrist—on individuals for engaging in a traditional form of dissent. The use of pain compliance techniques is likely to cause some people who would have engaged in this form of expression to decide against it, but the court completely ignored this chilling effect. The court also ignored the impact this had on nearby supporters who witnessed demonstrators screaming in pain at the hands of police. The failure of courts to protect demonstrators—even those engaged in illegal actions—from the intentional and unnecessary infliction of pain sends an unmistakable message heard by the protesters, their opponents, and the public at large, that dissent will not be tolerated.

---

135. *Forrester*, 25 F.3d at 810 (Kleinfeld, J., dissenting) (describing protesters' forms of passive resistance).

136. Nonchakus are two sticks connected by chord, which can be used to grip a demonstrator's wrist and apply pressure. *Id.* at 805.

137. *Id.* at 806.

138. Forrester v. City of San Diego, 25 F.3d 804, 806 (9th Cir. 1994).

139. *Id.*

140. *Id.* (quoting Hammer v. Gross, 932 F.2d 842, 846 (9th Cir. 1991) (en banc)).

141. *Id.* at 807.

142. *Id.*

The Ninth Circuit again addressed this issue in *Headwaters Forest Defense v. County of Humboldt*.[143] In that case, police used a different form of pain compliance against environmental demonstrators. These demonstrators connected their arms using lock-down devices called "black bears," from which they could release themselves, but which police could remove only by cutting with a steel-cutting grinder.[144] Use of these devices allowed demonstrators to sit-in for longer periods of time because of the difficulty of cutting through them.[145] Rather than use the grinder, police at several demonstrations decided to use pepper spray to convince demonstrators to release and thus arrest them.[146] They applied pepper spray to protesters' eyes with cotton swabs and sometimes sprayed protesters' faces with full blasts of pepper spray from closer than the recommended range.[147] The trial court granted summary judgment to the police defendants, finding no reasonable basis for jurors to conclude that the officers' use of pepper spray was objectively unreasonable.[148] The Ninth Circuit reversed, holding that reasonableness was a question for the jury since the inquiry is inherently fact-specific.[149]

The Ninth Circuit's analysis in *Headwaters* balances the amount of force used against the need for force. While considering that a jury could find that the level of intrusion caused by the use of pepper spray was significant,[150] the court still failed to take into account the First Amendment interests of the demonstrators in engaging in expressive activities without having pain inflicted on them. The court also found that a reasonable juror could view the government interest in using pepper spray as relatively weak because (1) the use of pepper spray did not seem to increase the speed with which demonstrators were removed from the site; (2) there did not seem to be any exigency involved in the removals; (3) the protesters posed no danger to themselves or others; (4) the crime was relatively minor; and (5) there was some evidence that less painful, alternative methods could have been used.[151]

The Ninth Circuit more accurately balanced the intrusion against the need for force in *Headwaters* than in *Forrester*, which assumed that the intrusion was minimal. However, neither case included freedom of expression in the balancing. The court twice failed to acknowledge that the use of nonviolent force against demonstrators sends the message that the government will respond harshly to dissent. While many of the factors considered by the Ninth Circuit are

143. 240 F.3d 1185 (9th Cir. 2000).

144. *Headwaters*, 240 F.3d at 1191.

145. *Id.*

146. *Id.* at 1192.

147. *Id.* at 1192–95.

148. Headwaters Forest Defense v. County of Humboldt, 240 F.3d 1185, 1196 (9th Cir. 2000).

149. *Id.* at 1201.

150. *Id.*

151. *Id.* at 1201–05.

appropriate, including the extent of disruption caused by the demonstrators, the level of force used, and the risk of injury to officers, a very important factor was ignored completely—the First Amendment interest in preventing the chilling of speech.

The Seventh Circuit similarly ignored the First Amendment concerns in *Jones v. Watson*[152] because the arrestee did not a raise a separate First Amendment claim.[153] The plaintiff was twice arrested at demonstrations at a construction site and charged with disorderly conduct for blocking access by standing in front of the gate.[154] He argued that there was no probable cause for the arrests, but the Seventh Circuit disagreed. The court found that blocking access to the site and failing to disperse after a police officer's order was a clear violation of Illinois's disorderly conduct statute; thus the officers had probable cause for the arrest.[155] The court found the lack of disruption immaterial, despite acknowledging that no one tried to enter or leave the site, and failed to consider whether the decision to arrest was reasonable.[156] However, because of the First Amendment interests at stake, these should have been important considerations.

The Second Circuit similarly disregarded First Amendment interests in *Kash v. Honey*[157] to conclude that forcible removal of a law-abiding protester was not a violation of the Fourth Amendment.[158] The demonstrator walked in the direction of two Congressmen at a local bar association event.[159] A police officer interpreted this as a threat and, to prevent the demonstrator from continuing toward the Congressmen, restrained the demonstrator and removed him from the room.[160] In analyzing the reasonableness of this temporary seizure and use of force, the court deferred to the judgment of the officer and concluded that no reasonable juror could find it unreasonable.[161]

This analysis hardly applies the Fourth Amendment with scrupulous exactitude. Rather than strictly analyzing the justification for the seizure, it is very deferential. The court found that "[d]eferring to the judgment of a reasonable officer on the scene[,] . . . no reasonable jury could conclude that this brief and minimal use of force . . . was objectively unreasonable."[162] The court failed to consider that this removal constituted a deprivation of the protester's First Amendment rights. Moreover, the opinion gave no basis for the officer's con-

152. 106 F.3d 774 (7th Cir. 1997).
153. *Id.* at 776 & n.1.
154. *Id.* at 776–77.
155. *Jones*, 106 F.3d at 779–80.
156. *Id.* at 780.
157. 38 Fed.Appx. 73 (2d Cir. 2002).
158. *Id.* at 76.
159. *Id.* at 75.
160. *Id.*
161. *Kash*, 38 Fed.Appx. at 77.
162. *Id.* at 76.

clusion that the protester posed a threat, and it seems the only disruption he created was through the desire to express his views. The court's failure to require even a minimal explanation under the Fourth Amendment is far too low a bar to protect demonstrators' First Amendment interests.

The courts have generally failed to consider the First Amendment when analyzing claims for false arrest and excessive force in the protest context. In doing so, they have disregarded the Supreme Court's admonition that when First Amendment rights are at stake, the Fourth Amendment must be applied with scrupulous exactitude. They have also ignored the Supreme Court's concern for chilling effects in the context of the First Amendment. In order to adequately protect freedom of expression, and give appropriate credence to Supreme Court precedent, courts must give the First Amendment a prominent place in any analysis of arrests or force in the context of demonstrations. A legal analysis which takes into account the free speech interests will also encourage less confrontational policing strategies and hopefully lead to decreased violence.

VI.
A MORE APPROPRIATE ANALYSIS INTEGRATES THE INTERESTS PROTECTED BY THE FIRST AND FOURTH AMENDMENTS

Stronger standards are necessary to ensure that Fourth Amendment claims account for First Amendment interests. As the older Supreme Court cases discussed in Part IV suggest, the First and Fourth Amendments should reinforce each other in the protest context. Yet, Part V shows that this has not been the case. In this part, I suggest concrete ways to treat Fourth Amendment claims in the protest context that would better protect First Amendment interests.

To better incorporate First Amendment concerns into Fourth Amendment analysis in cases of arrest, unnecessary arrests that chill speech should be deemed unreasonable and a violation of the Fourth Amendment. This standard should be utilized even where the existence of probable cause is clear. The Supreme Court has recognized that a search may sometimes be unreasonable even if supported by probable cause,[163] and, prior to *Atwater*, it appeared that this type of analysis could also apply to arrests. But, even after *Atwater*, a special First Amendment exception could still be created: even an arrest with probable cause should be held unreasonable when the situation could have been handled in a manner permitting greater expression with minimal additional disruption. This approach better accomplishes the goals of First Amendment jurisprudence—which has limited restrictions on speech to situations in which suppression is necessary to prevent serious, imminent harm—and attempts to

163. *See* Winston v. Lee, 470 U.S. 753, 755 (1985) (holding surgical removal of bullet from respondent's chest unreasonable even though there was probable cause that it would constitute evidence of crime).

provide as much breathing room for speech as possible through the consideration of chilling effects.[164]

Officers should employ an alternative to custodial arrest that not only minimizes the disruption of First Amendment interests, but also does not require completely ignoring the illegal conduct. For example, where protest activity, such as leafleting on the post office sidewalk, is minimally disruptive, it should be allowed to continue even if it is technically illegal.[165] The officers could issue tickets, as they do for traffic violations, which would provide more space for continued speech than would be possible with a custodial arrest. If an officer issues a summons rather than making a full scale arrest, then the disruption of First Amendment interests is minimized. While some discretion must be permitted to police on the ground, this discretion should be narrowed in light of First Amendment considerations because any other standard creates an impermissible risk of chilling legitimate, constitutionally protected speech.

Similarly, courts should carefully review the use of force at protests with First Amendment values in mind, especially given the strong punitive message that force can send to the targeted protester and those around her. Accordingly, force used in dispersal should be analyzed under the Fourth Amendment standard of reasonableness; the *Hodari* framework[166] should not apply to protests. The reasonableness standard should account for the harm to First Amendment interests caused by the use of force at protests. Because the reasonableness analysis required under the Fourth Amendment explicitly calls for balancing the nature of the intrusion against the interests of the state, it ought to consider whether the intrusion involved the limitation of expression. Given the high value placed on freedom of speech under the First Amendment, force should be limited unless absolutely necessary.

Incorporating First Amendment concerns into Fourth Amendment analysis of arrests and use of force will encourage the use of less confrontational tactics at demonstrations, and discourage arrests for crowd control that deprive demonstrators of their opportunity for speech. Requiring police to take the First Amendment into account will foster respect for the right to demonstrate and a generally accommodating, rather than repressive, outlook toward demonstrators.

For example, instead of pain compliance tactics, police could negotiate, wait demonstrators out, or use minimal force in removing them. The use of higher levels of force, even if objectively reasonable, is more likely to escalate confrontation between demonstrators and police.[167] Conversely, the use of minimal force to remove demonstrators sends a message of respect for dissent and protesters' personal integrity, while also posing a lower risk of chilling speech. In both *Forrester* and *Headwaters*, police could have removed demonstrators with

164. *See supra* Part II.

165. These were the facts in *Paff v. Kaltenbach*. *See supra* text accompanying note 123.

166. *See supra* notes 74–77 and accompanying text.

167. *See infra* notes 182–86 and accompanying text.

less force—by carrying them or cutting them out—which would have had a lower likelihood of chilling speech. Accordingly, courts should find the use of pain compliance to be unreasonable under the Fourth Amendment in light of the First Amendment concerns.

Although this approach is far from being generally applied, *Lamb v. Decatur*[168] provides an example of a district court using a Fourth Amendment analysis which incorporates First Amendment concerns.[169] *Lamb* involved a planned demonstration where the police sprayed pepper spray twice into a crowd of demonstrators "in response to some type of surge against the police line."[170] Demonstrators brought suit against the police for violation of their Fourth Amendment rights[171]; the police moved for summary judgment, raising the defense of qualified immunity.[172]

In denying the defendants' motion for summary judgment, the court emphasized the importance of the First Amendment in evaluating the plaintiffs' Fourth Amendment claim:

> This is not the type of Fourth Amendment case that involves the use of force by law enforcement personnel against a fleeing felon or a rebellious prisoner in custody. This case entails the rights of citizens exercising their First Amendment rights of speech and assembly. Where activities protected under the First Amendment are involved, "the requirements of the Fourth Amendment must be applied with scrupulous exactitude."[173]

The court noted that the fact that the claim arose under the Fourth Amendment did not "diminish the First Amendment protections available to the plaintiffs,"[174] indicating a willingness to consider the First Amendment implications of the Fourth Amendment claim. Balancing the police's use of force and the importance of freedom of expression, the court looked skeptically on the defendants' claim of qualified immunity. According to the court, the protection afforded by the First Amendment should have put the officers on notice that "unnecessary force is prohibited."[175] In this case, the strong First Amendment concerns involved were a significant factor in the court's decision to deny summary judgment and allow the case to be heard by a jury.

---

168. 947 F.Supp. 1261 (C.D. Ill. 1996).

169. *Id.* at 1264–66.

170. *Id.* at 1264.

171. Although the opinion does not indicate that plaintiffs raised a First Amendment claim explicitly, the court addressed the First Amendment implications in the context of the formal Fourth Amendment claim. *Id.* at 1263–64.

172. *Id.* at 1264.

173. *Id.* at 1263 (citation omitted).

174. Lamb v. Decatur, 947 F.Supp. 1261, 1264 (C.D. Ill 1996).

175. *Id.*

When applying the reasonableness standard to the use of force, the court again emphasized the difference between use of force against fleeing felons or rebellious prisoners and the use of force against demonstrators engaged in activity protected by the First Amendment.[176] While considering precedents regarding police use of force, the court found none of them to be analogous because they did not involve First Amendment activity.[177] In addition, the court indicated that the First Amendment would be an appropriate factor in the balancing required by the reasonableness analysis.[178] By incorporating First Amendment interests in its analysis and consequently denying the motion for summary judgment, the court both encouraged robust speech protection and increased the cost to police of using force against demonstrators.

This form of analysis will require police to permit the robust expression of dissenting views that *Brandenburg*'s clear and present danger test protects. It will also provide the type of breathing room for speech necessary to prevent chilling effects from police conduct. A strong connection between the First Amendment and the Fourth Amendment will deter police from questionable conduct that prevents protesters from expressing their views.

VII.
NEGOTIATED MANAGEMENT IS PREFERABLE FOR POLICING DEMONSTRATIONS BECAUSE IT REDUCES VIOLENCE AND VALUES FREEDOM OF EXPRESSION

While a legal analysis that considers the First and Fourth Amendments together would encourage police to be more selective in using force and arrests at demonstrations, it would also encourage a better style of policing that is less likely to result in violence. At the extremes, protest policing can take two possible forms: escalated force or negotiated management.[179] The escalated force style of policing characteristically makes extensive use of force and arrests, strictly enforces minor violations, shows disrespect for legal restrictions on police actions, employs a confrontational communication style, and adopts a rigid approach to maintaining order.[180] The negotiated management style typically avoids use of force and arrests whenever possible, tolerates minor disruptions, and shows respect for law and the right to demonstrate.[181] In reality,

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

177. *Id.*

178. *See id.*

179. Clark McPhail, David Schweingruber & John McCarthy, *Policing Protest in the United States: 1960–1995*, *in* POLICING PROTEST, *supra* note 7, at 49–50.

180. "For instance, police who repress a large number of protest groups, prohibit a wide range of protest activities, and intervene with a high degree of force are employing a diffused, repressive, and 'brutal' protest policing style." della Porta & Reiter, *Introduction*, *supra* note 7, at 3. For a list of categories that della Porta and Reiter have developed in order to differentiate forms of policing strategy, *see id.* at 4. *See also* McPhail, Schweingruber & McCarthy, *supra* note 179, at 50–54 (describing the five dimensions of protest policing).

181. McPhail, Schweingruber & McCarthy, *supra* note 179, at 50–54.

policing at any particular event will not perfectly conform to either model, but instead will feature components of both models. However, the negotiated management style is preferable because it reduces violence and shows respect for the right to protest.

A. The Theory of Negotiated Management

A closer examination of the difference between escalated force and negotiated management shows that negotiated management is advantageous for both demonstrators and police. At demonstrations, a confrontational policing style may take a variety of forms. Police may appear in riot gear instead of their normal uniforms. They may also employ a variety of violent dispersal or arrest techniques, such as using tear gas or pepper spray, making baton charges, riding horses or vehicles into crowds, or shooting rubber, plastic, or even metal bullets.[182] In addition, other, nonviolent, methods may be employed, such as strict crowd control through rule enforcement—keeping demonstrators corralled in pens,[183] requiring searches of anyone entering the demonstration site,[184] or rigorous enforcement of minor laws.[185] In such situations, demonstrators often perceive the police as attempting to stifle or discourage their protest. Police officers employing this style often enter such situations expecting trouble and viewing their role as one of protecting the general population from the troublemakers. The 2003 demonstration in Miami, during which police employed tear gas and rubber bullets to disperse crowds and made indiscriminate, preemptive arrests, is an example of the escalated force style of policing.[186]

Negotiated management policing, by contrast, employs techniques to decrease the tension between protesters and law enforcement. One visible aspect of negotiated management is that police appear in their regular uniforms, keeping any forces in riot gear out of sight until they are needed. Police also demonstrate greater tolerance for minor infractions.[187] For example, if demonstrators marching on the sidewalk move into the street, they are technically acting illegally. While police would have probable cause to arrest all demonstrators in the street, they might instead tolerate this minor disruption and cooperate with protesters by diverting traffic temporarily. The police could then use this concession to negotiate for more control by either redirecting the route or limiting the length of time demonstrators could be in the street. Thus, a violent confrontation is avoided, and the disruption to traffic is minimal.

182. For an example of deadly force at a demonstration, see Hooper, *supra* note 66.

183. *See* ARRESTING PROTEST, *supra* note 6, at 19–20.

184. *See* Stauber v. City of New York, No. 03 Civ. 9162, 2004 WL 1593870, at *11 (S.D.N.Y. July 16, 2004).

185. *See* della Porta & Reiter, *Introduction*, *supra* note 7, at 3.

186. *See supra* notes 4–6 and accompanying text.

187. *See* McPhail, Schweingruber & McCarthy, *supra* note 179, at 50–54.

Demonstrators are more likely to perceive the negotiated management style positively. The negotiated management style suggests to the demonstrators that the police role is to ensure everyone's safety and to protect the rights of both the demonstrators and the public. Similarly, police may perceive their role as minimizing disruption while simultaneously allowing for expression.[188] This congruence of perceptions of the role of law enforcement creates more positive relations between police and protesters. In addition, by negotiating concessions with the demonstrators, police can maintain better control of the situation in a peaceful manner.

Police trained in negotiated management techniques learn that it may be counterproductive to suppress all violations of the law during large demonstrations because such actions could cause the whole situation to degenerate into violence.[189] This training allows officers to recognize that strict law enforcement is not always the best strategy. As one officer policing a large protest observed:

> In the center of the demonstration, there was a small group from one of the social centers, with bad intentions. We were lined up in front of the church, fixed and immobile, and then these stones, bottles, and stuff are thrown. We didn't react in any way because these people, in the middle of a big demonstration of four to five thousand people, well, we would have immediately created a panic and disturbance among all the others. Or we might have got ourselves hurt, or others, confronting people who had nothing to do with it. For four people who were throwing stones. It wasn't the right time to intervene. You understand that *to go and arrest a protester in the middle of demonstration, even with an enormous deployment of officers, that would just create more disorder rather than restore public order.* So the officials were right not to order us to arrest a protester who was writing graffiti on a wall; that is, those responsible for public order prefer a wall to be written on than a big disturbance in the streets. And, in my opinion, I think they are right.[190]

Police recognize that in order to prevent escalation of conflict, which can lead to chaos and injuries, it is sometimes necessary to allow minor violations of the law.

Demonstrators can also raise the level of confrontation in ways which range from peaceful civil disobedience to more violent tactics such as rock-throwing

188. For an example of a shift from a confrontational policing strategy to one very much like that of negotiated management, along with the beneficial effects that such a shift seemed to produce in the police's own understanding of their relationship to the public more generally, see Donatella della Porta, *Police Knowledge and Protest Policing: Some Reflections on the Italian Case*, *in* POLICING PROTEST, *supra* note 7, at 228–52.

189. *Id.* at 240.

190. *Id.* at 233 (emphasis added).

and property destruction. One reason demonstrators might be motivated to escalate the situation may stem from a belief that the police are representative of the repressive political order that they are protesting. However, if a demonstration could potentially influence the political process by cultivating widespread support, the organizers may have a significant interest in avoiding escalation of the conflict so as to avoid a negative perception of the protesters.[191] Conversely, if their goal is to make their opinion felt through disruption, then demonstrators have much less interest in maintaining order.[192] Therefore, the desire of protesters for confrontation may be directly related to their feeling of marginalization in the political process.

A potential argument against use of the negotiated management style of policing is that violent demonstrators may exploit the police desire to avoid escalation to get away with illegal acts. Despite this possibility, a negotiated management policing style provides the best method to avoid violence yet still enforce serious violations of law because it is more likely to be viewed as legitimate by the majority of demonstrators. Demonstrators who consider policing tactics to be legitimate are less likely to confront those tactics through overtly disruptive acts and may also be more supportive of police intervention when serious violations of the law occur. Moreover, if fewer protesters employ confrontational tactics, it will be easier for police to single out those demonstrators who pose a significant threat to law and order. By contrast, the most violent demonstrations will occur when both police and protesters adopt a confrontational posture. While it is undisputed that police must be able to deal with people who pose serious threats, particularly those who are prepared to use violence, a negotiated management style of policing would do so without intensifying confrontation.

Teaching officers to use negotiated management at demonstrations may also help to create increased respect for the value of free speech within police culture. Since police are generally more tolerant of demonstrations which they view as legitimate expressions of grievances,[193] negotiated management might lessen tension between law enforcement and demonstrators. Use of negotiated management instead of escalated force signals to both officers and demonstrators that speech rights are valued by the police as an institution. Since police will always have to make on-the-spot determinations about how to deal with a given situation, it is especially important that respect for dissent be part of police culture. Training in negotiated management may help to achieve this goal.

---

191. For an interesting discussion of how protesters' desires to win public support might restrain their more antagonistic or violent activities, see Waddington, *supra* note 15, at 130–31.

192. As Waddington points out, the choice that protesters must make between a peaceful or an antagonistic form of demonstration (which in turn affects the police's own choice between a restrained or confrontational policing technique), seems to depend in large part upon the "institutional standing of protesters." *Id.* at 131.

193. *See, e.g.*, della Porta, *supra* note 188, at 241–45.

B. *Negotiated Management in Practice*

The contrast between the February 15, 2003 and March 20, 2004 antiwar demonstrations in New York illustrates how negotiated management can affect the level of violence at demonstrations. At the February 15 demonstration, police adopted an attitude of rigid control of all aspects of the event. They refused to allow demonstrators to march anywhere in the city because of security concerns, even though other cultural parades, such as the Saint Patrick's Day Parade, had been approved.[194] This increased the feeling of marginalization by demonstrators, which, as discussed above, creates a greater likelihood of confrontational tactics.[195]

On the day of the event, police actions created additional tension in a variety of ways. Demonstrators had difficulty reaching the stationary rally because the police closed many side streets to allow only a single point of entry.[196] At the rally site, protesters' freedom of movement was restricted by the use of pens.[197] Protesters could not leave the pens to use the bathroom or get refreshments; if they did leave, they could not rejoin their group.[198]

As a result, confrontations occurred between police and demonstrators and large numbers of police in riot gear were deployed. As the thousands of people unable to get to the demonstration filled the streets, police tried to regain control by using horses and pepper spray to disperse protesters.[199] This force was employed without warning against peaceful groups. At one point, frustrated demonstrators tried to break through police barricades to get to the protest. If police had adopted a more flexible approach to the protest, these conflicts might not have arisen.

There were two primary differences between the February 15 demonstration and the March 20 demonstration a year later: the attitude of the police and the size of the demonstration. Otherwise the events were similar: they were organized by the same group,[200] concerned the same issue, and likely attracted similar types of people.[201] Yet police and organizers both agreed that the March 20

194. ARRESTING PROTEST, *supra* note 6, at 3–6.

195. *See supra* notes 182–86 and accompanying text.

196. Stauber v. City of New York, No. 03 Civ. 9162, 2004 WL 1593870, at *4–5 (S.D.N.Y. 2004). *See also* ARRESTING PROTEST, *supra* note 6, at 7–10, 18.

197. *Stauber*, 2004 WL 1593870, at *5–6. *See also* ARRESTING PROTEST, *supra* note 6, at 19–20.

198. *Stauber*, 2004 WL 1593870, at *5–6. *See also* ARRESTING PROTEST, *supra* note 6, at 19–20.

199. *Stauber*, 2004 WL 1593870, at *5–6 (recounting the police's use of horses). *See also* ARRESTING PROTEST, *supra* note 6, at 8 (claiming that, according to "several accounts," the police used "pepper spray" on some demonstrators).

200. Both demonstrations were organized by United for Peace and Justice, as protests against the second war in Iraq. *See* Dewan, *After Gentler Tactics*, *supra* note 11, at B3.

201. The February 15, 2003 demonstration attracted between 100,000 and 500,000 protesters. *See* Shaila K. Dewan, *War Protesters Say They Were Bound for Rally, but Ended Up in Human Traffic Jam*, N.Y. TIMES, Feb. 17, 2003, at B4. The March 20, 2004 demonstration drew only

demonstration went smoothly, while the February 15 event encountered serious problems. Certainly the smaller crowds were easier for police to deal with, but I would argue that the change in police tactics made the largest difference.

On March 20, the police utilized a more flexible style of policing that respected the rights of demonstrators. Organizers were granted a permit to march.[202] Police made a proactive effort to disseminate information about how to get to the event,[203] and demonstrators were allowed to move freely around the demonstration site.[204] Most officers at the event appeared in standard police uniforms rather than in riot gear. There were almost no arrests made, in contrast to the hundreds of arrests on February 15, 2003.[205] In short, the police's use of negotiated management techniques generated few points of contention between police and protesters. This allowed demonstrators to channel their dissent into lawful, peaceful protest. If police see their role as both protecting demonstrators' rights and maintaining order, it will be easier for demonstrators to trust the police to make decisions about when the use of force or the arrest power is truly necessary.

The constitutional standards that govern policing of protests should encourage the use of negotiated management whenever possible because of its potential to decrease violence while respecting the right to protest. Consideration of both the First and Fourth Amendments will encourage the use of negotiated management by requiring police to justify their actions and adopt less confrontational strategies whenever possible. The resulting decrease in conflict will make law enforcement's job easier, and the First Amendment values essential to our democracy will also thrive.

VIII.
CONCLUSION

In this article, I have argued that Fourth Amendment analysis should be changed so as to incorporate more fully First Amendment interests. This change would call on law enforcement to practice more flexible policing, thereby allowing continued expression of views rather than using force and arrests as the first recourse to maintain order. A legal standard which encourages flexible policing, such as the negotiated management style, would not prohibit police from using force or arrests at protests. Rather, it would merely increase the costs of doing so, thus ensuring police awareness that their actions must be justified in

33,000 to 100,000 people. *See* Alan Feuer, *From Midtown to Madrid, Tens of Thousands Peacefully Protest War in Iraq*, N.Y. TIMES, Mar. 21, 2004, at 27.

202. *See Stauber*, 2004 WL 1593870, at *7.

203. *Id.* The NYPD sought to disseminate information about the event by posting information on its website, by holding a press conference, and by using sound trucks during the event itself.

204. *Id.*

205. *Compare* Feuer, *supra* note 201, *with* ARRESTING PROTEST, *supra* note 6, at 10.

light of the role of free speech in our democracy. This would encourage police to err on the side of too much speech, rather than too little. Most importantly, it would send the message that our society will not tolerate police actions that chill speech.