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"HEY, HEY! HO, HO! THESE MASS ARRESTS HAVE GOT TO GO!": THE EXPRESSIVE FOURTH AMENDMENT ARGUMENT

KAREN J. PITA LOOR*

ABSTRACT

The racial justice protests ignited by the murder of George Floyd in May 2020 constitute the largest protest movement in the United States. Estimates suggest that between fifteen and twenty-six million people protested across the country during the summer of 2020 alone. Not only were the number of protestors staggering, but so were the number of arrests. Within one week of when the video of George Floyd's murder went viral, police arrested ten thousand people demanding justice on American streets, with police often arresting activists *en masse*. This Essay explores mass arrests and how they square with Fourth Amendment protections, as conceived by its Framers. The first part of this Essay provides an account of mass arrests during the George Floyd protests in Los Angeles, the city with the largest number of reported arrests in the initial demonstrations. The second part of this Essay begins by briefly reviewing the Expressive Fourth Amendment, a doctrine the author previously introduced, which posits that the Framers designed the Fourth Amendment to protect freedom of expression, in addition to the prevailing understanding of its safeguard of bodily integrity. The Expressive Fourth Amendment shields from government overreach individuals engaged in political expressive conduct. Here, this Essay expands upon this doctrine by querying how this protection should apply to mass arrests during protests and ultimately concludes that courts should demand both that a police officer establish probable cause for each protester swept up in a mass arrest and that judges positively weigh an individual's expressive conduct when determining whether an arrest was reasonable in the totality of the circumstances.

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* Associate Clinical Professor of Law, Boston University School of Law. My sincerest gratitude to the student organizers of the *William & Mary Journal of Race, Gender, and Social Justice* Symposium, *The Largest Social Movement: Legal Lessons from the Black Lives Matter Movement*, for their invitation to participate in this special issue. I am grateful to Linda McClain for her wisdom, encouragement, and guidance as I worked on this project. Thank you also to Naomi Mann for her support and helpful conversations about this Essay. I am thankful to Sri Ravipati, Christiana Prater-Lee, and Robert Wirtz for their invaluable research assistance. I am indebted to Penélope P. Zambrana and Joseph E. Staska for their patience and support.

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INTRODUCTION

As this Special Issue of the *William & Mary Journal of Race, Gender, and Social Justice* recognizes, the racial justice protests ignited by the murder of George Floyd in May 2020 constitute the largest protest movement in the United States.[1] Estimates suggest that between fifteen and twenty-six million people protested across the country during the summer of 2020 alone.[2] Not only were the number of protestors staggering, but so were the number of arrests.[3] Within one week of when the video of George Floyd's murder went viral, police arrested 10,000 people demanding justice on American streets, with police often arresting activists *en masse*.[4] This Essay explores mass arrests and how they square with Fourth Amendment protections, as conceived by its Framers.

The first part of this Essay provides an account of mass arrests during the George Floyd protests in the City of Los Angeles. I focus on Los Angeles because it is the city with the largest number of

1. Larry Buchanan, Quoctrung Bui & Jugal K. Patel, *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html [https://perma.cc/K48Z-K67L].

2. *Id.*

3. *See* Meryl Kornfield, Austin R. Ramsey, Jacob Wallace, Christopher Casey & Verónica Del Valle, *Swept Up by Police*, WASH. POST: INVESTIGATIONS (Oct. 23, 2020), https://www.washingtonpost.com/graphics/2020/investigations/george-floyd-protesters-arrests [https://perma.cc/KJ7C-3ZLR].

4. Anita Snow, *AP Tally: Arrests at Widespread U.S. Protests Hit 10,000*, AP NEWS (June 4, 2020), https://apnews.com/article/american-protests-us-news-arrests-minnesota-burglary-bb2404f9b13c8b53b94c73f818f6a0b7#:~:text=PHOENIX%20(AP)%20%E2%80%94%20More%20than,known%20arrests%20across%20the%20U.S. [https://perma.cc/5JV8-75TS]. Within two weeks, the number of arrests reached 17,000. Kornfield et al., *supra* note 3.

reported arrests in the early days of the protests.[5] The second part of this Essay discusses how the doctrine of the *Expressive Fourth Amendment*, which I advanced in a prior piece by the same name,[6] should apply to mass arrests of individuals engaged in expressive conduct.[7]

I. ACCOUNTS OF MASS ARRESTS OF PROTESTERS

The police tactic of using mass arrests against protesters is by no means unique to the Black Lives Matter (BLM) movement.[8] Police have used mass arrests against environmental protesters,[9] WTO

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5. *See* Nicholas Bogel-Burroughs, John Eligon & Will Wright, *L.A.P.D. Severely Mishandled George Floyd Protests, Report Finds*, N.Y. TIMES, https://www.nytimes.com/2021/03/11/us/lapd-george-floyd-protests.html [https://perma.cc/K67K-BMJH] (last updated Mar. 29, 2021).

6. Karen Pita Loor, *The Expressive Fourth Amendment*, 94 S. CAL. L. REV. 101 (forthcoming 2021) [hereinafter Loor, *Expressive Fourth*]; Karen Pita Loor, *An Argument Against Unbounded Arrest Power: The Expressive Fourth Amendment & Protesting While Black*, MICH. L. REV. (forthcoming June 2022) [hereinafter Loor, *Protesting While Black*].

7. By conduct, I mean any behavior that leads to the interaction between police and the policed person, which during protests is expressive activity. The Supreme Court recognizes that conduct "expressing certain views is the type of symbolic act" that is "closely akin to 'pure speech' which . . . is entitled to comprehensive protection under the First Amendment." Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 505–06 (1969).

8. In 2013, three community organizers, Alicia Garzia, Patrisse Cullors, and Opal Tometi founded the Black Lives Matter ("BLM") movement through the hashtag, #BlackLivesMatter, on social media. Herbert G. Ruffin II, *Black Lives Matter: The Growth of a New Social Justice Movement*, BLACKPAST (Aug. 23, 2015), https://www.blackpast.org/african-american-history/black-lives-matter-growth-new-social-justice-movement [https://perma.cc/Y86S-74D8]. This idea came in the wake of the July 2013 acquittal of George Zimmerman for the murder of seventeen-year-old Trayvon Martin. *Id.* BLM drew inspiration from the 1960s civil rights/Black power movement, the 1980s Black feminist/womanist movement, the 2000s LGBTQ+ movement, and the 2011 Occupy Wall Street movement. *Id.* August 9, 2014 marked the first time that BLM members took to the streets in protest during the BLM Freedom Ride to Ferguson, Missouri. *Id.* There, they participated in non-violent protests in the wake of the murder of eighteen-year-old Michael Brown at the hand of police officer, Darren Wilson. *Id.* BLM was one of hundreds of organizations protesting in Ferguson, but they quickly stood out as the BLM slogan became the call for action against unjustifiable killings of countless African Americans beyond Michael Brown. *Id.* By summer of 2015, BLM opened chapters around the world including in United States, Canada, and Ghana. *Id.* BLM also began pressuring politicians to state their stance on BLM issues and to create policies that would facilitate the improvement of Black communities. *Id.* Between 2016 and 2020, BLM continued to protest police abuse and hold anti-racism rallies. *Id.* Following the deaths of Ahmaud Arbery, Breonna Taylor, and George Floyd in 2020, the BLM movement became more influential than ever as more than 20 million people in 2,000 cities and towns in every state in the United States took to the streets in protest. *Id.*

9. Katharine Gammon, *Line 3: Protests Over Pipeline Through Tribal Lands Spark*

protesters,[10] pro-immigrant advocates,[11] and Occupy,[12] just to name a few incidents in recent years. However, the data demonstrates that police are more likely to show up in high alert and high force when the protesters are Black and Brown.[13] Although, admittedly the George Floyd protests have been remarkedly racially diverse,[14] to the degree that police perceived these as Black movements, law enforcement presence was particularly aggressive.[15] Furthermore, it would be naïve to pretend that police conduct is not influenced by the fact that one of the fundamental tenets of the BLM movement is a critique of police brutality against Black and Brown people.[16]

Clashes and Mass Arrests, GUARDIAN (June 10, 2021), https://www.theguardian.com/environment/2021/jun/10/line-3-pipeline-arrests-minnesota [https://perma.cc/WTX8-ZY6M].

10. *See* Karen J. Pita Loor, *When Protest Is the Disaster: Constitutional Implications of State and Local Emergency Power*, 43 SEATTLE UNIV. L. REV. 1, 38–39 (2019) (discussing in detail the mass arrests of 1999 WTO protestors).

11. Ed Pilkington, *Almost 600 Arrested at Washington Protest Over Trump Immigration Policy*, GUARDIAN (June 28, 2018), https://www.theguardian.com/us-news/2018/jun/28/us-immigration-protest-trump-washington-senate [https://perma.cc/9FAU-X9MM].

12. Matt Wells, *Occupy Wall Street—The Story of the Brooklyn Bridge "Trap"*, GUARDIAN (Oct. 3, 2011), https://www.theguardian.com/world/blog/2011/oct/03/occupy-wall-street-brooklyn-bridge-arrests [https://perma.cc/CWC4-C3FC].

13. *See* Gabbatt, *infra* note 15. I have decided to capitalize "Black" and "Brown" but not "white" to reflect the shared identity and history of repression among communities of color. *See* David Bauder, *AP Says It Will Capitalize Black But Not white*, AP NEWS (July 20, 2020), https://apnews.com/article/entertainment-cultures-race-and-ethnicity-us-news-ap-top-news-7e36c00c5af0436abc09e051261fff1f [https://perma.cc/2JYA-PVSX]; Mike Laws, *Why We Capitalize 'Black' (and Not 'white')*, COLUM. J. REV. (June 16, 2020), https://www.cjr.org/analysis/capital-b-black-styleguide.php [https://perma.cc/9M7H-LC5P]; Nancy Coleman, *Why We're Capitalizing Black*, N.Y. TIMES (July 5, 2020), https://www.nytimes.com/2020/07/05/insider/capitalized-black.html [https://perma.cc/N5P6-7RFT]; *see also* Peter Wegner, *Capitalize Brown*, KQED (Aug. 12, 2020), https://www.kqed.org/perspectives/201601140174/peter-wegner-capitalize-brown [https://perma.cc/7G5V-YJ3N] ("Capital B for Black people. Capital B for Brown people. It's not a revolution, even in the world of typography. It's incremental, a keystroke's worth of change. It costs nothing. It is, literally, the least we can do.").

14. *See* LaGina Gause & Maneesh Arora, *Not All of Last Year's Black Lives Matter Protesters Supported Black Lives Matter*, WASH. POST (July 2, 2021), https://www.washingtonpost.com/politics/2021/07/01/not-all-last-years-black-lives-matter-protesters-supported-black-lives-matter [https://perma.cc/4YUP-ZBJU].

15. Adam Gabbatt, *Protests About Police Brutality Are Met with Wave of Police Brutality Across U.S.*, GUARDIAN (June 6, 2020), https://www.theguardian.com/us-news/2020/jun/06/police-violence-protests-us-george-floyd [https://perma.cc/UX7V-9N6F]; Shaila Dewan & Mike Baker, *Facing Protests Over Use of Force, Police Respond with More Force*, N.Y. TIMES (June 2, 2020), https://www.nytimes.com/2020/05/31/us/police-tactics-floyd-protests.html [https://perma.cc/U4PM-V7YT].

16. Since its origin, the BLM movement has expanded to embrace advocacy for other non-white people. *See, e.g.*, Russell Contreras, *How Black Lives Matter Helped Native Americans and Latinos*, AXIOS (Mar. 13, 2021), https://www.axios.com/george-floyd-native-americans-latinos-black-lives-matter-f9943dc3-0b4e-4fea-985e-349fdb9a5473.html [https://perma.cc/2SXM-C6P6].

Below is an account of Los Angeles Police Department (LAPD) mass arrests—the police department with the highest volume of arrests in the early days of the George Floyd protests.[17]

LAPD arrested over four thousand people from May 29 to June 2.[18] As is common during protests, the overwhelming number of arrests were for non-violent conduct.[19] In Los Angeles, the most frequent charges were failure to obey a police order or violating curfew.[20] The table below contains arrest statistics from a report, ordered by the Los Angeles City Council, examining LAPD's response to the protests:

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17. *Infra* Table 1. The cities trailing behind Los Angeles in the volume of arrests were Dallas, Philadelphia, and New York City. *See* Snow, *supra* note 4. For example, journalist Jake Bleiberg reported that Dallas police admitted to arresting 696 people on the Margaret Hunt Hill Bridge in Dallas in a single evening. *See* Jake Bleiberg (@JZBleiberg), TWITTER (June 2, 2020, 5:40 PM), https://twitter.com/JZBleiberg/status/1267934206363086848 [https://perma.cc/MT4Z-GFVJ]; *see also* Nichole Manna & Anna M. Tinsley, *Dallas Protesters Spent up to 36 Hours in Jail*, FORT WORTH STAR TELEGRAM (June 5, 2020), https://infoweb.newsbank.com/apps/news/document-view?p=WORLDNEWS&docref=news/17B69B034F4E9FF8&f=basic [https://perma.cc/YE5X-9MYN]. In New York City, 1,969 people were arrested from May 29 to June 4. N.Y. STATE OFF. OF THE ATT'Y GEN., NEW YORK CITY POLICE DEPARTMENT'S RESPONSE TO DEMONSTRATIONS FOLLOWING THE DEATH OF GEORGE FLOYD 13, 18 (2020), https://ag.ny.gov/sites/default/files/2020-nypd-report.pdf [https://perma.cc/FV3T-6AF7]. In Philadelphia, Police Commissioner Danielle Outlaw confirmed that there were over 700 arrests in the first week of the George Floyd protests. Anna Orso, *They Said His Name*, PHILA. INQUIRER (June 7, 2020), https://www.inquirer.com/news/inq/george-floyd-philadelphia-protest-photos-20200607.html [https://perma.cc/K74F-KF7D].

18. GERALD CHALEFF, L.A. CITY COUNCIL, AN INDEPENDENT EXAMINATION OF THE LOS ANGELES POLICE DEPARTMENT 2020 POLICE RESPONSE 10 (2021) [hereinafter L.A. CITY COUNCIL REPORT], http://www.lapdpolicecom.lacity.org/041321/BPC_21-067.pdf [https://perma.cc/X5X8-CAYZ].

19. Second Amended Complaint for Damages and Declaratory Injunctive Relief at 1, Black Lives Matter L.A. v. City of L.A., No. 2:20-cv-05027 (C.D. Cal. June 18, 2021) [hereinafter Second Amended Complaint]; *see also* Loor, *Protesting While Black*, *supra* note 6.

20. L.A. CITY COUNCIL REPORT, *supra* note 18, at 10. Failure to obey a police officer is only an infraction, which should not result in a custodial arrest. *See* L.A. MUN. CODE § 80.02 (1980); L.A. CITY COUNCIL REPORT, *supra* note 18, at 9. Yet those arrested were taken into custody. L.A. CITY COUNCIL REPORT, *supra* note 18, at 9; Second Amended Complaint, *supra* note 19, at 36. According to pleadings in *Black Lives Matter L.A. v. City of L.A.*, about a third of the people arrested were charged with an infraction. *See* Second Amended Complaint, *supra* note 19, at 31, 36. California Penal Code Section 853.5 mandates that individuals charged with an infraction should be released on their own recognizance on the field after they agree to appear at a subsequent hearing. *Id.* at 36. However, police held those accused of infractions in buses for extended periods of time and even booked them. *Id.*

TABLE 1. LAPD ARRESTS AND CHARGES MAY 30 THROUGH JUNE 2, 2020

Date	Number of arrests	Charges
May 30	866	curfew violation, failure to disperse, failure to obey a lawful police order, looting
May 31	700	curfew violation, looting
June 1	1242	curfew violation, failure to obey a lawful police order, looting
June 2[21]	956	curfew violation[22]

Although here I will focus on the mass arrest tactics employed by the LAPD during the protests, there were also numerous accusations of the LAPD's use of excessive force against protestors, including improper and abusive use of rubber bullets and baton strikes.[23] The Los Angeles City Council report was critical of the LAPD's response to the protests in this respect as well.[24] The LAPD's overall mishandling of the protests was so egregious that there were contemporaneous public demands for Police Chief Michel Moore's resignation.[25]

The LAPD's actions during protests also landed them in court.[26] In *Black Lives Matter Los Angeles v. City of Los Angeles*, several protesters brought a class action against the city, the police commissioner, and unnamed officers pursuant to § 1983 of the Civil Rights Act alleging violations of their Fourth Amendment rights for unlawful

21. For information regarding arrests from May 30 to June 1, 2020, see L.A. CITY COUNCIL REPORT, *supra* note 18, at 10.

22. The L.A. City Council Report does not classify for what offenses people were arrested on June 2, but only that there were 956 arrests. *Id.* at 23. However, we know that at least 120 people were arrested together for curfew violations in one area of the city. *See* Second Amended Complaint, *supra* note 19, at 4, 28.

23. *See* Order Regarding Plaintiffs' Application for Temporary Restraining Order at 4, Black Lives Matter L.A. v. City of L.A., No. 2:20-cv-05027 (2020); *see also* Second Amended Complaint, *supra* note 19, at 62.

24. *See* L.A. CITY COUNCIL REPORT, *supra* note 18, at 58–64.

25. Nouran Salahieh, *Residents Call on LAPD Chief to Resign in L.A. Police Commission's 1st Meeting Since Protests Started Across the City*, KTLA5 (June 2, 2020), https://ktla.com/news/local-news/l-a-police-commission-holds-1st-meeting-since-protests-started-across-the-city [https://perma.cc/UN8V-9WTP].

26. Second Amended Complaint, *supra* note 19, at 9–10, 14.

detention and arrest, as well as for excessive force.[27] The lawsuit recounts how the police employed mass arrest tactics in the days following the murder of George Floyd.[28] As the table above demonstrates, people were arrested routinely for failure to obey a police order or curfew violations.[29] An account of the facts from *Black Lives Matter Los Angeles v. City of Los Angeles* reveals that LAPD tactics made it often impossible to comply with curfews and police orders to disperse.[30] Rather, police tactics seemed explicitly designed to trap not only activists, but anyone in the vicinity of the protests.

Curfews were announced at the last minute; information about curfews was not well disseminated; or curfew times were changed without advance notice.[31] On May 31, LAPD police officers informed, at about 5:45 PM, 10,000 activists who were out on the streets protesting that a curfew would go into effect at 6:00 PM,[32] providing insufficient notice for people to leave the streets. The next day the City changed the curfew from 6:00 PM to 5:00 PM but waited until 4:00 PM to issue an announcement.[33] LAPD then used a well-known protest policing technique called "kettling" to prevent protesters from leaving the protest and complying with the impending curfew order or a dispersal order.[34] Police kettle protesters by corralling them and "blocking all exit routes."[35] Here, the LAPD positioned themselves rows deep, garbed in riot gear and armed with less lethal weapons, to block any escape.[36] One protester described "an impenetrable wall of officers at least 10 deep."[37] After corralling protesters, police proceeded to arrest *en masse*.[38] People were rounded up by the hundreds.[39]

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27. *Id.* at 62–63. Plaintiffs alleged their First Amendment and Due Process rights were also violated, as well as violations of California state law. *Id.*

28. *Id.* at 9–10, 14.

29. *See id.* at 4.

30. *See id.* at 23–24, 26.

31. *See* Second Amended Complaint, *supra* note 19, at 3–4; *see also* Erika Martin, *Glendale Curfew Warning Accidentally Sent to All of L.A. County; Countywide Curfew Is Still 6 p.m.*, KTLA5 (June 1, 2020), https://ktla.com/news/local-news/glendale-curfew-warning-accidentally-sent-to-all-of-l-a-county-countywide-curfew-is-still-6-p-m [https://perma.cc/K4GV-927H].

32. Second Amended Complaint, *supra* note 19, at 3–4.

33. *Id.* at 4.

34. *Id.* at 7.

35. *Id.*

36. *See id.* at 13. In 2007, LAPD agreed to a settlement in *Multi-Ethnic Immigrant Workers Org. Network v. City of L.A.* to provide protesters with "a clear and safe route" to disperse, as well as "an objectively reasonable" time to disperse, after issuing an audible order to disperse. *Id.* at 46–47 (quoting Multi-Ethnic Immigrant Workers Org. Network v. City of L.A., 246 F.R.D. 621 (C.D. Cal. 2007)).

37. Second Amended Complaint, *supra* note 19, at 13.

38. *Id.* at 12–14, 24, 26, 28, 30. Often, police also fired less lethal weapons at kettled crowds. *See id.* at 26.

39. *See id.* at 25.

Some protesters were surrounded on all sides by lines of police, while others were herded into an area where there was no escape.[40] Even when there was no curfew and no audible order to disperse, police still informed crowds that they were going to be arrested; often the police ordered people to sit down on the ground to wait for arrest or to kneel with their hands behind their backs.[41] Police ignored individuals' requests to be allowed to leave and furthermore chased and fired rubber bullets and other projectiles at people attempting to escape the area.[42] Protesters were not the only ones swept up in these mass arrests—journalists covering the demonstrations and others in the area, including homeless people, were also detained and arrested.[43] Once detained by police, individuals had to wait for prolonged periods on the street—sometimes tightly handcuffed and sitting on the ground—to be loaded into crowded buses where they waited again until they were transported and booked, even when they were ultimately charged with only an infraction.[44]

In June of 2020, I interviewed Jason Sywak.[45] Mr. Sywak participated in the summer 2020 George Floyd protests in Los Angeles.[46] His account of police tactics was consistent with those recounted by plaintiffs in *Black Lives Matter Los Angeles v. City of Los Angeles*.[47] According to Mr. Sywak, "riot police" and the National Guard blocked all streets before the curfew was initiated so people could not leave and would thus have no choice but to violate the curfew.[48] He stated that before the streets are blocked, buses are parked nearby in anticipation of arrests.[49] Police told protesters that they had to leave and go home, but there was "no way out."[50] In one of these instances, Mr. Sywak attempted to explain to "riot police" that passing through the police skirmish line to leave was impractical because his home was two blocks away in that direction.[51] The officer from the "riot police" raised his gun, aimed it at Mr. Sywak's head, and commanded

40. *Id.* at 9, 11–13, 18, 28.

41. *Id.* at 11, 24, 25, 28.

42. Second Amended Complaint, *supra* note 19, at 14–17.

43. *Id.* at 1, 14–15.

44. *See id.* at 5, 10–12, 15, 17, 18, 25 (discussing the supposedly lesser legal implications of infractions).

45. Telephone Interview with Jason Sywak, Protester (June 15, 2020).

46. *Id.*

47. *Compare* Telephone Interview with Jason Sywak, Protester, *supra* note 45, *with* Second Amended Complaint, *supra* note 19, at 14–17.

48. Telephone Interview with Jason Sywak, Protester, *supra* note 45.

49. *Id.*

50. *Id.*

51. *Id.*

that he leave in the opposite direction.[52] As of the date of our interview, Mr. Sywak had successfully evaded arrest during the summer's protests.[53] He is one of the lucky ones on that front.

II. THE EXPRESSIVE FOURTH AMENDMENT AND ITS APPLICATION TO MASS ARRESTS DURING PROTESTS

The current understanding of the Fourth Amendment is inappropriate, and inadequate, to protect activists engaged in expressive conduct from mass arrests during protests. This understanding is also inconsistent with the Framers' intent that the Fourth Amendment protect freedom of expression, in addition to bodily integrity. I have argued that courts have missed the expressive component of Fourth Amendment protection when evaluating claims of law enforcement excessive force against protesters.[54] Courts should apply an Expressive Fourth Amendment whenever a policed individual engages in primarily expressive conduct, as opposed to criminal conduct. Below I first describe how courts currently evaluate a protester's claim that police officers violated their right to be free from unreasonable arrest.[55] Then, I briefly introduce the Expressive Fourth Amendment and query how it might change this analysis.

A. The Current Understanding of the Fourth Amendment and Mass Arrests

The text of the Fourth Amendment protects individuals "against unreasonable searches and seizures" and states that "no Warrants shall issue, but upon probable cause, supported by oath and affirmation, and particularly describing the place to be searched, and the persons or things to be seized."[56] Despite this strict warrant requirement for arrests in the text of the Fourth Amendment, courts have read this language loosely and have made warrantless arrests the norm—whether for felonies, misdemeanors, or even criminal infractions

52. *Id.* Mr. Sywak stated that from May 30 to June 6, police officers pointed a gun at him on five different occasions. *Id.*

53. Telephone Interview with Jason Sywak, Protester, *supra* note 45.

54. *See* Loor, *Expressive Fourth*, *supra* note 6.

55. I use "they/them" pronouns throughout this Essay to be inclusive of all gender identities. *See* Jacob Tobia, *Everything You Ever Wanted to Know About Gender-Neutral Pronouns*, TIME (May 12, 2016, 3:35 PM), https://time.com/4327915/gender-neutral-pronouns; *2015 Word of Year is Singular "They"*, AM. DIALECT SOC'Y (Jan. 8, 2016), https://www.americandialect.org/2015-word-of-the-year-is-singular-they [https://perma.cc/TN3Z-GW6Q].

56. U.S. CONST. amend. IV.

that are not punishable with incarceration.[57] I will leave for another day the question of whether it comports with the Expressive Fourth Amendment for warrantless arrests to be the norm for people primarily engaged in expressive conduct. Here, I narrow my analysis to the pervasive protest policing tactic of mass arrests.

Even in the context of a warrantless arrest, courts still recognize that police need probable cause that a crime has been or is being committed to justify the arrest.[58] Probable cause is a complete defense to an unlawful arrest claim.[59]

There is probable cause when the court finds that a reasonable person, i.e., the police officer, would believe that any crime had been committed or was being committed.[60] Courts assess the existence of probable cause not by any bright-line test, but by assessing the totality of the circumstances.[61] To be sure, there is plenty to criticize about applying the probable cause standard in the course of a single arrest. Probable cause is a low standard that a police officer can easily satisfy for an individual arrest.[62]

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57. *See* Atwater v. City of Lago Vista, 532 U.S. 318, 325, 354 (2001) ("If an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, [they] may, without violating the Fourth Amendment, arrest the offender."); *see also* Maryland v. Pringle, 540 U.S. 366, 370 (2003) ("A warrantless arrest of an individual in a public place for a felony, or a misdemeanor committed in the officer's presence, is consistent with the Fourth Amendment if the arrest is supported by probable cause."); Arkansas v. Sullivan, 532 U.S. 769, 773 (2001) (Ginsburg, J., concurring) ("*Atwater* . . . recognized no constitutional limitation on arrest for a fine-only misdemeanor offense."); Chortek v. City of Milwaukee, 356 F.3d 740, 742 (7th Cir. 2004) (upholding arrest where penalty was "a fine plus the costs of prosecution"); *see also* Vargas v. City of New York, 56 N.Y.S.3d 438, 440 (N.Y. Sup. Ct. 2017) (upholding a warrantless arrest when sentenced to four days of community service and a $120 surcharge).

58. *Atwater*, 532 U.S. at 354.

59. Meyers v. City of New York, 812 F. App'x *11, *14 (2d Cir. 2020) ("Probable cause is a complete defense to a constitutional claim of false arrest"); *accord* Garcia v. Bloomberg, 662 F. App'x *50, *52 (2d Cir. 2016); Dukore v. District of Columbia, 799 F.3d 1137, 1142 (D.C. Cir. 2015); Betts v. Shearman, 751 F.3d 78, 82 (2d Cir. 2014); Oberwetter v. Hilliard, 639 F.3d 545, 554 (D.C. Cir. 2011); Ryan v. County of DuPage, 45 F.3d 1090, 1092–94 (7th Cir. 1995).

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

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

62. *See Brinegar*, 338 U.S. at 175. While a full critique of probable cause is beyond the scope of this Essay, other scholars have evaluated the problems with the fluid standard. *See* Paul Ohm, *Probably Probable Cause: The Diminishing Importance of Justification Standards*, 94 MINN. L. REV. 1514, 1515 (2010) ("In increasingly common situations,

Furthermore, courts look generously upon police officer actions the actions in the field where—from the judiciary's perspectives—circumstances are almost always "tense, uncertain, and rapidly evolving . . . ."[63] In addition, courts do not consider in their probable cause analysis whether a police officer has malicious intent or is using their arrest power pretextually.[64] A police officer's subjective intent is irrelevant in the court's assessment of the legality of the arrest.[65]

Despite the many shortcomings of the probable cause standard, matters are worse for protesters swept up in mass arrests. In the context of mass arrests, an increasing number of courts deviate from a central tenet of probable cause—*individualized suspicion*. In *Ybarra v. Illinois*, the Supreme Court denied the argument that police officers had probable cause to search Ventura Ybarra just because he was present in a tavern where officers were executing an arrest warrant.[66] The Court stated:

> A person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person. Where the standard is probable cause, a search or *seizure* . . . must be supported by *probable cause particularized with respect to that person*.[67]

The Supreme Court thus rejected the government's argument that the police could reasonably believe that Mr. Ybarra was guilty solely by association to a location or by his proximity to criminal suspects. The Court found this assertion inconsistent with Mr. Ybarra's

whenever the police have any suspicion at all about a piece of evidence, they almost always have probable cause and can meet the highest level of justification.); *see also* Cynthia Lee, *Probable Cause with Teeth*, 88 GEO. WASH. L. REV. 269, 269 (2020); Erica Goldberg, *Getting Beyond Intuition in the Probable Cause Inquiry*, 17 LEWIS & CLARK L. REV. 789, 790 (2013).

63. Graham v. Connor, 490 U.S. 386, 396–97 (1989); *see also* Nieves v. Bartlett, 139 S. Ct. 1715, 1725 (2019) ("Police officers conduct approximately 29,000 arrests every day—a dangerous task that requires making quick decisions in 'circumstances that are tense, uncertain and rapidly evolving.'" (quoting *Graham*, 490 U.S. at 397)); Paff v. Kaltenbach, 204 F.3d 425, 436 (3d. Cir. 2000) ("While probable cause to arrest requires more than mere suspicion, the law recognizes that probable cause determinations have to be made 'on the spot' under pressure and do 'not require the fine resolution of conflicting evidence that a reasonable doubt or even a preponderance standard demands.'" (quoting Gerstein v. Pugh, 420 U.S. 103, 121 (1975))).

64. *See* Whren v. United States, 517 U.S. 806, 813 (1996) ("Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis."). As a matter of fact, as long as there is probable cause for a crime, plaintiff's claim of retaliatory arrest under the First Amendment is defeated. *Nieves*, 139 S. Ct. at 1726–27 (2019).

65. *Nieves*, 139 S. Ct. at 1724–25.

66. Ybarra v. Illinois, 444 U.S. 85, 91–92 (1979).

67. *Id.* at 91 (emphasis added) (citations omitted).

reasonable expectation of privacy in his person.[68] "Each patron . . . was clothed with constitutional protection against unreasonable search or an unreasonable seizure. That *individualized protection* was separate and distinct from the Fourth Amendment . . . protection possessed by [others] . . . ."[69] Applying *Ybarra* to the context at hand, courts are strip protesters of Fourth Amendment constitutional protection when they do not demand that the police have individualized probable cause for every protester swept up in mass arrests. This is the devastating consequence when courts adopt the notion of what is best described as group or unit probable cause.

Group or unit probable cause reared its head in a 2009 protest case, *Carr v. District of Columbia.*[70] In that § 1983 class action lawsuit, Washington D.C. police officers arrested sixty-five to seventy protesters, including the plaintiffs, in a demonstration against George W. Bush's presidency.[71] Police reported following a group of about 250–300 protesters and effectuating the mass arrests, after seeing a few people in the group engage in vandalism, as others cheered in response.[72] Plaintiffs contended that although they marched along with the group, not everyone in the group cheered for individual acts of vandalism.[73] Some plaintiffs denied even seeing or knowing about any of the reported vandalism, a reasonable contention given the protest's size.[74]

Plaintiffs argued—and the D.C. District Court agreed—that there was no probable cause that each of them individually engaged in the crime of rioting.[75] D.C. Code § 22-1322(a) defines rioting as "a public disturbance involving an assemblage of [five] or more persons which by tumultuous and violent conduct or the threat thereof creates grave danger of damage or injury to property or persons."[76] Thus, the District Court granted the plaintiffs' request for summary judgment.[77] Citing *Ybarra v. Illinois* and the need for a particularized finding of probable cause for each individual, District Judge Ellen

68. *Id.* at 91–92.

69. *Id.* (emphasis added).

70. *See* 587 F.3d 401, 408 (D.C. Cir. 2009). I previously discussed the perils of unit probable cause and the particular risks it poses to protesters of color. *See* Karen J. Pita Loor, *Tear Gas + Water Hoses + Dispersal Orders: The Fourth Amendment Endorses Brutality in Protest Policing*, 100 B.U. L. REV. 817, 830 (2020).

71. *Carr*, 587 F.3d at 403–04.

72. *Id.* at 403–04.

73. *See id.* at 404–05.

74. *See id.*

75. *Id.* at 405, 410.

76. *See* D.C. CODE § 22-1322(a) (2020) (alteration added); *see also Carr*, 587 F.3d at 405–06.

77. Carr v. D.C., 565 F. Supp. 2d 94, 96 (D.D.C. 2008).

Segal Huvelle concluded that "[t]o demonstrate that plaintiffs' arrests were valid . . . the District [of Columbia] must show that it had probable cause to arrest each individual for rioting."[78] Judge Huvelle found that generalized statements about the conduct of the crowd were insufficient and that "[n]owhere does the [defendant municipality] 'ma[ke] [any] effort to ascribe misdeeds to the specific individuals arrested.'"[79] Tellingly, police officers were unable to identify those who were involved in violence or vandalism or specifically state whether any of the people arrested cheered such acts.[80]

However, on appeal, the D.C. Circuit Court reversed Judge Huvelle's ruling granting summary judgment to plaintiff protestors, finding instead that the protesters could have acted as a "cohesive unit."[81] Regarding Judge Huvelle's ruling about the necessity of probable cause for each arrested individual, the D.C. Circuit expressed concern that "[a] requirement that the officers verify that each and every member of a crowd engaged in specific riotous act would be practically impossible in any situation involving a large riot."[82] This finding expressly contradicts *Ybarra v. Illinois*, which does not require that the municipality demonstrate there was probable cause for everyone in the crowd, just for the people arrested.[83] Here, the police did not have to arrest a large mass of people, but could have just arrested those they observed engaged in vandalism had they bothered to keep track of those they claimed were particularly dangerous.[84] Although the D.C. Circuit worried that "appellees read the statute so as to make it unenforceable in situations where it is most needed,"[85] in so doing, it effectively stripped every single protester marching along of Fourth Amendment protection and began a trend towards group or unit probable cause which has proved dangerous for protesters swept up in mass arrests.

In his concurrence to the D.C. Circuit Court's decision in *Carr*, Circuit Judge Thomas B. Griffith stated, "[a]s Supreme Court precedent affirms, the Fourth Amendment requires an individualized showing of probable cause before arrest[]" and warned that "[t]he majority unnecessarily calls into question the heretofore straightforward application of that standard in this circuit."[86] Citing *Ybarra v.*

78. *Id.* at 100.
79. *Id.*
80. *Id.* at 101.
81. *Carr*, 587 F.3d at 407.
82. *Id.* at 408.
83. Ybarra v. Illinois, 444 U.S. 85, 91–92 (1979).
84. *See id.*
85. *Carr*, 587 F.3d at 408.
86. *Id.* at 412 (Griffith, J., concurring). Judge Griffith still concurred with the reversal

Illinois, Judge Griffith called out the majority for scrapping the traditional individualized suspicion standard and creating a new, less demanding standard of probable cause for mass demonstrations[87]—which I term *probable cause minus*. Out of concern that it is "practically impossible" for a police officer to establish probable cause for each arrestee, probable cause minus disposes with these individualized determinations in the context of large demonstrations if the arrestee is one of a group where some activists are engaged in unlawful conduct.[88] As Judge Griffith points out, "[t]he issue, however, is not what is practical but what the Fourth Amendment requires, and in this case the majority departs from the Supreme Court's consistent instruction that individualized probable cause must precede arrest."[89] Recognizing despite any reference to a cohesive unit, police officers currently arrest persons without requiring "an individualized determination that the person arrested acted unlawfully[,]" such that "a reasonable belief that a crowd acted 'as a unit[]' . . . cannot be the basis for the arrest of a member of that crowd, unless there is also a particularized showing that the person broke the law."[90] Although the majority's unit approach to probable cause was clearly contrary to long-standing Fourth Amendment precedent, it has not been confined to *Carr*. Instead, many other jurisdictions have since adopted this probable cause minus approach standard to justify mass arrests during protests.[91]

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of the grant of summary judgment because he concluded that there remained a genuine issue of material fact regarding whether a reasonable jury could credit Officer Keller's testimony that he observed every person in the crowd committing a crime. *Id.* While Judge Griffith recognized that "[t]he assertion that one officer could see each of the 300 individuals was audacious[,]" he stated that Judge Huvelle for the majority failed to view the facts in the light most favorable to the nonmoving party (as required by the rules governing summary judgment) and that issues regarding Officer Keller's credibility were the providence of the jury. *Id.* Judge Griffith explained that such a narrow ruling tailored to the facts of this case and focused on what the police officer claimed they could observe among people in the crowd would serve to "correct[] the district court's error without suggesting police may conduct mass arrests without individualized probable cause." *Id.*

87. *Carr*, 587 F.3d at 412–13.

88. *See id.* at 413.

89. *Id.*

90. *Id.*

91. *See, e.g.*, Bernini v. City of St. Paul, 665 F.3d 997, 1002, 1004 (8th Cir. 2012) (concluding that "[i]t was reasonable, therefore, for an officer to believe that the group, as a whole, was committing one or more offenses under state law, including . . . riot[ing] and unlawful assembly"); White v. Jackson, 865 F.3d 1064, 1079 (8th Cir. 2017) (finding that police officers had probable cause to believe that individuals during the Ferguson protests knew about the unlawful acts of others in the group and chose not to "disassociate" themselves and thus their arrest for unlawful assembly was lawful); Garcia v. Does, 779 F.3d 84, 87, 92–96 (2d Cir. 2015) (reversing Garcia v. Bloomberg, 865 F. Supp. 2d 478, 489–90 (S.D.N.Y. 2012)) (rejecting the argument—made pursuant to *Carr*—that it was reasonable for police officers to treat 700 Occupy protesters as a group and arrest them

It is too early in the *Black Lives Matter Los Angeles v. City of Los Angeles* lawsuit to know what approach the court will take to evaluate the mass arrests.[92] However, in their opposition to plaintiffs' request for an injunction that would restrict the LAPD's use of force—including projectiles and baton strikes—and their use of certain detention tactics, defendants sought to justify LAPD's actions in circumstances of what they termed "mass unrest" by alluding that "'arrestees were part of a group . . . operating in an organized and concerted effort to invade private property, obstruct business, and hinder law enforcement.'"[93] Defendants made this argument despite their own recognition in the first page of the same opposition brief that "[t]he recent mass demonstrations were largely peaceful."[94] Furthermore, while defendants asserted that there were "criminal acts of arson and looting," the City Council examination found that the overwhelming majority of arrests were for curfew violations or failure to follow a police order—contradicting defendants' claims.[95] Defendants knew this when they filed their opposition on June 30, 2020.[96] On June 2, LAPD Chief Michel Moore, one of the named defendants in the lawsuit, had informed the public that ninety-two percent of arrests were for these two types of non-violent offenses.[97]

B. Roots of the Expressive Fourth Amendment

In a prior article, I introduced the Expressive Fourth Amendment and explained its historical and doctrinal underpinnings. In this Section, I will briefly review both foundations, providing just enough background so the reader can generally understand the doctrine and its application to mass arrests of protesters. For a fuller explication,

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all even if only some of them heard the police warning to move or be arrested and dismissing the plaintiffs' complaint). *But see* Vodak v. City of Chicago, 639 F.3d 738, 740–46 (7th Cir. 2011) (rejecting the argument that defendants made in their brief pursuant to *Carr* that police officers had probable cause to arrest about 900 marchers); Brief of Defendants-Appellees Individual Defendant Officers at 18–19, Vodak v. City of Chicago, 639 F.3d 738 (Nos. 09-2768, 09-2834, 09-2901) (7th Cir. Mar. 8, 2010), 2010 WL 4621548 (arguing the "crowd was infected with disorder").

92. The plaintiffs filed their Second Amended Complaint in June 18, 2021. *See* Second Amended Complaint, *supra* note 19. The defendants have not filed a motion to dismiss and none of the parties have filed a motion for summary judgment.

93. Opposition to Plaintiffs' *Ex Parte* Application for a Temporary Restraining Order at 9, Black Lives Matter L.A. v. City of L.A. (No. 2:20-cv-05027) (C.D. Cal. June 30, 2020) (quoting Forrester v. City of San Diego, 25 F.3d 804, 807 (9th Cir. 1994)).

94. *Id.* at 3.

95. L.A. CITY COUNCIL REPORT, *supra* note 18, at 10.

96. LOS ANGELES DEPARTMENT OF POLICE, SAFE LA AFTER ACTION REPORT 44 (2020).

97. Cindy Von Quednow, *More Than 92% of 2,700 Arrests in L.A. Were for "Failure to Disperse" or Curfew Violations*, KTLA5 (Jun. 2, 2020, 7:23 PM), https://ktla.com/news/lapd-arrests-more-than-2700-people-amid-protests-chief [https://perma.cc/MR2P-7EN6].

the reader may choose to peruse my prior piece, *The Expressive Fourth Amendment*.[98]

Understanding the expressive component of Fourth Amendment protection in the context of protest is important because courts make a mistake when using the same lens to evaluate a police officer's response to a protester as a police officer's response to a criminal suspect. Courts should not equate protest activity to either suspected criminal activity or noncriminal non-expressive activity. Protest activity is not only socially valuable, but it is expressive conduct that is intended to be protected by the Fourth Amendment—not just the First Amendment. The Supreme Court has already recognized that the Fourth Amendment protects expression in the context of searches of expressive materials or "papers"[99] such as books, magazines, and videos, that are potentially protected by the First Amendment.[100]

The Fourth Amendment protects individuals from unreasonable seizures, including arrests, as well as against unreasonable searches.[101] Supreme Court precedent treats searches of papers differently than searches for non-expressive items, elevating the Fourth Amendment inquiry from what is reasonable to what is reasonable *in light of freedom of expression*.[102] This means that the Court reviews the Fourth Amendment intrusion more stringently when a government actor searches for papers than when the actor searches for ordinary materials.[103]

The Court provides this heightened review in paper searches because it recognizes that the Framers intended for the Fourth Amendment—not just the First Amendment—to be a constitutional vehicle that protects freedom of thought and expression, in addition to bodily integrity and privacy in the context of criminal investigation.[104] As Justice William Douglas asserted in his dissent to *Frank v. Maryland*, it is misreading "history . . . [to] relate[] the Fourth Amendment primarily to searches for evidence to be used in criminal

98. *See* Loor, *Expressive Fourth*, *supra* note 6.

99. By papers, I am referring to materials recognized as expressive by the Court. In Roaden v. Kentucky, 413 U.S. 496, 504 (1973), the Court found that "the prior restraint of the right of expression, whether by books or films [or other expressive material], calls for a higher hurdle in the evaluation of reasonableness." This standard thus applies to all "paper cases" regardless of medium. *See id.*

100. *See* New York v. P.J. Video, 475 U.S. 868, 873 (1986); Maryland v. Macon, 472 U.S. 463, 468 (1985); Zurcher v. Stanford Daily, 436 U.S. 537, 564 (1978); Roaden v. Kentucky, 413 U.S. 496, 504 (1973); Stanford v. Texas, 379 U.S. 476, 485 (1965); Marcus v. Search Warrants, 367 U.S. 717, 730 (1961).

101. U.S. CONST. amend. IV.

102. *See* Loor, *Expressive Fourth*, *supra* note 6 (quoting *Roaden*, 413 U.S. at 504).

103. *Id.*

104. *See id.*

prosecutions. . . . [I]t was the search for the nonconformist that led British officials to ransack private homes."[105] "The Fourth Amendment thus has a much wider frame of reference than mere criminal prosecutions."[106]

The history that Justice Douglas refers to—and that the Supreme Court has referenced again and again in these paper search cases—is the story of a controversy in the mid-eighteenth century between the English monarchy and the press.[107] Despite these events (and ensuing litigation) playing out on the other side of the Atlantic, the quarrel received significant coverage in the colonial press and shaped American thought on search and seizure, particularly the understanding that—if unrestrained—the government can easily use its search and seizure power to stifle expression.[108]

The story begins with the anonymous publication of an article critical of King George III in the forty-fifth weekly edition of the anti-government newspaper, *The North Briton*. *The North Briton 45* vigorously criticized the King's speech in support of the Treaty of Paris of 1763, which ended the Seven Years' War between Great Britain, France and Spain.[109] The issue condemned the treaty for ceding too much to the French in the name of peace.[110] In the view of some (including *The North Briton 45*'s author), the British Crown was surrendering the country's fought for and rightfully earned spoils of war.[111] The British Attorney General and Solicitor General labeled the forty-fifth edition libel, and thus began a search for anyone associated with its publication.[112]

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105. Frank v. Maryland, 359 U.S. 360, 376 (1959) (Douglas, J., dissenting).

106. *Id.* at 377.

107. *See* Loor, *Expressive Fourth*, *supra* note 6 (citing *Frank*, 359 U.S. at 376; Stanford v. Texas, 379 U.S. 476, 484 (1965); Marcus v. Search Warrants, 367 U.S. 717, 722–24 (1961)).

108. *Id.*

109. *See* WILLIAM J. CUDDIHY, FOURTH AMENDMENT: ORIGINS AND ORIGINAL MEANING 602–1791 440 (Oxford University Press, 2009); *see also America Revolution Podcast: Treaty of Paris and the Wilkes Affair* (Oct. 29, 2017). *The North Briton 45*'s author began criticizing the speech stating "The [King's] speech of last Tuesday is not to paralleled in the annals of our country." John Wilkes, *Issue No. 45*, THE NORTH BRITON 263–64 (Apr. 23, 1763), https://archive.org/details/northbriton00wilkgoog/page/n270/mode/2up [https://perma.cc/YG96-WTTW]. With regard to the agreements made by the Treaty of Paris, the author declared "The preliminary articles of peace were such as have drawn the contempt of mankind on our wretched negotiators." *Id.*

110. *See* CASH, *infra* note 112, at 265.

111. *See id. The North Briton 45*'s authors critiqued the King's actions as unbecoming and unroyal bemoaning, stating "I wish as much as any man in the kingdom to see the *honor of the crown* maintained in a manner truly becoming *Royalty*. I lament to see it sunk even to prostitution." *See id.* at 266–67.

112. *See* ARTHUR CASH, JOHN WILKES: THE SCANDALOUS FATHER OF CIVIL LIBERTY 101 (Yale Univ. Press 2006).

The instrument the British government used to execute these searches was a general warrant, signed by the Secretary of State.[113] The general warrant was essentially what its name suggests: general. It did not require specificity regarding the person or items to be seized or the place to be searched or even a specific account of the facts in support of the warrant.[114] It was not confined to a specific time period, but instead could last for as long as the monarch lived.[115] This warrant required "in his Majesty's name . . . to make strict & diligent search for the Authors, Printers & Publishers of a seditious and treasonable paper [e]ntitled, The North Briton Number 45 [sic]" and take dissenters into custody and bring them before the Secretary of State for questioning and further legal proceedings.[116] With warrant in hand, the King's messengers ransacked multiple homes, collected voluminous papers, and, at the conclusion of the search and seizure spree, arrested a total of forty-nine people.[117] Those arrested included not only individuals tangentially connected to the newspaper (such as employees who did not work on the forty-fifth edition), but also their family members.[118]

These arrests and searches resulted in about thirty lawsuits against the executors of the warrants for charges such as unlawful imprisonment and trespass.[119] The British press, as well as the Colonial press, covered these cases in detail—with the American press usually reprinting the content of British newspapers.[120] Press commentary was scathing of general warrants, referring to the instrument as "unconstitutional" and an affront to the "security [and liberty] of every Englishman."[121] While the results of the lawsuits varied in the courtroom, the reputation of general warrants was marred in the court of public opinion on both sides of the Atlantic.[122]

As the Supreme Court has recognized in its paper cases, the memory of *The North Briton 45* searches and arrests guided Framers as they drafted the Fourth Amendment.[123] Therefore, the Court has instructed that searches of expressive materials must be reviewed with "*most scrupulous exactitude.*"[124] The Court has used this

113. *See* CUDDIHY, *supra* note 109, at 440; *see also* CASH, *supra* note 112, at 101.
114. CUDDIHY, *supra* note 109, at 441; CASH, *supra* note 112, at 101.
115. *See* CUDDIHY, *supra* note 109, at 440.
116. CASH, *supra* note 112, at 101.
117. CUDDIHY, *supra* note 109, at 441–43.
118. *See id.* at 441, 443.
119. *Id.* at 443.
120. *See id.* at 458.
121. *Id.* at 459.
122. *See id.* at 463.
123. *See* Loor, *Expressive Fourth*, *supra* note 6 (citing Marcus v. Search Warrants, 367 U.S. 717, 722–24 (1961)).
124. Stanford v. Texas, 379 U.S. 476, 485 (1965).

heightened review in searches for expressive materials of a political and, interestingly, of a potentially obscene nature.[125] In these searches, the Court has reined in its usual deference to law enforcement out of concern that such treatment would result in overbroad and expansive searches where officers sweep up potentially First Amendment protected materials.[126] When the targets of the search are expressive materials, the Court has found repugnant to the Fourth Amendment procedures that rely on the "whim"[127] of individual police officers to determine what should be seized. Thus, the Court has placed limits on police officer discretionary actions, recognizing that even when the government has the power to police or actually prevent the distribution of these expressive materials that "does not mean that there can be no constitutional barrier to any form of practical exercise of that power."[128] Justice William Brennan connected the dots in his dissent to *Maryland v. Macon* from search to arrest and asserted that the Court must also review more stringently a person's arrest for the distribution of expressive obscene materials.[129] He stated that "[a] warrantless arrest involves the same difficulties and poses the same risks as does a warrantless seizure of books, magazines, or films."[130] "The disruptive potential [on the First Amendment] of an effectively unbounded [Fourth Amendment] power to arrest should be apparent."[131]

C. The Expressive Fourth Amendment and Mass Arrests

The existence of Supreme Court precedent limiting judicial deference to police officers when they search for expressive materials raises the question of *why* police enjoy such *unbounded power to arrest* when engaging with people participating in expressive protest activity. The answer is that they should not.

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125. *See, e.g.*, *id.* at 485–86 (involving the search for communist materials); Roaden v. Kentucky, 413 U.S. 496, 504–05 (1973) (involving the seizure of an allegedly obscene film).

126. *See* Loor, *Expressive Fourth*, *supra* note 6; *see also Marcus*, 367 U.S. at 733 (stating "procedures that sweep too broadly with too little discrimination are obviously deficient in techniques required . . . to prevent erosion of constitutional guarantees").

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

128. *Marcus*, 367 U.S. at 730 (quoting Roth v. U.S., 354 U.S. 476, 485 (1957)).

129. *See* Loor, *Expressive Fourth*, *supra* note 6 (citing Maryland v. Macon, 472 U.S. 463, 473 (1985) (Brennan, J., dissenting)). The majority in *Maryland v. Macon* did not decide whether the warrantless arrest of the bookstore's attendant, after an undercover police officer purchased two magazines which he and two other officers judged as obscene, was unconstitutional. 472 U.S. at 471. Instead, the majority only focused on whether the magazines that the undercover officer purchased were admissible at trial without a warrant. *Id.* at 467–71.

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

131. *Id.* at 474.

In light of the Expressive Fourth Amendment, the Court must limit police officers' arrest power when their targets are people involved in expressive conduct. The current understanding of the Fourth Amendment, which narrows its ambit of protection for intrusions on the person only to bodily integrity in the context of criminal investigations, does violence to the First Amendment rights of activists swept up indiscriminately swept up in mass arrests. Instead, courts must recognize that the Fourth Amendment also protects freedom of expression not just in the context of searches, but also in the context of seizures of individuals. As Justice Brennan predicted, the disruption to the First Amendment is clear when considering the accounts of mass arrests of swaths of people in the Los Angeles protests. To comport with the Expressive Fourth Amendment, courts must shift the question when an arrestee is involved in expressive activity and ask whether a police officer's action is "reasonable *in light of freedom of expression*."[132] In the context of mass arrests, courts must begin by discarding notions of group/unit probable cause. Second, when evaluating the existence of probable cause for arrest, courts must positively weigh an individual's expressive protest activity in the totality of the circumstances. Both considerations are briefly outlined below.

1. Group/Unit Probable Cause

Courts must review with scrupulous exactitude arrests of individuals engaged in protest. This heightened review provides no room for shortcuts that cast a shadow of probable cause over one protestor because of the unlawful or aggressive conduct of others in close proximity. The prevailing probable cause minus standard is inconsistent with the Expressive Fourth Amendment which requires stringent review. Just like the Court has been rightfully concerned over the expansive and overbroad searches that gather potentially protected expressive items,[133] so should the Court be concerned about expansive and overbroad arrests—based on a deficient probable cause minus standard—that result in the stifling seizure of individuals engaged in protected protest activity.

In the *Black Lives Matter Los Angeles v. City of Los Angeles* lawsuit, there were multiple accounts of people engaged in protest

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132. *See* Loor, *Expressive Fourth*, *supra* note 6 (citing Roaden v. Kentucky, 413 U.S. 496, 504 (1973) (emphasis added)); *see also supra* Section II.B for discussion of "in light of freedom of expression."

133. *See supra* Section II.B for discussion of expansive and overbroad searches of potentially protected expressive (obscene) items.

activity who were corralled and arrested by the hundreds.[134] While some of the arrestees may have been involved in unlawful activity, police must be able to articulate facts supporting probable cause for each individual arrested. It does not satisfy the Expressive Fourth Amendment to assert that police had probable cause to arrest the unit or group or, as the City of Los Angeles and the other defendants argued, that "arrestees were part of a group . . . operating in an organized and concerted effort to invade private property, obstruct business, and hinder law enforcement."[135] "Police don't arrest [groups or] units. They arrest persons[.]"[136] The unit probable cause approach provides too much deference and leeway to the whims of police who in their zeal to restore order trample—either carelessly or willfully—on activists' rights.[137] Although much greater in terms of numbers, these mass arrests of racial justice protesters are reminiscent, in their indiscriminate and rash nature, of the forty-nine arrests made in connection with *The Briton 45* search and seizure spree. This is the very practice against which the Framers sought to protect. "[T]he experience of . . . mass arrests was at the forefront" of those who drafted the Fourth Amendment with the goal of protecting against such seizures.[138]

2. *Expressive Conduct Under the Totality of the Circumstances*

Courts determine whether a police officer had probable cause to arrest an individual by looking at the totality of the circumstances.[139] Again, this means that there is no bright line test as probable cause is a fluid concept, but rather the judge must evaluate the whole picture to assess the reasonableness of the police officer's action.[140] When the question is shifted to what is reasonable in light of freedom of expression, courts' evaluation of the whole picture must include

134. Second Amended Complaint, *supra* note 19, at 7, 11–14, 24, 26, 28, 30.

135. Opposition to Plaintiff's Application for Temporary Restraining Order at 9, Black Lives Matter L.A. v. City of Los Angeles, No. 2:20-cv-05027 (C.D. Cal. May 7, 2021) (quoting Forrester v. City of San Diego, 25 F.3d 804, 807 (9th Cir. 1994)).

136. Carr v. D.C., 587 F.3d 401, 413 (D.C. Cir. 2009) (Griffith, J., concurring).

137. *See* Maryland v. Macon, 472 U.S. 463, 474 (1985) (Brennan, J., dissenting) (expressing concern over a police officer making their own determination about probable cause to arrest for distribution of obscenity since "the situation poses the same risk that the officer's zeal to enforce the law will lead to erroneous judgments with respect to the obscenity of material that is constitutionally protected.").

138. CUDDIHY, *supra* note 109, at 613.

139. *See* Tennessee v. Garner, 471 U.S. 1, 9 (1985); Illinois v. Gates, 462 U.S. 213, 230 (1983); United States v. Cortez, 449 U.S. 411, 418 (1981).

140. *See Garner*, 471 U.S. at 8–9; *Gates*, 462 U.S. at 230–31; *Cortez*, 449 U.S. at 417–18.

consideration of an individual's engagement in expressive protest activity. Fourth Amendment questions are questions of balancing.[141] When the government actor strikes the right balance between the intrusion on the individual—be it a search or a seizure—and the governmental interest at stake, the action is a reasonable one.[142] The balance is off when courts ignore an individual's engagement in expressive protest activity in the reasonableness calculus.[143]

To begin with, in the context of protest, the police action intrudes not only on a person's bodily integrity as is the case for arrests in the regular course of criminal investigations, but also on a person's freedom of expression rights against which the Expressive Fourth protects. Even more, protest activity is theoretically revered in our American democracy. As Justice Louis Brandeis eloquently stated:

> Those who won our independence . . . believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that, without free speech and assembly discussion would be futile . . . that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.[144]

Considering the centrality of freedom of expression in our system, the government also has an interest in facilitating protest activity—while it has no comparable interest in facilitating a criminal suspect's activities. This translates to a concomitant duty for police officers to protect freedom of expression, in addition to their traditional duty to maintain public safety.[145]

Furthermore, courts' heightened concerns about police officer safety should not be present when they interact with protesters in the same manner as when police interact with a criminal suspect. Courts defer to law enforcement, at least in part, because they consider policing a dangerous job. This is because courts consider people involved in criminal activity dangerous to police.[146] However, this

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141. *See* Delaware v. Prouse, 440 U.S. 648, 654 (1979).

142. *See id.* ("[T]he permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests."); *see also* Graham v. Connor, 490 U.S. 386, 396 (1989).

143. *See* Loor, *Expressive Fourth*, *supra* note 6.

144. Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring), *overruled by* Brandenburg v. Ohio, 395 U.S. 444 (1969).

145. *See* Loor, *Expressive Fourth*, *supra* note 6.

146. *See Graham*, 490 U.S. at 396 (considering "whether the suspect poses an immediate threat to the safety of the officers or others"); *see also* Tennessee v. Garner, 471

preoccupation with the well-being of police officers should not continue when people policed are protesters, and not people suspected of other alleged criminal activity.[147] As a matter of fact, research suggests that it is law enforcement violence that turns peaceful protests violent.[148] It is police who are escalating violence during protests—not protesters.[149]

Thus, when assessing whether police conduct was reasonable in light of freedom of expression, the balance must include and positively weigh an individual's expressive political conduct. When a law enforcement officer stops protest activity via arrest, they not only intrude on an individual's right to bodily integrity, but also on the individual's right to free expression. Furthermore, police also infringe on the government's own interest in the vigorous exchange of ideas that fuel our democracy. Courts must rein in the wide latitude typically afforded to police officers on the streets when considering the resulting threats to constitutionally protected protest activity.

CONCLUSION

Courts have consistently ignored the expressive component of Fourth Amendment protections when evaluating mass arrests of protesters. Judges have likewise failed to consider whether the fact that individuals are engaged first and foremost in First Amendment expressive conduct alters the reasonableness balancing. The Expressive Fourth Amendment mandates that government intrusions on expressive protest activity receive more discerning judicial review.

U.S. 1, 11 (1985) ("Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force.").

147. For instance, PolitiFact researched and found to be false a claim from a June 8, 2020, *The New York Post* article that claimed that 1,000 police officers were injured nationwide in the George Floyd protests. Tom Kertscher, *No Proof that Black Lives Matter Killed 36 People, Injured 1,000 Police Officers*, POLITIFACT (Aug. 7, 2020), https://www.politifact.com/factchecks/2020/aug/07/facebook-posts/no-proof-black-lives-matter-killed-36-people-injur/#sources [https://perma.cc/3LVT-MHSK].

148. Maggie Koerth & Jamiles Lartey, *Why So Many Police are Handling the Protests Wrong*, MARSHALL PROJECT (June 1, 2020, 2:55 PM), https://www.themarshallproject.org/2020/06/01/why-so-many-police-are-handling-the-protests-wrong [https://perma.cc/K4DD-3L9U].

149. *Id.*