

# national lawyers guild

Volume 67  
Number 1  
Spring 2010

# REVIEW

*A journal of  
legal theory  
and practice  
“to the end  
that human  
rights shall  
be more  
sacred than  
property  
interests.”*

—Preamble, NLG  
Constitution



## CHALLENGES TO MASS PROTEST

### **A Lawyer's Guide to the Repression Literature** 3

Jennifer Earl

### **A Criminal Mess: New York City's Response to Critical Mass Bicycle Rides, 2004-2010** 37

Gideon Orion Oliver

### **Brief of Amicus Curiae National Lawyers Guild In Support of Petitioners In *Kjonaas Et Al V. U.S.*** 52

Heidi Boghosian and  
Zachary Wolfe

## EDITOR'S PREFACE

*National Lawyers Guild Review* would especially like to thank Issue Editor Heidi Boghosian for her hard work and expertise in putting this mass protest theme issue together. Many of us in the Guild already know how lucky we are to have a dedicated activist and learned First Amendment scholar, like Heidi, serving as the Guild's Executive Director. This gratitude increases many times when one personally works with her on a project like this one, as I've been lucky enough to do over the past few months.

The rights of the people to peaceably assemble and protest their government—the right to “mass protest”—are more than just fundamental. They are the foundation and beating heart of our First Amendment. As these rights diminish, or are relinquished by a cowed populace, so too does nearly all that is healthy and virtuous in society—because, as the great social movements of the twentieth century have shown, the right to mass protest is the platform from which all the other rights which contribute to make a society great can be fought for and won. In this way, they are both a means and ends in themselves. To check the intellectual and moral health of a society—to examine its pulse—one must first determine how freely and openly its people can join to express their grievances.

Human social psychology is a complex, often frustratingly insoluble science. The admonition that ancient Athenians inscribed on the temple of Apollo, “know thyself,” is more a taunting riddle than a reasonable request, especially when applied to how we interact as social and political groups.

*Continued on inside back cover*

---

**National Lawyers Guild Review, formerly Guild Practitioner**, is published quarterly by the National Lawyers Guild, a non-profit institution, at 132 Nassau Street, # 922, New York NY 10038. ISSN 0017-5390. Periodicals postage paid at New York, NY and at additional mailing offices. Subscription rates are \$75/yr for libraries and institutions; \$30/yr for lawyers; \$10/yr for legal workers/law students; \$5/yr for incarcerated persons; add \$5/yr for overseas; \$6.50/single copy, and should be sent to: 132 Nassau Street, # 922, New York NY 10038. POSTMASTER: Send change of address to: **National Lawyers Guild Review**, 132 Nassau Street, # 922, New York NY 10038. Address all editorial correspondence and law-related poems, criticisms, articles and essays to: Editor-in-Chief, **National Lawyers Guild Review**, 132 Nassau Street, # 922, New York NY 10038. Unsolicited manuscripts will not be returned unless accompanied by return postage. **National Lawyers Guild Review** is indexed/abstracted in Westlaw, PAIS-Public Affairs Information Service, The Left Index, the Alternative Press Index and in A MATTER OF FACT.

**Editorial Board:** Nathan Goetting, Editor in Chief; Heidi Boghosian, Issue Editor; Robyn Goldberg, Managing Editor; Ryan Dreveskracht, Articles Editor; Kathleen Johnson, Book Editor; Britney Berry, Notes Editor; Alan Clarke, Marjorie Cohn, Riva Enteen, Peter Erlinder, David Gespass, Ann Fagan Ginger, Silvia Lopez, Melissa J. Sachs, Brenna Sharp, Deborah Willis, Henry Willis, Lisa Wong, Lester Roy Zipris. The opinions expressed in the articles are those of the various authors, and each article is Copyright, 2010, by the author and by National Lawyers Guild Review.

**Advisory Panel:** Elvia Arriola, Derrick Bell, John Brittain, Margaret Burnham, Erwin Chemerinsky, David Cole, Barbara Dudley, Richard Falk, Lennox Hinds, Sylvia A. Law, Staughton Lynd, Manning Marable, Ruben Remigio Ferro, Jitendra Sharma, Kenji Urata, Frank Valdes, Patricia Williams.

This issue of the *National Lawyers Guild Review* is devoted to what the National Lawyers Guild calls “mass defense”—defending large gatherings of individuals who assemble in our streets and parks to exercise their First Amendment rights. The Guild established a Legal Observing program in 1968 to support protesters at Columbia University and city-wide antiwar and civil rights demonstrations. That same year, Guild students organized for the defense of people swept up in mass arrests at the Democratic Convention in Chicago.

In the four decades since, Guild members have brought legal challenges to government tactics that interfere with the exercise of free speech by progressives and radicals. Such tactics have included authorities basing decisions to grant or deny parade permits on the politics of the applicant, unlawful ordinances passed before specific protests, pretextual searches and raids of organizing spaces, establishing screening checkpoints and so-called “free speech zones,” deploying less-lethal munitions against passive protesters and bystanders, containing protesters and then engaging in mass arrests without probable cause, increasing the penalties or bail for low-level offenses and creating new anti-terrorism laws that target certain kinds of activists.

In her article, “A Lawyer’s Guide to the Repression Literature,” sociologist Jennifer Earl surveys “protest control” literature in a range of fields, from political science, law, sociology and history. She touches on researchers’ attempts to understand the forms of repression and factors that might influence their impact on individuals, organizations and social movements.

In “A Criminal Mess: New York City’s Response to Critical Mass Bicycle Rides, 2004-2010,” Guild member Gideon Orion Oliver puts into context the New York Police Department’s marked change in response to monthly Critical Mass bicycle rides beginning with the 2004 Republican National Convention.

To demonstrate how new anti-terrorism legislation singles out animal rights activists, we are including the Guild’s amicus brief in the case of *Kevin Kjonaas et al. v. United States of America*, also known as the SHAC 7. In its prosecution of the case, the government misconstrued the Animal Enterprise Protection Act, which proscribes a narrow range of activities, such as enter-

ing an animal enterprise to free an animal, and incorrectly found that mere internet reporting of such activities rises to the level of prohibited conduct. Professor Zak Wolfe and I urge the Supreme Court to grant certiorari to clarify how well-established First Amendment principles should apply to online speech. Given that internet speech differs from oral speech and other traditional forms of written speech, traditional tests to determine imminence and incitement needed to constitute a “true threat” are inappropriate.

Each piece contained herein analyzes different aspects of how the government has sought to limit the legal exercise of free speech in the United States. Be it from ill-conceived legislation brought to appease a frightened public to a police force working in coordination with higher branches of government, the examples described in this issue expose various methods used to frighten protesters and potential protesters into silence. Guild members continue to challenge these intimidation tactics in the courts, in the streets, and through various forms of advocacy. It is an honor to present some examples of these challenges in this issue of the *National Lawyers Guild Review*.

**Keep  
track  
of  
the  
Guild**



**at [www.nlg.org](http://www.nlg.org)**

**and on Facebook**

**national lawyers guild**

**Jennifer Earl**

## **A LAWYER'S GUIDE TO THE REPRESSION LITERATURE**

Scholars from a variety of fields, including sociology, political science, law and society (and occasionally criminology), and history have spent decades studying how government and private actors try to prevent, impede, or otherwise control protest. Often discussed as research on “repression,” “political repression,” or “protest control,” researchers have worked to understand the characteristics and dynamics of various forms of repression, what might influence the timing, severity, or targeting of repression, what might influence the impacts of repression on social movements, specific organizations, and individual protesters and citizens, and how we can understand differences in large scale approaches to (or regimes of) protest control.

In more concrete terms, scholars have tried to answer questions such as: when are police likely to make arrests at a protest versus policing the protest solely using violence? What are the likely impacts of protester arrests on the movements they represent, the organizations they are associated with, and the individuals themselves? Have legalistic policing strategies been more or less effective at quelling protest than exclusive reliance on violence? How have broad approaches to protest policing changed since the 1960s?

The goal of this article is to provide a concise tour of the social science literature on repression. In the course of this review, I will summarize existing research answers to the specific questions just listed as well as answers to other questions as I review the sprawling literature on repression.<sup>1</sup>

### **Recognizing Different Varieties of Repressive Action**

A first principal look at repression requires that scholars and practitioners recognize key distinctions between broadly different repressive techniques and tools. Although it may be tempting to believe that repression could be wholly understood by examining its most public form—the policing of public protests—there are, in fact, a wide variety of ways to limit, control, or forestall dissent, as government and private actors have demonstrated across time. Because each kind of repression may have different predictors, dynamics, and consequences, it is important to differentiate between them.

---

Jennifer Earl is Associate Professor of Sociology at University of California, Santa Barbara. She thanks individuals from the New York City Chapter of the National Lawyers Guild and Eileen Clancy, who have been of great help to her in her research on the role of arrests in protest policing.

A popular classification scheme for repression identifies three major distinctions between different types of repression.<sup>2</sup> First, there are important distinctions based on the agents that are responsible for carrying out repressive acts (i.e., a national authority, local/sub-national authority, or private actor). Different actors are likely to be used in different situations, have different command structures, have different tools and training for protest control, and respond very differently to protest. In the U.S., for instance, the National Guard and local police departments are often called on in very different protest situations and behave very differently from one another. Private repressors, like the KKK, are expected to behave quite differently from government authorities as they are often acting either in secrecy or under the cloak of the willful blindness of government authorities.

Second, repression researchers distinguish between repression that is coercive and “channeling.” Coercion refers to actions meant to directly discourage protest such as harassment, surveillance, arrests, and violence. Channeling refers to actions or policies meant to promote more moderate protest or institutional dispute resolution through incentives instead of coercion. While coercive repression is a much more obvious and familiar form of repression, channeling can be quite important too. For instance, early work on channeling noted that the IRS code defining 501(c)(3) status encouraged groups to be more moderate by providing such groups more favorable tax standings.<sup>3</sup>

Third, repression may be covert or observable (i.e., overt). While this distinction seems obvious at first, covert versus overt may be difficult to discern where channeling is concerned. In this case, scholarship has recommended examining how overbroad the channeling is, and therefore how convincingly a unique connection to protest control can be made.<sup>4</sup> For instance, some channeling is quite clearly related to protest (i.e., regulations on collective bargaining and strikes meant to encourage institutional resolution and prevent strikes) while other effective forms of channeling are not so closely related to protest in the public imagination (i.e., IRS 501(c)(3) guidelines for non-profit status). Instances of channeling that are directly connected to protest would be considered observable/overt while overbroad channeling that is only indirectly connected to protest would be considered unobserved/covert.

Whether discussing coercion or channeling, overt and covert forms of repression may have different predictors, dynamics, and consequences. For instance, covert coercion (e.g., group infiltration) is often used to breed distrust and dissension among protest leaders whereas overt coercion rarely serves that function. Overt coercion by government actors, such as policing protests, may more easily be curtailed or controlled through public pressure. The range of coercive techniques that are used in public protest policing is

much smaller than the larger arsenal available to covert actors. Studies of FBI domestic counterintelligence programs from the 1960s and early 1970s disclose frequent uses of illegal searches in which agents would break into homes and perform searches while investigative targets were away.<sup>5</sup> However, these kinds of searches were denied by the FBI at the time and were certainly not techniques that could have been publicly acknowledged without triggering investigation (indeed, when they were publicly disclosed, they led to major investigations and substantial new controls; however, these controls have been subsequently loosened in the wake of the attacks of September 11, 2001).

**Table 1: Twelve Types of Repression**

Type of Repression	Example(s)	Selected Research Citations
Overt coercion by national authorities	Tiananmen Square killings of activists	Timberlake and Williams 1984; Zwerman 1987; Brockett 1995; della Porta 1995; della Porta 1998; Loveman 1998; McCarthy and McPhail 1999; Almeida 2003; Ball 2005; Johnston 2005
Overt coercion by sub-national authorities	Protest policing by local police	Kritzer 1977; Jones 1982; Barkan 1984; Waddington, Jones and Critcher 1989; Koopmans 1993; Useem 1997; McPhail, Schweingruber, and McCarthy 1998; McCarthy and McPhail 1999; White 1999; Wisler and Giugni 1999; Earl, Soule and McCarthy 2003; McPhail and McCarthy 2005; Vitale 2005; Earl and Soule 2006; Gilham and Noakes 2007; McCarthy, Martin and McPhail 2007; Noakes and Gillham 2007; Vitale 2007; Earl and Soule 2010
Overt coercion by private actors	KKK activity in the South in the 1950s and 1960s; the Church of Scientology's use of the legal system to block criticism and opponents	Astor 1971; McMillian 1971; Bromley and Shupe 1983; Griffin et al. 1986; Wade 1987; Blanchard 1993; Pichardo 1995; Kowalsewski 1996; Peckham 1998

*Table continues*

Type of Repression	Example(s)	Selected Research Citations
Covert coercion by national authorities	FBI's COINTELPRO operations	Marx 1974; Marx 1979; Marx 1988; Churchill 1994; Stotik, Shriver and Cable 1994; Carley 1997; Cunningham 2003a; Cunningham 2003b; Cunningham 2003c; Cunningham 2004
Covert coercion by sub-national authorities	Secret investigations carried out by the Mississippi State Sovereignty Commission in the 1960s; NYPD's investigation of likely participants in protests at the 2004 Republican National Convention	Irons 2006; Dwyer 2007; Irons 2009
Covert coercion by private actors	Anonymous threats and attacks (from harassment to property damage to violence)	McMillian 1971; Griffin et al. 1986; Blanchard 1993; Kowalewski 1996
Overt channeling by national authorities	Collective bargaining requirements meant to incentivize institutional resolution of disputes and discourage strikes	Oberschall 1973; Hebdon and Stern 1998; Loveman 1998
Overt channeling by sub-national authorities	State laws that incentivize institutional problem solving	Rowland 1972; Gibson 1989
Overt channeling by private actors	Differential charitable giving to moderate groups in a movement	McAdam 1982; Haines 1984; Jenkins and Eckert 1986; Silver 1998
Covert channeling by national authorities	501(c)(3) status requirements	Simon 1987; McCarthy et al 1991; Cress 1997; Edwards and McCarthy 2004
Covert channeling by sub-national authorities	State laws that exclude students with criminal convictions from receiving financial aid, even when those convictions were protest-related	Rowland 1972
Covert channeling by private actors	Internal grievance proceedings and company towns	Gaventa 1980

\* This table is updated and adapted from Jennifer Earl, *Tanks, Tear Gas and Taxes: Toward a Theory of Movement Repression*, 21 *Sociological Theory*, (2003).



As shown in Table 1, when one combines, or “crosses,” these three sets of distinctions, 12 broad types of repression emerge.<sup>6</sup> The willingness to use these types of repression has varied substantially over time and across the globe as well as within the U.S.<sup>7</sup> For instance, in the U.S. and other nations that are largely policed by decentralized, civilian police forces, federal authorities and the military play a relatively minor role in repression when compared to authoritarian states or when compared to democratic regimes with centralized police forces. And yet, even in countries with decentralized civilian police, there are times in which national authorities play a heavier role in repression (e.g., during Hoover’s tenure as FBI director and in the post-9/11 era). To gain a full picture of repression at a given historical moment, it is important to identify which forms of repression are in use and at what level of usage.

However, a complete understanding of repression cannot be reached without both an understanding all of these types of repression and the relationships that may exist between them (i.e., does harsher public protest policing encourage private coercive forms of repression or trade-off with private coercion?). Unfortunately, scholarship on repression has been relatively silent on the potential relationships between different forms of repression; instead, most research describes a specific form of repression, analyzes the predictors of a specific form of repression, or examines the effects of a specific form of repression, but does not consider the wider matrix of repression that might be operating at the same time.

## **Repression over the Lifecourse of Protest**

Much like a person has a lifecourse, one could imagine that a social movement has a life course too. Social movements are born/emerge, grow, mature, and go through decline. Different types of repression are likely to be used at different times in the lifecourse of a social movement. In this section I examine how different types of repression affect the emergence of protest movements and social movement organizations’ day to day operations and wellness across their lifecourse.

## **The Emergence of Dissent**

As Oliver<sup>8</sup> has pointed out, a perfectly repressive regime never actually faces dissent because dissent is entirely prevented. An iconic example of such a totalizing regime is a company town in which employees are so dependent on a company for a variety of needs (employment, housing, supplies through company stores, etc.) and so embedded in family and friendship networks with others who are similarly dependent on a company that dissent becomes unthinkable. Similarly, authoritarian regimes that create citizen dependence

on the state for a variety of needs may also be very effective at preventing dissent (e.g., North Korea).

Indeed, research suggests that such totalizing dependency relationships are quite effective at preventing dissent until the company (or authoritarian regime) is unable to meet its obligations. For instance, in Gaventa's research on company towns in Appalachia it was not until companies were unable to maintain their end of this dependency relationship that dissent began to emerge in any notable manner.<sup>9</sup> This suggests that while many people imagine coercive forms of repression to be the most important forms of repression, it is in fact channeling forms of repression that offer the capacity to actually entirely prevent dissent—coercive forms of repression never even come into play until the regime has failed at preventing dissent and must instead try to minimize it or influence its format and scope.

Moreover, even if dissent is not entirely preventable, channeling-based forms of repression remain front line defenses against hearty protest sectors. For instance, various types of channeling have been used to directly reduce the resources available to fledgling protest movements. Loveman discussed attempts by South American regimes to restrict funding to the Catholic Church because the Church was a major protest incubator.<sup>10</sup> By reducing the level of resources available to the Church in general, the governments hoped to reduce the capacity of the Church to support local activists.

Alternatively, channeling can be used to reduce resources more indirectly. For example, Rowland discussed the passage of state-level laws in the U.S. that cut off financial aid for students convicted of crimes.<sup>11</sup> These laws created substantial financial penalties for student protesters who were arrested and convicted of protest-related crimes. Although protest-related crimes were not singled out in the legislation, meaning that the acts could be used to cut off funding to a wide variety of students, Rowland nonetheless argues that the laws were passed in reaction to campus unrest and protest. Since so much social movements research shows that youth and students play a large role in protest movements, what may seem an indirect restriction on protest may actually be more pivotal than a first glance suggests. Although I am not aware of any academic research published on this point yet, it is possible that similar dynamics are in play today with respect to documented immigrants. The U.S. Immigration and Customs Enforcement policy of deporting immigrants convicted of any crimes—including protest-related crimes—may influence the willingness of documented and undocumented immigrants to protest.

If regimes still fail to squelch emerging movements, channeling also offers the potential to control dissent by institutionalizing conflict resolution

processes. For instance, the U.S. government has minimized labor strikes by requiring that collective bargaining and labor union grievances follow an institutionalized script.

Private actors may also engage in channeling that institutionalizes or moderates protest. For instance, companies have institutionalized conflict resolution requiring that grievances be handled through internal grievance resolution procedures.<sup>12</sup> Alternatively, some have argued that private donors may disproportionately donate to more moderate groups in a social movement area. Over time, this donation pattern will help to build the health of moderate movement factions, while starving more radical factions of resources.<sup>13</sup> The net result can be a much more moderate social movement than might have existed without this differential funding.

### **Surveillance and Surveillance Studies**

As the above comments suggest, while seemingly counterintuitive, it is only when all of these channeling-based forms of repression fail to stop the emergence of dissent that coercive forms of repression even come into play. One early manifestation of coercive repression is often surveillance. Because surveillance is frequently covert, scholars have only had the chance to study its use when it has been subsequently admitted to or discovered.

One of the most extensive and well-studied surveillance operations in the U.S. was the FBI's COINTELPRO, the domestic counterintelligence programs designed to infiltrate and dissolve social movements that the FBI deemed dangerous. The programs involved extensive intelligence efforts, including both legal and illegal techniques, and were meant to be covert.<sup>14</sup> In records related to the program that have subsequently been released, it is clear that the FBI engaged in extensive wiretapping, interception of mail, legal and illegal ("black bag") searches of residences and other buildings, other forms of physical surveillance (tailing people), and infiltration of groups by undercover agents. At times, it is clear that surveillance efforts were meant to intimidate the targets of surveillance,<sup>15</sup> while other efforts were meant to be truly covert operations.

Cunningham has completed the most extensive research on these programs, and several of his findings are worth particular note.<sup>16</sup> First, he shows that while the FBI targeted both left-wing movements (e.g., the Black Panthers, SDS, etc.) and right-wing movements (e.g., the KKK), it had different goals and used different mixes of methods to gather intelligence on and act against each movement. For instance, the New Left was targeted for its radical ideals and agenda, whereas white hate groups were only targeted if their methods were illegal. Therefore, the KKK was the subject of an FBI

COINTELPRO operation but White Citizen Councils were not. But, New Left activists were targeted no matter their methods because the goals of the movement themselves were viewed as dangerous by the FBI. This suggests that surveillance and disruption may be keyed to the kind of threat perceived from authorities.

Another important finding from this research involves the dynamics of covert action itself. Hoover, who was Director of the FBI during COINTELPRO, was personally committed to the belief that a variety of targeted leftist groups were inspired by and connected to Communism. In addition to trying to subvert these leftist movements, COINTELPRO operations were also trying to gather evidence to make the connection to Communism. However, when investigations suggested no connection, that evidence was not read as a disconfirming to Hoover's hypothesis. Rather, it was viewed as evidence that the Communist conspiracy was even deeper and more potentially nefarious than imagined, justifying more surveillance, investigation, and repression. This meant that in the face of mounting evidence against connections to Communism, the FBI increased its commitment to finding evidence of a connection and increased repression.

Cunningham argues that this resulted in both losses of liberty on the part of investigatory and repressive targets but also an incredibly inefficient FBI that was busy throwing resources at suspects that in the end would never be found to have Communist connections and never be found to be engaged in illegal acts.<sup>17</sup> Yet, because the FBI was committed at a philosophical, not evidentiary, level to this link between the Left and Communism and illegality, and the actions undertaken were covert, effective oversight to short-circuit these unwarranted incursions on personal freedoms and the inefficient allocation of government resources was impossible to accomplish.

Cunningham concludes his exploration with worries that the same kind of cycle could be occurring in the so-called War on Terror.<sup>18</sup> Indeed, many of the protections created in the wake of investigations of the COINTELPRO operations have since been rolled back. However, as Earl points out, because of restrictions on information access, it will be difficult to uncover this kind of cycle in the War on Terror for some time.<sup>19</sup> Authorities can use national security and law enforcement privileges to limit the information accessible to the public, effectively forestalling non-governmental oversight of these activities. Given that oversight might short-circuit processes that both reduce civil liberties and reduce law enforcement efficiency, this loss of oversight is particularly troublesome.

While COINTELPRO was the most well-known covert operation against U.S. social movements, it was certainly not the only one. Marx's research

provides an extensive history of covert operations against social movements in the U.S., with a particular focus on informants and undercover agents.<sup>20</sup> This work suggests that covert operations both support direct covert coercive repression and provide intelligence that facilitates the application of other forms of repression as well.

More recently, Starr and collaborators examine contemporary surveillance practices in the U.S. and the impacts of this surveillance on organizations and protesters.<sup>21</sup> Their interviews with activists from 71 social justice organizations lead them to argue that organizers are increasingly adopting a “security culture” where concerns about surveillance trump organizing concerns. For instance, many of their respondents reported limiting any written record of their activities, including refusing to take or keep meeting minutes, personal diaries, or other memorializations of their thoughts, discussions, or actions. Distrust is also heightened as activists fear infiltration by government agents. The researchers also discuss impacts of surveillance on framing activities, organization culture, and resources.

Outside of the literature on social movement repression, a new interdisciplinary field called “surveillance studies” has developed.<sup>22</sup> This area draws together researchers interested in new technologies (which have proven critical to the expansion of surveillance systems around the globe), political control, and the legal system. These scholars examine the rise of so-called surveillance societies in which people’s actions can be tracked through closed circuit TV cameras, movements can be tracked through cell phones, credit card transactions, and toll booth auto-payments, and online actions can be followed, among other incursions into personal privacy. This work does not tend to be focused on the surveillance of protesters or social movements, but rather on the increasing level of everyday surveillance in contemporary society.

### **Institutional Repression**

Presuming that a social movement or specific organization emerges despite the prophylactic effects of various types of channeling and is able to withstand surveillance, infiltration, and/or intimidation, the capacity of groups to operate and organize protest may be challenged by overt coercion that has been referred to as “institutional” repression.<sup>23</sup> In this style of coercive repression, the capacity of groups to organize at all is challenged by trying to drain resources, strain connections, and otherwise focus groups on survival versus activity. For instance, police may press charges against group leaders, tying up resources in their defense. Authorities may encourage landlords to refuse to rent space to the organizations or to evict members. Authorities may pressure friends and relatives of protesters in hopes that protesters leave

the group to avoid further pressure. Of course, covert surveillance and/or intimidation might also continue, which also reduce institutional capacity.

Overt, institutional repression aimed at completely annihilating an organization has been less common in the U.S. because constitutional protections make it difficult to create outright bans of specific groups. The best analog that exists in the U.S. involves groups that the government views as connected to terrorism (whether Jihadist terrorism or environmental or animal rights groups that the government labels as domestic terrorism). Covertly, though, total institutional repression is possible in the U.S.; it was at the very heart of FBI efforts against social movements like the New Left in COINTELPRO. However, overt institutional repression is much more common in other Western nations where specific kinds of groups (e.g., white supremacy) can be legally banned and in more authoritarian nations that place heavy restrictions on non-governmental organizations.

### **Permitting Negotiation and Protest Policing**

If groups persevere enough to be able to actually hold public protest events, authorities can still play a strong role in shaping both the planning and actualization of a protest. In terms of planning, permitting has become a major means for preventing protest (by denying permits) or controlling protest (by imposing restrictions on protesters in exchange for permits). The history of permitting regulations and protest control models more generally sheds some light on why this may be the case.

In the 1950s and 1960s, there were a number of high profile encounters between police and protesters where police in the U.S. used considerable force and violence. While police violence was not the average, or typical, response to protest,<sup>24</sup> most police departments nonetheless practiced a protest policing control strategy called “escalated force.”<sup>25</sup> In this strategy, protesters resisting police direction would be dealt with through increasing uses of force. Notorious images of Southern sheriffs using dogs and water hoses represented this approach taken to its extreme (at least in the U.S.; taken to its full extreme, this approach could involve the use of firearms or other lethal means). These uses of violence coupled with police riots<sup>26</sup> created major public relations dilemmas for police departments, which began to be viewed as unable to control line officers in crowd situations and unable to police assemblies without violence.

As escalated force met increasing public scrutiny, several police departments that were regarded as model police departments in the area of protest policing (e.g., Washington, D.C.) began to move away from the escalated force model. According to McPhail and McCarthy, escalated force was re-

placed by the “negotiated management” model. In negotiated management, the goal is to prevent the need for police uses of force by negotiating away as much potential conflict between police and protesters as possible in advance of a protest. Once at a protest, if conflict does occur, the first police response should be further negotiation and attempts to reduce the conflict. Only if these efforts fail would police action escalate into arrests (but not into violence, if at all possible).

It is worth noting that this change from escalated force to negotiated management also occurred in other countries in the 1970s.<sup>27</sup> The approach was actively promoted by the U.S. government in the late 1960s and 1970s within the U.S. and negotiated management was “exported” by U.S. police officers traveling abroad as consultants.<sup>28</sup>

In many countries, including the U.S., permits for protests were integral to the development and implementation of negotiated management because police departments could use the permitting process to negotiate over march routes or protest locations, time of day, marshals, and so forth. Paralleling arguments about shifts in American policing, Waddington conducted one of the most in-depth studies of permitting negotiations in England.<sup>29</sup> He found that police negotiations over permits substantially contributed to more controlled protests in which control was accomplished through negotiation instead of force. Indeed, he paints a portrait of a police department that is extremely adept at strategically navigating the permitting process, allowing the police to literally shape the form and timing of protest through their negotiation. Police were also found to prioritize their public order concerns and negotiate so that they achieved their most important goals in negotiation (such as protecting key landmarks or the busiest of streets from protest).

Once a protest is permitted, the negotiated management approach calls for police to continue to negotiate with protesters. Moreover, police using this approach aspire to having protest organizers and protest marshals “police” the crowd. For instance, the police would much rather protest organizers or protest marshals counsel protesters against specific acts that police would otherwise have to address. The handoff of these control and order functions to protest organizers further reduces the potential for police-protester conflict. Protest police are also trained to try to avoid conflict, which ranges from wearing regular uniforms and stashing riot gear in areas out of sight of protesters to relying much more heavily on arrests than on uses of violence during a protest.

The now relatively ritualized formula of negotiation, clear march routes, protest marshals, and planned arrests for civil disobedience has been argued to be the result of police and protest organizer cooperation in negotiated



management procedures. In fact, McPhail and McCarthy argue that over the decades in which negotiated management was in use, protests became substantially less disruptive and substantially more formulaic as a result.<sup>30</sup>

However, since the so-called “Battle in Seattle,” researchers have begun to question the transition from escalated force to negotiated management and to examine new models of protest policing that may be developing. The law enforcement community viewed Seattle as a “Pearl Harbor”<sup>31</sup> and research suggests that a number of alternative approaches for protest control are being used across the country as police departments attempt to settle on new approaches. Here I review the new alternative approaches that have been suggested (later in the article I move away from general models of police strategy and discuss specific factors that have been shown to shape police action at specific protest events).

Gillham and Noakes argue that a new model of “strategic incapacitation” is being used across the country:

This new approach is characterized by a range of tactical innovations aimed at temporarily incapacitating transgressive protesters, including the establishment of extensive no-protest zones, the increased use of less-lethal weapons, the strategic use of arrests, and a reinvigoration of surveillance and infiltration of movement organizations. This shift in police tactics during protests is consistent with broader changes in the ideological underpinnings of crime control, including an emphasis on risk management and the prevention of (rather than reaction to) crime and disorder.<sup>32</sup>

Vitale has argued for the rise of a Command and Control model in New York City, which he describes as micro-managing protest without negotiation:

This approach is distinguished from negotiated management because it sets clear and strict guidelines on acceptable behavior with very little negotiation with demonstration organizers. It is also inflexible to changing circumstance during the course of demonstration, and will frequently rely on high levels of confrontation and force in relation to even minor violations of the rules established for the demonstration. This does not represent a return to escalated force because it attempts to avoid the use of force through planning and careful management of the protest. When this fails, however, force is used, but only in the service of re-establishing control over the demonstration.<sup>33</sup>

In subsequent work Vitale has noted other models in simultaneous use in New York; the models include those discussed above as well as the so-called “Miami Model.”<sup>34</sup> The much more aggressive and violent Miami Model (so-called after its use in Miami at anti-FTAA protests in 2003) represents a more general trend toward aggressive protest policing acknowledged by a range of commentators.<sup>35</sup> But, at least one major study calls into question the “newness” of these trends. Specifically, Soule and Davenport quantitatively examine trends in protest policing in the U.S. from 1960 to 1990 and find that while policing did become less aggressive after 1969, that decline in aggres-



siveness could be explained by a trend toward less confrontational protest over the same period.<sup>36</sup> Moreover, across those three decades, where protest was confrontational or threatening, police responded aggressively. Their research, therefore, suggests that less aggressive policing over the preceding several decades may owe less to changes from escalated force to negotiated management and more to changes in the characteristics of protest. Therefore, as protest has again become more confrontational, so too has policing.

Others have argued that policing has become even more aggressive in the wake of 9/11. However, according to Zwerman,<sup>37</sup> one can find strong connections between anti-terrorism concerns and the repression of domestic social movements as early as the Reagan era. Moreover, SWAT capacities and riot control squads can be traced to the 1960s with increasing SWAT militarization over the last several decades.<sup>38</sup>

Despite these disagreements, what is clear from this research is that there are likely time-trends in police responses to protest based either on changing police models or changing characteristics of protests themselves. It is also clear that negotiation-based styles of control rely heavily on permitting and arrests whereas other models rely more heavily on threats and uses of force. Since negotiated management relies heavily on arrests when conflict cannot be negotiated away, the next section examines research on arrests and political trials in more detail.

### **Arrests and Political Trials**

Although the slowly growing literature on protest-related arrests and political trials has rarely explicitly acknowledged it, there are multiple scenarios for protest-related arrests that may have different characters and consequences. High profile arrests and ensuing politicized trials are quite familiar to even casual protest observers. In this scenario, a small number of arrests, often of leaders, are made (e.g., the Chicago Seven) and the subsequent trial becomes a public spectacle. Several excellent histories of such trials in the U.S. exist,<sup>39</sup> some of which include classic theorizing on the role and nature of political trials.<sup>40</sup> Barkan has extensively studied such trials, including examining: the dynamics of trials with *pro se* defendants,<sup>41</sup> the strategic and tactical decision-making of legal teams and defendants in political trials,<sup>42</sup> the discretion of judges in such trials,<sup>43</sup> and differences between political trials across movements.<sup>44</sup> More recent research examines trial support groups for defendants during lengthy political trials.<sup>45</sup>

A second scenario involves lower profile arrests of key leaders made over a longer policing campaign (e.g., arrests of labor organizers across strikes).<sup>46</sup> Research has shown that high bail amounts can be used to keep

leaders in jail or substantially tax movement resources through bail conditions.<sup>47</sup> Leaders are sometimes moved to distant jails as they await bail or trial, an action often justified by officials as trying to protect the safety of the accused. Distance imposes its own set of costs through increased travel time for lawyers, increased social isolation for the accused, and reduced ability to communicate with organizers who are still on the streets organizing.<sup>48</sup> Arrests are sometimes carried out in overly stigmatizing manners, attempting to shame leaders in front of their families or communities through the arrest.<sup>49</sup> Newspaper coverage of arrests is often negative and helps to portray protesters as lawbreakers and unruly to the broader public.<sup>50</sup>

Research suggests that unlike highly publicized arrests of a small group of leaders, charges against leaders in campaigns may be eventually dropped in large numbers.<sup>51</sup> An arrest campaign's success doesn't depend on gaining convictions but rather on making it increasingly difficult for leaders to play their role as organizers. As more and more resources, time, and concern are diverted to handle pending cases, fewer and fewer resources can be devoted to the original protest or strike. Indeed, these campaigns of arrests have proven very effective at defeating social movement campaigns, as Barkan showed in a classic study that compared the effectiveness of legalistic policing versus violent policing in defeating civil rights boycotts.<sup>52</sup>

A third scenario involves the use of mass arrests, sometimes with little attention to individual establishment of probable cause. For instance, police forces may arrest all individuals within a cordoned-off area. Much like campaigns of arrests of leaders, mass arrests have been shown to help defeat specific social movement campaigns<sup>53</sup> and high bail amounts may be used to holdover defendants. Prosecution and conviction rates are also often low.<sup>54</sup> Unlike arrest campaigns against leaders, instead of sapping a movement of its leadership, mass arrests sap willing protest participants in large numbers.

The mass nature of arrests can itself create additional complications. There are often delays in processing defendants prior to arraignment due to over-taxed facilities or personnel, which may effectively extend pre-trial holding times into several days for violations or minor misdemeanors.<sup>55</sup> Conditions from overcrowding or makeshift temporary holding facilities can be dirty or even dangerous.<sup>56</sup> Arrestees may lack access to medication and adequate medical care.<sup>57</sup>

Earl argues that the arrest experience and pre-trial detention can itself serve as an informal punishment for protest.<sup>58</sup> Examining arrests made at the 2004 Republican National Convention, Earl found that arrestees were routinely held for longer than 24 hours. Flexi-cuffs were frequently overly tightened and painful, conditions at the temporary holding facility in Pier 57 were dirty

and potentially hazardous, sleep deprivation was common, and some arrests involved substantial violence. This level of informal punishment could be lawfully meted out by police with only the legal burden of probable cause. Acknowledging the difficult conditions of detention, Thompson examines jail solidarity campaigns meant to challenge these kinds of arrests.<sup>59</sup>

A final scenario is far less ominous: it involves the relatively choreographed arrests that can take place when planned civil disobedience has been negotiated in advance with police. According to McCarthy and McPhail, these arrests are more ceremonial than legal, often very cordial, and may even involve pre-arranged release conditions including low bails or release on one's own recognizance.<sup>60</sup> The motivation for this style of arrest is media coverage of the arrests. Police make the arrests as much to satisfy the desires of organizers (who want the media attention) as they do to enforce the law. If this was the dominant style of arrest, arrests may be far less repressive. Indeed, it was this style of arrest that led McPhail and McCarthy to consider arrests to be a very weak form of repression.<sup>61</sup> However, it is empirically unclear how frequently the four different arrest scenarios discussed here are used: there have been no studies of protest-related arrests that decompose the arrests into these categories or otherwise empirically compare the frequency with which each type of arrest is used.

To conclude this section, thus far I have examined different types of repression and how those types of repression are theoretically distinct from one another and how they might be deployed at different moments in the lifecourse of a social movement. I now turn to research that takes up a different question: how can researchers explain when and against whom repression is likely to be deployed?

### **Explanations of the Targeting and Severity of Repression**

Researchers have worked assiduously to understand what factors may shape which social movements, or social movement organizations, are targeted for repression, when repression is likely to be more severe, and what might drive police action at particular protest events. The simple assumption underlying this work is that governments and private actors cannot, in the end, entirely repress all dissent. Whether dissent must be allowed because of democratic values, or whether the resources required to squelch dissent completely are simply too costly, repression is a somewhat scarce resource of powerholders that must be selectively deployed. Scholars have been interested in understanding why some governments are more willing to invest in repression than others. Within particular countries, scholars have also been interested in understanding why some historical moments are more repressive than others, why some groups are targeted even though others are not, and

why specific authority-protester encounters unfold as they do.

Across this body of research, the most robustly supported predictor of repression is threat.<sup>62</sup> Quite simply, based on research that spans decades and continents, the more threatening a social movement, a social movement group, or a particular protest tactic is, the more harshly scholars would expect it to be repressed. Since threat can be a vague word, it is important to make several distinctions. First, threats to powerholders are usually the subject of interest. For instance, social movements or social movement organizations that are larger (and therefore represent more of the citizenry) or have more radical or revolutionary goals (e.g., Communist groups in the U.S.) are generally viewed as more threatening. Similarly, groups that use more confrontational tactics (e.g., many “direct actions” such as office occupations would be considered confrontational) are viewed as more threatening. Of course, threats might also come from challenges to the dominance of privileged social groups (e.g., the civil rights movement was viewed as a threat to white supremacy by many).

However, situational threats to police (or, more generally, threats to the agents charged with carrying out the repression) have been argued to supersede more general threats to powerholders by some scholars.<sup>63</sup> In this line of argumentation, situational threats are more powerful triggers for repression and more accurately predict the severity of repression than diffuse concerns of powerholders. At the base of this prioritization is a principal-agent dilemma: powerholders (the principals) must have very strong control over repressive actors (the agents) for their concerns to trump the *in situ* concerns of repressive actors. Since this level of control can be hard to achieve, one would expect situational factors to heavily influence repression in many instances.<sup>64</sup> For instance, as discussed above, research on situational threats to police have shown that protest sizes that make crowds substantially more difficult to control, protesters throwing items at police, as well as property damage and violence, trigger more severe repression. While not immediately intuitive, the presence of counter-demonstrators also increases the potential for severe uses of force because police must both handle the original protest and a potential conflict between demonstrators and counter-demonstrators.

It is also important to note that threats are not always objective: threats must be perceived and may be exaggerated and downplayed. The process of interpreting threats is called “threat perception.” As Boudreau points out, understanding threat perception is critical because powerholders or agents of repression may have peculiar interests or concerns that trigger feelings of threat or minimize feelings of threat.<sup>65</sup> Specifically, Boudreau argues that groups that pose unique “match-up” problems for governments are viewed as more threatening than they might otherwise be. For instance, if a govern-

ment has strong control over urban areas but relatively weak control in the countryside, then a rural social movement will be much more threatening than an urban movement because rural mobilization creates a matchup problem for state authority. Conversely, a government with very strong urban control might be far less worried about an urban social movement than the movement's size, goals, or membership composition might otherwise predict.

Prior levels of repression, or what Gurr has referred to as the "Law of the Instrument," have also been tied to lingering dispositions to repress.<sup>66</sup> That is, if one were to want to predict future repression, a strong predictor according to Gurr would be present and past repression. This level of continuity may be attributable less to time dependence and more to enduring characteristics of a government. Scholars refer to the institutional features of governments as political opportunity structures.

Della Porta has been a strong proponent of the relevance of political opportunities to protest policing, particularly in research on Italian and German protest policing.<sup>67</sup> The basic idea is that some governments have institutional structures that are more closed to protest, and that often includes a disposition toward repression, while other governments are more open to protest (which often includes a looser hand in relation to protest). Moreover, at a given historical moment, elites in a government could be galvanized and united, making dissent much more difficult and repression much more likely. Or, government elites could be factionalized and in-fighting, leaving a window open for protesters and reducing the likelihood of repression. These enduring institutional features and more ephemeral constellations of power shape repressiveness across time according to this school of thought.

Consensus on additional factors affecting repression is much harder to come by.<sup>68</sup> Some scholars have argued that authorities like to win and that beating dissenters can actually strengthen a government.<sup>69</sup> Cast as a "weakness" model of repression, these analysts argue that states are opportunistic repressors, choosing to heavily repress movements or groups that may fold quickly under pressure. The same model has been used to explain repression of protesters from minority racial and ethnic groups or other social minorities. For instance, Stockdill's ethnographic research showed that black protesters were likely to be handled more harshly by police than white protesters.<sup>70</sup> Wood also found support for a weakness model; in her research, protesters from racial and ethnic minority groups were more likely to face heavy repression.<sup>71</sup> However, Earl and collaborators<sup>72</sup> failed to confirm a relationship between marginalized protester identities and police action at protests across a range of movements, leaving the ultimate validity of the weakness approach in question.

Other researchers have argued that threat and weakness come together to shape repression such that very threatening and very weak groups are likely to be repressed but that groups that are both weak and threatening will be subject to substantially larger amounts of repression than either their threat or weakness alone might predict. For instance, black nationalist groups in the 1960s and 1970s may arguably fit this profile. However, quantitative modeling of police action at protest events in the U.S. has not found support for this proposition either.<sup>73</sup>

Media coverage of social movements can also influence repression, although how media influences repression is still debated. For instance, Davenport and Eads find that media coverage predicted later repression, although different types of coverage were tied to distinct courses of police action against the Black Panther Party.<sup>74</sup> Earl and collaborators find that front page news coverage of protest increases the likelihood that police will do more than just monitor protests, but does not provide more refined leverage over what kind of action police will take.<sup>75</sup> Contrary to both of these findings, Wisler and Giugni find that media attention and repression were inversely related, meaning that increased media attention in advance of a protest reduced the severity of protest policing.<sup>76</sup>

### **Factors Specifically Affecting Protest Policing**

Thus far, I have discussed factors influencing repression generally. For example, threat is a good predictor of virtually any kind of repression. But, there are several findings that suggest additional influences on public protest policing and/or refinements to general approaches to explaining repression that may be of interest to readers.

### **Distinguishing Between Different Kinds of Police Action at Protests**

Before delving into these results, it is important to note that research suggests that different police reactions to protest have different predictors. For instance, the factors that make police likely to attend a protest to monitor it, but to take no further action, tend to differ from the factors that make police likely to respond to protest using only violence.

Consider Wisler and Giugni, who distinguish between police intervention generally, legalistic policing (arrests) specifically, and the use of rubber bullets in their study of European protest policing.<sup>77</sup> They find that: civil rights coalitions in parliament surprisingly increase the likelihood of rubber bullet usage; lower levels of press coverage increase the likelihood of police intervention and rubber bullet usage; violence by protesters increases the likelihood of some police intervention but cannot predict whether legalistic policing or rubber bullets will be used; and political culture did not affect

the likelihood of police intervention but did increase the likelihood of both legalistic policing and rubber bullet usage specifically.

Earl and her collaborators make additional distinctions in their study of protest policing in New York State.<sup>78</sup> First, they examine the likelihood that police attend a protest (since some protests were planned but others were spontaneous, leaving open the possibility that police were not at all protests). They find that police presence is more likely at larger protests, at protests that occur in jurisdictions where police have more resources, and at protests where confrontational tactics are used, radical goals are endorsed, social movement organizations are present, and/or protesters from subordinate groups are present (e.g., racial and ethnic minorities, gay and lesbian protesters). But, police are less likely to monitor protests when college students are the protesters (perhaps because campus authorities are already monitoring these events).

Second, assuming that police did attend, Earl and collaborators statistically model the likelihood that police attend but take no other action, attend and take only minimal action such as traffic direction or posting barricades, make arrests only, use violence without arrests, or make arrests and use violence. They find that the use of confrontational tactics substantially increases the probability that police make arrests and use violence, larger protest sizes are associated with either police attendance with no further action or the use of police violence with or without arrests, and greater press coverage is associated with slightly increased probabilities of police action of some sort (i.e., the likelihood of police attending but doing nothing else drops).

Earl and Soule examine the same set of distinctions but with reference to a wider set of potential influences.<sup>79</sup> Their research shows that larger protests and protests where confrontational tactics are used, radical goals are endorsed, and social movement organizations are present are more likely to have police presence. They also find that police are less likely to attend when college students are the protesters. However, once they account for other influences, they do not find that subordinate protester presence affects police presence, contrary to Earl and collaborators' earlier work. In addition, Earl and Soule find that protests with counter-demonstrators and protester violence and/or property damage are more likely to be met with at least police presence. A few indicators of the level of police professionalism also indicate that more professional departments are more likely to monitor protests.

In terms of police action once present at a protest, many findings are similar to Earl and collaborators' earlier findings. However, Earl and Soule also find that police uses of violence without arrests decline when police forces are wealthier on a per capita basis but become more likely when counter-demonstrators are present. Further, police uses of violence with or



without arrests are more likely when protesters engage in property damage and/or violence, including throwing items.

### **Policing as an Institution and Police Agencies as Organizations**

What is behind these differences and what other factors may influence police decision-making? One important set of factors focuses on police agencies and officers themselves, although the specific facets that are thought to matter vary in research. Earl and Soule argue for a “blue” approach to explaining protest policing that recalls that protest policing is only one of many tasks that police departments engage in.<sup>80</sup> They argue that this suggests that trends in policing as an institution, and the characteristics of specific police organizations, may shape how police departments engage in everything from traffic policing to protest policing. While many social movement researchers assume that trends in protest policing are going to be inherently tied to protest and social movements, Earl and Soule argue that trends in protest policing are likely to also be tied to trends in policing such as rising levels of police professionalism, management fads and fashions, and specialization of tasks and training. For instance, wealthier departments that can afford more training may be more restrained in their uses of violence in a range of situations, including protest policing (and Earl and Soule do find that wealthier departments are less likely to rely solely on violence).<sup>81</sup>

Earl and Soule also argue that threats to police at protest events are likely to mirror threats to police in other situations. For example, police officers are trained to gain control of all of the encounters in which they are involved. Moreover, loss of control of conflict situations is frequently tied to risks to officer safety in police training. Therefore, one might expect that factors that lead police believe that they may lose control (e.g., the presence of counter-demonstrators since two opposing groups are facing off against one another), would increase the likelihood of police action. Indeed, this is precisely what Earl and Soule find.<sup>82</sup> Moreover, indicators of threat are themselves likely to be professionally constructed. For example, Earl and Soule find that following government study reports indicating that rock, bottle, and brick throwing were associated with escalations into riot situations, police responded very seriously to rock, bottle, and brick throwing at protest events.

Della Porta, who has primarily studied European policing, takes this concern for police agencies in a different direction, focusing on the development and use of “police knowledge” about protesters, which includes beliefs police hold about protesters and beliefs about their own role in controlling protest.<sup>83</sup> Her qualitative research and that of other researchers confirms the importance of police knowledge.<sup>84</sup> However, other researchers have noted that police can overcome their negative beliefs about protesters in some situations.<sup>85</sup>



Waddington offers yet another alternative: he argues that British police are worried about preventing “on the job trouble” (which involves actual policing errors) and “in the job trouble” (which is political, career, or organizational trouble).<sup>86</sup> Similar to negotiated management arguments, Waddington argues that police officers use, rather than enforce, the law. For instance, police might pressure protesters to negotiate a specific point during the permitting process using legal rules as pressure points even if police are not actually interested in enforcing the specific legal rule being used to gain concessions.

Legal regulations certainly affect protest policing as well. For instance, McPhail and McCarthy argue that public forum law affects how police address protest on private versus public property.<sup>87</sup> Indeed, because police have so much of a freer hand to stop protest altogether in private spaces, McCarthy and McPhail worry about the future of protest given the trend toward people gathering in large numbers in private spaces (e.g., malls, sports arenas, etc.) instead of public property.<sup>88</sup> They argue that protesters face the unenviable choice between public venues where protest is more protected but where fewer people are around to witness the protest and private venues that are entirely closed to protest but have large audiences.

However, researchers know little about how more local variation in legal regulations affect protest policing—for example, research has not examined whether judgments against police departments affect subsequent protest policing, whether consent decrees affect protest policing, or whether civilian review boards affect protest policing. Earl and collaborators could not identify a statistically significant relationship between prior brutality claims and protest policing action, although the brutality measures were not directly taken from police but instead relied on allegations of brutality reported in the newspaper.<sup>89</sup> So, research does not disclose whether actual police brutality rates affect protest policing.

Research has also found differences in behavior and decision-making based on rank and responsibility. For instance, in the 1960s and 1970s in the U.S., a major concern facing police departments that wanted to curb police violence against protesters was how to better control line officers. Supervisors were thought to be more committed to models like negotiated management whereas line officers were thought to be more inclined to use an escalated force approach. European research confirms similar tensions between more negotiation-based supervisors and more violence-prone line officers.<sup>90</sup> However, this trend may depend on the particular agency and leadership directives. For instance, Earl's research on the policing of protests surrounding the 2004 Republican National Convention in New York found that supervisory officers were more often reported to be inciting aggressive policing; numerous

protesters reported line officers trying to calm supervisory officers and/or line officers delaying the implementation of a supervisory officer's orders in hopes that the supervisor might change his or her orders.<sup>91</sup> It is possible that better than two decades of police training geared to controlling line officers at protests was effective but that supervisory officers had different concerns, motivations, or instructions for how to handle protests at the 2004 RNC.

Still other research suggests that protest policing generally, and violent confrontations between police and protesters specifically, cannot be adequately explained using the above factors. Instead, these qualitative researchers argue based on ethnographic observations of protest policing that police-protester clashes result from flashpoints where long simmering grievances are ignited by a particular spontaneous encounter between police and protesters.<sup>92</sup> In this line of work, the situational interactions between protesters and police unfold more organically and less predictably than other models suggest and protest policing can turn from peaceful to violent very quickly if a flashpoint arises.

### **Bad Apples are Bad Explanations**

One explanation of police action at protest events that one will not read in the academic literature is that a few proverbial bad apples were responsible for police action at a protest. In fact, all research of which I am aware—even where it disagrees on which factors are the most important—would agree that the bad apple theory so commonly offered by police in the wake of policing scandals and so commonly believed by the public is inaccurate.

In the area of protest policing, no work makes this point more clearly than Stark's classic study of so-called police riots.<sup>93</sup> Police riots occur when police collectively use excessive violence to control or end a protest situation. They were originally called police riots because the seemingly out of control police response looked similar to a riot. For instance, police action during the 1968 Democratic National Convention has been referred to as a police riot.

However, even in these chaotic and surprising uses of police force, Stark argues that bad apples are not to blame; in fact, police riots actually result from the participation of a wide variety of officers. To make sense of this, Stark reminds readers that violence and the application of violence is a very common part of everyday policing (and delivering and experience violence is also a very common component of police training). What makes a police riot "special," then, is not the use of violence but the collective use of excessive violence.

When police have general animosity toward protesters or the groups they represent (e.g., racial animosity figured heavily into police riots in the

1960s and 1970s) and/or make tactical errors in policing an event so that it begins to get “out of control,” police may be more likely to react with violence much as they would in other policing situations. However, in protest policing, there are a larger number of officers present at the same location, making the collective over-use of violence possible. Violence may become excessive if line officers are insufficiently supervised and/or supervisors formally or informally sanction excessive violence.

To illustrate, Stark describes a typical police riot as involving several stages. First, a large number of officers have to be present or converge in response to a call. Second, a confrontation generally occurs (which could happen when officers and protesters disagree or when supervisors decide to declare an assembly illegal). The third stage occurs when police attempt to disperse the crowd even though a real possibility of dispersal does not exist (e.g. there are not exit routes or the police have blocked the only exit routes). When the crowd fails to disperse (given that they could not do otherwise), the police use force to motivate dispersal in the fourth stage. However, dispersal is still not possible. A limited police riot then occurs if police formations break up and officers use force in a punitive way but only for a limited duration. An extended police riot occurs when punitive and excessive violence continues for a prolonged period and/or when police continue to use violence against non-provocative subjects. For this series of events to unfold, a wide variety of officers have to participate and supervisory failure is required.<sup>94</sup>

Unfortunately, there is not much additional research on officer misconduct at protest events beyond research on police riots. For instance, little is known about the long recognized strategy of police officers covering their identification (e.g., name tags, badge numbers, or other identifiers) during protest events. This practice is intended to effectively limit immunity for officers who engage in misconduct because it is hard to identify them later. While covering identification itself is often forbidden and it has been reported across a wide variety of jurisdictions, there is no research that allows one to estimate how often these less violent forms of misconduct occur at protest events and whether they are harbingers of other kinds of collective or individual police misconduct.

It is also important to remember that there are many ways in which legal techniques can be used to limit or control social movements and their participants. Indeed, a singular focus on misconduct underappreciates how much can be done to repress protest without straying into the zone of misconduct. For instance, Barkan's classic work on the policing of civil rights boycotts in the South, discussed above, showed that legalistic techniques can be far

more effective at breaking boycotts than violence or other police activity that would be viewed as misconduct.

Moreover, what is legal versus misconduct changes over time. For instance, many of the practices that were outlawed following public revelations about the FBI's COINTELPRO are legal again following post-9/11 changes to the laws. Similarly, the lawful use of various pain compliance techniques has changed over time. In 1997, officers in Humboldt County used direct applications of pepper spray (by spray and swab) to the eyes of peaceful protesters engaged in civil disobedience lockdowns. For a period time, the California Police Officer Standards and Training (CA-POST), which sets minimum training requirements for California law enforcement officers, sanctioned that practice. Humboldt law enforcement provided a training video to the POST to help train other departments in this tactic. It took almost a decade for a court to decide that the use of pepper spray against passive subjects was in violation of the subject's constitutional rights.<sup>95</sup> During the intervening time, it was not judged to be misconduct, suggesting how malleable boundaries are between legal conduct and misconduct over time.

### **Effects of Repression**

With so much known about what factors may influence repression and protest policing, it would seem likely that much too would be known about the effects of repression. However, despite a large volume of research in this area, results are quite inconclusive.<sup>96</sup> Three broad potential repercussions include deterrence, radicalization, or no effect. First, it is possible that repression deters future protest participation, reduces willingness to join ongoing protest, reduces the capacity or activity of social movement organizations, and/or deteriorates overall movements over time. Alternatively, repression could radicalize individuals or groups, strengthen the resolve of individuals or cohesiveness of groups, or strengthen movements by showing bystanders the lengths to which state or private actors may go to forestall the movement. A final alternative is that both deterrence and radicalization occur and offset one another so that there are no net effects on social movement organizations or social movements of repression. All three of these broad claims have been examined by research and supported in certain circumstances.

More complicated versions of each of these three possibilities exist in the literature as well. For instance, some researchers argue that deterrence occurs but that it follows a U-shaped or inverse U-shaped curve. In these scenarios, low levels of repression and high levels of repression may foster protest whereas moderate repression deters protest (or vice versa where low and high levels of repression are associated with limited protest and moderate repression is associated with higher levels of protest). Alternatively, deter-

rence and radicalization may trade off over time so that initially repression deters but then later provokes protest. Moreover, it may be that only certain protesters are deterred by repression while others types of protesters are more likely to be unphased or radicalized by repression. Similarly, entire movements may react differently to protest, or react differently to different kinds of repression. Repression could also lead to shifts in tactical decision-making instead of reducing the level of protest. For instance, protesters facing increasing repression may begin to use less confrontational tactics in hopes of reducing repression.

Unfortunately, the only thing that repression researchers may be able to agree on here is that there is no research consensus pointing to a singular and predictable sequence of consequences following repression.

## **Conclusions**

This review of the repression literature was meant to introduce readers to the questions that repression researchers examine and to potential answers to those questions that have emerged across the past few decades. While this literature has much to say about the multiplicity of types of repression, how those forms of repression may be applied to social movements across their lifecourse, and what may predict or explain repression, a number of nagging and completely unaddressed questions remain. It is clearly important that researchers continue to try to understand the effects of repression, which will undoubtedly involve understanding switchpoints and predispositions to deterrence, radicalization, or no effect. It is also important that researchers investigate in more detail the use of less than lethal weapons, which make up an increasingly prominent tool in crowd control arsenals. Similarly, repression researchers should work to understand the effectiveness of attempts to reduce or forestall repression. For instance, studying the effect of consent decrees or civil judgments on later protest policing would inform litigation efforts. Finally, researchers should continue to examine how lawful forms of government intervention nonetheless affect free speech and assembly since research discloses the power of legalistic repression to reduce or stop protest with less notice or concern than violent suppression often provokes.

---

## **NOTES**

1. Other reviews of this literature include: Christian Davenport, *State Repression and Political Order*, 10 Ann'l Rev. of Political Science, (2007); Jennifer Earl, *Introduction: Repression and the Social Control of Protest*, 11 Mobilization, (2006); Christian Davenport, *Repression and Mobilization: Insights from Political Science and Sociology*, in *Repression and Mobilization*, (Christian Davenport, et al. eds., 2005); Christian Davenport, *Introduction*, in *Paths to State Repression*, (Christian Davenport, ed., 2000).

2. Jennifer Earl, *Tanks, Tear Gas and Taxes: Toward a Theory of Movement Repression*, 21 *Sociological Theory*, (2003).
3. Bob Edwards & John D. McCarthy, *Resources and Social Movement Mobilization*, in *The Blackwell Companion to Social Movements*, (David A. Snow, et al., eds., 2004). Daniel M. Cress, *Nonprofit Incorporation Among Movements of the Poor: Pathways and Consequences for Homeless Social Movement Organizations*, 38 *Sociological Quarterly*, (1997). John D. McCarthy, et al., *The Institutional Channeling of Social Movements by the State in the United States*, 13 *Research in Social Movements, Conflicts and Change*, (1991). John G. Simon, *The Tax Treatment of Nonprofit Organizations: A Review of Federal and State Policies*, in *The Non-Profit Sector: A Research Handbook*, (Walter W. Powell, ed., 1987).
4. Jennifer Earl, *supra* note 2.
5. David Cunningham, *There's Something Happening Here: The New Left, the Klan, and FBI Counterintelligence* (University of California Press. 2004).
6. Jennifer Earl, *supra* note 2.
7. Research attention, too, has varied across these types, with some kinds of repression (e.g., sub-national, overt coercion such as the public policing of protest events) receiving the vast majority of research attention while other forms receive scant notice (e.g., private, covert coercion and private, covert channeling).
8. Pamela E. Oliver, *Repression and Crime Control: Why Social Movement Scholars Should Pay Attention to Mass Incarceration as a Form of Repression*, 13 *Mobilization*, (2008).
9. John Gaventa, *Power and Powerlessness: Quiescence and Rebellion in an Appalachian Valley* (University of Illinois Press. 1980).
10. Mara Loveman, *High-Risk Collective Action: Defending Human Rights in Chile, Uruguay, and Argentina*, 104 *American Journal of Sociology*, (1998).
11. Ronald L. Rowland, *An Overview of State Legislation Responding to Campus Disorders*, 1 *Journal of Law Education*, (1972).
12. Robert P. Hebdon & Robert N. Stern, *Trade Offs Among Expressions of Industrial Conflict: Public Sector Strike Bans and Grievance Arbitrations*, 51 *Industrial and Labor Relations Review*, (1998).
13. Herbert H. Haines, *Black Radicalization and the Funding of Civil Rights: 1957-1970*, 32 *Social Problems*, (1984).
14. David Cunningham, *supra* note 5.
15. See Colin A. Beckles, *Black Bookstores, Black Power, and the FBI: The Case of Drum and Spear*, 20 *Western Journal of Black Studies*, (1996) for an example.
16. David Cunningham, *State versus Social Movement: FBI Counterintelligence Against the New Left*, in *States, Parties, and Social Movements*, (Jack A. Goldstone, ed., 2003). David Cunningham, *The Patterning of Repression: FBI Counterintelligence and the New Left*, 82 *Social Forces*, (2003). David Cunningham, *supra* note 5. David Cunningham, *Understanding State Responses to Left- versus Right-Wing Threats*, 27 *Social Science History*, (2003).
17. David Cunningham, *supra* note 5.
18. *Id.*
19. Jennifer Earl, *Information Access and Protest Policing Post-9/11: Studying the Policing of the 2004 Republican National Convention*, 53 *American Behavioral Scientist*, (2009).

20. Gary T. Marx, *Undercover: Police Surveillance in America* (U. of California Press, 1988). Gary T. Marx, *External Efforts to Damage or Facilitate Social Movements: Some Patterns, Explanations, Outcomes, and Complications*, in *Dynamics of Social Movements: Resource Mobilization, Social Control and Tactics*, (Mayer Zald & John D. McCarthy, eds., 1979). Gary T. Marx, *Thoughts on a Neglected Category of Social Movement Participant: The Agent-Provocateur and the Informant*, 80 *American Journal of Sociology*, (1974).
21. Amory Starr, et al., *The Impacts of State Surveillance on Political Assembly and Association: A Socio-Legal Analysis*, 31 *Qualitative Sociology*, (2008).
22. For instance, see Kirstie Ball, *Exposure: Exploring the Subject of Surveillance*, 12 *Information, Communication and Society*, (2009). Gary T. Marx & Glenn W. Muschert, *Personal Information, Borders, and the New Surveillance Studies*, 3 *Annual Review of Law and Social Science*, (2007).
23. Ruud Koopmans, *The Dynamics of Repression and Mobilization: The German Extreme Right in the 1990s*, 2 *Mobilization*, (1997).
24. Jennifer Earl, et al., *Protests Under Fire? Explaining Protest Policing*, 68 *American Sociological Review*, (2003).
25. See the following for detailed discussions of escalated force and negotiated management: John D. McCarthy & Clark McPhail, *The Institutionalization of Protest in the United States*, in *The Social Movement Society*, (David S. Meyer & Sidney Tarrow eds., 1998). John D. McCarthy & Clark McPhail, *Policing Protest: The Evolving Dynamics of Encounters between Collective Actors and Police in the United States*, in *Eigenwilligkeit und Rationalität sozialer Prozesse*, (Jurgen Gerhards & Ronald Hitzler eds., 1999). Clark McPhail, et al., *Policing Protest in the United States: 1960-1995*, in *Policing Protest: The Control of Mass Demonstrations in Western Democracies*, (Donatella Della Porta & Herbert Reiter, eds., 1998). John D. McCarthy, et al., *The Diffusion and Adoption of Public Order Management Systems, in Social Movements in a Globalizing World*, (Hanspeter Kriesi, et al. eds., 1999). Clark McPhail & John D. McCarthy, *Protest Mobilization, Protest Repression, and the Interaction*, in *Repression and Mobilization*, (Christian Davenport, et al., eds., 2005).
26. Rodney Stark, *Police Riots: Collective Violence and Law Enforcement* (Wadsworth Publishing, 1972).
27. See the following for discussion and examples: Richard Ericson & Aaron Doyle, *Globalization and the Policing of Protest: The Case of APEC 1997*, 50 *British Journal of Sociology*, (1999). Donatella Della Porta & Olivier Fillieule, *Policing Social Protest*, in *The Blackwell Companion to Social Movements*, (David A. Snow, et al. eds., 2004).
28. John D. McCarthy, et al., *The Diffusion and Adoption of Public Order Management Systems*, *supra* note 24.
29. P.A.J. Waddington, *Liberty and Order: Public Order Policing in a Capital City* (1994).
30. Clark McPhail & John D. McCarthy, *Protest Mobilization, Protest Repression, and the Interaction*, *supra* note 25.
31. As quoted on page 335 in John Noakes & Patrick F. Gillham, *Police and Protester Innovation Since Seattle*, 12 *Mobilization*, (2007).
32. Quote from page 343 from: Patrick F. Gillham & John Noakes, *"More than a March in a Circle": Transgressive Protests and the Limits of Negotiated Management*, 12 *Mobilization*, (2007).



33. As quoted from page 287 from Alex S. Vitale, *From Negotiated Management to Command and Control: How the New York Police Department Polices Protests*, 15 Policing and Society, (2005).
34. Alex S. Vitale, *The Command and Control and Miami Models at the 2004 Republican National Convention: New Forms of Policing Protests*, 12 Mobilization, (2007).
35. See Donatella Della Porta & Sidney Tarrow, *After Genoa and New York: the Anti-Global Movement, the Police and Terrorism*, 2 Items and Issues, (2001).
36. Sarah A. Soule & Christian Davenport, *Velvet Glove, Iron Fist or Even Hand? Protest Policing in the United States, 1960-1990*, 14 Mobilization, (2009).
37. Gilda Zwerman, *Domestic Counterterrorism: U.S. Government Responses to Political Violence on the Left in the Reagan Era*, 16 Social Justice, (1989).
38. See Peter B. Kraska and Victor E. Kappeler, *Militarizing American Police: The Rise and Normalization of Paramilitary Units*, 44 Social Problems, (1997); Peter B. Kraska & Derek J. Paulsen, *Grounded Research into U.S. Paramilitary Policing: Forging the Iron Fist Inside the Velvet Glove*, 7 Policing and Society, (1997) in regards to increasing paramilitarization. But see P.A.J. Waddington, *Swatting Police Militarism: A Comment on Kraska and Paulsen*, 9 Policing and Society, (1999) for the opposing position. See Robert Reiner, *Policing, Protest, and Disorder in Britain*, in Policing Protest: The Control of Mass Demonstrations in Western Democracies, (Donatella Della Porta & Herbert Reiter eds., 1998) for a different perspective on militarization.
39. Leon Friedman, *Political Power and Legal Legitimacy: A Short History of Political Trials*, 30 Antioch Review, (1970).
40. Theodore L. Becker, Political Trials (Bobbs-Merrill 1971). Otto Kirchheimer, *Political Justice: The Use of Legal Procedure for Political Ends* (1961).
41. Steven E. Barkan, *Political Trials and the Pro Se Defendant in the Adversary System*, 24 Social Problems, (1977).
42. Steven E. Barkan, *Strategic, Tactical, and Organizational Dilemmas of the Protest Movement Against Nuclear Power*, 27 Social Problems, (1979). Steven E. Barkan, *Political Trial and Resource Mobilization: Towards an Understanding of Social Movement Litigation*, 58 Social Forces, (1980). Steven Barkan, *Criminal Prosecution and the Legal Control of Protest*, 11 Mobilization, (2006).
43. Steven E. Barkan, *Judging the Judges*, 8 Human Rights, (1980).
44. Steven E. Barkan, *Criminal Prosecutions in the Southern Civil Rights and Vietnam Antiwar Movements: Repression and Dissent and Political Trials*, 3 Research in Law & Sociology, (1980). Steven E. Barkan, *Protesters on Trial: Criminal Justice in the Southern Civil Rights and Vietnam Antiwar Movements* (Rutgers U. Press. 1985).
45. Patricia G. Steinhoff, *Resisting Political Repression through Trial Support Groups in Japanese Social Movement Culture* (2007).
46. For an example in the U.S., see Barbara Kingsolver, *Holding the Line: Women in the Great Arizona Mine Strike of 1983* (ILR Press. 1989). For an example from England, see David Waddington, et al., *Split at the Seams? Community, Continuity and Change after the 1984-5 Coal Dispute* (1991).
47. Jennifer Earl, *You Can Beat the Rap, But You Can't Beat the Ride*, 26 Research in Social Movements, Conflict, and Change, (2005).
48. Steven E. Barkan, *Legal Control of the Southern Civil Rights Movement*, 49 American Sociological Review, (1984).
49. Barbara Kingsolver, *supra* note 46.



50. *Id.*; Steven E. Barkan, *Legal Control of the Southern Civil Rights Movement*, *supra* note 48; Jennifer Earl, *You Can Beat the Rap, But You Can't Beat the Ride*, *supra* note 47.
51. Barbara Kingsolver, *supra* note 46. Steven E. Barkan, *Legal Control of the Southern Civil Rights Movement*, *supra* note 48. Isaac D. Balbus, *The Dialectics of Legal Repression: Black Rebels before the American Criminal Courts* (1973).
52. Steven E. Barkan, *Legal Control of the Southern Civil Rights Movement*, *supra* note 48.
53. *Id.*
54. Balbus, *supra* note 51.
55. *Id.*
56. *Id.*
57. Jennifer Earl, *You Can Beat the Rap, But You Can't Beat the Ride*, *supra* note 47.
58. Jennifer Earl, *Arrests, Repression, and the 2004 Republican National Convention* (2008).
59. Beverly Yuen Thompson, *The Global Justice Movement's Use of "Jail Solidarity" as a Response to Police Repression and Arrest*, 13 *Qualitative Sociology*, (2007).
60. John D. McCarthy & Clark McPhail, *The Institutionalization of Protest in the United States*, *supra* note 25.
61. Clark McPhail & John D. McCarthy, *Protest Mobilization, Protest Repression, and the Interaction*, *supra* note 25.
62. See the following for more detailed reviews of this approach: Christian Davenport, *State Repression and Political Order*, *supra* note 1; Jennifer Earl, *Introduction: Repression and the Social Control of Protest*, *supra* note 1; Christian Davenport, *Repression and Mobilization*, *supra* note 1; Jennifer Earl, *Tanks, Tear Gas and Taxes*, *supra* note 2; Jennifer Earl, et al., *Protests Under Fire?* *supra* note 24; Christian Davenport, *Introduction*, in *Paths to State Repression*, (Christian Davenport ed., 2000).
63. Jennifer Earl & Sarah A. Soule, *Seeing Blue: A Police-Centered Explanation of Protest Policing*, 11 *Mobilization*, (2006).
64. However, one might expect that militaries or national agents are more readily controlled by powerholders and therefore better representatives of powerholders' concerns.
65. Vince Boudreau, *Precarious Regimes and Matchup Problems in the Explanation of Repressive Policy*, in *Repression and Mobilization*, (Christian Davenport, et al. eds., 2005).
66. Ted Robert Gurr, *Persisting Patterns of Repression and Rebellion: Foundations for a General Theory of Political Coercion*, in *Persistent Patterns and Emergent Structures in a Waning Century*, (Margaret P. Karns ed., 1986). Also, see discussion of this approach in Christian Davenport, *Media Bias, Perspective, and State Repression* (Cambridge U. Press. 2010).
67. Donatella Della Porta, *Social Movements, Political Violence, and the State: A Comparative Analysis of Italy and Germany* (Cambridge U. Press. 1995). See also Dominique Wisler & Hanspeter Kriesi, *Public Order, Protest Cycles, and Political Process: Two Swiss Cities Compared*, in *Policing Protest: The Control of Mass Demonstrations in Western Democracies*, (Donatella Della Porta & Herbert Reiter eds., 1998).
68. I only review other major competitive approaches here. For a full review of other explanations, see: Jennifer Earl, *Tanks, Tear Gas and Taxes: Toward a Theory of Movement*

- Repression, 21 *Sociological Theory*, (2003); Jennifer Earl, et al., *Protests Under Fire?* *supra* note 24.
69. William A. Gamson, *The Strategy of Social Protest* (The Dorsey Press. 1990 [1975]).
  70. Brett C Stockdill, *Multiple Oppressions and Their Influence on Collective Action: The Case of the AIDS Movement* (1996) (Ph.D., Northwestern University).
  71. Lesley J. Wood, *Breaking the Wave: Repression, Identity, and Seattle Tactics*, 12 *Mobilization*, (2007).
  72. Jennifer Earl, et al., *Protests Under Fire?* *supra* note 24.
  73. *Id.*; Jennifer Earl & Sarah A. Soule, *Seeing Blue*, *supra* note 63.
  74. Christian Davenport & Marci Eads, *Cued to Coerce or Coercing Cues? An Exploration of Dissident Rhetoric and its Relationship to Political Repression*, 6 *Mobilization*, (2001).
  75. Jennifer Earl, et al., *Protests Under Fire?* *supra* note 24.
  76. Dominique Wisler & Marco Giugni, *Under the Spotlight: The Impact of Media Attention on Protest Policing*, 4 *Mobilization*, (1999).
  77. *Id.*
  78. Jennifer Earl, et al., *Protests Under Fire?* *supra* note 24.
  79. Jennifer Earl & Sarah A. Soule, *Seeing Blue*, *supra* note 63.
  80. Jennifer Earl & Sarah A. Soule, *Seeing Blue*, *supra* note 63. For a related discussion, but on militaries, see J. Ron, *Savage Restraint: Israel, Palestine and the Dialectics of Legal Repression*, 47 *Social Problems*, (2000) and William Stanley, *The Protection Racket State: Elite Politics, Military Extortion, and Civil War in El Salvador* (Temple University Press. 1996).
  81. However, they also find that some characteristics do not affect protest policing. For instance, International Association of Chiefs of Police membership rates in a jurisdiction did not affect policing style according to Earl and Soule's research, despite IACP being a leading association advocating police professionalism.
  82. However, if one only thought of the police as instruments of ruling parties, then police should only react to what scares ruling parties. Counter-demonstrators at a protest are likely to be quite welcomed by ruling parties because counter-demonstrators suggest that the original demonstrators are not the only voice or interest and counter-demonstrators offer a kind of private resistance or pushback to social movements.
  83. Donatella Della Porta, *Police Knowledge and Protest Policing: Some Reflections on the Italian Case*, in *Policing Protest: The Control of Mass Demonstrations in Western Democracies*, (Donatella Della Porta & Herbert Reiter eds., 1998).
  84. For instance, see Mattias Wahlström, *Forestalling Violence: Police Knowledge of Interaction with Political Activists*, 12 *Mobilization*, (2007).
  85. Gianluca De Fazio, *Police Knowledge Revised: Insights from the Policing of the Civil Rights Movement in Northern Ireland*, 27 *Research in Social Movements, Conflict and Change*, (2007).
  86. P.A.J. Waddington, *Liberty and Order*, *supra* note 29.
  87. Clark McPhail, et al., *Policing Protest in the United States: supra* note 25.
  88. John D. McCarthy & Clark McPhail, *Protest and Place: The Shrinking Effective Size of the U.S. Public Forum*, 11 *Mobilization*, (2006).
  89. Jennifer Earl, et al., *Protests Under Fire?* *supra* note 24.

90. Olivier Fillieule & Fabien Jobard, *The Policing of Protest in France: Toward a Model of Protest Policing*, in *Policing Protest: The Control of Mass Demonstrations in Western Democracies*, (Donatella Della Porta & Herbert Reiter eds., 1998).
91. Jennifer Earl, *Arrests, Repression, and the 2004 Republican National Convention* (2006).
92. David Waddington, et al., *Flashpoints: Studies in Public Disorder* (1989).
93. Rodney Stark, *Police Riots: Collective Violence and Law Enforcement* (Wadsworth Publishing, 1972).
94. Stark also reviews a variety of reforms that might make police riots less likely and none of those suggestions involve different screening procedures to prevent "bad apples" from joining a police force.
95. See <http://www.nopepperspray.org/> for a lengthy recap of the incidents in question and ensuing legal dispute.
96. See Jennifer Earl & Sarah A. Soule, *The Impacts of Repression: The Effect of Police Presence and Action on Subsequent Protest Rates*, 30 *Research in Social Movements, Conflicts, and Change*, (2010) for a detailed review of specific predictions and findings.

---

## TABLE REFERENCES

(Many of these appear in earlier endnotes, but not all):

Paul D. Almeida, *Opportunity Organizations and Threat-Induced Contention: Protest Waves in Authoritarian Settings*, 109 *American Journal of Sociology*, (2003).

Gerald Astor, *The New York Cops: An Informal History* (Charles Scribner's Sons, 1971).

Patrick Ball, *On the Quantification of Horror: Notes from the Field*, in *Repression and Mobilization*, (Christian Davenport, et al. eds., 2005).

Steven E. Barkan, *Legal Control of the Southern Civil Rights Movement*, 49 *American Sociological Review*, (1984).

Dallas A. Blanchard, *The Anti-Abortion Movement and the Rise of the Religious Right: From Polite to Fiery Protest* (Twayne Publishers, 1993).

Charles D. Brockett, *A Protest-Cycle Resolution of the Repression/ Popular Protest Paradox*, in *Repertoires and Cycles of Collective Action*, (Mark Traugott ed., 1995).

David G. Bromley & Anson D. Shupe Jr., *Repression and the Decline of Social Movements: The Case of New Religions*, in *Social Movements of the Sixties and Seventies*, (Jo Freeman ed., 1983).

Michael Carley, *Defining Forms of Successful State Repression of Social Movement Organizations: A Case Study of the FBI's COINTELPRO and the American Indian Movement*, 20 *Research in Social Movements, Conflicts and Change*, (1997).

Ward Churchill, *The Bloody Wake of Alcatraz: Political Repression of the American Indian Movement during the 1970s*, 18 *American Indian Culture and Research Journal*, (1994).

Daniel M. Cress, *Nonprofit Incorporation Among Movements of the Poor: Pathways and Consequences for Homeless Social Movement Organizations*, 38 *The Sociological Quarterly*, (1997).

David Cunningham, *State versus Social Movement: FBI Counterintelligence Against the New Left*, in *States, Parties, and Social Movements*, (Jack A. Goldstone ed., 2003).

David Cunningham, *The Patterning of Repression: FBI Counterintelligence and the New Left*, 82 *Social Forces*, (2003).

David Cunningham, *Understanding State Responses to Left- versus Right-Wing Threats*, 27 *Social Science History*, (2003).

David Cunningham, *There's Something Happening Here: The New Left, the Klan, and FBI Counterintelligence* (University of California Press. 2004).

Donatella Della Porta, *Social Movements, Political Violence, and the State: A Comparative Analysis of Italy and Germany* (University of Cambridge Press. 1995).

Donatella Della Porta, *Police Knowledge and Protest Policing: Some Reflections on the Italian Case, in Policing Protest: The Control of Mass Demonstrations in Western Democracies*, (Donatella Della Porta & Herbert Reiter eds., 1998).

Jim Dwyer, *City Police Spied Broadly Before G.O.P. Convention*, The New York Times March 25. 2007.

Jennifer Earl & Sarah A. Soule, *Seeing Blue: A Police-Centered Explanation of Protest Policing*, 11 Mobilization, (2006).

Jennifer Earl & Sarah A. Soule, *The Impacts of Repression: The Effect of Police Presence and Action on Subsequent Protest Rates*, 30 Research in Social Movements, Conflicts, and Change, (2010).

Jennifer Earl, et al., *Protests Under Fire? Explaining Protest Policing*, 68 American Sociological Review, (2003).

Bob Edwards & John D. McCarthy, *Resources and Social Movement Mobilization*, in The Blackwell Companion to Social Movements, (David A. Snow, et al. eds., 2004).

John Gaventa, *Power and Powerlessness: Quiescence and Rebellion in an Appalachian Valley* (University of Illinois Press. 1980).

James L. Gibson, *The Policy Consequences of Political Intolerance: Political Repression During the Vietnam War Era*, 51 Journal of Politics, (1989).

Patrick F. Gillham & John Noakes, *"More than a March in a Circle": Transgressive Protests and the Limits of Negotiated Management*, 12 Mobilization, (2007).

Larry J. Griffin, et al., *Capitalist Resistance to the Organization of Labor Before the New Deal: Why? How? Success?*, 51 American Sociological Review, (1986).

Herbert H. Haines, *Black Radicalization and the Funding of Civil Rights: 1957-1970*, 32 Social Problems, (1984).

Robert P. Hebdon & Robert N. Stern, *Trade Offs Among Expressions of Industrial Conflict: Public Sector Strike Bans and Grievance Arbitrations*, 51 Industrial and Labor Relations Review, (1998).

Jenny Irons, *Who Rules the Social Control of Protest? Variability in the State-Countermovement Relationship*, 11 Mobilization, (2006).

Jenny Irons, *Reconstituting Whiteness: The Mississippi State Sovereignty Commission* (Vanderbilt University Press. 2009).

Craig J. Jenkins & Craig M. Eckhert, *Channeling Black Insurgency: Elite Patronage and Professional Social Movement Organizations in the Development of the Black Insurgency*, 51 American Sociological Review, (1986).

Hank Johnston, *Talking the Walk: Speech Acts and Resistance in Authoritarian Regimes*, in Repression and Mobilization, (Christian Davenport, et al. eds., 2005).

David Jones, *Crime, Protest, Community and Police in Nineteenth-Century Britain* (Routledge and Kegan Paul. 1982).

Ruud Koopmans, *The Dynamics of Protest Waves: West Germany, 1965 to 1989*, 58 American Sociological Review, (1993).

David Kowalewski, *Countermovement Vigilantism and Human Rights*, 25 Crime, Law, and Social Change, (1996).

Herbert M. Kritzer, *Political Protest and Political Violence: A Non-Recursive Causal Model*, 55 Social Forces, (1977).

- Mara Loveman, *High-Risk Collective Action: Defending Human Rights in Chile, Uruguay, and Argentina*, 104 *American Journal of Sociology*, (1998).
- Gary T. Marx, *Thoughts on a Neglected Category of Social Movement Participant: The Agent-Provocateur and the Informant*, 80 *American Journal of Sociology*, (1974).
- Gary T. Marx, *External Efforts to Damage or Facilitate Social Movements: Some Patterns, Explanations, Outcomes, and Complications*, in *Dynamics of Social Movements: Resource Mobilization, Social Control and Tactics*, (Mayer Zald & John D. McCarthy eds., 1979).
- Gary T. Marx, *Undercover: Police Surveillance in America* (U. California Press. 1988).
- Doug McAdam, *Political Process and the Development of Black Insurgency, 1930-1970* (University of Chicago Press. 1982).
- John D. McCarthy, et al., *The Institutional Channeling of Social Movements by the State in the United States*, 13 *Research in Social Movements, Conflicts and Change*, (1991).
- John D. McCarthy, et al., *Policing Disorderly Campus Protests and Convivial Gatherings: The Interaction of Threat, Social Organization, and First Amendment Guarantees*, 54 *Social Problems*, (2007).
- John D. McCarthy & Clark McPhail, *Policing Protest: The Evolving Dynamics of Encounters between Collective Actors and Police in the United States*, in *Eigenwilligkeit und Rationalität sozialer Prozesse*, (Jurgen Gerhards & Ronald Hitzler eds., 1999).
- John D. McCarthy, et al., *The Diffusion and Adoption of Public Order Management Systems, in Social Movements in a Globalizing World*, (Hanspeter Kriesi, et al. eds., 1999).
- Neil R. McMillen, *The Citizen's Council: Organized Resistance to the Second Reconstruction, 1954-64* (University of Illinois Press. 1971).
- Clark McPhail & John D. McCarthy, *Protest Mobilization*, *supra* note 25.
- Clark McPhail, et al., *Policing Protest in the United States: 1960-1995*, in *Policing Protest: The Control of Mass Demonstrations in Western Democracies*, (Donatella Della Porta & Herbert Reiter eds., 1998).
- John Noakes & Patrick F. Gillham, *Police and Protester Innovation Since Seattle*, 12 *Mobilization*, (2007).
- Anthony Oberschall, *Social Conflict and Social Movements* (Prentice-Hall. 1973).
- Michael H. Peckham, *New Dimensions of Social Movement/Countermovement Interaction: The Case of Scientology and Its Internet Critics*, 23 *Canadian Journal of Sociology*, (1998).
- Nelson A. Pichardo, *The Power Elite and Elite-Driven Countermovements: The Associated Farmers of California During the 1930s*, 10 *Sociological Forum*, (1995).
- Ronald L. Rowland, *An Overview of State Legislation Responding to Campus Disorders*, 1 *Journal of Law Education*, (1972).
- Ira Silver, *Buying An Activist Identity: Reproducing Class Through Social Movement Philanthropy*, 41 *Sociological Perspectives*, (1998).
- John G. Simon, *The Tax Treatment of Nonprofit Organizations: A Review of Federal and State Policies*, in *The Non-Profit Sector: A Research Handbook*, (Walter W. Powell ed., 1987).
- Jeffrey Stotik, et al., *Social Control and Movement Outcome: The Case of AIM*, 27 *Sociological Focus*, (1994).
- Michael Timberlake & Kirk R. Williams, *Dependence, Political Exclusion, and Government Repression: Some Cross-National Evidence*, 49 *American Sociological Review*, (1984).
- Bert Useem, *The State and Collective Disorders: The Los Angeles Riot/Protest of April, 1992*, 76 *Social Forces*, (1997).
- Alex S. Vitale, *From Negotiated Management to Command and Control: How the New York Police Department Polices Protests*, 15 *Policing and Society*, (2005).

Alex S. Vitale, *The Command and Control and Miami Models at the 2004 Republican National Convention: New Forms of Policing Protests*, 12 Mobilization, (2007).

David Waddington, et al., *Flashpoints: Studies in Public Disorder* (Routledge. 1989).

Wyn Craig Wade, *The Fiery Cross: The Ku Klux Klan in America* (Simon and Schuster. 1987).

Robert W. White, *Comparing State Repression of Pro-State Vigilantes and Anti-State Insurgents: Northern Ireland, 1972-1975*, 4 Mobilization, (1999).

Dominique Wisler & Marco Giugni, *Under the Spotlight: The Impact of Media Attention on Protest Policing*, 4 Mobilization, (1999).



## GIVE BACK TO THE GUILD

For information about opportunities to support the National Lawyers Guild through planned giving, contact Marjorie Suisman, Esq. at (617) 589-3836.

**Bequests:** Include the National Lawyers Guild in your will or estate plan and leave a legacy of defending civil rights and civil liberties to future generations. Request information on making gifts of life insurance, retirement plan benefits, stock, property, cash or proceeds from a charitable trust.

**Stock Gifts:** Save on capital gains taxes and make your contribution with stock or mutual fund shares instead of cash. If you have appreciated securities worth more than you paid for them, you gain a charitable deduction for the full fair market value of the shares and avoid capital gains tax.

**Charitable Gift Annuity:** Establish a charitable gift annuity and you, or someone you choose, will receive fixed income for life. You can use your income payments for current financial needs, or defer them until you retire, and you qualify for an income tax deduction the year you make the gift.

*Do you value the work that the National Lawyers Guild does?  
Has a Guild attorney helped you or someone you know?*

**Please help the Guild continue its work**

*—work it has been doing for over 65 years and,  
with your support, will continue doing.*

***As long as we are needed, we will be there.***

**Gideon Orion Oliver**

**A CRIMINAL MESS: NEW YORK  
CITY'S RESPONSE TO CRITICAL  
MASS BICYCLE RIDES, 2004-2010**

A coordinated government response to long-established monthly Critical Mass group bicycle rides in New York City offers one example of how tactics including prolonged criminal investigations and prosecutions and affirmative civil litigations have been applied in a long-term local campaign to criminalize perceived dissent and garden variety, nonviolent direct action protest tactics. This article offers observations about the mass defense to these protest case prosecutions in the New York City criminal courts—which led to state court decisions striking down the City's parade permitting scheme as facially unconstitutional on First Amendment grounds in 2006 and 2010<sup>1</sup>—and two civil cases focusing on the constitutionality of the parade permitting scheme and its applications to Critical Mass: *Rebecca Bray, et al. v. City of New York, et al.*<sup>2</sup> and *City of New York, et al. v. Time's Up, Inc., et al.*<sup>3</sup>

Critical Mass is a street and public space reclamation, celebration, and bicycling phenomenon in which cyclists gather and ride together, typically once a month, in leaderless groups. The rides grew out of a single so-called “commute clot” and other group rides in San Francisco in the early 1990s. As of 2004 there were Critical Mass events in over 400 cities worldwide.

Critical Mass is an event, not an organization. Critical Mass rides create temporary autonomous zones which provide participants and observers alike a glimpse of what their cities' streets could look like if they were not so dominated by cars. By riding together and without a pre-determined route, participants exercise their rights to occupy roadways at the same time as they communicate pro-bicycling, pro-pedestrian, environmental, and other messages, including, “We're not blocking traffic – we are traffic!”<sup>4</sup>

Prior to the 2004 Republican National Convention in New York City (the “RNC”), Critical Mass rides had occurred in Manhattan for at least a decade with almost universal police acquiescence, escort, or facilitation.<sup>5</sup> Cyclists who wish to participate in Manhattan Critical Mass typically gather in Union Square Park at around 7:00PM on the last Friday of each month.

---

Gideon Oliver is a solo general practitioner in New York, New York who has handled criminal and civil litigation in cases focusing on First Amendment issues, including many involving Critical Mass bicycle rides. See [www.oliverandoliverlaw.com/gideon](http://www.oliverandoliverlaw.com/gideon) (last visited Nov. 23, 2010). Since 2004, Oliver has served on the Executive Committee of the New York City Chapter of the National Lawyers Guild.



The rides were historically publicized by local environmental and bicycle advocacy groups such as Time's Up! and Transportation Alternatives<sup>6</sup> as well as the New York City Department of Transportation.<sup>7</sup> Some "Critical Mass participants concede that they ride through traffic lights, take up the entire roadway and 'often get off their bicycles to block intersections,' a practice known as 'corking.'"<sup>8</sup> The rides soared in popularity beginning especially in 2002 and regularly attracted thousands of participants in the summer of 2003. That year, *The Village Voice* deemed Manhattan Critical Mass the "Best Disruption of Traffic in New York" and described the rides as cycling for two hours "wherever their wheels take them."<sup>9</sup> "In the summer of 2004, Critical Mass bike rides reached a new crescendo."<sup>10</sup>

Manhattan Critical Mass rides during that summer regularly numbered in the thousands. Four-thousand people participated in the July 2004 Critical Mass. Some rode into the Battery Park underpass and onto the F.D.R. Drive, disrupting motorized vehicular traffic where cyclists are prohibited.<sup>11</sup> The next month, on the eve of the August 2004 Critical Mass, the City ended its decade-old policy of acquiescing in, escorting, or facilitating the rides.

Between August 27 and September 2, 2004, in response to the RNC, tens or hundreds of thousands participated in First Amendment assemblies including, but not limited to, parades, processions, demonstrations, rallies, and group bicycle rides. On August 27, 2004, days before the RNC officially started, New York City Police Department ("NYPD") officers arrested 264 cyclists for allegedly participating in the 5,000-person Critical Mass.<sup>12</sup> Around 90 more cyclists were arrested in connection with a "bike bloc" ride a few days later. At least 1,806 people had been arrested by the time the conventioners left town.<sup>13</sup> The Critical Mass arrests were the first the City treated as RNC-related. Police seized riders' bicycles and other property as alleged "arrest evidence" pending resolution of the criminal charges, providing a powerful bargaining chip to leverage arrestees – and particularly out-of-towners – to enter pleas in order to recover their property, which many did.

Though a few felony and misdemeanor charges were ultimately lodged, most of the RNC-related criminal court charging documents alleged violations of New York State Penal Law ("PL") § 240.20 (Disorderly Conduct)<sup>14</sup> and New York City Administrative Code ("NYCAC") § 10-110 (Parading Without a Permit).<sup>15</sup> Since the mass arrests of the 2004 RNC, the City of New York, the NYPD and other law enforcement partners have disrupted and sought to prevent Critical Mass bicycle rides in Manhattan in an unprecedented campaign involving mass arrests on the streets, prosecutions on these "protest charges," and a string of civil actions in federal and state courts.



As part of the post-RNC police response to Manhattan Critical Mass, the NYPD arrested more than 300 bicyclists between September 2004 and around March 2006 and prosecuted them for disorderly conduct and parade permitting violations. Almost a third of them pleaded not guilty and fought the prosecutions.<sup>16</sup> In the New York City Criminal Court misdemeanor and violation arraignment parts, Disorderly Conduct is among the most common charges and pleas. It is also typically one of various charges in prosecutions the Office of the District Attorney of New York County views as arising from perceived protests.<sup>17</sup>

Pursuant to the federal and state constitutions and New York's Criminal Procedure Law, defendants charged with Disorderly Conduct, Parading Without a Permit, and other violations have the rights to be prosecuted only on "legally sufficient" charging documents – meaning that the factual portions of the documents must "allege facts of an evidentiary character supporting or tending to support the charges;" "provide reasonable cause to believe that the defendant committed the offense charged;" and "nonhearsay, factual allegations must establish, if true, a *prima facie* case; that is, they must show every element of the offense charged and the defendant's commission of it."<sup>18</sup>

Many RNC arrestees, and almost every person arrested on the nights of post-RNC Critical Mass rides who pleaded not guilty and challenged the criminal prosecutions, challenged the facial sufficiency of the charging documents. As a result of those prosecutions and mass defenses, 2005 and 2006 saw a raft of written decisions passing on the facial sufficiency of Disorderly Conduct and parade permitting scheme violations in the protest context.

In addition to thousands of Disorderly Conduct prosecutions, the 2004 RNC and post-RNC Critical Mass crackdown saw a significant resurrection of Parading Without a Permit charges, and the first instance of attempts to apply the scheme to group bicycle rides. Along with other governmental schemes imposing prior restraints on First Amendment assemblies and related conduct, the parade permitting scheme was a commonly employed tool of the City and its police during Rudolph Giuliani's terms as mayor between 1994 and 2001. The scheme was the subject of a number of facial and as-applied challenges on First Amendment, due process, and other grounds in the federal courts in the 1990s, particularly between 1995 and 2000.<sup>19</sup>

In 2000, the Second Circuit held that NYCAC § 10-110, "standing alone, [was] not . . . 'sufficiently precise to survive the facial challenge,'" citing a provision allowing "the [NYPD] Commissioner to deny a permit if he believes the parade 'will be disorderly in character or tend to disturb the public peace'" as one example of several sections that "appear[ed] to afford

the Commissioner exactly the sort of discretion that has been found to violate the First Amendment . . . unless constrained by administrative construction or well-established practice.”<sup>20</sup>

At least in part in response to and other federal constitutional litigation challenging the City’s use of permitting regimes as prior restraints, the NYPD promulgated implementing regulations codified at 38 RCNY §§ 19.01-19.04, which went into effect on July 27, 2001. Though NYCAC §10-110(a) and (c) criminalize participation in “any procession, parade or race, for which a permit has not been issued when required by this section,” the NYCAC does not define the words “parade, procession, or race.”<sup>21</sup> As became particularly relevant in post-RNC litigation about the scheme’s constitutionality, the NYPD’s 2001 implementing regulations defined a “parade or procession” as “any march, motorcade, caravan, promenade, foot or bicycle race, or similar event of any kind, upon any public street or roadway.”<sup>22</sup>

Though *Parading Without a Permit* charges were sometimes lodged between 2000 and 2004, they were by no means utilized frequently, even in the context of “protest cases.” In fact, *Parading Without a Permit* charges appear to have been reserved for large-scale arrest situations arising from what the NYPD considered “special events” such as the 2002 World Economic Forum.<sup>23</sup> After the 2004 RNC, facial and as-applied challenges to the constitutionality of the parade permitting scheme were brought in the context of motions to dismiss in the criminal prosecutions. By the time the first decisions on those motions were rendered by the New York City Criminal Court, there had already been substantial post-RNC litigation over the constitutionality of the parade permitting scheme and its application to Critical Mass rides in the context of the *Bray* litigation, which was filed in response to the events of the September 2004 Critical Mass ride.

On the night of the September 2004 Manhattan Critical Mass ride—the first after the RNC<sup>24</sup>—the NYPD’s Incident Commander negotiated a route with a single person who, though acting in good faith, lacked the authority to agree upon a route on behalf of all of the gathered cyclists, most of whom had no knowledge of the agreement. Without communicating the route, the NYPD escorted and facilitated the ride until some cyclists—apparently fearing mass arrests were imminent—deviated from it. The NYPD then trapped perceived participants with orange nets and police scooters, arresting nine people. As the trap was sprung and the arrests were ongoing, some participants locked their bicycles to street fixtures and other objects, and left the area. The NYPD seized scores of bicycles as allegedly “abandoned” or “unattended” property.

In October 2004, Norman Siegel, Steven Hyman, and Deborah Berkman of McLaughlin & Stern, LLP filed *Bray*, a federal civil rights litigation challenging the seizures on behalf of several plaintiffs whose bicycles had been seized but who had not been charged with a crime or violation of law, seeking damages and injunctive relief related to the seizures on due process and First Amendment/retaliation grounds. In the context of that narrow litigation designed to prevent future bicycle seizures in a limited context, the NYPD, joined by the Parks Department, cross-moved for a preliminary injunction to prevent the October 2004 Critical Mass ride.

The City argued that a preliminary injunction against what was essentially a putative class of any person who might want to participate in the ride or pre-ride gathering was necessary to enforce the parade permitting scheme's requirement that some leaders or organizers of parades, processions, or races or gatherings in city parks apply for and receive governmental permission for First Amendment assemblies. It also claimed that a provision of the New York State Vehicle and Traffic Law prohibiting bicyclists' riding two or more abreast, and other provisions of state and local law, were routinely flouted during Critical Mass rides.<sup>25</sup>

Initially, the court observed that the First Amendment aspects of the case would present an interesting moot court problem, but expressed concern over wading into the "Serbonian bog" of answering what the court later characterized in a written opinion as the "novel and complex question of state law" involved in deciding whether the City's parade permitting scheme applied to Critical Mass rides. On the day before the October 2004 ride, the court rejected the City's reflex action and granted plaintiffs a preliminary injunction enjoining the City and the NYPD from seizing bicycles used by participants in the October 2004 ride without providing them notice of the reasons for seizure or charging them with a crime or violation of law.<sup>26</sup> The court rejected the City's motion for a preliminary injunction on *laches* grounds and because "the need to adjudicate novel and complex state law issues" militated "against the exercise of supplemental jurisdiction."<sup>27</sup>

In rejecting the City's bid for a preliminary injunction, the court recognized that, in First Amendment terms, participation in Critical Mass rides is protected as an exercise of the freedom to engage in expressive association, which

protects the rights of individuals to associate for the purpose of participating in activities protected by the First Amendment, including speech, assembly and religion. . . . Because they are meant to espouse a view on an issue of public import—namely, the environment—the Critical Mass rides fall within the expansive sweep of activities deemed 'expressive association.'<sup>28</sup>

Responding to the court's decision, the NYPD unilaterally proposed a route on which participants in the October 2004 Critical Mass ride could proceed "*en masse*" without fear of arrest. On the night of the ride, the NYPD published its proposed route with flyers and through a loudspeaker announcement to thousands of cyclists who gathered to participate. At first, the ride proceeded from Union Square without incident. However, cyclists were eventually diverted from the route the NYPD had proposed by the NYPD itself, and mass arrests ensued.<sup>29</sup>

Following evidentiary hearings between the October 2004 and December 2004 rides, the court denied the City's request for injunctive relief on jurisdictional grounds on December 28, 2004.<sup>30</sup> The court found that whether the parade permitting scheme applied to Critical Mass rides was a novel and complex question of state law, noting that,

[w]hile the City labels Critical Mass a 'procession,' that moniker begs the question. . . . 38 RCNY § 19-02(a) makes no reference to traffic laws and includes specific types of processions that may not violate traffic laws (e.g., a "caravan.") The statute does no more than list specific types of parades and processions, without explaining what makes them so. Apart from bicycle races, the definition provides no guidance concerning when a group of cyclists is required to obtain a parade permit. Thus, the City's interpretation does not follow ineluctably from the statutory language.<sup>31</sup>

After the December 2004 decision in *Bray II*, in early 2005, a number of New York City Criminal Court judges considered dismissing Disorderly Conduct and Parading Without a Permit charges based on arguments that the charging documents were facially insufficient and that the parade permitting scheme was unconstitutional. The first published decision passing on these issues came on January 18, 2005 in *People v. Charity James*, an RNC-related, non-Critical Mass prosecution. There the court upheld the facial sufficiency of the accusatory instrument with respect to the Disorderly Conduct charge based on assertions that the defendant was "observed . . . behind a police barricade, along with a group of over one hundred (100) other individuals and that this conduct caused a public inconvenience by obstructing vehicular or pedestrian traffic."<sup>32</sup>

With respect to the sufficiency of the parade permitting charge, the court held sufficient allegations that the defendant was observed "walking with over 100 other individuals at a location near Fifth Avenue and 17th Street (a public street) . . . [without] a written permit from the police commissioner authorizing the defendant and others to parade at that location."<sup>33</sup> The court also rejected the constitutional challenges to the parade permitting scheme, citing, among other things, the enactment of 38 RCNY Chapter 19 in the wake of the Second Circuit's 2000 decision in *MacDonald III* and the Supreme

Court's decision in *Thomas v. Chicago Park District*, 534 U.S. 316 (2002) as dispositive of all constitutional concerns about the scheme's facial sweep.<sup>34</sup>

Early the next month, the court came to similar conclusions in *People v. Julia Cohen*, the first New York City Criminal Court decision to treat the application of Disorderly Conduct and parade permitting scheme charges to a prosecution involving a group bicycle ride. Ms. Cohen was arrested during the RNC Critical Mass ride. The court upheld allegations that she was observed "on a bicycle in the street amongst numerous other people also on bicycles in the street" and "pedestrians and vehicles attempt[ed] to pass her and . . . [were] unable to pass because of defendant's location in the street" as to the Disorderly Conduct charge, but dismissed the parading without a permit charge on the basis that there was no allegation "that the defendant did not have a parade permit at the time."<sup>35</sup> The court also rejected the defendant's challenge to the constitutionality of the parade permitting scheme, citing its decision in *James*.

Beginning in January 2005 and following these initial decisions in *James* and *Cohen*, a number of New York City Criminal Court judges came to conflicting decisions passing on the sufficiency of Disorderly Conduct and parade permitting scheme violations as applied to prosecutions arising from the RNC demonstrations and subsequent Critical Mass rides.<sup>36</sup> Significantly, after the *Cohen* decision, the City of New York intervened as *amicus curiae* in proceedings pending before the New York City Criminal Court in which the constitutionality of the parade permitting scheme was at issue, and there were no written decisions issued until January 2006 questioning the constitutionality of the scheme.

Also during that time period, the NYPD continued its policies and practices of engaging in mass arrests on the nights of Critical Mass rides. In March 2005, the City undertook litigation in New York State Supreme Court seeking the same, as well as even more sweeping, injunctive relief it had sought and been denied in the *Bray* litigation.<sup>37</sup> In the *Time's Up!* case, the City, NYPD, and Parks Department targeted Time's Up!, "a grassroots, non-profit environmental interest group that seeks to promote a 'more sustainable, less toxic city'" along with its executive director, and three volunteers to be at the center of its broad requests for injunctions against putative classes of persons who might want to promote or participate in future Critical Mass rides or pre-ride gatherings.<sup>38</sup>

As the *Time's Up!* case was pending between March 2005 and January 2006,<sup>39</sup> the monthly mass arrests and criminal prosecutions continued unabated. So did the mass defenses to those prosecutions. On January 6, 2006, the court decided *People v. Matthew Namer*, rejecting a bid to reargue

its decision on the parade permitting scheme's constitutionality in *James*. The *Namer* defendant argued that the scheme was facially unconstitutional and overbroad on First Amendment and due process grounds, among other reasons, for the lack of a numerical threshold or trigger for its enforcement and on the basis that arrests and prosecutions were authorized absent proof of criminal *mens rea*, creating a strict liability scheme, citing *American-Arab Anti-Discrimination Comm. v. City of Dearborn*, 418 F.3d 600 (2005), and explicitly addressing *Thomas*, the 2001 implementing regulations promulgated in the wake of *MacDonald III*, and other grounds the Court relied on in *James* to uphold the facial constitutionality of the scheme.<sup>40</sup>

Rejecting those arguments, the *Namer* court found that the ordinance "includes specific examples of the type of events requiring a permit and does not contain any ambiguous terminology which could be applicable to small innocuous groups," that the language "bicycle race, or similar event" in 38 RCNY § 19-02 "clearly encompasses 'Critical Mass'" and that 38 RCNY § 19-02(d)'s definition of the word "demonstration" to exclude from the ordinance's sweep groups of fewer than 20 people would in any event save the ordinance from the constitutional challenges posed. The court also held that, because NYCAC § 10-110 violations were not technically crimes within the meaning of the New York State Penal Law "the term *mens rea* becomes inapplicable to this statute."

Three days later, another New York City Criminal Court Justice reached vastly different conclusions in light of the 600-plus page trial record in *People v. Jennifer Bezjak*.<sup>41</sup> The *Bezjak* court convicted all eight defendants of Disorderly Conduct.<sup>42</sup> However, in consideration of three days' worth of proof offered at the trial of eight defendants, in which around a dozen NYPD officers testified and "highlighted deficiencies in the City's parade permit scheme," the Court ultimately determined that the defendants' constitutional challenges to the parade permitting scheme were meritorious.<sup>43</sup>

Reversing a prior decision in the case on the facial constitutional challenges, the court held that, "[w]here the permit requirement would include almost any imaginable procession on the City's streets, without regard to size or number of participants, the statute is hopelessly overbroad. . . . [A] parade as defined in the statute can be descriptive of the activity of an individual or a small group[, and] . . . the City's permit scheme gives no guidance as to the minimum number of persons which constitutes a parade or procession requiring a permit."<sup>44</sup> The court continued:

Improbable though it may be, under the City's permit scheme as written, a person promenading, or two persons racing, are conceivably required to obtain a permit from the City of New York. Similarly, a funeral procession, two or three cars dis-

playing political posters traveling one behind the other, caravan style, or a small group of friends biking together could run afoul of the law.

While these examples may seem to strain a common sense application of the permit scheme, they serve to highlight the virtually unfettered discretion reposed in the Police Commissioner to determine when any particular event may be found to fall within the amorphous definition of parade or procession and, thus, require a permit.<sup>45</sup>

In addition to determining that the parade permitting scheme was “not narrowly tailored but [rather] overly broad and, therefore, unconstitutional on its face,” the court found “the absence of a requirement of mental culpability” to be “[a]nother constitutional infirmity of the City’s permit scheme as written.”<sup>46</sup> The court discussed *Dearborn* and sought to answer “whether the strict liability component of the City’s permit scheme chills the exercise of First Amendment rights.”<sup>47</sup> Noting first that parades and processions are “‘a unique and cherished form of political expression,’” the court continued, “When a strict liability statute potentially affects First Amendment Freedoms, it may ‘have the collateral effect of inhibiting the freedom of expression, by making the individual the more reluctant to exercise it.’”<sup>48</sup>

“Under the City’s permit scheme,” the court analyzed,

Any person who unknowingly participates in a permitless march may be arrested, fined, or imprisoned. Thus, bystanders or onlookers, stirred by the passion evoked by a political march, join in at their peril. As the Sixth Circuit held in *Dearborn*:

‘A good-faith belief is no excuse and thus the potential protestor cannot rely upon the assurances of participants in the march. Rather, the potential protestor would be well-advised to seek personal verification from a city official that the demonstration has been authorized, or run the risk of being thrown in jail. Requiring potential march participants to seek authorization from city officials before joining a public procession or risk being jailed is antithetical to our traditions, and constitutes a burden on free expression that is more than the First Amendment can bear.’<sup>49</sup>

Therefore, and in light of New York State Penal Law § 15.15(2)’s provision that “[a] statute defining a crime, unless clearly indicating a legislative intent to impose strict liability, should be construed as defining a crime of mental culpability,” the court held that, had it “not determined the parade permit scheme to be overbroad and facially invalid” it would have been required to construe the parade permitting scheme as requiring proof of knowledge or intent and address whether the prosecution had established beyond a reasonable doubt whether “each defendant was aware of the lack of a required permit and knowingly participated in the event notwithstanding that knowledge.”<sup>50</sup>

Also in January 2006, the *Beck* defendants—who had been arrested on the night of the February 2005 Critical Mass ride—were tried before the New York City Criminal Court for allegedly violating the parade permitting scheme



and committing two violations each of the Disorderly Conduct statute.<sup>51</sup> Notwithstanding the decision in *Bezjak*, the *Beck* trial court declined to dismiss the parade permitting charges on constitutional grounds, declined to import a *mens rea* requirement into the statute in determining liability, and found the defendants guilty of Parading Without a Permit and Disorderly Conduct.

Notwithstanding *Bezjak*, there were arrests made on the night of the January 2006 ride resulting in prosecutions including parade permitting violations.<sup>52</sup> On February 14, 2006, the New York State Supreme Court rejected the City's motion for preliminary injunctions in the *Time's Up!* case.<sup>53</sup> The court found there were strong prudential concerns militating against granting the preliminary injunction, including jurisdictional concerns arising from the City's request for relief against unidentified putative classes of people not before the court.<sup>54</sup> The court opined that the City was unlikely to succeed on the merits with respect to its bids to require the named defendants "and all others acting in concert with them" to request and obtain a special events permit from the New York City Department of Parks and Recreation prior to participating in or promoting pre-Critical Mass gatherings in New York City Parks.<sup>55</sup>

With respect to the relief the City requested on the basis of the parade permitting scheme, the *Time's Up!* court determined that "[t]he Critical Mass bicycle rides do not fall under any of the examples of 'parade or procession' set forth in the 38 RCNY 19-02" and rejected the City's contention that "the Critical Mass rides are akin to other parades or processions because riders 'travel *en masse*'" on the basis that "[p]laintiffs' '*en masse*' label d[id] not distinguish the Critical Mass rides from ordinary bicycle traffic."<sup>56</sup> The court continued:

[P]laintiffs concede that if there was no impact on traffic, the Police Department would have no way of knowing that a group of bicycles was parading or traveling as a procession in the streets. Following plaintiffs' reasoning, New Yorkers commuting over the Brooklyn Bridge on bicycles during a transit strike could be considered as 'bicycling *en masse*' and affecting vehicular traffic. . . . Plaintiffs' unsupported assumptions and vague "*en masse*" label also raise constitutional concerns. . . . Riding a bicycle on city streets is lawful conduct, as long as one observes the applicable traffic laws and rules. Vehicle & Traffic Law § 1231. A distinction based solely on an indeterminate number of riders in a given area would not give a person of ordinary intelligence fair notice of the conduct that would result in criminal prosecution, because the person would be punished for conduct not reasonably understood to be prohibited. Neither would the "*en masse*" label provide officials with clear standards for enforcement.<sup>57</sup>

After February 2006, the NYPD shifted its practices from making mass arrests and pushing Disorderly Conduct and Parading Without a Permit prosecutions to issuing summonses for alleged traffic infractions or bicycle equipment violations and, as far as I know, there have not been parade permitting arrests or prosecutions since then. Also in 2006, the City began the

process to amend its administrative definition of “parade”—a process that culminated in the amendment, effective February 25, 2007, of 38 RCNY § 19-02 to define a “parade” as “any procession or race which consists of a recognizable group of 50 or more pedestrians, vehicles, bicycles or other devices moved by human power, or ridden or herded animals proceeding together upon any public street or roadway”—and the parties in the *Time’s Up!* litigation stipulated to dismissing the case.<sup>58</sup>

The most recent reported New York City Criminal Court decision passing on the constitutionality of the parade permitting scheme (pre-amendment) and the facial sufficiency of Parading Without a Permit and Disorderly Conduct violations, *People v. Robert Barrett*, was rendered on September 11, 2006.<sup>59</sup> In *Barrett*, passing on many of the cases discussed herein, the court held that the information was insufficient as to the parade permitting scheme violation on constitutional grounds and the lack of allegations necessary to make out the charge.<sup>60</sup> It also found the Disorderly Conduct allegations facially sufficient as to only one defendant, who had allegedly been observed riding “her bicycle at a slow rate of speed through an intersection, while 50 other riders did the same, preventing vehicles and pedestrians from passing and moving forward in the street” while going through a red light. The court held that her failing to obey the light provided “a basis for inferring that she intended to cause public inconvenience, or recklessly created a risk of it.”<sup>61</sup>

Since the NYPD began issuing summonses in lieu of arresting perceived participants in Critical Mass rides in early 2006 in the wake of the decisions in *Bezjak* and *Time’s Up!*, there has been further federal litigation seeking prospective relief focusing on the constitutionality of the parade permitting scheme on its face and as applied, both in the context of group bicycle rides and otherwise, as well as cases<sup>62</sup> seeking exclusively or primarily damages brought on behalf of persons arrested or detained on the nights of post-RNC Critical Mass rides.<sup>63</sup>

The mass criminal defense efforts in the RNC and post-RNC “protest charge” cases had inconsistent and ultimately mixed results. With respect to post-RNC prosecutions, the court consistently upheld the parade permitting scheme in the face of facial and as-applied constitutional challenges until lengthy trial testimony and convincing but non-binding precedent led the court to the ineluctable conclusion that the scheme was in fact overbroad and lacked narrow tailoring, a determination upheld on appeal. As an apparent result of the *Bezjak* and *Time’s Up!* decisions, as well as affirmative litigations brought challenging the constitutionality of the parade permitting scheme after the *Time’s Up!* decision, in addition to amending the scheme, the NYPD apparently has not arrested any participants in First Amendment assemblies for Parading Without a Permit since early 2006.

Against the backdrop of those victories, it must be mentioned that many defendants who were tried for Disorderly Conduct as a result of allegedly participating in Critical Mass rides between late 2004 and early 2006 were convicted of Disorderly Conduct, based on vague testimony associating them with a “group” of bicyclists who could be characterized as “disorderly.”

It is also clear that the NYPD’s tactics on the street have effectively chilled participation in Manhattan Critical Mass rides. Moreover, earlier this year, in a post-trial decision in the *5BBC* case, the Southern District upheld the facial constitutionality of the parade permitting scheme as amended, paving the way for the NYPD to enforce the scheme as amended. When the NYPD does resurrect Parading Without a Permit mass arrests and there is a new wave of “protest charge” prosecutions, and in Disorderly Conduct prosecutions in such cases between now and then, *Bezjak*, *Time’s Up!*, and the other cases discussed in this piece may be of some help in legal defense/offense efforts.

---

#### NOTES

1. See *People v. Jennifer Bezjak*, et al., 11 Misc.3d 424 (N.Y. City Crim. Ct. Jan. 9, 2006), *aff’d*, 26 Misc.3d 130(A), 906 N.Y.S.2d 781 (N.Y. Sup. App. Term. 1st Dept., Jan. 14, 2010), *leave to appeal den’d*, [15 N.Y.3d 747 (N.Y. June 9, 2010)]; see also *People v. Jonathan Beck*, et al., 26 Misc.3d 42 (N.Y. Sup. App. Term 1st Dept., Jan. 4, 2010), *leave to appeal den’d*, 15 N.Y.3d 747 (N.Y. June 9, 2010); *People v. Robert Barrett*, 13 Misc.3d 929 (N.Y. City Crim. Ct. Sept. 11, 2006); *but see People v. Charity James*, 7 Misc. 3d 363 (N.Y. City Crim. Ct. Jan. 18, 2005) *People v. Julia Cohen*, 6 Misc.3d 1019(A), 800 N.Y.S.2d 352 (N.Y. City Crim. Ct. Feb. 7, 2005); *People v. Matthew Namer*, 11 Misc.3d 409 (N.Y. City Crim. Ct. Jan. 4, 2006).
2. See *Rebecca Bray*, et al. v. *City of New York*, et al., 346 F. Supp. 2d 480 (S.D.N.Y. Oct. 28, 2004) (“*Bray I*”); 356 F. Supp. 2d 277 (S.D.N.Y. Dec. 23, 2004) (“*Bray II*”); 2005 WL 2429504 (S.D.N.Y. Sept. 30, 2005) (“*Bray III*”).
3. See *City of New York*, et al. v. *Time’s Up, Inc.*, et al., 11 Misc.3d 1052(A), 814 N.Y.S.2d 890 (Sup. Ct. N.Y. Co. Feb. 14, 2006) (“*Time’s Up!*”); see also <http://www.times-up.org> (last visited Nov. 15, 2010). For more about the *Bray* and *Time’s Up!* cases and some of the relevant political and legal context discussed herein, see the documentary *Still We Ride: The Movie*, at <http://www.stillweridethemovie.com> (last visited Nov. 23, 2010), as well as resources linked to at the FreeWheels website, at <http://www.bicycledefensefund.org> (last visited Dec. 1, 2010).

This piece does not focus on other civil litigation centering on the Manhattan Critical Mass rides or the constitutionality of the parade permitting scheme as applied to group bicycle rides for a number of reasons, but two such cases bear mentioning. First, see *Five Boro Bicycle Club*, et al. v. *City of New York*, et al., 483 F. Supp. 2d 351 (S.D.N.Y., 2007), *aff’d*, 308 Fed. Appx. 511 (2nd Cir., 2009); 2010 WL 532065 (S.D.N.Y., 2010), and the archives at <http://www.5bbc.org/parade/casefiles.shtml> (last visited Dec. 1, 2010). Second, see the docket in *Sheila Callaghan*, et al. v. *City of New York*, et al., 07-cv-9611 (PKC) (DFE) (S.D.N.Y.). *Callaghan* was a federal civil rights litigation pending between 2007 and October 2010 in which 83 plaintiffs arrested on the nights of Critical Mass rides in Manhattan between October 2004 and March of 2006 won a \$965,000 settlement from the City.

4. See generally, *Critical Mass: Bicycling's Defiant Celebration*, edited by Chris Carlsson (AK Press, 2002); [www.critical-mass.info/](http://www.critical-mass.info/) (2003-2008 archive, closed as of 2008 when last visited Nov. 15, 2010); [http://www.criticalmass.wikia.com/wiki/List\\_of\\_rides](http://www.criticalmass.wikia.com/wiki/List_of_rides) (apparently current archive, last visited Nov. 15, 2010); see also FN6 below.
5. See generally, *Bray I*, 346 F.Supp.2d at 483-484 (discussing Critical Mass and pre-RNC Manhattan Critical Mass history); *Bray II*, 356 F.Supp.2d at 279 (same); *Bray III*, 2005 WL 2429504 at \*1 (same); *Time's Up!*, 11 Misc.3d 1052(A) at \*1-2 (same).
6. See [www.times-up.org](http://www.times-up.org) and [www.transalt.org](http://www.transalt.org) (last visited Nov. 15, 2010).
7. See *Time's Up!*, 11 Misc.3d 1052(A) at \*5 (discussing promotion of Critical Mass in 2005 by the City's Department of Transportation).
8. *Bray II*, 356 F.Supp.2d at 279.
9. *Bray I*, 346 F.Supp.2d at 484.
10. *Id.*
11. See, e.g., *Bray I*, 346 F.Supp.2d at 484.
12. See *supra* note 6.
13. Prior to the RNC, the NYPD's Legal Bureau prepared Legal Guidelines for the RNC. A copy of a version of those Guidelines is available online at <http://www.nyclu.org/files/NYPD%20Legal%20Guidelines%20for%20RNC%203-10-04.pdf> (last visited Nov. 23, 2010). These Guidelines include information regarding possible protest tactics and potential police responses and presumably reflect the NYPD's training at the time regarding the topics covered, including potentially appropriate charges to be levied in connection with mass arrests made in response to First Amendment assemblies. In the wake of the RNC, more than 50 civil rights lawsuits—including a putative class action potentially covering most or all RNC arrestees—were filed in the Southern District of New York. Though some RNC-related cases have settled, many remain pending, including many cases involving arrests made on the night of August 27, 2004 and during the rest of the NYPD's RNC response. As of November 2010, there are facial and as-applied constitutional challenges to the parade permitting scheme, as well as as-applied challenges to the Disorderly Conduct statute, pending in the RNC cases. A fuller discussion of the RNC litigations is beyond the scope of this piece.
14. Under PL § 240.20, “a person is guilty of disorderly conduct when, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof,” the person “blocks vehicular or pedestrian traffic,” see PL § 240.20(5), or “congregates with other persons in a public place and refuses to comply with a lawful order of the police to disperse,” see PL § 240.20(6).
15. NYCAC § 10-110 and Title 38 of the Rules of the City of New York (“RCNY”) §§ 19-01 through 19-04 comprise the City's “parade permitting scheme”. The scheme is a purported exercise of the City's police powers delegated by the New York State Constitution and state law. The NYCAC is available online at: [public.leginfo.state.ny.us/menuf.cgi](http://public.leginfo.state.ny.us/menuf.cgi) (last visited Nov. 15, 2010; click on Laws of New York, the last link on the page, scroll to the bottom of the resulting page, and click on ADC New York City Administrative Code under Miscellaneous). The RCNY are available online at: [24.97.137.100/nyc/rcny/entered.htm](http://24.97.137.100/nyc/rcny/entered.htm) (last visited Nov. 15, 2010). 38 RCNY §§ 19-01 through 19-04 are the police commissioner's administrative regulations implementing NYCAC § 10-110.
16. After mass arrests in February 2005, a number of arrestees formed a support organization called FreeWheels. See <http://www.bicycledefensefund.org> (last visited Nov. 15, 2010). The work of FreeWheels volunteers was critical to the criminal defense and civil litigation efforts discussed in this piece.

17. Many “protest case” arrestees are charged with violating both PL § 240.20(5) (Disorderly Conduct—Blocking Vehicular or Pedestrian Traffic) and PL § 240.20(6) (Disorderly Conduct—Failure to Comply With a Lawful Dispersal Order). In the *Bezjak* and *Beck* cases, for example, there were both PL §§ 240.20(5) and 240.20(6) charges pleaded. However, when it was established at trial that the basis for the alleged failure to comply charges as alleged in the charging documents in both sets of cases were recorded announcements generally threatening arrests, bicycle seizures, and criminal prosecutions, the trial judges dismissed the 240.20(6) charges. *See, e.g., Bezjak*, 11 Misc.3d at 436-437 (“Such messages may be described more appropriately as advisories or cautions, that persons choosing to ride risked arrest and seizure of their bicycles”). Beginning with the Critical Mass-related prosecutions arising from the March 2005 ride and moving forward until the prosecutions stopped in early 2006, none of those prosecuted were charged with PL § 240.20(6). Therefore, aside from this footnote, this piece focuses on charged PL § 240.20(5) and not PL § 240.20(6) violations.
18. *See, e.g., People v. Barrett*, 13 Misc.3d at 932.
19. *See, e.g., Irish Lesbian and Gay Organization v. Bratton*, 882 F.Supp. 315 (S.D.N.Y. March 15, 1995), *aff’d* 52 F.3d 311 (2<sup>nd</sup> Cir. March 16, 1995); *Irish Lesbian and Gay Organization v. Giuliani*, 918 F.Supp. 732 (S.D.N.Y. Mar 14, 1996); 949 F.Supp. 188 (S.D.N.Y. Dec 18, 1996); *aff’d in part, rev’d in part*, 143 F.3d 638 (2<sup>nd</sup> Cir. Apr 23, 1998); *MacDonald v. Safir*, 1998 WL 318690, 1998 U.S. Dist. LEXIS 8915 (S.D.N.Y. June 16, 1998), *vacated by* 206 F.3d 183 (2<sup>nd</sup> Cir. Mar 10, 2000) (“*MacDonald III*”); *Macdonald v. Safir*, 26 F. Supp.2d 664 (S.D.N.Y. Nov. 16, 1998); *Housing Works v. Kerik*, 1998 US Dist. LEXIS 10962 (SDNY 1998); *Housing Works v. Safir*, 1998 US Dist. Lexis 18515 (SDNY 1998); *Million Youth March, Inc. v. Safir*, 18 F.Supp.2d 334, 345 (SDNY 1998), *stay den’d* 155 F.3d 124 (2<sup>nd</sup> Cir. 1998).
20. *MacDonald III*, 206 F.3d at 192, *quoting* *Turley v. Police Department of New York*, 167 F.3d 757, 762 (2<sup>nd</sup> Cir. 1999).
21. *See* NYCAC § 10-110.
22. *See, e.g., 38 RCNY § 19-02(a), quoted in Barrett*, 13 Misc.3d at 933. As mentioned elsewhere, this administrative definition implementing NYCAC 10-110 was amended in 2007.
23. *See, e.g., Adrienne Allen v. City of New York*, 420 F.Supp.2d 295 (S.D.N.Y. 2006).
24. These facts about the September 2004 Critical Mass ride are taken generally from *Bray I*, 346 F.Supp.2d at 484-486, *Bray III*, 2005 WL 2429504 at \*1-3, and proof in the underlying proceedings available to the public.
25. These facts about the case are culled generally from the written decisions in *Bray* referred to herein and proof in the case available to the public. The City later admitted that the Vehicle and Traffic Law provision it had been relying on in part in seeking sweeping injunctions to prevent future, “unpermitted” group bicycle rides was in fact not applicable within New York City, a fact the Court points out in denying the City’s requested relief.
26. *See Bray I*.
27. *Bray I*, 346 F.Supp.2d at 491-492.
28. *Bray I*, 346 F.Supp.2d at 488; *see also Bray III*, 2005 WL 2429504 at \*1 (“By traversing City streets with hundreds of other cyclists, participants seek to promote ‘the rights of bicyclists and the rights of pedestrians on their own streets’ and focus attention on the ‘deteriorating quality of life . . . that cars create for cities’”); *Time’s Up!*, 11 Misc.3d 1052(A) at \*1 (“The rides ostensibly promote the rights of bicyclists and rights of pedestrians on their own streets, and focus attention on the deteriorating quality of life resulting from, among other things, the air and noise pollution that cars produce”); *Bezjak*, 11 Misc.3d at 431.

29. These facts about the October 2004 ride are taken generally from *Bray II*, 356 F.Supp.2d at 280-281 and proof in the underlying proceedings available to the public.
30. *See Bray II*.
31. *Bray II*, 356 F.Supp.2d at 283-284.
32. *People v. James*, 7 Misc.3d at 365-366.
33. *Id.*, 7 Misc.3d at 366-368.
34. *Id.*, 7 Misc.3d at 368-370.
35. *See People v. Julia Cohen*, *supra*, 6 Misc.3d 1019(A)
36. Unlike *James* and *Cohen*, many of those decisions were not published, so I do not cite them herein.
37. *See Time's Up!*, *supra* note 3.
38. *Time's Up!*, 11 Misc.3d 1054(A) at \*1.
39. The *Time's Up!* case was eventually dismissed by stipulation. The Critical Mass-related mass arrests stopped shortly after February 2006 when the NYPD began issuing summonses for alleged traffic infractions or bicycle equipment violations rather than for parade permitting or disorderly conduct violations.
40. *See People v. Matthew Namer*, *supra*.
41. *See People v. Jennifer Bezjak*, *supra*.
42. *Id.* at 437-438. In 2010, the convictions were upheld by the intermediate appellate court and the Court of Appeals declined to review them.
43. *See Bezjak*, 11 Misc.3d at 426-429.
44. *Id.* at 431-432.
45. *Id.* at 432.
46. *Id.* at 434.
47. *Id.*
48. *Id.*, quoting *Smith v. California*, 361 U.S. 147, 151 (1959).
49. *Id.*, quoting *Dearborn*, 418 F.3d at 612.
50. *Id.* at 434-435.
51. *See People v. Beck*, *supra*.
52. *See People v. Barrett*, *supra*.
53. *See Time's Up!*, *supra* note 3.
54. *Id.* at \*3-4.
55. *Id.* at \*5-7.
56. *Time's Up!* at \*8-10.
57. *Id.* at \*10.
58. *See Beck*, 26 Misc.3d at 44 FN1.
59. *See People v. Robert Barrett*, *supra*.
60. *See Barrett*, 13 Misc.3d at 932-948.
61. *Id.* at 944-948.
62. The 5BBC case mentioned above is one such case. Another is *International Action Center v. City of New York*, 522 F.Supp.2d 679 (SDNY, 2007), *aff'd*, 587 F.3d 521 (2nd Cir., 2009), which challenged the facial constitutionality of other aspects of the scheme.
63. *Callaghan*, mentioned above, settled in October 2010 for \$965,000.

**HEIDI BOGHOSIAN  
AND ZACHARY WOLFE**

**BRIEF OF AMICUS CURIAE  
NATIONAL LAWYERS GUILD IN  
SUPPORT OF PETITIONERS IN  
*KJONAAS ET AL V. U.S.***

**SUMMARY OF ARGUMENT<sup>1</sup>**

This Honorable Court should grant certiorari to clarify how Amendment principles apply in new fora, specifically, online speech reflective of a new culture that mixes reporting, advocacy, extreme statements, and thoughtful discourse. The overarching concern in this case is the Third Circuit’s refusal to consider how the fact that the statements at issue were made on an advocacy-focused internet site either influences the application of traditional tests or may even call for modifying the framework. Although the court below at times claimed to be addressing the various statements in detail, in the end it paints with a broad brush and creates criminal liability for postings that should be protected.

What has not changed with the advent of the latest technology, and what this Court must vigilantly reiterate, is that heightened political rhetoric is but one variety of free speech that is a necessary attribute of a free society. When expressed on the internet, through postings on a website that reports and expresses ideological support for the actions of third-party activists, political speech and commentary is afforded full First Amendment protection. Even commentary expressing support for acts of civil disobedience falls under the purview of protected speech—indeed, advocacy of actions far more disruptive of social institutions than those contemplated in this case has long been held constitutionally protected.<sup>1</sup>

Now, this Court must consider how those principles are to be identified and preserved in an ever-changing culture. The nature of the internet—available to and aimed at a general audience rather than a specific target, reaching numbers unknowable to the speaker at the time the communication is made, and accessed over an unpredictable period of time—precludes application of traditional tests to establish the imminence and incitement needed to constitute a “true threat.”

---

Heidi Boghosian is Executive Director of the National Lawyers Guild. Professor Zachary Wolfe is an attorney and chair of the Amicus Curiae Committee of the National Lawyers Guild, as well as an Assistant Professor and Deputy Director of First Year Writing at George Washington University in Washington, DC.



The Third Circuit's sanctioning of website postings that report on actions related to a campaign on a matter of public concern runs counter to the interest of maintaining diversity of thought on the internet that this Court has held essential in a democracy. Such sanctions are the equivalent of censoring a news channel. Website managers must not be punished for the contents of their websites, even if some of the descriptions or images are upsetting to certain audiences. Especially where, as here, the website was not the exclusive source of information and contained disclaimers against violence, the web managers cannot be held responsible for actions committed by third parties occurring before, or months after, the website materials were posted.

In addition, this case offers the Court an opportunity to clarify issues presented in other cases on its docket in a context that is more factually developed and concrete. Last term, the Court addressed speech that might aid terrorist organizations, but in a pre-enforcement context with many unknown variables.<sup>2</sup> This case presents a developed factual record and clearly raises some of the very issues that the *Holder* majority noted would require a new examination of the application of key constitutional issues.<sup>3</sup> More generally, the subject matter of proscribable speech may be elaborated upon further in cases the Court is considering this term, but again, this case presents key differences that will help the Court to define the outer markers of these developing doctrines. Specifically, *Snyder v. Phelps*<sup>4</sup> and *Schwarzenegger v. Entertainment Merchants Ass'n*<sup>5</sup> both involved claims that speech is beyond First Amendment protection; but unlike those cases, this petition involves criminal liability for website postings that endorsed acts of civil disobedience but did not directly cause harm.

### **Statement of interest of Amicus Curiae**

The National Lawyers Guild, Inc. is a non-profit corporation formed in 1937 as the nation's first racially integrated voluntary bar association, with a mandate to advocate for fundamental principles of human and civil rights including the protection of rights guaranteed by the United States Constitution. Since then the Guild has been at the forefront of efforts to develop and ensure respect for the rule of law and basic legal principles.

The Guild has championed the First Amendment right to engage in unpopular speech for over seven decades. The Guild has a long history of defending individuals accused by the government of espousing dangerous ideas, including in hearings conducted by the House Committee on Un-American Activities and other examples of governmental overreaching that are now popularly discredited.<sup>6</sup> Since then, it has continued to represent thousands of Americans critical of government policies, from anti-war activists during

the Vietnam era to current day anti-globalization, peace, environmental and animal rights activists.

## ARGUMENT

### I. Websites and blogs constitute an emerging media system that is transforming traditional journalism

The speech at issue here is reflective of a new online culture. With the advent of affordable or free software and increased access to bandwidth, individuals are availing themselves of the internet to take a more participatory role in collecting, reporting, and commenting on information and news events. This constitutes what Walter Mossberg has called “a new form of journalism, open to anyone who can establish and maintain a Web site.”<sup>7</sup> Postings on a website that report events after the fact, or that list upcoming events, are integral parts of the vast information network that has become a part of our daily lives.

This Court’s understanding of the internet in *ACLU v. Reno* proved prescient when it observed that the internet constituted a:

dynamic, multifaceted category of communication [that] includes not only traditional print and news services, but also audio, video, and still images, as well as interactive, real-time dialogue. Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer. As the District Court found, “the content on the Internet is as diverse as human thought.”<sup>8</sup>

Thanks in no small measure to this Court’s decisions solidly placing it within the core of protected speech, the internet’s capacity for shaping and expanding our political discourse has, if anything, exceeded anything the Court might have dreamed of in 1997.

More recently, scholars have noted that the latest incarnation of web-based media differs from more traditional media in how ideas are tested and refined. Traditional media “filters” prior to broadcasting. “Participants in a (web) community, by contrast, say what they have to say, and the good is sorted from the mediocre after the fact.”<sup>9</sup> The desire to examine and test thought even as it develops is central to the human experience, and to the concept of freedom of expression. As one popular blogger noted:

For centuries, writers have experimented with forms that suggest the imperfection of human thought, the inconstancy of human affairs, and the humbling, chastening passage of time. If you compare the meandering, questioning, unresolved dialogues of Plato with the definitive, logical treatises of Aristotle, you see the difference between a skeptic’s spirit translated into writing and a spirit that seeks to bring some finality to the argument. Perhaps the greatest single piece of Christian apologetics, *Pascal’s Pensées*, is a series of meandering, short, and incomplete

stabs at arguments, observations, insights. Their lack of finish is what makes them so compelling — arguably more compelling than a polished treatise by Aquinas.<sup>10</sup>

What is different now, as he noted, is that the technology allows for self-publication, immediate feedback, and both credibility and interconnectivity thanks to hyperlinks.<sup>11</sup> It is a phenomenon embraced by millions,<sup>12</sup> apparently speaking to rather fundamental personal and political values.

The nature of weblogs and websites is to post written, documentary, and visual information in a grassroots, unedited, and often unpolished format. Mainstream media has come to rely on these less sophisticated postings in their own story development. In describing the value of weblogs, Scott Rosenberg of *Salon* said, “They are a media life form that is native to the Web, and they add something new to our mix, something valuable, something that couldn’t have existed before the Web . . . . If the pros are criticized as being cautious, impersonal, corporate and herd-like, the bloggers are the opposite in, well, almost every respect: They’re reckless, confessional, funky—and herd-like.”<sup>13</sup>

This Court has upheld an inclusive definition of “press,” noting that the press includes individual publishers who may not have special affiliations or education, but who may use leaflets and other sorts of publications that provide both information and opinion.<sup>14</sup> In *Branzburg v. Hayes*,<sup>15</sup> this Court noted that the newsgatherer’s privilege applied to “the lonely pamphleteer” as much as the “large metropolitan publisher.”<sup>16</sup>

The prosecution at issue here threatens this evolving and socially valuable form of expression.<sup>17</sup> This Court has long recognized that context matters in determining whether or not something is a true threat. The website postings at issue here should be recognized as a modern form of political expression; and as described next, the Court may wish to take this opportunity to consider the complications in applying traditional tests to online speech.

## **II. The need for an internet-specific test to determine when website reporting and ideological commentary lose protected speech status**

Internet speech is qualitatively different from oral speech and from traditional forms of written speech, rendering traditional imminence and incitement tests inapplicable. The advent of internet speech necessitates at a minimum a refinement of traditional tests, and probably an internet-specific test to identify instances in which website postings lose their protected speech status and rise to the level of a true threat. Without such a test, it is tempting for critics of certain issues to apply traditional standards with too heavy a hand.

Commentators have proposed more suitable standards for determining whether internet speech rises to the level of incitement. John Cronan has sug-

gested that an internet incitement standard should consider: (1) imminence from the listener's perspective, (2) message content, (3) likely audience and (4) nature of issue involved.<sup>18</sup>

Another proposed test for determining the existence of a true threat narrows the likely audience prong to both specificity of target and foreseeability that the message will reach the target. It adds the element of reasonableness: (1) specificity of target, (2) if a reasonable speaker would know that his communication was threatening, (2) if a reasonable recipient would regard the statement as threatening; and (4) if the communication would foreseeably reach the target of the threat.<sup>19</sup>

In the context of this Court's care in distinguishing between protected and unprotected speech, at least one other possible internet-related test is possible. If the facts meet a threshold inquiry of an actor's intent to cause harm, then the analysis could proceed to a second phase of determining specificity of target, frequency and nature of the postings and the likelihood that the events may be performed within an imminent time-certain.

Full briefing on possible frameworks should await the merits stage, if the Court is inclined to consider such a change. In any event, the decision below should be reversed as violative of longstanding principles, as described above. But in addition, this case offers the Court a compelling and factually developed opportunity to consider better approaches to internet speech. As described next, granting certiorari in this case would also provide opportunities to clarify related, broader doctrines that need to reenforce principles from key, venerated precedents even as this Court's docket reflects a recognized need to consider their application in a developing culture.

### **III. Any review of this criminal case must be consistent with longstanding first amendment principles**

Although it is in a new forum and reaches a pitch that might make some people uneasy, the postings of details and commentary on the Stop Huntingdon Animal Cruelty (SHAC) animal rights activist campaign website contribute to a political discourse in a way that has, in principle, long since been protected. Political speech includes heated rhetoric, hyperbole and verbal expressions of support for others who commit actions on behalf of a particular campaign. Activities related to political discussion and organizing — including news reporting, picketing, attending meetings, advocating protest, writing about protest, organizing, and commenting on protest—are of such social value that they are long venerated in United States society. Identifying a hierarchy among the protected categories of speech, Professor David Kairys writes that “political speech is the most protected because it

has the highest social value, furthering society's interest in free and open debate as well as the individual's interest in expression."<sup>20</sup>

This Court has recognized the importance of protecting elevated political rhetoric.<sup>21</sup> Even when the rhetoric contains phrases that could be construed as a threat to the president, the Court has evaluated the language in the broader context of robust debate.<sup>22</sup> It has enunciated fundamental reasons for protecting freedom of speech, namely the need for political debate and to permit people to speak freely without fear of punishment for their words and ideas.<sup>23</sup> Charged political rhetoric is "at the core of the First Amendment,"<sup>24</sup>

This Court has held that internet speech is entitled to full First Amendment protection. "[O]ur cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium."<sup>25</sup>

**A. These website postings are best compared to reporting or expressions of ideological support for others' actions, and are constitutionally protected**

Although the Third Circuit opinion claims that it is being mindful of protected speech, a closer examination reveals that it is criminalizing what should be protected. As part of its campaign against animal cruelty, the SHAC website posted reportage of both lawful and unlawful conduct, sometimes with supportive commentary. (The unlawful conduct ranged from property destruction to break-ins that freed beagles and other animals.<sup>26</sup>) The broader campaign consisted of three roughly defined groups of participants: legal activists who engaged in lawful protest, sympathizers who agreed with the goal of stopping animal cruelty but who did not engage in any actions, and individuals who engaged in unlawful tactics; the last of which comprised the smallest group and is not present in this case.<sup>27</sup> But importantly, there is no evidence that anyone who is before the Court actually committed any act of property damage or other civil disobedience; accordingly, this prosecution is, at its core, based on the individuals' online rhetoric.

The decision below recites recognition that providing information such as the names and addresses of persons with whom one has grievances is protected speech, as is printing other information or instructions that others might choose to use as part of an unlawful act.<sup>28</sup> Yet it goes on to find criminal culpability for posts that provide instructions or details of precisely that nature.<sup>29</sup> Ultimately, the supportive commentary is no different from the opinions that are posted on thousands of blogs each day on the web.

The opinion below makes much of the fact that unknown people responded with civil disobedience against companies regarding which SHAC had publicly aired grievances, and that the civil disobedience stopped when

SHAC reported that the company's policies had improved.<sup>30</sup> But of course, countless individuals have, of their own volition, chosen to engage in civil disobedience in response to facts they learned from respected news sources, and then adjusted their actions accordingly when those offensive policies changed. Airing of grievances and accurate reporting of facts and new developments does not constitute incitement or control of those who act upon such information.

The decision below also finds a "true threat" in a disputed claim that some individuals displayed photos at protests outside company meetings in the U.S. that depicted a Huntingdon-UK executive after he was attacked by unknown assailants in England.<sup>31</sup> But as discussed below, celebration of violent acts by others is constitutionally protected; and the threat claimed here is no more pronounced than at countless labor actions in which strike-breakers are called "scabs."<sup>32</sup>

A comprehensive listing of errors in the decision below is best left for the merits stage. Here, amicus seeks only to alert the Court to the fact that important constitutional questions are raised by the precise speech that the Third Circuit found to be the basis for criminal culpability.

**1. Political speech that identifies certain individuals has long been recognized as protected speech—even in a context of illegal actions**

This Court has found that speech, even if related to a campaign that has components of violence or illegal activity, falls within the boundaries of protected speech, as long as the words do not directly incite imminent violence. Public disclosure of names, or drawing attention to specific individuals, such as boycott violators, has been permitted.

Both of these elements—a hybrid of non-violent and violent tactics and the singling out individuals for public attention—existed in *NAACP v. Claiborne Hardware*, involving the efforts of civil rights leader Charles Evers and others to organize an NAACP- sponsored boycott of white-owned businesses in Claiborne County.<sup>33</sup> The Court noted that the boycott had a "chameleon like character . . . ; it included elements of criminality and elements of majesty."<sup>34</sup>

The boycott was mostly peaceful but was peppered by some violence as a few boycott violators were beaten and shots were fired through some of their windows. Violators were publicly disclosed and "store-watchers" recorded which blacks patronized white-owned stores and then printed their names in a local newspaper and announced them in church.<sup>35</sup> Evers publicly proclaimed that "any 'uncle toms' who broke the boycott would 'have their necks broken' by their own people."<sup>36</sup> He "warned that the Sheriff could not sleep with boycott violators at night," and told his audience, "'If we catch any of you going in any of them racist stores, we're gonna break your damn neck.'"<sup>37</sup>

The Court found that Evers' speech—even set against a backdrop of violence, and even including apparent threats—did not exceed the limits of protected speech. The Court noted that the speeches consisted of impassioned political pleas within which Evers' seemingly threatening language was used, and that no imminent unlawful conduct followed the speeches.<sup>38</sup> Focusing on the political nature of Evers' speeches, the Court wrote:

Strong and effective extemporaneous rhetoric cannot be nicely channeled in purely dulcet phrases. An advocate must be free to stimulate his audience with spontaneous and emotional appeals for unity and action in a common cause. When such appeals do not incite lawless action, they must be regarded as protected speech.<sup>39</sup>

Other precedent likewise requires that illegal action be almost contemporaneous with the inciting speech if it is to be excluded from First Amendment protection.<sup>40</sup> The reason for an imminence requirement derives from the notion that the means to deter unlawful conduct is to punish the actor rather than the advocate.<sup>41</sup> In *Hess v. Indiana*,<sup>42</sup> the Court found no imminent action in a demonstrator's shout, "We'll take the fucking street later [or again]," as police attempted to move a crowd of demonstrators off the street.<sup>43</sup> Speech that incites others to violate the law is not protected by the First Amendment, but the incitement to lawless action must be imminent and likely.

In addition to meeting imminence and incitement standards, threatening remarks must be made with an intent to commit an act of unlawful violence to a particular individual or group of individuals.<sup>44</sup> Only then are they distinguished as "true threats." This Court found that the statement, "If they ever make me carry a rifle the first man I want to get in my sights is [the President]," made during a speech at an anti-war rally, is protected political hyperbole, not a true threat.<sup>45</sup>

## **B. Strict adherence to these principles is necessary to guard against governmental overreaching based on harmful mischaracterizations.**

*Claiborne Hardware* and the other cases discussed above are venerated precedent, and rightly so. They recognize that it is too easy for the government to characterize speech as dangerous. Although the victors in *Claiborne Hardware* have gained respectability in today's history books, they were not so universally accepted at the time. Rather, it is part of a now-celebrated history of extremely contentious campaigns, taking different protest formats that have later resulted in social change but were, at the time, the object of attempts to sanction:

For much of the history of free speech law, freedom of expression has been positively linked to movements for equality. . . . The outsiders, those speaking on behalf of the oppressed, communicated controversial messages in unconventional ways. The "establishment" tried to suppress free speech. One may think of the flag



burning decisions as continuing this connection between free speech and equality for dissidents.<sup>46</sup>

The alternative to the Court's decision in *Claiborne*, as Professor Eugene Volokh writes, would make it far too risky that valuable dissident speech would be suppressed:

Whenever words are said against a backdrop of violence, listeners can plausibly read an element of threat into the statements. Harshly condemning strikebreakers or polluters a few months after the shooting of a strikebreaker or an eco-terrorist attack may be reasonably seen by many as an implied threat.

But such statements are an inevitable part of political debate, especially when the speakers see the issue as literally a matter of life and death. It's important for us to hear this speech, partly because some aspects of it may be right, and partly because the very fact that people feel so strongly about an issue is itself important matter to know. . . . We need to punish the violence, but protect the speech.<sup>47</sup>

Justice William O. Douglas, in his broader and more reflective writings off the Bench, reminds us that the framework and legal tests that demand so much before speech may be regulated are needed because police and prosecutors cannot be in charge of making such distinctions; it is neither consistent with the premise of a free society nor with historic practice:

It was historically the practice of state police to use such labels as "breach of the peace" or "disorderly conduct" to break up groups of minorities who were protesting in . . . unorthodox ways. The real crime of the dissenters was that they were out of favor with the Establishment . . . .

While violence is not protected by the Constitution, lawful conduct, such as marching and picketing, often boils over into unlawful conduct because people are emotional, not rational, beings. So are the police; and very often they arrest the wrong people. For the police are an arm of the Establishment and view protesters with suspicion. Yet American protesters need not be submissive.<sup>48</sup>

Not only would much of Justice Douglas's own writings be suspect, but political discourse as a whole would be far less robust if speakers had to fear accountability for the actions of their most emotional listeners.

If speech that glorified illegality were proscribable, much valued political speech would be curtailed. It is too easy for government to make a theoretical connection between speech and illegal, violent action. Even thinkers and speakers as venerated as Dr. Martin Luther King, Jr., were, in their time, accused of inciting violence.<sup>49</sup>

In this case, the police were unable to catch the few who committed illegal activities, so they prosecuted "the visible, above-ground activists that ideologically support them."<sup>50</sup> Our constitutional tradition does not permit such a prosecution.

#### **IV. This case provides a useful context in which to clarify developing doctrines**

Justice Black famously poked fun at doctrines that try to separate proscribable speech from speech that is within First Amendment protection, but it has become accepted premise that, despite the Amendment's seemingly absolute terms, the mere fact that something is speech does not mean that "no law" can abridge it.<sup>51</sup>

This Court is in the midst of another round of trying to clarify the lines differentiating free speech, speech-acts, and speech that is outside the scope of constitutional protection. Last term, a divided Court held that "training" and "expert advice," even if made manifest only in written and spoken words, could be made unlawful under anti-terrorism laws.<sup>52</sup> However, the majority repeatedly noted that the activities were merely proposed, and with a level of generality that left many open questions.<sup>53</sup> As most relevant to the Petition here, the majority specified various circumstances that would require the Court to reconsider the constitutional questions:

All this is not to say that any future applications of the material-support statute to speech or advocacy will survive First Amendment scrutiny. It is also not to say that any other statute relating to speech and terrorism would satisfy the First Amendment. In particular, we in no way suggest that a regulation of independent speech would pass constitutional muster, even if the Government were to show that such speech benefits foreign terrorist organizations. We also do not suggest that Congress could extend the same prohibition on material support at issue here to domestic organizations.<sup>54</sup>

Other items on the Court's docket concern the scope of protection for "speech," but this Petition offers an opportunity to more clearly define the limits and applications of those developing doctrines. Early this term, the Court heard argument on whether or not the First Amendment would prohibit civil suits against persons who, as found by the jury, intentionally caused severe emotional distress with signs, chants, and website postings that claimed the plaintiff-father's son was killed as part of God's plan to punish the United States for being too accepting of homosexuality.<sup>55</sup> (In contrast, this petition involves criminal liability for website postings that endorsed acts of civil disobedience but did not directly cause harm.) A month later, the Court heard argument on whether the First Amendment applies to violent video games that are sold to minors.<sup>56</sup>

However the Court resolves those cases, and despite the Court's best efforts, there doubtless will be some degree of uncertainty and speculation both within the profession and among laypersons as to the implications of these

decisions on other forms of controversial speech. The petition at issue here would provide the Court with a well developed factual record, including a full criminal trial responding to specific allegations and an appellate record raising clear as-applied challenges. Moreover, it occurs in the context of a developing aspect of the culture that this Court should speak to with specificity.

## Conclusion

For the foregoing reasons, amicus curiae respectfully urges this Honorable Court to grant certiorari in this matter and reverse the decision below.

Respectfully submitted,

Heidi Boghosian, National Lawyers Guild

Prof. Zachary Wolfe, George Washington University

---

## NOTES

1. See *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (mere advocacy of violence is constitutionally protected).
2. *Holder v. Humanitarian Law Project*, 561 U.S. ---, 130 S. Ct. 2705, 177 L. Ed. 2d 355 (2010).
3. *Id.* at 2730.
4. *Snyder v. Phelps*, 09-751 (U.S., argued Oct 6, 2010)
5. *Schwarzenegger v. Entertainment Merchants Ass'n*, 08-1448 (U.S., argued Nov. 2, 2010).
6. See e.g. *Kinoy v. District of Columbia*, 400 F.2d 761 (1968).
7. See J.D. Lasica, *Blogs and Journalism Need Each Other*, Nieman Reports, Fall 2003, at 70.
8. *ACLU v. Reno*, 521 U.S. 844, 870 (1997).
9. Clay Shirky, *The Music Business and the Big Flip*, available at [http://www.shirky.com/writings/music\\_flip.html](http://www.shirky.com/writings/music_flip.html).
10. Andrew Sullivan, *Why I Blog*, The Atlantic (Nov. 2008).
11. *Id.*
12. As of this filing, more than 1.2 million individual blogs have self-registered with Technorati, which itself is just one voluntary directory that makes no claim to comprehensiveness. See <http://technorati.com/blogs/directory/>.
13. Lassica, *supra* note 7, at 72.
14. *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1935).
15. *Branzburg v. Hayes*, 408 U.S. 665 (1972).
16. *Id.* at 704.
17. Importantly, this case does not involve speech that is the direct and sole cause of harm and devoid of social or political value. This is contrasted with, for example, cases of “cyber-bullying” with a specific victim who is intentionally harmed by the post itself, often through the disclosure of private facts or other tortious or illegal content, and extremely personal in nature. The prosecution here does not claim that the posts did harm independently of others allegedly acting upon them, but rather seeks to criminal-

ize the mere reporting of and commentary on the acts of others, and in the context of political commentary on matters of public concern.

18. John Cronan, *The Next Challenge for the First Amendment: The Framework for an Internet Incitement Standard*, 51 Cath. U.L. Rev. 425 (2002).
19. Jordan Strauss, *Context is Everything: Towards a More Flexible Rule for Evaluating True Threats Under the First Amendment*, 32 S.W. U.L. Rev. 231, 263-68 (2003).
20. See e.g. David Kairys, *The Politics of Law* 197 (3d ed. 1998).
21. See e.g. *Bonds v. Floyd*, 385 U.S. 116, 133 (1966) (“While the SNCC statement said ‘We are in sympathy with, and support, the men in this country who are unwilling to respond to a military draft,’ this statement alone cannot be interpreted as a call to unlawful refusal to be drafted.”).
22. *Watts v. United States*, 394 U.S. 705 (1969).
23. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).
24. *NAACP v. Claiborne Hardware*, 458 U.S. 886, 926-27 (1982).
25. *Reno v. American Civil Liberties Union*, 521 U.S. 844, 870 (1997).
26. *United States v. Fullmer*, 584 F.3d 132, 140 (3d Cir. 2009).
27. Will Potter, *The Green Scare*, 33 Vermont L. Rev. 671, 678 (2009).
28. *Fullmer*, 584 F.3d at 155.
29. *Id.*
30. *Id.* at 156.
31. *Id.* at 39.
32. That one might take the epithet “scab” as a threat of violence is no stretch. A Jack London poem warns that “no man has a right to scab as long as there is a pool of water deep enough to drown his body in, or a rope long enough to hang his carcass with.” Jack London, *Ode to a Scab* (1915). Nevertheless, historic approval of laws punishing workers for using this term has long since been rejected. See e.g. Felix Frankfurter & Nathan Greene, *The Labor Injunction* 52, 81, 89-106 (1930); *Chandler v. McMinnville School Dist.*, 978 F.2d 524 (9th Cir. 1992) (upholding right of high school students to wear “scab” buttons during a teacher’s labor strike). Today, atomic weapons workers who are on strike poke hurtful fun at strike-breakers with a joke that not only uses “scab” to suggest harm may befall them should they cross a picket line, but that more serious harm may befall them by their failure to join with the union in demanding safer working conditions: “How many Honeywell scabs does it take to change a light bulb? None. They just hold it in their hands and it glows.” James Parks, *Explosion at Honeywell Nuclear Plant Staffed by Strikebreakers*, AFL-CIO Now Blog, Sept. 9, 2010, at <http://blog.aflcio.org/2010/09/09/explosion-at-honeywell-nuclear-plant-staffed-by-strike-breakers/>.
33. *Claiborne Hardware*, 458 U.S. at 898.
34. *Id.* at 888.
35. *Id.* at 903-04.
36. *Id.* at 900 n.28.
37. *Id.* at 902.
38. *Id.*
39. *Id.*
40. See e.g. *Brandenburg*, 395 U.S. at 447.
41. *Bartnicki v. Vopper*, 532 U.S. 514 (2001).

42. 414 U.S. 105 (1973).
43. *Id.* at 106-108.
44. *Virginia v. Black*, 538 U.S. 343, 359-60 (2003).
45. *Watts v. United States*, 394 U.S. 705, 706 (1969).
46. Kent Greenawalt, *Fighting Words* 151-152 (1995).
47. Eugene Volokh, *Menacing Speech, Today and During the Civil Rights Movement*, Wall St. J., Apr. 3, 2001.
48. William O. Douglas, *Points of Rebellion* (1969).
49. *See e.g.* Joseph Nazel, *Thurgood Marshall: Supreme Court Justice* (1993) 172 (recounting the blame placed upon Dr. King for the riots that occurred in Memphis riots just weeks before his assassination, including Senator Byrd's statement that the rioters "followed King's advice to break laws with which they did not agree. This has been a cardinal principle of his philosophy—a philosophy that leads naturally to the escalation of nonviolence into civil disobedience — which is only a euphemism for lawbreaking and criminality and which escalates next into civil unrest, civil disorder, and insurrection.")
50. Potter, 33 Vt. L. Rev. at 678.
51. *Cf.* Hugo L. Black, *A Constitutional Faith* 45-46 (1969) ("As I have said innumerable times before, I simply believe that 'Congress shall make no law' means Congress shall make no law."); Rebuttal Oral Argument of Erwin N. Griswold, Esq., in 71 *Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law* 265, 257 (1975) (recounting exchange between Solicitor General Griswold and Justice Black).
52. *Holder v. Humanitarian Law Project*, 561 U.S. —, 130 S. Ct. 2705, 177 L. Ed. 2d 355 (2010).
53. *Id.* at 2722 ("Deciding whether activities described at such a level of generality would constitute prohibited 'service[s]' under the statute would require 'sheer speculation' . . . It is apparent with respect to these claims that 'gradations of fact or charge would make a difference as to criminal liability,' . . .") (alterations in original; omissions added) (citations omitted); *id.* at 2729 ("Plaintiffs' proposals are phrased at such a high level of generality that they cannot prevail in this pre-enforcement challenge.").
54. *Id.* at 2730.
55. *Snyder v. Phelps*, 09-751 (U.S., argued Oct. 6, 2010).
56. *Schwarzenegger v. Entertainment Merchants Ass'n*, 08-1448 (U.S., argued Nov. 2, 2010).



But some facts about human social organization really are quite plain and simple—because they present themselves so frequently. It's no mystery, for example, how powerful governments, including and particularly the U.S., seek to discipline and control protest movements within their populations: they pass and enforce laws which isolate and censor. The former quiets and more easily identifies the voice. The latter slits its vocal cords.

Since our founding in 1937 the Guild has united its membership with a strong voice to push back against this two-fold tactic. Even during moments in our history of internal relative division and uncertainty, we have always been unified in support of the right to rally, march, picket, sit-in, teach-in and otherwise challenge our government en masse. Our championing of this right has long been one of our defining features, a core part of who we are and the world we insist on living in. For Guild members, studying the right to mass protest, as this issue invites you to do, is a kind of Apollonian self-study—an opportunity to dig a little deeper into one of our basic values and animating purposes.

Nathan Goetting, *Editor in Chief*

## **Does your library have National Lawyers Guild Review?**

*More than two hundred law school and county law libraries do.*

If yours does not, take this copy with you and request that your library subscribe to **National Lawyers Guild Review**, now in its 70th year. Issued quarterly. Library subscription rate \$75.00 per year, ISSN 0017-5390.

It may be ordered through the library's subscription agent or directly from: **National Lawyers Guild Review**, 132 Nassau Street, # 922, New York NY 10038.

Website: **[www.nlg.org](http://www.nlg.org)**. Email: **[communications@nlg.org](mailto:communications@nlg.org)**.



**2011 NLG**  
**LAW** for the  
**PEOPLE**  
Convention

***Crowne Plaza Hotel***  
***Philadelphia, Pennsylvania***  
***October 12-16, 2011***

*Watch for details at [www.nlg.org](http://www.nlg.org)*

National Lawyers Guild Review  
132 Nassau Street, Room 922  
New York, NY 10038

Periodicals  
Postage Paid





**2011 NLG**  
**LAW** for the  
**PEOPLE**  
Convention

***Crowne Plaza Hotel***  
***Philadelphia, Pennsylvania***  
***October 12-16, 2011***

*Watch for details at [www.nlg.org](http://www.nlg.org)*

National Lawyers Guild Review  
132 Nassau Street, Room 922  
New York, NY 10038

Periodicals  
Postage Paid

# national lawyers guild

Volume 67  
Number 1  
Spring 2010



*A journal of  
legal theory  
and practice  
“to the end  
that human  
rights shall  
be more  
sacred than  
property  
interests.”*

—Preamble, NLG  
Constitution



## CHALLENGES TO MASS PROTEST

### **A Lawyer's Guide to the Repression Literature** 3

Jennifer Earl

### **A Criminal Mess: New York City's Response to Critical Mass Bicycle Rides, 2004-2010** 37

Gideon Orion Oliver

### **Brief of Amicus Curiae National Lawyers Guild In Support of Petitioners In *Kjonaas Et Al V. U.S.*** 52

Heidi Boghosian and  
Zachary Wolfe

