



2022

## Who Can Protect Black Protest?

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### Recommended Citation

Brandon Hasbrouck, *Who Can Protect Black Protest?*, 170 U. Pa. L. Rev. Online 39 (2022).

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ESSAY

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WHO CAN PROTECT BLACK PROTEST?

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BRANDON HASBROUCK†

*Police violence both as the cause of and response to the racial justice protests following George Floyd’s murder called fresh attention to the need for legal remedies to hold police officers accountable. In addition to the well-publicized issue of qualified immunity, the differential regimes for asserting civil rights claims against state and federal agents for constitutional rights violations create a further barrier to relief. Courts have only recognized damages as a remedy for such abuses in limited contexts against federal employees under the Bivens framework. The history of Black protest movements reveals the violent responses police have to such challenges to the white supremacist social order. The use of federal officers in that violent response during the summer of 2020 makes the urgent need for Bivens relief for the victims of police violence clear. Fortunately, the history of the First and Fourth Amendments reveals a basis for extending Bivens relief under both Amendments in the context of the violent policing of Black protest. But will the courts or Congress extend that protection?*

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*[A] democracy cannot thrive where power remains unchecked and justice is reserved for a select few. Ignoring these cries and failing to respond to this movement is simply not an option. For peace cannot exist where justice is not served.<sup>1</sup>*

*John Lewis*

## INTRODUCTION

When George Floyd was murdered, Darnella Frazier had the presence of mind to pull out her cell phone and record—an act critical to the eventual conviction of former police officer Derek Chauvin.<sup>2</sup> Cell phone videos are a powerful tool against police misconduct, and even pro-police organizations recognize the legality of recording police.<sup>3</sup> Generally speaking, you’re allowed to openly record police so long as the recording does not interfere with their duties or break other laws, and they can’t seize your camera or force you to

<sup>1</sup> 166 CONG. REC. H2487 (daily ed. June 25, 2020) (statement of Rep. Lewis).

<sup>2</sup> See Rachel Treisman, *Darnella Frazier, Teen Who Filmed Floyd’s Murder, Praised for Making Verdict Possible*, NPR (Apr. 21, 2021, 11:15 AM), <https://www.npr.org/sections/trial-over-killing-of-george-floyd/2021/04/21/989480867/darnella-frazier-teen-who-filmed-floyds-murder-praised-for-making-verdict-possib> [<https://perma.cc/8XPT-9GN2>].

<sup>3</sup> See IACP LAW ENFORCEMENT POLICY CENTER, RECORDING POLICE ACTIVITY: MODEL POLICY 1 (2015), <https://www.theiacp.org/sites/default/files/2018-08/RecordingPolicePolicy.pdf> [<https://perma.cc/2B9L-BWLP>] (“Members of the public, including media representatives, have an unambiguous First Amendment right to record officers in public places, as long as their actions do not interfere with the officer’s duties or the safety of officers or others.”). The International Association of Chiefs of Police, based in Alexandria, Virginia, is the world’s largest professional association for police leaders, with over 31,000 members in 165 countries. The IACP uses advocacy, research, outreach, and education to advance the policing profession and public safety.

delete videos.<sup>4</sup> Yet police officers frequently disregard this fundamental right, and advice on how to stay safe while recording them abounds.<sup>5</sup>

Worse still, during the protests against racist police misconduct after George Floyd's murder, police have become more emboldened, going so far as to openly attack credentialed journalists.<sup>6</sup> Those attacks are particularly troubling in light of the ongoing push toward authoritarianism.<sup>7</sup> Protest,

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<sup>4</sup> *Id.* at 1-2; see also Geoffrey J. Derrick, *Qualified Immunity and the First Amendment Right to Record Police*, 22 B.U. PUB. INT. L.J. 243, 257-58 (2013) (“Courts have relied . . . on the free and open discussion of governmental affairs and the freedom of the press in order to uphold a First Amendment right to record police in public. Several other colorable bases for First Amendment protection exist, such as expressive conduct and the prohibition on prior restraints.” (footnotes omitted)); Letter from Jonathan M. Smith, Chief, Special Litig. Section, C.R. Div., Dep’t of Just. to Mark H. Grimes, Baltimore Police Dep’t & Mary E. Borja, Wiley Rein LLP (May 14, 2012), [https://www.justice.gov/sites/default/files/crt/legacy/2012/05/17/Sharp\\_tr\\_5-14-12.pdf](https://www.justice.gov/sites/default/files/crt/legacy/2012/05/17/Sharp_tr_5-14-12.pdf) [<https://perma.cc/HU7U-UKHB>] (Re: Christopher Sharp v. Baltimore City Police Department, et al.) (“Recording governmental officers engaged in public duties is a form of speech through which private individuals may gather and disseminate information of public concern, including the conduct of law enforcement officers.”).

<sup>5</sup> See, e.g., Steve Silverman, *7 Rules for Recording Police*, REASON (Apr. 5, 2012, 1:30 PM), <https://reason.com/2012/04/05/7-rules-for-recording-police> [<https://perma.cc/Y6XS-PWCE>] (outlining best practices regarding the recording of police officers); Sophia Cope & Adam Schwartz, *You Have a First Amendment Right to Record the Police*, ELEC. FRONTIER FOUND. (June 8, 2020), <https://www.eff.org/deeplinks/2020/06/you-have-first-amendment-right-record-police> [<https://perma.cc/XR4H-QHJS>] (emphasizing the strong legal basis for the propriety of recording police officers); The Takeaway, *5 Things to Know Before Recording the Police*, WNYC STUDIOS (Apr. 16, 2015), <https://www.wnycstudios.org/podcasts/takeaway/segments/5-things-you-should-know-video-recording-police> [<https://perma.cc/B6C5-EM9U>] (providing key information regarding the recording of police officers, including what civilians—and police—can and cannot do when the police are being recorded); Abby Ohlheiser, *The Tactics Police Are Using to Prevent Bystander Video*, MIT TECH. REV. (Apr. 30, 2021), <https://www.technologyreview.com/2021/04/30/1024325/police-video-filming-prevention-tactics> [<https://perma.cc/ZN4C-T2G8>] (describing the arrest of a documentary filmmaker who was recording a protest, and the police’s response and attempt to keep his recording equipment until lawyers intervened); Morgan Sung, *Cops Are Playing Music During Filmed Encounters to Game YouTube’s Copyright Striking*, MASHABLE (July 1, 2021), <https://mashable.com/article/police-playing-music-copyright-youtube-recording> [<https://perma.cc/22QD-Z63N>] (“Law enforcement across the country have responded to journalists, protestors, and even bystanders who record their actions by demanding they delete the videos, confiscating their phones without a warrant, and detaining those who resist.”).

<sup>6</sup> See Brian Hauss & Teresa Nelson, *Police Are Attacking Journalists at Protests. We’re Suing*, ACLU (June 3, 2020), <https://www.aclu.org/news/free-speech/police-are-attacking-journalists-at-protests-were-suing> [<https://perma.cc/E4Y2-U9YF>] (“[J]ournalists have become conspicuous targets for arrest, intimidation, and assault by police officers, even though (or perhaps because) they are clearly identifiable as members of the press.”); Laura Hazard Owen, *U.S. Police Have Attacked Journalists at Least 140 Times Since May 28*, NIEMANLAB (June 1, 2020, 9:53 AM) <https://www.niemanlab.org/2020/06/well-try-to-help-you-follow-the-police-attacks-on-journalists-across-the-country> [<https://perma.cc/GT96-AHQ2>] (“[I]t’s becoming clear that attacks by the police on journalists are becoming a widespread pattern, not one-off incidents.”).

<sup>7</sup> See Janai Nelson, Opinion, *The Stifling of Protest Around the World Paves the Road for Authoritarian Rule*, GUARDIAN (May 24, 2021, 11:20 PM), <https://www.theguardian.com/commentisfree/2021/may/24/george-floyd-protest-stifling-global-threat-civil-human-rights>

dissent, and a critical press are all essential to maintaining the power of the public over the government. Unfortunately, many politicians in power today would prefer not to have to face their critics, and are willing to endorse measures as extreme as declaring open season for hunting protestors with cars.<sup>8</sup> Several state legislatures have considered and even passed antidemocratic bills criminalizing protest, blatantly violating the underlying principles of the First Amendment.<sup>9</sup> It is clear that government officials who would ignore the rights of civilians and criminalize dissent have plenty of supporters in elected office. As such, our freedoms of speech and the press are under threat.

This Essay will explore the applicability of damages under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*<sup>10</sup> to redressing police abuses against Black protest. Part I will briefly examine the *Bivens* doctrine and its historical application and limitations. Part II will explore the history of Black protest movements and police suppression of them. Part III will argue that *Bivens* relief can protect Black protest through both the First and Fourth Amendments. Because any such *Bivens* claim will have to survive objections both that damages are not available and that officers have qualified immunity from such suits, Part III will deal with both doctrines.

### I. *BIVENS* RELIEF: DISCOURAGING EXECUTIVE VIOLATIONS THROUGH PERSONAL LIABILITY

In *Bivens*, the Supreme Court found that damages were available against individual federal agents as a remedy for violations of a plaintiff's constitutional rights—specifically of their rights under the Fourth Amendment.<sup>11</sup> Mr. *Bivens* alleged that he had been subjected to a warrantless

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[<https://perma.cc/8M86-Y7FD>] (discussing the legislative and law enforcement crackdown on anti-police violence protestors, and the resulting implications for civil liberties).

<sup>8</sup> See Alex Pareene, *The Right to Crash Cars into People*, NEW REPUBLIC (Apr. 24, 2021), <https://newrepublic.com/article/162163/republicans-anti-riot-laws-cars> [<https://perma.cc/ASX6-HPYL>] (describing Florida's recently enacted anti-riot act that "shield[s] drivers from civil liability if they injure or kill protestors on Florida roads" as well as similar bills in other states); see also FLA. STAT. § 870.07(1) (2021) ("In a civil action for personal injury, wrongful death, or property damage, it is an affirmative defense that such action arose from an injury or damage sustained by a participant acting in furtherance of a riot.").

<sup>9</sup> See Reid J. Epstein & Patricia Mazzei, *G.O.P. Bills Target Protestors (and Absolve Motorists Who Hit Them)*, N.Y. TIMES (June 16, 2021), <https://www.nytimes.com/2021/04/21/us/politics/republican-anti-protest-laws.html> [<https://perma.cc/8K6H-7G7E>] ("Republicans responded to a summer of protests by proposing a raft of punitive new measures governing the right to lawfully assemble. G.O.P. lawmakers in 34 states have introduced 81 anti-protest bills during the 2021 legislative session—more than twice as many proposals as in any other year . . .").

<sup>10</sup> 403 U.S. 388 (1971).

<sup>11</sup> See *id.* at 395, 397 ("That damages may be obtained for injuries consequent upon a violation of the Fourth Amendment by federal officials should hardly seem a surprising proposition. . . . [W]e

search of his home, arrested there in front of his family, and strip searched at the police station.<sup>12</sup> While the narcotics agents argued that Mr. Bivens should be limited to relief under state tort law, the Court refused to see the relationship between Mr. Bivens and the federal agents as analogous to one between two private citizens.<sup>13</sup> The Court reasoned that, “[h]istorically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty.”<sup>14</sup>

In the decade following *Bivens*, the Court recognized damages remedies for constitutional violations in two other cases: a Fifth Amendment due process claim for gender discrimination<sup>15</sup> and an Eighth Amendment cruel and unusual punishment claim for failure to provide medical care.<sup>16</sup> Congress has made no move to overrule the existing extensions of *Bivens*.<sup>17</sup> Yet, the Court has declined to find implied damages remedies under any other provision of the Constitution since then.<sup>18</sup>

When the Court does consider further constitutional claims for the availability of damages, it applies a two-step framework.<sup>19</sup> First, a court must consider whether the claim involves a new *Bivens* context.<sup>20</sup> Second, if it does, the court must then explore whether “special factors”—a term the court has declined to define<sup>21</sup>—indicate that Congress, rather than the court, should decide whether to allow damages.<sup>22</sup> “Through the special factors analysis, *Bivens* has come to allow relief in the limited set of situations for which Congress has neither legislated remedies nor expressed

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hold that petitioner is entitled to recover money damages for any injuries he has suffered as a result of the agents’ violation of the Amendment.”). Damages for similar violations by state and local officials are available under 42 U.S.C. § 1983.

<sup>12</sup> *Id.* at 389.

<sup>13</sup> *Id.* at 391-92.

<sup>14</sup> *Id.* at 395.

<sup>15</sup> See *Davis v. Passman*, 442 U.S. 228, 248-49 (1979).

<sup>16</sup> See *Carlson v. Green*, 446 U.S. 14 (1980).

<sup>17</sup> See *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1856 (2017) (“[I]n light of the changes to the Court’s general approach to recognizing implied damages remedies, it is possible that the analysis in the Court’s three *Bivens* cases might have been different if they were decided today. To be sure, no congressional enactment has disapproved of these decisions.”).

<sup>18</sup> *Id.* at 1855 (“These three cases—*Bivens*, *Davis*, and *Carlson*—represent the only instances in which the Court has approved of an implied damages remedy under the Constitution itself.”).

<sup>19</sup> See *id.* at 1859-60.

<sup>20</sup> *Id.* at 1859 (“If the case is different in a meaningful way from previous *Bivens* cases decided by this Court, then the context is new.”).

<sup>21</sup> See *id.* at 1858.

<sup>22</sup> *Id.* at 1848 (“The question is ‘who should decide’ whether to provide for a damages remedy, Congress or the courts?”) (quoting *Bush v. Lucas*, 462 U.S. 367, 380 (1983)).

a preference regarding their existence.”<sup>23</sup> The special factors analysis is a high bar, but not impossible to clear.<sup>24</sup>

## II. A BRIEF HISTORY OF BLACK PROTEST

Black advocacy for social and political change has typically been met with a violent response—often from police. The Ku Klux Klan’s assault on the Freedom Riders in Birmingham, Alabama was enabled by public safety commissioner Eugene “Bull” Connor—and allowed to happen by F.B.I. director J. Edgar Hoover.<sup>25</sup> Police in Selma, Alabama took a more direct approach, assaulting Black marchers attempting to register to vote with tear gas, clubs, and horses.<sup>26</sup> Police violence against the civil rights movement was so consistent and predictable that it became a part of the movement’s strategy.<sup>27</sup> The movement’s protests were designed to provoke a violent response to nonviolent behavior to call public attention to police brutality and the system of segregation it supported.<sup>28</sup>

Law enforcement have not confined their abuses of Black activists’ rights to public attacks on protesters. In 1964, the F.B.I. sent Martin Luther King, Jr. an anonymous letter implying that he should kill himself.<sup>29</sup> Chicago

<sup>23</sup> Anya Bernstein, *Congressional Will and the Role of the Executive in Bivens Actions: What Is Special About Special Factors?*, 45 IND. L. REV. 719, 722 (2012).

<sup>24</sup> See, e.g., *Korb v. Lehman*, 919 F.2d 243, 248 (4th Cir. 1990) (“We believe a *Bivens* action should also exist when government officials cause a *private* employee to be fired by his *private* employer for exercising his First Amendment right to speak out on matters of public concern. . . . [However] the appellees . . . were thus protected from suit by qualified immunity.”); *Martin v. Naval Crim. Investigative Serv.*, 539 F. App’x 830, 832 (9th Cir. 2013) (“We have long recognized that [a *Bivens*] remedy is available to redress allegations of retaliation against protected speech by federal law enforcement officers.” (citing *Gibson v. United States*, 781 F.2d 1334, 1341 (9th Cir. 1986))).

<sup>25</sup> See Meagan Day, *The Freedom Rides Made the Most of a Multiracial Activist Base*, JACOBIN (June 18, 2020), <https://www.jacobinmag.com/2020/06/freedom-riders-journey-reconciliation-george-floyd-protests> [<https://perma.cc/R6NB-XEAT>] (discussing the complicity of the Birmingham Police and F.B.I. in the Klan assault on the Freedom Riders).

<sup>26</sup> See Andres A. Gonzalez, *Creating a More Perfect Union: How Congress Can Rebuild the Voting Rights Act*, 27 BERKELEY LA RAZA L.J. 65, 71 (2017) (“However, when the marchers reached Selma’s Edmund Pettus Bridge, they were met by hundreds of state and local troopers armed with guns and tear gas.”).

<sup>27</sup> See Carl T. Bogus, *Race, Riots, and Guns*, 66 S. CAL. L. REV. 1365, 1375 (1993) (“In the 1960s, civil rights workers . . . deliberately selected Bull Connor as a target; because he was a perfect symbol of the brutality and vileness of Southern racism, they decided to ride into his jurisdiction, hoping of provoking him to violence.”).

<sup>28</sup> See Bruce Janu, *Let’s Get Real: The Civil Rights Movement Was About Police Brutality*, MEDIUM (June 9, 2020), <https://bdjanu.medium.com/lets-get-real-the-civil-rights-movement-was-about-police-brutality-bd1fa9b3cd59> [<https://perma.cc/9K3W-STU4>].

<sup>29</sup> See Beverly Gage, *What an Uncensored Letter to M.L.K. Reveals*, N.Y. TIMES MAG. (Nov. 11, 2014), <https://www.nytimes.com/2014/11/16/magazine/what-an-uncensored-letter-to-mlk-reveals.html> [<https://perma.cc/Y7ED-85NS>] (“King was certain the letter had come from the F.B.I. Its infamous

police—likely at the urging of the F.B.I.—assassinated Black Panther leader Fred Hampton in a raid of his home, while he was asleep.<sup>30</sup> But that pales in comparison to the sheer violence Philadelphia police used against the MOVE Black liberation group in 1985:

That night, the city of Philadelphia dropped a satchel bomb, a demolition device typically used in combat, laced with Tovex and C-4 explosives on the MOVE organization, who were living in a West Philadelphia rowhome known to be occupied by men, women, and children. It went up in unextinguished flames. Eleven people were killed, including five children and the founder of the organization. Sixty-one homes were destroyed, and more than two hundred and fifty citizens were left homeless.<sup>31</sup>

The attack left only two survivors.<sup>32</sup> Black people who organize for mutual aid and significant change are faced with deception and force, while even violent white reactionaries are handled with kid gloves.<sup>33</sup>

Officers' penchant for violence has been on full display during the Black-led racial justice protests of the past decade. Beginning with the uprising in Ferguson, Missouri, in response to the police killing of Michael Brown, police brought military hardware and a variety of tactical options to assault

director, J. Edgar Hoover, made no secret of his desire to see King discredited. A little more than a decade later, the Senate's Church Committee on intelligence overreach confirmed King's suspicion.”).

<sup>30</sup> See William Lee, *In 1969, Charismatic Black Panthers Leader Fred Hampton Was Killed in a Hail of Gunfire. 50 Years Later, the Fight Against Police Brutality Continues*, CHI. TRIB. (Dec. 3, 2019, 7:10 AM) <https://www.chicagotribune.com/news/ct-black-panthers-raid-fred-hampton-50-years-20191203-kbzgtrvtfh7tp7x4ggvtvhncpm-story.html> [<https://perma.cc/DK9A-EgU6>] (“FBI agent M. Wesley Swearingen became the agency's first whistleblower in 1977, claiming first to government lawyers and later in a 1995 book that the FBI set up Chicago police to kill the Panthers, warning the officers they'd be met with guns blazing.”).

<sup>31</sup> Lindsey Norward, *The Day Philadelphia Bombed Its Own People*, VOX (Aug. 15, 2019, 9:03 AM), <https://www.vox.com/the-highlight/2019/8/8/20747198/philadelphia-bombing-1985-move> [<https://perma.cc/3WRP-P6KL>].

<sup>32</sup> See *id.*

<sup>33</sup> See, e.g., The Oregonian/OregonLive, *Oregon Standoff Timeline: 41 Days of the Malheur Refuge Occupation and the Aftermath*, OREGONLIVE (Jan. 9, 2019, 6:04 PM), [https://www.oregonlive.com/portland/2017/02/oregon\\_standoff\\_timeline\\_41\\_da.html](https://www.oregonlive.com/portland/2017/02/oregon_standoff_timeline_41_da.html) [<https://perma.cc/N9X4-FJTF>] (describing how armed white protestors were allowed to occupy federal land for over a month, and were met with negotiation rather than immediate violence by the government); Luke Broadwater, *Capitol Police Told to Hold Back on Riot Response on Jan. 6, Report Finds*, N.Y. TIMES (Sept. 29, 2021), <https://www.nytimes.com/2021/04/13/us/politics/capitol-police-riot-report.html> [<https://perma.cc/4S29-YJRU>] (“[O]fficers were instructed by their leaders not to use their most aggressive tactics to hold off the mob, according to a scathing new report by the agency's internal investigator.”); Aymann Ismail, *The Anti-Lockdown Protests Prove Police Know How to Treat Protestors Fairly*, SLATE (May 28, 2020, 7:38 PM), <https://slate.com/news-and-politics/2020/05/police-response-george-floyd-minneapolis-shutdowns.html> [<https://perma.cc/75BX-CFV8>] (“Many who attended the anti-lockdown protests across the country were armed with guns. In North Carolina, at least one protester was armed with a bazooka. They were all met by a line of disciplined police officers who were reserved and measured with the amount of force they used.”).



protestors.<sup>34</sup> During the Baltimore protests over the police killing of Freddie Gray, the violence at the Mondawmin Mall was instigated by police who shut down bus routes that students needed to get home and then marched at the stranded students in full riot gear.<sup>35</sup> Police in Minneapolis attacked residents on their own front porches while patrolling in response to protests over the murder of George Floyd.<sup>36</sup> During the same protests, Minneapolis police arrested a CNN news crew during a live broadcast.<sup>37</sup> Louisville police similarly attacked journalists during the protests over the murder of Breonna Taylor.<sup>38</sup> Again and again, police meet Black protests with extreme violence.

During protests against police brutality, the police effectively act as armed counter-protestors against Black people and their allies. As such, attacks on journalists covering these events are utterly unacceptable. Such tactics betray a likelihood that police know the public will disapprove of their actions and so they seek to minimize their visibility—like the racist mobs attacking the Freedom Riders.<sup>39</sup>

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<sup>34</sup> See Terry Goldsworthy, *Urban Combat: Ferguson and the Militarisation of Police*, CONVERSATION (Aug. 18, 2014, 4:22 PM), <https://theconversation.com/urban-combat-ferguson-and-the-militarisation-of-police-30568> [<https://perma.cc/Y9RC-J5YA>] (questioning the need for military gear, the “warrior cop” mentality, and contradictory tactics in the police response to the Ferguson uprising).

<sup>35</sup> See Jenna McLaughlin & Sam Brodey, *Eyewitnesses: The Baltimore Riots Didn’t Start the Way You Think*, MOTHER JONES (Apr. 28, 2015), <https://www.motherjones.com/politics/2015/04/how-baltimore-riots-began-mondawmin-purge> [<https://perma.cc/J8EQ-AEQ5>] (“The kids were ‘standing around in groups of 3-4,’ Harris said in a Facebook message to *Mother Jones*. ‘They weren’t doing anything. No rock throwing, nothing . . . The cops started marching toward groups of kids who were just milling about.’”).

<sup>36</sup> See “Light ‘Em Up!”: Video Appears to Show Law Enforcement Shooting Paint Rounds at Mpls. Residents on Their Porch, CBS MINN. (May 30, 2020, 11:41 PM), <https://minnesota.cbslocal.com/2020/05/30/light-em-up-video-appears-to-show-law-enforcement-shooting-paint-rounds-at-citizens-on-their-porch> [<https://perma.cc/C26G-KYFN>] (“In the video, the officers are seen approaching the residents and repeatedly yelling at them to get inside their house. After a few demands, one can be heard yelling ‘light ‘em up!’ That’s when one officer appears to fire a paint round at the residents, who run inside.”).

<sup>37</sup> See Jason Hanna & Amir Vera, *CNN Crew Released from Police Custody After They Were Arrested Live on Air in Minneapolis*, CNN (May 29, 2020, 8:19 PM), <https://www.cnn.com/2020/05/29/us/minneapolis-cnn-crew-arrested/index.html> [<https://perma.cc/B58E-6BNN>] (“A CNN crew was arrested while giving a live television report Friday morning in Minneapolis . . . as the crew covered ongoing protests over the death in police custody of George Floyd.”).

<sup>38</sup> See Dave McNary, *SAG-AFTRA Condemns Police Attack on Louisville Journalists Covering Protest*, VARIETY (May 30, 2020, 5:37 PM), <https://variety.com/2020/tv/news/police-attack-louisville-journalists-sag-aftra-1234621164> [<https://perma.cc/755U-B9KE>] (“[A]s WAVE-TV was on air, Rust was heard yelling off-camera: ‘I’ve been shot! I’ve been shot!’ Video showed a police officer aiming directly at the camera crew, as Rust described the projectiles as ‘pepper bullets.’”).

<sup>39</sup> See Ian Shapira, *He Risked His Life Photographing the 1961 Freedom Riders. Theodore Gaffney Just Died from the Coronavirus at 92.*, WASH. POST (Apr. 16, 2020), <https://www.washingtonpost.com/history/2020/04/16/he-risked-his-life-photographing-1961-freedom-riders-theodore-gaffney-just-died-coronavirus-92> [<https://perma.cc/SZE2-AHDW>] (describing Gaffney’s terror when the mob attacking the Freedom Riders recognized him in the Birmingham bus station).

### III. THE FIRST AND FOURTH AMENDMENTS CAN PROTECT BLACK PROTEST THROUGH *BIVENS* RELIEF

Objections to police misconduct are hardly a new phenomenon in American law, and our constitutional history provides a clear basis for applying a damages remedy to them under the First and Fourth Amendments. This Part proceeds by exploring that history in Section A. Then, Section B will examine how widely known case law from the founding era should provide a jurisprudential basis for a modern damages remedy against illegal searches and seizures aimed at suppressing dissent. Finally, Section C will examine the application of these arguments to contemporary cases and current events.

#### A. *Police Abuses and the Origins of the Bill of Rights*

Police suppression of dissent is not a *new* problem, and its solution is centuries old, too. To really explore the tools our Constitution gives us for dealing with government suppression of dissent, we need to look back to 1762. That year, the King of England's Chief Messenger, Nathan Carrington, along with three of his comrades, raided the home of John Entick, a writer who published pamphlets criticizing the King.<sup>40</sup> They broke his locks, confiscated his pamphlets and charts, and caused around £2,000 in damage.<sup>41</sup> The following year, the King ordered the issuance of general warrants to combat seditious libel. This led to the raid of the home of another publisher, John Wilkes—who also happened to be a Member of Parliament whom Entick supported.<sup>42</sup> Both men challenged the invasions of their homes and the seizure of their papers, winning significant monetary judgments against the King's men—amounting to hundreds of thousands of dollars today.<sup>43</sup>

In the following decades, their cases were wildly popular with rebellious Americans as exemplars of the limits of royal power.<sup>44</sup> The authors of the various new States' declarations of rights incorporated provisions meant to protect the free press as well as the homes, papers, and personal property of

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<sup>40</sup> Entick v. Carrington (1765) 95 Eng. Rep. 807, 810 (KB).

<sup>41</sup> See *id.* at 807-08.

<sup>42</sup> See Wilkes v. Wood (1763) 98 Eng. Rep. 489, 498 (KB) (explaining the issuance of the warrant and subsequent raid).

<sup>43</sup> See *id.* at 499 (stating that the jury found for Mr. Wilkes and awarded £1,000 in damages); Entick, 95 Eng. Rep. at 818 (voiding the validity of the warrant and granting judgement for the plaintiff).

<sup>44</sup> See Doug Herring, *Historical Basis of the Fourth Amendment*, HERRINGDEFENSE (Feb. 17, 2016), <https://herringdefense.com/historical-basis-fourth-amendment> [<https://perma.cc/6UX3-E58M>] (contrasting the holdings in Entick and Wilkes, which were favorable to the plaintiffs, with the outcome of the Writs of Assistant Case, in which the authority of British customs inspectors to execute blanket search warrants of Boston merchants was affirmed).

citizens. Those provisions, of course, found their way into the Bill of Rights as parts of the First and Fourth Amendments. The Supreme Court has recognized the role of *Entick* and *Wilkes* in the foundations of our civil rights, and the historical role played by monetary damages remedies at common law for violations of those rights.<sup>45</sup>

B. *The Role of Foundational Cases in Clearly Establishing Law  
and Indicating Congressional Intent*

So, what do Eighteenth-Century trespassing cases in England have to do with Black Lives Matter protests? Aside from the somewhat strained comparison of dissenters with vastly different values, the connection is really about the nuances of overcoming modern qualified immunity defenses and satisfying the requirements of *Bivens* relief. When a police officer or other government employee invokes qualified immunity, a civil rights suit against them can't proceed unless the official violated *clearly established law*.<sup>46</sup> The *Bivens* doctrine also allows civil rights suits for monetary damages against federal officials (who are exempted from the main federal civil rights statutes), though the Supreme Court has backed away from that doctrine in recent decades, claiming deference to Congress.<sup>47</sup> But what could be more clearly established law—and proof of Congressional intent—than the cases Congress took as inspiration when it passed the Bill of Rights?<sup>48</sup> These foundational cases provide sufficient basis to both extend damages under *Bivens* and overcome the clearly established law prong of qualified immunity.

The Fourth Amendment application of *Bivens* to protect Black protest is rather straightforward—*Bivens* was, after all, a Fourth Amendment case. While not all Fourth Amendment claims have been upheld, the rejected claims have tended to focus on the novelty of extending *Bivens* to an immigration context.<sup>49</sup> The claims of protestors and journalists would center

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<sup>45</sup> See *Stanford v. Texas*, 379 U.S. 476, 484-85 (1965) (stating that the First, Fourth, and Fifth Amendments demonstrate learnings from *Entick v. Carrington*).

<sup>46</sup> See *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (“[G]overnment officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”).

<sup>47</sup> See *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1857-58 (2017) (“[T]he [*Bivens*] inquiry must concentrate on whether the Judiciary is well suited, absent congressional action or instruction, to consider and weigh the costs and benefits of allowing a damages action to proceed.”).

<sup>48</sup> See *Fourth Amendment: Historical Background*, CONST. ANNOTATED [https://constitution.congress.gov/browse/essay/amdt4\\_1](https://constitution.congress.gov/browse/essay/amdt4_1) [<https://perma.cc/UM2U-NL63>] (describing the cases relating to searches, seizures, and warrants, that form the historical backdrop to the Fourth Amendment).

<sup>49</sup> See *Abbasi*, 137 S. Ct. at 1851-52 (detention of undocumented immigrants in a terrorism sweep); *Hernandez v. Mesa*, 140 S. Ct. 735, 739 (2020) (cross-border shooting by federal agents).

upon illegal searches and seizures of a person and their property for domestic law enforcement purposes—essentially the same context as *Bivens* itself.

But *Bivens* relief under the Fourth Amendment is restricted by prior Fourth Amendment case law. The Supreme Court has carved out so many exceptions to the protection against unreasonable searches and seizures that they begin to dominate the rule.<sup>50</sup> A competent officer—one unlikely to lose a Fourth Amendment qualified immunity defense—should be able to avoid *Bivens* liability under the Fourth Amendment even while unjustifiably harassing protestors.<sup>51</sup> A claim for First Amendment retaliation is likely easier to prove, though a *Bivens* remedy for it is not universally recognized.<sup>52</sup> Both protestors and press would have clearly cognizable claims if their activities were arbitrarily stymied by police.<sup>53</sup>

There are several reasons to believe that the Constitution implies a damages remedy for First Amendment violations that would satisfy the two-step framework for extending *Bivens*. First, the Supreme Court has recognized that the First Amendment freedom of the press derives in part from *Entick* and *Wilkes*.<sup>54</sup> Because those foundational cases involved large damages awards for the unlawful disruption of publishers by government officials, Congress can be fairly said to have already considered and endorsed the availability of damages to redress such violations. The distinction between the freedom of speech and the freedom of the press is murky, and sometimes treated as nonexistent.<sup>55</sup> Protestors' speech rights, then, can easily be considered to fall within the scope of *Entick* and *Wilkes*.

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<sup>50</sup> See, e.g., Mark Moller, *The Fourth Amendment as Legal Fiction*, CATO INST.: CATO AT LIBERTY BLOG (June 15, 2006, 9:28 PM), <https://www.cato.org/blog/fourth-amendment-legal-fiction> [<https://perma.cc/37US-TLP5>] (“The result: An originalist constraint on police entry is recognized on paper, but left unenforced as a matter of breezy, factually unsupported judicial policy that would make even Justice William O. Douglas blush.”).

<sup>51</sup> See, e.g., *State v. Reynolds*, 504 S.W.3d 283, 315 (Tenn. 2016) (applying a good faith exception to avoid analyzing whether an implied consent statute could provide justification for a blood draw). Fourth Amendment jurisprudence is so full of exceptions that they practically swallow the rule. The application of such exceptions to a search as invasive as a blood draw has obvious implications for the difficulty of challenging far less invasive searches.

<sup>52</sup> See *Vanderklok v. United States*, 868 F.3d 189, 199–200 (3d Cir. 2017) (declining to recognize a First Amendment *Bivens* cause of action due to the Supreme Court’s recent reluctance to recognize new *Bivens* claims). *But see* *Wood v. Moss*, 572 U.S. 744, 757 (2014) (“[W]e have several times assumed without deciding that *Bivens* extends to First Amendment claims. We do so again in this case.” (citation omitted)).

<sup>53</sup> See *Lozman v. City of Riviera Beach*, 138 S. Ct. 1945, 1955 (2018) (describing criticism of public officials as “high in the hierarchy of First Amendment values” and rejecting the need for a plaintiff in such a retaliatory arrest suit to prove an absence of probable cause).

<sup>54</sup> See *Stanford v. Texas*, 379 U.S. 476, 485 (1965).

<sup>55</sup> See Jud Campbell, *Natural Rights and the First Amendment*, 127 YALE L.J. 246, 288–89 (2017) (discussing both the frequent treatment of the rights as equivalent and some of the historical justification for treating them as distinct); *id.* at 304–13 (discussing the wide range of meanings the two rights carried to different Founding Era elites).

Second, the Supreme Court has found a damages remedy appropriate in other First Amendment contexts. In *Tanzin v. Tanvir*, the Court permitted litigants to recover damages in suits for violations of their free exercise of religion.<sup>56</sup> Granted, this case relied upon the Religious Freedom Restoration Act (RFRA) rather than the First Amendment by itself.<sup>57</sup> But the RFRA does not purport to be a radical departure from the First Amendment's core principles.<sup>58</sup> Even though RFRA's provisions were too broad to apply to the states,<sup>59</sup> it did not exceed Congress's power to limit federal executive and legislative authority through remedial legislation.<sup>60</sup> Congress's intent is clear on the face of RFRA's language: RFRA restored the Constitutional order as Congress understood it to exist before *Employment Division v. Smith*.<sup>61</sup> RFRA does not explicitly authorize damages as relief, but the Court unanimously interpreted § 3(c)'s guarantee that a litigant may "obtain appropriate relief" to include damages.<sup>62</sup>

With both Founding Era and modern Congresses giving evidence supporting a damages remedy for First Amendment violations, we can infer

<sup>56</sup> 141 S. Ct. 486, 493 (2020).

<sup>57</sup> See *id.* at 489-90 ("As usual, we start with the statutory text. A person whose exercise of religion has been unlawfully burdened may 'obtain appropriate relief against a government.' 42 U.S.C. § 2000bb-1(c).") (citation omitted).

<sup>58</sup> See Religious Freedom Restoration Act of 1993, Pub. L. 103-141, 107 Stat. 1488 § 2 (codified at 42 U.S.C. § 2000bb note) (finding that the Court had departed from the First Amendment as Congress understood it and seeking to restore a prior interpretation). RFRA is open to abuse when it is weaponized against vulnerable populations, such as the LGBTQ+ community. See Tom Gjelten, *How the Fight for Religious Freedom Has Fallen Victim to the Culture Wars*, NPR (May 23, 2019, 5:00 AM), <https://www.npr.org/2019/05/23/724135760/how-the-fight-for-religious-freedom-has-fallen-victim-to-the-culture-wars> [<https://perma.cc/8KLN-9SAY>] ("[Conservatives] argued that religious freedom should mean they can't be forced to accommodate something they don't believe in. Liberals portrayed that stance simply as discriminatory and argued it should be illegal."). The compelling interest test, though, is fundamentally sound—it is our weak Equal Protection jurisprudence that fails to recognize the compelling government interest in preventing discrimination against vulnerable communities. Compare David E. Bernstein, *Antidiscrimination Laws and the First Amendment*, 66 MO. L. REV. 83, 117-18 (2001) (discussing a recent break from applying the compelling interest test in favor of antidiscrimination statutes); with Erwin Chemerinsky, *Not a Masterpiece: The Supreme Court's Decision in Masterpiece Cakeshop v. Colorado Civil Rights Commission*, HUM. RTS. Oct. 2018, at 11, 11 (predicting that future decisions will open religious exemptions to generally applicable antidiscrimination laws).

<sup>59</sup> See *City of Boerne v. Flores*, 521 U.S. 507, 533-34 (1997).

<sup>60</sup> More accurately, RFRA, as modified by its successor, the Religious Land Use and Institutionalized Persons Act of 2000 still applies. See *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 695 (2014).

<sup>61</sup> 107 Stat. 1488, § 2(a)(4); see also *Emp. Div. v. Smith*, 494 U.S. 872, 890 (1990) (allowing the State of Oregon to deny unemployment compensation to individuals that ingested peyote as part of a religious ceremony because the state's ban on peyote use was not constitutionally required to have a religious exemption).

<sup>62</sup> See *Tanzin v. Tanvir*, 141 S. Ct. 486, 489, 490 (2020) ("The question here is whether 'appropriate relief' includes claims for money damages against Government officials in their individual capacities. We hold that it does.").

that Congress either already expressed its intention regarding the availability of damages under the First Amendment or declined to express its desire to do so. The only action that Congress *has* taken since the initial *Bivens* case regarding First Amendment remedies is a broad affirmation of the availability of all appropriate remedies.

### C. *Applying Bivens Relief to Recording Federal Law Enforcement*

Last December, I argued for the availability of First Amendment *Bivens* relief in an amicus curiae brief in *Dyer v. Smith* with Professor Katherine Mims Crocker.<sup>63</sup> Dustin Dyer sued two TSA employees who ordered him to stop recording a pat-down search of his husband and to delete the video from his phone in the Eastern District of Virginia.<sup>64</sup> The judge agreed with our contention that the right to record government officials is clearly established and that monetary damages are available as relief when officials violate that right.<sup>65</sup> The TSA agents appealed that ruling, which the Fourth Circuit Court of Appeals has now agreed to review. If the Fourth Circuit affirms that ruling, it will join several other circuits in holding that the First Amendment protects the right to record government officials.<sup>66</sup>

A robust First Amendment *Bivens* regime protects Black protest in multiple ways. Recognition that police officers—including federal agents—are personally liable for violating protestors' speech and assembly rights would encourage them to utilize strategies less likely to result in violence.<sup>67</sup> Robust protection for press observers and their equipment further protects Black protest by ensuring that any police abuses that *do* occur are documented and publicized. Assuming that police officers act in good faith—or at least enlightened self-interest—personal liability for constitutional violations will

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<sup>63</sup> See generally Brief of Amici Curiae Professors Katherine Mims Crocker and Brandon Hasbrouck in Support of Neither Party with Respect to Defendants' Motion to Dismiss, *Dyer v. Smith*, No. 19-0921 (E.D. Va. Dec. 11, 2020) ECF No. 30.

<sup>64</sup> *Dyer v. Smith*, No. 19-0921, 2021 WL 694811, at \*1 (E.D. Va. Feb. 23, 2021).

<sup>65</sup> See *id.* at \*8 (“[B]ecause ‘a general constitutional rule’ ‘applies with obvious clarity’ to the First Amendment violations that Dyer alleges, the right he asserts was ‘clearly established’ at the time of the alleged conduct.”).

<sup>66</sup> See Matt Ford, *A Major Victory for the Right to Record Police*, ATLANTIC (July 7, 2017), <https://www.theatlantic.com/politics/archive/2017/07/a-major-victory-for-the-right-to-record-police/533031> [<https://perma.cc/CEE3-J2JB>] (stating that the First, Third, Fifth, Seventh, Ninth, and Eleventh Circuits have already held that such a right exists).

<sup>67</sup> See ANNE NASSAUER, SITUATIONAL BREAKDOWNS: UNDERSTANDING PROTEST VIOLENCE AND OTHER SURPRISING OUTCOMES 123-28 (2019) (discussing effective police strategies for avoiding outbreaks of violence at tense protest confrontations).

help ensure that police respect the right of Black protestors to peacefully assemble and advocate for their own liberation.<sup>68</sup>

### CONCLUSION

The wave of racial justice protests in the summer of 2020 reignited an awareness that police routinely abuse protestors and press alike. The Trump Administration's use of federal agents in suppressing these protests<sup>69</sup> raises the issue that the remedies available against state and local police are not uniformly applied to federal employees. The First and Fourth Amendments provide avenues for asserting claims for damages through *Bivens* relief against such federal agents, and courts should affirm the availability of this remedy.

Congress can make this entire issue academic by enshrining *Bivens* in federal statutory law and ending qualified immunity. And it should. But until that time, we need courts to do what is not only permissible but right and protect our right to record government officials by making monetary damages available against officials who violate that right. Without that, we would lose a valuable tool for holding them accountable and advocating for necessary change.

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<sup>68</sup> Of course, there are still plenty of police who revel in the idea of suppressing Black protest like modern day Bull Connors:

In a private Facebook group called the Pittsburgh Area Police Breakroom, many current and retired officers spent the year criticizing chiefs who took a knee or officers who marched with Black Lives Matter protesters, whom they called "terrorists" or "thugs." They made transphobic posts and bullied members who supported anti-police brutality protesters or Joe Biden in a forum billed as a place officers can "decompress, rant, share ideas."

Associated Press, *Police Officers' Posts to Private Facebook Group Show Hostility and Hate*, PBS: NEWS HOUR (Mar. 22, 2021, 9:41 AM), <https://www.pbs.org/newshour/nation/police-officers-posts-to-private-facebook-group-show-hostility-and-hate> [https://perma.cc/WF28-AD7J].

<sup>69</sup> See Dan Mangan, *Oregon Outrage: Elected Officials Blast Federal Authorities for Grabbing Protestors off the Streets in Portland*, CNBC (July 17, 2020, 4:41 PM), <https://www.cnbc.com/2020/07/17/george-floyd-federal-authorities-grab-portland-protesters.html> [https://perma.cc/J4VA-6LFD] ("Oregon elected officials blasted President Donald Trump's administration after reports that federal law enforcement personnel in recent days have arrested protestors off the streets of Portland while using unmarked government vehicles and refusing to tell people why they are being detained.").