



ESSAY

**“Foreseeable Violence” & Black Lives Matter:
How *Mckesson* Can Stifle a Movement**

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Introduction

Catalyzed by the death of George Floyd, protests against police brutality and systemic racism have spread across the United States and the world in 2020. Throughout the country, law enforcement has responded to these protests with the same type of brute force that protesters are challenging—excessive, violent, and militarized. Many have hypothesized that these protests, and the violent police response to them, will liberalize Americans’ perspectives on racial injustices.¹

While the current national tide leaves many participants in the antiracist struggle cautiously optimistic about the potential for progressive reform, next Term the Supreme Court faces a case that has major implications for the right to protest and the rights of those on the front lines of the Black Lives Matter movement.

Mckesson v. Doe,² a case out of the Fifth Circuit, could not be timelier. It examines whether a protest organizer, racial justice activist DeRay Mckesson, can be held liable for injuries that a police officer sustained during a Black Lives Matter protest. The Court should take the case: The Fifth Circuit’s holding creates a “negligent protest” standard, in which protest organizers can be held liable for any “foreseeable violence” that occurs during the course of the protest, regardless of whether the organizer intended, authorized, directed, or ratified the violent act. The holding must be overturned—it opens the door to

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1. Michael Tesler, *The Floyd Protests Will Likely Change Public Attitudes About Race and Policing. Here’s Why*, WASH. POST (June 5, 2020, 4:00 AM PDT), <https://perma.cc/PH54-MLTH>.

2. *Doe v. Mckesson*, 9s45 F.3d 818 (5th Cir. 2019), *petition for cert. filed*, No. 19-1108 (U.S. Mar. 5, 2020).

unfettered liability against protesters, of which Black and racial justice protesters will bear the brunt. If the Court does take the case, the briefing and the Court’s analysis will likely turn on whether a protest organizer can be held liable for “foreseeable violence” at a protest, a standard created by the Fifth Circuit, and how that standard squares with a forty-year-old precedent, *NAACP v. Claiborne*.³ But in deciding *Mckesson*, it is imperative that the Court look beyond the applicability of *Claiborne* and recognize the racialized impact that the Fifth Circuit’s “foreseeable violence” standard will have on Black protesters. The recent wave of protests against racial injustice and ensuing police violence has made clear that law enforcement, legislators, and even judges do not apply the right to protest in a race-neutral manner. It is high time that the Court acknowledge this reality.

In this Essay, I draw from recent events to show how the Fifth Circuit’s “foreseeable violence” standard uniquely harms Black and racial justice protesters. I contextualize the Fifth Circuit’s opinion in *Mckesson* as part of a wider project spanning state and local legislatures aimed at stifling Black protest. I also show that the Fifth Circuit’s liability standard, one in which protest organizers are responsible for any “foreseeable violence,” will disproportionately target Black protesters, as Black protests are overpoliced—often by a militarized police force—and are thus more likely to have violent encounters with police. Moreover, implicit bias plays a role both in the likelihood of police officers using force against Black protesters, and in how judges conceive of whether violence at a protest was “foreseeable.” I use this particular inflection point in our history to highlight how even tort liability standards for protest can be, and will be, weaponized against those whose First Amendment rights are the most vulnerable.

I. The Murder of George Floyd & Ensuing Protests

On May 25, 2020, George Floyd, a forty-six-year-old Black man and father to six-year-old Gianna,⁴ purchased cigarettes at a locally owned grocery store in Minneapolis, Minnesota.⁵ The grocery clerk, believing that Floyd paid with a counterfeit bill, called the police.⁶ Officers arrived on the scene and ordered Floyd out of his car.⁷ According to a criminal complaint filed against one of the

3. 458 U.S. 886 (1982).

4. Lindsay Lowe, *George Floyd's Daughter Gianna Shares Memories with Her Dad in Father's Day Interview*, TODAY (June 22, 2020), <https://perma.cc/J7JY-DQ8U>.

5. Nicholas Bogel-Burroughs & Jack Healy, *Cup Foods, a Minneapolis Corner Store Forever Tied to the Death of George Floyd*, N.Y. TIMES (updated June 17, 2020), <https://www.nytimes.com/2020/06/15/us/cup-foods-minneapolis-george-floyd.html>.

6. *Id.*

7. Amended Criminal Complaint at 3, *Minnesota v. Chauvin*, No. 27-CR-20-12646 (Minn. Dist. Ct. 2020).

Minnesota police officers, they handcuffed Floyd and attempted to put him in the police car. Floyd resisted and was eventually pulled back out, falling face down on the ground. Officer Derek Chauvin then put his knee on Floyd’s neck. He held Floyd in this position for eight minutes, during which Floyd repeated, over and over, “I can’t breathe.” Floyd also called for his mother and pleaded with the officers to release him. The three other officers on the scene did nothing. During this time, Floyd stopped breathing. Officers checked for a pulse and could not find one. Officer Chauvin’s knee remained on Floyd’s neck at this time. The officers called for an ambulance, and only when paramedics arrived did Officer Chauvin remove his knee from Floyd’s neck. Floyd was pronounced dead shortly thereafter.⁸

I rehash this particular night to contextualize the events that catalyzed where we are today. The following day, after videos of Floyd’s murder had been circulated on social media and in the news, protests were organized throughout Minneapolis.⁹ On May 27, 2020, protests spread to other cities, where protesters called for justice for others who have recently been murdered by police and vigilante violence, such as Breonna Taylor in Louisville, Kentucky, and Ahmaud Arbery in Brunswick, Georgia.¹⁰ On May 28, 2020, Minnesota Governor Tim Walz activated the National Guard to respond to acts of vandalism and fires that were set during the course of demonstrations.¹¹ Protests continued in Minneapolis, and police in riot gear responded with tear gas and mass arrests.¹² In one well-publicized incident, Oscar Jimenez, a Black CNN news anchor, was handcuffed while on air reporting on the protests.¹³

As protests spread across the country, police officers responded with characteristic force. Military vehicles and officers in full riot gear descended on cities, oftentimes deploying tear gas, pepper spray, flash-bangs, rubber bullets, and beanbag rounds.¹⁴ In Salt Lake City, officers clad in riot gear pushed a man with a cane to the ground.¹⁵ In Brooklyn, two police SUVs drove into a crowd of protesters.¹⁶ In Atlanta, police officers tasered two college students in a car.¹⁷ In Buffalo, two police officers pushed a seventy-five-year-old protester to the

8. *Id.* at 3-4.

9. Derrick Bryson Taylor, *George Floyd Protests: A Timeline*, N.Y. TIMES (June 22, 2020), <https://www.nytimes.com/article/george-floyd-protests-timeline.html>.

10. *Id.*

11. *Id.*

12. *Id.*

13. James Poniewozik, *CNN Arrest Is What Actual Censorship Looks Like*, N.Y. TIMES, (May 29, 2020), <https://perma.cc/L98F-UVPT>.

14. Knvul Sheikh & David Montgomery, *Rubber Bullets and Beanbag Rounds Can Cause Devastating Injuries*, N.Y. TIMES (June 12, 2020), <https://perma.cc/6G9Y-JRYQ>.

15. Shaila Dewan & Mike Baker, *Facing Protests over Use of Force, Police Respond with More Force*, N.Y. TIMES (updated June 2, 2020), <https://perma.cc/TH3L-2UFB>.

16. *Id.*

17. *Id.*

ground; he lay motionless on the ground, bleeding from his head, while dozens of other officers walked past without rendering aid.¹⁸

The events of the last three months have galvanized Americans across the political spectrum to demand accountability for police brutality and racial justice. The phrase “Black Lives Matter” has gone from a polarizing rhetorical boogeyman to a relatively uncontroversial rallying cry, taken up by politicians, celebrities, and corporations regardless of their political affiliation.¹⁹

But this moment has been about protest, and specifically Black protest, as much as it has been about police brutality. Social media and news channels have run an almost constant stream of videos of police officers brutalizing protesters in cities across the United States. And advocates and policymakers have seized on this moment to draw attention to the increasing militarization of local police forces.²⁰ Police and government responses to Black Lives Matter protesters starkly contrasted with police responses to predominantly white armed protesters, just weeks earlier, demanding the reopening of businesses that were closed due to COVID-19.²¹

The brutalization of racial justice protesters is not new. Many Americans can likely recall the images of fire hoses and dogs set on predominantly Black protesters in Birmingham in 1963. But while the brutalization of Black protesters is part and parcel of our country’s ugly racial history, these attempts to stymie protests for racial justice have taken a new and troubling turn in the last few years. Indeed, since the murders of Trayvon Martin in Florida in 2012 and Michael Brown in Ferguson in 2014 and the growth of the Black Lives Matter movement nationwide, there has been a concurrent increase in attempts to criminalize and create new avenues of liability for protest, thereby stymieing calls for racial justice and police accountability.²²

This Term, the Supreme Court has the opportunity to reverse this trend in *Mckesson v. Doe*. The Fifth Circuit’s holding allows protest organizers to be held liable for injuries that police officers incur while policing protests. The briefing and the Court’s holding will likely focus on whether the Fifth Circuit’s

18. Jacqueline Rose & Eric Levenson, *Buffalo Protester Martin Gugino Has a Fractured Skull and Cannot Walk*, CNN (June 16, 2020, 4:05 PM ET), <https://www.cnn.com/2020/06/16/us/martin-gugino-protester-skull/index.html>.

19. See Nate Cohn & Kevin Quealy, *How Public Opinion Has Moved on Black Lives Matter*, N.Y. TIMES: THE UPSHOT (June 10, 2020), <https://perma.cc/ZEM3-2H24>.

20. See, e.g., Ryan Browne, *Senior Pentagon Officials Are Concerned About the Militarized Appearance of Police and Law Enforcement Officers*, CNN (June 23, 2020, 2:43 PM ET), <https://perma.cc/V4ZC-34VQ>; Jack Riley & Aaron C. Davenport, *How to Address Concerns About “Militarization of Police”*, WALL ST. J. (June 14, 2020, 12:49 PM ET), <https://perma.cc/C9N4-P66L>; Brian Heater, *The 1033 Program Takes Center Stage Again as Militarized Police Make Headlines*, TECHCRUNCH (June 8, 2020, 1:42 PM PDT), <https://perma.cc/3FMV-KMAL>.

21. Ayman Ismail, *The Anti-Lockdown Protests Prove Police Know How to Treat Protesters Fairly*, SLATE (May 28, 2020, 7:38 PM), <https://perma.cc/48WJ-HRFG>.

22. See *infra* Section II.B.

opinion is compatible with a long-standing Supreme Court precedent, *NAACP v. Claiborne*. But police brutality, racial injustices, and protesters’ rights are currently at the forefront of national discourse; in deciding whether to take the case and ultimately how to rule in it, the Supreme Court should not divorce its analysis from the racial implications of the Fifth Circuit’s liability standard.

II. *Mckesson v. Doe*

A. The Fifth Circuit Opinion

On July 5, 2016, two Baton Rouge police officers shot 37-year-old Alton Sterling, a Black man, at close range.²³ That night, protesters assembled at the intersection where Sterling was murdered to demand justice and accountability.²⁴ They then regrouped in front of City Hall.²⁵ Protests continued over the next week.²⁶

The police responded with brute, militarized force. They descended on protesters with armored vehicles (one of which drove slowly into protesters)²⁷ and wielded military-grade assault rifles and a “long-range acoustic device,” which creates painfully loud sounds designed to drive people away.²⁸ Other officers were armed with thirty-round magazines—clipped together to allow them to reload faster if needed—and clad with heavy-duty armor and low-profile helmets with night-vision binocular mounts.²⁹ On the weekend of July 8, police officers arrested over 200 protesters, oftentimes without cause and while using excessive force.³⁰ The city of Baton Rouge ultimately paid a cash

23. German Lopez, *Alton Sterling Shooting: Video from Baton Rouge Police’s Cameras Released*, VOX (updated Mar. 30, 2018, 8:37 PM EDT), <https://perma.cc/GJ4M-45QV>.

24. *Alton Sterling: Video “Shows US Police Shooting Black Man in Louisiana,”* BBC NEWS (July 6, 2016), <https://perma.cc/NL4W-VUMH>.

25. *Id.*

26. *Timeline: Events Related to Alton Sterling’s Death*, ASSOCIATED PRESS (May 2, 2017), <https://perma.cc/Z6CG-E7WY>.

27. Maya Lau, *Helping or Hurting? Police Deploy Military-Style Gear at Alton Sterling Protests in Baton Rouge*, ADVOCATE (July 11, 2016, 8:50 PM), <https://perma.cc/6U8B-EPQL>.

28. Motion for Temporary Restraining Order and Preliminary Injunction at 4-5, *North Baton Rouge Matters v. City of Baton Rouge*, No. 16-cv-00463 (M.D. La. July 13, 2016).

29. Thomas Gibbons-Neff, *Why the Police in Baton Rouge Look Like They’re Dressed for War*, WASH. POST (July 11, 2016, 1:16 PM PDT), <https://perma.cc/VE88-7NS6>.

30. *See Baton Rouge Protesters File Lawsuit Alleging Baton Rouge Law Enforcement Officials Conspired to Suppress July 2016 Peaceful Protests with Mass Arrests on Phony Charges*, MACARTHUR JUST. CTR. (Mar. 24, 2017), <https://perma.cc/9LT9-KRK4>.

settlement to at least ninety-two of the protesters who were subjected to unconstitutional and abusive arrests.³¹

Among the hundreds arrested was DeRay Mckesson, a well-known activist affiliated with the Black Lives Matter movement. Mckesson was arrested for “simple obstruction of a highway of commerce.” He was released shortly after his arrest.³²

But Mckesson’s story did not end there. In November 2016, an anonymous Baton Rouge police officer sued Mckesson for injuries that he incurred during the Alton Sterling protests.³³ The plaintiff, known pseudonymously as Officer Doe, was tasked with responding to the Baton Rouge highway protest.³⁴ During the course of the protest, a number of protesters allegedly hurled water bottles at police officers.³⁵ At one point, an unidentified person allegedly threw a “rock like” object and injured Officer Doe.³⁶ Officer Doe did not know who injured him, nor did he allege that Mckesson directed the violence against him. Rather, his lawsuit against Mckesson alleged that, as an organizer of the protest, Mckesson should have known that the protests would become violent,³⁷ but did nothing to calm the crowd.³⁸

The district court dismissed the suit on First Amendment grounds, but the Fifth Circuit reversed, finding that protest organizers can be liable for a third party’s violence if they “knew or should have known” that a protest will turn violent.³⁹ The Fifth Circuit found that by leading protesters on to a public street and thereby breaking the law, Mckesson had conducted a protest “negligently.”⁴⁰ It was “patently foreseeable,” the court reasoned, that Baton Rouge officers would respond to the highway block by “making arrests,” which created a “foreseeable risk of violence” to “officers, bystanders, and demonstrators.”⁴¹ Thus, although an unknown demonstrator threw the projectile that injured Officer Doe, “Mckesson’s negligent actions were the ‘but for’ causes” of [Officer Doe’s] injury.⁴²

31. Andrea Gallo, *DeRay Mckesson, Arrested Alton Sterling Protestors to Get Payout from Baton Rouge in Lawsuit Settlement*, ADVOCATE (Nov. 22, 2016, 6:16 PM), <https://perma.cc/HQ3F-UBGK>.

32. Yamiche Alcindor, *DeRay Mckesson, Arrested While Protesting in Baton Rouge, Is Released*, N.Y. TIMES (July 10, 2016), <https://perma.cc/7SFQ-2K74>.

33. See Complaint for Damages/Police Officer Hit in Face with Rock, *Doe v. Mckesson*, No. 3:16-cv-00742 (M.D. La. Nov. 7, 2016).

34. *Id.* ¶¶ 3, 9.

35. *Id.* ¶ 18.

36. *Id.* ¶¶ 20-21.

37. *Id.* ¶ 28.

38. *Id.* ¶ 19.

39. *Doe v. Mckesson*, 945 F.3d 818, 826, 828 (5th Cir. 2019).

40. *Id.* at 827.

41. *Id.*

42. *Id.* at 828.

The briefing and the Fifth Circuit’s opinion primarily analyzed the longstanding precedent *NAACP v. Claiborne*, which shields protesters from liability for third-party violence, except when the protesters “authorized, directed, or ratified” the “specific tortious activity.”⁴³ Some First Amendment scholars note that absent any indication that Mckesson himself authorized or directed the rock-thrower’s conduct, Mckesson cannot be held liable for it.⁴⁴

While the First Amendment analysis and the applicability of an almost forty-year-old Supreme Court precedent in *Claiborne* is deserving of its own discussion and analysis, my focus here is highlighting how the “negligent protesting” standard created by the Fifth Circuit will disproportionately target Black protesters and those protesting against police injustice. This subject is particularly ripe for analysis given the current nationwide protests against police brutality.

B. Black Lives Matter and the Anti-Protest Project

In *Mckesson*, a key fact was that protesters blocked a major Baton Rouge highway in an act of civil disobedience. According to the Fifth Circuit, blocking the highway foreseeably resulted in arrests, which in turn foreseeably resulted in violence.⁴⁵ This logic creates an unfettered civil liability regime for anyone who dares risk arrest through civil disobedience. As others, including Judge Don Willett in his dissent, pointed out, the holding in *Mckesson* is at odds with our history of civil rights protest.⁴⁶ But it also makes Black Lives Matter protesters particularly vulnerable.

Civil rights protesters have long used civil disobedience as a means to secure political freedoms and civil rights. From Rosa Parks to lunch-counter sit-ins, freedom rides, and the march from Selma to Montgomery, civil rights activists have purposefully broken laws to protest racial injustices and discrimination and generate national attention for their demands.⁴⁷ But

43. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 916, 926-32 (1982). In fact, Judge Don Willett of the Fifth Circuit, who originally agreed with the majority opinion, subsequently issued a revised opinion, in which he described his “judicial change of heart” and dissented in part, reasoning that the majority’s opinion would stifle First Amendment rights. *Mckesson*, 945 F.3d at 835, 840-45 (Willett, J., concurring in part, dissenting in part).

44. See, e.g., *Appeals Court Chills First Amendment Activity by Allowing Cops to Retaliate Against Nonviolent Protesters*, RUTHERFORD INST. (Apr. 17, 2020), <https://perma.cc/QZ5Q-YA9T>; Garrett Epps, *Speech Rights for Trump, but Not DeRay Mckesson*, ATLANTIC (Apr. 30, 2019), <https://perma.cc/GC3R-PET8>.

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

46. *Id.* at 846-47 (Willett, J., concurring in part, dissenting in part).

47. See, e.g., Martin Luther King, Jr., *Letter from Birmingham Jail*, reprinted in 26 U.C. DAVIS L. REV. 835 (1993); Edward F. Marek, *Civil Disobedience in the Civil Rights Movement: To What Extent Protected and Sanctioned*, 16 W. RES. L. REV. 711, 712 (1965); Archibald Cox, *Direct Action, Civil Disobedience, and the Constitution*, 78 PROC. MASS. HIST. SOC’Y 105 (1966).

wittingly or not, protesters routinely break laws during protests, a phenomenon that is becoming more common due to an influx of antiprotest legislation that targets the Black Lives Matter movement.

In 2014, spurred by the death of Michael Brown in Ferguson, Missouri, Black Lives Matter protests calling attention to racialized police brutality broke out nationwide. By one estimate, over 780 protests occurred in over forty-four states in the year after Michael Brown’s death.⁴⁸ Black Lives Matter protesters have used diverse tactics to draw attention to their causes, from “die-ins” at well-attended public events⁴⁹ to occupying public spaces and police headquarters⁵⁰ and blocking major thoroughfares.⁵¹ For many activists, blocking highways, which have long run through Black neighborhoods and segregated Black communities from resources and opportunities in wealthier white neighborhoods, has a symbolic importance that highlights the connection between struggles for economic and racial justice.⁵²

As the Black Lives Matter protests have gained steam nationwide, lawmakers have responded by expanding criminal and civil liability for protesters. Since November 2016, legislators in forty states have proposed at least 133 bills that restrict the right to peaceful assembly in some way.⁵³ These bills would penalize protest bystanders,⁵⁴ criminalize protests in streets and

48. Vanessa Williamson, Kris-Stella Trump & Katherine Levine Einstein, *Black Lives Matter: Evidence That Police-Caused Deaths Predict Protest Activity*, 16 PERSPS. ON POL. 400, 403 (2018).

49. See, e.g., Mara H. Gottfried & Marino Eccher, *Black Lives Matter’s Twin Cities Marathon Protest Peaceful*, PIONEER PRESS (updated Oct. 28, 2015, 11:33 PM), <https://perma.cc/2DA4-B9RZ>.

50. See, e.g., Dale Kasler, *Black Lives Matter Plans to “Occupy” Sacramento Police Headquarters*, SACRAMENTO BEE (updated Mar. 14, 2019, 12:25 PM), <https://perma.cc/8K9L-C3JU>; Matthew Weaver & Jamie Grierson, *Black Lives Matter Protest Stops Flights at London City Airport*, GUARDIAN (Sept. 6, 2016, 6:44 PM EDT), <https://perma.cc/BQ55-9MH9>; Angela Jimenez, *Photos: Black Lives Matter Protesters Surround 4th Precinct*, MPR NEWS (Nov. 19, 2015, 2:13 AM), <https://perma.cc/US8P-AAJ5>.

51. See, e.g., Emmett Gienapp, *Black Lives Matter Rally Blocks Downtown Chattanooga Streets*, CHATTANOOGA TIMES FREE PRESS (July 22, 2016), <https://perma.cc/GEN2-GL36>; *Black Lives Matter Protests Peacefully Through Ybor City Streets*, TAMPA BAY TIMES (July 16, 2016), <https://perma.cc/PM7X-NX4G>; Lara Korte & Oliver Morrison, *Black Lives Matter Protesters Occupy Wichita Streets for Nearly Three Hours*, WICHITA EAGLE (updated July 13, 2016, 1:42 PM), <https://perma.cc/H8FC-G4EP>.

52. Olivia Paschal, *The Bitter History Behind the Highways Occupied by Protesters*, FACING SOUTH (June 5, 2020), <https://perma.cc/TYX3-8KB7> (“Demonstrators’ presence on highways whose very construction displaced and segregated black communities is a reminder that while the ongoing nationwide demonstrations were spurred by the deaths of Floyd and others at the hands of police, the injustices they protest have a deep history that’s embedded in the very fabric of the cities where residents are now demanding justice.”).

53. *US Protest Law Tracker*, ICNL, <https://perma.cc/XZJ8-8HUA> (last updated Aug. 30, 2020).

54. See, e.g., H. 1426, 65th Leg. Assemb. § 4 (N.D. 2017).

“Foreseeable Violence” & Black Lives Matter

73 STAN. L. REV. ONLINE 61 (2020)

highways⁵⁵, eliminate liability for police in cases where protesters or bystanders are killed during forced crowd dispersal,⁵⁶ allow police officers to use “any means necessary” to break up protests that obstruct traffic,⁵⁷ eliminate liability for hitting protesters,⁵⁸ and charge bystanders that refuse to assist in dispersal requests as rioters.⁵⁹ In some states, justification for this legislation has been explicitly tied to the growing Black Lives Matter movement and protests against police brutality in Ferguson.⁶⁰

Not all of these proposed bills have passed, but they are not without notice. John Inazu has highlighted that these antiprotest regulations cede too much authority to law enforcement,⁶¹ which is particularly troubling when law enforcement’s racism is the very issue being protested. Tabatha Abu-El Haj has also argued that criticisms of the disruptive nature of Black Lives Matter protests and legislation that penalizes these forms of protest are out of touch with the Founding Fathers’ conception of protected protest, which was subversive, unlawful, and often violent.⁶²

Even the recent spate of protests, has resulted in local governments enacting policies and regulations that are designed to deter and punish protesters. On June 1, 2020, Washington, D.C. instituted a curfew starting at 7:00 PM, prohibiting protests during the evening hours.⁶³ New York City

55. *See, e.g.*, H.1428, 191st Gen. Court (Mass. 2019); Act of Mar. 30, 2017, ch. 121, § 1, 2017 Tenn. Pub. Acts at cdviii (codified at TENN. CODE ANN. § 39-17-307(c)(2)); S. 1096, 2017 Leg., Reg. Sess. § 1 (Fla. 2017).

56. *See, e.g.*, Act of Mar. 9, 2018, ch. 112, 2018 W.V. Acts 1104, 1107-08 (codified at W. VA. CODE § 61-6-5 (2020)).

57. *See, e.g.*, S. 285, 120th Gen. Assemb., 1st Reg. Sess. (Ind. 2017). The bill as introduced states, “(15) minutes after first learning that a mass traffic obstruction exists in the official’s jurisdiction, dispatch all available law enforcement officers to the mass traffic obstruction with direction to use any means necessary to clear the roads of the persons unlawfully obstructing vehicular traffic.”

58. *See, e.g.*, H. 53, 2017 Gen. Assemb., Reg. Sess. § 2 (Ky. 2018).

59. *See, e.g., id.*

60. *See, e.g.*, Simon Davis-Cohen & Sarah Lazare, *Law Enforcement Has Quietly Backed Anti-Protest Bills in at Least 8 States Since Trump’s Election*, IN THESE TIMES (Apr. 16, 2018), <https://perma.cc/G788-K7AM>; Tafi Mukunyadzi, *Arkansas Governor Vetoes Anti-Mass Picketing Bill*, PHILA. TRIB. (Apr. 8, 2017), <https://perma.cc/L2CQ-TGEK> (noting that a proponent of an Arkansas bill that would have criminalized mass picketing “referenced a 2016 Black Lives Matter protest that blocked traffic for several hours in both directions on Interstate 40 in Memphis”); Alexis Zotos, *Mo. Lawmaker Wants to Ban Masks at Protests*, KMOV4 (Feb. 1, 2017) <https://perma.cc/E35X-CZ64> (noting that a proponent of a Missouri bill that would have criminalized the wearing of masks during unlawful protests “was inspired by the protests in Ferguson”).

61. John Inazu, *Unlawful Assembly as Social Control*, 64 UCLA L. REV. 2, 5, 29-37 (2017).

62. Tabatha Abu El-Haj, *Defining Peaceably: Policing the Line Between Constitutionally Protected Protest and Unlawful Assembly*, 80 MO. L. REV. 961, 967-72 (2015).

63. Office of the Mayor, D.C., *Mayor Bowser Orders Curfew* (June 1, 2020), <https://mayor.dc.gov/release/mayor-bowser-orders-curfew>.

imposed an 8:00 PM curfew the same day.⁶⁴ Law enforcement used these regulations as a pretense to brutalize and arrest protesters who remained on the streets after the start of the curfew. In Washington, D.C., hundreds of mostly people of color were arrested for being on the streets past the city’s curfew.⁶⁵ In the minutes leading up to the 8:00 PM curfew in the predominantly Black and Latinx neighborhood of Mott Haven⁶⁶ in the Bronx, police officers kettled protesters into one street block.⁶⁷ Using heavily armored police bicycles, police blocked protesters from leaving the confined area and slowly closed in, forcing them into extremely crowded and crushing conditions. At the moment the clock struck 8:00 PM, police officers pushed their bicycles into the crowd and assaulted protesters, with the ostensible purpose of making arrests for curfew violations.⁶⁸

It is crucial to recognize the climate in which the Fifth Circuit’s opinion is situated. In the face of a growing movement to create civil and criminal penalties for protest, the Fifth Circuit’s “negligent protest” standard empowers these anti-protest regulations to function more robustly. Now, any protester who engages in civil disobedience can be held liable for the violence of third-party actors at the protest. Even a protester who unwittingly breaks one of the hundreds of local ordinances on a state’s books is still on the hook. In the Fifth Circuit’s view, the mere breaking of an ordinance creates a “foreseeable risk of violence,” and thus anyone who breaks an ordinance can be held liable for creating such a risk. It is impossible to say what the Fifth Circuit had in mind when it created such a sweeping liability standard for protesters, but its holding is situated in a larger movement to quell Black Lives Matter protests.

C. “Foreseeable Violence” in the Face of the Militarized Police

According to the Fifth Circuit, the protesters were liable not just because they violated an ordinance, but because that violation led to foreseeable violence. I do not disagree that a Black Lives Matter protest, where people of color are engaging in civil disobedience against police brutality, is likely to result in tense encounters with police officers. But the same does not apply to

64. *NYC Curfew to Last Through Sunday; Vehicular Traffic Banned South of 96th Street During Curfew*, SPECTRUM NEWS (updated June 3, 2020, 2:58 AM ET), <https://perma.cc/ME6E-FSXF>.

65. Metro. Police Dep’t, D.C., *May-August 2020 Unrest-Related Arrests and Persons of Interest*, <https://perma.cc/U7V6-H8DD> (last updated Aug. 31, 2020); see also Unrest Arrest Summary Data (on file with author) (finding that 58% of people arrested for curfew violations and 66% of people arrested for any violation were not white).

66. Statistical Atlas, *Race and Ethnicity in Mott Haven, New York, New York*, <https://perma.cc/U52K-2EJD> (illustrating that Mott Haven is 67.8% Hispanic and 29.5% Black).

67. Jake Offenhartz, Nick Pinto & Gwynne Hogan, *NYPD’s Ambush of Peaceful Bronx Protesters Was “Executed Nearly Flawlessly,” City Leaders Agree*, GOTHAMIST (June 5, 2020, 3:34 PM), <https://perma.cc/S69A-VBFG>.

68. *Id.*

predominantly white protests that do not relate to racial justice. The most aggressive gun-carrying white protesters, who violate stay-at-home orders imposed in response to the COVID-19 pandemic and call for armed insurrections against state governments for ordering the temporary closure of businesses, have not been met with the same militarization, force, and mass arrests as nonviolent Black Lives Matter protesters.⁶⁹

The Fifth Circuit’s “foreseeable violence” standard will not be applied equally to all protesters. Black communities are overpoliced and disproportionately met with highly militarized police forces, which results in violent encounters between officers and protesters.⁷⁰ Moreover, due to unconscious bias, both police and judges are more likely to view Black protesters as dangerous and threatening.⁷¹ This bias results in police being more likely to use force against Black protesters and in judges being more likely to find that predominantly Black protests were foreseeably violent in comparison to predominantly white protests.⁷² *Mckesson* cannot be divorced from its racial context: Depending on which racial group takes to the streets and why it does so, the responses can be vastly different. The likelihood of violence, and thus the likelihood of liability, is much higher with Black protesters and those protesting police abuse.

1. Militarized Police Responses Fuel Violent Encounters

Protests in Black communities are more likely to elicit a militarized response. Perhaps the most striking example of police militarization in recent history was the police response to protests in Ferguson, Missouri, after Michael Brown’s death. In the weeks after Michael Brown was killed, Ferguson looked like a city under siege. Armored tanks rolled through the streets. Law enforcement officers dressed in army fatigues and riot gear toted military-grade assault rifles and flash grenades. Tear gas and rubber bullets besieged crowds that included children.⁷³

Since the death of George Floyd, Black Lives Matter protests have similarly been met with law enforcement officers ready for war. In Washington, D.C.,

69. See Li Zhou & Kainaz Amaria, *These Photos Capture the Stark Contrast in Police Response to the George Floyd Protests and the Anti-Lockdown Protests*, VOX (May 27, 2020, 4:50 PM EDT), <https://perma.cc/QY6R-QPZ5>.

70. Chan Tov McNamara, *White Caller Crime: Racialized Police Communication and Existing While Black*, 24 MICH. J. RACE & L. 335, 337-42 (2019).

71. See *infra* C.II.

72. *Id.*

73. German Lopez, *What Happened in Ferguson, Missouri, Following the Shooting and Grand Jury Decision?*, VOX (updated Jan. 27, 2016, 6:19 PM EST), <https://perma.cc/S4KN-DFTZ>; Dana Farrington, *Ferguson Police Use Tear Gas, Flash Grenades to Disperse Protesters*, NPR (Aug. 18, 2014, 5:16 PM ET), <https://perma.cc/PQ5M-967L>; Sarah Kliff, *Report: 8-Year-Old Hit With Tear Gas in Ferguson*, VOX (Aug. 17, 2014 10:40 PM EST), <https://perma.cc/YM46-S3F3>.

military helicopters swept over protesters in “show of force” maneuvers to intimidate and disperse crowds.⁷⁴ One law enforcement official described the protest being organized in Lafayette Square, which abuts the White House, as the “Alamo,” implying the city was under siege.⁷⁵ In New York City, NYPD officers clad in riot gear charged with barricades at protesters. Others deployed batons, shields, and pepper spray.⁷⁶

While the militarized police response to Black Lives Matter protests has now become predictable, it is emblematic of how police generally respond to Black communities. A 2018 study concluded that “militarized police units are more often deployed in communities with high concentrations of African Americans, a relationship that holds at multiple levels of geography and even after controlling for social indicators including crime rates.”⁷⁷

The militarized response to Black protesters starkly contrasts with how police tend to respond to predominantly white protesters. The Unite the Right protest in Charlottesville, Virginia, in August 2017 was widely advertised on far-right message boards as a violent uprising.⁷⁸ The local Charlottesville police chief and the State Police, however, failed to adequately prepare for the threats of violence and when there was “clear evidence of violence, police consistently failed to intervene, de-escalate, or otherwise respond.”⁷⁹ Ultimately, Heather Heyer was killed and dozens were injured when a car mowed down peaceful counterprotesters on a Charlottesville street.⁸⁰ More recently, when armed protesters assembled outside Michigan’s state capitol, in violation of the state’s stay-at-home order, and intimidated state lawmakers, they were not met with mass arrests or force.⁸¹

Moreover, the “foreseeable violence” standard overlooks how a militarized police response catalyzes violent encounters between police and protesters. When police officers attend Black Lives Matter protests in riot gear and use

74. Alex Horton, Andrew Ba Tran, Aaron Steckelberg & John Muyskens, *A Low-Flying Show of Force*, WASH. POST (June 23, 2020), <https://perma.cc/5FYJ-WDCE>.

75. Thomas Gibbons-Neff, Eric Schmitt & Helene Cooper, *Aggressive Tactics by National Guard, Ordered to Appease Trump, Wounded the Military, Too*, N.Y. TIMES (June 10, 2020), <https://perma.cc/HTE6-EA8V>.

76. *“It Felt Like Warfare”: Protesters Detail Clashes with Police During NY Attorney General Hearing*, PIX11 (updated June 18, 2020, 8:34 AM), <https://perma.cc/3ZQE-6LZ3>.

77. Jonathan Mummolo, *Militarization Fails to Enhance Police Safety or Reduce Crime but May Harm Police Reputation*, 115 PNAS 9181, 9181 (2018), <https://perma.cc/7J98-6QSC>.

78. George Joseph, *White Supremacists Joked About Using Cars to Run Over Opponents Before Charlottesville*, PROPUBLICA (Aug. 28, 2017, 2:53 PM EDT), <https://perma.cc/3CKN-BKAE>.

79. *Final Report: Independent Review of the 2017 Protest Events in Charlottesville, Virginia*, HUNTON & WILLIAMS at 155, 160 (2017).

80. *Id.* at 6.

81. See Michael Martina & Seth Herald, *Hundreds Protest Michigan Stay-at-Home Order*, REUTERS (May 14, 2020, 3:06 AM), <https://perma.cc/NL4E-L2TJ>.

military-grade weapons, they create an environment of intimidation and provocation that is more likely to lead to violence. The use of military equipment signals that police officers view themselves to be responding not to citizens practicing their First Amendment rights, but rather to a hostile enemy force. One former law enforcement official acknowledged that police officers are often trained to perceive protesters as the enemy.⁸² This us-versus-them mentality is exacerbated when protesters are majority-Black and law enforcement is majority-white.⁸³ The use of military weapons tends to embolden police to use violence and provoke protesters to respond with violence. Psychological studies show that the mere presence of weapons increases aggression in both police and protesters.⁸⁴ In addition to the immediate response that protesters likely have at the sight of military weapons, police in riot gear also arrive in military formation. Psychologists have found that marching in synchrony, such as in military formation, cultivates feelings of aggression towards and compliance with requests to aggress outgroups.⁸⁵

These psychological studies on the effects of militarized policing on violence are supported by the numbers. Social scientists who examined the relationship between militarized police forces and violence against civilians found that an increase in military equipment to police departments results in an increase in civilian fatalities from officer-involved shootings.⁸⁶

2. Implicit Bias Impacts What Violence Is Foreseeable

Implicit bias also plays a role in how individual officers interact with Black protesters. Countless psychological studies have shown that police officers’ tendency to associate Black people with aggression, criminality, and threats to personal safety.⁸⁷ These factors play a role in how police officers respond to

82. Tom Nolan, *Militarization Has Fostered a Policing Culture That Sets Up Protesters as “The Enemy,”* KINDER INST. FOR URB. RSCH. (June 10, 2020), <https://perma.cc/TA2E-SHS4>.

83. Kirsten Weir, *Policing in Black & White*, 47 MONITOR ON PSYCH. 36 (Dec. 2016).

84. Brad J. Bushman, *The “Weapons Effect,”* PSYCH. TODAY (Jan. 18, 2013), <https://perma.cc/AQ4B-RQP9>.

85. See Daniel M. T. Fessler & Colin Holbrook, *Marching into Battle: Synchronized Walking Diminishes the Conceptualized Formidability of an Antagonist in Men*, BIOLOGY LETTERS, Aug. 2014, at 1, 3.

86. Casey Delehanty, Jack Mewhirter, Ryan Welch & Jason Wilks, *Militarization and Police Violence: The Case of the 1033 Program*, RES. & POL., June 2017, at 3.

87. See, e.g., Katherine B. Spencer, Amanda K. Charbonneau & Jack Glaser, *Implicit Bias and Policing*, 10 SOC. & PERSONALITY PSYCH. COMPASS 50, 54 (2016); Justin Nix, Bradley A. Campbell, Edward H. Byers & Geoffrey P. Alpert, *A Bird’s Eye View of Civilians Killed by Police in 2015: Further Evidence of Implicit Bias*, 16 CRIMINOLOGY & PUB. POL’Y 309, 328-29 (2017); James H. Price & Erica Payton, *Implicit Racial Bias and Police Use of Lethal Force: Justifiable Homicide or Potential Discrimination?*, 21 AFR. AM. STUD. 674, 678, 681 (2017); Kimberly Barsamian Kahn & Paul G. Davies, *Differentially Dangerous? Phenotypic Racial Stereotypicality Increases Implicit Bias Among Ingroup and Outgroup Members*, 14 GRP. PROCESSES & INTERGROUP RELS. 569, 570 (2010).

protesters and in their arrest and use-of-force decisions.⁸⁸ A police officer making arrests at a Black Lives Matter protest in Baton Rouge, rather than at a predominantly white protest, is more likely to view protesters as threatening and violent, a view that often results in violent encounters between protesters and police.

In recent months, protests have hit the hearts of cities with relatively small minority populations, such as Portland, Oregon, and have brought out droves of white protesters. Racial justice protests since the death of George Floyd look markedly different from those before May 2020—one study estimates that over half of protesters marching in response to the murder of George Floyd are white.⁸⁹ And while these protesters have met the sorts of militarized response previously reserved for places like Ferguson, participants are acutely aware of how police respond to protesters of different races and have deliberately leveraged officers’ biases to protect people of color while protesting. Guides and articles on the protests have urged white protesters to “to do everything they can in their power to put their bodies between the bodies of black people and police.”⁹⁰ In Louisville, Kentucky, predominantly white women linked arms and formed a wall blocking police from Black protesters, which protesters called “white shield.”⁹¹ In a viral video, a young white woman launches herself in front of a young Black man, who faces down an approaching line of police officers with shields in Washington, D.C.’s Lafayette Park.⁹² While white protesters are not wholly immune from police abuse during racial justice protests, qualitative evidence from recent protests indicate that white protesters are not brutalized to the same extent as Black protesters.

Judges are also not immune from implicit bias. Psychological studies indicate that it is likely that judges will make subjective, after-the-fact determinations that protests with large numbers of Black participants were

88. Spencer, *supra* note 87 at 52, 54.

89. Dana R. Fisher, *The Diversity of the Recent Black Lives Matter Protests Is a Good Sign for Racial Equity*, BROOKINGS INST. (July 8, 2020), <https://perma.cc/B92S-JTRB>; see also Amy Harmon & Sabrina Tavernise, *One Big Difference About George Floyd Protests: Many White Faces*, N.Y. TIMES (updated June 17, 2020), <https://perma.cc/8WFX-HCZW>.

90. Emily Stewart, *How to Be a Good White Ally, According to Activists*, VOX (June 2, 2020, 2:10 PM ET), <https://perma.cc/MS7B-8KCR> (quoting Ben O’Keefe, former senior aide to Senator Elizabeth Warren); see also Louryn Strampe & Lauren Goode, *How to Protest Safely: What to Bring, What to Do, and What to Avoid*, WIRED (June 2, 2020, 4:36 PM), <https://perma.cc/6QBQ-RAS5>; PAUL KIVEL, GUIDELINES FOR BEING STRONG WHITE ALLIES (2006), <https://perma.cc/AG4G-F5BB>; Mari Vangen, *This Isn’t About You Bro; a How to Guide to Being White at Protests for Black Lives*, FEMINIST CAMPUS (July 13, 2016), <https://perma.cc/YN4F-XCSL>.

91. Neve Gordon & Nicola Perugini, *White Shields*, LRB Blog (June 9, 2020), <https://perma.cc/JWC2-68YN>.

92. Shomari Stone (@shomaritstone), TWITTER (May 31, 2020, 5:37 PM CT), <https://perma.cc/ZV4V-82XT>.

foreseeably violent, but will be less likely to say the same about white protests.⁹³ In determining after the fact whether a protest was foreseeably violent and thus a cause for liability, judges are more likely to view Black defendants unfavorably than white defendants. And in the First Amendment context, legal scholars like Justin Hansford and Derrick Bell have highlighted how judges are more inclined to rule against Black protesters’ rights when those protesters are seen as “militant” or as challenging state authority.⁹⁴ The foreseeable violence standard is problematically open-ended, leaving ample space for biased decisions against Black protesters.

Conclusion

We are at a moment of national reckoning, in which policymakers, academics, and law enforcement are made to confront the racial inequalities in our criminal justice system. And as we address the racialized impacts of criminal law, it is crucial that we consider tort law’s potential to target and harm racial minorities and racial justice movements.

Tort law, like criminal law, does not operate in a vacuum; the biases and systemic racism that exist in society are imported and weaponized in even private forms of justice. *Mckesson* highlights how these systems work in tandem—from police officers who brutalize members of the Black community, to state legislators who pass legislation to criminalize protest tactics, to law enforcement officers who again employ military weapons and brutal force against predominantly Black protesters because they are opposed to their message and perceive them as a threat. And now *Mckesson* introduces an additional element, where police officers and third parties can further sanction protesters, holding them liable for simply being at a protest where someone was harmed. *Mckesson* enables a heckler’s veto, in which individuals who are angry at the criticism levied against the criminal justice system can claim they were injured at a protest (without any proof that the injuries were even caused by a protester) and then sue protest organizers, alleging that their mere presence at a protest is enough to hold them liable.

93. See generally Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions*, 4 HARV. L. & POL’Y REV. 149, 151-58 (2010) (acknowledging that the author—a judge himself—is guilty of implicit bias and that judge-dominated voir dire processes are impermissibly vulnerable to judges’ implicit biases); Jeffrey J. Rachlinski, Sheri Lynn Johnson, Andrew J. Wistrich & Chris Guthrie, *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1208-26 (2009) (finding that judges harbor implicit bias that influences their judgments).

94. Justin Hansford, *The First Amendment Freedom of Assembly as a Racial Project*, 127 YALE L.J. F. 685, 697-98, 698 n.65 (2018) (citing DERRICK BELL, RACE, RACISM, AND AMERICAN LAW 549 (5th ed. 2004)) (describing the First Amendment as a racial project that “results in predictable racialized outcomes that redistribute resources along racial lines”).

If *Mckesson* is upheld, the effects will be devastating for racial justice protesters, from Black Lives Matter activists to indigenous organizers protesting the destruction of native lands. In *New York Times v. Sullivan*, the Supreme Court recognized the stifling effect of tort liability: “[T]he fear of [civil] damage awards may be markedly more inhibiting than the fear of prosecution under a criminal statute.”⁹⁵ Organizers have already expressed their concerns about the deterrent effect that *Mckesson* will have on potential protesters if it is not overturned.⁹⁶ While protesters might be willing to risk arrests, the costs of an open-ended liability regime that could potentially bankrupt individuals and organizations might be too high for protesters, particularly groups that are already under-resourced.

It would be a missed opportunity for the Court to view *Mckesson* simply as a right to protest case, when the right to protest in this country is frequently intertwined with the rights of the marginalized. Because protests are often the last bastion of political speech for groups whose political demands are otherwise unheard, limiting the right to protest also hinders crucial political reform. Key civil rights reforms were won through concerted and relentless protests. To uphold a standard that would disproportionately target the protest rights of those in society who need the right most (often those without the resources to meaningfully participate in other venues) would chill activity that is a crucial means of social change. When we punish the most vulnerable in society for raising their voices against oppression, our democracy as a whole suffers.

When the Supreme Court considers whether to hear *Mckesson v. Doe* this Term, it is imperative that it recognizes how much is at stake—for protesters, Black lives, and the larger racial justice movement.

95. 376 U.S. 254, 277 (1964).

96. See, e.g., Tony Mauro, *Nationwide Protests May Resound in Supreme Court First Amendment Case*, NAT’L L.J., (June 9, 2020, 1:15 PM), <https://perma.cc/LX5Q-MX4U> (“The Supreme Court should make sure that protesters and community organizers are not deterred by baseless lawsuits from the vital work of advocating for Black lives.” (quoting Kailee Scales, managing director of Black Lives Matter Global Network)).