

**NEW
ERA
OF
PUBLIC
SAFETY**

A GUIDE TO FAIR, SAFE, AND EFFECTIVE
COMMUNITY POLICING

6

THE FIRST AMENDMENT AND FREE SPEECH

The First Amendment to the U.S. Constitution protects some of our most cherished rights: our right to speak and publish freely, to gather publicly in large groups, to petition and lobby our government, and to practice religion. These rights lie at the heart of our democracy, yet they are often a source of tension between police departments and the communities they serve. Police are charged to protect the peace, but public assemblies sometimes turn violent, especially when massive amounts of people gather. Some officers, meanwhile, are uncomfortable being photographed or recorded while doing their jobs because they fear recordings will be used against them.

Police leaders should implement policies and practices that respect and protect the public's constitutional rights while maintaining public safety. To strike this balance, departments should train officers to serve in a wide range of unpredictable situations.

Most importantly, they should create and sustain a culture that understands and respects two deeply held values that sometimes come into conflict: keeping peace and exercising freedom. Achieving these goals is necessary during events such as celebrations of local sports teams, community parades, political protests, and presidential funerals. Police, in other words, have to manage crowds in a variety of contexts — but they are always bound to protect constitutional rights.

RECOMMENDED BEST PRACTICES

To respect and protect the public's First Amendment rights while ensuring safe public assemblies, departments should:

6.1

Clearly instruct officers about the public's right to record law enforcement activities.

6.2

Engage in cooperative and strategic advance planning.

6.3

Limit and closely supervise information-gathering techniques that target activities protected by the First Amendment.

6.4

Demilitarize officers and require them to interact with assemblers in a respectful and positive manner.

6.5

Promote crowd control tactics that are less likely to cause injury and set clear limits on the use of force.

6.6

Hold officers accountable for their responses to public assemblies.

FIRST AMENDMENT RIGHTS

Public speech and assembly. Under the First Amendment, public streets and sidewalks generally may be used for public assembly and debate.¹ Assemblies include gatherings where the purpose of those assembled is to express their political, social, or religious views. They can range from a parade to a picket line, from a rally to a mass demonstration — and even to demonstrations about the police themselves.

The First Amendment's protections, however, are not absolute. The U.S. Supreme Court has found that it does not protect speech that "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."² In addition, the Court has found that the First Amendment permits narrow regulation of the time, place, and manner of speech provided that the regulation does not relate to the content of the speech involved.³ Local governments, for example, may regulate the circumstances in which protests spill over into public roadways out of concern for motorist and pedestrian safety — but not in response to their political messages.

Regulations, however, cannot be too onerous.⁴ Whether the government grants permits for public assemblies can't depend on the message of the participants, no matter how controversial, offensive, or hateful it may be.⁵ Permits must also be available on short notice to allow the public to respond to breaking events.⁶



Assemblies typically require the presence of police officers to protect participants, bystanders, and property. Demonstrations regarding politically charged issues sometimes draw counterdemonstrators, in which case officers may be needed to prevent conflict.

Recording police activity. The First Amendment protects an individual's right to record people — including police officers — and activities in public places, ranging from everyday interactions to mass demonstrations.⁷ This right extends to photography, audio recordings, and live-stream video and audio feeds, as well as to written documentation that journalists, for example, may have. As noted earlier, this right is not limitless; it may be subject to time, place, and manner restrictions that don't relate to

the purpose of photographing or recording. For example, a photographer may be legally barred from entering a cordoned-off crime scene or standing between officers and the people they are trying to arrest.

Police surveillance. Public safety concerns, such as the threat of terrorism, may warrant police surveillance and recording of public events (as long as it's done within the confines of constitutional protections). But surveilling or collecting information on people for activities that are protected by the First Amendment, such as attending a protest, recording police conduct in public, or practicing a certain religion, is not warranted. Activities that chill the free exercise of speech, assembly, and religious observance are just as unconstitutional as those that prohibit it.⁸



THE HISTORICAL CONTEXT

Public assemblies and police violence. Law enforcement has had a long, and sometimes troubled, history with public speech and assemblies. The past century has seen unlawful mass arrests and excessive uses of force in connection with anti-war and civil rights movements, and other causes.⁹ These clashes (whether in response to peaceful assemblies or not) have deeply affected the popular and political culture in this country.

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Although police officers in other countries still use police dogs and water cannons to quell public disturbances,¹⁰ these methods are rarely used in the United States today due to abuses during the civil rights movement.¹¹ Broad abuses of police power also took place during Vietnam War protests — from the beating of protesters at the 1968 Democratic National Convention in Chicago to the shooting of student protesters at Kent State University in Ohio in 1970.

Abuses such as these led to widespread public examination of police conduct — and national conversations about the use of force and social order. In 1970, President Nixon created a presidential commission to examine the student protest movement — ostensibly to identify means to increase public order. The commission studied different ways to reduce disruption on college and university campuses and found that police behavior during group demonstrations “is often the most critical determinant of the course the disorder may take.”¹²

Its report noted that officers who engage in “conduct that can be interpreted as excessive, harassing or discriminatory” not only violate law and policy but are also “apt to make moderate members of the campus community join with the disrupters against the police.”¹³ In other words, police power that is not lawfully and judiciously applied may spur and spread lawless behavior — not contain it.

Recording police activity. From newspaper images of peaceful protestors attacked by police dogs to private videos of police

brutality, recorded activity of police misconduct sometimes seizes the public’s imagination and undermines confidence in police. More than a quarter century ago, four White police officers were recorded beating a Black man, Rodney King, sparking massive demonstrations and a public debate about police misconduct, race, and criminal justice.

Since then, smartphone technology has made recording of police officers by private individuals an everyday occurrence. The impact of this technology is not yet fully understood, but it has, at a minimum, led to the prosecution of unlawful police action that would likely not have otherwise occurred.¹⁴

Police surveillance. Historically, U.S. law enforcement agencies, from the Federal Bureau of Investigation to local police departments, have spied on, infiltrated, and obstructed legal political activist groups, from those affiliated with the civil rights movements in the last century to Black Lives Matter today.¹⁵ First Amendment rights are also implicated by police surveillance of religious activities. In 2018, New York City settled a series of class action lawsuits alleging police surveillance of Muslims for more than \$1 million. The case led to mandated reforms, including policies barring religious profiling and strengthening accountability for the department’s terrorism investigations.¹⁶

When unlawful police surveillance comes to light, it chills free expression and destroys trust between communities and police. Distrust, in turn, discourages cooperation with police officers, which compromises their ability serve the public safely and effectively.

BEST PRACTICES IN SAFEGUARDING THE FIRST AMENDMENT AND FREE SPEECH

To respect and protect the public's First Amendment rights while ensuring safe public assemblies, departments should:

RECOMMENDATION 6.1 **CLEARLY INSTRUCT OFFICERS ABOUT THE PUBLIC'S RIGHT TO RECORD LAW ENFORCEMENT ACTIVITIES.**

Documenting police activities fosters public confidence and trust, increases police accountability, and safeguards public and officer safety. Some officers may not like being photographed or recorded on the job, but departmental policies should nonetheless recognize and respect the public's right to record police activity.

At the same time, these policies should reflect the fact that the public does not have the right to observe or record officers in a way that impedes their ability to do their jobs. Individuals who record police activity are subject to laws that prohibit physically obstructing an officer, putting public and officer safety at risk,¹⁷ trespassing, surreptitious recording, and other activities.¹⁸

Departments should implement policies that detail how officers should respond when recorded, and officers should be trained accordingly.

Departments should ensure that officers:

- + Treat all people with courtesy and respect.
- + Verbally acknowledge the public's right to film or photograph police activity.
- + Give individuals a reasonable opportunity to comply with orders or requests before taking action.
- + Recognize that those who record police activity are under no obligation to share their photos, footage, or other forms of documentation.

Departments should prohibit officers from:

- x Presuming recording devices are a threat to their safety.
- x Intentionally obstructing, threatening, or otherwise discouraging an individual from recording.
- x Telling individuals to back away, unless they are interfering with their job or are at risk of injury (e.g., advising someone to back away from a subject wielding a knife).
- x Telling individuals to stop recording or to leave the area. (If people are interfering with an officer's job, the officer should ask them to back away.)
- x Detaining individuals who are (or were) recording unless they have an independent legal basis for doing so. (Officers may ask individuals to share recorded material, but they can't detain them without reasonable suspicion they engaged in criminal activity.)
- x Seizing recording devices without a warrant or exigent circumstances.
- x Coercing individuals to consent to the search or seizure of their recording devices or recorded material. (For more detail, see Chapter 3.)
- x Destroying footage or other recorded material or threatening to do so.

Policies that prohibit officers from retaliating against people who lawfully record police activity are also important. When recording police activities, community members also bear a responsibility to avoid unnecessarily escalating the situation.¹⁹





The Minneapolis Police Department's policy on public recordings of police:

- Prohibits officers from asking people who are recording to identify themselves or explain why they are recording.
- Prohibits officers from trying to prevent people from recording or discouraging them from recording if they are not interfering with their duties.
- Requires officers to ask supervisors to come to the scene before trying to review a recording or asking for consent to do so.

Source: Public Recording of Police Activities, Minneapolis Police Dep't Policy and Procedure Manual, Section 9-202, (2016), http://www.ci.minneapolis.mn.us/police/policy/impdpolicy_9-200_9-200.

Participants in public assemblies should:

- + Treat all people (officers included) with courtesy and respect.
- + Step back if directed.
- + Show they are not a threat by refraining from sudden or aggressive movements.
- + Calmly ask officers to explain why they are detaining or questioning them.

Participants in public assemblies should not:

- x Interfere with officers on duty or otherwise get in their way.
- x Enter marked and restricted crime scenes or restricted areas that are not otherwise accessible to the public (conduct that is prohibited by law).
- x Insult or threaten officers.
- x Secretly record police activity.
- x Resist arrest or run if officers try to detain them.

Finally, the public should understand that recording people against their will, especially those in a state of crisis, may escalate an encounter and endanger the person, officers, and themselves.



RECOMMENDATION 6.2 ENGAGE IN COOPERATIVE AND STRATEGIC ADVANCE PLANNING.

Although it is impossible to create standard operating procedures for every possible type of assembly, departments' overall philosophy should, as the Metropolitan Police Department in Washington, D.C., states, "be one of moderation, flexibility and controlled response."²⁰

As noted above, the First Amendment allows some regulation of public assemblies. Most jurisdictions require permits for parades, marches, demonstrations, public speeches, and the like. Permits for these types of events are usually approved by municipal officials, though sometimes this responsibility falls to police.

In either case, and to the extent possible, police departments should hold formal meetings with event organizers and/or protesters as early as possible to determine where the event will occur and what is permitted. This process is often more difficult when demonstrations are organized on social media, which are rarely led by a single, identifiable leader (and which often identify all participants as leaders).

In these situations, officers should not expect organizers to present a single leader; rather, they should remain flexible and consider using social media to communicate. Department leaders should keep community

leaders informed about and included in the planning process. Officers' relationships with community members are valuable and should be leveraged when preparing for "leaderless" or spontaneous demonstrations.

Communication during a demonstration is equally important. Officers should establish a media strategy that includes social and news media so they can maintain contact with event organizers, disseminate accurate information to the public, and correct false information during and after events.

In 2016, the Atlanta Police Department successfully managed a major protest organized by the National Association for the Advancement of Colored People (NAACP) and Black Lives Matter over police shootings of Black men in Minnesota and Louisiana. Although the event drew thousands of protestors and took place the day after a sniper ambushed police officers in Dallas, it resulted in only three arrests and no reports of violence. Notably, all officers stationed at the protests were in regular uniforms, not riot gear.

The NAACP described police presence during the event as "exemplary," and a department police major emphasized the value of advance planning and "to know and be in dialog with community groups when there are not times of tension."²¹

RECOMMENDATION 6.3

LIMIT AND CLOSELY SUPERVISE INFORMATION-GATHERING TECHNIQUES THAT TARGET ACTIVITIES PROTECTED BY THE FIRST AMENDMENT.

Gathering intelligence to prevent and solve crimes is an integral part of police work. But intelligence-gathering that targets activities protected by the First Amendment runs the risk of threatening or chilling the public's exercise of their constitutional rights. Every situation is different, but some general principles apply to information-gathering.

First, all information officers collect must relate to an authorized police function, such as a criminal investigation; it cannot be used for political or general surveillance purposes.

Second, police should not collect information about individuals who are lawfully exercising their constitutional rights, such as attending a protest or filming an officer on duty. Officers shouldn't collect information about people who are socially or politically active unless they have an independent and legitimate reason to do so. For example, while officers may wear body cameras while policing large public events or demonstrations, they shouldn't use them to identify or record people who are engaged in lawful conduct.

Third, departments should develop specific policies that define when and how officers may gather information through social media, including when they are required to obtain warrants or approvals from supervisors. Social media merits special attention because it holds vast amounts of data and is often used as a tool to organize lawful activities.

When setting social media monitoring policies, department leaders should place strict limits on the use of online aliases and third-party social media accounts and take steps to prevent unnecessary scrutiny of constitutionally protected activity. In Kentucky, the Louisville Metro Police Department enacted social media policies protecting individuals' privacy interests.

INTELLIGENCE-GATHERING THAT TARGETS ACTIVITIES PROTECTED BY THE FIRST AMENDMENT RUNS THE RISK OF THREATENING OR CHILLING THE PUBLIC'S EXERCISE OF THEIR CONSTITUTIONAL RIGHTS.

Louisville, Kentucky, Metro Police

Department's Social Media Policies:

Members will only utilize social media to seek and/or retain the following:

- Information that is based upon reasonable suspicion that an identifiable individual, regardless of citizenship or U.S. residency status, or organization has committed an identifiable criminal offense or is involved in, or is planning, criminal or terrorist conduct or activity that presents a threat to any individual, the community, or the nation and the information is relevant to the criminal conduct or activity (criminal intelligence information); or
- Information that is relevant to the investigation and prosecution of suspected criminal incidents; the resulting justice system response; the enforcement of sanctions, orders, or sentences or the prevention of crime; or
- Information that is useful in crime analysis or situation assessment reports for the administration of criminal justice and public safety.

Members will not utilize social media to seek and/or retain the following:

- Information regarding an individual or an organization based solely on religious, political, or social views/activities; or
- Information regarding an individual's participation in a particular non-criminal organization or lawful event, unless the member can articulate how the individual or group activities pose a bona fide public safety concern or criminal nexus; or
- Information regarding an individual's actual or perceived race, ethnicity/national origin, immigration status, language fluency, gender, gender identity/expression, sexual orientation, religion, socio-economic status, housing status, occupation, disability, age, politics, or other similar personal characteristics attributed to an individual as a member of such a group, unless such information is relevant to the individual's criminal conduct or activity, or if such information is required to identify the individual.

RECOMMENDATION 6.4 DEMILITARIZE OFFICERS AND REQUIRE THEM TO INTERACT WITH ASSEMBLERS IN A RESPECTFUL AND POSITIVE MANNER.

Department leaders should require all officers to interact with assemblers in a respectful and positive manner before, during, and after assemblies, and they should avoid militarized responses unless responding to high-risk threats. (For more detail, see Chapter 4.)

State and local departments often acquire army equipment (ranging from uniforms to armored vehicles) that is then used in response to mass demonstrations, and officers have used military vehicles, tear gas, rubber bullets, and military-grade weapons during protests.²² Evidence suggests that this type of militarized policing heightens the risk of violent conflict.²³ Officers may be more willing to engage in a confrontation when armed with military grade weaponry.

This is also true of officers wearing body armor (a.k.a. “battle rattle”).²⁴ Full riot gear covers officers’ faces, anonymizing and dehumanizing officers and often positioning them as part of the problem that demonstrators are protesting against. Militarized responses that are disproportionate to the threat have often been the subject of after-the-fact criticism.²⁵

Instead, police departments should take a community policing approach to crowd control.²⁶ In this “meet and greet” approach, also called the Vancouver model, officers in regular uniform interact with people in a friendly, respectful, and positive manner before, during, and after an assembly. This humanizes officers, which decreases the likelihood that assemblers will feel threatened by or fear them and turn violent. During the Atlanta protest mentioned earlier, officers did not wear riot gear or use intimidation, an approach that is safer and more effective in nonviolent demonstrations.²⁷

RECOMMENDATION 6.5 PROMOTE CROWD CONTROL TACTICS THAT ARE LESS LIKELY TO CAUSE INJURY AND SET CLEAR LIMITS ON THE USE OF FORCE.

Not all demonstrations are peaceful, and sometimes the best crowd management practices fail to pacify demonstrators who threaten public or officer safety. Even in violent situations, officers have techniques at their disposal to prevent isolated incidents from spiraling out of control. Specifically, departments should:

Ensure that all officers policing mass assemblies understand the rules of engagement and policies about the use of force. As discussed above, leaders should prioritize dialogue, de-escalation, and the use of less aggressive, preventive forms of crowd management over weapons. Officers should use police formations (though they should not encircle or “kettle” demonstrators); traditional barricades (such as fences and concrete barriers); and nontraditional barricades (like riding bicycles) to create buffer zones and separate opposing groups of protestors.²⁸ Doing so will decrease the likelihood of physical confrontation. (For more detail, see Chapter 4.)

Address the use of force in the context of assemblies. When developing policies and training, department leaders should address the use of force in the context of public demonstrations as well as concerns with specific types of force, such as chemical deterrents, which cause pain and injury. Department leaders should prohibit the use of certain weapons (such as batons against non-aggressive participants and water cannons, canines, firearms, or shotguns) to disperse crowds during public gatherings. They should also require officers to warn people before they use force and limit the circumstances in which officers deploy force without prior authorization from commanders.²⁹

Leaders should also understand that nonlethal uses of force can escalate tensions, cause injury, and endanger members of the public as well as officers. Water cannons, which shoot pressurized water that is sometimes mixed with chemical agents or dye, can cause injuries and hypothermia (particularly in cold climates).³⁰ (For more detail, see Chapter 4.) These tools should not be used for crowd control purposes. In the past, officers used dogs to control crowds, which risks injury and induces fear and intimidation. Leaders should prohibit the use of dogs for this purpose in accordance with the model policy adopted by the International Association of Chiefs of Police.³¹

Develop clear policies to manage disorderly members of large, peaceful protests. The First Amendment precludes police officers from stopping legal protests in the absence of clear and imminent danger of a riot; substantial traffic interference on public roads; or an immediate threat to public safety and order.³² But officers can remove people who engage in violence, vandalism, or dangerous or illegal behavior. When doing so, they should not “kettle” disruptive individuals³³ or conduct mass arrests of nonviolent, nondestructive assemblers who commit minor offenses (e.g., jaywalking or littering). Focusing only on people who pose a threat allows the peaceful assembly to continue and decreases the likelihood of escalation.

To minimize harm, police should escort people away from the protest rather than restrain or confront them. The goal is to maintain a visible, nonthreatening police presence to deter unlawful action and to keep the crowd moving steadily toward its destination. The Miami Police Department has used a specialized bike patrol to achieve this goal — earning praise from the Police Executive Research Forum.³⁴

RECOMMENDATION 6.6 **HOLD OFFICERS ACCOUNTABLE FOR THEIR** **RESPONSES TO PUBLIC ASSEMBLIES.**

Chapter 7 discusses accountability in greater detail, but some measures are particularly important during public assemblies. Specifically, departments should:



Regulate the use of body-worn cameras.

Departments that use body-worn cameras (BWCs) should restrict their use during mass demonstrations. Department leaders should remember that video recording devices can chill lawful speech and thus should not be used to target or record individuals engaged in lawful activity. (For more detail, see Chapter 8.) Yet, with proper policies strictly regulating their use, BWCs may document interactions, providing video evidence that departments can use to hold officers accountable for misconduct and to confirm or disprove accusations against them.

Ensure accountability and self-examination.

Department leaders should create formal protocols to (1) investigate violations of policy; (2) address complaints arising from mass demonstrations; and (3) evaluate the effectiveness of pertinent policies, resources, tactics, and training. This formal process should include not only the investigation of complaints from members of the public but also evaluation of uses of force, stops, searches, and arrests, and officer injury reports (along with relevant video footage) to assess how well officers followed policies, obeyed the rules of engagement, and carried out their overall mission. Both successes and failures should be analyzed and used to inform future training and deployment plans.

To ensure the free flow of information and to strengthen existing relationships, department leaders should seek feedback from event organizers on the above processes, which will improve practices and tactics for future assemblies.

Chapter 6

¹ See, e.g., *Amalgamated Food Employees Union v. Logan Valley Plaza*, 391 U.S. 308, 315 (1968) (“[S]treets, sidewalks, parks, and other similar public places are so historically associated with the exercise of First Amendment rights that access to them for the purpose of exercising such rights cannot constitutionally be denied broadly and absolutely.”); *Hudgens v. NLRB*, 424 U.S. 507, 515 (1976); *Carey v. Brown*, 447 U.S. 455, 460 (1980).

² *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (emphasis added).

³ See, e.g., *Grayned v. City of Rockford*, 408 U.S. 104, 115 (1972) (“Clearly, government has no power to restrict such [picketing] activity because of its message. Our cases make equally clear, however, that reasonable ‘time, place and manner’ regulations may be necessary to further significant governmental interests, and are permitted.”).

⁴ See, e.g., Nathan W. Kellum, *Permit Schemes: Under Current Jurisprudence, What Permits Are Permitted?*, 56 *Drake L. Rev.* 381, 407 (2008) (“Courts entertaining this issue routinely hold that a permit requirement imposed on individual or small group speech to be overly burdensome.”) (citing *Cox v. City of Charleston*, 416 F.3d 281, 285 (4th Cir. 2005), https://lawreviewdrake.files.wordpress.com/2015/06/irvol56-2_kellum.pdf; *Parks v. Finan*, 385 F.3d 694, 705-06 (6th Cir. 2004); *Douglas v. Brownell*, 88 F.3d 1511, 1524 (8th Cir. 1996); *Grossman v. City of Portland*, 33 F.3d 1200, 1206-07 (9th Cir. 1994); *Cmty. for Creative Non-Violence v. Turner*, 893 F.2d 1387, 1392 (D.C. Cir. 1990); *Diener v. Reed*, 232 F. Supp. 2d 362, 387-88 (M.D. Pa. 2002); *Paulsen v. Lehman*, 839 F. Supp. 147, 163-64 (E.D.N.Y. 1993)).

⁵ See, e.g., *Police Dep’t of Chicago v. Mosley*, 408 U.S. 92, 96 (1972) (“Under the Equal Protection Clause of the Fourteenth Amendment, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views.”); *Thomas v. Chicago Park Dist.*, 227 F. 3d 921, 925, 928 (2000).

⁶ See, e.g., *American-Arab Anti-Discrimination Comm. v. City of Dearborn*, 418 F.3d 600, 605 (6th Cir. 2005) (“Any notice period is a substantial inhibition on speech.”); *Sullivan v. City of Augusta*, 511 F.3d 16, 38 (1st Cir. 2007).

⁷ See, e.g., *Fields v. City of Philadelphia*, 862 F.3d 353, 355-56 (3d Cir. 2017) (“Every Circuit Court of Appeals to address this issue (First, Fifth, Seventh, Ninth, and Eleventh) has held that there is a First Amendment right to record police activity in public. Today we join this growing consensus.” (citations omitted)); see also Howard M. Wasserman, *Police Misconduct, Video Recording, and Procedural Barriers to Rights Enforcement*, 96 *N.C. L. Rev.* 1313, 1319 (2018).

⁸ See, e.g., *Lamont v. Postmaster Gen.*, 381 U.S. 301 (1965) (holding a federal statute that imposed an affirmative duty on the recipient to have communist propaganda delivered unconstitutional because the “requirement is almost certain to have a deterrent effect, especially as respects those who have sensitive positions”); *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 244 (2002) (“With these severe penalties [for a ban on materials that are neither obscene nor produced through exploitation of real children], few legitimate movie producers or book publishers, or few other speakers in any capacity, would risk distributing images in or near the uncertain reach of this law.”); see generally, Note, *The Chilling Effect in Constitutional Law*, 69 *Colum. L. Rev.* 808 (1969) (describing the First Amendment’s chilling effect jurisprudence).

⁹ See, e.g., Marissa J. Lang, *More than 500 Arrested as Women Rally in D.C. to Protest Trump’s Immigration Policy*, *Chi. Tribune* (June 28, 2018), <https://www.chicagotribune.com/news/nationworld/ct-arrested-women-trump-immigration-policy-20180628-story.html>; Daniel S. Levy, *Behind the Anti-War Protests that Swept America in 1968*, *TIME* (Jan. 19, 2018), <http://time.com/5106608/protest-1968/>.

¹⁰ See, e.g., *France Fuel Protests: Tear Gas and Water Cannon Fired By Police*, *BBC News* (Nov. 25, 2018), <https://www.bbc.com/news/av/world-europe-46328934/france-fuel-protests-tear-gas-and-water-cannon-fired-by-police>; Sandra Laville & Duncan Campbell, *Baton Charges and Kettling: Police’s G20 Crowd Control Tactics Under Fire*, *The Guardian* (Apr. 2, 2009), <https://www.theguardian.com/world/2009/apr/03/g20-protests-police-tactics>.

¹¹ The relatively few agencies that have used police dogs for crowd control have faced considerable pressure to abandon the practice. See, e.g., Victoria Bekiempis, *St. Louis County Police Board: No More Police Dogs for Crowd Control*, *Newsweek* (Sept. 15, 2015), <https://www.newsweek.com/ferguson-st-louis-county-police-michael-brown-police-dog-protest-crowd-control-373407>. The recent use of water cannons to dispel pipeline protestors in 2016 likewise drew critical national criticism and led to a class action lawsuit. See, e.g., Derek Hawkins, *Police Defend Use of Water Cannons on Dakota Access Protesters in Freezing Weather*, *Wash. Post* (Nov. 21, 2016), https://www.washingtonpost.com/news/morning-mix/wp/2016/11/21/police-citing-ongoing-riot-use-water-cannons-on-dakota-access-protesters-in-freezing-weather/?utm_term=.3409cc562eee; *Dundon v. Kirchmeier*, No. 1:16-cv-406 (D. N.D. 2016) (pending class action by pipeline protestors).

¹² U.S. Dep’t of Health, Education, and Welfare, National Insitutuion of Education, *The Report of the President’s Commission on Campus Unrest*, 152 (Arno Press, N.Y., 1970), <https://files.eric.ed.gov/fulltext/ED083899.pdf>.

¹³ *Id.*

¹⁴ See, e.g., Mark Guarino, *Chicago Police Officer Jason Van Dyke Convicted of Second-Degree Murder for Killing Laquan McDonald*, *Wash. Post* (Oct. 5, 2018), https://www.washingtonpost.com/news/post-nation/wp/2018/10/05/chicago-police-officer-jason-van-dyke-convicted-of-second-degree-murder-for-killing-laquan-mcdonald/?utm_term=.5de6cba78b34; Alan Blinder, *Michael Slager, Officer in Walter Scott Shooting Gets 20-Year Sentence*, *N.Y. Times* (Dec. 7, 2017), <https://www.nytimes.com/2017/12/07/us/michael-slager-sentence-walter-scott.html>.

- ¹⁵ See, e.g., Mark Morales & Laura Ly, Released NYPD Emails Show Extensive Surveillance of Black Lives Matter Protesters, CNN.com (Jan. 18, 2019), <https://www.cnn.com/2019/01/18/us/nypd-black-lives-matter-surveillance/index.html>; Nina Renata Aron, When the Black Justice Movement Got Too Powerful, the FBI Got Scared and Got Ugly, Medium Timeline (Feb. 9, 2017), <https://timeline.com/black-justice-fbi-scared-ebcf2986515c>.
- ¹⁶ Abigail Hauslohner, NYPD Settles Third Lawsuit over Surveillance of Muslims, Wash. Post (April 5, 2018), https://www.washingtonpost.com/national/nypd-settles-third-lawsuit-over-muslim-surveillance/2018/04/05/710882b2-3852-11e8-9c0a-85d477d9a226_story.html?utm_term=.a538f04cb083.
- ¹⁷ See, e.g., Turner v. Lieutenant Driver, 848 F.3d 678, 690 (5th Cir. 2017) (explaining the right to record is subject to reasonable time, place, and manner restrictions); Glik v. Cunniffe, 655 F.3d 78, 84 (1st Cir. 2011) (same).
- ¹⁸ See Am. Civil Liberties Union of Ill. v. Alvarez, 679 F.3d 583, 607 n. 13 (7th Cir. 2012) (“We are not suggesting that the First Amendment protects only open recording. The distinction between open and concealed recording, however, may make a difference in the intermediate-scrutiny calculus because surreptitious recording brings stronger privacy interests into play.” (citing Bartnicki v. Vopper, 532 U.S. 514, 529 (2001)); Justin Marceau & Alan K. Chen, Free Speech and Democracy in the Video Age, 116 Colum. L. Rev. 991, 1028 (2016) (“An important caveat to any asserted right to record, then, is that the right is only applicable to persons who have lawful access to the place where the recording occurs.”) (referring to S.H.A.R.K. v. Metro Parks Serving Summit County, 499 F.3d 553 (6th Cir. 2007) as an example), <https://columbialawreview.org/content/free-speech-and-democracy-in-the-video-age/>.
- ¹⁹ See, e.g., Lauren Regan, Policing the Police: Your Right to Record Law Enforcement, Civil Liberties Defense Center, (Apr. 21, 2015), <https://cldc.org/news/policing-the-police>; Dia Kayyali, Want to Record the Cops? Know Your Rights, Electronic Frontier Foundation, (Apr. 16, 2015), <https://www.eff.org/deeplinks/2015/04/want-record-cops-know-your-rights>; Legal Observer Training Manual, Nat’l Lawyers Guild, (2003), http://cldc.org/wp-content/uploads/2012/01/LO_Manual.pdf.
- ²⁰ Metro. Police Dep’t, SOP-16-01, Handling First Amendment Assemblies and Mass Demonstrations 2 (eff. Jan 20, 2011), https://go.mpdconline.com/GO/SOP_16_01.pdf.
- ²¹ Dan Klepal, NAACP: Atlanta Police ‘Exemplary’ During Protests, Atlanta Journal-Constitution (July 9, 2016), <https://www.myajc.com/news/local/naacp-atlanta-police-exemplary-during-protests/OKVniB5z83ApG3yY9XfIS/> (quoting Atlanta Police Maj. Darin Schierbaum).
- ²² See, e.g., Niraj Chokshi, Militarized Police in Ferguson Unsettles Some; Pentagon Gives Cities Equipment, Wash. Post (Aug. 14, 2014), https://www.washingtonpost.com/politics/militarized-police-in-ferguson-unsettles-some-pentagon-gives-cities-equipment/2014/08/14/4651f670-2401-11e4-86ca-6f03cbd15c1a_story.html?noredirect=on&utm_term=.c36e1d9896dc.
- ²³ See, e.g., Am. Civ. Liberties Union, War Comes Home: The Excessive Militarization of American Police, 2 (2014) (“[T]he use of hyper-aggressive tools and tactics results in tragedy for civilians and police officers, escalates the risk of needless violence, destroys property, and undermines individual liberties.”), <https://www.aclu.org/report/war-comes-home-excessive-militarization-american-police>; Michael Carlson et al., Effects of Situational Aggression Cues: A Quantitative Review, J. of Personality and Social Psychology, 58, 622–33 n.4 (1990); see also Radley Balko, After Ferguson, How Should Police Respond to Protests?, Wash. Post (Aug. 14, 2014), https://www.washingtonpost.com/news/the-watch/wp/2014/08/14/after-ferguson-how-should-police-respond-to-protests/?utm_term=.596ff835f9cd; Jesse Singal, How Militarizing Police Can Increase Violence, Law Enforcement, New York Magazine (Aug. 14, 2014), <http://nymag.com/scienceofus/2014/08/how-militarizing-police-can-increase-violence.html>.
- ²⁴ See Casey Delehanty et al., Militarization and Police Violence: The Case of the 1033 Program, Research and Politics 2 (2017) (concluding that police departments that received military gear were more likely to kill people), <https://journals.sagepub.com/doi/pdf/10.1177/2053168017712885>.
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- ²⁷ See Klepal, *supra* note 21; Tony Narr, et al., Police Management of Mass Demonstrations: Identifying Issues and Successful Approaches, Police Exec. Res. Forum, 58 (2006), https://www.policeforum.org/assets/docs/Critical_Issues_Series/police%20management%20of%20mass%20demonstrations%20-%20identifying%20issues%20and%20successful%20approaches%202006.pdf.
- ²⁸ See Narr, *supra* note 27, at 60; see also Martin Kaste, Police Struggle to Balance Public Safety with Free Speech During Protests, NPR (Aug. 26, 2017) (“One tactic that is quickly catching on is separation. When opposing political groups converge on the same place, police now do what they can to keep the groups apart. When alt-right groups held a small rally on Boston Common last Saturday, police used barricades to create a large buffer zone between them and the thousands of protesters who showed up in opposition.”), <http://www.npr.org/2017/08/26/546167516/police-struggle-to-balance-public-safety-with-free-speech-during-protests>.

²⁹ See Amnesty International, Good Practice for Law Enforcement Officials Policing Demonstrations, July 26, 2016, <https://www.amnestyusa.org/press-releases/amnesty-international-usa-says-philadelphia-protests-appear-peaceful-still-gathering-information-on-citations/> (follow "Background on best practices for law enforcement handling protests" link).

³⁰ Int'l Network of Civ. Liberties Organizations, Physicians for Human Rights, Water Cannons, Crowd-Control Weapon Control, 1-2, https://s3.amazonaws.com/PHR_other/PHR_INCLO_Fact_Sheets_Water_Cannons.pdf.

³¹ Int'l Ass'n of Chiefs of Police, National Law Enforcement Policy Center, Crowd Management And Control, Model Policy, at 2 (Oct. 2014).

³² See *Jones v. Parmley*, 465 F.3d 46, 56-58 (2d Cir. 2006) (citing *Cantwell v. State of Conn.*, 310 U.S. 296, 308-09 (1940)); *Cox v. State of La.*, 379 U.S. 536, 546-47, 549 n.12 (1965); *Edwards v. S.C.*, 372 U.S. 229, 232, 237 (1963)).

³³ Jamiles Lartey, St. Louis Police Condemned for 'Alarming' Attitude Towards Protesters, *The Guardian* (Sept. 19, 2017), <https://www.theguardian.com/us-news/2017/sep/19/st-louis-police-condemned-alarming-behavior>; Joe Sterling, St. Louis Protest Police Accused of Controversial 'Kettling' Tactics, *CNN* (Sept. 19, 2017), <https://www.cnn.com/2017/09/19/us/missouri-st-louis-kettling/index.html>; ACLU Sues City of St. Louis over Police Conduct During Protests, *St. Louis Post-Dispatch*, (Sept. 23, 2017), https://www.stltoday.com/news/local/crime-and-courts/aclu-sues-city-of-st-louis-over-police-conduct-during/article_325102fb-38c8-502b-867b-8e745c051ec5.html.

³⁴ Narr, *supra* note 27, at 45 (2006) ("The Miami Police Department opted to organize a bicycle patrol to escort all major parades and rallies during the [Free Trade Area of the Americas] meeting week. Bicycle officers could not only provide a rapid response (unlike cars or vans that would be impeded by heavy vehicular and pedestrian traffic), but also present a nonthreatening image to protestors and the media.").



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