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Contents

FROM THE CHAIR: Forum's Commitment to Diversity, Equity, and Inclusion Featuring a Guest Column with the Law Student's Perspective 2
By Lynn Carrillo, with a guest column by Katie Mellinger

Police Reports Shouldn't Set the News Agenda: A Guide to Avoiding Systemic Racism in Reporting 5
By Drew Shenkman and Kelli Slade

John Lewis: Profile of a Civil Rights Legend 20
By Wesley Lewis, Andrew Pauwels, Brian Underwood, and Adrianna Rodriguez

Race, Diversity, Inclusion, and the Media Bar: Will the National Conversation on Race, Diversity, and Inclusion Bring About Meaningful, Lasting Change Within Our Bar? 27
By James Carlos McFall, Trey McDonald, and Miguel Ortiz

Understanding Protests: The Importance of Meaningful Dialogue 31
By Keith Allen

Race and the First Amendment: A Compendium of Resources 35
By Solomon Furious Worlds and Len Niehoff

Public Access to Police Body-Worn Camera Recordings (Status Report 2020) 51
By Steve Zansberg

Officers, Governing Committee, and Editors 2020–2021 60

FROM THE CHAIR

Dear Forum Members,

This year, the Forum on Communications Law has dedicated all its efforts to supporting diversity, equity, and inclusion (DEI). Keeping with these efforts, I have decided to turn my column over to give a voice to those that we normally would not have the opportunity to hear from—voices that may not have the platform to discuss their experiences or their view of our profession.

In this issue, we hear from Katie Mellinger, a diverse law student, a member of the group for whom we are trying to create opportunities. In the Annual Conference communication, we will hear from Sara Bell, a young lawyer, a member of the group that will form our future.

Every initiative we have undertaken this year arose from one of our Governing Committee members. I know that the efforts of the Forum are only part of the solution. But with the continued encouragement from our members and support of our sponsors, our initiatives will open doors, inform, and lift up law students and young lawyers that will benefit the media bar for years to come.

Join me in spreading and shining our light, not only for our own futures, but for those that are coming behind us.

Thank you for the honor of serving as the Forum Chair.

—Lynn D. Carrillo, Vice President, NBCUniversal Media, LLC

Forum's Commitment to Diversity and Inclusion from a Law Student's Perspective

By Katie Mellinger

It's no question this past year has forced each of us to re-examine and readjust almost every aspect of our lives. Today, the experiences we might have once considered minutiae matter more than ever before, as many hunker down at home or head to the streets in protest for their lives. This past year, chock-full of challenges, has also been chock-full of resilience, reflection, and growth for individuals and institutions alike.

Diversity and inclusion have emerged at the forefront of the seemingly ever-changing landscape of our lives, beckoning us to question ourselves both as people and as legal professionals.

Law students and lawyers undoubtedly have a joint role in promoting equity in our field and broader society. The Forum on Communications Law has not shied away from its role to support diverse students and young lawyers aspiring to practice communications law, and it continues to take encouraging steps to promote equity and opportunity for underrepresented communities with its reinvigorated commitment to

diversity and inclusion.

The Forum was my first law school involvement that has served as an abundant source of support, mentorship, and opportunity.

Having grown up in Miami, Florida, I was privileged never once to question whether Latin women like me could become successful professionals because so many of the teachers, doctors, and lawyers I knew were Latina.

When I moved to North Carolina for law school at a predominantly white institution, however, I realized my outlook of the professional world was not remotely representative of either the legal industry's[1] or my law school class's demographic compositions. Moreover, it seemed the industry, and the communications sector in particular, were skewed toward students attending select elite law schools or those schools with extensive communications curricula, both categories of which I didn't attend. The cumulative odds felt stacked against me until I became involved in the Forum.

With a single semester of law school under my belt, I ventured into the Eden Roc for the ABA Forum on Communications Law 2019 Annual Conference. I hoped what I lacked in experience would be compensated for with my passion for communications. Nevertheless, as a first-time conference attendee, I was, naturally, petrified to drift through a sea of world-class communications lawyers. However, my anxiety was assuaged by the outpouring of kindness I encountered—from Frank LoMonte's and Chuck Tobin's (Go Gators!) beaming smiles of welcome to Lynn Carrillo's dedication of her time to brainstorm my path in communications law.

The mentorship and inclusion didn't rest only with the attorneys; the students also shared a role in shepherding me into the Forum. One student, in particular, Jasmine Bell, a third-year student and the Forum's student liaison at the time, took me under her wing, introducing me to the Women in Communications Law (WICL) Committee and encouraging me to apply for her liaison position, in which I've now served for almost two years. The rest of the student cohort also created a sense of community by jointly attending the diversity moot court competition, pairing up for plenaries, and even exploring Miami Beach. Although many of us students live in different parts of the country, the Forum that brought us together has held us together as we look forward to reuniting for every annual conference to come—virtual conferences included.

The 2019 Annual Conference was my first real foray into communications law that spurred what I hope will be a lifelong career. With each panel or plenary, I broadened my knowledge of communications issues I wouldn't have otherwise been able to study in an academic setting. I also made new Forum friends, and I bolstered my resolve to pursue communications law.

The conference even helped me discover my passion for communications regulatory work, which I have pursued at the Federal Communications Commission through the support of both the Forum and the Federal Communications Bar Association.

Without either organization, my interest in communications law might not have ever manifested itself in a desire to promote equitable broadband deployment in rural and remote communities.

Having the Forum's support, mentorship, and opportunity offerings so early on in my career has been transformative, a sentiment that I'm sure is shared by many other student and young lawyer Forum members.

However, as conference attendance and my work with the governing committee have revealed, the Forum could and should be engaging with more diverse law students and young attorneys so they too may benefit from and contribute to the vibrant and dynamic industry we serve.

Our Forum's 2021 commitment to diversity and inclusion is vital, not just for diverse law student or attorney members seeking to break into communications law but also for current members and the communications industry as a whole.

As law students and lawyers, we are called to a profession founded on the principles of equity and service. Although we all share the same calling, we are each fashioned with unique talents, backgrounds, and experiences. Unfortunately, not all of us are born into the same privilege. Therefore, diversity and inclusion must come from those privileged with the platforms to make a difference. To echo the words of former Forum Chair Dave Giles, "diversity is a key component of success . . . [and] it's the right thing to do," for attorneys and students alike.[2]

This past year has given me quite a bit of time to reflect. As a Latina, I reflected on how my ethnicity and gender have molded my identity and shaped my experiences, and I ruminated on the way I view and support others who don't share my background.

As a third-year law student, I questioned where I fit into the mix as I readied myself to enter a predominantly white and male-dominated profession.

The questions I asked myself were reminiscent of questions I had asked before. This time around, as I inch closer toward actualizing my dream of becoming a communications lawyer, my answers overflowed with more gratitude for the experiences, organizations, and people who have gotten me to this point. They also evoked more hope that the Forum's initiatives might help unstack the odds for students or young lawyers like me who might not be able to pursue communications law otherwise.

Katie Mellinger is a third-year law student at Wake Forest University School of Law, concentrating in communications and technology law and policy. She studied journalism and political science at the University of Florida. Katie serves as the Law Student Division liaison for the ABA Forum on Communications Law.

Endnotes

1. According to the ABA's 2020 National Lawyer Population Survey, only 5 percent of surveyed attorneys identified as Hispanic. *ABA National Lawyer Population Survey,* Am. Bar Ass'n, https://www.americanbar.org/content/dam/aba/administrative/market_research/national-lawyer-population-demographics-2010-2020.pdf (last visited Dec. 10, 2020).

2. Dave Giles, "Legal Profession Must Evolve in Step with the World Around Us," 35 Commc'ns Law., no. 2, Winter 2020, https://www.americanbar.org/content/dam/aba/publications/communications_lawyer/winter2020/cl_35_2.pdf.

Police Reports Shouldn't Set the News Agenda: A Guide to Avoiding Systemic Racism in Reporting

By Drew Shenkman and Kelli Slade

On the evening of May 25, 2020, George Floyd died in police custody.

The official police report documented the incident:

> On Monday, May 25 at 8:02pm, Minneapolis Police responded to a 911 call reporting a forgery in progress at 3759 Chicago Avenue South. Officers arrived and located a suspect in a vehicle. Officers reported that they ordered the suspect out of the vehicle and the suspect physically resisted officers. Officers handcuffed the suspect. The officers restrained the suspect on the ground and an ambulance was called. No weapons were used by anyone involved in this incident. The subject, an adult male believed to be in his 40s was transported to Hennepin County Medical Center where he was pronounced deceased.[1]

Missing from the official police narrative was the fact that one of the responding Minneapolis police officers knelt on Floyd's neck for 8 minutes and 46 seconds.[2] Also missing was that three other officers stood by as their fellow officer pressed his knee on Floyd's neck, hearing him say, "I can't breathe" multiple times, "Mama," and "please."[3] And missing was that after Floyd had become unresponsive, the kneeling on Floyd's neck continued for 2 minutes and 53 seconds, even after another officer checked Floyd for a pulse and "couldn't find one."[4]

Without eyewitness cell phone video and robust media coverage,[5] the world likely never would have known that a police officer killed George Floyd, let alone how.

Floyd's death rocked a nation struggling through the worst pandemic in 100 years, bringing a summer of reckoning on race, policing, and social justice unseen in America since the civil rights movement of the 1960s.

America seemed to notice that Black Americans have always been disproportionately victims of police violence: Black men are 2.5 times more likely than white men to be killed by police in America, according to a 2019 study, which also predicted that 1 in 1,000 Black men would be killed by police over their lifetime.[6]

In Minneapolis, where Black people account for only 19 percent of the population, the *New York Times* found they accounted for 58 percent of all police "use of force" incidents.[7] Protesters filled the streets and social media with calls for justice in policing, equality, and "Black Lives Matter." Their voices, heard on television and in newspapers, reverberated through the halls of government and permeated corporate America.

For the first time in 60 years, race and policing were at a crossroads throughout all of America.

* * *

Reporting on police reports is a frequent and routine practice in journalism—so much so that a bedrock principle of defamation law is the fair report privilege, which protects the "fair and accurate" reporting of official government documents, including police reports.[8] The fair report privilege is an important tool for journalists—and the media lawyers advising them—when reporting on crime and policing.

The privilege takes on even greater importance when reporting on the use of lethal force by law enforcement, which makes the most potentially defamatory of allegations: the killing of another human being.

But what happens when the police report is wrong, inaccurate, or incomplete, leading a journalist to a false narrative of what occurred? Rote reliance on police reports gives police the first opportunity to both shape and define their own violent encounters with the public.

George Floyd's death in police custody was hardly the first time that law enforcement failed accurately to describe their use of lethal force. Rodney King. Eric Garner. Laquan McDonald. Breonna Taylor. Just to name a few.

If a journalist acts as scrivener by parroting police narratives—as is often the case in shrinking newsrooms and budgets, and a lawyer encourages that practice to invoke legal protections—are we propagating the very systemic racism infecting policing in America? And are we even giving sound legal advice?

This article examines the intersection of race, policing, and the fair report privilege. We explore the privilege and its limitations, as well as examples where police narratives did not align with reality. Because media lawyers are usually steps removed from the actual reporting process, we interviewed a number of seasoned reporters and editors for their thoughts on how to approach police reporting and what media lawyers ought to consider when giving legal advice.

The Fair Report Privilege's Protection

The fair report privilege protects the repetition of otherwise defamatory content through an exception to the common law rule holding that one who repeats or republishes a defamation uttered by another adopts it as one's own.[9] Borrowing from its English common law heritage, the privilege protects reporting on public events such as trials, government proceedings, and the actions of legislative bodies.[10]

The American common law tradition added a key protection: the freedom to report on information found in government documents, including police records. Reporting on public documents is an essential tool to avoid the filter of a public performance, as public servants are likely to be more candid when they think they are not being watched.

The fair report privilege also reduces the chilling effect a journalist might feel when hearing controversial information during an official proceeding or discovering sensitive material in a government document. But the privilege grants only conditional immunity from defamation liability, requiring that the journalist's repetition is both a fair *and* an accurate report of the government proceeding or record.[11]

In sum, "the privilege springs from the recognition that in a democratic society, the public has both the right and the need to know what is being done and said in government—even if some of that is defamatory."[12] To that end, all 50 states have either codified into statute or maintain a common law fair report privilege.[13] The protection of the privilege ranges from being absolute in some states, to being capable of defeat through a showing of common law malice in others, and actual malice still in others.[14]

Some have even argued that the First Amendment ought to demand a national actual malice standard to defeat the privilege.[15]

In some states, the privilege applies only to the most formal of government proceedings and official documents.[16] In others, press releases and even informal statements from police officers may carry the privilege.[17] But whatever formulation the fair report privilege takes, it has one simple edict: to report on government proceedings and documents *fairly and accurately*.

Limitations of the Fair Report Privilege

There are times when the fair report privilege falls short in protecting reporting on public records. The privilege wanes when a reporter does not describe a document accurately, such as when reporting is "'garbled or fragmentary to the point where a false imputation is made about the plaintiff which would not be present had a full and accurate report been made'"[18] or summarized such that a jury could "conclude that the summary carried a greater sting and was therefore unfair."[19]

Similarly, the privilege might fall away when the reporting "present[s] a one-sided view of the action"[20] or paraphrases such that "the element of balance and neutrality is missing."[21] And except for states with an absolute privilege, there remains the possibility that a reporter's motivations can be examined, even if the report was fair and accurate, through proof of either common law malice or actual malice.[22]

To be sure, the fair report privilege is an important tool, but as we are about to see, reporting on police records is not without its severe limitations.

What Happens When Police Lie?

The fair report privilege is usually at its zenith when reporting on police records, which are the earliest, uncontested written accounts of an incident. As a society, we are asked to trust the accuracy of those reports because law enforcement is sworn to act fairly and uphold the law.

Yet, police records and narratives, especially those created in the immediate aftermath of law enforcement's use of deadly force, frequently fail to follow the expectation that they are fair and independent accounts. Indeed, criminology and sociology scholars have long examined the phenomenon of police lying and the negative impact it has on our criminal justice system.[23]

The scholarship concludes that lying is an expected part of the law enforcement process.[24] There are the "excusable lies," such as those slightly exaggerating situations to establish rapport with a suspect, and the "justifiable lies," such as undercover and deceptive operations to obtain evidence on the targets of investigations.[25] Society puts up with such excusable lies in order to maintain law and order, so the theory goes.

But then there are the "unacceptable lies," such as those told maliciously to create a false narrative in order to put a suspect behind bars—an ends-justify-the-means removal of a "criminal" from society, often resulting in an officer "testilying" on the stand to put him away.[26] Judges frequently given the "wink and nod" to questionable police testimony, giving "an improper (and frankly illegal) presumption in favor of police witness credibility."[27]

Then, perhaps, is the most dangerous form of lying, the "code of silence," where officers fail to identify serious misconduct in the ranks in order to protect other officers, even where it results in harm to a

defendant or innocent victim.[28] This "thin blue lie" often manifests itself in the worst way when officers are asked to record their actions after using excessive force, for "[a]lthough it is well known that some officers use unnecessary and excessive force, it is unlikely that officers report that level of force on an official form."[29] And "[w]hat distinguishes police officers is their unique power—to use force, to summarily deprive a citizen of freedom, to even use deadly force, if necessary."[30]

Sitting atop all of this is the rampant structural racism that exists in American policing. Ample scholarship has laid bare the inherent racial bias in the most common police practices, from pretextual vehicle stops to stop-and-frisk, which are often the genesis of police use-of-force incidents.[31]

George Floyd Wasn't the First. Nor the Last.

At this pivotal point in our nation's history, we must shift our approach to how we encounter police reporting. While a media lawyer rightly views the fair report privilege as inviolable when it comes to police records and defamation lawsuits, we need to stop and think: Are we not furthering the systemic issues of bad police practices, often rooted in racism, by encouraging journalists to rely on police records?

While George Floyd is perhaps the most recent example of a police department influencing the initial narrative through a false narrative in a police report, it was hardly the first. Distorted police narratives often go unchecked unless there is video evidence to the contrary.[32]

In each of the examples that follows, law enforcement used extreme or deadly force unaccounted for in the initial police documents following the incident. And in almost every instance, the fair report privilege would have protected the fair and accurate reporting of the police accounts, despite the reports themselves being inaccurate. And each lie begs the question: If the inaccurate document had been released by police in the immediate aftermath of the incident, would the reporting on it have been "fair and accurate"?

Rodney King: "The Jackie Robinson of Police Videos"[33]

One of the most prominent and earliest examples of police report lies contradicted by video is the 1991 beating of Rodney King.[34]

Police officers initially downplayed the brutal beating of King, an unarmed Black man, during a Los Angeles traffic stop, unaware they were being recorded by a curious onlooker with a new camcorder. The four LAPD officers who delivered fierce kicks and baton beatings to King, who tased him and left him seriously injured and hogtied on the pavement, were surrounded by a dozen or more officers, who merely watched.[35] King, who a jury later found possessed no realistic threat to the officers, suffered serious injuries, including skull fractures, a shattered eye socket and cheekbone, a broken leg, a concussion, injuries to both knees, and nerve damage that left his face partially paralyzed.[36]

When the *Los Angeles Times* reviewed the initial police documents presented to the grand jury investigating the beating, the newspaper revealed that the officers at the scene falsely claimed King's injuries appeared to be "light," that he "suffered only cuts and bruises 'of a minor nature'" and "contusions and abrasions."[37] The officers had written reports that King "attacked officers," "continued some resistance," and "increased (his) resistance," even though the videotape later showed King to be defenseless.[38]

Riots engulfed Los Angeles a year later when the four white officers charged in King's beating were acquitted (two were later convicted in federal court). The commission established to study the beating

bluntly stated, "Our Commission owes its existence to the . . . videotape of the Rodney King incident."[39]

While the false police reports were not publicly available in the immediate aftermath of the King beating, they demonstrate how easy it is for false police narratives to take hold in use-of-force incidents.

Eric Garner: The Chokehold That Almost Wasn't

The 2014 death of Eric Garner—a Black man arrested and placed in a chokehold on Staten Island for the misdemeanor offense of selling bootleg cigarettes—demonstrates the problem in two different ways.

First, police reports are not always available for public review in New York State, which meant that the incident was viewed only through the lens of bystander video showing an officer with his arm around Garner's neck in what appeared to be a prohibited chokehold, while Garner lay face down with dying pleas of "I can't breathe" heard over and over again.[40]

Taken alone, the video carried its own potential defamation risk: questioning the officer's tactics and implying Garner's death resulted from the chokehold without the protection of a fair report privilege defense. Bystander video without police input poses the opposite problem: Can a journalist know the *video* shows the complete story?

But a second, and consequential, problem was that incomplete and false information made its way into early official accounts of Garner's death. For example, the *New York Times* reported that "the first official police report on his death failed to note the key detail that vaulted the fatal arrest into the national consciousness: that a police officer had wrapped his arm around Mr. Garner's neck."[41] And in administrative proceedings resulting in the firing of the officer who performed the chokehold, a judge found that his testimony explaining his actions had been "untruthful" and that another officer on the scene incorrectly filled out initial arrest paperwork coding the "Force Use" field as "No" and erroneously cited a felony charge against Garner when it was only a minor misdemeanor.[42]

The *New York Times* also noted that the video was cited in the final autopsy report "as one of the factors that led the city medical examiner to conclude that the chokehold . . . caused Mr. Garner's death" and that "absent the video, many in the Police Department would have gone on believing his death to have been solely caused by his health problems. . . ."[43]

Like the Rodney King incident, without the bystander video, Eric Garner's death might have passed by like so many others. Whether it be a failure of New York's open records law, an "untruthful" responding officer, or misleading paperwork, a faulty police narrative would likely have emerged had the "official" police information been released prior to the videotape.

Laquan McDonald: A Year-Long False Narrative

While the impact of false police narratives in the King and Garner incidents may be hypothetical as to the media's subsequent reporting, the October 2014 killing of 17-year-old Laquan McDonald is not.

Chicago police officer Jason Van Dyke fired 16 shots at McDonald, including several fired after McDonald had fallen to the ground. Van Dyke, now imprisoned for second-degree murder, claimed McDonald posed a threat to him for holding a knife. But for over a year after the fatal shooting, Chicago's city government and police department kept the full picture of the killing from public view.[44] Only through the public release of graphic dash-cam video over a year later could the public see through all the lies.

As is often the case in police shootings, early media reports relied mainly on police sources, resulting in one-sided local headlines like "Cops: Boy, 17, Fatally Shot by Officer After Refusing to Drop Knife"[45] and "Police Shoot, Kill Knife-Wielding Teen on South Side."[46] A Chicago Fraternal Order of Police spokesperson said that McDonald had "lunged" at Van Dyke and that "the teen had a 'crazed' look about him as he approached the officers with the knife."[47] And the Chicago Police Department said that McDonald "refused to comply with orders to drop the knife and continued to approach the officers."[48]

While some eyewitnesses initially disputed the initial police accounts, they later claimed they were pressured by police into changing their story to match police accounts.[49] Only after a freelance journalist's Freedom of Information Act (FOIA) lawsuit produced the video[50]—which showed McDonald never moved toward the officers or posed a significant threat, and in fact showed he moved away from Van Dyke—were journalists able to uncover the truth.[51]

After the video came out, hundreds of documents were released showing that many officers' recorded accounts differed from the video, including Van Dyke himself, who told a detective investigating the shooting that McDonald "ignored Van Dyke's verbal direction to drop the knife and continued to advance toward Van Dyke. . . . When McDonald got to within 10 to 15 feet of Officer Van Dyke, McDonald looked toward Van Dyke. McDonald raised the knife across his chest and over his shoulder, pointing the knife at Van Dyke."[52]

The false narrative surrounding the McDonald shooting posed significant problems for journalists. The official police stance, protected by the fair report privilege, was directly at odds with the truth, but no one knew it until the video came out over a year later. As the *Atlantic* noted, "it took . . . 400 days to charge Van Dyke, but a jury took only seven and a half hours to convict him."[53]

What Journalists Say: A Practical Approach to Police Reporting

Recognizing that journalists face an enormous challenge covering policing, we interviewed several accomplished reporters and editors in order to give media lawyers a window into the practical side of reporting.

The journalists we spoke with all agreed on one thing: *Never* rely solely on police records or statements when reporting on incidents involving law enforcement. Throughout their careers, the journalists said that they have witnessed circumstances where the police version of events was inaccurate, including where the police were not forthright or complete in the retelling of events, they had engaged in wrongdoing, litigation was pending, investigations were open and ongoing, or there was inherent police bias. They overwhelmingly believe that it is their ethical and journalistic responsibility to move beyond official documents released by police, such as police reports and press releases, and cannot take these documents at face value.

Given today's racial climate, the journalists say, it is critical to explore the circumstances surrounding police incidents thoroughly and challenge the accounts generated by police. They uniformly noted that what an official document *does not* contain may be equally as important as what the document *does* contain.

The journalists recognized that police accounts are frequently unreliable:

> Taken at face value and relying solely on police accounts, you're sort of saying the police are right. You're saying you arrived first at the scene and you get to tell the story the way you get to tell the story.
>
> In the mid-2000s, I was a crime reporter dealing with white cops and almost exclusively Black victims and perpetrators. Police reports were inaccurate constantly. If you go into the neighborhoods and you talk to these victims, you can very clearly see the police are . . . approaching a story from their framework where they're never wrong.

The following interview excerpts and summaries provide the consensus that a journalist's approach to law enforcement incidents should be re-examined, and several factors should be taken into consideration in such reporting.

Examine Inherent Racial Bias

"Before we even talk about fair reporting, you have to look at our inherent racial bias whenever we step into a story," one reporter told us.

Reporters must examine what attitudes or stereotypes (both conscious and unconscious) are affecting the individual's understanding, actions, and decisions:

- How is law enforcement approaching a community?
- What is the police perspective?
- What kind of strain are police officers under given the lack of training that they may have received?

As one reporter noted, while race is important, it is often just one of the factors we should account for:

> I think to say George Floyd happened just because of race is too simplistic, just like defunding the police is too simplistic. So, I think it's got to be percentages. Yes. George Floyd happened in large preponderance because he's Black. How much did income have to do with it? How much did policing in this particular neighborhood have to do with it? All of it. How about police recruitment? Systemic. You know, racism within that.

The journalists were uniformly aware that Blacks and minorities are often treated differently by police and that, historically, police have tended to be more aggressive, both physically and verbally, in minority communities. They suggested that the over-policing and patrolling of minority communities create a tension when individuals are stopped that police do not often appreciate:

> When someone confronts them, there's gonna be an argument. There is already a conflict, almost culturally. The police may be looking at a situation as a person resisting, when that individual is simply wondering: "Why are you doing this?" This tends to ratchet up the situation, and it usually ends poorly.

The journalists noted that there is a perception that has been reinforced over many years that Black people, especially Black men, are more violent. Consequently, rather than seeing people as citizens to be protected, they say that Black men are only seen as suspects—a problem that is not just the perception of white cops, but Black cops as well.

Often, the journalists noted instances of covering stories where police pit minorities against each other in a white power structure:

> If law enforcement is going to defend the rich, White and the powerful, then every person of color who covers law enforcement has to come with a healthy skepticism.

And regarding bias, they noted that it often predates the police academy, relating to an officer's upbringing, or how they were recruited:

> These are people who come out of high school, who go straight into the academy and who may have come from homes with racial bias. In Los Angeles there are huge communities of color where there is recruitment happening . . . individuals with low-income backgrounds, not a lot of emotional and mental support when they were growing up. And then we give them a gun and expect them to be social workers and psychiatrists on the street. It is what we have done to policing with the cutbacks in mental health care and cutbacks in social services.

But above all else, journalists must recognize their own biases when they step foot into a new situation involving police reporting:

> I tell them, check your own bias. Pretend you are a Black kid who grew up on 78th and South Edgemont in Chicago. Start there as that kid. That's how you read a police report, and then you start to understand and read the sentences a little differently, especially if that young reporter is white or privileged. You have to look at it from a different perspective instead of just reading it plainly because everything we write down, including what we know, contains some sort of bias.

Explore Different Versions of the Incident

Even where there is a video record of a police encounter, it is rare for there not to be multiple versions told of the same event. Thus, the journalists we spoke with say that the only way to have a complete and balanced story is to get the perspective of as many individuals and sources who were involved as possible.

Unfortunately, even then, journalists recognize that they can't be completely certain that the truth is being told by police *or* by witnesses. This leads to the one question that should always be asked, "How many versions of this event are there?" This leads to another natural series of questions:

- What are we hearing from police?
- What are we hearing and seeing from the scene/the streets?
- What are we hearing from witnesses/neighbors?
- What are we hearing from the victim's family?
- What is on body-cam/social media/surveillance video?
- What are other media outlets reporting?
- Are any versions of the events contradictory?
- What questions are outstanding based on what we are hearing from law enforcement?

But how does a journalist make it happen, and how can a media lawyer assist in that process? One journalist explained the importance of boots on the ground:

> I think we need to get people on the ground. I think we sometimes get way too far away from getting people on the ground to interview about what they say happened. I think, when possible, always ask or be looking around at the crime scene to see what kind of video might be available. Who might give you access to video?

Another highlighted the importance of tracking down video evidence:

> I'm always looking for the video. There is security video on almost every house. Now there's Nest [cameras] everywhere. Sometimes we just need to widen our circle. In George Floyd, not only did we have cell phone video, we had the liquor store video. Then there was another camera on the other side of the street. So, I think just looking for all the cameras is helpful.

And another stated:

> If it weren't for video, there would be a lot of the stuff we would never know about.

But it's more than just talking to witnesses and tracking down video, they say; a journalist needs to actively listen to the family and friends of the victims:

> One of the first stories I covered involved an officer who chased down a guy in his cruiser and then drove the cruiser through the fence because he didn't want to get out of the car to chase him, and he killed him. And this was before Twitter or any of that. But I can recall, even in that situation, that the police were not being very forthright with the information and the details the family and friends were starting to gather and I was in there. I was in the house with them and the photographer, and they were basically demanding justice, and they did not get it.
>
> As a cops' reporter I always tried to make sure that I got the other side of the story. . . . I always thought about sitting in that living room with that mother and her crying. And oftentimes people don't actually spend enough time trying to get to the other side, especially if it was a Black guy who did something that was criminal. There isn't a whole lot of empathy there. In most of my experiences and in other newsrooms, I found myself trying to make sure that I completely reported out stories because otherwise the family could get the short shrift. That's something that really stuck with me. And even to this day I try to remember that everybody has a mother.

Look Out for Victim Shaming

The journalists we spoke to recognized that victims of police violence are occasionally engaged in criminal activities—sometimes petty and sometimes not—but they note that the punishment comes nowhere near fitting the alleged crime.

Police are often eager to share the criminal histories of police brutality victims with the media. This can often paint the picture of this person being somehow worthy of the misfortune that has befallen him; as one journalist told us, "People will say, 'look how bad he was and his prior crimes.' The story of this individual often shifts from victim to perpetrator." It is important to examine such issues and not necessarily take them at face value.

The journalists we talked to noted that individuals may live in a community where they are more likely to have a disproportionate number of encounters with police. They may have been pulled over and stopped and arrested by law enforcement on multiple occasions—but not every charge results in a conviction.

They recognize the ongoing struggle to determine the relevance of the information, and whether it should be reported. Sometimes, it is simply an irrelevant and naked attempt to shame the victim, but other times, it is necessary to know why this person reacted the way he did with the police:

> In the George Floyd case, Floyd says, "Officer, I've been shot before just like this. I've been shot before." And he's terrified and he's crying. And, again, that could inform how he's reacting to police.

> He has a criminal record. He's been in contact with the police. He says he's been shot before. I think it's all about how we use that information in context with what's happened to someone, making it clear that one does not equal the other.

Body-camera transcripts later showed that Floyd expressed his fear in dealing with police, claiming to officers that he had been shot by another officer in a previous incident.[54]

The journalists we spoke with repeatedly emphasized the importance of context when dealing with prior offenses:

> If you are someone who is wanted for murder or . . . some serious crime and the police are about to take you into custody, and you're unarmed and something terrible happens while in custody and you wind up dead, it goes to that person's frame of mind of why they may want to flee, why they may want to not allow the police to take them into custody. That is 100 percent relevant.

But as one journalist put it bluntly, "Shooting the person is never justifiable just because the individual had a criminal record."

Report What You Know and Be Clear About What You Don't

Stories typically evolve with various pieces of reporting coming together over time. But it is important to note that reporters themselves face pressures to report as quickly as possible. Breaking-news demands and limited resources often lead to a rush to publish that perpetuates the police-first narrative.

Recognizing those limitations, the journalists stressed the importance of being clear about what they know, and what they do not know, at any given time. They suggest that reporters should state with clarity:

- This is the police version of events.
- This is what we know now based on the preliminary investigation.
- We haven't talked to the victim's family or the suspect's family or lawyer.
- We don't know the full picture yet because we don't have all the information.
- We can expect that this may change.

Being transparent with the reader or audience is paramount:

> You have to give some caveats. Otherwise, you are reporting the events as fact, just exactly how police see it or even just based on what bit of video you have. And I think probably the key is to be really clear and honest about how little you know. This is one of the ways that we can save ourselves from being wrong.

Examine Disciplinary Records of Police

The journalists pointed out that some police officers make a high volume of arrests or are on teams in neighborhoods where they handle crime daily and in large volume. The journalists collectively highlighted the importance of looking into the police department's history:

> I worked in Oakland, where the police have been under a federal mandate for years, and still are, for misconduct, for planting evidence, for all sorts of things. That was a very difficult relationship because you need to be able to report on police as well. If we don't, I often feel that we never really get to the bottom of what may have happened.

They noted that these officers and departments often have multiple complaints against them, and reporters should review discipline history. Previous police conduct can be indicative of a department or officer's behavior in another situation. That said, police are quick to remind reporters of the importance of recognizing that not all officer complaints are substantiated.

But journalists agree that they should be just as judicious in disclosing negative information about police unrelated to the incident in question, just as they do with the criminal history of suspects.

Police Release of Information

Every department has a different way of releasing information. Many departments fail to provide complete and timely information to the media or to provide information at all. For example, in press conferences or press releases, the information provided by law enforcement is minimal:

> The press release would just say, victim shot. And that's not really enough for me to build a story around. So, I had to figure out how to fill in the rest of those blanks. A lot of times in the county in which I worked, they would file a more detailed report for jail processing. So I got into the habit of waiting for that court file because I knew that those details were in there.

Journalists across the country struggled for the consistent release of police body-cam video, often impeded by an ongoing investigation, and often released only through public records litigation. But the journalists agree, whatever the answer is, you should report on it:

> When we are going to write a story, we ask police for the dash-cam video or the body-cam video, and oftentimes they refuse to release it and tell us to FOIA it. I think we need to include that information in our stories and call them out in our writing and on air about the things that they're skirting their responsibility on or not giving us access to.

Yet, even where body-cam footage is released, it is often an edited, narrated, or abridged version. Journalists and their lawyers must press for release of the raw footage and be wary of relying on the police narrative for what they can observe on their own.

Of course, one of the constant challenges the journalists face is the silence they encounter from police after officer-involved shootings:

> The first question you'd always want to ask: Is it justified? Was there a gun recovered?
>
> You knew immediately when people were not being straight with you, when they were not giving you answers, that something was up.
>
> I always found it suspicious when the police did not give answers right away.

Journalists recognize that police are often not forthcoming because they are investigating the situation or, perhaps more cynically, are concerned about the possibility of civil lawsuits or criminal charges being brought against their officers and departments.

* * *

Shortly after midnight on March 13, 2020, Breonna Taylor, a 26-year-old Black emergency room

technician, was killed in her home by Louisville police serving a "no-knock" search warrant in a narcotics investigation.[55] Officers used a battering ram to break into Taylor's apartment, leading to a chain of events that left Taylor dead in her own apartment.

The fatal police shooting led to months of protests over the controversial "no-knock" tactic, calls for the officers to be fired and arrested, and a public demand to know exactly what happened in Taylor's apartment that night.

But without videotape or police body cams of the incident, and with Louisville police keeping much from the public due to an unending ongoing investigation, some of the most basic facts remain muddled, including many false rumors, such as that police were at the wrong apartment (false), that they didn't knock (false), that Taylor was shot in her bed or while she was asleep (false), or that she was living with a drug dealer (false).[56]

Three months after Taylor was shot, Louisville police finally released the incident report from that night[57]—except that it was almost entirely blank, save for some of the most basic information already known to the public, such as Taylor's name and age (but not her address or date of birth).[58]

The incident report, filled out the same day as the shooting, lists the then deceased Taylor's injuries as "none" and checked a "no" box under "forced entry" even though officers used a battering ram to break down the door.[59]

The "narrative" section, where police are expected to record their most immediate recollection of events, simply states "PIU Investigation," referring to the public integrity unit that was called in to examine the use of force.[60]

Much about Taylor's death still remains shrouded in secrecy and outright false information, but one thing is clear, on September 15, 2020, Louisville police made a record-breaking $12 million settlement with Taylor's family without admitting wrongdoing, one of the largest payments ever made in the United States to a Black victim of a police shooting.[61]

Drew Shenkman and Kelli Slade are each Assistant General Counsel with CNN in Atlanta, Georgia. The authors would like to thank Daniel Kozuh for his research assistance, as well as CNN journalists Sara Sidner, Kyung Lah, Ed Lavandera, DeLano Massey, Pervaiz Shallwani, and Shimon Prokupecz for their collective wisdom and insights. Additional thanks to S. Mitra Kalita for her inspiration to explore this topic.

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John Lewis: Profile of a Civil Rights Legend

By Wesley Lewis, Andrew Pauwels, Brian Underwood, and Adrianna Rodriguez

Few individuals in the history of the American civil rights movement cast as long a shadow as Representative John Lewis (1940–2020). Born in rural Alabama as the son of sharecroppers, Lewis first gained fame (at least in his hometown newspaper) by preaching a sermon at his family church before even turning 16. John Lewis then embarked on an incredible life of "good trouble": as a Freedom Rider, as a founding member of the Student Nonviolent Coordinating Committee (SNCC), as an organizer of the March on Washington, and as a leader of the famed march in Selma, Alabama, that became known as "Bloody Sunday." By the time he was 25, Lewis had done more than most accomplish in a lifetime, using speech and assembly as the powerful tools for change the Founders intended them to be. And, of course, he was only getting started; Lewis continued to serve as a powerful voice for racial justice and First Amendment freedoms in the halls of Congress for over 30 years.

Later in his life, Lewis frequently recognized the crucial role the press played in shaping his own life and the successes of the civil rights movement he helped spearhead. Lewis often repeated a variation of this message: "Without the brave journalists who covered our protests, the civil rights movement would have been like a bird without wings."[1]

When 2020 began, very few could have predicted how important Lewis's words would once again prove. Following the killing of George Floyd by a Minneapolis police officer on May 25, 2020, widespread protests broke out across the country. According to data collected by the *New York Times*, somewhere between 15 million and 26 million people participated in Black Lives Matter demonstrations in more than 500 locations.[2] Journalists covering these protests found themselves on the front lines like never before: In the course of covering these protests, members of the press were arrested, struck by rubber bullets, tear gassed, and otherwise targeted by law enforcement.[3] People of all ages and races are taking to the streets to wage "good trouble," and journalists are putting themselves in harm's way to make sure that message gets to as many people as possible.

Shortly before his death, Lewis commented on the connective thread linking this movement to the movement he helped lead decades prior, writing in a statement, "My fellow Americans, this is a special moment in our history. Just as people of all faiths and no faiths, and all backgrounds, creeds, and colors banded together decades ago to fight for equality and justice in a peaceful, orderly, non-violent fashion, we must do so again."[4]

Through the lens of these unique times, the Young Lawyers Committee of the ABA Forum on Communications Law remembers the life of John Lewis and looks to his legacy to provide an inspiration for media lawyers young and old to fight for the right to spark "good trouble" and for the journalists who shine a light on those who do.

Early Life

John Robert Lewis was born on February 21, 1940, near the town of Troy, Alabama. In his powerful graphic novel memoir *March*, Lewis recalled growing up on a farm and honing his skills as a young orator by preaching to the family chickens.[5] School—and particularly the access to the outside world provided by

books, newspapers, and magazines—became a central focus of Lewis's young life, with him often running away from the family farm to avoid chores and attend class.[6]

At the age of 15, Lewis first heard the words of Martin Luther King Jr. in a sermon on the radio; Lewis recalls: "Dr. King's message hit me like a bolt of lightning. He applied the principles of the church to what was happening now, today. It was called the social gospel—and I felt like he was preaching directly to me."[7] Lewis started to follow the civil rights movement closely, including the bus boycott in nearby Montgomery, and he began preaching in his family's church.

After high school, Lewis moved to Nashville. While attending American Baptist Theological Seminary, Lewis embraced nonviolent, civil disobedience as a means for change. Lewis was arrested for the first time in February 1960, along with other students who organized a series of sit-ins at whites-only lunch counters at a Woolworth's in Nashville.[8] "We took our seats in a very orderly, peaceful fashion," Lewis recounted. "[W]e stayed there at the lunch counter studying and preparing our homework, because we were denied service. The manager ordered that lunch counters be closed . . . and we'd just sit there and we continued to sit all day long. The first day nothing, in terms of violence or any disorder, nothing happened. This continued for a few more days, and it continued day in and day out."[9]

After several tense days of nonviolent sit-ins at the Woolworth's lunch counter, Lewis and his fellow demonstrators were arrested for disorderly conduct—the first of many times that Lewis would be arrested for his activism. Later, Lewis looked back on his arrest, describing it as "like being involved in a holy crusade," and considering it "a badge of honor."[10] Lewis and others refused to pay the fine set for them by the court, choosing instead to serve their sentences in the county workhouse.[11] This act drew national media attention to the sit-ins, and the public pressure ultimately resulted in Nashville becoming the first major southern city to desegregate public facilities.[12]

John Lewis as a Civil Rights Activist

Following his arrest in 1960, Lewis continued his civil rights demonstrations, participating in sit-ins and protests that often left him bruised and bloodied, yet undeterred. That year, the Supreme Court struck down segregation of interstate bus facilities in *Boynton v. Virginia*;[13] however, despite the Supreme Court's clear mandate, segregation remained a deeply embedded reality in many parts of the rural south. Shortly after *Boynton*, civil rights activists began a campaign to "complete the integration of bus service and accommodations in the Deep South"[14] by testing service providers' compliance with *Boynton* and *Morgan v. Virginia*, an earlier Supreme Court decision that found segregation on interstate buses and trains was unconstitutional.[15] To do so, Lewis and other members of the Congress of Racial Equality (CORE) embarked on a series of "Freedom Rides" to challenge ongoing practices of racism and segregation.[16]

On May 4, 1961, Lewis and 12 other Freedom Riders left Washington, D.C., on two buses bound for New Orleans, Louisiana. Once the buses arrived in South Carolina, the Freedom Riders began encountering violent reactions to their refusal to observe segregationist practices; in Rock Hill, South Carolina, Lewis and his colleagues were beaten and arrested for using whites-only facilities, despite the Supreme Court's ruling in *Boynton*.[17] In Alabama, local officials gave the Ku Klux Klan permission to beat and harass the Freedom Riders: One bus was firebombed, and several passengers were beaten while fleeing the burning bus.[18] At another stop, Lewis was attacked and left unconscious in a pool of his own blood outside a Greyhound Bus terminal in Montgomery, Alabama.[19] Ultimately, Lewis and several of his fellow Freedom Riders were incarcerated at Parchman Farm, the Mississippi State Penitentiary, for nearly a month for participating in the Freedom Rides.[20]

John Lewis remained steadfast. Throughout the early 1960s, he continued organizing and participating in demonstrations against racially segregated hotels, restaurants, and other facilities. In 1963, Lewis became the chairman of SNCC, which thrust him into the public eye. As SNCC chairman, one of Lewis's primary responsibilities was to utilize the press to raise awareness of the committee's nonviolent work, employing the news media to force the public to confront the suffering of nonviolent protesters at the hands of violent mobs and law enforcement.[21] Additionally, Lewis and other civil rights leaders took part in the Freedom Vote, a mock election and demonstration intended to raise awareness of disenfranchisement among black voters in Mississippi.[22]

By 1963, Lewis had gained a high profile within the civil rights movement, and he became one of the principal organizers of the March on Washington in 1963. On that August day in 1963, Lewis delivered a stirring speech regarding the need for civil rights legislation. As Lewis remarked:

> To those who have said, "Be patient and wait," we have long said that we cannot be patient. We do not want our freedom gradually, but we want to be free now! We are tired. We are tired of being beaten by policemen. We are tired of seeing our people locked up in jail over and over again. And then you holler, "Be patient." How long can we be patient? We want our freedom and we want it now. We do not want to go to jail. But we will go to jail if this is the price we must pay for love, brotherhood, and true peace.[23]

In March 1965, Lewis and hundreds of other civil rights advocates planned a now-infamous march from Selma to Montgomery, Alabama, to demand expanded voting rights in the state.[24] As demonstrators began to cross the Edmund Pettus Bridge in Selma, a group of Alabama State Troopers arrived to confront them. Governor George Wallace had declared the demonstration unlawful and ordered law enforcement officers to force the crowd to disperse. When Lewis and his group continued marching, the state troopers attacked the demonstrators. Lewis was knocked to the ground and beaten repeatedly with billy clubs; he sustained a fractured skull as a result of the attack.[25] That day became known as "Bloody Sunday," and images of the violence ultimately helped spur the passage of the Voting Rights Act of 1965.

John Lewis as a Congressman

Lewis's activism continued throughout the 1960s and 1970s, eventually culminating in his first run for Congress in 1977.[26] Although the initial run was unsuccessful, Lewis later attained a position on the Atlanta City Council in 1981.[27] In 1986, Lewis ran again for Congress, this time successfully.[28]

Upon reaching Washington, Lewis quickly established himself as an independent advocate for his district, not beholden to either party. As a result, Lewis's resolute advocacy for his ideals often placed him on the losing side of major proposals. For example, during the first Bush administration, Lewis voted against war in Iraq.[29] In 1996, Rep. Lewis joined just 100 other members of the House of Representatives to vote against President Clinton's welfare reform measures.[30] And when the question of war in Iraq arose a second time after the 9/11 terrorist attacks, Lewis again voted against the war, citing concerns about the long-term and unknown consequences of the conflict.[31] But even when voting in the majority, Lewis still faced opposition, enduring racial slurs for his support of the Affordable Care Act during the Obama administration.[32] When speaking to reporters afterward, Lewis was unmoved from his support of the legislation, saying, "[I]t's okay. I've faced this before."[33]

Lewis's advocacy continued into the Trump administration, occasionally leading to very public disputes with the president. The earliest of such disputes began shortly after the 2016 election and its polarizing results. Neither major candidate received a majority of the popular vote, and President Trump won

the electoral college despite Former Secretary of State Hillary Clinton's comfortable popular vote plurality.[34] The specter of foreign influence loomed large over the election results and would continue to linger through the investigation of Special Prosecutor Robert Mueller, to say nothing of the subsequent impeachment proceedings premised on similar concerns.[35]

In the wake of those results, Lewis announced he would not attend President Trump's inauguration ceremony, citing his concerns that Russian influence swayed the election's outcome and stating that he did not view Trump as a "legitimate president."[36] This was the second time Lewis declined to attend a presidential inauguration: He similarly skipped the 2001 inauguration of President George W. Bush due to the controversies surrounding the election results in Florida and the Supreme Court's *Bush v. Gore* decision.[37] President Trump responded via Twitter, saying that the congressman and former civil rights leader was "all talk, talk, talk" with "no actions or results."[38] The president further criticized Lewis's district—which comprises a substantial part of Atlanta and the surrounding metropolitan area—as being "in horrible shape and falling apart" and "crime infested," contending that Lewis was "falsely complaining" about the election results.[39] Unsurprisingly, a few angry tweets did not dissuade Lewis, and several other members of Congress joined Lewis in protest.[40]

Meanwhile, Lewis's authorial pursuits, which only expanded later in his life, complemented the continued activity in his political career. While Lewis previously coauthored *Walking with the Wind: A Memoir of the Movement* in 1999,[41] the 2010s saw a flurry of publishing activity by the seasoned congressman. From 2012 through the end of his life, Lewis coauthored or authored several new books, including the previously mentioned trilogy of autobiographical graphic novels titled *March*,[42] which recount Lewis's experiences in the civil rights movement. Lewis hoped the series would impact young people in a manner similar to another graphic work: *Martin Luther King and the Montgomery Story* (1958), which influenced Lewis in his youth in its advocacy for peaceful protest and nonviolent resistance.[43] *Run*, the sequel to *March*, published its first installment in 2019, picking up shortly after the Voting Rights Act was signed into law.[44]

Unfortunately, Lewis would not live to see the completed publication of the *Run* series. In December 2019, Lewis announced that he had been diagnosed with stage four pancreatic cancer.[45] Despite his diagnosis, Lewis's work continued. Following the death of George Floyd at the hands of Minneapolis police officers in May, among other high-profile examples of police misconduct, protests and civil unrest spread across the country to call for police reform.[46] In response, the House of Representatives passed the George Floyd Justice in Policing Act, which Lewis co-sponsored with his colleagues.[47] Among many other things, the bill would curtail the qualified immunity defense in Section 1983 civil actions, which allows state actors to avoid liability for violating statutory or constitutional rights that are not clearly established at the time of the purported violation.[48] Just a few weeks after the bill's passage in the House and while it remained stalled in the Senate, John Lewis passed away on July 17, 2020, at the age of 80.[49]

John Lewis as a Model for Young Lawyers

Lewis left behind a country that owes a great deal to him and those like him for pulling it forward, step by step, from the enduring legacy of slavery and toward a future free from the prejudices that stubbornly persist and divide neighbor from neighbor. The change he was able to achieve, and the change still yet to be achieved, would not be possible without the protections of the First Amendment. Even when the full force of state violence was unleashed on peaceful marchers in Selma, Alabama, the First Amendment set the baseline for the passive resistance—the "good trouble"—that facilitated all the progress of the civil rights movement. Decades later, those protections allowed Lewis to publicly challenge even the legitimacy of the president of the United States.

The life of John Lewis demonstrates the importance of utilizing, and protecting, the freedoms afforded by the First Amendment. Lawyers, through the unique privileges of their profession and their special access to the judicial system, play an important role in advocating for, maintaining, and expanding those (and other) freedoms. Sometimes that role is overlooked in the day-to-day life of young lawyers, whether they be associates in a large firm, solo practitioners, employed in government positions, or advocates in a nonprofit, public interest group. Each path has its benefits and drawbacks, but advocacy for the causes in which young lawyers believe and for the rights of others is possible regardless of which path they choose. Simply put, young lawyers do not need to work on the next landmark Supreme Court case to make an impact. As Lewis's life shows, meaningful advocacy can take a variety of forms: Organizing, writing, and voting are all options for encouraging meaningful change. Lawyers have the additional opportunity to represent those who organize, write, and vote through pro bono advocacy.

Lewis's experience also highlights the importance of individuals assisting and receiving assistance from others in connection with life's various pursuits, whether collective or individual. When Lewis participated in the Freedom Rides or when he marched on Selma and Washington, he did not do so alone. Instead, he was surrounded by likeminded individuals, all marching together for a common cause. Of course, the need for such support extends well beyond the realm of political action and is no less important, or perhaps even more so, in day-to-day life. As young lawyers quickly find out, the legal profession has a variety of strains and stresses. Maintaining a support group of family, friends, and colleagues helps to overcome such challenges, ultimately leading to a happier, more fulfilling career and allowing for more opportunities to help others in turn.

Last, however, Lewis shows young lawyers that it is never too early or too late to meaningfully participate in the causes that matter to them. Public advocacy can happen at any age. And no matter what progress is made, the possibility for improvement always remains. After all, even in the final days of his life, and despite all the advances made throughout his lifetime, Lewis still found such an opportunity for improvement, co-sponsoring a bill that would roll back the qualified immunity defense (among many other proposed reforms) such that state actors and private citizens may be placed on the same footing with respect to the phrase "Ignorance of the law excuses no one." Similar opportunities for improvement will always exist, if looked for. Young lawyers should not shy away from seeking and pursuing them, however grand or small they may seem. And hopefully, toward the end of their careers, they will keep looking for such opportunities—if not to pass the next sweeping reform bill in Congress, at least to encourage and mentor, as Lewis has done, the next generation to continue the work that will eventually be left to them.

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Race, Diversity, Inclusion, and the Media Bar: Will the National Conversation on Race, Diversity, and Inclusion Bring About Meaningful, Lasting Change Within Our Bar?

By James Carlos McFall, Trey McDonald, and Miguel Ortiz

The year 2020 will not easily be forgotten. We were confronted with a global pandemic that forced us to alter the way we work and interact with friends and loved ones, and we survived one of the most contentious presidential campaigns in U.S. history.

For many Americans, however, 2020 is perhaps most notable for the killings of George Floyd and Breonna Taylor and the national reckoning and protests that followed on issues of police brutality, institutional racism, and justice.

We interviewed prominent media and entertainment attorneys to gain a better understanding of their experiences as members of the media bar. The conversations were extremely informative. Perspectives on whether the recent conversation on race takes hold and, ultimately, leads to increased diversity and equity within the media bar varied widely, especially between age groups. There was a remarkable level of consistency in terms of experiences (both positive and negative) within the bar, with each of them echoing a similar sentiment, albeit in vastly different terms. Their sentiment can be summed up as follows:

1. Law firms, companies, and the bar have historically been reluctant to acknowledge that lack of diversity is a problem.
2. Law firms and companies often do not understand the unique challenges underrepresented attorneys face in the profession and the media bar.
3. There is no silver bullet, and law firms, companies, and members of our bar must do more to bring about lasting, positive change.

This article examines each of these points.

The Issues

1. The Need to Acknowledge the Problem and the Role We Play in Perpetuating It.

Black attorneys and jurists have played a crucial role in enshrining many of the First Amendment principles without which the George Floyd, Breonna Taylor, and Black Lives Matter protests could not have occurred. For example, in *Police Dep't of City of Chicago v. Mosley*,[1] Justice Thurgood Marshall, writing for the majority, famously declared:

> [A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. . . . Our people are guaranteed the right to express any thought, free from government censorship. The essence of this forbidden censorship is content control. Any restriction on expressive activity because of its content would completely

undercut the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."[2]

Despite their significant legal contributions, attorneys of color remain historically underrepresented in both the profession and the notoriously insular media bar.

An American Bar Association survey found that, despite accounting for 13.4 percent of the U.S. population in 2019, only 5 percent of the nation's attorneys are Black. Further, approximately 2 percent of partners at U.S. law firms are Black. The numbers are even worse for Hispanic attorneys.

It remains difficult for underrepresented minorities to break into the industry, let alone to thrive in it. Sibo McNally, vice president of business and legal affairs at Starz, pointed to the barriers that exist within the hiring process. "People often hire people who look like them or remind them of themselves. This becomes a problem if the people with the most hiring power are disproportionately white," she explained.

2. The Unique Challenges That Underrepresented Minorities Face in the Profession.

Another common sentiment expressed by the attorneys interviewed for this article is the feeling that they must constantly disprove negative racial stereotypes and low expectations that some may have for them. For example, Denise Beaudoin, who runs The Empire Firm, LLC and services several productions, including *The Dr. Oz Show,* discussed constantly feeling early in her career the need to be perfect or risk being deemed incompetent. The constant need to prove oneself is stressful and exhausting, which may explain why the attrition rates for racially diverse associates significantly exceed those of their white colleagues.

Further, many attorneys described the "loneliness" and "isolation" they have felt on the numerous occasions where they were the only person of color in the room. For example, Carolyn Forrest, senior vice president and general counsel of Tubi, a division of Fox Entertainment, stated, "[I]t was daunting . . . I felt like an outsider."

Black and Brown attorneys must also cope with the same fears and stresses that exist for minorities in a society that, as Philadelphia 76ers Coach Doc Rivers said, "[D]oesn't love us back." The attorneys interviewed recounted numerous conversations with friends and colleagues of varying ethnic and racial backgrounds in the aftermath of George Floyd's killing. They all recalled friends and colleagues being shocked to learn that they too had been targeted, demeaned, made to feel unwelcome, or, worse, threatened with violence because of their race.

The reality is that legal training, degrees from prestigious colleges and universities, and positions of prominence and authority have not shielded—and are unlikely to shield—us from the harsh realities of life that exist for many of our Black and Brown brothers and sisters who have not been afforded the same educational and professional opportunities. Former U.S. Attorney General Eric Holder and Senator Tim Scott (R-SC), for example, have spoken publicly in recent years about unwarranted confrontations they had with police officers while serving at some of the highest levels of the federal government and in elected office. Many of the attorneys we interviewed recounted similar personal experiences.

3. The Critical Role That We Must All Play in Remedying the Problem.

The role of a dedicated and influential mentor cannot be understated. Bradley Runyon, legal counsel for *The Dr. Oz Show*, described the importance of dedicated mentors who invested directly in his success. S.

Jenell Trigg, chair of Lerman Senter's Privacy and Data Security Practice, discussed the critical role that mentors played in her growth as an attorney when she started her career at the Federal Communications Commission. She described mentors taking her under their wing and encouraging her to take on projects and roles outside of her comfort zone and area of expertise because they knew doing so would make her a better attorney. "It changed the trajectory of my career," she explained.

Forrest expressed the need for diverse attorneys to take on some of those efforts themselves in the absence of a dedicated, committed mentor. "It's about marketing yourself as a team player and making yourself the one people want to work with," she said.

McNally noted that she has found herself more willing than ever to speak out against latent racism. McNally and Forrest encourage attorneys of color to make known their feelings regarding the need to improve diversity and inclusion efforts. Forrest, for example, explained:

> People of color have to speak up. I don't think it's a job only for people of color, but I do believe diverse attorneys have a duty to speak up . . . . There are always people who say we want to promote diversity. But then they say "we cannot find qualified candidates. It's a 'pipeline' problem." These are good, kind-hearted, well-intentioned people. But nothing changes.

The often-cited "pipeline" problem refers to the perceived scarcity of qualified diverse candidates. The attorneys interviewed for this article, however, share our belief that misconceptions about certain law schools and the candidates who attend them are equally, if not more, problematic. The legal industry is notoriously elitist. The most powerful firms and corporations recruit primarily candidates who attended the nation's top-ranked law schools. In doing so, they overlook the fact that qualified candidates from historically black colleges and universities (HBCUs) and lower-ranked schools often choose to attend those schools over their higher-ranked counterparts for reasons unrelated to their talent, work ethic, and qualifications, e.g., significant scholarship awards, lower tuition costs, and the ability to attend school on a part-time basis while working. In effect, those students are often afforded no meaningful opportunity to interview with, let alone be hired by, many firms and legal departments. And, as a result, many firms and legal departments continue to lack the critical mass of diverse talent that they have long espoused an interest in achieving.

The attorneys we interviewed outlined several steps that law firms and in-house legal departments can take to promote greater diversity within the profession and media bar:

- **Revisit recruiting strategies.** Legal employers should consider expanding the scope of their recruiting efforts to include on-campus interviews at HBCUs and other law schools with significant diverse law student populations. Employers should recognize that many of the students who attend those schools have overcome tremendous adversity to get to where they are. Those students should not be deprived of interview and employment opportunities because they attend lower-ranked schools.
- **Recognize internal deficiencies.** It is difficult, if not impossible, for organizations with no diverse leaders to identify policies and practices that have prevented them from being able to recruit, promote, and retain diverse talent. Law firms struggling to achieve greater diversity should consider the prospect of requiring their attorneys to attend implicit bias training and hiring a chief diversity officer.
- **Place an emphasis on retaining and promoting diverse talent.** It is difficult to recruit diverse talent when you can point to no, or very few, diverse attorneys who have thrived within your organization. The importance of knowing someone who looks like you and who you identify with culturally cannot be understated. Firms that espouse an interest in diversity, but lack the ability to demonstrate a meaningful commitment to the issue in practice, face an uphill battle when it comes to recruiting

diverse talent. The opposite is true for firms with a critical mass of diverse attorneys throughout the ranks, and it is especially true for those with diverse attorneys in positions of leadership.
- **Incorporate diversity initiatives into the long-term strategic plan.** Legal employers should mentor diverse candidates and invest in "pipeline" programs that expose diverse candidates to the practice of media and entertainment law.

Conclusion

The myriad issues that underlie the racial disparities within the media bar and legal profession as a whole are not new. In the wake of national protests and calls for equality, however, corporations, law firms, and attorneys are facing increased pressure to not just acknowledge the systemic and structural inequities that perpetuate racial disparities, but also to take an active role in remedying some of those societal ills. It remains to be seen whether and to what extent their responses will bring about meaningful, lasting change.

In the end, one thing is certain: It is imperative that we, the members of the media bar, continue the conversation, call out and attempt to remedy structural inequities in our own institutions, and implement and support initiatives dedicated to promoting diversity, equity, and inclusion within our bar.

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Trey McDonald is a trial lawyer and partner in Jackson Walker LLP's Houston office. Trey's practice focuses on a wide array of media, First Amendment, and complex commercial litigation matters. Trey has previously written and lectured on issues related to race and law. He is an active member of his firm's Diversity Committee and co-chairs the subcommittee responsible for diverse attorney recruiting initiatives.

Miguel Ortiz is a litigation associate in Jackson Walker LLP's Dallas office. Prior to law school, Miguel served as a paralegal in the Prosecution Department and the Defense Department of the U.S. Air Force. In those roles, Miguel gained experience in the areas of administrative law, operational law, and criminal law.

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2. *Id*. at 95–96 (internal citations omitted).

Understanding Protests: The Importance of Meaningful Dialogue

By Keith Allen

"Change happens when the pain of staying the same is greater than the pain of change."[1] The summer of 2020 was filled with an unending stream of protests. Why are these protests occurring? Are they effective in forwarding the protesters' interests? Is there anything we can do to dissolve the underlying tension? While the First Amendment's solution of meaningful dialogue may be uncomfortable, it has the potential to advance the interests of both the protesters and their detractors.

America Was Born from a Protest

Protests are part of America's nature. This nation started when the colonists raised their voices—i.e., "protested"—against an unsympathetic king who treated them like outcasts. When British soldiers fired into a group of unarmed colonists during the Boston Massacre, this country declared to the world that people have a right to alter a government that ignores the basic truth that all people are created equal with certain unalienable rights.[2] It created the First Amendment to show its commitment to "uninhibited, robust, and wide-open" debate on all issues, including the right to peacefully protest.[3]

Protests generally arise when a group feels it has no voice and/or power against another group's practice(s).[4] Over time, the group gathers people with similar experiences to raise awareness of their plight. When the group grows large enough, it has the potential of expressing its position in the form of protests.

America does not assume that every protester is correct. Instead, it recognizes protests warn of areas where meaningful dialogue is absent. When the country heeds this warning, the resulting dialogue has the power to strengthen the union and change the course of history.

For example, the Boston Tea Party was the result of colonists who grew tired of "taxation without representation." For more than 100 years, the king imposed increasing taxes on the colonists. When the king refused to listen to the colonists' objections, 9,000 people staged a peaceful protest against the latest Tea Act.[5] When that peaceful protest failed, 60 attackers disguised as Native Americans threw British tea into the ocean.[6] The king's continued refusal to engage in any dialogue led to the American Revolution.

The civil rights movement was the result of American frustration with Jim Crow laws. In 1943, a Black seamstress named Rosa Parks stepped on to a bus driven by James Blake. She paid her bus fare and, when she got off the bus to walk around to the back for her seat, she saw Blake drive off with her fare—a common practice to torment Black passengers.[7] Parks avoided Blake's bus for 12 years until that fateful day in December 1, 1955, when she inadvertently boarded Blake's bus again. This time, Blake had her arrested for refusing to relinquish her seat to a white passenger. Black Alabamans staged a 381-day protest in which they refused to ride Montgomery buses.[8]

Dr. Martin Luther King Jr. and his followers were arrested, bloodied, beaten, and attacked with fire hoses and police dogs during peaceful demonstrations in Birmingham, Alabama.[9] A few months later, King

appeared in Washington, D.C., to speak to 25,000 people about his dream. In his speech, he pleaded with all sides to "sit down together at the table of brotherhood" to create meaningful dialogue on several issues, including police brutality. He envisioned a day when "*all* of God's children, black men and white men, Jews and Gentiles, Protestants and Catholics, will be able to join hands" and work out their differences.[10] The failure of all sides to fully engage in this dialogue has allowed the fires of our past to smolder, ready to flare up whenever new fuel is added.

Dialogue may seem impossible in today's world because every incident has the potential to spark a new round of protests. However, this mindset may be the consequence of all sides using a micro-level lens to manage a macro-level complaint. Protests are rarely the result of a single incident. Instead, they arise out of a chain of events that protesters rightly or wrongly perceive as a pattern. For example, protesters may agree that it was improper for Jacob Blake to allegedly wrestle with the police and disobey their commands. But the image of bullets going through Blake's body reinforced the centuries-old story that everything can be taken away from minorities—from Rosa Parks's bus fare to places of worship to Blake's mobility. Shifting dialogue to the ongoing story is the key to resolving the tension.

Are We Listening?

The first step in creating meaningful dialogue is to listen to what the other person is saying. This does not necessarily mean agreeing with the statement; power exists in merely understanding what the other person believes.

The heart of protesting is perceived powerlessness. As a Black male, I know what it is like to have accomplished much but feel powerless simply because of the color of my skin. Though I may have been an associate at a large multinational law firm, that meant nothing when a security guard conspicuously followed me at a Target and told me he prevented me from stealing. Nor did it matter when my wife and I were pulled over by the Illinois State Police—one of my firm's clients—because we were driving in a luxury car we rented for a vacation. I also remember a state judge who referred to me in the third person and informed my opposing counsel that "they" (I could only assume Black lawyers) practice law in a certain way. The sting of these experiences was not the blatant racism; it was the perceived underlying sentiment that I—a person of color—did not deserve what I earned, that the right to life, liberty, and the pursuit of happiness did not apply to me. Whether that perception was right or wrong, it cannot be resolved until it is understood.

The same is true for addressing protests. Instead of listening to the colonists' cries for representation, Great Britain told the people to pay taxes or face military retaliation. When Rosa Parks asked one of the arresting officers why Black people were being pushed around, he confessed, "I don't know. But the law's the law and you're under arrest."[11] When King spoke out against segregation, he was vehemently attacked. Each of those protests could have been resolved by listening. The key task is identifying the story causing the unrest.

Listening is a two-way street. The failure to be heard does not give protesters the right to stop listening. Protests have little effect if protesters do not listen to their audience. For example, some of my white friends are frustrated because people of color reject their attempts to help. They feel people of color will never accept their sincerity. They "protest" by leaving integrated neighborhoods. This too can be solved by dialogue.

How Can We Dialogue?

Once we heed the warning signs of protest and hear the underlying story, the moment is ripe for dialogue. In its simplest form, dialogue is making space for someone else's humanity to meet your humanity. Jonathan Haidt opined this is possible by finding something in common to circle around, like a flag, a book, or an ideal.[12] In so doing, we stop seeing the other side as evil and start seeing them as a partner in creating a shared vision. When we let go of comparing America to a perfect utopia and start recognizing the great things this country has accomplished, we find ways in which our philosophies can coexist to accomplish even more.

When we find common ground, or the "table of brotherhood" as King called it, we stop yelling over each other and start addressing the specific problems that confront us. We move beyond the specific incident at hand and co-create specific goals. Each side takes responsibility for its role in the problem. All sides take the vulnerable steps of questioning their perceptions and admitting where they might be failing.

Those who engage in dialogue create long-lasting results. For example, a Black blues musician named Darryl Davis was instrumental in more than 200 Klansmen giving up their robes. He did not do so by telling them how evil they were, but rather by befriending them, understanding them, and finding common ground.[13]

Dialogue also changed an anti-police activist's approach to policing. Rev. Jarett Maupin agreed to put himself in police officer's shoes by participating in Phoenix's use-of-force training. When he failed almost every exercise, he saw that his expectations of officers may have been unreasonable.[14] Thereafter, he collaborated with police officers to develop appropriate standards.

Dialogue is uncomfortable, but the pain of disregarding each other is much worse. The practice of using the government to legislate matters of the heart rarely succeeds. Segregation did not work. A decade from now, we may discover that removing flags and statues only allowed hate to fester underground until it exploded in the form of politicians or legislation seeking to revive that feeling.

At the time of this article, the federal government is seeking to suppress reporting on protests. The Ninth Circuit recently struck down an injunction exempting "Journalists" and "Legal Observers" from dispersal orders during the Portland protests.[15] While the Ninth Circuit is scheduled to review its decision after the drafting of this article,[16] the federal government's position is troubling. If being heard is the underlying motivation for protests, then silencing the reporting of those protests will only exacerbate the unrest.

Dialogue starts by reaching out to those who we perceive to be our opponents. For example, I once arranged a meeting with the deputy chief of an all-white suburban police department. As I sat across the table from him, I described my perceptions concerning police behavior. I also explained to him that my perceptions of the police were just that—my perceptions—and I was willing to listen to his experiences and perceptions as a police officer dealing with a diverse range of individuals. Within an hour, we had created meaningful dialogue, developed respect for each other, and started to work on multiple ways to address my community's concerns through enhanced training, body cams, detailed reporting, and other methods.

For those who are averse to starting these conversations alone, groups such as chambers of commerce, bar organizations, nonprofits, and other organizations provide dialogue opportunities. The key to dialoguing in such groups is to be an active participant in those conversations.

If change happens when the pain of the status quo is greater than the pain of change, then our divisive political environment is demanding the latter. We can no longer afford to overlook our fellow countrymen. We must engage in dialogue because it is a practice designed to create buy-in from all sides. And while a utopian result is not likely, we can create circumstances in which neither side will have the desire to protest because their goals are heard, respected, and addressed. America was built for this dialogue; it runs in our country's blood. This current surge of protests gives us an opportunity to strengthen our nation. What will we do to rise to the challenge?

Keith Allen is a partner at Mandell Menkes LLC, a Chicago-based firm representing media companies in First Amendment matters. He also has experience leading efforts to build stronger police-civilian relationships and unite diverse communities.

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Race and the First Amendment: A Compendium of Resources

By Solomon Furious Worlds and Len Niehoff

This article provides summaries of law review articles and books that consider the complex relationship between racial justice and free speech. It seeks to assist law students, legal scholars, judges, and practitioners to think more deeply about the intersection between these critically important values. It describes scholarship that views these values as complementary, but also scholarship that views them as conflicting.

This article discusses a few pieces that reflect the traditional view—that the First Amendment has historically provided and continues to provide an essential tool in the pursuit of civil rights and in the advancement and empowerment of racial minorities. But it places much greater emphasis on recent works that take a substantially more critical view of First Amendment doctrine. This more recent scholarship argues that First Amendment doctrine rests on faulty assumptions about how the world actually works, that it amplifies the voices of those in power, and that racists have weaponized that doctrine against people of color in harmful and horrific ways.

We intentionally chose this balance. We worked from the assumption that the readers of this publication would already know (and probably subscribe to) the traditional view. We want to introduce new perspectives that challenge the orthodox paradigm and urge readers to ask themselves whether they really believe that First Amendment doctrine has gotten things right. It would be profoundly ironic if First Amendment lawyers, of all people, were unwilling to participate in some pointed and provocative competition in the marketplace of ideas.

These works certainly break no new ground insofar as they explore the connection between racial justice and free speech. As early as 1965, Harry Kalven wrote in his book *The Negro and the First Amendment* about how the civil rights movement had shaped First Amendment doctrine and how expressive liberty had promoted racial justice. But today's scholarship explores fresh territory nevertheless.

In their 2017 book *Free Speech on Campus*, Erwin Chemerinsky and Howard Gilman noted that polls of college-age students showed that they no longer have the reverence for the First Amendment that prior generations embraced. The authors offered several explanations for this trend. Among them was that these students had not witnessed the important role that free expression played during the civil rights movement of the 1960s. Three years later, this once-sound assessment is almost certainly wrong.

In 2020, the slayings of George Floyd, Breonna Taylor, and Tony McDade shifted the ground underneath many of us. Their killings prompted massive demonstrations in the United States and around the world. Many people were already engaged in anti-racist movements sparked by prior killings of unarmed Black people. Suddenly, however, the role of protests in the struggle for racial justice had immediate relevance again and was no longer the stuff of history books, documentaries, and the dusty memories of Baby Boomers.

At the same time, the murders of Floyd, Taylor, and McDade called foundational questions about our

social systems and structures. Over the summer following their deaths, cities saw months of continuous protests—some even had land seized by citizens frustrated by their government's inaction. Law students across the country demanded[1] that their schools facilitate more robust discussion of the ways in which our laws and legal system perpetuate white privilege and oppress people of color. In the view of these students, every component of our legal architecture must answer to this charge, and the First Amendment does not get a pass.

This article is divided into two parts. The first part, written primarily by Solomon Furious Worlds, looks at timely law review articles that have considered these issues. The second part, written primarily by Len Niehoff, looks at recent books that have done so. We end this unique project with a brief two-part personal afterword.

Law Review Articles

Articles Offering Traditional Defenses

Timothy Zick
The Dynamic Relationship between Freedom of Speech and Equality
12 Duke J. Const. Law & Pub. Pol'y 13 (2017)

Timothy Zick, professor of law at William & Mary Law School, succinctly explains the "dynamic," "bi-directional" relationship between the First Amendment's freedom of speech clause and the Fourteenth Amendment's Equal Protection Clause by examining the "race equality movement" of the 1950s and '60s and the "LGBT equality movement."[2] He argues that "free speech, along with rights of assembly and press, are powerful means of advocating for, and to some extent achieving, equal treatment under [the] law"[3] because earlier First Amendment court victories served as the precursor to later advancements in "substantive equality" and equal protections under the law.[4] Zick uses cases like *NAACP v. Alabama ex rel. Patterson*,[5] from the racial equality movement's mid-20th century wave,[6] and juxtaposes them to cases within the LGBT equality movement, like *Doe v. Reed*.[7] He also compares and contrasts the legal treatment of both movements,[8] and explores challenges each movement confronted.[9]

The article then examines the relationship in the other direction, exploring how the Equal Protection Clause affects the First Amendment. After discussing the First Amendment's strong "neutrality" principle, Zick contends that the "commitment to neutrality ultimately advanced equality, in part by helping to create a political process that was free from government bias."[10] Zick also explains that the neutrality principle is rooted in equality insofar as it attempts to foster the "central meaning" of the First Amendment, which is to allow for "'uninhibited, robust, and wide-open'"[11] debate by all voices on "public issues."[12]

Zick points out that the LGBT movement's focus on rights of association also connects equal protection doctrine with the First Amendment. And he notes that the LGBT equality movement "relied on" advancements made "during the civil rights era."[13] Zick concludes the article with an overview of intersections between the First and Fourteenth Amendments;[14] a discussion of differences between the two social movements;[15] and suggestions as to how the history of the "race equality" and "LGBT equality" movements may inform current efforts in the trans equality movement.[16]

Leonard M. Niehoff
Policing Hate Speech and Extremism: A Taxonomy of Arguments in Opposition
52 U. Mich. J. L. Reform 859 (2019)

Leonard Niehoff, professor from practice at the University of Michigan Law School and coauthor of this article, wrote *Policing Hate Speech and Extremism: A Taxonomy of Arguments in Opposition* to outline the barriers within traditional First Amendment doctrine to punishing hate speech and association. In the piece, he seeks to "highlight doctrinal problems, convey cautionary tales, and clarify matters so that we do not waste any more time doing things that do not work, that courts will not uphold, and that could lead to pernicious results."[17] The article then proceeds by discussing the link between the doctrines of free speech and association, describing three common categories of arguments against hate speech regulation, and, finally, considering whether it is wise to adopt anti-extremism measures. "Spoiler alert: [Niehoff] think[s] not."[18]

In linking the doctrines of free speech and association, Niehoff notes that "the Supreme Court inferred the right of free association from the right of free expression" through a string of cases, starting with *NAACP v. Alabama*.[19] The Court has therefore inextricably linked freedom of association, at least in this form, with freedom of speech.

Niehoff then turns to the three categories of arguments raised against legal restrictions on hate speech and extremist association, which he labels as definitional, operational, and conscientious. Definitional arguments focus on the vagueness and overbreadth problems that such restrictions often encounter. He argues that, under existing Supreme Court precedent, such laws tend to be "unworkably vague, leaving people to speculate whether the statute prohibits the behavior in question, and . . . overly broad, encompassing speech and association we want to protect along with that we want to proscribe."[20]

Operational arguments focus on the implementation stage of laws. Niehoff argues that at this stage, "we may discover that a law specifically targeting extremism turns out to be unnecessary." He further contends that when these laws are deployed, they may "end up harming the very populations they were intended to protect."[21]

Conscientious arguments, Niehoff argues, rest on the only right the Supreme Court has described as "absolute"—the freedom to "'believe.'"[22] He contends that hate speech or extremist association regulations can infringe on this absolute freedom. And he questions whether we want to adopt laws that infringe on the sanctity of the individual conscience.

Niehoff is sympathetic to the considerations that drive the desire to restrict hate and extremist speech. He begins his conclusion by acknowledging that "[t]olerance of hate speech and extremist association comes at a real and substantial cost" and that "[h]onorable impulses and commonsense intuitions tell us that we need to do something to address them and their consequences."[23] He concludes, however, by stressing that such efforts must account for the various doctrinal contours and arguments he discussed throughout this article. Niehoff warns that such regulation could become "another form of extremism, another tool of oppression, and another whipcord driving human hearts and minds toward orthodoxy and, finally, 'the unanimity of the graveyard.'"[24]

Articles Offering Critical Challenges

Justin Hansford
The First Amendment Freedom of Assembly as a Racial Project
127 Yale L.J. F. 685 (2018)

In this article, Justin Hansford, an associate professor at Howard University School of Law, argues that "the First Amendment is a racial project [that] results in predictable racialized outcomes that redistribute

resources along racial lines."[25] Hansford sets the tone of this article by detailing how he came to focus on assembly rights after being handcuffed and forced in the back seat of a police vehicle during a protest.[26] Hansford makes his argument by connecting America's past to America's present, revealing that conditions have not changed—only transformed.

Hansford discusses the history of Black people assembling in America, reminding the reader of who was originally included in the phrase "We the People" and the various slave codes that explicitly restricted the assemblage of Blacks.[27] Hansford continues by explaining that the First Amendment victories of Black people in the 1950s and '60s always occurred when the Supreme Court had an independent interest in granting the rights; he calls this the "theory of interest convergence."[28] In sum, he argues that the Court refused to recognize the rights of Blacks except where it had a separate agenda.

Using this theory, Hansford argues that the Court decided *Brown v. Board of Education* as it did in order to stymie anti-capitalist propaganda efforts in communist nations.[29] Hansford continues by pointing out that the Supreme Court had no such independent reason to support Black activists during sit-in protests in the mid to late 1960s, so it refused to extend First Amendment protections in those cases. He cites *Adderley v. Florida*,[30] where the Court upheld the convictions of more than 30 protesters under a Florida trespass law, as an example.

Pivoting to the present, Hansford "describes how law enforcement imposes its own will on protesters with little interference from the courts until after the fact."[31] Hansford notes that those protesting for racial justice are teargassed, arrested, and surveilled.[32] All of these actions, Hansford argues, produce a powerful chilling effect because they put the protester's life, liberty, and economic prospects at risk.[33] Hansford recounts a speech the attorney general gave—soon after a white man who was part of a Facebook group titled "Alt-Reich Nation" stabbed a Black student near the University of Maryland—praising white supremacist groups that engage in hate speech.[34] Then, he highlights the fact that those engaged in hate speech often receive taxpayer-funded protection,[35] while, at the same time, Black protesters and people protesting in support of racial equality receive no protection.[36] Hansford concludes with proposals for ways to better protect protest rights for those fighting racial injustice.[37]

Charlotte H. Taylor
Hate Speech and Government Speech
12 U. Pa. J. Const. L. 1115 (2010)

Dr. Charlotte Taylor—then law clerk to the Hon. Robert Katzmann on the U.S. Court of Appeals for the Second Circuit and currently a partner with Jones Day[38]—wrote "Hate Speech and Government Speech" to "explore the possibilities and limitations of using government speech to reduce the incidence of hate speech and so offer a way out of the impasse scholarly discussion has so far reached."[39]

Taylor's article has four sections. The first surveys the positions taken by those who subscribe to traditional views of First Amendment doctrine and those who are more critical of it with regard to hate speech, which Taylor labels "the free speech and anti-subordination camps," respectively.[40] The second section "lays out a typology of forms of government speech that are constitutionally permissible that might be used to deter or undermine the force of hate speech," and the third evaluates those forms of government speech.[41] The final section "briefly draws out some conclusions based upon this exploration."[42]

Section I, titled "The Impasse,"[43] details the main arguments of both First Amendment critics and traditionalists, along with the doctrinal response to those arguments. Taylor claims that the anti-

subordinationists believe that "the First Amendment, as currently understood, is an active impediment to achieving equality in the United States" and that "[h]ate speech causes harms that are a direct affront to equality norms" because, "[w]hen it targets an individual, that person is made to feel inferior and vulnerable on the basis of her membership in a group."[44] She explains that some in the anti-subordination camp base their arguments for regulating hate speech in the Thirteenth and Fourteenth Amendments.[45]

Next, Taylor outlines arguments of the free speech camp, who "take[] it as fundamental that free speech is 'indivisible'"—meaning that "regulators will not be able to draw lines cordoning off speech that expresses a particular viewpoint, however discredited and invidious, without opening the way for the suppression of any speech that legislators happen to disfavor."[46] Other arguments employed by the free speech camp include the difficulties associated with word reclamation tactics often used by marginalized groups (e.g., reclamation by many in the African-American community of the word "nigger") and the possibility of overzealous government censorship.[47] Taylor suggests that legislative attempts to regulate hate speech will have a very difficult time withstanding a constitutional challenge, given the Court's opinions in *R.A.V. v. City of St. Paul*[48] and *Virginia v. Black*.[49]

Government speech, according to Taylor, is a powerful tool that may "offer[] something to both the anti-subordination and the free speech camps."[50] Taylor outlines five types of "constitutionally permissible forms of government expression that could be used to intervene against hate speech": "1) precatory and hortatory speech by government officials and bodies, 2) commemorative expression, 3) public education, 4) government subsidies of private speech and selective control of expression in non-public fora, and 5) advisory and investigatory statements."[51]

After further describing each type of government speech,[52] Taylor addresses the anticipated concerns of the anti-subordination and free speech camps. She predicts the two primary complaints from the anti-subordination camp: First, "government speech is inadequate as a form of intervention." And second, these tactics will "promote backlash as perceived instances of the government favoring 'special interest' groups."[53]

Taylor addresses both concerns by creating hypothetical situations where government speech could have made a dramatic difference. For example, she submits, "Imagine the public reaction if President Bush had spoken out consistently against anti-gay hate speech, standing shoulder-to-shoulder with gay-rights activists and calling on citizens for toleration of same-sex relationships and gender non-conforming individuals."[54]

Taylor also cites historical instances when government speech worked to change behavior—for example, how "[Attorney General] Edwin Meese's Commission on Pornography [prompted] 7-Eleven stores and other retailers to pull adult magazines from their shelves."[55]

Turning to the free speech camp, Taylor argues that its members would likely argue that "any intentional manipulation of private speakers' expression by the government is suspect" and that "many of the proposed measures go far beyond benign admonition and amount to reprehensible, if technically doctrinally permissible, censorship."[56] Taylor responds that such manipulation is appropriate when "the Fourteenth Amendment value of equality" is pitted against First Amendment values, as is true with respect to hate speech.[57] Essentially, "when [there] is another constitutional value" in opposition, the "First Amendment concerns should not be allowed to dictate our conclusion."[58]

Taylor argues that "precatory government speech, commemorative speech, and education should all be used more extensively as means of intervening against hate speech."[59] She further contends that the

benefits of "the most apparently coercive forms of government speech—advisory and investigatory statements"—likely would not "outweigh the detriments" of such tactics.[60]

Petal Nevella Modeste
Race Hate Speech: The Pervasive Badge of Slavery That Mocks the Thirteenth Amendment
44 How. L.J. 311 (2001)

Petal Nevella Modeste, who currently serves as associate dean of student affairs administration at Columbia Law School, wrote "Race Hate Speech: The Pervasive Badge of Slavery That Mocks the Thirteenth Amendment" to "explore[] the protection granted to race hate speech under the First Amendment of the United States Constitution and how it affects the meaning and spirit of the Thirteenth Amendment."[61] Modeste maintains that "the only way to protect victims of race hate speech from its ill effects is to criminalize its dissemination altogether."[62] Her article "discuss[es] the phenomenon of race hate speech"; "examines the treatment of hate speech in international law and the jurisprudence of other countries as an indication of how the rest of the world views this phenomenon"; and "focuses on the First and Thirteenth Amendments to the U.S. Constitution" and the "unique commitment to protecting race hate speech, suggesting that the confusing nature of First Amendment jurisprudence has practically imprisoned lawmakers and jurists, who continue to ignore other portions of the Constitution."[63]

Modeste argues that "[t]he potency of race hate speech is in its ability to exclude, subordinate, discriminate, and create a second-class citizenship for entire groups of people."[64] In describing race hate speech, she contends it shares philosopher Jacques Ellul's four basic characteristics of propaganda: "(1) simultaneous manipulation of the individual and mass populations; (2) totality of reach; (3) power brokering, organization, continuity, and duration; and (4) orthopraxy, which is defined by Ellul as an action that leads directly to a goal, and which does not rely on logic or rational argument."[65] Like propaganda, race hate speech is so invasive that it "operate[s] on an individual at some unconscious level" and its effects on "the target group cannot be overstated"—all the more reason to regulate it.[66]

Next, Modeste examines international responses to race hate speech, starting with the third clause of Article One of the United Nations Charter, which "states that member nations vow to achieve international cooperation in solving international problems of economic, social and cultural or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all, without distinction as to race, sex, language, or religion."[67] Though the United States has ratified various international agreements, it "refus[es] to accept obligations to restrict 'rights to freedom of speech, expression and association.'"[68]

To demonstrate the "contrast" between the United States and other common law nations with respect to hate speech regulation,[69] Modeste discusses a Canadian Supreme Court case that upheld legislation criminalizing hate speech. She concludes this section by pointing out, when it comes to regulating "hate speech, which perpetuate doctrines of racial supremacy," the United States is the only common law nation "unwilling to sacrifice its notion of free speech to protect individuals' human rights."[70] Modeste signals a common theme among First Amendment critics: the United States' free speech doctrine makes it a human rights outlier.

Modeste then provides an overview of First Amendment jurisprudence[71] and the history of the Thirteenth Amendment.[72] She argues that "[r]ace hate speech is certainly a 'badge of slavery'"[73] within the Thirteenth Amendment's proscriptions. And she contends that "Congress' responsibility to uphold its obligations under the Thirteenth Amendment [has been] sacrificed for the noble ideal of [pure free] speech."[74]

Modeste next addresses four common arguments raised against regulating speech—what she calls the "pressure valve," the "minorities' best friend," the "more speech," and the "reverse enforcement" arguments. She contends that such "arguments against regulating race hate speech fall away when the speech is characterized as a badge of slavery."[75]

She concludes by emphasizing that "[t]olerance of hate speech is not tolerance borne by the community at large, it is a psychic tax imposed on those least able to pay"—namely, African Americans.[76] According to Modeste, ending protections for race hate speech is necessary to "make America entirely free."[77]

Zahra N. Mian
Note, "Black Identity Extremist" or Black Dissident?: How United States v. Daniels *Illustrates FBI Criminalization of Black Dissent of Law Enforcement, from COINTELPRO to Black Lives Matter*
21 Rutgers Race & L. Rev. 53 (2020)

Zahra N. Mian, a recent graduate of Rutgers Law School,[78] wrote this note to "examine how the [Black Identity Extremist or] BIE assessment criminalizes African-American dissent."[79] The BIE classification was created by the Federal Bureau of Investigation (FBI) to describe individuals it claimed to "possess a propensity for violence towards law enforcement," which, Mian notes, is similar to the FBI Counter Intelligence Program, or COINTELPRO. "COINTELPRO was a series of covert intelligence operations conducted by the FBI from 1956–1971" and were intended to "[eradicate] all progressive political activity in American society."[80]

In the first section of this note, Mian "explore[s] the targeting and surveillance of Black civil rights activists by the FBI from the COINTELPRO era of the 1960s through contemporary surveillance of Black Lives Matter."[81] Next, she "analyzes the accuracy of the BIE assessment and the impact of discriminatory FBI tactics on Black Lives Matter, and dissects the merits of the criminal prosecution of Christopher Daniels, commonly referred to as the first 'Black Identity Extremist' prosecuted.'"[82] Mian then "examines the disparate treatment of Black civil rights activists and White Supremacists by the FBI" and "offers a racially neutral framework for FBI surveillance of domestic terror threats going forward."[83]

The FBI's COINTELPRO program's purpose was "to 'expose, disrupt, misdirect, discredit, or otherwise neutralize the activities of [B]lack [N]ationalist, hate-type organizations and groupings, their leadership, spokesmen, membership, and supporters, and to counter their propensity for violence and civil disorder,'" which included individuals like Martin Luther King Jr. and groups like the Black Panther Party.[84] Mian writes that "COINTELPRO operations targeting alleged 'Black Nationalist' groups employed a variety of techniques and methods in order to neutralize anyone they deemed a threat to the established order"; in fact, "FBI documents indicate Hoover had no qualms about utilizing violence to neutralize targets."[85]

Today's Black activists, she argues, face a "post-Patriot Act expansion of domestic surveillance," through which "[p]rivate security firms work[] with the government" to "conduct surveillance of activists through the use of aerial technology, social media monitoring, [] direct infiltration" and "counterinformation campaigns to influence public opinion of activists."[86] She notes that documents "depict how the FBI manipulates the actions of lone wolf offenders to impute a presumption of violence onto other Black activists," which promotes the "unfettered surveillance of these activists"—an approach the agency has taken "since the early twentieth century."[87]

The BIE assessment used by the FBI feeds the legitimate concerns in the African-American community regarding police brutality and the murder of unarmed Black men by law enforcement agents.[88] Mian argues that by interpreting genuine critiques of law enforcement tactics as fuel for extremism, the FBI is

able to justify "unconstrained surveillance of Black activists without any underlying factual support for doing so, under the guise of being proactive in the investigation of BIE violence."[89]

Mian argues that if the FBI wants to fairly investigate threats to law enforcement in a race-neutral and fair manner, then the FBI must ensure that domestic terrorism investigations rest on evidence of criminal wrongdoing and not on acts of civil disobedience in the context of protest and demonstration.[90] She contends that, at present, "FBI assessments allow agents to begin investigating targets without 'probable cause' or 'reasonable suspicion.'"[91] She also notes that the FBI "hesitate[s] to bring federal charges against White Supremacists," sometimes only doing so after "increase[ed] social pressure force[s] them to act."[92] She concludes by arguing that "discontinuing the problematic BIE assessment and pursuing domestic terror threats through a racially-neutral framework, will allow the FBI to eradicate problematic surveillance techniques" and reduce the amount of state-sanctioned danger many contemporary activists face.[93]

Books

Book Offering Traditional Defenses

Timothy C. Shiell
African Americans and the First Amendment (2019)

Timothy Shiell is professor of philosophy at the University of Wisconsin–Stout. As a reader would expect, Shiell has a keen interest in the complex conceptual problems presented by the intersections of free expression and race. But this book does not consist of a philosopher's abstract ruminations; to the contrary, it mainly explores these issues through the vehicles of legal doctrine and case law.

Shiell's central thesis is that "First Amendment values, particularly freedom of expression, have been—and continue to be—essential allies in the struggle for racial equality and justice."[94] He grants that liberty and equality do come into conflict in some cases. But, he argues, the underlying values that each of these ideas serves are not in conflict—and the misconception that they are leads to dangerously misguided conclusions.

Shiell develops his argument over four chapters. In the first, he turns to the period from the colonial era to 1930, which he describes as one of "American apartheid." Of course, the robust body of First Amendment doctrine that we know today did not exist at that time. Nevertheless, he contends, the advancement of equal rights for Blacks was inextricably intertwined with speech. The "defiant exercise of liberty (First Amendment values) against the status quo inequality played a critical role in the racial progress that was achieved."[95] And, in turn, restrictions on liberty buttressed the prevailing inequality.[96]

The second chapter takes a close look at *Herndon v. Lowry*.[97] In that case, Herndon, a Black communist, was arrested in Atlanta, Georgia, and charged under state law with inciting insurrection. His cause gained widespread support, and he ultimately prevailed in a decision that marked the first time the Supreme Court protected a Black man's dissenting speech.[98] Shiell sees in the *Herndon* case "a critical first step in the civil rights movement, a milestone in the debate over race-neutral versus race-conscious strategies, and a paradigmatic example of the use of mass politics and mass protest to advance liberty and equality."[99]

The third chapter focuses on the civil rights era of the 1960s and '70s. Shiell argues that this period highlights the symbiotic relationship between free speech and civil rights: Vigorous expression proved essential to advances in equality, and the movement toward equality proved integral to the expansion of

First Amendment rights. During this era, he maintains, "[l]iberty and equality were widely understood to be fundamental allies."[100]

The final chapter seeks to rebut current claims that we should afford certain categories of expression (like hate speech) little or no protection in the service of promoting equality. Among other things, Shiell rejects the argument that our jurisprudence should follow the lead of countries that have adopted laws punishing hate speech and related communications. That argument usually suggests that an international consensus in favor of punishing hate speech has emerged, leaving the United States as an extremist outlier.

Here, Shiell largely follows the arguments set forth in Nadine Strossen in *Hate*,[101] another important book in the traditional defense category. Shiell draws on points made by other leading First Amendment scholars as well, including Ronald Krotoszynski Jr. Specifically, Shiell contends that (1) scant, if any, empirical evidence exists that such laws are effective; (2) foreign governments have used broad hate speech bans to punish speech that deserves protection; and (3) no international consensus exists around free speech theory or what to do about hate speech; the United States simply reflects one set of choices among many others.

Books Offering Critical Challenges

Steven H. Shiffrin
What's Wrong with the First Amendment? (2016)

Steven Shiffrin teaches at Cornell University Law School and has written widely and creatively about the First Amendment. As he notes in the Introduction, after teaching First Amendment law for nearly 40 years, he arrived at the conclusion that "we have come to a point when it is *thinkable* that the First Amendment does more harm than good."[102] In this book, Shiffrin says, he aims "to provoke second thoughts about First Amendment worship."[103]

The "main problem" with the First Amendment, Shiffrin argues, "is that it overprotects speech," particularly insofar as it encompasses speech that undermines equality.[104] Over 11 chapters, he explores various dimensions of this theme. In the third chapter of the book, he turns specifically to issues of race.

Shiffrin begins with a paradox: We know that racist speech causes harm, and yet the courts have held that the First Amendment protects it. Of course, the government can punish *some* racist speech without running afoul of the Constitution. For example, laws that criminalize threats and "fighting words" will reach some speech that is racist in nature. But, under current First Amendment doctrine, the government cannot punish speech simply because it reflects a racist or hateful point of view.

Shiffrin argues that this principle puts the United States "out of step with the rest of the world."[105] Focusing on the Canadian model, he contends that it is possible for a legal system to recognize the values generally served by free speech (in discovering truth, facilitating self-expression, and advancing the interests of democracy) while also acknowledging that hate speech does little or nothing to further those values. Our doctrines regarding content- and viewpoint-based discrimination, however, preclude such reasoning.

Shiffrin contends that it does not have to be this way. He argues that the United States "could have joined Canada and other countries in condemning hate speech through law."[106] And he points out that the Supreme Court actually upheld a state law prohibiting racist speech as late as 1952, in *Beauharnais v. Illinois*.[107] In short, Shiffrin asks us to consider whether our free speech exceptionalism has gone beyond

the formalistic to the fetishistic, putting us out of sync with the arc of reasoned jurisprudence.

Mari J. Matsuda, Charles R. Lawrence III, Richard Delgado, and Kimberlè Williams Crenshaw
Words That Wound: Critical Race Theory, Assaultive Speech, and the First Amendment (1993)

Some of the most severe criticisms of existing First Amendment doctrine have come from scholars associated with the Critical Legal Studies (CLS) and Critical Race Theory (CRT) movements. CRT resists a simple definition and is not monolithic in nature, but in essence it maintains that, despite our society's ostensible dedication to equal protection, racism and white supremacy remain defining characteristics of our culture and our legal system. CRT scholars take a profoundly skeptical and deconstructive approach to claims that our laws promote the interests of racial minorities, arguing that they instead institutionalize and perpetuate allocations of power that favor whites.

This book provides a useful overview of CRT's critiques of First Amendment doctrine, written by some of the key figures in those movements. It begins with an introduction that summarizes the history and principal elements of CRT. It then describes some of the ideological confrontations that have taken place between CRT advocates and "First Amendment hard liners."[108] And the introduction concludes with a brief reflection on how the First Amendment "arms conscious and unconscious racists—Nazis and liberals alike—with a constitutional right to be racist."[109]

In the chapters that follow, the authors focus on specific issues within the broader subject of the conflict between equality and liberty. In chapter 2, Mari J. Matsuda—professor at the University of Hawaii William S. Richardson School of Law—discusses "the victim's story," taking a close look at the effects of hate speech on its targets and documenting the ways in which such speech does "real harm to real people."[110] Along the way, she addresses what she calls "hard cases," the problem areas that emerge if one embraces the principle that racist speech should be legally actionable.

In her essay, Matsuda alludes to "the special case of universities."[111] In chapter 3, Charles R. Lawrence III—who also teaches at the University of Hawaii—focuses on racist speech on campus and on institutional efforts to regulate it. Among other things, he argues that existing law allows for the restriction of "certain face-to-face racial vilification on university campuses," essentially through the extension and application of the "fighting words" and "captive audience" doctrines.[112]

In chapter 4, Richard Delgado—professor at the University of Alabama Law School—argues for the recognition of a tort claim he calls "racial insult." The claim would require the plaintiff to prove that the defendant directed language toward the plaintiff that was "intended to demean through reference to race," that the plaintiff understood it as such, and that a reasonable person would recognize it as "a racial insult."[113] He anticipates and responds to objections to such a claim, including constitutional ones.

In chapter 5, Kimberlè Williams Crenshaw—professor of law at both the University of California Los Angeles School of Law and Columbia Law School—explores the concept of "intersectionality," specifically the ways in which the subordination of individuals on different bases (here, race and gender) overlap. To demonstrate the phenomenon, she draws from numerous examples in popular culture, including films and music. She focuses especially on controversies around the music of 2 Live Crew.[114]

The book concludes with a brief epilogue by Matsuda and Lawrence discussing *R.A.V. v. City of St. Paul*,[115] where a unanimous Supreme Court struck down St. Paul's Bias-Motivated Crime Ordinance and reversed the conviction of a teenager who had burned a cross on the lawn of an African-American family. The epilogue points toward a disconnection between the result in the case and the central theory behind

our doctrine of free expression: "Burning crosses do not bring to the table more ideas for discussion, and the Court's failure to see this is part of a long history of not seeing what folks on the bottom see. We hold faith that a critical view of law can reconstruct the first amendment to bring the voices of the least to the places of power."[116]

Richard Delgado & Jean Stefancic
Must We Defend Nazis? (2018)

In this book, Richard Delgado is joined by Jean Stefancic, a University of Alabama Law School colleague and fellow CRT scholar. Perhaps particularly because of Delgado's early influence on the CRT movement, *Must We Defend Nazis?* has been cited as an important text in the debate over the relationship between speech and race. And, indeed, it does raise provocative and important points.

Nevertheless, those seeking a fully developed and evidentiarily supported analysis of the tension that can exist between free expression and equal protection may struggle to find it here. Indeed, at points it is difficult to tell how strong a critical claim Delgado and Stefancic seek to make about the problems with existing First Amendment doctrine. More on this momentarily.

The book raises a number of intriguing questions that First Amendment traditionalists need to take seriously. For example, the authors challenge the conventional "safety valve" argument often raised in defense of free expression. Sure, the authors say, engaging in "[h]ate speech may make the speaker feel better, at least temporarily, but it does not make the victim safer."[117] To the contrary, they argue, the evidence suggests that allowing hate speech simply has the effect of fostering it, along with the attendant violence.

They similarly challenge the merits of the "marketplace of ideas" theory in this context. Do we really think that a virulent racist is going to change his mind when confronted with reasoned counterargument? And, perhaps more importantly, do we think it safe for members of racial minorities to engage in such confrontations or fair to burden them with the responsibility of doing so? A defense of existing First Amendment doctrine requires a thoughtful response to these important questions.

Still, *Must We Defend Nazis?* seems unlikely to satisfy many readers, regardless of their doctrinal predisposition. Traditionalists may question a number of claims for which the authors offer scant support. For example, the authors suggest that courts have been "smuggling in" a cause of action against hate speech despite the constitutional obstacles, including through defamation claims; but in the sole defamation case on which the authors appear to rely, the court rejected such a claim. A litany of other objections to their arguments can be found in Timothy Shiell's book, discussed above, and Alan Dershowitz's article "Dubious Arguments for Curbing the Free Speech Rights of Nazis."[118]

On the other hand, those looking for a radical rethinking of First Amendment doctrine may not find what they want, either. Many of the authors' prescriptions for future direction are so vague and abstract that it is difficult to tell exactly what they entail. And their more specific suggestions—like relying on the "fighting words" doctrine or using a hateful motive as the basis for enhancing the punishment for an underlying wrong—are of limited utility and do not appear to require much if any change in existing doctrine. Such a surgical identification of extant loopholes hardly seems like the kind of bold and paradigm-challenging thinking that CRT often exhibits.

Conclusion

The scholarship summarized above reflects a broad array of perspectives, from the traditional to the critical. During this time in our history, when events have called foundational questions about our social and legal structures, a closer look at existing First Amendment doctrine is required. The works cited provide an excellent introduction to the issues and viewpoints involved.

Personal Afterword by Solomon Furious Worlds

When Len Niehoff reached out to me and asked if I wanted to coauthor this piece with him, I became emotional; not because I was excited to call for his role in my life to shift from professor to colleague, but because I realized the deaths of Tony McDade, Breonna Taylor, George Floyd, and so many others have had a significant impact on how the world views the lives of Black people in America. On February 26, 2012, my 17th birthday, Trayvon Martin, age 17 at the time, was killed. I began to wonder what my life—a 17-year-old Black kid's life—was truly worth in the eyes of mainstream America. Since that day, I have watched over and over as this nation has moved from outrage to complacency after a number of people were unjustly killed. I also watched this nation ignore the deaths of so many others—people like 92-year-old Kathryn Johnston,[119] 37-year-old Tanisha Anderson,[120] and 7-year-old Aiyana Mo'Nay Stanley-Jones,[121] to name a few.[122,123] I stopped expecting mainstream society to care long enough for individuals' perceptions and actions to change; but Len Niehoff's reaching out to me to coauthor this piece, new people joining the movement in large numbers,[124] and the movement's sustained intensity[125] helped me to understand that something has changed for the collective zeitgeist. This year, finally, America is realizing that the lives of Black, indigenous, and people of color are worthy of a massive, sustained uprising.

Personal Afterword by Len Niehoff

In most respects, I subscribe to the traditional view of the First Amendment. But I also take seriously the reality that free expression does not impose the same costs on all groups or people. And I recognize that we traditionalists have often been callous in our disregard of that fact and precipitous in our flight to the comfortable shelter of "settled doctrine." Nothing should be settled that we are not prepared to defend, and strong and sensible voices are challenging us to explain why protecting hateful, racist, misogynistic, anti-Semitic, and countless other forms of individually and socially corrosive speech has anything to recommend it. In my view, we smugly dismiss those challenges at our peril, consigning our present First Amendment doctrine to irrelevancy and finally abandonment.

I am grateful to have students who are asking tough questions. And I am grateful to Solomon Furious Worlds for agreeing to explore this complex and troubled territory with me. In this endeavor, I am as much his student as he has been mine.

Solomon Furious Worlds is a 3L at the University of Michigan Law School who intends to lead a career as a public interest attorney—and, perhaps, a professor. Len Niehoff co-chairs the Media & Entertainment law group at Honigman and serves as professor from practice at the University of Michigan Law School, where he teaches First Amendment and Media Law.

Endnotes

1. *OPEN LETTER: Demands from the Black Law Students Association*, The Daily Campus (June, 25 2020), https://www.smudailycampus.com/opinion/open-letter-demands-from-the-black-law-students-association; *Harvard's*

Black Law Student Association's Letter to the Administration Regarding Black Lives, Harv. Black L. Students Ass'n (June 5, 2020), https://orgs.law.harvard.edu/blsa/2020/06/05/harvards-black-law-student-associations-letter-to-the-administration-regarding-black-lives; Karen Sloan, "*This Is the Civil Rights Movement of My Lifetime": Black Law Students Demand Action*, Law.com (June 18, 2020), https://www.law.com/2020/06/18/this-is-the-civil-rights-movement-of-my-lifetime-black-law-students-demand-action/?slreturn=20200804081955 (discussing that "Black law students groups at 17 schools in New York, Connecticut and New Jersey have signed an open letter to their deans asking them to take concrete steps toward racial justice"); Isha Trivedi, *Black Law Students Launch Petition for "Institutional Change" at Law School*, The GW Hatchet (July 6, 2020), https://www.gwhatchet.com/2020/07/06/black-law-students-launch-petition-for-institutional-change-at-law-school (regarding a petition launched by the George Washington University Law School's Black Law Students Association); Hannah Taylor, *The Empty Promise of the Supreme Court's Landmark Affirmative Action Case*, Slate (June 12, 2020), https://slate.com/news-and-politics/2020/06/grutter-v-bollinger-michigan-law-diversity-racism.html (regarding the University of Michigan Law School's history with affirmative action and the school's Black Law Student Association's list of demands).

2. Timothy Zick, *The Dynamic Relationship between Freedom of Speech and Equality*, 12 Duke J. Const. Law & Pub. Pol'y 13, 14 (2017).

3. *Id.*

4. *Id.* at 19–20.

5. 357 U.S. 449 (1958) (holding that the State of Alabama could not access the state's NAACP affiliate's membership list because it would chill the exercise of the First Amendment–based right to freedom of association).

6. Zick, *supra* note 2, at 18–19, 23.

7. *Id.* at 20, 23–24; Doe v. Reed, 561 U.S. 186 (2010).

8. Zick, *supra* note 2, at 28–29 (discussing "Identity Speech" protections).

9. *Id.* at 33 (discussing the "right to exclude").

10. *Id.* at 45–47. I must note that I find this to be a dubious, one-sided argument that ignores the extra-judicial consequences that many people—especially people of color—deal with in an attempt to exercise their *inalienable* rights. *See* Counterterrorism Div., Fed. Bureau of Investigation, Intelligence Assessment: Black Identity Extremists Likely Motivated to Target Law Enforcement Officers (2017).

11. Zick, *supra* note 2, at 48 (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 273 (1964)).

12. *Id.*

13. *Id.* at 51.

14. *Id.* at 57–68.

15. *Id.* at 68–69.

16. *Id.* at 71–74.

17. Leonard M. Niehoff, *Policing Hate Speech and Extremism: A Taxonomy of Arguments in Opposition*, 52 U. Mich. J. L. Reform 859, 862 (2019).

18. *Id.* at 864.

19. *Id.* at 864–65; *see also* NAACP v. Alabama, 357 U.S. 449 (1958).

20. Niehoff, *supra* note 17, at 867–69.

21. *Id.* at 886.

22. *Id.* at 893.

23. *Id.* at 900.

24. *Id.* at 901.

25. Justin Hansford, *The First Amendment Freedom of Assembly as a Racial Project*, 127 Yale L.J. F. 685, 690–91 (2018).

26. *Id.* at 687–88.

27. *Id.* at 692.

28. *Id.* at 694.

29. *Id.* at 694–95; Brown v. Bd. of Educ., 347 U.S. 483 (1954).

30. Hansford, *supra* note 25, at 696–98; Adderley v. Florida, 385 U.S. 39 (1966).

31. Hansford, *supra* note 25, at 700–01.
32. *Id.* at 701–02, 706–07.
33. *Id.* at 702.
34. *Id.* at 705–06 (recounting the attorney general's defense of white nationalists in a Georgetown University Law Center speech).
35. *Id.* at 706 (discussing the amount of money needed to protect Milo Yiannopoulos, Richard Spencer, and their supporters when they speak at college campuses).
36. *Id.* at 706–07.
37. *Id.* at 708–14.
38. Charlotte H. Taylor, *Hate Speech and Government Speech*, 12 U. Pa. J. Const. L. 1115 (2010); *see, also*, *Charlotte H. Taylor | Lawyers*, Jones Day, https://www.jonesday.com/en/lawyers/t/charlotte-taylor?tab=overview (listing her current occupation as partner within Jones Day, a large, international corporate law firm).
39. Taylor, *supra* note 38, at 1121.
40. *Id.* at 1123.
41. *Id.*
42. *Id.* at 1124.
43. *Id.*
44. *Id.* at 1126.
45. *Id.* at 1130–33.
46. *Id.* at 1133.
47. *Id.* at 1135–36.
48. 505 U.S. 377 (1992).
49. 538 U.S. 343 (2003); Taylor, *supra* note 38, at 1137–38.
50. Taylor, *supra* note 38, at 1142.
51. *Id.* at 1143.
52. *Id.* at 1146–76.
53. *Id.* at 1175.
54. *Id.* at 1177–78.
55. *Id.* at 1180. For further discussion of Edwin Meese's commission, see Nadine Strossen, *Feminist Critique of the Feminist Critique of Pornography, A Essay*, 79 Va. L. Rev. 1099 (1993).
56. Taylor, *supra* note 38, at 1183.
57. *Id.* at 1186–87.
58. *Id.* at 1187.
59. *Id.* at 1187–88.
60. *Id.* at 1188.
61. Petal Nevella Modeste, *Race Hate Speech: The Pervasive Badge of Slavery That Mocks the Thirteenth Amendment*, 44 How. L.J. 311, 312 (2001).
62. *Id.*
63. *Id.* at 312–13.
64. *Id.* at 317.
65. *Id.* at 317–18.
66. *Id.* at 319.
67. *Id.* at 321–22.
68. *Id.* at 324.
69. *Id.* at 325–29.
70. *Id.* at 330.
71. *Id.* at 330–37.
72. *Id.* at 337 (title of Part III.B, "The Forgotten Thirteenth Amendment").
73. *Id.* at 341.

74. *Id.* at 342.
75. *Id.* at 343–45.
76. *Id.* at 347.
77. *Id.* at 348.
78. 2020 Virtual Graduate Recognition Ceremony—Rutgers Law School, Newark Location (2020), https://law.rutgers.edu/sites/law/files/Virtual%20Ceremony%20Program_Newark%202020_0.pdf.
79. Zahra N. Mian, Note, *"Black Identity Extremist" or Black Dissident?: How* United States v. Daniels *Illustrates FBI Criminalization of Black Dissent of Law Enforcement, from COINTELPRO to Black Lives Matter*, 21 Rutgers Race & L. Rev. 53, 55 (2020).
80. *Id.* at 54–55.
81. *Id.* at 56.
82. *Id.*
83. *Id.*
84. *Id.* at 57.
85. *Id.* at 59, 61.
86. *Id.* at 63.
87. *Id.* at 66.
88. *Id.* at 67.
89. *Id.* at 72–74.
90. *Id.* at 89.
91. *Id.* at 90.
92. *Id.* at 91–92.
93. *Id.* at 92.
94. Timothy C. Shiell, African Americans and the First Amendment, at x (2019).
95. *Id.* at 11.
96. *Id.*
97. 301 U.S. 242 (1937).
98. Shiell, *supra* note 94, at xii.
99. *Id.*
100. *Id.*
101. Nadine Strossen, Hate: Why We Should Resist It with Free Speech, Not Censorship (2018).
102. Steven H. Shiffrin, What's Wrong with the First Amendment? 1 (2016).
103. *Id.* at 8.
104. *Id.* at 3.
105. *Id.* at 43.
106. *Id.* at 46.
107. 343 U.S. 250 (1952).
108. Mari Matsuda et al., Words That Wound: Critical Race Theory, Assaultive Speech, and the First Amendment 11 (1993).
109. *Id.* at 15.
110. Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story, in* Matsuda et al., *supra* note 108, at 50.
111. *Id.* at 44.
112. Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, *in* Matsuda et al., *supra* note 108, at 66–71, 86–87.
113. Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name Calling*, *in* Matsuda et al., *supra* note 108, at 109.
114. Kimberlè Williams Crenshaw, *Beyond Racism and Misogyny: Black Feminism and 2 Live Crew*, *in* Matsuda et al., *supra* note 108, at 120–132.

115. 505 U.S. 377 (1992).

116. Mari J. Matsuda & Charles R. Lawrence III, *Epilogue: Burning Crosses and the* R. A. V. *Case*, *in* Matsuda et al., *supra* note 108, at 136.

117. Richard Delgado & Jean Stefancic, Must We Defend Nazis? 60 (2018).

118. Alan Dershowitz, *Dubious Arguments for Curbing the Free Speech Rights of Nazis*, Wash. Post, Feb. 1, 2018.

119. Brenda Goodman, *Police Kill Woman, 92, in Shootout at Her Home*, N.Y. Times (Nov 23, 2006), https://www.nytimes.com/2006/11/23/us/23atlanta.html.

120. Michelle Dean, *"Black Women Unnamed": How Tanisha Anderson's Bad Day Turned into Her Last*, The Guardian (June 5, 2015), https://www.theguardian.com/us-news/2015/jun/05/black-women-police-killing-tanisha-anderson.

121. Kate Abbey-Lambertz, *How a Police Officer Shot a Sleeping 7-Year-Old to Death* (Sept. 17, 2014), https://www.huffpost.com/entry/aiyana-stanley-jones-joseph-weekley-trial_n_5824684.

122. Notice that two of the names I mentioned were the names of Black women, and one was a Black girl. Black, indigenous, and people of color who are trans, nonbinary, or women are often left out of the conversation. As much as we remember George Floyd, we must remember Breonna Taylor and Tony McDade. *See* Shirley Ngozi Nwangwa, *When We Don't Say Their Names, We Deny Them Justice*, The Nation (June, 24, 2020), https://www.thenation.com/article/society/black-women-trans-lives-matter.

123. Black people are killed by law enforcement at an alarming rate in this country so that it is not possible to give a comprehensive list. To add to the pain, indigenous and non-Black people of color are also disproportionately killed by law enforcement, but their deaths often receive little or no public outcry. *See* Nora Mabie, "*We Have No Justice": Are Native Americans the Forgotten Victims of Police Brutality?*, Great Falls Trib. (June 22, 2020), https://www.greatfallstribune.com/story/news/2020/06/22/montana-native-american-police-brutality-george-floyd-protest-lives-matter/5334187002; Julissa Arce, *It's Long Past Time We Recognized All the Latinos Killed at the Hands of Police*, Time (July 21, 2020), https://time.com/5869568/latinos-police-violence.

124. *See* Isabella Simonetti, *5 First-Time Protesters on Why They Showed up for Black Lives Now*, Vox (July 2, 2020), https://www.vox.com/first-person/2020/7/2/21306987/black-lives-matter-protests-george-floyd-protesters-first-time.

125. *See* Helier Cheung, *George Floyd Death: Why US Protests Are So Powerful This Time*, BBC (June 8, 2020), https://www.bbc.com/news/world-us-canada-52969905; Politico Magazine, *It Really Is Different This Time*, Politico (June 4, 2020), https://www.politico.com/news/magazine/2020/06/04/protest-different-299050; Leila Miller, *George Floyd Protests Have Created a Multicultural Movement That's Making History*, L.A. Times (June 7, 2020), https://www.latimes.com/california/story/2020-06-07/george-floyd-protests-unite-black-activists-new-allies.

Public Access to Police Body-Worn Camera Recordings (Status Report 2020)

By Steve Zansberg

An unarmed Black man is brutally murdered by police, who are utterly indifferent to his repeated pleas for restraint. First the people in that city, then across the nation (and, eventually, across the globe) take to the streets. They demand justice. They demand accountability. And they call upon the police, not only in that city but across the nation, to reform their practices, to eliminate racial profiling and overly aggressive militaristic responses, and to *become more transparent*—including by publicly releasing body-worn camera recordings of police-public confrontations.

You probably surmised that the victim described above was George Floyd, who was killed at police hands in Minneapolis on Memorial Day 2020. But it was not. It was Michael Brown; the city was Ferguson, Missouri, and it was August 2014. Here's what I wrote on this subject in 2016:

> Beginning with the murder of Michael Brown in Ferguson, MO, the in-custody death of Freddie Gray, in Baltimore, MD, and several subsequent high-profile deaths (primarily of African American men) at the hands of police, the conduct of America's law enforcement has been the focus of intense public interest and attendant media attention. In December 2014, President Obama urged Congress to provide 75 million dollars to deploy 50,000 Body Worn Cameras ("BWCs") as part of an effort to restore the public's trust. Although several police departments across the nation had earlier deployed BWCs, the political pressure caused by these events greatly accelerated the trend toward widespread BWC adoption.[1]

That was the previous iteration of what we have all seen unfold, again in 2020, in the aftermath of the horrific suffocation death of George Floyd by Minneapolis police. The transcript of the BWC recordings of the officers involved showed that Floyd, like Eric Garner before him,[2] had cried out—*more than 20 times*—"I can't breathe."[3]

In the six years since Michael Brown's death, nearly 8,000 police departments across the nation have outfitted their officers with BWCs.[4] Minneapolis's police department was among them, and although it was "citizen journalism" (cell phone footage) that exposed Floyd's murder to the public, the BWC footage of Floyd's encounter with the police[5] that resulted in his death, released by court order in August,[6] shed further light on the unjustifiable conduct of the officers.[7]

Following months of protests and civil disturbances in response to Floyd's killing, and only one week after the August 23, 2020, shooting of Jacob Blake by police in Kenosha, Wisconsin, the January 2020 suffocation death of an unarmed Black man, Daniel Prude, at the hands of police in Rochester, New York, came to light.[8] How? Prude's family had obtained the BWC footage capturing the incident, some six months earlier, and they released it to local television stations, causing it to go viral.[9] On September 8, 2020, Rochester's chief of police resigned, and his entire command staff either resigned or was demoted.[10] As of this writing, a grand jury is considering whether to file criminal charges in Prude's death, which the medical examiner ruled a homicide. The understandable public outrage upon seeing the BWC recording of Prude's death was yet another entry into the long and continuing string of such incidents.[11] On October

26, 2020, Philadelphia police fired 14 rounds, killing a mentally ill Black man, Walter Wallace Jr.; that shooting death sparked another round of public protests.[12]

Continued Incidents of Police Abuse Require Real Substantive Change, Including Greater Transparency

The factors contributing to the spate of police killings and maiming of Black and Hispanic men and women are many, variegated, and deeply rooted.[13] And, as has been reported elsewhere,[14] the public protests in response to Floyd's killing galvanized legislators in several jurisdictions to adopt significant reform of policing practices, including barring the use of chokeholds, eliminating sovereign immunity for officers, diversifying both the rank and file and departmental leadership, and adding additional training of police academy cadets and seasoned veteran officers.

One additional reform that will greatly contribute to building public trust in the men and women in blue is to increase transparency; it is universally understood that public trust is a necessary precondition for effective law enforcement.[15] If communities are to respect the pronouncements of internal investigations bureaus, commanders, police chiefs, and mayors, the public must be able to "see for themselves" what actually transpired at the time in question. As former Chief Justice Warren Burger famously put it, "People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing."[16] And Justice Harry Blackmun once wrote, "Public confidence cannot long be maintained where important . . . decisions are made behind closed doors and then announced in conclusive terms to the public, *with the record supporting the [agency's] decision sealed from public view*."[17]

So, while law enforcement personnel may view BWCs primarily as a tool for evidence gathering in investigating crimes—and they do[18]—the vital role that BWC footage can play in holding officers accountable to the public they serve, and thereby fostering public trust, cannot be overstated.

Where Do Things Stand Today?

More Cameras Mean More Footage

Many more police departments are using BWCs today than were doing so in 2014. According to the Department of Justice's (DOJ) Bureau of Justice Statistics, by 2016, nearly half (47 percent) of the 15,328 general-purpose law enforcement agencies in the United States had acquired BWCs.[19] From FY2016 to FY2020, Congress appropriated $112.5 million for a grant program under the DOJ to help law enforcement agencies purchase BWCs.[20] One set of researchers estimates that the number of law enforcement agencies with BWC programs more than doubled from 2013 to 2018.[21]

In 2018, California became only the third state in the nation (following South Carolina (2015)[22] and Nevada (2017)[23]) to require that all police departments in the state deploy BWCs.[24] Notably, after the killing of George Floyd, four more states—Colorado,[25] Connecticut,[26] New Mexico,[27] and New York[28]—have mandated that all police departments deploy BWCs. As a result, there are now many more BWC recordings of police-"civilian" interactions than six years ago, dramatically increasing the stock of BWC recordings that are *potentially* available for public viewing.

Legislative Changes

Several excellent online sources track the deployment and implementation of BWC programs, including transparency,[29] but none (as of this writing) has been updated in 2020 to capture recent developments.

In a previous *Communications Lawyer* article published in 2016,[30] and a handout I prepared for a boutique session at the Media Law Resource Center's "Virginia Conference" later that year, I surveyed laws in Connecticut,[31] Florida,[32] Georgia,[33] Illinois,[34] Kansas,[35] Louisiana,[36] Minnesota,[37] New Hampshire,[38] North Carolina,[39] North Dakota,[40] Oregon,[41] South Carolina,[42] and Texas,[43] all of which *restricted* public access to BWC recordings. I also lauded Oklahoma[44] and the city of Seattle, Washington,[45] for their pro-access legal regimes. Overall, my conclusion at that time was "state legislators have given much greater weight to the concerns of civilians' privacy rights and to protecting ongoing criminal investigations from interference[46] than to the transparency and public accountability benefits of providing public exposure to recordings of official police conduct."

In the last three years, several jurisdictions have made significant progress in providing public access to police BWC recordings. In March 2017, Utah Governor Gary Herbert signed into law H.B. 381, which subjects all police BWC recordings to that state's open records law.[47] In late 2018, California's legislature enacted, and former Governor Jerry Brown signed, Assembly Bill 748,[48] which (beginning on July 1, 2019) requires not only that all police departments in the state be equipped with BWCs, but also that they release "critical incident" BWC recordings within 45 days of the recorded incident.

In early 2020, Wisconsin's legislature passed 2019 S.B. 50,[49] which mandates that BWC recordings must be retained for a minimum of 120 days after the incident recorded, and longer if the incident involved the use of force by an officer. That bill, signed into law by Governor Tony Evers on February 28, 2020, requires that BWC recordings be subject to inspection and release pursuant to the state's open records act and requires that prior to releasing any recording of "a sensitive or violent crime," the identity of any victim or minor be redacted "using pixelization or another method of redaction," unless the affected individual (or his/her guardian) consents.[50] A record requester may challenge the degree of any such redaction in court under the open records act.

In the aftermath of George Floyd's killing and the nationwide demonstrations it triggered, several legislators and governors took swift action. On June 15, 2020, Connecticut's Governor Ned Lamont signed Executive Order No. 8—"Police Use of Force and Accountability," which requires that every Connecticut State Trooper wear a BWC (and every state patrol car be equipped with a dashboard camera), by January 1, 2021.[51] Governor Lamont also declared that state police should release BWC video within four days of the recorded incidents.[52]

On June 19, 2020, Colorado's Governor Jared Polis signed Senate Bill 217,[53] which, when it goes into effect in 2023, will enact far-reaching reforms to police practices, including barring chokeholds and eliminating sovereign immunity for officers. The new law also mandates that BWCs be worn by all Colorado police officers and sheriff's deputies and requires that the cameras be activated whenever an officer interacts with a member of the public; failure to record such an interaction gives rise to an adverse inference of police misconduct in any subsequent court proceeding. Lastly, the new law upends the current discretionary withholding standard for release of BWC recordings, mandating that all unedited recordings of those interactions be publicly released within 21 days of the filing of a complaint regarding the police conduct at issue.

In July 2020, the D.C. Council passed, and Mayor Muriel Bowser signed, an emergency resolution that

mandates public release of all BWC recordings of the D.C. Metro Police within five days.[54] Shortly thereafter, the union representing District of Columbia police officers went to court seeking an injunction barring the release of BWC recordings.[55] On August 12, 2020, D.C. Superior Court Judge Hiram Puig-Lugo denied the union's request to enjoin the release of BWC recordings under the new law.[56]

Finally, on September 20, 2020, New York State Attorney General Letitia James announced that her office will expedite and *proactively* release (in advance of any request) police BWC footage in all cases of law enforcement misconduct investigated by her office.[57]

Court Victories

The D.C. Superior Court ruling was only one of several recent judicial decisions affirming the public's right to inspect police BWC recordings.

In January 2018, a coalition of news organizations successfully obtained access, under Nevada's public records law, to approximately 750 hours of BWC recordings made by Las Vegas Metropolitan Police officers on duty the night of October 1, 2017, when gunman Stephen Paddock shot and killed 58 people and wounded 412 others attending the Route 91 Harvest Music Festival from his hotel room at the Mandalay Bay Resort.[58] The news organizations' motion seeking recovery of their attorney's fees for successfully pursuing that litigation, which is provided for by the Nevada Public Records Act, is pending as of this writing.

In February 2019, the First Department of New York's Appellate Division held that BWC recordings are not exempt from disclosure as "personnel records" exempt from New York's Freedom of Information Law.[59] Although New York has subsequently repealed the statutory exemption for police "personnel files," the earlier decision should have persuasive force in other jurisdictions where such exemptions remain in place:

> We find that given its nature and use, the body-worn-camera footage at issue is not a personnel record. . . .
>
> The purpose of body-worn-camera footage is for use in the service of other key objectives of the program, such as transparncy, accountability, and public trust-building.
>
> Although the body-worn-camera program was designed, in part, for performance evaluation purposes, and supervisors are required, at times, to review such footage for the purpose of evaluating performance, the footage being released here is not primarily generated for, nor used in connection with any pending disciplinary charges or promotional processes. . . . The footage, here, rather, is more akin to arrest or stop reports, and not records primarily generated for disciplinary and promotional purposes. To hold otherwise would defeat the purpose of the body-worn-camera program to promote increased transparency and public accountability.[60]

In January 2020, the New Jersey Court of Appeals similarly ruled that BWC recordings are not exempt from disclosure under that state's "ongoing criminal investigation" exemption.[61]

In May 2020, California's Supreme Court ruled that police departments could not charge records requesters for the staff time spent redacting BWC footage prior to producing it in response to a request under California's Public Records Act.[62]

Conclusion: Progress Is Being Made, but Greater Transparency Is Still Needed

The six years since the killing of Michael Brown in Ferguson, Missouri, has seen a dramatic expansion in the deployment of BWCs across the nation. This relatively short experiment has yielded mixed results regarding how the deployment of BWCs affects the conduct of officers in interacting with the public.[63] Of course, the high-profile incidents in which officers have disrespected, mistreated, and even killed people of color—even while their own and other officers' BWCs were in operation—does not, in my view, disprove the hypothesis that public scrutiny of officers' behavior through access to BWC recordings will, *over time*, have a beneficial effect. It is reasonable to assume that as the officers whose conduct *has been publicly exposed* lose their jobs,[64] and, in appropriate cases, are convicted and sent to jail, other officers *will* alter their conduct, going forward.

But equally importantly, a separate positive function is performed by providing public access to BWC recordings: It allows the public independently to scrutinize the conduct of their public servants, captured in real time (despite the limitations of those recordings), and thereby helps instill public trust in those institutions. Conversely, withholding BWC recordings from public scrutiny only exacerbates suspicions and thereby inflames the public *distrust* currently besetting the nation's law enforcement community. New York's appellate court said it best: Denying the public's ability to access BWC recordings "would defeat the purpose of the body-worn-camera program."[65]

Steve Zansberg recently launched his own law firm in Denver, Colorado. He is a past Chair of the ABA Forum on Communications Law.

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