The Costs of Dissent: Protest and Civil Liabilities

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Abstract

This Article examines the civil costs and liabilities that apply to individuals who organize, participate in, and support protest activities. Costs ranging from permit fees to punitive damages significantly affect First Amendment speech, assembly, and petition rights. A variety of common law and statutory civil claims also apply to protest activities. Plaintiffs have recently filed a number of new civil actions negatively affecting protest, including "negligent protest," "aiding and abetting defamation," "riot boosting," "conspiracy to protest," and "tortious petitioning." The labels are suggestive of the threats these suits pose to First Amendment rights. All of these costs and liabilities add to an already challenging and burdensome protest environment, which includes regulatory and other restrictions on speech and assembly. Owing to their chilling effect on First Amendment rights, courts have a special obligation to review both traditional costs and new civil actions skeptically, to require clarity and precision in terms of liability standards, and to allow civil liability only in very narrow circumstances. Applying these guidelines, the Article urges courts to reject a number of civil costs and claims as inconsistent with First Amendment precedents and doctrines, and to review other costs and liabilities in light of the First Amendment values protest activity serves. Beyond the courts, officials and administrators should more carefully consider the First Amendment implications of the cumulative—and rising—costs of dissent.

"The rights of political association are fragile enough without adding the additional threat of destruction by lawsuit."[1]

"What a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel. The fear of damage awards under a rule such as that invoked by the Alabama courts here may be markedly more inhibiting than the fear of prosecution under a criminal statute."[2]

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1 NAACP v. Overstreet, 384 U.S. 118, 122 (1966) (Douglas, J., dissenting from denial of certiorari).

2 N.Y. Times Co. v. Sullivan, 376 U.S. 254, 277 (1964) (footnote omitted).

Table of Contents

Introduction 235
I. The Costs of Dissent 241
A. *Administrative Costs* 241
B. *Common Law Tort Actions* 242
1. Intentional Torts 242
2. Publication of False Statements—"Aiding and Abetting Defamation" 243
3. "Negligent Protest" 244
4. "Tortious Petitioning" and Lost Business Opportunities 246
C. *Statutory Causes of Action* 247
1. "Riot Boosting" 247
2. "Conspiracy to Protest" 248
3. Threats and Racketeering 250
D. *Penalty Enhancements* 252
E. *Public Education and Government Employment* 253
II. The Chilling Effects of Civil Costs and Liabilities 255
A. *Financial Burdens* 255
B. *Indeterminate Liability Standards* 258
III. The First Amendment and Protest Liability 260
A. *General First Amendment Limits* 260
1. Fees and Costs 261
2. Protesters' Misconduct 261
3. General Limits on Civil Actions 262
4. Vicarious and Collective Liability 264
5. Students and Employees 268
B. *Civil Actions* 269
1. "Negligent Protest" 269
2. "Aiding and Abetting Defamation" 277
3. "Riot Boosting" 277
4. "Conspiracy to Protest" 279
5. "Tortious Petitioning" 285
C. *Civil Penalty Enhancements* 287
D. *Fees and Other Administrative Costs* 289
E. *Education and Employment* 293
Conclusion 296

Introduction

Commentators have documented the many potential *criminal* liabilities of protesters.[3] However, *civil* costs and liabilities also significantly affect protest activities. These costs and liabilities take the form of fees, fines, bonds, civil damages, and other monetary penalties. Protest activities can also lead to other costs, including loss of educational and employment opportunities. In many instances, the costs of dissent are borne by groups and individuals unable to absorb them. Separately, and in combination, they may chill or suppress the exercise of First Amendment rights to speak, assemble, and petition government officials.[4]

The costs and liabilities associated with "protest"—communicating dissent by means ranging from participation in mass protests to petitioning government officials—are rising.[5] The trend coincides with Americans' increased interest in public protest participation, and with national protests on matters ranging from immigration, to gender equality, to racial justice.[6] The extraordinary demonstrations following the death of George Floyd were a poignant affirmation of the values of protest to self-government and a culture of dissent. However, mass, spontaneous protests are a decided exception to the general rules under which protest activities normally occur.[7] Individuals and groups involved in organizing, participating in, and supporting protest actions, including some of the racial justice and police brutality demon-

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3 *See, e.g.*, Tabatha Abu El-Haj, *Defining* Peaceably*: Policing the Line Between Constitutionally Protected Protest and Unlawful Speech*, 80 Mo. L. Rev. 961, 964–66 (2015) [hereinafter *Defining* Peaceably] (reviewing potential criminal liabilities of protesters). For discussions of various criminal and other limits on public protest, see generally Tabatha Abu El-Haj, *The Neglected Right of Assembly*, 56 UCLA L. Rev. 543 (2009); Tabatha Abu El-Haj, *All Assemble: Order and Disorder in Law, Politics, and Culture*, 16 U. Pa. J. Const. L. 949 (2014); John Inazu, *Unlawful Assembly as Social Control*, 64 UCLA L. Rev. 2 (2017).

4 U.S. Const. amend. I.

5 The Article defines "protest" broadly, in part to highlight the many forms of civil liability that can apply to different kinds of dissent. Protest is not limited to mass or group events. An individual or small group on a street corner can be engaged in protest, as can the constituent who reaches out to officials to object to government projects or policies, or the individual who communicates support for protesters or their causes through words, training, and other actions. Individuals can also be liable for protest-related costs, including through application of common law tort liability. These are among the civil costs relating to protest.

6 Mary Jordan & Scott Clement, *Rallying Nation: In Reaction to Trump, Millions of Americans Are Joining Protests and Getting Political*, Wash. Post (Apr. 6, 2018), https://www.washingtonpost.com/news/national/wp/2018/04/06/feature/in-reaction-to-trump-millions-of-americans-are-joining-protests-and-getting-political/ [https://perma.cc/39JB-5UNG].

7 For example, as Mark Tushnet has explained, it is nearly "impossible in practice" to assess costs against those who participate in spontaneous protests. *See* Mark Tushnet, *Spontaneous Demonstrations and the First Amendment*, 71 Ala. L. Rev. 773, 790 (2020).

strations, are subject to a range of civil costs and liabilities. Liability may extend to damages from vandalism and destruction of property—even if the organizers did not directly participate in the unlawful acts. Further, lawmakers have historically reacted to disruptive protests by invoking "law and order" and cracking down on protest activities.[8] In the recent past, they have proposed a range of enhanced civil penalties for protest and civil disobedience activities.[9] It seems likely this historical pattern will hold. President Trump and other officials are explicitly invoking the same "law and order" platform that has precipitated such proposals.[10]

Many protest costs fly under the radar. In the administrative realm, these include permit fees, policing fees, cleanup costs, and liability insurance requirements—burdens that can easily run into the thousands of dollars for even moderately-sized events.[11] As protests have become more expensive to host and police, federal agencies, campus officials, and legislators have proposed cost-shifting measures that would increase financial burdens on protesters.[12] Some localities have sought restitution from protest organizers for trespass and damage to businesses.[13] As noted, in response to public protests at Presi-

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8 *See,* e.g., Christopher Ingraham, *Republican Lawmakers Introduce Bills to Curb Protesting in at Least 18 States*, WASH. POST (Feb. 24, 2017, 11:37 AM), https://www.washingtonpost.com/news/wonk/wp/2017/02/24/republican-lawmakers-introduce-bills-to-curb-protesting-in-at-least-17-states/ [https://perma.cc/8N9K-29XA].

9 *See U.S. Protest Law Tracker*, INT'L CTR. FOR NOT-FOR-PROFIT L., http://www.icnl.org/usprotestlawtracker [https://perma.cc/SB2F-535M]; Tracey Yoder, *New Anti-Protesting Legislation: A Deeper Look*, NAT'L LAWS. GUILD (Mar. 2, 2017), https://www.nlg.org/new-anti-protesting-legislation-a-deeper-look/ [https://perma.cc/NP9Y-TXFN].

10 *See* Matt Perez, *Trump Tells Governors to 'Dominate' Protesters, 'Put Them in Jail for 10 Years*,' FORBES (Jun. 1, 2020, 1:56 PM), https://www.forbes.com/sites/mattperez/2020/06/01/trump-tells-governors-to-dominate-protesters-put-them-in-jail-for-10-years/?sh=5e200213fb99 [https://perma.cc/T7FZ-45NL].

11 *See* Marissa J. Lang, *The Government Might Ask Activists to Repay the Costs of Securing Protests. Experts Say It Could Price Them Out.*, WASH. POST (Sept. 28, 2019, 1:49 PM), https://www.washingtonpost.com/local/the-government-might-ask-activists-to-repay-the-costs-of-securing-protests-experts-say-it-could-price-them-out/2019/09/28/66f7785a-e07b-11e9-8dc8-498eabc129a0_story.html [https://perma.cc/6QDL-R64A]; *see also* Eric Neisser, *Charging for Free Speech: User Fees and Insurance in the Marketplace of Ideas*, 74 GEO. L.J. 257 (1985); Cox v. New Hampshire, 312 U.S. 569, 577 (1941) (upholding fee that recouped expenses incident to maintaining order and processing permit). *But see* Forsyth County v. Nationalist Movement, 505 U.S. 123, 133–34 (1992) (striking down statute where fee's amount was largely left to administrator's discretion and depended on likely hostility of audience).

12 *See* Frederick Schauer, *Costs and Challenges of the Hostile Audience*, 94 NOTRE DAME L. REV. 1671, 1686 (2019) (reviewing costs associated with recent large-scale protests on campuses and elsewhere).

13 *See, e.g.*, *That Free Speech Will Cost You $70,000*, DEFENDING RIGHTS & DISSENT (Jan. 15, 2015), http://www.rightsanddissent.org/news/that-free-speech-will-cost-you-70000/ [https://

dent Trump's inauguration, Standing Rock, and in Ferguson, Missouri, many state legislatures enacted enhanced civil penalties for protest-related activities, including minor acts of civil disobedience.[14] All of these measures can significantly chill or even suppress First Amendment activities.

Damage awards resulting from civil causes of action, which also involve lawyers' fees and court costs (not to mention personal time and effort), represent a particularly concerning threat to protest. Public protest organizers and participants may incur civil liability under a variety of common law torts including public and private nuisance, trespass, defamation, and interference with business relations.[15] Protesters who block speakers from going to scheduled events may be liable for false imprisonment, obstructing free passage, battery, assault, and interference with advantageous relations.[16] Under federal and state laws, protesters may be liable for enhanced civil penalties—including punitive damages.[17] They may also incur civil liability pursuant to statutes prohibiting threatening communications, harassment, and other conduct.[18]

Plaintiffs have upped the civil liability ante. In a recent case, a police officer injured when an unknown assailant at a Black Lives Matter protest threw a rock at him filed a negligence suit against the protest organizer, DeRay Mckesson.[19] In his complaint, the officer claims that Mckesson is liable for his injuries because they were a

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perma.cc/CUU6-4GG9] (reporting that district attorney in Oakland is seeking $70,000 in restitution to cover police and emergency services in relation to a chain-in at a BART station in November 2014).

14 *See* Ingraham, *supra* note 8.

15 *See, e.g.*, N.Y. State Nat'l Org. for Women v. Terry, 704 F. Supp. 1247, 1258, 1261–62 (S.D.N.Y. 1989) (holding that plaintiffs had pleaded necessary elements of nuisance claim against anti-abortion protesters).

16 *See* Schauer, *supra* note 12, at 1693–94 (discussing potential common law actions against a "hostile audience").

17 *See, e.g.*, Leslie Gielow Jacobs, *Applying Penalty Enhancements to Civil Disobedience: Clarifying the Free Speech Clause Model to Bring the Social Value of Political Protest into the Balance*, 59 Ohio St. L.J. 185 (1998); Huffman & Wright Logging Co. v. Wade, 857 P.2d. 101, 111 (Or. 1993) (in banc) (upholding punitive damages award in connection with environmental protest involving trespass to chattels tort).

18 *See* Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coal. of Life Activists, 290 F.3d 1058, 1063 (9th Cir. 2002) (en banc) (upholding civil verdict under federal access to clinics statute for communicating threats to abortion providers).

19 Doe v. Mckesson, 945 F.3d. 818, 822–23 (5th Cir. 2019). The Supreme Court vacated the Fifth Circuit's decision on the ground that it should have clarified the extent of underlying state tort liability before deciding whether to allow the "negligent protest" theory to proceed. *See* Mckesson v. Doe, 141 S. Ct. 48, 51 (2020) (per curiam). The Court remanded for further proceedings. *Id.*

foreseeable consequence of Mckesson's negligent protest planning.[20] Under this "negligent protest" theory, protest organizers are liable for damages stemming from violent acts even if they did not personally engage in, direct, authorize, or ratify them.[21] To appreciate the implications of this cause of action, one need look no further than the public protests that rocked Minneapolis, Chicago, and many other cities following the death of George Floyd.[22] Under a "negligent protest" theory, if authorities can identify them, the protest organizers would be liable for *all* foreseeable damages that occurred during mass demonstrations—including those caused by the unlawful acts of counter-protesters and agitators not associated with a group or movement.[23]

A similar cause of action, "riot boosting," emerged from recent protest-related state legislation.[24] This action provides that anyone who trains, supports, or advocates on behalf of a public protest that later results in violence is liable for damages caused by the violent activity.[25] Like "negligent protest," the "riot boosting" action imposes civil liability without proof that the defendant directly committed any violent activity or intended that others commit it.[26]

In another troubling lawsuit, bakery owners in an Ohio town charged with racism in their dealings with student customers sued Oberlin College for defamation.[27] The plaintiffs alleged that Oberlin employees facilitated or "aided and abetted" the students' protest by providing facilities that students used to print flyers accusing the

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20 *Doe v. Mckesson*, 945 F.3d. at 826–27.

21 *See* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 920 (1982) ("Civil liability may not be imposed merely because an individual belonged to a group, some members of which committed acts of violence.").

22 *See* Brian Dakss, Audrey McNamara, Victoria Albert & Justin Carissimo, *George Floyd U.S. Protests Live Updates from June 1, 2020*, CBS NEWS, (June 2, 2020, 6:39 AM), https://www.cbsnews.com/live-updates/george-floyd-death-protests-minneapolis-2020-06-01/ [https://perma.cc/44M9-JD8G].

23 *See* Tony Mauro, *Nationwide Protests May Resound in Supreme Court First Amendment Case*, NAT'L L.J. (June 9, 2020, 1:15 PM), https://www.law.com/nationallawjournal/2020/06/09/nationwide-protests-may-resound-in-supreme-court-first-amendment-case/ [https://perma.cc/QY58-BYYA].

24 *See* Andrew Malone & Vera Eidelman, *The South Dakota Legislature Has Invented a New Legal Term to Target Pipeline Protesters*, ACLU (April 1, 2019, 3:45 PM), https://www.aclu.org/blog/free-speech/rights-protesters/south-dakota-legislature-has-invented-new-legal-term-target [https://perma.cc/NZ7L-U39Y].

25 *Id.*

26 *See id.*

27 *See* EJ Dickson, *How a Small-Town Bakery in Ohio Became a Lightning Rod in the Culture Wars*, ROLLING STONE (July 18, 2019, 5:16 PM), https://www.rollingstone.com/culture/culture-features/oberlin-gibson-bakery-protest-defamation-suit-controversy-culture-war-850404/ [https://perma.cc/R5Z9-8VRN].

bakery owner of racism and, in one case, by attending a protest outside the bakery.[28] A jury returned a $44 million verdict against Oberlin College for "aid[ing] and abet[ing]" the students' alleged defamatory statements.[29]

Other novel civil claims are currently making their way through the courts. For example, a group of plaintiffs who attended the infamous "Unite the Right" protests in Charlottesville, Virginia during the summer of 2017 sued the organizers of those protests under a federal civil rights law enacted to protect the equality rights of newly freed slaves.[30] In their complaint, plaintiffs' "conspiracy" claim relies extensively on various actions and statements related to organizing and publicizing the Charlottesville protests.[31] There may well be sufficient evidence to sustain this claim against the white supremacists who marched in Charlottesville. However, like the "riot boosting" law, a "conspiracy to protest" theory could make it an actionable civil wrong for anyone to organize a lawful protest at which violent activity later occurred.

The scope of protesters' civil liabilities continues to expand. A state appeals court recently upheld a $4 million jury verdict against a citizen who petitioned local officials to abandon a storm water project she believed would harm the environment.[32] The court held the petitioner was liable for the damages suffered by the business entities that stood to profit from the project.[33] This appears to be the first decision to hold a speaker liable for "tortious petitioning."

As if all this were not burden enough, protest activity could also result in loss of educational or employment opportunities. Elementary and secondary school children may face discipline for even off-campus protest activities.[34] University students may also be subject to disciplinary measures, including possible expulsion, for engaging in certain

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28 *Id.*

29 *Id.*

30 *See* 42 U.S.C. § 1985(3); Sines v. Kessler, 324 F. Supp. 3d 765, 773 (W.D. Va. 2018) (denying motion to dismiss federal civil rights claims against organizers of "Unite the Right" protest in Charlottesville, Virginia).

31 *See Sines*, 324 F. Supp. 3d at 773–74.

32 *See* Hurchalla v. Lake Point Phase I, LLC, 278 So. 3d 58, 68 (Fla. Dist. Ct. App. 2019) (upholding judgment).

33 *See* Patricia Mazzei, *The Florida Activist is 78. The Legal Judgment Against Her Is $4 Million.*, N.Y. TIMES (Sept. 8, 2019), https://www.nytimes.com/2019/09/08/us/maggy-hurchala-florida-mining.html [https://perma.cc/9JKA-X4VL].

34 *See, e.g.*, Morse v. Frederick, 551 U.S. 393, 397, 403 (2007) (upholding student discipline in connection with display of "BONG HiTS 4 JESUS" banner, but suggesting that protests on matters of public concern such as the legality of marijuana would be protected speech).

kinds of disruptive protest on or off campus.[35] Many universities have adopted stricter disciplinary measures for students who disrupt speakers and engage in other forms of dissent.[36] Finally, public employees may face termination or other adverse consequences for participating in public protests and other protest activities.[37]

The chilling effect of these costs and liabilities on First Amendment protest rights cannot be overstated. Historically, plaintiffs have used civil liability as a means of suppressing protest and dissent. During the civil rights era, plaintiffs used defamation lawsuits and other forms of civil liability to suppress reporting about civil rights protests.[38] Until the Supreme Court finally intervened, opponents of desegregation effectively weaponized civil liability to undermine the exercise of First Amendment rights.[39] The effort today is less coordinated, but just as concerning. Imagine, for example, that opponents of desegregation and racial equality had been able to resort to "negligent protest" or "aiding and abetting defamation" actions during the civil rights movement.

This Article provides a holistic account of the civil costs and liabilities that apply to protest activities. It seeks to reconcile the rising costs of dissent with a commitment to speech, assembly, and petition rights as well as core First Amendment values. Part I describes the array of civil liabilities—administrative, common law, and statutory—that apply to protest activities. Part II examines the extent to which civil costs and liabilities may chill or in some cases suppress First Amendment protest rights. Part III analyzes specific costs of dissent in light of the Supreme Court's precedents, which sharply limit the ex-

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35 *See* Debra Cassens Weiss, *New Policy Authorizes University of Wisconsin to Expel Students for Repeatedly Disrupting Speakers*, A.B.A. J. (Oct. 12, 2017, 3:58 PM), http://www.abajournal.com/news/article/new_policy_authorizes_university_of_wisconsin_to_expel_students_for_repeate [https://perma.cc/LLP5-PG9X]; *see also* Schauer, *supra* note 12, at 1694 (discussing uncertainty relating to disruption); *see generally* Gregory P. Magarian, *When Audiences Object: Free Speech and Campus Speaker Protests*, 90 U. Colo. L. Rev. 551 (2019) (examining First Amendment implications of campus dissent).

36 *See* Weiss, *supra* note 35.

37 *See* Anne Barnard, *Teachers in New York City Barred From Attending Climate Protest*, N.Y. Times (Sept. 19, 2019), https://www.nytimes.com/2019/09/19/nyregion/youth-climate-strike-nyc.html [https://perma.cc/3MSX-E3QQ] (discussing the decision of New York City Public Schools to bar teachers from taking students on optional field trip to climate protests).

38 *See generally* Aimee Edmondson, In Sullivan's Shadow: The Use and Abuse of Libel Law during the Long Civil Rights Struggle (2019); Anthony Lewis, Make No Law: The Sullivan Case and the First Amendment (1991).

39 *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964) (revising state defamation standards to require "actual malice" for statements concerning the official acts of public officials).

tent to which protesters are subject to civil liability. This Article argues that courts should explicitly reject a number of civil claims and costs based on First Amendment precedents and doctrines. More generally, considering the First Amendment values at stake, this Article urges public officials at all levels of government to work toward containing the rising costs of dissent. Once the dust of the current police brutality protests settles, we will need both a good accounting of the costs of dissent and a means of constitutionally apportioning those costs in the future.

I. The Costs of Dissent

This Part provides an overview of the civil costs and liabilities relating to protest activities. It starts with some administrative fees and costs, then examines common law and statutory civil actions, and finally civil penalty enhancements. Not all of these costs and liabilities are of equal First Amendment concern. However, the cumulative presentation is important, if only to put protesters on notice of their potential exposure. As discussed in Part III, imposition of some of the costs of dissent violates First Amendment precedents and doctrines. Other costs and liabilities may survive First Amendment scrutiny but are still problematic insofar as they inhibit protest activities.

A. Administrative Costs

With respect to public protests, the costs of dissent begin to accrue at an early stage. Planned protest events such as sizeable rallies and demonstrations are subject to permitting schemes.[40] Pursuant to those schemes, state and municipal laws require that protesters obtain a permit, which often requires payment of a fee.[41]

The costs only start there, and then can quickly add up. Some municipalities charge fees for cleanup costs, security, and traffic control.[42] Some also require that applicants obtain liability insurance or post bonds in advance of an event to cover costs and damages relating to a protest event.[43] In the District of Columbia and other locations,

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40 *See, e.g.*, Forsyth County v. Nationalist Movement, 505 U.S. 123, 130 (1992).

41 Cox v. New Hampshire, 312 U.S. 569, 577 (1941); *see generally* David Goldberger, *A Reconsideration of* Cox v. New Hampshire*: Can Demonstrators Be Required to Pay the Costs of Using America's Public Forums?*, 62 Tex. L. Rev. 403, 404 (1983).

42 *See, e.g.*, Long Beach Area Peace Network v. City of Long Beach, 522 F.3d 1010, 1015–17 (9th Cir. 2008) (noting total estimated charges for a planned march totaled $7,041).

43 *See* Neisser, *supra* note 11, at 300–29 (analyzing insurance requirements); *see also Long Beach Area Peace Network*, 574 F.3d at 1037; Santa Monica Food Not Bombs v. City of Santa Monica, 450 F.3d 1022, 1049 (9th Cir. 2006).

organizers must provide various amenities to demonstrators, including toilets, medical tents, and cooling stations, provide setup and teardown crews, and take measures to protect the grass—all of which impose considerable costs.[44]

Local and federal officials have been exploring new ways to recoup or recover costs relating to protest events. Some localities have sought restitution for property and business damages caused by protests.[45] The National Park Service, which oversees protest venues in the District of Columbia, recently proposed regulations that would require protest organizers to repay the federal government for security costs.[46] Legislators have also floated proposals that would require protesters arrested during unpermitted demonstrations to pay for police overtime.[47] Legislatures in eighteen states are considering similar proposals.[48]

For large protest events, costs already run into tens of thousands of dollars and more.[49] Adding security and other costs in line with recent proposals would raise the price tag for many significant public protests considerably.[50]

B. Common Law Tort Actions

Fees and costs are just one of the potential liabilities protesters face. They are also potentially subject to liability under a variety of common law tort actions. These lawsuits can result in significant damages for physical, emotional, and economic harms, not to mention the possible requirement for payment of legal fees and court costs.

1. Intentional Torts

Plaintiffs have sued protesters for a variety of intentional torts. For example, they have filed public nuisance and trespass claims against organizers and participants involved in protests near abortion clinics.[51] Plaintiffs have also sued abortion and environmental protes-

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44 Lang, *supra* note 11.

45 *See, e.g.*, *That Free Speech Will Cost You $70,000*, *supra* note 13 (reporting that Oakland is seeking $70,000 in restitution to cover police and emergency services in relation to a chain-in at a train station in November 2014).

46 Lang, *supra* note 11.

47 *Id.*

48 Ingraham, *supra* note 8.

49 *See* Lang, *supra* note 11 (noting that for large protests, organizers "can already expect to stare down a budget of more than $100,000").

50 *See id.* (reviewing security budgets for recent D.C. protests, which ranged from tens of thousands to millions of dollars).

51 *See, e.g.*, N.Y. State Nat'l Org. for Women v. Terry, 704 F. Supp. 1247, 1261–62

ters for false imprisonment, interference with contractual and business relations, inflicting emotional distress, private nuisance, and invasion of privacy.[52]

Business plaintiffs have also sued protesters for intentional torts. Contractors and other businesses have successfully sued environmental protesters for compensatory and punitive damages in connection with interference with prospective economic advantage and other property torts.[53] In some instances, plaintiffs have also been awarded significant punitive damages awards, in some cases in excess of $1 million.[54]

"Hostile audience" scenarios, in which audience members react negatively to speech they disagree with or do not wish to encounter, may also give rise to various forms of civil tort liability.[55] Thus, for example, a speaker may sue audience members who push, block, or shout her down for assault, battery, false imprisonment, and perhaps other common law torts.[56]

2. *Publication of False Statements—"Aiding and Abetting Defamation"*

The law of defamation, which concerns false statements of fact about an individual that damage reputation, applies to protest organizers and participants. False statements of fact about a public official or public figure generally require a showing that the speaker communicated with "actual malice"—i.e., knowledge that the statements of fact were false or reckless disregard for their truth.[57] That standard, based in First Amendment concerns, is a product of defamation claims filed during the civil rights era against media and other

(S.D.N.Y. 1989) (holding that plaintiffs had pleaded necessary elements of nuisance claim against anti-abortion protesters).

52 *See, e.g.*, Volunteer Med. Clinic, Inc. v. Operation Rescue, 948 F.2d 218, 220 (6th Cir. 1991); Tompkins v. Cyr, 995 F. Supp. 664, 676–81 (N.D. Tex. 1998) (upholding liability of anti-abortion protesters for intentional infliction of emotional distress and invasion of privacy in connection with focused picketing activities); Huntingdon Life Scis., Inc. v. Stop Huntingdon Animal Cruelty, 896 N.Y.S.2d 440, 441 (N.Y. App. Div. 2010).

53 *See* Highland Enters., Inc. v. Barker, 986 P.2d 996, 1003, 1016 (Idaho 1999) (upholding approximately $1 million damage award based on environmental protest activities including spiking trees and obstructing roadways).

54 *See, e.g.*, *id.* at 1003.

55 *See generally* Schauer, *supra* note 12, at 1693–94 (discussing various causes of action).

56 *See id.* at 1693–94.

57 N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964).

defendants determined to report on protests and other events central to the civil rights movement.[58]

The "actual malice" standard has curtailed the use of defamation actions to suppress protest. However, the speech-protective standard does not apply to false statements about a *private* individual or entity.[59] Private plaintiffs may still recover significant damage awards, under a more forgiving standard (typically negligence), against protest participants or supporters.

In one recent extraordinary case, a jury awarded a $44 million verdict against Oberlin College ($11 million in compensatory damages along with $33 million in punitive damages), a small private college located in Ohio, for allegedly supporting statements by students that a local bakery had engaged in racial profiling of customers.[60] Oberlin students engaged in protest activities near the bakery and advocated a boycott of the establishment.[61] An Oberlin official joined the students at one protest outside the bakery, some faculty cancelled classes to allow students to attend protests, and students used college resources to print flyers condemning the establishment, resulting in the owners suing the college for defamation.[62]

This allegedly facilitative and supportive activity was the central ground for imposing liability on the college. Under the theory of the case, which we might call "aiding and abetting defamation," allies and supporters of protesters could be liable for substantial damages for encouraging a public protest or boycott action.

3. "Negligent Protest"

Protest organizers also face substantial civil liability under certain tort theories. Indeed, a recent lawsuit against a Black Lives Matter (BLM) protest organizer may open the floodgates of tort liability.

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58 *See generally* EDMONDSON, *supra* note 38.

59 *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 346–47 (1974) (rejecting "actual malice" standard in cases brought by private plaintiffs).

60 The trial judge later reduced the award to $25 million. *Judge Reduces Jury Awards in Dispute with Oberlin College*, ASSOCIATED PRESS (June 28, 2019), https://apnews.com/f4bfb5db0289435ba34f636f74566524 [https://perma.cc/95X3-V6PT]. The case is on appeal. *See* Appellants' Brief at 2, Gibson Bros., Inc. v. Oberlin College, Nos. 19CA011563 & 20CA011632 (Ohio Ct. App. June 5, 2020) .

61 *See* Dickson, *supra* note 27.

62 *See* Brian Pascus, *Oberlin College President Carmen Twillie Ambar on the $44 Million Ruling Against the School*, CBS NEWS (June 27, 2019, 4:09 PM), https://www.cbsnews.com/news/oberlin-college-president-defamation-lawsuit-verdict-gibsons-bakery-44-million-libel/ [https://perma.cc/VMW9-3VJN].

In *Doe v. Mckesson*,[63] a group of BLM activists blocked the highway in front of the Baton Rouge, Louisiana, police department headquarters to protest police misconduct (in this case, the killing of Alton Sterling, an African American male).[64] According to the complaint, DeRay Mckesson, who is associated with Black Lives Matter, was "the prime leader and an organizer of the protest."[65] Baton Rouge police officers organized a line of officers in riot gear.[66] At some point, an unidentified individual threw a hard object that injured an officer, who later reported "loss of teeth, a jaw injury, a brain injury, a head injury, lost wages, and 'other compensable losses.'"[67]

Police arrested Mckesson and more than 100 others at the protest. The anonymous injured officer, referred to as John Doe, sued Mckesson and the entire Black Lives Matter movement, alleging that "Mckesson did nothing to prevent the violence or to calm the crowd" and that he "incited the violence."[68] A divided panel of the Fifth Circuit concluded that the officer could sue based on the theory that "Mckesson breached his duty of reasonable care in the course of organizing and leading the Baton Rouge demonstration."[69] The court reasoned that because blocking a highway is against the law, "Mckesson should have known that leading the demonstrators onto a busy highway was likely to provoke a confrontation between police and the mass of demonstrators, yet he ignored the foreseeable danger . . . and notwithstanding, did so anyway."[70] "By ignoring the foreseeable risk of violence that his actions created," the court reasoned, "Mckesson failed to exercise reasonable care in conducting his demonstration."[71]

Even though an unidentified individual threw the object and there was no evidence that Mckesson urged any participant or bystander to do so, the court held "Mckesson's negligent actions were

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63 945 F.3d 818 (5th Cir. 2019).

64 *Id.* at 822; *see also* Phil McCausland, *On Anniversary of Alton Sterling Killing, Protesters Arrested, Pepper Sprayed*, NBC News (July 5, 2017, 11:07 PM), https://www.nbcnews.com/news/nbcblk/anniversary-alton-sterling-killing-protesters-arrested-pepper-sprayed-n779911 [https://perma.cc/7QG3-HXMS].

65 945 F.3d at 823.

66 *Id.* at 822.

67 *Id.* at 823.

68 *Id.*

69 *Id.* at 827. Judge Willett dissented from the court's negligence holding, in part on the ground that the First Amendment forecloses Doe's "negligent protest" theory of liability. *Id.* at 842–43 (Willett, J., concurring in part, dissenting in part).

70 *Id.* at 827 (majority opinion).

71 *Id.*

the [factual] causes of Officer Doe's injuries."[72] The majority concluded that so long as the officer alleged that his injuries were one of the consequences of unlawful activity that Mckesson authorized or directed, the First Amendment did not bar recovery.[73] The majority reasoned, "Mckesson directed the demonstrators to engage in the criminal act of occupying the public highway, which quite consequentially provoked a confrontation between the Baton Rouge police and the protesters, and that Officer Doe's injuries were the foreseeable result of the tortious and illegal conduct of blocking a busy highway."[74] In short, the court held, because "Mckesson ordered the demonstrators to violate a reasonable time, place, and manner restriction by blocking the public highway," a jury could find him liable for *any* foreseeable civil or criminal act, by anyone, that transpired during the protest.[75]

Mckesson was decided before the mass protests for racial justice following the deaths of George Floyd and other African Americans at the hands of police and vigilantes. However, based on the "negligent protest" theory, organizers of these or similar events could be liable for any foreseeable damage that occurs at the public protests—whether or not the organizer participated in, encouraged, or directed the harmful conduct.

4. "Tortious Petitioning" and Lost Business Opportunities

"Negligent protest" is not the only novel tort theory plaintiffs have recently pursued against protesters. Plaintiffs have also sought to impose civil liability for lost economic opportunities allegedly resulting from the petitioning of government officials.

In *City of Keene v. Cleaveland*,[76] the City brought an action for tortious interference with contract relations against protesters who followed parking enforcement officers and recorded their activities, filled expired meters before the officers could issue parking citations, and encouraged officers to leave their positions.[77] The meter-fillers testified that they were protesting the City's enforcement actions against drivers and petitioning government officials.[78]

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72 *Id.* at 828.

73 *Id.* at 829.

74 *Id.*

75 *Id.* at 832.

76 118 A.3d 253 (N.H. 2015).

77 *Id.* at 255.

78 *Id.* at 255–56.

The City sued the protesters, arguing that their actions interfered with the contractual relations between the City and parking enforcement officials. In that case, the Supreme Court of New Hampshire expressed doubt as to whether the First Amendment permitted government to punish petitioning under common law tort theories. It ultimately held that under the circumstances, imposing civil liability would violate the protesters' First Amendment rights.[79] However, the court left open the possibility that a content-neutral injunction might still be enforceable against the protesters, presumably focused on preventing them from physically harassing or interfering with parking officials on the job.[80]

A more recent case resulted in a sizeable judgment based on a similar theory. A jury imposed a $4 million judgment for interference with contractual relations after a woman—the sister of former U.S. Attorney General Janet Reno—sent emails and other communications to local officials in which she harshly criticized, on environmental grounds, a proposed stormwater management project.[81] A state appeals court upheld the verdict, obtained by a mining company that stands to profit from the project.[82] The court concluded that because the defendant had acted with "actual malice" in making statements to the commissioners, she was not entitled to any First Amendment or state common law privilege relating to petitioning public officials.[83]

This appears to be the first reported decision recognizing "tortious petitioning" as a cause of action. Under this theory, citizen interactions with public officials that result in injuries to third party businesses may result in multimillion-dollar civil judgments.

C. Statutory Causes of Action

Protest organizers, participants, and their supporters may also be civilly liable under a variety of statutory causes of action. Federal and state laws provide for liability for engaging in conspiracies, aiding protesters, communicating threats, and racketeering activities.

1. "Riot Boosting"

Following high-profile protests at Standing Rock, in Ferguson, Missouri, and at President Trump's inauguration, several states en-

79 *Id.* at 261.

80 *Id.* at 264.

81 *See* Mazzei, *supra* note 33.

82 Hurchalla v. Lake Point Phase I, LLC, 278 So. 3d 58, 68 (Fla. Dist. Ct. App. 2019).

83 *Id.* at 65.

acted civil provisions relating to protest activities. One of these provisions created a civil cause of action for "riot boosting," which occurs when someone "directs, advises, encourages, or solicits" others to participate in public protests that turn out to be violent.[84]

Under South Dakota's version of this cause of action, a person or organization is liable for "riot boosting" if they engage in it personally "or through any employee, agent, or subsidiary."[85] The state or a third party can sue the "riot booster" for extensive civil damages, including punitive awards.[86] If the state sues, it must deposit any damages recovered in a "riot boosting recovery fund," which may be used to cover its cleanup and other costs.[87] In those actions, "riot boosting" recoveries act as another cost-shifting mechanism.

Similar to the "negligent protest" action, "riot boosting" may result in vicarious and collective liability for actions the defendant did not expressly encourage, order or authorize. Under this cause of action, individuals, organizations, and protest funders may be civilly liable for substantial damages even if they did not personally participate in any unlawful or violent protest.

2. "Conspiracy to Protest"

An 1871 federal law, the Ku Klux Klan Act, imposes civil damages for engaging in private conspiracies to violate the civil rights of racial and other minorities.[88] The law, which originally targeted terrorist activities of the Klan during Reconstruction, requires a showing of racial or other class-based animus and proof that the conspirators intended to deprive plaintiffs of rights guaranteed against private impairment (i.e., the right to be free from involuntary servitude and the right to travel).[89] During the 1980s and 1990s, abortion rights proponents unsuccessfully invoked this provision against anti-abortion protesters, claiming that acts like blocking access to clinics constituted a conspiracy to violate the civil rights of women. Many of those claims failed owing to the lack of evidence of the necessary gender-based animus.[90]

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84 S.B. 189, 2019 Leg., 94th Sess. (S.D. 2019); *see also* Malone & Eidelman, *supra* note 24.

85 S.B. 189, 2019 Leg., 94th Sess. (S.D. 2019).

86 *Id.*

87 *Id.*

88 42 U.S.C. § 1985(3).

89 United Brotherhood of Carpenters & Joiners of Am., Loc. 610 v. Scott, 463 U.S. 825, 829, 833, 836 (1983).

90 *See, e.g.*, Town of W. Hartford v. Operation Rescue, 991 F.2d 1039, 1046 (2d Cir. 1993) (rejecting claim under the Klan Act); Lucero v. Operation Rescue of Birmingham, 954 F.2d 624,

By contrast, in *Sines v. Kessler*,[91] a district court recently ruled that a group of plaintiffs could invoke the Klan Act to seek damages against the organizers of demonstrations held in Charlottesville during the summer of 2017.[92] In *Sines*, residents of Charlottesville, Virginia who suffered injuries at the now-infamous "Unite the Right" rally and an earlier demonstration brought an action against several organizations and individual members who organized and participated in the rallies.[93] Plaintiffs alleged that defendants violated the 1871 Act and related state laws by conspiring to engage in violence against racial minorities and their supporters.[94] The district court concluded that the complaint was legally and factually sufficient to overcome dismissal as to all but one plaintiff.[95] It also concluded that the plaintiffs alleged sufficient facts to demonstrate that the defendants conspired to engage in racial violence and the defendants' overt acts taken in furtherance of the conspiracy caused the plaintiffs' injuries.[96]

The district court's decision did not hold that the defendants were liable, but rather only that the facts alleged in the complaint were generally sufficient to survive a motion to dismiss.[97] Because its analysis centers on the sufficiency of the evidence, the court's opinion is fact-intensive.[98] As the court noted, the plaintiffs' complaint itself is 112-pages long.[99] As the district court observed, "the complaint frequently uses vague nouns, lumping all Defendants and all co-conspirators together."[100] The court rejected the plaintiffs' argument that the court should treat any rally attendee who merely *disagreed* with plaintiffs' views as part of an unlawful conspiracy.[101] The court emphasized that its opinion relied largely on *summaries* of allegations against various

628 (11th Cir. 1992) (holding that plaintiff abortion provider had not shown evidence of gender-based animus); Miss. Women's Med. Clinic v. McMillan, 866 F.2d 788, 794 (5th Cir. 1989) (same).

91 324 F. Supp. 3d 765 (W.D. Va. 2018).

92 *Id.* at 797–98. The case was originally scheduled to be tried in October 2020, but it has been delayed. *See* Tyler Hammel, *Unite the Right Lawsuit Trial Delayed Amid COVID-19 Concerns*, Daily Progress (Sept. 7, 2020), https://dailyprogress.com/news/local/crime-and-courts/unite-the-right-lawsuit-trial-delayed-amid-covid-19-concerns/article_3a8b98c3-d0cb-5517-80b1-9488019f7580.html [https://perma.cc/7XY5-68AC].

93 324 F. Supp. 3d at 774–75.

94 *Id.* at 773.

95 *See id.* at 798.

96 *Id.* at 795–98.

97 *Id.* at 773.

98 *See id.* at 773–74.

99 *Id.* at 774.

100 *Id.*

101 *Id.* at 784.

defendants, and that it was not certain the plaintiffs would or could prove these allegations at trial.[102] Nevertheless, the court concluded that the plaintiffs sufficiently alleged a conspiracy to violate plaintiffs' civil rights.[103]

Notwithstanding its preliminary posture, *Sines* is a potentially significant case concerning protester liability. The requirement of racial animus narrows the scope of the Klan Act, and the case may turn on whether the district court was correct in holding that the plaintiffs are among its intended beneficiaries.[104] However, as explained further in Part III, the district court's theory of liability relies substantially on various allegations relating to actions taken to organize or publicize the protests. That approach suggests that plaintiffs could successfully pursue "conspiracy to protest" cases against organizers of Black Lives Matter, gun rights, and other protests.

3. Threats and Racketeering

Political protesters may also be civilly liable under federal and state statutes prohibiting certain communications and activities. In particular, protesters may incur civil liability for threatening communications and for engaging in concerted racketeering activities.

In *Planned Parenthood of the Columbia/Willamette, Inc. v. American Coalition of Life Activists*, the full Court of Appeals for the Ninth Circuit upheld a substantial judgment against anti-abortion protesters under the federal Freedom of Access to Clinic Entrances Act ("FACE").[105] As its name suggests, FACE protects the rights of women and health care workers to access clinics for the purpose of obtaining and providing abortion services.[106] The law also imposes a civil fine for communicating threats against abortion providers.[107]

In *American Coalition of Life Activists*, an organization of pro-life activists distributed "Wanted" posters that identified certain abortion providers and accused them of "crimes against humanity."[108] The group also maintained a "Nuremberg Files" website that, among other things, kept track of abortion providers who had been murdered or

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102 *Id.* at 784–95.

103 *Id.*

104 *See id.* at 780–82 (concluding that racial animus requirement extends to animus against African Americans' supporters and plaintiffs pled a cognizable "right to be free from racial violence").

105 290 F.3d 1058, 1088 (9th Cir. 2002) (en banc).

106 18 U.S.C. § 248(a)(1).

107 *Id.* § 248(a)(1), (b), (c)(1)(A).

108 *Am. Coal. of Life Activists*, 290 F.3d at 1062–63.

injured.[109] The court upheld a multimillion dollar civil verdict based on the flyers and website.[110] It held that their content was not political speech made in the context of a public debate about abortion but rather communications that a reasonable recipient would perceive as a threat of bodily injury or death.[111]

FACE contains a specific threats provision, applicable in the context of abortion clinics.[112] However, the Ninth Circuit's logic applies to any law that prohibits threatening communications. Protesters who communicate ideas or messages that courts or juries could conclude are serious expressions of an intent to harm another may be liable for significant civil damages.[113]

Protest organizers may also incur liability under federal and state civil racketeering laws. In the past, pro-choice activists and abortion providers invoked these laws to prevent anti-abortion protesters from blocking access and engaging in other violent activities near clinics. Thus, under the federal Racketeering Influenced and Corrupt Organizations Act ("RICO"),[114] abortion clinics and their supporters alleged a coordinated campaign by protest "enterprises" to deprive women of access to clinics and drive the clinics out of business.[115]

In one of these cases, the Supreme Court rejected an argument that RICO only applied where the alleged wrongdoers' pattern of interstate racketeering activity had an economic motive, opening the way for application of RICO to a variety of political and other ideological protests.[116] In response to complaints that this interpretation unduly expanded RICO's language, the Court subsequently interpreted the statute in a manner that makes it more difficult to apply to abortion clinics and perhaps other protests.[117] However, given the

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109 *Id.* at 1062.

110 *Id.* at 1088.

111 *Id.*

112 18 U.S.C. § 248(a)(1).

113 *See* Virginia v. Black, 538 U.S. 343, 359 (2003) ("'True threats' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.").

114 18 U.S.C. §§ 1961–68.

115 *See, e.g.*, Palmetto State Med. Ctr. v. Operation Lifeline, 117 F.3d 142, 149 (4th Cir. 1997) (upholding dismissal of RICO claims against abortion protesters); Ne. Women's Ctr. v. McMonagle, 868 F.2d 1342, 1349–50 (3d Cir. 1989) (allowing RICO claim to proceed against anti-abortion protesters).

116 *See* Nat'l Org. for Women, Inc. v. Scheidler, 510 U.S. 249, 262 (1994) (holding RICO contains no economic motive requirement).

117 *See* Scheidler v. Nat'l Org. for Women, Inc., 537 U.S. 393, 409–10 (2003) (concluding that abortion protesters did not "obtain" property by their acts, and thus did not commit extortion in violation of RICO).

flexibility of its terms, including the definition of "enterprise" and the wide variety of predicate acts that support a RICO claim, the federal law may apply to environmental, animal rights, and other protesters.[118] Further, at the state level, legislatures can propose laws that hold counterprotesters liable under racketeering provisions.[119]

D. Penalty Enhancements

Federal and state laws also provide for enhanced civil penalties for protest-related activities. RICO, discussed earlier, provides for treble civil damages.[120] Civil rights laws, FACE,[121] and state laws provide for enhanced fines, civil penalties, and punitive damages.

As noted earlier, in response to recent public protests, many state legislatures have considered or adopted measures increasing the civil liability of protesters. The enactments include enhanced civil penalties.[122] More specifically, as they relate to public protest activities, these laws:

- Significantly increase the civil fines imposed for obstructing traffic or trespassing;
- Allow businesses to sue individuals who target them with protests;
- Increase fines for "mass picketing" behavior;
- Create new civil penalties for protests that take place near "critical infrastructure" ranging from gas pipelines to telephone poles; and
- Apply state anti-racketeering laws, including asset forfeiture provisions, to protest groups.[123]

Owing to their focus on repetitive behaviors or patterns of conduct, some of these penalty enhancements may disparately affect activists.[124] For instance, pro-life abortion protesters and environmental

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118 *See, e.g.*, Jaime I. Roth, *Reptiles in the Weeds: Civil RICO vs. The First Amendment in the Animal Rights Debate*, 56 U. MIAMI L. REV. 467, 468 (2002); Alexander M. Parker, *Stretching RICO to the Limit and Beyond*, 45 DUKE L.J. 819, 847–48 (1996); Suzanne Wentzel, National Organization for Women v. Scheidler*: RICO a Valuable Tool for Controlling Violent Protest*, 28 AKRON L. REV. 391, 392 (1995); Carole Golinski, Recent Decision, *In Protest of* NOW v. Scheidler, 46 ALA. L. REV. 163, 163–64 (1994); Lynn D. Wardle, *The Quandary of Pro-Life Free Speech: A Lesson From the Abolitionists*, 62 ALB. L. REV. 853, 900 (1999); Tracy S. Craige, *Abortion Protest: Lawless Conspiracy or Protected Free Speech?*, 72 DENV. U. L. REV. 445, 450 (1995).

119 *See* Ingraham, *supra* note 8; Yoder, *supra* note 9.

120 18 U.S.C. § 1964(c).

121 *Id.* § 248.

122 *U.S. Protest Law Tracker*, *supra* note 9 (tracking and describing the laws and bills).

123 *See* Ingraham, *supra* note 8; Yoder, *supra* note 9.

124 *See generally* Jacobs, *supra* note 17 (analyzing various penalty enhancements).

activists who trespass on private properties may face enhanced penalties under FACE, RICO, and newly enacted state laws relating to "critical infrastructure."[125] Enhanced penalties apply where individuals engage in civil disobedience, such as trespass and interference with business operations.

E. Public Education and Government Employment

Finally, some of the potential costs of engaging in protest are not monetary, in the narrow sense of consisting of fines and damage awards. Protesters must also consider the possibility that owing to their activities they may suffer loss of educational or employment opportunities.

The focus here is on *public* school students and *public* employees for the simple reason that the First Amendment applies only in those realms and, as discussed later, may offer affected parties some relief. Private school students and private employees may face similar consequences for their protest activities. They may be able to assert remedies under federal or state laws. For example, private-sector employees have the right to engage in concerted activity and discuss the terms and conditions of employment under the federal National Labor Relations Act.[126] In some states, private-sector employers cannot discriminate against their employees based on their political activity.[127]

In the context of public education, students may suffer adverse consequences if they organize or participate in protest activity. Officials may even be able to discipline students for engaging in off-hours protest activity, should that activity have a disruptive effect on school functions.[128] In addition, state legislators and public university officials have been increasingly concerned about protests on campus.[129] In re-

125 *See* Huffman & Wright Logging Co. v. Wade, 857 P.2d 101, 106–11 (Or. 1993) (in banc) (rejecting the argument that the punitive damages award violated the State Constitutional Free Speech Guarantee or First Amendment).

126 29 U.S.C. §§ 157, 158(c).

127 *See* Eugene Volokh, *Private Employees' Speech and Political Activity: Statutory Protection Against Employer Retaliation*, 16 TEX. REV. L. & POL. 295, 297 (2012).

128 The issue has arisen in a number of cases involving off-campus student social media expression. *See, e.g.*, Layshock *ex rel.* Layshock v. Hermitage Sch. Dist., 650 F.3d 205, 221 (3d Cir. 2011) (holding school officials could not punish students for creating fake online profiles of school officials absent reasonable forecast that expression would cause substantial disruption on campus); Wynar v. Douglas Cnty. Sch. Dist., 728 F.3d 1062, 1065 (9th Cir. 2013) (holding public high school could expel student for sending instant messages to his classmates that could be interpreted as planning violent attack).

129 *See generally* Lauren Camera, *Campus Free Speech Laws Ignite the Country*, U.S. NEWS

sponse to incidents in which students have interrupted or interfered with scheduled speakers and events, they have proposed new penalties for students who engage in disruptive protest. A Wisconsin bill would have required disciplinary action be taken against community members who engage in "violent, abusive, indecent, profane, *boisterous*, obscene, *unreasonably loud*, or other *disorderly conduct* that interferes with the free expression of others."[130] Although that bill did not pass, the University of Wisconsin ultimately adopted a policy allowing officials to discipline students who "materially and substantially" disrupt the free speech of others.[131] Arizona, North Carolina, Florida, and Georgia have enacted similar policies.[132] Under this approach, students who interfere with campus events are subject to discipline, up to and including expulsion.

Public sector employees have First Amendment rights to engage in political speech and political protest. However, those rights are constrained by employer interests in morale and efficient operations. The Supreme Court has held that when a public employee speaks as a citizen on a matter of public concern, the First Amendment bars adverse employment action so long as the right to speak outweighs the employer's interests.[133] That balancing standard may offer little protection to an employee who engages in protest activity when his superiors disapprove of it. Suppose, for example, a public school teacher decides to attend a climate change protest with her students in direct violation of a school board order.[134] Whether the teacher attended in order to provide students without parental supervision an opportunity to par-

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(July 31, 2017, 5:40 PM), https://www.usnews.com/news/best-states/articles/2017-07-31/campus-free-speech-laws-ignite-the-country (last visited Jan. 17, 2021); *see also* INT'L CTR. FOR NON-PROFIT L., CAMPUS SPEECH BILLS AND THE RIGHT TO PROTEST 1 (2018), https://mk0rofifiqa2w3u89nud.kinstacdn.com/wp-content/uploads/ICNL-Campus-Speech-Briefer-April-2018.pdf?_ga=2.253821832.1025486685.1588865837-948143158.1588616878 [https://perma.cc/PBG4-BWAW].

130 Cara Lombardo, *Groups, Students at Odds Over University Free Speech Bill*, ASSOCIATED PRESS (May 11, 2017) (internal quotations omitted), https://apnews.com/article/bdd14975b6a34d06a97a1f300c40af91 [https://perma.cc/92NQ-64GT].

131 *"Campus Free Speech Acts" Die in Wisconsin*, NAT'L CTR. FOR SCI. EDUC. (Mar. 29, 2018), https://ncse.ngo/campus-free-speech-acts-die-wisconsin [https://perma.cc/7LH3-6WKW]; Yvonne Kim, *UW Regents Approve Mandatory Student Punishments for Disrupting Free Speech*, CAP TIMES (Oct. 11, 2019), https://madison.com/ct/news/local/education/university/uw-regents-approve-mandatory-student-punishments-for-disrupting-free-speech/article_6852f1c1-ce5c-5cec-bee5-2d3a5260cf70.html [https://perma.cc/7SL2-WL84].

132 *See* H.B. 2563, 53d Leg., 2d Reg. Sess. (Ariz. 2018); Campus Free Expression Act, FLA. STAT. § 1004.097 (2018); S.B. 339, 154th Gen. Assemb., Reg. Sess. (Ga. 2018).

133 *See* Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968).

134 *See* Barnard, *supra* note 37.

ticipate or simply out of solidarity with their students, she may lose her job. Moreover, public employers have terminated public employees for posting controversial political and social viewpoints on social media.[135] Similarly, public employees could be terminated simply for attending a public protest at which others communicate offensive or incendiary ideas. In general, if public protest activity reflects negatively on the employer or creates disruption within the office, the First Amendment does not protect the employee's protest activity.[136]

II. The Chilling Effects of Civil Costs and Liabilities

The various administrative costs, civil actions, and penalties described in Part I seriously affect First Amendment speech, assembly, and petition rights. Civil costs and liabilities threaten the exercise of First Amendment rights in two distinct, but related, ways. The first concern is that imposition of costs and liabilities will effectively prohibit expressive activities. The second concern relates to indeterminate liability standards, which can also chill protest and other First Amendment activities. In both respects, civil costs and liabilities implicate the rights and values associated with the First Amendment.

A. Financial Burdens

Civil costs and liabilities impose significant monetary burdens on public protest organizers and participants. These costs, which include monetary judgments, lawyers' fees, security costs, liability insurance requirements, and, in some cases, enhanced civil damages, can be staggering. For protesters of limited means, the costs and liabilities can effectively prevent participation in protest activities. These civil costs are, of course, in addition to restitution and other costs associated with criminal penalties.[137] Even for those who have some ability to pay, the prospect of significant administrative costs, massive damage awards, civil penalties, loss of employment, and other costs might

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135 *See* David L. Hudson Jr., *Public Employees, Private Speech: 1st Amendment Doesn't Always Protect Government Workers*, A.B.A. J. (May 1, 2017, 4:10 AM), https://www.abajournal.com/magazine/article/public_employees_private_speech [https://perma.cc/C38H-YD9D] (discussing cases involving public employee social media speech).

136 *See, e.g.*, Locurto v. Giuliani, 447 F.3d 159, 179–83 (2d Cir. 2006) (upholding termination of police officers who appeared in public on racially derogatory parade float).

137 *See* Anna Stolley Persky, *Protesters May Pay the Price When Civil Disobedience Becomes Costly*, A.B.A. J. (Nov. 1, 2015, 2:50 AM), https://www.abajournal.com/magazine/article/protesters_may_pay_the_price_when_civil_disobedience_becomes_costly [https://perma.cc/JJQ7-NXF4] (discussing monetary and other costs associated with criminal arrest and conviction).

understandably diminish willingness to organize, participate in, or support public protests and other forms of dissent.[138]

Although Part I presents a general overview of the various monetary and other liabilities that apply to protest activity, even this account does not tell the complete story. The costs of dissent are part of a protest infrastructure that imposes significant monetary and non-monetary burdens on protest activities. These non-monetary burdens include, among other things, strict limits on access to public places, aggressive methods of protest policing, bureaucratic requirements applicable to public protests, and negative public and official attitudes toward protest and dissent.[139] The civil costs described in Part I are thus an *additional* layer of burdens and obstacles imposed on protest organizers, participants, and supporters. When thinking about the potential chilling effects of fees, damages, and the like, we need to appreciate that they are part of a multilayered regulatory framework that applies to protest activity.

History bears out the concern that civil costs can significantly chill protest. During the civil rights movement, opponents of racial equality turned to civil actions, including defamation lawsuits against newspapers and journalists, as a means of chilling and suppressing press reporting on segregation and civil rights.[140] These were early and effective SLAPP (Strategic Lawsuits Against Public Participation) actions—lawsuits filed to intimidate defendants from speaking out or publishing critical information.[141] Defamation lawsuits ultimately silenced thousands of journalists and others seeking to report on the civil rights movement.[142] Tort liability was just one of many weapons opponents of racial equality used to inhibit expression. They also re-

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138 *See* Timbs v. Indiana, 139 S. Ct. 682, 689 (2019) ("Excessive fines can be used . . . [to] chill the speech of political enemies . . . .").

139 *See generally* TIMOTHY ZICK, SPEECH OUT OF DOORS: PRESERVING FIRST AMENDMENT LIBERTIES IN PUBLIC PLACES (2008) (examining spatial and other restrictions on public protest); Inazu, *supra* note 3 (examining use of unlawful assembly arrests to restrict public protests); Edward R. Maguire, *New Directions in Protest Policing*, 35 ST. LOUIS U. PUB. L. REV. 67 (2015) (describing aggressive protest policing tactics); Rachel A. Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761 (2012) (noting the influence policing discretion has on public protests); Felicia Sonmez, *Trump Suggests That Protesting Should Be Illegal*, WASH. POST (Sept. 5, 2018, 12:35 PM), https://www.washingtonpost.com/politics/trump-suggests-protesting-should-be-illegal/2018/09/04/11cfd9be-b0a0-11e8-aed9-001309990777_story.html [https://perma.cc/35EP-YA58] (quoting President Trump as saying, "I think it's embarrassing for the country to allow protesters.").

140 For a thorough account of the use of defamation claims to suppress reporting on and discussion about racial justice, see EDMONDSON, *supra* note 38.

141 *See* Jerome I. Braun, *Increasing SLAPP Protection: Unburdening the Right of Petition in California*, 32 U.C. DAVIS L. REV. 965, 969–73 (1999) (explaining concept of SLAPP lawsuits).

142 *See* EDMONDSON, *supra* note 38, at 9.

lied on law enforcement actions, enforcement of business registration laws, and other measures (including vigilante violence) to suppress civil rights activism.[143] However, defamation actions were a central part of the strategy for suppressing political speech.

The Supreme Court eventually intervened and recognized the chilling effect of tort lawsuits on press and speech. In *New York Times Co. v. Sullivan*,[144] the Court articulated the "central meaning of the First Amendment"—that freedom of speech and press required protection for "uninhibited, robust, and wide-open" debate on matters of public concern.[145] To preserve that central First Amendment value, it held that states were required to alter their defamation laws in actions brought by public officials.[146] The Court ruled that public officials could sue for false statements about their official duties only when they could demonstrate that publishers communicated false statements with "actual malice"—knowledge that they were false or reckless disregard for falsity.[147]

This significant restructuring of state defamation laws was a direct response to concerns about the chilling effect of defamation judgments. As the Court observed, "The fear of damage awards under a rule such as that invoked by the Alabama courts here may be markedly more inhibiting than the fear of prosecution under a criminal statute."[148] As the Court emphasized, "since there is no double-jeopardy limitation applicable to civil lawsuits, this is not the only judgment that may be awarded against petitioners for the same publication."[149] Even if *The New York Times* could survive multiple judgments of many thousands of dollars, the Court recognized that most media outlets could not. Civil damage awards could effectively put many newspapers and other outlets out of business.

The Court expressed similar concerns about the chilling effects of tort liability in *NAACP v. Claiborne Hardware Co.*,[150] a case examined in greater detail in Section III.B. In that case, a Mississippi state court judge found that the NAACP and individual defendants

143 *See, e.g.*, NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 453 (1958) (rejecting state's argument that it needed list of rank-and-file members of NAACP in order to determine whether the organization was lawfully doing business in Alabama).

144 376 U.S. 254 (1964).

145 *Id.* at 270, 273.

146 *Id.* at 279–80.

147 *Id*.

148 *Id*. at 277.

149 *Id*. at 278.

150 458 U.S. 886 (1982).

who organized or participated in a boycott of white businesses during the civil rights movement were jointly and severally liable for all of the economic damages stemming from the boycott, which lasted from 1966 to 1972—a total of $1,250,699, plus interest.[151] The Mississippi Supreme Court affirmed the finding of liability and agreed with the lower court that the defendants were liable for any damages relating to the boycott, but it reversed and remanded the case with instructions to clarify the basis for liability of several of the defendants.[152]

On appeal, the Supreme Court significantly narrowed the liability of the defendants who organized and participated in the boycott.[153] Recognizing that protests, including business boycotts, are a critically important means of political and social change, the Court sharply limited the civil liability of protest organizers for the unlawful acts of some protest participants.[154] It warned that without strict limitations, civil damage awards could chill or even suppress First Amendment speech and association rights.[155]

In *Claiborne Hardware*, the Supreme Court was worried not only about the costs imposed on *individual* protesters, but also about the effect massive damages awards would have on the formation of associations and social movements. It quoted with approval Justice Douglas, who had written in a prior decision, "The rights of political association are fragile enough without adding the additional threat of destruction by lawsuit."[156]

B. Indeterminate Liability Standards

A second concern with respect to civil costs and liabilities relates not to the monetary burdens but to the indeterminacy of liability standards applicable to protesters. Adoption and application of ambiguous, overbroad, and indeterminate civil liability standards can significantly chill expressive activity. This is a general First Amend-

151 *Id.* at 891–93.

152 *Id.* at 894.

153 *Id.* at 920.

154 *Id.* at 926–27.

155 *Id.* at 915–16.

156 *Id.* at 931–32 (quoting NAACP v. Overstreet, 384 U.S. 118, 122 (1966) (Douglas, J., dissenting from denial of certiorari)). The Court has limited tort liability on First Amendment grounds in other contexts not directly implicating protest rights but raising similar concerns about chilling speech on matters of public concern. Thus, for example, it has applied *Sullivan*'s "actual malice" standard in suits invoking the "false light" invasion of privacy tort. *See* Time, Inc. v. Hill, 385 U.S. 374 (1967); *see also* Fla. Star v. B.J.F., 491 U.S. 524, 541 (1989) (invalidating civil judgment against newspaper for printing name of rape victim).

ment concern, applicable to all sorts of laws.[157] However, the Supreme Court has specifically addressed the potential chilling effect of civil liability standards.

The entire law of defamation reflects First Amendment concerns. Over time, the Court has constitutionalized and made more precise all elements of the defamation tort, including standards of proof and the requirement of falsity.[158] It did this "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."[159]

In *Snyder v. Phelps*,[160] members of the Westboro Baptist Church protested outside the funeral of Matthew Snyder, a U.S. soldier killed in Iraq. Church members, who had secured permission to demonstrate in a space adjacent to a public street some 1,000 feet from the funeral, displayed their signs—stating, *e.g.*, "Thank God for Dead Soldiers," "Fags Doom Nations," "America is Doomed," "Priests Rape Boys," and "You're Going to Hell"—for about 30 minutes before the funeral began.[161] Matthew Snyder's father, Alfred, saw the tops of the picketers' signs when driving to the funeral but did not learn what they said until watching a news broadcast later that night.[162] Alfred Snyder sued the Westboro protesters for, among other things, intentional infliction of emotional distress.[163] A jury held Westboro liable for $2.9 million in compensatory damages and $8 million (later reduced by the trial court to $2.1 million) in punitive damages.[164]

The Supreme Court held that the imposition of damages for intentional infliction of emotional distress violated the First Amendment.[165] It reasoned that Westboro's speech, including its signs, concerned "matters of public concern"—e.g., "the political and moral conduct of the United States and its citizens, the fate of our Nation, homosexuality in the military, and scandals involving the Catholic clergy . . . ."[166] The Court observed, "Given that Westboro's speech

157 *See, e.g.*, Ashcroft v. Free Speech Coal., 535 U.S. 234, 244 (2002) ("The Constitution gives significant protection from overbroad laws that chill speech within the First Amendment's vast and privileged sphere.").

158 N.Y. Times Co. v. Sullivan, 376 U.S. 254, 280 (1964) (announcing "actual malice" standard); Phila. Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986) (falsity requirement).

159 *Sullivan*, 376 U.S. at 270.

160 562 U.S. 443 (2011).

161 *Id*. at 448, 454 (internal quotation marks omitted).

162 *Id*. at 449.

163 *Id*. at 450.

164 *Id*.

165 *Id*. at 459.

166 *Id*. at 453–54.

was at a public place on a matter of public concern, that speech is entitled to 'special protection' under the First Amendment."[167]

The Court also relied on the ambiguity of the liability standard. It concluded that the First Amendment barred imposing liability under the intentional infliction's "outrageousness" standard because such a subjective standard would allow juries to enter judgments against unpopular, provocative, or offensive speakers based on the content of their expression.[168] In *Snyder*, the Court again altered common law tort liability owing to concerns that an indeterminate standard would chill speech and suppress discussion of public issues.[169]

In a variety of contexts, the Supreme Court has emphasized that public protest and dissent may be deterred "not only [by] heavy-handed frontal attack, but also . . . by more subtle governmental interference."[170] It has stressed both the chilling effect of civil damages and the inhibiting power of indeterminate civil liability standards. Based on these concerns, and to preserve robust discussion of public issues by individuals and organizations, the Court has narrowed damages liability in some contexts and eliminated it altogether in others. Part III examines more specifically how the Court's precedents and First Amendment values should affect how courts and other officials assess a variety of civil costs and liabilities.

III. The First Amendment and Protest Liability

Concerns about chilling First Amendment rights and doing harm to its central values ought to inform how courts and other officials approach the various and rising costs of dissent. However, officials need more concrete guidance. The Supreme Court has not provided much. This Part first identifies the rules, standards, and values the Supreme Court has articulated in the civil liability context. It next analyzes various costs and liabilities in accordance with this guidance.

A. General First Amendment Limits

Despite the Supreme Court's recognition that civil costs can chill expressive activities, the manner and extent to which the First Amendment limits those liabilities is not entirely clear. Indeed, in many respects the boundaries remain uncertain. In order to assess traditional costs and novel claims (e.g., "negligent protest" and "riot

167 *Id*. at 458.

168 *See id*. at 458–59 (discussing "outrageousness" standard).

169 *Id.*

170 Bates v. City of Little Rock, 361 U.S. 516, 523 (1960).

boosting"), we need first to have an understanding of the current standards.

1. Fees and Costs

In terms of permit fees and other costs, the Supreme Court upheld a maximum fee of $300 in a case decided in 1941.[171] It has not subsequently clarified how much officials may charge or whether they are required to waive fees and costs for some protesters. The Court has never addressed whether localities can insist on liability insurance, condition protest rights on other liability considerations, or recoup protest-related costs from organizers or participants.[172]

The Supreme Court has held that officials cannot vary the amount of the permit fee, for instance according to their own predictions about how violent crowds will become.[173] Variable fees violate the First Amendment because they empower government to discriminate against unpopular speakers. Beyond this, the Court has not ventured any guidance with respect to the administrative costs of protest.

2. Protesters' Misconduct

As far as substantive liability limits, the Court has held that the First Amendment does not limit the imposition of civil damages, penalties, or other costs associated with a protest organizer's or participant's *own* violent or unlawful conduct. As the Court stated in *Claiborne Hardware*, "[t]he First Amendment does not protect violence."[174] Thus, a protester who physically assaults someone or throws a rock or other object at a law enforcement officer or counterprotester is clearly liable for damages from such unlawful acts.

Similarly, the First Amendment does not protect individuals who intentionally conspire to engage in unlawful acts, including but not limited to violent conduct.[175] Thus, where there is clear proof of an intent to further the unlawful aims of a group, conspiracy and other civil claims do not violate the First Amendment. However, courts and juries cannot *infer* the requisite intent from membership in the group or other protected First Amendment activities. Rather, government must prove intent to engage in violent or unlawful activities.[176]

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171 Cox v. New Hampshire, 312 U.S. 569, 574–76 (1941) (upholding a permit fee of $300, although no fee was actually charged).

172 *See generally* Neisser, *supra* note 11, at 260.

173 *See* Forsyth County v. Nationalist Movement, 505 U.S. 123, 133 (1992).

174 NAACP v. Claiborne Hardware Co., 458 U.S. 886, 916 (1982).

175 *See id.* at 920.

176 *See* Scales v. United States, 367 U.S. 203, 229 (1961) ("[Q]uasi-political parties or other

3. General Limits on Civil Actions

Some commentators have argued that courts should not interpret the First Amendment in a manner that limits the imposition of certain tort liabilities.[177] However, as applied to protest activities, the First Amendment limits civil liability, at least to some degree. The Supreme Court has made clear that the First Amendment applies to private civil actions, including those addressed in this Article, even though they typically involve two private parties.[178] Whatever concerns some might have about First Amendment "expansionism,"[179] as it relates to civil liability, protest-related costs and liabilities raise significant First Amendment concerns.

Where peaceful forms of protest, dissent, and expression form even part of the basis for civil liability, courts are duty-bound to consider whether those actions comport with the First Amendment.[180] As the Court stated in *Claiborne Hardware*, the First Amendment "imposes a *special obligation*" on courts to "*examine critically* the basis on which liability was imposed."[181] In such circumstances, the Court has emphasized, "[*p*]*recision of regulation*" is required.[182]

Together, the highlighted phrases—"special obligation," "examine critically," and "precision of regulation,"—establish that the First Amendment significantly limits protesters' potential civil liability

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groups that may embrace both legal and illegal aims differ from a technical conspiracy, which is defined by its criminal purpose . . . ."); *see also Claiborne Hardware*, 458 U.S. at 908 ("The right to associate does not lose all constitutional protection merely because some members of the group may have participated in conduct or advocated doctrine that itself is not protected.").

177 *See* Kenneth S. Abraham & G. Edward White, *First Amendment Imperialism and the Constitutionalization of Tort Liability*, 98 TEX. L. REV. 813, 844 (2020) (arguing that First Amendment concerns should not limit application of certain torts, including fraud, product disparagement, and intentional interference with business relations).

178 *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 265 (1964) (concluding that First Amendment applied to states' enforcement of common law defamation standards); *see also* Daniel J. Solove & Neil M. Richards, *Rethinking Free Speech and Civil Liability*, 109 COLUM. L. REV. 1650, 1689 (2009) (proposing "duty-defining power" theory of First Amendment limits on civil liability, which focuses on governmental use of power to influence expression).

179 Regarding concerns about expansive interpretations of the scope of the First Amendment see, e.g., Morgan N. Weiland, *Expanding the Periphery and Threatening the Core: The Ascendant Libertarian Speech Tradition*, 69 STAN. L. REV. 1389, 1390 (2017); Amanda Shanor, *The New* Lochner, 2016 WIS. L. REV. 133, 133 (2016); Leslie Kendrick, *First Amendment Expansionism*, 56 WM. & MARY L. REV. 1199, 1200 (2015).

180 *See Claiborne Hardware*, 458 U.S. at 916–17 ("[T]he presence of activity protected by the First Amendment imposes restraints on the grounds that may give rise to damages liability and on the persons who may be held accountable for those damages.").

181 *Id.* at 915 (emphasis added).

182 *See* NAACP v. Button, 371 U.S. 415, 438 (1963) (emphasis added) ("Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms.").

exposure. Indeed, these principles or guidelines are particularly important where political expression and speech on matters of public concern are involved.[183]

Applying these general guidelines, the Supreme Court has altered some common law standards and required that they be precise, prohibited certain civil actions altogether, and interpreted protest-related civil statutes narrowly. As discussed earlier, concerning allegedly defamatory statements pertaining to public officials' exercise of their official duties, *New York Times Co. v. Sullivan* requires that states apply an "actual malice" standard.[184] The Court later extended this speech-protective rule to "public figures," or those who have general fame or notoriety in a community (i.e., celebrities and sports figures).[185] Private individuals can generally recover based on a showing of negligence, although punitive damage rewards require that the higher standard be satisfied.[186]

Snyder v. Phelps, of course, went further and eliminated protesters' liability for intentional infliction of emotional distress.[187] *Snyder* precludes liability so long as the protest relates to "matters of public concern."[188] In other words, the Court prohibited the imposition of liability for intentional infliction of emotional distress based on communications on matters of public concern.[189] Acknowledging that the Westboro speech was particularly upsetting to Matthew Snyder's grieving father, the Court nevertheless held that the tort's "outrageousness" standard lacked the requisite precision.[190] The standard essentially licensed or encouraged juries to engage in content discrimination.[191]

The Court has also interpreted federal statutes in ways that recognize their effects on speech, association, and petition rights. It has interpreted the Sherman Act, which relates to restraints on trade, in a

183 *See Claiborne Hardware*, 458 U.S. at 913 (observing that political expression "has always rested on the highest rung of the hierarchy of First Amendment values" (internal quotation marks omitted) (quoting Carey v. Brown, 447 U.S. 455, 467 (1980))); *see also* Garrison v. Louisiana, 379 U.S. 64, 74–75 (1964) ("[S]peech concerning public affairs is more than self-expression; it is the essence of self-government.").

184 376 U.S. 254, 279–80 (1964).

185 *See* Curtis Publ'g Co. v. Butts, 388 U.S. 130, 155 (1967).

186 *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974).

187 562 U.S. 443, 458–59 (2011).

188 *Id.* at 451.

189 *Id.* at 458.

190 *Id.*

191 *See id.* (holding that the jury must consider "[w]hat [the defendant] said, in the whole context of how and where it chose to say it" to determine First Amendment protection).

manner intended to preserve collective expression and certain forms of political activism.[192] Similarly, the Court has interpreted federal labor laws as limiting damages for secondary boycotts and other activities owing to the threat damage awards pose to protected forms of collective expression.[193] As discussed earlier, the Court has interpreted the civil RICO provisions in ways that limit the potential exposure of protesters.[194]

4. Vicarious and Collective Liability

A substantial question at the intersection of the protest activity and civil liability pertains to protesters' liability for the violent and unlawful acts of others. *Claiborne Hardware*, which addressed this aspect of liability in the context of a civil rights boycott, represents the Court's most significant engagement with this issue.

In *Claiborne Hardware*, protesters demanded that local officials and businesses change a variety of practices that harmed African Americans living in the community.[195] When these changes did not materialize, the protesters participated in an economic boycott of white businesses.[196] At the outset of its opinion, the Court observed that the boycott of white merchants "included elements of criminality and elements of majesty."[197] During the seven-year period under review, a few protesters committed violent acts.[198] The trial court concluded that the boycott was itself unlawful as a restraint of trade and held all organizers and participants jointly and severally liable for the damages suffered by white merchants.[199] The Mississippi Supreme Court upheld the finding of liability, although on the different ground that boycott organizers had "agreed to use force, violence and 'threats' to effectuate the boycott."[200]

The Supreme Court emphasized that banding together for the lawful purpose of protesting segregation and other race-based harms

192 *See* E. R.R. Presidents Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127, 137–38 (1961) (observing that Congress likely did not intend the antitrust laws to prohibit speech and petition rights of industries).

193 *See* United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 729 (1966) (emphasizing limits on liability for peaceful picketing).

194 *See* Scheidler v. Nat'l Org. for Women, Inc., 537 U.S. 393, 409–10 (2003) (rejecting imposition of liability on pro-life protesters).

195 NAACP v. Claiborne Hardware Co., 458 U.S. 886, 889 (1982).

196 *Id.*

197 *Id.* at 888.

198 *Id.* at 894.

199 *Id.* at 892–93.

200 *Id.* at 895 (emphasis omitted).

enhanced effective advocacy, and it effectively combined speech and assembly rights into a formidable means of change.[201] It concluded that boycott organizers and participants were engaged in protected association and "speech in its most direct form."[202] Accordingly, the Court emphasized that the earlier-mentioned First Amendment guidelines applied.[203]

The Court acknowledged that a state law could impose damages on any protester who engaged in violent conduct.[204] Thus, states could impose civil liability for damages "directly and proximately caused by *wrongful conduct chargeable to the defendants*."[205] According to the Court, this "careful limitation on damages" was necessary owing to the important First Amendment interests involved.[206] Thus, it emphasized that "[o]nly those losses proximately caused by *unlawful conduct* may be recovered."[207] As examples of such unlawful conduct, the Court mentioned "use of weapons, gunpowder, and gasoline."[208] In sum, the Court concluded, "a judgment tailored to the consequences of [protesters'] unlawful conduct may be sustained."[209]

This raises the question: where a protest involves both nonviolent protected activities and unlawful violence, what conduct is "chargeable to defendants"? The Court concluded that states retain undiminished authority to impose damages on protest organizers and participants who themselves perpetrate violence; however, states may hold a protest leader personally responsible for wrongs committed by others only when the leader himself "authorized, directed, or ratified" the violent acts.[210] In recognition of the First Amendment right of association, "[c]ivil liability may not be imposed," the Court wrote, "merely because an individual belonged to a group, some members of which committed acts of violence."[211] The Court concluded, "For liability to be imposed by reason of association alone, it is necessary to establish that the group itself possessed unlawful goals and that the individual held a specific intent to further those illegal aims."[212]

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201 *Id.* at 907–08.
202 *Id.* at 909.
203 *Id.* at 915.
204 *Id.* at 916.
205 *Id.* at 918 (emphasis added).
206 *Id.*
207 *Id.* (emphasis added).
208 *Id.* at 916.
209 *Id.* at 926.
210 *Id.* at 927.
211 *Id.* at 920.
212 *Id.*

As the Court observed, "[t]he right to associate does not lose all constitutional protection merely because some members of the group may have participated in conduct or advocated doctrine that itself is not protected."[213] Indeed, even if protesters form an association to advocate or undertake unlawful action, an individual is not liable for assisting in *lawful* meetings and other protected protest activities unrelated to such purposes.[214] Civil liability is appropriate only when the association has unlawful aims and the protest leader or participant intends to further them through unlawful acts.[215]

The Court specifically rejected the idea that courts could impose civil liability for regular attendance at weekly meetings of the NAACP where illegal conduct had not been "authorized, ratified, or even discussed."[216] That, the Court said, would be tantamount to imposing liability based on a principle of "guilt *for* association," which would clearly violate the First Amendment.[217] Nor, because they were lawful activities, could courts impose civil liability for *nonviolent* actions intended to facilitate or enforce the boycott.[218] In *Claiborne Hardware*, this included watching the stores to record who violated the boycott or wearing apparel associated with the boycott as a reminder that participants were indeed watching.[219]

The Court also addressed whether the award of damages against Charles Evers, one of the boycott organizers and Field Secretary of the NAACP, violated the First Amendment. Insofar as Evers attended meetings and persuaded African Americans to boycott white merchants, the Court held that the First Amendment fully protected his activities.[220] Evers also delivered public speeches in which he said that those who did not boycott would be "disciplined" and indicated, "If we catch any of you going in any of them racist stores, we're gonna break your damn neck."[221] The Court held that these speeches did not constitute a proper basis for imposing liability on Evers for violent acts committed much later by others.[222] It reasoned that his speeches

213 *Id.* at 908.

214 *Id.*

215 *Id.*

216 *Id.* at 924.

217 *Id.* at 925.

218 *Id.* at 915 (noting "the nonviolent elements of petitioners' activities are entitled to the protection of the First Amendment").

219 *Id.* at 925.

220 *Id.* at 926.

221 *Id.* at 902 (internal quotation marks omitted).

222 *Id.* at 926–27.

"predominantly contained highly charged political rhetoric" that did not pass the bounds of First Amendment protection.[223]

Reviewing with the requisite "precision," the Court concluded that Evers' "strong language" did not amount to "fighting words" or speech inciting unlawful action, but rather was "an impassioned plea for black citizens to unify, to support and respect each other, and to realize the political and economic power available to them."[224] The Court did note, "If that language had been followed by acts of violence, a substantial question would be presented whether Evers could be held liable for the consequences of that unlawful conduct."[225] However, the only acts of violence had occurred weeks after Evers' speeches.[226] In addition, there was no evidence aside from the speeches that Evers "authorized, ratified, or directly threatened acts of violence."[227] Thus, the Court concluded, "The findings are constitutionally inadequate to support the damages judgment against him."[228]

In sum, the Court rejected the imposition of liability on Evers and others who had not directly participated in or authorized others to engage in violent activities. As it emphasized, "[g]overnmental regulation that has an incidental effect on First Amendment freedoms may be justified in certain *narrowly defined* instances."[229] Accordingly, the Court limited the damages to those "proximately caused by the violence and threats of violence found to be present."[230] Because the damage award was not so limited, the Court held that it lacked the "precision" required by the First Amendment.[231] The civil judgment "compensate[d] respondents for the direct consequences of nonviolent, constitutionally protected activity."[232]

Summarizing these limits, the Court wrote, "The use of speeches, marches, and threats of social ostracism cannot provide the basis for a damages award. But violent conduct is beyond the pale of constitutional protection."[233] Although those who commit "violent deeds" may be held liable for their conduct, "[t]he burden of demonstrating

223 *Id.* at 926.
224 *Id.* at 927–28.
225 *Id.* at 928.
226 *Id.*
227 *Id.* at 929.
228 *Id.*
229 *Id.* at 912 (emphasis added).
230 *Id.* at 921.
231 *Id.*
232 *Id.* at 923.
233 *Id.* at 933.

that it colored the entire collective effort . . . is not satisfied by evidence that violence occurred or even that violence contributed to the success of the boycott."[234]

The precision and narrowness requirements for tort liability extend to other actions. As noted, the Court has constitutionalized the law of defamation. In the defamation context, a speaker is liable for defamatory statements she or her agent or servant publish, but not for statements published by others.[235] To hold speakers liable for merely supporting or "liking" another's defamatory statement would expand the reach of the defamation tort in ways similar to those that raised First Amendment concerns in *Claiborne Hardware*.

5. Students and Employees

Standards relating to the First Amendment rights of students and public employees recognize limited protections for political speech in some special contexts. With regard to the speech rights of students, the Court has emphasized, "state-operated schools may not be enclaves of totalitarianism."[236] Thus, the First Amendment generally prohibits officials from suppressing non-disruptive political speech on school grounds.[237] For example, students can engage in peaceful and silent forms of political protest on school property, such as wearing armbands to express opposition to a war.[238] They may also have a First Amendment right to make statements about matters of public concern, such as drug usage or drug policy, at school-sponsored events.[239] However, the scope and status of students' speech rights outside these narrow contexts remains uncertain. Government employers cannot discipline or fire employees for exercising First Amendment rights they otherwise enjoy as citizens to comment on matters of public concern, but they can subject employees to discipline or termination for protest and other expressive activities that harm workplace efficiency, public confidence, and office morale.[240]

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234 *Id.*

235 *See* RESTATEMENT (SECOND) OF TORTS, § 577(1) cmt. f (AM. L. INST. 1977).

236 Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 511 (1969).

237 *See id.*

238 *See id.* at 514 (invalidating suspension of students for wearing black armbands to school in protest of the Vietnam conflict).

239 *See* Morse v. Frederick, 551 U.S. 393, 397, 403 (2007) (upholding student discipline in connection with display of "BONG HiTS 4 JESUS" banner, but suggesting that protests on matters of public concern such as the legality of marijuana would be protected speech).

240 *See* Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968).

With these general standards, principles, and values in mind, the following Section examines more specifically how the First Amendment applies to various costs of dissent. It addresses these costs in what are perceived to be their descending order of First Amendment concern. Thus, the analysis starts with civil claims that likely violate the First Amendment and then considers other costs and liabilities that raise lesser but still significant First Amendment concerns.

B. Civil Actions

As the Supreme Court's precedents emphasize, courts have a "special obligation" to "examine critically"[241] civil claims to ensure "precision of regulation" and to impose appropriate restraints on civil actions and damage awards.[242] "Negligent protest," "aiding and abetting defamation," "riot boosting," "conspiracy to protest," and "tortious petitioning" claims pose the most acute dangers to First Amendment speech, assembly, and petition rights. They all impose a form of collective rather than individual responsibility for protest activities, and thus fail the liability precision and tailoring guidance provided by the Court. Courts should therefore reject such claims.

1. "Negligent Protest"

As discussed earlier, in *Doe v. Mckesson*, the Fifth Circuit allowed a civil negligence claim to proceed against a Black Lives Matter protest organizer, on the ground that he failed to exercise reasonable care in protesting and proximately caused injuries sustained when a participant threw a rock at a police officer.[243] The "negligent protest" theory poses a significant threat to protest rights. It directly conflicts with the First Amendment guidelines the Supreme Court announced in *Claiborne Hardware* and, for the reasons discussed in that case, threatens to chill protest organizing and participation. Accordingly, courts should not permit plaintiffs to base protesters' liability on the theory that they "negligently organized" a protest.

Recall that in *Mckesson*, the Fifth Circuit concluded that the injured police officer plausibly alleged that Mckesson "was negligent for organizing and leading the Baton Rouge demonstration because he 'knew or should have known' that the demonstration would turn violent."[244] The court explained that Mckesson owed a duty of reasonable

241 NAACP v. Claiborne Hardware Co., 458 U.S. 886, 915 (1982).

242 NAACP v. Button, 371 U.S. 415, 438 (1963).

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

244 *Id.* at 826.

care to protesters, bystanders, and officers responding to the protest.[245] Because it was foreseeable that the protest would involve some protesters being unlawfully present in the street, which would in turn entail interactions between protesters and police, the court reasoned that it was also foreseeable that a participant would "pick[ ] up a piece of concrete or a similar rock-like object" and throw it at one of the officers.[246]

Mckesson holds that protest organizers are liable for any foreseeable harms that occur at a public protest that involves even a minor breach of peace. Under this theory, where a protest organizer leads demonstrators who engage in *any* legal infraction, however minor, including blocking a public street or sidewalk, it is foreseeable that police will be "required to respond to the demonstration" by clearing the obstruction "and, when necessary, making arrests."[247] Further, according to the Fifth Circuit, "[g]iven the intentional lawlessness of this aspect of the demonstration," Mckesson and any similarly situated protest organizer "should have known that leading the demonstrators onto a busy highway was likely to provoke a confrontation between police and the mass of demonstrators."[248] "By ignoring the foreseeable risk of violence that his actions created," the court reasoned, "Mckesson failed to exercise reasonable care in conducting his demonstration."[249] Finally, the court held that by "provoking a violent confrontation with the police," Mckesson's actions were the factual and proximate causes of the officer's injuries.[250]

There are several fundamental problems with this conclusion. First, the Fifth Circuit ignored *Claiborne Hardware*'s guidelines relating to the preservation of protesters' First Amendment rights. *Claiborne Hardware* held that organizers and participants can be liable only for their *own* acts of violence or the acts of others they specifically direct or authorize.[251] Thus, had Mckesson thrown the heavy object at the officer or directed someone to do so, the First Amendment would not offer a defense. However, not only did he have no part in the violence that occurred, Plaintiff Doe did not allege Mckesson uttered a single word of encouragement to participants who might have

245 *Id.* at 827–28.

246 *Id.* at 823, 828.

247 *Id.* at 827.

248 *Id.*

249 *Id.*

250 *Id.* at 828.

251 NAACP v. Claiborne Hardware Co., 458 U.S. 886, 920 (1982) (concluding that civil liability applied only to violent conduct chargeable to individual defendants).

been inclined toward violence.[252] Imposing liability on a protest organizer who directs or encourages a "negligent protest," when the organizer does not authorize, encourage, or ratify any acts of violence, ignores the precision of regulation and narrow confines of protester liability the Court insisted on in *Claiborne Hardware*. The Fifth Circuit failed to satisfy its "special obligation" to carefully consider the First Amendment implications of the "negligent protest" theory.

Second, *Mckesson* is inconsistent with First Amendment precedents relating to a speaker's liability for the violent conduct of others. Holding a protest organizer liable for damages he did not expressly advocate and did not specifically intend to occur imminently violates the speech-protective standard set out in *Brandenburg v. Ohio*,[253] which imposed strict limits on liability for inciting imminent lawless activity.[254]

Third, the Fifth Circuit's decision is inconsistent with the broad protections afforded freedom of assembly and association. *Claiborne Hardware* specifically observed that "[t]he First Amendment . . . restricts the ability of the State to impose liability on an individual solely because of his association with another."[255] The court's approach allows juries and courts to impose broad liability on protest organizers and leaders, simply by virtue of their attendance at a protest event that may draw hundreds or thousands of participants, counterprotesters, and participants. Under this standard, Mckesson and similarly situated protest organizers would face liability for merely belonging to groups, "some members of which committed acts of violence."[256] "Negligent protest" imposes a form of guilt *for* association.

Fourth, as a liability standard, "negligent protest" lacks the care and precision demanded under *Claiborne Hardware*. The Fifth Circuit reasoned that Mckesson could be liable for the violence done by the object-thrower based on his direction of tortious activity—i.e., his *negligent planning* of the protest.[257] As the Court has noted in other civil liability contexts, including defamation, the negligence standard is far too broad and imprecise to protect speech on matters of public con-

252 *See Doe v. Mckesson*, 945 F.3d at 845 (Willett, J., dissenting).

253 395 U.S. 444 (1969).

254 *See id.* at 447–48 (holding that speakers may be held liable for advocacy of violence where they intend to incite imminent lawless acts and those acts are likely to occur).

255 *Claiborne Hardware*, 458 U.S. at 918–19.

256 *Id.* at 920.

257 *Doe v. Mckesson*, 945 F.3d at 827.

cern.[258] Lower courts have also rejected the negligence standard as inadequately protective of free speech and association rights.[259] As one state appeals court observed, in a case involving targeted picketing of an abortion provider's residence, "[t]he specter of protesters being subjected to unlimited liability for claims of negligent infliction of emotional distress from a contingent of unknown plaintiffs would doubtless have a stifling effect on [expression]."[260] Indeed, as discussed earlier, in *Snyder*, the Court refused to allow injured plaintiffs to sue public protesters even for *intentional* infliction of emotional distress.[261] The "outrageousness" standard is simply too fluid, the Court observed, to serve as the basis for liability where free speech is concerned.[262]

Similarly, with protest planning, the negligence tort's "reasonable care" and "foreseeability" standards are far too imprecise to offer the requisite protection for protest organizing. Encouraging protesters to assemble on a public street, or even to "take the streets," cannot give rise to civil liability for the violent actions of those who participate in or attend protest events.[263] *Claiborne Hardware* does not authorize civil damages for *every* violation of the myriad rules and regulations applicable to protests.[264] If it did, protesters could be liable for considerable damages for engaging in non-violent and sometimes technical violations. As Justice Gorsuch recently observed, in the context of a public protest "almost anyone can be arrested for something."[265] Under the "negligent protest" liability theory, protest organizers could face damages awards for hundreds of thousands of dollars or, perhaps, more for merely planning to block a public street. Again, this is not the sort of careful examination, precision, and restraint *Clai-*

258 *See, e.g.*, N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964) (holding proof of actual malice required in libel suits brought by public officials against critics).

259 *See, e.g.*, Herceg v. Hustler Mag., Inc., 814 F.2d 1017, 1024 (5th Cir. 1987) ("Mere negligence, therefore, cannot form the basis of liability under the incitement doctrine any more than it can under libel doctrine."); Valenzuela v. Aquino, 800 S.W.2d 301, 309 (Tex. App. 1990), *aff'd in part, rev'd in part*, 853 S.W.2d 512 (Tex. 1993) (dismissing negligent infliction of emotional distress claim brought by abortion provider whose home was picketed).

260 *Valenzuela*, 800 S.W. 2d at 309.

261 *See* Snyder v. Phelps, 562 U.S. 443, 459 (2011).

262 *Id.* at 458–59.

263 *See* Hess v. Indiana, 414 U.S. 105, 107–08 (1973) (per curiam) (reversing disorderly conduct conviction where protester suggested participants should "take the fucking street later" or "take the fucking street again").

264 *See* ZICK, *supra* note 139, at 191–96 (describing the development and content of detailed permitting regimes applicable to public protests).

265 Nieves v. Bartlett, 139 S. Ct. 1715, 1730 (2019) (Gorsuch, J., concurring in part and dissenting in part).

borne Hardware requires when civil actions implicate First Amendment rights. Further, owing to its lack of precision, the "negligent planning" liability theory invites juries and courts to make judgments based on the content of the activists' messages, or the reputation of their organizations, rather than negligence standards relating to duties of care and foreseeability. Indeterminate liability standards like this will inevitably chill public protest.

Finally, the "negligent protest" theory ignores the realities of the contemporary protest environment. As recent police brutality protests have shown, public protests are often fluid and complex events. They cause disruption, public inconvenience, and offense. It is hardly uncommon for participants who are not part of the organizing group to attend. The "negligent protest" theory holds protest leaders liable for the consequences of *any* disruptive and unlawful acts that transpire at public events. In fact, it authorizes holding leaders accountable for the violence even of those *opposed* to the protest on the theory that such violence was "foreseeable." Where passions run high, as they often do at public protests, it is foreseeable that counterprotesters may engage in unlawful and even violent acts. However, the fear of disruption that attends public protests is a ground for protecting, rather than deterring, this kind of activity.[266] *Mckesson*'s "negligent protest" theory not only ignores protest realities, but also turns fundamental free speech and assembly principles on their head by basing liability on the foreseeability of disruption.

The "negligent protest" action also allows law enforcement to dictate the extent of protesters' liability exposure. As the court set the scene in *Mckesson*, "[t]he Baton Rouge Police Department prepared *by organizing a front line of officers in riot gear*."[267] Recent protests affirm that police departments frequently respond to even peaceful protests with escalated force—beatings, use of chemical agents, and firing of rubber bullets.[268] In *Mckesson*, it was the aggressive method of protest policing, not the idea to block a public street, that ensured some kind of confrontation with protesters would occur. Yet the court's decision treats this show of force as a natural and "foresee-

266 *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508 ("Any word spoken . . . that deviates from the views of another person may start . . . a disturbance."); Terminiello v. City of Chicago, 337 U.S. 1, 4 (1949) (observing that free speech may best serve its functions "when it induces a condition of unrest").

267 Doe v. Mckesson, 945 F.3d 818, 822 (5th Cir. 2019) (emphasis added).

268 *See* Stephen Gandel, *At Least 40 Lawsuits Claim Police Brutality at George Floyd Protests Across U.S.*, CBS NEWS (June 23, 2020, 2:06 PM), https://www.cbsnews.com/news/george-floyd-protests-police-brutality-settlements-lawsuits/ [https://perma.cc/8Q7D-SWBT].

able" consequence of planning a protest in a street where protesters were allegedly not supposed to assemble. As applied, the liability standard allows government to stifle protest through law enforcement decisions to use escalated force.

The Fifth Circuit's general response to all these concerns—that the First Amendment "does not protect violence"[269]—is inadequate and ultimately beside the point. It is true that the First Amendment does not protect protesters or protest leaders who themselves engage in violent activities. It does not follow, and indeed *Claiborne Hardware* rejected the proposition, that juries can impose all "foreseeable" damages resulting from a protest organizer's alleged negligence. Indeed, as *Claiborne Hardware* emphasized, "the nonviolent elements of petitioners' activities are entitled to the protection of the First Amendment."[270] The Fifth Circuit was simply mistaken in asserting, "[t]here is no indication in *Claiborne Hardware* or subsequent decisions that the Supreme Court intended to restructure state tort law by eliminating" the "negligent protest" action.[271] That is precisely what the Court intended, as it made clear by requiring that courts exercise special care and precision in fashioning civil liability rules in the context of public protests.

All of this becomes clearer when one considers the effect "negligent protest" would have had on the civil rights movement. Indeed, opponents of the civil rights movement tried on occasion to invoke this theory against civil rights protesters. In *Maxwell v. Southern Christian Leadership Conference*,[272] decided in 1969, the Fifth Circuit—the same court that decided *Mckesson*—reviewed a $45,000 negligence judgment for a plaintiff injured during a civil rights protest.[273] In *Maxwell*, the injured plaintiff, who sued the organizers of a picket at a local supermarket, was a spectator shot while observing the picket.[274] The Fifth Circuit expressly rejected defendant SCLC's argument that holding the association liable in tort for "negligent protest" would jeopardize or chill lawful civil rights protests, although it ultimately reversed the judgment on proximate cause grounds. Indeed,

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269 *Doe v. Mckesson*, 945 F.3d at 828 (quoting NAACP v. Claiborne Hardware Co., 458 U.S. 886, 916 (1982)).

270 NAACP v. Claiborne Hardware Co., 458 U.S. 886, 915 (1982).

271 *Doe v. Mckesson*, 945 F.3d at 829.

272 414 F.2d 1065 (5th Cir. 1969).

273 *See id.* at 1066.

274 *Id.* at 1067.

the court concluded, "[t]he First Amendment is simply not involved in this case."[275] The court opined that where

> emotions were charged, there were recent incidents with racial overtones, and there was a potentially if not probably unmanageable number of participants . . . [i]t may indeed be negligent to foster a 'peaceful' demonstration . . . or at least to do so without proper safeguards, when it is reasonably foreseeable that harm to persons or property might result.[276]

However, the *Maxwell* court concluded that the specific chain of events, which involved discharge of a weapon by a passing motorist, was not reasonably foreseeable to the protest organizers.[277] Thus, relying solely on common law negligence principles, the court held that the plaintiff's gunshot wounds were not the proximate cause of the peaceful protest, but the cause of an intervening act—the shots fired by the motorist when some protesters converged on his car in the supermarket parking lot.[278]

Maxwell brazenly ignored *Sullivan*'s admonitions about the chilling effect of civil judgments, and the inadequacy of a negligence standard to protect speech on matters of public concern. The court's insistence that the First Amendment is "simply not involved" in a case involving liability for civil rights protesting ignores the historical fact of plaintiffs weaponizing civil tort claims to defeat the civil rights movement. If the court's view—whenever "emotions were charged," "racial overtones" were present, and a "potentially if not probably unmanageable number of participants" were involved, negligence liability might be imposed—had prevailed, civil rights protest leaders would have faced crushing civil damages claims for violence they might well have foreseen but were not responsible for perpetrating.[279] Imposing negligence liability on protest organizers for failing to take "proper safeguards" would have effectively invited juries to punish civil rights activists for the "racial overtones" and "emotions" that prevailed at such events.[280] Exposing civil rights activists to massive civil liabilities and costs for violating segregation laws, court orders,

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275 *Id.*

276 *Id.*

277 *Id.* at 1068 (footnote omitted).

278 *Id.*

279 *See id.* at 1067.

280 *See id.*

and other regulations might have stifled civil rights activism ranging from marches to sit-ins.[281]

Of course, the *Maxwell* court did not have the benefit of the *Claiborne Hardware* decision, which later clarified First Amendment limits on negligence and other forms of civil liability. The Fifth Circuit cannot hide behind that same veil of ignorance in *Mckesson*. In that case, *Maxwell*'s description of the negligence "risk factors"—i.e., charged emotions, racial overtones, and potentially unmanageable crowds—fits recent Black Lives Matter protests.[282] The only difference was the Fifth Circuit's willingness to accept a theory of liability the same court had grudgingly *rejected* six decades earlier.

Rejecting the *Mckesson* cause of action does not entail immunizing protesters from liability for all tortious acts, including some negligent acts. A protester who directly engages in intentional, reckless or negligent behavior may be responsible for resulting damages. Thus, a plaintiff could potentially sue a protest participant who wildly swings a protest sign without regard to the safety of others standing nearby. Similarly, a protester who ignored the health dangers of a pandemic and government stay-at-home orders might be liable for infecting others with a communicable virus (subject, of course, to contributory and comparative negligence, assumption of risk, or other defenses).[283] A protester who blocks passage or physically assaults a speaker or audience member intent on hearing the speaker may be liable for, among other things, false imprisonment, assault, and battery—all forms of harmful conduct, not expression. As well, a protest participant or supporter who directly and negligently defames a private citizen may be liable for reputational damages.

In any event, unlike the situation in *Mckesson*, which grounds liability on the foreseeability of the actions of third party participants, counterprotesters, or even onlookers, the protest sign waver, virus-spreader, heckler, and defamer would all be accountable only for damages stemming from their own negligent, reckless, or intentional acts. None of these hypothetical cases would involve the imposition of

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281 *See, e.g.*, Bell v. Maryland, 378 U.S. 226 (1964) (black students arrested for criminal trespass for refusing to leave a restaurant).

282 *See* Doe v. Mckesson, 945 F.3d 818, 822–23 (5th Cir. 2019) (referring to "a string of protests across the country, often associated with Black Lives Matter, concerning police practices").

283 *See generally* Julie Bosman, Sabrina Tavernise & Mike Baker, *Why These Protesters Aren't Staying Home for Coronavirus Orders*, N.Y. TIMES (Apr. 24, 2020), https://www.nytimes.com/2020/04/23/us/coronavirus-protesters.html [https://perma.cc/N6EU-YVUV].

collective or vicarious liability on a protest organizer for "negligently planning" an event.

2. "Aiding and Abetting Defamation"

The Oberlin College lawsuit, in which the bakery owner recovered $44 million for defamatory statements allegedly "aided-and-abetted" by Oberlin officials, highlights the need for courts to review civil liability with special care.[284] In that case, the trial court allowed the jury to impose liability on Oberlin not for publishing any defamatory statements of its own regarding the bakery's allegedly racist practices, but rather for supporting or facilitating the allegedly defamatory statements made by some student protesters.[285]

Under that theory, a supporter of a Black Lives Matter or other protest would be liable for defamation solely because of acts or statements that facilitated *others* in making false statements. That result would raise similar concerns to the "negligent protest" and "riot boosting" actions, discussed in the next section, which likewise purport to impose liability on defendants for the actions of others. In the defamation context, the publisher alone can be liable for damages resulting from defamatory statements.[286] Further, courts must ensure that damages are narrowly tailored to the conduct of the defendants—a conclusion that seems impossible to reach based on Oberlin's own alleged conduct, which at most facilitated distribution of student speech.

3. "Riot Boosting"

As discussed in Part I, states have demonstrated a growing appetite for enacting laws restricting public protest activities. Some recent proposals involve increasing the potential civil liability of protest organizers and participants. Similar to the novel civil actions, courts must carefully scrutinize these enactments to ensure they do not violate First Amendment protest rights.

Consider the offense of "riot boosting," recently enacted by South Dakota's legislature.[287] As written, the law applies broadly to speech and activities that support public protests. For example, it would appear to apply even to a tweet encouraging environmental ac-

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284 Appellants' Brief, *supra* note 60 at 3; *see also* Dickson, *supra* note 27.

285 *See* Appellants' Brief, *supra* note 60, at 3.

286 *See* 1 ROBERT D. SACK, SACK ON DEFAMATION, LIBEL, SLANDER, AND RELATED PROBLEMS 2–98 (5th ed. 2020).

287 *See* S.B. 189, 2019 Leg., 94th Sess. (S.D. 2019); Malone & Eidelman, *supra* note 24.

tivists to join a protest to stop a pipeline from being constructed, as well as to protest training provided to environmental and other activists. Should a scuffle or other violence break out at a subsequent protest, both the tweeter and trainer may be civilly liable for any property or personal injury damages. As the law does not clearly describe what speech or conduct constitutes "riot boosting," the South Dakota law and others like it lack the precision and clarity required under the First Amendment.

In addition to troubling vagueness problems, "riot boosting" suffers from some of the same First Amendment problems as the "negligent protest" action. As discussed in the context of that theory, states can impose liability for inciting violence only in very narrow circumstances.[288] Although states can prohibit incitement to imminent violence, they cannot punish protest-related advocacy on the ground that it "boosts" or supports a protest at which some violence ultimately occurs. Rather, the protest organizer or assistant must specifically intend that the unlawful conduct occur and, in addition, the conduct must be both imminent and likely to take place.[289]

"Riot boosting" also imposes expansive civil liability on individuals who do not themselves engage in, direct, or authorize any violent conduct. Potential "riot boosters" include the following:

- Any organization that plans a protest about an issue on which individuals have engaged in civil disobedience in the past;
- Any group that knows civil disobedience might occur at a demonstration and decides to train protesters on how to be peacefully arrested;
- Any group that provides water or medical aid to protestors committing civil disobedience; and
- Any individual who attends a planning meeting for a protest at which acts of civil disobedience occurred.

Imposing liability in this manner violates the First Amendment right of association. As discussed, courts and juries cannot *infer* the requisite intent from membership in the group or acts that may facilitate a group that engages in unlawful activity.[290] Rather, under the

288 *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (describing incitement standard).

289 *Id.*

290 *See* Scales v. United States, 367 U.S. 203, 229 (1961) ("[Q]uasi-political parties or other groups that may embrace both legal and illegal aims differ from a technical conspiracy, which is defined by its criminal purpose . . . .").

First Amendment, government must prove the actors *intended* to engage in the group's violent and unlawful activities.[291]

Similar to the "negligent protest" actions, "riot boosting" imposes civil liability based on fully protected—indeed traditionally prized—First Amendment activity. Under the circumstances, activists involved with training, educating, or advising protest organizers may rationally fear their actions will be characterized as unlawful "riot boosting." The uncertainty of future events at public protests, coupled with broad collective liability provisions, may deter organizers from participating in protest planning altogether. The potential for ruinous civil awards will chill protected First Amendment activities.

4. "Conspiracy to Protest"

In *Claiborne Hardware*, the Court observed that the prolonged effort to change conditions in the community "cannot be characterized as a violent conspiracy simply by reference to the ephemeral consequences of relatively few violent acts."[292] Thus, it wrote, "A court must be wary of a claim that the true color of a forest is better revealed by reptiles hidden in the weeds than by the foliage of countless freestanding trees."[293]

In some cases, however, protest participants may appear mostly to be "reptiles." That is more than a fair description of the white supremacists who came to Charlottesville, Virginia during the summer of 2017. The so-called "Unite the Right" protests were ostensibly about a peaceful protest relating to renaming a public park. As events unfolded, however, the demonstrations turned into hateful and deadly events.[294]

A group of individuals who allege they suffered injuries at these events is pursuing a civil action that implicates some of the concerns addressed in the context of "negligent protest" and "riot boosting." The case differs in important respects, and on its special facts it likely does not pose the clear and present threat to First Amendment protest rights as these other claims. However, it does raise some concerns about civil liability for protest organizing and participation. In that respect, this novel civil action relates to the present discussion.

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291 *See id.*

292 NAACP v. Claiborne Hardware Co., 458 U.S. 886, 933 (1982).

293 *Id.* at 934.

294 *See generally* RODNEY A. SMOLLA, CONFESSIONS OF A FREE SPEECH LAWYER: CHARLOTTESVILLE AND THE POLITICS OF HATE (2020) (describing the pre- and post-protest events in Charlottesville).

Recall that in *Sines v. Kessler*, plaintiffs who attended the "Unite the Right" rallies allege that protest leaders conspired with others to harm them physically based on their support for African Americans, Jews, and other minorities.[295] *Claiborne Hardware* admonishes courts to take special care to distinguish the First Amendment-protected aspects of concerted action from its unlawful components.[296] To repeat, courts have a "special obligation" to "examine critically" civil causes of action and to make sure legal standards are precise and allow for civil liability only in narrow circumstances.[297]

Before considering the specific context in *Sines*, a couple of important, if obvious, points should be made. First, it cannot be a violation of federal or state law to "conspire" with others to organize a peaceful and non-violent protest. As *Claiborne Hardware* emphasized, this is the essence of the expressive association right protected by the First Amendment.[298] The line between an unlawful conspiracy, on the one hand, and efforts to organize a lawful public protest, on the other, can sometimes be unclear. Indeed, this was true in *Claiborne Hardware* itself, which involved an economic boycott featuring both lawful and unlawful conduct. However, it is incumbent on courts to separate these two types of events. Second, to the extent that protest leaders or participants engaged in violence or expressly incited others to do so imminently, the First Amendment provides no defense to civil liability.[299] Further, if the protest leaders entered into an agreement to engage in specific violent acts, they may be liable for the harmful consequences of that conspiracy.[300] However, as discussed, *Claiborne Hardware* requires specific proof of an intent to conspire with others and limits damages to the direct consequences of this unlawful activity. In short, courts and juries cannot rely on the organization of the protest, membership in the protest groups, or the reptilian nature of the actors as a basis for civil liability.

Navigating these distinctions is required in order to distinguish a "conspiracy to protest," which is lawful and protected by the First Amendment, from conspiracies to violate civil rights or engage in other unlawful acts, which are not. Thus, the lawful aspect of the de-

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295 *See* Sines v. Kessler, 324 F. Supp. 3d 765, 783–95 (W.D. Va. 2018) (describing allegations of conspiracy to violate civil rights).

296 *See Claiborne Hardware*, 458 U.S. at 907–09 (discussing expressive and unlawful aspects of economic boycott).

297 *Id.* at 915–16.

298 *Id.* at 908.

299 *See id.* at 916.

300 *Sines*, 324 F. Supp. 3d at 783–84.

fendants' agreement in *Sines* was to assemble and protest the renaming of a park in Charlottesville. In the course of planning the demonstrations, and subsequently in executing those plans, organizers, participants, and others communicating in social media forums, some moderated by the defendants, advocated violent conduct or later engaged in violent acts.[301] The difficulty in *Sines*, as in *Claiborne Hardware*, lies in separating the protected activities of speech and assembly from any unlawful conduct—including any agreement to deprive plaintiffs of their civil rights.

As in *Mckesson*, the *Sines* court decided a motion to dismiss plaintiffs' claims and did not reach their merits.[302] Nevertheless, even in this posture, the plaintiffs' claim and the district court's assessment of it raise serious First Amendment concerns. To be clear, the point is not that a public protest or protest movement can *never* provide the basis for a conspiracy to violate civil rights or other laws. Rather, the concern is that the *evidence* for this claim must not consist primarily of allegations that defendants organized, promoted, or participated in an otherwise peaceful public protest, or that they engaged in protected speech during the planning or execution of the protest.

In light of these limits, there are several notable things about the *Sines* court's findings and conclusions. First, the court correctly rejected the plaintiffs' contention that "all rally attendees who disagreed with them were part of one overarching conspiracy."[303] Second, it rejected as "conclusory labeling" the plaintiffs' allegations that all individuals who posted statements on social media were "co-conspirators."[304] Consistent with *Claiborne Hardware*, the court demanded specific evidence of conspiratorial actions taken by individual defendants.[305]

With regard to the specific factual allegations, the complaint alleges that some of the individual defendants engaged in violent acts at the rallies—throwing torches, participating in personal assaults, and most infamously driving a car into a group of protesters.[306] As *Claiborne Hardware* makes clear, the First Amendment does not protect

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301 *See id.* at 784–95 (reviewing allegations concerning each individual defendants' actions).

302 *See id.* at 773.

303 *See id.* at 784.

304 *Id.*

305 *Id.* at 804.

306 *See, e.g.*, *id.* at 787 (allegations that defendant Cantwell personally attacked counterprotesters with mace and committed assault); *id.* at 790 (allegation that defendant Damigo assaulted counterprotesters).

these acts of violence or threats to commit violence.[307] However, as the Court has also made clear, some violence occurring at the rallies is not a valid basis for condemning the entire collective enterprise as an unlawful conspiracy or imposing liability on all organizers and participants.[308] Instead, plaintiffs must demonstrate that defendants engaged in a conspiracy to violate the plaintiffs' civil rights in a manner *distinct from their agreement to organize a lawful protest.*

This is where things get trickier. The complaint's allegations of an unlawful conspiracy to violate plaintiffs' civil rights—including the statutorily required racial animus and overt acts—significantly overlap with allegations concerning organizing, planning, and participating in the rallies. Indeed, many of the plaintiffs' allegations refer to actions taken by defendants to *organize* or *publicize* the rallies, which again had the lawful purpose of demonstrating against renaming a public park.[309] These activities include planning and participating in meetings among various defendants, sometimes in person but primarily online, urging members of various groups to attend the events, and advising on protest strategies and tactics. As in the context of the economic boycott in *Claiborne Hardware*, the First Amendment protects all these activities. The significant overlap between the allegations supporting the claim of unlawful conspiracy and acts such as organizing, planning, and publicizing the rallies raises the possibility that a jury or court could impose civil liability for assembly and other collective activities protected by the First Amendment.

Further, although many of the allegations concerned lawful planning activities, the court reasoned that in light of the violence that *later* occurred, it could construe these planning meetings as part of the unlawful conspiracy.[310] In this respect, the district court imputed a kind of retroactive intent to the defendants, even though the conspiracy claim required an *advance* meeting of the minds. Under this the-

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307 458 U.S. 886, 916 (1982).

308 *Id.* at 920.

309 *See Sines*, 324 F. Supp.3d at 784 (applying for permit and inviting participants); *id.* at 785 (inviting participants and organizing participation); *id.* at 787 (telling participants to march in formation); *id.* at 787 (using social media to "coordinate attendance" and instructing marchers to wear specific attire); *id.* at 789 (publishing content "in support of the rally" and contributing to planning of the rally); *id.* at 790 (meeting with other defendants to organize the rally); *id.* at 791 (using website to plan rallies); *id.* at 792 (using social media to communicate with participants); *id.* at 793 (meeting with other defendants to march in formation at rally); *id.* at 794 (promotion of event).

310 *See, e.g.*, *id.* at 788 (interpreting defendant Vanguard America's rhetoric in light of later acts of violence); *id.* at 790 (reasoning that defendant Damigo's arrest for violent acts at the rally demonstrated conspiratorial intent).

ory, the jury might impute unlawful conduct that transpires at a protest to organizers who may not have demonstrated the requisite intent.

In addition, *Sines* involves vicarious and collective liability concerns. *Claiborne Hardware* admonishes courts to limit protester liability to "wrongful conduct *chargeable to the defendants*."[311] As the Court emphasized, only "a judgment tailored to the consequences of [protesters'] unlawful conduct may be sustained."[312] Although there was certainly chatter about violence during the organizational phase, particularly in online fora, plaintiffs attributed little of the chatter directly to the named defendants. Rather, discussions of violence or potential violence consisted mostly of anonymous comments and posts that the court linked to defendants by virtue of their moderation or operation of websites or social media pages.[313] Under *Claiborne Hardware*, although defendants can be liable for their own unlawful communications they are not liable for the communications of third parties—including anonymous social media commenters.

The *Sines* complaint contains many allegations that defendants engaged in the sort of harsh rhetoric Evers communicated in *Claiborne Hardware*.[314] However, rather than treating this offensive and derogatory rhetoric as an insufficient basis for imposing liability, as the Supreme Court did in *Claiborne*, the *Sines* court relied on it to establish the existence of an unlawful conspiracy. To be clear, many of these communications were deeply offensive and hateful. However, as the Court concluded in *Claiborne Hardware*, so long as they do not threaten others or incite imminent unlawful acts, the First Amendment protects these communications.

Although the district court acknowledged that when lawful protest activities form part of the basis of civil liability courts must narrowly define legal standards, it interpreted the Supreme Court's precedents quite broadly. None of the statements referred to in the complaint meets the narrow definitions of threats, incitement, or other uncovered speech categories. However, the court consistently took the position that the First Amendment did not protect the defendants'

311 *Claiborne Hardware*, 458 U.S. at 918 (emphasis added).

312 *Id.* at 926.

313 *Sines*, 324 F. Supp. 3d at 784 (noting the defendant Kessler "allowed" derogatory and potentially threatening comments on the platform).

314 *See, e.g.*, *id*. at 785–86, 788 (noting allegations that defendants were performing Nazi salutes, chanting "Blood and Soil," "making monkey noises at black counter-protesters," posting article on website that stated "it's time to dominate the streets," made a post-rally comment that "[w]e're ready to close ranks and fight for what is ours," and posting violent drawings).

derogatory communications, or those made by their supporters.[315] For example, comments relied on by the district court included advice to be prepared for "self-defense" in light of planned counter-protests, to wear khaki pants and polo shirts because these were a "good fighting uniform," and to be "dressed and ready for action" and prepared to "dominate the streets."[316] Other comments used military and battle jargon, referring to protesters as "warriors" and "fighters" and urging participants to "[b]ring as much gear and weapons as you can within the confines of the law."[317] As the Supreme Court has recognized, however, tall talk and charged rhetoric like this constitutes protected speech.[318]

Allegations in the complaint do point to some specific instances in which defendants communicated in ways that a court could conclude were unlawful. Statements made *at the rallies* that certain groups should "charge" at counterprotesters or engage in specific acts of violence constitute unlawful incitement and can form the basis of civil liability.[319] However, these statements were not part of an advance agreement—a conspiracy—to engage in violent conduct at the rallies.

If, as *Claiborne Hardware* suggests, one treats the allegations of protest organization and the derogatory rhetoric as protected expression, the remaining evidence of a conspiracy to engage in violent acts appears to be relatively thin (although, again, allegations can ripen into evidence at trial). The *Sines* court recognized its obligation to parse carefully the plaintiffs' multitude of allegations.[320] However, in places its reasoning comes perilously close to assigning liability based on a "conspiracy to protest" theory. That theory, like "negligent protest" and "riot boosting," raises a significant concern that the basis for civil liability could be disapproval of the derogatory and hateful speech that characterized and fueled the rallies rather than the entry of an unlawful conspiracy.

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315 *See id.* at 785 (using hateful comments by defendants to demonstrate an agreement to engage in racially motivated violence); *id.* at 789 (characterizing comment at the rally relating to "ovens" as a true threat).

316 *Id*. at 787, 792, 786.

317 *Id*. at 786, 792 (alteration in original).

318 *See, e.g.*, Watts v. United States, 394 U.S. 705, 708 (1969) (reversing conviction for threatening the President and observing "[t]he language of the political arena, like the language used in labor disputes, is often vituperative, abusive, and inexact." (citation omitted)).

319 *Sines*, 324 F. Supp. 3d at 785.

320 *Id*. at 803–04 (recognizing that the court was obligated to engage in "careful parsing of the allegations" and suggesting it had applied a "heightened standard" to the complaint).

This is not to excuse, much less validate, the vile statements made by some of the defendants and their followers in *Sines*. However, hard cases sometimes make bad law. At a minimum, the case demonstrates why courts must exercise special care and insist on precision in the context of assigning public protest liability. Either at trial or on appeal, it will be necessary to pin down more narrowly the basis for conspiracy liability.[321]

Whatever the outcome in *Sines*, the concern is that future plaintiffs might invoke something like a "conspiracy to protest" theory under state civil conspiracy laws or common law. Indeed, governments have long used conspiracy charges to target protesters.[322] Civil conspiracy actions raise serious First Amendment concerns relating to imposition of collective liability for otherwise protected speech and assembly.[323] Accordingly, courts must not recognize or authorize any cause of action for "conspiracy to protest."

5. "Tortious Petitioning"

One final civil claim that raises serious First Amendment concerns is what I have referred to as "tortious petitioning." As discussed earlier, in recent cases courts have allowed claims to proceed based on allegations that defendants interfered with business relations by directly petitioning government officials.[324]

This theory of civil liability is flatly inconsistent with the First Amendment right to petition government for redress of grievances.[325] Imposing liability in tort based on communications between citizens and officials, in which individuals criticize public polices, strikes at the

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321 *See, e.g.*, Scheidler v. Nat'l Org. for Women, Inc., 537 U.S. 393, 409–10 (2003) (limiting liability under RICO to acts taken with an economic motive); NAACP v. Claiborne Hardware Co., 458 U.S. 886, 930–32 (1982) (discussing First Amendment limits on the assessment of derivative liability against ideological organizations); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 466 (1958) (invalidating under the First Amendment a court order compelling production of the NAACP's membership lists); Or. Nat. Res. Council v. Mohla, 944 F.2d 531, 533 (9th Cir. 1991) (applying a heightened pleading standard to a complaint based on presumptively protected First Amendment conduct).

322 *See generally* David B. Filvaroff, *Conspiracy and the First Amendment*, 121 U. PA. L. REV. 189 (1972).

323 *See* Chip Gibbons, *The Prosecution of Inauguration-Day Protesters Is a Threat to Dissent*, NATION (Oct. 20, 2017), https://www.thenation.com/article/archive/the-prosecution-of-inauguration-day-protesters-is-a-threat-to-dissent/ [https://perma.cc/2VXN-AQMZ] (describing "conspiracy to riot" charges, based on protected expression such as chanting and marching, brought against hundreds of inauguration day protesters).

324 *See supra* Section I.B.4.

325 *See generally* RONALD J. KROTOSZYNSKI, Jr., RECLAIMING THE PETITION CLAUSE (2012).

heart of the First Amendment. If the central meaning of the free speech guarantee is that citizens have a First Amendment right to criticize government officials in the performance of official duties, they must also be free to communicate those criticisms directly without fear of ruinous civil liability judgments.[326] Holding speakers liable for business damages stemming from otherwise lawful petitioning activities violates the First Amendment.

One response might be that the First Amendment does not prohibit government from punishing speakers for making false statements that result in private or collective harms, so that petitioning liability might lie for false statements.[327] In fact, lying to a public official can sometimes be the basis for criminal or civil liability—for example, when the falsehood leads to the obtaining of some personal benefit or undermines justice.[328] Further, falsehoods *about* public officials that harm reputation can sometimes lead to civil damages, even under a heightened standard of liability.[329]

However, the right to communicate grievances *to* government officials has never been limited to the communication of factually accurate or truthful statements. Imposing civil liability for false statements made in the course of petitioning government officials would severely chill speech at the core of the First Amendment. The resulting deterrence may extend to whistleblowing in the context of government contracts, complaints about fraudulent spending, and other matters about which we want individuals to freely petition officials. A petitioner who makes a false statement while presenting a complaint or criticizing an official at a town hall meeting might face extensive damages for the consequences of that act, particularly where there is harm to business interests. For instance, if the false statement involves a proposed stadium or other business project officials decline to pursue, the petitioner could be liable for the economic losses of the project participants.

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326 *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 276 (1964).

327 *See* United States v. Alvarez, 567 U.S. 709, 736 (2012) (Breyer, J., concurring in the judgment) (rejecting theory that falsehoods are categorically unprotected speech but allowing that speakers can be liable for falsehoods that cause tangible harms).

328 *See id.* at 723 (plurality opinion) ("Where false claims are made to effect a fraud or secure moneys or other valuable considerations, say, offers of employment, it is well established that the Government may restrict speech without affronting the First Amendment."); *id.* at 734–35 (Breyer, J., concurring in the judgment) (referring to perjury and false statements made to government officials).

329 *Sullivan*, 376 U.S. at 282.

As discussed earlier, one state appellate court has tried to account for First Amendment concerns in this context by grafting an "actual malice" limitation onto the interference with business relations tort in the petitioning context.[330] This, however, does not cure the First Amendment concerns associated with such liability. The "actual malice" standard still allows courts to impose liability for statements made to public officials in the course of their official duties. This would force petitioners to defend themselves against charges that they engaged in what is essentially reckless lobbying of public officials. If an affected business can show that petitioner's statements were the product of reckless research or misinformation that the petitioner could have avoided, she may be liable in tort for millions of dollars in damages.

Even under this standard, petitioning officials would be a very risky proposition. Moreover, the result would be directly contrary to the central purpose underlying adoption of the "actual malice" standard elsewhere, as in the defamation context—namely, to ensure "that debate on public issues should be uninhibited, robust, and wide-open."[331] The Supreme Court has recognized this concern in other contexts, including application of the federal antitrust laws, which it has specifically interpreted to exempt lobbying activities.[332] Civil libertarians, environmental activists, whistleblowers, and other petitioners ought not to face civil liability for engaging with public officials on matters of public concern. With or without an "actual malice" standard, civil actions based on petitioning activities are inconsistent with First Amendment values and violate the right to petition government for redress of grievances.

C. Civil Penalty Enhancements

As noted, one of the central concerns with civil liability is that significant damage awards will chill protest activity. This makes enhanced damage provisions and awards of punitive damages a special First Amendment concern. Although the First Amendment does not shield protesters from liability for trespass and other civil wrongs, courts ought to be mindful of First Amendment values when applying

330 *See* Hurchalla v. Lake Point Phase I, LLC, 278 So. 3d 58, 64 (Fla. Dist. Ct. App. 2019).

331 *See Sullivan*, 376 U.S. at 270.

332 *See, e.g.*, E. R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 137–38 (1961) (holding that antitrust laws do not apply to businesses combining to lobby the government, even where such conduct has an anticompetitive purpose and effect, because the alternative "would raise important constitutional questions" under the First Amendment).

enhanced and special damage assessments to protest activities. These damages, which can rise to millions of dollars, impose heavy costs on activists—in some cases even when they engage in minimally disruptive forms of civil disobedience.

As discussed earlier, several states have proposed increased civil penalties for trespass and other minor civil infractions and application of civil forfeiture laws to protesters' assets.[333] Many states did so in direct response to high-profile protest events, including minimum wage demonstrations, indigenous protests of the Standing Rock pipeline, Black Lives Matter protests in Ferguson, Missouri, and protests relating to Donald Trump's election.[334] That does not subject the laws to challenge as content-based regulations of speech. However, protesters can still challenge the laws based on vagueness, overbreadth, and lack of tailoring. A law that penalizes protest anywhere along hundreds of miles of pipeline may well be subject to these kinds of attacks.

The penalty enhancements themselves raise significant First Amendment concerns. Protesters sometimes rely on acts of civil disobedience, including occupying land or disabling equipment.[335] Environmental and other protests sometimes rely on the concept of expressive lawbreaking, which involves engaging in minor infractions like these.[336] Increasing civil fines and penalties would punish and may suppress peaceful, but technically unlawful, protest activities. Measures that enhance penalties for even minor trespass and other infractions impose liability far disproportionate to any public or private harm actually suffered.

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333 *See* discussion *supra* Part I.C.

334 *See* Alexander Sammon, *A History of Native Americans Protesting the Dakota Access Pipeline*, MOTHER JONES (Sept. 9, 2016, 6:16 PM), https://www.motherjones.com/environment/2016/09/dakota-access-pipeline-protest-timeline-sioux-standing-rock-jill-stein/ [https://perma.cc/RBU2-SESY] (examining the events that led to the pipeline protests); Monica Davey & Julie Bosman, *Protests Flare After Ferguson Police Officer Is Not Indicted*, N.Y. TIMES (Nov. 24, 2014), https://www.nytimes.com/2014/11/25/us/ferguson-darren-wilson-shooting-michael-brown-grand-jury.html [https://perma.cc/C9DS-T4DX] (explaining events that led to the Ferguson protests); Gregory Krieg, *Police Injured, More Than 200 Arrested at Trump Inauguration Protests in DC*, CNN (Jan. 21, 2017, 4:06 AM), https://www.cnn.com/2017/01/19/politics/trump-inauguration-protests-womens-march/index.html [https://perma.cc/5AZ4-445S] (examining events surrounding arrests of protesters at Trump inauguration).

335 *See, e.g.*, Huffman & Wright Logging Co. v. Wade, 857 P.2d 101, 105 (Or. 1993) (in banc) (finding protestors climbed on and chained themselves to plaintiff's logging equipment without permission).

336 *See generally* Jacobs, *supra* note 17 (challenging distinction between speech and conduct in context of expressive lawbreaking, including acts of civil disobedience).

As applied to minor acts of civil disobedience, such as trespass to land or chattels, penalty enhancements would burden public protest in ways out of all proportion to the actual harms they cause. Similar concerns arise with respect to the award of punitive damages in protest cases. The First Amendment may not generally prohibit such awards. However, *Claiborne Hardware* imposes a "special obligation" on courts to ensure that they impose civil damages in a manner aimed at compensating for actual harms and not to suppress protest.[337]

As in other liability contexts, while protesters are liable for engaging in tortious conduct, courts should be mindful of the close connection between speech and nonviolent tortious conduct. They ought also to recognize the harsh deterrent effect massive civil awards can have on the exercise of protest rights. For example, in the context of an environmental protest, the communicative aspect of climbing on logging equipment or occupying an access road is not negligible. In such cases, an award of punitive damages punishes the protesters at least *in part* for their communication.[338] Insofar as a civil damages award may have this effect, courts ought to limit damages for expressive forms of misconduct.

D. Fees and Other Administrative Costs

As discussed in Part I, governments regularly charge fees and sometimes impose other costs on protesters and demonstrators. Permit and rental fees, cleanup deposits, hold-harmless agreements, and insurance liability requirements increasingly have become ordinary costs of public protest.[339] These costs place considerable financial burdens on those planning and organizing protests.[340]

The Supreme Court has said very little about the constitutionality of permit fees and other costs. It has indicated that the First Amendment does not bar governments from charging flat fees for permits, which indicates that governments can recoup at least some of the costs associated with protests.[341] However, the Court has held that govern-

337 NAACP v. Claiborne Hardware Co., 458 U.S. 886, 915 (1982).

338 *Cf.* Wisconsin v. Mitchell, 508 U.S. 476, 487 (1993) (upholding hate crimes enhancement on the ground that enhancement was not tied to the message of the crime but rather the underlying conduct). In *Mitchell*, the conduct in question was a criminal assault, which does not itself express any message entitled to First Amendment consideration or protection. In the environmental or political protest context, the protest itself is entitled to free speech and assembly protection, even if the underlying trespass is not.

339 *See* Neisser, *supra* note 11, at 269–72 (describing various costs).

340 *See* Tushnet, *supra* note 7, at 789–90.

341 *See* Cox v. New Hampshire, 312 U.S. 569, 577 (1941). For an argument that these fees

ments cannot vest broad discretion in officials to impose *variable* fees based on predictions about how much disruption, or litter, or violence will attend a particular protest.[342] That sort of scheme invites content discrimination forbidden by the First Amendment.[343] Thus, any fee or cost schedule that varies the costs of protest, or provides broad discretion to officials to do so, violates the First Amendment. This includes schemes that impose costs after the fact, or allow a locality to seek reimbursement subsequent to an event.[344] These schemes are invalid because they charge protesters variably, based on reactions to their speech and other content concerns.[345]

The Court has never decided whether a permit scheme must provide a *waiver* for protesters unable to afford applicable fees and costs. Doubtless part of the reason for that is that permit schemes often contain waiver provisions for those who demonstrate they are unable to pay. Some courts have held that a waiver for indigent permit applicants is required under the First Amendment, while others have reached the opposite conclusion.[346]

At the next opportunity, the Court should hold that the First Amendment requires an indigency exception. In the absence of such a holding, all localities should allow access to protest venues without regard to ability to pay. The Court itself has indicated that "[f]reedom of speech . . . [must be] available to all, not merely to those who can pay their own way."[347] Courts that have rejected an indigency requirement are comforted by the notion that at least in their cases the protests can still go on—perhaps not in the plaza where people gather,

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violate the First Amendment, see C. Edwin Baker, *Unreasoned Reasonableness: Mandatory Parade Permits and Time, Place, and Manner Regulations*, 78 Nw. U. L. Rev. 937, 1024 (1983).

342 *See* Forsyth County. v. Nationalist Movement, 505 U.S. 123, 133–34 (1992).

343 *Id.* at 134–35.

344 *See* Nationalist Movement v. City of York, 481 F.3d 178, 186 (3d Cir. 2007) (invalidating reimbursement provision that allowed city to charge speaker for costs relating to audience reaction to speech).

345 *Id.* at 186–87.

346 Cases requiring an indigency exception include *Nationalist Movement*, 481 F.3d at 184, and *Central Florida Nuclear Freeze Campaign v. Walsh*, 774 F.2d 1515, 1523–24 (11th Cir. 1985). *But see* Sullivan v. City of Augusta, 511 F.3d 16, 41, 43–45 (1st Cir. 2007) ("Where, as here, . . . there are ample alternative forums for speech, we see insufficient justification for the district court's ruling that the Constitution mandates an indigency exception . . . ."); Stonewall Union v. City of Columbus, 931 F.2d 1130, 1137 (6th Cir. 1991) ("Because we believe the availability of the sidewalks and parks provides a constitutionally acceptable alternative for indigent paraders, we find that the lack of an indigency exception does not render the ordinance constitutionally invalid.").

347 Murdock v. Pennsylvania, 319 U.S. 105, 111 (1943).

but on the sidewalks or streets in the neighborhood.[348] However, that is cold comfort to protesters treated as second class based solely on their inability to pay. But for their inability to post a bond or pay a fee, the plaintiff protesters would be entitled to the same First Amendment right as other groups.

The Court has also never decided a case involving a challenge to the *amount* of a fee or cost. Pursuant to the guidelines set forth in *Claiborne Hardware,* courts have a special obligation to review all such costs to ensure they do not suppress lawful and protected expression. Some courts have invalidated particular costs owing to lack of specificity or lack of relationship to any strong governmental interest.[349] However, in some instances, administrative costs could ripen into an effective prohibition on protest. Should officials start charging thousands of dollars in permitting and other costs without providing for such waivers, then courts ought to invalidate such schemes under the First Amendment. Even with a waiver, protesters with means to pay may well decide it is not worth the expense. Again, ability to pay should not determine the exercise of First Amendment protest rights. Like participation in the electoral process, public protest should not be an option only for the wealthy.[350] At the very least, courts should require that costs and bond amounts that exceed an individual or group's ability to pay must be reduced.[351]

Whether the costs of policing or otherwise allowing a public protest, in a public park or on a college campus, can become so high as to constitute a compelling governmental interest in imposing limits on expression is another open question. Again, the Court has not offered any guidance. However, any expressive limit would have to be carefully calibrated to avoid imposing a "heckler's veto," which again would allow predicted reactions to certain speakers to serve as the basis for excluding them from public places otherwise open to expression.[352]

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348 *See Sullivan*, 511 F.3d at 45.

349 *See, e.g.*, Long Beach Area Peace Network v. City of Long Beach, 522 F.3d 1010, 1032–34 (9th Cir. 2008) (upholding some costs but holding that charges for "litter abatement" and "traffic control" were invalid).

350 *See, e.g.*, Clements v. Fashing, 457 U.S. 957, 964 (1982) (upholding Texas law regarding eligibility of officials to run for another public office by distinguishing cases requiring fee from candidates that may unconstitutionally burden candidates of lower economic status); Lubin v. Panish, 415 U.S. 709, 718 (1974) (holding selection of candidates solely on ability to pay filing fees unconstitutionally excludes candidates who are unable to pay).

351 *See* Tushnet, *supra* note 7, at 781 n.29 (reaching the same conclusion, although acknowledging a lack of judicial authority).

352 *See* Michael C. Dorf, *Reconsidering the Heckler's Veto Principle*, DORF ON LAW (Nov.

One particular cost burden—proof of liability insurance or an insurance mandate—is fundamentally at odds with *Claiborne Hardware*'s limitation of damages for protected activities and associations.[353] Courts should invalidate such requirements on First Amendment grounds.[354] Insurance mandates transfer the costs of wrongdoing from third party (including *intentional*) tortfeasors to protest sponsors and organizers.[355] In that sense, they raise First Amendment concerns similar to the "negligent protest" and "riot boosting" actions.[356] Moreover, requiring liability insurance for intentional (or negligent) conduct by protest participants raises questions of differential treatment. Why are *only* protests and demonstrations subject to such coverage requirements?[357] Insurance mandates also threaten associational rights. As one commentator has observed, "Mandatory liability insurance for special events thus creates a regulatory distinction based precisely on a particular form of constitutionally protected activity—public association—typical of those with dissident perspectives. It therefore must fall as a most insidious and unusual form of content discrimination."[358]

As commentators have long observed, administrative fees and costs raise serious concerns about differential taxation, imposition of unconstitutional prior restraints, and suppression of minority and other dissident associations.[359] However, as noted, there is a Supreme Court vacuum in the area of administrative costs.[360] As a result, it is difficult to say definitively which fees and costs violate the First Amendment. Some answers seem plausible based on the Court's guidance.[361]

This uncertainty does not compel officials to pile up costs or shift them onto protesters. It is within their power to fund these activities,

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22, 2017, 8:00 AM), http://www.dorfonlaw.org/2017/11/reconsidering-hecklers-veto-principle.html [https://perma.cc/W8VY-UKAQ] (suggesting that there may be a threshold amount which would qualify as a "compelling interest" for limiting campus speech).

353 *See* Neisser, *supra* note 11, at 301–02 (discussing First Amendment implications of insurance requirements).

354 *See* iMatter Utah v. Njord, 774 F.3d 1258, 1269–70 (10th Cir. 2014) (invalidating insurance liability requirement for parade).

355 *See id.*

356 *See supra* Part III.B.1, 3.

357 *See* Neisser, *supra* note 11, at 308–10.

358 *Id.* at 311.

359 *See id.* at 330–42 (discussing various First Amendment problems associated with police service fees); 343–44 (arguing against cleanup deposits on First Amendment grounds).

360 *See supra* Section III.A.1.

361 *See supra* Section III.D.

and they should do so. Whether or not particular costs violate the First Amendment, free speech and association *values* indicate that taxpayers ought to continue to bear most of the costs of collective expression.[362] As one critic of user fees and other protest costs argued, "[I]f the [F]irst [A]mendment is to assure a safety valve for dissatisfaction, genuine discussion of public policy, ascertainment of new scientific truths or cultural forms, and individual self-development, the public system of expression must, at a minimum, avoid replicating the private market's price structure and thereby reinforcing its inequities."[363]

If governments wish to avoid the costs and damages associated with certain kinds of protests, they have ample means at their disposal to do so without shifting the costs of dissent onto protest organizers and sponsors. These include objective permit regulations, enhanced security, and more efficient and effective protest policing. The increased costs of securing and maintaining places of protest should not fall on the shoulders of those seeking to engage in constitutionally protected activities.

E. Education and Employment

A final set of First Amendment concerns relates to the consequences of protest activity for public students and public employees. In these particular contexts, the concern is not the direct imposition of damages but rather the economic and other consequences relating to loss of educational and employment opportunities.

Students at all levels engage in protest activity, both on and off school premises.[364] As in the other contexts discussed in this Article, courts have a special obligation to preserve the protest rights of public-school students. Students are learning to be citizens, and part of that learning entails understanding the rights and responsibilities of self-government. The Supreme Court has emphasized that schools cannot be "enclaves of totalitarianism" or treat students as "closed-circuit recipients" of information.[365]

Of course, school officials have important interests in pedagogy, discipline, and order. The current First Amendment standards applicable to student speech recognize these interests. Current doctrine preserves students' rights to protest on school premises so long as it is

362 *See* Dorf, *supra* note 352 (discussing campus cost-shifting problem).

363 Neisser, *supra* note 11, at 297.

364 *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 511 (1969) (reversing expulsion for wearing black armbands to school in protest of the Vietnam War).

365 *Id.*

done in a manner not disruptive to the learning environment.[366] Owing to the special context, that standard is less precise than the First Amendment generally demands in the context of other protests. Even under the current standard, officials ought not to discipline students for acts of protest and dissent that do not raise any realistic prospect of disruption. As importantly, courts should treat student expression that occurs off school premises, including during demonstrations and protests, as fully protected by the First Amendment—whether or not the activity is consistent with school policies or causes some disruption at school.

The more acute danger in terms of student speech relates to college and university attendees. Like other school authorities, university officials retain broad authority to impose curricular requirements; regulate the time, place, and manner of expression on campus; and punish students who engage in violent conduct. However, they ought not to discipline students for peaceful protest activities on their campuses that do not disrupt learning. Moreover, they ought to create abundant space on campus for peaceful forms of protest rather than limit students to ill-defined or geographically unattractive locations.

Further, when drafting and enforcing disruptive conduct policies, administrators ought to be careful to preserve students' public protest rights both on and off campus. As *Claiborne Hardware* instructs, this entails drafting with precision and ensuring that officials do not define terms such as "disrupt" and "interfere" so broadly as to effectively prohibit campus counter-protests.[367]

Recently adopted campus policies relating to disruption of scheduled activities, including interference with invited speakers, raise the danger that officials will impose student discipline for constitutionally protected counter-speech.[368] Fearful of mandatory punishments, including expulsion, students may decide not to organize or participate in protest activity on campus. Given its harshness and consequences, lawmakers and university administrators should consider expulsion a last and least attractive alternative to non-disciplinary outcomes—including conversations with students about the importance of hearing different views and freedom of speech on campus. Expulsion or suspension should rarely be the price students pay for engaging in dissent.

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366 *Id.*

367 *See generally* Abu El-Haj, *Defining* Peaceably, *supra* note 3, at 967–80; *see also* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 916 (1982).

368 *See* INT'L CTR. FOR NON-PROFIT L., *supra* note 129.

Public employees are an important source of criticism and dissent, particularly owing to their access to information about the workings of government.[369] They may also be activists on their own time, outside of the work context.[370] Like students, public employees do not waive their First Amendment rights by virtue of accepting public employment. However, current First Amendment doctrine protects employees who speak as citizens on matters of public concern only through an imprecise balancing standard in which courts weigh First Amendment rights of employees against employer concerns relating to office efficiency and discipline.[371] Too often, this approach allows employers to discipline employees for political expression.

In some cases, employers may feel they have little choice but to terminate employees for off-site expression. For example, police departments must have the power to dismiss employees who engage in racially derogatory demonstrations outside of the workplace, because this activity will undermine community trust and effective policing.[372] Recently, employers fired a Federal Express employee and suspended a corrections officer after the pair mocked the murder of George Floyd during a public protest.[373] With respect to the civil servant, the First Amendment again provides discretion precisely for such instances.

However, public employers ought not to enjoy unbridled discretion to discipline or terminate employees whose protest or other expression they do not like. In some cases, courts have held that employers may terminate aides when they engage in offensive or other public expression likely to be associated with the employer.[374] That type of authority would give employers the power to terminate employees for taking part in political rallies and demonstrations, or

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369 *See, e.g.*, Pickering v. Bd. of Educ., 391 U.S. 563, 571–72 (1968) (observing that by virtue of their positions, public employees have special access to information of vital importance to the public).

370 *Id.* at 568.

371 *See id.*

372 *See* Locurto v. Giuliani, 447 F.3d 159, 180 (2d Cir. 2006) (upholding dismissal of NYPD and FDNY employees who took part in a parade while wearing blackface and engaging in other racially derogatory expression).

373 Jessica Chasmar, *FedEx Employee Fired, Corrections Officer Suspended Over Video Re-enacting George Floyd Killing*, WASH. TIMES (June 10, 2010), https://www.washingtontimes.com/news/2020/jun/10/fedex-employee-fired-corrections-officer-suspended/ [https://perma.cc/7TAN-WEY8].

374 *See, e.g.*, Gordon v. Griffith, 88 F. Supp. 2d 38, 57–58 (E.D.N.Y. 2000) (holding that state assemblyman could terminate aide for comments at a public rally concerning police brutality).

posting content to social media, based solely on employer concerns about attribution.[375] If public employees are to retain their right to protest and dissent, employers must not predicate workplace discipline on the viewpoint of the employee or the employer's disagreement with her political or social causes.

As these contexts show, the potential costs of dissent extend beyond imposition of monetary fees and damages. Individuals may place important educational interests and even their livelihoods at risk simply by engaging in public protest activities. The Court likely will not adopt more precise First Amendment standards in terms of students' and employees' expression. However, it is important for educators, government employers, and courts not to allow officials to burden protest rights except in clear cases of tangible educational or workplace disruption.

Conclusion

The nation has just witnessed the immense power and many perils of mass protest. Beneath the surface of the police brutality and racial justice protests lies a regulatory framework that imposes significant costs and liabilities on protest organizers, participants, and supporters. Plaintiffs may yet sue Black Lives Matter and other activists involved in the protests for civil damages. Whether they do or not, it is likely that the protests will spur legislative backlash in the form of additional civil penalties for acts of protest and civil disobedience.

Exorbitant administrative costs, civil actions, penalty enhancements, and other liabilities threaten speech, assembly, and petition rights as well as underlying First Amendment values. Perhaps the most concerning development has been a band of new civil actions whose labels—"negligent protest," "riot boosting," "conspiracy to protest," and "tortious petitioning"—are strongly suggestive of the First Amendment threats they pose. These actions would impose ruinous civil liabilities on protest organizers and activists. They threaten to chill public contention that is necessary to awaken the public to racial and other forms of injustice.

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375 *Compare* Conn v. Bd. of Educ., 586 F. Supp. 2d 852, 860–61 (E.D. Mich. 2008) (tenured teachers were engaged in activities protected under First Amendment when, while off-duty and acting as private citizens, they made speeches at school board meetings, participated in march, and participated in lawsuit to protest school closings), *with* Hudson v. Craven, 403 F.3d 691, 701 (9th Cir. 2005) (upholding discipline of professor who attended WTO protests with her students, contrary to school administrators' guidance).

The Supreme Court has imposed a special obligation on lower courts to ensure that liabilities are clear, precise, and apply only in very narrow circumstances to culpable non-expressive activities. The most recent civil actions fail to live up to these standards. Courts should reject these civil liability theories. Traditional costs of dissent, including penalty enhancements, punitive damages, and some administrative costs also deserve a much closer look. Even if precedents do not clearly require they be invalidated, support for First Amendment values requires that they be subject to close scrutiny. Similarly, courts ought to ensure that loss of educational and employment opportunities do not become regular costs of engaging in protest.

Just as importantly, public officials should stop seeking to pile onto the costs of dissent or shift the costs of protest onto those who cannot afford to bear them. Agencies and legislatures ought not to respond to the most recent mass protests with yet another flurry of enhanced penalties and cooked-up causes of action. Containing the rising costs of dissent does not entail absolving protesters of liability for their own violent or unlawful conduct. The costs of dissent are accumulating precisely because officials and courts are applying and imputing unwarranted costs to protesters. As part of its robust commitment to dissent, the First Amendment appropriately allocates most of the costs of protest to the public.