

Protest Policing in New York City: Balancing Safety and Expression

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INTRODUCTION

Protests are the core of political dissent for good reason. It is no secret that political outsiders—those whose views and interests fall outside the ambit of current party politics—face difficulties influencing public policy through formal channels.¹ The increasing necessity of vast-scale fundraising in political campaigns² and the mix of incumbent-protecting gerrymandering with winner-take-all single-member districts³ compound these difficulties for groups that lack wealth or geographic concentration. In this climate, public spectacles may provide the best chance for dissenters to communicate messages to a wide audience.⁴ Coverage of the protests in Ferguson, Missouri and the renewed spotlight on racial injustice in policing provides just one recent example.⁵ Moreover, protest events give dissenters power to build a sense of collective identity and contribute to the production of cultural meaning; cultural narratives shape individuals' understandings of their place

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¹ See Michael Lipsky, *Protest as a Political Resource*, 62 AM. POL. SCI. REV. 1144, 1144 (1968) (“The frequent resort to protest activity by relatively powerless groups . . . suggests that protest represents an important aspect of minority group and low income group politics.”). For a theoretical discussion of the relationship between the disempowerment of political minorities and the American system of territorial districting, see LANI GUINIER, *THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY* 135 (1994).

² See, e.g., Lawrence Norden, Op-Ed., *How to Put US Voters Back in Charge of Their Democracy*, CHRISTIAN SCI. MONITOR, Jan. 21, 2014, <http://perma.cc/4D3Q-GCKZ> (“[T]he \$1 billion spent by outside groups in the 2012 election is more than the total outside spending reported in the preceding 30 years combined.”); *Citizens United Four Years Later: Outside Spending Skyrockets*, BRENNAN CTR. FOR JUSTICE, Jan. 21, 2014, <http://perma.cc/3F6-EUKY>.

³ See, e.g., Brian Frydenborg, *What Caused the 2013 Government Shutdown? Redistricting*, POLICYMIC, Oct. 17, 2013, <http://perma.cc/8XXB-F23W> (arguing that gerrymandering caused the 2012 House election result because 1.4 million more votes were cast for Democrats, but Republicans won a 234 to 201 seat majority).

⁴ See JOHN R. PARKINSON, *DEMOCRACY AND PUBLIC SPACE: THE PHYSICAL SITES OF DEMOCRATIC PERFORMANCE* 35 (2012).

⁵ See, e.g., Charles M. Blow, Op-Ed., *Frustration in Ferguson*, N.Y. TIMES, Aug. 18, 2014, at A19.

in the world and can be powerful tools to influence the treatment of minority groups.⁶ Of course, protest activities also generate potential social costs: public inconvenience, emotional harm, concealment of unrelated criminal activity, and a latent threat of violence against people or destruction of property—costs that often fall under the headings of health, safety, and security.

In practice, the interaction between protesters and police officers determines the extent to which these benefits and harms occur. Current policing strategies focus on minimizing suspected harms but think little of facilitating benefits.⁷ This article will argue that police departments, particularly the New York City Police Department (“NYPD”), must take a more balanced approach to weighing the costs and benefits of facilitating large-scale public protests. Considering their history, police departments have demonstrated that they should not be solely entrusted with determining the appropriate balance. As a result, this article proposes an independent body to oversee policing of protests. It argues that, if we value dissent, we should think critically about how policies related to protest policing reduce the benefits that flow from dissent in the name of preventing fairly low risks of harm.

Throughout, this article takes two constellations of protest events in New York City as case studies for exploring the relationship between protesters and police and illustrating the inadequacy of current approaches to managing protests. The article focuses on New York City because it is the nation’s largest city, a city of symbolic importance for protesters (due to the presence of the United Nations and global financial institutions), and a city whose policy choices bear on the overall climate for dissent in the United States.⁸

⁶ Francesca Polletta, *Culture and Movements*, 619 ANNALS AM. ACAD. POL. & SOC. SCI. 78, 88–89 (2008) (“[M]ovements themselves may be the source of new interests. This is not only in the sense that clusters of movements generate master frames that figure in subsequent protest; for example, the equal rights frame that gained currency in the civil rights movement and was then promoted by the women’s movement and the disability movement. It is also that movements produce new ways of making sense of one’s life.”); cf. IRIS MARION YOUNG, *JUSTICE AND THE POLITICS OF DIFFERENCE* 86 (1990) (“Many social movements . . . have focused on politicizing . . . aspects of social life from the point of view of their linguistic, symbolic, affective, and embodied norms and practices.”); Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1, 4 (2004) (“A democratic culture is democratic in the sense that everyone—not just political, economic, or cultural elites—has a fair chance to participate in the production of culture, and in the development of the ideas and meanings that constitute them and the communities and subcommunities to which they belong.”).

⁷ See, e.g., Timothy Zick, *Speech and Spatial Tactics*, 84 TEX. L. REV. 581, 589–98 (2006) (“The most noticeable and disturbing recent trend has been the segmentation of place to control and displace mass protests, demonstrations, and other political and social agitation.”).

⁸ This article’s focus on New York City is not based on the city’s status as nationally representative; there are many ways in which police tactics used in New York are atypical among peer cities. See, e.g., Alex S. Vitale, *Managing Defiance: The Policing of the Occupy Wall Street Movement*, Presented at the Law and Society Association Annual Meeting (May 30, 2013), <http://perma.cc/A8UN-XFB4> [hereinafter Vitale, *Managing Defiance*]. Many of the problems identified below may thus be idiosyncratic. However, this article argues that the current level of dissent toleration practiced in New York City deserves both democratic values and practical concerns about security, providing another reason to focus on policy choices in the five boroughs.

In Part I, this article provides a brief account of what transpired during the protests to the 2004 Republican National Convention and the Occupy Wall Street Movement in 2011. In Part II, the article provides context for the NYPD's responses. First, it describes empirical research on how police officers handle protests and make decisions in protest situations. It then explores how different protest policing tactics developed from the 1960s to the present. Having described the general context for police action, this article poses several normative questions in Part III: What are the values and harms associated with protest activity? How should we evaluate police responses to protest events in light of the tradeoffs between values and harms? And, in light of this framework for evaluation, what is the ideal model for police action in response to public demonstrations? Part IV then presents candidates for institutional actors suited to facilitate meaningful reform. The article concludes by recommending that the NYPD use an independent monitor to make decisions on tactics deployed in a given protest situation.

I. POLICE OVERREACH DURING THE RNC AND OWS PROTESTS

This Part presents two vignettes of protesters' interactions with the NYPD in mass protest events, structured according to the motivation for protest action, the immediate context, the police response, and the outcome for the protesters.⁹ These vignettes aim to illustrate how practical constraints on protest activity can cut against positive social values (with minimal gains in public safety). After presenting these narratives, this Part draws out troubling patterns in recent protester-police interactions that flow from a failure to balance harms and values.

A. *"Everyone here will be placed under arrest right now"*

Motivation for action: People from all walks of life gathered in New York City during the 2004 Republican National Convention ("RNC") to express outrage at the policies of the Bush Administration and call for change through various protest events.

Immediate context: Months of surveillance preceded the RNC. Police targeted people considered "anarchists and direct action demonstrators," "crazies," and "street comics."¹⁰ Many of the largest demonstrations took place on August 31.¹¹ At several events that day, "the groups [the NYPD] had singled out as high risk were taken by surprise—and handcuffed with plastic straps and taken away."¹² According to one reporter who conducted

⁹ In Part III.A.2, this article describes a third mass protest event, the 1999 World Trade Organization ("WTO") protests in Seattle, to demonstrate the harms that police departments try to avoid in implementing a protest-management strategy.

¹⁰ See CHRISTOPHER DICKEY, SECURING THE CITY: INSIDE AMERICA'S BEST COUNTERTERROR FORCE—THE NYPD 200 (2009).

¹¹ See *id.*

¹² *Id.* at 201.

extensive interviews with NYPD counterterrorism officials, police aimed “to keep [certain] people out of circulation for the duration of the convention.”¹³

Included among the many obstacles protesters faced were situations in which police arrested demonstrators en masse for an obscure purpose. At a War Resisters League protest on August 31, hundreds of nonviolent protesters participating in a direct action day gathered near Fulton Street for a march.¹⁴ While the protesters lacked a permit,¹⁵ Thomas Galati, who then served as Deputy Chief of the NYPD’s Intelligence Division,¹⁶ told one of the organizers “that protesters could walk . . . one or two abreast so as to not block the sidewalk.”¹⁷ Galati shouted specific marching instructions over a bullhorn. Unfortunately, given the ambient street noise, protesters shouted back: “We can’t hear you!”¹⁸

Police response: Soon after the protesters’ response, Deputy Chief Terrence Monahan announced that the protesters would be arrested if they continued to block the street.¹⁹ Without additional warning, the police commenced a mass arrest of the demonstrators—sweeping away the protest. In the ensuing litigation, the police argued they had probable cause to arrest the marchers for obstructing vehicular or pedestrian traffic, parading without a permit, disobeying a lawful police order, and obstructing governmental administration.²⁰ Federal District Court Judge Richard Sullivan ultimately found probable cause lacking on each of these grounds.²¹ His account of events, based on video footage provided to the court, notes that protesters were not given an opportunity to disperse, did not block pedestrians or cars, did not require a permit due to the officer’s instructions (regardless of whether a permit would otherwise have been required), and were simply told one moment that “everyone here will be placed under arrest right now.”²² Over the course of the day, the NYPD arrested “nearly 1,100 people—

¹³ *Id.*

¹⁴ Diane Cardwell & Marc Santora, *At Least 900 Arrested in City as Protesters Clash With Police*, N.Y. TIMES, Sept. 1, 2004, at A1.

¹⁵ *Dinler v. City of New York*, No. 04 Civ. 7921(RJS)(JCF), 2012 WL 4513352, at *6 (S.D.N.Y. Sept. 30, 2012). Surprisingly, New York City law is ambiguous as to whether permits are required for protests on public sidewalks and courts have not yet resolved this ambiguity. *See id.* at *9. The New York Civil Liberties Union advises prospective protesters in New York City that “[i]f you want to . . . march on a public sidewalk and you do not intend to use amplified sound, you do not need any permit.” *Know Your Rights: Demonstrating in New York City*, N.Y. CIVIL LIBERTIES UNION (Oct. 2011), <http://perma.cc/6EY9-4USK>.

¹⁶ Declaration of Thomas Galati at 1–2, *Handscho v. Special Servs. Div.*, No. 71 Civ. 2203(CSH) (S.D.N.Y. May 16, 2013), available at <http://perma.cc/KWM2-KSZU>.

¹⁷ *Dinler*, 2012 WL 4513352, at *7.

¹⁸ *Id.*

¹⁹ *Id.* at *8.

²⁰ *Id.* The laws defining these offenses are, respectively, N.Y. PENAL LAW § 240.20(5) (McKinney 2014), N.Y.C., N.Y., ADMIN. CODE § 10-110 (2013), N.Y. PENAL LAW § 240.20(6) (McKinney 2014), and N.Y. PENAL LAW § 195.05 (McKinney 2014).

²¹ *Dinler*, 2012 WL 4513352, at *9–11.

²² *Id.* at *8–10.

protesters, legal observers, members of the press, and innocent bystanders”²³ at RNC protests across the city. The NYPD gathered hundreds in the Pier 57 bus depot, forced the arrestees “to sit or lie on the bare concrete floors covered with soot and grease,” and in many cases held them “overnight . . . [with] no access to running water or blankets.”²⁴ Roughly 1,800 people were arrested during the convention week for protesting.²⁵

Outcome: After nearly a decade of litigation stemming mainly from the events of August 31, and following a favorable judgment in the Southern District of New York, protesters reached a nearly \$18 million settlement with the city, “the largest protest settlement in history.”²⁶ In fact, “[t]he final costs [to the city] of settling civil rights lawsuits brought by hundreds of people who were swept up in mass arrests during the 2004 Republican National Convention . . . are likely to be well over \$35 million.”²⁷ Despite the nominal legal victory for the protesters, the police blocked the arrested protesters from achieving the benefits of their activities on August 31; no legal remedy can reinstate the political and social effects of the protests.

In a better world, reactions to heavy-handed NYPD behavior during the RNC and the unfolding monetary costs to the city would have been sufficient impetuses for sweeping police reform. Reality differed.

B. “The cables of the bridge suddenly look a lot like a cage”²⁸

Motivation for action: In September 2011, seven years after the RNC events, a new protest movement began to take shape and challenge various aspects of the American political system. The new movement, Occupy Wall Street (“OWS”), focused on the government’s perpetuation of economic inequality²⁹ and many of its participants intended to prefigure a more inclusive political order.³⁰ The movement notably featured an encampment in Zuccotti Park, but also featured many traditional marches.

Immediate context: A traditional march took place on October 1, 2011, when over one thousand OWS protesters began to traverse the Brooklyn

²³ CHRISTOPHER DUNN ET AL., N.Y. CIVIL LIBERTIES UNION, RIGHTS AND WRONGS AT THE RNC: A SPECIAL REPORT ABOUT POLICE AND PROTEST AT THE REPUBLICAN NATIONAL CONVENTION 5 (2005).

²⁴ *Id.* at 15.

²⁵ *Id.* at 12.

²⁶ Press Release, N.Y. Civil Liberties Union, Victory in Unlawful Mass Arrest During 2004 RNC the Largest Protest Settlement in History (Jan. 15, 2014), <http://perma.cc/D6JS-CNXA>.

²⁷ Jim Dwyer, Op-Ed., *Mass Arrests During '04 Convention Leave Big Bill and Lingering Mystery*, N.Y. TIMES, Jan. 7, 2014, at A17.

²⁸ Traci Yoder, *A Tale of Two (Occupied) Cities: Policing Strategies at Occupy Wall Street and Occupy Philadelphia*, 15 U. PA. J.L. & SOC. CHANGE 593, 593 (2012).

²⁹ See Sarah Kunstler, *The Right to Occupy—Occupy Wall Street and the First Amendment*, 39 FORDHAM URB. L.J. 989, 990 (2012).

³⁰ Alasdair Roberts, *Why the Occupy Movement Failed*, 72 PUB. ADMIN. REV. 754, 757 (2012) (describing OWS’s refigurative political goals).

Bridge.³¹ The march followed a series of protest events featuring mass arrests: police arrested more than eighty people during a march to Union Square on September 24³² and arrested over two hundred on a planned march to the financial district the same week.³³

Meanwhile, the Zuccotti Park camp continued apace with hundreds of occupiers. During the course of the encampment, protesters gained “international visibility through the transmission of detailed and evocative images in the media.”³⁴ One occupier described the park as “a dream campus of some fantastic grad program” where one could “learn intellectual economics or consensus rules” while “expressing . . . frustrations of economic and other inequalities through our First Amendment rights.”³⁵

Police response—Brooklyn Bridge march: As protesters began crossing the bridge, police shouted that they should avoid the roadway or risk arrest; later reports indicate that only protesters near the front of the column could hear the warnings.³⁶ Police officers walked ahead of the marchers, “seeming, from a distance, as if they were leading the way.”³⁷ Then, “[a]fter allowing the protesters to walk about a third of the way . . . the police . . . cut the marchers off and surrounded them with orange nets.”³⁸ Police arrested over seven hundred on the bridge.³⁹

Police response—Zuccotti Park eviction: In the early morning hours of November 15, officers engaged in a surprise raid of Zuccotti Park, where hundreds had been encamped since September.⁴⁰ This time, the event zone was a privately owned public space, with the ironic legal consequence that the First and Fourteenth Amendments had questionable force.⁴¹ Regardless, the First Amendment permits reasonable restrictions on the manner and timing of protest activities, and the private owner had issued rules against camping that the police sought to enforce.⁴² In evicting the occupiers from the

³¹ Al Baker, Colin Moynihan & Sarah Maslin Nir, *More Than 700 Arrested as Protestors Try to Cross Brooklyn Bridge*, N.Y. TIMES, Oct. 2, 2011, at A18.

³² Yoder, *supra* note 28, at 601; Colin Moynihan, *3 Sue Over Pepper-Spraying by Police at Fall Occupy Wall St. Protest*, CITY ROOM, N.Y. TIMES (July 31, 2012, 6:25 PM), available at <http://cityroom.blogs.nytimes.com/2012/07/31/3-sue-over-pepper-spraying-by-police-at-fall-occupy-wall-st-protest>, <http://perma.cc/F8ET-7G45>.

³³ Yoder, *supra* note 28, at 601.

³⁴ Karen A. Franck & Te-Sheng Huang, *Occupying Public Space, 2011: From Tahrir Square to Zuccotti Park*, in *BEYOND ZUCCOTTI PARK: FREEDOM OF ASSEMBLY AND THE OCCUPATION OF PUBLIC SPACE* 3, 17 (Ron Shiffman et al. eds., 2012).

³⁵ Wendy E. Brawer & Brennan S. Cavanaugh, *Being There*, in *BEYOND ZUCCOTTI PARK: FREEDOM OF ASSEMBLY AND THE OCCUPATION OF PUBLIC SPACE* 49, 52 (Ron Shiffman et al. eds., 2012).

³⁶ Baker et al., *supra* note 31.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ James Barron & Colin Moynihan, *City Reopens Park After Protesters Are Evicted*, N.Y. TIMES (Nov. 15, 2011), <http://www.nytimes.com/2011/11/16/nyregion/police-begin-clearing-zuccotti-park-of-protesters.html?ref=nyregion>, <http://perma.cc/226E-D7XG>.

⁴¹ See *Rodriguez v. Winski*, 973 F. Supp. 2d 411, 420–21 (S.D.N.Y. 2013).

⁴² *Waller v. City of New York*, 933 N.Y.S.2d 541, 543–45 (N.Y. Sup. Ct. 2011).

park, police officers “arrested more than two hundred people”⁴³ for trespass, disorderly conduct, and obstructing governmental administration.⁴⁴ They proceeded to destroy the fixtures of the occupation, “right down to the carefully assembled People’s Library.”⁴⁵

Outcome: Days after the Brooklyn Bridge arrests, marchers filed a class action suit for alleged wrongful arrests against Mayor Michael Bloomberg, the City of New York, Police Commissioner Raymond Kelly, and the arresting officers.⁴⁶ That suit is still winding its way through the courts.⁴⁷ The last of the scheduled criminal cases against the marchers concluded in dismissal in October 2013—over 90% of the criminal cases against bridge marchers ended in dismissal.⁴⁸

As for the Zuccotti Park eviction, the city settled a suit brought by the occupiers for destruction of property, paying over \$350,000 in April 2013.⁴⁹ However, the legal bases for the evictions and arrests at the park have generally been upheld.⁵⁰

Despite the temporal distance between the RNC protests and the OWS protests, the similarities in police tactics are striking. Over a series of protest events in a relatively brief period of time, the NYPD responded to dissenting activities with poor communication, mass arrests, aggressive and confrontational control measures, wrongful or questionably grounded arrests, and mistreatment of peaceful marchers.

⁴³ Yoder, *supra* note 28, at 602.

⁴⁴ *See, e.g.,* People v. Nunez, 943 N.Y.S.2d 857, 859 (N.Y. Crim. Ct. 2012) (upholding these charges against an occupier evicted from Zuccotti Park under sections 140.00(5), 240.20(6), and 195.05 of the New York Penal Law).

⁴⁵ Yoder, *supra* note 28, at 602.

⁴⁶ Garcia v. Bloomberg, 865 F. Supp. 2d 478, 482 (S.D.N.Y. 2012). Federal District Judge Jed Rakoff dismissed the suit against the Mayor, the Police Commissioner, and the City, but allowed the case to proceed against the arresting officer defendants. *Id.* at 494.

⁴⁷ Garcia v. Doe, 764 F.3d 170, 173 (2d Cir. 2014) (affirming the District Court’s denial of defendants’ motion to dismiss); Mark Wilson, ‘Occupy Wall Street’ Lawsuit Against NYC Can March On, *2nd Cir. Rules*, FINDLAW (Aug. 21, 2014), <http://perma.cc/LQ2L-NPWD>.

⁴⁸ Colin Moynihan, *Last Scheduled Case of Brooklyn Bridge Arrests, Like Most Others, Is Dismissed*, N.Y. TIMES, Oct. 21, 2013, at A19, available at <http://www.nytimes.com/2013/10/21/nyregion/last-scheduled-case-of-brooklyn-bridge-arrests-like-most-others-is-dismissed.html>, <http://perma.cc/6ZW9-CK9K> (“Of the 732 arrests made on the Brooklyn Bridge, 680 cases were dismissed, 195 at the request of prosecutors, 40 by the court[,] and 445 contingent on defendants’ not being arrested again within six months. The district attorney declined to prosecute 21 cases. Six people pleaded guilty to disorderly conduct, prosecutors said, five were convicted at trial and two were acquitted. One case was resolved with a plea in a separate case. Warrants have been issued for the 17 remaining defendants who have failed to show up for court dates; it is unclear when or if those cases will be resolved.”).

⁴⁹ Stipulation of Discontinuance and Settlement, *Occupy Wall Street v. City of New York*, 12 CV 4129 (GBD) (S.D.N.Y. Apr. 9, 2013), <http://perma.cc/ZN2P-JFWZ>; Becky Bratu, *NYC Settles Lawsuit with Occupy Wall Street for \$350K*, NBC NEWS (April 9, 2013), <http://perma.cc/JE3D-RCTQ>.

⁵⁰ *See, e.g.,* Rodriguez v. Winski, 973 F. Supp. 2d 411, 415 (S.D.N.Y. 2013) (rejecting protesters’ claims against private defendants); Waller v. City of New York, 933 N.Y.S.2d 541, 545 (N.Y. Sup. Ct. 2011) (upholding the park owner’s right to evict the protesters on health and safety grounds); People v. Nunez, 943 N.Y.S.2d 857, 859 (N.Y. Crim. Ct. 2012) (upholding criminal charges against occupier).

C. Police Responses to Mass, Nonviolent Claims on Government

Before specifying what ought to be disturbing about these two constellations of events, this section lays the groundwork for the critique by categorizing the RNC and OWS protests in the general schema of protest activities, identifying the scope of this article. Both the 2004 RNC protests and the 2011 OWS protests featured large groups of nonviolent demonstrators criticizing government policies over the course of days or weeks.⁵¹ To tease out the commonalities, we have (1) large groups, (2) avowed nonviolence, (3) claims on government, and (4) extended duration.⁵² These attributes define the boundaries of this article's concern.

Small-scale events,⁵³ events featuring physical violence as an intended tactic, actions directed at nongovernment sources, and fleeting moments of activity conjure up a different set of concerns. For instance, small-scale events may have less potential to attract external attention and stand a lower chance of influencing democratic decision-making or cultural norms; intentionally violent events may be uncontroversially wrong, especially in cases where the legitimacy of the state is not at issue.

For large-scale, nonviolent, political, long-term protests, then, this article addresses a practical policy question: how should police departments, and the NYPD in particular, determine policing practices for a given protest? Providing a framework and a mechanism for such decisions is one of the central aims of this article. My central claim is simple: when deciding how to police a given protest event, whoever makes the ultimate decision ought to weigh *all* the social values and costs in an evenhanded manner, to the greatest extent feasible. I call this suggested approach “comprehensive evaluation.” This claim would be almost too obvious for discussion—except for the fact that the positive social values of protest rarely factor into police decision-making.⁵⁴

This failure to consider the benefits of protest was apparent in the NYPD's response to the OWS and RNC protests. The police department used several tactics—preemptive arrests, mass arrests, and a low tolerance for disorder—that may have maximized security but failed to weigh the value of the protests. Further, tactics like these are inherently overbroad;

⁵¹ While OWS made claims on private actors as well, including banks and individual members of society, this article will focus on the movement's claims on government. Due to the leaderless structure of the movement, there was not an agreement on a particular “menu of reforms.” Roberts, *supra* note 30, at 758.

⁵² Cf. Verta Taylor & Nella Van Dyke, “*Get Up, Stand Up*”: *Tactical Repertoires of Social Movements*, in *THE BLACKWELL COMPANION TO SOCIAL MOVEMENTS* 262, 267–68 (David A. Snow et al. eds., 2004) (“The unit of analysis [for studies of protest events] is generally the collective action event, which is defined using three criteria: the event must be *collective*, involving more than one person; the actors must be making a *claim or expressing a grievance* either to change or preserve the system; and the event must be *public*.”).

⁵³ Here, I have in mind something like a small group of friends wearing armbands to protest a war or a small group soliciting money for a cause.

⁵⁴ Throughout this article, my working assumption is that police officials act in good faith when making protest management decisions. In practice, this may not be the case.

they catch people in the police dragnet who cannot plausibly pose a security threat.

New York City's approach to protest management demonstrates a lack of concern for the democratic and cultural values served by protest, which this article addresses in detail in Part III.A.1. In the case of OWS, police truncated a powerful symbolic display on the Brooklyn Bridge, conducting mass arrests to end a temporary inconvenience to motorists. Later, Mayor Michael Bloomberg publicly justified the eviction of the occupiers from their encampment over concerns about sanitation and safety.⁵⁵ Concerns about health and safety are perfectly valid, but should not categorically trump values tied to expression.

The ultimate flaw in the NYPD's approach to the RNC and OWS protests was an extremely poor fit between the tactics used and the harms avoided. This poor fit followed from a failure to afford serious weight to the social benefits of the protesters' activities—a failure to engage in comprehensive evaluation.⁵⁶ While the NYPD's tactics could have been justified in other circumstances, the police department's choice of tactics in these cases demonstrated a disturbing blindness to social consequences. In light of this blindness, it is worth exploring in more detail why the NYPD did not consider certain sources of social value. The next part builds an understanding of how police departments and individual officers have made decisions related to protest policing.

⁵⁵ Julian Brash, *Politics Out of Place: Occupy Wall Street and the Rhetoric of "Filth,"* in BEYOND ZUCCOTTI PARK: FREEDOM OF ASSEMBLY AND THE OCCUPATION OF PUBLIC 61 (Ron Shiffman et al. eds., 2012); Colleen Long & Verena Dobnik, *Zuccotti Park Eviction: Police Arrest 200 Occupy Wall Street Protesters*, HUFFINGTON POST (November 15, 2011), <http://perma.cc/3394-8MCC>. Many OWS participants and outside observers questioned whether the health and safety justification was merely a pretext to allow the city to remove the camp. *See, e.g.*, Brash, *supra*. Belying the sanitation narrative, access to the park was tightly controlled in the aftermath of the eviction. Patrick F. Gillham, Bob Edwards & John A. Noakes, *Strategic Incapacitation and the Policing of Occupy Wall Street Protests in New York City, 2011*, 23 POLICING & SOCIETY 91 (2013).

⁵⁶ Their failure to balance harms and values is a separate issue from whether the police complied with the First Amendment. Police almost certainly comply with constitutional requirements when they restrict the time, place, and manner of protests for an asserted safety or health reason under an established process. *See, e.g.*, *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (“[E]ven in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech”); *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 298 (1984) (“All those who would resort to the parks must abide by otherwise valid rules for their use, just as they must observe the traffic laws, sanitation regulations, and laws to preserve the public peace. This is no more than a reaffirmation that reasonable time, place, or manner restrictions on expression are constitutionally acceptable.”). Perversely, the First Amendment tightly restricts the government's ability to regulate offensive protests on matters of public concern *indirectly* via tort liability but allows the government to manage protests on matters of public concern extensively via *direct* police action and government regulation. *See Snyder v. Phelps*, 131 S. Ct. 1207, 1218–19 (2011).

II. THE DEEP ROOTS OF NYPD PROTEST POLICING STRATEGIES

To illuminate how and why police make protest management decisions, this Part briefly examines the empirical literature on factors associated with different types of protest policing. Recognizing that the empirical literature fails to answer important questions, this Part pivots to a historical discussion of evolving protest management frameworks. The historical discussion concludes that faulty sociology and a single-minded focus on diffusing threats lie at the heart of present failures to balance social costs and benefits.

A. *Repression and Mediated Threat Perception*

One understanding of police reaction to protest is that of repression, or the idea that the police impose sanctions on individuals or groups to deter “First Amendment-type” actions that criticize the government.⁵⁷ Along these lines, the repression literature empirically examines how protest-policing approaches relate to the suppression of public expression, particularly expression perceived as threatening the current political order.⁵⁸

The repression literature contains several findings about police behavior that bear on the unspoken factors behind police decision-making. For example, in reviewing the empirical literature, Christian Davenport finds that “challenges to the status quo” consistently correlate with repressive police responses across time and space.⁵⁹ This is ironic from a public value perspective because protests that challenge the status quo by criticizing government are the protests that most clearly serve democratic values. However, executive constraints on police behavior are associated with more peaceful policing⁶⁰ and political fragmentation appears to reduce the use of repression,⁶¹ suggesting that officers are less prone to repress political dissent when some members of government are sympathetic to the views of the dissenters. Although these findings are descriptively useful, they do not answer deeper questions about *why* authorities respond as they do to specific situations or

⁵⁷ Christian Davenport, *State Repression and Political Order*, 10 ANN. REV. POL. SCI. 1, 2–3 (2007). Davenport defines “First Amendment-type rights” to include: “Freedom of speech, assembly, and travel. Freedom of the press up to a very narrowly defined ‘clear and present danger’ point, regardless of the views communicated. Freedom of association and belief without government reprisal, obloquy, or investigation unless clearly connected with possible violations of existing laws. The general freedom to boycott, peacefully picket, or strike without suffering criminal or civil penalties.” *Id.* at 2.

⁵⁸ As an aside, the relationship between repressive activities and the ultimate strength of protest movements remains highly unclear. *Id.* at 10; Jennifer Earl, *A Lawyer’s Guide to the Repression Literature*, 67 NAT’L LAWYERS GUILD REV. 3, 26–27 (2010). Increased repression may strengthen or weaken protest movements depending on the level of repression and other contextual factors. Earl, *supra*, at 27. This article takes the view that repression of dissenting ideologies is not a legitimate course of action for the state, regardless of whether the targeted movements ultimately benefit.

⁵⁹ Davenport, *supra* note 57, at 7–8.

⁶⁰ *Id.* at 13.

⁶¹ Earl, *supra* note 58, at 18–19.

shed light on the processes they use to arrive at decisions. For any individual police department response to a given protest, the aggregate data cannot reveal why the department acted as it did.

For the purposes of this article, an important unanswered question is how police perceive challenges to political power holders, given that such challenges are positively associated with repression. Unfortunately, political threat studies, those that examine the relationship between threat and repression, have defined “threat” broadly enough to include ideological differences and actual threats of violence to life and property.⁶² This distinction is important because significant violence weighs heavily against the democratic and cultural values of protest, while ideological differences ought not factor into police forces’ tactical decisions.

Some studies come close to answering this question—whether ideological or antiviolenence motives are at play—by looking at how police officers respond to situational threats, as mediated by their perception of those threats.⁶³ For instance, officers are more likely to use repressive tactics when they feel personally threatened.⁶⁴ Given that police forces often explain their actions in terms of preventing harm to people or property, Jennifer Earl and Sarah Soule analyze police responses through the lens of situational threats perceived by police officers.⁶⁵ Analyzing data from events in New York State between 1968 and 1973, they find that police respond with repressive tactics when there are indicators of protestor violence such as brick and bottle throwing or destruction of private property.⁶⁶ However, they also find illegitimate reasons for police repression; “radical goals” have a significant relationship with police presence at protest events, regardless of the level of violence.⁶⁷ The story is also complicated by country-level evidence that protester ideology (and cultural attributes) may influence police officers’ perceptions of personal threats.⁶⁸ Davenport finds that deviance from cultural norms has the largest effect on repression of all the factors he examines, which include the presence of violence, the level of democracy, and the strategic variety of protesters’ activities.⁶⁹ These findings resonate with empirical observations from the RNC. Across six protests with varying attributes, police responses clustered in two categories—extreme restrictive action and moderate restrictive action—that correspond to the relative radicalism of the protesters.⁷⁰ For example, a protest organized by people “oriented toward

⁶² *Id.* at 18.

⁶³ *Id.* at 18–19.

⁶⁴ *Id.*

⁶⁵ Jennifer Earl & Sarah A. Soule, *Seeing Blue: A Police-Centered Explanation of Protest Policing*, 11 *MOBILIZATION* 145, 149 (2006).

⁶⁶ *Id.* at 157.

⁶⁷ *Id.* at 159.

⁶⁸ See Christian Davenport, *Multi-Dimensional Threat Perception and State Repression: An Inquiry Into Why States Apply Negative Sanctions*, 39 *AM. J. POL. SCI.* 683, 688–89 (1995).

⁶⁹ *Id.* at 702.

⁷⁰ See Alex S. Vitale, *Policing Protests in New York City*, in *URBANIZATION, POLICING, AND SECURITY: GLOBAL PERSPECTIVES* 275, 290 (Gary Cordner et al. eds., 2010) [hereinafter Vitale, *Policing Protests*].

anarchist politics” faced the most extreme level of restriction, while a protest organized by a council that represents the major New York City unions, including the firefighters’ and teachers’ unions, faced the most lenient restrictions observed.⁷¹ If police officers are responding to threats based primarily on protesters’ deviance from norms, there is reason to question whether officers are in the best position to make fair judgments about the likelihood of violence. Even assuming the best intentions, the evidence suggests that police have a poor track record for separating real security risks from ideological unorthodoxy.

Nonetheless, the empirical literature raises more questions than it answers. The literature only begins to address the role of motivational forces faced by individual decision makers: political dynamics, philosophies of policing, and internalized social expectations.

B. *Paradigms of Protest Policing*

Outside the repression literature, social scientists have examined how police responses to protests relate to specific models that police departments have adopted in different historical contexts. The hypothesis is that “[r]ather than reacting to individual situational factors, the police may rely on a framework of beliefs and practices that organize and orient their behavior.”⁷² If this hypothesis is correct, then it is important to know which tactical model a police department has adopted; police behavior reflects styles of policing that have grown and propagated over time because they fit police departments’ contemporary expectations about how protesters behave.

From the 1960s to the 1970s, the dominant style of protest policing in the United States was one of “*escalated force* in which the militancy of protesters was met by increased militancy by the police.”⁷³ The default police response to protester violence was “overwhelming force.”⁷⁴ It was not merely a coincidence that police agencies adopted this style at this time. The theory behind escalated force management was actively promoted to law enforcement agencies across the country.

In 1967, the U.S. Army Military Police School “created a national civil disorder training program for local police officials.”⁷⁵ Local police forces, FBI agents, and military personnel tasked with crowd management learned

⁷¹ *Id.* at 289–90.

⁷² Vitale, *Managing Defiance*, *supra* note 8, at 9.

⁷³ Vitale, *Policing Protests*, *supra* note 70, at 277.

⁷⁴ *Id.*

⁷⁵ David Schweingruber, *Mob Sociology and Escalated Force: Sociology’s Contribution to Repressive Police Tactics*, 41 Soc. Q. 371, 377 (2000). The U.S. Army Military Police School continues to train “Soldiers, Civilians, and Leaders in the core competencies of Soldiering, Policing, Investigations, and Corrections” as well as to develop “concepts, doctrine, organizations, materiel, and nonlethal scalable effects.” *Mission/Vision*, U.S. ARMY MILITARY POLICE SCH., <http://perma.cc/HM7H-LKYL>.

from the school's teachings while "[m]agazines aimed at civilian police" disseminated its core messages.⁷⁶

The school taught control measures based on the (faulty) theory of "mob sociology," which holds that peaceful crowds "transform into law-breaking mobs" when triggered by a stimulating event that causes individual crowd members to subsume their self-control into the "crowd mind."⁷⁷ Designed to respond to such a mob, the escalated force style included disregard for First Amendment-type rights, "low tolerance for community disruption," the use of undercover officers as the sole means of contacting and coordinating with demonstrators, mass arrests, and the "use [of] force to disperse demonstrators."⁷⁸ Despite its harshness, this model of policing made some amount of sense under the assumption that any crowd of peaceful demonstrators posed a serious risk of suddenly transforming into a riotous violent mob. However, the assumptions underlying this theory have long been discredited.⁷⁹

Beginning in the late 1960s, in the wake of the civil rights and anti-war movements, police agencies began adopting a new model of "negotiated management policing."⁸⁰ Many police departments across the country apply some version of this model today.⁸¹ Based on the findings of three national commissions dedicated to recommending responses to riots and demonstrations (in particular, the findings that excessive force was not an effective means of controlling disorder and that violence was rare in most protest events), the U.S. Army Military Police School retooled the curriculum for its training program.⁸² The new model encouraged officers to "vary their techniques" according to the form of protest activities and the likelihood that a given form would result in violence.⁸³ The features of the negotiated management model are, at least in theory, the mirror image of those behind the escalated force style: officers should respect First Amendment-style rights, negotiate conditions with protesters, tolerate community disruption, engage in open discussions with protesters, cede control of protester conduct to organizers, avoid arrests, and minimize the use of force.⁸⁴ Nonetheless, the goal of negotiated management style policing is to give police officers maximum control over potential disorder.⁸⁵

⁷⁶ Schweingruber, *supra* note 75, at 377.

⁷⁷ *Id.* at 373–74.

⁷⁸ *Id.* at 378.

⁷⁹ See, e.g., David Schweingruber & Ronald T. Wohlstein, *The Maddening Crowd Goes to School: Myths about Crowds in Introductory Sociology Textbooks*, 33 TEACHING SOC. 136, 136–37 (2005).

⁸⁰ Schweingruber, *supra* note 75, at 379.

⁸¹ See, e.g., Yoder, *supra* note 28, at 603–14 (describing the use of negotiated management policing in the context of the Occupy Philadelphia protests of 2011).

⁸² See Schweingruber, *supra* note 75, at 380–81; Clark McPhail, David Schweingruber & John McCarthy, *Policing Protest in the United States: 1960–1995*, in POLICING PROTEST 62–63 (Donatella della Porta & Herbert Reiter eds., 1998).

⁸³ Schweingruber, *supra* note 75, at 380.

⁸⁴ *Id.*

⁸⁵ See P.A.J. Waddington, *The Policing of Mass Demonstrations in Contemporary Democracies: Controlling Protest in Contemporary, Historical and Comparative Perspective* 4–5

While the general trend from the late 1960s to the 1990s was a shift away from escalated force policing and toward negotiated management,⁸⁶ the past decade has witnessed the emergence of more aggressive police tactics that incorporate elements of the escalated force model.⁸⁷ As with previous shifts in models of protest policing, the new protest control tactics have a long pedigree. Since the 1970s, criminal justice system reforms have increasingly abandoned rehabilitative policy goals in favor of incapacitative control techniques.⁸⁸

In the context of protest policing, this new focus on control has exerted considerable influence. It has manifested itself in a “*strategic incapacitation*” approach to protest policing.⁸⁹ This approach requires police to distinguish between good protesters, “those seen as ordinary . . . people protesting for a concrete goal that benefits themselves” and bad protesters, “professional or political protesters . . . pursuing abstract goals”⁹⁰ under the assumption that the bad protesters are more prone to violence. Once police identify the bad protesters, the goal is to strategically target them to “prevent or severely restrain demonstrations without necessarily causing permanent harm or engaging in extensive punishment of the protesters.”⁹¹ Thus, the model effects a split between “good” and “bad” protesters. Bad protesters are afforded fewer First Amendment-style rights and not tolerated when their activities disrupt communal life; they receive limited police communications and face temporary detention to incapacitate them for the duration of an event; and they may face the use of force for incapacitative purposes.⁹² Good protesters face a more lenient and tolerant response along each of these dimensions.⁹³ Some police departments, like the NYPD, have adopted a re-

(European Univ. Inst., Working Paper RSC No. 97/6, 1997) (“Once the negotiation begins, the aim of the police is to ‘win over’ the negotiator so that the demonstration is conducted as far as possible in accordance with police wishes” and “[a]ttempts to extend maximum control over protest do not cease once prior arrangements have been made.”); Yoder, *supra* note 28, at 596 (“Escalated Force and Negotiated Management . . . share the goal of controlling dissent and thwarting efforts to produce social changes. . . . [W]hen considered from the standpoint of movement development, public support, and legal defense, . . . [Negotiated Management] is in many ways more effective than Escalated Force in neutralizing social justice movements.”).

⁸⁶ Vitale, *Policing Protests*, *supra* note 70, at 277–78.

⁸⁷ *Id.* at 278–79.

⁸⁸ See John Noakes & Patrick F. Gillham, *Aspects of the ‘New Penology’ in the Police Response to Major Political Protests in the United States, 1999–2000*, in *THE POLICING OF TRANSNATIONAL PROTEST* 97, 100 (Donatella della Porta et al. eds., 2006).

⁸⁹ *Id.* at 111–12.

⁹⁰ *Id.* at 102.

⁹¹ *Id.* at 112.

⁹² *Id.* at 101. This article’s mention of “First Amendment-style” rights is designed to highlight the distinction between the de facto treatment of protesters, which is a product of police department discretion, and the de jure First Amendment standards, which may come into play after the damage is irreversibly done and may fail to influence future police behavior. See, e.g., *Stauber v. City of New York*, No. 03 Civ. 9162(RWS), 2004 WL 1593870, at *33 (S.D.N.Y. 2004) (enjoining the NYPD from “closing streets and sidewalks at demonstrations without making reasonable efforts to notify protesters” how they can safely access and leave protest sites—a measure that had little impact on the subsequent treatment of protesters described throughout this article).

⁹³ Noakes & Gillham, *supra* note 88, at 101.

lated approach that also falls under the heading of strategic incapacitation: a “*command and control*” model, which is “organized around the principle of ‘zero tolerance’ order maintenance stemming from . . . adherence to the ‘broken windows’ theory.”⁹⁴

III. THE NORMATIVE IDEAL FOR PROTEST POLICING

The repression literature and writing on historical paradigms of protest policing explain events from the perspective of an outsider trying to glean information about the real-world bases of police action. From the perspective of a hypothetical official deciding which tactics to use, a sensible place to start would be with some notion of the stakes. What are the positive values of protest that overly repressive police actions threaten to undermine? In what ways do protests undermine public order? This Part begins by tracing the social values and costs of protests falling within the scope of this article. It then proposes a mechanism for balancing the competing risks and suggests specific approaches that might be applied fruitfully in the context of the NYPD’s protest policing.

A. *Social Values and Harms of Protest Activity*

1. *The Value of Protest*

For present purposes, this social value can be divided into two broad categories: (1) democratic value, or ways in which protest events directly enhance the things we value about democracy, and (2) cultural value, or ways in which protest events allow dissenters to construct and change culture.

Protest events support democracy in at least three traditional ways. First, protest events are constitutive of the equal opportunity to participate in the process of democratic decision-making.⁹⁵ Protests allow individuals—particularly those with limited access to mass media—to give public voice to their preferences on a somewhat more equal footing with dominant groups.⁹⁶

⁹⁴ Vitale, *Policing Protests*, *supra* note 70, at 279. The broken windows theory of policing holds that police should strictly control minor crimes through proactive arrests in order to prevent an escalation of crime; for example, the seminal article on broken windows policing states that the “wish to ‘decriminalize’ disreputable behavior that ‘harms no one’ . . . is, we think, a mistake.” George L. Kelling & James Q. Wilson, *Broken Windows: The Police and Neighborhood Safety*, THE ATLANTIC (Mar. 1, 1982), <http://perma.cc/NJ27-FSRX>.

⁹⁵ In political theorist Robert Dahl’s scheme, “effective participation” encompasses an “adequate . . . and an equal opportunity[] for expressing . . . preferences as to the final outcome” of democratic processes. ROBERT A. DAHL, *DEMOCRACY AND ITS CRITICS* 109 (1989) (emphasis omitted).

⁹⁶ *Cf.* Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 313 n.14 (1984) (Marshall, J., dissenting) (“[A] content-neutral regulation that restricts an inexpensive mode of communication will fall most heavily upon relatively poor speakers and the points of view that such speakers typically espouse.”).

Second, protest events are core loci for democratic self-discovery. Political protests provide space for protesters to discover how government policies affect their interests as they interact with other protesters. Third, events that call attention to the state's failure to live up to the core principles of democracy bring us closer to the ideal if they succeed in persuading some people to take further action to that end.⁹⁷

But protest events are integral to other democratic values as well. Political theorists have long argued that democratic debate and decision-making require people to be able to communicate narrative structures through public performances.⁹⁸ Protest policing that confines protesters to designated zones can undermine the "staging, and thus the symbolic messages that are conveyed to attentive audiences."⁹⁹ For example, in 2003 during an early prelude to the RNC protests, anti-war demonstrators applied for a permit to march past the United Nations—proximity to the physical site being key to the protesters' anti-war message.¹⁰⁰ The NYPD denied the application, the denial was upheld in court,¹⁰¹ and the protesters ultimately had to rally in closed metal pens arranged to the north of the United Nations complex.¹⁰² A bystander near the mass of kenneled protesters could be forgiven for failing to grasp the point. A source of positive democratic value was thus diminished by the NYPD's actions.

Other than reinforcing democratic values, protests play an indispensable role in the construction of group identity and the development of challenges to dominant cultural norms.¹⁰³ Francesca Polletta, for example, argues

⁹⁷ Protesters can make demands on society that inhibit democracy as well. On balance, however, fostering spaces for dissent provides a useful counterweight to the pressure to conform to dominant norms. See CASS R. SUNSTEIN, *WHY SOCIETIES NEED DISSENT* 1 (2003) ("Unchecked by dissent, conformity can produce disturbing, harmful, and sometimes astonishing outcomes."). What is important is that dissenters have a meaningful opportunity to persuade others that they are right. See *id.* at 104 ("What is crucial is that speakers are allowed to press claims and concerns that might otherwise be ignored by their fellow citizens."). For a policy change to succeed, a majority must, eventually, come to support it.

⁹⁸ See I ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA*, ch. XIV, pt. II (Henry Reeve trans., 2006) (1835) ("Debating clubs are to a certain extent a substitute for theatrical entertainments: an American cannot converse, but he can discuss; and when he attempts to talk he falls into a dissertation. He speaks to you as if he was addressing a meeting; and if he should chance to warm in the course of the discussion, he will infallibly say, 'Gentlemen,' to the person with whom he is conversing."); PARKINSON, *supra* note 4, at 35 ("[W]ithout the ability to present [a political] narrative in a physical way through a staged event—we significantly undermine our ability to attract the cameras and thereby fail to transmit our narrative to the wider *demos*. . .").

⁹⁹ PARKINSON, *supra* note 4, at 167.

¹⁰⁰ See DUNN ET AL., *supra* note 23, at 2.

¹⁰¹ *United for Peace & Justice v. City of New York*, 243 F. Supp. 2d 19, 31 (S.D.N.Y. 2003), *aff'd*, 323 F.3d 175 (2d Cir. 2003).

¹⁰² *Stauber v. City of New York*, No. 03 Civ. 9162(RWS), 2004 WL 1593870, at *4–6 (S.D.N.Y. 2004).

¹⁰³ See STEVEN H. SHIFFRIN, *DISSENT, INJUSTICE, AND THE MEANINGS OF AMERICA* xii (1999) ("Dissent . . . is a practice of vital importance to the self-realization of many individuals, and even more important, a crucial institution for challenging unjust hierarchies and for promoting progressive change.").

that “movements produce new ways of making sense of one’s life.”¹⁰⁴ In fact, it is arguably the case that in a variety of areas, such as

racism, sexism, [and] homophobia[], the stereotypical evils in question can only be responsibly addressed . . . by the voice and outlook of protesting individuals who self-organize in their own terms to . . . forg[e] new cultural narratives that more responsibly do justice to the lives and experience of persons who have suffered from and struggled against structural injustice.¹⁰⁵

Demonstrations energize public life in a way that cannot be reduced to traditional democratic values. Protests are “sites of contestation in which bodies, symbols, identities, practices, and discourses are used to pursue or prevent changes in institutionalized power relations.”¹⁰⁶ This is how many occupiers viewed the OWS movement from the inside. As recounted by one participant, “Zuccotti Park was our public commons, our agora . . . ‘the center of athletic, artistic, spiritual, and political life of the city.’”¹⁰⁷ A goal of OWS was challenging “‘agoraphobia . . . a fear of participating as a full citizen in the commons.’”¹⁰⁸

2. *The Costs of Protest*

So far, however, these values apply to protest activities in general, and do not provide a guide for analyzing how police should respond to particular protest events. To say that protest activities should be allowed *in general* says little about whether an individual event should be allowed or what practical restrictions the state ought to place on the manner of a given protest. Given the potential costs of protest activities, it is not hard to imagine plausible cases in which the harms of protest activity would outweigh democratic and cultural benefits. For instance, the staggering inconvenience of an indefinite sit-in on a public highway to protest transportation policy might outweigh any cultural or democratic benefits.¹⁰⁹

The practical harms of protest activity can include inconvenience, emotional harm, concealment of unrelated criminal activity, and a latent threat of

¹⁰⁴ Polletta, *supra* note 6, at 88–89.

¹⁰⁵ David A.J. Richards, *Constitutional Legitimacy, the Principle of Free Speech, and the Politics of Identity*, 74 CHI.-KENT L. REV. 779, 783–84 (1999).

¹⁰⁶ Taylor & Van Dyke, *supra* note 52, at 268 (emphasis omitted).

¹⁰⁷ Benjamin Shepard, *Occupy Wall Street, Social Movements, and Contested Public Space*, in *BEYOND ZUCCOTTI PARK: FREEDOM OF ASSEMBLY AND THE OCCUPATION OF PUBLIC SPACE 21* (Ron Shiffman et al. eds., 2012).

¹⁰⁸ *Id.*

¹⁰⁹ In the case of the Seattle WTO protests, discussed immediately below, state police successfully protected a highway from an attempted traffic blockage. Patrick F. Gillham & Gary T. Marx, *Complexity and Irony in Policing and Protesting: The World Trade Organization in Seattle*, 27 Soc. JUST. 212, 221 (2000). Under longstanding First Amendment doctrine, such police action is clearly permissible. See *Schneider v. Irvington*, 308 U.S. 147, 160 (1939) (deciding under the First Amendment that “a person could not exercise [the] liberty [to leaflet] by taking his stand in the middle of a crowded street, contrary to traffic regulations”).

violence against people or property. While this article emphasizes the value of protest activity in its description of the OWS and RNC events above, another example from recent history—the 1999 World Trade Organization (“WTO”) protests in Seattle—illustrates the dangers.¹¹⁰ Major activity started with a downtown protest on November 30 featuring “thousands of well-trained activists engaged in nonviolent civil disobedience” that effectively blocked the streets leading to WTO venues.¹¹¹ But while the vast majority of protesters were entirely peaceful,¹¹² nonviolent protest activity facilitated vandalism and threatening activity.¹¹³ “[A] small number of youth (the numbers reported vary from 25 to 200) . . . spray paint[ed] graffiti on downtown buildings [S]mall groups began breaking windows of retail stores such as Nike and The Gap, using hammers and crowbars concealed inside backpacks, as well as newspaper boxes and heavy steel grates.”¹¹⁴ Hearing reports of disorder, looters traveled to the protest area and exacerbated the situation.¹¹⁵

Estimates of property damage—including lost business sales—ranged from \$2.5 million to \$20 million and the city incurred \$9.3 million in expenses for hosting and policing the WTO events.¹¹⁶ These figures are undoubtedly underestimates. Just as the benefits of protest activity extend beyond tangible gains, the costs extend beyond tangible losses.¹¹⁷ People who lost the ability to enjoy the benefits of normalcy in downtown Seattle suffered meaningful harm, as did passersby and convention-goers whom the protestors taunted and insulted.

B. *Evaluating Police Responses to Protests in Light of Social Values and Harms*

Above, this article noted that the core feature of its suggested comprehensive evaluation approach is that police departments should consider the full panoply of benefits and harms flowing from protest activity before reaching a decision about how to respond to a particular event. As also noted, this recommendation applies only to protests falling inside the scope

¹¹⁰ See generally Gillham & Marx, *supra* note 109. The social values mentioned above are equally applicable to this case, but harms that were speculative in the context of OWS and the RNC protests were realized in Seattle.

¹¹¹ *Id.* at 215.

¹¹² See DONATELLA DELLA PORTA & MARIO DIANI, *SOCIAL MOVEMENTS: AN INTRODUCTION* 163–64 (2d ed. 2006) (describing numerous nonviolent practices and noting that “[o]n the fringes of the demonstrations, however, small groups did turn violent”).

¹¹³ SEATTLE CITY COUNCIL, *REPORT OF THE WTO ACCOUNTABILITY REVIEW COMMITTEE* 3 (2000) (“During the WTO conference, legitimate protest activity by thousands on Seattle’s streets became tangled with criminal acts of property destruction, vandalism, and assaults on police officers by a few persons . . .”).

¹¹⁴ Gillham & Marx, *supra* note 109, at 218.

¹¹⁵ *Id.* at 221.

¹¹⁶ *Id.* at 222.

¹¹⁷ For a rebuttal of the notion that speech harms are categorically less severe than physical harms, see generally Frederick Schauer, *The Phenomenology of Speech and Harm*, 103 *ETHICS* 635 (1993).

of this article—protests that are relatively long term and for which police departments already devote time to planning their responses. The argument is that values and harms *must* be compared if sensible decision-making is to occur for these kinds of protests.

Because the author believes that the risk of error lies on the side of overly restrictive policies as opposed to overly lax ones, this article proposes a set of criteria that are admittedly weighted toward protection. For those who doubt that the greater risk lies with overly restrictive policies, consider that positive public values are often left out of the decision-making equation entirely, that the majority will always have some incentive to quash dissent, and that there is a correlation between dissenting viewpoints and police suppression, discussed above.¹¹⁸

Further, two “meta criteria” inform the proposal below: equality and minimalism. First, the criteria must treat protesters equally irrespective of their political aims; the longstanding and recent history of inferior treatment tied to dissenting ideology suggests the need for strong safeguards to ensure that “threat perception” amounts to more than ideological prejudice.¹¹⁹ Current First Amendment doctrine, discussed above, recognizes that this is the balance to be struck in the abstract. But it fails to protect valuable speech activity in concrete applications, leaving far too much room for highly restrictive but nominally neutral constraints on expression.¹²⁰ Second, the notion of minimalism holds that if two choices are available with identical success in efficiently mitigating harm, the measure that minimizes restriction of expressive activity is preferable.

¹¹⁸ There is yet another reason to believe that the greater risk lies on the side of over-restriction: security threats, real or imagined, are highly salient in the public imagination and available for officials to exploit. In a study of individuals’ willingness to pay for different kinds of flight insurance, subjects offered insurance for death due to *any act of terrorism* were willing to pay about 20% more on average than subjects offered insurance against death due to *any reason* at all. Eric J. Johnson et al., *Framing, Probability Distortions, and Insurance Decisions*, 7 J. RISK & UNCERTAINTY 35, 39 (1993). In other contexts as well, researchers have found a similar dynamic. *Id.* at 40–42. This suggests that perceptions of risk increase when decision-framers cue ideas of specific catastrophic events (without any change in the underlying risk of such events). Policymakers meditating on the specific security risks of protests are unlikely to be immune from this distortion.

¹¹⁹ For a discussion of neutrality in the context of OWS policing, see Alafair Burke, *Policing, Protestors, and Discretion*, 40 FORDHAM URB. L.J. 999, 1017–20 (2013). For a striking example of ideologically driven disparate treatment in another context, see Don Mitchell & Lynn A. Staeheli, *Permitting Protest: Parsing the Fine Geography of Dissent in America*, 29 INT’L J. URB. & REGIONAL RES. 796, 809–10 (2005) (comparing policing of an April 2002 pro-Israel, pro-Bush Administration rally in Washington, D.C. to the policing of an April 2002 pro-Palestinian, anti-Bush Administration rally in the same city).

¹²⁰ As argued above, a policy approach is better than a litigation-based approach in this context in large part because city officials will ultimately control the use and regulation of public space. Cf. Judy Lubin, *The ‘Occupy’ Movement: Emerging Protest Forms and Contested Urban Spaces*, 25 BERKELEY PLAN. J. 184, 192 (2012) (“Given the response of city officials to Occupy, future movements seeking to utilize similar protest strategies may be thwarted by stricter regulation of . . . spaces, increased surveillance of activists, and heavy-handed police tactics. . . . In addition to its responsibility to promote efficiency and safety in the built environment, city planning (and regulation) should be concerned with furthering democratic participation.”).

With this in mind, this article proposes the following normative criteria for what comprehensive evaluation should look like in practice. This framework has three parts: a mechanism for evaluating benefits, a mechanism for evaluating harms, and a mechanism for comparing the two to reach a decision. The scope of this normative framework is limited to protests that satisfy the criteria listed in Part I.C.: (1) large groups, (2) avowed nonviolence, (3) claims on government, and (4) extended duration.

On the benefit side, the key is to treat protesters' expressive activity as inherently valuable regardless of their particular message. The relevant thought experiment is to imagine a value or message one cares deeply about (perhaps the idea one cares most about) and substitute that for the protesters' actual message. Ideally, references to the actual content of the protesters' message would not be revealed to the decision maker so as to ensure equality, and the decision maker would not inquire about the substantive aims of a protest (after ascertaining that it dealt with government policy).

On the harm side, the task is to accurately and persuasively quantify harms, discounting them by their probability of occurrence. Small harms, like pedestrian inconvenience and the emotional displeasure (for some) of witnessing dissent, are fairly certain to occur. Severe harms, like terrorism or a mass riot, are exceedingly rare offshoots of nonviolent demonstrations. Before nightmare scenarios substantially influence decision-making, there should be persuasive evidence of a nontrivial probability that they will occur.¹²¹

Since a direct common-denominator comparison between intangible benefits and tangible harms is impossible, the general rubric for weighing them against each other should be rule based. Specifically, the rule should be that police officers should intervene to prevent harm in two cases: (1) where doing so does not conflict with the democratic and social values underlying protest activity (assuming intervention does not cost more than the harm it prevents), and (2) where intervention directly addresses severe harms, amply supported by evidence.

In one sense, the first category is trivial. Clearly, police departments should act to prevent harms efficiently when there is no conflict with values. However, as the case of the OWS encampment in Zuccotti Park demonstrates, police departments do not always heed this approach. For example, providing sanitation services to demonstrators is likely an efficient way to satisfy concerns about poor sanitary conditions without impinging on positive democratic and cultural values. Similarly, to deal with potential terror threats, police could monitor the air for hazardous materials without any impact on protest activity.¹²² The general point, which is by no means trivial,

¹²¹ Bear in mind that this is the normative ideal. If it is not pragmatic to quantify harms perfectly, the question is how to approximate them in a way that is feasible.

¹²² As early as 2003, New York City hosted several federally-sponsored air monitoring stations designed to detect biohazards. Judith Miller, *Threats and Responses: Biological Defenses; U.S. Deploying Monitor System for Germ Peril*, N.Y. TIMES, Jan. 22, 2003, at A1. State of the art technology is approaching the point at which simple portable or mounted devices

is that police departments should minimize their restriction of protest whenever possible by implementing ways to mitigate harms or compensate potential victims. Even the arrests of OWS protesters marching across the Brooklyn Bridge, which may appear at a glance as an appropriate action to address a severe inconvenience, demonstrates the NYPD's failure to appreciate the costliness of their chosen intervention relative to other options. The bridge blockage could have been resolved at less inconvenience to motorists and lower administrative cost to the city by allowing the protesters to cross the bridge and then arresting any protesters who lingered in the roadway after a reasonable amount of time had passed.

The second category, however, is where the NYPD has committed its gravest errors. The department has acted on hazy evidence of severe harm and concrete evidence of slight harm to curtail protest activity with significant democratic and cultural value.¹²³ Its mass arrests at the RNC and various OWS marches and its forceful eviction of the Zuccotti Park campers demonstrate a failure to appreciate the democratic and cultural costs of strict law enforcement.

Of course, with credible evidence of a terrorist attack planned during a march, prophylactic measures would be the appropriate course to protect protesters and residents alike. But when the expected harm is minor vandalism or a temporary traffic blockage that will occur whether or not arrests take place, there are insufficient grounds for preventing expressive activity within this article's scope.

An intermediate class of events, which potentially fall into the second category, concerns harms that are significant but not as severe as a terrorist attack or a mass riot. For example, the harm of smashing shop windows—as occurred during the Seattle WTO protests—or of a march to a highway with the intent to indefinitely block traffic. Under my proposed framework, these events fall into the second category, where police intervention is appropriate if the police wait until the activity is ongoing or imminent before restricting expressive activity¹²⁴ and do so in a way that is minimally restrictive (i.e., targeted to the individuals actually engaging in the conduct). In other words, police should operate under the assumption that each protester will comport herself well until the police are proven wrong by hard facts. Effectively, this

will be able to detect explosives in the air. *See* Press Release, N.Y.C. Coll. of Tech., City Tech Professor Andy Zhang Develops Portable Device to Monitor Air Quality (June 23, 2014), <http://perma.cc/KRN5-B5BW>.

¹²³ Recall Mayor Bloomberg's justification for evicting the OWS encampment: "From the beginning, I have said that the city has two principal goals: guaranteeing public health and safety, and guaranteeing the protesters' First Amendment rights. . . . But when those two goals clash, the health and safety of the public and our first responders must be the priority.'" Long & Dobnik, *Zuccotti Park Eviction*, *supra* note 55.

¹²⁴ This standard is analogous to the Supreme Court's standard for statutory penalties on political speech delivered to a crowd: "[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

rule balances order maintenance with democratic and social values by increasing the burden of proof for intermediate harms relative to the proof needed to intervene in the case of extremely severe harms. This rule also safeguards against potential biases in police perceptions of which ideological viewpoints tend toward violence.

The above discussion is abstract because its purpose is to establish a normative baseline against which to judge police actions. Below, the article builds off of this framework to identify a practical protest policing paradigm that would implement these principles.

C. *A New Paradigm of Protest Policing: Responsive Engagement*

The basic premises of negotiated management policing are sound: police should tailor techniques to avoid severe harm with a broad tolerance for minor disruptions and a willingness to interact constructively with protesters. There should be a continual dialogue between police and protesters. The paradigm can be improved by instilling police practices that reflect a genuine, as opposed to a politically instrumental, concern for the values of protest activity. In defining a new paradigm, this suggests an approach that embraces *engagement* and *responsiveness* in the specific senses detailed below.

Engagement: A police department practicing responsive engagement should exhaust the possibilities for creating public value in ways that do not detract from the democratic and cultural benefits of protest. Frequently, this means communicating clearly with protesters about governmental concerns related to their activity coupled with a willingness to allow protesters to implement solutions that meet those concerns. In other words, if the concern is sanitation, the police should provide opportunities for protesters to implement sanitation improvements and help them solve the problem with government resources. In a wide variety of cases, protesters themselves can mitigate harms associated with their activities in ways that build collective identity. While some may question whether protesters are capable of mitigating such harms, protesters should at least be afforded a genuine opportunity to self-regulate. As with negotiated management, police should continuously engage with protesters to find solutions. Unlike negotiated management, this should be a nonadversarial process. Police should not surreptitiously rig the game against protesters. Instead, negotiating officers should come to the table with an interest in seeing that protesters are able to convey their messages peacefully.

Responsiveness: In the course of a protest event, police should be responsive, rather than preemptive, in responding to severe harms (“violence”). By responding to ongoing, imminent, or well-evidenced violence instead of regulating peaceful protesters to prevent any risk of violence, police demonstrate respect for the individual autonomy of protesters—their capacity to make decisions that belie assumptions based on their ideological leanings. This ensures neutrality in police treatment of dissenters and status quo supporters, while according weight to incommensurable values con-

nected to protests. An added benefit is that police avoid triggering negative feedback cycles, like the one in Seattle's WTO protests, where police violence triggered protester violence and the protester violence heightened police violence.¹²⁵ Responsiveness allows ample room for police intervention when violence is actually occurring or virtually certain to occur. It does not allow vague threats of catastrophic harm to preempt protesters' expression.

This Part began by enumerating the possible benefits and costs of protests. It then proposed a set of normative criteria that would facilitate balancing these benefits and costs in a way that acknowledges the risks of overregulation. These criteria included restricting intervention to cases where it either: (1) does not conflict with positive values or (2) directly addresses severe harms, the existence of which are established by evidence of ongoing or imminent misconduct. The final section of this Part translated these criteria into a new paradigm for protest policing. The features of this paradigm are: (1) constructive engagement with protesters to facilitate the benefits of their activities while minimizing harms, and (2) responsiveness to developing violence, if any.

IV. GAUGING OPTIONS FOR REFORM

Implementing a new framework for evaluating police actions and a new paradigm of protest policing poses a challenge. Different institutional actors may be more or less willing—and able—to facilitate reform. This section addresses, and rejects, the argument that courts applying constitutional law would be well suited to manage implementing the new paradigm. It then looks at other public actors as candidates for implementing a responsive engagement approach.

A. *The Courts: Constitutional Infringement Versus Unsound Policy*¹²⁶

One possible solution to the present imbalance between the harms and values described above would be litigation to extend the constitutional framework under the First or Fourth Amendment. Adding a layer of judicial scrutiny to protest policing decisions could, in theory, achieve a balance between the relevant harms and values. Such an approach, however, would be neither doctrinally nor practically sound.

The problem with using the courts as the forum for reforming protest policing is at least threefold: the current constitutional doctrine strikes a con-

¹²⁵ After tear gas proved ineffective at dispersing nonviolent protesters, "police escalated their use of force, including the use of rubber bullets." Gillham & Marx, *supra* note 110, at 212. As the intensity of police action increased, the amount and intensity of vandalism and violence increased. *Id.* at 217–18. This, in turn, motivated an even more intense police response. *Id.* at 221.

¹²⁶ This framework is inspired by Richard Fallon's analysis of First Amendment jurisprudence. Richard Fallon, Constitutional Law: First Amendment Lecture at Harvard Law School (Spring 2014) (notes on file with author).

servative¹²⁷ balance between values and harms; there is an inherent difficulty in allowing judges to make decisions concerning antiestablishment expressive activity; and any discussion about a constitutional floor is simply different from a discussion about optimal social policy and practical implementation.

A conservative balance between values and harms: While democratic and cultural values are sometimes taken to be the core principles underlying the First Amendment,¹²⁸ the Court is especially sensitive to the harms engendered by protests. The outcome of this balance is that content-neutral regulations of the time, place, and manner of protests are generally upheld under a highly permissive test. In a line of public expression cases, notably including *Clark v. Community for Creative Non-Violence* (1984)¹²⁹ and *Ward v. Rock Against Racism* (1989),¹³⁰ the Court has held that efficacy-undermining restrictions on protest are permissible under a thin analysis of harms and benefits.

Clark dealt with an organization that wished to call public attention to homelessness. The organization's plan was to erect tents in Lafayette Park and the National Mall in which homeless people could demonstrate by day and sleep by night.¹³¹ While the organization received permits to erect the tents, the National Park Service relied on existing regulations to prevent demonstrators from sleeping there.¹³² Admitting that sleeping was both an expressive activity in this context and that it "would be difficult to get the poor and homeless to participate" without the ability to sleep and eat at the demonstration site,¹³³ the Court found that the anti-sleeping regulation was "a reasonable time, place, or manner regulation that withstands constitutional scrutiny."¹³⁴ It did so by looking away from the marginal harm of sleeping in tents that were already constructed and validly permitted, and focusing instead on hypothetical harms prevented by the regulation itself: "damage to the parks as well as their partial inaccessibility to other members of the public."¹³⁵ As for the benefits undermined by the regulation, the Court's analysis minimized the relevance of sleeping in the park for both expressing a message and facilitating participation in the event.¹³⁶ The Court also equated the anti-sleeping regulation with "traffic laws, sanitation regulations, and laws to preserve the public peace."¹³⁷ Certainly, this equation

¹²⁷ As used here, the term "conservative" means reluctant to deviate from traditional concerns with security and order.

¹²⁸ See, e.g., Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 257 (1961) (discussing democratic values underlying the First Amendment); Balkin, *supra* note 6, at 4 (discussing cultural values underlying the First Amendment).

¹²⁹ 468 U.S. 288, 298 (1984).

¹³⁰ 491 U.S. 781, 791 (1989).

¹³¹ *Clark*, 468 U.S. at 291-92.

¹³² *Id.* at 290-92.

¹³³ *Id.* at 296.

¹³⁴ *Id.* at 297.

¹³⁵ *Id.* at 298.

¹³⁶ *Id.* at 295.

¹³⁷ *Id.* at 298.

does not bode well for public demonstrators, whose activities inherently have effects on traffic, sanitation, and the “public peace.”

The Court cemented this mode of First Amendment analysis in *Ward*, where it held that the test for content neutrality—the doctrinal toggle switch between a permissive test and a searching one—“is whether the government has adopted a regulation of speech *because of* disagreement with the message it conveys,”¹³⁸ and that any analysis of whether less restrictive regulations could achieve the same practical benefits “has never been a part of the inquiry into the validity of a time, place, and manner regulation.”¹³⁹ The fate of protesters’ rights thus depends on the Court’s view of a regulation’s purpose as opposed to a practical look at a regulation’s disparate effects on different types of messages.

After these cases, regardless of whether one agrees or disagrees with the Court’s analysis and ultimate conclusions about constitutional law, the baseline doctrine is highly conservative. The doctrine strikes a balance that gives much greater weight to government concerns about maintaining order than to concerns about the integrity or efficacy of expression.

The balance in favor of order over expression has especially perverse consequences for antiestablishment public demonstrations that may pose security risks:

[I]nfluential protests are so because of their strategic timing, placement, and manner; vulnerability to terrorism increases, or is perceived to increase, at protests with strategic timing, placement, and manner. The result: current law allows the state to impose time, place, manner restrictions on protests, which materially alter the expressive content of the demonstration, which infringes upon the speech and assembly rights of protesters in the name of terrorism prevention.¹⁴⁰

Current Fourth Amendment doctrine strikes a similarly skewed balance in the context of protest policing. There is little in the doctrine to stop a police officer from arresting a protester who the officer reasonably believes has committed a crime, such as obstructing a sidewalk or a road.¹⁴¹ As one scholar summarizes the doctrine, “[t]emporary restrictions on liberty are permitted as long as reasonable suspicion of criminal activity is present[;] . . . custodial arrest is permissible as long as probable cause exists to believe the arrestee has committed a crime . . . and courts are generally deferential to officers in determining whether the level of force used was reasonable.”¹⁴²

Inherent unsuitability of courts for judging antiestablishment protests: But the flaws of the constitutional doctrine do not imply that raising the

¹³⁸ *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (emphasis added).

¹³⁹ *Id.* at 797 (quoting *Regan v. Time, Inc.*, 468 U.S. 641, 657 (1984) (plurality opinion)).

¹⁴⁰ Nick Suplina, *Crowd Control: The Troubling Mix of First Amendment Law, Political Demonstrations, and Terrorism*, 73 GEO. WASH. L. REV. 395, 397 (2005).

¹⁴¹ See N.Y. PENAL LAW § 240.20(5) (McKinney 2014).

¹⁴² Burke, *supra* note 119, at 1005.

constitutional bar is the answer. Heightening scrutiny on protest restrictions would still leave courts in the position of deciding whether a given restriction was closely tailored to suit an important government interest.¹⁴³ Applying such a test would require judges to trade off between important government interests and protesters' expressive rights. When the Court has been called to perform analogous balancing tasks in the First Amendment context, the results do not show a consistent or coherent approach to weighing the relevant interests at stake.¹⁴⁴ In fact, recognizing its poor position to make such tradeoffs, the Court has expressly disclaimed its capacity and authority to balance values against harms in the very process of doing so.¹⁴⁵ The haziness of intermediate scrutiny under the First Amendment has produced a paradigmatic example of legal indeterminacy—accepted tools of legal analysis cannot resolve whether a given outcome, or its opposite, is legally correct.¹⁴⁶ This bodes ill for protesters' rights because judges applying heightened scrutiny under the First Amendment are forced to characterize facts and infer whether harm is likely to result—a task heavily influenced by social circumstances, ideological commitments, and identity.¹⁴⁷

Broad tolerance for practical limits on protest activity is not simply a flaw with current doctrine that could be corrected by a more searching analysis of time, place, and manner restrictions. Against the backdrop of a generally conservative judiciary and with security interests in play, a victory on heightened scrutiny would likely achieve little practical protection. In fact, a

¹⁴³ The Second Circuit recently applied an intermediate scrutiny test to the NYPD's protest zone restrictions during the 2004 RNC and found such restrictions amply justified under the First Amendment. *Marcavage v. City of New York*, 689 F.3d 98, 104 (2d Cir. 2012) (NYPD's protest zone system during the 2004 RNC was narrowly tailored to an important government interest because "[g]overnment 'certainly has a significant interest in keeping its public spaces safe and free of congestion.'" (quoting *Bery v. City of New York*, 97 F.3d 689, 697 (2d Cir. 1996))).

¹⁴⁴ See, e.g., *United States v. Stevens*, 559 U.S. 460, 474 (2010) (characterizing the law at issue as overbroad and implying that some portrayals of animal cruelty are prohibitable due to their harmfulness and lack of redeeming social value); *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010) (implicitly weighing the harmfulness of support to terrorist organizations against the value served by the speech at issue); cf. *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2739 (2011) (concluding that the empirical evidence on the harmfulness of violent video games was insufficient to overcome the presumption in favor of protecting speech).

¹⁴⁵ See, e.g., *Stevens*, 559 U.S. at 470 (calling such a balancing approach "startling and dangerous").

¹⁴⁶ See Mark Tushnet, *The Critique of Rights*, 47 SMU L. REV. 23, 32–33 (1993); Mark Tushnet, *Defending the Indeterminacy Thesis*, 16 QUINNIPIAC L. REV. 339, 341 (1996).

¹⁴⁷ See generally Dan M. Kahan, *Foreword: Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, 125 HARV. L. REV. 1 (2011). Two cases that vividly illustrate the flexibility of First Amendment doctrine to social circumstances and ideological commitments are *Holder*, 561 U.S. 1 (2010), which upheld a congressional ban on peaceful political speech that would have aided a designated terrorist organization, and *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), which upheld a local zoning ordinance effectively eliminating adult theaters as a content-neutral time, place, and manner restriction. As Dan Kahan notes, *Cox v. Louisiana*, 379 U.S. 536 (1965), is a prime example of Justices characterizing facts in order to infer whether harm is likely to result. Kahan, *supra*, at 47–48 (noting the difference in perception between the majority and dissent where the majority saw "orderly" behavior by demonstrators portrayed on film, while a dissenting Justice saw an intimidating "mob of young Negroes" in the same film).

quest for greater constitutional protection in this context would likely distract advocates from straightforward arguments about “good policy”¹⁴⁸ directed at local officials with the power and inclination to make such changes.

The constitutional floor meets practical implementation: There are two further practical considerations that cast doubt on a judicial solution to the problem of overly aggressive protest policing. First, as with the lawsuits related to the RNC and OWS protests, a generous legal settlement for wronged protesters does little to incentivize good police behavior. Instead, taxpayers—including the protesters themselves—foot the bill for police wrongdoing or bear the negative consequences of strains on the public fisc. Even if a settlement or judgment fully compensates for private harms to individual protesters, it is unlikely to account for the democratic and cultural harms generated by police conduct. Legal victories for demonstrators have generated another perverse irony: the public bears the value-based harm and fiscal harm, while the police continue the status quo approach.

Second, assuming away all practical difficulties in reforming the doctrine, the discussion about optimal protest policing policies is simply distinct from the discussion about optimal constitutional doctrine. Judges craft doctrines knowing that they lack critical information about conditions on the ground, that they cannot act promptly to advise police departments in thorny situations, and that orders from the bench are not self-enforcing. To ask constitutional doctrine to provide clear guidance on how police departments should respond to the full variety of protest situations is asking too much. The doctrine can certainly screen out the most egregious cases of abuse, but police departments will always be the primary decision makers and will always have the flexibility to apply rules to their advantage.

In light of the flaws with constitutional law as a vehicle for changing protest-policing practices in New York City, judges and courts should not be the primary focus of advocates’ efforts. Instead, advocates should seek to empower public actors closer to the day-to-day practicalities of police decision-making.¹⁴⁹

Beyond court-based reform, the spectrum of possible reforms runs from establishing a new division within the NYPD to empowering an independent city agency—such as the Civilian Complaint Review Board (“CCRB”)—to facilitate the responsive engagement process and monitor police conduct. Each of these options is considered below.

B. Internal NYPD Reforms

Just as the NYPD currently implements a form of command and control policing, the department could undertake an internal reorientation toward

¹⁴⁸ Tushnet, *The Critique of Rights*, *supra* note 146, at 34.

¹⁴⁹ In line with Moore’s strategic analysis of change in the public sector, I evaluate different options according to their substantive public value, their political feasibility, and the organizational capacity of the proposed decision maker. MARK H. MOORE, CREATING PUBLIC VALUE: STRATEGIC MANAGEMENT IN GOVERNMENT 73–74 (1995).

responsive engagement policing. This would require retraining officers, appointing a negotiation team, and reorienting the mission of officers in the context of protest policing from strict order maintenance to genuine concern for balancing the expressive value of protest activity with the duty to avoid severe harms.

This approach suffers from severe problems along the dimensions of public value, organizational capacity, and authorizing environment.

Public value and organizational capacity: In this context, public value should be assessed based on fidelity to comprehensive evaluation and responsive engagement. The question to ask is whether internal reforms can create a police department that follows the new paradigm. The answer depends on the NYPD's organizational capacity—it depends on whether, considering everything about the NYPD's capabilities as an institutional actor, this transformation is feasible in the near future.¹⁵⁰ While a complete discussion of the structure of the NYPD, its management practices, and its capacity for reform is beyond the scope of this article, it offers some preliminary observations.

As the history of the RNC and OWS protests demonstrates, NYPD decision-making takes place within a culture that prioritizes security over concerns about values, particularly values that would pose a risk of impeding orderly society if accommodated.¹⁵¹ The NYPD's culture is not easily changed. Because the NYPD is hierarchical, positive cultural changes from the bottom cannot simply propagate upwards or cross internal silos; meanwhile, cultural pressures from top political appointees vary with political headwinds and are unlikely to be persistent enough to effect lasting cultural change.¹⁵² The organizational culture of the NYPD is certainly starting from a difficult baseline if the goal is to protect expressive activity.

Another institutional feature of the NYPD that cuts against its ability to implement responsive engagement is the fact that police officers are, almost

¹⁵⁰ The organizational capacity question asks what resources and capabilities, "including new investments and innovations" the NYPD would have to draw from or develop to achieve these results. Mark Moore & Sanjeev Khagram, *On Creating Public Value: What Business Might Learn from Government about Strategic Management 2* (Corporate Social Responsibility Initiative, Working Paper No. 3, 2004), <http://perma.cc/GJ2D-S46Q>.

¹⁵¹ For another example of NYPD culture, Police Commissioner Raymond Kelly's remarks after Mayor Bill de Blasio's election are representative. After accusing the Democratic mayoral candidates of pandering to voters by opposing stop-and-frisk, Kelly asserted that minority communities actually *support* stop-and-frisk and further asserted that blanket surveillance of Muslim communities was defensible. *NYPD Chief: Bill de Blasio 'Full of It' Over Stop-and-Frisk Publicised Views*, ASSOCIATED PRESS (NOV. 15, 2013), <http://perma.cc/Q6TJ-U8PU>. Kelly attributed internal dissension about the NYPD's policies to "disgruntled people in the NYPD who had retired or didn't get promoted" and said that federal officials opposed the NYPD because the department had "the nerve to [move] into the counterterrorism area that the federal government wanted to have a monopoly on." *Id.*

¹⁵² See, e.g., ELI B. SILVERMAN, *NYPD BATTLES CRIME: INNOVATIVE STRATEGIES IN POLICING 47–48* (1999) (discussing an attempt to reform the NYPD's supervisory culture that insiders "fiercely resisted" and that fizzled due to the strength of traditional attitudes and bureaucratic inertia). See also *id.* at 195 ("Previous [NYPD] reform efforts disintegrated once their vigilant champions left the scene.").

by definition, members of the established order that dissenters seek to challenge. As suggested in Part II.A., police are poorly positioned to forecast whether protesters are prone to violence because they are likely to conflate antiestablishment (or antipolice) views with violent tendencies—just as a law professor might feel more “threatened” by students protesting against her classroom pedagogy than by students assembling to praise her merits. For police officers to reconceive their role as enablers of dissent would require both a cultural shift and an uncanny ability to shield themselves from cognitive biases.¹⁵³

All this makes it difficult to imagine how retooling internal procedures could lead to a situation in which protesters would be treated equitably, irrespective of ideology, and with due respect for preserving the integrity of their activities.

Authorizing environment: Yet another problem with an internal reform approach is that it creates a tension between what members of the general public see as the role of the NYPD and their mission under the new paradigm. The public appears to judge the NYPD based on its ability to control disorder while avoiding egregious civil rights violations, not on its ability to foster expression or advance other incommensurables. New Yorkers are generally happy with the way the police department takes care of its order maintenance responsibilities.¹⁵⁴

C. *Empowering an Independent Authority*

The alternative to internal reform is external reform, establishing a new city agency or empowering an existing one to manage the responsive engagement approach. While no available alternative is perfectly adapted for implementing responsive engagement, an independent authority is the most promising option. An independent authority, particularly one housed in an existing city agency, would have several advantages as a protest policing manager: it would have its own organizational culture; it would be able to build practical expertise in protest policing from an impartial perspective; it would face public scrutiny for its success in achieving goals other than security; and it would draw on existing human resources, keeping costs low

¹⁵³ Although some may take this point to imply that responsive engagement is hopeless, it merely suggests the need to create a persistent, bureaucratically entrenched source of pressure. If such pressure cannot be supplied internally, then it must be supplied externally.

¹⁵⁴ Michael M. Grynbaum & Marjorie Connelly, *Majority in City See Police Favoring Whites, Poll Finds*, N.Y. TIMES, Aug. 21, 2012, at A1. (“57 percent of New Yorkers said they approved of the way [Mayor Bloomberg] was dealing with crime, and 61 percent said they approved of the way [Commissioner Kelly] was handling his job.”). In a December 2014 poll conducted days after a grand jury failed to indict an NYPD officer “whose chokehold on an unarmed black man led to the man’s death,” David J. Goodman & Al Baker, *New York Officer Facing No Charges in Chokehold Case*, N.Y. TIMES, Dec. 4, 2014, at A1, 73 percent of New Yorkers polled said the NYPD is doing a “fair” job or better, with 44 percent answering that the NYPD is doing a “good” or “excellent” job, N.Y. TIMES/SIENNA COLL. POLL, DECEMBER 4–10, 2014 (2014), <https://perma.cc/ST8E-GZBN>.

relative to an entirely new government body or a new training program for police officers.

The Civilian Complaint Review Board (“CCRB”), whose mission is to “receive, investigate, mediate, hear, make findings, and recommend action on complaints against New York City police officers,”¹⁵⁵ is a prime contender for this role. Similarly, the recently established Office of the Inspector General for the NYPD (“OIG”), whose mission includes making operational recommendations to “protect civil liberties and civil rights,” could serve as a protest-policing manager.¹⁵⁶

The CCRB is structured as a backward-looking organization, but has expertise evaluating police conduct and understands the mechanics of the NYPD’s internal operations. The OIG is gradually building its capacities from scratch, and is intended to be forward looking as well as backward looking.¹⁵⁷ Neither agency is currently tooled to provide real-time feedback to the NYPD. Regardless of the particular host agency, this article proposes retooling it to allow real-time management and advice. Specifically, the agency would ideally be able to convene negotiations between the NYPD and protesters, mediate those negotiations, and issue binding recommendations for the NYPD where an agreement cannot be reached. Additionally, the agency would serve as a clearinghouse through which the NYPD would be required to submit protest-policing plans before putting them into effect on the ground, time permitting.¹⁵⁸

Whether it be the CCRB, the OIG, or another organization, an independent agency has crucial advantages along the dimensions of public value, organizational capacity, and authorizing environment.

Public value and organizational capacity: Compared to the NYPD, the CCRB and OIG have a greater chance of building the institutional capacity to apply responsive engagement in the near term. These agencies do not bear the burden of the NYPD’s organizational culture; they have their own cultures reflecting different values and beliefs. As officials in these agencies are civilians, they stand in a relatively good position to conduct analyses involving governmental and protester interests. Given their institutional positions—government agencies with responsibility for overseeing government abuses—they have a much greater likelihood of maintaining neutrality with respect to protesters’ ideologies and a much better perspective on the trade-offs between the positive values and harms of protests. Further, they are more likely to attract employees with diverse social and political views,

¹⁵⁵ *About CCRB*, N.Y.C. CIVILIAN COMPLAINT REVIEW BD., <http://perma.cc/AF6T-4AVS>.

¹⁵⁶ *About NYPD Inspector General*, NYPD INSPECTOR GEN., <http://perma.cc/B3XQ-CWHD>; cf. GLOBAL JUSTICE CLINIC (NYU SCHOOL OF LAW) ET AL., SUPPRESSING PROTEST: HUMAN RIGHTS VIOLATIONS IN THE U.S. RESPONSE TO OCCUPY WALL STREET 130–131 (2012), <http://perma.cc/A5M6-Q4YB> (recommending that the Inspector General play a role in protest policing).

¹⁵⁷ *About NYPD Inspector General*, *supra* note 156.

¹⁵⁸ Realistically, there will often be unpredictable situations requiring an immediate response. In such situations, the backward-looking functions of the agency might stand a chance of incentivizing better police decision-making.

some of whom may be less suspicious of dissenting ideologies. Creating a new institutional home for protest management would provide a much-needed fresh slate for a team of impartial experts.

Authorizing Environment: A major flaw with the NYPD as a protest manager, as noted above, is the fact that the public is more likely to judge its success based on security outcomes, rather than speech-promoting ones. An external agency would have the benefit of facing public scrutiny for its success in pursuing other goals as well, such as whether it succeeds in facilitating nonviolent protests.

Yet another benefit of external control of protest policing—and one that makes the approach more politically feasible—is that the policy change would be relatively low cost. By utilizing an existing agency, this approach would not create an expensive new bureaucracy, and could reduce expenses for the NYPD by replacing otherwise necessary police retraining (and hopefully reducing the ground force required to manage protests).

Controversy will likely stem, however, from the idea of subjecting the NYPD to oversight outside its chain of command. This concern is real, but should not be overstated. The City Council successfully enacted the Inspector General Law as recently as March 2014 to provide more oversight of the NYPD's policies and tactics.¹⁵⁹ The position comes with subpoena power and its recently appointed leader, Philip Eure, has pledged to “go wherever the facts lead.”¹⁶⁰ In the present political moment, New Yorkers are open to reforming policing practices. For another example, even though most New Yorkers (77%) favored some form of stop-and-frisk according to a 2013 poll, a substantial majority (58%) “want[ed] the practice modified and improved.”¹⁶¹ With respect to public value, institutional capacity, and its legitimating environment, the CCRB and the OIG have many advantages over the NYPD.

CONCLUSION

This article has argued that the practical constraints on protests can subvert large public benefits to avoid marginal social costs. In New York, political dissenters encounter strict limits on their activities during their interactions with the NYPD in large-scale public protests. Focusing on such interactions in the particular context of nonviolent political protests in New York City, this article has highlighted the inadequacy of current responses to protests. Building on the normative ideal of comprehensively balancing the harms and benefits of protests, this article proposes a practical paradigm of responsive engagement. The new paradigm resists an overly restrictive and proactive approach to containing protest disorder and allows breathing room

¹⁵⁹ See Kate Taylor & J. David Goodman, *Police Department's Oversight Office, Fought by Bloomberg, Gets First Leader*, N.Y. TIMES, Mar. 29, 2014, at A17.

¹⁶⁰ *Id.*

¹⁶¹ Matthew Chayes, *Poll: Stop-Frisk Supported, but with Revisions*, NEWSDAY (Oct. 24, 2013), <http://perma.cc/VN4S-SGV8>.

for the positive values of protest to flourish. Based on the NYPD's poor track record, as well as policing dilemmas that apply more broadly, the article suggests that an independent body ought to facilitate police-protester negotiations and make real-time decisions on tactics to be deployed.

Promisingly, the administration of New York City Mayor Bill de Blasio is now implementing a sweeping array of police reforms in the domains of stop-and-frisk, surveillance, and oversight. With an agenda targeted at changing the NYPD, the political climate is ripe for a fundamental shift in the way the New York City government polices protests. New York should seize this opportunity to implement reform.