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NOTE

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THE ARKANSAS JOURNAL OF SOCIAL CHANGE AND PUBLIC SERVICE

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ABOUT THE JOURNAL

The Arkansas Journal of Social Change and Public Service is a vehicle for identifying and addressing the pressing needs of our society. It examines issues lying at the intersection of policy, public interest, academia, and the law, raising awareness of topics insufficiently examined in traditional scholarly publications.

The Journal seeks contributions in a variety of formats not only from academics, but also from advocates, students, and members of the general public in an effort to provide the broadest possible array of analysis and opinion. This approach fosters dialogue that reaches beyond a single discipline or perspective.

Reflecting the fact that world events do not occur in semi-annual installments, the Journal's content is dynamic, with frequent updates occurring through the efforts of its staff and outside contributors.

The Journal will serve as a gathering place and a rallying point for those committed to public service, public policy, and public advocacy. A candid and open exchange of ideas will provide guidance in the formation of initiatives not only in Arkansas but throughout the world.

See ualr.edu/socialchange for more information on the Journal.

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EDITOR'S PREFACE

Elizabeth Kimble

Welcome to Volume 11, Issue 2 of the Arkansas Journal of Social Change and Public Service! We are proud to present this issue in light of the still-turbulent times we find ourselves. Sociologists often define social change as the shift in human interactions that *transform* the existing cultural institutions, and the authors in this issue speak to several instances.

First, in *Minnesota's Police Accountability Act: What It Means For The Future Of Policing*, Commander Eric Vang-Sitcler of the Saint Paul, Minnesota Police Department considers the historical import of the new Police Accountability Act rising from the murder of Mr. George Floyd. Giving us a personal insight into the implications of the new provisions, this piece analyzes the opportunity to move forward with transparency and responsibility.

Next, Mr. Thomas McQuain explores the history and effectiveness of non-violent protests contrasted though today's increasingly polarized and often violent demonstrations in *The Public's Microphone: The Legal Foundation of American Protests And The Evolution Of Society's Many Voices*. The rapidly changing media landscape has changed both the methodology of organization and the tone and tenor of content within.

Finally, Macy Klein Eldredge's student Note brings the focus home with *Arkansas Supreme Court Upholds Constitutionality of Cash-Only Bail In Trujillo v. State*. In a state where the overwhelming majority of defendants are indigent, cash-only bail results in a disproportionately harmful and punitive overreach.

Together, these articles speak to the dramatically shifting social movements and mores as a result of long-standing suffering and oppression. It is our hope this issue contributes positively to the current discussion while moving the needle forward for our country.

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MINNESOTA'S POLICE ACCOUNTABILITY ACT: WHAT IT MEANS FOR THE FUTURE OF POLICING

Eric Vang-Sitcler [1]*

I. INTRODUCTION

On May 25, 2020, Minneapolis police officer Derek Chauvin and three other Minneapolis police officers arrested Mr. George Floyd after he used a counterfeit $20 bill to buy cigarettes.[2] Seventeen minutes after the first squad car arrived, Mr. Floyd was dead.[3] All four officers were fired the next day.[4] Within a week, all four were criminally charged for their roles in Mr. Floyd's death.[5] Moving forward, I use the term murder to refer to Mr. Floyd's death because Mr. Chauvin was found "guilty of second-degree unintentional murder, third-degree murder and second-degree manslaughter."[6] I remember the days that followed Mr. Floyd's murder because I was working as a police officer. I was a sergeant with the Saint Paul Police Department. Saint Paul borders Minneapolis and they are commonly known as the Twin Cities.

Within hours of its release, the video of Mr. Floyd's murder went viral on social media.[7] That night, I saw thousands of people take to the streets and express their rage at the brazen murder of an African American man at the hands of peace officers. I saw many of the businesses in my city looted and burned to the ground during the civil unrest that followed. At one

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[2] Evan Hill et al., *How George Floyd was Killed in Police Custody*, N.Y. TIMES (last updated Jan. 24, 2022), https://www.nytimes.com/2020/05/31/us/george-floyd-investigation.html?auth=link-dismiss-google1tap.

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] Chao Xiong & Paul Walsh, *Derek Chauvin, Convicted of Murdering George Floyd in Minneapolis, is Led Away in Handcuffs*, STAR TRIB. (Apr. 21, 2021, 5:36 AM), https://www.startribune.com/derek-chauvin-convicted-of-murdering-george-floyd-in-minneapolis-is-led-away-in-handcuffs/600048324/.

[7] Nelson Oliveira, *'A Hero': Darnella Frazier who Filmed Viral Video of George Floyd's Murder Credited with Making Guilty Verdict Possible*, N.Y. DAILY NEWS (Apr. 21, 2021, 5:17 PM), https://www.nydailynews.com/news/national/ny-darnella-frazier-praised-as-hero-for-filming-floyd-murder-20210421-jlziqd3mfvgchdzi57whmkh3r4-story.html.

point, I was part of a caravan of squad cars that went to Minneapolis to assist their officers. As we drove, we had to dodge cars that were crashed and left in the middle of intersections. Some of these cars were on fire. I heard explosions, roaring fires, and gunshots fired around us. I felt like I was in a war zone. When all was said and done, rioters looted and damaged more than 1,500 locations and caused hundreds of millions of dollars of damage.[8]

The days and weeks following Mr. Floyd's murder were the darkest of my career. I felt helpless. I did not think there was anything I could do to help my community heal. I felt hopeless that anything would improve the way we police in this state. I was torn because I know the bad and the good of policing. I must accept that there are some ignorant, ill-prepared, or brutal people who wear the badge. But I also know there are many dedicated public servants who love their communities and risk their lives to protect the public. Unfortunately, these public servants work within a system that creates unintended harm.

Our country was built as a "racialized system[.]"[9] A racialized system is a "complex of institutions that produces systemic racial biases and disadvantages."[10] This includes a history of systems that promoted slavery, segregation, racist housing policies, disparate outcomes for many Americans in healthcare and education, voter suppression, mass incarceration, and our current criminal justice system.[11] The racialized system that brought about the death of Mr. Floyd can only be changed if multiple institutions are reformed. I agree with President Obama when he said:

> It can't just be all on the police. It [has] also got to be on the community. It [has] also got to be on civic leaders. It [has] got to be on churches. It [has] got to be on elected officials to try to create these kinds of conversations before crises happen.[12]

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[8] Josh Penrod & C.J. Sinner, *Buildings Damaged in Minneapolis, St. Paul After Riots*, STAR TRIB. (Jul 13, 2020, 2:45 PM), https://www.startribune.com/minneapolis-st-paul-buildings-are-damaged-looted-after-george-floyd-protests-riots/569930671/.

[9] Brandon Vaidyanathan, *Systemic Racial Bias in the Criminal Justice System Is Not a Myth*, WITHERSPOON INST.: PUB. DISCOURSE (June 29, 2020), https://www.thepublicdiscourse.com/2020/06/65585/.

[10] *Id.*

[11] *See* Janice H. Hammond et al., *African American Inequality in the United States*, HBS No. 620-046 (Sept. 2019, revised May 5, 2020), https://www.utsouthwestern.edu/about-us/assets/harvard-business-school-study-on-african-americans.pdf (exploring the history of these systems that led to inequality for African Americans in the United States).

[12] Jordyn Phelps, *8 Powerful Quotes from President Obama's ABC Town Hall*, ABC NEWS (July 14, 2016, 7:56 PM), https://abcnews.go.com/Politics/powerful-quotes-

Law enforcement may be viewed as the current face of our racist past, but we were not the creators of our racialized system. I do not believe our profession is full of racist or brutal officers. However, changing this entire racialized system demands we also improve the institution of law enforcement. I believe our communities deserve and require us to "[p]rotect the peace and maintain public safety through trusted service with respect."[13] I believe the most effective and expedient way to achieve these goals is through our legislature. The Minnesota Legislature showed they could bring about meaningful law enforcement reform when they passed *The Minnesota Police Accountability Act* ("the Act") within weeks of Mr. Floyd's murder.[14]

This article will explore how the Act changed laws that govern peace officers and some of the outcomes from those changes. It will explore how the Act changed the ways peace officers train, use force, investigate officer-involved deaths, self-report, and how they are governed by the Minnesota Board of Peace Officer Standards and Training. This article will also explore some of the outcomes from each of these changes. These include greater community input, transparency, and oversight that will hopefully lead to improved accountability and legitimacy of law enforcement in Minnesota.

II. THE PATH FROM BILL TO LAW

The legislative action to pass the Act began two weeks after Mr. Floyd was murdered. On June 12, 2020, Governor Tim Walz convened a special session of the Minnesota Legislature.[15] One of his main priorities for the session was to pass legislation to promote police reform and accountability.[16] Although no bills were passed to address these issues, Representative Carlos Mariani, from the House Ways and Means Committee of the Public Safety and Criminal Justice Reform Finance and Policy Division, held remote hearings and continued to explore how the legislature could address officer accountability and how doing so would prevent civil unrest.[17] This included comparing the proposals from both chambers of the

president-obamas-abc-town-hall/story?id=40591539.

[13] *Police,* CITY OF ST. PAUL, MINN., https://www.stpaul.gov/departments/police (last visited Apr. 26, 2021).

[14] *Governor Walz Signs Minnesota Police Accountability Act*, OFF. OF GOVERNOR TIM WALZ & LT. GOVERNOR PEGGY FLANAGAN: NEWSROOM (July 23, 2020), https://mn.gov/governor/news/?id=1055-441356.

[15] *Governor Walz Convenes Special Session of the Minnesota Legislature*, OFF. OF GOVERNOR TIM WALZ & LT. GOVERNOR PEGGY FLANAGAN: NEWSROOM (June 10, 2020), https://mn.gov/governor/news/?id=1055-435517.

[16] *Id.*

[17] *Police Accountability in Minnesota*: *Hearing Before the H. Pub. Safety and Crim. Just. Reform Fin. and Pol'y Div. of the H. Comm. on Ways & Means*, 91st Leg., Pub. Info. Sess. (Minn. 2020), https://www.lrl.mn.gov/media/file?mtgid=1010891.

legislature for a future law enforcement reform bill.[18]

When no bills were passed to address these issues during the first special session, Governor Walz called a second special session to begin on July 13, 2020.[19] On the first day of the second special session, forty-nine days after Mr. Floyd's death, Representative Mariani introduced House File 1 (HF 1) which would later be named *The Minnesota Police Accountability Act* ("the Act").[20] Once the bill was read for the first time, it was referred to the House Committee on Ways and Means.[21] The next day, the Committee recommended the bill be placed on the General Register.[22] The bill was only amended slightly[23] before it was signed into law by Governor Walz on July 23, 2020.[24]

III. CERTAIN CHANGES CREATED BY THE ACT

When the Act was passed into law, it created new statutes and amended others. This article will explore some of these changes. It will focus on changes to the following:

- how peace officers are trained to use force,
- the statutes that govern the use of force by peace officers,
- the process for investigating officer-involved deaths,
- how law enforcement organizations report use of force and misconduct by their peace officers,
- and the role of the Minnesota Board of Peace Officer Standards and Training.

In Minnesota, the term "peace officer" generally refers to "an employee or an elected or appointed official of a political subdivision or law enforcement agency who is licensed by the board, charged with the prevention and detection of crime and the enforcement of the general criminal laws of the state and who has the full power of arrest[.]"[25] This term includes state and local peace officers we commonly refer to as police,

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[18] *Id.*

[19] *Governor Walz Convenes Special Session of the Minnesota Legislature*, OFF. OF GOVERNOR TIM WALZ & LT. GOVERNOR PEGGY FLANAGAN: NEWSROOM (July 10, 2020), https://mn.gov/governor/news/#/detail/appId/1/id/439786.

[20] Minn. H.J., 91st Leg., 2nd Spec. Sess. 5 (2020).

[21] *Id.*

[22] *Id*. at 20.

[23] *See id.* at 188-212.

[24] *Id.* at 343-44.

[25] MINN. STAT. § 626.84 (2020).

sheriffs, deputies, and troopers.[26] This does not include law enforcement personnel employed by federal agencies like the Federal Bureau of Investigations (FBI) or the Drug Enforcement Agency (DEA). The "board" referenced above is the Minnesota Board of Peace Officer Standards and Training ("the MN POST Board").[27] The MN POST Board has regulatory authority over peace officers in the state of Minnesota.[28] In later sections, this article will discuss the powers and duties of the MN POST Board, but it is important to note early on that the MN POST Board plays a significant role in many areas of training, licensing, and standards under the new Act.[29]

The most common way a person may become a peace officer is to earn a postsecondary degree, successfully complete a Professional Peace Officer Education program, and pass the licensing exam.[30] To be eligible to sit for the licensing exam, a person must be a citizen of the United States, possess a valid driver's license, complete a written application, and submit to a background investigation into their criminal history and conduct.[31] No one may become a peace officer if they have been convicted of a felony or any of the following crimes: assault, domestic assault, mistreatment of a resident or patient, criminal abuse, criminal neglect, financial exploitation of a vulnerable adult, failure to report, prostitution related crimes, presenting false claims, medical assistance fraud, theft, disorderly conduct by a caregiver, or controlled substance laws.[32] The person must submit their fingerprints as part of their criminal background check.[33] The person must pass a medical examination, an oral interview with a licensed psychologist, and a physical strength and agility exam.[34] Once a person meets these minimum standards, a chief law enforcement officer informs the MN POST Board they wish to appoint the person as a peace officer, the person applies for a license, the MN POST Board approves the application, then the person become a peace officer.[35]

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[26] *See id.* (listing the agencies that have employees included within the definition of peace officer).

[27] *Id.*

[28] *Id.*

[29] MINN. R. 6700.0200 (2020).

[30] *Routes to Peace Officer Licensure*, MINN. BD. OF PEACE OFFICER STANDARDS AND TRAINING (POST), https://dps.mn.gov/entity/post/becoming-a-peace-officer/Pages/Routes-to-Peace-Officer-Licensure.aspx (last visited Apr. 26, 2021).

[31] MINN. R. 6700.0800 (2020).

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] *Id.*

A. Changes to How Peace Officers are Trained to Use Force or Avoid Using Force

The Act changed the way peace officers are trained in four ways. First, it required the MN POST Board to create a statewide model policy for the use of force.[36] Second, it amended the crisis-intervention training standards to maintain a peace officer license.[37] Third, it added training intended to ensure safer interactions with persons with autism.[38] Finally, it created a statute that specifically prohibits the use of Warrior-Style training.[39] In order to implement these changes, the Act provided six million dollars per year from 2021 through 2023 to "support and strengthen law enforcement training and implement best practices."[40] This allocates roughly $550 per year to train each of the 11,000 peace officers in Minnesota.[41]

1. *A Statewide Model Use of Force Policy Required*

The Act required the MN POST Board to consult with interested parties and adopt a model policy on the use of force and use of deadly force by peace officers.[42] Although "interested parties" is not defined, it would be reasonable to believe these include people and peace officers who seek reform. The model policy was required to "recognize and respect the sanctity and value of all human life and the need to treat everyone with dignity and without prejudice" by implementing three duties on peace officers: (1) to intercede when they are present and observe another officer use force that is clearly beyond what is objectively reasonable; (2) to report any illegal use of force by another peace officer; and (3) to only use deadly force when authorized by statute and after less lethal measures have been considered.[43] The Act required the MN POST Board to distribute this model policy to every chief law enforcement officer in the state by September 1, 2020.[44] Finally, it required every law enforcement agency to update their use of force policy to be identical or substantially similar to the model by December 15,

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[36] Laws of Minn. 2020, 2nd Spec. Sess. ch. 1, sec. 17.

[37] *Id.* at sec. 21.

[38] *Id.* at sec. 22.

[39] *Id.* at sec. 14.

[40] *Id.* at sec. 26.

[41] *Who are Minnesota Peace Officers?*, MINN. BD. OF PEACE OFFICER STANDARDS AND TRAINING (POST), https://dps.mn.gov/entity/post/becoming-a-peace-officer/Pages/who-are-minnesota-peace-officers.aspx#:~:text=They%20do%20what%20it%20takes,enforcement%20agencies%20in%20the%20state (last visited Apr. 21, 2021).

[42] Laws of Minn. 2020, 2nd Spec. Sess. ch. 1, sec. 17.

[43] *Id.*

[44] *Id.*

2020.[45] On July 23, 2020 the MN POST Board called a special meeting and approved a model policy.[46] The model policy met the statutory standard and implemented the required duties.[47]

2. *New Required Training*

The amendment to the previously required crisis-intervention training (CIT) added six hours of CIT and mental illness crisis training and four hours of training meant to ensure safer interactions between peace officers and persons with autism.[48] This training cycle must be repeated every three years.[49] In order to promote quality training for peace officer on these topics, the MN POST Board is required to consult with the Commissioner of Human Services and mental health stakeholders to create a list of approved entities and training courses.[50] The training must include techniques for relating to persons with mental illness and their families, crisis de-escalation, techniques for relating to diverse communities and mental illness diversity, how mental illness and the criminal justice system intersect, information about community resources for the mentally ill and their families, and suicide prevention.[51] Importantly, the new law requires each law enforcement agency to keep records of said training and submit those records to the MN POST Board so it may evaluate the effectiveness of the training.[52] If an officer fails to comply with these licensing requirements, the MN POST Board may seek an injunction to restrain the peace officer from continuing to work.[53] The Act appropriated approximately $140,000 per year for this training.[54]

Separately, the Act created a statute to ensure safer interactions between peace officers and persons with autism.[55] Once again, the MN POST Board was tasked with preparing learning objectives for the

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[45] *Id.*

[46] *Special Meeting of the Board Agenda*, MINN. BOARD OF PEACE OFFICER STANDARDS AND TRAINING, (Aug. 17, 2020), https://dps.mn.gov/entity/post/meetings/meetingminutesdocumentlibrary/Signed%20August%2017%2c%202020%20Minutes.pdf.

[47] *Use of Force and Deadly Force Model Policy,* MINN. BD. OF PEACE OFFICER STANDARDS AND TRAINING, (Aug. 17, 2020, revised Jan. 28, 2021) https://dps.mn.gov/entity/post/model-policies-learning-objectives/Documents/pdf.pdf.

[48] Laws of Minn. 2020, 2nd Spec. Sess. ch. 1, sec. 21.

[49] *Id.*

[50] *Id.*

[51] *Id.*

[52] *Id.*

[53] *See id.*; *accord* MINN. STAT. § 214.11 (2020).

[54] Laws of Minn. 2020, 2nd Spec. Sess. ch. 1, sec. 35.

[55] *See id.* at sec. 22; *accord* MINN. STAT. § 626.8474 (2020)).

training.[56] It was specifically required to consult with persons with autism, their families, autism experts, and peace officers.[57] The training minimums include an overview of autism, best practices for intervention and de-escalation, prevention and crisis reduction models, and a review of the tools and technology available.[58] Unlike the CIT and mental illness training, this training must be completed before a person can be eligible to take the peace officer licensing exam.[59] Similar to the CIT training, officers must refresh this training at least every three years and failure to do so would allow the MN POST Board to seek an injunction to impose licensing sanctions against them.[60] Each law enforcement agency must keep records of their training on this subject and these records are subject to periodic review by the MN POST Board.[61] Unfortunately, the Act only appropriated $8,000 to support this training.[62]

3. *Warrior-Style Training Prohibited*

Warrior-Style training is defined in the Act and the newly enacted statute as "training for peace officers that dehumanizes people or encourages aggressive conduct by peace officers during encounters with others in a manner that deemphasizes the value of human life or constitutional rights, the result of which increases a peace officer's likelihood or willingness to use deadly force."[63] This definition may render this prohibition useless. It is unlikely providers of training will use language that "dehumanizes" anyone or "deemphasizes the value of human life or constitutional rights." Also, without a more specific definition or clarification of its terms, this prohibition may be applied in a capricious manner.

Whether a course includes Warrior-Style training is impliedly up to the MN POST Board.[64] The MN POST Board may not certify any continuing education credits (CEs) for trainings that meet the definition of Warrior-Style training, may not grant CEs to any officer who attends a course that includes Warrior-Style training, and may not reimburse agencies or officers for training that includes Warrior-Style training.[65] In short, Warrior-Style training will no longer count towards the credits required to

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[56] Laws of Minn. 2020, 2nd Spec. Sess. ch. 1, sec. 22.
[57] *Id.*
[58] *Id.*
[59] *Id.*
[60] *Id.*
[61] *Id.*
[62] Laws of Minn. 2020, 2nd Spec. Sess. ch. 1, sec. 31.
[63] *Id.* at sec. 14.
[64] *Id.*
[65] *Id.*

renew a MN POST Board license.[66] The Act also prohibits any law enforcement agency from providing Warrior-Style training to any peace officer.[67] An example of Warrior-Style training might be the training of Lieutenant Colonel Dave Grossman from the Killology Research Group.[68] Minneapolis Mayor Frey banned this "fear-based training" in 2019.[69] "The warrior style of policing teaches officers to adopt a mind-set that threats are ever present in their daily work."[70] Mayor Frey noted, "[w]hen you're conditioned to believe that every person encountered poses a threat to your existence, you simply cannot be expected to build out meaningful relationships with those same people."[71]

Admittedly, I have not attended Lt. Col. Grossman's training, so I cannot comment on which part(s) of the training led Mayor Frey to ban it. If the training truly conditioned peace officers to believe every person, they encounter poses a mortal threat, then I understand the problem. If a training truly trains peace officers to dehumanize members of the communities they serve, then there is a problem. On the other hand, if a training merely prepares peace officers to survive violent encounters, then the training is appropriate. Peace officers need training that prepares them to survive violent encounters.

An example of appropriate survival training might be as simple as something I experienced in the police academy. I remember my defensive-tactics training sergeant shouting at me as I grappled with another trainer. The second trainer was much larger and more skilled than I was. I heard my sergeant shouting, "Say it! I will survive! I will survive!" I shouted back, "I will survive! I will survive!" I lost every round against that trainer and was sore for a week, but I never gave up. This training showed me I was tougher than I thought I was. It taught me that I could take a beating for a while and it would not kill me. Most importantly, it taught me to breathe and think while I was in the middle of a fight. It taught me to stay under control while struggling with my adversary.

Peace officers need appropriate survival training. They need it because they are more likely to encounter violence than others. They are more likely to encounter violence because they are called upon daily to stop or address violence. Every officer will encounter situations where there is

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[66] *Id.*

[67] *Id.*

[68] *See generally* KILLOLOGY RESEARCH GROUP, https://www.killology.com/ (last visited Apr. 26, 2020).

[69] Andy Mannix, *Minneapolis to Ban 'Warrior' Training for Police, Mayor Jacob Frey Says*, STAR TRIB. (Apr. 18, 2019, 10:35 PM), https://www.startribune.com/minneapolis-to-ban-warrior-training-for-police/508756392/.

[70] *Id.*

[71] *Id.*

either no time for de-escalation or where de-escalation does not work. In situations like these, a peace officer must be prepared to use an amount of force that is reasonable and necessary to stop a violent actor. A peace officer that is unprepared to respond to resistance or aggression with controlled violence and a determination to survive may be more likely to use unreasonable or unnecessary force.

B. Changes to the Use of Force Statutes and New Duties

Minnesota has two statutes that authorize peace officers to use two different kinds of force; both were amended.[72] One authorizes the use of force.[73] The other authorizes the use of deadly force.[74] As discussed in section III, the Act required the MN POST Board to create a model use of force policy that included a duty to intercede and report.[75] The Act concurrently codified these into a new statute.[76] The statute requires peace officers to intercede if they are able to do so when they are present and observe another employee or peace officer use unauthorized force or force that is beyond that which is objectively reasonable.[77] It also requires the witnessing peace officer to report this conduct to the violating peace officer's chief law enforcement officer within 24 hours.[78]

A breach of either duty may subject a peace officer to civil sanctions. An example would include a judgment against a peace officer for money damages in an action against him or her for a civil rights violation[79] or a tort action like battery.[80] The new statute adds an ability for the MN POST Board to discipline the officer.[81] This could include sanctions like suspending or revoking a peace officer's POST license.[82]

1. *Authorized Use of Force*

The statute that authorizes the use of force by peace officers and

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[72] *See* Laws of Minn. 2020, 2nd Spec. Sess. ch. 1, sec. 7-10.
[73] MINN. STAT. § 609.06 (2020).
[74] *Id*. at § 609.066.
[75] Laws of Minn. 2020, 2nd Spec. Sess. ch. 1, sec. 17.
[76] *See id.* at sec. 23; *accord* MINN. STAT. § 626.8475 (2020)).
[77] MINN. STAT. § 626.8475 (2020).
[78] *Id.*
[79] *See* 42 U.S.C. § 1983 (2019).
[80] Sang v. City of St. Paul, No. 09–455, 2010 WL 2346600, at *7 (D. Minn. June 8, 2010) (stating if a police officer uses excessive force when physically contacting an individual, he or she may be liable for battery).
[81] MINN. STAT. § 626.8475 (2020).
[82] *Id.* at § 626.8432.

laypeople alike is Minn. Stat. § 609.06.[83] This statute authorizes peace officers to use force in the execution of their duties.[84] The most significant change to the use of force statute is the addition of a bar on using certain types of restraints unless deadly force is authorized.[85] These restraints include choke holds, tying all of a person's limbs behind the person's back so they are immobile, and securing a person in a way that results in transporting the person face down in a vehicle.[86] The Act further defines choke hold as:

> a method by which a person applies sufficient pressure to a person to make breathing difficult or impossible, and includes but is not limited to any pressure to the neck, throat, or windpipe that may prevent or hinder breathing, or reduce intake of air. Choke hold *also means applying pressure to a person's neck on either side of the windpipe, but not to the windpipe itself, to stop the flow of blood to the brain via the carotid arteries*" (emphasis added).[87]

Importantly, the second sentence addresses a carotid restraint that stops blood flow to the brain via the carotid arteries. This is different than a respiratory restraint that restricts oxygen from passing through the windpipe.[88] A carotid restraint looks like a respiratory restraint[89] but it uses "a combination of physiological factors to restrict blood flow to the brain which may cause the subject to lose consciousness."[90]

A month before the Act was passed, a similar police-reform bill, also authored by Representative Mariani, referred to this restraint by its trademarked name of Lateral Vascular Neck Restraint® (LVNR®).[91] LVNR® is the number one neck restraint system used by law enforcement.[92]

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[83] *Id.* at § 609.06.

[84] *Id.*

[85] Laws of Minn. 2020, 2nd Spec. Sess. ch. 1, sec. 8.

[86] *Id.*

[87] *Id.*

[88] Jack Ryan, *Neck Restraints Choke Holds/Carotid Holds What Law Enforcement Policy/Training Tells us the Medical/Scientific Debate what the Cases Tell Us*, LEGAL & LIAB. RISK MGMT. INST. (Sept. 8, 2020), https://www.llrmi.com/articles/legal_updates/2020_chokeholds/.

[89] *See generally* KMBC 9, *Protest Leaders Want KCPD Neck Restraint Technique Banned*, YOUTUBE (July 16, 2020), https://www.youtube.com/watch?v=tdqITGGYDPo (explaining and displaying differences between the carotid and respiratory restraints).

[90] Ryan, *supra* note 89.

[91] H.F. 4, 91st Leg., Spec. Sess. (Minn. 2020).

[92] *Lateral Vascular Neck Restraint (LVNR®)*, NAT'L LAW ENF'T TRAINING CTR., http://www.nletc.com/lateral-vascular-neck-restraint-lvnr (last visited Jun. 14, 2021).

That police-reform bill was not passed. The new language from the Act provides a broader prohibition on neck restraints, but it may require specific messaging to peace officers so they understand the new statute applies to the LVNR®.

2. *Authorized Use of Deadly Force by Peace Officers*

The statute that authorizes peace officers to use deadly force is Minn. Stat. § 609.066.[93] The Act added a subdivision labeled "Legislative Intent" to the statute and amended the language for when deadly force is authorized.[94] This subdivision is unique among Minnesota statutes. In a search of Minnesota's online statutes, "legislative intent" only appears thirty times.[95] Of these, only section 609.066 refers to peace officers.[96] The language and mere presence of the "legislative intent" subdivision demonstrates its significance to our lawmakers and communities. It expresses how concerned our legislators are about the use of deadly force by peace officers. No one wants to see the people responsible for protecting the public take another human life.

The first words of the new subdivision express that the power to use deadly force is an authority "conferred" or bestowed on peace officers by the statute.[97] It goes on to say this authority must be "exercised judiciously with respect for human rights and dignity and for the sanctity of every human life" and "every person has a right to be free from excessive use of force by officers acting under color of law."[98] When I read these words, I heard them say, "Listen! We need you and we need to trust you, but right now, we do not. We cannot be more clear. We demand change."

The final section states, "peace officers should exercise special care when interacting with individuals with known physical, mental health, developmental, or intellectual disabilities as an individual's disability may affect the individual's ability to understand or comply with commands from

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[93] MINN. STAT. § 609.066 (2020).

[94] Laws of Minn. 2020, 2nd Spec. Sess. ch. 1, sec. 9, 10.

[95] *See Document Search*, MINN. LEG. OFF. OF THE REVISOR OF STATUTES, (https://www.revisor.mn.gov/search/doc_result.php?search=all&keyword_type=exact&keyword=%22legislative+intent%22&stat=1&stat_year1=2020&stat_year2=2020&stat_chapter=&laws_session1=92&laws_session2=92&laws_chapter=&rule_year1=2021&rule_year2=2021&rule_chapter=&rule_agency%5B%5D=&court_year1=2010&court_year2=2010&court_type%5B%5D=&sreg_vol1=45&sreg_vol2=45 (last accessed Apr. 25, 2021) (revealing 32 returns for a search of "legislative intent" where two returns reference the statute indices).

[96] MINN. STAT. § 609.066 (2020).

[97] *Id.*

[98] *Id.*

peace officers."[99] This language supports the earlier provisions for more and improved training for peace officers to protect these communities from unnecessary uses of force by peace officers.[100]

The amended portions of the next subdivision, § 609.066 subd. 2, set higher standards for when and how deadly force may be used. Use of deadly force by a peace officer is only justified when necessary to protect themselves or another from a threat of great bodily harm or death.[101] Great bodily harm is "bodily injury which creates a high probability of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily harm."[102] The new language expresses requirements that the law enforcement officer[103] be able to articulate the threat with specificity; that great bodily harm or death is reasonably likely to occur absent the officer's action; and the threat must be addressed without unreasonable delay.[104] The previous version of this statute authorized use of deadly force in more circumstances by stating the threat only needed to be "apparent" instead of reasonably likely to occur absent the officer's action.[105]

The next paragraph further narrows the authority to use deadly force. This is the "capture clause." Previously, the statute authorized a peace officer to use deadly force to effect the capture, or prevent escape of a person known to have committed or attempted to commit a crime "involving the use or threatened use of deadly force[.]"[106] This language did not require the suspect to be currently armed or threatening. It could be interpreted to authorize deadly force to capture or prevent the escape of an unarmed suspect simply because a peace officer believed that the suspect recently used or threatened to use deadly force. Now the statute requires that (1) the suspect be a threat, (2) the threat can be articulated with specificity, (3) great bodily harm or death are likely to occur absent the officer's actions, (4) the threat must be addressed with deadly force without unreasonable delay, and (5) the peace officer believes the suspect will cause death or great bodily

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[99] *Id.*

[100] Laws of Minn. 2020, 2nd Spec. Sess. ch. 1, sec. 21, 22.

[101] MINN. STAT. § 609.066 (2020).

[102] *Id.* at § 609.02.

[103] Minnesota Chiefs of Police Association v. Walz, 2021 WL 2808920 (Minn. Dist. Ct. July 2, 2021). On Dec. 22nd, 2021, this district court concluded that the phrase "by the law enforcement officer" rendered this section of the statute unconstitutional because it violated the constitutional privilege against self-incrimination. It ordered the phrase severed from the statute.

[104] MINN. STAT. § 609.066 (2020).

[105] MINN. STAT. § 609.066, subd. 2(1) (2018).

[106] *Id.*

harm if not immediately apprehended.[107]

The final addition to this statute prohibits the use of deadly force in situations where the threat of great bodily harm or death is based on the danger a person poses to himself and no one else.[108] This change supports the Act's themes of narrowing the authority to use deadly force and requiring peace officers to deescalate. The language of this paragraph bases the decision to use deadly force on whether an objectively reasonable officer would believe, based on the totality of the circumstances, that the person was threatening great bodily harm or death to someone else.[109]

One example of a situation like this shows how complicated it might be to determine whether someone is a threat to others or just himself. It occurred in Lake Elmo, Minnesota, three years ago.[110] On that day, a young man decided to kill himself. He had just lost his job as an emergency medical technician (EMT) and found out his ex-girlfriend had started dating one of his friends. Washington County sheriff's deputies found the man dressed in his EMT uniform, kneeling in a crosswalk, with a pistol in his right hand, and the barrel of the pistol pointing at his own head.[111] The young man pointed his pistol at deputies at least once during the interaction.[112] In this situation, there are many reasons why an objectively reasonable peace officer would believe the young man was a threat to people other than himself, but there are more facts to consider.

One deputy took the lead during this incident. He talked to the young man and tried to convince him to discard his pistol. The deputy said the man was in crisis and he did not want to make him feel cornered or that he was running out of time.[113] The deputy negotiated with the man for about forty minutes.[114] He later testified that even though the man pointed a pistol at him that he did not feel threatened.[115] The man repeatedly said he did not want to push the deputies into shooting him and even complimented the way they were handling the situation.[116] Then the young man began to turn his head to look at the nine deputies that were on scene. These facts show

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[107] MINN. STAT. § 609.066 (2020).

[108] *Id.*

[109] *Id.*

[110] Mary Divine, *Washington County Deputy 'Ignored the Law' Prosecutors Say as Manslaughter Trial Begins*, TWIN CITIES PIONEER PRESS (Mar. 11, 2020, 8:59 PM), https://www.twincities.com/2020/03/11/washington-county-deputy-krook-evans-manslaughter-trial/.

[111] *Id.*

[112] *Id.*

[113] *Id.*

[114] *Id.*

[115] *Id.*

[116] *Id.*

reasons why a peace officer might believe the young man was not a current threat to anyone else. However, one of the nine deputies did believe he was a threat.

That deputy was Deputy Krook.[117] He said, "I'm getting uncomfortable with him turning his head, just so you know."[118] A short time later, while the young man knelt in the crosswalk, Deputy Krook shot him four times.[119] He was the only deputy that fired.[120] Two years later, a jury found Deputy Krook not guilty of manslaughter.[121] This example shows how complex officer-involved deaths can be and how much care should be used when encountering suicidal persons. The statute sets this group apart and now allows officers to disengage in situations where they believe the person is only a danger to himself.

Though most decisions to use deadly force will continue to be complicated, the new version of this statute actually simplifies the way peace officers process these decisions. The decision process is simpler because the new language of the statute is uniform. Each paragraph that authorizes deadly force refers to one set of requirements.[122] In each situation (1) the suspect must be a threat to someone other than himself, (2) the suspect must pose a threat of great bodily harm or death, (3) the threat can be articulated with specificity, (3) great bodily harm or death are likely to occur absent the officer's actions, and (4) the threat must be addressed with deadly force without unreasonable delay.[123] So the analysis is effectively the same for any situation where an officer may be authorized to use deadly force. This may sound like a lot, but it can be simplified to cover most situations. If I reasonably believe a suspect poses an immediate threat to kill someone and I believe victim will be killed if I do not immediately intervene, then it is likely that I am authorized to use deadly force.

C. Changes to the Way Officer-Involved Deaths are Investigated

An "officer-involved death" is defined as "the death of another that results from a peace officer's use of force while the officer is on duty or off duty but performing activities that are within the scope of the officer's law

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[117] *Id.*

[118] *Id.*

[119] *Id.*

[120] *Id.*

[121] Mary Divine, *Sheriff's Deputy not Guilty of Manslaughter in Lake Elmo Shooting*, TWINCITIES PIONEER PRESS (Mar. 19, 2020, 11:39AM), https://www.twincities.com/2020/03/19/krook-evans-mn-sheriffs-deputy-not-guilty-of-manslaughter-in-lake-elmo-shooting/.

[122] MINN. STAT. § 609.066 (2020).

[123] *Id.*

enforcement duties."[124] Few police officers are charged with a crime for an officer-involved death.[125] Of the ones that are charged, only about a third of those officers are convicted.[126] Of the nearly fifteen thousand people who have died at the hands of police in the last fifteen years, only forty-four officers have been convicted of any crime.[127] It makes sense that critics would be suspicious if Police Department X was allowed to investigate one of their own officers, Officer Y, in a case of an officer-involved death. It also makes sense that critics would be suspicious if the county attorney of the jurisdiction of Police Department X was in charge of prosecuting Officer Y. The specters of corruption and collusion arise when an organization is allowed to investigate its own members or when they are prosecuted by the organization with whom they work closely.

To avoid situations like this, the original version of the HF 1 provided an amendment to the powers of the attorney general so that "[t]he attorney general has charge of the prosecution of peace officers alleged to have caused an officer-involved death."[128] However, this amendment did not make it into the final bill. Even though this language did not make it into the final version of the Act, the Office of the Minnesota Attorney General has prosecuted some cases of officer-involved deaths. For example, Governor Walz transferred the case against Mr. Chauvin to the Attorney General's office after Minneapolis legislators expressed concerns about the ability of the Hennepin County Attorney's Office to prosecute the case.[129] The Attorney General's office currently has three avenues to appear for the state in officer-involved-death cases.[130] It shall appear for the state in cases where the interests of the state require it or upon the request of the jurisdiction's county attorney, and may prosecute any person charged with an indictable offense if the governor makes a request in writing to do so.[131]

Although the amendment to the attorney general's powers did not survive the legislative process, another amendment that promotes accountability and transparency did. This amendment was the creation of an

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[124] MINN. STAT. § 299C.80 (2020).

[125] Shaila Dewan, *Few Police Officers Who Cause Deaths Are Charged or Convicted*, N.Y. TIMES (last updated Nov. 30, 2021), https://www.nytimes.com/2020/09/24/us/police-killings-prosecution-charges.html.

[126] *Id.*

[127] *Id.*

[128] Minn. H.F 1 sec. 2 (2020), http://wdoc.house.leg.state.mn.us/leg/LS91/2_2020/HF0001.0.pdf (last accessed Apr. 27, 2021).

[129] Alex Johnson, *Minnesota Attorney General to Take Over Prosecutions in George Floyd's Death*, NBC NEWS (May 31, 2020, 8:12 PM), https://www.nbcnews.com/news/us-news/minnesota-attorney-general-take-over-prosecutions-george-floyd-s-death-n1220636.

[130] MINN. STAT. § 8.01 (2020).

[131] *Id.*

independent use of force investigations unit within the Bureau of Criminal Apprehension (BCA).[132] This unit's purpose is to investigate officer-involved deaths.[133] The BCA is the law enforcement agency for the state.[134] The "superintendent" is the head of the BCA.[135] The unit is also charged with investigating all criminal sexual conduct and conflict of interest cases involving peace officers.[136] The unit employs peace officers and other staff to conduct these investigations.[137] It is the responsibility of the superintendent of the BCA to develop policies and procedures to ensure there are no conflicts of interest in these investigations.[138] BCA agents are also peace officers.[139] Therefore, to avoid an interest conflict and promote accountability, if BCA agents are themselves the subject of an officer-involved death investigation, the county attorney in the jurisdiction where the offense took place will select an agency, other than the BCA, to conduct the investigation.[140]

Once the BCA completes an officer-involved death investigation and the data becomes public, the superintendent must make that data available on the BCA website within thirty days of the final criminal appeal.[141] By the first of February each year, the superintendent must also report to the Commissioner of the Department of Public Safety, the governor, and the chairs and ranking minority leaders of the committees with jurisdiction over public safety finance and policy.[142] The report must include the following: the number of investigations initiated and investigated, the outcomes and current status of these investigations, how they were charged, the number of plea agreements, and any other information relevant to this unit's mission.[143] There are BCA agents who were once employed as local peace officers in other jurisdictions. This may cause some critics to believe this is just another example of corruption in the system. However, future investigations will be more independent than previous ones as the investigators are not employed by the same organization as the subjects of the investigations, and should therefore promote transparency and accountability.

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[132] *See* Laws of Minn. 2020, 2nd Spec. Sess. ch. 1, sec. 5; *accord* MINN. STAT. § 299C.80 (2020).

[133] MINN. STAT. § 299C.80 (2020).

[134] MINN. STAT. § 299C.01 (2020).

[135] *Id.*

[136] *Id.* at § 299C.80.

[137] *Id.*

[138] *Id.*

[139] MINN. STAT. § 626.84 (2020).

[140] *Id.* at § 299C.80.

[141] *Id.*

[142] *Id.*

[143] *Id.*

D. Changes to the Way Law Enforcement Agencies Report Use of Force and Misconduct

In addition to the changes to how peace officers are trained, changes to the use of force statutes, and the more independent process for investigating officer-involved deaths, the Act promotes transparency and accountability by changing the way law enforcement agencies report the use of force and the misconduct of their employees to outside agencies.

1. *Use of Force Reporting Changes*

In an effort to promote more informed conversations about the use of force by law enforcement, the FBI developed the National Use-of-Force Data Collection and began collecting data on January 1, 2019.[144] The information collected in this data set includes officer-involved deaths, serious bodily injury due to law enforcement use of force, and other cases where peace officers discharge their firearms at humans that do not result in serious bodily injury or death.[145]

In 2020, 353 of 473 Minnesota law enforcement agencies participated in providing use-of-force data to this FBI database.[146] This represented 89% of the peace officers in the state.[147] Prior to the Act, reporting this data to the FBI was voluntary.[148] Now, the Act requires all chief law enforcement officers to report this data to the FBI database and to the superintendent of the BCA.[149] Now that this reporting is mandatory, it should change the number of officers represented in the report to the FBI from 89% to 100%. The report from the chief law enforcement officers to the superintendent must be filed once a month.[150] The superintendent is then charged with summarizing and analyzing the information in a report that must be submitted annually to the chairs and ranking minority members of the House of Representatives and Senate committees with jurisdiction over public safety.[151] Afterwards, the superintendent must also submit this information to the FBI.[152]

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[144] *Crime Data Explorer*, FED. BUREAU OF INVESTIGATION, https://crime-data-explorer.app.cloud.gov/officers/state/minnesota/uof (last visited Apr. 28, 2020).

[145] *Id.*

[146] *Id.*

[147] *Id.*

[148] *Id.*

[149] *See* Laws of Minn. 2020, 2nd Spec. Sess. ch. 1, sec. 11; *accord* MINN. STAT. § 626.5534 (2020).

[150] MINN. STAT. § 626.5534 (2020).

[151] *Id.*

[152] *Id.*

2. *Misconduct Reporting Changes*

Prior to January 15, 2021, public data about peace-officer misconduct was submitted to the MN POST Board by the chief law enforcement officer of each agency in an annual summary report.[153] This report was required to include the investigation and dispositions of alleged misconduct, total number of investigations, the types investigated, and the number dismissed because they were determined to be unfounded or unsubstantiated.[154] Minnesota, though one of the twelve states that treat most police misconduct reports as matters of public record,[155] limits this information to general information like the existence and status of complaints or charges against an employee, irrespective of whether they resulted in disciplinary action, and final dispositions of any "disciplinary action together with the specific reasons for the action and data documenting the basis of the action[.]"[156] As discussed in the next section, after January 15, 2021 this data and other "data that the [MN POST Board] determines is necessary" must be submitted in real time to a new central repository.[157] This deadline was subsequently pushed to July 1, 2021.[158]

E. Changes to the Minnesota Board of Peace Officer Standards and Training

As the licensing body for peace officers, the MN POST Board has the power to refuse to issue, refuse to renew, refuse to reinstate, suspend, revoke eligibility, and revoke a peace officer's license for multiple reasons.[159] This puts the MN POST Board in a unique position to require transparency and accountability from Minnesota peace officers. The legislature recognized this and made multiple changes to the MN POST Board that promote justice.[160] Each of these changes are explored in the following subsections.

As discussed in earlier sections, the Act required the MN POST Board to create and distribute a new statewide model use of force policy. It required the MN POST Board to work with stakeholders to develop learning objectives for newly implemented CIT, mental illness, and autism training

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[153] *Id.* at § 626.8457.

[154] *Id.*

[155] Rachel Moran, *Police Privacy*, 10 U.C. IRVINE L. REV. 153, 175 (2019), https://scholarship.law.uci.edu/ucilr/vol10/iss1/6.

[156] MINN. STAT. § 13.43 (2020).

[157] Laws of Minn. 2020, 2nd Spec. Sess. ch. 1, sec. 20.

[158] Laws of Minn. 2020, 3rd Spec. Sess. ch. 2, sec. 1.

[159] MINN. STAT. § 626.8432 (2020).

[160] *See* Laws of Minn. 2020, 2nd Spec. Sess. ch. 1, sec. 12-22.

and it implicitly required the MN POST Board to evaluate the effectiveness of this training. It also required the MN POST Board to ensure no peace officers were granted CE credits for Warrior-Style training and that no law enforcement agency provided Warrior-Style training.

1. *Board Member Positions*

The Act added two members to the MN POST Board.[161] The two additions must be appointed from the general public.[162] Now the MN POST Board is made up of seventeen members.[163] It includes the superintendent of the BCA, or his/her designee, and the following gubernatorial appointees: two sheriffs, four municipal peace officers of which at least two must be chiefs of police, another peace officer, at least one peace officer from the Minnesota State Patrol Association, two current or former peace officers who are full-time employees of a professional peace officer education program, one administrator of a Minnesota college or university that offers professional peace officer education, one elected official from a community with a population under 5,000, and four members from the general public.[164] The addition of two members of the public means the MN POST Board is not guaranteed to have a majority made up of sworn peace officers. The superintendent could preside over a balanced board. It could have eight members who are peace officers and eight who are not. However, at least two of the members who are not peace officers would have to be former officers.

2. *Power to Investigate Licensure Actions*

Section 13 of the Act is short and vague. It says, "[i]f the [MN POST Board] adopts rules to establish a subcommittee to investigate licensure actions, the subcommittee must have . . . " one board member from the general public and three who are current or former peace officers.[165] As of now, there is no subcommittee to investigate licensure actions. This addition appears to allow the MN POST Board to seek injunctive relief for the failure of a peace officer to meet the requirements of the earlier discussed requirements for CIT, mental illness, autism training, and for failing to intercede and report the unauthorized use of force by other officers.[166]

The MN POST Board is currently limited to investigating violations

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[161] *Id.* at sec. 12.
[162] *Id.*
[163] *See id.*; *accord* MINN. STAT. § 626.841 (2020).
[164] MINN. STAT. § 626.841 (2020).
[165] Laws of Minn. 2020, 2nd Spec. Sess. ch. 1. sec. 13.
[166] *Id.* at sec. 21, 22.

of standards of conduct where a person no longer meets one of the requirements to be a peace officer or where someone obtained a peace officer license by fraud or cheating.[167] The MN POST Board may also investigate licensed peace officers in situations where a peace officer was convicted of a gross misdemeanor or felony; failed to report adverse license actions while resolving a complaint or other disciplinary action; was convicted for a narcotics violation; was adjudicated mentally ill and dangerous to the public, incapacitated, chemically dependent, having a psychopathic personality, or being required to register as a predatory offender; was convicted for criminal sexual conduct; was convicted of solicitation, inducement, or promotion of prostitution; or violated an order of the MN POST Board.[168]

3. *Creation of a Misconduct Repository*

The Act requires the MN POST Board to create a central repository for data that is both public data and peace officer misconduct data.[169] As stated earlier, this public data is usually limited to the existence, status, and outcomes for complaints of misconduct.[170] The Act appropriated $3.5 million in 2021 to design, build, implement, and operate the database.[171] It appropriated another $500,000 to this activity for each year thereafter.[172] It appropriated $96,000 to staff the database in 2021 and another $128,000 per year thereafter.[173] The MN POST Board is required to consult with the Minnesota Chiefs of Police Association (MCPA), Minnesota Sheriff's Association, and the Minnesota Police and Peace Officer Association (MPPOA) for this task.[174]

There is no mention of whether this repository public data will be available to the public. There is also no mention of whether law enforcement agencies who seek to appoint a person to the position of peace officer will be allowed to access it. Although the MN POST Board will house the repository, it will offer little assistance for future licensing sanctions because the information it gathers will only be the limited public data. It would be more useful to the MN POST Board and hiring agencies if the data included more than the existence, status, and final disposition of complaints.[175] "In 2015, WNYC News published a fifty-state survey summarizing each state's

[167] MINN. R. 6700.1600 (2020).
[168] MINN. R. 6700.1600 (2020).
[169] Laws of Minn. 2020, 2nd Spec. Sess. ch. 1, sec. 16.
[170] MINN. STAT. § 13.43 (2020).
[171] Laws of Minn. 2020, 2nd Spec. Sess. ch. 1, sec. 32.
[172] *Id.*
[173] *Id.* at sec. 34.
[174] *Id.* at sec. 16.
[175] MINN. STAT. § 13.43 (2020).

approach to whether law enforcement disciplinary records are available to the public."[176] It found misconduct records fell within one of three general categories.[177] They were "confidential in twenty-three states, of ['limited availability['] in fifteen states, and publicly available in only twelve."[178] Some states prevent access to virtually all law enforcement misconduct records.[179] Minnesota makes most misconduct records available upon request.[180] If this data is statutorily defined as public[181] and much of it can be found online elsewhere, [182] then why not make it available to the public via this new repository?

Communities United Against Police Brutality (CUAPB) is an organization based in the Twin Cities that combats police brutality and abuse of authority.[183] They spent years creating their own source for police misconduct records by submitting data practices requests to obtain public records about formal complaints about police misconduct.[184] I invite the reader to review the public information, as compiled by the CUAPB, of my misconduct records.[185] The reader will find four complaints that were investigated by Internal Affairs and were closed.[186] That is it; there is nothing more. The responses to CUAPB's data practices request about my misconduct records provide no facts about the investigations or their outcomes. This limited information does nothing to inform the public or potential employers. It is basically useless.

It would be beneficial for the legislature to add a requirement to reveal more information about police misconduct complaints. Transparency is a way to promote the legitimacy of law enforcement and build a trustworthy reporting system that would encourage trust in the thousands of peace officers in Minnesota. Additional information could be some form of the original complaint against the officer, the misconduct accused, the

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[176] Rachel Moran & Jessica Hodge, *Law Enforcement Perspectives on Public Access to Misconduct Records*, 42 CARDOZO L. REV. 1237, 1245-46 (2021).

[177] Robert Lewis et al., *Is Police Misconduct a Secret in Your State?*, WNYC NEWS (Oct. 15, 2015), https://perma.cc/HG62-NMWS.

[178] *Id.*

[179] Moran & Hodge, *supra* note 181, at 1246.

[180] MINN. STAT. § 13.43(a) (2020).

[181] *Id.*

[182] *Police Complaint Lookup*, COMMUNITIES UNITED AGAINST POLICE BRUTALITY, http://complaints.cuapb.org/ (last visited Apr. 4, 2021).

[183] *Id.*

[184] *Id.*

[185] *See* Complaints filed against Eric D. Vang-Sitcler, COMMUNITIES UNITED AGAINST POLICE BRUTALITY, http://complaints.cuapb.org/police_archive/officer/4494/ (last visited Apr. 4, 2021) (revealing four complaints and the minute amount of public data that is available).

[186] *Id.*

officer's response to the allegation, and even what steps were taken to determine the outcomes of the complaint. To further promote accountability and transparency, the MN POST Board should consider making this public data available on their webpage. Alternatively, the MN POST Board could collect more comprehensive, non-public data and use it for limited purposes. These purpose could include sanctioning licensed peace officers or informing law enforcement agency hiring decisions.

4. *Ensuring Police Excellence and Improving Community Relations Advisory Council*

The Act established the Ensuring Police Excellence and Improving Community Relations Advisory Council (the Advisory Council) under the MN POST Board. It has fifteen members.[187] This council is made up of the superintendent of the BCA and the executive directors of the MN POST Board, MPPOA, Minnesota Sheriff's Association, and MCPA.[188] It also includes ten community members.[189] Four of the community members represent the Community-Specific Boards.[190] The Indian Affairs Council, the Minnesota Council on Latino Affairs, the Council for Minnesotans of African Heritage, and the Council on Asian-Pacific Minnesotans are the Community-Specific boards created by statute.[191] A significant responsibility of these boards is to inform their respective ombudsperson who has the duty to review "government and government related agencies in an effort to ensure that their practices are fair, reasonable and appropriate."[192]

One community member is a mental health advocate that was appointed by the Minnesota chapter of the National Alliance on Mental Illness.[193] Another is an advocate for victims that is appointed by Violence Free Minnesota.[194] Each of the final four members are appointed by one of the following: the speaker of the house, the house minority leader, the senate majority leader, and the senate minority leader.[195]

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[187] Laws of Minn. 2020, 2nd Spec. Sess. ch. 1, sec. 15.
[188] *Id.*
[189] *Id.*
[190] *Id.*
[191] MINN. STAT. § 257.0768 (2020).
[192] *About Us*, MINN. OFF. OF OMBUDSPERSON FOR FAMILIES, https://mn.gov/ombudfam/about-us/ (last visited Apr. 30, 2021).
[193] Laws of Minn. 2020, 2nd Spec. Sess. ch. 1. sec. 15.
[194] *Id.*
[195] *Id.*

The purpose of the Advisory Council is to:

> [A]ssist the [MN POST Board] in maintaining policies and regulating peace officers in a manner that ensures the protection of civil and human rights. The council shall provide for citizen involvement in policing policies, regulations, and supervision. The council shall advance policies and reforms that promote positive interactions between peace officers and the community.[196]

As such, the Advisory Council submits recommendations to the MN POST Board.[197] Then the chair of the MN POST Board must place these recommendations on their agenda.[198] The Advisory Council meets quarterly and reports to the "chairs and ranking minority members of the senate and house of representatives committees and divisions having jurisdiction over criminal justice policy and the board."[199] This report includes all the recommendations the Advisory Council presented to the MN POST Board and how that board acted on the recommendation, recommendations for statutory reform and legislative initiatives, and updates on the Advisory Council's review and determinations.[200] At its fourth meeting, the Advisory Council received two recommendations from the community.[201]

a. First Amendment Standard for Public Assembly Response

The Advisory Council first discussed a recommendation received in the form of a letter to the MN POST Board from The Council for Minnesotans of African Heritage.[202] The letter called for the MN POST Board to establish a First Amendment Standard for Public Assembly Response to protect the rights of protestors, bystanders, and the media as the trial for Mr. Chauvin approached.[203] The primary concerns were the inadequate accountability measures to protect these rights and the abuse of

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[196] *Id.*
[197] *Id.*
[198] *Id.*
[199] Laws of Minn. 2020, 2nd Spec. Sess. ch. 1. sec. 15.
[200] *Id.*
[201] *Ensuring Police Excellence and Improving Community Relations Advisory Council Meeting Agenda*, MINN. BD. OF PEACE OFFICER STANDARDS AND TRAINING (Feb. 19, 2021), https://dps.mn.gov/entity/post/meetings/meetingagendadocumentlibrary/Amended%20Meeting%20Materials%202-19-2021.pdf [hereinafter *Advisory Council Agenda*].
[202] *Id.*
[203] *Id.*

participants and the media by law enforcement.[204] The coalition called on the MN POST Board to pass a measure to protect First Amendment rights that required peace officers to comply with their existing policies or be subject to discipline; this included the loss of their license to serve as a peace officer.[205] The letter said the MN POST Board's authority over licensure is an effective instrument for First Amendment protections.[206] The letter also said this authority could help law enforcement leadership who have argued that the current disciplinary appeals process "make[s] it difficult to remove problem officers."[207]

The letter closed with examples of language the coalition requested the Advisory Council to hear and pass forward to the MN POST Board with its recommendations for a proposed rule change, a requirement for a model policy, and a requirement for each agency to have a policy.[208] This language incorporated a grant of power to the MN POST Board to take licensure action against peace officers who violate the new model policy.[209] On April 22, 2021, the Advisory Council forwarded and presented the recommendation to the MN POST Board where it was discussed.[210] On that same day, the MN POST Board voted to develop the recommended model policy for public assembly and protection of First Amendment Rights.[211] At the same meeting the MN POST Board decided to create a Special Committee to review the POST complaint process.[212]

b. Public Searchable Statewide Misconduct Database

The second recommendation received by the Advisory Council was from the Just Action Coalition.[213] The Coalition holds the position that recent police misconduct and crime are a result of an oversight system that

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[204] *Id.*

[205] *Id.*

[206] *Id.*

[207] *Advisory Council Agenda, supra* note 206.

[208] *Id.*

[209] *Id.*

[210] *Board Meeting Agenda*, MINN. BD. OF PEACE OFFICER STANDARDS AND TRAINING (Apr. 22, 2021), https://dps.mn.gov/entity/post/meetings/Documents/Updated%20Board%20Agenda%204-22-21.pdf.

[211] Dan Gunderson, *Police Standards Board Calls for Changes in Response to Protests*, MINN. PUB. RADIO NEWS (Apr. 22, 2021, 7:59 PM), https://www.mprnews.org/story/2021/04/22/police-standards-board-calls-for-changes-in-response-to-protests.

[213] *Advisory Council Agenda, supra* note 206.

focuses on discipline rather than prevention.[214] They believe law enforcement agencies can improve oversight via their recommendation for a more coherent and uniform system.[215] In part, they recommend a mandated report for every time an officer unholsters a firearm.[216] This report must include the gender, race or ethnicity, height, weight and other obvious physical details about the subject in question.[217] It must also include why the officer felt the need to draw the firearm, whether the subject was armed, and whether the officer saw a weapon.[218] Then, the subject may file a complaint with the law enforcement agency.[219] The recommendation creates three tiers of complaints and classifies certain complaints as substantial.[220] The tiers are classified as Level 1 Red, Level 2 Yellow, and Level 3 Blue flags.[221] A substantial complaint is one made by the subject or someone who was physically present during the interaction.[222]

Level 1 Red Flag complaints involve an interaction where an officer drew a firearm and there was excessive force, racial bias, socioeconomic bias, or bias based on disability.[223] These also include bias based on gender, gender presentation, sexuality, perceived sexuality or where there is sexual exploitation.[224] All Level 1 Red Flag complaints require the "department of origin" to initiate an internal investigation and to forward a copy of the complaint to the MN POST Board for review.[225] Level 2 Yellow Flag complaints include when an officer breaches the Act's duty to intercede and report or fails to intervene where they witnessed a Level 1 offense.[226] These also include interactions where an officers abuses power for personal gain, unlawfully searches and/or seizes property without probable cause, or unlawfully questions about citizenship.[227] A violation of this sort that is factually supported by an officers body camera footage requires an internal investigation with the intention of drawing a punitive conclusion.[228] Level 3 Blue Flag complaints shall be recorded in the officer's file but do not

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[214] *Id.*
[215] *Id.*
[216] *Id.*
[217] *Id.*
[218] *Id.*
[219] *Id.*
[220] *Id.*
[221] *Advisory Council Agenda, supra* note 206.
[222] *Id.*
[223] *Id.*
[224] *Id*
[225] *Id.*
[226] *Id.*
[227] *Id.*
[228] *Advisory Council Agenda, supra* note 206.

require an internal investigation.[229] These complaints include complaints that do not fall under the previous two types, where there is insufficient evidence, or there is inconclusive body camera footage.[230]

The MN POST Board review process will be a used to identify and distinguish whether trends may be addressed by the agency or require the legislature to address them.[231] For this type of review, the department of origin shall send all the officer's previous complaints, the current complaint, the body camera footage, the results of the internal investigation, the officer's report, and any other pertinent evidence.[232] This recommendation does not request the MN POST BOARD to be empowered to execute punitive punishment but grants them the power to strip an officer of their license.[233] This review shall be included in the MN POST Board's annual report to the legislature and then released to the public.[234]

The recommendation continues by requiring an annual public meeting where the mayor, chief of police, and other ranking law enforcement personnel are required to attend.[235] These meetings must allow for at least one hour of community questioning for every 250,000 persons per community with a minimum of one hour.[236] The purpose of the meeting is to explain all Level 1 Red Flag reports.[237] In an attempt to promote transparency, this recommendation concludes with the call for a public searchable database to document all complaints.[238] The database should include the name, a photo of the officer, badge number, department, branch of law enforcement, and all verified complaints against the officer.[239]

At the April 16, 2021 MN POST Board meeting, the Board met with stakeholders to begin development of their misconduct repository.[240] The Board estimated that the repository would be operating by July 2021.[241] In November 2021, the Board completed their user guide for the misconduct report database.[242] The database is live but may only be accessed by law

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[229] *Id.*
[230] *Id.*
[231] *Id.*
[232] *Id.*
[233] *Id.*
[234] *Id.*
[235] *Advisory Council Agenda, supra* note 206.
[236] *Id.*
[237] *Id.*
[238] *Id.*
[239] *Id.*
[240] Mike Meehan, *What's New? Evolving Training Standards for Mandatory Continuing Education*, MINN. BD. OF PEACE OFFICER STANDARDS AND TRAINING (POST) https://dps.mn.gov/entity/post/Pages/default.aspx (last visited Apr. 30, 2021).
[241] *Id.*
[242] *Post Misconduct Reporting*, MINN. BD. OF PEACE OFFICER STANDARDS AND

enforcement officials.[243] The database allows law enforcement agencies to submit reports of misconduct to the MN POST Board in real time.[244]

IV. CONCLUSION

The civil unrest that followed the murder of Mr. Floyd sparked a movement toward meaningful changes to law enforcement in the State of Minnesota that culminated with the passage of *The Minnesota Police Accountability Act*.[245] The Act changed the rules for how peace officers, law enforcement agencies, and the MN POST Board are held accountable to the people of Minnesota. The Act repealed, amended, and created new statutes that change how peace officers are trained to use force, respond to crises, and interact with persons with mental illness and autism.[246] It empowered the MN POST Board to create a statewide model use of force policy and required every law enforcement agency to adopt a same or substantially similar policy.[247] This change specifically prohibited choke holds[248] and banned Warrior-Style training that "dehumanized" or "deemphasized the value of human life."[249] It amended the statutes that authorized the use of force and deadly force in a way that sent a clear message to peace officers that this authority has been narrowed and is on the front of the minds of the legislature.[250] It created new duties for peace officers to intercede when they see other peace officers use unauthorized force, report the use of unauthorized force, and to consider less lethal measures before using deadly force.[251]

The Act promotes accountability by creating a new independent unit within the BCA to investigate officer-involved deaths and other significant crimes and requires the superintendent to report these outcomes to the legislature.[252] It further promotes accountability by requiring law enforcement agencies to report to the FBI's National Use-of-Force Data Collection[253] and misconduct to the MN POST Board's repository of

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TRAINING (POST), https://dps.mn.gov/entity/post/Pages/misconduct-reporting.aspx#search=database%20user (last visited Jan. 27, 2022).

[243] *Id.*

[244] *Id.*

[245] Minn. H.J., 91st Leg., 2nd Spec. Sess. 5 (2020).

[246] Laws of Minn. 2020, 2nd Spec. Sess. ch. 1, sec. 21.

[247] *Id.* at ch. 1, sec. 17.

[248] *Id.* at ch. 1, sec. 8.

[249] *Id.* at ch. 1, sec. 14.

[250] *Id.* at ch. 1, sec. 7-11.

[251] *Id.* at ch. 1, sec. 17.

[252] Laws of Minn. 2020, 2nd Spec. Sess. ch. 1, sec. 17.

[253] *Id.* at ch. 1, sec. 11.

misconduct data.[254] Finally, it promotes accountability by empowering the MN POST Board, its councils, and committees to impose licensure sanctions, recommend future changes to law enforcement, and create future approved statewide model policies.[255]

Our communities deserve and require us to "[p]rotect the peace and maintain public safety through trusted service with respect."[256] This comprehensive act has created a path that improves accountability and transparency which may promote trust in law enforcement. Hopefully, it will prevent many officer-involved deaths and begin to heal the relationship between law enforcement and the communities we serve.

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[254] *Id.* at ch. 1, sec. 16.

[255] *See id.* at ch. 1, sec. 13, 15, 17, 20-22.

[256] CITY OF SAINT PAUL, POLICE, (last visited Apr. 26, 2021, 2:42 PM) https://www.stpaul.gov/departments/police (internal quotation marks omitted).

THE PUBLIC'S MICROPHONE: THE LEGAL FOUNDATION OF AMERICAN PROTESTS AND THE EVOLUTION OF SOCIETY'S MANY VOICES

Thomas M. McQuain, Esq.[1*]

I. INTRODUCTION

On the evening of August 11, 2017, a group of approximately 250 people gathered around the University of Virginia campus, carrying torches and chanting, "Blood and soil, you will not replace us", as they marched toward their hallowed statue of General Robert E. Lee.[2] These people, a congregation of white supremacist and alt-right members under the "Unite the Right" movement, had come to protest the Charlottesville City Council's decision to remove the statue from the campus and the Council's endeavor to disassociate Charlottesville from the Confederate South by renaming the space "Emancipation Park".[3] Importantly, despite the group's public advancement of hate speech, racism, and violence, under America's extraordinary First Amendment speech protections, the group maintained a right to nonviolently protest publicly, as did the counter protesters who came to make their intolerance of the Unite the Right movement's extremist views known.[4] Among the counter protesters was a group known as Antifa, or anti-fascists, who had come to rival the intimidating show of force demonstrated by the Unite the Right movement, effectively priming the already tense and heated protests like a powder keg.[5] The Charlottesville protests captured national media attention as America watched with bated breath, aware that the police line was far too small a buffer to peacefully diffuse the situation.

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[2] MICHAEL CAPEK WITH DUCHESS HARRIS, THE CHARLOTTESVILLE PROTESTS, 4 (Alyssa Krekelberg,ed., Abdo Publishing, 2019).

[3] *Id.* at 6-7.

[4] *Id.* at 60-61.

[5] *Id.* at 48-49.

The worst of the violence came the following morning, resulting in the tragic death of Heather Heyer, after a white supremacist maliciously sped his car into a crowd of steadfastly nonviolent counter protesters.[6] In response to the tragedy, former President Donald Trump stated, "Yes, I think there's blame on both sides—" a statement largely condemned for its dismissiveness of an act of terror committed by a white supremacist.[7] However, though President Trump's reaction as "mourner-in-chief" was phrased insensitively[8], it is illustrative of the United States governments' unique hesitation towards viewpoint discrimination—a hesitation that persists even after a tragedy, even in the wake of hate speech brandished by white supremacists.[9]

In 2015, a Pew Research Center poll reported that 40% of millennials think that the government should be able to suppress hate speech toward minority groups, as is characteristic of other democratic countries, whereas only 12% of Americans born between 1928 and 1945 hold this viewpoint.[10] Establishing a legal standard articulating the suppression of any speech invites a host of difficulties, such as determining protected classes and the arbitrariness and potential abuse of enforcement, especially in a country so ideologically divided along partisan lines.[11] Whereas nonviolent protests are an invitation and a challenge to streamline adversarial communications as an open discourse on the betterment of society, government censorship is a suppression of communication, and as such would only reinforce the isolation and ideological schisms between suppressed groups and the rest of society.[12] It is unlikely that direct government censorship of hate speech would lead to increased safety, as the resentment felt by the declarant groups would persist. Such censorship would only increase distrust and discrimination among the suppressed groups.[13]

In the aftermath of Charlottesville, it became clear that the most powerful response to hate speech was more speech and more nationwide

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[6] Samuel Perry, *President Trump and Charlottesville: Uncivil Mourning and White Supremacy*, 8 J. of Contemp. Rhetoric 57, 57-58 (2018).

[7] *Id.* at 65-66.

[8] *Id*. at 58.

[9] *Id.* at 58; David Cole, *Why We Must Still Defend Free Speech*, N.Y. Rev. of Books, 2 -3 (2017), https:www.nybooks.com/articles/2017/09/28/why-we-must-still-defend-free-speech.

[10] Cole, *supra* note 7, at 2.

[11] *Id.* at 3-4.

[12] *Id.* at 4.

[13] Nadine Strossen, HATE: Why We Should Resist It with Free Speech, Not Censorship, 8 (2018).

conversation. When white supremacists rallied in Boston the week after Charlottesville, they were outnumbered by thousands of counter protesters peacefully protesting in condemnation of hate speech.[14] The overwhelming size and peaceful nature of the Boston protest garnered a clear federal response when Steve Bannon, President Trump's chief strategist at the time, and executive chairman of Breitbart News, denounced white supremacists as "losers" and "a collection of clowns".[15] As the 1965 civil rights marches in Selma, Alabama have taught protesters for decades, the line between civil protest and unlawful violence is and historically has been very thin, but that civility is the linchpin for success in every national movement. Violence only serves to distract and exacerbate the ugliness our society desires to improve from and overcome.

In his December 11, 1964, Nobel Peace Prize address, Martin Luther King, Jr. famously declared, "[Nonviolence] seeks to secure moral ends through moral means. …[I]t is a weapon unique in history, which cuts without wounding and ennobles the man who wields it."[16] Nonviolence is "the method which seeks to implement the just law by appealing to the conscience of the great decent majority who through blindness, fear, pride, and irrationality have allowed their conscious to sleep."[17]

This paper is a historical examination of the impact, effectiveness, and evolution of nonviolent protests, beginning with the American Civil Rights Movement in the 1960s and leading into the modern day. This paper highlights the critical significance and modern difficulties of maintaining open channels of communication between citizens and United States federal and state governments. This paper argues that increasing political polarization is strongly correlated to increasing dependency on social media for news and that polarization ultimately stagnates important legislative progress. To demonstrate the detrimental effects of political polarization and ensuing legislative stagnation, this paper discusses the United States' lagging bipartisan response to the current mass shooting epidemic as a case study. This paper is divided into three distinct sections.

The first section begins with a brief history of the foundational success of nonviolent protests in creating social and legislative reform through the Selma March and the quick passage of the Voting Rights Act of 1965. This section continues with a discussion of the pushback against anti-government protests during the Vietnam War through the lens of the United

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[14] Cole, *supra* note 7, at 3.

[15] *Id.*

[16] Martin Luther King Jr., Nobel Peace Prize Lecture: The Quest for Peace and Justice, (Dec. 11, 1964).

[17] *Id*.

States Supreme Court's analysis in *U.S. v. O'Brien* and how subsequent cases have rarely allowed government interests to take precedence over First Amendment speech protections. Next is an examination of the extent of free speech under the First Amendment, exemplified by two cases of inflammatory-yet-protected speech, *Brandenburg v. Ohio* and the similar, contemporary ruling of *Snyder v. Phelps*. This section concludes with a look at the ineffectiveness of court-established buffer zones, exemplified by the removal of buffer zones outside abortion clinics after the Supreme Court's decision in *McCullen v. Coakley*.

Section two of this paper examines the role and influence of media coverage of political protests and how media outlets have adapted as technology has evolved. This section begins with the role of mainstream news media outlets and the difference in coverage between nonviolent and violent protests, as well as an analysis of how an eruption of violence dilutes the overall message and power of the protest's message. This section then compares First Amendment speech protections and established news media with the rise of news dependency from social media, explaining how this drastic change in communication has placed both businesses operating social media platforms and individuals in a position of great power curtailing what political information is consumed online. Next is an analysis of ideological echo chambers increasing in size and quantity as a byproduct of social media's individualized censorship and targeted advertising tools. This section then discusses the United States government's attempt to define and limit censorship from state actors as political speech becomes more commonplace online. This section concludes with a discussion of social media's role in contributing to political polarization and communication breakdowns between Democrats and Republicans.

Section three discusses the continuing political polarization since the election of President Donald Trump and how that polarization hinders a bipartisan solution to the unanimously disliked mass shooting epidemic plaguing the United States in recent years. This section begins with an analysis of how Donald Trump's campaign tactics and Presidency have further polarized Democrats and Republicans by fostering an us-versus-them mentality and dismissing political opponents' stances as fake news. This section then discusses government entities' increasing online presence within social media and how courts have attempted to interpret government-run social media forums as extensions of their respective offices, thereby providing protesters a protective bubble to publicly speak in direct opposition to state actors at the heart of their online presence. This section next turns to an example of private finger-pointing journalism, and discusses how even debunked, falsified speech from a cult-of-personality remains preserved in echo chambers, suggesting that fake news' influences spread far beyond

normal news circulation. This section then analyzes the Democratic and conservative stances on gun control in the wake of the mass shooting epidemic and how breakdowns in bipartisan communications have hindered proper plans of action from being forged, despite much of the proffered action not being mutually exclusive. This paper concludes with the determination that the only way to begin countering political polarization and to reach solutions on mutually agreed evils like the mass shooting epidemic is to communicate as allies searching for an optimal solution, rather than as partisan opponents striving to have the final say.

II. CIVIL RIGHTS MOVEMENT TO THE PRESENT: THE DEVELOPMENT OF FREE SPEECH AND ASSEMBLY LAW IN THE CONTEXT OF PEACEFUL POLITICAL PROTESTS

The rights to freedom of speech and freedom of assembly under the First Amendment[18] are the grand equalizers to the David-versus-Goliath battle that protesters bring before lawmakers. State lawmakers originally argued that the First Amendment only applied to free speech protections against the federal government, as the First Amendment refers only to Congress explicitly.[19] However, through passage of the Fourteenth Amendment in 1868,[20] Congress extended First Amendment protections against state lawmakers through the Privileges and Immunities Clause.[21] Protestors in the United States have a legacy of impressive protections when criticizing state and federal governments, even when compared to modern speech laws in other countries. For example, the United Kingdom recently passed the Counter-Terrorism and Border Security Act of 2019, criminalizing speech and pictures raising a "reasonable suspicion" of extreme anti-government or terrorist ideologies.[22] Yet the freedom to speak and freedom to peacefully assemble are not unlimited freedoms under the Constitution.

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[18] U.S. CONST. amend. I.

[19] Akhil R. Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 Yale L. J. 1193, 1198-99 (1992).

[20] U.S. CONST. amend. XIV.

[21] *See* Douglas G. Smith, *The Privileges and Immunities Clause of Article IV, Section 2: Precursor of Section 1 of the Fourteenth Amendment*, 34 San Diego L. Rev. 809, 901-202 (1997).

[22] Counter-Terrorism and Border Security Act 2019 c.3, Available at: http://www.legislation.gov.uk/ukpga/2019/3/contents/enacted/data.htm (Accessed April 18, 2022); Index on Censorship, *New UK Counter-Terrorism Law Limits Online Freedoms*, European Digital Rights (Feb. 27, 2019), https://edri.org/new-uk-counter-terrorism-law-limits-online-freedoms/.

The right to protest peacefully is restricted by social realities including racism and general prejudices, which have historically challenged protesters to remain civil when their Goliath oppressors would not.

A. The Success of Nonviolent Assembly: The Selma March

Protests have always been an emblematic part of United States history, dating back to the country's founding after the American Revolution, but modern protesters largely credit the Civil Rights Movement of the 1960s for their social and legal roots. As such, perhaps the most important protest was the march from Selma to Montgomery, Alabama, in March of 1965, led by Dr. Martin Luther King, Jr. Iconic for an era stained by tyrannical restrictions of African American citizens' rights, the Selma March was intended to raise awareness of the inability of African Americans to change Alabama state law through the normal democratic processes.[23] Alabama at the time relied on the Supreme Court's ruling in *Giles v. Harris*, grandfathering-in white voting registration before January 1, 1903, while requiring those unregistered, who were mostly African American citizens, to satisfy a subjective and often arbitrary citizenship exam given by election officials.[24] In April of 1961, African Americans comprised nearly half of the voting-age population of Dallas County, Alabama, but only 156 African Americans were registered to vote out of the 15,000 that resided in the county.[25] Without effective participation in the polls, African Americans in Alabama were underequipped to combat the extreme political power gap between themselves and white citizens, and were further deterred by the often violent, and racist backlash of their oppressors.

What made the Selma March successful was the thin line it maneuvered between the permissible exercise of First and Fourteenth Amendment rights and deliberate civil disobedience. The Selma March was coordinated and executed with estimates of the local and national response.[26] The protest leaders, including King, expected that a violent response by Alabama state officials toward a peaceful protest would likely further shift national opinion towards favoring the marchers.[27] On March 7, 1965, a group of African Americans declared their 50-mile march to Montgomery. In response the Alabama governor, George Wallace, refused to endorse the

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[23] Jack Bass, *The Selma March and the Judge Who Made It Happen*, 67 Ala. L. Rev. 537, 537 (2015).

[24] Giles v. Harris, 189 U.S. 475, 482–84 (1903).

[25] David J. Garrow, Protest at Selma: Martin Luther King, Jr., and the Voting Rights Act of 1965*,* 31 (1978).

[26] *Id.* at 39.

[27] *Id.* at 229.

march, leading to a confrontation at Selma's bridge between protesters and state troopers.[28]

Unlike previous incidents taking place in the darkness of night and far away from cameras, the Selma March was stopped during daylight hours when troopers attacked the protestors in public with clubs, gas, and sticks.[29] The altercation was filmed and displayed on televisions across the nation, confirming the atrocities Selma protesters faced. This resulted in a federal lawsuit brought in Montgomery to prevent state officials from further interfering with the protest.[30] The court considered banning the march until a later date, but realizing that the march would likely continue and stir further violence, the federal court issued an order permitting the march.[31] Accompanied by a federal escort as they marched to Montgomery, King and his protesters demonstrated the immense power of nonviolent, peaceful assembly to combat firmly ingrained prejudices.[32] The Selma March had a significant and rapid impact across the nation, leading quickly to the passage of the Voting Rights Act in 1965, which banned many of the gatekeeping tests used to bar African Americans from voting in state elections.[33]

The success of the Selma March in bringing about quick legislative reform through nonviolent assembly is one of the most defining moments of the Civil Rights Movement. The principles of the Selma March, outlined in Martin Luther King's 1963 "Letter in Birmingham Cell", became a foundational standard for nonviolent protests that remains largely unchanged to the present day.[34] King's famous writing that "injustice anywhere is a threat to justice everywhere," and that individuals have a duty to combat unjust laws while remaining faithful to just laws, is the primary message of many nonviolent protests seeking support from a national audience.[35] But what King's "Letter" and the Selma March emphasized most effectively is that "justice too long delayed is justice denied," stressing to moderates and bystanders than social progress is not simply the result of the passage of

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[28] Burke Marshall, *The Protest Movement and the Law*, 51 Va. L. Rev. 785, 787 (1965).

[29] *Id.*

[30] *Id*.

[31] *Id.* at 787-88.

[32] *See* Bass, *supra* note 20, at 537-38.

[33] *Id.*; 52 U.S.C. § 10303(a) (2014).

[34] Zeke J. Miller, *Why Martin Luther King Jr.'s Lessons about Peaceful Protests Are Still Relevan*t, Time Mag. (Jan. 12, 2018, 4:15 PM), https://time.com/5101740/martin-luther-king-peaceful-protests-lessons/.

[35] *See id*. Letter from Martin Luther King, Jr. to his fellow clergymen (Apr. 16, 1963).

time.[36] If protesters do not take direct action as injustice arises, simply waiting with the hope that the democratic process will settle injustice eventually, true justice will undoubtedly fail.[37] Yet while active protests get the attention of lawmakers and courts, powerful national interests may ultimately prevail.

B. Government Pushback Against Free Speech: *U.S. v. O'Brien*

The Selma March helped foster a national desire to maintain the power of the popular vote over government suppression, but with the Vietnam War ushering in selective service lotteries, citizens found themselves sharply divided between supporting the war effort or protesting the lottery as an unjust method of fueling an unjust war. Through his "Why Vietnam?" speech and likeminded propaganda, former President Lyndon Johnson attempted to rally Americans into supporting Vietnam War, claiming the War was necessary to preserve peace and freedom throughout the world from threats of communist oppression.[38] Despite former President Johnson's efforts to revive U.S. morale in the war effort, citizen morale remained low as students publicly and continuously held anti-war protests that greatly diminished the public's opinion of the War.[39] Protests with thousands of participants calling for an end to the war were on television screens across the country, with soldiers notably throwing away service medals as a symbolic expression of their opposition.[40] Media coverage of the Vietnam War became increasingly negative as stories of atrocities overseas reached the American public, causing many draftees to seriously question just what awaited them once they left the United States.[41]

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[36] Letter from Martin Luther King Jr. to his fellow clergymen (Apr. 16, 1963); Michael C. Leff & Ebony A. Utley, *Instrumental and Constitutive Rhetoric in Martin Luther King Jr.'s "Letter From Birmingham Jail,"* 7 Rhetoric & Pub. Aff. 37, 38–39 (2004).

[37] Ronald J. Krotoszynski, Jr., *CELEBRATING SELMA: THE IMPORTANCE OF CONTEXT IN PUBLIC FORUM ANALYSIS*, 104 Yale L.J. 1411, 1412-13, 1435-1436 (1995).

[38] Connor Foley, Comment, *An Analysis of American Propaganda in World War II and the Vietnam War*, United States History Commons, In BSU Honors Program Theses and Projects, Item 90, 49-51 (2015), https://vc.bridgew.edu/cgi/viewcontent.cgi?article=1092&context=honors_proj.

[39] *Id.* at 51-52.

[40] *Vietnam War Protests*, HISTORY (Mar. 30, 2020), https://www.history.com/topics/vietnam-war/vietnam-war-protests.

[41] Anup Shah, *Media Propaganda and Vietnam*, Global Issues (Oct. 24,

As a symbolic expression of opposition to the Vietnam War, some draftees publicly burned their selective service registration cards, a violation of the Universal Military Training and Service Act of 1948.[42] Among such protesters was David Paul O'Brien, who burned his registration card on the steps of the South Boston Courthouse and claimed that the statute prohibiting burning draft cards was an unconstitutional abridgement of free speech serving no legitimate purpose.[43] The Supreme Court disagreed with O'Brien, claiming that Congress did have substantial legitimate interests in preventing destruction of the draft cards because the cards serve as proof of draft registry, facilitate communication between registrants and local draft boards, and preservation of the cards prevents fraud.[44]

In so holding, the Supreme Court set a new precedent known as the *O'Brien* test, which allows lawmakers to: create restrictions on symbolic expression if the restriction is (1) within the power of the government to make, (2) furthers a substantial government interest, (3) that interest is unrelated to suppression of free speech, and (4) the restriction extends only as far as necessary to fulfill the government interest.[45]

The *O'Brien* test makes explicit that, if the government has a very substantial justification for restricting First Amendment rights outside of a straightforward desire to restrict speech, then the government has the authority to do so.[46] In his dissent, Justice Douglas raises his concern that allowing mandatory conscriptions, despite Congress never issuing a declaration of war, implies that the federal government can restrict speech with less than a truly compelling national interest.[47] The question of whether conscription is permissible absent a declaration of war was not presented before the *O'Brien* Court. However, mandatory service was the issue at the heart of *O'Brien,* and similar draft card burners' protests.[48] Without properly addressing that issue, the scope of what truly comprises a substantial government interest remains ambiguous under the *O'Brien* test.

O'Brien's holding appears at first glance to grant the government

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2003), http://www.globalissues.org/article/402/media-propaganda-and-vietnam#ThemedialostthewarforAmerica.

[42] U.S. v. O'Brien, 391 U.S. 367, 370 (1968).

[43] *Id.*

[44] *Id.* at 377-79.

[45] *See id*. at 376-77; Mark R. Arbuckle, *Vanishing First Amendment Protection for Symbolic Expression 35 Years After United States v. O'Brien*, 25 COMM. & L. 1, 2-3 (2003) (citing U.S. v. O'Brien, 391 U.S. at 376-77).

[46] *See* Arbuckle, *supra* note 42 at 3.

[47] U.S. v. O'Brien, 391 U.S at 389–91 (Douglas, J. dissenting).

[48] *Id*.

tremendous power to mute government criticism, but time and future cases have demonstrated the government's difficulty to satisfy the *O'Brien* test without an exceptional government interest. For example, in 1989, the Supreme Court heard *Texas v. Johnson*, one of the many controversial cases involving burning the American flag. In protest to several Reagan administration policies, Gregory Johnson burned an American flag in front of the Dallas, Texas city hall, chanting "America, the red, white, and blue, we spit on you" alongside other protestors, leading to his arrest for desecration of a venerated object in violation of a Texas statute.[49] Applying strict scrutiny, the Supreme Court found that the protester's First Amendment rights outweighed the government's interests in censoring his antipatriotic disdain for America.[50] However, symbolic expression has occasionally been restricted in more recent years, such as when a Virginia statute outlawing burning crosses with the intent of intimidating others was upheld by the Supreme Court in 2003.[51] The Court's insistence that the cross burning must be intended to intimidate emphasizes the narrowness of its holding, i.e., without clear intent to intimidate and without a particularly egregious context, such as the "history of impending violence" cross burning entails, symbolic, yet inflammatory speech is likely to be protected under the First Amendment.[52]

C. The Extent of Protected Free Speech in Protests: *Brandenburg v. Ohio*

Inflammatory public speech carries with it many of the same First Amendment protections that less provocative protests carry. However, preventing immediate violence has historically been a valid, albeit narrow, exception from First Amendment protections that can satisfy the *O'Brien* test.[53] Despite the Selma March's success and national acclaim, the march also sparked a new breed of nonviolent protests with many inimical roots. Social tides began changing rapidly in the 1960s and many private organizations like the Klu Klux Klan, which faced nationwide vilification, countered with the argument that they, too, possess a right to free speech and nonviolent assembly, even if the underlying speech is hateful and a potential instigator of violence.[54] Just four years after the Selma March, in *Brandenburg v. Ohio*, the Klu Klux Klan challenged the incarceration of one

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[49] Texas v. Johnson, 491 U.S. 397, 399–400 (1989).
[50] *See id.* at 420; *See also* Arbuckle, *supra* note 42, at 11.
[51] Virginia v. Black, 538, U.S. 343, 363 (2003).
[52] *Id*.
[53] Brandenburg v. Ohio, 395 U.S. 444 (1969).
[54] *See Id*. at 446-47.

of their rally leaders under Ohio's Criminal Syndicalism statute, which forbade political speech advocating violence against the state as a purported security risk.[55]

Clarence Brandenburg spoke at a Klan rally broadcast on a national network, claiming that the Klan will march to Ohio's Congress and demand retribution for the Caucasian race, ultimately leading to his arrest for advocating violence to achieve political reform.[56] Despite Brandenburg's inflammatory speech which alluded to possible "revengeance" being taken against the government for "suppress[ing] the white, Caucasian race," the Supreme Court reversed his conviction, emphasizing that only if the speech rallies imminent lawless action, will the speaker be criminally liable.[57] Brandenburg's rally employed the same tactic as the Selma March of using mass, nonviolent assembly to get lawmakers' attention, albeit the message was the polar opposite of the earlier Selma March.[58] *Brandenburg*'s holding highlights the American value of combatting speech with speech and minimizing content-based restrictions within First Amendment protections, believing that government censorship of speech solely based upon its content has a chilling effect on open public debate.[59] The implications of *Brandenburg* span all the way to modern-day America, where society continues to question whether First Amendment protections for inflammatory speech are worth upholding, despite vast quantities of empirical evidence linking long-term effects of hate speech and racist propaganda to violent crimes motivated by such prejudices.[60]

Inflammatory rhetoric and hate speech remain commonplace tactics for some marginalized groups' public protests in modern America. In the last ten years, one of the most infamous groups employing hate speech in protests has been the Westboro Baptist Church. The organization claims to have protested over 40,000 times across America largely in condemnation of America's increasing acceptance of homosexuality.[61] In 2011, the Westboro Baptist Church picketed the funeral of a gay soldier in a public place adjacent

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[55] *Id.* at 447.

[56] *Id.* at 444–47.

[57] *Id.* at 446-49.

[58] *Id.* at 446.

[59] Geoffery Stone, *Content-Neutral Restrictions*, 54 Univ. of Chi. L. Rev. 46, 47-48 (1987).

[60] Alexander Tsesis, *Prohibiting Incitement on the Internet*, 7 Va. J. L. & Tech. 5, 20 (2002).

[61] *Westboro Baptist Church*, S. Poverty L. Ctr., https://www.splcenter.org/fighting-hate/extremist-files/group/westboro-baptist-church(last accessed Apr. 6, 2019).

to the funeral ceremony, raising the question of whether First Amendment protections for hate speech could bar a private tort claim of intentional infliction of emotional distress.[62] The Supreme Court reasoned that, despite the hateful nature of the speech, the content of Westboro's speech related to broad issues of public interest, rather than purely private speech targeted only at the deceased, and was therefore entitled to protection under the First Amendment.[63] The Court held that even if Westboro's protest contributed nothing to the public good, the speech occurred lawfully, peacefully, and on public property, and therefore must be shielded from tort liability in the interest of promoting public debate.[64] While protecting the freedom to publicly debate and criticize is a fundamental American value, many agree with Justice Alito in his dissent, wherein he wrote that "our profound national commitment to free and open debate is not a license for the vicious verbal assaults…".[65] Perhaps with an adequate buffer zone, Westboro protesters could be heard while a soldier's family could bury its son in relative peace, but striking such a balance has proven more difficult than merely drawing a line in the sand.

D. Public Buffer Zones and *McCullen v. Coakley*

It is said that the purpose of debate is to bring forth the greater truths behind the arguments and examine flaws under a microscope. Participants in debates commonly keep a fixed distance from one another—a no-man's-land ensuring that only the opponent's words and intentions reach the other. For protesters, these no-man's-lands are known as buffer zones, fixed distances away from the protest's opponent, such as a government entity or a private clinic, where protections under the First and Fourteenth Amendments end if the zone is crossed.[66] The existence of buffer zones presents a very difficult and controversial balancing act for courts between citizens' right to publicly protest, content-neutral government interests including maintaining peaceful order, and preserving the rights of bystanders to freely access public spaces.[67]

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[62] Snyder v. Phelps, 562 U.S. 443, 448–49 (2011).

[63] *Id.* at 457–58.

[64] *Id.* at 460–61.

[65] *Id.* at 463 (Alito, J., dissenting).

[66] Michael S. Leonard, *Supreme Court Invalidates Massachusetts Abortion Clinic 'Buffer Zone',*10 No. 4 Westlaw J. Med. Malpractice 1, 1-2 (2014).

[67] *Id.*; Nate Nasrallah, *Preventing Conflict or Descending an Iron Curtain? Buffer-Zone Laws and Balancing Histories of Disruption with Free Speech*, 66 Case W. Res. L. Rev. 849, 856 (2016); *See* Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 772(1994).

No buffer zone laws in recent years have been quite as controversial as those surrounding abortion-clinics at the 35-foot marker. In *McCullen v. Coakley*, the Supreme Court struck down a Massachusetts statute which criminalized protesting beyond the 35-foot buffer zone in front of abortion clinics.[68] The Court held that the Massachusetts government's interests unconstitutionally overreached against abortion-related speech because the buffer zones were not content neutral.[69] Yet, even the Justices themselves disagreed about the level of discrimination the state law imposed.[70] As a result, *McCullen* sparked a national debate about whether abortion clinic buffer zones could meet strict scrutiny standards, justifying discrimination as a means to protect women seeking abortions, and whether the removal of these buffer zones would result in greater success for the picketing protesters.[71]

The scientific consensus seems to be that the removal of buffer zones from outside abortion clinics causes women seeking abortions greater emotional stress, but generally does not discourage them from carrying out the abortions or regretting the abortion post-operation.[72] However, abortion protestors have been successful in delaying many abortions, compared to days when protesters are not gathered outside the clinic. Tammi Kromenaker, executive director of the Red River Women's Clinic in North Dakota, reports that, via security cameras, she has seen intimidated women turn away from the clinic and protesters cheer, but often these women subsequently call to reschedule their abortion appointments.[73] The most success the protesters have had, Kromenaker reports, is convincing people who likely didn't want an abortion in the first place from carrying out the procedure.[74] Deterring women on the fence from receiving an abortion is indeed a success for the protest. Yet, from Kromenaker's report and the Bixby Center's study, it appears that, regardless of whether protesters stand 35 feet away or are right outside the door, the effectiveness of their protest remains relatively the same.

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[68] McCullen v. Coakley, 573 U.S. 464, 478 (2014).

[69] *Id.*

[70] *Id.*; *See Id*. at 497-98 (Scalia, J., concurring).

[71] *Id.* at 478*; Kate* Pickert*, Why Abortion Clinic Protestors May Not Matter,* Time Mag. (June 26, 2014, 4:24 PM), http://time.com/2928597/abortion-buffer-zone-protestors/.

[72] *Id.;* Diana Greene Foster et al., *Effect of abortion protesters on women's emotional response to abortion*, 87 Contraception 81, 87 (2013).

[73] Pickert, *supra* note 67.

[74] *Id.*

III. THE EVOLVING ROLE OF THE MEDIA IN NONVIOLENT PROTESTS

A. News Media Outlets

Media coverage functions as a double-edged sword for most protests. Because televised and textual coverage of a protest can spread its message across the nation over an afternoon, media outlets function as the first impression of a protest on most of the nation's citizens. Many protests succeed or fail in large part by determinations of which media outlet covers the protest, who journalists interview, and levels of authority of the interviewees, among other variables.[75] An unfortunate reality for many protests meaningful in character but limited in resources, is that without a degree of drama to attract media attention, overall news coverage and discussion of the protest will likely be minimal at the national level.[76] For example, media outlets largely ignored an anti-pornography protest in Minneapolis until some demonstrators ransacked an adult bookstore.[77] The difficulty most protesters face is balancing the protest's message through peaceful, legitimate means and inciting just enough drama to attract a large audience without allowing that drama to overshadow the protest's message.[78]

In terms of media coverage, the objective of most protesters is to educate the masses of the importance of the protest and what makes the protest worth supporting. Modern protests often require a self-advertising presence on social media to clarify the protest's objectives. Disinterested mass media coverage can hinder the growth of peaceful protests by either glossing over or failing to cover underlying protest objectives. For example, when covering the peaceful 2006 Los Angeles "Day Without Immigrants" demonstrations, no widely publicized articles gave an in-depth explanation of the many immigration issues that birthed the protest, instead merely giving a basic overview of the House and Senate bills fueling the plight of the protesters.[79]

By contrast, riots and rebellions draw in journalists like moths to flame, generating much higher viewership and more real-time updates than most peaceful protests, even if both protests seek to accomplish similar

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[75] Douglas M. McLeod, *News Coverage and Social Protest: How the Media's Protect Paradigm Exacerbates Social Conflict*, 2007 J. Disp. Resol. 185, 186-88, 191 (2007).

[76] Bart Cammaerts, *The Mediation of Insurrectionary Symbolic Damage: The 2010 U.K. Student Protests*,18 Int'l J. Press & Pol. 525, 529-31 (2013).

[77] McLeod, *supra* note 71, at 185.

[78] *Id.* at 186.

[79] *Id. at* 190.

objectives.[80] Higher viewership does not necessarily equal greater protest successfulness however, as negative press surrounding a protest, especially one resorting to violence, threatens to damage or delegitimize the protest at the price of higher publicity.[81] The "Battle for Seattle" protest outside a WTO assembly received national coverage but risked losing its anti-globalization message when activists blocked intersections and smashed windows, forcing police clad in riot gear to launch tear gas to scramble and dismantle the rallied crowds.[82] The constant updates from news media sources were not focused on the protest's anti-globalization message, but rather on the mass chaos in downtown Seattle, referring to the protest as a "riot" or a "crime story."[83]

If the anti-globalization protests had remained peaceful, it is more probable that any national coverage would have been focused on the anti-globalization debate, rather than the demonstration's misdeeds.[84] However, trends in media coverage of recent protests indicate that some protests, such as the anti-racism Charlottesville protest and the Dakota Pipeline protest, are perceived as "confrontational" by the nature of their topic, rather than as public debate.[85] Coverage of these protests often immediately depicts the protesters as combative, greatly undermining the meaning of the protests and ignoring the debate over resolving systemic problems, focusing instead on officials' attempts at keeping the peace.[86] By contrast, despite drawing enormous attendance, gender-related protests such as the Women's March are rarely covered by media outlets as confrontational or combative.[87] Moreover, environmental, healthcare, and immigration protests are generally covered as civil public debates.[88] Therefore, peaceful protests are better poised to maintain media emphasis on the protest's message, albeit they may receive less coverage overall. Yet, even without the emergence of violence, preconceived bias greatly affects how media outlets cover and convey a protest to a national audience.

Not only has the quantity of major news media outlets rapidly increased as media technology continues to develop, but the amount of coverage of a single event from different perspectives has also increased

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[80] Cammaerts, *supra* note 72, at 529-531.

[81] *Id.* at 531.

[82] McLeod, *supra* note 71, at 185-86.

[83] *Id*. at 186.

[84] Danielle K. Kilgo & Summer Harlow, *Protests, Media Coverage, and a Hierarchy of Social Struggle*, 24 Int'l J. of Press/Pol. 509, 522 (2019).

[85] *Id.*

[86] *Id.* at 522-23.

[87] *Id*. at 521.

[88] *Id.* at 521-25.

considerably.[89] Publication over the internet, rather than by newspaper or broadcast, has drastically decreased the cost of producing and distributing information.[90] With so many news outlets and personal perspectives available instantly via the internet, individuals may easily choose only to consume information from outlets and perspectives confirming their already-held beliefs.[91] Individuals self-filtering news for consumption is no new trend, as having the opportunity to support some news outlets while ignoring others is an integral effect of press freedoms guaranteed in the U.S. Constitution.[92] What has changed with news outlets' transition to online space is the massively increased quantity of filtered news individuals are likely to see. Media outlets now advertise constantly across Facebook, Twitter, and other private spaces consumers frequent, even giving consumers the ability to advertise for them via the social media hub's "share" technology.[93] Instead of waiting for consumers to walk to a newsstand or watch a certain channel for news, media outlets can now exist directly within the social hubs of their consumers.

This change in the relationship between mass media outlets and their consumers contributes greatly to increased ideological polarization between political ideologies, far more than increased information availability has been able to narrow the divide.[94] Through its marriage with social media, traditional news media outlets have likewise become increasingly more dependent on the health of their online presence, just as their viewers have. Political articles found on social media are more likely to be strongly opinionated and segregated from opposing viewpoints than those found on the same media outlet's official website.[95] Similarly, political media outlets have greater exposure and traffic from opposing perspectives on their websites than their presence on social media.[96]

This trend indicates that bipartisan information consumers tend to go directly to the opposing position's news source, rather than passively find

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[89] *See* Richard R. Lau et al., *Effect of Media Environment Diversity and Advertising Tone on Information Search, Selective Exposure, and Affective Polarization*, 39 Pol. Behav. 231, 234-35 (2017).

[90] Seth Flaxman et al., *Filter Bubbles, Echo Chambers, and Online News Consumption*, 80 Pub. Op. Q. 298, 298 (2016).

[91] *Id.* at 299.

[92] U.S. Const. amend. 1.

[93] Flaxman *supra* note 85, at 298-99.

[94] *Id.* at 300.

[95] *Id.* at 317-18.

[96] *Id.* at 318.

their articles on social media.[97] Opposing news outlets therefore remain accessible to interested consumers. However, according to a 2016 survey by the Pew Research Center, approximately 62% of adults in the United States consume news primarily from social medial sites, and subsequent trends indicate that the number of people consuming social media news instead of traditional news media is still increasing.[98] With increased dependency on sensationalized news and rapid news sharing, comes a substantial rise in fake news—news articles with intentionally false information meant to mislead and emotionally deceive readers.[99] Fake news is not a new problem, but the near-zero cost of creating social media accounts and lack of reprimand for fake news spreaders suggests that news derived from social media has a considerably higher likelihood of containing bias and falsehoods than traditional news outlets.[100] Traditional news outlets have greater concerns over losing credibility and legitimacy, but still tailor their speech to a narrative allied to their respective viewers, imperfectly combatting disinformation with contrasting misinformation or an incomplete picture.[101] As dependence on social media platforms for a primary source for news continues to grow, the mere availability of opposing arguments is not sufficient to stop the growing political ideological divides in America.

B. Social Media: The Personal Media Outlet

With the rise of the Internet Age, the exponentially increased speed, methods, and quantity of information readily accessible to individuals has drastically altered the battlefield for protesters. State-sponsored and privatized mass media outlets are no longer the sole providers of local and national news, as citizens through social media efficiently self-advertise and reach thousands of like-minded individuals in an instant.[102] Social media is

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[97] *Id.*

[98] Amy Mitchell, *Key findings on the traits and habits of the modern news consumer*, Pew Res. Ctr. (July 7, 2016), https://www.pewresearch.org/fact-tank/2016/07/07/modern-news-consumer/ ; Kai Shu et al., *Fake News Detection on Social Media: A Data Mining Perspective*, 19 ACM SIGKDD Expl. Newsl. 1, 12 (2017).

[99] *Id*. at 1.

[100] *Id.* at 1, 3.

[101] Jana Laura Egelhofer & Sophie Lecheler, *Fake news as a two-dimensional phenomenon: a framework and research agenda*, 43 Annals of the Int'l Commc'n. Ass'n. 97, 102-105 (2019).

[102] Rebecca Kay LeFebvre & Crystal Armstrong, *Grievance-based social movement mobilization in the #Ferguson Twitter storm*, 20 New Media & Soc'y. 8, 11 (2018).

a readily available, low-cost tool for activists to combat mass media censorship and plays a fundamental role in instilling rapid social change, especially in more authoritarian regions of the world, such as Tunisia during the Arab Spring.[103] Social media enables protesters to dilute the risk of bad mass media impressions (for example, coverage of a violent protester deviating from an otherwise peaceful assembly) by speaking openly and directly to viewers across the nation the instant an incident occurs, helping to ensure that the protest's narrative continues to hold credence with their national audience.[104]

In 2014, after a grand jury decided not to indict Officer Darren Wilson for killing Michael Brown, an unarmed African American teenager, numerous protests and riots broke out across the United States.[105] At the same time, approximately 6 million messages were sent across Twitter under the banner '#Ferguson,' uniting approximately 1.5 million Twitter users to demand a change in police conduct and the criminal justice system.[106] The national outcry led Ferguson's local government to begin changing its policies to help combat "over-policing" minority communities. Ferguson is a town whose population is 70% African American, but staffs only three African American officers on a police force 53 individuals strong.[107] Congress also took notice of the online discussions and response to Ferguson, leading Congress to question the long-running practice of sending surplus military gear to police departments.[108] Though the surplus policies were designed to increase police-readiness for violent confrontations, the policies also exacerbated antagonistic tensions between police and citizens, especially in cities with demographically segregated populations and high minority populations.[109] Were it not for the nonviolent, nationwide criticisms of police and court powers over social media, the Ferguson riots would likely have overshadowed peaceful attempts of demonstrators and critics to bring about change, the silence perhaps even aiding Congress in justifying militarizing police to effectively prevent riots.

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[103] *Role of the Internet and Social Networks in the Arab Uprisings An Alternative to Official Press Censorship*, 21 Cumminicar 147, 148 (2013).

[104] *See* LeFebvre, *supra* note 97, at 11.

[105] *Id.* at 9.

[106] *Id.* at 9, 16, 23.

[107] Patrik Jonsson, *Ferguson Announces Changes to Policing, Courts to 'Improve Trust',* Christian Science Monitor (Sept. 9, 2014) https://www.csmonitor.com/USA/Justice/2014/0909/Ferguson-announces-changes-to-policing-courts-to-improve-trust.

[108] *Id.*

[109] *Id.*

Though social media has become an interwoven asset of free speech, it has also become one of the most powerful tools for speech censorship. Social media hubs like Facebook and Twitter are private enterprises, despite being used and perceived as public forums for free speech by millions of daily users.[110] Because these private social media spaces are not government-run, they are not subject to the same strict scrutiny analysis when attempting to restrict free speech.[111] Facebook's CEO Mark Zuckerberg has reported that Facebook will ban white nationalism and separatism-related content posts on its website.[112] There is no *O'Brien*-tested, narrowly tailored reason Facebook must provide to ban hate speech, as Facebook maintains its right as a private entity to moderate content on its forums. In response to queries about limiting free speech, Facebook leaders say that the restrictions' objective is primarily about safety.[113] Contrasting the Supreme Court's holding in *Brandenburg,* that the speech must be linked to *imminent* violence to be restricted, Facebook is instead pointing to the long-term effects of their website being used by hate groups to radicalize individuals and entice them to commit atrocities.[114] In creating this ban, Facebook is acknowledging concerns from nations that ban hate speech, such as India, whose citizens make up about 90% of Facebook users outside the U.S.[115]

Even though Facebook is attempting to disassociate itself from hate speech groups, Facebook has done far less, and indeed profits from, the rampant spreading of fake, targeted, and potentially malicious political advertising.[116] In 2018, the U.S. House of Representatives Permanent Select Committee on Intelligence released a dataset indicating that between 2015

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[110] Benjamin F. Jackson, *ARTICLE: CENSORSHIP AND FREEDOM OF EXPRESSION IN THE AGE OF FACEBOOK*, 44 N.M. L. Rev. 121, 121 (2014).

[111] *Id*.

[112] Sasha Ingber, *Facebook Bans White Nationalism And Separatism Content From Its Platforms*, NPR (Mar. 27, 2019, 4:33 PM), https://www.npr.org/2019/03/27/707258353/facebook-bans-white-nationalism-and-separatism-content-from-its-platforms.

[113] Aarti Shahani, *With Facebook Ban On White Extremism, International Norms Apply to U.S.*, NPR (April 5, 2019, 5:15 PM), https://www.npr.org/2019/04/05/710313380/facebooks-ban-on-white-extremism-comes-amid-international-pressure.

[114] *Id.*

[115] *Id.*; India Penal Code § 295A.

[116] Filipe N. Ribeiro et al., *On Microtargeting Socially Divisive Ads: A Case Study of Russia-Linked Ad Campaigns on Facebook*, 19 ACM Digit. Libr., and Transparency, 140, 140 (2019).

and 2017, approximately 3,517 political Facebook advertisements had their origins linked to a Russian propaganda group called the Internet Research Agency.[117] Many of these advertisements are designed to be delivered to and only visible by the advertisements' target demographics, exploiting viewers' confirmation biases and eluding other demographics more likely to report the advertisements as fake.[118] Most of these advertisements are socially-divisive in nature, meaning that they are designed to provoke and inflame viewers, and are reported to have approximately ten times the view count as typical Facebook ads.[119] Facebook's allowance of targeted advertisements as a source of revenue is a reminder that, despite being one of the largest vessels for speech in the Internet Age, Facebook is simultaneously a business with its own self-interests and ambitions. With citizens becoming increasingly dependent on Facebook for news, the United States government could foreseeably declare a need to curtail Facebook's allowance of targeted political advertising, arguing that preventing the spread of malicious, fake political advertising is a substantial state interest.

One potential approach to directing Facebook away from incentivizing targeted falsified political advertisements is to create a narrow extension of the Supreme Court's ruling in *New York Times v. Sullivan*. L.B. Sullivan, an elected commissioner in Montgomery, Alabama, sued several supporters of Martin Luther King, Jr. for libel over an advertisement criticizing the local police for their mistreatment of civil rights protesters.[120] Despite some factual inaccuracies in the advertisement, the Supreme Court unanimously held that public officials cannot recover damages for defamation relating to official conduct unless actual malice, defined as false information spread knowingly or recklessly, is proven.[121] A natural extension of *Sullivan*'s holding would allow defamed officials to file injunctions or seek potential money damages against social media businesses, such as Facebook, who recklessly allow their online platforms, search algorithms, and user data to be used for dispensing maliciously false news in exchange for revenue. However, the greatest flaw with this or any other recovery from the spreading of false news, is that it is indeed a reaction—a response to damage already done. Despite any findings or conclusions a court makes in granting relief to the official, if confirmation bias leads individual users to continue believing what the malicious articles purport, the public official gains little from prevailing in court.

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[117] *Id.* at 140–41.
[118] *Id.* at 140.
[119] *Id.* at 140–41, 49.
[120] New York Times Co. v. Sullivan, 376 U.S. 254, 256–58 (1964).
[121] *Id.* at 279–80.

Individual users and groups on social media also possess the ability not just to ignore, but to block and delete the speech of others when it is posted on a forum they retain moderator privileges on, such as a personal feed. The freedom of private users to self-regulate censorship is akin to a powerful buffer zone beyond the restrictions of state-made buffer zones. There are no public rights to access and comment on an individual's private social media page, besides what the platform moderator is capable of censoring. These private buffer zones can be used not only to block hate speech and other egregious forms of commenting, but also to block rational criticism. Whereas in the past, avoiding conflicting opinions was more difficult, social media allows us to easily bubble ourselves in layers of consensus and biased information sources. Consequently, political activists have increased difficulty reaching and persuading individuals not already under the activists' banner, especially those in opposition, resulting in the creation of an unprecedented rise of political echo chambers and the breakdown of bipartisan communication.[122]

C. Political Activism on Social Media and Political Echo Chambers

Social media and political speech are deeply intertwined, with millions of users logging on every day across the country to raise awareness for, or reply to, local and national issues. Former President Trump's presidential campaign and administrative policies unleashed a plethora of controversial issues which Americans were quick to discuss over their preferred forms of social media. Use of social media in the U.S. has exploded in recent years, with usage increasing by approximately 88% since 2006 for U.S. adults between ages 18–29—many of whom were too young to vote in the 2016 election.[123] Older demographics have shown rapidly increased social media activity too, ranging from a 78% increase from U.S. adults between ages 30–49 to a 37% increase in usage for those age 65 or older.[124]

According to the Pew Research Center's 2018 report on social media activism, roughly 50% of Americans state that they have engaged in a form of political or social-minded activity via social media in the last year.[125]

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[122] *See* Christopher A. Bail et al., *Exposure to opposing views on social media can increase political polarization*, 115 PNAS 1, 5-6 (2018).

[123] Lee Rainie, *Americans' complicated feelings about social media in an era of privacy concerns*, Pew Rsch. Ctr. (Mar. 27, 2018), http://www.pewresearch.org/fact-tank/2018/03/27/americans-complicated-feelings-about-social-media-in-an-era-of-privacy-concerns.

[124] *Id.*

[125] Monica Anderson et al., *ACTIVISM IN THE SOCIAL MEDIA AGE*,

Social media has been especially important for aiding racial and ethnic minority users in finding like-minded activists and expressing political ideologies openly, as well as getting elected officials to listen to social protests.[126] However, despite the communication boom social media offers to political activists, roughly 77% of U.S. adults believe that social media distracts individuals from more important issues, at least to some degree.[127] African American and Hispanic social media users report more frequently that social media highlights important underrepresented issues, while White users frequently report that social media distracts from more important issues.[128]

The Pew Research Center's report indicates that politically active social media users, and not merely political extremists, push opposing or unrelated activists away, labeling them distractions from worthier causes. Selective exposure and confirmation biases acting as filters on the content an internet user experiences highlights why so many U.S. adults see ideologically distant protests as mere distractions. When an activist is interconnected with thousands of like-minded individuals via social media and is praised for his or her input on a controversial issue, essentially it is as if the activist is centerstage in a filled coliseum, receiving applause from countless attendees. With such reassuring feelings of correctness and authority, confirmation bias dilutes outside issues as distractions from "what's truly important."[129]

1. Echo Chamber Polarization Impacting the Marketplace of Ideas

While social media has become an integral forum for protests to grow peacefully, social media has also negatively impacted protest effectiveness through by-product echo-chambers, where radical ideas find unopposed justification despite flawed logic. Studies indicate that most of an internet user's experiences online are subject to that user's selective exposure and confirmation bias—that is, users are more likely to expose themselves to information that reinforces already established viewpoints.[130] In other words,

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Pew Rsch. Ctr. (July, 11, 2018), http://www.pewinternet.org/2018/07/11/public-attitudes-toward-political-engagement-on-social-media/.

[126] *See Id.*

[127] *Id.*

[128] *Id*.

[129] *Id*.

[130] Elanor Colleoni et al., *Echo Chamber or Public Sphere? Predicting Political Orientation and Measuring Political Homophily in Twitter Using*

studies indicate that individuals tailor their social media feeds to largely conform with their already-established beliefs.[131] Internet echo chambers arise when individuals create homogeneous forums which limit ideological exposure only to what is agreeable within that chamber's worldview, escalating confirmation bias by the absence of opposition.[132] Unchallenged ideological stagnation dampens the effect of cries for immediate activism to address civil rights issues beyond the scope of the echo chamber's worldview.

Overexposure to like-minded people in echo chambers is often associated with the adoption of more unflinching, extreme political views, starkly contrasting most general media coverage and typical political opinions.[133] Political discussion through social media tends to arise over controversial public issues where journalists or other users have brought the topic forward, forming a chain of commentary directly attached to the coverage piece itself, rather than appearing only in spaces reserved as dedicated political forums.[134] The way individuals respond to political debates through social media has shown to differ between the two primary political parties in America, but both have habits that tend to exacerbate political polarization.

Political polarization, according to Elanor Colleoni's 2014 study, is more pronounced among active followers of official partisan social media accounts than the general public.[135] Overall however, as social media usage increases, political polarization is becoming more commonplace in the general public.[136] Based upon their Twitter activity, Democrats are less likely than Republicans to follow official partisan accounts, but Democratic discourse is ten times more likely to appear in Democratic users' general conversations.[137] By contrast, the level of ideological uniformity among Republican followers of official partisan accounts is considerably higher than respective Democratic followers, but Republicans are less likely to express their ideas about controversial issues in general conversations across online forums.[138] Whereas Democratic discussion over social media is ten times that of similar Republican discussion, Republicans are more strongly organized and likely to be followers of official partisan accounts, indicating that echo

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Big Data, 64 J. Commc'n. 317, 318-19 (2014).

[131] *Id.*

[132] *Id.* at 319.

[133] *Id.*

[134] *Id.* at 325.

[135] *Id.* at 328.

[136] *See Id* at 328-29.

[137] *Id.* at 325.

[138] *Id.* at 325, 328.

chambers form differently between the two parties.[139] Democratic echo-chambers more easily find ideological confirmation *en masse* by assuming consensus in an overwhelming amount of political discussion online, while Republican echo-chambers emerge as alleged safe-zones for what is deemed radical conservative discourse by the more numerous Democratic users.

In either case, protests, legislation, and social movements are stifled by echo chambers, as encouraging individuals unwilling to acknowledge opposing viewpoints to embrace alternatives is an incredibly difficult challenge. Reluctance to listen, fostered by contempt for opposition, is a key component of the increasing political polarization in America, and without active efforts from both political parties to communicate amicably with one another, America is likely to continue politically polarizing.[140] Such polarization delays and enfeebles America's democratic process, which has vastly increased protesters' and lawmakers' difficulty resolving contemporary issues with a unified, bipartisan plan.

Despite these impediments to bipartisan communication, American jurisprudence fosters a "marketplace of ideas" at the very source of online political discussions across social media platforms, often creating a small buffer zone between echo chambers and the speech of state leaders.[141] Influence from John Stuart Mill's theory that truth is best separated from falsehoods when ideas compete free from censorship is apparent from the United States' promotion of "internet freedom" and First Amendment protections against viewpoint discrimination underlying state action.[142] These censorship restrictions preserve a free market of ideas within state actors' presence on social media, exhibiting a readily observable mapping of Mill's theory in government-controlled online spaces. Twitter, for example, publicly displays how many favorites and shares every post and every comment to that post has accrued. Many political leaders in the United States have increasingly been using Twitter and similar platforms as a quick and direct means of speaking out to the American population.[143] As social media

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[139] *Id.* at 325.

[140] Michael Dimock et al., *Political Polarization in the American Public*, Pew Res. Ctr. (Jun. 12, 2014), *https://www.people-press.org/2014/06/12/political-polarization-in-the-american-public/.*

[141] David Schultz, *Marketplace of Ideas*, The First Amend. Encyclopedia, https://www.mtsu.edu/first-amendment/article/999/marketplace-of-ideas (last updated June 2022).

[142] *Id.;* Clay Shirky*, The Political Power of Social Media - Technology, the Public Sphere, and Political Change*, 90 Foreign Aff., 28, 30 (2011).

[143] Michael Bossetta, *The Digital Architectures of Social Media: Comparing Political Campaigning on Facebook, Twitter, Instagram, and*

continues to become an integral form of state speech, one can see in real time the comparable popularity of state speech, as well as the popularity of its praise and criticisms with minimal censorship.

In the years leading up to the 2016 presidential election of Donald Trump, the United States Supreme Court vocalized the importance of preserving the marketplace of ideas.[144] One notable case is *Reed v. Town of Gilbert*, wherein the Arizona town of Gilbert placed dimensional restrictions on political and religious signs.[145] In ruling that the content-based discrimination of the town's ordnance was unconstitutional, Justice Breyer wrote in his concurrence,

> whenever government disfavors one kind of speech, it places that speech at a disadvantage, potentially interfering with the free marketplace of ideas and with an individual's ability to express ideas determining what kind of society that individual wishes to live, help shape that society, and define his place within it.[146]

Justice Breyer's concurrence supports the principle that a free market of ideas is a critical asset to a healthy democracy, no matter what medium the speech takes.[147]

Reed and similar First Amendment cases permit political criticism and protests to exist where they matter most—as a direct, easily viewable response to official state action directly upon the state actor's official social media account. Without such protections against government censorship, such criticism could only remain published within echo chambers with largely redundant viewership, diminishing the marketplace of ideas. Emulating the marketplace's democratic philosophy that the most popular idea wins the day, social media platforms are designed to prioritize popular speech though publishing that speech as a trending phenomenon, further increasing new incoming praises and criticisms.[148] However, visibility based upon popularity reveals the double-edged nature of the marketplace of ideas in an online political setting. Lengthy, well-documented research often finds

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Snapchat in the 2016 U.S. Election, 95 Journalism & Mass Commc'n. Q. 471, 472 (2018).

[144] Schultz, *supra* note 136.

[145] Reed v. Town of Gilbert, 135 S.Ct. 2218, 2224 (2015).

[146] *Id.* at 2234 (Breyer, J., concurring).

[147] Schultz, *supra* note 136.

[148] Sitaram Asur et al., *Trends in Social Media: Persistence and Decay*, 5 Fifth Int'l AAAI Conf. on Weblogs and Soc. Media 434, 434 (2011).

itself less viewed than quick, satirical anecdotes from cults of personality.[149]

The near-ubiquity of sensationalized, biased news, coupled with rising trends of viewers avoiding criticism, reveals that there is great difficulty discerning truth from dramatic-yet-popular propaganda, and that it is more difficult than previously assumed for legitimate news to prevail over falsified news.[150] Overall, political advertising across digital platforms rose from 1.7% of ad spending in the 2012 election cycle to a 14.4% share in 2016 for both local and national elections.[151] Increased distrust of opposing Democratic and Republican news sources became a hallmark of the 2016 presidential race and the Trump Presidency, exacerbating political tensions between the parties.[152]

IV. THE TRUMP-ERA

A. Success in Maintaining First Amendment Protections Across Social Media

Former President Donald Trump, even before being inaugurated, has been the focal point of one of the largest battles over truth in United States history. Former President Trump on Twitter and during press conferences personally rejected many news sources painting his administration in a less than stellar light as an attempt by Democrats to diminish his accomplishments.[153] Trump's crusade against sources of alleged fake news strikes many as a political witch hunt, as Trump attempted to vilify his political opponents, most notably presidential candidate Hillary Clinton.[154]

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[149] *See* Jeff Grabmeier, *Not Just Funny: Satirical News has Serious Political Effects*, ScienceDaily (Jan. 23, 2017), https://www.sciencedaily.com/releases/2017/01/170123115741.htm.

[150] *See* Lili Levi, *Real Fake News and Fake Fake News*, 16 First. Amend. L. Rev. 232, 233-37 (2017); Philip M. Napoli, *What If More Speech Is No Longer the Solution: First Amendment Theory Meets Fake News and the Filter Bubble,* 70 Fed. Commc'n. L.J. 55, 59 (2018).

[151] Michael Bossetta, *The Digital Architectures of Social Media: Comparing Political Campaigning on Facebook, Twitter, Instagram, and Snapchat in the 2016 U.S. Election*, 95 Journalism & Mass Commc'n. Q. 471, 472 (2018).

[152] John Gramlich, *Q&A: How Pew Research Center evaluated Americans' trust in 30 news sources*, Pew Rsch. Ctr. (Jan. 24, 2020), https://pewrsr.ch.208F7Tp.

[153] David Jackson, *Trump blames Democrats for wave of claims*, USA TODAY (Int'l Ed.), Dec. 14, 2017, at 3A.

[154] Heidi M. Przybyla, *Clinton, Trump swap accusations of putting country in danger*, USA TODAY (US Ed.), Sept. 20, 2016, at 2.

Trump's campaign rallies were infamously more evocative against Clinton than focused on the structure of his future policies, with Trump himself leading chants of "Lock her up!" even long after securing the presidency.[155] Trump's rallies enticed right-leaning media to repeatedly portray Clinton as a criminal due to her leaked emails, purposely disregarding Clinton's multiple exonerations in 2015 and 2016.[156]

Despite Trump's fake news accusations not always being justified and often being hypocritical, Trump shed light on America's inability to learn from past incidents where misinformation and propaganda effectively spread falsehoods as evidentiary truths.[157] But while awareness of potential fake news is enlightening, Trump's demagogical approach to lime-lighting fake news fostered an us-versus-them mentality hindering bipartisan communication.[158] Declaring information fake news because it is adversarial to the declarant's worldview encourages the opposite party to do much the same. As *Time Magazine* reports, the only thing Republicans and Democrats seem to agree on these days is that the other party is brainwashed.[159]

1. Government Speech in Online Spaces: The Knight Cases and Implications

Prior to Donald Trump's time in office, courts had largely left questions of government use of social media unanswered.[160] Government presence on social media became much more controversial when former President Trump's personal Twitter account became closely associated with official state action, especially when the former president made executive announcements such as his administration's ban on transgender people

[155] Emily R. Anderson, *The narrative that wasn't: what passes for discourse in the age of Trump*, Media, Culture & Soc'y 1,9 (2019).

[156] *Id.* at 6.

[157] Anya Schiffrin, *DISINFORMATION AND DEMOCRACY: THE INTERNET TRANSFORMED PROTEST BUT DID NOT IMPROVE DEMOCRACY*, 71 J. Int'l Aff. 117, 117 (2017).

[158] Paul Elliott Johnson, *The Art of Masculine Victimhood: Donald Trump's Demagoguery*, 40 Women's Stud. in Commc'n. 229, 231-232 (2017).

[159] Charlotte Alter et al., *Pro-Trump, Anti-Trump Protesters Agree: The Other Side as Brainwashed*, FORTUNE, (July 18, 2016, 8:04 PM), https://fortune.com/2016/07/18/pro-trump-anti-trump-protesters-agree-the-other-side-has-been-brainwashed/.

[160] Samantha Briggs, *The Freedom of Tweets: The Intersection of Government Use of Social Media and Public Forum Doctrine*, 52 Colum. J.L. & Soc. Probs. 1, 1, 6-7 (2018).

participating in U.S. military service.[161] Despite the then-sitting president speaking in his official capacity, the online space his speech occupied originated as a private account in the domain of a private corporation.[162] This leaves courts with the difficult question of whether blocking another Twitter user from seeing or interacting with the president's speech simply by using banning tools available to every Twitter user an unconstitutional violation of that user's First Amendment rights to political participation in the public forum.[163] At first glance, it appeared clear that the president, while overtly acting in his official capacity, engaged in unlawful viewpoint discrimination when blocking critical political speech on his Twitter page.[164] In *Knight First Amendment Institute v. Trump*, the New York Southern District Court determined that, while the president does have the right to ignore criticism, he does not have the right to outright block users on social media.[165] Blocking prevents users from seeing and replying to official government messages, and is thus a violation of those users' First Amendment rights to speak and be heard free of government censorship.[166] *Knight*'s holding was affirmed 3–0 by the United States Court of Appeals, Second Circuit.[167]

However, in *Biden v. Knight First Amendment Institute At Columbia University*, the United States Supreme Court vacated the previous *Knight* judgment and remanded the case to the Second Circuit with instructions to dismiss the case as moot.[168] In his concurrence, Justice Thomas addresses the difficulty of determining what is truly a state-controlled, public forum within the purview of a state agent's social media presence, evidenced by Twitter's ultimate authority and decision to permanently remove the then-president's Twitter account for violations of Twitter's terms of service.[169] "Any control Mr. Trump exercised over the account greatly paled in comparison to Twitter's authority, dictated in its terms of service to remove the account 'at any time for any or no reason'" Justice Thomas writes.[170]

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[161] *Id.* at 3-4.

[162] *Id.* at 29.

[163] *Id.* at 5-6.

[164] *Id.* at 12-13.

[165] Knight First Amend. Inst. at Colum. Univ. v. Trump, 302 F.Supp.3d 541, 575-77 (2018).

[166] *Id*.

[167] Knight First Amend. Inst. at Colum. Univ, v. Trump, 928 F.3d 226 (3rd Cir. 2019).

[168] *Biden v. Knight First Amend. Inst. at* Colum*. Univ.,* 141 S.Ct. 1220 (Mem), 209 L.Ed.2d 519 (2021).

[169] *Id.* at 1222.

[170] *Id.*

The unilateral authority of social media providers to ban is seldom invoked against government authorities, yet that unilateral authority hangs over every user, President or otherwise. Justice Thomas notes that "when a platform's unilateral control is reduced, a government official's account begins to better resemble a government-controlled space."[171] Multiple avenues exist that could make that reduction in unilateral authority a reality in the future. The legislature could enact a public accommodation doctrine creating restrictions on removing government accounts or digital platform regulations, like those binding common carriers, such as telephone companies, to service the general public.[172] In addition to possible legislative action, circumstantial doctrines could enable courts to prohibit unilateral speech bans in digital spaces, such as if the ban was the result of coercion from another government entity.[173]

However, Congress has yet to pass any such public accommodation doctrine, and the *Knight* Court failed to identify any existing regulation that limited Twitter's authority to ban former President Trump's Twitter due to it being a government-controlled space.[174] As Justice Thomas concludes "[I]f the aim is to ensure that speech is not smothered, then the more glaring concern must perforce be the dominant digital platforms themselves…the extent to which that power matters for purposes of the First Amendment and the extent to which that power could lawfully be modified raises interesting and important questions."[175] Justice Thomas's discussion of social media giants' unilateral authority over digital spaces appears likely to influence court and legislative deliberations on the matter in the coming years, but only time will tell if those regulations will keep pace with the ever-evolving digital landscape.

It is important to remember that, while the *Biden* Court calls into question the public nature of the place, the content of the speech, i.e. the then-president speaking in his official capacity, was never disputed. Additionally, the *Biden* Court does *not* hold that government spaces in social media cannot be public forums with First Amendment protections. Instead, Justice Thomas's concurrence explains that there are additional elements that need to be addressed, namely the unilateral power of social media providers, but that the case at issue is nonetheless moot.

How much weight courts should give to this element has not yet been determined. Allowing government entities to ban protesters' speech based on

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[171] *Id.* at 1225.
[172] *Id. at 1223*, 1226.
[173] *Id.*
[174] *Id.* at 1225-226.
[175] *Id.* at 1227.

viewpoint discrimination without a narrowly tailored and significant prevailing government interest would greatly strip protesters of one of the quickest, most publicly viewed, and most easily accessible methods of directly interacting with government entities on social media.[176] Speech through social media platforms is a staple form of instant communication in today's world. Allowing government officials to delete speech adverse to their state action without a prevailing interest, and merely on the premise that the government's social media presence is technically private, removes a key avenue for constructive criticism and encourages elected leaders to ignore such criticism, potentially leading to government-run echo chambers.

Knight's holding may have been vacated and dismissed as moot, but other courts of appeals have reached similar holdings that have not been overturned. In *Davison v. Randall*, the Fourth Circuit Court of Appeals held that a state agent's Facebook page constituted a public forum, and the state agent engaged in unconstitutional viewpoint discrimination when banning Davison for expressing disapproval for the funding and management of local public schools.[177] Unlike in *Knight*, the claim that Facebook is a private website, and thus not a public forum, was raised. The Fourth Circuit notes that "the Supreme Court and lower courts have held that private property, whether tangible or intangible, constituted a public forum when, for example, the government retained substantial control over the property under regulation or by contract."[178] Social media user-agreements are contracts between the user (private individual, president, or otherwise) and the social media provider articulating the terms of service and grounds for service termination.

The Fourth Circuit held that the Facebook page was "clothed in the trappings of [the state agent's] public office," and that the state agent exercised "complete control" over the Facebook page.[179] Combined with Justice Thomas's concurrence in *Biden*, the missing element for future cases appears to be, put simply: How much weight should be attributed to the ultimate authority of the social media provider's ability to interfere with government spaces? In situations like *Davison*, the answer appears to be minimal weight relative to the overt viewpoint discrimination and suppression of speech on important matters of public concern on a webpage inviting public commentary. In addition to the Fourth Circuit, the Fifth Circuit of Appeals held that a Facebook page run by the Hunt County

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[176] *See* Knight First Amend. Inst. at Colum. Univ., 302 F. Supp. 3d at 557-58; U.S. Const. amend. I.

[177] Davidson v. Randall, 912 F.3d 666, 688 (4th Cir. 2019).

[178] *Id.* at 683.

[179] *Id.* at 683-84.

Sheriff's Office which expressly stated that it is "not a public forum" is in fact a public forum because it is a space maintained by public officials inviting public commentary, and thus the officials maintaining the page are prohibited from banning commentary based upon viewpoint discrimination.[180]

These appellate court holdings suggest that, despite social media forums technically being private entities, if the accounts are held by public officials and used to discuss or announce official policies, those forums should be treated as public forums. While the appellate courts do not analyze the social media provider's apparent unilateral authority when defining government-maintained online spaces as public forums, they do thoroughly analyze what facets of the online spaces the government entities *do* control. Even with the proverbial sword of Damocles hanging overhead, viewpoint discrimination by state authorities acting in official capacities remains a more immediate, apparent threat to lawfully protesting citizens. If the courts overturn these decisions, ruling instead that government-run online spaces remain private due to the unilateral authority of the private provider, protesters will lose a quick, inexpensive-yet-effective communication medium with a national audience on matters of important public concern. Such a ruling runs contrary to the litany of First Amendment cases protecting against viewpoint discrimination, and merely on the ambiguous premise that a social media provider could intervene, if it wanted to.

As further studies emerge correlating frequent online hate speech to imminent violence, exceptions to these holdings could emerge where the threat of speech encouraging violence could prevail over the protections of the First Amendment. However, the Court's analysis in *Brandenburg v. Ohio* demonstrates how difficult the correlation between hate speech and *imminent* violence is to establish. Without an abundantly clear tie between the two, the government would merely be attempting to censor the speech for the purpose of censoring free speech, something the *U.S. v. O'Brien* holding prohibits.

2. Infowars and Sandy Hook Commentary

While cases restricting government activity online have vast roots and precedent arising from decades of First Amendment litigation prior to the Internet Age, speech-related suits against private actors online are a relatively novel concept in need of guidance from the courts.[181] Communication

[180] Robinson v. Hunt County, Texas, 921 F. 3d 440, 447-50 (5th Cir. 2019).

[181] Manav Tanneeru, *Can the law keep up with technology?*, CNN (Nov. 17, 2009, 10:08 AM), http://www.cnn.com/2009/TECH/11/17/law.technology/index.html.

technology and speech in modern times are outpacing the law.[182] Defamation cases arising from mass broadcasts by private individuals, for example, are still in the process of setting boundary lines for protected speech, questioning if such a boundary should even be set.[183] One highly discussed and ongoing conflict of this type is the series of lawsuits brought by the parents of the victims of the Sandy Hook Elementary shooting in 2012 against Alex Jones and his business, Infowars, LLC. The victims' parents brought several lawsuits against Mr. Jones and Infowars for intentional infliction of emotional distress ("IIED") and defamation in response to multiple broadcasts wherein Mr. Jones called the Sandy Hook shooting a hoax "as phony as a three-dollar bill" and attempted to disprove its occurrence.[184]

Mr. Jones's speech never identifies the victims or their parents by name, raising the question of whether a plaintiff can bring an IIED or defamation claim without being individually identified by the defaming statements.[185] Mr. Jones made the statements about Sandy Hook's shooting knowing that his accusations are false, but asserts that the statements are "rhetorical hyperbole" and therefore are not "of and concerning the plaintiff" to an extent actionable.[186] However, the Texas Appellate Court determined that the parents of the Sandy Hook victims are a very limited class of potential plaintiffs and readily identifiable from Mr. Jones's statements, resulting in a denial of Mr. Jones's Motion to Dismiss.[187]

In November of 2021, the Connecticut Superior Court ruled that Mr. Jones defaulted by refusing to relinquish documents per the Court's order regarding whether Mr. Jones's companies profited from publishing the false claims at the center of the Sandy Hook defamation lawsuits.[188] In 2022, the

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[182] *Id*.

[183] *See* Crystal Revilla, *As Social Media Continues to Evolve, Online Defamation Laws Remain Stagnant*, FIU L. Rev. (Apr.17, 2017), https://law.fiu.edu/2017/04/17/social-media-continues-evolve-online-defamation-laws-remain-stagnant/.

[184] Jones v. Lewis, No. 03-19-00423, 2019 WL 5090500, at *1, *7 (Tex. Ct. App. Oct. 11, 2019).

[185] *Id* at *3.

[186] *Id.;* Associated Press, *Alex Jones to pay $100,000 in Sandy Hook case, judge rules*, NBC NEWS (Dec. 31, 2019, 1:14 PM), https://www.nbcnews.com/news/us-news/alex-jones-pay-100-000-sandy-hook-case-judge-rules-n1109096.

[187] *Jones,* 2019 WL 5090500, at *4.

[188] *Connecticut judge finds Jones liable in lawsuit over school shooting denial*, Reuters (November 15, 2021, 7:30 PM), https://www.reuters.com/world/us/conspiracy-theorist-jones-found-guilty-

families of the Sandy Hook victims promptly rejected a settlement offer from Mr. Jones and the Connecticut Superior Court found Mr. Jones in contempt of court until he complies with court orders to appear for a deposition.[189] The victims' families continue to pursue defamation lawsuits against Mr. Jones following the dismissal of a Chapter 11 bankruptcy filed by Mr. Jones's holding companies amid allegations that the bankruptcy was filed as a "sinister" attempt to shield Mr. Jones's assets from the defamation lawsuits.[190] Additionally, the father of one of the Sandy Hook victims previously won a separate defamation lawsuit against authors of a book claiming that the shooting never occurred.[191] Yet despite these victories, naysayers continue to harass the families of the victims, illustrating the stagnation, durability, and longevity ideological echo chambers can foster.[192] The actionability of these claims raise important questions for future litigation of how limited a class of unidentified plaintiffs must be and to what extent the defaming speech's medium and view count plays a role.

The infamy of Mr. Jones's case is largely the product of what his business, Infowars, LLC, and their respective broadcasts purport to be: a hub for United States and world news tailored for politically conservative ideologies. Articles appearing on the main page of Infowars's website are styled to be aggressively accusatory and inflammatory, demonizing political opponents and naysayers.[193] Despite Infowars's general infamy and Alex Jones testifying that some of the stories he broadcasts are false, Infowars continues to have an avid, national following in the United States, albeit with a gradual decline in popularity.[194] Infowars and Mr. Jones are an extreme

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by-default-us-school-shooting-defamation-2021-11-15/.

[189] Barbara Goldberg, *Alex Jones found in contempt of court in Sandy Hook lawsuit*, Reuters (March 30, 2022, 4:43 PM), https://www.reuters.com/world/us/lawyers-infowars-host-sandy-hook-school-shooting-families-head-back-court-2022-03-30/.

[190] Maria Chutchian, *Alex Jones' InfoWars agrees to dismiss bankruptcy*, Reuters (June 2, 2022, 6:17 PM) https://www.reuters.com/legal/litigation/alex-jones-infowars-agrees-dismiss-bankruptcy-2022-06-02/.

[191] Pat Eaton-Robb, *Newton parents score a win in growing fight against hoaxers*, PBS NEWS HOUR (June 18, 2019, 9:56 AM), https://www.pbs.org/newshour/nation/newtown-parents-score-a-win-in-growing-fight-against-hoaxers.

[192] *Id.*

[193] INFOWARS, https://www.infowars.com/ (last visited Jan. 18, 2020).

[194] similarweb,*infowars.com*,https://www.similarweb.com/website/infowars.co

case of the power of biased journalism and fake news, but they are not an uncommon example of the extent biased or falsified news influences viewers unwilling to seek second opinions from differing sources.[195] Infowars's finger-pointing journalism and its zealous following mark an important example of the influence private media sources have when leading discussions and the great difficulty of overcoming political polarization on highly sensitive political issues in the United States.[196] The polarizing nature of sensationalist journalism and analogous us-versus-them political strategies severely deteriorate efforts for the nation to come together to solve even mutually-agreed crises, notably the mass shooting epidemic that has surged in recent years.

B. Gun-Control Protests: Contemporary Hurdles of Political Polarization

Numerous protests have arisen since Donald Trump took office in 2016, but few have been as nationally captivating and divisive as the protests surrounding the sale and possession of firearms during the recent surge of mass shootings. Mass shootings, defined as shootings where four or more people excluding the shooter are killed[197], continue to be a growing epidemic in the United States because the federal government continues in its reluctance to secure a bipartisan solution to the problem.[198] In only 18 years, the 21st century has more reported mass shooting casualties than the entire 20th century.[199] The total number of mass shootings increased by 41%, from a total of 417 mass shootings in 2019 to another 592 mass shootings through

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m (last visited Jan. 18, 2020).

[195] *See* Joshua DeLung et al., *Proximity and Framing in News Media: Effects on Credibility, Bias, Recall, and Reader Intentions*, 2 Journalism and Mass Commc'n. 748, 749-50 (2012).

[196] *Id.*

[197] Adam Lankford, *Public Mass Shooters and Firearms: A Cross-National Study of 171 Countries,* 31 Violence and Victims, 1,5 (2016).

[198] Aaron Smith, *Eight Years After Sandy Hook, Mass Shootings Are Up, But Federal Gun Control Remains the Same*, Forbes (Dec. 11, 2020, 7:01 AM), https://www.forbes.com/sites/aaronsmith/2020/12/11/eight-years-after-sandy-hook-mass-shootings-are-up-but-federal-gun-control-remains-the-same/?sh=1e83889a5a34.; Springer, *Rapid rise in mass school shootings in the United States, study shows: Researchers call for action to address worrying increase in the number of mass school shootings in past two decades,* ScienceDaily (Apr. 19, 2018), https://www.sciencedaily.com/releases/2018/04/180419131025.htm.

[199] *Id.*

December 8, 2020.[200] Firearm protests, both for and against the restriction of private firearm possession, have been commonplace throughout much of America's history.[201] However, in 2018, the victims of the Parkland, Florida, mass shooting brought the topic of gun violence center stage before a national audience with a clear and cohesive voice that persuaded federal and state lawmakers to more avidly consider stricter gun-control legislation previously deemed off the table.[202]

The victims of the Parkland shooting were able to gain greater media attention, both over social media and through large news outlets, than similar protests arising in the aftermath of mass shootings due to a combination of factors surrounding the incident. The Parkland victims were old enough to attend rallies and testify at the time of the mass shooting. The victims recorded video and audio of the shooting and posted it to social media, leading to greater and speedier national attention than previous gun control protests, including those in response to the Las Vegas shooting in 2017, the Sandy Hook shooting in 2012, and the Columbine shooting in 1999, respectively.[203] Much like the Selma March activists in 1965, the Parkland shooting protesters poised themselves as bipartisan advocates against an urgent national crisis, resulting in some success increasing restrictions in the sale of firearms and firearm accessories at the state level. Some noteworthy resulting state legislation included state-wide bans on bump stocks and expanded criminal background checks before firearm sales in certain states.[204] Restricting the rights of firearms is a long-debated issue, but both political parties wholeheartedly agree that a reduction in the number of mass shootings benefits everyone.

Despite bipartisan consensus that something must be done to curb the

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[200] *Id.*

[201] *See* RJ Reinhart, *One in Three Americans Have Felt Urge to Protest*, GALLUP (Aug. 24, 2018), https://news.gallup.com/poll/241634/one-three-americans-felt-urge-protest.aspx.

[202] Alan Gomez, *The Parkland survivors started a movement when they took on gun violence. Here's how it happened.,* USA TODAY (Feb. 22, 2018, 4:33 PM), https://www.usatoday.com/story/news/nation/2018/02/22/parkland-survivors-started-movement-when-they-took-gun-violence-heres-how-happened/361297002/.

[203] *Id.*

[204] Matt Vasilogambros, *After Parkland, States Pass 50 New Gun-Control Laws*, PEW (Aug. 2, 2018), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2018/08/02/after-parkland-states-pass-50-new-gun-control-laws

number of mass shootings, Parkland shooting protesters have not yet been able to persuade Congress to pass new federal restrictions on firearm sales.[205] Compared to the quick passage of the Voting Rights Act of 1965 in response to the Selma March, which passed under a Democrat-dominated Congress and Presidency, there was higher political division within 2018's Republican-dominated Congress and Presidency that prevented bipartisan steps towards a solution.[206] Hesitant of infringing or altering Second Amendment rights, Republican members of Congress have instead responded with policies aimed at better law enforcement and teacher training to diffuse crises before they cause casualties.[207] Democratic members of Congress, by contrast, are pushing for new restrictions on firearms, including "red flag" laws which would allow court petitions for removal of firearms from individuals perceived as dangerous.[208] While there is some moderate bipartisan agreement on passing red flag laws in the wake of mass shootings, these bills continue to run into an uncompromising blockade once they reach the Senate.[209] Likewise, Democratic senators have been unwilling to compromise on their proposals for new gun safety legislation and have put intense pressure on dissenting Republican senators.[210] As an unfortunate result of the communication breakdown among elected officials, hardly any gun safety-related legislation aimed to curb mass shootings has had a decent

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[205] Smith, *supra* note 177.

[206] Cynthia R. Farina, *Congressional Polarization: Terminal Constitutional Dysfunction?,* 115 Colum. L. Rev. 1689, 1728-29, 1734-35 (2015); *See Congress Profiles: 89th Congress (1965-1967)*, Hist. Art & Archives, U.S. House of Representatives, https://history.house.gov/Congressional-Overview/Profiles/89th/ (last visited Apr. 14, 2019).

[207] Andrew Ujifusa, *Federal Response to Fla. Shooting Starts to Take Shape*, Educ. Wk., (Mar. 20, 2018), https://www.edweek.org/leadership/federal-response-to-fla-shooting-starts-to-take-shape/2018/03.

[208] *Id.*; Sheryl Gay Stolberg, *'Red Flag' Gun Control Bills Pick Up Momentum With G.O.P. in Congress*, N.Y. Times (Aug. 6, 2019), https://www.nytimes.com/2019/08/06/us/politics/congress-gun-control.html.

[209] *Id.*

[210] Sheryl Gay Stolberg, *After String of Mass Shootings, Democrats Begin New Push for Gun Control*, N.Y Times (Mar. 11, 2021), https://www.nytimes.com/2019/09/10/us/politics/democrats-gun-control.html.

chance of even making it to the Senate floor in the years since the Sandy Hook mass shooting, while the epidemic continues to worsen.[211]

This adversarial debate on whether mass shootings are better reduced by increasing training and security or by tighter gun control laws impedes the progress of both theories, preventing either from fully addressing the issue. These proposed solutions are not mutually exclusive, but unwavering partisan loyalty hinders Congress from moving forward with propositions made by either party.[212] Communication stagnation is exacerbated by Congressional echo chambers, impeding America's progress toward a solution to its mass shooting epidemic.

Because many members of Congress favor less-restricted gun rights and because of the lobbying power of the National Rifle Association, increased federal monitoring of guns is a difficult position for gun-control advocates, as are major alterations to statutory and Constitutional firearm freedoms a vast number of citizens peacefully exercise.[213] Despite exponentially increasing numbers of school shootings, CNN reports from multiple surveys taken in recent years that only approximately 50% of surveyed Americans support stricter gun control, regardless of age.[214] The lack of a definite public majority may be explained in large part by the geographic location of the Americans surveyed. In densely populated urban areas such as New York where firearms have fewer immediate legal uses, more residents are likely to support stricter gun control, rather than in rural areas of the country such as West Virginia, where guns are more widely considered multifaceted tools for hunting and sport.[215] The right to own a firearm is a right and responsibility deeply intertwined with America's perspective on freedom, second only to the individual's right to believe and speak his or her mind freely. The firearm conversation lead by both protestors and Congress has been greatly strained by increasing political polarization,

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[211] *Id.; See* Smith *supra* note 177.

[212] Alex Casendino, *Missing the Mark: How the Intense Partisan Divide over Gun Control Impedes Solutions*, Berkeley Pol. Rev. (Nov. 29, 2017), https://bpr.berkeley.edu/2017/11/29/missing-the-mark-how-the-intense-partisan-divide-over-gun-control-impedes-solutions.

[213] Jeffrey A. Marlin, *The National Guard, the National Board for the Promotion of Rifle Practice, and the National Rifle Association: Public Institutions and the Rise of a Lobby for Private Gun Ownership*, Dissertation, Georgia State University, 19-23 (2013).

[214] *Id.*

[215] Kim Parker et al., *America's Complex Relationship With Guns*, Pew Resch. (June 22, 2017), https://www.pewresearch.org/social-trends/2017/06/22/americas-complex-relationship-with-guns/.

but it remains a necessary conversation so long as the threat posed by sudden mass shootings looms and rises across the country.

The Selma March had several strengths that contemporary gun control protests lack, further highlighting what holds up a federal and more unanimous social response to mass shootings. Both protests have strong, lobbied opposition from empowered organizations, but the Selma March was granted federal protection, utilizing the firmly established Constitutional right to peacefully assemble. Gun control protests, on the other hand, seek revision of firearm statutes and potentially the Constitution itself from an administration, legislature, and large number of the population opposed to revision. Fostering national sympathy, Selma's success largely rested on the ground that the atrocities African Americans were being subject to were not only shocking and tragic, but importantly, the oppression could clearly be perceived as an oppression of American freedom itself with an empathetic solution—let the people vote and coexist as the Constitution guarantees they can. Causation for the Selma marchers' suffering was abundantly clear to the millions of Americans tuning in from home.

In contrast, pro-gun rights activists aptly reply that stricter gun control does not necessarily equal fewer mass shootings, citing to the Parkland, Florida shooting where the shooter was a 19-year-old with no criminal record who purchased the guns used legally.[216] Mass shootings appearing commonly in news cycles can desensitize individuals into thinking they're mere by-products occurring randomly beyond reasonable social or governmental control, though the Parkland victims were able to mitigate desensitization with audio and video recordings from the shooting posted to social media.[217] Media coverage and social media responses to gun rights legislation have been very two-faced, with some demanding gun rights be reduced to promote safety while others view gun restrictions as an erosion of the Second Amendment.[218]

Contemporary Trump-era gun control protests have only experienced minimal success at the federal level.[219] The ongoing partisan shifts will likely create only modest statutory alterations without effective correlations between the gun restrictions proposed and a reduction in mass shootings.[220]

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[216] Walsh, *supra* note 192.

[217] Gomez, *supra* note 181.

[218] Anna Pohoryles, *The Problem With U.S. Media Coverage of the Gun Control Debate*, odyssey (Oct. 19, 2015), https://www.theodysseyonline.com/problem-media-coverage-gun-control-debate-united-states.

[219] Smith, *supra* note 177.

[220] Stolberg, *supra* note 205.

The right of private individuals to freely bear arms is not a right many are willing to regress for merely a chance at reducing mass shootings, especially when such restrictions may disarm potential victims but not mass shooters. However, by continuing to exercise their rights to protest mass shootings beyond the initial front-page news cycles, gun control protesters, like the Parkland protestors, prevent solutions to the mass shooting epidemic from stagnating, inviting evolving legislation for a rapidly evolving society. Keeping a protest alive is as simple (or as difficult) as keeping it relevant in contemporary conversation, and through social media the nation continues to keep the gun-control debate perpetually centerstage. Few Americans are surprised that mass shootings have reportedly been on the rise in the 21st century, and the only remaining question for many, even between those starkly ideologically divided, is how we can effectively stem the tide, as these tragic shootings are a blight upon all Americans across all party lines.

V. CONCLUSION

Protests, when occurring under the protections of the First and Fourteenth Amendments, are powerful forms of speech able to not only create dramatic scenes and lists of demands, but also to invite intellectual challenge and bipartisan solutions to long-standing problems. America should work towards encouraging, rather than dismissing the sharing of ideas, even controversial and potentially inflammatory ideas. Keeping the marketplace of ideas open not only enables ideological opponents to forge well-tempered and thoroughly scrutinized opinions, but also enfeebles hate speech by dragging it into the open, forcing it to compete against more rational ideologies, popping the bubble of the echo chamber the hate speech's source. A lack of protest is a disadvantage for both governments, always seeking to improve themselves, and those who living under its unchallenged principles.

The courageous protestors participating in the Selma march, through nonviolent opposition to oppressive segregationist laws, were able to convince Congress to pass the Voting Rights Act of 1965 just a few months after the demonstration, enabling many voters in Alabama to better combat generations of segregationist politics with their votes. Many nonviolent gatherings thereafter tested the boundaries of free speech, finding their propositions thoroughly considered by state officials, unless, rarely, a compelling state interest prevailed over the speech. There are consequences to such immense protections, most infamously the Constitution's protections for hate speech, leading officials to experiment with buffer zones and other means of maintaining peace during controversial demonstrations. As First Amendment rights continue to evolve alongside technology and current events, one wonders if America will always be protective of inflammatory speech in nonviolent protests as further sociological studies continue to

strongly correlate the long-term effects of inflammatory speech with violent activity.

Media activity has always been crucial to the success of protests, but the era of social media has radically altered media relationships with consumers. Internet interconnectedness has reduced individuals' reliance on large news outlets for national news, helping to reduce the information monopoly large news outlets maintained in previous eras. However, social media trends indicate that, despite the availability of so much information from a plethora of unaffiliated sources, the information individuals typically choose to consume is largely tailored to that individual's preconceived biases. Individuals and social media operators alike possess incredible censorship power, far exceeding the state and federal censorship powers, allowing individuals not just to ignore, but to outright delete the speech of others if it appears in online spaces they control. The number of echo chambers, communication hubs with zero tolerance for opposition, has greatly increased, widening ideological divides on numerous issues, and has already become a prominent force within America politics. This phenomenon illustrates both the lack of protections free speech has in private online spaces and the need for opposing parties to continue communicating effectively instead of blocking one another's speech, lest they become further ideologically polarized.

Former President Donald Trump, as a former government figure much in favor of his own private free speech rights, became the bridge between private online rights and government censorship in the *Knight* litigation. The appellate courts' holdings in *Davison and Robinson* demonstrate that even though government entities in fact have identical faculties to private users for blocking and restricting speech across their social media accounts, blocking said speech would constitute a First Amendment violation without a prevailing government interest. Thus, as these appellate court holdings stand, free speech protections for nonviolent protests of government entities posted on their social media accounts mirror more traditional protections of in-person nonviolent protests.

Currently, America is faced with an immense increase in mass shootings occurring across the country, leading to countless national protests, passage of state but not federal legislation, and increased ideological and media polarization over Second Amendment gun rights. Unlike the Selma March, which protested segregation and an unconstitutional restriction of free speech, rather than combatting the constitutional right to bear arms, there is no easy or immediate bipartisan process to solve the mass shooting crisis. Gun rights have always been a polarizing topic, especially between urban and rural demographics, but without having that bipartisan conversation on how to proceed, the problems surrounding mass shootings will perpetuate and

worsen. Protests from the Parkland victims and others have given much needed impetus to the mass shooting debate and have kept the debate relevant in ever-shifting news cycles, but it is up to the rest of the nation, lawmakers and private individuals alike, to respond and help create a well-tempered solution. Gun-control movements need to vigorously, but civilly, voice opposition to pro-gun advocates, rather than outright ignore, denounce, or delete their speech from online forums, and vice versa. If the conversation continues long enough it will progress into a potential solution to the mass shooting epidemic, but that can only happen if we find the courage to allow each other's voices to be heard and reach past our ever-widening buffer zones into a habitable middle ground.

* * *

ARKANSAS SUPREME COURT UPHOLDS CONSTITUTIONALITY OF CASH-ONLY BAIL IN *TRUJILLO V. STATE*

*Macy Klein Eldredge**[1]

I'm stuck in jail, the D.A.'s tryin' to burn me,
I'd be out on bail, if I had a good attorney,
Want to label me a criminal and cuff me up,
...
*In the county and I'm mad as f**k,*
Got a record so they put me with the baddest bunch
...
Got me sittin' in a cell, a five by seven
Will I finally get to go to ghetto heaven?

—2Pac, *Out on Bail*[2]

A. INTRODUCTION

Justice Baker made sure to list the facts of the appellant's case in her opinion, holding cash-only bail to be constitutional under the Arkansas Constitution in the case of *Trujillo v. Arkansas* (2016).[3] Ramon Ballesteros Trujillo was arrested on June 1, 2015, in Benton County and "charged with two counts of aggravated assault, one count of second-degree domestic battery, one count of third-degree domestic battering, and an enhanced penalty for an offense committed in the presence of children."[4] On June 3, 2015, Trujillo appeared in district court, and the district court entered a "no contact" order for the alleged victims[5] and set bail at $25,000 cash or surety.[6] Trujillo posted bond and was released that same day.[7]

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[1] *J.D., University of Arkansas at Little Rock, William H. Bowen School of Law, May 2021. M.A., University of Oklahoma. C.N.P.M., Bush School of Government and Public Service, B.B.A., Texas A&M University.

[2] 2PAC, *Out on Bail*, *on* LOYAL TO THE GAME (Interscope Records 2004); Justice Howard Brill begins his dissent in this case by quoting Johnny Cash's "Starkville City Jail." *See* Trujillo v. State, 2016 Ark. 49, at *8-9 ,483 S.W.3d 801, 806-07. In comparison, this author presents 2Pac's "Out on Bail."

[3] Trujillo v. State, 2016 Ark. 49, at *8, 483 S.W.3d 801, 806.

[4] *Id.* at *1, 483 S.W.3d at 802.

[5] "Alleged victims" at that time during the pendency of the trial.

[6] *Trujillo*, 2016 Ark. 49, at *1, 483 S.W.3d at 802.

[7] *Id.*, 483 S.W.3d at 802.

Nine days later, the State filed a motion to revoke Trujillo's release status and increase his bail to $150,000.00, alleging that he violated the "no contact" order.[8] Benton County Circuit Judge Robin Green issued a bench warrant that day.[9] In July of 2015, two bail hearings were conducted, and at the completion of the second hearing, the court set Trujillo's bail at "$300,000 cash."[10] Trujillo objected and argued that: (1) Arkansas does not allow cash-only bail; and (2) Trujillo's $300,000.00 cash-only bail was excessive.[11] Trujillo filed a petition for writ of certiorari on August 12, 2015, and three days later, the State responded.[12] The Arkansas Supreme Court took the case as a petition and set it for briefing.[13] The parties timely filed their briefs to review the issues: (1) the circuit court erred in setting a cash-only bail and (2) the circuit erred in ordering $300,000 cash-only bail because $300,000 is excessive.[14]

In this Comment, I disagree with the holding of this case and point to the arguments made in both dissents. In addition, I propose that there is a strong public policy argument that disfavors cash bail for its discriminatory effect on indigent defendants. Cash bail is unconstitutional under Article 2, Section 8 of the Arkansas Constitution.[15] In *Trujillo v. State*, the Arkansas Supreme Court refused to examine the issue of excessive bail because it deemed the issue moot.[16] I believe there to be an exception to the mootness doctrine in this case due to the strong implication of public interest.

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[8] *Id.* at *1–2, 483 S.W.3d at 802.

[9] *Id.* at *2, 483 S.W.3d at 802–03.

[10] *Id.*, 483 S.W.3d at 803.

[11] *Id.*, 483 S.W.3d at 803.

[12] *Trujillo*, 2016 Ark. 49, at *2, 483 S.W.3d at 803.

[13] *Id.*, 483 S.W.3d at 803.

[14] *Id.*, 483 S.W.3d at 803.

[15] "No person shall be held to answer a criminal charge unless on the presentment or indictment of a grand jury, except in cases of impeachment or cases such as the General Assembly shall make cognizable by justices of the peace, and courts of similar jurisdiction; or cases arising in the army and navy of the United States; or in the militia, when in actual service in time of war or public danger; and no person, for the same offense, shall be twice put in jeopardy of life or liberty; but if, in any criminal prosecution, the jury be divided in opinion, the court before which the trial shall be had, may, in its discretion, discharge the jury, and commit or bail the accused for trial, at the same or the next term of said court; nor shall any person be compelled, in any criminal case, to be a witness against himself; nor be deprived of life, liberty or property, without due process of law. *All persons shall, before conviction, be bailable by sufficient sureties, except for capital offenses, when the proof is evident or the presumption great*." (emphasis added). ARK. CONST. art. 2, § 8.

[16] *Trujillo*, 2016 Ark. 49, at *4, 483 S.W.3d at 804.

B. APPELLANT'S ARGUMENTS

At the bail hearing on June 15, 2015, the appellant offered that he had contacted the Rogers Police Department and talked with two police officers who agreed to go "to the residence where the alleged victim lived to act as a civil standby."[17] Once they arrived, one of the officers realized that the appellant "did not have the necessary paperwork for them to act as civil standby, so they all left."[18] The appellant did not make any contact with the alleged victim.[19] The State offered evidence at the hearing that the appellant made three phone calls to the alleged victim's phone, but the alleged victim did not accept the calls.[20] "Further, the appellant's mother testified that she made the phone calls."[21] Judge Green discredited this testimony.[22]

At the conclusion of the hearing, the court revoked Mr. Trujillo's release and ordered him held without bail.[23] At that time, Mr. Norwood, the defense counsel, objected to no bail being set in violation of Arkansas Constitution, Article 2, Section 8.[24] On July 23, 2015, the court set a second hearing on the bail issue, where Judge Green "acknowledged that the court must set a reasonable bail except in capital cases."[25] The prosecutor then asked bail to be set at $500,000.00.[26] Appellant's brief offers that "no reasonable explanation was offered as to why the prosecutor went from the initial request of $150,000.00 to $500,000.00."[27] Judge Green then set the bail at $300,000.00, cash only. Mr. Norwood again objected, this time stating that there is no such thing as cash-only bail in Arkansas.[28] The following colloquy took place:

> THE COURT: He's got to post $300,000.00 cash.
>
> MR. NORWOOD: I object to this. There's no such thing of a cash-only bail in Arkansas. I mean, it says sufficient sureties. I don't think that cash-only bond is –
>
> THE COURT: I don't think I'm required to order a bondsman –

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[17] Appellant's Brief, Trujillo v. State, 2016 Ark. 49, 483 S.W.3d 801 (No. CR-15-638), SC No. 1.

[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] *Id.*

[23] Appellant's Brief, *Trujillo*, 2016 Ark. 49, 483 S.W.3d 801 (No. CR-15-638), SC No. 1.

[24] *See* ARK. CONST. art. 2, § 8.

[25] Appellant's Brief, *supra* note 14.

[26] *Id.*

[27] *Id.*

[28] *Id.*

> MR. NORWOOD: Your Honor, that's the equivalent of a 3 million-dollar bond.
>
> THE COURT: I understand that. I'm very concerned that if this man is released –
>
> MR. NORWOOD: I'm going to object to that.
>
> THE COURT: --and this child – and based upon him – the Court finding previously violating the no contact order and the order of protection, I find that to be very reasonable.
>
> MR. NORWOOD: Okay, well, Your Honor, I need to make my objection. It's not only – at this point not only just a state constitutional requirement but also the federal bail thing and the 8th Amendment, which is a totally stand alone thing. Are you denying that, Your Honor?
>
> THE COURT: I am. I find that this is reasonable given the conduct of Mr. Trujillo as determined after the evidentiary hearing.[29]

1. Argument #1: The Trial Court Erred in Setting a Cash-Only Bail

Arkansas Constitution Article 2, Section 8 confers an absolute right before conviction, except in capital cases, to reasonable bail.[30] Bail decisions are generally left to the sound discretion of the trial judge, whose decision is reviewed under the abuse of discretion standard.[31] The issue of whether or not the Arkansas Constitution allows for the use of cash-only bail was argued as a case of first impression in Arkansas.[32] There is a split of authority on the issue of cash-bail. Some states allow for cash bail,[33]

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[29] *Id.*

[30] Appellant's Brief, *Trujillo*, 2016 Ark. 49, 483 S.W.3d 801 (No. CR-15-638), ARG No. 1(first citing Reeves v. State, 261 Ark. 384, 387, 548 S.W.2d 822, 824 (1977); and then citing Duncan v. State, 308 Ark. 205, 206, 823 S.W.2d 886, 887 (1992)).

[31] *Id.* (citing Hobbs v. Reynolds, 375 Ark. 313, 316, 289 S.W.3d 917, 920 (2008)).

[32] *See* Appellant's Brief, Trujillo, 2016 Ark. 49, 483 S.W.3d 801 (No. CR-15-638).

[33] *See e.g.*, Sanders v. Hornecker, 344 P.3d 771, 782 (Wyo. 2015) (holding that the term "sufficient sureties" under rule of criminal procedure guaranteeing bail permits cash-only bail); State v. Jackson, 384 S.W.3d 208, 217 (Mo. 2012) (holding "[t]he trial court had authority to set a cash-only bond as sufficient surety to secure [defendant's] appearance at trial"); State v. Gutierrez, 140 N.M. 157 (N.M. App. 2006) (holding "in a matter of first impression, [the] rule governing secured bonds as condition of release did not violate provision of State Constitution providing that all persons 'be bailable by sufficient sureties'"); Fragoso v. Fell, 210 Ariz. 427 (Ariz. App. 2005) (holding that the "provision of State Constitution stating that '[a]ll persons charged with crime shall be bailable by sufficient sureties' did not prohibit trial court from imposing 'cash only' restriction on defendant's pretrial release bond"); Ex Parte Singleton, 902 So.2d 132, 135-36 (Ala. Crim.

while others do not.[34] The appellant argued as to the meaning of the phrase "sufficient sureties" as it is found in many state Constitutions, including the Arkansas Constitution.[35] In relevant part, the Arkansas Constitution Article 2, Section 8 states: "…All persons shall, before conviction, be bailable by sufficient sureties, except for capital offenses, which proof is evident or the presumption is great." The appellant pointed the court to the case of *State v. Barton*, where that "court traced the history of the meaning 'sufficient sureties' and concluded that the correct interpretation of the term prohibits cash-only bail."[36] Namely, the court noted that the plain common language meaning of "sufficient sureties" is where third parties essentially guarantee the appearance.[37] Because the trial court did not allow for "sufficient sureties" in allowing for a cash-only bail, the trial court erred.

2. Argument #2: $300,000.00 Cash Bail is Excessive in this Case

On June 3, 2015, bail was set at $25,000.00 cash or surety.[38] On July 23, 2015, bail was set at $300,000.00 cash-only, or the equivalent of a $3 million corporate bond.[39] The state did not prove that any contact was made with the alleged victim.[40] Judge Green ordered no bail to be set at the June 15, 2015 hearing, implying that she did not want the defendant to be released from jail.[41] Appellant's attorney compared this situation to analysis

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App. 2004) (holding that the State Constitution did not prohibit trial judge from setting a cash only pretrial bail, and cash only bail of $150,000 was not excessive); State v. Briggs, 666 N.W.2d 573, 584–85 (Iowa 2003) (holding imposition of cash only bail on prostitution defendant did not violate sufficient sureties and excessive bail clauses).

[34] *See e.g.*, State v. Barton,181 Wash.2d 148, 150 (2014) (holding as a matter of first impression, constitutional provision mandating that a criminal defendant "shall be bailable by sufficient sureties" requires that the defendant be allowed the option of a surety arrangement); People v. Horn, 18 N.Y.3d 660, 666 (2012) (holding that the Supreme Court was prohibited under criminal procedure rule from imposing "cash only" bail); State v. Hance, 180 Vt. 357, 358 (2006) (holding statute allowing imposition of cash-only bail violated State Constitution); Smith v. Leis, 106 Ohio St.3d 309, 323 (2005) (holding cash-only bail violates Ohio Constitution, even after constitutional amendment permitting courts to determine at any time the type, amount, and conditions of bail); State v. Brooks, 604 N.W.2d 345, 354 (Minn. 2000) (holding that the bail clause of the Minnesota State Constitution prohibited cash only bail).

[35] Appellant's Brief, *supra* note 28.

[36] *Id.*

[37] *Id.*

[38] Trujillo v. State, 2016 Ark. 49, at *1, 483 S.W.3d 801, 802.

[39] *Id.* at *2, 483 S.W.3d at 803.

[40] Appellant's Brief, *Trujillo*, 2016 Ark. 49, 483 S.W.3d 801 (No. CR-15-638), ARG No. 2.

[41] *Id.*

performed in *Best v. State*, quoting:

> It is clear from these statements that it was the trial judge's intent to set a bond that was unattainable for Petitioner based on his financial circumstances in order to keep him incarcerated. The court abuses its discretion when it sets an excessive bail that is designed to be the functional equivalent of no bail.[42]

Appellant argued that no poor person in Arkansas could make this type of bail.[43] A $300,000.00 cash-only bail is excessive under the facts of this case in violation of Arkansas Constitution, Article. 2, Section 9.[44] This author could imagine only a slim set of facts that would necessitate a $3 million surety bond. None of those facts would involve a defendant who is not extremely wealthy in conjunction with a crime that is less than murder.

C. STANDARD OF REVIEW

The remedy of the writ of certiorari is appropriate to review bail-bond proceedings.[45] The scope and nature of the writ of certiorari is as follows: certiorari lies to correct proceedings erroneous on the face of the record where there is no other adequate remedy, and it is available to the appellate court in its exercise of superintending control over a lower court that is proceeding illegally where no other mode of review has been provided.[46]

To grant a writ of certiorari, a demonstration of a "plain, manifest, clear, and gross abuse of discretion" is essential.[47] The Arkansas Supreme Court reviews the circuit court's interpretation of the Arkansas Constitution de novo.[48] However, the Arkansas Supreme Court accepts the circuit court's interpretation as correct on appeal in the absence of a showing that the circuit court erred.[49]

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[42] *Id.* (citing Best v. State, 28 So.3d 134, 135 (Fla. App. 2010)).

[43] *Id.* ("How many people in a poor state like Arkansas have $300,000.00 cash just sloshing around in their checking account? Seriously, how many lawyers or doctors could write that check?"). *Id.*

[44] *Id.*

[45] Trujillo v. State, 2016 Ark. 49, at *2, 483 S.W.3d 801, 803.

[46] *Id.*, 483 S.W.3d at 803.

[47] *Id.* at *2–3, 483 S.W.3d at 803.

[48] *Id.* at *3, 483 S.W.3d at 803.

[49] *Id.*, 483 S.W.3d at 803 (citing Shipp v. Franklin, 370 Ark. 262, 264, 258 S.W.3d 744, 747 (2007)).

D. MOOTNESS

The Arkansas Supreme Court first assessed whether the issues presented in the case were ripe for review.[50] The State argued that the issues were moot because a trial date had been set before the Arkansas Supreme Court reached the merits of Trujillo's arguments.[51] It is also true that "Trujillo plead guilty to aggravated assault, second-degree domestic battery, and third-degree domestic battery on November 30, 2015, and was in the custody of the Arkansas Department of Correction" at the time the Arkansas Supreme Court took up the case.[52] However, Trujillo argued that despite these facts, "his petition falls within an exception to the mootness doctrine as an issue of substantial public interest."[53]

The Arkansas Supreme Court does not typically review issues that are moot because those opinions would be construed as advisory opinions.[54] The Arkansas Supreme Court offered two exceptions to the mootness doctrine:

> …one of which involves issues that are capable of repetition, yet evade review. The other mootness exception concerns issues that raise considerations of substantial public interest which, if addressed, would prevent future litigation. This exception arose early in our caselaw and continues today.[55]

The court determined that because "the imposition of 'cash only' bail affects all criminal defendants seeking pretrial release," it falls under an "exception to the mootness doctrine as an issue of substantial public interest."[56] However, the court determined the excessive bail issue to be moot, stating that the issue presented was "specific to Trujillo."[57] I respectfully disagree with this decision. The excessive bail issue is a matter of substantial public interest, affecting all criminal defendants. In addition, it is an issue that is capable of repetition, not just once, but every day that a criminal court sets a bond in the state of Arkansas.

The Eighth Amendment to the United States Constitution provides that: "Excessive bail shall not be required, nor excessive fines imposed, nor

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[50] *Id.* at *3, 483 S.W.3d at 803.

[51] *Trujillo*, 2016 Ark. 49, at *3, 483 S.W.3d at 803. The State also argued that Trujillo's arguments lacked merit. *Id.*, 483 S.W.3d at 803.

[52] *Id.*, 483 S.W.3d at 803.

[53] *Id.*, 483 S.W.3d at 803.

[54] *Id.*, 483 S.W.3d at 803.

[55] *Id.* at *4, 483 S.W.3d at 804.

[56] *Id.*, 483 S.W.3d at 804.

[57] *Trujillo*, 2016 Ark. 49, at *4, 483 S.W.3d at 804.

cruel and unusual punishments inflicted."[58] Arkansas's constitutional version of the U.S. Eighth Amendment appears in Article 2, § 8, which has been interpreted by the Arkansas Supreme Court to confer an absolute right before conviction, except in capital cases, to a *reasonable* bond.[59] In *Foreman v. State*, the Arkansas Supreme Court held that in setting a $1 million cash-only bail, the circuit court purposely set the bond out of Foreman's reach and did not take into account "all facts relevant to the risk of wilful [sic] nonappearance," such as those examples appearing in Ark.R.Crim.P. 9.2(c).[60] In *Foreman*, the Arkansas Supreme Court held that the circuit court's action in setting bail at so high a figure was arbitrary and exceeded the circuit court's discretion.[61] The same should have been held in *Trujillo* where the bail was set at $300,000 cash-only.[62]

Further, in Appellant's Reply Brief, appellant's counsel cites a Wyoming court ruling where the issue of a specific cash-only bail was reviewed under the "likely to evade review" exception to mootness.[63] The Wyoming Supreme Court concluded that "pretrial bail issues are likely to evade review, namely because they are generally short-lived."[64] The effect of this is that a "failure to decide this issue impacts those defendants who are unable to post cash-only bail."[65]

In Arkansas, "the Public Defender system represents approximately

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[58] U.S. CONST. amend. 8.

[59] *See* Duncan v. State, 308 Ark. 205, 206, 823 S.W.2d 886, 887 (1992) (holding that the defendant's prior tendering of guilty plea which was deferred was not equivalent of conviction, and thus defendant was entitled to bail); Reeves v. State, 261 Ark. 384, 387, 548 S.W.2d 822, 824 (1997) (holding that the rule permitting revocation of bail constitutional, but that it was unconstitutionally applied as to deny all bail to defendant rather than merely imposing new and reasonable bail with new terms and restrictions); *see also* Kendrick v. State, 180 Ark. 1160, 24 S.W.2d 859, 860 (1930) (holding that the accused charged with selling liquor had legal right to bail); Thomas v. State, 260 Ark. 512, 521–22, 542 S.W.2d 284, 289 (1976) (holding that circuit court erred in refusing to direct municipal court to conduct pretrial release inquiry before setting money bail and to require municipal court to make determination that no other condition would ensure accused's appearance in court before setting money bail only); Stack v. Boyle, 342 U.S. 1, 4 (1951) ("Federal law has unequivocally provided that person arrested for noncapital offense shall be admitted to bail, since the traditional right of accused to freedom before conviction permits unhampered preparation of defense and serves to prevent infliction of punishment prior to conviction, and presumption of innocence, secured only after centuries of struggle, would lose its meaning unless such right to bail before trial were preserved.").

[60] Foreman v. State, 317 Ark. 146, 148, 875 S.W.2d 853, 855 (1994).

[61] *Id.* at 149, 875 S.W.2d at 855.

[62] *See Trujillo*, 2016 Ark. 49, at *8, 483 S.W.3d at 806.

[63] Appellant's Reply Brief, Trujillo v. State, 2016 Ark. 49, 483 S.W.3d 801 (No. CR-15-638), ARG No. 1.

[64] *Id.* (quoting Saunders v. Hornecker, 344 P.3d 771, 775 (Wyo. 2015)).

[65] *Id.*

90-95% of those persons prosecuted by the State of Arkansas in which an attorney is involved for the defendant."[66] Indigent defendants cannot make excessive cash-bails by nature of their indigence. Therefore, this issue affects 90-95% of criminal defendants in the state of Arkansas. An issue that affects 90-95% of criminal defendants in the state of Arkansas is a matter of substantial public interest, and had the court addressed it, they could have prevented future litigation. The Arkansas Supreme Court erred in deciding that the issue was moot.

E. CASH-ONLY BAIL

The only issue that the Arkansas Supreme Court addressed was "whether the circuit court erred in setting a "cash only" bail."[67] Trujillo argues that "cash only" bail in in violation of the Arkansas Constitution, Article 2, section 8.[68] The Arkansas Constitution states: "All persons shall, before conviction, be bailable by *sufficient sureties*, except for capital offenses, when the proof is evident or the presumption great."[69] Rule 9.2 of the Arkansas Rules of Criminal Procedure, "Release on Money Bail," provides:

> (a) The judicial officer shall set money bail only after he determines that no other conditions will reasonably ensure the appearance of the defendant in court.
> (b) If it is determined that money bail should be set, the judicial officer shall require one (1) of the following:
>
> (i) the execution of an unsecured bond in an amount specified by the judicial officer, either signed by other persons or not.
>
> (ii) the execution of an unsecured bond in an amount specified by the judicial officer, accompanied by a deposit of cash or securities equal to ten per cent (10%) of the face amount of the bond.
> (iii) the execution of a bond secured by the deposit of the full amount in cash, or by other property, or by obligation of qualified sureties.[70]

Money (cash) bail is only mentioned in the last option.[71] Money bail

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[66] 2017–2019 ARK. STATE LEGIS. BIENNIUM BUDGET INFO. REP. vol. 4, at 541.
[67] Trujillo v. State, 2016 Ark. 49, at *5, 483 S.W.3d 801, 804.
[68] *Id.*, 483 S.W.3d at 804.
[69] ARK. CONST. art. 2, § 8.
[70] ARK. R. CRIM. P. 9.2.
[71] *See Trujillo*, 2016 Ark. 49, at *15, 483 S.W.3d at 810 (Hart, J., dissenting).

is designed to be a last resort when all other conditions have been exhausted to ensure that a defendant will appear in court.[72] Further, a "judicial officer is required to use the "least restrictive" type of bail arrangement as found in Rule 9.2(b) in securing the appearance of an arrested person."[73] However, in *Trujillo*, the least restrictive option was not imposed.[74] The circuit court erred in not considering the possibility of sections (b)(i) or (b)(ii) of Rule 9.2.[75] In effect, the circuit court "circumvented the requirement of the least restrictive bail."[76]

Trujillo argued that his cash-only bail violated the "sufficient sureties" as required by Article 2, section 8 of the Arkansas Constitution.[77] The State argued "that the obvious and common meaning of "sufficient" and "surety" includes cash", and that cash is not precluded from acting as surety.[78] As stated, this was a case of first impression before the Arkansas Supreme Court, and at the time of this publication, no other cases have challenged *Trujillo*'s holding. The majority analyzed a split of authority between Washington and Wyoming.[79] The Washington case held "that "surety" contemplates a third-party arrangement, as distinguished from a cash-only or property deposit with the court."[80] The Wyoming Supreme Court, however, held that "cash only" bail was permissible under Wyoming's Constitution when used to ensure the defendant's presence to answer the charges "without excessively restricting the defendant's liberty pending trial."[81] The majority determined that Arkansas was akin to Wyoming in that bail is set to ensure the presence of defendants.[82]

The majority noted that the definition of "sufficient" is "adequate: of such quality, number force, or value as is necessary for a given purpose."[83] "Surety" as defined is: "A formal assurance, esp., a pledge, bond, guarantee, or security given for the fulfillment of an undertaking."[84] The majority adopted the reasoning in *Saunders* and held that "sufficient sureties" refers

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[72] *Id.* at *7, 483 S.W.3d at 806.

[73] *Id.* at *15–16, 483 S.W.3d at 810 (Hart, J., dissenting) (citing Thomas v. State, 260 Ark. 512, 522, 542 S.W.2d 284, 290 (1976)).

[74] *Id*. at *16, 483 S.W.3d at 810.

[75] *Id*. at *16, 483 S.W.3d at 810.

[76] *Id*. at *16, 483 S.W.3d at 810.

[77] *Id*. at *5, 483 S.W.3d at 805.

[78] *Id*., 483 S.W.3d at 805.

[79] *Trujillo*, 2016 Ark. 49, at *6–7, 483 S.W.3d at 805–06.

[80] *Id*. at *6, 483 S.W.3d at 805 (citing State v. Barton, 181 Wash.2d 148, 331 P.3d 50, 59 (2014)).

[81] *Id.* at *7, 483 S.W.3d at 805–06 (citing Saunders v. Hornecker, 344 P.3d 771, 780–81 (Wyo. 2015).

[82] *Id.*, 483 S.W.3d at 806.

[83] *Id.*, 483 S.W.3d at 806.

[84] *Id.*, 483 S.W.3d at 806.

to a "broad range of methods," including cash.[85] However, the majority neglects to effectively analyze "cash bail" as opposed to "cash-only bail," which is the issue in this case. Though cash may be *included* as a "sufficient surety" under Rule 9.2 and Article 8, section 2 of the Arkansas Constitution, it may not be the *only* option for defendants.[86] There can be no plain meaning reading that allows a single option of cash-only bail to be either reasonable or an effective means of ensuring a defendant's presence except in the most extreme cases.[87]

Justice Brill offers a "plain and ordinary meaning" analysis of "sufficient sureties," pointing to the intent of the framers in adopting the guarantee to bail by sufficient sureties.[88] He offers:

> 'Bailable' meant 'entitled to be discharged on bail,' and 'bail' was defined as 'delivery of a person arrested, out of the custody of the law, into the safe keeping or friendly custody of persons who become sureties for his retorn of appearance.' A 'surety' was '[o]ne who engages to be answerable for the debt, default, or miscarriage of another; one who undertakes to do some act in the event of the failure of another to do it, and as security for its being done.' Taking these definitions together, 'bailable by sufficient sureties' meant that in a case where bail was available, the prisoner was entitled to be released into the custody of a person, a 'surety,' who was answerable for any subsequent failure of the prisoner to appear.[89]

The idea and effect of bail has evolved since the framers' time.[90] However, the same purpose can hold true today.[91] If cash-only bail is to be a method of last resort to ensure an appearance, then all other avenues need to be exhausted. Appearance agreements should be standard practice, and the bail requirements need only increase according to the facts. District and Circuit judges have far too much latitude in deciding what a reasonable

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[85] *Trujillo*, 2016 Ark. 49, at *8, 483 S.W.3d at 806.

[86] *Id.,* 483 S.W.3d at 806.

[87] For instance, when a defendant is wealthy and poses a flight risk. In addition, a high bond could be set when a defendant poses a serious risk of re-offending while out on bail. However, those facts were not present in *Trujillo*'s case. *See* Appellant's Brief, *Trujillo*, 2016 Ark. 49, 483 S.W.3d 801 (No. CR-15-638), ABS No. 18. He never violated the no contact order. *Id.* There was no basis for revoking and then increasing his bail. *Id.*

[88] *Trujillo*, 2016 Ark. 49, at *11–12, 483 S.W.3d at 808-09 (Brill, C.J., dissenting).

[89] *Id.* at *11, 483 S.W.3d at 808.

[90] *Id.* at *12, 483 S.W.3d at 808–09.

[91] *Id.* at *12, 483 S.W.3d at 808–09.

bond may be, and in instances where cash-only bail is the only option, these courts are setting bonds in a punitive fashion. Lastly, in requiring cash-only bail, courts in Arkansas are depriving defendants of their "constitutional right to provide any sufficient surety for their release."[92]

F. ARKANSAS POLICY IMPLICATIONS

Indigent persons charged with crimes are by nature of their indigence unable to afford large cash-only bails. As an effect, they must sit in jail unless they are released upon their own recognizance or until their trial has completed. During the COVID-19 pandemic, "speedy trial" was tolled[93] in felony cases in the state of Arkansas and trials were continued until in-person court could safely resume, jury members could be safely empaneled, et cetera. The effect of this is that indigent persons charged with felonies have been incarcerated in jails across the state without the possibility of release for possibly years pending their trials.[94] Cash-only bails have a "disparate impact on lower-income defendants without resources."[95] Cash-only bail cannot be construed as reasonable, except in the most extreme of cases, in which a surety bond should still be used to ensure a defendant's appearance. Cash on its own is not a "sufficient surety;" it has no practical effect over a surety bond except to act as a punitive measure for lower-income defendants that are "innocent until proven guilty" and are awaiting their trials in jail.

The Arkansas Supreme Court erred in its holding in *Trujillo*. Cash-only bail is unconstitutional under the U.S. Constitution, the Arkansas Constitution, and under the Arkansas Rules of Criminal Procedure. The Arkansas Constitution calls for "sufficient sureties," which does not contemplate cash-only bail. Allowing cash-only bail has a discriminatory effect on indigent defendants, who comprise an estimated 90-95% of all criminal defendants in the state of Arkansas. The purpose of bail is to

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[92] *Id.* at *13, 483 S.W.3d at 809.

[93] *In re Response to the COVID-19 Pandemic,* 2021 Ark. 72, 2 (per curiam) (first citing *In re Response to the COVID-19 Pandemic*, 2020 Ark. 384, 3 (per curiam); and then citing *In re Response to the COVID-19 Pandemic*, 2020 Ark. 116, 3 (per curiam)).

[94] For instance, a person arrested in December 2019 or January 2020 may have had their original plea and arraignment set in a Circuit Court in March 2020, which had been postponed when the courthouses closed on March 17, 2020. Even if the court set a "low bond," if that person was incapable of making any sort of bail, then they would still be in jail today if they have plead "not guilty" and are awaiting a jury trial. In those cases, someone who may be found guilty will have been incarcerated for years until their verdict comes down. *See Trujillo*, 2016 Ark. 49, at *13, 483 S.W.3d at 809 (Hart, J., dissenting) ("[T]he majority creates and grants to the government an absolute right to incarcerate until the time of trial an accused who is not affluent.").

[95] *Id.*, 483 S.W.3d at 809 (Brill, C.J., dissenting).

ensure a defendant's appearance at trial. To allow cash-only bail far exceeds that aim, treading dangerously into unconstitutional waters.

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