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Aya Gruber
University of Colorado Law School

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The Fourth Amendment's Forgotten Free-Speech Dimensions

Author : Aya Gruber

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Karen Pita Loor, *The Expressive Fourth Amendment*, 94 **S. Calif. L. Rev.** __ (forthcoming, 2021), available on SSRN.

For over a year, protests and police brutality have been at the forefront of the public mind. In the summer of 2020, people were horrified by the images of officers arriving in armored bearcats, donning military battle gear, lodging projectiles of banned chemical weapons at peaceful Black Lives Matter protesters and walls of moms, and even engaging in dictatorship-style "disappearances." Those protests, 25 million strong and admirably nonviolent, were themselves a reaction to the police brutality which took George Floyd's life and was captured in a wrenching viral video. Last summer, there was a clear right-left divide on the desirability and propriety of heavy-handed protest policing tactics. The violent images moved many on the left to call for the defunding, disarming, and even dismantling of police forces. But many on the right felt police were entirely too restrained and offered as evidence the Seattle "CHOP" zone—the apotheosis of anarchic dystopia for conservatives. Then came 1/6 and the storming of the U.S. Capitol, and it was liberals decrying the police's restraint in handling the pro-Trump rally-turned-riot.

For decades, scholars of policing and criminal procedure have wrestled with the issue of police use of force against protesters. In recent years, and especially after the Ferguson protests, there has been a virtual consensus among legal scholars that the Fourth Amendment use-of-force framework established in *Graham v. Connor* is entirely too permissive of police violence against protesters—and everyone else. Experts have called for doctrinal reforms ranging from altering *Graham*'s test for excessiveness to eliminating the qualified immunity doctrine. Also since Ferguson, a number of scholars have weighed in on the First Amendment implications of protest policing, arguing that police management tactics were not mere time, place, and manner restrictions, but serious infringements on free speech. For the most part, these Fourth and First Amendment critiques of protest policing have been siloed: either reform Fourth Amendment law to make it harder for police to use force on anyone or broaden First Amendment speech protections for protesters. In *The Expressive Fourth Amendment*, Professor Karen Pita Loor offers an important, novel intervention to the ongoing discussions of protest policing.

Loor draws on legal history and constitutional jurisprudence to argue that a policed person's engagement in speech activities should factor into not just First Amendment analysis but also *Fourth Amendment* use-of-force analysis. Coining the term "the expressive Fourth Amendment," she makes the case that substantive speech concerns lay at the very heart of the Constitution's prohibition of "unreasonable search and seizure." After outlining current protest policing litigation and how judges apply the *Graham* test, Loor turns to history. She writes "The very concept of the Fourth Amendment derives in part not just from a concern of government intrusion, but of the power of that intrusion to quell political thought. Freedom of expression was very much in the framers' minds when constructing these first ten amendments, and its protection was encapsulated within the First Amendment *and* the Fourth Amendment."

The article's fascinating historical discussion begins decades before the Bill of Rights with a British sedition case against a newspaper critical of King George III, *The North Briton*. Because the publishers were unknown, the crown issued a number of general warrants to discover the culprits. These warrants presaged widespread and invasive searches of people tangentially related to the paper. The *North Briton* case ultimately led to the ban on general warrants and greatly influenced the U.S. Constitution's framers. Later, the *North Briton* case informed the Supreme Court's Fourth Amendment "papers" jurisprudence. In this line of cases, Justice Douglas asserted that "[t]he Court misreads history when it relates the Fourth Amendment primarily to searches for evidence to be used in criminal prosecutions. . . . [I]t was the search for the nonconformist that led British officials to ransack private homes." Examining the papers cases and a number of other Supreme Court opinions on the policing of expressive conduct,

Loor brings to light a principle that has been all but ignored in today's use-of-force cases: Courts determining the reasonableness of police force must "examine what is 'unreasonable' in light of freedom of expression" and impose a "higher hurdle" when seizures implicate expression, as the Court stated in *Roaden v. Kentucky*.

Loor then examines how the framework of reasonableness "in light of freedom of expression" alters the *Graham* analysis in protest cases. *Graham* already directs courts to take into account the policed person's underlying activity—violent felony, misdemeanor, unlawful gathering, etc. The expressive Fourth Amendment framework would add to this analysis whether the underlying activity was also speech related. Now, one may query whether courts *should* distinguish between unruly protestors and, say, an unruly gathering of pandemic-fatigued partiers on the streets Boulder, CO or Ocean Drive. Loor's answer, drawing on the Supreme Court cases, is "yes." Protest policing involves a different state-versus-individual interests calculus because it implicates "an additional and countervailing public interest in ensuring the broad exercise of First Amendment freedoms," in Justice Brennan's words.

Loor highlights the Court's admonition that constitutional protections should be most robust when the risk of police abuse is high. One cannot imagine a higher risk of excessive force than during a protest that condemns the police. By contrast, the police were surprisingly unprepared and restrained during the 1/6 insurrection. This, the author argues, fits with the "data . . . that far-right activists have received a much more restrained, and at times even friendly, reception by law enforcement" and ultimately demonstrates the need to ensure that protest policing is itself content neutral. The article concludes in a novel fashion by offering a rewritten judgment. Loor reimagines *White v. Jackson*, an Eighth Circuit case involving police brutality against a protester, creating something of a template for applying the expressive Fourth Amendment framework.

In sum, this article has the potential to affect a doctrinal paradigm shift in the analysis of protest policing. I hope it will receive the attention it deserves and move judges to recognize in their Fourth Amendment analyses the incontrovertible principle that they claim to venerate: protesting is not a crime.

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