Put it on Ice: Chilling Free Speech at National Conventions

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Introduction

Citing security concerns and fears of future illicit behavior, cities hosting Republican and Democratic National Conventions and large-scale protests have taken extreme measures to curtail dissent.[1] The 2008 Republican National Convention (RNC) in the Twin Cities saw a continuation of the aggressive tactics of past conventions, resulting in a chilling effect on free speech and assembly.[2] A "chilling effect" describes a situation in which speech or conduct is inhibited or discouraged by fear of penalization, prompting self-censorship and therefore hampering free speech.[3] A law or police action need not explicitly prohibit legitimate speech to create a chilling effect; the actions of the government must merely pose an undue burden and deterrent effect on freedom of expression.[4] The chilling measures at the 2008 RNC included large-scale arrests, preemptive raids on private residences, and the use of violence to disperse otherwise peaceful crowds.[5]

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1. *See, e.g.*, Defendants' Memorandum of Law in Opposition to Plaintiff's Second Motion for a Preliminary Injunction at 32, Coal. to March on the RNC and Stop the War v. City of St. Paul, Minn., 557 F. Supp. 2d 1014 (D. Minn. 2008) (No. 08-835 JNE/JJG) (rejecting the protestors' proposed parade route and time in an effort to preserve public safety and order).

2. Nick Coleman, Editorial, *Wrong Place, Wrong Time, Wrong Lessons from the RNC*, STAR TRIB., Sept. 9, 2008, at B1 ("Yes, you can blame the out-of-control protestors. But everyone felt chilled."); *Police Actions Designed to Chill Free Speech of RNC Opponents: Permitted March for September 1 Goes Forward*, March on the RNC and Stop the War Media Blog, http://www.marchonrnc.org/node/75 (Aug. 31, 2008, 11:22).

3. BLACK'S LAW DICTIONARY 257 (8th ed. 2004).

4. *Id.*

5. PUB. SAFETY PLANNING AND IMPLEMENTATION REVIEW COMM'N, REPORT OF THE REPUBLICAN NAT'L CONVENTION PUB. SAFETY PLANNING AND IMPLEMENTATION

Current judicial remedies for redressing abuse of police power do not adequately protect the First Amendment rights of those who choose to dissent at conventions and large-scale protests. By examining the merits of police abuse in a post-hoc fashion, courts provide police with unlimited power to chill free speech when dissenters most desire to express their views.[6] Part I of this Article will document the abuses of power that occurred in past National Conventions, as well as select legal adjudications emanating from those events. Part I will also focus on government restriction of demonstration activities in the Twin Cities during the 2008 RNC. Part II will detail the current state of available judicial remedies. Part III will identify the insufficiencies associated with the various judicial options. Part IV will recommend new burden-shifting frameworks which will enhance protections for the constitutional right to dissent. In sum, this Article seeks to show how the freedom to dissent is chilled at National Convention protests and how shifting various legal burdens to the government will assist efforts to increase freedom of expression.

I. Background

A. Prior Conventions

The quad-annual gatherings of delegates of the Republican and Democratic political parties to nominate their candidate for President always draw large oppositional crowds.[7] Strong police responses have coincided with the protests and demonstrations held at the respective parties' conventions, especially since the infamous 1968 Democratic National Convention (DNC), where scores of demonstrators were arrested amid numerous allegations of a "police riot."[8]

REVIEW COMM'N 74 (2009) [hereinafter COMMISSION REPORT]; Randy Furst & Anthony Lonetree, *Promises of Police Review Also Raise a Few Questions*, STAR TRIB., Sept. 8, 2008, at B8 ("Police have been accused of unnecessary arrests, using excessive force and excessive use of chemical irritants.").

6. *See, e.g.*, COMMISSION REPORT, *supra* note 5 (discussing the various methods employed by the police during the 2008 RNC in order to curtail protest activities organized to occur simultaneously with the RNC).

7. *See, e.g.*, Graham Rayman et al., *Massive Protest Mostly Peaceful*, CHI. TRIB., Aug. 30, 2004, http://www.chicagotribune.com/features/magazine/nyc-prot0830,0,5602809.story (noting that organizers estimated that up to 400,000 people protested on a single day of the 2004 RNC in New York).

8. Mary M. Cheh, *Demonstrations, Security Zones, and First Amendment Protection of Special Places*, 8 D.C. L. REV. 53, 54 n.5 (2004).

Since that time, police have developed enhanced security techniques to ensure law and order. Demonstration zones or free speech zones have become a popular technique to better control demonstrators.[9] At the 2004 DNC, protestors were only allowed to protest in a 300 x 90 square foot caged demonstration zone.[10] Judge Douglas P. Woodlock referred to the sight as "an offense to the spirit of the First Amendment" and "a brutish and potentially unsafe place for citizens who wish to exercise their First Amendment rights."[11] The judge also noted that "[t]he overall impression created . . . is that of an internment camp."[12]

Despite the increased police presence and strategic planning, the 2004 RNC protests in New York resulted in roughly 1,800 arrests,[13] a significant increase from the 1968 DNC demonstrations.[14] In addition to the free speech zones, the New York Police Department employed techniques such as casting large nets over crowds and arresting everyone caught in the net.[15] The arrested demonstrators were brought to an old bus depot that was used as a makeshift holding facility; many were detained for hours in unclean conditions, which caused some to break out in rashes.[16] The facility was popularly dubbed "Guantanamo-on-the-

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9. *See generally* James J. Knicely & John W. Whitehead, *The Caging of Free Speech in America*, 14 TEMP. POL. & CIV. RTS. L. REV. 455 (2005) (noting that since 9/11, the use of demonstration zones and similar control tools has increased in an effort to maintain safety).

10. *Id.* at 457–58.

11. Coal. to Protest the Democratic Nat'l Convention v. City of Boston, 327 F. Supp. 2d 61, 76 (D. Mass. 2004), *aff'd sub nom.* Bl(A)ck Tea Soc'y v. City of Boston, 378 F.3d 8 (1st Cir. 2004).

12. *Id.* at 74. Despite the colorfully negative language from Judge Woodlock, the court denied the injunction, holding that whether the design of the demonstration zones was narrowly tailored could not be determined by the court. *Id.* at 74–75; *see also* Thomas Crocker, *Displacing Dissent: The Role of "Place" in First Amendment Jurisprudence*, 75 FORDHAM L. REV. 2587, 2598–99 (2007) (describing the court's analysis in *Coal. to Protest the Democratic Nat'l Convention*).

13. COMMISSION REPORT, *supra* note 5, at 30.

14. Paul Haridakis, *The Tension Between National/Homeland Security and the First Amendment in the New Century*, 14 TEMP. POL. & CIV. RTS. L. REV. 433, 448 (2005).

15. *Police Trampled Civil Rights During Republican National Convention, NYCLU Charges*, ACLU, Oct. 7, 2004, http://www.aclu.org/freespeech/protest/11518prs20041007.html.

16. Julia Preston, *Lawsuit is Filed Over Detention of Protesters During Convention*, N.Y. TIMES, Nov. 23, 2004, at B8; Democracy Now!, *Guantanamo On the Hudson: Detained RNC Protesters Describe Prison Conditions*, DEMOCRACY NOW!, Sept. 2, 2004, http://www.democracynow.org/2004/9/2/guantanamo_on_the_hudson_detained_rnc. One detained demonstrator summarized her experience: "[y]ou didn't want to sit on the floor, that's for sure." Tom Hays, *Complaints Swirl Over Holding Area For Arrested Protesters*, ASSOCIATED PRESS, Sept. 1, 2004, *available at*

Hudson."[17] When facial challenges are brought against such policing tactics, however, courts generally will not overturn them, reluctant to second guess the security rationale employed by the government.[18]

B. The 2008 RNC

The Twin Cities, host of the 2008 RNC, undoubtedly encountered illicit behavior from certain demonstrators. The acts of violence included smashing police cars and store front windows,[19] and a particular individual launching a fifty-pound sandbag onto a highway.[20] Reports indicated that demonstrators were attacking vehicles transporting Republican delegates with bricks and bottles,[21] as well as puncturing their buses' tires.[22] On the more docile side, there were reports of various groups tipping over newspaper boxes and emptying large trash bins into the street.[23] Many of the demonstrators committing violent acts likely had a goal of getting arrested, or at least knew that their actions were likely to result in an arrest.[24] Overall, the damage done to private property was relatively limited in comparison with other memorable large-scale protests.[25]

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http://www.commondreams.org/headlines04/0902-03.htm.

17. Democracy Now!, *supra* note 16. The protestors may have been detained longer had Judge Cataldo of the New York Supreme Court not ordered their release. *See* Julia Preston, *Judge Keeps City on Notice Over Convention Protest Arrests*, N.Y. TIMES, Sept. 10, 2004, at B3.

18. *See, e.g.*, Bl(a)ck Tea Soc'y v. City of Boston, 378 F.3d 8, 10 (1st Cir. 2004) (upholding Boston's use of a designated demonstration zone, despite a district court finding that the demonstration zone was "an offense to the spirit of the First Amendment" (quoting Coal. To Protest the Democratic Nat'l Convention v. City of Boston, 327 F. Supp. 2d 61, 76 (D. Mass. 2004))); Coal. to March on the RNC and Stop the War v. City of St. Paul, Minn., 557 F. Supp. 2d 1014 (D. Minn. 2008) (denying injunctive relief for restrictions to parade route).

19. COMMISSION REPORT, *supra* note 5, at 46; Posting of Orin Kerr to The Volokh Conspiracy, http://volokh.com/posts/1220326475 (Sept. 2, 2008, 24:34) [hereinafter Volokh Conspiracy].

20. COMMISSION REPORT, *supra* note 5, at 43–48, 72; Editorial, *An Appropriate Show of Police Force*, STAR TRIB., Sept. 2, 2008, at A12.

21. Volokh Conspiracy, *supra* note 19.

22. Emily Gurnon, *Protester Pleads Guilty to Felony*, ST. PAUL PIONEER PRESS, Oct. 15, 2008, at 7B.

23. COMMISSION REPORT, *supra* note 5, at 46.

24. St. Paul Police Chief Matt Bostrom defended the validity of arrests stating that "[p]eople worked hard to get arrested. . . . It didn't just happen." Furst & Lonetree, *supra* note 5. St. Paul Mayor Chris Coleman stated that "[w]e have for a year watched people who made very clear that they were coming to the city of St. Paul to commit criminal activity." Randy Furst & Anthony Lonetree, *Protest Arrests: Security or Repression?*, STAR TRIB., Sept. 4, 2008, at A1.

25. *See, e.g.*, PUB. SAFETY PLANNING AND IMPLEMENTATION REVIEW COMM'N, REPORT OF THE REPUBLICAN NAT'L CONVENTION PUB. SAFETY PLANNING AND

Despite the relative lack of property damage and violence, the police continued to employ far-reaching measures in the name of maintaining security and order, as seen in past conventions. One action garnering significant attention was a series of preemptive raids on the private homes of individuals who were hosting activists.[26] A team of local and federal agencies raided six buildings, claiming to target the self-described anarchist group the "RNC Welcoming Committee."[27] The raids did yield weapons, ingredients for Molotav cocktails, buckets of urine and feces, and plans to blockade the delegates from the convention.[28] The raids resulted in eight arrests.[29] Some of the members were held on "probable cause holds,"[30] and others were later charged with conspiracy to riot in furtherance of terrorism.[31] Most notably, the raids depended on the information of informants who pretended for an extended period of time to be associated with the targeted activist groups.[32]

Although only eight individuals were arrested, when the police raided the buildings, they handcuffed and interviewed scores of people located inside.[33] When added together, there were hundreds of seemingly innocent activists temporarily detained.[34] Additionally, the police seized what would normally be considered constitutionally protected literature, buttons, pamphlets, leaflets,

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IMPLEMENTATION REVIEW COMM'N EXECUTIVE SUMMARY 7–8 (2009) [hereinafter COMMISSION REPORT EXECUTIVE SUMMARY] (identifying the 1999 Seattle World Trade Organization Conference (WTO) as "[t]he seminal event in threats to national and international conferences"). At the infamous WTO Protests, demonstrators were seen "carrying bottles filled with flammable liquids, locking down intersections by forming human chains from lightpost to lightpost, breaking windows at retail stores, overrunning and looting small retail stores, and jumping on cars." Menotti v. City of Seattle, 409 F.3d 1113, 1121 (9th Cir. 2005).

26. *See* COMMISSION REPORT, *supra* note 5, at 34–37.

27. Heron Marquez Estrada, Bill McAuliffe & Abby Simons, *Police Raids Enrage Activists, Alarm Others*, STAR TRIB., Aug. 31, 2008, http://www.startribune.com/local/27703754.html?elr=KArksLckD8EQDUoaEyqyP4O:DW3ckUiD3aPc:_Yyc:aULPQL7PQLanchO7DiUX.

28. *Id.*; *see also* Posting of Orin Kerr to The Volokh Conspiracy, http://volokh.com/posts/1220218012.shtml (Aug. 31, 2008, 17:26) (detailing a "three-tiered strategy" to blockade the RNC Convention).

29. Jon Collins & Alex Robinson, *U Student to Plead Not Guilty to Terrorism Charges*, MNDAILY.COM, Oct. 13, 2008, http://www.mndaily.com/2008/10/12/u-student-plead-not-guilty-terrorism-charges.

30. National Lawyers Guild, Press Releases, http://www.nlg.org/news/index.php?entry=080831-110018 (Aug. 31, 2008, 11:00).

31. Collins & Robinson, *supra* note 29.

32. Estrada et al., *supra* note 27.

33. *Id.*

34. *See id.*

and books.[35] Despite the objections of those owning the materials, the full collection of materials was allowed to be retained by the police department "to preserve claims by the criminal defendants that the police officers overreached their authority under the search warrant."[36]

The far-reaching nature of the measures taken during the preemptive raids continued during the actual protests at the RNC. Typically, some use of force by police is allowable when probable cause exists to make an arrest.[37] During protests for which a permit has been issued, police do not have probable cause to make arrests unless an individual is committing an illegal act.[38] Once a permit has expired, however, the police have a right to arrest protestors for "presence at an unlawful assembly" following police orders to disperse.[39] Thus, by being in the protest area after the permit has expired, although not committing any act of violence, people can be arrested and have force used against them.[40] The only probable cause that an officer needs is the demonstrator's presence.[41] Following this mantra, the St. Paul Police repeatedly used tear gas, pepper spray, smoke grenades, and nightsticks to disperse crowds.[42] Additionally, there were numerous reports of

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35. Am. Civil Liberties Union of Minn., *ACLU Sues St. Paul and Minneapolis for Release of Educational Materials Seized During Raids*, Sept. 4, 2008, http://www.aclu.org/freespeech/protest/36640prs20080904.html.
In *Demuth v. Fletcher*, No. 08-0593, 2008 WL 4151841 (D. Minn. Sept. 4, 2008), the court reviewed the seizure of the materials on the last day of the convention, and despite noting that the notion that hundreds of copies of documents needed to be retained as evidence was "far-fetched," the court held that injunctive relief was inappropriate because the activists had gotten along for the first three days of the convention without the materials, thus no additional substantial irreparable harm would occur by not returning the materials to them expediently. *Id.* at *3.

36. *Demuth*, 2008 WL 4151841, at *3. The court apparently put the activists in a lose-lose situation by not allowing the materials to be used for their intended purpose; instead, the court required that the materials be maintained by the police so that the other activists criminal cases could be dismissed. *See id.*

37. *E.g.*, MINN. STAT. § 609.06(1) (2008) (outlining the authorized use of force, including police use of force).

38. *See Final Day of Tense Anti-War Protests Goes Out With a Flash Bang*, ST. PAUL PIONEER PRESS, Sept. 5, 2008, http://obrag.org/?p=1511.
[hereinafter *Final Day*] (quoting Minneapolis Police Sergeant Bill Palmer and suggesting that during the permit's valid time period, protestors had the right to assemble).

39. *Id.*; *see also* COMMISSION REPORT, *supra* note 5, at 7 (detailing a St. Paul Police Department brochure which warned that, "[e]ven if you are not engaged in unlawful activity, you are subject to arrest if you do not leave the area defined by the police in their order to disperse").

40. *See* COMMISSION REPORT, *supra* note 5, at 7; *see also* MINN. STAT. § 609.06(1) (2008)(outlining when the use of force is authorized).

41. § 609.06(1).

42. COMMISSION REPORT, *supra* note 5, at 49, 57, 60, 64, 74.

protestors being met with nightsticks and pepper spray as they tried to escape the tear gas that authorities had fired at them.[43] In sum, the absence of a permit justifies the use of force against individuals who are engaging in non-violent political expression.[44]

In addition to using harsh tactics to disperse crowds, the police made mass arrests of demonstrators during the 2008 RNC.[45] More than 800 protestors were arrested during the convention; yet only fifteen percent of those arrested were charged with a criminal offense.[46] Also, some of the remaining charges were dismissed by the court.[47] Numerous demonstrators were caught up in "sweeps," where the police would surround an entire group of protestors and arrest all of them.[48] Charges brought against a person in a sweep were more likely to be dismissed, as the arrested individual was unlikely to have been personally observed committing illicit acts.[49]

Not only were mass arrests carried out against demonstrators, but also forty members of the media were caught in the fray and arrested as well.[50] Many were pepper sprayed, as

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43. *Id.* at 74 (concluding that the St. Paul Police used pepper spray "offensively" on crowds, and that they should have instead "simply arrested those individuals engaged in peaceful . . . unlawful behavior").

44. While pepper spray and tear gas do not typically have long term effects, they can cause tremendous short term pain and suffering, and can also prompt panic and emotional distress. *See* C. Gregory Smith & Woodhall Stopford, *Health Hazards of Pepper Spray*, 60 N. C. Med. J. 268, 269 (1999). *But see*, AM. CIVIL LIBERTIES UNION OF S. CAL., PEPPER SPRAY UPDATE: MORE FATALITIES, MORE QUESTIONS 2 (1995), *available at* http://www.aclu-sc.org/attach/p/Pepper_Spray_New_Questions.pdf (suggesting that pepper spray may have long term and serious effects).

45. Chris Havens, *Media Detained at RNC Won't Face Court Action*, STAR TRIB., Sept. 20, 2008, at B2.

46. Pat Pheifer, *RNC Charges Fall by the Wayside*, STAR TRIB., Feb. 21, 2009, at A1.

47. *Id.*

48. Am. Civil Liberties Union of Minn., *At RNC, Arraignments Begin and Arrests Continue*, Sept. 4, 2008, http://www.aclu-mn.org/home/news/atrncarraignmentsbeginanda.htm ("Most of the people arraigned . . . were swept up in mass arrests . . . .").

49. *See, e.g.*, People v. Munoz, No. 2004NY065044, 2005 WL 3134229, at *4 (N.Y. City Crim. Ct. Mar. 22, 2005) (evaluating an arrest made in a 300-person sweep at the 2004 RNC, in which the court dismissed the complaint against the defendant for failure to be "personally observed" committing any wrongdoing). Of the 396 people arrested in the final night of the convention, who were pinned on a bridge and detained in a mass arrest, 323 were never charged. Pheifer, *supra* note 46.

50. COMMISSION REPORT EXECUTIVE SUMMARY, *supra* note 25, at 7; Jason Hoppin, *Protestors or Press? During the RNC, it Often Didn't Matter*, ST. PAUL PIONEER PRESS, Sept. 5, 2008, at 1A ("More than 30 – and possibly as many as 50, based on an informal Pioneer Press survey – were arrested.").

they typically stationed themselves near the police line in order to document confrontations.[51] Most famously, the police arrested Amy Goodman, host of Democracy Now!, and charged her with obstructing the legal process when she presented her credentials to a line of riot police upon learning that two of her producers had been arrested.[52] The police also tackled and smashed the camera of an AP journalist before checking his press pass and releasing him.[53] Some weeks later, the City of St. Paul decided to drop all charges against journalists, including Amy Goodman.[54]

In sum, the police used aggressive and far-reaching tactics during the 2008 RNC. Whether the threats to security were real or imagined, the police certainly took drastic measures to advance security in the name of law and order.

II. The Current State of Legal Remedies for Demonstrators Arrested or Injured by the Police

Demonstrators whose First Amendment rights are chilled are not totally without recourse. Protestors with criminal charges stemming from the 2008 RNC can move to dismiss the charges just like any other criminal defendant.[55] Individual demonstrators or groups can also challenge the facial constitutional validity of restrictive government regulations and policies.[56] Lastly, demonstrators who feel their constitutional rights were violated may also seek civil damages from the government.[57]

A. Criminal Dismissals

Although many protestors were arrested or detained and released without charge, many were charged with offenses such as Unlawful Assembly,[58] Riot or Conspiracy to Riot,[59] Civil Disorder,[60] and, in extreme cases, Conspiracy to Riot in

51. Hoppin, *supra* note 50.

52. *Id*

53. COMMISSION REPORT, *supra* note 5, at 23.

54. *See* Havens, *supra* note 45.

55. MINN. STAT. § 630.18(7) (2008).

56. *See, e.g.*, Bl(A)ck Tea Soc'y v. City of Boston, 378 F.3d 8 (1st Cir. 2004) (showing that while the First Circuit did not find a prevailing injunction appropriate in a challenge to conditions for demonstrators at the 2004 DNC, the demonstrators were able to at least challenge the policies).

57. 42 U.S.C. § 1983 (2006).

58. MINN. STAT. § 609.705 (2008).

59. *Id.* § 609.71.

60. *Id.* § 609.669.

Furtherance of Terrorism.[61] If motions for criminal dismissals of charges following the 2004 RNC are any indication, demonstrators with pending charges should not be overly optimistic. To survive a motion to dismiss, the prosecution only has to show "facial sufficiency" of the complaint.[62] Similar to the notice pleading requirements in civil cases,[63] if the facts alleged would constitute a criminal offense, then the complaint is sufficient.[64] In three published decisions concerning motions to dismiss stemming from the 2004 RNC, the New York Criminal Court dismissed one case[65] and found the other two complaints facially sufficient.[66] Emerging from those cases was a theme that dismissal was appropriate when the defendant was not "personally observed" committing any criminal activity, but simply swept up in a large raid.[67] If Minnesota courts follow the New York Criminal Court decisions, then the police will only need to state that they "personally observed" a defendant committing a certain act, and the claim will survive dismissal.[68]

The defendant in *People v. James* challenged the facial constitutionality of the New York Administrative Code[69] regulating unpermitted parades and demonstrations.[70] The court relied on *Thomas v. Chicago Park District*,[71] which held that as long as the ordinance was "content neutral," it would satisfy First Amendment concerns, provided that the regulation required specification of the reasons for denial.[72] Thus, the *James* court held that New York's content neutral ordinance met the *Thomas* requirements, and was constitutional.[73] If *People v. James* is any

61. *Id.* § 609.713.

62. People v. Munoz, No. 2004NY065044, 2005 WL 3134229, at *1 (N.Y. City Crim. Ct. Mar. 22, 2005).

63. FED. R. CIV. P. 8(a).

64. *See, e.g.*, MINN. R. CRIM. P. 17.06, subd. 2(2) (stating that a motion to dismiss may be brought if the "facts stated do not constitute an offense").

65. *Munoz*, 2005 WL 3134229, at *1.

66. People v. Cohen, 2005 WL 293510 (N.Y. City Crim. Ct. Feb. 7, 2005); People v. James, 793 N.Y.S.2d 871 (N.Y. City Crim. Ct. 2005).

67. *Munoz*, 2005 WL 3134229, at *4.

68. *See id.* (finding as fatal to the complaint the failure to allege that the defendant was "personally observed" in order to connect the defendant to illegal activity or conduct).

69. ADMIN. CODE OF CITY OF NY § 10-110(a-c) (1996).

70. *James*, 793 N.Y.S.2d at 875–77.

71. Thomas v. Chicago Park Dist., 534 U.S. 316 (2002). The *James* court stated, "[t]he ruling in *Thomas* . . . is dispositive of the constitutional[] issue." *James*, 793 N.Y.S.2d at 877.

72. *James*, 793 N.Y.S.2d at 878 (citing *Thomas*, 534 U.S. at 322).

73. *Id.*

example, Minnesota defendants seeking to challenge the facial validity of the unlawful assembly ordinance[74] will have an uphill battle, as long as the ordinance is found "content-neutral."[75]

B. Constitutional Challenges

Demonstrators can bring facial challenges to laws and policies, arguing that the regulations violate the First Amendment.[76] The Supreme Court in *Ward v. Rock Against Racism*[77] articulated a standard for First Amendment challenges involving public protests:

> [I]n a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions "are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information."[78]

However, the challenged policy or law "need not be the least restrictive or least instructive means of doing so."[79] The regulation will not be invalidated, "[s]o long as the means chosen are not substantially broader than necessary to achieve the government's interest," even if "some less-speech-restrictive alternative" is available.[80] The government must be "content neutral" in its actions and cannot regulate the speech based on simple disagreement.[81]

The demonstrators' ability to choose the time, place, and manner in which they dissent is vital to their exercise of freedom of expression.[82] The power of the RNC protestors' message is

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74. MINN. STAT. § 609.705 (2008).

75. *See Thomas*, 554 U.S. at 322–24. Defendants in Minnesota may still be able to challenge the constitutional validity of § 609.705 as applied to their particular cases.

76. *See, e.g.*, Coal. to March on the RNC and Stop the War v. City of St. Paul, Minn., 557 F. Supp. 2d 1014 (D. Minn. 2008) (involving an argument that the City's regulations violated the First Amendment).

77. Ward v. Rock Against Racism, 491 U.S. 781 (1984).

78. *Id.* at 791 (quoting Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984)).

79. *Id.* at 798–99.

80. *Id.* at 799.

81. *Id.*

82. Crocker, *supra* note 12, at 2587. According to Crocker:

> Would the principle of free speech have value if there were no public place to speak? What would be the point of dissent if political differences were relegated to the realm of "freedom of thought," disappearing into the silent mental lives of those who harbor political disagreement with prevailing orthodoxy? What would be the value of free speech if public dissent

diminished when that protest is not permitted to occur during the RNC, nor near the RNC, nor with the freedom for demonstrators to march as they choose. In this context, numerous challenges have been brought against limitations in parade routes,[83] denial or revocation of public assembly permits,[84] and emergency orders to contain demonstrations.[85]

If challenges to the constitutionality of restricting political demonstrations are brought as emergency motions and appeals, courts will view the challenges under the traditional Temporary Restraining Order (TRO) framework.[86] On a motion for preliminary injunction, the "court considers: (1) movant's likelihood of success on the merits; (2) threat of irreparable harm absent injunction; (3) balance between that harm and harm experienced by other parties if injunction issues; and (4) the public interest."[87] These challenges have been largely unsuccessful, as the government has been careful to adhere to the *Rock Against Racism* requirement of content neutrality, which diminishes the movant's likelihood of success on the merits.[88]

Demonstrators challenging government regulations are nonetheless successful on occasion. At the 2000 DNC, Los Angeles restricted protestors' access to the event by creating an 185-acre security zone around the convention site and by requiring parade permit applications to be filed at least forty days in advance.[89] In

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disappeared?

Id.

83. *E.g.*, United for Peace and Justice v. Bloomberg, 323 F.3d 175 (2d Cir. 2003) (denying a motion to enjoin a march outside of the United Nations headquarters); Coal. to March on the RNC and Stop the War v. City of St. Paul, Minn., 557 F. Supp. 2d 1014 (D. Minn. 2008) (involving a march during the 2008 Republican National Convention).

84. Randy Furst, *Police Revoke RNC Permit for Welfare Rights Group*, STAR TRIB., Aug. 13, 2008, at B4.

85. Menotti v. City of Seattle, 409 F.3d 1113 (9th Cir. 2005).

86. *See Coal. to March*, 557 F. Supp. 2d at 1020.

87. *Id.*

88. *See* Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989). In *Grove v. City of York, Penn.*, 342 F. Supp. 2d 291 (M.D. Pa. 2004), the court found the officers' refusal to permit protestors to display signs depicting aborted fetuses during the parade was not content neutral and held for the plaintiffs under a § 1983 action. *Id.* at 302. The lesson from *Grove* is that a city can either prohibit all protesting or none, but cannot choose which types of protestors can march. *See id.* The views, however, of those protesting a Republican or Democratic National Convention are well-known to the greater public. *See* Serv. Employee Int'l Union v. City of Los Angeles, 114 F. Supp. 2d 966, 970 n.1 (C.D. Cal. 2000) (*SEIU*) (doubting the content neutrality of the secured access zone at the 2000 DNC and noting that although some democrats would be denied access to the "secured zone," all non-Democrats would be denied access).

89. *SEIU*, 114 F. Supp. 2d at 971–73.

Service Employees International Union v. City of Los Angeles, groups seeking to conduct demonstrations at the 2000 DNC brought an action for injunctive relief to bar the city from enforcing the restrictive policies.[90] The court noted that because the validity of restrictions impacting the First Amendment was at issue, the government had the ultimate burden of establishing that the regulations were narrowly tailored and that ample alternative channels were available.[91] The court held that the 185-acre "secured zone" was not narrowly tailored, because the secured zone covered much more area than necessary to protect the delegates and blocked expressive activities twenty-four hours a day.[92] The demonstrators were also not afforded ample means of communication since the speakers were not permitted to reach their intended audience: the DNC delegates and attendees.[93] The court also held that the forty day permit request period and the other permit procedures imposed a prior restraint and "vest[ed] public officials with unbridled discretion to implement terms and conditions on the permit."[94]

Challenges to regulations limiting free speech at the 2004 national conventions did not enjoy the same success seen in *Service Employees International Union*. The National Council of Arab Americans was denied a permit to hold a rally on the Great Lawn in Central Park during the 2004 RNC.[95] Despite noting that the plaintiffs would suffer irreparable harm,[96] the court denied their motion for injunctive relief and held that the denial of a permit was legitimate due to the absence of a "rain contingency"[97]

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90. *Id.* at 968.

91. *Id.* at 970 (citing N.A.A.C.P., W. Region v. City of Richmond, 743 F.2d 1346, 1354 (9th Cir. 1984)).

92. *Id.* at 971–72. The court noted "that banning political speech is an unacceptable means of planning for potential misconduct." *Id.* at 972.

93. *Id.*

94. *Id.* at 975. The court in *SEIU* also cited *Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123 (1992), which found that unfettered discretion can become a means of suppressing a particular point of view. 505 U.S. at 130–31. The *SEIU* court did recognize that the "defendants have a significant government interest in providing security to those attending the convention;" however, the court held that the "secured zone" around the DNC venue was not narrowly tailored to serve that interest because it burdened more speech than was necessary. 114 F. Supp. 2d at 975

95. Nat'l Council of Arab Ams. v. City of New York, 331 F. Supp. 2d 258, 260–62 (S.D.N.Y. 2004). The Great Lawn has great symbolic importance, as it represents "the heart and soul of New York City." *Id.* at 263 (citations omitted). The plaintiffs argued that the Great Lawn was a vital part of their political message, "namely acceptance and equality of Arab Americans." *Id.*

96. *Id.* at 266.

97. *Id.* at 264 (noting that a large crowd could significantly harm the Great

and the inability to control the size of the crowd.[98] The court placed the burden on the plaintiffs to establish a "clear" or "substantial" likelihood of success on the merits, holding that governmental policies were entitled to a higher degree of deference.[99] The court also noted in dicta that even if the permit's denial was unconstitutional, the plaintiffs would not be entitled to injunctive relief due to the "daunting security concerns facing this City" during the 2004 RNC.[100]

The events surrounding the creation of a "demonstration zone" at the 2004 DNC in Boston and the ensuing litigation[101] have received heavy attention from First Amendment commentators.[102] In *Bl(A)ck Tea Society v. City of Boston*, the First Circuit upheld the Massachusetts District Court's denial of a preliminary injunction, allowing demonstrators to protest outside the designated "demonstration zone."[103] The court found that the demonstration zone "imposed a substantial burden on free expression,"[104] and "left little opportunity for groups wishing to demonstrate to do so within sight and sound of the delegates."[105] Nevertheless, the court was deferential to "the government's judgment as to the best means for achieving" its legislative objectives.[106]

Lawn if the grass was wet).

98. *Id.* at 263–64. Organizers expected as many as 75,000 demonstrators, a number within the capacity of the Great Lawn. *Id.* at 270. However, because the organizers could not guarantee that the capacity of the Great Lawn would not be exceeded, the court ruled that the "inability to control the size of the crowd" was a legitimate reason for denial of a park permit. *Id.*

99. *Id.* at 266.

100. *Id.* at 272. The court also noted that the "events will take place against the backdrop of 'a persistent threat of terrorist attack.'" *Id.* at 265. Whether the court was referring to the National Council of Arab Americans or speaking more generally is unclear. *See id.* The parties eventually settled for the plaintiffs attorney's fees, $50,000 in damages, and the undertaking of a feasibility study to determine under what conditions large rallies can be held on the Great Lawn. *See* Stipulation and Order of Voluntary Dismissal at 2, *Nat'l Council of Arab Ams.*, 331 F. Supp. 2d 258 [hereinafter Stipulation and Order of Voluntary Dismissal].

101. Coal. to Protest the Democratic Nat'l Convention v. City of Boston, 327 F. Supp. 2d 61, 76 (D. Mass. 2004), *aff'd sub nom.* Bl(A)ck Tea Soc'y v. City of Boston, 378 F.3d 8 (1st Cir. 2004).

102. *See* Crocker, *supra* note 12; Knicely & Whitehead, *supra* note 9; Ronald Krotoszynski & Clint Carpenter, *The Return of Seditious Libel*, 55 UCLA L. REV. 1239, 1319 (2008); Susan Nanes, *"The Constitutional Infringement Zone": Protest Pens and Demonstration Zones at the 2004 National Political Conventions*, 66 LA. L. REV. 189, 197–202 (2005).

103. 378 F.3d at 10.

104. *Id.* at 13.

105. *Id.* at 11.

106. *Id.* at 13.

In contrast, the court in *Stauber v. New York*[107] invalidated New York City's use of "pens"[108] to enclose demonstrators to a confined area and found unreasonable the search of protestors' bags as a condition of entrance to the pen, leading up to the 2004 RNC.[109] The plaintiffs sought a preliminary injunction, and damages for injuries that they alleged resulted from the use of "pens" in various 2003 demonstrations.[110] The plaintiffs' first-hand experience was relevant to the preliminary injunction motion and likely aided in achieving a favorable result.[111] The court noted that the plaintiffs needed to only show a likelihood of success on the merits and did not impose a higher standard that would have been deferential to government regulations.[112]

The most recent facial challenge to a city regulation was seen at the 2008 RNC in St. Paul. In *Coalition to March on the RNC and Stop the War v. City of St. Paul* (*Coalition to March on the RNC*), a Minnesota federal court denied the plaintiff's request for a preliminary injunction to require the city to allow the protest parade route to encircle the RNC venue, not merely to come "within sight and sound" of the convention hall.[113] The court compared past conventions and held that the demonstrators had "unprecedented access to the convention site."[114] The court, in holding that encirclement of the convention site would "substantially compromis[e] significant government interests,"[115] was also concerned with reports of protestors planning to blockade the RNC site[116]

In sum, plaintiffs have had varying degrees of success in bringing facial challenges against government regulations on public speech.[117] In light of the well-publicized *Bl(A)ck Tea Society*

107. Stauber v. City of New York, No. 03 Civ. 9162 (RWS), 2004 WL 1593870 (S.D.N.Y. July 16, 2004).

108. The "pens" were described as "NYPD's use of interlocking, metal barricades to create four-sided enclosures in which demonstrators are expected to assemble during demonstrations." *Id.* at *3.

109. *Id.* at *1.

110. *Id.* at *1–2.

111. *See* Nanes, *supra* note 101.

112. *Stauber*, 2004 WL 1593870 at *22–23.

113. Coal. to March on the RNC and Stop the War v. City of St. Paul, Minn., 557 F. Supp. 2d 1014, 1021 (D. Minn. 2008).

114. *Id.* at 1021–22.

115. 557 F. Supp. 2d at 1027 (citing Nat'l Council of Arab Ams. v. City of New York, 331 F. Supp. 2d 258, 272 (S.D.N.Y. 2004)).

116. *Id.* at 1026; *see also supra* notes 20–32 and accompanying text (summarizing the events of the 2008 RNC).

117. *Compare SEIU*, 114 F. Supp. 2d 966 (C.D. Cal. 2000) (finding that the City's proposed "secured zone" was not narrowly tailored because it burdened more

opinion,[118] groups have not been as successful.[119] Each decision, however, is heavily fact dependent, leaving room open to grant a preliminary injunction in the future, should government regulations be found unduly restrictive.[120]

C. Civil Remedies

Demonstrators who are subjected to police brutality, arrest, or intimidation may always bring an action under 42 U.S.C. § 1983. Section 1983 actions can be maintained against government employees if they are not entitled to qualified immunity.[121] The two-part test for denial of qualified immunity is (1) whether the plaintiff's constitutional rights were violated, and (2) whether those rights were so clearly established that reasonable defendants would have known that their specific actions transgressed those rights.[122]

Many plaintiffs, instead of suing the individual officer, prefer to sue the municipality that employs the officer.[123] For liability to attach to the municipality under § 1983, the officer's conduct must be a product of city policy or custom.[124] Liability may also attach to a municipality if the violation was found to have occurred due to

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speech than necessary), *and* Stauber v. City of New York, 2004 WL 1593870 (S.D.N.Y. July 16, 2004) (holding that the police department's policy "of closing streets and sidewalks at demonstrations without making reasonable efforts to provide information about access is an insufficiently narrowly tailored time, place or manner restriction because it unnecessarily burdens the ability of persons to attend demonstrations"), *with* Bl(A)ck Tea Soc'y, v. City of Boston, 378 F.3d 8 (1st Cir. 2004) (concluding that although the City's security measures were extreme, they were still narrowly tailored), *Coal. to March*, 557 F. Supp. 2d 1014 (stating that the City's restriction on parade routes was narrowly tailored and served significant government interests), *and Nat'l Council of Arab Ams.*, 331 F. Supp. 2d 258 (denying plaintiffs' preliminary injunction).

118. 378 F.3d 8.

119. *See, e.g.*, Citizens for Peace in Space v. City of Colorado Springs, 477 F.3d 1212 (10th Cir. 2007) (holding that demonstrators were not unconstitutionally prohibited from protesting in the traditional public forums surrounding the hotel within which defense ministers of nineteen member nations of the North Atlantic Treaty Organization (NATO) were meeting); *Coal. to March*, 557 F. Supp. 2d 1014 (holding that the city's denial of the permit was content neutral, as required for valid time, place, and manner requirements, that the denial was sufficiently narrowly tailored to promote the city's interest in security, and that the denial left open ample alternatives for communication of the protestor's message).

120. In *Coal. to March*, the court examined street-by-street the parade route in determining whether St. Paul's regulation was narrowly tailored. 557 F. Supp. 2d at 1026–27.

121. 42 U.S.C. § 1983 (2006).

122. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

123. *See, e.g.*, Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978) (indicating that the plaintiff brought suit against the municipality).

124. *Id.* at 691–94.

a police officer's lack of training, where the failure to train amounts to deliberate indifference of an individual's constitutional rights.[125]

Demonstrators bringing § 1983 actions related to arrests or other police activity at large-scale protests have had varying degrees of success. In *Menotti v. City of Seattle*,[126] a case that stemmed from thousands of arrests during the WTO protests, the court held that issues of fact remained as to whether the officers were acting pursuant to municipal policy when they implemented an order in an unconstitutional manner and as to whether an officer's warrantless seizure of a protestor's sign was justified by exigent circumstances.[127] The court, however, upheld the facial constitutionality of the order under the *Rock Against Racism* test.[128] The court also held that the order on its face did not give unfettered discretion to the officers who were administering the restricted zone.[129]

In *Victory Outreach Center v. Melson*,[130] a minister was able to establish a genuine issue of material fact as to whether his First Amendment rights were violated for the words he spoke, and as to whether the police had probable cause to arrest him for preaching the gospel to assemblages on college campuses.[131] The court determined that the municipality had given sufficient training and that the municipality did not adopt a policy of inadequately training its officers on First Amendment issues.[132] Thus, the municipality could not be held liable for the individual officer's acts with "deliberate indifference."[133]

In *Lyons v. City of Lewiston*,[134] a gay-rights protestor was arrested for leaving a demonstration zone when President George H.W. Bush visited his city.[135] The Maine Supreme Court held that the police defendants were not entitled to qualified immunity, and that since an issue of fact remained as to whether the defendants engaged in conduct that amounted to careless indifference to the demonstrator's First Amendment rights, summary judgment was

125. City of Canton, Ohio v. Harris, 489 U.S. 378 (1989).
126. Menotti v. City of Seattle, 409 F.3d 1113 (Wash. 2005).
127. *Id.* at 1150–55.
128. *Id.* at 1142–44.
129. *Id.* at 1145–46.
130. Victory Outreach Center v. Melson, 313 F. Supp. 2d 481 (E.D. Pa. 2004).
131. *Id.* at 491–92.
132. *Id.* at 495.
133. *Id.*
134. Lyons v. City of Lewiston, 666 A.2d 95 (Me. 1995).
135. *Id.* at 98.

precluded on punitive damages grounds.[136]

Thus, plaintiff demonstrators have had relative success suing under § 1983. Many of these cases, however, are dismissed or settled.[137] Further, each holding is tailored to its particular facts, such that future demonstrators cannot be assured that they will have the same outcome.[138] Lastly, each of these cases undoubtedly takes enormous time and expense to fully adjudicate and takes committed individuals to be successful.[139]

D. Policy-Change Settlements

"Police misconduct litigation around the country has resulted in several settlements to help restrain over-reaching law enforcement and facilitate the exercise of free speech."[140] Under one settlement reached after a violent Washington, D.C. march, the police department agreed to revise its handbook and training in order "to provide protections for protesters, including a requirement that officers report use of force during mass demonstrations and forbid arrests without evidence that a crime was committed."[141] The police department also agreed to "include restrictions and prohibitions on the use of police lines against protestors and instruct[] officers that parading without a permit is not an arrestable offense."[142]

"In June 2005, the City of Los Angeles entered into a settlement agreement in . . . an action arising from the use of unlawful force and disruption of lawful assemblies during the 2000 Democratic National Convention, as well as at a demonstration on October 22, 2000."[143] According to the National Lawyers Guild, which brought the suit:

> The terms of the settlement provide that demonstrators

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136. *Id.* at 99–102.

137. *See, e.g.*, Stipulation and Order for Voluntary Dismissal, *supra* note 100 (agreeing to settle the case for the plaintiffs attorney's fees, $50,000 in damages, and the undertaking of a feasibility study to determine under what conditions large rallies can be held on the Great Lawn).

138. *Compare* Menotti v. City of Seattle, 409 F.3d 1113 (9th Cir. 2005) (discussing WTO riots in Seattle), *with Lyons*, 666 A.2d 95 (regarding a protest against the President by a small group).

139. *See, e.g.*, Stipulation and Order for Voluntary Dismissal, *supra* note 100 (noting attorney's fees of over $500,000).

140. HEIDI BOGHOSIAN, NAT'L LAWYERS GUILD, PUNISHING PROTEST: GOVERNMENT TACTICS THAT SUPPRESS FREE SPEECH 53 (2007), https://www.nationallawyersguild.org/NLG_Punishing_Protest_2007.pdf.

141. *Id.* at 54.

142. *Id.*

143. *Id.*

> participating in lawful assemblies are not to be prevented from using public sidewalks adjacent to a lawful march route. . . . [Los Angeles Police Department (LAPD)] officers are not to use their motorcycles as a weapon of crowd control against peaceful demonstrators. Less-lethal munitions may only be used on "armed suspects or individuals showing aggressive or combative actions . . . [and] are not to be used on a lawfully dispersing crowd or individual." The settlement provides that before declaring an unlawful assembly, the LAPD Incident Commander should evaluate the feasibility of isolating and arresting individuals responsible for unlawful conduct, and should pursue such action if feasible.[144]

III. The Problem

As Part II demonstrates, protestors challenging government action have experienced varied degrees of success. Although the criminal, constitutional, and civil damages contexts present different burdens to the demonstrators, the onus to show that government action was illegitimate rests on the demonstrators in all scenarios.

A. Criminal Defendants Need Greater Protection

If New York City Criminal Court is any example,[145] a criminal defendant need only be "personally observed" committing the alleged act for a complaint to be facially sufficient.[146] Therefore, criminal defendants, even if the charges against them are completely without merit, face a jury trial to determine whether their liberty will be taken away for what is normally considered a constitutionally protected political protest.[147] Thus, free speech does not receive heightened consideration when determining whether a criminal prosecution should go forward to trial.[148]

Similar to the inadequacy of civil remedies, a demonstrator

144. *Id.* at 54–55. Settlements and consent decrees similar to those described in Washington, D.C., and Los Angeles have also been reached in Chicago, Columbus, Albuquerque, Oakland, Denver, New York, Portland, and Detroit. *See id.* at 53–62 (citations omitted).

145. Currently there are no published criminal adjudications emanating from the 2008 RNC in St. Paul, Minn.

146. *See supra* notes 63–67 and accompanying text.

147. *See generally* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S 37, 45 (1983) ("In places which by long tradition or by government fiat have been devoted to assembly and debate, the rights of the state to limit expressive activity are sharply circumscribed.").

148. *See, e.g.*, People v. Munoz, No. 2004NY065044, 2008 WL 3134229 (N.Y. City Crim. Ct. Mar. 22, 2005) (granting a motion to dismiss based on facial insufficiency, but without reference to free speech).

arbitrarily arrested at a national convention loses the time, place, and manner of his political protest.[149] Furthermore, other demonstrators or members of the community who witness mass arrests and other oppressive tactics may think twice about engaging in political protest.[150] Therefore, even if an individual is able to get his charge dismissed, that person has lost his right to dissent, and the public could be chilled from engaging in political protest both at the time of the demonstration and in the future.

B. Facial Challenges Fall Short

The *Rock Against Racism* test allows time, place, and manner restrictions on speech.[151] However, the time, place, and manner of large-scale demonstrations—such as protesting a Republican or Democratic National Conventions—is essential to the adequate expression of the dissenter's view.[152] Whether it is the ability to not only come within "sight and sound" of the convention, but also to actually march fully past the delegates,[153] the ability for Arab-Americans to hold a rally on the Great Lawn in Central Park,[154] or the ability to be able to express views outside of a designated free speech zone far away from the convention,[155] the manner in which protestors dissent is as important as the actual message that they seek to convey.[156]

Not only is the *Rock Against Racism* test weighted against demonstrators, plaintiffs must also confront the test in the context of a preliminary injunction.[157] To establish a likelihood of success on the merits, the plaintiff must show that the government's

149. *See* Nick Suplina, *Crowd Control: The Troubling Mix of First Amendment Law, Political Demonstrations, and Terrorism*, 73 GEO. WASH. L. REV. 395, 396 (2004-2005).

150. *See generally* Coleman, *supra* note 2 (discussing the effect of police presence on typical citizens, not protesters).

151. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1984).

152. *See* Suplina, *supra* note 149, at 405–06.

153. *See* Coal. to March on the RNC and Stop the War v. City of St. Paul, 557 F. Supp. 2d 1014, 1030 (D. Minn. 2008).

154. *See* Nat'l Council of Arab Ams. v. City of New York, 331 F. Supp. 2d 258, 260 (S.D.N.Y. 2004).

155. *See* Bl(A)ck Tea Soc'y v. City of Boston, 378 F.3d 8, 11 (1st Cir. 2004).

156. *See* Crocker, *supra* note 12, at 2587–88; *see also* Lamont v. Postmaster General of the U.S., 381 U.S. 301, 308 (1965) (Brennan, J., concurring) ("It would be a barren marketplace of ideas that had only sellers and no buyers.").

157. Facial challenges surrounding national conventions are usually time-sensitive. *See, e.g.*, *Coal. to March*, 557 F. Supp. 2d 1014 (issuing a decision less than two months before the 2008 RNC); *see also* Nanes, *supra* note 101, at 223 (arguing that the timing of a First Amendment challenge is vital to the outcome of the suit).

regulations were not narrowly tailored.[158] The regulation, however, "need not be the least restrictive or least instructive means" but merely not "substantially broader than necessary."[159] Some courts place the burden on the plaintiffs to establish that the government regulation *is* "substantially broader than necessary."[160] Thus, the plaintiffs have the difficult task of demonstrating ex-ante that the government regulation will be "substantially broader than necessary,"[161] akin to showing without evidence that a government policy is "unreasonable."[162]

C. Civil Remedies Present A Gap in Liability

Civil suits against police officers under § 1983 for violations of First Amendment rights hinge on whether the officer acted "reasonably."[163] For liability to attach to a municipality, however, the actions of an officer must be causally linked to a policy, practice, or custom of the municipality.[164] Consequently, an officer could arbitrarily make an arrest or otherwise infringe on a demonstrator's constitutional rights, and a municipality would not be liable unless the municipality's actual or constructive approval was causally linked to the officer's conduct.[165] Since a suit against an officer, as opposed to a municipality, does not have a deterrent effect on the municipality, the potential for creating better

158. *See* Bl(A)ck Tea Soc'y, 378 F.3d at 11–12 (citing Ward v. Rock Against Racism, 491 U.S. 781, 791 (1984)).

159. Ward v. Rock Against Racism, 491 U.S. 781, at 799–800 (1984).

160. *Compare Bl(A)ck Tea Soc'y*, 378 F.3d at 12 (rejecting a higher level of scrutiny for prior restraints because "the City ha[d] not sought to prevent speech, but rather, to regulate the place and manner of its expression"), *with SEIU*, 114 F. Supp. 2d 966, 970 (C.D. Cal. 2000) (holding that when First Amendment rights are restricted, the burden is on the defendant to show that the regulations are narrowly tailored and that ample alternatives channels are available); *see also* Nanes, *supra* note 101, at 217 (examing the degree of deference that courts have given to city regulations).

161. In *Stauber v. City of New York*, the plaintiffs were able to use first-hand accounts of police abuse in prior demonstrations as evidence that the New York Police Department's policies were not narrowly tailored. Stauber v. City of New York, 2004 WL 1593870, at *3–12 (S.D.N.Y. July 16, 2004). The ability to present testimony significantly aided the plaintiffs successful suit, a luxury that most parties bringing facial challenges before a convention do not have. *See* Nanes, *supra* note 101, at 202–05.

162. *See Rock Against Racism*, 491 U.S. at 803 (holding that if the government's means chosen are not substantially broader than necessary, its action is valid).

163. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

164. City of Canton v. Harris, 489 U.S. 378, 385–86 (1989).

165. *See id.* The municipality can also be liable for "failure to train" under limited circumstances. *Id.* at 387. However, as *Victory Outreach Center v. Melso*, 313 F. Supp. 2d 481 (E.D. Pa. 2004) demonstrates, a minimum amount of training will not result in liability predicated on a municipality's failure to train. *Id.* at 495.

training and affirmative policies to protect First Amendment rights through judgments, settlements, and consent decrees is diminished.[166]

Furthermore, monetary damages are an insufficient remedy when an individual's right to dissent has been infringed at a DNC or RNC demonstration. When a demonstrator is subject to an arbitrary arrest, the arrested dissenter's choice of time, place, and manner is lost.[167] Since national conventions are held once every four years, and the particular candidate or issue may present a one-time opportunity to protest, a dissenter's First Amendment expression is likely lost forever. Further, most protestors will not decide whether to engage in dissent based on the availability of civil damages, and thus monetary remedies do not fully address the chilling effect of abusive police practices.[168]

IV. Burden-Shifting Solutions

Demonstrators who seek to challenge governmental action emanating out of public-forum demonstrations face an uphill battle.[169] Criminal defendants arrested in police sweeps, groups challenging the validity of parade-route restrictions, and victims of excessive police force seeking civil damages, are burdened with various hurdles imposed by the current state of the law.[170] In the criminal, constitutional, and civil damages categories, a new burden-shifting mechanism is needed to provide increased remedies for demonstrators whose right to dissent has been abridged.

A. SLAPPing Frivolous Prosecutions

To reduce the problem of demonstrators having their First Amendment rights at stake in a jury trial, the motion to dismiss option needs to have greater force for protest defendants.[171] In the civil context, a special motion to dismiss is available in lawsuits aimed at chilling free speech.[172] California has such a statute,

166. *See generally* BOGHOSIAN, *supra* note 140, at 53–62 (detailing various settlements and consent decrees reached with cities after alleged § 1983 violations in large-scale demonstrations).

167. *See* Suplina, *supra* note 149, at 405–06.

168. *See, e.g.*, ProtestRNC2008.org, http://protestrnc2008.org (last visited Feb. 11, 2009) (citing the war in Iraq, taxes, immigration, health care, and GLBT rights as reasons that a coalition group was marching against the 2008 RNC).

169. *See supra* Part III.

170. *See id.*

171. *See supra* Part III.A.

172. *See, e.g.*, Minn. Stat. §§ 554.01–554.05 (2000) (providing a motion to dismiss

known as an anti-SLAPP statute (Strategic Lawsuit Against Public Participation).[173] California's anti-SLAPP statute reads:

> A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.[174]

If extended to a criminal context, the statute could be limited to those who could show that their arrest stemmed from protected First Amendment political protest.[175] The defendants would have the initial burden of showing that they were engaged in public forum political protest.[176] Upon satisfying that condition, the burden would shift to the prosecution to show that the State's case would succeed on the merits, or at least that a reasonable jury could convict.[177] As a result, unless the prosecution makes out the equivalent of a prima facie case, the charges against the defendant will be dropped.[178]

Providing an analogous special motion to dismiss for those arrested while exercising their First Amendment right to dissent would have a number of benefits. First, the risk of a defendant being at the mercy of the jury for a charge without merit would be reduced. As a result, the demonstrator would not feel pressured to plea bargain and plead guilty to a reduced charge.[179]

Second, the government would be aware of the extra resources necessary to prosecute individuals charged after a mass arrest.[180] Consequently, the police would have an incentive not to

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in cases involving speech aimed at procuring government action).

173. *See* CAL. CIV. PROC. CODE § 425.16 (West 2004). Many anti-SLAPP laws were promulgated to stop land developers from chilling public protest by filing frivolous lawsuits to defeat public opposition. *See* John Barker, *Common-Law and Statutory Solutions to the Problem of SLAPPS*, 26 LOY. L.A. L. REV. 395, 403–07 (1992-1993).

174. § 425.16(b)(1).

175. *Cf. id.* (indicating that the statute applies to those whose First Amendment expression is the subject of charges).

176. *See id.*

177. *See id.*

178. *See id.*

179. Even if an individual does not serve a prison sentence, the conviction and charge would stay on the accused's record absent an expungement. *See, e.g.*, MINN. STAT. § 609A.03 (2008) (describing the petition for criminal expungement and the relief a petitioner can be granted).

180. *See* Democracy Now!, *supra* note 16 (noting hundreds of arrests); *Police Trampled Civil Rights During Republican National Convention, NYCLU Charges*, *supra* note 15 (noting the use of mesh nets to detain and arrest large numbers of

make arbitrary arrests, or at a minimum, the prosecutors would be encouraged to let many of those arrested go free without charge. Third, added liberty protections would lessen the chilling effect on public participation, since those wishing to publicly dissent would not fear arbitrary arrest and prosecution as strongly.[181]

Additionally, a special motion to dismiss for demonstrators would not have dramatic negative consequences. First, those that have actually committed criminal wrongdoing would not likely have their charges dismissed. Since the Due Process clause[182] requires the prosecution to prove "beyond a reasonable doubt . . . every fact necessary to constitute the crime with which he is charged,"[183] a prosecutor should not be overly taxed in establishing the equivalent of a prima facie case at a preliminary stage.[184] Second, the police will not hesitate to arrest those they believe to be committing criminal wrongdoing. Given the large numbers of convention demonstrators who are already arrested but not charged, the police are not likely to scale back their arrests due to a special motion to dismiss.[185] Lastly, providing an easier mechanism for charges against demonstrators to be dismissed would not unduly expose the police or prosecutors to additional civil liability.[186] Qualified immunity would still protect prosecutors and police performing discretionary functions from liability.[187]

Shifting the burden through the use of a special motion to dismiss would also fit within the spirit of established Supreme Court precedent. A "clear and convincing" standard of proof is required when the individual interests at stake are both "particularly important" and "more substantial than a mere loss of money" in any state proceeding that threatens an individual with "a significant deprivation of liberty."[188] The curtailment of

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demonstrators).

181. *See* Coleman, *supra* note 2 (noting the chilling effect on the public of the arrests of demonstrators).

182. U.S. CONST. amend XIV, § 1.

183. *In re* Winship, 397 U.S. 358, 365 (1970).

184. Granted, the government would have the time and expense of defending the special motion to dismiss for those with meritorious charges against them. However, the special motion to dismiss would likely not be in addition to a regular dismissal motion, and thus some of the expense would be mitigated.

185. *See* Pheifer, *supra* note 46.

186. *See* Kjellsen v. Mills, 517 F.3d 1232, 1236–37 (11th Cir. 2008) (citing Harlow v. Butterfield, 457 U.S. 800 (1981)).

187. *Id.*

188. Santosky v. Kramer, 455 U.S. 745, 756 (1982).

expression through mass arrest and the subsequent chilling of First Amendment rights experienced by the criminal defendant is a deprivation of liberty.[189] Thus, a special motion to dismiss would properly extend Supreme Court protections against the deprivation of liberty caused by the chilling of free speech.[190]

B. Burden Shifting of the "Narrowly Tailored" Determination for Facial Sufficiency

The burden of proof should not only be shifted to the government in criminal cases, but also in TRO determinations regarding the facial constitutionality of government regulations and policies. Commentators have criticized the *Rock Against Racism* test of content-neutrality, narrow tailoring, and providing ample alternative channels for communication, on many levels. Some scholars have attacked the content-neutrality prong as unduly limiting the time, place, and manner of public protest.[191] Others have criticized the Court for being overly deferential to the government-claimed security interest when determining if the regulation is narrowly tailored.[192] While these thoughtful criticisms are valid, no signs point to the *Rock Against Racism* test becoming undone, or lower courts suddenly not being at least somewhat deferential to purported "security" interests.[193]

All courts recognize that speech in public forums is presumptively protected under the First Amendment.[194] Therefore, courts should treat the *Rock Against Racism* test for

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189. *See* Suplina, *supra* note 149, at 408–09 (citing C. Edwin Baker, *Unreasoned Unreasonableness: Mandatory Parade Permits and Time, Place and Manner Regulations*, 78 NW. U. L. REV. 937, 945–48 (1983)).

190. *See, e.g.*, *Santosky*, 455 U.S. at 756.

191. *See* Crocker, *supra* note 12, at 2601–02 (characterizing the right to publically dissent as an autonomy and liberty issue).

192. *See* Krotoszynski & Carpenter, *supra* note 102, at 1240 (questioning whether security concerns actually motivate the censoring of political protest); Suplina, *supra* note 149, at 409–12 (analyzing free speech restrictions justified by the war on terror).

193. *Rock Against Racism* has been positively examined or discussed in over 500 cases since its adjudication. *See, e.g.*, Hill v. Colorado, 530 U.S. 703, 711 (2000) (holding that a criminal statute that prohibited any person from knowingly coming within eight feet of another individual near a health care facility was a narrowly tailored, content neutral, time, place, and manner regulation); Vincent v. Bloomberg, 476 F.3d 74, 84 (2d Cir. 2007) (applying the narrowly tailored, content neutral, time, place, and manner test to a New York City ordinance that prohibited the sale of aerosol spray paint containers and broad tipped indelible markers to individuals under the age of twenty-one).

194. *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).

what it is: an exception to the rule.[195] In the context of a TRO, the plaintiff must demonstrate a likelihood of success on the merits.[196] The plaintiff, however, should only have to show that he seeks to engage in public political protest. Any time, place, and manner restrictions on such speech should not be presumptively valid. Instead, the burden should shift to the government to show that the regulations are content-neutral, narrowly tailored, and leave ample alternative channels available.

The *Service Employee International Union* court and *Stauber* court followed this approach and shifted the burden to the government.[197] The *Bl(A)ck Tea Society* court merely noted that "intermediate scrutiny" was appropriate and did not explicitly indicate who had the burden of proof.[198] The *Coalition to March on the RNC* court also did not address the issue.[199]

Had the *Bl(A)ck Tea Society* court shifted the burden to the government in order to show that its plan was narrowly tailored, the outcome may have been different.[200] Although the court noted that "the challenged regulation imposed a substantial burden on free expression,"[201] and the district court characterized the designated demonstration zone as an "internment camp,"[202] the court was unwilling to overturn the government regulation.[203] Had the court started with a presumption that the government restrictions on free speech were invalid, the court may have been more comfortable granting the TRO.[204]

A burden-shifting rule may not have changed the outcome in *Coalition to March on the RNC*. Judge Ericksen held that the demonstrators were afforded "unprecedented access to the

195. Suplina, *supra* note 149, at 397 (describing "time, place, and manner" restrictions as an exception).

196. *See, e.g.*, Bl(A)ck Tea Soc'y v. City of Boston, 378 F.3d 8, 11 (1st Cir. 2004) (stating that the likelihood of success on the merits is one of four factors that courts must weigh in determining whether to issue a preliminary injunction).

197. *SEIU*, 114 F. Supp. 2d 966, 970 (C.D. Cal. 2000); *see* Kastner v. Cinnamon, No. 04L-005081, 2007 WL 1593870, at *26 (Ill. Cir. Ct. 2007); Nanes, *supra* note 101, at 217.

198. 378 F.3d at 12; *cf. SEIU*, 114 F. Supp. 2d at 970 ("The government bears the burden of proving that a prior restraint on speech is constitutional.").

199. Coal. to March on the RNC and Stop the War v. City of St. Paul, 557 F. Supp. 1014 (D. Minn. 2008).

200. *See Bl(A)ck Tea Soc'y*, 378 F.3d 8.

201. *Id.* at 13.

202. Coal. to Protest the DNC v. City of Boston, 327 F. Supp. 2d 61, 74 (D. Mass. 2004).

203. *Bl(A)ck Tea Soc'y*, 378 F.3d at 13.

204. *See id.* at 8.

convention site,"[205] and were allowed to come "within sight and sound of the delegates," an accommodation not afforded to the 2004 DNC demonstrators.[206] Although the access to the demonstrators may have objectively been "narrowly tailored," the court used the *Bl(A)ck Tea Society* opinion as a constitutional floor, which the 2008 St. Paul RNC regulations easily cleared.[207] Thus, had the *Bl(A)ck Tea Society* court shifted the burden to the government and ruled for the demonstrators, the floor could have been set much higher at either the "sight and sound" of the delegates or some other less restrictive time, place, and manner constraint.

Additionally, placing the burden on the government to show that its regulations are narrowly tailored would have other positive effects. As the policy-change settlements indicate, the government, when pressured, can craft policies that are not as unduly restrictive of the right to publically dissent.[208] Policy changes, such as forbidding arrests without evidence that a crime was committed or forbidding the use of less-lethal munitions on non-violent demonstrators, exemplify the narrow tailoring of government policies.[209] If the government is aware that it bears the burden in any subsequent TRO determinations, officials may have incentives to craft policies that can be defended in court. Further, by starting with more narrowly tailored policies in the first place, demonstrators' right to dissent may be curtailed less. As government policies become more narrowly tailored and restrictions are lifted, the individuals could feel less chilled from publicly exercising their First Amendment rights.[210]

C. Shifting the Burden to the Municipality in Civil Damages Cases

In addition to criminal cases and constitutional challenges, in order to address the potential gap in liability posed by the "policy,

205. Coal. to March on the RNC and Stop the War v. City of St. Paul, 557 F. Supp. 2d 1014, 1021 (D. Minn. 2008). In fact, the St. Paul Police intentionally created a "free speech zone," which was distinct from that used in Boston, in that it was much closer to the convention venue, was not heavily guarded, had no covering, and used fencing which allowed speakers to be seen as well as heard. COMMISSION REPORT, *supra* note 5, at 37–38.

206. COMMISSION REPORT, *supra* note 5, at 37–38; *see* 378 F.3d at 11.

207. *See Coal. to March on the RNC*, 557 F. Supp. 2d at 1022.

208. *See supra* Part II.D.

209. *See* BOGHOSIAN, *supra* note 140, at 53–62.

210. *See* Coleman, *supra* note 2; *see also* COMMISSION REPORT, *supra* note 5, at 15 (noting numerous community members' feeling that "St. Paul took on the appearance of a Police State").

custom, or practice of the municipality" and "reasonableness" of the officer's actions, courts should once again engage in a different type of burden shifting.[211] A police officer standing in a line with other officers in full riot gear is acting pursuant to an order. Should an individual officer then make an arbitrary arrest or otherwise unduly harm a demonstrator, the municipality should not escape liability. Simply because the individual officer was neither ordered to perform the unlawful act nor had received prior adequate training does not mitigate the harm suffered by the public from the officer's actions.[212] Those whose free speech is chilled when shot with rubber bullets do not see an individual officer harming them, but see a collective action of an aggressive police force.[213] Therefore, municipalities should be presumptively liable for police officers who act unreasonably toward lawful demonstrators in large-scale political demonstrations. As a defense, the municipality could show that the officer disobeyed a direct order or otherwise violated police department policy.

Shifting the burden to the municipality to demonstrate that an officer acted against orders, policies, or training would incentivize police departments to give enhanced training for large-scale demonstrations. Police departments would also be encouraged to craft policies regarding the handling of large crowds that are less violent and confrontational.[214] Shifting the burden to the municipality would not cause frivolous litigation, as a showing that the officer unreasonably violated a plaintiff's clearly established constitutional rights would still have to be established.[215]

Conclusion

The 2008 RNC in St. Paul represented a continuation of free speech chilling tactics against demonstrators. Mass arrests, preemptive raids, and violent dispersals of otherwise peaceful crowds will continue to be seen at national conventions and other large protests. In a post-September 11 world, security threats,

211. *See supra* discussion Part II.C.

212. *See* BOGHOSIAN, *supra* note 140, at 43 ("Would-be protesters or entire communities frequently targeted by the police may decide it is not worth the risk of encountering police violence and possible arrest.").

213. *See* COMMISSION REPORT, *supra* note 5, at 36–37, 64 (noting the use of less-lethal munitions to disperse crowds).

214. *Cf. Final Day*, *supra* note 38 (noting the use of tear gas, pepper spray, and concussion grenades to disperse crowds).

215. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

both real and imagined, will trump the right to dissent.[216] Consequently, police tactics that are "an insult to the First Amendment"[217] will continue to be administered.

The courts, however, have yet to fully address the necessity of changing the legal framework in the context of large-scale political protests. The criminal defendant arbitrarily arrested and charged needs a quicker way to have the merits of his case heard. The demonstration group seeking a TRO against an unduly restrictive government regulation should face a lower evidentiary hurdle. The demonstrator whose constitutional rights were violated must be allowed to hold not only the individual tortfeasor, but also the municipality liable for the irreparable harm suffered. Shifting legal burdens to the government to show that its actions are legitimate would increase protections for those who choose to dissent and curtail the chilling effect of government restriction on free expression.

On September 4, 2008, the RNC in the Twin Cities came to an end. Republican Presidential candidate John McCain and the Republicans used the Twin Cities as a forum to express their ideas to the nation. Many seeking to simultaneously convey opposing views to the nation, however, were chilled by government action.[218] Once the RNC was over, and the delegates and major media presence left the Twin Cities, the opportunity to express one's views on a national stage was over. The marketplace of ideas, while still technically open in the Twin Cities, no longer had any buyers. If the First Amendment is truly valued, those choosing to dissent must be given adequate access to the national forum created by national conventions without significant government interference.

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216. *See* Krotoszynski & Carpenter, *supra* note 102, at 1257–59; Suplina, *supra* note 149, at 409–12.

217. Coal. to Protest the DNC v. City of Boston, 327 F. Supp. 2d 61, 76 (D. Mass. 2004).

218. *See* COMMISSION REPORT, *supra* note 5.