

Say it loud, I protest and I'm proud

Your silence will not protect you! Here's a look at the laws that will

By Rodney S. Diggs

Peaceful protesting is a constitutional right that is protected by law and precedent. When a protestor's constitutional rights are violated, there are legal tools at the state and federal level to help provide redress.

History of protests

Perhaps one of the most memorable images of a protest etched in our minds remains the March on Washington led by the Revered Dr. Martin Luther King, Jr. This was considered a peaceful protest by many. Protests come in various forms and have been given many names. With this, there are several legal implications in how protests are categorized and how those participants are handled when participating. At times, protests have turned disorderly and rendered the need for the intervention of law enforcement to protect citizens, cities, and property, vis a vis January 6. However, where the protest is peaceful, nonviolent, and civil, force against demonstrators could be a clear violation of their constitutional rights.

Protesting as a constitutional right under the First Amendment

The foundation of one's right to peacefully protest lies within the Constitution, particularly every citizen's First Amendment right to freedom of speech, the right of the people to peaceably assemble. In full text, the First Amendment provides, "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." (U.S. Const., 1st Amend.)

Pertinent here are citizens' right to freedom of speech, meaning, right to speak out against conduct they believe is a violation of the rights bestowed upon them as citizens, and the right to peaceably assembly, which essentially allows for the multitudes to gather as a collective in opposition to some violative conduct, often carried out by a government official, although we can see this in other contexts such as employment and access to public accommodations.

Additionally, under section 1983 of title 42 of the United States Code, individuals or groups protesting peacefully shall not be retaliated against for their demonstrations.

Sometimes, even peaceful protests are *conveniently* classified as violent uprisings that dangerously give law enforcement the "cause" they need to perpetrate violent attacks against protestors. In 2020, Amnesty International USA launched a report tracking violence and lethal force against protesters. The report, *The World is Watching: Mass Violations by US Police of Black Lives Matter Protesters' Rights*, builds on the organization's tracking of violence against protesters and new findings on the use of lethal force by the police. The report, although focused on the various nationwide Black Lives Matter protests, illustrates how protests often reflect more serious racial dynamics between African-

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Americans and law enforcement in this country.

This historically tumultuous relationship is mirrored in the arena of protesting, where African-American protestors are often met with higher rates of violence. As a result, causes surrounding the African-American community such as Black Lives Matter, which was formed in response to the brutal and unnecessary killing of George Floyd, are particularly targeted by law enforcement. While other non-violent protests are often met with less police presence and violence, Black and African-American protestors are often met with the most severe response by law enforcement – hostility, violence, and often, killings.

My practice as a civil rights attorney is saturated with Fourth Amendment violations by law enforcement officers who, unjustifiably and against policy, exercise excessive force against citizens. Unfortunately, a lot of my work involves excessive force taken against individuals in situations where law enforcement is involved. In many of these cases, excessive force led to the unlawful killing of an unarmed individual. Regrettably, what many of these cases have in common are the fact that the victims are people of color.

Excessive force as a violation of the civil right to peacefully protest

From a legal standpoint, the conduct of law enforcement also triggers the right to be free from excessive force, which is an indirect right granted to citizens via the Fourth Amendment. By pepper-spraying, shoving, hitting, beating, utilizing their batons, and even shooting and killing protesters, law enforcement brings into question the ability of citizens to exercise their constitutional rights without repercussion.

Under the Fourth Amendment, anyone in the United States, citizen or not, has the constitutional right to be free from excessive force by police officers, sheriff's deputies, highway patrol officers, federal agents, and other law enforcement officials. The Fourth Amendment provides, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." (U.S. Const., 4th Amend.)

While there is no specific language about excessive force seen in the Fourth Amendment, *Graham v. Connor* (1989) 490 U.S. 386 provides the basis for such right. *Graham* supports that a claim of excessive force by law enforcement during an arrest, stop, or other seizure of an individual is subject to the objective reasonableness standard of the Fourth Amendment, rather than a substantive due process standard under the Fourteenth Amendment.

In other words, the facts and circumstances related to the use of force should drive the analysis, rather than any improper intent or motivation by the officer who used force. With this, in the case of peaceful protests, the use of force, especially excessive force, should sparingly, if at all, be used, otherwise it is unreasonable under the circumstances and violates protestors' individual and collective rights.

Thus, *Graham* supports the view that the right to be free from excessive force should be observed by our law-enforcement agencies nationwide, including when they are engaging with protestors. Despite this, law enforcement has constantly approached peaceful protest with violence, and it has subjected them to serious and often costly and punitive litigation against the individual officer(s) and/or their respective departments.

§ 1983 actions arising out of protests

Because a constitutional right is involved, whether it be the right of the protestors to exercise freedom of speech, freedom of assembly, or their right to be free from excessive force, matters such as these brought by protesters to enforce these rights will often be heard before a federal court. Section 1983 of title 42 of the United States Code is the vehicle plaintiffs may use to bring a cause of action against law enforcement that has violated their civil rights as peaceful protestors.

The statute of limitations that any potential plaintiff must be wary of for these types of cases generally are two years from the date of incident or they run the risk their claims will be barred. The most critical step to initiate the process of filing a lawsuit against the government or a government official is to "exhaust administrative remedies." Usually this means putting the government on notice within six months of the date of the incident by filing a form or other required documentation to the appropriate government entity prior to filing the lawsuit before a judicial body.

Elements of a § 1983 civil rights action

The causes of action a plaintiff could bring under a 42 U.S.C. § 1983 case include, but are not limited to: excessive force, wrongful death, failure to administer medical aid, and many others.

To establish this claim, a plaintiff must prove all of the following: 1) the defendant intentionally committed a wrongful act; 2) the defendant was acting or purporting to act in the performance of their official duties; 3) the defendant's conduct violated plaintiff's right; 4) the plaintiff was harmed; and 5) that the defendant's wrongful act was a substantial factor in causing plaintiff's harm.

Remedies under § 1983

Those who are successful in bringing a section 1983 claim can obtain money damages or injunctive relief. In one case, a protestor was successful in his action seeking injunctive relief when the City of Charlottesville revoked his protest permit. This case was controversial because it involved a self-proclaimed white nationalist. With this, section 1983 could prove particularly useful and relevant in the context of one's right to protest.

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When discussing money damages, "entitlement to compensatory damages in a civil rights action is not a matter of discretion: 'Compensatory damages . . . are mandatory; once liability is found, the jury is required to award compensatory damages in an amount appropriate to compensate the plaintiff for his loss.'" (*Hazle v. Crofoot* (9th Cir. 2013) 727 F.3d 983, 992.) Additionally, a successful plaintiff will be entitled to attorney's fees, which may even surpass the amount of the judgment award.

The role of state-level statutes – The Tom Bane Act

On a state level, protestors can also bring causes of action that specifically address the physical harm they may have sustained at the hands of law enforcement. As an example, in California, the Tom Bane Civil Rights Act (also simply referred to as the "Bane Act") authorizes suit against anyone who by threats, intimidation, or coercion interferes with the exercise or enjoyment of rights secured by the state or federal constitutions or laws without regard to whether the victim is a member of a protected class. (Civ. Code, § 52.1.) "The essence of a Bane Act claim is that the defendant, by the specified improper means (i.e., 'threats, intimidation or coercion'), tried to or did prevent the plaintiff from doing something he or she had the right to do under the law or to force the plaintiff to do something that he or she was not required to do under the law." (*Austin B. v. Escondido Union Sch. Dist.* (2007) 149 Cal.App.4th 860, 883.)

To obtain relief under section 52.1, a plaintiff does not need to allege that a defendant acted with discriminatory animus or intent; liability only requires interference or attempted interference with the plaintiff's legal rights by the requisite threats, intimidation, or coercion. (*Venegas v. County of Los Angeles* (2004) 32 Cal.4th 820, 841-843.)

In the context of protesting, the intimidation factor law enforcement often use is engaging sometimes hundreds of officers at a protest or rally to attempt to scare protestors. Officers will also threaten to release painful gasses on protestors or even threaten to throw them in prison, even during peaceful protests.

In the most extreme cases, actual physical harm to protesters occurs and some are even imprisoned. In these circumstances, when law enforcement denies protesters their right to exercise their right to free speech and freedom to peacefully assemble, the Bane Act could provide relief and damages, meaning money with significant attorney's fees associated, if applicable.

The Bane Act could be seen as quite "plaintiff-friendly" since the Bane Act does not require actual interference with a plaintiff's legal rights. Rather, even an attempted interference is enough to give rise to a Bane Act claim. (Civ. Code, § 52.1, subds. (a)-(b).) Surely, other states have similar protections for protestors and its citizens generally. Outside of statutes, there are also relevant tort claims such as assault and battery.

Bivens and federal officials

Not only can protestors whose rights have been violated sue law enforcement agencies and its individual officers acting under state color of law, federal law enforcement officers may specifically be sued in a *Bivens* action, which is a similar type of claim established by a U.S. Supreme Court decision rather than a statute. In *Bivens*, the Supreme Court found it inherently unfair that someone whose constitutional rights were violated could be deprived of redress simply by virtue of the fact that the wrongdoer was a federal rather than state official. (*Bivens v. Six Unknown Fed. Narcotics Agents* (1971) 403 U.S. 388.)

To prevail on a *Bivens* claim, a claimant must prove two elements. First, the claimant must prove that she had a constitutionally protected right at stake. Second, she must prove that a federal official or someone acting on behalf of the federal government violated that right. Bringing a successful *Bivens* action has the same remedies as other section 1983 actions.

Officers may look to qualified immunity to protect them against *Bivens* and section 1983 actions. However, this should not be relied on. In a case where protesters were peacefully speaking out against police misconduct, the Court found qualified immunity did not apply when an officer arrested protesters in retaliation for their chalking anti-police messages on sidewalks. (*Ballentine v. Tucker* (2022) 28 F.4th 54, 61.)

When the protest becomes unpeaceful

California has several different statutes related to protesting charges, such as Penal Code 408 – unlawful assembly. Penal Code 407 describes an unlawful assembly as when two or more people gather to commit an unlawful act, or a lawful act in a violent, boisterous manner.

The most common California charges related to protesting include:

- Penal Code 408 PC – unlawful assembly,
- Penal Code 404 PC – participation in a riot,
- Penal Code 404.6 PC – inciting a riot,
- Penal Code 409 PC – failure to disperse at scene of riot,
- Penal Code 416 PC – failure to disperse,
- Penal Code 415 PC – disturbing the peace,
- Penal Code 148 PC – resisting arrest.

When met with these circumstances, necessary and reasonable force should surely be used to maintain the safety and wellbeing of all citizens and property. Nothing here is intended to suggest law enforcement does not serve a significant purpose in protecting this country and its citizens from those who choose not to abide by the constitution by protesting peacefully.

All citizens who choose to engage in their constitutional right to speak out about injustice to be addressed and

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redressed by our government should have the space to do so free from the threat of violence by law enforcement. Law enforcement must uphold the rights of citizens by ensuring they treat protesting as a constitutional right, not a neighborhood gathering that is not protected under the constitution and offered fewer protections.

Final words

Change is often necessary, and history has shown us that protests, whether marches, refusing to sit on a bus, or bearing certain colors in solidarity, have led to that positive change, which has made this great nation what it is today.

In the words of the late and great Dr. Martin Luther King Jr., "Every man of humane convictions must decide on the protest that best suits his convictions, but we must all protest."

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