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Panel IV Discussion: The Future of 1st Amendment Protections: Examining the Use of Brutality on those Fighting Against Violence

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PANEL IV: Discussion

**THE Future of 1st Amendment Protests Protections:
Examining the Use of Brutality on Those Fighting Against
Violence**

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*Honorable Craig Washington, Attorney, Former Texas Senator and U.S.
Representative*
Attorney Roy J. Rodney, Jr., Rodney & Etter, LLC
Attorney George Oginni, Lee & Oginni Trial Lawyers, PLLC

Hyperlink to presentation: <https://www.youtube.com/watch?v=4-DHwRzV5io>.

TRANSCRIPTION:

Larry Taylor

A minute before we officially start. My name is Larry Taylor. I'm the managing partner for the Cochran Firm in Texas, and I want to say thank you for joining us on this important symposium. The speakers here today, I am, myself, not even able to carry their book bag because of their skillset and level and knowledge on this particular subject. Our moderator today will be Sarah Guidry. I will let Sarah make the introductions to all of the speakers. So, if you continue to wait and have patience, we will join you in just a second. And Sarah, matter of fact, let's get ready to go live and wait for George to join us.

Sarah Guidry

Thank you, Larry. My name is Sarah Guidry. I'm the executive director of the Earl Carl Institute. We're a research, writing, and advocacy think tank at Thurgood Marshall School of Law, Texas Southern University. And the work that we do is all aimed at reducing disproportionality and disparities as it affects people of color. Today, I'm proud to be able to moderate this particular panel where we're going to examine your rights under the First Amendment, and we're going to examine how black people receive disparate treatment when it comes to police interactions. As I was preparing for this panel and I came across a quote from Livio De La Cruz, who's a board member of Black Lives Matter in Seattle, King County, and what he said was, "Police must not respond to the mass, to dismantle systemic racism and end their violence against black people with more violence. Police brutality and the use of excessive force has spread to protests all over the

United States. In response, many protesters find themselves the subjects of police brutality while they are seeking to peacefully assemble to petition the government for systemic change when it comes to racism. The first amendment to the constitution provides, the right to freedom of speech or press, the right of people to peaceably assemble and petition the government for a redress of grievances." So, we're going to examine, today in this panel, what constitutes peaceful protest. What limitations can be placed on such speech? We'll examine the current jurisprudence around those issues. We'll query what the future of the first amendment right to protest should look like in our history. We will hear from our speakers talking about the despaired treatment of African Americans from the point of slavery to right after the death of George Floyd. We will talk about how protesters were treated during the Civil Rights era, and what the police can and cannot do in terms of how they interact with protesters.

So, with that said, I'm going to take just a second to share my screen. And I'm going to ask everyone to take a minute of silence and look at the screen because this is the reason why we are here today.

[silence]

Say their names. So, I'm going to start with attorney Roy J. Rodney. Attorney Rodney is a practicing attorney over 30 years. He is the leader of Rodney & Etter, LLC. His work focuses on class action cases, toxic torts, complex contracts. He does extensive pro bono work in civil rights and voting rights. And I've asked attorney Rodney to discuss the spirit of disparities related to police brutality. How qualified immunity intertwines with that. And also, some of the cases that he has dealt with and most especially, the Alton Sterling case, and the impact that it had on students at that time. Attorney Rodney, I'll turn it over to you.

Roy Rodney

Yes. Thank you, Sarah. First of all, let me thank you for the opportunity to be a member of the panel with you, and with George. And also, let me congratulate our moderator Larry Taylor for the wonderful job that he's done. It's been an outstanding seminar.

I've been a practicing lawyer now for 37 years, and my father was a civil rights advocate and a union organizer in the 1960s. His job was to organize black workers at paper plants in Louisiana and Mississippi. And by definition, it was a dangerous job, one of which I remember my mother crying many a night that he would make it home safely. There were many times that he did not make it home safely, and it was my first introduction to police brutality. But I came to this job in a very circuitous route because I would marry a lady whose parents are both police officers, and as a young man, understood and began to understand their perspective as civil service who really were dedicated to protecting and serving, particularly in the African American community. I also come to the career as a circuitous route because I took a job with a large law firm when I graduated from law school, and one of my early clients was a company by the name of Transit Casualty Insurance Company. And perhaps their biggest client was an organization, an entity of the city of New Orleans, and in particular police misconduct because they wrote police misconduct policies for the New Orleans Police Department, which had been, historically, one of the most brutal, and even recently, police departments in the history of this county. So as a young lawyer, I was asked to be involved in a representation of this organization before I even knew what it was about and

became embroiled in an infamous case called the Algiers 7 Case¹. And in that case, which became the motivation for the movie, *The Big Easy*, a young white police officer was found dead on the levy in the Algiers community of New Orleans. And as a result of that, there was an entity, a group of police officers, who invaded the police department armory in New Orleans on the East Bank of the city, traveled back to the West Bank, invaded the Algiers neighborhood, and shot seven people to death, one of whom was Sherry Singleton, a young mother who was shot 30 some more times in the bathtub naked. And it was one of her children, who survived the massacre by hiding behind furniture in the living room. After that case which settled, and by the way bankrupted Transit Casualty Insurance Company, I decided that I would redirect my life to maybe try to provide representation for those who sought to preserve their civil rights. And so, as a result of that, I began to do a lot of work in Voting Rights Act, which is where I met Sherrilyn Ifill, who was our speaker today, and volunteered with LDF and a number of other people, and we handled several historic cases to Redistrict to Louisiana Supreme Court and others. And in late 1980s, I won the state Pro Bono Award for those activities, but as a result of that, I never really got away from the issues surrounding the interaction of the police department in minority communities. That's particularly because in New Orleans and in Houston, Texas, we've had an infamous history of police interaction with the African American community as bad, if not worse, than perhaps any other place. And in fact, my comments today are colored by both my experiences and my geography because, while I have heard many people speak today, the differences in the decisions of the Second Circuit and the Ninth Circuit in the Federal Court system are dramatic when compared to the Fifth Circuit and the Eleventh Circuit. And the rest may skew towards conservative or one way or the other, but I have to say that those judges of the Fifth Circuit who in the 1960s may have been at the forefront of expanding and recognizing the civil rights of the African American community must be spinning in their graves to read some of the decisions that have been rendered in the Fifth Circuit Court of Appeal with regard to civil rights qualified immunity. I heard the gentleman from the Cochran firm, who's the AJA lawyer litigator of the year spoke so eloquently about the opportunities to have a great trial even in front of all-white juries. Well, I certainly respect that talent and that experience. But I can tell you that the way qualified immunity is practiced today in the 5th Circuit, you can't get a trial at all. And on the qualified immunity, you can't get any discovery. So, you cannot satisfy the conundrum that's been set up by the Supreme Court which requires you to establish specific facts and past precedent when you cannot get any discovery or any facts at all.

Well, all of these things came to head for me personally in the representation of a young man by the name of DeRay Mckesson and the Black Lives Matter Movement in the aftermath of the Alton Sterling shooting in Baton Rouge, Louisiana. I had been contacted by Billy Murphy, who had been the lawyer for Freddy Gray, and asked if I would go down there and to here out and to look at the situation. And it was in that vein that we decided to bring a class-action lawsuit as a result of what had been a mass arrest, primarily of students from Southern University, some from Texas Southern University, Xavier University, Dillard University, all schools with a long history of participating

¹ 7 Officers Indicted in New Orleans, New York Times (July 10, 1981), <https://www.nytimes.com/1981/07/10/us/7-officers-indicted-in-new-orleans.html>.

in the Civil Rights Movement. I was highly motivated by their courage. And almost a 100 more went to jail as a result of that case.

And the efforts of Judge deGravelles who's a conservative person, but a magnificent judge. We were able to get the class-action resolved. We provided both equitable and financial reliefs. We were able to obtain compensation for all of those whose injury had included jail time but not major physical injury. We obtained a written apology from the state of Louisiana signed by the Governor in writing for each protester. We were able to obtain an expungement of all of their records, payment of all of their attorney's fees, all of their expenses, refunding of all of their bonds, transportation, and everything else in an effort that was made by the district attorney in Baton Rouge to make the situation whole. But still, there were those who were severely injured in the police attack, and those cases continue. And we continue to represent in the class a case called Max Geller versus the City of Baton Rouge², which is joined with a number of other cases and/or by a number of civil rights organizations as we sort of pursue their compensation.

What we have in America today is a very serious situation and an existential threat to every aspiration of every African American in this country. Young people have recognized that. And to their credit, they've taken it to the streets, often in a multi-cultural fashion. They recognize that all of their goals and all of their aspirations, all of our achievements, everything that we hold dear, our very future is at risk in the situation that we have now. And we see that in the treatment that they have received in an effort to preserve their rights, versus the treatment that we saw on January 6. Police have killed nearly 1,000 people, almost every year. And as of July 10th, of this year, there have been more than 28,400 deaths dating back to January 1st, 2000. There's no way to minimize this. That list that you posted are those who have been able to have some documentation, those who have received assistance, those in some way God has allowed to speak clearly. But there are so many in jails, in prisons, in other places, who have perished, who have died, who have been severely injured as a result of police misconduct, all within the context-- many within the context of attempting to exercise their First Amendment rights.

Sarah Guidry

Attorney Rodney, I'm going to thank you, and we will come back for Q&A in just a little bit, but at this time I would like to introduce our other attorney on the panel, Attorney George Oginni. He is a graduate from Thurgood Marshall School of Law, so thumbs up. He, along with some other civil rights attorneys, filed a lawsuit in Dallas on behalf of protestors to prohibit the city, Texas and Dallas police chief and officers of the Dallas Police Department, from using less lethal weapons such as tear gas, smoke bombs, flash bangs, purple balls, mace, among other things. I have asked Attorney Oginni to talk about that lawsuit, to talk about why the First Amendment is so critical, and to talk about disparate treatment over the years in terms of how protestors have been treated by the police.

George Oginni

² *Geller v. City of Baton Rouge*, No. 17-324-JWD-EWD, 2019 U.S. Dist. LEXIS 192739 (M.D. La. 2019)

Thank you, Miss Guidry for having me. I'm very honored to actually be here and to speak on those matters. And good afternoon to everyone. It's a day of reflection and a month of celebration. It's crazy that so many years that went by without us celebrating Black History Month. I'm not sure if you're aware, but it went from one day to one week, and now a month. I know that I'm not alone when I say that we're currently in a movement of black excellence where our history of southern growth is celebrated all year round. My name is George Oginni as Miss Guidry stated. I'm a partner at Leo & Oginni Trial Lawyers, a small law firm in Houston, Texas, who primarily focus on personal injury matters all over Texas. And I'm honored to be here during Black History Month to go over some of the ideals and history of the Civil Rights Movement. We have recently experienced our first black president in Mr. Barack Obama and the first African American female Vice President, Miss Kamala Harris. So just stop and think about that for a second. We have spent so many years dreaming, and to see some of these dreams coming true is truly amazing. I wish we could do this in person and to come and express these ideas, but COVID-19 has left us to do so via Zoom. Either way, we're going to get through this message. After all, our ancestors, they had to endure much greater obstacles to get their points across, and we're going to do the same. I want to title, I guess, my presentation part of it as A House Unfinished, and with every house comes a proper foundation. The First Amendment rights of the US Constitution was pivotal for civil rights advocacy. These tools provided abolitionists, activists, sitters, marchers, and petitioners the ability to lay down the foundation that we currently stand on. You see, for the purpose of this presentation I want to focus on the First Amendment rights and how it has impacted the Civil Rights Movement more specifically how the rights of expression, assembly, and the right of petition has made an impact in the 1960s. The right to assemble; that served as the blueprint. That was the blueprint for civil rights activists to convene and express dissident opinions of justice. The right of the freedom of speech that allowed leaders such as Martin Luther King and the late and great John Lewis-- may his soul rest in peace, to march across the Edmund Pettus Bridge for our voting rights. You have the right of association which allowed the NAACP and Justice Thurgood Marshall, the Justice Thurgood Marshall to stand as a unit to fight the legal fight in front of the US Supreme Court. The right to petition which served as the cement. It was the cement to galvanize First Amendment ideals into a legal precedent. You see, the First Amendment right; it is civil rights. It embodies the very goal that we hope to achieve. The First Amendment rights is blind to race, is blind to gender, is blind to age.

In today's protest, you can see little boys holding up Black Lives Matter signs and little girls with T-shirts that said, "Daddy, you change the world." But it wasn't always that way. As Robert O'Neil states many areas of the First Amendment were shaped by the civil rights movement. I want to get to the case that I'm involved on in Dallas, Texas, but before then, I want to touch on some history and what led to that and how we're able to fight that case. In *Brown v. Board of Education*³, where the Supreme Court ruled that the segregation of public schools was unconstitutional. This landmark case, it actually serves as the catalyst for the transgender civil rights that are currently going on in progress today. You have the *NAACP v. Alabama*⁴ in 1958. This case was the State of Alabama sought to prevent the NAACP-- I wanted to refer to it as the association, from conducting

³ [*Brown v. Bd. of Educ.*, 347 U.S. 483, 74 S. Ct. 686 \(1954\)](#)

⁴ [*NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 78 S. Ct. 1163 \(1958\)](#)

business in the state. The association was successful in convincing the court to grant a restraining order. However, the State of Alabama had issued a subpoena for the association membership list. If you consider the potential harm that can be done to its members, no wonder why the association would have objected this production of the list. If the list gets in the wrong hands, who knows the premeditated harm that can be caused.

Fortunately, the Supreme Court ruled protecting the free associational rights of NAACP and its members. They determined that the list then from the freedom of association. This ruling, it broadened all of the association similar to prevent the states such as Alabama from discouraging citizens, citizens like you and I from participating in associations that engaged in lawful and ethical activities. You have *Edwards v. South Carolina*⁵, the Supreme Court's alternative breach of peace conviction for 187 African American students. These students marched from South Carolina to the statehouse carrying signs that read "Down with the segregation." The court ruled that the government cannot criminalize the peaceful expression of unpopular views. You see, the First Amendment, it allows America to look closer to itself, to look at itself. It served as a mirror to hold the Constitution accountable for its delay of promises, accountable for its misconstrued promises, accountable for its constitution's ever needed growth and evolution.

You may come and heard the phrase today that no justice, no peace. No justice, no peace. Well, that call for change; that is the First Amendment. That's the First Amendment in its purest form. And I have to be honest with y'all. I wasn't born in the 1950s or even in the 1960s. So, I can only research, trying to find and discover the impact of what the First Amendment had to civil rights. But I'm limited. I can only simply view it as history. But Eric Garner, Alton Sterling, Breonna Taylor, Botham Jean - that's my version of freedom writers. Instead of freedom writers attempting to use white restrooms, Botham attempted to eat vanilla ice cream before he was slayed in his own home. Charleston Church massacre, see, that's my reality of bombing of a Baptist church in Birmingham, Alabama that left four girls for dead. George Floyd, that's my Emmett Till. A shocking video that was displayed for the world to see, that video alone, that took place as an open casket. Just as the first and-- just as the first amendment enabled the NAACP to provide funding for representation of seven individuals during the civil rights, it allows me and allowed me the ability to represent Houston protesters who were arrested during George Floyd protests, allowing me to show off my version of freedom of petition.

See, the first amendment is our greatest shield that protects us from unfair treatment in society. It's also our greatest weapon in our fight for civil rights. A weapon, when used powerfully, can pierce patterns of oppression and injustice. Today, civil rights focuses on police brutality rather than de jure sovereignty. Similar to our forefathers, we have marched the streets and petitioned the courts just like our forefathers, the narrative towards protesters has essentially been parallel. It's been merely 60 years since the Freedom Riders and Bloody Sunday. But we must ask ourselves, "Has the treatment of protesters really changed at all?" Let's draw a comparison really quick.

In 1961, you had black and white activists known as Freedom Riders. They took the bus trips from the south to protest segregation of bus terminals. They even attempted to use whites-only restrooms

⁵ [*Edwards v. South Carolina*, 372 U.S. 229, 83 S. Ct. 680 \(1963\)](#)

and white-only countertops. Although the Freedom Riders protested peacefully, they were met with horrific violence from white protesters. And some cities such as Birmingham, Alabama, the police even cooperated with the Ku Klux Klan. They cooperated with the Ku Klux Klan chapter to allow mobs to physically attack Freedom Riders and burn the buses that was used to travel throughout the South.

You see, the Freedom Riders such as Diane Nash, she risked it all. She was arrested dozens of times for nonviolent protest, even when she was six months pregnant. You had water cannons and firehoses that were widely used against protesters. You had police dogs that attacked the civil rights demonstrators. These dogs and firehose, they were in the sole possession of various police forces, the same police force that undertook the social contract. You see, this harsh treatment of protesters continued to Bloody Sunday where a 25-year-old activist by the name of John Lewis, he led over 600 marchers across the Edmund Pettus Bridge. They were faced with brutal attacks by state troopers. The troopers clubbed the protesters. They even fatally shot Jimmy Lee Jackson, a 26-year-old African American who was only trying to protect his mother while she was being struck by police. You had leaders such as Martin Luther King Junior and Rev. Ralph Abernathy, they received death threats. They were arrested and experienced the bombing of the homes and churches.

We see this type of treatment that protesters gained-- this type of treatment gained national coverage of how they treated protesters. Even today, the treatment that protesters get and innocent bystanders, it continues to gain national attention. So, I currently represent a client, and his name is Vincent Doyle and has sued against the City of Dallas. During the George Floyd protests in Dallas, Texas, Vincent was an innocent bystander. He was actually a photographer there to document the incidents that was taking place. And just like many others on our case, Miss Tasia Williams, and Brandon Saenz. But instead of water hose and attack dogs, the police forces, they have switched to aerial projectiles such kinetic impact. These projectiles include teargas gas, smoke bombs, and even rubber bullets. So, I'm sure you can even imagine what the rubber bullets look like. But have you seen the damages that these rubber bullets cause? So, I want to ask you guys a question. If you can either chat in the box or just think to yourself, has the treatment towards the process has gotten even better? And while you do that, I want to go over the petition real quick. I want to share my screen. This is the petition that we used against the city of Dallas. As you can see, we filed it in the Northern District of Texas. So, this is an aerial projectile right now faced towards what seems to be an innocent bystander or a protest, but they're protesting peacefully, as well as with this little girl. If we scroll down further in our petition, this is Ms. Linda Tirado. As you can see, she sustained damages to her eye from the aerial projectiles, she's still healing. This right here is an image of one of these projectiles that we're petitioning and we're fighting really hard against the city and as well as any other cities wanting to just ban this particular use of what's called non- or less lethal. So, this is my client. This is Vincent Doyle. These images are public record. My client himself has released this to the media. And he also granted permission for us to display this during the seminar. As you can see, he received the impact right here from the projectile. He must undergo three surgeries. One for his retina, one for his dental, and then one to facial reconstruction in order to replace his cheekbone.

Sarah Guidry

Attorney Oginni, I want to just let you know we have three minutes to wrap up. So, I don't want you to miss providing any information that you want to before you summarize.

George Oginni

Yes, ma'am. Thank you. This is the type of treatment that protesters, our today's generation, are facing. It's not a firehose. It's not the dogs, but there's new technology that they're using against them. This is Brandon Saenz. He actually received impact to his eye, and he lost his eye. And he had to undergo multiple surgeries. We filed a temporary restraining order against the city to halt the use of any of these projectiles just to make sure that protesters can actually safely protest and exercise their First Amendment rights. Social media has helped with this accountability. There has been a disparity for the treatment between African American protesters and other protesters. If you look right here, this is an image of Capitol Hill during the George Floyd protest. As you can see, these are not your regular police officers that we see on an everyday basis. They were actually ready and equipped to do whatever needs to be done in order to, in my opinion, suppress First Amendment rights. But if you look on January 6th, during the storming of the Capitol, as you can see, you don't see those soldiers in sight. This shows a clear image of the disparity that we are facing today in America. In conclusion-- I know that I have only a couple of minutes left. But in conclusion, it seems we're fighting a de facto issue in 2021 rather than one of de jure sovereignty. We'll continue to fight for equality in all aspects of life, especially when we protest. I want to leave you guys with a challenge before I depart. I challenge you to educate someone this month. If you've taken anything away from today's seminar, whether it be my early morning portion of what's to come, please pass along this information. Let's change the narrative, not just by today, not just by a week, not just Black History Month, let's change it for a lifetime.

Sarah Guidry

I am privileged to introduce to you Attorney Craig Washington, the honorable Craig Washington who's licensed to practice law around the country in his practice before the Supreme Court of Texas. Mr. Washington was a state representative in the state senate as well as a congressional representative. He is the second black to have served in the Texas Senate since reconstruction. He provides representation and has, for decades, provided representation of civil rights and civil liberties and the political process. So, I've asked him to please speak to you all from the perspective of an elected official as well as an attorney who has represented individuals in civil rights matters as well as a citizen - I want to say those images were hard to watch George - who has suffered in watching other black people harmed because of interactions with the police. So, Mr. Washington, you want to take your phone off mute. I'll turn the program over to you.

Sarah Guidry

I have some questions that maybe you all can respond to. When can law enforcement legally intervene in a protest? And you touched on a little bit Attorney Oginni, but is there a limit on the amount of force that can be used under the constitutional rights of both the United States and Texas?

George Oginni

Oh, yes, there is a limit. But to answer your question directly, normally, when someone else's life is in harm or as you can see on January 6th when there was a federal property building endangered, that's when the most part of law enforcements can intervene. However, as long as protesters are protesting peacefully and doing their first amendment rights, there should be no intervening at all. They should actually support and guide and allow those protestors to actually speak up and heighten those voices. That was just a quick, short answer for it.

Sarah Guidry

So, what are the circumstances under which-- what types of situations do police usually use to justify their intervention?

George Oginni

For the most part, what I've seen is just their life was at stake. They assume that their life was at stake or if a fellow police officers was actually undergoing severe harm or potential risk of harm. Those are some of the excuses that I personally have seen. I'm sure Attorney Rodney may have other experiences as well.

Roy Rodney

There's a relatively complicated scheme with regard to the expression of the first amendment in general, that prohibit police and government suppression of the type of speeches that are being made, which sometimes gives very broad discretion with regard to administrative aspect of those speeches, where they can be made, how people are assembled, obtain the permits, comply with the local traffic laws. Complying with the police instructions. And so, this will be a great opportunity to talk about qualified immunity because while the first amendment is first, and I agree with George, is a dominant amendment in the constitution, there're restrictions upon its use. And when the police are in a position to be able to argue that they had probable cause to intervene, to arrest, or to enforce those restrictions, they then are entitled to the protections with regard to qualified immunity, assuming that the force is proportionate to the situation. And of course, that is a huge assumption, because right now under qualified immunity I think that unless you're in a prone position and almost absolutely defenseless, you will be met with a qualified immunity defense by the police because they will contend that their use of force was potentially reasonable. And then of course you get into very subjective issues with regard to whether or not they recognized that there was a constitutional violation taking place, whether or not they were in a position to see that what were the actions of the defendant, so on and so forth. So, you have this long litany of cases where people-- and I think George touched upon it --people were basically doing the minimum. In the case that we handled, in the DeRay Mckesson case versus the State of Louisiana, the police actually entered into private property where protestors had fled to get away from the police and arrested them upon that private property. So, Sarah, there's a big issue as to what police can do legally and what they can do illegally but still get away with it, under the application of qualified immunity defenses. I wanted to say, first of all, George, I enjoyed your presentation, but violence has always been used against black folks to maintain and communicate a racial and social hierarchy

in this country. It has not changed. And what we saw in all of these cases showed disparate treatment, and even the aftermath of these cases shows disparate treatment because just like in reconstruction, which was another powerful Black Lives Matter movement in the country, the investigation of the mobs have always seemingly been superficial, seemingly confused, and most of the people are charged with minor offenses, if at all. And I cannot believe that the same thing is occurring right now with regard to the January 6th. I'm amazed that the FBI and others are placing photographs on television asking the public to identify people because I can tell you in the Alton Sterling case they used confidential informants. They used facial recognition. They used satellite technology. They used all sorts of-- they knew more about the protestors and who they were and were able to find them. In fact, we forced the court to force them to reveal all of the names of the protestors because we couldn't find all of the young people who had been involved in the aftermath. So, Sarah, I hope I answered your question. I'm teaching a course at Southern University in Baton Rouge next spring that talks about the first amendment, the restrictions on it, and police action. But I do want to show-- I'm going to press my screen share button, and hopefully I'm able to get to a couple of things here that I wanted to show. The issue of whether or not there's been disparate treatment and whether or not there's violence in the treatment. I think it's been pretty much resolved. And it's just a matter of, what we're going to do about it, how we're going to rectify it. When Joe Biden made this statement, which has been well shared--

Sarah Guidry

Mr. Rodney, you need to open up the-- I don't know if it's an image or document. We're just seeing your folder.

Roy Rodney

Oh, you are? Okay. Let me go back and see if I can do it.

Sarah Guidry

While he's working on that, Attorney Oginni, can you explain what the free speech zones are and how the police use that, to control the ability of protestors, to limit them to certain areas so that the police can contain them?

George Oginni

Yes, mam. So normally when they-- as Mr. Rodney touched upon, the freedom of speech in the First Amendment is limited and depending on the type of scrutiny about it and the form of speech that is used is a way that police, as well as legislators, use in order to limit the potential protestors and the freedom of speech. This is many tools that has been used in the past as well as now and you see move forward with the January 6 insurrection that took place on the Capitol Hill-- at the Capitol. You can see that that actually-- in my opinion, was a situation where the freedom of speech had been limited and what could've been said during that time as well as pointing towards former president Trump's Twitter video they released when he spoke about his review of what happened with this election. That in general kind of speaks to your point about the zone and the freedom of speech which could've been used in order to prevent and limit the First Amendment Rights.

Sarah Guidry

Well, I'm going to ask one final question, and then I guess, we're going to have to move on. Can you briefly speak to the impact of when police do (e)n masse arrest, and what happens to folks who are arrested particularly here in Texas? And Attorney Rodney mentioned that getting records clear was part of the relief that they got in losses that he filed, so I don't know if you can just speak briefly. Because in Texas, your arrest record, even in the case of dismiss-- which here in Houston about 700 cases were dismissed because they didn't have probable cause to arrest the protestors, but they still had to apply to get their criminal record cleared. And some of them don't even realize what the repercussions might be, so if one of you wants to speak to that.

George Oginni

I can. I think that was just a half-battle. Honestly, when you're speaking as far as 700 protestors that were released from custody by some of the DAs in Houston as well as the same in Dallas, what happened that occurred on the bridge. I think that's just half the battle as far as releasing it. But as you mentioned, the other half is actually expunging it off their record so that they won't have to travel and continue life with it.

Sarah Guidry

Well, we're going to go the Q and A. Let's see here. It says, "You talk about getting rid of the alternative force during protests. What other avenues would you propose to use?" Well, I'll respond before you do, George. But the first avenue is allowing people to peacefully protest.

George Oginni

That was my answer.

Sarah Guidry

Feel free to elaborate on that.

George Oginni

Yes, ma'am. I think you hit the nail right there on the coffin. The first avenue is to allow people to peacefully protest, and also not to excite people. I remember when I was joining some of the protestors in Houston, Texas, as we were walking some of the streets of downtown. You would see some of the incidents shouldn't have been escalated. If people were allowed to just speak freely, to walk freely instead of police fighting off their traffic or coming into their face and escalating the situation. That's one way of alternative method, learning how to deescalate situations and altercations. If your question was directed towards as far as needing potential other physical alternatives, I would say just learning combat. It doesn't have to address towards shooting or shooting aerial projectiles. Or even training. The main issue that we really have-- one, is that they shouldn't be on the streets. Two, is that inadequate people are allowed to take this. In Dallas, anyone can just get it. And if they had the adequate training and the proper funding for it, then none of this would have happened. So, there's various layers that needs to be addressed. And it starts with-- as Mrs. Guidry said-- allowing them to freely protest.

Sarah Guidry

Okay, it appears that Craig Washington is now able to join us. Are you there? Mr. Washington? You must still be having technical difficulties. So, I'm going to go onto the next question which I think is a good one. To what extent does addressing qualified immunity exist as a threat to the use of discretion among police and does this perception serve as a barrier to meaningful reform efforts?

Roy Rodney

I think-- may I answer that? I think that qualified immunity is the number one issue with regard to police interaction with protestors and the public at large. There's been a lot of discussion about it today, but qualified immunity is really the police brutality protection legislation. That's what it does. It's the legal framework that is designed for one purpose which is to gut the applications of the civil rights section 1983 litigation and to make it much more difficult. It's a vicious attack on the black community, and it's directly akin to the things that we saw in the black codes post-reconstruction when African Americans were once again asserting their rights to equality. When you combine this, I heard a speaker earlier today. When you combine it with the protective state laws, I mean, you have a situation where you have cases but you're not able to get discovery. The matter is handled in a summary fashion. And most of these-- and a large percentage of these cases are dismissed and challenged before the plaintiffs have had much of an opportunity to do anything. And in fact, even though they have the right to amend, it is very tightly granted. I've been involved in pollution and toxic tort cases where we've had more than 10 amendments to our original petition as we began to understand the facts and circumstances surrounding the exposure. But in these sorts of cases, the courts rarely give the opportunity for more than one or two opportunities to amend. So, we have to change the qualified immunity case. And if I can mention just a couple of cases to those who-- or lawyers and those who are fans of following the law from the Fifth Circuit Court of Appeals, I want to take about this case called *Katie Joseph*. On behalf of *The Estate of Kendall Joseph versus Damon Bartlett*⁶, the police officers. And in that case, it's-- the young man in question was suffering, obviously, from a mental illness. Even when the police arrived, he asked that someone call the police to help him. As a result of it, he ran into a convenience store, jumped behind the counter, and the police came in in force, and he endured 26 blunt face injuries to his face, to his chest, his back, his extremities, his scrotum. And through an eight-minute account to why he was on the ground experiencing extreme psychosis and continuing yelling for someone to call for the police while he was being beaten by the police. He was kicked, and maligned, and tased three times. And he died of his injuries. Now, in that case, the court went on in an opinion forever in a tortured reading of qualified immunity. And while it did not allow the police officers who committed the batteries to be dismissed, all of the police officers who held them down, who cordoned off the scene, who protected the scene were let out of the charge of bystander liability due to qualified immunity. And bystander liability is what allowed police officers to work together to suppress rights of protestors and to make arrests. It has shifted the burden from protecting police officers who do the right thing to protecting every police officer, whether they've done the right

⁶ [Joseph v. Bartlett, 981 F.3d 319 \(5th Cir. 2020\)](#)

thing or not. And has shifted the burden of making a difference to the plaintiff rather than to the police officer on the scene.

Sarah Guidry

I want them to just try one more time to give Craig Washington an opportunity to speak. And then there are a couple of follow-up questions that I do want to get from the Q&A list we have here.

Craig Washington

Hello.

Sarah Guidry

I introduced you and I asked that you speak to this issue from the perspective of a former lawmaker as well as a civil rights attorney as well as [black?] person who has been fighting these issues for a very long time.

Hon. Craig Washington

Well, thank you. Realizing that time is being consumed, I don't have prepared remarks. I have some thoughts. I'll try to congeal those things into together, the opportunity that people gave me to serve in a public way and my experiences as a lawyer. I want to drill down on not so much-- like Andy Young said, "We ain't where we ought to be and we ain't what we're going to be but we ain't what we were." I want to drill down on qualified immunity because it may very well be the key that finally opens the gate. I want to direct your brain back to the video of the police officer who had his knee on George Floyd's neck. He looked straight at the camera and he looked straight at you knowing that it was being recorded and it ought to give you chills. It ought to give any human being chills because he did it with absolute, complete, total knowledge of the fact that nothing would happen to him with impunity. And the reason that he did it with impunity is because of qualified immunity because qualified immunity is a judge-made doctrine. And I won't even talk about the fact that all these people lament judges making laws all the time instead of interpreting the laws as the Constitution said. There's nothing in the Constitution that even suggests all the way back to the Federalist's papers that there would be a perception that when government is called to account and they were later called to account in the Reconstruction Acts when the 13th-- 42 United States code, section 1983, 85, 88 were passed and became law. This was made by judges. It was not within contemplation that-- the statute says, "Any person." And so, my point is if some of us would focus on attacking that, using *Trent vs. Riojas*⁷ as perhaps a little chink in the wall where they reversed and remanded the 5th Circuit maybe we can get to the point where when these police officers think about doing something wrong, violating someone's rights, whether it's the First Amendment or any other amendments, any right. That they are not given the knowledge that they're going to get away with it. They're going to be held accountable. And so, now I come back to my preference and then I'll be quiet. Start with the fact that if you had a person who had had four or five incidents involving driving while intoxicated. And he came into my office, and I ran an insurance business where I sold automobile insurance, I have the right to check his background

⁷ [Taylor v. Riojas, 141 S. Ct. 52 \(2020\)](#)

to see what his driving record looks like before I decide whether I want to bear the risk of him driving an automobile down the highway with me standing behind him as insurance. Make these police officers get personal liability insurance. Stop letting the cities cover up for them. In Houston and in Texas, they violate the constitution every time that the city legal department represents them when you sue them in their private capacity. You sue them in the course and scope of employment, then they're entitled to be covered. But they're not entitled to have the city legal department defend them when they're sued in their individual capacity. The Texas Constitution prohibits a gift of public money, and it is a gift of public money for the City of Houston-- City Attorney's office-- to represent them in both capacities. In fact, it's probably a conflict of interest as well, but that's another story for another day. So, let's fight this battle on a lot of different fronts. Don't stop doing what you're doing. Don't stop marching. Don't stop doing anything that you're doing, but let's get some lawyers and some thinkers-- not just lawyers, but-- I didn't mean to say that only lawyers were thinkers. But let's get some thinkers involved and file these lawsuits. There was a time when *Swain vs. Alabama*⁸ was the law before *Batson vs. Kentucky*⁹, and if lawyers hadn't given up on the fact that the Supreme Court said in *Swain* that every time you strike black people off the jury or anyone off the jury, for that matter, you have to show that in every case involving that particular D.A., under any circumstances, regardless of the circumstances, that the Constitution was not being violated. If lawyers had given up on that, there would be no *Batson vs. Kentucky*. We have to fight on many fronts. We don't all need to be standing in lockstep fighting the same battle. Find a way to bring, not an egregious situation like the one in Taylor which is despicable-- I can't imagine a human being even-- anyway-- doing that to another human being. But the point is we have to fight on different fronts. We don't accept qualified immunity. There's no such thing as qualified immunity. There's no such thing as immunity. First of all, make them get insurance of their own. And so, when their background is checked and they move from department to department, and the insurance company walks in and they want to buy \$100,000 or \$1 million policy or whatever. And if they can't buy a policy, set up a pool like they do in automobile insurance. If I'm too big of a risk to have automobile insurance, I have to go into a pool because I get to drive a car. I have a-- not a right, but a privilege to drive a car. But I cover myself if X, Y, Z insurance agency won't cover me, I can go into their assigned risk pool. Make these jokers go into the assigned risk pool because of their previous egregious acts of misconduct. Every complaint, every IAD complaint, whatever citizen has complained about them and their actions ought to be recorded. And the internal affairs department is a joke. It's an absolute joke. All they do is cover up for each other.

Sarah Guidry

I just want to thank all of the panelists. We really appreciate your knowledge, your insight. This is a difficult conversation to have.

⁸ *Swain v. Alabama*, 380 U.S. 202, 85 S. Ct. 824 (1965)

⁹ *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712 (1986)