First Amendment — Freedom of Speech — Retaliatory Arrest — Nieves v. Bartlett

Police officers violate the First Amendment when they arrest individuals in retaliation for protected speech, but the First Amendment is not an impenetrable shield.[1] In general, to sue a government actor for retaliatory arrest, a plaintiff must show three things: that he was injured, that the government acted against him with "retaliatory animus," and that the government's action was a but-for cause of the injury.[2] Because causation can be difficult to prove if the officer had a valid reason to arrest the plaintiff, circuit courts have split over whether a showing of probable cause defeats a § 1983 claim for retaliatory arrest.[3] Last Term, in *Nieves v. Bartlett*,[4] the Supreme Court held that in order to mount a retaliatory arrest claim under 42 U.S.C. § 1983, plaintiffs must show that the officer did not have probable cause to arrest the plaintiff for any crime.[5] However, the Court carved out an important exception: plaintiffs would not have to prove the lack of probable cause if arrested for conduct that "otherwise similarly situated individuals" were not arrested for (the "atypical-arrest" exception).[6] Because officers often have probable cause to arrest individuals for *some* crime, the majority was right to include the atypical-arrest exception. But the majority failed to wrestle with other policing issues, leaving the exception vulnerable to discriminatory application and at risk of being impossible to use. Because the exception is insufficient to protect First Amendment rights, the majority should have continued to apply only the preexisting test for evaluating First Amendment retaliation claims.

Every year, around 10,000 people gather in Paxson, Alaska, to attend "Arctic Man," a weeklong winter sports event known both for its snowmobile races and its parties.[7] On April 13, 2014, plaintiff Russell P. Bartlett attended one of these parties in the Arctic Man parking lot.[8] The parties dispute what happened next. Officer Nieves claims that

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[1] *See* Lozman v. City of Riviera Beach, 138 S. Ct. 1945, 1948–49 (2018); *see also* Reichle v. Howards, 566 U.S. 658, 668 (2012) (explaining that speech can be a "wholly legitimate consideration" in making an arrest).

[2] Nieves v. Bartlett, 139 S. Ct. 1715, 1722 (2019); *see also* John Koerner, Note, *Between* Healthy *and* Hartman*: Probable Cause in Retaliatory Arrest Cases*, 109 COLUM. L. REV. 755, 760 (2009).

[3] *Compare, e.g.*, Ford v. City of Yakima, 706 F.3d 1188, 1193 (9th Cir. 2013) (maintaining that even if an arrest was justified by probable cause, a plaintiff could still bring a retaliatory arrest claim), *with* Redd v. City of Enterprise, 140 F.3d 1378, 1383 (11th Cir. 1998) (requiring plaintiffs to plead no probable cause), *and* Keenan v. Tejeda, 290 F.3d 252, 260 (5th Cir. 2002) (same).

[4] 139 S. Ct. 1715.

[5] *Id.* at 1724.

[6] *Id.* at 1727.

[7] *Id.* at 1720.

[8] Bartlett v. Nieves, No. 4:15-cv-00004, 2016 WL 3702952, at *1 (D. Alaska July 7, 2016).

when he asked nearby partygoers to move a keg into their RV, an intoxicated Bartlett began acting "belligerently" and yelled to the RV owners that they should not speak with Officer Nieves.[9] Bartlett claims that he was neither drunk nor belligerent.[10] A few minutes later, Bartlett observed Officer Weight interacting with several underage partygoers.[11] According to Weight, Bartlett "aggressive[ly]" approached Weight and "yelled" that Weight should not be talking to the minors.[12] Both parties agree about what happened next: Officer Weight pushed Bartlett, Officer Nieves initiated an arrest, and Bartlett was slow to respond to Officer Nieves's orders once the arrest had begun.[13] Bartlett contends that his slow responses were due to a lingering back injury, and that after handcuffing Bartlett, Officer Nieves said, "[B]et you wish you would have talked to me now."[14] Bartlett was charged with disorderly conduct and resisting arrest.[15] The charges were eventually dismissed.[16]

In March 2015, Bartlett alleged that he had been arrested in retaliation for exercising his First Amendment right to free speech.[17] Judge Gleason granted summary judgment for the officers.[18] The court first explained that it was at least "reasonably arguable" that the officers had probable cause to arrest Bartlett for the crime of "harassment."[19] The court acknowledged that the First Amendment protects individuals' right to criticize the police, even with obscene gestures and words.[20] However, the Supreme Court had not yet decided whether plaintiffs could bring a retaliatory arrest claim if the arrest had been nevertheless supported by probable cause.[21] The court held that the existence of probable cause foreclosed a retaliatory arrest claim, no matter what the officers' motivations had been.[22] Bartlett appealed.[23]

The Ninth Circuit affirmed in part, reversed in part, and remanded.[24] Citing a circuit decision from 2013, the panel held that the

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[9] *Nieves*, 139 S. Ct. at 1720.
[10] *Id.*
[11] *Id.*
[12] *Id.* Bartlett denies behaving aggressively. *Id.* at 1721.
[13] *Id.* at 1720–21.
[14] *Id.* at 1721 (quoting Bartlett v. Nieves, 712 F. App'x 613, 616 (9th Cir. 2017)).
[15] *Id.*
[16] Bartlett v. Nieves, No. 4:15-cv-00004, 2016 WL 3702952, at *3 (D. Alaska July 7, 2016).
[17] *Id.* Bartlett also brought several other claims under both § 1983 and § 1985. *Id.*
[18] *Id.* at *12. The court also granted summary judgment on the other claims. *Id.*
[19] *Id.* at *5. Under Alaska law, a person commits "harassment in the second degree if, with intent to harass or annoy another person, that person . . . insults, taunts, or challenges another person in a manner likely to provoke an immediate violent response." ALASKA STAT. ANN. § 11.61.120(a)(1).
[20] *Bartlett*, 2016 WL 3702952, at *11.
[21] *Id.*
[22] *Id.*
[23] Bartlett v. Nieves, 712 F. App'x 613, 614–15 (9th Cir. 2017).
[24] *Id.* at 617. Judges Wardlaw, Clifton, and Owens issued a joint memorandum.

existence of probable cause did not foreclose a retaliatory arrest claim.[25] The court explained that Bartlett had potentially established a retaliatory arrest claim because "the officers' conduct would chill a person of ordinary firmness from future First Amendment activity," and Bartlett's claim that Nieves had told him, "[B]et you wish you would have talked to me now" was sufficient to prove that "the officers' desire to chill his speech was a but-for cause of their allegedly unlawful conduct."[26] The officers petitioned for certiorari regarding the retaliatory arrest claim.[27]

The Supreme Court reversed and remanded.[28] Writing for the Court, Chief Justice Roberts[29] began by explaining that the First Amendment forbids retaliation against individuals for engaging in protected speech.[30] However, plaintiffs must show that the government actor's "retaliatory animus" was a but-for cause of the retaliatory action.[31] In *Hartman v. Moore*,[32] the Court held that § 1983 plaintiffs must prove the lack of probable cause in retaliatory *prosecution* cases because proving the causal connection could be difficult.[33] Chief Justice Roberts held that the same evidentiary requirement applied to retaliatory arrest claims.[34] Further, a no-probable-cause requirement was appropriate for three reasons: probable cause evidence would be available and probative in nearly every case; the requirement would avoid subjective inquiries about the officers' state of mind; and setting aside the officer's speech as evidence of retaliatory animus would encourage officers to communicate clearly during arrests.[35] If no probable cause was shown, then the test established in *Mt. Healthy City School District Board of Education v. Doyle*[36] would govern; the plaintiff would still need to show that he engaged in protected speech and that retaliation was a "substantial" or "motivating" factor behind the arrest.[37] Moreover, historical common law torts from the time of the enactment of § 1983 such as false imprisonment and malicious prosecution were defeated by probable cause.[38] Thus, the no-probable-cause requirement was appropriate.

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[25] *Id.* at 616 (citing Ford v. City of Yakima, 706 F.3d 1188, 1195–96 (9th Cir. 2013)).
[26] *Id.* at 616 (citing *Ford*, 706 F.3d at 1193).
[27] *Nieves*, 139 S. Ct. at 1721.
[28] *Id.* at 1728.
[29] Justices Breyer, Alito, Kagan, and Kavanaugh joined the opinion.
[30] *Nieves*, 139 S. Ct. at 1722.
[31] *Id.*
[32] 547 U.S. 250 (2006).
[33] *Id.* at 265–66.
[34] *Nieves*, 139 S. Ct. at 1724.
[35] *Id.* at 1724–25.
[36] 429 U.S. 274 (1977).
[37] *Nieves*, 139 S. Ct. at 1725.
[38] *See id.* at 1726 ("When defining the contours of a claim under § 1983, we look to 'common-law principles that were well settled at the time of its enactment.'" (quoting Kalina v. Fletcher, 522 U.S. 118, 123 (1997))).

Finally, the Court carved out an exception to the no-probable-cause requirement.[39] Where officers have probable cause to make an arrest "but typically exercise their discretion not to do so," the plaintiff may still bring suit.[40] However, a plaintiff would need to provide "objective evidence that he was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been."[41] Plaintiffs could not rely on the statements and motivations of the particular arresting officer, which the Court deemed "irrelevant."[42] This exception was justified for two reasons. First, at the time of § 1983's enactment, officers were authorized to make warrantless arrests in many fewer situations than today, undermining the historical support for a no-probable-cause requirement.[43] Second, certain crimes like jaywalking are rarely enforced, so the existence of probable cause does not adequately rebut a retaliatory arrest claim where the crime does not normally lead to an arrest.[44]

Justice Thomas concurred in part and concurred in the judgment.[45] Justice Thomas disagreed only with the Court's atypical-arrest exception, claiming it "lack[ed] the support of history, precedent, and sound policy."[46] He argued that common law does not support the exception, and that while the Court may be uncomfortable with an absolute rule, that discomfort was "an issue for state legislatures, not a license for this Court to fashion an exception to a previously 'consistent rule.'"[47]

Justice Gorsuch concurred in part and dissented in part.[48] He argued that the existence of probable cause should never be dispositive in a retaliatory arrest claim.[49] He observed that the no-probable-cause requirement was unsupported by the broad statutory language of § 1983, and that the Court had overstepped its authority by interpreting the statute so narrowly.[50] He criticized the Court's analogy to historical common law claims, arguing that they had turned on whether the officers had acted "without lawful authority," while retaliatory arrest claims turn on whether officers have "abuse[d] their authority by making an otherwise lawful arrest for an unconstitutional reason."[51] Instead, he

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[39] *Id.* at 1727.
[40] *Id.*
[41] *Id.*
[42] *Id.* (quoting Devenpeck v. Alford, 543 U.S. 146, 153 (2004)).
[43] *Id.*
[44] *Id.*
[45] *Id.* at 1728 (Thomas, J., concurring in part and concurring in the judgment).
[46] *Id.* at 1730.
[47] *Id.* at 1729. Justice Thomas also argued that the exception should have been limited to minor crimes and "risk[ed] chilling law enforcement officers from making arrests." *Id.*
[48] *Id.* at 1730 (Gorsuch, J., concurring in part and dissenting in part).
[49] *Id.* at 1734.
[50] *Id.* at 1730.
[51] *Id.* at 1731 (emphasis omitted).

analogized to Fourteenth Amendment discriminatory enforcement claims where an otherwise lawful arrest is unconstitutional if *motivated* by racial animus.[52] That said, he conceded that probable cause, particularly for a more serious crime, would provide strong evidence against a retaliatory arrest claim.[53]

Justice Gorsuch also disagreed that *Hartman* provided strong support for the result in *Nieves*.[54] *Hartman* relied on both the presumption of prosecutorial regularity and the difficulty of proving retaliatory intent on the part of the *investigator* when the *prosecutor* was the one bringing the charges.[55] Instead, Justice Gorsuch tentatively analogized to *United States v. Armstrong*,[56] in which the Court indicated that in discriminatory prosecution cases, while the existence of probable cause was probative, "direct admissions . . . of discriminatory purpose" might also be enough to support a claim.[57] He then encouraged lower courts to interpret the majority opinion as leaving open the possibility that direct evidence of retaliatory intent would be admissible even when there was probable cause.[58]

Justice Sotomayor dissented.[59] She largely agreed with Justice Gorsuch's analysis of the issues — particularly his analogy to the Fourteenth Amendment — but unlike Justice Gorsuch, she did not see room in the majority's holding for lower courts to evaluate direct evidence of an officer's retaliatory intent.[60] In fact, Justice Sotomayor sharply disagreed with the majority's casting aside of direct evidence of an officer's intent in favor of the atypical-arrest exception.[61] She noted that the disavowal of direct evidence was inconsistent with precedent, would become increasingly troublesome as innovations like body cameras increased the availability of direct motive evidence, and would put up unreasonable evidentiary barriers to bringing a claim.[62] She also challenged the majority's assumption that a subjective test would lead

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[52] *Id.* at 1731–32.

[53] *Id.* at 1732.

[54] *Id.* at 1732–33.

[55] *Id.* at 1733.

[56] 517 U.S. 456 (1996).

[57] *Nieves*, 139 S. Ct. at 1733 (Gorsuch, J., concurring in part and dissenting in part) (quoting *Armstrong*, 517 U.S. at 469 n.3).

[58] *Id.* at 1734.

[59] *Id.* at 1735 (Sotomayor, J., dissenting). Justice Ginsburg concurred in the judgment in part and dissented in part. *Id.* at 1734 (Ginsburg, J., concurring in the judgment in part and dissenting in part). She argued that the majority's rule would check only "entirely baseless arrests," citing several cases in which journalists were arrested for minor crimes while covering police activity. *Id.* She argued that the Court should continue to use the *Mt. Healthy* test. *Id.* at 1734–35. However, Justice Ginsburg concluded that Bartlett had not produced enough evidence to support his claim. *Id.* at 1735.

[60] *Id.* at 1735–36 (Sotomayor, J., dissenting).

[61] *Id.* at 1738–39.

[62] *Id.* at 1739–40.

to a flood of litigation, citing the small number of cases brought over the last decade.[63] Justice Sotomayor ultimately agreed with Justice Ginsburg that the Court should apply only the *Mt. Healthy* test.[64]

By requiring retaliatory-arrest plaintiffs to plead no probable cause as a prerequisite to evaluating the claim under the *Mt. Healthy* test, the Court created a substantial gap in First Amendment protections. The majority wisely considered the realities of overcriminalization to craft the atypical-arrest exception, but the exception does not do enough to protect plaintiffs. The Court's atypical-arrest exception is problematic for three reasons. First, by framing the question around individuals who are "similarly situated," the Court risks some communities being better protected from retaliatory arrests than others. Second, the test may have blind spots where retaliatory arrests in certain contexts, like antipolice protesting, are authorized *because* they are commonplace. Third, even those who should be protected by the exception may have trouble bringing a claim due to the ambiguity of the test or the mechanics of gathering evidence. Instead, the Court should have continued to apply only the *Mt. Healthy* test.

Adding a no-probable-cause requirement on top of the *Mt. Healthy* test has made it significantly harder for plaintiffs to make retaliatory arrest claims.[65] To show causation under the *Mt. Healthy* test, a plaintiff needs to show only that he was arrested after engaging in protected speech, and that retaliation was a "substantial or motivating" factor behind the arrest.[66] At that point, the burden shifts onto the official to demonstrate that he would have made the arrest even if the protected speech had never occurred.[67] The no-probable-cause requirement adds significantly to the plaintiff's burden.

Because the United States' exceptionally broad criminal laws make pleading no probable cause difficult, the atypical-arrest exception is a much-needed limitation on officers' discretion to leverage innocuous criminal activity into retaliatory arrests. As the majority acknowledges, officers will very often have probable cause to arrest someone for *some* crime[68] — a staggering amount of commonplace conduct is criminal.[69]

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[63] *Id.* at 1737. The Ninth Circuit has allowed direct evidence of subjective intent for over ten years but only a few such cases have reached trial. *Id*.

[64] *Id.* at 1742. Justice Sotomayor refused to revisit the question of whether the Ninth Circuit had correctly applied the *Mt. Healthy* test, and thus issued a full dissent. *See id.*

[65] *See* Katherine Grace Howard, Note, *You Have the Right to Free Speech: Retaliatory Arrests and the Pretext of Probable Cause*, 51 GA. L. REV. 607, 629 (2017).

[66] *See* Lozman v. City of Riviera Beach, 138 S. Ct. 1945, 1952 (2018).

[67] *See id.*

[68] *Nieves*, 139 S. Ct. at 1727.

[69] *See, e.g.*, Inga Ivsan, *To Plea or Not to Plea: How Plea Bargains Criminalize the Right to Trial and Undermine Our Adversarial System of Justice*, 39 N.C. CENT. L. REV. 135, 139 (2017); Marc A. Levin, *At the State Level, So-Called Crimes Are Here, There, Everywhere*, CRIM. JUST., Spring 2013, at 4, 6.

And when evaluating an officer's conduct, courts do not analyze whether the underlying law is reasonable.[70] As two Justices and numerous commentators have pointed out, retaliation-motivated arrests made under the pretext of probable cause for minor crimes happen with some regularity.[71] Against this background, the atypical-arrest exception is an important acknowledgement that a cocktail of overcriminalization and unbridled police discretion to use low-level crimes as a pretext for a search or arrest creates an unacceptable risk that an officer might abuse his discretion to quash protected speech.[72] At a minimum, the exception may deter police officers from engaging in blatantly retaliatory arrests[73] and responds, at least in part, to the barrage of concern about the legitimacy of the police.[74] Thus, a modest carve-out like the atypical-arrest exception has the potential to limit misconduct and increase confidence in the police. But the Court's discussion of the atypical-arrest exception stopped short of grappling with several important policing issues and, as a result, is both insufficiently protective of § 1983 plaintiffs and vulnerable to discriminatory application. The Court's atypical-arrest exception has three important flaws.

First, by tying plaintiffs' claims to the fates of "similarly situated" people, the exception is likely to exacerbate patterns of economically and racially discriminatory policing. The Supreme Court has emphasized the importance of equality in First Amendment law.[75] But because

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[70] *See, e.g.*, Whren v. United States, 517 U.S. 806, 818 (1996) ("[W]e are aware of no principle that would allow us to decide at what point a code of law becomes so expansive and so commonly violated that infraction itself can no longer be the ordinary measure of the lawfulness of enforcement."); *see also* Atwater v. City of Lago Vista, 532 U.S. 318, 354 (2001) (holding that the Fourth Amendment does not forbid a warrantless arrest for a minor offense punishable only by a fine).

[71] *See Nieves*, 139 S. Ct. at 1734 (Ginsburg, J., concurring in the judgment in part and dissenting in part); *id.* at 1740 (Sotomayor, J., dissenting); *see also, e.g.*, Arielle W. Tolman & David M. Shapiro, *From City Council to the Streets: Protesting Police Misconduct After* Lozman v. City of Riviera Beach, 13 CHARLESTON L. REV. 49, 62–64 (2018) (describing common charges used to arrest protestors like unlawful assembly, disorderly conduct, noise ordinance violations, failure to disperse, and blocking roads and sidewalks).

[72] *See* HOPE METCALF & SIA SANNEH, LIMAN PUB. INTEREST PROGRAM, OVERCRIMINALIZATION AND EXCESSIVE PUNISHMENT: UNCOUPLING PIPELINES TO PRISON (2012), https://law.yale.edu/system/files/area/center/liman/document/liman_overcriminalization.pdf [https://perma.cc/5DEQ-T3WK] (collecting news and scholarship); Tolman & Shapiro, *supra* note 71, at 54; Howard, *supra* note 65, at 636–37.

[73] *See Nieves*, 139 S. Ct. at 1729–30 (Thomas, J., concurring in part and concurring in the judgment); *id.* at 1727 (majority opinion).

[74] *See, e.g.*, Tom R. Tyler, *Can the Police Enhance Their Popular Legitimacy Through Their Conduct?: Using Empirical Research to Inform Law*, 2017 U. ILL. L. REV. 1971, 1972–73; *see also* Note, *The Paradox of Progressive Prosecution*, 132 HARV. L. REV. 748, 758–59 (2018).

[75] *See* Daniel P. Tokaji, *First Amendment Equal Protection: On Discretion, Inequality, and Participation*, 101 MICH. L. REV. 2409, 2411 (2003) (arguing that the Court has been particularly stringent in assessing equal protection claims for free speech).

police departments or cities treat their residents differently,[76] a plaintiff's set of comparators — the list of "similarly situated" people — might depend on where one lives. As a result, plaintiffs arrested for the same actions and the same speech but in different neighborhoods might not have similar luck in bringing a § 1983 claim. This concern is exemplified by the majority's jaywalking example — jaywalking arrests are often made in a racially and economically discriminatory way. For example, in Jacksonville, Florida, black residents were *three times* as likely as white residents to get jaywalking tickets, and residents in poor neighborhoods were *six times* as likely to get tickets as compared to their wealthier counterparts.[77] These inconsistencies may create a perverse result where people in disadvantaged communities — where arrests for minor crimes are rife[78] — will have the least protection from retaliatory arrests. Especially in light of how flexible probable cause can be,[79] the inconsistencies and the inequities of a localized test are likely to undercut the equal protection of the First Amendment.[80]

Second, the test may authorize retaliatory arrests for engaging in certain protected activities — like antipolice protesting — *because such retaliatory arrests are commonplace*. Scholars and commentators have noted that in many jurisdictions the relationship between the police and their communities is frayed.[81] In response, some overpoliced communi-

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[76] *See* Sonja B. Starr, *Testing Racial Profiling: Empirical Assessment of Disparate Treatment by Police*, 2016 U. CHI. LEGAL F. 485, 485; Radley Balko, *There's Overwhelming Evidence that the Criminal-Justice System Is Racist. Here's the Proof.*, WASH. POST (Sept. 18, 2018), https://www.washingtonpost.com/news/opinions/wp/2018/09/18/theres-overwhelming-evidence-that-the-criminal-justice-system-is-racist-heres-the-proof [https://perma.cc/DC6N-QY8F]. A number of studies have highlighted unequal treatment of people in different neighborhoods. In particular, minority neighborhoods often face higher incidents of arrests. For example, in Chicago, three times as many bicycle tickets are issued in black neighborhoods than in white neighborhoods. *Id.* In Manhattan, black residents are fifteen times more likely to be arrested for marijuana despite similar rates of use. *Id.* Perhaps most disturbingly, the National Registry of Exonerations has shown that in fifteen cities the police have engaged in mass arrests of over 1800 minority residents who were later exonerated. NAT'L REGISTRY OF EXONERATIONS, RACE AND WRONGFUL CONVICTIONS IN THE UNITED STATES 21–25 (2017), http://www.law.umich.edu/special/exoneration/Documents/Race_and_Wrongful_Convictions.pdf [https://perma.cc/3X3U-K6TX].

[77] Balko, *supra* note 76.

[78] Maarten Rikken, *Two in One: Differences in the U.S. Justice System for the Rich and the Poor*, RES. GATE (Apr. 14, 2016), https://www.researchgate.net/blog/post/two-in-one-differences-in-the-us-justice-system-for-the-rich-and-the-poor [https://perma.cc/X24F-43CW].

[79] *See generally* Andrew Manuel Crespo, *Probable Cause Pluralism*, 129 YALE L.J. (forthcoming 2020).

[80] *Cf.* Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20 (1975) (arguing that equal protection is part of the "central meaning of the First Amendment," *id.* at 21 (citations omitted)); Tokaji, *supra* note 75.

[81] *See, e.g.*, Jocelyn Simonson, *Copwatching*, 104 CALIF. L. REV. 391, 392–93 (2016).

ties have tried to combat police misconduct by protesting or "copwatching."[82] Those activities are generally protected by the First Amendment.[83] However, the atypical-arrest exception might not protect these political organizers if police regularly arrest such activists. This concern would seem hyperbolic, except that such arrests are already happening. Perhaps most visibly, hundreds of people have been arrested at #BlackLivesMatter protests.[84] As another example, despite a sometimes-recognized First Amendment right to film the police,[85] officers have repeatedly arrested individuals for filming them, using a variety of laws to justify the arrest.[86] Depending on how courts interpret the test, both of these examples suggest that the atypical-arrest exception might not be enough to protect police-critical activists. These types of arrests have already chilled efforts to push back against police mistreatment in violation of the First Amendment.[87] The Court should have recognized that the exception may create perverse incentives for police to quash all anti-police activism and leave police-critical activists defenseless.

Third, the exception may be hard to use; the vagueness of the exception will make it hard to litigate, and even as the doctrine develops plaintiffs may struggle to gather sufficient evidence to bring a claim. The majority opinion was vague about how the atypical-arrest exception should be applied. In particular, the test raises a number of questions regarding what it means for an arrest to be sufficiently rare that it rises to the level of "atypical," which individuals are "similarly situated," and at what level and scope comparisons must be conducted.[88] Courts are likely to wade through years of litigation to define the contours of

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[82] *Id.* at 425. There is a tradition of communities and groups pushing back against police mistreatment by "watching" the police, either by filming or otherwise memorializing the actions police take. *See id.* at 408–09.

[83] Tolman & Shapiro, *supra* note 71, at 85–86; *see also* Simonson, *supra* note 81, at 441–42 ("First Amendment jurisprudence is well on its way to recognizing a right to film police officers in public . . . . However, this right is far from settled.").

[84] Garrett Epps, *Speech Rights for Trump, but Not DeRay Mckesson*, THE ATLANTIC: IDEAS (Apr. 30, 2019), https://www.theatlantic.com/ideas/archive/2019/04/doe-v-mckesson-lawsuit-black-lives-matter/588346/ [https://perma.cc/4APD-LN7V]; *see also* Tolman & Shapiro, *supra* note 71, at 56 ("In a 2015 report, the Department of Justice found that 'suppression of speech' by the Ferguson, Missouri Police Department (FPD) 'reflects a police culture that relies on the exercise of police power — however unlawful — to stifle unwelcome criticism.'" (citations omitted)).

[85] *See* Simonson, *supra* note 81, at 442; *see also* Jocelyn Simonson, *Beyond Body Cameras: Defending a Robust Right to Record the Police*, 104 GEO. L.J. 1559, 1562–63 (2016).

[86] *See* Seth F. Kreimer, *Pervasive Image Capture and the First Amendment: Memory, Discourse, and the Right to Record*, 159 U. PA. L. REV. 335, 357–63 (2011) (describing arrests justified by, among other things, wiretapping, harassment, or obstruction statutes). Some arrests are made without any real justification. *Id.* at 363–66.

[87] Simonson, *supra* note 81, at 429. Though "bad actors" might be most likely to retaliate, even officers who are not engaged in improper conduct often dislike being watched by community groups. *Id.*

[88] Should the court look to an individual officer's history? Compare to city statistics? To the state?

the exception. An analogous case foreshadows some of these concerns. In *Whren v. United States*,[89] the Supreme Court considered an empirical test similar to the atypical-arrest exception but rejected it, explaining that it "seem[ed] easier" to evaluate the intent of a single officer than to "plumb the collective consciousness of law enforcement" to determine how a "reasonable officer" would have behaved.[90] The *Whren* Court worried that when evaluating whether an officer "deviated materially from usual police practices,"[91] the court would typically be "reduced to speculating about the hypothetical reaction of a hypothetical constable."[92] On a related note, the need for empirical evidence may thwart retaliatory-arrest plaintiffs. Another Supreme Court case foreshadowed this problem. In *United States v. Armstrong*, plaintiffs sought to bring a discriminatory enforcement claim.[93] Despite the fact that *every person* arrested for conspiring to distribute crack cocaine was black, the plaintiffs were denied discovery because they could not show that the government had not prosecuted "similarly situated" individuals of other races.[94] It seems likely that plaintiffs in atypical-arrest cases will have similar evidentiary problems; it may be very hard to prove that other people were *not* arrested without discovery or police support.[95]

The Court rightly recognized that it would be problematic to grant police officers a blanket protection from *any* retaliatory arrest claim as long as they can, even post hoc, find probable cause for *some* crime. But the atypical-arrest exception does not go far enough. By failing to grapple with race and discriminatory policing, the Court leaves certain communities vulnerable to retaliatory arrests. By failing to acknowledge that police might regularly arrest individuals for exercising their First Amendment rights, the Court leaves activists vulnerable to retaliatory arrest. By failing to think about the challenges of bringing a claim, the Court leaves everyone vulnerable. Sticking with the *Mt. Healthy* test would have been better. Requiring plaintiffs to show that officers acted with retaliatory intent is hard enough for plaintiffs, the number of retaliatory arrest cases under the *Mt. Healthy* test was minimal, and the fears of chilling police action with the *Mt. Healthy* test are probably overstated.[96] If the no-probable-cause requirement was a bullet wound to First Amendment protections, the atypical-arrest exception is a bandaid: better than nothing, but not good enough.

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[89] 517 U.S. 806 (1996).

[90] *Id.* at 815.

[91] *Id.* at 814.

[92] *Id.* at 815.

[93] United States v. Armstrong, 517 U.S. 456, 459 (1996). *Armstrong* was cited by both the majority, the dissent, and two concurrences in *Nieves*.

[94] *Id.* at 459, 470.

[95] *See id.* at 482–83 (Stevens, J., dissenting); *see also* Andrew Manuel Crespo, *Systemic Facts: Toward Institutional Awareness in Criminal Courts*, 129 HARV. L. REV. 2049, 2096–101 (2016).

[96] *See Nieves*, 139 S. Ct. at 1737 (Sotomayor, J., dissenting).