



Should Protest Organizers Be Held Liable for Protest Violence?

Nothing renders the crime of high treason more arbitrary than declaring people guilty of it for indiscreet speeches. Speech is so subject to interpretation; there is so great a difference between indiscretion and malice; and frequently so little is there of the latter in the freedom of expression, that the law can hardly subject people to a capital punishment for words unless it expressly declares what words they are. Words do not constitute an overt act; they remain only in idea. — Baron Montesquieu, *The Spirit of Laws* (1748)



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During a Black Lives Matter (BLM) demonstration in Baton Rouge in 2016, an unidentified individual wielded a rock or a piece of concrete, launching it at law enforcement, striking an officer in the head. Notably, it was not BLM leader DeRay Mckesson who committed this act. Nonetheless, Mckesson finds himself embroiled in a legal battle, accused of creating an environment that led to the officer's injuries.

The U.S. Court of Appeals for the 5th Circuit has upheld the lawsuit — *Ford v. McKesson* — despite Mckesson's assertion that it infringes upon his First Amendment rights. Represented by the American Civil Liberties Union, Mckesson has petitioned the U.S. Supreme Court to intervene. His argument is compelling, as he contends that such litigation has the potential to undermine the protest rights of individuals from all corners of the political spectrum.

The catalyst for the BLM demonstration arose from the tragic passing of Alton Sterling in July 2016. Mr. Sterling, a 37-year-old black man, was shot six times during a struggle with two Baton Rouge police officers. While federal and state investigations ultimately determined that the officers bore no criminal culpability, a wrongful death lawsuit brought by Sterling's family culminated in a \$4.5 million settlement in 2021.

The focal point of the civil case involving Mckesson was the protest that materialized outside the Baton Rouge Police Department just four days following Sterling's demise. The injured officer, initially identified as John Doe and later as John Ford in a complaint amendment filed last August, endured injuries to his jaw, head, and brain.

Ford asserts that Mckesson bears responsibility for these injuries, contending that Mckesson negligently orchestrated a protest he should have recognized as susceptible to violence, given the history of preceding BLM demonstrations. The complaint further alleges negligence on Mckesson's part for staging the protest in the street adjacent to police headquarters, attempting to obstruct traffic on a nearby highway, and failing to curtail looting at a convenience store, where some participants seized



Written by [Joe Wolverton, II, J.D.](#) on October 14, 2023

water bottles subsequently thrown at law enforcement.

In a decision rendered last June, a divided panel of the 5th Circuit determined that Ford's allegations possessed the necessary merit to support a Louisiana tort claim, all while staying within the parameters set by the Supreme Court for the civil liability of protest leaders. However, Judge Don Willett, in his dissenting opinion, contended that this ruling misinterpreted the Court's 1982 precedent in *NAACP v. Claiborne Hardware Co.* This landmark case emphasized the First Amendment's call for "precision of regulation" when addressing protests that blend constitutionally protected expression with threats or violent actions.

The 1982 case delved into a predominantly peaceful, yet at times turbulent boycott of white merchants in Claiborne County, Mississippi, initiated by the NAACP in 1966. As opposed to Mckesson's stance, boycott organizer Charles Evers openly endorsed violence, stating, "If we catch any of you going in any of them racist stores, we're gonna break your damn neck."

Notwithstanding such provocative language, the Supreme Court, which had earlier ruled in 1969 that even advocacy of unlawful conduct is constitutionally safeguarded unless it is both "aimed" at "immediately inciting lawless action" and "likely" to cause such action, concluded that holding Evers liable for protest-related violence would infringe upon the First Amendment. Judge Willett argued that if this principle held true for Evers, it should likewise hold true for Mckesson.

Judge Willett argued, in accordance with *Claiborne*, that Mckesson's liability for violence hinges on his direct encouragement of such acts, and merely endorsing or participating in nonviolent, albeit unlawful, actions preceding violence is insufficient.

Judge Willett pointed out that even the civil rights movements led by Martin Luther King Jr., including the 1965 march from Selma to Montgomery, at times disrupted traffic and experienced incidents of violence. Under the 5th Circuit's rationale, he implied, King could have faced liability for that violence, despite not being its instigator.

Willett cautioned that the emerging concept of "negligent protest" liability, as embraced by his colleagues, poses a severe threat to constitutionally protected activities. He argued that it would effectively dilute the First Amendment's safeguard of protest leaders, rendering it virtually impotent in practice. The Supreme Court has a unique opportunity to avert this outcome by considering Mckesson's appeal.

It must be recalled that on November 2, 2020, the United States Supreme Court made a significant decision. It nullified the 5th Circuit's judgment and instructed them to seek guidance from the Louisiana Supreme Court regarding the potential liability of protest organizers for injuries sustained by officers during protests, according to Louisiana state law.

Although the Court acknowledged the profound constitutional matter raised by the case, it believed that the situation could benefit greatly from clarification on Louisiana law from the Louisiana Supreme Court, thereby simplifying the case significantly.

And applying that advice in this case — to have state courts apply state law to the case — as well as so many others, would go a long way toward restoring the proper constitutional balance between state and federal authority, as well as forcing the federal beast back inside its constitutional cage. States must assert their sovereignty and the retained authority to refuse to allow themselves to be subordinated by the federal government, be it the courts, Congress, or the president.



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