

FILMING THE POLICE AS CITIZEN-JOURNALISTS—
A TALE OF TWO HEROES: WHAT THEY DID,
WHY THEY COULD DO IT, AND THE
CONSEQUENCES FOR THE RACIAL DIVIDE
IN THIS COUNTRY

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I. INTRODUCTION

On Yom Kippur I gave a talk at the Etz Chaim synagogue in Portland, Maine, discussing a decision I wrote about ten years ago for the First Circuit, *Glik v. Cunniffe*.¹ Although discussing an appellate opinion during a religious service on the holiest day of the year might seem an odd choice, I thought it was appropriate for several reasons. The *Glik* decision helped establish the right of a bystander in Minneapolis to take the shocking video of Officer Derek Chauvin killing George Floyd. That video, and others like it, have changed the nature of policing in this country, and they have intensified the debate about racial injustice.

We say this prayer on Yom Kippur:

Justice, justice shall you pursue, that you may live;
do good and not evil, that you may live.

The *Glik* case, and its implications, are all about justice—for individuals treated unjustly by the police, for

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1. 655 F.3d 78 (1st Cir. 2011).

those challenging the conduct of the police in the courtroom, and for a Black minority struggling with racism in this country. These issues are closely connected. As I explain those connections, I wish to emphasize that I have enormous respect for police officers and the indispensable work that they do. But I cannot tell the story that I wish to tell without casting a harsh light on some aspects of police work.

II. THE HEROES

There are two heroes in this story. The first one is Darnella Frazier, the African-American teenager, seventeen-years-old at the time, who video-recorded the murder of George Floyd on May 25, 2020, in Minneapolis. Frazier was walking to a local convenience store, Cup Foods, with her nine-year-old cousin to get some snacks. She lived nearby and had made that walk many times over the years. As Frazier and her cousin approached the store, they walked past a parked police car. Behind that car, Derek Chauvin and three other police officers had surrounded Floyd. As Frazier later described it at Chauvin's trial, she saw "a man on the ground and . . . a cop kneeling down on him."² Not wanting her cousin to see "a man terrified, scared, begging for his life," Frazier walked her cousin to the store entrance. She then stayed outside because "it wasn't right." She could tell that Floyd "was suffering, he was in pain." So "I opened my phone and started recording because I knew if I didn't, no one would believe me."³ Twenty seconds after she started recording, Floyd said, "I can't breathe." Frazier

2. Frazier testified at Chauvin's trial on March 30, 2021, and recalled the circumstances leading to her decision to start recording. KARE 11, *Derek Chauvin trial: Teen bystander who took George Floyd video describes his last moments*, YOUTUBE (Mar. 30, 2021), <https://youtu.be/FrO92IWAu9U>.

3. Joanna Stern, *They Used Smartphone Cameras to Record Police Brutality—and Change History*, WALL ST. J. (June 13, 2020), <https://www.wsj.com/articles/they-used-smartphone-cameras-to-record-police-brutalityand-change-history-11592020827>.

filmed the scene for nine minutes and twenty seconds until Floyd, already dead, was carried away by medics.⁴

So why was Darnella Frazier able to record that scene? The officers knew that she had her smartphone trained on them. They surely would have preferred to stop the recording. In the not-too-distant past, they would have stopped her, on the theory that she was interfering with their work. But they were not able to stop her because of the second hero in this story.

His name is Simon Glik, a Jewish, Russian immigrant from Moscow who came to this country decades ago and now practices law in the Boston area.⁵ Frazier and Glik are connected by the *Glik* decision. In my thirty-six years as a judge—state, federal, trial, and appellate—I have written approximately 1,500 opinions. The decision I wrote connecting Glik and Frazier is surely the most important opinion that I have ever written, and it will probably remain so.

Glik's story begins on the evening of October 1, 2007, when he was walking by the Boston Common, the oldest public park in America.⁶ The Boston Common is an iconic public space and the setting for protests and celebrations from colonial times to the Civil Rights era. Protests continue to be held there. It is a quintessential setting for the exercise of free speech and public assembly.⁷

4. Independent medical examiners determined that Floyd died at the scene as a result of asphyxia due to neck and back compression that led to a lack of blood flow to the brain. Ben Crump (@AttorneyCrump), TWITTER (June 1, 2020, 3:38 PM), <https://twitter.com/AttorneyCrump/status/1267540974244442112/>. A paramedic testified that he thought Floyd was dead when he arrived at the scene. Vanessa Romo & Bill Chappell, *In Lay Terms, I Thought He Was Dead, Testifies Paramedic of George Floyd*, NPR (Apr. 1, 2021, 5:45 PM), <https://www.npr.org/sections/trial-over-killing-of-george-floyd/2021/04/01/983630478/in-laymans-terms-i-thought-he-was-dead-paramedic-testifies>.

5. *About Simon Glik*, SIMON GLIK, ATT'Y AT L., http://gliklaw.com/gliklaw/About_Me.html (last visited Oct. 22, 2021); Telephone interview with Simon Glik by the author's research assistant (June 25, 2021).

6. *Boston Common*, CITY OF BOS.—PARKS & RECREATION, <https://www.boston.gov/parks/boston-common> (last visited Nov. 22, 2021) (showing establishment date of 1634).

7. *See id.*; *see also The Common*, FRIENDS OF THE PUB. GARDEN, <http://friendsofthepublicgarden.org/our-parks/boston-common/history/> (last visited Nov. 11, 2021) (outlining the history of assemblies on the Common).

On his walk, Glik noticed three police officers arresting a young man on the Common.⁸ Then he heard a bystander say, “You are hurting him, stop.”⁹ Concerned that the officers were using excessive force to make the arrest, Glik stood about ten feet from the officers and began recording video footage of the arrest on his cellphone.¹⁰

After placing the suspect in handcuffs, one of the officers turned to Glik and said, “I think you have taken enough pictures.”¹¹ Glik replied: “I am recording this. I saw you punch him.”¹² Another officer then approached Glik and asked if his cellphone recorded audio.¹³ When Glik said it did, the officer arrested him for unlawful audio recording in violation of the Massachusetts wiretap statute.¹⁴ Glik was taken in cuffs to the South Boston police station,¹⁵ where the police confiscated his cellphone and a computer flash drive and held them as evidence.¹⁶ Later, the police added charges of disturbing the peace and aiding in the escape of a prisoner.¹⁷

The prosecution soon withdrew the escape charge.¹⁸ A Boston municipal judge then dismissed the disturbing-the-peace and wiretap charges.¹⁹ Angered by the contrived charges, Glik filed a federal civil rights lawsuit in February 2010 against the arresting officers and the City of Boston, claiming that the arrest had violated his First Amendment rights.²⁰

8. Glik v. Cunniffe, 655 F.3d 78, 79 (1st Cir. 2011).

9. *Id.*

10. *Id.* at 79–80.

11. *Id.* at 80.

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.* Glik also claimed his Fourth Amendment rights had been violated. *Id.*

III. QUALIFIED IMMUNITY

Relying primarily on the doctrine of qualified immunity, the defendants moved to dismiss the complaint because, in their words, “it is not well-settled that [Glik] had a constitutional right to record the officers.”²¹ After the district court denied their motion, the defendants immediately appealed, again relying on qualified immunity.²² The officers claimed that they could not be sued for damages because they could have reasonably believed that Glik did not have a First Amendment right to record their conduct.²³

The doctrine of qualified immunity, which applies to government officials generally, was in the news recently because of a police reform measure—the George Floyd Justice in Policing Act—that was under consideration by Congress.²⁴ The doctrine “balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly, and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably.”²⁵ Largely along party lines, Democrats pushed to eliminate the doctrine in its application to the police because they believe that it supports bad police behavior. Republicans resisted the reform measures, believing that qualified immunity gives the police important protections.²⁶

In its application, the qualified immunity defense poses two questions. First, did the government officials violate a constitutional right of the plaintiff; second, was that right clearly established at the time so that the

21. *Id.* (quoting defendants’ argument).

22. *Id.*

23. *Id.* at 80–82.

24. George Floyd Justice in Policing Act of 2021, H.R. 1280, 117th Cong. (2021).

25. *Glik*, 655 F.3d at 81 (quoting *Pearson v. Callahan*, 555 U.S. 223, 231 (2009)).

26. Negotiations between Democrats and Republicans over the fate of the legislation ended unsuccessfully. See Catie Edmondson, *Bipartisan police overhaul talks are officially dead on Capitol Hill*, N.Y. TIMES (Sept. 22, 2021), <https://www.nytimes.com/2021/09/22/us/politics/police-reform-booker-scott.amp.html>.

officials should have known that what they did to the plaintiff was wrong.²⁷ If either question is answered no—there was no violation of a constitutional right, or the right was not clearly established at the time of the violation—the defendants are entitled to immunity from any claim for damages.

IV. THE *GLIK* DECISION

The Boston police officers wanted our panel to focus first on the clearly established law question, arguing that even if they had violated Glik's First Amendment rights, his right to record their conduct was not clearly established at the time of his arrest.²⁸ This approach—assuming that the right at issue exists but then deciding that it was not clearly established—would have allowed the officers to prevail without our court ruling that Glik had a First Amendment right to record their conduct.²⁹ The Supreme Court has explicitly permitted courts to take this approach.³⁰ But we wanted no part of it here. The First Amendment issue at the heart of the case was too important to avoid.

By its terms, the language of the First Amendment only prohibits laws “abridging the freedom of speech, or of the press.”³¹ It says nothing about the gathering or dissemination of information by the public. But the Supreme Court long ago established that “the First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw.”³² Also, the Supreme Court had

27. *Glik*, 655 F.3d at 81.

28. *Id.* at 80–82.

29. *See id.*

30. In *Pearson v. Callahan*, the Supreme Court receded from its prior decision in *Saucier v. Katz*, 533 U.S. 194 (2001), in which it had instructed the lower courts to determine whether a constitutional right has been violated before determining whether the right was clearly established at the time of the violation. *See Pearson*, 555 U.S. at 241–42.

31. U.S. CONST. amend. I.

32. *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 783 (1978).

established that “[t]here is an undoubted right to gather news from any source by means within the law.”³³ Citing that authority, I wrote a decision for our panel concluding that “[t]he filming of government officials engaged in their duties in a public place, including police officers performing their responsibilities, fits comfortably within these principles.”³⁴

We also made the important point that the public’s right of access to information is co-extensive with that of the press, and that changes in technology had blurred the lines between private citizens and journalists.³⁵ As we said in a prophetic statement:

The proliferation of electronic devices with video-recording capability means that many of our images of current events come from bystanders with a ready cell phone or digital camera rather than a traditional film crew, and news stories are now just as likely to be broken by a blogger at her computer as a reporter at a major newspaper.³⁶

Having decided that Glik had a First Amendment right to record the arrest on the Boston Common, we then had to decide if his right was clearly established in the First Circuit when the Boston police officers arrested him. (The First Circuit includes Maine, Massachusetts, New Hampshire, Rhode Island, and Puerto Rico.) There is an important connection between the constitutional question and the clearly established question. If there is abundant law supporting the conclusion that the conduct of government officials violated the Constitution, the clearly established question becomes easier to answer affirmatively.

I would not say that we found abundant law in *Glik* supporting the right to record. There were the general First Amendment principles I have mentioned about the right to gather information on the work of government

33. *Houchins v. KQED, Inc.*, 438 U.S. 1, 11 (1978) (internal quotation marks omitted).

34. *Glik*, 655 F.3d at 82.

35. *Id.* at 83–84.

36. *Id.* at 84.

officials, available both to journalists and private citizens. There were two court of appeals decisions concluding, with scant analysis, that an individual has a First Amendment right to record police conduct in public places.³⁷ And, importantly, we had a First Circuit precedent that said, again with scant analysis, that a self-styled journalist, arrested for filming members of a local commission conferring in the hallway outside the location of a public meeting, had been exercising a First Amendment right to film.³⁸ Although the defendant officers in the *Glik* case had cited two other court of appeals decisions holding that the right to film the work of police officers in public was not clearly established, one of those opinions was an unpublished per curiam decision with no precedential force, and the other involved a traffic stop, characterized by the court as an inherently dangerous situation. That description did not apply to the arrest on the Boston Common.³⁹

So the question was whether these sources of law would have given reasonable police officers in the First Circuit, confronted with Glik's video-recording, fair warning that he had a First Amendment right to film their conduct. If so, the officers would not be entitled to immunity for their unconstitutional conduct in arresting Glik.

In answering this fair warning question, we found notable the brevity of the analysis in our First Circuit case, and in the precedent of the other two circuits agreeing that the First Amendment provides a right to film the public conduct of government officials. As we saw it:

37. *See id.* at 83 (first citing and discussing *Smith v. City of Cumming*, 212 F.3d 1332 (11th Cir. 2000); and then citing *Fordyce v. City of Seattle*, 55 F.3d 436 (9th Cir. 1995)).

38. *See id.* (citing and discussing *Iacobucci v. Boulter*, 193 F.3d 14 (1st Cir. 1999)).

39. *See id.* at 85 (first citing *Szymborski v. Houck*, 353 F. App'x 852 (4th Cir. 2009) (per curiam); and then citing *Kelly v. Borough of Carlisle*, 622 F.3d 248, 262 (3d Cir. 2010) ("Our decision on the First Amendment question is further supported by the fact that none of the precedents upon which Kelly relies involved traffic stops, which the Supreme Court has recognized as inherently dangerous situations.")).

“This terseness implicitly speaks to the fundamental and virtually self-evident nature of the First Amendment’s protections in this area.”⁴⁰ We also gave considerable weight to the clear language in our own precedent, which stated that, because the plaintiff’s journalistic activities “were peaceful, not performed in derogation of any law, and *done in the exercise of his First Amendment rights*, [the officer] lacked the authority to stop them.”⁴¹

We therefore disagreed with the Boston police officers’ assertion that, at the time of Glik’s arrest, there was no clearly established First Amendment right in the First Circuit to record police officers carrying out their public duties. Rather, our own precedent and the self-evident nature of the First Amendment right at issue led us to conclude that “the state of the law at the time of [Glik’s arrest] gave the [police officers] fair warning that [their] particular conduct was unconstitutional.”⁴² In practical terms, our decision meant that Glik’s lawsuit for damages against the Boston police officers would continue.

V. THE CONSEQUENCES OF THE RIGHT TO RECORD FOR THE POLICE

The *Glik* decision was a big deal. An editorial in *The New York Times* described it as a “strong opinion” protecting the right to video-record the activities of police officers in public.⁴³ It noted that “[t]he officers tried to turn Mr. Glik’s exercise of his rights into a crime. By turning his cellphone camera on them, he held them accountable for their conduct.”⁴⁴ Law journals and media bloggers said that the decision established that there

40. *Id.*

41. *Id.* at 83 (emphasis in original) (quoting *Iacobucci*, 193 F.3d at 25).

42. *Id.* at 85 (internal quotation marks omitted).

43. Editorial, *A Vital Liberty*, N.Y. TIMES (Sept. 1, 2011), <http://www.ny-times.com/2011/09/02/opinion/a-vital-liberty.html>.

44. *Id.*

was now a clear constitutional right to record public activities of the police.⁴⁵ As one commentator put it:

The *Glik* case was sort of a turning point, because it was a very clear opinion. The First Circuit really grounded its recognition of this First Amendment right in a long tradition of First Amendment activity in public places . . . And so it was a very powerful statement that yes, we should recognize this right. And other courts started to pick up on that⁴⁶

Indeed, three other federal circuits have followed the *Glik* decision, making it broadly applicable in the country.⁴⁷ Although the Supreme Court has never ruled that there is a First Amendment right to record the work of the police in public, I doubt that the Court would rule otherwise, given the grounding of the right in well-established First Amendment principles.⁴⁸

Still, it is increasingly important that the Supreme Court address this issue.⁴⁹ There is now a backlash in some quarters against the right to record the public work of the police. In June, Miami Beach passed an ordinance designed to curb such recording by making it a crime to stand within twenty feet of officers with the “intent to

45. See, e.g., Jesse Harlan Alderman, *Before You Press Record: Unanswered Questions Surrounding the First Amendment Right to Film Public Police Activity*, 33 N. ILL. U. L. REV. 485, 488–89 (2013) (“[T]he First Circuit held unambiguously that there is a constitutionally protected right to videotape police carrying out their duties in public.”).

46. *The Right to Record Police*, WNYC—ON THE MEDIA, at 1:34 (Apr. 16, 2015), <http://www.wnyc.org/story/right-record-police/> (providing a recording of host Bob Garfield’s on-air conversation with Jeff Hermes, deputy director of the Media Law Resource Center).

47. See *Fields v. City of Philadelphia*, 862 F.3d 353, 359–60 (3d Cir. 2017); *Turner v. Lieutenant Driver*, 848 F.3d 678, 688–90 (5th Cir. 2017); *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 597–601 (7th Cir. 2012). As previously noted, two circuits had previously recognized a First Amendment right to record police conduct in public places. See *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000); *Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995).

48. See *supra* notes 31–33 and accompanying text.

49. The Supreme Court recently denied a writ of certiorari in a case where the Tenth Circuit concluded that it was not clearly established in August 2014 that private citizens have a First Amendment right to record police actions in public. See *Frasier v. Evans*, 992 F.3d 1003 (10th Cir. 2021), *cert. denied* Nov. 1, 2021 (No. 21-57). As is usually the case, it is difficult to derive any particular meaning from this denial.

impede, provoke or harass” them.⁵⁰ That ordinance was eventually suspended after all thirteen people arrested under it were young Black men or women.⁵¹ Eight of them had been recording police officers.⁵² This data underscores the importance that members of the Black community attach to their right to record the work of the police.

Indeed, if one recalls the video of the police beating of Rodney King, a Black man, in Los Angeles in 1991,⁵³ it is easy to understand the significance of this right to record for the Black community. Shown on our television screens, that video transfixed the country because of its brutality and the novelty of its public airing. However, we only saw the beating because of the happenstance that a Sony Handycam, hardly a ubiquitous item, was in the hands of a plumber, who recorded the encounter and then, sensing its implications, sent the tape to a local television station.⁵⁴

Darnella Frazier did not have to rely on a television station to air her video. She posted it herself on Facebook at 1:46 a.m., four hours after George Floyd was pronounced dead at the County Medical Center.⁵⁵ She

50. Allison Busemeyer, *Miami Beach suspends law used against people filming police*, PORTLAND PRESS HERALD (Aug. 21, 2021), <https://www.pressherald.com/2021/08/21/miami-beach-suspends-law-used-against-people-filming-police/>.

51. *Id.*

52. *Id.*

53. Daniel Victor & Mike McPhate, *Critics of Police Welcome Facebook Live and Other Tools to Stream Video*, N.Y. TIMES (July 7, 2016), <https://www.nytimes.com/2016/07/08/us/critics-of-police-welcome-facebook-live-and-other-tools-to-stream-video.html> (noting improvements in personal video-recording technology since the King recording and the recent development of web-based, live-streaming services, but noting that even a live video does not necessarily capture every nuance of the story behind a particular incident).

54. *Id.* The plumber, George Holliday, recently passed away from complications of COVID-19 in his early sixties. The Rev. Al Sharpton has referred to Holliday’s video as “the Jackie Robinson of police videos.” Clay Risen, *George Holliday, Who Taped Police Beating of Rodney King, Dies at 61*, N.Y. TIMES (Sept. 22, 2021), <https://nytimes.com/2021/09/22/us/george-holliday-dead.amp.html>.

55. Dalton Bennett et al., *The death of George Floyd: What video and other records show about his final minutes*, WASH. POST (May 30, 2020), <https://www.washingtonpost.com/nation/2020/05/30/video-timeline-george-floyd-death/>.

included this caption: “They killed him right in front of cup foods over south on 38th and Chicago!! No type of sympathy [two broken-heart emojis] #POLICEBRUTALITY.”⁵⁶ Local protests against police brutality began later that day and soon erupted around the country. The four officers shown on the video were quickly fired.⁵⁷

Now, in the smartphone and social media era, it is no longer happenstance that Darnella Frazier, Simon Glik, or others like them, have the tools to be citizen-journalists exposing police misconduct. Those tools are everywhere. Indeed, in recognition of that reality, and to their credit, the police in many places have begun to use body cameras to record their own work.⁵⁸ Those body cameras can confirm the good work that most police officers do, tell the rest of the story if a bystander video tells only part of it, and enhance the accountability of the police to the public.

The right to record articulated in *Glik*, and the technology now available for the exercise of that right, have also fundamentally changed the way police conduct is evaluated in the courtroom. Traditionally, trials have been the re-creation through courtroom testimony of events outside the courtroom. Although testimony remains important, smartphone videos now bring those events into the courtroom to confirm or contradict the live testimony. Commentators have long noted that juries usually favor a police officer’s version of events over that of a civil rights plaintiff or a criminal defendant.⁵⁹ But, as one commentator has put it, “[v]ideo footage often

56. Darnella Frazier, FACEBOOK (May 26, 2020, 1:46 AM), <https://www.facebook.com/darnellareallprettymarie/videos/1425398217661280/>.

57. *MPD Chief Arradondo: 4 Police Officers Fired Following Death Of George Floyd*, CBS MINN. (May 26, 2020, 6:51 PM), <https://minnesota.cbslocal.com/2020/05/26/mpd-chief-arradondo-4-police-officers-fired-following-death-of-george-floyd/>.

58. See, e.g., *All Portland police officers equipped with body cameras*, WMTW NEWS 8 (Oct. 3, 2019), <https://www.wmtw.com/article/all-portland-police-officers-equipped-with-body-cameras/29356119#>.

59. See, e.g., Jonathan M. Warren, *Hidden in Plain View: Juries and The Implicit Credibility Given to Police Testimony*, 11 DEPAUL J. FOR SOC. JUST. 1, 2 (2018).

goes a long way in narrowing or eliminating this built-in credibility gap.”⁶⁰ Put bluntly, as another commentator has stated, “a camera can mean that there is no ambiguity about what happened.”⁶¹

The Derek Chauvin murder trial proves the power of that observation. In the hours following George Floyd’s death, the Minneapolis Police Department issued a press release, later withdrawn, titled, “Man Dies After Medical Incident During Police Interaction.”⁶² The release explained that officers responded to a report of a “forgery in progress,” and that “[o]fficers were advised that the suspect was sitting on top of a blue car and appeared to be under the influence.”⁶³ The release added that Floyd “physically resisted officers” and “appeared to be suffering medical distress,” prompting them to call for an ambulance.⁶⁴

Incredibly, the release implied that the officers tried to help Floyd. It said nothing about the use of physical force by the officers. Yet we now know from Darnella Frazier’s video what actually happened. Of course, there were other witnesses to the actions of Chauvin and the other officers, and some of those witnesses testified at Chauvin’s trial.⁶⁵ In an earlier era, in the absence of Frazier’s video, Chauvin’s trial would have become a credibility contest between Chauvin, the other officers on the scene, and the civilian witnesses. The outcome of that

60. Gregory T. Frohman, Comment, *What Is and What Should Never Be: Examining the Artificial Circuit “Split” on Citizens Recording Official Police Action*, 64 CASE W. RES. L. REV. 1897, 1903–04 (2014).

61. Darryl Pinckney, *Black Lives and the Police*, N.Y. REV. OF BOOKS (Aug. 18, 2016), <http://www.nybooks.com/articles/2016/08/18/black-lives-and-the-police/>.

62. John Elder, *Man Dies After Medical Incident During Police Interaction*, MINNEAPOLIS POLICE DEP’T (May 25, 2020), <https://www.insidempd.com/2020/05/26/man-dies-after-medical-incident-during-police-interaction/>.

63. *Id.*

64. *Id.*

65. Paul Walsh et al., *Who were the witnesses in the Derek Chauvin trial?*, STARTRIBUNE (Apr. 15, 2021), <https://www.startribune.com/who-are-the-witnesses-in-the-derek-chauvin-trial-for-the-killing-of-george-floyd-in-minneapolis/600042794/>.

trial might have been different than the trial dominated by Frazier's searing and unambiguous video.

VI. LARGER CONSEQUENCES

To be sure, Frazier's video is only one of the most dramatic of numerous, widely disseminated videos taken by citizens in recent years recording police violence against Black men. Recall the video taken by a bystander on Staten Island in 2014 of a police officer using a chokehold on Eric Garner, who died after repeating the phrase "I can't breathe" eleven times.⁶⁶ It is an inescapable fact that Black men in particular often experience the police, and the criminal justice system, differently than white men. Bryan Stevenson, a distinguished criminal justice advocate and the head of the Equal Justice Initiative, an organization dedicated to saving the lives of death row inmates, many of them Black men, puts it this way:

Our society applies a presumption of dangerousness and guilt to young black men, and that's what leads to wrongful arrests and wrongful convictions and wrongful death sentences, not just wrongful shootings [of suspects by police]. There's no question that we have a long history of seeing people through this lens of racial difference. It's a direct line from slavery to the treatment of black suspects today, and we need to acknowledge the shamefulness of that history.⁶⁷

As Stevenson suggests, there is a link between the abusive treatment of Black suspects by the police and the long history of racial oppression in this country, beginning with slavery. Hence, it is no surprise that videos of that abusive treatment shown on television and the

66. Wesley Lowery, *I can't breathe: Five years after Eric Garner died in struggle with New York police, resolution still elusive*, WASH. POST (June 13, 2019), https://www.washingtonpost.com/national/i-cant-breathe-five-years-after-eric-garner-died-in-struggle-with-new-york-police-resolution-still-elusive/2019/06/13/23d7fad8-78f5-11e9-bd25-c989555e7766_story.html.

67. Jeffrey Toobin, *The Legacy of Lynching, On Death Row*, NEW YORKER (Aug. 15, 2016), <https://www.newyorker.com/magazine/2016/08/22/bryan-stevenson-and-the-legacy-of-lynching> (quoting Bryan Stevenson).

internet have inspired a larger debate about the ongoing impact of that cruel history on Black Americans. Unfortunately, it is much more difficult to be Black in America than it should be.

In her riveting book, *Caste: The Origins of Our Discontents*, Isabel Wilkerson describes the vulnerability of the Black community to premature death. She notes these facts:

- In 2015, Black people were five times more likely to be killed by police than white people.⁶⁸
- The average white American at age twenty-five is likely to live five years longer than the average Black American.⁶⁹
- During the pandemic, Black Americans and Latino Americans died at higher rates than white Americans, in part because of their concentration in jobs at the bottom of the hierarchy, where high levels of public contact put them at greater risk of contracting COVID-19.⁷⁰

There are other disproportionately harsh fates:

- Black Americans are incarcerated in state prisons at nearly five times the rate of white Americans.⁷¹
- In 2019, Black people accounted for just 13 percent of the U.S. population but nearly 40 percent of people experiencing homelessness.⁷²

68. ISABEL WILKERSON, *CASTE: THE ORIGINS OF OUR DISCONTENTS* 319 (2020). Today, that rate is closer to three times. MAPPING POLICE VIOLENCE, <https://mappingpoliceviolence.org/> (last visited Oct. 25, 2021).

69. WILKERSON, *supra* note 68, at 307.

70. *Id.* at 356–57.

71. ASHLEY NELLIS, THE SENT’G PROJECT, *THE COLOR OF JUSTICE: RACIAL AND ETHNIC DISPARITY IN STATE PRISONS* 6 (2021).

72. JOINT CTR. FOR HOUS. STUD. OF HARVARD UNIV., *THE STATE OF THE NATION’S HOUSING 2020*, at 6 (2020).

- Black men are ten times more likely than white men to be victims of firearm homicides in the United States.⁷³

There is a striking underrepresentation of Black people in positions of power:

- In the business world, there are only five Black CEOs running a Fortune 500 company, making up just one percent of the list.⁷⁴
- In the military, more than seventy years after the Armed Forces were integrated and despite a military force that is seventeen percent Black, there is not a single Black officer among the top twenty-five officers on the staff of the Joint Chiefs.⁷⁵

These statistics are only illustrative of the extent of Black disadvantage in this country. I could fill pages with similar statistics involving such critical issues as educational opportunity,⁷⁶ income levels,⁷⁷ and wealth accumulation.⁷⁸

73. Archive of Data from the Web-based Injury Statistics Query and Reporting System (WISQARS), CTRS. FOR DISEASE PREVENTION AND CONTROL, <https://www.cdc.gov/injury/wisqars/index.html> (last visited Nov. 28, 2021) (first follow “Fatal Injury and Violence Data” link; then follow “Fatal Injury Reports 1981–2019” link; then toggle “Homicide” and “Firearm,” and select “Race” and “Sex” as output groups).

74. Phil Wahba, *The number of black CEOs in the Fortune 500 remains very low*, FORTUNE (June 1, 2020, 11:19 AM), <https://fortune.com/2020/06/01/black-ceos-fortune-500-2020-african-american-business-leaders/>.

75. *60 Minutes: Race in the Ranks: Investigating Racial Bias in the U.S. Military* (CBS television broadcast Aug. 22, 2021), <https://www.cbsnews.com/news/us-military-racism-60-minutes-2021-08-22/>.

76. See, e.g., GARY ORFIELD & DANIELLE JARVIE, UCLA C.R. PROJECT, BLACK SEGREGATION MATTERS: SCHOOL RESEGREGATION AND BLACK EDUCATIONAL OPPORTUNITY (2020), <https://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/black-segregation-matters-school-resegregation-and-black-educational-opportunity/BLACK-SEGREGATION-MATTERS-final-121820.pdf>.

77. See, e.g., EMILY A. SHRIDER ET AL., U.S. CENSUS BUREAU, INCOME AND POVERTY IN THE UNITED STATES: 2020, at 3 (2021), <https://www.census.gov/content/dam/Census/library/publications/2021/demo/p60-273.pdf>.

78. See, e.g., Kriston McIntosh et al., *Examining the Black-white wealth gap*, BROOKINGS (Feb. 27, 2020), <https://www.brookings.edu/blog/up-front/2020/02/27/examining-the-black-white-wealth-gap/>.

And then there are these implacable realities: the rising threats of domestic terror from white supremacist groups, the modern incarnations of the Ku Klux Klan;⁷⁹ the shocking campaigns in many states to disenfranchise minority voters, with their echoes of the Jim Crow era;⁸⁰ the dismissive attitude held by many toward reparations proposals to address historical wealth and opportunity gaps for members of the Black community;⁸¹ and the angry resistance to instruction in our public schools on the history of racism in this country, on the theory that it imposes on our children an unfair sense of guilt.⁸² Of course our children are not responsible for the sins of the past. But we are all responsible for understanding those sins and dealing with their consequences.

Sadly, these problems are not new. In *Caste*, Wilker-son describes how a sixteen-year-old African–American girl won an essay contest in the spring of 1944 when she answered with a single sentence the question of “what to do with Hitler after the war?”: “Put him in a black skin and let him live the rest of his life in America.”⁸³

If this 1944 answer seems dated, consider what President Biden said this past June when he traveled to Tulsa, Oklahoma, to acknowledge the riot and massacre

79. See Eileen Sullivan & Katie Benner, *Top law enforcement officials say the biggest domestic terror threat comes from white supremacists*, N.Y. TIMES (May 12, 2021), <https://www.nytimes.com/2021/05/12/us/politics/domestic-terror-white-supremacists.html>.

80. See Amy Gardner et al., *How GOP-backed voting measures could create hurdles for tens of millions of voters*, WASH. POST (Mar. 11, 2021), <https://www.washingtonpost.com/politics/interactive/2021/voting-restrictions-republicans-states/>.

81. See Dartunorro Clark & Frank Thorp V, *McConnell on slavery reparations: Not ‘a good idea’*, NBC NEWS (June 18, 2019), <https://www.nbcnews.com/politics/politics-news/mcconnell-slavery-reparations-not-good-idea-n1019091>. Nevertheless, Evanston, Illinois, recently adopted a reparations program to address the effects of racial discrimination in housing. Evanston’s program is likely the first such program adopted by a governmental body in the United States. Rachel Treisman, *In Likely First, Chicago Suburb of Evanston Approves Reparations for Black Residents*, NPR (Mar. 23, 2021), <https://www.npr.org/2021/03/23/980277688/>.

82. See Michael Melia, *Opponents of critical race theory seek to flip school boards*, ABC NEWS (Oct. 25, 2021), <https://abcnews.go.com/Lifestyle/wireStory/opponents-critical-race-theory-seek-flip-school-boards-80766991>.

83. WILKERSON, *supra* note 68, at 164.

that occurred in that city one hundred years ago because a Black neighborhood dared to be prosperous. The President minced no words:

[W]e must address what remains the stain on the soul of America. What happened [here] was an act of hate and domestic terrorism with a through line that exists today still. Just close your eyes and remember what you saw in Charlottesville four years ago on television. Neo-Nazis, white supremacists, the KKK coming out of those fields at night in Virginia with lighted torches—the veins bulging on their [necks]—as they were screaming. Remember? Just close your eyes and picture what it was. . . . I didn't realize hate is never defeated; it only hides. It hides.⁸⁴

Strikingly, President Biden draws on unforgettable images of the neo-Nazis marching in Charlottesville to capture the urgent need for renewed attention to the problem of racial injustice in this country. Darnella Frazier's video of the murder of George Floyd, and others like it shown on television and the internet, serve the same purpose: they force millions of us to confront the dangerous realities of the Black experience in America. They make it difficult to look away.

VII. CONCLUSION

Of course, the videos taken by Darnella Frazier and Simon Glik were not inevitable. They could have looked away. They could have kept on walking. But they did not, and that is why they are heroes. They saw people suffering at the hands of the police and they felt an obligation to act, whatever the risks to themselves, by making a record of what they saw. For her heroism, Frazier was awarded a special citation by the Pulitzer Prize Board “[f]or courageously recording the murder of George

84. Joseph R. Biden, President of the U.S., *Remarks by President Biden Commemorating the 100th Anniversary of the Tulsa Race Massacre*, WHITE HOUSE (June 2, 2021), <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/06/02/remarks-by-president-biden-commemorating-the-100th-anniversary-of-the-tulsa-race-massacre>.

Floyd, a video that spurred protests against police brutality around the world, highlighting the crucial role of citizens in journalists' quest for truth and justice."⁸⁵ Glik received a settlement of \$170,000 from the City of Boston, and he changed police behavior when the City created a training video instructing police officers not to arrest people who openly record what the police are doing in public.⁸⁶ Most importantly, Glik's heroism led to the court decision that said Darnella Frazier had a First Amendment right to be the citizen–journalist honored by the Pulitzer Board.

The examples of Frazier and Glik should be instructive for us, even if the consequences of our actions are more modest. We, too, should not walk away in the face of injustice. We should follow the command in Leviticus: "Do not stand idly by while your neighbor's blood is shed."⁸⁷ Elie Wiesel has elaborated on this command:

When you hear of a person or a group being persecuted, . . . [w]hen there is something wrong in the community around you—or far [a]way—do not stand idly by. You must intervene. You must interfere.⁸⁸

As I have suggested, the problem of racial injustice in this country demands our intervention, our interference. There is so much unfinished business that requires our attention and our action. We should pledge that we will not "stand idly by." That biblical command is the burden and blessing of our humanity.

85. *The 2021 Pulitzer Prize Winner in Special Citations and Awards: Darnella Frazier*, PULITZER PRIZES, <https://www.pulitzer.org/winners/darnella-frazier> (last visited Nov. 25, 2021).

86. *See City of Boston Pays \$170,000 to Settle Landmark Case Involving Man Arrested for Recording Police with Cell Phone*, ACLU MASS. (Mar. 27, 2012), <https://www.aclum.org/en/press-releases/city-boston-pays-170000-settle-landmark-case-involving-man-arrested-recording-police>.

87. *Leviticus* 19:16.

88. Elie Wiesel's 2011 Commencement address at Washington University in St. Louis, SOURCE (May 20, 2011), <https://source.wustl.edu/2011/05/elie-wiesels-2011-commencement-address-at-washington-university-in-st-louis/>.