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Reexamining First Amendment Principles Through a 2020 Lens

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Recurring themes in 2020 protests

- Protests targeted at police; while police try to keep the peace
- Spontaneous protests and parades without permits (social media effect)
- Peaceful protestors contrasted with "allies" who are rioters
- Demonstrators vs. counter-demonstrators
- Blocking public streets/Vehicles plowing into demonstrators
- Violation of public health orders prohibiting mass gatherings
- Targeted residential picketing
- Increasing risk of gun violence
- Lawsuits, lawsuits, lawsuits



“What’s past is prologue”

- 1992: KKK vs. MLK Parade at the Colorado State Capitol
- 1998-2007: American Indian Movement vs. Columbus Day Parade
- 2008: Democratic National Convention and “Recreate ‘68”
- 2010: 4/20 Smokeouts
- 2011: Occupy Denver
- 2014: Post-Ferguson protests and the rise of BLM
- 2017: New wave of immigration-related protests



KKK v. MLK Day Parade

- Dueling permitted events
- The legacy of *Village of Skokie v. National Socialist Party of America*, 69 Ill.2d 605 (Ill. 1978)
- Provocative speakers cannot be denied permits or forced to bear exorbitant permit costs (“Heckler’s veto”) *Forsyth County, Georgia v. Nationalist Movement*, 112 S.Ct. 2395 (1992); *Imatter Utah v. Njord*, 744 F.3d 1258 (10th Cir. 2014)
- First-come-first-served permitting for prime demonstration space (west steps of Capitol)
- Peaceful protest degenerates into riot



King day observance explodes into a riot

Confrontation is worst in U.S. as nation honors civil rights leader who preached non-violence

By John C. Ensslin and Mark Brown

Rocky Mountain News Staff Writer

A riot ignited by a Ku Klux Klan rally at the capitol Monday marred a celebration of Martin Luther King Jr.'s birthday.

The violence was apparently the worst in the nation among cities honoring King on Monday, and drew national attention.

A crowd, tossing snowballs and bottles, pelted a busload of Klan members, flipped a Denver patrol car and engaged police in a running street battle.

The chaos spilled over into downtown as packs of youths went on a rampage along the 16th Street Mall, tossing a garbage can lid into a store window and ran-



15,000 marchers recall their hero's bold dream

By Robert Jackson

Rocky Mountain News Staff Writer

They came, 15,000 strong, from more than a dozen Colorado cities to pay tribute to the "dreamer," Martin Luther King Jr., on the occasion of his 63rd birthday.

Black and white, brown and red, the young and the elderly assembled at 8:30 a.m. Monday at the foot of King's statue in City Park, vowing to rededicate themselves to King's dreams.

For more than two hours, more than 7,000 attended wreath-laying ceremonies at the statue.

They heard speeches by Gov. Roy Romer, Sen. Tim Wirth, D-Colo., Rep. Pat Schroeder, D-Colo., Denver Mayor Wellington Webb, and his wife, Rep. Wilma Webb, D-Denver, a major backer of the King holiday legislation. His actual birthday is Jan. 15.

"We are here in 1992 because we realize that King's dream has not been fully realized as yet," said Wilma Webb. "We know that in spite of the great marches that happened during his lifetime, the laws that passed in our Congress in Washington and the great people who gave



AIM v. Sons of Italy

- Long history of strife over Columbus Day Parade
- Permitted parade obstructed by counter-protestors.
- Denver attempts (unsuccessfully) to mediate and accommodate both sides
- Obstruction of a lawful assembly CRS 18-9-108, *Dempsey v. People*, 117 P.3d 800 (Colo. 2005)
- Parade organizers have no duty to include other voices. *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 115 S.Ct. 2338 (1995)





2008 DNC

- Legacy of Seattle WTO riots of 1999. *Menotti v. City of Seattle*, 409 F.3d 1113 (9th Cir. 2005)
- "Re-Create '68"
- Massive show of force by police ("militarization"?)
- Authority to establish security perimeters. *Citizens for Peace in Space v. City of Colorado Springs*, 477 F.3d 1212 (10th Cir. 2007); *ACLU v. Denver*, 569 F.Supp.3d (D.Colo. 2008)
- Mass arrests: A **Fourth Amendment** dilemma? *Acks v. Denver*, 2011 WL 1754290 (D.Colo. 2011); *Fogerty v. Gallegos*, 523 F.3d 1147 (10th Cir. 2008)
- Selective arrests: A **First Amendment** dilemma? *Nieves v. Bartlett*, 139 S.Ct. 1715 (2019)





4/20 Smokeouts

- The most important speech permitting decision in history focused on a cannabis legalization rally: *Thomas v. Chicago Park District*, 534 U.S. 316 (2002); see also: *Utah Animal Rights Coalition v. Salt Lake City*, 371 F.3d 1248 (10th Cir., 2004)
- A tradition of mass civil disobedience going back decades
- A policing philosophy of containment vs. mass arrests (Denver) and forum closure (CU-Boulder)
- Intrinsic connection to First Amendment, both before and after “legalization” but public consumption always illegal
- Another example of first-come-first served permitting competition
- Four shot, one killed at Denver event in 2013





Occupy Denver

- From Sept. to Dec. 2011 protestors occupied public spaces continuously in Denver and numerous other cities around the U.S. in violation of numerous state and local laws.
- When cities finally took action in December to dismantle the encampments, dozens of First Amendment lawsuits ensued, including *Occupy Denver v. City and County of Denver*, 2011 WL 6096501 (D.Colo. 2011)
- First Amendment does not prevent government from regulating camping on public property. *Clark v. Community for Creative Non-Violence*, 104 S.Ct. 3065 (1984)





Advent of BLM

- August 10, 2014: Michael Brown shot and killed in Ferguson, MO
- Denver high school students begin pattern of marching without a parade permit from their schools to the state capitol
- During one of the impromptu marches, Officer John Adsit struck and critically injured when vehicle crashes into DPD bicycle patrol
- In 2015 BLM activists seize control of stage at annual Marade event in Denver
- A post-Ferguson wave of criminal justice reform sweeps Colorado and the nation





Immigration Protests

- In response to Trump “Travel Ban” executive order, spontaneous unpermitted protests break out at airports across the U.S.
- Shone a light on need for tolerance of short-notice political demonstrations in response to current events. *McDonnell v. City and County of Denver*, 238 F.Supp. 3d 1279 (D.Colo. 2017); rev’d in part, 878 F.3d 1247 (10th Cir. 2018)
- ICE detention center in Aurora a flashpoint for demonstrators vs. counter-demonstrators





Targeted residential picketing

- Ban on targeted demonstrations outside an individual home O.K.; total ban on all demonstrations in residential neighborhoods probably not O.K. *Frisby v. Schultz*, 108 S.Ct. 2495 (1988)
- A misdemeanor under state law. CRS 18-9-108.5 (2008)
- “The provisions of this section shall not prohibit a local government from adopting more restrictive provisions concerning targeted picketing or carrying in a residential area more than one sign of a certain size.”
- Past and present examples of residential picketing abound in Colorado





To sum up . . .

- Permits to occupy public property can absolutely be required for any First Amendment demonstration or parade
- Permit holders have a right to expect that they will be able to manage and control their own event without disruption by others
- Police can establish security perimeters to keep battling protestors apart
- As a practical matter, unpermitted First Amendment demonstrations and parades have been increasingly tolerated in recent years, particularly “short-notice” demonstrations in reaction to current events
- Containment and security of an unauthorized event, rather than mass arrests of those engaged in an “unlawful assembly” is most often the chosen strategy
- A great resource for further reading: ***Protests and Public Safety: A Guide for Cities and Citizens***; <https://constitutionalprotestguide.org/>



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Questions?

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