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Unexceptional Protest

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Unexceptional Protest

Amber Baylor

ABSTRACT

Anti-protest legislation is billed as applying only in the extreme circumstances of mass-movements and large scale civil disobedience. Mass protest exceptionalism provides justification for passage of anti-protest laws in states otherwise hesitant to expand public order criminal regulation. Examples include a Virginia bill that heightens penalties for a “failure to disperse following a law officer’s order”; a Tennessee law directing criminal penalties for “blocking traffic”; a bill in New York criminalizing “incitement to riot by nonresidents.” These laws might be better described as anti-protest expansions of public order legislation.

While existing critiques of these laws emphasize the chilling effects on free speech, this analysis masks the threat of such legislation in the everyday lives of already targeted people and communities. In actuality, the application of anti-protest legislation is not limited to “exceptional” circumstances, increasing everyday surveillance and public order regulation for Black, Latinx, and other targeted communities. The consequences of anti-protest legislation on highly surveilled communities are alarming.

This Article examines the construction of mass protest law exceptionalism and advocates for using resistance frameworks, such as joyful protest, to better understand the burdens and consequences borne by communities. This analysis incorporates text of recent mass anti-protest legislation, proponents’ arguments in media, and debate in legislative sessions. This framing exposes the lack of exceptionalism, surfaces the thin line between mass protest and everyday public order regulation in targeted communities, and demonstrates the high stakes of ignoring this blurred line when considering mass anti-protest criminal laws.



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INTRODUCTION

On a weekend afternoon, a troop of twelve community group members gathered in the predominantly Black neighborhood of Englewood in Chicago.¹ The volunteers knelt down with garbage bags, picking up trash on the street as a part of a neighborhood cleanup effort. They wore coordinated black t-shirts and carried red, black, and green Black unity flags as they moved down the street.² They stopped to talk to fellow residents, sharing flyers supporting local Black businesses. As the group cleaned and chatted with neighbors, a few sang, making “little chants to support black love.”³ They reported seeing a police SUV trailing them before they received a sudden demand to clear the street. Soon after, video footage shows police surrounding the group.⁴ At the time, the group was not engaged in an organized mass protest or civil disobedience.⁵

Their volunteer ranks included a firefighter.⁶ As a first responder, he felt comfortable approaching the police officers to explain the community effort. But instead of mitigating the interference, he was among the first detained and was unable to stop the impending arrests and roundup of the entire community group. Among the charges against him: “obstruction of traffic” and “resisting a police officer.”⁷ Both were later dismissed.⁸

From 2020 to 2021, over eighty-one antiprotest criminal laws were introduced across the country.⁹ These include new crimes and enhancements to

1. See Maya Dukmasova, *Markham Firefighter Sues Chicago Cops for False Arrest*, CHI. READER (Nov. 15, 2018), <https://chicagoreader.com/news-politics/markham-fire-fighter-sues-chicago-cops-for-false-arrest> [<https://perma.cc/QT7T-M4QN>].

2. See Leah Donnelly, *On Flag Day, Remembering the Red, Black and Green*, NPR: CODE SWITCH, <https://www.npr.org/sections/codeswitch/2017/06/14/532667081/on-flag-day-remembering-the-red-black-and-green> [<https://perma.cc/EF9G-8XJD>].

3. Dukmasova, *supra* note 1.

4. *See id.*

5. Protest is defined as “[t]he act of challenging, resisting, or making demands upon authorities, powerholders, and/or cultural beliefs and practices by some individual or group.” MOISÉS ARCE & ROBERTA RICE, *PROTEST AND DEMOCRACY 2* (2019). This Article argues that the line between mass protest and everyday assertions of personhood is illusory. I do, however, lean on general understandings of mass demonstration and protest as a contrast to lesser-discussed individual challenges to power. That said, one could make the case that the group was engaged in some form of protest, even if not a mass demonstration. *See id.*

6. *See* Dukmasova, *supra* note 1.

7. Donnelly, *supra* note 2.

8. *See id.*

9. ARMED CONFLICT LOCATION & EVENT DATA PROJECT (ACLED), FACT SHEET: ANTI-PROTEST AND DEMONSTRATION ACTIVITY IN THE UNITED STATES (2021), <https://acleddata.com/2021/04/>

existing laws including “obstruction of traffic” and “resisting a police officer.”¹⁰ Antiprotest laws limit, curb, discourage, and criminalize public expression that violate norms of orderly dissent. The applications of antiprotest criminal laws are not limited to the large, highly publicized demonstrations that inspire them.

Antiprotest criminal statutes like “riot” or “unlawful assembly” often require only a gathering of three people to trigger criminal liability for charges.¹¹ Enhanced penalties for “obstruction of a walkway” often significantly impact people who are unhoused.¹² “Obstruction of traffic” and “resisting arrest” are charges commonly brought against people that argue peaceably or question police orders.¹³ Courts are filled with people charged with order-related crimes created in response to antiprotest legislation. These laws might be better described as antiprotest expansions of public order crimes.

Such legislation is often introduced in the aftermath of protests that are depicted as unsanctioned or appear to lawmakers as insufficiently controlled.¹⁴ Yet for the people most commonly targeted and affected by low-level misdemeanors and public order laws, protest-related laws limit expression, free movement and assembly, autonomy and safety—all outside of the traditional context of mass protest.¹⁵ Some may argue that living assertively and joyfully as a

30/fact-sheet-anti-protest-legislation-and-demonstration-activity-in-the-us [https://perma.cc/3UND-AUUU].

10. *Id.*

11. OKLA. STAT. tit. 21 § 21-1311 (2019).

12. Amanda Vinicky, *Federal Court Rules Illinois’ Panhandling Law Unconstitutional*, WTTW (Jan. 19, 2021, 9:13 PM), <https://news.wttw.com/2021/01/19/federal-court-rules-illinois-panhandling-law-unconstitutional> [https://perma.cc/MZL2-37V9].

13. See Plaintiff’s Memorandum of Law in Support of His Motion for Partial Summary Judgment, *Valentin v. City of Manchester*, No. 1:15-cv-00235 (D. N.H. May 6, 2016), ECF No. 14-1 (a man turned on his video camera as police approached his house to speak with him); First Amended Complaint, *Johnson v. Turner*, No. 21-cv-00383 (E.D. La. Apr. 6, 2021), ECF No. 18 (failure to follow order against woman in traffic argument with officer in New Orleans); Levi Pulkkinen, *Man Convicted of Obstructing for Refusing to Open His Door for Police*, APPEAL (Oct. 17, 2018), <https://theappeal.org/man-convicted-of-obstruction-for-refusing-to-open-his-door-for-police> [https://perma.cc/HDS9-TUQG]; *Landmark Class Action Lawsuit Filed Against the City of Chicago Alleging Racially Discriminatory Policing and Violent Police Abuse*, MACARTHUR JUST. CTR. (June 14, 2017), <https://www.macarthurjustice.org/landmark-class-action-lawsuit-filed-against-the-city-of-chicago-alleging-racially-discriminatory-policing-and-violent-police-abuse> [https://perma.cc/73VJ-TEB4].

14. See, e.g., “Combating Public Disorder,” S.B. 484, 123rd Sess. (Fla. 2021).

15. “Protest” as a noun means “a solemn declaration of opinion and usually of dissent” or “the act of objecting or a gesture of disapproval.” As a verb, it means to “express an objection to what someone has said or done” or “to make a statement or gesture in objection to.” The subject indicated by the noun is likely a motivator for the legislation, though the action indicated by the verb might be said to happen in encounters with criminal surveillance and the regulatory state

person under heightened surveillance and criminal law regulation is a form of everyday resistance, subject to increasing penalties under these laws.¹⁶

For individuals living in neighborhoods with a constant police presence, everyday components of life and community building are susceptible to antiprotest laws. Members of the community group canvassing in Englewood were not engaged in protest.¹⁷ In the everyday lives of the surveilled, the problem of these laws is not just that they deter mass protests, but rather that they suppress the health of a community, individual and communal autonomy, and the collective, even joyful, expression of politically marginalized people.

The threat grows with a recent onslaught of new public order laws appearing before U.S. state and city governments.¹⁸ Twice as many mass antiprotest bills were introduced following the uprising in the summer of 2020 than in any other year in the country's history.¹⁹ Examples include a Virginia bill that heightens penalties for a "failure to disperse following a law officer's order;"²⁰ a Tennessee law directing criminal penalties for "blocking traffic;"²¹ a bill in New York

every day. *Protest*, MERRIAM-WEBSTER.COM, <https://www.merriam-webster.com/dictionary/protest> [https://perma.cc/78NQ-Q8HM].

16. See Javier Auyero, *When Everyday Life, Routine Politics, and Protest Meet*, 33 THEORY & SOC'Y 417 (2004).
17. The community group is best known for cleanups, food distribution, Black unity and self-love workshops, and open mics. New Era Chicago (@newerachicago), FACEBOOK, <https://www.facebook.com/newerachicago> [https://perma.cc/34D6-JP9Y].
18. Most bill opponents often refer to these laws as "antiprotest legislation." I use this term though I argue that these are an expansion of order-maintenance criminal regulation. See *Anti-Protest Laws in the United States*, FIRST AMEND. WATCH, <https://firstamendmentwatch.org/deep-dive/states-rush-to-pass-anti-protestor-laws> [https://perma.cc/UHB3-PQ4C]. Whether proposed, pending, dead or enacted, legislation has repressive effects. The status of the law may cause confusion and lead to deterring expression. Kristine Ruhl, "An Alarming Trend": *The Dangers of Recently Proposed Anti-Protest Legislation*, 22 PUB. INT. L. REP. 95, 96–97 (2017). The rhetoric surrounding introduction and debate may become planted in the minds of lawmakers and the general public. See, e.g., Kriston Capps, *Republicans Ramp Up Rhetoric Against 'Anarchist Jurisdictions'*, BLOOMBERG (Sept. 23, 2020, 10:00 AM), <https://www.bloomberg.com/news/articles/2020-09-23/-anarchist-jurisdictions-face-doj-funding-threat> [https://perma.cc/8JM7-LTUW].
19. Char Adams, *Experts Call 'Anti-Protest' Bills a Backlash to 2020's Racial Reckoning*, NBC NEWS (May 18, 2021, 10:46 AM), <https://www.nbcnews.com/news/nbcblk/experts-call-anti-protest-bills-backlash-2020-s-racial-reckoning-n1267781> [https://perma.cc/FA6U-NLDY].
20. S.B. 5056, 2020 Spec. Sess. (Va. 2020) ("Every person, except the owner or lessee of the premises, his family and nonrioting guests, and public officers and persons assisting them, who remains at the place of any riot or unlawful assembly after having been lawfully warned to disperse, is guilty of a-Class 1 misdemeanor.") (formatting in original); see *id.* § 18.2-407 ("Remaining at place of riot or unlawful assembly after warning to disperse; penalty").
21. TN CODE § 39-17-307 (2021). The law says:
 - (a) A person commits an offense who, without legal privilege, intentionally, knowingly or recklessly: (1) Obstructs a highway, street, sidewalk, railway,

criminalizing “incitement to riot by nonresidents;”²² a Kentucky bill aimed to criminalize taunting police, expanding its existing “disorderly conduct” laws;²³ and a bill in Oklahoma that would make it a felony to commit nondestructive acts of expression during protests on a government structure or building.²⁴ The Arizona legislature recently passed a law making engagement in disorderly assembly a felony, eliminating eligibility for public benefits for those convicted.²⁵ A Texas bill that floundered at the House Committee stage attempted to enhance obstruction of a sidewalk to a third degree felony.²⁶

Critical analyses of the antiprotest bills focus on their effect on mass protest. Opponents of these bills have been vocal about the laws, noting that they may deter protests, chill dissent, and harm people attending large protests.²⁷ Like most recent antiprotest public order bills, the proposed legislation targets protestor conduct.²⁸ By contrast, there are comparatively few bills and enacted legislation that regulate state officials’ use of violence.²⁹ Some have noted the laws are disproportionately

waterway, elevator, aisle, or hallway to which the public, or a substantial portion of the public, has access; or any other place used for the passage of persons, vehicles or conveyances, whether the obstruction arises from the person’s acts alone or from the person’s acts and the acts of others; . . .

Id.

22. NY PENAL LAW § 240.08 (2017) (heightening penalties for “inciting to riot” under N.Y. PENAL LAW § 240.08 to a class A misdemeanor).
23. Soraya Ferdman, *Kentucky Senate Passes Bill That Would Make It a Crime to “Taunt” a Police Officer*, FIRST AMEND. WATCH (Mar. 12, 2021) <https://firstamendmentwatch.org/kentucky-senate-passes-bill-that-would-make-it-a-crime-to-taunt-a-police-officer> [<https://perma.cc/D884-YZ9U>].
24. H.B. 2096, 58th Sess. (Okla. 2021) (proposing to increase the penalty for violating OKLA. STAT. tit. 21, § 1312). The word “nondestructive” is not used but the bill alludes to it.
25. H.B. 2309, 55th Leg., Reg. Sess. (Ariz. 2021).
26. H.B. 2150, 87th Leg. (Tex. 2021).
27. Mary Louise Kelly, Karen Zamora, Mia Venkat & Sarah Handel, *Wave of ‘Anti-Protest’ Bills Could Threaten First Amendment*, NPR (Apr. 30, 2021, 4:08 PM), <https://www.npr.org/2021/04/30/992545210/wave-of-anti-protest-bills-could-threaten-first-amendment> [<https://perma.cc/67YT-25LL>].
28. Justin Hansford, *5 Years After Ferguson, We’re Losing the Fight Against Police Violence*, N.Y. TIMES (Aug. 9, 2019), <https://www.nytimes.com/2019/08/09/opinion/ferguson-anniversary-police-race.html> [<https://perma.cc/B8ZZ-5ZJ4>]. This project tracks legislation from 2015 to 2021. The year 2015 marks the beginnings of backlash to protests related to the uprising in Ferguson.
29. Lindsey Van Ness, *Tear Gas Bans: A Policing Change Not Gaining Traction*, STATELINE (Aug. 4, 2020, 12:00 AM), <https://stateline.org/2020/08/04/tear-gas-bans-a-policing-change-not-gaining-traction/> [<https://perma.cc/J8V7-4487>]. *But see*, Anna Orso, *Most Major Cities Haven’t Banned Tear Gas During Protests. Will Philly Be Different?*, PHILA. INQUIRER (Oct. 9, 2020), <https://www.inquirer.com/news/tear-gas-rubber-bullet-ban-philadelphia-police-other-cities-20201009.html> [<https://perma.cc/7KGH-CD4C>]; Nico Savidge, *Protests: California Could Ban Tear Gas, Limit Rubber Bullets Amid Outrage Over Police Response*,

applied to protestors of color.³⁰ These are important critiques, particularly when considering the distinct state responses to protestors from marginalized communities. Yet this narrow emphasis on mass protest misses the great threat of such legislation to everyday life.

Antiprotest legislation is presented as exceptional: narrowly and directly responsive to the unique and supposedly dangerous conditions of mass protest. This Article considers the language of protest and protest law exceptionalism from state legislation from 2015 to 2021, language which indicates laws will be limited to exceptional circumstances and individuals.³¹ This analysis incorporates the text of legislation, legislators' arguments in media, and debate in legislative sessions. Nearly all of the recent bills center on what legislators perceive as threatening demonstrations. The most recent bills have centered on the perceived dangers of protests against police violence and those targeting gas and oil pipelines.³² These bills have been largely introduced by conservative legislators, but antiprotest laws have also been proposed by people across the political spectrum.³³ The debates around these bills also call into question their framing as narrowly targeting mass protest.

Presenting antiprotest bills as responses to exceptional circumstances allows them to bypass well-established skepticism towards public order crimes and critiques of expansive criminalization. Lawmakers present protest bills as limited to singular, dangerous events and people, providing justification for passage in states otherwise contemplating limiting criminal regulation. The call for new antiprotest legislation is popular even where there has been significant agreement

TIMES-HERALD (Aug. 7, 2020, 6:13 PM), <https://www.timesheraldonline.com/2020/08/07/george-floyd-protests-california-could-ban-tear-gas-limit-rubber-bullets-amid-outrage-over-police-response> [<https://perma.cc/7KGGH-CD4C>]; Lynsey Smith, *New York Bills Seek to Demilitarize Police, Ban Use of Tear Gas Amid Protests* (June 9, 2020, 7:55 PM), WRGB CBS 6, <https://cbs6albany.com/news/local/new-york-bills-seek-to-demilitarize-police-ban-use-of-tear-gas-amid-protests> [<https://perma.cc/K8Q8-8R43>].

30. See, e.g., Garrett Epps, *Tell Me It's Not About Race*, ATLANTIC (June 22, 2019), <https://www.theatlantic.com/ideas/archive/2019/06/does-v-mckesson-and-ram-cases-show-courts-hypocrisy/592327> [<https://perma.cc/JZL8-W4S3>]; Tasnim Motala, "Foreseeable Violence" & Black Lives Matter: How Mckesson Can Stifle a Movement, 73 STAN. L. REV. ONLINE 61 (2020).
31. This analysis starts with legislation responsive to Ferguson. See Hansford, *supra* note 28 (describing a backlash developing a year after the Ferguson uprising).
32. *US Protest Law Tracker*, INT'L CTR. NOT-FOR-PROFIT LAW, <https://www.icnl.org/us-protestlawtracker/> [<https://perma.cc/KU25-A8PW>].
33. See, e.g., H.B. 1601, Reg. Sess. (Va. 2018) (addressing "Domestic Terrorism Offenses which was introduced to the Virginia House of delegates by Marcia S Cia Price of the democratic party").

across political lines on legalization, decriminalization, and limiting the expansion of public order criminal laws.³⁴ The myth of mass protest legislation exceptionalism allows for the expansion of everyday criminal public order policing.³⁵ This Article challenges the boundary between antiprotest criminal laws and regulation outside of the context of mass protest. By examining and challenging the language of exceptionalism, this Article expands our understanding of the full impact of such laws, particularly on communities that are suffering from intensive criminal legal regulation.

Studies of resistance movements acknowledge a spectrum of resistance that exists outside of mass protest events.³⁶ The varied acts of resistant behaviors, referred to in the literature as the repertoire, include both mass protests and minor ones, as well as everyday encounters against oppressive forces.³⁷ Everyday resistance can be intentional or unintentional.³⁸ The everyday encompasses the things people do as a part of their lives that may not constitute organized collective action, but still challenge hierarchical norms and redistribute power.³⁹ Examination of the boundaries, or lack thereof, between mass protest and everyday life are also prominent in emerging resistance frameworks challenging public order norms. One such framework is joyful protest. Joyful protest, a framework fleshed out in sociology and philosophy literature, has also been developed and applied outside of the academy in organizing and popular media.⁴⁰

Focusing on the language of exceptionalism, the expansion of public order regulation, and the repertoire of resistance allows us to better understand both (1)

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34. See, e.g., *Overcriminalization*, RIGHT ON CRIME <https://rightoncrime.com/initiatives/overcriminalization> [<https://perma.cc/LEY3-HQ9C>]; see also Dan T. Coenen, *Freedom of Speech and the Criminal Law*, 97 B.U. L. REV. 1533, 1533 (2017) (identifying a “fast-growing ‘decriminalization movement’” that “has taken hold across the nation” and at the heart of which are the people’s First Amendment rights).
 35. For other examples of “exceptionalism” arguments in law, see *International Law – Exceptionalism*, AM. FOREIGN RELATIONS, <https://www.americanforeignrelations.com/E-N/International-Law-Exceptionalism.html> [<https://perma.cc/B6K9-7V6U>]; Michele Goodwin & Allison M. Whelan, *Constitutional Exceptionalism*, U. ILL. L. REV. 128 (2016); Laura S. Underkuffler, *Religious Exceptionalism and Human Rights*, CORNELL L. FAC. PUBLS. (2014), <https://scholarship.law.cornell.edu/facpub/1673> [<https://perma.cc/GC96-DZTV>].
 36. See CHARLES TILLY & SIDNEY TARROW, *CONTENTIOUS POLITICS* (2007).
 37. See *id.*
 38. As quoted by CHRISTINA SHARPE, *IN THE WAKE: ON BLACKNESS AND BEING* 113 (2016), Fanon wrote “[T]he [colonized subject’s] individual’s breathing is an observed breathing. It is a combat breathing.” FRANTZ FANON, *TOWARD THE AFRICAN REVOLUTION* 50 (1964).
 39. Sandra Mathison, *Resistance in the Quotidian Life: With Special Attention to Daily Life in Schools*, 23 CULTURAL LOGIC: MARXIST THEORY & PRAC. 55 (2019).
 40. Kristie Soares, *Dancing with Death: Celia Cruz’s Azúcar and Queer of Color Survival*, YOUTUBE (Nov. 4, 2020), <https://www.youtube.com/watch?v=NaeGF9YDDJY> [<https://perma.cc/4NJW-UKZL>]; NICK MONTGOMERY & CARLA BERGMAN, *JOYFUL MILITANCY: BUILDING THRIVING RESISTANCE IN TOXIC TIMES* (2017).

the hollowness of the exceptionalism arguments in favor of antiprotest legislation and (2) the overlap between protest regulation and regulation in everyday lives of people under surveillance. Both insights should be incorporated into critiques of bills that claim to respond to the unique threat of protest but instead expand our most discriminatory subset of criminal laws.

Part I explores antiprotest criminal legislation and the use of exceptionalism arguments in legislative debate. Part II describes existing critiques of protest laws and the overlap between policed aspects of mass protest and life outside of protest.

Finally, Part III engages the repertoire of protest and explores what novel challenges to the laws may emerge by acknowledging everyday protest. Joyful protest offers an example of a framework that traverses from mass protest events into the everyday assertion of dignity. This reframing of antiprotest criminal laws demonstrates that the implications of the laws are larger than their impact on mass protest. Similarly, their justifications may be shaken by challenging the claims that people opt in to protest and that the state of being in protest is an exceptional condition for all.

I. PROTEST LAW EXCEPTIONALISM

Mass protests centered on racial justice often have contrasting effects on criminal regulation in the county. Protests push our society towards social change, coalescing dissent or exposing injustices.⁴¹ Studies have noted that protests centered on policing can serve to enlighten and have positive effects, such as localities increasing funding for social services to enhance equity.⁴² But just as protests produce positive effects in driving awareness and policy change, they also elicit a correlating sentiment: a concern for “social control.”⁴³ Protests can make

41. Omar Wasow, Do Protests Matter? Evidence From the 1960s Black Insurgency, 3 (Apr. 13, 2016) (unpublished manuscript), https://web.stanford.edu/group/peacejustice/Wasow_Protests_on_Voting10_19.pdf [<https://perma.cc/JQY8-JCXE>].

42. *Id.* at 13–14.

43. Wasow contrasts “dominant” groups against “subordinated” groups engaged in protests. *Id.* at 2–3. Protest deemed “nonviolent” can have the opposite effect, even when Black-led. Wasow notes, “[d]isruptions in which some protester-initiated violence occurs, by contrast, cause a statistically significant decline in proximate county-level white Democratic vote share in the same period.” *Id.* at 4. *But see* ELIZABETH HINTON, AMERICA ON FIRE: THE UNTOLD HISTORY OF POLICE VIOLENCE AND BLACK REBELLION SINCE THE 1960S 4 (2021). Hinton observes that those who critique violent protest as “riots” believe they alienate allies and encourage mass criminality. The problem lies in the framing of “riot” and mass criminality as fundamentally Black. *Id.* at 2.

more elite groups⁴⁴ fearful, leading to reinforcement of current social hierarchies.⁴⁵ Many, including those who would support criminal law reforms, see public expressions of dissent as threatening and dangerous.⁴⁶ Studies show that members of dominant classes often quickly transition from sympathy for a cause, and engaging in demonstrations of their own, to viewing mass resistance as uncontrolled “riots.”⁴⁷ At the local level, coverage of protestor-led violence has led to a rise in punitive policies and decline in “liberal” support.⁴⁸ Thus, in response to demonstrations, the elite are more likely to create policy change that disfavors the protesting groups.⁴⁹ The backlash manifests in the expansion of antiprotest criminal laws and punitive enhancements.⁵⁰

This Part describes the mechanisms used to exceptionalize protest and distinguish antiprotest legislation as urgent and more narrowly drawn than other order-related laws. This Part starts by describing the appeal of antiprotest legislation, especially in response to hateful speech. It then applies the tenets of criminal law exceptionalism to antiprotest law. It highlights the operation of exceptionalism in antiprotest legislation in two ways. First, laws are framed as

44. C. Wright Mills, *The Power Elite* in SOCIAL STRATIFICATION: CLASS, RACE, AND GENDER IN SOCIOLOGICAL PERSPECTIVE 202–11 (David B. Grusky ed., 4th ed. 2019) (defining elite groups as small groups representing the most wealthy, powerful, and influential people in business, government, and the military).

45. Wasow, *supra* note 41, at 3 (“Subordinate group violent protests, all things being equal, likely increase the salience of ethnic and racial boundaries, amplify feelings in the dominant group of inter-group competition and reinforce their desire for group-based hierarchy and order.”).

46. See, e.g., Nora Benavidez, James Tager & Andy Gottlieb, *Closing Ranks: State Legislators Deepen Assaults on the Right to Protest*, PEN AMERICA, <https://pen.org/closing-ranks-state-legislators-deepen-assaults-on-the-right-to-protest> [<https://perma.cc/Z3FY-7P5X>] (discussing how policymakers have introduced at least 100 proposals since June 2020 to reduce the scope of Americans’ right to protest due to an increasing belief that protests are dangerous).

47. See MARC LAMONT HILL, *WE STILL HERE: PANDEMIC, POLICING, PROTEST, AND POSSIBILITY* 64–65 (2020) (describing the tone of the ruling class and the elite reacting to protests as looting and declaring shooting as the way for the state police force to respond); see also HINTON, *supra* note 43, at 4 (noting that dominant groups describe riots with words such as “misguided,” “meaningless,” “irrational,” “pathological,” “spontaneous,” and “uncontrollable”).

48. Wasow, *supra* note 41, at 38 (“I don’t even call it violence when it’s self-defense; I call it intelligence.” (quoting MALCOLM X, *THE AUTOBIOGRAPHY OF MALCOLM X* (1965))) (discussing the disfavor of violent tactics of African Americans by the elite, ruling class).

49. *Id.* at 19, 38.

50. The U.S is not alone in proposing these bills. The Police, Crime Sentencing and Courts bill, also known as the “Police Crackdown” bill in London criminalizes protest that is loud enough to annoy. Deborah Frances-White, Opinion, *What Do We Want? The Right to Noisy Protests. When Do We Want It? Now!*, *GUARDIAN* (June 23, 2021), <https://www.theguardian.com/commentisfree/2021/jun/23/what-do-we-want-the-right-to-noisy-protests-when-do-we-want-it-now> [<https://perma.cc/WL5E-JRU9>].

targeting a small subset of agitators, leaning on language implicating outsiders and anarchists. Second, while some tightly controlled, respectable protests may be recognized as legitimate, often Black-led protests surrounding racial justice are described, without context, as riotous and violent. Black-led protests are exceptionalized, justifying a call for tighter criminal regulation and state controls. Inevitably, this expansion of order-related laws furthers the injustices of discriminatory policing and prosecutorial power and undoes the work of reforms against rampant criminalization.

A. Operation of Exceptionalism in Antiprotest Law

People across the political spectrum may be persuaded that laws criminalizing protest are necessary.⁵¹ Some organizations that are critical of laws arising out of the backlash against racial justice protests nevertheless identify instances where they find protest-related order laws are appropriate.⁵² Justifications have included the perceived need to respond to instances of protests that invoke white supremacist ideals. For example, supporters of racial justice projects may be swayed towards supporting criminal legislation by events such as the January 6, 2021 invasion of the U.S. Capitol.⁵³ The rally to “Unite the Right” in Charlottesville spurred legislation criminalizing those protests that support goals of domestic terrorism.⁵⁴

These distinct forms of protests can easily be conflated with other forms in efforts to gather support for antiprotest criminal laws. As an example, a Kentucky legislator claimed that the laws expanding “disorderly conduct” were responsive to protests related to the police killing of Breonna Taylor and the January 6 “riots” at the Capitol.⁵⁵ The legislators framed the bill as specifically narrowed to address

51. See Daryl Johnson, *State of Virginia Proposes Domestic Terrorism Law*, S. POVERTY L. CTR. (Feb. 16, 2018), <https://www.splcenter.org/hatewatch/2018/02/16/state-virginia-proposes-domestic-terrorism-law> [<https://perma.cc/YRH6-ECHH>] (discussing the support for a domestic terrorism bill across the political spectrum).

52. See *id.* (also explaining that the bill was necessary in response to the August 12, 2017 racist alt-right rally in Charlottesville, Virginia).

53. See, e.g., *id.*

54. H.B. 1601, Reg. Sess. (Va. 2018); see also, Neal Augenstein, *Va. Domestic Terrorism Bill Sparks Hope, Concern*, WTOP NEWS (Jan. 29, 2018), <https://wtop.com/virginia/2018/01/va-domestic-terrorism-bill-sparks-hope-concerns> [<https://perma.cc/5TKZ-E7ES>]; Jake Burns, *Attorney General Backs Bill That Establishes ‘Domestic Terrorism’ Statute*, 06NEWS RICHMOND (Jan. 24, 2018) <https://www.wtvr.com/2018/01/24/attorney-general-backs-bill-that-establishes-domestic-terrorism-statute> [<https://perma.cc/75QX-F4XN>].

55. Celine Castronuovo, *Kentucky Governor Condemns Use of Hitler Quotes in Uncovered Police Training Material*, HILL (Oct. 31, 2020, 12:15 PM) <https://thehill.com/homenews/state->

people “committing criminal acts,” such as “yelling in officer’s face and trying to provoke a response.”⁵⁶

One argument in favor of criminal legislation that has emerged in response to terrorizing demonstrations like white supremacist rallies is that the need to protect vulnerable communities against terrorizing demonstrations may supersede concerns about such laws’ limiting impact on expression. For instance, legal scholar and activist Justin Hansford critiques context-neutral advocacy against hate crime legislation following Charlottesville.⁵⁷ He notes that the response to protestors in Ferguson as contrasted with the response to the rally in Charlottesville shows that First Amendment protections are unlikely to equally benefit protestors for racial justice and protestors attempting to maintain historic racial hierarchies.⁵⁸ Hansford and other scholars argue compellingly that limitations on hate rallies are necessary exceptions to the First Amendment’s broad protections because restricting hateful protests will help silence white supremacist, even if such laws may not protect protestors from subjugated communities.⁵⁹

Yet, as these scholars acknowledge, there is no neutral application of public order protest laws.⁶⁰ White supremacist rallies are not analogous to the demonstrations against police violence and uprisings in 2020, but bill proponents must rely on the criminal legal system to distinguish between the two and allocate punishment accordingly.⁶¹ Criminal regulation has historically been used to

watch/523760-kentucky-governor-condemns-use-of-hitler-quotes-in-uncovered-police [https://perma.cc/L75N-842X].

56. *Id.*

57. See, Justin Hansford, *The First Amendment Freedom of Assembly as a Racial Project*, YALE L.J. F. 685, 709–10 (2018).

58. *Id.*

59. *E.g., id.* at 710–11. Hansford offers that though the laws may be unequally applied at present, the uneven prosecution of hate laws against protestors of color could be documented and tracked. *Id.* at 710. I am wary of the argument that tracking will lead to less disparities in application. Hansford cites to scholars including K-Sue Park, Richard Delgado and Jean Stefancic who also note the uneven application of the First Amendment and support hate speech restrictions. Hansford, *supra* note 57, at 688, 711.

60. See Epps, *supra* note 30.

61. Jacob Sullum, *Prosecuting Trump for Incitement Would Set a Dangerous Precedent*, CHI. SUN TIMES (Jan. 12, 2021, 10:34 AM), <https://chicago.suntimes.com/columnists/2021/1/12/22227285/freedom-of-speech-first-amendment-josh-hawley-incitement-jacob-sullum> [https://perma.cc/8BVT-EEMW]. This article argues that prosecuting incitement to riot in the context of white supremacist rallies like the one inspired by President Donald Trump to protest the election will set a dangerous precedent for charges more likely to be brought in the context of a Black Lives Matter-inspired protest.

maintain racial and social hierarchies.⁶² Even bills framed as protective of vulnerable individuals have been used to the detriment of the most marginalized within those same communities.⁶³ Like all other criminal laws, antiprotest laws are unlikely to be used against the powerful classes or used with equal discretion in communities of color without significant examination or remediation.⁶⁴

Exceptionalism limits the terms of discourse on such laws. Those who subscribe to exceptionalism as a way of thinking about antiprotest laws believe that there is something unique about protest and protestors that warrants specific and enhanced regulation by the state. But exceptionalist views of protest are not necessarily supportive of new legislation.⁶⁵ One might accept that antiprotest laws narrowly target and affect elements unique to mass protest—and still challenge the laws or their speech-abridging effects. Accepting the exceptionalist premise, even as an opponent to protest laws, still restricts the scope of debate on their impact.

Protest exceptionalism views antiprotest laws as narrowly affecting a subset of the population and a subset of activity.⁶⁶ Its targets are people who willfully engage in and incite protest.⁶⁷ Under these conceptions, proponents of new laws argue that the individual bad intent in causing disorder requires an unusually harsh response from the state.⁶⁸ Opponents argue that the laws capture legitimate

62. See Dorothy E. Roberts, *Constructing a Criminal Justice System Free of Racial Bias: An Abolitionist Framework*, 29 COLUM. HUM. RTS. L. REV. 261 (2008).

63. See STAN. L. SCH. L. & POL'Y LAB & N.Y.U BRENNAN CTR. FOR JUST., EXPLORING ALTERNATIVE APPROACHES TO HATE CRIMES 18–36 (2021), http://law.stanford.edu/wp-content/uploads/2021/06/Alternative-to-Hate-Crimes-Report_v09-final.pdf [<https://perma.cc/VX2G-DJLL>]; Lori A. Saffin, *Identities Under Siege: Violence Against Transpersons of Color*, in CAPTIVE GENDERS: TRANS EMBODIMENT AND THE PRISON INDUSTRIAL COMPLEX 141, 153–56 (Eric A. Stanley & Nat Smith eds., 2011) (“By not taking into consideration the ways in which the criminal justice system regulates, pursues, controls, and punishes the poor and communities of color, LGBT hate crimes initiatives reproduce harm and do not end it.”); Motala, *supra* note at 30, at 62 (arguing that antiprotest legislation disproportionately affects Black protestors).

64. See STAN. L. SCH. L. ET AL., *supra* note 63; Saffin, *supra* note 63, at 153–56; Motala, *supra* note 30, at 22.

65. For another example of exceptionalism as value-neutral, see Shadi Hamid, *Is Islam ‘Exceptional’?*, ATLANTIC (June 6, 2016), <https://www.theatlantic.com/international/archive/2016/06/islam-politics-exceptional/485801> [<https://perma.cc/K9YV-37ES>]. Although the author is of the opinion Islam is exceptional in how it relates to law, governance and politics, he does not quite support new legislation or a secularized reformation of it.

66. Cf. Jamelia N. Morgan, *Rethinking Disorderly Conduct*, 109 CALIF. L. REV. 1637, 1646 (2021) (describing early “disorderly conduct” as addressed towards disorderly persons and disorderly public harms).

67. See WILLIAM J. NOVAK, *THE PEOPLE’S WELFARE* 244–45 (1996).

68. See Claire G. Gastañaga, *Why We Can’t Support HB 1601, Domestic Terrorism Legislation*, ACLU VA. (Jan. 24, 2018), <https://acluva.org/en/news/why-we-cant-support-hb-1601-domestic-terrorism-legislation> [<https://perma.cc/E8AE-XRMZ>].

mass protest or are overly harsh in relation to the protest actions.⁶⁹ Proponents focus on protests as volatile, with property destruction and violence as endemic to certain types of protests. Protests, they argue, require close regulation and looming consequences to thwart their natural destructive course. Opponents may instead argue that the deterrent value is outweighed by the chilling impact of the laws.

Protest bill exceptionalism debates center on terms that reinstate and solidify social hierarchies. Exceptionalism surrounding antiprotest bills creates a false boundary between protest-based regulation and regulation in everyday life. This is its own violence in that it ignores the lived harms of many people outside of that context. The language of exceptionalism deludes people that the laws will be narrowly applied to the specific circumstances of protest and that debate must be centered on these terms.

B. Exceptionalist Justifications for the Expansion of Order-related Penal Laws

Proponents of antiprotest laws may argue that protestors and mass protest events involve exceptional characters and behavior and are a particular threat to society, such that they warrant criminal law interventions. The idea of exceptionalism is at the root of justifications for the criminal law system.⁷⁰ The system captures certain behaviors as exceptionally deviant, warranting the stigma of criminal law convictions. Exceptionalism also justifies the punitive aspects of criminal law, such as imprisonment, as uniquely capable of addressing extreme deviance.⁷¹

Legal scholar Alice Ristroph notes that the idea that criminal law addresses exceptional problems has been used to justify the unique horrors of the system.⁷² The notion that criminal law is well-suited to establish order results in

69. See Reid J. Epstein & Patricia Mazzei, *G.O.P. Bills Target Protesters (and Absolve Motorists Who Hit Them)*, N.Y. TIMES (Apr. 21, 2021), <https://www.nytimes.com/2021/04/21/us/politics/republican-anti-protest-laws.html> [<https://perma.cc/B22k-3XXL>]; Billy Corriher, *Southern States' Anti-Protest Bills Face First Amendment Challenges*, FACING S. (July 14, 2021), <https://www.facingsouth.org/2021/07/southern-states-anti-protest-bills-face-first-amendment-challenges> [<https://perma.cc/9GWP-3MD6>]; Nicole Goodkind, *Republican Anti-Protest Laws Sweep Across the U.S.*, FORTUNE (Aug. 13, 2021), <https://fortune.com/2021/08/13/republican-anti-protest-laws-black-lives-matter> [<https://perma.cc/BSF7-CPZQ>].

70. See Alice Ristroph, *Criminal Law as Public Ordering*, 70 U. TORONTO L.J. 70 (2020).

71. *Id.* at 70.

72. *Id.*

overreliance on criminal legal systems.⁷³ Behaviors subject to criminal law are often not exceptional, but rather common acts subject to punishment based on discretionary decisions.⁷⁴ Consequently, the uniquely punitive and reactionary responses of criminal law are not justly applied.⁷⁵

Ristroph notes that what criminal law “does” is vastly different from addressing the extraordinary threats to order and other conceptions that inspire regulation.⁷⁶ As many scholars have noted, most criminal legal regulation targets low-level misdemeanors, often public order laws.⁷⁷ Rather than being a deviation from normative operations of criminal law, concern about order crimes and desire for compliance are the origins of law enforcement in the country.⁷⁸ Fear of extreme disruptions drive public fervor for safety and criminal regulation, and they often are expansive enough to include “ordinary non-conformity.”⁷⁹

In the instance of antiprotest laws inspired by mass protest events, Ristroph’s suggestion encourages the examination of the exceptionalism justifications from the perspective of the actual criminal law interactions incited by the laws, rather than the scenarios they are thought to address.⁸⁰ What antiprotest laws “do” is much broader and more insidious than even their intended applications.⁸¹ Critics might consider the breadth by understanding them as a part of the same tradition of low level public order charges described by Ristroph.

The immense discretion in application of order-related laws means that the individuals they capture may be engaged in ordinary non-conformance, petty disturbances, if any.⁸² The people subjected to the law are more likely seen as “out of place” and deemed disorderly rather than witnessed committing any actually exceptional behavior.⁸³ As Ristroph points out, the eventual use of criminal laws sprawls beyond lawmakers’ intent. Black and other targeted communities are

73. *Id.* at 66–67.

74. *Id.* at 70–71 (describing subject matter exceptionalism).

75. *Id.* at 72 (discussing that claims of exceptionalism of criminal law result in reliance on it without the sorts of analyses that may be employed in determining whether to apply other forms of law to an issue).

76. Ristroph suggests studying the actual drama of interaction with the system rather than its ideals or aspirations. *Id.*

77. *See id.* at 75.

78. *Id.* at 78. “Order [as a noun], perhaps, is the result, or hoped- for result of law.” *Id.* at 65, 78 (describing that policing in the U.S. originated in part to curb racial conflict and protests).

79. Such laws encompass conduct resulting in minimal, if any, social harm. *Id.* at 73–74.

80. *Id.* at 69.

81. *Id.* at 69–70.

82. *Id.* at 73–74.

83. *Id.* at 76.

caught in the net of such laws, which are used in contexts not envisioned by legislatures.⁸⁴

The harmful implications of antiprotest laws are not limited to mass protest activity. Like all other public order criminal laws, new laws driven by mass protest are often vague, broad, and involve a high amount of discretion in application.⁸⁵ They are subject to the same subjective and biased applications as other forms of low-level misdemeanor and public order policing. They are notorious for their disproportionate impact on people of color, people experiencing poverty, and other intensely policed communities.⁸⁶ The addition of new public order laws is itself an example of the dangerous forms of criminal regulation that are at the heart of protests.

Antiprotest laws are depicted as unique and distinct in their aims from general public order laws. The justifications for additional protest-specific public order laws are hollow and easily controverted.

1. Proponents of Antiprotest Laws Frame Laws as Narrowly Targeting Exceptionally Riotous Individuals and Outsider Agitators

Exceptionalism imagines a special participant in protest, a person so dangerous or reckless that they disrupt communal norms to such an extent that they should be singled out for criminal punishment. Often, that exceptional protestor is depicted as an outsider or an anarchist.⁸⁷ Recent bills provide examples of the framing of laws as targeting exceptional individuals.⁸⁸ Language attached to recent antiprotest laws indicates reliance on two frames to push legislation forward: the outsider and the provocateur.⁸⁹

84. *Id.* at 81.

85. Dorothy E. Roberts, *Foreword: Race, Vagueness, and the Social Meaning of Order-Maintenance Policing*, 89 J. CRIM. L. & CRIMINOLOGY 775 (1999).

86. *Id.*

87. Jacey Fortin, *The Long History of the 'Outside Agitator'*, N.Y. TIMES (June 8, 2020), <https://www.nytimes.com/2020/06/08/us/outside-agitators-history-civil-rights.html> [<https://perma.cc/F4NC-4ZYF>].

88. See “Combating Public Disorder,” S.B. 484, 123rd Sess. (Fla. 2021); see also *Anti-Riot or Anti-Protest? Florida Governor Signs Contentious New Bill*, FIRST AMEND. WATCH (Apr. 20, 2021), <https://firstamendmentwatch.org/anti-riot-or-anti-protest-florida-governor-signs-contentious-new-bill> [<https://perma.cc/JP46-XMDT>]. The goal of this law is to silence dissent and create fear among Floridians who want to take to the streets to march for justice.

89. *Id.*; see e.g., H.B. 2309, 55th Leg., Reg. Sess. (Ariz. 2021). This bill would heighten the penalties for a number of charges associated with protests and create a new charge for “violent or disorderly assembly” for people who act “with seven or more other persons...with the intent to engage in conduct constituting a riot or an unlawful assembly, [and cause] damage to

The first linguistic frame is that outsiders are exceptionally dangerous protestors. Language distinguishing outsider protestors from local citizens is an old and common trope. The United Nations Commission on Human Rights states that countries continue to perpetuate the myth that outside agitators and anarchists incite uprisings against police violence.⁹⁰ An article in the New York Times analogized references to “outside agitators” during the summer of 2020 to those made during the Civil Rights Movement.⁹¹

In support of recent bills, officials pin disruptions on outsiders and professional protestors.⁹² One bill targets paid and professional protestors, emphasizing that it applies to only this dangerous group.⁹³ In another, the “riot” boosting law is aimed towards “out-of-state rioters.”⁹⁴ The stated goal of a bill in Texas is to ensure alleged “rioters who traveled to the state of Texas to ‘riot’ with the aim of inciting violence and looting are held accountable.”⁹⁵ Local legislators refer to the dangers of “terrorists” and “rioters” during the introduction of new public order laws.⁹⁶ One legislator proclaimed, “[m]any otherwise peaceful protests are being co-opted by individuals whose goal is to create and escalate uncontrollable confrontation and mayhem.”⁹⁷

property or injury to another person.” This proposed law would make these charges a class six felony, punishable with up to two years in prison if the individual committed them in the context of a “violent or disorderly assembly.” The bill’s current language also posits that protestors would also have to be kept in official custody for twelve hours after the initial arrest.

90. Press Release, Off. of the High Comm’r for Human Rights, UN Human Rights Chief Urges Immediate, Transformative Action to Uproot Systemic Racism (June 28, 2021), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=27218&LangID=E> [<https://perma.cc/U2G6-2CM4>].
91. Fortin, *supra* note 87.
92. See Ruhl, *supra* note 18, at 96.
93. *Id.*
94. Monica Krup, “Riot Boosting”: *South Dakota’s Integration of Environmental, Indigenous, and First Amendment Concerns and the Rhetoric on Protest*, 22 RUTGERS RACE & L. REV. 293 (2021).
95. Patrick Strickland, *Backed by Abbott, Texas Anti-Riot Bill Could Have ‘Chilling Effect’: Rights Group*, DALL. OBSERVER (Mar. 4, 2021, 4:00 AM), <https://www.dallasobserver.com/news/abbott-backed-texas-anti-riot-bill-could-harm-free-speech-say-watchdogs-11991818> [<https://perma.cc/V8K9-8AY6>]. This bill targets trespassers who may not be residents of Texas and heightens penalties for riots.
96. “The purpose of this bill is to prevent lawlessness, not protected free speech.” Dara Kam, *Florida House Panel Backs Protest Bill After Fierce Debate*, FIRST COAST NEWS (Jan. 29, 2021, 11:28 PM), <https://www.firstcoastnews.com/article/news/state/florida-house-panel-backs-protest-bill-after-fierce-debate/77-b929fede-32d0-4c4e-ba44-30eef389a7e2> [<https://perma.cc/64UT-K4N8>] (quoting Florida lawmaker).
97. *Stitt Signs Bill Adding “Unlawful Assembly” to Oklahoma RICO Statutes*, CLAREMORE DAILY PROGRESS (Apr. 29, 2021), https://www.claremoreprogress.com/news/stitt-signs-bill-adding-unlawful-assembly-to-oklahoma-rico-statutes/article_6cd09784-a91f-11eb-a686-c763aaaa97c4.html [<https://perma.cc/H926-U2L6>].

The outsider trope is often inaccurate regarding the resident location of protestors or the impact and intention on nonresident protestors.⁹⁸ Critics of the outside agitator trope point out that it is offensive and untrue to suggest that only outside organizations can coordinate a massive uprising.⁹⁹ The outsider trope minimizes the intensity of local dissent.¹⁰⁰ Often, as was the case during the summer of 2020 uprising, the depiction of protestors as outsiders was factually incorrect.¹⁰¹

Uncritically criminalizing nonresident advocacy is a tactic for reducing oversight of local harms. In many instances of Black rebellion in the United States, protestors were not local residents, as assistance for protests often arrived from supporters outside of the locality.¹⁰² Freedom Riders, for example, came from out

98. Eric Levitz, *We Have Seen the 'Outside Agitator' and He Is Us*, N.Y. MAG.: INTELLIGENCER (June 1, 2020), <https://nymag.com/intelligencer/2020/06/outside-agitators-george-floyd-riots-protests-police.html> [<https://perma.cc/Q3TR-X37D>].

99. Li Zhou, *The Trope of "Outside Agitators" at Protests*, VOX (June 3, 2020), <https://www.vox.com/2020/6/3/21275720/george-floyd-protests-outside-agitators-ferguson-civil-rights-movement> [<https://perma.cc/3Z9V-DXSQ>]; *Unmasking the 'Outside Agitator'*, NPR (June 9, 2020), <https://www.npr.org/2020/06/09/873592665/unmasking-the-outside-agitator> [<https://perma.cc/TW5G-TY94>]. The trope indicates:

these black folks who are protesting are not authentic black folks. And that has a very, very long history of white Southerners saying in the South, we treat our colored people good and our Negroes love us and we love them. Trouble only happens when you have Northerners who come in and tell us that there's something wrong with our traditional folk ways.

Id.

100. As Professor Thomas Holt—quoted in *The Nation*—stated, “[p]art of the motivations for the charge was to sustain the myth that the locals were satisfied with things as they were, and if you could just crack down on the outsiders, the protests would cease. As the movement grew and spread, that myth became more difficult to sustain.” Jeet Heer, *Stop Blaming 'Outside Agitators' for America's Problems*, NATION (June 10, 2020), <https://www.thenation.com/article/society/outside-agitators-antifa-racism> [<https://perma.cc/9779-WHRX>]; Rachel Lippmann, *Just Who Were the Outside Agitators in Ferguson?* ST. LOUIS PUB. RADIO (Aug. 27, 2014), <https://news.stlpublicradio.org/government-politics-issues/2014-08-27/just-who-were-the-outside-agitators-in-ferguson> [<https://perma.cc/68PW-2PD8>].

101. See Audrey McNamara, *St. Paul Mayor Says Earlier Comments About Arrested Protestors Being Out of State Were Not Correct*, CBS NEWS (May 30, 2020, 8:47 PM), <https://www.cbsnews.com/news/minnesota-officials-say-most-people-who-acted-violently-at-protests-are-not-state-residents/> [<https://perma.cc/83J8-LC56>].

102. Fortin, *supra* note 87 (“[T]he concept of ‘outside agitators’ in popular protests has persisted, in part because it is rooted in some truth: Then as now, activists and leaders traveled from city to city to help organize demonstrations or mutual aid programs.”).

of state to participate in protest in the South.¹⁰³ Nonresidents can be legitimate participants in protest, as human rights concerns are not limited by jurisdiction.¹⁰⁴

The second model of the exceptional protestor focuses on people described as provocateurs. References to “anarchists” and “antifa” are a politically expedient way to streamline the passing of criminal laws.¹⁰⁵ State officials depict protestors as lawless hooligans.¹⁰⁶ Officials claim that demonstrators are engaged in “chaos for the sake of chaos” while disregarding the harms leading to protest.¹⁰⁷

The anarchist is intentionally generalized to describe all protestors by many critics of protest who aim to diminish the moral basis of disorderly,

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103. Marian Smith Holmes, *The Freedom Riders, Then and Now*, SMITHSONIAN MAG. (Feb. 2009), <https://www.smithsonianmag.com/history/the-freedom-riders-then-and-now-45351758> [<https://perma.cc/TSV3-PFJ5>].
104. Fortin, *supra* note 87 (quoting Dr. Martin Luther King, Jr., Letter From Birmingham Jail (Apr. 16, 1963)) (“‘Never again can we afford to live with the narrow, provincial “outside agitator” idea,’ Dr. King wrote. ‘Anyone who lives inside the United States can never be considered an outsider anywhere within its bounds.’”).
105. *Id.* Rose City Antifa, the first such group, originated out of A.R.A. (anti-racist action), a youth led movement in Minneapolis in the late 80s. Luke Mogelson, *In the Streets with Antifa*, NEW YORKER (Oct. 25, 2020), <https://www.newyorker.com/magazine/2020/11/02/trump-antifa-movement-portland> [<https://perma.cc/C7X3-VJYP>].
106. Senator Tom Cotton advocated to give “no war for insurrectionists, anarchists, rioters and looters,” lumping all constructs of illegitimate protestors into one class. Libby Cathey, *Backlash After Arkansas Sen. Tom Cotton Pushes Trump to Invoke Insurrection Act in NYT Op-ed: ‘Send in the Troops*, ABC NEWS (June 4, 2020) <https://abcnews.go.com/Politics/backlash-arkansas-sen-tom-cotton-pushes-trump-invoke/story?id=71069575> [<https://perma.cc/P8RB-4T39>]; The NYPD has questioned detainees about their political allegiance to “Antifa” or anarchist principles. Nick Pinto, “*That Happens in Fascist Countries*”: *The NYPD Is Interrogating Protesters About Their Political Sympathies*, GOTHAMIST (June 9, 2020) <https://gothamist.com/news/that-happens-in-fascist-countries-the-nypd-is-interrogating-protesters-about-their-political-sympathies> [<https://perma.cc/8FXZ-PV25>]. After uprisings the summer of 2020, reports demonstrated that almost all arrested persons had no known Antifa claims. See Alanna Durkin Richer, Colleen Long & Michael Balsamo, *AP Finds Most Arrested in Protests Aren’t Leftist Radicals*, ASSOC. PRESS (Oct. 20, 2020), <https://apnews.com/article/virus-outbreak-race-and-ethnicity-suburbs-health-racial-injustice-7edf9027af1878283f3818d96c54f748> [<https://perma.cc/KMK9-6WK2>].
107. Monique Judge, *New York City, Portland, Ore., and Seattle Declared ‘Anarchist Jurisdictions’ by Department of Justice* (Sept. 21, 2020), <https://www.theroot.com/new-york-city-portland-ore-and-seattle-declared-ana-1845129832> [<https://perma.cc/8KZ7-CM4L>]; David Hines, *If Mass Shootings to Provoke Political Panic Catch on, We’re in Serious Trouble*, FEDERALIST (Aug. 9, 2019) <https://thefederalist.com/2019/08/09/mass-shootings-provoke-political-panic-catch-serious-trouble> [<https://perma.cc/WK6U-N57B>]. President Trump tweeted a baseless claim that the seventy-five-year-old man injured by police in Buffalo, New York was a dangerous Antifa member. Luke Darby, *Trump Says the Elderly Man Assaulted by Buffalo Police Was an “Antifa Provocateur”*, G.Q. (June 9, 2020), <https://www.gq.com/story/trump-claims-old-man-antifa> [<https://perma.cc/YZ9W-MPQT>].

confrontational protest.¹⁰⁸ During the uprising in 2020, villainization of anarchists dominated the media.¹⁰⁹ Depictions from outlets ranged from accusing broad swaths of demonstrators of being anarchists to defensively claiming that only a small percentage of anarchists are among protestors.¹¹⁰ Those sympathetic to a cause also adopted negative assumptions about anarchists, arguing that protestors aligned with anarchism detract from the cause.¹¹¹

Casting the legislation as narrowly targeting lawless protestors weakens resistance to the legislation. Protest laws aimed at lawless individuals appear to be race neutral. If anything, a popular archetype is the image of the white male traveling provocateurs, disconnected from the cause.¹¹² This archetype may expand the pool of people willing to support laws that claim to exclusively root out anarchists.¹¹³

While the archetype of the anarchist deployed in media and official accounts may invoke the white provocateur, the resulting policing leads to disproportionate and militarized uses of force against Black people.¹¹⁴ Protestors of color complained that white disrupter provocations were likely to end in police violence against Black protestors.¹¹⁵ Videos show Black protestors asking provocateurs, many white, to limit violent reactions to police.¹¹⁶ A highly

108. Heer, *supra* note 100.

109. Lucy Diavolo, *In the "Anarchist Jurisdiction" of New York City, I've Seen a Summer of Beautiful Anarchy*, TEEN VOGUE (Sept. 22, 2020), <https://www.teenvogue.com/story/anarchist-jurisdiction-new-york-summer-beautiful-anarchy> [<https://perma.cc/PL4Z-X7ZK>].

110. *See* Fortin, *supra* note 87.

111. *Id.*

112. *See* McNamara, *supra* note 101.

113. *Id.* (showing Black leaders also accusing people from the outside of coming in and vandalizing during protests).

114. ACLED, *supra* note 9.

115. Mogelson, *supra* note 105.

116. Josh Skulzacek, *Affidavit: Hell's Angel Member Believed to Be 'Umbrella Man' Spotted Inciting Violence During George Floyd Protests*, KSTP (July 28, 2020), <https://kstp.com/kstp-news/top-news/affidavit-hells-angels-member-believed-to-be-umbrella-man-spotted-inciting-violence-during-george-floyd-protests/> [<https://perma.cc/G5JB-CJB2>]; Mogelson, *supra* note 105 ("People are going to use tonight to say that Black Lives Matter is a bunch of thugs." (quoting protestor)). These examples describe tensions between people of color and more militant white supporters. The fear is that these white protestors will make it riskier for Black community members to protest. *See, e.g.*, Lawrence Glickman, *How White Backlash Controls American Progress*, ATLANTIC (May 21, 2020) <https://www.theatlantic.com/ideas/archive/2020/05/white-backlash-nothing-new/611914> [<https://perma.cc/X73P-DENY>]. But some Black speakers at protests emphasize the use of all methods of protest as legitimate. Mogelson, *supra* note 105. Some accounts include stories of police inaction towards Black the Blue protestors but police

disproportionate number of Black-led protests have been met with government intervention in contrast with all other forms of protest.¹¹⁷

Uninformed overgeneralizations about anarchist activity bolsters efforts to expand public order laws.¹¹⁸ Many of the protests during the summer of 2020 were in fact led by Black organizers with varying anarchist practices.¹¹⁹ Rather than presenting the exceptional dangers justifying legislation, for many, anarchism solidified sentiments of unity, affinity, and support.¹²⁰ Black-led mutual aid and healing, a part of overall resistance efforts, was for some an expression of their anarchist values.¹²¹ Black anarchists developed medical support teams and street medicine.¹²² Ultimately, the expansion of laws, even in a mass protest setting, leads to enhanced danger for those potentially accused of the proscribed activity.

2. Proponents of Antiprotest Laws Decontextualize Violence and Disorder at Protests

Legislators also argue that new antiprotest laws are necessary for combatting the unique danger of disorderly conduct at protests. There is a general expectation of a particular form of order at protests. For many, disorder provides a reason to question the legitimacy of protests, particularly those in Black communities. The public desire for social controls is especially high in the aftermath of Black-led protest.

As L.A. Kauffman details in *How to Read a Protest*, the 1963 March on Washington (the March) is the standard for legitimate civil rights protest.¹²³ The intensely planned, tightly controlled march is seen as a model for appropriate

declarations of “unlawful assembly” against anti-police brutality protestors at the same event. *Id.*

117. ACLED, *supra* note 9.

118. It is strange reasoning to believe that new laws will deter a person who eschews the states’ laws. *See also* Diavolo, *supra* note 109.

119. Fortin, *supra* note 87. This includes protestors who identify their disorderly dissent as a political value and expression of anarchism. Mogelson, *supra* note 105 (describing Portland police rapid response team).

120. Some “are particularly interested in currents of anarchism and anti-authoritarianism that have emphasized the importance of affinities over ideologies.” MONTGOMERY & BERGMAN, *supra* note 40 at 16.

121. WILLIAM C. ANDERSON, *THE NATION ON NO MAP: BLACK ANARCHISM AND ABOLITION 1* (2021).

122. *Id.*

123. L.A. KAUFFMAN, *HOW TO READ A PROTEST: THE ART OF ORGANIZING AND RESISTANCE* 55–56 (2018).

racial justice demonstrations against which others are judged.¹²⁴ Only months after the March, civil rights activists that took the rallies back to their hometowns were told that in contrast to the hierarchically-led, highly controlled March on Washington, their demonstrations were too chaotic or anarchist in tone.¹²⁵

Respectability politics have long played a role in delineating where police misconduct is appropriate. For instance, during protests in the Black community after the 1890's race massacres in New York City's Tenderloin district, Black leaders argued that respectable people were attacked while violent criminals were intentionally left alone by the police who wanted the protest to get out of hand.¹²⁶

Yet violence during civil rights protests frequently occurred in this country's history.¹²⁷ Violence at protests is not meaningless.¹²⁸ There are distinctions in form and purpose.¹²⁹ In *America on Fire*, Elizabeth Hinton argues that violence during the uprisings of the 1960s and 1970s was a tangible threat on which change

124. The March was tightly controlled by organizers, to the point of only allowing preapproved slogans on signs. *Id.* at 45. However, the success of that event was that it cleared the path for more mass marches, including marches that would later embrace greater mix of protest styles. The effort related to that intensive organizing effectively repressed a good deal of local actions and activism. *Id.*

125. Tightly controlled protests were often the result of the work of the large organizations that would lead them. Those types of organizations are not as prominently in existence, often because they have been decimated by attacks. *Id.* at 50 (describing ACORN as an example of an organization destroyed by right-wing attacks).

126. CHERYL D. HICKS, *TALK WITH YOU LIKE A WOMAN: AFRICAN AMERICAN WOMEN, JUSTICE, AND REFORM IN NEW YORK, 1890–1935* (2010) at 275–77.

127. From 1964 to 1972, the U.S. had internal violence on a scale not seen since the Civil War. HINTON, *supra* note 43, at 2. By the end of the 1960s, protests by students at North Carolina A&T State University in Greensboro, where sit-ins began in 1960, involved destruction of property, assaults on officers, and shooting officers in self-defense. *Id.*

128. See Michael Harriot, *Yes, Anti-Fascists Are Violent . . . and Necessary*, ROOT (Aug. 16, 2017), <https://www.theroot.com/yes-anti-fascists-are-violent-and-necessary-1797900724> [<https://perma.cc/GUQ6-WXKK>] (discussing the view that the violence emanating from protest is a way the people have found to be effective in reacting to years of oppression, or in other words, as he describes in this article, the only way to fight bullies is to stand up to them); see also Ryan D. Enos, Aaron R. Kaufman & Melissa L. Sands, *Can Violent Protest Change Local Policy Support? Evidence From the Aftermath of the 1992 Los Angeles Riot*, 113 AM. POL. SCI. REV. 1, 2 (2019) (“However, social scientists often view rioting as a political act and classic studies of riots show that participant aims include demanding redress for political grievances.”). As Hinton indicates, young people using violence during the 1960s were often not viewed as real political actors. HINTON, *supra* note 43, at 12 (“[They] understood their predecessors to have failed.”).

129. See Jeremy Scahill, *Scholar Robin D.G. Kelley on How Today's Abolitionist Movement Can Fundamentally Change the Country*, INTERCEPT (June 27, 2020), <https://theintercept.com/2020/06/27/robin-dg-kelley-intercepted> [<https://perma.cc/V545-D9DV>] (arguing it is especially important to distinguish local protestors from outside dissidents that relish disruption over the cause).

makers could capitalize.¹³⁰ In a study of attitudes following the uprising in Los Angeles after the Rodney King trial, researchers found that Black residents were much more likely to find the uprising justified (35 percent) than white residents (17 percent).¹³¹ A similar trend occurred during uprisings in the 1960s.¹³² Forceful rebellion can be effective political activity, affecting local policy.¹³³ Both supporters and detractors of the uprisings were likely to be more attuned to divestment from Black communities and the need for additional public funding.¹³⁴

Historically, rumor of Black violence during protest has also served as an impetus for punishment.¹³⁵ The belief, fomented through rumor, that property damage is widespread has justified the heavy penalties levied in response.¹³⁶ The trope of Black criminality and property damage at protest often overshadows the injustices at the heart of many protests—fatal instances of state violence against Black people.¹³⁷ A higher portion of polled people believe that protestors related to Black Lives Matter are “trying to incite violence or destroy property” more than other types of protestors, even when there is evidence to the contrary.¹³⁸

130. HINTON, *supra* note 43, at 17.

131. Enos et al., *supra* note 128, at 3. The study also tracked local public-school funding following the uprising and found that white residents were more likely to favor funding as the actions brought the severity of the problem to light. It may also have encouraged funding for initiatives they deemed to “lessen violence,” like education. *Id.* at 4.

132. *Id.*

133. *See id.*

134. *See id.*

135. See ELIZABETH KAI HINTON, LESHAE HENDERSON & CINDY REED, AN UNJUST BURDEN: THE DISPARATE TREATMENT OF BLACK AMERICANS IN THE CRIMINAL JUSTICE SYSTEM, 4 (2018), <https://www.vera.org/publications/for-the-record-unjust-burden> [<https://perma.cc/H5BZ-ED5B>] (arguing that studies have shown that “people with racial associations of crime are more punitive regardless of whether they are overtly racially prejudiced,” in the wake of Black Lives Matter protests and also generally making them more likely to support policies such as the death penalty); see also NAZGOL GHANDNOOSH, RACE AND PUNISHMENT: RACIAL PERCEPTIONS OF CRIME AND SUPPORT FOR PUNITIVE POLICIES 19 (2014), <https://www.sentencingproject.org/app/uploads/2022/08/Race-and-Punishment.pdf> [<https://perma.cc/PW6M-CSQA>].

136. *Id.*

137. Scahill, *supra* note 129; see, e.g., Jiayang Fan, *Telling the Stories of the Protests Here and in Hong Kong*, NEW YORKER (June 23, 2020), <https://www.newyorker.com/news/daily-comment/telling-the-stories-of-the-protests-here-and-in-hong-kong> [<https://perma.cc/M5NK-ZB3U>] (contrasting Hong Kong and U.S. protests in 2020) (describing a reticence in the U.S. to examine the source or protest and instead villainize protestors, “institution[al] and political systems live inside of the stories we tell ourselves”).

138. Sanya Mansoor, *93% of Black Lives Matter Protests Have Been Peaceful, New Report Finds*, TIME (Sept. 5, 2020), <https://time.com/5886348/report-peaceful-protests> [<https://perma.cc/5BJT-VJBE>]. As another example, President Lyndon B. Johnson referred to those who engaged in violence during the 1960s protests as hoodlums and habitual lawbreakers, painting “riots” as fundamentally Black. Yet most instances of mass criminality

Eventually, fictional and decontextualized true accounts of violence or property damage in Black-led protests are used to justify additional laws, which expand existing problems of criminalizing and policing public order laws.

According to protestor accounts, many protestors saw the first sparks of needless violence set by the hands of the state.¹³⁹ Protestors sometimes reacted to frightening tactics, such as kettling, the surrounding and corralling of protestors into a confined space.¹⁴⁰ Those police tactics often incited a fierce backlash from protestors, who described kettling as an example of unnecessary use of force that prompted chaos.¹⁴¹ Kettling was often the reason for blocked roadways—the

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- have been historically perpetrated by white vigilantes, such as during Jim Crow and later. HINTON, *supra* note 43, at 4–5. Government reports in the 1960s indicated that bored “riffraff” were the ones looting. *Id.* at 6. Robin D.G. Kelley writes of a national obsession with Black looting. He also critiques society’s valuing of property over Black life. Scahill, *supra* note 129.
139. See @peopleunitedorg, *Police Brutalized Us After We Stood Up Against Police Brutality and State Murder*, TIKTOK (Oct. 21, 2021), https://www.tiktok.com/@peopleunitedorg/video/7021553481752284421?is_copy_url=1&is_from_webapp=v1&q=policy%20brutality%20during%20peaceful%20gathering%20&t=1654536359149 [<https://perma.cc/TJE4-B4WZ>] (showing footage of police being violent towards protestors, using aggressive language and tactics); see also CATHY LISA SCHNEIDER, POLICE POWER AND RACE RIOTS: URBAN UNREST IN PARIS AND NEW YORK 55 (2014) (“[T]he first response to police violence was nonviolent. Only when the police responded to the nonviolent assembly with violence did the NAACP and CORE lose control of the crowds.”); see also Katherine Rosenberg-Douglas, *What Is ‘Kettling’? It’s a Controversial Tactic to Contain Crowds, and Chicago Police Are Accused of Using It During Downtown Protests*, CHI. TRIB. (Aug. 18, 2020), <https://www.chicagotribune.com/news/breaking/ct-kettling-chicago-police-20200818-bf3qemv6cjgyfkxea6bcxanzqi-story.html> [<https://perma.cc/CM2Q-4AS2>]; Ali Watkins, *‘Kettling’ of Peaceful Protesters Shows Aggressive Shift By N.Y. Police*, N.Y. TIMES (June 5, 2020), <https://www.nytimes.com/2020/06/05/nyregion/police-kettling-protests-nyc.html> [<https://perma.cc/RCD3-NLZL>]; Jill Ament, *Dallas Reporter Says Police ‘Kettling’ Turned Peaceful Protest Chaotic*, TEX. STANDARD (June 2, 2020), <https://www.texasstandard.org/stories/dallas-reporter-says-police-kettling-turned-peaceful-protest-chaotic/> [<https://perma.cc/UED6-5AGG>]; FRANCES FOX PIVEN, WHO’S AFRAID OF FRANCES FOX PIVEN?: THE ESSENTIAL WRITINGS OF THE PROFESSOR GLENN BECK LOVES TO HATE 85 (2011) (“The substantial record of violence associated with protest movements in the United States is a record composed overwhelmingly of the casualties suffered by protestors at the hands of public or private armies.”).
140. FRANCES FOX PIVEN & RICHARD CLOWARD, POOR PEOPLE’S MOVEMENTS: WHY THEY SUCCEED, HOW THEY FAIL 19 (2012).
141. *Id.*; see also Andrew Neal, Sven Opitz & Chris Zebrowski, *Capturing Protest in Urban Environments: The ‘Police Kettle’ as a Territorial Strategy*, 37 SOC’Y & SPACE 1045, 1051–52 (2019) (describing tactics protestors have developed to fight against kettling). Recent instances of kettling include:
- Kettling in North Carolina: Alice Speri, *Ambushed by the Cops: When Police Deliberately Trap Peaceful Protesters*, INTERCEPT (June 2, 2021), <https://theintercept.com/2021/06/02/kettling-protests-charlotte-police> [<https://perma.cc/SLT4-838U>].
 - Kettling in New York: Watkins, *supra* note 139.

blocked roadways then serving as justification for arrests for obstructing traffic.¹⁴² Some commentators have accused protestors of provoking police to encourage police violence and further their cause.¹⁴³ Protesters on the scene of such events testify that often the violence from police was occurring without provocation.¹⁴⁴

The protestor testimonies shift narratives about public safety at mass protest and about the justifications for additional public order laws.¹⁴⁵ As explained by traditional critiques of public order legislation, the application of protest-related public order laws is impossible to grasp without the grounded experiences of people who have been subject to it.¹⁴⁶ Such testimony supports contesting the expansion of new public order legislation in two ways.¹⁴⁷ First, it provides a counter to the narratives of protest and the need for legal controls as exceptionally necessary during mass protest.¹⁴⁸ Second, it also contests criminal law interventions at protests as exceptional and distinct from general public order policing. Decontextualized portrayals of violence at protests fail to interrogate why legitimate protest and the airing of human rights grievances should be met with

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- Kettling in Philadelphia: Vanessa Maria Graber, *What Happened Last Night in West Philly? Demands for Justice, Fire, Kettling by Police*, GENEROCITY (Oct. 28, 2020), <https://generocity.org/philly/2020/10/28/west-philly-protests-walter-wallace-police-violence-kettling-arrests-looting> [<https://perma.cc/56HS-2PYD>].
 - Kettling in Oregon: Sarah Armstrong, *ACLU of Oregon Sues City of Portland for “Kettling” Protesters*, ACLU OR. (Nov. 15, 2017), <https://www.aclu-or.org/en/press-releases/aclu-oregon-sues-city-portland-kettling-protesters> [<https://perma.cc/56HS-2PYD>].
 - Kettling in Texas: Silas Allen, *Kettling Tactic Dallas Police Used Against Protesters Is Steeped in Controversy*, DALL. OBSERVER (June 8, 2020), <https://www.dallasobserver.com/news/dallas-police-protesters-kettling-margaret-hunt-hill-bridge-11916828> [<https://perma.cc/R439-MG2E>].

142. *Id.*

143. Mogelson, *supra* note 106.

144. *Id.*

145. As Hinton writes, following uprisings in 1960s, President Johnson leaned on police as a short-term solution. The administration’s failure to listen to residents in communities where uprisings occurred created harmful policies. As a result, President Johnson’s 1965 War on Crime involved militarized responses to protests. HINTON, *supra* note 43, at 11; see Morgan, *supra* note 66 (recentering harm as a part of “disorderly conduct” policing).

146. See *Protest in the Archives*, BLACK METROPOLIS RSCH. CONSORTIUM (BMRC), <https://bmrc.lib.uchicago.edu/resources/protest-archives> [<https://perma.cc/77CE-7U9Z>]. These protests were in response to the recent murders of Ahmaud Arbery, Breonna Taylor, Tony McDade and George Floyd and its aftermath and laws ensuring more systematic racism and police brutality.

147. *See id.*

148. *See id.*

state force.¹⁴⁹ Instead, local legislators use the chaos that ensues from force to justify further state restrictions on protest.

C. Unexceptional Problems of Protest Laws

Mass antiprotest legislation has resulted in a new buffet of public order-related regulation. Antiprotest laws flood the nation's penal codes just as the country begins to seriously interrogate the merits of low-level criminal regulation, discriminatory impact in public order policing, and systemic power imbalances such as prosecutors' charging decisions. Unfortunately, the expansion of criminal law is much easier than its contraction. This moment of rampant legislation may create intractable codes and policies that will be difficult to reverse.

Public order policing privileges "desirable" members of the community over those intentionally marginalized by local policies.¹⁵⁰ Public order criminal regulations do not just maintain and support the existing power hierarchies but also create them.¹⁵¹ As an example, policing against public sleeping in order to "clean up" neighborhoods means disappearing people whose unhoused condition contributes to an appearance of blight.¹⁵² Public ordering involves the creation of anti-camping laws to maintain the marginalization of unhoused people in the city. Anti-camping laws reduce the issue to a matter of criminal law rather than a public health problem.

Power hierarchies created and supported through public order criminal regulation have direct consequences. Those include an inexhaustible list of harms: arrests, pretrial jailing and bail, days lost to mass processing through criminal court, criminal records, consequences of convictions, and the trauma and loss of stability resulting from incarceration. Many of the most egregious instances of state violence are rooted in low-level criminal regulation.¹⁵³ Youth, people of color,

149. See ELIZABETH HINTON, *FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA* 65 (2016) at 80. Authorities in response to riots expanded laws that imposed curfews on children to adults outside their homes at 8:00 PM proving a legal justification for mass arrests of black protesters.

150. Roberts, *supra* note 85, at 823.

151. *See id.*

152. *See Voters Pass Proposition B, Reinstating Public Camping Ban, Council Direction and Policy*, AUSTINTEXAS.GOV, <https://www.austintexas.gov/department/council-direction-and-policy> [<https://perma.cc/ZB5Z-ZH72>]. In Austin, Texas voters approved a law making it a Class C misdemeanor punishable by a fine for anyone to sit, lie down, or camp in public areas and prohibiting solicitation of money or other things of value at specific hours and location.

153. *See* Laurn Gouldin, *Opinion, Why Is There Over-Policing for Low-level Offenses?*, HILL, <https://thehill.com/opinion/criminal-justice/549902-why-is-there-over-policing-for-low-level-offenses> [<https://perma.cc/5JQK-H4X8>]; Alexandra Natapoff, *Misdemeanors*, 85 S. CAL.

people in low-income areas, and people subject to policing of gender and homelessness are the most susceptible to order-related charges.¹⁵⁴ A central danger of antiprotest legislation is identical to the dangers of discretionary misdemeanor policing.

Diverse interests and unusual coalitions have challenged the expansion of criminal laws in the country. Unlikely allies find common ground in critiquing the number of criminal laws that regulate non-dangerous behavior.¹⁵⁵ Bipartisan legislative efforts have famously led to some reduction of criminal laws.¹⁵⁶ In particular, campaigns for decriminalization have at times enlisted prosecutors to help push legislators towards narrowing the scope of criminal laws.¹⁵⁷

Extensive scholarship covers the ills of public order-related laws, order maintenance, and broken windows or quality of life policing.¹⁵⁸ This body of scholarship centers on the discriminatory impact of the laws and their function in maintaining socioeconomic hegemonies. This includes using criminal law to discourage Black and poor people from using public spaces where their presence is likely to disturb gentrification efforts.¹⁵⁹ Asserting this form of control requires localities to redistribute city services to the criminal law system.¹⁶⁰ The scholarship

L. REV. 1313, 1317 (2012) (attributing the mass criminalization of minority young men to local levels of criminal regulation where the police are effectively empowered to decide not only who will be arrested but who will be convicted).

154. Roberts, *supra* note 85, at 88–89.

155. Darryl K. Brown, *Criminal Law's Unfortunate Triumph Over Administrative Law*, 7 J.L. ECON. & POL'Y 657, 657 (2011); *see also* Kimberly Humphrey, *Criminal Codes Gone Wild*, ACLU (Oct. 20, 2010) <https://www.aclu.org/blog/smart-justice/mass-incarceration/criminal-codes-gone-wild> [<https://perma.cc/8XM9-2WK8>].

156. *But see* Marie Gottschalk, *No Star State: What's Right and Wrong About Criminal Justice Reform in Texas*, 19 SEATTLE J. SOC. JUST. 927 (2021) (arguing that the story of bipartisan reform is incomplete).

157. *See, e.g.*, Carissa B. Hessick, *The Prosecutors and Politics Project Study of Campaign Contributions in Prosecutorial Elections*, CAROLINA L. SCHOLARSHIP REPOSITORY 1 (2019); *see also* Bret Stephens, *Our 'Broken Windows' World*, N.Y. TIMES (Aug. 24, 2021), <https://www.nytimes.com/2021/08/24/opinion/united-states-worlds-policeman.html> [<https://perma.cc/W7HA-T29A>]; Justin Murray, *Prosecutorial Nonenforcement and Residual Criminalization*, 19 OHIO ST. J. CRIM. L. 1 (2022).

158. *See, e.g.*, Roberts, *supra* note 85.

159. *See, e.g.*, Katherine Beckett & Steve Herbert, *Dealing with Disorder: Social Control in the Post-Industrial City*, 12 THEORETICAL CRIMINOLOGY 5, 17, 20 (2008) (casting urban control as spatial governmentality and criminal regulation to contain populations).

160. *See* Nicole Smith Futrell, *Vulnerable, Not Voiceless: Outsider Narrative in Advocacy Against Discriminatory Policing*, 93 N.C. L. REV. 1597 (2014). This article illustrates years of racial subordination manifested through aggressive urban policing practices. *See also* Helane E. Davis, *Broken and Disordered: Selected Critical Readings on Broken Windows Policing*, 36 LEGAL REFERENCE SERVS. Q. 166 (2017) this article provides further basis for the assertion that the opinion that police patrols and legal regulation of public order are key to order

looks at vagrancy laws and their impact since Black Codes in regulating and coercing work from legally freed people.¹⁶¹ Work critiquing the 1990s regimes of broken windows policing of low-level misdemeanors¹⁶² emphasizes the impact on communities of color and the re-entrenchment of marginalization and gentrification through criminalization. Emerging scholarship centers portions of the penal code that lead to public order policing, including “disorderly conduct,” “unlawful assembly,” and contempt laws.¹⁶³

1. Order-related Laws Increase the Discretion of law Enforcement

One characteristic of order-related criminal laws is that they require and delegate discretion to police to determine violations.¹⁶⁴ Whether a violation of the law is alleged depends on whether a person is existing in public in a manner that officers read as suspicious or necessitating interaction and regulation. Low-level public order laws can thus interfere with targeted people’s enjoyment of public space and ability to move freely without interference in public.

An oversized criminal law regime results in criminal liability for activities that many think are lawful. Under these laws, nearly all people are guilty of some offense at some time. The expansion of criminal law regulation enables stops of people deemed suspicious due to race and other factors. The likelihood of being stopped aligns with the agent’s view of people of color, people of limited financial means, gender nonconforming people, youth and other targeted groups as likely criminals.¹⁶⁵ For example, common conduct like “jaywalking” is prohibited in

maintenance in society, despite evidence showing police brutality is used to achieve the aforementioned goal.

161. See Jennifer Roback, *Southern Labor Law in the Jim Crow Era: Exploitative or Competitive?*, 51 U. CHI. L. REV. 1161 (1984); Roberts, *supra* note 85, at 788.

162. See, e.g., BERNARD E. HARCOURT, *ILLUSION OF ORDER: THE FALSE PROMISE OF BROKEN WINDOWS POLICING* (2001); see also Roberts, *supra* note 85; Babe Howell, *Broken Lives from Broken Windows: The Hidden Costs of Aggressive Order-Maintenance Policing*, 33 N.Y.U. REV. L. & SOC. CHANGE 271 (2009).

163. See Morgan, *supra* note 66; see also Rachel Moran, *Doing Away with Disorderly Conduct*, 63 B.C. L. REV. 65 (2022).

164. Sanford H. Kadish, *The Crisis of Overcriminalization*, 7 AM. CRIM. L. Q. 17, 30 (1968) (“Disorderly-conduct statutes vary widely. They usually proscribe such conduct such as riot, breach of the peace, unlawful assembly, disturbing the peace, and similar conduct in terms so general and imprecise as to offer the police a broad freedom to decide what conduct to treat as criminal.”).

165. Katherine B. Spencer, Amanda K. Charbonneau & Jack Glaser, *Implicit Bias and Policing*, 10 SOC. & PERSONALITY PSYCH. COMPASS 50 (2016); Phillip Atiba Goff & Kimberly Barsamian Kahn, *Racial Bias in Policing: Why We Know Less Than We Should*, 6 SOC. ISSUES & POL’Y REV. 177 (2012).

many states' penal codes.¹⁶⁶ The police, however, are unable to stop the large number of people jaywalking daily; officers are instead subjectively selective about when to apply the law.¹⁶⁷ In other instances, some crimes, like “disorderly conduct,” are so vague that people are without guidance on whether they have in fact committed a crime.¹⁶⁸

Police are also able to call upon a host of criminal laws prohibiting harmless conduct to justify unrelated investigations.¹⁶⁹ If an officer wants to further investigate a person they deem suspicious, they may lean on one of many public order laws to compel a stop and search, regardless of whether the officer has objective proof meriting suspicion for another offense.¹⁷⁰ Similarly, if an officer has no probable cause of a crime, but rather their approach or engagement stirs up dissent, they may allege a violation of a public-order law. A violation of a low-level, order-related law permits questioning and search, with investigation justified by a citation. The availability of multiple public order laws impinges on the ability of

166. See, e.g., CAL. VEH. CODE ANN. § 21955 (West 1959) (jaywalking is characterized as a misdemeanor); N.Y. VEH. & TRAF. LAW § 1152 (West 2021) (same); VA. CODE ANN. § 46.2-923 (2021) (same); TEX. TRANSP. CODE ANN. § 552 (West 2007) (same); OHIO REV. CODE ANN. § 4511.50 (West 2021) (same).

167. See e.g., Rebecca J. Rosen, *In Champaign-Urbana, Illinois, 89% of Those Arrested for Jaywalking Are Black*, ATLANTIC (Aug. 24, 2012), <https://www.theatlantic.com/technology/archive/2012/08/in-champaign-urbana-illinois-89-of-those-arrested-for-jaywalking-are-black/261522> [<https://perma.cc/LJK3-Y9TS>]; Gersh Kuntzman, *Jaywalking While Black: Final 2019 Numbers Show Race-Based NYPD Crackdown Continues*, STREETS BLOG NYC (Jan. 27, 2020), <https://nyc.streetsblog.org/2020/01/27/jaywalking-while-black-final-2019-numbers-show-race-based-nypd-crackdown-continues> [<https://perma.cc/J88R-95MC>]; see also Natapoff, *supra* note 153; *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001) (permitting arrests for offenses that carry no jail time).

168. CHRISTY E. LOPEZ, ISSUE BRIEF: DISORDERLY (MIS)CONDUCT: THE PROBLEM WITH “CONTEMPT OF COP” ARRESTS, AM. CONST. SOC’Y FOR L. & POL’Y 8 (2010) (citing CITIZEN COMPLAINT REVIEW BOARD, DISORDERLY CONDUCT ARRESTS MADE BY METROPOLITAN POLICE DEPARTMENT OFFICERS 1, 3–4 (2003)); Darren Botelho, *At Least Two Students Plan to Fight “Riot” Charges*, DIAMONDBACK (Mar. 26, 2010); Ruben Castaneda, *Beating of University of Maryland Student by Police Probed by County Prosecutors*, WASH. POST (Apr. 13, 2010).

169. Morgan, *supra* note 66, at 1645–46.

170. Jeff D. May, Rob Duke & Sean Gucco, *Pretext Searches and Seizures: In Search of Solid Ground*, 30 ALASKA L. REV. 151 (2013); Jeffrey Fagan & Amanda Geller, *Profiling and Consent: Stops, Searches, and Seizures After Soto*, 27 VA. J. SOC. POL’Y & L. 17 (2020). Also see the case of *Terry v. Ohio*, which gave law enforcement officers the right to search people based on a reasonable suspicion. 392 U.S. 1 (1968). In delivering the majority decision, the Warren Court explained that a reasonably prudent officer may make a reasonable search for weapons of a person believed to be armed and dangerous if the officer believes that his safety or that of others is endangered. *Id.* at 28. Also, in *Whren v. United States*, the U.S. Supreme Court held that plain clothed officers may detain a motorist where probable cause exists to believe that a traffic violation has occurred. 517 U.S. 806 (1996).

community members to travel safely and freely without threat of criminal law intervention.¹⁷¹

2. Duplicative Penal Laws Enhance Negotiating Power of Prosecutors

Redundant and overlapping laws are also a result of expanding criminal laws.¹⁷² New laws addressing public order often overlap with existing penal codes. This expansion leads to overcharging and duplicative charging that ratchets up prosecutorial power. Enhanced prosecutorial tools to induce pleas widens the gulf between the power of the state and the ability of individuals to defend themselves against criminal charges.¹⁷³

Redundancy in the penal code occurs when there is more than one criminal charge in the code that can be brought for essentially the same violation. The laws may cover the same activity, but because the laws prohibiting it arise out of different political contexts, one may offer a more severe punishment than another. If political pressures are pushing towards a new law covering an existing crime as a response to protest, it is likely to be more punitive. Criminal law scholars note that redundancy results in a “massive reallocation of power to prosecutors—to detrimental systemic effect.”¹⁷⁴ Redundancy results in different sections of penal codes prohibiting similar conduct with dissimilar consequences. This allows prosecutors to select for the most punitive charge, which can result in biased uses of discretion. It also provides more negotiating power for prosecutors because they can offer a plea to a charge with fewer consequences or ratchet up the stakes by charging violation of a new, but similar law, with more severe consequences.

Charge stacking is another potential negative consequence of redundancy.¹⁷⁵ Police or prosecutors may bring multiple charges against an individual for the

171. See Wayne A. Logan, *The Shadow Criminal Law of Municipal Governance*, 62 OHIO ST. L.J. 1409, 1440 (2001).

172. See generally WAYNE R. LAFAVE, JEROLD H. ISRAEL, NANCY J. KING & ORIN S. KERR, *CRIMINAL PROCEDURE* 126–63, 512–49 (5th ed. 2009) (discussing search and seizure rules).

173. See Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 722 (2005); but see Darryl K. Brown, *Criminal Enforcement Redundancy: Oversight of Decisions Not to Prosecute*, 103 MINN. L. REV. 843 (2018) (calling for greater redundancy among different agencies to address under-enforcement of police crimes and sexual assault).

174. Some states permit individuals to challenge redundant prosecutions. See Andrew Manuel Crespo, *The Hidden Law of Plea Bargaining*, 118 COLUM. L. REV. 1303, 1348–49, 1380 (2018) (citing to William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 507–12, 579–80 (2001)).

175. See Crespo, *supra* note 174, at 1313.

same action.¹⁷⁶ Where charges are stacked, a person charged faces additional punishment based on the one event.¹⁷⁷ A person is more likely to take a deal rather than face trial and potential sentencing for multiple charges.¹⁷⁸ The availability of consecutive sentences is likely to induce plea bargaining. While stacking can be challenged individually in court, these arguments can be complex, requiring representation by counsel.¹⁷⁹ In many places, low-level charges will not trigger free representation from the state.¹⁸⁰

In the case of new mass antiprotect laws, some argue that the laws deemed redundant instead address conduct overlooked by similar, pre-existing laws. Often legislators point out that a new bill focuses on a specific space, for instance, conduct in front of places of commerce, legislative houses, or critical infrastructure.¹⁸¹ Yet, the proffered examples are usually already covered by existing laws. Of those examined since 2015, many were redundant of existing trespass, obstruction of government, “riot,” and destruction of property criminal laws.¹⁸² They purport to target activity covered by some other law, though perhaps not subject to the expanded consequences proponents are seeking.¹⁸³

176. *Id.* at 1323.

177. *Id.* at 1332.

178. *Id.*

179. For instance, counsel for a person charged may argue for severance of charges, raising the efficiency costs to the prosecution of charging multiple crimes. Andrew Manuel Crespo argues that after severance, attempts to try a second case could implicate the law of preclusion. Preclusion through a claim of double jeopardy may then prevent the prosecution from subsequent prosecution of a severed, redundant charge. *Id.* at 1324.

180. Andrew Cohen, *The Right to an Attorney: Theory vs. Practice*, BRENNAN CTR. FOR JUST. (Dec. 20, 2021) <https://www.brennancenter.org/our-work/analysis-opinion/right-attorney-theory-vs-practice> [<https://perma.cc/P2CW-MZRV>].

181. See Mitch Smith & Michael Wines, *Across the Country, a Republican Push to Rein in Protesters*, N.Y. TIMES (Mar. 2, 2017), <https://www.nytimes.com/2017/03/02/us/when-does-protest-cross-a-line-some-states-aim-to-toughen-laws.html> [<https://perma.cc/9QPX-QEAH>].

182. Laura Eastes, *Anti-Protest Bills Could Curb Freedom of Speech or Provide Protection in Oklahoma*, OKLA. GAZETTE (Mar. 15, 2017), <https://www.okgazette.com/oklahoma/anti-protest-bills-could-curb-freedom-of-speech-or-provide-protection-in-oklahoma/> Content?oid=2979832 [<https://perma.cc/2BYG-8HM8>].

183. Smith & Wines, *supra* note 181; *but see* Krup, *supra* note 94, at 17. A “riot-boosting” statute as well as two felony riot statutes were passed in South Dakota with the goal of offsetting any costs incurred by riot-boosting. Yet its effect was to further criminalize citizens who participated, assisted, directed, encouraged, and solicited riots, as well as those who followed direction and forcefully or violently took part in any riot.

Traffic-related laws, termed “anti-obstruction bills,” criminalize interference with traffic.¹⁸⁴ Most states already have laws addressing traffic obstructions.¹⁸⁵ As an example, Oklahoma recently passed a law making it a misdemeanor for an individual to unlawfully obstruct the normal use of any public street, highway, or road.¹⁸⁶ Obstruction of traffic has existed in the state’s motoring and pedestrian code since 1961.¹⁸⁷ Similarly, vandalism bills exist in every state. Laws addressing the takedown of statues and confederate monuments are not necessary enforcement tools but rather an artifact of the culture wars related to monuments of racist figures.¹⁸⁸

Proponents of new bills might argue that new low-level, public order laws have the beneficial effect of deterring prosecutors from trying to fit protest-related activity into codes that are more severely punitive. For instance, new laws might prevent prosecutors from using ill-fitting terrorism statutes to address protests. In the absence of a better fit, it follows that prosecutors might rely on more serious laws. On the other hand, prosecutors may abuse discretion in charging serious existing crimes, threatening protestors with significant time. While reducing the scope of terrorism charges is a valid corollary project, it does not necessarily follow that more laws would reduce the application of severe charges. In fact, charges brought under the new protest laws are likely to be stacked alongside more severe charges.¹⁸⁹

Legislators’ unnecessary replication of criminal laws demonstrates the political appeal of new mass antiprotest legislation. Through the expressive function of the law, protestors are to be doubly forewarned. Support for new bills is likely to be found among property owners, police unions, local prosecutors, as

184. Ruhl, *supra* note 18, at 95 (describing laws that also eliminate liability for hitting obstructers).

185. Caroline M. Moos, Note, *#ProtestersRightsMatter: The Case Against Increased Criminal Penalties for Protesters Blocking Roadways*, 38 MITCHELL HAMLINE L.J. PUB. POL’Y & PRAC. 1, 6–8 (2017).

186. H.B. 1674, 58th Sess. (Okla. 2021).

187. OKLA. STAT. tit. 47, § 11–1003 (2016).

188. Francis Wilkinson, Opinion, *As Monuments to Racism Fall, Trump’s Culture War Falts*, BLOOMBERG (June 7, 2020), <https://www.bloomberg.com/opinion/articles/2020-06-07/falling-monuments-to-racism-are-defeats-for-trump-s-culture-war> [https://perma.cc/J2JM-535C].

189. See Dina Temple-Raston, *Lawyers Charged With Seven Felonies in Molotov Cocktail Attack Out on Bail*, NPR (July 1, 2020), <https://www.npr.org/2020/07/01/882075310/lawyers-charged-with-seven-felonies-in-molotov-cocktail-attack-out-on-bail> [https://perma.cc/NB7R-CUS2]. Police charged Rahman and Mattis not only for being involved in protests but also for more severe offenses like a domestic terrorism case: arson, conspiracy, use of destructive device, civil disorder, making or possessing a destructive device, and the use of explosives during a crime of violence.

well as a public fearful or disapproving of the protests that spur the bills,¹⁹⁰ even if the bills replicate existing law. But the result will be a dangerous imbalance of prosecutorial power in any case where a person is charged.

3. Expanding Criminal law is a Regression From Recent Advances

Recent scholarship on misdemeanors emphasizes the harms of state investment in policing and prosecuting low-level charges.¹⁹¹ Shrinking, rather than expanding, public order offenses is viewed by many government officials and researchers as a way to meaningfully reduce racial and socioeconomic disparities in the system and the fiscal costs of a system heavily populated by people charged with misdemeanors. Efforts to enact new antiprotest laws run counter to these trends. The laws fly in the face of significant research on public safety and equality.

Public order offenses, which are usually somewhat low-level charges, are rife with the problems that characterize misdemeanor justice more generally and lead to the consequences that follow.¹⁹² Counsel is often not assigned.¹⁹³ Juries are not always required at trial.¹⁹⁴ Lawyer and court dockets are so high that constitutional defects in the prosecution's case and exonerating evidence are commonly bypassed.¹⁹⁵ Many people may take plea bargains rather than spend more time in

190. Connor Gibson, *The Police Groups and Fossil Fuel Corporations Lobbying to Criminalize Protest*, NPQ (July 5, 2022), <https://nonprofitquarterly.org/the-police-groups-and-fossil-fuel-corporations-lobbying-to-criminalize-protest> [<https://perma.cc/C6SL-JBLE>]; Alleen Brown, *Law Enforcement Groups Drive Anti-Protest Laws, New Analysis Shows*, INTERCEPT, (May 9, 2021, 8:00 AM), <https://theintercept.com/2021/05/09/police-anti-protest-greenpeace-voting-rights> [<https://perma.cc/5J4U-STR2>].

191. See Matthew Clair, *Book Review: Alexandra Natapoff, Punishment Without Crime: How Our Massive Misdemeanor System Traps the Innocent and Makes America More Unequal*, PUNISHMENT & SOC'Y (2022); Katherine Beckett, *In and Beyond Misdemeanorland*, 38 CRIM. JUST. ETHICS 221 (2019) (reviewing ISSA KOHLER-HAUSMANN, *MISDEMEANORLAND: CRIMINAL COURTS AND SOCIAL CONTROL IN AN AGE OF BROKEN WINDOWS POLICING* (2018)); Jenny M. Roberts, *Crashing the Misdemeanor System*, 70 WASH. & LEE L. REV. 1089 (2013); Irene Oritseweyinmi Joe, *Rethinking Misdemeanor Neglect*, 64 UCLA L. REV. 738 (2017).

192. Joe, *supra* note 191, at 740, 756–70 (stating that persons convicted face consequences such as losing federal student loan assistance, immigration status, public housing, employment, or their social network); see also Natapoff, *supra* note 153; Amber Baylor, *Design Justice in Municipal Criminal Regulation*, 51 N.M.L. REV. 163, 168–70 (2021).

193. Robert C. Boruchowitz, *Fifty Years after Gideon: It Is Long Past Time to Provide Lawyers for Misdemeanor Defendants Who Cannot Afford to Hire Their Own*, 11 SEATTLE J. SOC. JUST. 891, 892 (2013) (describing misdemeanor guilty pleas taken without defense counsel in a variety of jurisdictions).

194. Jessica A. Roth, *The Culture of Misdemeanor Courts*, 46 HOFSTRA L. REV. 215, 215 (2017) (citing *Lafler v. Cooper*, 566 U.S. 156, 170 (2012)) (describing the criminal justice system at the lower levels, as a system of pleas and not of trials, where juries are not often seen).

195. *Id.* at 217–18.

the system fighting charges.¹⁹⁶ The courts, especially the more local courts, are not highly regulated. In many lower courts, judges are not lawyers.¹⁹⁷

Increasing attention has been paid to abolition of low-level public order crimes rather than enhancing law enforcement, prosecution, and adjudication in public order criminal law. In years past, jurisdictions began to remove loitering and vagrancy statutes.¹⁹⁸ Enforcement of these low-level laws, many officials rationalized, relied on biased uses of discretion. More compelling to some, was research that the prosecution of many public order laws bloated the criminal law system the associated costs outweighed perceived benefits of regulation.¹⁹⁹

Scholars and lawyers Jamelia Morgan and Rachel Moran have advocated for removing “disorderly conduct” from the penal codes.²⁰⁰ Eliminating low-level crimes from the penal code can reduce the opportunity for biased regulation and policing. Calls for abolition of these statutes acknowledges the limitations of policing, prosecution, and court reforms.²⁰¹ Shrinking the scope of criminal law’s footprint is the only way to reduce these harms.²⁰²

Examples of reduced criminalization include varied reforms across the country. Such reforms have legalized certain behaviors and, at times, offered retroactive relief to people most affected by public order laws.²⁰³ Some reforms eliminate crimes targeting sex workers.²⁰⁴ More well-known are those which have

196. MALCOLM M. FEELEY, *THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT* 805–07 (1979); Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2496–97 (2004).

197. Alexandra Natapoff, *Criminal Municipal Courts*, 134 HARV. L. REV. 964, 979 (2021).

198. See, e.g., *Senator Wiener’s Legislation to Repeal Discriminatory Loitering Law Targeting Sex Workers Passes Assembly*, SENATOR SCOTT WIENER (Sept. 10, 2021), <https://sd11.senate.ca.gov/news/20210910-senator-wiener%E2%80%99s-legislation-repeal-discriminatory-loitering-law-targeting-sex-workers> [https://perma.cc/RT7J-TGNA]; Jimmy Vielkind, *New York Repeal of Anti-Prostitution Loitering Statute Is Approved*, WALL ST. J. (Feb. 2, 2021), <https://www.wsj.com/articles/new-york-repeal-of-anti-prostitution-loitering-statute-passed-by-lawmakers-11612303523> [https://perma.cc/PQJ8-ALUG].

199. Mary Fleck & Aaron Stagoff-Belfort, *Reducing Policing’s Footprint?* VERA INSTITUTE OF JUSTICE 1, 4–6 (2021) <https://www.vera.org/downloads/publications/reducing-policings-footprint.pdf> [https://perma.cc/H4W6-VCEY].

200. Morgan, *supra* note 66; Moran, *supra* note 163.

201. *Id.*

202. *Id.*

203. See Deborah M. Ahrens, *Retroactive Legality: Marijuana Convictions and Restorative Justice in an Era of Criminal Justice Reform*, 110 J. CRIM. L. & CRIMINOLOGY 379, 425 (2020).

204. See Chelsea Cirruzzo, *The Case for Decriminalizing Sex Work*, U.S. NEWS (Jan. 11, 2021), <https://www.usnews.com/news/health-news/articles/2021-01-11/calls-mount-to-decriminalize-sex-work-in-the-interest-of-public-health>; Aaron Katersky, *New York City Moves to Dismiss Hundreds of Prostitution Cases, Decriminalize Sex Work*, ABC NEWS (Mar.

decriminalized or legalized marijuana and expunged marijuana convictions.²⁰⁵ In other places, city and town councils have addressed certain crimes of poverty, for example through the elimination or reduction of public sleeping ordinances.²⁰⁶ Some states legislatures have reduced order-related crimes in schools, such as disruption of class.²⁰⁷ Others have eliminated archaic prohibitions, such as laws criminalizing the possession of gravity knives often carried and used by day laborers.²⁰⁸

It cannot be assumed that all states are engaged in narrowing their criminal laws. There is also renewed advocacy for public order criminal laws even outside of the context of mass protest. After experiments with decriminalization of crimes of poverty, some cities have recriminalized in the interest of maintaining public order norms.²⁰⁹ Some critics have recently questioned the scholarship on “broken windows” policing and challenged the claim that it has a racist impact.²¹⁰ In many instances, the reprisal of public order laws indicates frustration with the slow movement of and underinvestment in alternative legal frameworks.²¹¹

Despite broad consensus on the problems of expansive criminal law regimes, few crimes are removed from the books.²¹² The actual reduction of criminal legal regulation is often not in the form of the elimination of criminal statutes.²¹³

16, 2021), <https://abcnews.go.com/US/york-city-moves-dismiss-hundreds-prostitution-cases-decriminalize/story?id=76494315> [<https://perma.cc/NTV9-M9L7>].

205. See Kyle Jaeger, *St. Louis Lawmakers Move to Decriminalize Marijuana Possession and Cultivation*, MARIJUANA MOMENT (Nov. 22, 2021), <https://www.marijuanamoment.net/st-louis-lawmakers-move-to-decriminalize-marijuana-possession-and-cultivation> [<https://perma.cc/BX4G-BZVX>].

206. Overcriminalization can also lead to regulation of things best left to other agencies, such as social services. Kadish, *supra* note 164, at 19–30.

207. Amber Baylor, *Criminalized Students, Reparations, and the Limits of Reform*, 99 WASH. U. L. REV. 1229, 1230–31 (2022).

208. Jesse McKinley, *The ‘Gravity Knife’ Led to Thousands of Questionable Arrests. Now It’s Legal*, N.Y. TIMES (May 31, 2019), <https://www.nytimes.com/2019/05/31/nyregion/ny-gravity-knife-law.html> [<https://perma.cc/P7VH-2MA8>].

209. See Stephanie Sy & Frank Carlson, *Texas’ Homeless Suffer Due to Lack of Public Housing as Public Camping Is Criminalized*, PBS: NEWS HOUR (Aug. 26, 2021), <https://www.pbs.org/newshour/show/texas-homeless-suffer-due-to-lack-of-public-housing-as-public-camping-is-criminalized> [<https://perma.cc/RRS7-B3LU>].

210. See Stephens, *supra* note 157.

211. See Sy & Carlson, *supra* note 209; Joseph Hauger, *Oakland Council Passes Sidewalk Obstruction Law*, GARRETT COUNTY REPUBLICAN (Aug. 6, 2020), https://www.wvnews.com/garrett-republican/news/oakland-council-passes-sidewalk-obstruction-law/article_d7bae83d-8ce8-5e8d-a439-088707f91c64.html [<https://perma.cc/VUG4-4ZRT>].

212. See Stuntz, *supra* note 174, at 854, stating that despite the agreement that there has been the overcriminalization of various forms of conduct, legislators regularly add to criminal codes, but rarely subtract from them.

213. Logan, *supra* note 171, at 1415.

Instead, statutes are modified to “depenalize,” or remove incarceration as an option. Some modifications add procedural protections that limit the scope of enforcement.²¹⁴ In some jurisdictions, “decriminalization” efforts result in the use of civil penalties rather than criminal ones.²¹⁵ In many places, the crimes remain on the books, but agency enforcement policies are altered to reflect public pressure to reduce criminal law interventions within the jurisdiction.²¹⁶

Judicial review and decisions invalidating low-level crimes are also rare.²¹⁷ Often, they are not challenged at trial or on appeal because the charges target people with the fewest resources and least ability to retain counsel where one is not assigned.²¹⁸ In many instances, people appear *pro se*, resulting in quick resolution and little judicial review.²¹⁹

Undoing mass antiprotest legislation after reconsideration is difficult. The problem with laws remaining on the books, even where policy discourages enforcement, is that legally, they still provide justification for stops and other criminal law interventions.²²⁰ The promise of decriminalization, towards greater equality and less discrimination in law enforcement, can only be partially met through enforcement policy.²²¹ As long as pretextual stops are permitted, and *passé* laws remain on the books, biased regulation will exist.²²² The rash expansion of criminal laws in response to protest is likely to leave a lasting, harmful legacy even after the wisdom of such laws is reconsidered.

II. ANTIPROTEST LAWS’ IMPACT IN EVERYDAY LIFE

Critiques of new mass protest laws center on their impact on protestors. This Article argues that the legislation passed in the aftermath of protest is likely to exacerbate problems in discriminatory criminal regulation outside of the context

214. Baylor, *supra* note 207, at 173.

215. Natapoff, *supra* note 153, at 1374.

216. See e.g., Matt Goodman, *Dallas City Council Approves Cite and Release Policy*, D MAG. (Apr. 12, 2017), <https://www.dmagazine.com/frontburner/2017/04/dallas-city-council-approves-cite-and-release-policy> [<https://perma.cc/9T92-VZ7S>].

217. Nancy J. King & Michael Heise, *Misdemeanor Appeals*, 99 B.U.L. REV. 1933, 1939 (2019).

218. *Id.* at 1946.

219. Kadish, *supra* note 164, at 28.

220. See *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001) (allowing a Texas seat belt law to justify the warrantless stop, seizure, and arrest of the petitioner and her child despite Fourth Amendment protections).

221. Logan, *supra* note 171, at 1440–43 (discussing possibility of the implementation decriminalization policies in localities through policy and the immense institutional benefits it presents).

222. *Id.* at 1457–58

of protests. As Barbara Ransby writes, people on the corner having a political discussion could fall within the ambit of recent protest laws.²²³ Expanding the critique of mass protest laws beyond protests demonstrates the expansive nature of mass protest legislation. Such laws increase the vulnerability of communities subject to violence—which is often the cause of racial justice uprisings.²²⁴

This Part applies the critiques of antiprotest criminal regulation to the everyday regulation of highly surveilled communities and individuals. It provides examples of the violative operation of these laws outside of the context of mass protest. New antiprotest laws result in increased penalties that affect the communal health and advancement of targeted and historically oppressed people likely to be subjected to the laws outside of the context of mass protest.

A. Existing Critiques in the Context of Mass Protest Applied to Everyday Life

Current critiques of antiprotest legislation focus on the mass protestor. These center on constitutional violations, expansion of punishment, and evidence of targeting marginalized demonstrators and Black demonstrators. This Subpart considers these critiques and notes that these components are echoed in everyday public order regulation. The impact of these new laws demonstrates that they are simply an expansion of invasive, everyday public order policing and surveillance.

While much examination of confrontation of power centers around “big moments,” examination of the everyday recognizes “everyday people” as political actors.²²⁵ It opens the conversation of resistance to daily or common practices.²²⁶ Focusing on “the everyday” links state politics to daily operations and, some social movement theorists argue, allows us read ordinary or ephemeral acts as having

223. Sharon Zhang, *Republicans Have Introduced 81 Anti-Protest Laws in 34 States Just This Year*, TRUTHOUT (Apr. 21, 2021), <https://truthout.org/articles/republicans-have-introduced-81-anti-protest-laws-in-34-states-just-this-year> [https://perma.cc/VN4Z-JMQ9] (this was in response to recent Florida antiprotest laws which are similar to many antiprotest laws around the country).

224. HINTON, *supra* note 43, at 13–14 (stating that in the late 1960s to early 1970s, rebellions usually started when law enforcement intervened, usually violently, in the everyday life of a resident).

225. Xavier Guillaume and Jef Huysmans, *The Concept of ‘The Everyday’: Ephemeral Politics and the Abundance of Life*, 54 COOP. & CONFLICT 278, 287 (2019); Sandra Mathison, *Resistance in the Quotidian Life: With Special Attention to Daily Life in Schools*, 23 CULTURAL LOGIC: MARXIST THEORY & PRACTICE 55 (2019).

226. Guillaume & Huysmans, *supra* note 225, at 288; ANNA JOHANSSON & STELLAN VINTHAGEN, CONCEPTUALIZING ‘EVERYDAY RESISTANCE’: A TRANSDISCIPLINARY APPROACH 19 (2020) (explaining that everyday resistance is about exploring how people act in their everyday lives to undermine power and not about large-scale, organized, collective resistance).

politically significant meaning.²²⁷ It helps us understand individual responses to state-imposed norms.

The problems of aggressive regulation of protests are replicated in the everyday lives of people outside of a mass protest. This overlap is described below, indicating the susceptibility of communities to mass antiprotest public order laws. Rather than focus on differentiation between mass protestors and people not engaged in organized protest, the overlapping susceptibility of protestors and people in targeted communities is exactly the site of vulnerability to antiprotest law in nonprotest times. In other words, the increased vulnerabilities of a protestor during a demonstration heighten the likelihood that highly surveilled communities will be affected by mass protest-targeted laws.²²⁸

It is not a new argument to point out that the safety concerns of the protestor are fused to the everyday lives of Black people.²²⁹ Many scholars note the relationship of criminal law regulation driven by protest and how it affects people's everyday lives. Organizers in the 1960s linked daily, oppressive criminal law practices to their difficulties recruiting people to participate in public protests.²³⁰

In *America on Fire*, Hinton also argues that modern policing in Black communities is derived from the militarization and surveillance that followed the 1960s rebellions.²³¹ The goal of government was to prevent uprisings through police presence.²³² Hinton further points out that everyday policing practices and injustices can be the incitement to rebellion.²³³

Critiques centered on the new public order laws generally fall into three categories. A number of constitutional challenges to the laws exist, most

227. Guillaume & Huysmans, *supra* note 225, at 286–87.

228. See, e.g., Amended Complaint, *West Philadelphia Protestors v. City of Philadelphia*, No. 2:20-cv-03431 (E.D. Penn. Sept. 16, 2020), <https://www.naacpldf.org/wp-content/uploads/As-filed-Amended-Complaint.pdf> [<https://perma.cc/7RFJ-BWWM>] (detailing police use of force during the 2020 uprisings in Black neighborhoods outside the context of mass demonstration).

229. See SAIDIYA HARTMAN, *WAYWARD LIVES, BEAUTIFUL EXPERIMENTS: INTIMATE HISTORIES OF SOCIAL UPRISINGS* 261 (2019) (“Was her fate to remain trapped within the impoverished realm of realism, or worse, confined in the sociological imagination that could only ever recognize her as a problem? And even in absence of wrongdoing found her guilty?”).

230. KWAME TURE & CHARLES V. HAMILTON, *BLACK POWER: POLITICS OF LIBERATION IN AMERICA* 10–12 (1992).

231. The Anti-Riot Act was passed in the aftermath of rebellions in the 1960s. Adams, *supra* note 19.

232. HINTON, *supra* note 43, at 15.

233. Elizabeth Hinton, Opinion, *Will We Ever Get Beyond ‘The Fire Next Time’?*, *N.Y. TIMES* (May 23, 2021), <https://www.nytimes.com/2021/05/21/opinion/police-violence-floyd-protests.html> [<https://perma.cc/BJT7-CCZ2>].

prominently arising from First Amendment and Fourth Amendment concerns, that have implications for daily life.²³⁴ Another body of critique examines the expansive nature of the laws. Of note, additional collateral consequences are likely to limit the economic and social health of the most vulnerable communities.²³⁵ Finally, the protest laws have already been demonstratively discriminatory—a fact that tracks with the rest of criminal law in application.²³⁶

Commonly expressed concerns with new antiprotest laws center on constitutional violations. While this Article does not focus in depth on constitutional analyses, it is worth noting that many arguments as to the constitutionality of the laws are derived from those formulated in critiques of general public order legislation outside of the protest context.²³⁷ These include

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234. See, e.g., Casey Bruce-White, Nadege Green & Ella Wiley, *Civil Rights Groups File Lawsuit Challenging Florida's Anti-Protest Law*, NAACP LDF (May 11, 2021), <https://www.naacpldf.org/wp-content/uploads/FL-H.B.-1-Lawsuit-Release.pdf> [<https://perma.cc/9WYU-BNJL>]; Ellie Silverman, *ACLU Helps Photojournalists Sues D.C. Officers Over Use of Chemical Irritants and Stun Grenades During Racial Justice Protests*, WASH. POST (Aug. 12, 2021), <https://www.washingtonpost.com/dc-md-va/2021/08/12/aclu-lawsuit-dc-police-protest> [<https://perma.cc/9R8Y-NDDH>].
235. Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. REV. 457 (2010); Carrie Levine, *New Anti-Protest Laws Cast a Long Shadow on First Amendment Rights*, CTR. PUB. INTEGRITY (Dec. 20, 2021), <https://publicintegrity.org/politics/new-anti-protest-laws-cast-a-long-shadow-on-first-amendment-rights> [<https://perma.cc/5U4J-ZR39>] (describing how convictions under antiprotest laws could potentially empower authorities to shut down peaceful protests and arrest nonviolent participants and charge them, which would seriously limit free speech and also suppress any form of public demonstrations); Carolyn L. Todd, *Why Police Brutality Is a Public Health Issue*, SELF (June 17, 2020), <https://www.self.com/story/police-brutality-public-health-issue> [<https://perma.cc/F5MG-K923>]; Sirry Alang, Donna McAlpine, Ellen McCreedy & Rachel Hardeman, *Police Brutality and Black Health: Setting the Agenda for Public Health Scholars*, 107 AM J. PUB. HEALTH. 662, 663 (2017).
236. Moran, *supra* note 163, at 65. Many of these critiques apply not just to new laws but also to existing mass protest laws. Existing laws are not necessarily better. At the very least, people should be wary of states passing new mass protest laws. Dismantling current mass protest laws should be a corollary project to protecting communities against protest activity policing.
237. See *Dakota Rural Action v. Noem*, 416 F. Supp. 3d 874 (D.S.D. 2019) (holding that riot statutes were unconstitutionally vague and thus impermissibly chilling of the plaintiffs' ability to protest construction of petroleum pipeline across the State); see also *United States v. Miselis*, 972 F.3d 518 (4th Cir. 2020), *cert. denied*, 141 S. Ct. 2756 (2021), and *cert. denied sub nom. Daley v. United States*, 141 S. Ct. 2756 (2021) (holding that the overbreadth of the Virginia Riot Act in relation to protected First Amendment speech was substantial, and conduct intended to "encourage" a riot did not bear the requisite relation between speech and lawlessness to constitute unprotected speech under the First Amendment, so the Anti-Riot Act was thus overbroad with respect to its prohibition on conduct intended to encourage a riot).

criminal law statutes that infringe on the right to speech and assembly and individualized suspicion requirements.²³⁸

First Amendment challenges to order-related laws often focus on infringement on expression. Many critics of public order laws note that the proposed mass antiprotest bills are overly broad.²³⁹ Public order laws' description of prohibited conduct is so expansive that it incorporates legitimate activity.²⁴⁰ Overbreadth is not just unconstitutional because it curbs lawful speech. The statutes require enforcers to distinguish on their own the boundaries between lawful and unlawful speech.²⁴¹ The U.S. Supreme Court clearly stated that this discretion would largely be used to unconstitutionally restrict the content of the speech and discriminate between the speakers.²⁴²

While critiques of antiprotest laws center on the context of mass demonstration, the violations described often are echoed in everyday criminal regulation. One is the everyday surveillance of people of color and use of regulation to return individuals to their place in social hierarchies. Another is the

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238. John Inazu, *Unlawful Assembly as Social Control*, 64 UCLA L. REV. 2, 10 (2017). More recent First Amendment cases have been confined to violations of free speech while ignoring its implications for assembly. Moos, *supra* note 185, at 4.
239. *See, e.g.*, *Boos v. Barry*, 485 U.S. 312, 108 S. Ct. 1157, (1988) (holding that District of Columbia Code which prohibited congregations and the display of signs within 500 feet of a foreign embassy which tended to "bring that government into public odium or public disrepute" violated the first amendment with regard to the restrictions of the sign displays); *see, e.g.*, *Dream Defenders v. Governor of Florida*, 21-13489 (11th Cir. 2023) (upholding preliminary injunction granted by the district court on enforcement of the Section 870.01(2) "riot" statute as overbroad and potentially extending liability to all participating in a demonstration).
240. *See State v. Johnson*, 475 S.W.3d 860 (Tex. Crim. App. 2015) (holding that the flag destruction statute prohibited a substantial amount of activity that was protected by the First Amendment and was unconstitutionally overbroad); *Gottschalk v. State*, 575 P.2d 289 (Alaska 1978) (holding that Criminal Libel Laws in the state were unconstitutional for being overly broad and restricting the defendant's first amendment rights to speech); *see also City of Wichita v. Trotter*, 316 Kan. 310 (2022) (holding that licensing ordinances were overly broad in violation of the First Amendment).
241. Another objection may be made that the laws are vague in that they do not clearly grant individuals notice of what is illegal and an opportunity to comply. Although vagueness challenges have been brought against such laws, many courts find the language sufficiently clear. *Compare* *U.S. v. Matthews*, 173 U.S. 381 (1899) (relying on the fact that enforcement will know a grave danger when they see it), *with Coates v. City of Cincinnati*, 402 U.S. 611 (1971) (where a state supreme court convicted Coates of loitering in breach of city laws, noting that the word 'annoying' as used in the loitering law was a widely used and well understood word, Coates argued that the law violated due process and the First Amendment because it was vague infringed on the freedoms of assembly and association and the Supreme Court of the US agreed and invalidates it).
242. *Broadrick v. Oklahoma*, 413 U.S. 601 (1973).

criminalization of gatherings. Moreover, police use of force can make compliance with antiprotest laws impossible.

1. Oppressed People's Presence is Disruptive to Those at the Peak of Power Hierarchies

As a person of color, you are aware of the ways your presence is deemed transgressive in your daily activities.²⁴³ You are often cognizant of being viewed through a lens of danger, justifying surveillance.²⁴⁴ Your presence could trigger concern over property, such as, trespass, vandalism, or theft.²⁴⁵ Skin color, gender nonconformity, socio-economic signaling, and other factors impact your ability to escape police suspicion.²⁴⁶ That suspicion may motivate an officer to stop you. You may draw the unwanted attention of a concerned citizen or store employee who calls the police on you due to your imbued danger.²⁴⁷ This occurs even in your own community.²⁴⁸ Your presence in spaces where you are not desired is deemed disruptive. Your behavior may be read by enforcers as being outside of the norms

243. HARTMAN, *supra* note 229, at 250 (noting that vagrancy laws dictated that if Black or poor, you were assumed criminal).

244. Vincent Southerland, *The Master's Tools and a Mission: Using Community Control and Oversight Laws to Resist and Abolish Surveillance Technologies*, 70 UCLA L. REV. 2, 14–17 (2023) (describing police surveillance technologies and experiences of racial control); SIMONE BROWNE, DARK MATTERS: ON THE SURVEILLANCE OF BLACKNESS 63 (2015) (describing lantern laws); Amber Baylor, *Boynton v. Virginia and the Anxieties of the Modern Africa-American Customer*, 49 STETSON L. REV. 315, 332–35 (2020) (describing the lasting legacy of Black customer susceptibility to policing and the limitations of important Civil Rights era protections).

245. Baylor, *supra* note 244; HARTMAN, *supra* note 229, at 270 (describing the ways the emphasis on property solidified white hegemony).

246. Morgan, *supra* note 66, at 1658–59 (“[M]arginalized groups are more vulnerable to police contact and violence because members of these groups often have non-normative identities to which stereotypes of criminality and presumptions of disorder apply.” (quoting Devon W. Carbado, *Blue-on-Black Violence: A Provisional Model of Some of the Causes*, 104 GEO. L.J. 1479, 1497 (2016))); JOEY L. MOGUL, ANDREA J. RITCHIE & KAY WHITLOCK, QUEER (IN)JUSTICE: THE CRIMINALIZATION OF LGBT PEOPLE IN THE UNITED STATES 23 (2012); ANDREA J. RITCHIE, INVISIBLE NO MORE: POLICE VIOLENCE AGAINST BLACK WOMEN AND WOMEN OF COLOR 57 (2017).

247. Baylor, *supra* note 244, at 318; Taja-Nia Y. Henderson & Jamila Jefferson-Jones, *#LivingWhileBlack: Blackness as Nuisance*, 69 AM. U. L. REV. 863, 865 (2020).

248. HINTON, *supra* note 43, at 46–49 (describing the beginning of and resistance to the War on Crime in the nation's housing projects).

of that space.²⁴⁹ Hegemonic, order-related norms harm communities of color.²⁵⁰ The impact of these public order laws is immense.²⁵¹

Legal scholar Jamelia Morgan describes the impact of policing disorderliness. First, the policing of disorderly conduct, like the common law regime before it, continues to target historically marginalized groups. In this way, disorderly conduct laws enforce discriminatory norms for behavior and, in doing so, “reinforce social hierarchies based on race, gender, sexual orientation, and disability.”²⁵² More critically aligned with this Article’s central argument is Morgan’s description of normative conceptions of community which often exclude marginalized peoples.²⁵³ Behavior norms are not universal, nor is the regulation of such norms evenly applied. Instead, vague language allows for individual perception of orderly norms to be enforced. New public order bills aimed at protest heighten the everyday consequences of vague public order regulation.²⁵⁴

The protestor is seen as disrupting regular business. Many bills penalize protestors for disrupting regular business and infringing on property ownership rights.²⁵⁵ They prohibit disturbance of business or government operations.²⁵⁶ Often protest and dissent are regulated through the invocation of property interests despite their impact on free speech.²⁵⁷ This has justified race-based exclusion of people²⁵⁸ and enables law enforcement officials to evade the

249. Morgan, *supra* note 66, at 1648–49, 1652 (identifying norms as social context for behavior and describing unhoused people charged with “disorderly conduct” for camping in affluent areas). Enforcers may be residents, business owners, police, or agencies. See Norrinda Brown Hyatt, *Section 8 Is the New N-Word: Policing Integration in the Age of Black Mobility*, 51 WASH. U. J.L. & POL’Y 61, 69–71 (2016).

250. Morgan, *supra* note 66, at 1642.

251. For historical rendering of the impact of vagrancy laws, see HARTMAN, *supra* note 229, at 288. Hartman observed that “[t]he discretionary power granted the police in discerning future crime would have an enormous impact on black social life and the making of the ghetto.” *Id.* at 476.

252. Morgan, *supra* note 66, at 1642.

253. *Id.* Morgan cites Hutchison to point out that Black community members might also have internalized and expressed support for dominant behavioral norms. *Id.* at 1662.

254. Laws are based on social norms that are not necessarily shared by all in the designated community. *Id.* at 1657.

255. See, e.g., H.B. 1324, 65th Leg. Assemb., Reg. Sess. (N.D. 2017); H.B. 2128, 56th Leg., 1st Sess. (Okla. 2017).

256. See, e.g., H.B. 2150, 87th Leg., Reg. Sess. (Tex. 2021).

257. See Jenny E. Carroll, *Graffiti, Speech, and Crime*, 103 MINN. L. REV. 1285, 1303 (2018) (using graffiti as an example of expression regulated under property law rather than First Amendment jurisprudence).

258. Henderson & Jefferson-Jones, *supra* note 247, at 875–76; see also *Ward v. Rock Against Racism*, 491 U.S. 781 (1989).

protections offered for speech-based dissent.²⁵⁹ The U.S. Constitution bans prohibition of speech and laws infringing on speech with a few caveats.²⁶⁰ The First Amendment does not prevent the criminalization of all expressive activity. The government is permitted to regulate the time, place, and manner of speech activities—though, with few exceptions, this regulation cannot be based on the identity of the speaker or the content of the speech. One exception to the content neutral requirement is that expression likely to incite violence is not protected.²⁶¹ Violence in protest is generally not protected.²⁶² The current regime does not prize expressive rights over those of private property owners.²⁶³ This type of regulation is often not neutrally applied. Many scholars have argued that the regulation of speech based on content tends to further criminalize dissenting Black individuals.²⁶⁴

The bills are likely to have a chilling effect on protest.²⁶⁵ A number of recent bills are directed to this disruptive function. For instance, bills criminalize “caus[ing] public inconvenience, annoyance or alarm” or “creat[ing] a hazardous condition that serves no legitimate purpose.”²⁶⁶ The D.C. “riot” act prohibits conduct that “[p]oses a ‘grave’ danger of injury or property damage.”²⁶⁷ A court

259. See *Papineau v. Parmley*, 465 F.3d 46, 57 (2d Cir. 2006) (describing how protesters in this case posed no “clear and present danger” of immediate harm or violence because they made no threats to the police or anyone else, they did not incite violence or disorder, and they had no dangerous weapons).

260. *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) (“fighting words” not protected by the First Amendment); see Etienne Toussaint, *Blackness as Fighting Words*, 106 VA. L. REV. ONLINE 124, 143–45 (2020) (describing the fighting words exception and its application to Black people viewed through a lens of criminality explaining that some words incite an immediate breach of the peace, and consequently, are deemed unprotected speech under the First Amendment’s freedom of speech).

261. Kevin Francis O’Neill, *Disentangling the Law of Public Protest*, 45 LOY. L. REV. 411, 474–84 (1999); *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

262. *Brandenburg*, 395 U.S. at 452.

263. See Carroll, *supra* note 257, at 1304.

264. Toussaint, *supra* note 260, at 157.

265. Ruhl, *supra* note 18.

266. For more on the constitutionality of such charges, see Moran, *supra* note 163, at 24. “Broadly conceived, disorderly conduct is conduct that disrupts public order or creates a risk of disorder.” Morgan, *supra* note 66, at 1641. For more on the history of “disorderly conduct,” see *id.* (describing origins in “common law offenses, such as breach of peace, affray, unlawful assembly, and public nuisance”).

267. This includes protesters who are kettled and cannot leave. See Gabe Rottman, Opinion, *Memo to D.C.: Protesters Are Not Rioters*, WASH. POST (Feb. 4, 2018), https://www.washingtonpost.com/opinions/memo-to-dc-protesters-are-not-rioters/2018/02/04/449e51cc-0862-11e8-94e8-e8b8600ade23_story.html [https://perma.cc/RB5D-ZRXG].

must rely on the police or prosecutors' allegation of a grave danger, even when no resultant harm has occurred.²⁶⁸

2. Gatherings are Deemed Dangerous and Individualized Suspicion is Eroded

Under antiprotest laws, gatherings are deemed distinctly dangerous.²⁶⁹ Gathering with friends can lead to accusations of gang involvement.²⁷⁰ Misfeasance alleged against one member of the group will be transferable to other members as well.

Since the days of slave codes, Black assembly has been criminalized.²⁷¹ If someone has been in the criminal legal system, gathering with others can be deemed a violation of post-conviction terms that risks their liberty. The existence of a free Black community that gathered autonomously and in support of each other was a counter to the white supremacist assertion that Black subjugation is inevitable.²⁷² As Hinton points out, many policing tactics developed in response to the unrest and violence of the 1960s include daily policing practices of breaking up large groups.²⁷³

268. U.S. v. Matthews, 419 F.2d 1178 (D.C. Ct. App 1969) (relying on the idea that enforcement will know a grave danger when they see it).

269. HINTON, *supra* note 43, at 25 (detailing how the 1968 rebellion in Fort Wayne started from a police order to disperse at a recreation center).

270. Problems of suspicion based on association with a group already plague public order regulation. Gang laws are applied to groups of people, particularly young people of color. BERNARD E. HARCOURT, *ILLUSION OF ORDER: THE FALSE PROMISE OF BROKEN WINDOWS POLICING* 2–5 (2001) (describing the 1992 Chicago Anti-Gang Loitering Ordinance). Gang laws have been critiqued for criminalizing by association in a manner not permitted by general rules of conspiracy. Police “gang experts” claim to be able to determine individual engagement in a gang, including factors such as “five or more people” and “meeting on a regular basis.” A determination that one is in a gang erodes requisite individualized suspicion. Fareed Nassor Hayat, *Preserving Due Process: Require the Frye and Daubert Expert Standards in State Gang Cases*, 51 N.M. L. REV. 196, 212–14 (2021).

271. Sarah Blunkosky, *Unlawful Assembly and the Fredericksburg Mayor’s Court Order Books, 1821–1834*, at 3 (May 1, 2009) (M.A. Thesis, Virginia Commonwealth University) (on file with Virginia Commonwealth University) (describing a Virginia law in 1840 prohibiting all assemblages of slaves, negroes, and mulattoes from mixing during the day or night as unlawful assemblies); Edwin Olson, *The Slave Code in Colonial New York*, 29 J. NEGRO HIST. 147, 147 (1944).

272. Blunkosky, *supra* note 271, at 32.

273. Moynihan has stated that where Black people cluster, “law and order have only a tenuous hold.” HINTON, *supra* note 43, at 6. Where youth congregated was seen as an ideal place to “patrol and arrest,” and 1971 Albuquerque is another example. *Id.* at 41–42. There is also a distinction in accounts of Black targeting in contrast to white peers. Gang enforcement, however, expanded in 1970s. *Id.* at 231.

Antiprotest laws affect not only expressions of dissent, but also gatherings and effervescence of joy, sharing, and expression.²⁷⁴ As in Englewood, the exchange of literature and singing during a community cleanup can be suffocated under the expansion of these laws. Or in another example, thirty young Black and Latinx people, wearing matching t-shirts in honor of their recently passed friend, were apprehended on their way to a wake.²⁷⁵ The police and prosecutor initially alleged that the group was guilty of charges commonly used against protestors: stopping traffic and blocking sidewalks.²⁷⁶ The students were arrested by police and many were detained overnight.²⁷⁷ Later, the allegations were challenged by witnesses.²⁷⁸ While the charges for most of the teenagers were dropped, many spent days in police custody following arrest.²⁷⁹ In another instance, covered in Christy Lopez's tract on "contempt of cop charges," two young Black people skipping and dancing outside of a basketball game were accused of running and screaming in an unruly matter and contempt of officers.²⁸⁰ They brutalized the young people with police batons, causing a concussion during arrest.²⁸¹ Ultimately, video footage showed that outside of dancing, all the young people did was reach innocently towards a police horse.²⁸²

A number of statutes enhance liability for protestors that are identified as a member of a group.²⁸³ Obstruction of traffic laws, such as those used against the

274. Henderson & Jefferson-Jones, *supra* note 247, at 885. Historically, Hartman writes, [t]he problem of crime was the threat posed by the black presence in the city; the problem of crime was the wild experiment in black freedom; and the efforts to manage and regulate this crisis provided a means of solidifying and extending the color line that defined urban space, reproducing the disavowed apartheid of everyday life.

HARTMAN, *supra* note 229, at 476.

275. NYCLU *Calls on NYPD to Investigate Mass Arrest of Brooklyn Youth*, ACLU (June 8, 2007), <https://www.aclu.org/press-releases/nyclu-calls-nypd-investigate-mass-arrest-brooklyn-youth> [<https://perma.cc/3SUQ-EQX9>].

276. Andy Newman, *No Charges for Most of the 32 Arrested on Way to Wake*, N.Y. TIMES (Jan. 29, 2008), <https://www.nytimes.com/2008/01/29/nyregion/29arrest.html> [<https://perma.cc/LEF9-MASA>].

277. *Id.*

278. *Id.*

279. ACLU, *supra* note 275.

280. LOPEZ, *supra* note 168, at 78–79.

281. *Id.* at 79.

282. *Id.*

283. See "Combating Public Disorder," S.B. 484, 123rd Sess. (Fla. 2021); S.B. 912, 87th Leg., Reg. Sess. (Tex. 2021). These Florida and Texas state laws have enhanced penalties for protestors acting as members of a group through their expansive definitions of riots to include three or more people and by imposing such penalties due to the concert to act together. Oklahoma law,

students headed to the funeral and the Englewood cleanup volunteers, are used as a workaround to the right to assembly.²⁸⁴ Though pitched as addressing the feared, uncontrollable mass of protestors, in reality, the numbers required for prosecutions related to mass protest are not large. The numbers of people gathered for riot charges are different in each jurisdiction. In Texas, the number is seven.²⁸⁵ In a bill proposed by Florida's governor, three or more comprise a "mob."²⁸⁶

Groups are targeted in unlawful assembly and riot laws. Unlawful assembly laws are similar to riot statutes with the distinction being that unlawful assembly covers future unlawful actions and riot covers groups that have already engaged in an unlawful action.²⁸⁷ Assembly laws often specify that the person charged must have engaged in a violent or unlawful action with others.²⁸⁸ Often, police arrest people, alleging unlawful assembly or riot, without specifying the other alleged actors or unlawful action.²⁸⁹ Some states have done away with threat of violence as a part of assemblage and instead charge people for assembly when others have caused minimal interruption, such as blocking thoroughfares.²⁹⁰ Even where violence requirements exist, people are often arrested and processed despite lack of violence.²⁹¹ The charges may not be prosecuted and those apprehended may ultimately avoid conviction, but the damaging intervention of the system will have occurred.²⁹²

The expansion of liability for the actions of others in a group invokes First and Fourth Amendment concerns.²⁹³ Unlawful assembly laws prohibit gathering for a future criminal action. Early formations of the laws required that the feared lawbreaking be "violent or tumultuous."²⁹⁴ The amount of discretion over what

H.B. 1674, Leg. Assemb., Reg. Sess. (Okla. 2021), and Tennessee law, S.B. 902, 110th Gen. Assemb. (Tn. 2017), criminalize obstruction.

284. See Ruhl, *supra* note 18, at 95; De Jonge v. Oregon, 299 U.S. 353 (1937).

285. S.B. 912, 87th Leg., Reg. Sess. (Tex. 2021).

286. "Combating Public Disorder," S.B. 484, 123rd Sess. (Fla. 2021).

287. Inazu, *supra* note 238, at 10.

288. *Id.* at 14.

289. *Id.* at 5–14.

290. See Owens v. Commonwealth, 512 S.W.3d 1 (Ky. Ct. App. 2017) (finding an "unlawful assembly" statute overly broad).

291. Inazu, *supra* note 238, at 34–35.

292. *Id.* at 35.

293. For descriptions of increased civil liability, see Motala, *supra* note 30.

294. In that the action, if uncurbed, would result in a riot. Inazu, *supra* note 238, at 14. Other early treatises on the law emphasized inciting terror in the people—namely, a "crime by open force." *Id.* at 15. Modern "unlawful assembly" laws neglect three important elements that once constrained the enforcement of unlawful assembly: (1) a fear of harm that disturbs the peace; (2) the likelihood of severe harm; and (3) the contemplated use of force or violence. *Id.* at 18.

constitutes unlawful activity in early unlawful assembly laws may have been responsive to fears of rebellion where the police had little power.²⁹⁵ The laws provide a preemptive tool, enabling police action before a group's misfeasance grew out of the control of the small police force. In our current context, such laws are dangerously deferential to law enforcement—particularly with the training and military-level tools available to police.²⁹⁶

“Unlawful assembly” is often deployed as a powerful tool of social control.²⁹⁷ As law professor John Inazu points out, unlawful assembly statutes require law enforcement to use discretion to determine where individuals would engage in a crime not yet committed.²⁹⁸ Often, police discretion in determining what constitutes a lawful gathering as opposed to an unlawful assembly results in a racially biased decision.²⁹⁹ Inazu points to instances of police arresting protestors without sufficient evidence of violent conspiracies or future conduct related to such charges.³⁰⁰ The statutes are too open to discretion, at times easing the way for suspicion-less arrests.³⁰¹ Inazu emphasizes that now courts often deal with overbreadth challenges by shifting the burden to the charged person, giving them the duty to disassociate themselves from the group.³⁰² Similarly, incitement and riot-boosting statutes are so vague that people cannot know when they may run afoul of the law.³⁰³ The right to assemble in daily life is undermined by recent antiprotest laws.

3. Inability to Comply may be Deemed Failure to Comply

Targeted protestors will be subject to the costs of the use of force against them.³⁰⁴ Statutes reduce liability for harm against protestors.³⁰⁵ The statutes also

295. *Id.* at 8.

296. *Id.* at 8, 48–51.

297. *See id.* at 7.

298. *Id.*

299. *Id.* at 46–47.

300. *Id.* at 5–6 (citing to cases of a notable activist in Ferguson, Missouri, Vietnam and Iraq anti-war demonstrators in Washington D.C., and labor organizers in Arizona, among others).

301. *See* Moos, *supra* note 185, at 6–7.

302. Inazu, *supra* note 238, at 22.

303. *Id.* at 20 Krup, *supra* note 94, at 6.

304. *See* POLICE BRUTALITY: AN ANTHOLOGY 9–10 (Jill Nelson ed., 2001); James W. Mullally, *The Problem of Police Brutality*, 10 SANTA CLARA LAWYER 168, 168–71 (1969); Desiree Alexander, *Resisting Arrest: Shifting the Focus of the New York Police Department*, 19 BERKELEY J. AFR.-AM. L. & POL'Y 47, 21–41 (2017).

305. For example, Oklahoma antiprotest law, H.B. 1674, 58th Sess. (Okla. 2021), affords protection to motorists who cause injury or death to protestors from criminal liability.

allocate the costs of the use of force against the protestor to the protestor.³⁰⁶ Their displeasure, as expressed, may be the source of police conflict and criminal charges.³⁰⁷ Unsurprisingly, Black people are more likely to be charged with resisting arrest.³⁰⁸ Similarly, disability, especially in a body already coded as criminal, may be penalized harshly.³⁰⁹

Perceived failure to comply with police requests is charged under laws like “resisting arrest,” “obstruction of governmental administration,” or “interference with police activity.”³¹⁰ In the context of protest, tactics like kettling make it impossible for protestors to disperse.³¹¹ A target’s inability to comply may go unnoticed or unappreciated. Any movement may be interpreted as a threatening movement.³¹² Similarly, in non-protest life, there may be no safe way to comply.

In some instances, disability inhibits compliance.³¹³ Language differences also complicate compliance.³¹⁴ Physical resistance may be a rational response to

306. See Scott Holmes, *Resisting Arrest and Racism - The Crime of Disrespect*, 85 UMKCL REV. 625, 4–8 (2017).

307. In addition to the typical “disorderly conduct” expansions of antiprotest law, new bills criminalize speech addressed towards public figures. *North Dakota Enacts Law Ensuring Colleges and Universities Fulfill Their First Amendment Obligations*, FIRE (Apr. 19, 2021), <https://www.thefire.org/news/north-dakota-enacts-law-ensuring-colleges-and-universities-fulfill-their-first-amendment>. Reviews of recent bills reveal a host of concerns about the consequences of perceived non-compliance. See Adams, *supra* note 19; Toussaint, *supra* note 260, at 126.

308. Lisa Cacho & Jodi Melamed, *How Police Abuse the Charge of Resisting Arrest*, BOS. REV. (June 29, 2020), <https://bostonreview.net/articles/lisa-cacho-jodi-melamed-resisting-arrest> [<https://perma.cc/9XN4-S7QK>].

309. See Jamelia N. Morgan, *Policing Under Disability Law*, 73 STAN. L. REV. 1401, at 1671 (2021).

310. See Lopez, *supra* note 168, at 53–71; ALEXANDRA NATAPOFF, PUNISHMENT WITHOUT CRIME: HOW OUR MASSIVE MISDEMEANOR SYSTEM TRAPS THE INNOCENT AND MAKES AMERICA MORE UNEQUAL 3 (2018); Morgan, *supra* note 66, at 1640–41.

311. Watkins, *supra* note 139.

312. See e.g., *Amadou’s Story*, AMADOU DIALLO FOUND., <http://amadoudiallofoundation.org/amadou-story.html> [<https://perma.cc/F2M2-GKFT>] (describing the police shooting an unarmed Black man 41 times after he reached for his wallet); Lex Scott (@lethallex), TIKTOK (Apr. 10, 2020), https://www.tiktok.com/@lethallex/video/6814135894954528006?is_copy_url=1&is_from_webapp=v1&q=Black%20people%27s%20experiences%20with%20police&t=1654701685424 [<https://perma.cc/7GMD-BN5C>] (showing a Black woman saying that Black people should not have to comply with the police to avoid being killed).

313. Morgan, *supra* note 309, at 1673–74; see Lucy Tompkins, *Here’s What You Need to Know About Elijah McClain’s Death*, N.Y. TIMES (Jan. 18, 2022), <https://www.nytimes.com/article/who-was-elijah-mcclain.html> [<https://perma.cc/VDT4-W2VE>].

314. Paul Krueger, *Barriers to Justice: How Spanish-Speaking Suspects Are at Risk During Police Interrogations*, NBC SAN DIEGO (June 8, 2018), <https://www.nbcsandiego.com/news/local/barriers-to-justice-how-spanish-speaking-suspects-are-at-risk-during-police-interrogations/148314> [<https://perma.cc/N5GX-2PVE>].

aggression, based on the historical reality of violence from police or incarceration.³¹⁵ The discretion in determining violation of the terms of compliance lies with law enforcement.³¹⁶

New laws allowing for criminalization of dissent towards officers justifies otherwise baseless arrests and harmful uses of force. These are often disproportionately charged against marginalized groups.³¹⁷ Some scholars argue that the law permits expression of dissent to police activity.³¹⁸ Yet often these expressions of dissent are used to legitimate uses of force.³¹⁹

Mass protest policing assesses risks on people wishing to gather, engage in free speech and expression of dissent. A more insidious impact of greater protest legislation is the levy it imposes on people in surveilled communities every day. Consciously or not, many people are forced into the daily decision between forms of expression and being with others that risks subjecting themselves to criminal law interference on the one hand or attempting to minimize contact with the criminal law system through self-censure and repression of gathering and expression on the other.³²⁰

B. New Antiprotest Laws Expand Punishments in Multiple Realms

Many of the new bills sparked by racial justice protests expand the potential consequences for violation of public order laws. The punishments increase the risk for those charged, in a few ways, including (a) enhancing the level of an

315. See Omavi Shukur, *The Criminalization of Black Resistance to Capture and Policing*, 103 B.U. L. Rev. 1 (2023).

316. *Id.*; Toussaint, *supra* note 260, at 135–40 (“Use of these so called ‘fighting words’ removes First Amendment protection, whether the speech is directed at a police officer or at a civilian.”).

317. LOPEZ, *supra* note 168, at 75–76. “In Seattle, Washington, a 2008 investigation by the *Post-Intelligencer* found that prosecutors had dropped nearly half of all cases in which the sole charge was ‘obstructing a public officer.’ The news investigation found also that half of all such arrests were of African Americans, even though Seattle is predominately white.” *Id.*

318. See, e.g., Daniel Denvir, *Everyone Has the Right to Mouth Off to Cops*, BLOOMBERG CITYLAB JUST. (July 24, 2015), <https://www.bloomberg.com/news/articles/2015-07-24/insulting-a-police-officer-is-not-a-crime> [https://perma.cc/5C5C-A23K].

319. Wasow, *supra* note 41, at 11 (“Protest tactics that included violence in self-defense were generally seen by black nationalists as a legitimate and essential tool in the repertoire of resistance against institutionalized racism.”); HINTON, *supra* note 43, at 90 (citing to ROBERT WILLIAMS, *NEGROES WITH GUNS* (1962)); Toussaint, *supra* note 260, at 147.

320. See *Commonwealth v. Warren*, 475 Mass. 530 (Mass. 2016) (finding that jogging away from police is rational and not a basis for reasonable suspicion).

offense; (b) increasing allowed punishments; and (c) implementing punitive consequences beyond sentencing on the case.³²¹

Often legislation creates crimes that are similar to existing ones, but mandate more severe consequences. Legislators have added time to offenses to further deter and punish. Some bills enhance crimes charged from misdemeanors to felonies. Some new legislation solely creates collateral consequences for existing laws. The language surrounding these bills tends to imply that they are justified by the unique nature of mass protest.

As an example, a Texas bill creates a new class of felonies, changing a charge “participating in a riot” from a Class B misdemeanor to a state jail felony, in an alleged effort to separate “peaceful protestors” from looters.³²² States seek harsher punishments for traffic offenses,³²³ for instance, enhancing potential sentences for obstruction of government up to one year jail.³²⁴

In other examples, the bills include penalties far beyond the realm of traditional sentencing. These are often collateral consequences to a conviction.³²⁵ Consequences may include barriers to educational loans and benefits³²⁶ or the elimination of eligibility for some state jobs.³²⁷ In Florida, the “Combating Public Disorder” law denies protestors bail until first appearance, mandating detention.³²⁸

Ristroph claims that part of the point of public-order regulation is to “order” people, to assign them to a lower social and political status due to the effects of conviction.³²⁹ This ordering places significant obstacles in the path of people most likely to be under enforcement. Felony enhancements have a devastating effect on

321. Many people recognize these impacts as collateral consequences. See Pinard, *supra* note 235, at 511–16.

322. H.B. 2747, 87th Leg., Reg. Sess. (Tex. 2021); see *State Rep. Brooks Landgraf Files Bill to Enhance Penalties for Rioters*, CBS 7 (Mar. 1, 2021), <https://www.cbs7.com/2021/03/01/state-rep-brooks-landgraf-files-bill-to-enhance-penalties-for-rioters/> (describing that the state representative claims the law is meant to protect rights of protestors by penalizing unlawful protest); see also “Combating Public Disorder,” H.B. 1, 123rd Sess. (Fla. 2021) (enhancing incitement to riot to a 3rd degree felony).

323. Ruhl, *supra* note 18, at 95.

324. *Id.*

325. See *id.*; David McElhatten, *The Proliferation of Criminal Background Check Laws in the United States*, 127 AM. J. SOCIO. 1037, 1084 (2022) (asserting that these consequences include ineligibility for federal welfare benefits, public housing, student loans, employment opportunities, disenfranchisement, and various forms of civic exclusion).

326. Adams, *supra* note 19.

327. *Id.*

328. “Combating Public Disorder,” H.B. 1, 123rd Sess. (Fla. 2021).

329. Ristroph, *supra* note 70.

employment options.³³⁰ Increasing carceral and financial punishments further entrench targeted communities in the criminal legal system. The consequences in many bills would directly affect access to advancement through education by mandating suspension or expulsion of violators in public schools.³³¹

The language of exceptionalism has facilitated the expansion of criminal laws following mass protest.³³² New mass antiprotest public order laws will inevitably impact the everyday lives of intensely policed communities, disproportionately based on race and socioeconomic status.³³³ Mass protest exceptionalism is thus used to justify significant consequences and obstacles in the path of the targeted communities.

Why examine the impact of mass protest legislation on nonprotest daily life? First, the exact dimensions of nonprotest life for many targeted communities are not always expressly understood or acknowledged by nonimpacted people. Second, to the extent that people view protest as optional, this analogy demonstrates that the laws will not be narrowly applied to those who opt into the protest. Finally, while negative tropes of protest abound somewhat unchallenged, tropes of criminality in communities of color are more obviously problematic. The tropes of exceptionally dangerous people and events at a protest cannot justify the sprawl of these public order criminal laws into non-protest regulation.

For many, there is no such thing as a life free from the confrontations that appear during mass protest. Antiprotest legislation does not just chill speech. It has a potential impact on curbing the everyday life of people whose existence and movement are viewed as disruptive and dangerous.

III. TROUBLING THE BOUNDARY BETWEEN PROTEST AND EVERYDAY LIFE

The nonexistent boundary line between aspects of protest and everyday life is apparent from the experiences of people heavily impacted by criminal

330. See Pinard, *supra* note 235; McElhattan, *supra* note 325.

331. See, e.g., H.B. 269, 2017 Leg., Reg. Sess. (La. 2017). This bill prohibits promotion to the fourth grade of certain students whose reading deficiencies have not been remedied by the end of the third grade.

332. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 522–23 (1989) (Scalia, J., concurring) (noting the “social reality . . . that racial discrimination against any group finds a more ready expression at the state and local level than at the federal level”).

333. Pinard argues that the racist roots of collateral consequences explain their dominance in the U.S. despite the negative impact on dignity. Pinard, *supra* note 235, at 470; see also McElhattan, *supra* note 325, 1038–44.

regulation.³³⁴ Noting this connects the importance of protecting expression and assembly at mass demonstration to protecting historically oppressed people's ability to live freely and assertively in everyday life.³³⁵

Sociologist Javier Auyero writes of the intimate relationship of the everyday with protest.³³⁶ Auyero explores the idea of repertoires of resistance. Repertoires of resistance describe different ways a subordinated groups make claims for greater selfhood, including but not limited to group protest.³³⁷ This is a framework developed in social movement theory. Auyero emphasizes that contentious routines are related to everyday life's routines.³³⁸ Repertoires of resistance can describe the daily routines of those unintentionally engaged in formal protest.³³⁹

Repertoires of resistance helps to describe the overlaps and shared goals and dangers between individual, less conscious action and formal mass action events. This idea is helpful in frameworks that expand the definition of protest to include oppressed people's everyday assertion of dignity. "Joyful protest" is one framework that explores these repertoires of resistance, in the everyday and at mass social justice actions.

A. Joyful Protest Traverses Mass Demonstrations and Everyday Resistance

This Part describes joyful protest as a framework that incorporates both mass demonstration events and everyday assertions of dignity. The joyful protest framework helps to explore and understand the day-to-day impact of antiprotest legislation. In doing so, the section argues that the costs of such legislation are not just enhanced penalties, but the loss of life-sustaining gatherings, expression, and resistance.

334. STEVPHEN SHUKAITIS, *IMAGINAL MACHINES: AUTONOMY & SELF-ORGANIZATION IN THE REVOLUTIONS OF EVERYDAY LIFE* 15 (2009) ("The everyday has this essential trait: it allows no hold. It escapes. It belongs to insignificance, and the insignificant without truth, without reality, but perhaps also the site of all signification . . . hence the weight and enigmatic force of everyday truth." (quoting Maurice Blanchot)).

335. See e.g., Nayyera Haq, *If You're Not Black in America, Protesting Is the Easy Part*, WASH. POST (June 16, 2020), <https://www.washingtonpost.com/outlook/2020/06/16/george-floyd-black-protest> [<https://perma.cc/LUV8-6PXF>].

336. Auyero, *supra* note 16, at 419.

337. "Tilly sees the repertoire as the whole set of means that a group has for making claims of different kinds on different individuals" and as "collective claim-making across time and space." *Id.* at 421 (quoting Charles Tilly, "they do not descend from abstract philosophy . . . they emerge from struggle").

338. Repertoires are the link between the "the impact of structural change on collective action and the transformation of the culture of popular protest." *Id.* at 421.

339. See *id.* at 431.

Joyful protest is a concept explored within movements and academic literature examining resistance activities. The idea of joyful protest, as developed by people engaged in resistance, is considered by some to be a practice expanding the possibilities of protest. The framework draws into question public order norms and their relationship to the maintenance of social hierarchy. For this reason, it is useful to consider joyful protest, a framework that traverses mass protest and everyday life, and the potential impact of increased antiprotest regulation.³⁴⁰

Joy is but one aspect of an uprising.³⁴¹ One may argue that it should not be given preeminence above the rest of the expressive range that occurs across protest, which exhibits a complex mix of motivators.³⁴² Protestors and theorists have warned against conflating symbols of happiness and expressive protest.³⁴³ Scholarship on joyful protest centers less on the exact quality of the emotion expressed, but rather on the impact of the affect of joy.³⁴⁴ As an internalized feeling or aspect, joy is an important motivator. Yet a second type of joy, the affect, is the active expression, differentiated from the passively experienced joy.³⁴⁵ It is

340. “People who talk about revolution and class struggle without referring explicitly to everyday life, without understanding what is subversive about love and what is positive in the refusal of constraints, such people have a corpse in their mouth.” RAOUL VANEIGEM, *THE REVOLUTION OF EVERYDAY LIFE* 19 (1967).

341. See Josh Williams & Matthew Croasmun, *Justice Somewhere: Local Lament and Joyful Protest in New Haven, CT*, YALE CTR. FAITH & CULTURE (June 13, 2020), <https://faith.yale.edu/media/justice-somewhere-local-lament-and-joyful-protest-in-new-haven-ct> [<https://perma.cc/4DTX-TLZW>]; Elize Manoukian, Ellen Moynihan & David Goldiner, *Black Parents March to Demand Racial Justice in NYC Child-Welfare System*, DAILY NEWS (June 20, 2020), <https://www.nydailynews.com/news/politics/ny-protest-black-lives-matter-20200620-sqiyn27g45fn7jyuynwrmyd7la-story.html> [<https://perma.cc/4WAV-KF5U>]; Soares, *supra* note 40.

342. See Kristie Soares, *The Political Implications of Playing Hopefully: A Negotiation of the Present and the Utopic in Queer Theory and Latina Literature*, in *THE UN/MAKING OF LATINA/O CITIZENSHIP* 121, 121–44 (Ellie D. Hernández & Eliza Rodríguez y Gibson eds., 2014). Other feminist movements and other expressions of Latina consciousness reflects their positions on issues of national importance for which their voices must be heard.

343. Siobhan Burke, *Dancing Bodies That Proclaim: Black Lives Matter*, N.Y. TIMES (June 9, 2020), <https://www.nytimes.com/2020/06/09/arts/dance/dancing-protests-george-floyd.html> [<https://perma.cc/6556-KV4E>]. Similarly, dances such as Ojibwa jingle jangle or the Mexican Nahua may be considered not expression of happiness per se but utilized to spread and ignite emotion in watchers and participants. *Id.*; MONTGOMERY & BERGMAN, *supra* note 40, at 29.

344. Sébastien Fevry, *The Joyful Power of Activist Memory: The Radiant Image of the Commune in the Invisible Committee’s Writings*, 12 MEMORY STUDS. 46, 51 (2019) (“Cultural (and memory) study of emotions, the main issue is not to understand ‘what emotions are, but, rather, to explore how they function as social practices in continually changing circumstances – that is, what emotions do.” (emphasis in original)).

345. *Id.* at 56.

intentional, rather than circumstance-driven joy—joy that operates to “increas[e] the power of the action.”³⁴⁶

Imagine the Chicago collective singing songs of Black love during their literature distribution campaign. The creation of joy during resistant activities is the opportunity to live for a moment in the utopian future, free of daily subordination.³⁴⁷ Others consider the expression of joy during an act of resistance as a symbol of resilience, as evidence that protestors remain unbowed. The communal expression of joy deepens connection and serves to motivate continued resistance.³⁴⁸

The joyful protest framework is commonly applied to mass protest. This concept has been applied in contexts as varied as ballroom culture,³⁴⁹ the Occupy Movement,³⁵⁰ the Pulse nightclub massacre in Orlando,³⁵¹ Black Mardi Gras Indians in New Orleans,³⁵² and student protests in apartheid South Africa.³⁵³ Sébastien Fevry describes the coming together of protestors itself, the physical nearness, as heightening joy.³⁵⁴ Testimonies in protest archives describe protestors as being motivated by anger, but also experiencing ecstasy and unity in protest events.³⁵⁵ During protest that challenges state policing of order norms against

346. “For Spinoza, joy constitutes one of three primitive affects . . .” *Id.* at 51.

347. *Id.* at 56–57 (“[M]emory precisely orients thoughts and actions on the basis of a joyful affect, already felt in the past, but destined to grow still in the future . . . [It] facilitates moving from an abstract idea to a concrete experience by means of bodily images echoing the lived experience.”).

348. See Burke, *supra* note 343; VASHON JORDAN JR., CHICAGO PROTESTS: A JOYFUL REVOLUTION (2020); Fevry, *supra* note 344.

349. Burke, *supra* note 343.

350. See e.g. Kimberly A.C. Wilson, *Occupy Portland: Protest Liaisons to City and Police Unhappy With Mayor Sam Adams, Demand Apology*, OREGONIAN (Nov. 15, 2011, 2:02 PM) https://www.oregonlive.com/portland/2011/11/occupy_portland_protester_lia.html [<https://perma.cc/Q4NV-2TPM>] (ccupy protestors describe police disruption of ‘joyful protest’ in letter to the Portland mayor).

351. Sociologist Kristie Soares describes the protests in the aftermath of the Pulse club massacre where Celia Cruz’s music is played. Instead of “being an escape from mourning, playing Celia’s music helped facilitate mourning. Soares, *supra* note 40.

352. Ricardo Guthrie, *Embodying an Imagined Other Through Rebellion, Resistance and Joy: Mardi Gras Indians and Black Indigeneity*, 12 ALTERNATIVE: INTENTIONAL J. INDIGENOUS PEOPLES 558 (2016).

353. Janey Starling, *The Subversive Power of Joy*, OPEN DEMOCRACY (June 26, 2017), <https://www.opendemocracy.net/en/transformation/subversive-power-of-joy> [<https://perma.cc/484X-3AK4>].

354. Fevry, *supra* note 344.

355. Donald Earl Collins, Opinion, *American Culture Sees Blackness as the Damage It Did to Us, Not the Joy We Take in Ourselves*, NBC NEWS (Aug. 9, 2020), <https://www.nbcnews.com/think/opinion/american-culture-sees-blackness-damage-it-did-us-not-joy-ncna1235703> [<https://perma.cc/Q4AH-MCAK>].

targeted communities, the exploration of joyful effect is both motivation and resistance.³⁵⁶ The body is actualizing the sought-after freedom of the individual or collective.

The framing of joyous resistance is not limited to the sites of the protests. Conduct by individuals outside of a mass protest, subject to increased regulation, might also be captured as joyful protest. A visual artist describes joyful resistance as “a response to society telling Afro-descendants to ‘shut up’, or that we are ‘too loud.’”³⁵⁷ Joyful protest is the vision of the freed future, subverting oppressive realities of life in the present moment.³⁵⁸ The framework appears across disciplines in connection with historic instances of resistance to order-related criminal regulation. Historian Saidiya Hartmann writes of Black women’s gathering and mutuality, “necessary to sustain life,” as being the subject of control through criminal regulation.³⁵⁹

“Joyful protest,” “pleasure activism,” and similar paradigms center on sustainable forms of subverting order norms. The regulation of conduct can be so

356. Fevry, *supra* note 344 (“reframing memory outside the framework of grievance”); Burke, *supra* note 343 (describing Bomba, massive electric slide, Cupid shuffle, as well as spiritual dances, such as jingle jangle Ojibwa dance, all included on a list of dance protest, created by MiRi Park) (describing “collective exhilaration”); *see also* Fevry, *supra* note 344, at 55.

357. *Joy as Resistance*, NEVERAPART, <https://www.neverapart.com/exhibitions/joy-as-resistance> [<https://perma.cc/YA62-GVG5>]. Another related framework, Pleasure Activism, argues that it is “the work we do to reclaim our whole, happy and satisfiable selves from the impact, delusions, and limitations of oppression and/or supremacy.” ADRIENNE MAREE BROWN, PLEASURE ACTIVISM: THE POLITICS OF FEELING GOOD at 4 (2019).

358. Guthrie, *supra* note 352, at 559–61; Fevry, *supra* note 344, at 56; *see also* JORDAN JR., *supra* note 348.

359. Saidiya Hartman, *The Anarchy of Colored Girls Assembled in a Riotous Manner*, 117 S. ATLANTIC Q. 465, 469–70 (2018). As Hartman writes:

What the law designated as crime were the forms of life created by young black women in the city. The modes of intimacy and affiliation being fashioned in the ghetto, the refusal to labor, the forms of gathering and assembly, the practices of subsistence and getting over were under surveillance and targeted by the police as well as the sociologists and the reformers who gathered the information and made the case against them, forging their lives into tragic biographies of poverty, crime, and pathology.

Id.; *see also* TERA HUNTER, TO ‘JOY MY FREEDOM: SOUTHERN BLACK WOMEN’S LIVES AND LABORS AFTER THE CIVIL WAR 166 (1997). Hunter describes the justification for an ordinance forcing young black women from strolling during the evening on streets, that this:

class can be seen prowling around on streets seemingly seeking whom they may or can devour, instead of being in their home, helping their poor mothers to earn bread. . . . [I]n the great majority of negro women, self-pride is much needed Let the city authorities enact an ordinance forcing this class of women off the streets after a certain hour, or lock them up.

Id. (quoting E.B. Barco, ATLANTA INDEPENDENT (Oct. 28, 1905)).

intensive that people start to self-regulate and mute expression.³⁶⁰ Joy may be one of the most sustaining drivers of resistance.³⁶¹ Instead of trivializing pain, the joyful expression signals an internalization of the call for greater freedom, a depth of emotion connected to the cause, and an outward expression of that call.³⁶² While systemic racism strips away our humanity, people can claim power over their joy and their ability to retain it in the face of state violence.³⁶³ Fevry writes of the sustained power of joyful protest, “[i]n activist movements, the will to change society in reenacting certain experiences of the past supposes that those experiences be perceived as sufficiently joyful and emancipatory for a desire to reactivate them to be felt in the present.”³⁶⁴

Paradigms that encompass group and individual assertions of dignity are helpful to understanding the thin or non-existing lines between mass protests that spur legislation and the everyday resistance and expression under threat from such laws. Protest laws affect the driver in a debate against a traffic officer. They impact the group of students headed to a funeral who are perceived as threatening. Applying everyday protest framework to the expansion of antiprotest laws is a

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360. See Dev & Montyy (@dmtv22), TIKTOK (Apr. 8, 2021), https://www.tiktok.com/@dmtv22/video/6948828547754511621?is_copy_url=1&is_from_webapp=v1&q=Black%20people%27s%20experiences%20with%20police&t=1654701685424 [<https://perma.cc/5FGE-QZ4A>] (showing video of how Black people have to change their behavior around police so they will not be targeted). Some describe this as Black Governmentality. See Thozamile Zolisa Mtyalela & Christopher Allsobrook, *Freedom From Black Governmentality Under Privatized Apartheid*, 50 PHIL. PAPERS 357 (2021) (applying Foucault’s theory of governmentality to Biko’s writings on Black Shame in apartheid South Africa).
361. See Shannon Gormley, *Portland Comedian and Musician Crème Brûlée Has Become a Fixture of the Protests—Mostly by Dancing*, WILLAMETTE WEEK (July 29, 2020) <https://www.wweek.com/arts/2020/07/29/portland-comedian-and-musician-creme-brulee-has-become-a-fixture-of-the-protests-mostly-by-dancing/> [<https://perma.cc/462F-466S>]. The goal is for people to return home to their communities with a call to action. Kauffman, *supra* note 123, at 52 (asserting that the goal is to return “with a commitment to continued action and a clear sense of how they might contribute”). Although activist memories may rely on painful emotions since the traumas of the past represent “a storehouse of lessons.” Fevry, *supra* note 344, at 47 (“The role of positive emotions and positive memories is determinant to understand activist movements whose action is oriented towards the future and transforming the present.”).
362. “I must not laugh too much,
They say black folk can only laugh;
I must not weep too much,
They say black folk weep always”
– Una Marson, “Black Burden,” in *THE MOTH AND THE STARS* 93 (1938).
363. See Burke, *supra* note 343; Dan Berger, *Constructing Crime, Framing Disaster*, 11 PUNISHMENT & SOC’Y 491, 495 (2009) (“Yet most people there exhibited tremendous solidarity and nonviolence amid the storm, even though all levels of government had abandoned them”).
364. Fevry, *supra* note 344, at 47.

potent way to demonstrate the costs, the condition of daily protest, and the inattention to the consequences. This Article utilizes frameworks that recognize everyday protest and that resistance is necessary to existing freely while under surveillance and under order-maintaining and order-creating regulation.

CONCLUSION

The danger of additional criminal laws in the context of mass protest is apparent. The impact resulting from chilling and punishing expression, heightening negative impacts, widening police discretion, and enhancing prosecutorial power is frightening. Such laws are built from narratives that assert protest as exceptional, in terms of unique danger and heterodox participants. Exceptionalism is so strong that it overrides bipartisan concerns about the sprawling, intrusive, and discriminatory effects of laws regulating public order.

What is harder to predict than the effect on protest is the inevitable impact on people living their everyday lives. Laws impacting protest have been used against those gathering in public, those in debate with authority, and those engaged in joyful forms of expression. The risks are not only those of chilling protest, but also of the punishment, disenfranchisement, and endangerment to community health through expansion of criminal laws. These kinds of legislation threaten not just to further criminalize, but to deter and eliminate the things that grant us the capacity to enjoy life. Additional surveillance and punishment of traditionally targeted groups is the legacy of antiprotest laws.

Imagine the group members in the Englewood community-cleanup who were impacted by emerging protest laws. In some states, disorderly conduct laws have been heightened to felonies. Proposed legislation could result in mandatory no bail. Stacking of charges or ratcheting up prosecutorial power could heavily pressure a member to plea. A plea or conviction on any of the antiprotest laws may result in, along with the host of regular consequences, being barred from attending state universities. The volunteers may be civilly liable for the damage that came from enforcement operations. Finally, the laws impact communal expression in public protest. As one group member reported, after his arrest, he could not shake his nerves when encountering police in his everyday job as a firefighter. Communal efforts like this could effectively be suppressed.

Challenges against expansion of criminal laws after protest must incorporate not just the mass protest event, but the everyday impacts on people outside of stage dissent. The chilling impact does not only effect organized mass protests. It affects community building in public, education and celebration, and subjects our daily, public grief or joy to enhanced state regulation and punishment.