

2023

Arresting Assembly: An Argument Against Expanding Criminally Punishable Protest

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VILLANOVA LAW REVIEW

VOLUME 68

2023

NUMBER 2

Articles

ARRESTING ASSEMBLY: AN ARGUMENT AGAINST EXPANDING CRIMINALLY PUNISHABLE PROTEST

ALLISON M. FREEDMAN*

ABSTRACT

In recent years, public protests have shed light on societal inequities that had previously gone unheard. Yet instead of responding to protesters' concerns, many state legislators are attempting to silence disenfranchised groups by introducing hundreds of "anti-protest" bills. This is a recent phenomenon and one that is accelerating—the largest wave of "anti-protest" bills was introduced on the heels of the most robust protest movement in recent history, Black Lives Matter during the summer of 2020.

Although it is clear that legislators are attempting to tamp down public protest through restrictive legislation, it is less clear why state legislators have been emboldened to encroach on the assembly right in recent years. One answer may lie in the Supreme Court's treatment of this fundamental right. Although the First Amendment articulates the right to peaceable assembly, the Supreme Court has not decided a case explicitly on free assembly grounds in over forty years. Instead, it has collapsed the right of assembly into the First Amendment's other free expression guarantees. In doing so, it has relied on a muddled and ill-suited free speech standard—"time, place, and manner"—that provides minimal protection for public dissenters.

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This Article looks at the practical effects of collapsing the free speech and assembly rights and advocates for a new standard that places the public gathering, its impact, and its context at the center of the inquiry. It also encourages a focus on the consequences of restrictive legislation rather than its mere intent. This framework will help safeguard the rights of disenfranchised groups while ensuring that truly violent conduct does not go unchecked.

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INTRODUCTION

ON May 25, 2020, George Floyd, a forty-six-year-old Black man, was murdered in Minneapolis when white police officer Derek Chauvin knelt on his neck for nine minutes and twenty-nine seconds.¹ The next day, seventeen-year-old Darnella Frazier's cell phone video of the killing went viral on social media, and the local community took to the streets.² A day later, protests erupted across the United States—the chant “I can’t breathe” could be heard around the country.³ By early June, global marches broke out in solidarity with American protesters calling for racial justice and an end to police brutality.⁴ Nearly 98% of the domestic protests were peaceful, causing no violence, injuries, or property damage.⁵

1. See, e.g., Derrick Bryson Taylor, *George Floyd Protests: A Timeline*, N.Y. TIMES (Nov. 5, 2021), <https://www.nytimes.com/article/george-floyd-protests-timeline.html> [<https://perma.cc/G3PQ-LXSY>]; Nicholas Bogel-Burroughs, *Prosecutors Say Derek Chauvin Knelt on George Floyd for 9 Minutes 29 Seconds, Longer than Initially Reported*, N.Y. TIMES (Mar. 30, 2021), <https://www.nytimes.com/2021/03/30/us/derek-chauvin-george-floyd-kneel-9-minutes-29-seconds.html> [<https://perma.cc/E852-BTJM>].

2. See, e.g., Taylor, *supra* note 1; Nicholas Bogel-Burroughs & Marie Fazio, *Darnella Frazier Captured George Floyd's Death on Her Cellphone. The Teenager's Video Shaped the Chauvin Trial*, N.Y. TIMES (July 7, 2021), <https://www.nytimes.com/2021/04/20/us/darnella-frazier-video.html> [<https://perma.cc/5RNM-CPK7>].

3. See Taylor, *supra* note 1.

4. See, e.g., Damien Cave, Livia Albeck-Ripka & Iliana Magra, *Huge Crowds Around the Globe March in Solidarity Against Police Brutality*, N.Y. TIMES (June 9, 2020), <https://www.nytimes.com/2020/06/06/world/george-floyd-global-protests.html> [<https://perma.cc/U2Y3-D2MU>]; Audra D.S. Burch, Weiyi Cai, Gabriel Gianordoli, Morrigan McCarthy & Jugal K. Patel, *How Black Lives Matter Reached Every Corner of America*, N.Y. TIMES (June 13, 2020), <https://www.nytimes.com/interactive/2020/06/13/us/george-floyd-protests-cities-photos.html> [<https://perma.cc/695D-DFPP>] (recognizing that people “protested in every single state and in Washington, D.C., with turnouts that ranged from dozens to the tens of thousands”); Alan Taylor, *Images From a Worldwide Protest Movement*, ATLANTIC (June 8, 2020), <https://www.theatlantic.com/photo/2020/06/images-worldwide-protest-movement/612811/> [<https://perma.cc/7C2Y-VS5V>] (noting that “[o]ver the weekend, demonstrations took place around the world, with thousands of people outside the United States marching to show solidarity with American protests over the killing of George Floyd by Minneapolis police,” and stating that marchers worldwide “voiced their anger about systemic racism and police brutality”); Larry Buchanan, Quoctrung Bui & Jugal K. Patel, *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), <https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html> [<https://perma.cc/3GCV-74NB>].

5. See Erica Chenoweth & Jeremy Pressman, *This Summer's Black Lives Matter Protestors Were Overwhelmingly Peaceful, Our Research Finds*, WASH. POST (Oct. 16, 2020, 6:00 AM), <https://www.washingtonpost.com/politics/2020/10/16/this-summers-black-lives-matter-protesters-were-overwhelming-peaceful-our-research-finds/> [<https://perma.cc/A23F-BK8M>] (researchers at Harvard Kennedy School documenting 7,305 protest events in May and June 2020 and concluding that “96.3% of events involved no property damage or police injuries, and in 97.7% of events, no injuries were reported among participants, bystanders or police”); see also ARMED CONFLICT LOCATION & EVENT DATA PROJECT, DEMONSTRATIONS & POLITICAL VIOLENCE IN AMERICA: NEW DATA FOR SUMMER 2020 (2020), <https://acleddata.com/>

Through a rising swell of public assembly, George Floyd became a household name overnight, a galvanizing force for the Black Lives Matter (BLM) movement, and a symbol of desired social change.

These public demonstrations did not go unheard. In the subsequent months, many states began implementing measures to address issues such as chokeholds, lack of officer intervention in the face of excessive force or misconduct, no-knock warrants, and qualified immunity.⁶ And nearly a year after Mr. Floyd's murder, in a rare rebuke of police misconduct, a jury found Mr. Chauvin guilty on all three charges—unintentional second-degree murder, third-degree murder, and second-degree manslaughter.⁷

acledatanew/wp-content/uploads/2020/09/ACLED_USDataReview_Sum2020_SeptWebPDF_HiRes.pdf [https://perma.cc/U52S-4FPL] (collecting protest data between May and August 2020, and concluding that of the more than 10,600 protest events during that time period, nearly 95% involved peaceful protesters); Geoffrey Skelley, *How Americans Feel About George Floyd's Death and the Protests*, FIVETHIRTYEIGHT (June 5, 2020, 5:58 AM), <https://fivethirtyeight.com/features/how-americans-feel-about-george-floyds-death-and-the-protests/> [https://perma.cc/LD5Q-SXGG] (noting that despite the overwhelmingly peaceful nature of Black Lives Matter protests, in a recent poll, 42% of respondents believed “most protesters [associated with the Black Lives Matter movement] are trying to incite violence or destroy property”).

6. See Ram Subramanian & Leily Arzy, *State Policing Reforms Since George Floyd's Murder*, BRENNAN CTR. FOR JUST. (May 21, 2021), <https://www.brennancenter.org/our-work/research-reports/state-policing-reforms-george-floyds-murder> [https://perma.cc/AR9M-2QX9] (summarizing changes in policing since George Floyd's murder and highlighting that twenty-five states and D.C. have “addressed at least one of three areas directly related to the circumstances of Floyd's killing: use of force; [the] duty for officers to intervene, report, or render medical aid in instances of police misconduct; and policies relating to law enforcement misconduct reporting and decertification,” such as revocation of authorization to serve as an officer); Sara Swann, *How Policing Has Changed in the Year Since George Floyd's Death*, FULCRUM (May 25, 2021), <https://thefulcrum.us/big-picture/george-floyd-police> [https://perma.cc/68FP-AYXF] (summarizing data from the National Conference of State Legislatures' database on policing legislation, and cataloging by state changes such as: bans or restrictions on chokeholds and neck restraints, requiring state investigations into officer-involved deaths, requiring officer intervention to stop use of excessive force and/or misconduct, mandating or funding the use of body cameras for on-duty officers, prohibiting or restricting the use of tear gas or rubber bullets, banning or restricting no-knock warrants, limiting or ending officers' use of qualified immunity as a defense against charges of civil rights violations, and establishing and maintaining a database with details on alleged officer misconduct).

7. See, e.g., Laurel Wamsley, *Derek Chauvin Found Guilty of George Floyd's Murder*, NAT'L PUB. RADIO (Apr. 20, 2021, 5:37 PM), <https://www.npr.org/sections/trial-over-killing-of-george-floyd/2021/04/20/987777911/court-says-jury-has-reached-verdict-in-derek-chauvins-murder-trial> [https://perma.cc/7LZ3-9GPN]; Griff Witte, Joyce Koh, Kim Bellware & Silvia Foster-Frau, *The Chauvin Verdict had Cities Nationwide Braced for Unrest. Instead, they got a Celebration.*, WASH. POST (Apr. 20, 2021, 10:34 PM), https://www.washingtonpost.com/national/derek-chauvin-verdict-reaction/2021/04/20/58086c4a-a21d-11eb-85fc-06664ff4489d_story.html [https://perma.cc/VET2-UVPC].

For a moment, this modicum of change seemed to validate some of what protesters across the country had been demanding.⁸

Behind the scenes, however, state legislators had begun quietly introducing a deluge of legislation attempting to chip away at the right to peaceful assembly. In other words, instead of addressing systemic racism and inadequacies in policing, state legislators mounted a campaign to silence historically disenfranchised groups and public outrage in support of these groups. This is a recent phenomenon and one that is accelerating. In the years leading up to 2017, there were almost no “anti-protest” bills, yet between 2017 and 2020, at least 145 such bills were introduced.⁹ In 2021, ninety-two bills were introduced.¹⁰ And the timing of this legislation is not coincidental—the introduction of “anti-protest” legislation often closely follows major protest events. In mid-2016, protests sprang up in reaction to the approved construction of the Dakota Access Pipeline, which was slated to cross under the Missouri River near the Standing Rock

8. See Vanessa Romo, *Minnesota Attorney General Calls Chauvin Guilty Verdict First Step Toward Justice*, NAT'L PUB. RADIO (Apr. 20, 2021, 6:31 PM), <https://www.npr.org/sections/trial-over-killing-of-george-floyd/2021/04/20/989284035/minnesota-attorney-general-calls-chauvin-guilty-verdict-first-step-in-justice> [https://perma.cc/9ER6-KBJD]; Joe Margulies, *Chauvin Verdict First Step in Police Reform, Finding Alternatives to Policing*, CORNELL UNIV. MEDIA RELATIONS OFF. (Apr. 21, 2021), <https://news.cornell.edu/media-relations/tip-sheets/chauvin-verdict-first-step-police-reform-finding-alternatives-policing> [https://perma.cc/9EXS-HLFJ] (“Thoughtful observers know that the Chauvin verdict is the first step, not the last.”); see also Aidan Gardiner & Rebecca Halleck, *Few Charges, Fewer Convictions: The Chauvin Trial and the History of Police Violence*, N.Y. TIMES (Apr. 19, 2021), <https://www.nytimes.com/interactive/2021/04/19/us/derek-chauvin-police-killing.html> [https://perma.cc/3AP9-PW4C] (detailing history of recent police killings and recognizing that charges in these cases are rare, trials are often avoided through plea deals or dropped charges, and although “many cases prompted public outrage . . . very few have resulted in convictions at trial”); Amelia Thomson-DeVeaux, Nathaniel Rakich & Likhitha Butchireddygar, *Why It's So Rare for Police Officers to Face Legal Consequences*, FIFTYEIGHT (June 4, 2020, 6:00 AM), <https://fivethirtyeight.com/features/why-its-still-so-rare-for-police-officers-to-face-legal-consequences-for-misconduct/> [https://perma.cc/4HKY-DZXT] (explaining why it has historically been difficult to hold police officers accountable for using excessive force or worse); Jim Hilbert, *Improving Police Officer Accountability in Minnesota: Three Proposed Legislative Reforms*, 47 MITCHELL HAMLINE L. REV. 222, 224–25, 229–31 (2020) (contrasting recent police reform efforts with legal systems that have historically fallen short of curbing police violence).

9. NORA BENAVIDEZ & JAMES TAGER, PEN AM., *ARRESTING DISSSENT: LEGISLATIVE RESTRICTIONS ON THE RIGHT TO PROTEST* 4 (Summer Lopez ed., 2020), <https://pen.org/wp-content/uploads/2020/05/Arresting-Dissent-FINAL.pdf> [https://perma.cc/GUW6-7XV5]; *US Protest Law Tracker*, INT'L CTR. FOR NOT-FOR-PROFIT L., <https://www.icnl.org/usprotestlawtracker/> [https://perma.cc/HWN9-PYZY] (last updated May 1, 2023) (tracking “anti-protest” legislation since November 2016 after recognizing a rise in such legislation); see also Nora Benavidez, James Tager & Andy Gottlieb, *Closing Ranks: State Legislators Deepen Assault on the Right to Protest*, PEN AM., <https://pen.org/closing-ranks-state-legislators-deepen-assaults-on-the-right-to-protest/> [https://perma.cc/EHK5-2RTJ] (last visited May 19, 2023) (updating research on “anti-protest” bills discussed in *Arresting Dissent*).

10. *US Protest Law Tracker*, *supra* note 9 (including all state-level 2021 bills). An independent review of each bill was also conducted for purposes of this Article.

Sioux Reservation, threatening the region's water supply as well as ancient burial grounds and cultural sites of historical importance.¹¹ In response, state legislators began introducing "anti-protest" legislation aimed at individuals protesting near "critical infrastructure" such as gas and oil pipelines.¹² Then, shortly after the election of Donald Trump in late 2016, a renewed fervor around public protest began to surface with women's marches and marches in protest of the presidency of Donald Trump, many of which took place on interstate highways.¹³ This spurred legislation aimed at restricting public gatherings on various roadways.¹⁴ This pattern continues today with the largest wave of "anti-protest" legislation to date coming on the heels of the most robust protest movement in recent history, the summer 2020 BLM protests.¹⁵

Although it is clear that state legislators are attempting to tamp down public protest through restrictive legislation, it is less clear why state legislators have been emboldened to encroach on the assembly right in recent years. One answer may lie in the Supreme Court's treatment of this fundamental right. Although the First Amendment articulates the "right of the people peaceably to assemble,"¹⁶ the Supreme Court has not decided a case explicitly on free assembly grounds in over forty years. Instead, it has collapsed the right of assembly into the First Amendment's other free expression guarantees.¹⁷ In doing so, it has relied on an ill-suited free speech standard—"time, place, and manner" (TPM)—that provides minimal protection for public dissenters.¹⁸ Indeed, even those who have attempted to breathe life into the Assembly Clause recognize it as "the ugly

11. See, e.g., Jack Healy, *North Dakota Oil Pipeline Battle: Who's Fighting and Why*, N.Y. TIMES (Dec. 2, 2016), <https://www.nytimes.com/2016/11/02/us/north-dakota-oil-pipeline-battle-whos-fighting-and-why.html> [<https://perma.cc/6GFX-VLFG>].

12. BENAVIDEZ & TAGER, *supra* note 9, at 5–6; *US Protest Law Tracker*, *supra* note 9.

13. See, e.g., Sabrina Siddiqui, Molly Redden, Lauren Gambino & Joanna Walters, *This Is the Upside of the Downside: Women's March Finds Hope in Defiance*, GUARDIAN (Jan. 21, 2017, 1:44 PM), <https://www.theguardian.com/us-news/2017/jan/21/women-march-washington-protest-donald-trump> [<https://perma.cc/K8XY-FF4Z>].

14. See BENAVIDEZ & TAGER, *supra* note 9, at 5–6; *US Protest Law Tracker*, *supra* note 9.

15. See *US Protest Law Tracker*, *supra* note 9. Although many recent "anti-protest" bills were introduced after the January 6, 2021 United States Capitol insurrection, the content of these recent bills is generally consistent with "anti-protest" bills introduced prior to January 6, and the bills appear to be developed in response to the overwhelmingly peaceful summer 2020 BLM protests rather than in response to the events of January 6. See *infra* Part II.

16. U.S. CONST. amend. I.

17. See *infra* Section I.B.

18. See *infra* Section I.C.

duckling of the First Amendment,”¹⁹ “the forgotten freedom,”²⁰ “the neglected right,”²¹ and just “roundly ignored.”²²

Yet this was not always the case. In fact, the majority of scholarship devoted to reviving the Assembly Clause has provided detailed textual and historical analyses to conclude that assembly held an important place in society, both before and after American independence was recognized by the Founders as a right separate from that of free speech and other First Amendment guarantees.²³

Today, in-person gatherings have taken on renewed importance in the wake of a highly politicized electoral system shaped by political gerrymandering, voter suppression, and congressional stalemates that stand in the way of legislative efforts to address constituents’ concerns. Thus, if we are to take seriously the messages of BLM and other nonviolent, in-person gatherings, we cannot allow state legislation to slowly chip away at the assembly right. Doing so strips protesters of the power that the right to assemble was meant to convey and upholds the power imbalance and structural inequities embedded in our legislative system.

One way to keep state actors in check is through a more robust legal standard than the current TPM framework. This Article argues for a novel standard that places the gathering, its impact, and its context at the center of the inquiry and encourages a focus on the consequences of restrictive legislation rather than its mere intent. This framework will help safeguard the rights of disenfranchised groups while ensuring that truly violent conduct does not proceed unchecked.

Part I looks at the historical underpinnings of the assembly right and discusses how current Supreme Court jurisprudence employs a muddled and ill-suited standard for cases involving public protest, deviating from the Founders’ vision of this fundamental freedom. It also explores the importance of public protest as a means to provide disenfranchised groups a seat at the table. Part II analyzes recent protest activity and the vast increase in state legislation aimed at criminalizing protest that has followed, some of which will be difficult to challenge under current Supreme Court jurisprudence. This Part focuses on legislation that attempts to broaden concepts such as “riot” to include nonviolent conduct, the heightened penalties often proposed in connection with this expansion,

19. Nikolas Bowie, *The Constitutional Right to Self-Government*, 130 YALE L.J. 1652, 1655 (2021).

20. John D. Inazu, *The Forgotten Freedom of Assembly*, 84 TUL. L. REV. 565, 570 (2010).

21. Tabatha Abu El-Haj, *The Neglected Right of Assembly*, 56 UCLA L. REV. 543, 565 (2009) (“The right of assembly has been the subject of little commentary. Classic nineteenth-century legal treatises on American constitutional law offer at most cursory explanations.” (footnotes omitted)).

22. Nicholas S. Brod, Note, *Rethinking a Reinigorated Right to Assemble*, 63 DUKE L.J. 155, 158 (2013).

23. See Inazu, *supra* note 20, at 571–611; Abu El-Haj, *supra* note 21, at 554–86; Brod, *supra* note 22, at 162–81.

and overbroad and ambiguous language that paves the way for arbitrary and discretionary enforcement by prosecutors and local law enforcement officials. It also highlights recent legislation aimed at restricting protests on roadways and near “critical infrastructure.” Together these tactics thwart social change, drown out diverse voices, divert attention from the underlying issues protesters are aiming to address, and perpetuate the carceral state by ratcheting up punishment for individuals gathering to voice dissent. This is antithetical to the fundamental right of assembly and what has historically been seen as an important check on electoral politics, particularly for marginalized groups. Finally, Part III proposes and argues for a new legal standard to be employed in public assembly cases. Instead of allowing state actors to slowly chip away at the assembly right through legislation, a more protective standard would place physical gatherings and their impact at the center of the inquiry and would thereby help ensure disenfranchised groups a forum for participation. Given the recent uptick in protests around the country and our nation’s changing attitudes toward the meaning and value of public dissent, now is an optimal time to mount a campaign against expanding criminally punishable protest.²⁴

I. HISTORICAL CONTEXT OF THE RIGHT OF ASSEMBLY

A. *The Framing and Text of the First Amendment Assembly Right*

To understand the peculiar posture of current Supreme Court jurisprudence on the right to assemble, it is helpful to look at how the Assembly Clause came to be. Given that recent scholarship examining the Assembly Clause has focused almost exclusively on the text and history of the assembly right, this Article provides only a brief overview of this backstory.²⁵

24. See Amna A. Akbar, Sameer M. Ashar & Jocelyn Simonson, *Movement Law*, 73 STAN. L. REV. 821, 825 (2021) (“[The] scale and volume of left social movement activity . . . marks a resurgence of contestation after decades of relative quiet.”); Michael Levitin, *Occupy Wall Street Did More Than You Think*, ATLANTIC (Sept. 14, 2021), <https://www.theatlantic.com/ideas/archive/2021/09/how-occupy-wall-street-resaped-america/620064/> [https://perma.cc/2PA5-6PWU] (recognizing that today’s attitudes around protesting sprung, in part, from Occupy Wall Street: “Occupy made protesting cool again—it brought the *action* back into activism—as it emboldened a generation to take to the streets and demand systemic reforms Confronting power and issuing demands through . . . disobedience is now an ingrained part of our political culture”).

25. See Bowie, *supra* note 19, at 1663–1722; Inazu, *supra* note 20, at 571–611; Abu El-Haj, *supra* note 21, at 554–86; Brod, *supra* note 22, at 162–81. This Article does not purport to adopt an analysis of the text and history of the right to peaceably assemble as the only means by which to analyze this right. Given the undertheorized nature of the Assembly Clause, however, looking to text and history provide, at least in part, a helpful tool in thinking about this right.

The text of the First Amendment articulates both a right to free speech and a right to peaceably assemble.²⁶ When James Madison first introduced the Bill of Rights in 1789, he distinguished the rights of assembly and petition from the rights of speech and press.²⁷ In other words, the Founders not only envisioned two distinct yet related rights, but also singled out peaceable assembly for protection. The assembly right was also considered a “traditional right of English freemen,” and was therefore included in the Bill of Rights without controversy and with little commentary.²⁸

This is not surprising given that the United States came into existence amid a storm of riots—crowds were inflamed by issues such as ratification of the Constitution and signing of the Jay Treaty.²⁹ During this time, riots were seen less as a threat and more as a quasi-legitimate part of a well-functioning society.³⁰ In fact, during the nineteenth century, a riot was not considered a breakdown of the democratic process, but rather “its conduct by another means It was a congregation in open space to publish the collective opinion of a distinctive group.”³¹ Assemblies in the form of “‘mobs,’ rioters, soapbox orators, pamphleteers, proselytizers, provocateurs, and press agents” were frequent on founding-era streets.³² These gatherings were often spontaneous and contentious, with dissent taking center stage.³³ As one court put it at the time, the right of assembly protects the peoples’ right to “a public demonstration or parade to influ-

26. U.S. CONST. amend. I. For a detailed analysis of the words and syntax of the First Amendment Assembly Clause see Inazu, *supra* note 20, at 571–77; Brod, *supra* note 22, at 162–71.

27. Stephen A. Higginson, Note, *A Short History of the Right to Petition Government for the Redress of Grievances*, 96 YALE L.J. 142, 155–56 (1986). Because all rights enshrined in the Bill of Rights have underpinnings in at least one state constitution, some scholars have looked at the five state constitutions that explicitly protected the assembly right prior to ratification of the Bill of Rights—Massachusetts, New Hampshire, North Carolina, Pennsylvania, and Vermont—to point out that these early versions of the Assembly Clause did not touch on speech rights, which frequently found protection elsewhere. See Brod, *supra* note 22, at 176–77; Inazu, *supra* note 20, at 571–72.

28. Abu El-Haj, *supra* note 21, at 564 (quoting LEON WHIPPLE, OUR ANCIENT LIBERTIES: THE STORY OF THE ORIGIN AND MEANING OF CIVIL AND RELIGIOUS LIBERTY IN THE UNITED STATES 101 (1927)).

29. PAUL A. GILJE, RIOTING IN AMERICA 1–2 (1996).

30. GILJE, *supra* note 29, at 20–21 (“[W]hat stands out in examining eighteenth-century popular disorder is not the doubts and threats it posed; instead, it is the general acceptance of the mob as a quasi-legitimate part of the standing social and political order.”).

31. MARY P. RYAN, CIVIC WARS: DEMOCRACY AND PUBLIC LIFE IN THE AMERICAN CITY DURING THE NINETEENTH CENTURY 131 (1997). For a robust history of the role of riots and large public street gatherings from the founding through the early nineteenth century, see Abu El-Haj, *supra* note 21, at 554–61.

32. TIMOTHY ZICK, SPEECH OUT OF DOORS: PRESERVING FIRST AMENDMENT LIBERTIES IN PUBLIC PLACES 26 (2009).

33. *Id.* at 30; Brod, *supra* note 22, at 180 (“[D]issent [was] the order of the day.”).

ence public opinion, and impress their strength upon the public mind, and to march upon the public streets of the cities.”³⁴ In sum, large street gatherings were an important pillar of democratic politics following the founding.³⁵

These gatherings included a wide variety of groups, including workers, impoverished people, and racial minorities, often allowing marginalized groups a place for their voices to be heard.³⁶ And they encompassed a variety of social movements—during the Progressive Era, for example, the women’s movement, the labor movement, and African-Americans all invoked the freedom of assembly.³⁷ Assembly was thus seen as a “right of the people to bring wayward government to heel.”³⁸

Given this historical backdrop, American law narrowly defined the crimes of riot and unlawful assembly³⁹ until the late nineteenth century, “requiring an immediate and serious risk of violence.”⁴⁰ The law at that time was “highly tolerant of the disorder associated with outdoor assem-

34. *Anderson v. City of Wellington*, 19 P. 719, 722 (Kan. 1888).

35. Abu El-Haj, *supra* note 21, at 554.

36. *Id.* at 559 (“The streets enabled workers, poor people, and racial minorities to broadcast messages to large numbers of people, which partly explains the vibrant popularity of parades of all kinds and the variety of autonomously produced mobile performances.” (quoting SUSAN G. DAVIS, *PARADES AND POWER: STREET THEATRE IN NINETEENTH-CENTURY PHILADELPHIA* 33 (1986))); ZICK, *supra* note 32, at 30 (citing GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* 90 (1991)) (recognizing that demonstrations allowed marginalized groups such as women, free Blacks, and servants a space where their voices could be heard); Brod, *supra* note 22, at 180 (noting that assembly was a “force so powerful that it often cut across gender, race, and class”).

37. Inazu, *supra* note 20, at 590–95.

38. AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 26 (1998).

39. Some jurisdictions also recognize the offense of “rout,” which falls between unlawful assembly and riot. Rout is often defined as an unlawful assembly that has moved toward execution of a riot. See, e.g., *Follis v. State*, 40 S.W. 277, 277 (Tex. Crim. App. 1897); CAL. PENAL CODE § 406 (West 2023). In most jurisdictions, however, the crime of rout has been abandoned or merged with unlawful assembly.

40. Tabatha Abu El-Haj, *Defining Peaceably: Policing the Line Between Constitutionally Protected Protest and Unlawful Assembly*, 80 MO. L. REV. 961, 971 (2015); see also John Inazu, *Unlawful Assembly as Social Control*, 64 UCLA L. REV. 2, 11 (2017) (“Early American restrictions on unlawful assembly emphasized significant threats to the public order, including threats that local officials could not control on their own.”); *State v. Russell*, 45 N.H. 83, 85 (1863) (“[T]he common law in respect to riots [might be] inconsistent with the spirit of our institutions . . . [if] mere political demonstrations and parades, unattended by violence, actual or threatened, are held to be riots, or unlawful assemblies.”). Early U.S. statutory formulations of unlawful assembly often drew on English common law antecedents. For a discussion of these common law underpinnings, see Inazu, *supra* note 20, at 10–11 (contrasting William Hawkins’s relatively broad approach to liability for unlawful assembly with William Blackstone’s narrower approach, but recognizing that unlawful assembly at the time was never charged unless it was intimately connected with the element of riot).

blies,”⁴¹ and “accommodated the inconveniences associated with assemblies.”⁴² Americans “understood that acting illegally was not the same as acting violently and that the constitutional right of assembly protected disorder short of violence.”⁴³ This stands in stark contrast to many Americans’ current distaste for public dissent.⁴⁴

B. *The Collapse of the Right of Assembly into the Right of Free Speech*

Despite the Framers explicitly articulating a fundamental right of assembly, the Supreme Court has consistently narrowed and muddled this right. This first occurred in the late nineteenth century when the Court suggested that the right of assembly was limited to petitioning the government, rather than distinguishing the right to assemble from the right to petition.⁴⁵ Since that time, the Supreme Court affirmed that the use of “streets and parks . . . for purposes of assembly, communicating thoughts between citizens, and discussing public questions. . . . has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.”⁴⁶

41. Abu El-Haj, *supra* note 40, at 971.

42. Tabatha Abu El-Haj, *All Assemble: Order and Disorder in Law, Politics, and Culture*, 16 U. PA. J. CONST. L. 949, 953 (2014) (“In our understandable nervousness about disorder and condemnation of violence, we have lost sight of the fact that . . . for dissenters, in particular, disruption is central to the efficacy of public protest. While unlawful and violent actions on the part of gatherers obviously must be addressed, a robust right of assembly would seem to require a recalibration of the balance.” (footnote omitted)). This broad conception of the right of assembly also meant that early state supreme courts balked at attempts to enact municipal laws requiring permits before assembling in public streets. Abu El-Haj, *supra* note 40, at 971–72. More recently, courts have regularly upheld such permit requirements. *See, e.g.*, *Cox v. New Hampshire*, 312 U.S. 569, 576 (1941) (holding that the government can base the lawfulness of an assembly on obtaining advance permission through permits if no official discrimination is involved); *Thomas v. Chi. Park Dist.*, 534 U.S. 316, 326 (2002) (upholding permit requirement for activities in public parks as appropriate regulation of free speech).

43. Abu El-Haj, *supra* note 40, at 971.

44. *See infra* Part II (discussing current laws and bills being introduced to further expand the definitions of riot and unlawful assembly and thereby punish additional, often nonviolent, conduct); *see also* Abu El-Haj, *supra* note 42, at 952 (“Americans today accept a high level of regulation of outdoor assembly.”).

45. *See Presser v. Illinois*, 116 U.S. 252, 267 (1886) (suggesting that the First Amendment protects the right of assembly only if “the purpose of the assembly was to petition the government for a redress of grievances”); *see also* Inazu, *supra* note 40, at 8 (recognizing that the right of assembly “has long been dormant, owing in large part to a fundamental misreading of the First Amendment suggesting that assembly was limited to the purposes of petitioning the government”). *But see* Jason Mazzone, *Freedom’s Association*, 77 WASH. L. REV. 639, 713 (2002) (arguing that the assembly right is tailored only to petitioning the government). *See also* Brod, *supra* note 22, at 169–71 (outlining debate between Inazu and Mazzone regarding the text of the assembly right and whether the right can only be exercised to petition the government or whether the Framers sought to distinguish the right to assemble from the right to petition).

46. *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939) (recognizing an exception to the overarching principle that the government can regulate

The Court has also recognized that the free exchange of ideas “may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.”⁴⁷ And that:

criminal laws have grown . . . to cover so much previously innocent conduct that almost anyone can be arrested for something. If the state could use [criminal] laws not for their intended purpose but to silence those who voice unpopular ideas, little would be left of our First Amendment liberties⁴⁸

The Court has also highlighted the value of “speech” related to current events, which is “situated at the core of our First Amendment values.”⁴⁹ In other words, the Court has specifically highlighted the problematic nature of using criminal laws to silence dissent as well as the importance of discourse connected to current events, something public protests are particularly well situated to accomplish. Yet the Supreme Court has not decided a case explicitly on free assembly grounds in over forty years.⁵⁰

C. Current Supreme Court Jurisprudence

Instead of treating assembly as a distinct constitutional right, the Court has come to analyze assembly issues involving protests under a free speech framework.⁵¹ As with other expressive activity, government actors can regulate the “time, place and, manner” of protests as long as the re-

speech on its own property; this came to be known as the “public forum doctrine”).

47. *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949).

48. *Nieves v. Bartlett*, 139 S. Ct. 1715, 1730 (2019) (Gorsuch, J., concurring in part and dissenting in part).

49. *Texas v. Johnson*, 491 U.S. 397, 411 (1989).

50. JOHN D. INAZU, *LIBERTY’S REFUGE: THE FORGOTTEN FREEDOM OF ASSEMBLY* 7 n.15 (2012) (stating in 2012 that “[t]he last time the Court applied the constitutional right of assembly appears to have been in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 88 (1982)—thirty years ago. A majority opinion of the Supreme Court has only *mentioned* the right of assembly six times in the past twenty years”).

51. See INAZU, *supra* note 50, at 61–62 (“[B]y the end of the 1960s, the right of assembly in law and politics was largely confined to protests and demonstrations,” and by the early 1980s, “even cases involving protests or demonstrations could now be resolved without reference to assembly”); *id.* at 61 (“In 1983, the Court swept the remnants of assembly within the ambit of free speech law”); Ashutosh Bhagwat, *Associational Speech*, 120 *YALE L.J.* 978, 986 (2011) (“[T]he Court largely followed its new approach, emphasizing association, not assembly, as the relevant right and treating association as subsidiary to free speech.”). Interestingly, while the original “Four Freedoms” expressed in the Constitution include assembly, speech, press, and religion, in an effort to rally support for entry into World War II, President Franklin Delano Roosevelt reframed these freedoms as: freedom of speech and expression, freedom of worship, freedom from want, and freedom from fear. John D. Inazu, *The Four Freedoms and the Future of Religious Liberty*, 92 *N.C. L. REV.* 787, 788–89 (2014).

strictions (1) are content-neutral, (2) are narrowly tailored to serve a significant governmental interest, and (3) leave open ample alternatives for communication.⁵² For example, when asked to consider whether permit requirements were constitutional, the Court stated that the government is permitted to regulate the TPM of parades “in relation to the other proper uses of the streets.”⁵³

This intermediate-scrutiny standard has little teeth in practice, particularly as it pertains to public assemblies.⁵⁴ Courts routinely accept almost any government interest as “narrowly tailored,” and determine that essentially any other way of communicating a message, even if it is far less effective, is an “ample alternative channel[].”⁵⁵ This framework also ignores

52. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). The Supreme Court has recognized certain instances in which the heightened strict scrutiny standard applies, such that laws must be necessary to serve a compelling state interest and narrowly drawn to achieve that end. This is true where laws attempt to regulate expressive conduct “inten[d] to convey a particularized message,” and “the likelihood [is] great that the message would be understood by those who viewed it.” *Spence v. Washington*, 418 U.S. 405, 410–11 (1974) (per curiam); see, e.g., *Virginia v. Black*, 538 U.S. 343, 347–48 (2003) (cross burning); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505–06 (1969) (wearing black wristbands); *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 568 (1995) (parades); *Stromberg v. California*, 283 U.S. 359, 369–70 (1931) (flag waving). The Court has also recognized a number of categories that are excluded from protected speech altogether. See, e.g., *Black*, 538 U.S. at 359–60 (threats); *New York v. Ferber*, 458 U.S. 747, 764 (1982) (child pornography); *Miller v. California*, 413 U.S. 15, 23 (1973) (obscenity); *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam) (incitement); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964) (defamation); *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949) (speech integral to criminal conduct); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (fighting words).

53. *Cox v. New Hampshire*, 312 U.S. 569, 576 (1941). By subsuming the right of assembly into the First Amendment free speech doctrine, the Supreme Court has also, in some instances, transformed the right of assembly into a right of expressive association. See *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958) (recognizing a constitutional right of association); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618 (1984) (dividing constitutional association into intimate and expressive components). This has further complicated the neglected assembly right. A recent line of scholarship has argued that the Assembly Clause should take the place of expressive association, particularly given that there is no textual basis for such association in the Constitution. See *INAZU*, *supra* note 50, at 4 (noting that the author’s book “offers assembly as an alternative to the enfeebled right of expressive association”); see also Bhagwat, *supra* note 51, at 981; Abu El-Haj, *supra* note 21, at 545–47.

54. Abu El-Haj, *supra* note 21, at 585.

55. See, e.g., *Ward*, 491 U.S. at 798, 802 (stating that content-neutral regulations “need not be the least restrictive or least intrusive means” of achieving the government’s interests); *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 295 (1984) (requiring government show only that it has left open other ways of communicating the message); *Frisby v. Schultz*, 487 U.S. 474, 483 (1988) (upholding a content-neutral regulation as long as it permits “the more general dissemination of a message”); see also Abu El-Haj, *supra* note 40, at 979 (“Lower courts, meanwhile, uphold virtually all means that government officials devise to quash the disruptive elements of assemblies, so long as the government refrains from content or viewpoint discrimination. They rarely scrutinize the means-ends fit

the fundamental point of outdoor assemblies—the gathering of people in solidarity to effect change. As legal scholar Ashutosh Bhagwat has noted:

In the typical modern protest or assembly utilizing the public forum, speeches are no doubt made and signs are waved, but they are hardly the main point of the exercise. After all, most of the speeches are inaudible and the signs often illegible. The point, rather, is the assembly itself.⁵⁶

Lower courts have similarly recognized the importance of in-person gatherings:

Our analysis is guided by the fact that parades and processions are a unique and cherished form of political expression, serving as a symbol of our democratic tradition. There is scarcely a more powerful form of expression than the political march. Unlike stationary demonstrations or other forms of pure speech, the political march is capable of reaching and mobilizing the larger community of citizens. It is intended to provoke emotive and spontaneous action, and this is where its virtue lies. As it progresses, it may stir the sentiments and sympathies of those it passes, causing fellow citizens to join in the procession as a statement of solidarity.⁵⁷

The effective disappearance of the assembly right from Supreme Court jurisprudence has left room for state legislators to define the terms of peaceable assembly and for state and local actors to ratchet up arrest and prosecution of protesters. This chills assembly and spurns the history behind what the Founders singled out as an explicitly protected right.

D. *Why Protests Matter*

Not only do the text and history of the assembly right help explain the importance of this constitutional right, but the gatherings themselves also demonstrate the value of outdoor assembly. From 2017 through 2020, there were at least 27,270 protests involving over 13.5 million attendees across more than 4,040 American cities.⁵⁸ From racial justice, to

carefully, and they willingly accept virtually any interest the government offers as substantial enough to suppress the disorder and inconveniences associated with demonstrators.”).

56. Bhagwat, *supra* note 51, at 1016.

57. *Am.-Arab Anti-Discrimination Comm. v. City of Dearborn*, 418 F.3d 600, 611–12 (6th Cir. 2005).

58. Tommy Leung & Nathan Perkins, COUNT LOVE, <https://countlove.org/> [<https://perma.cc/GJQ6-P4VL>] (last visited May 8, 2023) (cataloging protests and the cities in which they occurred from January 20, 2017 through January 31, 2021); *see also id.* at <https://countlove.org/statistics.html> [<https://perma.cc/T8AE-94WF>] (providing statistics on researched protests). Interestingly, although public protest is on the rise, a study from the Pew Research Center shows that the share of Americans who say the phrase “people are free to peacefully protest” describes the

immigration, to police brutality, to election results, public protest over the last several years has been on the rise.⁵⁹ But why do people protest? And should we value outdoor assembly?

People protest for a variety of reasons, such as airing grievances, affirming personal identity, validating emotions, influencing public opinion, sending a message to political officials, and gathering with like-minded individuals to create a sense of solidarity.⁶⁰ Demonstrations are a uniquely tangible form of social participation. The in-person experience of flesh-and-blood gatherings has the power to create social bonds and networks as well as lasting civic and political participation.⁶¹ Protests are therefore effective not necessarily because they send a signal to policymakers, but be-

United States very or somewhat well fell from 73% in 2018 to 60% in 2020. *In Views of U.S. Democracy, Widening Partisan Divides over Freedom to Peacefully Protest*, PEW RSCH. CTR. (Sept. 2, 2020), <https://www.pewresearch.org/politics/2020/09/02/in-views-of-u-s-democracy-widening-partisan-divides-over-freedom-to-peacefully-protest/> [https://perma.cc/H56J-N4FG].

59. See Mary Jordan & Scott Clement, *Rallying Nation: In Reaction to Trump, Millions of Americans Are Joining Protests and Getting Political*, WASH. POST (Apr. 6, 2018), <https://www.washingtonpost.com/news/national/wp/2018/04/06/feature/in-reaction-to-trump-millions-of-americans-are-joining-protests-and-getting-political/> [https://perma.cc/YR3T-S7AU] (stating that 1 out of 5 Americans participated in a protest or political rally between 2016 and 2018, and many had never attended a similar event). This Article focuses on the most recent wave of mass protests associated with the BLM movement but recognizes the importance of protests during the 1950s and 1960s civil rights movement. See, e.g., Anne E. Bromley, *Q&A: Historian Compares Today's Protests to Civil Rights Movement of '50s and '60s*, UVATODAY (June 3, 2020), <https://news.virginia.edu/content/qa-historian-compares-todays-protests-civil-rights-movement-50s-and-60s> [https://perma.cc/TD87-MDPA] (quoting Kevin Gaines, University of Virginia's Julian Bond Professor of Civil Rights, who comments that "[t]oday's protests in response to the most recent spate of high-profile police and vigilante killings of unarmed black people are patterned after the model of nonviolent, or peaceful protests established by the modern civil rights movement").

60. Jacqueliën van Stekelenburg & Bert Klandermans, *The Social Psychology of Protest*, 61 CURRENT SOCIO. 886, 888-95 (2013) (working through a social psychological lens and detailing five reasons people protest: grievances, efficacy, identification, emotions, and social embeddedness); MK Manoylov, *Scientists Say They've Pinpointed the Reasons Why People Protest. They're All Visible in Black Lives Matter Demonstrations*, INSIDER (June 27, 2020, 1:00 PM), <https://www.insider.com/why-people-protest-according-to-science-2020-6> [https://perma.cc/5VVY-9YJV]; Bhagwat, *supra* note 51, at 1016 ("The fact of a large public gathering forms a sense of solidarity, helps to influence public opinion, and sends a message to political officials.").

61. See Abu El-Haj, *supra* note 40, at 981 (drawing on social science research to conclude that "[o]rganizing and participating in protests and demonstrations tends to create and strengthen exactly the sort of social ties that encourage additional civic and political engagement"); Abu El-Haj, *supra* note 42, at 1031 n.477 (stating that collective protests create "enduring bonds of solidarity" (quoting ROBERT J. SAMPSON, *GREAT AMERICAN CITY: CHICAGO AND THE ENDURING NEIGHBORHOOD EFFECT* 184 (2012))).

cause they motivate people to get politically active.⁶² They also have the ability to change political views and behaviors.⁶³ And they often capture the attention of the media, helping to overcome political asymmetries.⁶⁴

For many, protests also act as a countervailing force to a more conventional form of civic participation—elections. While voting is often touted as the mechanism to bring about reform, this rhetoric tends to devalue marginalized groups who often take to the streets when their voices are not being heard through traditional means.⁶⁵ Over the last decade, voter restrictions in many states around the country have disproportionately disenfranchised racial minorities.⁶⁶ High rates of incarceration of Black and Hispanic men coupled with laws that make felons ineligible to vote also contribute to voter disenfranchisement.⁶⁷ Nowhere have these realities

62. See Andreas Madestam, Daniel Shoag, Stan Veuger & David Yanagizawa-Drott, *Do Political Protests Matter? Evidence from the Tea Party Movement*, 128 Q.J. ECON. 1633, 1633 (2013).

63. Quynh-Nhu Le, *Political Protests Change Behavior, Says Study*, HARV. CRIMSON (Oct. 24, 2013), <https://www.thecrimson.com/article/2013/10/24/protest-study-behavior/> [<https://perma.cc/X37Q-ZZ7R>] (using data from Tea Party protests to conclude that political protests do not just show changing political preferences, but can also change political views and behaviors); see also Andrew Perrin, *23% of Users in U.S. Say Social Media Led Them to Change Views on an Issue; Some Cite Black Lives Matter*, PEW RSCH. CTR. (Oct. 15, 2020), <https://www.pewresearch.org/fact-tank/2020/10/15/23-of-users-in-us-say-social-media-led-them-to-change-views-on-issue-some-cite-black-lives-matter/> [<https://perma.cc/DH8G-F7WL>] (noting that roughly a quarter of adult social media users in the United States reported changing their views about a political or social issue because of something they saw on social media, with many mentioning the BLM movement and police brutality).

64. See Omar Wasow, *Agenda Seeding: How 1960s Black Protests Moved Elites, Public Opinion and Voting*, 114 AM. POL. SCI. REV. 638, 638 (2020).

65. See Andre M. Perry & Carl Romer, *Protesting Is as Important as Voting*, BROOKINGS (Aug. 28, 2020), <https://www.brookings.edu/blog/the-avenue/2020/08/28/protesting-is-as-important-as-voting/> [<https://perma.cc/ZZA2-BM7V>].

66. See Theodore R. Johnson & Max Feldman, *The New Voter Suppression*, BRENNAN CTR. FOR JUST. (Jan. 16, 2020), <https://www.brennancenter.org/our-work/research-reports/new-voter-suppression> [<https://perma.cc/X77V-KH97>] (“Over the past decade, half the states in the nation have placed new, direct burdens on people’s right to vote, abetted by [the] 2013 Supreme Court decision that struck down a key provision of the Voting Rights Act.”); Will Wilder & Stuart Baum, *5 Egregious Voter Suppression Laws from 2021*, BRENNAN CTR. FOR JUST. (Jan. 31, 2022), <https://www.brennancenter.org/our-work/analysis-opinion/5-egregious-voter-suppression-laws-2021> [<https://perma.cc/EJX6-RKBH>] (recognizing that in 2021, nineteen states had enacted thirty-four laws that make it harder for Americans to vote, “far and away the most in any year in at least the past decade”).

67. See *Report to the United Nations on Racial Disparities in the U.S. Criminal Justice System*, SENT’G PROJECT (Apr. 19, 2018), <https://www.sentencingproject.org/reports/report-to-the-united-nations-on-racial-disparities-in-the-u-s-criminal-justice-system/> [<https://perma.cc/TR59-ESFN>] (stating that as of 2018, African Americans and Latinos made up 29% of the United States population, but represented 57% of the prison population); Ram Subramanian & Leily Arzy, *State Policing Reforms Since George Floyd’s Murder*, BRENNAN CTR. FOR JUST. (May 21, 2021), <https://www.brennancenter.org/our-work/research-reports/state-policing-reforms-george-floyds-murder> [<https://perma.cc/BWJ2-6Y89>] (“While comprising only 13[%] of the country, Black people face 21[%] of police contact, make

been felt more acutely than in communities at the heart of the BLM movement. By coming together through outdoor assemblies, marginalized groups can voice dissent and make otherwise neglected issues visible.⁶⁸ Yet the introduction of recent “anti-protest” legislation across the country has attempted to restrict this dissent.

II. STATE LEGISLATIVE EFFORTS TO CRIMINALIZE PROTEST

A. 2016–2020

Against the backdrop of a muddled right of assembly in cases of public protest, state legislators have begun to shape the contours of this fundamental right. They have done so by introducing legislation that broadly defines conduct deemed to fall outside constitutionally protected peaceable assembly and then harshly punishing that conduct. In other words, although many states had unlawful assembly or anti-riot statutes on the books before 2017, over the past five years state legislators have begun redrawing the line between legal and illegal protest activity so that more protest-related conduct is criminalized.⁶⁹ This line drawing is frequently

up 33[%] of people behind bars, and are over three times more likely to be killed by the police than their white counterparts.”); *Felon Voting Rights*, NAT’L CONF. OF STATE LEGISLATURES, <https://www.ncsl.org/research/elections-and-campaigns/felon-voting-rights.aspx> [https://perma.cc/4YQA-KKSD] (last updated Apr. 6, 2023) (recognizing that “[i]t has been common practice in the United States to make felons ineligible to vote, in some cases permanently” and providing state-by-state data on felon voter rights).

68. Some scholars have recently argued that the Assembly Clause should be read first and foremost to protect outdoor assembly. See Timothy Zick, *Recovering the Assembly Clause*, 91 TEX. L. REV. 375, 395–402 (2012) (reviewing JOHN D. INAZU, *LIBERTIES REFUGE: THE FORGOTTEN FREEDOM OF ASSEMBLY* (2012)) (“[P]erhaps the most natural interpretation of the Assembly Clause is that it protects an individual’s right to gather with others for some limited period in a public place in order to pursue some common cause.”); see also Brod, *supra* note 22, at 155 (“The assembly right is in fact best understood as an assembly right, not as a right about associations.”); Abu El-Haj, *supra* note 40, at 980–85 (discussing the Assembly Clause in the context of outdoor assembly).

69. International bodies have also taken note of this trend. In 2017, the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression (David Kaye) and the Special Rapporteur on the rights to freedom of peaceful assembly and of association (Maina Kiai) publicly communicated to United States lawmakers that recent draft legislation presented in sixteen states, if passed into law, represented a “worrying trend” that “would severely infringe upon the exercise of the rights to freedom of expression and freedom of peaceful assembly in ways that are incompatible with [U.S.] obligations under international human rights law.” Letter from David Kaye, Special Rapporteur on the Promotion & Prot. of the Right to Freedom of Op. & Expression, Off. of the High Comm’r for Hum. Rts., and Maina Kiai, Special Rapporteur on the Rts. to Freedom of Peaceful Assembly & of Ass’n, Off. of the High Comm’r for Hum. Rts., to Theodore Allegra, U.S. Deputy Permanent, Rep. to the U.N. (Mar. 27, 2017), <https://www.ohchr.org/en/special-procedures/sr-freedom-of-opinion-and-expression/comments-legislation-and-policy> [permalink not available] (under “United States of America” at link “USA 3/2017”). The U.S. government’s response to the Special Rapporteurs’ attempt to ward off the noted concerns by stating that the

done with an eye toward the TMP standard, often making it difficult to challenge these “anti-protest” laws under that standard. Given that these new bills frequently increase punishment for protest-related conduct, a chilling effect may also follow.

This is a recent phenomenon. In the years leading up to 2017, there were almost no new bills attempting to restrict protests.⁷⁰ In fact, in 2015 and 2016 combined, state legislators introduced only 6 bills aimed at restricting protests.⁷¹ Yet between 2017 and 2020, at least 145 such bills were introduced.⁷² More specifically, in 2017, approximately 52 bills were introduced.⁷³ The number of bills then dropped to approximately 17 in 2018, rose again to approximately 41 in 2019, and remained fairly steady in 2020 with 33 such bills introduced.⁷⁴

These trends over the past five years are not coincidental—the introduction of “anti-protest” legislation often closely follows major protest events. In mid-2016, protests sprang up in reaction to the approved construction of the Dakota Access Pipeline, which was slated to cross under the Missouri River near the Standing Rock Sioux Reservation, threatening the region’s water supply as well as ancient burial grounds and cultural sites of historical importance.⁷⁵ In response, state legislators began introducing “anti-protest” legislation aimed at “riots” and individuals protesting

United States has “robust judicial mechanisms to enforce . . . the right of the people peacefully to assemble . . . [which is] safeguarded . . . through a long history of robust Supreme Court decisions to protect this right,” and citing to, among other things, the TPM standard. Letter from Jason R. Mack, U.S. Deputy Permanent, Rep. to the U.N. to David Kaye, Special Rapporteur on the Promotion & Prot. of the Right to Freedom of Op. & Expression, and Annalisa Ciampi (vice Maina Kiai), Special Rapporteur on the Rts. to Freedom of Peaceful Assembly and of Ass’n (May 11, 2017), https://www.ohchr.org/sites/default/files/Documents/Issues/Opinion/Legislation/USA_Reply_to_SR_freedom_Assembly_2017-05-11_16-41-01.pdf [<https://perma.cc/GMP5-JTQ7>]. As explained in Section I.C above, the TPM standard is not as robust as the U.S. government’s response implies.

70. BENAVIDEZ & TAGER, *supra* note 9, at 4.

71. *Id.*; see also *US Protest Law Tracker*, *supra* note 9 (tracking “anti-protest” legislation beginning in November 2016 after recognizing a rise in such legislation).

72. BENAVIDEZ & TAGER, *supra* note 9, at 4 (recording 116 state-level “anti-protest” bills introduced from 2015 to 2019); *US Protest Law Tracker*, *supra* note 9 (cataloguing 145 state-level “anti-protest” bills introduced from 2017 through 2020). For purposes of tallying bills in this Article, companion bills and bills with near-identical language introduced in state House and Senate legislatures are counted as one bill. However, all bills are cited separately in the footnotes *infra* for ease of reference to a particular bill.

73. BENAVIDEZ & TAGER, *supra* note 9, at 4 (cataloguing 52 “anti-protest” bills introduced in 2017); *US Protest Law Tracker*, *supra* note 9 (listing 52 “anti-protest” bills introduced in 2017).

74. *US Protest Law Tracker*, *supra* note 9 (listing 17 “anti-protest” bills introduced in 2018, 41 such bills introduced in 2019, and 33 such bills introduced in 2020); BENAVIDEZ & TAGER, *supra* note 9, at 4 (listing 17 “anti-protest” bills introduced in 2018 and 37 such bills introduced in 2019; PEN America did not collect data for 2020 in the cited report).

75. See Healy, *supra* note 11.

near “critical infrastructure” such as gas and oil pipelines.⁷⁶ For example, the North Dakota legislature introduced five different “anti-protest” bills in January 2017, the legislative session directly following significant Dakota Access Pipeline protests.⁷⁷ Three of these bills went on to become law.⁷⁸ Similarly, the sponsor of a 2017 Oklahoma law targeting protests near “critical infrastructure” stated that the bill was prompted by the Dakota Access Pipeline protests in North Dakota.⁷⁹ Today, as environmental advocates and landowners continue to protest pipeline projects such as the Keystone XL Pipeline, Enbridge’s Line 5 Pipeline in Wisconsin, and the Permian Highway Pipeline in Texas, eighteen states have passed restrictive protest legislation aimed at “critical infrastructure.”⁸⁰

This trend continued shortly after the election of Donald Trump in late 2016, when a renewed fervor around public protest began to surface with women’s marches and demonstrations in protest of the presidency of Donald Trump, many of which took place on public streets.⁸¹ This spurred legislation aimed at restricting public gatherings on various road-

76. BENAVIDEZ & TAGER, *supra* note 9, at 5–6, 16; *see also US Protest Law Tracker*, *supra* note 9.

77. H.B. 1426, 65th Leg. Assemb., Reg. Sess. (N.D. 2017); H.B. 1293, 65th Leg. Assemb., Reg. Sess. (N.D. 2017); H.B. 1304, 65th Leg. Assemb., Reg. Sess. (N.D. 2017); H.B. 1203, 65th Leg. Assemb., Reg. Sess. (N.D. 2017); H.B. 1193, 65th Leg. Assemb., Reg. Sess. (N.D. 2017).

78. H.B. 1426, 65th Leg. Assemb., Reg. Sess. (N.D. 2017); H.B. 1293, 65th Leg. Assemb., Reg. Sess. (N.D. 2017); H.B. 1304, 65th Leg. Assemb., Reg. Sess. (N.D. 2017). Interestingly, these three laws are aimed at conduct deemed to be “riot.” North Dakota passed an “anti-protest” law related to “critical infrastructure” in early 2019. *See* S.B. 2044, 66th Leg. Assemb., Reg. Sess. (N.D. 2019).

79. H.B. 1123, 56th Leg., Reg. Sess. (Okla. 2017); *US Protest Law Tracker*, *supra* note 9; Oklahoma Legislature Discussion of H.B. 1123, held by Okla. House of Representatives (2017), at 10:45:01-10:45:40 (<https://bit.ly/3IYHpxQ>) [<https://perma.cc/8H2E-BYJB>].

80. *See US Protest Law Tracker*, *supra* note 9 (tracking restrictive protest legislation aimed at “critical infrastructure”: S.B. 17, 2022 Leg., Reg. Sess. (Ala. 2022); H.B. 21, 2022 Leg., Reg. Sess. (Ala. 2022); H.B. 1321, 93rd Gen. Assemb., Reg. Sess. (Ark. 2021); S.B. 471, 121 Gen. Assemb., 2019 Reg. Sess. (Ind. 2019); S.B. 172, 2021–2022 Leg., Reg. Sess. (Kan. 2021); H.B. 44, 2020 Gen. Assemb., Reg. Sess. (Ky. 2020); H.B. 727, 2018 Leg., Reg. Sess. (La. 2018); H.B. 1243, 2020 Leg., Reg. Sess. (Miss. 2020); H.B. 355, 100th Gen. Assemb., 1st Reg. Sess. (Mo. 2019); H.B. 481, 67th Leg., Reg. Sess. (Mont. 2021); S.B. 2044, 66th Legis. Assemb., Reg. Sess. (N.D. 2019); S.B. 33, 134th Gen. Assemb., Reg. Sess. (Ohio 2021); H.B. 1123, 2017 Leg., Reg. Sess. (Okla. 2017); S.B. 151, 2020 Leg., 95th Leg. Sess. (S.D. 2020); S.B. 189, 2019 Leg., 94th Leg. Sess. (S.D. 2019); S.B. 264, 111th Gen. Assemb., Reg. Sess. (Tenn. 2019); H.B. 3557, 86th Leg., Reg. Sess. (Tex. 2019); H.B. 4615, 85th Leg., 2nd Reg. Sess. (W. Va. 2020); A.B. 426, 2019–2020 Leg., Reg. Sess. (Wis. 2019)).

81. *See, e.g.,* Perry Stein, Steve Hendrix & Abigail Hauslohner, *Women’s Marches: More than One Million Protesters Vow to Resist President Trump*, WASH. POST (Jan. 22, 2017), https://www.washingtonpost.com/local/womens-march-on-washington-a-sea-of-pink-hatted-protesters-vow-to-resist-donald-trump/2017/01/21/ae4def62-dfdf-11e6-acdf-14da832ae861_story.html [<https://perma.cc/QR7A-3BEB>] (noting that protesters were “squeezing into every street,” “fill[ing] . . . bridges,” and in some instances “shut[ting] down streets”).

ways.⁸² For example, after thousands marched in Minneapolis and St. Paul to protest Trump's presidency,⁸³ the Minnesota legislature introduced five new "anti-protest" bills in early 2017, which would have amended existing law to create new criminal penalties for obstructing a highway or traffic.⁸⁴

When looking at the "anti-protest" legislation from 2016 through 2020 holistically, the majority of the proposed bills "expand the definition of and/or heighten penalties for conduct deemed to be riot, criminal trespass, obstruction of traffic, or a similar offense," thus attempting to redefine what constitutes legal protest-related activity and explicitly criminalizing common protest tactics.⁸⁵ The vast majority of these bills had a Republican primary sponsor, and legislators sometimes explicitly indicated that they were proposing a bill to address conduct from a specific, recent protest.⁸⁶ Of the approximately thirty bills from this time period that have become law, only three have been challenged through litigation.⁸⁷ Further, although some of these bills have not become law, the

82. See BENAVIDEZ & TAGER, *supra* note 9, at 5–6; *US Protest Law Tracker*, *supra* note 9.

83. See, e.g., BENAVIDEZ & TAGER, *supra* note 9, at 6; Hannah Weikel, *Thousands March in Minneapolis to Protest Trump Inauguration*, AP NEWS (Jan. 20, 2017), <https://apnews.com/article/e8dbb6d6d29e460594e9539b3d04b416/> [<https://perma.cc/9X8M-UUKP>]; A nemona Hartocollis & Yamiche Alcindor, *Women's March Highlights as Huge Crowds Protest Trump: 'We're Not Going Away'*, N.Y. TIMES (Jan. 21, 2017), <https://www.nytimes.com/2017/01/21/us/womens-march.html> [<https://perma.cc/4WJ4-ZBVQ>] (highlighting women's marches around the United States, including in St. Paul).

84. BENAVIDEZ & TAGER, *supra* note 9, at 6 n.24 (listing relevant bills as: H.F. 34, 90th Leg., Reg. Sess. (Minn. 2017); H.F. 390, 90th Leg., Reg. Sess. (Minn. 2017); H.F. 55, 90th Leg., Reg. Sess. (Minn. 2017); S.F. 148, 90th Leg., Reg. Sess. (Minn. 2017); S.F. 803, 90th Leg., Reg. Sess. (Minn. 2017); H.F. 1066, 90th Leg., Reg. Sess. (Minn. 2017); S.F. 918, 90th Leg., Reg. Sess. (Minn. 2017); see also *US Protest Law Tracker*, *supra* note 9 (listing similar bills)).

85. BENAVIDEZ & TAGER, *supra* note 9, at 11 (dividing proposed legislation from 2015 to 2019 into four categories, capturing the most common trends observed among these bills: (1) bills that "expand the definition of and/or heighten penalties for conduct deemed to be riot, criminal trespass, obstruction of traffic, or a similar offense"; (2) bills that "impose costs on protesters such as clean-up costs or the costs of law enforcement"; (3) bills that "criminalize constitutionally-protected activity that may occur in relation to a protest"; and (4) bills that "immunize public or private actors from liability for harm caused to protesters").

86. BENAVIDEZ & TAGER, *supra* note 9, at 5–6.

87. *Id.* at 1, 25, 25 n.197 (citing S.B. 189, 98th Leg., Reg. Sess. (S.D. 2019); H.B. 727, 2018 Leg., Reg. Sess. (La. 2018)) (noting that South Dakota S.B. 189 and Louisiana H.B. 727 were the only two "anti-protest" laws challenged of those that became law from 2015 to 2019). As of the writing of this Article, only one additional challenge to the "anti-protest" laws passed from 2015 to 2020 has been identified. See *US Protest Law Tracker*, *supra* note 9 (noting that a Judge of the Circuit Court of St. Louis County found H.B. 1413, 99th Gen. Assemb., 2nd Reg. Sess. (Mo. 2018) unconstitutional and granted a permanent injunction against enforcement of the law in January 2020).

mere proposal of the legislation endorses a narrative of protests as prohibited criminal activity rather than encouraged social discourse.⁸⁸

B. 2021

The trend of introducing bills that attempt to restrict protests is not subsiding.⁸⁹ In fact, the pattern of introducing legislation aimed at specific protest activity is only mounting, with the largest wave of “anti-pro-

88. BENAVIDEZ & TAGER, *supra* note 9, at 4 (noting that of the approximately 116 bills proposed from 2015 to 2019, 23 have become law across 15 states); *US Protest Law Tracker*, *supra* note 9 (cataloguing 30 “anti-protest” bills across 17 states that have become law from 2015 to 2020).

89. In addition to state legislative efforts to curb protest activity, federal, state, and local officials are using a variety of other tactics to tamp down or discourage protests. For example, prosecutors have attempted to use decade-old gang laws to prosecute protesters, inherently categorizing protesters as “gang members” and ratcheting up punishment for voicing dissent to potential life sentences. *See, e.g.*, Ali Winston, *Prosecutors are Using Gang Laws to Criminalize Protest*, APPEAL (Sept. 1, 2020), <https://theappeal.org/gang-laws-criminalize-protest/> [https://perma.cc/HL7N-LC7T]; Dave Biscobing, *Politically Charged: Officials Create ‘Fictional Gang’ to Punish Phoenix Protestors*, ABC15: ARIZ. (May 6, 2021, 5:26 PM), <https://www.abc15.com/news/local-news/investigations/protest-arrests/politically-charged-officials-create-fictional-gang-to-punish-phoenix-protesters> [https://perma.cc/B7C2-8A3A]; Tim Cushing, *Arizona Protestors Pretend ‘ACAB’ Is Gang Lingo to Hit Protestors with Felony Gang Charges*, TECHDIRT (Jan. 21, 2021, 3:33 AM), <https://www.techdirt.com/articles/20210117/16075846074/arizona-prosecutors-pretend-acab-is-gang-lingo-to-hit-protestors-with-felony-gang-charges.shtml> [https://perma.cc/MW6L-QA5H]. Police have also used various surveillance techniques to track protesters during and after demonstrations. *See* Katie Tarasov, *As Protests Over the Killing of George Floyd Continue, Here’s How Police Use Powerful Surveillance Tech to Track Them*, CNBC (June 18, 2020, 8:46 AM), <https://www.cnbc.com/2020/06/18/heres-how-police-use-powerful-surveillance-tech-to-track-protestors.html> [https://perma.cc/7TGR-NHXF]; Kristina Libby, *How to Spot Police Surveillance Tools*, POPULAR MECHS. (June 12, 2020), <https://www.popularmechanics.com/technology/security/a32851975/police-surveillance-tools-protest-guide/> [https://perma.cc/6PKE-JMMA]. And federal prosecutors are targeting protesters, a practice not in keeping with the Department of Justice’s historical stance of leaving low-level crimes to state and local authorities. *See* Anjali Kamat, *‘Go After the Troublemakers’*, REVEAL (Nov. 1, 2020), <https://revealnews.org/article/go-after-the-troublemakers/> [https://perma.cc/A4Y6-J4NS] (“Federal resources are scarce and get used for major priorities like international terrorism, massive fraud and drug trafficking with Mexican cartels—you know, massive cases.’ Many of these protest cases struck [me] as ‘very small potatoes’ unworthy of federal resources.” (quoting Barbara McQuade, former U.S. Att’y for the E.D. Mich.)); Michael Loadenthal, *Tracking Federal and Non-Federal Cases Related to Summer-Fall Protests, Riots, & Uprisings*, PROSECUTION PROJECT (Dec. 29, 2022), <https://theprosecutionproject.org/2020/12/22/tracking-federal-cases-related-to-summer-protests-riots-uprisings/> [https://perma.cc/A48C-JMMV]. This is consistent with Justin Hansford’s conclusion that “authorities have always chilled civil rights speech more than white supremacist speech.” Justin Hansford, *The First Amendment Freedom of Assembly as a Racial Project*, 127 YALE L.J. F. 685, 685 (2018); *see also* Li Zhou & Kainaz Amaria, *These Photos Capture the Stark Contrast in Police Response to the George Floyd Protests and the Anti-lockdown Protests*, VOX (May 27, 2020, 4:50 PM), <https://www.vox.com/2020/5/27/21271811/george-floyd-protests-minneapolis-lockdown-protests> [https://perma.cc/4MPB-V9WC]; Molly Shah, *Anti-Abortion Protestors Get Special Treatment from the Police*, REAL NEWS NETWORK (Nov. 18, 2020),

test” legislation to date coming on the heels of the most robust protest movement in recent history.⁹⁰ In 2021, ninety-two “anti-protest” bills were introduced, with eighty-four such bills introduced during the first quarter of 2021.⁹¹ That is more than half the number of bills introduced during the previous four years combined. The first part of this section provides a comprehensive survey of these bills, highlighting some of the most problematic aspects of the proposed legislation. The second part of this section uses three states’ recently enacted “anti-protest” laws as case studies, unpacking the specific language state legislators are using to target protesters. Together, the survey and case studies show that state legislators are rapidly attempting to expand criminalized conduct (often to include non-violent conduct), increase penalties for certain protest activity, and target specific types of protest activity—most recently, that aimed at police brutality and racial justice issues.

1. *Survey of 2021 Bills*

A comprehensive survey of the ninety-two bills introduced during 2021 reveals the following data and trends.⁹² The ninety-two bills were introduced across thirty-five states, with multiple bills introduced in several states.⁹³ Twelve bills (across ten different states) have been enacted into

ealnews.com/anti-abortion-protesters-get-special-treatment-from-the-police [https://perma.cc/LU96-VCMF].

90. *US Protest Law Tracker*, *supra* note 9.

91. *Id.*

92. The ninety-two bills include all state-level bills identified on the *US Protest Law Tracker* for the year 2021. *Id.*

93. The number of bills introduced in 2021 by state are as follows: Alabama (6 bills), Arizona (4 bills), Arkansas (2 bills), Connecticut (1 bill), Florida (2 bills), Georgia (1 bill), Illinois (1 bill), Indiana (4 bills), Iowa (4 bills), Kansas (2 bills), Kentucky (3 bills), Maryland (1 bill), Massachusetts (1 bill), Minnesota (6 bills), Mississippi (4 bills), Missouri (2 bills), Montana (1 bill), Nebraska (1 bill), Nevada (1 bill), New Hampshire (1 bill), New Jersey (1 bill), New York (2 bills), North Carolina (6 bills), North Dakota (1 bill), Ohio (4 bills), Oklahoma (13 bills), Oregon (1 bill), Rhode Island (2 bills), South Carolina (1 bill), Tennessee (2 bills), Texas (6 bills), Utah (1 bill), Virginia (1 bill), Washington (2 bills), and Wisconsin (1 bill). The fifteen states that did not introduce “anti-protest” bills in 2021 are: Alaska, California, Colorado, Delaware, Hawaii, Idaho, Louisiana, Maine, Michigan, New Mexico, Pennsylvania, South Dakota, Vermont, West Virginia, and Wyoming. Of these states, only Delaware, Hawaii, Maine, New Mexico, and Vermont have never introduced “anti-protest” initiatives since the time these initiatives began to rise in 2015. *See id.*

law,⁹⁴ with the remainder either expiring or having been defeated.⁹⁵ All but one of the ninety-two bills were introduced by Republicans.⁹⁶

In terms of subject matter, the bills fall into three primary categories: (1) bills aimed at conduct defined to be riot or unlawful assembly (fifty-four in total);⁹⁷ (2) bills aimed at protests that disrupt or obstruct traffic

94. See S.B. 152, 2021 Leg., Reg. Sess. (Ala. 2021); H.B. 1508, 93rd Gen. Assemb., Reg. Sess. (Ark. 2021); H.B. 1321, 93rd Gen. Assemb., Reg. Sess. (Ark. 2021); H.B. 1, 2021 Leg., Reg. Sess. (Fla. 2021); S.B. 484, 2021 Leg., Reg. Sess. (Fla. 2021) (portions of this law were preliminarily enjoined by a federal judge on September 9, 2021); S.F. 342, 89th Gen. Assemb., Reg. Sess. (Iowa 2021); S.B. 172, 2021–2022 Leg., Reg. Sess. (Kan. 2021); H.B. 481, 67th Leg., Reg. Sess. (Mont. 2021); S.B. 300, 2021–2022 Leg., Reg. Sess. (N.C. 2021); H.B. 1674, 2021 Leg., Reg. Sess. (Okla. 2021) (portions of this law were preliminarily enjoined by a federal judge on October 27, 2021); H.B. 2095, 2021 Leg., Reg. Sess. (Okla. 2021); S.B. 451, 112th Gen. Assemb., Reg. Sess. (Tenn. 2021); H.B. 881, 112th Gen. Assemb., Reg. Sess. (Tenn. 2021); H.B. 9, 87th Leg., Reg. Sess. (Tex. 2021); S.B. 1163, 87th Leg., Reg. Sess. (Tex. 2021). For further detail on the Florida, Oklahoma, and Arkansas bills, which have now been enacted into law, see *infra* Section II.B.2.

95. *US Protest Law Tracker*, *supra* note 9 (sorting by date as “2021” and status as “defeated or expired”).

96. A Democratic legislator from Rhode Island, Arthur J. Corvese, introduced H.B. 5001 on January 8, 2021. See H.B. 5001, 2021 Gen. Assemb., Reg. Sess. (R.I. 2021). This bill was defeated. *Id.* Further, one bill from Massachusetts (H.B. 1586), one bill from Minnesota (H.F. 254/S.F. 386), one bill from Rhode Island (S.B. 404), and one bill from Washington (S.B. 5310) were introduced by both democrats and republicans, and four bills were introduced by committees rather than individuals—Connecticut H.B. 6455 was introduced by the judiciary committee, Iowa S.S.B. 1140 was introduced by a subcommittee, Iowa H.F. 430 was introduced by the committee on public safety, and Kansas S.B. 172 was introduced by the committee on utilities. See H.F. 254, 92nd Leg., Reg. Sess. (Minn. 2021); S.F. 386, 92nd Leg., Reg. Sess. (Minn. 2021); S.B. 404, 2021 Gen. Assemb., Reg. Sess. (R.I. 2021); S.B. 5310, 67th Leg., Reg. Sess. (Wash. 2021); H.B. 6455, 2021 Gen. Assemb., Reg. Sess. (Conn. 2021); S.S.B. 1140, 89th Gen. Assemb., Reg. Sess. (Iowa 2021); H.F. 430, 89th Gen. Assemb., Reg. Sess. (Iowa 2021); S.B. 172, 2021–2022 Leg., Reg. Sess. (Kan. 2021). Finally, Florida H.B. 1 was partially introduced by the judiciary committee. See H.B. 1, 2021 Leg., Reg. Sess. (Fla. 2021); S.B. 484, 2021 Leg., Reg. Sess. (Fla. 2021).

97. H.B. 133, 2021 Leg., Reg. Sess. (Ala. 2021); H.B. 445, 2021 Leg., Reg. Sess. (Ala. 2021); S.B. 398, 2021 Leg., Reg. Sess. (Ala. 2021); S.B. 155, 2021 Leg., Reg. Sess. (Ala. 2021); S.B. 1033, 55th Leg., 2nd Reg. Sess. (Ariz. 2021); S.B. 1784, 55th Leg., 1st Reg. Sess. (Ariz. 2021); H.B. 2039, 55th Leg., 1st Reg. Sess. (Ariz. 2021); H.B. 2485, 55th Leg., 1st Reg. Sess. (Ariz. 2021); H.B. 1508, 93rd Gen. Assemb., Reg. Sess. (Ark. 2021); H.B. 1, 2021 Leg., Reg. Sess. (Fla. 2021); S.B. 484, 2021 Leg., Reg. Sess. (Fla. 2021); H.B. 289, 2021–2022 Gen. Assemb., Reg. Sess. (Ga. 2021); H.B. 1205, 122nd Gen. Assemb., 1st Reg. Sess. (Ind. 2021); S.B. 198, 2021 Gen. Assemb., Reg. Sess. (Ind. 2021); S.B. 34, 122nd Gen. Assemb., 1st Reg. Sess. (Ind. 2021); S.B. 96, 122nd Gen. Assemb., 1st Reg. Sess. (Ind. 2021); S.F. 342, 89th Gen. Assemb., Reg. Sess. (Iowa 2021); S.S.B. 1140, 89th Gen. Assemb., Reg. Sess. (Iowa 2021); H.F. 251, 89th Gen. Assemb., Reg. Sess. (Iowa 2021); H.F. 430, 89th Gen. Assemb., Reg. Sess. (Iowa 2021); S.B. 211, 2021 Gen. Assemb., Reg. Sess. (Ky. 2021); H.B. 564, 2021 Gen. Assemb., Reg. Sess. (Ky. 2021); H.B. 164, 2021 Gen. Assemb., Reg. Sess. (Ky. 2021); S.B. 2374, 2021 Leg., Reg. Sess. (Miss. 2021); H.B. 83, 2021 Leg., Reg. Sess. (Miss. 2021); H.B. 763, 2021 Leg., Reg. Sess. (Miss. 2021); L.B. 111, 107th Leg., 1st Reg. Sess. (Neb. 2021); A.B. 168, 2021 Leg., 81st Sess.

(forty-six in total);⁹⁸ and (3) bills aimed at protests related to oil and gas or other critical infrastructure (eight in total).⁹⁹ Bills in these categories sometimes overlap.

(Nev. 2021); S. 3992, 219th Leg., Reg. Sess. (N.J. 2021); A. 5121, 2021–2022 Leg., Reg. Sess. (N.Y. 2021); S.B. 300, 2021–2022 Leg., Reg. Sess. (N.C. 2021); H.B. 805, Gen. Assemb., 2021–2022 Sess. (N.C. 2021); H.B. 1240, 67th Legis. Assemb., Reg. Sess. (N.D. 2021); H.B. 109, 134th Gen. Assemb., Reg. Sess. (Ohio 2021); S.B. 16, 134th Gen. Assemb., Reg. Sess. (Ohio 2021); S.B. 41, 134th Gen. Assemb., Reg. Sess. (Ohio 2021); S.B. 15, 2021 Leg., Reg. Sess. (Okla. 2021); H.B. 1674, 2021 Leg., Reg. Sess. (Okla. 2021); H.B. 1565, 2021 Leg., Reg. Sess. (Okla. 2021); H.B. 1578, 2021 Leg., Reg. Sess. (Okla. 2021); H.B. 2095, 2021 Leg., Reg. Sess. (Okla. 2021); H.B. 2094, 2021 Leg., Reg. Sess. (Okla. 2021); H.B. 2096, 2021 Leg., Reg. Sess. (Okla. 2021); H.B. 2215, 2021 Leg., Reg. Sess. (Okla. 2021); H.B. 2464, 2021 Leg., Reg. Sess. (Okla. 2021); S.B. 806, 2021 Leg., Reg. Sess. (Okla. 2021); H.B. 3329, 81st Leg., Reg. Sess. (Or. 2021); H.B. 3491, 124th Gen. Assemb., 1st Reg. Sess. (S.C. 2021); S.B. 451, 112th Gen. Assemb., Reg. Sess. (Tenn. 2021); H.B. 881, 112th Gen. Assemb., Reg. Sess. (Tenn. 2021); H.B. 2747, 87th Leg., Reg. Sess. (Tex. 2021); S.B. 912, 87th Leg., Reg. Sess. (Tex. 2021); H.B. 3652, 87th Leg., Reg. Sess. (Tex. 2021); H.B. 2461, 87th Leg., Reg. Sess. (Tex. 2021); S.B. 138, 2021 Leg., Gen. Sess. (Utah 2021); S.B. 5310, 67th Leg., Reg. Sess. (Wash. 2021); S.B. 296, 2021–2022 Leg., Reg. Sess. (Wis. 2021); A.B. 279, 2021–2022 Leg., Reg. Sess. (Wis. 2021).

98. H.B. 445, 2021 Leg., Reg. Sess. (Ala. 2021); S.B. 1784, 55th Leg., 1st Reg. Sess. (Ariz. 2021); H.B. 2039, 55th Leg., 1st Reg. Sess. (Ariz. 2021); H.B. 2485, 55th Leg., 1st Reg. Sess. (Ariz. 2021); H.B. 1508, 93rd Gen. Assemb., Reg. Sess. (Ark. 2021); H.B. 1, 2021 Leg., Reg. Sess. (Fla. 2021); S.B. 484, 2021 Leg., Reg. Sess. (Fla. 2021); H.B. 289, 2021–2022 Gen. Assemb., Reg. Sess. (Ga. 2021); S.B. 34, 122nd Gen. Assemb., 1st Reg. Sess. (Ind. 2021); S.F. 342, 89th Gen. Assemb., Reg. Sess. (Iowa 2021); S.S.B. 1140, 89th Gen. Assemb., Reg. Sess. (Iowa 2021); H.F. 251, 89th Gen. Assemb., Reg. Sess. (Iowa 2021); H.F. 430, 89th Gen. Assemb., Reg. Sess. (Iowa 2021); S.B. 211, 2021 Gen. Assemb., Reg. Sess. (Ky. 2021); H.B. 564, 2021 Gen. Assemb., Reg. Sess. (Ky. 2021); H.B. 164, 2021 Gen. Assemb., Reg. Sess. (Ky. 2021); H.B. 645, 2021 Gen. Assemb., Reg. Sess. (Md. 2021); H.B. 1586, 192nd Gen. Ct., Reg. Sess. (Mass. 2021); H.F. 1967, 92nd Leg., Reg. Sess. (Minn. 2021); S.F. 1285, 92nd Leg., Reg. Sess. (Minn. 2021); S.B. 2374, 2021 Leg., Reg. Sess. (Miss. 2021); H.B. 83, 2021 Leg., Reg. Sess. (Miss. 2021); S.B. 2283, 2021 Leg., Reg. Sess. (Miss. 2021); H.B. 1441, 101st Gen. Assemb., 1st Reg. Sess. (Mo. 2021); H.B. 1914, 101st Gen. Assemb., 2nd Reg. Sess. (Mo. 2021); L.B. 111, 107th Leg., 1st Reg. Sess. (Neb. 2021); A.B. 168, 2021 Leg., 81st Sess. (Nev. 2021); S. 3992, 219th Leg., Reg. Sess. (N.J. 2021); S.B. 16, 134th Gen. Assemb., Reg. Sess. (Ohio 2021); H.B. 109, 134th Gen. Assemb., Reg. Sess. (Ohio 2021); H.B. 1674, 2021 Leg., Reg. Sess. (Okla. 2021); S.B. 560, 2021 Leg., Reg. Sess. (Okla. 2021); H.B. 1561, 2021 Leg., Reg. Sess. (Okla. 2021); H.B. 2215, 2021 Leg., Reg. Sess. (Okla. 2021); H.B. 2464, 2021 Leg., Reg. Sess. (Okla. 2021); S.B. 806, 2021 Leg., Reg. Sess. (Okla. 2021); H.B. 3329, 81st Leg., Reg. Sess. (Or. 2021); S.B. 404, 2021 Gen. Assemb., Reg. Sess. (R.I. 2021); H.B. 5001, 2021 Gen. Assemb., Reg. Sess. (R.I. 2021); H.B. 3491, 124th Gen. Assemb., 1st Reg. Sess. (S.C. 2021); S.B. 843, 112th Gen. Assemb., Reg. Sess. (Tenn. 2021); H.B. 513, 112th Gen. Assemb., Reg. Sess. (Tenn. 2021); H.B. 2150, 87th Leg., Reg. Sess. (Tex. 2021); H.B. 9, 87th Leg., Reg. Sess. (Tex. 2021); S.B. 1163, 87th Leg., Reg. Sess. (Tex. 2021); S.B. 138, 2021 Leg., Gen. Sess. (Utah 2021); S.B. 1308, 112th Ge. Assemb., Reg. Sess. (Va. 2021); S.B. 5456, 67th Leg., 2021 Reg. Sess. (Wash. 2021); S.B. 5310, 67th Leg., Reg. Sess. (Wash. 2021); S.B. 296, 2021–2022 Leg., Reg. Sess. (Wis. 2021); A.B. 279, 2021–2022 Leg., Reg. Sess. (Wis. 2021).

99. H.B. 516, 2021 Leg., Reg. Sess. (Ala. 2021); H.B. 1321, 93rd Gen. Assemb., Reg. Sess. (Ark. 2021); S.B. 172, 2021–2022 Leg., Reg. Sess. (Kan. 2021); H.B.

As to the first category, many of the bills are particularly expansive in the way they define conduct such as riot or unlawful assembly, often reaching nonviolent conduct. Specifically, at least eighteen bills expand the definition of riot beyond that already codified in the state's criminal code.¹⁰⁰

Thirty-five bills create new riot or unlawful assembly crimes, or other crimes committed during a riot or unlawful assembly (e.g., assault during the course of a riot).¹⁰¹ Many other bills also create new crimes aimed at

1558, 92nd Leg., Reg. Sess. (Minn. 2021); S.F. 355, 92nd Leg., Reg. Sess. (Minn. 2021); H.F. 254, 92nd Leg., Reg. Sess. (Minn. 2021); S.F. 386, 92nd Leg., Reg. Sess. (Minn. 2021); H.F. 129, 92nd Leg., Reg. Sess. (Minn. 2021); S.F. 1378, 92nd Leg., Reg. Sess. (Minn. 2021); H.B. 481, 67th Leg., Reg. Sess. (Mont. 2021). The handful of bills that do not fall into one of these three categories, fall into categories such as bills aimed at: (1) protests on college campuses (*see, e.g.*, H.B. 3409, 102nd Gen. Assemb., Reg. Sess. (Ill. 2021); A.8342, 2021–2022 Leg., Reg. Sess. (N.Y. 2021); H.B. 333, 2021–2022 Gen. Assemb., 2021–2022 Sess. (N.C. 2021)); (2) protests that would disrupt a state's general assembly or a meeting of a public body (*see, e.g.*, H.B. 6455, 2021 Gen. Assemb., Reg. Sess. (Conn. 2021); S.B. 335, 2021–2022 Gen. Assemb., 2021–2022 Sess. (N.C. 2021); H.B. 3599, 87th Leg., Reg. Sess. (Tex. 2021); H.B. 1822, 2021 Leg., Reg. Sess. (Okla. 2021)); (3) permit fees and/or where protesters can gather (*see, e.g.*, S.B. 152, 2021 Leg., Reg. Sess. (Ala. 2021); H.B. 11, 2021 Leg., Reg. Sess. (Fla. 2021)); and (4) distraction of law enforcement officers (*see, e.g.*, H.B. 22, 134th Gen. Assemb., Reg. Sess. (Ohio 2021)). Some bills also include specific categories of problematic legislation. *See infra* notes 104–113.

100. H.B. 133, 2021 Leg., Reg. Sess. (Ala. 2021); H.B. 445, 2021 Leg., Reg. Sess. (Ala. 2021); S.B. 398, 2021 Leg., Reg. Sess. (Ala. 2021); H.B. 1, 2021 Leg., Reg. Sess. (Fla. 2021); S.B. 484, 2021 Leg., Reg. Sess. (Fla. 2021); H.B. 2039, 55th Leg., 1st Reg. Sess. (Ariz. 2021); H.B. 289, 2021–2022 Gen. Assemb., Reg. Sess. (Ga. 2021); H.B. 1205, 122nd Gen. Assemb., 1st Reg. Sess. (Ind. 2021); S.B. 96, 122nd Gen. Assemb., 1st Reg. Sess. (Ind. 2021); S.F. 342, 89th Gen. Assemb., Reg. Sess. (Iowa 2021); A.B. 168, Leg., 81st Sess. (Nev. 2021); S. 3992, 219th Leg., Reg. Sess. (N.J. 2021); S.B. 300, 2021–2022 Leg., Reg. Sess. (N.C. 2021); H.B. 805, 2021–2022 Gen. Assemb., Reg. Sess. (N.C. 2021); H.B. 1674, 2021 Leg., Reg. Sess. (Okla. 2021); H.B. 2215, 2021 Leg., Reg. Sess. (Okla. 2021); H.B. 2464, 2021 Leg., Reg. Sess. (Okla. 2021); H.B. 3329, 81st Leg., Reg. Sess. (Or. 2021); S.B. 451, 112th Gen. Assemb., Reg. Sess. (Tenn. 2021); H.B. 881, 112th Gen. Assemb., Reg. Sess. (Tenn. 2021).

101. H.B. 133, 2021 Leg., Reg. Sess. (Ala. 2021); H.B. 445, 2021 Leg., Reg. Sess. (Ala. 2021); S.B. 398, 2021 Leg., Reg. Sess. (Ala. 2021); S.B. 1784, 55th Leg., 1st Reg. Sess. (Ariz. 2021); H.B. 2039, 55th Leg., 1st Reg. Sess. (Ariz. 2021); H.B. 2485, 55th Leg., 1st Reg. Sess. (Ariz. 2021); S.B. 1033, 55th Leg., 2nd Reg. Sess. (Ariz. 2021); H.B. 1, 2021 Leg., Reg. Sess. (Fla. 2021); S.B. 484, 2021 Leg., Reg. Sess. (Fla. 2021); H.B. 289, 2021–2022 Gen. Assemb., Reg. Sess. (Ga. 2021); H.B. 1205, 122nd Gen. Assemb., 1st Reg. Sess. (Ind. 2021); H.F. 251, 89th Gen. Assemb., Reg. Sess. (Iowa 2021); S.B. 211, 2021 Gen. Assemb., Reg. Sess. (Ky. 2021); H.B. 1586, 192nd Gen. Ct., Reg. Sess. (Mass. 2021); S.B. 2374, 2021 Leg., Reg. Sess. (Miss. 2021); H.B. 83, 2021 Leg., Reg. Sess. (Miss. 2021); H.B. 1441, 101st Gen. Assemb., 1st Reg. Sess. (Mo. 2021); L.B. 111, 107th Leg., 1st Reg. Sess. (Neb. 2021); A.B. 168, 2021 Leg., 81st Sess. (Nev. 2021); S. 3992, 219th Leg., Reg. Sess. (N.J. 2021); A. 5121, 2021–2022 Leg., Reg. Sess. (N.Y. 2021); S.B. 333, 2021–2022 Gen. Assemb., Reg. Sess. (N.C. 2021); H.B. 109, 134th Gen. Assemb., Reg. Sess. (Ohio 2021); H.B. 1674, 2021 Leg., Reg. Sess. (Okla. 2021); H.B. 1578, 2021 Leg., Reg. Sess. (Okla. 2021); H.B. 2095, 2021 Leg., Reg. Sess. (Okla. 2021); H.B. 2096, 2021 Leg., Reg. Sess. (Okla. 2021); H.B. 2215, 2021 Leg., Reg. Sess. (Okla. 2021);

curtailing protest activity, such as violating curfew, mob intimidation, and swarming.¹⁰² And the bills frequently ratchet up penalties for conduct that was already criminalized—thirty-one bills increase penalties for riot, unlawful assembly, or other similar crimes.¹⁰³ Some bills even impose mandatory minimums for particular types of protest activity, including

H.B. 2464, 2021 Leg., Reg. Sess. (Okla. 2021); S.B. 806, 2021 Leg., Reg. Sess. (Okla. 2021); H.B. 3329, 81st Leg., Reg. Sess. (Or. 2021); S.B. 843, 112th Gen. Assemb., Reg. Sess. (Tenn. 2021); H.B. 513, 112th Gen. Assemb., Reg. Sess. (Tenn. 2021); S.B. 912, 87th Leg., Reg. Sess. (Tex. 2021); H.B. 3652, 87th Leg., Reg. Sess. (Tex. 2021); S.B. 138, 2021 Leg., Gen. Sess. (Utah 2021); S.B. 5456, 67th Leg., 2021 Reg. Sess. (Wash. 2021); S.B. 5310, 67th Leg., Reg. Sess. (Wash. 2021); S.B. 296, 2021–2022 Leg., Reg. Sess. (Wis. 2021); A.B. 279, 2021–2022 Leg., Reg. Sess. (Wis. 2021).

102. *See, e.g.*, S.B. 198, 2021 Gen. Assemb., Reg. Sess. (Ind. 2021) (creating new offense of violating curfew); S.B. 1033, 55th Leg., 2nd Reg. Sess. (Ariz. 2021) (creating new offense of mob intimidation); S.B. 5456, 67th Leg., 2021 Reg. Sess. (Wash. 2021) (creating new offense of swarming). Although not the focus of this Article, several bills also created new disorderly conduct offenses or other similar crimes. *See, e.g.*, S.F. 342, 89th Gen. Assemb., Reg. Sess. (Iowa 2021); S.S.B. 1140, 89th Gen. Assemb., Reg. Sess. (Iowa 2021); H.F. 251, 89th Gen. Assemb., Reg. Sess. (Iowa 2021); H.F. 430, 89th Gen. Assemb., Reg. Sess. (Iowa 2021); S.B. 2374, 2021 Leg., Reg. Sess. (Miss. 2021). Although the Supreme Court has held that it is unconstitutional for government officials to use crimes such as disorderly conduct to suppress constitutionally protected assemblies, crimes like this are often used to manage protesters. *See* Gregory v. City of Chi., 394 U.S. 111, 112 (1969) (reversing conviction for disorderly conduct as petitioners were involved in a peaceful march); Abu El-Haj, *supra* note 40, at 977. These laws also allow great discretion, resulting in law enforcement arrest patterns that can nullify the First Amendment protections protesters should be afforded. *See, e.g.*, Abu El-Haj, *supra* note 42, at 1014–18 (demonstrating that police often arrest protesters for minor crimes as a control mechanism and that lower courts often uphold these practices).

103. H.B. 133, 2021 Leg., Reg. Sess. (Ala. 2021); H.B. 445, 2021 Leg., Reg. Sess. (Ala. 2021); S.B. 398, 2021 Leg., Reg. Sess. (Ala. 2021); S.B. 1784, 55th Leg., 1st Reg. Sess. (Ariz. 2021); H.B. 1508, 93rd Gen. Assemb., Reg. Sess. (Ark. 2021); H.B. 1205, 122nd Gen. Assemb., 1st Reg. Sess. (Ind. 2021); S.B. 198, 2021 Gen. Assemb., Reg. Sess. (Ind. 2021); S.B. 34, 122nd Gen. Assemb., 1st Reg. Sess. (Ind. 2021); S.F. 342, 89th Gen. Assemb., Reg. Sess. (Iowa 2021); S.S.B. 1140, 89th Gen. Assemb., Reg. Sess. (Iowa 2021); H.B. 564, 2021 Gen. Assemb., Reg. Sess. (Ky. 2021); H.B. 164, 2021 Gen. Assemb., Reg. Sess. (Ky. 2021); H.B. 83, 2021 Leg., Reg. Sess. (Miss. 2021); A.B. 168, 2021 Leg., 81st Sess. (Nev. 2021); A. 5121, 2021–2022 Leg., Reg. Sess. (N.Y. 2021); S.B. 300, 2021–2022 Leg., Reg. Sess. (N.C. 2021); H.B. 805, 2021–2022 Gen. Assemb., Sess. (N.C. 2021); H.B. 1240, 67th Legis. Assemb., Reg. Sess. (N.D. 2021); H.B. 109, 134th Gen. Assemb., Reg. Sess. (Ohio 2021); S.B. 41, 134th Gen. Assemb., Reg. Sess. (Ohio 2021); S.B. 15, 2021 Leg., Reg. Sess. (Okla. 2021); H.B. 1565, 2021 Leg., Reg. Sess. (Okla. 2021); S.B. 806, 2021 Leg., Reg. Sess. (Okla. 2021); H.B. 3329, 81st Leg., Reg. Sess. (Or. 2021); S.B. 404, 2021 Gen. Assemb., Reg. Sess. (R.I. 2021); H.B. 5001, 2021 Gen. Assemb., Reg. Sess. (R.I. 2021); H.B. 3491, 124th Gen. Assemb., 1st Reg. Sess. (S.C. 2021); S.B. 451, 112th Gen. Assemb., Reg. Sess. (Tenn. 2021); H.B. 881, 112th Gen. Assemb., Reg. Sess. (Tenn. 2021); H.B. 2747, 87th Leg., Reg. Sess. (Tex. 2021); S.B. 912, 87th Leg., Reg. Sess. (Tex. 2021); H.B. 3652, 87th Leg., Reg. Sess. (Tex. 2021); S.B. 138, 2021 Leg., Gen. Sess. (Utah 2021).

mandatory minimums for first time offenders that may not have been involved in violent conduct.¹⁰⁴

Eight particularly problematic bills prohibit bail for individuals arrested in connection with public demonstrations.¹⁰⁵ And nineteen others remove or curtail liability for harming protesters, such as by driving a vehicle into a crowd of demonstrators or using deadly force.¹⁰⁶

Some of the bills also include harsh non-criminal penalties such as a prohibition on holding public office,¹⁰⁷ termination of employment,¹⁰⁸ or a bar on the receipt of state or local public benefits.¹⁰⁹ Others impose

104. *See, e.g.*, H.B. 133, 2021 Leg., Reg. Sess. (Ala. 2021) (creating a mandatory minimum sentence of thirty days' imprisonment for the crime of "riot," and a mandatory minimum sentence of six months' imprisonment for the crime of aggravated riot).

105. H.B. 133, 2021 Leg., Reg. Sess. (Ala. 2021); S.B. 34, 122nd Gen. Assemb., 1st Reg. Sess. (Ind. 2021); S.B. 2374, 2021 Leg., Reg. Sess. (Miss. 2021); H.B. 83, 2021 Leg., Reg. Sess. (Miss. 2021); L.B. 111, 107th Leg., 1st Reg. Sess. (Neb. 2021); S. 3992, 219th Leg., Reg. Sess. (N.J. 2021); H.B. 3329, 81st Leg., Reg. Sess. (Or. 2021); H.B. 2461, 87th Leg., Reg. Sess. (Tex. 2021); H.B. 3491, 124th Gen. Assemb., 1st Reg. Sess. (S.C. 2021). Five other bills restrict bail by, for example, requiring a twenty-four-hour hold, prohibiting bail until the first appearance, and imposing presumptions against bail. *See* S.S.B. 1140, 89th Gen. Assemb., Reg. Sess. (Iowa 2021); H.B. 564, 2021 Gen. Assemb., Reg. Sess. (Ky. 2021); H.B. 164, 2021 Gen. Assemb., Reg. Sess. (Ky. 2021); H.B. 805, 2021–2022 Gen. Assemb., Reg. Sess. (N.C. 2021); S.B. 138, 2021 Leg., Gen. Sess. (Utah 2021).

106. *See, e.g.*, H.B. 763, 2021 Leg., Reg. Sess. (Miss. 2021) (amending Mississippi criminal code to add a defense such that the killing of a protester by a business owner during a riot, looting, or other violent protest would be considered justifiable homicide); S.B. 155, 2021 Leg., Reg. Sess. (Ala. 2021) (expanding the instances in which a person may lawfully use deadly force to include areas near a "riot"). Other such bills include: H.B. 1, 2021 Leg., Reg. Sess. (Fla. 2021); S.B. 484, 2021 Leg., Reg. Sess. (Fla. 2021); H.B. 289, 2021–2022 Gen. Assemb., Reg. Sess. (Ga. 2021); S.F. 342, 89th Gen. Assemb., Reg. Sess. (Iowa 2021); H.F. 251, 89th Gen. Assemb., Reg. Sess. (Iowa 2021); S.B. 211, 2021 Gen. Assemb., Reg. Sess. (Ky. 2021); S.B. 2374, 2021 Leg., Reg. Sess. (Miss. 2021); H.B. 83, 2021 Leg., Reg. Sess. (Miss. 2021); A.B. 168, 2021 Leg., 81st Sess. (Nev. 2021); H.B. 197, 2021 Gen. Ct., Reg. Sess. (N.H. 2021); S. 3992, 219th Leg., Reg. Sess. (N.J. 2021); H.B. 1674, 2021 Leg., Reg. Sess. (Okla. 2021); S.B. 560, 2021 Leg., Reg. Sess. (Okla. 2021); H.B. 2464, 2021 Leg., Reg. Sess. (Okla. 2021); H.B. 1561, 2021 Leg., Reg. Sess. (Okla. 2021); H.B. 2215, 2021 Leg., Reg. Sess. (Okla. 2021); S.B. 843, 112th Gen. Assemb., Reg. Sess. (Tenn. 2021); H.B. 513, 112th Gen. Assemb., Reg. Sess. (Tenn. 2021); S.B. 138, 2021 Leg., Gen. Sess. (Utah 2021); S.B. 5456, 67th Leg., 2021 Reg. Sess. (Wash. 2021); S.B. 5310, 67th Leg., Reg. Sess. (Wash. 2021).

107. *See, e.g.*, S.B. 138, 2021 Leg., Gen. Sess. (Utah 2021) (prohibiting holding public office for five years under certain circumstances).

108. *See, e.g.*, H.B. 1565, 2021 Leg., Reg. Sess. (Okla. 2021) (requiring that employees of the state who are convicted of "[i]ncitement to riot" or "[u]nlawful assembly" be terminated from their job and barred from further employment with any state government entity).

109. *See, e.g.*, H.B. 289, 2021–2022 Gen. Assemb., Reg. Sess. (Ga. 2021) (barring anyone convicted of unlawful assembly from receiving state or local unemployment benefits). Other bills that limit public benefits include: H.B. 2485, 55th Leg., 1st Reg. Sess. (Ariz. 2021); H.B. 2039, 55th Leg., 1st Reg. Sess. (Ariz. 2021); S.B. 34, 122nd Gen. Assemb., 1st Reg. Sess. (Ind. 2021); S.B. 211, 2021 Gen. Assemb., Reg. Sess. (Ky. 2021); H.F. 466, 92nd Leg., Reg. Sess. (Minn. 2021); S.F.

restrictions on local governments, such as civil liability for localities that interfere with the ability of law enforcement to provide protection during an unlawful assembly or riot.¹¹⁰ Still others encourage police involvement in protest activity by, for example, creating civil liability against municipal governments that fail to intervene to protect people and property during a riot or unlawful assembly.¹¹¹ Finally, some bills impose costs on protesters, including the costs of law enforcement¹¹² or the cost of cleanup or damage from a protest (sometimes in the form of restitution).¹¹³

2381, 92nd Leg., Reg. Sess. (Minn. 2021); S.B. 2374, 2021 Leg., Reg. Sess. (Miss. 2021); H.B. 83, 2021 Leg., Reg. Sess. (Miss. 2021); H.B. 3329, 81st Leg., Reg. Sess. (Or. 2021).

110. *See, e.g.*, H.B. 289, 2021–2022 Gen. Assemb., Reg. Sess. (Ga. 2021) (imposing civil liability on governing authorities of a county or municipality if they intentionally interfere with the ability of a law enforcement agency to provide reasonable law enforcement protection during an unlawful assembly or riot, as defined under state law). Other similar bills include: S.B. 1033, 55th Leg., 2nd Reg. Sess. (Ariz. 2021); H.B. 1, 2021 Leg., Reg. Sess. (Fla. 2021); S.B. 484, 2021 Leg., Reg. Sess. (Fla. 2021); H.B. 1205, 122nd Gen. Assemb., 1st Reg. Sess. (Ind. 2021); S.B. 34, 122nd Gen. Assemb., 1st Reg. Sess. (Ind. 2021); S.B. 211, 2021 Gen. Assemb., Reg. Sess. (Ky. 2021); S.B. 2374, 2021 Leg., Reg. Sess. (Miss. 2021); H.B. 83, 2021 Leg., Reg. Sess. (Miss. 2021); H.B. 321, 2021–2022 Gen. Assemb., Reg. Sess. (N.C. 2021); S.B. 238, 2021–2022 Gen. Assemb., Reg. Sess. (N.C. 2021); H.B. 2094, 2021 Leg., Reg. Sess. (Okla. 2021); H.B. 3329, 81st Leg., Reg. Sess. (Or. 2021); S.B. 5310, 67th Leg., Reg. Sess. (Wash. 2021).

111. *See, e.g.*, H.B. 1, 2021 Leg., Reg. Sess. (Fla. 2021) (creating a new civil right of action against municipal governments that fail to “respond appropriately to protect persons and property [damage] during a riot or an unlawful assembly,” making such local governments civilly liable for damages, including personal injury and property damage); *see also*, S.B. 484, 2021 Leg., Reg. Sess. (Fla. 2021). Other similar bills include: S.B. 1033, 55th Leg., 2nd Reg. Sess. (Ariz. 2021); S. 3992, 219th Leg., Reg. Sess. (N.J. 2021); H.B. 321, 2021–2022 Gen. Assemb., Reg. Sess. (N.C. 2021); S.B. 238, 2021–2022 Gen. Assemb., Reg. Sess. (N.C. 2021).

112. *See, e.g.*, S.B. 152, 2021 Leg., Reg. Sess. (Ala. 2021); H.B. 289, 2021–2022 Gen. Assemb., Reg. Sess. (Ga. 2021); H.F. 254, 92nd Leg., Reg. Sess. (Minn. 2021); S.F. 386, 92nd Leg., Reg. Sess. (Minn. 2021); S.B. 41, 134th Gen. Assemb., Reg. Sess. (Ohio 2021).

113. *See, e.g.*, S.B. 152, 2021 Leg., Reg. Sess. (Ala. 2021); S.B. 398, 2021 Leg., Reg. Sess. (Ala. 2021); H.B. 445, 2021 Leg., Reg. Sess. (Ala. 2021); H.B. 133, 2021 Leg., Reg. Sess. (Ala. 2021); S.B. 1033, 55th Leg., 2nd Reg. Sess. (Ariz. 2021); H.B. 1508, 93rd Gen. Assemb., Reg. Sess. (Ark. 2021); H.B. 1, 2021 Leg., Reg. Sess. (Fla. 2021); S.B. 484, 2021 Leg., Reg. Sess. (Fla. 2021); H.B. 289, 2021–2022 Gen. Assemb., Reg. Sess. (Ga. 2021); H.B. 1205, 122nd Gen. Assemb., 1st Reg. Sess. (Ind. 2021); S.B. 96, 122nd Gen. Assemb., 1st Reg. Sess. (Ind. 2021); S.F. 342, 89th Gen. Assemb., Reg. Sess. (Iowa 2021); S.S.B. 1140, 89th Gen. Assemb., Reg. Sess. (Iowa 2021); S.B. 172, 2021–2022 Leg., Reg. Sess. (Kan. 2021); S.B. 211, 2021 Gen. Assemb., Reg. Sess. (Ky. 2021); H.B. 164, 2021 Gen. Assemb., Reg. Sess. (Ky. 2021); H.B. 564, 2021 Gen. Assemb., Reg. Sess. (Ky. 2021); H.B. 1558, 92nd Leg., Reg. Sess. (Minn. 2021); H.F. 254, 92nd Leg., Reg. Sess. (Minn. 2021); S.F. 386, 92nd Leg., Reg. Sess. (Minn. 2021); H.F. 129, 92nd Leg., Reg. Sess. (Minn. 2021); S.F. 1378, 92nd Leg., Reg. Sess. (Minn. 2021); S.B. 2374, 2021 Leg., Reg. Sess. (Miss. 2021); H.B. 83, 2021 Leg., Reg. Sess. (Miss. 2021); H.B. 481, 67th Leg., Reg. Sess. (Mont. 2021); H.B. 805, 2021–2022 Gen. Assemb., Reg. Sess. (N.C. 2021); H.B. 1240, 67th Legis. Assemb., Reg. Sess. (N.D. 2021); L.B. 111, 107th Leg., 1st Reg. Sess. (Neb. 2021); S. 3992, 219th Leg., Reg. Sess. (N.J. 2021); H.B. 109, 134th Gen.

2. *Case Studies*

In addition to the statistics provided above, it is helpful to explore the language of these bills in detail as well as the context in which they were introduced and passed. The following case studies—Florida, Oklahoma, and Arkansas¹¹⁴—highlight some of the ways that state legislators are redrawing the line between legal and illegal protest activity, thereby slowly chipping away at the assembly right. Together, these case studies help demonstrate how at least some of the “anti-protest” laws will likely be used in practice—to silence protesters, stripping them of the power assembly should afford.

a. Florida—Riot or Unlawful Assembly

On January 6, 2021, the Florida legislature introduced H.B. 1, targeting select individuals participating in public demonstrations.¹¹⁵ Governor Ron DeSantis signed this bill into law on April 19, 2021, as the Combating Public Disorder Act (the Act), and touted it as the “strongest anti-rioting, pro-law enforcement measure in the country.”¹¹⁶ This legislation includes a helpful example of the types of bills in the first category—those attempting to redefine what constitutes unlawful assembly or riotous conduct, sweeping in potentially peaceful conduct and harshly punishing that conduct. It also supplements this expanded criminalization of protest activity

Assemb., Reg. Sess. (Ohio 2021); S.B. 41, 134th Gen. Assemb., Reg. Sess. (Ohio 2021); S.B. 15, 2021 Leg., Reg. Sess. (Okla. 2021); H.B. 1674, 2021 Leg., Reg. Sess. (Okla. 2021); S.B. 806, 2021 Leg., Reg. Sess. (Okla. 2021); H.B. 3491, 124th Gen. Assemb., 1st Reg. Sess. (S.C. 2021); S.B. 451, 112th Gen. Assemb., Reg. Sess. (Tenn. 2021); H.B. 881, 112th Gen. Assemb., Reg. Sess. (Tenn. 2021); S.B. 912, 87th Leg., Reg. Sess. (Tex. 2021); H.B. 3652, 87th Leg., Reg. Sess. (Tex. 2021).

114. Although the Florida, Oklahoma, and Arkansas bills have become law, introducing bills such as those in the case studies can have a detrimental chilling effect on protest activity even if the bills do not become law. These expansive bills send a signal that voicing dissent is akin to criminal activity rather than protected assembly.

115. H.B. 1, 2021 Leg., Reg. Sess. (Fla. 2021); S.B. 484, 2021 Leg., Reg. Sess. (Fla. 2021).

116. Greg Allen, *Florida Adopts Nation’s Toughest Restrictions on Protests*, NAT’L PUB. RADIO (Apr. 19, 2021, 2:19 PM), <https://www.npr.org/2021/04/19/988791175/florida-adopts-nations-toughest-restrictions-on-protests> [https://perma.cc/WT72-FEFF]; see also H.B. 1, 2021 Leg., Reg. Sess. (Fla. 2021). On September 9, 2021, Northern District of Florida Chief Judge Mark Walker granted a request by civil rights groups to preliminarily enjoin enforcement of key provisions of H.B. 1, including enforcement of the riot definition created by section 15 of the law. *Dream Defs. v. DeSantis*, 559 F. Supp. 3d 1238, 1289 (N.D. Fla. 2021). The ruling was appealed, and the Eleventh Circuit held oral argument in case number 21-13489 on March 17, 2022. *Oral Argument Recordings*, U.S. CT. OF APPEALS FOR THE ELEVENTH CIR., <https://www.ca11.uscourts.gov/oral-argument-recordings> (type “Dream Defenders” into the search box and click “search”) [https://perma.cc/72L2-FK3C] (last visited May 17, 2023). And on January 10, 2023, the Eleventh Circuit certified interpretation of the new definition of “riot” to the Florida Supreme Court. *Dream Defs. v. Governor of Fla.*, 57 F.4th 879 (11th Cir. 2023).

with other provisions aimed at tamping down public protest. This sweeping legislation came against the backdrop of the BLM protests during the summer of 2020, and the specific language of the statute reveals an attempt to encroach on the right to peaceable assembly.

i. *New Definition of “Riot”*

The specific language of the law highlights the danger of state legislators defining the contours of the assembly right and the deterrent effect some new laws may have on peaceful protests. For example, section 15 of the Act amends Florida Statutes section 870.01 to add a new definition of “riot.”¹¹⁷ Under the bill, a person now commits riot if:

he or she [sic] willfully participates in a violent public disturbance involving an assembly of three or more persons, acting with a common intent to assist each other in violent and disorderly conduct, resulting in:

- (a) Injury to another person;
- (b) Damage to property; or
- (c) Imminent danger or injury to another person or damage to property.¹¹⁸

Riot is a third-degree felony punishable by up to five years in prison.¹¹⁹ Under this new definition, an individual could potentially be charged without actually engaging in disorderly or violent conduct. The statute also does not require that an individual commit any actual damage or injury. In other words, no concrete act is required, but rather inchoate conduct is criminalized. This means that even nonviolent protesters who find themselves near violent conduct or property damage could be charged under this provision.

ii. *New Crimes and Increased Penalties*

Section 15 of the Act also amends Florida Statutes section 870.01 to add three new crimes: (1) aggravated rioting; (2) inciting a riot; and (3) aggravated inciting a riot.¹²⁰ A person commits aggravated riot:

if, in the course of committing a riot, he or she [sic]:

- (a) Participates with 25 or more other persons;
- (b) Causes great bodily harm to a person not participating in the riot;
- (c) Causes property damage in excess of \$5,000;

117. H.B. 1, 2021 Leg., Reg. Sess. § 15 (Fla. 2021) (codified as FLA. STAT. § 870.01 (2023)).

118. *Id.* § 15(2) (codified as FLA. STAT. § 870.01(2)).

119. *Id.* (codified as FLA. STAT. § 870.01).

120. *Id.* § 15(3) (codified as FLA. STAT. § 870.01(3)) (aggravated rioting); *id.* § 15(4) (codified as FLA. STAT. § 870.01(4)) (inciting a riot); *id.* § 15(5) (codified as FLA. STAT. § 870.01(5)) (aggravated inciting a riot).

(d) Displays, uses, threatens to use, or attempts to use a deadly weapon; or

(e) By force, or threat of force, endangers the safe movement of a vehicle traveling on a public street, highway, or road.¹²¹

Aggravated riot is a second-degree felony punishable by up to fifteen years in prison.¹²² In addition to the problematic nature of the definition of “riot” used in this provision, simply by joining a larger group of protesters or temporarily blocking traffic, an individual risks an additional ten years of imprisonment. Inciting a riot (a third-degree felony)¹²³ and aggravated inciting a riot (a second-degree felony)¹²⁴ also employ the ambiguous definition of “riot.”¹²⁵

iii. *Restrictions on Bail*

The Act amends Florida law to restrict bail for individuals arrested for riot, aggravated rioting, inciting a riot, and aggravated inciting a riot.¹²⁶ Even people who are erroneously arrested must be held without bail until

121. *Id.* § 15(3) (codified as FLA. STAT. § 870.01(3)).

122. *Id.*

123. A person who “willfully incites another person to participate in a riot, resulting in a riot or imminent danger of a riot,” commits the offense of inciting a riot. H.B. 1, 2021 Leg., Reg. Sess. § 15(4) (Fla. 2021) (codified as FLA. STAT. § 870.01(4)).

124. A person who incites a riot that results in “great bodily harm to another person not participating in the riot,” incites a riot that results in “property damage in excess of \$5,000,” or “[s]upplies a deadly weapon to another person or teaches another person to prepare a deadly weapon with intent that the deadly weapon be used in a riot for an unlawful purpose,” commits aggravated inciting a riot. *Id.* § 15(5) (codified as FLA. STAT. § 870.01(5)).

125. The Act also amends Florida Statutes to create other new crimes. Section 8 of the Act creates a new offense of “[m]ob intimidation,” defined as two or more people “acting with a common intent, to use force or threaten to use imminent force, to compel or induce, or attempt to compel or induce, another person to do or refrain from doing any act to assume, abandon, or maintain a particular viewpoint against his or her will.” *Id.* § 8(1) (codified as FLA. STAT. § 784.0495(1)). This offense is a first-degree misdemeanor punishable by up to one year imprisonment. *Id.* § 8(2) (codified as FLA. STAT. § 784.0495(2)). Much of the conduct proscribed by this section was already criminalized under Florida’s assault law, which is a second-degree misdemeanor punishable by up to sixty days’ imprisonment. *See* FLA. STAT. §§ 784.011, 775.082 (2021). The new offense of mob intimidation therefore targets protesters, subjecting them to up to approximately three hundred additional days in jail. Further, section 10 of the Act creates a new third-degree felony offense (punishable by up to five years in prison) for an individual who “willfully and maliciously defaces, injures, or otherwise damages by any means a memorial or historic property,” if the value of the damage is more than \$200. H.B. 1, 2021 Leg., Reg. Sess. § 10(3) (Fla. 2021) (codified as FLA. STAT. § 806.13(3) (2023)). “Deface” is left undefined, so an individual who puts chalk or paint on a specific type of property during a peaceful protest could face up to five years in prison. *Cf. id.* § 10(3) (codified as FLA. STAT. § 806.13).

126. H.B. 1, 2021 Leg., Reg. Sess. § 15(6) (Fla. 2021) (codified as FLA. STAT. § 870.01(6)).

a judge makes a bail determination.¹²⁷ Given the unclear language in the Act and the discretion the Act confers on law enforcement to arrest some nonviolent protesters, this provision is particularly problematic.

iv. *Repercussions for Defunding the Police*

The Act opens with a provision aimed at municipalities that may wish to reallocate resources away from law enforcement agencies.¹²⁸ Governor DeSantis touted this provision during his appearance on the *Tucker Carlson Tonight* show: “Some of the people on the far left, they are just anti-police [and] . . . believe in defunding the police, and so . . . [I’m saying] No, no, no, you’re not going to defund the police, we’ll defund you”¹²⁹ He went on to say that politicians running for office in Florida would need to take a position on the bill: “Are you for law enforcement—rule of law—or are you going to stand with the mob? I know where I stand.”¹³⁰

The section Governor DeSantis is referencing provides for an appeal (which must be filed with the Executive Office of the Governor) of any municipality’s proposed budget that includes “a funding reduction to the operating budget of the municipal law enforcement agency.”¹³¹ Once an appeal is filed and the municipality has replied (having only five days to do so), the Governor will hold a budget hearing and issue a report to the Administration Commission.¹³² Within thirty days, that Commission must approve, amend, or modify the municipality’s budget proposal, and the Commission’s decision is final.¹³³ On its face, this provision of the bill cuts to the very heart of the issues BLM protesters were seeking to address.

v. *Encouraging Law Enforcement Involvement*

Section 3 encourages law enforcement involvement during a protest by waiving sovereign immunity for municipalities in the context of demonstrations, making them civilly liable for damages “arising from personal injury, wrongful death, or property damages proximately caused by the

127. See *id.* The Act also restricts bail for individuals arrested for mob intimidation and breaching the peace, both low-level misdemeanors punishable by less than a year of imprisonment. H.B. 1, 2021 Leg., Reg. Sess. § 8(3), 16(2) (Fla. 2021) (codified as FLA. STAT. § 784.0495(3), § 870.02(2), respectively). This may be a grave deterrent for potential protesters given that they could spend time in jail for such low-level offenses.

128. See H.B. 1, 2021 Leg., Reg. Sess. *id.* § 1 (Fla. 2021) (codified as FLA. STAT. § 166.241).

129. Ron DeSantis (@GovRonDeSantis), TWITTER (Sept. 22, 2020, 9:17 AM) at 2:50–3:03, <https://twitter.com/govrondesantis/status/1308395017132793858?lang=EN> [<https://perma.cc/YBY7-DSCV>] (tweeting @TuckerCarlson and including Fox News clip of Governor DeSantis touting his “anti-protest” bill).

130. *Id.* at 3:20–3:25.

131. H.B. 1, 2021 Leg., Reg. Sess. § 1(4)(a) (Fla. 2021) (codified as FLA. STAT. § 166.241(4)(a)).

132. *Id.* § 1(4)(b) (codified as FLA. STAT. § 166.241(4)(b)).

133. *Id.* § 1(5) (codified as FLA. STAT. § 166.241(5)).

municipality's breach of duty."¹³⁴ That duty requires municipalities "to respond appropriately to protect persons and property during a riot or an unlawful assembly based on the availability of adequate equipment to its municipal law enforcement officers and relevant state and federal laws."¹³⁵ This invites harsh law enforcement responses in the protest context and disincentives municipalities from intervening to prevent overzealous and punitive law enforcement conduct.

vi. *Affirmative Defense for Harming Protesters*

Section 18 of the Act creates an affirmative defense in civil lawsuits for personal injury, wrongful death, or property damage, such that a defendant can avoid liability if the injury, death, or damage "arose from an injury or damage sustained by a participant acting in furtherance of a riot."¹³⁶ The defense must be "established by evidence that the participant has been convicted of a riot or an aggravated riot . . . or by proof of the commission of such crime by a preponderance of the evidence."¹³⁷ This provision essentially invites violence against protesters by shielding aggressors from money damages if they can show that protesters had some connection to a riot, without satisfying the criminal burden of proof.

vii. *Non-Criminal Penalties*

Finally, the Act carries several unprecedented penalties with severe consequences for protesters. For example, protesters convicted of "riot" will be stripped of their voting rights.¹³⁸ And H.B. 1 creates civil liability for willful obstruction of traffic, using language so broad that "[s]tanding on or remaining in the street, highway, or road" can result in a civil infraction.¹³⁹

viii. *Context Surrounding the Act's Introduction and Enactment*

The context in which H.B. 1 was introduced also sheds light on the type of protest conduct the Florida legislature is interested in curbing, despite the facial neutrality of many of the law's provisions. As BLM protests broke out around the country during the summer of 2020, Governor De-

134. *Id.* § 3 (Fla. 2021) (codified as FLA. STAT. § 768.28(5)(b)).

135. *Id.*

136. *Id.* § 18 (codified as FLA. STAT. 870.07(1)).

137. *Id.*

138. *See id.* H.B. 1, 2021 Leg., Reg. Sess. § 15 (Fla. 2021) (codified as FLA. STAT. § 870.01). Because section 15 of Florida H.B. 1 makes rioting a felony offense, and Florida law bars convicted felons from voting until completion of all terms of their sentence (including the payment of fines, fees, and other financial obligations related to the sentence), FLA. CONST. art. 6 § 4; FLA. STAT. § 98.0751 (2023), individuals convicted for riot under H.B. 1 will be stripped of their voting rights for the foreseeable future.

139. H.B. 1, 2021 Leg., Reg. Sess. § 2 (Fla. 2021) (codified as FLA. STAT. § 316.2045).

Santis activated the Florida National Guard, sending hundreds of guardsmen across the state.¹⁴⁰ By June 2, 2020, the Governor had deployed more than seven hundred national guardsmen in response to the racial justice demonstrations.¹⁴¹ Despite the largely peaceful protests throughout Florida,¹⁴² law enforcement officers arrested hundreds of BLM protesters, many of whom later had their charges dropped.¹⁴³ In contrast, Florida law enforcement rarely cracked down on individuals demonstrating in opposition to racial justice reforms.¹⁴⁴

By September, Governor DeSantis had announced a preliminary version of the legislative proposal that eventually became H.B. 1.¹⁴⁵ He

140. David Dwork, *Florida National Guard Activated by Gov. Ron DeSantis in Response to George Floyd Protests*, LOCAL10.COM (May 31, 2020, 5:46 PM), <https://www.local10.com/news/local/2020/05/31/florida-national-guard-activated-by-gov-ron-desantis-in-response-to-george-floyd-protests/> [https://perma.cc/SC7W-NA5K] (noting that 150 guardsmen were deployed to Miramar, 150 to Camp Blanding, and 100 to Tampa).

141. James Tuten, *George Floyd Protests: DeSantis Deploys 700 More Florida National Guard Soldiers to Aid Law Enforcement*, WFTV 9:ABC (June 1, 2020, 1:34 PM), <https://www.wftv.com/news/local/george-floyd-protests-desantis-deploys-additions-florida-national-guard-aid-law-enforcement/FCHKQKJTOFAERMJDLVP4FNABDA/> [https://perma.cc/75WM-F3MW].

142. Press Release, Fla. Governor Ron DeSantis, Governor Ron DeSantis Reports that Florida Demonstrations Have Remained Largely Peaceful Over Past 24 Hours (June 2, 2020), <https://www.flgov.com/2020/06/02/governor-ron-desantis-reports-that-florida-demonstrations-have-remained-largely-peaceful-over-past-24-hours/> [https://perma.cc/M4CJ-8BEV].

143. See, e.g., Neil MacFarquhar, *Why Charges Against Protestors are Being Dismissed by the Thousands*, N.Y. TIMES (Feb. 11, 2021), <https://www.nytimes.com/2020/11/19/us/protests-lawsuits-arrests.html> [https://perma.cc/JX3E-AJSE] (reporting that in the aftermath of the mass arrests in connection with the summer 2020 BLM protests, prosecutors were declining “to pursue many of the cases because they concluded that the protestors were exercising their basic civil rights,” and noting that “[p]rosecutors called the scale of both the mass arrests and mass dismissals within a few short months unrivaled”); Cristóbal Reyes, *More than 100 Arrested During George Floyd Protests in Orlando; Nearly 80 Have Had Charges Dropped*, ORLANDO SENTINEL (July 27, 2020, 7:37 AM), <https://www.orlandosentinel.com/news/crime/os-ne-protester-arrest-disorderly-conduct-dropped-20200720-spfogvhrcc5ghdmmmpbq5mcep5ny-story.html> [https://perma.cc/L6EN-RGJW] (noting prosecutors dropped charges against most individuals arrested during George Floyd protests in Orlando).

144. Compare Tim Craig, *He Was Arrested at a Black Lives Matter Protest. Now, He’s Warning Others About Florida’s Anti-Riot Proposal*, WASH. POST (Apr. 9, 2021, 8:30 AM), https://www.washingtonpost.com/national/florida-protest-bill-silences-activists/2021/04/09/5b5b252c-93c2-11eb-a74e-1f4cf89fd948_story.html [https://perma.cc/SKW4-SRWT], with Tim Craig, *Proud Boys and Black Lives Matter Activists Clashed in a Florida Suburb. Only One Side Was Charged*, WASH. POST (Feb. 4, 2021, 8:41 PM), https://www.washingtonpost.com/national/florida-protest-bill-unequal-treatment/2021/02/01/415d1b02-6240-11eb-9061-07abcc1f9229_story.html [https://perma.cc/F6NJ-6ZKS].

145. Press Release, Fla. Governor Ron DeSantis, Governor Ron DeSantis Announces the “Combating Violence, Disorder and Looting and Law Enforcement Protection Act” (Sept. 21, 2020), <https://www.flgov.com/2020/09/21/governor-ron-desantis-announces-the-combating-violence-disorder-and-looting-and-law-enforcement-protection-act/> [https://perma.cc/V8CW-2WDZ].

framed the proposal as necessary because “throughout the country we’ve seen th[e] right [to peacefully assemble] being taken advantage of by professional agitators, bent on sowing disorder and causing mayhem in our cities.”¹⁴⁶ He also highlighted that people who violated the proposed legislation would feel “a ton of bricks . . . rain down on [them].”¹⁴⁷

Yet the governor had previously recognized that protests in Florida were largely peaceful.¹⁴⁸ And current data backs this up. In the over 7,300 demonstrations around the country during the first month after George Floyd’s death, nearly 98% were peaceful—no injuries were recorded in 97.7% of these protests, only 3.7% involved property damage, and only slightly over 1% resulted in police injuries.¹⁴⁹

Governor DeSantis also made clear who the bill was aimed at while promoting it on the *Tucker Carlson Tonight* show—he specifically called out opposition to the bill as “people . . . on the far left . . . they are just anti-police,” and “believe in defunding the police.”¹⁵⁰ Further, despite fervent testimony and media reports highlighting the bill’s racially discriminatory

146. *Id.*; see also Olga Khazan, *Why People Loot*, ATLANTIC (June 2, 2020), <https://www.theatlantic.com/health/archive/2020/06/why-people-loot/612577/> [https://perma.cc/BW7Q-DFS3] (discussing looting as “a form of empowerment—a way to reclaim dignity after decades of abuse at the hands of police and other authorities”); Robin D. G. Kelley, *What Kind of Society Values Property Over Black Lives?*, N.Y. TIMES (June 18, 2020), <https://www.nytimes.com/2020/06/18/opinion/george-floyd-protests-looting.html> [https://perma.cc/4GHC-F6VA]; David Jones Media, *#BLM How Can We Win*, YOUTUBE (June 9, 2020), https://www.youtube.com/watch?v=LLci8MVh8J4&ab_channel=CARJAMTV [https://perma.cc/42A2-DRKT] (Kimberly Jones discussing reasons for looting).

147. Matt Dixon & Arek Sarkissian, *‘It’s Dog-Whistle Base Stuff’: DeSantis Launches Trump-Styled Protest Crackdown*, POLITICO (Sept. 21, 2020, 7:13 PM), <https://www.politico.com/states/florida/story/2020/09/21/its-dog-whistle-base-stuff-de-santis-launches-trump-styled-protest-crackdown-1317656> [https://perma.cc/B9GX-73RE].

148. Press Release, Fla. Governor Ron Desantis, *supra* note 142. For a discussion of the contours of “peaceful” protests, see Abu El-Haj, *supra* note 40.

149. Chenoweth & Pressman, *supra* note 5; see also Kerby Goff & John D. McCarthy, *Critics Claim BLM Protests Were More Violent Than 1960s Civil Rights Ones. That’s Just Not True.*, WASH. POST (Oct. 12, 2021, 6:00 AM), <https://www.washingtonpost.com/politics/2021/10/12/critics-claim-blm-was-more-violent-than-1960s-civil-rights-protests-thats-just-not-true/> [https://perma.cc/6FB8-4C3J] (citing statistics to conclude that “the racial justice protests of 2020 were both less violent and less dangerous than were civil rights-era protests. Black Lives Matter protesters were much less likely to destroy property or injure police and much less likely to be injured or arrested”). For protests involving matters of great public concern (like the summer 2020 BLM protests), there is also a higher likelihood of drawing both counter-protesters and heightened police response, thereby increasing the odds that clashes may occur. Between May 24 and August 22, 2020, over 360 counter-protests were recorded around the country (nearly 5% of all demonstrations); of these demonstrations, 43 (nearly 12%) turned violent. DEMONSTRATIONS & POLITICAL VIOLENCE IN AMERICA, *supra* note 5.

150. Ron DeSantis, *supra* note 129, at 2:43–2:57 (tweeting @TuckerCarlson and including Fox News clip of Governor DeSantis touting his “anti-protest” bill).

impact, amendments to the bill that called for racial impact studies were withdrawn or defeated.¹⁵¹

The legislature also ignored credible reports that the bill was unnecessary to protect public safety given the laws already on the books. For example, one state prosecutor explained that “[e]xisting laws already give police and prosecutors the tools to hold looters and rioters accountable.”¹⁵² And the Executive Director for the Department of Law Enforcement at the Broward County Sheriff’s Office emphasized that Florida has “enough laws on the books to do our job effectively without the new law,” and that “[t]hings should not change for us in how we enforce the law pertaining to protest(s) as we have been very effective doing just that.”¹⁵³

Although the bill was not slated to take effect until July 1, 2021, it was revised in March 2021 to become immediately effective upon the governor’s signature. Governor DeSantis signed the bill into law on April 19, 2021, one day before the verdict came down in the Derek Chauvin trial.

b. Oklahoma—Disruption or Obstruction of Traffic

Of the ninety-two bills introduced in 2021, forty-six included provisions aimed at restricting protests on public streets. A recently enacted law in Oklahoma provides an example of the type of protest activity targeted by these types of provisions. H.B. 1674 was first introduced on February 1, 2021 and signed into law on April 21, 2021.¹⁵⁴ Under the law, a person

151. Sen. Amend. 866454, S.B. 484, 2021 Leg., Reg. Sess. (Fla. 2021), <https://www.flsenate.gov/Session/Bill/2021/1/Amendment/866454/PDF> [https://perma.cc/JBE9-TFM5] (amendment requiring racial impact study withdrawn); Sen. Amend. 650056, S.B. 484, 2021 Leg., Reg. Sess. (Fla. 2021), <https://www.flsenate.gov/Session/Bill/2021/1/Amendment/650056/PDF> [https://perma.cc/EB8Z-MQ4L] (amendment requiring study of bill’s effects on racial inequality failed).

152. Andrew Warren, Opinion, *This State Prosecutor Is Against DeSantis’ Anti-Protest Bill*, S. FLA. SUN SENTINEL (Feb. 10, 2021, 8:52 PM), <https://www.sun-sentinel.com/opinion/commentary/fl-op-com-desantis-anti-protest-bill-prosecutor-2021-0210-6n44w542xrdrh6ujc67edille-story.html> [https://perma.cc/HE4X-PF34].

153. Eileen Kelly, *Sheriff’s Office Backs Away from Anti-Riot Law, Worried that People’s Civil Rights Could Be Violated.*, S. FLA. SUN SENTINEL (Apr. 23, 2021, 9:24 PM), <https://www.sun-sentinel.com/news/crime/fl-ne-anti-riot-ss-prem-20210423-in42u4ngsjhsragl5uvl4lnr6y-story.html> [https://perma.cc/UJJ4-Q5M7] (quoting Col. David R. Holmes, Exec. Dir. of Law Enf’t, Broward Sheriff Off.).

154. H.B. 1674, 2021 Leg., Reg. Sess. (Okla. 2021) (codified as OKLA. STAT. tit. 21, § 1312 (2023)); see also *Bill Information for HB 1674*, OKLA. STATE LEGISLATURE, <http://www.oklegislature.gov/BillInfo.aspx?Bill=HB1674&Session=2100> [https://perma.cc/RL4Q-D762] (last visited May 11, 2023). This law has been challenged in *Okla. State Conf. of the NAACP v. O’Connor*, 569 F. Supp. 3d 1145 (W.D. Okla. 2021). The district court granted a preliminary injunction delaying the effective date of H.B. 1674 on October 27, 2021. *Id.* This decision is on appeal with the Tenth Circuit, after two questions were certified to the Oklahoma Court of Criminal Appeals. *Okla. State Conf. of NAACP v. O’Connor*, No-21-6156, 2022 WL 1210088 (10th Cir. Apr. 21, 2022); see also *O’Connor v. Okla. State Conf. of NAACP*, 516 P.3d 1164 (Okla. Crim. App. 2022) (answering certified questions by stating that (1) “punishment for a person who participates in a riot and who ‘shall unlawfully obstruct the normal use of any public street, highway or road’ applies

who participates in a “riot” and “obstruct[s] the normal use of any public street,” can be found guilty of a misdemeanor punishable by up to one year in prison, a \$5,000 fine, and restitution for any damage to persons or property that occurs.¹⁵⁵ “Obstruct” means “to render impassable or to render passage unreasonably inconvenient or hazardous,” and includes “standing or approaching motor vehicles” on the street.¹⁵⁶ And “riot” under existing Oklahoma law is defined broadly as any “use of force or violence” or “threat to use force or violence if accompanied by immediate power of execution, by three or more people acting together.”¹⁵⁷ In other words, individuals standing on a street could face criminal charges if others in the crowd threaten to use force or violence. The legislation essentially acts as a deterrent to demonstrating in a quintessential public forum for protest activity.

The Oklahoma law provides a second provision that grants immunity to drivers who strike and injure protesters during a riot.¹⁵⁸ The law specifies that a driver cannot be criminally or civilly liable for killing or injuring someone if the driver was “fleeing from a riot,” “exercis[ing] due care,” and held a “reasonable belief that fleeing was necessary to protect [the driver].”¹⁵⁹ This comes on the heels of a pickup truck carrying a horse trailer driving through a crowd of BLM protesters on a freeway in Tulsa in June 2020.¹⁶⁰ The driver injured several people and left one paralyzed, but was not charged after stating that he feared for his safety.¹⁶¹ The bill’s author, Republican State Senator Rob Standridge, has publicly stated that the Tulsa incident prompted him to seek immunity for drivers who hit protesters.¹⁶²

The new Oklahoma law also includes an additional provision providing that an organization found “to be a conspirator” with individuals

only to individuals who are guilty of participating in a riot” and (2) a “criminal statute establishing penalty for an organization that conspires with a person found to have violated specified anti-riot laws imposes liability only on organizations that have been found guilty of conspiring with others to violate one of the specifically enumerated anti-riot laws, where the others with whom the organization is conspiring are found to have violated one of the specifically enumerated anti-riot laws”).

155. H.B. 1674, 2021 Leg., Reg. Sess. § 1 (Okla. 2021) (codified as tit. 21, § 1312(5)).

156. *Id.*

157. Tit. 21, § 1311.

158. H.B. 1674, 2021 Leg., Reg. Sess. § 2 (Okla. 2021) (codified as tit. 21, § 1320.11).

159. *Id.*

160. Reid J. Epstein & Patricia Mazzei, *G.O.P. Bills Target Protesters (and Absolve Motorists Who Hit Them)*, N.Y. TIMES (June 16, 2021), <https://www.nytimes.com/2021/04/21/us/politics/republican-anti-protest-laws.html> [https://perma.cc/359D-9SHX].

161. *Id.*

162. *Id.*; see also Associated Press, *Oklahoma Legislature Passes Bill Protecting Drivers Who Hit Protesters*, KOCO NEWS 5: ABC (Apr. 14, 2021, 5:22 PM), <https://www.koco.com/article/oklahoma-legislature-oks-bill-to-crack-down-on-protesters/36123193> [https://perma.cc/UBE8-2DXD].

found guilty of certain offenses, including “unlawful assembly,” “riot,” “incitement to riot,” refusing to aid the arrest of a “rioter,” and remaining at the scene of a “riot” after ordered to disperse, will be fined ten times the fine amount authorized for the individual’s conduct.¹⁶³ This could effectively shut down advocacy groups organizing or encouraging protests, thus impeding the very heart of many protest movements—group gatherings that send a message through the size and fervor of the crowd.

c. Arkansas—Critical Infrastructure

A handful of state legislators have also introduced bills aimed at protests around oil and gas pipelines or other “critical infrastructure.” In 2021, eight such bills were introduced with three becoming law.¹⁶⁴ This number was much larger in prior years—from 2015 to 2020, thirty-three bills seeking to create or expand criminal punishments for crimes relating to trespass on “critical infrastructure” were introduced, with fourteen becoming law.¹⁶⁵ Many of these bills draw heavily on model legislation produced by the American Legislative Exchange Council (ALEC), a nonprofit organization comprised of conservative state legislators and private sector representatives known for drafting industry-friendly bills.¹⁶⁶ Finalized in January 2018, ALEC’s Critical Infrastructure Protection Act (CIPA) draws on two 2017 Oklahoma anti-trespass laws, which were the first of their

163. See H.B. 1674, 2021 Leg., Reg. Sess. § 3 (Okla. 2021) (codified as tit. 21, § 1320.12).

164. H.B. 516, 2021 Leg., Reg. Sess. (Ala. 2021); H.B. 1321, 93rd Gen. Assemb., Reg. Sess. (Ark. 2021); S.B. 172, 2021–2022 Leg., Reg. Sess. (Kan. 2021); H.B. 1558, 92nd Leg., Reg. Sess. (Minn. 2021); S.F. 355, 92nd Leg., Reg. Sess. (Minn. 2021); H.F. 254, 92nd Leg., Reg. Sess. (Minn. 2021); S.F. 386, 92nd Leg., Reg. Sess. (Minn. 2021); H.F. 129, 92nd Leg., Reg. Sess. (Minn. 2021); S.F. 1378, 92nd Leg., Reg. Sess. (Minn. 2021); H.B. 481, 67th Leg., Reg. Sess. (Mont. 2021). Arkansas H.B. 1321, Kansas S.B. 172, and Montana H.B. 481 have become law. H.B. 1321, 93rd Gen. Assemb., Reg. Sess. (Ark. 2021) (codified as amended in scattered sections of ARK. CODE ANN. § 5 (2021)); S.B. 172, 2021–2022 Leg., Reg. Sess. (Kan. 2021) (codified as amended in scattered sections of KAN. STAT. ANN. § 21 (2021)); H.B. 481, 67th Leg., Reg. Sess. (Mont. 2021) (codified as amended in scattered sections of MONT. CODE ANN. § 82 (2021)).

165. *US Protest Law Tracker*, *supra* note 9 (sorting by relevant date range, issue as “infrastructure,” and status as “enacted”); see also BENAVIDEZ & TAGER, *supra* note 9, at 14 (reporting twenty-eight bills aimed at “critical infrastructure” from 2015 to 2019).

166. See Nancy Scola, *Exposing ALEC: How Conservatives-Backed State Laws Are All Connected*, ATLANTIC (Apr. 14, 2012), <https://www.theatlantic.com/politics/archive/2012/04/exposing-alec-how-conservative-backed-state-laws-are-all-connected/255869/> [https://perma.cc/UY56-FEHF]; see also Yvonne Wingett Sanchez & Rob O’Dell, *What Is ALEC? ‘The Most Effective Organization’ for Conservatives, Says Newt Gingrich*, USA TODAY (Apr. 5, 2019, 4:15 PM), <https://www.usatoday.com/story/news/investigations/2019/04/03/alec-american-legislative-exchange-council-model-bills-republican-conservative-devos-gingrich/3162357002/> [https://perma.cc/T94M-K956].

kind.¹⁶⁷ CIPA codifies criminal penalties for an individual “convicted of willfully trespassing or entering property containing a critical infrastructure facility without permission by the owner of the property.”¹⁶⁸ While many critical infrastructure bills were initially introduced in fossil fuel producing states on the heels of specific pipeline project protests, several of the 2021 bills have been introduced in states that do not currently have pipeline projects in the works.¹⁶⁹

In Arkansas, Republican Representative Jimmy Gazaway introduced a bill in January 2021, which was signed into law on April 14, 2021.¹⁷⁰ Much of the law closely tracks ALEC’s model legislation.¹⁷¹ The law broadly defines “critical infrastructure” to include a range of facilities associated with gas or oil production, storage, and distribution that have been fenced off or otherwise designated as forbidden.¹⁷² The facilities not only include natural gas company and crude oil storage facilities (including infrastructure both above and below ground), but also infrastructure such as trucking terminals, food processing or manufacturing facilities, telephone poles and lines, broadband infrastructure, and railroad property.¹⁷³

Purposely entering or remaining on any “critical infrastructure” is a class D felony, punishable by up to six years in prison and a \$10,000 fine.¹⁷⁴ This stands in stark contrast to Arkansas’s general laws criminalizing trespass, which designate trespass as a misdemeanor.¹⁷⁵ And all states where critical infrastructure bills have been introduced already had gen-

167. H.B. 1123, 56th Leg., Reg. Sess. (Okla. 2017) (codified as tit. 21, § 1792); H.B. 2128, 56th Leg., Reg. Sess. (Okla. 2017) (codified as tit. 76, § 80.1).

168. *Critical Infrastructure Protection Act*, AM. LEGIS. EXCH. COUNCIL, <https://www.alec.org/model-policy/critical-infrastructure-protection-act/> [https://perma.cc/6SGT-Z6F2] (last visited May 11, 2023). The model act also holds an individual liable for any property damage while trespassing and prescribes criminal penalties for organizations “conspiring” with people who willfully trespass and/or damage critical infrastructure sites. *Id.*

169. See *supra* Section II.A for a discussion of critical infrastructure bills introduced in response to specific protest activity. Arkansas, Kansas, and Montana have all passed critical infrastructure bills in 2021, but none of these states currently have pending pipeline projects. See *US Protest Tracker*, *supra* note 9; see also Naveena Sadasivam, *Montana, Kansas, and Arkansas Enter the Arms Race to Criminalize Protest*, GRIST (May 3, 2021), <https://grist.org/protest/pipeline-protest-laws-montana-kansas-arkansas/> [https://perma.cc/EM8Z-6QND].

170. H.B. 1321, 93rd Gen. Assemb., Reg. Sess. (Ark. 2021) (enacted as 2021 Ark. Acts 712).

171. Compare *Critical Infrastructure Protection Act*, *supra* note 168, with H.B. 1321, 93rd Gen. Assemb., Reg. Sess. (Ark. 2021) (codified in scattered sections of ARK. CODE ANN. art. 5 (2023)).

172. H.B. 1321, 93rd Gen. Assemb., Reg. Sess. § 1 (Ark. 2021) (codified as § 5-38-101(6)).

173. *Id.*

174. *Id.* § 4 (codified as §§ 5-39-203(a)–(b)). This law also creates a class D felony for trespassing on “critical infrastructure” located in an unincorporated area (e.g., outside of a city or town) even if the critical infrastructure is not fenced off or designated as forbidden. *Id.* § 5 (codified as § 5-39-305(a)–(b)).

175. See generally § 5-39-203(b).

eral criminal trespass laws on the books.¹⁷⁶ The law also creates a class B felony offense for purposely and without legal justification causing any amount of damage to critical infrastructure, which is punishable by five to twenty years in prison and a fine of up to \$15,000.¹⁷⁷ “Damage” is not defined in the statute. In other words, peaceful protesters who put paint on a piece of critical infrastructure, including telephone poles or railroad property, could face harsh prison sentences.¹⁷⁸

III. RE-ENVISIONING A VIGOROUS RIGHT OF ASSEMBLY

Having explored some of the ways state legislators are attempting to curb protest activity and silence specific groups, this Part turns to potential solutions for ensuring a robust right to assembly. Specifically, it advocates for a vigorous lobbying effort to stop “anti-protest” bills before they are introduced and discusses a limited set of potential challenges to recently enacted laws. For laws that likely cannot be challenged under the Supreme Court’s current TPM framework, this Part also proposes a more robust standard to help ensure disenfranchised groups have a seat at the table.

A. Lobbying Against “Anti-Protest” Bills

If “anti-protest” bills are passed into law, potential protesters may not know whether taking to the streets will lead to imprisonment or other punishment. The ever-expanding definitions of crimes such as riot and unlawful assembly cause confusion among the public about their protest rights and give police leeway to stifle public expression, particularly when it is

176. See ALA. CODE § 13A-7-4 (2023); ARK. CODE ANN. § 5-39-203 (2023); KAN. STAT. ANN. § 21-5808 (2023); MINN. STAT. § 609.605 (2023); MONT. CODE ANN. § 45-6-203 (2023).

177. H.B. 1321, 93rd Gen. Assemb., Reg. Sess. § 2 (Ark. 2021) (codified as §§ 5-38-203(a)–(b)); see also §§ 5-4-201(a)(1), 5-4-401(a)(3).

178. Some states’ “anti-protest” bills pertaining to “critical infrastructure” restrict protest on private property. Although there is generally no First Amendment right to protest on private property, when private property is not used solely for private purposes, the Supreme Court has recognized that some First Amendment protections may apply. See *Marsh v. Alabama*, 326 U.S. 501, 509 (1946) (holding that private company town could not invoke state trespassing statute to prevent leafleting on private sidewalks because common spaces of the town functioned like shared public areas where First Amendment protections are guaranteed); *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 325 (1968) (applying similar analysis to privately-owned but publicly accessible shopping center). But see *Lloyd Corp., Ltd. v. Tanner*, 407 U.S. 551, 569–70 (1972) (holding privately-owned shopping centers can forbid dissemination of anti-war handbills inside their facilities); *Hudgens v. Nat’l Lab. Rels. Bd.*, 424 U.S. 507, 520–21 (1976) (holding First Amendment does not protect union members picketing inside privately-owned shopping mall, which has seemingly limited the Court’s holding in *Logan Valley*). For critical infrastructure laws involving private property, balancing the nature of the property at issue, the government interest at play, and the fundamental First Amendment right of protesters would become necessary.

critical of modern policing.¹⁷⁹ This has led to mass arrests of many peaceful protesters at public demonstrations, only to result in the majority of individuals being released without charges. For example, during the summer 2020 BLM protests in Orlando, over one hundred individuals were arrested but nearly eighty had their charges dropped.¹⁸⁰ Although these arrests do not necessarily lead to formal charges, they may deter assembly. Thus, one important tactic for ensuring protection of peaceful outdoor assemblies is lobbying against the introduction and passage of “anti-protest” bills. Rallying to stop these bills before they get off the ground can help ensure that protesters can voice dissent without wondering whether they will arbitrarily be targeted by law enforcement under vague legislative frameworks.

B. Challenging “Anti-Protest” Legislation

Once “anti-protest” bills do become law, they are rarely challenged. Of the twelve “anti-protest” bills that became law in 2021, only two have been challenged.¹⁸¹ Similarly, of the approximately thirty “anti-protest” bills that became law from 2016 through 2020, only three have been challenged.¹⁸² This is likely due, at least in part, to the fact that many “anti-protest” bills have been artfully drafted to pass constitutional muster under the current TPM framework, despite narrowing the scope of peaceful protest, particularly for historically disenfranchised groups and their supporters.¹⁸³ In other words, “anti-protest” legislation strips protesters of

179. See Arielle W. Tolman & David M. Shapiro, *From City Council to the Streets: Protesting Police Misconduct After Lozman v. City of Riviera Beach*, 13 CHARLESTON L. REV. 49, 60–66 (2018).

180. Reyes, *supra* note 143; see also Dan Sullivan, *Hillsborough Declines to Prosecute 67 Arrested in Protests*, TAMPA BAY TIMES (June 15, 2020), <https://www.tampabay.com/news/hillsborough/2020/06/15/hillsborough-declines-to-prosecute-67-arrested-in-protests/> [https://perma.cc/6BCX-4ZBQ].

181. Florida H.B. 1 has been challenged in two lawsuits: Complaint, Dream Defs. v. DeSantis, 553 F. Supp. 3d 1052 (N.D. Fla. 2021) (No. 4:21-cv-191); Complaint, Legacy Ent. & Arts Found., Inc., v. Mina, No. 6:21-cv-698-PGB-DCI, 2021 WL 2907722 (M.D. Fla. May 18, 2021). Oklahoma H.B. 1674 has been challenged in one lawsuit: Complaint, Okla. State Conf. of the NAACP v. O'Connor, 569 F. Supp. 3d 1145 (W.D. Okla. 2021) (No. CIV-21-859-C).

182. BENAVIDEZ & TAGER, *supra* note 9, at 1, 25, 25 n.197 (citing S.B. 189, 98th Leg., Reg. Sess. (S.D. 2019); H.B. 727, 2018 Leg., Reg. Sess. (La. 2018)) (noting that South Dakota S.B. 189 and Louisiana H.B. 727 were the only two “anti-protest” laws challenged of those that became law from 2015 to 2019). As of the writing of this Article, only one additional challenge to the “anti-protest” laws passed from 2015 to 2020 has been identified. See *US Protest Law Tracker*, *supra* note 9 (noting that a Judge of the Circuit Court of St. Louis County found H.B. 1413, 99th Gen. Assemb., 2nd Reg. Sess. (Mo. 2018) unconstitutional and granted a permanent injunction against enforcement of the law in January 2020).

183. See Dana R. Fisher, *The Diversity of the Recent Black Lives Matter Protests is a Good Sign for Racial Equity*, BROOKINGS (July 8, 2020), <https://www.brookings.edu/blog/how-we-rise/2020/07/08/the-diversity-of-the-recent-black-lives-matter-protests-is-a-good-sign-for-racial-equity/> [https://perma.cc/3EGR-KTSQ] (collecting data from BLM protests in Los Angeles, New York City, and Washington, D.C. from

the power the right to assemble was meant to convey, and the inability to challenge these laws delivers the ultimate blow. The laws thus uphold the power imbalance and structural inequities embedded in our legislative system.

For sweeping legislation like Florida's H.B. 1, challenging the legislation through the courts makes sense. Provisions of the law creating an extremely broad definition of riot as well as new crimes incorporating that definition may be successfully challenged under the overbroad and vagueness doctrines. These provisions fail to put protesters on notice of what conduct will be punished, and provide discretion to law enforcement to arrest nonviolent protesters in close proximity to violent activity with which they are not associated.¹⁸⁴ Governor DeSantis's statements about the purpose of the bill—"the strongest anti-rioting, pro-law enforcement piece of legislation in the country"¹⁸⁵—as well as the context surrounding enactment of the statute also provide an avenue for challenging the law as impermissibly viewpoint- and content-based.¹⁸⁶

Other provisions such as those creating repercussions for "defunding the police," encouraging law enforcement involvement during protests, and creating an affirmative defense for harming protesters may also be viewpoint discriminatory.¹⁸⁷ These provisions advance a "law and order" viewpoint at the expense of protesters supporting modern policing and racial justice.¹⁸⁸ The law may face further as-applied challenges given how it has been employed in practice. In July 2021, shortly after the law went into effect, demonstrators gathering to protest Cuba's communist government shut down part of a Miami-area highway.¹⁸⁹ No citations were issued

June 1, 2020 through July 8, 2020, and concluding that 54% of protest participants were white, 21% were Black, 7% were Latinx, 11% were Asian/Pacific Islander, and 8% were multiracial/other).

184. See H.B. 1, 2021 Leg., Reg. Sess. § 15 (Fla. 2021); S.B. 484, 2021 Leg., Reg. Sess. §15 (Fla. 2021); see also Complaint at 2, *Dream Defs.*, 559 F. Supp. 3d 1238 (No. 4:21-cv-191) (challenging Florida H.B. 1, Section 15 under the vagueness and overbroad doctrines).

185. Valeriya Antonshchuk, 'Strongest Anti-Rioting, Pro-Law Enforcement Piece Of Legislation In The Country': Community Looks Ahead As Florida's HB 1 Comes Into Effect, WUFT NEWS (Apr. 22, 2021), <https://www.wuft.org/news/2021/04/22/strongest-anti-rioting-pro-law-enforcement-piece-of-legislation-in-the-country-community-looks-ahead-as-floridas-hb-1-comes-into-effect/> [https://perma.cc/JE9N-R4KU].

186. See *supra* Section II.B.2.a.viii; see also Complaint at 3–4, *Dream Defs.*, 559 F. Supp. 3d 1238 (No. 4:21-cv-191) (challenging Florida H.B. 1, Section 15 as viewpoint discriminatory).

187. See *supra* Sections II.B.2.a.iv–vi; see also Complaint at 3–4, *Dream Defs.*, 559 F. Supp. 3d 1238 (No. 4:21-cv-191) (challenging Florida H.B. 1, Sections 1, 3, and 18, among others, as viewpoint discriminatory).

188. See *supra* Sections II.B.2.a.iv–vi; see also Complaint, *Dream Defs.*, 559 F. Supp. 3d 1238 (No. 4:21-cv-191).

189. See Brittany Shammas, Timothy Bella & Meryl Kornfield, *None of the Cuba Protestors Who Closed Miami Highway Cited Under GOP-Backed Anti-Rioting Law*, WASH. POST (July 14, 2021, 10:54 PM), <https://www.washingtonpost.com/nation/2021/07/14/cuba-protest-florida-anti-rioting-law/> [https://perma.cc/SS5T-65V2]; see also Glenna Milberg, *Why Weren't SOS Cuba Protesters in Miami Arrested Under Florida's New*

under the law's provision prohibiting obstruction of traffic.¹⁹⁰ Florida Representative Anna Eskamani noted that the new law was applicable to the Miami-area protests and indicated that the lack of enforcement showed the law was specifically targeting BLM protesters.¹⁹¹ Still other provisions, such as those restricting bail for certain protesters, may be more difficult to challenge, although advocates have already tried under a cruel and unusual punishment theory.¹⁹²

C. *Defining a New Standard for Public Protest Cases*

1. *How the Current TPM Standard Fails to Adequately Protect Public Assembly*

Unlike Florida's H.B. 1, for many other "anti-protest" laws, mounting a constitutional challenge under the current TPM framework is likely an uphill battle.¹⁹³ In the case of in-person assembly, public safety almost always constitutes a narrowly tailored, significant governmental interest.¹⁹⁴

Anti-Riot Law?, LOCAL10 (July 14, 2021, 6:52 PM), <https://www.local10.com/news/local/2021/07/14/why-werent-cuba-protesters-in-miami-arrested-under-floridas-new-anti-riot-law/> [https://perma.cc/KUR9-WCEL]; Katherine Lewin, *Activists Note Differences Between Law Enforcement at BLM Protests, Cuban Demonstrations*, FLA. TIMES-UNION (July 14, 2021, 5:54 PM), <https://www.jacksonville.com/story/news/2021/07/14/activists-differences-in-treatment-by-law-enforcement/7971571002/> [https://perma.cc/S8MT-KBTE].

190. See Shammass, Bella & Kornfield, *supra* note 189; see also Milberg, *supra* note 189; Lewin, *supra* note 189.

191. Shammass, Bella & Kornfield, *supra* note 189.

192. Complaint at 18, *Legacy Ent. & Arts Found., Inc., v. Mina*, No. 6:21-cv-698-PGB-DCI, 2021 WL 2907722 (M.D. Fla. May 18, 2021) (stating that Florida H.B. 1 "generates a cruel and unusual punishment by depriving a presumably innocent citizen of the right to assemble, the right to timely bail, and a right to a punishment that has not been arbitrarily enhanced").

193. See *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 795–96 (1989) (holding that government actors can regulate the "time, place, and manner" of protests as long as the restrictions are (1) content-neutral, (2) narrowly tailored to serve a significant governmental interest, and (3) leave open ample alternatives for communication). For further discussion about current Supreme Court jurisprudence related to the TPM standard, see *supra* Section I.C. There are other contexts in which public protests and movements have lost legal challenges under the current TPM standard. See, e.g., Brod, *supra* note 22, at 187–89 (noting that Occupy movements across the country lost legal challenges to various park regulations that stymied the movement's around-the-clock occupation of public spaces under the TPM framework—"First, courts reasoned that the government had a substantial interest in preserving the appearance and safety of public parks. Second, regulations prohibiting structures, overnight sleeping, or camping were found to be narrowly tailored to achieve that interest. Third . . . content-neutral . . . regulations of public parks left open ample alternative channels of communication because they allowed protestors to use the parks during the day and to avail themselves of other methods of communication, namely, speaking." (footnotes omitted)).

194. See, e.g., *Ward*, 491 U.S. at 798 (stating that content-neutral regulations "need not be the least restrictive or least intrusive means" of achieving the government's interests); see also Abu El-Haj, *supra* note 40, at 979 ("Lower courts, meanwhile, uphold virtually all means that government officials devise to quash the disruptive elements of assemblies, so long as the government refrains from content

Courts also often find that there are ample alternatives for communication in public protest cases because there are always other ways to communicate information other than in-person gathering (e.g., through speech).¹⁹⁵ This leaves the bulk of the analysis on the content-neutrality prong.

Many traffic-related “anti-protest” laws, like that passed in Oklahoma, appear facially neutral.¹⁹⁶ Critical infrastructure laws like Arkansas’s also appear to prohibit trespass on their face, but actually target specific acts of protest when considered in the context of when and why they were passed.¹⁹⁷ Depending on the breadth of the legislation, some laws redefining riot or unlawful assembly also appear facially neutral and may be difficult to challenge in practice.¹⁹⁸ This is particularly true where there is no public denunciation of particular categories of protesters that points to viewpoint discrimination, as was the case in Florida.¹⁹⁹

The only way to challenge these laws under current First Amendment jurisprudence, therefore, is through an as-applied challenge.²⁰⁰ Yet this requires protesters to put their liberty on the line, through arrest and possible criminal prosecution, to test the constitutionality of the “anti-protest” laws. If the laws are upheld as constitutional, these protesters may face grave prison sentences and ruinous financial penalties.²⁰¹ As-applied challenges also require piecemeal adjudication that produces uncertainty and requires repeated and costly litigation.²⁰²

Further, although it may be possible to challenge some of these laws under the vagueness or overbreadth doctrines, such challenges often result in courts recognizing a narrow construction of the law rather than striking it down altogether.²⁰³ This perpetuates the cycle of “anti-protest”

or viewpoint discrimination. They rarely scrutinize the means-ends fit carefully, and they willingly accept virtually any interest the government offers as substantial enough to suppress the disorder and inconveniences associated with demonstrators.”).

195. See, e.g., *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 294 (1984) (requiring the government show only that it has left open other ways of communicating the message); *Frisby v. Schultz*, 487 U.S. 474, 483 (1988) (upholding a content-neutral regulation as long as it permits “the more general dissemination of a message”).

196. See *supra* Section II.B.2.b.

197. See *supra* Section II.B.2.c.

198. See *supra* Section II.B.1 (discussing recent bills expanding the definition of riot and unlawful assembly).

199. See *supra* Section II.B.2.a (discussing Florida’s H.B. 1).

200. See Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321, 1335–41 (2000) (discussing complexities with defining challenges to statutes as either “as applied” or “facial”).

201. See *supra* Part II for examples of the types of jail or prison sentences and financial penalties associated with the relevant “anti-protest” laws.

202. Roger Pilon, *Facial v. As-Applied Challenges: Does It Matter?*, 2008 CATO SUP. CT. REV. vii, xi.

203. See, e.g., *United States v. Miselis*, 972 F.3d 518, 546 (4th Cir. 2020) (holding that language in the federal Anti-Riot Act making it a crime to “encourage,”

laws that chill assembly despite excising some particularly unclear aspects of certain statutes.

2. *Prescribing a More Protective Standard for Public Assembly*

Given the difficulties with challenging “anti-protest” laws under the current TPM standard, state actors are slowly chipping away at the assembly right through “anti-protest” legislation without consequence. This is particularly alarming given that the most robust wave of “anti-protest” legislation came on the heels of the summer 2020 BLM protests, despite the peaceful nature of nearly 98% of these protests.²⁰⁴ If we are to protect the fundamental right of assembly and continue to assure its presence as a countervailing force to an electoral system shaped by political gerrymandering, voter suppression, and congressional stalemates, this cannot continue unabated. A new standard that focuses on the gathering, its impact, and its context would help preserve public assembly as a fundamental freedom. This standard should also focus on the consequences of restrictive legislation rather than its mere intent.²⁰⁵

“promote,” or urge a riot is unconstitutionally overbroad because it encompasses speech protected by the First Amendment, but narrowing the law rather than striking it down as unconstitutional), *cert. denied*, 141 S. Ct. 2756 (2021), *cert. denied sub nom.* Daley v. United States, 141 S. Ct. 2756 (2021); United States v. Rundo, 990 F.3d 709, 720 (9th Cir. 2021) (agreeing with the lower court that the Anti-Riot Act intrudes on protected speech, but finding that the law should not be struck down in its entirety, and instead courts should ignore the statute’s prohibitions on urging, encouraging, promoting, or organizing a riot).

204. See Chenoweth & Pressman, *supra* note 5. This stands in stark contrast to the January 6, 2021 capitol riot, which was marked by demonstrators armed with stun guns, bear and pepper spray, baseball bats, flagpoles wielded as clubs, and other unknown chemical agents sprayed at officers. Tom Dreisbach & Tim Mak, *Yes, Capitol Rioters Were Armed. Here Are the Weapons Prosecutors Say They Used*, NAT’L PUB. RADIO (Mar. 19, 2021, 5:06 AM), <https://www.npr.org/2021/03/19/977879589/yes-capitol-rioters-were-armed-here-are-the-weapons-prosecutors-say-they-used> [<https://perma.cc/G82Y-8L9S>]. Capitol police feared for their lives as they were dragged and beaten by the crowd. Lauren Leatherby, Arielle Ray, Anjali Singhvi, Christiaan Triebert, Derek Watkins & Haley Willis., *How a Presidential Rally Turned into a Capitol Rampage*, N.Y. TIMES (Jan. 12, 2021), <https://www.nytimes.com/interactive/2021/01/12/us/capitol-mob-timeline.html> [<https://perma.cc/S5JV-DXAV>]; THE DAILY, *‘I Thought I Was Going to Die’: A Capitol Police Officer Recounts Jan. 6*, N.Y. TIMES (Dec. 9, 2021), <https://www.nytimes.com/2021/03/10/podcasts/the-daily/capitol-riot-police-officer.html?showTranscript=1> [<https://perma.cc/T9K5-24V8>]. Five people died, including one officer, and “more than one hundred officers suffered injuries including cracked ribs, gouged eyes, and shattered spinal disks.” Jack Healy, *These Are the 5 People Who Died in the Capitol Riot*, N.Y. TIMES (Oct. 13, 2022), <https://www.nytimes.com/2021/01/11/us/who-died-in-capitol-building-attack.html> [<https://perma.cc/JBN2-XE5X>]; see also Dreisbach & Mak, *supra*. Although this Article recommends a renewed assembly framework, it does not condone violent protests like that of January 6, 2021.

205. In addition to preserving public assembly as a fundamental freedom, this standard promotes the equality of marginalized groups assembling, something the Supreme Court has often done when applying the TPM framework to speech cases. See Jenny E. Carroll, *Graffiti, Speech, and Crime*, 103 MINN. L. REV. 1285, 1328–30 (2019) (recognizing and providing examples of when the Court has “pre-

If we place the public gathering at the center of the inquiry, each of the three TPM prongs should be modified to account for the unique nature of in-person protests as opposed to other types of expressive conduct. What follows is not an exhaustive discussion of the possibilities for a more robust, protest-specific standard, but rather a framework to help ensure state legislators cannot continue to diminish the right to public assembly.

First, the content-neutral prong could better account for the context in which a bill is introduced and passed into law by looking to collateral evidence.²⁰⁶ Although many “anti-protest” bills are facially neutral, the environment surrounding their enactment often points to viewpoint discrimination. Because laws that are content-based are analyzed using strict scrutiny (rather than the intermediate scrutiny TPM standard), a more exacting approach to the content-neutrality analysis could help curb legislators impinging on the assembly right. Such an approach would also help promote a truer version of content-neutrality, one that does not endorse the silencing effect of majoritarian positions on dissenting and resistant speech. By taking seriously the “anti-protest” bills’ context, courts can better determine whether the bill promotes a viewpoint that endorses bias and inequality (and is, thus, not neutral).²⁰⁷

Although the circumstances leading to a bill’s passage are sometimes considered by courts, the history and reasons for enacting “anti-protest” legislation are not always clear. Many states lack relevant legislative history and the trends surrounding passage of “anti-protest” legislation have not been widely discussed. For example, in states like Florida, Governor DeSantis’s public comments and actions leading up to the enactment of H.B. 1 may give courts enough data to find parts of the law to be viewpoint discriminatory. For traffic-related and infrastructure bills like those in

served forums of expression, even those on private property, when equality interests appear to mandate curtailing property rights in the interest of preserving marginalized speech,” and noting that the examples “recast time, place, or manner restrictions in terms of interests in equality”). Although the Court has noted that it does not try to read the minds of legislators when determining whether a law is viewpoint discriminatory, considering the context surrounding the passage of the law does not require an inquiry into the particular thoughts of state legislators.

206. The Court looks to collateral evidence in other contexts. For example, under the Equal Protection Clause and in cases involving the right of religious expression, the Court often looks to legislative intent to unearth potentially prejudicial intent. *See, e.g.,* U.S. Dep’t of Agriculture v. Moreno, 413 U.S. 528 (1973) (looking to legislative intent in case involving the Equal Protection Clause); *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) (looking to legislative intent in case involving right of religious expression). Thank you to Professor John Kang for helping to inform my thinking on this point.

207. My thinking on this point is informed by Jenny E. Carroll, who uses graffiti to challenge “the notion that time, place, or manner regulations do not also regulate content.” *See* Carroll, *supra* note 205, at 1348. Carroll recognizes that “this neat dichotomy of content versus content-neutral regulation becomes problematic in the context of speech such as graffiti, in which the communication itself is embedded in the mechanism of the speech,” and that where speech is “walled out by a dominant perspective . . . content neutrality *is not* neutral.” *Id.* at 1331.

Oklahoma and Arkansas, the content-based nature of these bills is less obvious. Yet it is hard not to see viewpoint discrimination behind this legislation when put in the context of the swell of “anti-protest” legislation enacted over the last five years, the fact that much of this legislation follows specific protest events, and the idea that groups like ALEC provide model legislation based on particular types of protest activity. Thus, when considered in context, what at first glance may appear like a routine trespass or traffic-safety law becomes obviously content-based. This Article sheds light on the history and context surrounding some of the most common types of “anti-protest” legislation, which could be taken into account by courts analyzing restrictive protest laws.

Second, the narrowly tailored significant governmental interest prong could be altered to employ a balancing test that better accounts for the in-person gathering and its impact. Instead of considering only the government’s interest, courts could weigh that interest against the impact the government action will have on public gathering. This would also require a determination of whether the government’s goal is important enough to justify the means. Some interests, such as curbing violence or property damage, would often outweigh the interest in gathering publicly. Other government interests, such as keeping public roadways clear, might be outweighed by the detrimental impact on public gathering—public roadways are traditional forums for protest, and demonstrators cannot disseminate their message without widespread visibility. Thus, shutting down a peaceful protest on a public roadway may too greatly diminish public protest when compared to the need for smooth traffic patterns.²⁰⁸ Public assembly is a fundamental right, driving unimpeded is not.

Third, the ample alternative channels prong could be tailored to the impact of such alternative channels. In other words, “ample” alternative channels would not be any alternative channel given that in public protest cases speech is always an alternative but rarely has the same impact as a flesh-and-blood gathering. Instead, an alternative channel would need to result in a similar impact to that of group protest. This construction of the ample alternative channels prong would also recognize that not all forums are created equal,²⁰⁹ a truth that courts currently seem to ignore.²¹⁰ Diverting protests to online forums would not be a sufficient alternative channel, while containing protests to certain clearly visible public streets

208. There may be instances in which impeding traffic is so dangerous as to shift the balance toward government regulation, but that is unlikely to be true in many cases.

209. Carroll, *supra* note 205, at 1338 (discussing critiques of protest zones at political conventions and noting that “speech in the confined and often isolated space of the protest zones at the Democratic National Convention in 2008 are hardly the same as protests on the floor of the Convention in 1968”).

210. *Id.* (“[C]ourts seem deaf to the claim that the speaker chose the particular mode of expression precisely because it was not equal but superior to other alternatives the court might find in retrospect.”).

as opposed to dangerously crowded highways might be an ample alternative.

A protest-specific framework could also be enhanced by focusing on the consequences of an “anti-protest” law rather than the intent of it.²¹¹ Many state legislators do not publicly acknowledge that the intent of “anti-protest” laws is to tamp down public demonstrations. Yet the consequence of these laws is precisely that. Less public protest and more arrests of peaceful protesters necessarily follow from the influx of “anti-protest” legislation nationally.²¹² When considered in this light, courts could take stock of the effect the law will have on public assembly rather than the mere intent (often presented as innocuous) of a particular law when considering the constitutionality of restrictive protest laws. If the effect of a restrictive protest law is a significant infringement on public protest, a strict scrutiny analysis could be used. This would better protect minority rights, rather than allowing courts to hide behind the shield of innocuous intent, which in practice often guts the rights of disenfranchised groups.

Some scholars have suggested that because “Americans have largely internalized and accepted the strict management of dissent by public and private actors,” facilitating “the communication of diverse ideas and participation by diverse speakers . . . will take more than a few decisions by the current or future Supreme Court.”²¹³ It “will require broad-scale attitudinal changes among our citizens regarding the purposes and values of public protest and dissent.”²¹⁴ Given the current climate around public protest and dissent, now is precisely the time when a change in Supreme Court jurisprudence could solidify the shifting attitudes toward the importance of public protest. Together with lobbying and challenging “anti-protest” laws, a more protective assembly standard can help create an environment ripe for participation by diverse speakers and their supporters.

211. My thought process on this piece of the protest-specific framework draws on a similar concept expounded by Ibram X. Kendi in his book *How To Be AN ANTIRACIST* (2019).

212. For example, the early summer 2020 protests resulted in over 13,600 arrests nationwide. See Loadenthal, *supra* note 89; see also *supra* note 143 (discussing arrests and the subsequent dismissal of charges for individuals participating in protests after the murder of George Floyd).

213. Timothy Zick, *Managing Dissent*, 95 WASH. U.L. REV. 1423, 1425–27 (2018). Although the current composition of the Supreme Court may make it difficult to accomplish the type of jurisprudential change this Article suggests, the deluge of “anti-protest” bills aimed at silencing BLM protesters could also be used to silence dissent from groups such as anti-abortion protesters, which should encourage the Court to look more holistically at Americans’ right to peacefully assemble rather than viewing the issue along ideological lines.

214. *Id.* at 1427.

CONCLUSION

By collapsing the right of assembly into the First Amendment's other free speech guarantees, the Supreme Court has opened the door for state legislators to redefine what constitutes constitutionally protected public protest. Recently, this has meant that instead of responding to protesters' concerns about issues such as inadequacies in policing, state legislators are attempting to silence demonstrators. Chilling assembly in this way thwarts social change, drowns out diverse voices, diverts attention from the underlying issues protesters are aiming to address, and perpetuates the carceral state by ratcheting up punishment for gathering to voice dissent. This is antithetical to the fundamental right of assembly and what has historically been seen as an important check on electoral politics, particularly for marginalized groups. A more protective legal standard that focuses on the in-person gathering as a unique and historically valued form of expression can help ensure a robust right to public protest. Lobbying against "anti-protest" bills and challenging "anti-protest" laws where possible will also help stop the ever-expanding criminalization of public assembly.