PROTECTING DISSENT: THE FREEDOM OF PEACEFUL ASSEMBLY, CIVIL DISOBEDIENCE, AND PARTIAL FIRST AMENDMENT PROTECTION

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Protesters in the United States frequently engage in peaceful unlawful conduct, or civil disobedience, such as blocking traffic or trespass. Often citing to the First Amendment, authorities will routinely decline to arrest or prosecute this nonviolent conduct or do so for lesser offenses than they could. This treatment, though, can vary considerably by location, issue, or the group demonstrating, with civil disobedience sometimes triggering an aggressive police and prosecutorial response. Further, those who engage in civil disobedience at protests face at least two emerging threats. First, some states have targeted protest movements, such as Black Lives Matter and anti-pipeline protests, by substantially increasing criminal penalties for peaceful unlawful conduct associated with these demonstrations. Second, organizers of demonstrations involving civil disobedience confront expansive new theories of civil liability under which they can be held liable when others engage in violence.

Courts have traditionally not provided civil disobedience First Amendment protection. While this stance has intuitive appeal from a rule of law perspective, it leaves demonstrators engaged in peaceful unlawful conduct, and organizers of such protests, excessively exposed—potentially facing substantial criminal and civil liability. This vulnerability can chill protected peaceful assembly and undercut socially beneficial forms of civil disobedience.

In response, this Article proposes partial First Amendment protection for peaceful unlawful conduct at nonviolent demonstrations. Such protection would not decriminalize previously unlawful actions. It would, though, have at least two consequences. First, it would introduce penalty sensitivity analy-

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sis. For instance, peaceful protesters should generally not face felony charges for trespass connected with a nonviolent assembly. Second, it would limit civil liability for those who organize nonviolent assemblies that involve civil disobedience when others then commit violence.

While this approach marks a shift in First Amendment doctrine, it is not as striking as it may first appear. Supreme Court precedent already acknowledges a form of First Amendment penalty sensitivity, and it has been keenly aware of the need to limit civil liability for organizers and others at protests. Meanwhile, the Constitution's neglected freedom of assembly clause provides a natural constitutional vehicle for developing this protection more fully, while at the same time, appropriately targeting its application. The Article ends by considering and rejecting five potential counterarguments to this proposal, concluding that it provides the best avenue for protecting First Amendment values in hard cases involving civil disobedience at nonviolent protests.

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INTRODUCTION

The last decade has been an era of protests in the United States.[1] The first half of the 2010s saw Occupy Wall Street, Tea Party, and Black Lives Matter demonstrations transform U.S. politics.[2] The second half of the decade saw the Presidency of Donald Trump, which saw high-profile demonstrations around issues such as climate change, gun control, immigration, and, then in 2020, COVID-19.[3] The 2017 Women's march was reportedly the largest demonstration ever in the United States,[4] while the 2020 protests for racial justice triggered by the police killing of George Floyd comprised the country's largest protest movement ever.[5]

Not only did increasing numbers of people turn out for demonstrations, but there were numerous high-profile acts of peaceful unlawful conduct or civil disobedience.[6] These ac-

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1 *See* L.A. Kauffman, *We Are Living Through a Golden Age of Protest*, GUARDIAN (May 6, 2018), https://www.theguardian.com/commentisfree/2018/may/06/protest-trump-direct-action-activism [https://perma.cc/3VJV-8KVZ] ("The overall turnout for marches, rallies, vigils and other protests since the 2017 presidential inauguration falls somewhere between 10 and 15 million. . . . . That is certainly more people in absolute terms than have ever protested before in the US. . . . [I]t's probably a higher percentage than took to the streets during the height of the Vietnam anti-war movement in 1969 and 1970 . . . ."); 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/M2J8-6H3M] (documenting a 2018 poll finding that one in five Americans have protested in the streets or participated in a political rally since the beginning of 2016).

2 *See* Erica Chenoweth, *From Occupy to Black Lives Matter: How Nonviolent Resistance Is Shaping the 2016 Elections*, VOX (Apr. 18, 2016) https://www.vox.com/2016/4/18/11450126/nonviolence-2016-elections [https://perma.cc/7XTW-SDLG] (describing how Occupy Wall Street, Tea Party, and Black Lives Matter demonstrations emerged in the first half of the 2010s and shaped electoral politics).

3 *See* COUNT LOVE: STATISTICS, https://countlove.org/statistics.html [https://perma.cc/A957-SJA2] (last visited Mar. 20, 2021) (providing a count of U.S. protests from Jan. 2017 to Jan. 2021 categorized by topic).

4 L.A. KAUFFMAN, HOW TO READ A PROTEST: THE ART OF ORGANIZING AND RESISTANCE 91 (2018) (listing the eight largest coordinated protests in U.S. History up until 2018 and finding that the largest was the 2017 Women's March).

5 *See* Larry Buchanan, Quoctrung Bui & Jugal K. Patel, *Black Lives Matter May Be the Largest Protest 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/4ZM5-4CSS] (finding that based on four public polls that between 15 to 26 million people participated in protests in June 2020 in reaction to the police killing of George Floyd, arguably making it the largest protest movement ever in the U.S.).

6 *See* Emily Badger, *Why Highways Have Become the Center of Civil Rights Protest*, WASH. POST (July 13, 2016) https://www.washingtonpost.com/news/

tions included protesters blocking streets or highways to bring attention to a cause, obstructing the construction of new fossil fuel pipelines, or surrounding immigrant detention centers to disrupt their functioning.[7]

Despite the centrality of civil disobedience at many demonstrations, the courts have traditionally not provided such disobedience First Amendment protection.[8] From a rule of law perspective this stance has intuitive appeal: if a law is violated, that violation should be punished.[9] As such, the Supreme Court has historically treated the First Amendment like an on/off switch where either conduct is protected, and so is lawful, or is unprotected (as in the case of civil disobedience), and so is subject to sanction.[10]

This Article argues that this approach fails to adequately protect the U.S.'s rich tradition of protest, which has included acts of civil disobedience from its founding through struggles for abolition, suffrage, and civil rights to the contemporary moment.[11] This gap in judicial protection has recently become more apparent as states have begun targeting civil disobedience at protests with extreme criminal penalties and organizers of these demonstrations have faced broad theories of civil liability.[12] In response, this Article proposes that the courts

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wonk/wp/2016/07/13/why-highways-have-become-the-center-of-civil-rights-protest/ [https://perma.cc/K65K-9MVL] (describing how blocking roadways has become a central tactic of Black Lives Matter protests).

7 *See id.*; Jennifer A. Dlouhy, *Oil Companies Persuade States to Make Pipeline Protests a Felony*, BLOOMBERG (Aug. 19, 2019) https://www.bloomberg.com/news/articles/2019-08-19/oil-companies-persuade-states-to-make-pipeline-protests-a-felony [https://perma.cc/2U5H-P3A8] (explaining how activists have actively blocked the construction of pipelines); Kelly Heyboer, *36 Jewish Protesters Avoid Jail Time After Shutting Down Access to ICE Detention Center*, NJ.COM (Sept. 16, 2019), https://www.nj.com/news/2019/09/36-jewish-protesters-avoid-jail-time-after-shutting-down-access-to-ice-detention-center.html [https://perma.cc/W7ZQ-ZHPX] (describing how protesters avoided jail time for blocking traffic in front of an immigrant detention center in New Jersey).

8 *See, e.g.*, Leslie Gielow Jacobs, *Applying Penalty Enhancements to Civil Disobedience: Clarifying the Free Speech Clause Model to Bring the Social Value of Political Protest into the Balance*, 59 OHIO ST. L.J. 185, 187 (1998) ("[T]he Constitution does not protect civil disobedients from imposition of punishment for their crimes. Such a constitutional principle would subvert the rule of law upon which this constitutional democracy is based." (footnote omitted)).

9 *See id.*

10 *Id.* at 258 ("The current free speech clause model contains the assumption that lawbreaking is once and forever into the future 'unprotected.'").

11 *Id.* at 238–40 ("From before the American Revolution through anti-slavery activities, the women's suffrage movement, civil rights and anti-war activism, up to the current environmental, animal rights, gay rights, and abortion-related protests, to name a few, civil disobedience has contributed to the American political dialogue." (footnotes omitted)).

12 For a fuller discussion of these threats, see *infra* Part II.

should build off of existing jurisprudence to adopt what the Article terms partial, or limited, First Amendment protection for peaceful unlawful conduct at nonviolent demonstrations.

The Article begins in Part I by describing how police and prosecutors treat civil disobedience at demonstrations. It finds that these authorities will routinely not arrest or prosecute protesters for peaceful unlawful conduct or do so for lesser crimes than they could. Indeed, they frequently explicitly justify this restraint in the name of protecting demonstrators' First Amendment rights.[13] In this way, on the ground, there is already a type of limited First Amendment protection for civil disobedience.

This practice of restraint, however, can vary considerably by location, issue, or the group protesting.[14] In many cases, protesters engaged in peaceful unlawful conduct can face aggressive policing and prosecution.[15] For example, there is evidence that law enforcement is more likely to arrest or use force against Black demonstrators or those protesting against police brutality.[16] In other words, police and prosecutors provide an uneven and often politicized patchwork of First Amendment protection for civil disobedience at demonstrations that, in many instances, can switch to harsh targeting of this conduct.[17]

Part II of this Article presents two emerging threats to those who engage in civil disobedience, drawing on examples from recent anti-pipeline and Black Lives Matter demonstrations. The first is the targeting of peaceful unlawful conduct associated with these protests with heightened criminal penalties. In response to anti-pipeline protests, which have sometimes in-

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13 For a discussion of how police and prosecutors treat civil disobedience, see *infra* Part I.

14 *See* Christian Davenport, Sarah A. Soule & David A. Armstrong II, *Protesting While Black? The Differential Policing of American Activism, 1960 to 1990*, 76 AM. SOCIO. REV. 152, 152 (2011).

15 For a fuller description of these policing and prosecutorial tactics, see *infra* Part I.

16 *See, e.g.*, Davenport, Soule & Armstrong II, *supra* note 14, at 153 (examining 15,000 protest events between 1960 and 1990 to show that, compared to other groups, predominantly Black protests are more likely to attract a police presence and then, once there, lead to arrests and use of force and violence by law enforcement); Heidi Reynolds-Stenson, *Protesting the Police: Anti-Police Brutality Claims as a Predictor of Police Repression of Protest*, 17 SOC. MOVEMENT STUD. 48, 48 (2018) (using data from over 7,000 protest events from 1960 to 1995 in New York to show that police are twice as likely to show up at demonstrations against police brutality, and then either use force or make arrests in about half of these protests, compared to a third for other protests).

17 *See id.*

volved protesters temporarily blocking construction of fossil fuel pipelines, over a dozen states have enacted so-called "critical infrastructure" acts since 2017.[18] Among other measures, these acts often make trespass on or obstructing construction of pipelines a felony offense punishable by multiple years in jail.[19] Meanwhile, in reaction to Black Lives Matter demonstrations, many states have enacted or introduced bills that dramatically heighten penalties for nonviolent offenses related to demonstrations like blocking traffic or "camping" on state public property.[20]

The second emerging threat is the use of expansive theories of civil liability against organizers of protests involving civil disobedience. Consider the case of DeRay Mckesson, who faces a civil suit for helping organize a Black Lives Matter demonstration that blocked a highway in Louisiana in July 2016.[21] During the demonstration, an unknown protester threw an object, injuring a police officer who subsequently sued Mckesson.[22] In 2019, the Fifth Circuit found that Mckesson could be held liable under a theory of negligence even though there was no evidence Mckesson condoned the violence.[23] The Court found that the violence was a "foreseeable" consequence of blocking a highway, and, since blocking a highway is illegal, Mckesson's conduct was not protected under the First Amendment.[24] On appeal in 2020, the Supreme Court declined to decide whether the First Amendment protected Mckesson's ac-

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18 *See U.S. Protest Law Tracker*, INT'L CTR. FOR NOT-FOR-PROFIT- LAW (ICNL), http://icnl.org/usprotestlawtracker/ [https://perma.cc/YHQ4-VKWH] (last visited Mar. 20, 2021) [hereinafter ICNL Protest Law Tracker] (showing the passage of at least 13 critical infrastructure acts as of Jan. 30, 2021: Indiana S.B. 471 (2019); Kentucky H.B. 44 (2020); Louisiana H.B. 727 (2018); Mississippi H.B. 1243 (2020); Missouri H.B. 355 (2019); North Dakota S.B. 2044 (2019); Ohio S.B. 33 (2019); Oklahoma H.B. 1123 (2017); South Dakota S.B. 151 (2020); Tennessee S.B. 264 (2019); Texas H.B. 3557 (2019); Wisconsin A.B. 426 (2019); West Virginia H.B. 4615 (2020)).

19 *Id.*

20 *See* ICNL Protest Law Tracker, *supra* note 18 (detailing states that have introduced or enacted bills that would increase the penalties for traffic interference or camping).

21 Doe v. Mckesson, 945 F.3d 818, 822–23 (5th Cir. 2019) (describing the incident that injured the police officer leading to the civil suit against Mckesson), *cert. granted*, *judgment vacated*, 131 S. Ct. 48 (2020).

22 *Id.*

23 *Id.* at 823 (showing how the complaint alleged that Mckesson did nothing to calm the crowd); *id.* at 826–829 (finding that McKesson could potentially be held liable under a theory of negligence); *see also id.* at 846 (Willett, J., dissenting) (arguing that the majority's judgment created "negligent protest" liability).

24 *Id.* at 827 (finding it was "patently foreseeable" that the protest would lead to a police response and confrontation); *id.* at 828–832 (addressing and dismissing Mckesson's First Amendment claims).

tions, but rather sent the case to the Louisiana Supreme Court to decide whether the Fifth Circuit had correctly interpreted the state's tort law.[25] With similar types of cases continuing to be brought, organizers of nonviolent protests that involve peaceful unlawful conduct, like blocking a street, face the specter of potentially expansive civil liability if someone at the demonstration engages in violence.[26]

Part III of this Article describes how excessive punishment of peaceful unlawful conduct at protests can chill protected assembly rights and undermine socially beneficial civil disobedience. Contemporary demonstrations in the U.S. must navigate a thick set of regulation and a highly charged political environment, including frequently militarized, politicized, and racialized policing.[27] As such, protesters may not attend or organize a demonstration if they are concerned that interactions with law enforcement could quickly devolve into a situation where they may face harsh criminal sanction or extensive civil liability even if they do not themselves plan to violate the law.[28]

This excessive penalization also threatens to all but silence certain types of civil disobedience. Few would argue that civil disobedience should never be punished, but such unlawful acts at demonstrations have historically been a critical avenue of democratic dialogue, particularly for marginalized voices within society.[29] Indeed, it is these voices that are often disproportionately affected by expansive civil liability or extreme penalties for civil disobedience.[30] For example, an organizer of a predominantly Black protest that involves civil disobedience, such as blocking a street, is arguably at increased risk of facing civil liability since Black protesters have historically inspired a stronger police response, leading to a greater likelihood of a confrontation that could lead to violence.[31] Meanwhile, it is

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25 Mckesson v. Doe, 141 S. Ct. 48, 49–51 (2020). In vacating the Fifth Circuit's opinion, the Supreme Court found that "the Fifth Circuit's interpretation of state law is too uncertain a premise on which to address the [constitutional] question presented." *Id.*

26 For a fuller discussion of the Mckesson case and others that raise similar issues, *see infra* subpart II.B.

27 For a discussion of policing practices, see *infra* Part II and subpart III.A.

28 For a discussion of this chilling effect on protest, see *infra* subpart III.A.

29 For a discussion of the justification of civil disobedience by political theorists, see *infra* subpart III.B.

30 *See* Tasnim Motala, *"Foreseeable Violence" & Black Lives Matter: How* Mckesson *Can Stifle a Movement*, 73 STAN. L. REV. ONLINE 61, 70 (2020) (arguing that racial justice protests composed predominantly of people of color are more likely to lead to tense police encounters that could create civil liability for organizers).

31 *Id.*

common for fossil fuel companies to hire private security firms to guard pipeline construction sites.[32] These firms often hire off-duty law enforcement, creating a financial incentive for law enforcement to move aggressively against anti-pipeline protesters, including arresting them under "critical infrastructure" statutes.[33]

The uneven treatment of civil disobedience by police and prosecutors, as well as new threats to those who engage in it from extreme criminal penalties and expansive civil liability create a need for judicial intervention. In response, Part IV proposes that the courts provide limited First Amendment protection to peaceful unlawful conduct connected with nonviolent assemblies.[34] This partial protection would not immunize protesters who engage in peaceful unlawful activity from liability. However, it would have at least two significant consequences. First, it would introduce penalty sensitivity analysis into any criminal punishment of such expressive unlawful conduct. For example, nonviolent protesters should generally not face felony penalties for unlawful conduct like trespass. Second, this partial protection would limit the civil liability of organizers of protests involving civil disobedience. For instance, it would protect those who organize a nonviolent assembly that involves peacefully obstructing a street from being held liable for any violence committed by others that the organizer did not direct, authorize, or ratify.

Such explicit limited protection would be a shift for First Amendment jurisprudence, but it is not as striking a move as it may first appear and builds on well-established doctrine. Scholars like Michael Coenen have documented that the Supreme Court already has a history of recognizing a form of penalty sensitivity in its First Amendment jurisprudence.[35] In particular, the Court has repeatedly weighed the severity of a

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32 *See* Mike Soraghan, *Are Pipeline Companies Buying Justice?*, E&E NEWS (Jan. 4, 2021), https://www.eenews.net/stories/1063721653 [https://perma.cc/WL6C-9XTH] (describing how private security firms for oil and gas pipelines often hire off-duty law enforcement).

33 *Id.*

34 Notably, a "nonviolent" assembly does not mean one in which there is zero violence. For a fuller description of the definition of "violence" in the context of assemblies, see *infra* Part IV. *See also* U.N. Hum. Rts. Comm., *General Comment No. 37 (2020) on the Right of Peaceful Assembly (Article 21)*, ?17, U.N. Doc. CCPR/C/GC/37 (Sept. 17, 2020) [hereinafter General Comment 37] (describing how "isolated acts of violence" should not be attributed to a larger gathering).

35 *See* Michael Coenen, *Of Speech and Sanctions: Toward a Penalty-Sensitive Approach to the First Amendment*, 112 COLUM. L. REV. 991, 995 (2012) ("[T]he Court, individual Justices, and some lower courts have tinkered with penalty-sensitive analysis in a variety of free speech settings."); *see also* Jacobs, *supra*

potential sanction when deciding whether or not laws that affect expressive activity are constitutional under the First Amendment.[36] Further, seminal cases like *NAACP v. Claiborne Hardware Co.*[37] show how the Court has historically been sensitive to the special problems that arise in regard to derivative civil liability in the First Amendment context.[38]

Partial First Amendment protection could conceivably be expanded to all types of civil disobedience, such as refusing to pay one's taxes or to comply with the draft on moral principle.[39] However, the case for partial First Amendment protection is particularly strong in relation to demonstrations. Given competing demands on physical space, contemporary demonstrations are highly regulated, with courts allowing numerous time, place, and manner restrictions, creating a greater likelihood that a demonstrator or protest organizer will violate some law.[40] As such, Part V of this Article argues that the Constitution's long-neglected freedom of assembly clause provides a natural vehicle for more fully developing partial First Amendment protection, while at the same time, appropriately targeting its application.

Finally, Part VI considers and rejects five potential counterarguments to this proposal. First, that such limited First Amendment protection is unnecessary because existing constitutional jurisprudence already provides adequate protection for protesters. Second, that limited protection would weaken the First Amendment by providing judges the option of finding some conduct partially protected instead of fully protected.

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note 8, at 193 (arguing for a penalty-sensitive approach in applying penalty enhancements in the civil disobedience context).

36 Coenen, *supra* note 35, at 996 ("[C]ourts have signaled that the scope of the free speech right depends on the harshness of the penalty administered."); *see also* subpart II.A (describing key cases in which the Court has used forms of penalty sensitivity).

37 458 U.S. 886 (1982).

38 For a discussion of *NAACP v. Claiborne Hardware Co.* and the Court's treatment of derivative liability at protests, see *infra* subpart II.B.

39 *See* Michael Stewart Foley, *The Moral Case for Draft Resistance*, N.Y. TIMES (Oct. 17, 2017), https://www.nytimes.com/2017/10/17/opinion/vietnam-draft-resistance.html [https://perma.cc/M7G8-A48T] (describing and defending draft resisters during the Vietnam War); HENRY DAVID THOREAU, *Resistance to Civil Government (Civil Disobedience)*, *in* THOREAU: POLITICAL WRITINGS 1 (Nancy L. Rosenblum ed., 1996) (advocating for not paying taxes in protest of the U.S. government's support of slavery).

40 *See* Brief for First Amendment Scholars as Amici Curiae Supporting Petitioner at 3–4, Mckesson v. Doe, 141 S. Ct. 48 (2020) (No. 19-1108) [hereinafter First Amendment Scholars Amicus Brief] (describing how the highly regulated nature of contemporary demonstrations makes it likely protesters will violate some law).

Third, that limited protection would encourage unlawful behavior. Fourth, that limited protection would undermine the moral and political power of civil disobedience. And fifth, that limited protection would be too difficult for the courts to administer.

In proposing the courts adopt limited First Amendment protection for peaceful unlawful conduct at nonviolent demonstrations, this Article merely builds off of a commonsense understanding of the First Amendment already embraced by other parts of government: civil disobedience at demonstrations has always been part of the U.S. political tradition, is deeply intertwined with the freedom of assembly, and should be treated more cautiously than other illegal conduct.[41] Having the federal judiciary recognize partial First Amendment protection would allow courts to intervene in cases that involve excessive punishment of peaceful unlawful conduct at assemblies. It would also allow the courts to develop more general principles that could be used by all parts of government—whether it is police, prosecutors, or legislators—to help guide them in how to appropriately sanction civil disobedience.

A note on terminology. This Article uses "civil disobedience" and "peaceful unlawful conduct" interchangeably in the context of demonstrations. Civil disobedience often implies that unlawful conduct is a conscientious political act that is undertaken as part of the lawbreaker's message.[42] This Article uses an expansive interpretation of "civil disobedience" that includes peaceful unlawful conduct, whether or not it was meant to be part of that person's message.[43] In other words, a person might unlawfully block traffic as part of their message or just as a byproduct, conscientious or not, of going out to a demonstration to have their voice heard. For purposes of simplicity, this Article terms both instances "civil disobedience."

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41 *See* Jacobs, *supra* note 8, at 238–40.

42 JOHN RAWLS, A THEORY OF JUSTICE 320 (rev. ed. 1999) ("I shall begin by defining civil disobedience as a public, nonviolent, conscientious yet political act contrary to law usually done with the aim of bringing about a change in the law or policies of the government.").

43 Note that some acts of civil disobedience involve disobeying an unjust law, while others involve engaging in unlawful acts to bring attention to a cause. *See* RONALD DWORKIN, A MATTER OF PRINCIPLE 107 (1985) (contrasting civil disobedients who break a law that is unjust or that compels them to do what their conscience forbids with civil disobedients who break laws to raise awareness about unwise or dangerous policies). It is the latter on which this Article is focused. *See id.*

I
THE POLICING AND PROSECUTION OF CIVIL DISOBEDIENCE AT DEMONSTRATIONS

The policing and prosecution of peaceful unlawful conduct at protests can vary markedly depending on location, issue, or the group protesting.[44] This section begins by laying out how police and prosecutors routinely treat unlawful civil disobedience preferentially to other unlawful conduct, often in the name of protecting the First Amendment.[45] It then describes how this practice is highly uneven and protesters engaged in civil disobedience will at other times face aggressive policing and prosecution.

The policing of protests, and related civil disobedience, has shifted markedly during different periods in U.S. history. During the wave of civil rights and anti-war protests in the 1960s, police departments often moved aggressively against civil disobedience, treating such conduct like other crime, and regularly arresting protesters for even minor violations of the law.[46] This approach was criticized for often leading to escalation and conflict between police and protesters.[47] In response, some police departments in the late 1960s, and then more widely in the 1970s onwards, began adopting an approach to policing protests termed "negotiated management."[48] As Alex Vitale describes, this "negotiated management" approach is characterized by "the protection of free speech rights, toleration of community disruption, ongoing communication between po-

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44 *See* Davenport, Soule & Armstrong II, *supra* note 14, at 159.

45 The Constitution is not just interpreted by the judiciary, but by the other branches of government as well. *See, e.g.*, David A. Strauss, *Presidential Interpretation of the Constitution*, 15 CARDOZO L. REV. 113, 115–16 (1993) (emphasizing that the executive branch interprets the Constitution in far more instances than the courts).

46 *See* J.L. LeGrande, *Nonviolent Civil Disobedience and Police Enforcement Policy*, 58 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 393, 401 (1968) ("The police pattern most widely accepted and acclaimed [to address civil disobedience] is one of strict enforcement with all parties treated equally under the law."); *see also* Alex S. Vitale, *From Negotiated Management to Command and Control: How the New York Police Department Polices Protests*, 15 POLICING & SOC'Y 283, 286 (2005) (describing the policing of protests in the 1960s as characterized as "escalated force" in which militancy of protesters was met by militancy by the police).).

47 *See* Legrande, *supra* note 46, at 402.

48 *See* John D. McCarthy & Clark McPhail, *Places of Protest: The Public Forum in Principle and Practice*, 11 MOBILIZATION 229, 234 (2006) (describing the rise of "negotiated management" policing); LeGrande, supra note 46, at 402 ("A relatively small group of police administrators . . . . have followed a policy of extreme tolerance, fully cooperating with lawful demonstrations and ignoring minor misdemeanor offenses committed by civil disobedients; they take specific arrest and enforcement actions only when public danger is involved.").

lice and demonstrators, avoidance of arrests, and limiting the use of force to situations where violence is occurring."[49] Starting in the late 1990s, partly in response to anti-globalization protests, law enforcement increasingly adopted a "command and control" approach that micromanaged protests, was more militarized, and was characterized by widespread use of "less lethal" weapons and surveillance of demonstrators.[50]

Still, even in the current, more hard-edged environment for policing protests, it is common for law enforcement to either not arrest demonstrators engaged in peaceful unlawful conduct or do so for lesser crimes than they could. For example, the Police Executive Research Forum, a leading research organization on policing, notes that "[m]ost departments do not make arrests for low-level civil disobedience during a protest, such as blocking traffic, particularly if traffic can be rerouted around a blocked intersection."[51]

Law enforcement officials routinely recognize civil disobedience as unlike other types of unlawful conduct and often explicitly state that such unlawful conduct is protected, at least partly, by the First Amendment.[52] For example, in advising other officers on how to manage crowds, a New York Police Lieutenant emphasized that, "Civil disobedience is very different from a criminal act. If you make an arrest, you're taking away that person's right to demonstrate. So we want to make sure that decision is made while looking at all of the factors."[53] Similarly, during racial justice protests in 2020, a San Diego Police Department spokesperson noted to the media that while it was unlawful for protesters to block a street, "[T]hat's OK. We understand people want to be heard . . . . As long as

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49 Vitale, *supra* note 46, at 286.

50 While most scholars agree that the "negotiated management" model receded in dominance since at least the early 2000s, they disagree about how to characterize the current, more aggressive, policing environment. *See, e.g.*, Edward R. Maguire, *New Directions in Protest Policing*, 35 ST. LOUIS U. PUB. L. REV. 67, 79–80, 83–85 (2015) (describing how scholars have characterized contemporary policing of protests as the "command and control model", the "strategic incapacitation model", or the "Miami model" each of which is characterized by different levels of police aggressiveness); Vitale, *supra* note 46, at 287 (arguing that the police department in New York City adopted a "command and control" approach towards demonstrations in the early 2000s that attempted to micromanage demonstrations to "eliminate any disorderly or illegal activity" and rely on confrontation even for minor violations of rules).

51 *See* POLICE EXEC. RSCH. F., THE POLICE RESPONSE TO MASS DEMONSTRATIONS: PROMISING PRACTICES AND LESSONS LEARNED 27 (2018).

52 *See id.* at 18.

53 *Id.* (quoting New York City Police Lieutenant Christophe Stissi).

protests are peaceful, we will do the best we can to facilitate, but we cannot tolerate violence or destruction."[54]

Similarly, it is common for prosecutors to use their discretion when addressing cases of civil disobedience at demonstrations.[55] Prosecutors often decide not to charge protesters who violate the law with the harshest crime they could, or even any crime at all, in part out of recognition that the activist is engaged in an expressive activity.[56] For example, prosecutors dropped charges against over 700 protesters in Harris County who had been arrested for occupying roadways during demonstrations for racial justice in the summer of 2020.[57] The County's prosecutor noted that while there was probable cause to arrest many of the protesters for failure to disperse, "We will always protect the First Amendment rights of peaceful protestors . . . . The only people I will be prosecuting are those who intentionally hurt others and intentionally destroy property."[58] Or consider Fulton County Solicitor General Keith Gammage who, when reviewing more than 100 misdemeanor arrests surrounding racial justice protests in 2020, stated, "If we determine that an individual was exercising their lawful First

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54 Ashly McGlone, *Police Have Wide Discretion Over When to Deem a Protest 'Unlawful'*, VOICE OF SAN DIEGO (June 3, 2020) https://www.voiceofsandiego.org/topics/public-safety/police-have-wide-discretion-over-when-to-deem-a-protest-unlawful/ [https://perma.cc/RB58-7RNH] (quoting San Diego Police Lieutenant Shawn Takeuchi). Or as a sergeant in the Seattle Police Department noted about protesters who engaged in an unsanctioned demonstration that was supposed to require a permit, "Your constitutional rights are not dependent on whether or not you took the time to fill out a form." Simone Alicea, *Unpacking Government: How Does Law Enforcement Deal with Civil Disobedience?*, KNKX (Feb. 20, 2017), https://www.knkx.org/post/unpacking-government-how-does-law-enforcement-deal-civil-disobedience [https://perma.cc/43B4-JPD2] (quoting Seattle Police Sergeant Sean Whitcomb); *see also* William Smith, *Policing Civil Disobedience*, 60 POL. STUD. 826, 826 (2012) (calling on police to use "negotiated accommodation" instead of harsher tactics when addressing civil disobedience).

55 Neil MacFarquhar, *Why Charges Against Protesters Are Being Dismissed by the Thousands*, N.Y. TIMES (Nov. 19, 2020), https://www.nytimes.com/2020/11/19/us/protests-lawsuits-arrests.html?smid=TW-share [https://perma.cc/WHS7-RL5Y] (last updated Feb. 11, 2021) (surveying charges brought in select cities against Black Lives Matter protesters during the summer of 2020 and noting that most misdemeanors and nonviolent crimes were being dropped by prosecutors).

56 *See* Caroline M. Moos, Student Article, *#ProtestersRightsMatter: The Case Against Increased Criminal Penalties for Protesters Blocking Roadways*, 38 MITCHELL HAMLINE L.J. PUB. POL'Y & PRAC. 1, 14 (2017) (describing how prosecutors often reduce or decide not to bring charges against those who block roadways during protests).

57 *Charges Dropped Against Nearly 800 Houston Protesters*, FOX 26 HOUS. (June 9, 2020), https://www.fox26houston.com/news/charges-dropped-against-nearly-800-houston-protesters [https://perma.cc/EN8L-QYZW].

58 *Id.* (quoting Harris County District Attorney Kim Ogg).

Amendment right and engaging in civil disobedience, then those cases I plan to dismiss."[59]

While police and prosecutors routinely treat nonviolent unlawful conduct at demonstrations in a preferential manner, often invoking the First Amendment as a justification, such practice is at best mixed and varies considerably by location. Reflecting on this phenomenon, Tabatha Abu El-Haj has written, "[A] citizen's right to come out to protest . . . depends significantly on local officials' tolerance for inconvenience and disorder. While some cities tend to crack down hard on spontaneous or disruptive assemblies, others . . . are more tolerant."[60] Or as one California defense attorney put it, "What is an unlawful assembly in San Diego might be a happy public gathering in San Francisco."[61]

Not only does location matter in the response of authorities, but so does who is protesting.[62] For example, studies have found that police have historically been more likely to aggressively police left-wing protests,[63] anti-police brutality

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59 Meryl Kornfield, Austin R. Ramsey, Jacob Wallace, Christopher Casey & Verónica Del Valle, *Swept Up by Police*, WASH. POST (Oct. 23, 2020), https://www.washingtonpost.com/graphics/2020/investigations/george-floyd-protesters-arrests/ [https://perma.cc/6QFY-PU4V] (quoting Fulton County Solicitor General Keith Gammage).

60 Tabatha Abu El-Haj, *Defining Peaceably: Policing the Line Between Constitutionally Protected Protest and Unlawful Assembly*, 80 MO. L. REV. 961, 966 (2015).

61 McGlone, *supra* note 54 (quoting Gary Gibson, a San Diego criminal defense attorney and professor of advanced criminal litigation at California Western School of Law).

62 Research has found that individuals' group commitments influence how they view protesters conduct. *See* Dan M. Kahan, David A. Hoffman, Donald Braman, Danieli Evans & Jeffrey J. Rachlinski, *"They Saw a Protest": Cognitive Illiberalism and the Speech-Conduct Distinction*, 64 STAN. L. REV. 851, 876–883 (2012) (reporting evidence that participants shown a video of a protest had markedly different views on the legality and demeanor of the demonstrators depending on whether the participants were told the protest was blocking an abortion clinic or a military recruitment center in opposition to "'don't ask, don't tell' policy," correlated strongly with participants' cultural worldviews).

63 Maggie Koerth, *The Police's Tepid Response to the Capitol Breach Wasn't an Aberration*, FIVETHIRTYEIGHT (Jan. 7, 2021) https://fivethirtyeight.com/features/the-polices-tepid-response-to-the-capitol-breach-wasnt-an-aberration/ [https://perma.cc/HX6Q-F82J] (citing data from ACLED that found between May 1 and November 28, 2020 to show that authorities were more than twice as likely to attempt to break up a left-wing than a right-wing protest, using force in interventions "34 percent of the time with right-wing protests compared with 51 percent for the left").

protests,[64] and protests that are predominantly Black,[65] including by being more likely to arrest protest participants or use force against them. Meanwhile, prosecutors may target unlawful peaceful conduct, particularly in high profile cases, including by stacking charges against protesters to pressure them to plea to a lesser offense.[66]

In sum, there is a strong tradition of police and prosecutors providing preferential treatment to civil disobedience in the United States, often justifying this treatment by invoking the First Amendment. This practice though is highly uneven, and authorities will at other times aggressively target protesters. These differing reactions are driven in part by who is protesting, what issue they are protesting, and the city in which the protest takes place.

II
EMERGING THREATS TO CIVIL DISOBEDIENCE

This part draws on the experiences of two recent protest movements—Black Lives Matter and anti-pipeline demonstrations—to explore two emerging threats to unlawful peaceful conduct at protests. The first is a new set of laws that create extreme criminal penalties for peaceful unlawful conduct related to protests.[67] The second is recent attempts to have courts apply an expansive theory of civil liability to peaceful unlawful conduct at demonstrations.[68]

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64 *See* Reynolds-Stenson, *supra* note 16, at 48 (using data from over 7,000 protest events from 1960 to 1995 in New York to show that police are twice as likely to show up at demonstrations against police brutality, and then either use force or make arrests in about half of these protests compared to a third for other protests).

65 Davenport, Soule & Armstrong II, *supra* note 14, at 153.

66 *See, e.g.*, Sam Adler-Bell, *With Last Charges Against J20 Protesters Dropped, Defendants Seek Accountability for Protesters*, INTERCEPT (July 13, 2018), https://theintercept.com/2018/07/13/j20-charges-dropped-prosecutorial-misconduct/ [https://perma.cc/AFB7-TQUL] (describing how the Justice Department aggressively prosecuted over 100 protesters on riot charges for protesting during President Trump's inauguration even though they did not have evidence that most of the protesters had engaged in or supported violence themselves). For a discussion of charge stacking, see *States Have Put 54 New Restrictions on Peaceful Protests Since Ferguson*, PRESSNEWSAGENCY (June 5, 2020), https://pressnewsagency.org/states-have-put-54-new-restrictions-on-peaceful-protests-since-ferguson/ [https://perma.cc/RK8N-U6E4] ("When you have mass movements and a lot of people in the street, you see false arrests and heavy-duty charge stacking to get people to plead to lesser charges." (quoting Mara Verheyden-Hilliard)).

67 *See* ICNL Protest Law Tracker, *supra* note 18.

68 *See* Doe v. Mckesson, 945 F.3d 818, 826–29 (5th Cir. 2019) (finding that a protest organizer could potentially be held liable under a theory of negligence for

A. Extreme Criminal Penalties

Peaceful protesters will often engage in unlawful conduct during a demonstration, such as by violating rules around traffic interference, trespassing, loitering, or camping on public property. In reaction to protest movements, some states have taken steps to increase penalties of these historically minor violations of the law, seemingly as a way to deter these protests or at least the acts of civil disobedience associated with them.[69]

One of the most prominent examples of extreme penalties faced by peaceful protesters come in the context of a wave of new laws that criminalize protest-related conduct undertaken by anti-pipeline activists. Since the Dakota Access Pipeline protests in 2016, which stalled construction of the Dakota Access Pipeline, at least twenty states have introduced so-called "critical infrastructure" bills[70] and at least thirteen have enacted them.[71] Many of these bills have provisions that are identical, or nearly identical, to model legislation developed and promoted by the American Legislative Exchange Council (ALEC),[72] a group of conservative state lawmakers that is funded by a range of companies, including those in the fossil fuel industry.[73]

These laws codify an expansive definition of "critical infrastructure" that includes oil and gas pipelines, power plants, water treatment plants, dams, rail lines, and even telephone poles.[74] Most of the bills create a new category of felony tres-

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damages he did not directly cause), *cert. granted, judgment vacated*, 131 S. Ct. 48 (2020).

69 *See* ICNL Protest Law Tracker, *supra* note 18.

70 *See* Naveena Sadasivam, *After Standing Rock, Protesting Pipelines Can Get You a Decade in Prison and $100k in Fines*, GRIST (May 14, 2019), https://grist.org/article/after-standing-rock-protesting-pipelines-can-get-you-a-decade-in-prison-and-100k-in-fines/ [https://perma.cc/3T93-B95V] (explaining how legislatures have enacted critical infrastructure acts after the Dakota Access Pipeline protests); ICNL Protest Law Tracker, *supra* note 18 (providing a catalog of anti-protest bills introduced and enacted from November 2016 to present). Bills that have been introduced but not enacted include Colorado S.B. 17-035 (2017); Idaho S.B. 1090 (2019); Illinois H.B. 1633 (2019); Minnesota S.F. 2011 (2019); Ohio S.B. 250 (2018); Pennsylvania S.B. 652 (2018); Wyoming H.B. 10 (2018). *Id.*

71 *See* ICNL Protest Law Tracker, *supra* note 1818 (listing enacted critical infrastructure acts).

72 *See* INTERNATIONAL CENTER FOR NOT-FOR-PROFIT LAW, CRITICAL INFRASTRUCTURE BILLS: TARGETING PROTESTERS THROUGH EXTREME PENALTIES 1–2 (2019) [hereinafter ICNL LEGISLATIVE BRIEFER] (describing and citing to model ALEC bill that many critical infrastructure bills are based on).

73 Dlouhy, *supra* note 7 (describing how fossil fuel companies have promoted ALEC's model critical infrastructure act in states across the country).

74 *See* ICNL LEGISLATIVE BRIEFER, *supra* note 72, at 1–2 ("[T]he bills typically codify an expansive definition of 'critical infrastructure' that includes not just

pass on critical infrastructure facilities and construction sites.[75] They also create new felony crimes for impeding or interfering with the construction or operation of critical infrastructure, such as a pipeline.[76] These felonies can be punished by multiple years in jail. For example, under a 2018 Louisiana law, unauthorized entry at a critical infrastructure site is punishable by five years in jail, while under a 2020 Mississippi law "impeding" critical infrastructure is punishable by seven years in jail.[77]

While the oldest of these laws dates to only 2017, states have already begun enforcing these acts. For example, in September 2019, Greenpeace activists rappelled off the Fred Hartman Bridge near Baytown, Texas, the site of the largest oil refinery in the United States.[78] They unfurled banners to temporarily block shipping and bring attention to the connection between the oil industry and climate change.[79] Thirty-one activists were each charged with felonies under the state's critical infrastructure act.[80] Meanwhile, in Louisiana, activists in kayaks near pipelines were arrested by private security personnel under the state's critical infrastructure act in 2018, as well as an activist who was protesting on private land near a pipeline,

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power plants, water treatment plants, and dams, but also far more ubiquitous infrastructure like oil and gas pipelines, rail lines, and even telephone poles.").

75 These trespass provisions encompass a variety of activity, from "willful trespass or ent[ry of] property containing a critical infrastructure facility" in Oklahoma, to the much broader "unauthorized entry" criminalized in Louisiana. ICNL LEGISLATIVE BRIEFER, *supra* note 72, at 2 & n.6 (emphasizing that felony penalties for trespass and interfering or impeding construction are a common component of these bills) (alteration in original).

76 *Id.*; *see, e.g.*, N.D. CENT. CODE § 12.1-21-06 (2019) ("An individual may not cause a substantial interruption or impairment of a critical infrastructure facility . . . by . . . [i]nterfering, inhibiting, impeding, or preventing the construction or repair of a critical infrastructure facility.").

77 LA. STAT. ANN. § 14:61(C) (2018); MISS. CODE ANN. § 97-25-59(2) (2020).

78 Michelle Iracheta & Jay R. Jordan, *Greenpeace Protesters Who Closed Houston Ship Channel Face Local, Federal Charges*, HOUS. CHRON. (Sept. 13, 2019), https://www.houstonchronicle.com/news/houston-texas/houston/article/Greenpeace-protesters-arrested-charged-14436988.php [https://perma.cc/GS6V-6VM2].

79 Annie Leonard, *Houston, We Have a Solution*, GREENPEACE (Oct. 8, 2019), https://www.greenpeace.org/usa/houston-we-have-a-solution/ [https://perma.cc/464Y-HLHY].

80 Iracheta & Jordan, *supra* note 78. Thirty-one of the protesters were also charged with misdemeanor criminal trespass and obstruction of a roadway and twenty-two of the protesters also faced one federal count of aiding and abetting obstruction of navigable waters. *Id.*

despite the landowner permitting them to be present.[81] They faced felony charges of unauthorized entry.[82]

Lawmakers have also targeted nonviolent protest-related activity connected with the Black Lives Matter movement.[83] For example, in August 2020, in response to Black Lives Matter protests, Tennessee's legislature adopted a law that increased the crime of obstructing a public "highway, street, sidewalk, railway, waterway, elevator, aisle, or hallway" from a maximum penalty of thirty days in jail to a penalty of eleven months and twenty-nine days.[84] At the same time, the new law increased the penalty for "camping" on state property to a felony after Black Lives Matter protesters had organized an all-night vigil at the state capitol.[85]

This Tennessee law is part of a larger trend. From January 2017 to January 2021, at least twenty states introduced bills that would increase penalties for blocking traffic on streets or highways.[86] For example, in Missouri, after the Ferguson protests, a bill has repeatedly been introduced that would make it a Class D felony punishable by seven years in jail to commit "traffic interference" during an unlawful assembly.[87] In Mississippi, a bill introduced in 2021 after racial justice protests would have made obstructing vehicular traffic during a "disorderly assembly" a felony, punishable by two years in prison.[88]

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81 Complaint for Declaratory and Injunctive Relief at 22, 24, White Hat v. Landry, 475 F. Supp. 3d 532 (M.D. La. 2020) (No. 19-322-JWD-EWD) (recounting facts of arrested petitioners).

82 *Id.*

83 Moos, *supra* note 56, at 19–21 (explaining how many states introduced increased penalties for blocking roadways in response to Black Lives Matter protests); Badger, *supra* note 66 (reporting that researchers at the Rudin Center for Transportation at New York University counted more than 1,400 protests in nearly 300 U.S. and international cities from November 2014 through May 2015 related to the Black Lives Matter movement and at least half of the protests in that time period in St. Louis, Los Angeles, San Francisco and Oakland shut down transportation infrastructure).

84 *See* ICNL Protest Law Tracker, *supra* note 18 (describing key provisions of the Tennessee "critical infrastructure" law); *see also* TENN. CODE ANN. § 40-35-111 (2010) (detailing the authorized sentences for the various classes of felonies and misdemeanors under Tennessee law). If the obstruction prevented an emergency vehicle from accessing the street, then the penalty increased to a Class E Felony punishable by up to six years in prison. TENN. CODE ANN. § 39-14-414 (=2020).

85 *See* ICNL Protest Law Tracker, *supra* note 18.

86 *See id.*

87 Several bills have been introduced with this provision in recent years, including Missouri S.B. 9 (2020); H.B. 288 (2019); H.B. 2145 (2018); H.B. 1259 (2017). *See* ICNL Protest Law Tracker, *supra* note 18. The punishment for a Class D felony has increased in Missouri between 2017 and 2020 from four to seven years. *See id.*

88 H.B. 83, 2021 Leg., Reg. Sess. (Miss. 2021).

A 2017 Minnesota bill that would have increased penalties for blocking a road to an airport was vetoed by the governor[89] and in South Dakota a law was enacted in 2017 in response to the Dakota Access pipeline protests that makes it a Class I misdemeanor punishable by one year in jail to stand on a highway with the intent to impede traffic.[90]

These examples are not meant to be exhaustive, but whether it is bills aimed at anti-pipeline or Black Lives Matter activists, protesters face a range of new legislation that increases penalties for peaceful unlawful conduct connected with protests.

B. Expansive Civil Liability

In addition to the problem of extreme penalties for civil disobedience, those who organize such conduct can face expansive civil liability for the actions of others.[91] Unlike in the criminal context, individuals or organizations can file civil claims, applying additional pressure on the courts to differentiate between peaceful unlawful conduct at demonstrations and other types of unlawful conduct.

Consider the example of the case of DeRay Mckesson. In July 2016, a group of Black Lives Matter demonstrators, led in part by Mckesson, blocked a public highway in Baton Rouge, Louisiana, and police officers began making arrests.[92] An unidentified individual in the group threw a rock-like object that hit a police officer in the face, causing substantial injuries.[93] After the protest, the injured officer brought a civil suit against Mckesson on the theory that he was responsible for the injury as he had organized a protest that unlawfully blocked a highway and so should have known a confrontation with the police could have resulted.[94]

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89 *See* ICNL Protest Law Tracker, *supra* note 18; H.F. 896, 90th Leg. (Minn. 2017).

90 2017 S.D. Sess. Laws ch. 42 § 4; *see also* S.D. CODIFIED LAWS § 22-6-2 (2017) (establishing that the penalty for a Class 1 misdemeanor in South Dakota is punishable by up to one year in jail).

91 *See generally* Timothy Zick, *The Costs of Dissent: Protest and Civil Liabilities*, 89 Geo. Wash. L. Rev. 233, 235–241 (2021) (describing use of theories of expansive civil liability against protest organizers and arguing to allow for civil liability in only very narrow circumstances).

92 Doe v. Mckesson, 945 F.3d 818, 822–23 (5th Cir. 2019) (describing the confrontation that led to the officer's injuries*), cert. granted*, *judgment vacated*, 131 S. Ct. 48 (2020).

93 *Id.*

94 The police officer sued Mckesson under the theories of negligence, respondeat superior, and civil conspiracy. *Id.* at 823. The Circuit court dismissed the first two theories, but found that the case could proceed under a theory of negli-

A federal district court found that Mckesson's conduct was protected by the First Amendment as there was no evidence that he had struck the police officer or that he had "authorized, directed, or ratified specific tortious activity."[95] However, in August 2019, the Fifth Circuit found that Mckesson could potentially be held be liable under a theory of negligence.[96] Judge E. Grady Jolly held that the officer had "plausibly alleged that Mckesson breached his duty of reasonable care in the course of organizing and leading the Baton Rouge demonstration [which obstructed a highway]."[97] Judge Jolly continued that "[g]iven the intentional lawlessness of this aspect of the demonstration, Mckesson should have known that leading the demonstrators onto a busy highway was likely to provoke a confrontation between police and the mass of demonstrators, yet he ignored the foreseeable danger to officers, bystanders, and demonstrators, and notwithstanding, did so anyway."[98]

Addressing Mckesson's First Amendment defense, the court cited to *NAACP v. Claiborne* holding that "[t]he First Amendment does not protect violence."[99] According to Judge Jolly, Mckesson did not have to ratify the unknown assailant's conduct. Rather, the officer simply had to "plausibly allege that his injuries were one of the 'consequences' of 'tortious activity,' which itself was 'authorized, directed, or ratified' by Mckesson in violation of his duty of care."[100] As such, by allegedly directing protesters to unlawfully block a highway, Mckesson could be held liable for injuries that were a foreseeable result of the "tortious and illegal conduct."[101]

The Fifth Circuit's decision created concern among civil liberties advocates that organizers could be held liable for "negligently directing a protest" any time they might violate a law, like blocking a road, and there is confrontation or property

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gence. *Id.* at 825–28. The original suit also named Black Lives Matter as a defendant, but the federal district court found that Black Lives Matter is not a legal entity that could be sued. *Id.* at 824.

95 *Id.* at 828 (quoting NAACP v. Claiborne Hardware Co., 458 U.S. 886, 927 (1982)).

96 *Id.* at 826–29.

97 *Id.* at 827.

98 *Id.* Judge Jolly also found that the officer had plausibly alleged that Mckesson's breach of duty was the cause-in-fact of the injury. *Id.* at 828 ("[B]y leading the demonstrators onto the public highway and provoking a violent confrontation with the police, Mckesson's negligent actions were the 'but for' causes of Officer Doe's injuries.").

99 *Id.* (quoting *Claiborne*, 458 U.S. at 916).

100 *Id.* at 829 (quoting *Claiborne*, 458 U.S. at 927).

101 *Id.*

destruction.[102] Strikingly, in December 2019, four months after the Fifth Circuit's decision, Judge Don. R. Willett, who had been on the original three judge unanimous panel, reversed his opinion and authored a dissent.[103] He wrote that the Court should first certify a question to the Louisiana Supreme Court whether Mckesson's actions qualified as "negligence" under Louisiana tort law because it was not clear he owed a duty to the police officer.[104] Further, even if Mckesson could be held liable under Louisiana tort law, Judge Willett cited to *Claiborne* to argue that Mckesson's conduct was protected under the First Amendment because "encouraging . . . unlawful activity cannot expose Mckesson to liability for violence because he didn't instruct anyone to commit violence."[105]

The case was appealed to the Supreme Court, which in 2020 declined to decide any of the First Amendment implications of the suit.[106] Rather, following the lead of Judge Willett's dissent, it vacated the Fifth Circuit's judgment and held that the Louisiana Supreme Court should first decide whether the Fifth Circuit had correctly interpreted whether Mckesson's actions could be considered "negligence" under state tort law.[107]

In not addressing the First Amendment question, the Court left organizers of protests involving civil disobedience with a lack of clarity about their potential liability. Indeed, several other recent cases have raised similar concerns.[108] For example, in 2020, after the city of Detroit was sued by Detroit Will Breathe for alleged abusive policing of racial justice protests, the city filed a countersuit claiming that the organization,

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102 *Id.* at 827; *see also* Garrett Epps, *The Important First Amendment Principle Now at Risk*, ATLANTIC (Apr. 22, 2020), https://www.theatlantic.com/ideas/archive/2020/04/important-first-amendment-principle-now-risk/610348/ [https://perma.cc/58L3-Q8TG] (noting concern in First Amendment circles about the implications of the Fifth Circuit's ruling).

103 *Id.* (describing Judge Willett's decision to reverse and dissent).

104 Mckesson, 945 F.3d at 846 (5th Cir. 2019) (Willett, J., dissenting) (explaining that the dissent did not find it clear the Mckesson had a duty to the officer in this case, preferring to refer this decision to the Louisiana Supreme Court), *cert. granted, judgment vacated*, 131 S. Ct. 48 (2020).

105 *Id.* at 844 (emphasis omitted).

106 Mckesson v. Doe, 141 S. Ct. 48, 50 (2020).

107 *Id.* at 51.

108 As Timothy Zick has written, several other recent cases involving demonstrations raise concerns about overbroad civil liability. *See* Zick, *supra* note 91, at 233. For example, in *Sines v. Kessler*, a federal district court let a civil case go forward under the Ku Klux Klan Act brought by those injured at the white supremacist Charlottesville demonstration in 2017 against the protest organizers. *Id.* at 249. Zick has argued that this sets a precedent that could allow protest organizers to be sued in the future if violence occurs at the protest, including against Black Lives Matter protest organizers. *Id.* at 250.

and a number of its members, were part of a "civil conspiracy" that resulted in violence against police officers and others.[109] Amongst the primary evidence presented by the City of Detroit that the protesters' conduct was not protected under the First Amendment was that members of Detroit Will Breathe helped organize protests that involved peaceful unlawful conduct, particularly blocking roadways.[110] Whether or not these civil cases, like those involving Detroit Will Breathe or Mckesson, result in actual damages, they tie up organizers in costly and distracting litigation, potentially discouraging activists from organizing similar protests.[111]

III
EFFECT ON DEMOCRATIC DIALOGUE

The Supreme Court has never explicitly treated civil disobedience as protected by the First Amendment.[112] As scholars have noted, this is true even of a famous series of cases in which the Supreme Court overturned convictions of civil rights activists who had been convicted for unlawful peaceful conduct, such as sit-ins, ride-ins, or unlawful assemblies.[113] Instead, the Supreme Court vacated these convictions because it found the underlying statute used to prosecute the unlawful conduct was too vague or selectively enforced;[114] a federal law

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109 Chris Gelardi, *Detroit is Suing Black Lives Matter Protesters for "Civil Conspiracy"*, INTERCEPT (Dec. 21, 2020) https://theintercept.com/2020/12/21/detroit-black-lives-matter-lawsuit/?utm_medium=email&utm_source=the%20Intercept%20Newsletter https://theintercept.com/2020/12/21/detroit-black-lives-matter-lawsuit/?utm_medium=email&utm_source=the%20Intercept%20Newsletter [https://perma.cc/2PWV-U8YU].

110 Pls.'/Counterdefs.' Mot. to Dismiss Countercl. at 8–9, Breathe v. City of Detroit, 484 F. Supp. 3d 511 (E.D. Mich. 2020) (No. 2:20-cv-12363).

111 National groups, for example, called the suit against Detroit Will Breathe a SLAPP, or Strategic Lawsuit Against Public Participation, that could discourage others from organizing protests. *See* Motion of Protect the Protest Taskforce for Leave to File *Amicus Curiae* Brief at 2, *Breathe*, 484 F. Supp. 3d 511 (E.D. Mich 2020) (No. 2:20-cv-12363).

112 Jacobs, *supra* note 8, at 186 ("[T]he free speech clause of the First Amendment holds no sanctuary for violators. So long as a law is directed at eliminating harmful conduct rather than suppressing disfavored ideas, the government may punish or hold civilly responsible, those who break it." (footnotes omitted)).

113 *See* Justin Hansford, *The First Amendment Freedom of Assembly as a Racial Project*, 127 YALE L.J. F. 685, 695 (2017–2018) ("The Supreme Court found methods of reversing these convictions on a range of non-First Amendment grounds . . . ."); DERRICK BELL, RACE, RACISM, AND AMERICAN LAW 546 (5th ed. 2004) (noting that the Court decided these civil rights cases on narrow grounds that did not expand protest rights further).

114 *See* Cox v. Louisiana, 379 U.S. 536, 557 (1965) (finding unconstitutional the selective enforcement of an obstruction of public passages law against a civil rights leader); Edwards v. South Carolina, 372 U.S. 229, 230, 237–238 (1963)

legalized the conduct;[115] or the activists' conduct did not actually violate the statute under which they had been convicted.[116] In these decisions, the Court found ways to avoid convicting civil rights activists for civil disobedience, but it never found civil disobedience, per se, protected under the First Amendment.

Given emerging threats to peaceful unlawful conduct at demonstrations, this Part argues the lack of explicit First Amendment protection for civil disobedience can lead to the chilling of freedom of assembly rights protected under the Constitution. The absence of protection also threatens to substantially undercut forms of civil disobedience that have played an important role in shaping U.S. democratic discourse.

A. The Chilling of Protected First Amendment Activity

Protesters, and protest organizers, in the U.S. navigate a thicket of regulation. They also frequently face a highly charged political environment, including the potential for politicized policing and prosecution, as well as unpredictable confrontations with counter-protesters.[117] In this precarious political environment, where civil disobedience often happens side-by-side with constitutionally protected conduct, the possibilities of extreme criminal penalties and expansive civil lia-

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(vacating the conviction of activists for breaching the peace because the Court found they had been peacefully protesting at the statehouse and because breaching the peace in South Carolina was an overly vague offence that criminalized peaceful expressions of unpopular views).

115 *See* Hamm v. City of Rock Hill, 379 U.S. 306, 308 (1964) (vacating convictions of state trespass laws for Black activists who had engaged in "sit-in" demonstrations of lunch counters because the Civil Rights Act protected their behavior and was enacted before their conviction (albeit after their prosecution)). *See also* Boynton v. Virginia, 364 U.S. 454, 463 (1960) (finding that the Interstate Commerce Act barred segregation and so vacated a judgement for trespass against a Black activist who had refused to leave the white part of a restaurant a bus terminal).

116 *See* Brown v. Louisiana, 383 U.S. 131, 141 (1966) (vacating convictions under a breach of peace statute of Black activists for a sit-in in a public library because the Court found a silent, peaceful demonstration did not violate the statute); Garner v. Louisiana, 368 U.S. 157, 157 (1961) (vacating convictions of Black activists for disturbing the peace for engaging in a sit-in at a lunch counter because there was no evidence they had violated the underlying statute); Taylor v. Louisiana, 370 U.S. 154, 154 (1962) (vacating the convictions of Black bus riders for breach of peace for entering a waiting room customarily used by white passengers since their conduct did not violate the breach of peace statute).

117 *See* Fabiola Cineas, *Why Some Counterprotests to Black Lives Matter Are Turning Violent*, VOX (Sept. 14, 2020) https://www.vox.com/2020/9/14/21432330/counterprotests-black-lives-matter-violent [https://perma.cc/6JJZ-44XY]; *see also supra* Part I (describing the uneven treatment of protests and civil disobedience by police and prosecutors).

bility for peaceful unlawful conduct related to protests are particularly likely to chill protected protest activity.[118] Even if protesters plan to engage only in lawful conduct, they may still fear being caught up in legal action that can be costly to defend against and which could result in uncertain legal outcomes.

Demonstrations are, by their nature, frequently disruptive. They often involve large numbers of people congregating to bring the attention of the public to their message. Critics have long noted that legislators and judges have strictly confined where and how protests can take place, whether it is the judiciary's limited interpretation of the "public forum",[119] the development of burdensome permitting requirements,[120] or overly broad "public order" laws, such as unlawful assembly[121] or disorderly conduct statutes.[122] As one group of leading schol-

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118 Frederick Schauer, *Fear, Risk and the First Amendment: Unraveling the "Chilling Effect"*, 58 B.U. L. REV. 685, 694 (1978) ("The definition of the chilling effect . . . assumed that individuals will frequently be deterred by governmental regulation not intended to cover their contemplated activities."); *see also id.* at 688 (expounding upon the implications of the chilling effect on protest activity).

119 *See* TIMOTHY ZICK, SPEECH OUT OF DOORS: PRESERVING FIRST AMENDMENT LIBERTIES IN PUBLIC PLACES 7, 10, 22 (2009) (discussing how the judiciary has restricted the public forum doctrine to effectively exclude many public places, like transit hubs, and semi-public places like shopping malls); McCarthy & McPhail, *supra* note 48, at 229 (arguing that public forums have shrunk in number, protesters have difficulty access them, and they are no longer where people congregate in large numbers); Ronald J. Krotoszynski Jr., *Could a Selma-Like Protest Happen Today? Probably Not*, L.A. TIMES (Mar. 7, 2015), https://www.latimes.com/opinion/op-ed/la-oe-0308-krotoszynski-selma-march-protest-doctrine-20150308-story.html [https://perma.cc/YNH9-MQKB] ("[I]f courts do not designate a place a 'traditional public forum,' government may forbid its use as a site of protest altogether.").

120 The development of burdensome permitting requirements in the 20th century has significantly restricted protests, including confining some demonstrations to "free speech zones." *See* Emerson Sykes & Vera Eidelman, *When Colleges Confine Free Speech to a 'Zone,' It Isn't Free*, ACLU (Feb. 7, 2019), https://www.aclu.org/blog/free-speech/student-speech-and-privacy/when-colleges-confine-free-speech-zone-it-isnt-free [https://perma.cc/DMC9-9SG4]; *see generally* Timothy Zick, *Speech and Spatial Tactics*, 84 TEX. L. REV. 581, 581 (2006) (discussing the implication of place regulations of speech on First Amendment rights); ZICK, *supra* note 119, at 23 (describing the use of free speech regulations on university campuses that confine demonstrations to certain areas); McCarthy & McPhail, *supra* note 48, at 235–36 (describing restricted protest zones at national party conventions).

121 *See* John Inazu, *Unlawful Assembly as Social Control*, 64 UCLA L. REV. 2, 51 (2017) ("A better approach would eliminate liability under the inchoate offense of unlawful assembly but retain liability for the attempted or completed target offense . . . ."); *see generally* El-Haj, *supra* note 60, at 968 (describing how unlawful assembly violations were used to arrest and control protesters at Black Lives Matter protests in Ferguson, Missouri and elsewhere).

122 *See* Hansford, *supra* note 102, at 701, 708 (describing how trespass, failure to disperse, and unlawful assembly were used to target protesters in Ferguson, Missouri); El-Haj, *supra* note 60, at 976 ("Another dynamic that undermines

ars on freedom of assembly wrote, in the "modern era . . . protests are meticulously regulated. The sheer volume of regulation virtually guarantees that today any large gathering will engage in some technical violation of this or that time, place, or manner restriction."[123] Making a similar (if broader) point, Justice Neil Gorsuch has written that in the U.S., "criminal laws have grown so exuberantly and come to cover so much previously innocent conduct that almost anyone can be arrested for something."[124]

Given this context, it is easy for protesters or organizers of demonstrations to be chilled if they fear peaceful unlawful conduct could lead to extreme criminal penalties or extensive civil liability. For example, environmental protesters may not attend a rally near a pipeline if trespass at the pipeline carries an extreme penalty, even if they have no intention of trespassing, because they fear being caught up in a law enforcement action against other protesters who might try to trespass. Similarly, a group may not help organize a protest even if there is no planned civil disobedience because they are concerned that if there was property destruction they could face civil legal action. Such a legal action could drain resources and, perhaps, even result in liability if it were shown that in organizing the demonstration the group did violate some relatively minor law and were negligent towards the conduct of those who caused property damage.[125] As the Supreme Court recognized in *New York Times Co. v. Sullivan*, "[t]he fear of [civil] damage awards . . . may be markedly more inhibiting than the fear of prosecution under a criminal statute."[126]

In this context, the Court's categorical on/off approach to applying the First Amendment provides the judiciary with inadequate tools to protect the freedom of assembly. Demonstrators and protest organizers may have their constitutionally protected conduct chilled because they fear if they engage in

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the right of assembly today . . . is the overuse of broad, catchall crimes, such as disorderly conduct.").

123 First Amendment Scholars Amicus Brief, *supra* note 40, at 3–4.

124 Nieves v. Bartlett, 139 S. Ct. 1715, 1730 (2019) (Gorsuch, J., concurring in part and dissenting in part) ("If the state could use these laws not for their intended purposes but to silence those who voice unpopular ideas, little would be left of our First Amendment liberties, and little would separate us from the tyrannies of the past or the malignant fiefdoms of our own age.").

125 First Amendment Scholars Amicus Brief, *supra* note 40, at 23 (arguing that the Fifth Circuit's "expansive theory of tort liability" would suppress expression by a diverse range of groups involved in organizing and supporting protests, leading to litigation intended to silence protest and political movements).

126 376 U.S. 254, 277 (1964).

peaceful unlawful conduct, or are suspected of doing so, they could face extreme criminal penalties or expansive civil liability.

B. The Threat to Civil Disobedience

Besides chilling protected peaceful assembly, extreme penalties and expansive civil liability can substantially threaten certain types of civil disobedience. While, generally, a goal of a democratic government is to have citizens follow the law, civil disobedience can promote democratic values, including the ability to dissent and the possibility for marginalized populations to be heard. The over-penalization of civil disobedience risks shutting down this historical avenue for democratic dialogue. It also does so in a way that is likely to have an uneven impact, where some of the most marginalized voices in society are likely to be punished the most severely for engaging in civil disobedience.

Ronald Dworkin wrote in the 1980s that, "Americans accept that civil disobedience has a legitimate if informal place in the political culture of their community."[127] Indeed, the Americans' tradition of civil disobedience against unjust laws and policies precedes the country's creation, in resistance to British colonial rule, and includes subsequent struggles over slavery, suffrage, civil rights, the environment, LGBTQ rights, abortion, and anti-war activism.[128]

Civil disobedience has been repeatedly defended by political theorists and moral philosophers. For example, John Rawls argued that civil disobedience is morally justified in limited situations to implore the majority in a political community to reconsider its decisions.[129] Bertrand Russell claimed that

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127 DWORKIN, *supra* note 43, at 105 (1985); *see also*, Jacobs, *supra* note 8, at 240 ("Although it is lawbreaking, civil disobedience enjoys a level of public acceptance that distinguishes it from ordinary illegal actions.").

128 *See* Jacobs, *supra* note 8, at 238–39.

129 John Rawls, *The Justification of Civil Disobedience*, *in* MORAL PROBLEMS: A COLLECTION OF PHILOSOPHICAL ESSAYS 125, 137 (James Rachels ed., 1971) ("We have been considering when one has a right to engage in civil disobedience, and our conclusion is that one has this right should three conditions hold: when one is subject to injustice more or less deliberate over an extended period of time in the face of normal political protests; where the injustice is a clear violation of the liberties of equal citizenship; and provided that the general disposition to protest similarly in similar cases would have acceptable consequences."). Rawls also supported civil disobedience in instances of there being a violation of the principle of equal liberty and of open offices. *Id.* at 134–35; RAWLS, *supra* note 42, at 335 ("By engaging in civil disobedience one intends . . . to address the sense of justice of the majority and to serve fair notice that in one's sincere and considered opinion the conditions of free cooperation are being violated.").

concerns over nuclear safety and war did not gain sufficient public attention and so protesters needed to engage in civil disobedience to raise public awareness.[130]

More recently, Daniel Markovits has argued in support of "democratic disobedience," in which citizens engage in disruptive protest tactics, including lawbreaking, to bring attention to desired policy changes.[131] He claims that "[democratic] disobedience is a necessary part of every well-functioning democratic politics and not merely a defense against authoritarian oppression."[132] The goal of such disobedience, he argues, is to reengage the sovereign over a question where the protester believes there has been a breakdown in the democratic process—for example, because of capture by special interest groups or the continuation of an old, but now outdated, policy.[133]

While there is a significant literature justifying civil disobedience because it promotes better democratic decision-making, the literature on what penalties there should be for those who engage in it is more limited.[134] Rawls called on those who break the law during civil disobedience to willingly accept arrest and punishment for their actions as it demonstrates their respect for legal procedures.[135] As U.S. Supreme Court Justice Abe Fortas wrote in his 1968 book *Concerning Dissent and Civil Disobedience*, "A citizen cannot demand of his government or of other people obedience to the law, and at the same time claim a

130 *See* Bertrand Russell, *From the NS Archive: Civil Disobedience*, NEW STATESMAN (July 29, 2020), https://www.newstatesman.com/2020/07/ns-archive-civil-disobedience [https://perma.cc/25VD-8K3W] ("To make known the facts which show that the life of every inhabitant of Britain, old and young, man, woman and child, is at every moment in imminent danger . . . [is] an imperative duty which we must pursue with whatever means are at our command.").

131 *See* Daniel Markovits, *Democratic Disobedience*, 114 YALE L.J. 1897, 1902 (2005).

132 *Id.* at 1949.

133 *Id.* at 1940 ("Democratic disobedience . . . seeks to initiate a process of sovereign reengagement with an issue concerning which the political system, at the moment, stands in democratic deficit.").

134 *See* R.M. Dworkin, *Law and Civil Disobedience*, *in* MORAL PROBLEMS: A COLLECTION OF PHILOSOPHICAL ESSAYS, *supra* note 129, at 141, 142–43 ("Almost all of [the literature on civil disobedience] speaks to the issue of what a man should do who thinks that a law is immoral. It does not speak to the decision the government must make if someone does break the law out of conscience.").

135 Rawls, *supra* note 129, at 132 ("Civil disobedience is also civil in another sense. Not only is it the outcome of a sincere conviction based on principles which regulate civil life, but it is public and nonviolent, that is, it is done in a situation where arrest and punishment are expected and accepted without resistance.").

right in himself to break it by lawless conduct, free of punishment or penalty."[136]

While relatively few have claimed civil disobedience should not be punished at all,[137] some have suggested civil disobedience should be sanctioned differently than other nonexpressive unlawful conduct. Ronald Dworkin argued for prosecutorial leniency for those who break doubtful laws on grounds of conscience, such as conscientious objectors during the Vietnam War.[138] Meanwhile, Leslie Gielow Jacobs has claimed that, at the very least, civil disobedience should not be punished more severely than similarly situated crimes, and, generally, should be treated preferentially.[139] She emphasizes that the values of justice, fairness, and public participation that civil disobedience promote are "in the stratosphere of the free speech hierarchy."[140] As she aptly argues: "Because civilly disobedient lawbreaking is publicly valuable expression, it should be analyzed differently than other illegal conduct that is functional only. A complete free speech model should include civil disobe-

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136 ABE FORTAS, CONCERNING DISSENT AND CIVIL DISOBEDIENCE 55 (1968). The courts have also generally adopted the view that those who engage in civil disobedience should not be treated differently than others who engage unlawful conduct. *See* Jacobs, *supra* note 8, at 187 ("[T]he Constitution does not protect civil disobedients from imposition of punishment for their crimes. Such a constitutional principle would subvert the rule of law upon which this constitutional democracy is based." (footnote omitted)); *see also* Curtis Publ'g Co. v. Butts, 388 U.S. 130, 148 (1967) (noting that freedom of speech does not include freedom to trespass).

137 *But see* HOWARD ZINN, DISOBEDIENCE AND DEMOCRACY: NINE FALLACIES ON LAW AND ORDER 31 (1968) ("The sportsmanlike acceptance of jail as the terminus of civil disobedience is fine for a football game, or for a society determined to limit reform to tokens. It does not suit a society which wants to eliminate long-festering wrongs.").

138 *See* Dworkin, *supra* note 134, at 156 ("[W]e owe leniency to those who break doubtful laws on grounds of conscience . . . ."). However, Dworkin would not extend such leniency to situations where doing so would affect others' rights, such as in the case of segregationists. *Id.* at 155.

139 *See* Jacobs, *supra* note 8, at 193 (arguing that penalty enhancements should not apply to civil disobedience in several contexts). *But see* Kimberley Brownlee, *Civil Disobedience*, STAN. ENCYC. PHIL. ARCHIVE (Dec. 20, 2013), https://plato.stanford.edu/archives/fall2017/entries/civil-disobedience/ [https://perma.cc/ABC2-W3HC] (observing there may be reasons to deal with civil disobedients more severely than other lawbreakers, including that their actions are often public and seem to place themselves above the law, thereby challenging the government's authority, or that greater punishment is necessary to deter civil disobedients in the future since their beliefs are often firmly held).

140 Jacobs, *supra* note 8, at 238; *see also* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 913 (1982) ("This Court has recognized that expression on public issues 'has always rested on the highest rung of the hierarchy of First Amendment values.'" (quoting Carey v. Brown, 447 U.S. 455, 467 (1980)); Garrison v. Louisiana, 379 U.S. 64, 74–75 (1964) ("[S]peech concerning public affairs is more than self-expression; it is the essence of self-government.").

dience's public value as well as the harms that it necessarily causes."[141]

Notably, some protesters are more likely to face either harsh criminal penalties or expansive civil liability if they engage in civil disobedience. For example, "critical infrastructure" bills, backed by the fossil fuel industry, explicitly target the tactics of anti-pipeline protesters, dramatically increasing penalties for trespass around "critical infrastructure", such as pipelines, but not for trespass more generally.[142] The companies that own these pipelines have hired private security firms, which often, in turn, employ off-duty law enforcement to assist in policing demonstrations.[143] These private security firms have been involved in arresting protesters under trespass provisions of critical infrastructure bills, leading to criticism that enforcement of these laws is biased and politicized.[144]

Meanwhile, organizers of predominantly Black protests against police violence are arguably more likely to face civil liability because these protests have historically inspired disproportionately aggressive law enforcement responses.[145] As Tasnim Motala writes, a "foreseeable violence" standard for civil liability in organizing protests, as proposed by the Fifth Circuit in *Mckesson*, would "not be applied equally to all protesters. Black communities are overpoliced and disproportionately met with highly militarized police forces, which results in violent encounters between officers and protesters."[146] As such, not all protests involving civil disobedience are equally likely to expose organizers to potentially extensive civil liability.

In addressing peaceful unlawful conduct related to protests, a First Amendment analysis should begin with first principles.[147] Bright line rules around protected and unprotected activity may sometimes be easier to administer, but such an

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141 Jacobs, *supra* note 8, at 218.

142 *See generally supra* subpart II.A (describing passage of critical infrastructure laws in several states).

143 *Cf.* Soraghan, *supra* note 32 (describing how private security firms for oil and gas pipelines often hire off-duty law enforcement).

144 *Id.*

145 *See* Davenport, Soule & Armstrong II, *supra* note 14, at 153 (presenting evidence that between 1960 and 1990 Black protests were more likely to draw a police response as well as police arrests and violence compared to other protests).

146 Motala, *supra* note 30, at 71; *see also* Shaila Dewan & Mike Baker, *Facing Protests Over Use of Force, Police Respond with More Force*, N.Y. TIMES (May 31, 2020), https://www.nytimes.com/2020/05/31/us/police-tactics-floyd-protests.html [https://perma.cc/P35V-NH9G] (last updated June 2, 2020) (describing how the use of military equipment can escalate tensions with protesters).

147 Jeremy K. Kessler & David E. Pozen, *The Search for an Egalitarian First Amendment*, 118 COLUM. L. REV. 1953, 2001 (2018) ("Why limit the analysis to the

on/off switch does not adequately protect the kinds of unlawful expressive activities that have been, and continue to be, critical in shaping U.S. democracy. In his dissent in *Mckesson*, Judge Willett of the Fifth Circuit described how political uprisings that engaged in unlawful conduct have marked U.S. history, from the "Sons of Liberty" dumping tea into Boston Harbor to Dr. Martin Luther King Jr.'s march from Selma to Montgomery in which protesters occupied the full width of the Edmund Pettis Bridge.[148] He observed that "'[n]egligent protest' liability . . . would have enfeebled America's street-blocking civil rights movement, imposing ruinous financial liability against citizens for exercising core First Amendment freedoms."[149]

These historical examples of peaceful civil disobedience are not minor, or marginal, to the country's democratic trajectory. Nor can they necessarily be replaced through lawful alternative means of expression. A protest that receives a permit for a public park may not gain the same visibility as one in a roadway or at a construction site that may be more symbolic or disruptive.[150] The willingness of protesters to risk arrest and prosecution captures the public's mind in a way that lawful tactics may not.[151]

A First Amendment jurisprudence that simply categorizes conduct as either protected, and so lawful, or unprotected, and so punishable, does not adequately promote the public dialogue needed for democratic self-governance.[152] Nor does it account for how civil disobedience is differentially policed and punished depending on the group protesting.[153] The next Part of this Article proposes an alternative.

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claims of competing speakers, rather than ask which sorts of regulation would best serve the expressive environment as a whole?").

148 Doe v. Mckesson, 945 F.3d 818, 846 (5th Cir. 2019) (Willett, J., dissenting), *cert. granted, judgment vacated*, 131 S. Ct. 48 (2020).

149 *Id.*

150 *See* Jacobs, *supra* note 8, at 240?41 ("Lawbreaking, however, is a unique mode of communication. It grabs the majority attention in a way that lawful means may not, signifying not only a distinct substantive message, but also signaling the protester's depth of commitment in an induplicable way." (footnotes omitted)).

151 *Id.*

152 *See* ROBERT C. POST, CITIZENS DIVIDED: CAMPAIGN FINANCE REFORM AND THE CONSTITUTION 40 (2014) ("For the last eighty years, First Amendment jurisprudence has been founded on the premise that 'speech concerning public affairs is . . . the essence of self-government.'" (alternation in original) (quoting Garrison v. Louisiana, 379 U.S. 64, 74–75 (1964))).

153 See *supra* Part I (detailing studies that show how protests by Blacks, for left wing causes, and against police violence have historically garnered a more aggressive response from law enforcement).

IV
A PROPOSAL FOR PARTIAL FIRST AMENDMENT PROTECTION

This Part argues that the courts should apply what this Article terms partial First Amendment protection for peaceful unlawful conduct related to nonviolent assemblies. Providing limited protection for peaceful unlawful activity that takes place in the context of a nonviolent demonstration helps ensure that protesters are not targeted in an overly harsh manner that would chill the freedom of assembly or undermine the nation's tradition of civil disobedience. While this approach might seem novel, as this Part details, it builds on the Court's existing jurisprudence.[154]

Partial protection would have at least two elements. First, it would introduce penalty sensitivity analysis for any criminal punishment of peaceful unlawful conduct at a nonviolent assembly. Second, it would limit a person's civil liability if they help organize an assembly that involves nonviolent unlawful conduct, like trespass or traffic interference, as long as the organizer does not intend for violence or property destruction to occur.

Partial First Amendment protection would apply to peaceful participants in protests that are not currently considered First Amendment protected assemblies, such as certain street protests.[155] However, such protection would not apply to violent gatherings. The U.S. Supreme Court has been criticized for not more fully defining what is, and is not, a "peaceful" assembly under the First Amendment.[156] One common test that is used to determine whether an assembly is still considered peaceful is from the D.C. Circuit, which found that police

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154 Although not explored here, international law also invokes a form of rights protection for civil disobedience at assemblies. *See* General Comment 37, *supra* note 34, at ¶16 ("Collective civil disobedience or direct-action campaigns can be covered by article 21 [i.e. freedom of peaceful assembly], provided they are nonviolent.").

155 *See* Andrew M. Winston, *Right to Peaceful Assembly: United States*, LIBR. OF CONG. (Oct. 2014) https://www.loc.gov/law/help/peaceful-assembly/us.php [https://perma.cc/U3FT-GQWM] (describing the limits of the First Amendment right to assembly).

156 Tabatha Abu El-Haj, *What Does the Constitutional Right of Assembly Protect? What Counts as "Peaceable"? And Who Should Decide?*, JUST SECURITY, (June 9, 2020), https://www.justsecurity.org/70653/what-does-the-constitutional-right-of-assembly-protect-what-counts-as-peaceable-and-who-should-decide/ [https://perma.cc/YA9H-MLKW] ("[T]he frequent use of catch-all public order offenses to control peaceful demonstrations, as a practical matter, devolves the decision of what is 'peaceful' to law enforcement.")

may act to control a demonstration if "it is substantially infected with violence."[157]

International law has clearer standards. The General Comment on the Freedom of Assembly, for example, states that "isolated acts of violence"[158] should not be attributed to the larger gathering and "[m]ere pushing and shoving or disruption of vehicular or pedestrian movement or daily activities do not amount to 'violence'."[159] Rather, a peaceful assembly stands in opposition to one that is "characterized by widespread and serious violence."[160] "Violence" is defined as entailing "the use by participants of physical force against others that is likely to result in injury or death, or serious damage to property."[161]

U.S. courts could, and should, develop clearer standards for what constitutes a "peaceful" assembly, including by drawing on international standards. For the purposes of this Article though, what is important is that partial First Amendment protection would only apply to participants in or organizers of nonviolent gatherings. In many instances, whether or not the gathering is nonviolent will be readily apparent, while in others courts will have to make this determination in a context-specific manner.

A. Penalty Sensitivity

Where expressive speech or conduct is not protected by the First Amendment, and so can be criminalized, the U.S. Supreme Court's First Amendment jurisprudence is traditionally understood not to place limits on the severity of the penalty for this conduct.[162] However, more recently, scholars like Michael

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157 Wash. Mobilization Comm. v. Cullinane, 566 F.2d 107, 120 (D.C. Cir. 1977) ("It is the tenor of the demonstration as a whole that determines whether the police may intervene; and if it is substantially infected with violence or obstruction the police may act to control it as a unit.").

158 General Comment 37, *supra* note 34, at ¶17.

159 *Id.* at ¶15.

160 *Id.*

161 *Id.* While this definition of "violence" is still imprecise enough to be subject to interpretation, certainly an action like the January 2021 attack on the U.S. Capitol by a gathering of Trump supporters that broke through a police line (and through windows), and attacked numerous Capitol police officers, would not be a considered a "non-violent" demonstration. *See generally* Mark Mazzetti, Helene Cooper, Jennifer Steinhauer, Zolan Kanno-Youngs, & Luke Broadwater, *Inside a Deadly Siege: How a String of Failures Led to a Dark Day at the Capitol*, N.Y. TIMES, (Jan. 10, 2021), https://www.nytimes.com/2021/01/10/us/politics/capitol-siege-security.htm [https://perma.cc/2FGX-MJSG] (last updated Jan. 17, 2021) (describing how the attack on the Capitol unfolded).

162 In 1998 Christine Jolls, Cass R. Sunstein, and Richard Thaler wrote that "no one has suggested that the First Amendment imposes limits on the severity of punishment for speech that the government is entitled to criminalize." Christine

Coenen have detailed how the Supreme Court has a history of taking into account the severity of punishment when deciding whether or not speech should be protected by the First Amendment in the first place.[163] This Part argues that this type of First Amendment penalty sensitivity analysis should be developed further to limit extreme criminal penalties for peaceful unlawful conduct associated with demonstrations.

Perhaps the first example of the Supreme Court taking into account the severity of a penalty when deciding a First Amendment case came in Justice Oliver Wendell Holmes' famous dissent in *Abrams v. United* States in 1919.[164] In the case, the Court upheld the 20-year sentences of anti-war pamphleteers for seditious libel.[165] In dissent, Holmes found that not only did the pamphleteers not meet the necessary intent requirements to be held liable, but that if they somehow did meet the intent requirement, "the most nominal punishment seems to me all that possibly could be inflicted, unless the defendants are to be made to suffer not for what the indictment alleges but for the creed that they avow."[166] Scholars like Thomas Reed Powell and, later, David Currie noted that in this passage Holmes seemed to suggest that there were limits to punishing speech not fully protected by the First Amendment.[167]

In other, more recent, cases Supreme Court justices have reinforced the principle that unprotected expression should not be disproportionately sanctioned. For example, in 1974 in *Gertz v. Robert Welch, Inc.*[168] in addressing defamation actions against private individuals, the Court permitted the award of actual damages, but not presumed or punitive damages, seemingly as a way to limit the chilling effect defamation actions could have on speech.[169]

Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1517 (1998).

163 *See* Coenen, *supra* note 35, at 995–96 (describing Supreme Court cases that adopted a penalty sensitivity approach to the First Amendment).

164 250 U.S. 616, 624 (1919) (Holmes, J., dissenting).

165 *Id.*

166 *Id.* at 629 (Holmes, J., dissenting).

167 Thomas Reed Powell, *Constitutional Law in 1919–1920 (pt. 3)*, 19 MICH. L. REV. 283, 292 (1920); David P. Currie, *The Constitution in the Supreme Court: 1910–1921*, 1985 DUKE L.J. 1111, 1154 n.225 (cited in Coenen, *supra* note 35, at 1005).

168 418 U.S. 323 (1974).

169 *Id.* at 349 ("The largely uncontrolled discretion of juries to award damages where there is no loss unnecessarily compounds the potential of any system of liability for defamatory falsehood to inhibit the vigorous exercise of *First Amendment* freedoms.").

Similarly, this type of penalty sensitivity analysis seems apparent in the Supreme Court's "practice of reviewing First Amendment vagueness and overbreadth claims more aggressively in the criminal context than in the civil context . . . ."[170] For example, in *Ashcroft v. Free Speech Coalition*[171] the Court addressed the constitutionality of the Child Pornography Protection Act (CPPA), which prohibited the possession and distribution of images that appeared to depict minors engaged in sexually explicit conduct (even if the individuals were not in fact minors).[172] The Supreme Court struck down the Act in its entirety for overbreadth, with Justice Kennedy emphasizing the severe penalties of violating the CCPA, with a first offense leading to imprisonment of up to 15 years.[173] These strict penalties, he claimed, would lead to the chilling of protected speech when the law was so unclear and broadly written.[174]

In contrast, when upholding the constitutionality of statutes that arguably burden speech, the Court has pointed to the lightness of the sanction. In *National Endowment for the Arts (NEA) v. Finley*,[175] the Court upheld against a First Amendment challenge a Congressionally mandated rule that the NEA take into consideration "general standards of decency" when evaluating grant applications.[176] Justice O'Connor accepted that "[t]he terms of the provision are undeniably opaque" and that "if they appeared in a criminal statute or regulatory scheme, they could raise substantial vagueness concerns."[177] However, since the stakes were not a criminal penalty, but rather the awarding of a grant, the Court gave more leeway to Congress in allowing for vague and subjective language.[178] Meanwhile, in *FCC v. Pacifica Foundation*[179] the Court upheld from First Amendment challenge a Federal Communications Commission (FCC) enforcement action against a radio station that had

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170 Coenen, *supra* note 35, at 995–96.

171 535 U.S. 234 (2002).

172 *Id.* at 239–40.

173 *Id.* at 244 ("The CPPA's penalties are indeed severe. A first offender may be imprisoned for 15 years. § 2252A(b)(1). A repeat offender faces a prison sentence of not less than 5 years and not more than 30 years in prison.").

174 *Id.* ("While even minor punishments can chill protected speech, . . . this case provides a textbook example of why we permit facial challenges to statutes that burden expression. With these severe penalties in force, few legitimate movie producers or book publishers, or few other speakers in any capacity, would risk distributing images in or near the uncertain reach of this law." (citation omitted)).

175 524 U.S. 569 (1998).

176 *Id.* at 576.

177 *Id.* at 588.

178 *Id.*

179 438 U.S. 726 (1978).

played a program with indecent language during an afternoon broadcast.[180] In justifying its decision, the Court pointed out that the FCC's order had been merely a declaratory order or, in other words, a warning.[181] It seemed to imply that if the sanction had been more severe the Court might have ruled differently.[182]

These cases point to a Court that has long used penalty sensitivity when determining whether a regulation violates the First Amendment. While the Court has not reduced penalties for expressive unlawful conduct, such a measure would seemingly be in line with this jurisprudence and scholars like Coenen have advocated for making such penalty sensitivity analysis more explicit and robust.[183]

Similarly, in the late 1990s, Leslie Gielow Jacobs argued that the judiciary should adopt a type of penalty sensitivity analysis in the context of demonstrations.[184] While the Court had repeatedly found that expressive violent unlawful conduct was unprotected under the First Amendment,[185] Jacobs noted there is no reason from the Court's jurisprudence that other expressive unlawful conduct could not receive some protection.[186] She claimed that "as illegal acts become less violent and less personally directed, the balance between expressive value and social harm may come out differently according to the circumstances of particular actions."[187] In particular, Jacobs proposed that in many instances, courts should not subject civil disobedience to penalty enhancement because its

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180 *Id.* at 750–51.

181 *Id.* at 733.

182 For a discussion of *Pacifica* and this order, see Coenen, *supra* note 35, at 1013–15 (describing the Court's "fact-specific" ruling in Pacifica and how the Court in *Reno v. ACLU*, 521 U.S. 844 (1997), later distinguished upholding the constitutionality of the FCC's order in *Pacifica* because that order was "not punitive" (quoting *id.* at 867)). Similarly, Justice Souter in his concurrence in *Nat'l Org. for Women, Inc. v. Scheidler*, 510 U.S. 249 (1994), noted that "even in a case where a RICO violation has been validly established, the First Amendment *may limit the relief* that can be granted against an organization otherwise engaging in protected expression." *Id.* at 264–65 (Souter, J., concurring) (emphasis added).

183 Coenen, *supra* note 35, at 997 ("[C]ourts should seek to build upon the penalty-sensitive foundations they have already laid down.").

184 Jacobs, *supra* note 8, at 258.

185 *Id.* at 220?22 (citing to precedent from NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982) and Roberts v. United States Jaycees, 468 U.S. 609 (1984)).

186 *Id.* at 258 (describing how her proposed "clarified free speech clause model distinguishes between civil disobedience and lawbreaking that lacks an expressive purpose. Presumptively protecting the former from penalty enhancement more fully realizes the free speech guarantee.").

187 *Id.* at 222.

expressive character furthers larger benefits for society.[188] For example, she argued that in instances of civil disobedience the Court could bar the awarding of punitive damages in a civil case or the application of penalty enhancements under the Racketeer Influence and Corrupt Organizations Act (RICO).[189]

The contours of penalty sensitivity analysis to limit extreme criminal penalties for peaceful unlawful conduct that is part of a nonviolent demonstration would need to be developed further by courts and might often be context-specific.[190] However, courts could relatively easily develop a handful of clear rules for these cases, such as that peaceful protesters engaged in unlawful activity like trespass or traffic interference should not face felony penalties. What should be clear though is that such limited First Amendment protection is not a marked departure from current doctrine. Instead, it merely builds on a type of penalty sensitivity analysis that is already part of the Court's jurisprudence. Further, as Part I detailed, it is also in line with common practice by law enforcement and prosecutors who do not wish to chill expression through overly harsh penalties for civil disobedience.

B. Limiting Civil Liability

As described in subpart II.B, organizers of protests that involve peaceful unlawful activity risk being held liable for the destructive or violent acts of others. Limited protection for such organizing is arguably already provided under principles laid out by *Claiborne* and other Supreme Court cases that have recognized limits to associational liability in the context of expressive activity.[191] This limited protection for civil liability

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188 *Id.* at 258 ("Civil disobedience is socially valuable expression. When, through any variety of means, the government seeks to enhance the punishment for civil disobedience beyond that applicable to the broader class of actions that cause the same functional harms the free speech clause enters the picture.").

189 *Id.* at 256–58 (discussing why civil disobedience should generally not be penalized with punitive damages); *id.* at 253–56 (arguing that those engaged in civil disobedience should generally not receive penalty enhancements under RICO).

190 Jacobs, for example, suggests that "[b]ecause civil disobedience is expression under [her] clarified free speech clause model, a multi-factor balance must determine whether a punitive damages award is appropriate in any particular instance." *Id.* at 256. She goes on to argue that "[i]n any particular case, jury instructions must focus on nonexpressive harms and judicial review must balance those harms against the lawbreaking's expressive value. In most instances that involve no personally directed threats or violence, the judicial balance should remove the question from the jury." at 257.

191 NAACP v. Claiborne Hardware Co., 458 U.S. 886, 932 (1982); *see also* Scales v. United States, 367 U.S. 203, 229 (1961) ("[A] blanket prohibition of

though is contested and needs to be more explicitly developed by courts.[192]

Claiborne is the leading Supreme Court case that considers the limits of civil liability of protesters for others' actions.[193] In 1966, during a NAACP meeting, Black leaders organized a boycott of white-owned businesses in Claiborne County, Mississippi, to pressure county business and civic leaders to meet a list of demands related to racial justice.[194] The boycott was largely nonviolent, but some threats and acts of violence occurred.[195] White merchants sued the organizers of the boycott, including Charles Evers. The Mississippi Supreme Court found that Evers could be held liable because there was evidence that fear of violent reprisal pressured some citizens into participating in the boycott, which then made the entire boycott unlawful.[196] The U.S. Supreme Court reversed, finding that the organizers' nonviolent actions qualified for First Amendment protection.[197] Justice John Paul Stevens reasoned for the majority that "[w]hile the State legitimately may impose damages for the consequences of violent conduct, it may not award compensation for the consequences of nonviolent, protected activity. Only those losses proximately caused by unlawful conduct may be recovered."[198]

Claiborne has long stood for the proposition that when an activist organizes protected First Amendment activity, such as a lawful assembly or a boycott, they are protected from tort

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association with a group having both legal and illegal aims . . . [creates] a real danger that legitimate political expression or association would be impaired . . . ."); De Jonge v. Oregon, 299 U.S. 353, 365 (1937) ("If the persons assembling have committed crimes elsewhere, . . . they may be prosecuted for their conspiracy or other violation of valid laws. But it is a different matter when the State, instead of prosecuting them for such offenses, seizes upon mere participation in a peaceable assembly and a lawful public discussion as the basis for a criminal charge.").

192 Zick, *supra* note 91, at 297 ("[Civil liability standards must be] clear, precise, and apply only in very narrow circumstances to culpable non-expressive activities.").

193 Justice Stevens found that courts have a "special obligation . . . to examine critically the basis on which liability [i]s imposed" to ensure that potential liability does not unduly impede the right to organize and petition the government. NAACP v. Claiborne Hardware Co., 458 U.S. 886, 915 (1982).

194 *Id.* at 889.

195 *Id.* at 886.

196 *Id.* at 893–96.

197 *Id.* at 933 ("The taint of violence colored the conduct of some of the petitioners. They, of course, may be held liable for the consequences of their violent deeds. The burden of demonstrating that it colored the entire collective effort, however, is not satisfied by evidence that violence occurred or even that violence contributed to the success of the boycott.").

198 *Id.* at 918.

liability for someone else's unlawful actions during that activity.[199] Under *Claiborne*, only a finding that a protest leader "authorized, directed, or ratified specific tortious activity would justify holding him responsible for the consequences of that activity."[200]

What is less clear is whether *Claiborne's* rule limiting liability also attaches to nonviolent unlawful conduct related to a protest, such as blocking traffic or trespass. In a world where the First Amendment is an on/off switch, *Claiborne* would arguably not provide protection. For example, the Fifth Circuit found that since Mckesson directed "specific tortious activity" (i.e. blocking a road), the First Amendment was effectively turned off, and so Mckesson could be held "responsible for the consequences of that activity" including the injuries to a police officer.[201]

Yet, *Claiborne* never explicitly addressed the scenario of organizing peaceful unlawful activity at a protest. The Court in *Claiborne* emphasized that violent conduct is unprotected under the First Amendment but did not hold that all *unlawful* conduct is unprotected.[202] Indeed, the Court instead emphasized the importance of whether actions were violent or nonviolent, finding "that the nonviolent elements of petitioners' activities are entitled to the protection of the First Amendment."[203]

One plausible reading of *Claiborne*, which Judge Willett embraced in his dissent in *Mckesson*, is that *Claiborne's* holding would apply equally in the context of an activist organizing peaceful unlawful activity.[204] According to this reading, for an

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199 The Court specifically noted that "[t]he First Amendment . . . restricts the ability of the State to impose liability on an individual solely because of his association with another." *Id.* at 918–19.

200 *Id.* at 927.

201 Doe v. Mckesson, 945 F.3d 818, 829 (5th Cir. 2019) (citing *Claiborne*, 458 U.S. at 927), *cert. granted*, *judgment vacated*, 131 S. Ct. 48 (2020). The Fifth Circuit concluded that in order to survive challenge at the pleading stage "Officer Doe simply needed to plausibly allege that his injuries were one of the 'consequences' of 'tortious activity,' which itself was 'authorized, directed, or ratified' by Mckesson in violation of his duty of care." *Id.* at 829 (citing *Claiborne*, 458 U.S. at 927).

202 *Claiborne*, 458 U.S. at 916 ("The First Amendment does not protect violence").

203 *Id.* at 915.

204 *Mckesson*, 945 F.3d at 840 (Willett, J., dissenting) ("Under *Claiborne Hardware* (and a wealth of precedent since), raucous public protest—even 'impassioned' and 'emotionally charged' appeals for the use of force—is protected unless clearly intended to, and likely to, spark immediate violence."), *cert. granted*, *judgment vacated*, 131 S. Ct. 48 (2020).

activist to be held liable for any violent conduct it would have to be shown that she had "specific intent" for that violent conduct to occur.[205] As such, Mckesson could be held liable for blocking a street but not for another's violence that occurred when the street was blocked, unless it could be shown that Mckesson had "authorized, directed, or ratified" that violence.[206]

Clairborne is just one of several Supreme Court decisions in which the Court has been sensitive to the need to create liability rules that do not chill protected First Amendment activity.[207] For example, in the criminal context, in *Smith v. California* the Court ruled in 1959 that even though obscene material is not protected under the First Amendment, a bookstore owner could not be held strictly liable for selling such material. The Court said doing so would chill protected speech by forcing sellers to have to inspect every book that they sell, thereby limiting their offerings.[208] The Sixth Circuit used a similar reasoning concerning the chilling effect of overly broad liability rules on protected speech to strike down a city ordinance that imposed strict liability in requiring a permit for demonstrations.[209]

Limited First Amendment protection should protect organizers of nonviolent protests involving civil disobedience from civil liability for other violent or destructive actions at the protest unless the organizer "authorized, directed, or ratified" those actions.[210] After all, many protected protests involve conduct that is potentially unprotected—for instance, a protest organizer may decide to go forward with a protest without a permit in a situation in which it is unclear she requires one. Having a stricter civil liability rule would cast a dark cloud of potential liability over organizers of protests that involve even minor unlawful acts. Fortunately, *Claiborne* already provides

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205 *See Claiborne*, 458 U.S. at 920 ("Civil liability may not be imposed merely because an individual belonged to a group, some members of which committed acts of violence. For liability to be imposed by reason of association alone, it is necessary to establish that the group itself possessed unlawful goals and that the individual held a *specific intent* to further those illegal aims." (emphasis added)).

206 *Id.* at 927. Further, not only did Mckesson not specifically intend violence, but leading demonstrators into the street arguably was too disconnected with the officer's injury to be its proximate cause. *See id.* at 918, 927.

207 See discussion of *Scales* and *De Jonge* at *supra* note 191.

208 Smith v. California, 361 U.S. 147, 152–153 (1959).

209 Am.-Arab Anti-Discrimination Comm. v. City of Dearborn, 418 F.3d 600, 611 (6th Cir. 2005) ("Like the ordinance in *Smith*, we believe that the Ordinance in this case chills constitutionally protected speech."); *see also* Video Software Dealers Ass'n v. Webster, 968 F.2d 684, 690 (8th Cir. 1992) ("[A]ny statute that chills the exercise of First Amendment rights must contain a knowledge element.").

210 *Claiborne*, 458 U.S. at 927.

the conceptual tools required to appropriately limit civil liability when a person organizes a nonviolent protest that involves civil disobedience.

V
REVITALIZING THE SUPREME COURT'S FREEDOM OF ASSEMBLY JURISPRUDENCE

While partial First Amendment protection could be applied to all civil disobedience, this Article makes a narrower claim. Instead, it argues for limited protection for peaceful unlawful conduct in nonviolent demonstrations. In order to tailor this limited protection, the Court should revive its long-languishing freedom of assembly jurisprudence.[211]

Such an approach would have at least two benefits. First, it would limit this doctrine, at least initially, to the context of demonstrations, making it more manageable. Second and more importantly, it would apply this doctrine in the First Amendment context where it is arguably most needed—as protesters risk violating an assortment of laws given the highly regulated nature of contemporary demonstrations.[212]

Using the freedom of assembly as a constitutional vehicle to provide partial First Amendment protection starts out with an obvious problem. The Supreme Court has not decided a single case based on the Constitution's freedom of assembly clause since its 1982 decision in *Claiborne*.[213] Instead, most cases involving the freedom of assembly in recent years have been decided under the First Amendment's freedom of speech jurisprudence.[214]

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211 *See generally* John D. Inazu, *The Forgotten Freedom of Assembly*, 84 TUL. L. REV. 565, 566–70 (2010) (providing a history of the use of the freedom of assembly clause of the U.S. Constitution and describing its early misapplication by the Court which first limited it to only petitioning the federal government and then later had it subsumed under freedom of speech and freedom of association jurisprudence).

212 *See Know Your Rights: Free Speech, Protests & Demonstrations*, ACLU (Dec. 13, 2019), https://www.aclunc.org/our-work/know-your-rights/know-your-rights-free-speech-protests-demonstrations [https://perma.cc/MUV2-6AXC] (describing the various laws surrounding demonstrations).

213 JOHN D. INAZU, LIBERTY'S REFUGE: THE FORGOTTEN FREEDOM OF ASSEMBLY 191 n.15 (2012) (noting that "[t]he last time the Court applied the constitutional right of assembly appears to have been in [*Claiborne* in 1982]").

214 Nicholas S. Brod, Note, *Rethinking a Reinvigorated Right to Assemble*, 63 DUKE L.J. 155, 159 (2013) (describing how in the decades following the Court's decisions involving assembly in the 1950s "assembly withered into a mere afterthought, nothing more than a historical artifact" replaced by the freedom of association, and particularly the freedom of speech); INAZU, *supra* note 213, at 61 ("By the mid-1960s, the only cases invoking the freedom of assembly were those over-

Assemblies, though, are different than speech alone. Protests are physical, collective, and disruptive.[215] As Jeremy Waldron has emphasized, a demonstration is best understood not as simple speech[216] but rather as about "show[ing]" or "display[ing]" an "array of interests, concerns, and principles *embodied in people*—real men and women bearing witness in their presence to the importance of what is said."[217] Their disruptive physical nature, frequently in a symbolically salient location, makes it more likely that the public will pay attention to their message and perhaps join the protest.[218]

Protests are about "making a fuss"[219] and in the process they create new potential rules for democratic engagement, particularly for groups that may have few alternative outlets to be heard.[220] Indeed, studies show protests are not only critical

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turning convictions of African Americans who had participated in peaceful civil rights demonstrations.").

215 The physicality of a gathering is core to the protection provided by the freedom of assembly clause. Brod, *supra* note 214 at 171 ("The textual evidence . . . demonstrates that the Assembly Clause is both *independent* and *in person*. It is independent in the sense that the assembly right . . . stands on its own, distinct from other rights to free speech, press, and petition. It is in person in the sense that the words of the Assembly Clause, as originally understood, were crafted to protect physical gatherings.").

216 Jeremy Waldron, *What Demonstrations Are, and What Demonstrations Mean* 14 (N.Y.U. Sch. of L., Pub. L. Research Paper No. 20-41, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3664849 [perma.cc/CW4H-HGXN].

217 *Id.* at 18–19. Or as Zeynep Tufekci writes, protesters "feel morally compelled to show up and be counted." Zeynep Tufekci, *Do Protests Even Work? It Sometimes Takes Decades to Find Out*, ATLANTIC (June 24, 2020), https://www.theatlantic.com/technology/archive/2020/06/why-protests-work/613420/ [https://perma.cc/5QBF-V566].

218 For a discussion of the importance of the physical space that demonstrations occupy, see Zick, *supra* note 108, at 13–19 ("[P]ublic places are important not only for their variable and dynamic intersection with speakers' individual messages, but also for their more general connection to public politics and popular sovereignty."); Am.-Arab Anti-Discrimination Comm. v. City of Dearborn, 418 F.3d 600, 611 (6th Cir. 2005) ("[T]he 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.").

219 Waldron, *supra* note 216, at 26.

220 Mary M. Cheh, *Demonstrations, Security Zones, and First Amendment Protection of Special Places*, 8 U.D.C. L. REV. 53, 61 (2004) ("Demonstrations, particularly troublesome demonstrations, are one of the few remaining ways for dissenting views to be aired and to be made known to the larger public."). As Amna A. Akbar argues, a protest signals the emergence of "an alternative political community, where people come together to break the rules of engagement and forge different possibilities of democratic engagement." Amna A. Akbar, *The Radical Possibilities of Protest*, *in* PROTEST AND DISSENT 64, 68 (Melissa Schwartzberg ed., 2020).

to shaping public opinion,[221] but also to increasing citizen engagement with voting[222] and political organizing.[223]

Currently, the Supreme Court's First Amendment jurisprudence provides protection to both protesters' speech and their physical conduct, but each in a markedly different manner. On the one hand, it provides robust protection to the protesters' speech. For instance, the regulation of assemblies by the government needs to be viewpoint neutral or else it will receive the Court's strictest scrutiny.[224] On the other hand, the Supreme Court has generally given far more leeway to the government to regulate the conduct of protesters.[225] In particular, the Court has made clear that the government can regulate the time, place, and manner of demonstrations as long as the regulation is content-neutral and narrowly tailored to serve a significant government interest, and the government has provided ample alternative channels of communication.[226] To

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221 *See* Soumyajit Mazumder, *The Persistent Effect of U.S. Civil Rights Protests on Political Attitudes*, 62 AM. J. POL. SCI. 922, 923 (2018) (finding that whites in counties that experienced historical civil rights protests are more likely to support affirmative action, be Democrats, and be less likely to harbor racial resentment towards blacks).

222 *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, 1665 (2013) (finding that Tea Party protests with good weather and thus increased turnout on Tax Day, April 15, 2009, was positively correlated with increased support for Republican candidates in the 2010 midterm election); Daniel Q. Gillion & Sarah A. Soule, *The Impact of Protests on Elections in the United States*, 99 SOC. SCI. Q. 1649, 1650 (2018) (showing that protests on partisan issues lead to greater turnout for the respective party).

223 Political figures have gotten their start through demonstrations, including recently Representative Alexandria Ocasio-Cortez, who credited her participation in the 2016 Standing Rock protests as part of her inspiration to run for public office. *See* Rebecca Solnit, *Standing Rock Inspired Ocasio-Cortez to Run. That's the Power of Protest*, GUARDIAN (Jan. 14, 2019), https://www.theguardian.com/commentisfree/2019/jan/14/standing-rock-ocasio-cortez-protest-climate-activism [https://perma.cc/FJA3-YGZT] (quoting Alexandria Ocasio-Cortez as stating that she decided to run for Congress after attending Standing Rock protests).

224 *See* Erica Goldberg, *Competing Free Speech Values in An Age of Protest*, 39 CARDOZO L. REV. 2163, 2206 (2018) (describing how the strictest First Amendment scrutiny would apply if protesters can show the purpose of legislation is to target particular speech or protest movements and discussing scholarly suggestion that such targeting may be per se unconstitutional); Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. PA. L. REV. 2417, 2425 n.44 (1996) (observing that the Supreme Court has treated viewpoint-based restrictions on speech as even more suspect than content-based restrictions).

225 *See* Brod, *supra* note 214, at 186 ("This seemingly rigorous intermediate-scrutiny standard [for conduct at demonstrations] is, in practice, quite feeble, and the Court has largely eviscerated any of its potential force.").

226 *See* Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) ("[T]he government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions 'are justified without reference to the

meet this intermediate standard of scrutiny, regulations do not have to be the least restrictive way of serving a government interest,[227] and a significant government interest can range from wanting to maintain the "sedate" atmosphere of a community[228] to not wanting to damage public parks by allowing protesters to sleep in them.[229]

This contrast between how the Court has treated speech and conduct in relation to protests led Edwin Baker in the 1980s to lament that the Court had "relegate[d] assemblies," which almost always involve conduct, "to a lesser constitutional status than speech."[230] In one way this dual treatment is understandable. Few would argue that protests can occur whenever, wherever, and however protesters want.[231] There are competing uses of physical space in any society. That said, this weaker approach towards protecting conduct has allowed the Court to justify significant regulation of protests.

Recognizing the particular nature of demonstrations versus speech, scholars have criticized the Supreme Court for its neglect of the freedom of assembly clause and called for its revival.[232] For example, Tabatha Abu El-Haj has argued that the collapse of the freedom of assembly into the freedom of

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content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.'" (citing Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984))).

227 *Id.* at 798 ("Lest any confusion on the point remain, we reaffirm today that a regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government's legitimate, content-neutral interests but that it need not be the least restrictive or least intrusive means of doing so.").

228 *Id.* at 792 ("The principal justification for the sound-amplification guideline is the city's desire to control noise levels at bandshell events, in order to retain the character of the Sheep Meadow and its more sedate activities, and to avoid undue intrusion into residential areas and other areas of the park.").

229 *See Clark*, 468 U.S. at 298 ("Damage to the parks as well as their partial inaccessibility to other members of the public can as easily result from camping by demonstrators as by nondemonstrators. In neither case must the Government tolerate it.").

230 C. Edwin Baker, *Unreasoned Reasonableness: Mandatory Parade Permits and Time, Place, and Manner Regulations*, 78 NW. L. REV. 937, 941 (1984) ("The speech-conduct dichotomy, . . . when accepted, immediately relegates assemblies," which almost always involve conduct "to a lesser constitutional status than speech.").

231 *See* Hague v. Comm. for Indus. Org., 307 U.S. 496, 515–16 (1939) ("The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute . . . .").

232 *See, e.g.*, Tabatha Abu El-Haj, *The Neglected Right of Assembly*, 5 UCLA L. REV. 543, 586–89 (2009) (critiquing the turn toward requiring prior permission for assemblies and arguing "that the right of assembly should not be collapsed into the right of free expression"); Inazu, *supra* note 121, at 8 (arguing that courts'

speech is "thoroughly misguided—leaving protestors feeling that First Amendment protections are weak and lower courts confused about how to decide what level of public disruption the Constitution requires officials to tolerate."[233]

Given the broad latitude the Court has given the government to regulate conduct at demonstrations, one element of a revived freedom of assembly clause should be to provide partial protection for peaceful unlawful conduct that violates laws related to demonstrations—in particular, laws that regulate competing uses for physical space, like trespass or traffic interference statutes.[234] As Margot Kaminski has argued, "[r]estriction on assembly can and should be limited as much as possible to preventing actual or attempted force and violence."[235] This does not mean the state can never regulate assemblies to manage competing demands of space or to protect private or public property. However, under a more developed freedom of assembly model, those restrictions, even if permissible, would still come under partial First Amendment scrutiny when used against peaceful demonstrators at nonviolent protests.

First Amendment scholars have argued that earlier in U.S. history the freedom of assembly was seen as providing much broader protection and that illegal acts did not necessarily deprive one of constitutional protections.[236] In practice, nineteenth-century cities also imposed relatively few restrictions on assemblies like parades or outdoor meetings.[237] As the Su-

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freedom of assembly clause should be used to further First Amendment principles which constrain discretionary enforcement by public authorities).

233 El-Haj, *supra* note 60, at 963.

234 Doing so would help return the freedom of assembly to a central place in the constitutional hierarchy. De Jonge v. Oregon, 299 U.S. 353, 364 (1937) ("The right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental."); Bates v. City of Little Rock, 361 U.S. 516, 522–23 (1960) ("Like freedom of speech and a free press, the right of peaceable assembly was considered by the Framers of our Constitution to lie at the foundation of a government based upon the consent of an informed citizenry . . . .").

235 Margot E. Kaminski, *Incitement to Riot in the Age of Flash Mobs*, 81 U. CIN. L. REV. 1, 46 (2013).

236 *See* First Amendment Scholars Amicus Brief, *supra* note 40, at 7 (claiming that in the original meaning of "peaceable" in the freedom of assembly clause that "[m]erely illegal acts did not necessarily deprive one of constitutional protection.").

237 Nineteenth-century cities generally did not impose such restrictions on activities connected with the right of assembly, such as parades, marches, and outdoor public meetings. When such restrictions were first imposed, courts generally rejected them. El-Haj, *supra* note 232, at 545. In striking down one of the first municipal permit requirements for a parade, an 1889 Illinois appellate court emphasized, "Under a popular government like ours, the law allows great latitude to public demonstrations, whether religious, political or social, and it is against

preme Court noted in *Hague v. Committee for Industrial Organization*, "use of the streets and public places [to assemble and discuss public questions] has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens."[238] Providing limited protection for peaceful unlawful conduct related to nonviolent demonstrations would be a way to revive this earlier jurisprudence and set of state practices that arguably more robustly protected assembly while still acknowledging the need for laws to protect other competing interests for physical space.

The Court's existing free speech jurisprudence as it has been applied to assemblies already provides examples of how it could be developed further to create this type of partial First Amendment protection. Consider if demonstrators take to the street and violate a traffic interference law. The courts already recognize streets as a traditional public forum.[239] As such, time, place, and manner restrictions are only permissible as long as they are content-neutral and do not "burden substantially more speech than is necessary to further the government's legitimate interests."[240] Traffic interference laws, per se, almost certainly do not violate the constitution.[241] Still, the state arguably should not be able to subject protesters who violate these laws to an extreme penalty or allow broad liability rules to be applicable to organizers of a protest that unlawfully block a street, as either action would "burden substantially more speech than is necessary to further the government's legitimate interests."[242] In other words, if a protester or organizer violates a time, place, and manner of restriction, their related unlawful conduct should not then lose all First Amendment protection. Instead, penalties for such unlawful conduct should be calibrated so as not to chill protected speech.

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the genius of our institutions to resort to repressive measures . . . to encroach on [these] fundamental rights . . . ." Trotter v. City of Chi., 33 Ill. App. 206, 208 (Ill. App. Ct. 1889), *aff'd*, 26 N.E. 359 (1981).

238 307 U.S. 496, 515 (1939).

239 *Id.* (finding that streets have always been a place for people to assemble).

240 McCullen v. Coakley, 573 U.S. 464, 486 (2014) (quoting Ward v. Rock Against Racism, 491 U.S. 781, 799 (1989)); *see also* United States v. O'Brien, 391 U.S. 367, 377 (1968) ("[W]e think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.").

241 *See, e.g.*, *Hague*, 307 U.S. at 498 (finding that the right to use streets to communicate views is not absolute and can be regulated).

242 *McCullen*, 573 U.S. at 486 (quoting *Ward*, 491 U.S. at 799).

VI
ADDRESSING COUNTERARGUMENTS

This final part of the Article briefly addresses five counterarguments to providing partial First Amendment protection to peaceful unlawful conduct connected with nonviolent assemblies.[243]

A. Unnecessary

The first counterargument is that partial protection is unnecessary. Providing limited First Amendment protection is certainly not the only strategy that courts could adopt to address the problem of harsh penalties or expansive civil liability for nonviolent unlawful conduct that can chill protected peaceful assembly or undercut socially beneficial civil disobedience. However, such limited protection arguably provides a more complete and balanced strategy than alternatives.

One alternative to limited First Amendment protection is to find unconstitutional laws that have extreme criminal penalties or create expansive civil liability. After all, if a law is unconstitutional it moots any further consideration about its impact.

Frederick Schauer has argued that the Supreme Court has historically dealt with the problem of regulation that "chills" speech through either creating "buffer zones" or through its vagueness and overbreadth doctrines.[244] For example, in *N.Y. Times Co. v. Sullivan*[245] the Court adopted an "actual malice" requirement in defamation cases involving public officials.[246] In so doing, the Supreme Court recognized that, although there is no constitutional value in a false statement of fact, a heightened "actual malice" standard better protected societally useful

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243 Note that these are not the only counterarguments one could raise to this proposal. Michael Coenen, for example, in defending a penalty sensitive approach to the First Amendment, also addresses objections that such an approach would illegitimately transfer power from the legislature to the courts. *See* Coenen, *supra* note 35, at 1045–47.

244 Schauer, *supra* note 118, at 685–87 (describing how the Court has used its vagueness doctrine to address First Amendment chilling concerns); *id.* at 703–07 (explaining how the Court has created "buffer zones" to guard against the possibility of chilling speech).

245 376 U.S. 254 (1964).

246 *Id.* at 279–80 ("The constitutional guarantees require . . . a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.").

speech.[247] In other words, the Court created a "buffer zone" or "overprotection" in order to combat the potential chilling effect of too tailored a standard.[248] Meanwhile, the Court's use of its vagueness and overbreadth doctrines helps ensure that laws can be readily understood, thereby limiting their chilling effect.[249] In *Ashcroft*, Justice Kennedy wrote, "The overbreadth doctrine prohibits the Government from banning unprotected speech if a substantial amount of protected speech is prohibited *or chilled* in the process."[250]

Yet both these constitutional strategies are inadequate to address the problem raised in this Article. Consider a trespass law that includes an extreme penalty like those at issue in laws targeting anti-pipeline protesters. Many trespass provisions are written clearly.[251] As such, it is hard to argue they are vague or overbroad. Meanwhile, it would also be difficult to adopt a "buffer zone" strategy and claim that trespass laws should not be constitutional because they may sometimes chill speech. Yet, if demonstrators face felony penalties for trespass, it may deter protesters who have no intention of trespassing but are afraid they may become caught up in a law enforcement action where they could face lengthy jail time.

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247 *See* Schauer, *supra* note 118, at 705–07 (describing how the Supreme Court in *N.Y. Times v. Sullivan* recognized that although false factual statements did not have social value the Court would provide protection to them anyway so as not to chill socially valuable speech or debate).

248 *Id.*; *see also* Time, Inc. v. Hill, 385 U.S. 374, 389 (1967) ("[S]anctions against either innocent or negligent misstatement would present a grave hazard of discouraging the press from exercising the constitutional guarantees. Those guarantees are not for the benefit of the press so much as for the benefit of all of us.").

249 Coenen, *supra* note 35, at 1032 ("The vagueness and overbreadth rules serve this anti-chilling purpose by reducing the risk that individuals will mistakenly decline to engage in protected expression as a result of miscomprehending the ambit of a speech-restricting rule."). For more on the Court's vagueness and overbreadth rules, *see, e.g.*, Ashcroft v. Free Speech Coalition, 535 U.S. 234, 257 (2002) (holding that a criminal law prohibiting computer child pornography was unconstitutionally overbroad because it could be applied even to mainstream movies); Grayned v. City of Rockford, 408 U.S. 104, 108 (1972) ("[W]e insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly."); Coates v. City of Cincinnati, 402 U.S. 611, 616 (1971) (striking down an ordinance banning any assembly of three or more people who "annoy" passersby as being unconstitutionally vague because it has no ascertainable standard).

250 *Ashcroft*, 535 U.S. at 255 (emphasis added).

251 Some trespass laws though are not written clearly. *See, e.g.*, ICNL LEGISLATIVE BRIEFER, *supra* note 72, at 5 (discussing how the Louisiana Critical Infrastructure Act does not define "unauthorized entry" on the state's pipelines, which stand upon both private and public land).

Alternatively, protesters could challenge laws as unconstitutional for targeting specific viewpoints. After all, many of the laws targeting civil disobedience discussed in this Article seemed to be enacted in response to anti-pipeline protesters or Black Lives Matter activists. However, this strategy also has shortcomings. Under First Amendment jurisprudence, the strictest scrutiny would apply if it can be demonstrated that legislation was motivated by a desire to target particular speech or particular causes.[252] Yet, while scholars like Jed Rubenfeld have encouraged courts to engage in expansive inquiries about the motivation of legislators, in practice courts have been far more hesitant.[253] After all, the motivations of legislators for enacting a law are often mixed and legislators can frequently provide explanations for laws that target protesters that do not, at least on their face, seem motivated by viewpoint animosity.[254] For example, high penalties for trespass around critical infrastructure or traffic interference can be explained not as an attempt to silence a particular protest movement but as being motivated by concerns about public safety or public order.[255]

Instead of attempting to strike down laws as unconstitutional to address their chilling effect, courts could turn to the Eighth Amendment to limit penalties or liability.[256] However,

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252 Content-based restrictions on speech are subject to strict scrutiny by the Supreme Court and presumed unconstitutional unless they are proven to be "necessary to serve a compelling state interest and . . . narrowly drawn to achieve that end." Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n, 460 U.S. 37, 45 (1983). This is true even for regulation that is facially content-neutral if the intent of the government is to target specific speech. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) ("[T]he principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys."); *see also* Joseph Blocher, *Viewpoint Neutrality and Government Speech*, 52 B.C. L. REV. 695, 703 (2011) ("The first rule of free speech theory and doctrine is that the government may not discriminate against a particular viewpoint based simply on its disagreement with that viewpoint."); Goldberg, *supra* note 224, at 2206 ("The strictest First Amendment scrutiny would apply if protesters could prove that state legislation was motivated by the desire to target particular speech or particular causes.").

253 *See* Jed Rubenfeld, *The First Amendment's Purpose*, 53 STAN. L. REV. 767, 768 (2001) (arguing for a searching analysis of government purpose in enacting legislation and an absolutist position of striking down laws that were motivated out of desire to suppress a viewpoint.).

254 *Id.* at 793 (noting the difficulty of determining the purpose of government regulation).

255 *See* Goldberg, *supra* note 224, at 2209 (describing how in the context of traffic interference laws the government could claim that lower penalties had not adequately deterred protesters from blocking traffic, which is both unsafe and disruptive).

256 *See* Timbs v. Indiana, 139 S. Ct. 682, 687 (2019) (incorporating the Eighth Amendment's excessive fines clause against the states); Robinson v. California,

the Supreme Court has traditionally been extremely hesitant to use the Eighth Amendment to reduce seemingly excessive penalties, particularly prison sentences.[257]

There are potentially strong reasons to argue that the Court should apply the Eighth Amendment more strictly in cases where expressive activity or other constitutional values are at stake. For instance, in *Bowers v. Hardwick*,[258] Justice Lewis F. Powell Jr. in his concurrence suggested that Hardwick could have an Eighth Amendment defense if he was convicted under Georgia's anti-sodomy statute (which carried a twenty-year penalty at the time), perhaps indicating that in relation to conduct that is at the border of what the constitution protects, the Court might apply more aggressive Eighth Amendment scrutiny.[259] Yet, even if a more aggressive Eighth Amendment jurisprudence were used to find the extreme penalties discussed in this Article unconstitutional, part of the reason the penalties would be judged to be extreme or disproportionate is that they are used to penalize peaceful unlawful expressive conduct.[260] In other words, more aggressive Eighth Amendment scrutiny of extreme penalties in the context of demonstrations would simply be partial First Amendment protection by another name.

Finally, activists can raise, and at times have raised, a necessity defense for breaking the law during civil disobedience at a protest. For example, in 2018, a Boston municipal court judge dropped charges of trespass and disturbing the peace

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370 U.S. 660, 667–68 (1962) (incorporating the cruel and unusual punishment clause against the states).

257 Richard S. Frase, *Limiting Excessive Prison Sentences Under Federal and State Constitutions*, 11 J. CONST. L. 39, 57 (2008) ("As is well known, the Court has been very reluctant to invalidate lengthy prison terms on Eighth Amendment grounds. Only one prisoner, in *Solem v. Helm*, has won such a claim in modern times."); Vicki C. Jackson, *Constitutional Law in an Age of Proprortionality*, 124 YALE L.J. 3094, 3104 n.44 (2015) ("[F]rom 1983 . . . until *Graham*, 560 U.S. 48 (2010), the Court did not invalidate any sentence of imprisonment for disproportionality under the Eighth Amendment.").

258 Bowers v. Hardwick, 478 U.S. 186 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

259 *Id.* at 197 (Powell, J., concurring) ("[A] prison sentence for such conduct—certainly a sentence of long duration—would create a serious Eighth Amendment issue."); *see also* Coenen, *supra* note 35, at 1023 n.147 ("Justice Powell's Eighth Amendment analysis is unusual in suggesting that especially strict proportionality requirements might apply to punishments that target conduct lying on the edge of other freestanding constitutional protections.").

260 For an argument for a more robust Eighth Amendment jurisprudence, see Richard S. Frase, *Excessive Prison Sentences, Punishment Goals, and the Eighth Amendment: "Proportionality" Relative to What?*, 89 MINN. L. REV. 571, 647–51 (2005).

against a group of thirteen activists who had interfered with construction of a pipeline. The activists had presented a necessity defense in which they warned about both the local and global dangers posed by pipelines.[261] In April 2019, the Washington State Court of Appeals found that an activist who had broken into a facility to turn off the valve to an oil pipeline had the right to present a necessity defense for charges of burglary and sabotage.[262] Despite these recent cases, the success of the necessity defense is rare,[263] and the Ninth Circuit has indicated it would be inapplicable where the law that is broken is not directly related to the object of the protest.[264]

To be clear, limited First Amendment protection is not meant to be a substitute for these and other strategies to provide at least some legal protection for protesters engaged in peaceful unlawful conduct at assemblies. However, partial First Amendment protection arguably provides both a fuller and better-balanced strategy for the challenges confronting how to punish civil disobedience discussed in this Article. Limited protection recognizes the authority of the state to have laws that regulate the physical spaces in which demonstrations occur, but also makes clear that protesters' expressive rights do not end when they peacefully violate those regulations.

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261 Alex Lubben, *Pipeline Protesters Just Got a New Legal Defense*, VICE (Mar. 31, 2018), https://www.vice.com/en_us/article/ne974b/west-roxbury-pipeline-protestors-use-necessity-of-climate-change-as-legal-defense [https://perma.cc/WHU3-AWYQ] ("Based on the very heartfelt expressions of the defendants who believe . . . in their cause because they believe they were entitled to invoke the necessity defense, I'll accept what they said . . . ." (quoting Judge Mary Ann Driscoll)).

262 State v. Ward, 438 P.3d 588, 596 (Wash. Ct. App. 2019) ("[T]he harms that Ward asserted he was trying to alleviate were more than just climate change, generally, but also included both the specific dangers of Canadian tar sands oil and the impacts of sea level rise on Washington . . . . As such, . . . the trial court erred in preventing Ward from introducing evidence in support of his necessity defense.").

263 Michael Mayer, *The 'Necessity Defense' Hit Two Climate Milestones Since 2018*, SIGHTLINE INST. (July 2, 2019), https://www.sightline.org/2019/07/02/necessity-defense-hits-climate-milestones/ [https://perma.cc/7756-H2BL] (noting that up until 2018, despite numerous attempts, a climate activist had never successfully used the necessity defense); Steven M. Bauer & Peter J. Eckerstrom, Note, *The State Made Me Do It: The Applicability of the Necessity Defense to Civil Disobedience*, 39 STAN. L. REV. 1173, 1177–78 (1987) (describing the historical use of the necessity defense during Vietnam War and anti-nuclear protests but emphasizing that most courts have excluded the defense).

264 United States v. Schoon, 971 F.2d 193, 200 (9th Cir. 1991) (finding that activists who break a law that is not the direct object of protest will never qualify for the necessity defense).

B. Weakens First Amendment Protection

Partial First Amendment protection could arguably weaken, instead of strengthening, protections for demonstrators and activists. After all, if a judge can limit the extremity of a criminal penalty or the breadth of civil liability, she may decide not to strike down a law of questionable constitutionality but rather only apply partial First Amendment protection.

Consider, for instance, a critical infrastructure act that has provisions making obstruction of pipeline construction a felony offense. These provisions are arguably unconstitutionally vague and overbroad,[265] but given the option of partial First Amendment protection, a court may decline to find the statute unconstitutional and instead ensure that an activist only faces a misdemeanor for such interference. If partial First Amendment protection were unavailable, the court might have struck down the entire provision. Now, because of the option of partial protection, a statute with arguably vague and overbroad language remains, even if with a reduced penalty.

This is not an insignificant concern and has been debated in a number of other contexts. For example, proponents of proportionality in U.S. constitutional law, like Vicki Jackson and Jamal Greene, have had to push back on claims that such a balancing approach weakens the enforcement of rights compared to the more categorical approach to rights or rights as "trumps," for which U.S. constitutional law is (somewhat distinctively) known.[266] Similarly, advocates of a more consequentialist approach to the First Amendment,[267] which

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265 *See* Jenna Ruddock, Comment, *Coming Down the Pipeline: First Amendment Challenges to State-Level 'Critical Infrastructure' Trespass Laws*, 69 AM. U. L. REV. 665, 691–96 (2019) (describing how provisions of critical infrastructure laws may be vague and overbroad); INT'L CTR. FOR NOT-FOR-PROFIT LAW, "GUILT BY ASSOCIATION" CRITICAL INFRASTRUCTURE BILLS AND THE RIGHT TO PROTEST 2, 4 (2018) (arguing that critical infrastructure acts use language that is so vague and overbroad, like impeding or interfering with access to a critical infrastructure site, that they may be unconstitutional).

266 Jackson, *supra* note 257, at 3157–58 (responding to critics that proportionality "might undermine the distinctively principled character of rights" by noting that jurisdictions that use proportionality still recognize elements of rights that are entirely "non-abrogable" or "core" to the right); Jamal Greene, *The Supreme Court, 2017 Term—Foreword: Rights as Trumps?*, 132 HARV. L. REV. 28, 87–89 (2018) (responding to objections that proportionality undercuts the moral power of rights by subjecting them to a balancing of interests by arguing that all rights involve moral questions that are subject to debate and that all constitutional adjudication is a decision procedure for resolving that disagreement).

267 *See, e.g.*, Frederick Schauer, *Harm(s) and the First Amendment*, 2011 SUP. CT. REV. 81, 82 (2011) (claiming the Supreme Court has downplayed the harms that speech can cause); David S. Han, *The Mechanics of First Amendment Audience Analysis*, 55 WM. & MARY L. REV. 1647, 1682–83 (2014) (arguing that courts

examines more closely the harms that speech can cause and balances them against benefits, have faced criticism for undermining "America's exceptional commitment to strong free speech protections."[268] A partial First Amendment protection doctrine could similarly potentially allow for the dilution of the current absolutist nature of the First Amendment in ways that could be unhealthy for the U.S.'s larger expressive environment.

These concerns though are easily overblown. The Court has long recognized that "even minor punishments can chill protected speech."[269] Laws that are vague and overbroad are still chilling even if a court has the option to lessen the penalty. Just because courts can limit civil liability or reduce the extremity of a criminal penalty does not mean that they will suddenly shift the goalposts on protected speech. Further, scholars have suggested that when a judge's only option is to strike down a punishment as unconstitutional in its entirety, they are actually more likely to uphold the penalty.[270] Providing judges the option of limited First Amendment protection arguably makes it more likely they will intervene, at least in some manner, on behalf of peaceful protesters.

C. Encourages Unlawful Activity

Providing partial First Amendment protection that limits penalties or liability could encourage more unlawful and potentially dangerous activity at demonstrations. Civil disobedience may have social benefit but providing this conduct preferential treatment risks signaling that demonstrators can violate the law with minimal or no punishment, leading to a breakdown in the rule of law.[271]

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should take into account how audiences process speech when determining the harm speech may cause).

268 Erica Goldberg, *Free Speech Consequentialism*, 116 COLUM. L. REV. 687, 702 (2016) (reviewing literature on free speech consequentialism in which scholars advocate for balancing speech's harms against benefits within the context of the First Amendment).

269 Ashcroft v. Free Speech Coalition, 535 U.S. 234, 244 (2002) (citing Wooley v. Maynard, 430 U.S. 705 (1977)).

270 *See* Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 891–94 (1999) (discussing two cases in which researchers suspect that courts read down rights in order to avoid governments from having to make large payouts).

271 As the district court in *United States v. Berrigan*, 283 F. Supp. 336, 339 (D. Md. 1968) observed, "No civilized nation can endure where a citizen can select what law he would obey because of his moral or religious belief. . . . It is axiomatic that chaos would exist if an individual were permitted to impose his beliefs upon

This concern though is again overstated. First, the proposal that this Article makes would not provide any First Amendment protection (partial or otherwise) for conduct that involves physical violence or unlawful conduct at a violent gathering. As the Supreme Court wrote in *Claiborne*, "[t]he First Amendment does not protect violence,"[272] and this Article's proposal is in line with the Court's jurisprudence, which finds that violent conduct is *per se* not protected.[273]

Further, partial First Amendment protection would not eliminate punishment of peaceful unlawful conduct. Those directly involved in such activity could still be punished—it would just limit the extent of liability or the harshness of the punishment.[274]

Even if partial First Amendment protection may encourage civil disobedience in some cases, or at least not deter it in the way extreme penalties would, the disruption this causes is justified when balancing the expressive rights of activists against other competing demands like public order. As two UN Special Rapporteurs emphasized in 2016, "A certain level of disruption to ordinary life caused by assemblies, including disruption of traffic, annoyance and even harm to commercial activities, must be tolerated if the right [to assembly] is not to be deprived of substance."[275]

D. Undercuts the Power of Civil Disobedience

The political power of civil disobedience stems in part from the fact that those who engage in it are willing to face being

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others and invoke justification in a court to excuse his transgression of a duly-enacted law."

272 NAACP v. Claiborne Hardware Co., 458 U.S. 886, 916 (1982).

273 *See* Roberts v. United States Jaycees, 468 U.S. 609, 628 (1984) ("[V]iolence or other types of potentially expressive activities that produce special harms distinct from their communicative impact . . . are entitled to no constitutional protection."). This is not to say that violent conduct cannot be expressive, but rather that in a constitutional democracy it should not receive constitutional protection. Jacobs, *supra* note 8, at 221. There is a broader question about whether property destruction should ever receive any type of First Amendment protection. For example, in *United States v. O'Brien*, 391 U.S. 367, 387 (1968), O'Brien had famously burnt his draft card, which was government property. However, this Article does not address this question, limiting partial protection only to unlawful nonviolent conduct, such as blocking traffic or trespass, that does not directly cause property destruction. *See id.*

274 *See supra* Part IV (describing how partial First Amendment protection would affect criminal and civil liability).

275 Maina Kiara & Christof Heyns, *Joint Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association and the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions on the Proper Management of Assemblies*, ¶ 32, U.N. Doc. A/HRC/31/66 (Feb. 4, 2016).

punished for their actions. John Rawls, for example, claimed that civil disobedience could be accepted as a source of change within a democratic legal system because "fidelity to law is expressed by the public and nonviolent nature of the act, by the willingness to accept the legal consequences of one's conduct."[276] If peaceful unlawful conduct related to assemblies is provided partial First Amendment protection this could undermine the moral force of civil disobedience and the moral authority of its message.

This claim, too, overstates the case. The partial protection advanced in this Article would not immunize previously unlawful actions from punishment. Further, it is not clear that risking or receiving an overly harsh penalty is essential to civil disobedience's moral power. For example, Martin Luther King Jr. was arrested for violating a temporary ban on protests in Birmingham, Alabama, where he penned his famous letter from Birmingham jail while spending eight days in jail, in 1963, before posting bail.[277] If he had initially been sentenced to eight months or eight years in prison and a federal court had intervened on the basis of providing partial First Amendment protection, it is not obvious that it would have lessened the moral authority or political power of his act of civil disobedience.

Importantly, part of the justification for providing partial First Amendment protection to these unlawful actions is not to protect civil disobedience itself but to ensure that lawful constitutionally protected protest is not chilled.[278] From this perspective, the effect of partial protection on the power of civil disobedience is secondary.

E. Administrability

A final argument against partial First Amendment protection for peaceful unlawful conduct connected with nonviolent demonstrations is one of administrability. Compared to a more nuanced partial protection standard, bright-line rules can create more predictability in enforcement—conduct is either cov-

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276 RAWLS, *supra* note 42, at 322.

277 *See* Michael Leff & Ebony A. Utley, *Instrumental and Constitutive Rhetoric in Martin Luther King Jr.'s "Letter from Birmingham Jail"*, 7 RHETORIC & PUB. AFF. 37, 39 (2004) (describing Martin Luther King Jr.'s arrest).

278 *See supra* subpart III.A (justifying partial protection on the ground of protecting protected assembly rights from being chilled).

ered by the First Amendment and so lawful, or not covered and so can potentially be sanctioned by the state.[279]

Yet, this on/off switch for the First Amendment comes with an unhealthy rigidity. As this Article has argued, it ultimately does a disservice to the principles of freedom of expression and assembly that the First Amendment is designed to protect.[280]

Nor is the challenge of administrability unsurmountable. As this Article has suggested, courts could fashion relatively clear rules that would be comparatively easy to administer and for the public to understand. For instance, those engaged in peaceful unlawful trespass or traffic interference in relation to a nonviolent assembly should generally not face a felony penalty.[281] Further, an activist who helps organize peaceful unlawful conduct in relation to a nonviolent assembly should not be held liable for the violent activity or property destruction of others if that conduct was not "authorized, directed, or ratified" by the organizer.[282] These rules are clear standards that are relatively easy to enforce.

In other cases, particularly in the context of penalty sensitivity, the Court may need to adopt more flexibility through using context-specific penalty sensitivity holdings.[283] While this may add some uncertainty to the law, the alternative scenario of having extreme penalties or expansive liability is ultimately less workable for furthering the robust protection of the freedom of assembly.

CONCLUSION

This Article has argued for the courts to recognize partial First Amendment protection for peaceful unlawful conduct at

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279 *See* Michael Coenen, *Rules Against Rulification*, 124 YALE L.J. 644, 646 (2014) ("With [bright-line] rules, the Court can buy itself uniformity, predictability, and low decision costs, at the expense of rigidity, inflexibility, and arbitrary-seeming outcomes.").

280 *See supra* subpart II.A (describing how critical infrastructure acts frequently have felony penalties for trespass and proposed harsh penalties for traffic interference in many states); subpart II.B (describing expansive liability that protesters can face for engaging in or organizing peaceful unlawful activity at a protest).

281 *See supra* subpart IV.A (arguing for a penalty-sensitive First Amendment approach for peaceful unlawful conduct connected to a demonstration).

282 NAACP v. Claiborne Hardware Co., 458 U.S. 886, 927 (1982); *see also supra* subpart IV.B (arguing for limiting civil liability for peaceful unlawful conduct connected to a demonstration).

283 *See* Coenen, *supra* note 35, at 1051–52 ("When circumstances demand flexibility, soft penalty-sensitive holdings can accommodate this need. When circumstances demand predictability, hard penalty-sensitive rules can be developed.").

nonviolent protests. Civil disobedience has a long and celebrated history in U.S. politics and is frequently intertwined with peaceful demonstrations. Other parts of government, particularly police and prosecutors, already frequently recognize the connection of this peaceful unlawful conduct to First Amendment values. Given the U.S.'s current highly politicized environment and new legal threats to those who engage in civil disobedience, there is a need for courts to build upon past case law to recognize that civil disobedience should receive protection, albeit limited protection, under the U.S. Constitution.