

PUBLIC PROTEST AND CIVIL UNREST

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Governments and officials must respond to protest-related civil unrest. How they do so is both an index of official respect for dissent and a measure of how committed governments are to democratic accountability. This Article examines official responses to civil unrest in connection with several recent high-profile demonstrations. In general, it concludes that governments and officials have relied on aggressive and increasingly draconian measures to quell protest-related civil unrest. Among other things, they have invoked emergency powers and used aggressive protest policing methods; dispatched federal agency personnel and threatened to deploy military forces to police demonstrations; enacted successive waves of laws that broaden riot offenses, increase penalties for minor offenses and acts of civil disobedience, and restrict campus protest; and charged protesters with domestic terrorism and racketeering. Officials have an obligation to maintain public order and safety. However, the recent pattern constitutes troubling evidence of democratic backsliding. Both contemporaneous and subsequent responses to protest-related civil unrest jeopardize even lawful public protest, disproportionately punish acts of civil disobedience, and imperil a long tradition of campus activism. In response, the Article offers a broad reform agenda that includes demystifying the government's emergency powers, deescalating protest policing, defederalizing responses to local unrest, repealing or narrowing public order offenses, considering the proportionality of charges and sanctions for protest-related offenses, preserving campus protest, and ensuring neutral and consistent responses to protest-related civil unrest.

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INTRODUCTION

Public protests can cause or be associated with civil unrest ranging from mild disruption to acts of physical violence. Governments and other officials have the authority to respond to protest-related and other kinds of civil unrest. How they do so is a measure of their respect for civil liberties and their commitment to preserving a culture of dissent. This Article examines how state and federal governments, as well as university officials, have responded to civil unrest associated with environmental protests, Black Lives Matter (“BLM”) protests following the murder of George Floyd, pandemic-related demonstrations, the Charlottesville “Unite the Right” rallies, the January 6, 2021 Capitol insurrection, and campus protests concerning the Hamas–Israel War.

Protest-related civil unrest poses serious law enforcement, logistical, and other challenges. However, responses to recent protests show that authorities are increasingly resorting to repressive measures to quell or address civil unrest. Their rhetoric and actions suggest an antagonistic and punitive approach to public demonstrations, including those that are peaceful. During his first term as President, Donald Trump repeatedly expressed antipathy toward public protests and protesters, whom he described as “thugs” and “terrorists.”¹ At the height of the BLM protests, Trump and top-level officials in the Trump Administration referred to the public streets as a “battlespace” officials needed to “dominate.”² In public remarks about

1. Tommy Beer, *Trump Called BLM Protesters ‘Thugs’ but Capitol-Storming Supporters ‘Very Special’*, FORBES, <https://www.forbes.com/sites/tommybeer/2021/01/06/trump-called-blm-protesters-thugs-but-capitol-storming-supporters-very-special> [https://perma.cc/6H86-CJ92] (Apr. 14, 2022, 2:05 PM).

2. Matt Perez, *Trump Tells Governors to ‘Dominate’ Protesters, ‘Put Them in Jail for 10 Years’*, FORBES, <https://www.forbes.com/sites/mattperez/2020/06/01/trump-tells-governors-to-dominate-protesters-put-them-in-jail-for-10-years> [https://perma.cc/8VXS-ZV8Y] (June 1, 2020, 1:56 PM); Meghann Myers, *Esper Encourages Governors to ‘Dominate the Battlespace’ to Put Down Nationwide Protests*, MIL. TIMES (June 1, 2020), <https://www.militarytimes.com/news/your-military/2020/06/01/secdef-encourages-governors-to-dominate-the-battlespace-to-put-down-nationwide-protests/> [https://perma.cc/9EJF-6379].

the protests, then-President Trump used the racially charged phrase, “When the looting starts, the shooting starts.”³ According to one former Cabinet member, at one point Trump asked why law enforcement could not “shoot” public protesters.⁴

In his first presidential term, Trump threatened to invoke the Insurrection Act of 1807 to quell disorder associated with mass demonstrations.⁵ The Act authorizes the President to deploy National Guard and U.S. military forces inside the United States to respond to unlawful assemblies and quell civil unrest.⁶ While he only threatened to unleash the nation’s military on domestic protesters, Trump ultimately dispatched personnel from several federal agencies to cities across the United States—even when state and local officials made clear they did not need or want them.⁷ While these federal law enforcement personnel were ostensibly deployed to protect federal facilities from vandalism, President Trump sent them to several cities that were experiencing civil unrest.⁸ Some of the federal agents—many of whom were not identified as such—seized protesters, assaulted them, and engaged in other acts of protest policing beyond their purview.⁹ Trump made clear that if he won reelection, which has now happened, he would use National Guard

3. See Katelyn Burns, *The Racist History of Trump’s ‘When the Looting Starts, the Shooting Starts’ Tweet*, VOX (May 29, 2020, 2:00 PM), <https://www.vox.com/identities/2020/5/29/21274754/racist-history-trump-when-the-looting-starts-the-shooting-starts> [<https://perma.cc/85TN-KKLL>] [hereinafter Burns, *The Racist History of Trump’s Tweet*].

4. Michel Martin & Tinbete Ermyas, *Former Pentagon Chief Esper Says Trump Asked About Shooting Protesters*, NPR (May 9, 2022, 5:00 AM), <https://www.npr.org/2022/05/09/1097517470/trump-esper-book-defense-secretary> [<https://perma.cc/24QG-MB6D>].

5. 10 U.S.C. §§ 251–253 (2020); see Michael S. Schmidt & Maggie Haberman, *Trump Aides Prepared Insurrection Act Order During Debate Over Protests*, N.Y. TIMES (June 25, 2021), <https://www.nytimes.com/2021/06/25/us/politics/trump-insurrection-act-protests.html> [<https://perma.cc/QNV2-GTBQ>].

6. See Jonathon Berlin & Kori Rumore, *12 Times the President Called in the Military Domestically*, CHI. TRIB., <https://www.chicagotribune.com/2020/06/01/12-times-the-president-called-in-the-military-domestically/> [<https://perma.cc/3AQ7-U38G>] (June 1, 2020, 11:06 PM).

7. For a critical account of the federal government’s response to the BLM racial justice protests, see KAREN J. GREENBERG, *SUBTLE TOOLS: THE DISMANTLING OF AMERICAN DEMOCRACY FROM THE WAR ON TERROR TO DONALD TRUMP* 145–72 (2021).

8. See Emily Badger, *How Trump’s Use of Federal Forces in Cities Differs from Past Presidents*, N.Y. TIMES (July 23, 2020), <https://www.nytimes.com/2020/07/23/upshot/trump-portland.html> [<https://perma.cc/E8EW-37GY>] (discussing constitutional concerns regarding use of federal forces for local law enforcement purposes).

9. See Katie Shepherd & Mark Berman, *‘It Was Like Being Preyed upon’: Portland Protesters Say Federal Officers in Unmarked Vans Are Detaining Them*, WASH. POST (July 17, 2020, 8:24 PM), www.washingtonpost.com/nation/2020/07/17/portland-protests-federal-arrests/ [<https://perma.cc/8LTC-QJMG>]; Alex Ward, *The Unmarked Federal Agents Arresting People in Portland, Explained*, VOX (July 20, 2020, 6:30 PM), www.vox.com/2020/7/20/21328387/portland-protests-unmarked-arrest-trump-world [<https://perma.cc/D5C5-P6HQ>]; Nicole Sganga, *Federal Agents Sent to Portland in 2020 Were ‘Unprepared’ to Quell Unrest, Waichdog Finds*, CBS NEWS (Apr. 21, 2021, 1:04 PM), www.cbsnews.com/news/portland-protests-2020-federal-agents-unprepared [<https://perma.cc/CDX7-HPL5>].

and U.S. military forces to quell protest-related civil unrest.¹⁰ Trump supporters have reportedly developed a blueprint for executive power that includes using the Insurrection Act as a basis for deploying military personnel to police local protests.¹¹

The federal government has been involved in responding to local protests in other ways. Prosecutors pursued federal charges against BLM protesters who allegedly engaged in vandalism or blocked interstate highways.¹² Protesters were charged with violating the Anti-Riot Act and the Civil Obedience Act, two rarely used federal laws enacted during the 1960s to suppress the activities of civil rights “agitators.”¹³ The Department of Justice reportedly also considered arresting some BLM protesters for “sedition.”¹⁴ In Congress, legislators have proposed increasingly draconian punishments for those convicted of protest-related offenses, and they have threatened to withhold highway and other funding from states that do not crack down on street protests.¹⁵

States and localities have responded to protest-related unrest in similar fashion. Governors have relied heavily on their powers to declare civil unrest emergencies. These powers provide for enhanced restrictions on protest activity, including curfews and restrictions on access to public places. Acting under emergency declarations, state and local law enforcement officers across the nation responded to the BLM demonstrations with unlawful force.¹⁶ Their reactions to even peaceful and lawful demonstrations included assaulting protesters, indiscriminately using pepper spray and other less-lethal weapons to disperse peaceful crowds,

10. Charlie Savage et al., *Deploying on U.S. Soil: How Trump Would Use Soldiers Against Riots, Crime and Migrants*, N.Y. TIMES, <https://www.nytimes.com/2024/08/17/us/politics/trump-2025-insurrection-act.html> [<https://perma.cc/S7ZD-7794>] (Nov. 6, 2024).

11. Katherine Fung, *Conservatives Have a Plan to Expand Donald Trump's Powers*, NEWSWEEK, <https://www.newsweek.com/conservatives-have-plan-expand-donald-trumps-powers-1842288> [<https://perma.cc/E4BJ-5RXM>] (Nov. 9, 2023, 1:23 PM).

12. See, e.g., *United States v. Pugh*, No. 1:20-cr-73-TFM, 2021 U.S. Dist. LEXIS 177266, at *2–3 (S.D. Ala. May 13, 2021) (denying motion to dismiss a federal indictment of a BLM protester under the Civil Obedience Act), *aff'd*, 90 F.4th 1318 (11th Cir. 2024).

13. 18 U.S.C. § 2101(a); *id.* § 231.

14. See Katie Benner, *Barr Told Prosecutors to Consider Sedition Charges for Protest Violence*, N.Y. TIMES, <https://www.nytimes.com/2020/09/16/us/politics/william-barr-sedition.html> [<https://perma.cc/MQZ5-NB7A>] (Sept. 22, 2020).

15. See, e.g., Clear the ROADS Act of 2024, H.R. 8823, 118th Cong. § 2(b); see also *infra* Subsection II.C.3.

16. See Mark Berman & Emily Wax-Thibodeaux, *Police Keep Using Force Against Peaceful Protesters, Prompting Sustained Criticism About Tactics and Training*, WASH. POST (June 4, 2020), https://www.washingtonpost.com/national/police-keep-using-force-against-peaceful-protesters-prompting-sustained-criticism-about-tactics-and-training/2020/06/03/5d2f51d4-a5cf-11ea-bb20-ebf0921f3bbd_story.html [<https://perma.cc/SH2X-XKG6>]; see Ashley Southall, *N.Y. Attorney General Sues N.Y.P.D. over Protests and Demands Monitor*, N.Y. TIMES, www.nytimes.com/2021/01/14/nyregion/nypd-police-protest-lawsuit.html [<https://perma.cc/6ZWW-SSXB>] (June 28, 2021) (discussing misconduct allegations against NYPD officers); see also Katelyn Burns, *Police Targeted Journalists Covering the George Floyd Protests*, VOX (May 31, 2020, 1:10 PM), www.vox.com/identities/2020/5/31/21276013/police-targeted-journalists-covering-george-floyd-protests [<https://perma.cc/6WW6-GQSC>] [hereinafter Burns, *Police Targeted Journalists*].

arresting journalists, “kettling” or trapping large groups of protesters, and declaring lawful assemblies to be unlawful riots.¹⁷

In response to trespassing, vandalism, and other offenses at environmental, racial justice, and other protests, state legislatures created new criminal offenses and increased criminal penalties for protest-related crimes.¹⁸ BLM protests gave rise to another wave of anti-protest laws.¹⁹ States raced to create additional offenses and increase penalties for protest-related misconduct. They broadened riot laws and increased criminal and civil penalties for vandalizing public monuments, blocking traffic, refusing to disperse, and other offenses.²⁰ A few states went so far as to provide legal immunity to drivers who harmed protesters blocking a street or highway.²¹

In response to recent unrest on university campuses associated with the Hamas–Israel War, some national lawmakers immediately called for activation of National Guard troops.²² At some universities, students and faculty involved in campus protests were subjected to forcible arrests by officers clad in riot gear, some of whom used tear gas and flash grenades.²³ Thousands of students were charged with misdemeanor or felony criminal offenses; and many were expelled from campus for extended periods, making it impossible for them to participate in lawful expressive activities on campus or in some cases to receive their degrees.²⁴ Other students were charged with archaic offenses. In Ohio, for example, students were charged for protesting in disguise under an 1800s-era law aimed at combatting the

17. See Kim Barker et al., *In City After City, Police Mishandled Black Lives Matter Protests*, N.Y. TIMES, <https://www.nytimes.com/2021/03/20/us/protests-policing-george-floyd.html> [<https://perma.cc/C3R5-W92G>] (June 28, 2021); Berman & Wax-Thibodeaux, *supra* note 16.

18. See *US Protest Law Tracker*, INT’L CTR. FOR NOT-FOR-PROFIT L., <https://www.icnl.org/usprotestlawtracker> [<https://perma.cc/KEN3-2STD>] (Apr. 10, 2025).

19. See Nicole Goodkind, *Republican Anti-Protest Laws Sweep Across the U.S.*, FORTUNE (Aug. 13, 2021, 3:34 PM), <https://fortune.com/2021/08/13/republican-anti-protest-laws-black-lives-matter/> [<https://perma.cc/J7JM-EPWV>]; see also Allison M. Freedman, *Arresting Assembly: An Argument Against Expanding Criminally Punishable Protest*, 68 VILL. L. REV. 171, 177–79 (2023) (arguing that courts should assess the effects of the wave of anti-protest laws rather than their intent).

20. See Goodkind, *supra* note 19.

21. See *U.S. Current Trend: Bills Provide Immunity to Drivers Who Hit Protesters*, INT’L CTR. FOR NOT-FOR-PROFIT L. (Sept. 2021) <https://www.icnl.org/post/analysis/bills-provide-immunity-to-drivers-who-hit-protesters> [<https://perma.cc/K5JN-FKCW>] (reporting that legislatures have enacted driver liability laws in Oklahoma, Iowa, and Florida and that similar bills are pending in several other state legislatures).

22. Christopher Cadelago, *Republicans Escalate Calls for Troops on Campus*, POLITICO (Apr. 25, 2024, 8:56 PM), <https://www.politico.com/news/2024/04/25/republicans-campus-protesters-democrats-00154508> [<https://perma.cc/RR4S-QK9T>].

23. See, e.g., Eryn Davis et al., *Police Clear Building at Columbia and Arrest Dozens of Protesters*, N.Y. TIMES, <https://www.nytimes.com/live/2024/04/30/nyregion/columbia-protests-college> [<https://perma.cc/4VHQ-P5CT>] (May 7, 2024).

24. See Jamal Andress, *Some College Student Protesters Are Now Facing Criminal Charges*, SCRIPPS NEWS (May 1, 2024, 4:41 PM), <https://www.scrippsnews.com/us-news/education/some-college-student-protestors-are-now-facing-criminal-charges> [<https://perma.cc/P4VB-JGJV>].

Ku Klux Klan.²⁵ Universities also expelled pro-Palestine and pro-Israel student groups from campus.²⁶

Weighing in on the campus protests, then-candidate Trump said he would “deport” foreign student protesters involved in the campus protests and “crush” the pro-Palestine movement.²⁷ Since his election in 2024, President Trump has made good on his vow to have international students deported for participating in campus protests.²⁸ Members of Congress introduced bills that would deny student loan forgiveness to any student who engaged in any form of unlawful protest activity and would revoke the visas of noncitizen students who participated in encampments or other forms of unlawful protest.²⁹ One bill would have required any student convicted of “unlawful activity” on a university campus to be assigned to the Gaza Strip for six months for what the bill described as “community service.”³⁰ Since the initial protests, campuses across the nation have adopted new rules and policies restricting campus protest, including: bans on encampments and masking, near-total bans on spontaneous demonstrations, new restrictions on where and when protest is permitted on campus, restrictions on signage and other displays, and conduct code provisions singling out anti-Semitic language.³¹

Federal and state executive officials have also resorted to increasingly harsh measures to prosecute and punish crimes committed during public protests. In Georgia, prosecutors recently charged protesters with “domestic terrorism” after they allegedly committed property and other crimes while opposing the construction

25. A grand jury later rejected the charges. See Cameron Knight, *Grand Jury Ignores Felony Disguise Charges Against Pro-Palestinian Protesters at Xavier*, CIN. ENQUIRER, <https://www.cincinnati.com/story/news/crime/2024/05/13/xavier-protesters-appear-in-court-on-felony-charges/73671331007/> (May 14, 2024, 9:48 AM) [https://perma.cc/H8P4-XKTU] (May 14, 2024, 9:48 AM).

26. Andrew Hay, *Florida’s DeSantis Bans Pro-Palestinian Student Group*, REUTERS (Oct. 26, 2023, 8:16 AM), <https://www.reuters.com/world/us/floridas-desantis-bans-pro-palestinian-student-group-2023-10-25/> [https://perma.cc/YGE7-Q76C].

27. David A. Graham, *Trump Has a New Plan to Deal with Campus Protests*, THE ATLANTIC (May 28, 2024) <https://www.theatlantic.com/ideas/archive/2024/05/trump-campus-protests-deportation/678521/> [https://perma.cc/D2HZ-PWV7]; Robert Tait, *Trump Tells Donors He Will Crush Pro-Palestinian Protests if Re-Elected*, THE GUARDIAN (May 27, 2024, 12:33 PM), <https://www.theguardian.com/world/article/2024/may/27/trump-donors-israel-gaza-palestinian-protests> [https://perma.cc/YAF2-2XGY].

28. See Eliza Shapiro, *Immigration Authorities Arrest Pro-Palestinian Activist at Columbia*, N.Y. TIMES (Mar. 9, 2025), <https://www.nytimes.com/2025/03/09/nyregion/ice-arrests-palestinian-activist-columbia-protests.html> [https://perma.cc/NK9L-7EE4].

29. See No Debt Forgiveness for Self-Centered Pupils at Overpriced Institutions Lacking Effectively Disciplined Students Act, H.R. 8468, 118th Cong. § 2(a)–(b) (2024); Study Abroad Act, H.R. 8322, 118th Cong. § 2 (2024).

30. See Antisemitism Community Service Act, H.R. 8321, 118th Cong. § 2 (2024).

31. Alan Blinder, *New Training and Tougher Rules: How Colleges Are Trying to Tame Gaza Protests*, N.Y. TIMES (Aug. 24, 2024), <https://www.nytimes.com/2024/08/24/us/universities-campus-protests-rules.html> [https://perma.cc/FEA7-4M9F].

of “Cop City,” a proposed police training facility near Atlanta.³² Enacted in 2017, Georgia’s domestic terrorism law carries a penalty of up to 35 years in prison for acts that damage critical infrastructure and a sentence of life without parole if an act results in death.³³ By its terms, the law applies only to crimes accompanied by political expression critical of the government. Georgia’s attorney general also indicted more than 60 Cop City protesters for criminal racketeering, an offense typically used to combat organized crime.³⁴

Although the general posture regarding public demonstrations has been antagonistic, officials have not responded aggressively to protest-related civil unrest in all circumstances.³⁵ Law enforcement, prosecutors, and legislatures did not respond with the same rhetoric, force, and regulation to pandemic-related protests, the “Unite the Right” rally in Charlottesville, or the January 6, 2021 Capitol insurrection. In those instances, officials apparently did not anticipate civil unrest or were ill-prepared or unwilling to address it. No wave of anti-protest legislation followed these demonstrations.

Treating public streets and parks as “battlespaces,” multiplying protest-related offenses, and enhancing criminal penalties for minor offenses may have a devastating chilling effect on the lawful exercise of First Amendment speech and assembly rights.³⁶ Throwing the book at public protesters also threatens longstanding and venerable traditions of dissent and civil disobedience.³⁷ As commentators have observed, civil disobedience can “promote democratic values, including the ability to dissent and the possibility for marginalized populations to be heard.”³⁸ Anti-protest measures are part of the playbook of autocratic regimes rather than governments committed to democratic accountability. Recent government responses to protest-related civil unrest are indicative of democratic backsliding or loss of respect for rights and norms that are necessary to hold officials accountable.³⁹

32. Sean Keenan & Rick Rojas, ‘Cop City’ Prosecutions Hinge on a New Definition of Domestic Terrorism, N.Y. TIMES, <https://www.nytimes.com/2024/02/26/us/cop-city-domestic-terrorism.html> [<https://perma.cc/5Q5L-TBFS>] (Feb. 27, 2024).

33. GA. CODE ANN. §§ 16-11-220 to 221 (2022).

34. Jozsef Papp & Shaddi Abusaid, *More than 60 Atlanta Training Center Activists Named in RICO Indictment*, ATLANTA J.-CONST., <https://www.ajc.com/news/crime/breaking-more-than-60-training-center-activists-named-in-rico-indictment/DQ6B6GHTAJR4SLGIIBAMXR4/> [<https://perma.cc/8HVS-ZKQK>] (Sept. 5, 2023).

35. See discussion *infra* Subsection II.C.5.

36. See Frederick Schauer, *Fear, Risk and the First Amendment: Unraveling the Chilling Effect*, 58 B.U. L. REV. 685, 693 (1978) [hereinafter Schauer, *Fear*] (observing that speech is chilled or deterred when “individuals seeking to engage in activity protected by the first amendment are deterred from so doing by governmental regulation not specifically directed at that protected activity”).

37. See Nick Robinson & Elly Page, *Protecting Dissent: The Freedom of Peaceful Assembly, Civil Disobedience, and Partial First Amendment Protection*, 107 CORNELL L. REV. 229, 251–54 (2021) (discussing chilling effects of common protest regulations).

38. *Id.* at 254.

39. See generally Aziz Z. Huq, *The Supreme Court and the Dynamics of Democratic Backsliding*, 699 AM. ACAD. POL. & SOC. SCI. 50 (2022); TOM GINSBURG & AZIZ HUQ, *HOW TO SAVE A CONSTITUTIONAL DEMOCRACY* (2018).

Governments and officials have the power and duty to enforce public order laws and to respond to civil unrest. University officials are entitled to take steps to maintain order on campus and are required under federal law to protect students from harassment and discrimination.⁴⁰ However, authorities have ample power to maintain order without declaring public emergencies at the slightest indication of unrest, invoking the Insurrection Act to militarize protest policing, enacting stricter penalties for civil disobedience, further cabining campus protests, and charging protesters with crimes related to political expression. Further, when they respond to civil unrest, lawmakers and prosecutors ought to ensure that punishments for protest-related offenses are proportionate to the alleged crimes.⁴¹ Finally, the First Amendment requires that protest-related civil unrest be addressed without regard to the viewpoint, message, or identity of protesters.

Part I of the Article discusses the concept of civil unrest and its relationship to public protest. Part II examines the constitutional and statutory distribution of authority to respond to civil unrest and recent official responses to protest-related civil unrest. Part III argues that these responses threaten First Amendment rights and values, the tradition of civil disobedience, and democratic accountability. It proposes several steps that lawmakers, prosecutors, and judges can take to preserve protest-related civil liberties.

I. CIVIL UNREST AND PUBLIC PROTEST

This Article examines governmental responses to civil unrest caused by, associated with, or attributed to public protests. To contextualize and assess the responses, this Part discusses the concept of civil unrest and its relationship to public protest.

There is no uniform or generally accepted definition of civil unrest.⁴² Yet how civil unrest is defined or conceptualized has significant implications for the scope of governmental authority and the exercise of First Amendment speech and assembly rights. As discussed further in Part III, national and state governments can declare public emergencies in the event of civil unrest.⁴³ These declarations trigger special legal authorities or justify actions purportedly aimed at addressing a unique form of public disorder.⁴⁴ At the state level, such actions include: imposition of curfews; designation of “no protest” zones and other regulations of speech on public

40. See 42 U.S.C. § 2000e.

41. Cf. Michael Coenen, *Of Speech and Sanctions: Toward a Penalty-Sensitive Approach to the First Amendment*, 112 COLUM. L. REV. 991, 994–97 (2012) (arguing that courts should examine the penalties imposed on speakers in various contexts).

42. For that matter, there is no generally accepted definition of “public protest.” As used in this Article, public protest refers broadly to assemblies of individuals intended to be *expressive*—i.e., whose purpose is to communicate support for or opposition to some cause, policy, or issue. The protests discussed are representative examples.

43. On governmental emergency powers during public protest events, see Karen J. Pita Loo, *When Protest Is the Disaster: Constitutional Implications of State and Local Emergency Power*, 43 SEATTLE U. L. REV. 1 (2019) (examining executive and judicial responses to 2016 North Dakota Access Pipeline, 2014 Ferguson, and 1999 Seattle World Trade Organization protests).

44. *Id.*

property; mass arrests; and reliance on unlawful assembly, failure to disperse, and other public order offenses. A broad definition of civil unrest that includes nonviolent and peaceful public demonstrations raises the specter that officials will treat protected speech and assembly as a basis for using repressive measures to undermine or violate First Amendment rights.

Civil unrest is generally associated with public disorder, societal discord, and threats to tranquility. Although the focus of this Article is on domestic protests, civil unrest can describe national, regional, or local conditions. While official definitions often include unlawful actions such as riots and violence, others are broad enough to include even lawful “demonstrations” or “assemblies that have become disruptive.”⁴⁵ Indeed, some government agencies define civil unrest so broadly that it includes all “acts by groups of people that are intended to disrupt a community or organization.”⁴⁶

Civil unrest is not the same thing as “civil disturbance” or “civil disorder,” which are related concepts but typically constitute discrete criminal offenses.⁴⁷ Civil unrest is a broader category or condition than these specific offenses. It can be, but does not have to be, a criminal act. Civil unrest is not the same thing as civil *disobedience*. The latter term describes nonviolent conduct by a person or group of persons who refuse to obey a law for moral reasons.⁴⁸ Civil disobedience can be a form and/or cause of civil unrest. However, again, civil unrest is a more generic term encompassing disruptions to daily routines, whether participants cause those disruptions through lawful or unlawful behavior.

Civil unrest can occur any time there is a public event or assembly. At such gatherings, the acts of individuals or groups can disrupt daily routines.⁴⁹ Because civil unrest is generally a condition related to discontent with the status quo, it is frequently associated with public protests, demonstrations, and rallies. These kinds of direct collective action are typically responses to laws, policies, and societal conditions that groups find objectionable or unacceptable.⁵⁰ Further, insofar as civil unrest is associated with hostility to government, protests and demonstrations are among its most natural forms.

45. See *Civil Unrest*, FLA. STATE UNIV. EMERGENCY MGMT., <https://emergency.fsu.edu/hazards/civil-unrest> [<https://perma.cc/W89A-7KA8>] (last visited Mar. 15, 2025).

46. SEATTLE OFF. OF EMERGENCY MGMT., SEATTLE HAZARD IDENTIFICATION AND VULNERABILITY ANALYSIS, https://www.seattle.gov/documents/departments/emergency/plansoem/shiva/2014-04-23_socialunrest.pdf [<https://perma.cc/Y7BX-UFVR>].

47. See, e.g., 18 U.S.C. § 232 (defining “civil disorders” in part as “[a] public disturbance involving acts of violence by assemblages of three or more persons, which causes an immediate danger of or results in damage or injury to the property or person of any other individual”).

48. See RONALD K. L. COLLINS & DAVID M. SKOVER, ON DISSENT: ITS MEANING IN AMERICA 2–4 (2013).

49. See, e.g., Claire Fahy, *N.J. Officials Briefly Close Popular Boardwalk, Citing ‘Civil Unrest’*, N.Y. TIMES (May 27, 2024), <https://www.nytimes.com/2024/05/27/nyregion/wildwood-boardwalk-civil-unrest.html> [<https://perma.cc/7CDW-BBLT>].

50. See TIMOTHY ZICK, MANAGED DISSENT: THE LAW OF PUBLIC PROTEST 17–24 (2023) (discussing concepts of protest and dissent).

In relation to public assemblies, civil unrest can be associated with lawful and peaceful demonstrations, unlawful riots or other criminal activity, or minor offenses that constitute civil disobedience. Even entirely lawful and peaceful protests are sometimes considered a form of civil unrest. For example, some university policies categorically treat “demonstrations” as a form of civil unrest.⁵¹ Of course, one of the central tactics of public demonstrations is to force public officials and the public at large to take note of the group’s message through lawful but disruptive tactics.⁵² This was true of the BLM and recent campus protests, which were predominantly peaceable but disruptive in this sense.⁵³

Even when they have lawful aims and consist primarily of lawful activities, public protests can be highly combustible events. This is particularly so when the protest or event draws a sizable crowd of counter-protesters, and a speaker makes provocative remarks. One of the most difficult conundrums in terms of policing protest-related civil unrest relates to the presence of hostile audiences. Protest events can sometimes devolve into violent clashes between protesters and counter-protesters.

Justice Robert Jackson addressed this concern in his dissenting opinion in *Terminiello v. Chicago*, which reversed the breach of peace conviction of Father Terminiello for delivering caustic and inflammatory remarks at a public event.⁵⁴ Justice Jackson explained how speech can inflame mobs and lead to breaches of public order. He discussed the circumstances that preceded and followed Father Terminiello’s speech, which upset a crowd that swelled to 1,500 people—some of whom threw rocks, broke windows, and obstructed public sidewalks.⁵⁵ Justice Jackson highlighted the conditions that can lead to protest-related civil unrest:

One faction organizes a mass meeting, the other organizes pickets to harass it; each organizes squads to counteract the other’s pickets; parade is met with counterparade. Each of these mass demonstrations has the potentiality, and more than a few the purpose, of disorder and violence. This technique appeals not to reason but to fears and mob spirit; each is a show of force designed to bully adversaries and to overawe the indifferent.⁵⁶

Drawing on his experience as a Nuremberg Trials prosecutor, Justice Jackson invoked Adolf Hitler’s and Nazism’s call to use mass demonstrations to dominate

51. See *Civil Unrest*, *supra* note 45.

52. See Tabatha Abu El-Haj, *All Assemble: Order and Disorder in Law, Politics, and Culture*, 16 U. PA. J. CONST. L. 949, 953 (2014) (“In our understandable nervousness about disorder and condemnation of violence, we have lost sight of the fact that . . . for dissenters, in particular, disruption is central to the efficacy of public protest.”).

53. See Erica Chenoweth & Jeremy Pressman, *This Summer’s Black Lives Matter Protesters Were Overwhelmingly Peaceful, Our Research Finds*, WASH. POST (Oct. 16, 2020), <https://www.washingtonpost.com/politics/2020/10/16/this-summer-black-lives-matter-protesters-were-overwhelming-peaceful-our-research-finds> [<https://perma.cc/RB7H-7Y84>] (finding that 96% of protest events involved no physical violence or property destruction).

54. 337 U.S. 1 (1949).

55. See *id.* at 14–17 (Jackson, J., dissenting).

56. *Id.* at 23.

the streets.⁵⁷ Jackson emphasized the need to recognize broad local authority to prevent mob violence and civil disorder associated with what he called “the battle for the streets.”⁵⁸ “No mob has ever protected any liberty, even its own,” he wrote, “but if not put down it always winds up in an orgy of lawlessness which respects no liberties.”⁵⁹ Although his brethren did not recognize any such threat from Terminiello’s speech and the audience’s reaction to it, Jackson’s account expresses a concern with mob violence and civil unrest that exists today. An increase in the number of armed individuals and groups attending public demonstrations, some of them openly carrying firearms, has created heightened concerns about protest-related violence.⁶⁰

University campuses have again become a central focus of discussions of protest-related unrest. Campuses have long been venues for disruptive protests.⁶¹ In *Healy v. James*, Justice Powell reflected on the violence and disruption on university campuses during the Vietnam War:

A climate of unrest prevailed on many college campuses in this country. There had been widespread civil disobedience on some campuses, accompanied by the seizure of buildings, vandalism, and arson. Some colleges had been shut down altogether, while at others files were looted and manuscripts destroyed. . . . Although the causes of campus disruption were many and complex, one of the prime consequences of such activities was the denial of the lawful exercise of First Amendment rights to the majority of students by the few. Indeed, many of the most cherished characteristics long associated with institutions of higher learning appeared to be endangered.⁶²

As Justices Jackson and Powell observed, provocative remarks and unlawful actions by individuals and groups can create civil unrest. While most demonstrations consist of lawful activity, such as marching, chanting, displaying signs, and the like, protesters also block highways, trespass, vandalize property, loot, riot, and assault individual attendees and law enforcement officers. Some protests have explicit criminal aims. The neo-Nazis and white nationalists who organized the Charlottesville protests in 2017 conspired to encourage violence and made specific plans to that effect.⁶³ Some participants in the January 6, 2021 Capitol insurrection conspired or intended to engage in destructive and violent acts, and some leaders of

57. *Id.*

58. *Id.* at 30.

59. *Id.* at 32.

60. See *Armed Assembly: Guns, Demonstrations, and Political Violence in America*, EVERYTOWN FOR GUN SAFETY (Aug. 23, 2021), <https://everytownresearch.org/report/armed-assembly-guns-demonstrations-and-political-violence-in-america> [https://perma.cc/Q9J2-AXVG].

61. See SEYMOUR MARTIN LIPSET, *REBELLION IN THE UNIVERSITY* 159–96 (1972) (describing campus activism from the Revolution through the 1950s); see also KENNETH J. HEINEMAN, *PUT YOUR BODIES UPON THE WHEEL: STUDENT REVOLT IN THE 1960s* (2001).

62. 408 U.S. 169, 171 (1972).

63. See *Sines v. Kessler*, 324 F. Supp. 3d 765, 776–77 (W.D. Va. 2018) (describing the preparations that led to the “Unite the Right” rallies in Charlottesville).

the riot were convicted of conspiring to engage in the overthrow of government by force or violence (sedition).⁶⁴

Protest-related civil unrest may last for very short or much longer periods. A one-off public demonstration or parade may disrupt routines or create noise or traffic only during the permitted event. By contrast, a mass protest movement may continue for weeks or even months. Indeed, some protest movements seek to establish a permanent public presence and create a more permanent state of civil unrest. For example, Occupy Wall Street and some recent campus protests were associated with longer-term civil unrest.⁶⁵

The economic and other costs of civil unrest can be substantial. As Justice Jackson warned, mob violence can lead to physical injury or even death. Civil unrest may also cause property damage, loss of business income, and other financial losses. On university campuses, disorder and unrest can interfere with the rights of students to learn and of faculty to teach, as well as more generally disrupt the university's educational mission. In addition, there are substantial costs associated with policing and securing public protests, maintaining the public properties where they occur, and providing for cleanup after the fact.⁶⁶

Public order and other concerns about protest-related civil unrest should not be downplayed or dismissed. Mass protests and other protest events create significant challenges for law enforcement and public officials charged with keeping the peace and maintaining order. However, the issue is not *whether* governments and officials should respond to civil unrest, but *how* they ought to do so. Part II discusses how governments and officials have responded to recent protest-related civil unrest. Part III critiques that response and recommends an approach to protest-related civil unrest that will better preserve First Amendment rights, the tradition of civil disobedience, and official accountability.

II. RESPONSES TO PROTEST-RELATED CIVIL UNREST

Federal, state, and local governments have constitutional and statutory authority to respond to protest-related and other forms of civil unrest. This Part first discusses these powers and general First Amendment limits on their exercise. It then

64. Alan Feuer, *Sedition Sentence for Oath Keepers Leader Marks Moment of Accountability*, N.Y. TIMES (May 26, 2023), <https://www.nytimes.com/2023/05/26/us/politics/sedition-oath-keepers-stewart-rhodes.html> [<https://perma.cc/T7NZ-E5QZ>].

65. See Karen A. Franck & Te-Sheng Huang, *Occupying Public Space, 2011: From Tahrir Square to Zuccotti Park*, in BEYOND ZUCCOTTI PARK: FREEDOM OF ASSEMBLY AND THE OCCUPATION OF PUBLIC SPACE 3, 8 (Ronald Shiffman et al. eds., 2012); Patrick Gillham et al., *Strategic Incapacitation and the Policing of Occupy Wall Street Protests in New York City, 2011*, 34 POLICING & SOC'Y 81, 89 (2013).

66. See Frederick Schauer, *Costs and Challenges of the Hostile Audience*, 94 NOTRE DAME L. REV. 1671, 1686 (2019) [hereinafter Schauer, *Costs*]; see also Claire McNeill, *UF Security Costs Top \$500,000 for Richard Spencer's Talk on White 'Separation'*, TAMPA BAY TIMES (Oct. 11, 2017), <https://www.tampabay.com/news/education/college/uf-security-costs-top-500000-for-richard-spencers-talk-on-white-separation/2340689> [<https://perma.cc/WQ2U-FE5D>].

discusses how governments, as well as university leaders, have responded to recent protest-related civil unrest.

A. *Constitutional and Statutory Authorities*

In the United States, there is no overarching constitutional or statutory framework for responding to civil unrest or other public emergencies.⁶⁷ With regard to responses to civil unrest—including unrest associated with public protests—federal, state, and local officials all have authority to respond. University administrators are responsible for responding to civil unrest when it affects university campuses, although they may call on local law enforcement and state governors for assistance.

In the United States, there is no discrete body of law that addresses governmental power to respond to emergencies or crises. Indeed, there are no agreed-upon definitions of “emergency” or “crisis.”⁶⁸ Governments and officials do not have express power to formally suspend constitutional rights or impose martial law. The U.S. Constitution does provide that Congress cannot suspend the writ of habeas corpus, an important protection against unlawful detention, *except* in cases of “Rebellion” or “Invasion.”⁶⁹ It also provides that the United States, upon application of a state’s legislature or executive, shall protect states from “domestic Violence.”⁷⁰ However, the Supreme Court has never defined “domestic Violence” or otherwise interpreted the scope of the power granted to the federal government under the Domestic Violence Clause. Aside from these provisions, the Constitution is silent regarding explicit governmental emergency powers.

This constitutional silence complicates the balance between maintaining order and preserving civil liberties. As Oren Gross has observed, “Emergencies present decisionmakers with a tension of tragic dimensions. Democratic nations faced with serious threats must maintain and protect life and the liberties necessary to a vibrant democracy. Yet, emergencies challenge the most fundamental concepts of constitutional democracy.”⁷¹ Among other concerns, emergencies and crises pose serious challenges to the preservation of First Amendment and other constitutional rights.⁷²

67. For a discussion of emergency powers, see generally Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 YALE L.J. 1011 (2003).

68. See Keith E. Whittington, *Yet Another Constitutional Crisis?*, 43 WM. & MARY L. REV. 2093, 2096–98 (2002) (describing the problems associated with defining “crisis”).

69. See U.S. CONST. art. I, § 9, cl. 2 (“The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”)

70. U.S. CONST. art. IV, § 4.

71. Gross, *supra* note 67, at 1096 (footnote omitted).

72. See generally GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME, FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM (2004); David Cole, *Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crisis*, 101 MICH. L. REV. 2565 (2003).

By law and design, the federal government plays a limited role in responding to localized civil unrest. Under federal law and longstanding custom, U.S. military personnel are generally prohibited from engaging in domestic policing activities, including patrolling the streets during demonstrations.⁷³ However, under the Insurrection Act of 1807, the President can, under certain circumstances, call upon or federalize the National Guard to suppress insurrection and enforce federal laws.⁷⁴ The Act also allows the President to deploy U.S. military troops for similar purposes.⁷⁵ Presidents have sometimes invoked this authority to quell civil unrest. For example, during the Los Angeles riots in 1992, California’s governor asked the President to deploy military troops to assist law enforcement and the state National Guard in quelling violence.⁷⁶ During the 1960s, President Eisenhower deployed U.S. Army troops to Arkansas to assist in public school integration of Black students.⁷⁷ Eisenhower’s action was precipitated by the Arkansas governor’s activation of the state National Guard to block Black students from entering a public high school.⁷⁸

Congress has also authorized various federal agencies to enforce laws under their respective jurisdictions. For example, the Department of Homeland Security (“DHS”) has the authority to protect federal buildings, grounds, and property.⁷⁹ U.S. Capitol Police protect members and officers of Congress and police Capitol grounds and buildings.⁸⁰ In some circumstances, the exercise of these federal powers may affect public speech and assembly. Congress has also enacted federal laws, including the Anti-Riot Act and the Civil Obedience Act, which can be enforced in response to protest-related civil unrest.⁸¹

Although the federal government has some authority to address local protest-related unrest, states and localities are the primary governmental institutions tasked with maintaining order. State governments can declare “emergencies” in response to infectious diseases, natural disasters, terrorism events, and civil unrest.⁸² For example, during the public demonstrations following the murder of George Floyd, many state governors declared a state of emergency or disaster owing to civil unrest.⁸³ Such declarations trigger enhanced executive powers, including deployment of the National Guard, suspension of certain laws or regulations, closure of certain public facilities, imposition of curfews, and access to federal and state

73. 18 U.S.C. § 1385.

74. 10 U.S.C. §§ 251–253.

75. *Id.*

76. *See* Berlin & Rumore, *supra* note 6.

77. *Id.*

78. *See* Cooper v. Aaron, 358 U.S. 1, 12 (1958) (discussing the President’s deployment of federal troops to facilitate integration).

79. 40 U.S.C. § 1315.

80. 2 U.S.C. §§ 1961, 1966–1967.

81. *See* 18 U.S.C. § 2101(a); *id.* § 231.

82. *See also* James G. Hodge, Jr. et al., *Legal Crises in Public Health*, 47 J.L. MED. & ETHICS 778, 778 (2019) (noting propensity of state and federal officials to declare public health emergencies). *See generally* Loor, *supra* note 43.

83. *See, e.g.*, Alex Samuels, *Texas Gov. Greg Abbott Declares State of Disaster After George Floyd Protests*, TEX. TRIB. (May 31, 2020, 3:00 PM), <https://www.texastribune.org/2020/05/31/texas-greg-abbott-state-disaster-george-floyd> [<https://perma.cc/G8J4-4P97>].

resources and personnel to address the emergency.⁸⁴ State and local law enforcement increasingly police protests during declared emergencies. The declarations generally continue until the unrest subsides or a state legislature declares an end to the emergency. As noted, during protest-related unrest, National Guard units can assist state and local law enforcement in certain respects, including providing support and equipment and barricading streets.

Most universities employ their own campus security and police forces or employ private security guards to deal with campus unrest.⁸⁵ However, universities frequently have memoranda of agreement with municipal law enforcement and can call on local police to respond to civil unrest on campus.⁸⁶ In some circumstances, state police may also be called upon to assist campus police and local law enforcement. State governors can also call up the National Guard to address civil unrest on university campuses. One such deployment had infamously tragic consequences. In 1970, members of the Ohio National Guard killed four students and wounded nine others at Kent State University when they employed combat techniques to control a crowd of anti-Vietnam War protesters.⁸⁷

B. Free Speech, Assembly, and Civil Disobedience

As noted, no government institution or official can *suspend* the First Amendment or other constitutional provisions during declared civil unrest or other emergencies. Even during such emergencies, individuals and groups possess rights to communicate, peaceably assemble for expressive purposes, petition governments for redress of grievances, and engage in free press activities.⁸⁸

The rights of protesters are, of course, not absolute. As the Supreme Court established in an early decision, “[w]hen clear and present danger of riot, disorder, interference with traffic on the public streets, or other immediate threat to public safety, peace, or order, appears, the power of the state to prevent or punish is obvious.”⁸⁹ However, that same decision established that “[e]qually obvious is that a state may not unduly suppress free communication of views . . . under the guise of conserving desirable conditions.”⁹⁰

84. See Loor, *supra* note 43.

85. See Yalile Suriel et al., *Introduction: A Fresh perspective on Campus Policing in America*, in *COPS ON CAMPUS: RETHINKING SAFETY AND CONFRONTING POLICE VIOLENCE (ABOLITION: EMANCIPATION FROM THE CARCERAL)* 1, 1 (Yalile Suriel et al. eds, 2024); Alex S. Vitale, *Campus Police Are Among the Armed Heavies Cracking Down on Students*, *THE NATION* (May 9, 2024), <https://www.thenation.com/article/archive/campus-police-arresting-student-protesters> [<https://perma.cc/X6YR-KVEV>] (discussing history of campus police).

86. John J. Sloan III, *Why Universities Turn to the Police to End Student Protests*, *U.S. NEWS & WORLD REP.* (May 2, 2024, 3:45 PM), <https://www.usnews.com/opinion/articles/2024-05-02/why-universities-turn-to-the-police-to-end-student-protests> [<https://perma.cc/S6KV-FM83>].

87. See PRESIDENT’S COMM’N ON CAMPUS UNREST, *THE REPORT OF THE PRESIDENT’S COMMISSION ON CAMPUS UNREST* (1970), <https://files.eric.ed.gov/fulltext/ED083899.pdf> [<https://perma.cc/8V93-DTRU>] (concluding that the shootings were unjustified).

88. U.S. CONST. amend I.

89. *Cantwell v. Connecticut*, 310 U.S. 296, 308 (1940).

90. *Id.*

Thus, with very narrow exceptions, officials cannot punish speakers based on the content of their messages or ideas.⁹¹ However, they can impose content-neutral time, place, and manner regulations on protest activities.⁹² Thus, protests can be restricted to certain areas, times of day, or manners of communication.⁹³ For example, local officials can limit where and how protests can occur through permitting and other requirements, and university officials can impose restrictions that prevent protest activity from disrupting classroom or other educational activities.

The First Amendment protects peaceful and nonviolent forms of protest and demonstration. However, it does not protect violent conduct such as physical assault of counter-protesters or law enforcement officers.⁹⁴ Similarly, there is no First Amendment right to engage in unlawful trespass, vandalism, or interference with governmental proceedings.⁹⁵ Even if it is expressive, conduct such as engaging in unauthorized sit-ins, installing makeshift tent camps on public university grounds, and blocking ingress to buildings can be punished pursuant to content-neutral laws regulating conduct and the time, place, and manner of demonstrations.⁹⁶

Protesters sometimes violate laws or campus rules as a form of civil disobedience or moral objection to the enforcement of laws that they believe to be unjust. When they do so, they cannot rely on the First Amendment as a defense.⁹⁷ However, though civil disobedience as such is not protected, punishing civil disobedience has serious First Amendment implications. Civil disobedience is part of a long and venerable tradition of democratic change in the United States. That tradition includes resistance to British colonial rule, anti-war activism, and the Civil Rights Movement.⁹⁸ Although some punishment for this form of law violation is appropriate, commentators have observed that “[t]he over-penalization of civil disobedience risks shutting down this historical avenue for democratic dialogue.”⁹⁹

As discussed, hostile audiences can create conditions of civil unrest during protests. The Supreme Court has indicated that protesters cannot be prohibited from speaking solely because of an audience’s hostile reaction to speech, which would

91. See *Texas v. Johnson*, 491 U.S. 397, 420 (1989) (invalidating state law conviction for “desecrating” the U.S. flag).

92. See, e.g., *Frisby v. Schultz*, 487 U.S. 474, 486–88 (1988) (upholding ordinance banning “targeted picketing” of residences).

93. *Id.* at 482; see also *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (upholding law requiring speakers to use city-approved sound system).

94. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 915–16 (1982).

95. See *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288 (1984) (upholding restrictions on overnight camping in Lafayette Square Park and National Mall).

96. See *id.*

97. 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, 186 (1998) (“[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)).

98. See *Robinson & Page*, *supra* note 37, at 254.

99. *Id.*

result in a heckler's veto.¹⁰⁰ The Court has been less clear regarding law enforcement's overall obligation to protect speakers when there is a potential for imminent violence or unlawful activity.¹⁰¹ So long as officials have the capacity to maintain public order, the Court's precedents indicate that speakers cannot be arrested for making provocative remarks or otherwise stirring up public audiences.¹⁰² In other words, law enforcement has a presumptive duty to protect the First Amendment rights of speakers confronted by hostile audiences.

These are some of the general rights and concepts implicated by recent government responses to protest-related civil unrest. Governments responding to civil unrest must maintain order while upholding First Amendment and other constitutional rights.¹⁰³ However, as commentators have observed, during public emergencies, courts are more likely to defer to executive and legislative authority and under-protect First Amendment and other constitutional rights.¹⁰⁴ For example, during the COVID-19 pandemic, some courts upheld bans on *all* large public assemblies.¹⁰⁵ More generally, commentators have observed that courts sometimes apply a "suspension model" to First Amendment and other rights claims during public emergencies.¹⁰⁶ Under that approach, courts apply a highly deferential standard of review to restrictions on speech, assembly, and other rights.

C. Responses to Recent Protest-Related Unrest

To better understand how governments and officials respond to protest-related civil unrest, this Article considers several recent high-profile protest events. Although it is not possible to conduct a thorough review of all aspects of official responses to these events, some general patterns have emerged. With a few notable exceptions, recent responses to protest-related civil unrest have relied on the following: (1) emergency declarations and militarized protest policing; (2) broad assertion or use of federal authority; (3) enactment or adoption of new and increasingly punitive protest-related laws and policies; and (4) escalated charges—e.g., domestic terrorism, racketeering, and sedition.

100. See *Feiner v. New York*, 340 U.S. 315, 320 (1951) (holding that police did not impose a heckler's veto on speaker arrested for making provocative remarks).

101. See Schauer, *Costs*, *supra* note 66.

102. See *Edwards v. South Carolina*, 372 U.S. 229, 238 (1963) (invalidating breach of peace convictions of civil rights protesters); *Cox v. Louisiana*, 379 U.S. 536, 545 (1965) (same).

103. See, e.g., Timothy Zick, *Public Protest and Governmental Immunities*, 97 S. CAL. L. REV. 1583, 1585–86 (2024) (examining First Amendment and Fourth Amendment claims brought by public protesters).

104. See generally, e.g., Cole, *supra* note 72; STONE, *supra* note 72; Lindsay F. Wiley & Stephen I. Vladeck, *Coronavirus, Civil Liberties, and the Courts: The Case Against "Suspending" Judicial Review*, 133 HARV. L. REV. F. 179 (2020); James G. Hodge, Jr. et al., *COVID's Constitutional Conundrum: Assessing Individual Rights in Public Health Emergencies*, 88 TENN. L. REV. 837 (2021).

105. See *Givens v. Newsom*, 459 F. Supp. 3d 1302, 1310 (E.D. Cal. 2020) (upholding ban on large assemblies); *Binford v. Sununu*, No. 217–2020-CV-00152, 2020 N.H. Super. LEXIS 20, 27 (Mar. 25, 2020) (upholding ban on large public gatherings).

106. See Wiley & Vladeck, *supra* note 104, at 182.

1. Emergency Declarations and Aggressive Protest Policing

When protest-related civil unrest breaks out, officials need to respond in the moment and on the ground. Recent responses have featured two general tactics or measures. Governors and other officials have declared public emergencies, which broaden their powers and limit the public's civil liberties. Relatedly, during declared emergencies, law enforcement officials have typically relied on escalated force and command-and-control protest policing.¹⁰⁷

The BLM demonstrations became perhaps the largest protest movement in U.S. history.¹⁰⁸ In just the first few months after George Floyd's murder, there were more than 4,700 public demonstrations across the nation.¹⁰⁹ On June 6, 2020, nearly half a million protesters showed up at more than 550 demonstrations around the United States.¹¹⁰ No corner of the nation was untouched by these protests.¹¹¹ Although the BLM protests were predominantly peaceful events, the mass demonstrations were highly disruptive.¹¹² Protesters assembled en masse in public places, engaged in lengthy and boisterous rallies, and challenged urban and suburban tranquility. Some participants and outsiders engaged in unlawful activities. By the third night of protests, civil unrest broke out in many cities.¹¹³ Looting, property damage, and vandalism occurred in various localities.¹¹⁴ In some of those locations, property damage was extensive: police cars, buses, and government buildings were set ablaze; Confederate and other monuments were damaged or destroyed; and some officers were assaulted or hit with objects thrown from protest crowds.¹¹⁵

In response to this civil unrest, many state governors declared civil unrest emergencies. Under these declarations, during the first several days of protest, at least 31 governors activated their National Guard troops based on emergency

107. See LESLEY J. WOOD, *CRISIS AND CONTROL: THE MILITARIZATION OF PROTEST POLICING* (2014); Edward R. Maguire, *New Directions in Protest Policing*, 35 ST. LOUIS U. PUB. L. REV. 67 (2015); see also TIMOTHY ZICK, *SPEECH OUT OF DOORS: PRESERVING FIRST AMENDMENT LIBERTIES IN PUBLIC PLACES* 200–58 (2008) (describing militarized protest policing during national political conventions and other critical democratic moments).

108. Larry Buchanan et al., *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), <https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html> [<https://perma.cc/9ZNJ-KPYD>].

109. *Id.*

110. *Id.*

111. Audra D.S. Burch et al., *How Black Lives Matter Reached Every Corner of America*, N.Y. TIMES (June 13, 2020), <https://www.nytimes.com/interactive/2020/06/13/us/george-floyd-protests-cities-photos.html> [<https://perma.cc/FY4K-5EE4>].

112. See ERICA CHENOWETH, *CIVIL RESISTANCE: WHAT EVERYONE NEEDS TO KNOW* 55 (2021) (referencing a study that found 97% of BLM protests that took place in the summer of 2020 were nonviolent).

113. *Minneapolis Police Precinct and Businesses Set on Fire as Protests over George Floyd's Death Rage On*, CBS NEWS (May 29, 2020, 8:20 AM), <https://www.cbsnews.com/news/george-floyd-protests-minneapolis-police-third-precinct/> [<https://perma.cc/32LJ-XQAT>].

114. *Id.*

115. See Derrick Bryson Taylor, *George Floyd Protests: A Timeline*, N.Y. TIMES (Nov. 5, 2021), <https://www.nytimes.com/article/george-floyd-protests-timeline.html> [<https://perma.cc/9T88-V3D7>] (describing violent acts by protesters).

statutory authorities.¹¹⁶ The declarations also activated additional law enforcement personnel to assist localities in maintaining order and authorized localities to call on neighboring states to provide policing assistance. During the declared emergencies, nearly 80 cities enacted curfews requiring residents, with few exceptions, to remain in their homes throughout the evening and early morning hours.¹¹⁷

For those concerned about preserving rights to speech, assembly, and public dissent, protest policing has long been a special concern. Watchdogs and police departments have identified protest policing abuses during many public demonstrations, including the World Trade Organization protests in 1999 and street demonstrations in Ferguson, Missouri, in 2014.¹¹⁸ Assessments have been highly critical of law enforcement's use of escalated force, poor event preparation, and deficient training.¹¹⁹

The response to the BLM racial justice protests in 2020 exhibited the same shortcomings. Although the demonstrations were, again, predominantly peaceful, law enforcement consistently relied on aggressive policing tactics.¹²⁰ Police departments relied on a command-and-control model that entailed significant demonstrations of weaponry and force, restrictions on protesters' movements, use of less-lethal munitions and physical aggression against even lawful protesters, and mass arrests for minor violations.¹²¹ In cities across the United States, police dressed in riot gear used military surplus equipment to police demonstrations, fired non-lethal but harmful projectiles into protest crowds, beat peaceful protesters retreating from law enforcement, and drove patrol cars into crowds of demonstrators. Law enforcement made at least 10,000 protest-related arrests during the summer of 2020 for infractions ranging from curfew violation to refusal to disperse.¹²²

116. See Jack Arnholz et al., *US Protests Map Shows Where Curfews and National Guard Are Active*, ABC NEWS (June 4, 2020, 2:30 PM), <https://abcnews.go.com/US/locations-george-floyd-protests-curfews-national-guard-deployments/story?id=70997568> [<https://perma.cc/K4UY-2Z74>].

117. *Id.*

118. See SEATTLE CITY COUNCIL, REPORT OF THE WTO ACCOUNTABILITY REVIEW COMMITTEE (2000), <https://depts.washington.edu/wtohist/documents/arcfinal.pdf> [<https://perma.cc/C28U-R7RY>]; see also U.S. DEPT. OF JUSTICE, AFTER-ACTION ASSESSMENT OF THE POLICE RESPONSE TO THE AUGUST 2014 DEMONSTRATIONS IN FERGUSON, MISSOURI (2015), <https://portal.cops.usdoj.gov/resourcecenter/content.ashx/cops-p317-pub.pdf> [<https://perma.cc/W8CY-Y3AM>].

119. For further discussion, see NAT'L LAWS. GUILD, THE POLICING OF POLITICAL SPEECH: CONSTRAINTS ON MASS DISSENT IN THE U.S. (2010), <https://www.nlg.org/wp-content/uploads/2016/09/PolicingPolSpeechCoverAndBody.pdf> [<https://perma.cc/4FCY-6MYZ>].

120. See Berman & Wax-Thibodeaux, *supra* note 16.

121. See Barker et al., *supra* note 17.

122. Anita Snow, *AP Tally: Arrests at Widespread U.S. Protests Hit 10,000*, AP NEWS (June 4, 2020, 12:23 AM), <https://apnews.com/bb2404f9b13c8b53b94c73f818f6a0b7> [<https://perma.cc/7KTB-GNXX>].

Police departments in at least 100 U.S. cities used tear gas against racial justice protesters, most of them engaged in peaceful and lawful forms of protest.¹²³ Although law enforcement protocol generally advises firing tear gas canisters at the edge of crowds, in many instances police fired the canisters directly into crowds at short range.¹²⁴ Police also violated safety protocols relating to rubber projectiles, often shooting them at protesters' faces within close range.¹²⁵ Protesters suffered head injuries, including broken jaws, blindness, and brain trauma. Journalists covering the protests were not spared; indeed, in some instances, they were *targets* of aggressive police tactics.¹²⁶ One reporter was permanently blinded by a projectile fired by police.¹²⁷

The degree of police misconduct and aggression in New York City, the site of many demonstrations, was so extreme that the state's attorney general took the highly unusual step of suing the New York City Police Department ("NYPD").¹²⁸ She alleged that officers beat protesters with batons, rammed them with bicycles, used a dangerous containment strategy called "kettling" (trapping and restraining groups of protesters by force), arrested legal observers and medics without proper justification, and used tear gas and other "non-lethal" force against peaceful assemblies.¹²⁹ New York's police officers were hardly outliers. Over a dozen cities released official reviews of their police departments' responses to the BLM protests.¹³⁰ According to the reports, police were poorly trained, unprepared to deal with large crowds, and prone to utilize over-aggressive and militarized approaches that escalated violence and disorder when negotiation and de-escalation were viable and better options.¹³¹

The upshot of the after-event reviews was that police departments had failed to internalize lessons from the faulty policing of prior public demonstrations. Confronted with public protests and civil unrest and acting pursuant to emergency declarations, law enforcement generally resorted to a militarized policing approach that resulted in physical injuries, mass arrests, and violations of protesters' First Amendment and other rights.

123. K.K. Rebecca Lai et al., *Here Are the 100 U.S. Cities Where Protesters Were Tear Gassed*, N.Y. TIMES (June 18, 2020), <https://www.nytimes.com/interactive/2020/06/16/us/george-floyd-protests-police-tear-gas.html> [<https://perma.cc/LQS5-TSVX>].

124. *Id.*

125. Liz Szabo et al., *Fractured Skulls, Lost Eyes: Police Break Their Own Rules when Shooting Protesters with 'Rubber Bullets'*, USA TODAY, <https://www.usatoday.com/in-depth/news/nation/2020/06/19/police-break-rules-shooting-protesters-rubber-bullets-less-lethal-projectiles/3211421001> [<https://perma.cc/9TH3-S973>] (Sept. 11, 2020, 9:00 PM).

126. Burns, *Police Targeted Journalists*, *supra* note 16; *ACLU of Oregon Files Class Action Lawsuit Against Police in Portland for Attacking Journalists and Legal Observers*, ACLU OR. (June 28, 2020), <https://www.aclu-or.org/en/press-releases/aclu-oregon-files-class-action-lawsuit-against-police-portland-attacking-journalists> [<https://perma.cc/3KSU-KXFX>].

127. Burns, *Police Targeted Journalists*, *supra* note 16.

128. Southall, *supra* note 16.

129. *Id.*

130. Barker et al., *supra* note 17.

131. *Id.*

Recent university protests focused on the Hamas–Israel War substantially disrupted activities on campuses.¹³² Some students established encampments on campus lawns, while others interfered with the flow of pedestrian traffic.¹³³ In some instances, students and others occupied campus buildings and damaged university property.¹³⁴ There were also concerns about the substance of student speech, which included anti-Semitic words, chants, and displays. In some instances, the language and actions of protesters may have constituted anti-Semitic harassment and discrimination, which universities are obligated under federal law to address.¹³⁵ For example, protesters on some campuses prevented Jewish students from accessing certain areas of campus and, in some instances, harassed individual Jewish or Muslim students. Some protesters were also confrontational and physically violent.¹³⁶

Universities responded to campus civil unrest in different ways. Some leaders exhibited a degree of forbearance and negotiated with demonstrators. That approach was criticized and even ridiculed by donors, public officials, and others who pressured universities to take a harder line.¹³⁷ Many universities took that harder line and relied on aggressive protest policing to address protest-related unrest. For example, Columbia University, which since the 1960s had generally relied on its own security and rules rather than local law enforcement, called in NYPD officers to disband encampments and arrest students who refused to leave.¹³⁸ At the University of Texas at Austin, protesters were dragged, pepper sprayed, and tear-gassed by officers wearing riot gear.¹³⁹ At the University of California, Los Angeles (“UCLA”), pro-Palestine protesters were hit with rubber bullets fired by police and physically attacked by counter-protesters, as law enforcement apparently stood

132. See, e.g., Isabela Rosales et al., *Encampments Cleared from at Least 3 University Campuses Early Friday as Pro-Palestinian Demonstrations Continue*, CNN, <https://www.cnn.com/2024/05/10/us/college-campus-protests-encampments-cleared/index.html> [https://perma.cc/Z3TY-LZJ9] (May 10, 2024, 9:39 PM).

133. *Id.*

134. *Id.*

135. See *Alexander v. Sandoval*, 532 U.S. 275, 278 (2001) (observing that Title VI prohibits recipients of federal funds from intentionally discriminating “on the ground of race, color, or national origin”).

136. See *Kestenbaum v. President & Fellows of Harvard Coll.*, 743 F. Supp. 3d 297, 307–10 (D. Mass. 2024) (denying university’s motion to dismiss Title VI claim based on alleged deliberate indifference to harassment based on national origin).

137. See Bianca Quilantan, *House GOP to Grill College Leaders for Negotiating with Protesters*, POLITICO (May 23, 2024, 5:00 AM), <https://www.politico.com/news/2024/05/23/house-republicans-college-leaders-protest-negotiations-00159541> [https://perma.cc/7TVC-K5ST].

138. See Sharon Otterman, *Columbia Said It Had ‘No Choice’ but to Call the Police*, N.Y. TIMES, <https://www.nytimes.com/2024/05/01/nyregion/columbia-university-protests-arrests.html> [https://perma.cc/PAL4-76RR] (May 2, 2024).

139. See Lily Kepner & Chase Rogers, *Seventy-Nine Pro-Palestinian Protesters Arrested After Setting Up Encampment at UT Austin*, USA TODAY, <https://www.usatoday.com/story/news/politics/state/2024/04/29/south-mall-ut-austin-protest-arrest-pro-palestinian-encampment-college-campus-protests/73497972007/> [https://perma.cc/S2YM-WXZJ] (Apr. 30, 2024, 3:39 PM).

down.¹⁴⁰ Universities experiencing building occupations and vandalism called in riot squads and other law enforcement units to remove students and restore order to campus. However, universities experiencing otherwise peaceable encampments, though ones that violated campus rules, made similar choices.¹⁴¹ Indiana University changed its campus protest policies on the eve of a tent protest, then arrested students who violated the amended policy.¹⁴² State police were called in and snipers were posted on rooftops overlooking the peaceful but now unlawful protest.¹⁴³

Criminal charges for campus protesters reached historic levels.¹⁴⁴ During the height of far more widespread anti-Vietnam War protests in 1969, police arrested approximately 4,000 students.¹⁴⁵ During recent campus protests, which occurred at only a fraction of campuses nationwide, police arrested more than 3,000 students.¹⁴⁶

Criminal charges were not the only sanctions imposed on students who organized and participated in campus protests. There were also academic consequences, including suspension and withholding of diplomas—including for students who participated in encampments or who blocked sidewalks.¹⁴⁷ For international students, participation in rule-breaking protests meant possible revocation of their visas.¹⁴⁸ Universities also took steps against student groups that organized or participated in campus protests. Public and private universities banned chapters of Students for Justice in Palestine (“SJP”) from their campuses.¹⁴⁹

140. See Richard Winton et al., *A Staggering Two Weeks at UCLA: Protest, Violence, Division Mark ‘Dark Chapter’*, L.A. TIMES, <https://www.latimes.com/california/story/2024-05-07/a-ucla-timeline-from-peaceful-encampment-to-violent-attacks-aftermath> [<https://perma.cc/CZ5U-NAKK>] (May 7, 2024, 5:11 PM); Jaelyn Diaz, *In NYC and LA, Police Response to Campus Protests Draws Sharp Criticism*, NPR (May 8, 2024, 5:01 AM), <https://www.npr.org/2024/05/08/1248935672/campus-protests-police-arrests> [<https://perma.cc/Z3FN-F6RP>].

141. Jeremy W. Peters, *Students Want Charges Dropped. What Is the Right Price for Protests?*, N.Y. TIMES (June 4, 2024), <https://www.nytimes.com/2024/06/04/us/politics/college-protests-charges-students.html> [<https://perma.cc/PV4Q-AZEW>].

142. Liam Knox, *Abrupt Changes to Protest Policies Raise Alarm*, INSIDE HIGHER ED. (Apr. 30, 2024), <https://www.insidehighered.com/news/students/free-speech/2024/04/30/indiana-protest-policy-change-raises-free-speech-concerns> [<https://perma.cc/AT3X-ML6T>].

143. *Id.*

144. Isabelle Taft et al., *Campus Protests Led to More than 3,100 Arrests, but Many Charges Have Been Dropped*, N.Y. TIMES (Jul. 21, 2024), <https://www.nytimes.com/2024/07/21/us/campus-protests-arrests.html> [<https://perma.cc/HVP3-YKPU>].

145. *Id.*

146. *Id.*

147. See Michael Loria & Christopher Cann, *No Diploma: Colleges Withhold Degrees from Students After Pro-Palestinian Protests*, USA TODAY, <https://www.usatoday.com/story/news/nation/2024/06/01/college-degrees-withheld-after-israel-gaza-protests/73899493007> [<https://perma.cc/H6LD-BKEA>] (Jun. 4, 2024, 5:50 PM).

148. See Maham Javaid, *For International Students, Protesting on Campuses Has Higher Stakes*, WASH. POST, <https://www.washingtonpost.com/nation/2024/05/03/international-students-campus-protest-visas> [<https://perma.cc/CA95-AGLD>] (May 3, 2024).

149. See Jonathan Friedman, *Suspensions of Students for Justice in Palestine Chapters Raise Questions and Concerns About Chilled Campus Environments*, PEN AM.

Florida's public university system first ordered the deactivation of *all* SJP chapters, claiming that the groups provided "material support" to Hamas, a terrorist group, apparently through their activism and "membership," to later backtrack only based on First Amendment concerns.¹⁵⁰ Some universities claimed the groups violated campus rules, although they apparently did not suspend other groups that had engaged in similar activity.¹⁵¹

These responses occurred within a broader political and social context where campus civil unrest became a prominent flash point. Donors, boards of trustees, leaders in Congress, and others encouraged campus protest crackdowns, including deployment of National Guard troops.¹⁵² As discussed earlier, Congress threatened universities with the loss of substantial federal funds if they did not take a harder line with student protesters.¹⁵³ Donald Trump stated that if he were President, he would "deport" protesting students and "crush" their movement.¹⁵⁴

2. Federal Interventions

As discussed earlier, the primary legal authority to respond to protest-related civil unrest resides with states, cities, and counties. However, the response to the BLM protests indicates federal authorities may become more directly involved in responding to local protest-related civil unrest. This would create additional opportunities for deploying the National Guard, federal agency personnel, and perhaps U.S. military forces to the streets. It also entails a possible role for federal prosecutors, who may charge protesters with federal felony offenses. Finally, Congress has pressured university leaders to punish students for protest-related offenses. Some university presidents have been forced to resign over their responses to student-led campus protests.¹⁵⁵

Civil unrest associated with the BLM protests quickly became a national political issue. Then-President Trump glorified violence against Black protesters,

(Dec. 8, 2023), <https://pen.org/suspensions-of-students-for-justice-in-palestine-chapters-raise-questions-and-concerns-about-chilled-campus-environments> [<https://perma.cc/V8XC-NFJM>].

150. See Ari Blaff, *Florida Walks Back Ban on Students for Justice in Palestine amid Constitutional Concerns*, NAT'L REV. (Nov. 15, 2023, 11:37 AM), <https://www.nationalreview.com/news/florida-walks-back-ban-on-students-for-justice-in-palestine-amid-constitutional-concerns> [<https://perma.cc/HDA8-Y8DP>].

151. *Id.*

152. See Madina Touré & Irie Sentner, *Johnson Demands Biden Send in National Guard During Raucous Columbia Visit*, POLITICO, <https://www.politico.com/news/2024/04/24/mike-johnson-columbia-national-guard-00154199> [<https://perma.cc/7SNP-7D7L>] (Apr. 24, 2024, 9:27 PM).

153. See Bianca Quilantan, *Stefanik Demands Biden Administration Yank Columbia's Federal Funding*, POLITICO (April 23, 2024, 6:55 PM), <https://www.politico.com/news/2024/04/23/stefanik-columbia-federal-funding-00153967> [<https://perma.cc/MR2R-KHB2>].

154. Graham, *supra* note 27.

155. See Susan Svrluga & Danielle Douglas-Gabriel, *After Harvard and Penn Resignations, Who Wants to Be a College President?*, WASH. POST (Jan. 12, 2024), <https://www.washingtonpost.com/education/2024/01/12/college-presidents-pressures-harvard-penn/> [<https://perma.cc/BNH9-TAQC>].

whom he referred to as “thugs,” when he tweeted the racially charged phrase, “When the looting starts, the shooting starts.”¹⁵⁶ He repeatedly called for “law and order” and urged “weak” state governors to “dominate” and jail racial justice protesters.¹⁵⁷ Trump’s Secretary of Defense, Mark Esper, told state governors that they needed to “mass and dominate the battle space” (a phrase he would later claim he regretted using)—public streets—and that he was ready to send in troops if needed for that purpose.¹⁵⁸ Trump called for massive law enforcement and National Guard interventions, including in cities that were not experiencing significant civil unrest. This raised questions about the political motivation behind the President’s protest-related statements and actions.¹⁵⁹

In a Rose Garden speech delivered on June 1, 2020, Trump declared himself to be “the president of law and order” (and an “ally of all peaceful protesters”) and reiterated Secretary Esper’s call for state governors to deploy the National Guard to “dominate the streets.”¹⁶⁰ In the event that governors did not take sufficient action to quell violence and restore order, Trump threatened to “deploy the United States military and quickly solve the problem for them.”¹⁶¹ The President indicated he would invoke the Insurrection Act of 1807 and deploy active-duty U.S. military personnel to quell civil unrest associated with mass civil rights protests. Some in his political party urged him to do so, even though, as noted, the demonstrations were predominantly lawful and no state had asked for this form of assistance.¹⁶² Trump also indicated that if he won the 2024 election, he would invoke the Act on his *first day* in office.¹⁶³ Although it is not clear what “domestic violence” or “insurrection” such an act would address, one possibility is an invocation to suppress demonstrations and civil unrest relating to the election itself.¹⁶⁴

Trump claimed in the June 2020 speech that he had “dispatch[ed] thousands and thousands of heavily armed soldiers, military personnel and law enforcement officers to stop the rioting, looting, vandalism, assaults and the wanton destruction of property” in Washington, D.C.¹⁶⁵ That claim was false. However, the President did dispatch federal agents from several agencies to cities across the United States to respond to civil unrest. Beginning in mid-July 2020, Customs and

156. See Burns, *The Racist History of Trump’s Tweet*, *supra* note 3.

157. Perez, *supra* note 2.

158. Myers, *supra* note 2.

159. See Badger, *supra* note 8 (discussing constitutional concerns regarding use of federal forces for local law enforcement purposes).

160. *Transcript: Trump to Mobilize Federal Resources to Stop Violence, Restore Security*, ABC NEWS (June 1, 2020, 5:15 PM), <https://abcnews.go.com/Politics/transcript-trump-mobilize-federal-resources-stop-violence-restore/story?id=71008802> [<https://perma.cc/75BL-UBNL>].

161. *Id.*

162. See Tom Cotton, *Send in the Troops*, N.Y. TIMES (June 3, 2020), <https://www.nytimes.com/2020/06/03/opinion/tomcotton-protests-military.html> [<https://perma.cc/R6NS-VT7E>].

163. See Savage et al., *supra* note 10 (discussing Trump’s plans to use the military to quell domestic disorder).

164. This was something apparently on the table during the runup to the 2020 presidential election. See Schmidt & Haberman, *supra* note 5.

165. *Transcript*, *supra* note 160.

Border Patrol (“CBP”) agents were deployed to Portland, Oregon, where mass protests and some rioting had occurred for approximately two months.¹⁶⁶ Trump ordered these agents to protect federal properties in Portland, including a courthouse used by protesters as a symbolic location.¹⁶⁷

The presence of CBP agents, who appeared to be engaged in local law enforcement activities far from the border, escalated violence and disruption in Portland’s streets. The federal presence also gave rise to additional protests, which focused specifically on the deployment of federal law enforcement personnel to protest sites.¹⁶⁸ Federal agents clashed with Portland protesters, used tear gas against those present (including a so-called Wall of Moms and the Portland mayor), shot some protesters with rubber bullets, and snatched protest participants off the streets using unmarked vans.¹⁶⁹ The state’s elected officials did not ask for or want the federal intervention. In fact, although Oregon Governor Kate Brown asked acting DHS Secretary Chad Wolf to recall federal agents from Portland, he refused.¹⁷⁰

The federal government has responded to local protest-related civil unrest in other ways as well. In response to street protests, a bill was introduced in Congress that would deny a percentage of federal highway funds to states that do not make “reasonable efforts” to prohibit individuals from “knowingly and recklessly obstructing” federal highways.¹⁷¹ Under the bill, states that do not prosecute protesters for blocking any federally assisted roadway would be subject to loss of highway funding.¹⁷²

Federal prosecutors pursued charges against BLM protest participants under the Anti-Riot Act and the Civil Obedience Act.¹⁷³ These federal laws criminalize, respectively, crossing state lines for the purpose of engaging in riots or causing “civil disorder” that disrupts interstate commerce. Ordinarily, local vandalism and other crimes are charged and prosecuted under state and local laws. However, in these instances, prosecutors pursued federal charges against protesters accused of such misconduct.

166. See Sergio Olmos et al., *Federal Agents Unleash Militarized Crackdown on Portland*, N.Y. TIMES, <https://www.nytimes.com/2020/07/17/us/portland-protests.html> [https://perma.cc/9ZV5-6Z93] (Sept. 1, 2020).

167. See Exec. Order No. 13,933, 85 Fed. Reg. 40081 (June 26, 2020).

168. Mike Baker, *Chaotic Scenes in Portland as Backlash to Federal Deployment Grows*, N.Y. TIMES, <https://www.nytimes.com/2020/07/21/us/portland-protests.html> [https://perma.cc/L94V-PWZL] (June 9, 2021).

169. Shepherd & Berman, *supra* note 9; Ward, *supra* note 9.

170. Oregon’s Attorney General later filed a lawsuit alleging federal agents were violating Oregonians’ civil rights by seizing and detaining protesters without probable cause. See Emily Gillespie & Rachel Siegel, *Oregon Attorney General Sues Federal Agencies for Allegedly Violating Protesters’ Civil Rights*, WASH. POST (July 19, 2020), <https://www.washingtonpost.com/nation/2020/07/18/portland-oreland-ag-lawsuit> [https://perma.cc/XK5H-BM73]. A court later dismissed the lawsuit on the ground that the state lacked legal standing to assert claims on behalf of protesters. *Rosenblum v. Does 1–10*, 474 F. Supp. 3d 1128 (D. Or. 2020).

171. Clear the Roads Act of 2024, H.R. 8823, 118th Cong. § 2(b).

172. *Id.* § 2(a).

173. See 18 U.S.C. §§ 2101–2102; *id.* § 231.

In one case, prosecutors charged and convicted a woman under the Civil Obedience Act for allegedly breaking the window of a police cruiser after officers fired tear gas into a crowd of protesters blocking an on-ramp to an interstate highway.¹⁷⁴ She was initially arrested and charged under state law with inciting a riot and criminal mischief, both misdemeanors in Alabama.¹⁷⁵ Invoking the law suggested a new federal strategy for dealing with protest-related civil unrest. Since the Nixon Administration, federal prosecutors have charged individuals with violating the Civil Obedience Act in only about a dozen cases.¹⁷⁶ However, beginning with the BLM protests during the summer of 2020, federal prosecutors charged this offense more than 125 times.¹⁷⁷

Attorney General William Barr also suggested that line prosecutors should pursue “sedition” charges against some BLM protest participants. The sedition charge, which would later be used against ringleaders of the January 6, 2021 Capitol insurrection, involves conspiring to overthrow the government, levying war against the United States, or using force to obstruct enforcement of federal law.¹⁷⁸ Sedition has a long and sordid history in the United States, principally owing to its use during World War I to punish political opposition to the draft and the war.¹⁷⁹ However, the text of the federal seditious conspiracy law, which prohibits using force to “prevent, hinder, or delay the execution of any law of the United States” or to “seize, take, or possess any property of the United States,” is broad enough to sweep in certain kinds of civil disobedience or disruptive but non-violent protests.¹⁸⁰ That renders sedition a potential charge any time a protester engages in vandalism, destruction of property, or other acts that interfere with law enforcement.

The federalization of the response to protest-related civil unrest marks an important change in protest policing. Principles of federalism and the distribution of authority for responding to local crime and other protest-related misconduct suggest only a minor role for federal authorities. Yet in 2020, federal interventions included the deployment of federal agency personnel and National Guard units, the threatened or promised deployment of U.S. armed forces under the Insurrection Act, and charges under federal law for local protest-related crimes, including obstruction of roadways and vandalism. More recently, federal lawmakers have tried to shape responses to campus unrest. Future federal responses to protest-related civil unrest may include some or all of these actions.

174. United States v. Pugh, No. 1:20-cr-73-TFM, 2021 U.S. Dist. LEXIS 177266 (S.D. Ala. May 13, 2021) (order denying motion to dismiss a federal indictment), *aff'd*, 90 F.4th 1318 (11th Cir. 2024).

175. See Josh Gerstein, *Court Rejects Challenge to Federal Anti-Riot Law*, POLITICO (May 13, 2021, 10:22 PM), <https://www.politico.com/news/2021/05/13/court-rejects-challenge-to-federal-anti-riot-law-488193> [<https://perma.cc/3RCY-RNXE>].

176. Conrad Wilson, *DOJ Uses Civil Rights-Era Law to Charge Protesters and Insurrectionists*, NPR (May 22, 2021, 7:01 AM), <https://www.npr.org/2021/05/22/999180144/doj-uses-civil-rights-era-law-to-charge-protesters-and-insurrectionists> [<https://perma.cc/5U6P-7KFT>].

177. *Id.*

178. 18 U.S.C. § 2384; see Benner, *supra* note 14.

179. See Cole, *supra* note 72, at 2569.

180. § 2384.

3. Anti-Protest Backlash

Protest activities and movements have led to a legislative and policy backlash that entails the proposal and adoption of increasingly restrictive laws and policies relating to public protest. Anti-protest laws at the federal and state levels call for new and more punitive punishments, while campuses have responded to recent unrest by adopting various restrictions on campus protests.

At the federal level, members of Congress have proposed withholding federal highway funds from states that do not take adequate steps to prevent protesters from obstructing interstate roadways. One bill, the Unmasking Antifa Act, would increase criminal penalties for anyone who injures, threatens, or oppresses another while in disguise, including while wearing a mask.¹⁸¹ Another bill proposes deporting foreign protesters charged with any crime, including a misdemeanor, related to their participation in a protest.¹⁸² Other measures would increase the criminal penalties for riot or incitement to riot and create new federal crimes relating to obstruction of public roads and highways.¹⁸³ Sponsors of some of these measures have justified their enactment by specific reference to protest activities or movements.¹⁸⁴

Federal officials have also acted in response to protest-related civil unrest on university campuses. Some members of Congress accused several universities of failing to protect Jewish students from anti-Semitic harassment.¹⁸⁵ They focused, in part, on several university presidents' responses to campus unrest and pressed them to punish students who committed trespassing and other offenses. Members of Congress have introduced bills that would deny student loan forgiveness to any student who engaged in any form of unlawful protest activity.¹⁸⁶ Others have proposed bills revoking the visas of students who participated in encampments or other forms of unlawful protest.¹⁸⁷ One bill would require that any student convicted of "unlawful activity" on a university campus be assigned to the Gaza Strip for six

181. Unmasking Antifa Act of 2024, H.R. 8248, 118th Cong. §§ 2–3. To see the full text of this and other bills, see *US Protest Law Tracker*, *supra* note 18.

182. Hamas Supporters Have No Home Here Act, H.R. 8221, 118th Cong. § 2 (2024).

183. See Stop Pro-Terrorist Riots Now Act, S. 3887, 118th Cong. § 2 (2024); Safe and Open Streets Act, S. 3492 118th Cong. § 2 (2024).

184. See Press Release, Congresswoman Beth Van Duyne, Rep. Van Duyne Introduces the "Hamas Supporters Have No Home Here Act" to Deport Aliens Who Participate in Pro-Terrorism And Antisemitic Mob Gatherings (May 1, 2024), <https://vandyne.house.gov/2024/5/rep-van-duyne-introduces-the-hamas-supporters-have-no-home-here-act-to-deport-aliens-who-participate-in-pro-terrorism-and-antisemitic-mob-gatherings> [<https://perma.cc/ZA9A-QK6R>].

185. See Joseph DeAvila & Melissa Korn, *Republican Lawmakers Spar With University Presidents at Campus Antisemitism Hearing*, WALL ST. J., <https://www.wsj.com/us-news/education/harvard-mit-penn-presidents-antisemitism-congress-f39aacfe> [<https://perma.cc/GD9A-A9V5>] (Dec. 5, 2023, 2:02 PM).

186. See No Debt Forgiveness for Self-Centered Pupils at Overpriced Institutions Lacking Effectively Disciplined Students Act, H.R. 8468, 118th Cong. § 2(a)–(b) (2024).

187. See Study Abroad Act, H.R. 8322, 118th Cong. § 2 (2024).

months for what the bill describes as “community service.”¹⁸⁸ Members have also offered bills that would deny federal funds to universities that do not clear protest encampments or otherwise adequately punish students who engage in protest-related misconduct.¹⁸⁹

At the state level, since 2017, legislatures have responded to protest-related civil unrest by proposing and enacting numerous laws that restrict assemblies, create new criminal offenses, and increase criminal penalties for protest-related misconduct.¹⁹⁰ Most of these laws do not restrict protest directly but rather punish activities that arise naturally from demonstrations or are a foreseeable part of them. Such activities include trespassing and blocking sidewalks or roads. As one commentator has noted:

In the years leading up to 2017, there were almost no “anti-protest” bills, yet between 2017 and 2020, at least 145 such bills were introduced. In 2021, ninety-two bills were introduced. And the timing of this legislation is not coincidental—the introduction of “anti-protest” legislation often closely follows major protest events.¹⁹¹

The first wave of protest-related laws followed demonstrations against the Dakota Access Pipeline project and public marches following Donald Trump’s election.¹⁹² In response to these protests, between 2017 and 2020, state legislatures enacted a wave of laws creating or enhancing penalties for protest-related civil unrest.¹⁹³ The measures expanded prohibited public demonstrations near “critical infrastructure” including pipelines; broadened the definition of riot, criminal trespass, obstruction of traffic, and other offenses; and increased criminal penalties for violations.¹⁹⁴

The second wave of state protest-related laws followed the mass BLM demonstrations.¹⁹⁵ Before the tear gas dissipated in Minneapolis, Portland, Kenosha, and other cities where mass protests had occurred, Republican-controlled legislatures enacted or proposed laws that broadened the definition of and increased the criminal penalties for protest-related offenses like riot, unlawful assembly, and

188. See Antisemitism Community Service Act, H.R. 8321, 118th Cong. § 2 (2024).

189. See No Tax Dollars for College Encampments Act of 2024, H.R. 8883, 118th Cong. § 2 (2024) (amending the Higher Education Act); Encampments or Endowments Act, S. 4295, 118th Cong. §§ 2–3(2024).

190. See Freedman, *supra* note 19, at 176–77 (describing context of passage of “anti-protest” laws).

191. *Id.* at 176 (citation omitted).

192. *Id.* at 177.

193. NORA BENAVIDEZ & JAMES TAGER, PEN AM., ARRESTING DISSENT: LEGISLATIVE RESTRICTIONS ON THE RIGHT TO PROTEST 4 (2020), [https:// pen.org/wp-content/uploads/2020/05/Arresting-Dissent-FINAL.pdf](https://pen.org/wp-content/uploads/2020/05/Arresting-Dissent-FINAL.pdf) [<https://perma.cc/FF7N-R842>].

194. See *id.* at 11.

195. *Id.* For detailed descriptions and analyses of these measures, see Freedman, *supra* note 19, at 193–211.

obstruction of passage and denied or restricted bail for certain offenders.¹⁹⁶ For example, Florida enacted an anti-riot law that could apply even to peaceful demonstrators and made the offense a felony punishable by 15 years in prison under some circumstances.¹⁹⁷ In addition, several states increased the penalty for blocking a sidewalk or street—common offenses during large-scale demonstrations—to a year in prison.¹⁹⁸ Some states also declared that offenders of the new protest-related laws would be ineligible for benefits including housing assistance, student loans, and state employment, while others granted legal immunity to drivers who negligently ran over protesters in the streets.¹⁹⁹

There were other legislative responses to protest-related unrest, specifically those associated with the BLM protests. For example, some states addressed issues relating to police brutality and officers' immunity from civil suits.²⁰⁰ However, the most prominent and sustained legislative response was to enact laws that affect protest-related misconduct. These laws provide state prosecutors with a new set of weapons to wield against protest organizers and participants.

State legislative and university-based backlashes against recent campus protests have also begun. Legislatures have enacted new limits on campus activism. Louisiana enacted a law that purports to bar free speech protection for any act that carries a criminal penalty.²⁰¹ The law purports to override any university policy that offers protection for students engaged in civil disobedience. That would mean, for example, that students arrested for trespassing could not raise a First Amendment defense.

Under intense pressure from Congress, boards of trustees, and others, many universities have revised their own policies regarding campus protest. More than 40

196. All Things Considered, *Wave of 'Anti-Protest' Bills Could Threaten First Amendment*, NPR (Apr. 30, 2021, 4:08 PM), <https://www.npr.org/2021/04/30/992545210/wave-of-anti-protest-bills-could-threaten-first-amendment> [<https://perma.cc/S2EE-HSAL>]; see also Nick Robinson, *Rethinking the Crime of Rioting*, 107 MINN. L. REV. 77 (2002).

197. Lalee Ibssa, *What to Know About Florida's Anti-Riot Law and the Corresponding Legal Challenge*, ABC NEWS (Aug. 7, 2021, 6:56 AM), <https://abcnews.go.com/US/floridas-anti-riot-law-legal-challenge/story?id=79224398> [<https://perma.cc/AK3X-52LR>].

198. BENAVIDEZ & TAGER, *supra* note 193, at 6 n.24.

199. See, e.g., H.B. 289, 2021–2022 Gen. Assemb., Reg. Sess. (Ga. 2021) (barring anyone convicted of unlawful assembly from receiving state or local unemployment benefits); see also Nicole Goodkind, *Republican Anti-Protest Laws Sweep Across the U.S.*, FORTUNE (Aug. 13, 2021, 3:34 PM), <https://fortune.com/2021/08/13/republican-anti-protest-laws-black-lives-matter> [<https://perma.cc/WDA3-ZWYX>].

200. See Ram Subramanian & Leily Arzy, *State Policing Reforms Since George Floyd's Murder*, BRENNAN CTR. FOR JUST. (May 21, 2021), <https://www.brennancenter.org/our-work/research-reports/state-policing-reforms-george-floyds-murder> [<https://perma.cc/2RQN-E8PA>] (summarizing policing reforms enacted since George Floyd's murder).

201. See Jessica Blake, *Louisiana Law Cracks Down on Campus Civil Disobedience*, INSIDE HIGHER ED. (June 20, 2024), <https://www.insidehighered.com/news/quick-takes/2024/06/20/louisiana-law-cracks-down-campus-civil-disobedience> [<https://perma.cc/5UQQ-F74H>].

universities have already adopted encampment bans.²⁰² Many universities have also imposed new permitting rules that require significant advance notice of any protest or demonstration and organizational sponsorship of public events; significantly limit where and when campus protests can occur; ban or restrict sound amplification; ban or restrict face coverings; restrict where signs, displays, and chalking can occur; and subject certain words or phrases to code of conduct sanctions.²⁰³ Other universities will surely follow suit. These new restrictions are in addition to those that were in university policies prior to the recent campus protests.

4. *Augmented Charges*

Another state-level response to recent protest-related civil unrest has been to charge participants, some of whom engaged in minor infractions or civil disobedience, not with minor trespassing or obstruction of passage charges or even with violation of new punitive protest-related state laws, but instead with crimes such as domestic terrorism and racketeering. When applied to minor infractions and civil disobedience, these felony charges ratchet up prison terms and fines. They also associate protest organizers and participants with violent terrorist groups and organized criminal enterprises.

Some states have amended and updated their domestic terrorism laws, many enacted in the wake of the September 2001 terrorist attacks on the United States, to include protest-related conduct. A test case has been brought in Georgia, where prosecutors have charged protesters who attempted to occupy a proposed site for a police training facility—“Cop City”—and allegedly destroyed property at the site with domestic terrorism.²⁰⁴ One protester was killed in the civil unrest associated with the Cop City protests.²⁰⁵ Some of those arrested claim to have been swept up in an arrest dragnet applied to all who were present.²⁰⁶ Others may have engaged in conduct that would merit misdemeanor or lower-level felony offenses including breach of peace or destruction of property.²⁰⁷ The domestic terrorism charge carries a prison term of 35 years. Broadly worded laws like Georgia’s apply to protesters who “damage” highways or other “infrastructure” or who engage in other acts that foreseeably occur during public protests. Further, protesters’ attempts to pressure or shame public officials could be used to charge them with “intimidation” or “coercion” under state domestic terrorism laws.²⁰⁸

In response to the civil unrest during the 2020 racial justice protests, some political officials encouraged prosecutors to charge BLM and Antifa members with

202. See Declan Bradley & Garrett Shanley, *We Looked at Dozens of Colleges’ New Protest Policies. Here’s What We Found*, CHRON. HIGHER EDUC. (Sept. 12, 2024), <https://www.chronicle.com/article/we-looked-at-dozens-of-colleges-new-protest-policies-heres-what-we-found?sra=true> [https://perma.cc/57J4-JA35].

203. See Blinder, *supra* note 31.

204. See Keenan & Rojas, *supra* note 32.

205. *Id.*

206. *Id.*

207. *Id.*

208. BENAVIDEZ & TAGER, *supra* note 193, at 17.

racketeering.²⁰⁹ Georgia prosecutors have charged more than 50 participants in the Cop City protests with this offense, which has historically been used against participants in organized crime, drug dealers, and other members of unlawful conspiracies, and carries a prison term of 20 years.²¹⁰ Racketeering laws provide for expansive liability not only for those who engage in criminal activity but also for individuals who encourage or participate in conspiracies to engage in unlawful assemblies.²¹¹ In Georgia, prosecutors have recently charged members of a social movement dedicated to protecting the environment with racketeering crimes.²¹² In addition to property destruction and violence, the indictments rely on a combination of protected speech, lawful protest activities, and unlawful acts of civil disobedience.²¹³

The Georgia prosecutions may represent the beginning of a trend where state officials investigate and prosecute protest-related unrest using terrorism and racketeering frameworks. State domestic terrorism laws may grant investigators greater authority to surveil and investigate protest movements.²¹⁴ Racketeering laws can be used against entire protest groups and social movements, with prosecutors characterizing them as environmental or racial justice extremists.

As noted, federal prosecutors have also upped the ante for protest-related offenses by charging protesters with violations of the Anti-Riot Act and Civil Obedience Act. They have also considered charging protesters who engage in vandalism and other local crimes with sedition. Like the augmented state charges, federal charges of this sort raise the stakes for protesters alleged to have engaged in what would otherwise amount to mine-run vandalism, property, or trespassing crimes. Because of the context where they are charged, the offenses also raise the specter of punishing political expression.

5. Anomalous Responses

Not all official responses to recent protest-related civil unrest have relied on repressive measures or have produced backlash laws in state legislatures or the halls of Congress. In fact, in certain instances, officials seemed either unwilling or unprepared to address civil unrest resulting from public demonstrations. In others, they have responded more harshly to certain protests and protesters than to others.

For example, when white supremacists held a “Unite the Right” rally in Charlottesville in 2017, city and campus officials were aware there would likely be

209. Adam Federman, *The War on Protest Is Here*, IN THESE TIMES (Apr. 17, 2024), <https://inthesetimes.com/article/war-protest-standing-rock-cop-city-repression-criminalize-dissent-political-rights-first-amendment> [<https://perma.cc/Q5CQ-DF3H>].

210. See Papp & Abusaid, *supra* note 34.

211. *Id.*

212. Federman, *supra* note 209.

213. *Id.*

214. See Alleen Brown, *Federal Agencies Pushed Extreme View of Cop City Protesters, Records Show*, THE GUARDIAN (Dec. 6, 2023), <https://www.theguardian.com/us-news/2023/dec/06/cop-city-atlanta-georgia-environment-protesters-terrorism> [<https://perma.cc/7TX3-WVYU>].

violence when rallygoers met up with counter-protesters.²¹⁵ Although the governor had declared an emergency, city and local law enforcement seemed unprepared for the violence and civil unrest that ensued.²¹⁶ Indeed, some counter-protesters complained that the police did not intervene when they were assaulted and that law enforcement appeared to stand down more generally—according to the ACLU—so that the state government could declare an emergency and shut down the rally and counter-protests.²¹⁷ On the day of the rally, even though there were many skirmishes and significant law enforcement and National Guard presence, police made only eight arrests.²¹⁸ A city-commissioned report described the law enforcement response as “woefully inadequate” and laid much of the blame for the violence that occurred on “police passivity.”²¹⁹

There were public demonstrations during the COVID-19 pandemic. Some demonstrations were organized by BLM, and the response to those events has already been described. Relying on emergency declarations, state and local governments enacted public health-related restrictions including curfews and bans on public gatherings.²²⁰ Demonstrations focused on objections to state and local pandemic-related regulations.²²¹ Although the pandemic-related demonstrations produced civil unrest, official responses were relatively muted again. The law enforcement response to anti-lockdown protests was far less aggressive and relied far less on unlawful law enforcement tactics than the response to BLM protests.²²² There were no calls to deploy the National Guard, nor were there presidential threats to invoke the Insurrection Act. In contrast to their response to racial justice protests, including peaceable events, police did not arrest either BLM or pandemic-focused protesters for violations of pandemic-related restrictions.

215. See Frances Robles, *As White Nationalist in Charlottesville Fired, Police ‘Never Moved’*, N.Y. TIMES (Aug. 25, 2017), <https://www.nytimes.com/2017/08/25/us/charlottesville-protest-police.html> [<https://perma.cc/E7B3-7KVD>]; Robert Zullo, *Virginia Officials Defend Handling of Violent Charlottesville Rally and Counterprotest*, RICH. TIMES-DISPATCH (Aug. 14, 2017), https://web.archive.org/web/20170814225844/http://www.richmond.com/news/virginia-officials-defend-handling-of-violent-charlottesville-rally-and-counterprotest/article_bcb2d481-bb3f-5fd6-982c-96328d02ab8e.html [<https://perma.cc/24LA-XWVM>].

216. Zullo, *supra* note 215.

217. *Id.*

218. Robles, *supra* note 215.

219. Maggie Snow, *Heaphy Report Criticizes ‘Woefully Inadequate’ Response from U.Va. Police on Aug. 11*, CAVALIER DAILY (Dec. 7, 2017), <https://www.cavalierdaily.com/article/2017/12/heaphy-report-criticizes-woefully-inadequate-response-from-uva-police-on-aug-11> [<https://perma.cc/QGZ5-CVXU>].

220. See ZICK, *supra* note 50, at 173–76 (discussing pandemic-related restrictions on demonstrations).

221. See *id.* at 163–65 (describing pandemic protests).

222. See Aymann Ismail, *The Anti-Lockdown Protests Prove Police Know how to Treat Protesters Fairly*, SLATE MAG. (May 28, 2020, 7:38 PM), <https://slate.com/news-and-politics/2020/05/police-response-george-floyd-minneapolis-shutdowns.html> [<https://perma.cc/Z44Y-5P8G>]; Li Zhou & Kainaz Amaria, *These Photos Capture the Stark Contrast in Police Response to the George Floyd Protests and the Anti-Lockdown Protests*, VOX (May 27, 2020, 1:50 PM), <https://www.vox.com/2020/5/27/21271811/george-floyd-protests-minneapolis-lockdown-protests> [<https://perma.cc/7AP8-DEVZ>].

Another anomalous response occurred during the January 6, 2021 rally and subsequent Capitol riot. In the lead-up to scheduled events, federal and local law enforcement did not respond with escalated force or militarized tactics. Indeed, although they were aware that the rally was going to occur and that some participants might have unlawful intentions, Capitol Police leadership ordered officers *not* to resort to their most aggressive policing tactics, including stun grenades and other weapons frequently resorted to in the BLM protests.²²³ President Trump, who headlined the rally that preceded the riot, did not view even *armed* rallygoers as a potential threat (at least to himself) at the time.²²⁴ Further, in contrast to his Administration's response to the racial justice protests, once the riot ensued, President Trump did not propose or take any measures to "dominate" the "battlespace" of D.C. streets or the Capitol grounds. In many respects, the government's initial policing and emergency response to the "Stop the Steal" rally was markedly different from its approach to the racial justice demonstrations. Its prosecutorial response, however, did entail a broad interpretation of the federal witness tampering law.²²⁵ But the Supreme Court concluded that the law could not be applied to individuals who breached the Capitol's security.²²⁶

In the foregoing instances, law enforcement did not respond to public protest with aggressive, militarized policing. There were no calls for military intervention. Nor did the civil unrest from these events produce waves of restrictive protest-related laws. Further, charges brought against those involved in civil unrest were typically proportional to the crimes committed. For example, although Virginia has a domestic terrorism law, several Charlottesville torchbearers were charged with burning an item with intent to intimidate, a charge that carries a five-year prison term, rather than a more serious terrorism offense.²²⁷ While Capitol rioters who assaulted police officers or engaged in other violent conduct have faced serious charges, including sedition charges in some cases, half of those arrested were charged with misdemeanors for participating in an attack on the Capitol.²²⁸

223. Luke Broadwater, *Capitol Police Told to Hold Back on Riot Response on Jan. 6, Report Finds*, N.Y. TIMES, <https://www.nytimes.com/2021/04/13/us/politics/capitol-police-riot-report.html> [<https://perma.cc/E2GS-VD73>] (Sept. 29, 2021).

224. Martin Pengelly, *Trump Knew Crowd at Rally Was Armed yet Demanded They Be Allowed to March*, THE GUARDIAN (June 28, 2022, 2:47 PM), <https://www.theguardian.com/us-news/2022/jun/28/trump-jan-6-rally-guns-capitol-attack> [<https://perma.cc/NR9H-KK25>].

225. See 18 U.S.C. § 1512(c)(1)–(2).

226. *Fischer v. United States*, 603 U.S. 480 (2024).

227. Mike Wendling, *Charlottesville Torch Marchers Face Criminal Charges Six Years Later*, BBC (Apr. 19, 2023), <https://www.bbc.com/news/world-us-canada-65307774> [<https://perma.cc/2RZV-6MUT>]; see VA. CODE ANN. § 18.2-46.5 (2017) (domestic terrorism).

228. Tom Jackman & Spencer S. Hsu, *Hundreds of People Stormed the Capitol. Most Won't Face Hefty Prison Terms, Legal Experts Say*, WASH. POST (May 13, 2021), <https://www.washingtonpost.com/nation/2021/05/13/capitol-rioters-sentencing/> [<https://perma.cc/5B3K-S4NU>].

III. RECONSIDERING RESPONSES TO PROTEST-RELATED CIVIL UNREST

Official responses to recent protest-related civil unrest threaten protesters' First Amendment rights. They also undermine a venerable tradition of civil disobedience and, more broadly, respect for civil liberties and democratic norms. If this pattern continues or gets worse, it will become more difficult to hold governments and leaders accountable. What follows is a general reform agenda that addresses some of the most disturbing aspects of official responses to protest-related unrest. Legislative, executive, and judicial officials should work to demystify the nature and scope of emergency powers, deescalate protest policing, defederalize the response to localized protest-related civil unrest, repeal or narrow state protest-related laws, consider the proportionality of charges and penalties in public protest cases, preserve the right to protest on university campuses, and ensure neutral and equitable responses to protest-related civil unrest.

A. Preventing Democratic Backsliding

The general response to protest-related civil unrest is a manifestation of what scholars refer to as “democratic backsliding,” or the weakening of rights, norms, and institutions necessary to maintain democratic accountability.²²⁹ In the United States, political and social polarization, the rampant spread of misinformation, rising support for authoritarianism, and other influences have produced worrisome signs of democratic decay.²³⁰ Other manifestations of backsliding include political attacks on media and other institutions, laws restricting the academic freedom and independence of faculty and universities, and the refusal to accept the outcomes of elections.²³¹

Responses to protest-related civil unrest examined in this Article likewise indicate an erosion of rights and norms that hold governments and officials accountable. As discussed in the Introduction and Part I, political leaders increasingly discuss protesters and protests in autocratic terms. National political leaders including Donald Trump and members of Congress have urged law enforcement and military personnel to “dominate” public “battlespaces” long dedicated to speech and assembly. They have referred to protesters as “losers,” encouraged the use of aggressive policing and deployment of troops to quell protest-related unrest, and suggested shooting protesters and crushing protest movements. Finally, Trump and other officials have threatened deportation of individuals who commit even minor infractions while protesting. These statements are not mere political bombast. They have led to kneejerk emergency declarations, aggressive and militarized protest policing, successive waves of state-level anti-protest laws, plans to deploy military force under the Insurrection Act, and other repressive measures.²³²

229. See generally Huq, *supra* note 39; GINSBURG & HUQ, *supra* note 39.

230. See, e.g., Robert R. Kaufman & Stephan Haggard, *Democratic Decline in the United States: What Can We Learn from Middle-Income Backsliding?*, 17 *PERSP. ON POLS.* 417 (2019).

231. See, e.g., Tom Ginsburg, *Academic Freedom and Democratic Backsliding*, 71 *J.L. EDUC.* 238, 245 (2022).

232. See generally STEVEN LEVITSKY AND DANIEL ZABLATT, *HOW DEMOCRACIES DIE* (2018).

In sum, authoritarian political rhetoric has contributed to many recent restrictions on public protests.

Recent responses to protest-related civil unrest suggest that many political officials, and many Americans, consider the act of public protest *itself* to be a threat to public order. Some governmental policies identify even peaceable and lawful demonstrations as a form of civil unrest. From this perspective, every public assembly is a disturbance that must be quelled or suppressed or, at the least, treated as an imminent threat to public order. By this logic, every demonstration becomes a presumptive or incipient riot. If normalized, this attitude would abolish the distinction between protected protest and unlawful violence. It would authorize governments to suppress not just individual demonstrations but entire protest movements. This attitude toward protest would also chill or extinguish a long tradition of civil disobedience, as individuals would face increasingly draconian punishments for even minor infractions.

Delegitimizing and suppressing public protest may be part of a conservative plan for future governance. For example, the Heritage Foundation published Project 2025, which sets out comprehensive plans for the next Republican President to generally consolidate executive power.²³³ Some news reports have observed that since his election, President Trump has enacted many of the policies associated with Project 2025.²³⁴ Concentration of excessive executive power has been associated with democratic backsliding.²³⁵ Some associated with what the Heritage Foundation calls its *Mandate for Leadership: The Conservative Promise* have supported invocation of the Insurrection Act to deploy military forces to police local protests.²³⁶ That autocratic impulse, which Donald Trump has indicated that he shares, points toward a more aggressive response to public protests.

In a healthy democracy, governments respect and preserve civil rights and liberties, especially those that allow citizens to hold elected officials accountable. In that sense, public protests are a testing ground for democracy. Reactions to protest-related civil unrest pose a challenge for political leaders. They can respond in ways that preserve public demonstrations that challenge their power, or they can resort to measures that delegitimize and suppress such challenges. In recent years, governments and officials have frequently chosen the latter path.

It is a striking anomaly that while most public demonstrations in the United States are lawful and peaceable, public attitudes that protest is dangerous and unworthy of protection persist. As indicated, some responsibility for this

233. HERITAGE FOUND., MANDATE FOR LEADERSHIP: THE CONSERVATIVE PROMISE (2023), https://static.project2025.org/2025_MandateForLeadership_FULL.pdf [<https://perma.cc/CL4K-XPHW>].

234. See, e.g., Melissa Quinn, *Where Trump Policies and Project 2025 Proposals Match Up*, CBS NEWS (Feb. 3, 2025, 5:02 PM), <https://www.cbsnews.com/news/trump-project-2025-playbook/> [<https://perma.cc/FN5J-NAA3>].

235. See generally SUZANNE METTLER & ROBERT C. LIEBERMAN, FOUR THREATS: THE RECURRING CRISES OF AMERICAN DEMOCRACY (2020).

236. Isaac Arnsdorf et al., *Trump and Allies Plot Revenge, Justice Department Control in a Second Term*, WASH. POST, <https://www.washingtonpost.com/politics/2023/11/05/trump-revenge-second-term/> [<https://perma.cc/YZE3-6NY7>] (Nov. 6, 2023).

incongruence lies with its political leaders, who have derogated and demonized public protest and protesters. There is a concerted messaging effort, by officials and some media outlets, to portray public demonstrations as a form of anarchy or lawlessness. How mainstream media covers demonstrations also contributes to this portrayal. Media coverage tends to focus on violence and conflict to the exclusion of other aspects of public protest. As Greg Magarian has observed, “[L]aw enforcement and the media drastically overstate the prevalence of violence in public protests, including campus speaker protests, and misleadingly blur the distinction between violent and nonviolent protesters.”²³⁷ Whenever there is any violence at or near a public protest, the media’s tendency is to report that the protest was pervasively violent.²³⁸ Any violence “on the streets,” even if it is not part of a demonstration, is falsely attributed to “protesting.” This leaves the impression that only “fringe” elements of society participate in public protests. Magarian notes that this is a “dangerous fallacy to indulge if we care about sustaining a vibrant democracy.”²³⁹

As Harry Kalven Jr. once implored on behalf of civil rights activists, it is necessary that the protester’s “unusual means of communication be recognized as robust and amateur means of communication and not be too quickly read as tactics of obstruction and harassment.”²⁴⁰ A general failure or unwillingness to recognize the First Amendment value inherent in disruptive demonstrations threatens a critical democratic check on government.²⁴¹ To avoid this outcome, officials need to change their responses to protest-related unrest.

B. Clarifying Emergency Powers and Deescalating Protest Policing

The use of escalated force and military-style tactics by law enforcement during declared civil unrest emergencies poses a significant threat to First Amendment rights. During declared emergencies, executive officials and law enforcement personnel have relied on broad grants of power and aggressive protest policing to restrict public demonstrations.²⁴² As Karen Loor has explained, “Emergency officials view protests as law-enforcement-centric events, which means that before and after a legal emergency is declared, officials give the police free rein to control protesters.”²⁴³

A default initial response to protest-related civil unrest has emerged. Officials quickly declare a public emergency, which typically grants them expansive

237. Gregory P. Magarian, *When Audiences Object: Free Speech and Campus Speaker Protests*, 90 U. COLO. L. REV. 551, 559 (2019).

238. See Douglas M. McLeod, *News Coverage and Social Protest: How the Media’s Protest Paradigm Exacerbates Social Conflict*, 2007 J. DISP. RESOL. 185, 186–87 (2007).

239. Magarian, *supra* note 237, at 559–60.

240. Harry Kalven, Jr., *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1, 30 (1965).

241. See generally El-Haj, *supra* note 52.

242. See generally WOOD, *supra* note 107 (discussing the militarization of protest policing).

243. Loor, *supra* note 43, at 6 (footnote omitted).

powers to address civil unrest.²⁴⁴ A central aspect of this response is to deploy scores of militarized law enforcement personnel to contain and restrict protest activity. Further, as discussed, during declared emergencies, governors call up National Guard forces, impose curfews, sharply limit access to public forums, and take other measures that restrict civil liberties.²⁴⁵ In addition to displays and actual use of force, during declared emergencies, officers rely heavily on vaguely worded public order laws, including failure to disperse and breach of peace, to effectuate mass arrests.²⁴⁶

Policing public demonstrations poses significant challenges for governments, officials, and campus leadership. One study shows that during the years 2017 to 2020, there were more than 27,000 protests in the United States with over 13 million participants and attendees.²⁴⁷ From the perspective of maintaining public order, these numbers are daunting. However, governments and officials have options in terms of how they will use their powers to respond to civil unrest associated with such events. They can respond with tolerance, de-escalation, and negotiation, which would entail fewer injuries, arrests, and constitutional violations. Or they can respond aggressively and with repressive policies, a path that has led to mass arrests, greater numbers of physical injuries, and the overall chilling of expressive activity. Official responses could also draw on both approaches, with greater tolerance for minor lawbreaking but aggressive responses to incidents of physical or other violence.

As the political scientist John Berger observed in the wake of the civil unrest of the 1960s, “The aims of a demonstration . . . are symbolic: it *demonstrates* a force that is scarcely used.”²⁴⁸ However, from the government’s perspective, when faced with a public protest, it faces an unattractive choice. If the government does nothing, it demonstrates weakness. Public officials risk losing control, not just of the public narrative but of the public square itself. Berger’s general observation still holds true today: “Almost invariably, authority chooses to use force.”²⁴⁹

More and more frequently, that choice is not driven by the scale or nature of the threat of public protest, which in most instances *is* largely symbolic. Rather, the possibility of losing control, or the potential for violence, is used to justify militarized displays and the use of aggressive tactics. The unlawful use of force often backfires, with municipalities paying significant damages for law enforcement

244. See Giselle Ruhyyih Ewing, *Kemp Declares State of Emergency in Georgia Over ‘Cop City’ Protests*, POLITICO (Jan. 27, 2023, 12:12 AM), <https://www.politico.com/news/2023/01/27/kemp-cop-city-protests-emergency-00079846> [https://perma.cc/CJ36-DXF2].

245. See Loor, *supra* note 43, at 8–13 (describing emergency orders issued in response to protest-related civil unrest).

246. See ZICK, *supra* note 50, at 182 (discussing reliance on vaguely worded public order laws).

247. COUNT LOVE, <https://countlove.org/> [https://perma.cc/NG6T-MS4L] (recording protest events from January 20, 2017 through January 31, 2021) (last visited Mar. 18, 2025).

248. John Berger, *The Nature of Mass Demonstrations*, 34 INT’L SOCIALISM 11, 11 (1968).

249. *Id.*

abuses and excesses.²⁵⁰ Further, as Berger asserted, “[B]y attacking the demonstration authority ensures that the symbolic event becomes an historical one: an event to be remembered, to be learnt from, to be avenged.”²⁵¹ This is particularly the case when the target of the protest itself is law enforcement, as was the case in the BLM demonstrations. However, one could say the same thing about recent campus protests, which garnered more attention owing to the responses by university leaders and law enforcement.

Executive responses to protest-related civil unrest often disregard and violate free speech, assembly, and other constitutional rights. As Loor has observed, in past instances, “the government viewed the mass protests as a crisis and acted to maintain order without true regard for constitutional liberties both before and, more egregiously, after the emergency declaration.”²⁵² That description applies equally to the response to BLM and other recent demonstrations. Rather than adopt policies and tactics that avoid violating civil liberties in the first place, municipalities appear willing to pay large damage awards after violating protesters’ First Amendment rights.

Three related reforms would ameliorate the negative effects on free speech and assembly from the default initial response to protest-related civil unrest. First, state legislatures should reform laws relating to emergency declarations and powers. Amendments should clarify and provide meaningful legislative and judicial checks on emergency powers granted to governors and other officials during civil unrest and other emergencies.²⁵³ Appropriate limits include express time limits on the duration of an emergency and clear procedures for terminating an emergency declaration once the emergency subsides.²⁵⁴ Executive officials should issue such emergency declarations reluctantly and sparingly, acknowledge the need to preserve free speech and assembly rights in their declarations, and narrowly tailor restrictions on public speech and assembly—again, for example, by limiting their timeframe and scope.²⁵⁵ To assist with implementing these and other reforms, Professor Loor has proposed using a “council” made up of police representatives, local civil rights attorneys, and others who can work in advance to establish protocols for responding to emergencies, with an emphasis on preserving protest and other rights during any

250. See, e.g., Daniel Politi, *Jury Awards \$14 Million to George Floyd Protesters Injured by Cops in Denver*, SLATE MAG. (March 26, 2022, 10:04 AM), <https://slate.com/news-and-politics/2022/03/jury-awards-14-million-george-floyd-protesters-denver.html> [<https://perma.cc/C7KJ-QAL5>].

251. Berger, *supra* note 248 at 12.

252. Loor, *supra* note 43, at 22.

253. See *id.* at 56–68 (discussing ways to check state emergency powers).

254. See *id.* at 14 (noting that state authorities do not provide for preservation of individual liberties during declared emergencies). The sole exception appears to be that a few states expressly forbid firearms restrictions during emergencies. See, e.g., MO. REV. STAT. § 44.101 (2007).

255. See Loor, *supra* note 43, at 1 (“The emergency management one-size-fits-all approach, however, does not differentiate between political activism, a flood, a terrorist attack, or a loose shooter.”).

declared civil unrest or other emergency.²⁵⁶ Finally, these protocols should be published so that the press and public can review them.

Second, proper law enforcement preparation and training for public demonstrations are long overdue. Police departments must finally act on the various recommendations made in post-protest reports or be held fully accountable for not doing so. At this point, only willful blindness or blatant disregard for civil liberties can explain the continued protest policing abuses that routinely occur at demonstrations.²⁵⁷ Law enforcement's reliance on militarized and aggressive policing tactics violates the duty to preserve and protect First Amendment rights. It also exacerbates disruption and violence, which is then often falsely attributed to public demonstrations and protesters. In fact, aggressive protest policing is itself a form of civil unrest. Holding law enforcement accountable, whether through lawsuits or internal reforms, is critically important. For example, in connection with a settlement between New York's attorney general and the NYPD, the department has agreed to appoint a protest supervisor to implement policies that will better protect First Amendment rights at protest events.²⁵⁸

Third, courts have an important role to play in preserving civil liberties during declared civil unrest emergencies. As Justice Samuel Alito said in a speech addressing pandemic-related orders: "All sorts of things can be called an emergency or disaster of major proportions. Simply slapping on that label cannot provide the ground for abrogating our most fundamental rights."²⁵⁹

Justice Alito's statement highlights a persistent problem concerning the exercise of judicial power during declared public emergencies. During declared civil unrest and other emergencies, courts tend to be overly deferential to government officials and insufficiently protective of civil liberties.²⁶⁰ As John Hart Ely once observed, the history of free speech jurisprudence in times of crisis "mocks our commitment to an open political process."²⁶¹ In light of governments' aggressive

256. See *id.* at 66–70.

257. See Christopher Maag, *At Chaotic Rally in Brooklyn, Police Violently Confront Protesters*, N.Y. TIMES, <https://www.nytimes.com/2024/05/19/nyregion/nypd-protest-brooklyn-gaza.html> [<https://perma.cc/MJ68-FMY6>] (May 20, 2024).

258. See Rocco Parascandola, *NYPD Appoints First Amendment Protest Supervisor, New Role Created by Fed Settlement*, DAILY NEWS, <https://www.nydailynews.com/2024/09/19/nypd-appoints-first-amendment-protest-supervisor-new-role-created-by-fed-settlement> [<https://perma.cc/K76K-PMPZ>] (Sept. 19, 2024, 4:29 PM).

259. Debra Cassens Weiss, *Alito: COVID-19 Restrictions Highlight Disturbing Trend of 'Lawmaking by Executive Fiat'*, ABA J. (Nov. 13, 2020, 12:00 PM) <https://www.abajournal.com/news/article/alito-covid-19-restrictions-highlight-disturbing-trend-of-lawmaking-by-executive-fiat> [<https://perma.cc/4FQN-ZWQ3>].

260. See, e.g., Wiley & Vladeck, *supra* note 104, at 194 (highlighting the "unique checking role of an independent judiciary and the costs of its absence" during declared emergencies); Cole, *supra* note 72.

261. See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 109 (1980); see also Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 457 (1985) ("Most constitutional commitments are fragile in the sense that they embody ideals that are easily abandoned or tempered in times of

default responses to civil unrest, courts must be prepared to check governmental abuses of emergency powers.²⁶²

C. Defederalizing the Response to Local Civil Unrest

As discussed earlier, the primary authority for responding to protest-related civil unrest lies with state and local authorities.²⁶³ However, federal officials have become increasingly involved in responding to local protests. President Trump threatened to deploy U.S. military forces to quell civil unrest during the 2020 racial justice protests and ultimately dispatched federal agents to U.S. cities, who detained and assaulted protesters.²⁶⁴ Federal prosecutors brought charges against BLM protesters based on local vandalism and other crimes. Members of Congress have proposed legislation that: (1) conditions receipt of federal funds on the enactment of state restrictions on protest-related offenses; (2) adopts new anti-riot offenses; and (3) threatens to deny federal education funds to universities that fail to crack down on campus protesters.²⁶⁵ Federalization of the response to protest-related civil unrest represents a new and distinctive threat to civil liberties.

As a general matter, the response to protest-related civil unrest needs to be defederalized. This will require clarifying and limiting executive power, limiting federal prosecutions for protest-related violations, and encouraging congressional restraint.

Just as state emergency powers concerning protest-related civil unrest require clarification and narrowing, so too do those of the federal Executive. Sending military troops, who are not trained to police protests and whose mission does not involve policing civilians, to the streets will further militarize the protest environment and escalate violence. Deployment of federal agents to quell local protest-related unrest will mean that even lawful protesters will interact with state, local, and now federal law enforcement—not to mention National Guard troops in many instances—as they seek to exercise their First Amendment rights. When paired with the presence of militarized local law enforcement units, deployments of federal personnel are likely to further chill the exercise of First Amendment rights.

As discussed, federal law generally prohibits U.S. armed forces from performing domestic law enforcement functions, including policing public demonstrations.²⁶⁶ However, the Insurrection Act—which President Trump invoked in his June 2020 speech, and some have identified as a potential tool to quell future civil unrest—is an exception to this general rule. The Insurrection Act allows the President to deploy federalized National Guard personnel and active-duty U.S. military personnel to respond to civil unrest and domestic violence, including but

stress. Certain distinctive features of the commitment to free speech enhance that fragility.”); L.A. Powe, Jr., *Situating Schauer*, 72 NOTRE DAME L. REV. 1519, 1531–32 (1997) (describing speech as “a good times civil liberty”).

262. See Wiley & Vladeck, *supra* note 104, at 182–83 (encouraging courts to apply “ordinary” constitutional standards during declared emergencies).

263. See *supra* Section II.A.

264. See *supra* Subsection II.C.2.

265. See *supra* Subsection II.C.3.

266. The Posse Comitatus Act, 18 U.S.C. § 1385, prohibits such activity in the absence of a constitutional or legislative exception.

not limited to unlawful “combinations” or “assemblages.”²⁶⁷ It provides that the President can order the deployment of military personnel when a governor or state legislature requests assistance in response to an “insurrection” or when an insurrection or “rebellion” is hindering enforcement of state or federal law.²⁶⁸

No President has invoked the Insurrection Act to address civil unrest associated with mostly peaceful and lawful protests or to put down demonstrations. During the 1960s, President Lyndon B. Johnson invoked the Insurrection Act three times in response to the riots that followed the assassination of Dr. Martin Luther King Jr.²⁶⁹ Other Presidents have also invoked the Act to suppress widespread rioting.²⁷⁰ The most recent invocation of the Act was by President George H. W. Bush, who deployed troops to Los Angeles in 1992 to respond to the riots following the brutal police beating of Rodney King.²⁷¹ Prior invocations have aimed to suppress the Ku Klux Klan’s first terror campaign in the nineteenth century, intervene in labor disputes, and protect Chinese immigrants from violent white mobs in Washington State.²⁷² Finally, Presidents have also invoked the Act to enforce federal court orders desegregating schools in the South and to protect civil rights marchers in Alabama.²⁷³

As the examples show, in extreme situations, Presidents have the power to use military force to quell civil unrest. However, relying on the Insurrection Act to deploy U.S. military personnel as a domestic police force would be an unprecedented use of this authority.²⁷⁴ It would effectively mean that a President could deploy military forces in response to unpermitted mass protests (“unlawful combinations” or “assemblages”) or put down protest events because individuals have engaged in minor offenses such as trespass, vandalism, and blocking streets and sidewalks.²⁷⁵ So interpreted, the Act would become a potent weapon for suppressing political demonstrations and movements.

267. Pub. L. No. 9-39, 2 Stat. 443 (1807) (codified as amended at 10 U.S.C. §§ 251–255); see Joseph Nunn & Elizabeth Goitein, *Guide to Invocations of the Insurrection Act*, BRENNAN CTR. FOR JUST. (Apr. 25, 2022), <https://www.brennancenter.org/our-work/research-reports/guide-invocations-insurrection-act> [<https://perma.cc/EH7T-JPXA>].

268. See 10 U.S.C. §§ 251–253.

269. PAUL J. SCHEIPS, *THE ROLE OF FEDERAL MILITARY FORCES IN DOMESTIC DISORDERS, 1945-1992*, at 267–368 (2005).

270. See *id.* at 188–204, 267–368, 440–49.

271. See Elizabeth Goitein & Joseph Nunn, *An Army Turned Inward: Reforming the Insurrection Act to Guard Against Abuse*, 13 J. NAT’L. SEC. L. & POL’Y. 355, 368 (2023).

272. See ROBERT W. COAKLEY, *THE ROLE OF FEDERAL MILITARY FORCES IN DOMESTIC DISORDERS, 1789-1878*, at 312 (1988); CLAYTON D. LAURIE & RONALD H. COLE, *THE ROLE OF FEDERAL MILITARY FORCES IN DOMESTIC DISORDERS, 1877-1945*, at 33–41, 99–109, 124–52, 203–18, 320–24 (1954).

273. See SCHEIPS, *supra* note 269, at 17–66, 101–28, 145–53, 159–61.

274. See Charlie Savage, *Ex-Officials Urge Curbing Presidential Power to Deploy Troops on U.S. Soil*, N.Y. TIMES (Apr. 8, 2024), <https://www.nytimes.com/2024/04/08/us/trump-president-troops-riots-protests.html> [<https://perma.cc/X4KB-B8EN>].

275. See Goitein & Nunn, *supra* note 271, at 369 (“For instance, a president seeking to suppress dissent might consider an unpermitted protest against the implementation of a controversial executive order to be an ‘unlawful combination’ that ‘opposes . . . the execution of the laws of the United States.’” (quoting 10 U.S.C. § 253)).

As many have recognized, the Insurrection Act is badly in need of amendment and reform. It is notably short on definitions for critical terms such as “insurrection” and “rebellion” and imposes few, if any, substantive legislative or judicial checks on presidential power.²⁷⁶ Commentators and former public officials have proposed a variety of amendments.²⁷⁷ For example, a group invited by the American Law Institute to propose amendments to the Act suggested that antiquated terms like unlawful “assemblage” and “combinations” be removed from the text, that the Act clearly specifies that a President can act only when it is clear that state and local law enforcement have been overwhelmed and cannot maintain public safety, and that Congress amend the Act to require reporting, consultation, and designated time limits for deployment of military forces.²⁷⁸ If adopted, these and other proposed amendments would make it clearer that the President cannot invoke the Insurrection Act any time there is a degree of protest-related civil unrest.

Other federal interventions pose similar dangers for public protest. Congress has the power to protect interstate highways from obstruction and damage. However, pursuing federal felony charges against protesters under the Anti-Riot Act, the Civil Obedience Act, or the Sedition Act opens a new front in the prosecution of protesters. Federal crimes with longer sentences and steeper fines may displace existing state and local offenses. Rather than facing misdemeanor charges for obstructing roadways or petty vandalism, protesters would face federal felony charges. As we know from their historical use, sedition charges raise a serious risk of punishing political expression.

Prosecution of protest-related misconduct should generally be undertaken by state and local, not federal, prosecutors.²⁷⁹ In addition to concerns about increased jail time and fines for even minor infractions, some of the federal laws used by prosecutors against protesters threaten political expression. For example, the Anti-Riot Act expressly covers expression—including *promoting* or *encouraging* violence—that is fully protected by the First Amendment.²⁸⁰ Indeed, two federal appeals courts have invalidated portions of the Anti-Riot Act on this ground.²⁸¹ Even without this language, there is a danger that protesters engaged in protected First Amendment activity will be charged with federal offenses. The fear of federal felony charges for blocking a highway may chill civil disobedience and, in some instances, lawful public assembly. States have ample laws and resources to prosecute

276. *See id.*

277. *See id.* at 377–400 (offering several proposed amendments and reforms).

278. AM. L. INST., PRINCIPLES FOR INSURRECTION ACT REFORM 2–3 (2024), <https://static01.nyt.com/newsgraphics/documenttools/7754dbe9d2dd969a/1bdba8be-full.pdf> [<https://perma.cc/2QC5-UZUT>].

279. Federal–state jurisdiction over crime and the allocation of prosecutorial authority have long been the subjects of robust scholarly debate. *See, e.g.*, Rachel E. Barkow, *Federalism and Criminal Law: What the Feds Can Learn from the States*, 100 MICH. L. REV. 519 (2011).

280. *See* Recent Case, *United States v. Miselis*, 972 F.3d 518 (4th Cir. 2020), 134 HARV. L. REV. 2614, 2616 (2021).

281. *See* *United States v. Miselis*, 972 F.3d 518 (4th Cir. 2020); *United States v. Rundo*, 990 F.3d 709 (9th Cir. 2021); *see also* *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam) (holding that the First Amendment requires more than mere advocacy or encouragement of unlawful action for conviction).

individuals for vandalism, blocking highways, and other minor crimes. In such cases, there is no pressing need for federal intervention. The federal government “picks the cases it wishes to pursue.”²⁸² Federal prosecutors should exercise their ample discretion to leave such matters to states and localities.

Federal sedition charges raise special First Amendment concerns. Federal prosecutors charged some of the organizers of the January 6 Capitol insurrection with sedition. They obtained convictions for seditious conspiracy against members of the Proud Boys and others who led the effort to sack the Capitol. As the evidence showed, and the jury concluded, these individuals had gone beyond merely advocating interference with the lawful transfer of power or generally advocating violence.²⁸³ Rather, they had taken concrete steps toward interfering with the peaceful transfer of presidential power. These prosecutions show that in extraordinary cases, federal sedition charges may be warranted. However, the language of the sedition laws is broad enough to cover nonviolent conspiracies and even some minor criminal activities.²⁸⁴ Thus, prosecutors should exercise caution in bringing these charges in response to protest-related infractions. Some of the Supreme Court’s earliest free speech and press decisions upheld long prison terms for political dissidents who had objected to the war and conscription.²⁸⁵ Although the First Amendment now protects such communications, prosecutions for sedition still involve a risk of criminalizing political dissent. In fact, some sedition prosecutions have foundered because prosecutors relied on protected political expression.²⁸⁶ Given the threat to First Amendment rights, absent extraordinary circumstances, prosecutors should refrain from using sedition laws to prosecute protest-related violations.

Other federal interventions pose similar dangers for public protest. Congress has the power to protect interstate highways from obstruction and damage. However, pursuing federal felony charges against protesters under the Anti-Riot Act, the Civil Obeyance Act, or the Sedition Act opens a new front in the prosecution of protesters. Federal crimes with longer sentences and steeper fines may displace existing state and local offenses. Rather than facing misdemeanor charges for obstructing roadways or petty vandalism, protesters would face federal felony charges. As we know from their historical use, sedition charges raise a serious risk of punishing political expression.

282. Barkow, *supra* note 279, at 522.

283. *Court Sentences Two Oath Keepers Leaders on Seditious Conspiracy and Other Charges Related to U.S. Capitol Breach*, U.S. DEP’T OF JUST. (May 25, 2023), <https://www.justice.gov/opa/pr/court-sentences-two-oath-keepers-leaders-seditious-conspiracy-and-other-charges-related-us> [<https://perma.cc/TNZ5-XMSJ>].

284. *See* 18 U.S.C. § 2384.

285. *See, e.g., Schenck v. United States*, 249 U.S. 47 (1919) (upholding Espionage Act conviction for political pamphleteering). *See generally* STONE, *supra* note 72.

286. *See* Timothy Zick, *Seditious Conspiracy Charge Against Oath Keepers Founder and Others in Jan. 6 Riot Faces First Amendment Hurdle*, THE CONVERSATION (Jan. 14, 2022, 8:35 AM), <https://theconversation.com/seditious-conspiracy-charge-against-oath-keepers-founder-and-others-in-jan-6-riot-faces-first-amendment-hurdle-174958> [<https://perma.cc/P6XJ-J3ZL>].

In terms of federalization, congressional interventions also pose significant risks to local protest-related activity. Congress has the power to regulate interstate commerce and possesses the power of the purse. However, using those authorities to increase protest-related penalties or to pressure states to do so constitutes an unwarranted intervention. States, localities, and universities are generally able to respond to protest-related unrest without additional federal penalties. Moreover, there are existing constitutional and statutory means of requesting federal assistance should it be needed. Congressional proposals to increase penalties for blocking roadways, to defund educational institutions it does not believe have acted with sufficient force in response to campus protests, and to deport student protesters studying on visas will do little to quell civil unrest, but pose significant additional threats to free speech and civil disobedience.²⁸⁷

Finally, states, localities, and universities can actively resist some forms of protest-response federalization. Governors and other state officials can make clear, as some did during the BLM protests, that they do not need or want federal intervention in local protest policing. When they consider federal responses to local protests unduly repressive, officials can limit or eliminate cooperation agreements with federal law enforcement. Further, state and local officials can refuse to share data with federal authorities when they believe the information will be used to investigate protest organizations and individual protesters.²⁸⁸ Finally, although it can be quite difficult to do so, university leaders can resist federal entreaties to adopt the most punitive responses to student protest-related misconduct and campus protests.

The costs of federalizing the response to protest-related civil unrest far outweigh its benefits. Deploying U.S. military and National Guard troops as default protest policing units will worsen problems associated with aggressive and conflict-exacerbating protest policing. Federal charges for local protest-related crimes will sometimes threaten and chill political expression. Federalization ought to generally be reserved for circumstances where subnational actors indicate that they are overwhelmed and cannot maintain public order.

D. Repealing, Amending, or Narrowing Public Order Laws

Different categories of laws have been enacted and enforced to address protest-related civil unrest. One general category includes traditional public order laws—e.g., disorderly conduct, breach of peace, or failure to disperse—frequently enforced against public protesters. In addition, state legislatures have responded to recent protest-related civil unrest by enacting successive waves of anti-protest laws.²⁸⁹ Laws in both categories need to be repealed, amended, or narrowed to preserve protest rights.

An extensive body of state and local laws is regularly used to sanction protest-related offenses. Especially during declared emergencies, disorderly conduct and other public order laws have been the tool of choice for law enforcement

287. See discussion *supra* Subsection II.C.3.

288. See ACLU, TRUMP ON SURVEILLANCE, PROTEST, & FREE SPEECH: ABUSING EXECUTIVE POWER 3 (2024), https://assets.aclu.org/live/uploads/2024/07/Memo_Trump_FreeSpeech_FINAL_240710.pdf [<https://perma.cc/TJ87-CQMP>].

289. See *supra* Subsection II.C.3.

responding to protest-related civil unrest. When police engage in mass arrests, most protesters are charged with these offenses. As Justice Gorsuch observed in the context of a case involving a disruptive public protest:

History shows that governments sometimes seek to regulate our lives finely, acutely, thoroughly, and exhaustively. In our own time and place, criminal laws have grown so exuberantly and come to cover so much previously innocent conduct that *almost anyone can be arrested for something*. If the state could use these laws not for their intended purposes but to silence those with 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. The freedom to speak without risking arrest is “one of the principal characteristics by which we distinguish a free nation.”²⁹⁰

Commentators have identified many problems with existing public order criminal laws. As they have observed, such laws are often overbroad, vague, or suffer from other constitutional defects.²⁹¹ Rachel Moran has identified problems with public order laws that extend beyond the violation of First Amendment and other rights.²⁹² According to Moran, they also include harms from discriminatory enforcement of such laws against people of color and those with unpopular views and, more broadly, the exercise of social control over members of marginalized communities who are disparately harassed and jailed for these offenses.²⁹³ As Moran has noted, disorderly conduct laws “ensnare thousands of people in the criminal legal system each year,” waste taxpayer funds that could be better spent elsewhere, “traumatize people whose conduct caused very little harm,” and “exacerbate inequities for people already living on the margins of society.”²⁹⁴

John Inazu has leveled similar charges against “unlawful assembly” laws, which criminalize gathering with others for the purpose of committing an unlawful act.²⁹⁵ Inazu has argued that state laws defining unlawful assembly cede too much discretion to law enforcement to punish assemblies, even when there is no evidence of a plan to commit a violent act.²⁹⁶ Like Moran, Inazu has observed that some unlawful assembly laws constitute a form of “social control” owing to the threat of criminal prosecution of even non-violent and in some cases entirely lawful

290. *Nieves v. Bartlett*, 587 U.S. 391, 412–13 (2019) (Gorsuch, J., concurring in part and dissenting in part) (emphasis added) (quoting *Houston v. Hill*, 482 U.S. 451, 463 (1987)).

291. *See generally* Dan T. Coenen, *Freedom of Speech and the Criminal Law*, 97 B.U. L. REV. 1533 (2017).

292. Rachel Moran, *Doing Away with Disorderly Conduct*, 63 B.C. L. REV. 65 (2022).

293. *Id.* at 90–107.

294. *Id.* at 68. *See generally* Amber Baylor, *Unexceptional Protest*, 70 UCLA L. REV. 716 (2023) (arguing that anti-protest legislation affects marginalized communities in non-protest circumstances).

295. John Inazu, *Unlawful Assembly as Social Control*, 64 UCLA L. REV. 2 (2017).

296. *Id.* at 5.

assemblies.²⁹⁷ He has argued enforcement of these laws “stifles dissent, mutes expression, and ultimately weakens the democratic experiment.”²⁹⁸

Finally, Nick Robinson has criticized rioting and incitement to riot offenses.²⁹⁹ Like unlawful assembly and disorderly conduct laws, riot offenses sweep up protesters who may not themselves be engaged in any unlawful activity, while incitement to riot laws can be enforced against protesters who communicate provocative but constitutionally protected messages.³⁰⁰ Like other public order laws, riot and incitement to riot statutes are sufficiently discretionary to invite discriminatory abuses against certain racial and political groups. Further, as Robinson has observed, “A broad legal definition of rioting or incitement to riot has very real consequences, allowing the government to arrest, charge, and even convict protesters who are simply nonviolently demonstrating.”³⁰¹

As applied to protest activities, vague and discretionary public order laws pose special dangers to free speech and assembly. These laws make it difficult to identify content-based applications that violate the First Amendment, in part because they are broad enough to sweep in even entirely innocent conduct. Responding to these concerns, commentators have proposed that legislatures repeal or amend certain public order laws. Rachel Moran has proposed outright repeal of disorderly conduct laws.³⁰² On balance, Moran concludes that the costs of enforcement of disorderly conduct laws far outweigh the benefits.³⁰³ Robinson has similarly concluded that riot and incitement to riot offenses are unnecessary given that the underlying misconduct—violence by crowds—is already subject to criminal prohibition.³⁰⁴ He proposes repealing or tailoring these laws to limit their application to nonviolent conduct and civil disobedience.³⁰⁵ Inazu has similarly proposed that unlawful assembly laws be amended to apply only when there is proof of a plan to engage in forceful and violent lawbreaking that is likely to cause *imminent* and *severe* harm.³⁰⁶ By contrast, he has asserted that nonviolent forms of civil disobedience should not be prosecuted as “unlawful assembly,” though law enforcement can arrest lawbreakers after the fact.³⁰⁷ Under this approach, a group gathering near an intersection, for example, would not be subject to arrest for

297. *Id.* at 7.

298. *Id.* at 8–9.

299. Robinson, *supra* note 196.

300. *See id.* at 82 (discussing application of riot laws to nonviolent conduct and incendiary political rhetoric).

301. *Id.*

302. *See* Moran, *supra* note 292, at 66 (“Disorderly conduct laws cause more harm than good and should be abolished.”).

303. *Id.* at 121.

304. Robinson, *supra* note 196, at 81.

305. *Id.* at 83.

306. Inazu, *supra* note 295, at 9–10.

307. *Id.* at 10.

unlawful assembly, but participants could be punished in the event they obstructed passage.³⁰⁸

Politically, amendments that narrow or clarify public order laws, rather than outright repeal, appear to be the more viable path forward. Although there are significant concerns regarding abuse of disorderly conduct and other public order laws, including during protests, legislatures and officials are more likely to turn to amending these laws and reforming protest policing than outright repeal.

Unfortunately, rather than working in the direction proposed by Moran, Inazu, and others, many states have decided to *expand* the arsenal of laws applicable to protest-related misconduct and to broaden the definition of public order laws.³⁰⁹ Although existing public order laws are generally sufficient to respond to protest-related unrest, legislatures have provided law enforcement and prosecutors with additional bases for arresting public protesters. Unlike generally applicable public order laws, new protest-related enactments are a direct response to, and in many cases directly target, protest-related civil unrest. The newly enacted offenses frequently involve enhanced sanctions—for example, raising the offense from a misdemeanor to a felony and/or increasing fines.³¹⁰

As applied to protest activities, state protest-related laws represent an additional layer of criminal sanction—including for nonviolent acts of civil disobedience or, in some instances, simply being in the wrong place at the wrong time. Commentators’ objections to public order laws apply with equal and perhaps greater force to the recent waves of protest-related laws. Some protest-related laws have been drafted in broad terms that authorize law enforcement to effectively shut down public protests and arrest participants for even minor offenses. As one commentator observed, these laws can “thwart social change, drown out diverse voices, divert attention from the underlying issues protesters are aiming to address, and perpetuate the carceral state by ratcheting up punishment for individuals gathering to voice dissent.”³¹¹

States ought to resist the political urge to enact increasingly draconian protest-related laws. Ideally, they would repeal recently enacted expansions of “riot” and other offenses and enhanced penalties for nonviolent protest-related misconduct. At the least, legislatures should narrow their laws to reduce the possibility that prosecutors will enforce them against nonculpable protesters. If legislatures are not willing to do so, then courts ought to require appropriate narrowing. For example, in a recent decision, the Supreme Court of Florida held that Florida’s anti-riot statute—the Combatting Violence, Disorder, and Looting, and Law Enforcement Protection Act, enacted in 2021—cannot be enforced against a person who is present at a violent protest but neither engages in nor intends to assist

308. *Id.* Inazu also suggests, in the alternative, a “two-tier” system in which assemblies contemplating violence are subject to criminal liability while those contemplating only non-violent actions are subject to a civil fine. *Id.* at 51.

309. *See* discussion *supra* Subsection II.C.3.

310. *See* Freedman, *supra* note 19, at 176–77 (describing recent state “anti-protest” laws).

311. *Id.* at 179.

others in engaging in violent and disorderly conduct.³¹² This type of narrowing construction will help limit the unconstitutional applications of anti-rioting and similar protest-related laws. It will also provide some level of assurance to protest participants that they cannot be arrested and prosecuted merely for attending a protest where criminal activity occurs.

Narrowing the terms of riot, unlawful assembly, and other state protest-related laws is essential to preserving public protest rights. As John Inazu has noted, this will make it less likely that law enforcement will disperse participants “based on speculative concerns over insignificant damage.”³¹³ As he has stressed:

The exigency of an unlawful assembly means that the social control resulting from dispersals and arrests may often be more important to authorities than a successful prosecution. This concern is plausibly heightened when the purpose of the assembly is to protest the very authorities who have the power to order its dispersal.³¹⁴

Limiting the contexts that protest-related offenses can be charged removes a degree of discretion law enforcement has used to displace, contain, or suppress otherwise lawful and nonviolent assemblies. As Inazu has noted, narrowing these laws would not entail giving protesters license to commit violent or destructive acts.³¹⁵ However, it would protect “the First Amendment moments that can never be replicated”—nonviolent assemblies and protests cut short and silenced by application of “unlawful assembly” laws.³¹⁶

Narrowing such laws is a decidedly second-best solution to repeal. As important as narrowing constructions can be, as Justice Labarga observed in a concurring opinion in the recent Supreme Court of Florida decision, amending such laws will not resolve the problem of unwarranted arrests:

Practically speaking, consider an assembly where a violent public disturbance erupts, and where law enforcement is working to quell the disturbance and identify suspects. In the midst of such a fluid scenario, innocent individuals may be taken into custody only for things to be sorted later. At a minimum, this means that arrested individuals will be held in custody until first appearance. An arrest can carry significant implications, such as possibly affecting professional or educational pursuits. Because of such risks, it is likely that peaceful protestors will be reluctant to exercise their First Amendment freedoms of speech and assembly.³¹⁷

In addition, state laws that limit access to bail for offenders in protest-related cases exacerbate the harms associated with unlawful arrests. The chilling

312. DeSantis v. Dream Defs., 389 So. 3d 413, 424 (Fla. 2024).

313. Inazu, *supra* note 295, at 29.

314. *Id.* at 34.

315. *See id.* at 7 (“Our laws do not allow civil rights protesters to hurl glass bottles at police, antiwar protesters to break into government buildings, or labor protesters to assault replacement workers who cross the picket lines. These laws are good things.”).

316. *Id.* at 52.

317. *Dream Defs.*, 389 So. 3d at 426 n.13 (Labarga, J., concurring) (citation omitted).

effects of unlawful arrests are also especially acute for Black protesters, whom prosecutors have sometimes charged with the most serious offenses.³¹⁸

In sum, the combination of traditional public order and new anti-protest legislation creates a protest environment that is intolerably risky for those who want to organize, participate in, or even support demonstrations that could or do in fact become unlawful. Legislative repeal and/or amendment of these laws is an important aspect of reforming governmental responses to protest-related civil unrest.

E. Incorporating Penalty Sensitivity and Proportionality

How governments punish those who cause or are associated with civil unrest is critically important—not only to protest participants who bear the immediate consequences, but also to the character of free speech culture and the government’s own democratic legitimacy. Few would defend the imposition of severe sanctions, for instance 20-year imprisonment and hefty fines, for a protester who engaged in unlawful trespassing. No one—or *almost* no one—would advocate that law enforcement or National Guard troops shoot or otherwise physically harm protesters engaged in protest activity.

As discussed, recently enacted state laws provide for increased jail time and other sanctions for individuals who block a sidewalk or street or assemble with others in violation of broadly worded riot and unlawful assembly laws. State prosecutors have also charged protesters with more serious crimes, including domestic terrorism and racketeering. Further, as discussed earlier, federal prosecutors have brought felony charges against public protesters. These charges carry long sentences and substantial fines. Moreover, police have arrested student protesters for trespassing, and universities have subjected them to a host of additional sanctions in connection with their participation in campus protests.

An age-old adage asserts that “the punishment should fit the crime.”³¹⁹ Yet in the First Amendment context, courts and policymakers rarely consider the proportionality or severity of sanctions on expression, including protest-related speech and assembly. Scholars have expressly urged courts to do so. For example, Michael Coenen has advocated a “penalty-sensitive” approach that “treats the severity of a speaker’s punishment as relevant to the merits of his First Amendment claim.”³²⁰ The approach is not based on “the determination that a particular punishment is, as a policy matter, too harsh or too unfair” but rather “the determination that First Amendment priorities demand application of light penalties, trumping whatever policy considerations might otherwise counsel in favor of more exacting sanctions.”³²¹ As applied to public protest, courts applying penalty

318. See Neil MacFarquhar, *Why Charges Against Protesters Are Being Dismissed by the Thousands*, N.Y. TIMES, <https://www.nytimes.com/2020/11/19/us/protests-lawsuits-arrests.html> [<https://perma.cc/X2LG-ZDJY>] (Feb. 11, 2021) (noting that according to one study, “Black people constituted 53 percent of those arrested [during BLM protests in Louisville, Kentucky], but that they faced 69 percent of the felony charges”).

319. See *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575 n.24 (1996) (“The principle that punishment should fit the crime ‘is deeply rooted and frequently repeated in common-law jurisprudence.’” (quoting *Solem v. Helm*, 463 U.S. 277, 284 (1983))).

320. Coenen, *supra* note 41, at 994.

321. *Id.* at 1046.

sensitivity would generally take into account the constitutional value of expression, along with the government's interests in addressing civil unrest and deterring crime, when assessing the validity of penalties imposed for civil unrest. Application of penalty sensitivity would apply regardless of the *content* of the speech in question. In other words, judges and other officials would not weigh the importance or merits of specific subjects, ideas, or messages. Rather, they would assess penalties in light of broader concerns about their potential chilling and other negative effects on public expression.

Coenen claims a penalty-sensitive free speech approach serves beneficial purposes: "promoting fair judicial outcomes, mitigating chilling effects, 'preserving' unprotected speech, screening for improper government motives, and enhancing transparency."³²² As applied to public protest activity, penalty sensitivity would have three distinct benefits. First, as Coenen suggests, it would help "prevent the imposition of punishments that are marked by undue harshness when viewed in relation to the expressive value of the act in question."³²³ Second, "given that punishment severity contributes significantly to a law's deterrent effect, penalty-sensitive adjudication also can operate to combat chilling effects."³²⁴ Third, penalty-sensitive review can reveal invalid or improper governmental motives.³²⁵ If realized, these benefits would reduce the punitive chilling effects associated with increased sanctions and enhanced criminal charges.

As commentators have observed, civil disobedience and minor legal infractions committed in the context of public protests are hardly without expressive value.³²⁶ Penalty sensitivity would require that courts and officials take the First Amendment value of civil disobedience and other misconduct into account when considering appropriate sanctions. It would draw attention to the fact that state legislatures, reacting to public demonstrations, have piled on sanctions without factoring in or weighing First Amendment concerns. Courts would ask whether it is proportionate, for example, to elevate the mere blocking of a sidewalk to a felony offense, to deny public benefits to persons convicted of protest-related offenses, or to revoke the visas of students arrested for trespassing.

Commentators have applied penalty sensitivity analysis to public protest-related sanctions. Addressing the imposition of *civil* liability for nonviolent civil disobedience, Nick Robinson and Ellie Page have urged courts to apply a form of penalty sensitivity.³²⁷ Under their approach, protesters who engage in tortious conduct would not escape liability altogether. However, courts would limit the penalties or damages awarded based on the *actual harm* done.³²⁸ Similarly, Leslie Jacobs has argued against applying civil penalty enhancements to nonviolent civil disobedience, again to acknowledge the value of the speech and assembly inherent

322. *Id.* at 997.

323. *Id.* at 1031.

324. *Id.* at 1033.

325. *Id.* at 1039.

326. *See generally* Jacobs, *supra* note 97.

327. *See generally* Robinson & Page, *supra* note 37.

328. *See id.* at 236 (urging that "courts provide limited First Amendment protection to peaceful unlawful conduct connected with nonviolent assemblies").

in many acts of civil disobedience.³²⁹ While these analyses focus on the *civil* liability burdens imposed on public protest organizers and participants, they address problems of disproportionate sanctions and chilled speech and assembly that arise in the context of criminal charges.³³⁰

Although commentators have not yet analyzed it as such, *charging* sensitivity can also constitute a kind of penalty sensitivity. Overcharging can occur when a prosecutor elevates a misdemeanor offense to a felony.³³¹ Recently enacted protest-related laws, which enhance penalties for nonviolent protest-related misconduct, facilitate this sort of overcharging. Like over-sanctioning, overcharging may fail to consider the value of expressive activities along with the costs of civil unrest. It may also chill expression and conceal invalid motives.

The same problems may arise when prosecutors charge protesters for more serious crimes when lesser offenses are available and sufficient. In recent protest cases, prosecutors have proposed bringing or have charged offenses such as sedition, domestic terrorism, and racketeering. As discussed earlier, sedition and other federal charges are part of the federalization of the response to protest-related civil unrest. Faced with the prospect of 20 years in jail and substantial monetary fines for activities that could be charged as sedition or violation of the Anti-Riot Act, protest organizers and participants may decide that even being involved with a demonstration that *could* include violent elements or acts, the destruction of property, or obstruction of passage is simply not worth the risk. The fear that prosecutors will charge a protester with these federal offenses, along with the criminal and non-criminal repercussions that accompany such charges, may deter even lawful speech and assembly.³³²

Decisions by state prosecutors to charge protesters with domestic terrorism or racketeering rather than vandalism, refusing to disperse, or other lesser crimes are similarly problematic. These elevated charges raise concerns that prosecutors have charged protesters and activists based on their political views. Treating entire protest groups or movements as radicals or extremists is a disproportionate response to the civil unrest the government legitimately seeks to deter and punish. The message to those who would organize or attend a political demonstration could not be clearer: if you or anyone else associated with a demonstration engages in unlawful conduct, expect the government to reach for the highest-level offense and the harshest sentence available. Indeed, protesters can expect to be branded as “terrorists” or participants in a criminal enterprise.

Evidence exists that prosecutors engage in charge sensitivity in public protest cases. For example, prosecutors declined to pursue charges against thousands

329. Jacobs, *supra* note 97.

330. For an examination of the civil liability of protesters, see generally Timothy Zick, *The Costs of Dissent: Protest and Civil Liabilities*, 89 GEO. WASH. L. REV. 233 (2021).

331. See, e.g., Kyle Graham, *Overcharging*, 11 OHIO ST. J. CRIM. L. 701, 702 (2014).

332. See Schauer, *Fear*, *supra* note 36, at 694 (explaining the states of mind that can lead to chilling effects).

of people involved in the BLM demonstrations.³³³ Many of the declinations came after prosecutors concluded that those who had been arrested, often in law enforcement dragnets that threatened to overrun the court system, had not broken any laws and were engaged in lawful First Amendment activity.³³⁴ In other words, a significant number of arrests were the product of overly aggressive protest policing.³³⁵ The general pattern of arresting now, but dismissing charges later, is not new. Indeed, some have suggested that it is part of a law enforcement strategy to make mass arrests to paint even peaceful and lawful protests as a public menace.³³⁶

In Portland, Oregon, prosecutors declined to charge BLM protesters unless the offense included property damage, theft, or threats or use of force against another person.³³⁷ Prosecutors brought charges for arson and assaulting police officers—but not, it is worth noting, for “domestic terrorism.” Recognizing both the value of the expression and the interest in maintaining public order, Portland’s district attorney explained, “If we leverage the full force of the criminal justice system on individuals who are peacefully protesting and demanding to be heard, we will cause irreparable harm to them individually and to our society.”³³⁸ Similarly, although Texas law enforcement officers arrested nearly 80 students for trespassing in connection with a pro-Palestine encampment, county prosecutors later dismissed the charges.³³⁹ In addition to stating that the cases did not meet the requisite legal standard, the county attorney observed in a public statement: “We also have the responsibility to determine if pursuing any case is in the interest of justice, in the interest of public safety, and aligns with the values of this community.”³⁴⁰

Some critics have argued that these declinations are a sign of weakness or even a dereliction of duty.³⁴¹ However, refusing to bring the most serious charges against protesters charged with nonviolent offenses, while pursuing charges against more serious violators, is a sign that some prosecutors are considering not just the

333. See MacFarquhar, *supra* note 318.

334. *Id.*

335. See *id.* (“There was also the recognition that law enforcement officers often use mass arrests as a technique to help clear the streets, not to confront illegal behavior.”).

336. Tom Perkins, *Most Charges Against George Floyd Protesters Dropped, Analysis Shows*, THE GUARDIAN (Apr. 17, 2021, 8:00 AM), <https://www.theguardian.com/us-news/2021/apr/17/george-floyd-protesters-charges-citations-analysis> [https://perma.cc/R5LV-X7RG]

337. Madeline Holcombe, *Peaceful Portland Protesters Will Not Be Prosecuted to Avoid ‘Irreparable Harm,’ DA Announces*, CNN (Aug. 12, 2020, 6:25 AM), <https://www.cnn.com/2020/08/12/us/portland-protesters-prosecution-dropped/index.html> [https://perma.cc/BNF4-WEHS].

338. *Id.*

339. Lily Kepner & Christopher Cann, *Charges Dropped in Nearly 80 Arrests at University of Texas Protest of Israel War*, USA TODAY, <https://www.usatoday.com/story/news/nation/2024/06/27/pro-palestinian-protests-university-texas-charges-dropped/74230861007/> [https://perma.cc/5RCQ-R9DQ] (June 27, 2024, 12:56 PM).

340. *Id.*

341. Lora Ries & Zack Smith, *Portland’s Rogue DA in Inaction: 543 Cases of Injustice*, HERITAGE FOUND. (Oct. 16, 2020), <https://www.heritage.org/crime-and-justice/commentary/portlands-rogue-da-inaction-543-cases-injustice> [https://perma.cc/QAZ8-JKVA].

social costs of infraction but also the chilling effect on the right to demonstrate. In other words, preserving peaceable protest is a defensible reason to temper justice with mercy.

Penalty and charging sensitivity should be part of a reformed response to protest-related civil unrest. Legislatures should consider the First Amendment value of protest-related misconduct when adopting offenses, defining infractions, and determining penalties. In cases that affect First Amendment rights or involve nonviolent civil disobedience, prosecutors should engage in charge-sensitive decision-making. University leaders should, in all but the most serious cases, opt to rely on university codes of conduct rather than criminal arrests and prosecutions. Even under their own codes, which presumably are informed by a commitment to expressive rights, universities ought to consider the value of student activism when determining whether to expel student offenders or take other actions.

F. Preserving Campus Protest

University campuses have long been important venues for political discourse and cultural movements. Recent responses to protest-related unrest on campuses jeopardize not only individual First Amendment rights but a long tradition of campus activism.

We ought to assess recent responses to campus protest-related unrest with an understanding of the nature and central purposes of the university. The Supreme Court has recognized that universities are “vital centers for the Nation’s intellectual life” and has expressed special concern that individual thought and expression must not be chilled on campus.³⁴² As John Inazu has observed, “[A] central purpose, if not *the* central purpose, of the university is to be a place of facilitating disagreement across differences.”³⁴³ Preserving space for protest and dissent on campus is vitally important to teaching students what it means to engage in robust and uninhibited debate, and to “enact[ing] the aspirations of democratic governance.”³⁴⁴ If, as the Supreme Court has opined, America’s elementary and secondary schools are “the nurseries of democracy,” universities are part of an educational system that teaches, facilitates, and sustains democratic participation.³⁴⁵

Indeed, the tradition of campus protest has sparked significant social and political change. As John Kenneth Galbraith observed during the period of campus unrest relating to the Vietnam War:

It was the universities . . . which led the opposition to the Vietnam War, which forced the resignation of President Johnson, which are forcing the pace of our present withdrawal from Vietnam, which are leading the battle against the great corporations on the issue of pollution, and which at the last Congressional elections retired a score

342. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 836 (1995).

343. John Inazu, *The Purpose (and Limits) of the University*, 5 UTAH L. REV. 943, 947 (2018).

344. *Id.* at 950.

345. *Mahanoy Area Sch. Dist. v. B.L.*, 594 U.S. 180, 190 (2021).

or more of the more egregious time-servers, military sycophants and hawks.³⁴⁶

Given universities' missions, including their general support for the free exchange of ideas, it is unfortunate more university leaders did not turn, initially at least, to discourse and negotiation rather than more aggressive tactics: criminal arrests, use of tear gas and less-lethal weaponry, snipers, armored personnel carriers, and the like.³⁴⁷ As Keith Whittington has observed:

If universities are to be a space where ideas are held up to critical scrutiny and our best understanding of the truth is identified and professed, then dissenting voices must be tolerated rather than silenced, and disagreements must be resolved through the exercise of reason rather than the exercise of force.³⁴⁸

While the principle was directed at *students'* recent disruptions of offensive expression on campuses, Whittington's admonition should apply to *anyone* who would silence or censor campus expression by force—including university leaders.

Both the initial and subsequent responses to recent campus unrest highlight distinct threats to students' First Amendment rights and campus protest more generally.³⁴⁹ Responding to significant political, trustee, donor, and other pressures, many universities initially responded with aggressive tactics that may chill future campus protests. After the initial protests, universities adopted additional restrictions on campus protest-related activities.

University leaders face unique challenges when it comes to campus unrest. They must simultaneously protect free speech and assembly rights and ensure that students are not harassed or discriminated against based on race, national origin, ethnicity, and other protected characteristics. While balancing these interests and obligations, universities must respond to unrest that threatens to disrupt or interfere with their instructional and other functions.

University leaders should not respond to concerns about harassment and discrimination by broadly suppressing campus protests. Initial responses relied heavily on law enforcement to disperse and arrest student activists. In general, this approach brought to campus the same aggressive policing tactics that have escalated

346. John Kenneth Galbraith, *An Adult's Guide to New York, Washington and Other Exotic Places*, 4 NEW YORK 52, 52 (1971), quoted in Seymour Martin Lipset & Richard B. Dobson, *The Intellectual as Critic and Rebel: With Special Reference to the United States and the Soviet Union*, 101 DÆDALUS 137, 146 (1972).

347. See Eddie R. Cole, *Instead of Calling in Law Enforcement to Deal with Protesters, College Presidents Could Have Followed This Example*, TIME (June 4, 2024, 9:00 AM), <https://time.com/6984701/college-presidents-protest-history/> [<https://perma.cc/6RTC-WX7R>] (describing 1960s campus protests in which college presidents engaged in dialogue with activists).

348. KEITH E. WHITTINGTON, SPEAK FREELY: WHY UNIVERSITIES MUST DEFEND FREE SPEECH 7 (2018).

349. The First Amendment does not apply on *private* university campuses. However, private universities generally commit to protecting broad expressive rights and may be contractually and otherwise bound to respect the expressive rights of students, faculty, and staff.

violence and confrontation outside campus gates. Universities should instead consider relying on negotiation and management tactics and consider calling on law enforcement as a last resort or a response reserved for violent or more serious misconduct. We should never forget that the use of snipers and National Guard troops led to fatalities during the Vietnam War-protest era.³⁵⁰ In general, universities should respond to campus civil disobedience and other misconduct in ways that preserve expressive rights and values.

The subsequent backlash against campus protests raises additional First Amendment concerns. Universities can adopt and enforce content-neutral time, place, and manner regulations. That includes measures that ensure all students enjoy equal access to all campus facilities. Under settled Supreme Court precedent, bans on encampments and noise that disrupts classes are likely valid under the First Amendment.³⁵¹ However, other measures, including sharp restrictions on spontaneous protests, new limits on where and when protests can occur, masking bans or restrictions, and code of conduct provisions that single out certain phrases may well be invalid.³⁵² From a broader perspective, like new state anti-protest laws, recently adopted campus speech measures add to already-existing campus codes that place significant limits on protest.³⁵³ Whatever their individual validity, *cumulatively*, the measures may deter students and others from engaging in campus protests.

Title VI of the Civil Rights Act of 1964 imposes an obligation on universities receiving federal education funds to protect students from harassment and discrimination based on race, shared ancestry, and other characteristics. The Department of Education, universities, and courts should not interpret Title VI to mean that campus protests can, *as a general matter*, create a hostile learning environment.³⁵⁴ Provocative and sometimes derogatory expression is frequently part of robust public demonstrations. While universities can and should respond to

350. See generally Gregory P. Magarian, *Kent State and the Failure of First Amendment Law*, 65 WASH. U. J.L. & POL'Y 41 (2021).

351. See *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288 (1984) (upholding a federal ban on overnight camping in certain locations).

352. See generally ZICK, *supra* note 50, at 123–32 (discussing use of free speech zones and other campus protest restrictions). Some courts have invalidated mask prohibitions. See, e.g., *Am. Knights of the Ku Klux Klan v. City of Goshen*, 50 F. Supp. 2d 835 (1999) (N.D. Ind. 1999) (striking down a law banning mask wearing in public). University expulsions of student groups may also violate the First Amendment. See *Healy v. James*, 408 U.S. 169, 180 (1972) (holding expulsion of local Students for a Democratic Society chapter violated First Amendment).

353. See ZICK, *supra* note 50, at 117–42.

354. See Michael C. Dorf, *Federal Antidiscrimination Law Does Not Require Campus Crackdowns*, JUSTIA: VERDICT (Apr. 22, 2024) [hereinafter Dorf, *Federal Antidiscrimination Law*], <https://verdict.justia.com/2024/04/22/federal-antidiscrimination-law-does-not-require-campus-crackdowns> [https://perma.cc/MSJ3-XWV6]; Michael C. Dorf, *Free Speech Versus Antidiscrimination in the Scholarship of Eugene Volokh*, CONST. COMMENT. (forthcoming) (manuscript at 9–15) (Cornell Legal Studies Research Paper No. 24-12, 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4935040 [https://perma.cc/6WYC-GQMD] (addressing the intersection of Title VI and the First Amendment).

harassment and discrimination against students when it interferes with the opportunity to learn, they should take care not to suppress speech at campus protest events that communicates protected political dissent.³⁵⁵

As Justice William O. Douglas once wrote, “Without ferment of one kind or another, a college or university . . . becomes a useless appendage to a society which traditionally has reflected a spirit of rebellion.”³⁵⁶ Both initial and subsequent university responses to recent protest-related unrest threaten the democratic and other functions of campus activism.

G. Ensuring Response Neutrality

Finally, as discussed earlier, officials have not responded to all protest-related civil unrest with aggressive policing, legislative backlash, enhanced punishments, and federal interventions.³⁵⁷ As officials consider reforming their response to protest-related civil unrest, evidence that officials have not responded consistently or neutrally to such unrest must be considered and addressed.

Officials have an obligation to respond to protest-related civil unrest consistently. The First Amendment imposes a content-neutrality requirement on government officials and institutions, which prohibits adopting or enforcing laws based on protesters’ identities or messages. Even if government responses are not purposefully discriminatory, their legitimacy turns in part on the principle that laws and regulations apply equally to all who engage in public protest activity. Thus, when the responses to civil unrest associated with alt-right, public health, and insurrectionist protests differ from those that relate to environmental, racial justice, or other protests, it is important to assess governmental neutrality.³⁵⁸

Such disparities have led to concerns that governmental responses are partly attributable to the racial makeup or ideology of the demonstrators.³⁵⁹ Indeed, studies and anecdotal evidence suggest that officials have sometimes responded more harshly to protests based on the ideology or message of the demonstration.³⁶⁰

355. Dorf, *Federal Antidiscrimination Law*, *supra* note 354.

356. Healy, 408 U.S. at 197 (Douglas, J., concurring).

357. See *supra* Subsection II.C.5.

358. Joe Gould, *Trump Wants to Send Troops to the Inner Cities. A Top Senator Wants to Rein Him in*, POLITICO (Jan. 24, 2024, 3:08 PM), <https://www.politico.com/news/2024/01/24/trumpinsurrection-act-deploy-military-00137598> [<https://perma.cc/3J6P-AZPK>].

359. See WOOD, *supra* note 107, at 41–42 (“Police and intelligence agents are much more likely to label protesters from poor or racially marginalized communities, ideologically oriented protesters, and youthful protesters [as uncooperative and threatening].”).

360. See Heidi Reynolds-Stenson, *Protesting the Police: Anti-Police Brutality Claims as a Predictor of Police Repression of Protest*, 17 SOC. MOVEMENT STUD. 48, 49, 56–57 (2017) (concluding that police “respond to protests making anti-police brutality claims more aggressively than other protests”); Tim Craig, *Proud Boys and Black Lives Matter Activists Clashed in a Florida Suburb. Only One Side Was Charged*, WASH. POST (Feb. 4, 2021, 8:41 PM), https://www.washingtonpost.com/national/florida-protestbill-unequal-treatment/2021/02/01/415d1b02-6240-11eb-9061-07abcc1f9229_story.html [<https://perma.cc/HAW6-BVQV>] (describing clashes between BLM protesters and Proud Boys, where only BLM protesters were charged with “unreasonable noise”); Brittany Shammass et al., *None of*

Consider a recent example. On the UCLA campus, law enforcement officers stood down while violent counterdemonstrators attacked pro-Palestine demonstrators.³⁶¹ That kind of passivity, along with the ideological biases that may lie behind it, undermines First Amendment rights and raises concerns about neutral application of protest-related laws. Officials have an obligation to protect protesters from hostile audiences and to be prepared to address protest-related civil unrest. Those obligations apply, again, regardless of identity or message.

Some would attribute more aggressive law enforcement responses solely to ideological biases. While, as noted, there is evidence for disparate responses on this basis, each protest may also present unique factors. Thus, anomalous responses to the Charlottesville “Unite the Right” rallies, January 6 Capitol insurrection, and pandemic-related protests may have been but were not *necessarily* the result of law enforcement bias or discrimination based on the content or ideology of the protests. For example, the disparate response to pandemic-related demonstrations may relate to the fact they were smaller, less disruptive, or included fewer instances of unlawful conduct than other mass protest events. Perhaps the initially muted response to the January 6 Capitol insurrection was the result of complicated security protocols or confusion as to who was responsible for responding to protest-related civil unrest. Charlottesville authorities may have anticipated unrest but lacked the weapons or other resources to adequately respond to the “Unite the Right” rallies, or they may have made various tactical errors. Michigan authorities confronted with armed protests at the legislature were constrained by state law broadly allowing public carry of firearms.³⁶² This is not to downplay the significant danger that official responses to protest events are ideologically biased. We should be having a transparent and honest discussion about that very possibility. At the same time, we should be careful to draw conclusions based on facts and data rather than assumptions about the motives of law enforcement.

Insisting on neutrality and consistency is not an argument for leveling up the official response to protest-related civil unrest—for example, by responding to all protests with aggression and backlash legislation. As discussed, governments and officials should level *down* their responses in various respects. They should do so without regard to the identity or ideology of protesters.

CONCLUSION

Broadly speaking, how governments and leaders conceptualize and respond to protest-related civil unrest provides an index of their respect for

the Cuba Protestors Who Closed Miami Highway Cited Under GOP-Backed Anti-Rioting Law, WASH. POST (July 14, 2021, 10:54 PM), <https://www.washingtonpost.com/nation/2021/07/14/cuba-protest-florida-anti-rioting-law> [https://perma.cc/6M5M-YBB8] (describing concerns of discriminatory use of Florida’s new anti-riot law).

361. See Jon Swaine et al., *Despite Warnings of Violence at UCLA, Police Didn’t Step in for over 3 Hours*, WASH. POST (May 11, 2024), <https://www.washingtonpost.com/investigations/2024/05/11/ucla-protests-police-inaction-fights/> [https://perma.cc/8LC9-M5ZY].

362. See Ivan Pereira, *Michigan Bans Open Carry Guns from Statehouse*, ABC NEWS (Jan. 11, 2021, 1:37 PM), <https://abcnews.go.com/US/michigan-bans-open-carry-guns-statehouse/story?id=75181901> [https://perma.cc/54NH-FNSV].

expressive rights and democratic norms. The United States has entered a dangerous period where protest is increasingly considered a form of civil unrest to which officials must respond with aggression and repression.

Protest-related civil unrest is real, and it comes in many variations. Officials must impose significant sanctions on those who commit violent criminal acts and organize or participate in insurrections. However, aggressive protest policing, the proliferation of protest-related sanctions, the bringing of augmented or higher-level charges against protesters, the federalization of responses to local public unrest, and other measures jeopardize even peaceful protests and acts of civil disobedience. The lack of restraint and proportionality suggests not so much a plan to respond to public disorder as a desire to crack down on, and even delegitimize, public protest. By contrast, when governments fail to respond or respond passively to some protest-related civil unrest, they imperil First Amendment rights and raise serious questions about their neutrality.

Various measures would prevent or limit the negative effects of this form of democratic backsliding. They include clarifying and limiting governments' emergency authority during protest-related civil unrest, reforming protest policing, limiting federal executive and legislative interventions in local protest, repealing or narrowing state public order and anti-protest laws, ensuring that penalties and charges for protest-related misconduct are proportionate, and ensuring consistent and equitable protest policing. Failure to address these matters imperils First Amendment rights and makes it more difficult for citizens to hold their government accountable—a defining feature of a healthy democracy.