DOING AWAY WITH DISORDERLY CONDUCT

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INTRODUCTION

Disorderly conduct laws cause more harm than good and should be abolished. All fifty states and many municipalities have disorderly conduct laws that criminalize a wide swath of poorly defined activities including engaging in "offensive" conduct or speech,[1] using "opprobrious" language,[2] acting in a "tumultuous" manner,[3] making "unreasonable noise,"[4] corrupting the public morals,[5] impeding another person for the purpose of soliciting alms,[6] "recklessly creat[ing] a hazardous condition,"[7] and even keeping a disorderly house.[8] Many of these laws have been in effect for decades, and both courts and scholars recognize their flaws. Courts have declared these statutes unconstitutional or construed them narrowly to avoid proscribing constitutional conduct.[9] Scholars have warned that these laws create adverse consequences disproportionate to the minor misbehaviors they condemn.[10] Advocates have issued reports warning that police employ these laws to surveil and criminalize politically unpopular people, including racial and religious minorities.[11] But none have explicitly called for abolition, and law enforcement still utilize these laws to charge and prosecute hundreds of thousands of people every year.[12]

It is time to acknowledge that these laws cannot—or should not—be saved. The past decade, as Alexandra Natapoff has noted, "has seen a deepening public and scholarly reckoning with the extraordinary human costs of the American carceral state" and its consequent physical, psychological, and economic harms.[13] Amidst a growing national

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[1] Conn. Gen. Stat. Ann. § 53a-181(a)(1).
[2] Ga. Code Ann. § 16-11-39(a)(3).
[3] N.J. Stat. Ann. § 2C:33-2(a)(1).
[4] Ala. Code § 13A-11-7(a)(2).
[5] Fla. Stat. Ann. § 877.03.
[6] Haw. Rev. Stat. Ann. § 711-1101(1)(e).
[7] Alaska Stat. Ann. § 11.61.110(a)(6).
[8] Mass. Gen. Laws Ann. ch 272, § 53(a).
[9] *See infra*, Part I.
[10] Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1316 (2012); Jenny Roberts, *Crashing the Misdemeanor System*, 70 WASH. & LEE L. REV. 1089, 1090 (2013).
[11] *See, e.g.*, INDEP. COMM'N ON N.Y.C. CRIMINAL JUSTICE & INCARCERATION REFORM, A MORE JUST NEW YORK CITY 37 (2017), https://perma.cc/MJN6-472Z; CTR. FOR CONSTITUTIONAL RIGHTS, STOP AND FRISK: THE HUMAN IMPACT 11-12, 14 (2012), http:// stopandfrisk.org/the-human-impact-report.pdf; *see also* Part III.A., *infra*.
[12] *See* 2018 CRIME IN THE UNITED STATES: TABLE 43, Federal Bureau of Investigations, Uniform Crime Reporting, https://ucr.fbi.gov/crime-in-the-u.s/2018/crime-in-the-u.s.-2018/tables/table-43 (reporting approximately 249,000 arrests for disorderly conduct in 2018, a statistic which does not include citations issued without arrest).
[13] Alexandra Natapoff, Atwater *and the Misdemeanor Carceral State*, 133 HARV. L. REV. F. 147, 148 (2020).

reckoning over the crisis of abusive and discriminatory policing and the criminal laws that enable these harms, disorderly conduct laws should be some of the first to go. Yet, as Jamelia Morgan acknowledged in *Rethinking Disorderly Conduct*, "[L]egal scholars critiquing disorder have largely accepted disorder as within the community's interest and prerogative to regulate."[14]

Much of the so-called disorder these laws criminalize is not within the community's prerogative to regulate, in that many disorderly conduct laws punish speech and conduct that the First Amendment protects.[15] But even when the laws are constitutional, they are not beneficial. The broad language of disorderly conduct laws—which empower law enforcement to charge and prosecute conduct as minor as playing one's music too loudly[16] or lingering with friends on the sidewalk after police decide it is time to leave[17]—serves as a rubber stamp for law enforcement control of and retaliation against people they deem suspicious. The laws ensnare thousands of people in the criminal legal system each year, resulting in arrest records, fines, and convictions that adversely affect ability to obtain or maintain housing, jobs, and legal status in the country.[18] They exhaust taxpayer money that could be spent on education or social programs. They traumatize people whose conduct caused very little harm. They exacerbate inequities for people already living on the margins of society.

Scholars, practitioners, and even politicians increasingly agree that the United States suffers from an "overcriminalization" problem in that it punishes criminal conduct too severely, resulting in excessive prison terms and the highest incarceration rate per capita in the world.[19] But overcriminalization is not limited to excessive sentences: it also involves labeling too much conduct as criminal. Some criminal punishments are unjust not because they involve lengthy prison terms, but because they "are inflicted for conduct that should not have been criminalized at all."[20] Disorderly conduct laws fit within this category. They are not the only laws that legislatures should consider eliminating; others

[14] Jamelia Morgan, *Rethinking Disorderly Conduct*, 109 CAL. L. REV. __ (forthcoming 2021), *45.
[15] *Infra*, Part II.
[16] Mo. Ann. Stat. § 574.010(1)(a).
[17] Md. Code. Ann., Crim. Law § 10-201(c)(3).
[18] *See supra* n. 12 (U.S. law enforcement made approximately 249,000 arrests for disorderly conduct in 2018); *infra* Part III.C.
[19] *See* Stephen F. Smith, *Overcoming Overcriminalization*, 102 J. CRIM. L. & CRIMINOLOGY 537, 565 (2012); Megan Stevenson & Sandra Mayson, *The Scale of Misdemeanor Justice*, 98 B.U. L. REV. 731, 766 (2018); Anthony Bradley, ENDING OVERCRIMINALIZATION AND MASS INCARCERATION: HOPE FROM CIVIL SOCIETY (2018); U.S. Dept. of Justice Bureau of Justice Statistics, *Prisoners in 2017* (Apr. 2019), https://www.bjs.gov/content/pub/pdf/p17_sum.pdf; The Sentencing Project, *New Prison and Jail Population Figures Released by U.S. Department of Justice* (Apr. 2019), https://www.sentencingproject.org/news/new-prison-jail-population-figures-released-u-s-department-justice/ ("The United States remains as the world leader in its rate of incarceration, locking up its citizens at 5-10 times the rate of other industrialized nations"); Lauren-Brooke Eisen & Inimai Chettiar, *39% of Prisoners Should Not Be in Prison*, TIME, Dec. 9, 2016, https://time.com/4596081/incarceration-report/.
[20] Douglas Husak, OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW 3 (2008).

have expressed concern for the overcriminalization of drug possession,[21] speech,[22] and misdemeanors generally.[23] But disorderly conduct laws are both constitutionally and socially problematic to a degree few other criminal laws achieve.

This article's call for abolition of disorderly conduct laws speaks both to the overcriminalization conversation and to the ongoing debate about policing abuses and reform. Eric Miller has argued, and this author agrees, that one of the central questions for policing in modern society is "the limits of the authority of the police to interfere with the public."[24] This has been perhaps nowhere more true than in my own city of Minneapolis. In the months since George Floyd's death under the knees of Minneapolis police[25] both Minneapolis and neighboring St. Paul have grappled publicly and painfully with how and when to enforce minor law violations like crimes of disorder.[26] Declining to police disorder can be uncomfortable, especially for those who benefit from traditional notions of order. But if we are to seriously address the twin problems of overcriminalization and abusive policing, we must consider uncomfortable steps.

While ultimately calling for elimination of disorderly conduct laws, this article also wrestles with the concerns of those who defend such laws. The article is divided into five parts. Part I provides an overview of state and municipal disorderly conduct laws, explaining the wide variety of speech and behavior that these laws penalize. Part I also offers a brief history of the development of these laws, spanning from their early enactment in the nineteenth century to increasingly enthusiastic enforcement through the twenty-first century.

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[21] *E.g.*, Stevenson & Mayson, *The Scale of Misdemeanor Justice*, *supra* n. 19 at 767 (noting the movement in recent years toward decriminalizing marijuana possession).

[22] *E.g.*, Michal Buchhandler-Raphael, *Overcriminalizing Speech*, 36 CARDOZO L. REV. 1667 (2015) (critiquing statutes that criminalize potentially constitutional speech).

[23] *E.g.*, Natapoff, Atwater *and the Misdemeanor Carceral State*, *supra* n. 13 at 152 (suggesting that misdemeanors "offer an especially fertile space to grapple with abolitionist ideas.").

[24] Eric Miller, THE POLICE AS CIVIC NEIGHBORS ch. 5.1 (The Cambridge Handbook of Policing in the United States, 2019).

[25] Josh Campbell, Sara Sidner & Eric Levenson, *All Four Former Officers Involved in George Floyd's Killing Now Face Charges*, CNN, Jun. 4, 2020, https://www.cnn.com/2020/06/03/us/george-floyd-officers-charges/index.html. Four police officers have been charged with murdering Mr. Floyd and are scheduled to stand trial in 2021. *Id.*; *see also* Tommy Wiita & Callan Gray, *2 Trials in George Floyd Case: Chauvin Trial in March, 3 Other Former Officers in Late Summer*, KSTP News, Jan. 12, 2021, https://kstp.com/news/george-floyd-case-two-trials-derek-chauvin-march-thomas-lane-alexander-kueng-tou-thao-august-2021/5975132/.

[26] *See* Miguel Otárola & Paul Welsh, *Minneapolis Park Board Votes to End Relationship with Minneapolis Police, Differentiate Uniforms*, STAR TRIB., Jun. 4, 2020, https://www.startribune.com/park-board-votes-unanimously-to-end-working-with-police-in-minneapolis/570982312/?refresh=true (Minneapolis Park Board deciding to sever its relationship with Minneapolis Police Department); Caitlin Dickerson, *A Minneapolis Neighborhood Vowed to Check Its Privilege. It's Already Being Tested*, NY TIMES, Jun. 24, 2020, https://www.nytimes.com/2020/06/24/us/minneapolis-george-floyd-police.html; Mara Gottfried, *Fewer Police in St. Paul? Not Enough? People Who Wrote to Mayor, City Council Were Deeply Divided*, ST. PAUL PIO. PRESS, Dec. 13, 2020, https://www.wctrib.com/news/crime-and-courts/6799960-Fewer-police-in-St.-Paul-Not-enough-People-who-wrote-to-mayor-City-Council-were-deeply-divided (St. Paul residents expressing divide about law enforcement response to disorder in public parks).

Part II addresses the constitutional flaws of disorderly conduct laws. Part II begins by discussing the facial invalidity of many disorderly conduct laws, and the numerous judicial decisions that have either declared such laws unconstitutional or construed them more narrowly than their text to avoid implicating constitutional rights. Part II then segues into discussing unconstitutional enforcement: even when the laws themselves pass constitutional muster, law enforcement officials frequently apply them in an unconstitutional way.

After dissecting the constitutional ailments of disorderly conduct laws, Part III turns to the non-constitutional harms these laws enable. Part III describes how the broad language of disorderly conduct laws—even if constitutional—authorize law enforcement abuses, facilitate discrimination against people who society deems undesirable, alienate communities of color, saddle defendants with devastating collateral consequences, and waste taxpayer money.

Part IV responds to the proponents of disorderly conduct laws, acknowledging the main arguments in favor of such laws and explaining why these arguments do not justify the existence or enforcement of disorderly conduct laws. The article culminates in Part V with a call for abolition of disorderly conduct laws.

I. Overview of disorderly conduct laws

A. Survey of modern disorderly conduct laws

All fifty states have disorderly conduct laws,[27] as do many municipalities.[28] These laws criminalize[29] a vast array of behavior encompassing both speech and conduct. The laws

[27] Ala. Code § 13A-11-7; Alaska Stat. Ann. § 11.61.110; Ariz. Rev. Stat. Ann. § 13-2904; Ark. Code Ann. § 5-71-207; Cal. Penal Code § 647; Colo. Rev. Stat. Ann. § 18-9-106; Conn. Gen. Stat. Ann. § 53a-181; Del. Code Ann. tit. 11, § 1301; D.C. Code Ann. § 22-1321; Fla. Stat. Ann. § 877.03; Ga. Code Ann. § 16-11-39; Haw. Rev. Stat. Ann. § 711-1101; Idaho Code Ann. § 18-6409; 720 Ill. Comp. Stat. Ann. 5/26-1; Ind. Code Ann. § 35-45-1-3; Iowa Code Ann. § 723.4; Kan. Stat. Ann. § 21-6203; Ky. Rev. Stat. Ann. § 525.060; La. Stat. Ann. § 14:103; Me. Rev. Stat. tit. 17-A, § 501-A; Md. Code. Ann., Crim. Law § 10-201 ; Mass. Gen. Laws Ann. ch 272, § 53 ; Mich. Comp. Laws § 750.167; Minn. Stat. Ann. § 609.72; Miss. Code Ann. § 97-35-7; Mo. Ann. Stat. § 574.010; Mont. Code Ann. § 45-8-101; Neb. Rev. Stat. Ann § 28-1322; Nev. Rev. Stat. Ann. § 269.215; N.H. Rev. Stat. Ann. § 644:2; N.J. Stat. Ann. § 2C:33-2; N.M. Stat. Ann. § 30-20-1; N.Y. Penal Law § 240.20; N.C. Gen. Stat. Ann. § 14-132; N.D. Cent. Code Ann. § 12.1-31-01; Ohio Rev. Code Ann. § 2917.11; Okla. Stat. Ann. tit. 21, § 1362; Or. Rev. Stat. § 166.023; Or. Rev. Stat. § 166.025; 18 Pa. Cons. Stat. § 5503; 11 R.I. Gen. Laws Ann. § 11-45-1; S.C. Code Ann. § 16-17-530; S.D. Codified Laws 22-18-35; Tenn. Code Ann. § 39-17-305; Tex. Penal Code Ann. § 42.01; Utah Code Ann. § 76-9-102; Vt. Stat. Ann. tit. 13, § 1026; Va. Code Ann. § 18.2-415; Wash. Rev. Code Ann. § 9A.84.030; W.Va. Code Ann. 61-6-1b; Wis. Stat. Ann. § 947.01; Wyo. Stat. Ann. § 6-6-102.

[28] *E.g.*, Seattle Muni. Code 12A.12.010; Minn. Muni. Code 385.90; Atl. Code of Ord. § 106-81; Sioux City, IA Muni. Code 8.08.010; Medford, OR Muni. Code 5.120; Omaha, NE Muni Code Art III, Sec. 20-42.

[29] Disorderly conduct is a misdemeanor in most states. Ala. Code § 13A-11-7(b); Alaska Stat. Ann. § 11.61.110(c); Ariz. Rev. Stat. Ann. § 13-2904(b); Ark. Code Ann. § 5-71-207(b); Cal. Penal Code § 647; Conn. Gen. Stat. Ann. § 53a-181(b); D.C. Code Ann. § 22-1321(h); Del. Code Ann. tit. 11, § 1301; Fla. Stat. Ann. § 877.03; Ga. Code Ann. § 16-11-39(b); Idaho Code Ann. § 18-6409; 720 Ill. Comp. Stat. Ann. 5/26-1(b); Ind. Code Ann. § 35-45-1-3(a); Iowa Code Ann. § 723.4; Kan. Stat. Ann. § 21-6203(b); La. Stat. Ann. § 14:103(b); Md. Code. Ann., Crim. Law § 10-201(d); Minn. Stat. Ann. § 609.72 subd. 1; Miss. Code Ann. § 97-35-7(2); Mo. Ann. Stat. § 574.010.2; Neb. Rev. Stat. Ann § 28-1322(2); Nev. Rev. Stat. Ann. § 203.010; N.C. Gen. Stat. Ann. § 14-288.4(b); N.D. Cent. Code Ann.

are so broad that it is often difficult to decipher exactly what speech or behaviors they prohibit. Florida's disorderly conduct law, for example, states that people are guilty of disorderly conduct if they:

> commit[] such acts as are of a nature to corrupt the public morals, or outrage the sense of public decency, or affect the peace and quiet of persons who may witness them, or engage[] in brawling or fighting, or engage[] in such conduct as to constitute a breach of the peace or disorderly conduct.[30]

Georgia's disorderly conduct statute makes Florida's seem downright precise. In Georgia, one commits disorderly conduct when one:

> Without provocation, uses to or of another person in such other person's presence, opprobrious or abusive words which by their very utterance tend to incite to an immediate breach of the peace, that is to say, words which as a matter of common knowledge and under ordinary circumstances will, when used to or of another person in such other person's presence, naturally tend to provoke violent resentment, that is, words commonly called 'fighting words'; [or] Without provocation, uses obscene and vulgar or profane language in the presence of or by telephone to a person under the age of 14 years which threatens an immediate breach of the peace.[31]

In Alaska, people are guilty of disorderly conduct if they engage in any of a long list of prohibited behaviors including: making "unreasonably loud noise" with reckless disregard of the effect that noise may have on others; refusing to comply with a peace officer's lawful order to disperse; challenging someone else to fight in public or private (even if no one accepts the challenge); or recklessly creating a "hazardous condition for others by an act which has no legal justification or excuse."[32]

§ 12.1-31-01; Ohio Rev. Code Ann. § 2917.11(E); Okla. Stat. Ann. tit. 21, § 1362; Or. Rev. Stat. § 166.023(2)(a); 11 R.I. Gen. Laws Ann. § 11-45-1(c); S.C. Code Ann. § 16-17-530(A); S.D. Codified Laws § 22-18-35; Tenn. Code Ann. § 39-17-305; Tex. Penal Code Ann. § 42.01(d); Vt. Stat. Ann. tit. 13, § 1026(b); Va. Code Ann. § 18.2-415; Wash. Rev. Code Ann. § 9A.84.030(2); W. Va. Code Ann. § 61-6-1b(a); Wis. Stat. Ann. § 947.01(1); Wyo. Stat. Ann. § 6-6-102. It is a petty misdemeanor or violation in a much smaller number of states. Colo. Rev. Stat. Ann. § 18-9-106(3) (petty offense in certain circumstances, misdemeanor in others); Haw. Rev. Stat. Ann. § 711-1101(3); Mass. Gen. Laws Ann. ch 272, § 53 (first offense is a petty offense; second or subsequent punishable by incarceration); Mont. Code Ann. § 45-8-101(2)(a) (petty misdemeanor for first offense); N.H. Rev. Stat. Ann. § 644:2 (misdemeanor if offense continues; otherwise infraction); N.J. Stat. Ann. § 2C:33-2; N.M. Stat. Ann. § 30-20-1; N.Y. Penal Law § 240.20; 18 Pa. Cons. Stat. § 5503(b) (misdemeanor under certain conditions, otherwise summary offense); Utah Code Ann. § 76-9-102(4) (misdemeanor if offense continues; otherwise infraction).

[30] Fla. Stat. Ann. § 877.03.

[31] Ga. Code Ann. § 16-11-39(a)(3)-(4).

[32] Alaska Stat. Ann. § 11.61.110.

Californians run the risk of committing disorderly conduct if they are intoxicated in a public place,[33] or if they "while loitering, prowling, or wandering upon the private property of another, at any time, peek[] in the door or window of any inhabited building or structure, without visible or lawful business with the owner or occupant."[34] In Washington, D.C., people commit disorderly conduct if they "stealthily" look into the window of a dwelling "under circumstances in which an occupant would have a reasonable expectation of privacy"—even if the dwelling is unoccupied at the time of the stealthy look.[35] Washingtonians may also commit disorderly conduct if they "jostl[e] against" or "unnecessarily crowd" another person "under circumstances whereby a breach of the peace may be occasioned."[36]

The list of offenses that constitute disorderly conduct goes on. Louisiana prohibits "engaging in a fistic encounter."[37] Michiganders are guilty of disorderly conduct if they loiter in houses where lewdness is encouraged.[38] New Mexico's definition of disorderly conduct includes intentionally touching someone else's house "in an insolent manner."[39] In Atlanta, one can be guilty of disorderly conduct by "forc[ing] oneself upon the company of another."[40] Maryland—perhaps weary of attempting to define disorderly conduct at all—simply prohibits people from "willfully act[ing] in a disorderly manner that disturbs the public peace."[41]

Though some of these laws contain absurdly specific provisions (how, exactly, does one touch a house in an insolent manner?[42]), a study of all fifty states' disorderly conduct laws also reveals many common themes. More than half of all states' disorderly conduct laws criminalize speech, with no accompanying conduct requirement.[43] Alabama's disorderly conduct statute, for example, criminalizes "abusive" speech in a public place.[44] Montana's prohibits profane language.[45] Arkansas bans "abusive or obscene language, or

[33] Cal. Penal Code § 647(f); *see also* La. Stat. Ann. § 14:103(A)(3) (barring "appearing in an intoxicated condition"); Ohio Rev. Code Ann. § 2917.11(B)(1) (prohibiting annoying behavior while intoxicated).
[34] Cal. Penal Code § 647(i).
[35] D.C. Code Ann. § 22-1321(f).
[36] D.C. Code Ann. § 22-1321(g).
[37] La. Stat. Ann. § 14:103(A)(1).
[38] Mich. Comp. Laws § 750.167(1)(i).
[39] N.M. Stat. Ann. § 30-20-1(B).
[40] Atl. Code of Ord. § 106-81(12).
[41] Md. Code. Ann., Crim. Law § 10-201(c)(2); *see also* S.C. Code Ann. § 16-17-530(A)(1) (prohibiting conducting oneself "in a disorderly or boisterous manner").
[42] N.M. Stat. Ann. § 30-20-1(B).
[43] *See, e.g.*, Ala. Code § 13A-11-7(a)(3); Ark. Code Ann. § 5-71-207(a)(3); Conn. Gen. Stat. Ann. § 53a-181(a)(3), (5); Del. Code Ann. tit. 11, § 1301(1)b; Ga. Code Ann. § 16-11-39(a)(3)-(4); Haw. Rev. Stat. Ann. § 711-1101(1)(c); Idaho Code Ann. § 18-6409(1); Iowa Code Ann. § 723.4.3; Kan. Stat. Ann. § 21-6203(a)(3); La. Stat. Ann. § 14:103(A)(2); Me. Rev. Stat. tit. 17-A, § 501-A(1)(b); Minn. Stat. Ann. § 609.72, subd. 1(3); Mont. Code Ann. § 45-8-101(1)(a)(iii); N.H. Rev. Stat. Ann. § 644:2(II)(b); N.J. Stat. Ann. § 2C:33-2(b); N.Y. Penal Law § 240.20(3); N.C. Gen. Stat. Ann. § 14-288.4(a)(2); N.D. Cent. Code Ann. § 12.1-31-01(1)(c); Ohio Rev. Code Ann. § 2917.11(A)(2)-(3); Okla. Stat. Ann. tit. 21, § 1362; 18 Pa. Cons. Stat. § 5503(a)(3); 11 R.I. Gen. Laws Ann. § 11-45-1(a)(3); Tex. Penal Code Ann. § 42.01(a)(1); Vt. Stat. Ann. tit. 13, § 1026(a)(3); Wis. Stat. Ann. § 947.01(1); Wyo. Stat. Ann. § 6-6-102(a).
[44] Ala. Code § 13A-11-7(a)(3).
[45] Mont. Code Ann. § 45-8-101(1)(a)(iii).

. . . an obscene gesture, in a manner likely to provoke a violent or disorderly response."[46] Connecticut bars people from even threatening to commit "any crime against another person or such other person's property."[47] Louisiana criminalizes "[a]ddressing any offensive, derisive, or annoying words to any other person who is lawfully in any street, or other public place; or call[ing] him by any offensive or derisive name, or mak[ing] any noise or exclamation in his presence and hearing with the intent to deride, offend, or annoy him."[48]

More than half of state disorderly conduct laws also encompass unreasonable noise.[49] Approximately the same number ban creating "hazardous conditions" or the like.[50] Many disorderly conduct laws bar "tumultuous" behavior.[51] Several state disorderly conduct laws prohibit behavior related to asking for money.[52]

New York's disorderly conduct statute is a standard example of a disorderly conduct law containing prohibitions that many of the other states share:

> A person is guilty of disorderly conduct when, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof:
> 1. He engages in fighting or in violent, tumultuous or threatening behavior; or
> 2. He makes unreasonable noise; or
> 3. In a public place, he uses abusive or obscene language, or makes an obscene gesture; or
> 4. Without lawful authority, he disturbs any lawful assembly or meeting of persons; or
> 5. He obstructs vehicular or pedestrian traffic; or

[46] Ark. Code Ann. § 5-71-207(a)(3).
[47] Conn. Gen. Stat. Ann. § 53a-181(a)(3), (5).
[48] La. Stat. Ann. § 14:103(A)(2); Wyo. Stat. Ann. § 6-6-102(a).
[49] Ala. Code § 13A-11-7(a)(1); Alaska Stat. Ann. § 11.61.110(a)(1); Ark. Code Ann. § 5-71-207(a)(2); Colo. Rev. Stat. Ann. § 18-9-106(1)(c); Del. Code Ann. tit. 11, § 1301(1)b; D.C. Code Ann. § 22-1321(d); Haw. Rev. Stat. Ann. § 711-1101(1)(b); Idaho Code Ann. § 18-6409(1); Ind. Code Ann. § 35-45-1-3(a)(2); Iowa Code Ann. § 723.4.2; Ky. Rev. Stat. Ann. § 525.060(1)(b); Me. Rev. Stat. tit. 17-A, § 501-A(1)(A)(1); Md. Code. Ann., Crim. Law § 10-201(c)(4)(i); Mo. Ann. Stat. § 574.010(1)(1)(a); Mont. Code Ann. § 45-8-101(1)(a)(ii); Nev. Rev. Stat. Ann. § 203.010; N.H. Rev. Stat. Ann. § 644:2(III)(a); N.Y. Penal Law § 240.20(2); N.D. Cent. Code Ann. § 12.1-31-01(1)(b); Ohio Rev. Code Ann. § 2917.11(A)(2); 18 Pa. Cons. Stat. § 5503(a)(2); 11 R.I. Gen. Laws Ann. § 11-45-1(a)(2); S.D. Codified Laws § 22-18-35(2); Tex. Penal Code Ann. § 42.01(a)(5); Utah Code Ann. § 76-9-102(1)(b)(ii)-(iii); Vt. Stat. Ann. tit. 13, § 1026(a)(2); Wyo. Stat. Ann. § 6-6-102(a).
[50] Alaska Stat. Ann. § 11.61.110(a)(6); Ark. Code Ann. § 5-71-207(a)(7); Conn. Gen. Stat. Ann. § 53a-181(a)(6); Haw. Rev. Stat. Ann. § 711-1101(1)(d); : Ky. Rev. Stat. Ann. § 525.060(1)(c); Mont. Code Ann. § 45-8-101(1)(a)(viii); N.H. Rev. Stat. Ann. § 644:2(I); N.J. Stat. Ann. § 2C:33-2(a)(2); N.D. Cent. Code Ann. § 12.1-31-01(1)(g); Ohio Rev. Code Ann. § 2917.11(A)(5); 18 Pa. Cons. Stat. § 5503(a)(4); Tenn. Code Ann. § 39-17-305(a)(3); Utah Code Ann. § 76-9-102(1)(a);
[51] Ala. Code § 13A-11-7(a)(1); Ark. Code Ann. § 5-71-207(A)(1); Del. Code Ann. tit. 11, § 1301(1)a.; Haw. Rev. Stat. Ann. § 711-1101(1)(a); Idaho Code Ann. § 18-6409(1); Ind. Code Ann. § 35-45-1-3(a)(3); : Ky. Rev. Stat. Ann. § 525.060(1)(a); Nev. Rev. Stat. Ann. § 203.010; N.H. Rev. Stat. Ann. § 644:2(II)(a); N.J. Stat. Ann. § 2C:33-2(a)(1); N.Y. Penal Law § 240.20(1); N.D. Cent. Code Ann. § 12.1-31-01(1)(a); 18 Pa. Cons. Stat. § 5503(a)(1); 11 R.I. Gen. Laws Ann. § 11-45-1(a)(1); Utah Code Ann. § 76-9-102(1)(b)(i); Vt. Stat. Ann. tit. 13, § 1026(a)(1);
[52] *E.g.*, Cal. Penal Code § 647(c); Haw. Rev. Stat. Ann. § 711-1101; Mich. Comp. Laws § 750.167(1)(h).

> 6. He congregates with other persons in a public place and refuses to comply with a lawful order of the police to disperse; or
> 7. He creates a hazardous or physically offensive condition by any act which serves no legitimate purpose.[53]

B. History and evolution of disorderly conduct laws

Early disorderly conduct laws—those that penalized, for example, keepers of "disorderly houses" facilitating prostitution, gambling, or drunkenness—were the product of a belief that disorder was "the antithesis of the well-regulated society."[54] In that view, society has not only a right but an obligation to regulate public morality, and "disorderly" people were those who violated society's morality norms.[55]

Some of the earliest known disorderly conduct laws in the United States criminalized whole classes of people based on statuses, rather than simply behaviors, that society deemed morally unacceptable. [56] In 1801, for example, New York had a law regulating "beggars and disorderly persons."[57] By the 1830s, Michigan had a "disorderly persons" law that encompassed fortunetellers, "drunkards," prostitutes, people who play cards on public streets, and people who leave their children as a burden on the public.[58] An 1837 act in Illinois criminalized keepers of "disorderly houses."[59] Some of these laws were enacted and enforced in a racially selective manner. One nineteenth century Nevada statute criminalized "idle and dissolute" people who regularly engaged in activities like immodesty, profanity, prostitution, gambling, staying out past 9 p.m., and "rowdyism," among others.[60] But the statute's own text explicitly did not apply to "Indians" or Chinese people "unless complained of by their own countrymen."[61]

As disorderly conduct laws evolved, they began to encompass speech as well as statuses and behaviors. An early published case involving a conviction for disorderly conduct based purely on speech is *Commonwealth v. Redshaw*, decided in 1892.[62] Mr. Redshaw was a former union employee who had been laid off along with thousands of others; after being laid off he called two non-union men "damned scabs."[63] He was prosecuted for disorderly conduct, and the trial court reasoned that a person who uses such language in

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[53] N.Y. Penal Law § 240.20.
[54] William J. Novak, THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH CENTURY AMERICA 155-70 (1996).
[55] *Id.*
[56] *See* Morgan, *supra* n. 14 at 9 (noting that nineteenth-century disorderly conduct statutes prohibited a wide array of behaviors including public drunkenness, provoking others to violence, disrupting worship services, and engaging in conduct "tending to corrupt public morals.").
[57] Novak, *supra* n. 54 at 15 (citing *Laws of New York, 1781-1801* (Albany, NY 1802)).
[58] Novak, *supra* n. 54 at 15 (citing Revised Statutes of Michigan, 199).
[59] Novak, *supra* n. 54 at 4 (citing "An Act to Incorporate the City of Chicago, 1837," in LAWS AND ORDINANCES GOVERNING THE CITY OF CHICAGO, 1837, ed. Joseph E. Gary (Chicago, 1866), 537-38).
[60] Compiled Laws of Nevada, Section 4861, An Act Concerning Vagrancy and Vagrants (eff. March 5, 1877).
[61] *Id.*
[62] Commonwealth v. Redshaw, 2 Pa. Dist. 96 (Ct. Quarter Sess. 1892).
[63] *Id.*

public "cannot, in any sense, be held to be an orderly person."[64] The court sentenced him to thirty days in jail.[65]

An early twentieth-century disorderly conduct conviction (which the New Jersey Supreme Court eventually reversed) involved a prosecutor walking into a police station and calling an officer a "big muttonhead" in a "loud and offensive tone."[66] Although the prosecutor was convicted at trial, the Supreme Court concluded that the insult was a "trivial epithet" that did not rise to the level of disorderly conduct.[67]

The twentieth century also saw disorderly conduct and related laws increasingly used as a means of controlling people of color who some in power perceived as invading white spaces. As Black people migrated by the thousands from southern rural areas into northern cities, many white people came to view cities as places of disorder, occupied primarily by poor people and minority groups they "identified with crime, racialism, poverty, unemployment, discrimination, violence, and insecurity."[68] Searching for a way to control these unwanted residents, government officials took advantage of laws that criminalized people based largely on their statuses as members of undesirable categories. Risa Golubuff's book *Vagrant Nation* details the historical use of vagrancy statutes—which criminalized common behavior such as "loafing" on the street, as well as statuses such as being unemployed while able to work[69]—as a tool for managing and harassing politically unpopular people, unemployed people, and religious, racial, and sexual minorities.[70]

Southern states also used disorderly conduct and vagrancy laws as a means of generating cheap labor by making unemployment an arrestable offense.[71] In states with convict-leasing laws that required people to pay off their crimes through unpaid manual labor,[72] laws criminalizing vagrancy and disorder allowed states to literally profit off poor people—predominantly Black—who faced the Hobson's choice of either working for little pay or getting arrested for not working.[73]

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[64] *Id.*
[65] *Id.*
[66] Ruthenbeck v. First Criminal Judicial District of Bergen County, 7 N.J. Misc. 969, 969-70 (1929).
[67] *Id.* at 970.
[68] Stanley Cohen, VISIONS OF SOCIAL CONTROL: CRIME, PUNISHMENT AND CLASSIFICATION 212-13 (1985); *see also* Isabel Wilkerson, THE WARMTH OF OTHER SUNS (2010) (describing the mass migration of Black people to the north during the early-mid twentieth century).
[69] *E.g.*, Jacksonville Ordinance Code § 26-57 (1972) (criminalizing "habitual loafers and disorderly persons"); ALA. CODE tit. 14, § 437 (1958) (criminalizing anyone who "lives in idleness"); ARIZ. REV. STAT. ANN. § 13-991(4) (1956) (prohibiting "idle . . . itinerants"); *see also* Robin Yeamans, *Constitutional Attacks on Vagrancy Laws*, 20 STAN. L. REV. 782, 782-83 (1968) (summarizing many states' vagrancy laws); Risa Golubuff, VAGRANT NATION: POLICE POWER CONSTITUTIONAL CHANGE AND THE MAKING OF THE 1960S ch. 1 (2016).
[70] Golubuff, *supra* n. 69 at ch. 1; *see also id.* at 74 (describing the main function of vagrancy laws as "policing the visibly poor and underemployed").
[71] Gabriel J. Chin, *The Jena Six and the History of Racially Compromised Justice in Louisiana*, 44 HARV. C.R.-C.L. L. REV. 361, 374 (2009).
[72] *See* State v. Cunningham, 58 So. 558, 561 (La. 1912).
[73] Chin, *supra* n. 71 at 374-75 (citing Matthew J. Mancini, ONE DIs, GET ANOTHER: CONVICT LEASING IN THE AMERICAN SOUTH, 1866-1928 at 19 (1996)); *see also* Douglas A. Blackmon, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II

In 1972, the United States Supreme Court finally struck down one such law as void for vagueness.[74] The vagrancy ordinance in *Papachristou v. City of Jacksonville* deemed "disorderly persons," as well as "[r]ogues and vagabonds, or dissolute persons who go about begging, common gamblers . . . common drunkards . . . persons wandering or strolling around from place to place without any lawful purpose or object, [or] habitual loafers" as guilty of misdemeanors.[75] The Court declared the law unconstitutionally vague because it failed to provide ordinary people fair notice of what conduct the law criminalized.[76] The Court also criticized the law for giving "unfettered discretion" to police, and noted that the imprecise terms of the ordinance implicated "poor people, nonconformists, dissenters, idlers—[who] may be required to comport themselves according to the life style deemed appropriate by the Jacksonville police and the courts."[77]

Even before *Papachristou* struck the death knoll for vagrancy laws, law enforcement in the United States were arresting hundreds of thousands of people for disorderly conduct per year.[78] After the *Papachristou* decision invalidated many vagrancy laws, states relied on disorderly conduct laws even more as a substitute to maintain control over undesirable people.[79] Although disorderly conduct laws ostensibly penalize conduct rather than status, they still empower police to control and harass "minorities and non-conformists."[80]

Toward the end of the twentieth century the "broken windows" theory of policing, first promulgated by James Q. Wilson and George L Kelling, became yet another factor contributing to widespread enforcement of disorderly conduct laws.[81] The broken windows theory posited a correlation between police enforcing minor "quality of life" offenses and cities experiencing a decrease in serious crime and uptick in perceived safety.[82] According to Wilson and Kelling, urban residents feared not just violent crime but "being bothered by disorderly people. Not violent people, nor, necessarily, criminals, but disreputable or obstreperous or unpredictable people," including "panhandlers,

(2008) (discussing how low-level criminal laws like vagrancy, loitering, and the like were enforced primarily against Black people as a means of subordination).

[74] Papachristou v. City of Jacksonville, 405 U.S. 156 (1972).

[75] *Id.* at 156 n.1 (1972) (citing Jacksonville Ordinance Code § 26—57).

[76] *Papachristou*, 405 U.S. at 163.

[77] *Id.* at 168-69.

[78] *See* Norval Morris & Gordon Hawkins, THE HONEST POLITICIAN'S GUIDE TO CRIME CONTROL 12 (1969) (stating that nearly 600,000 arrests were made for disorderly conduct in 1968, four years before *Papachristou* was decided).

[79] *Papachristou*, supra n. 74; *see also* Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551, 595-608 (1997); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 559-60 (2001) (after courts invalidated vagrancy and loitering statutes, state legislatures began turning to other statutes to prohibit behavior like excessive noise, curfew violation, etc.).

[80] *See* Golubuff, *supra* n. 69 at 71-73 (discussing the process by which disorderly conduct laws substituted for unconstitutional vagrancy laws, but achieved almost the same effect); *id.* at 285 (during the 1960s and 1970s, jurisdictions facing challenges the constitutionality of their vagrancy or loitering laws increasingly came to rely on disorderly conduct laws instead).

[81] *See* James Q. Wilson & George L. Kelling, *Broken Windows: The Police and Neighborhood Safety*, ATLANTIC MONTHLY 29, 38 (Mar 1982).

[82] *Id.*

drunks, addicts, rowdy teenagers, prostitutes, loiterers, the mentally disturbed."[83] If law enforcement proactively arrested people for minor crimes like disorderly conduct and other low-level offenses, these cities would become inhospitable to more serious offenses as well.[84] Professor Bernard Harcourt has characterized broken windows policing as setting up a dichotomy between "honest people and the disorderly; between 'committed law-abiders' and 'individuals who are otherwise inclined to engage in crime'; between people who take care of their homes and neighborhoods versus disreputable people involved in disorder."[85]

By the early 1990s, many residents of large urban areas had become tired of what they perceived as significant growth in crime.[86] In liberal cities like New York, San Francisco, and Washington D.C., local lawmakers campaigned on promises to increase social control for minor misconduct, and city councils obligated by granting police even more authority to arrest for low-level offenses.[87] In 1994 alone, voters in Berkeley, Santa Monica, and Santa Cruz passed laws cracking down on street disorder.[88] Cities across the United States began aggressively policing disorderly conduct and other minor crimes in response to "the growing visibility of poverty" that threatened "municipal aspirations for reinvigorating the urban core."[89] While broken windows did not target disorderly conduct alone, it aggressively policed many forms of social "disorder," including public intoxication and other minor misbehaviors that many disorderly conduct laws address.[90]

Today, broken windows theory has largely been disavowed amid widespread recognition that it disproportionately disadvantaged communities of color.[91] But its effects remain. According to FBI arrest statistics, police arrested more than 291,000 people for disorderly

[83] *Id.*
[84] *Id.*
[85] Bernard E. Harcourt, *Reflecting on the Subject: A Critique of the Social Influence Conception of Deterrence, the Broken Windows Theory, and Order-Maintenance Policing New York Style*, 97 MICH. L. REV. 291, 297 (1998).
[86] *See* Robert C. Ellickson, *Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows, and Public-Space Zoning*, 105 YALE L. J. 1165, 1167-68 (1996). Crime rates fell dramatically in the 1990s after a rise in the 1970s and 1980s. *See* Steven D. Levitt, *Understanding Why Crime Fell in the 1990s: Four Factors that Explain the Decline and Six that Do Not*, 18 J. ECON. PERSPECTIVE 163, Table 2 (2004).
[87] *See, e.g.*, Ellickson, *supra* n. 86 at 1167-68; Chicago, Ill., Municipal Code § 8-4-015 (1992) (Chicago ordinance criminalizing loitering); Dorothy Roberts, *Foreword: Race, Vagueness, and the Social Meaning of Order-Maintenance Policing*, 89 J. CRIM. L. & CRIMINOLOGY 775, 775-76 (1999) (discussing the growing popularity of order-maintenance policing in the early 1990s).
[88] Ellickson, *supra* n. 86 at 1167-68.
[89] Forrest Stuart, DOWN, OUT, AND UNDER ARREST: POLICING AND EVERYDAY LIFE IN SKID ROW 10 (2016); *see also id.* at 69-70 (describing the broken windows-inspired move to criminalize "a host of common public behaviors" that spread through major U.S. cities in the 1990s).
[90] Bernard Harcourt & Jens Ludwig, *Broken Windows: New Evidence from New York City and a Five-City Social Experiment*, 73 U. CHI. L. REV. 271, 280-81 (2006); Livingston, *supra* n. 79 at 553-56; *see also* Wilson & Kelling, *supra* n. 81 at 31.
[91] *See* Tracey Meares, *Broken Windows, Neighborhoods, and the Legitimacy of Law Enforcement*, 52(4) J. RESEARCH IN CRIME & DELINQUENCY 609, 611 (2015); Tom Tyler & Jeffrey Fagan, *The Impact of Stop and Frisk Policies On Police Legitimacy*, https://www.urban.org/sites/default/files/publication/25781/412647-Key-Issues-in-the-Police-Use-of-Pedestrian-Stops-and-Searches.PDF at 30; *see also* Part IV.A., *infra*.

conduct in 2016,[92] and slightly fewer than 249,000 two years later.[93] These numbers, while significantly lower than those during the broken windows era, [94] are still high. Because the FBI statistics include only arrests and not citations for disorderly conduct, those statistics likely underestimate by many thousands the overall number of people charged with disorderly conduct each year.[95]

Law enforcement officials still use disorderly conduct laws to criminalize and prosecute conduct ranging from swearing to fighting to simply being noisy. They frequently use these laws to ensnare people who are poor, unpopular, or politically inconvenient. Enforcement of these laws is often unconstitutional.

II. Constitutional problems with disorderly conduct laws

A. Facial unconstitutionality

The First Amendment protects the right to freedom of speech and assembly.[96] Speech is presumptively constitutional, and states may criminalize only certain limited categories of speech that fall outside the protections of the First Amendment.[97] These narrowly limited classes of speech include true threats, obscenity, and fighting words.[98] The fighting words doctrine, particularly pertinent to disorderly conduct statutes, excludes from constitutional protection "abusive epithets" that are "inherently likely to provoke a violent reaction."[99] Speech that does not fall into these exceptions remains constitutionally protected.[100]

Criminal statutes are also unconstitutional if they are overbroad or vague. An overbroad statute is one with language that encompasses both unprotected and constitutionally protected speech or behavior, such that it runs the risk of chilling a substantial amount of

[92] Federal Bureau of Investigations, *Uniform Crime Reporting, 2016: Crime in the United States: Table 21*, https://ucr.fbi.gov/crime-in-the-u.s/2016/crime-in-the-u.s.-2016/topic-pages/tables/table-21.
[93] Federal Bureau of Investigations, *Uniform Crime Reporting, 2018 Crime in the United States: Table 43*, https://ucr.fbi.gov/crime-in-the-u.s/2018/crime-in-the-u.s.-2018/tables/table-43.
[94] Federal Bureau of Investigations, *Crime in the United States: Table 29, Estimated Number of Arrests, United States, 2009*, http:// www2.fbi.gov/ucr/cius2009/data/table_29.html (in 2009, police in the United States made at least 655,322 arrests for disorderly conduct).
[95] *See* Sandra Mayson & Megan Stevenson, *Misdemeanors By the Numbers*, 61 B.C.L. REV. 971, 986 (2020) (misdemeanor charges can be initiated by arrest, citation, or summons); *id.* at 1008 (tracking some jurisdictions in which nearly half of misdemeanor cases are initiated by citation or summons rather than arrest); KY. REV. STAT. ANN. § 431.015 (2019) (example of state law dictating issuance of citation rather than arrest under certain circumstances); *see also* Measures for Justice, https://measuresforjustice.org/portal/measures (attempting to gather nationwide information on, *inter alia*, criminal cases that begin with a non-custodial citation rather than an arrest).
[96] U.S. Const. amend. I.
[97] Gooding v. Wilson, 405 U.S. 518, 521-22 (1972).
[98] Virginia v. Black, 538 U.S. 343, 359 (2003).
[99] Cohen v. California, 403 U.S. 15, 20 (1971).
[100] United States v. Stevens, 559 U.S. 460, 468-69 (2010).

protected speech or conduct.[101] A statute is unconstitutionally vague if the average civilian cannot understand what conduct the statute prohibits.[102]

Many disorderly conduct laws are overbroad, unconstitutionally vague, or infringe on the rights to free speech and freedom of assembly.[103] The United States Supreme Court has repeatedly struck down disorderly conduct or related laws[104] as facially unconstitutional. One of the Court's earliest forays into the unconstitutionality of disorderly conduct laws came in *Terminiello v. City of Chicago*.[105] The petitioner in *Terminiello* gave a public speech criticizing political groups and races whose activities he felt were "inimical to the nation's welfare," and was convicted of disorderly conduct under a Chicago ordinance stating that anyone "who shall make, aid, countenance, or assist in making any improper noise, riot, disturbance, breach of the peace, or diversion tending to a breach of the peace . . . shall be deemed guilty of disorderly conduct."[106]

At the petitioner's jury trial, the court instructed the jury that speech may qualify as disorderly conduct "if it stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance, or if it molests the inhabitants in the enjoyment of peace and quiet by arousing alarm."[107] The Supreme Court concluded that, while some speech tending to incite "an immediate breach of the peace" could be prohibited as "fighting words" that fall outside the First Amendment's protection, the ordinance's broad language—at least as construed by the trial court in that case—improperly criminalized speech that merely "stirred people to anger, invited public dispute, or brought about a condition of unrest."[108] The Court held the lower court's interpretation of the ordinance violated the petitioner's right to free speech and was therefore unconstitutional.[109]

More than twenty years later, the Supreme Court in *Gooding v. Wilson* addressed the constitutionality of a Georgia statute that prohibited "opprobrious words or abusive language, tending to cause a breach of the peace."[110] The Court held that because the "dictionary definitions of 'opprobrious' and 'abusive'" are not limited to fighting words, the statute was overbroad and facially unconstitutional.[111]

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[101] Ashcroft v. Free Speech Coalition, 535 U.S. 234, 255 (2002); Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973); see also Coates v. Cincinnati, 402 U.S. 611, 614 (1971) (a statute is unconstitutionally broad if it "authorizes the punishment of constitutionally protected conduct").
[102] *Coates*, 402 U.S. at 614.
[103] *See* U.S. CONST. AMENDS. I, XIV; *see also* Eric M. Larsson, 27 C.J.S. DISORDERLY CONDUCT § 1 (2020) ("Statutes and ordinances prohibiting disorderly conduct are often challenged for infringing on the First Amendment right of freedom of speech or assembly.").
[104] A few of the statutes or ordinances discussed in this Part are titled something other than "disorderly conduct," but are in content extremely similar to disorderly conduct laws.
[105] Terminiello v. City of Chicago, 337 U.S. 1 (1949).
[106] *Id.* at n.1, 3.
[107] *Id.* at 3.
[108] *Id.* at 4-5.
[109] *Id.* at 5.
[110] Gooding v. Wilson, 405 U.S. 518, 519 (1972).
[111] *Id.* at 525, 528.

In *Papachristou*—decided the same year as *Gooding*—the Supreme Court struck down a law that punished "disorderly loitering" and "disorderly conduct," concluding that the law failed to give fair notice of what constitutes criminal behavior and "encourage[d] arbitrary and erratic arrests and convictions."[112] The Court condemned statutes that create lists of prohibited behavior "so all-inclusive and generalized [that] those convicted may be punished for no more than vindicating affronts to police authority."[113]

Just two years later the Supreme Court in *Lewis v. City of New Orleans* held that an ordinance prohibiting "any person wantonly to curse or revile or to use obscene or opprobrious language" toward an on-duty police officer was unconstitutional.[114] Relying on *Gooding*, the Court noted again that the ban on "opprobrious" language "embraces words that do not 'by their very utterance inflict injury or tend to incite an immediate breach of the peace,'" and illegally infringed constitutionally protected speech.[115]

The United States Supreme Court is not the only court to address challenges to disorderly conduct laws. In *Bell v. Keating*, the Seventh Circuit struck down a Chicago disorderly conduct ordinance as overbroad, where it authorized police to order people to disperse who were engaged in conduct "likely to cause . . . serious inconvenience, annoyance or alarm."[116] Police had used this ordinance to arrest people protesting the Iraq War.[117] The Court concluded that the ordinance was void for vagueness because it empowered law enforcement to apply the ordinance arbitrarily and discriminatorily.[118]

In *Kirkwood v. Loeb*, a federal court in Tennessee struck down a Memphis disorderly conduct ordinance prohibiting, *inter alia*, conducting oneself in an offensive or disorderly way or acting in an annoying or offensive manner.[119] The court held that the ordinance was overbroad and void for vagueness.[120]

Courts have struck down state or municipal disorderly conduct laws as unconstitutional, either in whole or in part, in at least twenty states.[121] In some of these cases courts

[112] *Papachristou*, 405 U.S. at 160-62.
[113] *Id.* at 167-68.
[114] Lewis v. City of New Orleans, 415 U.S. 130, 131-32 (1974).
[115] *Id.* at 133.
[116] Bell v. Keating, 697 F.3d 445, 450, 461 (7th Cir. 2012).
[117] *Id.* at 450.
[118] *Id.* at 463.
[119] Kirkwood v. Loeb, 323 F. Supp. 611, 613, 615-16 (W.D. Tenn. 1971).
[120] *Id.*; *see also* Original Fayette County Civic & Welfare League, Inc. v. Ellington, 309 F. Supp. 89, 92 (W.D. Tenn. 1970); Baxter v. Ellington, 318 F.Supp. 1079 (E.D. Tenn. 1970) (striking down Tennessee's disorderly conduct statute that prohibited "rude, boisterous, offensive, or blasphemous language" as unconstitutional).
[121] *See* Marks v. City of Anchorage, 500 P.2d 644, 649 (Alaska 1972); Poole v. State, 524 P.2d 826 (Alaska 1974); Hansen v. People, 548 P.2d 1278 (Colo. 1976); Aguilar v. People, 886 P.2d 725 (Colo. 1994); Severson v. Duff, 322 F. Supp. 4, 10 (M.D. Fla. 1970); State v. Poe, 88 P.3d 704 (Idaho 2004); Bell v. Keating, 697 F.3d 445, 450 (7th Cir. 2012); Com. v. A Juvenile, 334 N.E.2d 617, 622, 629 (Mass. 1975); Leonard v. Robinson, 477 F.3d 347, 359 (6th Cir. 2007); Speet v. Schuette, 726 F.3d 867, 878 (6th Cir. 2013); Matter of Welfare of S. L. J., 263 N.W.2d 412, 418 (Minn. 1978); State v. Hensel, 901 N.W.2d 166, 173 (Minn. 2017); State v. Swoboda, 658 S.W.2d 24, 25 (Mo. 1983); State v. Carpenter, 736 S.W.2d 406 (Mo. 1987); Langford v. City of Omaha, 755 F. Supp. 1460 (D. Neb. 1989); State v. Nickerson, 424 A.2d 190, 194 (N.H. 1980); State in Interest of H.D., 501 A.2d 1016, 1018 (N.J. App. Div. 1985); People v. Diaz, 4 N.Y.2d 469, 470-71 (1958); State v. Ausmus, 336 Or. 493 (Ore. 2003);

specifically criticized the discriminatory enforcement that these broad laws enable. The Alaska Supreme Court struck down as facially overbroad an Anchorage disorderly conduct ordinance that prohibited "'threatening and violent or tumultuous behavior,' 'unreasonable noise,' 'abusive language' and 'offensively coarse utterances, gestures or displays' when motivated by an intent to cause 'public inconvenience, annoyance or alarm.'"[122] The court noted that the broad language of the ordinance was an "obvious invitation to discriminatory enforcement against those whose association together is 'annoying' because their ideas, their lifestyle, or their physical appearance is resented by the majority of their fellow citizens."[123]

A New York court struck down a Dunkirk, New York disorderly conduct ordinance that prohibited lounging or loitering on street corners.[124] The defendant in that case was a migrant worker who spoke little English; he was standing outside a hotel with approximately twelve other men when the police ordered him to move and arrested him when he failed to do so.[125] The court concluded that the broad language of the ordinance subjected civilians to arbitrary and discriminatory enforcement, and was thus unconstitutional.[126]

B. Limiting constructions to avoid facial unconstitutionality

Because so many disorderly conduct laws have unconstitutionally vague or overbroad text, many courts have interpreted the laws as narrower than their actual text as a workaround to their facial invalidity. In *Chaplinsky v. New Hampshire*, the Supreme Court assessed the constitutionality of a New Hampshire statute prohibiting people from addressing "any offensive, derisive or annoying word to any other person" in public, calling people by "any offensive or derisive name," or making "any noise or exclamation in his presence and hearing with intent to deride, offend or annoy him, or to prevent him from pursuing his lawful business or occupation."[127] Although the text of the statute barred speech that is merely annoying or offensive—which violates the First Amendment—New Hampshire construed the statute narrowly to criminalize only those words having "direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed."[128] The Court held that this interpretation did not violate free speech because it was "narrowly drawn and limited to define and punish . . . words likely to cause a breach of the peace," which fell within the fighting words exception to the First Amendment.[129]

Kirkwood v. Loeb, 323 F. Supp. 611, 613, 615-16 (W.D. Tenn. 1971); Original Fayette County Civic & Welfare League, Inc. v. Ellington, 309 F. Supp. 89, 92 (W.D. Tenn. 1970); Baxter v. Ellington, 318 F. Supp. 1079 (E.D. Tenn. 1970); State v. Dronso, 279 N.W.2d 710 (Wis. Ct. App. 1979).

[122] Marks v. City of Anchorage, 500 P.2d 644, 649 (Alaska 1972).

[123] *Id.* (citing Coates v. Cincinnati, 402 U.S. 611 (1971)).

[124] People v. Diaz, 4 N.Y.2d 469, 470-71 (1958).

[125] *Id.* at 471.

[126] *Id.* at 470-71.

[127] Chaplinsky v. New Hampshire, 315 U.S. 568, 569 (1942).

[128] *Id.* at 573.

[129] *Id.*

In the years since *Chaplinsky* more than twenty states have endeavored to salvage their disorderly conduct laws not by amending the text of the laws themselves, but instead by interpreting the laws to mean something different than the actual text.[130] In most of these cases courts recognized that the text of the statutes criminalized, for example, annoying or offensive language (which the First Amendment protects), but followed *Chaplinsky* in interpreting the laws more narrowly than their text, to encompass only language that rises to the level of fighting words.[131]

While reading limiting language into criminal laws to avoid constitutional implications is a tactic the Supreme Court has endorsed,[132] it is especially problematic in the context of disorderly conduct laws. Multiple state courts have followed *Chaplinsky*'s example in reading their disorderly conduct laws as constitutional because they only apply to "fighting words."[133] But the Supreme Court itself has revisited the fighting words exception repeatedly since *Chaplinsky* and never once upheld a conviction based on fighting words.[134] The fighting words exception on which so many state courts rely to uphold disorderly conduct convictions is an exception the Supreme Court itself has repeatedly declined to follow.

In *Hess v. Indiana*, the Court addressed the case of a defendant convicted of disorderly conduct under an Indiana statute that prohibited, *inter alia*, "loud, boisterous or

[130] *See, e.g.*, Mosley v. City of Auburn, 428 So.2d 165, 166 (Ala. Crim. App. 1982); Swann v. City of Huntsville, 455 So. 2d 944, 950 (Ala. Crim. App. 1984); R.I.T v. State, 675 So.2d 97 (Ala. 1995); State v. Brahy, 529 P.2d 236 (Ariz. 1974); In re Louise C., 3 P.3d 1004 (Ariz. Ct. App. 1999); Lucas v. State, 494 S.W.2d 705 (Ark. 1973); Johnson v. State, 37 S.W.3d 191 (Ark. 2001); Watkins v. State, 377 S.W.3d 286 (Ark. App. Ct. 2010); State v. White, No. CR.A. N87-04-0497T, 1989 WL 25818, at *2 (Del. Super. Ct. Mar. 7, 1989); White v. State, 330 So.2d 3 (Fla. 1976); State v. Saunders, 339 So.2d 641 (Fla. 1976); Freeman v. State, 805 S.E.2d 845, 850 (Ga. 2017); Knowles v. State, 797 S.E.2d 197, 200 (Ga. App. 2017); People v. Slaton, 322 N.E.2d 553, 554 (Ill. App. 1974); People v. Allen, 680 N.E.2d 795 (Ill. App. 1997); People v. Redwood, 780 N.E.2d 760 (Ill. App. 2002); State v. New, 421 N.E.2d 626, 628 (Ind. 1981); State v. Huffman, 612 P.2d 630 (Kan. 1980); State v. John W., 418 A.2d 1097 (Me. 1980); People v. Gagnon, 341 N.W.2d 867, 869 (Mich. App. 1983); City of Billings v. Batten, 705 P.2d 1120, 1124–25 (Mont. 1985); State v. Drahota, 788 N.W.2d 796, 803 (Neb. 2010); State v. James M., 806 P.2d 1063 (N.M. App. 1990); State v. Orange, 206 S.E.2d 377, 379 (N.C. App. 1974); State v. Hoffman, 387 N.E.2d 239, 242 (Ohio 1979); Com. v. Jarboe, 12 Pa. D. & C.3d 554, 558 (Pa. Com. Pl. 1979); Gilles v. Davis, 427 F.3d 197, 205 (3d Cir. 2005); State v. Tavarozzi, 446 A.2d 1048 (R.I. 1982); State v. Perkins, 412 S.E.2d 385, 386 (S.C. 1991); City of Landrum v. Sarratt, 572 S.E.2d 476 (S.C. 2002); Johnson v. Quattlebaum, 664 F.Appx. 290 (4th Cir. 2016); In re S.J.N-K., 647 N.W.2d 707 (S.D. 2002); Jimmerson v. State, 561 S.W.2d 5 (Tex. Crim. App. 1978); Duran v. Furr's Supermarkets, Inc., 921 S.W.2d 778, 785 (Tex. App. 1996); State v. Read, 165 Vt. 141 (Vt. 1996).

[131] *E.g.*, R.I.T v. State, 675 So.2d 97 (Ala. 1995) (disorderly conduct statute prohibiting "abusive or obscene language" only applies to fighting words); State v. Brahy, 529 P.2d 236 (Ariz. 1974) ("The statute must be drawn or interpreted to include, as a violation, only those epithets amounting to 'fighting words.'"); State v. James M., 806 P.2d 1063 (N.M. App. 1990) ("By narrowly construing the statute to punish only "fighting words," we avoid any punishment of speech that is protected under the first and fourteenth amendments.").

[132] *See, e.g.*, INS v. St. Cyr, 533 U.S. 289, 299-300 (2005) (if one construction of a statute would violate the Constitution and another reasonable interpretation would avoid constitutional problems, "we are obligated to construe the statute to avoid such problems").

[133] *Supra*, n. 124.

[134] *See* Brandenburg v. Ohio, 395 U.S. 444 (1969); Cohen v. California, 403 U.S. 15 (1971); Hess v. Indiana, 414 U.S. 105 (1973); City of Houston, Tex. v. Hill, 482 U.S. 451, 461-63 (1987); Texas v. Johnson, 491 U.S. 397 (1989).

disorderly" actions, "loud or unusual noise," and "tumultuous or offensive behavior."[135] The defendant was convicted after participating in an antiwar demonstration where approximately 100 to 150 demonstrators moved onto a public street and began blocking the passage of cars.[136] As sheriffs moved in to disperse the crowd, the defendant said either, "'We'll take the fucking street later,' or 'We'll take the fucking street again.'"[137] Sheriffs promptly arrested him.[138] The Court held that the defendant's speech did not constitute fighting words because the comments were not aimed at a particular person and thus "amounted to nothing more than advocacy of illegal action at some indefinite future time."[139] The Court also noted that the fighting words exception permits the State to criminalize speech only when that speech is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[140]

The Court has declined to apply the fighting words exception in multiple other contexts, including a man who wore a jacket with the words "Fuck the Draft" emblazoned across,[141] a white supremacist who spoke publicly about the duty to use violence against other races,[142] and a statute barring people from interrupting or abusing police in the execution of their duties.[143] The Court has also cautioned that the fighting words exception should be limited to a "small" class of words that are "likely to provoke the average person to retaliation," for example, an "invitation to exchange fisticuffs."[144]

Though the Supreme Court has not upheld a fighting words conviction in nearly 80 years, untold numbers of people each year are prosecuted and convicted of speech-based disorderly conduct under the theory that these statutes are constitutional because they only criminalize fighting words.[145] Since low-level misdemeanors are so rarely appealed, the enormous majority of those cases are never subjected to judicial review.[146]

During the apex of the broken windows era, Professor Debra Livingston sounded an alarm against the government's expanding obsession with policing public disorder.[147] Livingston cautioned that laws punishing disorder "raise many of the same concerns that led courts of that period to invalidate public order laws for vagueness."[148] This is still true today. Many disorderly conduct laws are unintelligibly vague, relying only on the narrow interpretations of courts to salvage their constitutionality. Unfortunately, this vague

[135] Hess v. Indiana, 414 U.S. 105, 105 n.1 (1973).
[136] *Id.* at 105-06.
[137] *Id.* at 107.
[138] *Id.*
[139] *Id.* at 108.
[140] *Id.*
[141] Cohen v. California, 403 U.S. 15, 17, 20, 22-26 (1971).
[142] Brandenburg v. Ohio, 395 U.S. 444, 444-45 (1969).
[143] City of Houston, Tex. v. Hill, 482 U.S. 451, 461-63 (1987).
[144] Texas v. Johnson, 491 U.S. 397, 399, 409 (1989).
[145] *See supra*, n. 123-24.
[146] *See* Nancy J. King & Michael Heise, *Misdemeanor Appeals*, 99 B.U. L. REV. 1933, 1941 (2019) (concluding that misdemeanor convictions are appealed at a rate of about one appeal per 1250 misdemeanor convictions in state courts).
[147] Livingston, *supra* n. 79 at 560.
[148] *Id.*

language in practice enables law enforcement to apply the laws unconstitutionally, frequently with significant harm to those subjected to the unconstitutional application.

C. Enabling unconstitutional enforcement

Even when disorderly conduct laws are not facially unconstitutional, their expansive text still makes them vulnerable to unconstitutional enforcement. The field of criminal law invests tremendous discretion in law enforcement officers to decide what laws to enforce and against whom.[149] This is perhaps never more true than at the intersection of broadly written statutes subject to multiple interpretations, and low-level offenses enforced at the pleasure of the police.[150]

Disorderly conduct laws fit squarely within this intersection. In 1968 Judge Robert Watts criticized the "looseness and vagueness" of disorderly conduct statutes, warning that the "broadness of the statutes and definitions may lead to violations of civil liberties."[151] Jacinta Gau and Rod Brunson have explained that, because "disorderly" is a fluid concept that "eludes precise articulation of the specific behaviors that should be considered unacceptable," disorderly conduct laws tend to "provide little guidance to individual officers working the streets."[152] Police officers with minimal legal training are not prepared to decipher complex statutes, much less to know when courts mandate that the laws be interpreted more narrowly than the text itself.[153] Decisions about when order becomes disorder are matters about which the general public often does not agree, but which we expect police to enforce.[154]

A Vermont Supreme Court decision illustrates the infeasibility of expecting law enforcement to interpret disorderly conduct laws constitutionally.[155] In *State v. Colby*, two people were prosecuted for disorderly conduct after attending a ceremony where the then-Director of National Intelligence was speaking, yelling that the director had "blood

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[149] Charles Breitel, *Controls in Criminal Law Enforcement*, 27 U. CHI. L. REV. 427, 428 (1960) ("There is more recognizable discretion in the field of crime control, including that part of its broad sweep which lawyers call 'criminal law,' than in any other field in which law regulates conduct."); Caleb Foote, *Vagrancy-Type Law and Its Administration*, 104 U. PA. L. REV. 603, 603 (1956) ("Minor offenses are seldom reviewed by higher courts, and the actual limits of [statutes like vagrancy or disorderly conduct] by practices of police and magistrates."); Jerome H. Skolnick, JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN DEMOCRATIC SOCIETY 14 (1966) (police are the "chief interpreter[s]" of the criminal law); Robert Watts, *Disorderly Conduct Statutes in Our Changing Society*, 9 WM. & MARY L. REV. 349, 350-51 (1967) (disorderly conduct statutes are difficult to understand and interpret, and thus lend themselves to arbitrary enforcement).

[150] Jenny Roberts, *Why Misdemeanors Matter*, 45 U.C. DAVIS L. REV. 277, 304 (2011) ("public order offenses such as disorderly conduct . . . often implicate free speech, overbreadth, and vagueness issues."); Breitel, *supra* n. 142 at 429

[151] Watts, *supra* n. 142 at 351.

[152] Jacinta M. Gau & Rod K. Brunson, *Procedural Justice and Order Maintenance Policing: A Study of Inner-City Young Men's Perceptions of Police Legitimacy*, 27 JUSTICE Q. 255, 258 (2010).

[153] Yuri Linetsky, *What the Police Don't Know May Hurt Us*, 48 N.M. L. REV. 1, 5 (2018); *see also id.* at 6 (failure to appreciate the legality of a citizen's conduct leads to many illegal [disorderly conduct] arrests."); *supra* Part II.B.

[154] Thomas Johnson, *Police-Citizen Encounters and the Importance of Role Conceptualization for Police-Community Relations*, 7(1) ISSUES IN CRIMINOLOGY 113-14 (1972).

[155] State v. Colby, 185 Vt. 464, 468 (Vt. 2009).

on his hands," and inviting the audience to join them in walking out on the speech.[156] Vermont's disorderly conduct statute prohibited disturbing a lawful assembly "with intent to cause public inconvenience, or annoyance or recklessly creating a risk thereof."[157] The protestors' interruption was minimal, the speech was "hardly stopped," and the protestors were immediately escorted out.[158] The court began its analysis by recognizing that the statute raised a "legal dilemma" over how to interpret its broad text in light of the First Amendment guarantees of freedom of speech and assembly.[159] The court concluded that the statute was overbroad on its face because it "impermissibly sanctions a substantial amount of protected speech."[160] While choosing to construe the statute narrowly rather than striking it down altogether, the court held the prosecution unconstitutional because the defendants' speech fell within the Constitution's protection.[161]

According to Yuri Linetsky, a full-time law professor and part-time police officer, police officers arrest people for constitutionally protected conduct "daily throughout the country—leading to countless improper arrests, which degrade the relationship between police officers and the communities they serve."[162] Linetsky writes that police officers' misunderstanding of legal concepts "is evident in the over-enforcement of statutes, misapplication of fundamental rights, and especially in the misunderstanding of the intersection of statutory law and constitutional safeguards."[163] The vague language of disorderly conduct laws empower police to define disorder in a manner inconsistent with the Constitution, with little risk of being held accountable for their misinterpretations.[164]

III. Other harms that disorderly conduct laws enable

A. Arbitrary and abusive enforcement

In addition to enabling constitutional violations, poorly defined statutes also inevitably lead to arbitrary enforcement. [165] Expansive disorderly conduct laws maximize prosecutorial power by creating what Alexandra Natapoff refers to as the "infinite pool of the guilty," empowering law enforcement officers to snare their choice of offenders in

[156] *Id.* at 468, 472.
[157] *Id.* at 467 n.3.
[158] *Id.* at 472.
[159] *Id.* at 468.
[160] *Id.* at 469.
[161] *Id.* at 470-71.
[162] Linetsky, *supra* n. 146 at 2.
[163] *Id.* at 5; *see also* Wayne A. Logan, *Police Mistakes of Law*, 61 EMORY L. REV. 69, 78-82 (2011) (discussing the many ways in which courts forgive, and even expect, police officers' misinterpretations of poorly worded criminal laws); *id.* at 83 ("A prime justification for forgiving police mistakes of law lies in the enormous number and often-technical nature of low-level offenses that commonly serve as bases to stop and arrest individuals").
[164] Harcourt, *Reflecting on the Subject*, *supra* n. 85 at 299; Erin Murphy, *Manufacturing Crime: Process, Pretext, and Criminal Justice*, 97 GEO. L.J. 1435, 1499 (2009) (noting that the low visibility of state prosecutions of minor crimes "may make them particularly amenable to abuse by the government").
[165] Craig Hemmens & Daniel Levin, *Not A Law At All: A Call for a Return to the Common Law Right to Resist Unlawful Arrest*, 29 SW. U. L. REV. 1, 5 (1999).

their net.[166] People commit minor crimes far more often than police can enforce or prosecutors can charge, and thus misdemeanor charges are highly discretionary by nature.[167] (Consider, for example, how many times people cross the street against a light or play music louder than their neighbors would like without being charged with jaywalking or disorderly conduct.) When police cannot arrest or cite everyone, they necessarily choose who they will charge.[168] The result is misdemeanor charges that are "less a product of underlying crime patterns than of which neighborhoods get policed, which people the police choose to monitor, which incidents they deem arrest-worthy, and which cases prosecutors choose to pursue."[169]

Broad statutes have always been a tool for arrests of powerless or unpopular people, and disorderly conduct laws are no exception.[170] More than fifty years ago, Robert Watts cautioned that the "vagueness or lack of specificity" in disorderly conduct statutes "may lead to arbitrary or capricious action on the part of the police."[171] By designs, these laws vest enormous discretion in law enforcement and thus invite discriminatory

[166] Natapoff, *Misdemeanors*, *supra* n. 10 at 1358; *see also* Smith, *supra* n. 19 at 565; Stevenson & Mayson, *The Scale of Misdemeanor Justice*, *supra* n. 19 at 766.
[167] Stevenson & Mayson, *The Scale of Misdemeanor Justice*, *supra* n. 19 at 766.
[168] Todd Haugh, *Overcriminalization's New Harm Paradigm*, 68 VAND. L. REV. 1191, 1202 (2015) ("Because the criminal law is so broad, it cannot be enforced as written; there are simply too many potential violators to prosecute. Therefore, decisions about enforcement fall on the executive, specifically prosecutors and law enforcement officers."); *see also* Bartlett v. Nieves, 139 S. Ct. 1715, 1730 (2019) (Gorsuch, J., concurring & dissenting) (expressing concern that criminal laws have "grown so exuberantly and come to cover so much previously innocent conduct that almost anyone can be arrested for something.").
[169] Stevenson & Mayson, *The Scale of Misdemeanor Justice*, *supra* n. 19 at 766; *see also* Livingston, *supra* n. 79 at 589 (noting that police discretion and bias are especially significant concerns in the enforcement of minor crimes and vague criminal statutes); Herbert L. Packer, THE LIMITS OF THE CRIMINAL SANCTION 290 (1968) ("If police or prosecutors find themselves free (or compelled) to pick and choose among known or knowable instances of criminal conduct, they are making a judgment which in a society based on law should be made only by those to whom the making of law is entrusted. . . . When victims of discriminatory enforcement see what his happening, secondary effects subversive of respect for law . . . are produced."); *see also id.* at 287 ("Making and retaining criminal laws that can be only sporadically enforced not only is something of an exercise in futility but also can result in actual harm.").
[170] *See, e.g.*, Golubuff, *supra* n. 69 at ch. 1 (describing the historical use of vagrancy statutes as a tool for control and harassment of politically unpopular people, the jobless, religious or racial minorities, gay people, etc.); *see also id.* at 74 (describing the main function of vagrancy laws as "policing the visibly poor and underemployed"); Wayne A. Logan, *Police Mistakes of Law*, 61 EMORY L. REV. 69, 102 (2011) (police use of low-level offenses as a basis to arrest "is known to not fall uniformly on the polity"); Etienne Toussaint, *Blackness As Fighting Words*, 106 VA. L. REV. ONLINE 124, 146 (2020) (laws that criminalize poorly-defined terms like "fighting words" effectively grant police "discretionary authority to determine what kinds of activities or public speech amount to criminal conduct").
[171] Watts, *supra* n. 142 at 352; *see also id.* at 354 ("The very nature of the disorderly conduct statutes and definitions creates fertile ground for possible abuse."); Morris & Hawkins, *supra* n. 78 at 12 ("Disorderly conduct statutes allow the police very wide discretion in deciding what conduct to treat as criminal and are conducive to inefficiency, open to abuse, and bad for police-public relations."); Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 STAN. L. REV. 611, 630 (2014) ("The police can find as many instances of . . . [minor crimes and] disorderly conduct as they devote the time and resources to find.").

enforcement.[172] They allow police to claim probable cause when the charge was "prompted by [an improper] motive."[173]

The following sections describe the types of people most likely to suffer the arbitrary and discriminatory enforcement of disorderly conduct laws.

1. People with unpopular beliefs

Disorderly conduct laws have served as a tool to control people with unpopular religious beliefs. In 1949, two ministers of the Jehovah's Witness faith were convicted of disorderly conduct for speaking about their faith to a group of congregants in a local park, after the city had repeatedly refused to allow Jehovah's Witnesses to hold their meetings in the park.[174] The ministers spoke anyway in absence of a permit, and the police promptly arrested each of them.[175] Maryland's highest court declined to overturn the convictions.[176]

Chicago police arrested two members of an obscure religious sect advocating "the Unification of World Christianity" and charged them with disorderly conduct for distributing literature about their faith to passing motorists.[177] The arrestees later sued, and a federal court concluded that the arrests were unjustified because the act of distributing religious literature created no threat of harm and the police did not order the plaintiffs to disperse before arrest.[178]

Politically unpopular beliefs can also be the target of disorderly conduct enforcement. In the 1960s, police in Rochester, New York arrested a group of people and charged them with disorderly conduct for staging "anti-Vietnam war skits in the presence of Christmas shopping crowds."[179] The State took the cases to trial, but the trial court dismissed the charges on grounds that the defendants' actions were protected by the First Amendment.[180] Protesters in Chicago were convicted of disorderly conduct for participating in a peaceful march to protest school segregation.[181] After extensive litigation the United States Supreme Court ultimately reversed the convictions,

[172] Morgan, *supra* n. 14 at *6, *42; Wayne A. Logan, *After the Cheering Stopped: Decriminalization and Legalism's Limits*, 24 CORNELL J.L. & PUB. POL'Y 319, 331 (2014) (noting that police "wield near-total discretion to execute arrests for low-level social-disorder offenses."); Michael Johnston, *As Free As A Bird: the Middle Finger and the First Amendment*, http://wakeforestlawreview.com/2019/09/as-free-as-a-bird-the-middle-finger-and-the-first-amendment/ ("Expansive disorderly conduct laws "give law enforcement broader discretion to stop people, even if the stops are only motivated by personal animus.").

[173] Bartlett v. Nieves, 139 S. Ct. 1715, 1734 (2019) (Ginsburg, J., concurring & dissenting); *see also* Watts, *supra* n. 142 at 358 (When disorderly conduct statutes are so broad as to permit many interpretations of what satisfies, "due process and justice becomes not what the legislature intended but what for a given purpose the police felt was disturbing or inciting."); Roberts, *supra* n. 87 at 782 (Criminal laws with broad language are "an invitation to police abuse.").

[174] Neimotke v. State, 194 Md. 247, 250-51 (1950).

[175] *Id.*

[176] *Id.* at 252-53.

[177] Hartnett v. Schmit, 501 F. Supp. 1024, 1025 (N.D. Ill. 1980).

[178] *Id.* at 1025-27.

[179] People v. Losinger, 313 N.Y.S.2d 60, 61 (City Ct. 1970).

[180] *Id.* at 62-64.

[181] Gregory v. City of Chicago, 394 U.S. 111, 111-12 (1969).

concluding both that the record was devoid of evidence suggesting that the protesters acted in a disorderly way, and that the jury convicted based on acts "clearly entitled to First Amendment protection."[182]

During the Civil Rights Movement, police routinely used disorderly conduct laws as a basis to arrest protesters.[183] More recently, police in central Illinois arrested a young man and charged him with disorderly conduct after he posted a photo to Facebook of himself burning an American flag, with an accompanying statement ruing his country's mistreatment of minorities.[184] During Jeff Sessions' Attorney General confirmation hearing in 2017, three female protesters were charged with disorderly conduct: two for dressing as Ku Klux Klan members to protest Sessions' alleged ties to the KKK, and one for simply laughing during the hearing.[185] After mass protests over Louisville, Kentucky police officers killing Breonna Taylor, the Kentucky Senate passed a bill—sponsored by a retired police officer—that would expand disorderly conduct to include people who "accost[], insult[], taunt[], or challenge[] a law enforcement officer with offensive or derisive words, or by gestures or other physical contact" tending to provoke a violent response.[186] These are all efforts to use disorderly conduct laws as a tool for suppressing politically unwelcome speech.

Disorderly conduct charges have been used to suppress other unwelcome or dissenting views. A man in Georgia was cited for disorderly conduct after interrupting a church prayer to raise his middle finger and yell "about sending children off to the evil public schools and having them raised by Satan."[187] He was convicted at trial but the Georgia Supreme Court eventually reversed, holding that the conduct at issue was constitutionally protected.[188] A New Jersey resident was arrested and charged with disorderly conduct for recording city council meetings over the objection of the mayor and city council members.[189] The State prosecuted, but a court found him not guilty after trial.[190]

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[182] *Id.* at 112-13.
[183] Golubuff, *supra* n. 69 at 119, 125; Christopher Schmidt, *Divided By Law: Sit-Ins and the Role of the Courts*, 33 LAW & HIST. REV. 93, 98-100, 108, 142 (2015).
[184] Steve Nelson, *Legal Fireworks: Police Unconstitutionally Arrest Flag-Burner on Fourth of July*, U.S. NEWS, Jul. 5, 2016, http://www.usnews.com/news/articles/2016-07-05/legal-fireworks-police-unconstitutionally-arrest-flag-burner-on-fourth-of-july; Tracy Crane, *Update: Urbana Flag-Burner Won't Be Charged*, THE NEWS-GAZETTEE, Jul. 5, 2016, http://www.news-gazette.com/news/local/2016-07-05/update-urbana-flag-burner-wont-be-charged.html.
[185] *See* Maya Salam, *Case Is Dropped Against Activist Who Laughed at Jeff Sessions's Hearing*, NY TIMES, Nov. 7, 2017, https://www.nytimes.com/2017/11/07/us/jeff-sessions-laughter-protester.html. Two of the women were acquitted after trial and the third was convicted but had her conviction vacated by the trial judge. *Id.*
[186] Joe Sonka & Kala Kachmar, *'How dare you': Kentucky Democrats lash out over bill criminalizing police insults, but bill passes state Senate*, USA TODAY, Mar. 13, 2021, https://www.usatoday.com/story/news/politics/2021/03/13/kentucky-senate-passes-riot-bill-criminalizing-insulting-police/4680301001/.
[187] Freeman v. State, 805 S.E.2d 845 (Ga. 2017).
[188] *Id.*
[189] Tarus v. Borough of Pine Hill, 189 N.J. 497, 500-03 (2007).
[190] *Id.* at 504.

2. Racial or sexual minorities

People of color have long been the "primary targets of proactive policing tactics," including aggressive enforcement of misdemeanor laws.[191] This type of policing has long occurred in communities of color both because police have long viewed people in those communities as more suspicious, and also because communities of color have traditionally lacked power to make their complaints heard.[192]

Part III.B. discusses in detail the ways in which disorderly conduct laws serve as a means of social control against people of color. One brief example is the phenomenon of white people calling the police to complain about the activities of Black people. While these calls have received substantial attention in recent years,[193] they are hardly a new problem. In one 1975 case, Ohio police responded to a call from a white family complaining about their Black neighbors; after police arrived one of the Black neighbors swore at the officers and commented that if a Black person had called the police, "they wouldn't have got this much motherfucking police protection."[194] The police charged her with disorderly conduct, and she was convicted under a theory that her language was obscene. An appellate court then affirmed her conviction, concluding that her language was not obscene but qualified as fighting words.[195] The Ohio Supreme Court reversed the conviction on grounds that her language was not obscene and the court had not given her an opportunity to rebut the notion that her language constituted fighting words.[196]

Etienne Toussaint has written that the mere status of being Black is often perceived as a symbol of disorder, or of resistance to law enforcement.[197] Toussaint posits that, where disorder itself is a racially biased concept, it should not be surprising that police are more likely to perceive disorder when they are confronted with Black people or even those protesting in support of Black lives.[198]

People with non-traditional sexual orientation or gender identities have also born some brunt of disorderly conduct enforcement.[199] The defendant in *United States v. Lanning* was convicted of disorderly conduct after an undercover park ranger targeting gay men initiated a sexually explicit conversation with the defendant and then agreed to have sex.[200] In response, the defendant briefly touched the ranger's clothed crotch.[201] The

[191] Hemmens & Levin, *supra* n. 158 at 4; *see also* Roberts, *supra* n. 87 at 780 (detailing how unconstitutional ordinances like Chicago's loitering ordinance are employed disproportionately against people of color).
[192] Livingston, *supra* n. 79 at 596.
[193] *See generally* Michael Harriot, *'White Caller Crime': The Worst Wypipo Police Calls of All Time*, ROOT (May 15, 2018), https://www.theroot.com/white-caller-crime-the-worst-wypipo-police-calls-of-1826023382; Chan T. McNamarah, *White Caller Crime: Racialized Police Communication and Existing While Black*, 24 MICH. J. RACE & L.. 335 (2019).
[194] City of Columbus v. Fraley, 324 N.E.2d 735, 736 (Ohio 1975).
[195] *Id.* at 737.
[196] *Id.* at 738.
[197] Toussaint, *supra* n. 163 at 153-54.
[198] *Id.* at 151-52, 158-59.
[199] *Golubuff*, supra n. 69 at ch. 1.
[200] United States v. Lanning, 723 F.3d 476, 478-79 (4th Cir. 2013).
[201] *Id.* at 478.

government charged him with disorderly conduct under a statute prohibiting "obscene" conduct, and the court sentenced him to 15 days in jail.[202] The Fourth Circuit reversed the conviction, holding that the statute was unconstitutionally applied because the defendant's conduct did not qualify as obscene for purposes of First Amendment analysis.[203]

3. People with mental health challenges

People with mental health issues are similarly vulnerable to disorderly conduct enforcement. In Massachusetts, the State charged a psychiatric patient involuntarily detained in a hospital with disorderly conduct after he began shouting and threatening to injure anyone who detained him against his will.[204] A jury convicted him of disorderly conduct under a statute requiring proof that he engaged in "violent or tumultuous behavior" "with purpose to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof."[205] The Supreme Court reversed the conviction, finding no evidence that the patient possessed the requisite mental state.[206]

In Atlanta, police charged a mentally ill man with disorderly conduct after they found him covered in feces and yelling obscenities at a gas station.[207] He spent months in jail, unable to afford the $500 bond.[208] In Minnesota, an 11-year-old boy whose mother described as possibly "on the autism spectrum" was charged with disorderly conduct after running around in a park with a mask covering his face, which prompted multiple neighbors to call the police.[209] The charge, which cost the family $3500 in legal fees to defend, resulted in anxiety for the child and an agreement that he must complete community service before the State would dismiss the case.[210]

4. People who annoy law enforcement

After studying disorderly conduct arrests and prosecutions in Philadelphia during the 1950s, Caleb Foote noted that many of the arrests involved people who had offended or insulted police officers.[211] Foote's examples included someone who was sitting in a bar "making uncomplimentary comments about the police in general" and a man of Mexican ancestry who used allegedly abusive language after a police officer told him to leave a

[202] *Id.* at 478-79 (citing 36 C.F.R. § 2.34(a)(2)).
[203] *Lanning*, 723 F.3d at 482-83.
[204] Commonwealth v. Accime, 476 Mass. 469, 470-71 (Mass. 2017).
[205] *Id.* at 473.
[206] *Id.* at 473-74.
[207] Rhonda Cook, *Suit: Free Jailed Atlanta Man Too Poor To Pay Bond*, ATLANTA J. CONSTIT. (Jan. 8, 2018), https://www.ajc.com/news/local/suit-filed-force-atlanta-free-jailed-poor-who-can-pay-bond/IXax3TpxJKWmyhVba4FGFK/.
[208] *Id.*
[209] Erin Adler, *Eagan Boy Thought He Was Just Playing in the Park, But Those on Social Media Felt Otherwise*, STAR TRIB., Dec. 2, 2019, https://www.startribune.com/eagan-boy-thought-he-was-just-playing-in-the-park-but-those-on-social-media-felt-otherwise/565914922/.
[210] *Id.*
[211] Caleb Foote, *Vagrancy-Type Law and Its Administration*, 104 U. PA. L. REV. 603, 637 (1956).

bus terminal.[212] The arresting officer acknowledged that the man was speaking Spanish—which the officer did not understand—but that the officer assumed the language was inappropriate and decided to arrest.[213]

The practice of police officers charging people who offend them with disorderly conduct has continued in the decades since Foote's research. In *Thompson v. City of Louisville*, the United States Supreme Court reversed a disorderly conduct conviction for a man who the police forcibly removed from a bar for arguing with the police, despite testimony that the man was a welcome patron and had purchased food and drink to pass the time while waiting for his bus.[214] There was no testimony that the man so much as raised his voice at police, nor did he use obscenities or physically resist arrest.[215]

Examples abound of law enforcement officers improperly charging people with disorderly conduct for using obscenities against police. In 2019, the Eighth Circuit held that an Iowa state trooper violated the First Amendment when he arrested a man and charged him with disorderly conduct for yelling "fuck you" at the trooper out his car window.[216] In New York City, police detained a defendant on suspicion of disorderly conduct after he shouted obscenities at the officers in a subway station.[217] While the swearing provoked "looks of surprise and curiosity from some passengers," it caused no additional response or harm.[218] In Rochester, New York, police arrested a man for disorderly conduct after he approached a vehicle to ask why the police officer had checked the license plate of his girlfriend's car.[219] When the officer said he could run whatever plates he wanted, the defendant backed away but began swearing and accusing the officer of harassing him.[220] The officer then got out of his car and arrested the defendant.[221] The Court of Appeals concluded that, where the outburst lasted only about fifteen seconds and no one but the officer was offended, no disorderly conduct occurred.[222]

Police in Omaha, Nebraska detained a Black woman getting off an airplane after receiving a vague tip about a Black person transporting drugs on a flight to Omaha.[223] The officers detained and searched the woman against her will; after they released her without finding evidence of crime, she told one of the officers that he was an "asshole."[224] They then arrested her for disorderly conduct.[225] She was found not guilty, and the Eighth Circuit

[212] *Id.*
[213] *Id.*
[214] Thompson v. City of Louisville, 362 U.S. 199, 201-02, 205-06 (1960).
[215] *Id.* at 205.
[216] Thurairajah v. Cross, No. 17-3419 (8th Cir. Jun. 3, 2019), https://ecf.ca8.uscourts.gov/opndir/19/06/173419P.pdf.
[217] People v. Gonzalez, 35 N.E.3d 478, 479 (N.Y. 2015).
[218] *Id.*
[219] People v. Baker, 984 N.E.2d 902, 903-04 (2013).
[220] *Id.* at 904.
[221] *Id.*
[222] *Id.* at 908.
[223] Buffkins v. City of Omaha, 922 F.2d 465, 467 (8th Cir. 1990).
[224] *Id.*
[225] *Id.*

later concluded that the officers had no probable cause to arrest because her speech was constitutionally protected.[226]

Massachusetts police officers attempting to serve a restraining order arrested a man inside his own yard after he became agitated at their arrival and bumped an officer.[227] A jury found him guilty, but the appellate court held that the disorderly conduct statute required evidence of public harm or threat, which was not present in this case.[228] An intoxicated Naval petty officer was charged with disorderly conduct after using unspecified profanity at a Naval security officer who woke him up from sleep.[229] The man was convicted of disorderly conduct after trial but a federal court reversed the conviction, holding that the man's speech was constitutionally protected.[230]

An Alaska state trooper pulled over a driver for driving "in an unusual manner" and ordered the driver to complete sobriety tests.[231] After the front seat passenger objected with "loud and obscene" language, the trooper arrested him and charged him with disorderly conduct.[232] The Alaska Supreme Court concluded that the evidence was insufficient to convict.[233] In yet another case, a Yosemite National Park ranger entered the cabin of a park employee and, finding the employee asleep on a bed, poked the employee in the chest.[234] The employee began swearing at the officer and attempted to get up from the bed.[235] Deciding that the employee posed a threat, the ranger arrested him for disorderly conduct.[236] The Ninth Circuit ultimately held that because the federal disorderly conduct statute required that the conduct at issue be "public," and because this incident happened in private, the defendant was not guilty of disorderly conduct.[237]

Use of the middle finger toward police could alone fill an article on improper disorderly conduct charges.[238] A North Carolina state trooper pulled a man over for giving the trooper the middle finger while driving by on the highway.[239] The defendant argued that his middle finger gesture did not provide reasonable suspicion of disorderly conduct.[240] Although both the trial and appellate courts denied the defendant's motion to suppress,

[226] *Id.* at 467 n.6, 472; *see also* Cavazos v. State, 455 N.E.2d 618, 620-21 (Ind. Ct. App. 1983) (Indiana woman convicted of disorderly conduct for calling a police officer an "asshole" and accusing him of having a grudge against her brother; conviction reversed on appeal after appellate court concluded the language was protected speech).
[227] Com. v. Mulvey, 784 N.E.2d 1138, 1140-41 (Mass. App. Ct. 2003).
[228] *Id.* at 1141-43.
[229] United States v. McDermott, 971 F. Supp. 939 (E.D. Pa. 1997).
[230] *Id.*
[231] State v. Martin, 532 P.2d 316, 317 (Alaska 1975).
[232] *Id.* at 318.
[233] *Id.* at 322.
[234] United States v. Taylor, 258 F.3d 1065, 1066 (9th Cir. 2001).
[235] *Id.*
[236] *Id.*
[237] *Id.* at 1068.
[238] Ira Robbins, *Digitus Impudicus: The Middle Finger and the Law*, 41 U.C. DAVIS L. REV. 1403, 1451 (2008) ("Convictions for use of the middle finger often arise from its use in the presence of a police officer.").
[239] State v. Ellis, 374 N.C. 340, 341 (2020).
[240] *Id.*

the state supreme court eventually held that merely "flipping the bird" did not establish reasonable suspicion of disorderly conduct.[241]

Arizona police arrested a Latino man for disorderly conduct for swearing and directing his middle finger at officer.[242] During the arrest the police dislocated the man's elbow, requiring hospitalization.[243] The Ninth Circuit held that the arrest violated the man's First Amendment rights.[244] A Pennsylvania police officer pulled a car over and arrested the passenger for disorderly conduct after he gestured with his middle finger at the officer.[245] After the man sued, a federal court concluded that the gesture constituted neither fighting words nor obscenity, and thus could not serve as probable cause for a disorderly conduct arrest.[246] In Texas, a sheriff's deputy saw a driver display his middle finger at the deputy.[247] The deputy pulled the man over for having a missing license plate and questioned him about his gesture.[248] When the man said he had a constitutional right to display his middle finger, the sheriff replied that "Texas law did not see it that way."[249] The trooper cited the man for disorderly conduct but a federal district court later held that displaying the middle finger was constitutionally protected.[250]

Kansas police arrested a man and charged him with disorderly conduct after the man was allegedly discharging grass clippings from his own yard into the street while mowing.[251] After police approached, the man turned to the nearby mayor's house, raised his middle finger, and swore at police.[252] The court concluded that police had no probable cause to arrest for disorderly conduct, given that the gesture and speech were constitutionally protected.[253] An Ohio police officer charged a man with disorderly conduct after the man gestured with his middle finger while telling the officer to "have a nice day."[254] A federal court concluded that the officer had no probable cause to charge the defendant.[255] A North Dakota police officer arrested a man for disorderly conduct after he walked past her patrol car, gestured with his middle finger, and said "fuck you" to her multiple times.[256] Though a jury found him guilty after trial, the North Dakota Supreme Court reversed, holding that the man's words were protected by the First Amendment.[257]

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[241] *Id.* at 344.
[242] Duran v. City of Douglas, 904 F.2d 1372, 1374 (9th Cir. 1990).
[243] *Id.* at 1375.
[244] *Id.* at 1377.
[245] Brockway v. Shepard, 942 F. Supp. 1012, 1014 (M.D. Pa. 1996).
[246] *Id.* at 1016-17.
[247] Brown v. Wilson, No. 1:12-CV-1122-DAE, 2015 WL 4164841 (W.D. Tex. July 9, 2015).
[248] *Id.*
[249] *Id.*
[250] *Id.*
[251] Youngblood v. Qualls, 308 F. Supp. 3d 1184, 1190-91 (D. Kan. 2018).
[252] *Id.* at 1190.
[253] *Id.* at 1197; *see also* Cook v. Bd. of the Cty. Comm'rs, 966 F. Supp. 1049, 1051 (D. Kan. 1997) (Kansas patrol officer cited a man for disorderly conduct after the man drove past and "flipped the bird" at the officer).
[254] Perkins v. City of Gahanna, No. C2-99-533, 2000 WL 1459444 (S.D. Ohio Sept. 21, 2000).
[255] *Id.*
[256] City of Bismarck v. Schoppert, 469 N.W.2d 808, 809 (N.D. 1991).
[257] *Id.* at 810-13.

An Arkansas state trooper pulled a man over and cited him with disorderly conduct after the man gave him the middle finger as he drove by.[258] The man was acquitted after trial, and a federal district court concluded that the gesture was constitutionally protected.[259] In 2019, the ACLU of Iowa filed a complaint alleging that an Iowa sheriff's office repeatedly arrested people and charged them with disorderly conduct for calling an officer "sum bitch" in a Facebook post, cursing at an officer, and "flipping the bird" at an officer.[260]

Even defying illegitimate police orders can result in a disorderly conduct charge. In a New York case, police claimed to have probable cause of disorderly conduct when a man was standing on a sidewalk with three purported gang members and refused to move when the police ordered him to do so.[261] The Court of Appeals held that disorderly conduct requires actual or threatened public harm, and where none existed the police did not have probable cause to arrest.[262]

Harvey Silverglate, a civil rights attorney, has called disorderly conduct law enforcement's "charge of choice" for civilians who disrespect police officers.[263] The First Amendment protects the right to disagree with and even disrespect law enforcement, and rigorously enforcing disorderly conduct laws can chill the exercise of those rights.[264] Civilians have a constitutional right to shout at the police, swear at them, and even call them racist.[265] But as the above cases show, police too frequently respond to such behavior by abusing their power to charge civilians with disorderly conduct.

5. People who offend other civilians

Disorderly conduct charges are used as a cudgel against people who exercise their right to free speech in an obnoxious way, even when those people are not directing their speech at law enforcement. In Georgia, a middle schooler was found guilty of disorderly conduct for yelling, "I better get my f—ing Sharpie back" at a teacher after the teacher confiscated his markers during lunch.[266] The State prosecuted under the theory that the child's speech constituted fighting words.[267] The Georgia Supreme Court eventually rejected that theory, reasoning that the words were "not sufficiently threatening, belligerent, profane, or abusive enough to sustain a finding that an average hearer would be goaded into violence

[258] Nichols v. Chacon, 110 F. Supp. 2d 1099 (W.D. Ark. 2000).
[259] *Id.*
[260] Jon Richard Goldsmith v. Adams County et al., No.: 4:19-cv-00152, Verified Complaint (May 21, 2019), https://www.aclu-ia.org/sites/default/files/stamped_goldsmith_complaint.pdf.
[261] People v. Johnson, 9 N.E.3d 902, 903 (N.Y. 2014).
[262] *Id.*
[263] Camille Fassett, *Police Are Threatening Free Expression By Abusing the Law to Punish Disrespect of Law Enforcement*, FREEDOM OF THE PRESS FOUND., Jul. 31, 2018, https://freedom.press/news/police-are-threatening-free-expression-abusing-law-punish-disrespect-law-enforcement/.
[264] *See* Eric Miller, *Police Encounters with Race and Gender*, 5 UC IRVINE L. REV. 735, 747 (2015) (lauding the civic value of contesting police authority, but noting that "contestation may be, to some extent, disorderly").
[265] *Id.* at 748.
[266] In re L.E.N., 299 Ga. App. 133, 133-34 (Ga App. 2009).
[267] *Id.* at 134.

upon hearing the statement."[268] In Colorado, a 14-year-old child took a photo of his friend, used Snapchat to draw a penis over it, and showed the doctored photo to other friends.[269] The State prosecuted him for disorderly conduct, and a judge convicted the child after a bench trial.[270] The Colorado Court of Appeals reversed the conviction, holding that the drawing was constitutionally protected speech.[271]

Use of the middle finger against civilians is, again, a frequent target of disorderly conduct charges.[272] As Ira Robbins noted in *The Middle Finger and the Law*, prosecution of mildly offensive speech threatens significant detriment to people whose speech or behavior causes minimal harm.[273] While some readers may have little sympathy toward people who use offensive speech, charging this type of behavior as disorderly conduct nonetheless represents an overstep of governmental authority.

Criminal prosecutions are, to use the words of William Stuntz, "morality plays."[274] If the act of prosecuting crime is to send any meaningful message, it should be limited to behavior that society widely agrees is both wrong and harmful. [275] Disorderly conduct prosecutions are not so limited. Police have arrested and charged people with disorderly conduct for speaking in a foreign language, waiting outside a restaurant while pizza they had ordered was baking, lingering too long at a restaurant, honking a car horn, lying down in front of a store, displaying a religious pamphlet too closely to a store, picketing a business, and refusing to descend from a tree they had climbed.[276] The expansive language of disorderly conduct laws, and the abuses these laws foster, erode the criminal legal system's credibility.

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[268] *Id.* at 135.
[269] People in the Interest of R.C., 411 P.3d 1105 (Colo. App. 2016).
[270] *Id.*
[271] *Id.*
[272] *See, e.g.,* Coggin v. State, 123 S.W.3d 82 (Tex. App. 2003) (defendant found guilty of disorderly conduct for flipping middle finger at another driving moving slowly on the highway; state court of appeals reversed on grounds that the middle finger did not constitute fighting words); Pennsylvania v. Kelly, 758 A.2d 1284, 1285-88 (Pa. Super. Ct. 2000) (woman found guilty of disorderly conduct after saying, "Fuck you, asshole" and gesturing with middle finger at a city employee who confronted her; appellate court reversed conviction on grounds that the speech was constitutionally protected); Commonwealth v. Danley, 13 Pa. D. & C.4th 75, 76-77 (1991) (trooper pulled over garbage truck driver and charged him with disorderly conduct for gesturing middle finger toward other drivers; reviewing court concluded that gesture was not obscene and no probable cause to charge); Sandul v. Larion, 119 F.3d 1250, 1252-53 (6th Cir. 1997) (police officer charged man with disorderly conduct for yelling "fuck you" and extending his middle finger at group of abortion protesters; Sixth Circuit held that speech was constitutionally protected); Swartz v. Insogna, 704 F.3d 105, 108 (2d Cir. 2013) (police officer charged man with disorderly conduct for using middle finger while driving; cases pended for several years before charges were eventually dismissed).
[273] Robbins, *supra* n. 230 at 1411-12.
[274] William J. Stuntz, *Self-Defeating Crimes*, 86 VA. L. REV. 1871, 1882 (2000).
[275] *Id.*
[276] *See* Kimberly J. Winbush, ANNOTATION, VALIDITY, CONSTRUCTION, AND APPLICATION OF STATE STATUTES AND MUNICIPAL ORDINANCES PROSCRIBING FAILURE OR REFUSAL TO OBEY POLICE OFFICER'S ORDER TO MOVE ON, OR DISPERSE, ON STREET, AS DISORDERLY CONDUCT, 52 A.L.R.6th 125, §45, 47, 49 (2010).

B. Social control that disproportionately affects people of color

Criminal law—particularly enforcement of minor crimes—has long been used as a means of social control against people of color.[277] Charles Breitel, the Chief Judge of the New York Court of Appeals in the mid-twentieth century, once commented that crime control is "not so much a field of law as it is a great engine for social administration."[278] More recently, Nirej Sekhon has theorized that police departments serve primarily as "guarantors of a social order that benefits dominant groups" and a "tool for managing those segments of the lower classes that the upper and middle classes found threatening."[279] Similarly, Alexandra Natapoff has argued that prosecuting low-level offenses is "central to the carceral ethos" because these offenses "expand the power of the state to criminalize large numbers of people . . . [and] confer vast discretion on police to aim that carceral power in racially disproportionate ways."[280]These concerns are rarely more apparent than in the enforcement of disorderly conduct laws.

The entire concept of disorder is racially fraught, shaped by racial and economic biases.[281] Implicit bias research suggests that Americans hold "persistent beliefs" linking Black people and other disadvantaged minorities to stereotypes about criminality, disorder, and "undesirability as neighbors."[282] White people are, according to some studies, both less

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[277] *See, e.g.*, Kristin Henning, *Criminalizing Normal Adolescent Behavior in Communities of Color*, 98 CORNELL L. REV. 383, 404-08 (2013) (discussing history of juvenile justice system and how juvenile law originated as a means of social control of children of color); Gary Stewart, *Note, Black Codes and Broken Windows: The Legacy of Racial Hegemony in Anti-Gang Civil Injunctions*, 107 YALE L.J. 2249 (1998) (discussing the ways in which supposedly race-neutral but broad laws like vagrancy statutes and gang ordinances inevitably result in police discrimination against "undesirable" people of color); Golubuff, *supra* n. 69 at 272-74 (2016) (detailing the disparate enforcement of vagrancy laws against Black people).

[278] Breitel, *supra* n. 142 at 432.

[279] Nirej Sekhon, *Police and the Limit of Law*, 119 COLUM. L. REV. 1711, 1711, 1717, 1731-32 (2019).

[280] Natapoff, Atwater *and the Misdemeanor Carceral State*, *supra* n. 13 at 152; *see also id.* ("Historically, misdemeanors have been central to the racialization of crime, to the criminalization of black men in particular, and to the criminalization of poverty in general."); Jocelyn Simonson, *Copwatching*, 104 CALIF. L. REV. 391, 400 (2016) (The fact that broadly written laws give police enormous discretion in whom to arrest is "of particular concern for many poor people of color in areas that engage in order-maintenance policing and other place-based initiatives."); Abdallah Fayyad, *The Criminalization of Gentrifying Neighborhoods*, THE ATLANTIC (Dec. 20, 2017), https://www.theatlantic.com/politics/archive/2017/12/the-criminalization-of-gentrifying-neighborhoods/548837/ (quoting Professor Paul Butler for the proposition that enforcement of disorder crimes against people of color tends to increase as white people move into gentrifying neighborhoods).

[281] Robert J. Sampson & Stephen W. Raudenbush, *Seeing Disorder: Neighborhood Stigma and the Social Construction of "Broken Windows,"* 67 SOC. PSYCHOL. Q. 319, 323 (2004); *see also* Sekhon, *supra* n. 271 at 1737 (2019) ("'disorder' is not an objective fact but heavily shaped by race and class presuppositions"); Harcourt, *Reflecting on the Subject*, *supra* n. 85 at 297 (1998) ("the category of the disorderly is itself a reality produced by the method of policing. It is a reality shaped by the policy of aggressive misdemeanor arrests"); Roberts, *supra* n. 87 at 786 ("The discriminatory impact of discretion is magnified tremendously by laws that leave not only the determination of suspicion but the very definition of offending conduct almost entirely to an officer's judgment.").

[282] Sampson & Raudenbush, *supra* n. 273 at 320; *see also id.* at 322-23 (citing multiple studies finding positive correlation between presence of young Black men in a neighborhood and perceptions of disorder, even absent actual differences in reported crimes or neighborhood deterioration); Andrea Ritchie, INVISIBLE NO MORE: POLICE VIOLENCE AGAINST WOMEN AND WOMEN OF COLOR 55 (2017) ("What is deemed disorderly or lewd is often in the eye of the beholder, an eye that is informed by deeply racialized and gendered perceptions."); Morgan, *supra* n. 14 at *6 ("disorderly conduct laws enforce discriminatory norms that may inform, shape, and reinforce

likely to be the subject of disorder complaints and more likely to perceive disorder among other racial groups.[283]

Assumptions about race and gender permeated even the earliest disorderly conduct laws.[284] In the nineteenth century, single women and people of color were inherently suspicious and vulnerable to prosecutions for conduct like keeping a disorderly house.[285] In 1953, Forrest Lacey critiqued disorderly conduct and vagrancy laws for giving police power "to arrest members of certain classes and abuse them more than persons without those classes," and noted this appeared to be especially true for "members of minority groups."[286] In the 1960s, Thomas Johnson warned that society could not rely on police officers to maintain social order in an unbiased way, arguing that "most" officers have "absorbed some of the prejudices and antipathies toward minority groups that are so tragically widespread in our society."[287] Around the same time period, a Los Angeles Times op-ed suggested amending or abolishing disorderly conduct laws because of the intense resentment unequal enforcement of those laws created among Black people.[288]

During the height of the broken windows policing era, people of color suffered the brunt of police enforcement of low-level offenses. Devon Carbado has observed that broken windows policing, which was "expressly predicated on the view that police officers should enforce minor criminal infractions and surveil communities for signs of disorder," increased unwelcome contacts between Black people and police officers because perceptions of disorder are racialized.[289] Statistics support that observation: between 1990 and 2020, the number of misdemeanor arrests in New York City—the epicenter of the broken windows movement—increased for Hispanic people in New York City by more than 158% and for Black people by more than 105%, while misdemeanor arrests for while people increased by only 35% during that same period.[290]

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deeply rooted historical and current social understandings of which conduct—and which persons—are considered disorderly.").

[283] Sampson & Raudenbush, *supra* n. 273 at 337; *see also* Gau & Brunson, *supra* n. 145 at 259 (observing that "neighborhood-level characteristics such as racial heterogeneity and poverty influence people's perceptions of disorder even more so than disorder itself does.").

[284] William J. Novak, THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH CENTURY AMERICA 170 (1996); Compiled Laws of Nevada, *supra* n. 60.

[285] Novak, *supra* n. 276 at 170.

[286] Forrest W. Lacey, *Vagrancy and Other Crimes of Personal Condition*, 66 HARV. L. REV. 1203, 1205-06 (1953).

[287] Thomas Johnson, *Police-Citizen Encounters and the Importance of Role Conceptualization for Police-Community Relations*, ISSUES IN CRIMINOLOGY, Vol.7 at 108 (1972) (quoting Joseph Lohman, THE POLICE AND MINORITY GROUPS 5 (1947)).

[288] Golubuff, *supra* n. 79 at 268.

[289] Devon W. Carbado, *Blue-on-Black Violence: A Provisional Model of Some of the Causes*, 104 GEO. L.J. 1479, 1486 (2016); *see also id.* at 1489 (granting police significant discretion about whom to arrest allows them to target Black people "whose very embodiment or self-presentation is a sign of disorder."); Gau & Brunson, *supra* n. 145 at 258-59 (finding that police are most likely to be influenced by extralegal factors such as race or socioeconomic status when the laws are unclear and the behavior at issue relatively insignificant); Jeffrey Fagan & Garth Davies, *Policing Guns: Order Maintenance and Crime Control in New York*, in Bernard E. Harcourt, ed, GUNS, CRIME, AND PUNISHMENT IN AMERICA 191, 210 (NYU 2003) (Black people have "shouldered much of the burden" of order-maintenance policing).

[290] Kohler-Hausmann, *supra* n. 164 at 633-34 (2014) (displaying graph from New York Division of Criminal Justice Services); *see also* Harcourt, *Reflecting on the Subject*, supra n. 85 at 299 ("The brute fact is that the decision to

Similar disparities are still present today. According to the FBI's crime report statistics for both 2016 and 2018, Black people comprised approximately 32 percent of the people arrested for disorderly conduct, despite representing less than 13 percent of the population.[291] The Black arrest rate for crimes like disorderly conduct has been at least double the rate for white people since 1980 and shows no signs of equalizing.[292] In a 2016 Cato Institute study, Black Americans reported being stopped by police at significantly higher rates than white people.[293] Black people are about twice as likely as white people to report that they have personally been mistreated by police or know someone who was.[294] The Black Lives Matter movement has been fueled not only by tragic and violent deaths of Black people at the hands of police, but by the frequency and disparities of stops and arrests for minor offenses like disorderly conduct. [295]

One of the most problematic consequences of this social control is the damaged relationship between police and communities subjected to consistently invasive policing.[296] The phenomenon of being a consistent subject of law enforcement surveillance and suspicion has been labeled a "form of racial subordination,"[297] a socialization method that forces Black people to "internalize[] racial obedience" to police,[298] and a "regressive racial tax" that burdens people simply for being poor and a person of color.[299] Black communities are often at such odds with police that Professor

arrest for misdemeanors results in the arrest of many minorities."); Scott Holmes, *Resisting Arrest and Racism: the Crime of "Disrespect,"* 85 UMKC L. REV. 625, 626 (2017) (noting police enforcement of low-level crimes "must be understood within the larger context of racially divided communities, and the long history of defining 'insiders' and 'outsiders' within our society based upon wealth, privilege, and race.").

[291] Federal Bureau of Investigations, 2018: CRIME IN THE UNITED STATES: TABLE 43, Uniform Crime Reporting, https://ucr.fbi.gov/crime-in-the-u.s/2018/crime-in-the-u.s.-2018/tables/table-43; Federal Bureau of Investigations, 2016: CRIME IN THE UNITED STATES, https://ucr.fbi.gov/crime-in-the-u.s/2016/crime-in-the-u.s.-2016/topic-pages/tables/table-21; U.S. Dep't of Health & Human Services Office of Minority Health, PROFILE: BLACK/AFRICAN AMERICANS, https://minorityhealth.hhs.gov/omh/browse.aspx?lvl=3&lvlid=61#:~:text=Overview%20(Demographics)%3A%20In%20July,following%20the%20Hispanic%2FLatino%20population (Black people comprised 12.7% of the United States population as of July 2017).

[292] Stevenson & Mayson, *supra* n. 19 at 761.

[293] Emily Ekins, *Policing in America: Understanding Public Attitudes Toward the Police. Results from a National Survey*, CATO INSTITUTE, Dec. 7, 2016, https://www.cato.org/survey-reports/policing-america.

[294] *Id*.

[295] *See* Alexandra Natapoff, *The High Stakes of Low-Level Criminal Justice*, 128 YALE L.J. 1648, 1650 (2019); Jana Kooren, *The Hard Truth of the Minneapolis Black Lives Matter Protests: Communities of Color Have No Trust in Their Police Force*, ACLU OF MINN., Dec. 9, 2015, https://www.aclu.org/blog/racial-justice/race-and-criminal-justice/hard-truth-minneapolis-black-lives-matter-protests (urging people to understand Black Lives Matter protests in light of overpolicing of offenses like disorderly conduct in Black communities that feel targeted by police).

[296] See Eric Miller, *Role-Based Policing: Restraining Police Conduct "Outside the Legitimate Investigative Sphere,"* 94 CAL. L. REV. 617, 621 (2006) ("The current focus on constitutional remedies for low-level police abuses has failed to reduce justified resentment against the police by individuals and local communities subject to heightened amounts of increasingly invasive policing."); Harcourt, *Reflecting on the Subject*, *supra* n. 85 at 298 (describing the "disorderly person" as "an object of suspicion, surveillance, control, relocation, micromanagement, and arrest").

[297] Charles R. Epp, Steven Maynard-Moody & Donald Haider-Markel, PULLED OVER: HOW POLICE STOPS DEFINE RACE AND CITIZENSHIP 135 (2014).

[298] Devon W. Carbado, *(E)racing the Fourth Amendment*, 100 MICH. L. REV. 946, 966 (2002).

[299] Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 727 (2005).

Monica Bell has coined them "legally estranged."[300] Laws like disorderly conduct, that equip police with nearly unfettered discretion to harass and arrest people engaged in relatively harmless conduct, contribute to that estrangement.

Racially disparate enforcement of disorderly conduct laws serves an especially insidious purpose when it acts as a means to create separation between races and classes: for example, white people moving into gentrifying neighborhoods and calling the police on their neighbors of color for playing their music too loudly. In this sense disorderly conduct laws play a tangible role as "mechanism[s] for racial subordination"[301] by ensuring that poor people of color remain concentrated in spaces white people rarely live.[302]

Consistent unwanted police encounters are problematic for yet another reason: they can be violent or even deadly, especially for people of color. Because disorderly conduct laws grant police discretion to stop or arrest civilians for such a wide array of behavior, they necessarily increase opportunities for violent encounters with police. In discussing the causes of police violence against Black people, Devon Carbado has noted that policing of low-level offenses makes Black people "vulnerable to ongoing police surveillance and contact," which in turn exposes them to the possibility of what Carbado labels "blue-on-black violence."[303] One person of color described the trauma of being stopped, frisked, and arrested by New York City police for disorderly conduct as follows: "My jeans were ripped. I had bruises on my face. My whole face was swollen…[two days later the charges were dismissed, but] I still am scared."[304] People who were not physically harmed during a police stop or arrest can still suffer trauma and stigmatization from the arrest.[305]

Even courts are starting to acknowledge that enforcement of low-level crimes exacerbates racial disparities and injustice. In her 2016 dissent in *Utah v. Strieff*, Justice Sotomayor noted that "it is no secret that people of color are disproportionate victims" of police scrutiny, and urged her colleagues not to "pretend that the countless people who are routinely targeted by police are isolated."[306] In 2020, the Salt Lake City municipal court issued an order recognizing that "municipal courts like ours have historically been situated on, or at least very near, the tip of systemic racism's spear."[307]

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[300] Monica Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054 (2017).
[301] Morgan, *supra* n. 14 at *40.
[302] Reuben Jonathan Miller & Amanda Alexander, *The Price of Carceral Citizenship: Punishment, Surveillance, and Social Welfare Policy in an Age of Carceral Expansion*, 21 MICH. J. RACE & L. 291, 301 (2016).
[303] Carbado, Blue-on-Black Violence, *supra* n. 281 at 1483.
[304] Rima Vesely-Flad, *New York City Under Siege: The Moral Politics of Policing Practices, 1993-2013*, 49 WAKE FOREST L. REV. 889, 898 (2014) (quoting Ctr. for Constitutional Rights, *Stop and Frisk: The Human Impact* 11-12, 14 (2012), http:// stopandfrisk.org/the-human-impact-report.pdf).
[305] *See* Josh Gupta-Kagan, *The School-to-Prison-Pipeline's Legal Architecture*, 45 FORDHAM URB. L.J. 83, 94-96 (2017) (young woman who was wrongly arrested for disorderly conduct after recording an abusive police officer in a school refused to return to school even after charges were dismissed, noting her embarrassment about the incident and anxiety every time she saw a police officer).
[306] Utah v. Strieff, 136 S. Ct. 2056, 2070-71 (2016) (Sotomayor, J., dissenting).
[307] *See, e.g.*, Salt Lake City Justice Court, Standing Order No. 10-7, May 31, 2020, https://twitter.com/saltlakejustice/status/1267170980842991617/photo/1.

C. Barrier to employment, housing, and other opportunities

While disorderly conduct charges usually involve fairly innocuous conduct, their consequences are serious. Disorderly conduct charges carry the possibility of incarceration in all fifty states.[308] Apart from incarceration, the collateral harms of misdemeanor charges and convictions are many: misdemeanants are often "punished, stigmatized, and burdened by their convictions in many of the same ways as their felony counterparts."[309] People with misdemeanor charges or convictions face loss of jobs (or job opportunities), ineligibility for subsidized housing, rejection of applications for non-subsidized housing, and even loss of educational opportunities.[310] Misdemeanor criminal records can affect "eligibility for professional licenses, child custody, food stamps, student loans, health care, or lead to deportation."[311]

The harms of misdemeanor charges are far more severe than even a decade ago, in large part due to the increasing availability criminal records.[312] Because most criminal records are now available electronically to the public, employers, landlords, educators, and others have easy access to such records.[313] Even dismissed charges often remain public record

[308] Ala. Code § 13A-11-7(b); Alaska Stat. Ann. § 11.61.110(c); Ariz. Rev. Stat. Ann. § 13-2904(B); Ark. Code Ann. § 5-71-207(b); Cal. Penal Code § 647; Colo. Rev. Stat. Ann. § 18-9-106(b)-(c); Conn. Gen. Stat. Ann. § 53a-181(b); Del. Code Ann. tit. 11, § 1301; D.C. Code Ann. § 22-1321(h); Fla. Stat. Ann. § 877.03; Ga. Code Ann. § 16-11-39(b); Haw. Rev. Stat. Ann. § 711-1101(3); Idaho Code Ann. § 18-6409; 720 Ill. Comp. Stat. Ann. 5/26-1(b); Ind. Code Ann. § 35-45-1-3(a); Iowa Code Ann. § 723.4; Kan. Stat. Ann. § 21-6203(b); Ky. Rev. Stat. Ann. § 525.060(2); La. Stat. Ann. § 14:103(B); Me. Rev. Stat. tit. 17-A, § 501-A(3); Md. Code. Ann., Crim. Law § 10-201(d); Mass. Gen. Laws Ann. ch 272, § 53(b) (incarceration available only for second or subsequent offense); Mich. Comp. Laws § 750.168(1); Minn. Stat. Ann. § 609.72 subd. 1; Miss. Code Ann. § 97-35-7(2); Mo. Ann. Stat. § 574.010(2); Mont. Code Ann. § 45-8-101(b) (incarceration available only for second or subsequent offense); Neb. Rev. Stat. Ann § 28-1322(2); Nev. Rev. Stat. Ann. § 203.010; N.H. Rev. Stat. Ann. § 644:2 (misdemeanor only if the offense "continues after a request by any person to desist"); N.J. Stat. Ann. § 2C:33-2; N.M. Stat. Ann. § 30-20-1; N.Y. Penal Law § 240.20; N.C. Gen. Stat. Ann. § 14-288.4(c); N.D. Cent. Code Ann. § 12.1-31-01; Ohio Rev. Code Ann. § 2917.11(E) (punishable by incarceration only in certain circumstances); Okla. Stat. Ann. tit. 21, § 1362; Or. Rev. Stat. § 166.023(2); 18 Pa. Cons. Stat. § 5503(b); 11 R.I. Gen. Laws Ann. § 11-45-1(c); S.C. Code Ann. § 16-17-530(A); S.D. Codified Laws § 22-18-35; Tenn. Code Ann. § 39-17-305(c); Tex. Penal Code Ann. § 42.01(d) (punishable by incarceration only in certain circumstances); : Utah Code Ann. § 76-9-102(4) (misdemeanor only if the offense "continues after a request by any person to desist"); Vt. Stat. Ann. tit. 13, § 1026(b); Va. Code Ann. § 18.2-415; Wash. Rev. Code Ann. § 9A.84.030(2); W. Va. Code Ann. § 61-6-1b(a); Wis. Stat. Ann. § 947.01(a); Wyo. Stat. Ann. § 6-6-102(b).

[309] Natapoff, *Misdemeanors*, *supra* n. 10 at 1313.

[310] *Id.*; Roberts, *Crashing the Misdemeanor System*, *supra* n. 10 at 1090; Stevenson & Mayson, *The Scale of Misdemeanor Justice*, *supra* n. 19 at 73 ("the consequences of misdemeanor arrest or conviction are far from trivial."); Vesely-Flad, *supra* n. 296 at 898 ("Arrests can create permanent criminal records that are easily located on the internet by employers, landlords, schools, credit agencies, licensing boards, and banks."); INDEP. COMM'N ON N.Y.C. CRIMINAL JUSTICE & INCARCERATION REFORM, A MORE JUST NEW YORK CITY 37 (2017), https://perma.cc/MJN6-472Z ("A criminal record can have life-changing implications, and not in a good way.").

[311] Natapoff, *Misdemeanors*, *supra* n. 10 at 1316-17; *see also* Roberts, *Why Misdemeanors Matter*, *supra* n. 143 at 299-300 (calling challenges to finding and keeping work the "most pervasive collateral effect" of misdemeanor convictions); Miller & Alexander, *supra* n. 294 at 293 (even charges that do not result in convictions have been shown to effect job eligibility and licensing).

[312] Roberts, *Why Misdemeanors Matter*, *supra* n. 143 at 287.

[313] *Id.*

unless the charged person undertakes a sometimes complicated and lengthy process to expunge records.[314]

D. Waste of resources that could be better spent elsewhere

Prosecuting disorderly conduct takes resources: law enforcement officers to make arrests or issue citations; prosecutors and public defenders to pursue and defend the cases; judges and court staff to preside over the administrative aspects of the case. It also saps the economic resources of defendants, requiring them to miss work, school, or other obligations to answer to such charges. [315]

In 1969 two criminologists proposed dramatically limiting the effect of disorderly conduct and vagrancy laws (along with other minor offenses), with the goal of freeing law enforcement resources to focus on more serious crimes.[316] The subsequent decades instead saw a dramatic increase in state expenditures on prosecution and incarceration.[317] In recent years the decriminalization movement has gained some traction, driven in part by realizations about the far-reaching human and financial costs of prosecutions.[318] A 2017 study in Portland, Oregon showed that every dollar spent providing services to homeless people saved the city $13 it would have otherwise spent in criminal justice costs.[319] In Pinellas County, Florida, the practice of arresting and charging homeless people for offenses like disorderly conduct and trespassing was causing routine overcrowding at the jail.[320] In an attempt to alleviate overcrowding the sheriff created a "safe harbor" shelter to remove homeless people incarcerated on low-level offenses and instead provide services like medical care, treatment, and access to laundry.[321] The move saved the county $113 per person, per day. [322] The economic costs of disorderly conduct prosecutions cannot be ignored in assessing whether society should continue to prosecute these charges.

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[314] *Id.*; *see also, e.g.*, Minn. Stat. 609A.02, 609A.03 (laying out the process for expungement of dismissed charges, which in most cases still requires a filed petition, a waiting period of at least 120 days, and multiple opportunities for other parties to object to expungement).
[315] Roberts, *Why Misdemeanors Matter*, *supra* n. 143 at 331-32.
[316] Morris & Hawkins, *supra* n. 73 at 3-4.
[317] *See* The Sentencing Project, *Fact Sheet: Trends in U.S. Corrections*, https://www.sentencingproject.org/wp-content/uploads/2020/08/Trends-in-US-Corrections.pdf.
[318] *See* Roberts, *Why Misdemeanors Matter*, *supra* n. 143 at 331-32 ("Driven by the stark fiscal reality of the high costs of low-level prosecutions in hard economic times," some states and municipalities have moved away from prosecuting certain misdemeanor offenses); Dan Coenen, *Freedom of Speech and the Criminal Law*, 97 B.U. L. REV. 1533, 1535 (2017) (noting that a "decriminalization movement" has been motivated in large part by the costs of the existing criminal system).
[319] Police Executive Research Forum, *The Police Response to Homelessness* 10 (June 2018), https://www.policeforum.org/assets/PoliceResponsetoHomelessness.pdf (citing *Study of the Service Coordination Team and its Impact on Chronic Offenders: 2017 Report*, Portland State University, Capstone Class UNST 421, Section 572).
[320] Police Executive Research Forum, *supra* n. 311 at 12.
[321] *Id.*
[322] *Id.*

IV. Responses to proponents of disorderly conduct laws

A. Proponents of order-maintenance policing

Most people who support enforcement of low-level crimes like disorderly conduct are proponents of order-maintenance policing: the idea that maintaining order in public spaces is necessary to ensure quality of life and deter more serious crimes.[323] The broken windows theory of policing, discussed in Part I.B. above,[324] is a form of order-maintenance policing. Robert Ellickson, a supporter of order-maintenance policing, frames his argument as follows: "Rules of proper street behavior are not an impediment to freedom, but a foundation of it . . . the regulation of public spaces 'has never been regarded as inconsistent with civil liberties but rather as one of the means of safeguarding the good order upon which they ultimately depend.'"[325] Other order-maintenance proponents invoke principles of communitarianism: community norms establish standards of orderly conduct, and police are responsible for enforcing these norms at some cost to individual freedoms.[326]

Without dismissing the importance of communitarianism in many aspects of life, invoking it in support of disorderly conduct laws is problematic. As a crime prevention measure, broken windows policing has largely been discredited in that it does not actually have a causal relationship to reducing serious crime.[327] But even setting aside the question of efficacy, enforcing disorderly conduct laws—with their broad language enabling the many discretionary decisions and resulting discrimination that Parts II and III of this article discuss—creates too great a cost relative to the minimal gains it begets. Broken windows proponents themselves acknowledged from the outset that their theory of policing could authorize law enforcement to serve as "agents of neighborhood bigotry."[328] Some of order-maintenance policing's most prominent early proponents have retracted their support for this very reason. Tracey Meares has acknowledged that, though she was a self-described "fan" of order-maintenance policing in its early years, she "became concerned" over time as she watching how such policing played out in

[323] *See* David Thacher, *Order Maintenance Policing*, THE OXFORD HANDBOOK OF POLICE AND POLICING (2014).
[324] *See supra*, n. 81-90.
[325] Robert C. Ellickson, *Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows, and Public-Space Zoning*, 105 YALE. L. J. 1165, 1174 (1996).
[326] David Thacher, *Order Maintenance Reconsidered: Moving beyond Strong Causal Reasoning*, 94 J. CRIM. L. & CRIMINOLOGY 381, 401 (2004).
[327] Harcourt, *Reflecting on the Subject*, supra n. 85 at 308-39; Bernard Harcourt & Jens Ludwig, *Broken Windows: New Evidence from New York City and a Five-City Social Experiment*, 73 U. CHI. L. REV. 271, 283-87, 299-300, 315-16 (2006); Roberts, *supra* n. 87 at 794-99 (discussing lack of evidence that order maintenance policing caused drop in crime); Thacher, *supra* n. 318 at 384-88 (summarizing sociologists' critiques of Broken Windows theory and its lack of causal relationship between order maintenance policing and reduction of violent crime); Jack R. Greene, *Police Field Stops: What Do We Know, and What Does It Mean?*, https://www.urban.org/sites/default/files/publication/25781/412647-Key-Issues-in-the-Police-Use-of-Pedestrian-Stops-and-Searches.PDF at 14-15 ("Police strategies "aimed at order maintenance to deter serious crime, have not been supported in the research conducted to date").
[328] Wilson & Kelling, *supra* n. 81 at 35.

practice.[329] Of most concern was that order maintenance policing appeared to exacerbate the racial and financial inequities that she originally hoped it would solve. [330]

Aggressive policing of disorderly conduct also detrimentally impacts respect for law. Tom Tyler, an expert on police legitimacy, has warned that "frequent arrests for low-level public-order offenses are widely viewed as unjust because they are insensitive, harsh, or racially selective and potentially based upon prejudice."[331] Tracey Meares expressed this same concern in her denunciation of broken windows policing, noting that "this kind of policing potentially impacts the legitimacy of law in a detrimental way—by undermining procedural justice of law enforcement."[332]

Even when disorderly conduct laws are not enforced in a discriminatory manner, they criminalize activities or speech that many people do not agree are wrong, including behaviors that may be more indicative of poverty or mental illness than criminal intent.[333] Policing low-level misdemeanors involves arresting and convicting "people who engage in commonplace, unremarkable conduct, who may not be at all dangerous, and who have not done anything particularly bad or harmful."[334] As authors of another research study on order maintenance policing in inner cities stated, "Order maintenance policing strategies are supposed to send a particular message to active and potential law-breakers, but it is not at all clear whether or how that message is being received."[335]

Even Robert Ellickson has acknowledged that the behavior he supports criminalizing in certain contexts is "trivial."[336] Using the power of the state to cite, charge, and jail someone for speech or conduct that many consider relatively inoffensive both harms the individual charged and collectively reduces respect for the criminal legal system.[337] Those who strongly support law enforcement, and want to invest significant resources into ensuring effective policing, may agree that police are better off not enforcing disorderly conduct laws, as such policing detracts from the legitimacy of police and their ability to effectively spend resources fighting more serious crime.[338]

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[329] Meares, *supra* n. 91 at 611.
[330] *Id.*
[331] Tom Tyler & Jeffrey Fagan, *The Impact of Stop and Frisk Policies On Police Legitimacy*, https://www.urban.org/sites/default/files/publication/25781/412647-Key-Issues-in-the-Police-Use-of-Pedestrian-Stops-and-Searches.PDF at 30.
[332] Meares, *supra* n. 91 at 611; *see also* Sanford H. Kadish, Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations, 30 U. CHI. L. REV. 423, 444-46 (1963) (reasoning that moral impact of criminal convictions is significantly reduced when people can be convicted for conduct for behavior not widely perceived as morally culpable).
[333] Parts I and II, *supra*; *see also* Stevenson & Mayson, *The Scale of Misdemeanor Justice*, *supra* n. 19 at 766.
[334] Natapoff, Atwater *and the Misdemeanor Carceral State*, supra n. 13 at 168; *see also* Kohler-Hausmann, *supra* n. 164 at 615 ("Lower criminal courts process cases where the alleged crimes do not, by and large, represent an affront to widely held moral sentiments or cry out for the social act of punishment.").
[335] Gau & Brunson, *supra* n. 145 at 257.
[336] Ellickson, *supra* n. 317 at 1169.
[337] Gau & Brunson, *supra* n. 145 at 256.
[338] Miller, *Role-Based Policing*, *supra* n. 288 at 664 (2006) (proposing to take police away from enforcement of low-level offenses, and cautioning that this "does not entail that the 'real' police do less policing, but that they do policing of a particular kind, one that avoids escalation and the minority perceptions of illegitimacy that accompany it.").

B. Proponents of proactive policing

The concept of proactive policing is subject to multiple definitions, but is primarily grounded in the idea of reducing crime by proactively maintaining a consistent law enforcement presence in communities or places suffering from high crime rates.[339] Support for proactive policing of low-level offenses is not based in the notion that misdemeanor crimes are themselves particularly egregious, but that stopping, frisking, and arresting people for minor offenses gives police an opportunity to proactively investigate and forestall more serious crimes. This theory of policing is perhaps best articulated by William Stuntz, who wrote that police officers "benefit from laws that criminalize street behavior that no one wishes actually to punish, solely as a means of empowering them to seize suspects."[340] Stuntz explained that low-level crimes "often serve as a convenient basis for an arrest and, perhaps, a search. Such crimes make policing cheaper, because they permit searches and arrests with less investigative work."[341] Proactive policing can also strengthen the coercive power of the government. Forrest Stuart, for example, has documented how police officers on Skid Row in Los Angeles aggressively police disorderly conduct under the guise of "therapeutic policing," giving people struggling with addiction and homelessness the choice of either leaving the streets and entering rehabilitation or getting arrested for minor disorderly behaviors like panhandling.[342]

New York City's stop and frisk program is one of the most controversial examples of proactive policing.[343] For years New York City police officers attempted to prevent crime by aggressively and invasively stopping and frisking people for a variety of ostensible minor offenses, in hopes of seizing guns or other contraband.[344] While disputes remain about whether New York's stop and frisk program helped reduce crime, there is no question that people of color were its target.[345] Proactive policing of low-level offenses, for many of the same reasons as order-maintenance policing, comes at too great a cost to

[339] *See* Paul Haskins, *Research Will Shape the Future of Proactive Policing*, NATIONAL INSTITUTE OF JUSTICE, Oct. 24, 2019, https://nij.ojp.gov/topics/articles/research-will-shape-future-proactive-policing ("the elements of proactivity include an emphasis on prevention, mobilizing resources based on police initiative, and targeting the broader underlying forces at work that may be driving crime and disorder"); PROACTIVE POLICING: EFFECTS ON CRIME AND COMMUNITIES 1 (2018) (defining proactive policing as "all policing strategies that have as one of their goals the prevention or reduction of crime and disorder and that are not reactive in terms of focusing primarily on uncovering ongoing crime or on investigating or responding to crimes once they have occurred").
[340] Stuntz, *The Pathological Politics of Criminal Law*, *supra* n. 79 at 539.
[341] *Id.*
[342] *See, e.g.*, Stuart, *supra* n. 89 at chs. 1-2 (describing the rise of "therapeutic policing" that enables police to make arrests for minor disorderly behavior and use threat of jail as an opportunity to incentivize enrollment in rehabilitation programs).
[343] *See* Floyd v. City of New York, 959 F.Supp.2d 540, 556 (S.D.N.Y. 2013) ("This case is about the tension between liberty and public safety in the use of a proactive policing tool called "stop and frisk.'"); David Rudovsky & Lawrence Rosenthal, *Debate: The Constitutionality of Stop-and-Frisk in New York City*, 162 U. PA. L. REV. ONLINE 117 (2013) (exploring the controversies inherent in New York's stop and frisk policy).
[344] *Floyd*, 959 F.Supp.2d at 558-59 (detailing millions of stops over an eight-year period, many of which were legally unjustified and less than 2% of which yielded weapons or contraband).
[345] *Id.* at 556 (NYPD made 4.4 million stops over an eight-year period; over 80% of the people stopped were Black or Hispanic).

justify its use. The harms of this policing are broader than just arrest records: they include a permanent sense of second-class citizenship for those constantly subjected to state suspicion and force, as well as an increased distrust between police and civilians.[346] Proactive policing of minor crimes counterproductively increases the likelihood that police will stereotype people of color as potential criminal suspects, and creates what L. Song Richardson has referred to as "suspicion cascades" that make negative interactions between police and people of color more likely.[347]

C. Concerns that underenforcement of laws negatively impacts communities of color

Some proponents of low-level crime enforcement argue that declining to enforce crimes of disorder would exacerbate rather than alleviate racial inequities, by creating entire neighborhoods where minor lawbreakers are free to create disorder. Professor Randall Kennedy has argued that underenforcement of laws denies Black people "the things that all persons legitimately expect from the state: civil order and, in the event that crimes are committed, best efforts to apprehend and punish offenders."[348] This is particularly true because Black people are more likely to live in areas of concentrated poverty, where disorder may be more likely present.[349]

Kennedy's concerns are worth treating seriously, but he raises them specifically in the context of underenforcement of crimes that create serious physical threats to Black communities.[350] While Kennedy demands protection for "the great mass of black communities" against "criminals preying upon them," he also acknowledges that decriminalization may actually be a better policy for certain non-violent offenses.[351] Similarly, other Black commentators have expressed concern that they feel both overpoliced in minor crimes and underprotected for more serious crimes.[352] Monica Bell has questioned the claim that Black people in low-income communities want more policing, noting that while Black people (like everyone else) want to feel safe,

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[346] *Id.* at 557 (recognizing "the human toll of unconstitutional stops. While it is true that any one stop is a limited intrusion in duration and deprivation of liberty, each stop is also a demeaning and humiliating experience."); Bell, *Police Reform and the Dismantling of Legal Estrangement*, *supra* n. 292 at 2084 (noting the "profound sense of legal estrangement" that many poor people in communities of color suffer due to aggressive policing).

[347] L. Song Richardson, Keynote Speech, ABA Crim. Justice Section annual meeting, Nov. 12, 2020.

[348] Randall Kennedy, *The State, Criminal Law, and Racial Discrimination: A Comment*, 107 HARV. L. REV. 1255, 1267 (1994).

[349] *See* Elizabeth Kneebone & Natalie Holmes, *U.S. Concentrated Poverty in the Wake of the Great Recession*, BROOKINGS INSTITUTE, Mar. 31, 2016, https://www.brookings.edu/research/u-s-concentrated-poverty-in-the-wake-of-the-great-recession/; Solomon Greene, Margery Austin Turner, & Ruth Gourevitch, *Racial Residential Segregation and Neighborhood Disparities*, U.S. PARTNERSHIP ON MOBILITY FROM POVERTY, Aug. 29, 2017, https://www.mobilitypartnership.org/publications/racial-residential-segregation-and-neighborhood-disparities.

[350] Kennedy, *supra* n. 340 at 1267-68.

[351] *Id.* at 1278.

[352] *See, e.g.*, D.A. Bullock, *Black America is Over-Policed and Under-Protected*, MINN. REFORMER, Dec. 7, 2020, https://minnesotareformer.com/2020/12/07/black-america-is-over-policed-and-under-protected/.

policymakers and civilians alike have for so long assumed policing is necessary to safety that we fail to consider alternatives that could improve safety.[353]

This disjunction—the desire for greater safety but concern about police presence in a community—steers away from concluding that communities of color need police enforcing laws like disorderly conduct. Use of police to maintain order in social spaces sometimes generates more safety risk than it does protection, particularly for people of color.[354] Incarcerating people, or even saddling them with criminal records that make their efforts to find work and stable housing more challenging, has a reverse public safety effect in that people who cannot find paid work are more likely to turn to crime.[355] Robust debates can and should be had about the need for police to investigate and protect communities of color against serious crimes. But that is very different than enforcement of disorderly conduct laws. Where the harms of disorderly conduct are less concrete than the risks of enforcement,[356] policymakers should not assume that enforcement of disorderly conduct benefits communities of color.

D. Proponents of enforcing misdemeanors as a means of generating funds

Some municipalities rely on policing low-level offenses like disorderly conduct as a means of generating funds: rather than incarcerate people for these offenses, they impose fines and fees that serve as a primary source of funding for the municipal budget.[357] The Department of Justice report investigating the city of Ferguson, Missouri's policing practices details the ill-conceived practice of policing low-level offenses as a means of making money.[358] Municipal officials encouraged police officers to cite as many residents as possible for minor offenses to generate income for the city, and people of color were the primary targets of those tickets.[359]

Part III.D. of this article has already explained why the policing and prosecution of low-level offenses, with all of its accompanying time and personnel commitments, acts as

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[353] *See* Monica Bell, *Black Security and the Conundrum of Policing*, JUST SECURITY, Jul. 15, 2020, https://www.justsecurity.org/71418/black-security-and-the-conundrum-of-policing/.
[354] Holmes, *supra* n. 282 at 645.
[355] Roberts, *Why Misdemeanors Matter*, supra n. 143 at 299-301 ("the public safety effect on a community when many members are incarcerated or unable to find work because of a minor conviction cannot be underestimated in a cost-benefit analysis of low-level prosecutions.").
[356] *See, e.g.*, Morgan, *supra* n. 14 at *6 (noting that "the enforcement of disorderly conduct laws persists even despite the lack of concrete evidence as to . . . concrete social harm" and "the harms that stem from criminalizing disorderly conduct tend to outweigh the purported benefits.").
[357] *See* Dick Carpenter, Ricard Pochkhanawala &Mindy Menjou, *Municipal Fines and Fees: A 50-State Survey of State Laws*, INSTITUTE FOR JUSTICE, https://ij.org/report/fines-and-fees-home/; Matthew Menendez & Lauren-Brooke Eisen, *The Steep Costs of Criminal Justice Fines and Fees*, BRENNAN CENTER, Nov. 21, 2019, https://www.brennancenter.org/our-work/research-reports/steep-costs-criminal-justice-fees-and-fines; Torie Atkinson, *Note, A Fine Scheme: How Municipal Fines Become Crushing Debt in the Shadow of the New Debtors' Prisons*, 51 HARV. C.R.C.L. 190 (2015).
[358] U.S. Dep't of Justice, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 9-14, Mar. 4, 2015, https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf.
[359] *Id.* at 9-14, 62-81.

more of a drain on resources than a financial boon.[360] Even if prosecuting disorderly conduct did create a net financial gain for municipalities, governments should not drain the wallets of low-income people to generate city funds.

E. Proponents of disorderly conduct as a plea bargaining tool

Some practitioners or even defendants may object to abolition of disorderly conduct laws for one reason: guilty pleas to disorderly conduct are a popular way to resolve other low-level charges.[361] Prosecutors sometimes offer a plea to disorderly conduct as a way of extending apparent leniency to defendants charged with more serious offenses.[362]

Others have written extensively about the problems of a legal system so heavily dependent on plea bargaining rather than proving charges at trial.[363] One of the ways our system discourages defendants from exercising their rights is through the practice of overcharging: prosecutors charge more serious crimes than they necessarily plan to prosecute at trial, in hopes of persuading defendants to accept a plea offer to a lesser offense.[364] Laws like disorderly conduct enable this destructive practice, in that they offer a compromise for people who may have been charged with assault, theft, or any number of offenses which could theoretically qualify as a crime of disorder.

While pleas to disorderly conduct may benefit individual defendants, they do nothing to solve the greater problem of a system that relies on overcharging: if anything, they exacerbate that system. If a prosecutor truly wishes to extend leniency to a defendant who could otherwise be convicted of a more serious crime, other options are available; the astounding breadth of our criminal laws ensures that.[365] The usefulness of disorderly conduct as a plea bargaining tool is not alone a justification for continuing to embrace these laws.

V. Abolishing disorderly conduct laws

While this article is the first to call for abolition of disorderly conduct laws, other scholars have expressed concern about these laws for decades. In the 1960s, Robert Watts bemoaned the breadth of disorderly conduct laws and cautioned judges to "interpret

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[360] *See* Part III.D., *supra*.
[361] *See* Thea Johnson, *Fictional Pleas*, 94 IND. L.J. 855, 861-62 (2019) (describing disorderly conduct as a common resolution for charges of, *e.g.*, shoplifting or turnstile jumping).
[362] *Id.* at 882.
[363] *See* Russell Covey, *Reforming Plea Bargaining With Plea-Based Ceilings*, 82 TUL. L. REV. 1237 (2008); Kyle Graham, *Overcharging*, 11 OHIO ST. J. CRIM. L. 701 (2014); Mitchell Caldwell, *Coercive Plea Bargaining: the Unrecognized Scourge of the Criminal Justice System*, 61 CATH. U. L. REV. 63 (2011).
[364] Graham, *supra* n. 355 at 709 ("to the extent that an excessive charge encompasses lesser-included offenses or possesses other attractive "landing spots" for a plea bargain or compromise verdict, these options reduce the risk of an all-or-nothing prosecution, and encourage strategic overcharging"); Caldwell, *supra* n. 355 at 84 ("overcharging sets the stage for coercive pleas by virtue of the very leverage unduly obtained").
[365] *See* Glenn Harlan Reynolds, *Ham Sandwich Nation: Due Process When Everything Is a Crime*, 113 COLUM. L. REV. SIDEBAR 102, 104 (2013) ("the proliferation of federal criminal statutes and regulations has reached the point where virtually every citizen, knowingly or not (usually not) is potentially at risk for prosecution").

disorderly conduct statutes with a view toward due process specificity."[366] In 1997, Debra Livingston questioned whether criminal prosecutions were an appropriate means of addressing "petty misbehavior" that was "harmless, although annoying."[367] Most recently, Jamelia Morgan has called on lawyers to "rethink" the use of disorderly conduct statutes to punish minor offenders.[368] But none have yet suggested doing away with the charge altogether.

The call for abolition of disorderly conduct laws aligns with many existing critiques of American criminal practice. Even in a highly polarized country, there is widespread and growing consensus that the United States criminal legal system is too vast, criminalizing and incarcerating far too high a percentage of its population.[369] Many agree that laws giving police officers and prosecutors substantial discretion over whom to charge and punish invites discriminatory enforcement.[370] William Stuntz has argued that "[t]he most obvious way to limit discretion . . . is to shrink the codes, to limit the scope of criminal liability."[371]

In the past decade some jurisdictions have embraced Stuntz's suggestion to "shrink the codes" by decriminalizing certain conduct. An increasing number of states have decriminalized low-level drug charges, mostly involving marijuana possession.[372] The Minneapolis City Council voted to strike ordinances prohibits "spitting" and "lurking" in part due to their disparate enforcement against people of color.[373] In 2020, Oregon

[366] Watts, *supra* n. 142 at 358.
[367] Livingston, *supra* n. 79 at 586-87 (1997) (citing multiple scholars writing in the 1960s).
[368] Morgan, *supra* n. 14 (entitling her article "Rethinking Disorderly Conduct").
[369] *E.g.*, Natapoff, *Misdemeanors*, *supra* n. 10 at 1314 (2012) (calling the "American penal behemoth" a "target for widespread and bipartisan criticism," and noting multiple major political institutions that have criticized the system's breadth); Reynolds, *supra* n. 357; Shon Hopwood, *The Effort to Reform the Federal Criminal Justice System*, 128 YALE L.J. FORUM 791, 800-04 (2019) (describing the bipartisan coalition supporting passage of the federal First Step Act); *but see* Benjamin Levin, *The Consensus Myth in Criminal Justice Reform*, 117 MICH. L. REV. 259 (2018) (raising questions about the depth of consensus on criminal justice reform).
[370] *E.g.*, Stuntz, *The Pathological Politics of Criminal Law*, *supra* n. 79 at 579 (critiquing "a system in which too much law produces too much discretion"); David Thacher, *Channeling Police Discretion: the Hidden Potential of Focused Deterrence*, 2016 U. CHI. LEGAL F. 533, 535 (2016) ("The arbitrary and intensive use of [police discretion] contributes to many of the most significant concerns about American criminal justice today");
[371] Stuntz, *Self-Defeating Crimes*, *supra* n. 266 at 1893; David Alan Sklansky, *The Nature and Function of Prosecutorial Power*, 106 J. CRIM. L. & CRIMINOLOGY 473, 474 (2016) ("Much of what is wrong with American criminal justice—its racial inequity, its excessive severity, its propensity for error—is increasingly blamed on prosecutors.").
[372] *See* Marijuana Policy Reform Legislation (updated Jan. 11, 2021), https://www.mpp.org/issues/legislation/key-marijuana-policy-reform/ (cataloging marijuana decriminalization efforts across the states); *see also* Roberts, *Why Misdemeanors Matter*, *supra* n. 143 at 299, 332-33 (2011); Stevenson & Mayson, *The Scale of Misdemeanor Justice*, *supra* n. 19 at 767 ("A decriminalization movement has gathered momentum in recent years, including, but not limited to, efforts to decriminalize the possession of marijuana."); Logan, *After the Cheering Stopped*, *supra* n. 165 at 320 (2014) (noting that state legislatures are increasingly willing to "shrink their criminal codes and decriminalize conduct once classified as criminal.").
[373] Brandt Williams, *Minneapolis Strikes Spitting, Lurking Laws*, June 5, 2015, MPR, https://www.mprnews.org/story/2015/06/05/lurking-spitting-laws; *see also* CITY OF PROVO, UTAH CODE § 9.17.010 (2013) (decriminalizing a variety of minor municipal offenses).

became the first state to decriminalize possession of small amounts of "hard" drugs like cocaine and heroin.[374]

Scholars have proposed a variety of options for loosening the criminal legal system's tentacles over the American populace. Many scholars have critiqued the overcriminalization of speech, though not focused on disorderly conduct laws.[375] In her first critique of misdemeanor prosecutions Alexandra Natapoff suggested making certain misdemeanor offenses "nonarrestable as well as nonjailable,"[376] a proposal that Stephanos Bibas labeled "surprisingly halfhearted."[377] More recently Natapoff has gotten bolder, acknowledging that many "disorder offenses . . . only weakly justify state coercion,"[378] and that "crime-control justifications are at their weakest" when the alleged crime "is not particularly weighty."[379] Devon Carbado has criticized "the criminalization of relatively nonserious behavior or activities," and the negative impact of misdemeanor enforcement on Black communities in particular.[380] Monica Bell has proposed "shrinking and refining the footprint of the police" by reducing "the carceral net."[381] In the wake of Minneapolis police officers killing George Floyd, some scholars even turned to Twitter to advocate for abolishing low-level offenses.[382]

So how does the call to do away with disorderly conduct laws specifically fit within these more general critiques? Disorderly conduct laws are at the intersection of all the above concerns: they frequently infringe free speech rights while enabling discriminatory discretion and wreaking havoc on the lives of poor people, many of whom are people of color. They have prospered "largely in an era of mass criminalization characterized by overpolicing in public spaces."[383] While many of this article's criticisms are applicable to other low-level offenses, disorderly conduct laws are perhaps the most problematic of all.

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[374] *See* Amelia Templeton, *Oregon Becomes 1st State in the US to Decriminalize Drug Possession*, OPB, Nov. 3, 2020, https://www.opb.org/article/2020/11/04/oregon-measure-110-decriminalize-drugs/.

[375] *See, e.g.*, Buchhandler-Raphael, *supra* n. 22 at 1671 (criticizing broadly worded statutes that criminalize potentially constitutional speech); Luna, supra n. 291 at 704, 706 (bemoaning expansion of criminal law that allows arrests for relatively harmless conduct); Stuntz, *The Pathological Politics of Criminal Law*, *supra* n. 79 at 519 (criticizing expansion of criminal law, in part because they "shift lawmaking from courts to law enforcers"); Coenen, *supra* n. 310 at 1588-1602 (proposing various avenues for decriminalizing speech-based criminal laws).

[376] Natapoff, *Misdemeanors*, *supra* n. 10 at 1374.

[377] Stephanos Bibas, *Bulk Misdemeanor Justice*, 85 S. CAL. L. REV. POSTSCRIPT 73, 74 (2012).

[378] Alexandra Natapoff, *The High Stakes of Low-Level Criminal Justice*, *supra* n. 287 at 1695.

[379] *Id.*; *see also* Natapoff, Atwater *and the Misdemeanor Carceral State*, *supra* n. 13 at 152 (2020) (suggesting that misdemeanors "offer an especially fertile space to grapple with abolitionist ideas.").

[380] Carbado, *Blue-on-Black Violence*, *supra* n. 281 at 1487; *see also* Artika Tyner & Darlene Fry, *Iron Shackles to Invisible Chains*, 49 BALT. L. R. 357, 365-68 (2020) (detailing disparities in the way Black people are arrested, charged, and sentenced in the United States criminal legal system).

[381] Bell, *Police Reform and the Dismantling of Legal Estrangement*, supra n. 292 at 2147-48.

[382] *See* Chiraag Bains, @chiraagbains, Jun. 5, 2020, 9:17 a.m., https://twitter.com/chiraagbains/status/1268909708448010246 ("We should be looking not just at policing, but criminal codes. A lot of criminal statutes have no place on the books."); Tracey Meares, @mearest, Jun. 4, 2020, 12:38 p.m., https://twitter.com/mearest/status/1268598025141858306 ("The proliferation of laws and minor offense ordinances are not the fault of police. YOUR MOVE LEGISLATURES and CITY COUNCILS").

[383] Morgan, *supra* n. 14 at *17.

As Bernard Harcourt noted, "Once the category [of the disorderly] is in place, there is little else to do but crack down on the disorderly."[384] Police and prosecutors have been cracking down on disorderly conduct for far too long, and as Parts I through III of this article describe, those crackdowns have created more harm than good. Serious changes are needed to address the overcriminalization of America, and abolishing disorderly conduct laws should be part of that change.

CONCLUSION

Declining to prosecute perceived misconduct is hard for Americans. It "goes very much against the American grain to adopt the alternative of doing nothing."[385] But when "doing nothing" is less harmful than the alternative, we need to seriously consider that option. I am sympathetic to proponents of disorderly conduct laws: disorder can be frustrating, and occasionally even alarming. But criminally prosecuting disorderly conduct has consistently proven even more harmful. That harm comes in the form of infringed speech, lost jobs and income, overincarceration, and unfair discrimination against people voicing minority opinions or otherwise lacking popularity and power. American society has significant racial and class inequities, and the criminal legal system is a major driver of those inequities. To create a more equitable society, we may need to inconvenience ourselves with a bit of disorder.

[384] Harcourt, *Reflecting on the Subject*, *supra* n. 85 at 298.
[385] Packer, *supra* n. 162 at 259.