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LEGISLATIVE BRIEFER

Critical Infrastructure Bills: Targeting Protesters through Extreme Penalties

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The United States has recently witnessed a rise in protests against the construction of oil and gas pipelines by those concerned about pipelines' harm to the environment, indigenous land, and landowner rights. State lawmakers nationwide have responded to this trend with legislation criminalizing certain conduct near pipelines and other "critical infrastructure." Since the Dakota Access Pipeline protests in 2016,¹ at least sixteen states have introduced so-called "critical infrastructure bills"² and seven states have enacted them.³ Although legislation that focuses on "critical infrastructure" may sound innocuous and technocratic, these bills can significantly undermine the right to peaceful assembly.

While the individual provisions of the bills vary, they contain similar elements, and many resemble a model bill promulgated by the American Legislative Exchange Council (ALEC), an organization of conservative state legislators.⁴ First, the bills

¹ In 2016, thousands of demonstrators gathered at the Standing Rock Indian Reservation in South and North Dakota to protest the construction of the Dakota Access Pipeline to oppose the effect the pipeline would have on indigenous communities and the environment.

² See, Colorado SB 17-035 (2017); Idaho SB 1090 (2019); Illinois HB 1633 (2019); Indiana SB 471 (2019); Kentucky HB 238 (2019); Louisiana HB 727 (2018); Minnesota SF 2011 (2019); Mississippi SB 2754 (2019); Missouri HB 355 (2019); North Dakota SB 2044 (2019); Ohio SB 33 (2019); Oklahoma HB 1123 (2017); Pennsylvania SB 652 (2017); Tennessee SB 264 (2019); Texas HB 3557 (2019); Wyoming HB 10 (2018). International Center for Not-for-Profit Law (ICNL) U.S. Protest Law Tracker, available at <http://icnl.org/usprotestlawtracker/>.

³ Indiana SB 471 (2019) Louisiana HB 727 (2018); Missouri HB 355 (2019); North Dakota SB 2044 (2019); Oklahoma HB 1123 (2017); Tennessee SB 264 (2019); Texas HB 3557 (2019).

⁴ AMERICAN LEGISLATIVE EXCHANGE COUNCIL, <https://www.alec.org/about/>.

typically codify an expansive definition of “critical infrastructure” that includes not just power plants, water treatment plants, and dams, but also far more ubiquitous infrastructure like oil and gas pipelines, rail lines, and even telephone poles.⁵ Second, many of the bills create a new offense of felony trespass on critical infrastructure facilities and construction sites, frequently punishable by multiple years in jail.⁶ Given the broad definition of critical infrastructure in many of the bills, peaceful protesters could potentially be prosecuted for felony trespass for simply accidentally protesting too close to a pipeline.⁷ Third, most of the bills create new felony crimes of impeding the construction or operation of critical infrastructure. As such, individuals involved in a peaceful and otherwise lawful protest near a pipeline construction site could be arrested and prosecuted as felons if the protest merely inconveniences the movement of construction equipment or personnel. Finally, many of the bills have broadly worded collective liability provisions that can create liability for other protesters or organizations that are found to have been “conspirators” or to have encouraged or advised a protester’s unlawful activity, such as trespass.⁸ The significant chilling effect of those collective liability provisions are explained in detail in ICNL’s briefer *“Guilt by Association”: Critical Infrastructure Bills and the Right to Protest* (2018).

This briefer focuses on the provisions of critical infrastructure bills that dramatically increase penalties for trespass, as well as those that severely penalize interference with the construction or operation of critical infrastructure sites. The penalties in critical infrastructure bills are extreme and unnecessary, as the conduct they claim to deter is already criminalized under current law. At the same time, the bills use language that is so broad and vague—arguably unconstitutionally so—that it is likely to lead to self-censorship by individual protesters and provide opportunities for arbitrary application by law enforcement. Finally, the bills seem designed to directly or indirectly limit or chill particular demonstrations, specifically those protesting pipeline construction, which is not only undemocratic, but also unconstitutional.

Unnecessary and Extreme Penalties

The provisions in critical infrastructure bills that penalize trespass and interference with the construction or operation of pipelines are both unnecessary and extreme. They do little to meaningfully protect the public from harm while potentially exposing

⁵ See, e.g., Louisiana HB 692 (2018); North Dakota SB 2044 (2019); Oklahoma HB 1123 (2017).

⁶ These trespass provisions encompass a variety of activity, from “willful trespass or ent[ry of] property containing a critical infrastructure facility” in Oklahoma HB 1123 (2017) to the much broader “unauthorized entry” criminalized under Louisiana HB 727 (2018).

⁷ For example, under Louisiana’s critical infrastructure act critical infrastructure includes “pipelines” (undefined in the act) and a person may be convicted of a felony if they commit “unauthorized entry of a critical infrastructure”. Unauthorized entry does not require any specific intent. Louisiana HB 727 (2018)

⁸ See, e.g., Oklahoma HB 1123 (2017); Minnesota SF 3463 (2018); South Dakota SB 189 (2019).

peaceful protesters who have no intention of breaking the law—as well as those wishing to engage in peaceful civil disobedience—to severe criminal penalties.

State lawmakers and supporters of critical infrastructure bills justify the new statutes as necessary to protect infrastructure from damage by bad actors, yet conduct that could result in damage—such as trespass, disorderly conduct, or vandalism—is in most, if not all cases, already criminalized under state law.⁹ Governor Mark Dayton cited the redundancy of the critical infrastructure bill in Minnesota when he vetoed it in May 2018, pointing out that existing state law on trespass and damage to property not only already criminalized the activity targeted by the bill, but it did so in a clearer manner.¹⁰

In addition to being duplicative, the penalties in critical infrastructure bills are draconian.¹¹ For example, under Louisiana’s critical infrastructure law, a person who trespasses on land near pipelines or other critical infrastructure can be convicted of a felony and sentenced to five years in jail. Before the law was passed, a similar act of trespass was a misdemeanor offense.¹² Following enactment of North Dakota’s critical infrastructure law, an activist protesting at the designated future site of a new pipeline faces a felony sentence of up to five years in prison if they are deemed to be “interfering, inhibiting, impeding or preventing” pipeline construction efforts.¹³ Previously, these activities would have been charged as misdemeanor trespass or not charged at all if they were protected First Amendment activity, such as engaging in a lawful protest near a construction site that had the effect of impeding construction efforts.¹⁴

Felony convictions under a critical infrastructure law result not only in longer jail sentences, but also an array of potential collateral consequences including loss of voting rights,¹⁵ as well as restrictions on jury service,¹⁶ public employment, and military service.¹⁷ Further, the consequences of such heightened penalties may begin

⁹ For example, in North Dakota state law already criminalizes damage to and trespass against infrastructure. N.D. CENT CODE ANN. § 12.1-22-03 (West 2019) (Criminal Trespass); N.D. CENT CODE ANN. § 12.1-21-05 (West 2019) (Criminal Mischief); N.D. CENT CODE ANN. § 12.1-17-03 (West 2019) (Reckless Endangerment); N.D. CENT CODE ANN. § 12.1-31-01 (West 2019) (Disorderly Conduct).

¹⁰ Office of the Governor, Veto Letter of Ch. 197, Senate File 3463, May 30, 2018, http://mn.gov/gov-stat/pdf/2018_05_30_LETTER_VETO_Letter_Infrastructure_Protest_Bill.pdf.

¹¹ Most of these bills establish felony level offenses for their violation. *See, e.g.*, Indiana SB 471 (2019) (Level 6 Felony); North Dakota SB 2044 (2019) (Class C Felony); Tennessee SB 264 (2019) (Class E Felony).

¹² *White Hat v. Landry Complaint*, May 22, 2019, available at <https://ccrjustice.org/sites/default/files/attach/2019/05/White%20Hat%20v%20Landry%20Complaint.pdf>.

¹³ North Dakota SB 2044 (2019).

¹⁴ N.D. CENT CODE ANN. § 12.1-22-03 (West 2019) (Criminal Trespass).

¹⁵ *State Felon Voting Laws*, PROCON.ORG, https://felonvoting.procon.org/view_resource.php?resourceID=000286 (enumerating the length of suffrage loss for convicted felons).

¹⁶ Margaret E. Finzen, *Systems of Oppression: The Collateral Consequences of Incarceration and their Effects on Black Communities*, 12 GEO. J. ON POVERTY L. & POL’Y 299, 307-08 (2005).

¹⁷ Zachary Hoskins, *Criminalization and the Collateral Consequences of Conviction*, 12 CRIM. L. & PHIL. 625, 627 (2018).

even if one is not charged with these crimes, but merely arrested: A felony arrest can trigger the loss of custody of one's child, eviction, or loss of employment.¹⁸ As such, turning these crimes into felonies gives substantial power to law enforcement to punish protesters by simply arresting them for allegedly violating provisions of a critical infrastructure act.

Overbroad and Unclear Language

Activists seeking to protest pipeline construction are not only affected by critical infrastructure bills' harsh new penalties, but also by the uncertainty that accompanies their enforcement. The bills include language that is both so broad that it renders constitutionally protected speech illegal, and so vague that those who wish to follow or to enforce the law are unclear as to the legislation's scope.

Under the First Amendment, laws that restrict speech must be "narrowly tailored to serve a significant government interest."¹⁹ Yet most critical infrastructure bills are not "narrowly tailored." For example, a bill passed in North Dakota, which is similar to recently enacted legislation in Tennessee and Texas,²⁰ includes an overbroad provision that prohibits "caus[ing] a substantial interruption or impairment of a critical infrastructure facility [by]... interfering, inhibiting, impeding or preventing the construction or repair of a critical infrastructure facility."²¹ This provision lacks a geographical link between an individual's conduct and the "impeding" of construction. For instance, if protestors hold an otherwise lawful demonstration near the entrance of a pipeline construction site and construction vehicles are delayed in reaching the site as a result, the protesters could be deemed to be "impeding" the construction of the pipeline. Similarly, protestors who merely demonstrate outside the company's headquarters and successfully use public attention to pressure the company to slow or halt a project might be deemed to have "impeded" construction. Criminalizing these sorts of otherwise lawful protests is not necessary to ensure public safety and, as a result, this provision fails the test of being "narrowly tailored."

Many of the bills are also vague. The Constitution requires that a law be sufficiently clear that a person of ordinary intelligence can understand what conduct is prohibited.²² Vagueness in the law raises due process concerns, as courts have held

¹⁸ Eisha Jain, *Arrests as Regulation*, 67 STAN. L. REV. 809, 810-12 (2015) (discussing the myriad of consequences of arrest outside of the formal criminal justice system process).

¹⁹ *Clark v. Community for Creative Nonviolence*, 468 U.S. 288, 293 (1984). See, e.g., *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002) (holding that a criminal law prohibiting computer child pornography was unconstitutionally overbroad because it could be applied even to mainstream movies).

²⁰ North Dakota SB 2044 (2019); Tennessee SB 264 (2019); Texas HB 3557 (2019).

²¹ North Dakota SB 2044 (2019).

²² *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). See, e.g., *Coates v. Cincinnati*, 402 U.S. 611 (1971) (holding that an anti-loitering ordinance prohibiting groups of three or more people from conducting themselves in "a manner annoying to persons passing by" was unconstitutionally vague because the judgement of what is annoying is subjective).

that individuals should not be confused about the terms of a penal statute that may result in their imprisonment.²³ In the context of laws restricting speech, vagueness raises First Amendment problems as well, as it can lead individuals to censor themselves out of fear that they might otherwise violate the law. Vague laws can also be applied selectively by law enforcement against parties engaged in disfavored speech.

Consider Louisiana, where the critical infrastructure law provides that anyone who commits “unauthorized entry” onto “critical infrastructure” commits a felony. The law defines critical infrastructure to include “pipelines”, but does not define what would be considered “unauthorized entry” on the state’s 125,000 miles of pipelines, which run across both private and public land.²⁴ It is not clear what distance around a pipeline might be considered a critical infrastructure site, for instance, or whether unauthorized entry extends to individuals walking above underground pipelines. Nor does the law account for the reality that ownership rights where pipelines are constructed are often shared by the true landowner and a pipeline company that has exercised eminent domain to claim a portion of an individual’s land.²⁵ Indeed, activists were recently arrested under the new law while protesting pipeline construction on private land, despite the landowner having permitted them to be present.²⁶ Landowners in Louisiana and other states with critical infrastructure laws can no longer be sure that they or anyone else can engage in protest activity on their land without serious legal repercussions.

Targeting Disfavored Voices

Given the timing of the critical infrastructure bills—on the heels of a marked increase in anti-pipeline protests—and the likely impact of their vague provisions and draconian penalties, the bills seem to be intentionally designed to discourage individuals from attending peaceful protests near pipelines. For lawmakers to target a particular protest movement simply because they disagree with the movement’s message undermines the free speech essential to a functioning democracy. Indeed, the Supreme Court has found that laws that discriminate against particular viewpoints must face strict scrutiny and are particularly unlikely to survive a First Amendment

²³ *Lanzetta v. N.J.*, 306 U.S. 451, 453 (1939) (“No one may be required, at peril of life, liberty or property, to speculate as to the meaning of penal statutes.”)

²⁴ Louisiana HB 727 (2018).

²⁵ Eminent Domain is the right of the government or, here, a dedicated private agent (natural gas companies) to take private land and convert it for public use. Landowners often have no say over who may enter and build on their land, if they are opposed to a pipeline’s construction or even if they may be greatly harmed by its presence on their land.

²⁶ *White Hat v. Landry Complaint*.

challenge.²⁷ This is true even if the regulation appears content-neutral on its face, but the government adopted the regulation with the intent to undermine particular speech that it disfavors.²⁸

Academics and others have argued that recent legislation that restricts protest rights could comprise unconstitutional viewpoint discrimination because the bills are passed by lawmakers with the apparent intention of targeting members of specific protest movements with onerous penalties.²⁹ In a number of cases, the state legislators who sponsored critical infrastructure bills explicitly criticized anti-pipeline protests or cited protesters' actions as justification for the bills.³⁰

Lawmakers are not the only ones seemingly using critical infrastructure legislation to target specific groups. Law enforcement is as well. For instance, Louisiana's critical infrastructure law contains a carveout both for "lawful assembly," as well as "lawful commercial or recreational activities" such as "fishing, hunting, boating, and birdwatching."³¹ Yet in August 2018, while crawfishermen and others plied the waters near pipelines, three individuals peacefully protesting pipelines from a kayak and canoe in similar waters were arrested by security guards for a pipeline company. The protesters are currently facing felony charges under the new law.³²

Conclusion

Critical infrastructure bills significantly chill assembly and speech rights protected by the First Amendment. Draconian penalties coupled with unclear provisions create an

²⁷ Content based restrictions on speech are strictly scrutinized by the Supreme Court and therefore presumed unconstitutional, unless they are "necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983).

²⁸ *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (noting "The principal inquiry in determining content-neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys."); see also *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015) (explaining that "Our precedents have also recognized a separate and additional category of laws that, though facially content neutral, will be considered content-based regulations of speech: laws that cannot be 'justified without reference to the content of the regulated speech,' or that were adopted by the government 'because of disagreement with the message [the speech] conveys,' ...").

²⁹ Erica Goldberg, *Competing Free Speech Values in an Age of Protest*, 39(6) *CARDOZO LAW REVIEW* 2163, 2206-2209 (2018).

³⁰ While introducing Oklahoma House Bill 1123, the basis for ALEC's promulgated model legislation, Representative Scott Biggs stated that concerns about the impact of protests like Standing Rock would have on pipeline construction were "the main reason behind this [bill]." Audio Recording: Oklahoma House Judiciary - Criminal Justice and Corrections Committee (Feb. 22, 2017), <https://sg001-harmony.sliq.net/00283/Harmony/en/PowerBrowser/PowerBrowserV2/20170222/-1/7904?mediaStartTime=20170222102919&mediaEndTime=20170222110755&viewMode=3>. In South Dakota, Governor Noem made her intent to restrict the disfavored voices of protesters and their supporters more explicit, stating that the "Riot Booster" bill was designed to target out of state funders of protesters, who want to "come in and create disruption on a build... [they are] what we're hoping to shut down." Lee Strubinger, *Governor indicates George Soros Funding Out-Of-State Protesters*, SDPB Radio (Mar. 5, 2019) <https://listen.sdpb.org/post/governor-indicates-george-soros-funding-out-state-protestors>.

³¹ Louisiana HB 727 (2018).

³² Alleen Brown and Will Parrish, *Recent Arrests Under New Anti-Protest Law Spotlight Risks that Off-Duty Cops Pose to Pipeline Opponents*, THE INTERCEPT, Aug. 22, 2019, <https://theintercept.com/2018/08/22/recent-arrests-under-new-anti-protest-law-spotlight-risks-that-off-duty-cops-pose-to-pipeline-opponents/>

environment ripe for misuse and self-censorship. Moreover, the bills are unnecessary to secure pipelines and other critical infrastructure, as existing law already protects them. When legislators pass such overbroad, punitive, and superfluous legislation, they send a message that they are trying to undermine protesters of oil and gas pipelines who wish to exercise their right to express their views.

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