

Global Trends

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RESTRICTIONS ON PROTEST IN THE UNITED STATES

The United States, like many other countries in recent years, has witnessed mass protest activity by large-scale movements. The Occupy movement, Black Lives Matter, Women's March, Dakota Access Pipeline protests, climate change activism, #MeToo movement, and most recently, March for Our Lives are just a few prominent examples of recent protests. Many elected officials in the United States federal and state governments have responded to the rise in protest activity—a trend that has led some civil society experts to describe the current moment as the “age of rage”¹—by seeking to restrict the right to assemble.

Since November 2016, ICNL's U.S. Protest Law Tracker has recorded sixty-four draft laws proposed in thirty-one states to restrict protest activities.² As of July 2018, nine of these bills have been enacted into law, eight remain pending, and forty-seven were withdrawn, defeated, or have expired.³

States have also amped up their enforcement of existing protest-related laws, militarized the gear and tactics used by law enforcement officers, conducted mass arrests, increased surveillance of protest organizers, and failed to protect demonstrators. The use and spread of these measures threaten to undermine freedoms of association, assembly, and expression,

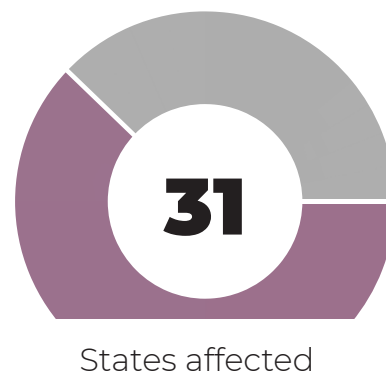
1 Thomas Carothers and Richard Youngs, “The Complexities of Global Protests,” Carnegie Endowment for International Peace, October 8, 2015, <http://carnegieendowment.org/2015/10/08/complexities-of-global-protests-pub-61537>.

2 The U.S. Protest Law Tracker, which is routinely updated, may be accessed on ICNL's website at <http://www.icnl.org/usprotestlawtracker/>.

3 Failure of a proposal to pass into law primarily occurs in three ways: failure to achieve the necessary votes (“defeat”), failure to act on the law within the defined time frame or legislative season (“expiration”), and the withdrawal of the proposed bill prior to its moving forward (“withdrawal”). Note that, also included in the “defeated/expired” category are laws that were passed but with the most problematic provisions removed or substantially amended. Examples of the latter include Louisiana's HB 727 and Arizona's HB 2007 laws. These terms are used on ICNL's Protest Law Tracker as described below. Note that the figures contained and analyzed in this issue of Global Trends are from mid-July 2018.

STATE BILLS RESTRICTING THE RIGHT TO PROTEST

Since November 2016*



States affected



Total bills introduced



Bills defeated or expired



Bills enacted



Bills pending

* data current as of September 2018

which are not only protected by the first amendment of the U.S. Constitution but are also enshrined in a variety of international treaties ratified by the United States.⁴

Freedom of assembly, the universal human right most directly implicated in restrictions on protests, guarantees the right of everyone, without exception, to gather publicly and privately to collectively express, promote, and defend a shared interest.⁵ This fundamental right includes the right to participate in strikes, sit ins, demonstrations, rallies, and any other peaceful gathering, including protests organized for any legal purpose.⁶ The right to assembly is essential to democracy, as it allows individuals to peacefully voice their dissatisfaction with public policies. Coalitions that peacefully gather to express a shared concern or grievance send visible reminders to the government that the opinions of the public should be taken into account.

Under international human rights law, the right to peaceful assembly is not absolute. It can be restricted in certain exceptional situations, but only if such restrictions are necessary, proportionate, and done for certain narrowly construed purposes, such as protecting public health or safety.⁷

Part of a Broader Global Trend

The imposition of greater restrictions on protesters and protest movements in the United States is part of a broader global phenomenon.⁸ According to recent research by the Open Society Foundations and the European Center for Not-for-Profit Law, countries throughout Central and Eastern Europe and the Western Balkans are “backsliding” in their protection of the right to protest.⁹ Governments “of many, but not all, of the countries in the region have been more willing to limit the right to assemble,” suggesting “a disturbing region-wide trend toward more restrictions” on protest activities.¹⁰ Other reports, including those

4 For example, the UN General Assembly, Resolution 217A, The Universal Declaration of Human Rights, December 10, 1948, arts. 19 and 20; UN General Assembly, Resolution 2200 (XXI), International Covenant on Civil and Political Rights, December 16, 1966, arts. 19, 21, and 22.

5 Maina Kiai. “What are the Rights to Freedom of Peaceful Assembly and of Association,” Freeassembly.net. <http://freeassembly.net/about/freedoms/>.

6 UN General Assembly, Human Rights Council, “Report of the Special Rapporteur on Rights to Freedom of Peaceful Assembly and of Association, Maina Kiai,” 20th Session, A/HRC/20/27, May 21, 2012, para. 24 [“A/HRC/20/27”].

7 According to Article 22 of the ICCPR, the authorized purposes for imposing any restriction on the right to peaceful assembly include “the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.”

8 See ICNL “Survey of Trends Affecting Civic Space: 2015-2016,” Global Trends in NGO Law Vol. 7, Iss. 4, September 2016.

9 “Q & A: Defending Europeans’ Right to Protest,” Open Society Foundations, February 18, 2018, <https://www.opensocietyfoundations.org/voices/qa-defending-europeans-right-protest>.

10 Ibid.

issued by the United Nations (UN) special rapporteur on the rights to freedom of peaceful assembly and of association,¹¹ confirm that this trend is not unique to Europe and the United States but extends to countries around the world of all regime types, including Australia, Canada, Israel, Kenya, and the United Kingdom.¹²

Laws Restricting Protest Activities in the United States

ICNL created the U.S. Protest Law Tracker in 2016 to closely track the introduction and status of laws restricting protest activities in the United States. The tracker serves as a source of timely information about legal developments at the state and federal levels that threaten to impose new restrictions on the right to assemble. The tracker reveals that laws restricting protest primarily fall into six categories:

1. Laws that criminalize or expand the definition of already criminalized protest-related activities;
2. Laws that enhance penalties for violations of existing laws applicable to protest-related activities and protesters;
3. Laws that define certain protest-related activities as terrorism or terrorism-related offenses;
4. Laws that eliminate liability for causing injury or death to protesters;
5. Laws that expand police or executive powers to deal with protesters; and
6. Executive orders and emergency powers to restrict protest-related activities.

11 A/HRC/20/27, para. 34.

12 Take Back the Street: Repression and Criminalization of Protest Around the World, International Network of Civil Liberties Organizations, October 2013, https://www.aclu.org/files/assets/global_protest_suppression_report_inclo.pdf. The report includes case studies from the United States, Israel, Canada, Argentina, Egypt, Hungary, Kenya, South Africa, and the United Kingdom. See also Willie Osterweil, "Countries Around World are Revoking Freedom of Assembly," Al Jazeera America, May 4, 2015, <http://america.aljazeera.com/opinions/2015/5/countries-across-world-are-revoking-freedom-of-assembly.html> (discusses crackdowns on protest activities in Spain, France, Quebec, Turkey, and elsewhere); Max Goldbart, "Protest Around the World," Xindex: The Voice of Free Expression, September 21, 2015; and Hugh de Kretser "NSW Anti-Protest Laws are Part of a Corrosive National Trend," The Sydney Morning Herald, March 22, 2016, <https://www.smh.com.au/opinion/nsw-antiprotest-laws-are-part-of-a-corrosive-national-trend-20160322-gno10h.html>.

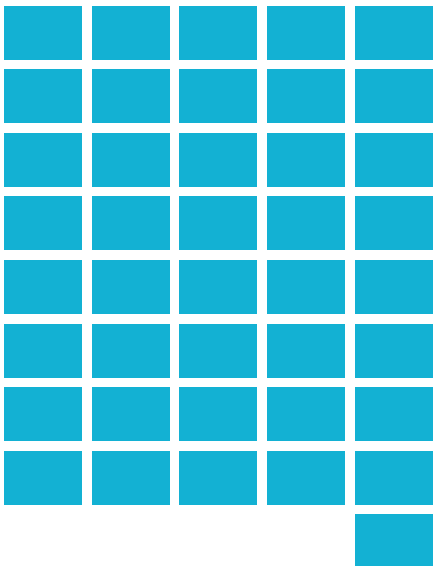
LEGISLATION & EXECUTIVE ORDERS RESTRICTING PROTEST ACTIVITIES: BY INTRODUCTION DATE

Includes proposed legislation and executive orders tracked by ICNL at both the state and federal levels: 64 bills and 5 executive orders

NOV TO DEC 2016 (2)



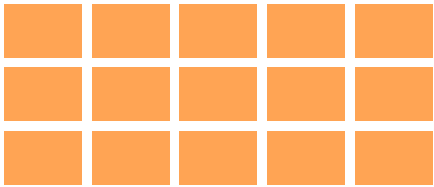
1ST HALF 2017 (41)



2ND HALF 2017 (11)



1ST HALF 2018 (15)



This issue of *Global Trends in NGO Law* examines examples of these laws and concludes with a brief discussion of how they have fared in the legislative process.¹³

LAWS THAT CRIMINALIZE PROTEST-RELATED ACTIVITIES

A number of states seek to criminalize protest-related activities. In some cases, the laws attempt to create entirely new crimes, such as Arkansas' AB 550, which would have created the crime of "unlawful mass picketing."¹⁴ Oklahoma's HB 1123, adopted in May 2017, created the new offense of trespassing on property containing "critical infrastructure," which includes telephone poles.

In many other cases, however, laws seek to expand the scope of existing crimes to encompass new protest-related activities. At least four states (Arizona, New Jersey, Virginia, and Wisconsin) have introduced laws that expand the definition of "riot" to include a greater range of behaviors. For example:

- Wisconsin's AB 395, which was introduced in June 2017 but expired with the end of the legislative term, broadly defined "riot" as a "public disturbance," including an act or threat of violence by an assembly of three or more people, which "constitutes a clear and present danger." This language was later revised in SB 303 to include an intent requirement. Penalties for participating in a "riot," according to AB 395, included up to three and one-half years in prison and a \$10,000 fine. This law would have created a new crime under Wisconsin criminal law; under current law rioting is neither defined nor identified as a specific crime.

At least four other states (North Dakota, Ohio, Oklahoma, and Wyoming) have attempted to broaden the definition of "criminal trespass." For example:

- Ohio's SB 250, introduced in January 2018 and still pending, expands the definition of "criminal trespass" and "criminal mischief" to include entering and remaining on fenced-off, posted, or otherwise private property containing a "critical infrastructure facility." If convicted, violators would face up to six months in jail and a \$1,000 fine.

Arizona, Missouri, North Dakota, Ohio, and Washington have proposed harsh new criminal penalties for concealing one's identity by, for example, wearing

¹³ To read the full text of all laws cited in this issue, see ICNL's Protest Law Tracker, which includes links to all bills at <http://www.icnl.org/usprotestlawtracker/>.

¹⁴ The bill, which was vetoed by the Governor in April 2017, defined "mass picketing" as "the assembly of persons in the use of pickets or demonstrations at or near a business, school, or private facility." The bill was defeated in April 2017.

any kind of disguise while protesting. For example:

- North Dakota's HB 1304, adopted in February 2017, imposes new penalties on protesters who conceal their identities, such as by wearing hooded clothing, of up to one year in prison and a \$3,000 fine.

LAWS THAT ENHANCE EXISTING PENALTIES FOR PROTEST-RELATED ACTIVITIES

Countries not only have an obligation under international human rights law to refrain from interfering in individuals' right to peaceably stage demonstrations. They also have a positive obligation to facilitate exercise of this right.¹⁵ Laws that impose excessive or serious penalties for protest violations potentially interfere with the full enjoyment of this right.

States most commonly restrict the right to assembly by increasing penalties or creating new penalties for protest-related activities. At least nineteen states have proposed at least thirty laws increasing or creating protest-related penalties, five of which have been adopted.¹⁶ These new or steeper penalties attach to a wide variety of activities and can include criminal convictions with crippling financial obligations, lengthy prison sentences, or both. The penalties threaten to deter legitimate protest activities and acts of civil disobedience, which are traditional methods of democratic resistance, as well as over-penalize first-time, minor, or tangentially involved offenders.

Laws imposing steep new penalties on protests held near oil and gas pipelines or other "critical infrastructure" have

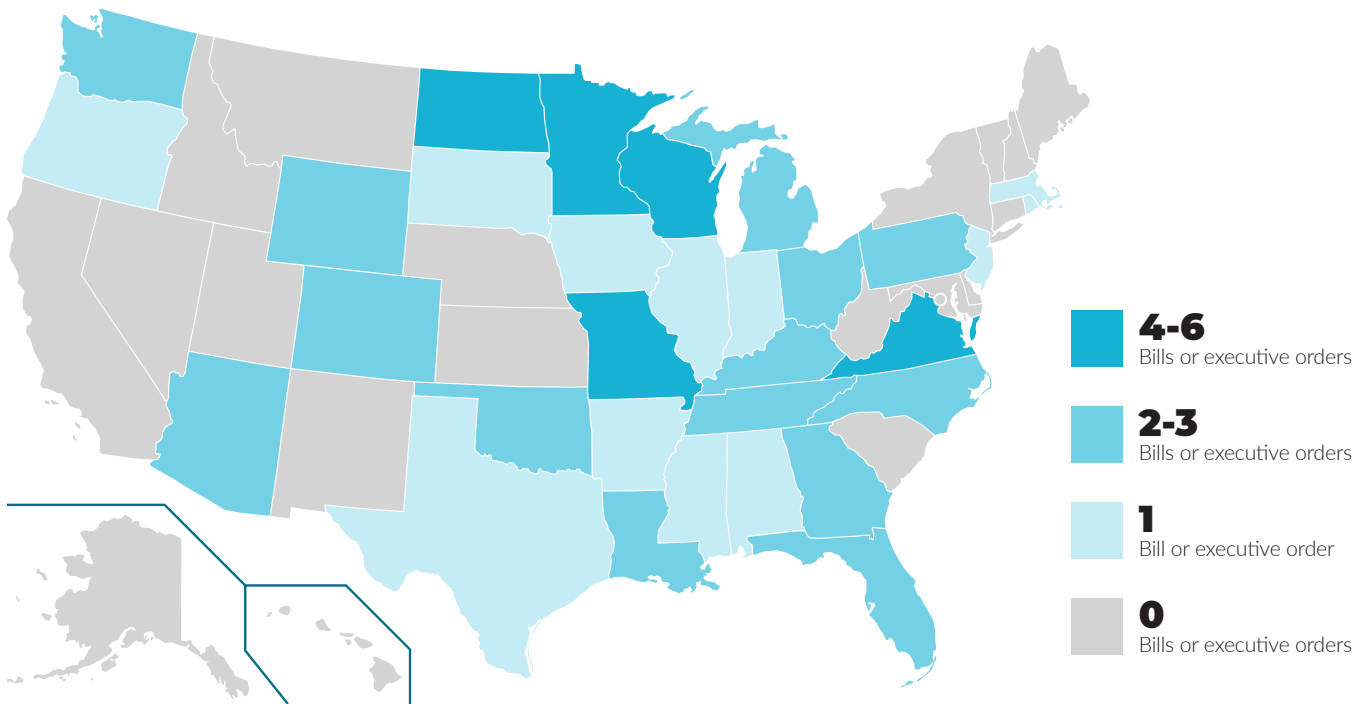


At least
nineteen
states have
proposed
at least
thirty laws
increasing
or creating
protest-
related
penalties,
five of
which
have been
adopted.

¹⁵ A/HRC/ 20/ 27, para. 27 (stating that "the enjoyment of the right to hold and participate in peaceful assemblies entails the fulfillment by the State of its positive obligation to facilitate the exercise of this right").

¹⁶ The states proposing increased penalties are Alabama (HB 94, expired), Arizona (SB 1033 (expired), HB 2007, most problematic provisions defeated), Colorado (SB 17-035, failed in committee), Georgia (SB 160, approved with protest provisions deleted), Iowa (SF 2222, expired), Kentucky (BR 175, expired), Massachusetts (HB 916, pending), Michigan (HB 4643, failed in committee), Minnesota (HF 1066/SF 918, expired; SF 3463, vetoed; HF 390/SF 676, vetoed; HF 896/SF 803, vetoed), Mississippi (SB 2730, failed in committee), Missouri (HB 1259; SB 813; HB 2145; all expired), North Carolina (SB 229, expired), North Dakota (HB 1426 and HB 1304, both enacted), Ohio (SB 250 and HB 423, both pending), Oklahoma (HB 1123 and HB 2128, both enacted), Pennsylvania (SB 652, pending), Tennessee (SB 0902, enacted), Virginia (HB 1791, vetoed; SB 1055, failed in Senate), and Washington (SB 5941 and SB 5009, both have expired).

STATES WHICH HAVE PROPOSED OR ENACTED LEGISLATION RESTRICTING PROTEST ACTIVITIES SINCE NOVEMBER 2016



also been introduced in recent years. Colorado, Louisiana, Minnesota, Ohio, Oklahoma, Pennsylvania, and Wyoming are among the states that have proposed or enacted such laws. For example:

- Oklahoma’s HB 1123, adopted in May 2017, heightens the penalties for willfully and without permission entering property containing “critical infrastructure”; an offense can now result in a fine of up to \$1,000, six months in prison, or both. A trespasser who also damages or vandalizes infrastructure can be punished with up to ten years in prison and a \$100,000 fine.

Laws proposed or enacted in Georgia, Iowa, Minnesota, Missouri, South Dakota, Tennessee, and Washington seek to impose harsh new penalties on interfering with or blocking traffic, including during a protest. In some cases these laws make interference with traffic a felony offense punishable by a lengthy prison sentence, despite the UN Human Rights Council's warning that "the free flow of traffic should not automatically take precedence over [the] freedom of peaceful assembly."¹⁷ An example:

- Missouri's SB 813, introduced in January 2018 but expired, heightened penalties for committing a "peace disturbance," including

17 A/HRC/ 20/ 27, para. 41.

obstructing traffic. If the obstruction involved an interstate highway, the law elevated the crime to a higher level of misdemeanor, subject to an automatic fine on the first offense of \$5,000 or up to one month in jail. Violators were also held civilly responsible for any person harmed in the course of the protest.

At least four states (Massachusetts, Minnesota, North Carolina, and Pennsylvania) have proposed laws that hold protesters and those involved in planning protests personally responsible for the costs incurred by public officials tasked with monitoring and protecting protest areas. International legal experts warn that “organizers [of protests] should not incur any financial charges for the provision of public services during an assembly (such as policing, medical services and other health and safety measures).”¹⁸ According to the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association, protest organizers and participants “should not be considered responsible (held liable) for the unlawful conduct of others” or for “the maintenance of public order.”¹⁹ As one example of a law that potentially conflicts with this principle:

- Minnesota’s HF 322/SF 679, introduced in February 2017 but now expired, required participants (including both organizers and protesters) in an unlawful assembly to cover the costs incurred by public authorities in responding to the gathering. The law allowed the state agency or political subdivision that incurred the costs to sue to recover costs if the individual voluntarily refused to pay.

LAWS THAT DEFINE PROTEST-RELATED ACTIVITIES AS TERRORISM OR TERRORISM-RELATED OFFENSES

North Carolina and Georgia proposed laws that defined various protest-related activities as “domestic” or “economic” terrorism; both were defeated.²⁰ One other remains pending:

- Virginia’s HB 1601, introduced in January 2018, bans members of designated “domestic terrorist organizations,” which is broadly defined, from assembling in groups of three or more.²¹ If such groups gather, they automatically constitute an “unlawful assembly,” and anyone who participates in their gathering can be charged with a misdemeanor punishable by up to one year in prison and a \$2,500 fine. Additionally, if anyone involved, whether or not a member of

¹⁸ Id., para. 31.

¹⁹ Ibid.

²⁰ North Carolina’s HB 249 failed in committee April 2017; Georgia SB 1 failed in the House in March 2017.

²¹ A domestic terrorist organization is defined as a group with three or more people that has an “identifiable name or identifying sign or symbol,” whose primary goal would be to carry out an act of domestic terrorism, or has members who have attempted to commit two or more acts of domestic terrorism on their own or with others.

the designated terrorist group, carries a firearm or other dangerous weapon, the offense is elevated to a felony, punishable by up to ten years in prison.

LAWS THAT ELIMINATE LIABILITY FOR CAUSING INJURY OR DEATH TO PROTESTERS

Florida, Kentucky, North Carolina, North Dakota, Rhode Island, Tennessee, and Texas have proposed laws shielding motorists from liability if they unintentionally injure or kill protesters who block or otherwise interfere with traffic. In most cases the laws address only civil liability, but at least one, Kentucky's HB 53 (which expired), also shielded drivers from criminal liability. Some of the laws require that the protest be "unpermitted" or that the driver exercise "due care" before absolving the perpetrator from liability, and none of the laws would bar liability in situations where a protester was intentionally harmed. All seven of these laws were defeated or expired. An example of one of these bills includes:

- North Carolina's HB 330, introduced in March 2017, eliminated a driver's civil liability where a participant in a protest was hit or injured if the latter did not have a permit and was blocking traffic and the driver exercised "due care."

LAWS THAT EXPAND POLICE OR EXECUTIVE POWERS TO DEAL WITH PROTESTERS

Indiana, Massachusetts, and South Dakota have proposed or adopted laws that expand police or executive powers to deal with protesters. Two of these laws, one enacted and the other still pending, are designed to prevent traffic obstructions.

- South Dakota's SB 176, enacted in March 2017, expands the power of the governor and the sheriff to curtail protest activities on public land—for example, by prohibiting gatherings of twenty or more people on public land if the gathering might damage the land or interfere with a renter's use of it.
- Massachusetts' HB 916, introduced in June 2017 and still pending, will, if passed, allow police officers to arrest a person without a warrant if

LEGISLATION AFFECTING PROTEST RIGHTS: BY TYPE OF RESTRICTION

Out of 69 total bills or executive orders tracked since November 2016. Top seven categories listed.

22

Traffic interference

9

Face coverings/disguises

9

Riot

9

Trespass

8

Infrastructure

8

Campus speech

7

Driver immunity

they have probable cause to believe that he or she has unlawfully impeded traffic.

EXECUTIVE ORDERS AND EMERGENCY POWERS TO RESTRICT PROTEST-RELATED ACTIVITIES

Various state governments have used executive orders (EOs) and emergency powers, which bypass the legislative review process, to restrict protest activities or grant additional powers to designated police units. This is typically done in the context of protests in which certain participants have become, or threaten to become, unruly or caused harm to others. According to international human rights law, “an individual does not cease to enjoy the right to peaceful assembly as a result of sporadic violence or other punishable acts committed by others in the course of the demonstration, [so long as] the individual in question remains peaceful in his or her own intentions or behavior.”²²

Three examples of EOs from 2017 include:

- In Florida, in October 2017, in advance of a highly controversial speech at the University of Florida by the white nationalist Richard Spencer, Governor Richard Scott issued EO 17-264, which declared a state of emergency for seven days. The EO activated the Florida National Guard, allowed the closure of government buildings, and waived budget restrictions.
- In North Dakota, in February 2017, Governor Douglas Burgum issued EO 2017-01, which authorized the mandatory evacuation of the Dakota Access Pipeline protest camp.
- In Virginia, in August 2017, Governor Terence McAuliffe signed EO 66, declaring a five-day state of emergency following the Unite the Right rally and counter-protests in Charlottesville, which resulted in the death of one protester.²³ The EO mobilized the National Guard and allowed state agencies to use extraordinary measures to manage the protests.

²² Zilibierberg v. Moldova, No. 61821/00, European Court of Human Rights (2004).

²³ Executive Order 13809.

EXECUTIVE ORDERS: BY JURISDICTION

Since November 2016, a total of six executive orders restricting protest activities or granting additional power to designated police units have been enacted in the following jurisdictions:



VIRGINIA

3



NORTH DAKOTA

1



FLORIDA

1



FEDERAL

1



Police filming a protest at the inauguration of President Trump in 2017 (photo: Mobilus In Mobili/Flickr)

Other State and Federal Actions to Restrict Protest-Related Activities

THE MILITARIZATION OF GEAR AND TACTICS

An EO issued by President Donald Trump in August 2017 allows for the broader and easier transfer of surplus military equipment to police departments throughout the United States. Transferred equipment includes grenade launchers, armored and weaponized vehicles, bayonets, assault rifles, and ammunition.²⁴ The transfers have resulted in the militarization of the appearance and capabilities of many police units in the United States. In a report issued following a June 2017 visit to the United States, the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association noted that “it has become commonplace [in the United States] for police to respond to peaceful demonstrations with military-style tactics, full body armor, and an arsenal of weaponry suited more to a battlefield than a protest.”²⁵

An example of militarized tactics used by law enforcement officers in responding to protest activity includes:

- The eviction of a small group of Dakota Pipeline Activists who remained at the protest site Oceti Sakowin beyond the mandatory deadline for their departure. Local law enforcement officers, including snipers, swarmed the area in Humvees and helicopters,

²⁴ Adam Goldman, “Trump Reverses Restrictions on Military Hardware for Police,” New York Times, August 28, 2017, <https://www.nytimes.com/2017/08/28/us/politics/trump-police-military-surplus-equipment.html>.

²⁵ Ibid.

and officers wore military fatigues and carried assault rifles.

According to human rights experts, the only circumstances warranting the use of deadly weapons during a demonstration includes “the imminent threat of death or serious injury.”²⁶ Even then, responsible law enforcement officers should use only the level of force that is “indispensable to control such situations in a rational and proportional manner, and respecting the rights to life and humane treatment.”²⁷

THE STIGMATIZATION OF PROTEST MOVEMENTS

Coinciding with the recent rise of laws restricting protests throughout the United States has been a noticeable shift in language used by public officials regarding large-scale protest movements, such as Black Lives Matter and the Dakota Access Pipeline protests. Protesters have been cast as extremists, aggressors, criminals, and even terrorists. Civil and human rights activists worry that the stigmatization of activist movements threatens not only to delegitimize their goals in the eyes of the public but also to justify increased scrutiny and surveillance by security personnel and government officials.²⁸

Three recent examples illustrate the increasingly aggressive, disapproving tone used by public officials and government entities to describe activists and protest movements.

- In May 2018, an office in the Department of Homeland Security released a report referring to the Dakota Access Pipeline protesters as “suspected environmental rights extremists” engaged in “criminal and violent acts.”
- In October 2017, a group of eighty U.S. representatives, primarily Republicans but also two Democrats, sent Attorney General Jeff Sessions a letter asking whether demonstrators

Recent examples illustrate the increasingly aggressive, disapproving tone used by public officials and government entities to describe activists and protest movements.

²⁶ A/HRC/20/27, para. 35 (citing the UN Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions).

²⁷ Ibid.

²⁸ Thaddeus Talbot and Hugh Handeyside, “Is the FBI Setting the Stage for Increased Surveillance of Black Activists?” ACLU, October 18, 2017, <https://www.aclu.org/blog/racial-justice/fbi-setting-stage-increased-surveillance-black-activists>.

who target energy infrastructure can be prosecuted as domestic terrorists. They argued that because these demonstrators pose “a threat to human life, and appear to be intended to intimidate and coerce policy changes,” their acts might satisfy the definition of terrorism under existing U.S. law.²⁹

- Also in October 2017, a leaked internal report produced by the FBI’s Domestic Terrorism Analysis Unit warned of the emerging domestic terror threat posed by the “Black Identity Extremist” (BIE) movement, which, according to the report, particularly threatens the lives of law-enforcement officers.³⁰ The “BIE ideology,” the report states, focuses on “perceptions of unjust treatment of African-Americans and the perceived unchallenged illegitimate actions of law enforcement,” warning that such grievances “will inspire premeditated attacks against law enforcement.”³¹

DISPROPORTIONATE USE OF FORCE AND MASS ARRESTS

Local security personnel have been accused in multiple instances of using excessive force to control protests. While the right to freedom of peaceful assembly is not absolute and does not protect violent protests, peaceful intentions on the part of protesters should always be presumed unless there is “compelling and demonstrable” evidence to the contrary, according to the *Guidelines on Freedom of Peaceful Assembly* issued by the Organization for Security and Cooperation in Europe. Security personnel should use force only in “exceptional” situations, and police powers, including the power to arrest, should be deployed only in direct response to immediate or impending harm.³² Even then, actions must be necessary, proportionate, and carefully tailored to deal with only the danger at hand or the dangerous individuals involved and not the broader protest movement or body of activists.³³

Examples of potentially excessive or disproportionate use of force by security officers during protests include:

29 Letter to Attorney General Jeff Sessions from members of the Congress of the United States, October 23, 2017, available at https://buck.house.gov/sites/buck.house.gov/files/wysiwyg_uploaded/Protecting%20Energy%20Infrastructure.pdf.

30 Sam Levin, “FBI Terrorism Unit Says ‘Black Identity Extremists’ Pose a Violent Threat,” *The Guardian*, October 6, 2017, <https://www.theguardian.com/us-news/2017/oct/06/fbi-black-identity-extremists-racial-profiling>; and Talbot and Handeyside, “Is the FBI Setting the Stage for Increased Surveillance of Black Activists?”.

31 Ibid.

32 A/HRC/20/27, paras. 25 and 36. The Special Rapporteur on the Rights to Freedom of Peaceful Assembly and Association considers the *Guidelines on Freedom of Peaceful Assembly* “the most advanced set of good practices” currently available.

33 ICCPR, art. 21.



Black Lives Matter protest, New York, 2016 (photo: Karla Cote/Flickr)

St. Louis, Missouri

In September 2017 widespread street protests erupted following the acquittal of a white police officer accused of killing an African-American man in 2011. While some protesters engaged in vandalism and aggressive behavior during the weeks-long protest, the police response throughout the unrest was seen by many as excessive. Police officers drove in armored vehicles, wore riot gear, frequently used chemical sprays, prevented the filming of police actions, and forced demonstrators into small areas to arrest them en masse (an aggressive police tactic known as “kettling”). By the end of September, more than three hundred protesters had been arrested, and both the mayor and the interim police chief called for an independent investigation into the handling of the protests.³⁴

Phoenix, Arizona

At a largely peaceful rally for President Trump in August 2017, during which there were allegations of minor scuffles and bottle throwing, police deployed smoke bombs, pepper balls, tear gas, and non-lethal projectiles in an attempt to disperse protesters. According to media reports, police gave no warning to protesters and did not request them to evacuate the area until well after the munitions had been deployed. An internal investigation by the Phoenix police conceded that the officers should have better communicated with protesters before deploying these tactics.³⁵

34 “St. Louis Mayor, Police Chief Call for Independent Investigation into Police Response to Protests,” St. Louis Post-Dispatch, September 28, 2017, https://www.stltoday.com/news/local/crime-and-courts/st-louis-mayor-police-chief-call-for-independent-investigation-into/article_3ca150df-d493-5396-bfd1-1a78c0116df7.html.

35 Megan Cassidy and Michael Kiefer, “We Could Communicate Better, Phoenix Police Say in Report About Trump Protest,” AZCentral, January 29, 2018, <https://www.azcentral.com/story/news/local/phoenix/2018/01/29/phoenix-police-trump-rally-report-failures-successes-communication-public-could-improved/1075621001/>.



The 2018 March for Our Lives protest in Washington, DC (Phil Roeder/Flickr)

Puerto Rico

According to a 2013 report, the Puerto Rico Police Department regularly uses excessive force against nonviolent protesters and suppresses constitutionally protected speech and expression by indiscriminately deploying pepper spray, tear gas, batons, rubber bullets, sting ball grenades, and other potentially harmful weapons. In a particularly egregious case, a group of students peacefully entering the capitol building to engage in a protest were physically beaten by riot squad officers, who hit them on their faces and bodies with batons, forcing them to fall down a flight of marble stairs.³⁶

Washington, DC

On the day of President Trump's inauguration in 2017, 234 protesters were arrested, including some journalists, and 210 were charged with felony rioting, which is punishable by up to ten years in prison. One individual pled guilty for assaulting a police officer and another twenty pled guilty to misdemeanor rioting. A jury found the first six defendants who went to trial not guilty on all counts, and prosecutors dropped the remaining charges on all others by July 2018.³⁷ The American Civil Liberties Union (ACLU) sued the Washington DC police force on behalf of four demonstrators, accusing the police officers involved of executing an "unlawful mass roundup"; using weapons excessively, including mace and stinger grenades; and holding detainees for hours without food, water, or access to toilets.³⁸

³⁶ "Take Back the Street," 4.

³⁷ Rick Massimo, "Charges dropped against last of Inauguration Day protesters," WTOP, July 6, 2018.

³⁸ Peter Herman, "ACLU Sues DC Police Over Arrests During Inauguration Disturbance," The Washington Post, June 21, 2017, https://www.washingtonpost.com/local/public-safety/aclu-sues-dc-police-over-arrests-during-inauguration-disturbance/2017/06/21/91316cd0-503f-11e7-b064-828ba60fbb98_story.html?utm_term=.49d90689c1a2.

INCREASED SURVEILLANCE

Covert surveillance of activist movements appears to be on the rise. A few examples support this growing concern among civil and human rights organizations:³⁹

Washington, DC

In the days before President Trump's inauguration on January 20, 2017, court documents reveal that various planning meetings held by Disrupt J20, a movement organizing inauguration day protests, were infiltrated by undercover police officers without the organizers' knowledge. The home of at least one Disrupt J20 activist was involuntarily searched by Washington police officers, who seized various personal items. The search was allegedly part of an effort to build a legal case contending that Disrupt J20 intended to riot, a crime under U.S. law.⁴⁰

Memphis, Tennessee

In early 2017, law enforcement officials in the Memphis Police Department created a "watch list" of Black Lives Matter protesters, with identifying data such as birthdates, weight, height, race, and body type, as well as photographs and video footage. The list was originally created to bar identified individuals from entering the Memphis City Hall without an escort.⁴¹

New York, New York

Court documents revealed that the city police department sent undercover officers to Black Lives Matter protests to collect multimedia records on the protesters. The records also revealed that certain New York City police units had regularly spied on Black Lives Matter protesters, deployed plainclothes officers to monitor demonstrations, shared photos of activists, and tracked their movements.⁴²



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³⁹ See, for example, Talbot and Handeyside, "Is the FBI Setting the Stage for Increased Surveillance of Black Activists?"

⁴⁰ Perry Stein and Keith Alexander, "DC Police Infiltrated Inauguration Protest Group, Court Papers Show," The Washington Post, April 18, 2017, https://www.washingtonpost.com/local/dc-police-infiltrated-inauguration-protest-group-court-papers-show/2017/04/17/f3739f44-236c-11e7-b503-9d616bd5a305_story.html?utm_term=.cd14335a3c65.

⁴¹ Aris Folley, "Memphis Police Store Secret Surveillance of Black Lives Matter Protesters for 'Watch List,'" AOL, February 21, 2017, <https://www.aol.com/article/news/2017/02/21/memphis-police-store-secret-surveillance-black-lives-matter-protesters/21718619/>.

⁴² George Joseph, "NYPD Sent Undercover Officers to Black Lives Matter Protest, Records Reveal," The Guardian, September 29, 2016, <https://www.theguardian.com/us-news/2016/sep/29/nypd-black-lives-matter-undercover-protests>.

FAILURE TO PROTECT PROTESTERS

It is the role of police officers and other official security personnel to protect all individuals within their jurisdictions. Not only must law enforcement officers generally facilitate peaceful protests, but they must also ensure that, once underway, protesters are safe and secure, including from counter-protesters and provocateurs who seek to incite chaos.⁴³ It is not the job of assembly organizers or participants to maintain public order or protect the public against these threats. Law-abiding protesters should not be held responsible for the unlawful conduct of others.⁴⁴

However, numerous recent examples throughout the United States suggest a failure on behalf of state and local law enforcement officers to adequately protect peaceful protesters. A key example:

- During the Unite the Right rally on August 12, 2017 in Charlottesville, Virginia, hundreds of counter-protesters clashed with white nationalists. One protester, Heather Heyer, was killed. Law enforcement units “failed to maintain order and protect citizens from harm, injury, and death,” according to a detailed independent investigation conducted shortly after the day’s tragic events.⁴⁵ According to an independent review commissioned by Charlottesville officials and led by a former U.S. Attorney, the Charlottesville police did not ensure that protesters and counter-protesters were safely separated, adequately prepare for clashes, or effectively coordinate with state police. The report concluded that Heyer’s death marked a “most tragic manifestation of [the police’s] failure to protect public safety.”⁴⁶

Conclusion

Between spring 2017 and spring 2018, measures restricting protests doubled in number in state legislatures throughout the United States.⁴⁷ In almost all cases, the measures were proposed and supported by conservative lawmakers but rejected and criticized by both Democratic and Republican lawmakers. This nationwide trend is thus difficult to conceptualize along partisan lines.

43 A/HRC/20/27, para. 30.

44 Ibid., citing the submission by the OSCE/ODIHR Panel of Experts.

45 Independent Review of the 2017 Protest Events in Charlottesville, VA, Final Report, Hunton and Williams LLP, available at https://docs.wixstatic.com/ugd/c869fb_04949e939e2e440d99520dfb8400219c.pdf.

46 Bart Jansen, “Charlottesville Protests: Police Failed to Maintain Order, Review Finds,” USA Today, December 1, 2017, <https://www.usatoday.com/story/news/2017/12/01/flawed-law-enforcement-plan-failed-prevent-injury-death-violent-charlottesville-protests/912671001/>; see also Alex Vitale, “How the Police Failed in Charlottesville,” The Nation, August 15, 2017, <https://www.thenation.com/article/how-the-police-failed-in-charlottesville/>.

47 “Conservative-Led Anti-Protest Legislation Already Doubled Since Last Year,” National Lawyers Guild, February 15, 2018, <https://www.nlg.org/conservative-led-anti-protest-legislation-already-doubled-since-last-year/> (citing ICNL’s Protest Law Tracker).

Opposition to restrictive protest initiatives has been strong and, in many cases, led to their defeat. While nine of the sixty-four proposed bills have been enacted into law, the vast majority, forty-seven (as of September 2018) have failed to become law.

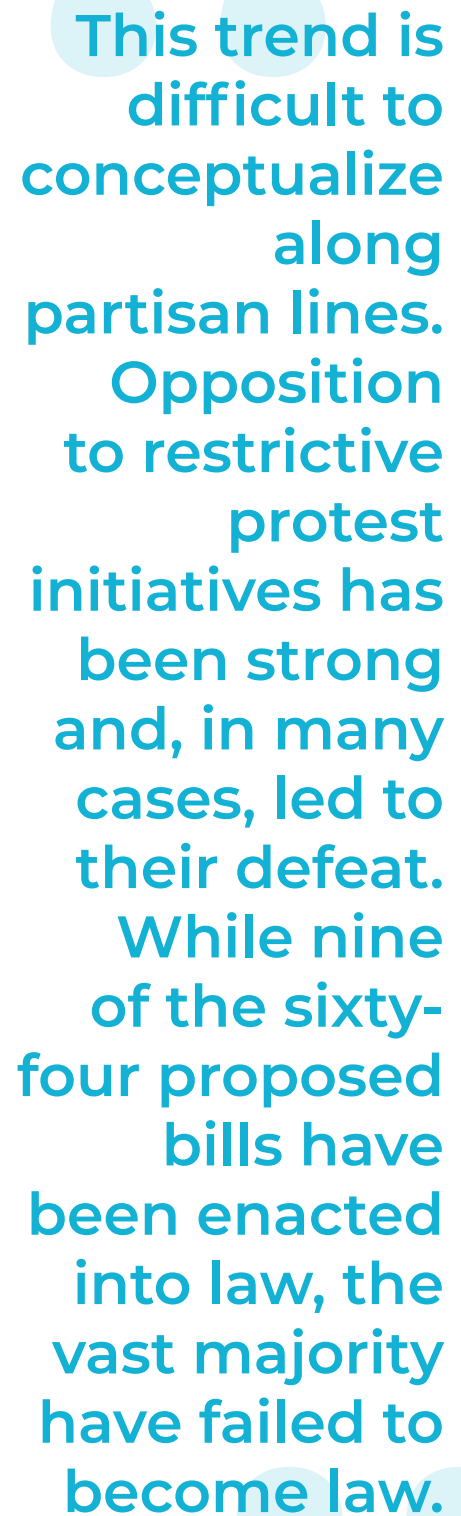
Several trends are apparent when examining how these laws typically fare in the legislative process. First, vociferous campaigns opposing the measures led by civil society organizations (CSOs) and activists are contributing to their defeat. In Arizona, Colorado, Georgia, Minnesota, and Virginia, among others, high-profile advocacy campaigns led by CSOs have successfully convinced lawmakers that laws restricting protest activities threaten long-standing and deeply cherished constitutional protections. For example, in Colorado, a bill seeking to bar teachers from participating in strikes was subject to widespread criticism by advocacy groups in the days immediately following its introduction. Subsequently, a Senate committee voted to postpone the bill indefinitely and its sponsors agreed to withdraw it.⁴⁸ Similarly in Arizona a law that would have substantially expanded the definition of “riot” failed to achieve the necessary votes in the House of Representatives after the house speaker and the law’s sponsor were bombarded with calls by constituents and CSOs demanding the law’s withdrawal.⁴⁹

Second, in at least thirty cases the restrictive protest measures never received an initial vote, and in at least four cases the laws were voluntarily withdrawn or the most restrictive provisions were removed before they moved toward a first vote. At least seven bills failed or were substantially softened in committee, and another five were approved by the first house but subsequently defeated by the second either by committee or floor vote.

Third, seven of the twenty-nine laws defeated to date were vetoed by governors; most were Democratic, but at least

48 Jesse Paul, “Colorado Teachers Won’t Be Barred from Striking—or Face Fines or Jail Time—Because the Bill’s GOP Sponsor Says He’ll Yank It,” Daily Camera, April 30, 2018, http://www.dailycamera.com/ci_31843816.

49 Yvonne Wingett Sanchez and Mary Jo Pitzl, “Arizona House Speaker Declares Controversial ‘Protest’ Bill Dead,” AZCentral, February 27, 2017, <https://www.azcentral.com/story/news/politics/legislature/2017/02/27/why-gov-doug-ducey-wont-have-weigh-arizonas-controversial-protest-bill/98474882/>.



This trend is difficult to conceptualize along partisan lines. Opposition to restrictive protest initiatives has been strong and, in many cases, led to their defeat. While nine of the sixty-four proposed bills have been enacted into law, the vast majority have failed to become law.

two were Republican.⁵⁰ In cases such as Louisiana's HB 269, which imposed mandatory sanctions on campus protesters, the governor issued his veto despite widespread support for the final bill, which was significantly watered down from the original draft.⁵¹ In many instances vetoing governors cited concerns with bills' vague or overly broad language, as well as their redundancy with already existing laws.⁵² In one instance, lawmakers failed to override a governor's veto of a restrictive measure.⁵³

Finally, in some cases laws imposing restrictions on protest activities are failing to pass in part because of high profile protest-related events occurring elsewhere. For example, a Florida law that would have eliminated driver liability for hitting protesters was defeated after a counter-protester was struck and killed by a driver in Charlottesville, Virginia, during the Unite the Right rally in August 2017. Opponents of the Florida law pointed out that the proposed bill could be used to exonerate drivers such as the one who killed the counter-protestor, whereupon the bill failed in committee. However, in other cases, such as North Dakota where large-scale protests erupted over the installation of a pipeline, laws seem to be passing because of high-profile demonstrations. Indeed, three out of the nine enacted laws were adopted in North Dakota in the wake of the Dakota Access Pipeline protests.

The uptick in measures restricting protest activities, which have appeared in well over half of all US states since November 2016, is a worrisome trend. Even though most of these measures have failed to pass into law, powerful and influential forces continue to push for their passage or reintroduction. Moreover, the bills that have been enacted set a negative precedent for other states and threaten to normalize new restrictions on protest activities previously considered unacceptable. While activism and other forms of resistance have led many of these restrictive measures to fail, constant vigilance is required to ensure that these types of bills, and the anti-protest attitude they embody, do not become the new normal.

50 These include Arkansas's AB 550, Minnesota's SF 3463, HF 896/SF 803, HF 390, Virginia's HB 1791, Wyoming's SF 0074, and Louisiana's HB 269.

51 "College 'Free Speech' Bill Vetoed by Louisiana Gov. John Bel Edwards," The Times-Picayune, June 27, 2017, https://www.nola.com/politics/index.ssf/2017/06/louisiana_campus_speech_vetoed.html.

52 For example, see Arkansas Governor Hutchinson's veto letter for AB 550 and Minnesota Governor Dayton's veto letter for SF 3463. Both cited concerns about the "unacceptably vague" nature of both laws.

53 Wyoming SF 0074, introduced February 7, 2018; approved by the Senate February 27, 2018; approved by the House March 10, 2018; vetoed by Governor Mead March 14, 2018.