DOING AWAY WITH DISORDERLY CONDUCT

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Abstract: Disorderly conduct laws are weapons the powerful wield against the unpopular. All fifty states and many municipalities have disorderly conduct laws that criminalize speech and conduct ranging from unreasonable noise to opprobrious language. Although these laws are facially neutral, their astounding breadth and vagueness serve as a rubber stamp for law enforcement to surveil and criminally charge marginalized people. Their targets include communities of color, people with unpopular religious or political beliefs, and people whose mental health struggles render them incapable of complying with societal expectations of order. Although courts and scholars have criticized these laws for decades, none have explicitly called for their abolition. This Article does so. The Article examines both the constitutional flaws of disorderly conduct laws and the many societal harms they enable, before ultimately concluding that any minimal good they accomplish cannot justify the damage they inflict. Amidst a growing national reckoning over the crisis of abusive and discriminatory policing, this Article provides a timely critique of the criminal laws that empower such policing. It uses disorderly conduct laws as a lens through which to examine the extraordinary costs of overcriminalization and the vulnerable people who most often bear the brunt of such costs. Although disorderly conduct laws are not the only criminal laws legislatures should consider eliminating, they are both constitutionally and socially problematic to a degree few other criminal laws achieve.

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

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[1] CONN. GEN. STAT. ANN. § 53a-181(a)(4) (West 2021).

[2] GA. CODE ANN. § 16-11-39(a)(3) (2021).

"tumultuous" manner,[3] "mak[ing] unreasonable noise,"[4] "corrupt[ing] the public morals,"[5] impeding another person in order to "solicit[] alms,"[6] "recklessly creat[ing] a hazardous condition,"[7] and even maintaining 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 discriminate in their use of these laws and enforce them disparately against 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. In the last decade both scholars and the public have recognized the tremendous costs of the United States prison system, and its consequent physical, psychological, and economic harms.[13] Amidst a growing national reckoning over the crisis of abusive and discriminatory policing and the criminal laws

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[3] N.J. STAT. ANN. § 2C:33-2(a)(1) (West 2021).

[4] ALA. CODE § 13A-11-7(a)(2) (LexisNexis 2021).

[5] FLA. STAT. § 877.03 (2021).

[6] HAW. REV. STAT. § 711-1101(1)(e) (2021).

[7] ALASKA STAT. § 11.61.110(a)(6) (2021).

[8] MASS. GEN. LAWS ANN. ch. 272, § 53(a) (West 2021).

[9] For examples of courts that have struck or limited these statutes, see *infra* Part I.

[10] *See* Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1316 (2012) (expressing the outsize impact misdemeanor convictions can have, like depriving the misdemeanant of "child custody . . . student loans, [and] health care"); Jenny Roberts, *Crashing the Misdemeanor System*, 70 WASH. & LEE L. REV. 1089, 1090 (2013) (describing how a misdemeanor can affect's one's opportunities for jobs and housing).

[11] *See, e.g.*, CTR. FOR CONST. RTS., STOP AND FRISK: THE HUMAN IMPACT 11–12, 14 (2012), https://ccrjustice.org/sites/default/files/attach/2015/08/the-human-impact-report.pdf [https://perma.cc/Z5XF-H8NK] (arguing that race, sexual orientation, and religion play a significant role in who police choose to stop and frisk in New York); INDEP. COMM'N ON N.Y.C. CRIM. JUST. & INCARCERATION REFORM, A MORE JUST NEW YORK CITY 34–37 (2017), https://static1.squarespace.com/static/5b6de4731aef1de914f43628/t/5b96c6f81ae6cf5e9c5f186d/1536607993842/Lippman%2BCommission%2BReport%2BFINAL%2BSingles.pdf [https://perma.cc/MJN6-472Z] (presenting the disparate effect that the justice system has on racial and ethnic minorities and vulnerable populations and outlining how New York could reorient its criminal justice system, including by addressing the use of misdemeanors); *see also infra* Part III.A. (describing the facial invalidity of these laws).

[12] *See 2018 Crime in the United States: Table 43: Arrests by Race and Ethnicity*, FED. BUREAU OF INVESTIGATION: UNIF. CRIME REPORTING (2018), https://ucr.fbi.gov/crime-in-the-u.s/2018/crime-in-the-u.s.-2018/tables/table-43 [https://perma.cc/Y35L-RRXT] (reporting approximately 249,000 arrests for disorderly conduct in 2018, a statistic that does not include citations issued without arrest).

[13] *See* Alexandra Natapoff, Atwater *and the Misdemeanor Carceral State*, 133 HARV. L. REV. F. 147, 148 (2020) (noting that the last decade "has seen a deepening public and scholarly reckoning with the extraordinary human costs of the American carceral state").

that enable these harms, disorderly conduct laws should be some of the first to go. Yet, "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—many disorderly conduct laws punish speech and conduct that the First Amendment protects.[15] And even when the laws are constitutional, they are not beneficial. The broad language of disorderly conduct laws—which, for example, empowers law enforcement to charge and prosecute conduct as minor as playing one's music too loudly—serves as a rubber stamp for law enforcement control of and retaliation against people they deem suspicious.[16] The laws ensnare thousands of people in the criminal legal system each year, resulting in arrest records, fines, and convictions that adversely affect a person's ability to obtain or maintain housing, jobs, and legal status in the country.[17] They exhaust taxpayer money that could be spent on education or social programs.[18] They traumatize people whose conduct caused very little harm.[19] They exacerbate inequities for people already living on the margins of society.[20]

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.[21] But overcriminalization is

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[14] Jamelia N. Morgan, *Rethinking Disorderly Conduct*, 109 CALIF. L. REV. 1637, 1686 (2021).

[15] *See infra* Part II (providing instances in which laws have been struck as contrary to the First Amendment's protection for freedom of speech)

[16] *See* MO. REV. STAT. § 574.010(1)(1)(a) (2021) (including disturbing others by "[l]oud noise" under the description of "the offense of peace disturbance").

[17] *See supra* note 12 (presenting that U.S. law enforcement made approximately 249,000 arrests for disorderly conduct in 2018); *infra* Part III.C (providing examples of the social impact of these laws).

[18] *See infra* Part III.D (arguing that enforcement of disorderly conduct laws is a waste of taxpayer money).

[19] *See infra* Part III.A (describing the minor offenses for which people are charged with disorderly conduct).

[20] *See infra* Part III.C (examining how enforcement of these laws has a disproportionate effect on certain classes of people).

[21] *See* ANTHONY B. BRADLEY, ENDING OVERCRIMINALIZATION AND MASS INCARCERATION: HOPE FROM CIVIL SOCIETY (2018) (advocating for an end to overcriminalization through community, rather than policy); Stephen F. Smith, *Overcoming Overcriminalization*, 102 J. CRIM. L. & CRIMINOLOGY 537, 565 (2012) (stating that the most significant issue with overcriminalization is that it causes crimes to be poorly defined, which increases police power and thus potential criminal liability); Megan Stevenson & Sandra Mayson, *The Scale of Misdemeanor Justice*, 98 B.U. L. REV. 731, 766 (2018) (arguing that overcriminalization of misdemeanor offenses gives police great discretion, which makes arrests a product of the areas and people police monitor). For statistics on incarceration rates, see BUREAU OF JUST. STAT., U.S. DEP'T OF JUST., NCJ 252156, PRISONERS IN 2017 (2019), https://www.bjs.gov/content/pub/pdf/p17_sum.pdf [https://perma.cc/R9N6-4764] (presenting statistics on

not limited to excessive sentences: it also involves labeling too much conduct as criminal. Some criminal punishments are unreasonable not because they involve lengthy prison terms, but because they are exacted for behaviors that society should never have criminalized.[22] Disorderly conduct laws fit within this category. They are not the only laws that legislatures should consider eliminating; other scholars have expressed concern for the overcriminalization of drug possession, speech, 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 truer than in this author's own city of Minneapolis. In the months after George Floyd's murder under the knees of Minneapolis police, both Minneapolis and neighboring St. Paul grappled publicly and painfully with how and when to enforce minor law violations like crimes of disorder.[25] Declining to police dis-

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imprisonment and demographics); *New Prison and Jail Population Figures Released by U.S. Department of Justice*, SENT'G PROJECT (Apr. 25, 2019), https://www.sentencingproject.org/news/new-prison-jail-population-figures-released-u-s-department-justice/ [https://perma.cc/N468-G9WL] (stating that the United States leads in 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/ [https://perma.cc/AW6Y-BQWA] (detailing that 25% of those in prison were "non-violent, low-level offenders" and 14% had "already served long sentences" and could be freed).

[22] *See* DOUGLAS HUSAK, OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW 3 (2008) (decrying prison sentences "inflicted for conduct that should not have been criminalized at all").

[23] For authors who hold these respective viewpoints, see Stevenson & Mayson, *supra* note 21, at 767 (noting the recent effort toward decriminalizing marijuana possession); Michal Buchhandler-Raphael, *Overcriminalizing Speech*, 36 CARDOZO L. REV. 1667, 1667 (2015) (critiquing the statutes that criminalize potentially constitutional speech); John Inazu, *Unlawful Assembly as Social Control*, 64 UCLA L. REV. 2 (2017) (arguing that unlawful assembly laws fail the First Amendment by preventing free speech); Natapoff, *supra* note 13, at 152 (suggesting that misdemeanors "offer an especially fertile space to grapple with abolitionist ideas").

[24] Eric J. Miller, *The Police as Civic Neighbors*, *in* THE CAMBRIDGE HANDBOOK OF POLICING IN THE UNITED STATES 104, 106 (Tamara Rice Lave & Eric J. Miller eds., 2019).

[25] *See* Caitlin Dickerson, *A Minneapolis Neighborhood Vowed to Check Its Privilege. It's Already Being Tested.*, N.Y. TIMES, https://www.nytimes.com/2020/06/24/us/minneapolis-george-floyd-police.html [https://perma.cc/6KQP-VL3M] (July 21, 2020) (detailing the situation in a gentrified area of Minneapolis where residents have agreed not to call the police to protect others, but are finding that promise difficult to keep); Mara H. Gottfried, *Fewer Police in St. Paul? Not Enough? People Who Wrote to Mayor, City Council Were Deeply Divided.*, BEMIDJI PIONEER (Dec. 13, 2020), https://www.bemidjipioneer.com/news/crime-and-courts/6799960-Fewer-police-in-St.-Paul-Not-enough-People-who-wrote-to-mayor-City-Council-were-deeply-divided. [https://perma.cc/8SCJ-3N5Z] (interviewing St. Paul residents who divide about law enforcement's response to disorder in public parks); Miguel

order can be uncomfortable, especially for those who benefit from traditional notions of order. But if we are to address the twin problems of overcriminalization and abusive policing seriously, we must consider uncomfortable steps.

Although 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 and offers a brief history of the development of these laws.[26] Part II discusses the constitutional flaws of disorderly conduct laws, including their facial invalidity, judicial decisions that have invalidated or limited them, and the problems with enforcement.[27] Part III turns to the non-constitutional harms these laws enable, specifically 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.[28] 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.[29] The Article culminates in Part V with a call for abolition of disorderly conduct laws.[30]

I. Overview of Disorderly Conduct Laws

Before delving into the problematic nature of disorderly conduct laws one must understand the statutes themselves. Section A of this Part outlines modern disorderly conduct laws in the fifty states, explaining the wide variety of speech and behaviors that these laws penalize.[31] Section B provides infor-

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Otárola & Paul Walsh, *Minneapolis Park Board Votes to End Relationship with Minneapolis Police, Differentiate Uniforms*, Star Trib. (June 4, 2020), https://www.startribune.com/park-board-votes-unanimously-to-end-working-with-police-in-minneapolis/570982312/?refresh=true [https://perma.cc/M24W-VNRY] (outlining how the Minneapolis Park Board decided to sever its relationship with the Minneapolis Police Department). All four police officers involved were charged in the murder of Mr. Floyd; Derek Chauvin was convicted of second-degree murder in April 2021 and the remaining three officers are, at the time of this publication, still scheduled to stand trial. Josh Campbell, Sara Sidner & Eric Levenson, *All Four Former Officers Involved in George Floyd's Killing Now Face Charges*, CNN (June 4, 2020), https://www.cnn.com/2020/06/03/us/george-floyd-officers-charges/index.html [https://perma.cc/72GB-QWQN]; *Chauvin Found Guilty of Murder, Manslaughter in George Floyd's Death*, KSTP.com (Apr. 20, 2021), https://kstp.com/news/former-minneapolis-police-officer-derek-chauvin-found-guilty-of-murder-manslaughter-in-george-floyd-death/6081181/?cat=1 [https://perma.cc/GP5Q-NDRR].

[26] *See infra* Part I.

[27] *See infra* Part II.

[28] *See infra* Part III.

[29] *See infra* Part IV.

[30] *See infra* Part V.

[31] *See infra* Part I.A.

mation on the history and development of these laws, spanning from their early enactment in the nineteenth century to increasingly enthusiastic enforcement through the twenty-first century.[32]

A. Survey of Modern Disorderly Conduct Laws

All fifty states have disorderly conduct laws,[33] as do many municipalities.[34] These laws criminalize, generally as a misdemeanor, a vast array of behavior encompassing both speech and conduct.[35] The laws are so broad that it

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[32] *See infra* Part I.B.

[33] ALA. CODE § 13A-11-7 (2021); ALASKA STAT. § 11.61.110 (2021); ARIZ. REV. STAT. ANN. § 13-2904 (2021); ARK. CODE ANN. § 5-71-207 (2021); CAL. PENAL CODE § 647 (West 2021); COLO. REV. STAT. § 18-9-106 (2021); CONN. GEN. STAT. ANN. § 53a-181 (West 2021); DEL. CODE ANN. tit. 11, § 1301 (2021); D.C. CODE § 22-1321 (2021); FLA. STAT. § 877.03 (2021); GA. CODE ANN. § 16-11-39 (2021); HAW. REV. STAT. § 711-1101 (2021); IDAHO CODE § 18-6409 (2021); 720 ILL. COMP. STAT. 5/26-1 (2021); IND. CODE § 35-45-1-3 (2021); IOWA CODE § 723.4 (2021); KAN. STAT. ANN. § 21-6203 (West 2021); KY. REV. STAT. ANN. § 525.060 (West 2021); LA. STAT. ANN. § 14:103 (2021); ME. REV. STAT. tit. 17-A, § 501-A (West 2021); MD. CODE ANN., CRIM. LAW § 10-201 (LexisNexis 2021); MASS. GEN. LAWS ANN. ch. 272, § 53 (West 2021); MICH. COMP. LAWS § 750.167 (2021); MINN. STAT. § 609.72 (2021); MISS. CODE ANN. § 97-35-7 (2021); MO. ANN. STAT. § 574.010 (West 2021); MONT. CODE ANN. § 45-8-101 (West 2021); NEB. REV. STAT. § 28-1322 (2021); NEV. REV. STAT. § 269.215 (2021); N.H. REV. STAT. ANN. § 644:2 (2021); N.J. STAT. ANN. § 2C:33-2 (West 2021); N.M. STAT. ANN. § 30-20-1 (West 2021); N.Y. PENAL LAW § 240.20 (McKinney 2021); N.C. GEN. STAT. § 14-132 (2021); N.D. CENT. CODE § 12.1-31-01 (2021); OHIO REV. CODE ANN. § 2917.11 (LexisNexis 2021); OKLA. STAT. ANN. tit. 21, § 1362 (West 2021); OR. REV. STAT. ANN. § 166.023(2)(a) (West 2021); 18 PA. CONS. STAT. § 5503 (2021); 11 R.I. GEN. LAWS § 11-45-1 (2021); S.C. CODE ANN. § 16-17-530 (2021); S.D. CODIFIED LAWS § 22-18-35 (2021); TENN. CODE ANN. § 39-17-305 (2021); TEX. PENAL CODE ANN. § 42.01 (West 2021); UTAH CODE ANN. § 76-9-102 (LexisNexis 2021); VT. STAT. ANN. tit. 13, § 1026 (2021); VA. CODE ANN. § 18.2-415 (2021); WASH. REV. CODE § 9A.84.030 (2021); W. VA. CODE § 61-6-1b (2021); WIS. STAT. § 947.01 (2021); WYO. STAT. ANN. § 6-6-102 (2021).

[34] *E.g.*, ATLANTA, GA., CODE OF ORDINANCES ch. 106, art III, § 106-81 (2021); MEDFORD, OR., MUN. CODE ch. 5, § 120 (2021); MINNEAPOLIS, MINN., MUN. CODE ch. 385, § 90 (2021); OMAHA, NEB., MUN. CODE art III, § 20-42 (Supp. 89 2021); SEATTLE, WASH., MUN. CODE § 12A.12.010 (2021); SIOUX CITY, IOWA, MUN. CODE § 8.08.010 (2021).

[35] *See, e.g.*, ALA. CODE § 13A-11-7(b); ALASKA STAT. § 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); DEL. CODE ANN. tit. 11, § 1301; D.C. CODE § 22-1321(h); FLA. STAT. § 877.03; GA. CODE ANN. § 16-11-39(b); IDAHO CODE § 18-6409; 720 ILL. COMP. STAT. 5/26-1(b); IND. CODE § 35-45-1-3(a); IOWA CODE § 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); MICH. COMP. LAWS § 750.168(1) (2021); MINN. STAT. § 609.72 subdiv. 1; MISS. CODE ANN. § 97-35-7(2); MO. ANN. STAT. § 574.010(2); NEB. REV. STAT. § 28-1322(2); NEV. REV. STAT. § 203.010 (2021); N.C. GEN. STAT. § 14-288.4(b) (2021); N.D. CENT. CODE § 12.1-31-01; OHIO REV. CODE ANN. § 2917.11(E); OKLA. STAT. ANN. tit. 21, § 1362; OR. REV. STAT. ANN. § 166.023(2)(a); 11 R.I. GEN. LAWS § 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); VT. STAT. ANN. tit. 13, § 1026(b); VA. CODE ANN. § 18.2-415(E); WASH. REV. CODE § 9A.84.030(2); W. VA. CODE § 61-6-1b(a); WIS. STAT. § 947.01(1); WYO. STAT. ANN. § 6-6-102(b). It is a petty misdemeanor or violation in a much smaller number of states. *See, e.g.*, COLO. REV. STAT. § 18-9-106(3) (crimi-

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:

> [C]ommit[] 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 . . . .[36]

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

> (3) 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 (4) 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.[37]

In Alaska, people are guilty of disorderly conduct if they engage in any of a long list of prohibited behaviors including: "mak[ing] unreasonably loud noise" with "reckless disregard" of the effect that noise may have on others; "refus[ing] to comply with a lawful order of a peace officer to disperse"; "[i]n a public or private place . . . challen[ging] another to fight" (even if no one accepts the challenge); or "recklessly creat[ing] a hazardous condition for others by an act which has no legal justification or excuse."[38]

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nalizing disorderly conduct as a petty offense in certain circumstances, and a misdemeanor in others); HAW. REV. STAT. § 711-1101(3) (defining the crime as "a petty misdemeanor if it is . . . intention[al] . . . or if the defendant persists . . . after reasonable warning or request to desist" and "[o]therwise . . . a violation"); MASS. GEN. LAWS ANN. ch. 272, § 53(b) (describing the "first offense" as a petty offense and "second or subsequent offense[s]" as punishable by incarceration); MONT. CODE ANN. § 45-8-101(2)(a) (declaring it a petty misdemeanor for first offense); N.H. REV. STAT. ANN. § 644:2(VI) (stating that it "is a misdemeanor if the offense continues . . . otherwise, it is a violation"); N.J. STAT. ANN. § 2C:33-2; N.M. STAT. ANN. § 30-20-1; N.Y. PENAL LAW § 240.20 (declaring the offense a violation); 18 PA. CONS. STAT. § 5503(b) (stating it is a misdemeanor under certain conditions, or "otherwise . . . a summary offense); UTAH CODE ANN. § 76-9-102(4) (describing it as a misdemeanor if the offense continues, otherwise an infraction).

[36] FLA. STAT. § 877.03.

[37] GA. CODE ANN. § 16-11-39(a)(3)–(4).

[38] ALASKA STAT. § 11.61.110(a).

Californians run the risk of committing disorderly conduct if they are intoxicated "in any public place," 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."[39] 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.[40] Residents of Washington, D.C. 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."[41]

The list of offenses that constitute disorderly conduct goes on. Louisiana prohibits "[e]ngaging in a fistic encounter."[42] In Michigan, people are guilty of disorderly conduct if they loiter in places where "lewdness is . . . encouraged."[43] New Mexico's definition of disorderly conduct includes "intentionally touching" someone else's house "in an insolent manner."[44] In Atlanta, one can be guilty of disorderly conduct by "forc[ing] oneself upon the company of another."[45] 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."[46]

Although some of these laws contain absurdly specific provisions (how, exactly, does one touch a house in an insolent manner?), a study of all fifty states' disorderly conduct laws reveals many common themes. More than half of all states' disorderly conduct laws criminalize speech, with no accompanying conduct requirement.[47] Alabama's disorderly conduct statute, for example,

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[39] CAL. PENAL CODE § 647(f); *id.* § 647(i); *see also* LA. STAT. ANN. § 14:103(A)(3) (barring "[a]ppearing in an intoxicated condition"); OHIO REV. CODE ANN. § 2917.11(B)(1) (prohibiting annoying behavior while intoxicated).

[40] D.C. CODE § 22-1321(f).

[41] *Id.* § 22-1321(g).

[42] LA. STAT. ANN. § 14:103(A)(1).

[43] MICH. COMP. LAWS § 750.167(1)(i) (2021).

[44] N.M. STAT. ANN. § 30-20-1(B) (West 2021).

[45] ATLANTA, GA., CODE OF ORDINANCES ch. 106, art. III, § 106-81(12) (2021).

[46] MD. CODE ANN., CRIM. LAW § 10-201(c)(2) (LexisNexis 2021); *see also* S.C. CODE ANN. § 16-17-530(A)(1) (2021) (prohibiting conducting oneself "in a disorderly or boisterous manner").

[47] *See, e.g.*, ALA. CODE § 13A-11-7(a)(3) (2021); ARK. CODE ANN. § 5-71-207(a)(3) (2021); CONN. GEN. STAT. ANN. § 53a-181(a)(3), (5) (West 2021); DEL. CODE ANN. tit. 11, § 1301(1)(b) (2021); GA. CODE ANN. § 16-11-39(a)(3)–(4) (2021); HAW. REV. STAT. § 711-1101(1)(c) (2021); IDAHO CODE § 18-6409(1) (2021); IOWA CODE § 723.4(3) (2021); KAN. STAT. ANN. § 21-6203(a)(3) (West 2021); LA. STAT. ANN. § 14:103(A)(2); ME. REV. STAT. tit. 17-A, § 501-A(1)(B) (West 2021); MINN. STAT. § 609.72, subdiv. 1(3) (2021); MONT. CODE ANN. § 45-8-101(1)(a)(iii) (West 2021); N.H. REV. STAT. ANN. § 644:2(II)(b) (2021); N.J. STAT. ANN. § 2C:33-2(b) (West 2021); N.Y. PENAL LAW § 240.20(3) (McKinney 2021); N.C. GEN. STAT. § 14-288.4(a)(2) (2021); N.D. CENT. CODE

criminalizes "abusive" speech "[i]n a public place."[48] Montana's statute prohibits "threatening, profane, or abusive language."[49] Arkansas bans "abusive or obscene language, or . . . an obscene gesture, in a manner likely to provoke a violent or disorderly response."[50] Connecticut bars people from even "threaten[ing] to commit any crime against another person or such other person's property."[51] 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 . . . .[52]

More than half of state disorderly conduct laws also encompass unreasonable noise.[53] Approximately the same number of states ban creating "hazardous conditions."[54] Many disorderly conduct laws bar "tumultuous" behavior.[55]

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§ 12.1-31-01(1)(c) (2021); OHIO REV. CODE ANN. § 2917.11(A)(2)–(3) (LexisNexis 2021); OKLA. STAT. ANN. tit. 21, § 1362 (West 2021); 18 PA. CONS. STAT. § 5503(a)(3) (2021); 11 R.I. GEN. LAWS § 11-45-1(a)(3) (2021); TEX. PENAL CODE ANN. § 42.01(a)(1) (West 2021); VT. STAT. ANN. tit. 13, § 1026(a)(3) (2021); WIS. STAT. § 947.01(1) (2021); WYO. STAT. ANN. § 6-6-102(a) (2021).

[48] ALA. CODE § 13A-11-7(a)(3).

[49] MONT. CODE ANN. § 45-8-101(1)(a)(iii).

[50] ARK. CODE ANN. § 5-71-207(a)(3).

[51] CONN. GEN. STAT. ANN. § 53a-181(a)(3).

[52] LA. STAT. ANN. § 14:103(A)(2).

[53] ALA. CODE § 13A-11-7(a)(2); ALASKA STAT. § 11.61.110(a)(1) (2021); ARK. CODE ANN. § 5-71-207(a)(2); COLO. REV. STAT. § 18-9-106(1)(c) (2021); DEL. CODE ANN. tit. 11, § 1301(1)(b) (2021); D.C. CODE § 22-1321(d) (2021); HAW. REV. STAT. § 711-1101(1)(b) (2021); IDAHO CODE § 18-6409(1) (2021); IND. CODE § 35-45-1-3(a)(2) (2021); IOWA CODE § 723.4(2) (2021); KY. REV. STAT. ANN. § 525.060(1)(b) (West 2021); ME. REV. STAT. tit. 17-A, § 501-A(1)(A)(1) (2021); MD. CODE ANN., CRIM. LAW § 10-201(c)(4)(i) (West 2021); MO. ANN. STAT. § 574.010(1)(1)(a) (2021); MONT. CODE ANN. § 45-8-101(1)(a)(ii); NEV. REV. STAT. § 203.010 (2021); N.H. REV. STAT. ANN. § 644:2(III)(a) (2021); N.Y. PENAL LAW § 240.20(2) (McKinney); N.D. CENT. CODE § 12.1-31-01(1)(b) (2021); OHIO REV. CODE ANN. § 2917.11(A)(2) (LexisNexis 2021); 18 PA. CONS. STAT. § 5503(a)(2) (2021); 11 R.I. GEN. LAWS § 11-45-1(a)(2) (2021); S.D. CODIFIED LAWS § 22-18-35(2) (2021); TEX. PENAL CODE ANN. § 42.01(a)(5) (West 2021); UTAH CODE ANN. § 76-9-102(2)(b)(ii)–(iii) (LexisNexis 2021); VT. STAT. ANN. tit. 13, § 1026(a)(2) (2021); WYO. STAT. ANN. § 6-6-102(a) (2021).

[54] ALASKA STAT. § 11.61.110(a)(6); ARK. CODE ANN. § 5-71-207(a)(7); CONN. GEN. STAT. ANN. § 53a-181(a)(6); HAW. REV. STAT. § 711-1101(1)(d); KY. REV. STAT. ANN. § 525.060(1)(d); 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) (West 2021); N.D. CENT. CODE § 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) (2021); UTAH CODE ANN. § 76-9-102(2)(a).

[55] 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. § 711-1101(1)(a); IDAHO CODE § 18-6409(1); IND. CODE § 35-45-1-3(a)(1); KY. REV. STAT. ANN. § 525.060(1)(a); NEV. REV. STAT. § 203.010; N.H. REV. STAT. ANN. § 644:2(II)(a) (2021); N.J. STAT. ANN. § 2C:33-2(a)(1); N.Y. PENAL LAW § 240.20(1); N.D. CENT.

Several state disorderly conduct laws prohibit behavior related to asking for money.[56]

New York's disorderly conduct statute is a standard example of a disorderly conduct law and contains 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
>
> 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.[57]

In sum, all fifty states and many cities have disorderly conduct laws. These laws share many central themes and broadly penalize a wide array of innocuous speech and behavior.

B. History and Evolution of Disorderly Conduct Laws

Early disorderly conduct laws—those that penalized keepers of so called "disorderly house[s]" facilitating prostitution, gambling, or drunkenness—were the product of a belief that "disorder was the antithesis of the well-regulated society."[58] Under 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.[59]

CODE § 12.1-31-01(1)(a); 18 PA. CONS. STAT. § 5503(a)(1); 11 R.I. GEN. LAWS § 11-45-1(a)(1); UTAH CODE ANN. § 76-9-102(2)(b)(i); VT. STAT. ANN. tit. 13, § 1026(a)(1).

[56] *E.g.*, CAL. PENAL CODE § 647(c) (West 2021); HAW. REV. STAT. § 711-1101(1)(e).

[57] N.Y. PENAL LAW § 240.20.

[58] WILLIAM J. NOVAK, THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA 157 (1996); *see id.* at 155–70 (outlining the attempts to regulate morality and rationale for such in the nineteenth century).

[59] *See id.* at 157 (detailing how perspectives shifted from prioritizing the sanctity of a man's home and privacy, to allowing "communities to defend themselves" by enforcing order in all respects, including in space previously held private).

Some of the earliest known disorderly conduct laws in the United States criminalized entire classes of people based on statuses, rather than simply behaviors, that society deemed morally unacceptable.[60] In 1801, for example, New York had a law regulating "beggars and disorderly persons."[61] 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.[62] An 1837 act in Illinois criminalized keepers of "disorderly houses."[63]

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 9:00 P.M., and "rowdyism," among others.[64] But the statute's own text explicitly stated that the law did not pertain to "Indians" or Chinese people "unless complained of by their own countrymen."[65]

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.[66] Mr. Redshaw was prosecuted for disorderly conduct after he "call[ed] . . . 'damned scab' to . . . two . . . non-union workmen" during a strike protesting the replacement of laid-off union workers with non-union workers.[67] The trial court reasoned that a person who uses such language in public "cannot, in any sense, be held to be an orderly person."[68] The court sentenced him to thirty days in jail.[69]

An early twentieth-century disorderly conduct conviction involved a prosecutor walking into a police station and loudly calling an officer a "big muttonhead."[70] Although the prosecutor was convicted at trial, the Supreme

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[60] *See* Morgan, *supra* note 14, at 1646 (noting that nineteenth-century disorderly conduct statutes prohibited a wide array of behaviors including public drunkenness, "provok[ing] others to violence," disrupting worship services, and engaging in conduct "tending to corrupt [public] morals," and were aimed at targeting beggars, homeless people, and others considered "idle").

[61] NOVAK, *supra* note 58, at 15 & n.52.

[62] *Id.* at 15 & nn.53–54.

[63] *Id.* at 4, 6 n.11.

[64] An Act Concerning Vagrancy and Vagrants, ch. 110, § 2, 1877 Nev. Stat. 181, 182–83 (no longer in force).

[65] *Id.* at 183.

[66] 2 Pa. D. 96, 96 (Ct. Quarter Sess. 1892).

[67] *Id.*

[68] *Id.*

[69] *Id.*

[70] Ruthenbeck v. First Crim. Jud. Dist. Ct. of Bergen Cnty., 147 A. 625, 625 (N.J. 1929).

Court of New Jersey concluded that the insult was a "trivial epithet" that did not rise to the level of disorderly conduct and reversed the charge.[71]

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.[72] As thousands of Black people migrated 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 associated with crime and joblessness.[73] 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 Goluboff's book *Vagrant Nation* details the historical use of vagrancy statutes—which criminalized common behavior such as "loafing" on the street and statuses such as being unemployed while able to work—as a tool for managing and harassing politically unpopular people, unemployed people, and religious, racial, and sexual minorities.[74]

Southern states also used disorderly conduct and vagrancy laws as a means of generating cheap labor by forcing people arrested for minor offenses to work in the labor system for free.[75] In states with convict-leasing laws that required people to pay off their crimes through unpaid manual labor, laws criminalizing vagrancy and disorder allowed states to profit off poor, predomi-

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[71] *Id.* at 625 n.2.

[72] *See* STANLEY COHEN, VISIONS OF SOCIAL CONTROL: CRIME, PUNISHMENT AND CLASSIFICATION 211–13 (1985) (explaining how the idea of the city as a place of order and civility faded by the 1950s and cities were considered areas of "crisis" to city planners and politicians).

[73] *Id.* at 212 (stating that white people viewed Black migrants as "identified with crime, racialism, poverty, unemployment, discrimination, violence and insecurity"). *See generally* ISABEL WILKERSON, THE WARMTH OF OTHER SUNS: THE EPIC STORY OF AMERICA'S GREAT MIGRATION (2010) (describing the mass migration of Black people to the north during the early-mid twentieth century).

[74] RISA GOLUBOFF, VAGRANT NATION: POLICE POWER, CONSTITUTIONAL CHANGE, AND THE MAKING OF THE 1960S 12–41 (2016) (outlining how governmental officials used vagrancy laws to target politically unpopular people, like Isidore Edelman); *see also id.* at 74 (describing the main function of vagrancy laws as "policing the visibly poor and underemployed"); Mark H. Haller, *Historical Roots of Police Behavior: Chicago, 1890–1925*, 10 LAW & SOC'Y REV. 303, 313 (1976) (outlining that in early twentieth-century Chicago, police used disorderly conduct laws as a "standard system of harassment" for unwelcome newcomers to the city and noting that "[u]ntil at least the 1930s, vagrancy and disorderly conduct [charges] constituted between 40 and 66 percent of all [Chicago] arrests each year" and that many of the arrested people were homeless). In a 1968 article, Robin Yeamans summarized the vagrancy statutes of many states, including in Arizona, which criminalizes "idle" itinerants. Robin Yeamans, *Constitutional Attacks on Vagrancy Laws*, 20 STAN. L. REV. 782, 782–83 (1968) (summarizing many states' vagrancy laws and (quoting ARIZ. REV. STAT. ANN. § 13-991(4) (1956))). For examples of municipal vagrancy statutes, see ALA. CODE tit. 14, § 437 (1958) (criminalizing anyone who "lives in idleness"); Papachristou v. City of Jacksonville, 405 U.S. 156, 156 n.1 (1972) (holding that JACKSONVILLE, FLA., ORDINANCE CODE § 26-57 (1965), which criminalizes "habitual loafers" and "disorderly persons," was unconstitutional).

[75] 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).

nantly Black, people who faced the Hobson's choice of either working for little pay or getting arrested for not working.[76]

In 1972, the United States Supreme Court finally struck down one such law as void for vagueness.[77] 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.[78] The Court declared the law unconstitutionally vague because it failed to provide ordinary people fair notice of what conduct the law criminalized.[79] The Court also criticized the law for giving "unfettered discretion" to police.[80]

Even before *Papachristou* struck the death knell for vagrancy laws, law enforcement officers were arresting hundreds of thousands of people for disorderly conduct every year.[81] After the *Papachristou* decision invalidated many vagrancy laws, states relied on disorderly conduct laws as a substitute to maintain control over undesirable people.[82] Although disorderly conduct laws ostensibly penalize conduct rather than status, they still empower police to control and harass "minorities and nonconformists."[83]

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[76] *Id.* at 374–75 (citing MATTHEW J. MANCINI, ONE DIES, GET ANOTHER: CONVICT LEASING IN THE AMERICAN SOUTH, 1866–1928, at 41 (1996)). *See generally* DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II (2008) (discussing how low-level criminal laws like vagrancy, loitering, and the like were enforced primarily against Black people as a means of subordination). For an example of the use of the convict-leasing laws, see State v. Cunningham, 58 So. 558, 561 (La. 1912) (outlining that any person convicted in Louisiana at the time might be "set to work").

[77] *Papachristou*, 405 U.S. at 156.

[78] *Id.* at 156 n.1 (citing JACKSONVILLE, FLA., ORDINANCE CODE § 26-57 (1965)).

[79] *Id.* at 162–63.

[80] *Id.* at 168–70 (noting 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").

[81] *See* NORVAL MORRIS & GORDON HAWKINS, THE HONEST POLITICIAN'S GUIDE TO CRIME CONTROL 12 (1970) (stating that "nearly six hundred thousand arrests [were made] for disorderly conduct in 1968[,]" four years before *Papachristou* was decided).

[82] *See* Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551, 606–08 (1997) (describing the impact of *Papachristou* for policing, including that jurisdictions turned to disorderly conduct laws which were made clearer); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 559–60 (2001) (outlining how after courts invalidated vagrancy and loitering statutes, state legislatures began turning to other statutes to prohibit behavior like excessive noise and curfew violation).

[83] *See* GOLUBOFF, *supra* note 74, 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 (noting that during the 1960s and 1970s, jurisdictions facing challenges to the constitutionality of their vagrancy or loitering laws increasingly came to rely on disorderly conduct laws instead).

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.[84] The broken windows theory posited a correlation between police enforcing minor "quality of community life" offenses and cities experiencing a decrease in serious crime and uptick in perceived safety.[85] According to Kelling and Wilson, 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 . . . ."[86] So, 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.[87]

By the early 1990s, many residents of large urban areas had become tired of what they perceived as significant growth in crime.[88] In liberal cities like New York, San Francisco, and Washington D.C., local lawmakers campaigned on promises to penalize minor misconduct, and city councils obliged by granting police even more authority to arrest for low-level offenses.[89] For example, the liberal enclaves of Berkeley, Santa Monica, and Santa Cruz passed laws cracking down on "street disorder" in 1994.[90] Cities across the United States began aggressively policing disorderly conduct and other minor crimes in response to the increased presence of poverty.[91] Although broken windows did not target disorderly conduct alone, it aggressively policed many forms of so-

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[84] *See* George L. Kelling & James Q. Wilson, *Broken Windows: The Police and Neighborhood Safety*, THE ATLANTIC (Mar. 1982), https://www.theatlantic.com/magazine/archive/1982/03/broken-windows/304465/ [https://perma.cc/Q524-8AF5].

[85] *Id.*

[86] *Id.* (including "panhandlers, drunks, addicts, rowdy teenagers, prostitutes, loiterers, the mentally disturbed").

[87] *Id.*

[88] *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) (outlining this phenomenon and the resulting "compassion fatigue"). 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. PERSPS., Winter 2004, at 163, 166 tbl.2.

[89] Ellickson, *supra* note 88, at 1167–68; *see, e.g.*, CHI., ILL., MUN. CODE § 8-4-015 (2021) (outlining a Chicago ordinance criminalizing loitering, enacted in 1992); Dorothy E. Roberts, *Supreme Court Review—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 among jurisdictions in the early 1990s).

[90] Ellickson, *supra* note 88, at 1168.

[91] *See* FORREST STUART, DOWN, OUT, AND UNDER ARREST: POLICING AND EVERYDAY LIFE IN SKID ROW 10 (2016) (referring to the idea that "the growing visibility of poverty . . . threaten[ed] municipal aspirations for reinvigorating the urban core"); *see also id.* at 69 (describing the broken windows-inspired move to criminalize "a host of common public behaviors" that spread through major U.S. cities in the 1990s).

cial "disorder," including public intoxication and other minor misbehaviors that many disorderly conduct laws address.[92]

Today, the broken windows theory has been largely disavowed amid widespread recognition that it disproportionately disadvantaged communities of color.[93] But its effects remain. According to FBI arrest statistics, police arrested more than 291,000 people for disorderly conduct in 2016, and slightly fewer than 249,000 two years later.[94] These numbers, although significantly lower than those during the broken windows era, are still high.[95] 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.[96]

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[92] *See* Bernard E. 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) (explaining the idea of broken windows policing and how it had broad applications to all kinds of minor offenses); Livingston, *supra* note 82, at 578–79 (explaining the rationale behind the theory that police should monitor minor disorder to proactively eliminate larger problems); *see also* Kelling & Wilson, *supra* note 84 (outlining the theoretical underpinnings of broken windows policing, that enforcing minor-offense rules leads to lower crime rates).

[93] *See* Tracey Meares, *Broken Windows, Neighborhoods, and the Legitimacy of Law Enforcement or Why I Fell In and Out of Love with Zimbardo*, 52 J. RSCH. CRIME & DELINQ. 609, 611 (2015) (disavowing her earlier support of broken window policing due to its harmful effects); Tom R. Tyler & Jeffrey Fagan, *The Impact of Stop and Frisk Policies upon Police Legitimacy*, *in* URB. INST. JUST. POL'Y CTR., KEY ISSUES IN THE POLICE USE OF PEDESTRIAN STOPS AND SEARCHES: DISCUSSION PAPERS FROM AN URBAN INSTITUTE ROUNDTABLE 30, 30–35 (Nancy La Vigne, Pamela Lachman, Andrea Matthews & S. Rebecca Neusteter eds., 2012), https://www.urban.org/sites/default/files/publication/25781/412647-Key-Issues-in-the-Police-Use-of-Pedestrian-Stops-and-Searches.PDF [https://perma.cc/685V-8ED9] (presenting research showing that stop and frisk policies undermined trust in the police); *see also infra* Part IV.A (presenting the arguments of proponents of disorderly conduct laws). 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. 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) (footnotes omitted) (quoting Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349, 371 (1997)).

[94] *2016 Crime in the United States: Table 21: Arrests by Race and Ethnicity*, FED. BUREAU OF INVESTIGATION: UNIF. CRIME REPORTING (2016), https://ucr.fbi.gov/crime-in-the-u.s/2016/crime-in-the-u.s.-2016/topic-pages/tables/table-21 [https://perma.cc/ZV5V-QGBR]; *2018 Crime in the United States: Table 43*, *supra* note 12.

[95] *See 2010 Crime in the United States: Table 29: Estimated Number of Arrests*, FED. BUREAU OF INVESTIGATION: UNIF. CRIME REPORTING (2010), https://ucr.fbi.gov/crime-in-the-u.s/2010/crime-in-the-u.s.-2010/tables/10tbl29.xls [https://perma.cc/3PLC-XB6Y] (describing how in 2010, police in the United States made at least 615,172 arrests for disorderly conduct).

[96] *See* Sandra G. Mayson & Megan T. Stevenson, *Misdemeanors by the Numbers*, 61 B.C. L. REV. 971, 986 (2020) (stating that misdemeanor charges can be initiated by "arrest, a citation, or a summons"); *id.* at 1008 (tracking jurisdictions in which nearly half of misdemeanor cases are initiated by citation or summons rather than arrest); *see also Measures*, MEASURES FOR JUST., https://measures

To this day, law enforcement officials still use disorderly conduct laws to criminalize and prosecute conduct ranging from swearing and fighting to simply being noisy. Indeed, as subsequent parts discuss, officials 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

The First Amendment guarantees the right to free speech and the right to assemble, and laws that penalize individuals for protected speech or assembly are unconstitutional. Courts have limited or struck down disorderly conduct laws for this very reason. This Part explores the constitutionality of disorderly conduct rules. Section A outlines the facial invalidity of many disorderly conduct laws.[97] Section B presents numerous judicial decisions that have either declared such laws unconstitutional or construed them more narrowly than their text to avoid implicating constitutional rights.[98] Finally, Section C discusses the unconstitutional enforcement of these laws: even when they pass constitutional muster, law enforcement officials frequently apply them in an unconstitutional manner.[99]

A. Facial Unconstitutionality

The First Amendment protects the right to freedom of speech and assembly.[100] Speech is presumptively constitutional, and states may criminalize only certain limited categories of speech that fall outside the protections of the First Amendment.[101] These narrowly limited classes of speech include true threats, obscenity, and fighting words.[102] The fighting words doctrine, particularly pertinent to disorderly conduct statutes, excludes from constitutional protection

forjustice.org/portal/measures [https://perma.cc/HY8D-CJ9B] (attempting to gather nationwide information on, *inter alia*, criminal cases that begin with a non-custodial citation rather than an arrest). For an example of a state law that dictates the issuance of a citation rather than arrest under certain circumstances, see KY. REV. STAT. ANN. § 431.015 (West 2021).

[97] *See infra* Part II.A.

[98] *See infra* Part II.B.

[99] *See infra* Part II.C.

[100] U.S. CONST. amend. I.

[101] *See* Gooding v. Wilson, 405 U.S. 518, 521–22 (1972) (reiterating the protections against vague statutes that limit constitutionally protected rights, like to freedom of speech).

[102] Virginia v. Black, 538 U.S. 343, 359–62 (2003).

speech that is likely to incite violent reactions.[103] Speech that does not fall into these exceptions remains constitutionally protected.[104]

Criminal statutes are also unconstitutional if they are overbroad or vague. An overbroad statute is one that risks chilling constitutionally protected speech or conduct because its broad text criminalizes both constitutionally protected and unprotected behavior.[105] A statute is unconstitutionally vague if the average civilian cannot understand what conduct the statute prohibits.[106]

Many disorderly conduct laws are overbroad, unconstitutionally vague, or infringe on the rights to free speech and freedom of assembly.[107] The United States Supreme Court has repeatedly struck down disorderly conduct or related laws as facially unconstitutional.[108] One of the Court's earliest forays into the unconstitutionality of disorderly conduct laws came in 1949 in *Terminiello v. City of Chicago*.[109] The petitioner in *Terminiello* gave a public speech criticizing political groups and races who he perceived were operating contrary to the country's wellbeing.[110] He was later 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."[111]

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."[112] The Su-

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[103] *See* Cohen v. California, 403 U.S. 15, 20 (1971) (citing the accepted fighting words doctrine, which bans "abusive epithets" that are "inherently likely to provoke violent reaction" (citing Chaplinsky v. New Hampshire, 315 U.S. 568 (1942)).

[104] United States v. Stevens, 559 U.S. 460, 468–69 (2010), *superseded by statute*, 18 U.S.C. § 48 (2010), *as stated in* United States v. Richards, 755 F.3d 269 (5th Cir. 2014).

[105] For instances of the Supreme Court describing the overbreadth doctrine, see, e.g., Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973), *superseded by statute*, Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263, *as stated in* Bauers v. Cornett, 865 F.2d 1517 (8th Cir. 1989); Ashcroft v. Free Speech Coal., 535 U.S. 234, 255 (2002); *see also* Coates v. City of Cincinnati, 402 U.S. 611, 614 (1971) (stating that a statute is "unconstitutionally broad" if it "authorizes the punishment of constitutionally protected conduct").

[106] *Coates*, 402 U.S. at 614.

[107] *See* U.S. CONST. amends. I, XIV (prohibiting laws that infringe on freedom of speech and assembly, and requiring due process); *see also* 27 C.J.S. *Disorderly Conduct* § 1 (2020) (stating that "[s]tatutes and ordinances prohibiting disorderly conduct are often challenged for infringing on the First Amendment right of freedom of speech, or assembly" (footnotes omitted)).

[108] 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.

[109] 337 U.S. 1 (1949).

[110] *Id.* at 3.

[111] *Id.* at 2 n.1 (quoting CHI., ILL., REV. CODE ch. 193, § 1(1) (1939)).

[112] *Id.* at 3.

preme Court concluded that, although some speech tending to incite 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.[113] The Court held that the lower court's interpretation of the ordinance violated the petitioner's right to free speech and was therefore unconstitutional.[114]

More than twenty years later in 1972, 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."[115] The Court held that because the meanings of 'opprobrious' and 'abusive' are not limited to fighting words, the statute was overbroad and facially unconstitutional.[116]

In *Papachristou v. City of Jacksonville*—decided the same year as *Gooding*—the Supreme Court struck down a law that punished "disorderly loitering" and "disorderly conduct."[117] The Court concluded that the law failed to give fair notice of what constitutes criminal behavior and promoted arbitrary arrests and convictions.[118] Moreover, the Court condemned statutes that create lists of prohibited behavior "so all-in-clusive and generalized . . . [that] those convicted may be punished for no more than vindicating affronts to police authority."[119]

Just two years later in 1974, 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.[120] Relying on *Gooding*, the Court noted again that the ban on "opprobrious" language would include words that alone do not typically cause harm or disrupt the peace, and thus illegally infringed on constitutionally protected speech.[121]

The Supreme Court is not the only court to address challenges to disorderly conduct laws. In 2012, in *Bell v. Keating*, the Seventh Circuit struck

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[113] *Id.* at 4–5. Specifically, the Court stated that speech that simply "stirred people to anger, invited public dispute, or brought about a condition of unrest" should not be criminalized because it was protected by the First Amendment. *Id.* at 5 (majority opinion).

[114] *Id.* at 5.

[115] 405 U.S. 518, 519 (1972) (quoting GA. CODE ANN. § 26-6303).

[116] *Id.* at 525, 528.

[117] Papachristou v. City of Jacksonville, 405 U.S. 156, 160–61 (1972).

[118] *Id.* at 160–62.

[119] *Id.* at 166–67 (footnote omitted) (criticizing the statutes).

[120] 415 U.S. 130, 131–32 (1974) (quoting NEW ORLEANS, LA., 828 M.C.S. § 49-7).

[121] *Id.* at 133 (reasoning that the broad prohibition against "'opprobrious language,' embraces words that do not 'by their very utterance inflict injury or tend to incite an immediate breach of the peace'" (first quoting City of New Orleans v. Lewis, 269 So. 2d 450, 456 (La. 1972), *rev'd*, 415 U.S. 130; and then quoting *Gooding*, 405 U.S. at 525)).

down a Chicago disorderly conduct ordinance as overbroad where it authorized police to order people to disperse who were engaged in conduct liable to induce "serious inconvenience, annoyance or alarm."[122] Police had used this ordinance to arrest people protesting the Iraq War.[123] The court concluded that the ordinance was invalid for vagueness because it empowered law enforcement to apply the ordinance "arbitrar[ily] or discriminator[ily]."[124]

Similarly, in 1971, 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.[125] The court held that the ordinance was overbroad and void for vagueness.[126]

Courts have struck down state or municipal disorderly conduct laws as unconstitutional, either in whole or in part, in at least twenty states.[127] In some of these cases, courts specifically criticized the discriminatory enforcement that these broad laws enable. For example, 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

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[122] 697 F.3d 445, 461 (7th Cir. 2012) (quoting CHI., ILL., MUN. CODE § 8-4-010(d)).

[123] *Id.* at 449–50.

[124] *Id.* at 463.

[125] 323 F. Supp. 611, 613 (W.D. Tenn. 1971) (striking down MEMPHIS, TENN., CITY CODE § 22-12).

[126] *Id.* at 615–16; *see also* Baxter v. Ellington, 318 F. Supp. 1079, 1085 (E.D. Tenn. 1970) (striking down Tennessee's disorderly conduct statute that prohibited "rude, boisterous, offensive, obscene or blasphemous language" as unconstitutional (quoting TENN. CODE ANN. § 39-1213 (1961))); Original Fayette Cnty. Civic & Welfare League, Inc. v. Ellington, 309 F. Supp. 89, 92 (W.D. Tenn. 1970) (declaring that the disorderly conduct statute in Tennessee violated due process by being overly vague and broad).

[127] *See, e.g.*, Speet v. Schuette, 726 F.3d 867, 878 (6th Cir. 2013); *Bell*, 697 F.3d at 450; Leonard v. Robinson, 477 F.3d 347, 359 (6th Cir. 2007); *Kirkwood*, 323 F. Supp. at 611; Severson v. Duff, 322 F. Supp. 4, 10 (M.D. Fla. 1970); Langford v. City of Omaha, 755 F. Supp. 1460, 1464 (D. Neb. 1989); *Baxter*, 318 F. Supp. at 1079; *Ellington*, 309 F. Supp. at 89; Poole v. State, 524 P.2d 286, 289 (Alaska 1974); Marks v. City of Anchorage, 500 P.2d 644, 649 (Alaska 1972); Aguilar v. People, 886 P.2d 725, 729 (Colo. 1994) (en banc); Hansen v. People, 548 P.2d 1278, 1279 (Colo. 1976) (en banc), *superseded by statute*, COLO. REV. STAT. § 18-9-106(1)(a), 1981 Colo. Sess. Laws 1010, *as stated in* People v. Smith, 862 P.2d 939, 942 n.6 (Colo. 1993) (en banc); State v. Poe, 88 P.3d 704, 725 (Idaho 2004); Commonwealth v. A Juvenile, 334 N.E.2d 617, 622, 629 (Mass. 1975); State v. Hensel, 901 N.W.2d 166, 173 (Minn. 2017); *In re* Welfare of S. L. J., 263 N.W.2d 412, 418–19 (Minn. 1978); State v. Carpenter, 736 S.W.2d 406, 408 (Mo. 1987) (en banc); State v. Swoboda, 658 S.W.2d 24, 25 (Mo. 1983) (en banc); State v. Nickerson, 424 A.2d 190, 194 (N.H. 1980), *superseded by statute*, N.H. REV. STAT. ANN. § 644:2, 1983 N.H. Laws 200:1, *as stated in* State v. Biondolillo, 55 A.3d 1034, 1041 (N.H. 2012); State in the Interest of H.D., 501 A.2d 1016, 1018 (N.J. Super. Ct. App. Div. 1985); People v. Diaz, 151 N.E.2d 871, 871 (N.Y. 1958); State v. Ausmus, 85 P.3d 864, 871 (Or. 2003); State v. Dronso, 279 N.W.2d 710, 714 (Wis. Ct. App. 1979).

or alarm.'"[128] The court reasoned that the broad language of the ordinance created an "obvious invitation" for officers to discriminate against people they disfavored.[129]

A New York court struck down a Dunkirk, New York disorderly conduct ordinance that prohibited lounging or loitering on street corners.[130] 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.[131] The court concluded that the broad language of the ordinance subjected civilians to arbitrary and discriminatory enforcement, and was thus unconstitutional.[132]

B. Limiting Constructions to Avoid Facial Unconstitutionality

Because so many disorderly conduct laws have unconstitutionally vague or overbroad text, many courts have interpreted these laws narrowly to circumvent their facial invalidity. In 1942 in *Chaplinsky v. New Hampshire*, the Supreme Court assessed the constitutionality of a New Hampshire statute which prevented people from saying annoying or offensive things to other people.[133] Although the text of the statute barred speech that is merely annoying or offensive—in violation of the First Amendment—New Hampshire construed the statute narrowly to criminalize only those words with a strong proclivity to incite violent reactions.[134] The Court held that this interpretation did not violate free speech because it fell within the fighting words exception to the First Amendment as it was narrowly tailored and restricted to speech likely to provoke "a breach of the peace."[135]

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[128] *Marks*, 500 P.2d at 649 (quoting ANCHORAGE, ALASKA., CODE OF ORDINANCES § 15-1mm (1970)).

[129] *Id.* (citing Coates v. City of Cincinnati, 402 U.S. 611, 616 (1971)). The court stated that the overly broad statute 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." *Id.* (quoting *Coates*, 402 U.S. at 616).

[130] *Diaz*, 151 N.E.2d at 871.

[131] *Id.*

[132] *Id.* at 871–72.

[133] 315 U.S. 568, 569 (1942). Specifically, the statute prohibited people from "address[ing] any offensive, derisive or annoying word to any other person" in public, calling people "by any offensive or derisive name," or "mak[ing] 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." *Id.*

[134] *Id.* at 573 (noting that New Hampshire interpreted the language of the statute to penalize only speech having a "direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed" (first citing State v. Brown, 38 A. 731 (N.H. 1895); and then citing State v. McConnell, 47 A. 267 (N.H. 1900)).

[135] *Id.* at 573–74.

In the years following *Chaplinsky*, more than twenty states have endeavored to salvage their disorderly conduct laws by interpreting the laws to mean something different than the actual text, rather than by amending the text of the laws themselves.[136] For their part, courts recognized that the statutes criminalized annoying or offensive language—which the First Amendment protects—but followed *Chaplinsky* in interpreting the laws narrowly to apply solely to fighting words.[137]

Although the Supreme Court has endorsed reading limiting language into criminal laws to avoid constitutional implications, this tactic is especially problematic in the context of disorderly conduct laws.[138] Multiple state courts have followed *Chaplinsky*'s example of construing disorderly conduct laws as only applying to "fighting words," and thus have found these laws to be constitu-

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[136] *See, e.g.*, Johnson v. Quattlebaum, 664 F. App'x. 290, 295 (4th Cir. 2016); Gilles v. Davis, 427 F.3d 197, 205 (3d Cir. 2005); R.I.T. v. State, 675 So. 2d 97, 98 (Ala. Crim. App. 1995); Swann v. City of Huntsville, 455 So. 2d 944, 950 (Ala. Crim. App. 1984); Mosley v. City of Auburn, 428 So. 2d 165, 166 (Ala. Crim. App. 1982), *superseded by rule*, ALA. R. CRIM. P. TEMP. 15.5 (1983), *as stated in* Mason v. City of Vestavia Hills, 518 So. 2d 221, 223 (Ala. Crim. App. 1987); *In re* Louise C., 3 P.3d 1004, 1006 (Ariz. Ct. App. 1999); State v. Brahy, 529 P.2d 236, 237 (Ariz. Ct. App. 1974); Johnson v. State, 37 S.W.3d 191, 194 (Ark. 2001); Lucas v. State, 494 S.W.2d 705, 706–07 (Ark. 1973), *vacated*, 416 U.S. 919 (1974); Watkins v. State, 377 S.W.3d 286, 291 (Ark. Ct. App. 2010); State v. White, 1989 WL 25818, at *2 (Del. Super. Ct. Mar. 7, 1989); White v. State, 330 So. 2d 3, 6 (Fla. 1976); State v. Saunders, 339 So. 2d 641, 644 (Fla. 1976); Freeman v. State, 805 S.E.2d 845, 849–50 (Ga. 2017); Knowles v. State, 797 S.E.2d 197, 200 (Ga. Ct. App. 2017); People v. Redwood, 780 N.E.2d 760, 763 (Ill. App. Ct. 2002); People v. Allen, 680 N.E.2d 795, 799 (Ill. App. Ct. 1997); People v. Slaton, 322 N.E.2d 553, 554 (Ill. App. Ct. 1974); State v. New, 421 N.E.2d 626, 628–29 (Ind. 1981); State v. Huffman, 612 P.2d 630, 634 (Kan. 1980); State v. John W., 418 A.2d 1097, 1101 (Me. 1980); People v. Gagnon, 341 N.W.2d 867, 869 (Mich. Ct. 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, 1065–66 (N.M. Ct. App. 1990); State v. Orange, 206 S.E.2d 377, 379 (N.C. Ct. App. 1974); State v. Hoffman, 387 N.E.2d 239, 242 (Ohio 1979); Commonwealth v. Jarboe, 12 Pa. D. & C.3d 554, 558 (Pa. Ct. C.P. 1979); State v. Tavarozzi, 446 A.2d 1048, 1051–52 (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, 477–78 (S.C. Ct. App. 2002); *In re* S.J.N-K., 647 N.W.2d 707, 711 (S.D. 2002); Jimmerson v. State, 561 S.W.2d 5, 7 (Tex. Crim. App. 1978) (en banc); Duran v. Furr's Supermarkets, Inc., 921 S.W.2d 778, 785 (Tex. App. 1996); State v. Read, 680 A.2d 944, 946 (Vt. 1996).

[137] *E.g.*, *R.I.T.*, 675 So. 2d at 98 (stating that a disorderly conduct statute prohibiting "abusive or obscene language" only applies to fighting words (quoting ALA. CODE § 13A-11-7(a)(3) (1975)); *Brahy*, 529 P.2d at 237 (stating that "[t]he statute must be drawn or interpreted to include, as a violation, only those epithets amounting to 'fighting words'"); *James M.*, 806 P.2d at 1068 (declaring that "[b]y narrowly construing the statute to punish only 'fighting words,' we avoid any punishment of speech that is protected under the first and fourteenth amendments").

[138] *See, e.g.*, I.N.S. v. St. Cyr, 533 U.S. 289, 299–300 (2001) (reasoning that 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"), *superseded by statute*, REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 305, 310 (codified as amended at 8 U.S.C. § 1252), *as stated in* Nasrallah v. Barr, 140 S. Ct. 1683, 1690 (2020).

tional.[139] But since *Chaplinsky*, the Supreme Court has revisited the fighting words exception repeatedly, yet has never once upheld a conviction based on fighting words.[140] The fighting words exception, which numerous state courts rely on to uphold disorderly conduct convictions, is an exception the Supreme Court itself has continually declined to follow.

In 1973, in *Hess v. Indiana*, the Supreme Court addressed the case of a defendant convicted of disorderly conduct under an Indiana statute that prohibited, *inter alia*, "loud, boisterous or disorderly" actions, "loud or unusual noise," and "tumultuous or offensive behavior."[141] The defendant was convicted after participating in an anti-war demonstration during which approximately 100 to 150 demonstrators blocked the passage of cars on a public street.[142] As sheriffs moved in to disperse the crowd, the defendant said either, "'We'll take the [f***ing] street later,' or 'We'll take the [f***ing] street again.'"[143] Sheriffs promptly arrested him.[144] 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 were merely allusions to possible future illegal action.[145] 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."[146]

The Supreme Court has declined to apply the fighting words exception in several other situations, including a man who wore a jacket emblazoned with the words "[F***] the Draft,"[147] a white supremacist who spoke publicly about the duty to use violence against other races,[148] and a statute barring people from interrupting or abusing police in the execution of their duties.[149] 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."[150]

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[139] *Supra* notes 136–137 (providing examples of state cases that have followed *Chaplinsky* to give statutes a narrow reading and preserve their validity).

[140] For cases involving the Supreme Court holding that the First Amendment prohibited conviction for so called "fighting words," see Texas v. Johnson, 491 U.S. 397 (1989); City of Hous. v. Hill, 482 U.S. 451, 461–63 (1987); Hess v. Indiana, 414 U.S. 105 (1973); Cohen v. California, 403 U.S. 15 (1971); Brandenburg v. Ohio, 395 U.S. 444 (1969).

[141] 414 U.S. at 105 n.1 (quoting IND. CODE § 35-27-2-1 (1971)).

[142] *Id.* at 106.

[143] *Id.* at 107.

[144] *Id.*

[145] *Id.* at 108 (holding that the defendant's remarks "amounted to nothing more than advocacy of illegal action at some indefinite future time").

[146] *Id.* (quoting Bradenburg v. Ohio, 395 U.S. 444, 447 (1969)).

[147] Cohen v. California, 403 U.S. 15 (1971).

[148] *Brandenburg*, 395 U.S. at 444–45.

[149] City of Hous. v. Hill, 482 U.S. 451, 461–63 (1987).

[150] Texas v. Johnson, 491 U.S. 397, 399, 409 (1989) (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 574 (1942)). In *Johnson*, the Court emphasized that no reasonable person would have per-

Although the Supreme Court has not upheld a fighting words conviction in nearly eighty years, countless people each year are prosecuted and convicted of speech-based disorderly conduct under the theory that statutes which criminalize fighting words alone are constitutional.[151] Because low-level misdemeanors are so rarely appealed, the enormous majority of those cases are never subjected to judicial review.[152]

During the apex of the broken windows era, Professor Debra Livingston warned against the government's expanding obsession with policing public disorder.[153] Livingston cautioned that laws punishing disorder "raise many of the same concerns that led courts of [the previous era] to invalidate public order laws for vagueness."[154] This is still true today. Many disorderly conduct laws are unintelligibly vague and rely on courts' narrow interpretations to salvage their constitutionality. Unfortunately, in practice, this vague language enables law enforcement to apply the laws unconstitutionally—frequently with significant harm to those subjected to the laws' unconstitutional application.

C. Enabling Unconstitutional Enforcement

Even when disorderly conduct laws are not facially unconstitutional, their expansive text renders them vulnerable to unconstitutional enforcement. The field of criminal law gives law enforcement officers tremendous discretion to decide what laws to enforce and against whom.[155] When broadly worded statutes intersect with minor misconduct, law enforcement discretion is at its height.[156]

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ceived the defendant's words "as a direct personal insult or an invitation to exchange fisticuffs." *Id.* at 409.

[151] *See supra* notes 136–137 (detailing cases that have upheld the fighting words doctrine).

[152] *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 1,250 misdemeanor convictions in state courts).

[153] Livingston, *supra* note 82, at 560.

[154] *Id.*

[155] *See* JEROME H. SKOLNICK, JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN DEMOCRATIC SOCIETY 14 (1966) (defining the police as the "chief interpreter[s]" of criminal law); Charles D. Breitel, *Controls in Criminal Law Enforcement*, 27 U. CHI. L. REV. 427, 428 (1960) (stating that "[t]here 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) (explaining that "[m]inor offenses are seldom reviewed by higher courts, and the actual limits of [statutes like vagrancy or disorderly conduct] by practices of police and magistrates"); Robert B. Watts, *Disorderly Conduct Statutes in Our Changing Society*, 9 WM. & MARY L. REV. 349, 350–51 (1967) (outlining that disorderly conduct statutes are difficult to understand and interpret, and thus lend themselves to arbitrary enforcement).

[156] *See* Breitel, *supra* note 155, at 429 (explaining that discrimination is more likely when police officers have discretion over enforcement); Jenny Roberts, *Why Misdemeanors Matter: Defining Ef-*

Disorderly conduct laws fit squarely within this intersection. In 1968 Judge Robert Watts criticized "[t]he looseness and vagueness" of disorderly conduct statutes, and warned that the statutes' expansive language may infringe upon civil liberties.[157] Jacinta Gau and Rod Brunson have explained that, because "disorderly" is a fluid concept that lacks clear definition, disorderly conduct laws provide insufficient guidance for police.[158] Police officers with minimal legal training are not prepared to decipher complex statutes, much less to know when a court mandates that the laws be applied more narrowly than the text itself prescribes.[159]

A Vermont Supreme Court decision illustrates the infeasibility of expecting law enforcement to interpret disorderly conduct laws constitutionally.[160] In *State v. Colby*, decided in 2009, the defendants were prosecuted for disorderly conduct for interrupting a speech by the then-Director of National Intelligence, yelling that he "had blood on his hands," and "invit[ing] the audience" to walk out.[161] Vermont's disorderly conduct statute prohibited disturbing a lawful assembly "with intent to cause public inconvenience, or annoyance or recklessly creating a risk thereof."[162] The protestors' interruption was minimal, and they were immediately escorted out.[163] The court recognized that the statute raised a question of how to interpret its broad text in light of the First Amendment guarantees of freedom of speech and assembly.[164] The court concluded that the statute was overbroad on its face because it illegally criminalized a considerable range of protected speech.[165] Although the court elected to construe the statute narrowly, rather than striking it down altogether, it held the prosecution

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fective Advocacy in the Lower Criminal Courts, 45 U.C. DAVIS L. REV. 277, 304 (2011) (noting that "public order offenses such as disorderly conduct . . . often implicate free speech, overbreadth, and vagueness issues").

[157] Watts, *supra* note 155, at 350–51.

[158] 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 JUST. Q. 255, 258 (2010).

[159] Yuri R. Linetsky, *What the Police Don't Know May Hurt Us: An Argument for Enhanced Legal Training of Police Officers*, 48 N.M. L. REV. 1, 5 (2018); *see id.* at 6 (explaining that the "failure to appreciate the legality of a citizen's conduct leads to many illegal [disorderly conduct] arrests"); *see also supra* Part II.B; Thomas A. Johnson, *Police-Citizen Encounters and the Importance of Role Conceptualization for Police Community Relations*, ISSUES CRIMINOLOGY, Winter 1972, at 103, 113–14 (describing that the public wants police protection, but has not explicitly defined what the police should protect, leading to tension between the two entities).

[160] State v. Colby, 972 A.2d 197, 200–01 (Vt. 2009).

[161] *Id.* at 199–200.

[162] *Id.* at 200 n.3 (quoting VT. STAT. ANN. tit. 13, § 1026(4) (1971)).

[163] *Id.* at 204.

[164] *Id.* at 200.

[165] *Id.* at 202.

unconstitutional because the defendants' speech fell within the Constitution's protection.[166]

According to Yuri Linetsky, a law professor and former 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."[167] Linetsky writes that police officers' "[mis]understanding 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."[168] The vague language of disorderly conduct laws allows police to define disorder in a manner inconsistent with the Constitution with little risk of being held accountable for their misinterpretations.[169]

III. Other Harms That Disorderly Conduct Laws Enable

As discussed previously, disorderly conduct laws can be facially unconstitutional and encourage unconstitutional enforcement. These are further exacerbated by other non-constitutional harms. Section A of this Part presents the arbitrary and abusive enforcement of disorderly conduct laws and how this enforcement harms certain types of peoples.[170] Section B examines the use of disorderly conduct laws as a form of social control that disproportionately impacts people of color.[171] Section C identifies how disorderly conduct laws create barriers to employment, housing, and other opportunities.[172] Lastly, Section D argues that disorderly conduct laws waste taxpayer money that could be put to more productive use.[173]

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[166] *Id.* at 202–03.

[167] Linetsky, *supra* note 159, at 2.

[168] *Id.* at 5; *see also* Wayne A. Logan, *Police Mistakes of Law*, 61 Emory L.J. 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 (stating that "[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").

[169] *See* Harcourt, *supra* note 93, at 299 (describing how police brutality complaints increased from 1993 to 1997 during a height of order-maintenance policing and targeted minority groups); 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").

[170] *See infra* Part III.A.

[171] *See infra* Part III.B.

[172] *See infra* Part III.C.

[173] *See infra* Part III.D.

A. Arbitrary and Abusive Enforcement

In addition to enabling constitutional violations, poorly defined statutes also inevitably lead to arbitrary enforcement.[174] Expansive disorderly conduct laws maximize prosecutorial power by creating what Alexandra Natapoff refers to as the "infinite pool of the guilty."[175] This empowers law enforcement officers to snare their choice of offenders in their net.[176] In reality, people commit minor crimes more frequently than police can investigate or prosecutors can charge.[177] Consequently, misdemeanor charges are highly discretionary by nature.[178] 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.[179] 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."[180]

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[174] *See* 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, 7 (1999) (explaining how the deference given to police offers and misunderstandings of the law lead to arbitrary enforcement).

[175] Natapoff, *supra* note 10, at 1358.

[176] *Id.*; *see also* Smith, *supra* note 21, at 565 (decrying the poorly defined criminal statutes that lead to overcriminalization and great authority for police); Stevenson & Mayson, *supra* note 21, at 766 (arguing that arrests related to misdemeanor offenses are related to the neighborhoods and people that police monitor because they are so ill-defined, granting police great latitude in enforcement).

[177] *See* Stevenson & Mayson, *supra* note 21, at 766–67 (listing routine misdemeanors that people commit daily, like "walking dogs off the leash" or speeding).

[178] *See id.* at 766 (arguing that the location of police surveillance drives disorderly conduct arrests, rather than the offense itself).

[179] *See* 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." (footnote omitted)); *see also* Nieves v. Bartlett, 139 S. Ct. 1715, 1730 (2019) (Gorsuch, J., concurring in part and dissenting in part) (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").

[180] Stevenson & Mayson, *supra* note 21, at 766; *see also* 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."); *id.* at 287 (stating that "[m]aking 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"); Livingston, *supra* note 82, at 589 (noting that police discretion and bias are especially significant concerns in the enforcement of minor crimes and vague criminal statutes).

Broad statutes have historically been misused as a tool to arrest powerless or unpopular people, and disorderly conduct laws are no exception.[181] More than fifty years ago, Judge Watts cautioned that "[t]he vagueness or lack of specificity" in disorderly conduct statutes "may lead to arbitrary or capricious action on the part of the police."[182] By design, these laws vest enormous discretion in law enforcement and thus invite discriminatory enforcement.[183] Disorderly conduct laws allow police to claim probable cause when the charge was "prompted by [an improper] motive."[184]

The following subsections describe the types of people most likely to suffer the arbitrary and discriminatory enforcement of disorderly conduct laws. Subsection 1 explores the impacts of enforcing disorderly conduct laws on people with unpopular beliefs.[185] Subsection 2 looks at effects on minority people.[186] Subsection 3 analyzes the impact of disorderly conduct enforcement

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[181] *See, e.g.*, GOLUBOFF, *supra* note 74, at 12–41 (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"); Logan, *supra* note 168, at 102 (stating that police use of low-level offenses as a basis to arrest "is known to not fall uniformly on the polity"); Etienne C. Toussaint, *Blackness as Fighting Words*, 106 VA. L. REV. ONLINE 124, 146 (2020), https://www.virginialawreview.org/articles/blackness-as-fighting-words/ [https://perma.cc/JM8Z-YN5M] (noting that laws that criminalize poorly-defined terms like "'fighting words[]' effectively grant[] police officers discretionary authority to determine what kinds of activities or public speech amount to criminal conduct").

[182] Watts, *supra* note 155, 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* note 81, at 12 (stating that "[d]isorderly 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) (writing that "[t]he police can find as many instances of . . . [minor crimes] and disorderly conduct as they devote the time and resources to find").

[183] *See* Michael Johnston, *As Free as a Bird: The Middle Finger and the First Amendment*, WAKE FOREST L. REV. CURRENT ISSUES BLOG (Sept. 4, 2019), http://wakeforestlawreview.com/2019/09/as-free-as-a-bird-the-middle-finger-and-the-first-amendment/ [https://perma.cc/N8SR-6BX2] (writing that expansive disorderly conduct laws "give law enforcement broader discretion to stop people, even if the stops are only motivated by personal animus"); 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"); Morgan, *supra* note 14, at 1642–43, 1657 (noting how disorderly conduct laws allow those with discretion free reign to choose which individuals will be subject to regulation, causing a disproportionate impact on marginalized peoples).

[184] *Nieves*, 139 S. Ct. at 1734 (Ginsburg, J., concurring in part and dissenting in part); *see also* Roberts, *supra* note 89, at 782 (arguing that criminal laws with broad language are "an invitation to police abuse"); Watts, *supra* note 155, at 357–58 (explaining that 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").

[185] *See infra* Part III.A.1.

[186] *See infra* Part III.A.2.

on people with mental health challenges.[187] Subsection 4 discusses the effect on people who annoy law enforcement.[188] Finally, Subsection 5 describes the impact of the laws on people who offend other civilians.[189]

1. People with Unpopular Beliefs

Disorderly conduct laws have served as an instrument 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.[190] The ministers spoke anyway in absence of a permit, and the police arrested each of them.[191] Maryland's highest court declined to overturn the convictions.[192]

Chicago police arrested two members of an obscure religious sect and charged them with disorderly conduct for "distributing literature" about their faith to passing motorists.[193] The arrestees later sued.[194] 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.[195]

Politically unpopular beliefs can also be the target of disorderly conduct enforcement. In the 1960s, police in Rochester, New York arrested and charged a group of people with disorderly conduct for "staging anti-Vietnam war skits in the presence of Christmas shopping crowds."[196] The State took the cases to trial, but the trial court dismissed the charges on ground that the defendants' actions were protected by the First Amendment.[197]

Protesters in Chicago were convicted of disorderly conduct for participating in a peaceful march to protest school segregation.[198] The United States Supreme Court ultimately reversed the convictions, concluding that: (1) no evidence suggested that the protesters acted in a disorderly way; and (2) the jury convicted based on acts the First Amendment protects.[199]

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[187] *See infra* Part III.A.3.
[188] *See infra* Part III.A.4.
[189] *See infra* Part III.A.5.
[190] Niemotko v. State, 71 A.2d 9, 9–10 (Md. 1950).
[191] *Id.*
[192] *Id.* at 11.
[193] Hartnett v. Schmit, 501 F. Supp. 1024, 1025 (N.D. Ill. 1980).
[194] *Id.* at 1025.
[195] *Id.* at 1025–27.
[196] People v. Losinger, 313 N.Y.S.2d 60, 61 (Rochester City Ct. 1970).
[197] *Id.* at 62–64.
[198] Gregory v. City of Chicago, 394 U.S. 111, 111–12 (1969).
[199] *Id.* at 112–13.

During the Civil Rights Movement, police routinely used disorderly conduct laws as a basis to arrest protesters.[200] More recently, police in central Illinois arrested a young man and charged him with disorderly conduct after he posted a photo of himself burning an American flag to Facebook with an accompanying statement ruing his country's mistreatment of minorities.[201] During Jeff Sessions's Attorney General confirmation hearing in 2017, three female protesters were charged with disorderly conduct: two of the women were arrested for dressing as Ku Klux Klan (KKK) members to protest Sessions's alleged ties to the KKK, and the third woman was arrested for simply laughing during the hearing.[202] 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.[203] These are all efforts to use disorderly conduct laws as a tool for suppressing politically unwelcome speech.

Disorderly conduct charges have been used to subdue 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 yelling about the malevolence of public schools which, he reasoned, were akin to an education by Satan.[204] He was convicted at trial, but the Georgia Supreme Court eventually reversed, holding that the conduct at issue was constitutionally protected.[205] A New Jersey resident was arrested and charged with disorderly conduct for re-

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[200] *See* GOLUBOFF, *supra* note 74, at 118–19, 125 (describing how police officers responded with creative charges to harass protestors during the Civil Rights Movement, but that they "routinely and repeatedly" used disorderly conduct laws); Christopher W. Schmidt, *Divided by Law: Sit-ins and the Role of the Courts in the Civil Rights Movement*, 33 LAW & HIST. REV. 93, 108, 142 (2015) (outlining how police used disorderly conduct laws to arrest peaceful sit-in protestors in the South).

[201] Tracy Crane, *UPDATE: Urbana Flag-Burner Won't Be Charged*, NEWS-GAZETTE (July 5, 2016), http://www.news-gazette.com/news/local/2016-07-05/update-urbana-flag-burner-wont-be-charged.html [https://perma.cc/9TP9-WVNJ?type=image]; Steven Nelson, *Legal Fireworks: Police Unconstitutionally Arrest Flag-Burner on Fourth of July*, U.S. NEWS (July 5, 2016), http://www.usnews.com/news/articles/2016-07-05/legal-fireworks-police-unconstitutionally-arrest-flag-burner-on-fourth-of-july [https://perma.cc/Q7NA-74Y9].

[202] *See* Maya Salam, *Case Is Dropped Against Activist Who Laughed at Jeff Sessions's Hearing*, N.Y. TIMES (Nov. 7, 2017), https://www.nytimes.com/2017/11/07/us/jeff-sessions-laughter-protester.html [https://perma.cc/3EED-PPGM]. Two of the women were acquitted after trial and the third was convicted but had her conviction vacated by the trial judge. *Id.*

[203] 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/ [https://perma.cc/K7SW-43UF] (quoting S.B. 211, 2021 Gen. Assemb., Reg. Sess. (Ky. 2021)).

[204] Freeman v. State, 805 S.E.2d 845, 848 (Ga. 2017).

[205] *Id.* at 850–51.

cording city council meetings over the objection of the mayor and city council members.[206] The State prosecuted, but a court found him not guilty after trial.[207]

2. Minoritized People

People of color have long been the central focus of "proactive policing tactics[,]" which include aggressive enforcement of misdemeanor laws.[208] Proactive policing has long occurred in communities of color both because police have long viewed people in those communities as more suspicious, and because communities of color have traditionally lacked the power to make their complaints heard.[209]

Part III, Section 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. Although these calls have received substantial attention in recent years, they are hardly a new problem.[210] 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 mother[f***]ing police protection."[211] The police charged her with disorderly conduct, and she was convicted under a theory "that her language was obscene."[212] An appellate court then affirmed her conviction, concluding that her language was not obscene but qualified as fighting words.[213] The Ohio Supreme Court reversed the conviction on the grounds that her language was not obscene and the lower court had not given her an opportunity to rebut the notion that her language constituted fighting words.[214]

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[206] Tarus v. Borough of Pine Hill, 916 A.2d 1036, 1039 (N.J. 2007).

[207] *Id.* at 1041.

[208] Hemmens & Levin, *supra* note 174, at 4; *see also* Roberts, *supra* note 89, at 780 (detailing how unconstitutional ordinances like Chicago's loitering ordinance are employed disproportionately against people of color).

[209] *See* Livingston, *supra* note 82, at 596 (describing how this policing occurred against those "who lacked effective political power to complain").

[210] *See generally* Chan Tov McNamarah, *White Caller Crime: Racialized Police Communication and Existing While Black*, 24 MICH. J. RACE & L. 335 (2019); Michael Harriot, *'White Caller Crime': The Worst Wypipo Police Calls of All Time*, THE ROOT (May 15, 2018), https://www.theroot.com/white-caller-crime-the-worst-wypipo-police-calls-of-1826023382 [https://perma.cc/5YB6-2JYT].

[211] City of Columbus v. Fraley, 324 N.E.2d 735, 736 (Ohio 1975).

[212] *Id.* at 736–37.

[213] *Id.* at 737.

[214] *Id.* at 738.

Etienne Toussaint wrote that the mere status of being Black is often perceived as a symbol of disorder, or of resistance to law enforcement.[215] 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.[216]

People with non-traditional sexual orientation or gender identities have also experienced discriminatory disorderly conduct enforcement.[217] The defendant in the 2013 case, *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.[218] In response, the defendant briefly touched the ranger's clothed crotch.[219] The government charged him with disorderly conduct under a statute prohibiting "obscene" conduct, and the court sentenced him to fifteen days in jail.[220] 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.[221]

3. People with Mental Health Challenges

People with mental health issues are similarly vulnerable to exploitative disorderly conduct enforcement. In Massachusetts, the State charged a psychiatric patient, who was involuntarily detained in a hospital, with disorderly conduct after he began shouting and threatening to injure anyone who detained him against his will.[222] A jury convicted him of disorderly conduct under a statute requiring proof that he engaged in "violent or tumultuous behavior" and "with purpose to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof[.]"[223] The Supreme Judicial Court reversed the conviction, finding no evidence that the patient possessed the requisite mental state.[224]

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[215] Toussaint, *supra* note 181, at 153–54 (stating that "Blackness itself [is] a kind of symbolic speech that becomes 'fighting words'" (emphasis omitted)).

[216] *Id.* at 151–52 (stating that disorder is racially biased); *id.* at 158–59 (describing the outsize response by police to BLM protestors and connecting this with a failure to listen to Black words).

[217] *See* GOLUBOFF, *supra* note 74, at 41 (describing how the outcome in 1953 in *Edelman v. California* caused others who had been targeted under vagrancy statutes to question their constitutionality).

[218] 723 F.3d 476, 478–79 (4th Cir. 2013).

[219] *Id.* at 479.

[220] *Id.* at 478–79 (citing 36 C.F.R. § 2.34(a)(2)).

[221] *Id.* at 482–83.

[222] Commonwealth v. Accime, 68 N.E.3d 1153, 1155–56 (Mass. 2017).

[223] *Id.* at 1157 (quoting MODEL PENAL CODE § 250.2 (AM. L. INST., Official Draft and Revised Comments 1980)) (citing Commonwealth v. Sholley, 739 N.E.2d 236, 241 n.7 (Mass. 2000)).

[224] *Id.* at 1157–58.

In Atlanta, police charged a mentally ill man with disorderly conduct after they found him coated in feces and yelling obscenities at a gas station.[225] He spent months in jail, unable to afford the $500 bond.[226] In Minnesota, an eleven-year-old boy, whose mother described him as possibly "on the autism spectrum," was charged with disorderly conduct after his neighbors called the police because he was running around in a park with a mask covering his face.[227] The charge cost the family $3,500 in legal expenses to defend and resulted in anxiety for the child.[228]

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.[229] Foote's examples included someone who was in a bar insulting the police and a man of Mexican ancestry who employed allegedly offensive language after a police officer told him to leave a bus terminal.[230] The man was speaking Spanish—which "the officer did not understand"—but the officer surmised that the language was inappropriate and decided to arrest.[231]

The practice of police officers charging people who offend them with disorderly conduct has continued in the decades since Foote's research. In 1960, 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.[232] There was no testimony that the man so much as "raised his voice" at police, nor did he use obscenities or physically resist arrest.[233]

Examples abound of law enforcement officers improperly charging people with disorderly conduct for using obscenities against police. In 2019, the

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[225] Rhonda Cook, *Suit: Free Jailed Atlanta Man Too Poor to Pay Bond*, ATLANTA J.-CONST. (Jan. 8, 2018), https://www.ajc.com/news/local/suit-filed-force-atlanta-free-jailed-poor-who-can-pay-bond/IXax3TpxJKWmyhVba4FGFK/ [https://perma.cc/T23Y-GWGN].

[226] *Id.*

[227] Erin Adler, *Eagan Boy Thought He Was Just Playing in the Park, but Those on Social Media Felt Otherwise*, STAR TRIB. (Dec. 7, 2019), https://www.startribune.com/eagan-boy-thought-he-was-just-playing-in-the-park-but-those-on-social-media-felt-otherwise/565914922/ [https://perma.cc/SHX3-KAEL].

[228] *Id.*

[229] Foote, *supra* note 155, at 637.

[230] *Id.*

[231] *Id.*

[232] 362 U.S. 199, 200–02, 205–06 (1960), *abrogated by* Jackson v. Virginia, 443 U.S. 307 (1979).

[233] *Id.* at 205.

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 "'f**k you!' out of his car window" at the state trooper.[234] In New York City, police detained a defendant on suspicion of disorderly conduct after he yelled profanities at the officers in a subway station.[235] Although the swearing surprised the other passengers, it caused no additional response or harm.[236] In Rochester, New York, police arrested a man for disorderly conduct after he approached a vehicle to ask why the police officer had run a check on the license plate of his girlfriend's car.[237] When the officer said he could check whatever plates he wanted, the defendant retreated from the vehicle, but began cursing and "accused [the officer] of harassing him."[238] The officer then got out of his car and arrested the defendant.[239] The Court of Appeals concluded that because the outburst lasted only about fifteen seconds and no one but the officer was offended, no disorderly conduct occurred.[240]

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.[241] The officers detained and searched the woman against her will; after they released her without finding evidence of crime, she used an expletive to describe one of the officers.[242] They "then decided to arrest [her] for disorderly conduct."[243] She was found not guilty, and the Eighth Circuit later concluded that the officers had no probable cause to arrest her because her speech was constitutionally protected.[244]

Massachusetts police officers attempting to serve a restraining order arrested a man inside his mother's yard after he became agitated at their arrival and bumped an officer.[245] 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.[246] An intoxicated Naval petty officer was

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[234] Thurairajah v. City of Fort Smith, 925 F.3d 979, 982, 985 (8th Cir. 2019).

[235] People v. Gonzalez, 35 N.E.3d 478, 479 (N.Y. 2015).

[236] *Id.*

[237] People v. Baker, 984 N.E.2d 902, 903–04 (N.Y. 2013).

[238] *Id.* at 904.

[239] *Id.*

[240] *Id.* at 907–08.

[241] Buffkins v. City of Omaha, 922 F.2d 465, 467 (8th Cir. 1990).

[242] *Id.*

[243] *Id.*

[244] *Id.* at 467 n.6, 472–73; *see also* Cavazos v. State, 455 N.E.2d 618, 619–21 (Ind. Ct. App. 1983) (describing an Indiana woman convicted of disorderly conduct for calling a police officer an "[a**hole]" and accusing him of holding resentment against her brother; the appellate court reversed the defendant's conviction after the appellate court concluded the language was protected speech).

[245] Commonwealth v. Mulvey, 784 N.E.2d 1138, 1140–41 (Mass. App. Ct. 2003).

[246] *Id.* at 1141–43.

charged with disorderly conduct in Pennsylvania after using unspecified obscenities at a Naval security officer who woke him up from sleep.[247] 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.[248]

An Alaska state trooper pulled over a driver for driving unusually, and ordered the driver to complete sobriety tests.[249] After the front seat passenger objected with "loud and obscene language[,]" the trooper arrested him and charged him with disorderly conduct.[250] The Alaska Supreme Court concluded that "the evidence was insufficient to warrant a conviction under the [state's disorderly conduct] statute. . . ."[251] 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 and chin."[252] The employee began swearing at the officer and attempted to get out of bed.[253] Deciding that the employee posed a threat, the ranger arrested him for disorderly conduct.[254] 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.[255]

Use of the middle finger toward police could alone fill an article on improper disorderly conduct charges.[256] A North Carolina state trooper pulled a man over for giving the trooper the middle finger while passing by him on the highway.[257] The defendant argued that his middle finger gesture did not provide reasonable suspicion of disorderly conduct.[258] Although both the trial and appellate courts denied the defendant's motion to suppress, the state supreme court eventually held that merely "flipping the bird" did not establish reasonable suspicion of disorderly conduct.[259]

Arizona police arrested a man for disorderly conduct for swearing and directing his middle finger at an officer.[260] During the arrest the police "dislocat-

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[247] United States v. McDermott, 971 F. Supp. 939, 940 (E.D. Pa. 1997).

[248] *Id.* at 942–43.

[249] State v. Martin, 532 P.2d 316, 317 (Alaska 1975).

[250] *Id.* at 317–18.

[251] *Id.* at 322.

[252] United States v. Taylor, 258 F.3d 1065, 1066 (9th Cir. 2001).

[253] *Id.*

[254] *Id.*

[255] *Id.* at 1068.

[256] For such an article, see Ira P. Robbins, *Digitus Impudicus: The Middle Finger and the Law*, 41 U.C. DAVIS L. REV. 1403, 1451 (2008) (stating that "[c]onvictions for use of the middle finger often arise from its use in the presence of a police officer").

[257] State v. Ellis, 841 S.E.2d 247, 249 (N.C. 2020).

[258] *Id.*

[259] *Id.* at 250.

[260] Duran v. City of Douglas, 904 F.2d 1372, 1374 (9th Cir. 1990).

ed [the man's] elbow[,] requiring hospitalization."[261] The Ninth Circuit held that the arrest violated the man's First Amendment rights.[262] A Pennsylvania police officer pulled a car over and arrested the passenger for disorderly conduct after he motioned with his middle finger at the officer.[263] 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.[264] In Texas, a sheriff's deputy saw a driver display his middle finger at the deputy.[265] The deputy pulled the man over for having a missing license plate and questioned him about his gesture.[266] 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."[267] The sheriff cited the man for disorderly conduct, but a federal district court later held that displaying the middle finger was constitutionally protected.[268]

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 his lawn.[269] After police approached, the man turned to the nearby mayor's house, raised his middle finger, and swore at police.[270] The court concluded that police had no probable cause to arrest for disorderly conduct, given that the gesture and speech were constitutionally protected.[271] An Ohio police officer charged a man with disorderly conduct after the man motioned with his middle finger while telling the officer to "have a nice day."[272] A federal court concluded that the officer had no probable cause to charge the defendant.[273] 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 "[F***] you" to her multiple times.[274] Although a jury found

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[261] *Id.* at 1375.

[262] *Id.* at 1377–78.

[263] Brockway v. Shepherd, 942 F. Supp. 1012, 1014 (M.D. Pa. 1996).

[264] *Id.* at 1016–17.

[265] Brown v. Wilson, No. 12-CV-1122, 2015 WL 4164841, at *1 (W.D. Tex. July 9, 2015).

[266] *Id.*

[267] *Id.*

[268] *Id.* at *8.

[269] Youngblood v. Qualls, 308 F. Supp. 3d 1184, 1190–91 (D. Kan. 2018).

[270] *Id.* at 1190.

[271] *Id.* at 1197; *see also* Cook v. Bd. of Cnty. Comm'rs of Wyandotte, 966 F. Supp. 1049, 1051 (D. Kan. 1997) (describing how a Kansas patrol officer cited a man for disorderly conduct after the man drove past and "flipped the bird" at the officer).

[272] Perkins v. City of Gahanna, No. C2-99-533, 2000 WL 1459444, at *2 (S.D. Ohio Sept. 21, 2000).

[273] *Id.* at *4.

[274] City of Bismarck v. Schoppert, 469 N.W.2d 808, 809 (N.D. 1991).

him guilty after trial, the North Dakota Supreme Court reversed, holding that the man's words were protected by the First Amendment.[275]

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.[276] The man was acquitted after trial, and a federal district court concluded that the gesture was constitutionally protected.[277] In 2019, the American Civil Liberties Union (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.[278]

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 declined to move when the police ordered him to do so.[279] 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.[280]

Harvey Silverglate, a civil rights attorney, "has called disorderly conduct law enforcement's 'charge of choice'" for civilians who disrespect police officers.[281] 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.[282] Civilians have a constitutional right to shout at the police, swear at them, and even call them racist.[283] But as the above cases show, police too frequently respond to such behavior by abusing their power to charge civilians with disorderly conduct.

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[275] *Id.* at 810–13.

[276] Nichols v. Chacon, 110 F. Supp. 2d 1099, 1101 (W.D. Ark. 2000), *aff'd*, 19 F. App'x 471 (8th Cir. 2001).

[277] *Id.* at 1110.

[278] Verified Complaint at 6–9, Goldsmith v. Adams Cnty., No. 4:19-cv-00152 (S.D. Iowa May 21, 2019), https://www.aclu-ia.org/sites/default/files/stamped_goldsmith_complaint.pdf [https://perma.cc/V8L8-HG4W].

[279] People v. Johnson, 9 N.E.3d 902, 903 (N.Y. 2014).

[280] *Id.*

[281] Camille Fassett, *Police Are Threatening Free Expression by Abusing the Law to Punish Disrespect of Law Enforcement*, FREEDOM OF THE PRESS FOUND. (July 31, 2018), https://freedom.press/news/police-are-threatening-free-expression-abusing-law-punish-disrespect-law-enforcement/ [https://perma.cc/E664-V9Z5] (quoting Harvey Silverglate).

[282] *See* Eric J. Miller, *Police Encounters with Race and Gender*, 5 U.C. IRVINE L. REV. 735, 747 (2015) (lauding the civic value of contesting police authority, but noting that "contestation may be, to some extent, disorderly").

[283] *See id.* at 748 (stating that challenging the police is a valid form of political engagement).

5. People Who Offend Other Civilians

Disorderly conduct charges are used as a weapon 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.[284] The State prosecuted under the theory that the child's speech constituted fighting words.[285] 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 upon hearing the statement."[286] In Colorado, a fourteen-year-old child photographed his friend, used Snapchat to draw a penis over it, and then "showed the doctored photo to . . . some other friends."[287] The State prosecuted him for disorderly conduct, and a judge convicted the child following a bench trial.[288] The Colorado Court of Appeals reversed the conviction, holding that the drawing was constitutionally protected speech.[289]

Use of the middle finger by civilians against civilians is, again, a frequent target of disorderly conduct charges.[290] As Ira Robbins noted, prosecution of mildly offensive speech threatens significant detriment to people whose speech or behavior causes minimal harm.[291] Although 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.

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[284] *In re* L.E.N., 682 S.E.2d 156, 157 (Ga. Ct. App. 2009).

[285] *Id.*

[286] *Id.* at 158.

[287] People in the Interest of R.C., 411 P.3d 1105, 1106 (Colo. App. 2016).

[288] *Id.*

[289] *Id.* at 1113.

[290] *See, e.g.*, Swartz v. Insogna, 704 F.3d 105, 108 (2d Cir. 2013) (relating that charges were dismissed after the case spent years pending); Sandul v. Larion, 119 F.3d 1250, 1252–53 (6th Cir. 1997) (holding that speech was constitutionally protected after police officer charged man with disorderly conduct for yelling "[f***] you" and directing his middle finger at an assemblage of abortion protesters); Commonwealth v. Kelly, 758 A.2d 1284, 1285–88 (Pa. Super. Ct. 2000) (reversing a conviction of woman found guilty of disorderly conduct after saying, "F*** you, a**hole" and directing her middle finger at a city employee who confronted her, on grounds that the speech was not within the definition of the statute); Commonwealth v. Danley, 13 Pa. D. & C.4th 75, 76–77 (Pa. Ct. C.P. 1991) (concluding that the gesture was not obscene and there was no probable cause to charge after a trooper pulled over a garbage truck driver and charged him with disorderly conduct for gesturing his middle finger toward other drivers); Coggin v. State, 123 S.W.3d 82, 85 (Tex. App. 2003) (reversing the defendant's conviction of disorderly conduct for flipping the middle finger at another driving slowly on the highway, on grounds that the middle finger did not constitute fighting words).

[291] Robbins, *supra* note 256, at 1411–12.

Criminal prosecutions are, in the words of William Stuntz, "morality plays."[292] 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.[293] 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 for a pizza they had ordered, 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 come down from a tree they had climbed.[294] The expansive language of disorderly conduct laws, and the abuses these laws foster, erode the criminal legal system's credibility.

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.[295] 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."[296] More recently, Nirej Sekhon has theorized that police departments serve primarily to ensure order for controlling groups within society and manage groups perceived as threatening that order.[297] Similarly, Alexandra Natapoff has argued that prosecuting low-level crimes is "central to the carceral ethos" because these crimes "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

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[292] William J. Stuntz, *Self-Defeating Crimes*, 86 VA. L. REV. 1871, 1882 (2000).

[293] *See id.* (explaining that "if the play is unconvincing," the idea that the system is righteously dedicated to punishing crime is weakened).

[294] *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 §§ 28, 45, 47 (2010) (providing these absurd examples as instances in which police have used disorderly conduct laws).

[295] *See, e.g.*, GOLUBOFF, *supra* note 74, at 272–74 (detailing the disparate enforcement of vagrancy laws against Black people); Kristin Henning, *Criminalizing Normal Adolescent Behavior in Communities of Color: The Role of Prosecutors in Juvenile Justice Reform*, 98 CORNELL L. REV. 383, 404–08 (2013) (discussing the history of the 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, 2250 (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).

[296] Breitel, *supra* note 155, at 432.

[297] Nirej Sekhon, Essay, *Police and the Limit of Law*, 119 COLUM. L. REV. 1711, 1711, 1717 (2019); *see id.* at 1731–32 (providing a historical background for these laws as imported from nineteenth-century Ireland when the British tried to control local revolts). Sekhon writes that police are "guarantors of a social order that benefits dominant groups." *Id.* at 1711.

ways."[298] 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.[299] Research suggests that Americans harbor implicit biases linking Black people and other minorities to stereotypes about criminality and disorder.[300] White people are, according to some studies, both less likely to be the subject of disorder complaints and more likely to perceive disorder among other racial groups.[301]

Assumptions about race and gender permeated even the earliest disorderly conduct laws.[302] In the nineteenth century, single women and people of color

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[298] Natapoff, *supra* note 13, at 152; *see also id.* (stating that "[h]istorically, 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) (explaining that 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/ [https://perma.cc/8X8K-BDE3] (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).

[299] *See* Robert J. Sampson & Stephen W. Raudenbush, *Seeing Disorder: Neighborhood Stigma and the Social Construction of "Broken Windows,"* 67 SOC. PSYCH. Q. 319, 323 (2004) (explaining the theories underlying the authors' study where they found that racial and economic context is indicative of perceived disorder); *see also* Harcourt, *supra* note 93, at 297 (1998) ("[T]he 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* note 89, at 786 (writing that "[t]he 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"); Sekhon, *supra* note 297, at 1737 (writing that "'disorder' is not an objective fact but heavily shaped by race and class presuppositions").

[300] Sampson & Raudenbush, *supra* note 299, at 320; *see also id.* at 322–23 (citing multiple studies finding a positive correlation between the presence of young Black men in a neighborhood and perceptions of disorder, even absent actual differences in reported crimes or neighborhood deterioration); ANDREA J. RITCHIE, INVISIBLE NO MORE: POLICE VIOLENCE AGAINST BLACK WOMEN AND WOMEN OF COLOR 55 (2017) (writing that "[w]hat 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* note 14, at 1642 (explaining that "disorderly conduct laws enforce discriminatory norms that inform, shape, and reinforce deeply rooted understandings of which conduct—and which persons—are considered disorderly").

[301] Sampson & Raudenbush, *supra* note 299, at 337; *see also* Gau & Brunson, *supra* note 158, 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") (citing Sampson & Raudenbush, *supra* note 299).

[302] *See* NOVAK, *supra* note 58, at 170 (explaining how disorderly conduct laws targeted certain people, for example people of color and single women, who were considered more suspicious); An Act Concerning Vagrancy and Vagrants, ch. 110, § 2, 1877 Nev. Stat. 181, 182–83 (no longer in force) (providing that any "idle" person who begs, engages in prostitution, or is a "drunkard" will be deemed guilty of vagrancy).

were inherently suspicious and vulnerable to prosecutions for conduct like keeping a disorderly house.[303] In 1953, Forrest Lacey critiqued disorderly conduct and vagrancy laws for giving police the power to target and abuse particular classes of people, and noted this appeared to be "especially true . . . [for] members of minority groups."[304] In the 1960s, Thomas Johnson warned that society could not rely on police officers to maintain social order in an unbiased way, and argued that many police officers have adopted prejudices toward minority populations.[305] Around the same time period, a *Los Angeles Times* op-ed suggested amending or abolishing disorderly conduct laws because of the severe resentment that unequal enforcement of those laws created among Black people.[306]

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 is based on the idea that officers should police minor crime and disorder to deter future crime, increased unwelcome interaction between Black people and police officers because "perception of disorder is racialized."[307] Statistics support that observation: between 1990 and 2010, the number of misdemeanor arrests in New York City—the epicenter of the broken windows movement—increased for "Hispanic individuals by over 158%" and for Black people "by over 105%[.]"[308] Conversely, "misdemeanor arrest[s] . . . [for] white individuals increased by around 35%" during that same period.[309]

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[303] NOVAK, *supra* note 58, at 170.

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

[305] Johnson, *supra* note 159*,* at 108 (quoting Joseph Lohman who similarly argues that "officers have 'absorbed some of the prejudices and antipathies toward minority groups that are so tragically widespread in our society'" (quoting JOSEPH D. LOHMAN, THE POLICE AND MINORITY GROUPS: A MANUAL PREPARED FOR USE IN THE CHICAGO PARK DISTRICT POLICE TRAINING SCHOOL 5 (1947)).

[306] GOLUBOFF, *supra* note 74, at 268.

[307] 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 (stating that granting the police significant discretion about whom to arrest allows them to target Black people "whose very embodiment or self-presentation is a sign of disorder"); Jeffrey A. Fagan & Garth Davies, *Policing Guns: Order Maintenance and Crime Control in New York*, *in* GUNS, CRIME, AND PUNISHMENT IN AMERICA 191, 210 (Bernard E. Harcourt ed., 2003) (noting that Black people "disproportionately shoulder the burden" of order-maintenance policing); Gau & Brunson, *supra* note 158, 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).

[308] Kohler-Hausmann, *supra* note 182, at 633–34 (providing the data and displaying a graph from the New York Division of Criminal Justice Services).

[309] *Id.*; *see also* Harcourt, *supra* note 93, at 299 (stating that "[t]he brute fact is that the decision to arrest for misdemeanors results in the arrest of many minorities" (emphasis omitted)); 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 di-

Similar disparities are still present today. According to the FBI's crime report statistics for both 2016 and 2018, Black people comprised approximately 32% of the people arrested for disorderly conduct, despite representing less than 13% of the population.[310] The Black arrest rate for crimes like disorderly conduct has been at least triple the rate for white people since 1980, and shows no signs of equalizing.[311] In a 2016 Cato Institute study, Black Americans reported being stopped by police at significantly higher rates than white people.[312] Black people have around double the chance as white people to report being personally mistreated by police or knowing someone who was.[313] 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 such as . . . disorderly conduct."[314]

One of the most problematic consequences of this social control is the damaged relationship between police and the communities subjected to consistently invasive policing.[315] Scholars have labeled the phenomenon of being a consistent subject of law enforcement surveillance and suspicion a "form of

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vided communities, and the long history of defining 'insiders' and 'outsiders' within our society based upon wealth, privilege, and race").

[310] *2018 Crime in the United States: Table 43: Arrests by Race and Ethnicity*, *supra* note 12; *2016 Crime in the United States: Table 21: Arrests by Race and Ethnicity*, FED. BUREAU OF INVESTIGATION: UNIF. CRIME REPORTING (2016), https://ucr.fbi.gov/crime-in-the-u.s/2016/crime-in-the-u.s.-2016/topic-pages/tables/table-21 [https://perma.cc/M7CV-TKS4]; *Profile: Black/African Americans*, U.S. DEP'T OF HEALTH & HUM. SERVS., https://minorityhealth.hhs.gov/omh/browse.aspx?lvl=3&lvlid=61#:~:text=Overview%20(Demographics)%3A%20In%20July,following%20the%20Hispanic%2FLatino%20population [https://perma.cc/F5QT-ASW3] (Oct. 1, 2021) (noting that Black people comprised 12.8% of the population of the United States as of 2019).

[311] Stevenson & Mayson, *supra* note 21, at 761.

[312] EMILY EKINS, CATO INST., POLICING IN AMERICA: UNDERSTANDING PUBLIC ATTITUDES TOWARD THE POLICE. RESULTS FROM A NATIONAL SURVEY 3 (2016), https://www.cato.org/survey-reports/policing-america [https://perma.cc/G2VE-AVCC].

[313] *Id.*

[314] *See* Alexandra Natapoff, *The High Stakes of Low-Level Criminal Justice*, 128 YALE L.J. 1648, 1650 (2019) (reviewing ISSA KOHLER-HAUSMANN, MISDEMEANORLAND: CRIMINAL COURTS AND SOCIAL CONTROL IN AN AGE OF BROKEN WINDOWS POLICING (2018)) (outlining the impetus for the Black Lives Matter movement); Jana Kooren, *The Hard Truth of the Minneapolis Black Lives Matter Protests: Communities of Color Have No Trust in Their Police Force*, ACLU (Nov. 19, 2015), https://www.aclu.org/blog/racial-justice/race-and-criminal-justice/hard-truth-minneapolis-black-lives-matter-protests [https://perma.cc/BF6Y-TP4S] (urging people to understand Black Lives Matter protests in light of over policing of offenses like disorderly conduct in Black communities that feel targeted by police).

[315] *See* Eric J. Miller, *Role-Based Policing: Restraining Police Conduct "Outside the Legitimate Investigative Sphere*,*"* 94 CALIF. L. REV. 617, 621 (2006) (writing that "[t]he 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, *supra* note 93, at 298 (describing "the disorderly person as an object of suspicion, surveillance, control, relocation, micromanagement, and arrest").

racial subordination[,]"[316] a socialization method that forces Black people to "internalize[] racial obedience toward . . . police[,]"[317] and a "regressive 'racial tax'" that "burden[s] [people simply for] being poor and of color."[318] Black communities are often at such odds with police that Professor Monica Bell has coined them as subject to "legal estrangement."[319] Laws like disorderly conduct, which 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 is used to create separation between races and classes, as when white people move into gentrifying neighborhoods and call 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" by ensuring that poor people of color remain concentrated in spaces white people rarely live.[320]

Consistent unwanted police encounters are troubling for yet another reason: they can turn 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 inevitably 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 . . . ."[321] 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. . . . [T]wo days later[,] [t]he charges were dismissed[,] . . . I still am scared."[322] People who were not physically harmed dur-

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[316] CHARLES R. EPP, STEVEN MAYNARD-MOODY & DONALD HAIDER-MARKEL, PULLED OVER: HOW POLICE STOPS DEFINE RACE AND CITIZENSHIP 135 (2014).

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

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

[319] *See generally* Monica C. Bell, Essay, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054 (2017) (coining the term in the title and throughout the piece).

[320] Morgan, *supra* note 14, at 1681; *see* 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) (explaining why order-maintenance policing almost guarantees a large police presence in poor places).

[321] Carbado, *supra* note 307, at 1483.

[322] 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, *supra* note 11, at 5).

ing a police stop or arrest can still suffer trauma and stigmatization from the arrest.[323]

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 Sonia 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.'"[324] 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."[325]

C. Barrier to Employment, Housing, and Other Opportunities

Although disorderly conduct charges usually involve fairly innocuous conduct, their consequences are serious. Disorderly conduct charges carry the possibility of incarceration in all fifty states.[326] Apart from incarceration, the

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[323] *See* Josh Gupta-Kagan, *The School-to-Prison-Pipeline's Legal Architecture: Lessons from the Spring Valley Incident and Its Aftermath*, 45 FORDHAM URB. L.J. 83, 92–96 (2017) (describing a young woman who was wrongly arrested for disorderly conduct after recording an abusive police officer in a school and 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).

[324] Utah v. Strieff, 136 S. Ct. 2056, 2070–71 (2016) (Sotomayor, J., dissenting).

[325] *See* Salt Lake City Just. Ct. (@saltlakejustice), TWITTER (May 31, 2020, 3:07 PM), https://twitter.com/saltlakejustice/status/1267170980842991617/photo/1 [https://perma.cc/ZS98-KQ5P] (outlining Standing Order No. 10-7, issued by the Salt Lake City Justice Court).

[326] ALA. CODE § 13A-11-7(b) (2021); ALASKA STAT. § 11.61.110(c) (2021); ARIZ. REV. STAT. ANN. § 13-2904(B) (2021); ARK. CODE ANN. § 5-71-207(b) (2021); CAL. PENAL CODE § 647 (West 2021); COLO. REV. STAT. § 18-9-106(3)(b)–(c) (2021); CONN. GEN. STAT. ANN. § 53a-181(b) (West 2021); DEL. CODE ANN. tit. 11, § 1301 (2021); D.C. CODE § 22-1321(h) (2021); FLA. STAT. § 877.03 (2021); GA. CODE ANN. § 16-11-39(b) (2021); HAW. REV. STAT. § 711-1101(3) (2021); IDAHO CODE § 18-6409 (2021); 720 ILL. COMP. STAT. 5/26-1(b) (2021); IND. CODE § 35-45-1-3(a) (2021); IOWA CODE § 723.4 (2021); KAN. STAT. ANN. § 21-6203(b) (West 2021); KY. REV. STAT. ANN. § 525.060(2) (West 2021); LA. STAT. ANN. § 14:103(B) (2021); ME. REV. STAT. tit. 17-A, § 501-A(3) (West 2021); MD. CODE ANN., CRIM. LAW § 10-201(d) (Lexis Nexis 2021); MASS. GEN. LAWS ANN. ch. 272, § 53(b) (West 2021) (providing incarceration only "[f]or a second or subsequent offense"); MICH. COMP. LAWS § 750.168(1) (2021); MINN. STAT. § 609.72 subdiv. 1 (2021); MISS. CODE ANN. § 97-35-7(2) (2021); MO. ANN. STAT. § 574.010(2) (West 2021); MONT. CODE ANN. § 45-8-101(2)(b) (West 2021) (stating that incarceration is available only for "second or subsequent" offenses); NEB. REV. STAT. § 28-1322(2) (2021); NEV. REV. STAT. § 203.010 (2021); N.H. REV. STAT. ANN. § 644:2(VI) (2021) (declaring it a misdemeanor only "if the offense continues after a request by any person to desist"); N.J. STAT. ANN. § 2C:33-2 (West 2021); N.M. STAT. ANN. § 30-20-1 (West 2021); N.Y. PENAL LAW § 240.20 (McKinney 2021); N.C. GEN. STAT. § 14-288.4(c) (2021); N.D. CENT. CODE § 12.1-31-01 (2021); OHIO REV. CODE ANN. § 2917.11(E) (Lexis Nexis 2021) (declaring it punishable by incarceration only in certain circumstances); OKLA. STAT. ANN. tit. 21, § 1362 (West 2021); OR. REV. STAT. ANN. § 166.023(2) (West 2021); 18 PA. CONS. STAT. § 5503(b) (2021); 11 R.I. GEN. LAWS § 11-45-1(c) (2021); S.C. CODE ANN. § 16-17-530(A) (2021); S.D. CODIFIED LAWS § 22-18-35 (2021); TENN. CODE ANN. § 39-17-305(c) (2021); TEX. PENAL CODE ANN. § 42.01(d) (West 2021) (stating that it is punishable by incarceration only in certain circumstances); UTAH CODE ANN. § 76-9-

collateral harms of misdemeanor charges and convictions are many: misdemeanants are often treated similarly to those convicted of felonies in terms of punishment and stigma.[327] 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.[328] Additionally, misdemeanor criminal records "can affect eligibility for professional licenses, child custody, food stamps, student loans, health care, or lead to deportation."[329]

The harms of misdemeanor charges are far more severe than even a decade ago, in large part due to the increasing availability of criminal records.[330] Because most criminal records are now available electronically to the public, employers, landlords, educators, and others have quick access to such records.[331] Even dismissed charges often remain public record unless the charged person undertakes a sometimes complicated, costly, and lengthy process to expunge records.[332]

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; and judges and court staff to preside over the administra-

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102(4) (Lexis Nexis 2021) (calling for incarceration only in certain circumstances); VT. STAT. ANN. tit. 13, § 1026(b) (2021); VA. CODE ANN. § 18.2-415(E) (2021); WASH. REV. CODE § 9A.84.030(2) (2021); W. VA. CODE § 61-6-1b(a) (2021); WIS. STAT. § 947.01(1) (2021); WYO. STAT. ANN. § 6-6-102(b) (2021).

[327] Natapoff, *supra* note 10, at 1315.

[328] *Id.*; Roberts, *supra* note 10, at 1090; Stevenson & Mayson, *supra* note 21, at 735 (stating that "the consequences of misdemeanor arrest or conviction are far from trivial"); Vesely-Flad, *supra* note 322, at 898 (explaining that "[a]rrests can create permanent criminal records that are easily located on the internet by employers, landlords, schools, credit agencies, licensing boards, and banks" (citing HARRY G. LEVINE & LOREN SIEGEL, MARIJUANA ARREST RSCH. PROJECT, DRUG POL'Y ALL., $75 MILLION A YEAR: THE COST OF NEW YORK CITY'S MARIJUANA POSSESSION ARRESTS 1 (2011), https://drugpolicy.org/sites/default/files/%2475%20Million%20A%20Year.pdf [https://perma.cc/X6YT-74KG]); INDEP. COMM'N ON N.Y.C. CRIM. JUST. & INCARCERATION REFORM, *supra* note 11, at 37 (noting that "[a] criminal record can have life-changing implications, and not in a good way").

[329] Natapoff, *supra* note 10, at 1316; *see also* Miller & Alexander, *supra* note 320, at 293 (noting that even charges that do not result in convictions have been shown to effect job eligibility and licensing); Roberts, *supra* note 156, at 299 (calling challenges to securing and retaining work "[t]he most pervasive collateral effect of a misdemeanor conviction").

[330] Roberts, *supra* note 156, at 287.

[331] *Id.*

[332] *Id.*; *see also, e.g.*, MINN. STAT. § 609A.02, 609A.03 (2021) (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).

tive aspects of the case. It also saps the economic resources of defendants, requiring them to miss work, school, or other obligations to answer charges.[333]

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.[334] The subsequent decades instead saw a dramatic increase in state expenditures on prosecution and incarceration.[335] 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.[336] 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.[337] 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.[338] 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, substance use treatment, and access to laundry.[339] The move saved the county $113 per person, per day, on average. [340] The economic costs of disorderly conduct prosecutions cannot be ignored in assessing whether society should continue to prosecute these charges.

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[333] *See* Roberts, *supra* note 156, at 331–32 (describing the time- and cost-saving impacts in states that have decriminalized marijuana, like California and Massachusetts).

[334] MORRIS & HAWKINS, *supra* note 81, at 3–5.

[335] *See Fact Sheet: Trends in U.S. Corrections*, SENT'G PROJECT, https://www.sentencingproject.org/wp-content/uploads/2021/07/Trends-in-US-Corrections.pdf [https://perma.cc/XF59-YKXE] (May 2021) (detailing increases in expenditures on corrections, including up from $6.7 billion in 1985 to $56.6 billion in 2019).

[336] *See* Dan T. Coenen, *Freedom of Speech and the Criminal Law*, 97 B.U. L. REV. 1533, 1534 (2017) (noting that a "decriminalization movement" has been motivated in large part by the costs of the existing criminal system (quoting Logan, *supra* note 183, at 348)); Roberts, *supra* note 156, at 331–32 (explaining that "[d]riven 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 some specific misdemeanor offenses).

[337] POLICE EXEC. RSCH. F., CRITICAL ISSUES IN POLICING SERIES: THE POLICE RESPONSE TO HOMELESSNESS 10 (2018), https://www.policeforum.org/assets/PoliceResponsetoHomelessness.pdf [https://perma.cc/EM43-MSVR] (citing PORTLAND STATE UNIV, CAPSTONE CLASS UNST 421, SECTION 572, STUDY OF THE SERVICE COORDINATION TEAM AND ITS IMPACT ON CHRONIC OFFENDERS: 2017 REPORT).

[338] *Id.* at 12.

[339] *Id.*

[340] *See id.* (outlining how the average cost per inmate in jail in Pinellas County is $126 per day, while the Safe Harbor only costs an average of $13 per day, thus saving the county money).

IV. Responses to Proponents of Disorderly Conduct Laws

This Article has provided an overview and history of disorderly conduct rules, outlined their potential unconstitutionality, and explored how the laws harm people directly and indirectly by targeting certain groups and creating collateral damage. Despite this, proponents for disorderly conduct laws argue against their demise. This Part will discuss a few major arguments advocates make for these laws, explaining the theories behind the arguments and why they are insufficient. Section A addresses the arguments by proponents of order-maintenance policing, those that believe the public places should be regulated to maintain a particular standard and to act as a deterrence for worse crimes.[341] Section B responds to advocates of proactive policing who argue that allowing the police to arrest people for low-level crimes gives the police the ability to prevent future crimes proactively.[342] Section C counters academics who have concerns that failing to enforce low-level crimes could negatively impact communities by allowing for disorder to permeate.[343] Section D confronts those who favor enforcement of disorderly conduct laws as a way to generate funds.[344] Finally, Section E responds to proponents of disorderly conduct as a plea bargaining tool.[345]

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.[346] The broken windows theory of policing, discussed in Part I, Section B above, 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. . . . [T]he 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."[347]

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[341] *See infra* Part IV.A.
[342] *See infra* Part IV.B.
[343] *See infra* Part IV.C.
[344] *See infra* Part IV.D.
[345] *See infra* Part IV.E.
[346] *See* David Thacher, *Order Maintenance Policing*, *in* Oxford Handbooks in Criminology & Crim. Just., Oxford Handbook of Police and Policing 122–47 (Michael D. Reisig & Robert J. Kane eds., 2014) (outlining the theory).
[347] Ellickson, *supra* note 88, at 1174 (quoting Cox v. New Hampshire, 312 U.S. 569, 574 (1941)).

Other order-maintenance proponents invoke principles of communitarianism: community norms "establish the standards of orderly conduct[,]" and police are responsible for "enforc[ing] these norms, even at some cost to individual freedom[s] . . . ."[348]

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 because it does not actually have a causal relationship to reducing serious crime.[349] But even setting aside the question of efficacy, enforcing disorderly conduct laws—with their broad language enabling the many discretionary decisions and resulting discrimination—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[.]"[350] Some of order-maintenance policing's most prominent early proponents have retracted their support for this very reason. Tracey Meares has acknowledged that, although she was a self-described "fan" of order-maintenance policing in its early years, she grew alarmed over time as she watched how such policing played out in practice.[351] Her greatest concern was that order-maintenance policing appeared to exacerbate the racial and financial inequities that she originally hoped it would solve.[352]

Aggressive policing of disorderly conduct also detrimentally impacts respect for the 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."[353] Meares expressed this same concern in her denunciation of broken windows policing, noting that these types of policing practices

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[348] David Thacher, *Order Maintenance Reconsidered: Moving Beyond Strong Causal Reasoning*, 94 J. CRIM. L. & CRIMINOLOGY 381, 401 (2004).

[349] *See* Harcourt, *supra* note 93, at 308–39 (outlining the lack of evidence showing that the broken windows policy is an effective deterrence); Harcourt & Ludwig, *supra* note 92, at 283–87, 299–300, 315–16 (explicating upon the fact that broken windows policing has no supporting evidence); Roberts, *supra* note 89, at 794–99 (discussing the lack of evidence that order-maintenance policing caused a drop in crime); Thacher, *supra* note 348, at 384–88 (summarizing sociologists' critiques of the broken windows theory and its lack of causal relationship between order-maintenance policing and the reduction of violent crime); *see also* Jack R. Greene, *Police Field Stops: What Do We Know, and What Does It Mean?*, *in* URB. INST. JUST. POL'Y CTR., *supra* note 93, at 12, 14 (writing that enforcement strategies "aimed at order maintenance to deter serious crime, have not been supported in the research conducted to date").

[350] *See* Kelling & Wilson, *supra* note 84 (questioning how to avoid this outcome).

[351] Meares, *supra* note 93, at 611.

[352] *Id.*

[353] Tyler & Fagan, *supra* note 93, at 30.

may harm the legitimacy of the law by "undermining procedural justice of law enforcement."[354]

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.[355] Policing low-level misdemeanors involves "the arrest and conviction of people who engage in commonplace, unremarkable conduct, who may not be at all dangerous, and who have not done anything particularly bad or harmful."[356] Therefore, the theoretical justification for order-maintenance policing—that it discourages future crime—is not necessarily even accurate.[357]

Even a current proponent of order-maintenance policing has acknowledged that the behavior he supports criminalizing in certain contexts is "trivial."[358] 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.[359] Indeed, those who support law enforcement may agree that police should not enforce disorderly conduct laws because it detracts from their legitimacy and ability to effectively spend resources fighting serious crime.[360]

B. Proponents of Proactive Policing

The concept of proactive policing is subject to multiple definitions, but it is primarily grounded in the idea of reducing crime by proactively maintaining a consistent law enforcement presence in communities or places suffering from

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[354] Meares, *supra* note 93, 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 the moral impact of criminal convictions is significantly reduced when people can be convicted for conduct for behavior not widely perceived as morally culpable).

[355] *See supra* Parts I and II (providing a survey of disorderly conduct laws and discussing their questionable constitutionality); *see also* Stevenson & Mayson, *supra* note 21, at 766 (stating that misdemeanor offenses may criminalize uniformly recognized bad behavior, like shoplifting, but often criminalizes mental illness, addiction, and other "symptoms of poverty").

[356] Natapoff, *supra* note 13, at 168; *see also* Kohler-Hausmann, *supra* note 182, at 615 (writing that "[l]ower 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").

[357] *See* Gau & Brunson, *supra* note 158, at 257 (stating that "[o]rder 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").

[358] Ellickson, *supra* note 88, at 1169.

[359] Gau & Brunson, *supra* note 158, at 256.

[360] Miller, *supra* note 315, at 664 (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").

high crime rates.[361] Support for proactive policing of low-level offenses is not based on 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."[362] Stuntz explained that low-level crimes provide an advantageous, and often inexpensive, reason to arrest or search someone.[363] 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.[364]

New York City's stop and frisk program is one of the most notorious examples of proactive policing.[365] 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.[366] Although disputes remain about whether New York's stop and frisk program helped reduce crime, there is no question that people of col-

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[361] *See* Paul A. Haskins, *Research Will Shape the Future of Proactive Policing*, NAT'L INST. JUST. J., 11/2019, at 86, 88, https://www.ojp.gov/pdffiles1/nij/252736.pdf [https://perma.cc/BH43-9AN2] (reasoning that "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"); NAT'L ACADS. OF SCIS. ENG'G & MED., PROACTIVE POLICING: EFFECTS ON CRIME AND COMMUNITIES 1 (David Weisburd & Malay K. Majmundar eds., 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").

[362] Stuntz, *supra* note 82, at 539.

[363] *Id.* (noting further that minor 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" (footnote omitted)).

[364] *See, e.g.*, STUART, *supra* note 91, at 37–124 (describing "[t]he [r]ise of [t]herapeutic [p]olicing" that enables police to make arrests for minor disorderly behavior and uses the threat of jail as an opportunity to incentivize enrollment in rehabilitation programs).

[365] *See* Floyd v. City of New York, 959 F. Supp. 2d 540, 556 (S.D.N.Y. 2013) (writing that "[t]his case is about the tension between liberty and public safety in the use of a proactive policing tool called 'stop and frisk'"). *See generally* David Rudovsky & Lawrence Rosenthal, *Debate: The Constitutionality of Stop-and-Frisk in New York City*, 162 U. PA. L. REV. ONLINE 117 (2013), https://scholarship.law.upenn.edu/faculty_scholarship/590/ [https://perma.cc/C6SK-2MKC] (exploring the controversies inherent in New York's stop and frisk policy).

[366] *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).

or were its target.[367] Proactive policing of low-level offenses, for many of the same reasons as order-maintenance policing, comes at too great a cost to 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.[368] 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 and Phillip Atiba Goff have referred to as "suspicion cascades" that make negative interactions between police and people of color more likely.[369]

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 generate 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."[370] This is particularly true because Black people are more likely to live in areas of concentrated poverty, where disorder may be more likely present.[371]

Kennedy's concerns are worth treating seriously, but he raises them specifically in the context of underenforcement of crimes that create serious phys-

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[367] *Id.* at 556 (finding that the New York Police Department (NYPD) made 4.4 million stops over an eight-year period; over 80% of the people stopped were Black or Hispanic).

[368] *Id.* at 557 (calling attention to "the human toll of unconstitutional stops" and noting that [w]hile 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, *supra* note 319, at 2086 (noting the profound sense of "legal estrangement" that many poor people in communities of color suffer due to aggressive policing).

[369] L. Song Richardson & Phillip Atiba Goff, *Self-Defense and the Suspicion Heuristic*, 98 IOWA L. REV. 293, 335 (2012).

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

[371] *See generally* SOLOMON GREENE, MARGERY AUSTIN TURNER & RUTH GOUREVITCH, U.S. P'SHIP ON MOBILITY FROM POVERTY, RACIAL RESIDENTIAL SEGREGATION AND NEIGHBORHOOD DISPARITIES (2017), https://www.mobilitypartnership.org/publications/racial-residential-segregation-and-neighborhood-disparities [https://perma.cc/CKB5-GNUF] (noting that people of color generally are more likely to live in areas of high poverty); Elizabeth Kneebone & Natalie Holmes, *U.S. Concentrated Poverty in the Wake of the Great Recession*, BROOKINGS INST. (Mar. 31, 2016), https://www.brookings.edu/research/u-s-concentrated-poverty-in-the-wake-of-the-great-recession/ [https://perma.cc/8L59-X7N9] (observing statistics that reflect that Black and Hispanic peoples are more likely to live in areas of poverty).

ical threats to Black communities.[372] Whereas Kennedy demands protection for the black communities "against criminals preying upon them[,]" he also acknowledges that decriminalization may actually be a better policy for certain non-violent offenses.[373] Similarly, other Black commentators have expressed concern that they feel both overpoliced in minor crimes and under-protected for more serious crimes.[374] Monica Bell has questioned the claim that Black people in low-income communities want more policing.[375] She notes that although Black people (like everyone else) want to feel safe, policymakers and civilians alike have assumed for so long that policing is necessary to safety that we fail to consider alternatives to policing that could improve safety.[376]

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.[377] Rather than reducing crime, one recent study suggests that prosecutors' decisions not to prosecute minor crimes like disorderly conduct lead to reductions in the likelihood of new criminal complaints, with no corresponding increase in local crime rates.[378]

Incarcerating people, or even saddling them with criminal records that make their efforts to find work and stable housing more challenging, has an adverse public safety effect—people who cannot find paid work are more likely to turn to crime.[379] Robust debates can and should be had about the need for police to investigate and protect communities of color against serious crimes.

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[372] Kennedy, *supra* note 370, at 1267–68.

[373] *Id.* at 1278.

[374] *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/ [https://perma.cc/4WAM-NSU4] (offering a perspective on the problem of over-policing).

[375] *See* Monica Bell, *Black Security and the Conundrum of Policing*, JUST SEC. (July 15, 2020), https://www.justsecurity.org/71418/black-security-and-the-conundrum-of-policing/ [https://perma.cc/WRP2-899S] (presenting the generally skeptical attitude of Black people toward modern policing).

[376] *See id.* (writing that there has never been a viable alternative and asking various research questions aimed at fortifying the security of Black Americans).

[377] Holmes, *supra* note 309, at 645.

[378] *See* Amanda Y. Agan, Jennifer L. Doleac & Anna Harvey, *Misdemeanor Prosecution* 4 (Nat'l Bureau of Econ. Rsch., Working Paper No. 28600, 2021), https://www.nber.org/system/files/working_papers/w28600/w28600.pdf [https://perma.cc/3PUB-AHUC] (examining the non-prosecution of crimes, correlated with reductions in criminal complaints).

[379] Roberts, *supra* note 156, at 299–301 (explaining this phenomenon and stating that "[t]he 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" (citing JUST. POL'Y INST., SYSTEM OVERLOAD: THE COSTS OF UNDER-RESOURCING PUBLIC DEFENSE 2 (2011)).

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, policymakers should not assume that enforcement of disorderly conduct benefits communities of color.[380]

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.[381] The Department of Justice report investigating the city of Ferguson, Missouri's policing practices details the ill-conceived practice of policing low-level offenses to make money.[382] 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.[383]

Part III, Section D of this Article has already explained why the policing and prosecution of low-level offenses, with all its accompanying time and personnel commitments, acts as more of a drain on resources than a financial boon.[384] 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.

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[380] *See* Morgan, *supra* note 14, at 1642 (noting that "[t]he enforcement of disorderly conduct laws persists despite the lack of evidence showing concrete social harm[,]" and "the harms that stem from criminalizing disorderly conduct tend to outweigh the purported benefits").

[381] *See* Dick Carpenter, Ricard Pochkhanawala &Mindy Menjou, *Municipal Fines and Fees: A 50-State Survey of State Laws*, INST. FOR JUST., https://ij.org/report/fines-and-fees-home/ [https://perma.cc/78NW-EKYU] (Jan. 1, 2020) (finding that these fees can be the largest sources of income for some municipalities); MATTHEW MENENDEZ, MICHAEL F. CROWLEY, LAUREN-BROOKE EISEN & NOAH ATCHISON, BRENNAN CTR. FOR JUST., THE STEEP COSTS OF CRIMINAL JUSTICE FEES AND FINES: A FISCAL ANALYSIS OF THREE STATES AND TEN COUNTRIES (2019), https://www.brennancenter.org/sites/default/files/2020-07/2019_10_Fees%26Fines_Final.pdf [https://perma.cc/5X64-D5Z8] (finding that onerous fees for defendants helps fund local governments and judicial systems); 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. L. REV. 189, 190 (2016) (writing that as municipalities feel budgets shrink, they compensate with fines).

[382] U.S. DEP'T OF JUST. C.R. DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 9–14 (2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf [https://perma.cc/DHF5-GFED].

[383] *See id.* at 9–14, 62–81 (detailing this practice extensively).

[384] *See supra* Part III.D (arguing that disorderly conduct laws waste taxpayer money).

E. Proponents of Disorderly Conduct as a Plea Bargaining Tool

Some criminal law practitioners and 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.[385] Prosecutors sometimes offer a plea to disorderly conduct as a way of extending apparent leniency to defendants charged with more serious offenses.[386]

Despite these perceived benefits to individual defendants, retaining disorderly conduct laws because they occasionally serve as a plea bargaining tool is problematic. They do nothing to solve the greater problem of a system that relies on overcharging. If anything, they exacerbate that system. Others have written extensively about the problems of a legal system so heavily dependent on plea bargaining rather than proving charges at trial.[387] One of the ways the American legal 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.[388] 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 that could theoretically qualify as a crime of disorder.

Rather than keeping disorderly conduct laws as a plea bargaining tool, the better practice would be to stop charging people for very minor offenses: if the parties agree that a conviction for assault is not appropriate or necessary, then perhaps the best remedy is dismissal rather than a plea to disorderly conduct. Alternatively, legislatures could retain disorderly conduct laws but amend the statutes to make clear that disorderly conduct is not alone a basis for arrest or criminal citation. Although this would be an unusual remedy, it would allow prosecutors to pursue disorderly conduct as a lesser or alternative charge, but

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[385] *See* Thea Johnson, *Fictional Pleas*, 94 IND. L.J. 855, 861–62 (2019) (describing disorderly conduct as a "common . . . resolution" for low-level charges like "shoplifting or turnstile jumping").

[386] *Id.* at 882.

[387] For authors who delve into this subject matter, see H. Mitchell Caldwell, *Coercive Plea Bargaining: The Unrecognized Scourge of the Justice System*, 61 CATH. U. L. REV. 63 (2011); Russell D. Covey, *Fixed Justice: Reforming Plea Bargaining with Plea-Based Ceilings*, 82 TUL. L. REV. 1237 (2008); Kyle Graham, *Overcharging*, 11 OHIO ST. J. CRIM. L. 701 (2014).

[388] Graham, *supra* note 387, at 709 (arguing that "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" (citing Ronald F. Wright & Rodney L. Engen, *The Effects of Depth and Distance in a Criminal Code on Charging, Sentencing, and Prosecutor Power*, 84 N.C. L. REV. 1935, 1953–54 (2006))); Caldwell, *supra* note 387, at 84 (writing that "overcharging sets the stage for coercive pleas by virtue of the very leverage unduly obtained").

prevent law enforcement officers from arresting or citing people for disorderly conduct as a standalone offense.

V. ABOLISHING DISORDERLY CONDUCT LAWS

Although 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, Judge Watts bemoaned the breadth of disorderly conduct laws and cautioned judges to "interpret disorderly conduct statutes with a view toward due process specificity . . . ."[389] In 1997, Debra Livingston questioned whether criminal prosecutions were an appropriate means of addressing minor offenses that were generally harmless, even if annoying.[390] Most recently, Jamelia Morgan has called on lawyers to rethink the use of disorderly conduct statutes to punish minor offenders.[391] 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.[392] Many agree that laws giving police officers and prosecutors substantial discretion over whom to charge and punish invites discriminatory enforcement.[393] Stuntz has argued that the best way to reduce discretion is to reduce the scope of the codes themselves.[394]

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[389] Watts, *supra* note 155, at 358.

[390] Livingston, *supra* note 82, at 586–87 (providing examples of multiple scholars writing in the 1960s, who support this theory).

[391] Morgan, *supra* note 14, at 1637 (entitling her article "Rethinking Disorderly Conduct").

[392] *E.g.*, Natapoff, *supra* note 10, at 1314 (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); Shon Hopwood, Essay, *The Effort to Reform the Federal Criminal Justice System*, 128 YALE L.J. F. 791, 800–04 (2019), https://www.yalelawjournal.org/pdf/Hopwood_evjni3rp.pdf [https://perma.cc/KKC3-R2PY] (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).

[393] *E.g.*, Stuntz, *supra* note 82, at 579 (critiquing "a system in which too much law produces too much discretion" (emphasis omitted)); David Thacher, *Channeling Police Discretion: The Hidden Potential of Focused Deterrence*, 2016 U. CHI. LEGAL F. 533, 535 (arguing that "[t]he arbitrary and intensive use of [police discretion] contributes to many of the most significant concerns about American criminal justice today").

[394] Stuntz, *supra* note 292, at 1893; David Alan Sklansky, *The Nature and Function of Prosecutorial Power*, 106 J. CRIM. L. & CRIMINOLOGY 473, 474 (2016) (decrying that "[m]uch of what is wrong with American criminal justice—its racial inequity, its excessive severity, its propensity for error—is increasingly blamed on prosecutors").

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.[395] The Minneapolis City Council voted to strike ordinances that prohibit "spitting and lurking" in part due to their disparate enforcement against people of color.[396] In 2020, Oregon became the first state to decriminalize possession of small amounts of "hard" drugs like cocaine and heroin.[397] Some prosecutors have also taken matters into their own hands, declining to prosecute specified non-violent misdemeanors.[398]

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.[399] In her first critique of misdemeanor prosecutions, Alexandra Natapoff suggested making certain misdemeanor offenses "nonarrestable as well as nonjailable."[400] More recently Natapoff acknowledged that many disorder-related offenses "only weakly justify state coercion" because the crimes

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[395] *See 2021 Marijuana Policy Reform Legislation*, MARIJUANA POL'Y PROJECT, https://www.mpp.org/issues/legislation/key-marijuana-policy-reform/ [https://perma.cc/2JM9-HVCG] (June 22, 2021) (cataloging marijuana decriminalization efforts across the states and providing an overview of decriminalizing legislation); *see also* Logan, *supra* note 183, at 320 (noting that state legislatures are increasingly willing "to shrink their criminal codes and decriminalize conduct once classified as criminal"); Roberts, *supra* note 156, at 299 (explaining the outsize impact of a marijuana conviction, like students losing federal loan assistance for a year); Stevenson & Mayson, *supra* note 21, at 767 (mentioning that decriminalization has attracted attention, including with "efforts to decriminalize the possession of marijuana").

[396] Brandt Williams, *Minneapolis Strikes Spitting, Lurking Laws*, MPR NEWS (June 6, 2015), https://www.mprnews.org/story/2015/06/05/lurking-spitting-laws [https://perma.cc/5XWT-AXUC]; *see also* PROVO, UTAH, CODE § 9.17.010 (2013) (expressing an intention to decriminalize a variety of minor municipal offenses).

[397] Amelia Templeton, *Oregon Becomes 1st State in the US to Decriminalize Drug Possession*, OR. PUB. BROAD., https://www.opb.org/article/2020/11/04/oregon-measure-110-decriminalize-drugs/ [https://perma.cc/5RDQ-8SXD] (Nov. 4, 2020).

[398] *See, e.g.*, SUFFOLK CNTY. DIST. ATT'Y, THE RACHAEL ROLLINS POLICY MEMO 5 (2019), http://files.suffolkdistrictattorney.com/The-Rachael-Rollins-Policy-Memo.pdf [https://perma.cc/WCB5-P7PZ] (announcing that the Suffolk County District Attorney in Massachusetts will decline to prosecute disorderly conduct and other minor misdemeanors because "a carceral approach to low-level, non-violent offenses can do more harm than good").

[399] *See, e.g.*, Buchhandler-Raphael, *supra* note 23, at 1671 (criticizing broadly worded statutes that criminalize potentially constitutional speech); Coenen, *supra* note 336, at 1588–1602 (proposing various avenues for decriminalizing speech-based criminal laws); Luna, *supra* note 318, at 704–06 (bemoaning and providing examples of the expansion of criminal laws that allows arrests for relatively harmless conduct); Stuntz, *supra* note 82, at 519 (criticizing the expansion of criminal law, in part because they "shift lawmaking from courts to law enforcers").

[400] Natapoff, *supra* note 10, at 1374. Stephanos Bibas has leveled this proposal "surprisingly halfhearted." Stephanos Bibas, *Bulk Misdemeanor Justice*, 85 S. CAL. L. REV. POSTSCRIPT 73, 74 (2012).

themselves are not serious.[401] Carbado has criticized the criminalization of relatively harmless conduct, and the negative impact of misdemeanor enforcement on Black communities in particular.[402] Bell has proposed "[s]hrinking [and] [r]efining the [f]ootprint of the [p]olice" by reducing "the carceral net."[403] In the wake of Minneapolis police officers killing George Floyd, some scholars and prominent organizations even turned to Twitter to advocate for abolishing low-level offenses.[404]

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 "in an era of mass criminalization characterized by over-policing in public spaces."[405] Although many of this Article's criticisms are applicable to other low-level offenses, disorderly conduct laws are perhaps the most problematic of all.

As Bernard Harcourt noted, "[o]nce the category [of the disorderly] is in place, there is little else to do but crack down on the disorderly."[406] Police and prosecutors have been cracking down on disorderly conduct for far too long, and those crackdowns have created more harm than good.[407] 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

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[401] Natapoff, *supra* note 314, at 1695. Natapoff also states that "crime-control justifications are at their weakest" when the alleged crime "is not particularly weighty[.]" *Id.*; *see also* Natapoff, *supra* note 13, at 152 (suggesting that misdemeanors "offer an especially fertile space to grapple with abolitionist ideas").

[402] Carbado, *supra* note 307, at 1487; *see also* Artika Tyner & Darlene Fry, *Iron Shackles to Invisible Chains: Breaking the Binds of Collateral Consequences*, 49 U. BALT. L. REV. 357, 365–68 (2020) (detailing disparities in the way Black people are arrested, charged, and sentenced in the United States criminal legal system).

[403] Bell, *supra* note 319, at 2147–48.

[404] *See* ACLU (@ACLU), TWITTER (Apr. 12, 2021, 1:23 PM), https://twitter.com/ACLU/status/1381659268370284550 [https://perma.cc/N5CF-44F9] (arguing that "[w]e must end the criminal enforcement of low-level offenses"); Tracey Meares (@mearest), TWITTER (June 4, 2020, 1:38 PM), https://twitter.com/mearest/status/1268598025141858306 [https://perma.cc/6W6J-FXCY] (stating "[t]he proliferation of laws and minor offense ordinances are not the fault of police. YOUR MOVE LEGISLATURES and CITY COUNCILS").

[405] Morgan, *supra* note 14, at 1657.

[406] Harcourt, *supra* note 93, at 298.

[407] *See supra* Parts I–III (providing an overview of disorderly conduct laws and their lack of constitutionality, as well as discussing the other harms their enforcement causes).

nothing."[408] But when "doing nothing" is less harmful than the alternative, we need to seriously consider that option. This author is 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.

[408] PACKER, *supra* note 180, at 259.