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Policing Protest: Speech, Space, Crime, and the Jury

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ABSTRACT. Speech is more than just an individual right—it can serve as a catalyst for democratically driven revolution and reform, particularly for minority or marginalized positions. In the past decade, the nation has experienced a rise in mass protests. However, dissent and disobedience in the form of such protests is not without consequences. While the First Amendment promises broad rights of speech and assembly, these rights are not absolute. Criminal law regularly curtails such rights—either by directly regulating speech as speech or by imposing incidental burdens on speech as it seeks to promote other state interests. This Feature examines how criminal statutes and ordinances adversely affect marginalized or dissenting speech. Despite their general classification as constitutionally permissible time, place, and manner restrictions, this Feature concludes that enforcement of such statutes contributes to a subordinating First Amendment landscape, disproportionately burdening some speakers and some messages more than others.

To address these concerns, this Feature makes two critical normative claims. First, scholars and courts alike have failed to prioritize access to spaces properly. This, in turn, carries a second normative claim: the current consideration of access to space as a forum of speech ignores the reality that presence, at times, is the message. To force a speaker to an alternative forum through the enforcement of criminal law is effectively to regulate the message out of existence. Finally, this Feature proposes a novel First Amendment defense when criminal charges implicate the defendant's speech activity. This proposed defense provides a mechanism to vindicate the overlooked First Amendment consequences of such charges and empower citizen jurors to engage in community-based decision-making about the value of speech.

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INTRODUCTION

Speech is a component of democratic processes in the United States. Whatever debate may exist around the First Amendment's history or its, at times, confounding jurisprudence, the proposition that expression matters to our democracy seems uncontested. [1] Admittedly, not all communication may drive democratic engagement. The promise of whiter teeth or hastily scrawled professions of love on gas-station bathroom doors may not move the body politic toward change. Yet, other speech may serve both as a means to inform and drive accurate representation in formal democratic institutions and a mechanism of direct participation in which those who live under the law may push back on its application and enforcement in their realm.[2]

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1. *See, e.g.*, Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 576 U.S. 200, 207 (2015) ("[T]he Free Speech Clause helps produce informed opinions among members of the public, who are then able to influence the choices of government that, through words and deeds, will reflect its electoral mandate."); Citizens United v. FEC, 558 U.S. 310, 340 (2010) ("Speech is an essential mechanism of democracy."); Buckley v. Valeo, 424 U.S. 1, 48-49 (1976) (describing the value of free speech to democratic principles); Stromberg v. California, 283 U.S. 359, 369 (1931) ("The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people . . . is a fundamental principle to our constitutional system."); ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWER OF THE PEOPLE 27 (1979) ("The principle of the freedom of speech springs from the necessities of the program of self-government."); Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and* Hustler Magazine v. Falwell, 103 HARV. L. REV. 601, 670 (1990) [hereinafter Post, *Public Discourse*] (noting the role of speech in deliberative democratic moments). For a discussion of confounding doctrine, see, for example, David M. Rabban, *The Emergence of Modern First Amendment Doctrine*, 50 U. CHI. L. REV. 1205, 1208-13 (1983), which describes shifts in First Amendment doctrine before and after World War I; and Robert Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1249-50 (1995) [hereinafter Post, *Recuperating*], which notes that "contemporary First Amendment doctrine is nevertheless striking chiefly for its superficiality, its internal incoherence, its distressing failure to facilitate constructive judicial engagement with significant contemporary social issues connected with freedom of speech."

2. *See* ROBERT C. POST, CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT, 270-75 (1995) (noting that speech is not just a means to contest policy but also how the democracy operates); Post, *Recuperating*, *supra* note 1, at 1271-72 (describing speech as a means to inform and to shape social values and institutions); Ashutosh Bhagwat, *Details: Specific Facts and the First Amendment*, 86 S. CALIF. L. REV. 1, 33-35 (2012) (discussing cases that center a democratic function of speech); James Weinstein, *Participatory Democracy as the Central Value of American Free Speech Doctrine*, 97 VA. L. REV. 491, 493-97 (2011) (noting that free speech advances self-governance not only through creation of consensus but also by creating spaces for dissent). Professor Ashutosh Bhagwat urges a slight variation on this claim, arguing that a "democratic First Amendment" ought to be a broadly conceived one in which discourse—flowing from freedom of speech and press—combines with rights of assembly, association, and petition to promote social change and citizen engagement. *See* Ashutosh

This democratically vital speech need not be formal or even civil. From John Peter Zenger's closing argument in his trial for seditious libel that helped fuel a revolution,[3] to marches on Washington and Selma that pushed forward civil rights[4] and voting-rights legislation,[5] to graffiti tags that marked gentrification's displacement of diasporas in major cities,[6] to protests for social justice and policing reform following the murders of Michael Brown, Eric Garner, George Floyd, Breonna Taylor, Ahmaud Arbery, and beyond, speech in a variety of forms has driven revolutions and change.[7]

Bhagwat, *The Democratic First Amendment*, 110 NW. U. L. REV. 1097, 1117-18 (2016). Even as this Feature in later Parts defines presence as speech, such a claim does not preclude broader consideration of the regulation of protest and dissent as impinging on other First Amendment rights. *See infra* note 264 and accompanying text.

John Peter Zenger's case is often cited as an example of jury nullification. *See, e.g.*, Jenny E. Carroll, *The Jury's Second Coming*, 100 GEO. L.J. 657, 674-75 (2011). Embedded in this call for nullification, Zenger's defense also urged resistance and defense of colonial speech rights even in the face of law that prohibited it. *See* Albert W. Alschuler & Andrew G. Deiss, *A Brief History of Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 872-74 (1994) (describing Zenger's trial in detail). Zenger was a printer of the *New York Weekly Journal*. Carroll, *supra*, at 668. In 1735, he was tried for seditious libel after publishing articles alleging corruption by New York's colonial royal governor. *Id.* The court found as a matter of law that those articles met the definition of seditious libel, essentially directing a verdict of guilt. *Id.* Zenger's counsel, however, argued to the jury that truth ought to be a defense to the charge or, in the alternative, the colonial jurors could determine whether or not the law ought to apply in this case. *Id.* at 668-

In doing so, Zenger's defense urged the jury to find the application of the law as the court had described to be unjust. *Id.* at 669.

See Kenneth W. Mack, *Foreword: A Short Biography of the Civil Rights Act of 1964*, 67 SMU L. REV. 229, 229-30 (2014) (noting that the Civil Rights Act of 1964 and the Voting Rights Act of 1965 were the products of protest and civic engagement, including marches on Washington in 1963 and in Selma, Alabama, in 1965).

See JACK BASS, TAMING THE STORM: THE LIFE AND TIMES OF JUDGE FRANK M. JOHNSON, JR., AND THE SOUTH'S FIGHT OVER CIVIL RIGHTS 236-37 (1993) (quoting Dr. Martin Luther King, Jr. as saying, "We are going to bring a voting bill into being in the streets of Selma"). For descriptions of the Selma marches and their role in shaping legislation, see, for example, RONALD J. KROTOSZYNSKI, JR., RECLAIMING THE PETITION CLAUSE: SEDITIOUS LIBEL, "OFFENSIVE" PROTESTS, AND THE RIGHT TO PETITION THE GOVERNMENT FOR REDRESS OF GRIEVANCES 3 (2012).

See TRICIA ROSE, BLACK NOISE: RAP MUSIC AND BLACK CULTURE IN CONTEMPORARY AMERICA 33-36 (1994) (chronicling the role of graffiti in pushing back on gentrification and urban revitalization in New York City in the 1970s and 1980s); Jenny E. Carroll, *Graffiti, Speech, and Crime*, 103 MINN. L. REV. 1285, 1297-98 (2018) (describing graffiti's role in marking the presence of displaced communities).

For a description of these protests and their impact on public opinion and reform efforts, see, for example, Audra D.S. Burch, Weiyi Cai, Gabriel Gianordoli, Morrigan McCarthy & Jugal Patel, *How Black Lives Matter Reached Every Corner of America*, N.Y. TIMES (June 13, 2020), https://www.nytimes.com/interactive/2020/06/13/us/george-floyd-protests-cities-photos.html

Democratic significance, however, does not guarantee speech or speakers constitutional protection.[8] Consider participants in the Watts Uprising of 1965 who both communicated dissatisfaction with policing policies and contributed to grassroots efforts that remain ongoing nearly sixty years later to reform criminal-legal and law-enforcement systems.[9] Yet, even as they engaged in vitally democratic acts of communicating dissent and urging change, participants may have neither expected nor received First Amendment protection for their efforts even if they had tried to claim it.[10] In fact, regulation of speech and speakers is common and often accepted as necessary and appropriate to maintain social order. Criminal law is a mechanism through which much of this regulation occurs.[11] Despite its commonality and acceptance, questions linger: who decides

photos.html [https://perma.cc/KK2Y-SCZM]. Protests following the murder of George Floyd galvanized many reform efforts. For descriptions of these efforts, see, for example, Michael Tesler, *The Floyd Protests Have Changed Public Opinion About Race and Policing*, WASH. POST (June 9, 2020), https://www.washingtonpost.com/politics/2020/06/09/floyd-protests-have-changed-public-opinion-about-race-policing-heres-data [https://perma.cc/T83U-LNJD]; Brad Brooks, *Citizens Lead the Call for Police Reform Since George Floyd's Death*, REUTERS (Apr. 13, 2021), https://www.reuters.com/world/us/protesting-shaping-police-reform-citizens-lead-way-since-george-floyds-death-2021-04-13 [https://perma.cc/5NV3-WSNW]; Ram Subramanian & Leily Arzy, *State Policing Reforms Since George Floyd's Murder*, BRENNAN CTR. FOR JUST. (May 21, 2021), https://www.brennancenter.org/our-work/research-reports/state-policing-reforms-george-floyds-murder [https://perma.cc/3DQG-F694]; and Patrick McGreevy, *Gov. Newson Approves Sweeping Reforms to Law Enforcement in California*, L.A. TIMES (Sept. 30, 2021), https://www.latimes.com/california/story/2021-09-30/newsom-approves-sweeping-changes-to-californias-criminal-justice-system [https://perma.cc/AB68-UMCW].

8. Genevieve Lakier, *The Invention of Low Value Speech*, 128 HARV. L. REV. 2160, 2168, 2170-79 (2015) (tracking the judicial creation of low-value speech, including commercial speech, obscenity, and "fighting words").

9. For a description of the underlying causes of the Watts Uprising, see MIKE DAVIS & JON WIENER, SET THE NIGHT ON FIRE: L.A. IN THE SIXTIES 203-225 (2021); and GERALD HORNE, FIRE THIS TIME: THE WATTS UPRISING AND THE 1960S, at 43-63 (1995).

10. Participants in the Watts Uprisings may have suspected that their activity would not be protected even before the uprising escalated into mass action that included assaultive behavior and theft. *See* HORNE, *supra* note 9, at 64-78.

11. Indeed, some of the most famous free-speech cases came to the Court as challenges to criminal convictions. *See, e.g.*, Schenck v. United States, 249 U.S. 47, 48-49 (1919) (contesting a conviction for attempting and conspiring to incite and "cause insubordination in the military and naval forces of the United States, and to obstruct the recruiting and enlistment service of the United States"); Stromberg v. California, 283 U.S. 532, 532-33 (1931) (challenging a conviction for unlawful display of a red flag in a public place as "a sign, symbol or emblem of opposition to organized government as an invitation or stimulus to anarchistic action" (quoting CAL. PENAL CODE § 403a)); Cantwell v. Connecticut, 310 U.S. 296, 300-01 (1940) (challenging a conviction for disorderly conduct and improper solicitation of funds); Chaplinsky v. New Hampshire, 315 U.S. 568, 569-70 (1942) (challenging a conviction for use of offensive

what speech deserves First Amendment protection and, if the communicative act falls outside of that protected category, when may enforcement of criminal statutes impede it?

Courts applying First Amendment doctrine and free-speech scholars alike tend to relegate this decision-making power to judicial actors alone, reserving questions of constitutional protection for pretrial litigation.[12] There is a logic to this relegation. Such claims may raise questions of law that require judicial interpretation.[13] Beyond this, given the complexity and ever-shifting nature of First Amendment jurisprudence,[14] professional decision makers may be better suited to parse the legal issues each case presents.[15] Yet, to rely on judicial actors alone to set the boundaries of First Amendment protection is to risk the creation of First Amendment doctrines at odds with the very democratic principles they purport to embody and the very people who might rely on First Amendment protections to speak at all. It is to risk the construction of a formalistic doctrine that ignores the functional realities of its implementation—that some speech and some speakers simply lose their rights.

This Feature pushes back against the notion that decisions about the scope of First Amendment protection in the face of criminal charges ought to rest with formal actors alone. Instead, this Feature argues that defendants, arrested and charged in the course of communicative activity, ought to have the opportunity to present a First Amendment defense—a claim that the value of their speech outweighs whatever interests enforcement of the criminal law might promote. Such a defense is distinct from current practice and scholarly treatment of First Amendment concerns that intersect with criminal law. In the courtroom, defendants raise First Amendment issues either as a defense that hinges on a factual finding that the State has failed to meet its burden of proof with regard to a

language in a public place); Brandenburg v. Ohio, 395 U.S. 444, 448 (1969) (challenging a conviction under Ohio's Criminal Syndicalism Act). For a more general discussion of the criminalization of speech, see, for example, TIMOTHY ZICK, THE DYNAMIC FREE SPEECH CLAUSE: FREE SPEECH AND ITS RELATION TO OTHER CONSTITUTIONAL RIGHTS, at xi (2018); and Lakier, *supra* note 8, at 2186-92.

12. *See infra* notes 53-101, 187-253 and accompanying text.

13. *See* Neder v. United States, 527 U.S. 1, 14 (1999) (noting that questions of law—here, materiality—were "for the court, not the jury"). *But see* United States v. Gaudin, 515 U.S. 506, 518-19 (1999) (holding that when the materiality of a statement is an element of an offense, the question must be presented to the jury to resolve).

14. As Professor Genevieve Lakier notes, First Amendment jurisprudence has shifted with the Court's composition. Lakier, *supra* note 8, at 2168-69.

15. *See* Post, *Recuperating*, supra note 1, at 1272 (noting the challenges of constructing and understanding a coherent First Amendment doctrine); Genevieve Lakier, *Imagining an Antisubordinating First Amendment*, 118 COLUM. L. REV. 2117, 2121 (2018) (arguing that modern First Amendment jurisprudence is highly formalistic and unintuitive).

particular element[16] or, more commonly, in pretrial motions that contest the constitutionality of the law itself.[17] These motions allow a court to decide, as a matter of law, whether a regulation is constitutional. And, unlike their defense counterparts, these facial challenges avoid or minimize factual analysis. A court may find that a law is overly broad, void for vagueness, or runs afoul of First Amendment doctrine, regardless of how or to whom it is applied.

Such First Amendment defenses are consistent with other constitutional defenses.[18] Defendants can and do raise facial due-process challenges under the Fifth and Fourteenth Amendments to the overbreadth or vagueness of regulations. Defendants may also raise fact-specific or as-applied challenges that are distinct from questions of factual guilt. For example, a defendant may challenge prosecution as a violation of the Double Jeopardy Clause,[19] the Equal Protection Clause,[20] or the Ex Post Facto Clause.[21] They may move to suppress the evidence used to support the allegations that was obtained in violation of the defendant's Fourth, Fifth, or Fourteenth Amendment rights. For their part, judges adjudicate each of these constitutional claims, rendering legal decisions about the constitutional validity of the law or the evidence. In the end, even as these defenses challenge the constitutionality of the State's actions, like their First Amendment counterparts, they do not raise questions jurors decide, nor do they ask the fact finder to weigh the value of the right at stake against the State's interest in prosecution.

In contrast, the First Amendment defense this Feature contemplates allows the accused to challenge the application of the law — even a facially constitutional

16. Such instructions urge the jury to draw a distinction between mere speech, which is protected, and speech that falls outside of the First Amendment's protective purview because it incites or encourages others to engage in criminal activity. *See, e.g.*, United States v. Freeman, 761 F.2d 549, 551-52 (9th Cir. 1985) (holding that the defendant was entitled to a First Amendment jury instruction on some counts of his indictment and that, in order to convict, the government needed to prove that Freeman had incited or encouraged tax evasion or fraud with his speech); *Brandenburg*, 395 U.S. at 447-48 (holding that, to survive First Amendment scrutiny, a criminal-syndication statute required proof that the defendant had incited or encouraged others to engage in the prohibited conduct with his speech).

17. *See, e.g.*, Schenck v. United States, 249 U.S. 47, 48-49 (1919) (challenging the constitutionality of statutes as a matter of law pretrial and later on appeal); Stromberg v. California, 283 U.S. 532, 532-33 (1931) (same); Cantwell v. Connecticut, 310 U.S. 296, 300-01 (1940) (same); Chaplinsky v. New Hampshire, 315 U.S. 568, 569-70 (1942) (same); *Brandenburg*, 395 U.S. at 448 (same); Walker v. City of Birmingham, 388 U.S. 307, 321 (1967) (same); Shuttlesworth v. City of Birmingham, 394 U.S. 147, 150 (1968) (same).

18. *See infra* notes 350-366 and accompanying text.

19. U.S. CONST. amend. V.

20. *Id.* amend. XIV.

21. *Id.* art. I, § 9, cl. 3.

one—and urges the fact finder to serve as arbitrator between the interests the State seeks to preserve through enforcement of law and the speech rights sacrificed by such enforcement. This defense promotes democratic objectives in a variety of ways by vesting decision-making power in the very body who must live under the resulting, albeit limited, construction of law: the community. First, it allows the defendant the opportunity to present a distinct counternarrative to the State's accusation in the case-in-chief (as opposed to raising a failure-of-proof defense or a pretrial challenge) and to stake a constitutional value to their communicative efforts, even if their counternarrative is ultimately rejected. Second, it shifts the terms of the constitutional analysis. Instead of formal actors—whether executive actors prior to a charge, or a judicial actor after a charge—addressing the facial or as-applied constitutionality of a statute, this defense empowers the citizen jury to determine what application of law resonates with their own communal values and what is discordant.[22] In the case of bench trials, the defense allows the judge, sitting not as arbiter of law, but as a fact finder, to make the same determination.[23] In doing this, the defense not only reconstructs First Amendment doctrine on a case-by-case basis around community values, but also deconstructs the current First Amendment landscape that subordinates marginalized speakers' rights to competing State interests in preserving private property and public order.

Admittedly, the defense will, at times, fail, as all criminal defenses do. Fact finders—whether juror or judge—may reject claims based on bias or majoritarian ideals that suppress dissenting perspectives.[24] Some acts and some actors will

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22. As recently as last year, the Court recognized the democratic value of juror decision-making in *Flowers v. Mississippi*. There, Justice Kavanaugh, writing for the majority, noted that "[o]ther than voting, serving on a jury is the most substantial opportunity that most citizens have to participate in the democratic process." Flowers v. Mississippi, 139 S. Ct. 2228, 2238 (2019).

23. In the context of judicial decision-making, legal realists have long urged judges to consider the effect of law in reaching their verdict. *See, e.g.*, Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 609-10 (1908) (urging "adjustment of [legal] principles and doctrines to the human conditions they are to govern rather than to assumed first principles"). Under this view, judges sitting as a fact finder must sit as a sort of juror substitute—bringing community interests and values into their assessment of culpability.

24. *See* Peña-Rodriguez v. Colorado, 580 U.S. 206, 223 (2017) ("[D]iscrimination on the basis of race, 'odious in all aspects, is especially pernicious in the administration of justice[]' . . . ." (quoting Rose v. Mitchell, 443 U.S. 545, 555 (1979))); Jody Armour, *Stereotypes and Prejudice: Helping Legal Decisionmakers Break the Prejudice Habit*, 83 CALIF. L. REV. 733, 739 (1995) (describing the effect of stereotypes on decision maker bias); Samuel R. Sommers & Phoebe C. Ellsworth, *How Much Do We Really Know About Race and Juries? A Review of Social Science Theory and Research*, 78 CHI.-KENT L. REV. 997, 997-98 (2003) (reviewing studies of juror bias); Jennifer S. Hunt, *Race, Ethnicity, and Culture in Jury Decision Making*, 11 ANN. REV. L.

remain so discordant with communal values that the fact finder will reject the defense. The juror or judge will balance the harm caused by the communication with the harm of suppressing the speech and ultimately vote to convict. For those who throw sticks and stones to communicate, this defense may offer little shelter and may result in conviction.

For others, the rejection will be more personal. The fact finder will reject the speaker themselves and convict based on bias.[25] While this is a disturbing result, it too is not inconsistent with current systems in which individual bias may inform a myriad of discretionary decisions from arrest to prosecution to conviction to sentence.[26] In the context of juries, this concern may raise questions about

& Soc. Sci. 269, 270, 273 (2015) (noting that studies of juror bias have concluded that "the race and ethnicity of defendants, victims, and jurors can impact outcomes of criminal trials"); Jerry Kang, Mark Bennett, Devon Carbado, Pam Casey, Nilanjana Dasgupta, David Faigman, Rachel Godsil, Anthony G. Greenwald, Justin Levinson & Jennifer Mnookin, *Implicit Bias in the Courtroom*, 59 UCLA L. Rev. 1124, 1132 (2012) (noting the effect of juror implicit bias on verdicts).

25. *See* Hunt, *supra* note 24, at 273.

26. There is a broad trove of literature describing discretion and bias within criminal legal systems. For a small sampling, see, for example, Radley Balko, *There's Overwhelming Evidence That the Criminal Justice System Is Racist. Here's the Proof*, Wash. Post (June 10, 2020), https://www.washingtonpost.com/graphics/2020/opinions/systemic-racism-police-evidence-criminal-justice-system [https://perma.cc/HQS2-KQGA], which notes that Black drivers are more likely to be stopped in traffic stops than are white drivers and more likely, once stopped, to be arrested; Alice Ristroph, *The Thin Blue Line from Crime to Punishment*, 108 J. Crim. L. & Criminology 305, 327 (2018), which argues that "[w]ith discretion, of course, comes the potential for discrimination. It is all too well established that police and prosecutorial discretion yield patterns of racially disparate treatment, in which minorities are more likely to receive the greatest investigative scrutiny, the most serious charges, and the heaviest penalties"; Carlos Berdejó, *Criminalizing Race: Racial Disparities in Plea-Bargaining*, 59 B.C. L. Rev. 1187, 1231-38 (2018), which describes the impact of racial and ethnic bias in prosecutorial plea offers and bargaining; Joe Soss & Vesla Weaver, *Police Are Our Government: Politics, Political Science, and the Policing of Race-Class Subjugated Communities*, 20 Ann. Rev. Pol. Sci. 565, 571-72 (2017), which describes studies showing that high-volume stops and arrests on low-level offenses are weakly correlated with crime but strongly correlated with race and socioeconomic class; Paul Butler, *The System Is Working the Way It Is Supposed to: The Limits of Criminal Justice Reform*, 104 Geo. L.J. 1419, 1455 (2016), which notes that perceptions of dangerousness based on race affect discretionary decision-making from arrest to sentencing; Traci Schlesinger, *Racial Disparities in Pretrial Diversion: An Analysis of Outcomes Among Men Charged with Felonies and Processed in State Courts*, 3 Race & Just. 210, 215 (2013), which finds that "when asked to match photos of criminals to the crimes they committed, people match photos of Black men to violent crimes. These findings suggest that Americans associate Black men not only with criminality generally but also with violence in particular;" and Justin D. Levinson, Danielle M. Young & Laurie A. Rudman, *Implicit Racial Bias: A Social Science Overview*, *in* Implicit Racial Bias Across the Law 9, 10-11 (Justin D. Levinson & Robert J. Smith eds., 2012), which describes studies documenting racial bias in criminal legal systems. For a description of the lived experience of this bias, see Jay-Z, *99 Problems*, *on* The Black

jury composition.[27] However, it does not alone undermine the value of the defense as a mechanism to allow fact finders to render application of law consistent with community values.[28] Nor would recognizing such a defense to a criminal charge eliminate the defendant's ability to raise a failure-of-proof defense or constitutional claims pretrial or to appeal a conviction. Rather, the defense offers an opportunity for a populist construction of First Amendment rights consistent with the original role of the jury in criminal legal systems in the United States.[29]

Current First Amendment doctrine highlights the need for a such a defense. Free-speech jurisprudence divides relevant regulations between those that regulate speech for its content—directly targeting what is said and denying

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ALBUM (Roc-a-Fella Records 2004), which details, "So I pull over to the side of the road / I heard, 'Son do you know why I'm stopping you for?' / 'Cause I'm young and I'm [B]lack and my hat's real low / Do I look like a mind reader sir? I don't know."

27. It is well established that the composition of the jury can affect decision-making. *See, e.g.*, David C. Baldus, George Woodworth, David Zuckerman, Neil Alan Weiner & Barbara Broffitt, *The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis*, 3 U. PA. J. CONST. L. 3, 124-25 (2001); Ann M. Eisenberg, Amelia Courtney Hritz, Caisa Elizabeth Royer & John H. Blume, *If It Walks Like Systematic Exclusion and Quacks Like Systematic Exclusion: Follow-Up on Removal of Women and African-Americans in Jury Selection in South Carolina Capital Cases, 1997-2014*, 68 S.C. L. REV. 373, 376-77 (2017); Catherine M. Grosso & Barbara O'Brien, *A Stubborn Legacy: The Overwhelming Importance of Race in Jury Selection in 173 Post*-Batson *North Carolina Capital Trials*, 97 IOWA L. REV. 1531, 1533, 1535-36, 1550-56 (2012). Similar concerns could be raised around judicial fact finders. The composition of the judiciary and bias of judges may create bias. *See* Allison P. Harris & Maya Sen, *Bias and Judging*, 22 ANN. REV. POLI. SCI 241, 253 (2019) (finding that "judges' backgrounds—including their race, gender, ethnicity, and religion—shape their decision-making"). Interestingly, Harris and Sen concluded that judicial ideology, as opposed to the judge's race or gender identity, had the greatest impact on individual decision-making, though, as an aggregate, other factors did appear to influence the judiciary as a whole. *Id.* at 242-45.

28. The Court has repeatedly described the jury as serving a critical function to check improper application of law. *See, e.g.*, Taylor v. Louisiana, 419 U.S. 522, 530 (1975) ("The purpose of a jury is to guard against the exercise of arbitrary power—to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge."); Duncan v. Louisiana, 391 U.S. 145, 155 (1968) ("A right to jury trial is granted . . . to prevent oppression.").

29. *See* Apprendi v. New Jersey, 530 U.S. 466, 477 (2000) (quoting 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES: WITH A PRELIMINARY REVIEW OF THE CONSTITUTIONAL HISTORY OF THE COLONIES AND STATES BEFORE THE ADOPTION OF THE CONSTITUTION 540-41 (Boston, Little, Brown & Co. 4th ed. 1873)) (describing the role of the jury to "guard against a spirit of oppression and tyranny on the part of rulers" and to function "as the great bulwark of [our] civil and political liberties"); Blakely v. Washington, 542 U.S. 296, 306-07 (2004) (rejecting a limit on the jury's role by noting that "[t]he jury could not function as circuitbreaker in the State's machinery of justice if it were relegated to making a determination that the defendant at some point did something wrong, a mere preliminary to a judicial inquisition into the facts of the crime the State *actually* seeks to punish").

protection for low-value speech (such as obscenity and fighting words)[30]—and those that incidentally burden speech by regulating how, when, or where the communication occurs.[31] The latter regulations, also known as time, place, and manner restrictions, are constitutional "provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant government interest, and that they leave open ample alternative channels for communication of the information."[32]

The Court's adoption of this bifurcated speech jurisprudence, between regulation of speech content and regulation of speech methodology, renders access to forums of speech especially critical to constitutional protection. This regime entwines the ability to control the spaces in which speech occurs with the ability to engage in communication. Access to forums of speech may afford refuge to even low-value speech while lack of such access may consign ordinarily protected speech to locations that render it all but silent. The resulting First Amendment landscape is decidedly uneven.[33] Well-resourced speech enjoys ever-expanding protections as the Court moves toward a construction of free speech that eschews substantively equalizing principles.[34] For less well-resourced speakers, access to speech forums may be limited at best and illusory at worst, as criminal statutes and ordinances regulate that access on purportedly content-neutral grounds. The result is that, for some speakers, the distinction between direct content regulation of speech and time, place, and manner restrictions is a false one. For these marginalized speakers, both categories of regulation serve a common purpose—to exclude some speakers and, as a result, some messages.

In urging a First Amendment defense to criminal charges stemming from communicative acts, this Feature also urges reconsideration of this distinction. Criminal laws' regulation of access to spaces is, for some speakers, more than a mere incidental burden. It is entwined with individual speech rights, and it carries implications for speech content. To borrow Timothy Zick's phrase, for some

30. *See* Lakier, *supra* note 8, at 2186-92.

31. *See* Brandenburg v. Ohio, 395 U.S. 444, 455-56 (1969) (Douglas, J., concurring) (noting that the Court had repeatedly defined picketing as "free speech plus" and permitted regulation of "the number of pickets and the place and hours," even as it declined to regulate their content because "traffic and other community problems would otherwise suffer"); Michael Anthony Lawrence, *Government as Liberty's Servant: The "Reasonable Time, Place, and Manner" Standard of Review for All Government Restrictions on Liberty Interests*, 68 LA. L. REV. 1, 48 (2007).

32. Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984).

33. *See* Lakier, *supra* note 15, at 2120.

34. *Id.*

speakers, the "expressive topography"[35] does more than create access to audiences. It serves to contextualize communication, to force dialogue, and to demonstrate the pervasiveness or depth of commitment to a viewpoint. At times, the space is the message. It is not just the quality of Zenger's defense that changes without a public trial and its accompanying audience. It is the message itself that a citizen jury, sitting in judgment, is the last resort for the rights of citizenship and those rights ought to include the opportunity to criticize a governor.[36] Crossing a bridge in Selma in defiance of criminal law matters as marchers elsewhere may not sway a nation that the denial of voting rights in Alabama or across the South requires federal legislative action.[37] Graffiti in a former Dominican neighborhood carries significance to mark the location of a community broken apart in the name of urban renewal in ways that the same tag in another neighborhood does not.[38] In the same way, a "stop killing us" tag on a confederate monument in Virginia scrawled in protest in the summer of 2020 carries a message absent in another context.[39] And Black Lives Matter protests that fill streets across the nation signal a broad-based call for change in ways that Instagram posts and yard signs cannot.[40] Sometimes, even just the presence of a marginalized actor in a majority-dominated location can serve as a catalyst for conversation about how notions of belonging and danger are constructed and what role policing plays in enforcing and/or creating those notions.[41]

In these instances and for these speakers, location is more than a mere place that speech occurs. It is the speech. And jurisprudential distinctions that seek to

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35. *See* Timothy Zick, Speech out of Doors: Preserving First Amendment Liberties in Public Places 11, 25-64 (2009) (constructing expressive topography as a means of explaining the link between location and speech rights).

36. *See* Stanley Nider Katz, *Introduction* to James Alexander, A Brief Narrative of the Case and Trial of John Peter Zenger, Printer of the New York Weekly Journal 1, 1 (Stanley Nider Katz ed., Belknap Press Harvard Univ. Press ed. 1963) (describing Zenger's trial and defense); Stephen Botein, 'Mr. Zenger's Malice and Falsehood': Six Issues of the New York Weekly Journal, 1733-34, at 5 (Stephen Botein ed., 1985).

37. *See* David J. Garrow, Protest at Selma: Martin Luther King, Jr. and the Voting Rights Act of 1965, at 1 (1978); Daniel Q. Gillion, The Political Power of Protest: Minority Activism and Shifts in Public Policy 84-87 (2013); Taeku Lee, Mobilizing Public Opinion: Black Insurgency and Racial Attitudes in the Civil Rights Era 1-3 (2002).

38. *See* Carroll, *supra* note 6, at 1297-98.

39. *See* Ezra Marcus, *Will the Last Confederate Statue Standing Turn Off the Lights?*, N.Y. Times (July 9, 2021), https://www.nytimes.com/2020/06/23/style/statue-richmond-lee.html [https://perma.cc/SZQ7-6YMP] (describing graffiti placed on confederate statutes in Richmond and elsewhere in the United States as part of protests over police killings of Black men).

40. *See* Zackary Okun Dunivin, Harry Yaojun Yan, Jelani Ince & Fabio Rojas, *Black Lives Matter Protests Shift Public Discourse*, 119 PNAS art. no. e2117320119, at 1 (2022).

41. *See infra* notes 265-272 and accompanying text.

split or cabin that speech from those locations ignore the implications of forums to the content of speech. To relegate Zenger's trial to a closed courtroom, to confine civil rights activists to their own churches across the midcentury South, to keep demonstrations for social justice in city parks and on sidewalks, or to regulate presence itself is not just to change the time, place, and manner of the speech. It is to create an unequal speech landscape that silences some speech and some speakers. Just as some speech matters for democracy, access to location matters for speech.

To recognize the centrality of forums of speech, in turn, requires an acknowledgment that regulating spaces is a means to regulate speech and to create a hierarchy of rights and interests.[42] Criminal law is a central mechanism of this regulation and serves as a tool to reinforce this hierarchy. Speech is increasingly suppressed not through statutes that directly target it, but through the enforcement of criminal statutes that curtail access to spaces in which speech occurs or might occur. Yet enforcement of property and orderly conduct regulations typically evades constitutional scrutiny. Either the speech in question is deemed outside the realm of First Amendment protection altogether, or the regulation itself is viewed as an acceptable time, place, and manner restriction that imposes only incidental burdens on speech. This compartmentalization trivializes the significance of these burdens—particularly on dissenting and marginalized speech. Indeed, those burdens are major contributors to what Professor Genevieve Lakier has termed a subordinating First Amendment landscape. Lakier argues that this uneven landscape relies on the Court's modern allegiance to formalistic speech equality.[43] I do not disagree with that assessment, but here, I argue, more is at stake. The modern First Amendment doctrine that Lakier critiques endorses a hierarchy of rights that devalues marginalized speech and overvalues protection of property and majoritarian order. Simply put, the incidental burdens of criminal law's regulation of spaces drive a speech landscape that determines who can speak. These burdens also serve as a sort of content curator, dictating which messages can reach audiences and which are confined to backrooms or are "incidentally" regulated out of existence.

To imagine a modern free-speech doctrine that recognizes and preserves the vital role speech plays in our democracy requires imagining a universe that takes into account the burden some criminal laws place on spaces of communication and so on communication itself. This Feature sparks this imagination by proposing a novel First Amendment defense to criminal statutes that create burdens on speech through their regulation of access to spaces where speech might occur. In this, my proposal follows a legal-realist tradition that acknowledges the

42. *See* Lakier, *supra* note 15, at 2119–20.

43. *Id.* at 2120–21.

significance of such burdens on speech and pushes toward an antisubordinating First Amendment doctrine.[44]

There are three component parts to this argument. Part I begins with a discussion of illustrative criminal statutes that create burdens on speech through their regulation of access to spaces or locations and their place in the First Amendment canon. Such criminal regulations run the gamut of criminal codes (federal and state) and municipal ordinances that reside at the intersection of criminal law, property interests, and speech rights. Importantly, such criminal provisions enjoy a typical elemental simplicity that carries hidden implications. With fewer elements to meet, enforcement discretion is extremely broad. Yet such regulations and their enforcement avoid constitutional rebuke because they are deemed to impose incidental, as opposed to direct, burdens on First Amendment speech rights. In addition, they often present in the criminal law canon as low-level felonies, misdemeanors, and infractions. Although their place on the bottommost rungs of the criminal or culpability ladder creates the temptation to dismiss them as less significant, such simplistic, low-level offenses often serve as a first point of contact within criminal legal systems, allowing police to stop, arrest, and search; prosecutors to charge; and judges to convict and ultimately sentence. Their lowly position may also place them outside of the federal and most state constitutional promises of a right to counsel[45] or jury trial,[46] stripping

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44. *See, e.g.*, *id.* at 2121; J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375, 380-83; Richard Delgado, *First Amendment Formalism Is Giving Way to First Amendment Legal Realism*, 29 HARV. C.R.-C.L. L. REV. 169, 171 (1994); Richard Delgado & Jean Stefancic, *Southern Dreams and a New Theory of First Amendment Legal Realism*, 65 EMORY L.J. 303, 313-14 (2015); Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 17-22.

45. The right to counsel has been interpreted more broadly than the right to jury trial. Even in this broad interpretation, however, the Court has recognized that the Sixth Amendment does not guarantee the right to counsel when the accused does not face imprisonment if convicted. *See* Argersinger v. Hamlin, 407 U.S. 25, 30-31, 37 (1972); Alabama v. Shelton, 535 U.S. 654, 661-62 (2002). Despite the Court's efforts to broaden the category of offenses for which counsel must be appointed, studies suggest that no-lawyer courts are not unusual. *See, e.g.*, Thomas B. Harvey, Jared H. Rosenfeld & Shannon Tomascak, *Right to Counsel in Misdemeanor Prosecutions After* Alabama v. Shelton*: No-Lawyer-Courts and Their Consequences on the Poor and Communities of Color in St. Louis*, 29 CRIM. JUST. POL'Y REV. 688, 688-89 (2018) (describing the de facto creation of no-counsel courts in St. Louis, Missouri as a result of lack of funding to provide defense counsel to indigent defendants); Robert C. Boruchowitz, *Fifty Years After* Gideon*: It Is Long Past Time to Provide Lawyers for Misdemeanor Defendants Who Cannot Afford to Hire Their Own*, 11 SEATTLE J. FOR SOC. JUST. 891, 892 (2013) (noting that misdemeanor courts are often no-counsel courts and "thousands of individuals go to criminal court every year and are convicted without ever speaking with a defense lawyer or being adequately informed of their right to counsel").

46. *See* Blanton v. City of N. Las Vegas, 489 U.S. 538, 541-42 (1989) (holding that state legislatures

marginalized defendants of procedural protections. Even when not charged, these laws carry implications. They may serve to justify searching a suspect for evidence of other, often more serious crimes. Or prosecutors may threaten to add them to a defendant's existing charge or charges with an eye toward coercing guilty pleas and thereby avoiding the procedural protections of criminal trials. Or they may serve to simply suppress speech by discouraging further action by individuals arrested or threatened with arrest.[47] Rigorous enforcement and even the threat of enforcement of such laws, coupled with no opportunity to claim a First Amendment shelter as a defense, have had a corroding effect on diverse, underresourced, and otherwise marginalized speakers.[48]

With this general overview of criminal regulations that impact speech in place, Part II engages with the work of First Amendment scholars who have sought to map what is admittedly an inconsistent jurisprudence around speech while describing the impact of this doctrine on marginalized speakers and messages. This work only incidentally explores the implications of the criminal regulations described in Part I. Nonetheless, it provides vital context to the resulting speech landscape, helping to describe a jurisprudence of speech equality that is at odds with the lived experience of those affected by the regulation of speech. This Part makes a critical descriptive claim that current doctrine around time, place, and manner restrictions creates an unequal or subordinating First Amendment landscape that underestimates the impact of criminal law on speech, particularly among marginalized speakers. In doing so, this Part challenges the treatment of incidental burdens that flow from criminal law's regulation of spaces and argues that scholars and courts alike have overlooked the vital role presence plays in free speech—a neglect this Feature corrects by asserting the novel normative claim that there are times when presence is the message.

Finally, Part III argues that, as the nation grows increasingly polarized and as speech, specifically protest, enjoys a resurgence as a critical force to drive democratic change, burdens on speech, even incidental ones, require attention. Here, this Feature takes a prescriptive turn, urging a First Amendment defense to criminal prosecutions that impose incidental burdens on speech. This Part considers the parameters of such a defense, including how it differs from existing First Amendment and necessity defenses or pretrial challenges to the constitutionality of regulations and how it would be actualized. Part III asserts that the proposed

may designate some criminal offenses as petty and so allow them to evade the right to jury trial); Duncan v. Louisiana, 391 U.S. 145, 159 (1968) ("[T]here is a category of petty crimes or offenses which is not subject to the Sixth Amendment jury trial provision . . . .").

47. *See* Issa Kohler-Hausmann, Misdemeanorland: Criminal Courts and Social Control in an Age of Broken Windows Policing 26-38, 44 (2018) (describing the use of misdemeanor offenses to ensure police and later court contact).

48. *See infra* notes 178-186 and accompanying text.

defense offers an opportunity to present a counternarrative to the State's accusation—rendering evidence of the defendant's intent to communicate and the value of that communication relevant to the assessment of culpability that is a verdict.

While this democratic function is, in part, reliant on a trial, the proposed defense matters even in criminal legal systems in which defendants are more likely to plead guilty than go to trial and may not enjoy a right to a jury even if they go to trial. In a jury trial, this defense would offer an opportunity for community-based decision makers to draw more nuanced boundaries around protected communicative conduct that they value, even in the face of competing interests. In the absence of a jury or a trial, the proposed defense would still allow underresourced people an ironic (and admittedly imperfect) access to courts, opening avenues of negotiation around charges or potential charges and pushing formal actors, including judges, to consider discordance between current application of the law and communal expectations. With sufficient prevalence, the defense would potentially shape policing, prosecutorial, and even judicial decision-making.

In all these ways, the availability of this defense would serve a legitimating and democratic function for resulting legal doctrine. Written law may create the scaffolding of doctrine, but on-the-ground enforcement ultimately lends meaning and nuance to such scaffolding. Discretionary decision-making from formal governmental actors often dominates this arena. The defense proposed here opens the possibility that community-based actors, such as defendants or jurors, may exercise their own discretionary power, a power that is uniquely transparent as it literally occurs in public spaces and may be approved or rejected by the same public that the law claims to serve. A defense thus opens its own space for an alternative rights hierarchy that creates an equalizing speech landscape—one that depends less on access to resources to realize its democratic principles.

I. SPEECH AND CRIME

Enforcement of criminal law entwines and, at times, bounds First Amendment speech rights. If individual free-speech rights have a doctrinal identity—albeit one that appears internally inconsistent at times—then criminal law constructs the borders of that meandering identity, offering mechanisms of government restrictions on speech that might survive constitutional scrutiny. Courts and First Amendment scholars alike tend to accept this reality, pushing back around margins but largely endorsing the premise that criminal laws—even

those that impair, curtail, or silence speech—may be constitutionally permissible or may lack constitutional saliency altogether.[49]

This acceptance of criminal regulation of speech hinges in no small part on an implicit collective sense that criminal law regulates conduct that "requires" regulation or, at least, that the majority accepts ought to be regulated.[50] As a result, criminal law may impede an individual's right—either directly or as a secondary effect—but it may nonetheless survive constitutional attack if it does so to promote a state purpose to protect other permissible and valuable interests.[51] Under this theory, fighting words may be the subject of regulation for threats, rioting, or sedition, and civil rights protestors may be arrested as trespassers or

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49. *See, e.g.*, Lakier, *supra* note 8, at 2168 (arguing that even as low-value speech was not originally contemplated at the Founding, courts and scholars have accepted the notion that some speech simply falls outside First Amendment protection); Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1769, 1774-84 (2004) (describing the boundaries of the First Amendment as creating categories of unprotected speech and permitting incidental regulation of protected speech); Lisa A. Kloppenberg, *Avoiding Serious Constitutional Doubts: The Supreme Court's Construction of Statutes Raising Free Speech Concerns*, 30 U.C. DAVIS L. REV. 1, 54-55 (1996) (describing the Court's hesitation to overturn criminal regulations as void or otherwise unconstitutional when alternative interpretations are possible); Robert C. Ellickson, *Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows, and Public-Space Zoning*, 105 YALE L.J. 1165, 1208-19 (1996) (describing the history of criminal law as a means to reinforce social norms within public spaces and private spaces that serve public functions); Larry A. Alexander, *Trouble on Track Two: Incidental Regulations of Speech and Free Speech Theory*, 44 HASTINGS L.J. 921, 925-26 (1993) (describing permissible incidental burdens on speech); Geoffrey R. Stone, *Flag Burning and the Constitution*, 75 IOWA L. REV. 111, 113-14 (1989) (arguing that a statute may both limit speech and nonetheless avoid constitutional offense); John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1483-90 (1975) (describing criminal statutes that create permissible burdens on free speech and when such statutes violate the First Amendment in the context of *United States v. O'Brien*). For examples of judicial acceptance of this premise, see, for example, *United States v. O'Brien*, 391 U.S. 367, 377 (1968), which permitted criminal regulation of some protected speech; *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 916 (1982), which held that true threats are not protected under the First Amendment and may, as a result, be regulated by criminal and civil law; *Miller v. California*, 413 U.S. 15, 23-24 (1973), which defined obscenity as nonprotected speech and permitted criminal regulation of obscenity; *Brandenburg v. Ohio*, 395 U.S. 444, 447, which permitted criminal regulation of speech "directed to inciting or producing imminent lawless action"; *Roth v. United States*, 354 U.S. 476, 485 (1957), which held that the First Amendment does not protect obscene communication; and *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72, which permitted criminal regulation of fighting words.

50. *See* Dan T. Coenen, *Freedom of Speech and the Criminal Law*, 97 B.U. L. REV. 1533, 1533 (2017). This is not to say that all regulation is deemed acceptable or required.

51. *See, e.g.*, Michael C. Dorf, *Incidental Burdens of Fundamental Rights*, 109 HARV. L. REV. 1175, 1176, 1200-10 (1996); Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 105-14 (1987).

for violating noise ordinances, in the name of preserving public order and property rights.[52]

This Part explores criminal statutes that regulate speech, first providing a brief literature review before turning to criminal law itself. The sampling of statutes and ordinances that follow in this Part all regulate speech as a secondary consequence of enforcement. Many are low-level offenses. Focus on these statutes and ordinances is not accidental. Such regulations are routinely employed against speakers, yet their status in the criminal canon also often insulates these regulations from review and public critique. As low-level offenses, they may never produce a charge, and, if they do result in prosecution, the sanction they carry may appear minor, even as they disproportionately impact marginalized and underresourced populations. They hide in plain sight as mechanisms to suppress speech. They accomplish this result through incidental burdens on speech, which makes them uniquely situated to both have a chilling effect and to evade constitutional offense and scholarly attention.

A. The First Amendment's Free Speech

The First Amendment promises protection of the freedom of speech, or at least the prohibition of its regulation.[53] Despite this broad edict, laws that regulate, curtail, and even bar speech survive constitutional scrutiny. There are vast swaths of literature that explore the subtle nuances of First Amendment doctrine, as well as its limits.[54] This Section does not replicate this important work but rather sketches the broad boundaries of First Amendment doctrine as it relates to permissive regulation of speech generally and, more specifically, through criminal law. Central to this inquiry is the acceptance of time, place, and manner restrictions, or content-neutral restrictions on speech. This Section begins with an overview of work at the intersection of criminal law and speech before turning to a broader review of First Amendment jurisprudence. The next Section will examine the criminal statutes themselves described below.

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52. *See* Lakier, *supra* note 8, at 2190-92; Ellickson, *supra* note 49, at 1208-19.

53. U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.").

54. For such broad and in-depth discussions, see, for example, ZICK, *supra* note 11; Stone, *supra* note 51; and Rabban, *supra* note 1.

1. *Criminal Law and Free Speech*

Before turning to the construction of free-speech doctrines, at the outset, several realities in the space at the intersection of criminal law and the First Amendment are worth noting. First, speech and other First Amendment rights may be regulated through civil or criminal law. First Amendment jurisprudence is built around denials of parade permits;[55] the enforcement of antileafletting ordinances;[56] allegations of zoning-regulation violations;[57] and arrests resulting from unsanctioned gatherings that disturb the peace,[58] littering,[59] and displays of obscenity.[60] Courts and scholars tend to discuss criminal and civil sanctions in a single jurisprudential breath. Doctrines that emerge around regulations of content or time, place, and manner weave their way through decisions that cross civil and criminal law. From the perspective of trying to construct or critique the emerging and shifting First Amendment jurisprudence, such an agnosticism to the body of law in question makes sense. After all, doctrines may emerge from both, and if the goal is to document the effect of the regulation on the speech or speaker, the legal source of the restriction may appear to carry a limited significance.

Second, despite this multijurisdictional approach in First Amendment scholarship, this Feature's focus is on criminal restrictions alone. This focus is not accidental. While civil statutes may shape law and curtail speech, criminal law is distinct for reasons that I, and other scholars, argue are worth noting. Most obviously, criminal sanctions impede liberty in ways that civil sanctions rarely, if ever, do.[61] Beyond this, as will be discussed further in Part III, First Amendment challenges to criminal sanctions tend to present in two distinct ways: (i) as sufficiency-of-the-evidence or failure-of-proof defenses in a trial, or (ii) as pretrial

55. *See, e.g.*, Cox v. New Hampshire, 312 U.S. 569, 575 (1941).

56. *See, e.g.*, Schneider v. New Jersey, 308 U.S. 147, 149, 154-55 (1939).

57. *See, e.g.*, Barnes v. Glen Theatre, Inc., 501 U.S. 560, 562-63 (1991).

58. *See, e.g.*, Terminiello v. Chicago, 337 U.S. 1, 4-5 (1949).

59. *See, e.g.*, *Schneider*, 308 U.S. at 150-51.

60. *See, e.g.*, Cohen v. California, 403 U.S. 15, 16-17 (1971).

61. While civil contempt may allow a court to imprison an individual, such imprisonment is not viewed as punishment per se but may be a means to coerce future cooperation from the contemptee. In contrast, criminal sanctions may include incarceration. Other deprivations of liberty may also occur as a result of conviction, including denial of the right to own firearms and restrictions on movement, association, residency, and occupation.

motions that claim that the regulation in question is either overly broad or void for vagueness.[62]

The defense may challenge that the State has presented sufficient evidence to meet their burden of proof that the defendant actually committed the prohibited activity. While these carry First Amendment implications, they are not First Amendment challenges per se. Whether the defendant had the mens rea required to incite an insurrection is a question of whether the mental-state element of the criminal-syndicalism statute was met.[63] It carries a First Amendment implication because without such a mens rea, their speech is not in fact the constitutionally unprotected class of "fighting words" and so may not be regulated based on its content.[64] But it also carries non-First Amendment significance because without the mens rea element, the defendant cannot be convicted of the offense because there is insufficient factual proof of an element.[65] Even offenses where the speech itself is integral to the crime, such as criminal conspiracy, may require additional mens rea elements to survive constitutional scrutiny.[66] In other words, the court may permit the regulation of the speech alone, yet require that the defendant have some intent beyond the speech in order for the conviction to survive constitutional challenge.

For their part, pretrial motions that challenge the constitutionality of criminal statutes rely on established criminal-law principles of notice of the prohibited conduct and narrow tailoring to regulate only the prohibited conduct.[67] Such

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62. *See infra* notes 350-372 and accompanying text. In addition to this defense, organizations have recently sought preliminary injunctions against antiprotest statutes, arguing in part that such statutes are overly broad and void for vagueness. *See, e.g.*, Dream Defenders v. DeSantis, 559 F. Supp. 3d 1238, 1251, 1282-84 (N.D. Fla. 2021) (granting in part a preliminary injunction against Florida's antirioting statute, finding it was overly broad and vague).

63. *See, e.g.*, Whitney v. California, 274 U.S. 357, 359-60 (1927) (challenging conviction under the California Criminal Syndicalism Act where there was no evidence that the defendant intended to incite action with speech); Brandenburg v. Ohio, 395 U.S. 444, 447-48 (1969). In *Brandenburg*, the Court held that "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to produce such action." *Id.*

64. *Brandenburg*, 395 U.S. at 448 (holding that without the intent to incite lawless action, such laws would "impermissibly intrud[e] upon the freedoms guaranteed by the First and Fourteenth Amendments").

65. *See In re* Winship, 397 U.S. 358, 361-62 (1970) (noting the long-established principle that all essential elements must be proven beyond a reasonable doubt prior to conviction).

66. *See, e.g.*, United States v. Spock, 416 F.2d 165, 173 (1st Cir. 1969) (requiring proof of specific intent in order to convict a defendant on a conspiracy charge).

67. *See* Broadrick v. Oklahoma, 413 U.S. 601, 613-15 (1973) (noting that a law's punishment of a "substantial" amount of protected speech "judged in relation to the statute's plainly legitimate

challenges permit courts to strike down statutes that are vague or overly broad in their construction, or, as is more common, to adopt interpretations of statutes that preserve their constitutional integrity.[68] Again, this may carry First Amendment implications; a vague statute may prohibit protected and unprotected speech alike, and an overly broad statute may create restrictions on the time, place, and manner of speech that is so broad as to curtail all speech. Yet these challenges are not unique to the First Amendment.

Given these two types of challenges, scholarship that addresses the interplay between criminal law and the First Amendment has largely focused on critiquing cases and assessing their contribution to either First Amendment or criminal-law doctrine or both. In addition, criminal-law scholarship has focused on unique aspects of criminal legal systems that affect and occur in criminal cases, including those that implicate the First Amendment. Questions about how statutes are constructed, how they are applied, what harms they seek to regulate, and what rights they promote in the process are discussed in subsequent Sections. However, in the discussion of the First Amendment doctrine that follows, it is worth noting that in criminal law, discretion may play a unique and outsized role, particularly for content-neutral regulations.

To the extent that content-neutral regulations may survive constitutional scrutiny precisely because they are applied evenly, discretionary decision-making in criminal law may upset the formalistic construction of equality the Court often uses to describe such regulations.[69] Likewise, discretionary decision-making by police and prosecutors determines not only who is arrested and who is charged with a crime, but in the process, whose speech is burdened and the consequences of that burden. The reality of current criminal legal systems is that this discretion disproportionately burdens marginalized populations, particularly poor and minority populations. At the intersection of the First Amendment and criminal law, this uneven application of discretion may not only undermine claims of formal equality but also fuel the disparate impact Justice Marshall noted in his dissent in *Clark v. Community for Creative Non-Violence*, discussed in the next Section.[70] In *Clark*, Marshall cautioned that while equal application of content-neutral law may promote "even handed content neutrality," it may nonetheless suppress vital speech and undermine long-established First Amendment goals of robust debate.[71]

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sweep" will invalidate all elements of that law "until and unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression").

68. *Id.*

69. *See infra* notes 163-177, 211-253 and accompanying text.

70. 468 U.S. 288, 313-14 (1984).

71. *Id.* at 314.

While I do not dispute Justice Marshall's claim, and indeed find it consistent with Lakier's assessment of a subordinating First Amendment doctrine that flows from formalistic notions of equality, the prominence of discretion in criminal law's applications render it rarely equal. Bias embedded in criminal legal systems and disproportionate application of criminal law within marginalized communities signal heightened risk for disparate impact of even content-neutral criminal regulations and heightened probability that some messages and some speakers will be regulated out of existence.[72]

In addition, as is described in more detail in Section I.B.3, such discretionary decision-making may evade review while still suppressing speech.[73] Even if police decline to arrest protestors or prosecutors decline to bring charges against those arrested, review of § 1983 claims reveal that speakers make choices not to continue their communicative conduct based on the threat of prosecution and arrest.[74] To the extent that the conduct in question is criminalized, arguably this goal is consistent with criminal law's aims to deter prohibited acts. However, to the extent that the conduct is both criminalized and represents constitutionally protected speech, this discretion may allow the State to create a chilling effect without facing a successful constitutional challenge. This is not because the claim lacks merit but rather because claimants lack a means to successfully litigate the claim.[75]

Finally, current First Amendment scholarship treats presence—or the right to speak in a particular space—as a question of forum. Under this treatment, criminal laws that purport to protect property rights by regulating access to places are seen as regulating where speech occurs and not speech itself. This Feature pushes back on that classification, arguing that presence is sometimes the message. Whether discussing a lunch-counter sit-in in the 1960s to protest segregation or the decision to remain in a Starbucks restaurant in an effort to push back on racialized notions of who is permitted to occupy a commercial space, arrests for trespass or disturbing the peace sometimes accomplish more than simply removing a body. They silence the communicative act that that body is making.

All of this previews a central claim of this Feature that remains unexplored within the current literature: that criminal systems are uniquely situated to

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72. *See supra* note 26 and accompanying text; *infra* notes 102-104, 163 and accompanying text.

73. *See infra* notes 163-177 and accompanying text.

74. *See infra* note 179 and accompanying text.

75. Not only do § 1983 claims present daunting proof problems as described recently in *Nieves v. Bartlett*, 139 S. Ct. 1715, 1721-28 (2019), which held that because there was probable cause for his arrest, Bartlett's claim of retaliatory arrest failed as a matter of law, but the doctrine of qualified immunity also often provides insulation for State actors, even if protestors can prove that they were engaged in protected activity at the time of their arrest.

resolve conflicts between speech rights, including claims that flow from presence as speech, and other social interests like property rights. At its core, the conclusion of any criminal case is a balance between the right or interest the State seeks to protect through enforcement of criminal law and the accused's claim that their action is not in fact criminal because the State cannot prove it is or because the harm caused by the individual's action is justified, excused, or insignificant in the face of the harm caused by the enforcement of law.

Sometimes the case is clear-cut: the State's interest in preserving the life and safety of people who live within its boundaries outweighs a defendant's desire to commit homicide. Sometimes, however, the cases are harder. A defendant's assertion that they acted in self-defense or under extreme emotional disturbance calls on a fact finder to balance the defendant's claim against whatever harm the criminal statute seeks to punish.

In these moments, criminal fact finders, particularly citizen jurors, do more than merely make a factual determination. In these moments, criminal fact finders weigh a singular world of the case in which the law is enforced against the defendant before them, or it is not. In this weighing, they imagine not only what "law" is, as written and applied through legislation, arrest, and prosecution, but also whether the application in the case before them properly balances the State's power to punish against whatever harm that punishment is applied to. Property rights may be generally worthy of enforcement to most jurors, but jurors can recognize the difference between a trespass that consists of stepping on the corner of someone's lawn in a mass protest and a burglary that results in an assault on the homeowner. In the first case, a prosecution for trespass may seem insignificant in the face of the silencing effect that a conviction will have on future protestors. In the second case, even if a defendant were to claim a First Amendment interest at stake in the burglary—a more dubious proposition given the description, but one I am willing to consider here for the sake of argument—the prosecution may feel more "appropriate" given the harm (the burglary and assault), even if the prosecution silences future actors who might engage in the same conduct. In this weighing, jurors, and at times judges, sitting as fact finders, craft a living law constructed around the community values and expectations of those who live under it.

Recognizing this unique power of criminal legal systems, this Feature argues that when weighing the application of the statutes described in Section I.B to the speech rights imagined in the First Amendment and by the doctrine described below, a First Amendment defense in the case-in-chief permits a defendant to push for a community-constructed doctrine. As discussed in Part III, such a doctrine is notably absent in current discussion of the First Amendment and criminal law. Further, adopting such a community-constructed doctrine would promote an antisubordinating First Amendment jurisprudence by jettisoning

formalistic notions of equality. Instead, this doctrine would serve as a basis to construct a body of law at the intersection of First Amendment and criminal law that more accurately promotes dissent and encourages the robust debate often described by courts as the heart of speech rights.

2. *Constructing a First Amendment Jurisprudence*

With the broad overview of criminal law's discussion of the First Amendment described above, we can turn to First Amendment jurisprudence more generally. In this, the threshold inquiry of modern First Amendment protection asks whether the regulated conduct actually "was sufficiently imbued with elements of communication."[76] In *Spence v. Washington*, the Court, drawing on its previous decision in *United States v. O'Brien*,[77] concluded that a defendant's First Amendment interests were implicated when "[a]n intent to convey a particularized message was present, and in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it."[78] Later courts, confronted with First Amendment challenges to criminal statutes, returned to the *Spence* test.[79]

While this inquiry into the communicative nature of the regulated speech is necessary, alone it is not sufficient to garner First Amendment protection. Otherwise, the constitutionality of any regulation would pivot solely on a tripod fulcrum of the speaker's intent to communicate, the message itself, and the audience's ability to register (and possibly to understand) that message.[80] But the First Amendment clearly does not protect everything that is communicated.[81] To avoid an overinclusion dilemma, *Spence* is therefore read as a threshold inquiry of what precisely is regulated, creating a criteria for recognizing First

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76. Spence v. Washington, 418 U.S. 405, 409 (1974). In *Spence*, the Court considered whether Washington's prohibition on displaying a flag with a "figure, mark, picture, design, drawing or advertisement" triggered a First Amendment violation. *Id.* at 407.

77. United States v. O'Brien, 391 U.S. 367 (1968).

78. *Spence*, 418 U.S. at 410-11.

79. *See, e.g.*, Texas v. Johnson, 491 U.S. 397, 403 (1989) (holding, in another flag-desecration case, that the first question was "whether Johnson's burning of the flag constituted expressive conduct"); United States v. Hayward, 6 F.3d 1241, 1249-50 (7th Cir. 1993).

80. *See* Post, *Recuperating*, *supra* note 1, at 1252; *O'Brien*, 391 U.S. at 376.

81. *See* Post, *Recuperating*, *supra* note 1, at 1252; Chaplinsky v. New Hampshire, 315 U.S. 568, 571-73 (1942) (holding there is no protection for fighting words); New York v. Ferber, 458 U.S. 747, 756-64 (1982) (holding there is no protection for child pornography); Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 757-61 (1985) (limiting protection for defamation); Virginia v. Black, 538 U.S. 343, 358-64 (2003) (holding there is no protection for true threats).

Amendment salience.[82] It also leads to a second, more complicated, and narrowing question: why exactly does the State seek to regulate the defendant's conduct?

For this question, the State's motive for the regulation, as opposed to the impact of its enforcement, is critical. If the State can articulate a plausible, neutral, and legitimate interest in regulating even traditionally protected speech, enforcement of the regulation may not offend the First Amendment.[83] The doctrine that flows from this second inquiry is complicated. First, it implicates a difficult assessment of what precisely qualifies as a "plausible, neutral, and legitimate interest." Second, it folds into its analysis categories of speech that simply evade First Amendment protection because state interests exceed the interest in their preservation.[84] Finally, it rejects the reality that a regulation's impact on speech, even if an unintended one, can have the same effect as a regulation that targets particular content for exclusion. Nonetheless, courts and scholars alike have understood this second line of First Amendment inquiry as drawing distinctions between regulations that target the content of the speech itself and those that incidentally burden speech as they seek to regulate something other than content.[85]

Content-neutral regulations, commonly referred to as time, place, and manner restrictions, ostensibly seek to promote competing state interests in clean streets, quiet neighborhoods, and respectable business zones rather than any particular speech content.[86] As a result, even when enforcement of such regulations suppresses communication, the First Amendment is not offended if the regulation is an effort to preserve a competing interest as opposed to curtailing speech.[87] The Court introduced this concept of acceptable time, place, and manner restrictions in *Cox v. New Hampshire*.[88] In *Cox*, the Court upheld a parade-permit requirement, noting that the State was free to impose regulations on

82. *See, e.g.*, N.Y. Times Co. v. Sullivan, 376 U.S. 254, 283-84 (1964) (recognizing a First Amendment interest at stake when the defendants had engaged in clearly communicative conduct in traditional mediums of communication); Brandenburg v. Ohio, 395 U.S. 444, 447-48 (1969) (same).

83. Such interests have included preventing litter, Schneider v. New Jersey, 308 U.S. 147, 162 (1939), taxing the press to raise revenue, Minn. Star & Trib. Co. v. Minn. Comm'r of Revenue, 460 U.S. 575, 586 (1983), and protecting order and morality, Barnes v. Glen Theatre, Inc., 501 U.S. 560, 568 (1991), to name just a few.

84. *See* Lakier, *supra* note 8, at 2182-92; *supra* notes 49, 81 and accompanying text.

85. *See, e.g.*, Stone, *supra* note 51, at 47-48.

86. *Id.* at 49-50.

87. *See* Dorf, *supra* note 51, at 1177-78, 1204.

88. 312 U.S. 569, 575 (1941) (concluding that the requirement of a parade permit did not impermissibly burden speech rights).

"time, place and manner so as to conserve public convenience."[89] In the face of competing public interests—access to public streets and free speech—the Court was willing to permit the State to craft regulations that seek to accommodate or coordinate competing demands.[90] Scholars have argued that this notion of coordination versus subordination of speech was originally central to time, place, and manner doctrine.[91] Just a year earlier, in *Schneider v. State*, the Court had struck down an antileafletting ordinance, despite its apparent agnosticism towards content.[92] In the *Schneider* decision, the Court acknowledged both the content neutrality of the regulation and the legitimate state interest in preventing litter.[93] Despite this, the Court concluded that a ban on leafletting subordinated speech interests, as opposed to merely designating an accepted time, place, and manner restriction.[94]

In time, however, the doctrine of time, place, and manner restrictions abandoned the subordination-coordination distinction. In *Buckley v. Valeo*, the Court articulated the principle as permitting the government to adopt "time, place, and manner regulations, which do not discriminate among speakers or ideas, in order to further an important governmental interest unrelated to the restriction of communication."[95] The Court recast time, place, and manner restrictions as permissible even if they subordinated speech to competing government interests. The Court expanded this position in *Clark v. Community for Creative Non-Violence*, holding that time, place, and manner restrictions "are valid provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication."[96]

At first glance, *Clark* may appear to offer more protection for speech with its second and third requirements. Yet application of the test has yielded a different result. In *Ward v. Rock Against Racism*, for example, the Court held that the "narrowly tailored" requirement is met as long as the regulation is "not substantially

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89. *Id.* at 575-76.

90. *Id.*

91. *See, e.g.*, John D. Inazu, *The First Amendment's Public Forum*, 56 Wm. & Mary L. Rev. 1159, 1188 (2015); Post, *Recuperating*, *supra* note 1, at 1261; Susan H. Williams, *Content Discrimination and the First Amendment*, 139 U. Pa. L. Rev. 615, 638-44 (1991); Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. Rev. 1713, 1721-24 (1987) [hereinafter Post, *Public Forum*].

92. 308 U.S. 147 (1939).

93. *Id.* at 150.

94. *Id.* at 165.

95. 424 U.S. 1, 18 (1976).

96. 468 U.S. 288, 293 (1984).

broader than necessary to achieve the government's interest."[97] In making this determination, the Court instructed lower courts to defer to the government's determination that its interests are, in fact, best served by the regulation.[98]

The requirement of alternative forums is likewise deceptively weak. *Clark* did not require that the State create alternative forums or even assure that they existed.[99] Per *Clark*, the State's only obligation is to not impede such forums. In the context of a zoning regulation imposed on adult theaters, the Court held "the First Amendment requires only that [the State] refrain from effectively denying respondents a reasonable opportunity to open and operate an adult theater within the city."[100] The Court concluded that the ordinance in question, which designated a small district for such operations, "easily [met] this requirement."[101]

A lingering question remains as to whether the dual-doctrine approach that hinges on the State's motive for regulating the speech in fact overlooks the functional reality that the designation between content-neutral or content-based regulations may make little difference in a world of limited forums and discretionary enforcement of criminal laws designed to regulate access to those spaces. Whether the regulation restricts speech secondarily through the application of a law seeking to promote alternative interests, or whether the speech is regulated because of its content that is deemed unworthy of protection, makes little difference from the perspective of the speaker. The result is the same: the subordination of the speech to other interests. For marginalized speakers, this result carries an amplified impact.

For such speakers, not only is access to alternative means to communicate likely less plentiful,[102] but also their own views and perspectives may be excluded

97. 491 U.S. 781, 800 (1989).

98. *Id.*

99. Post, *Recuperating*, *supra* note 1, at 1262-63 (noting that *Clark* did not require "actual nor demonstrable [forums]; they can be entirely theoretical and putative"); Balkin, *supra* note 44, at 397.

100. City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 54 (1986).

101. *Id.*

102. *See* Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 218 (1983) (noting that the application of content-neutral law may create disparate impacts on marginalized speakers and messages); Martin H. Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113, 130-31 (1981) (arguing that content-neutral regulations can have uneven effects on content); Geoffrey R. Stone, *Restrictions of Speech Because of its Content: The Peculiar Case of Subject-Matter Restrictions*, 46 U. CHI. L. REV. 81, 102-03 (1978) (describing the disparate impact of content-neutral restrictions on particular subject matter); Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20, 36 (1975) (arguing that the application of content-neutral restrictions can have an uneven impact on various types of messages).

from the construction of legitimate government interests and possibly even protection-worthy speech.[103] If the body spoken against is the majoritarian or government position, speakers without the means to acquire private speech forums or who choose to express their opposition in fiery terms may find their own views subordinated by the very power they seek to oppose.[104] Such a result seems at odds with the basic principles of the First Amendment that purport to open rather than contract speech and debate.

B. Regulating Speech Through Criminal Law

The focus of a First Amendment jurisprudence that distinguishes between content-based and content-neutral restrictions seeks to explain why the speech is regulated. By necessity, answering that question requires a more functional inquiry into precisely how the speech in question is regulated. Frequently the answer is criminal law through common statutes and ordinances, some of which are directed specifically at speech and others that merely incidentally affect it.

While this Section does not consider every regulation that might impact speech, it does consider a broad sample of statutes that can and have been used to curtail speech. As a group, they are simple and so routinely applied as to be nearly ubiquitous and prosaic. They are often infractions, misdemeanors, or low-level felonies. As a result, they may carry relatively short sentencing ranges, if they permit incarceration at all. An investigation of or arrest for a violation may not produce a charge, much less a conviction. This combination of simplicity, ordinary application, and improbability of incarceration or a criminal record can also make their enforcement and effect difficult to detect and easy to ignore. Even as the nation constantly revises and reforms its various criminal legal systems, these statutes and ordinances rarely receive attention.[105] Ignoring them, however, is a mistake. Their enforcement can lead to speech suppression and contributes to an unequal and subordinating First Amendment landscape.

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103. *See* GILLION, *supra* note 37, at 84-87 (describing the impact of limited forums on minority speakers).

104. *See, e.g.*, Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 312-16 (1984) (Marshall, J., dissenting) (describing the suppression of nonmajoritarian positions under the *Clark* test).

105. There are of course exceptions, including First Amendment litigation around some statutes and ordinances that impact speech, but more often they simply fail to garner attention, existing instead as the background noise of the maintenance of an ordered society. For examples, consider the cases cited *supra* note 81.

1. *Regulating Some Speech as Nonprotected Speech*

Before turning to statutes that are the central focus of this Feature—those that are not directed at speech but nonetheless affect speech—this Section first considers criminal laws that directly target speech as speech. These statutes focus on speech that carries little, if any, constitutional saliency, such as fighting words, pornography, obscenity, and lewd or lascivious conduct.[106] Communication that falls into these categories is deemed unworthy of protection because of the harm it may cause, because it lacks redeeming social value, or both.[107] These statutes also raise the concerns that are the subject of this Feature. In particular, protection that will depend on social perceptions of what speech is "worthy" of protection. And, such regulations also are subjected to a variation of the First Amendment defense for which this Feature advocates, as courts are charged with assessing the "redeeming social values" or the underlying purpose of the materials in question.[108] In fact, the permissibility of their regulation under the First Amendment is routinely litigated as a facial First Amendment concern.[109] What

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106. *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942) (describing categories of speech that historically may be regulated without implicating the First Amendment); New York v. Ferber, 458 U.S. 747, 763-64 (1982) (same). As Lakier has noted, such categories of speech did not always exist. She writes, "early American courts did not in fact recognize the existence of a delimited set of well-defined and narrowly limited categories [of speech] to which the constitutional guarantees of press and speech freedom did not apply." Lakier, *supra* note 8, at 2179.

107. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 382-83 (1992); *Chaplinsky*, 315 U.S. at 572; Memoirs v. Massachusetts, 383 U.S. 413, 418 (1966).

108. While the standards for determining obscenity are notoriously vague, the Court and lower courts applying the standards have relied in part on the existence (or absence) of "redeeming social value" in the material in question. *See, e.g.*, *Memoirs*, 383 U.S. at 418. The *Memoirs* test was unseated by the equally vague and social-norm-grounded *Miller* tripart test asking: first, "whether 'the average person, applying contemporary community standards' would find the work, taken as a whole, appeals to the prurient interest;" second, "whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law;" and third, "whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." Miller v. California, 413 U.S. 15, 24 (1973). The Court in *Miller* concluded that "the primary concern . . . is to be certain that . . . [the] material . . . will be judged by its impact on an average person, rather than a particularly susceptible or sensitive person—or indeed a totally insensitive one." *Id.* at 33.

109. *See, e.g.*, *Miller*, 413 U.S. at 18-20; Roth v. United States, 354 U.S. 476, 485 (1957) ("We hold that obscenity is not within the area of constitutionally protected speech or press."); *Chaplinsky*, 315 U.S. at 571-72 ("There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene . . . . It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.").

remains underlitigated and undertheorized are regulations that may evade First Amendment notice altogether or have not been the subject of First Amendment defenses because they affect speech secondarily. These criminal regulations that incidentally impact speech are therefore the focus of the remainder of this Section.

2. *Regulating Speech as Something Other than Speech: Trespass, Disturbing the Peace, Civil Unrest, Resisting Arrest, and Impeding Traffic*

More often than regulating speech as speech, criminal laws instead regulate speech indirectly by regulating access to locations where speech might occur through time, place, and manner restrictions.[110] While First Amendment jurisprudence accepts such incidental regulation so long as it appears content neutral,[111] this characterization of neutrality overlooks the reality that by regulating how, where, or when speech can occur, these regulations create speech inequities. By controlling the time, place, and manner of speech, these statutes and ordinances also control what speech can and does occur across the country.

A space to speak has long been recognized as a critical component of the First Amendment's speech rights. Indeed, even in the limited protections *Clark* provided, the Court hinged constitutional sanction of content-neutral regulations on the State not impeding alternative forums.[112] Likewise, during its period of commitment to substantive speech equity, the Court struck down restrictions on forums of speech likely to be utilized by marginalized speakers.[113] The Court has since jettisoned this substantive approach in favor of a formalistic one, which is the topic of Part II. As a result, criminal laws that regulate access to forums, even though facially neutral with regard to content, nonetheless may create a First Amendment landscape that subordinates marginalized speech in favor of better-resourced expression.

To consider this subordinating effect, it is also necessary to understand the types of laws that produce such an effect, for example, trespass, disturbing the peace, civil unrest, resisting arrest, and impeding traffic. These laws are near omnipresent in the criminal canon—crossing federal, state, and local jurisdictions regardless of the geographical, demographic, or political identity of any

110. *See* Lakier, *supra* note 8, at 2186-92.

111. *See supra* notes 83-104 and accompanying text.

112. Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984).

113. *See, e.g.*, Niemotko v. Maryland, 340 U.S. 268, 272-73 (1951) (striking down a conviction for disorderly conduct based on the use of a public park by a religious group); Martin v. City of Struthers, 319 U.S. 141, 146-49 (1943) (permitting door-to-door distribution of religious literature); Cantwell v. Connecticut, 310 U.S. 296, 306-07 (1940) (striking down a regulation that required a permit for religious solicitation).

particular location.[114] They are as common in big cities as in small towns—in red, blue, and purple states—and they span the nation.[115]

In addition to their pervasiveness, these laws share a simplicity of construction. Comprised of few elements, there is little required to establish probable cause for an arrest or a charge, or guilt beyond a reasonable doubt for a conviction. This simplicity renders them susceptible to discretionary decision-making in ways that more complicated statutes may not be susceptible.[116] More elements mean more proof requirements for discretionary actors who must find evidence to justify an arrest and charge. While this may not be an insurmountable task for a variety of reasons, the absence of an elemental requirement alleviates the proof problem altogether. The less the State must prove, the more flexibility executive or judicial actors may have to investigate, arrest, charge, or convict. The simplicity of these statutes can also mask the outsized impact such laws can have on marginalized populations. As recent § 1983 litigation stemming from social-justice protests in 2020 and 2021 demonstrates, an arrest, or even possibility of arrest, can create a chilling effect on marginalized speakers even if charges are never filed.[117]

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114. Ironically, some of the strictest regulations of presence occur in what are ordinarily thought of as liberal cities such as Berkeley, New York, San Francisco, and Washington, D.C. *See* Sarah Gillespie, Katrina Ballard, Samantha Batko & Emily Peiffer, *Addressing Chronic Homelessness Through Policing Isn't Working. Housing First Strategies Are a Better Way*, URB. INST. (June 29, 2020), https://www.urban.org/urban-wire/addressing-chronic-homelessness-through-policing-isnt-working-housing-first-strategies-are-better-way [https://perma.cc/K676-2358]; Tristia Bauman, Janet Hostetler, Janelle Fernandez, Eric Tars, Michael Santos, Jenifer Brewer, Elizabeth Dennis, Ruth El & Maria Foscarinis, *Housing Not Handcuffs: Ending the Criminalization of Homelessness in U.S. Cities*, NAT'L L. CTR. ON HOMELESSNESS & POVERTY 10-12, 22-28 (2016), https://www.courthousenews.com/wp-content/uploads/2016/11/Homeless-report.pdf [https://perma.cc/6SUL-UU7]; Jordan Bailey, *Food-Sharing Restrictions: A New Method of Criminalizing Homelessness in American Cities*, 23 GEO. J. ON POVERTY L. & POL'Y 273, 273-283 (2016); Maria Foscarinis, Kelly Cunningham-Bowers & Kristen E. Brown, *Out of Sight—Out of Mind?: The Continuing Trend Toward the Criminalization of Homelessness*, 6 GEO. J. ON POVERTY & POL'Y 145, 149-51 (1999). Some of this may simply be the product of population density, but as Professor Robert C. Ellickson suggests, that attribution is likely incomplete given the breadth and depth of these statutes. *See* Ellickson, *supra* note 49, at 1168-69. Instead, such restrictions may reflect what Chief Justice Hughes described as a "means of safeguarding the good order upon which [civil liberties] ultimately depend." Cox v. New Hampshire, 312 U.S. 569, 574 (1941).

115. *See Housing Not Handcuffs*, *supra* note 114, at 21-29 (describing the creation of such laws and their application on housing-insecure individuals across the country).

116. Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551, 589 (1997) (describing broad police discretion to enforce nuisance laws).

117. *See infra* notes 179-181 and accompanying text.

a. Trespass

Any discussion of the regulation of access to spaces must begin with trespass. Trespass literally regulates access to property. The right to access is determined by the property owner in all but limited cases.[118] In its most common form, criminal trespass (there is also civil trespass) is a property offense that contemplates a knowing unlawful entry but no additional harm.[119] Modern derivations often include trespass associated with nonphysical property in the form of breach of intellectual-property rights or impermissible use of cyber platforms and identities, for example hacking, hijacking internet or bandwidth, or bombing sites.[120] Whether in its physical or virtual iteration, trespass preserves property rights to the detriment of competing interests. The offense permits the property owner to determine the terms of entry and use, and upon giving notice of those terms, to engage in wholesale or selective exclusion.[121] While such deference to the property owner in the construction of trespass and other similar criminal doctrines regulating property may create arbitrary enforcement and often carries a racialized, gendered, or classist component, courts have nonetheless preserved the constitutionality of such statutes.[122]

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118. The most common exception is the landlord-tenant exception that limits owner access to occupied rented property. *See* Elena Goldstein, *Kept Out: Responding to Public-Housing No Trespass Policies*, 38 HARV. C.R.-C.L. L. REV. 215, 220-21 (2003).

119. *See* George F. Deiser, *The Development of Principle in Trespass*, 27 YALE L.J. 220, 232-34 (1917) (describing the historical development of criminal trespass); George E. Woodbine, *The Origins of the Action of Trespass, Part II*, 34 YALE L.J. 343, 358 (1925) (same). For examples of different constructions of trespass statutes, see, for example, MISS. CODE ANN. § 97-17-87 (2001); LA. REV. STAT. ANN. § 14:63 (2018); FLA. STAT. § 810.08 (2000); CONN. GEN. STAT. § 4b-11 (2011); GA. CODE ANN. § 16-7-21 (2001); and NEV. REV. STAT. ANN. § 207.200 (LexisNexis 2009).

120. *See* Benjamin L.W. Sobel, *A New Common Law of Web Scraping*, 25 LEWIS & CLARK L. REV. 147, 154-60 (2021); Patricia L. Bellia, *Defending Cyberproperty*, 79 N.Y.U. L. REV. 2164, 2175-78 (2004); Mark A. Lemley, *Place and Cyberspace*, 91 CALIF. L. REV. 521, 541 (2003); Richard A. Epstein, *Intellectual Property: Old Boundaries and New Frontiers*, 76 IND. L.J. 803, 818 (2001).

121. *See* Laurent Sacharoff, *Criminal Trespass and Computer Crimes*, 62 WM. & MARY L. REV. 571, 644 (2020); Peterson v. City of Greenville, 373 U.S. 244, 248 (1963) (overturning convictions stemming from a racially motivated city ordinance but preserving the underlying principle that property owners may use criminal trespass to exclude at will from their property). In the context of the First Amendment, the Court has held that property owners may exclude at will, including for speech reasons. *See* Lloyd Corp. v. Tanner, 407 U.S. 551, 588 (1972).

122. *See* Sacharoff, *supra* note 121, at 643 (noting that the Court, while overruling some criminal trespass convictions, "did not question the underlying principle that the property owner could exclude at will" and that "[i]t did not violate the Equal Protection Clause" to arrest, prosecute, and convict for trespass "when the underlying reason for the exclusion was race"); DAN BERGER, CAPTIVE NATION: BLACK PRISON ORGANIZING IN THE CIVIL RIGHTS ERA 46 (2018)

A defendant for their part may claim in their defense that they lacked the requisite mens rea. In other words, the defendant may claim that they did not know that they entered the property, that they did not know that their entry or use was not permitted, or that they made a mistake about permission. They may not, however, claim that the entry or use itself was necessary to realize some other right,[123] nor may they claim that they should be permitted to enter or to continue their use because the property is in fact public or quasi-public (to borrow free-speech terms).[124]

In practical terms, this means that a property owner may decide they do not want to permit a particular person to enter their store or to cross their lawn or to use an idea, image, identity, website, or bandwidth.[125] If the property owner has drawn a distinction between areas that may be accessed and those that may not be accessed (at least not accessed at will),[126] the owner may exclude whomever they wish with few limitations.[127] And they may rely on the power of the State to uphold their decision through the enforcement of criminal law.[128]

Admittedly, there is variance depending on whether public or private property is involved. Many states, for example, require in-person notice of exclusion from public property.[129] They also carve out exceptions even within private spaces to accommodate areas that are presumptively accessible, for example, a front walkway that leads to a house (even a fenced one) or the foyer of an apartment building.[130] These exceptions, however, do not undo the breadth of

(describing the use of trespass statutes to arrest Black civil rights leaders as a "color-blind" policing strategy); Taja-Nia Y. Henderson & Jamila Jefferson-Jones, *#LivingWhileBlack: Blackness as Nuisance*, 69 AM. U. L. REV. 863, 870 (2020); Jamelia N. Morgan, *Policing Marginality in Public Space*, 81 OHIO ST. L.J. 1045, 1047-48 (2020); Addie C. Rolnick, *Defending White Space*, 40 CARDOZO L. REV. 1639, 1691, 1702 (2019); Angela Onwuachi-Willig, *Policing the Boundaries of Whiteness: The Tragedy of Being "Out of Place" from Emmett Till to Trayvon Martin*, 102 IOWA L. REV. 1113, 1119 (2017).

123. This should not be confused with the use of the necessity defense by civil disobedients discussed in Part III. That defense claims that the action prevented a harm.

124. *See* Post, *Public Forum*, *supra* note 91, at 1758-65 (describing the creation of a modern public-forum doctrine that included quasi-public forums).

125. *See* Amber Baylor, Boynton v. Virginia *and the Anxieties of the Modern African-American Customer*, 49 STETSON L. REV. 315, 316-18 (2020) (noting that trespass codes were frequently used to enforce social norms including racism).

126. A fence or sign may suffice. *See, e.g.*, N.Y. PENAL LAW § 140.10(a) (McKinney 2023).

127. An owner of a public space may not exclude members of protected classes based on their protected status, for example. Henderson & Jefferson-Jones, *supra* note 122, at 890-91 (describing retail racism).

128. *Id.* at 891-92.

129. *See* Deiser, *supra* note 119, at 232-34.

130. *Id.*

trespass statutes or the cat's paw problem[131] they may present. A property owner may offer a neutral reason to police to justify an arrest that is in fact based on an impermissible consideration, such as race or gender.[132] Without knowledge of the owner's animus, the officer may enforce the law, and the arrest will survive constitutional challenge.[133] As for the arrestee, they may have little opportunity to discover a particular animus that motivated the report of their violation in the first place. Beyond this, the arrest or the threat of arrest may be sufficient to deter efforts to enter the property, even if ultimately those efforts would be lawful and therefore not trespassing. In other words, the no-trespassing sign, the fence, or the gate at the opening of property may be enough to send the message that outsiders are simply not welcome.

Trespass laws have traditionally been used to regulate access to spaces where citizens seek to speak and be heard. From workers seeking to unionize, to environmental activists, to civil-rights demonstrators, to more recent Black Lives Matter protestors, the State has relied on trespass as a mechanism to control where speech will occur and if it will occur at all.

b. Minor Damage to Property

Closely related to trespass are minor-damage-to-property offenses (sometimes called malicious-mischief offenses), a set of catch-all offenses with relatively few elements.[134] Typically treated as a "nuisance" regulation, minor damage to property is sometimes locally regulated by ordinances or treated as an infraction. While some harm—actual damage to the property—is an element,

131. The term cat's paw comes from a fable from Jean de la Fontaine in which a monkey convinces a cat to pull hot chestnuts from a fire. The cat burns its paw doing so, and the monkey eats the nuts. In the context of law, this phrase describes the insulation of an actor from liability because they are a third party or a subordinate who was used by a superior to engage in discriminatory behavior. *See* Staub v. Proctor Hosp., 562 U.S. 411, 415-16 (2011). For the purposes of this discussion, the property owner uses the State to enforce their discriminatory intent, though the State avoids an equal-protection or other civil-rights-based challenge by claiming that the State actor lacked the required animus.

132. Henderson & Jefferson-Jones, *supra* note 122, at 891-92; Baylor, *supra* note 125, at 330-32.

133. Baylor, *supra* note 125, at 332.

134. *See* W. Page Keeton, Dan B. Dobbs, Robert E. Keeton & David C. Owen, Prosser and Keeton on the Law of Torts § 86 (5th ed. 1984) (describing the common-law concept of nuisance as a "catch-all" action and the evolution of civil and criminal regulation of nuisance). For examples of nuisance statutes, see, for example, 720 Ill. Comp. Stat. 5/21-1.3 (2017); Cal. Penal Code §§ 370, 372 (West 2023); Nev. Rev. Stat. § 206.310 (2013); Tex. Penal Code Ann. § 28.03 (West 2021); 18 Pa. Cons. Stat. § 3304 (2006); Colo. Rev. Stat. § 18-4-501 (2023); N.H. Rev. Stat. Ann. § 634:2 (2023); Me. Stat. tit. 17-A, § 806 (2023); Utah Code Ann. § 76-6-106 (LexisNexis 2022); and Ariz. Rev. Stat. Ann. § 13-2908 (2022), which are all general property-damage statutes.

most statutes do not require that the damage be either significant or permanent.[135] For example, trenching a lawn—which clearly damages grass that will grow back—falls within this category, as do chalk graffiti, posting an unwanted flyer on property, and littering. Like many offenses within criminal law, the behavior that is regulated by these statutes is often regulated elsewhere. For example, graffiti may be covered statewide within this type of statute (regardless of the damage it causes), but it may also be covered locally under antigraffiti ordinances (criminalizing graffiti itself) and graffiti-abatement ordinances (criminalizing the failure to remove graffiti).[136] Likewise, local antilittering ordinances may overlap with antilitter enforcement under these statutes.

Like their trespass counterparts, these statutes give tremendous power to property owners to regulate what type of behavior is permitted on their property and what is disallowed. These statutes even go beyond the discretion that the property owner has in deciding whether a person should be reported to the police in the first place.[137] While abatement ordinances may curb this power, as a general rule, it is up to the property owner to designate if damage did in fact occur to the property. In addition, like their trespass counterparts, property owners may seek protection selectively or uniformly.[138]

Unlike their trespass counterparts, such statutes are not regulations of access to property per se, but, in the context of protest suppression, they may serve a similar purpose. Such broad-based statutes may be used to justify the investigation, arrest, prosecution, or conviction of those who physically engage with property in an effort to communicate. This behavior may include relatively minor or transient behavior such as placing physical objects—like signs or graffiti—on property, and more substantial behavior such as removing or altering property. These statutes do not consider that often such behavior is speech. For example, in the summer of 2020, Black Lives Matter protestors removed, toppled, and altered statutes around the world in an effort to confront the symbols that romanticized racism and/or slavery.[139] Their actions were a component of their

135. *See* KEETON ET AL., *supra* note 134, § 90.

136. *See* Carroll, *supra* note 6, at 1295, 1327-28.

137. *See* Morgan, *supra* note 122, at 1047-48.

138. *See supra* notes 127-128 and accompanying text.

139. *See, e.g.*, Kelly Grovier, *Black Lives Matter Protests: Why Are Statues So Powerful?*, BBC (June 12, 2020) https://www.bbc.com/culture/article/20200612-black-lives-matter-protests-why-are-statues-so-powerful [https://perma.cc/9U3C-MW95]; Claire Selvin & Tessa Solomon, *Toppled and Removed Monuments: A Continually Updated Guide to Statues and the Black Lives Matter Protests*, ARTNEWS (June 11, 2020, 4:41 PM), https://www.artnews.com/art-news/news/monuments-black-lives-matter-guide-1202690845 [https://perma.cc/JK3N-V7RJ]; Denise Lavoie, *Robert E. Lee Statue Becomes Epicenter of Protest Movement*, ASSOCIATED PRESS

protests—highlighting the prevalence of racism in everyday existence and challenging its sanctioned place in communities—yet, they also subjected them to potential prosecution under property-damage statutes.

c. Theft

Theft may seem counterintuitive in this grouping of substantive criminal statutes. In general, theft requires the unlawful taking (and sometimes transportation) of the property of another with the intent to permanently deprive the other of that property or its use.[140] Its designation as a misdemeanor or felony is contingent on the value of the property at stake.

For the purposes of this Feature, misdemeanor theft is particularly interesting as it often requires no value to the property, eliminating an element present in felony theft.[141] Felony theft, with a particular value requirement and a correspondingly increased sentencing range, is still relevant, however. In either iteration, theft does not involve use of the property per se or even the ability to fully gain control of it, but rather an intent to acquire the property.[142] While at first blush this may not appear to regulate access to potential speech forums, this initial perception is worthy of reconsideration. Like the other offenses listed in this Part, theft statutes enforce the right of the property owner to exert control over the property, including who may access the property, how and when that access may occur, and for what purposes.[143]

This right of control policed by theft statutes is indifferent as to whether the owner gave permission for the use of the property or whether the property is eventually recovered. Violation hinges on whether the accused intended to exceed that permission (or obtained it by deception) and whether they intended to keep the property when they took it—even if they failed in that endeavor or had a change of heart at some point. Theft does not require that the property owner have suffered a harm. In fact, convictions involving theft in which the accused

(July 2, 2020, 12:15 PM EDT), https://apnews.com/article/police-brutality-us-news-ap-top-news-police-richmond-34d5451fe96f0fc684d2de235bb9cb0b [https://perma.cc/DW2W-2BJJ]; Marcus, *supra* note 39.

140. *See* Michael E. Tigar, *The Right of Property and the Law of Theft*, 62 TEX. L. REV. 1443, 1451-61 (1984) (describing the evolution of the definition of theft).

141. *See, e.g.*, WASH. REV. CODE §§ 9A.56.030-.050 (2017) (defining the degree of theft by the value of the property taken).

142. *See, e.g.*, People v. Tijerina, 459 P.2d 680, 683 (Cal. 1969) (noting that the theft did not even require successfully removing the property from the true owner's real property). Use of property may be criminalized by other offenses, for example, embezzlement or unlawful conversion.

143. *See* Tigar, *supra* note 140, at 1443-44 (making the same argument, although linking property owners' control to capitalist aims as opposed to speech aims).

picked up an object but never left the true owner's premises, in which the property was immediately returned undamaged, or in which the property was returned to the true owner before they ever realized it was missing have all been upheld.[144] Theft is about who gets to control property as much as it is about whether the property is actually taken.

As with their property-damage and trespass counterparts, from a First Amendment perspective, theft statutes may implicate those who impermissibly engage with property in an effort to communicate. Coupled with civil-disobedience statutes, however, theft serves another purpose—to evoke a threat of particular lawlessness often used to characterize protestors as little more than looters and rioters.[145] In May 2020, President Trump famously tweeted, "when the looting starts, the shooting starts."[146] His word choice was not accidental—the threat of wide-scale theft he conjured served a dual purpose. On the one hand, it was a sort of dog whistle justifying silencing police tactics and the demonizing of dissenters.[147] On the other hand, claims of the dangers of protests may serve to discourage would-be participants. In this, the rhetoric of theft—and the public-safety collapse it engenders—facilitates police and prosecutorial behavior that may chill speech even if the theft is not part of the speech per se.

d. Civil-Disobedience Statutes

This category of offenses covers a broad swath of statutes and ordinances that regulate public order or may be used to quell dissent.[148] Although they do

144. *See* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 32 (4th ed. 2006) (discussing theft offenses).

145. Debates around the antiprotest statutes described in Section I.B.2.d often cited the dangers posed by Indigenous and Black Lives Matter protestors as necessitating further restrictions on protest. This narrative of harm that protestors posed did not focus on First Amendment concerns, but rather on threats to public safety, including commercial interests.

146. *See* Katelyn Burns, *The Racist History of Trump's "When the Looting Starts, the Shooting Starts" Tweet*, VOX (May 29, 2020, 4:00 PM EDT), https://www.vox.com/identities/2020/5/29/21274754/racist-history-trump-when-the-looting-starts-the-shooting-starts [https://perma.cc/G2PN-6U37].

147. For a broad discussion of this, see Safia Samee Ali, *'Not by Accident': False 'Thug' Narratives Have Long Been Used to Discredit Civil Rights Movements*, NBC NEWS (Sept. 27, 2020, 9:19 AM EDT), https://www.nbcnews.com/news/us-news/not-accident-false-thug-narratives-have-long-been-used-discredit-n1240509 [https://perma.cc/3FJJ-YTZX]; and Barbara Sprunt, *The History Behind 'When the Looting Starts, the Shooting Starts*,*"* NAT'L PUB. RADIO (May 29, 2020, 1:13 PM ET), https://www.npr.org/2020/05/29/864818368/the-history-behind-when-the-looting-starts-the-shooting-starts [https://perma.cc/9UZA-UYBZ].

148. Alice Ristroph describes this as a general aim of criminal law. *See* Alice Ristroph, *Criminal Law as Public Ordering*, 70 U. TORONTO L.J. 64, 66 (Supp. 1 2020). This Section refers to more specific enforcement of public-order statutes used against protestors.

not target speech per se, they may target speech-adjacent conduct or access to locations where speech might occur. They may range from the obvious—disorderly conduct, disturbing the peace, assembly without a permit, impermissible entry onto a street—to the more subtle—for example, resisting arrest.[149] They also may not directly implicate property,[150] but their enforcement is used to limit access to and use of property. They establish parameters of public order and, in the process, define who and what type of behavior belongs where. The construction of public order that emerges is itself laden with bias—excluding marginalized speakers and demonizing dissent.[151] Access to private property may also insulate potential prosecution for these offenses in much the same way as it may conceal other criminalized behavior.[152]

For youth, such offenses may include curfew and school-disorder offenses, including some that may not produce a delinquency referral on their own but may serve as first points of contact between the child and the police or a juvenile-

149. Civil disobedience as a concept is not limited to particular criminal statutes. And civil disobedients may certainly violate regulations beyond what is described here. Generally, civil disobedience refers to resistance "against a specific law or act of the State having the effect of law." Harrop A. Freeman, *The Right of Protest and Civil Disobedience*, 41 IND. L.J. 228, 231 (1966). For a discussion of the types of charges those who participate in civil disobedience may face, see Juliana Morgan-Trostle, *A Guide for Law Students Considering Non-Violent Civil Disobedience*, 41 THE HARBINGER 21, 22-23 (2017).

150. Though sometimes they do directly implicate property. *See, e.g.*, N.Y. PENAL LAW § 240.20 (McKinney 2020) (outlawing obstructing vehicular or pedestrian traffic as well as congregating with others in a public place and refusing to leave upon a lawful order). This might be more of a mode of trespass laws, even if categorized as disorderly conduct (as in New York).

151. While a full discussion of the bias embedded in the construction and maintenance of public order through criminal law is beyond the scope of this Feature, others have discussed the biased construction of public-order offenses and the public safety they purport to promote. *See, e.g.*, Jamelia N. Morgan, *Rethinking Disorderly Conduct*, 109 CALIF. L. REV. 1637, 1654 (2021) (arguing that "[d]isorderly conduct laws reinforce discriminatory notions of disorder that function to exclude and subordinate negatively racialized and historically marginalized groups").

152. *Illinois v. Wardlow* provides a helpful example. 528 U.S. 119 (2000). In *Wardlow*, a divided Court upheld a search of a young Black man seen in public carrying an opaque bag who, upon seeing the officers arrive, fled. *Id.* at 121-22. These two facts combined gave the officers reasonable suspicion to conduct a *Terry* stop, which eventually led to the discovery of a gun in the bag. *Id.* at 125-26. Though this decision was much decried as improperly curtailing the Fourth Amendment's privacy protections and misinterpreting the significance of a Black man running from the police, implicit in *Wardlow* is the acknowledgement that had the defendant been in his home, as opposed to in public, he would have avoided the police encounter altogether. Admittedly, noise ordinances or assembly regulations, often local infractions, may regulate behavior on private property as well as in public spaces, but again the detection issue lingers. Assemblies may occur without detection, and neighbors, even if disturbed, may not report a noise violation.

court system.[153] Like other statutes in this Section, these offenses cover a range of behavior and may be state- or local-based regulations. They include failure to abide by curfew (whether uniformly set or one set in conjunction with a civil proceeding in the best interest of the child), school dress-code violations, and "bad attitude" offenses, such as talking back to school officials, failure to report to class,[154] presence in the hallway without permission, failure to complete assignments, and the poorly defined, disturbing school.[155] Each of these statutes, regulations, and infractions maintain order by either removing the child from the occupied space—in this case, school property—or compelling conforming behavior from the child. Again, the construction of an order to be maintained through these regulations is laden with bias, with marginalized children suffering disproportionate enforcement and punishment.[156]

Finally, in the wake of mobilization around social-justice reform, "protest bills" linked to property usage have been proposed and, in many jurisdictions, adopted.[157] Like their civil-disorder predecessors, these antiprotest statutes and ordinances target "different forms of protest adjacent activity" and are broadly premised on a presumption that damage to property or social order will result if prohibited activity occurs.[158] Original versions of such statutes often broadly focused on disruption of critical infrastructure, permitting broader liability,

153. *See* Damien Sojoyner, *Black Radicals Make for Bad Citizens: Undoing the Myth of the School to Prison Pipeline*, 4 BERKELEY REV. EDUC. 241, 243 (2013).

154. *See, e.g.*, KRISTIN HENNING, THE RAGE OF INNOCENCE: HOW AMERICA CRIMINALIZES BLACK YOUTH 51-66, 122-46 (2021); Kristin Henning, *Criminalizing Normal Adolescent Behavior in Communities of Color: The Role of Prosecutors in Juvenile Justice Reform*, 98 CORNELL L. REV. 383, 386 (2013).

155. *See* Amanda Ripley, *How America Outlawed Adolescence*, ATLANTIC (Nov. 2016), https://www.theatlantic.com/magazine/archive/2016/11/how-america-outlawed-adolescence/501149 [https://perma.cc/AW3X-NA7A] (reporting that at least twenty-two states have provisions that criminalize a child's behavior that disturbs a school).

156. *See* Sarah E. Redfield & Jason P.Nanci, *American Bar Association: Joint Task Force on Reversing the School-to-Prison Pipeline*, 47 U. MEM. L. REV. 1, 16-87 (2016) (concluding that enforcement of school-based regulations disproportionately impacted students of color, students with dis-abilities, and LGBTQ+ students).

157. Such statutes have been proposed and, in some cases, enacted in response to protests against the Keystone and Dakota pipelines. *See Anti-Protest Bills Around the Country*, ACLU (June 23, 2017), https://www.aclu.org/issues/free-speech/rights-protesters/anti-protest-bills-around-country [https://perma.cc/WD7C-KGS5]; Barry J. Pollack, *From the President: Criminalizing the Tradition of Protest*, 41 CHAMPION 5 (2017). Others were enacted in response to Black Lives Matter protests in 2020. *See* Eric Halliday & Rachael Hanna, *State Anti-Protest Laws and Their Constitutional Implications*, LAWFARE (Oct. 25, 2021, 8:01 AM), https://www.lawfaremedia.org/article/state-anti-protest-laws-and-their-constitutional-implications [https://perma.cc/Q6LW-VRPU].

158. *See* Halliday & Hanna, *supra* note 157.

including vicarious or conspiracy liability.[159] More recent antiprotest statutes restrict protest activity either by targeting a range of activity from traffic violations to rioting to defacing public monuments to organizational support for protests or by simply broadening the definition of existing offenses to include protestor's behavior.[160] Unlike their disorderly conduct predecessors, these regulations are

159. This broad category of offenses targets environmental protestors specifically and imposes criminal penalties on disruption of vital aspects of the economy. *Id.* The federal government has adopted a broad definition of critical infrastructure, defining it as "systems and assets, whether physical or virtual, so vital to the United States that the incapacity or destruction of such systems and assets would have a debilitating impact on security, national economic security, national public health or safety, or any combination of those matters." 42 U.S.C. § 5195c(e) (2018). State statutes tend to be more narrowly focused on energy providers. *See* Kaylana Mueller-Hsia, *Anti-Protest Laws Threaten Indigenous and Climate Movements*, BRENNAN CTR. FOR JUST. (Mar. 17, 2021), https://www.brennancenter.org/our-work/analysis-opinion/anti-protest-laws-threaten-indigenous-and-climate-movements [https://perma.cc /L8HX-DAK9]. Regardless of their focus, these statutes provide enhanced protections that are designed to silence protests. *Id.* This may include the wholesale creation of a new offense or type of liability. *See, e.g.*, MONT. CODE ANN. § 82-1-602(3) (2021) (creating conspiracy liability for damage to critical infrastructure).

160. For a general description of such statutes, see Halliday & Hanna, *supra* note 157; Vera Eidelman, *States Are Passing Laws Targeting Peaceful Protesters*, CNN (Apr. 27, 2021, 7:05 PM EDT) https://www.cnn.com/2021/04/26/opinions/laws-target-peaceful-protesters-eidelman/index.html [https://perma.cc/UPZ8-6BNY]; and Char Adams, *Experts Call 'Anti-Protest' Bills a Backlash to 2020's Racial Reckoning*, NBC NEWS (May 18, 2021, 1:46 PM EDT), https://www.nbcnews.com/news/nbcblk/experts-call-anti-protest-bills-backlash-2020-s-racial-reckoning-n1267781 [https://perma.cc/X9TC-T8JB]. For an example of a specific stat-ute, see ARK. CODE ANN. § 5-71-214(c) (2021), which amended "obstruct[ion of] a highway or other public passage" to be a class A misdemeanor, carrying a maximum sentence of one year. It should be noted that Arkansas permits a defense to obstruction of highway or public passage if it "was rendered impassable solely because of a gathering of persons to hear the defendant speak or otherwise communicate."ARK. CODE ANN. § 5-71-214(b) (2021); *see also* H.B. 164, 2021 Leg., Reg. Sess. (Ky. 2021) (increasing penalties for blocking traffic); H.B. 645, 2021 Leg., 2021 Reg. Sess. (Md. 2021) (same); H.B. 303, 92d Leg., Reg. Sess. (Minn. 2021)(same); S.B. 2374, 2021 Leg., Reg. Sess. (Miss. 2021) (same). In 2021, Iowa passed the "Back the Blue" bill that lawmakers indicated were necessary in response to Black Lives Matter pro-tests. *See* Rod Boshart, *Iowa Governor Signs "Back the Blue" Law to Raise Penalties for Rioting, Protect Officers*, POLICE 1 (June 18, 2021), https://www.police1.com/legal/articles/iowa-governor-signs-back-the-blue-law-to-raise-penalties-for-rioting-protect-officers-qWYM7fKKiPcaFHTW/ [https://perma.cc/5FSG-TVGF]; Paul Brennan, *Iowa Legislature Passes Bill That Increases Penalties for Some Protest-Related Offenses, Protects Drivers Who Hit Protesters from Law-suits*, LITTLE VILL. MAG. (May 19, 2021), https://littlevillagemag.com/iowa-legislature-passes-bill-increasing-protest-penalties [https://perma.cc/6G9E-5SQV]. The bill expanded the definition of criminal mischief and increased penalties for protestors blocking traffic. Brennan, *supra*; *see also* H.B. 1508, 93d Gen. Assemb., Reg. Sess. (Ark. 2021) (broadening definitions of offenses and victims); S.B. 152, 2021 Leg., Reg. Sess. (Ala. 2021) (expanding the power of municipalities to regulate protests, including requiring permits); H.B. 2309, 55th Leg., 1st Sess. (Ariz. 2021) (creating new charge for behavior defined as "violent or disorderly

often prophylactic in their construction.[161] They allow arrest of protestors even if the protestors have not violated any other criminal laws in anticipation that a gathering may create a breach of peace or cause some other harm.[162] While such antiprotest bills raise blatant First Amendment concerns and have garnered attention as a result, it is worth noting that such statutes represent a continuation of preexisting regulations and enforcement policies that utilize criminal law as a mechanism to control who speaks and where.

3. Discretion, Speech, and Criminal Law

A final component of any discussion of criminal law's impact on speech is discretion. Despite criticism of the application of such discretion, discretionary moments are embedded in criminal law often on the theory that they may allow executive and judicial actors to target legislative aims more precisely with the enforcement and application of laws.[163] Proponents of discretion describe it as potentially removing risks of bias or illogical application from criminal law and allowing for construction of law that is responsive to community goals and expectations while protecting nonmajority perspectives.[164] This position, while

assembly"); H.B. 1, 2021 Leg., Reg. Sess. (Fla. 2021) (expanding the definition of disorderly conduct, rioting, and traffic obstruction, and increasing municipal law-enforcement budgets); H.B. 1205, 2021 Leg., Reg. Sess. (Ind. 2021) (expanding the definition of riot); S.B. 198, 2021 Leg., Reg. Sess. (Ind. 2021) (increasing penalties for violating curfew). Some proposed legislation also carried significant collateral consequences including barring social benefits such as student loans, housing, and unemployment assistance, or rendering individuals ineligible for state jobs upon conviction. *See* Adams, *supra*.

161. *See* Halliday & Hanna, *supra* note 157. States that have adopted such statutes include Alabama, Arkansas, Florida, Iowa, Missouri, North Dakota, Oklahoma, South Dakota, Tennessee, Texas, Utah, and West Virginia. For a tracker of protest laws, see *US Protest Law Tracker*, INT'L CTR. FOR NOT-FOR-PROFIT L., https://www.icnl.org/usprotestlawtracker/?location=&status=enacted&issue=&date=&type=legislative [https://perma.cc/A86X-YBVE].

162. *See, e.g.*, ARK. CODE ANN. §§ 5-39-203(a)-(b) (2021) (creating a felony offense, in certain contexts, of entering and remaining on property defined as critical infrastructure in § 5-38-101).

163. Discretion is also criticized as creating more bias. For a discussion of prosecutorial discretion, see ANGELA J. DAVIS, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR 125-26, 140-41 (2012); Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13, 20 (1998); and Christina Morris, *The Corrective Value of Prosecutorial Discretion: Reducing Racial Bias Through Screening, Compassion, and Education*, 31 B.U. PUB. INT. L.J. 275, 276 (2022). For a famous criticism of judicial discretion that led to the implementation of the, now ironically, advisory Federal Sentencing Guidelines, see generally MARVIN FRANKEL, CRIMINAL SENTENCE: LAW WITHOUT ORDER (1973).

164. *See, e.g.*, Thurman W. Arnold, *Criminal Attempts—The Rise and Fall of an Abstraction*, 40 YALE L.J. 53, 79 (1930) (describing the law of criminal attempt's vagueness as creating an

widely criticized, nonetheless persists as discretion remains an integral component of the functional reality of criminal legal systems. Consideration of discretion with regard to the statutes described above is therefore required.

a. The Discretion of Formal Actors

In the context of the statutes described above and others like them, the exercise of discretion by formal or system-based actors such as police, prosecutors, and judges creates secondary impacts on speech that transform neutral statutes and ordinances into targeted tools designed to suppress particular types of speech, to curtail access to particular forums for speech, and to exclude or discourage particular speakers.[165] This transformative power is evident in policing and prosecutorial theories that facilitate the investigation and prosecution of low-level offenses in the name of promoting public safety and preventing more serious or violent offenses.[166] Often referred to as broken-windows policing, this theory of enforcement endorses overpolicing in neighborhoods that appear unwatched and uncared for by residents and local authorities.[167] In practice, this theory has been used to justify raced, gendered, and classed policing policies. While broken-windows policing has been largely disowned and discredited, even by its early proponents, aggressive policing and prosecution of minor offenses in poor and majority-minority communities persists.[168]

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opportunity for discretionary correction). Early legal realists urged judicial discretion in particular to account for the effect of law on the governed. *See, e.g.*, Pound, *supra* note 23, at 609-10; Karl Llewellyn, *Some Realism About Realism: Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1223-24 (1931).

165. Many have critiqued biased enforcement of public-order and minor-property offenses as a mechanism to control presence and maintain white spaces. *See supra* notes 114-138 and accompanying text.

166. *See, e.g.*, WESLEY G. SKOGAN, DISORDER AND DECLINE: CRIME AND THE SPIRAL OF DECAY IN AMERICAN NEIGHBORHOODS 10 (1990) (discussing the argument that neglected properties are criminogenic, creating spaces for low-level offenses). As this source suggests, traditionally the need for low-level policing has been associated with urban decay and therefore discretionary enforcement in city contexts. However, the rise of the opium epidemic has seen an increase of similar principles applied in rural areas. *Cf.* Morgan, *supra* note 122, at 1047-48 (discussing the police's wide discretion to cite and arrest for quality-of-life offenses, which "disproportionately target unsheltered communities").

167. *See* George L. Kelling & James Q. Wilson, *Broken Windows: The Police and Neighborhood Safety*, 249 ATLANTIC 29 (Mar. 1982) (introducing the broken-windows theory).

168. For example, the Department of Justice's 2015 report investigating policing practices in Ferguson, Missouri following the death of Michael Brown chronicled aggressive ticketing in marginalized and predominantly Black and immigrant communities outside of St. Louis. *See* C.R. Div., *Investigation of the Ferguson Police Department*, U.S. DEP'T JUST. 2-8 (Mar. 4, 2015)

This reality alone would warrant scrutiny, but in the context of the criminal laws described in the preceding Sections, this discretion plays an outsized role for distinct reasons. First, given the sparse structure of the statutes themselves, law-enforcement officials may use these laws to address a broad array of behaviors, rendering them frequent bases of initial contact between law enforcement and the citizenry. Unexplained presence, even in the absence of additional behavior, can raise reasonable articulable suspicion to justify a police encounter for these low-level, elementally sparse offenses.[169]

Second, discretionary decision-making by formal actors is often obscured from the public.[170] Police departments and prosecutor's offices alike may not announce enforcement decisions or their basis, outside of the most general terms.[171] In the field, individual actors may engage in their own discretionary decision-making for a variety of reasons, rendering enforcement policies irregular and, at times, seemingly unknowable.[172]

Third, the ubiquity of these statutes across systems, coupled with their purported purpose to neutrally enforce accepted and commonly understood social norms around locations (don't trespass on someone else's land, don't litter in parks, don't yell fire in crowded theaters) and the obscurity surrounding moments of discretionary decision-making, allows them to exist with little objection as the background noise necessary for an ordered society.[173] Arrests or

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[hereinafter *Ferguson Report*], https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf [https://perma.cc/XU3M-KPQM]; Morgan, *supra* note 151, at 1657-76 (noting disparate en-forcement rates among disabled individuals and people of color).

169. For example, in *Terry v. Ohio*, while the police officer indicated that he suspected Terry was about to commit a burglary, he described what amounts to trespass to justify his stop and frisk of Terry. 392 U.S. 1, 5 (1968). Jamelia N. Morgan has also written on the use of low-level offenses to justify regulation of nonconforming identities. *See, e.g.*, Morgan, *supra* note 122, at 1049-50; Morgan, *supra* note 151, at 1645-47.

170. *See* Joseph Goldstein, *Police Discretion Not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice*, 69 YALE L.J. 543, 552 (1960); Roger A. Fairfax, Jr., *Prosecutorial Nullification*, 52 B.C. L. REV. 1243, 1243-44 (2011); Jenny E. Carroll, *Safety, Crisis, and Criminal Law*, 52 ARIZ. ST. L.J. 769, 790 (2020).

171. *See* Carroll, *supra* note 170, at 790 (noting that what the public sees is outcomes as opposed to the decision-making processes); Goldstein, *supra* note 170, at 552 (same); W. Kerrel Murray, *Populist Prosecutorial Nullification*, 96 N.Y.U. L. REV. 101, 173, 175 (2021) (same).

172. *See* Kim Forde-Mazrui, *Ruling Out the Rule of Law*, 60 VAND. L. REV. 1497, 1512-16 (2007); L. Song Richardson, *Police Efficiency and the Fourth Amendment*, 87 IND. L.J. 1143, 1144-45 (2012); L. Song Richardson, *Cognitive Bias, Police Character, and the Fourth Amendment*, 44 ARIZ. ST. L.J. 267, 268 (2012); Goldstein, *supra* note 170, at 552.

173. While some, such as anticamping ordinances, have admittedly come under more frequent scrutiny, these challenges tend not to spring from the community per se but are often part of

prosecutions for trespass or minor property damage rarely make national or even local headlines without some aggravating event. Instead, they may be viewed as the stuff of everyday existence—and even as value-added policing and prosecutions—when enforcement is drawn to a community's attention.[174]

This generalized indifference to the enforcement or existence of these statutes allows for the maintenance of inequities in discretionary applications by formal actors. Even in the face of data confirming disproportionate enforcement against marginalized populations generally,[175] courts remain reluctant to disturb the sanctity of executive discretion in investigation, arrest, and charging decisions.[176] As a result, such discretion drives neutral statutes toward the regulation of particular populations and particular behavior.[177]

In the context of speech—even speech that is a purported incidental casualty to enforcement of these facially neutral statutes—this is especially troubling. It raises the specter that what scholars and courts have dismissed as non-speech-targeted laws are, in fact, commonly applied to and disproportionately impact marginalized populations and dissenting positions. Again, access to places for speech, particularly privately owned ones, looms large. Property rights insulate speakers from enforcement in many situations, either by obscuring activity or by rendering that activity legal. Lack of access to property may force speakers into public spaces where enforcement of traffic regulations or trespass statutes may

larger civil rights litigation campaigns. *See, e.g.*, Charlotte Allen, *The ACLU Against the Cities*, CITY J. (1994), https://www.city-journal.org/article/the-aclu-against-the-cities [https://perma.cc/A4MJ-JX43] (describing the ACLU's early campaign against restrictions on homeless populations).

174. *See, e.g.*, Jack Healy, *Rights Battles Emerge in Cities Where Homelessness Can Be a Crime*, N.Y. TIMES (Jan. 9, 2017), https://www.nytimes.com/2017/01/09/us/rights-battles-emerge-in-cities-where-homelessness-can-be-a-crime.html [https://perma.cc/R7CC-34H5] (describing conflict around enforcement of anticamping statutes between advocates for those with housing insecurity and those who argued that "homeless encampments" were sources of crime, impeded access and use of public spaces, and devalued property); Morgan, *supra* note 151, at 1646, 1654-57.

175. *See* Morgan, *supra* note 151, at 1665-76 (discussing enforcement data). Looking beyond crime-reporting data, recent discussion about the variances between prosecution of Black Lives Matter protestors and January 6th insurrectionists underscores this point. *See* Josh Gerstein & Kyle Cheney, *Black Lives Matter Comparison Roils Court in Jan. 6 Cases*, POLITICO (Oct. 4, 2021), https://www.politico.com/news/2021/10/04/black-lives-matter-comparison-roils-court-in-jan-6-cases-515086 [https://perma.cc/4PLU-ST44]; Alana Durkin Richer, Michael Kunzelman & Jacques Billeaud, *Records Rebut Claims of Unequal Treatment of Jan. 6 Rioters*, AP NEWS (Aug. 30, 2021), https://apnews.com/article/records-rebut-claims-jan-6-rioters-55adf4d46aff57b91af2fdd3345dace8 [https://perma.cc/L9MN-5TRY] (relying on court rec-ords to demonstrate that Black Lives Matter protestors were more aggressively prosecuted and received longer sentences than January 6th actors).

176. *See* Davis, *supra* note 163, at 20, 22, 23.

177. *See* Morgan, *supra* note 122, at 1048; Morgan, *supra* note 151, at 1665-76.

carry a silencing effect. Beyond this, when speech is linked to a specific location, or where presence in a particular space is the message, regulation of locations may serve as a functional equivalent of content suppression. As the Court increasingly rejects substantive equity in First Amendment jurisprudence, the resulting uneven First Amendment landscape is the product of a subordinating First Amendment doctrine that is enforced and maintained by formalized discretionary decision-making and larger social acceptance of that discretion.

b. The Discretion of Informal Actors

The discretion of official actors, however, is not the only discretion that renders these statutes corrosive to free speech. Informal actors—those subject to these regulations—may adjust their behavior based on the exercise of formal discretion or the threat of it.[178] Most obviously, actors may decline to engage in future speech activity or may cease participation contemporaneously based on an arrest or threat of an arrest or future charge. While it is challenging to track this behavioral pattern—it is, after all, a calibration of what someone did not do as opposed to what they did do—§ 1983 filings provide useful evidence.[179] These claims document decisions by individuals not to engage in protests and acts of civil (and at times uncivil) disobedience out of fear of arrest, prosecution, and police violence. Reactions to antiprotest statutes offer another window into the

178. *See* Adams, *supra* note 160 (noting the passage of antiprotest legislation and overpolicing during protests harms grassroots social movements).

179. *See, e.g.*, Minter v. City of Aurora, No. 20-cv-02172, 2021 WL 5067593, at *2-3 (D. Colo. Sept. 29, 2021) (noting in a § 1983 claim that orders to disperse from a violin vigil for a slain community member caused attendees to leave the scheduled protest and caused others to decline to attend future protests); Alsaada v. City of Columbus, 536 F. Supp. 3d 216, 256 (S.D. Ohio 2021) (noting in a § 1983 claim that policing efforts around Black Lives Matter protests, even if they did not produce arrest or prosecutions, had the effect of discouraging attendance at events); Complaint at 16, Kampas v. City of St. Louis, No. 22-cv-01057 (E.D. Mo. Oct. 3, 2022) [hereinafter *Kampas* Complaint] (alleging the chilling effect on future participation in protest and speech); Complaint at 18, Stilp v. City of Pottsville, No. 22-cv-01266 (M.D. Pa. Aug. 12, 2022) [hereinafter *Stilp* Complaint] (describing arrest for disorderly conduct as having a chilling effect on expression); Complaint at 6, 9, Urbanski v. Blunck, No. 22-cv-01483 (N.D. Tex. July 7, 2022) [hereinafter *Urbanski* Complaint] (alleging that the arrest for disorderly conduct and noise-ordinance violations in a protest of "Santa Claus" chilled First Amendment activity); Complaint at 40, Jordan II v. City of Dallas, No. 22-cv-01173 (N.D. Tex. May 27, 2022) [hereinafter *Jordan II* Complaint] (alleging that the arrest for disorderly conduct and failure to disperse deterred speech and violated plaintiffs' assembly rights protected under the First Amendment); Complaint at 42, Cleveland v. City of Dallas, No. 22-cv-01154 (N.D. Tex. May 26, 2022) (alleging that the city's policy to arrest, but not charge protestors, was a means to suppress speech).

effect of informal discretion on speech.[180] Even in jurisdictions in which such statutes and ordinances were ultimately not passed or enforced, organizers argued that fear of enforcement drove decisions about participation for many community members.[181]

On the one hand, such decisions are consistent with criminal law's articulated goals of deterrence. Decisions to maintain police presence, to arrest those who violate state or local laws, and to prosecute violators are intended to curb both current and future behavior. In the context of speech, however, this deterrent aim may raise concerns absent a competing state interest. Deterrence tactics that drive informal decision makers to cease present and future activity may shift ominously toward prior restraint. The realities that speakers without access to private forums of speech or other resources may be subject to these tactics more readily and that dissenting speech may be particularly targeted raise additional concerns.

Beyond the deterrent effect that formal discretion may have on informal actors, enforcement of these regulations may elude review, even if an arrest is made or a charge is brought. The status of these regulations as misdemeanors or infractions places them in a category of offenses for which there are limited constitutional protections. A ticket for littering or a misdemeanor trespass charge, even if it results in a prosecution, may not trigger a federal (or often state) right to counsel or a right to jury trial if a defendant does not face imprisonment upon conviction.[182] For already marginalized populations, this reality can create

180. *See, e.g.*, Dream Defenders v. DeSantis, 559 F. Supp. 3d 1238, 1251–54 (N.D. Fla. 2021) (noting protestors sought a preliminary injunction against Florida's amended antirioting statute in part because ambiguity around liability resulted in self-censorship by protestors and chilled speech activity). In Florence, Alabama, protestors filed a claim that discriminatory enforcement of ordinances that assigned police fees to Black Lives Matter organizers in the wake of George Floyd's murder rendered demonstrations financially unfeasible and that the threat of arrest for noncompliance had a chilling effect on speech. *Civil Rights Group Sues City of Florence over Ordinances Used to Curb Protests*, Ala. Pol. Rep. (Apr. 20, 2022, 7:52 AM CDT) https://www.alreporter.com/2022/04/20/civil-rights-group-sue-city-of-florence-over-ordinances-used-to-curb-protests/ [https://perma.cc/C7ST-HX87].

181. *See* Carrie Levine, *New Anti-Protest Laws Cast a Long Shadow on First Amendment Rights*, Ctr. for Pub. Integrity (Dec. 20, 2021), https://publicintegrity.org/politics/new-anti-protest-laws-cast-a-long-shadow-on-first-amendment-rights/#:~:text=Some%20of%20the%20new%20laws,losing%20the%20right%20to%20vote [https://perma.cc/Y42Z-ZHAV] (de-scribing confusion over the coverage and validity of laws as chilling speech). These statutes may also implicate other First Amendment concerns, including press concerns. *See* April Knight, *Under Attack: How Enhanced Anti-Protest Laws Impede and Endanger the Free Press*, 58 Am. Crim. L. Rev. 84, 85 (2021); Eidelman, *supra* note 160 (noting that some statutes may have a chilling effect on the press).

182. *See* Argersinger v. Hamlin, 407 U.S. 25, 37 (1972) (holding that the Sixth Amendment right to counsel extends to all cases in which imprisonment is a possible sentence); Alabama v.

impediments to challenging the allegation on any grounds, much less a complex constitutional claim of free speech. Such a challenge requires either an ability to self-navigate the waters of municipal and county court systems, which are admittedly murky and winding,[183] or come up with the resources to hire private counsel. It also requires the commitment of temporal and monetary resources to attend court proceedings over offenses that, upon conviction, may impose only a fine. This is not to minimize the effect of fines; they clearly impose tremendous burdens on marginalized populations.[184] In practice, however, the fine imposed is often less than the costs incurred contesting the charge in terms of lost work, childcare or eldercare, transportation or parking, or other personal burdens.[185]

Faced with this reality, those targeted by the discretion of formal actors may engage in a bifurcated decision-making of sorts. They may decide that, if charged, they would rather cut their losses and plead guilty than bear the consequences of a prolonged legal contest.[186] Or they may engage in their own prophylactic efforts and forgo behavior that could induce or facilitate arrest. Either decision may not only silence speech but also serve to obscure the speech danger by permitting enforcement and the threat of enforcement to go unchallenged. Even if discretionary decisions by formal actors to arrest, charge, and prosecute protestors were challenged, courts' allegiance to time, place, and manner doctrine would likely permit them to survive under current First Amendment doctrine.

II. NEUTRALITY, OR A SUBORDINATING FIRST AMENDMENT

This Part turns to the First Amendment landscape created by modern speech doctrines. Whatever the First Amendment might have been at the Founding, its

Shelton, 535 U.S. 654, 674 (2002) (same); Baldwin v. New York, 399 U.S. 66, 71 (1970) (holding that the Sixth Amendment right to jury trial extends to offenses in which imprisonment of more than six months is a possible sentence).

183. *See* KOHLER-HAUSMANN, *supra* note 47, at 5-11; ALEXANDRA NATAPOFF, PUNISHMENT WITHOUT CRIME: HOW OUR MASSIVE MISDEMEANOR SYSTEM TRAPS THE INNOCENT AND MAKES AMERICA MORE UNEQUAL 132-33 (2018); Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 STAN. L. REV. 611, 619 (2014).

184. *See* Beth A. Colgan, *Reviving the Excessive Fines Clause*, 102 CALIF. L. REV. 277, 284-95 (2014); *see also Ferguson Report*, *supra* note 168, at 4-5, 42-61 (describing the complex challenges involved in navigating the court system even for those charged with minor violations).

185. For a discussion of such burdens in the context of bail, see Jenny E. Carroll, *Beyond Bail*, 73 FLA. L. REV. 143, 186-88 (2021), which argues that the hidden financial costs of pretrial court proceedings include lost wages and the costs of childcare, eldercare, transportation, and parking.

186. *See* KOHLER-HAUSMANN, *supra* note 47, at 5 (describing misdemeanor systems as mechanisms to force pleas from marginalized defendants).

meaning and tradition have altered with time and with the emerging jurisprudence, creating a complex and at times near-incomprehensible doctrine.[187] Different First Amendment scholars have offered different explanations for this reality. Two approaches offer constructive lenses through which to examine the question of whether a First Amendment defense ought to be available to criminal charges. The first suggests that while modern First Amendment doctrine purports to protect only speech, speech is not, in fact, an entity with independent constitutional saliency.[188] Instead, speech is a tool that preserves social order.[189] Protecting speech, therefore, requires decoupling it from an individual-rights analysis and contextualizing it within accepted social norms. The result is that not all speech is consistently protected or excluded from protection. Some obscene speech may carry value because it is consistent with accepted social norms,[190] and some clearly communicative efforts will not.[191]

The second approach asserts, not unrelatedly, that the post-New Deal free-speech doctrine emerged couched in notions of expressive equality.[192] This theory also urges consideration of First Amendment rights not in terms of individual rights, but in terms of a collective right—here, a comparative right that may require government efforts to equalize access to forums of speech. Under this theory, the right to speak is not only a literal right to speech itself, but a right to speech equal to that of other speakers. The precise terms of that equality have changed with time and judicial interpretation. Early twentieth-century cases adopted a substantive-equality approach to speech that considered the impact of marginalizing factors such as poverty, social inequity, or even dissenter status.[193]

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187. *See, e.g.*, Rabban, *supra* note 1, at 1207-08, 1210-11; Post, *Recuperating*, *supra* note 1, at 1280; John Greenman, *On Communication*, 106 MICH. L. REV. 1337, 1341 (2008); Paul Horwitz, *Universities as First Amendment Institutions: Some Easy Answers and Hard Questions*, 54 UCLA L. REV. 1497, 1497 (2007); Barry P. McDonald, *Speech and Distrust: Rethinking the Content Approach to Protecting the Freedom of Expression*, 81 NOTRE DAME L. REV. 1347, 1430 (2006).

188. *See, e.g.*, Post, *Recuperating*, *supra* note 1, at 1280-81; Bhagwat, *Details*, *supra* note 2, at 32-33 (describing theories that free speech carries constitutional value only as it supports democratic engagement).

189. *See* Post, *Recuperating*, *supra* note 1, at 1250, 1279.

190. *See, e.g.*, Cohen v. California, 403 U.S. 15, 18 (1971) (protecting plaintiff's right to embellish his jacket with "Fuck the Draft" in an effort to make a political statement).

191. *See* Post, *Recuperating*, supra note 1, at 1252.

192. *See* Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV 20, 20-21 (1973); Lakier, *supra* note 15, at 2119.

193. *See* Lakier, *supra* note 15, at 2139-52 (describing substantive-equality cases).

Later cases abandoned this approach in favor of neutrality as a mechanism to achieve equality.[194]

Both doctrinal approaches offer a mechanism to explain what appear to be inconsistent decisions and the enshrinement of inequality in First Amendment jurisprudence. They also raise questions about how courts ought to consider speech claims in the context of criminal cases. Finally, while both offer mechanisms to consider speech inequality created by uneven access to forums, neither address whether criminal laws' regulation of space to speak ought to be subject to a First Amendment defense to mitigate that inequality. Building on the work of these scholars, this Part seeks to fill those gaps in several ways. First, it offers a summary of the two perspectives, including a functional analysis in the context of the criminal laws considered in Part I. Second, this Part extends the arguments offered by these theories to assert the novel theory that an individual's presence in a space is significant not just in the characterization of that space as a forum for speech, but because presence itself can at times be speech.

A. Social Norms and Speech

First Amendment scholars, including Professor Robert Post, have argued that free-speech jurisprudence is best understood as an effort to preserve particular social norms.[195] Seen through this lens, the resulting doctrine is less an effort to preserve speech as a right of private citizens per se than an effort to acknowledge that speech is "an instrument by which the law locates, defines and sustains desirable social practices."[196] As such, the preservation of speech rights is not a balance or compromise between competing values or rights, but rather a tool to protect and maintain social values that in turn lend context to a right.[197] It is good work if you can get it, or you know it when you see it. Some clearly

194. An interesting point of comparison for the two approaches to equality doctrine is campaign finance. In *Buckley v. Valeo*, 424 U.S. 1 (1976), the Court restricted the amount of money that could be spent on political advertising in part in the name of creating equality. *Id.* at 17. Nearly fifty years later, in *Citizens United v. FEC*, 558 U.S. 310 (2010), the Court struck down funding restrictions, holding that the First Amendment did not differentiate between corporations and individuals and, in the process, rejecting the equalizing view adopted by *Buckley*. In doing this, scholars argue that the Court endorsed a formalistic construction of free speech in which well-resourced speakers enjoyed disproportionate access to forums compared to underresourced speakers. *See, e.g.*, Lakier, *supra* note 15, at 2129-30 (comparing the two cases as part of an evolving formalist speech doctrine); Kathleen M. Sullivan, *The Supreme Court 2009 Term Comments: Two Concepts of Freedom of Speech*, 124 HARV. L. REV. 143, 145 (2010) (describing the *Citizens United* case as libertarian as opposed to egalitarian).

195. *See* Post, *Recuperating*, *supra* note 1, at 1279-80.

196. *Id.* at 1279.

197. *Id.* at 1279-80.

communicative acts, however, will fall outside of this protective bubble. Such speech will lose constitutional saliency precisely because it fails to support an identified and protected social norm.

To be clear, this exclusion of some communicative efforts is not the same as regulation of speech based on its content. Rather, some efforts to communicate will fail to engage or will offend social norms sufficiently such that they will simply lose protection. Post offers as an illustration of such an exclusion: an individual who carves the clearly political message "Down with Clinton" into a bus seat.[198] Post acknowledges that while such an act would survive the *Spence* test's primary requirement that words must carry a particularized message likely to be understood by their audience, it clearly would not receive constitutional protection where the First Amendment is interpreted in ways that uphold accepted social norms.[199] A speaker's decision to use graffiti[200] to express their view is inconsistent with what social norms will support.[201] In another context, spoken another way, the message would enjoy all the protection it deserves as political speech.[202] But as a scrawl on a bus seat, its creator faces a vandalism conviction if caught.

There is a seduction to Post's argument. On the one hand, it accomplishes the not-insignificant task of offering a coherent rubric through which to understand First Amendment decisions and to sort through future, complex cases. Under this theory, a protestor for social justice who trespasses, while violating criminal laws and social norms, may nonetheless receive protection if their claim resonates with the community. In contrast, a January 6th rioter, even one who only trespassed, may forfeit First Amendment protections if efforts to overturn a lawful election are discordant with commonly shared social values. Each actor engaged in communicative acts. In this hypothetical, both violated the same content-neutral criminal statute—trespass—yet the application of community norms may protect one speaker but not the other. That many may find the results intuitively acceptable reinforces Post's claim that speech rights are best imagined as tools to reinforce and promote social norms. In addition, the theory acknowledges that virtually every government action affects speech and offers a principle that may help determine when a government action raises constitutional concern or when it merely reflects the reality of a governed community.[203] Finally, it seeks to reconnect the Court's efforts to grant cover to some regulation of speech, but

198. *Id.* at 1252.

199. *Id.*

200. I prefer the neutral term, "graffiti," as opposed to the normative term, "vandalism."

201. *See* Post, *Recuperating*, *supra* note 1, at 1252.

202. *See id.* at 1274 ("[S]peech is always situated in real social space.").

203. *See id.* at 1277; Alexander, *supra* note 49, at 925-26; Dorf, *supra* note 51, at 1176.

not others, with the "community" for which the Court aims to speak as the head of the judicial branch.[204]

These are all laudable goals. Yet as an as-applied doctrine, the resulting case line may appear erratic, difficult to predict, and exclusionary toward marginalized positions. To tether speech protection under the First Amendment to the enforcement of court-interpreted social norms inevitably requires courts (or perhaps earlier actors, such as law enforcement or prosecutors) to prioritize some norms over others on behalf of the community.[205] This requires an understanding of those norms, which may be elusive in and of itself, as well as the ability to understand the norm hierarchy, which may include protecting marginalized perspectives. When would an act violate a community norm? And if multiple norms are implicated, which ought to take priority? And further, when should majoritarian positions seek to preserve and protect minority positions as part of social norms?

The theory also fails to account for the persistent reality that nonconformity with social norms may be part of communicative efforts. In other words, not only may marginalized positions at times lack the ability to present their speech in socially accepted ways, but they may also choose not to precisely because they want to push back on their marginalization.[206] Carving a political statement into a bus seat may be a forum that is utilized by or reaches a population that does not have access to other forums of speech.[207] There may be value in its jarring discordance with the accepted norm that, no matter how strongly held the belief, it ought not be carved into the back of a bus seat.[208] Likewise, graffiti in a neighborhood or on a Confederate monument, or the mere act of refusing to leave a restaurant, may be *the* message—the communication may be an effort to mark a presence or position discordant with social norms.[209] Such acts may be communicative, and they may deserve First Amendment protection.

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204. *See* Post, *Recuperating*, *supra* note 1, at 1278; Post, *Public Discourse*, *supra* note 1, at 626-66. *See generally* Robert C. Post, *Between Democracy and Community: The Legal Constitution of Social Form*, *in* DEMOCRATIC COMMUNITY: NOMOS XXXV 163 (John W. Chapman & Ian Shapiro eds., 1993) (discussing "the concept of 'democratic community' from the . . . perspective of the American legal system").

205. For a general discussion of how government action results in public ordering in criminal law, see Ristroph, *supra* note 148.

206. Cohen's "fuck the draft," Johnson's burning of the flag, and Tinker's armbands all offer good examples of nonconformity being part of the message. *See* Cohen v. California, 403 U.S. 15 (1971); Texas v. Johnson, 491 U.S. 397 (1989); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969).

207. *See* Carroll, *supra* note 6, at 1288-89.

208. *Id.* at 1289-90.

209. *Id.*

Nonetheless, Post's proposal to think of free-speech doctrine as preservation of social values is vital to the work of this Feature, in no small part because it recognizes that there may be times when the enforcement of content-neutral criminal law in ways that incidentally impact speech will not be consistent with community norms and values. Such laws ought to be subject to constitutional scrutiny not because they are invalid in the abstract but because their application in a particular case, one that implicates speech, contravenes community norms. The availability of a First Amendment defense to certain criminal charges as contemplated here would facilitate this approach. Where Post would vest this power in formal actors, particularly judges, my proposed defense would assign it to community members, namely defendants and jurors, in the hopes of more accurately reflecting accepted norms.[210] Admittedly, there may be problems with this bottom-up approach, as discussed in Part III. However, the approach carries its own value, particularly in light of the current uneven First Amendment landscape.

B. Equality and Speech

The equality doctrine is not incompatible with a theory of free speech grounded in social norms. This approach views modern free-speech doctrine as premised on ideals of equality and considers how the Court, at various stages, sought to achieve that equality.[211] This descriptive ideal is central to the claim of this Feature: enforcement of criminal laws that are ostensibly speech neutral can create unequal speech spaces that disproportionately burdens some speech and some speakers even when applied equally.

This claim is reinforced by ideological shifts in the Court that have driven efforts to implement equal speech opportunities, with equality goals either accomplished or undermined by government regulation. Viewing government regulation as necessary to achieve equality goals, the Court once upheld regulations that suppressed the speech of some to ensure access for less powerful speakers and required the government to grant access to public spaces and even private public forums for speakers without other places or means to speak.[212] Such decisions attempted to level the free-speech playing field by ensuring a substantive equality of speech.[213]

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210. As noted above, there may be times when judges will serve as fact finders in cases in which the defense is raised. In these instances, the defense would urge them to do so not as formal actors but as community members who sit in lieu of a jury.

211. *See supra* note 192 and accompanying text.

212. *See* Lakier, *supra* note 15, at 2122.

213. *See, e.g.*, Martin v. City of Struthers, 319 U.S. 141, 146 (1943).

Later, the Court jettisoned this approach in favor of a more formalized doctrine that relied on neutrality to achieve equality. Under this approach, equality was achieved if all speakers were treated the same.[214] As a result, economic or social factors that might create inequalities were irrelevant to courts' interpretation of the First Amendment. The government's role was to avoid interference and to allow the free market of ideas to be truly a free market.[215] The resulting free-speech landscape was one of commodified speech rights in which those with the access to resources were free to express themselves, while those without such access found little protection in the Court's neutral First Amendment.[216]

Along this road of shifting First Amendment formalism, the concept of access to spaces to speak as a critical component of the doctrine's ideology has waxed and waned. There were outliers and exceptions—for example, protected speech in a Pennsylvania shopping mall[217] and on a privately owned radio station (oddly, also from Pennsylvania).[218] These outliers, however, stand in stark contrast to the neutrality-based First Amendment doctrine. Approaches that sought to create substantive speech equality also sought to create spaces or forums in which such speech might occur, even if doing so impeded on property rights or other competing community values and interests. In contrast, linking equity to neutrality contracted these spaces in favor of letting each speak in whatever space they might have some right to occupy at a time and in a manner that was permissible. This shift towards formalism deprioritized speech in the face of competing property rights. As a result, the policing of dissenting and marginalized speech became a function of enforcing statutes that regulate access to spaces, including the criminal statutes described in the preceding Part.

Neither equality doctrine sought to account for the possibility that presence and speech might be bound together. Even as the Court pursued a substantive-equality doctrine of free speech that sought to equalize access to spaces to speak, it also defined locations as forums which might facilitate a message, as opposed to communication itself. Likewise, in later formalistic regimes, regulations that prohibited access to locations, even as they prohibited speech in the process, survived constitutional challenges if neutrally applied. Part III pushes back on this narrow construct, arguing that presence can be speech and free-speech doctrines ought to account for this reality.

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214. *See, e.g.*, Citizens United v. FEC, 558 U.S. 310, 340 (2010).

215. *See* FCC v. Pacifica Found., 438 U.S. 726, 745-46 (1978).

216. *See* Sullivan, *supra* note 194, at 149-51.

217. Amalgamated Food Emps. Union Loc. 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 324-25 (1968), *abrogated by* Hudgens v. Nat'l Lab. Rels. Bd., 424 U.S. 507 (1976).

218. Red Lion Broad. Co. v. FCC, 395 U.S. 367, 400-01 (1969).

1. A Substantive-Equality Free-Speech Doctrine

While the First Amendment may speak only of liberty, expressive equality is a component of that liberty interest.[219] To imagine a right to speak as one of substantive equality (a right to speak that is equal to the right of others) requires a corrective principle whereby the fields of communication undergo a leveling. Markets alone are not reliable creators of substantive equity. Instead, the State must play a role, declining to adopt a neutral position toward the facilitation of speech but instead assuming a role of active resistance to inequalities that might curtail or marginalize certain types of speech or speakers.[220]

As a practical matter, a substantive-equality doctrine requires the Court to treat different types of speech claims differently, accounting for the disparate impact of law as a result of economic, social, or political inequality on the ability of people to speak.[221] It also would mean rejecting notions of law's neutrality and acknowledging that content "neutral" regulations produce unequal burdens on some speakers and some types of speech.[222]

In *New York Times v. Sullivan*, the Court, applying this substantive-equality doctrine, recognized that in order to preserve "uninhibited, robust, and wide-open" public debate, it would have to take into account the unequal impact of regulations on some speakers and ideas.[223] In later cases, the Court warned that "the government's ability to impose content-based burdens on speech raises the specter that the government may effectively drive certain ideas or viewpoints from the marketplace."[224] Put another way, in these cases the Court recognized that facially neutral laws impact some speakers and some ideas unequally. Without the expressive opportunities that other, more powerful perspectives enjoy, speakers and ideas may be disadvantaged or driven out of the public realm completely.[225] This not only diminishes the dignity of First Amendment rights but also destroys the very notion of free and open debate on public issues, which those rights profess to protect. As Justice Marshall made plain, the First

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219. *See* Lakier, *supra* note 15, at 2123.

220. For example, see *Niemotko v. Maryland*, 340 U.S. 268, 272 (1951); and *Cantwell v. Connecticut*, 310 U.S. 296, 310 (1940), which both struck down licensing laws not because they restricted too much speech but because their discretionary nature created too much room for discrimination against marginalized populations.

221. *See, e.g.*, Martin v. City of Struthers, 319 U.S. 141, 146 (1943) ("Door to door distribution of circulars is essential to the poorly financed causes of little people.").

222. *See, e.g.*, *id.*

223. 376 U.S. 254, 270 (1964).

224. *See* Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 116 (1991) (citing Leathers v. Medlock, 499 U.S. 439, 448-49 (1991)).

225. *See* Lakier, *supra* note 15, at 2125.

Amendment must guarantee not only freedom of expression but also "equality of status in the field of ideas."[226]

Consider the result in *Martin v. City of Struthers*. Here, the Court struck down a facially neutral ordinance that prohibited the door-to-door distribution of flyers because it found that this method of communication was critical to democratic politics and was "essential to the poorly financed causes of the little people."[227] The affected homeowners who suffered the flyer distribution may have property interests at stake, but the Court noted that, without this mechanism of communication, speakers who lacked the resources to pursue other modes of speech would be silenced.[228] While the ordinance may have been content neutral, the effect of its enforcement was to disproportionately burden particular types of speakers and to foreclose forums for speech for underresourced speakers.[229]

Likewise, in the heckler's veto cases, the Court struck down content-neutral breach-of-the-peace laws despite a compelling state interest in public order. In *Terminiello v. Chicago*, the Justices expressed concern that the ability to arrest a speaker based on the unpopularity of their ideas was little more than the use of government power to coerce silence from those who lacked power.[230] The Court noted that "a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger."[231] Centering dissenting speech in the First Amendment canon, the Court restricted Illinois's power to enforce the statute to situations where such enforcement was absolutely necessary to preserve the safety of the community.[232]

The Court later would abandon the *Terminiello* position in *Feiner v. New York*, holding that "there was no evidence which could lend color to a claim that the acts of the police were a cover for the suppression of the petitioner's views and

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226. Police Dep't of Chi. v. Mosley, 408 U.S. 92, 96 (1972) (internal quotation marks omitted) (quoting MEIKLEJOHN, *supra* note 1, at 27).

227. *Martin*, 319 U.S. at 144-46.

228. *Id.* at 146.

229. *Id.*

230. 337 U.S. 1, 4-5 (1949) ("[A] more restrictive view [of the First Amendment] . . . would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups.").

231. *Id.* at 4.

232. *Id.* (citing Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942)) ("[F]reedom of speech, though not absolute . . . is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest.").

opinions."[233] But in *Terminiello*, the Court noted that the unequal result produced by allowing audience discomfort with a message to justify the arrest was the same regardless of the State's explicit motivation.[234] The unpopular view was suppressed by the heckler, and the marketplace of ideas became less free and less open. Unequal access to expressive capital rendered the impact of the neutral law disparate for those whose identity or message resided in the margins. And that impact, if sufficiently substantial, gave rise to constitutional concern.

This is not to say that applying this substantive-equality doctrine did not strike down laws that regulated speakers. Rather, what is apparent is that even as the Court adopted a neutral approach with regard to content regulation, it protected those with little economic or social power.[235] In other forums of speech, besides public gatherings and doorsteps, the Court struck down neutral laws that had an unequal impact on marginalized and dissenting speech and upheld laws that promoted equality by opening forums—even private ones—to those who otherwise lacked the resources to speak.[236]

The result was an antisubordinating effect for speech rights. Even when confronted with competing state interests, the Court struck down regulations that created an uneven speech landscape. Despite this antisubordinating effect (or maybe because of it), the Court would ultimately abandon its substantive-equality doctrine in favor of a formalistic approach. Nonetheless, the cases that define the substantive-equality doctrine offer a glimpse of a First Amendment tradition that recognizes that the playing field of speech is stacked against marginalized speakers. A commitment to free expression therefore requires not just a robust defense of speech itself but a defense of equality of access to spaces in which speech might occur—whether in public or private forums. It may likewise require curtailing or subordinating other rights, including property rights, to open forums for dissenting and marginalized viewpoints. Under the substantive-equality approach, First Amendment doctrine acknowledges the impact of racial, social, political, and economic inequality on an individual's expressive rights.

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233. 340 U.S. 315, 315 (1951).

234. *Terminiello*, 337 U.S. at 5; *see also id.* at 25 (Jackson, J., dissenting) ("It does not appear that the motive in punishing [the speaker was] to silence the ideology he expressed . . . .").

235. For some examples of when courts protected the speech of marginalized speakers such as Jehovah's Witnesses or Communists, see *Saia v. New York*, 334 U.S. 558, 559 (1948); *Cantwell v. Connecticut*, 310 U.S. 296, 300 (1940); *Herndon v. Lowry*, 301 U.S. 242, 245 (1937); and *Stromberg v. California*, 283 U.S. 359, 362 (1931).

236. *See, e.g.*, Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390-92 (1969); United States v. UAW, 352 U.S. 567, 582 (1957); Associated Press v. United States, 326 U.S. 1, 13-15 (1945).

2. *From Substantive to Formalistic Equality*

Legal scholars mark the 1970s as the point when the Court "turned away from its power- and context-sensitive approach" and adopted a formalistic doctrine of free speech that relied on government neutrality to create equality.[237] As long as the State applied the challenged restriction equally and agnostically with regard to content, the regulation and its execution would survive constitutional scrutiny.[238] The Court's treatment of time, place, and manner regulations is a helpful illustration. As described in Part I, such regulations facially seek to control how speech is presented, not what speech is presented.[239] The Court permits reasonable time, place, and manner restrictions so long as such restrictions are content neutral, are narrowly tailored to serve government interests, and do not impede alternative means of expression.[240] This type of regulation considers other interests in contrast to speech interests.[241] In the process, those with access to speech resources, including property, gain opportunities to speak and to regulate speech denied to those without access. Property owners may regulate speech on their own property, rely on the State to enforce the regulation, and count on courts to permit the resulting burden on speech, not because the affected speech is "low-value" or represents an already widely available viewpoint, but solely because the speech occurs on their property.[242]

Even in public forums (i.e., spaces traditionally or recently made available for public use, including for speech use), the State may regulate speech in the

237. Lakier, *supra* note 15, at 2127.

238. *Id.* at 2133 (noting that while the Court continued to claim that applications of time, place, and manner restrictions must not impede alternative channels of communication, by the 1980s the Court refocused its analysis on the content neutrality of the regulation).

239. *See supra* notes 86-96, 110-162, and accompanying text.

240. *See* Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984).

241. *See, e.g.*, City of Ladue v. Gilleo, 512 U.S. 43, 45 (1994) (balancing the interests of regulating expression on private property). At times, such property interests and rights are linked to other interests such as national security or public safety, the idea being that the use of the property for the speech interferes with such interests. *Cf.* Laura S. Underkuffler, *When Should Rights "Trump?" An Examination of Speech and Property*, 52 ME. L. REV. 311, 315 (2000) ("[R]ights of individuals are usually contrasted with public-interest demands.").

242. *See* Craig L. Finger, *Rights of Shopping Center Owners to Regulate Free Speech and Public Disclosure*, FOX ROTHSCHILD LLP, at 1 (Oct. 2011), https://foxrothschild.gjassets.com/content/uploads/2015/05/in-the-zone_oct2011.pdf [https://perma.cc/P6JH-TLUB] ("States generally protect the rights of private property owners to enact regulations governing political protests, demonstrations and similar activities on their properties.").

interest of promoting competing interests.[243] And such regulations may curtail speech, even if that speech might otherwise have enjoyed the benefit of constitutional protection, so long as the methodology of the regulation complies with time, place, and manner restrictions.[244]

While time, place, and manner restrictions existed under the former substantive-equality regime, they take on a different tenor under the formalistic one. As with the content-based-regulation doctrine, the restrictions treat speech as an individual liberty that should exist primarily in a sphere beyond government control, but that must also give way in the face of other, more compelling interests. Private actors, or at times public ones, may restrict access to speaking spaces — even if the effect is to silence the speech — so long as they do so through neutral mechanisms such as trespass and noise ordinances. Even protected speech, therefore, may be regulated, not for its content but rather for its failure to comply with these neutral restrictions and often for its collision with property interests.

This formalistic approach is indifferent to its impact on the rights of marginalized people to speak. Resource-poor speech may not expropriate another's property for its purposes.[245] Nor may speech regulation restrict an owner's use of their own property to promote their own chosen speech even if that use excludes all others.[246]

This regulation of speech based on such "neutral criteria" may produce odd results. Nazis may be permitted to march through the center of predominantly Jewish towns,[247] and crosses may be burned in Black families' yards.[248] Union protestors, however, may not assemble without a permit,[249] nor may antiracism

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243. *See* Perry Educ. Ass'n v. Perry Loc. Educators Ass'n, 460 U.S. 37, 45-46 (1983) (noting that lower courts have upheld restrictions on public parks, streets, and other traditional locations of speech in the face of competing community interests).

244. *See id.* at 45.

245. *See* Texas v. Johnson, 491 U.S. 397, 412-13 n.8 (1989) (noting that while the Court concluded that one could burn an American flag in protest, one could not steal a flag and burn it); Wooley v. Maynard, 430 U.S. 705, 714-17 (1977) (holding that New Hampshire may not force drivers to display a message on their vehicles); Hudgens v. Nat'l Lab. Rels. Bd., 424 U.S. 507, 520-21 (1976) (holding that a group of labor-union members could not picket their employer's privately owned shopping center without his permission).

246. In the wake of the *Citizens United* opinion, the Brennan Center found that super PACs empower wealthy donors to monopolize political spending and often exclude less well-resourced speakers from participating. *See* David I. Weiner, *Citizens United Five Years Later*, BRENNAN CTR. FOR JUST. (Jan. 15, 2015), https://www.brennancenter.org/our-work/research-reports/citizens-united-five-years-later [https://perma.cc/H9R5-GDPU].

247. *See* Nat'l Socialist Party of Am. v. Vill. of Skokie, 432 U.S. 43, 43-44 (1977).

248. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 396 (1992).

249. *See* Hague v. Comm. for Indus. Org., 307 U.S. 496, 516 (1939).

musicians have a concert in a park after ten o'clock at night.[250] If the regulation of speech based on content is decidedly undemocratic, as the Court has repeatedly held, then the adoption of this formalistic approach is decidedly nonpopulist. It relies on citizens to open or acquire spaces for speech. Implicit in this reliance is faith that citizens have the means to do this or, if they do not, that others will offer spaces — public or private — in which underresourced speakers may enjoy free and equal speech rights.

When challenges to regulations of space do occur, the Court falls back on the formalistic doctrine to justify the prioritization of other rights or interests (often property rights or interests in public order) over speech. It does so without an opportunity for citizens to judge whether such a prioritization reflects a community's own values. In the process, free speech becomes less equal and less diverse.

Nonetheless, the Court defends this formalistic approach as a judicial construct of free speech that promotes liberty by checking the government's power to regulate private actors.[251] The government — even the courts — may not tip an unequal field of access to speech forums even if it means that some voices never surface. This formalistic approach adopts a Darwinian logic that defies the realities of marginalizing forces. Those who can access spaces to speak, do, and those who can't are relegated to speech cages, permitted marches, and quiet concerts against racism that end by 10:00 PM. In situations where property rights and speech interests clash, the property owner may assert a claim that they are entitled to preserve the sanctity of their property interests even in the face of compelling, important, or otherwise unheard speech.

Citizens United compounds the effects of this formalistic approach. The Court's decision in this case claims to uphold speech equality, and in the process, individual speech rights, by striking down regulations that restrict or mandate activity. The resulting speech equality the Court constructs aligns individual rights with access to resources. Despite the limited question before the Court in *Citizens United*,[252] the result of the Court's decision was to draw a direct line between property in the form of funding and speech rights. In the process, the decision undermined past efforts to preserve forums for underfunded, dissenting, or unorthodox speech through government-constructed equality of access.[253]

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250. *See* Ward v. Rock Against Racism, 491 U.S. 781, 803 (1989).

251. *See, e.g.*, Citizens United v. FEC, 558 U.S. 310, 340 (2010).

252. *Id.* at 319.

253. *See* Lakier, *supra* note 15, at 2130; Weiner, *supra* note 246; Sullivan, *supra* note 214, at 145 (discussing *Citizens United* as "representing a triumph of the libertarian over the egalitarian vision of free speech").

C. *The Hazards of a Formalistic Approach: Speech Zero-Scapes and Presence as Speech*

The formalistic approach to First Amendment equality creates and perpetuates a decidedly unequal speech landscape for marginalized speakers. Yet, for those without access to the private resources that the Court sought to deregulate, a speech zero-scape is created. They may be shut out of forums of speech and their messages or opportunities to speak may be regulated out of existence as the State prioritizes other interests, including property rights, over speech rights. For these speakers, no landscape remains, equal or unequal. This may be literally true—without the resources to acquire property, marginalized speakers may lack access to the physical spaces in which speech might be permitted—but it may also be figuratively true as such speakers may be unable to access nonphysical speech landscapes. Marginalized speakers may be "priced out" of commodified speech landscapes such as pay-per-post internet sites, television, or print advertising. And while free access to the internet exists to some extent,[254] dissenting movements have struggled to sustain themselves relying on such low- or no-cost forums.[255]

Regardless of how it presents, at first blush, courts may judge the constitutionality of these resulting speech zero-scapes as hinging on the reasonableness of the regulation or the availability of alternative forums—inquiries that have long formed the basis of challenges to time, place, and manner restrictions under formalistic doctrines.[256] While this initial assessment is surely accurate in many cases, reducing the impact of a formalistic construct of speech equality to this alone overlooks the subordinating effect of the doctrine and ignores the possibility that location and speech may be one in the same.

The Court's preservation of property interests under a formalistic approach subordinates the competing speech right to other interests, including those associated with property and public order. By necessity, those without access to

254. As I have argued elsewhere, while courts often suggest that nonphysical spaces such as social media and other internet-based platforms may offer free or low-cost alternative forums, such speech landscapes may carry hidden costs. For underresourced speakers, accessing the internet may carry financial burdens and may prove to be a suboptimal mechanism of reaching fellow marginalized actors. *See* Carroll, *supra* note 6, at 1338-40.

255. Consider, for example, the Arab Spring, which struggled to develop a coherent or sustained voice relying on free online platforms, particularly when government officials and private actors moved to shut down access. *See* Jessi Hempel, *Social Media Made the Arab Spring but Couldn't Save It*, WIRED (Jan. 26, 2016), https://www.wired.com/2016/01/social-media-made-the-arab-spring-but-couldnt-save-it [https://perma.cc/J87X-G65B] (describing the limited value of social media in the Arab Spring movement).

256. *See, e.g.*, Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984); Ward v. Rock Against Racism, 491 U.S. 781, 800 (1989).

property—either at all or property that impacts speech—lose their individual right to speak in the face of the other, prioritized interests. Admittedly, even a substantive-equality approach may not guarantee a right to speak at the best possible forum, merely a reasonable one. But protecting marginalized speech also requires some recognition that not all forums are created equal, and some forums are so remote to the speech value at stake that they might as well be nonexistent.[257]

As Professors Ronald J. Krotoszynski, Jr.,[258] Timothy Zick,[259] and Jack M. Balkin,[260] among others, have argued, speech relegated to forums that are miles from the audiences they seek to address is the functional equivalent of silence. Their arguments address an unequal speech landscape. Yet as the Court commodifies speech and deregulates equality, truly underresourced speakers face a speech zero-scape—one in which presence alone will trigger police contact and threats of arrest will produce submission.[261] That an alternative forum exists in theory is not the same as ensuring that alternative forums ensure equality or opportunity for speech.

But even more is at stake here. Location for marginalized speakers may not just be a space to speak; it may be part of the message itself. This may present in different ways. First, the space in which the speech occurs may be a critical component of the communication. Balkin's analysis of *Hague v. Committee for Industrial Organization*[262] and Krotoszynski's analysis of speech cages at the Democratic National Convention[263] are both helpful to this point. To require a speaker to acquire a permit or rent a hall to advocate for unionization, or to limit where a person can speak to a designated location distant and separate from the target of the speech, is to render the speech ineffective and—from a legal-realist perspective—nonexistent. If the object of the speech—a worker, the public, a delegate to a convention, or a political speaker—is not only isolated from the speaker, but literally never has an opportunity to know they were even speaking because of forum restrictions, any remaining space to speak is little more than an illusory forum. Even if the test for an alternative forum under *Clark* is satisfied, the speech is still being denied in any meaningful sense.

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257. *See* Post, *Recuperating*, *supra* note 1, at 1262-63.

258. *See* KROTOSZYNSKI, *supra* note 5, at 3, 20-21 (describing efforts to isolate dissenting political speakers from the objects of their dissent using the example of free speech zones created at political conventions).

259. *See* ZICK, *supra* note 35, at 1-8.

260. *See* Balkin, *supra* note 44, at 399-401.

261. *See* Morgan, *supra* note 122, at 1047-48.

262. Balkin, *supra* note 44, at 399-403.

263. KROTOSZYNSKI, *supra* note 5, at 20-21.

To imagine presence as speech is to disentangle the forum from the communication. It is also to jettison notions that obedience to neutral speech laws is pro-democracy, pro-populism, or even neutral. It is to recognize that there are times when being in a location is to challenge existing norms and to reject the regime that parses out permissive speech around permissive entry.[264] Here, concrete examples are helpful.

Consider first the 2018 arrest of Donte Robinson and Rashon Nelson.[265] Robinson and Nelson had entered a Starbucks coffee shop in Philadelphia for a business meeting.[266] As they waited, they asked to use the restroom.[267] A Starbucks employee told them that the restroom was for paying customers and asked them to leave.[268] When they refused, an employee called the police, and Robinson and Nelson were arrested.[269]

The incident sparked outrage and its own set of protests.[270] At first glance, however, it may appear an odd illustration of communicative presence. After all, neither Robinson nor Nelson entered Starbucks to make a statement. Yet their refusal to leave and their subsequent arrest served to highlight and resist notions of who "belonged" in Starbucks.[271] Their presence was their communication. They challenged the racially biased policies of the coffee shop and the police by staying and were arrested for it. Remaining elsewhere would not have produced similar communication. By remaining, their presence challenged the accepted practice of policing spaces based on race and gender in the United States. By remaining, they also joined a line of others who resisted racial discrimination with their presence. From lunch-counter sit-ins to lining up to vote, the presence

264. *See supra* notes 37-40 and accompanying text. Other scholars have characterized presence in either in terms of assembly rights or as some alchemy of assembly, association, and petition rights. *See, e.g.*, KROTOSZYNSKI, *supra* note 5, at 12-13 (describing the Selma bridge protest of 1965 as combining rights of speech, assembly, and petition).

265. *See* Matt Stevens, *Starbucks C.E.O. Apologizes After Arrests of 2 Black Men*, N.Y. TIMES (Apr. 15, 2018), https://www.nytimes.com/2018/04/15/us/starbucks-philadelphia-black-men-arrest.html [https://perma.cc/D47J-GED5].

266. *Id.*

267. *Id.*

268. *Id.*

269. *Id.*; Emily Stewart, *Two Black Men Were Arrested in a Philadelphia Starbucks for Doing Nothing*, VOX (Apr. 15, 2018, 10:55 AM EDT), https://www.vox.com/identities/2018/4/14/17238494/what-happened-at-starbucks-black-men-arrested-philadelphia [https://perma.cc/YBR2-JUGF].

270. *See* Christine Hauser, *Men Arrested at Starbucks Hope to Ensure "This Situation Doesn't Happen Again"*, N.Y. TIMES (Apr. 19, 2018), https://www.nytimes.com/2018/04/19/us/starbucks-black-men-arrests-gma.html [https://perma.cc/2D4L-K8B8].

271. *Cf.* Baylor, *supra* note 125, at 316 (discussing how Black customers visiting other businesses "constantly guard against a potentially discriminatory request to leave").

of civil rights activists have served, and continue to serve, as acts of civil disobedience that protest race-based discrimination without uttering a word.[272] Remaining is the message.

Other examples abound. The Occupy Wall Street movement was defined, in part, by its literal occupation of space adjacent to Wall Street.[273] Black Lives Matter organizers have stressed the importance of taking anger over racism and police brutality to the literal streets.[274] And in January 2017, Women's March organizers urged participation, claiming that protestors' numbers mattered as they sought to mark the existence of those who would resist efforts to curtail access to equality generally and to medical care, including reproductive care, in particular.[275] President Trump's Muslim ban and family-separation policies; immigration policies under the Obama, Trump, and Biden administrations; and police violence have all elicited similar responses: calls for presence as a mechanism of communicating a message.

The concept of presence as a message is not limited to the physical presence of a person. Graffiti embodies the presence of an image or words serving a communicative function. In large cities, graffiti movements of the 1980s and 1990s sought to reclaim urban spaces that were increasingly fractured by gentrification and policing theories that overly regulated poor neighborhoods and their largely minority populations.[276] Urban-revitalization policies during this time declared these neighborhoods "slums" and relocated residents.[277] As a result, Black and Latinx communities in particular were splintered.[278] Without access to city

272. *See supra* note 37 and accompanying text.

273. *See, e.g.*, Astra Taylor & Jonathan Smucker, *Occupy Wall Street Changed Everything: Ten Years Later, the Legacy of Zuccotti Park Has Never Been Clearer*, N.Y. MAG.: INTELLIGENCER (Sept. 17, 2021), https://nymag.com/intelligencer/2021/09/occupy-wall-street-changed-everything.html [https://perma.cc/NA7Q-BCT8] (noting the value of the Zuccotti Park location to communication); Stephen Tower, *Not in My Front Yard: Freedom of Speech and State Action in New York City's Privately Owned Public Spaces*, 22 J.L. & POL'Y 433, 436 (2013).

274. *See, e.g.*, Myisha Cherry, *Anger Can Build a Better World*, ATLANTIC (Aug. 25, 2020), https://www.theatlantic.com/ideas/archive/2020/08/how-anger-can-build-better-world/615625 [https://perma.cc/LBA5-8DGU] (stressing that by showing up to protests, Black Lives Matter protestors communicate a message).

275. *See* Anemona Hartocollis & Yamiche Alcindor, *Women's March Highlights as Huge Crowds Protest Trump: "We're Not Going Away"*, N.Y. TIMES (Jan. 21, 2017), https://www.nytimes.com/2017/01/21/us/womens-march.html [https://perma.cc/6VRL-ES94].

276. *See* JEFF FERRELL, CRIMES OF STYLE: URBAN GRAFFITI AND THE POLITICS OF CRIMINALITY 3-16 (1996) (describing the rise of urban graffiti movements in response to the division of traditionally poor and often Black or Latinx neighborhoods).

277. *See id.* at 33-34 (describing this phenomenon in the Bronx, Bedford Stuyvesant, and Harlem neighborhoods in New York City).

278. *See* ROSE, *supra* note 6, at 33-34.

resources or traditional forums for speech, these communities relied on illicit speech, including graffiti, to preserve their identity and to literally mark the spaces they had been forced to vacate.[279] Graffiti artists at the time described their work in terms of preserving their identity in the midst of an emerging urban reality that sought to render them irrelevant or invisible.[280]

These artists' work was also an act of resistance to the political and social structures that might segregate and confine communities. Their graffiti pushed back against the physical structure of an urban landscape that, in their absence, grew increasingly homogenous and that minimized and depersonalized public spaces.[281] The image of the graffiti may have carried a message, but its presence in a now-gentrified neighborhood was also an act of opposition that carried its own message. In another space, this message may be diminished or not exist at all. Out of context, work by graffiti artist Bansky may still be art but may cease to transform the physical space it now occupies into a platform of dissent and defiance.

This effort to use graffiti in particular spaces to communicate particular messages was replicated in Black Lives Matter protests in the summer of 2020. In Richmond, Virginia, once the capital of the Confederacy, protestors "tagged [a Confederate monument's] enormous base with a kaleidoscopic array of graffiti, including with the protest messages of 'stop killing us' and 'defund the police.'"[282] In another location, the meaning of the messages shifts—it loses context and salience. On the base of a monument to a government built on the promise of perpetuated racism, the words are literal acts of resistance against the continuation of policies premised on the same ideals of white supremacy. This is not to say that placed elsewhere the words lose all meaning, but it is to say the context

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279. *Id.* at 34 (arguing that "[a]lthough city leaders and the popular press had literally and figuratively condemned the South Bronx neighborhoods and their inhabitants, its youngest black and Hispanic residents answered back" with graffiti and in the process attempted to reclaim their neighborhood, their identity, and their power); FERRELL, *supra* note 276, at 49 (explaining that graffiti served as a means of reclaiming specific spaces and signaling a continued existence even as old neighborhoods were undermined in the name of gentrification and urban policing policies).

280. *See* FERRELL, *supra* note 276, at 79-80 (noting that graffiti writers seek to document their existence in neighborhoods that have exclude them).

281. *See, e.g.*, *id.* at 79 (arguing that part of what urban graffiti artists seek to do is to reclaim increasingly depersonalized public spaces); Susan G. Davis, *Streets Too Dead for Dreamin'*, NATION, Aug. 3/Sept. 7, 1992, at 220, 220-21; MIKE DAVIS, *Fortress Los Angeles: The Militarization of Urban Space*, *in* VARIATIONS ON A THEME PARK: THE NEW AMERICAN CITY AND THE END OF PUBLIC SPACE 154, 154-80 (Michael Sorkin ed., 1992); Michael Sorkin, *Introduction* to VARIATIONS ON A THEME PARK: THE NEW AMERICAN CITY AND THE END OF PUBLIC SPACE, at i, ii (1992).

282. *See* Marcus, *supra* note 39.

of the speech matters and that place and message are so entangled as to be inseparable.

III. A FIRST AMENDMENT DEFENSE

The preceding Parts describe criminal statutes that create burdens on First Amendment speech rights and their impact in creating a subordinating First Amendment landscape — a speech zero-scape. With this descriptive component in place, the normative task lingers. How should the State balance First Amendment interests against competing interests? Or, in the alternative, how should First Amendment doctrines create a concept of speech grounded in community values? Here, criminal law can offer an admittedly imperfect solution by allowing defendants to challenge regulations that impact their speech rights via a First Amendment defense.[283]

The model jury instruction contained in the Appendix to this Feature, coupled with Sections III.C and III.D, seek to define the terms of the defense. Like all defenses, actualizing the proposed First Amendment defense will not be without risks and challenges. Defendants' narratives may not resonate with citizen fact finders — whether jurors or judges. Or even if they do, fact finders may reject the value of such a narrative in the face of competing community interests. And the promise of a defense does not guarantee defendants the opportunity for a trial. Nonetheless, this defense accomplishes two critical tasks. First, it would permit the accused to raise a constitutional challenge to a charge in the criminal case-in-chief. And second, it would permit citizen jurors (and at times judges) to weigh the interest of a defendant's speech claims against the competing values the State purports to promote in its enforcement of the law against the defendant. In this, the defense this Feature proposes is distinct from existing necessity defenses and constitutional defenses.

283. I recognize that this is an imperfect solution for several reasons. First, as noted in Part II, many of these cases may not go to trial, either because no arrest or charge is ever made or because the accused decides to plead guilty rather than go to trial. Those cases that actually do make it to trial may not be eligible for a jury. Even in these circumstances, as noted later in this Part, the defense may still be raised in an effort to negotiate a more favorable plea or dismissal or presented to a judge sitting as fact finder during a bench trial. Second, the central claim of the defense — that it allows community members to align enforcement of the law with their own expectations of the law by weighing competing interests at stake — may result in suppression of dissenting speech that does not resonate with the fact finder. This is a hazard of any defense, but it may be more problematic for speech that is more marginal.

A. Non-First Amendment Defenses

Before considering the possibility of a First Amendment defense, it is helpful to consider other potentially relevant defenses.[284] In addition to the sufficiency-of-the-evidence or failure-of-proof defenses discussed in Part I, in which a defendant claims that the State has failed to meet its evidentiary burden, defendants challenging speech restrictions have also asserted necessity defenses.[285] This defense is most common in civil-disobedience cases in which the defendant claims necessity in response to charges stemming from protest.[286] These efforts have met with limited success in part because this defense is poorly suited to recognize and protect the competing interests that dissenting actors may have when faced with statutes that appear neutral to speech activity.[287] The result is an odd historical-litigation record of attempting to construct a claim that the benefit created through the speech prevents or outweighs the harm that the regulation in question seeks to address. For some speakers, this construction is not difficult when the expressive activity is tied directly to the harm it seeks to prevent. For others, however, this construction is a tortured or futile one, particularly when the harm the speaker is seeking to address is not localized or when fact finders deem that speakers have not availed themselves of alternative legal mechanisms to abate harm. For this second group of defendants, who may find the necessity defense an imperfect fit, the proposed First Amendment defense offers an alternative mechanism to argue that their speech ought to be criminalized. First, however, this Section summarizes the history and contours of the necessity defense particularly when used by defendants who are engaged in expressive activity.

1. A Brief Overview of the Necessity Defense

The necessity defense is a historical common-law defense.[288] It seeks to balance the defendant's criminal act against the harm they sought to avoid through

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284. For a general discussion of defenses, see Paul H. Robinson, *Criminal Law Defenses: A Systematic Analysis*, 82 COLUM. L. REV. 199, 206-07 (1982).

285. *See* Laura J. Schulkind, Note, *Applying the Necessity Defense to Civil Disobedience Cases*, 64 N.Y.U. L. REV. 79, 82 (1989); Steven M. Bauer & Peter J. Eckerstrom, Note, *The State Made Me Do It: The Applicability of the Necessity Defense to Civil Disobedience*, 39 STAN. L. REV. 1173, 1176 (1987).

286. *See* Bauer & Eckerstrom, *supra* note 285, at 1175-76.

287. *See id.* at 1173.

288. *See* Edward B. Arnolds & Norman F. Garland, *The Defense of Necessity in Criminal Law: The Right to Choose the Lesser Evil*, 65 J. CRIM. L. & CRIMINOLOGY 289, 291-96 (1975); JEROME

their illegal conduct.[289] To assert the defense, the defendant must demonstrate they acted to avoid a significant and imminent harm.[290] There must have been no adequate legal means to avoid the harm.[291] Further, the defendant must reasonably believe that there is a direct causal relationship between their own act and avoiding the harm.[292] And finally, the defendant's actions must have been proportionate to the harm the defendant sought to avoid or mitigate.[293]

While the defense has not been codified across all jurisdictions, it is widely accepted as part of common law.[294] Its broad acceptance speaks to critical democratic functions of criminal trials within the larger body politic in the United States.[295] First, the necessity defense embodies a recognition that enforcement of law and ideals of justice are not always aligned.[296] In fact, at times, disobedience or resistance may be more desirable than blind allegiance to constructed law.[297] Not unrelatedly, the defense also recognizes that uniform enforcement of a law may create results that stand in direct opposition to democratic movements or misalign with commonly shared values, even as formal actors may engage in discretionary decision-making in an effort to bring a law into alignment with those values. When codified and facially unoffensive laws present as discordant to the governed as a result of discretionary applications that are inconsistent with shared community values, the necessity defense serves as a democratic safety valve of sorts.[298] It recognizes that some acts are justified and therefore not subject to criminal enforcement.[299]

Like other defenses, necessity permits citizen fact finders serving as jurors or judges (in the case of bench trials) to weigh application of law in particular cases in an effort to align their own values with those a law might seek to preserve. In times when there is a disjunction between the application of law and the community's own values, the defense creates a space for fact finders to reject the law

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HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 416 (2d ed. 1960) (describing the common-law defense of necessity as "anciently woven into the fabric of our culture").

289. *See* MODEL PENAL CODE § 3.02 (AM. L. INST. 1985).

290. *See* Arnolds & Garland, *supra* note 288, at 294.

291. *Id.*

292. *Id.*

293. *Id.*

294. United States v. Bailey, 444 U.S. 394, 410-11 (1980) (recognizing necessity as part of federal common law).

295. *See* Jenny E. Carroll, *Nullification as Law*, 102 GEO. L.J. 579, 581-83 (2014).

296. *Id.*

297. *See* Schulkind, *supra* note 285, at 83-84.

298. The recognition of the defense as a safety valve is consistent with the recognized similar role of the jury. *See* Carroll, *supra* note 3, at 699.

299. *Id.*

in favor of a more nuanced perseveration of both the rule of law (the law itself is not stricken) and competing ideals.[300] When presented to a jury, the defense offers a moment of direct and responsive democratic engagement that transcends government branches; the citizen juror, in a single space on a verdict form, both acknowledges the generalized need for a law (hence preserving legislative efforts) while rejecting executive enforcement of the law in the case before them or as applied to the defendant.[301] Without such spaces and moments, the creation and application of law becomes increasingly distant from the values of the very people it seeks to govern, and the rule of law may deteriorate.[302]

To play such a role, however, the defendant's own claim of necessity must resonate with the members of the community sitting as fact finders. Some have described this as the strict-liability component of necessity since, regardless of the defendant's own conviction to their values, if those values do not resonate with jurors, the defense will fail.[303] This means that in order for a necessity defense to succeed, the defendant must convince the fact finder that they acted in a way consistent with commonly shared values and that criminalizing the defendant's act in question will misalign with those values.[304] This does not mean the community must actually share the defendant's particular values, but they must share a view that those values deserve defense from state prosecution. Within statutes and case law, this requirement is described as a "choice of evils" in which the defendant, when confronted with the harms of obeying or disobeying the law, chose the lesser evil when they acted.[305] This implicates other

300. *Id.* at 706.

301. *See* Jenny E. Carroll, *The Jury as Democracy*, 66 Ala. L. Rev. 825, 831-32 (2015). Arguably, judges sitting as fact finders in bench trials transcend their formal roles—serving not as citizens charged with enforcing law alone, but also with aligning proof and values to produce the verdict.

302. *See* Carroll, *supra* note 295, at 581-83.

303. *See, e.g.*, Schulkind, *supra* note 285, at 91.

304. The most common example of this that courts often invoke is that a defendant may not take a life to defend property under a necessity defense. *See, e.g.*, United States v. Ashton, 24 F. Cas. 873, 873 (C.C.D. Mass. 1834) (No. 14,470).

305. *See, e.g.*, United States v. Maxwell, 254 F.3d 21, 27 (1st Cir. 2001) ("The necessity defense requires the defendant to show that he . . . was faced with a choice of evils and chose the lesser evil."); United States v. Schoon, 971 F.2d 193, 195 (9th Cir. 1991) ("To invoke the necessity defense . . . the defendants . . . must have shown that . . . they were faced with a choice of evils and chose the lesser evil . . . ."). Because this test is easily met by the typical protest defendant—the relevant "situation" requiring a choice of evils usually involves a pressing crisis of national or global concern that the defendant is not responsible for creating—this element is not further discussed in this Feature. For a full description of the defense, see, for example, Model Penal Code § 3.02 (Am. L. Inst. 1985). Some states have modified the defense to preclude it if the defendant has been reckless and/or negligent in bringing about the choice of

components of the necessity defense: that the defendant's belief in the harm they seek to avoid with their action must be reasonable and their response to that harm must be proportional to the threat they face.[306] At the end of the day, community members serving as fact finders are likely to reject using a knife in a moral spoon fight.

2. *The Necessity Defense and Civil Disobedience*

Those engaged in civil disobedience have sought to use the necessity defense to argue that the harm they protested or resisted outweighs that created by their violation of a constitutional law.[307] As a result, their own actions are justified and should not be criminal. Their claim is consistent with the first element of the traditional defense—that the defendant sought to avoid an imminent and serious harm in their action. They claim that the collective good is in fact promoted by permitting them to engage in an illegal act to thwart the ensuing harm. Other elements, however, have proven more challenging for those engaging in civil disobedience.

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evils. *See, e.g.*, 18 PA. CONS. STAT. § 503 (1972) ("When the actor was reckless or negligent in bringing about the situation requiring a choice of harms or evils or in appraising the necessity for his conduct, the justification afforded by this section is unavailable . . . ."); N.J. STAT. ANN. § 2C:3-2 (West 1979) ("Conduct which would otherwise be an offense is justifiable by reason of necessity to the extent permitted by law and as to which neither the code nor other statutory law defining the offense provides exceptions or defenses dealing with the specific situation involved and a legislative purpose to exclude the justification claimed does not otherwise plainly appear."). Some courts have adopted this modification as well. *See, e.g.*, United States v. Gant, 691 F.2d 1159, 1162-63 (5th Cir. 1982); Jones v. City of Tulsa, 857 P.2d 814, 816 (Okla. Crim. App. 1993). Even this modification suggests that the concept of choosing between evils remains a central component of the defense.

306. These latter requirements of reasonableness and proportionality are linked to the necessity defense's status as a justification, as opposed to an excuse, defense. As a justification defense, a defendant is claiming that they promoted a collective good when they acted and so their actions should not be criminalized. As a result, the defendant's perception of the harm faced must resonate with others: they too must believe that when confronted with a similar choice, they would behave as the defendant did. The response to that harm also must not exceed the damage that inaction might produce. For a broader discussion of the necessity defense as a justification defense and the distinction between justification and excuse defenses, see Arnolds & Garland, *supra* note 288, at 289-91.

307. *See, e.g.*, State *ex rel.* Haskell v. Spokane Cnty. Dist. Ct., 491 P.3d 119, 121 (Wash. 2021) (considering a defendant's claim that his criminal act reduced the immediate threat of climate crisis); *Gant*, 691 F.2d at 1164-65 (finding that the defendant's criminal act must mitigate harm or else there is no social benefit to the defendant's illegal act). For a general discussion of the use of the necessity defense in climate protest, see Lance N. Long & Ted Hamilton, *The Climate Necessity Defense: Proof and Judicial Error in Climate Protest Cases*, 38 STAN. ENV'T L.J. 57 (2018).

Trial courts have resisted permitting an instruction on the necessity defense for two primary reasons. First, the court may fail to see a link between the defendant's own actions and the prevention of the perceived harm.[308] Second, the court may view the defendant's actions as unnecessary given the availability of legal alternatives to address the perceived harm.[309]

a. Indirect and Direct Disobedience

Turning first to the requirement that the defendant's actions actually prevent or reduce the impending harm, courts have commonly divided acts of disobedience between those directly linked to the harm and those that take indirect or symbolic action against the harm. Direct civil disobedience protests the harm created by a particular law by breaking that law.[310] For example, civil-rights protestors engaged in direct civil disobedience when they broke laws that sought to segregate lunch counters and buses by sitting at segregated lunch counters and riding segregated buses.[311] In contrast, acts of indirect civil disobedience break a law that is not related to the harm they seek to protest.[312] Environmental protestors who block trains or spill paint on pipelines, antiwar protestors who burn their draft cards, or those who protest nuclear weapons by blocking access to military bases engage in illegal acts in order to protest.[313] They are not protesting

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308. *See, e.g.*, United States v. DeChristopher, 695 F.3d 1082, 1096 (10th Cir. 2012) (affirming the denial of a necessity instruction when the defendant had failed to show "a direct, causal relationship . . . between defendant's action and the avoidance of harm" (quoting United States v. Baker, 508 F.3d 1321, 1325 (10th Cir. 2007))); *Schoon*, 971 F.2d at 196-200 (rejecting the defendant's claim that spilling paint meant to simulate blood on the floor of the IRS building would prevent the greater harm of continued U.S. military involvement in El Salvador); *Maxwell*, 254 F.3d at 29-30 (rejecting the defendant's claim that interruption of naval exercises would prevent deployment of American Trident submarines in the Caribbean); Andrews v. People, 800 P.2d 607, 610 (Colo. 1990) (holding that the defendants had failed to present evidence that their protests would actually halt production of nuclear weapons); State v. Marley, 509 P.2d 1095, 1109 (Haw. 1973) (finding that the defendant's occupation of a defense contractor's office would not halt production of weapons).

309. *See* United States v. Quilty, 741 F.2d 1031, 1033-34 (7th Cir. 1984) (rejecting the defendants' claims that they had no reasonable legal alternative to entering a military installation to protest nuclear weapons).

310. *See* State *ex rel.* Haskell v. Spokane Cnty. Dist. Ct., 465 P.3d 343, 350 (Wash. Ct. App. 2020).

311. *See id.* at 367 (Fearing, J., dissenting); LEE, *supra* note 37, at 1.

312. *See supra* note 308 and accompanying text.

313. *See, e.g.*, *Maxwell*, 254 F.3d at 26 n.2, 28-29; *Schoon*, 971 F.2d at 195-96; United States v. Romano, 849 F.2d 812, 816 n.7 (3d Cir. 1988); United States v. Kabat, 797 F.2d 580, 590-92 (8th Cir. 1986); United States v. Montgomery, 772 F.2d 733, 736-37 (11th Cir. 1985); *Quilty*, 741 F.2d at 1033-34; United States v. Seward, 687 F.2d 1270, 1274-76 (10th Cir. 1982); United States v. Cassidy, 616 F.2d 101, 102 (4th Cir. 1979).

the laws they violate per se, though they may disagree with their enforcement.[314] They are impeding interstate commerce, destroying a government document, superficially damaging property, or trespassing to prevent the future harm they perceive and seek to prevent.

Courts are more likely to recognize a necessity defense in instances in which there is direct rather than indirect civil disobedience.[315] In articulating this distinction, courts note that the necessity defense requires a causal connection between the defendant's actions and the harm they sought to prevent.[316] Without such a link, the defendant's actions are simply illegal acts without a particular justification or excuse.

Acceptance of the distinction between direct and indirect civil disobedience is not uniform. Some courts have rejected efforts to distinguish the means of resistance (the trespass or other criminalized act) from the mitigation of the harm, accepting broader definitions of the causal-link element of the defense.[317] These courts have noted that while a fact finder may ultimately reject a necessity defense for a symbolic action or one remote from the actual harm the defendant seeks to address, the defendant is nonetheless entitled to present the claim to the jury for consideration.[318]

b. Reasonable Legal Alternatives

In addition to the causal-link element, defendants seeking to raise a necessity defense must also demonstrate that they had exhausted reasonable legal

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314. For example, Rev. George Taylor was not protesting access to the rail lines or even the ability of a train to run unobstructed when he was arrested for second-degree trespass and obstruction of a train. *See Haskell*, 465 P.3d at 345. He was protesting the transportation of waste though his community and blocking the train became a mechanism to effectuate the protest. *Id.* at 345-46; *see also* State v. Higgins, 458 P.3d 1036, 1041 (Mont. 2020) (noting that the defendant was engaged in indirect civil disobedience as he "was not protesting criminal mischief or criminal trespass laws" which served as the basis of his arrest).

315. Courts have routinely rejected the necessity defense in cases of indirect civil disobedience. *See supra* note 308; *see also Higgins*, 458 P.3d at 1041-42 (rejecting a necessity defense in the case of indirect civil disobedience).

316. *See, e.g.*, United States v. DeChristopher, 695 F.3d 1082, 1096 (10th Cir. 2012) (requiring that the defendant show "a direct, causal relationship . . . between defendant's action and the avoidance of harm" (quoting United States v. Baker, 508 F.3d 1321, 1325 (10th Cir. 2007)); *Cassidy*, 616 F.2d at 102 (noting the defense is unavailable without a demonstration of a causal link).

317. *See* Schulkind, *supra* note 285, at 104-05.

318. *Id.*

alternatives.[319] Courts have reasoned that this requirement ensures that defendants do not use the defense to justify illegality that was unnecessary to prevent harm. In the case of protestors, past courts have defined such reasonable legal alternatives to include protesting on public property, educating the public, and petitioning elected officials.[320] Historically, courts have been unsympathetic to claims that legal means of protest are ineffective. The Eleventh Circuit, for example, noted that "[p]eople are not legally justified in committing crimes simply because their message goes unheeded."[321]

Recent cases, however, have called into question this treatment of the "no reasonable legal alternatives" element, granting the requested necessity-defense instruction when defendants have been able to demonstrate the futility of available legal alternatives.[322] Such courts have focused on the "reasonableness" component of the element to conclude that if legal action is unlikely to produce any change, it is not in fact a reasonable alternative from the defendant's perspective.[323] Courts have split as to whether a defendant must provide evidence that they actually pursued such futile alternative acts.[324] Some courts have permitted a fact finder to consider a defendant's claim of necessity based on third-party testimony regarding the effectiveness of alternatives. Others have merely allowed a defendant to submit the question to the jury as to whether the available alternatives were in fact reasonable or, given their perceived ineffectiveness, even

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319. *See* Arnolds & Garland, *supra* note 288, at 294; United States v. Bailey, 444 U.S. 394, 410 (1980).

320. *See, e.g.*, People v. Gray, 571 N.Y.S.2d 851, 861-62 (Crim. Ct. 1991) (holding that the defendants had exhausted reasonable legal alternatives prior to taking over a lane of traffic by filing formal written complaints, writing letters to and calling Department of Transportation officials, creating petitions, requesting a public hearing, and engaging in weekly demonstrations that did not block the road); State *ex rel.* Haskell v. Spokane Cnty. Dist. Ct., 465 P.3d 343, 350 (Wash. Ct. App. 2020) (noting that the defendant could have pursued legal alternatives and listing some such alternatives), *rev'd*, 491 P.3d 119 (Wash. 2021); United States v. Quilty, 741 F.2d 1031, 1033-34 (7th Cir. 1984) (rejecting the necessity defense of protestors on the grounds that there were "thousands of opportunities" legally available to spread their message, including the "nation's electoral process"); United States v. Seward, 687 F.2d 1270, 1274-75 (10th Cir. 1982); Bauer & Eckerstrom, *supra* note 285, at 1179-80; Kevin Goddard, *Freedom for Members of the 'Winooski 44'*, UPI (Nov. 17, 1984), https://www.upi.com/Archives/1984/11/17/Freedom-for-members-of-the-Winooski-44/2330469515600 [https://perma.cc/CT34-J53Z]; UPI, *Activists Acquitted*, Bulletin, Nov. 18, 1984, at A14; Associated Press, *Trespassing Case Turns Into a Legal Landmark*, Argus-Press, Nov. 29, 1984, at 7.

321. United States v. Montgomery, 772 F.2d 733, 736 (11th Cir. 1985).

322. *See Haskell*, 491 P.3d at 125.

323. *Id.*

324. *See* Goddard, *supra* note 320; UPI, *supra* note 320, at A14; Associated Press, *supra* note 320, at 7.

actually alternatives to the defendant's illegal act.[325] In this sense, these courts have mirrored courts that accepted more flexible causal links between the defendant's action and the harm they sought to prevent by prioritizing juror consideration of the defense.

3. The Hazards of a Necessity Defense for Civil Disobedience

Even as some courts accept a broader interpretation of the necessity defense for those engaged in civil disobedience, the defense itself rests on underlying premises that may limit its utility for protestors. First, the defense is not a constitutional challenge. Instead, it accepts that the law violated is constitutional—both in construction and application. As a result, use of this defense jettisons any First Amendment claim that enforcement of the law is unconstitutional as it curtails speech in an impermissible way. Second, defendants utilizing the defense must fit their claims into preexisting elements of the offense, elements that do not appear to contemplate acts of political and social resistance. This is evident both in the requirement of a causal link between the defendant's actions and prevention of the harm and in the reasonable-legal-alternative requirement.[326] Both seek to curtail the type of actions that the defense may shelter. Even a broad interpretation of these elements may not render it applicable to those seeking to communicate dissent through protest, symbolic action, or other types of speech. Put another way, acts that may highlight injustice or call for change may suffer degrees of separation from the issue they seek to address, and they may circumvent legal alternatives in favor of mass mobilization.

Relatedly, courts have declined to grant instructions for "uncivil" disobedience.[327] Superficially, this may seem like an appropriate restriction given the

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325. *See Haskell*, 491 P.3d at 126-27 (accepting affidavits from experts that other means of resistance were futile); State v. Ward, 438 P.3d 588, 595 (Wash. Ct. App. 2019) ("Whether Ward's evidence was sufficient to establish that his history of failed attempts to address climate change revealed the futility of supposed reasonable alternatives was a question for the jury."); *cf.* United States v. Gant, 691 F.2d 1159, 1164 (5th Cir. 1982) (noting in an appeal of a bench trial that "a history of futile attempts" could demonstrate the lack of alternatives).

326. Rarely have courts recognized that symbolic action may establish the necessary causal link with the harm the protestor seeks to prevent when coupled with other action. *See, e.g.*, Commonwealth v. Berrigan, 472 A.2d 1099, 1115 (Pa. Super. Ct. 1984) (Spaeth, J., concurring) (arguing that the defendant ought to be permitted to present a necessity defense because "[a]ppellants do not assert that their action would *avoid* nuclear war . . . . Instead, at least so far as I can tell from the record, their belief was that their action, *in combination with* the actions of others, *might accelerate a political process* ultimately leading to the abandonment of nuclear missiles"), *rev'd*, 501 A.2d 226 (Pa. 1985). This position was rejected by the Pennsylvania Supreme Court. *Berrigan*, 501 A.2d at 229-30.

327. *See Haskell*, 491 P.3d at 126 (noting as relevant that the defendant was engaged in "peaceful civil disobedience").

proportionality requirement embedded in the defense. The restriction, however, is at odds with the claim that the illegal action was necessary in the face of a harm. If the harm is uncivil in nature, resistance to that harm might follow suit. In addition, the restriction to civil disobedience defies the necessity defense's rhetoric of community-grounded balancing of harms. Courts' willingness to limit the availability of the defense to particular types of speech clearly makes it unavailable to some defendants. A defendant may claim necessity when they hang a banner to protest a war, but not when they take a hammer to a missile-launch facility.

From a First Amendment perspective, these limitations matter. First, the defense becomes a mechanism to obscure and redirect constitutional challenges. The result may undermine the value of the necessity defense itself. The cases in question become unique and singular occurrences that require no constitutional attention or alteration of policies of prosecution. Second, their focus on the manner of the speech permitted (civil versus noncivil or direct versus indirect) alters the function of the necessity defense. Instead of permitting community members to weigh the value of the defendant's actions, including their speech, against the harm they sought to avoid, application of the necessity defense to acts of civil disobedience cabins juror consideration around permissive versus nonpermissive protest. This, in turn, raises a third and more global concern: that reliance on the necessity defense to challenge criminal charges related to acts of protest and civil disobedience rests on a premise that such charges are the product of permissive restrictions on speech (i.e., restrictions that address time, place, and manner as opposed to content). This characterization of these restrictions overlooks the reality that even facially content-neutral statutes can serve to silence marginalized content by closing access to forums of speech and, as this Feature asserts, in some cases may target speech itself when presence is the message.

B. The Value of a Defense Generally and a First Amendment Defense in Particular

Admittedly, constitutional challenges to criminal statutes are currently available to defendants. The defense this Feature proposes does not preclude such challenges, but it is distinct.[328] Unlike a traditional constitutional challenge that requires a pretrial motion and, if lost, an appeal, the defense would allow the defendant to present the claim in the case itself, arguing that they should not be convicted because the behavior the State seeks to criminalize in their case is in

328. It should also be noted that this defense is not exclusive. Accepting the proposed defense would not preclude speakers from raising § 1983 challenges to state action that curtailed speech or from seeking pre-event injunctions from such state action. Those remedies have their values and limitations, though they are beyond the scope of this Feature.

fact constitutionally protected. There are advantages to this type of presentation, particularly given the category of potential offenders this Feature seeks to address.

First, appeals are procedurally complex and, despite a rising tide of pro se petitions, are not intuitively accessible. Appeals from infractions and misdemeanor convictions are often more complex with added appellate layers created in many state systems that permit initial proceedings in nonrecord courts followed by a de novo trial in a court of record as the first appellate step.[329] This complexity not only makes the appellate process less accessible but also may increase time and financial obligations for already-marginalized defendants. Each court hearing is likely to carry with it fees and attendance requirements, both of which disproportionately burden marginalized populations and carry rippling economic burdens.[330]

The proliferation of pro se petitions also signals another challenge of appellate processes: the lack of access to counsel beyond the initial appeal.[331] Admittedly, many of the regulations described in Part I may also lack a right to counsel at trial because they do not carry sufficient carceral risks to trigger constitutional protection.[332] While imperfect, trial courts, particularly lower-level courts, are often spaces of relaxed procedural requirements, which may afford pro se parties greater leeway than appellate courts to present claims. This is not to suggest that they are benevolent or perfect or that they offer broad access to unfettered presentations. For many pro se defendants, they are not, and they do not. Instead, these systems are often used to "grind" guilty pleas out of the marginalized.[333] Acknowledging all their failings, municipal, magistrate, and misdemeanor courts may still permit a less sophisticated or learned presentation than their appellate counterparts.

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329. *See, e.g.*, Blackledge v. Perry, 417 U.S. 21, 22 (1974) (describing N.C. GEN. STAT. §§ 7A-272, 7A-290, 15-177.1 (1965), which granted the District Court Division "exclusive jurisdiction for the trial of misdemeanors" but provided an absolute right to a de novo trial in the superior court upon appeal of conviction in the district court).

330. *See* Laura I. Appleman, *Nickel and Dimed into Incarceration: Cash-Register Justice in the Criminal System*, 57 B.C. L. REV. 1483, 1498 (2016); Carroll, *supra* note 185, at 186-88.

331. *See* Douglas v. California, 372 U.S. 353, 355 (1963) (granting a right to counsel for statutory rights of appeal from conviction); Ross v. Moffitt, 417 U.S. 600, 616 (1974) (declining to extend the Sixth Amendment's right to counsel to discretionary appeals from criminal conviction).

332. *See supra* note 182 and accompanying text.

333. *See* KOHLER-HAUSMANN, *supra* note 47, at 26-38, 44; Paul D. Butler, *Poor People Lose:* Gideon *and the Critique of Rights*, 122 YALE L.J. 2176, 2197 (2013) (noting that the rights afforded to criminal defendants, including the right to counsel, often do not produce increased procedural protections, but rather facilitate efficient judicial systems).

Second, a defense carries a democratic value that is all its own.[334] It shifts the discretionary windfall of formal actors toward a defendant and their community by asking the criminal legal system in which they are presented to consider actions—or even harms—not as all-or-nothing propositions but as a range of acceptable possibilities. Such a defense is a moment of increased discretion that creates not just a safety valve, which allows valued behavior or even valued actors to avoid criminalization, but also nuance.[335] Some behavior, while creating a "harm," may also bring a social value that is worthy of acknowledgement if criminal law is to avoid oppressive cruelty.

In this, a defense serves multiple important functions. First, it meets Post's challenge to construct a First Amendment doctrine around community norms and values, as opposed to merely relying on a formal actor to weigh perceived interests against speech rights. Second, it revitalizes the original vision of the criminal jury in the United States. A vital function of jurors within criminal legal systems is to serve as community-based checks on the power of government.[336] Originally, such citizen actors were instructed that they could nullify law as jurors, rejecting applications of law that were foreign to commonly shared values by rendering a not-guilty verdict.[337] That right quickly receded as professional judges claimed sole control of questions of law in criminal cases.[338] Yet, even without explicit instructions allowing nullification—and sometimes in defiance of instructions forbidding it—jurors continue to return verdicts that reflect their efforts to align the application of criminal law with their own expectations of what the law is or ought to be.[339]

Admittedly, defenses are limited in their abilities. Raising a defense is not the same as avoiding conviction or even being guaranteed a trial. Nonetheless, a defense does important work, pushing to the surface suppressed claims, including

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334. *See* Jenny E. Carroll, *The Resistance Defense*, 64 Ala. L. Rev. 589, 628-30 (2013) (arguing that defenses push back on state-based narratives and offer an opportunity for direct community judgment of law and prosecution); Janet Moore, Marla Sandys & Raj Jayadev, *Make Them Hear You: Participatory Defense and the Struggle for Criminal Justice Reform*, 78 Alb. L. Rev. 1281, 1285-86 (2015) (describing the value of participatory defenses).

335. *Cf.* Carroll, *supra* note 3, at 659 (noting that when jurors are asked to nullify, they are asked to apply a nuanced meaning of the law, "however the community may define that meaning"); Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 Yale L.J. 677, 705 (1995) ("[L]egal resolutions involve moral decisions, judgments of right and wrong").

336. *See* Carroll, *supra* note 3, at 670.

337. *See id.* at 673-75.

338. *Id.* at 677-78 (discussing the historical shift away from reliance on citizen jurors to adjudicate questions of law).

339. *Id.* at 680-82.

those of incidental or secondary burdens, and challenging formalistic constructions of law.

Even if a case does not go to trial, the defense matters. It is a point of negotiation leverage. The possibility of acquittal or even judicial sympathy at sentencing may drive a more advantageous plea offer. In time, raising a defense may also drive more formal channels of discretion away from arrest or prosecution. Defenses that fail may still influence policing and prosecutorial decision-making if defendants insist on trials and the opportunity to raise the claim.[340] If the defense succeeds, it also provides a point of valuable feedback to formal actors: more protection is needed within the law's folds for particular actors or actions.

Third, defenses serve to permit individualized consideration. In addition to asking fact finders to weigh the value of a particular action against its harm, they ask this analysis to occur in a single case only. This permits a flexibility normally absent in written law or even discretionary decision-making by formal actors. In the First Amendment context, this individualization would recognize the reality that not all harms are the same and not all speech is the same.

Admittedly, again, even the individualized nature of defenses may be problematic. Some narratives inevitably resonate with fact finders better than others. This Feature's proposed defense, like any, may therefore produce inconsistent or biased verdicts. A jury or judge may find difficulty recognizing communal value in speech discordant with their own experiences or expectations. Uncivil speech or speech in support of nonmajoritarian causes may ultimately find no shelter in the First Amendment defense proposed here.

Even in the face of this critique, the defense is worthy of support. It is true that as with other democratic processes, marginalized or perceived outlier positions may suffer defeat, and they may suffer that defeat unequally in the context of a First Amendment defense. This reality alone, however abhorrent, does not undermine the value of a previously suppressed defense. Defenses can carve out figurative spaces in the legal canon over time. As discussed above, they can influence formal actors to rethink long-held positions or to adopt more nuanced ones. Not only may prosecutors and law-enforcement officials make different decisions in exercising their discretion, but defenses can wind their way into formal law. Defenses, such as the battered-woman defense, cultural defenses, and post-traumatic-stress defenses, were once rejected but are now common in many jurisdictions.[341]

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340. Such a strategy was used in diverse social-justice movements from early antislavery efforts to the civil rights movement to Occupy Wall Street. *See, e.g.*, BERGER, *supra* note 122, at 46.

341. *See* Stephen J. Morse, *Excusing and the New Excuse Defenses: A Legal and Conceptual Review*, 23 CRIME & JUST. 329, 330 (1998) (describing the introduction of new excuses).

The defense also serves important functions, even if it is ultimately rejected in a particular case. First, it serves an informative function, demarcating for individual defendants communally valued communicative action. This function is valuable particularly in the face of concerns that the availability of a defense may spur increasingly cavalier behavior among those seeking to draw attention to their cause. To the extent that this may occur, rejection of the defense supplies a community-based correction: the value of some speech simply does not outweigh the harm it causes. Second, the availability of the defense allows a defendant to control the narrative of the case, albeit in narrow ways.[342] For marginalized individuals, this matters. Without a defense, criminal-legal processes can be alienating and foreign, and the promise of procedural protections against overaggressive state action may prove illusory.[343] The defense offers an opportunity to give name and constitutional significance to lived experiences and the actor's motives that may not otherwise be noticed or acknowledged.[344]

In particular, the possibility of a First Amendment defense opens a space for a speaker to claim that their regulated presence can be speech and ought to be protected. It allows a defendant to define the terms of their communication. This is certainly vital for nonmajoritarian positions, but it may also serve a valuable purpose for disobedients, both civil and uncivil.

First Amendment doctrine has rejected those who engage in uncivil conduct to communicate their dissent. This is consistent with a similar rejection by courts applying necessity defenses as discussed above. Viewed through a First Amendment lens, uncivil action, even if communicative, may simply exist outside of constitutional protection in a realm of fighting words or beyond. In the alternative, the harm it creates may exceed its communicative value. A political assassination surely displays dissent with a particular politician, though the expression of that dissent is unlikely to exceed the value of the life taken.

Without the defense proposed here, however, all uncivil action would be excluded from First Amendment protection. In the face of an uncivil body politic, should all dissent be confined to civil response? The question is difficult. The

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342. *See* Carroll, *supra* note 334, at 628-29, 635-36 (noting that the ability to present a counternarrative allows for a more nuanced understanding of a case and the values at stake); Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 5-6, 7-8 (1983) (arguing that narrative and law are bound to one another and, in the process, allow formal actors to consider the stories of the governed).

343. *See* Butler, *supra* note 333, at 2178 (arguing that even the right to counsel serves to offer merely a veneer of legitimacy to justify convictions of poor and marginalized defendants); Carroll, *supra* note 334, at 599 (describing defendants who sought to demonstrate that procedural protections were hollow promises and in fact only reinforced harms created by criminal legal systems).

344. *See* Cover, *supra* note 342, at 5 (arguing that lived experiences matter to legal decisions).

work of political dissidents, from John Brown[345] to Malcolm X[346] to women suffragettes,[347] might argue that when faced with an uncivil world, there were moments when they had to respond in kind.[348] Likewise, January 6th participants might utilize the defense to urge consideration of the value of their resistance to what they perceived as a suspect election.[349]

Such cases are complicated and require a faith in deliberative processes that may be difficult to muster. The most obvious response is that no matter the uncivil actor, jurors might reject their claim—undervaluing their own communicative action in the face of competing interests or finding the claim discordant to their own values. Beyond this, particularly in the case of January 6th actors, jurors may view their claimed speech as decidedly undemocratic in comparison to the speech of suffragettes or other civil rights actors who sought to expand rather than undermine enfranchisement.

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345. *See* Carroll, *supra* note 334, at 600-04 (describing John Brown's trial and decision to use violence to protest slavery).

346. *See* PENIEL E. JOSEPH, THE SWORD AND THE SHIELD: THE REVOLUTIONARY LIVES OF MALCOLM X AND MARTIN LUTHER KING JR. 16-19, (2020) (describing Malcolm X's commitment to "radical [B]lack dignity" as a means to challenge existing power structures); Fred-erick D. Harper, *The Influence of Malcolm X on Black Militancy*, 1 J. BLACK STUD. 387, 387-88 (1971) (describing the influence of Malcolm X on Eldridge Cleaver and members of the Black Panther Party to move beyond nonviolent protests to defeat racial oppression).

347. While use of violence by women suffragettes in the United States is not well documented, suffragettes in Great Britain and Ireland engaged in bombing and arson campaigns in an effort to achieve enfranchisement in Great Britain. For a description of such efforts, see C.J. Bearman, *An Examination of Suffragette Violence*, 120 ENG. HIST. REV. 365, 365 (2005). This is not to say that suffragettes in the United States did not engage in protests that were considered uncivil. Picketing in front of the White House resulted in arrests of suffragettes who were deemed an embarrassment to President Wilson. Following their arrest, the women were reportedly tortured in custody and force-fed in an effort to break their hunger strike. *See Tactics and Techniques of the National Woman's Party Suffrage Campaign*, LIB. CONG. 7-11, https://www.loc.gov/static/collections/women-of-protest/images/tactics.pdf [https://perma.cc/Y7AE-ZF2K] (describing suffragette protest actions and responses in the United States).

348. Political philosophers have long argued that violent systems may require violent responses. *See generally* FRANTZ FANON, THE WRETCHED OF THE EARTH (1961) (arguing that colonization by white countries justified violence against actors who benefitted from and supported such countries).

349. *See* Benjamin R. Young, *The Capitol Siege Wasn't Like the 'Third World.' It Was Uniquely American*, WASH. POST (Jan. 25, 2021, 6:00 AM EST), https://www.washingtonpost.com/outlook/2021/01/25/capitol-siege-wasnt-like-third-world-it-was-uniquely-american [https://perma.cc/3PMJ-5MYM] (rejecting the analogy to violent uprisings described by Fanon and others). Ambassador Susan Page rejected the comparison between rebellion from oppression and the January 6th insurrection. *See* Susan D. Page, *U.S. Race Relations and Foreign Policy*, 26 MICH. J. RACE & L. 77, 78-79 (2021).

Regardless of the viability of the defense for these uncivil disobedients, its existence would still carry some power worth preserving. The defense carries with it the opportunity to speak within the formal process of a courtroom trial in response to the State's exercise of power against these speakers. The value of having a defendant offer a counternarrative to accusation, even one that is ultimately rejected, is vital to any democratic function that a criminal trial process might serve. And the counternarrative of the defense might be one that pushes, even as it is rejected by the jurors who hear it, toward a future, more nuanced application of law.

C. Constructing a First Amendment Defense to Protest

Constitutional defenses that go to the fact finder's decision about a verdict of guilt are rare. This is not to say that defendants do not raise constitutional challenges to criminal prosecutions. They do. They may even present First Amendment defenses in the case-in-chief, though such claims are difficult to locate. More often, constitutional challenges come as pretrial motions.[350] These include contesting evidence obtained in violation of the Fourth[351] or Fifth[352] Amendments, failure to properly indict under the Fifth Amendment,[353] violation of the

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350. *See, e.g.*, Douglas L. Colbert, *The Motion in Limine in Politically Sensitive Cases: Silencing the Defendant at Trial*, 39 STAN. L. REV. 1271, 1280-81 (1987) (describing motions in limine brought by defendants).

351. The Fourth Amendment, which is made applicable to the states via the Fourteenth Amendment, provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV. Challenges under the Fourth Amendment may seek to suppress evidence if the search or seizure that led to the discovery of such evidence was unreasonable. *See, e.g.*, Mapp v. Ohio, 367 U.S. 643, 656-57 (1961) (holding that the exclusionary rule applies when evidence is seized in violation of the Fourth Amendment).

352. The Fifth Amendment, which is made applicable to the states via the Fourteenth Amendment, provides in relevant part: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury; . . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself . . . ." U.S. CONST. amend. V. Challenges under the Fifth Amendment may seek to suppress compelled or coerced confessions given by a defendant while in custody. *See, e.g.*, Miranda v. Arizona, 384 U.S. 436, 467 (1966) (applying the exclusionary rule to coerced confessions).

353. The requirement of the grand jury contained in the Fifth Amendment has not been incorporated against the states. *See, e.g.*, Hurtado v. California, 110 U.S. 516, 535 (1884); Palko v. Connecticut, 302 U.S. 319, 323 (1937); Alexander v. Louisiana, 405 U.S. 625, 633 (1972).

Double Jeopardy Clause,[354] or failure to give notice of what behavior is actually criminalized as the statute is either overly broad[355] or vague.[356] They may also be raised on appeal, seeking review of pretrial rulings and raising independent Fifth,[357] Sixth,[358] Eighth,[359] and Fourteenth Amendment[360] claims. Or, in the alternative, they present during the trial itself as an allegation that the State has failed to meet an element of the offense that is required in order for the offense to survive constitutional challenge.[361] For example, in *United States v. Freeman*, the Ninth Circuit found that the trial court had erred in denying Freeman's requested jury instruction regarding an intent to incite criminal behavior with his speech.[362] Without such an intent, the defendant argued that he had engaged in protected speech which the government then sought to criminalize.[363] Even as the court characterized this as a "First Amendment" defense, Freeman had not actually asked the jury to determine if his speech was protected by the First

354. *See, e.g.*, United States v. Dixon, 509 U.S. 688, 703-12 (1993) (defining the same offense within the meaning of the Double Jeopardy Clause); Blockburger v. United States, 284 U.S. 299, 302-05 (1932) (same).

355. *See, e.g.*, United States v. Williams, 553 U.S. 285, 293 (2008) (describing overbreadth challenges based on the failure to give notice of prohibited conduct); United States v. Stevens, 559 U.S. 460, 473 (2010) (same).

356. *See, e.g.*, City of Chicago v. Morales, 527 U.S. 41, 56-60 (1999) (striking down an antiloitering statute as void for vagueness because it failed to give sufficient notice of criminal behavior).

357. In addition to the claims described above, see *supra* notes 352-356. Such claims may include pretrial due-process claims, such as the failure to provide counsel and the failure to provide notice of charges.

358. The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense." U.S. CONST. amend. VI. This collection of trial rights gives rise to a variety of claims both before trial and on appeal.

359. The Eighth Amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." U.S. CONST. amend. VIII. Excessive-bail claims can be raised pretrial. In *Stack v. Boyle*, 342 U.S. 1 (1951), the Court indicated that bail was excessive if it exceeded its articulated purpose—to assure the presence of the defendant. *Id.* at 5-6.

360. The Fourteenth Amendment provides in relevant part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

361. *See, e.g.*, United States v. Freeman, 761 F.2d 549, 551-52 (9th Cir. 1985) (granting a First Amendment jury instruction on some counts of an indictment requiring that the jury find that the defendant had intended to incite or encourage tax evasion or fraud with his speech).

362. *Id.*

363. *Id.*

Amendment, only whether or not he had satisfied the mens rea element required to preserve the constitutionality of the statute.

Efforts to document First Amendment defenses in trials in researching this Feature have proven challenging. Certainly, reviews of § 1983 claims raised around arrests during protests reveal First Amendment assertions outside of criminal cases.[364] In addition, my conversations with members of the defense bar during the summer of 2020 in connection with the representation of those arrested during Black Lives Matter protests included discussion of possible First Amendment defenses to charges such as trespass, damage to property, and disorderly conduct.[365] These conversations are not unique. Prior counsel representing protestors have urged raising First Amendment claims not only as pretrial challenges to charges but also as questions for the jury.[366]

Despite these discussions, First Amendment defenses seem poorly defined, rarely urged, and scarce.[367] It is hard to pinpoint the source of this scarcity for constitutional defenses that might go to a jury in criminal law, though several possibilities spring to mind. First, defenses are often cabined into categories of

364. *See, e.g.*, *Kampas* Complaint, *supra* note 179, at 16 (describing an arrest for entering a highway to protest the acquittal of former police officer Jason Stockley in the killing of Anthony Lamar Smith, a Black man, as having a chilling effect on protected speech); *Stilp* Complaint, *supra* note 179, at 18 (describing an arrest for disorderly conduct for burning a flag as having a chilling effect on protected First Amendment expression); *Urbanski* Complaint, *supra* note 179, at 4, 6, 9 (describing an arrest for disorderly conduct and noise ordinance violations in a protest of "Santa Clause" as chilling First Amendment activity); *Jordan II* Complaint, *supra* note 179, at 12-14 (describing an arrest for disorderly conduct and failure to disperse during George Floyd and Black Lives Matter protests as deterring speech and assembly rights pro-tected under the First Amendment).

365. Notes of conversations on file with author. Additional conversations with various defense counsel revealed that such defenses were raised and judges declined to allow defendants to argue the defense to the jury, frequently ruling that such a defense asked the jury to decide questions of law. In at least one case, defense counsel reported that after the court denied her client the ability to raise the defense, she believed her client had received a longer sentence upon conviction. She indicated that she believes this longer sentence was in response to the defense.

366. Martin Stolar, in a continuing-legal-education video, *Representing Protestors*, argues for such a defense and references having raised it in the context of the trial of the Camden 28, a group of anti-Vietnam War protestors charged with breaking into a local draft board, and in representation of members of Occupy Wall Street. Martin R. Stolar, *Representing Protestors*, NAT'L ASS'N CRIM. DEF. L. (Oct. 11, 2017), https://www.nacdl.org/Media/RepresentingProtesters [https://perma.cc/BAE3-R69A]. It should be noted that descriptions of the representation of the Camden 28 frequently refer to their defense not as a First Amendment claim, but rather as a nullification claim based on the morality of the Vietnam War and/or the draft. *See, e.g.*, Sonali Chakravarti, *The Practice of Nullification*, 95 CHI.-KENT L. REV. 671, 690-91 (2020).

367. Scholars, for example, seem much more likely to urge a necessity defense in lieu of a First Amendment defense in protest cases. *See, e.g.*, Long & Hamilton, *supra* note 307, at 78-110 (arguing that necessity defenses ought to be accepted and used for climate protestors).

refuting the sufficiency of the evidence or arguing failure of proof (i.e., addressing the factual support for the State's claim), mitigating the defendant's conduct or culpability, suggesting a particular defendant is not eligible for prosecution because of their age or status, or offering a justification or an excuse for the action.[368] In this broad scheme of categorization, defenses address a particular element or elements of the charge and urge either a reduced assessment of culpability or a finding of no culpability. Second, defenses beyond failure-of-proof defenses are often codified.[369] While states are not required to offer particular defenses, many states have codified common-law defenses (including defenses like necessity) and have created additional, statutorily based defenses.[370] This codification can limit noncodified defenses. Third, given that verdict forms are often general and acquittals and dismissals by the court are not appealable by the State, it is possible that such defenses are raised—either explicitly or implicitly—and evade a record.[371] Finally, and perhaps most significantly, criminal legal systems tend to reserve challenges to the application of law itself to formal actors.[372] At a trial level, this means a judge, not a jury, determines constitutionality. A First Amendment defense inverts this norm.

The constitutional defense contemplated here challenges the law as applied to a defendant by urging a weighing of values between the interests the State purports to protect through enforcement and prosecution and the value of the defendant's speech rights. In this, the defense not only explicitly expands the type of claim a defendant might make—away from traditional excuse, justification, failure of proof, or other defenses—but also rests the power to determine which values and rights warrant protection in informal, community-based, and accountable actors sitting as jurors.[373] While jurors often weigh values in the

368. *See generally* Robinson, *supra* note 284, at 204-41 (discussing a system of defenses and contrasting defenses, such as a failure of proof, that are not codified from other defenses that are).

369. *Id.*

370. *See id.* at 234-41.

371. *See* Carroll, *supra* note 3, at 683 (describing the hazard of general verdict forms).

372. *See* George W. Warvelle, *The Jurors and the Judge*, 23 HARV. L. REV. 123, 123 (1909) (describing the function of the judge as determining questions of law while the jury determines questions of fact); United States v. Dougherty, 473 F.2d 1113, 1134 (D.C. Cir. 1972) (contrasting the role of the jury to decide questions of fact with the role of the judge to decide questions of law). Admittedly, I am dubious of the law/fact distinction.

373. As discussed elsewhere, granting this power to jurors is consistent with an originalist vision of the jury as having power to weigh questions of both fact and law. For example, John Adams had faith in the jury as a proper source of judgment on law. He wrote, posing the question of whether jurors should be confined to deciding only questions of fact, that "[t]he common people . . . should have as complete control . . . in every judgment of a court of judicature" as they have in the other branches of government, and that it was "not only [the juror's] right,

context of defenses—for example, a juror considering a necessity defense may weigh the competing harms facing a defendant—those values are viewed from the defendant's perspective. The jury considers whether the defendant's behavior was reasonable, and therefore offers a justification for the defendant's actions that excuses criminal liability, based on what the defendant perceived at the moment they broke the law. In contrast, the proposed defense asks jurors to consider what they, as members of the community, value as they make a choice in the form of a verdict between the defendant's speech rights and competing state interests. This type of valuing is likely most successful and/or accurate when conducted by jurors, who sit with no other qualification than their status as members of the community.[374] However, a judge conducting a bench trial could also serve this role if one imagines that judicial fact finder as qualified to decide factual questions because of their membership in the community, rather than their formal role as judge.[375]

There may be a temptation to describe such a defense as nullification. And in fact, the defense shares some traits with nullification, yet a significant difference also exists. Nullification permits a fact finder, often a juror, to reject law without basis.[376] It is an unfettered power of citizen actors to decline to apply law regardless of the reason behind that decision. Indeed, criticism of nullification often stems from concerns that it encourages lawlessness by allowing jurors

but his duty, . . . to find the verdict according to his own best understanding, judgment, and conscience, though in direct opposition to the direction of the court." 2 JOHN ADAMS, THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES 253-55 (Charles Francis Adams ed., Boston, Charles C. Little & James Brown 1850). In addition, he feared judges "being few . . . might be easily corrupted; being commonly rich and great, they might learn to despise the common people, and forget the feelings of humanity, and then the subject's liberty and security would be lost." Letter from the Earl of Clarendon (John Adams) to William Pym (Jan. 27, 1766), *reprinted in* THE REVOLUTIONARY WRITINGS OF JOHN ADAMS 51, 55 (C. Bradley Thompson ed., 2000). Adams's conception of jurors was consistent with that of others at the time. Alexis de Tocqueville noted in 1835 that juries "teach[] men to practice equity." 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 448 (Eduardo Nolla, ed., James T. Schleifer trans., Liberty Fund Inc. 2012).

374. *See* Carroll, *supra* note 301, at 840.

375. While procedural rules and constitutional interpretation may dictate when a defendant is entitled to a jury trial for a criminal charge, such dictates do not undo the reality that the role of deciding questions of fact is treated as distinct from that of deciding questions of law. As a result, a judge who decides questions of fact during a bench trial arguably does so as a procedurally mandated substitute for a jury and so serves with the same qualifications and identity as a juror. Further examination of this issue is, unfortunately, beyond the scope of this Feature.

376. Justice Story initially expressed concern about granting the jury broad power to consider law. *See* United States v. Battiste, 24 F. Cas. 1042, 1043 (C.C.D. Mass. 1835) (No. 14,545). Subsequent cases echoed these concerns. *See* Sparf v. United States, 156 U.S. 51, 64-80 (1895) (describing jury nullification as threatening consistent application of the law); Horning v. Dist. of Columbia, 254 U.S. 135, 138-39 (1920).

to reject law for ignoble reasons.[377] The First Amendment defense contemplated by this Feature curtails this power, calling not for unrestrained consideration of law, but rather an assessment of when constitutional rights or values counsel against application of criminal law in a particular circumstance.

D. Actualizing a First Amendment Defense

The fact that First Amendment defenses may be difficult to document, or may face criticism as seeking nullification, counsels toward regularizing such a defense. Yet defining a defense that by its nature contemplates that jurors weigh the value of communicative conduct against a harm allegedly caused by that act, and crafting a jury instruction around it, are challenging tasks. Certainly, different jurisdictions and/or defendants may embrace different iterations of the defense. This final Section offers a possible presentation of a First Amendment defense, contemplating elements and proof requirements. A model jury instruction is offered in the Appendix.

1. Defining the Elements of the Defense

The novel First Amendment defense for which this Feature advocates is premised on the fundamental notion that the citizens who live under the law ought to have some ability to weigh in on competing values the law may protect and curtail as a result of enforcement. While a model jury instruction is offered in the Appendix, the presentation of the defense may vary, as jurisdictions adopt versions in accord with their treatment of other defenses. Regardless of its precise presentation, at its core, such a defense rests on two central claims or elements: first, the defendant engaged in communicative conduct; and second, that communication, and the First Amendment rights it implicates, warrant protection even if it impedes other rights or interests.

In response, the State may dispute the defendant's factual assertions. For example, the prosecution might argue that the defendant's conduct is not in fact communicative or that the communication in question does not warrant protection under the First Amendment because of the nature of the speech. In the alternative, the State may assert that the defense ought to fail because the regulation in question complies with time, place, and manner requirements: it is not directed at particular content, it is narrowly tailored to protect a state interest, and it does not impede alternative forums of communication. Accordingly, the

377. *See, e.g.*, *Horning*, 254 U.S. at 138 (describing a trial court's admonition to the jury that only a "flagrant disregard of the evidence, the law, and their obligation as jurors" would result in nullification).

State might contend that the defendant has failed to prove that the communication in question requires protection to the detriment of other interests or rights. If, for example, an adequate alternative forum exists such that a defendant does not have to trespass to communicate, the value of the communication as engaged in by the defendant may not outweigh the competing property interests. The State may also challenge the defendant's claim that the communication ought to take precedence over other implicated rights or interests. Just as a defendant might ask the fact finder to recognize the value of communication in the face of competing social interests or individual rights—like prioritizing a protest over noise-ordinance compliance or property rights—the State might argue the reverse: that the communication carries less value than the rights or interests it impedes, or that the communication unnecessarily curtailed them. Or the State may argue that the defendant's assessment of the value of the communication is unreasonable, either because alternative forums existed that would not affect other rights or interests or because the defendant has fundamentally miscalculated the worth of their speech.

2. *Proof Burdens Associated with a First Amendment Defense and the Evidence that Would Meet Them*

With elements of the defense defined above and in the jury instruction in the Appendix, inquiry must turn to what proof requirements will be associated with the defense. Proof requirements associated with defenses are both common and varied. Outside of failure-of-proof defenses,[378] a defendant wishing to raise a defense may bear some burden of proof or persuasion associated with that defense, though one lower than the State's burden of proof beyond a reasonable doubt.[379] The existence of this burden for a defense does not alleviate the State

378. In the case of a failure-of-proof defense, the defendant is claiming that the State has not met its burden with regard to a particular element. As a result, the defendant is entitled to make this claim without presenting any evidence and have the jury instructed on all elements of the offense. *See* Robinson, *supra* note 284, at 252; Patterson v. New York, 432 U.S. 197, 206 (1977) (holding that the State bears the burden of proving all elements of the offense); *In re* Winship, 397 U.S. 358, 364 (1970) (holding that the burden is proof beyond a reasonable doubt). The defendant may also be entitled to have the jury consider evidence presented by the defense that the State has failed to prove all elements of the offense beyond a reasonable doubt. Such evidence may fail to meet proof requirements associated with an affirmative or statutory defense but may still raise doubt about the sufficiency of the State's case. *See* Martin v. Ohio, 480 U.S. 228, 233 (1987).

379. For a general discussion of burdens of persuasion and production for defenses, see JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 74-75, 77-78 (7th ed. 2015); *Proof Issues*, 37 GEO. L.J. ANN. REV. CRIM. PROC. 652, 659-60 (2008); Robinson, *supra* note 284, at 255, 262; Dixon v. United States, 548 U.S. 1, 5-8 (2006), which held that requiring a defendant to prove

of its burden of proof, but it may require the defendant to produce a quantum of evidence to support a defense or to trigger the State's burden to disprove the defense.[380] As a threshold matter, this burden presents merely as one of production. The defendant must proffer evidence to support the elements of the defense in order to receive an instruction on it and have it considered by the jury.[381] Consider again the necessity defense. To be entitled to present this claim to the jury, a defendant must first meet an "entry-level burden of producing competent evidence [to support the defense]."[382]

The burden of production, however, is a threshold proof requirement. States may also impose a burden of persuasion on a defendant wishing to present a defense.[383] At its most basic level, it may be helpful to think of this burden of persuasion as creating doubt and thereby defeating the State's burden of proof beyond a reasonable doubt. While scholars tend not to describe this as a burden of persuasion, to the extent that burdens associated with defenses are grounded in the ability to persuade a jury rather than the quantum of evidence, raising doubt may be viewed as a burden of persuasion embedded in any criminal case. A defendant may win an acquittal if they can convince the fact finder that a fact exists that excuses, justifies, mitigates, or disproves an element of the offense.[384] If they cannot, the defense fails, and the defendant may suffer conviction.

Defenses, however, may also take on additional or higher burdens of persuasion. While such burdens of persuasion are controversial, they nonetheless

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a duress defense by a preponderance of the evidence did not undermine the defendant's due-process rights; and *Patterson*, 432 U.S. at 206, which held that the defendant's due-process rights were not violated by New York's requirement that he prove an extreme-emotional-disturbance defense by a preponderance of the evidence. The Model Penal Code adopts slightly different language with the same result, alleviating the prosecution of the burden of disproving an affirmative defense "unless and until there is evidence supporting such defense." MODEL PENAL CODE § 1.12(2)(a) (AM. L. INST. 1985). The Model Penal Code does not define the burden of production, however. *See id.* § 1.12 cmt. 3.

380. *See, e.g.*, *Patterson*, 432 U.S. at 205-06; *Martin*, 480 U.S. at 233; DRESSLER, *supra* note 379, at 78 ("[T]he Model Penal Code allocates to the prosecution the duty to disprove defenses, assuming that the defendant has satisfied her burden of production."); Paul H. Robinson & Markus Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 338-40 (2007) (describing allocations of burdens of production by the defendant and response by the prosecution associated with affirmative defenses).

381. *See* Robinson, *supra* note 284, at 250-51; John Calvin Jeffries, Jr. & Paul B. Stephan, III, *Defenses, Presumption, and Burden of Proof in the Criminal Law*, 88 YALE L.J. 1325, 1333 (1979).

382. United States v. Maxwell, 254 F.3d 21, 29 (1st Cir. 2001). The Model Penal Code imposes a burden of production on all affirmative defenses. *See* MODEL PENAL CODE § 1.12(2)(a), (3)(a), (3)(c) (AM. L. INST. 1985).

383. *See* DRESSLER, *supra* note 379, at 78.

384. Robinson, *supra* note 284, at 256-57.

persist.[385] As a result, defendants seeking to raise affirmative defenses, or defenses beyond failure of proof, may be required to prove by a preponderance of the evidence the facts that support their claim. Commentary to the Model Penal Code suggests that a burden of persuasion ought to be allocated to "controversial defenses."[386] Defenses such as insanity and self-defense often carry a burden of persuasion of proof by a preponderance of the evidence.

Regardless of whether a defendant faces a burden for production or persuasion vis-à-vis a defense, the State still bears the fundamental burden of proving the defendant guilty beyond a reasonable doubt. In addition, once the defendant's burden with regard to the defense is met, the State may face a burden to refute or disprove the defendant's evidence beyond a reasonable doubt.[387] If the State fails to do so, the defendant is entitled to acquittal.

In the context of the First Amendment defense contemplated here, a defendant would initially bear a burden of production to demonstrate both elements of the proposed defense: that the defendant engaged in communicative conduct and that the communication, and the First Amendment rights it implicates, warrants protection even if it impedes other rights or interests. With regard to the first element, this burden of production would require the defendant to present some evidence that their action carried a communicative intent. Such a burden would not require a defendant to demonstrate that those who encountered it understood the defendant's message, interpreted that message correctly, or even perceived the defendant's conduct as communication. It would, however, require the defendant to present some evidence that they intended their conduct to carry a message. The second element would carry a similar burden of production, requiring the defendant to present some evidence of the value of the communication in question and that that value exceeded the harm the State has sought to prevent through enforcement of the law.

Meeting these burdens may be easier in some contexts than in others. It may be readily apparent that those who march in a protest that impedes traffic or trespasses on another's property were seeking to communicate even as they violated a law. Yet for those who trespass by remaining in a coffee shop after being asked by the store manager to leave, communicative intent may be more obscure. To prove that their presence is speech, these defendants, like their protesting brethren, would need to present some evidence that they intended to communicate with their presence. Likewise, it may be readily apparent that the value of a protest that pushes for social change far exceeds the harm caused when some protestors step off a sidewalk onto private property or cross a corner of a yard

385. *Id.* at 259-60 (noting that there is little consensus around appropriate burdens of persuasion).

386. *Id.* at 261 n.232.

387. *See* DRESSLER, *supra* note 379, at 78.

without permission. The expressive value of smashing a shop window to protest an economic system, however, may appear insignificant in comparison to the harm caused. Yet, to successfully invoke the defense, a defendant charged under either scenario would have to produce evidence to support both the claim that there was value in the communication and the claim that the value exceeded the harm the defendant's actions allegedly caused.

Whether easily proven or not, the proposed defense would render relevant evidence of that communicative intent and the value of the communication. Further, it would allow jurors to weigh that value in the face of the competing alleged harm. The defense creates an opportunity to consider the alleged criminal act not as a random moment of lawlessness, but as part of an arc of dissent or a movement for change. A protestor would be able to introduce information regarding the subject of the protest and their own participation in it. And those asserting that their presence is speech would be able to introduce evidence regarding their decision to remain in the shop after being asked to leave. In this, the burden of production would expand the scope of the trial narrative. It would allow jurors to consider evidence previously excluded in assessing the culpability of the defendant's actions and to weigh that evidence against their own values. Without the defense, the story of the defendant's actions is cabined and decontextualized by the elements of the charge. The fact finder's consideration is limited to an inquiry of whether or not the defendant entered or remained on the property without permission (in the case of trespass) or impeded traffic or damaged property. The defendant's motive to communicate and the fact finder's perception of that motive or the value of the message or even the enforcement of the law is irrelevant.

This expansion of relevant evidence to include the defendant's motivations not only grants the defendant an opportunity to control some of the criminal trial's narrative, but it permits the fact finder to consider an explanation for the defendant's action. Put another way, the defense pushes criminal legal systems towards previously absent goals. First, it allows defendants to explain why they engaged in their action (to communicate) and why, under the second element, that motive ought to be considered and ultimately valued. Second, it allows the fact finder to consider this more complete story of the defendant's culpability—one defined not only by the State through the elements of the alleged offense but also by the defendants through their explanation of their actions and by the fact finder in their consideration of the relative values at stake.

In practical terms, this means Black Lives Matter protestors in 2020 might present evidence of their actions through the aspirational lens of using mass mobilization to challenge criminal legal systems that foster disparate impacts of policing, prosecution, and incarceration on marginalized communities even if protests may trespass or impede traffic in the process. A graffiti artist might explain

the value of marking property that once housed a now-displaced diaspora in contrast to the harm caused by a spraypainted tag. And a lunch-counter protestor might present evidence that, by remaining, they pushed back against the harm of segregation even as they defied the property owner's request that they leave.

In establishing the value of the defendant's conduct in comparison to the harm alleged, the defendant might present not only evidence as to their own motives, but also testimony from affected individuals, including those who participated in the communicative act, and from those allegedly harmed by it. A protestor might testify that they stepped off the sidewalk to call further attention to their cause by blocking traffic or because the sheer number of fellow participants exceeded the sidewalk's capacity. Likewise, a motorist might testify that while they were inconvenienced by blocked traffic, such inconvenience does not fuel a desire to see protestors arrested, convicted, and sentenced. Evidence to support the second element of the defense, however, is not limited to such firsthand accounts. The defense would also permit expert testimony, akin to that utilized in necessity defenses, explaining the value of a type of communicative activity, the futility of prior efforts to reform or abolish oppressive systems, and the nature and extent of the harm that is the subject of the communicative activity.

For their part, fact finders could reject, as a threshold matter, that the defendant in fact engaged in communication with their activity. Or they could reject the value the defendant sought to assign to their communication—either absolutely or relative to the harm the defendant is accused of causing. A juror might conclude that a defendant, even one with a laudable goal, should not smash a window or step onto another's property without permission. They might conclude that the value of the defendant's speech is outweighed by the other interests at stake, such as the ability to preserve one's property or to preserve community order.

Yet, the value of the defense itself does not rest solely in its ability to acquit the defendant. As discussed above, the defense would render relevant evidence previously excluded from criminal trials in the hypotheticals described. In doing so, the evidence that supports this second element not only broadens the defendant's narrative but also promotes the original function of the jury, allowing jurors to weigh the defendant's actions against the juror's own expectations of the law that functions and regulates behavior in their midst. The defense grants jurors discretionary power normally curtailed or reserved for formal actors: the power to make choices about how law ought to be enforced in their lives and communities. The law that results from this moment of citizen-based discretionary power is one grounded in community values as determined *by* members of the community, rather than *for* them. In weighing the defense, they decide which

interests warrant protection and which may be curtailed through criminal law. In this, the burden of production alone may accomplish a primary goal of the defense.

For some jurisdictions, however, requiring only a burden of production may prove discordant with other defenses. In this case, a jurisdiction could attach a burden of persuasion to the proposed defense in addition to a burden of production. This burden would not bar a jury instruction if the defendant had met the initial burden of production with regard to the defense. It would, however, create a persuasive threshold the defendant would have to meet to be acquitted based on the defense. Commentary to the Model Penal Code suggests such a burden associated with controversial defenses.[388] Without parsing the meaning of such a classification, there is a hazard associated with such a persuasive requirement: it will likely exclude particular types of communication. Intrusive or nontraditional communicative conduct may fail to meet a burden of persuasion that it is either sufficiently communicative in nature or sufficiently valuable to warrant protection. While this risk is already present with the proposed defense that relies on the fact finder to find some resonance in the defendant's claim, increasing a burden of persuasion may only heighten that risk.

3. Proposed Jury Instruction for a First Amendment Defense

Regardless of whether the jurisdiction adopts a burden of production or persuasion, once the defendant meets that burden, they are entitled to a jury instruction to guide the fact finder's consideration of the claim. The Appendix to this Feature offers two alternative proposed pattern jury instructions for defendants seeking to raise a First Amendment defense. The instruction is designed to work with other instructions routinely given within a jurisdiction, including those that provide guidance on burdens of proof and elements of the offense. As a result, this instruction does not duplicate those efforts, but rather offers additional instruction around the defense alone.

The first instruction contemplates a defendant who seeks both to contest the alleged criminal activity and to assert a First Amendment defense. This instruction notes that the jury should consider the First Amendment defense only if they find that the State has proven beyond a reasonable doubt that the defendant violated the law. The second instruction contemplates a defendant who admits the criminal activity but nonetheless asserts a First Amendment defense. In either iteration, the defense offers a justification for the defendant's actions that would absolve them of criminal liability.

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388. Robinson, *supra* note 284, at 261 n.232.

These instructions are offered as possible options, and, in many ways, track pattern jury instructions given in other justification defenses. Like many defense instructions, they do not inform the jury that the finding of the defense will produce acquittal. A jurisdiction could certainly opt to insert this language.

CONCLUSION

As our nation spirals toward increased polarization, citizen democratic participation matters. Such participation can take a variety of forms, including speech. In speech, dissenting and marginalized positions may find refuge precluded or overpowered in other majoritarian-based democratic exercises. And while not all communication will serve a democratic purpose, the possibility of a First Amendment defense to incidental regulation of speech through criminal law opens a space of reckoning between the speaker and the community in whose midst the speech occurred. Allowing a defendant to challenge a charge on the grounds that their speech matters in ways that jurors ought to notice is a radical reimagining of First Amendment roles and recentering of power to decide the scope of speech protection in the citizen as defendant and as juror and not formal actors. The defense pushes back on claims that a court can and should recognize and enforce community norms through law over the objection of those who would live under the law. It pushes back on claims that an uneven First Amendment landscape promotes First Amendment goals or equity. And it pushes back on claims that space is a question of forum and presence alone cannot be speech.

Admittedly, a First Amendment defense alone will not provide constitutional protection to all marginalized speakers. This defense is limited both in terms of the mechanics of raising it and by the probability that jurors may reject it if the speech right at stake does not resonate with their own sense of community values. Both limitations will also likely disproportionately impact the most underresourced and marginal speech. The result will be a perpetuation of the subordinating First Amendment landscape that currently exists, even though it mitigates the zero-scape by creating a space—the courtroom—to speak if charges are brought.

The imperfection of the remedy, however, does not undo the value a defense brings in literally offering a means to resist speech regulation and to revitalize traditions of dissent and protection of marginalized speech that is vital to the democratic value of First Amendment protections. Even as the imperfection of the defense is apparent, considering a defense also counsels toward consideration of alternative remedies to challenge the regulation of marginalized speakers, a reconsideration of First Amendment doctrine, or an embrace of a marketplace of ideas in which dissent and nonmajoritarian positions find shelter as citizen fact finders assign them a value worthy of protection.

APPENDIX

A. First Amendment Defense Version One

The defendant asserts [he/she/they] did not commit the offense of [charged offense/offenses] [may insert other defense instructions] OR

The defendant asserts that the State has not proven beyond a reasonable doubt each element of the alleged offense of [charged offense/offenses].

You as jurors are charged first with determining whether the State has met its burden of proof with regard to each element of the [offense/offenses] as explained to you in [instructions regarding burden-of-proof and offense elements].

If, after reviewing all the evidence in the case, you determine that the State has met its burden of proof with regard to each element of the alleged [offense/offense], you may still return a verdict of not guilty if you determine that the defendant's acts were justified.

The defendant has presented evidence that [he/she/they] was/were engaged in a communicative act/engaged in speech when [he/she/they] allegedly violated the law by [crime that forms the basis of the charge]. [He/she/they] identify this act/speech as [describe the defendant's communicative act/speech] and [he/she/they] contend that this communication carries a value that exceeds the harm the State alleges occurred as a result of their violation of law, and as a result, you, the jury, ought to find their alleged criminal behavior justified.

The First Amendment protects a person's right to speak. While this right is not absolute, free speech is considered a central tenet of our democracy and our free society. Given the value of free speech, you may consider the value of the defendant's communicative act/speech against the harm [he/she/they] are accused of causing by violating the law. If you find that the value of the defendant's communicative act/speech outweighs the harm [he/she/they] are accused of causing/you find the defendant did cause the harm, you may acquit the defendant of the charge[s] before you.

To make this determination, you must first find that the defendant engaged in a communicative act/speech.

A communicative act/speech is one/an act that is intended to convey information or a message. A communicative act/speech can include a variety of behavior including individual action or participation in a larger, communal effort. It can include speech, singing, protest, visual displays, art, dance, and even just presence/remaining in a particular location. You do not have to find that the defendant actually conveyed a message with [his/her/their] act/speech, nor do you have to find that the defendant's efforts were the most effective or persuasive communication. You should not seek to determine if you, in the defendant's

position, would engage in the same manner or type of communication. Likewise, you do not have to agree with the message the defendant wished to convey. You must only find that the defendant intended to communicate in [his/her/their] act/speech.

If you find the defendant did in fact engage in a communicative act/speech, you must then determine the value of that act/speech in comparison to the harm that the defendant allegedly caused when [he/she/they] violated the law. In doing so, you should consider both the action/speech the defendant engaged in and the consequences of that engagement, including [his/her/their] alleged violation of the law. You should not speculate on potential consequences, but you may consider other, reasonable alternatives of communication available to the defendant. You may also consider whether the defendant reasonably believed that it was necessary for [him/her/them] to engage in this communicative act/speech. Towards that end, you may consider both what the defendant hoped to communicate with [his/her/their] communicative act/speech and why.

In considering the harm, the defendant caused/allegedly caused with [his/her/their] communicative act/speech, you may consider both the interests that the State has in enforcing law and maintaining social order as well as any private interests that may be implicated. [IF RELEVANT TO THE CASE: For example, you may consider evidence regarding the victim's fear or experience as a result of the defendant's action. Likewise, you may consider evidence of any monetary or emotional loss that resulted from the defendant's actions or was a foreseeable consequence of the defendant's actions. You should only consider the evidence presented of this harm with regard to the victim. You should not speculate on the monetary value of any loss/damage suffered and must base your calculation on the proffered evidence.] You may differentiate between harm that is public and affects the community as a whole and harm that is private and affects only the complaining witness/victim. You may consider either or both in your weighing of the harm against the value of the defendant's communicative act/speech.

You may consider your own interest, as a member of this community, in the enforcement of the law in this case as well as permitting the defendant's communication.

Regardless of your views on the defendant's message, you must weigh whether [his/her/their] ability to engage in the communication you have found [he/she/they] intended is sufficiently valuable to our community to warrant protection even if it results in or caused the violation of law. If you find that the value of the defendant's communication outweighs the harm caused by the violation of the law/by the State's enforcement of the law against [him/her/them], you have found that the defendant's actions were justified, and you should indicate so on your verdict form.

B. First Amendment Defense Version Two

The defendant admits [he/she/they] committed the offense of [charged offense/offenses] [may insert other defense instructions] OR

The defendant admits that the State has proven beyond a reasonable doubt each element of the alleged offense of [charged offense/offenses] but claims that [his/her/their] acts were justified, as will be explained below.

Despite this admission, you are charged first with determining whether the State has met its burden of proof with regard to each element of the [offense/offenses] as explained to you in [instructions regarding burden-of-proof and offense elements].

If, after reviewing all the evidence in the case, you determine that the State has met its burden of proof with regard to each element of the alleged [offense/offense], you may still return a verdict of not guilty if you determine that the defendant's acts were justified.

The defendant has presented evidence that [he/she/they] was/were engaged in a communicative act/engaged in speech when [he/she/they] violated the law by [crime that forms the basis of the charge]. The defendant identifies this act/speech as [describe the defendant's communicative act/speech] and [he/she/they] contend that this communication carries a value that exceeds the harm the State alleges occurred as a result of their violation of law, and as a result, you, the jury, ought to find their alleged criminal behavior justified.

The First Amendment protects a person's right to speak. While this right is not absolute, free speech is considered a central tenet of our democracy and our free society. Given the value of free speech, you may consider the value of the defendant's communicative act/speech against the harm [he/she/they] are accused of causing by violating the law. If you find that the value of the defendant's communicative act/speech outweighs the harm [he/she/they] are accused of causing/you find [he/she/they] did cause, you may acquit the defendant of the charge[s] before you.

To make this determination, you must first find that the defendant engaged in a communicative act/speech.

A communicative act/speech is one/an act that is intended to convey information or a message. A communicative act/speech can include a variety of behavior including individual action or participation in a larger, communal effort. It can include speech, singing, protest, visual displays, art, dance, and even just presence/remaining in a particular place. You do not have to find that the defendant actually conveyed a message with [his/her/their] act/speech, nor do you have to find that the defendant's efforts were the most effective or persuasive communication. You should not seek to determine if you, in the defendant's position, would engage in the same manner or type of communication. Likewise,

you do not have to agree with the message the defendant wished to convey. You must only find that the defendant intended to communicate in [his/her/their] act/speech.

If you find the defendant did in fact engage in a communicative act/speech, you must then determine the value of that act/speech in comparison to the harm that the defendant allegedly caused/caused when [he/she/they] violated the law. In doing so, you should consider both the action/speech the defendant engaged in and the consequences of that engagement, including [his/her/their] violation of the law. You should not speculate on potential consequences, but you may consider other, reasonable alternatives of communication available to the defendant. You may also consider whether the defendant reasonably believed that it was necessary for [him/her/them] to engage in this communicative act/speech. Towards that end, you may consider both what the defendant hoped to communicate with [his/her/their] communicative act/speech and why.

In considering the harm, the defendant caused/allegedly caused with [his/her/their] communicative act/speech, you may consider both the interests that the State has in enforcing law and maintaining social order as well as any private interests that may be implicated. [IF RELEVANT TO THE CASE: For example, you may consider evidence regarding the victim's fear or experience as a result of the defendant's action. Likewise, you may consider evidence of any monetary or emotional loss that resulted from the defendant's actions or was a foreseeable consequence of the defendant's actions. You should only consider the evidence presented of this harm with regard to the victim. You should not speculate on the monetary value of any loss/damage suffered and must base your calculation on the proffered evidence.] You may differentiate between harm that is public and affects the community as a whole and harm that is private and affects only the complaining witness/victim. You may consider either or both in your weighing of the harm against the value of the defendant's communicative act/speech.

You may consider your own interest, as a member of this community, in the enforcement of the law in this case as well as permitting the defendant's communication.

Regardless of your views on the defendant's message, you must weigh whether [his/her/their] ability to engage in the communication you have found [he/she/they] intended is sufficiently valuable to our community to warrant protection even if it results in or caused the violation of law. If you find that the value of the defendant's communication outweighs the harm caused by the violation of the law/by the State's enforcement of the law against [him/her/them], you have found that the defendant's actions were justified, and you should indicate so on your verdict form.