

2017

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Recommended Citation

Kristine Ruhl, *"An Alarming Trend": The Dangers of Recently Proposed Anti-Protest Legislation*, 22 Pub. Interest L. Rptr. 95 (2017).

Available at: <https://lawcommons.luc.edu/pilr/vol22/iss2/6>

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“An Alarming Trend”: The Dangers of Recently Proposed Anti-Protest Legislation

Kristine Ruhl

From the Black Lives Matter Movement, to the Dakota pipeline protests, to the record-breaking Women’s Marches, to the various anti-Trump and anti-Trump legislation protests, America has experienced a rebirth of civil disobedience in recent years.¹ However, the emergence of this new wave of activism has brought with it a torrent of proposed legislation aiming to quell protests and restrain activists’ abilities to publicly express their grievances.² While analysts have largely deemed these bills unconstitutional and unlikely to become law,³ the sheer number and timing of the bills presents the potential for a chilling effect on movements as a whole.⁴

Brief Overview of Proposed Legislation

Much of this historic activism has resulted in protestors flocking to public roadways and streets.⁵ In response, several states have proposed legislation, often framed as “anti-obstruction bills” that would enforce various fines and other punishments for protestors who block traffic.⁶

In the wake of the Dakota Access Pipeline Protests, several bills have been proposed which would exempt motorists who strike protestors obstructing highways from liability, as long as the motorist did so accidentally.⁷ Although legislators ultimately rejected those bills, Governor Doug Burgum did sign several protest-related bills into law on February 23, 2017, which, among other

¹ Lindsay Keeler, *Protests swept across the nation in 2016*, AOL.COM NEWS (Dec. 13th, 2016), <https://www.aol.com/article/news/2016/12/13/protests-swept-across-the-nation-in-2016/21627149/>.

² Spencer Woodman, *Republican Lawmakers in Five States Propose Bills to Criminalize Peaceful Protests*, THE INTERCEPT (Jan. 19, 2017), <https://theintercept.com/2017/01/19/republican-lawmakers-in-five-states-propose-bills-to-criminalize-peaceful-protest/>.

³ Traci Yoder, *New Anti-Protesting Legislation: A Deeper Look*, NAT’L LAWYERS GUILD (Mar. 2, 2017), <https://www.nlg.org/new-anti-protesting-legislation-a-deeper-look/>.

⁴ Mitch Smith & Michael Wines, *Across the Country, a Republican Push to Rein In Protestors*, N.Y. TIMES (Mar. 2, 2017), https://www.nytimes.com/2017/03/02/us/when-does-protest-cross-a-line-some-states-aim-to-toughen-laws.html?_r=0.

⁵ Woodman, *supra* note 2.

⁶ Woodman, *supra* note 2.

⁷ Kira Lerner, *Republicans push anti-protest laws*, THINK PROGRESS (Jan. 31, 2017), <https://thinkprogress.org/anti-protest-legislation-2afe0d59360a#.7fhj751in>.

things, will increase punishments for riot and trespass offenses.⁸ Similar highway-protesting bills have sprouted up in several other states, including Minnesota, where a fine of \$10,000 and a penalty of imprisonment of at least 12 months would be implemented against any nonviolent protestor who “obstructs the legal process.”⁹

Other legislation has aimed to expand the definition of “riot” so as to more easily draw a connection between protests and terrorism.¹⁰ Some states, such as Arizona, are introducing bills under the pretext that they are necessary to stifle the actions of those who are “paid or professional protestors.”¹¹ President Trump has actively supported the notion that these bills are necessary to protect citizens from “ideologues and anarchists” who are “almost professional agent provocateurs that attempt to create public disorder.”¹²

Are the Laws Constitutional?

The Supreme Court of the United States has held that the First Amendment protects the right to conduct a peaceful assembly.¹³ However, that right is not absolute.¹⁴ The First Amendment does not protect the right to conduct an assembly at which there is a “clear and present danger of riot, disorder, or interference with traffic on public streets, or other immediate threat to public safety, peace, or order.”¹⁵ Statutes that prohibit people from assembling and using force or violence to accomplish unlawful purposes are permissible under the First Amendment.¹⁶

⁸ John Hageman, *Burgum Signs Protest Bills After Main Camp Is Closed*, BAKKEN TODAY (Feb. 24, 2017), <http://www.bakkentoday.com/2017/02/24/burgum-signs-protest-bills-after-main-camp-is-cleared/>.

⁹ Woodman, *supra* note 2.

¹⁰ Yoder, *supra* note 3.

¹¹ Christopher Ingraham, *Republican lawmakers introduce bills to curb protesting in at least 18 states*, WASH. POST (Feb. 24, 2017), https://www.washingtonpost.com/news/wonk/wp/2017/02/24/republican-lawmakers-introduce-bills-to-curb-protesting-in-at-least-17-states/?utm_term=.03d29f1abe8b.

¹² Howard Fischer, *Arizona Senate votes to seize assets of those who plan, participate, in protests that turn violent*, ARIZ. CAP. TIMES (Feb. 22, 2017), <http://azcapitoltimes.com/news/2017/02/22/arizona-senate-crackdown-on-protests/>. See also @realDonaldTrump, TWITTER (Feb. 3, 2017, 3:48 AM), <https://twitter.com/realdonaldtrump/status/827483841589891073?lang=EN> (stating, “Professional anarchists, thugs and paid protestors are proving the point of the millions of people who voted to MAKE AMERICA GREAT AGAIN!”).

¹³ De Jonge v. State of Oregon, 299 U.S. 353, 364 (1937).

¹⁴ *Id.*

¹⁵ Jones v. Parmley, 465 F.3d 46, 56–57 (2nd Cir. 2006).

¹⁶ Cole v. Arkansas, 338 U.S. 345, 353 (1949).

..... Critics of the recently proposed anti-protest legislation argue that the bills targeting specific groups will not survive a constitutional challenge.¹⁷ Lee Rowland, an attorney for the ACLU, has stated that the bills would “criminalize or penalize protected speech and protest.”¹⁸ She also stated that the bills “go against the very fabric of our constitutional democracy.”¹⁹ Others argue that if the bills were passed into law, the laws would have a chilling effect on citizens’ rights to free speech.²⁰ When laws have the effect of dissuading reasonable, law-abiding citizens from exercising their rights, those laws are unconstitutional.²¹ Several bills, such as those in North Dakota, Virginia, and Michigan have been defeated on the basis that they were unconstitutional.²²

Dangers of Proposed Legislation

Although much of the proposed legislation has been deemed unconstitutional and is unlikely to pass, the sheer number and inflammatory rhetoric of recently proposed bills builds confusion and instills fear, or at the very least, trepidation for many protestors.²³ The recent wave of anti-protest legislation has received an enormous amount of press.²⁴ News articles often report on the large number of bills being introduced across the United States; however, the articles do not always describe where the bills are in the legislative process, or the likelihood that they will actually pass into law.²⁵ As a result, even if most of these bills are unlikely to become law, protestors who become bombarded by the news of the potential of these bills passing may become discouraged to take action.²⁶ Thus, even though the bills have not become law, they still may nonetheless cause a chilling effect.²⁷

¹⁷ Elise Young & Janan Hanna, *States Are Cracking Down on the Biggest Protest Since '60s*, BLOOMBERG POLITICS (Feb. 3, 2017), <https://www.bloomberg.com/politics/articles/2017-02-03/woorst-u-s-protests-since-1960s-spur-states-to-pursue-crackdown>.

¹⁸ Lerner, *supra* note 7.

¹⁹ *Id.*

²⁰ Lee Rowland & Vera Eidelman, *Where Protests Flourish, Anti-Protest Bills Follow*, MOYERS & COMPANY (Feb. 22, 2017), <http://billmoyers.com/story/protests-flourish-anti-protest-bills-fol/>.

²¹ *Id.*

²² *Id.*

²³ Yoder, *supra* note 3.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

Chase Iron Eyes, a North Dakota Pipeline protestor and recent congressional candidate, stated in the *New York Times* that the government implements this chilling effect by “squash[ing] opposition and chill[ing] the will of people who are willing to face risks to their liberty to further their cause.”²⁸ Even though these proposed bills may not deter protestors altogether, they may cause some activists to alter their plans, or take extra precautions when planning to protest.²⁹ For example, Alexandra Murphy, a 29-year-old Senior Manager of Health at United Way Chicago, participated in the Women’s March on Washington and described her preparation steps.³⁰ She stated that she was aware of the recent trends in anti-protest legislation, and thus felt the need to consult the ALCU website to educate herself on her rights, and also the potential dangers of taking part in such a large-scale protest.³¹ When asked if Murphy would be discouraged from participating in protests in light of the newly proposed legislation, she explained that she, and her immediate network comprised of young adults, would probably not be significantly affected by the legislation.³² Murphy stated, “I suspect older women might feel trepidation. They might think, ‘why am I going to risk this when I have a family at home?’ But I don’t think my immediate network would be at this phase in our lives.”³³

The potential trepidation and second-guessing Murphy describes are evidence of the chilling effect of the proposed legislation on citizens’ exercise of their civil liberties.³⁴ The greater number of states that promote anti-protest legislation, the greater ripples the chilling effect may cause.

Conclusion

Recently, civil activism has found a renewed pulse throughout America.³⁵ But this new era has brought with it numerous challengers who, via proposed legislation, have worked to quell civil disobedience movements.³⁶ Although many bills have been deemed unconstitutional, the spur of the proposed laws

²⁸ Smith & Wines, *supra* note 4.

²⁹ Telephone interview with Alexandra Murphy, Senior Manager of Health at United Way Chicago (Mar. 22, 2017).

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ Smith & Wines, *supra* note 4.

³⁵ Keeler, *supra* note 1.

³⁶ Woodman, *supra* note 2.

nonetheless may result in a chilling effect on protestors everywhere.³⁷ As a result, these bills, even if un-passable, are likely to have a dangerous effect on those who wish to speak out against injustice.

³⁷ Rowland & Eidelman, *supra* note 20.