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## Coming Down the Pipeline: First Amendment Challenges to State-Level "Critical Infrastructure" Trespass Laws

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**Coming Down the Pipeline: First Amendment Challenges to State-Level "Critical Infrastructure" Trespass Laws**

# COMING DOWN THE PIPELINE: FIRST AMENDMENT CHALLENGES TO STATE- LEVEL “CRITICAL INFRASTRUCTURE” TRESPASS LAWS

JENNA RUDDOCK\*

*Since late 2016, state legislatures across the country have been inundated by a wave of anti-protest bills. In states with significant oil and gas development, new “critical infrastructure” trespass laws have raised the stakes for those who protest pipeline construction, whether on public or private land. In some states, these laws make trespassing near pipelines a felony; in other states, organizations who aid pipeline protestors face potentially devastating financial liability. This Article explores the critical First Amendment concerns raised by critical infrastructure trespass laws, as well as their implications for the future of American protest. These laws implicate an uncertain but undeniably vast amount of both public and private lands where protected expression can and should be able to occur. Provisions targeting “conspirator” groups additionally violate individuals’ and organizations’ First Amendment rights to free speech and free association. These statutes’ vagueness and their outsized penalties risk criminalizing protected speech and thus have an unconstitutional chilling effect on the legitimate exercise of free speech and free association by individuals and groups organizing to protest fossil fuel infrastructure development.*

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\* Senior Staff Member, *American University Law Review*, Volume 69; J.D. Candidate, May 2020, *American University Washington College of Law*. This Comment would never have been finished without support from my family, especially my husband, Jorge Franzini, and my parents, Susan and Ted. I am also endlessly grateful for the Law Review staff’s hard work, as well as for the encouragement and support of Professors Amanda Leiter and Robert Tsai. This Comment is dedicated to environmental defenders on the front lines in the United States and around the world.

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## INTRODUCTION

In late summer 2018, two sets of trespassing charges were filed in southern Louisiana in connection with the Bayou Bridge pipeline, a project stretching across sections of Louisiana's ecologically sensitive (and crawfish-rich) Atchafalaya Basin. The first charges were filed against pipeline protesters, who had been arrested after being detained by private security for the company funding the pipeline, Energy Transfer Partners.<sup>1</sup> The rest of the charges were filed against the pipeline company itself, which had moved construction crews onto private property against the express wishes of landowners, proceeding to cut down trees and tear up land without a clear legal right to be there.<sup>2</sup>

Just two weeks earlier, Louisiana's legislature passed a new law that heightened protections for "critical infrastructure"—a category lawmakers deliberately expanded beyond its definition at the time (which included sites such as water treatment facilities and power stations) to include pipeline construction sites and any land containing equipment or materials being used to construct a pipeline.<sup>3</sup> Similar critical infrastructure trespass bills have been cropping up in state legislatures around the country since early 2017,<sup>4</sup> following the widely covered

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1. See Karen Savage, *Louisiana Law Enforcement Officers Are Moonlighting for a Controversial Pipeline Company*, APPEAL (Aug. 28, 2018), <https://theappeal.org/louisiana-police-arrest-bayou-bridge-pipeline-protesters> [<https://perma.cc/RLQ8-F78J>]; see also *Atchafalaya Basin*, ATCHAFALAYA NAT'L HERITAGE AREA, <http://www.atchafalaya.org/atchafalaya-basin> [<https://perma.cc/4T9W-CG3V>] (noting that the Atchafalaya Basin's "estimated average annual commercial harvest" of crawfish totals nearly twenty-two million pounds).

2. See Julie Dermansky, *Despite Lingering Land Dispute, Louisiana's Bayou Bridge Pipeline Is Nearly Complete*, DESMOGBLOG (Oct. 11, 2018), <https://www.desmogblog.com/2018/10/11/atchafalaya-basin-land-dispute-louisiana-bayou-bridge-pipeline> [<https://perma.cc/F9KB-F6CQ>]; Steve Hardy, *Bayou Bridge Pipeline Builders Must Pay \$450 for Trespassing; Judge OKs Land Seizure*, ADVOC. (Dec. 6, 2018), [https://www.theadvocate.com/baton\\_rouge/news/environment/article\\_7cd9cd64-f713-11e8-ba69-e3d91d6d0aaa.html](https://www.theadvocate.com/baton_rouge/news/environment/article_7cd9cd64-f713-11e8-ba69-e3d91d6d0aaa.html) [<https://perma.cc/QKK5-3KRR>].

3. H.B. 727, 2018 Leg., Reg. Sess. (La. 2018).

4. See Alleen Brown, *Ohio and Iowa Are the Latest of Eight States to Consider Anti-Protest Bills Aimed at Pipeline Opponents*, INTERCEPT (Feb. 2, 2018), <https://theintercept.com/2018/02/02/ohio-iowa-pipeline-protest-critical-infrastructure-bills> [<https://perma.cc/Z4BE-HQLT>] (describing the development of critical infrastructure bills in states such as Ohio and Iowa); see also Stacy M. Brown, *Bill Raising Infrastructure Trespassing Penalty Called 'Out of Line'*, PHILA. TRIB. (Oct. 12, 2018), [https://www.phillytrib.com/news/state\\_and\\_region/bill-raising-infrastructure-trespassing-penalty-called-out-of-line/article\\_f6bffeab-1153-5ad0-9bbd-7f0cf0ce8537.html](https://www.phillytrib.com/news/state_and_region/bill-raising-infrastructure-trespassing-penalty-called-out-of-line/article_f6bffeab-1153-5ad0-9bbd-7f0cf0ce8537.html) [<https://perma.cc/4A2S-E6VR>].

clashes between demonstrators and law enforcement in Cannon Ball, North Dakota, along the construction route of the Dakota Access pipeline.<sup>5</sup> The Louisiana state legislature successfully passed its critical infrastructure trespass law in 2018, approximately one year after Oklahoma passed the first.<sup>6</sup> At least a half dozen other states have drafted similar bills, and several have put these bills to a vote.<sup>7</sup>

Because of Louisiana's new law, the protesters arrested in early September faced potential felony charges for the alleged crime of trespassing on a pipeline easement—land upon which, mere weeks earlier, trespassers would have faced at most a misdemeanor charge.<sup>8</sup> Meanwhile, for Energy Transfer Partners' acts of trespass, a Louisiana judge granted the company rights to the land and required them to pay just \$150 to each landowner whose property construction crews occupied and damaged.<sup>9</sup>

This Comment will argue that critical infrastructure trespass laws are unconstitutionally vague and overbroad, implicating an uncertain but undeniably vast amount of both public and private lands where protected expression can and should be able to occur. The provisions in these laws targeting “conspirator” groups additionally violate individuals' and

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(stating that Pennsylvania's state legislature was also considering a critical infrastructure trespass bill).

5. See Julia Carrie Wong & Sam Levin, *Standing Rock Protesters Hold out Against Extraordinary Police Violence*, GUARDIAN (Nov. 29, 2016, 3:26 PM), <https://www.theguardian.com/us-news/2016/nov/29/standing-rock-protest-north-dakota-shutdown-evacuation> [https://perma.cc/UQY4-EU64] (“Police have acknowledged using sponge rounds, bean bag rounds, stinger rounds, teargas grenades, pepper spray, Mace, Tasers and a sound weapon . . . . More than two dozen people were hospitalized and 300 injured . . .”).

6. See *New Lawsuit Challenges Anti-Protest Trespass Law: Pipeline Protesters, Journalists, and Landowners Sue Over Louisiana Law*, CTR. FOR CONST. RTS (May 22, 2019), <https://ccrjustice.org/home/press-center/press-releases/new-lawsuit-challenges-anti-protest-trespass-law> [https://perma.cc/T7MP-YAJA].

7. See Alleen Brown, *supra* note 4 (naming Ohio and Iowa as two states considering critical infrastructure trespass bills and listing North Dakota, South Dakota, and Oklahoma as already passing such bills); see also Naveena Sadasivan, *After Standing Rock, Protesting Pipelines Can Get You a Decade in Prison and \$100K in Fines*, GRIST (May 14, 2019), <https://grist.org/article/after-standing-rock-protesting-pipelines-can-get-you-a-decade-in-prison-and-100k-in-fines> [https://perma.cc/WAF8-T3QG] (adding Texas, Minnesota, Kentucky, and Illinois as states in the process of considering similar legislation).

8. See Travis Lux, *Tougher Laws on Pipeline Protests Face Test in Louisiana*, NPR (Sept. 19, 2018), <https://www.npr.org/2018/09/19/648029225/tougher-laws-on-pipeline-protests-face-test-in-louisiana> [https://perma.cc/5VZL-KMU4].

9. See Hardy, *supra* note 2.

organizations' First Amendment rights to free speech and free association. These statutes' vagueness and their outsized penalties risk criminalizing protected speech and thus have an unconstitutional chilling effect on the legitimate exercise of free speech and free association by individuals and groups organizing to protest fossil fuel infrastructure development. Part I will discuss the events that inspired the wave of anti-protest legislation that included the first critical infrastructure trespass bills, the central components of these bills, and key First Amendment issues that these laws raise. Part II will analyze the strongest potential First Amendment challenges to critical infrastructure trespass laws and argue that critical infrastructure trespass bills are unconstitutionally overbroad and vague. Finally, the Conclusion explores whether existing First Amendment jurisprudence goes far enough in protecting free speech rights in the context of civil disobedience, or whether courts' reluctance to scrutinize facially neutral, conduct-oriented laws under the First Amendment creates opportunities for legislative abuse.

## I. BACKGROUND

### A. *Oil and Water: State Lawmakers' Escalating Hostility Towards Protesters During and After Standing Rock*

As the saying goes, there is no putting toothpaste back in the tube. The same is true for oil and oil pipelines. When oil spills, no cleanup effort can return the surrounding landscape to its prior condition.<sup>10</sup> While affected wildlife populations may eventually recover, individual birds and mammals rarely do; studies have demonstrated that “in general, the post-treatment survival rate of oil-soaked birds is less than one percent.”<sup>11</sup> Like birds, mammals attempt to clean themselves of the oil, ultimately dying of organ failure.<sup>12</sup> Cleaning oil-soaked vegetation often requires cutting or burning plants that cannot be protected ahead

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10. Andrew Nikiforuk, *Why We Pretend to Clean Up Oil Spills*, SMITHSONIAN.COM (July 12, 2016), <https://www.smithsonianmag.com/science-nature/oil-spill-cleanup-illusion> [<https://perma.cc/7CKR-4EL3>] (“In an oil-based society, the cleanup delusion is also irresistible. Just as it is difficult for us to acknowledge the limits of medical intervention, society struggles to acknowledge the limits of technologies or the consequences of energy habits. And that’s where the state of marine oil spill response sits today: it creates little more than an illusion of a cleanup. Scientists—outside the oil industry—call it ‘prime-time theater’ or ‘response theater.’”).

11. *Id.*

12. *Id.*

of time.<sup>13</sup> Groundwater is equally vulnerable, and while water supplies can sometimes be restored to useable quality after an oil spill, groundwater contamination in particular “is not always amenable to total clean up.”<sup>14</sup> Oil-contaminated water can cause serious harm to the health of anyone who relies on that water source, from liver and kidney damage to elevated risk for certain blood conditions ranging from high blood pressure to leukemia.<sup>15</sup> The United States has experienced “more than 1,500 spills from crude oil pipelines” in the last decade.<sup>16</sup>

In late 2014, Texas-based Energy Transfer Partners began applying for permits to build a 1172-mile crude oil pipeline stretching from North Dakota’s booming Bakken oil fields to southern Illinois.<sup>17</sup> The pipeline’s proposed route required tunneling under the Missouri River, the longest river in the United States, a half-mile upstream from the Standing Rock Sioux Reservation and surrounding lands near Cannon Ball, North Dakota.<sup>18</sup> In addition to the Standing Rock Sioux Tribe, roughly seventeen million people downstream of the reservation rely on the Missouri River for water.<sup>19</sup> Other proposed pipeline routes, including one that would have placed the pipeline’s Missouri River crossing just north of North Dakota’s capital, Bismarck, were rejected—partly due to concerns over risks to the city’s water supply.<sup>20</sup>

Over the next two years, opposition to the pipeline mounted, particularly on the Standing Rock reservation.<sup>21</sup> Even other federal agencies began to

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13. *Oil Spills in Rivers*, NAT’L OCEANIC & ATMOSPHERIC ADMIN. OFF. OF RESPONSE & RESTORATION, <https://response.restoration.noaa.gov/oil-and-chemical-spills/oil-spills/resources/oil-spills-rivers.html> [<https://perma.cc/JQZ8-KPLR>].

14. Ejikeme Ugwoha & Benedict Emeka Omenogor, *Effect of Oil Spillage on Groundwater Quality*, 3 J. ENVTL. STUD. 1, 1 (2017), <http://www.avensonline.org/wp-content/uploads/JES-2471-4879-03-0019.pdf> [<https://perma.cc/74YS-VEGZ>].

15. *Id.*

16. Ryan W. Miller, *How the Dakota Access Pipeline Battle Unfolded*, USA TODAY (Dec. 2, 2016), <https://www.usatoday.com/story/news/nation/2016/12/02/timeline-dakota-access-pipeline-and-protests/94800796> [<https://perma.cc/P98Z-TMYC>].

17. *Id.*

18. *Oil, Water, and Steel*, EARTHJUSTICE, <https://earthjustice.org/features/oil-water-and-steel-the-dakota-access-pipeline> [<https://perma.cc/VS4U-WR4G>].

19. *Id.*

20. U.S. ARMY CORPS OF ENG’RS, ENVIRONMENTAL ASSESSMENT: DAKOTA ACCESS PIPELINE PROJECT CROSSINGS OF FLOWAGE EASEMENTS AND FEDERAL LANDS 8 (2016).

21. See Jack Healy, *North Dakota Oil Pipeline Battle: Who’s Fighting and Why*, N.Y. TIMES (Aug. 26, 2016), <https://www.nytimes.com/2016/11/02/us/north-dakota-oil-pipeline-battle-whos-fighting-and-why.html> (examining the status of the North Dakota oil pipeline battle, including the increase in the numbers of individuals participating in the protests and the resulting increase in clashes between protesters and law enforcement).



voice concerns in early 2016, after the U.S. Army Corps of Engineers published a draft Environmental Assessment regarding the pipeline's Missouri River crossing.<sup>22</sup> In March of that year, for example, the U.S. Environmental Protection Agency (EPA) sent a letter to the Army Corps calling for a revised draft Environmental Assessment and a second public comment period in light of the route's proximity to the Standing Rock reservation and other drinking water supplies.<sup>23</sup> The U.S. Department of the Interior and the Advisory Council on Historic Preservation sent similar letters citing worries that the Corps "did not adequately justify or otherwise support its conclusion that there would be no significant impacts upon the surrounding environment and community."<sup>24</sup>

Over that summer, members of the Standing Rock community, other Native tribes, and environmental groups from across the country began arriving in Cannon Ball, where two makeshift camps had been set up near the pipeline's contested river crossing site.<sup>25</sup> The main camp, Sacred Stone Camp, sat on land located within the boundaries

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22. News Releases, *Corps Grants Easement to Dakota Access, LLC*, OMAHA DIST., U.S. ARMY CORPS OF ENG'RS (Feb. 8, 2017), <https://www.nwo.usace.army.mil/Media/News-Releases/Article/1077134/corps-grants-easement-to-dakota-access-llc> [<https://perma.cc/FD9U-54KL>].

23. Letter from Philip S. Strobel, Dir., NEPA Compliance & Review Program, United States Envtl. Protection Agency Region 8, to U.S. Army Corps of Eng'rs, Omaha Dist., (Mar. 11, 2016) <https://www.documentcloud.org/documents/3036068-Dakota-Access-2nd-DEA-Cmts-3-11-16-002.html> [<https://perma.cc/8VXP-YDBG>] ("[W]e recommend that the applicant's spill planning and emergency response efforts cover the entire length of the pipeline as the proposed pipeline crosses many creeks and rivers that could quickly convey a spill into the Missouri River or other water resources.").

24. Letter from Lawrence S. Roberts, Acting Assistant Sec'y Indian Affairs, U.S. Dep't of the Interior, to Brent Cossette, U.S. Army Corps of Eng'rs, Omaha Dist. (Mar. 29, 2016), <http://indigenoustrising.org/wp-content/uploads/2016/04/DOI-Signed-Standing-Rock-Corps-Letter.pdf> [<https://perma.cc/P7VX-UDYV>] (explaining his beliefs as to why the Corps failed to support its conclusions regarding the environmental impact of the proposed Dakota Access Pipeline on the Standing Rock Sioux Reservation); see also Steven Mufson, *How the Army Corps of Engineers Wound up in the Middle of the Fight over the Dakota Access Pipeline*, WASH. POST (Feb. 8, 2017), [https://www.washingtonpost.com/business/economy/how-the-army-corps-of-engineers-wound-up-in-the-middle-of-the-fight-over-the-dakota-access-pipeline/2017/02/08/33eaedde-ed8a-11e6-9662-6eedf1627882\\_story](https://www.washingtonpost.com/business/economy/how-the-army-corps-of-engineers-wound-up-in-the-middle-of-the-fight-over-the-dakota-access-pipeline/2017/02/08/33eaedde-ed8a-11e6-9662-6eedf1627882_story) (describing the nuances and challenges faced by the Army Corps of Engineers while siting projects).

25. See Nicky Woolf, *North Dakota Oil Pipeline Protesters Stand Their Ground: 'This Is Sacred Land'*, GUARDIAN (Aug. 29, 2016), <https://www.theguardian.com/us-news/2016/aug/29/north-dakota-oil-pipeline-protest-standing-rock-sioux> [<https://perma.cc/8SWK-RZEK>] (noting that the first camp, Sacred Stone Camp, was established in April 2016).

of the Standing Rock reservation and owned by LaDonna Brave Bull Allard, who had established the camp and invited demonstrators to join it.<sup>26</sup> As numbers swelled at the Sacred Stone site, a second camp, dubbed Oceti Sakowin, spilled onto land managed by the Army Corps of Engineers north of the reservation.<sup>27</sup> The two camps soon housed hundreds of residents prepared to stay indefinitely.<sup>28</sup> Meanwhile, the Standing Rock Sioux Tribe filed a federal legal challenge to the project's Army Corps permits, seeking to halt and prevent further construction until a new environmental impact review was completed.<sup>29</sup>

Construction crews did not wait for a final court decision on the Tribe's lawsuit.<sup>30</sup> Bulldozers broke ground in early September, setting the stage for the first serious clashes between protesters and private security forces.<sup>31</sup> By late October, with the 2016 general election looming and lawyers continuing to battle over the project in court, tensions on the ground had escalated rapidly.<sup>32</sup> Militarized local police equipped with armored vehicles, riot gear, and sound cannons confronted protesters who had established a blockade near the camps.<sup>33</sup> The number of protest-related arrests approached 300.<sup>34</sup> Reports of local law enforcement unlawfully detaining and mistreating protesters put a spotlight on the conflict, drawing the attention of the United

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26. Wong & Levin, *supra* note 5.

27. *Id.* (noting also that the Army Corps had leased the land to a private rancher).

28. Woolf, *supra* note 25 ("Hundreds more join when they can, swelling the camp's numbers on weekends. Others come when they get time and bring what supplies they can.").

29. Motion for Preliminary Injunction Request for Expediting Hearing, Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, No. 1:16-cv-1534-JEB (D.D.C. Aug. 4, 2016); see also Rebecca Hersher, *Key Moments in the Dakota Access Pipeline Fight*, NPR (Feb. 22, 2017), <https://www.npr.org/sections/thetwo-way/2017/02/22/514988040/key-moments-in-the-dakota-access-pipeline-fight> [<https://perma.cc/TS27-4QXC>] (examining the main historic moments in the Dakota Access Pipeline fight, one of which includes the Standing Rock Sioux Tribe suing the U.S. Army Corps of Engineers).

30. See Alexander Sammon, *A History of Native Americans Protesting the Dakota Access Pipeline*, MOTHER JONES (Sept. 9, 2016), <https://www.motherjones.com/environment/2016/09/dakota-access-pipeline-protest-timeline-sioux-standing-rock-jill-stein> [<https://perma.cc/S3SR-ZZN7>] (quoting Jan Hassleman, an attorney for the Standing Rock Sioux Tribe: "We're days away from getting a resolution on the legal issues, and they came in on a holiday weekend and destroyed the site").

31. *Id.*

32. See Catherine Thorbecke, *141 Arrested at Dakota Access Protest as Police Move In*, ABC NEWS (Oct. 28, 2016), <https://abcnews.go.com/US/tensions-mount-protesters-police-controversial-pipeline/story?id=43078902> [<https://perma.cc/G8ZJ-XWY3>].

33. *Id.*

34. *Id.*

Nations' (UN) Permanent Forum on Indigenous Issues.<sup>35</sup> The situation escalated further in late November when police fired rubber bullets, tear gas, and water cannons at protesters in sub-freezing temperatures.<sup>36</sup> Less than two weeks later, the outgoing Obama Administration denied a final permit for the pipeline—just ahead of an Army Corps deadline requiring the protesters to leave the two main campsites.<sup>37</sup>

Ultimately, however, the newly elected Trump Administration gave the Dakota Access project a green light in early 2017.<sup>38</sup> By the time law enforcement cleared away the Oceti Sakowin camp on February 23, 2017, an estimated 800 people had been arrested and charged with various offenses for their participation in the Standing Rock protests.<sup>39</sup> Local law enforcement and prosecutors were accused of “an aggressive campaign” to suppress activism “using drawn-out criminal cases and lengthy prison sentences.”<sup>40</sup> Charges levied against hundreds of

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35. See Sam Levin, *Dakota Access Pipeline Protests: UN Group Investigates Human Rights Abuses*, GUARDIAN (Oct. 31, 2016), <https://www.theguardian.com/us-news/2016/oct/31/dakota-access-pipeline-protest-investigation-human-rights-abuses> [https://perma.cc/3M2Z-FMK3] (detailing the investigation by the UN's Permanent Forum on Indigenous Issues into the abuses against pipeline protesters).

36. See Madison Park & Mayra Cuevas, *Dakota Access Pipeline Clashes Turn Violent*, CNN (Nov. 22, 2016), <https://www.cnn.com/2016/11/21/us/dakota-access-pipeline-protests/index.html> [https://perma.cc/Q876-CFQX]; Alan Taylor, *Water Cannons and Tear Gas Used Against Dakota Access Pipeline Protesters*, ATLANTIC (Nov. 21, 2016), <https://www.theatlantic.com/photo/2016/11/water-cannons-and-tear-gas-used-against-dakota-access-pipeline-protesters/508370> [https://perma.cc/769C-U5BW].

37. Kris Maher & Will Connors, *Dakota Pipeline Project Halted as Obama Administration Denies Permit for Last Leg*, WALL ST. J. (Dec. 5, 2016), <https://www.wsj.com/articles/obama-administration-moves-to-deny-easement-for-dakota-pipeline-1480890468>.

38. Brian Naylor, *Trump Gives Green Light to Keystone, Dakota Access Pipelines*, NPR (Jan. 24, 2017), <https://www.npr.org/2017/01/24/511402501/trump-to-give-green-light-to-keystone-dakota-access-pipelines> [https://perma.cc/F9XZ-7JB4] (noting that the Standing Rock Sioux Tribe quickly announced that it would “take legal action to fight Trump's decision”).

39. See Zoë Carpenter & Tracie Williams, *Photos: Since Standing Rock, 56 Bills Have Been Introduced in 30 States to Restrict Protests*, NATION (Feb. 16, 2018), <https://www.thenation.com/article/photos-since-standing-rock-56-bills-have-been-introduced-in-30-states-to-restrict-protests> [https://perma.cc/H67J-RJHV].

40. Sam Levin, *He's a Political Prisoner: Standing Rock Activists Face Years in Jail*, GUARDIAN (June 22, 2018), <https://www.theguardian.com/us-news/2018/jun/22/standing-rock-jailed-activists-water-protectors> [https://perma.cc/B4MS-FR9D]; see also Colin Moynihan, *A Murky Legal Mess at Standing Rock*, NEW YORKER (Jan. 11, 2017), <https://www.newyorker.com/news/news-desk/people-arrested-at-standing-rock-protests-fight-for-their-legal-rights> [https://perma.cc/T7SJ-52B4] (noting that the legal battles over individual protesters' cases reflected “the polarized political dispute over the pipeline”).

protestors were ultimately dropped, but not before those charged were forced to live with the specter of potentially lengthy and costly legal proceedings.<sup>41</sup> In some cases, defense attorneys reported a pattern of protestors seeing charges dropped after they had incurred the upfront costs of preparing their cases, only to be re-filed at a later date, a practice a local attorney described as “financial warfare.”<sup>42</sup> One state prosecutor handling the Standing Rock cases argued that protesters who could not afford their own counsel should be required to reimburse the state for their court-appointed representation.<sup>43</sup>

In the wake of the Standing Rock conflict, state legislators across the country began similarly aggressive campaigns, introducing a flurry of bills targeting protesters, particularly in states where fossil fuel infrastructure development was booming. These proposals ranged from measures that would enable prosecutors to charge demonstrators under racketeering laws to bills intended to “indemnify drivers who strike protesters in the street.”<sup>44</sup> Some of the proposals were draconian enough to attract the attention of special rapporteurs from the UN’s Office of the High Commissioner for Human Rights, who lodged a complaint with the U.S. Department of State.<sup>45</sup>

These bills included proposals to penalize anyone who set foot on land owned—or expropriated—by a pipeline company. Oklahoma was the first state to act. In early 2017, state legislators began debating House Bill (HB) 1123, a measure targeting trespass on “critical

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41. Jack Dura, *DAPL Cases Could Close in 2018*, BISMARCK TRIB. (Dec. 28, 2017), [https://bismarcktribune.com/news/local/crime-and-courts/dapl-cases-could-close-in/article\\_6fb1d6e7-e54b-5d16-9869-7f408746aefd.html](https://bismarcktribune.com/news/local/crime-and-courts/dapl-cases-could-close-in/article_6fb1d6e7-e54b-5d16-9869-7f408746aefd.html) [https://perma.cc/6KWJ-P2Y3] (reporting that at the end of 2017 “[o]ver 300 [cases] await dispositions, either still open or inactive with warrants”).

42. *Id.*

43. Moynihan, *supra* note 40 (quoting state’s attorney for McLean County, Ladd R. Erickson, “[O]ur systems are not set up to be foddered by economic weaponry when people from around the world come to intentionally commit crimes for political purposes and have North Dakota taxpayers pick up the tab”).

44. Eliza Newlin Carney, *Spate of Anti-Protest Bills Target Social Justice Infrastructure*, SUNLIGHT FOUND. (June 18, 2018), <https://sunlightfoundation.com/2018/06/18/spate-of-anti-protest-bills-target-social-justice-infrastructure> [https://perma.cc/BTA6-PP5A].

45. See Adam Gabbatt, *Anti-Protest Bills Would ‘Attack Right to Speak Out’ Under Donald Trump*, GUARDIAN (May 8, 2017), <https://www.theguardian.com/world/2017/may/08/donald-trump-anti-protest-bills> [https://perma.cc/3HK2-FUEG] (stating, “Kaye and Kiai, special rapporteurs on the freedom of expression and freedom of peaceful assembly respectively, said the bills represent ‘a worrying trend that could result in a detrimental impact on the rights to freedom of peaceful assembly and freedom of expression in the country’”).

infrastructure.”<sup>46</sup> The bill was introduced just days after protesters made public their intent to protest the Diamond Pipeline, a project that would break ground in Oklahoma and snake its way to Tennessee.<sup>47</sup> The bill’s principal author, State Representative Scott Briggs, emphasized, “[A]cross the country, we have seen time and time again these protests have turned violent, these protests that have disrupted the infrastructure in those other states . . . . This is a preventative measure . . . to make sure that doesn’t happen here.”<sup>48</sup>

The Oklahoma legislature passed HB 1123 in May 2017.<sup>49</sup> Because the legislature approved the bill as an “emergency” measure, it went into effect as soon as Governor Mary Fallin signed it.<sup>50</sup> By early 2018, other states began jumping on the bandwagon. In January, the American Legislative Exchange Council (ALEC)—a group funded in part by fossil fuel giants including ExxonMobil, Shell, and Chevron<sup>51</sup>—

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46. H.B. 1123, 2017 Leg., 56th Sess. (Okla. 2017); *see also* Joe Wertz, *Oklahoma Bill to Protect ‘Critical Infrastructure’ Could Curb Public Protest, Critics Say*, STATEIMPACT OKLAHOMA: NPR (Mar. 2, 2017), <https://stateimpact.npr.org/oklahoma/2017/03/02/oklahoma-bill-to-protect-critical-infrastructure-could-curb-public-protest-critics-say> [<https://perma.cc/T72B-62RQ>] (discussing the advancement of HB 1123 in the House and what the new bill entails).

47. Nicholas Kusnetz, *Harsh New Anti-Protest Laws Restrict Freedom of Speech, Advocates Say*, WASH. POST (Aug. 22, 2018), <https://www.washingtonpost.com/energy-environment/2018/08/22/environmentalists-say-new-pipeline-protest-laws-restrict-their-freedom-speech/>; *Diamond Pipeline*, PLAINS ALL AMERICAN PIPELINE, L.P., <https://www.plainsallamerican.com/about-us/subsidiary-websites/diamond-pipeline> [<https://perma.cc/H54L-4HFF>].

48. Laura Eastes, *Anti-Protest Bills Could Curb Freedom of Speech or Provide Protection in Oklahoma*, OKLA. GAZETTE (Mar. 15, 2017), <https://www.okgazette.com/oklahoma/anti-protest-bills-could-curb-freedom-of-speech-or-provide-protection-in-oklahoma/Content?oid=2979832> [<https://perma.cc/U6JP-D7BW>].

49. *See* Will Haskell, *Legislation in Oklahoma Aims to Protect Critical Infrastructure in Wake of Environmental Protests*, GEO. U. FREE SPEECH PROJECT (Aug. 22, 2017), <https://freespeechproject.georgetown.edu/tracker-entries/legislation-aims-to-protect-critical-infrastructure-in-wake-of-environmental-protests> [<https://perma.cc/3M6F-5HSM>].

50. Alleen Brown, *Oklahoma Governor Signs Anti-Protest Law Imposing Huge Fines on ‘Conspirator’ Organizations*, INTERCEPT (May 6, 2017), <https://theintercept.com/2017/05/06/oklahoma-governor-signs-anti-protest-law-imposing-huge-fines-on-conspirator-organizations> [<https://perma.cc/4L2W-RJEB>].

51. *See* Peter C. Frumhoff & Naomi Oreskes, *Fossil Fuel Firms Are Still Bankrolling Climate Denial Lobby Groups*, GUARDIAN (Mar. 25, 2015), <https://www.theguardian.com/environment/2015/mar/25/fossil-fuel-firms-are-still-bankrolling-climate-denial-lobby-groups> [<https://perma.cc/Q22B-DUB2>]; *see also* Cora Currier, *ALEC and ExxonMobil Push Loopholes in Fracking Chemical Disclosure Rules*, PROPUBLICA (Apr. 24, 2012), <https://www.propublica.org/article/alec-and-exxonmobil-push-loopholes-in-fracking>

published a model critical infrastructure trespass bill “drawing inspiration from” Oklahoma’s new law.<sup>52</sup> In the following months, legislators in Iowa, Ohio, Pennsylvania, Wyoming, Minnesota, and Louisiana all introduced variations on critical infrastructure trespass bills, some modeled after ALEC’s proposal.<sup>53</sup>

Much like in Oklahoma, Louisiana lawmakers introduced their own draft critical infrastructure bill amidst concerns over protests against a major pipeline project in the Bayou State.<sup>54</sup> The completed Bayou Bridge pipeline, another Energy Transfer Partners project, would carry crude oil across Louisiana’s Atchafalaya Basin, wetlands more expansive than the Florida Everglades.<sup>55</sup> In early 2018, a coalition of local, state, and national conservation groups filed suit to block construction, citing potentially irreversible damage to the Basin’s fragile ecosystem.<sup>56</sup> After a district court granted a temporary injunction, however, the Fifth Circuit overturned the lower court’s decision, allowing construction to proceed.<sup>57</sup>

Louisiana passed its critical infrastructure law in August 2018.<sup>58</sup> Within just a few weeks, the first protesters were arrested near a Bayou

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chemical-disclosure-rules [https://perma.cc/5H2P-2T4V] (describing ExxonMobil’s direct influence in drafting some of ALEC’s model legislation).

52. See *Critical Infrastructure Protection Act*, AM. LEGIS. EXCHANGE COUNCIL (Jan. 20, 2018), <https://www.alec.org/model-policy/critical-infrastructure-protection-act> [https://perma.cc/PT8T-3VZ3].

53. Alleen Brown & Will Parrish, *Louisiana and Minnesota Introduce Anti-Protest Bills Amid Fights Over Bayou Bridge and Enbridge Pipelines*, INTERCEPT (Mar. 31, 2018), <https://theintercept.com/2018/03/31/louisiana-minnesota-anti-protest-bills-bayou-bridge-enbridge-pipelines> [https://perma.cc/3LTH-H3AQ]; see also Connor Gibson, *State Bills to Criminalize Peaceful Protest of Oil & Gas “Critical Infrastructure”*, POLLUTER WATCH (Feb. 18, 2019), <https://polluterwatch.org/State-Bills-Criminalize-Peaceful-Protest-Oil-Gas-Critical-Infrastructure-pipelines> [https://perma.cc/ZT6R-RER8] (stating that nine states have enacted some form of a critical infrastructure trespass law, including North Dakota, South Dakota, Oklahoma, Iowa, Louisiana, Indiana, Tennessee, Texas, and Missouri (current information through August 28, 2019)).

54. *Bayou Bridge*, ENERGY TRANSFER PARTNERS, [web.archive.org/web/20190321001745/https://www.energytransfer.com/ops\\_bayou\\_bridge.aspx](http://web.archive.org/web/20190321001745/https://www.energytransfer.com/ops_bayou_bridge.aspx) [https://perma.cc/VZE5-ZA65].

55. See *Atchafalaya Basin*, *supra* note 1.

56. See Mark Schleifstein, *Federal Appeals Court Rules in Favor of Bayou Bridge Pipeline Construction*, NOLA.COM: TIMES-PICAYUNE (July 7, 2018), [https://www.nola.com/environment/2018/07/federal\\_appeals\\_court\\_rules\\_in.html](https://www.nola.com/environment/2018/07/federal_appeals_court_rules_in.html) [https://perma.cc/2AJF-DQTQ].

57. See *Atchafalaya Basinkeeper v. U.S. Army Corps of Eng’rs*, No. 18-30257 (5th Cir. July 6, 2018); see also Schleifstein, *supra* note 56.

58. LA. STAT. ANN. § 14:61 (2019); Lux, *supra* note 8.

Bridge pipeline construction site.<sup>59</sup> Some of these arrests reportedly involved protesters being pulled from their kayaks onto an airboat, despite the fact that navigable waterways in Louisiana are generally treated as public property. Other arrests occurred on private property surrounding the pipeline easement, even though the protesters claimed to have express permission from the landowners to be present.<sup>60</sup> Under the state's new critical infrastructure law, these protesters each faced potential felony convictions and up to five years in prison.<sup>61</sup>

### B. *The Anatomy of Critical Infrastructure Trespass Laws*

#### 1. *Defining “critical infrastructure” and setting draconian penalties*

Trespass is already a misdemeanor offense in every state where critical infrastructure bills have been passed or introduced. Critical infrastructure trespass laws establish a separate class of penalties to protect an expansive and less-than-clearly defined range of both private and public property that is loosely defined as “critical infrastructure.”<sup>62</sup> To be charged with critical infrastructure trespass in Oklahoma, for example, an individual must simply “enter property containing a critical infrastructure facility without permission by the owner of the property or lawful occupant thereof.”<sup>63</sup>

States have taken different approaches to defining “critical infrastructure,” but a common element is that these definitions are vague and far-reaching. Critical infrastructure bills proposed to date have implicated sites as varied, ubiquitous, and poorly defined as “transportation facilities,”<sup>64</sup> “below or aboveground pipeline or

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59. Lux, *supra* note 8.

60. *Id.*; John Haughey, *Pipeline Protesters’ Trespassing Arrests Are First Test of State’s New Felony Law*, CENTER SQUARE: LA WATCHDOG (Sept. 24, 2018), [https://www.thecentersquare.com/louisiana/pipeline-protesters-trespassing-arrests-are-first-test-of-state-s/article\\_61ea48b2-c036-11e8-ad1d-3b9e6054cd9e.html](https://www.thecentersquare.com/louisiana/pipeline-protesters-trespassing-arrests-are-first-test-of-state-s/article_61ea48b2-c036-11e8-ad1d-3b9e6054cd9e.html) [<https://perma.cc/S6X5-7ZHG>] (“I am very much against the Bayou Bridge Pipeline endangering the Louisiana wetlands and possible destroying not only the water, but the abundant wildlife in the area,” said Theda Wright, a landowner who gave the ‘Water Protectors’ written permission to be on her property.”); *see also* LA. CIV. CODE ANN. art. 450 (2018) (stating that “[p]ublic things that belong to the state are such as running waters, the waters and bottoms of natural navigable water bodies, the territorial sea, and the seashore”).

61. Lux, *supra* note 8.

62. Brown, *supra* note 50.

63. OKLA. STAT. ANN. tit. 21, § 1792 (West 2019); *see also* LA. STAT. ANN. § 14:61 (2018) (“[I]ntentional entry by a person without authority into any structure or onto any premises, belonging to another, that constitutes in whole or in part a critical infrastructure . . .”).

64. LA. STAT. ANN. § 14:61 (2018).

pipings,”<sup>65</sup> and “electric power lines and associated equipment infrastructure.”<sup>66</sup> Louisiana is home to roughly 50,000 miles of intrastate pipelines alone.<sup>67</sup> Across the country, that number skyrockets to nearly two million miles of oil and gas pipelines, according to the United States Department of Transportation.<sup>68</sup> Louisiana’s law reaches still further to include “any and all structures, equipment, or other immovable or movable property” located on any property containing structures defined as “critical infrastructure” or “any site where the construction or improvement of any such facility or structure . . . is occurring.”<sup>69</sup> As a result, in the context of pipelines, Louisiana’s law reaches far beyond operational pipelines to include any pipeline construction site or any property where any piece of material or equipment that might be used to construct a pipeline is being stored. In Iowa, critical infrastructure similarly includes “[a]ny land, building, conveyance, or other temporary or permanent structure whether publicly or privately owned, that contains, houses, supports, or is appurtenant to any critical infrastructure.”<sup>70</sup> Such vague and overbroad definitions do not add clarity to the scope of these laws; instead, they implicate a vast amount of both private and public property.

Additionally, legislatures in states like Idaho<sup>71</sup> and Iowa<sup>72</sup> have proposed critical infrastructure bills that go beyond trespass to encompass acts of “impeding critical infrastructure” and “critical infrastructure sabotage.”<sup>73</sup> These provisions reach an even broader and

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65. *Critical Infrastructure Protection Act*, *supra* note 52.

66. *Id.*

67. *Louisiana: Pipeline to the Nation*, STATE OF LA. DEP’T OF NAT. RESOURCES, <http://www.dnr.louisiana.gov/index.cfm/page/150> [<https://perma.cc/H85G-ZPZS>].

68. *U.S. Oil and Gas Pipeline Mileage*, U.S. DEP’T OF TRANSP., <https://www.bts.gov/content/us-oil-and-gas-pipeline-mileage> [<https://perma.cc/NC7L-GX6C>].

69. H.B. 727, 2018 Leg., Reg. Sess. (La. 2018).

70. IOWA CODE ANN. § 716.11 (West 2018).

71. See Phil Haunschild, *Senate Bill 1090 - Critical Infrastructure Trespass*, IDAHO FREEDOM FOUND. (Mar. 7, 2019), <https://idahofreedom.org/senate-bill-1090-critical-infrastructure-trespass> [<https://perma.cc/CMS3-T4CU>] (examining Idaho’s posed addition of “impeding critical infrastructure” to its current critical infrastructure law).

72. See S.F. 2235, 87th Gen. Assemb., Reg. Sess. (Iowa 2018), <https://www.legis.iowa.gov/docs/publications/LGI/87/SF2235.pdf> [<https://perma.cc/U6WK-LL4P>] (labeling Iowa’s proposed bill as “critical infrastructure sabotage”).

73. *Id.*; see William Petroski, *Bill Banning Sabotage of Pipelines, ‘Critical Infrastructure’ Passes Iowa Senate*, DES MOINES REG. (Feb. 21, 2018), <https://www.desmoinesregister.com/story/news/politics/2018/02/21/bill-banning-pipeline-sabotage-critical-infrastructure-passes-iowa-senate/354510002> [<https://perma.cc/4MV7-C2CR>] (explaining



even less clearly defined assortment of property and expressive conduct, such as peaceful protests on access roads or other adjacent properties.<sup>74</sup> In Texas, a group of protestors who rappelled from a bridge near various oil refineries now faces charges for “disrupting critical infrastructure” because shipping traffic was interrupted.<sup>75</sup>

Potential financial penalties for critical infrastructure trespass also far exceed those for misdemeanor trespass.<sup>76</sup> Possible fines range from \$1000 to \$10,000 for individuals.<sup>77</sup> In Iowa, those convicted of critical infrastructure sabotage “shall be punished by a fine of not less than eighty-five thousand dollars.”<sup>78</sup> Potential prison time for those convicted under critical infrastructure trespass laws ranges anywhere from six months, for those states whose laws include a misdemeanor charge, to more than five years.<sup>79</sup>

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Iowa’s proposed bill’s definition of “critical infrastructure sabotage” is “any unauthorized act intended to cause substantial interruption or impairment of service rendered to the public relating to critical infrastructure property”); *see also* Andrew Graham, *Industry Backs Bill Criminalizing Infrastructure Interference*, WYOFILE (Feb. 20, 2018), <https://www.wyofile.com/industry-backs-bill-criminalizing-infrastructure-interference> [<https://perma.cc/4NJ9-HCEJ>] (describing Wyoming’s proposed bill to “impose severe penalties on protesters and anyone else who damages or interferes with ‘critical infrastructure’ such as a pipeline or a mine”).

74. Andrew Graham, *‘Critical Infrastructure’ Bill Resurfaces*, CASTER STAR-TRIB. (Dec. 24, 2018), [https://trib.com/news/state-and-regional/govt-and-politics/critical-infrastructure-bill-resurfaces/article\\_e95b2fe3-0f0f-52a2-8259-ab8c074e4793.html](https://trib.com/news/state-and-regional/govt-and-politics/critical-infrastructure-bill-resurfaces/article_e95b2fe3-0f0f-52a2-8259-ab8c074e4793.html) [<https://perma.cc/2HK9-N4NT>] (noting that “a protest that blocked a pipeline construction project and cost a pipeline company more than \$1,000 could be prosecuted as a felony even with less than \$1,000 of physical damage”).

75. Mose Buchele, *Activists Say New Laws to Protect Critical Infrastructure Aim to Silence Them*, CAPITAL PUBLIC RADIO (Sept. 25, 2019), <http://www.capradio.org/news/npr/story?storyid=763530303> [<https://perma.cc/NH4C-CTZP>].

76. OKLA. STAT. ANN. tit. 21, § 1792 (West 2019).

77. *See id.* (naming the range of monetary fines that can be imposed on an individual for critical infrastructure trespass).

78. IOWA CODE ANN. § 716.12 (West 2019); *see also* William Petroski, *Banning Sabotage of ‘Critical Infrastructure’ Passes Iowa Senate*, DES MOINES REGISTER (Feb. 21, 2018), <https://www.desmoinesregister.com/story/news/politics/2018/02/21/bill-banning-pipeline-sabotage-critical-infrastructure-passes-iowa-senate/354510002> [<https://perma.cc/4D5Z-GRXL>] (quoting state Senator Robert Hogg’s concerns that the bill “could result in nonviolent protesters being prosecuted for circumstances that simply represented trespassing and a ‘bare intention,’” and efforts to amend the law to protect individuals who do not cause any damage as well as individuals “protesting eminent domain while on their own property”).

79. *Id.* (defining critical infrastructure sabotage as a class “B” felony, punishable up to twenty-five years); LA. STAT. ANN. § 14:61 (2018) (citing the penalty for critical infrastructure trespass as a maximum of five years); OKLA. STAT. ANN. tit. 21, § 1792

Some statutes, like Louisiana's, include provisions noting that "lawful assembly" is protected by the U.S. Constitution, but such provisions do little to clarify for the public exactly when, where, and how these critical infrastructure laws might transform an ordinary act of protest into a felony.

## 2. *Consequences for organizations*

In addition to severe penalties for individuals, most critical infrastructure trespass bills include harsh penalties for organizations affiliated with individuals charged under these laws. Oklahoma's HB 1123 includes a provision that states that any organization "found to be a conspirator with persons who are found to have committed" any of the individual offenses described in the statute "shall be" fined up to ten times the maximum penalty faced by the individual—in other words, up to \$1,000,000 per case.<sup>80</sup> Under Oklahoma law, conspiracy merely requires "any agreement, combination or common plan or scheme by two or more persons, coupled with an overt act in furtherance of such agreement . . . to violate any section of this act."<sup>81</sup> ALEC included the "conspirator" provision in its model bill.<sup>82</sup>

A whole host of otherwise lawful activities routinely undertaken by advocacy organizations, from coordinating peaceful protests to training people how to engage in nonviolent civil disobedience to simply offering material support such as food and water to demonstrators, could create massive liability for an organization as soon as one demonstrator steps over the wrong property line.<sup>83</sup>

These three elements—expansive definitions of what constitutes "critical infrastructure," felony penalties for individuals, and vicarious liability for organizations—have each cropped up in multiple states' proposed critical infrastructure trespass laws. Each raises significant First Amendment concerns.

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(classifying critical infrastructure trespass penalties as six months in jail for a misdemeanor charge and one year for a felony charge).

80. H.B. 1123, 2017 Leg., 56th Sess. (Ok. 2017).

81. OKLA. STAT. ANN. tit. 21, § 988 (West 2019).

82. *Critical Infrastructure Protection Act*, *supra* note 52.

83. Legislative Briefer, "Guilt by Association" *Critical Infrastructure Bills and the Right to Protest*, INT'L CTR. FOR NOT-FOR-PROFIT L. (Sept. 2018), <http://www.icnl.org/programs/US%20Programs/Critical%20Infrastructure%20Legislative%20Briefer.pdf> [<https://perma.cc/EZ28-YSSA>] (examining liability for those who organize or support protests).

*C. Analyzing Laws Under the First Amendment*

Acts of protest and the First Amendment have a long and complicated history. While the First Amendment only specifically references protections for “speech,” the Supreme Court has long recognized that First Amendment protections reach beyond “the spoken or written word.”<sup>84</sup> Expressive conduct, like an act of protest, is central to the Supreme Court’s First Amendment jurisprudence.<sup>85</sup> When laws regulate conduct that is not clearly expressive, however, First Amendment challenges become more complicated.

Political expression is generally protected by the First Amendment.<sup>86</sup> Yet, the conduct accompanying protesters’ political expression is less well protected, particularly in cases involving acts of civil disobedience. Courts typically treat laws that purport to regulate only conduct, even if they might also implicate speech or expressive conduct, as content-neutral laws subject to intermediate, rather than strict scrutiny.<sup>87</sup> Under intermediate scrutiny, courts must ask whether a law is “justified without reference to the content of the regulated speech,” is “narrowly tailored to serve a significant governmental interest,” and leaves open “ample alternative channels for communication of the information.”<sup>88</sup> The Supreme Court has further clarified that “narrowly tailored” is not as exacting a standard under intermediate scrutiny as under strict scrutiny; under intermediate scrutiny, a regulation passes muster provided it is not “substantially broader than necessary to achieve the government’s interest.”<sup>89</sup> By contrast, a regulation subject to strict scrutiny must be “the least restrictive or least intrusive means” of achieving a legitimate governmental interest.<sup>90</sup>

A similar sliding scale exists regarding how compelling the government’s interest in enacting a particular regulation must be in

84. *Texas v. Johnson*, 491 U.S. 397, 404 (1989).

85. *See id.*; *see also* *United States v. O’Brien*, 391 U.S. 367, 385 (1968) (holding that the destruction of selective service certificates was not “inevitably or necessarily expressive” conduct and, therefore, the statute at issue did not conflict with the First Amendment).

86. *See* *Citizens United v. FEC*, 558 U.S. 310, 329 (2010) (“[P]olitical speech . . . is central to the meaning and purpose of the First Amendment.”).

87. Barbara J. Katz, *Civil Disobedience and the First Amendment*, 32 UCLA L. REV. 904, 904–05 (1985) (“For the most part, the courts have refused to recognize the First Amendment as a defense in situations where the law violated is itself regarded as a valid law not aimed at the denial of speech—for example, a trespass law.”).

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

89. *Ward v. Rock Against Racism*, 491 U.S. 781, 800 (1989).

90. *Id.* at 798.

order to justify its restrictions on either speech or expressive conduct.<sup>91</sup> In *United States v. O'Brien*,<sup>92</sup> the Supreme Court held that a law imposing criminal penalties for burning draft cards was constitutional despite the conduct having expressive elements—in O'Brien's case, publicly burning his draft card to express his opposition to the draft and the Vietnam War.<sup>93</sup> The Court held that “when ‘speech’ and ‘nonspeech’ elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.”<sup>94</sup> The Court does not define a “sufficiently important governmental interest,” although it acknowledges this lack of precision and cites several other terms that are comparable: “compelling; substantial; subordinating; paramount; cogent; strong.”<sup>95</sup> The *O'Brien* test still governs the Court's analysis of laws that place a burden on “expressive conduct”—such as acts of protest meant to communicate a political message—in order to balance the value of laws that uniformly regulate certain types of conduct against “the undue suppression of opinions or ideas.”<sup>96</sup>

While the substantial government interest in regulating certain conduct must be “unrelated to the suppression of free expression,” the degree to which courts have been willing to question legislatures' asserted intent is minimal. The Supreme Court has also noted that it would not “strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive.”<sup>97</sup> This reasoning has limited courts' willingness to examine legislatures' motives in passing laws that, on their face, assert a valid governmental interest in regulating conduct, even if the legislative history might reveal other primary motives.

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91. *Id.*

92. 391 U.S. 367 (1968).

93. Katz, *supra* note 87, at 910.

94. *O'Brien*, 391 U.S. at 376.

95. *Id.* at 376–77 (emphasizing that even though the court's ruling may be imprecise, a government regulation is “justified” when it (1) falls within the government's constitutional powers, (2) furthers a significant government interest that “is unrelated to the suppression of free expression,” and (3) is “no greater than necessary” to further that interest).

96. Daniel J. Hay, Note, *Baptizing O'Brien: Towards Intermediate Protection of Religiously Motivated Expressive Conduct*, 68 VAND. L. REV. 177, 179 (2015).

97. *O'Brien*, 391 U.S. at 377, 383.

### 1. *Trespass and the First Amendment*

Trespass laws, generally, are no exception to the relatively under-protective rules governing the First Amendment analysis of facially content-neutral, conduct-oriented laws. Additionally, under most circumstances, the First Amendment “does not shield the exercise of speech on private property.”<sup>98</sup> This is true even for acts of trespass intended to communicate a political message.

Nevertheless, this line of precedent has several critical caveats.<sup>99</sup> When private property is not used solely for private purposes, the Court has been less absolute in its jurisprudence. In *Marsh v. Alabama*,<sup>100</sup> the Court held that a private company town could not invoke a state trespassing statute to prevent leafleting on sidewalks, even though the sidewalks in this case were technically private property.<sup>101</sup> Writing for the majority, Justice Hugo Black asserted that “[w]hen we balance the Constitutional rights of owners of property against those of the people to enjoy [First Amendment rights], as we must here, we remain mindful of the fact that the latter occupy a preferred position.”<sup>102</sup> The Court emphasized the functional nature of the property in question, noting that while a private company might own title to the town and its sidewalks, the town otherwise operated just like any other town, and common spaces like sidewalks functioned like shared public areas where First Amendment protections are guaranteed in other communities.<sup>103</sup> Justice Frankfurter, in a concurring opinion, added that “the technical distinctions on which a finding of ‘trespass’ so often depends are too tenuous to control decision[s] regarding the scope of the vital liberties guaranteed by the Constitution.”<sup>104</sup> The Court extended this balancing test to a privately-owned but publicly accessible shopping center in *Amalgamated Food Employees Union v. Logan Valley Plaza*.<sup>105</sup>

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98. Joseph H. Hart, *Free Speech on Private Property—When Fundamental Rights Collide*, 68 TEX. L. REV. 1469, 1471 (1990).

99. *Id.* at 1470 (“The United States Supreme Court has wrestled for decades with the meaning of the first amendment and the protections it affords to expression on private property.”).

100. 326 U.S. 501 (1946).

101. *Id.* at 502–10.

102. *Id.* at 509.

103. *Id.* at 507–08 (holding that both municipalities and corporations have identical interests in maintaining free and functional channels of communication when acting as owner of a town).

104. *Id.* at 511 (Frankfurter, J., concurring).

105. 391 U.S. 308 (1968).

The Court has since distinguished and narrowed its holdings in *Marsh* and especially *Logan Valley*, perhaps most notably in *Lloyd Corp. v. Tanner*<sup>106</sup> and *Hudgens v. NLRB*.<sup>107</sup> It has not, however, gone so far as to abandon its balancing of constitutional interests in such cases. In *Lloyd Corp.*, the majority emphasized that First Amendment safeguards place limits on state action, not on owners of “private property used nondiscriminatorily for private purposes only.”<sup>108</sup> The Court reiterated this holding in *Hudgens*, where the majority further stated that the decision in *Lloyd Corp.* amounted to a “total rejection” of the holding in *Logan Valley*—even though the Court in *Lloyd* explicitly distinguished *Logan Valley* rather than overruling it.<sup>109</sup> Nonetheless, the *Hudgens* Court clearly employs the same balancing test followed by both *Logan Valley* and *Lloyd Corp.*, though with different results, to hold that “the pickets in the present case did not have a First Amendment right to enter this shopping center for the purpose of advertising their strike . . . .”<sup>110</sup> As Justice White notes in his concurrence, this outcome would have been the same had the majority explicitly adopted the balancing test employed in *Logan Valley*.<sup>111</sup>

Additionally, most First Amendment trespass cases involving facilities designated by federal and state governments as “critical,” high-security properties have dealt with facilities such as military bases and jails, where the compelling government interest in preventing trespass is either central to the nature of the property—as with jails—or is a government interest to which courts have historically been very deferential, such as national security.<sup>112</sup> Though *O’Brien* did not deal with trespass, the Court repeatedly emphasized that the “power of Congress to raise and support armies and to make all laws necessary and proper to that end is broad and sweeping.”<sup>113</sup> Similarly in *Adderley v. Florida*,<sup>114</sup> the Court upheld trespass convictions for students arrested while protesting on

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106. 407 U.S. 551 (1972) (involving the right to distribute anti-war handbills in a privately-owned shopping center).

107. 424 U.S. 507, 508 (1976) (involving the rights of union members to picket inside a privately-owned shopping mall); *see also* Hart, *supra* note 97, at 1470–71.

108. 407 U.S. at 567.

109. 424 U.S. at 518–19.

110. *Id.* at 520–21 (emphasis added).

111. *Id.* at 524 (White, J., concurring).

112. Katz, *supra* note 87, at 912–13 n.56 (citing several cases upholding trespass convictions involving government facilities).

113. *United States v. O’Brien*, 391 U.S. 367, 377 (1968).

114. 385 U.S. 39 (1966).

the premises of a local jail.<sup>115</sup> The Court highlighted the secure nature of the facility and the fact that the public did not have open access to the jail, despite it being public property.<sup>116</sup> The Court relied on similar facts in *United States v. Apel*,<sup>117</sup> which involved an antiwar activist charged with trespassing on property controlled by Vandenberg Air Force Base.<sup>118</sup> The Court noted that Vandenberg had been designated as a “closed base” due to its “sensitive missile and space launch facilities,” a designation that extended to areas around the base to which the military allowed conditional public access, but over which the base Commander retained ultimate authority.<sup>119</sup> However, had either *Apel* or *O’Brien* involved a less sensitive government interest, or had *Adderley* involved a type of property where security and lack of public access were less integral to the government’s interest, these cases might have turned out differently.

While the above cases make it clear that laws regulating trespass generally fall outside the scope of the First Amendment, it is also clear that this is not an absolute, hard-and-fast rule, and that a balancing of fundamental rights, government interests, and the specific character of the property at issue is necessary.

It should also be noted when “balanc[ing] the Constitutional rights of owners of property against those of the people to enjoy [First Amendment rights],” that the penalties in all of the trespassing cases discussed above were misdemeanor convictions or fines.<sup>120</sup> The protestors in *Adderley* faced misdemeanor trespassing charge and a \$100 fine or a maximum three months in jail.<sup>121</sup> The protestor in *Apel* faced less than \$500 in fines and no more than six months in jail, even after multiple incidents.<sup>122</sup> None of these cases approached the severity of penalties threatened by critical infrastructure bills. In assessing whether content-neutral regulations impose merely “incidental limitations” on First Amendment rights, the penalties imposed must also be considered.

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115. *Id.* at 40.

116. *Id.* at 41 (“Traditionally, state capitol grounds are open to the public. Jails, built for security purposes, are not . . . Here the demonstrators entered the jail grounds through a driveway used only for jail purposes and without warning to or permission from the sheriff.”).

117. 571 U.S. 359 (2014).

118. *Id.* at 364.

119. *Id.* at 361–62.

120. *Marsh v. Alabama*, 326 U.S. 501, 509 (1946).

121. *Adderley*, 385 U.S. at 40 n.1.

122. *United States v. Apel*, 371 U.S. 359, 365 (2014).

## 2. *Vagueness and overbreadth*

Another pair of doctrines often invoked in protest and civil disobedience cases are vagueness and overbreadth. The key constitutional questions in assessing vagueness and overbreadth are whether a law implicates too much protected expression, whether it fails to put the public on notice regarding what kinds of conduct are prohibited, and whether it enables discriminatory enforcement.<sup>123</sup> Vagueness and overbreadth challenges are not only critical tools for those who have been subject to unconstitutional laws but also for those who wish to preemptively challenge the application of vague and overbroad laws in future cases, based on the laws' potential to discourage constitutionally protected speech and expressive conduct before it even takes place.<sup>124</sup> Different courts have recognized the harm posed by this "chilling effect" to different degrees and in a variety of contexts. In *National Student Ass'n v. Hershey*,<sup>125</sup> the U.S. Court of Appeals for the District of Columbia Circuit noted that "[t]he peculiar feature of suits alleging a First Amendment chilling effect . . . is that if the allegation is correct, immediate and real injury is done to the plaintiff's interests if he *does not* speak or act as he says he wants to."<sup>126</sup>

Of these two doctrines, overbreadth is uniquely concerned with the First Amendment. For a law to be overbroad, it must reach constitutionally-protected conduct even if its stated intent is to regulate activities that are "constitutionally subject to regulation."<sup>127</sup> Yet, overbreadth challenges are an uphill battle, as the doctrine has "long rested on the periphery of First Amendment law."<sup>128</sup> In *Broadrick v. Oklahoma*,<sup>129</sup> the Court emphasized that

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123. See *Grayned v. City of Rockford*, 408 U.S. 104, 108–09, 112, 114 (1972).

124. Harold Naill Falls, Jr., *First Amendment Vagueness and Overbreadth: Theoretical Revisions by the Burger Court*, 31 VAND. L. REV. 609, 610 (1978) (noting that overbroad and vague laws present a number of dangers to expression, such as "inordinate discretionary power to enforcement officials," potentially applying to "constitutionally protected activit[ies]" and "chill[ing]" or discouraging "the exercise of first amendment freedoms").

125. 412 F.2d 1103 (D.D.C. 1969).

126. *Id.* at 1111 (adding that injury "may result from the threat of enforcement itself, even if that threat never materializes").

127. Falls, *supra* note 123, at 610 (citing *NAACP v. Alabama*, 377 U.S. 288, 302 (1964)) ("The modern Court repeatedly has expressed the principle that 'a governmental purpose to control or prevent activities constitutionally subject to regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.'").

128. Alan K. Chen, *Statutory Speech Bubbles, First Amendment Overbreadth, and Improper Legislative Purpose*, 38 HARV. C.R.-C.L. L. REV. 31, 31 (2003).

129. 413 U.S. 601 (1973).



the baseline rules for challenging a law as overbroad are stringent and that the Court is reluctant to strike down a law due to overbreadth except under extreme circumstances.<sup>130</sup> The Court refers to the application of the doctrine as “strong medicine . . . employed by the Court sparingly and only as a last resort,” because the result of such a holding typically involves striking down the challenged law in its entirety.<sup>131</sup> In *Broadrick*, the Court upheld a state statute governing state employees’ political activities on the grounds that appellants had failed to demonstrate that the law was *substantially* overbroad.<sup>132</sup> However, the overbreadth doctrine remains a powerful tool in cases where parties can successfully invoke it. The Court has identified two significant factors it considers in addressing overbreadth: whether a law allows for excessive enforcement discretion and whether the statute in question imposes criminal sanctions.<sup>133</sup> In *United States v. Robel*,<sup>134</sup> the Court held a law to be overbroad due to its blanket prohibition on “all types of association with Communist-action groups” for individuals with jobs in designated “defense facilities,” without regard to “the quality and degree” of an individual’s group membership or the nature of their job.<sup>135</sup> In his concurrence, Justice Brennan added that delegating sole authority to the Secretary of Defense to designate “defense facilities” created “the danger of overbroad, unauthorized, and arbitrary application of criminal sanctions in an area of protected freedoms”—in that case, freedom of association.<sup>136</sup> Justice Brennan added that due to the statute’s lack of any “meaningful standard” by which authorities would determine what facilities would receive such designations as well as the absence of any procedures “to contest or review” those designations, the law was overbroad and thus invalid.<sup>137</sup> Similarly, in *City of Houston v. Hill*,<sup>138</sup>

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130. *Id.* at 613.

131. *Id.*

132. *Id.* at 602, 609, 618 (“It may be that such restrictions are impermissible and that § 818 may be susceptible of some other improper applications. But, as presently construed, we do not believe that § 818 must be discarded *in toto* because some persons’ arguably protected conduct may or may not be caught or chilled by the statute.”).

133. *Virginia v. Hicks*, 539 U.S. 113, 119 (2003) (“We have provided this expansive remedy out of concern that the threat of enforcement of an overbroad law may deter or ‘chill’ constitutionally protected speech—especially when the overbroad statute imposes criminal sanctions.”).

134. 389 U.S. 258 (1967).

135. *Id.* at 262, 267.

136. *Id.* at 272 (Brennan, J., concurring).

137. *Id.* at 272–73.

138. 482 U.S. 451 (1987).

the Court held that a municipal ordinance was substantially overbroad in part due to the “unguided discretion” of police in enforcing the statute.<sup>139</sup>

While courts have been particularly reluctant to embrace overbreadth challenges in cases involving “ordinary criminal laws,” such as trespass, these laws do not fully escape First Amendment scrutiny simply because they regulate “ordinary” criminal conduct.<sup>140</sup> In such cases, the Court has typically employed a case-by-case inquiry that results in a reversed conviction if a specific individual’s conduct under the particular circumstances should have been protected.<sup>141</sup> This approach allows for the “ordinary” criminal law at issue to remain in place, which would not be the case if a court sustained an overbreadth challenge.<sup>142</sup> However, the “ordinary criminal laws” considered in this line of precedent typically involve common misdemeanor offenses, such as common-law breach of the peace<sup>143</sup> or violating anti-noise ordinances.<sup>144</sup> Few of these cases involve laws that rise to the level of a potential felony conviction or hefty five- to six-figure fines. And despite the Court’s articulated reluctance to strike down “ordinary criminal laws” as overbroad, in *Hill*, the Court nonetheless emphasized that “[c]riminal statutes must be scrutinized with particular care . . . those that make unlawful a substantial amount of constitutionally protected conduct may be held facially invalid even if they also have a legitimate application.”<sup>145</sup>

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139. *Id.* at 465–67 (noting that the Court “appreciate[s] the difficulties of drafting precise laws” but nonetheless has “repeatedly invalidated laws that provide the police with unfettered discretion to arrest individuals for words or conduct that annoy or offend them”).

140. *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973) (“[O]verbreadth claims, if entertained at all, have been curtailed when invoked against ordinary criminal laws that are sought to be applied to protected conduct.”).

141. *Id.* at 614 (describing the cases *Edwards v. South Carolina* and *Cox v. Louisiana*, the Court notes that it “considered in detail the State’s evidence and in each case concluded that the conduct at issue could not itself be punished under a breach-of-the-peace statute. On that basis, the judgments affirming the convictions were reversed”).

142. *Id.* at 613–15.

143. *Cantwell v. Connecticut*, 310 U.S. 296, 300–03, 307–08 (1940) (holding that a man who played a phonograph record for two passing men, after obtaining their permission to do so, was not guilty of a breach of the peace even though the record upset the two men because it insulted their religious beliefs).

144. *Grayned v. City of Rockford*, 408 U.S. 104, 106–08, 121 (1972) (finding that Rockford’s “modest” anti-noise ordinance, which prohibited the “making of any noise or diversion” that is likely to disturb the operations of a school while class is in session, is valid on its face because it is intended to protect normal school activities).

145. 482 U.S. at 459.

### 3. *Organizational freedom of speech and association*

First Amendment protections for organizations and their members have historically proven to be fairly robust. These protections extend not only to individuals in their role as members of an organization but to organizations themselves. As a baseline rule, the First Amendment protects political organizations' freedom of speech just as it protects their members' freedom of speech.<sup>146</sup> In *NAACP v. Button*,<sup>147</sup> faced with efforts by the Virginia state legislature to target the NAACP and neutralize the organization's aggressive litigation efforts in promotion of civil rights, the Court held that the First Amendment protects both "vigorous advocacy" as well as "the right 'to engage in association for the advancement of beliefs and ideas.'"<sup>148</sup> As Justice Harlan emphasized in his dissenting opinion, "[f]reedom of expression embraces more than the right of an individual to speak his mind. It includes also his right to advocate and his right to join with his fellows in an effort to make that advocacy effective."<sup>149</sup>

When faced with the question of organizations' liability for the actions of individuals, the Court has broadly indicated that the acts of a few are not, by themselves, sufficient to indict an entire organization or its advocacy efforts. In *NAACP v. Claiborne Hardware Co.*,<sup>150</sup> the Court upheld demonstrators' right to organize an economic boycott under the First Amendment despite allegations of violence by certain boycott participants and charges that the boycott amounted to "malicious interference with the plaintiffs' businesses."<sup>151</sup> Regarding the acts of violence, evidence demonstrated that certain supporters of the boycott "discipline[d]" those who did not participate in the boycott using tactics such as throwing bricks through home windows and beating individuals in the street.<sup>152</sup> Nonetheless, Justice Stevens wrote for the majority, an "effort to change the social, political, and economic structure of a local environment cannot be characterized as a violent conspiracy simply by reference to the ephemeral consequences of relatively few violent acts."<sup>153</sup> The Court was not willing to impose

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146. See, e.g., *NAACP v. Button*, 371 U.S. 415, 428–29 (1963).

147. 371 U.S. 415 (1963).

148. *Id.* at 429–30.

149. *Id.* at 452 (Harlan, J., dissenting) (emphasizing that certain types of associative conduct, even when accompanying otherwise protected speech, may nonetheless be constitutionally regulated).

150. 458 U.S. 886 (1982).

151. *Id.* at 890–91, 907–09, 911.

152. *Id.* at 904–06.

153. *Id.* at 933.

liability on the NAACP for individuals' actions during the course of an advocacy effort that was otherwise "uniformly peaceful and orderly."<sup>154</sup>

#### 4. *Content neutrality and the question of legislative intent*

Though courts have been hesitant to look beyond the face of a law when asking whether the regulation is content-based or content-neutral,<sup>155</sup> particularly if the law only regulates conduct, there is some key precedent for peeling back the veil of legislative intent in the First Amendment context. In *Wallace v. Jaffree*,<sup>156</sup> the Supreme Court found that the expansion of an existing state statute to explicitly include "voluntary prayer" violated the First Amendment's Establishment Clause because the law as previously written was already broad enough to allow for voluntary prayer.<sup>157</sup> The Court cited the initial law as one type of evidence of impermissible intent, noting that the law had been sufficiently broad to indicate that the only purpose of expanding it further was to endorse a religious practice.<sup>158</sup> The Court also noted that there was evidence in the legislative record to demonstrate the bill sponsor's impermissible intent—"to return voluntary prayer' to the public schools."<sup>159</sup> The Court specifically referenced an evidentiary hearing conducted by the District Court during which the lower court heard from the bill's sponsor, who admitted that he had "no other purpose in mind" for the bill aside from returning prayer to schools.<sup>160</sup> The weight of these two types of evidence, taken together, was sufficient to pierce the otherwise largely impenetrable veil of legislative intent.<sup>161</sup>

Additionally, while the Court has expressed a general unwillingness to dig into legislative intent when determining whether a law was meant to target protected First Amendment activities, *Wallace* is not the only case in which the Court has—even if less explicitly—considered non-textual evidence in assessing a law's purpose and breadth in a First Amendment context. In *Broadrick*, in determining whether a statute was overbroad, the

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154. *Id.* at 903.

155. *United States v. O'Brien*, 391 U.S. 367, 382–83 (1968) (expressing an unwillingness to strike down a law under the First Amendment "on the basis of an alleged illicit legislative motive").

156. 472 U.S. 38 (1985).

157. *Id.* at 40, 59–61 (1985) (noting that the first statute, enacted in 1978, "authorized a 1-minute period of silence in all public schools 'for meditation'" while the second statute, enacted in 1981, authorized a period of silence "for mediation or voluntary prayer").

158. *Id.* at 58–59.

159. *Id.* at 56–57.

160. *Id.* at 43.

161. *Id.* at 59–61.

Court referenced several statements that went beyond the actual text of the law in question.<sup>162</sup> The Court quoted both the State Personnel Board and the State’s Attorney General’s interpretations of the law and its scope; these interpretations narrowed the statute’s theoretical application and thus weighed against a finding of overbreadth.<sup>163</sup> In referencing these remarks, Justice White, writing for the majority, plainly stated, “Surely a court cannot be expected to ignore these authoritative pronouncements in determining the breadth of a statute.”<sup>164</sup> If courts will consider such non-textual statements in their efforts to avoid striking down a law as unconstitutional, they should also consider similarly “authoritative pronouncements” when they attest to an unconstitutional purpose.

## II. ANALYSIS

While critical infrastructure trespass laws present significant challenges to those who wish to contest these laws under the First Amendment, there are several potential paths forward that could prove vital in protecting citizens’ rights to protest against infrastructure projects that may have profound implications for their communities’ welfare.

### *A. Critical Infrastructure Trespass Laws Are Overbroad, Implicating a Substantial Amount of Protected Expression While Giving Law Enforcement an Impermissible Amount of Enforcement Discretion*

Pipelines are not like the other self-contained facilities—such as chemical plants or water treatment facilities—that are protected under pre-existing critical infrastructure bills. Nor are they confined to high-security properties like those examined in *Adderley*,<sup>165</sup> or discreet tracts of private property as in *Lloyd*.<sup>166</sup> Pipelines, by definition, cross numerous types of property, including property where protected expression could otherwise occur. Pipelines run beneath public sidewalks,<sup>167</sup> through

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162. *Broadrick v. Oklahoma*, 413 U.S. 601, 617 (1973).

163. *Id.* at 617 (noting that the Personnel Board had construed the law at issue to permit “virtually any expression not within the context of active partisan political campaigning,” and the Attorney General only prohibited “clearly partisan political activity”).

164. *Id.* at 618.

165. *Adderley v. Florida*, 385 U.S. 39 (1966).

166. *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972).

167. Alana Lafore, *Gas Pipeline Project in Historic Northeast Leaves Sidewalks a Mess and Neighbors Irked*, FOX4KC (Aug. 23, 2019), <https://fox4kc.com/2019/08/23/gas-pipeline-project-in-historic-northeast-leaves-sidewalks-a-mess-and-neighbors-irked> [<https://perma.cc/3LF8-XYNS>].

backyards,<sup>168</sup> past neighborhood playgrounds,<sup>169</sup> near vital groundwater sources,<sup>170</sup> and through critical watersheds.<sup>171</sup> Yet critical infrastructure trespass laws do not distinguish between trespassing on or interfering with pipeline easements that run through public or private lands, or private lands abutting public lands. They do not distinguish between pieces of property that have been purchased in their entirety by energy companies and property over which the energy company holds an easement. Nor do they account for the fact that some landowners are willing hosts, while others have been coerced through exercise of eminent domain. As a result, the statutes reach both publicly accessible lands and private lands to which landowners have granted public access and thus implicate substantially more protected First Amendment expression than typical trespass statutes, with far more serious potential consequences.

1. *The full scope of affected property is vague and overbroad*

Two key provisions common to critical infrastructure statutes are demonstrably vague and overbroad, implicating a substantial amount of property on which expressive conduct would otherwise be protected, while at the same time giving policing entities too much enforcement discretion.

Louisiana's "any site" and "any and all structures, equipment, or other immovable or movable property" language illustrates how these statutes reach a significant amount of property that might otherwise afford protesters First Amendment protections for expressive conduct. As in *Robel*, the full scope of property that could fall within the reach of critical

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168. Andrew Maykuth, *Approved in Pa. and Blocked in N.Y., a Contentious Shale Project Hangs in the Balance*, PHILA. INQUIRER (Mar. 25, 2017), <https://www.inquirer.com/philly/business/energy/Contentious-Constitution-Pipeline-Marcellus-Shale-project-hangs-in-legal-limbo.html> [https://perma.cc/8AF8-LTS2] (describing how pipeline construction crews cleared "about three acres of trees" on property housing a family-run maple farm).

169. Frank Kummer, *Pa. Nuns Protest Gas Pipeline with Last-Ditch 'Chapel'*, PHILA. INQUIRER (July 14, 2017), <https://www.inquirer.com/philly/health/environment/pa-nuns-protest-gas-pipeline-with-last-ditch-chapel-20170714.html> [https://perma.cc/V2M7-YVN3] (noting that a "small township park" is adjacent to the pipeline easement).

170. Steven Mufson, *Keystone XL Pipeline May Threaten Aquifer that Irrigates Much of the Central U.S.*, WASH. POST (Aug. 6, 2012), <https://www.washingtonpost.com/national/health-science/keystone-xl-pipeline-may-threaten-aquifer-that-irrigates-much-of-the-central-us/2012/08/06/7bf0215c-d4db-11e1-a9e3-c5249ea531ca>.

171. David Lohr, *Bayou Bridge Pipeline Threatens the Riches of Louisiana's Atchafalaya Basin*, HUFFPOST (Sept. 21, 2018), [https://www.huffpost.com/entry/bayou-bridge-pipeline-louisiana\\_n\\_5ba4560be4b0375f8f9b8588](https://www.huffpost.com/entry/bayou-bridge-pipeline-louisiana_n_5ba4560be4b0375f8f9b8588) [https://perma.cc/Y865-GYXN].

infrastructure laws is unclear but undeniably vast.<sup>172</sup> Pipelines are rarely constructed on property already belonging to pipeline companies; instead, constructing a pipeline typically requires crossing public lands or claiming easements through many private landowners' properties along the pipeline route.<sup>173</sup> In *Robel*, the Government justified the statute's breadth by arguing that it served a critical national security purpose; to this, the Court replied that "[e]ven the war power does not remove constitutional limitations safeguarding essential liberties."<sup>174</sup> In the case of critical infrastructure trespass laws, the justification is far less compelling, particularly when it comes to pipeline construction sites. Pipeline construction sites have not traditionally required, nor have they received, a security status comparable to nuclear facilities or military bases. The government may certainly have a compelling interest in protecting operational pipelines to the extent that interference with such infrastructure could endanger those nearby.<sup>175</sup> However, this interest does not justify imposing felony penalties for protesters who simply stray too close to a pipeline easement or who approach construction equipment nearby.

Frequently, as in Louisiana, landowners will not voluntarily agree to grant pipeline companies an easement through their property.<sup>176</sup> As a

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172. See 389 U.S. 258, 258 (1967).

173. See, e.g., Duncan Adams, *Mountain Valley Sues Landowners to Gain Pipeline Easements and Access through Eminent Domain*, ROANOKE TIMES (Oct. 27, 2017), [https://www.roanoke.com/business/news/mountain-valley-sues-landowners-to-gain-pipeline-easements-and-access/article\\_abff5d87-1aee-5a50-b3c2-b3ee0c812e44.html](https://www.roanoke.com/business/news/mountain-valley-sues-landowners-to-gain-pipeline-easements-and-access/article_abff5d87-1aee-5a50-b3c2-b3ee0c812e44.html) [https://perma.cc/44LE-N438] (quoting University of Virginia law professor Maureen Brady's observation that "filing suit against multiple landowners and properties at once is standard procedure" for pipeline projects, such as the Mountain Valley Pipeline LLC, which "filed a federal lawsuit against hundreds of landowners in Virginia").

174. *Robel*, 389 U.S. at 263–64 ("For almost two centuries, our country has taken singular pride in the democratic ideals enshrined in its Constitution, and the most cherished of those ideals have found expression in the First Amendment. It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties—the freedom of association—which makes the defense of the Nation worthwhile.").

175. Blake Nicholson, *Pipeline Companies Say Activist 'Valve Turners' a Public Danger*, ASSOCIATED PRESS (Mar. 9, 2019), <https://www.detroitnews.com/story/news/local/Michigan/2019/03/09/valve-turners-enbridge/39172951> [https://perma.cc/6LJN-F7UF] (noting that federal regulators issued a warning that "tampering with pipeline valves can result in 'death, injury, and economic and environmental harm,'" although none of these direct actions have "led to an injury or spill").

176. See, e.g., Adams, *supra* note 175 (describing a lawsuit brought by a pipeline company to condemn private property to obtain easements because the company "has been unable to negotiate mutually agreeable easement agreements with landowners"

result, companies often acquire tracts of land along a pipeline route using eminent domain, a process that can be set in motion even before a project has received all necessary permissions.<sup>177</sup> As a result, some courts have granted rights of way through both public and private land to pipeline projects still facing legal challenges from landowners.<sup>178</sup> Under critical infrastructure trespass laws, such land and any adjacent sites being used to house construction materials would immediately become off-limits for First Amendment activities, even by the landowners themselves. The Court's focus on the specific character and use of property in *Marsh* and even in *Lloyd* is highly relevant in the gray area created by the Louisiana statute's "any site" language, due to the unique position pipeline easements occupy on the public-private property spectrum.

The confusion surrounding the arrests of protesters near the Bayou Bridge pipeline highlights the complexity of property rights where pipeline easements are involved. One set of protesters asserted that they had the express permission of the original property owners to be present.<sup>179</sup> Other protesters alleged that the pipeline project's private security confronted them on a public waterway—public lands being a common feature near fossil fuel infrastructure development.<sup>180</sup> Yet, critical infrastructure statutes make no clear distinction as to when their application begins; in fact, most seem to deliberately expand their reach beyond the narrow boundaries of an easement, such as Louisiana's decision to include any construction equipment or "any site" where construction is

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due in part to the fact that "[m]any property owners opposed to the pipeline have refused to even enter such negotiations"); Dave Fehling, *Pipeline Companies Fight for Right to Take Property*, NPR: STATEIMPACT (Feb. 13, 2012) <https://stateimpact.npr.org/texas/2012/02/13/pipeline-companies-fight-for-right-to-take-property> [<https://perma.cc/5QAQ-MKZJ>] (describing a Texas landowner and farmer's refusal to allow a pipeline survey crew onto their property).

177. Andrew Wimer & Institute for Justice, *The Supreme Court Should End Pipeline Companies' "Build First, Pay Later" Use of Eminent Domain*, FORBES (May 13, 2019), <https://www.forbes.com/sites/instituteforjustice/2019/05/13/the-supreme-court-should-end-pipeline-companies-build-first-pay-later-use-of-eminent-domain/#74534e806cc9> [<https://perma.cc/43UU-J2MV>].

178. Order, *In Re PennEast Pipeline, LLC.*, Civ. A. No.:18-1585 (D.N.J. Dec. 14, 2018); Jon Hurdle, *PennEast Pipeline Can Take New Jersey Lands Using Eminent Domain, Judge Rules*, NPR (Dec. 14, 2018), <https://stateimpact.npr.org/pennsylvania/2018/12/14/penneast-pipeline-can-take-new-jersey-lands-using-eminent-domain-judge-rules> [<https://perma.cc/SD4E-BVD6>].

179. Haughey, *supra* note 60.

180. *Id.*; *see also* LA. CIV. CODE ANN. art. 450 (1979) (categorizing various types of bodies of water, namely "running waters," "navigable water bodies," "the sea," and "the seashore," as public places owned by the state).



occurring, in addition to any “property containing” critical infrastructure. The gray property lines and resulting vagueness of the boundaries of permission and access under these circumstances differentiate critical infrastructure trespass laws from conventional trespass laws.

2. “Co-conspirator” penalties under critical infrastructure laws implicate a substantial amount of protected activity

Similarly, Oklahoma’s “any organization” language in its conspirator provision casts the net far too wide and implicates legitimate organizing and advocacy activities. By indiscriminately imposing liability on organizations that might be affiliated in any way with individuals charged under these statutes, critical infrastructure trespass bills threaten activities ranging from providing food and water to demonstrators to encouraging, and even organizing, lawful protests against pipelines. This is exactly the sort of “substantial” infringement the Court says it looks for in overbreadth cases.<sup>181</sup>

The “conspirator” provisions of critical infrastructure trespass laws thus constitute an impermissible restriction on the speech of advocacy organizations that engage in protests against fossil fuel infrastructure as well as a massive burden on those organizations’ members’ rights of free association. *Claiborne Hardware* directly addresses the arguments made by certain bills’ sponsors, that these bills are only meant to prevent “violent” protests, not peaceful ones: in the Court’s words, an “effort to change the social, political, and economic structure of a local environment cannot be characterized as a violent conspiracy simply by reference to the ephemeral consequences of relatively few violent acts.”<sup>182</sup> Yet, the “any organization” conspirator provisions of critical infrastructure trespass laws cast exactly the kind of broad net prohibited by *Claiborne*.<sup>183</sup> An organization faces potentially devastating liability if even one individual involved with an otherwise peaceful, lawful protest steps across the wrong property line—property lines that, as discussed above, these statutes have deliberately rendered vague and overbroad. Convicting an advocacy organization for conspiracy under these statutes would require a holding that directly conflicts with *Claiborne*.

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181. See *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973).

182. 458 U.S. 886, 933 (1982).

183. OKLA. STAT. ANN. tit. 21, § 1792 (2017). (“If an organization is found to be a conspirator with persons who are found to have committed any of the crimes described [in this section], the conspiring organization shall be punished by a fine that is ten times the amount of said fine . . .”).

Advocacy organizations' work—in organizing and otherwise facilitating lawful protests *and* in training individuals to responsibly conduct nonviolent, direct civil action—merits protection under the First Amendment. As the Court noted in *Button*, “[f]ree trade in ideas’ means free trade in the opportunity to persuade to action, not merely to describe facts.”<sup>184</sup> The Court emphasized that the NAACP and its members “were advocating lawful means of vindicating legal rights,” which is certainly true for organizations orchestrating peaceful protests of pipelines and pipeline construction sites.<sup>185</sup> States should not criminalize these activities simply because a demonstrator crosses an unclear line in the sand. But even organizations training activists in direct action techniques as a mode of political expression are not inherently undeserving of protection simply because some individuals intend to break a particular law. The training that many grassroots organizations provide for those activists who choose to engage in civil disobedience is critical to ensuring those activists’ safety as well as the safety of others, such as work crews, law enforcement, and other bystanders.<sup>186</sup>

3. *The overbroad scope of critical infrastructure trespass laws allows for an excessive amount of law enforcement discretion*

The breadth of properties implicated by critical infrastructure trespass laws gives law enforcement vast discretion regarding where and when to enforce such laws, thus enabling discriminatory enforcement. This discretion is particularly disconcerting in light of the relationship between pipeline companies, private security forces, and law enforcement.<sup>187</sup>

These troubling relationships came under fierce scrutiny during the protests at Standing Rock, where private intelligence and security firms hired by the construction company reportedly aided law enforcement

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184. 371 U.S. 415, 437 (1963) (quoting *Thomas v. Collins*, 323 U.S. 516, 537 (1945)).

185. *Id.*

186. Nadine Bloch, *Education and Training in Nonviolent Resistance*, U.S. INST. OF PEACE SPECIAL REPORT 394 (2016), <https://www.usip.org/sites/default/files/SR394-Education-and-Training-in-Nonviolent-Resistance.pdf> [<https://perma.cc/6WH3-Y8B4>].

187. Karen Savage, *Sheriff's Deputies Protect Corporate Interests in Bayou Bridge Case*, TRUTHOUT (Dec. 12, 2018), <https://truthout.org/articles/sheriffs-deputies-protect-corporate-interests-in-bayou-bridge-case> [<https://perma.cc/3C49-5E8V>] (quoting University of South Carolina law professor Seth Stoughton saying “[a]s public officials, officers have an obligation to ensure they are honoring and indeed protecting protesters’ First Amendment rights. The interest in respecting and protecting First Amendment rights can come into sharp conflict with the private employers’ interests in not having protesters in or near or around their work sites”).

by collecting information on protesters and monitoring the protesters' activities.<sup>188</sup> In Louisiana, according to local reporting, the St. Martin Parish Sheriff's Office has allowed nearly five dozen deputies to moonlight for a company contracted by Energy Transfer Partners to provide security for the Bayou Bridge pipeline.<sup>189</sup> As a result, thirteen of the sixteen arrests under the state's critical infrastructure law in 2018 were made by local sheriff's deputies approved to work for the pipeline project, and it remains unknown "whether the deputies . . . were working their regular shifts or were moonlighting at the time" of the arrests.<sup>190</sup> In Minnesota, where a critical infrastructure trespass bill successfully made its way through the legislature before being tabled—at least temporarily—by the Governor, law enforcement has allegedly been cooperating with private security firms "keeping tabs" on protesters organizing to oppose the controversial Enbridge Line 3 pipeline.<sup>191</sup> In his opinion concurring in part and dissenting in part in *Hill*, Justice Powell noted that Houston had "made no effort to curtail the wide discretion of police officers under the present ordinance."<sup>192</sup> In these states, far from curtailing the discretion of police officers, legislatures are turning a blind eye to the fact that members of law enforcement may have an active incentive to exercise their discretion in an impermissible way, by specifically targeting individuals protesting pipeline projects.

*B. Courts Should Analyze Critical Infrastructure Trespass Laws as Content-Based Restrictions Motivated by an Impermissible Desire to Suppress Certain Types of Protest*

Courts can only see critical infrastructure laws as content-neutral if they deliberately ignore the context in which these laws appeared as well as the express intent of the laws' authors and supporters. Legislators'

188. Will Parrish & Alleen Brown, *How Police, Private Security, and Energy Companies Are Preparing for a New Pipeline Standoff*, INTERCEPT (Jan. 30, 2019), <https://theintercept.com/2019/01/30/enbridge-line-3-pipeline-minnesota> [<https://perma.cc/XHV6-JNKW>] ("In a time of growing resistance to fossil fuel industries, the public-private partnership served as a chilling example of law enforcement agencies acting as bulwarks of the oil industry.").

189. See Savage, *supra* note 187 (noting that "moonlight[ing]" is the phenomenon of officers working side jobs, in this instance, for private security firms).

190. *Id.* (noting that "[d]eputies wear full uniforms and use parish-issued weapons and gear whether on duty as public servants for the parish or clocking in as part of Energy Transfer Partners' private security force").

191. See Parrish & Brown, *supra* note 190.

192. 482 U.S. 451, 480 (1987) (Powell, J., concurring in part and dissenting in part).

comments regarding the intended purpose of critical infrastructure trespass bills should open the door to content-based challenges to these statutes. As Alan Chen writes, “constitutional analysis must account for the possibility that lawmakers may draft laws in broad terms precisely to *obscure* an illicit discriminatory legislative purpose.”<sup>193</sup> In states such as Louisiana and Oklahoma, where legislators are on the record discussing their desire to restrict certain types of protest, the Court’s decision in *Wallace* illustrates how such comments can pierce the veil of legislative intent that often shrouds facially neutral laws from First Amendment content-based scrutiny. The Court in *Wallace* examined two factors: the express declarations of a bill’s author, and the demonstration of impermissible intent through an otherwise unnecessary expansion of existing law.<sup>194</sup>

For critical infrastructure laws, the bills’ authors and proponents have not been shy.<sup>195</sup> The Court’s approach in both *Wallace* and *Broadrick* supports the consideration of statements made by those in authoritative positions to interpret a law’s scope when determining whether or not it implicates protected First Amendment rights.<sup>196</sup> While the laws themselves might not expressly state that they are meant to target protesters, let alone anti-pipeline protesters specifically, courts “cannot be expected to ignore . . . authoritative pronouncements” in determining the breadth and purpose of these bills.<sup>197</sup>

In addition to express declarations of intent, a number of states, like Alabama in *Wallace*, had a pre-existing critical infrastructure trespass statute that encompassed more traditional critical infrastructure sites such as electrical transmission substations and water treatment facilities.<sup>198</sup> Louisiana’s newest law explicitly expanded its existing statute to include pipelines and pipeline construction sites.<sup>199</sup> While Oklahoma did not have a pre-existing critical infrastructure statute, it has both conspiracy and trespass laws already on the books, like every other state that has or is currently considering critical infrastructure trespass bills.<sup>200</sup>

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193. Chen, *supra* note 128, at 34.

194. 472 U.S. 38, 49–61 (1985).

195. See *Brown & Parrish*, *supra* note 53; see also *Eastes*, *supra* note 48.

196. *Broadrick v. Oklahoma*, 413 U.S. 601, 613, 617 (1973).

197. *Id.*

198. See 472 U.S. 38 (1985).

199. H.B. 727, 2018 Leg., Reg. Sess. (La. 2018) (“An Act . . . to amend the definition of ‘critical infrastructure’; to provide for a definition of ‘pipeline.’”).

200. See, e.g., IOWA CODE ANN. § 716.11-12 (West 2018) (defining critical infrastructure and critical infrastructure sabotage and determining that a “person who commits critical infrastructure sabotage . . . is guilty of a class ‘B’ felony,” which results

Coupling this factor with bill sponsors' on-the-record statements concerning the motivating purpose of critical infrastructure trespass bills, as the Court did in *Wallace*, establishes a compelling case that the intent behind these laws is to establish an impermissible, viewpoint-based restriction on anti-pipeline protests.

#### CONCLUSION

Critical infrastructure trespass laws go far beyond regulating “ordinary” criminal conduct, though these laws try hard to masquerade as simple trespass laws.<sup>201</sup> The fact that the states proposing and passing these statutes already have trespass laws on the books, along with the statutes' draconian penalties in comparison to existing trespass laws, underscore that these laws are a far cry from the ordinary trespass statutes, breach-of-the-peace laws, and anti-noise ordinances dealt with in similar cases where the Court has been reluctant to use First Amendment doctrines to overturn facially neutral laws.<sup>202</sup> The fact that these statutes focus on conduct, rather than speech, should not blind courts to the openly articulated and constitutionally impermissible motivation behind these laws. If courts look away, they will only further illustrate the extent to which First Amendment jurisprudence in recent decades has left the promise of that Amendment ringing hollow.

The history of this country has been shaped by political expression involving both speech and conduct. Civil disobedience in particular has been vital to American political expression since colonists' first declarations of resistance to British rule. Since then, from the labor movement<sup>203</sup> to the Civil Rights movement to the anti-Vietnam War

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in a fine ranging from eighty-five thousand to one hundred thousand dollars); S.B. 33, 133d Gen. Assemb., Reg. Sess. (Ohio 2019) (proposing broader definitions of “criminal trespass” and “aggravated trespass,” which would impose stricter penalties for protests near pipelines); OKLA. STAT. ANN. tit. 21, § 1835 (West 2019) (imposing criminal liability on anyone who “willfully or maliciously enter[s] the garden, yard, pasture or field of another,” or “willfully enter[s] the pecan grove of another without the prior consent of the owner”); S.B. 652, 2017 Gen. Assemb. (Pa. 2018) (classifying critical infrastructure facility trespass as a type of felony criminal trespass).

201. See *Broadrick v. Oklahoma*, 413 U.S. 601, 613, 616 (1973) (noting that the law under review, unlike “ordinary criminal laws,” targeted “political expression”).

202. See *Grayned v. City of Rockford*, 408 U.S. 104, 106–08, 121 (1972); *Cantwell v. Connecticut*, 310 U.S. 296, 300–03 (1940).

203. HANNAH ARENDT, *CRISES OF THE REPUBLIC: LYING IN POLITICS; CIVIL DISOBEDIENCE; ON VIOLENCE; THOUGHTS ON POLITICS AND REVOLUTION* 80 (1969) (“The whole body of labor legislation—the right to collective bargaining, the right to

movement to the gay rights movement, every major political movement in this country to date has relied upon acts of civil disobedience to convey its message to those in power. Throughout these movements, protestors have submitted themselves to fines, arrest, and even jail time for the variety of misdemeanor charges historically associated with such conduct.

Of course, as long as Americans have practiced nonviolent disobedience, there have been those who have rejected it as a viable means of political expression. When Martin Luther King, Jr. wrote his famous Letter from Birmingham Jail, he was replying to a letter from eight Alabama clergymen criticizing the “unwise and untimely” use of nonviolent civil disobedience by Civil Rights activists, calling upon them to instead seek change through the “proper channels.”<sup>204</sup> As discussed throughout this Comment, courts have adopted a similarly hostile attitude towards First Amendment claims involving acts of civil disobedience. Hannah Arendt observed this trend in the 1960s, writing: “the First Amendment neither in language nor in spirit covers the right of association as it is actually practiced in this country—this precious privilege whose exercise has in fact been (as Tocqueville noted) ‘incorporated with the manners and customs of the people’ for centuries.”<sup>205</sup> Instead, First Amendment jurisprudence has created too many opportunities for abuse by legislatures creative enough to mask their motives. In his dissenting opinion in *Adderley*, Justice Douglas wrote: “Today a trespass law is used to penalize people for exercising a constitutional right. Tomorrow a disorderly conduct statute, a breach-of-the-peace statute, a vagrancy statute will be put to the same end.”<sup>206</sup>

These critical infrastructure trespass statutes are imposters—and clever ones. As demonstrated repeatedly by the sponsors of critical infrastructure trespass bills in multiple states, these laws are motivated by an express desire to target pipeline protests and to penalize those who do engage in

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organize and to strike—was preceded by decades of frequently violent disobedience of what ultimately proved to be obsolete laws.”).

204. Letter to Martin Luther King, Jr.: A Group of Clergymen, TEACHING AMERICAN HISTORY (Apr. 12, 1963), <https://teachingamericanhistory.org/library/document/letter-to-martin-luther-king> [<https://perma.cc/AYU6-LRJB>]; see also Lily Rothman, *Why MLK Was Jailed in Birmingham*, TIME (Apr. 16, 2015), <https://time.com/3773914/mlk-birmingham-jail> [<https://perma.cc/65NA-LLGX>].

205. Arendt, *supra* note 226, at 203.

206. 385 U.S. 39, 56 (1966) (Douglas, J., dissenting). As Douglas further noted, “It is said that the sheriff did not make the arrests because of the views which petitioners espoused. That excuse is usually given, as we know from the many cases involving arrests of minority groups for breaches of the peace, unlawful assemblies, and parading without a permit.” *Id.*

such protests while discouraging—via the threat of draconian penalties—those who might otherwise be willing to risk not just engaging in direct action and trespass, but even those who might simply participate in lawful protests in the vicinity of pipelines or attend organizing efforts where such protests might be discussed. Such impermissible intent should not be shielded from scrutiny simply because critical infrastructure bills look more like traditional trespass laws that the Court has been reluctant to examine on First Amendment grounds.

Perhaps most importantly, if courts hold that critical infrastructure trespass laws are unconstitutional, states will not be left without the laws they need to regulate the “ordinary criminal conduct” of trespass. Protestors who choose to deliberately trespass directly on the land where pipelines are being constructed will face the same penalties activists have faced for acts of civil disobedience throughout this country’s history. Striking down critical infrastructure laws will leave states’ traditional trespass laws in full effect. Laws against criminal assault that protect construction crews and law enforcement would similarly remain in force, as would laws against damaging private property. In other words, as in *Wallace* and *Hill*, all of legislators’ alleged concerns in passing these laws would still be addressed by existing law without jeopardizing First Amendment interests.

The first legal challenge to Louisiana’s new critical infrastructure trespass law was filed on May 22, 2019, by individuals arrested protesting the Bayou Bridge pipeline and their community supporters.<sup>207</sup> It will no doubt be the first of many filed across the country. Whether or not courts recognize these statutes for what they are will have profound consequences for the future of American protest.

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207. *White Hat v. Landry*, CTR. FOR CONST. RIGHTS, <https://ccjjustice.org/home/what-we-do/our-cases/white-hat-v-landry> [<https://perma.cc/69SP-J7H5>] (last modified Oct. 11, 2019).