II

Relevant Federal & State Laws

Federal and state laws both limit how jurisdictions may respond to the potential for violence at public events and provide tools to prevent violence from occurring. This chapter details various categories of laws that may be particularly relevant in shaping jurisdictions' responses to public events:

- Hate Crimes and Domestic Terrorism: Federal and state laws often impose stricter penalties for hate crimes and acts of terrorism than for other violent crimes because these crimes seek to affect more people than the immediate target. Protecting against and prosecuting hate crimes and domestic terrorism sends the message that the community will not tolerate these kinds of crimes.

- Laws Barring Private Paramilitary Activity: Laws in every state bar private individuals from engaging in military or law-enforcement activity outside of governmental authority. Depending on the circumstances, jurisdictions concerned about the presence of private militias may be able to seek an injunction prohibiting groups from acting as paramilitary organizations or assuming law enforcement functions; to include prohibitions on such activity in their event restrictions; to seek help from state authorities; or, when appropriate, to prosecute those who violate these laws.

- Unlawful Assembly Laws: Participating in an unlawful assembly is a crime in every state. A peaceful public event can become an unlawful assembly—and participants ordered to disperse—if the participants develop the shared intent to commit an illegal act or do an act "in a violent, unlawful, and tumultuous manner" that causes others to fear violence against persons or property. However, individual unlawful activity is not enough to transform an otherwise peaceful demonstration into an unlawful assembly.

- Anti-Mask Laws: Anti-mask laws prohibit people from wearing masks in order to conceal their identity. Some laws ban wearing a mask only if it is done with the further intent to intimidate or threaten another person or while engaged in the commission of a crime. In times of public-health emergencies such as the COVID-19 pandemic, anti-mask laws generally have been suspended.

- Public Nuisance Laws: Officials in every state have the power to abate public nuisances that interfere with the public health, safety, peace, and convenience. For the most part, even somewhat disruptive demonstrations may not be prohibited as a public nuisance. However, where groups participating in public demonstrations have engaged in conduct presenting a significant hazard to public health and safety or to access to public facilities, jurisdictions may seek an injunction against such conduct as a public nuisance, but demonstrators must remain able to engage in protected speech and assembly.

- Firearms-Regulation Preemption Laws: Most states have laws that bar local jurisdictions from regulating firearms in a way that exceeds, or differs from, state law. Some of these laws could prevent or limit a locality's ability to restrict the carrying of firearms as a condition of a public-event permit.

II. RELEVANT FEDERAL AND STATE LAWS

In addition to understanding constitutional constraints, localities preparing for public demonstrations also should be aware of state and federal laws that both constrain how they may respond to the potential for violence and provide tools that may be utilized to create the conditions that allow for First Amendment expression while minimizing the risk of harm. This Section details categories of both statutory and common law concepts that may be particularly relevant as localities consider what kinds of conditions to include in permits, what the thresholds are between protected activity and unlawful conduct, and how to avoid repeated violence where individuals have engaged in unlawful conduct in the past. At the same time, as recent events have demonstrated, these laws can be abused to undermine free-speech rights, and localities should exercise care in how they employ the legal tools at their disposal.

A. Criminal Prohibitions on Certain Types of Violence

All 50 states and the District of Columbia criminalize violent conduct that results in injury to persons and property. Federal and state laws also provide separate and often more stringent penalties for hate crimes and acts of terrorism because these types of crimes seek to intimidate and coerce whole communities, thereby affecting a broader array of people than the immediate target. Protecting against and prosecuting hate crimes and domestic terrorism sends a critical message that the community will not tolerate these kinds of crimes.

1. Hate-Crimes Statutes

Hate crimes are violent crimes in which the perpetrator targets an individual, group, or institution because of the actual or perceived characteristics of the victim. Hate crimes can include assault, murder, arson, vandalism, and threats and conspiracies to commit such crimes.

The Matthew Shepard and James Byrd Jr. Hate Crimes Prevention Act makes it a federal crime to willfully cause bodily injury, or attempt to do so using a dangerous weapon, because of the victim's actual or perceived race, religion, ethnicity, national origin, gender, sexual orientation, gender identity, or disability.[150] Forty-five states and the District of Columbia also have their own hate-crime laws.[151] While some states' hate-crime statutes cover a more limited set of characteristics—e.g., only race, ethnicity, and religion—others extend to the same array of protected characteristics as the Shepard Byrd Act. In *Wisconsin v. Mitchell*, the U.S. Supreme Court upheld the constitutionality of Wisconsin's hate-crimes law as consistent with the First Amendment.[152]

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[150] 18 U.S.C. § 249. The Shepard Byrd Act covers hate crimes committed on the basis of certain characteristics (including gender identity, sexual orientation, and disability) only if the crime affected interstate or foreign commerce or occurred within federal jurisdiction. *See id.* § 249(a)(2), (3). Where there is not a sufficient federal nexus, such hate crimes would have to be prosecuted under state law.

[151] For a comprehensive list of state hate-crime statutes, see Anti-Defamation League, *State Hate Crime Statutory Provisions*, https://www.adl.org/sites/default/files/documents/(3)Excel-State-Hate-Crime-Statutes-UPDATED-Fall-2017-sheet1.pdf.

[152] 508 U.S. 476 (1993).

Federal law also includes other hate-crimes provisions that may be relevant when individuals seek to engage in violence at public demonstrations. For example, it is unlawful for two or more people to "conspire to injure, oppress, threaten, or intimidate" others "in the free exercise or enjoyment" of any constitutional right or federal statutory right.[153] Federal law also prohibits the intentional defacement, damage, or destruction of religious real property "because of the religious character of that property" or because of "the race, color, or ethnic characteristics" of the people associated with that property.[154] This statute also criminalizes intentionally obstructing, by force or threat of force, any person from enjoying "that person's free exercise of religious beliefs."[155]

Many state-law provisions allow victims of hate crimes to seek civil remedies.[156] Where bias-motivated conduct is recurring, some states also allow that state's attorney general to seek an injunction to prevent such harm from happening in the future.[157]

2. Domestic-Terrorism Statutes

Domestic terrorism is defined by federal law as conduct that occurs primarily in the United States, that is a crime under federal or state law, that "involve[s] acts dangerous to human life," and that "appear[s] to be intended" to (a) "intimidate or coerce a civilian population," (b) "influence the policy of a government by intimidation or coercion," or (c) "affect the conduct of a government by mass destruction, assassination, or kidnapping."[158] Bias-motivated violence may qualify as both a hate crime and domestic terrorism, depending on the perpetrator's intent. For example, an individual who commits criminal acts of violence against black people in order to "spark a race war" may be engaging in both domestic terrorism and a hate crime. At the same time, some acts of domestic terrorism may be motivated by ideologies unrelated to bias. For example, the 1995 Oklahoma City bombing, one of the deadliest domestic terrorism attacks in U.S. history, was motivated primarily by animus against the federal government.

Although federal law defines domestic terrorism, there is no generic federal crime of "domestic terrorism."[159] Instead, federal law creates dozens of "terrorism" crimes applicable to specific circumstances—such as using a bomb, biological agent, or radiological dispersal device[160]—but does not penalize as "terrorism" violent acts committed domestically using firearms or vehicles when not

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[153] 18 U.S.C. § 241; *see also id.* § 245 (criminalizing interference with federally protected activities). Federal law also provides a civil cause of action for victims of conspiracies to interfere with civil rights against those involved in the conspiracy, *see* 42 U.S.C. § 1985, and those who neglect or refuse to prevent the conspiracy's aim from being accomplished, *see id.* § 1986.
[154] 18 U.S.C. § 247 (a), (c).
[155] *Id.* § 247(a).
[156] *See* Anti-Defamation League, *supra* note 151 (listing state civil-remedy provisions).
[157] *See, e.g.*, Me. Rev. Stat. tit. 5, § 4681; W. Va. Code § 5-11-20.
[158] 18 U.S.C. § 2331(5).
[159] *See* Mary B. McCord, *Filling the Gap in Our Terrorism Statutes*, Program on Extremism, George Washington Univ. (Aug. 2019), https://extremism.gwu.edu/sites/g/files/zaxdzs2191/f/Filling%20The%20Gap%20in%20Our%20Terrorism%20Statutes.pdf; *cf.* 18 U.S.C. § 2332b (criminalizing "acts of terrorism transcending national boundaries").
[160] *See, e.g.*, 18 U.S.C. § 2332a (use of weapons of mass destruction); *id.* § 2332h (radiological dispersal devices).

committed on behalf of a foreign terrorist organization like al Qaeda or the Islamic State and not targeted at U.S. officials or U.S. property.[161] While federal officials sometimes describe such acts as domestic terrorism, those who commit mass shootings or vehicle attacks for what are thought of as "domestic" extremist causes like white supremacy cannot be charged with a federal crime of terrorism.[162]

At least 25 states and the District of Columbia have statutes that criminalize domestic terrorism or impose a sentencing enhancement for acts of terrorism.[163] These statutes generally employ a similar definition for the requisite intent as that used in the federal definition. States vary, however, in the types of criminal conduct they deem to be "acts of terrorism" when committed with the requisite intent. At a minimum, state terrorism offenses cover conduct that causes or creates a risk of death or serious physical injury, and many also include serious property damage. Some state statutes make clear that peaceful protests are not acts of terrorism, although there should be no doubt about this proposition.[164]

B. State Anti-Paramilitary Laws

In August 2017, the Unite the Right rally turned violent as ideologically opposed groups clashed in the streets of Charlottesville, Virginia. Several white-nationalist groups, utilizing centralized command structures, arrived outfitted in helmets and matching uniforms and deployed shields, batons, clubs, and flagpoles as weapons in skirmishes with counter-protesters. Meanwhile, private militia groups—many dressed in camouflage fatigues, tactical vests, helmets, and combat boots, and most bearing assault rifles—stood guard as self-designated protectors of the protesters and counter-

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161 A mass shooting or vehicle attack in support of a foreign terrorist organization would qualify as an act of *international terrorism*, even if it occurred in the United States, and it would be prosecuted as a terrorism crime under federal law. *See* 18 U.S.C. § 2332b (acts of terrorism transcending national boundaries); *id.* § 2339B (providing material support or resources to a foreign terrorist organization).

162 *See* Dep't of Justice, Press Release: Ohio Man Pleads Guilty to 29 Federal Hate Crimes for August 2017 Car Attack at Rally in Charlottesville (Mar. 27, 2019), https://www.justice.gov/opa/pr/ohio-man-pleads-guilty-29-federal-hate-crimes-august-2017-car-attack-rally-charlottesville (describing James Alex Fields' crimes, prosecuted as hate crimes, as "acts of domestic terrorism").

163 *See* Ala. Code §§ 13A-10-151, -152; Ariz. Rev. Stat. §§ 13-2301, -2308.01; Ark. Code §§ 5-54-201, -205; Conn. Gen. Stat. § 53a-300; D.C. Code § 22-3153; Fla. Stat. § 775.30; Ga. Code §§ 16-11-220, -221; Idaho Code §§ 18-8102, -8103; 720 Ill. Comp. Stat. 5/29D-14.9; Iowa Code §§ 708A.1, 708A.2; Kan. Stat. § 21-5421; Ky. Rev. Stat. § 525.045; La. Stat. § 14:128.1; Mich. Comp. Laws §§ 750.543b, .543f; Minn. Stat. § 609.714; Nev. Rev. Stat. §§ 202.4415, .445; N.J. Stat. § 2C:38-2; N.Y. Penal Law §§ 490.05, .25; N.C. Gen. Stat. § 14-10.1; Ohio Rev. Code §§ 2909.21, .24; Okla. Stat. tit. 21, §§ 1268.1, .2; 18 Pa. Cons. Stat. § 2717; S.D. Codified Laws § 22-8-12; Tenn. Code §§ 39-13-803, -805; Vt. Stat. tit. 13, § 1703; Va. Code §§ 18.2-46.4, .5.

164 *See, e.g.*, Nev. Rev. Stat. § 202.4415; Okla. Stat. tit. 21, § 1268.1; *cf. People v. Morales*, 982 N.E.2d 580, 586 (N.Y. 2012) ("[T]he concept of terrorism has a unique meaning and its implications risk being trivialized if the terminology is applied loosely in situations that do not match our collective understanding of what constitutes a terrorist act.").

protesters.[165] The heavily armed presence and coordinated paramilitary activities of these groups not only increased the prevalence of violence at the rally but also made it more dangerous for state and local law enforcement to maintain public safety. Moreover, the attire and behavior of some of the self-professed militia led to confusion as to who was lawfully authorized to keep the peace and give commands to the civilian population.

Constitutional and statutory provisions exist in every state to prohibit these kinds of private armies and paramilitary activity.[166] These laws fall into four categories.

1. State Constitutional Provisions

Forty-eight states have constitutional provisions requiring the subordination of the military to civil authorities. Virginia's constitutional provision is representative: "in all cases the military should be under strict subordination to, and governed by, the civil power."[167] When private armies organize into military-style units that are neither responsible to, nor under the command of, the civil power of the state authorities, they violate this constitutional command to the detriment of civil order.[168]

2. Unauthorized-Private-Militia Statutes

Twenty-nine states have statutes that prohibit groups of people from organizing as private military units without the authorization of the state government. These statutes usually also prohibit such groups from "parading" or "drilling" in public with firearms. New York's statute is representative: "No body of men other than the organized militia and the armed forces of the United States except such . . . organizations as may be formed under the provisions of this chapter, shall associate themselves together as a military company or other unit or parade in public with firearms in any city or town of this state."[169] When self-designated private militia organizations attend public rallies purportedly to keep the peace or protect the rights of protesters or counter- protesters, they likely violate this prohibition, particularly when bearing arms and wearing military-style uniforms.

3. Anti-Paramilitary-Activity Statutes

Twenty-five states have statutes that criminalize paramilitary activity. These laws make it illegal for individuals to teach others how to use firearms, explosives, or techniques capable of causing injury or death, or to assemble to train or practice with such firearms, explosives, or techniques, knowing

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165 *See* First Am. Compl., *City of Charlottesville v. Pa. Light Foot Militia*, No. CL 17-560 (Va. Cir. Ct. filed Jan. 4, 2018), *available at* https://www.law.georgetown.edu/icap/wp-content/uploads/sites/32/2018/02/charlottesville-complaint.pdf (describing events at Unite the Right rally).

166 For a catalog of each state's unauthorized private militia and anti-paramilitary-activity laws, see ICAP's *Prohibiting Private Armies at Public Rallies* (Feb. 2018), https://www.law.georgetown.edu/icap/wp-content/uploads/sites/32/2018/04/Prohibiting-Private-Armies-at-Public-Rallies.pdf.

167 Va. Const. art. I, § 13.

168 *See City of Charlottesville v. Pa. Light Foot Militia*, No. CL 17-560, 2018 WL 4698657, at *4 (Va. Cir. Ct. July 7, 2018) ("[U]nder this constitutional provision, no private army or militia would have any justified existence or authority apart from the federal, state, or local authorities.").

169 N.Y. Mil. Law § 240.

or intending that these techniques will be used to further a civil disorder.[170] "Civil disorder" generally is defined as a public disturbance involving acts of violence by two or more persons that causes an immediate danger of, or results in, damage or injury to persons or property.[171] This prohibition covers conduct similar to that witnessed at the Unite the Right rally, where organized groups used firearms and dangerous techniques (including using shields and sharpened flagpoles to form phalanxes) in the civil disorder that resulted in the event being declared an unlawful assembly.[172]

4. False-Assumption Statutes

A number of states prohibit the false assumption of the uniform or duties of a peace officer or member of the military, including at least 14 states with statutes that may apply in the context of unauthorized private militia activity at public demonstrations.[173] For example, Arizona bars any person except service members and veterans from wearing "any part of the uniform of the national guard or the army, navy or air force of the United States, or a uniform so similar as to be easily mistaken therefor,"[174] and Virginia prohibits the false assumption of the "functions, powers, duties, and privileges" of a law enforcement or peace officer.[175] Private militias that wear uniforms highly similar to military uniforms and those who seek to "keep the peace" to the exclusion of authorized law enforcement may violate these prohibitions.[176]

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These prohibitions reinforce the fundamental tenet of civil society that the government must maintain a monopoly on the legitimate use of force for the protection of public safety.[177] The laws are consistent with the First Amendment, as they regulate conduct harmful to public safety—not

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170 *See, e.g.*, Colo. Rev. Stat. § 18-9-120(2).
171 *See id.* § 18-9-120(1)(a).
172 *See City of Charlottesville*, 2018 WL 4698657, at *6 (concluding that plaintiffs had adequately pleaded a violation of Virginia's anti-paramilitary-activity statute where the complaint alleged that the organizer of the Unite the Right rally "was engaged and involved in the solicitation, training, and command of . . . paramilitary units" knowing that they would be used in a civil disorder); *see also id.* at *7 (finding, with respect to a left-wing militia, that "forming a security perimeter while carrying tactical rifles makes out a sufficient claim of paramilitary activity under this provision").
173 Many other states ban the false assumption of the duties of law enforcement and the impersonation of law enforcement or members of the military. However, certain elements of those offenses (e.g., intent requirements) may not be as readily applicable to conduct likely to occur at public demonstrations.
174 Ariz. Rev. Stat. § 26-170.
175 Va. Code § 18.2-174.
176 *See City of Charlottesville*, 2018 WL 4698657, at *8 ("There are sufficient facts pleaded to support a finding that Redneck Revolt was involved in assuming the functions and duties of law enforcement, and that they were appearing to 'keep the peace' and did not want the police to be anywhere around.").
177 *See Vietnamese Fishermen's Ass'n v. Knights of the Ku Klux Klan*, 543 F. Supp. 198, 216 (S.D. Tex. 1982) ("[P]rotecting citizens from the threat of violence posed by private military organizations . . . is a vital governmental interest because the proliferation of private military organizations threatens to result in lawlessness and destructive chaos.").

speech or assembly for peaceable purposes—and with the Second Amendment right to bear arms, which does not protect private paramilitary activity.[178]

Anti-paramilitary laws may be enforced in a number of ways. Where private militias and groups engaging in paramilitary activity at public demonstrations violate a state's relevant statutes, law-enforcement officials may pursue criminal charges.[179] State-level officials may also seek to enforce their constitutional prerogative to ensure that all military activity remains under civil control. Localities and affected communities have utilized anti-paramilitary laws to obtain injunctive relief against imminent or repeated dangerous paramilitary activity.[180] Finally, such laws may be used proactively as a basis for lawful time, place, and manner restrictions designed to minimize violence at future rallies.[181]

C. Unlawful-Assembly Laws

Both at common law and under various state statutes, participating in an unlawful assembly is a criminal offense punishable as a misdemeanor. Although there is some variation among the statutes of different states, an unlawful assembly ordinarily involves an assembly of three or more persons[182]

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178 *See Commonwealth v. Murphy*, 44 N.E. 138, 138 (Mass. 1896) ("The right to keep and bear arms for the common defense does not include the right to associate together as a military organization, or to drill and parade with arms in cities and towns, unless authorized so to do by law."); *City of Charlottesville*, 2018 WL 4698657, at *11 (rejecting First and Second Amendment challenges to the enforcement of anti-paramilitary-activity laws because, even though paramilitary conduct was enjoined, the defendants "will still be able to come exercise their free speech rights, and assemble with each other, as well as carry a firearm, so long as such is openly carried (unless the person has a concealed weapon permit), and not concealed or brandished or used in a threatening way"); *Vietnamese Fishermen's Ass'n*, 543 F. Supp. at 216 (concluding that Texas's anti-paramilitary-activity law was consistent with both the First Amendment, as a conduct regulation, and the Second Amendment); *see also District of Columbia v. Heller*, 554 U.S. 570, 621 (2008) (citing *Presser v. Illinois*, 116 U.S. 252 (1886), for the principle that the Second Amendment "does not prevent the prohibition of private paramilitary organizations"). For further discussion of the Second Amendment, see *supra* Section I.B. For further information on the First Amendment test for laws that regulate conduct but have an incidental restriction on speech, see *infra* Section II.D.1.

179 *See Presser*, 116 U.S. at 254 (upholding conviction for violation of unauthorized-private-militia statute where an unauthorized military company paraded through the streets of Chicago).

180 *See City of Charlottesville*, 2018 WL 4698657 (suit on behalf of City of Charlottesville, local businesses, and local residents' associations, which obtained injunctions against private paramilitary activity by participants in the 2017 Unite the Right rally and counter-protest); *Vietnamese Fishermen's Ass'n*, 543 F. Supp. 198 (S.D. Tex. 1982) (enjoining military activity by militia wing of the Ku Klux Klan, who sought to intimidate local minority fishermen); *Person v. Miller*, 854 F.2d 656 (4th Cir. 1988) (upholding a Carolina Ku Klux Klan member's contempt conviction for violating a court-ordered consent decree prohibiting him from operating a paramilitary organization); Complaint, *City of Dayton v. Honorable Sacred Knights* (Ohio Common Pleas Ct.), *available at* https://perma.cc/YC93-JF7R.

181 *See* Section V.C for additional suggestions on how to utilize anti-paramilitary-activity prohibitions to protect public safety.

182 Some statutes set the minimum number of participants at two, while others require a larger gathering. *See, e.g.*, Cal. Penal Code § 407 ("two or more persons"); Va. Code. § 18.2-406 ("three or more persons"); N.Y. Penal Code § 240.10 ("with four or more other persons"); Mo. Stat. § 574.040 ("with six or more other persons").

who share a common intent "to do an unlawful act" or to do an "act in a violent, unlawful, and tumultuous manner to the terror and disturbance of others."[183] That is, a gathering may be deemed an unlawful assembly regardless of whether its object is unlawful if those participating in the assembly intend to achieve their ends in such a way "as to give firm and courageous persons in the neighborhood of such assembly ground to apprehend a breach of the peace in consequence of it."[184]

Unlawful-assembly offenses are closely related to the common law and statutory crimes of riot and disturbing the peace: when participants in an unlawful assembly "take steps towards the performance of their purpose, it becomes a rout; and, if they put their design into actual execution, it is a riot."[185] Prohibitions on unlawful assemblies therefore seek to "stop trouble before it occurs"[186] and to prevent riots—"to discourage assemblies which get 'out of hand,' which interfere with the public, and thus disturb the public peace and provoke the commission of other and more serious crimes."[187]

Lawful demonstrations can become unlawful assemblies if the participants develop the intent to do an unlawful act or any act in a violent and unlawful manner during the course of the assembly.[188] This intent must be shared among the participants; individual wrongdoing is not enough to transform a lawful assembly into an unlawful assembly.[189] Even unlawful activity by some participants in a demonstration does not necessarily transform a "peaceful demonstration into a potentially disruptive one."[190] However, although the participants in an unlawful assembly must share a common intent, not every individual needs to have committed a violent or unlawful act to render the assembly as a whole unlawful. Rather, "a person can become a member of an unlawful

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183 *Lair v. State*, 316 P.2d 225, 234 (Okla. Crim. Ct. App. 1957) (interpreting Okla. Stat. tit. 21, § 1314); *see also, e.g.*, *Heard v. Rizzo*, 281 F. Supp. 720, 740 (E.D. Pa. 1968) (three-judge court), *aff'd per curiam*, 392 U.S. 646 (1968) (construing Pennsylvania's unlawful-assembly statute); *Black's Law Dictionary* (11th ed. 2019) (defining "unlawful assembly" as "a meeting of three or more persons who intend either to commit a violent crime or to carry out some act, lawful or unlawful, that will constitute a breach of the peace").

184 *Lair*, 316 P.2d at 234; *State v. Simpson*, 347 So. 2d 414, 415 (Fla. 1977).

185 *Heard*, 281 F. Supp. at 740 (quoting *Black's Law Dictionary*). A riot is "[a]n unlawful disturbance of the peace by an assemblage of usu[ally] three or more persons acting with a common purpose in a violent or tumultuous manner that threatens or terrorizes the public or an institution." *Black's Law Dictionary* (11th ed. 2019).

186 *People v. Uptgraft*, 8 Cal. App. 3d Supp. 1, 8 (App. Dep't Super Ct. 1970).

187 *State v. Hipp*, 213 N.W.2d 610, 615 (Minn. 1973); *see also State v. Mast*, 713 S.W.2d 601, 603–04 (Mo. Ct. App. 1986) ("The purpose of unlawful assembly statutes is to discourage assemblies which interfere with the rights of others and endanger the public peace and excite fear and alarm among the people."); *Lair*, 316 P.2d at 233 ("[T]he public peace and welfare require that unlawful assemblies be 'nipped in the bud' before they get out of hand and become riots.").

188 *Lair*, 316 P.2d at 234; *Mast*, 713 S.W.2d at 603–04.

189 *See Lair*, 316 P.2d at 236 (union members involved in strike did not concur in another member's unlawful threat, so there was no unlawful assembly).

190 *Jones v. Parmley*, 465 F.3d 46, 57 (2d Cir. 2006) (citing *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 908 (1982)).

assembly by not disassociating himself from the group assembled and by knowingly joining or remaining with the group assembled after it has become unlawful."[191]

Prohibitions on unlawful assemblies generally have been upheld as consistent with the First Amendment. The Supreme Court has repeatedly affirmed that the First Amendment does not bar government officials from restricting public demonstrations where "clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order, appears."[192] At the same time, however, "a state may not unduly suppress free communication of views, religious or other, under the guise of conserving desirable conditions."[193]

Courts have concluded that the common-law history of unlawful-assembly offenses and the First Amendment's rights of freedom of speech and assembly constrain the otherwise broad range of conduct that arguably could fall within the definition of unlawful assembly, such that the statutes are neither vague nor overbroad.[194] In doing so, courts generally have read into the statutes a limitation that "protests or assemblies cannot be dispersed on the ground that they are unlawful unless they are violent or . . . pose a clear and present danger of imminent violence, or they are violating some other law in the process."[195]

Thus, in the context of public demonstrations, government officials must draw a distinction between loud but orderly protest activity and conduct that threatens public safety due to imminent violence, destruction or property, or other unlawful acts. Neither loud but generally peaceful protest activities, such as chanting, singing, or praying on a public sidewalk, nor demonstrations in support of unpopular causes likely to offend onlookers can support a conclusion that an assembly is

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191 *Mast*, 713 S.W.2d at 604; *State v. Dixon*, 479 P.2d 931, 939 (1971); *In re Wagner*, 119 Cal. App. 3d 90, 103 (Cal. Ct. App. 1981) ("If a person is a participant in a lawful assembly which becomes unlawful, he has an immediate duty upon learning of the unlawful conduct to disassociate himself from the group." (citations omitted)).

192 *Cantwell v. Connecticut*, 310 U.S. 296, 308 (1940); *see also Feiner v. New York*, 340 U.S. 315, 320 (1951) (explaining that threats to "public peace, order and authority" fall within "the bounds of proper state police action"); *Cox v. Louisiana*, 379 U.S. 559, 574 (1965) ("We . . . reaffirm the repeated decisions of this Court that there is no place for violence in a democratic society dedicated to liberty under law . . . ."); *see also United States v. Griefen*, 200 F.3d 1256, 1263 (9th Cir. 2000) ("[A] government entity may close . . . a street engulfed in a riot or an unlawful assembly . . . ."); *State v. Elliston*, 159 N.W.2d 503, 508 (Iowa 1968).

193 *Cantwell*, 310 U.S. at 308.

194 *See In re Brown*, 510 P.2d 1017 (Cal. 1973); *Simpson*, 347 So. 2d at 415–16; *Hipp*, 213 N.W.2d at 615; *Dixon*, 479 P.2d at 935–38; *Heard*, 281 F. Supp. at 739–40. *But see Owens v. Commonwealth*, 179 S.E.2d 477, 479–80 (1971) (striking down portion of unlawful-assembly statute as overbroad because it "makes unlawful a peaceable assembly that poses no clear and present danger"). By contrast, when interpreted broadly, statutes criminalizing disorderly conduct and breach of the peace have been found unconstitutionally vague and overbroad. *See, e.g.*, *Cox v. Louisiana*, 379 U.S. 536, 551–52 (1965); *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949).

195 *Collins v. Jordan*, 110 F.3d 1363, 1371 (9th Cir. 1996) (quotation marks and citations omitted); *see also Jones*, 465 F.3d at 57–58 ("[T]he police may not interfere with demonstrations unless there is a 'clear and present danger' of riot, imminent violence, interference with traffic or other immediate threat to public safety.").

unlawful.[196] By contrast, where a once-peaceful gathering grows hostile and violent and threatens the safety of others or their property, an official would be justified in concluding that the assembly has become an unlawful one.[197] The key question is whether those assembled have shown a "common intent to resort to force or violence," as demonstrated "by an actual resort to violence or by acts giving probable cause to believe that such violence is imminent."[198]

When statutes grant government officials the authority to order an unlawful assembly to disperse, a failure to disperse following such an order is generally a separate misdemeanor offense.[199] Officials may declare an unlawful assembly only if they have probable cause to believe that the current gathering has become unlawful. It is not enough that there was violence on another day, in similar circumstances, or by others responding to the same issue,[200] although a pattern of escalating violence by the same group may be a relevant consideration.[201] Moreover, a decision to declare an unlawful assembly should not be based on the content of the assembly's message.[202]

An officer dispersing an unlawful assembly should ensure that the order to disperse is loud enough to be "reasonably likely to have reached all of the crowd" and should, absent a threat of imminent harm, provide time to comply with the order before arresting those who remain.[203] The language an official uses to order dispersal need only reasonably convey to an observer that she is being commanded to depart; it need not specify the extent of the area that must be vacated nor the time by which it must be cleared.[204] In enforcing a lawful dispersal order, officials need not allow non-

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196 *See Edwards v. South Carolina*, 372 U.S. 229, 235–36 (1963) (overturning conviction for breach of the peace where protesters peaceably assembled and sang songs without any threat of violence; the only danger was that their opinions "were sufficiently opposed to the views of the majority of the community to attract a crowd and necessitate police protection"); *Cox v. Louisiana*, 379 U.S. at 546 (similar); *In re Brown*, 510 P.2d at 1024 ("Although the public may fear a large, noisy assembly, particularly an assembly that espouses an unpopular idea, such an apprehension does not warrant restraints on the right to assemble unless the apprehension is justifiable and reasonable and the assembly poses a threat of violence."); *Jones v. State*, 355 S.W.2d 727, 727 (Tex. Crim. App. 1962) (orderly sit-in was not an unlawful assembly).

197 *Feiner*, 340 U.S. at 317–21; *Hipp*, 213 N.W.2d at 616 (finding declaration of unlawful assembly warranted where demonstrators disrupted a restaurant's business, blocked access to and damaged its property, impeded vehicular and pedestrian traffic, engaged in shouting and profanity, and disregarded officials' requests that they conduct an orderly demonstration).

198 *Commonwealth v. Abramms*, 849 N.E.2d 867, 875 (Mass. App. Ct. 2006).

199 *See, e.g.*, Cal. Penal Code § 409; Mo. Stat. § 574.060; Va. Code § 18.2-407.

200 *Collins*, 110 F.3d at 1372.

201 *Uptgraft*, 8 Cal. App. 3d Supp. at 8–9 (unlawful assembly justified based on pattern of escalating violence in recent protests by the same group even though the group's activities on that day would not alone qualify as an unlawful assembly).

202 *Kessler v. City of Charlottesville*, No. 3:19-cv-00044, 2020 WL 871484, at *10 (W.D. Va. Feb. 21, 2020).

203 *Dellums v. Powell*, 566 F.2d 167, 181 n.31 (D.C. Cir. 1977); *Jones*, 465 F.3d at 60. The appropriate methods for dispersing those who remain, including what level of force is warranted, are beyond the scope of this discussion.

204 *See Mast*, 713 S.W.2d at 605–06; *State v. Johnson*, 500 P.2d 788, 795 (Wash. App. 1972), *opinion adopted*, 508 P.2d 1028 (Wash. 1973).

violent demonstrators to remain; even those who merely choose not to disperse and dissociate themselves from the unlawful assembly may be subject to arrest.[205]

D. Anti-Mask Laws and Ordinances

Some states and localities have enacted statutes and ordinances that forbid the wearing of masks and other disguises intended to conceal one's identity while on public property. In the extenuating circumstances related to COVID-19, mask-wearing is recommended as a public health measure and required in many states, and some states and localities have expressly suspended enforcement of their existing anti-mask laws.[206] This Section addresses anti-mask laws in ordinary times; it does not in any way cast doubt on recommended or required mask-wearing in the context of a grave public health emergency.

Many anti-mask laws were passed in response to outbreaks of violence by masked individuals, such as attacks perpetrated by the Ku Klux Klan against members of minority communities into the mid-20th century.[207] Given this history of intimidation and harassment, masks often are perceived as threatening, especially in combination with the presence of weapons, and they can strike fear in members of the public.[208] More generally, anti-mask laws recognize that mask-wearing allows individuals to commit criminal acts anonymously, thereby threatening public safety and the public peace and hindering the identification and apprehension of perpetrators of crime and violence.[209] After the pandemic has subsided, jurisdictions may want to consider enacting and enforcing generally applicable anti-mask statutes, even as they remain aware that such statutes are likely to face opposition from groups seeking to protest anonymously.

Anti-mask statutes generally can be grouped into two categories. Statutes in the first category, "general anti-mask statutes," criminalize wearing a mask in public to conceal one's identity. Many such laws also include exceptions for wearing masks in contexts where a threat to public safety is considered less likely. For example, Georgia bans wearing "a mask, hood, or device by which any portion of the face is so hidden, concealed, or covered as to conceal the identity of the wearer" while "upon any public way or public property or upon the private property of another without" permission.[210] The statute exempts from its prohibition wearing "holiday costume[s]"; donning a mask for physical safety while on the job or for a sporting activity; using a mask "in a theatrical

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205 *See White v. Jackson*, 865 F.3d 1064, 1075–76 (8th Cir. 2017); *Kessler*, 2020 WL 871484, at *11; *Mast*, 713 S.W.2d at 605.

206 For additional discussion of mask-wearing ordinances during the COVID-19 pandemic, see *infra* Protesting During a Pandemic.

207 *See State v. Miller*, 398 S.E.2d 547, 550 (Ga. 1990) (explaining the origins of Georgia's 1951 Anti-Mask Act); *see also Church of Am. Knights of the Ku Klux Klan v. Kerik*, 356 F.3d 197, 203–05 (2d Cir. 2004) (tracing origins of New York's anti-mask law to armed insurrections of tenant farmers in the mid-1800s).

208 *See Miller*, 398 S.E.2d at 549–51 (describing interests served by anti-mask statute); *see also id.* at 550 (noting that victims feared reporting incidents of Klan violence "in case law enforcement officers might have been involved").

209 *See Kerik*, 356 F.3d at 205; *Hernandez v. Commonwealth*, 406 S.E.2d 398, 401 (Va. Ct. App. 1991).

210 Ga. Code § 16-11-38(a).

production," Mardi gras celebration, or masquerade ball; and wearing a gas mask in an emergency or emergency drill.[211]

Statutes in the second category, "criminal anti-mask statutes," ban wearing a mask only when it is worn either with a specified intent or while engaged in the commission of a crime. For example, Washington, D.C., criminalizes "wearing any mask, hood, or device . . . to conceal the identity of the wearer" when done with certain specified intents, including an "intent to deprive any person . . . of equal protection of the law," "intent to intimidate, threaten, abuse, or harass any other person," or "intent to cause another person to fear for his or her personal safety"; or "[w]hile engaged in conduct prohibited by civil or criminal law, with the intent of avoiding identification."[212]

Individuals prosecuted under anti-mask statutes and groups seeking to wear masks at public demonstrations—including members of Ku Klux Klan affiliates and students protesting against the government of Iran in the 1970s—have raised First Amendment challenges to the enforcement of anti-mask statutes and ordinances. Although some courts have struck down anti-mask statutes as unconstitutional, the Second Circuit, Seventh Circuit, the Georgia and West Virginia supreme courts, and a Virginia court of appeals have upheld their constitutionality. Challengers primarily have raised four arguments.

1. Symbolic Speech

Protesters have argued that mask-wearing is a type of conduct that qualifies as symbolic speech, requiring the application of heightened scrutiny under the First Amendment. Courts generally have rejected this argument in the context of Ku Klux Klan–affiliated groups, concluding that mask-wearing is not protected speech because the incremental speech value of wearing the mask beyond that of wearing the Klan's traditional robe and hood without the mask is negligible.[213] However, a court held that mask-wearing by protesters of the Iranian government was expressive conduct where the masks had become symbols "of opposition to a regime which is of such a character that its detractors believe they must disguise their identity to protect themselves."[214] To the extent mask-wearing qualifies as symbolic speech, the government must satisfy the test set forth in *United States v. O'Brien*: it must establish that the prohibition furthers an important governmental interest unrelated

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211 *Id.* § 16-11-38(b); *see also* N.Y. Penal Law § 240.35(4) (similar).

212 D.C. Code § 22-3312.03; *see also* 18 U.S.C. § 241 (prohibiting "two or more persons" from going "in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege"); 42 U.S.C. § 1985(3) (allowing a civil suit when the same conduct constitutes a conspiracy to interfere with civil rights).

213 *See Kerik*, 356 F.3d at 206–08 (finding the "expressive force" of the mask to be "redundant"); *Miller*, 398 S.E.2d at 551 (concluding that "the statute's incidental restriction on expression is *de minimis*," as "the law restricts only unprotected expression—the communication of a threat[—]and regulates only the noncommunicative function of the mask"); *Hernandez*, 406 S.E.2d at 400 ("The mask adds nothing, save fear and intimidation, to the symbolic message expressed by the wearing of the [KKK] robe and the hood."). *But see Church of Am. Knights of Ku Klux Klan v. City of Erie*, 99 F. Supp. 2d 583, 587 & n.3 (W.D. Pa. 2000) (concluding that mask-wearing qualified as symbolic speech where the mask was not detachable from the Klan hood).

214 *Aryan v. Mackey*, 462 F. Supp. 90, 92 (N.D. Tex. 1978).

to the suppression of speech; that there is a sufficient nexus between the prohibition and the governmental interest it supports; and that the incidental restriction on speech is no greater than necessary to the furtherance of that interest.[215] Courts have reached different conclusions as to how this test applies depending on the context of the challengers' conduct.[216]

2. Anonymous Speech

Protesters have argued that they have a First Amendment right to protest anonymously because of the risk that they or their families will be retaliated against for their views. The First Amendment protects individuals' right to engage in anonymous speech where the government's interests in requiring disclosure of one's identity do not justify the chilling effect disclosure would impose on the rights of speech and association.[217] However, the extent to which the right to anonymity extends to public demonstrations is unsettled, and courts disagree as to whether prohibiting masked protests implicates the right to anonymity at all.[218] Where courts have found that prohibitions on wearing masks implicate a protected First Amendment right, thereby requiring heightened scrutiny, they generally also have concluded that the government failed to demonstrate that the law was appropriately tailored to meet its interests.[219]

3. Overbreadth

Defendants charged with violating anti-mask statutes have argued that the statutes are overbroad—i.e., that they prohibit a substantial amount of constitutionally protected activity. General anti-mask statutes are more susceptible to overbreadth challenges because the only intent required ordinarily is

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[215] 391 U.S. 367, 376–77 (1968).

[216] *Compare Miller*, 398 S.E.2d at 551 (finding law to be amply supported by legitimate state interests), and *State v. Berrill*, 474 S.E.2d 508, 514–16 (W. Va. 1996) (similar), *with Aryan*, 462 F. Supp. at 93–94 (finding that a public university's concern about violence at a masked protest was speculative, so there was an insufficient nexus to the government's interests to prohibit mask-wearing).

[217] *NAACP v. Alabama ex. rel. Patterson*, 357 U.S. 449 (1958) (concluding that Alabama could not compel the NAACP to produce its membership lists because it would chill the members' free-association rights); *McIntyre v. Ohio Election Comm'n*, 514 U.S. 334 (1995) (striking down prohibition on distribution of anonymous campaign literature).

[218] *Compare Kerik*, 356 F.3d at 209 (refusing to extend the rule of *NAACP v. Alabama* to "the concealment of one's face while demonstrating"), *and Miller*, 398 S.E.2d at 553 (finding that the prohibition's "effect on the Klan's ability to advocate or proselytize anonymously is negligible" where other methods of anonymous communication remain available), *with Am. Knights of Ku Klux Klan v. City of Goshen*, 50 F. Supp. 2d 835, 836, 840–41 (N.D. Ind. 1999) (concluding that the anti-mask law burdened Klan members' free speech and association rights because past retaliation made "it likely that disclosing the members would impact the group's ability to pursue its collective efforts at advocacy"), *and Ghafari v. Mun. Court*, 87 Cal. App. 3d 255, 261 (Ct. App. 1978) (finding anti-mask statute to impinge on the right to anonymous speech because "the state either inhibits the exercise of free speech or exposes the speaker who dares, to retaliation by a foreign government").

[219] *See City of Goshen*, 50 F. Supp. 2d at 836 (finding the government's evidence connecting masked protesting with an increased risk of violence and criminal activity to be insufficient); *see Ghafari*, 87 Cal. App. 3d at 261 (finding that other existing statutes sufficiently, and more narrowly, prohibited "illegitimate and improper use of concealment of identity").

the intent to conceal one's identity, thereby allowing application in a broader array of circumstances.[220] In order to avoid such an overbreadth problem, in *State v. Miller*, the Georgia Supreme Court construed Georgia's general anti-mask statute to apply only "when the mask-wearer knows or reasonably should know that the conduct provokes a reasonable apprehension of intimidation, threats or violence."[221] Criminal anti-mask statutes, by contrast, are less susceptible to an overbreadth challenge because they are more focused on the connection between mask-wearing and constitutionally unprotected conduct.[222]

4. Content-Based Restriction

Where a general anti-mask statute exempts from its prohibition masks worn for specific purposes—such as Halloween costumes or masquerade balls—challengers have argued that the statute operates as a content-based restriction on speech (or as a violation of the Equal Protection Clause under a content-based theory) and therefore should be subject to strict scrutiny. This type of challenge has only rarely been successful.[223] Where courts conclude that an anti-mask statute only minimally affects speech rights, they generally defer to legislative judgments in determining what categories to exempt from prohibition.[224] It remains to be seen, however, whether exemptions from mask-wearing prohibitions will be treated as content-based following the Supreme Court's decision in *Reed*

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220 *See Robinson v. State*, 393 So. 2d 1076, 1077 (Fla. 1980); *Ghafari v. Mun. Court*, 87 Cal. App. 3d at 262. *But see Hernandez*, 406 S.E.2d at 400 (rejecting an overbreadth challenge to a law requiring that the mask-wearer "*intend* to conceal his identity," which the court found did not reach a substantial amount of constitutionally protected mask-wearing for other reasons).

221 398 S.E.2d at 551–52.

222 The language used to specify the required intent for a criminal anti-mask statute will be scrutinized in the context of an overbreadth challenge. For example, *City of Erie* drew a distinction among the enumerated types of intents in Erie's anti-mask ordinance. It struck down as overbroad and vague a provision barring mask-wearing with "intent to intimidate, threaten, abuse or harass any other person," but upheld provisions barring mask-wearing "when the person has the intent to deprive other persons of the equal protection of the laws," "the intent, by force or threat of force, to injur[e], intimidate, or interfere with any person because of his exercise of" his legal rights, or "the intent to cause another person to fear for his or her personal safety." 99 F. Supp. 2d at 589–91; *see also Knights of the Ku Klux Klan v. Martin Luther King, Jr. Worshippers*, 735 F. Supp. 745, 751 (M.D. Tenn. 1990) (finding an ordinance prohibiting paraders from wearing masks or disguises "to the disturbance of the peace or to the alarming of the citizens" to be overbroad because it could "be used to stifle" protected symbolic speech); *Cf. Virginia v. Black*, 538 U.S. 343, 347, 360 (2003) (concluding that Virginia's statute criminalizing cross-burning with "an intent to intimidate a person or group of persons" did not violate the First Amendment because "[i]ntimidation in the constitutionally proscribable sense of the word is a type of true threat").

223 *See Ghafari*, 87 Cal. App. 3d at 265–66. In *Ghafari*, the California Court of Appeals also held that the exception for mask-wearing for "purposes of amusement [and] entertainment" was unconstitutionally vague. *Id.* at 264.

224 *See Kerik*, 356 F.3d at 209–10 (concluding that the anti-mask statute regulates non-expressive conduct, and deferring to the legislature's decision to exempt certain uses of masks); *see also Miller*, 398 S.E.2d at 553 (rejecting an Equal Protection Clause challenge on similar grounds because "the statute distinguishes appropriately between mask-wearing that is intimidating, threatening or violent and mask-wearing for benign purposes"); *City of Erie*, 99 F. Supp. 2d at 588 (finding mask-wearing to be symbolic speech as applied, but rejecting the notion that the prohibition operates on its face as a content-based restriction).

v. Town of Gilbert,[225] which articulated a seemingly rigid framework for determining whether speech restrictions are content-neutral or content-based.

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Even if a court concludes that mask-wearing implicates demonstrators' First Amendment rights, that is not the end of the inquiry.[226] The government may still prevail if it establishes that its substantial interests furthered by the statute justify the impingement on individuals' First Amendment rights. Courts generally have found the interests furthered by anti-mask statutes—protecting public safety, identifying criminals, and guarding against violence and intimidation—to be substantial and even compelling interests.[227] Where governments defending their anti-mask ordinances have lost challenges to their statutes, it has often been because of a lack of evidence demonstrating the nexus between public-safety goals and the protest activity at issue.[228] Jurisdictions are on safer ground where they can demonstrate specific, non-speculative public-safety justifications for their anti-mask regulations.[229] Finally, even when enactment of an anti-mask prohibition was motivated by the behavior of a single group, like the Ku Klux Klan, courts have not found that fact relevant to their First Amendment analysis.[230] Still, it is essential that anti-mask laws—like any other type of speech restriction—serve broader governmental ends, rather than simply targeting individual groups based on their messages.

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225 576 U.S. 155 (2015).

226 An overbreadth challenge is the exception to this rule, as a successful challenge indicates that the statute sweeps too broadly for the interests it protects.

227 *See Miller*, 398 S.E.2d at 551 ("Safeguarding the right of the people to exercise their civil rights and to be free from violence and intimidation is not only a compelling interest, it is the General Assembly's affirmative constitutional duty."); *Berrill*, 474 S.E.2d at 514 ("The obvious governmental interest here is the protection of citizens from violence and from the fear and intimidation of being confronted by someone whom they cannot identify.").

228 *See City of Goshen*, 50 F. Supp. 2d at 842 (recognizing that "preventing violence and identifying and apprehending criminals are compelling governmental interests," while concluding that the statute was insufficiently tailored to those ends); *Aryan*, 462 F. Supp. at 93–94 (finding an insufficient nexus between the government's interests and the prohibition on mask-wearing where evidence of potential violence was speculative).

229 *See Ryan v. Cty. of DuPage*, 45 F.3d 1090, 1092 (7th Cir. 1995) (finding a rule banning masks in a courthouse to be "reasonable" because courts generally "have acute security problems" and the specific courthouse at issued had "been the scene of a crime committed by a masked man").

230 *See Hernandez*, 406 S.E.2d at 401 (acknowledging a focus on the Klan, but commenting that "whatever motivation might have prompted the anti-mask statute's enactment, the purpose of the statute is no more than what appears in the plain language of the statute"); *City of Erie*, 99 F. Supp. 2d at 588 n.4 (finding the legislative focus on the Klan neither "dispositive" for a facial challenge nor "relevant" to whether it would be "applied in a discriminatory fashion"). *But see Miller*, 398 S.E.2d at 554 (Smith, J., dissenting) (emphasizing legislative purpose to "unmask the Ku Klux Klan" to argue for heightened scrutiny).

E. Public-Nuisance Laws

Public nuisance is a common law tort and a crime in every state. "The concept of common law public nuisance . . . elude[s] precise definition."[231] At the general level, a public nuisance is an "unreasonable interference with a right common to the general public."[232] Rights "common to the general public" are those related to the public health, safety, peace, comfort, convenience, and morals, rather than individual rights.[233] Moreover, the "unreasonable interference" involved in a public nuisance—i.e., the conduct or condition that is deemed to be a nuisance—generally must affect "the interests of the public generally, as distinguished from those of a particular class," even if that class involves a large number of people.[234] Finally, the effect on the public right—i.e., the "annoyance, discomfort, inconvenience, or injury to the public"—must be "substantial."[235] For example, an unreasonable obstruction that blocks access to a public street for a considerable period of time is considered a public nuisance.[236]

Generally, in determining whether conduct or a condition so unreasonably interferes with a public right to be considered a public nuisance, courts assess three factors: (a) "[w]hether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience," (b) "whether the conduct is proscribed by a statute, ordinance or administrative regulation," or (c) "whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right."[237] The unreasonableness of the interference may be shown if any one of the three factors is met, though these factors are not exclusive.[238]

States have broad authority to prohibit conduct or the creation of a harmful condition as a public nuisance.[239] Many states have a general public-nuisance misdemeanor offense.[240] These statutes generally have been interpreted to include interferences with public rights that were considered

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231 *City of Chicago v. Festival Theatre Corp.*, 438 N.E.2d 159, 164 (1982).
232 *Restatement (Second) of Torts* § 821B.
233 *Lawton v. Steele*, 152 U.S. 133, 136 (1894); *see also Kovacs v. Cooper*, 336 U.S. 77, 83 (1949) (plurality op.) ("The police power of a state extends beyond health, morals and safety, and comprehends the duty, within constitutional limitations, to protect the well-being and tranquility of a community."); *City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099, 1113–14 (2004).
234 *Lawton*, 152 U.S. at 137. In a few states, it is sufficient that a nuisance affects a large number of people, even if it does not affect a public right. *See, e.g.*, Cal. Civ. Code § 3480; Okla. Stat. tit. 50, § 2. Even in those states, the conduct regulated must affect a large number of people simultaneously; it is not enough to affect many people one by one. *See, e.g.*, *City of McAlester v. Grand Union Tea Co.*, 98 P.2d 924, 926 (Okla. 1940) (striking down a public-nuisance ordinance regulating door-to-door salespeople because the conduct would affect only one residence at a time).
235 58 *Am. Jur. 2d Nuisances* § 31; *see also Breeding ex rel. Breeding v. Hensley*, 258 Va. 207, 213 (1999) ("More than sporadic or isolated conditions must be shown; the interference must be 'substantial.'").
236 *See, e.g.*, *Breeding*, 258 Va. at 213.
237 *Restatement (Second) of Torts* § 821B.
238 *Id.* cmt. e.
239 *Lawton*, 152 U.S. at 140.
240 *See, e.g.*, Minn. Stat. § 609.74; N.M. Stat. § 30-8-1.

public nuisances at the common law.[241] States also have specifically criminalized certain activities as public nuisances per se because they interfere with public rights.[242] Moreover, many states have delegated to municipalities and administrative agencies the ability to define public nuisances by ordinance or regulation.[243] The enumeration of specific public-nuisance offenses does not preclude common-law remedies for other, non-enumerated conduct that unreasonably interferes with a right common to the public.

Public nuisances may be regulated in three main ways: (1) criminal prosecution; (2) civil suits for abatement, such as through injunctive relief; and (3) civil suits for damages.[244] States generally have authority to sue for abatement of public nuisances,[245] and many states also have shared that authority with municipalities by statute.[246] Private individuals also may be able to sue for abatement or damages, but only to the extent that they have suffered damages different in kind from those suffered by the public at large.[247] Where injunctive relief is sought, the ordinary standards for an injunction apply.[248] Finally, where a continuing nuisance exists, a plaintiff may seek both damages and an injunction.[249]

Municipalities may seek to enjoin actually harmful conduct as a public nuisance even if that conduct occurs in the course of a public demonstration. For example, in *Thomas v. City of Danville*, the Virginia Supreme Court upheld an injunction where ongoing protests had, over a period of multiple months, repeatedly turned violent and blocked public streets and buildings.[250] In *New York State National Organization for Women v. Terry*, the U.S. Court of Appeals for the Second Circuit upheld an injunction obtained by New York City under a public-nuisance theory where anti-abortion

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241 *See Restatement (Second) of Torts* § 821B cmt. c.
242 *Id.*
243 *Id.*; *see, e.g.*, Cal. Gov. Code § 13771.
244 *See, e.g.*, Cal. Civ. Code § 3491.
245 *See Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 603 (1982) (citing cases in which states had standing to sue to enjoin public nuisances); *United Steelworkers of Am. v. United States*, 361 U.S. 392 (1959) (Frankfurter, J., concurring) ("The judicial power to enjoin public nuisance at the instance of the Government has been a commonplace of jurisdiction in American judicial history.").
246 *See, e.g.*, Minn. Stat. §§ 412.221 subd. 23, 368.01 subd. 15; Va. Code § 15.2-900; *see also N.Y. State Nat'l Org. for Women v. Terry*, 886 F.2d 1339, 1361 (2d Cir. 1989); *Cox v. New Castle Cty.*, 265 A.2d 26, 27 (Del. 1970); *City of Gary ex rel. King v. Smith & Wesson Corp.*, 801 N.E.2d 1222, 1238 (Ind. 2003); *City of Charlottesville*, 2018 WL 4698657, at *9 (Va. Cir. Ct. July 7, 2018).
247 *See Restatement (Second) of Torts* § 821C; *see also, e.g.*, Okla. Stat. tit. 50, §§ 10, 12; Cal. Civ. Code § 3493.
248 *Festival Theatre Corp.*, 438 N.E.2d at 167 (injunction improvidently granted "because it was not shown that criminal prosecution fails to afford an adequate remedy for the harm caused"); *Wade v. Campbell*, 200 Cal. App. 2d 54, 62 (Ct. App. 1962) (scope of injunction should be no broader than necessary to remedy harm).
249 58 *Am. Jur. 2d Nuisances* § 180; *Columbia Cty. v. Doolittle*, 512 S.E.2d 236, 238 (1999).
250 152 S.E.2d 265, 269 (1967) ("Clearly the lower court had the right . . . to enjoin the defendants and their associates from obstructing or attempting to obstruct the free use of the streets and the free ingress and egress to the public buildings and other acts which were patently disorderly and riotous."); *see also City of Charlottesville*, 2018 WL 4698657, at *10 (concluding that municipality could bring public-nuisance action against armed militia groups patrolling public demonstrations because their presence unreasonably interfered with the public's right "to be free to visit and use the downtown area without fear or intimidation from organized, armed, uniformed, but unofficial military-like groups").

protesters engaged in "en masse demonstrations" in order to block access to health clinics, thereby impeding both the public's right to obtain medical services and the health and safety of those who wanted to use the public streets.[251] And municipalities may, within reasonable limits, enact public-nuisance ordinances to control the volume of amplified sound.[252]

However, like any other government action, public nuisance prohibitions and injunctions must comport with constitutional limits, including First Amendment and due process protections. For example, in *Near v. Minnesota ex rel. Olson*, the Supreme Court held that the First Amendment precluded Minnesota from imposing a prior restraint on what a newspaper could publish in the name of abating a public nuisance.[253] And in *Thomas v. City of Danville*, while upholding some of the provisions of an injunction against riotous conduct, the Virginia Supreme Court nonetheless struck down other terms of the injunction because the conduct prohibited by those terms was protected by the First Amendment.[254]

F. State Firearms-Regulation Preemption Laws

In many states, firearms-regulation preemption statutes bar local jurisdictions from regulating firearms in a manner that differs from state law, even if the regulation fully complies with the Second Amendment. The specifics of such laws vary, but they often prohibit localities from regulating most aspects of firearms manufacturing, ownership, possession, and sale, and could pose an obstacle to including restrictions on carrying firearms as a condition of public-event permits.[255]

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[251] 886 F.2d 1339, 1362 (2d Cir. 1989)

[252] See *Kovacs*, 336 U.S. at 88–89 (1949) (plurality op.) (finding public-nuisance ordinance barring broadcasting from sound trucks "in a loud and raucous manner on the streets" to be consistent with the First Amendment).

[253] 283 U.S. 697, 720 (1931) ("Characterizing the publication as a business, and the business as a nuisance, does not permit an invasion of the constitutional immunity against restraint."); *see also Vance v. Universal Amusement Co.*, 445 U.S. 308, 317 (1980) (per curiam) (public-nuisance statutes restraining the playing of obscene films failed to provide sufficient due process safeguards); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212 (1975) (public-nuisance rationale did not justify content-based restriction on protected speech); *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676, 682 (1968) (regulations of public nuisances subject to vagueness challenges where they restrict First Amendment-protected activity); *New York ex rel. Spitzer v. Operation Rescue Nat'l*, 273 F.3d 184, 207–08 (2d Cir. 2001) (finding a no-protest zone that extended from a health clinic to the sidewalk in front of neighboring businesses too broad because the "use of nuisance law for such a broad prohibition of protest activities raises profound constitutional issues"); *cf. Cinevision Corp. v. City of Burbank*, 745 F.2d 560, 571 (9th Cir. 1984) (concluding that a contract provision was overbroad where it permitted a city to disapprove concerts in a public venue if the concerts had "the potential of creating a public nuisance"); *Leonardson v. City of E. Lansing*, 896 F.2d 190, 198–99 (6th Cir. 1990) (although a city had a compelling interest "in abating the public nuisance created by" a recurring "drunk, raucous" event, the city's ordinance preventing the event was vague and overbroad where it "also permit[ted] the city to prevent the occurrence of events which enjoy constitutional protection").

[254] 152 S.E.2d at 269–70.

[255] *See, e.g.*, Ariz. Rev. Stat. § 13-3118(A) ("Except for the legislature, this state and any agency or political subdivision of this state shall not enact or implement any law, rule or ordinance relating to the possession, transfer or storage of firearms other than as provided in statute."); Fla. Stat. § 790.33(1) ("Except as expressly

Some such laws, however, contain exceptions allowing localities to regulate certain aspects of gun safety, such as the recent amendment to Virginia's preemption law, which preserves the ability of localities to restrict possession of firearms in government buildings and public spaces owned by the locality, such as parks.[256] Other states, including Connecticut, Hawaii, Massachusetts, New Jersey, and New York, have no express firearms-regulation preemption law. Even those states, however, may follow general preemption principles that recognize the supremacy of state over local law, which could affect how localities can regulate firearms.

Localities may want to include firearms restrictions in public-events permits, but, because the specifics of each state law vary, localities should check the law in their state before doing so.[257] Note also that some state firearms-regulation preemption laws impose fines, criminal penalties, or removal from office for local officials who violate them.[258] Depending on the wording of the specific preemption statute in any given state, there may be an argument available that the statute does not apply to reasonable time, place, and manner restrictions on gun possession during public events where there are well-founded concerns about protecting public safety.

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provided by the State Constitution or general law, the Legislature hereby declares that it is occupying the whole field of regulation of firearms and ammunition, including the purchase, sale, transfer, taxation, manufacture, ownership, possession, storage, and transportation thereof, to the exclusion of all existing and future county, city, town, or municipal ordinances or any administrative regulations or rules adopted by local or state government relating thereto. Any such existing ordinances, rules, or regulations are hereby declared null and void."); Idaho Code § 18-3302J ("Except as expressly authorized by state statute, no county, city, agency, board or any other political subdivision of this state may adopt or enforce any law, rule, regulation, or ordinance which regulates in any manner the sale, acquisition, transfer, ownership, possession, transportation, carrying or storage of firearms or any element relating to firearms and components thereof, including ammunition."); Ind. Code § 35-47-11.1-2 ("a political subdivision may not regulate . . . the ownership, possession, carrying, transportation, registration, transfer, and storage of firearms, ammunition, and firearm accessories"); 25 Me. Rev. Stat. § 2011 ("no political subdivision of the State, including, but not limited to, municipalities, counties, townships and village corporations, may adopt any order, ordinance, rule or regulation concerning the sale, purchase, purchase delay, transfer, ownership, use, possession, bearing, transportation, licensing, permitting, registration, taxation or any other matter pertaining to firearms, components, ammunition or supplies").

256 *See* Va. S. 35 (Apr. 22, 2020) (amending and reenacting §§ 15.2-915 and 15.2-915.5 of the Code of Virginia and repealing § 15.2-915.1 of the Code of Virginia), *available at* https://lis.virginia.gov/cgi-bin/legp604.exe?201+ful+SB35ER2+pdf; *see also* Md. Crim. Law Code § 4-209(b) (allowing localities to regulate firearms possession in or within 100 yards of "a park, church, school, public building, and other place of public assembly").

257 Giffords Law Center to Prevent Gun Violence contains a helpful catalog of state firearms laws, including firearms-regulation preemption statutes. *See* https://lawcenter.giffords.org/.

258 *See, e.g.*, Fla. Stat. § 790.33(3); Ky. Rev. Stat. § 65.870(4)-(6); Ariz. Rev. Stat. § 13-3108(I)-(K).

FREQUENTLY ASKED QUESTIONS

Can a local jurisdiction stop private individuals from purporting to protect public safety or property during a demonstration?

During recent demonstrations, private militias and paramilitary organizations have shown up, often in military gear and heavily armed, engaging in unauthorized paramilitary and law enforcement functions, intimidating protesters, and escalating tensions that sometimes leads to violence. Laws in every state bar private individuals from engaging in military or law enforcement activity outside of governmental authority. Many states have criminal laws that prohibit this activity, and local authorities may arrest and prosecute individuals who violate them. Where there is reason to believe that paramilitary groups may attend a protest, jurisdictions may want to consider including prohibitions on paramilitary activity in their permits and in event restrictions applicable to anyone who attends the event. Jurisdictions also may want to consider involving state authorities, who may be able to make clear ahead of time that such actions are not allowed under state law. And where certain militias or paramilitary organizations have engaged in unlawful activity at demonstrations in the past, and present a threat of engaging in unlawful and unauthorized activity at future demonstrations, local authorities could consider seeking court-ordered injunctive relief under public nuisance laws. *See* Chapter II.B

My town has had protests turn violent in the past. Now the protesters want to come back again. What can I do to stop them from becoming violent again?

In general, governments may not prohibit First Amendment-protected activity altogether in order to prevent anticipated violence. The threat of violence may support time, place, and manner restrictions, including weapons bans (where allowed by state law), separation of protesters and counter-protesters, prohibitions on coordinated paramilitary activity, and other measures, but individuals who engage in unlawful conduct generally should be dealt with on an individual basis. Cancelling an event altogether is likely to fail strict scrutiny if the risk of impending harm could be mitigated through less drastic measure. *See* Chapter III.B.1.c

If a group of demonstrators has previously engaged in violence or broken laws and a locality has a basis to believe they will do so again, a municipality may be able to seek an injunction preventing that conduct as a public nuisance—though it could not stop the demonstrators from assembling and engaging in protected speech. *See* Chapter II.E

If a group of demonstrators has in the past followed a pattern in which their demonstrating has led to violent, illegal activity, that pattern may be relevant to whether and at what point officials may declare a gathering an unlawful assembly. Where a pattern repeats itself, officials may be able to intervene sooner to avoid a repeat of violence *See* Chapter II.C

When do actions at a demonstration become a public nuisance?

Officials in every state have the ability to abate public nuisances that interfere with the public health, safety, peace, and convenience. Generally, to be considered a nuisance, the conduct must create a significant interference with those rights, be prohibited by law, or be continuing or long-lasting and significantly affect those rights. For the most part, even somewhat disruptive demonstrations may not be prohibited as a public nuisance. But where, without permission from the local jurisdiction, groups engaged in demonstrations block public streets and sidewalks to a significant degree, prevent access to public facilities, or violate the law—presenting a significant hazard to public health and safety—localities may seek an order from a court that the demonstrators may not engage in the problematic conduct in the future. Governments should not use public nuisance law to attempt to silence unwanted speech, however, and even with a court order prohibiting unprotected conduct, demonstrators are entitled to engage in protected speech and assembly. *See* Chapter II.E

When is it OK to order an unruly demonstration to disperse?

Unlawful assembly laws in every state allow authorities to disperse protests and other assemblies where the group has become violent or poses a clear danger of imminent violence, or if the group is violating other laws in the process. Loud, boisterous protest activity is not enough to make a demonstration an unlawful assembly, nor is supporting an unpopular cause that is likely to cause a hostile reaction from onlookers. When the group assembled grows hostile and violent and threatens the safety of other people or their property, an official may declare an unlawful assembly and order the demonstrators to disperse. *See* Chapter II.C

If some demonstrators commit crimes, can a jurisdiction declare an unlawful assembly?

Generally, an unlawful assembly should not be declared if the only basis is that individual demonstrators commit crimes. In order for the assembly to be unlawful, the participants must share the intent to engage in unlawful or violent activity. The more appropriate way to address individual criminal activity is to arrest those who are committing crimes, while allowing the peaceful demonstrators to continue their event. *See* Chapters II.C and VII.4.

What should officials do in declaring an unlawful assembly?

If there is probable cause to believe that a demonstration has become unlawful, officials may declare an unlawful assembly and order the participants to disperse. Failing to disperse after being ordered to do so is a separate misdemeanor in many states. An officer dispersing an unlawful assembly should ensure that the order to disperse is loud enough to reach all of the crowd, and law enforcement should give participants a reasonable amount of time to comply with the order before arresting those who remain. In ordering participants to disperse, jurisdictions should think carefully about where the participants will go when they disperse in order to avoid merely moving conflicts elsewhere in the locality. Jurisdictions also should look to best practices about how to enforce a dispersal order, including what types of force are appropriate under the circumstances. *See* Chapters II.C and VII.4.

What are anti-mask laws?

Anti-mask laws prohibit people from wearing masks in order to conceal their identity. Some of these laws allow exceptions for wearing masks on Halloween, for theatrical productions, and the like; other laws ban wearing a mask only if it is done with intent to, for example, intimidate or threaten another person or while engaged in the commission of a crime. Anti-mask laws generally have been enacted in response to outbreaks of violence by masked groups, such as the Ku Klux Klan. Anti-mask laws generally serve the government's interest in protecting public safety by preventing the anonymous commission of crimes and allowing the identification and apprehension of wrongdoers, but in times of public health emergencies such as the COVID-19 pandemic, anti-mask laws should be suspended in the interest of public safety. *See* Chapter II.D

Should anti-mask laws be enforced during a pandemic?

During the COVID-19 pandemic, public health officials have recommended—and many states require—that people wear masks in public places and where they cannot maintain adequate distancing from others, as is often true of public demonstrations. Many states therefore have suspended enforcement of their anti-mask laws, and it is unlikely that anyone wearing a mask for health reasons would be prosecuted under anti-mask laws still in effect. *See* Chapter VI

Are anti-mask laws constitutional?

People seeking to protest anonymously have raised First Amendment challenges to anti-mask laws. Most appellate courts have upheld the constitutionality of these laws, so there is a strong argument that these laws are constitutional. A few courts have found anti-mask laws unconstitutional as applied to certain factual scenarios. These cases turn on circumstance-specific issues, including the reasons the demonstrators seek to wear masks and the basis for the jurisdiction's concerns that the demonstrators will engage in violence. *See* Chapter II.D