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#PROTESTERSRIGHTSMATTER: THE CASE AGAINST INCREASED CRIMINAL PENALTIES FOR PROTESTERS BLOCKING ROADWAYS

Caroline M. Moos*

I. Introduction

With the increased prevalence of protests involving roadway blocks, some have called for stronger penalties for protesters who engage in this disruption.¹ Director of the Rudin Center for Transportation at New York University, Mitchell Moss, opined that, “political protest today is now almost totally focused on transportation systems, whether it’s a road, a bridge, in some cases a tunnel – rather than buildings.”² With protests in July 2016 in St. Paul, mere blocks from Mitchell Hamline School of Law, local communities must consider protesters’ actions and those consequences with added gravitas. By reviewing the historical background for roadway blocking protests, the recent increase in protests, available penalties and consequences, and the motivations of protesters, we can better understand the landscape regarding urban roadway protests. While it seems to be in the best interest of public safety to prevent roadway blocking protests, increasing criminal penalties would not have this intended effect and should be avoided for this purpose.

II. BACKGROUND

Protests and demonstrations have been a common thread throughout American history, oftentimes blocking traffic and roadways. Roadways are a common target for protests because they have significant potential for disruption and thus, attention to the protesters’ cause. For almost 200 years, “blocking city streets has been [a] . . . tactic since there were urban protests.”³ Research has shown that more than half of the urban protests related to the Black Lives Matter movement that occurred from November 2014 to May 2015 in the United States focused on shutting down roadways.⁴

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¹ Clay Masters, *Bills Across The Country Could Increase Penalties For Protesters*, Minnesota Public Radio (Jan. 31, 2017), <http://www.npr.org/2017/01/31/512636448/bills-across-the-country-could-increase-penalties-for-protesters>.

² Emily Badger, *Why Highways Have Become the Center of Civil Rights Protest*, WASH. POST (July 13, 2016), <https://www.washingtonpost.com/news/wonk/wp/2016/07/13/why-highways-have-become-the-center-of-civil-rights-protest/>.

³ Sarah Goodyear, *In Protests, Who Owns the Highways?*, CITYLAB FROM THE ATLANTIC (Oct. 27, 2014), <http://www.citylab.com/politics/2014/10/in-protests-who-owns-the-highways/381963>.

⁴ Badger, *supra* note 2.

The prevalence of roadway shutdowns shows that instances of these demonstrations are certainly not unique to the Minneapolis-St. Paul metro area. Nathan Connolly, an historian at Johns Hopkins University, compared blocking a highway to blocking a city's artery, creating a blockage akin to a heart attack.⁵ "Block a highway, and you command a lot more attention than would a rally outside a church or city hall — from traffic helicopters, immobile commuters, [and] alarmed officials."⁶ While the impact of an "artery" blocking protest is significant, and often the motivation, there is concern about the frequency of these blockages and their potential threat to public safety.

A. MARCH TO SELMA

One of the most famous and celebrated protests in American history was Dr. Martin Luther King Jr.'s march for civil rights from Selma to Montgomery in 1965. Prior to that lauded final march, there were several violent clashes that ended previous marches.⁷ Dr. King worked with the authorities to get final approval for group's movement which included necessary security detail to prevent more violence.⁸ "This Selma to Montgomery march was the culmination of a stage of the African-American freedom struggle . . . But it was also the last major racial protest of the 1960s to receive substantial white support."⁹

Recently honored in a movie garnering significant accolades, Dr. King's movement started with a crowd of 3,300 that swelled to 25,000 by the end in Montgomery.¹⁰ Fifty years in retrospect, American society celebrates Dr. King's demonstration and embraces the Civil Rights Movement. "The law is clear that the right to petition one's government for the redress of grievances may be exercised in large groups and these rights may be exercised by marching, even along public highways."¹¹ However, thinking of the current protests garnering negative attention, one cannot help but wonder if our modern day protests will be similarly celebrated by societies in the future despite the vitriol they evoke now?

B. MODERN PROTESTS

There are countless examples of modern protests that have blocked roadways to gain attention for their cause. The Occupy Wall Street Movement, born in 2011, seemed to reignite the public's thirst for protests and occupations, whereby supporters would demand change in exchange for their evacuation of an

⁵ *Id.*

⁶ *Id.*

⁷ *Civil Rights Movement*, THE HISTORY CHANNEL (2009), <http://www.history.com/topics/black-history/civil-rights-movement>.

⁸ *Id.*

⁹ *Id.*

¹⁰ Rick Harmon, *Timeline: The Selma-to-Montgomery Marches*, *USA Today* (March 6, 2015), <http://www.usatoday.com/story/news/nation/2015/03/05/black-history-bloody-sunday-timeline/24463923/>.

¹¹ *Id.*

inconvenient space in which they have occupied.¹² The demonstrations seem to be happening more frequently in the past few years with the growth of the Black Lives Matter Movement. In January 2015, protests in Boston¹³ and Seattle¹⁴ blocked major interstates and disrupted traffic; drawing sharp criticism and enthusiastic support from people across the nation. In November 2015, La Jolla, California experienced a rush hour blocking protest.¹⁵ In Minnesota, protests were precipitated by fatal police shootings of two African-American men: Jamar Clark¹⁶ in November 2015 and Philando Castile¹⁷ in July 2016. Protesters hoping to draw attention to these incidents blocked roads to and from the Minneapolis-St. Paul International airport briefly,¹⁸ occupied the road in front of the Minnesota Governor's residence for several weeks despite attempts at dispersal,¹⁹ and barricaded both Interstate 94 and Interstate 35-W each for hours at a time.²⁰ Even more recently, protests against the North Dakota Access Pipeline²¹ and President Donald Trump's victory²² have blocked roadways and garnered national attention to issues outside of the Black Lives Matter Movement. In light of these frequent and significant instances of disruption, there has been frustration and public outcry over the perceived lack of consequences for these protesters.

¹² Jamie Lalinde et al., *Revolution Number 99*, VANITY FAIR (Feb. 2012), <http://www.vanityfair.com/news/2012/02/occupy-wall-street-201202>.

¹³ Peter Schworm et al., *Highway Protesters had Brushes with the Law: Many Blocking I-93 on Thursday were Part of the Occupy Effort*, BOSTON GLOBE (Jan. 16, 2015), <https://www.bostonglobe.com/metro/2015/01/16/lawmakers-look-toughen-penalties-against-highway-protests/EoZQmQGF7jKR6cDtqGVTYM/story.html>.

¹⁴ Brandi Kruse, *'Black Lives Matter' Protesters Who Blocked Traffic Want Criminal Cases Thrown Out*, Q13 FOX (June 18, 2015), <http://q13fox.com/2015/06/18/black-lives-matter-protesters-want-criminal-cases-thrown-out/>.

¹⁵ Allison Ash, *CHP Explains Why Officers Didn't Arrest I-5 Protesters Who Blocked Rush Hour Traffic*, SCRIPPS MEDIA ABC 10 NEWS (Nov. 26, 2014), <http://www.10news.com/news/chp-explains-why-officers-didnt-arrest-i-5-protesters-who-blocked-rush-hour-traffic-112614>.

¹⁶ Associated Press, *Black Lives Matter Airport Protesters Shouldn't Be Charged, Mark Dayton Says*, PIONEER PRESS (Feb. 9, 2016), <http://www.twincities.com/2016/02/09/black-lives-matter-minneapolis-st-paul-airport-mark-dayton/>.

¹⁷ Riham Feshir, *Police Reopen Summit Avenue Outside Governor's Mansion*, MPR NEWS (July 18, 2016), <https://www.mprnews.org/story/2016/07/18/police-reopen-street-outside-governors-mansion>.

¹⁸ Associated Press, *supra* note 16.

¹⁹ Riham, *supra* note 17.

²⁰ Paul Walsh & Tim Harlow, *Protesters Shut Down I-35W in Minneapolis During Rush Hour; 41 Arrested*, STAR TRIB. (July 13, 2016), <http://www.startribune.com/protesters-block-i-35w-in-minneapolis/386622281/>.

²¹ Jack Healy, *North Dakota Oil Pipeline Battle: Who's Fighting and Why*, N.Y. TIMES (Aug. 26, 2016, updated Dec. 2, 2016), <http://www.nytimes.com/2016/11/02/us/north-dakota-oil-pipeline-battle-whos-fighting-and-why.html>.

²² Pervaiz Shallwani, Kate King & Trisha Thadani, *Protests Against President-Elect Donald Trump Continue Across the U.S.*, WALL STREET J. (Nov. 13, 2016), <http://www.wsj.com/articles/donald-trump-protests-continue-in-u-s-person-injured-in-portland-1478955985>.

III. ANALYSIS

Understanding what rights protesters have and the consequences for acting beyond them is essential to clarify whether additional consequences may be necessary.

A. CONSTITUTIONAL RIGHT TO FREE ASSEMBLY

In order to understand what consequences protesters may face, one must first understand what rights they are afforded at a minimum. The First Amendment guarantees that, “Congress shall make no law . . . abridging the freedom of speech; or the right of the people peaceably to assemble . . .”²³ Since the court considers free speech a fundamental right, the government would need to show that they have a compelling state interest in enacting legislation to abridge it.²⁴ A compelling state interest could be an interest in public safety, for example.²⁵ Second, the government must show that the legislation is narrowly tailored to preserve their interest and that there are no less restrictive means to achieve it.²⁶ Narrowly tailored means that, “[i]f a less restrictive alternative would serve the Government’s purpose, the legislature must use that alternative.”²⁷ In summary, the right to free speech is so important that it is difficult to pass legislation to limit it. “These rights rest on firmer foundation.”²⁸

While limiting free speech through legislation is difficult, it is not impossible. The courts have found that, “[a]ccess to the streets, sidewalks, parks, and other similar public places . . . for the purpose of exercising (First Amendment rights) cannot constitutionally be denied broadly. . . .”²⁹ However, courts have ruled that regulating the content of speech is unconstitutional but the government may regulate conduct or “non-speech” elements.³⁰ Additionally,

[T]he government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions ‘are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant

²³ U.S. CONST. amend. I.

²⁴ See *Thomas v. Collins*, 323 U.S. 516, 530 (1945) (“[T]he indispensable democratic freedoms secured by the First Amendment. . . That priority gives these liberties a sanctity and a sanction not permitting dubious intrusions. And it is the character of the right, not of the limitation, which determines what standard governs the choice.”).

²⁵ See *id.* (“ . . . [W]hatever occasion would restrain orderly discussion and persuasion, at appropriate time and place, must have clear support in public danger, actual or impending. Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation.”).

²⁶ *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 813 (2000).

²⁷ *Id.*

²⁸ *Collins*, 323 U.S. at 530.

²⁹ *Grayned v. City of Rockford*, 408 U.S. 104, 117 (1972) (internal quotation marks omitted) (omission and alteration in original).

³⁰ *United States v. O’Brien*, 391 U.S. 367, 376 (1968).

governmental interest, and that they leave open ample alternative channels for communication of the information.”³¹

In short, public assemblies may be reasonably regulated.³²

These regulations typically fall within the purview of municipal jurisdictions. Some jurisdictions will allow the public to block traffic or close down a street if they obtain a required permit.³³ For example, in St. Paul, permits are available by application and can be approved or denied based on a series of factors listed in the municipal code.³⁴ In addition, a permit is often required in order to use “sound amplifying” equipment or for gatherings in “certain designated” areas.³⁵

While the constitutional depiction of a peaceful demonstration evokes a certain type of activity, in reality, “assemblies are inevitably messy and inconvenient” as is their intent.³⁶ Assemblies necessarily “create a risk of disorder.”³⁷ Despite this risk, peaceful assemblies are protected and allowed under the First Amendment. Frustration comes when the protests lose their peaceful character. “[P]rotests or assemblies cannot be dispersed on 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.”³⁸

In an effort to prevent violence and maintain order, police officers may want to attempt to contain protests at the outset. However, “[e]njoining or preventing First Amendment activities before demonstrators have acted illegally or before the demonstration poses clear and present danger is presumptively a First Amendment violation.”³⁹

In this age of social media, there are a number of ways to take the pulse of and monitor public opinion with regard to an issue. Social media is often used to organize groups, including rallies and protests. Police were recently rebuffed by Twitter for attempting to use a tool that monitored keywords related to

³¹ Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (quoting Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984)).

³² See *Grayned*, 408 U.S. at 104.

³³ ST. PAUL, MN, MUN. ORDINANCE § 366A.01.

³⁴ *Id.*

³⁵ *Know Your Rights: Demonstrations and Protests*, ACLU, https://www.aclu.org/sites/default/files/field_pdf_file/kyr_protests.pdf.

³⁶ Tabatha Abu El-Haj, *All Assemble: Order and Disorder in Law, Politics, and Culture*, 16 U. PA. J. CONST. L. 949, 951 (Apr. 2014).

³⁷ *Id.*

³⁸ *Collins v. Jordan*, 110 F.3d 1363, 1371 (9th Cir. 1996) (internal citation marks omitted) (omission in original).

³⁹ *Id.*

likely protests in an effort to find protests before they happen.⁴⁰ The tool “Media Sonar” operates “social media surveillance software” that tracks keywords like “Mikebrown” and “Blacklivesmatter” and sells access to police departments for “thousands of dollars.”⁴¹ Twitter blocked Media Sonar’s API keys due to the recent discovery that it markets itself as a “way to ‘avoid the warrant process when identifying social media accounts for particular individuals.’”⁴² It is not disclosed how common use of this tool was among police departments but it is alarming that it is marketed as able to sidestep Fourth Amendment rights.⁴³ Again, this monitoring tool may have been intended to be used by police as a preventative measure to immediately respond to any indication of a protest.⁴⁴

B. FREE ASSEMBLY RIGHTS ASSERTED

The courts have articulated some boundaries of the right to free assembly over the years but have not articulated bright line rules. This provides protesters with some expectations of whether their actions could be criminally culpable. Generally, when demonstrations are peaceful and do not obstruct traffic but the demonstrations attract hostile spectators, the Supreme Court of the United States has upheld the Constitutional right of free assembly and reversed criminal convictions.⁴⁵

Courts have invalidated statutes as unconstitutional due to vagueness or overbreadth, because the statutes could be applied in a discriminatory manner, despite states having a general right to regulate traffic and the streets.⁴⁶ In contrast, the court has upheld convictions where demonstrators blocked traffic.⁴⁷ Further confusing matters, the court has allowed statutes that regulate picketing near courthouses since the court found the statute’s intent was to impact the “administration of justice.”⁴⁸

⁴⁰ Timothy J. Seppala, *Twitter Says No to Law Enforcement Protest Policing Tool*, MSN NEWS (Dec. 11, 2016), <http://www.msn.com/en-us/news/technology/twitter-says-no-to-law-enforcement-protest-policing-tool/ar-AAIpV5d?li=AA4Zoy&ocid=spartanntp>.

⁴¹ *Id.*

⁴² *Id.* (citation omitted).

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ John E. Theuman, *Annotation: Right of Petition and Assembly under Federal Constitution’s First Amendment--Supreme Court Cases*, 86 L. Ed. 2d 758 (2nd ed. 2012).

⁴⁶ *Id.*

⁴⁷ See *Adderley v. Florida*, 385 U.S. 39, 48 (1966). (“The United States Constitution does not forbid a State to control the use of its own property for its own lawful nondiscriminatory purpose.”)

⁴⁸ See *Cox v. Louisiana*, 379 U.S. 559, 567 (1965). (“Louisiana . . . has the right to construe its statute to prevent parading and picketing from unduly influencing the administration of justice at any point or time in its process, regardless of whether the motives of the demonstrators are good or bad.”)

With the firm, but grey, foundation of these fundamental rights, we turn to an exploration of potential consequences for having purportedly acted outside of those rights. There are a number of criminal provisions under which individuals could be prosecuted for a protest blocking a roadway. Depending on the facts of the situation, charges ranging from a misdemeanor to a felony may be appropriate and are available at the discretion of the arresting officer and the prosecuting attorneys.

i. Minnesota Statutes

Common charges in Minnesota for individuals participating in a roadway blocking protest include: (a) unlawful assembly, (b) disorderly conduct, (c) trespassing, (d) resisting arrest, (e) assault, (f) riot, and (g) pedestrian interference.⁴⁹ It is worth noting that protesters may be charged with one or some combination of the following charges.

a. Unlawful assembly

Unlawful assembly is a misdemeanor meaning it is punishable by no more than 90 days in confinement and up to \$1,000 in fines, or both.⁵⁰ Unlawful assembly occurs when:

[T]hree or more persons assemble, . . . if the assembly is: (1) with intent to commit any unlawful act by force; or (2) with intent to carry out any purpose in such manner as will disturb or threaten the public peace; or (3) without unlawful purpose, but the participants so conduct themselves in a disorderly manner as to disturb or threaten the public peace.⁵¹

In *State v. Hipp*, a group of seven protesters were among those arrested for picketing a restaurant.⁵² The demonstration blocked roads and “impeded all vehicular traffic in the area.”⁵³ The protesters were convicted in municipal court of unlawful assembly and appealed, challenging the constitutionality of the statute for overbreadth or vagueness.⁵⁴ The court upheld the statute because it was not “so vague that a person of common understanding” would be confused as to its meaning.⁵⁵

b. Disorderly conduct

Disorderly conduct is also a misdemeanor and is committed when, “in a public or private place, including on a school bus, knowing, or having reasonable grounds to know that it will, or will tend to, alarm, anger

⁴⁹ See Daniel Taylor, *Protesters Blocking Streets: What Are the Legal Consequences?*, FINDLAW BLOTTER (Dec. 8, 2014), <http://blogs.findlaw.com/blotter/2014/12/protesters-blocking-streets-what-are-the-legal-consequences.html>.

⁵⁰ MINN. STAT. § 609.02, subdiv. 3.

⁵¹ MINN. STAT. § 609.705.

⁵² 213 N.W.2d 610, 612 (Minn. 1973).

⁵³ *Id.* at 616.

⁵⁴ *Id.* at 613.

⁵⁵ *Id.* at 615.

or disturb others or provoke an assault or breach of the peace”⁵⁶ when one: “(1) engages in brawling or fighting; or (2) disturbs an assembly or meeting, not unlawful in its character; or (3) engages in offensive, obscene, abusive, boisterous, or noisy conduct or in offensive, obscene, or abusive language tending reasonably to arouse alarm, anger, or resentment in others.”⁵⁷

In *Matter of Welfare of S.L.J.*, the defendant said “fuck you pigs” to police officers as they walked away after being questioned about a crime.⁵⁸ The defendant was charged pursuant to part (c) under the disorderly conduct statute, as “fuck you pigs” could be considered abusive or obscene language.⁵⁹ The court admitted that this subdivision was unconstitutional on its face due to the content restrictions but construed it more narrowly to include only “fighting words” or incitement speech.⁶⁰ Since this comment was neither, the court remarked that the police “overreacted” and reversed the conviction.⁶¹ In a protest situation, it is possible that the same narrower definition of the “obscene or abusive language”⁶² to include only incitement speech would be applied but that has yet to be tested.

c. Trespassing

Trespassing is also generally a misdemeanor and can be committed in a variety of specific ways but for our purposes, it usually occurs when a person intentionally enters an area or property without consent.⁶³

In *State v. Occhino*, the defendant was at a police station expressing frustration, eventually becoming agitated and striking an officer.⁶⁴ Despite being asked to leave the station four times and repeated attempts to forcibly escort him out, he refused to vacate the premises.⁶⁵ The court acknowledged that the police station is a public space where he had the right to be initially, but the court found that refusing to comply with orders to leave the station amounted to criminal trespass.⁶⁶ The court affirmed the conviction.⁶⁷ In

⁵⁶ MINN. STAT. § 609.72, subdiv. 1.

⁵⁷ *Id.*

⁵⁸ 263 N.W.2d 412, 415 (Minn. 1978).

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.* at 420 n.7.

⁶² MINN. STAT. § 609.72.

⁶³ MINN. STAT. § 609.605.

⁶⁴ 572 N.W.2d 316, 318 (Minn. Ct. App. 1997).

⁶⁵ *Id.*

⁶⁶ *Id.* at 319.

⁶⁷ *Id.* at 321.

protest situations, which are often conducted in public places, failure to comply with police requests to leave an area is a common occurrence and thus, this is a common charge for protesters.

d. Resisting Arrest

Resisting arrest or obstructing the legal process can range from a misdemeanor, like the others, to a felony depending on the circumstances.⁶⁸ The most serious penalty under this charge would be punishable by up to five years of confinement or up to a \$10,000 fine, or both.⁶⁹

In *State v. Bono*, the defendant was participating in a protest, and the police witnessed him jab a supposed metal object into a tire on a bus.⁷⁰ The police grabbed the defendant, attempting to arrest him, but the other protesters swelled around them and freed defendant who evaded arrest by blending into the crowd.⁷¹ Later, he was apprehended, charged, and convicted with resisting arrest under a provision in this statute⁷² and felony escape from custody.⁷³

In the current Minnesota legislative session, there is proposed house bill called the “Minnesota Public Safety Personnel Protection Act” with the intended purpose of increasing penalties for obstructing emergency response personnel.⁷⁴ Conceivably, if passed, this expansion could provide a mechanism for additional charges against protesters who obstruct emergency responders in the course of a demonstration. For example, if a fire engine is unable to get to a burning vehicle at the center of a protest blockade, it would meet the requirements of the statute and allow for protesters to be charged accordingly where they might not have been culpable before.

e. Assault

Assault covers a wide range of offenses to another person. The most serious is first-degree assault whereby one “assaults another and inflicts great bodily harm” which is a felony punishable by up to 20 years confinements, up to \$30,000 in fines, or both.⁷⁵ First-degree also includes an enumerated provision

⁶⁸ MINN. STAT. § 609.50, subdiv. 2.

⁶⁹ MINN. STAT. § 609.50, subdiv. 2(1).

⁷⁰ No. A09-1968, 2010 WL 5071259, at *1 (Minn. Ct. App. Dec. 14, 2010).

⁷¹ *Id.*

⁷² *Id.* at *2.

⁷³ MINN. STAT. § 609.485, subivs. 2(1) and 4(a)(1).

⁷⁴ H.B. 34, 90th Leg., (MN 2017).

⁷⁵ MINN. STAT. § 609.221, subdiv. 1.

for using “deadly force” against a police officer with the same potential consequences.⁷⁶ Second-degree assault includes assault of another with a deadly weapon which is a felony punishable by up to 7 years of confinement, up to \$14,000 in fines, or both; if serious bodily harm is inflicted with the weapon, the available punishment increases to 10 years and \$20,000.⁷⁷ Third-degree assault includes assault and serious bodily harm and is a felony punishable by up to five years confinement, \$10,000 in fines, or both with a specific provision if the victim is a child under four years old.⁷⁸ Fourth-degree assault includes assault against a number of enumerated public officials including police officers and medical personnel.⁷⁹ Depending on the circumstances, this is a felony and is punishable by up to \$6,000, or some term of confinement generally under 3 years, or both.⁸⁰ The confinement terms depend on the type of victim and the assault.⁸¹ Fifth-degree assault would be the most likely charge for a protester and is generally a misdemeanor committed by causing imminent fear of bodily harm or intentionally inflicting bodily harm on another.⁸²

At the July 2016 Interstate 94 protests in Minnesota, a police officer was hit in the head with a piece of concrete, possibly dropped by an individual from an overhead pedestrian bridge.⁸³ He suffered a serious injury, a spinal compression injury. Had the police officers been able to identify the individual who had done this, assault charges against him for this action would be likely.

f. Riot

Riot charges have three degrees of severity.⁸⁴ Third-degree is the least serious and occurs “when three or more persons assembled disturb the public peace by an intentional act or threat of unlawful force or violence to person or property.”^{85,86} This is a misdemeanor punishable by up to a year confinement,

⁷⁶ MINN. STAT. § 609.221, subdiv. 2.

⁷⁷ MINN. STAT. § 609.222.

⁷⁸ MINN. STAT. § 609.223.

⁷⁹ MINN. STAT. § 609.2231.

⁸⁰ MINN. STAT. § 609.2231, subdiv. 1(c).

⁸¹ MINN. STAT. § 609.2231.

⁸² MINN. STAT. § 609.224, subdiv. 1.

⁸³ Josh Verges, *Police Officer Hit by Concrete at I-94 Protest Cleared for Work, Did Not Break Vertebrae*, PIONEER PRESS (July 12, 2016), <http://www.twincities.com/2016/07/12/police-officer-hit-by-concrete-at-protest-did-not-break-his-back/>.

⁸⁴ MINN. STAT. § 609.71.

⁸⁵ Criminal damage to property is a similar charge as compared to third-degree riot but does not require three of more people to be applicable. See MINN. STAT. § 609.595. There are four degrees of charging to criminal property damage, ranging from misdemeanor to felony at its most severe. *Id.*

⁸⁶ MINN. STAT. § 609.71, subdiv. 3.

\$1,000 in fines, or both.⁸⁷ The protesters blocking Interstate 94 in St. Paul, Minnesota in July 2016, were all charged with third-degree riot.⁸⁸ Second-degree riot is applicable when there are dangerous weapons involved, and first-degree riot requires deadly weapons and a death to result from the situation.⁸⁹ Both are felonies punishable by up to five and twenty years in confinement, or up to \$10,000 and \$35,000 in fines, or both, respectively.⁹⁰

In *Binion v. City of St. Paul*, the defendant was participating in a protest of a political convention and was walking in an organized, permitted march.⁹¹ Police were warned about a woman with two cement bricks attached to her vest.⁹² The defendant matched the physical description of this woman.⁹³ The police assumed that the woman intended to use them to start a riot.⁹⁴ Police descended on the defendant since she matched the description and arrested her for attempted second-degree riot.⁹⁵ The court ruled on other matters regarding Fourth Amendment rights in the case, but this case serves to illustrate the circumstantial hazards that may be uniquely present when protesting.⁹⁶ Further, it serves as a reminder that there is the possibility of an attempt or conspiracy attachment on any of these possible charges, even if a riot, for instance, does not result.

g. Pedestrian Interference

A charge of pedestrian interference is a misdemeanor, which occurs when someone crosses a roadway not at a marked crosswalk and does not yield to traffic.⁹⁷ This is the same provision under which someone may be ticketed for jaywalking. Given that comparison for context, this is likely the least damaging charge that may result, if any, from a protest.

⁸⁷ *Id.*

⁸⁸ Cody Nelson, *46 Protesters Charged with 3rd Degree Riot in I-94 Shutdown*, MPR NEWS (July 11, 2016), <https://www.mprnews.org/story/2016/07/11/interstate-i94-shutdown-protest-charges-philando-castile>.

⁸⁹ MINN. STAT. § 609.71.

⁹⁰ *Id.*

⁹¹ 788 F. Supp. 2d 935, 938 (D. Minn. 2011).

⁹² *Id.* at 939.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.* at 942.

⁹⁶ *Id.*

⁹⁷ MINN. STAT. § 169.21.

ii. Other States

In other states, there are similar statutory provisions under which protesters may be prosecuted.⁹⁸ Some states have specific provisions that target unlawful protesters in an effort to prevent traffic obstruction. For example, in Missouri, there is a “failure to disperse” statute that was used widely in 2014 to arrest at least 125 people protesting the death of Michael Brown at the hands of police.⁹⁹ This law forbids knowingly failing or refusing to obey a lawful command to leave an unlawful assembly or riot and it is a felony.¹⁰⁰ However, there were concerns this law would be found unconstitutionally overbroad so the county amended the charges for 95 of these individuals to a lesser charge of misdemeanor interference, essentially obstructing justice.¹⁰¹

Louisiana has specific statutory provisions to punish those that obstruct a “highway of commerce,” in two degrees of severity.¹⁰² “Simple obstruction” is a misdemeanor whereby the “intentional or criminally negligent placing of anything or performance of any act on any railway, railroad, navigable waterway, road, highway, thoroughfare, or runway of an airport, which will render movement thereon more difficult.”¹⁰³ The felony counterpart to this provision is the “aggravated obstruction of a highway of commerce” providing a felony level offense for the “intentional or criminally negligent placing of anything or performance of any act on any railway, railroad, navigable waterway, road, highway, thoroughfare, or runway of an airport, wherein it is foreseeable that human life might be endangered.”¹⁰⁴

iii. Federal Charges

Similar federal charges are available in nearly every category as the aforementioned Minnesota Statutes, often with the added requirement of having occurred in a location subject to federal jurisdiction or that the accused individuals have used some “facility of interstate or foreign commerce” to carry out their action.¹⁰⁵ Using its Commerce Clause power, Congress has created mechanisms of federal enforcement for unlawful protests affecting interstate commerce. In 1968, Congress enacted the Federal Anti-Riot

⁹⁸ See, e.g., LA. STAT. ANN. § 14:97 (2014); Mo. Rev. Stat. § 574.060 (2017).

⁹⁹ Mariah Stewart & Ryan J. Reilly, *Dozens of Ferguson Protesters Were Charged Under A Bad Law. Now They Could Be Arrested Again*, HUFFINGTON POST (June 1, 2016), http://www.huffingtonpost.com/entry/ferguson-protesters-st-louis-county-municipal-court_us_574855bfe4b055bb1171e652.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² LA. STAT. ANN. § 14:97 (2014).

¹⁰³ LA. STAT. ANN. § 14:97(A) (2014).

¹⁰⁴ LA. STAT. ANN. § 14:96(A) (2014).

¹⁰⁵ 18 U.S.C. § 2101(a).

Act¹⁰⁶ and the Federal Civil Disobedience Act¹⁰⁷ in reaction to civil rights era protest activities. These charges have been modified over the years and remain available to federal prosecutors today. The elements of the federal riot provision mirror the Minnesota state statutes but include the requirement that the incident occurs within federal jurisdiction, i.e. in more than one state or on federal land.¹⁰⁸ For instance, a protest site for the Dakota Access Pipeline (DAPL) protesters was located on federally owned land and, if arrested and charged, these federal provisions may be applicable to their actions.¹⁰⁹

Individuals may be pursued under both state and federal statutory provisions, if applicable. To illustrate, a DAPL protester was arrested following an incident on federal land where she allegedly discharged a firearm twice while officers were attempting to arrest her.¹¹⁰ Originally, state's murder charges were filed in the county of origin, but those charges were later dismissed in favor of the federal case, which included the charge of possession of a firearm by a felon.¹¹¹ The government may seek grand jury indictment so that additional, more serious charges, may be filed in the future as well.¹¹²

The federal civil disobedience provisions are unique as compared to Minnesota state law provisions and penalties include a fine and/or up to five years imprisonment.¹¹³ Federal law provides that:

Whoever commits or attempts to commit any act to obstruct, impede, or interfere with any fireman or law enforcement officer . . . during the commission of a civil disorder which in any way or degree obstructs, delays, or adversely affects commerce or the movement of any article or commodity in commerce or the conduct or performance of any federally protected function.¹¹⁴

Federal charges for disorderly conduct are available that mirror the Minnesota state statute provisions but, again, are available if a protest should occur in a location outside the jurisdiction of Minnesota.¹¹⁵

¹⁰⁶ *Id.*

¹⁰⁷ 18 U.S.C. § 231.

¹⁰⁸ Compare MINN. STAT. § 609.71 with 18 U.S.C. § 2101(a).

¹⁰⁹ *Factbox: The Dakota Access Pipeline's Long Journey*, REUTERS (Dec. 5, 2016), <http://www.reuters.com/article/us-north-dakota-pipeline-facts-factbox-idUSKBN13U1V2>.

¹¹⁰ Caroline Grueskin, *Protester Accused of Shooting at Police Charged in Federal Court*, BISMARCK TRIB. (Nov. 28, 2016), http://bismarcktribune.com/news/local/crime-and-courts/protester-accused-of-shooting-at-police-charged-in-federal-court/article_a67db6aa-5979-5392-b0aa-d1417eab3730.html.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ 18 U.S.C. § 231(a)(3).

¹¹⁴ *Id.*

¹¹⁵ 36 C.F.R. § 2.34.

Another potential charge could come from the US Patriot Act under the umbrella of Domestic Terrorism but no protesters have been officially charged with such at this time.¹¹⁶

iv. Likelihood of Legal Consequences

Often upon arrival at a protest, police will request protesters to disperse. If the protesters follow police orders, there are often no consequences or arrests made. Many times, the protesters scatter more quickly than officers can arrive on scene so there is no longer a disturbance to disperse.

Even if protesters are taken into custody, the likelihood of charges is low. In the Boston Interstate-93 protest in January 2015, only one of the 41 individuals initially arrested paid a \$50 civil fine after all criminal charges were dropped.¹¹⁷ More than 200 people were arrested in Baltimore, Maryland but authorities had to let over half of them go.¹¹⁸ Since the protesters were arrested amid such “bedlam” and chaos, the officers found it nearly impossible to document specific charges and reasons for holding each person.¹¹⁹ In the Los Angeles protests, more than 300 were initially taken into custody but only 27 were charged or “fewer than 9% of those arrested.”¹²⁰

While the Occupy Wall Street protests barely predated the recent Black Lives Matter Movement, the district attorney’s office decided against charging many of the arrested protesters, stating that they would bring only the cases that met their “high standard of proof.”¹²¹ Following a big Occupy protest in New York City, 2,812 individuals were arrested but only “49 were convicted of minor crimes,” fewer than 2%.¹²² “The stiffest sentence was 30 days in jail, which a few people served—the rest of the sentences were extremely light, typically one to five days of community service.”¹²³ In the Oakland, California

¹¹⁶ *How the USA Patriot Act Redefines “Domestic Terrorism,”* ACLU, <https://www.aclu.org/other/how-usa-patriot-act-redefines-domestic-terrorism?redirect=national-security/how-usa-patriot-act-redefines-domestic-terrorism> (last visited March 16, 2017).

¹¹⁷ Schworm, *supra* note 13.

¹¹⁸ Luke Broadwater et al., *Half Those Arrested in Riot Released without Charges*, BALT. SUN (Apr. 29, 2015), <http://www.baltimoresun.com/news/maryland/baltimore-city/bs-md-ci-riot-released-20150429-story.html>.

¹¹⁹ *Id.*

¹²⁰ Kate Mather, *Charges Dismissed Against Black Lives Matter Protesters Who Blocked L.A. Freeway*, L.A. TIMES (May 12, 2016), <http://www.latimes.com/local/lanow/la-me-protest-charges-dropped-20160512-snap-story.html>.

¹²¹ Paul T. Rosynsky, *Most Arrested in Occupy Oakland Protests Never Charged*, MERCURY NEWS (Oct. 24, 2012), <http://www.mercurynews.com/2012/10/24/most-arrested-in-occupy-oakland-protests-never-charged/>.

¹²² Shaya T. Mohajer, *Thousands of Occupy Protesters Were Arrested. But Were They Guilty of Crimes?*, TAKE PART (Sept. 12, 2013), <http://www.takepart.com/article/2013/09/12/thousands-occupy-protesters-were-arrested-how-many-were-guilty-any-crime>.

¹²³ *Id.*

Occupy protests, 737 individuals were arrested but only 109 were charged resulting in only 32 convictions and 22 dismissals.¹²⁴

In January 2017, a judge dismissed gross misdemeanor riot charges against 38 people participating in the July 2016 protest on Interstate 94 in St. Paul.¹²⁵ The primary reason was a lack of evidence; while there were bottles and rocks thrown at police at the protest, the state failed to present evidence showing that the 38 defendants were the throwers.¹²⁶ “[S]imply being at the protest and ignoring orders to leave the freeway does not constitute active rioting.”¹²⁷ The judge further stated, “Even if Defendant was aware of the violence toward law enforcement personnel, this is insufficient to support a riot third degree charge.”¹²⁸

Understandably, reactions to the dismissals were mixed. One protester, present in court, said, “[T]o have the riot charges dropped is huge. It shows protesting works.”¹²⁹ A police spokesperson said,

We certainly support people’s rights to protest and have their voices heard, but when their actions include violence, that is where we draw the line. Every time the people are on Interstate 94 and disregarded a lawful order for to leave the freeway, they extended the amount of time our officers were put in harm’s way.¹³⁰

A former Ramsey County attorney, not involved in the case, explained that this illustrated, “how difficult it is when you have a large number behaving in a disruptive way and you obviously can’t prosecute the group and . . . it is very difficult in this kind of chaotic situation to develop evidence specifically against any individual.”¹³¹

The judge admitted that there is sufficient evidence to uphold the lesser charge of misdemeanor unlawful assembly, should the prosecutor pursue them.¹³² Not all protesters from this demonstration were given relief with this ruling. Up to eight other protesters have plead guilty to some charge in their matters before this dismissal.¹³³ Two counts of second-degree riot against one other protester have not been dismissed and will proceed with initial hearings.¹³⁴

¹²⁴ Rosynsky, *supra* note 121.

¹²⁵ Randy Furst, *Riot Charges Thrown Out Against Castile Protesters on I-94 in July*, Star Trib. (Jan. 12, 2017), <http://www.startribune.com/judge-throws-out-riot-charges-against-july-freeway-protesters/410459215/>.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.* (internal quotation marks omitted) (omission in original).

¹³² *Id.*

¹³³ *Id.*

Some observers note the lack of conversion from arrests to criminal charges, and ultimately convictions, may be an indication that police are overreaching in their discretion to arrest protesters.¹³⁵ Perhaps police are merely arresting protesters to break up the assemblies and then releasing them once they have preserved order and control of the situation. One San Francisco attorney remarked, “You could be sure that if the district attorney could prove their case, they would have charged. Oakland was sort of reacting and just arresting people.”¹³⁶ Following the Occupy Oakland protests, the local police chief recommended to discipline an “unprecedented” 44 officers for “violating various department crowd-control policies.”¹³⁷ Admittedly, the amount of evidence needed to prove a case is much greater than to arrest, and there are different entities making each of these decisions: police make arresting decisions and prosecutors make charging determinations.¹³⁸ Even so, the overwhelming and widespread lack of conversion from arrest to charging and conviction seems to be an indication that it is hard for police to successfully hold protesters responsible.¹³⁹

v. Public Safety Concerns

Public safety is one of the most significant concerns when protests block roadways. Many concerned citizens express fear for the lives of those in need of emergency assistance and frustration that immobilized traffic may impede emergency services.¹⁴⁰ There are a few news stories about disruption to emergency services during protests, some leading to proposed legislation which will be explored in subsequent sections, but no statistics regarding frequency are available. Urban emergency medical responders spend significant time navigating the challenges of modern traffic regardless of whether the traffic jam is caused by a protest, an accident on the shoulder, construction congestion, or a popular sporting event. Often, emergency medical vehicles are re-routed to avoid common traffic hazards and protests are no different in that respect.

¹³⁴ *Id.*

¹³⁵ Rosynsky, *supra* note 121.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ Rebecca Hains, *Discrediting #BlackLivesMatter with Ambulance Concerns is Disingenuous. Here's Why*, <https://rebeccahains.com/2015/01/15/discrediting-blacklivesmatter-with-ambulance-concerns-is-disingenuous-heres-why/> (last visited Jan. 15, 2015).

The first priority of police officers at any protest is public safety.¹⁴¹ This encompasses the safety of the bystanders, journalists, protesters, and their fellow police officers. In January 2015 at a protest in Minneapolis, MN, a motorist drove through a group of people protesting in an intersection and ran over one woman.¹⁴² Thankfully, she was only slightly injured.¹⁴³ The motorist was arrested for reckless driving.¹⁴⁴ Later, the charge was reduced to mere failure to yield to a pedestrian with a \$575 fine and a requirement to attend a driver education course.¹⁴⁵ The light sentence received criticism from some as an insufficient deterrent to others.¹⁴⁶

In February 2016, a St. Paul police officer was put on administrative leave and ultimately resigned following a Facebook post advocating “run them over” in advance of a publicized Black Lives Matter protest.¹⁴⁷ This malicious comment undermines the police’s role in promoting and protecting safety. Moreover, in North Dakota, a legislator proposed a bill that “would exempt drivers from liability if they accidentally hit a pedestrian at a protest” since the protesters are intentionally putting themselves in danger by blocking the road.¹⁴⁸ This bill was likely introduced as a reaction to the recent DAPL protests. If passed, it seems this would create more dangerous situations for anyone coming into contact with a protest, intentionally or otherwise.¹⁴⁹ These situations illustrate the charged atmosphere in which the police must operate to protect public safety.

Following the July 2016 protests in St. Paul, the local police force is providing protest training for 1,000 police officers in the metro.¹⁵⁰ In the training, the officers are learning about how to react when they are

¹⁴¹ Associated Press, *Cities Spending \$13M to Police Occupy Protests*, CBS NEWS (Nov. 23, 2011), <http://www.cbsnews.com/news/cities-spending-13m-to-police-occupy-protests/>.

¹⁴² Paul Walsh, *Motorist Pleads Guilty to 1 Traffic Count, Fined \$575 for Driving through Mpls. Protesters*, STAR TRIB. (Oct. 2, 2015), <http://www.startribune.com/motorist-pleads-guilty-to-misdemeanor-is-fined-for-driving-through-protesters-in-minneapolis/330442631/>.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ Mara H. Gottfried, *St. Paul Police Officer Who Posted ‘Run Them Over’ Resigns*, PIONEER PRESS (Feb. 17, 2016), <http://www.twincities.com/2016/02/17/st-paul-police-run-them-over-black-lives-matter-resigns/>.

¹⁴⁸ Andy Campbell, *North Dakota Bill Would Protect Drivers Who ‘Accidentally’ Hit and Kill Protesters*, HUFFINGTON POST (Jan. 14, 2017), http://www.huffingtonpost.com/entry/bill-would-legalize-accidentally-driving-into-and-killing-protesters_us_587a3dabe4b0e58057ff1ebc.

¹⁴⁹ *Id.*

¹⁵⁰ Mara H. Gottfried, *In Wake of Philando Castile Shooting, 1,000 Officers Going through Protest Training*, PIONEER PRESS (Sept. 15, 2016), <http://www.twincities.com/2016/09/15/in-wake-of-philando-castile-shooting-1000-officers-going-through-protest-training/>.

under attack “physically and verbally” and the First Amendment rights of protesters.¹⁵¹ Lastly, they are practicing arrest tactics in the chaotic and unique situation of an active protest.¹⁵² A senior commanding officer said, “It’s a tough balance because we want people to be able to express whatever their issue is, even if it’s an anti-government or anti-police message, but we want to see that done in a manner that the public and protesters and the officers are all safe when that happens.”¹⁵³ Some are critical of the training as further police “militarization” but others are welcoming the tools as a way to help police do their jobs better in a complicated time.¹⁵⁴

As with any public assembly, there is a risk of “outsiders” instigating violence.¹⁵⁵ In the July 2016 Interstate 94 protests in St. Paul, the Black Lives Matter group and the police agreed that the violence was instigated by those not from the community.¹⁵⁶ A police spokesperson stated, “The leader of Black Lives Matter St. Paul was in touch with [the Police Chief] . . . to find out how he could bring the violence to an end and he was working to do that.”¹⁵⁷ He went on, “[Black Lives Matter St. Paul] have protested in our city numerous times and have always been peaceful.”¹⁵⁸

Ultimately, protesters draw public criticism when they stage protests of this scale, disrupting traffic and delaying commuters. Many, including President Donald Trump, chastise protest groups for being a nuisance and not protesting in some supposed correct manner.¹⁵⁹ While the negative reaction to their case is not the best result, the attention derived from these disruptive assemblies is “precisely the point.”¹⁶⁰ One activist summarized this well, “[w]hen people disrupt highways and streets, yes, it is about disrupting business as usual. . . . It’s also about giving a visual that folks are willing to put their bodies on the line to create the kind of world we want to live in.”¹⁶¹

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ Mara H. Gottfried, *Prosecutors Charge Protesters Arrested in St. Paul I-94 Riot*, PIONEER PRESS (July 11, 2016), <http://www.twincities.com/2016/07/11/st-paul-interstate-94-i94-protest-charges-philando-castile/>.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* (internal citation marks omitted).

¹⁵⁸ *Id.*

¹⁵⁹ Robert Mackey, *Trump Concerned His Rallies Are Not Violent Enough*, INTERCEPT (Mar. 11, 2016), <https://theintercept.com/2016/03/11/trumps-good-old-days-when-battering-protesters-was-celebrated-in-the-white-house/>.

¹⁶⁰ Badger, *supra* note 2.

¹⁶¹ *Id.*

vi. Reactionary Legislation

Given the seemingly increased prevalence of roadway blocking protests, it is not surprising that some states have enacted or proposed new legislation to help deter or punish protesters who choose to assemble in such a disruptive way. In the most recent Missouri state legislative session, lawmakers passed a new charge of “promoting civil disorder” which is a first-degree felony.¹⁶² “Civil disorder” is defined as “any public disturbance involving acts of violence by assemblages of three or more persons, which causes an immediate danger of or results in damage or injury to the property or person of any other individual.”¹⁶³

Following protests blocking Interstate-93 in Massachusetts, lawmakers expressed frustration that an emergency vehicle transporting a car crash victim was delayed by the protest.¹⁶⁴ While the victim survived, it led to calls to protect public safety by imposing tougher penalties on protesters.¹⁶⁵ In Berkeley, California, a man collapsed and later died at the hospital when EMTs were delayed in reaching him due to protests.¹⁶⁶ Similar situations have occurred across the country, which has spurred some of the discussion about increased penalties for protesters.

Proposed changes to the resisting arrest statute, introduced at the Minnesota legislature in January 2017, seem positioned to increase penalties for such an obstruction.¹⁶⁷ The proposed changes to the statute are extensive.¹⁶⁸ First, it proposes adding EMTs, reserve officers, nurses, and physicians to the list of officials to whom obstruction is criminal.¹⁶⁹ Second, it decreases the culpability requirement from “intentional” to “knowing” which has a lower burden of proof for the state and makes it easier to convict.¹⁷⁰ Lastly, it suggests increasing the penalty to a felony level with sentencing guidelines of no less than 12 months incarceration up to 5 years and a fine of not more than \$10,000.¹⁷¹ A distinction is outlined for more serious situations that carries a suggested minimum of 24 months incarceration, “if (i) the person knew or had reason to know that the act created a risk of death, substantial bodily harm, or serious property

¹⁶² MO. REV. STAT. § 574.070.01.

¹⁶³ *Id.*

¹⁶⁴ *Massachusetts Lawmakers Seek Crackdown on Highway Protests*, WCVB BOSTON (Jan. 16, 2015), <http://www.wcvb.com/news/massachusetts-lawmakers-seek-crackdown-on-highway-protests/30758320>.

¹⁶⁵ *Id.*

¹⁶⁶ Emilie Raguso, *Exclusive: Man Died after Berkeley Protests Delayed Help*, BERKELEYSIDE (Dec. 19, 2014), <http://www.berkeleyside.com/2014/12/19/exclusive-man-died-after-berkeley-protests-delayed-help/>.

¹⁶⁷ H.B. 34, 90th Leg., (Minn. 2017). *See, also*, S.B.184, 90th Leg., (Minn. 2017).

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

damage; or (ii) the act caused death, substantial bodily harm, or serious property damage.”¹⁷² It is yet to be seen if the bill will be modified and if it will be passed, but the suggested modifications seem poised to have the effect of creating additional, severe penalties for protesters in Minnesota.¹⁷³

The Michigan House introduced legislation in December 2016, to “make it easier for courts to shut down ‘mass picketing’ demonstrations and fine protesters who block entrances to businesses, private residences or *roadways*.”¹⁷⁴ State law already prohibits this activity but proponents of the bill argue that, “the current penalties are not sufficient to deter already-illegal activity.”¹⁷⁵ The bill has been sent to the state Senate for consideration and the likelihood of passage is uncertain.¹⁷⁶ In a similar vein, Representative Nick Zerwas and Representative Kathy Lohmer, Minnesota legislators, proposed two separate House bills¹⁷⁷ that would “beef up penalties for obstructing highways, including entrance and exit ramps.”¹⁷⁸ Currently, this obstruction charge is a misdemeanor but the proposals are to make the charge a gross misdemeanor and punishable by up to a year in jail.¹⁷⁹ Rep. Lohmer, expressed discontent with the lack of consequences for the protesters from the July 2016 Interstate 94 demonstration in St. Paul and hoped these increased penalties would be a more successful deterrent, if enacted.¹⁸⁰ Rep. Lohmer remarked, “You need to obey the laws on the freeway . . . They are there for a purpose.”¹⁸¹ As of February 22, 2017, this proposed bill has successfully passed through the Public Safety and Security Policy and Finance Committee.¹⁸²

Again in Minnesota, a sponsor of one of the previous anti-protest bills, Rep. Zerwas suggested a unique punishment for protesters to quell their activity: “civil[] liabil[ity] for law enforcement costs if they refuse

¹⁷² *Id.*

¹⁷³ As of May 1, 2017, the bill has not been passed through any committee and seems unlikely to moved forward this legislative session.

¹⁷⁴ Jonathan Oosting, *GOP House Approves Big Fines for ‘Mass Picketing,’* DETROIT NEWS (Dec. 7, 2016), <http://www.detroitnews.com/story/news/local/michigan/2016/12/07/mass-picketing/95124708/> (emphasis added).

¹⁷⁵ *Id.* (internal quotation marks omitted).

¹⁷⁶ *Id.*

¹⁷⁷ H.B.390, 90th Leg., (Minn. 2017). H.B.1066, 90th Leg., (Minn. 2017).

¹⁷⁸ Pat Kessler, *New Bill Would Make Freeway Protesting Serious Crime*, CBS MINNESOTA (Jan. 12, 2017), <http://minnesota.cbslocal.com/2017/01/12/minnesota-bill-freeway-protesting-serious-crime/>.

¹⁷⁹ *See* H.B.390, 90th Leg., (Minn. 2017). *See* H.B.1066, 90th Leg., (Minn. 2017).

¹⁸⁰ Kessler, *supra* note 178.

¹⁸¹ *Id.* (internal quotation marks omitted).

¹⁸² Kevin Featherly, *2 freeway protest bills likely constitutional, expert says*, MINNESOTA LAWYER (Mar. 1, 2017), <http://minnlawyer.com/2017/03/01/2-freeway-protest-bills-likely-constitutional-expert-says/>.

to disperse when ordered to do so and end up being arrested and convicted of a crime.”¹⁸³ Rep. Zerwas said, “taxpayers were hit with thousands of dollars in extra costs because police had to respond to a protest . . . it took 24 law enforcement agencies to respond.”¹⁸⁴ This bill passed the Civil Law and Data Practices Committee on January 26, 2017, but has not moved since then.¹⁸⁵ With all of the proposed legislation, it’s certain that these discussions will be ongoing in Minnesota, and in other states, about how to address the increase in protest activity.

C. PROTESTER MOTIVATIONS

With all the existing criminal enforcement mechanisms, and the proposed, new statutes, we must consider whether increased criminal penalties will actually be a more effective deterrent for protesters. In order to determine whether increased legal consequences would be an effective deterrent, it’s helpful to examine what motivates individuals to protest. The motives seem to fall into three categories: achieve a specific goal, attention for a cause, and to act on feelings of injustice.

For some movements, there is a clearly defined goal that the protests are attempting to achieve. For the DAPL protesters, the goal was, at first, to prevent the new oil pipeline from being completed where it threatened their water source.¹⁸⁶ Since that objective has been achieved, the efforts have continued in different ways outside of traditional protests.¹⁸⁷ For the Black Lives Matter Movement, their goals were expressed in a list of published demands with regard to eliminating discriminatory policing.¹⁸⁸

Often, movements are seeking attention by protesting on a large scale. Recently, Anti-DAPL protesters hung a banner from the ceiling of the US Bank Stadium in Minneapolis.¹⁸⁹ One of the protesters remarked, “(Media) rarely get interested unless an action is either very, very large . . . or disruptive, or

¹⁸³ Aaron Rupar, *Minnesota Lawmaker Launches Possibly Unconstitutional Attempt to Curtail Black Lives Matter Protesters*, THINK PROGRESS (Mar. 14, 2016), <https://thinkprogress.org/minnesota-lawmaker-launches-possibly-unconstitutional-attempt-to-curtail-black-lives-matter-fbd4998762b7#.ak6yn28fr>. See H.B.322, 90th Leg., (Minn. 2017).

¹⁸⁴ Associated Press, *Minnesota Lawmaker Wants to Bill Protesters for Police Costs*, PIONEER PRESS (Mar. 10, 2016), <http://www.twincities.com/2016/03/10/minnesota-lawmaker-wants-to-bill-protesters-for-police-costs/>.

¹⁸⁵ Featherly, *supra* note 182.

¹⁸⁶ Associated Press, *Dakota Access Pipeline Protests across U.S. Find Encouragement*, MPR NEWS (Jan. 11, 2017), <http://www.mprnews.org/story/2017/01/11/patchwork-of-dakota-access-protests-across-us-encouraged>.

¹⁸⁷ *Id.*

¹⁸⁸ John Binder, *Black Lives Matter Has List of Demands, Including One Big One, as They Block Minneapolis Freeway*, BIZPAC REVIEW (July 13, 2016), <http://www.bizpacreview.com/2016/07/13/black-lives-matter-has-list-of-demands-including-one-big-one-as-they-block-minneapolis-freeway-364575>.

¹⁸⁹ Associated Press, *supra* note 186.

especially, violent.”¹⁹⁰ This sentiment shows the impetus to continue making statements in a way that will garner significant media attention for their cause.

Lastly, some protest in order to express feelings of injustice about an issue. Most recently, the 2016 election results had many people taking their views to the streets.¹⁹¹ One protester shared their motivation, “I came out here to let go of a lot of fear that was sparked as soon as I saw the results.”¹⁹² Another shared, “It’s been really frustrating, because as a nation we thought we had come so far but it seems like we’re taking many steps back . . . so we want to come together to change that and make sure we keep going forward.”¹⁹³ An attorney for one protester explained her viewpoint: “it’s about protecting our First Amendment right to protest and to engage in lawful, civil disobedience in the face of injustice.”¹⁹⁴

An alternative hypothesis for why people feel free to participate in protests, especially ones that may become unlawful, is that there is a belief that people don’t get in trouble for protesting due to the shield of the First Amendment. This belief is seemingly reinforced by the lack of charging, frequent dismissals, and limited convictions for protesters across the country. The legislative discontent with the current penalties available serves to bolster this position; the proposed legislation aims to create more effective penalties, thereby representing the presumption that the available enforcement mechanisms are inadequate or ineffective. President Donald Trump famously remarked at a campaign rally in May 2016, that protesters can “get away with murder.”¹⁹⁵

Regardless of the potential penalties, it seems that these passionate movements are precipitated more by romanticized notions of justice with little concern for legal the consequences. “Transportation . . . has long been central to the black civil rights movement, with the Selma march, the Freedom Rides, and Rosa Park’s appeal to equal rights on public buses.”¹⁹⁶ “Highways also carry a particular resonance for the grievances today of black civil rights activists, given that many deadly encounters with police, such as Castile’s, began with traffic stops.”¹⁹⁷ For the foregoing reasons, it seems unlikely that an increase in criminal penalties for protesters who block roadways would accomplish the intended mitigation.

¹⁹⁰ *Id.* (alteration and omission in original).

¹⁹¹ Euan McKirdy et al, *Thousands Take to the Streets to Protest Trump Win*, CNN (Nov. 10, 2016), <http://www.cnn.com/2016/11/09/politics/election-results-reaction-streets/>.

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ Brandi, *supra* note 14.

¹⁹⁵ Veronica Stracqualursi, *How Donald Trump Handles Protesters and What He Thinks of Them*, ABC NEWS (Mar. 10, 2016), <http://abcnews.go.com/Politics/donald-trump-handles-protesters-thinks/story?id=37553007>.

¹⁹⁶ Badger, *supra* note 2.

¹⁹⁷ *Id.*

III. CONCLUSION

While stronger penalties may be constitutionally enacted, there are sufficient mechanisms already in place to address unlawful protests. Stronger penalties do not seem an effective means to deter the frequency or intensity of protests. Ultimately, more avenues for criminal penalty will likely not mitigate these demonstrations and will likely be ineffectually enforced. There is much activity in this area as legislative sessions across the country are in progress this year; however, it is yet to be seen whether new criminal or civil penalties will be successfully enacted. By reviewing the historical background for roadway blocking protests, the recent increase in protests, the current and proposed penalties, and the motivations of protesters, we can better understand the legal landscape regarding urban roadway protests. In reflecting on the fiftieth anniversary of the March to Selma, Ronald J. Krotoszynski Jr., professor at the University of Alabama School of Law, remarked, “[t]o truly celebrate the legal legacy of this civil rights milestone, we should embrace Selma's main lesson: Taking to the streets and other public spaces in protest is central to our democracy.”¹⁹⁸

¹⁹⁸ Ronald J. Krotoszynski Jr., *Could a Selma-like protest happen today? Probably not*, LOS ANGELES TIMES (Mar. 7, 2015), <http://www.latimes.com/opinion/op-ed/la-oe-0308-krotoszynski-selma-march-protest-doctrine-20150308-story.html>.