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Rethinking Disorderly Conduct

Jamelia N. Morgan*

Disorderly conduct laws are a combination of common law offenses aimed at protecting the public order, peace, and tranquility. Yet, contrary to common legal conceptions, the criminalization of disorderly conduct is not just about policing behavior that threatens to disrupt public order or even the public's peace and tranquility. Policing disorderly conduct reflects and reinforces deeply rooted discriminatory understandings about what behavior—and which persons—violate community norms. By relying on a false dichotomy between "order" and "disorder," disorderly conduct laws construct and reinforce a hierarchy of normative behaviors that are imbued with racism, sexism, and ableism. Disorderly conduct laws "otherize" certain nonconforming behaviors, delegitimize them through the label of "disorderly," and in doing so exclude certain historically marginalized groups from normative conceptions of community. They do this in part by prohibiting a wide range of behaviors and conferring vast amounts of discretion upon law enforcement and private citizens to target individuals for behavior regulation, physical removal, and community exclusion. These laws often determine access to shared community spaces, resulting in the exclusion of historically marginalized groups from these purportedly "public" spaces. In this way, disorderly conduct laws delineate and police the normative boundaries of communities.

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This Article begins by offering an overview and substantive critique of disorderly conduct laws. It then demonstrates how enforcement of these laws reinforces social hierarchies on the basis of race, gender, and disability and defines and constructs community boundaries. In this way, the Article offers a site for problematizing unitary models of community in criminal law and is situated within criminal legal scholarship's ongoing discussions on the role of "the community" in criminal justice reform. The Article concludes by identifying pathways to end the harms of the disorderly conduct enforcement regime, including decriminalizing and abolishing disorderly conduct. Instead of honing in on specific policy reforms, the Article aims to set forth certain models that rely less on consensus and more on contestatory approaches to democratic participation, which better account for the multiplicity of communities affected by criminal law enforcement.

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PROLOGUE

A few years ago, I was in a small courtroom in western Pennsylvania with my colleague waiting for a probable cause hearing to begin. The tiny courtroom held little more than the judge's bench, a medium-sized table for counsel, and no more than ten chairs, each lined against the back of the courtroom wall. It was an unusually large crowd for the small courtroom in western Pennsylvania—at least that is what the bewildered reactions of the court staff suggested. Members from the local community had gathered to support our client who was facing criminal charges for disorderly conduct, resisting arrest, and refusal to disperse—charges stemming from the act of filming a police officer. Their[1] courage was on full display in the courtroom that day as they prepared to face off against the officer who tackled them to the ground in a brutal arrest captured on a cell phone video that soon went viral, with more than one million views. Yet they were not alone. A crowd of approximately thirty to forty supporters, predominantly Black women, had come to observe the hearing and to advocate for the judge to drop the charges.

Though not everyone could fit within the small courtroom, I estimated that about five to six people could have found a seat inside. A few supporters noticed this too and attempted to move into the courtroom's narrow entranceway. The judge noticed the crowd and spotted the attempt of three supporters—three Black women—to enter the courtroom. The women had poked their heads into the courtroom, unsure about when and where to enter at first. As the women twisted their bodies to enter, the judge, to my surprise, sternly instructed the women that if they took another step into the courtroom, they would be charged with disorderly conduct. As I sat there, I thought it curious that these three Black women risked being charged with disorderly conduct as part of their protest of the disorderly conduct charges brought against my client and for exercising their right to participate in a public court proceeding. I wondered what precisely would constitute the "disorderly" conduct in such a situation. Was it stepping over the threshold to the courtroom? Was it their mere movements partially inside the courtroom itself? Even so, in my assessment, the negligible movement and the lack of any utterance whatsoever from the women themselves seemed to

1. My client uses they/them pronouns.

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undermine a justification for disorderly *conduct* per se. What was it about these Black women that amounted to disorderly conduct in the eyes of the judge?

The statute proscribing disorderly conduct offered a guide. Both sets of charges—the one against my client and the potential charges against the Black women supporting them—would arise under Pennsylvania's disorderly conduct law, which reads in part:

> A person is guilty of disorderly conduct if, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof, he:
>
> (1) engages in fighting or threatening, or in violent or tumultuous behavior;
>
> (2) makes unreasonable noise;
>
> (3) uses obscene language, or makes an obscene gesture; or
>
> (4) creates a hazardous or physically offensive condition by any act which serves no legitimate purpose of the actor.[2]

Yet the statute simply provided a starting point. It proved an unsatisfying answer to the question of the precise definition or nature of the disorderly conduct in the cases before me.

What I didn't realize at the time was that the incident framed within my mind two sites for observing the policing of disorderly conduct—one on the street by a police officer and one in the courtroom by the presiding judge. In my client's case, the exercise of their First Amendment freedoms resulted in a disorderly conduct charge, among other charges. This was an effort by the police officer to regulate my client's behavior—i.e., stop them from recording, force them to leave, and so on—regardless of whether they were constitutionally entitled to engage in that behavior.[3] For the Black women in the courtroom, the presiding judge's warning positioned within my mind the use of disorderly conduct as a tool for managing and controlling access to and decorum in space—here, a small courtroom. Disorderly conduct also then defined who counted as "the public." The behaviors deemed unacceptable in the public space of the courtroom weren't really about conduct—any conduct was *de minimis.* Rather, the unacceptability of these behaviors was rooted in perceptions of the presence and movement of their racialized bodies in spaces designated for members of the public.

Months later, after the charges against my client were dropped, these questions lingered. The incident spurred a deeper critical inquiry into the offense

2. 18 PA. CONS. STAT. § 5503(a) (2015); *see also id.* § 5503(c) ("As used in this section the word 'public' means affecting or likely to affect persons in a place to which the public or a substantial group has access; among the places included are highways, transport facilities, schools, prisons, apartment houses, places of business or amusement, any neighborhood, or any premises which are open to the public.").

3. *See* Fields v. City of Philadelphia, 862 F.3d 353 (3d Cir. 2017) (holding that there is a First Amendment right to record the police engaged in official police activities in public places).

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of disorderly conduct—its nature, the types of conduct it proscribes, the properties that distinguish "disorderly" from "orderly" conduct, the social meaning of disorder, and the enforcement of disorderly conduct laws. This Article is the result of that critical inquiry.

I.
INTRODUCTION

Broadly conceived, disorderly conduct is conduct that disrupts public order or creates a risk of disorder.[4] The core and oft-stated purpose of disorderly conduct is to protect the community (often referred to in statutes as "the public") from conduct that threatens its sense of safety and security.[5] Beyond this core purpose is the closely related, though more expansive, stated objective of preserving the public peace or tranquility.[6] Both purposes point to disorderly conduct as a type of "order-maintenance" offense intended to prohibit conduct that "interfere[s] with the operations of society and the ability of people to function efficiently."[7]

Disorderly conduct laws are an amalgamation of common law offenses that purport to protect public peace and public order. Though there is a wide variation in their content and scope, contemporary disorderly conduct laws share common origins. A review of disorderly conduct statutes today shows that such provisions derive from common law offenses, such as breach of peace, affray, unlawful assembly, and public nuisance.[8] Additional features of the disorderly conduct regime today function as salient vestiges of the common law regime that policed offenses to public peace and order. Like their common law antecedents, modern-day disorderly conduct laws are typically vague and broad in scope. In his discussion of the common law offense of breach of peace, prominent nineteenth-century criminal law scholar Joel Bishop Prentiss noted that the term was of "indefinite yet larger meaning, sometimes greatly expanded, but commonly . . . signifies in the law a criminal act of the sort which disturbs the public repose."[9] Moreover, as with these common law offenses, the harm against which modern-day disorderly conduct laws aim to protect does not have to be realized to be punished—risks to public order, peace, and tranquility are enough.[10] Today,

4. *See, e.g.*, Commonwealth v. Mauz, 122 A.3d 1039, 1041 (Pa. Super. Ct. 2015) ("The cardinal feature of the crime of disorderly conduct is public unruliness which can or does lead to tumult and disorder." (quoting Commonwealth v. Hock, 728 A.2d 943, 946 (Pa. Super. Ct. 1999))).

5. *See, e.g.*, State v. Love, 351 P.3d 780, 784 (Or. Ct. App. 2015).

6. *See, e.g.*, Commonwealth v. Vetter, 149 A.3d 71, 77 (Pa. Super. Ct. 2016).

7. LARRY J. SIEGEL, CRIMINOLOGY: THEORIES, PATTERNS, AND TYPOLOGIES 426 (9th ed. 2007).

8. *See infra* Figure A.

9. JOEL PRENTISS BISHOP, COMMENTARIES ON THE CRIMINAL LAW § 536 (1877).

10. Prentiss stated as much in his treatise, explaining that at common law, "[t]o lay the foundation for a criminal prosecution, the peace need not be actually broken. If what is done is unjustifiable and unlawful, tending with sufficient directness to break the peace, no more is required." *Id.* § 539. Prentiss explained the rationale for permitting criminal sanction for conduct that tended to lead to breach of peace: "The criminal law is as well preventive as vindictive. And a threatened danger

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disorderly conduct laws continue to serve a preventive function, and some disorderly conduct laws do not require disorder to actually manifest itself in order to constitute a violation.[11]

That modern disorderly conduct laws reflect remnants of the common law regime aimed at protecting the public peace and order may at first glance provide no cause for concern. Yet an examination of the use of disorderly conduct laws today shows alarming trends. First, the policing of disorderly conduct, like the common law regime before it, continues to target, or risks targeting, enforcement against historically marginalized groups. In this way, disorderly conduct laws continue to enforce discriminatory norms for behavior and, in doing so, reinforce social hierarchies based on race, gender, sexual orientation, and disability. Second, disorderly conduct laws continue to offer localities a ready mechanism for tightly regulating access to public spaces in order to deny access or to intensely monitor, scrutinize, and police "people out of place."[12] Taken together, disorderly conduct laws enforce discriminatory norms that inform, shape, and reinforce deeply rooted understandings of which conduct—and which persons—are considered disorderly. Finally, disorderly conduct laws "otherize" certain nonconforming behaviors, delegitimizing them through the label of "disorderly," and exclude certain historically marginalized groups from normative conceptions of community. These social costs have not yet been meaningfully addressed in court opinions and substantive scholarly accounts.

The enforcement of disorderly conduct laws persists despite the lack of evidence showing concrete social harm. I argue that the harms that stem from criminalizing disorderly conduct tend to outweigh the purported benefits to the identifiable community, particularly in cases in which the conduct itself does not cause any concrete harm. Even where the conduct does cause concrete harm, other criminal offenses, such as assault, already criminalize such conduct.

A critique that identifies the harms stemming from enforcing disorderly conduct laws may lead some to suggest legal remedies to the identified problems. Some may point to constitutional challenges, whether void-for-vagueness or overbreadth claims; others may point to substantive protections like mens rea requirements or procedural protections to prevent wrongful arrests and convictions. But these previously underexplored harms are insulated from legal challenge for two reasons. First, due to the wide range of conduct prohibited,

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demands correction the same as an actual one. Moreover, the community is disturbed when it is alarmed. Attempts are indictable, and the before-mentioned acts are in the nature of attempt." *Id.* § 540.

11. *Compare* 18 PA. CONS. STAT. § 5503(a) (2015) ("A person is guilty of disorderly conduct if, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a *risk* thereof . . . .") *with* ALASKA STAT. § 11.61.110(a)(1) (2020) ("A person commits the crime of disorderly conduct if . . . with intent to disturb the peace and privacy of another not physically present on the same premises or with reckless disregard that the conduct is having that effect after being informed that it is having that effect, the person *makes* an unreasonably loud noise . . . .").

12. Indeed, as will be discussed, these twin goals largely characterized the social ills that stemmed from the policing of vagrancy, long since discredited by the Supreme Court in *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972).

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disorderly conduct laws by design confer vast amounts of discretion upon law enforcement and private citizens to select individuals for behavior regulation, physical removal, and community exclusion. Indeed, today's laws are not always vague but are often extremely broad.[13] Second, as disorderly conduct laws are classified as low-level offenses—misdemeanors, criminal citations, noncriminal violations, and municipal code violations—opportunities for legal challenges could be rare. Misdemeanor and municipal courts currently fail to offer defendants opportunities to adjudicate guilt, let alone raise constitutional claims.[14] Thus, total reliance on judicial back-end remedies would do little to address the over-policing and over-criminalization facilitated by proscribing disorderly conduct.

Beyond this, legal remedies would do little to address the harms that go beyond the individual case. As I argue below, the harms from enforcement extend beyond the individual defendant and include the structural, coercive, exclusionary features and effects of a disorderly conduct enforcement regime—a regime that provides communities a ready mechanism to target certain individuals for behavior regulation, modification, and removal. This Article's critique of disorderly conduct demonstrates how criminal law enforcement constructs community boundaries and reproduces social hierarchies. Viewed in this light, the Article is situated within criminal legal scholarship's ongoing discussions on the role of "the community" in criminal law and broader criminal justice reform.[15] My critique of disorderly conduct laws and their enforcement offers one site for problematizing unitary models of community in criminal law. This Article concludes by identifying pathways to end the harms of the disorderly conduct enforcement regime, including decriminalizing and abolishing disorderly conduct. Instead of focusing on specific policy reforms,

13. For a discussion of the differences between the issues raised by extremely broad laws as opposed to vague ones, see Kiel Brennan-Marquez, *Extremely Broad Laws*, 61 ARIZ. L. REV. 641 (2019).

14. *See, e.g.*, ALEXANDRA NATAPOFF, PUNISHMENT WITHOUT CRIME: HOW OUR MASSIVE MISDEMEANOR SYSTEM TRAPS THE INNOCENT AND MAKES AMERICA MORE UNEQUAL 7–9 (2018); ISSA KOHLER-HAUSMANN, MISDEMEANORLAND: CRIMINAL COURTS AND SOCIAL CONTROL IN AN AGE OF BROKEN WINDOWS POLICING 5–11 (2018) [hereinafter KOHLER-HAUSMANN, MISDEMEANORLAND]; Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 STAN. L. REV. 611, 619–29 (2014). Where cases do make it to court, appellate review of misdemeanor charges is rare. Nancy J. King & Michael Heise, *Misdemeanor Appeals*, 99 B.U. L. REV. 1933, 1933, 1938 (2019) (estimating that appellate courts review no more than eight in ten thousand misdemeanor convictions and no more than one in ten thousand convictions are overturned).

15. *See, e.g.*, Jocelyn Simonson, *The Place of "The People" in Criminal Procedure*, 119 COLUM. L. REV. 249 (2019) [hereinafter Simonson, *The Place of "The People"*]; Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054 (2017); Dorothy E. Roberts, *Democratizing Criminal Law as an Abolitionist Project*, 111 NW. U. L. REV. 1597 (2017); Jocelyn Simonson, *Democratizing Criminal Justice Through Contestation and Resistance*, 111 NW. U. L. REV. 1597, 1609 (2017); Eric J. Miller, *Policing on Behalf of the Community*, CITY SQUARE: ONLINE J. FORDHAM URBAN L. REV. (Apr. 17, 2017), https://news.law.fordham.edu/fulj/2017/04/17/on-behalf-of-the-community/ [https://perma.cc/392X-44SD]; Dorothy E. Roberts, *Foreword: Race, Vagueness, and the Social Meaning of Order-Maintenance Policing*, 89 J. CRIM. L. & CRIMINOLOGY 775 (1999) [hereinafter Roberts, *Social Meaning of Order-Maintenance Policing*].

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this Article aims to set forth certain models that should be adopted to ensure more inclusive, equitable, and democratic participation in the development of reform and transformative change proposals. These models rely less on consensus and more on contestatory approaches to democratic participation in efforts to reduce the harms of disorderly conduct enforcement, including potential reforms that seek to decriminalize and eventually legalize disorderly conduct.

In Part II, I discuss the historical roots of disorderly conduct laws. I expand on existing scholarly critiques of quality-of-life policing, which centered on broken windows policing initiatives of the 1980s and 1990s, and order-maintenance policing, which characterized the vagrancy regimes of the latter half of the twentieth century. I show that disorderly conduct laws have roots in the hyper-policing of public order and the use of criminal laws to protect the "public welfare." These roots trace as far back as the nineteenth century. I also discuss which behaviors disorderly conduct laws proscribe today and offer a taxonomy of behaviors found in most disorderly conduct laws. Part III discusses how policing disorderly conduct enforces discriminatory norms for behavior—norms that I label racist, gendered, and ableist. Part IV demonstrates how disorderly conduct laws, by defining public spaces and enforcing discriminatory behavioral norms in those spaces, delineate legal boundaries distinguishing public from private and construct normative publics—that is, normative ideas about which spaces certain groups *should* occupy. In Part V, I discuss the harm principle and courts' failure to interrogate the precise nature and scope of the public harm that justifies criminalizing disorderly conduct. In Part VI, I discuss how the enforcement of disorderly conduct laws challenges criminal law's unitary constructions of "the community." I then demonstrate how reforming disorderly conduct regimes presents possibilities for considering less consensus-driven and more contestatory models for democratic participation and engagement. The Article concludes by discussing implications for broader reform efforts tackling mass criminalization and mass incarceration.

II.
DISORDERLY CONDUCT: PAST AND PRESENT

In the Section that follows, I trace contemporary disorderly conduct laws to their common law antecedents. This historical overview not only demonstrates the breadth of conduct labeled as "disorderly conduct" today and the myriad offenses that disorderly conduct laws codify, but also provides background for my substantive critique. Identifying the historical roots of disorderly conduct laws might offer insight into the social meaning and social function of the laws that existed then, and as I suggest, even today.

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A. Policing Disorderly Behaviors: A Historical Overview

"Disorderly conduct" did not exist as a crime under common law; rather, it is a statutory creation that incorporates many common law offenses targeting public disorder.[16] Many contemporary disorderly conduct provisions derive from these common law offenses or codify these offenses in other laws that also aim to protect the public order. Common law offenses falling within this category included riot, rout, unlawful assembly, affray, breaches of peace or public fighting, forcible detainer, forcible entry, forcible trespass, challenges to duel, libel, words to stir quarrels, eavesdropping, being a common scold, litigious or quarrelsome behavior (i.e., barratry, champerty, or selling land in adverse possession), and disturbance of meetings (e.g. town meetings or worship assemblies).[17] The following chart compares contemporary disorderly conduct statutes with their common law antecedents:

Figure A. Common law antecedents of disorderly conduct laws

Common Law Offense	**Disorderly Conduct Laws**
Breach of peace; disturbing meetings or worship assemblies	Intent to disturb the peace; unreasonably loud noise; disturbance
Affray, challenges to duel	Fighting; tumultuous behavior
Libel, words to stir quarrels, common scold, litigious or quarrelsome behavior	Abusive language
Public nuisance	Creating a hazardous condition, urination/defecation
Indecent exposure	Exposing buttocks or anus for insult or offense, obscene language or gesture
Unlawful assembly, rout, obstructing public highways	Refusal to disperse; obstructing vehicular or pedestrian traffic
Vagrancy	Loitering, begging in public, public intoxication

Recognizing the common law origins of modern-day disorderly conduct laws, courts have relied on the common law meanings of certain offenses to interpret contemporary provisions. For example, the Alaska Supreme Court, relying on legislative history, determined that the state's prohibition against fighting in its disorderly conduct law stemmed from the common law offense known as affray. After discussing the common law origins, the court noted that "most American jurisdictions have codified the common-law crime of affray," and that although some states codified it as a stand-alone offense, the Alaska legislature chose to insert the definition of affray into its disorderly conduct statute in the mid-1930s.[18]

16. MODEL PENAL CODE & COMMENTS., pt. II, § 250.2 cmt. 1, at 325 (AM. L. INST. 1980).
17. *See* BISHOP, *supra* note 9, §§ 533–45.
18. Dawson v. State, 264 P.3d 851, 854–55 (Alaska Ct. App. 2011).

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Early references to disorderly behaviors proliferated within and across state criminal codes in the nineteenth century.[19] These early statutes prohibited a vast array of conduct that included "disruptive behavior and acts tending to provoke others to violence, but also conduct tending to corrupt morals, to endanger health or safety, or simply to annoy other members of the community."[20] These codes included "disorderly" offenses as diverse and wide-ranging as interrupting a congregation during a worship service,[21] using vulgar language in the presence of women,[22] riding a horse on a sidewalk,[23] being intoxicated in public,[24] and engaging in fortune-telling.[25]

Nineteenth-century disorderly conduct analogues contemplated two ways disorder might manifest—in public (as in public disorder) and in bodies and minds (as in disorderly persons whose behavior purportedly threatened public order). Common law offenses aimed at protecting against public disorder included not only offenses such as breach of peace or disturbing the peace, but also included "whatever, of sufficient magnitude for the law's notice, one willfully does to the disturbance of the public order or tranquility."[26] Beyond this, laws common throughout the nineteenth century contained provisions that explicitly criminalized conduct regarded as likely to contravene public morals and thereby threaten public order. Typical public morals laws criminalized conduct such as using profanity in the presence of women or in any public place, interrupting or cursing during church services, appearing drunk in public, and running a disorderly house (such as a bawdy house).[27]

Beyond threats to public disorder, the historical antecedents of modern-day disorderly conduct statutes explicitly criminalized "disorderly persons."[28] Disorderly persons included a host of individuals perceived as contravening public morals. According to legal historian William J. Novak, most states passed

19. *See, e.g.*, Act of Feb. 7, 1879, No. 115, 1878-9 Ala. Laws 144; Act of Mar. 20, 1875, No. 177, 1874–75 Ala. Laws 257; Act of Feb. 19, 1885, No. 17, 1885 Ariz. Sess. Laws 17; Act of Apr. 9, 1891, Act 126, 1891 Ark. Acts 229; Act of July 23, 1868, No. 59, 1868 Ark. Acts 214; Act of Mar. 21, 1881, No. 71, 1881 Ark. Acts 135; Act of Apr. 16, 1850, Ch. 125, 1850–53 Cal. Stat. 638; Act of Apr. 2, 1870, Ch. 251, 1869–70 Cal. Stat. 654; Act of Mar. 20, 1878, § 415, 1872 Cal. Penal Code 172; Act of Apr. 10, 1855, Art.1973, § 112, 1857 Cal. Stat. 347; Act of Jan. 9, 1868, Ch. 22, 1868 Colo. Sess. Laws. 230; Act of Nov. 5, 1861, § 101, 1861 Colo. Sess. Laws 311; Act of Feb. 10, 1874, § 156, 1874 Colo. Sess. Laws 100; Act of Apr. 9, 1891, § 2-123, 1891 Colo. Sess. Laws 125; 1865 Conn. Pub. Acts 80–81; Act of Feb. 10, 1832, Ch. 70, 1822 Fla. Laws 400; Act of Dec. 29, 1890, § 4391, 1890 Ga. Laws 83.

20. MODEL PENAL CODE & COMMENTS., pt. II, § 250.2 cmt. 1, at 325.

21. Act of Feb. 10, 1874, 1874 Colo. Sess. Laws 100.

22. Act of Dec. 29, 1890, § 4391, 1890 Ga. Laws 83.

23. WILLIAM LAIR HILL, CODES AND GENERAL LAWS OF OREGON § 1857 (1887).

24. *See, e.g.*, Pratt v. Brown, 16 S.W. 443 (Tex. 1891).

25. *See, e.g.*, People v. Plaskett, 13 N.Y.S.2d 682 (N.Y. Ct. Spec. Sess. 1939).

26. BISHOP, *supra* note 9, § 533 (citations omitted).

27. *See* WILLIAM J. NOVAK, THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA 159–69 (Thomas A. Green & Hedrik Hartog eds., 1996).

28. *See generally* Eric H. Monkkonen, *A Disorderly People? Urban Order in the Nineteenth and Twentieth Centuries*, 68 J. AM. HIST. 539 (1981) (discussing drunk and disorderly conduct that led to criminal liability when the violator was in a public place).

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criminal laws targeting "rogues, vagabonds, common beggars, and other idle, disorderly and lewd persons."[29] These laws should be considered part of an era in which states and local municipalities possessed and exercised their broad police powers to protect and promote the general welfare of society.[30] As Novak wrote, "[t]he power of self-governing communities and associations to police themselves through the enactment of bylaws and ordinances regulating safety, economy, property, morals, and health were reviewed only irregularly by higher authorities and seldom were overturned."[31] These broad police powers conflicted with, and were exercised at high costs to, strong protections for individual rights, such that "the ability of individuals to contest local controls on hawkers or peddlers, vagrants or prostitutes, noisome trades or disorderly houses, wooden buildings or unhealthy premises was severely circumscribed."[32]

B. What Disorderly Conduct Criminalizes Today

All fifty states and the District of Columbia have laws prohibiting disorderly conduct.[33] Beyond this, federal regulations criminalize disorderly behavior on government property,[34] and each of the United States' fifty most populous municipalities criminalize disorderly conduct or the related offenses of breach of the peace and disturbing the peace, which are considered the historical antecedents to disorderly conduct.[35] Although accurate data are hard to find, by

29. NOVAK, *supra* note 27, at 167.

30. *See id.* at 10 ("[T]he *salus populi* tradition . . . was embedded in the practices of local institutions and common laws.").

31. *Id.* at 244.

32. *Id.*

33. ALA. CODE § 13A-11-7 (2015); ALASKA STAT. § 11.61.110 (2020); ARIZ. REV. STAT. ANN. § 13-2904 (2018); ARK. CODE ANN. § 5-71-207 (2019); CAL. PENAL CODE § 647 (West 2020); COLO. REV. STAT. § 18-9-106 (2020); CONN. GEN. STAT. § 53a-181 (2021); DEL. CODE ANN. tit. 11, § 1301 (2020); D.C. CODE § 22-1321 (2020); FLA. STAT. § 877.03 (2020); GA. CODE ANN. § 16-11-39 (2019); HAW. REV. STAT. § 711-1101 (2020); IDAHO CODE § 18-6409 (2020); 720 ILL. COMP. STAT. 5/26-1 (2021); IND. CODE § 35-45-1-3 (2020); IOWA CODE § 723.4 (2013); KAN. STAT. ANN. § 21-6203 (2019); KY. REV. STAT. ANN. § 525.060 (West 2016); LA. STAT. ANN. § 14:103 (2018); ME. STAT. tit. 17-A, § 501-A (2006); MD. CODE. ANN., CRIM. LAW § 10-201 (LexisNexis 2021); MASS. GEN. LAWS ch. 272, § 53 (2020); MICH. COMP. LAWS § 750.167 (2021); MINN. STAT. § 609.72 (2020); MISS. CODE ANN. § 97-35-7 (2021); MO. REV. STAT. § 574.010 (2016); MONT. CODE ANN. § 45-8-101 (2021); NEB. REV. STAT. § 28-1322 (2020); NEV. REV. STAT. § 269.215 (2020); N.H. REV. STAT. ANN. § 644:2 (2016); N.J. STAT. ANN. § 2C:33-2 (2016); N.M. STAT. ANN. § 30-20-1 (2021); N.Y. PENAL LAW § 240.20 (McKinney 2020); N.C. GEN. STAT. § 14-132 (2019); N.D. CENT. CODE § 12.1-31-01 (2013); OHIO REV. CODE ANN. § 2917.11 (LexisNexis 2016); OKLA. STAT. ANN. tit. 21, § 1362 (2015); OR. REV. STAT. § 166.023 (2019); 18 PA. CONS. STAT. § 5503 (2015); 11 R.I. GEN. LAWS § 11-45-1 (2016); S.C. CODE ANN. § 16-17-530 (2015); S.D. CODIFIED LAWS § 22-18-35 (2021); TENN. CODE ANN. § 39-17-305 (2020); TEX. PENAL CODE ANN. § 42.01 (2016); UTAH CODE ANN. § 76-9-102 (LexisNexis 2020); VT. STAT. ANN. tit. 13, § 1026 (2020); VA. CODE ANN. § 18.2-415 (2021); WASH. REV. CODE § 9A.84.030 (2020); W. VA. CODE § 61-6-1b (2021); WIS. STAT. § 947.01 (2020); WYO. STAT. ANN. § 6-6-102 (2021).

34. *See, e.g.*, 38 C.F.R. § 1.218 (2021) (prohibiting disorderly conduct in medical facilities for the Veterans Affairs).

35. Albuquerque, N.M., Crim. Code § 12-2-5; Atlanta, Ga., Code of Ordinances § 106-81; Bos., Mass., City of Bos. Municipal Code § 16-10.4; Bos., Mass., City of Bos. Municipal Code § 16-26.6; Chi., Ill., Municipal Code of Chi. § 8-4-010; Columbus, Ohio, Code of Ordinances § 23.17.11; Denver,

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official accounts, hundreds of thousands of people are arrested for disorderly conduct in the United States every year. According to the most recent FBI crime statistics, approximately 291,951 people were arrested in 2017 alone for disorderly conduct.[36]

Conceptually, disorder itself can be separated into two broad, at times closely linked, categories of disorder, namely violent disorder and disruptive disorder. The first category includes conduct either deemed violent or deemed to threaten violence; the second includes conduct that is regarded as disrupting the public's peace. Disorderly conduct laws also purport to protect against disruptions to a particular location's normal operations—whether the conduct they prohibit tends to, or actually does, have any such disruptive effect. Assessments of "normal operation" depend on the nature and character of the location, whether a courtroom, street corner, city park, or hospital. Which types of disorders warrant enforcement, and are deemed to be so disruptive to the normal operations of a particular place as to warrant criminal sanction, is partly a question of enforcement priorities. But at least where a charge leads to citation or conviction, deciding whether to uphold or overturn a conviction may involve

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Colo., Code of Ordinances § 38-89; Detroit, Mich., Code of Ordinances § 38-5-1; Hous., Tex., Code of Ordinances § 16; Jacksonville, Fla., Code of Ordinances § 614.106; Kan. City, Kan., Code of Ordinances § 50-164; Kan. City, Kan., Code of Ordinances § 50-167; Long Beach, Cal., Municipal Code § 9.30.010; L.A., Cal., Municipal Code § 1-41.03 to 41.72; Louisville, Ky., Louisville-Jefferson County Metro Government § 132.03; Memphis, Tenn., Code of Ordinances § 10-8-2; Milwaukee, Wis., Code of Ordinances § 106-1; Minneapolis, Minn., Code of Ordinances § 385.90; Nashville, Tenn., Code of Ordinances § 13.24.430; Nashville, Tenn., Code of Ordinances § 11.12.010; New Orleans, La., Code of Ordinances § 54-403; N.Y.C., N.Y., N.Y.C. Admin. Code § 10-179; Oakland, Cal., Code of Ordinances § 12.64.100; Oakland, Cal., Code of Ordinances § 8.18.010; Okla. City, Okla., Code of Ordinances § 30-81; Phila., Pa., Phila. Code § 10-600; Phx., Ariz., Phx. City Code § 22-3; Phx., Ariz., Phx. City Code § 22-6; Portland, Or., Charter, Code and Policy § 14A.30.010; San Diego, Cal., Municipal Code ch.5, art. 6; S.F., Cal., S.F. Police Code art. 2; San Jose, Cal., Code of Ordinances § 10.16.010-020; Seattle, Wash., Municipal Code § 12A.12.010; Tulsa, Okla., Code of Ordinances ch. 14; Va. Beach, VA, Code of Ordinances § 23-10; Va. Beach, VA, Code of Ordinances § 23-14; D.C. Code § 22-1321; D.C. Code §§ 22-1301, 1307–1314, 1317–1319; Wichita, Kan., Code of Ordinances § 5.24.010.

36. *2016 Crime in the United States: Table 21, Arrests by Race and Ethnicity*, FBI: Uniform Crime Reporting, https://ucr.fbi.gov/crime-in-the-u.s/2016/crime-in-the-u.s.-2016/topic-pages/tables/table-21 [https://perma.cc/P8LS-M9TS]. The actual number of arrests may be higher, as many jurisdictions do not report disorderly conduct arrests. *See* Alexandra Natapoff, *Criminal Misdemeanor Theory and Practice*, Oxford Handbooks Online, Oct. 2016, at 4, https://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199935352.001.0001/oxfordhb-9780199935352-e-9?print=pdf [https://perma.cc/J4GB-BW9F]. Depending on the jurisdiction, disorderly conduct offenses can be labeled civil ordinance offenses, municipal offenses, state law misdemeanor offenses, criminal ordinance violations, summary offenses, or infractions. *See* Megan Stevenson & Sandra Mayson, *The Scale of Misdemeanor Justice*, 98 B.U. L. REV. 731, 739 (2018) ("The set of offenses officially designated as 'misdemeanors' in a given jurisdiction is largely a function of that jurisdiction's idiosyncratic labeling choices."). In some jurisdictions, an individual may receive a citation in lieu of arrest. *See* Amber Widgery, *Citation in Lieu of Arrest*, Nat'l Conf. State Legislatures (Mar. 18, 2019), http://www.ncsl.org/research/civil-and-criminal-justice/citation-in-lieu-of-arrest.aspx [https://perma.cc/VH54-NTCG].

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an assessment of the particular place's character and norms—typically referred to by courts as the social context.[37]

These categories of disorder implicate varying community interests, ranging from freedom from harm to freedom from disruption or some mixture of the two. Although I attempt to describe these categories in greater detail, these conceptual categories are not always distinct in practice, so it may be best to consider these behaviors as a mixture of elements and interests rather than one neat category.[38] Nevertheless, separating out the stated community's interest under each type of disorder will clarify the nature and scope of the proscribed conduct. It will also provide an entry point for calling into question the legitimacy of these categories and the community interests that purport to justify them.

1. Violent Disorders

Statutory prohibitions against violent disorder seek to protect the public against conduct that poses an immediate risk of injury or harm.[39] Fighting in a public street is the prototypical example of the violent-disorder type of disorderly conduct.[40] In cases involving fighting, disorderly conduct could overlap with assault, as both punish "attempt[ing] to cause or purposely, knowingly or recklessly caus[ing] bodily injury to another."[41] However, assault and disorderly conduct are not coextensive. Disorderly conduct primarily targets violent, tumultuous, or threatening conduct that disturbs the *public*'s peace, whereas the crime of assault focuses on conduct that puts another *person* in fear of imminent harm or that causes or attempts to cause actual bodily injury.[42] Abusive

37. *See, e.g.*, Livingston v. State, 995 A.2d 812, 822 (Md. Ct. Spec. App. 2010) (upholding conviction of tuberculosis patient for assaulting medical staff and noting that disorderly conduct must be interpreted "in the context of a treatment facility for tuberculosis"); State v. Colby, 972 A.2d 197, 203 (Vt. 2009) (overturning conviction during graduation speech by U.S. Director of National Intelligence on the grounds that "such *de minimis* disturbances, even if rude and out of place in the context of a commencement ceremony, cannot serve as the basis for criminal liability without running afoul of the First Amendment"); *In re* L.E.N., 682 S.E.2d 156 (Ga. Ct. App. 2009) (noting it not disorderly conduct for a juvenile to shout an expletive at a teacher in the cafeteria, although it was rude and disrespectful in context).

38. For example, behaviors categorized as violent, or as a threat of violence to both persons and property, may be viewed as disrupting the sense of safety and security of some members in the community but perhaps will not generate enough disruption to amount to a broader public disruption.

39. Feiner v. New York, 340 U.S. 315, 319 (1951).

40. Model Penal Code & Comments., pt. II, § 250.2 cmt. 3, at 330 (Am. L. Inst. 1980) ("One of the chief uses of a disorderly conduct statute is to prohibit public brawling.").

41. *Id.* § 211.1.

42. *See id.* § 250.2 cmt. 3 at 330 ("The proscription of fighting [in disorderly conduct] does not precisely duplicate the Section 211.11 offense of assault. The latter provision reaches one who attempts to cause or who purposely, knowingly, or recklessly causes bodily injury to another. The instant section, in contrast, requires neither injury to another nor any intention of bringing about that result. The difference in coverage is justified on the ground that disorderly conduct is concerned with the effects of fighting on members of the public generally rather than with any harm to the participants. It is consistent with this rationale that the disorderly conduct provision requires culpability with respect to the risk of causing public annoyance or alarm.").

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behaviors that create a risk of violence are also considered a type of violent disorder.[43] If the purpose of criminalizing disorderly conduct is to proscribe those behaviors that "provoke public disorder,"[44] then violent conduct is deemed "disorderly conduct" because it poses a threat to safety and therefore disrupts—or threatens to disrupt—normal social operations.

2. Disruptive Disorders

Disruptions to the public are the crux of disorderly conduct laws. However, public disruptions may not involve acts of violence. Disruptive behaviors can be characterized as "unruly," "tumultuous,"[45] "maliciously disturbing,"[46] or hazardous and may not necessarily involve violence.

a. Disorders as Offensive Conduct

Consistent with the purpose of protecting the public against offensive disorders, disorderly conduct laws proscribe conduct that offends the sensibilities and morals of the community. Abusive or obscene language or gestures[47] and lewd conduct, including exposing one's "private parts"[48] or "buttock or anus,"[49] are some examples of offensive-disruptive disorders. For example, the Model Penal Code section 250.2(1)(b) prohibits individuals from engaging in an "offensively coarse utterance, gesture or display, or . . . abusive language to any person present."[50] Provisions similar to section 250.2(1)(b) have garnered considerable scrutiny as they may implicate protected speech and test the extent to which the state may restrict speech to preserve the public peace.[51] In some jurisdictions, disorderly conduct laws also proscribe "physically offensive conditions," construed by at least one state appellate court to mean that a "condition must be offensive to the senses rather than morally or intellectually offensive."[52] Here, the community's interest in prohibiting offensive conduct is purportedly to prevent community members from being subjected to sights and sounds that highly offend the senses or may be regarded as abusive.

43. *See, e.g.*, Albuquerque, N.M., Code of Ordinances § 12-2-5(A) (disorderly conduct).

44. Commonwealth v. Vetter, 149 A.3d 71, 77 (Pa. Super. Ct. 2016).

45. The Model Penal Code provides the example of "running up and down the corridors of an office building" as one example of "tumultuous" behavior. Model Penal Code & Comments., pt. II, § 250.2 cmt. 3, at 331.

46. *See, e.g.*, Albuquerque, N.M., Code of Ordinances § 12-2-5(C), (F).

47. *See, e.g.*, 18 Pa. Stat. and Cons. Stat. Ann. § 5503 (2015); Vt. Stat. Ann. tit. 13, § 1026(a)(3) (2020).

48. Ark. Code Ann. § 5-71-207 (2019).

49. Alaska Stat. § 11.61.110(7) (2020).

50. Model Penal Code § 250.2(1)(b) (Westlaw through 2020 Annual Meeting of American Law Institute).

51. Model Penal Code & Comments., pt. II, § 250.2 cmt. at 332–33 (Am. L. Inst. 1980) (noting free speech concerns implicated by 205.2(1)(b)).

52. State v. Lang, 359 P.3d 349, 354 (Or. Ct. App. 2015).

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b. Disorders as Physical Hazards

A hazardous condition is another type of disruptive disorder. State statutes that criminalize physically hazardous disorders also label such disorders "physically offensive conditions."[53] "Stink bombs [and] the strewing of garbage, nails or other noxious substances"[54] are examples of actions that may constitute disorderly conduct based on hazardous conditions. Public urination and defecation are also types of disorders that may be classified as hazards.[55]

c. Disorders as Disruptions to Comfort and Peace

Disorders that disrupt the comfort of the community include unruly or tumultuous behaviors, such as creating loud noises, shouting, or making excited outbursts.[56] Preserving the public peace in this context involves managing disruptive behaviors that infringe upon the public's peace or tranquility, but determining which behaviors are "disruptive" becomes a place- and context-specific inquiry. Disorderly conduct laws that proscribe loud noise and other disruptions in hospitals, for example, aim to prevent disruptions to patient comfort.[57] These laws may also be regarded as attempts to prevent disturbances that risk disrupting medical care.[58]

d. Disorders as Disruptions in Access to Public Spaces

"Disruptive presence in public" refers to disorderly conduct provisions that criminalize presence—that is, remaining in a public place when that person's presence is unwanted or undesirable. Disruptive disorders include actions that impede pedestrian or vehicular traffic and refusals to disperse after police have issued an order to do so.[59] These provisions aim to protect "the public's"

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53. Ky. Rev. Stat. Ann. § 525.060(1)(a)(3) (West 2020) ("[Physically offensive conditions] create[] a hazardous or physically offensive condition by any act that serves no legitimate purpose."); Mont. Code Ann. § 45-8-101(h) (2021) (same); N.Y. Penal Law § 240.20(7) (West 2020).

54. Commonwealth v. Jarboe, 12 Pa. D. & C.3d 554, 557 (Pa. Ct. C.P. Cumberland Cnty. 1979).

55. *See, e.g.*, D.C. Code § 22-1321(e) (2020).

56. *See, e.g.*, N.D. Cent. Code Ann. § 12.1-31-01(1) (2013); Idaho Code § 18-6409 (2020); Mo. Rev. Stat. § 574.010(1.)(1)(a) (2016); Mont. Code Ann. § 45-8-101(1)(b) (2021).

57. *See, e.g.*, N.H. Rev. Stat. Ann. § 644:2(II)(d) (2016) (ascribing disorderly conduct where accused "engages in conduct in a public place which substantially interferes with . . . the provision of emergency medical treatment, or the provision of other emergency services when traffic or pedestrian management is required"); Utah Code Ann. § 76-9-102(2) (LexisNexis 2020).

58. *See, e.g.*, United States v. Agront, 773 F.3d 192, 197 (9th Cir. 2014) ("The prohibition on '[d]isorderly conduct' creating 'loud, boisterous, and unusual noise' on VA property therefore serves '[t]he government's interest in caring for veteran patients and not triggering adverse psychological reactions from such patients.'"); State v. Amsden, 75 A.3d 612, 621 (Vt. 2013) (upholding conviction for disorderly conduct where, among other evidence, police testified that defendant's outbursts disrupted patient care).

59. *See* Ala. Code § 13A-11-7(6) (2015); Haw. Rev. Stat. § 711-1101(e) (2020). Ensuring access to public ways implicates one of the core functions and justifications of state police power. *See, e.g.*, Schneider v. New Jersey, 308 U.S. 147, 160–61 (1939) ("Municipal authorities, as trustees for the public, have the duty to keep their communities' streets open and available for movement of people and property, the primary purpose to which the streets are dedicated. So long as legislation to this end does

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unimpeded access to public space. Though these laws proscribe behaviors that limit access to public space, they are a small part of a broader disorderly conduct regime that collectively polices behavior in, and access to, public space.

People who lack stable housing and who reside on public streets have been charged with disorderly conduct for their presence in affluent areas, particularly in recently gentrified or gentrifying areas,[60] or in cities that have big ticket events that draw in tourists to the local community.[61] Although these laws do not expressly proscribe presence, in cases in which the conduct proscribed is inextricably linked to status, the line between conduct and status blurs. Disruptive presence implicates a number of community interests. Removing inhabitants from public places may serve the community's interest in preserving unobstructed access to, for example, public sidewalks or park benches; maintaining the aesthetics of certain public spaces; or managing the number of inhabitants in public spaces, such as near the entrances of event venues, bus terminals, or parks.

Disruptive presence disorders tend to merge with wholly innocent behaviors, such as sleeping in public or public mental health episodes, which are criminalized as disorderly behaviors because they are done in public. These types of disorderly conduct laws tend to criminalize actions that would not be criminal if done in a private place. For example, individuals in mental crises have been charged with disorderly conduct for behaviors that are likely public manifestations of their psychiatric disabilities.[62]

e. Disorders as Dissent or Resistance

Disruptive disorderly conduct also includes forms of dissent, sweeping within its scope protected First Amendment freedoms. The surge in media attention involving the criminalization of protest and officer-civilian confrontations caught on video, has brought the issue front and center to another generation. But the criminalization of dissent as disorderly conduct is nothing new. Historically and today, participation in protests, marches, or direct actions has subjected participants to criminal sanction, often as disorderly conduct or

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not abridge the constitutional liberty of one rightfully upon the street to impart information through speech or the distribution of literature, it may lawfully regulate the conduct of those using the streets.").

60. *See* Jason McGahan, *LAPD Is Arresting Increasing Numbers of Homeless in Gentrifying Neighborhoods*, L.A. Wkly. (Oct. 20, 2017), https://www.laweekly.com/lapd-is-arresting-increasing-numbers-of-homeless-in-gentrifying-neighborhoods/ [https://perma.cc/3NMY-52BU].

61. *See, e.g.*, Pottinger v. City of Miami, 810 F. Supp. 1551, 1555 (S.D. Fla. 1992) (describing "systematic police 'sweeps' of homeless areas prior to high-profile events such as the Orange Bowl Parade"); *see also* Benjamin Oreskes, *More than 500 Homeless People Wonder Where They'll Go as O.C. Clears out Largest Encampment near Angel Stadium*, L.A. Times (Jan. 21, 2018), https://www.latimes.com/local/lanow/la-me-ln-santa-ana-riverbed-homeless-20180122-story.html [https://perma.cc/T398-CZQK].

62. *See* Rhonda Cook, *Suit: Free Jailed Atlanta Man Too Poor to Pay Bond*, Atlanta J.-Const. (Jan. 9, 2018), https://www.ajc.com/news/local/suit-filed-force-atlanta-free-jailed-poor-who-can-pay-bond/IXax3TpxJKWmyhVba4FGFK/ [https://perma.cc/U2CQ-8PV8].

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related common law offenses.[63] During the civil rights era, states used disorderly conduct statutes to quell protests and mass demonstrations.[64]

Over the last few years, state laws criminalizing protest have proliferated across the country. These laws include criminalizing protest attire, such as masks or face coverings during protests, and protests and direct actions themselves at critical infrastructure sites.[65] Some have criticized these restrictions as government attempts to chill speech and quell dissent.[66] Other restrictions include the construction and use of "free speech zones" and the containment of demonstrations within so-called protest pens. One scholar has observed that such "practice . . . all but guarantees police-citizen tussles over physical space, since 'spatial dynamics' are a major topic of contestation between protesters and the police."[67]

Disorderly conduct also encompasses confrontations between civilians and law enforcement that police construe as intentional acts of defiance. In this context, some commentators have described the offense of disorderly conduct as a type of "contempt of cop."[68] Police have arrested civilians for so-called disorderly behaviors, including filming or recording the police,[69] even though these activities are protected under the First Amendment.[70]

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63. *See, e.g.*, Gregory v. City of Chicago, 394 U.S. 111 (1969) (overturning disorderly conduct convictions of protestors for direct action at mayor's residence that provoked hostile reaction from audience); Garner v. Louisiana, 368 U.S. 157 (1961); Bachellar v. Maryland, 397 U.S. 564, 568–71 (1970) (setting aside the disorderly conduct convictions of anti-war protesters who inspired a hostile reaction among one-hundred onlookers while demonstrating at an Army recruiting station); *2 Found Guilty of Disorderly Conduct for ICE Protest*, AP News (Mar. 20, 2019), https://www.apnews.com/ce5e666c75774dd8a8938ed195dc575a [https://perma.cc/KE76-CQG4] (reporting that two individuals allegedly blocking a road in front of an Immigration and Customs Enforcement office were convicted of disorderly conduct); Rebecca Fishbein, *Cornel West & Other Stop-and-Frisk Protesters Convicted of Disorderly Conduct*, Gothamist (May 5, 2012), https://gothamist.com/2012/05/05/twenty_protesters_convicted_of_diso.php [https://perma.cc/MTK4-D54B] (reporting that thirty-two activists protesting stop-and-frisk were convicted of disorderly conduct).

64. *See, e.g.*, Cox v. Louisiana, 379 U.S. 536 (1965) (reversing convictions where a group of students protesting against segregation and discrimination and who assembled peaceably at state capitol building and marched to courthouse where they sang, prayed, and listened to a speech by defendant, were convicted of disturbing the peace and of obstructing public passages in violation of state statutes).

65. *See U.S. Protest Law Tracker*, Int'l Ctr. for Not-For-Profit L. (June 28, 2021), http://www.icnl.org/usprotestlawtracker/ [https://perma.cc/PM7V-GEZQ].

66. *See, e.g.*, Traci Yoder, *New Anti-Protesting Legislation: A Deeper Look*, NAT'L LAWS. GUILD (Mar. 2, 2017), https://www.nlg.org/new-anti-protesting-legislation-a-deeper-look/ [https://perma.cc/86MV-8TBC].

67. JARRET S. LOVELL, CRIMES OF DISSENT: CIVIL DISOBEDIENCE, CRIMINAL JUSTICE, AND THE POLITICS OF CONSCIENCE 118 (2009).

68. NATAPOFF, *supra* note 14, at 60 ("Offenses like disorderly conduct and resisting arrest are sometimes referred to as 'contempt-of-cop' crimes because they give the police the opportunity to arrest people who challenge police authority.").

69.*See, e.g.*, Eli Rosenberg, *Suit Accuses New York Police of Violating Citizens' Right to Film*, N.Y. TIMES (July 7, 2016), https://www.nytimes.com/2016/07/08/nyregion/suit-accuses-new-york-police-of-violating-citizens-right-to-film.html [https://perma.cc/V8TN-D9WC].

70. *See, e.g.*, Fields v. City of Philadelphia, 862 F.3d 353 (3d Cir. 2017); Turner v. Lieutenant Driver, 848 F.3d 678 (5th Cir. 2017); Gericke v. Begin, 753 F.3d 1 (1st Cir. 2014); ACLU of Ill. v.

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Criminalizing disorderly dissent purports to protect the community from a variety of disruptions, particularly where these laws regulate how protests take place or aim to maintain safety and security of persons and property.[71] However, the line between disruptive disorderly dissent and legitimate dissent is far from clear. This lack of clarity may facilitate an overuse of disorderly conduct by law enforcement. At best, this might allow law enforcement to manage crowds during protests to ensure safety to persons and property. At worst, it chills speech, particularly speech and demonstrations against police violence.

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As the taxonomy above shows, disorderly conduct offenses fall within broader efforts by the state to control and manage (e.g., contain, disperse, and remove) physical and social disorder in public spaces. On its face, this may not raise any concerns. Yet, as I discuss in the Sections below, as with their common law antecedents, disorderly conduct offenses similarly subordinate, or risk subordinating, the individual rights of those subjected to policing. In the next Section, I discuss how the enforcement of disorderly conduct laws promotes and reinforces discriminatory norms that lead to the exclusion of certain historically marginalized groups from access to public space while facilitating pathways to increased scrutiny and surveillance in public space.

III.
POLICING DISORDER, ENFORCING DISCRIMINATION

Disorderly conduct laws reinforce discriminatory notions of disorder that function to exclude and subordinate negatively racialized and historically marginalized groups. As I discuss below, disorderly conduct laws, like the vagrancy regimes before them, serve to police "people out of place," albeit in different ways. For much of history, vagrancy was labeled a crime. The "offense" of vagrancy, according to one scholar, "consists of being a certain kind of person rather than in having done or failed to do certain acts."[72] These crimes include "being a common drunkard, common prostitute, common thief, tramp, or disorderly person."[73] As Professor Lisa Goluboff has written in her comprehensive history on the demise of vagrancy laws in the United States,

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Alvarez, 679 F.3d 583 (7th Cir. 2012); Glik v. Cunniffe, 655 F.3d 78 (1st Cir. 2011); Smith v. City of Cumming, 212 F.3d 1332 (11th Cir. 2000); Fordyce v. City of Seattle, 55 F.3d 436 (9th Cir. 1995).

71. *See, e.g.*, Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 297 (1984) ("But the Park Service's decision to permit nonsleeping demonstrations does not, in our view, impugn the camping prohibition as a valuable, but perhaps imperfect, protection to the parks. If the Government has a legitimate interest in ensuring that the National Parks are adequately protected, which we think it has, and if the parks would be more exposed to harm without the sleeping prohibition than with it, the ban is safe from invalidation under the First Amendment as a reasonable regulation of the manner in which a demonstration may be carried out.") (holding National Park Service regulation prohibiting camping in certain parks did not violate the First Amendment even though it barred demonstrators from sleeping in Lafayette Park and on the Mall to protest the plight of the unhoused).

72. Forrest W. Lacey, *Vagrancy and Other Crimes of Personal Condition*, 66 HARV. L. REV. 1203, 1203 (1953).

73. *Id.*

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"[t]he vagrancy law regime . . . regulated so much more than what is generally considered 'vagrancy.' Vagrancy laws were as versatile as they were common and legally valid. They represented an approach to policing, a vision of society, and, for many, an inescapable vulnerability."[74] These laws, observed Professor Priscilla Ocen, "targeted conduct and movement by individuals and groups associated with crime and disorder, particularly African-Americans. [T]hese vagrancy laws, which came to be known as the Black Codes, were used to reassert control over newly freed African-Americans through the operation of the criminal law."[75]

The Supreme Court finally invalidated vagrancy laws in 1972 in *Papachristou v. City of Jacksonville.*[76] In *Papachristou*, eight defendants challenged their convictions under a Jacksonville, Florida ordinance criminalizing vagrancy.[77] In overturning Jacksonville's vagrancy ordinance, the Supreme Court held that the ordinance's vague terms failed to provide notice of what conduct fell within the statute's prohibitions and failed to provide standards to guide the exercise of discretion.[78] *Papachristou* is regarded as a triumphant victory in the fight for individual rights for all individuals whose identities and behaviors failed to conform to the social norm—the so-called people out of place.[79] *Papachristou* limited the ability of communities to regulate "disorder" and "disorderly people" within their borders, but it did not end social efforts to regulate so-called people out of place, particularly considering Supreme Court opinions enhancing police discretion during that same period.[80] After vagrancy laws were overturned in *Papachristou* on vagueness grounds, state legislatures and municipalities enacted statutes and ordinances that enumerated a litany of specific violations now labeled disorderly conduct.[81]

In some ways, disorderly conduct statutes can be viewed as the second-generation versions of vagrancy laws. These statutes and ordinances, like the vagrancy laws before them, serve the purpose of regulating a wide swath of human behaviors—from cursing to drunkenness, profanities to fighting, and shouting to loitering. Like vagrancy laws, contemporary disorderly conduct

74. RISA GOLUBOFF, VAGRANT NATION: POLICE POWER, CONSTITUTIONAL CHANGE, AND THE MAKING OF THE 1960S 4 (2016).

75. Priscilla A. Ocen, *Birthing Injustice: Pregnancy as a Status Offense*, 85 GEO. WASH. L. REV. 1163, 1193 (2017).

76. 405 U.S. 156 (1972).

77. *Id.* at 156–61. The defendants were arrested and charged with a range of offenses, including prowling by auto, loitering, disorderly loitering on a street, and disorderly conduct by resisting arrest with violence, among others. *Id.* at 158.

78. *See id.* at 171.

79. *Papachristou* represented the culmination of activism and advocacy targeting the vagrancy law regimes, including legal challenges and legislative advocacy on behalf of historically marginalized groups. Risa Goluboff's fascinating account provides a social context for what becomes the legal movement to dismantle the vagrancy law regime. *See* GOLUBOFF, *supra* note 74, at 1–11.

80. *See* GOLUBOFF, *supra* note 74, at 9–11 ("[T]he Court invalidated vagrancy laws only after it had created other methods of authorizing police discretion.").

81. *See, e.g.*, RISA LAUREN GOLUBOFF, VAGRANT NATION POLICE POWER, CONSTITUTIONAL CHANGE, AND THE MAKING OF THE 1960S 71–73 (2016).

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statutes tend to criminalize and punish conduct not only for so-called disorderly *actions* but also for perceived disorderly *persons*. This is true when behaviors are criminalized that closely relate to status.[82]

However, important differences exist between the vagrancy laws of yesterday and the disorderly conduct laws of today. To begin, disorderly conduct laws tend not to criminalize persons *per se*. Conviction for disorderly conduct by law requires a criminal act and, in most cases, a requisite mental state. Second, the vast diversity of defendants charged with disorderly conduct differs from earlier conceptions of "people out of place" under vagrancy law regimes.[83] So-called social misfits, or non-conformists, are not the only groups subjected to the broad sweep of disorderly conduct statutes; professionals—doctors, lawyers, professors—and affluent individuals from historically marginalized groups are also affected by the broad scope of these laws and by aggressive enforcement policies. Disorderly conduct charges are distributed to professionals for conduct alleged to have disrupted the public order and peace.[84] For example, Symone Sanders, then a press secretary for presidential candidate Bernie Sanders, was detained at LaGuardia Airport in New York City for allegedly refusing to submit to a detailed security check and making an "unreasonable noise" while "cursing in front of patrons and young children."[85] In another case, two police offers dragged Anila Daulatzai, a Pakistani American and visiting professor at Harvard Divinity School, from a Southwest Airlines flight after allegedly complaining of pet-related allergies.[86] She was later charged with disorderly conduct.[87] Finally, the conception of disorder is not necessarily related to an individual's ongoing presence in public or urban spaces. Instead, less stable conceptions of "public

82. *See, e.g.*, Martin v. City of Boise, 920 F.3d 584 (9th Cir. 2019). In this constitutional challenge to Boise's camping and disorderly conduct ordinance, the court held that the Eighth Amendment's Cruel and Unusual Punishments Clause prohibits the enforcement of a statute that bans sleeping outside against unhoused persons with no access to alternative housing. *See id.* at 616–18. Boise's Disorderly Conduct Ordinance prohibited "[o]ccupying, lodging, or sleeping in any building, structure, or public place, whether public or private . . . without the permission of the owner or person entitled to possession or in control thereof." BOISE, IDAHO, CITY CODE § 6- 01-05. The Supreme Court denied the city's petition for certiorari on December 16, 2019. City of Boise v. Martin, No. 19-247, 2019 WL 6833408 (U.S. Dec. 16, 2019).

83. This does not mean that "professionals" belonging to negatively racialized or marginalized groups would not have been criminalized under vagrancy law regimes of a prior era. Rather, I mean to state that criminalizing "conduct" seems to have swept up professionals within the ambit of disorderly conduct laws whereas the prior vagrancy regime was generally targeted at those marginalized in society because of their status (e.g., those individuals labeled as poor, outcasts, or deviant).

84. At the same time, these cases may mirror the vagrancy laws of a previous era because of their tendency to sweep up persons whose conduct defied the class hierarchy.

85. James Ford, *Bernie Sanders' Former Press Secretary Detained at LaGuardia Airport: Sources*, PIX11 (Apr. 12, 2018), https://pix11.com/2018/04/12/bernie-sanders-former-press-secretary-detained-at-laguardia-airport/ [https://perma.cc/8KY7-3CTF].

86. Mary Hui & Lindsey Bever, *Southwest Said She Was Removed from the Plane over Dog Allergies. She Has a Very Different Story*, WASH. POST (Oct. 5, 2017), https://www.washingtonpost.com/news/dr-gridlock/wp/2017/10/04/southwest-says-she-was-forced-off-a-plane-over-dog-allergies-the-woman-has-a-very-different-account/ [perma.cc/56CX-QN7U].

87. *Id.*

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space" go beyond "chronic misconduct in city spaces,"[88] extending to airports and coffee shops and to spaces on or near private college campuses.[89]

If vagrancy laws involved policing people "out of place," disorderly conduct laws have extended the conception of place[90] in an era of mass criminalization characterized by over-policing in public spaces. Beginning in the late 1980s, public resources were channeled into policing initiatives and enforcement policies that focused on aggressive enforcement of low-level, non-violent, quality-of-life offenses under the so-called broken windows approach.[91] These aggressive policing strategies were justified on the grounds that they were necessary to manage or eliminate physical and social disorder to protect the local community and access to public space. By concentrating these aggressive policing efforts in low-income communities of color, enforcing disorderly conduct offenses has functioned as a means not only to identify, contain, or remove conduct labeled disorderly *in* these public spaces, but also to regulate the people *constructed as* disorderly.

A. Discriminatory Norms

Disorderly conduct laws do more than delineate behaviors deemed disorderly; policing these behaviors also expresses social meaning. Disorderly conduct laws construct categories of "orderly" and "disorderly" people not based on objective criteria or objective standards (e.g., of reasonableness), but instead based on social norms that are not necessarily shared by all in the designated community.[92] In the Sections that follow, I examine the social construction of disorder and its role in enforcing discriminatory norms through an intersectional lens. I argue that historically rooted racist, gendered, and ableist norms are embedded within determinations of, and distinctions between, what is "disorderly" and "orderly." In particular, disorderly conduct laws rely in part on normative constructions of race, gender, and (dis)ability as a "test"[93] for determining who and what are considered disruptions to public order.

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88. Robert C. Ellickson, *Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows, and Public-Space Zoning*, 105 YALE. L.J. 1165 (1996).

89. *See, e.g.*, *Police Use Taser on Man After Chaos Erupts in Downtown Starbucks*, WPXI (Mar. 7, 2019), https://www.wpxi.com/news/top-stories/police-use-taser-on-man-after-chaos-erupts-in-downtown-starbucks/928194783/ [https://perma.cc/F7LJ-MAQ9]; Amir Vera, *Video Shows Cambridge Police Tackle and Punch Black Harvard Student During Arrest*, CNN (Apr. 17, 2018), https://www.cnn.com/2018/04/17/us/harvard-student-police-use-of-force/index.html [https://perma.cc/E3WK-X6WV].

90. I am indebted to Steven Wilf for this formulation.

91. *See generally* BERNARD E. HARCOURT, ILLUSION OF ORDER: THE FALSE PROMISE OF BROKEN WINDOWS POLICING 23–27 (2001) (discussing James Wilson and George Kelling's broken windows theory and the order-maintenance approach to crime control).

92. Eric J. Miller, *Role-Based Policing: Restraining Police Conduct "Outside the Legitimate Investigative Sphere*," 94 CALIF. L. REV. 617, 683 n.333 (2006) ("Who counts as orderly and disorderly . . . may itself be contested.").

93. Roberts, *Social Meaning of Order-Maintenance Policing*, *supra* note 15, at 805 ("One of the main tests in American culture for distinguishing law-abiding from lawless people is their race.").

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1. Racist Norms

Like racialized notions of criminality, racist stereotypes and norms[94] shape conceptions that inform which individuals and what behaviors are considered disorderly.[95] This is because deeply rooted norms that serve to link racial minorities or negatively racialized groups to criminality also inform social expectations for behavior, including what behaviors are perceived as disorderly.[96] Negatively racialized groups, trans and queer communities of color, and low- to no-income communities of color in particular have faced the harms of over-policing due to stereotypes that inform social perceptions of criminality and disorder.[97] As criminal law scholar and critical race theorist Devon Carbado

94. In this Article, I refer to both stereotypes and norms. Norms are "rules or expectations that are socially enforced. . . . The term is also sometimes used to refer to patterns of behavior and internalized values." Christine Horne, *Norms*, OXFORD BIBLIOGRAPHIES (Jan. 11, 2018), https://www.oxfordbibliographies.com/view/document/obo-9780199756384/obo-9780199756384-0091.xml [https://perma.cc/DK89-F8AC]. In my view, norms account for the ways some social constructs have become not only widespread but normalized, entrenched, and widely accepted throughout society. *Cf.* JOEY L. MOGUL, ANDREA J. RITCHIE & KAY WHITLOCK , QUEER (IN)JUSTICE: THE CRIMINALIZATION OF LGBT PEOPLE IN THE UNITED STATES 23 (2011) (noting that "[t]he specter of criminality [that] moves ceaselessly through the lives of LGBT people . . . is so deeply rooted in U.S. society that the term *stereotype* does not begin to convey its social and political force").

95. According to Professor L. Song Richardson, "[p]olice officers often engage in proactive policing in urban, poor, majority-black neighborhoods. Research demonstrates that officers who work in urban environments have higher levels of implicit racial bias than those working in other neighborhoods." L. Song Richardson, *Police Efficiency and the Fourth Amendment*, 87 IND. L.J. 1143, 1160 (2012) (citing Joshua Correll, Bernadette Park, Charles M. Judd, Bernd Wittenbrink, Melody S. Sadler & Tracie Keesee, *Across the Thin Blue Line: Police Officers and Racial Bias in the Decision to Shoot*, 92 J. PERSONALITY & SOC. PSYCH. 1006, 1020–22 (2007)). Perceptions of disorder are linked to race. Professor Richardson pointed out that "one study revealed that similarly situated neighborhoods are viewed as more disorderly when they are majority black versus majority white." *Id.* (citing Robert J. Sampson & Stephen W. Raudenbush, *Seeing Disorder: Neighborhood Stigma and the Social Construction of "Broken Windows,"* 67 SOC. PSYCH. Q. 319 (2004)).

96. *Cf.* Roberts, *Social Meaning of Order-Maintenance Policing*, *supra* note 15, at 803 (examining the legally constructed dichotomy between orderly and disorderly individuals and discussing how Chicago gang loitering ordinance "incorporates racist social norms that help to perpetuate stereotypes of Black criminality").

97. *See, e.g.*, MICHELLE ALEXANDER, THE NEW JIM CROW 229 (2010) ("One way of understanding our current system of mass incarceration is to think of it as a bird cage with a locked door. It is a set of structural arrangements that locks a racially distinct group into a subordinate political, social, and economic position, effectively creating a second-class citizenship."); Reuben Jonathan Miller & Amanda Alexander, *The Price of Carceral Citizenship: Punishment, Surveillance, and Social Welfare Policy in an Age of Carceral Expansion*, 21 MICH. J. RACE & L. 291, 296–97 (2016) ("The carceral citizen is *not* a second-class citizen in a traditional sense. Carceral citizenship does not engender a constitutional contradiction, where one's citizenship rights are not enforced, and he or she may therefore invoke protections from the state based on their right to full social, civic and economic participation. Rather, the carceral citizen has unique rights, responsibilities, and claims that he or she is permitted to make on the state. The carceral citizen, then, does not inhabit a racial category (a category based on perceived ancestry) but an alternate citizenship track and a novel form of citizenship. This is an important distinction. The carceral citizen experiences social, political, and economic life in ways that are unique to members of his or her class, and are not typically shared by even the most marginalized people who have traditionally been marked by their race, religion, ethnicity, or gender. Indeed, the carceral citizen is a novel legal and social category that has emerged in the age of mass incarceration. Carceral citizens face constitutionally justified forms of exclusion based solely on the presumption of legal guilt at some point in their lifetimes."); *see also* Amna Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L.

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contended, "marginalized groups are more vulnerable to police contact and violence because members of these groups often have non-normative identities to which stereotypes of criminality and presumptions of disorder apply."[98] Here, I propose that what Carbado referred to as "stereotypes of criminality and presumptions of disorder" are also evident in the social and legal regulation of "disorderly" behavior through the offense of disorderly conduct.

Associations between race and crime are deeply rooted in American history. For instance, as historian Khalil Gibran Muhammad explained, after emancipation and through the end of the 19th century, major studies on race depicted Black criminality as a consequence of freedom. These studies emphasized "crime as *the* Negro Problem at the dawn of the Jim Crow era [and] identified the transition from slavery to freedom as the origin of the problem."[99] Influential crime studies of that period reflected such views. For example, statistician and actuary Frederick Hoffman, author of *Race Traits and Tendencies of the American Negro*, wrote what was the first nationwide study on Black crime statistics and "arguably the most influential race and crime study of the first half of the twentieth century."[100] While Muhammad recounted that, relying on white supremacist ideas that challenged "abolitionists' claims that with freedom, education, and moral training Blacks would gradually achieve equality with [W]hites," Hoffman instead claimed that Blacks were "impervious to civilizing influences by wedding increasing crime trends to the dramatic increase in black schools and churches over the three decades after slavery."[101]

Racist stereotypes or norms of criminality also informed policing strategies and enforcement objectives targeting Mexican and Indigenous communities. In nineteenth century Los Angeles, state and municipal codes criminalizing vagrancy and public drunkenness were enforced principally against Indigenous communities, although single, White males without jobs and without families were targeted for enforcement as well.[102] As Kelly Lytle Hernandez illuminated, enforcing such laws reinforced racist norms that linked Indigenous people to

REV. 405, 420 (2018) ("Moreover, the DOJ identified the fundamental relationship among wealth, poverty, and criminalization to these constitutional violations in both [the Ferguson and Baltimore] police departments. At the direction of the city, Ferguson's police and courts extracted money from poor Black residents, padding the municipal budget. The police saw African Americans not 'as constituents to be protected' but as 'potential offenders and sources of revenue.' In Baltimore, a 1990s turn to zero-tolerance policing drove stops, searches, and arrests, and uses of force 'even for minor offenses and with minimal or no suspicion.'" (citations omitted)).

98. Devon W. Carbado, *Blue-on-Black Violence: A Provisional Model of Some of the Causes*, 104 GEO. L.J. 1479, 1497 (2016).

99. KHALIL GIBRAN MUHAMMAD, THE CONDEMNATION OF BLACKNESS: RACE, CRIME, AND THE MAKING OF MODERN URBAN AMERICA 85 (2010).

100. *Id.* at 35.

101. *Id.* at 51–52.

102. *See* KELLY LYTLE HERNÁNDEZ, CITY OF INMATES: CONQUEST, REBELLION, AND THE RISE OF HUMAN CAGING IN LOS ANGELES, 1771–1965, at 36 (2017) ("The Los Angeles Common Council echoed state law with municipal public order codes that did not specifically target Native peoples but that local law enforcement officials, namely rangers and marshals, sweepingly enforced against 'Indians,' in particular.").

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criminality—as well as to threats to public order—due to false claims of inherent propensities toward immorality and intoxication. This label of criminality, combined with the purported threat Indigenous people posed to public disorder, justified their imprisonment and, subsequently, the forced extraction of their labor through state-sanctioned convict leasing. Professor Lytle Hernandez explained further that "[Anglo-American settlers] invested in imprisonment, spur[ed] a phenomenal carceral boom by broadly caging a diverse cast of Native landholders and racialized outsiders variously criminalized, policed, and caged as vagrants, drunks, hobos, rebels, illegal immigrants, and illegitimate residents trespassing in their [W]hite settler society."[103]

Even nineteenth-century prosecutions for disorderly houses tended to link race with criminality and disorder. For example, as historian William Novak wrote, "[r]ace often found its way into the primary legal statement of disorder," and "allegations of 'drunken negroes' triggered disorderly house prosecutions, especially in lower courts, especially in the South."[104] Novak further contended that "[w]hen race and slavery were involved, the line between public and private, civility and disorder grew exceedingly thin."[105] Here, the label of disorder attached to homes that disrupted race, class, and gender hierarchies. In *State v. Boyce*, slave patrols entered the home of Jacob Boyce on Christmas night and found Boyce, his family, and enslaved people gathered for conversation, music, and dance.[106] A jury convicted Boyce of keeping a disorderly house on the basis of jury instructions stating that they should find Boyce guilty if he had "suffered white persons and negroes, of both sexes, to meet together at his house and fiddle and dance together, and get drunk, and make noise."[107]

Racialized presumptions of criminality are linked to presumptions of disorderliness. These historical associations influence the enforcement of disorderly conduct laws today. More research is needed here, but what empirical evidence exists lends support to the claim that disorderly conduct laws disproportionately target racial minorities. The disproportionate racial impacts of policing disorder are apparent in statistics on disorderly conduct arrests. FBI data from 2018 identified approximately 63.7 percent of the arrestees for disorderly conduct as non-Latino White, 31.4 percent as Black, 13.2 percent as Hispanic or Latino, 3.9 percent as American Indian or Alaska Native, and 0.8 percent Asian,[108] compared with 60.1 percent, 12.5 percent, 18.5 percent, 0.7 percent, and 5.9 percent of their proportion of the total U.S. population,

103. *Id.* at 12–14.
104. NOVAK, *supra* note 27, at 161.
105. *Id.* at 162.
106. *Id.*
107. *Id.* (internal quotation marks omitted).
108. *2018 Crime in the United States: Table 43: Arrests by Race and Ethnicity*, FBI: UNIFORM CRIME REPORTING, https://ucr.fbi.gov/crime-in-the-u.s/2018/crime-in-the-u.s.-2018/tables/table-43 [https://perma.cc/A82R-AZYG].

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respectively.[109] Though there is reason to question the accuracy and completeness of self-reported data provided by participating jurisdictions, the reported numbers suggest that Black people and American Indian or Alaska Natives are overrepresented among disorderly conduct arrestees. Although disparities in arrest rates for Latinx communities may not show up in national arrest rates, recent data from San Jose, California, show that although Latinx individuals make up 30 percent of the population, they make up 70 percent of arrests for disturbing the peace.[110]

Ongoing aggressive policing strategies and enforcement priorities targeting racial groups enforce racist norms by reinforcing associations between these racial groups and disorder.[111] Stated differently, and in admittedly circular fashion, enforcement priorities may serve to reinforce stereotypes through those very same enforcement priorities. By targeting certain racial minorities for enforcement—facilitated by hyper-surveillance—law enforcement may reinforce stereotypes linking those groups to those substantive offenses or violations.[112] For example, such racist norms serve to reinforce associations between certain disruptive disorders, such as loud noise, with certain racial groups. In one case, Black cisgender male defendants were charged with disorderly conduct for playing music loudly from a car radio. The defendants offered evidence from a report indicating that 79 percent of the people issued noise citations in the jurisdiction were Black men.[113] The court nonetheless upheld the conviction. The court explained that "[a]lthough the statistics in the report were relevant, they alone were not sufficient to prove a constitutional violation, which would involve the Equal Protection Clause."[114]

Despite these harms, some may argue that disorderly conduct laws, and other order-maintenance laws, find support in Black communities. And if they do, some may wonder how these laws could be regarded as enforcing racist

109. William H. Frey, *The Nation Is Diversifying Even Faster than Predicted, According to New Census Data* (July 1, 2020), https://www.brookings.edu/research/new-census-data-shows-the-nation-is-diversifying-even-faster-than-predicted/ [https://perma.cc/94VK-8GF3]. Census data indicates 2.2 percent of the population identifies as "2+ and other races." *Id.*

110. NATAPOFF, *supra* note 14, at 152.

111. *Id.*; *see also* Jennifer M. Chacon & Susan Bibler Coutin, *Racialization Through Enforcement*, *in* RACE, CRIMINAL JUSTICE, AND MIGRATION CONTROL 172 (Mary Bosworth, Alpa Parmar & Yolanda Vázquez eds., 2018) ("[P]rofiling practices bind and reif[y] the concepts of race and criminality, fixing them into the subconscious of the profiled, the profiler, and society at large." (internal quotation marks omitted)).

112. Roberts, *Social Meaning of Order-Maintenance Policing*, *supra* note 15, at 804–05("While aggressive policing techniques impose norms on the community, they also reinforce pre-existing notions of criminality, disorder, and lawlessness. This is particularly true of loitering laws like the Chicago ordinance that rely on characteristics other than criminal conduct to identify offenders. Standing on a street corner is a sign of disorder only when it is engaged in by 'visibly lawless' people. When 'law-abiding' neighbors gather to chat in front of their homes or businesses it is seen as a sign of a vibrant community. Defining visibly lawless people adopts America's longstanding association between blackness and criminality.").

113. State v. Boggs, No. C-980640, 1999 WL 420108, at *4 (Ohio Ct. App. June 25, 1999).

114. *Id.*

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norms.[115] That Black communities have supported and may continue to support punitive policies does not suggest that these communities are not also reinforcing racialized norms that link, in many cases, Black people with conceptions of disorder. In this way, even if some Black communities supported policies that reinforced racial disparities, this support may be linked to anti-Black racism. Professor Darren Hutchinson provided a context to elaborate on this point. In his review of Professor James Forman's book *Locking Up Our Own*, he argued that support of punitive policies by Black communities could "*result from*—rather than disprove—the existence of racism."[116] Relying on social psychology research, Hutchinson explained that support from Black communities of punitive policies may stem from implicit racial bias, or "anti-Black stigma" based on out-group preferences, or what Hutchinson described as "negative perception of persons from [one's] social class and favorable impression of outside groups."[117] In another example, Hutchinson suggested that social dominance theory can also provide a richer context for understanding punitiveness within Black communities by noting that individuals who support punitive criminal laws and punishments tend to have higher social dominance orientation (SDO) scores and by connecting this finding with studies that show high SDO scores among members from historically marginalized groups.[118] Individuals with high SDO scores, Hutchinson wrote, also "tend to embrace negative stereotypes that portray people of color as disposed to criminality."[119] Thus, as Hutchinson illustrates, social psychology research supports the notion that even members of negatively racialized groups can support criminal law and enforcement efforts that reinforce racialized—and even racist—norms for order and disorder.

Even if historically marginalized groups participate in such policing within their own communities, one could argue that these groups are simply policing conduct and not persons, and that it is possible to distinguish disorderly conduct from the *person* engaged in the prohibited conduct. Stated differently, one could be engaged in, cited or arrested for, or even convicted of disorderly conduct and not be labeled deviant. Yet the historical associations between criminality and Blackness, and criminality and Indigenous and Latinx groups, suggest that those engaged in conduct in public spaces are more likely to be labeled as not only having engaged in disorderly conduct, but also as being deviant and criminal,

115. *See, e.g.*, Tracey L. Meares & Dan M. Kahan, *The Wages of Antiquated Procedural Thinking: A Critique of* Chicago v. Morales, 1998 U. CHI. LEGAL F. 197, 197–99 (describing support for anti-gang loitering ordinance among minority communities).

116. Darren Lenard Hutchinson, *Who Locked Us Up? Examining the Social Meaning of Black Punitiveness*, 127 YALE L.J. 2388, 2413 (2018) (reviewing JAMES FORMAN, JR., LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA (2017)).

117. *Id.* at 2415.

118. *See id.* at 2418–19. The Social Dominance Orientation is an index measuring "one's degree of preference for inequality among social groups." Felicia Pratto, Jim Sidanius, Lisa M. Stallworth & Bertram F. Malle, *Social Dominance Orientation: A Personality Variable Predicting Social and Political Attitudes*, 67 J. PERSONALITY & SOC. PSYCH. 741, 741 (1994).

119. Hutchinson, *supra* note 116, at 2419.

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subjecting those so identified to risk of removal, exclusion, and expulsion from public spaces.[120] Similarly, it could be argued that even if communities do label such conduct as disorderly, exclusion or expulsion from the community does not necessarily follow. That may be true in certain cases, but the labeling of behavior as disorderly opens the door to this forcible removal and to exclusion from public spaces, especially when such behaviors are subjected to criminal sanction.

2. Gendered Norms

Historically, the regulation of social and physical disorder targeted women who were unmarried, labeled sexually promiscuous, or otherwise thought to deviate from paternalistic and heteronormative conceptions of womanhood.[121] In the nineteenth century, that meant the policing of social and physical disorder stretched into the private sphere. As historian William Novak contended, by situating the orderly and well-governed home as the cornerstone of the well-ordered society, the enforcement of public morals regulations reinforced gender roles and tightly regulated sexuality.[122] In the nineteenth century, aggressive morals-regulation campaigns specifically targeted bawdy houses, or houses of prostitution.[123] Brothel house prosecutions and other anti-prostitution efforts specifically targeted women.[124] Women were regularly prosecuted for operating bawdy houses and convicted on little more than hearsay evidence of the woman's "general reputation."[125] Single women were especially targeted, particularly those alleged to have more than what was deemed an acceptable number of male acquaintances.[126] For example, single women could be found guilty of keeping a disorderly or bawdy house on the basis of allegations that they engaged in sexual intercourse outside of marriage.[127]

Dominant cultural norms regarding gender identities and expressions persist today in linking gender nonconformity with disorder or other social vices.[128] Through criminalizing disorder, states and localities have a ready mechanism for policing gender identities and expressions—by enforcing

120. *See supra* notes 99–102 and accompanying text.

121. *See, e.g.*, NOVAK, *supra* note 27, at 162–67 (discussing legal arguments in bawdy house prosecutions as reflecting a "deeply rooted ideology about young women's proper place in American society, beside their mothers or helping their husbands").

122. *See id.* at 162.

123. *See id.* at 162–63.

124. *See id.* at 166.

125. *Id.* at 167.

126. *See id.* at 166.

127. An example taken from Novak's *The People's Welfare* provides a useful example:
In *State v. Evans* (1845), Augusta Ann Evans, a "spinster" abandoned by her husband for over a year, was found guilty of keeping an "ill-governed" and disorderly bawdy house. The evidence consisted solely of neighbors' testimony of the early evening visits of a few different men. The Superior Court judge charged the jury that "while one or two acts of adulterous intercourse" do not a bawdy house make, "yet if this had become habitual and common . . . she would be guilty of the offense." *Id.*

128. *See* MOGUL ET AL., *supra* note 94, at 72.

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normative standards in public spaces.[129] Law enforcement often interprets gender nonconformity as embodying disorder, which can serve as a justification for aggressive policing.[130] Trans women, particularly trans women of color, have been charged with prostitution, solicitation, *and* disorderly conduct as a result of police profiling and crackdowns.[131] These crackdowns are rooted in historical associations between gender nonconforming behaviors and expressions and disorder. According to the authors of *Queer Injustice*, over-policing—whether through surveillance, regulation, removal, or the exclusion of queer and trans communities of color—is facilitated by "the persistent melding of homosexuality and gender nonconformity with concepts of danger, degeneracy, disorder, deception, disease, contagion, sexual predation, depravity, subversion, encroachment, treachery, and violence."[132] These constructs extend beyond the mere stereotypes and are, as the authors documented, "[s]o deeply rooted in U.S. society that the term *stereotype* does not begin to convey [their] social and political force."[133] As the authors of *Queer Injustice* maintained, "[t]he narratives . . . are so vivid, compelling, and entrenched that they are more properly characterized as *archetypes*—recurring, culturally ingrained representations that evoke strong, often subterranean emotional associations and responses."[134] Ultimately, the authors concluded that "[o]ver time within broader notions of criminality informed by race, class, and gender, a number of closely related and mutually reinforcing 'queer criminal archetypes' have evolved that directly influence the many manifestations and locations of policing and punishment of people identified as queer or living outside of 'appropriately gendered' heterosexual norms."[135] Such criminalization of queer identities, and

129. *Cf.* Ocen, *Birthing Injustice*, *supra* note 75, at 1199 ("[T]he criminalization of performative conduct by pregnant women enables the state to enforce normative standards, particularly those associated with motherhood and childrearing."). As Ocen pointed out, "criminalization and incarceration have long been used as a means to police gender norms." *Id.* at 1169; *see also* Priscilla A. Ocen, *Punishing Pregnancy: Race, Incarceration, and the Shackling of Pregnant Prisoners*, 100 CALIF. L. REV. 1239, 1262 (2012) ("The states disciplined Black women's perceived gender identities through convictions for behavior associated with masculinity, including public quarreling, using profane language, and public drunkenness.").

130. *See* ANDREA RITCHIE, INVISIBLE NO MORE: POLICE VIOLENCE AGAINST BLACK WOMEN AND WOMEN OF COLOR 53–54, 56, 59 (2017).

131. *See, e.g.*, People v. P.V., 64 Misc. 3d 444 (N.Y. Crim. Ct. 2019) (vacating prostitution charges but upholding disorderly conduct charges for a transgender woman asserting a defense that she was a victim of sex trafficking); *see also* J. Kelly Strader & Lindsey Hay, *Lewd Stings: Extending* Lawrence v. Texas *to Discriminatory Enforcement*, 56 AM. CRIM. L. REV. 465, 470 (2019) ("[P]olice departments often target transgender and transsexual people when enforcing vice crimes, particularly prostitution laws. Once again, a large proportion of arrestees are people of color, including immigrants and others who lack the economic means or political resources to fight discriminatory enforcement practices.").

132. MOGUL ET AL., *supra* note 94, at 23.

133. *Id.*

134. *Id.*

135. *Id*. *See generally* MARGOT CANADAY, THE STRAIGHT STATE: SEXUALITY AND CITIZENSHIP IN TWENTIETH-CENTURY AMERICA 19–134 (William Chafe, Gary Gerstle, Linda Gordon & Julian Zelizer eds., 2009) (discussing policing of LGB identities and expressions in the first half of the twentieth century in the immigration system, the military, and the welfare state).

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the "persistent melding" of gender nonconformity and fluidity with disorder, have rendered trans communities vulnerable to arrests and imprisonment for disorderly conduct. In discussing the policing of public spaces such as public restrooms, author Andrea Ritchie remarked, "[p]olice police gender every day, even just in the context of 'broken windows' policing, when they decide who feels 'disorderly', who looks quote-unquote 'suspicious.' They will often read gender nonconformity, particularly in combination with race and poverty, to embody disorder."[136]

Sting operations—so-called lewd stings—have used disorderly conduct laws as part of an enforcement regime aimed at policing LGBT communities. Here too, given the historical connections between sexual orientation and disorder, there is an increased risk that disorderly conduct will continue to be used to target LGBT individuals who do not conform to heterosexual norms. Undercover lewd sting operations targeting LGBT individuals have led to—and continue to lead to—arrests based on charges such as indecent exposure, lewd conduct, and disorderly conduct.[137] At least one court has recognized the potential for disorderly conduct laws to be used as a tool for discriminating against LGBT individuals. In reversing a conviction against a defendant charged with disorderly conduct for allegedly touching the crotch of a fully clothed park ranger, the Fourth Circuit held that the term "obscene" under the federal regulations proscribing conduct in national parks was unconstitutionally vague.[138] Reaching its decision, the court noted that the risk for arbitrary and discriminatory enforcement was high, because the sting operation targeted gay men, and the sting itself had been prompted by citizen complaints.[139] The court noted that "[s]imply enforcing the disorderly conduct regulation on the basis of citizen complaints therefore presents a real threat of anti-gay discrimination."[140]

Applying an intersectional lens to the twin problems of overcriminalization and over-policing demonstrates how social conceptions of disorder carry within them racist *and* gendered norms.[141] Failure to comply with such norms—norms that masquerade as objective behavioral standards—provides legally permissible grounds for police intervention, use of force, or criminal sanction. Existing race-gender norms stigmatize women who do not conform to normative standards of womanhood. In some cases, as Professor Ocen noted, such perceived deviancy

136. Amanda Marcotte, *How Cops Target Transgender People: "They Will Often Read Gender Nonconformity . . . to Embody Disorder,"* SALON (Aug. 15, 2017), https://www.salon.com/2017/08/15/how-cops-target-transgender-people-they-WILL-often-read-gender-nonconformity-to-embody-disorder/ [https://perma.cc/Y2BV-KVF6].

137. Strader & Hay, *supra* note 131, at 469.

138. United States v. Lanning, 723 F.3d 476, 483 (4th Cir. 2013).

139. *See id.*

140. *Id.*

141. Professor Kimberlé Crenshaw first coined the term intersectionality in a ground-breaking set of articles. *See* Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991); Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139.

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may form the basis for heightened surveillance and scrutiny, which results in over-policing and overcriminalization of Black women and women of color.[142]

By way of further illustration and to offer another site of extensive critical inquiry, it is worth noting that legal scholars have long since documented the ways in which racist and gendered norms are enforced through the policing of pregnant mothers. Race-gender norms construct and reinforce notions of motherhood—and in particular, the "ideal of motherhood."[143] As Dorothy Roberts argued, "[w]omen who fail to meet the ideal of motherhood (unwed mothers, unfit mothers, and women who do not become mothers) are stigmatized for violating the dominant norm and considered deviant or criminals."[144] Such stereotypes and the labeling of deviant behaviors not only render low-income women of color particularly vulnerable to entanglement with the criminal legal system, but also characterize the womb of Black women as the figurative site and source of public disorder. As Professor Ocen explained, "[p]oor women's reproductive capacities have long been viewed as a public threat as they and their families are viewed as sources of public disorder and moral disintegration."[145] Ocen explained that due to "poor women's perceived deviation from prevailing gender norms and the expectations of motherhood, they are subjected to heightened forms of scrutiny by medical staff and more often referred to law enforcement for investigation."[146] The connection between reproduction and "public disorder" explains in part the history of state-sanctioned efforts to control the reproductive capacities of women of color, including the historical and current vulnerability of low-income women of color to forced sterilization campaigns.[147] It also provides a conceptual framework for understanding how disorderly conduct laws can be deployed to enforce racist and gendered norms that presume disorder in certain bodies.

Beyond this, and more specific to disorderly conduct enforcement, race and gender norms often inform how behaviors are interpreted and responded to, in some cases rendering behaviors that would otherwise be considered innocuous as disruptive, offensive, threatening, or even violent.[148] As attorney and scholar

142. Ocen, *Birthing Injustice*, *supra* note 75, at 1199–1200.

143. Dorothy E. Roberts, *Racism and Patriarchy in the Meaning of Motherhood*, 1 AM. U. J. GENDER & L. 1, 5 (1993) [hereinafter Roberts, *Racism and Patriarchy in the Meaning of Motherhood*]; *see also* DOROTHY ROBERTS, KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY 150–201 (1997); Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419 (1991); ANGELA Y. DAVIS, WOMEN, RACE, AND CLASS 202–22 (1983).

144. Roberts, *Racism and Patriarchy in the Meaning of Motherhood*, *supra* note 143, at 5.

145. Ocen, *Birthing Injustice*, *supra* note 75, at 1199–1200.

146. *Id.*; *see also* Priscilla A. Ocen, *Incapacitating Motherhood*, 51 U.C. DAVIS L. REV. 2191, 2210 (2018) ("In addition to morals crimes such as lewdness, stubbornness, disorderly conduct, fornication, or venereal disease, women were sent to reformatories for attempting to control their reproductive capacities through abortion, which was deemed a crime against person[s].").

147. *See* ROBERTS, *supra* note 143, at 94–97.

148. *See, e.g.*, Elizabeth Sepper & Deborah Dinner, *Sex in Public*, 129 YALE L.J. 78 (2019). In their discussion on the history of sex discrimination in public accommodation laws, Elizabeth Sepper

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Andrea Ritchie put it, "[w]hat is deemed disorderly . . . is often in the eye of the beholder, an eye that is informed by deeply racialized and gendered perception."[149] Through her research, Ritchie noted that "[a]nti-Blackness, including its specific manifestations with respect to Black women," permeates the policing of disorder and "is embedded within this fear of disorder."[150] These racialized and gendered fears of disorder have resulted in, as Ritchie contended, "dramatically increased frequency and intensity of police interactions with Black and Latinx youth, low-income, and homeless people; public housing residents; people who are—or who are perceived to be—engaged in . . . prostitution; street vendors (many of whom are immigrants); and anyone else who is hypervisible in public spaces[,] . . . including lesbian, gay, bisexual, trans, and gender-nonconforming youth and adults."[151] In short, the policing of disorder renders these groups more susceptible to the label of disorder, interference by police, and even police violence.[152]

One recent incident may help make the point. Chikesia Clemons, a Black woman, visited a Waffle House in Saraland, Alabama. Officers claimed that Clemons and her friend, both Black cisgender women, were drunk and had brought alcohol into the restaurant. On these grounds, two police officers placed Clemons under arrest. The arrest was captured on video. On the video, a White male officer grabs Clemons's crotch and shoulder. Clemons tells the officer that he was not permitted to grab Clemons in that way, and the situation quickly escalates when the officer, continuing to grab Clemons, twists her arm around her back and wrestles her to the ground.[153] While Clemons is on the ground, a second White male officer attempts to pin Clemons to the ground by placing his body weight on her while the other officer tries to cuff her arms. In the scuffle that ensues, Clemons's top is pulled down, leaving her bare breasts exposed to the officers and the restaurant patrons. As Clemons twists and writhes topless on the ground, she yells, "What did I do wrong?" Police later charged Clemons with disorderly conduct and resisting arrest.

The confrontation between Clemons and the officers demonstrates what can happen when race-gender constructions of disorder collide. Though one can only speculate as to the mental state of the officers during the violent arrest, there is no evidence to rule out the extent to which implicit or explicit biases may have

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and Deborah Dinner noted, "[r]ace and ethnicity often delineated between realms of respectability and vice. Police viewed young women of color as inherently licentious." *Id.* at 91.

149. RITCHIE, *supra* note 130, at 55.

150. *Id.* at 56; *see also id.* (discussing 1994 internal memorandum titled, "Reclaim the Public Spaces of New York," by then-Mayor Rudy Giuliani and Police Commissioner William Bratton that cited Daniel Patrick Moynihan's report, The Negro Family: The Case for National Action, and tracing social disorder to Black families and Black mothers in particular).

151. *Id.* at 57.

152. *Id.*

153. *See* Jenna Amatulli, *Waffle House Doubles Down on Chikesia Clemons Arrest as Activists Call for Boycott*, HUFFPOST (Apr. 30, 2018), https://www.huffpost.com/entry/waffle-house-doubles-down-on-chikesia-clemons-arrest-as-activists-call-for-boycott_n_5ae73398e4b02baed1bcbab2 [https://perma.cc/68HX-RCN5].

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played a role in the way police officers interpreted Clemons's behaviors. Specifically, these biases may have led the officers to perceive Clemons as disorderly and to respond with physical—if not excessive—force.

The policing of disorder can at times subject individuals perceived as disrupting traditional gender norms to heightened scrutiny in public places—and ultimately to criminalization. Matilda Jean Renfro, a Muslim trans woman,[154] was charged with disorderly conduct for creating a disturbance at a Department of Veteran Affairs (VA) hospital.[155] The circumstances surrounding Renfro's arrest are as follows. Renfro arrived at the VA hospital emergency room waiting area and approached the receptionist, who requested that Renfro provide her name and information about the nature of her visit. Renfro refused to provide this information, which led to a confrontation with the receptionist. Law enforcement later arrived and approached Renfro in the waiting area. Officers reported that Renfro was "shouting" and "appeared agitated," and had refused requests by officers and staff to "lower her voice and calm down."[156] Around this time, Renfro requested to be transferred to the patient's advocate office. Two officers then proceeded to escort her to that office. During the walk to the patient's advocate office, Renfro reportedly told the officers that she could not believe the way they were treating her and that she was being treated like a "n****r of the VA."[157] Renfro informed the VA hospital police that "she was not using the term as a racial slur but instead to express that she felt she was being 'disenfranchised.'"[158] According to evidence at trial, as Renfro and the officers walked by another section of the VA, approximately twenty to thirty patients and their families were present in the day surgery area and observed Renfro "creating a scene and causing everyone to look at her."[159] It was around this time that Renfro also told the officers that they were "mistreating her because she was a Muslim woman."[160] Once at the patient's advocate office, Renfro was reportedly shouting and refused requests to calm down. After continuing to shout, once again repeating that she was being treated like a "n****r," Renfro was asked to leave. When she refused, Renfro was arrested for disorderly conduct and charged under a federal regulation[161] which makes it an offense to

154. I am characterizing this incident as involving the policing of *race* and gender norms because I recognize Muslim identity as a raced identity. *See* Khaled A. Beydoun, *Between Muslim and White: The Legal Construction of Arab American Identity*, 69 N.Y.U. ANN. SURV. AM. L. 29 (2013) (discussing the conflation of Arab and Muslim identity whereby Muslims were presumed to be non-white). That said, it should be noted that the appellate opinion does not identify Renfro's racial identity.

155. United States v. Renfro, 702 F. App'x 799, 801 (11th Cir. 2017).

156. *Id.* at 802.

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.* at 803.

161. 38 C.F.R. § 1.218(b)(11) (2021). Subsection (b)(11) is the penalty provision—the substantive provision is contained in (b)(5).

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engage in "[c]onduct on property which creates loud or unusual noise . . . or [engage in] loud, abusive, or otherwise improper language.[162]

At the bench trial, Renfro argued that the state failed to prove she had willfully engaged in conduct that created loud, boisterous, or unusual noise. She argued that because of surgery on her vocal cords, she was in fact unable to control the volume of her voice when she was under stress. For evidence, Renfro reproduced medical records showing that she had surgery on her vocal cords. The magistrate judge found that Renfro had willingly created an unusual noise. The judge found the evidence that Renfro was unable to control the volume of her voice not credible given her statements to police that she "could say whatever she wanted."[163] The district court affirmed Renfro's conviction, rejecting the vagueness challenge raised on appeal. In affirming the conviction, the district court found that Renfro's conduct amounted to disorderly conduct because it "would tend to disturb the normal operation of a VA facility" and it "drew multiple VA employees out of their offices to see what was going on."[164]

The Eleventh Circuit, in an unpublished opinion, rejected Renfro's as-applied and facial constitutional challenges.[165] As to the as-applied challenge, the Eleventh Circuit held that there was sufficient evidence that Renfro had caused a loud, boisterous, and unnatural noise that disrupted the operations of the VA.[166] The court also rejected Renfro's facial challenge, holding that the statute was not unconstitutionally vague, because it provided fair notice to those affected by the regulation.[167] In reaching the holding, the court reasoned that the level of disturbance must be measured against the normal operations of a particular public space.[168] It upheld the conviction on the grounds that there was enough evidence for a reasonable fact-finder to conclude that Renfro had knowingly caused an unusual noise that created a disturbance and "impeded the VA's normal operations."[169]

The Eleventh Circuit did not address the heightened scrutiny Renfro may have experienced as a Muslim, transgender woman attempting to access services at the VA.[170] Indeed, the court did not even acknowledge Renfro's identity as a

162. *Renfro*, 702 F. App'x at 804. Under the regulations, the Secretary of the VA has the authority to set rules for behavior on VA property, which can be found in subsection (a) of 38 C.F.R. § 1.218. 38 C.F.R. § 1.218(a)(5) prohibits: "[c]onduct on property which creates loud or unusual noise; which unreasonably obstructs the usual use of entrances, foyers, lobbies, corridors, offices, elevators, stairways, or parking lots; which otherwise impedes or disrupts the performance of official duties by Government employees; which prevents one from obtaining medical or other services provided on the property in a timely manner; or the use of loud, abusive, or otherwise improper language."

163. *Renfro,* 702 F. App'x at 804.

164. *Id.*

165. *Id.* at 806–07.

166. *Id.* at 807.

167. *Id.* at 806–07.

168. *Id.* at 808–09.

169. *Id.* at 808.

170. Renfro provided medical records to show that she had surgery on her vocal cords. *Id.* at 803. Renfro filed a civil suit challenging her arrest and detention. In that case, Renfro identifies herself as a

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transgender person in its opinion. Moreover, in court records from a civil case challenging her arrest, Renfro is described as "fully covered in a burqa at the time she was taken into federal custody."[171] Such details—Renfro's identity as a Muslim, transgender woman dressed in a full burqa—are completely missing from the Eleventh Circuit's opinion. While rejecting that there must be a "precise quantum of noise or disturbance" to sustain a conviction, the court went on to construe the statute as prohibiting "noises *likely* to disturb the provision of care or services to veterans."[172] In *Renfro*, this formulation of disorderly conduct builds in an assessment of likelihood of disruption without evidence of actual disruption. Renfro's disturbances, according to the trial record, attracted the attention of onlookers, but there is no evidence that her behavior disrupted *care or services*.[173] Moreover, the court's analyses miss the extent to which disturbances are perceived as disruptions because of the identity or status of the alleged disruptor and how those perceived disturbances translate into charges of disorderly conduct. In short, the court failed to assess how Renfro's identity as a member of a historically marginalized group may have rendered her vulnerable to being labeled disruptive and charged with disorderly conduct.

3. Ableist Norms

Ableist norms are another type of discriminatory norm enforced through the policing of disorderly conduct. Ableist norms stem from ableism, which is a "complex system of cultural, political, economic, and social practices that facilitate, construct, or reinforce the subordination of people with disabilities in a given society."[174] Ableist norms create and reinforce standards of behavior or social expectations that privilege able bodies and neurotypical minds while subordinating disabled bodies and neurodivergent minds. Ableist norms enforce

Muslim, transgender woman. *See* Renfro v. Carroll, No. 14-CV-161, 2014 WL 6886059, at *1 (N.D. Fla. Dec. 8, 2014).

171. *Id.*

172. *Renfro*, 702 F. App'x at 807.

173. Courts reviewing disorderly conduct under the federal regulations have presumed disruptions to care and service where employees are drawn away from their regular duties to respond to the disturbance. *See, e.g.*, Harris v. U.S. Dep't of Veterans Affs., 776 F.3d 907, 912–13 (D.C. Cir. 2015) ("Taken together, these undisputed facts were sufficient to justify arrest. Sheets had ordered Harris to leave group therapy, and the police observed Harris' failure to comply when they entered the room. 'Failure to leave the premises when so ordered constitute[d] a[ ] disturbance' that subjected Harris 'to arrest and removal from the premises' under VA regulations. 38 C.F.R. § 1.218(a)(5) (2021). Sheets also interrupted the therapy session he was running to address Harris' alleged 'disturbance.' Conduct that 'tend[s] to disturb the routine operations of a VA hospital . . . is prohibited' under § 1.218(b)(11)."). The standard is de minimis to the extent it requires only that VA staff were taken away from their regular duties at some point during the episode. *See, e.g.*, United States v. Agront, 773 F.3d 192, 197 (9th Cir. 2014).

174. Jamelia N. Morgan, *Reflections on Representing Incarcerated People with Disabilities: Ableism in Prison Reform Litigation*, 96 DENV. L. REV. 973, 980 (2019).

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a type of compulsory normalcy[175] or compulsory able-bodiedness,[176] which reproduces social hierarchies of disability through reinforcing distinctions between able bodyminds and disabled bodyminds and assigning meanings to those distinctions.[177]

The policing of disorderly conduct reinforces the binary between able bodyminds and *dis*abled bodyminds where there is a perceived failure to comply with the social norms governing "normal" bodies and minds. As a result, disability—or manifestations of disability—can serve as a basis for citation or arrest for disorderly conduct. Existing accounts suggest that people with disabilities may be overrepresented in citations, arrests, and/or charges for disorderly conduct and other order-maintenance offenses.[178] Yet, disparities in arrests and charging reveal only part of the picture.

Here again, a discussion of the historical context provides a useful starting point. Ableist norms are informed by historical meanings of disability—in particular, social meanings that linked disability with "unsightly" physical disorders. These were in turn linked to the risk of public disorder and criminalized. For example, scholar Susan Schweik documented how ugly laws criminalized the sight of "unsightly disabled folk" and "disabled beggars" in cities across the United States in the late nineteenth and early twentieth centuries.[179] However, ugly laws were not the only laws criminalizing disabilities, or manifestations of disabilities, in public spaces.

Though less explored through a disability lens, vagrancy laws also served to criminalize disabilities. As is well known, vagrancy laws enforced in the South served to reinforce racist ideas linking Blackness with criminality and justified the effective re-enslavement of Black people under conditions that closely mirrored chattel slavery.[180] These laws also ensured an available supply of Black laborers on lands held by the former planter class struggling to reestablish new

175. *See* LENNARD J. DAVIS, ENFORCING NORMALCY: DISABILITY, DEAFNESS, AND THE BODY 23–25, 29 (1995).

176. *See* Robert McRuer, *Compulsory Able-Bodiedness and Queer/Disabled Existence*, *in* THE DISABILITY STUDIES READER 396, 397 (Lennard J. Davis ed., 5th ed. 2017).

177. *See, e.g.*, Doron Dorfman, *Re-Claiming Disability: Identity, Procedural Justice, and the Disability Determination Process*, 42 LAW & SOC. INQUIRY 195, 197 (2017) ("The social model views disability as a social rather than a purely medical or tragic phenomenon. This model has evolved over the years, and focuses on social construction and the complex processes by which people with disabilities are stigmatized as the reason for their discrimination and exclusion.").

178. *See, e.g.*, Laura I Appleman, *Deviancy, Dependency, and Disability: The Forgotten History of Eugenics and Mass Incarceration*, 68 DUKE L.J. 417, 468 (2018) ("A 1983 study by Edwin Valdiserri reported that mentally ill jail inmates were four times more likely to have been incarcerated for less serious charges such as disorderly conduct and threats compared to non-mentally ill inmates. Mentally ill inmates were three times more likely to have been charged with disorderly conduct, five times more likely to have been charged with trespassing, and ten times more likely to have been charged with harassment. This still proves true; in Dade County, Florida, for example, the vast majority of mentally ill offenders are there due to misdemeanors or low-level felonies.").

179. SUSAN M. SCHWEIK, THE UGLY LAWS: DISABILITY IN PUBLIC 161, 236 (2006).

180. *See* DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II, 1–2 (2008).

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systems of racial, political, economic, and social subordination following the Civil War.[181] Yet vagrancy laws also helped reinforce associations between disorder and disability by linking idleness with immorality and characterizing both as risks to public order. As part of a larger scheme to regulate unsecured, intransient labor, vagrancy laws were also aimed specifically at the "criminalization of the condition of being able-bodied, propertyless, and unemployed[.]"[182] Toward the end of the nineteenth century, these laws swept up transient White laborers who wandered across the country on railroads, many disabled physically and psychologically by the Civil War or by harsh employment conditions, and left without work due in part to the cyclical nature of work in industrial capitalism.[183] The surge in what was referred to at the time as "hoboeing," or unauthorized railroad travel, and "tramping," or committing crimes as a labeled vagrant,[184] triggered an array of acts passed by legislatures in Northern states. These acts aimed at regulating vagrancy and tramping, given the fears that such crimes posed a risk to public order.[185]

As Professor Ahmed White explained, those without work were lumped into an "underclass of vagrants [labeled] as criminals, moral degenerates, ethnic or *genetic* inferiors, and *diseased* outcasts who had either to be removed from society or saved from themselves by the harshest of policies."[186] Here, vagrancy, or indolence, is a race-based, class-based, and ableist construction, whereby the crime of vagrancy becomes a tool for criminalizing not only negatively racialized groups but also purportedly genetic traits. Vagrancy is conceived of as a transmittable disease, a social disorder which society must protect against. According to the racist and ableist logics, these so-called degenerates contributed to social disorder by failing to produce for—and contribute to—the economic operations of the local community.

Today, disorderly conduct laws are deployed to enforce ableist norms that target behaviors linked to disability—or at public manifestations of disability—perceived as deviant or threatening. Though there is no publicly available national data on the proportion of people with disabilities arrested for disorderly conduct, there is reason to suspect that people with disabilities are also disproportionately represented where "atypical reactions" to social cues or to police officer commands are regarded as threatening, confrontational, or unduly disruptive in public places.[187]

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181. *See id.* at 41–42.

182. Ahmed A. White, *A Different Kind of Labor Law: Vagrancy Law and the Regulation of Harvest Labor, 1913–1924*, 75 U. COLO. L. REV. 667, 683 (2004).

183. *See id.* at 682.

184. *Id.* at 682–83.

185. *See id.* at 683.

186. *Id.* at 682–83.

187. Elliot Oberholtzer, *Police, Courts, Jails, and Prisons All Fail Disabled People*, PRISON POL'Y INITIATIVE (Aug. 23, 2017), https://www.prisonpolicy.org/blog/2017/08/23/disability/ [https://perma.cc/M2G6-93TB].

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Disorderly conduct laws facilitate the removal of people with disabilities with psychiatric, developmental, and intellectual disabilities from public places, whether parks, streets, or commercial centers. For example, in one case, police arrested forty-five-year-old Randall McCrary after complaints that he was yelling obscenities at customers in an Atlanta gas station.[188] When arrested, McCrary was covered in his own feces. The reporting officer stated in his report that he had arrested McCrary after he continued to yell threats and obscenities. McCrary was charged with disorderly conduct and held in jail for more than two months because he could not pay the $500 bond.[189]

For some, McCrary's arrest may appear as the paradigmatic example of disorderly conduct. Yet recognition of the historically rooted linkages between disability and disorder suggests reason to scrutinize such a characterization. McCray's removal by law enforcement from the public shopping mall conveys a message to bystanders. This message equates public manifestations of psychiatric disabilities with disruptive disorders and even the risk of violent disorders. What appears as a cause for public alarm, disturbance, or disruption that risks harm to the public is instead an indication of a need for mental health treatment and support. By equating these types of disorders with disability, and criminalizing such behaviors on that basis, the enforcement of disorderly conduct provides a pathway for the criminalization of manifestations of psychiatric disabilities more broadly.[190] Responding to mental episodes by bringing disorderly conduct charges—whether the resulting charge leads to physical removal via citation or arrest—conveys the social message that individuals with psychiatric disabilities are disorderly, violent, or prone to violence and criminality. These social meanings in turn reinforce existing justifications for responding to mental episodes with law enforcement rather than with public health approaches.

In addition, the focus on disorderly *conduct* obscures an unintended consequence of enforcing these offenses: the criminal regulation of bodies deemed disorderly in public spaces, including persons who are labeled as behaving disorderly in public *because of* their social status and/or identities. Modern approaches to policing disorderly conduct and current constitutional doctrine[191] state that the focus of enforcing disorderly conduct is to proscribe

188. *See* Cook, *supra* note 62. A judge in Fulton County State Court later changed McCrary's charges to "fighting words/use of profanity." *Id.*

189. *Id.*

190. An individual does not have to be formally convicted of, or even charged with, disorderly conduct to be labeled disorderly and excluded from communities. These processes—the former (conviction/charges) formal and the latter (labeling) informal—can exist independently, for example, where disorderly conduct is used to track and mark certain individuals for social control. *See generally* KOHLER-HAUSMANN, MISDEMEANORLAND, *supra* note 14, at 143–82 (discussing marking, or what Kohler-Hausmann defines as "the practice of indexing certain behaviors and status determinations about individuals"). And while the law provides a potential pathway to criminalization, individuals can be stigmatized even absent formal legal processes, particularly through social isolation or ostracism.

191. *See* Papachristou v. City of Jacksonville, 405 U.S. 156, 163–64 (1972).

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conduct rather than persons or status.[192] However, the line is blurred in cases where so-called disorderly behaviors are manifestations of physical, cognitive, or psychiatric disabilities. Disorderly conduct statutes facilitate the managing of disabled—and oft-negatively racialized—persons by regulating how they behave in certain public spaces through criminal law and providing a legal mechanism for their segregation, removal, and incarceration.

Ironically, people with psychiatric disabilities may be criminalized as disorderly for behaviors related to their mental disability even in places where they are seeking, or may obtain access to, mental health treatment. One case may help illustrate the point. Richie Accime was charged with disorderly conduct after being admitted as a patient in the psychiatric unit of the Emergency Department in a Boston area hospital.[193] Accime was taken to the hospital against his will. While at the hospital, Accime was involuntarily detained in a "small room in the psychiatric area of the hospital's emergency department."[194] After being informed that he would be held against his will for two or three days, Accime started to yell.[195] Medical staff and multiple hospital security officers were dispatched to the scene.[196] Responding officers were armed; at least one officer arrived with a baton and handcuffs, and three others arrived with pepper spray. Officers attempted to persuade Accime to take medication, but he refused.[197] Police officers testified that they told Accime that he would be sprayed with pepper spray if he did not comply with their orders.[198] Accime continued to refuse medications and made statements threatening to inflict physical harm on anyone who continued to hold him against his will and force him to take medications.

By this time, according to testimony at trial, patients in the vicinity began to notice the commotion, and as a precautionary measure, officers redirected these patients out of the area.[199] Accime, according to the record at trial, took his shirt off and assumed a "fighting stance."[200] Officers then approached Accime with pepper spray, and when he did not back down, at least three and perhaps as many as six officers sprayed him with pepper spray. Audio recordings admitted

192. *See* Robinson v. California, 370 U.S. 660 (1962) (overturning conviction as violative of Cruel and Unusual Punishment Clause where the defendant was convicted for being addicted to narcotics). *But see* Powell v. Texas, 392 U.S. 514 (1968) (no violation of Cruel and Unusual Punishment Clause for public intoxication conviction where an individual with alcoholic dependency was compelled to drink).

193. Commonwealth v. Accime, 68 N.E.3d 1153, 1155–56 (Mass. 2017).

194. *Id.* At trial and on appeal, Accime testified that he was shown no evidence that the state complied with the procedures required for the temporary restraint and hospitalization of persons posing a serious risk of harm due to mental illness. *See id.* at 1161.

195. *Id.* at 1155.

196. *Id.*

197. *Id.*

198. *Id.* at 1156.

199. The Massachusetts Supreme Judicial Court noted that there was, however, "no evidence introduced to suggest that any aspect of the disturbance the defendant was claimed to have caused in the room ever extended beyond the confines of the room." *Id.* at 1155 n.2.

200. *Id.* at 1155.

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at trial included statements by the officers describing Accime as "built like a friggin refridge[sic] . . . too big, too jacked . . . like six four and 280 pounds of pure, just, ripped nastiness." On the recording, one officer acknowledged that Accime did not fight back once sprayed but that he "complied after, you know. Everybody, like five people sprayed him."[201]

The Supreme Judicial Court overturned Accime's conviction for disorderly conduct. On appeal, Accime argued that the Commonwealth had failed to prove that he recklessly created a risk of "public inconvenience, annoyance, or alarm" and disputed the "public character of any such risk" (the public harm element).[202] The relevant statute, as interpreted by the state's highest court, required proof that a person acted "with purpose to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof,'" while engaging in "fighting or threatening," "violent or tumultuous behavior" or creating a "hazardous or physically offensive condition by any act which serves no legitimate purpose of the actor."[203] On these grounds, the court found the evidence insufficient to show that Accime had intended to cause public inconvenience, annoyance, or alarm. The court also found that there was no evidence that Accime knew his conduct would have this effect on the other patients near and outside of the room where he was held.[204]

The court opinion offers a useful framework for understanding the relationship between disorder, disability, and the criminal regulation of public space. The court's context- and place-specific analysis, in part, led it to conclude that Accime's actions, albeit belligerent according to the court, did not rise to the level of disorderly conduct. First, the court noted that in defining "public," attention is paid to conduct likely to affect persons in places to which a substantial group has access.[205] Even so, the court emphasized that "conduct disruptive in one setting may be tolerable in another."[206] In deciding what disruptions could be tolerated, the court suggested looking to the social context to determine the effect on the audience and the impact on the persons whose duties were interrupted when they responded to the disturbance. The court held that Accime's actions did not amount to a "public disturbance," because they "did not attract the crowd of onlookers that typifies public disturbance."[207] Moreover, the court stressed that Accime's actions to avoid detention and forcible medication "would seem to be the kind of disruption a psychiatric area

201. *Id.* at 1156 n.5.
202. *Id.* at 1156; *see also* Reply Brief for Defendant at 2, Commonwealth v. Accime, 68 N.E.3d 1153 (2017) (No. SJC-12081), 2016 WL 6088439, at *2.
203. *Accime*, 68 N.E.3d at 1157 (quoting Commonwealth v. Sholley, 739 N.E.2d 236, 241 n.7 (Mass. 2000)).
204. *Id.*
205. *Id.* at 1158.
206. *Id.* at 1159.
207. *Id.* at 1158 n.9.

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in the hospital's emergency department is designed to absorb."[208] "To decide otherwise," the court stated, "risks criminalizing mental illness in the very treatment centers where help must be available."[209]

The *Accime* case demonstrates how norms enforcing "order" can be applied to punish disorderly behaviors that are inextricably linked to disabilities. This much is acknowledged by the Massachusetts Supreme Judicial Court. The disorder that subjects Accime to criminal sanction seems to inhere in his physical body—described by the police as resembling a refrigerator—and his inability or unwillingness to be subdued by law enforcement. Moreover, the enforcement of disorderly conduct laws in the hospital setting reinforces discriminatory norms that track assumptions about physical and mental abilities. People with disabilities, even when seeking treatment in hospitals, are expected to conform their conduct to norms of order based on the normal bodymind that is not in need of medical or mental health services. Even in this setting, policing for signs of disorder reinforces associations between disability and criminality and reinforces norms governing expectations for how bodies and minds should exist in public spaces.

B. Disorderly Conduct Laws and the Legal Construction of Public Space

The purported goals of disorderly conduct laws are to protect communities from public nuisances by regulating disorderly behaviors. The Sections above demonstrate how the offense of disorderly conduct is conceptualized as, at a fundamental level, an offense to the public (i.e., a public nuisance). Indeed, whether conduct is deemed sufficiently "disorderly" is in part based on its public nature (i.e., the public harm element), and courts have overturned convictions for disorderly conduct where there was no evidence of harm to the public.[210]

208. *Id.* at 1159–60 (noting that "disorderly conduct in the context of mental health treatment in the emergency department of a large urban hospital, although not per se unavailable, should be rare").

209. The court distinguishes this case from a case in which a defendant assaults hospital staff or "intentionally or recklessly causes the substantial disruption to other patients or hospital operations." *Id.* at 1160.

210. *See, e.g.*, People v. Gonzalez, 35 N.E.3d 478, 479 (N.Y. 2015); People v. Johnson, 9 N.E.3d 902, 903 (N.Y. 2014); People v. Baker, 984 N.E.2d 902, 906–07 (N.Y. 2013); United States v. Taylor, 258 F.3d 1065, 1068 (9th Cir. 2001) (reversing the conviction of disorderly conduct for an incident occurring entirely within a private cabin and thus was "not 'public' in the sense proscribed by the statute"); Commonwealth v. Mulvey, 784 N.E.2d 1138, 1143 (Mass. App. Ct. 2003) (holding that the incident was insufficient to establish the "public" element of disorderly conduct because it occurred on purely private property, shielded from off-premises view by partially opaque fence, and there was no evidence that two police officers standing outside the property's gate observed defendant's conduct); People v. Favreau, 661 N.W.2d 584, 585 (Mich. Ct. App. 2003) (holding that a defendant creating a disturbance in a hotel room was not in a "public place," and thus he did not satisfy the definition of "disorderly person" for purposes of offense of disorderly conduct); State v. McCoy, 546 So.2d 240, 242 (La. Ct. App. 1989) (holding that defendant's front yard was not a sufficiently "public place" to satisfy a disorderly conduct conviction for words addressed to people in the front yard); Zimmerman v. State, 141 P.2d 809, 811 (Okla. Crim. App. 1943) (defining a public place as "a place where the public are generally permitted to assemble," thus excluding private homes); Williams v. City of Atlanta, 7 S.E.2d 82, 83 (Ga. Ct. App. 1940) (holding that a man who was intoxicated in a private room failed to disturb the public). For a late 19th Century case, see Kahn v. City of Macon, 22 S.E. 641, 642 (Ga. 1895) ("The

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Because harm to the public is a core element of disorderly conduct, deciding whether the offense has been committed requires determining what is "public" or deemed public space.

States vary widely in how they define "public" and public spaces in disorderly conduct statutes.[211] Some states define "public place" to include places open to use and enjoyment by members of the public, locations where a "substantial group of persons has access,"[212] or places where people can see or hear behavior.[213] The Model Penal Code offers some guidance, defining public as "affecting or likely to affect persons in a place to which the public or a substantial group has access; among the places included are highways, transport facilities, schools, prisons, apartment houses, places of business or amusement, or any neighborhood."[214]

However, these statutory definitions alone do not determine what is considered public space, because public space is both a social and legal construction.[215] Of course, public spaces are *designated* for members of the public. Yet the use and enjoyment of public spaces for historically marginalized groups have been and remain restricted, closely monitored, or otherwise highly regulated.[216] For those groups, using and enjoying public spaces entails

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claim that it was 'disorderly conduct,' however, rested wholly upon the fact that it was gambling, a violation of the penal law of the state . . . In the present case, so far as appears from the record, there was no disturbance of the public. The playing was carried on quietly, and not in any sense publicly. Although the room in which it was conducted was situated over a barroom, it does not appear that there was any communication between the two places.").

211. Disorderly conduct offenses are not limited to conduct in public spaces. Some jurisdictions criminalize disorderly conduct that occurs in private places, such as a private residence. For example, Wisconsin criminalizes disorderly conduct in public or private places where a person engages in "violent, abusive, indecent, profane, boisterous, unreasonably loud or otherwise disorderly conduct under circumstances in which the conduct tends to cause or provoke a disturbance." WIS. STAT. § 947.01 (2020); *see also* State v. Russell, 890 A.2d 453, 461 (R.I. 2006) (construing state's disorderly conduct statute to apply to conduct in a private home). *But see* State v. Richards, 779 P.2d 689, 691–92 (Utah Ct. App. 1989) (holding that confrontation within a private residence failed to satisfy the public element of disorderly conduct because it did not produce "unreasonable noise" so as to disturb anybody outside of the home).

212. N.Y. PENAL LAW § 240.00(1).

213. GA. CODE ANN. § 16-1-3(15) (2019) ("'Public place' means any place where the conduct involved may reasonably be expected to be viewed by people other than members of the actor's family or household.").

214. MODEL PENAL CODE § 250.2 (Westlaw through 2020 Annual Meeting of American Law Institute).

215. *See, e.g.*, RACE, SPACE, AND THE LAW: UNMAPPING A WHITE SETTLER SOCIETY 7–10 (Sherene H. Razack ed., 2002).

216. *See, e.g.*, PAUL BUTLER, CHOKEHOLD: POLICING BLACK MEN 47–79 (2017); VICTOR M. RIOS, HUMAN TARGETS: SCHOOLS, POLICE, AND THE CRIMINALIZATION OF LATINO YOUTH 56–74 (2017); RITCHIE, *supra* note 130; KIMBERLÉ WILLIAMS CRENSHAW & ANDREA J. RITCHIE WITH RACHEL ANSPACH, RACHEL GILMER & LUKE HARRIS, AFR. AM. POL'Y F. & CTR. FOR SOC. POL'Y STUD., SAY HER NAME: RESISTING POLICE BRUTALITY AGAINST BLACK WOMEN (2015), https://44bbdc6e-01a4-4a9a-88bc-731c6524888e.filesusr.com/ugd/62e126_8752f0575a22470ba7c7be7f723ed6ee.pdf [https://perma.cc/N5LG-9UV9]; Tracey Maclin, *The Decline of the Right of Locomotion: The Fourth Amendment on the Streets*, 75 CORNELL L. REV. 1258, 1333–37 (1990).

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heightened monitoring and surveillance. The sections above provide a context for understanding the heightened scrutiny of some groups when accessing and enjoying public space. For negatively racialized and historically marginalized groups, accessing and enjoying public space comes with a presumption that law enforcement and other members of the public will closely regulate their access to, and behavior and movement in, public spaces.

The policing of public disorder is closely related to the policing of public space. As historian William Novak suggested, in the nineteenth century, the legal construction of public space through the enforcement of public welfare legislation provided a pathway to more policing in those public spaces. Indeed, the early nineteenth-century legal regime that constructed the notion of the public's right to access public spaces had immense implications for the American state and its powers of regulation and policing.[217] Novak observed that

> As streets and highways became increasingly *public*, the regulatory powers of the state were enhanced. State control of streets, rivers, ports, and other public spaces involved not only the power to keep them free and open to public access but a more general duty to police them. Expanding public powers over public ways involved the regulation of an *increased* range of social and economic activities deemed hostile to people's welfare, including public morality and public health. Policing these things first on public properties paved the way for the public regulation of some of the most private of American spaces.[218]

Today, the legal construction of public space through the enforcement of disorderly conduct laws similarly allows for more policing in those public spaces for certain members of the public. The enforcement of disorderly conduct informs and conveys social meanings about which public spaces certain groups can occupy. If actions that can be charged as disorderly conduct are considered harmful because they are committed in public spaces, then the offense of disorderly conduct reveals as much about what is considered public space as it does about what is considered disorderly. Behaviors defined as disorderly are interpreted as such in part because there is a literal *and* normative conception of what is public—a baseline from which to assess the extent of the risk of public disorder. In this way, the offense of disorderly conduct provides a useful context for understanding how criminal law and law enforcement may be deployed not only to aggressively police access to public spaces, but also to construct differentiated tiers of access to those spaces.

Normative conceptions of "the public" drive access to public spaces and render those who exist beyond such conceptions vulnerable to exclusion. The enforcement of disorderly conduct laws can serve as a mechanism by which comparatively more race-, gender-, disability-, and class-privileged residents in communities can work to exclude those members labeled disorderly or deviant.

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217. NOVAK, *supra* note 27, at 147.
218. *Id.* at 147–48.

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This removal from public space in turn communicates a message that this individual or group does not belong in a space designated for members of the community and public. In other words, it communicates a message that this person, and this *type* of person, is not a part of the normative conception of community.[219] The reason that individuals can be criminalized in the first place is because of their presence—indeed, their hypervisibility—in public.[220] Paradoxically, though they occupy public space, they can be excluded from public spaces because they exist beyond the normative conceptions of community. For instance, in cities and counties across the country, individuals who lack stable housing risk being charged with disorderly conduct for engaging in routine daily activities in public, such as sleeping,[221] using the bathroom, or walking.[222] Unhoused people engaging in these daily activities are viewed as creating a risk of disorder or actual disorder. Disorderly conduct provides a legal basis for excluding them from public space.

Viewed in this way, disorderly conduct laws challenge notions of universal "public access," or a unitary "public" with uniform access to public spaces. The example of access to public bathrooms provides an illustration. As mentioned, disorderly conduct can be used to arrest individuals for urinating or defecating in public spaces.[223] Many have argued that communities have a legitimate interest in regulating such conduct because permitting this behavior may pose hazards to public health due to sanitation and aesthetic concerns.[224] Beyond this,

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219. As noted *supra*, this is particularly true wherein conduct that is labeled disorderly is inextricably linked to one's status as in the case of not only unhoused individuals but also individuals with mental or psychiatric disabilities. *See, e.g.*, Pottinger v. City of Miami, 810 F. Supp. 1551, 1563 (S.D. Fla. Nov. 16, 1992) (noting that it is "less settled whether involuntary conduct that is inextricably related to that status may be punished").

220. PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS 56 (1991).

221. Cheryl McCormack, *Disorderly Conduct Charge Likely for Sleeping Gym Goer*, BISMARCK TRIB. (Oct. 31, 2018), https://bismarcktribune.com/news/local/disorderly-conduct-charge-likely-for-sleeping-gym-goer/article_5bd3cf79-2a05-5986-8456-33b75e3aae15.html [https://perma.cc/ND36-PRLL] (reporting on disorderly conduct charge to homeless man for following gym-goers into gym and sleeping on gym bench).

222. For example, one sheriff noted that in his jurisdiction of Pinellas County (near Tampa Bay), there were "people who had been arrested seventy-five times in a two-year period for minor crimes—disorderly conduct for urinating, public trespassing, minor retail theft, all those things. Some were spending hundreds of days in the county jail." POLICE EXEC. RSCH. F., THE POLICE RESPONSE TO HOMELESSNESS 12 (June 2018), https://www.policeforum.org/assets/PoliceResponsetoHomelessness.pdf [perma.cc/N98M-H3FY].

223. *See, e.g.*, Kathleen Edgecomb, *Fountain Incident Puts Spotlight on Homeless Issue*, THE DAY (June 8, 2011), https://www.theday.com/article/20110608/NWS01/306089901 [https://perma.cc/3LAP-DTS4] (discussing homeless man charged with disorderly conduct for using public fountain to wash himself after defecating in his pants); Oscar Contreras, *Man Caught Defecating on Colorado Springs Porch Arrested, Released for Disorderly Conduct*, DENVER CHANNEL (May 4, 2017), https://www.thedenverchannel.com/news/crime/man-caught-defecating-on-colorado-springs-porch-arrested-released-for-disorderly-conduct [perma.cc/V43Y-YEHH].

224. *See* Matt Flegenheimer & J. David Goodman, *Public Urination in New York City Becomes Test Case for Policing*, N.Y. TIMES (July 15, 2015), https://www.nytimes.com/2015/07/16/nyregion/public-urination-in-new-york-becomes-test-case-for-policing.html [perma.cc/84GF-BSH6].

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regulating public urination or defecation sets forth a clear standard for behavior: residents of this community are expected to use private or public restrooms and refrain from urinating or defecating in public areas not specified for such use. Though communities may debate whether to criminalize such conduct,[225] few would argue that such behavioral norms should not be enforced at least informally in public spaces. Under this formulation, regulating excrement in public places through the offense of disorderly conduct seems to be a wholly objective exercise. Violators are charged with disorderly conduct for engaging in biological behaviors in public places where communities have determined those behaviors should be left to restrooms—whether private or public.

Yet, even the "public" in public restroom is a contested, socially constructed public space. "Disorderly" individuals are often, in practice, excluded from the public restrooms they need to avoid breaking laws against public urination. Historically and currently, reports have documented the ways in which gay men, men of color, transgender people, and unhoused people are subject to profiling, harassment, and surveillance in public restrooms.[226] These groups face general suspicion when accessing these public spaces, even where those spaces are designated for public use and are engaged in appropriate use. Here, the association between these groups and disorder—whether disorder in the form of blight, crime, lewdness, or sexual misconduct—renders these groups more vulnerable to surveillance and harassment in public restrooms. It also renders the "public" in public restroom more exclusive and less public. Even where the community's interest in regulating behavior may be legitimate, broad enforcement discretion may mean that the burdens of criminal enforcement fall disproportionately on historically marginalized groups occupying those contested public spaces.

1. Racialization of Space

In the previous Sections, I argued that the enforcement of disorderly conduct laws reinforces discriminatory norms that historically and presently link certain groups with disorder. I suggested that recognizing that public spaces are contested and legally and socially constructed demonstrates how even wherein a seemingly legitimate community interest in regulation may exist, some groups will still bear the burden of such enforcement. Here I contend that the disorderly conduct regime also provides a mechanism for preserving the dominant norms and identities that characterize those public spaces. To expand on this claim, I

225. Daniel Denvir, *Peeing Is Not a Crime*, CITYLAB (July 21, 2015), https://www.citylab.com/equity/2015/07/peeing-is-not-a-crime/399068/ [https://perma.cc/T8P9-ZUN5].

226. *See, e.g.*, Joseph Goldstein, *Lawyers Challenge Lewdness Arrests at Port Authority Bus Terminal*, N.Y. TIMES (Oct. 7, 2014), https://www.nytimes.com/2014/10/08/nyregion/lawyers-challenge-lewdness-arrests-at-port-authority-bus-terminal.html [https://perma.cc/7RW7-JD6Q] (reporting that gay men were allegedly profiled by plain clothes police officers at Port Authority Bus Terminal in New York City).

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build on the "racialization of space," which refers to how spaces come to be regarded as indications of the norms, values, beliefs, and behaviors of the racial groups believed to live in those places.[227]

Scholars have long argued that spaces possess a kind of racial identity and that law has been used historically to police and preserve the racial composition of those spaces.[228] Such legal mechanisms were readily apparent within a society constructed on a foundation of state-sanctioned segregation. Today, segregation persists, though the legal mechanisms have changed. As Professor Ocen has noted, "[t]he racialization of space . . . is not merely a relic of past regimes of overt discrimination. Rather, its existence relies on active methods of racial stratification that create and maintain spatial separation."[229]

The enforcement of disorderly conduct laws can be viewed as one of those "active methods of racial stratification that create and maintain spatial separation," which points to, at least with respect to negatively racialized groups, its role as a mechanism for racial subordination. More specifically, the enforcement of disorderly conduct laws can be viewed as part of a social process of creating racialized space.[230] As discussed in Part III, the enforcement of disorderly conduct laws reinforces racist norms that link Black, Latinx, and Indigenous identities with both disorder and criminality. These stereotypes attach to negatively racialized and historically marginalized groups and may influence disorderly conduct enforcement decisions. In this way, enforcing disorderly conduct laws is another method to maintain spatial separation and the exclusion of certain historically marginalized groups from particular public spaces.

Furthermore, disorderly conduct provides yet another mechanism[231] not just for preserving or controlling the racial composition of spaces but also for

227. *See* Priscilla A. Ocen, *The New Racially Restrictive Covenant: Race, Welfare, and the Policing of Black Women in Subsidized Housing*, 59 UCLA L. REV. 1540, 1552 (2012) (citing Susan J. Smith, *Residential Segregation and the Politics of Racialization*, *in* RACISM, THE CITY AND THE STATE 128, 133 (Malcolm Cross & Michael Keith eds., 1993); *see also* John O. Calmore, *Racialized Space and the Culture of Segregation: "Hewing A Stone of Hope from A Mountain of Despair*,*"* 143 U. PA. L. REV. 1233, 1235 (1995) ("The 'racialization of space,' as I am using the term, is the process by which residential location and community are carried and placed on racial identity.").

228. *See* Calmore, *supra* note 227, at 1235; *see also* Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841, 1844 (1994).

229. Ocen, *New Racially Restrictive Covenant*, *supra* note 227, at 1553; *see also* Addie C. Rolnick, *Defending White Space*, 40 CARDOZO L. REV. 1639, 1691 (2019) ("Yet, as the typical legal tools of segregation (from public housing plans to racially restrictive covenants) have been repealed or rejected, modern segregation has come to be viewed as a social or economic problem rather than a legal one. Segregation is still reinforced by law, but one may need to look more deeply to see the relationship.").

230. The racialization of space is itself a process of racial formation. *See, e.g.*, Calmore, *supra* note 227, at 1237.

231. Disorderly conduct laws are, of course, not the only criminal laws that preserve the racial composition of certain spaces. In her article, *Defending White Space*, Professor Addie Rolnick examined "the role of self-defense doctrine in maintaining White residential spaces" and how those laws insulate private violence from legal liability. Rolnick, *supra* note 229, at 1647. Professor Angela Onwuachi-Willig also analyzed the role of criminal law in her broader discussion on how the killings of Emmett

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regulating negatively racialized groups' access to and movement in "the white space." [232] Sociologist Elijah Anderson used the term "the white space" to refer to "[o]verwhelmingly white neighborhoods, schools, workplaces, restaurants, and other public spaces."[233] For example, Professor Anderson wrote that in white spaces, Blacks may experience profiling, heightened scrutiny, and stigma as they attempt to navigate white space:

> When the anonymous black person enters the white space, others there immediately try to make sense of him or her—to figure out "who that is," or to gain a sense of the nature of the person's business and whether they need to be concerned. In the absence of routine social contact between [B]lacks and [W]hites, stereotypes can rule perceptions, creating a situation that estranges blacks. . . . [W]hites and others often stigmatize anonymous black persons by associating them with the putative danger, crime, and poverty of the iconic ghetto[.][234]

The use of disorderly conduct laws reflects how these laws provide a legal mechanism for regulating access and movement in white spaces to manage negatively racialized and historically marginalized groups in predominantly White, gentrifying, or gentrified areas.[235] For instance, residents are encouraged in many cities to use 311, rather than emergency services, to report neighborhood issues such as sewer problems, graffiti, noise reports, street and sidewalk cleaning, and disorderly conduct.[236] Mobile apps, such as the city of San Francisco's Open311 or Los Angeles's MyLA311 app, permit city and neighborhood residents to easily report signs of "public disorder."[237] Advocates have raised concerns that the use of such apps will lead to more harassment of unhoused people in particular.[238] Some commentators have raised concerns that

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Till and Trayvon Martin are rooted in the policing of boundaries of whiteness, or "regulating the presence and movement of Blacks in what sociologist Elijah Anderson has defined as 'the white space.'" Angela Onwuachi-Willig, *Policing the Boundaries of Whiteness: The Tragedy of Being "Out of Place" from Emmett Till to Trayvon Martin*, 102 IOWA L. REV. 1113, 1119 (2017).

232. Elijah Anderson, *"The White Space,"* 1 SOCIO. RACE & ETHNICITY 10, 10 (2015).

233. *Id.*

234. *Id.* at 13.

235. *See* Abdallah Fayyad, *The Criminalization of Gentrifying Neighborhoods*, ATLANTIC (Dec. 20, 2017), https://www.theatlantic.com/politics/archive/2017/12/the-criminalization-of-gentrifying-neighborhoods/548837/ [https://perma.cc/4Q2F-ASQX]; Jason McGahan, *LAPD Is Arresting Increasing Numbers of Homeless in Gentrifying Neighborhoods*, L.A. WKLY. (Oct. 20, 2017), https://www.laweekly.com/lapd-is-arresting-increasing-numbers-of-homeless-in-gentrifying-neighborhoods/ [https://perma.cc/3NMY-52BU].

236. According to data compiled by CityLab, there are more than 200 cities that use 311 services. Sarah Goodyear, *3-1-1: A City Services Revolution*, CITYLAB, https://www.citylab.com/city-makers-connections/311/ [https://web.archive.org/web/20191217053313/https://www.citylab.com/city-makers-connections/311/].

237. Fayyad, *supra* note 235.

238. *See* Laura Bliss, *How Apps Can Help (and Harm) the Homeless*, CITYLAB (Oct. 28, 2015), https://www.citylab.com/solutions/2015/10/how-apps-can-help-and-harm-the-homeless/412780/ [perma.cc/P7SD-6WNW].

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these apps and others like Nextdoor, Citizen, and Amazon Ring's Neighbors facilitate racial profiling and vigilantism.[239]

Regulating the presence and movement of negatively racialized and historically marginalized groups illustrates what Professor Angela Onwauchi-Willig referred to as "policing the boundaries of whiteness."[240] Policing the boundaries of whiteness is a racial project that includes preserving the racial identities of certain public spaces. Indeed, as Professor Cheryl Harris wrote in her seminal article *Whiteness as Property*, "the exclusion of subordinated 'others' was and remains a central part of the property interest in whiteness and, indeed, is part of the protection that the court extends to whites' settled expectations of continued privilege."[241] As applied to disorderly conduct regimes, it is clear to see how these laws embody a set of norms—enforced by police and private citizens, and, in some cases, sanctioned by prosecutors and courts—that serve to settle expectations of privilege, in particular, privileged access to public space. Disorderly conduct provides yet another legal tool to regulate access to and movement in white spaces, as well as the boundaries between and among racialized public spaces. It provides a legal pathway for police and private actors to racially profile "otherized" groups, and remove those groups from public spaces in an effort to reduce who and what have been labeled as disorderly.

Disorderly conduct laws exist among a constellation of social practices that serve to regulate access to and movement in public spaces for negatively racialized and historically marginalized groups. The broad scope of disorderly conduct laws, as with order-maintenance laws more broadly, permits wide discretion in enforcement priorities. This invites discriminatory enforcement[242] but offers ample opportunities to engage in behavior modification. These social practices coupled with the enforcement of disorderly conduct laws serve to construct separate publics—or tiers of public access—that govern who can access public spaces and how they must behave if permitted access to those public spaces. Once again, these tiers of access to public spaces call into question the notion of "the public" as a unitary construction and illustrate how criminal law serves to stratify not only people but also places.

239. *See* Sarah Lustbader, *Spotlight: Neighborhood Crime Apps Stoke Fears, Reinforce Racist Stereotypes, and Don't Prevent Crime*, THE APPEAL (June 4, 2019), https://theappeal.org/spotlight-neighborhood-crime-apps-stoke-fears-reinforce-racist-stereotypes-and-dont-prevent-crime/ [https://perma.cc/9GAL-EHAX]; Jessi Hempel, *For Nextdoor, Eliminating Racism Is No Quick Fix*, WIRED (Feb. 16, 2017), https://www.wired.com/2017/02/for-nextdoor-eliminating-racism-is-no-quick-fix/ [https://perma.cc/F5H5-3ECT].

240. Onwuachi-Willig, *supra* note 231, at 1119.

241. Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1758 (1993).

242. *See* Roberts, *Social Meaning of Order-Maintenance Policing*, *supra* note 15, at 790.

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2. How Exclusion Based on Gender and Disability Constructs Public Space

Recent work by Elizabeth Sepper and Deborah Dinner provided a historical overview of sex discrimination in public accommodation laws and demonstrated how laws were deployed not only to preserve the gender composition of certain public spaces but also to reinforce gender hierarchies.[243]

As cultural norms evolved, the epicenter of the American social life shifted from the home to public spaces, and women—largely, White middle-class or wealthy women—began to frequent these places. In response, jurisdictions adopted a patchwork of laws aimed at preserving the "male character" of certain public spaces, such as bars and social clubs, by keeping women out or closely regulating their behaviors in those public spaces.[244]

As Sepper and Dinner recounted, the threat of disorder featured prominently in justifications for a constellation of laws aimed at protecting certain spaces as male only. It served to police sex and sexuality in public spaces. Proponents of sex segregation laws relied on an imagined fear of disorder in defense of those laws. Proponents of ordinances that excluded women from bars or professional clubs argued that permitting women to access these sites would risk inviting in prostitution and violence or harassment against women. Accordingly, these laws relied on sexist notions of womanhood to depict women as potential offenders (i.e., as disorderly persons), threats to the good order of these places, and potential victims in those same places.[245]

Law enforcement frequently targeted women of color in their enforcement of such laws. Here again, the racial and gender aspects of the legal and social constructions of disorder are apparent. As Sepper and Dinner noted, "[r]ace and ethnicity often delineated between realms of respectability and vice. Police viewed young women of color as inherently licentious. Cities from New York to Chicago to Miami constructed African American and immigrant neighborhoods simultaneously as sexual playgrounds for white voyeurs and as sites of criminality."[246] Thus, the reliance on racial and gendered notions of disorder, like disorderly conduct laws, reinforced racial and gender *norms* for behavior in certain public spaces and served to preserve the racial and gender *composition* and *character* of these public spaces.

Fear of disorder also featured prominently in medico-legal justifications for laws that criminalized the presence of disabled people with physical disabilities in public spaces. Rhetorical appeals in support of so-called ugly laws reinforced associations between disability, deformity, and dependency in ways that constructed the "other" as a foreign corporeal intrusion threatening to disrupt the public order of local communities. For example, as Schweik recounted,

243. *See generally* Sepper & Dinner, *supra* note 148, at 91–92.
244. *Id.* at 83.
245. *Id.* at 91–93.
246. *Id.* at 91–92.

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> [W]hen members of the Academy of Medicine organized in 1902 to push for enactment of an ugly law in New York City, involving the example of "a nervous and delicate woman" pestered by a beggar exposing the "ineffable impression" of a "horribly distorted limb," their plea on her behalf was not directed at just any old unsightly beggar. For these doctors, unsightliness was a foreigner's dialect, an Old World disorder. "Until 1901 the beggars of Greater New York seemed to be content with ordinary methods," wrote Clifton Spacks, a reporter covering the physicians' campaign. But "since the news of the richness of the field spread to foreign shores," new methods of begging were showing up in town . . . "The man with the wooden leg, or with no arms, is now superseded by hideous creatures who are apparently bereft of nearly every particle of likeness to humanity."[247]

In an effort to prevent public disorder—spurred in response to discomfort, disgust, and fear[248] among members of the able-bodied public—these laws prohibited the physical presence of people with physical disabilities in public. When coupled with laws and social practices that relegated people with disabilities to institutions, poor houses, and jails, these laws reinforced the literal exclusion of disabled people from public spaces.[249]

IV.
CHALLENGING THE ROLE OF "THE COMMUNITY" IN CRIMINAL LAW

The previous Sections demonstrate that criminalizing disorderly conduct involves more than prohibiting conduct that disrupts the public order and peace. Disorderly conduct regulates behaviors from a normative—and often discriminatory—baseline of "order." It is imbued with discriminatory norms that define and police the normative boundaries of communities *and* public spaces. Enforcing disorderly conduct enforces discriminatory norms and reinforces social hierarchies through maintaining spatial exclusion and hypersurveillance of negatively racialized and historically marginalized groups accessing public space. The policing of these often racist, gendered, and ableist norms creates what can be viewed as tiers of public access that may render certain groups vulnerable to harassment, hyperregulation, and exclusion from these public spaces. Furthermore, by enforcing disorderly conduct laws, communities construct the notions of "public" and "public space" by creating and upholding norms that define who belongs in public spaces, what behaviors are permitted in those spaces, and the particular racial-, gender-, or dis/ability-based make-up of

247. SCHWEIK, *supra* note 179, at 166.

248. *See, e.g.*, Jasmine E. Harris, *The Aesthetics of Disability*, 119 COLUM. L. REV. 895, 897 (2019) ("The aesthetics of disability trigger affective processes, however, and some emotions, such as fear or disgust, make it hard to recognize, respect, adjudicate, and enforce the rights of people with disabilities.").

249. *See, e.g.*, DISABILITY INCARCERATED: IMPRISONMENT AND DISABILITY IN THE UNITED STATES AND CANADA 1–18 (Liat Ben-Moshe, Chris Chapman & Allison C. Carey eds., 2014); DAVID WAGNER, THE POORHOUSE: AMERICA'S FORGOTTEN INSTITUTION 3 (2005).

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those public spaces. What is most troubling about the policing of these behaviors is that the criminalized behavior is presumed harmful, even when the harms are not clear, concrete, or even expressly stated.

A. Disorder and the Harm Principle

Courts often presume harm without inquiry into the specific harms posed by the defendant's allegedly disorderly conduct.[250] Criminal law scholars, even those critical of order-maintenance and discriminatory policing, generally accept disorder as a concrete harm.[251] The legal community has yet to interrogate claims that disorder poses a concrete harm defined in relation to an array of social norms enforced through both public and private actors.[252] Moreover, even where challenged in the criminal law scholarship as leading to discriminatory enforcement against low-income communities of color, legal scholars critiquing disorder have largely accepted disorder as within the community's interest and prerogative to regulate.[253]

Proponents of order-maintenance policing in the 1980s and 1990s argued in favor of targeting social and physical disorder as a concrete harm to be prevented by criminal law.[254] As Bernard Harcourt explained,

Before order maintenance, the disorderly were merely the 'losers' of

250. *See, e.g.*, State v. Zwicker, 164 N.W.2d 512, 519 (Wis. 1969) (holding that failure to follow police orders about where to display signs during a protest was disorderly conduct without discussing any specific harm); State v. Maker, 180 N.W.2d 707, 710 (Wis. 1970) (holding that a performer at a local tavern appearing on stage scantily clad was disorderly conduct but addressing no specific harm beyond a conclusion that the performer did in fact "cause and provoke a disturbance"); Commonwealth v. Logue, No. 00-10,302, 2000 WL 35819842 (Pa. Ct. C.P. Sept. 19, 2000) (holding a defendant guilty of disorderly conduct for shouting obscenities because "the statute does not require a risk of harm"); Layton City v. Tatton, 2011 UT App 334, ¶ 15, 264 P.3d 228, 232 (Utah Ct. App. 2011) (holding a defendant guilty of disorderly conduct for shouting obscenities at a high volume, meeting the statute's requirements for "unreasonable noise," without discussion of any specific harm); People v. Frie, 646 N.Y.S.2d 961, 964 (Dist. Ct. 1996) (holding that a dog barking constituted "unreasonable noise" under a reasonableness standard without consideration of specific harm).

251. *See, e.g.*, Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349, 370–71 (1997); Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551, 581–91 (1997). *But see* Bernard E. Harcourt, *Reflecting on the Subject: A Critique of the Social Influence Conception of Deterrence, the Broken Windows Theory, and Order-Maintenance Policing New York Style*, 97 MICH. L. REV. 291, 293 (1998).

252. Organizations, such as INCITE!, work to end quality-of-life policing, which, when coupled with zero tolerance policies, disproportionately target youth, unhoused people, and queer and trans communities. An issue brief published by INCITE! addressed the social construction of disorder as an essential framework for understanding the nature and scope of the problem of overpolicing and violence in these communities: "The practice of order maintenance policing is premised on society being divided into two groups, the 'orderly' upstanding, the law-abiding citizen and the 'disorderly' criminal-in-the-making. Once in existence, this construct is used to justify policies that treat the disorderly person as one who 'needs to be policed, surveyed, watched, relocated, controlled.'" *"Quality of Life" Policing*, INCITE!, https://incite-national.org/wp-content/uploads/2018/08/toolkitrev-qualitylife.pdf [https://perma.cc/5L2W-F39G].

253. *See supra* note 251 and accompanying text. *But see* Roberts, *Social Meaning of Order-Maintenance Policing*, *supra* note 15.

254. HARCOURT, *supra* note 91, at 185–86.

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> society. They were hoboes, bums, winos—a nuisance to many, but not threatening or dangerous. Similarly, practices like loitering and panhandling were, again for many, mere inconveniences. Today, however, the disorderly are considered the agents of crime and neighborhood decline. . . . Sheer disorder has become the harm that justifies criminal punishment. And the principal justification is no longer offense nor immorality but harm—the harm that these misdemeanor offenses cause.[255]

Where punishment is not the end goal, but rather social control, disorderly "harms" provide a pathway to entanglement with the criminal legal system. In part, the popularity of order-maintenance policies stems from proponents' ability to "transform *offensive* conduct into *harmful* conduct."[256] The proliferation of harm arguments has, as Harcourt argued, "inadvertently undermined the force of harm arguments. It has collapsed the harm principle. The proliferation of harm arguments in late modernity has weakened any single claim of harm."[257] As a result, "[i]n the context of order maintenance, the fact that a broken window may cause harm is no longer determinative. Whatever harms that disorder may cause, these injuries must now be weighed against other potential harms, especially those associated with order-maintenance policing."[258]

Part II.B takes up the challenge of identifying the concrete harms stemming from each type of disorderly conduct. Under the most common conception of disorderly conduct statutes today, the purported harm of disorderly conduct exists in relation to social order. An individual who behaves "disorderly" does so in relation to the order or relative order of the *particular* community. Stated differently, whether conduct is so disorderly that it amounts to a harm that may be criminalized depends on the conditions of the particular public and zone of order. A close fit between the prohibited conduct and the core purpose of criminalizing the offense would require finding that what threatens the community's sense of safety and security, or disrupts the public's peace, *is* conduct that amounts to disorderly conduct. As a result, in determining whether conduct is disorderly, courts largely look to the surrounding social context—the local community—to determine what norms, values, and beliefs govern what standards for behavior.[259]

Disorderly conduct laws and enforcement rely on a notion of order and disorder that is socially constructed. The sociological approach known as the constructionist perspective helps to explain why. A constructionist perspective provides insight into how disorderly conduct statutes assist communities in

255. *Id.* at 185.
256. *Id.* at 183.
257. *Id.*
258. *Id.* at 183–84.
259. *See, e.g.*, Shepherd v. District of Columbia, 929 A.2d 417 (D.C. 2007); People v. Dennis, 823 N.Y.S.2d 830 (N.Y. App. Term 2006).

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defining, through exclusion,[260] membership in their own communities. This approach first appeared in the late 1950s, spurring a new field in sociology focused on the study of deviant behavior or social deviance.[261] This perspective recognizes that "what defines, embodies, or *constitutes* deviance sociologically –are the concrete or *potential reactions of audiences*."[262] The constructionist perspective assumes that someone is valuing these behaviors as deviant or not. This valuing and devaluing of behaviors can occur on a collective basis wherein there is some agreement on the value to assign certain beliefs or characteristics. Some agreement as to whether a certain behavior constitutes deviant behavior can exist in relatively large or relatively small groups, but agreement is rarely universal.

The various categories of disorder outlined above are wide ranging and diverse. Across these categories, it may be rare for there to be consistently universal agreement within the community purportedly protected by these laws. Yet, state courts reviewing challenges to disorderly conduct have largely adopted a positivist approach to disorderly behaviors. This approach views behaviors that deviate, typically identified as "substantial deviations" or "gross deviations" from the given social norm, as "*objectively given*."[263] In accordance with this approach, some courts have assumed without scrutiny that there is "widespread consensus or agreement regarding what constitutes a normative violation."[264] As a result, in reviewing disorderly conduct convictions, these courts rely on evidence that particular behaviors offend "ordinary sensibilities" or "normal sensibilities of average persons,"[265] or judge disorderly behaviors from the perspective of "reasonable persons."[266]

260. *See* Erich Goode, *The Sociology of Deviance: An Introduction*, *in* THE HANDBOOK OF DEVIANCE 13 (Erich Goode ed., 2015).

261. *Id.* According to this new approach, "'deviance' came to mean behavior and, later, beliefs and characteristics as well, which are not necessarily harmful or pathological, but are, from someone's point of view, *disvalued*." *Id.*

262. *Id.*

263. *Id.*

264. *Id.* at 8.

265. *See, e.g.*, State v. Givens, 135 N.W.2d 780, 787 (Wis. 1965); State v. Sweeney, 255 A.2d 622, 625 (Conn. 1969) (Cotter, J., dissenting); State v. Indrisano, 640 A.2d 986, 998 (Conn. 1994); City of Cleveland v. Swiecicki, 2002-Ohio-4027, 775 N.E.2d 899, 902, at ¶ 18 (Ohio Ct. App. 2002); Madden v. State, 786 N.E.2d 1152, 1156 (Ind. Ct. App. 2003).

266. *See, e.g.*, State v. Ross, 573 S.W.3d 817, 823–24 (Tex. Crim. App. 2019) ("Furthermore, construing 'calculated' to refer to objective probability rather than subjective intent would put the statute on surer constitutional footing from a vagueness perspective. This is because, as the Supreme Court of Texas has noted, reading 'calculated' to convey a sense of objective likelihood also tends to invoke the reasonable-person standard. We agree with our sister court that the word 'calculated,' used in this manner, does convey some sense of the reasonable person's response, rather than the actor's subjective intent. And we note that linking this objective-likelihood understanding of 'calculated' to the reasonable-person standard greatly reduces Section 42.01(a)(8)'s susceptibility to a vagueness challenge—because compliance with the statute would not turn upon the unknowable, idiosyncratic sensibilities of whoever may be present."); *Givens*, 135 N.W.2d at 787; *In re* A.S., 626 N.W.2d 712, 724 (Wis. 2001); State v. Najibi, 892 P.2d 475, 479 (Haw. Ct. App. 1995).

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At first glance, such positivist approaches may seem like a welcome reform. With respect to disorderly conduct laws, as with order-maintenance policing more broadly, reasonableness standards purportedly allow for a measure of objectivity in the inherently subjective exercise of distinguishing disorderly behaviors in a given community. Furthermore, courts applying a positivist approach have overturned disorderly conduct statutes that apparently distinguished disorderly conduct from orderly conduct based on extreme or personal "sensitivities." These courts did so on the grounds that upholding such convictions would permit highly subjective factors to play a role in determining what can be criminalized.[267] However, even these courts, which recognized the subjectivity inherent in determinations of disorderly conduct, still adhered to the notion that there exists some objective standard by which to distinguish orderly from disorderly behaviors.[268]

The first problem with the positivist approach is that it presupposes that objective aspects of disorder can be identified and compared with the normative baseline of "social order." Such an approach also assumes shared norms for defining the nature, scope, and balance of harms in a sociopolitical context in which such norms are contested. A more searching inquiry would require assessing the specific, concrete harms the disorder poses, or the risk thereof.[269] The second problem is that positivist approaches conflate what is at stake in cases involving violent disorder and disruptive disorder. With violent disorders, the purported risk or potential harm to the public is violence or physical harm. With disruptive disorders, the risk of harm to the public is the loss of benefits, whether comfort, peace, tranquility, or access to public spaces. Conflating these two types of harm distorts a true assessment of public harm and, in so doing, fails to appropriately weigh the negative consequences on both sides[270]—the "public"

267. *See, e.g.*, State *ex rel.* H.D., 501 A.2d 1016, 1017 (N.J. Super. Ct. App. Div. 1985); State v. Profaci, 266 A.2d 579, 583 (N.J. 1970).

268. *See, e.g.*, Gooding v. Wilson, 405 U.S. 518, 524 (1972); State v. Rosenfeld, 303 A.2d 889, 893 (N.J. 1973).

269. Of course, even within the wide range of behaviors that may be criminalized as disorderly, it can be argued that some behaviors are *more* objectively disorderly (e.g., public urination) than others (e.g., "tumultuous behavior"—where tumultuous behavior differs based on the social setting). Yet, even so, public urination may be tolerated more in certain spaces (e.g., college campus with excessive drinking and limited access to restrooms), suggesting that even where claims to objectively disorderly conduct are made, enforcement will still vary, raising concerns over which individuals and groups are targeted for enforcement—and why.

270. Prof. Jenny Roberts has argued that misdemeanor plea bargains rarely work to advantage defendants:

For example, a defendant might be "offered" a sentence of time already served-which can mean the night spent in jail awaiting arraignment, or even a fictional time period if the person was never incarcerated-in exchange for pleading guilty to a misdemeanor of disorderly conduct. This may sound advantageous, or at least not harmful, until the actual consequences of this plea are added into the equation. This conviction can, and does, lead to proceedings to evict an individual from public housing. It can, and does, pose a bar to demonstrating "good moral conduct" for citizenship. Perhaps most significantly, in an era in which employers can, and do, easily access electronic criminal records, the person taking the "harmless" disorderly conduct plea will have difficulty finding work. Indeed, this

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and the criminalized. It ignores the balancing of harms that should determine which conduct is labeled disorderly.[271] Especially in an era of mass criminalization and incarceration, the characterization of disorderly conduct as harmful should be scrutinized depending on the nature of the purported conduct, particularly given the social costs of enforcement.

Equating all forms of disorder with harmful conduct can be traced to the popular rhetoric surrounding broken windows policing.[272] As originally developed, such policing was regarded as a type of community policing that "emphasize[d] proactive enforcement of misdemeanor laws and zero tolerance for minor offenses."[273] The devastating effects on communities that stemmed from broken windows policing policies are apparent today. According to researchers at John Jay College of Criminal Justice, between 1980 and 2013, the arrest rate for lower-level crimes in New York City had surpassed those for more serious offenses and increased by 190.5 percent, with 225,684 arrests by police.[274] People of color comprised the vast majority of these low-level arrests—some eighty-six percent.[275] Despite the proliferation of order-maintenance policing and its overwhelmingly positive reception in the academy, popular media, and among lawmakers, Bernard Harcourt argued persuasively that it offered a false promise—an illusion—of order.[276] He demonstrated that there is no strong empirical evidence to support proponents' main contention: that broken windows policing and other order-maintenance strategies reduce

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employment issue alone starkly illustrates the way in which the most minor misdemeanor conviction has serious implications for so many people.

Jenny Roberts, *Crashing the Misdemeanor System*, 70 WASH. & LEE L. REV. 1089, 1097–99 (2013) (citations omitted).

271. In his book, *Illusion of Order*, Harcourt unearthed the theoretical foundations of the order-maintenance approach that "emphasize[] the social norm of orderliness and its influence on crime," before challenging the "uncritical dichotomy between disorderly people and law abiders—or, more generally, between disorder and disorder." HARCOURT, *supra* note 91, at 7. Harcourt wrote that the "order-maintenance approach fails to explore how these notions of thicker propensities and human nature—how the categories of the disorderly and law abider—are themselves shaped by policing punishment strategies." *Id.* As a result, Harcourt continued, "these categories mask the repressive nature of the broken-windows policing and overshadow significant costs, including increased complaints of police misconduct, racial bias in stops and frisks, and further stereotyping of black criminality." *Id.*

272. As Professor Harcourt has argued, the rhetoric of broken windows theory changed disorderly conduct from a "mere nuisance or annoyance into seriously harmful conduct—conduct that in fact contributes to serious crimes, such as murder and armed robbery." *Id.* at 207.

273. *Id.*

274. PREETI CHAUHAN, ADAM G. FERA, MEGAN B. WELSH, ERVIN BALAZON & EVAN MISSHULA, JOHN JAY COLL. CRIM. JUST., TRENDS IN MISDEMEANOR ARRESTS IN NEW YORK 11 (2014), http://johnjay.jjay.cuny.edu/files/web_images/10_28_14_TOCFINAL.pdf [https://perma.cc/TD75-H2ZX].

275. INDEP. COMM'N ON N.Y.C. CRIMINAL JUSTICE & INCARCERATION REFORM, A MORE JUST NEW YORK CITY 37 (2017), https://static1.squarespace.com/static/5b6de4731aef1de914f43628/t/5b96c6f81ae6cf5e9c5f186d/1536607993842/Lippman%2BCommission%2BReport%2BFINAL%2BSingles.pdf [https://perma.cc/X4EH-JX63].

276. HARCOURT, *supra* note 91, at 6, 19.

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serious crime.[277] Harcourt showed how proponents of order-maintenance policing and broken windows theory "transformed conduct that was once merely offensive or annoying into positively harmful conduct—conduct that *causes* serious crime."[278] This history may explain why uncritical assumptions equating disorder with harmful conduct overwhelmingly characterize court opinions involving disorderly conduct charges.[279]

Perhaps one response to this critique is that the unitary, objective, and discernible baseline is a given locality's "normal operations." Such framing does not insulate the inquiry from subjectivity issues or render the criminalization of disorderly behaviors based on disruptions to a community's normal social operations an objective inquiry. Normal operations themselves are informed by subjective assessments of what a given public place *is* in its normal state and normative assessments of what a community should be—for example, with respect to residents, sounds, sights, smells, etc.—when it is operating normally. Ultimately, for disorderly conduct offenses, even harm to a given locality's normal operations cannot provide a principled basis for distinguishing between conduct to criminalize and conduct to permit or tolerate.

Finally, problems stemming from a failure to identify or scrutinize claims of concrete public harm may arise in part because several state disorderly conduct statutes condition criminal liability on conduct that tends to disturb the peace.[280] This inchoate nature[281] of disorderly conduct expands the breadth of liability even beyond the wide range of conduct either specifically enumerated or contained in catch-all provisions also found in disorderly conduct laws.[282] For example, New Mexico's disorderly conduct statute prohibits "engaging in violent, abusive, indecent, profane, boisterous, unreasonably loud or otherwise disorderly conduct which tends to disturb the peace."[283] In *State v. Florstedt*,[284] the New Mexico Supreme Court determined that the term "disturb the peace"

277. *Id.* at 7, 59–90.

278. *Id.* at 8.

279. *See supra* note 250.

280. *See* ARIZ. REV. STAT. ANN. § 13-2904 (2018); ARK. CODE ANN. § 5-71-207 (2019); COLO. REV. STAT. § 18-9-106 (2020); DEL. CODE ANN. tit. 11, § 1301 (2020); D.C. CODE § 22-1321 (2020); GA. CODE ANN. § 16-11-39 (2019); HAW. REV. STAT. § 711-1101 (2020); IOWA CODE § 723.4 (2013); KAN. STAT. ANN. § 21-6203 (2019); ME. STAT. tit. 17-A, § 501-A (2006); MINN. STAT. § 609.72 (2020); N.H. REV. STAT. ANN. § 644:2 (2016); N.J. STAT. ANN. § 2C:33-2 (2016); N.M. STAT. ANN. § 30-20-1 (2021); OHIO REV. CODE ANN. § 2917.11 (LexisNexis 2016); 18 PA. CONS. STAT. § 5503 (2015); 11 R.I. GEN. LAWS § 11-45-1 (2016); TEX. PENAL CODE ANN. § 42.01 (2016); VA. CODE ANN. § 18.2-415 (2021); WIS. STAT. § 947.01 (2020); WYO. STAT. ANN. § 6-6-102 (2021).

281. *Cf.* John Inazu, *Unlawful Assembly as Social Control*, 64 UCLA L. REV. 2, 20–21, 30–31 (2017) (discussing inchoate nature of unlawful assembly provisions).

282. *See* ALA. CODE § 13A-11-7 (2015); ALASKA STAT. ANN. § 11.61.110 (2020); COLO. REV. STAT. ANN. § 18-9-106 (2020); DEL. CODE ANN. tit. 11, § 1301 (2020); FLA. STAT. ANN. § 877.03 (2020); KY. REV. STAT. ANN. § 525.060 (West 2020); LA. STAT. ANN. § 14:103 (2018); MASS. GEN. LAWS ch. 272, § 53 (2020); MICH. COMP. LAWS § 750.167 (2021); MINN. STAT. § 609.72 (2020).

283. N.M. STAT. ANN. § 30-20-1(A) (2021). A separate provision prohibits "maliciously disturbing, threatening or, in an insolent manner, intentionally touching any house occupied by any person." *Id.* § (B).

284. 1966-NMSC-208, 77 N.M. 47, 419 P.2d 248 (N.M. 1966).

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was equivalent to "breach of the peace" and defined breach of peace to be "a disturbance of public order by an act of violence, or by any act likely to produce violence, or which, by causing consternation and alarm, disturbs the peace and quiet of the community."[285] In *State v. James M.*,[286] the New Mexico Supreme Court found sufficient evidence of disorderly conduct, holding that the defendant's words constituted fighting words likely to incite an immediate breach of the peace and that "defendant's conduct of getting excited, speaking in a loud voice . . . and flailing his arms" supported the officer's "reasonable belief that a fight was possible."[287] In deciding to uphold the conviction, the court reasoned that the defendant's conduct did not need to actually disturb the peace of a community; it simply had to be *likely* to disturb the peace.[288] In this case, the court's assessment of the likelihood of harm was not rooted in any concrete harms to the public allegedly inflicted by the defendant's conduct. In fact, evidence of concrete harm was difficult to find in the record. Facts obtained in juvenile court indicated that "[t]hroughout the incident, a lot of people were going in and out of . . . the nearby stores . . . [and] [f]our or five people had gathered to watch the incident . . . [including a] witness from half a block away [who] later testified that he could not hear any yelling."[289]

The inchoate nature of liability, which conditions liability on conduct tending to provoke public disorder, is another aspect of disorderly conduct laws that make them a particularly useful tool for overcriminalization.[290] In jurisdictions where disorderly conduct stems from conduct *likely to* result in public disruption, police officers may intervene before any actual disruption. As Professor John Inazu argued in his article discussing unlawful assembly, inchoate crimes "force [police] to rely on judgments and inferences about future acts."[291] Such preventative policing may lead to arbitrary, discriminatory enforcement where notions of disorder, or the risk of disorder, and criminality are linked to discriminatory norms.

285. *Id.* ¶ 7, 77 N.M. at 49, 419 P.2d at 249 (quoting People v. Most, 64 N.E. 175, 177 (1902)).

286. 1990-NMCA-135, ¶ 14, 111 N.M. 473, 477, 806 P.2d 1063, 1066 (N.M. Ct. App. 1990).

287. *Id.* ¶ 19, 111 N.M. at 477, 806 P.2d at 1067.

288. *Id.* ¶ 15, 111 N.M. at 477, 806 P.2d at 1066 ("Defendant contends that the state must show not only that his behavior was provocative but also that it actually provoked. We disagree. Section 30–20–1 does not require that defendant's speech and conduct actually caused a violent reaction in Lujan. Rather, the standard is whether defendant's conduct tends to disturb the public peace."); City of Oak Creek v. King, 436 N.W.2d 285, 290 (Wis. 1989) ("The law only requires that the conduct be of a type which tends to cause or provoke a disturbance, under the circumstances as they then existed.").

289. *Id.* at 1065.

290. *See* DOUGLAS HUSAK, OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW 162–65 (2008) (discussing overcriminalization risks with respect to inchoate offenses).

291. Inazu, *supra* note 281, at 7.

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B. Proposal: Legalize Disorderly Conduct

The previous Sections have investigated and analyzed the deep and widespread harms that discriminatory enforcement of disorderly conduct laws causes. In this Section, I propose legalizing disorderly conduct.[292]

I will demonstrate that decriminalization is a reasonable proposal, given the overuse and abuse of disorderly conduct laws.[293] Because the interests that criminalization allegedly promotes differ between disruptive disorders and violent disorders, I will address each in turn.

1. Arguments in Support of Legalizing Disruptive Disorders

Disruptive disorders prohibit disruptions to the peace, quiet, and tranquility of communities. At their core, disruptive disorders are irreconcilably subjective and marked by inconsistent criteria for distinguishing mere disruptions from disruptions criminalized as disorderly conduct. The normative baseline is almost never explicitly stated, and when it is, it is hardly an objective metric. Consider the enumerated conduct prohibited under disruptive disorders. As discussed, these offensive or annoying behaviors and behaviors that disrupt peace and tranquility become deviant only in relation to an unarticulated normative standard, whether non-offensive/annoying or non-disruptive.[294] Some courts have responded to this problem with an "I know it when I see it" approach. But where the purported harm of these types of disorder is contested, the rationale for criminalizing these behaviors collapses.

Some may contend that disruptions stemming from disorderly conduct pose concrete and objective harms that communities may seek to criminalize. They may argue that these disruptions are concretely harmful in two ways: they disrupt the normal operations of communities or businesses, and they offend the public's sense of decency. With respect to the first category of harms, even if one acknowledges that these behaviors do in fact result in actual harms to communities, noise ordinances and laws prohibiting obstructing public

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292. Arguments for decriminalization are not new. Criminal law scholars in the 1970s proposed numerous critiques challenging the criminalization of order-maintenance criminal laws, including disorderly conduct, vagrancy, loitering, public intoxication, and breach of peace. *See, e.g.*, Robert Force, *Decriminalization of Breach of the Peace Statutes: A Nonpenal Approach to Order Maintenance*, 46 TUL. L. REV. 367, 370 (1971–72) (listing criminal scholarship critical of overcriminalization).

293. *See, e.g.*, MARIAN GEWIRTZ & STEPHEN KOPPEL, N.Y.C. CRIM. JUST. AGENCY, RESEARCH BRIEF: DISORDERLY CONDUCT (§ 240.20) – NEW YORK CITY'S CATCHALL DISPOSITION (2019), https://issuu.com/csdesignworks/docs/cja_discon_nyc_catchall [perma.cc/G4Y4-JXSJ] (noting that in New York City disorderly conduct has "emerged as a catchall disposition in a wide variety of cases"); CHRISTY E. LOPEZ, ISSUE BRIEF: DISORDERLY (MIS)CONDUCT: THE PROBLEM WITH "CONTEMPT OF COP" ARRESTS, AM. CONST. SOC'Y FOR L. & POL'Y (2010), http://cdn.ca9.uscourts.gov/datastore/library/2015/08/10/Velazquez_ContemptOfCop.pdf [https://perma.cc/U7FE-27DR].

294. *See, e.g.*, City of Oak Creek v. King, 436 N.W.2d 285, 288 (Wis. 1989) ("While it is impossible to state with accuracy just what may be considered in law as amounting to disorderly conduct, the term is usually held to embrace all such acts and conduct as are of a nature to corrupt the public morals or to outrage the sense of public decency, whether committed by words or acts.").

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walkways, sidewalks, and streets often already proscribe these behaviors. Moreover, the nature of the harm is one of disruption, which should not rise to the level of warranting criminal liability. Finally, criminal liability based on thwarting the normal operations of a particular community or business risks criminalizing people and behaviors that are simply outside of the location's run-of-the-mill operations. In these cases, any disruption is sufficient to confer liability even if the interruption is momentary, slight, or based on conduct perceived as offensive and labeled socially disruptive.[295]

With respect to the second category, the harms are even more tenuous. The harms to be avoided are those that offend the public's morals or sense of decency.[296] Scholars and advocates have challenged the use of criminal law to police public morality—or more specifically, to regulate so-called vices—and thus advocate for decriminalization.[297] Though a full discussion of the regulation of vices is beyond this Article's scope, criminalizing harmless disruptive disorders of the type that offend public morals runs the risk of reinforcing discrimination against and subordinating historically marginalized groups. Regulating vices provides a mechanism for criminal law to be used as a means of enforcing traditional views or a majoritarian moral code. For example, in challenging radical feminist proposals abolishing or criminalizing sex work, Professor India Thusi argued that "[r]adical feminism often relies upon a discourse that disempowers sex workers and is consistent with discourses that focus on sex workers as public nuisances, immoral, and pathological."[298] Professor Thusi posited in her critique that "[b]y suggesting that their work is categorically "wrong" or immoral and treating it as a vice to be eliminated, these scholars marginalize sex workers and reflect a continuity with patriarchal discourses that condemn sex work because it is a form of female sexuality that is inconsistent with dominant morality."[299] Furthermore, the regulation of vices absent tangible social harm may rest on shaky constitutional ground in light of Supreme Court decisions challenging the use of criminal law to uphold

295. *See, e.g.*, U.S. v. Encinger, No. 10CR3027, 2010 WL 2771884 (D. Neb. July 13, 2010).

296. *See, e.g.*, State v. Zwicker, 164 N.W.2d 512, 517–18 (Wis. 1969) ("Only such conduct as unreasonably offends the sense of decency or propriety of the community is [disorderly conduct]."). Here, a reasonableness standard aims to provide an objective way for determining whether conduct is disorderly without resorting to criminalizing behaviors that offend those communities with heightened sensibilities.

297. *See, e.g.*, I. India Thusi, *Radical Feminist Harms on Sex Workers*, 22 LEWIS & CLARK L. REV. 185, 225 (2018) ("Although sex work is often dangerous and may include harms, decriminalization can often mitigate these harms. Accordingly, decriminalization seems suitable in most contexts in its recognition of the sex worker's autonomy and liberty. However, a singular model for sex work regulation should not be transposed to all contexts."). *But see* Strader & Hay, *supra* note 131, at 466 ("Despite rapid advances in LGBTQ rights in civil contexts, such as samesex marriage, and in the decriminalization of sodomy and in the enactment of criminal hate crimes statutes, those advances generally have failed to protect against such discriminatory police actions and their substantial consequences.").

298. Thusi, *supra* note 297, at 229.

299. *Id.*

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"majoritarian morality."[300] Similarly, policing disorderly disruptions that offend the public's sense of decency further marginalizes already marginalized groups by enforcing a moral code imbued with dominant cultural norms. Absent concrete social harms, morality on its own cannot justify criminalizing these types of disorders.

2. Arguments in Support of Legalizing Violent Disorders

As noted, violent disorders include behaviors labeled violent, abusive, threatening, or tumultuous. Such disorders are premised on claims of harm or the threat of harm to community members. The stated purpose of prohibiting violent disorders is to protect the community against harm, but the standards for determining whether disorderly behaviors are violent are not always based on objective criteria. In some cases involving conduct labeled as a violent disorder—for example, abusive, threatening, or tumultuous behaviors—whether the behavior is found disorderly frequently depends on whether the conduct "tend[s] to cause or provoke a disturbance."[301] More specifically, whether a disorder is "violent" depends on whether there was evidence of negative reactions, or any reaction at all, to the disturbance by members of the public. This category thus bases criminal liability on the subjective impressions and reactions of others. Perhaps some would be disturbed by the loud noise caused by Defendant A, but perhaps others would notice the noise without being disturbed. Moreover, even where actual harm is present, as in the case of a bar fight or brawl that threatens to harm patrons or bystanders, disorderly conduct laws merely criminalize actions that assault offenses already proscribe. Therefore, even as a conceptual category, violent disorders collapse into assault crimes, minimizing the social utility of criminalizing them.

C. Alternatives to Abolition: Reforms Aimed at Reducing Harm

I have argued that disorderly conduct laws should be abolished given the social harms stemming from historical, social, and legal constructions of disorder. Yet some would argue that even today disorderly conduct offers some utility. For example, the capacious nature of disorderly conduct and its classification as a non-deportable offense permits individuals to enter into plea agreements that avoid harsh collateral consequences. As such, disorderly

300. Strader & Hay, *supra* note 131, at 465. As authors J. Kelley Stray and Lindsay Hay noted, the Supreme Court's *Lawrence* decision turned Bowers—a 1986 decision upholding a Georgia law criminalizing same-sex relations between consenting adults—and its "morality-based approach on its head." *Id.* at 471. The authors continue by noting that:

The [*Lawrence*] Court then stated that "[o]ur obligation is to define the liberty of all, not to mandate our own moral code." [The Court also] concluded that "the fact that the governing majority in a State has traditionally viewed a particular practice as *immoral* is not a sufficient reason for upholding a law prohibiting the practice," noting that traditional moral views" did not provide a basis for laws prohibiting inter-racial marriage. *Id.*

301. City of Oak Creek v. King, 436 N.W.2d 285, 288 (Wis. 1989).

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conduct laws may help some undocumented defendants avoid deportation.[302] Aggressors in conflicts involving intimate partner violence have been charged with disorderly conduct whereby, for instance, the survivor of the violence declines to testify. This may lead some to conclude that disorderly conduct benefits survivors of intimate partner violence by providing a basis to arrest the perpetrator of the violence. These concerns warrant further consideration that extends beyond the scope of this Article. In the examples above, charging disorderly conduct masks a deeper structural problem—the criminalization of immigration and the pervasiveness of sexual violence in society.

Though I have argued for the decriminalization of disorderly conduct, some reforms would also curb the overuse of disorderly conduct and may further the goals of harm reduction. First, simply eliminating disruptive disorders from the offense of disorderly conduct would narrow the scope of proscribed behaviors and prevent much of the criminalization of status-related conduct, such as that targeting unhoused people. Decriminalizing disruptive disorders would also narrow police discretion and prevent split-second assessments of which conduct is disruptive and disorderly. It may also reduce the use of disorderly conduct as a means of regulating the conduct of historically marginalized and negatively racialized groups in public places. Second, revising disorderly conduct laws to require concrete manifestation of actual, severe public harm would reduce the risk of overcriminalization. Finally, legislatures should consider revising the mental requirements for disorderly conduct laws so that the required mens rea is intent to cause public harm as opposed to disorder (or inconvenience, annoyance, or alarm). Here again, the proposal offers a way to narrow criminal liability to instances in which intentional conduct has led to, or intends to cause, actual public harm.

D. From Consensus to Contestation

The policing of physical and social disorder places conflicting conceptions of "the community" front and center. On the one hand, popular discourse largely assumes consensus in criminal law with respect to the purposes and justifications for criminal laws and punishment. Yet such discourse rests largely on the overreliance on criminal law as a response to social problems. Where communities view disorder as a social problem, historically and today, criminal law has been and continues to be positioned as the suitable and ready mechanism by which to respond to those problems.[303] On the other hand, recent scholarship demonstrates that disagreement and conflict exist within criminal justice reform

302. NATAPOFF, *supra* note 14, at 33 ("Attorneys can bargain a minor marijuana-possession charge into a disorderly conduct charge to spare the defendant automatic deportation.").

303. *See, e.g.*, JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR 13–14 (2007); Benjamin Levin, *Mens Rea Reform and Its Discontents*, 109 J. CRIM. L. & CRIMINOLOGY 491, 498, 528–29 (2019).

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proposals that rely on unitary construction of communities.[304] Critical race scholars have long argued against the unitary construction of communities and assumptions regarding community consensus in criminal law.[305]

Progressive criminal scholars have paid comparatively less attention to the role criminal law plays in constructing communities, largely through exclusion and by policing low-level offenses such as disorderly conduct. As Judith Butler wrote,

> [A]ny version of "the people" that excludes some of the people is not inclusive and, therefore, not representative. But it is also true that every determination of "the people" involves an act of demarcation that draws a line . . . . [T]here is no possibility of "the people" without a discursive border drawn somewhere, either traced along the lines of existing nation-states, racial or linguistic communities, or political affiliation. The discursive move to establish "the people" in one way or another is a bid to have a certain border recognized, whether we understand that as a border of a nation or as the frontier of that class of people to be considered "recognizable" as a people.[306]

Butler's argument that the designation of "the people" is both a contested and exclusionary designation offers one conceptual challenge to unitary and uniform descriptions of "the community," or "the public," in criminal law. Viewed in this way, the designation of "the people," connotes contested sites of power—or in Butler's words, a "bid for hegemony."[307] It also calls into question policing and enforcement priorities implemented in the name of "the community" that fail to acknowledge the socially constructed nature of communities and public spaces.[308]

Sociology offers insights into how criminal law may function to construct communities, particularly ways of thinking about the relationship between norms, policing of norms, and social cohesion or solidarity. As is well known, criminal law can be deployed to strengthen or reinforce social norms by imposing criminal sanctions.[309] At the same time, even though criminal law functions as a source of formal control, policing for compliance with standards of behavior occurs even without formal state intervention. As Professor Melissa Murray noted, members in society in some instances "observe this standard of conduct, regardless of whether the state is actually watching."[310] Beyond this,

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304. *See* Jocelyn Simonson, *The Place of "The People," supra* note 15, at 253–57. Recently, scholars have questioned the assumptions that communities will act less punitively and more equitably when given control of local decision-making processes within the criminal legal system. *See, e.g.*, John Rappaport, *Some Doubts About "Democratizing" Criminal Justice*, 87 U. CHI. L. REV. 711 (2020).

305. *See* CYNTHIA LEE & ANGELA P. HARRIS, CRIMINAL LAW: CASES AND MATERIALS 2 (4th ed. 2019).

306. JUDITH BUTLER, NOTES TOWARDS A PERFORMATIVE THEORY OF ASSEMBLY 5 (2015).

307. *Id.* at 4.

308. *See, e.g.*, Simonson, *The Place of "The People," supra* note 15, at 255.

309. *See* Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 473–74 (1997) ("Perhaps more than any other society, ours relies on the criminal law for norm-nurturing.").

310. *See* Melissa E. Murray, *Marriage as Punishment*, 112 COLUM. L. REV. 1, 52 (2012).

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criminal law may be deployed to strengthen social cohesion and solidarity. As Professor Kaaryn Gustafson explained, "[t]o create and maintain solidarity, dominant members of the group must engage in practices that help define the collective, define the boundaries of membership, and set norms on behavior within the collective. An important part of building social solidarity is labeling as deviant those behaviors considered unacceptable threats to cohesion."[311]

Critical criminal law reform scholarship discusses how criminal law and punishment regimes are wielded to deny individuals charged with and/or convicted of crimes the ability to claim membership in "the community."[312] Most of this scholarship, unsurprisingly given the ongoing discourse about mass incarceration, focuses on incarceration as the reason for community exclusion and on felony offenses as the primary category of offenses. Yet, as the foregoing Sections demonstrate, exclusion happens through enforcement of so-called low-level offenses. Failures to recognize how felony and misdemeanor arrests and convictions mark persons for exclusion from normative conceptions of community skew how "the community" is defined in criminal legal reform debates and proposals. Even in the search for express criminal law reforms, failure to recognize who benefits from, or is harmed by, particular decisions to criminalize or punish paradoxically ensures the supremacy of "the community" as a touchstone for the viability and desirability of any given reform proposal and erases dissenting factions within the community.

Disorderly conduct laws provide an interesting case study into how criminal laws construct and define communities through singling out so-called deviant behaviors that threaten social cohesion. Policing disorderly conduct facilitates the social process of constructing communities in two ways: first, by determining which norms control a given situation or which "community" values dominate, and second, by constructing figurative tiers of public access that distinguish between members of the public who have unfettered access in these public spaces and those who are subjected to heightened scrutiny and surveillance. These laws shape and define descriptive and normative boundaries of communities; through the behaviors they proscribe or identify as "disorderly," they shape and define standards and norms for behavior that construct communities.

Labeling behaviors as "disorderly" is a comparative exercise. By labeling behaviors disorderly, the law can be used to define a code of conduct for communities. Individuals whose behaviors fall outside the acceptable standards of behavior can not only be criminalized but also "otherized," even as they occupy the same shared spaces as members of the community whose behaviors

311. Kaaryn Gustafson, *Degradation Ceremonies and the Criminalization of Low-Income Women*, 3 U.C. IRVINE L. REV. 297, 301 (2013) (citing EMILE DURKHEIM, THE DIVISION OF LABOR IN SOCIETY 63 (W.D. Halls trans., 1984) ("The real function [of criminal punishment] is to maintain inviolate the cohesion of society by sustaining the common consciousness in all its vigour.")).

312. *See, e.g.*, Simonson, *The Place of "The People," supra* note 15, at 270–86 (discussing problems inherent in criminal procedure's dichotomy between "the people" and "the defendant").

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seemingly conform to these acceptable standards of behavior. At the same time, as I illustrate above, what is labeled disorderly is imbued with racist, gendered, and ableist norms. Therefore, protecting "the community" from disorder means risking reinforcing social hierarchies based on race, gender, class, and disability through the criminal law. "Otherizing" non-conforming behaviors, in particular those associated with negatively racialized and historically marginalized groups, risks excluding these groups not only from public spaces but also from the normative conceptions of democratic community.[313]

Policing disorder is justified primarily as a basis for preserving public order and the public's peace—both interests described as benefitting the local community or as promoting the general welfare. Yet how can benefits of enforcement be presumed where the harms of the prohibited conduct are contested, where the harms of enforcement fall disproportionately on negatively racialized and historically marginalized groups, and where such laws are often enforced for the *purpose* of exclusion? A critical analysis of the offense of disorderly conduct illustrates the complexities of assessing not only the interests and concrete harms stemming from enforcement but also the constitutive members of the community itself.

Acknowledging the multiplicity of interests reflected in decisions to criminalize and punish disorderly conduct calls for a set of alternative models for democratic engagement and contestation, particularly in this era of mass criminalization and incarceration.[314] These alternative models provide possibilities for adopting and implementing healthy democratic contestation in discussions on whether and how to police physical and social disorder in communities, if at all. Agonism is one such model that invites democratic contestation. As Jocelyn Simonson explained:

> Agonism serves as a contrast to, on one end, *antagonism*, through which groups withdraw from political institutions altogether, and on the other end, *deliberation*, which emphasizes consensus through rational dialogue. Because no one idea can be representative of a diverse modern population, "[t]oo much emphasis on consensus, together with aversion

313. *See* Ford, *supra* note 228, at 1847 ("[R]esidence in a municipality or membership in a homeowners association involves more than simply the location of one's domicile; it also involves the right to act as a citizen, to influence the character and direction of a jurisdiction or association through the exercise of the franchise, and to share in public resources."); Ocen, *supra* note 227, at 1552 ("In particular, the marginalization and isolation that racialized groups experience in segregated spaces prevents such communities from being recognized as members of the larger polity. In this way, recognition acts as a prerequisite for citizenship in the broadest sense of the term, and exclusion from particular spaces prevents Black people from occupying the role of citizen. Consequently, the negative racial imagery that justified the initial construction of racialized neighborhood boundaries is reinforced through misrepresentation.") (footnote omitted).

314. This is not to suggest that directly impacted communities have not contested criminalization—or more specifically, the use of criminal law to respond to social problems—and done so by participating in political processes or criminal proceedings. *See, e.g.*, Jocelyn Simonson, *Bail Nullification*, 115 MICH. L. REV. 585 (2017); Jocelyn Simonson, *Copwatching*, 104 CALIF. L. REV. 391 (2016).

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> toward confrontations, leads to apathy and to a disaffection with political participation." Agonism thus pushes up against the exclusion that can come from avoiding conflict through consensus, but maintains that change can come through contestation that engages with formal democratic processes.[315]

Similarly, distributional analysis offers another method for communities to contest criminalization. As Professor Aya Gruber noted, distributional analysis "map[s] out the terrain of interests in any given legal controversy," and "involves meticulous and deliberate contemplation of the many interests affected by the existing criminal law regime and evidence-informed predictions about how law reform might redistribute harms and benefits, not just imminently but over time."[316] Applying a distributional analysis may require that a diverse array of advocates within communities seeking to rely on criminal law enforcement take up the justifications for criminalizing each type of disorderly conduct on its own terms. In particular, this would require interrogating the stated harms posed to the public by each type of disorder, then weighing those harms against the harms that stem from enforcing laws that criminalize each type of disorder.

Re-centering the harm principle in discussions on criminalization and addressing the full scope of harms—i.e., not just harms to an imagined unitary community but also harms to policed communities—invites a wider, more inclusive range of views and values to the debate on criminal justice reform and transformative change. However, it does not compel a particular course of action as among a given set of options, whether maintaining the status quo or seeking to criminalize or decriminalize.[317] It does provide the possibility of recasting and expanding the terms of the criminal law reform debate and opens pathways toward more transformative approaches to respond to harm and mediate conflict, such as abolition and restorative justice approaches.[318] Disorderly conduct reinforces race-, gender-, and disability-based status hierarchies. Policing disorderly conduct is not really about disorder at all; rather, it is about policing the boundaries within and around "white spaces," policing sexuality and gender, and constructing normative bodyminds through policing. Abolishing disorderly conduct would remove the most readily available tool for policing these social groups, but it is certainly not the only mechanism for social control. Decriminalizing or legalizing disorderly conduct will not end overpolicing of

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315. Simonson, *Copwatching*, *supra* note 314, at 436 (footnotes omitted).

316. Aya Gruber, *When Theory Met Practice: Distributional Analysis in Critical Criminal Law Theorizing*, 83 FORDHAM L. REV. 3211, 3213, 3233 (2015).

317. *See, e.g.*, Bernard E. Harcourt, *Joel Feinberg on Crime and Punishment: Exploring the Relationship Between the Moral Limits of the Criminal Law and the Expressive Function of Punishment*, 5 BUFF. CRIM. L. REV. 145, 168 (2001) ("Putting aside the more conventional cases of unjustifiable homicide or mass killings, the 'harm' associated with the more difficult cases (drug use, sodomy, prostitution, etc.) is more a term of *contestation* than a term of *consensus*. The term 'harm' is likely to trigger social disagreement and cleavage, rather than unity. It is by no means an easy path.").

318. *See, e.g.*, Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1 (2019); Akbar, *supra* note 97; Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156 (2015).

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historically marginalized groups. Nonetheless, abolishing disorderly conduct would eliminate one common pathway to reinforcing these ideological constructs through criminal law enforcement.

CONCLUSION

The enforcement of disorderly conduct laws does more than shape or enforce norms for public order; it is itself a mechanism for defining and reinforcing public boundaries and access to public spaces. Public spaces are community spaces; access, use, and enjoyment are based on who is regarded as a member of the community. Stated differently, the use of criminal law to manage space informs what is considered public and, once those literal and figurative boundaries are established, who is granted access to those spaces. If, as feminist legal theorist Francis Olsen wrote, "private" can be regarded as "not a natural attribute nor descriptive in a factual sense, but rather [a]s a political and contestable designation," then disorderly conduct laws provide a case study into what extent spaces designated as "public" are also political and contestable.[319]

This article expands ongoing scholarly discussions, largely informed by social movements, aimed at challenging mass criminalization, mass incarceration, and the devastating reach of the carceral state. Challenging the criminalization of disorderly conduct calls into question the criminalization of other offenses that police norms for behavior in public spaces or criminalize conduct in an effort to protect against disruptions or inconveniences.

Moreover, this critical approach provides a site for challenging the role of the monolithic and unitary conception of community in criminal law. Criminal law constructs communities through exclusion—those who are in (the orderly, the law-abiding) and those who are out (the disorderly, the criminal). These categories are imbued with racial, gendered, and ableist norms. Historically, class-privileged, White, heteronormative communities employed criminal law to regulate people and behaviors that disrupted or challenged the social order. Vagrancy laws notoriously policed "people out of place," including freed Black people in the South following the Civil War and Mexican and Indigenous communities in Los Angeles during the mid-nineteenth century through the twentieth century.

Some communities may be more intentional and systematic in their exclusion practices through enforcement, while others less so. Whether intentional or not, the result of policing disorder is to reinforce existing social

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319. Frances Olsen, *Constitutional Law: Feminist Critiques of the Public/Private Distinction*, 10 CONST. COMMENT. 319, 319 (1993); *see also* Ruth Gavison, *Feminism and the Public/Private Distinction*, 45 STAN. L. REV. 1, 16 (1992) ("Moreover, the conceded fact that what is private is determined by public norms and laws does not invalidate the presumption of noninterference with private arrangements. Although the public realm may be the final arbiter of what remains immune from interference, public norms and laws should grant private arrangements this immunity where these are transactions between full and informed individuals. This follows from the belief that it is desirable to leave individuals an area in which they can act free from governmental interference.").

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hierarchies and perpetuate stereotypes that continue to associate negatively racialized and historically marginalized groups with crime and disorder. This Article offers an example that builds upon criminal law's role as a mechanism for social control and provides a specific context to illustrate how that social control takes place. It demonstrates how criminal law provides a mechanism for some members within communities, with law enforcement's assistance, to regulate the behaviors of "others" who inhabit those public spaces.

Understanding how communities use criminal law to exclude those they "otherize" is an important discussion during a moment when social movements are pushing for transformative change to, if not abolition of, the carceral state, including surveillance, police, and prisons. For reformers, ending mass incarceration and mass criminalization requires a thorough examination of criminal law's role in constructing and upholding notions of criminality *and* disorder that further race-, gender-, class-, and ability-based social hierarchies, exclusion, and social stigma. It also requires more than ending overcriminalization. It requires decriminalization or legalization, and a turn away from order-maintenance-style policing. Ending mass incarceration and criminalization requires reckoning with the socially constructed nature of crime and how such constructions map onto and reinforce social hierarchies.

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