

UNDER ATTACK: HOW ENHANCED ANTI-PROTEST LAWS IMPEDE AND ENDANGER THE FREE PRESS

April Knight*

INTRODUCTION

In May 2020, police arrested Andrea Sahouri, a reporter from *The Des Moines Register*, while she was covering a Black Lives Matter demonstration.¹ They pepper sprayed Sahouri and zip-tied her hands behind her back, even though she repeatedly identified herself as “press” to the officers.² Des Moines police claimed that Sahouri was not wearing press credentials and appeared to be participating in an unlawful assembly,³ and charged her with “failure to disperse and interfering with official acts.”⁴ These charges drew swift criticism as “clear violation[s] of press freedom” and part of a “disturbing pattern of abuses against journalists by police” in America.⁵

The Des Moines protest was part of the resurgence in activism in response to the deaths of George Floyd, Breonna Taylor, and other unarmed Black Americans.⁶ These demonstrations have been followed by a wave of enhanced anti-protest legislation,⁷ which First Amendment activists have criticized as an unconstitutional means of quelling public dissent and civil disobedience movements.⁸ Tennessee Gov. Bill Lee signed a law last year making camping on state property, previously a misdemeanor, a felony

* April Knight is a *juris doctor* candidate at Georgetown University Law Center, with expected graduation in 2022. She is a former journalist, and a Featured Online Contributor for Volume 58 of the *American Criminal Law Review*.

1. Scott Neuman, *Iowa Reporter Goes On Trial In Case That Raises Press Freedom Concerns*, NPR (Mar. 8, 2021), <https://www.npr.org/2021/03/08/974842305/iowa-reporter-goes-on-trial-in-case-that-raises-press-freedom-concerns>.

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. Felicia Fonseca, Deepti Hajela & Janie Har, *Floyd’s Death Sparks New Activism Among Communities of Color*, ASSOCIATED PRESS (Aug. 25, 2020), <https://apnews.com/article/c626645429c5f675ea8d6d01c71a5d80>; Emily Witt, *Despite a National Outcry, Activists in Louisville Fight the Breonna Taylor Decision Alone*, NEW YORKER (Sept. 29, 2020), <https://www.newyorker.com/news/dispatch/despite-a-national-outcry-activists-in-louisville-fight-the-breonna-taylor-decision-alone>.

7. Anti-protest legislation are laws that strengthen or augment existing laws addressing certain protest activities, including occupying state property, blocking roadways or camping near critical infrastructure, such as pipelines. 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/>; Spencer Woodman, *Republican Lawmakers in Five States Propose Bills to Criminalize Peaceful Protests*, THE INTERCEPT (Jan. 19, 2017), <https://theintercept.com/2017/01/19/republican-lawmakers-in-five-states-propose-bills-to-criminalize-peaceful-protest/>.

8. Yoder, *supra* note 7; Woodman, *supra* note 7.

punishable by one to six years in prison.⁹ Between 2015 and 2019 alone, 116 state bills restricting protest rights were introduced, 23 of which became law in 15 states.¹⁰ These enhanced anti-protests laws produce a chilling effect for members of the Fourth Estate by increasing restrictions and dangers to journalists covering protests.

While the press enjoys First Amendment protections, states must refrain from passing redundant, vaguely drafted, enhanced anti-protest legislation that hinder journalists' ability to perform press functions and endanger their persons. Part I of this Comment will summarize existing First Amendment protections for newsgathering. Part II describes how enhanced anti-protest laws place journalists at greater risk of arrest or attack from law enforcement and the general public.¹¹ Part III argues that states should refrain from passing redundant anti-protest legislation, or, in the alternative, craft cautiously narrow proposals that would not proscribe constitutionally protected activity by the press and public.

I. EXISTING FIRST AMENDMENT PROTECTIONS FOR NEWSGATHERING

The First Amendment provides some protections for journalists who are collecting news to report,¹² though the Supreme Court has issued conflicting approaches. On the one hand, the Supreme Court has underscored that “news gathering is not without its First Amendment protections.”¹³ On the other hand, the Court has held that generally applicable civil and criminal laws do not offend the First Amendment simply because their enforcement against the press has “incidental effects

9. Kerri Bartlett, *Lee Signs Protest Bill Into Law Despite Pushback Over Increased Penalty for Camping*, TENNESSEAN (Aug. 20, 2020), <https://www.tennessean.com/story/news/2020/08/21/lee-signs-protest-bill-into-law-despite-pushback/3409670001/>.

10. PEN AMERICA, *ARRESTING DISSENT: LEGISLATIVE RESTRICTIONS ON THE RIGHT TO PROTEST* 4 (2020) [hereinafter *ARRESTING DISSENT*].

11. While critics of anti-protest laws also stress their redundancy, this is beyond the scope of this contribution. Alleen Brown & Akela Lacy, *In Wake of Capitol Riot, GOP Legislatures Rebrand Old Anti-BLM Protest Laws*, INTERCEPT (Jan. 12, 2021), <https://theintercept.com/2021/01/12/capitol-riot-anti-protest-blm-laws/>; Vera Eidelman & Lee Rowland, *Where Protests Flourish, Anti-Protest Bills Follow*, ACLU BLOG (Feb. 17, 2017, 2:00 PM) <https://www.aclu.org/blog/free-speech/rights-protesters/where-protests-flourish-anti-protest-bills-follow?redirect=blog/speak-freely/where-protests-flourish-anti-protest-bills-follow>.

12. The First Amendment separately protects freedom of speech and freedom for the press. U.S. CONST. amend. I (“Congress shall make no law . . . abridging the freedom of speech . . .”). However, the Court has declined to extrapolate special protections for the press under the speech clause, citing “practical and conceptual difficulties of a high order.” *Branzburg v. Hayes*, 408 U.S. 665, 704 (1972). As a result, the First Amendment protections described within this section derive from the speech clause.

13. *Branzburg v. Hayes*, 408 U.S. 665, 707 (1972) (explaining that, “without some protection for seeking out the news, freedom of the press would be eviscerated”).

on its ability to gather and report the news.”¹⁴ As a result, journalists must comply with generally applicable laws, such as trespass laws and other anti-protest laws,¹⁵ when gathering the news.¹⁶

However, reporters have a First Amendment right to document and record in public spaces.¹⁷ Though the Supreme Court has never addressed this issue directly, most courts have held that the First Amendment allows journalists to record public demonstrations, as well as police officers when they are in public, subject to restrictions on time, place and manner, including curfews and assigned demonstration zones.¹⁸ Journalists must abide with these rules, as long as the government’s restrictions are content-neutral (e.g., does not target the regulated speech), serves a significant governmental interest, and allows “alternative channels for communication of the information.”¹⁹ Journalists share these First Amendment protections with members of the general public.²⁰

Furthermore, journalists do not need credentials to perform press functions in a public space where they have the right to be.²¹ Additionally, reporters, like members of the general public, have Fourth Amendment protections against unreasonable searches and seizures.²² Journalists also enjoy added protections under the Privacy Protection Act of 1980,²³ which requires law enforcement to get a subpoena, instead of a search warrant, to search or seize a journalist’s work product and equipment.²⁴

14. *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991) (holding that the First Amendment does not prohibit holding a newspaper liable for promissory estoppel, where the newspaper published information it promised its source it would not).

15. *Guide to Legal Rights in the U.S.*, COMM. TO PROTECT JOURNALISTS (Sept. 10, 2020) [hereinafter *Guide to Legal Rights*], <https://cpj.org/2020/09/guide-to-legal-rights-in-the-u-s/>.

16. The Supreme Court has never explicitly held, however, that the First Amendment does not protect the unlawful collection of information by a journalist *C.f.* *Bartnicki v. Vopper*, 532 U.S. 514, 524 (2001) (holding that a journalist could report on truthful information of public concern that a third-party unlawfully obtained, reserving the question of whether the same rule would apply if a journalist took unlawful action).

17. REPS. COMM. FOR THE FREEDOM OF THE PRESS, POLICE, PROTESTERS AND THE PRESS 3 (2020) [hereinafter *POLICE, PROTESTERS AND THE PRESS*].

18. *Guide to Legal Rights*, *supra* note 15.

19. *Id.*

20. *Ward v. Rock Against Racism*, 491 US 781, 789-90 (1989) (finding that New York City’s governmental regulation of the time, place, and manner of a rock concert is constitutional under the First Amendment because it was content-neutral and narrowly tailored to serve a legitimate public interest).

21. Peter Stern & Jonathan Peters, ‘*Put the Camera Down*’: *Covering Protests Has Become the Riskiest Job in Journalism*, COLUM. JOURNALISM REV. (Fall 2017), https://www.cjr.org/special_report/covering-protests-threats-press-freedom-tracker.php.

22. *Id.* In 2014, the Supreme Court ruled that the police may not search a cell phone seized from an arrestee without a warrant, a holding that is particularly useful for journalists who may be searched pursuant to arrest. *See id.*

23. 42 U.S. Code § 2000aa.

24. *Guide to Legal Rights*, *supra* note 15; REPS. COMM. FOR THE FREEDOM OF THE PRESS, THE FIRST AMENDMENT HANDBOOK 32 (Gregg P. Leslie ed., 2011). A 1970 Department of Justice policy requires the Department to notify journalists and other news media

II. NEWSGATHERING UNDER THE THREAT OF LIABILITY

Anti-protest laws, which increase liability for protesters or expand the range of unlawful actions,²⁵ severely impact reporting on protests.²⁶ In July 2020, for example, while covering a protest in Portland, freelance journalist Justin Yau filmed a skirmish between police and protesters who refused to disperse. He moved backward to comply with police instructions, after which two officers tackled him.²⁷ He was charged with felony riot and interfering with a peace officer, a misdemeanor.²⁸ Portland police held Yau’s phone and camera as evidence until a detective could clear it for release, depriving him of primary tools for reporting on a matter of public concern.²⁹ Unfortunately, this story is not unique. Police arrested 127 journalists in 2020—a large majority at protests—during a year that dwarfed the previous year’s nine arrests.³⁰ Even in past years, the majority of journalists’ arrests have occurred at protests.³¹

The laws are even more problematic given that self-identifying as a journalist may not provide protection.³² In fact, a press card may make journalists even more vulnerable to arrest.³³ In 2017, twenty-one journalists were physically attacked at protests or rallies because they were journalists.³⁴ While recording the aftermath of the deadly car attack in Charlottesville, for example, *The Hill* reporter Taylor Lorenz was punched in the head by a shirtless man who had told her to stop recording after identifying herself as a journalist.³⁵ A WHYYY reporter recording a protest in Philadelphia was attacked by “a bizarre group of bat-weilding (sic)

practitioners of third-party search warrants, court orders, or subpoenas. 28 C.F.R. § 50.10. The policy was issued in response to “uproar about the growing number of subpoenas seeking to compel journalists to reveal confidential news sources.” Bruce Brown, Linda Moon & Gabe Rottman, *New DOJ Reports Provide Detail on Use of Law Enforcement Tools Against the News Media*, REPS. COMM. FOR FREEDOM OF THE PRESS (Nov. 9, 2018), <https://www.rcfp.org/new-doj-reports-provide-detail-use-law-enforcement-tools-against-new/>.

25. H.B. 8005, 2020 Leg., 112th Sess. (Tenn. 2020), for instance, makes it a felony to stand on state property, chilling reporting in places where events of public concern may occur. Bartlett, *supra* note 9.

26. Bartlett, *supra* note 9.

27. Jonathan Levinson, *Portland Police Arrest 3 Journalists During Tuesday Protest*, OR. PUB. BROAD. (July 1, 2020), <https://www.opb.org/news/article/portland-police-arrest-3-journalists-during-violent-protests/>.

28. *Id.*

29. *Id.*

30. Neuman, *supra* note 1.

31. *Id.*

32. *See supra* Part I (describing the lack of strong First Amendment protection for newsgathering).

33. Stern & Peters, *supra* note 21; Jasmine Aguilera, *Watchdogs Say Assaults on Journalists Covering Protests is on a ‘Scale That We Have Not Seen Before,’* TIME (June 2, 2020), <https://time.com/5846497/journalists-police-george-floyd-protests/>.

34. Stern & Peters, *supra* note 21.

35. *Id.*

vigilantes, who witnesses say had the tacit support of the Philly police.”³⁶ In 2020 specifically, police shot a foam bullet at a photojournalist, permanently blinding her left eye, shoved a photojournalist who fell and hit her head on a fire hydrant, and repeatedly hit a *Wall Street Journal* reporter wearing a police-issued press credential.³⁷ Police have also used press passes to “identify and corral journalists” to prevent them from documenting protests that are of public concern.³⁸ During the Occupy Wall Street protests, for example, the New York Police Department isolated journalists away from the scene before conducting a mass arrest of protesters in Zuccotti Park.³⁹ Such arrests chill important reporting and reduce public access to information.

Furthermore, some proposed anti-protest laws threaten to reduce liability for individuals who harm protestors, which may also have negative effects on journalists who are already besieged by anti-media rhetoric⁴⁰ and civilian attacks.⁴¹ Florida’s SB 1096, proposed by Sen. George Gainer in February 2017, for instance, would have protected drivers from civil liability for “unintentionally injuring or even killing a protester obstructing a public road.”⁴² Under the bill, an injured journalist would have the evidentiary burden of proving that she was not blocking the road when struck, and that the driver hit her intentionally.⁴³ North Carolina’s HB 330 would also have excused drivers from civil liability if they injured a journalist among a crowd of protesters blocking traffic.⁴⁴ In New Hampshire, a proposal would strengthen “stand your ground” laws, allowing a person to use deadly force if confronted by a “mob” or riot,⁴⁵ increasing the danger to journalists embedded in disruptive protests.

While some of these proposed bills either stalled or ultimately failed,⁴⁶ the United States continues to witness a surge in similar proposals, with

36. U.S. Press Freedom Tracker (@uspresstracker), TWITTER (June 2, 2020, 8:23 AM), <https://twitter.com/uspresstracker/status/1267793939991592961>.

37. Courtney Douglas, *Amid Black Lives Matter Protests, A Crushing Moment for Journalists Facing Record Attacks, Arrests at the Hands of Law Enforcement*, REPS. COMM. FOR THE FREEDOM OF THE PRESS (Sept. 4, 2020), <https://www.rcfp.org/black-lives-matter-press-freedom/>.

38. Stern & Peters, *supra* note 21.

39. *Id.*

40. *Id.*

41. *Id.*; *Man Arrested Following Assault of Reporter During Live Broadcast*, U.S. PRESS FREEDOM TRACKER (May 23, 2020), <https://pressfreedomtracker.us/all-incidents/man-arrested-following-assault-reporter-during-live-broadcast/>; Briana Whitney (@brianawhitney), TWITTER (May 30, 2020, 2:17AM), <https://twitter.com/brianawhitney/status/1266614725284003845>.

42. ARRESTING DISSENT, *supra* note 10, at 24.

43. *Id.*

44. H.B. 330, 2017 Gen. Assemb., Reg. Sess. (N.C. 2017), <https://www.ncleg.gov/Sessions/2017/Bills/House/PDF/H330v0.pdf>

45. Alleen Brown & Akela Lacy, *State Legislatures Make “Unprecedented Push” on Anti-Protest Bills*, INTERCEPT (Jan. 21, 2021), <https://theintercept.com/2021/01/21/anti-protest-riot-state-laws/>.

46. ARRESTING DISSENT, *supra* note 10, at 24; Eidelman & Rowland, *supra* note 11.

lawmakers in 34 states introducing 81 anti-protest bills during the 2021 legislative session alone, more than doubling such proposals in any other year.⁴⁷ Some of these proposals succeeded. Florida Gov. Ron DeSantis recently signed a sweeping “anti-mob” legislation that expands Florida’s “stand your ground” law, “making it easier to shoot and kill with impunity people looting property,” and blocking civil damages for people harmed as part of protest actions.⁴⁸ Under DeSantis’ bill, individuals arrested at a protest would also be detained until their first court appearance, a treatment typically employed where defendants pose an immediate threat to public safety.⁴⁹ The Oklahoma and Iowa legislatures have also passed bills granting immunity to motorists who strike and injure protesters in public streets.⁵⁰

III. STATES SHOULD REFRAIN FROM PASSING REDUNDANT AND OVERBROAD ANTI-PROTEST LAWS

These new laws are unnecessary to serve the public interest they purportedly protect. In Florida, for instance, there are already laws on the books to address public disorder during demonstrations that, “by most measures . . . have worked.”⁵¹ Ohio has had a bevy of anti-riot laws in place since the 1960s, penalizing behavior during unruly demonstrations that result in damage to persons or property.⁵² The riot participation proscribed by these laws appropriately do not apply to bystanders or the press,⁵³ providing protections that the state’s recent anti-protest laws effectively diminish. States should refrain from passing enhanced anti-protest laws where laws penalizing the same behavior already exist.

If states must pass such laws, legislators should take care to draft the proposals narrowly, avoiding overbroad characterizations of prohibited behavior that can be construed to cover protected activity or infringe on constitutionally ensured rights.⁵⁴ Many states, however, have not necessarily drafted narrow laws. For example, Florida’s recently enacted law establishes a new “aggravated riot” charge classified as a second-degree felony:

47. Reid Epstein & Patricia Mazzei, *G.O.P. Bills Target Protesters (and Absolve Motorists Who Hit Them)*, N.Y. TIMES (Apr. 22, 2021), <https://www.nytimes.com/2021/04/21/us/politics/republican-anti-protest-laws.html>; Brown & Lacy, *supra* note 11.

48. Epstein & Mazzei, *supra* note 47; Brown & Lacy, *supra* note 11.

49. Brown & Lacy, *supra* note 11.

50. Epstein & Mazzei, *supra* note 47.

51. Lizette Alvarez, *Opinion: Florida’s new ‘anti-riot’ law benefits one person: Ron DeSantis*, WASH. POST (April 26, 2021), <https://www.washingtonpost.com/opinions/2021/04/26/floridas-new-anti-riot-law-is-vague-draconian/>.

52. *See generally* Roger H. Norman, *The Ohio Riot Laws*, 30 OHIO STATE LAW J. 810 (1969).

53. *Id.* at 811.

54. *See supra* Part I.

A person commits aggravated rioting if, in the course of committing a riot, he or she: (a) Participates with 25 or more other persons; (b) Causes great bodily harm to a person not participating in the riot; (c) Causes property damage in excess of \$5,000; (d) Displays, uses, threatens to use, or attempts to use a deadly weapon; or (e) By force, or threat of force, endangers the safe movement of a vehicle traveling on a public street, highway, or road.⁵⁵

Absent from the new law is clear language addressing specific behavior or language that would qualify as inciting or committing a riot.⁵⁶ Similarly, a bill introduced in Oklahoma grants civil and criminal immunity for drivers who “unintentionally” injure or kill protesters while “fleeing from a riot,” provided there is a “reasonable belief that fleeing was necessary.”⁵⁷ But without defining circumstances that would be deemed “necessary” or “unintentional,” the law allows for broad and inconsistent interpretations of when individuals may be immune from liability for injuring or killing a journalist.⁵⁸

CONCLUSION

After reporter Andrea Sahouri’s arrest, prosecutors chose to press on with her prosecution, a decision condemned by the American Civil Liberties Union.⁵⁹ On March 10, 2021, after a three-day trial, a jury found Sahouri not guilty on charges of failure to disperse and interference with official acts.⁶⁰ While Sahouri’s story ended with a court victory, her arrest and prosecution still resulted in physical injury, a three-hour detention, and the ten-month specter of a criminal trial.⁶¹ Watchdogs continue to log attacks on journalists by police and public.⁶²

The wave of enhanced anti-protest laws heightens existing dangers to members of the press like Sahouri and imperils the valuable functions the free press fulfills in American democracy. While certain protections exist

55. H.B. 1, 2021 Gen. Assemb., Reg. Sess. (Fla. 2017), <http://laws.flrules.org/2021/6>.

56. William Morris, *The Jury Made the Right Decision: Reporter Andrea Sahouri Acquitted in Trial Stemming from Arrest as She Covered Protest*, DES MOINES REG. (Mar. 10, 2021), <https://www.desmoinesregister.com/story/news/2021/03/10/andrea-sahouri-trial-des-moines-register-reporter-acquitted-george-floyd-protest-arrest/6933780002/>.

57. H.B. 1674, 2021 Gen. Assemb., Reg. Sess. (Okla. 2021), <http://www.oklegislature.gov/BillInfo.aspx?Bill=HB1674&Session=2100>.

58. *Id.*; Sharon Zhang, *Oklahoma Governor Signs Law Granting Immunity for Drivers Who Kill Protesters*, TRUTHOUT (Apr. 23, 2021), <https://truthout.org/articles/oklahoma-governor-signs-law-granting-immunity-for-drivers-who-kill-protesters/>.

59. Morris, *supra* note 56; Neuman, *supra* note 1.

60. Morris, *supra* note 56.

61. Morris, *supra* note 56; Neuman, *supra* note 1.

62. All Incidents of Attacks on Journalists in 2021, U.S. PRESS FREEDOM TRACKER, <https://pressfreedomtracker.us/all-incidents/?search=2021>.

for the press, the Press Clause remains the least defined among First Amendment rights. The protections that have been articulated by courts are hindered by the difficulty police face in identifying individuals who perform press functions and fall within Press Clause Protections. While strengthened anti-protest laws target public behavior at public demonstrations, they restrict journalists by exposing them to a greater risk of attacks and interference by law enforcement and members of the public.

States should resist the passage of redundant anti-protest laws that target behaviors already penalized by existing laws. Furthermore, any enhanced anti-protest laws must be narrowly crafted with specific language defining proscribed behaviors to avoid encroaching on protected activity.