

# In Defense of Land and Water Protectors: Environmental Justice and the Criminalization of Environmental Activism

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## I. PREFACE: YOU'RE A LAWYER, NOT AN ACTIVIST

The week that I spent at Red Lake Treaty Camp, on the frontlines of the Line 3 Pipeline, I woke up to the smell of smoke and tobacco and the sounds of construction equipment every morning. We would start the day with a song for the river and warm drinks around the ceremonial fire, which we kept burning at all times. We would warm ourselves against the cold of the morning, relieved that we made it through another night without a police raid or violence from those who did not welcome our prayerful protest. Some, who had kept watch

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throughout the night, were just going back to their tents to try to get some much-needed sleep.

Some people questioned why I went, despite the risks of arrest,<sup>1</sup> professional consequences, or bodily harm. The pipeline had already been completed under the stretch of river next to the camp the week before I arrived. Construction was slow, thanks to the water protectors, but relentless, nonetheless. “There’s nothing to be done,” people said. “You’re a lawyer, not an activist.”

As an Indigenous woman and attorney, I understand the law to be but one tool for change, and a deeply flawed tool at that. But it’s a powerful thing to take a law, or a legal system, that was designed to disempower a community and to instead use it as a means of harm reduction, or even for betterment.<sup>2</sup> When our legal and policy tools fail us, however, sometimes the best that we can offer as movement lawyers is our solidarity, ourselves as another body to march with a crowd, our grief, and our willingness to bear witness to an injustice that we could not prevent.

This article is dedicated to the land and water protectors who bear witness and who risk arrest, incarceration, and their lives to advocate for a better future for all of us.

## II. INTRODUCTION: A CALL TO ENVIRONMENTAL JUSTICE LAWYERS

Across the globe, environmental activists play a crucial role in the environmental justice movement, from defending against land-based exploitation to holding government and private actors accountable for inflicting disproportionate environmental health harms on low-income communities and communities of color.<sup>3</sup> In the face of intensifying environmental impacts due to climate change and increasing structural barriers to legal and policy change, communities

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1. “[R]ebellious lawyers must be courageous. Social movements require vision, boldness, creativity, and sacrifice. . . . Rebellious lawyers who desire to be fully enmeshed in and of service to social movements must be willing to take risks and to relinquish their privileges.” Betty Hung, *Movement Lawyering as Rebellious Lawyering: Advocating with Humility, Love and Courage*, 23 CLINICAL L. REV. 663, 668 (2017).

2. See generally Robert A. Williams Jr., *Vampires Anonymous and Critical Race Practice*, 95 MICH. L. REV. 741 (1997).

3. See generally *id.*

may increasingly turn to protest, activism, and non-violent civil disobedience as an alternative means to having their voices heard.<sup>4</sup> Despite the pivotal role these efforts play in protecting the environment and community wellbeing, a 2015 report by the United Nations Special Rapporteur on the rights to freedom of peaceful assembly and association found that environmental activists “face considerable opposition, harassment, stigmatization and even physical attacks from the State and non-State actors in many countries.”<sup>5</sup>

We as environmental justice lawyers must be ready to support our community partners in the face of this increased state-sanctioned targeting and criminalization of environmental activists. From the mass arrests of activists participating in Indigenous-led resistance to oil and gas infrastructure<sup>6</sup> to the activists facing domestic terrorism charges related to their opposition to “Cop City” in Atlanta,<sup>7</sup> the role that the criminal legal system plays in the battle for environmental justice has become increasingly salient. This article explores several related and concerning trends: the escalating criminalization of environmental activists who engage in non-violent civil disobedience,<sup>8</sup> the implications for the Environmental Justice Movement (“EJ Movement”), and the impact to protected First Amendment rights to speech and assembly. Part III provides an overview of the environmental justice movement and the application of movement lawyering in that context. Part IV discusses the role of non-violent civil disobedience in social movements and examines the relationship

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4. Oliver C. Ruppel & Larissa Jane H. Houston, *The Human Right to Public Participation in Environmental Decision-making: Some Legal Reflections*, 53 ENV'T POL'Y & L. 125, 125 (2023).

5. Int'l Ctr. for Not-for-Profit L., *Environmental Advocacy: Challenges to Environmental Groups' Rights to Assemble, Associate and Express Their Opinions*, 7 GLOB. TRENDS IN NGO L. 1, 2 n.6 (2016), [https://www.icnl.org/wp-content/uploads/global-ngo-law\\_Global-Trends-Vol-7-iss-1.pdf](https://www.icnl.org/wp-content/uploads/global-ngo-law_Global-Trends-Vol-7-iss-1.pdf).

6. Hiroko Tabuchi et al., *Police Make Mass Arrests at Protest Against Oil Pipeline*, N.Y. TIMES (June 9, 2021), <https://www.nytimes.com/2021/06/07/climate/line-3-pipeline-protest-native-americans.html>.

7. Odette Yousef, *Domestic Terrorism Charges in Georgia Are Prompting Concern over Political Repression*, NPR (June 29, 2023, 2:52 PM), <https://www.npr.org/2023/06/28/1184782128/cop-city-atlanta-domestic-terrorism>.

8. For purposes of this article, I generally include causing damage to fossil fuel infrastructure to halt or slow construction under the umbrella of non-violence.

between non-violent civil disobedience and protected First Amendment activities; Part IV concludes by outlining potential legal tools to challenge legislation, such as critical infrastructure legislation, that specifically targets non-violent civil disobedience by environmental activists.

### III. MOVEMENT LAWYERING FOR ENVIRONMENTAL JUSTICE

The modern EJ Movement<sup>9</sup> emerged as a response to the systemic experience of environmental racism. Environmental racism refers to the disproportionate exposure to environmental health hazards for low-income communities and communities of color (“environmental justice communities”).<sup>10</sup> The EJ Movement embraces the principle that people have the right to a clean, healthy, and sustainable environment without regard to race, color, or national origin.<sup>11</sup>

#### *A. Foundations of the Environmental Justice Movement*

The emergence of the EJ Movement is a relatively recent development. On the heels of the Civil Rights Movement, the landmark 1987 report, *Toxic Wastes and Race in the United States*, first revealed the relationship between the “treatment, storage and disposal of hazardous wastes and race.”<sup>12</sup> This report was published by the United Church of Christ Commission for Racial Justice, a divergence from its usual protest actions in the civil rights context. A few years later, the First National People of Color Environmental Leadership Summit was held in Washington D.C. in 1991, where delegates from

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9. Indigenous peoples were the first to experience environmental racism in the Americas when first confronted by foreign colonial powers and have been resisting that injustice ever since.

10. See LUKE W. COLE & SHEILA R. FOSTER, FROM THE GROUND UP: ENVIRONMENTAL RACISM AND THE RISE OF THE ENVIRONMENTAL JUSTICE MOVEMENT 10–11 (Richard Delgado & Jean Stefancic eds., 2001).

11. Dr. Robert Bullard, *Introduction: Environmental Justice—Once a Footnote, Now a Headline*, 45 HARV. ENV'T L. REV. 243, 244 (2021).

12. UNITED CHURCH OF CHRIST COMM'N FOR RACIAL JUST., TOXIC WASTES AND RACE IN THE UNITED STATES, at 1x (1987), <https://www.nrc.gov/docs/ML1310/ML13109A339.pdf>.

across movements adopted the Principles of Environmental Justice that continue to guide the EJ Movement to this day.<sup>13</sup>

Race remains the biggest indicator of whether an individual lives near a hazardous waste facility.<sup>14</sup> This is true despite some gains, including the Biden administration's recent executive order<sup>15</sup> reaffirming the federal government's commitment to environmental justice. In addition, the EJ Movement must contend with the disproportionate impacts of climate change, with global emissions expected to rise by 10.6% by 2030, leading to approximately 2.5 degrees of warming by the end of the century despite current greenhouse gas reduction pledges.<sup>16</sup> Relatedly, the Climate Justice Movement<sup>17</sup> recognizes that those who contribute the least to the climate crisis are often those who will bear the brunt of the environmental impacts, on both a domestic and international scale.<sup>18</sup> Domestically, climate change magnifies existing socioeconomic inequalities.<sup>19</sup> Communities of color and low-income communities that are already the most impacted by fossil fuel extraction and infrastructure are also disproportionately impacted by natural disasters

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13. First Nat'l People of Color Env't Leadership Summit, *The Principles of Environmental Justice*, ENV'T JUST. NETWORK (Oct. 1991), <https://www.ejnet.org/ej/principles.pdf>.

14. Zoë Schlanger, *Race Is the Biggest Indicator in the US of Whether You Live Near Toxic Waste*, QUARTZ (Mar. 22, 2017), <https://qz.com/939612/race-is-the-biggest-indicator-in-the-us-of-whether-you-live-near-toxic-waste>.

15. Exec. Order No. 14,096, 88 Fed. Reg. 25251 (Apr. 21, 2023). See also Exec. Order No. 12,898, 59 Fed. Reg. 7629 (Feb. 11, 1994).

16. Josephine Latu-Sanft, *COP 28 Is a Crunch Point for Countries on the Front Lines of Climate Change*, SCI. AM. (Nov. 29, 2023), <https://www.scientificamerican.com/article/cop-28-is-a-crunch-point-for-countries-on-the-front-lines-of-climate-change1/>.

17. Building upon the EJ Movement, “[c]limate Justice recognizes the disproportionate impacts of climate change on low-income communities and communities of color around the world, the people and places least responsible for the problem.” *What is Climate Justice?*, UNIV. OF CAL. CTR. FOR CLIMATE JUST., <https://centerclimatejustice.universityofcalifornia.edu/what-is-climate-justice/> (last visited Apr. 4, 2024).

18. *Id.*; *Because the Climate Fight Is a Justice Fight*, THE CLIMATE REALITY PROJECT, <https://www.climateRealityproject.org/climate-justice> (last visited Apr. 11, 2024).

19. See generally S. Nazrul Islam & John Winkel, *Climate Change and Social Inequality* (U.N. Dep't Int'l Econ. & Soc. Aff., Working Paper No. 152, Oct. 2017).

and extreme weather events.<sup>20</sup> These unjust distributions of the costs of climate changes will likely be at the forefront of the EJ Movement in the coming decades.

### *B. Structural Discrimination*

Another function of environmental racism is procedural—the systemic disenfranchisement of communities from meaningfully participating in spaces and decision-making processes that impact their lives.<sup>21</sup> The Environmental Protection Agency (“EPA”) incorporates procedural justice into its latest definition of environmental justice, which is “the just treatment and meaningful involvement of all people regardless of income, race, color, culture, national origin, Tribal affiliation, or disability in agency decision-making and other Federal activities that affect human health and the environment . . . .”<sup>22</sup> Despite the intention reflected by this definition, environmental justice communities continue to experience twofold structural discrimination. First, exclusion occurs within environmental regulatory bodies and mainstream environmental organizations with the most access and influence over environmental decision-making.<sup>23</sup> Second, it occurs through barriers to public participation in environmental policy decision-making processes.<sup>24</sup>

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20. For example, research shows that white families generally experience an increase in wealth after suffering significant damage due to natural disasters while Black families generally experience a decrease. Aneesh Patnaik et al., *Racial Disparities and Climate Change*, PRINCETON STUDENT CLIMATE INITIATIVE (Aug. 15, 2020), <https://psci.princeton.edu/tips/2020/8/15/racial-disparities-and-climate-change>.

21. See generally Sara Pirk, *Expanding Public Participation in Environmental Justice: Methods, Legislation, Litigation and Beyond*, 17 J. ENV'T L. & LITIG. 207 (2002).

22. *Environmental Justice*, U.S. ENV'T PROT. AGENCY, <https://www.epa.gov/environmentaljustice> (last updated Feb. 6, 2024).

23. See GREEN 2.0, 2023 NGO & FOUNDATION TRANSPARENCY REPORT CARD, <https://diversegreen.org/wp-content/uploads/green2.0-2023-report-card.pdf> (last visited Apr. 11, 2024) (collecting racial data for NGO leadership positions).

24. See Pirk, *supra* note 22.

The EJ Movement was catalyzed by the exclusion of communities of color from mainstream environmentalism.<sup>25</sup> In 1990, the Southwest Organizing Project drafted a letter addressed to the directors of the “Big 10” environmental organizations, and about one hundred “artists, writers, academics, students, activists, representatives of churches, unions, and community organizations,” all people of color, signed it.<sup>26</sup> Notably, that letter expressed that these organizations “continue to support and promote policies which emphasize the clean-up and preservation of the environment on the back of working people in general and people of color in particular.”<sup>27</sup> And it pointed out that, “the lack of people of color in decision-making positions in [these] organization[s] such as executive staff and board positions is also reflective of [their] histories of racist and exclusionary practices,” and that “racism is a root cause of [their] inaction around addressing environmental problems in our communities.”<sup>28</sup> While improvements have been made in the thirty years since this letter, as of 2023, 71.3% of Senior Staff; 68.4% of heads of organizations; and 56.2% of board members at environmental NGO’s are white.<sup>29</sup>

Too often, public participation in environmental decision-making is treated as “merely a technicality” to satisfy regulatory requirements for notice and consultation.<sup>30</sup> When communities are not empowered and intentionally incorporated throughout the decision-making process, participation is likely to be lower due to the understanding that input will not impact the end result.<sup>31</sup> Other barriers to public participation include a lack of access to data, information, and necessary technology; language access issues such as lack of

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25. Letter from Sw. Org. Project to Mr. Jay D. Hair, President, Nat’l Wildlife Fed’n (Mar. 16, 1990), <https://www.ejnet.org/ej/swop.pdf>.

26. *Id.*; see also Marty Durlin, *The Shot Heard Round the West*, HIGH COUNTRY NEWS (Feb. 1, 2010), <https://www.hcn.org/issues/42-2/the-shot-heard-round-the-west/>.

27. Letter from Sw. Org. Project, *supra* note 26.

28. *Id.*

29. See GREEN 2.0, *supra* note 24. Additionally, the latest demographic data provides that fifteen percent of the EPA’s employees are Black and twelve percent are Hispanic or Latino. U.S. Environmental Protection Agency Demographics and Statistics, ZIPPPIA, <https://www.zippia.com/u-s-environmental-protection-agency-careers-54016/demographics/> (last updated July 21, 2023).

30. Pirk, *supra* note 22, at 209.

31. *Id.*

translation of key documents or failing to offer translation services at public hearings; holding meetings at times inaccessible to working-class people; and publicizing upcoming meetings in obscure publications where community members are not likely to see the announcement. Although these procedural inequalities may be addressed through tools like the National Environmental Policy Act (“NEPA”)<sup>32</sup> and Title VI of the Civil Rights Act,<sup>33</sup> fighting for procedural justice continues to be a core struggle of the EJ Movement.

In addition, federally recognized tribes, as sovereign nations, face unique challenges to participation in environmental decision-making. Formal government-to-government consultation with federally recognized Indian tribes is mandated by federal statute in Section 106 of the National Historic Preservation Act (“NHPA”)<sup>34</sup> and reinforced by other federal laws such as NEPA.<sup>35</sup> The right to consultation stems from the inherent right of tribes, as sovereign nations, to safeguard sites of cultural and religious significance both on and off reservation territory from actions by the federal government.<sup>36</sup> The federal government’s duty to consult is rooted in its trust responsibility<sup>37</sup> that obligates it to manage tribal trust lands and

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32. See Lily Cohen, *The Role of Environmental Law in Addressing the Violent Effects of Resource Extraction on Native Women*, 47 HARV. ENV’T L. REV. 275, 289–90 (2023) (discussing the procedural shortcomings of the NEPA to protect Indigenous women from sexual violence related to environmental extraction projects).

33. Title VI of the Civil Rights Act, 42 U.S.C. §§ 2000d–2000d7

34. 54 U.S.C. § 300320; 36 C.F.R. § 800.3 (2000).

35. 40 C.F.R. § 1502.25(a) (1996) (“To the fullest extent possible, agencies shall prepare draft environmental impact statements concurrently with and integrated with environmental impact analyses and related surveys and studies required by . . . the National Historic Preservation Act . . .”). The NHPA mandates that “[t]he agency official shall make a reasonable and good faith effort to identify any Indian tribes or Native Hawaiian organizations that might attach religious and cultural significance to historic properties in the area of potential effects and invite them to be consulting parties.” 36 C.F.R. § 800.3 (2000).

36. See Gabriel S. Galanda, *The Federal Indian Consultation Right: A Frontline Defense Against Tribal Sovereignty Incursion*, FED. BAR ASS’N: INDIAN L. SECTION (2010), <https://www.fedbar.org/wp-content/uploads/2019/12/Federal-Indian-Consultation-Right-pdf.pdf>.

37. “The trust responsibility is a name describing the relationship between Indian tribes and the United States, which involves a duty of protection to Indians and tribes.” Daniel I.S.J. Rey-Bear & Matthew L.M. Fletcher, *“We Need Protection from Our Protectors”*: *The Nature, Issues, and Future of the Federal Trust Responsibility*



resources in the best interests of the tribe.<sup>38</sup> Although consultation is mandated by federal law, the specifics of what constitutes consultation are generally left open for definition by federal agencies, and the consultation process pursuant to the NHPA is ultimately subject to a discretionary finding by the consulting agency that a good faith effort was made to consult.<sup>39</sup> While tribal self-determination is a crucial component of Indigenous environmental justice,<sup>40</sup> tribes are still fighting for “free, prior, and informed consent” in decisions that impact their ancestral territories and their communities’ health and well-being.<sup>41</sup>

Finally, community organizing has been foundational to addressing and overcoming these systemic barriers to achieving environmental justice. In 1996, the Southwest Network for Environmental and Economic Justice hosted the “Working Group Meeting on Globalization and Trade,” where forty representatives co-created the Jemez Principles for Democratic Organizing.<sup>42</sup> They include six core principles: (1) Be inclusive, (2) Emphasis on bottom-up organizing, (3) Let the people speak for themselves, (4) Work together in solidarity and mutuality, (5) Build just relationships among ourselves, and (6) Commitment to self-transformation. Often

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to Indians, 6 MICH. J. ENV’T & ADMIN. L. 397, 399 (2017); see also *What is the Federal Indian Trust Responsibility?*, U.S. DEP’T OF INTERIOR, INDIAN AFF., <https://www.bia.gov/faqs/what-federal-indian-trust-responsibility> (Nov. 8, 2017, 10:13 PM).

38. Elizabeth Ann Kronk, *United States v. Jicarilla Apache Nation: Its Importance and Potential Future Ramifications*, 59 FED. LAW. 4, 4, 6 (2012).

39. See Matthew J. Rowe et al., *Accountability or Merely “Good Words”? An Analysis of Tribal Consultation Under the National Environmental Policy Act and the National Historic Preservation Act*, 8 ARIZ. J. ENV’T L. & POL’Y 1, 13 (2018) (“NHPA provides lead agencies with substantial flexibility to develop tribal consultation practices that are tailored to the size, scope, and location of the project, provided that the agency makes a good faith effort to consult with tribes and other stakeholders.”).

40. Rebecca Tsosie, *Indigenous People and Environmental Justice: The Impact of Climate Change*, 78 U. COLO. L. REV. 1625, 1631 (2007).

41. G.A. Res. 61/295, annex, United Nations Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007).

42. SW. NETWORK FOR ENV’T. & ECON. JUST., JEMEZ PRINCIPLES FOR DEMOCRATIC ORGANIZING (Dec. 1996), <https://www.ejnet.org/ej/jemez.pdf>; see also Abigail Fleming & Catherine Dremluk, *Armoring the Just Transition Activist*, 25 RICH. PUB. INT. L. REV. 171, 184 (2022).

considered in tandem with the Principles of Environmental Justice, the Jemez Principles provide an intersectional framework to guide the road to systemic change that centers those most impacted. These principles continue to be adopted by many organizations and progressive activist movements in the present day.<sup>43</sup>

### *C. Movement Lawyering*

Movement Lawyering has many definitions,<sup>44</sup> but I adopt the definition by Betty Hung: “Lawyering that supports and advances social movements, defined as the building and exercise of collective power, led by the most directly impacted, to achieve systemic institutional and cultural change.”<sup>45</sup> In addition, Hung articulates three “essential threads” of movement lawyering: (1) “to be grounded in a place of humility that recognizes lawyering as but one of multiple strategies necessary to advance a social movement”; (2) “to act from a place of love that affirms the intersectional humanity of the whole person and entire communities in order to build movements together”; and (3) to practice courage and be willing to relinquish our privileges in order to act and stand up for justice.”<sup>46</sup> For lawyers working in the

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43. Fleming & Dremluk, *supra* note 43, at 184.

44. Although they have overlapping roles and values, I distinguish movement lawyering from community lawyering for purposes of this article:

[Community lawyering] describes a way of lawyering that includes much of traditional lawyering. Generally, community lawyering is a method of providing legal service, advice, and representation which approaches case work or legal issues with appropriate consideration and an understanding of community values, concerns, ideas or beliefs and their impact on the treatment of the client, the treatment of the legal issues, and the final legal solution crafted. Community lawyering seeks to approach individual clients and communities with an understanding of the community the client comes from and ever mindful of the impact of legal work on the community. Community lawyering is working with communities and the individuals which comprise communities, not independent of them.

Christine Zuni Cruz, *[On the] Road Back in: Community Lawyering in Indigenous Communities*, 5 *CLINICAL L. REV.* 557, 572 (1999) (footnote omitted).

45. Hung, *supra* note 2, at 664.

46. *Id.*

EJ Movement, I offer my own additional “threads,” informed by the Jemez Principles:

To be guided by frontline communities and to fight for solutions determined by those most affected by environmental harms;

To value opportunities for relationship building, relational power, and power sharing over hierarchy; and

To recognize environmental racism as one symptom of systemic injustice and to assist clients, organizations, and communities to build capacity and power to respond holistically.

As lawyers in the EJ Movement, our practice must respond holistically to address the intersectional needs of communities experiencing disproportionate environmental health harms. Perhaps in recognition of this intersectionality, there is growing momentum for the consideration and regulation of cumulative impacts, or “the totality of exposures to combinations of chemical and non-chemical stressors and their effects on the health, well-being, and quality of life outcomes”<sup>47</sup> when issuing environmental permits.<sup>48</sup> Studies show that people living in hazardous facility fenceline zones are faced with multiple risks and health hazards such as the threat of chemical releases, higher risk of cancer from air pollution, and living in an area with limited access to food.<sup>49</sup> They also show that areas that are low-

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47. *EPA Researchers Release Cumulative Impacts Report, Prioritizing Environmental Justice in New Research Cycle*, U.S. ENV’T PROT. AGENCY (Oct. 11, 2022), <https://www.epa.gov/sciencematters/epa-researchers-release-cumulative-impacts-report-prioritizing-environmental-justice>.

48. *See* Press Release, N.J. Env’t Just. All., New Jersey Sets National Precedent with Environmental Justice Bill Signing Today (Aug. 2, 2021), <https://njeja.org/press-release-new-jersey-sets-national-precedent-with-environmental-justice-bill-signing-today/> (discussing a new law directing the N.J. Department of Environmental Protection to “deny or condition certain permits due to cumulative, disproportionate impacts of pollution in environmental justice communities”).

49. *See generally* Ronald White, *Life at the Fenceline: Understanding Cumulative Health Hazards in Environmental Justice Communities*, THE ENV’T JUST.

income and have low food access within fenceline zones also have higher rates of poverty, a higher percentage of residents who are people of color, and a higher risk of cancer and respiratory illness compared to surrounding areas.<sup>50</sup>

With these realities in mind, in practicing movement lawyering for environmental justice, we must ask an essential question: how can we best support communities facing the day-to-day realities of pollution exposure, chronic health challenges, poverty, and other related social stressors such as over-policing? Sometimes the answer may be to provide support in meeting a more immediate need for food security. Sometimes it may look like litigation or more traditional environmental lawyering. Other times it may look like linking arms with criminal defense attorneys to prepare support for protests, direct actions, and non-violent civil disobedience.

Approached through a movement lawyering framework, it becomes clear that environmental justice lawyers have a role to play in the potential increase in public dissent and protest. This is especially true as communities respond to the exacerbation of existing environmental inequalities due to climate change and its intersection with other social injustices.<sup>51</sup> As movement lawyers, the tools that will prove effective are shifting as our democratic institutions and norms decline due to threats such as political polarization, partisan gerrymandering and voting restrictions, as well as the influence of corporate and special interests.<sup>52</sup> Where legal and policy tools fail, we

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HEALTH ALL. FOR CHEM. POL'Y REFORM (Sept. 2018), <https://ej4all.org/assets/media/documents/Life%20at%20the%20Fenceline%20-%20English%20-%20Public.pdf>.

50. *Id.*

51. *See generally* Ruppel & Houston, *supra* note 5. Climate Change will have many complex intersections with the Criminal Justice System, such as impacts to prison infrastructure. Sierra Garcia, *Climate Change and the Criminal Justice System*, JSTOR DAILY (Sept. 24, 2021), <https://daily.jstor.org/climate-change-criminal-justice-system/>.

52. Sarah Repucci, *Reversing the Decline of Democracy in the United States*, FREEDOM HOUSE, <https://freedomhouse.org/report/freedom-world/2022/global-expansion-authoritarian-rule/reversing-decline-democracy-united-states> (last visited Apr. 14, 2024); *see also* Samuel Issacharoff, *Democracy's Deficits*, 85 U. CHI. L. REV. 485, 485–88 (2018). Additionally, it is important to recognize that these threats build upon the foundation of a democracy that was not designed to be inclusive of environmental-justice communities.

must be prepared to support communities by engaging in other forms of strategic dissent and activism to further the goals of the environmental justice movement.

#### IV. THE LAW OF PROTEST AND CIVIL DISOBEDIENCE

Within the EJ Movement, there are two distinct but overlapping trends in the legal consequences of activism: (1) peaceful speech and assembly that is wrongfully criminalized<sup>53</sup> and (2) the escalation of charges and penalties for non-violent civil disobedience (for example, trespass or interference with critical infrastructure). As argued below, both trends are interrelated and have a chilling effect on our First Amendment rights, our community organizing, and the struggle for environmental justice. For purposes of this article, however, I will be focusing on the implications for non-violent civil disobedience.

##### *A. Non-Violent Civil Disobedience*

The modern “American” practice of civil disobedience was inherited from early traditions of Christian religious dissent, and later, the teachings of figures such as Henry David Thoreau and Mahatma Gandhi and campaigns such as the Civil Rights Movement.<sup>54</sup> Additionally, civil disobedience is a tradition of Indigenous resistance to colonial powers, from early defense against European settlers to the occupation of Alcatraz and Standing Rock.<sup>55</sup>

I’ll begin with a few definitions. Black’s Law Dictionary defines “civil disobedience” as “[a] deliberate but nonviolent act of lawbreaking to call attention to a particular law or set of laws believed by the actor to be of questionable legitimacy or morality.”<sup>56</sup> It defines “nonviolence” as “[t]he abstention as a matter of principle from any

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53. See generally Allison M. Freedman, *Arresting Assembly: An Argument Against Expanding Criminally Punishable Protest*, 68 VILL. L. REV. 171 (2023).

54. LEWIS PERRY, CIVIL DISOBEDIENCE: AN AMERICAN TRADITION IX–X (2013).

55. Melissa Hellmann, *What Standing Rock Tells Us About Civil Disobedience*, YES! MAG. (Nov. 15, 2016), <https://www.yesmagazine.org/democracy/2016/11/15/what-standing-rock-tells-us-about-civil-disobedience>.

56. *Civil Disobedience*, BLACK’S LAW DICTIONARY (11th ed. 2019).

behavior that is intended to hurt other people physically; esp., the practice of opposing a government without using any kind of force, as by passively disobeying the law.”<sup>57</sup> Nonviolence is based on the concept that individuals can be empowered to enact change not by harming others but through self-sacrifice or suffering for a just cause. This utilization of suffering is “based on ‘the idea that each person has the power to change things not by inflicting suffering on others but by being willing to undergo suffering for a cause.’”<sup>58</sup>

In his *Letter from a Birmingham Jail*, Dr. Martin Luther King Jr. offered the following framework for non-violent civil disobedience:

One who breaks an unjust law must do so openly, lovingly, and with a willingness to accept the penalty. I submit that an individual who breaks a law that conscience tells him is unjust, and who willingly accepts the penalty of imprisonment in order to arouse the conscience of the community over its injustice, is in reality expressing the highest respect for law.<sup>59</sup>

This model, often associated with Dr. King and Mahatma Gandhi, is strategic in its generation of public sympathy.<sup>60</sup> While not all theorists align with this aspiration for sportsmanship, an essential element of civil disobedience is a willingness to accept punishment.<sup>61</sup> However, we must ask whether this directive remains sustainable in the face of increasingly severe, and at times unpredictable, punishments and legal consequences?

Critics of civil disobedience, relying on the foundations of social contract theory,<sup>62</sup> often assert that abiding by the rule of law is “not

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57. *Nonviolence*, BLACK’S LAW DICTIONARY (11th ed. 2019).

58. PERRY, *supra* note 55, at 8.

59. Letter from Dr. Martin Luther King Jr. to Fellow Clergymen (Apr. 16, 1963), [https://www.africa.upenn.edu/Articles\\_Gen/Letter\\_Birmingham.html](https://www.africa.upenn.edu/Articles_Gen/Letter_Birmingham.html). See also Juliana Morgan-Trostle, *A Guide for Law Students Considering Nonviolent Civil Disobedience*, 41 HARBINGER 1, 1 (2017).

60. PERRY, *supra* note 55, at 17.

61. *Id.* at 9–10.

62. See generally, Anita L. Allen, *Social Contract Theory in American Case Law*, 51 FLA. L. REV. 1, 27 (1999) (The social contract “denote[s] principles of law

simply a gesture of courtesy to the state; it is the consideration we exchange with other citizens as the price of living together.”<sup>63</sup> Still, the social contract model assumes that citizens have consented to be governed;<sup>64</sup> so where does that leave those whose path to citizenship was paved by violence and colonialism, the descendants of forcibly enslaved persons and Indigenous people? Further, protest and, by extension, civil disobedience are crucial tools of social change. Civil disobedience serves as a powerful bridge between accepting the world as it is and advocating for the world as it should be.<sup>65</sup>

There is an important place for civil disobedience in a functioning democratic society.<sup>66</sup> And it is distinct from other forms of criminality in its recognition of the limitations of law-breaking to further movement goals and its ultimate respect for the democratic process.<sup>67</sup> Civil disobedience is an inherently and defiantly hopeful act; it is a belief that the power of a sacrifice, or collective sacrifices, may move the hearts and minds of the people to push for incremental change towards justice. It is also a belief that breaking the law, sometimes in conjunction with lawful means of activism, delivers a more powerful impact.<sup>68</sup> Further, civil disobedience is a powerful tool for a democratic minority to have the majority acknowledge its experiences of injustice.<sup>69</sup>

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and government with which rational persons should, would, or do agree in exchange for greater freedom and security.”).

63. HARRY W. JONES, *THE EFFICACY OF LAW* 100–01 (1968).

64. See Maegan Nation, *Locke’s Social Contract: Is It Legitimate?*, 7 CENT. ARK. CLA J. 85, 86 (2019).

65. EDWARD T. CHAMBERS, *ROOTS FOR RADICALS: ORGANIZING FOR POWER, ACTION, AND JUSTICE* 21 (2003).

66. Bruce Ledewitz, *Civil Disobedience, Injunctions, and the First Amendment*, 19 HOFSTRA L. REV. 67, 68 (1990) (describing civil disobedience as “an established part of American political life”) “Certainly since the 1960’s, but even before then, many groups seeking political reform have used civil disobedience either as a tactic to bring their message to the attention of the public or as an expression of non-cooperation with policies they oppose.” *Id.*

67. PERRY, *supra* note 55, at 9–10, 15.

68. Leslie Gielow Jacobs, *Applying Penalty Enhancements to Civil Disobedience: Clarifying the Free Speech Clause Model to Bring the Social Value of Political Protest into the Balance*, 59 OHIO ST. L.J. 185, 185–86 (1998).

69. JOHN RAWLS, *A THEORY OF JUSTICE* 366 (1971).

In the context of environmental activism, the laws that are broken are often state laws against trespass or disorderly conduct but may also lead to state tort liability or fall under federal criminal prosecution.<sup>70</sup> The protest therefore lies not in breaking a law that is itself unjust, but in breaking a law in furtherance of a movement's goal to bring attention to an injustice or to slow or interfere with an unjust extractive project. States undeniably have a right to pass laws to deter criminal behavior.<sup>71</sup> However, what legal protections do communities and activists have when laws are enacted in defense of corporate powers that threaten our collective health and well-being?

### *B. Civil Disobedience and the First Amendment*

Although it often occurs in conjunction with constitutionally protected speech and assembly, non-violent civil disobedience is not protected by the free speech guarantees of the First Amendment.<sup>72</sup> But perhaps because of the interwoven nature of protected protest and non-violent disobedience in a movement context, the latter sometimes falls within the outskirts of the First Amendment's penumbra of protections and may be regarded differently by courts than other forms of criminality. For example, in *NAACP v. Claiborne Hardware Company*, the Supreme Court reasoned that "when [unlawful] conduct occurs in the context of constitutionally protected activity[,] . . .

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70. Civil disobedient protestors may be subject to state criminal prosecution, such as for disorderly conduct, trespass, or some more specific property crime, or federal criminal prosecution, when their protest activities fall within the definition of federal crimes. Bruce Ledewitz, *Perspectives on the Law of the American Sit-in*, 16 WHITTIER L. REV. 499, 534-38 (1995) (listing the forms of state and federal liability for nonviolent sit-ins).

71. "No federal rule of law restricts a State from imposing tort liability for business losses that are caused by violence and by threats of violence." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 916 (1982).

72. U.S. CONST. amend. I. ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.") (emphasis added); see Jacobs, *supra* note 69, at 186 ("[T]he First Amendment holds no sanctuary for violators.").



precision of regulation is demanded.”<sup>73</sup> Because of this interwoven nature, I echo the call made by other scholars regarding the need for “a limited First Amendment protection for civil disobedience.”<sup>74</sup> Such a distinction would not wholly preclude criminal sanctions, but would “[stay] the hand of equity,”<sup>75</sup> recognize the important role of civil disobedience in our democratic society, and provide activists with limited protection against states’ enactment of laws specifically intended to target actions of environmental civil disobedience.

Activists have long been met with sentencing injustices such as prosecutorial overcharging in the form of penalty enhancements<sup>76</sup> and retaliatory charges.<sup>77</sup> Moreover, environmental justice activists considering engaging in civil disobedience are faced with another concerning trend—laws enacted to target a specific civilly disobedient lawbreaking, which consequently, chills related, protected First Amendment activities and imposes excessive and inequitable applications of the law.<sup>78</sup> Such laws are constitutionally valid if they are not directed at suppressing speech or expressive conduct.<sup>79</sup> For example, “burning a flag in violation of an ordinance against outdoor fires could be punishable, whereas burning a flag in violation of an ordinance against dishonoring the flag is not.”<sup>80</sup>

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73. *Claiborne Hardware Co.*, 458 U.S. at 916 (internal citations omitted) (citing *NAACP v. Button*, 371 U.S. 415, 438 (1963)).

74. *Ledewitz*, *supra* note 67, at 69.

75. *Id.* at 71

76. *See Jacobs*, *supra* note 69, at 186.

77. For example, activists opposing the Line 3 Pipeline were charged with “aiding attempted suicide” for crawling inside a pipe to impede construction. Alexandria Herr, *‘They Criminalize Us’: How Felony Charges Are Weaponized Against Pipeline Protestors*, THE GUARDIAN (Feb. 10, 2022, 5:00 AM), <https://www.theguardian.com/us-news/2022/feb/10/felony-charges-pipeline-protesters-line-3>. Twenty-three activists opposed to the construction of “Cop City” in Atlanta were charged with domestic terrorism. Rebekah Riess et al., *23 Face Domestic Terrorism Charges After Arrests in ‘Cop City’ Protests at Planned Police Training Site in Atlanta*, CNN (Mar. 8, 2023), <https://www.cnn.com/2023/03/06/us/atlanta-cop-city-protests/index.html>.

78. Int’l Ctr. for Not-for-Profit L., *supra* note 6, at 3.

79. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992) (“The First Amendment generally prevents government from proscribing speech, or even expressive conduct, because of disapproval of the ideas expressed. Content-based regulations are presumptively invalid.” (internal citations omitted)).

80. *Id.* at 385.

Still, there are limits to what types of conduct the First Amendment protects and courts do not automatically grant protections “whenever the person engaging in the conduct intends thereby to express an idea.”<sup>81</sup> Notably, the Supreme Court has held that “violence or other types of potentially expressive activities that produce special harms distinct from their communicative impact . . . are entitled to no constitutional protection.”<sup>82</sup> In *Claiborne Hardware*, the Court defined damage to property as violent conduct that is unprotected by the First Amendment.<sup>83</sup> Certainly, opponents of non-violent civil disobedience would argue that any actions that damage property, such as vandalizing equipment at the site of a resource extraction project, or inflicting any number of purported “special harms,” would be rendered ineligible for any limited First Amendment protections.

Further, what protections are available from states who employ clever lawyers to craft laws targeting disfavored speech, masquerading as legitimate government interests? In *United States v. O’Brien*, the Court established a four-part test to determine the constitutionality of laws purporting to target conduct but incidentally target expression. Such a law is constitutional and “government regulation is sufficiently justified”<sup>84</sup> if:

- (1) it is within the constitutional power of the Government;
- (2) it furthers an important or substantial governmental interest;
- (3) the governmental interest is unrelated to the suppression of free expression; and
- (4) the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.<sup>85</sup>

Thus, under our current constitutional framework, a law criminalizing an act of non-violent civil disobedience may be

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

82. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 628 (1984).

83. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 916 (1982).

84. *O’Brien*, 391 U.S. at 377.

85. *Id.*

challenged if its impact on related protected speech or expressive conduct is implicated under *O'Brien*.<sup>86</sup>

But more may be necessary to defend against the enactment of laws targeting environmental activism. For example, additional scrutiny of a purported “substantial government interest” and a rebalancing of the scale between that interest and incidental chilling effects on protected First Amendment activities might offer such protection. We must ask: how much deference is due to an ostensible government interest in safety and order where government actions are condemning constituents to a future of climate change and its consequent disproportionate environmental harms by enabling the continuance of the fossil fuel industry? Although our current First Amendment jurisprudence is far from providing the protection needed to respond to the targeting of environmental activists, it may yet be recognized as a tool in supporting communities impacted by unjust laws such as those discussed below.

### C. Critical Infrastructure Legislation

Since the Standing Rock uprising against the Dakota Access Pipeline in 2017, sixteen states have passed laws specifically targeting protest and non-violent civil disobedience involving fossil fuel infrastructure.<sup>87</sup> These laws have largely been supported by the fossil fuel industry, and notably, many of these bills resemble a model “critical infrastructure bill”<sup>88</sup> circulated to state lawmakers by the American Legislative Exchange Council (“ALEC”).<sup>89</sup> In general, these

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86. See also *United States v. Schoon*, 971 F.2d 193, 199 (9th Cir. 1991) (reasoning that breaking a law that is not the direct object of protest will never qualify under its four-part test).

87. See *Protecting Americans’ Right to Peaceful Assembly from “Critical Infrastructure” and Other Anti-Protest Laws: Presented to the H. Oversight Subcomm. on Civil Rights and Civil Liberties 1* (2022) (testimony of Elly Page, Senior Legal Advisor, International Center for Not-for-Profit Law) [hereinafter Page Testimony], <https://www.congress.gov/117/meeting/house/115106/witnesses/HHRG-117-GO02-Wstate-PageE-20220914.pdf>.

88. *Id.*

89. See *id.*; *Holding American Legislative Exchange Council (ALEC) Accountable*, COMMON CAUSE, <https://commoncause.org/our-work/money-influence/alec/> (last visited Apr. 14, 2024) (“(ALEC) is a corporate lobbying group

laws enhance penalties for protesting near oil and gas pipelines, expand the scope of what constitutes a “critical infrastructure facility,” and establish organizational criminal liability.<sup>90</sup> These laws generally target both protected speech and assembly as well as non-violent civil disobedience actions intended to impede pipeline construction.<sup>91</sup> Table 1 provides a list of the critical infrastructure laws introduced since 2017.

Table 1<sup>92</sup>

State	Bill	Year Passed
Alabama	<u>SB 17 / HB 21</u>	2022
Arkansas	<u>HB 1321</u>	2021
Indiana	<u>SB 471</u>	2019
Kansas	<u>SB 172</u>	2021
Kentucky	<u>HB 44</u>	2020
Louisiana	<u>HB 727</u>	2018
Mississippi	<u>HB 1243</u>	2020
Missouri	<u>HB 355</u>	2019
Montana	<u>HB 481</u>	2021
North Carolina	<u>SB 58</u>	2023
North Dakota	<u>SB 2044</u>	2019
Ohio	<u>SB 33</u>	2021
Oklahoma	<u>HB 1123</u>	2017

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that brings together corporate lobbyists and politicians to draft and vote . . . on ‘model bills’ that often benefit the corporations’ bottom line.”).

90. See Page Testimony, *supra* note 88.

91. *Id.*

92. *US Protest Law Tracker*, INT’L CTR. FOR NOT-FOR-PROFIT L., <https://www.icnl.org/usprotestlawtracker/> (last updated July 25, 2024).

South Dakota	<u>SB 151</u>	2020
South Dakota	<u>SB 189</u>	2019
Tennessee	<u>SB 264</u>	2019
Texas	<u>HB 3557</u>	2019
West Virginia	<u>HB 4615</u>	2020
Wisconsin	<u>AB 426</u>	2019

Consider North Dakota’s critical infrastructure bill, for example. That state introduced the bill in 2019,<sup>93</sup> two years after water protectors gathered to oppose the Dakota Access Pipeline. This law prohibits “interfering, inhibiting, impeding, or preventing the construction or repair” of a critical infrastructure facility, and violations are categorized as a Class C felony punishable by five years’ imprisonment, a fine of \$10,000, or both.<sup>94</sup> Organizations found to have “conspired” with the violator may also be held criminally liable for up to \$100,000.<sup>95</sup> Laws like this enhance penalties from misdemeanor charges for run-of-the-mill trespass to felony charges punishable with years of jailtime, sending a clear message of deterrence to activists and organizations opposing pipeline infrastructure in the post-Standing Rock world.

As these critical infrastructure laws have only been passed since 2017, there is limited caselaw to demonstrate how challenges will be treated by the courts. In one recent case, *White Hat v. Landry*, activists facing criminal charges, landowners, and environmental justice organizations challenged Louisiana’s law prohibiting the unauthorized entry of critical infrastructure.<sup>96</sup> There, three activists<sup>97</sup> were arrested

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93. S.B. 2044, 66th Legis. Assembly, Regular Sess. (N.D. 2019).

94. *US Protest Law Tracker*, *supra* note 93.

95. *Id.*

96. 475 F. Supp. 3d 532 (M.D. La. 2020); *see also* LA. STAT. ANN. §§ 14:61–61.1 (2018) (outlining criminal penalties for “[u]nauthorized entry of a critical infrastructure” and “[c]riminal damage to critical infrastructure”).

97. *White Hat*, 475 F.Supp. 3d at 540–41 (“Anne White Hat (‘White Hat’) is Sicangu Lakota, and part of an indigenous led opposition to the Bayou Bridge Pipeline in Louisiana . . . . Karen Savage (‘Savage’) is an investigative journalist and

while protesting and monitoring construction of the Bayou Bridge Pipeline even though they were on private property and had permission from a co-owner to be on the land.<sup>98</sup> They were charged under Louisiana's critical infrastructure law, facing a potential ten years of imprisonment.<sup>99</sup> This law was drafted and proposed by the Louisiana Mid-Continent Oil and Gas Association<sup>100</sup> in 2018 and enacted that same year.<sup>101</sup> The law increased the penalties for "engaging in peaceful demonstrations or civil disobedience in the vicinity of pipelines or pipeline construction" from a misdemeanor charge of trespass to a felony charge of five years imprisonment and up to a \$1,000 fine, in addition to expanding the definition of critical infrastructure to include all of the state's 125,000-mile network of oil and gas pipelines.<sup>102</sup>

The Plaintiffs alleged that the law was unconstitutional on its face and as applied under the First and Fourteenth Amendments for three reasons:

- (1) it is vague as it does not provide adequate notice to plaintiffs and others, as well as state actors who must enforce the law, what conduct is prohibited and where, and allows for arbitrary and discriminatory enforcement;
- (2) it is overbroad and has the effect of chilling constitutionally protected speech or expression; and
- (3) targets speech and expressive conduct with a particular viewpoint for harsher punishment.<sup>103</sup>

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photojournalist who covers stories on criminal justice and the environment, and a resident of New York, New York . . . . Roman Mejía ('Mejía') 'is an eighth-grade social studies teacher and a founding member of #VetsVsHate, a national grassroots initiative founded by war veterans to overcome racism and bigotry, and resides in Biloxi, Mississippi.'" (internal citations omitted).

98. The Bayou Bridge Pipeline is the last leg of the Dakota Access pipeline, carrying oil from Texas to export terminals in the Gulf Coast. *Meet the Leaders Fighting the Bayou Bridge Pipeline – And Join Them*, 350.ORG (Oct. 17, 2017), <https://350.org/meet-leaders-fighting-bayou-bridge/>.

99. *Landry*, 475 F. Supp. 3d at 540.

100. *About Us*, LA. MID-CONTINENT OIL & GAS ASS'N, <https://www.lmoga.com/about-us> (last visited Apr. 14, 2024).

101. *Landry*, 475 F. Supp. 3d at 537.

102. *Id.* at 539.

103. *Id.* at 538; *see also* LA. STAT. ANN. § 14:61(D).

Notably, the critical infrastructure law states that it should not “be construed to apply to or prevent . . . [the] [l]awful assembly and peaceful and orderly petition, picketing, or demonstration for the redress of grievances or to express ideas or views regarding legitimate matters of public interest.”<sup>104</sup>

The Court did not reach these substantive arguments. Instead, the court granted the defendants’ alternative motion to transfer and the case is now pending in another district.<sup>105</sup> However, the plaintiffs’ claims raise important questions about the legality of these critical infrastructure statutes: what proximity to oil and gas infrastructure triggers liability and how specific laws must be to survive vagueness challenges; what the scope of impacts of organization liability will be;<sup>106</sup> and how courts will address the impacts of such legislation on protected speech and assembly. This case also alerts to the potential ways that critical infrastructure legislation can and will be used to intimidate and retaliate against protected First Amendment activity.

## V. CONCLUSION

As we move towards a future of exacerbated environmental injustice due to climate change and a democracy threatened by corporate power and authoritarianism, we must prepare to support our community partners and clients who turn to protest and civil disobedience as a means of having their voices heard and working towards systemic change. We must holistically expand our environmental justice practice and stand in defense of the land and water protectors facing increasingly severe consequences for expressing their dissent. We must stand against the erosion of our

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104. *Landry*, 475 F. Supp. 3d at 538.

105. *Id.* at 556.

106. Attacks to supporting organizations may be on the rise. For example, Georgia is currently considering SB 63, a bill that would ban bail funds in the state and restrict individuals, organizations, or other groups from bailing out more than three people per year. Chamian Cruz, *Opposition to Georgia’s Cash Bail Bill Grows Amid Legal and Constitutional Concerns*, WABE (Feb. 8, 2024), <https://www.wabe.org/opposition-to-georgias-cash-bail-bill-grows-amid-legal-and-constitutional-concerns>.

constitutional rights represented by legislation like critical infrastructure laws, and never lose sight of the world as it should be.<sup>107</sup>

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107. CHAMBERS, *supra* note 66, at 21.