Article

Rethinking the Crime of Rioting

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INTRODUCTION

On the evening of September 24, 2020, Representative Attica Scott was with a group of protesters in Louisville, Kentucky. She was demonstrating against the state's failure to charge police officers who had killed Breonna Taylor, a Black woman wrongly shot by law enforcement in her own apartment.[1] Representative Scott, then the only Black female member of the Kentucky legislature, was navigating past lines of police in riot gear toward a nearby church to comply with a looming curfew when someone broke a window and threw a flare into a public library.[2] Law enforcement moved in swiftly and arrested Representative Scott, her daughter, and at least twenty others on felony rioting charges.[3] While the rioting charges were later dropped, those arrested claimed that law enforcement was trying to use the judicial process to "bully" and discredit nonviolent protesters who were speaking out about police violence.[4] Similar arrests of nonviolent demonstrators on rioting charges were repeated across the country during the racial justice protests of 2020, with protestors frequently claiming they were victims of police intimidation.[5]

Although the nationwide demonstrations for racial justice in the summer and fall of 2020 were overwhelmingly nonviolent,[6] during the following year, many state lawmakers pointed to

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1. *See* Elizabeth Joseph, *Kentucky's Only Black Female Legislator Arrested in Breonna Taylor Protest*, CNN (Sept. 26, 2020), https://www.cnn.com/2020/09/26/us/attica-scott-arrest-breonna-taylor-protest/index.html [https://perma.cc/EE5J-CBDU] (describing the arrest of Attica Scott and other protesters).

2. *Id.*

3. *Id.*

4. Bailey Loosemore, *Attica Scott Sues Louisville Police Officers over Arrest at Breonna Taylor Protest*, COURIER J. (June 14, 2021), https://www.courier-journal.com/story/news/local/2021/06/14/kentucky-rep-attica-scott-sues-louisville-police-officers-over-arrest/7690585002 [https://perma.cc/AM3B-US4L] (quoting Shameka Parrish-Wright, who was arrested along with Scott).

5. *See, e.g.*, Nick Robinson, *Breonna Taylor Protest Arrest of Kentucky Lawmaker Shows Risk of Anti-Riot Laws' Abuse*, NBC THINK (Sept. 26, 2020), https://www.nbcnews.com/think/opinion/breonna-taylor-protest-arrest-kentucky-lawmaker-shows-risk-anti-riot-ncna1241140 [https://perma.cc/EE5J-CBDU] (describing rioting arrest of protesters in Texas with demonstrators claiming police simply did not like their Black Lives Matter signs).

6. *See* ERICA CHENOWETH, CIVIL RESISTANCE: WHAT EVERYONE NEEDS TO KNOW 55 (2021) (referencing a study that found ninety-seven percent of Black Lives Matter protests that took place in the summer of 2020 were nonviolent).

property destruction or violence that did occur to justify legislation that would expand rioting offenses as well as increase penalties for these crimes.[7] By the end of 2021, state lawmakers had introduced over sixty such bills in twenty-eight states, of which six have so far been enacted.[8] These bills arguably represent the most far-reaching attempt to change the country's anti-rioting laws in decades. Activists have widely criticized this wave of legislation, claiming it provides law enforcement with excessive discretion and is aimed at silencing peaceful protesters who will fear being caught up by these laws' broad provisions and draconian penalties.[9]

Despite the high-profile role riots have played in U.S. history, there has been remarkably little scholarship on the crime of rioting.[10] To help fill this gap and contextualize recent debates about the impact of anti-rioting laws on non-violent protest, this Article traces the historical development of the offenses of rioting and incitement to riot in the United States, and surveys these laws in all fifty states to provide the first systematic analysis and critique of these crimes.

Historically, the word "riot" has been used to describe a broad range of activity that involves a group of persons who dis-

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7. For a discussion of the introduction of this legislation and its characteristics, see *infra* Parts II.B, III.C.

8. *U.S. Protest Law Tracker*, INT'L CTR. FOR NOT-FOR-PROFIT L. [hereinafter ICNL Tracker], https://www.icnl.org/usprotestlawtracker [https://perma.cc/QKJ5-EE6E] (searching Tracker issues for "riot" laws from June 1, 2020 to Dec. 31, 2021).

9. *See, e.g.*, Char Adams, *Experts Call 'Anti-Protest' Bills a Backlash to 2020's Racial Reckoning*, NBC NEWS (May 18, 2021), https://www.nbcnews.com/news/nbcblk/experts-call-anti-protest-bills-backlash-2020-s-racial-reckoning-n1267781 [https://perma.cc/R8WU-W2YJ] (describing criticisms of anti-protest bills, including those related to rioting).

10. There have been relatively few studies of any type regarding anti-riot legal measures in the United States. For two notable exceptions to this lack of analysis, see Margot E. Kaminski, *Incitement to Riot in the Age of Flash Mobs*, 81 U. CIN. L. REV. 1 (2012) (providing an extensive analysis of incitement to riot statutes in the United States) and Martin J. McMahon, Annotation, *What Constitutes Sufficiently Violent, Tumultuous, Forceful, Aggressive, or Terrorizing Conduct to Establish Crime of Riot in State Courts*, 38 A.L.R. 4th 648 (1985) (providing an expansive cataloging of state court judgments that interpret which types of force, violence, or terrorizing conduct are necessary to be considered rioting).

turb the public peace through the use of unlawful force or violence.[11] It can encompass everything from a barroom brawl that has spilled into the street, to a crowd that smashes storefronts over a felt injustice. In the United States, riots have been associated with violence of very different character and motivation. The Boston Tea Party was a riot.[12] As were mob lynchings of Black Americans in the Jim Crow South[13] and race riots of the 1960s and 1970s.[14] The United States has seen riots against Catholics, Chinese people, and Native Americans.[15] There have also been riots in the name of labor and gay rights, and against U.S. involvement in war.[16] Violence during riots has been directed at destroying or looting property, and has pitted law enforcement against the public, or different groups in U.S. society against each other.[17]

Despite, or perhaps because of, their diverse character, the specter of the riot has long loomed large in both the public and government's imagination. This is at least partly justified. Riots can create unique dangers, including the rapid spread of violence

11. Commentators have defined rioting in a broad array of ways. *See, e.g.*, PAUL A. GILJE, RIOTING IN AMERICA 4 (1996) (describing the challenges of defining a riot and defining it for his book as "any group of twelve or more people attempting to assert their will immediately through the use of force outside the normal bounds of law"); CHENOWETH, *supra* note 6, at 53 ("A riot is simply a disturbance by a crowd.").

12. *See* GILJE, *supra* note 11, at 1, 5 (describing the Boston Tea Party as a riot).

13. *Id.* at 2, 101–08, 153 (describing lynchings in the Jim Crow South as riots).

14. *Id.* at 3 (describing the race riots that accompanied the Civil Rights Movement).

15. *See id.* at 25, 64–69, 77–79, 123–30 (detailing nativist riots against ethnic and religious minority groups).

16. *See id.* at 116–23, 167–68, 170 (describing riots arising out of labor rights, gay rights, and anti-war movements).

17. *See Final Report of the National Commission on the Causes and Prevention of Violence*, U.S. DEPT. OF JUST., OFF. OF JUST. PROGRAMS 57 (1969) [hereinafter *Report of Violence Commission*], https://www.ojp.gov/pdffiles1/Digitization/275NCJRS.pdf [https://perma.cc/UTD8-ER5T] ("[Group] [v]iolence has been used by groups seeking power, by groups holding onto power, and by groups in the process of losing power. Violence has been pursued in the defense of order by the satisfied, in the name of justice by the oppressed, and in fear of displacement by the threatened.").

and property destruction that can overwhelm the capacity of government to respond.[18] At the same time, from the American colonies to the Civil Rights era, the accusation of rioting has a history of being used to discredit largely peaceful protest movements, tainting them with the implications of violence, mayhem, and disorder connoted with rioting.[19]

The use of the label of rioting to target dissent is not just a political but also a legal problem. The contemporary offense of rioting in the United States has its roots in English anti-riot acts and common law of the sixteenth, seventeenth, and eighteenth centuries, with many U.S. anti-rioting provisions still mirroring language from this era.[20] However, these English anti-rioting measures were the product of a political regime that would now be considered highly intolerant of political and religious dissent, and were used to quell not just violence by crowds, but also broader protests against government policies.[21]

While governments have a clear interest in preventing and stopping riots, this Article claims that the crimes of rioting and incitement to riot are unnecessary to maintain public safety. The underlying offense that the crime of rioting attempts to capture—violence by crowds—is already criminalized by other parts of the law that make violence against persons or destruction of property by individuals unlawful.[22] Indeed, not all states today even have the offenses of rioting and incitement to riot, nor did the federal government until 1968.[23]

Although legal definitions of rioting in the United States vary considerably by state, they often broaden liability beyond

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18. *See infra* Part I.B (describing the challenges rioting presents to governments).

19. *See infra* Part I.C (detailing examples of the politicized used of the charge of rioting in American history).

20. For a discussion of the English law of rioting from this period and how it was created in response to protests of different government policies, see *infra* Part II.A.

21. *See infra* Part II.A (discussing English anti-rioting laws).

22. *See infra* notes 168–170 and accompanying text (discussing the sections of California penal code that outlaw violence or property destruction by individuals).

23. *See infra* Part II.B (discussing which states do and do not have rioting and incitement to riot offenses); *see also* Marvin Zalman, *The Federal Anti-Riot Act and Political Crime: The Need for Criminal Law Theory*, 20 VILL. L. REV. 897, 911 (1975) (describing how an early proposal of the federal anti-riot act, similar to the version enacted in 1968, was designed to supplement preexisting state anti-riot measures).

other existing criminal law in a manner that can capture nonviolent conduct, including that of protesters.[24] First, in attempting to control group violence by protecting the "public peace," many rioting offenses expand criminal liability to those who engage in no violence themselves, but are simply part of a crowd that is deemed to be "rioting."[25] Second, some rioting crimes create liability for conduct that does not result in violence, but is only perceived to create the threat of it.[26] Meanwhile, the crime of incitement to riot can create unique dangers for activists by outlawing merely provocative speech or advocacy.[27]

Since riots often involve politicized violence or its seeming threat, it is not surprising to see the politicized use of anti-riot laws. U.S. history is replete with examples of anti-rioting criminal offenses being used against nonviolent protesters and critics of government, including anti-war demonstrators, environmentalists, and racial justice activists.[28] A broad legal definition of rioting or incitement to riot has very real consequences, allowing the government to arrest, charge, and even convict protesters who are simply nonviolently demonstrating.[29]

There may be a superficial appeal in advocating for tougher rioting and incitement to riot laws to respond to rising fears about political violence in the United States,[30] but, ultimately, government is better off relying on a range of other tools. It should take measures that address the underlying causes of rioting and, when faced with potentially confrontational crowds, emphasize de-escalation tactics.[31] When rioting does occur, law enforcement has a variety of means to manage and, if necessary,

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24. *See infra* Part III.B (providing a critique of the expansive nature of many rioting and incitement to riot offenses).

25. *See infra* Part III.B.1 (analyzing the expansion of rioting and incitement to riot offenses to members of a "rioting" crowd).

26. *See infra* Part III.B.2 (describing the expansion of rioting offenses to cover conduct that is perceived to create a threat).

27. See *infra* Part III.B.3 (discussing dangers that incitement to riot offenses pose to activists).

28. *See infra* Part III.B.2–3 (discussing use of anti-rioting laws against anti-war demonstrators, environmentalists, and racial justice activists).

29. *See infra* Part III.B (providing examples of how broad anti-rioting measures have been used to target nonviolent demonstrators).

30. *See generally* Rachel Kleinfeld, *The Rise of Political Violence in the United States*, 32 J. DEMOCRACY. 160 (2021) (describing concerns about rising political violence in the United States).

31. For a discussion of alternative tools to combat rioting before it begins, see *infra* Part IV.A.

disperse crowds and arrest specific individuals who are engaged in unlawful conduct.[32]

Consider the breach of the U.S. Capitol on January 6th, 2021, perhaps the most famous riot in recent memory.[33] While certainly not an example of how law enforcement should handle a confrontational crowd, the federal government has since charged over 700 people for this attempt to stop the certification of President Joe Biden's election, but, strikingly, not one has been charged with rioting or incitement to riot.[34] Instead, prosecutors have charged them with a wide range of other crimes, including often serious offenses.[35] This more targeted approach points to how government can still hold those engaged in group violence accountable without relying on vague and overbroad rioting or incitement to riot charges.

This Article proceeds in four parts. Part I provides a short history of the shifting nature of rioting in the United States, lays out some of the unique challenges rioting can create, and describes how the accusation of rioting has often become politicized to discredit social movements. Part II traces the history of anti-riot legal measures in the United State from their repressive English roots through to the modern day. Part III provides a critique of the criminal offenses of rioting and incitement to riot in the United States. It shows how these crimes are unnecessary to address riots and are frequently overbroad, providing wide discretion to law enforcement that can easily be used in a politicized manner to chill nonviolent protest. Part IV argues that jurisdictions should eliminate the offenses of rioting and incitement to riot. Where that is politically infeasible, it lays out a framework to better tailor these crimes to minimize their potential for abuse.

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32. For a discussion on ways to handle ongoing riots, see *infra* Part IV.A.

33. *See* Keith L. Alexander, *Prosecutors Break Down Charges, Convictions for 725 Arrested So Far in Jan. 6 Attack on U.S. Capitol*, WASH. POST (Dec. 31, 2021), https://www.washingtonpost.com/politics/2021/12/31/capitol-deadly-attack-insurrection-arrested-convicted [https://perma.cc/8F4H-SN9U] (detailing charges brought as of publishing date against Capitol "rioters").

34. *Capitol Breach Cases*, U.S. DEP'T OF JUST. U.S. ATT'Y'S OFF., D.C. [hereinafter *Capitol Breach Cases*], https://www.justice.gov/usao-dc/capitol-breach-cases [https://perma.cc/98G8-2FKK] (listing prosecutions brought by Department of Justice against those that breached the Capitol on January 6, 2021).

35. Alexander, *supra* note 33 (indicating common charges brought included assault, resisting arrest, and entering a restricted building).

Before beginning, it is useful to note that this Article uses the word "riot" for a broad range of collective or group violence, even while recognizing the motivation for and consequences of rioting can vary dramatically. Despite significant debate on the topic, the Article does not address whether collective violence is ever justified[36] or if riots are more likely to hurt or harm the political cause of their participants.[37]

Finally, although it is not a focus of this Article, reform of U.S. anti-rioting laws should be informed by the use of these types of laws globally. From Hong Kong to New Delhi, governments have frequently used overbroad rioting and incitement to riot offenses to undermine largely nonviolent social movements.[38] In a time of rising concern about authoritarianism everywhere,[39] U.S. policymakers should view international experience as a warning about how anti-rioting laws in the United States could be even further abused. It should also add urgency to U.S.-led reform efforts to help build global momentum for an improved approach.

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36. *See, e.g.*, Benjamin S. Case, *Riots as Civil Resistance: Rethinking the Dynamics of "Nonviolent" Struggle*, 4 J. RESISTANCE STUD. 9, 35 (2018) (arguing that in some situations riots can be strategically and morally appropriate).

37. *See* Eric Shuman, Siwar Hasan-Aslih, Martijn van Zomeren, Tamar Saguy & Eran Halperin, *Does Violence Within a Nonviolent Social Movement Help or Hurt the Movement? Evidence from the 2020 Black Lives Matter Protests*, PSYARXIV 2 (Nov. 7, 2021) (manuscript at 2), https://psyarxiv.com/4m79q [https://perma.cc/W4JE-JWWG] (finding that violent protests made it more likely that conservatives in liberal areas would support policy goals of the Black Lives Matter movement). *But see* Omar Wasow, *Agenda Seeding: How 1960s Black Protests Moved Elites, Public Opinion, and Voting*, 114 AM. J. POL. SCI. 638, 638 (2020) (finding race riots in the 1960s and 1970s undermined support for civil rights and increased votes for Republican candidates who promised law and order, while nonviolent action increased support and votes for Democrats).

38. *See, e.g.*, Emma Graham-Harrison & Laurel Chor, *Anger as Hong Kong Protesters Appear in Court on Rioting Charges*, GUARDIAN (July 31, 2019), https://www.theguardian.com/world/2019/jul/31/anger-as-hong-kong-protesters-appear-in-court-on-rioting-charges [https://perma.cc/9JDC-UBVP] (describing use of rioting charges against pro-democracy Hong Kong demonstrators); Hannah Ellis-Petersen, *Delhi Police Accused of Filing False Charges over February Riots*, GUARDIAN (June 23, 2020), https://www.theguardian.com/world/2020/jun/23/delhi-police-accused-after-charging-activists-over-february-riots [https://perma.cc/C4AP-XD99] (detailing criticism of Delhi police for charging human rights advocates with inciting riots in Feb. 2020).

39. Melissa Morgan, *Understanding the Global Rise of Authoritarianism*, STAN. FREEMAN SPOGLI INST. FOR INT'L. STUD. (Nov. 8, 2021), https://fsi.stanford.edu/news/understanding-global-rise-authoritarianism [https://perma.cc/S2QN-F442].

I. THE PROBLEM OF RIOTING

To provide context for this Article's critique of the offenses of rioting and incitement to riot, this Part makes three preliminary points. First, it briefly examines the history of rioting in the United States to show that, while the frequency and levels of violence involved in rioting have changed markedly at different points in the country's history, these shifts do not seem to be driven by changes in criminal offenses related to rioting. Second, it details the unique challenges created by some riots but notes that the government does not necessarily require separate anti-rioting offenses to address these challenges. Third, it describes how the stigmatizing label of rioting has been used to undercut and discredit largely peaceful protest movements and argues overbroad rioting laws can exacerbate this problem.

A. THE UNITED STATES AND ITS MANY TYPES OF RIOTS

Historically, riots in the United States are highly varied. Riots have been undertaken by marginalized groups as well as by politically dominant ones, and they can vary considerably in their level of violence and property destruction.[40] Despite these differences, from a historical perspective, rioting in the United States can be broadly categorized into three periods.[41]

The first historical era of rioting starts in the colonial period, passes through the American Revolution, and ends in the early nineteenth century. During this period, riots were often used as a tool by communities against an unresponsive government or outsiders.[42] The Boston Tea Party and Boston Massacre were only two riots among many similar showdowns between colonists and imperial power.[43] As Paul A. Gilje has written, during this time, those who participated in riots were generally deferential

40. *See* GILJE, *supra* note 11, at 1–3 (describing range of motivations for rioting in the United States).

41. This typology is adopted from Paul Gilje, who demarcated rioting in the United States into four distinct periods. GILJE, *supra* note 11, at 9–10. While Gilje describes two distinct periods of rioting in colonial America, this Article focuses on the latter of the two. *Id*. Others have also noted the shifting nature of riots and their relative level of political violence. *See, e.g.*, *Report of Violence Commission*, *supra* note 17, at 59 ("[W]hile group violence in the 1960's [sic] was at a higher level than in the decades immediately preceding, several earlier decades of American history were marked by higher levels of group violence . . . than has been true of the decade now ending.").

42. *See* GILJE, *supra* note 11, at 35–36.

43. *See id*. at 45–51 (describing the political context of riots during the era leading up to the American Revolution).

toward colonial elites and violence was highly ritualized—such as by humiliating individuals through effigy processions, tarring and feathering British officials, breaking windows, or tearing down buildings.[44] As a result, these riots were relatively less violent[45] and were often seen as a useful check (within limits) on the tyrannical practices of government.[46]

The second era of U.S. rioting starts roughly in the early nineteenth century, traverses the Civil War, and ends in the middle of the twentieth century.[47] As the traditional social hierarchy of the eighteenth century broke down, different social groups—whether based on race, ethnicity, or class—battled each other in riots that resulted in widespread and often much more severe violence.[48]

Race played a central role in these riots. Before the Civil War, white mobs assaulted free Black people in the North when they were viewed as being too assertive (such as not making way for white persons on the sidewalk),[49] and free Black people rioted in response to being attacked or in opposition to slavery.[50] After the Civil War, mob and vigilante violence by groups like the Ku Klux Klan sought to roll back the gains in Black power brought about by Reconstruction.[51] Between 1882 and 1937, there were over 5,000 lynchings in the United States, frequently by mob crowds.[52] In the first quarter of the twentieth century, a series

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44. *Id.* at 25, 47, 58 (describing common elements of a colonial riot).

45. *Id.* at 9–10. Notably, there was often significantly more violence toward Native Americans during rioting in this period. *See id.* at 25 (describing violence by the Paxton boys in Pennsylvania who killed twenty Native Americans in the mid-1760s).

46. *Id.* at 20–21. *See also* C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 183 (1989) (describing how American colonists understood popular uprisings and mobs as necessary evils to address the abuses of government); John Phillip Reid, *In a Defensive Rage: The Uses of the Mob, the Justification in Law, and the Coming of the American Revolution*, 49 N.Y.U. L. REV. 1043, 1043, 1069, 1090 (1974) (arguing many American colonial leaders found at least certain kinds of mob action in the 1760s legitimate in response to the widely viewed tyrannical imposition of the Stamp Act).

47. *See* GILJE, *supra* note 11, at 10.

48. *Id.*

49. *Id.* at 89.

50. *Id.* at 88–90.

51. *Id.* at 94–100.

52. *Id.* at 101; Ida B. Wells-Barnett, *"Lynch Law in America,"* ARENA, Jan. 1900, at 15, *reprinted in* THE LIGHT OF TRUTH: WRITINGS OF AN ANTI-LYNCHING CRUSADER 396–97 (Henry Louis Gates Jr. ed., 2014) (discussing the "unwritten law" that justified mob violence against Blacks in the South and elsewhere in

of major urban race riots broke out—including in Atlanta, St. Louis, and Tulsa—which were often sparked by Black people organizing to fight back against violence and intimidation by white people.[53]

This period also saw significant rioting between other social groups. Nativists clashed with Chinese and Irish people, Germans, Catholics, Mormons, and others in lethal riots throughout the nineteenth century.[54] Workers frequently rioted based on labor grievances, often directing violence toward scabs or strike breakers.[55] And concern over anarchist and communist infiltration into the labor movement helped justify police violence against workers that at times led to violent confrontation, such as at the Haymarket Riot of 1886.[56]

The third era of rioting in the United States runs broadly from the 1940s to the present. During this period, rioting became less violent toward persons (although property destruction could still be extensive), and grievances were frequently directed not toward other social groups but rather toward government.[57] Many riots were sparked by confrontations between law enforcement and Black Americans. For example, violence against Black people by law enforcement was a common driver behind the race riots of the 1960s and 1970s,[58] as well as riots in Los Angeles in

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the United States). Not all lynchings in this period were of Black people. For example, between 1849 and 1902, there were about 300 lynchings in California, of which around 200 were of Asian persons. JEAN PFAELZER, DRIVEN OUT: THE FORGOTTEN WAR AGAINST CHINESE AMERICANS 54 (2007).

53. *See* GILJE, *supra* note 11, at 108–15.

54. *See id.* at 64–69, 123–30 (describing a range of ethnic and religious riots during the nineteenth century).

55. *See id.* at 116–21 (describing national railroad strikes in 1877, 1886, and 1894 that resulted in rioting that sometimes pitted ethnic groups against each other).

56. *Id.* at 131.

57. *Id.* at 144. *See also* Barbara Rhine, *Kill or Be Killed?: Use of Deadly Force in the Riot Situation*, 56 CALIF. L. REV. 829, 829 (1968) (noting that the race riots in the United States in the 1960s differed from earlier race riots "which were characterized by offensive action of white mobs against Negroes."); THOMAS J. SUGRUE, SWEET LAND OF LIBERTY: THE FORGOTTEN STRUGGLE FOR CIVIL RIGHTS IN THE NORTH 326 (2008) (arguing that, during the riots of the 1960s, "most of the casualties were the result of law enforcement actions against [B]lacks, not [B]lack violence against the police or white bystanders . . . and [riots] resulted primarily in property damage or destruction.").

58. SUGRUE, *supra* note 57, at 325–27 ("Nearly every riot in the 1960s . . . was sparked by a police incident, usually the arrest, injury, or alleged harassment of a [B]lack person by a police officer.").

1992, Cincinnati in 2001, Ferguson in 2014, Baltimore in 2015, and in a number of cities across the country in the summer of 2020.[59] However, rioting in this period also had other motivations. There were riots in opposition to the Vietnam War,[60] in outrage over the police's treatment of the gay community,[61] over injustices created by global trade,[62] in response to prison conditions,[63] and at the U.S. Capitol over false claims of a stolen presidential election.[64]

While it can be useful and appealing to categorize riots in the United States into these three periods, not all clearly fit into the typology. For example, there has been a recent increase in political violence, often by white nationalists against racial and religious minorities.[65] This may signal a return to a period where rioting, and political violence more generally, is motivated not primarily by grievances with the government, but rather directed between groups within U.S. society.

Scholars have provided a litany of explanations about the decline in riots, particularly their reduction in violence against

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59. *See* ELIZABETH HINTON, AMERICA ON FIRE: THE UNTOLD HISTORY OF POLICE VIOLENCE AND BLACK REBELLION SINCE THE 1960S, at 229–309 (2021) (chronicling police violence sparking Black rebellion after the 1970s).

60. *See* GILJE, *supra* note 11, at 162–69 (discussing violence connected with anti-Vietnam War protests).

61. *See id.* at 170 (describing the Stonewall riot of 1969).

62. *See* Gene Johnson, *WTO Protests in Seattle 20 Years Ago Helped Change Progressive Politics*, L.A. TIMES (Nov. 29, 2019), https://www.latimes.com/world-nation/story/2019-11-29/wto-protests-in-seattle-20-years-ago [https://perma.cc/RAA8-F7TA] (chronicling a protest of the World Trade Organization and its impact twenty years later).

63. Prison riots were often sparked by poor conditions at prisons or rivalries between different factions within a prison. *See, e.g.*, Joseph Bernstein, *Why Are Prison Riots Declining While Prison Populations Explode?,* ATLANTIC (Dec. 2013), https://www.theatlantic.com/magazine/archive/2013/12/have-a-safe-riot/354671 [https://perma.cc/GN7G-7KJY] (documenting the decline of prison riots from the 1970s until 2013).

64. *See* David Bauder, *Riot? Insurrection? Words Matter in Describing Capitol Siege,* ASSOCIATED PRESS (Jan. 14, 2021), https://apnews.com/article/donald-trump-capitol-siege-riots-media-8000ce7db2b176c1be386d945be5fd6a [https://perma.cc/AEN7-2HM2] (describing the Jan. 6, 2021 attack of the U.S. Capitol as a riot).

65. *See* Robert O'Harrow Jr., Andrew Ba Tran & Derek Hawkins, *The Rise of Domestic Extremism in America*, WASH. POST (Apr. 12, 2021), https://www.washingtonpost.com/investigations/interactive/2021/domestic-terrorism-data/ [https://perma.cc/DG2Q-65V3] (describing a surge in political violence in the United States against other Americans, being driven primarily by the far-right, but also to a lesser extent the far-left).

persons at riots, starting in the 1940s and then again after the race riots of the 1960s and 1970s. These explanations have included the rise of non-violent mass protests and direct action providing a new avenue for grievances;[66] a government that more actively addressed civil rights or labor concerns, including through greater intervention by the federal government to protect minorities;[67] less polarization within society;[68] and greater political power for minorities and increasingly diverse police forces.[69] Strikingly, stronger or revised anti-riot acts are generally not proposed as a reason for the decline in violent riots during this period and, as will be explored in Part II, in many states, the criminal offense of rioting has changed very little since the eighteenth century.[70]

B. THE CHALLENGE OF THE RIOT

Riots can vary considerably in size and danger to persons and property. That said, some riots clearly present unique challenges for law enforcement. This Section briefly highlights three elements of rioting that can potentially require a different government response than to other types of violence.

First, rioting can be substantially more destructive than violence by individuals.[71] Riots can cause widespread loss of life, injury, and property destruction. As the previous Section described, dominant groups have a history of using group violence

66. *See* GILJE, *supra* note 11, at 175–76 (describing how, by the 1960s, public protests became a legitimized form of expression).

67. *See* Steven I. Wilkinson, *Riots*, 12 ANN. REV. POL. SCI. 329, 337 (2009) ("The national government began to intervene again to prevent antiminority violence only in the 1940s and 1950s, when the competitiveness of national politics made Democrats eager to appeal to black voters . . . .").

68. *See* GILJE, *supra* note 11, at 144–45 (describing how Americans became more alike during the 1960s and 1970s).

69. *See* J. SAMUEL WALKER, MOST OF 14TH STREET IS GONE: THE WASHINGTON, DC RIOTS OF 1968, at 131–32 (2018) (arguing that race riots decreased after the 1960s and 1970s because, among other reasons, Black people gained political power and police departments hired more Black people).

70. *See infra* Part II.B (describing how many U.S. states base their rioting definitions off of eighteenth century English common law).

71. *See* Kaminski, *supra* note 10, at 76 (noting "mobs" can be violent and are difficult for law enforcement to control); People v. Cipriani, 95 Cal. Rptr. 722, 725 (Ct. App. 1971) ("The law prohibiting riots is . . . based upon the need to prevent the combined effect of concurring violent [a]cts of individuals.").

to target marginalized communities or as part of hate crimes.[72] In other words, not only can riots cause significant harm to individuals and property; they can also damage a community's social fabric.

Second, some social science and psychology literature indicates that witnessing group violence may then make it more likely that individuals in the crowd will engage in violence themselves.[73] Under the theory of "deindividuation" or "contagion," a riot can take on a logic of its own, causing some to engage in violence who would not otherwise, potentially increasing the need for intervention.[74]

Third, and relatedly, not only can riots cause significant harm that can spread quickly, but group violence can overwhelm the ability of government officials to contain it. Indeed, it can even challenge the very authority of the state.[75] This can create a need for specific law enforcement strategies to combat and contain rioting, such as dispersing crowds, calling in outside reinforcements, and even imposing curfews.[76]

These features of riots are all reasons why the state has a clear interest in controlling rioting and may often have to deploy additional tools to do so.[77] As such, riots can indeed be different than other types of violence or property destruction. While it is important to foreground these features of rioting, as will be argued in Part III.A and Part IV.A of this Article, these differences

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72. *See supra* Part I.A (describing how rioting was used in lynching Black Americans after the Civil War, and against minority religious groups like Mormons and Catholics).

73. *See* Kaminski, *supra* note 10, at 76 ("[A]t least one strand of crowd psychology, deindividuation, suggests that mobs themselves cause the people in them to do bad things."); Wilkinson, *supra* note 67, at 338–39 (providing an overview of social science and psychology literature on how witnessing group violence can trigger psychological responses that may make certain individuals more likely to engage in violence themselves).

74. *See* Kaminski, *supra* note 10, at 72, 74–76 (describing some elements of deindividuation theory); *see also* Wilkinson, *supra* note 67, at 338–39 (providing evidence of psychological responses within individuals that give the perception that riots have a logic of their own).

75. Kaminski, *supra* note 10, at 76 (explaining that "mobs threaten existing social structure").

76. For more on these measures, see *infra* Part IV.A.

77. *See* LEON WHIPPLE, OUR ANCIENT LIBERTIES 12 (1927) ("This duty of real protection against mob violence or any other coercion by force or fear . . . is generally proclaimed as one of the ideal purposes of the modern state and [has reserved] a place in the Preamble of the United States Constitution in the words 'to insure domestic tranquility.'").

do not, by themselves, justify having separate criminal offenses of rioting or incitement to riot, given the other available tools to combat rioting.

C. THE WEAPONIZATION OF THE ACCUSATION OF RIOTING

Although rioting can present unique challenges for the state, the irrationality and danger connoted by rioting has frequently been politically weaponized. Tim Newburn has observed that rioting is a pejorative term "often used by states or by others in powerful positions to label events of which they disapprove and consider illegitimate."[78] Meanwhile, Erica Chenoweth has explored how the term has been used "to demean and delegitimize social movements using peaceful if confrontational approaches."[79]

The United States has seen numerous instances of this type of political weaponization. For example, in the summer of 2020, President Donald Trump attempted to tar Black Lives Matter protests as riots, although ninety-seven percent of the protests took place without violence or property destruction.[80] In the 1960s, activists like Martin Luther King Jr. had to respond to "white backlash" against race riots that was used to justify opposition to the broader Civil Rights Movement.[81] And even before U.S. independence, Benjamin Franklin, while stationed in London, had to defend American colonists from the discrediting charge that they voiced their disagreement with Parliament and the Crown through violent "riots" and "mobs."[82]

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78. Tim Newburn, *The Causes and Consequences of Urban Riot and Unrest*, 4 ANN. REV. CRIMINOLOGY 53, 54 (2021).

79. CHENOWETH, *supra* note 6.

80. *Id.*

81. Dr. Martin Luther King Jr., *Speech at Stanford University: The Other America* (Apr. 14, 1967), https://www.crmvet.org/docs/otheram.htm [https://perma.cc/S3YU-EQP2] (arguing that race riots are "the consequences of the white backlash rather than the cause of them," and explaining that "a riot is the language of the unheard").

82. *The Examination of Dr. Benjamin Franklin in the British House of Commons Relative to the Repeal of the American Stamp Act, in* 4 THE WORKS OF BENJAMIN FRANKLIN 171, 199 (John Bigelow ed., 1904) (Franklin argued in response that "[t]he proceedings of the assemblies [in America] have been very different from those of the mobs, and should be distinguished as having no connection with each other. The assemblies have only peaceably resolved what they take to be their rights . . .").

Given the negative connotations associated with the term rioting, there are frequent debates about how to best label different types of group violence. As Thomas Sugrue has written, the terms commentators chose to label the race riots of the 1960s and 1970s signaled their position on the meaning of these events.[83] Those who used "civil disorder" adopted "a social scientific term, ostensibly neutral," while "disturbance" implied "a disruption of an otherwise tranquil state of affairs."[84] Meanwhile, "'uprising' . . . suggested a spontaneous upsurge of protest or violent expression of discontent, something with political content," and a "'rebellion' described a deliberate insurgency against an illegitimate regime."[85] Finally, "riot," which was the most common term used in the period, described "seemingly senseless, inarticulate expression of violence or rage—one that observers continued to use because of its imprecision and its association with mobs and irrationality."[86]

More recently, the breach of the U.S. Capitol in January 2021 that disrupted Congress from counting electoral votes to certify Joe Biden's election as President has been called a "riot," "violent assault," "insurrection," and "terrorism" by those who view it as a direct attack on U.S. democracy.[87] In contrast, those attempting to minimize the violence have labeled it a "largely peaceful protest" and even a "civil rights march."[88]

The political salience of the label of rioting arguably adds to the importance of how it is legally defined. A legal finding of rioting can support a similar political claim and political claims that a social movement engages in rioting can potentially influence law enforcement to more aggressively pursue rioting charges. It is to the criminal offenses of rioting and incitement to riot that this Article now turns.

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83. SUGRUE, *supra* note 57, at 334.

84. *Id.*

85. *Id.*

86. *Id.*; *see also*, HINTON, *supra* note 59, at 7 ("The so-called urban riots from the 1960s to the present can only be properly understood as *rebellions*. These events did not represent a wave of criminality, but a sustained insurgency.") (emphasis in the original).

87. *See* Bauder, *supra* note 64 (describing different terms used to reference the U.S. Capitol attack in 2021).

88. *Id.*

II. THE DEVELOPMENT OF THE CRIME OF RIOTING

This Part begins by describing how early English anti-rioting laws, which served as a model for later U.S. law, were blunt tools that were used to address not only group violence but also broader dissent. It then traces the history of rioting criminal offenses in the United States from the early republic to the present day, and shows how contemporary U.S. rioting offenses are still heavily influenced by this earlier heavy-handed English approach.

A. ENGLISH ROOTS

English anti-rioting legal measures arose out of a period of royal and parliamentary rule that was highly intolerant to political and religious dissent. This can be partly seen in how early English statutes conflated rioting—on any public issue—as a direct challenge to the authority of the state, and so labeled it as treason. For example, the Riot Act of 1549, enacted by King Edward VI in response to the Prayer Book Rebellion, made it high treason for twelve or more people to assemble with the intent to change the laws of the kingdom if they refused to disperse within an hour after being ordered to do so.[89] In a similar measure, to help prevent large groups of aggrieved people from gathering, the newly restored monarchy of Charles II enacted the Tumultuous Petitioning Act of 1661, which banned any group larger than ten from appearing in person to petition either Parliament or the king.[90]

Some commentators of this period did not even view riots concerning a public political issue as a riot at all. William Hawkins, a prominent interpreter of English common law, defined a riot in his 1716 treatise as:

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89. Riot Act of 1549, 3 & 4 Edw. VI. 6 c. 5 (1549) [hereinafter 1549 Riot Act], https://babel.hathitrust.org/cgi/pt?id=pst.000017915519&view=1up&seq=192 [https://perma.cc/Z3RE-8JJM]; *see also* Frances Webber, *Six Centuries of Revolt and Repression*, 15 HALDANE BULL. 6 (1981) (describing context of the passage of the Riot Act of 1549 and its reenactment by Queen Mary and Queen Elizabeth).

90. 13 Car. 2 s.2, c.2 (1661), https://statutes.org.uk/site/the-statutes/seventeenth-century/1661-13-charles-2-session-2-c-5-tumultuous-petitioning-act [https://perma.cc/WB2K-SWCQ]; *see also* Mark Knights, *The Gordon Petition and Riots*, U.K. PARLIAMENT COMMS., (Sept. 20, 2019), https://committees.parliament.uk/committee/326/petitions-committee/news/99303/the-gordon-petition-and-riots [https://perma.cc/868Z-NC5Z] (describing how the Tumultuous Petitioning act was passed out of concern that mass petitioning had helped lead to the outbreak of civil war in 1641–42).

> [A] tumultuous [d]isturbance of the [p]eace, by three [p]ersons, or more . . . with an [i]ntent mutually to assist one another . . . in the [e]xecution of some [e]nterprise of a *private* [*n*]*ature*, and afterwards actually executing the same in a violent and turbulent [m]anner, to the [t]error of the [p]eople . . . .[91]

Hawkins went on to describe how the "private [n]ature" of a riot must relate to a "private [q]uarrel."[92] He explained that "wher-ever the intention of such an [a]ssembly is to address publick [g]rievances," such as to "pull down all [i]nclosures," "reform [r]eligion," or remove "evil [c]ounsellors from the [k]ing," it was not a riot but rather "levying [w]ar against the [k]ing" and so "[h]igh [t]reason."[93]

The Riot Act of 1714, enacted by the British Parliament, did not distinguish between rioting for a private or public purpose.[94] However, it, like many earlier English statutes,[95] punished rioting with death, making clear how tightly restricted public assemblies could be at the time.[96] Besides outlawing participation in a riot that destroyed property like a building or church,[97] the act also made it a capital offense for twelve or more people to "unlawfully, riotously, and tumultuously assemble[] together, to the disturbance of the publick peace" if they did not disperse within an hour of being told to do so by an official of the king.[98] This led to the well-known expression to "read the riot act" to someone, which means providing a warning for someone to change their behavior.[99] This authority to disperse crowds that

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91. WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 155 (1716) (emphasis added).

92. *Id.* at 157.

93. *Id.*

94. BRITISH PARLIAMENT, THE RIOT ACT (2005) (ebook) [hereinafter 1714 RIOT ACT], (containing a typed version of the Riot Act of 1714, 1 Geo. 1 c. 5).

95. *See, e.g.*, Riot Act of 1549, 3 & 4 Edw. 6 c. 5 (1549), https://babel.hathitrust.org/cgi/pt?id=pst.000017915519&view=1up&seq=192 [https://perma.cc/QK4U-PFBQ].

96. 1714 RIOT ACT, *supra* note 94 (declaring that those convicted of rioting "shall suffer death . . . without benefit of clergy").

97. *Id.* at art. IV.

98. *Id.* at art. I.

99. *See* Ella Morton, *What it Actually Means to "Read the Riot Act" to Someone*, SLATE (Sept. 4, 2015), https://slate.com/human-interest/2015/09/reading-the-riot-act-wasn-t-always-just-a-metaphor.html [https://perma.cc/BA3X-QPQA] (describing the linkage of "read the riot act" to the Riot Act of 1714). Notably, the Riot Act of 1714 was not the first English riot act to include this dispersal tool. *See, e.g.*, Riot Act of 1549, 3 & 4 Edw. 6 c. 5 (1549), https://babel.hathitrust.org/cgi/pt?id=pst.000017915519&view=1up&seq=192

the government found "riotous" became a helpful tool for officials who wished to break up demonstrations against government policies.[100]

Rioting was viewed in England as an offense not against persons or property but against the more nebulous "public peace."[101] It was understood to be one of three interconnected and escalating offenses: unlawful assembly, rout, and rioting.[102] William Blackstone defined an unlawful assembly as "when three or more do assemble themselves together to do an unlawful act, as to pull down enclosures, to destroy a warren or the game therein, and part without doing it or making any motion towards it."[103] In contrast, "[a] rout is where three or more meet to do an unlawful act upon a common quarrel . . . and make some advances towards it."[104] While "[a] riot is where three or more actually do an unlawful act of violence, either with or without a common cause or quarrel . . . or do any other unlawful act with force and violence, or even do a lawful act, as removing a nuisance, in a violent and tumultuous manner."[105] In other words, an unlawful assembly was a gathering with an unlawful goal; a rout involved the gathering taking some step toward that goal; and a riot was when a gathering engaged in violence.

Anti-riot legal measures of this period did far more than just define and punish rioting, they also addressed the vexing problem of how best to quell riots. Riots presented real practical administrative problems in an era without a professionalized police force or a criminal justice system equipped to handle mass arrests. For example, statutes in 1361, 1411, and 1414 provided justices of the peace and other officials the power to detain and try rioters, often laying down very specific procedures for rioters' arrests, the collection of evidence, and how to try the accused.[106]

[https://perma.cc/QK4U-PFBQ] (requiring those to disperse within an hour of reading of the official proclamation).

100. *See* Webber, *supra* note 89, at 7 (describing how the Riot Act of 1714 was in constant use throughout the eighteenth and early nineteenth century against riots protesting government policies).

101. *See, e.g.*, 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND IN FOUR BOOKS *142 (1893) (placing the offense of rioting in a Chapter on offenses against the public peace).

102. *Id.* at 145–46.

103. *Id.* at 145.

104. *Id.* at 145–46.

105. *Id.* at 146.

106. *See* Justice of the Peace Act of 1361, 34 Edw. 3 c.1 (Eng.); Riot Act of 1411, 13 Hen. 4 c.7 (Eng.) (providing rules to local officials for investigating

This legislation also made clear to local officials that they did not just have the power to intervene against a riot but a duty to do so.[107] For example, the Riot Act of 1411 imposed fines on local justices of the peace who failed to detain rioters.[108] The 1714 Riot Act called on the public to assist officials in putting down rioters.[109] It also indemnified officials and the public who injured or killed rioters in the process of attempting to detain them or stop their riotous conduct.[110] Finally, it made inhabitants of the Hundred, a local administrative unit, liable for compensation of anyone whose property was damaged during a riot.[111]

In sum, rioting was a serious offense in England in this period and, if motivated by disagreement with the government's laws or policies, was often seen as a direct challenge to the state or treason. Anti-riot acts outlawed—and often punished by death—participation in a broad range of gatherings that were viewed to be violent and tumultuous, but they also focused on quelling riots by providing extensive powers to—and forcing duties on—local officials and the public. In this way, anti-riot legal measures of the period were a natural extension of a government that today would be viewed as both highly controlling of dissent and as a relatively weak state in need of blunt tools of coercion against rioters, potential rioters, and its own officials.

B. UNITED STATES EVOLUTION

Anti-riot legal measures in the United States have been significantly shaped by their English roots. U.S. state judges in the early Republic generally drew directly from the common law to

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riots); Riot Act of 1414, 2 Hen. 5 c.8 (Eng.), (providing justices of the peace and other officials the power to arrest, collect evidence, and try rioters); HAWKINS, *supra* note 91, at 158–66 (providing details about how officials are to respond to riots).

107. HAWKINS, *supra* note 91, at 158, 165–66 (describing duty of local officials to suppress a riot).

108. *See* Riot Act of 1414, 2 Hen. 5 c.8 (Eng.) (imposing a fine of "an Hundred Pounds" on justices of the peace who did not enforce the statute).

109. *See* 1714 RIOT ACT, *supra* note 94, at art. III (describing how non-officials could be "commanded" to assist officials to quell a riot).

110. *Id.* (declaring that all officials and those assisting them "shall be free, discharged, and indemnified" if they injure or kill those participating in a riot). *But see* Webber, *supra* note 89, at 7 (noting that, despite the indemnity provision of the 1714 Riot Act, there was confusion over magistrates' powers and they were tried for murder arising out of riots three times during the eighteenth century).

111. *See* 1714 RIOT ACT, *supra* note 94, at art. VI.

define rioting as well as to impose duties on officials to quell riots.[112] Even today, some states rely on the common law to define rioting[113] or have statutory definitions of rioting that would be very familiar to Blackstone or Hawkins.[114] That said, the offense has evolved in many states, creating distinct approaches to defining the crime. Significantly, rioting in the United States that challenges government policies is not legally understood to be treason as it was during certain periods in English history,[115] even if U.S. politicians and others sometimes label rioters as treasonous.[116]

During codification of state law in the nineteenth century, the offense of rioting entered statute books, with legislators often merely copying the common law definition. For example, the 1833 penal code of Georgia criminalized rioting as "any two or more persons, either with or without a common cause or quarrel, [who] do an unlawful act of violence, or any other act in a violent

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112. *See, e.g.*, Commonwealth v. Runnels, 10 Mass. (9 Tying) 518, 520 (1813) (relying on William Hawkins' definition of rioting); Respublica v. Montgomery, 1 Yeates 419, 422 (Pa. 1795) (citing to William Hawkins as an authority for the duty of officials to respond to riots); State v. Stalcup, 23 N.C. (1 Ired.) 30, 31 (1840) (citing to William Hawkins' definition of rioting).

113. *See, e.g.*, Schlamp v. State, 891 A.2d 327, 335 (Md. 2006) (enforcing the common law offense of rioting); *see also* Kaminski, *supra* note 10, at 14 ("Rioting is punishable at common law, although most states now have statutes to address it.").

114. *See, e.g.*, *infra* note 118 (describing how the state of Georgia's definition of rioting is similar to Blackstone's definition).

115. Commentators on the common law in the United States were careful to note that in the United States, unlike in the United Kingdom, a riot aimed at resisting a government statute or policy was not "treason," but rather just a riot. *See, e.g.*, FRANCIS WHARTON, 2 A TREATISE ON THE CRIMINAL LAW 344 (8th ed. 1880) ("If the object [of a riot] be to overthrow the government, then the offence, if there be adequate overt acts, is treason. If it be to resist a statute, but not to overthrow government, then, in the United States (however it may be in England), the offence is not treason, though it may be riot or a high misdemeanor.").

116. President Trump claimed that some of those taking part in Black Lives Matter protests in 2020 were involved in "treason" and "sedition." Colby Itkowitz, *Trump Lashes Out at Black Lives Matter, Accuses One Member of 'Treason'*, WASH. POST (June 25, 2020), https://www.washingtonpost.com/politics/trump-lashes-out-at-black-lives-matter-accuses-one-member-of-treason/2020/06/25/45667ec8-b70f-11ea-a510-55bf26485c93_story.html [https://perma.cc/8KSM-8TJJ]. Marvin Zalman has described how "[t]here is evidence that the conservative [Congressional] supporters of the Anti-Riot Act viewed it as being a disguised treason and sedition law. Certainly, some of them thought that the activities of the rioters and protesters approached treason and sedition." Zalman, *supra* note 23, at 915.

and tumultuous manner."[117] This language closely mirrored Blackstone's definition of rioting, and the contemporary Georgia statutory definition of rioting remains very similar.[118]

Like in the English common law, riot provisions in U.S. states were generally codified as an offense against the public.[119] This is important because, by making rioting an offense against the public peace, the offense then did not require actual violence against persons or property.[120] Also, like in England, rioting was commonly classified as part of a series of crimes that included unlawful assembly and rout.[121] Today though, only a handful of states have the offense of rout.[122]

Early state riot laws would sometimes have different penalties depending on the purpose of the riot, indicating the types of concerns that motivated lawmakers to codify the offense. For instance, the 1857 Texas Penal Code created different penalties if a riot was used to stop collection of taxes, prevent enforcement of the law, or rescue a prisoner.[123] Today, many states have different penalties depending on how the riot was undertaken or its outcome. For example, in New York, a riot in the second degree requires participating with four or more persons in violent conduct that creates a grave risk of causing public alarm; rioting in the first degree requires (1) participating with over ten persons,

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117. THOMAS R.R. COBB, 2 A DIGEST OF THE STATUTE LAWS OF THE STATE OF GEORGIA 811 (Christy, Kelsea & Burke 1851).

118. *See* BLACKSTONE, *supra* note 101, at *146 (defining the crime of rioting as "[a] riot is where three or more actually do an unlawful act of violence, either with or without a common cause or quarrel . . . . or do any other unlawful act with force and violence; or even do a lawful act . . . in a violent and tumultuous manner") Today, Georgia defines rioting as "[a]ny two or more persons who shall do an unlawful act of violence or any other act in a violent and tumultuous manner commit the offense of riot." GA. CODE ANN. § 16-11-30 (2022).

119. *See, e.g.*, JOEL PRENTISS BISHOP, 1 COMMENTARIES ON THE CRIMINAL LAW 324 (5th ed. 1872) (listing rioting in a chapter under "Protection to the Public Order and Tranquility").

120. *See* Kaminski, *supra* note 10, at 14 ("These origins are important because one of the fundamental problems with current riot statutes is the treatment of riot as an offense against the public peace rather than a crime involving actual violence or damage.").

121. *See, e.g.*, THE PENAL CODE OF CALIFORNIA 172–73 (James H. Deering ed., Bancroft-Whitney Co. 1906) (defining the offenses of unlawful assembly, rout, and riot).

122. *See* Kaminski, *supra* note 10, at 15 ("Most states now criminalize both 'unlawful assembly' and 'riot,' but no longer criminalize 'rout.'").

123. *See* THE PENAL CODE OF THE STATE OF TEXAS 67–71 (John W. Harris, O.C. Hartley & James Willie eds. 1857).

and (2) that during the riot a person—other than one of the participants—is injured, or there is substantial property damage.[124] Several states increase the penalty for rioting if the person convicted of rioting was armed with a dangerous weapon,[125] and it is not uncommon for states to have a separate offense, and penalties, for rioting in prison.[126]

Incitement to riot was not a common offense in early U.S. statutes or common law understandings. Three major treatises on U.S. criminal law of the late nineteenth century do not mention an offense of incitement to riot, even while they describe the offense of rioting in significant detail.[127] That said, the offense was seemingly prosecuted, at least occasionally, in the nineteenth century. For instance, in 1855 Boston minister Theodore Parker was indicted for inciting an abolitionist riot by giving a speech calling for the freeing of a runaway slave.[128] By the twentieth century, states began adding the offense of inciting a riot to their criminal code, and today at least twenty-one states, Washington, D.C., and the federal government have a statutory crime against incitement to riot (although in two of these states the crime only applies inside a correctional facility).[129] Some

124. *Compare* N.Y. PENAL LAW § 240.06 (Consol. 2022) (defining rioting in the second degree), *with* N.Y. PENAL LAW § 240.05 (Consol. 2022) (defining rioting in the first degree).

125. *See, e.g.*, N.C. GEN. STAT. § 14-288.2 (2022) (increasing the penalty for rioting in North Carolina to a felony if the person participated in the riot with a dangerous weapon).

126. *See, e.g.*, MONT. CODE. ANN. § 45-8-103(3) (2021) (creating a heightened penalty for engaging in an act of violence during a riot in a correctional facility); COLO. REV. STAT. § 18-8-211 (2022) (creating a separate riot offense for rioting in a correctional institution).

127. *See* BISHOP, *supra* note 118 at 324–28 (describing the offense of rioting, but not incitement to riot); WHARTON, *supra* note 115, at 342–52 (describing offense of rioting and powers of officials during a riot, but not the crime of incitement to riot); JOHN WILDER MAY, THE LAW OF CRIMES 147–50 (Harvey Augustus Bigelow ed., 1905) (describing the crime of rioting, but not incitement to riot).

128. *See Boston Minister Tried for Inciting a Riot*, MASS MOMENTS, https://www.massmoments.org/moment-details/boston-minister-tried-for-inciting-a-riot.html [https://perma.cc/JB8M-JSR9] (describing the indictment and trial of Theodore Parker).

129. *See* ALA. CODE § 13A-11-4 (2022); ARIZ. REV. STAT. ANN. § 13-1207 (2022) (applying only to prisoners who commit assault to incite a riot), ARK. CODE ANN. § 5-71-203 (2021); CAL. PENAL CODE § 404.6 (West 2022); COLO. REV. STAT. § 18-9-102 (2022); CONN. GEN. STAT. § 53a-178 (2022); FLA. STAT. § 870.01 (2022); GA. CODE ANN. § 16-11-31 (2022); KAN. STAT. ANN. § 21-6201 (2022); KY. REV. STAT. ANN. § 525.040 (West 2022); LA. REV. STAT. ANN. § 329.2

states have also recognized incitement to riot as part of the common law[130] even though nineteenth century U.S. common law commentators, and English common law interpreters like Hawkins and Blackstone did not explicitly recognize the offense.[131]

Like in England, legal interpretations of the offense of rioting not only defined rioting but also created duties to quell or control riots. For example, in 1795, when a justice of the peace was prosecuted for failing to intervene against protesters during the Whiskey Rebellion, the Pennsylvania Supreme Court affirmed that under the common law, "[i]t is the duty of every good citizen to endeavor to suppress a riot," and they are protected by law in so doing.[132] These duties were sometimes elaborated in statute. In Virginia, large sections of a law enacted in 1786 to suppress riots were copied near verbatim from the English anti-riot act of 1411, including laying out duties of the justice of peace to arrest and try rioters, and fining these officials for noncompliance.[133] While most of these provisions imposing duties to quell riots have not survived, some have, even if they are rarely used.

(2022); MICH. COMP. LAWS § 752.542 (2022); MONT. CODE. ANN. § 45-8-104 (2021); N.Y. PENAL LAW § 240.08 (Consol. 2022); N.C. GEN. STAT. § 14-288.2 (2022); N.D. CENT. CODE § 12.1-25-01 (2021); 21 OKLA. STAT. tit. 21, § 1320.2 (2022); R.I. GEN. LAWS § 11-38-5 (2022) (applicable only to a person who incites a riot at a correctional institution); S.C. CODE ANN. § 16-5-130 (2022) (creating the crime of "instigating" a riot); TENN. CODE ANN. § 39-17-304 (2022); VA. CODE ANN. § 18.2-408 (2022); D.C. CODE § 22-1322 (2022); 18 U.S.C. § 2101.

130. *See, e.g.*, Lynch v. State, 236 A.2d 45, 55–56 (Md. Ct. Spec. App. 1967) (upholding common law incitement to riot conviction against white nationalists); Commonwealth v. Hayes, 209 A.2d 38, 39 (Pa. Super. Ct. 1965) (upholding common law incitement to riot conviction against defendant for leading cheers against police).

131. *See supra* note 127 (surveying how three leading U.S. commentaries on the criminal law in the nineteenth century did not directly reference incitement to riot); *see also*, BLACKSTONE, *supra* note 101, at 142–43 (defining the crime of rioting, but not incitement to riot); HAWKINS, *supra* note 91, at 161–67 (same). That said, the crime of incitement was certainly not unknown at the time. For example, the Seditious Meeting Act of 1795 held that officials could disperse any meeting which is held that "shall tend to incite or stir up the people to hatred or contempt of the person of his majesty, his heirs or successors, or of the government and constitution of this realm." Seditious Meetings Act 36 Geo.3 c.8. (1795), https://web2.uvcs.uvic.ca/courses/lawdemo/DOCS/SMA.htm [https://perma.cc/F6RW-LCWP].

132. Respublica v. Montgomery, 1 Yeates 419, 421 (1795).

133. *Compare* Riot Act of 1411, 13 Hen. 4 c.7 (Eng.) (imposing fines on sheriffs and justices of the peace who fail to quell riots), *with* An Act for the Suppression and Punishment of Riots, Routs, and Unlawful Assemblies §§ 1–4, *reprinted in* REVISED CODE OF THE LAWS OF VIRGINIA 556 (1819) (same).

For example, in Massachusetts and West Virginia, the criminal code still allows local officials to command the public to assist in repressing riots.[134] And the current Pennsylvania criminal code reads that all those summoned by the Philadelphia police to help suppress a riot shall be paid one dollar a day for their efforts.[135]

In response to race riots during the 1960s and 1970s, several states and the federal government enacted anti-riot legislation.[136] The new federal anti-riot act was part of a compromise with conservative lawmakers that allowed for the passage of the 1968 Civil Rights Act.[137] It defined the crime of rioting to be a public disturbance involving an act of violence, or the threat thereof, by at least one person as part of an assemblage of three or more persons where the act would constitute "a clear and present danger" to, or result in, damage or injury to property or person.[138] The 1968 Civil Rights Act also included a chapter that defined a "civil disorder" in a manner similar to rioting and then made it an offense to block a police or a firefighter during a "civil disorder," transport a weapon to further a "civil disorder," or assist someone in making a firearm or explosive device that may be used in a "civil disorder."[139] While the federal definition of rioting inspired little mimicry by the states, several states did adopt a similar offense to the federal crime of promoting a "civil disorder," and this crime continues to be used by prosecutors.[140]

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134. *See* W. VA. CODE § 61-6-4 (2022) ("[West Virginia officials] may require the aid of a sufficient number of persons, in arms or otherwise, and proceed. . . to disperse and suppress such assemblage . . . ."); MASS. GEN. LAWS. ch. 269 § 1 (explaining that if those unlawfully assembled *do not* disperse Massachusetts officials "shall command the assistance of all persons there present in suppressing such riot or unlawful assembly and arresting such persons.").

135. *See* 53 PA. CONS. STAT. ANN. § 16622 (2022) ("Every person . . . who may be summoned, and aid and assist the said marshal in the suppression of any riot . . . shall be paid . . . the sum of one dollar for each day . . . .").

136. *See, e.g.*, 1968 Riots and Related Crimes Act, No. 302, 1968 Mich. Pub. Acts 512 (enacting Michigan anti-riot act); Act of Dec. 6, 1972, No. 334, ch. 55, 1972 Pa. Laws 1482, 1564 (enacting Pennsylvania anti-riot act); Zalman, *supra* note 23, at 911 (describing how the federal anti-riot act was enacted in response to race riots).

137. Zalman, *supra* note 23, at 912 ("The anti-riot bill functioned as a source of compromise which led to the passage of the 1968 Civil Rights Act.").

138. *See* 18 U.S.C. § 2102(a) (enacted as part of the Civil Obedience Act of 1968, Pub. L. No. 90-284, 82 Stat. 73 (1969).

139. *See* Civil Obedience Act of 1968, Pub. L. No. 90-284, 82 Stat. 73, 90–91 (1969).

140. *See, e.g.*, MO. REV. STAT. § 574.070 (2022); MONT. CODE ANN. § 45-8-109 (2021); S.C. CODE ANN. § 16-8-20 (2022); TENN. CODE ANN. § 39-17-314 (2022).

As of today, states have adopted five major approaches to defining rioting. First, eleven states do not explicitly define rioting in statute and so either use a common law definition or, in a small number of cases (e.g., Nebraska, Wisconsin, and Wyoming), do not have the crime at all.[141] Since there is no universally accepted common law definition of rioting, state courts have adopted their own from historical sources, particularly English common law and case law from their state.[142]

Second, sixteen states and Washington, D.C. have drawn on elements of the common law, particularly as exemplified by

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Federal "civil disorder" charges have been used to prosecute both racial justice protesters in 2020 and those who attacked the U.S. Capitol in 2021. Conrad Wilson, *Court Fight to Protect Racial Justice Protesters Could Benefit US Capitol Attackers,* OPB (May 7, 2021), https://www.opb.org/article/2021/05/06/civil-disorder-charges-racial-justice-protests-portland-us-capitol-attack [https://perma.cc/6ZQ6-YDYJ] (describing how, over the past year, the Justice Department had turned to the charge of "civil disorder" over 125 times against protesters).

141. Maryland, Massachusetts, Mississippi, Nebraska, New Mexico, Rhode Island, South Carolina, Vermont, West Virginia, Wisconsin, and Wyoming do not have an offense for rioting that is defined in statute. In South Carolina, West Virginia, and Vermont, legislation provides a penalty for rioting, even though the offense is not statutorily defined, and so the courts must rely on the common law. *See* S.C. CODE ANN. § 16-5-130 (2022); W. VA. CODE § 61-6-6 (2022); 13 VT. STAT. ANN., tit. 13, § 902 (2021) (providing penalties for rioting). Maryland, Mississippi, New Mexico, and Rhode Island do not reference an offense of rioting in their criminal code, but explicitly allow in statute for criminal offenses at the common law to be punished if they do not contradict the state's statutes. RACHEL M. KANE, ANNE E. MELLEY, KARL OAKES, MARRY ELLEN WEST & JUDY ZELIN, 7 MARYLAND LAW ENCYCLOPEDIA CRIMINAL LAW § 3 (2022); MISS. CODE ANN. § 99-1-3 (2022); N.M. STAT. ANN. § 30-1-3 (2022); 11 R.I. GEN. LAWS § 11-1-1 (2022). Through case law, Massachusetts also recognizes criminal common law. *See* Commonwealth v. Carter, 115 N.E.3d 559, 569 (Mass. 2019) (describing how the state recognizes criminal common law for certain offenses). Nebraska, Wyoming, and Wisconsin have explicitly abolished common law crimes through statute or case law and do not have a statutory crime of rioting. *See* State v. Ryan, 543 N.W.2d 128, 145 (Neb. 1996) (Gerrard J., dissenting) ("There are no common-law crimes in Nebraska."); WYO. STAT. ANN. § 6-1-102 (2021) (abolishing common law crimes); WISC. STAT. § 939.10 (2021) (abolishing common law crimes).

142. *See, e.g.*, Schlamp v. State 891 A.2d 327, 330 (Md. 2006) (describing the historical underpinnings of the English common law offense of rioting, and citing to an earlier Maryland Supreme Court judgement defining common law rioting); Commonwealth v. Hayes, 209 A.2d 38, 39 (Pa. Super. Ct. 1965) (citing to an earlier Pennsylvania Supreme Court decision that defines rioting, and citing to William Blackstone's definition of rioting); State v. Beasley, 317 So.2d 750, 752 (Fla. 1975) (citing to an earlier Florida Supreme Court decision that defines rioting and citing to William Hawkins).

Blackstone's *Commentaries of the Laws of England*, to adopt through statute a definition of rioting as a group that engages in "tumultuous and violent conduct."[143] There is, though, important variation within this grouping. For example, many of these acts also require that the group's tumultuous and violent conduct create a grave danger of causing "public alarm,"[144] while others require that this conduct create a danger to persons or property.[145]

Third, in eleven states, rioting is defined, in part, as a group that engages in "force or violence."[146] Again though, there is significant variation, with many states also defining rioting as the "threat of force or violence" if "accompanied by immediate power of execution."[147] Some require that this conduct disturb the public peace[148] and others require that it violate the law.[149]

Fourth, six states have based their rioting provision on the 1962 Model Penal Code, which defines rioting as multiple people engaging in "disorderly conduct" with the intent to commit a crime.[150]

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143. ALA. CODE § 13A-11-3 (2022); ALASKA STAT. § 11.61.100 (2021); ARK. CODE ANN. § 5-71-201 (2021); COLO. REV. STAT. § 18.9-101(2) (2021); CONN. GEN. STAT. § 53a-175 (2022); D.C. CODE § 22-1322 (2022); GA. CODE ANN. § 16-11-30 (2022); IND. CODE ANN. § 35-45-2 (2022); KY. REV. STAT. ANN. § 525.010(5) (West 2022); LA. REV. STAT. ANN. § 14:329.1 (2022); N.H. REV. STAT. ANN. § 644.1 (2022); NEV. REV. STAT. § 203.020 (2021); N.Y. PENAL LAW §§ 240.05–240.06 (Consol. 2022); N.D. CENT. CODE § 12.1-25-01 (2021); OR. REV. STAT. § 166.015 (2021); TENN. CODE ANN. § 39-17-301(3) (2022); UTAH CODE ANN. § 76-9-101 (West 2022).

144. *See, e.g.*, CONN. GEN. STAT. § 53a-175 (2021); N.H. REV. STAT. ANN. § 644.1 (2022).

145. *See, e.g.*, KY. REV. STAT. ANN. § 525.010(5) (West 2022); D.C. CODE § 22-1322 (2022).

146. ARIZ. REV. STAT. ANN. § 13-2903 (2022); CAL. PENAL CODE § 404(a) (West 2022); IDAHO CODE ANN. § 18-6401 (2022); 720 ILL. COMP. STAT. § 25.1(a)(1) (West 2022) (criminalizing "mob action" instead of "rioting"); IOWA CODE § 723.1 (2022); KAN. STAT. ANN. § 21-6201(a) (2022); MINN. STAT. § 609.71 (2021); MO. REV. STAT. § 574.050 (2022); OKLA. STAT. tit. 21 § 1311 (2022); S.D. CODIFIED LAWS § 22-10-1 (2022); VA. CODE ANN. § 1 8.2-405 (2022).

147. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-2903 (2022); CAL. PENAL CODE § 404(a) (West 2022); IDAHO CODE ANN. § 18-6401 (2022); OKLA. STAT. tit. 21 § 1311 (2022); S.D. CODIFIED LAWS § 22-10-1 (2022).

148. *See, e.g.*, 720 ILL. COMP. STAT. § 25.1(a)(1) (West 2022); KAN. STAT. ANN. § 21-6201(a)(1) (2022).

149. *See, e.g.*, IOWA CODE § 723.1 (2022); MO. REV. STAT. § 574.050 (2022).

150. *Compare* MODEL PENAL CODE § 250.1 Riot (AM. L. INST., 2021), *with* DEL. CODE ANN. tit. 11, § 1302 (2022); HAW. REV. STAT. § 711-1103 (2022); ME. REV. STAT. ANN. tit. 17A, § 503 (West 2021); N.J. STAT. ANN. § 2C:33-1 (2022); OHIO REV. CODE ANN. § 2917.03 (LexisNexis 2022); 18 PA. CONS. STAT. ANN.

Finally, another six states have a hodge-podge of definitions but generally require a group engage in "violence" or its threat.[151]

Despite these five categories, the definitions of rioting adopted by different jurisdictions tend to have similar component parts. First, all rioting offenses in the U.S. require that a riot involve a group of persons. The minimum size of that group varies by state from two to eight.[152] Second, in general, anti-riot acts require that at least someone in the group engage in violent conduct, create the threat of violence, or undertake an unlawful act of some kind, like disorderly conduct.[153] For some states, only these two steps are required for a rioting conviction.[154] However, most states require a third step, which is that this group have some harmful or deleterious effect or that those involved have the intent or purpose to have a harmful effect. For example, that the group risks disturbing the public peace or creating public alarm, or that members of the group intend to violate the law.[155]

In an era of professionalized law enforcement, it is now less common for anti-riot legislation to require the public to respond to riots, or to penalize local officials for not personally suppressing a riot. If local law enforcement requires additional assistance

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§ 5501 (2022). For a critique of "disorderly conduct," as a criminal offense, see Jamelia Morgan, *Rethinking Disorderly Conduct*, 109 CALIF. L. REV. 1637, 1693–95 (2021) (calling for the abolition of the offense of "disorderly conduct" in part because it provides law enforcement too much discretion to arrest individuals for behavior that might be considered disruptive of the public peace).

151. *See* FLA. STAT. § 870.01 (2021); MICH. COMP. LAWS § 752.541 (2022); MONT. CODE ANN. § 45-8-103 (2021); N.C. GEN. STAT. § 14-288.2(a) (2022); TEX. PENAL CODE ANN. § 42.02 (West 2021); WASH. REV. CODE § 9A.84.010 (West 2022) (defining an offense of "criminal mischief" that is similar to rioting).

152. For example, 720 ILL. COMP. STAT. § 25.1 (West 2022) requires only two persons to participate in a "mob action" while TEX. PENAL CODE § 42.02 requires that a person knowingly participate with seven or more persons in a riot.

153. An exception to the requirement that a riot require violence is Texas where the definition of riot includes a group that "substantially obstructs law enforcement of other government functions or services." TEX. PENAL CODE ANN. § 42.02 (West 2021).

154. For example, in Georgia, rioting is defined quite simply as: "Any two or more persons who shall do an unlawful act of violence or any other act in a violent and tumultuous manner . . . ." GA. CODE ANN. § 16-11-30 (2022).

155. *See*, *e.g.*, ARIZ. REV. STAT. ANN. § 13-2903 (2022) (requiring that the group "disturb the public peace"); ALA. CODE § 13A-11-3 (2022) (requiring the group create grave risk of creating "public terror or alarm"); HAW. REV. STAT. § 711-1103 (2022) (requiring that members of the group intend to commit a felony, or use or intend to use a firearm or other dangerous instrument).

to address a riot, a governor can declare an emergency and call in the National Guard.[156] Emergency powers in different states can also trigger a range of other powers that have been used during riots, such as declaring curfews[157] or suspending the sale of alcohol or firearms.[158] Declaring a riot may also empower law enforcement to use certain tactics. For example, it is common for it to be a crime to remain at the scene of a riot or unlawful assembly if ordered to disperse by law enforcement.[159] And in 2020, the state of Oregon enacted legislation that banned law enforcement from using tear gas "except in circumstances constituting a riot."[160]

Rioting laws continue to evolve. After the national protests for racial justice in 2020, at least six bills have been enacted that modify rioting offenses.[161] These new laws include increased felony penalties for rioting and incitement to riot,[162] expanded definitions of rioting and aggravated rioting,[163] mandatory mini-

156. Statutes for empowering governors to declare an emergency sometimes explicitly invoke riots. For example, Massachusetts's Civil Defense Act of 1950 allows the Governor to declare an emergency for the "Civil Defense" of the state, which includes responding to riots. Civil Defense Act of 1950, ch. 639, § 1, 1950 Mass. Acts. Ch. 521, 522.

157. A. Kenneth Pye & Cym H. Lowell, *The Criminal Process During Civil Disorders*, *Part II,* 1975 DUKE L.J. 1021, 1037 (1975) (describing how once a state of emergency exists, it is common for officials to be able to declare a curfew).

158. *Id*. at 1024 (describing how once a state of emergency exists, it is common for officials to be able to suspend the sale of alcohol or firearms). Some states also have more liberal rules for searching homes. *See* Note, *Riot Control and the Fourth Amendment*, 81 HARV. L. REV. 625 (1968) (describing a house-to-house search for firearms in Plainfield, New Jersey by the National Guard and local law enforcement, without warrants, but acting under authority of the Governor's emergency declaration after riots in Newark).

159. *See, e.g.*, COLO. REV. STAT. § 18-9-105 (2021); CAL. PENAL CODE § 409 (West 2022).

160. *See* H.B. 4208, 80th Or. Legis. Assemb., Spec. Sess. (Or. 2020). Washington state enacted similar legislation in 2021 that restricted the use of tear gas to riots, hostage situations, and barricaded subjects. H.B. 1054 § 4, 67th Leg., Reg. Sess. (Wash. 2021).

161. ICNL Tracker, *supra* note 8 (searching by issue "riot" and date between July 1, 2020 and Nov. 1, 2021).

162. *See* H.B. 1 § 15, 2021 Leg., 123d Sess. (Fla. 2021); S.B. 451 § 1, 112th Gen. Assemb. (Tenn. 2021).

163. *See* H.B. 1 § 15, 2021 Leg., 123d Sess. (Fla. 2021); S.B. 451 § 1, 112th Gen. Assemb. (Tenn. 2021). For a short analysis of these laws, see ICNL Tracker, *supra* note 8.

mum sentences for rioting,[164] requirements that those convicted of rioting or inciting a riot pay restitution for damage caused during a riot,[165] and explicit liability protections for those who hit "rioters" with their vehicle or otherwise injure or kill them.[166] As will be discussed in the next Part, this latest wave of anti-riot legislation has generated renewed concern about how overbroad and highly punitive anti-rioting measures can chill the right to peaceful assembly.[167]

III. A CRITIQUE OF ANTI-RIOT LEGAL MEASURES

The first Section of this Part argues that rioting laws are unnecessary because the core conduct involved in rioting is already illegal under other law. The second Section describes how the crimes of rioting and incitement to riot not only outlaw this core conduct but frequently expand criminal liability in an overbroad and vague manner that can chill protected speech and provide law enforcement and prosecutors wide discretion. The third Section details how this discretion has been used to target protesters and others in a seemingly politicized and racialized manner.

A. UNNECESSARY

The core conduct that the offense of rioting is designed to combat—group violence against persons or property—is already illegal.[168] It is unlawful for an individual to commit assault or battery, or destroy property whether or not they are part of a group.[169] It is also illegal to engage in a variety of other types of

164. *See* H.B. 1508 § 7, 93d Gen. Assemb., Reg. Sess. (Ark. 2021) (explaining that initiating riot is always a class A misdemeanor at the very least.

165. *See* H.B. 1508 § 7, 93d Gen. Assemb., Reg. Sess. (Ark. 2021); H.B. 1674 § 3, 58th Leg., Reg. Sess. (Okla. 2021); S.B. 5 § 13, 111th Gen. Assemb., 2d Sess. (Tenn. 2020).

166. *See* H.B. 1 § 18, 2021 Leg., 123d Sess. (Fla. 2021); S. FILE 342 § 51, 89th 2021 Gen. Assemb. (Iowa 2021); H.B. 1674 § 2, 58th Leg., Reg. Sess. (Okla. 2021).

167. *See* Ashcroft v. Free Speech Coal., 535 U.S. 234, 255 (2002) ("The overbreadth doctrine prohibits the Government from banning unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process.").

168. For example, the California Penal Code criminalizes a variety of crimes against the person and against property. CAL. PENAL CODE §§ 25–653 (West 2022).

169. *See, e.g.*, CAL. PENAL CODE §§ 240–48, 594 (West 2022).

conduct associated with rioting, including trespass, larceny, arson, unlawfully obstructing roadways, or failure to obey police orders (including a failure to disperse order).[170] As such, the underlying conduct that is of primary concern in rioting is already criminalized, making the crime of rioting duplicative and so seemingly unnecessary to deter or punish it.

The crime of incitement to riot is partly duplicated by other criminal law. For example, it is already a crime to "attempt," "solicit," or "conspire" in unlawful violence or "aid and abet" someone to engage in unlawful violence or be an "accomplice."[171] That said, the core offense of incitement, encouraging or urging someone to commit a crime, is arguably broader than these other crimes and encompasses different conduct. However, this broader scope is also where incitement runs directly into First Amendment concerns. As will be discussed in Section B.3 of this Part, federal jurisprudence has recently interpreted incitement to riot quite narrowly, finding merely "encouraging" or "urging" others to riot is constitutionally protected speech.[172] As such, the crime of incitement to riot either replicates existing law or expands it in a manner that is arguably largely unconstitutional.

In this way, anti-rioting offenses seem both duplicative of existing law and unnecessary to discourage or quell riots. Indeed, at least three states do not have the offense of rioting at all, and over half do not have the crime of incitement to riot.[173] As discussed in the Introduction, perhaps the most meticulously prosecuted riot in recent memory—the storming of the U.S. Capitol on January 6, 2021—has so far led to no rioting or incitement

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170. *See, e.g.*, CAL. PENAL CODE §§ 552–58, 484, 502, 450–57, 647, 416 (West 2022).

171. Richard Schmechel, Exec. Dire., *Testimony for the October 15, 2020 Hearing on B23-0723, the "Rioting Modernization Amendment Act of 2020*," D.C. CRIM. CODE REFORM COMM'N 7, 28 (Oct. 15, 2020), https://ccrc.dc.gov/sites/default/files/dc/sites/ccrc/publication/attachments/Written-Testimony-for-October-15-2020-Hearing-on-B23-0723-Rioting-and-B23-0882-Comprehensive-Policing-and-Justice-Reform.pdf [https://perma.cc/UX3D-KYXE] (arguing that an incitement to riot offense is unnecessary in Washington D.C. because other parts of the criminal law, including "aiding and abetting" and "conspiracy," already cover activity that incitement to riot is attempting to criminalize).

172. *See infra* Part III.B.3 (describing recent federal court decisions reading down the federal offense of "incitement to riot").

173. For a discussion of which states do and do not have rioting offenses, see *supra* note 141. *See supra* note 129 for a list of states with the offense of incitement to riot.

to riot charges, despite resulting in the prosecution of hundreds of individuals, many for serious crimes.[174]

There is little evidence that the crimes of rioting or incitement to riot actually deter rioting or provide law enforcement with tools needed to stop it. While there is poor historical data on incidents of rioting, in analyzing data compiled by the Armed conflict Location & Event Data Project (ACLED) for 2020 and 2021, there was not substantially more or less rioting in the three states without the offense of rioting than in other states.[175] Further, few have argued that the presence or absence of these anti-rioting offenses is responsible for the decline in rioting that was witnessed in the twentieth century.[176] And major studies on how to best control rioting in the future, like the Report of the National Advisory Commissions on Civil Disorders, published at the behest of President Johnson after the race riots of the 1960s, do not focus on calling for stronger rioting offenses.[177]

Importantly, unlike when rioting laws were first adopted in England and the United States, law enforcement today has much more capability to respond to riots, including the ability to

174. *See Capitol Breach Cases*, *supra* note 34.

175. ACLED documented 1,023 incidents of rioting in the United States between Jan. 1, 2020 and Jan. 1, 2022. Wisconsin is 1.76% of the population and made up 2% of rioting incidents in this period (twenty-one cases). Nebraska is 0.59% of the population and made up 0.68% of rioting in this period (seven cases). Wyoming is 0.17% of the population and made up 0% of rioting in this period (zero cases). *Data Export Tool*, ACLED, https://acleddata.com/data-export-tool [https://perma.cc/GKD7-UFDU] (data and analysis on file with author).

176. *See supra* Part 1.A (discussing other proposed reasons for the decline in riots and violence at riots in the twentieth century and noting that stronger rioting laws are not commonly proposed as a reason for this decline).

177. *See* OTTO KERNER, JOHN V. LINDSAY, FRED R. HARRIS, I.W. ABEL, EDWARD W. BROOKE, CHARLES B. THORNTON, JAMES C. CORMAN, ROY WILKINS, WILLIAM M. MCCULLOCH, KATHERINE GRAHAM PEDEN & HERBERT JENKINS, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 230–31 (1968) (recommending expansion of socioeconomic opportunities as a cure to rioting, not stronger anti-riot laws); A. Kenneth Pye & Cym H. Lowell, *The Criminal Process During Civil Disorders*, *Part I*, 1975 DUKE L.J. 581, 595–97 (1975) (critiquing the Riot Commission for proposing an approach to rioting that treats individuals involved in rioting as part of the normal criminal justice system and calling for stronger tools to restore order, but also not emphasizing the need for stronger rioting or incitement to riot laws).

rapidly call in reinforcements.[178] It also has more modern policing tools, such as access to video footage of violence or property destruction, that allow it to more easily assign individual culpability either in the moment or after the fact.[179] Under their most charitable reading, broad rioting laws allow law enforcement to cast a wide net of culpability in an attempt to deter rioting and ensure all those involved in a riot are punished.[180] But given the current context of modern policing, they have even less justification today than in the past.[181]

B. THE DANGER OF EXPANDED CRIMINAL LIABILITY

Though the core offense of rioting is already illegal, rioting is usually not just a type of penalty enhancement but often creates new types of criminal liability. These new types of liability can capture, or chill, peaceful protest. In particular, there are three common, although by no means universal, features of anti-riot legal measures that can capture those who do not engage in violence, namely by: (1) creating liability for persons who are only part of a crowd that is deemed a riot; (2) defining rioting to include conduct that is merely threatening; and (3) criminalizing inciting others to engage in a riot. This Section addresses the dangers of each of these in turn.

1. Being Part of the Crowd

Riots, or group violence, can be difficult for law enforcement and other authorities to control. As such, many rioting offenses

178. During unrest resulting from the police killing of George Floyd in 2020, law enforcement agencies relied on mutual aid agreements with nearby agencies, and governors called in the National Guard in at least twenty-four states. Alexandra Sternlicht, *Over 4,400 Arrests, 62,000 National Guard Troops Deployed: George Floyd Protests by the Numbers*, FORBES (June 2, 2020), https://www.forbes.com/sites/alexandrasternlicht/2020/06/02/over-4400-arrests-62000-national-guard-troops-deployed-george-floyd-protests-by-the-numbers/?sh=318b7732d4fe [https://perma.cc/FQ5E-T2AA].

179. David Henderson, Opinion, *It's Time to Challenge America's Repressive Anti-Riot Laws*, WASH. POST (July 16, 2020), https://www.washingtonpost.com/opinions/2020/07/16/its-time-challenge-americas-repressive-anti-riot-laws [https://perma.cc/YK59-4HD7] ("[Police officers] can—and often do—exaggerate the circumstances, giving them wide latitude to arrest nonviolent protesters.").

180. *Id.*

181. For a similar argument about eliminating certain unlawful assembly laws, see John Inazu, *Unlawful Assembly as Social Control*, 64 UCLA L. REV. 2, 47–49 (2017) (calling for reconsideration of criminalization of inchoate activity found in many unlawful assembly statutes that were in place out of a fear local law enforcement would be overrun).

criminalize being part of a group that is rioting to encourage those at a riot to disperse. At first, this requirement may not seem unreasonable as the government certainly has an interest in breaking up a gathering where there is widespread group violence. However, in practice, it can often be difficult for an individual to know if they are taking part in a boisterous nonviolent protest, a largely peaceful protest with isolated violence, or a gathering with pervasive violence. This challenge is made more difficult because case law has repeatedly found that law enforcement does not need to first order a crowd to disperse before a person can be found to be part of a riot.[182] As such, a broad interpretation of rioting can leave those in a crowd confused about their potential criminal liability. It also provides law enforcement extensive leeway to designate a gathering or protest a riot and engage in mass arrests for rioting, even if there is only isolated property destruction or violence (or just its threat).[183]

Historically, many states have adopted the position that one can be convicted of rioting for being part of a larger group that is rioting whether or not one is engaged in violence or property destruction oneself.[184] For example, in 1917, in *Commonwealth v. Merrick*, the Superior Court of Pennsylvania articulated the common law principle that if there is a riot, one has to leave or

182. Commonwealth v. Frishman, 120 N.E. 838, 840 (Mass. 1920) ("It was not necessary to [a] convic[tion] [for rioting] to prove that the persons who took part in the parade were commanded to disperse . . . ."); Chapman v. State, 516 S.W.2d 598, 602 (Ark. 1974) (finding that the failure of law enforcement officials to order a crowd of over 200 Black persons to disperse did not convert a riot into a lawful assembly); Carr v. District of Columbia, 587 F.3d 401, 409 (D.C. Cir. 2009) ("[W]e disagree with plaintiffs (and the district court) that the police could not lawfully complete the mass arrest [for rioting] without first ordering the crowd to disperse and then giving plaintiffs an opportunity to comply.").

183. *See* Meryl Kornfield, Austin B. Ramsey, Jacob Wallace, Christopher Casey & Veronica Del Valle, *Swept Up by Police*, WASH. POST (Oct. 23, 2020), https://www.washingtonpost.com/graphics/2020/investigations/george-floyd-protesters-arrests/ [https://perma.cc/44RK-3ZJY] (describing how after the 2020 racial justice protests, a number of protesters sued for wrongful arrest and claimed that "police are using anti-rioting laws to restrict free speech").

184. *See, e.g.*, WHARTON, *supra* note 115, at 345 (finding that if one is present at a riot and not actively suppressing it then it is prima facie inferred that one is participating); State v. Albert 184 S.E.2d 605, 608–09 (S.C. 1971) ("It has been held that a participant in a riot in which acts of violence are committed may be held criminally liable even though he is not identified as one of those committing the violent acts.").

resist in its suppression or one is prima facie considered a rioter.[185]

For example, in North Dakota, one is guilty of rioting if one "engages" in a riot whether or not one actually engages in violent conduct oneself.[186] While in South Carolina, one can be guilty of rioting by being "personally present" at a riot.[187]

That said, other states take a different approach, making clear that the prosecutor has to demonstrate the defendant was not just present at a riot but personally engaged in criminal or violent conduct. For example, in Hawaii, to be convicted of rioting a person needs to engage in disorderly conduct and have the intent to commit or facilitate a felony.[188] While in states like New York and Oregon, one has to personally engage in "tumultuous and violent conduct" not just be part of a gathering in which some are engaging in such conduct.[189]

In several states, those engaged in rioting have to act in concert.[190] This has also been read into some state common law interpretations of rioting.[191] For example, in South Dakota, the offense of rioting requires that one must "act[] together and without authority of law" with three other persons to cause injury or damage to property.[192] That said, a common purpose has

185. Commonwealth v. Merrick, 65 Pa. Super. 482, 490 (Pa. Super. Ct. 1917) ("[I]n riotous and tumultuous assemblies all persons who are present and not actually assisting in their suppression where their presence is intentional, and where it tends to the encouragement of the rioters, are prima facie inferred to be participants . . . ."); *see also* Commonwealth v. Hayes (1965) 209 A.2d 38, 38 (Pa. Super Ct. 1965) (reiterating the rule that those "voluntarily present and not assisting in [the] suppression of [a] riot, where their presence tends to encourage the rioters, shall be prima facie inferred to be participants").

186. *See* N.D. CENT. CODE § 12.1–25-01 (2021).

187. *See* S.C. CODE ANN. § 16-8-20 (2022).

188. *See* HAW. REV. STAT. § 711-1103 (2022).

189. *See* OR. REV. STAT. § 11.015 (2021); N.Y. PENAL LAW § 240.06 (Consol. 2022)*; see also*, People v. Morales, 601 N.Y.S.2d 261, 263 (N.Y. Crim. Ct. 1993) (dismissing the charge of rioting against defendant because the New York riot law requires that an individual must actually engage in tumultuous and violent conduct themselves).

190. Several states require that those in a riot act together. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-2903 (2022); CAL. PENAL CODE § 404 (West 2022); IDAHO CODE ANN. § 18-6401 (2022); OKLA. STAT. tit. 21 § 1311 (2022).

191. *See* Commonwealth v. Frishman, 126 N.E. 838, 839 (Mass. 1920) (finding that to be convicted of rioting under the common law, one does not have to engage in violence, but act in "concert" with others to accomplish an unlawful purpose).

192. S.D. CODIFIED LAWS § 22-10-1 (2022).

sometimes been interpreted broadly by courts. In one striking example, in 1920, the Supreme Judicial Court of Massachusetts found that some fifteen hundred men, women, and children could be convicted of rioting because they participated in an unpermitted protest promoting socialism, chanted similar slogans, waved red flags, and so shared a "common purpose."[193]

Broad anti-riot acts not only allow people to be convicted of rioting for being part of a larger group that engages in riotous conduct, but can also allow law enforcement to engage in mass arrests, including of peaceful protesters, as they must only meet a probable cause standard.[194] For example, as described in the Introduction, Representative Attica Scott was arrested in 2020 for felony rioting after someone in a crowd she was near threw a flare into a public library.[195] In Dallas, Texas, three women sued the city for wrongful arrest for rioting after police swept them up with other racial justice protesters in 2020—the women claimed the police simply did not like their Black Lives Matter signs.[196] Unfortunately, courts have upheld broad readings of anti-riot acts by law enforcement. For instance, in 2009, the D.C. Circuit found that police had probable cause to arrest for rioting a group of dozens of demonstrators protesting President George W. Bush's second inauguration where some had engaged in property destruction.[197] The Court held that the police had reasonable belief to arrest all members of the crowd because the protesters operated as a "unit,"[198] and so individualized probable cause was unnecessary.[199]

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193. *See Frishman*, 126 N.E. at 839–40 (1920) (finding that similar flags, slogans, and singing within a group constituted a "procession or parade" and so all who participated had "a common purpose by force and violence to march and parade on a public street without permission and in violation of law.").

194. *See* Thomas K. Clancy, *What Constitutes an "Arrest" Within the Meaning of the Fourth Amendment?*, 48 VILL. L. REV. 129, 141–66, 174–80 (2003) (providing an overview of the jurisprudence defining probable cause for an arrest).

195. *See* Joseph, *supra* note 1.

196. *See* Robinson, *supra* note 5 (describing arrest of Texas protesters).

197. *See* Carr v. District of Columbia, 587 F.3d 401, 403–04 (D.C. Cir. 2009) (describing the context of the mass arrest for rioting).

198. *Id.* at 408 ("Police witnesses must only be able to form a reasonable belief that the entire crowd is acting as a unit and therefore all members of the crowd violated the law.").

199. *Id.* at 413 (Griffith, J., concurring) ("Not only does the majority avoid . . . calling for particularized probable cause that the arrested person committed a crime, but it flatly rejects that standard in this case.").

These broad provisions for rioting that do not require individualized criminal conduct can also make it easier for prosecutors to bring charges related to rioting. For example, over two hundred protesters were arrested during demonstrations over President Trump's inauguration on January 20, 2017, after a handful of protesters had engaged in property destruction.[200] The members of the group were charged with felony rioting, conspiracy to riot, and aiding and abetting a riot.[201] In September 2017, a D.C. Superior Court judge rejected a motion to dismiss and found that, based on a theory of conspiracy, charges could go forward against the defendants even though the indictment did not cite any specific plan to engage in a riot or attribute specific acts of violence to individuals.[202] Instead, the Assistant U.S. Attorney cited protesters' collective chanting and wearing of similar clothing as evidence of collective action and a conspiracy to riot.[203]

Riot provisions that can be used to create liability for protesters who do not personally engage in violence or property destruction raise clear First Amendment concerns. In particular, such a broadly worded offense can be a form of unconstitutional guilt by association. In *NAACP v. Claiborne Hardware*, the Supreme Court found that "[c]ivil liability may not be imposed merely because an individual belonged to a group, some members of which committed acts of violence. For liability to be imposed by reason of association alone, it is necessary to establish that the group itself possessed unlawful goals and that the individual held a specific intent to further those illegal aims."[204] Further, some anti-rioting provisions are so vague that they could

200. Sam Adler-Bell, *With Last Charges Against J20 Protesters Dropped, Defendants Seek Accountability for Prosecutors*, INTERCEPT (July 13, 2018), https://theintercept.com/2018/07/13/j20-charges-dropped-prosecutorial-misconduct [https://perma.cc/MAV6-EHUU].

201. Rachel Kurzius, *Judge Denies Motions to Dismiss Rioting Charges Against Inauguration Day Protesters*, DCIST (Sept. 14, 2017), https://dcist.com/story/17/09/15/judge-denies-motions-to-dismiss-rio [https://perma.cc/9WSP-6Y7D].

202. *See* Order Denying Motion to Dismiss at 10–11, United States v. Mielke, 2017 CF2 001149 (D.C. Super. Ct. Sept. 14, 2017).

203. *See* Indictment at 23, 29, United States v. Jaffe, 2017 CF2 00147 (D.C. Super. Ct. Apr. 3, 2017) (describing indictment for rioting of all named defendants in part because they wore the same black clothing and cheered "Whose Streets, Our Streets" after destruction of property). After an initial group of the demonstrators were acquitted by a jury in 2018, prosecutors later dropped all charges. Adler-Bell, *supra* note 200.

204. NAACP v. Claiborne Hardware, 458 U.S. 886, 920 (1982).

potentially be challenged on their face for overbreadth for creating a type of guilt by association and chilling the freedom of assembly.[205]

Indeed, courts have, at times, expressed skepticism toward the claim that simply being part of a group at a riot can make one liable for rioting.[206] For example, in April 2021, Florida enacted a new definition of rioting that criminalizes someone who "willfully participates in a violent public disturbance involving an assembly of three or more persons, acting with a common intent to assist each other in violent and disorderly conduct" that results in injury, property damage, or the imminent danger thereof.[207] In September 2021, a federal district court temporarily enjoined enforcement of this definition of rioting, finding that what "willfully participates" in a "violent public disturbance" meant was unconstitutionally vague and could "criminalize mere presence and nothing more."[208]

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205. That said, vagueness challenges have traditionally been unsuccessful against rioting definitions. *See, e.g.*, United States v. Jeffries, 45 F.R.D. 110, 116 (D.D.C. 1968) (rejecting a constitutional vagueness challenge to the Washington D.C. anti-riot act finding that it was "narrowly drawn and limited so as to define and punish specific conduct."); State v. Ayers, 260 A.2d 162, 167 (Del. 1969) (dismissing a facial constitutional challenge for vagueness to the state's rioting offense, which is based on the Model Penal Code, by reading it down to apply only to disorderly conduct "which reasonably may be considered to inflame a crowd to riot and destroy."); Douglas v. Pitcher, 319 F. Supp. 706, 706 (E.D. La. 1970) (upholding Louisiana's anti-riot act against charges of vagueness after it was applied against protesters of a police officer shooting that killed a Black man); State v. Beasley, 317 So. 2d 750 (Fla. 1975) (rejecting a constitutional vagueness challenge to the common law definition of riot used in Florida). *But see* Dream Defenders v. DeSantis, 559 F. Supp. 3d 1238, 1279–82 (N.D. Fla. 2021) (finding merit to vagueness challenge against new Florida rioting definition).

206. *See, e.g.*, United States v. Matthews, 419 F.2d 1177, 1185 (D.C. Cir. 1969) (finding under Washington D.C.'s riot act that "the requirement that . . . members of the assemblage must have engaged in such a public disturbance willfully" means that they "participated in the public disturbance on purpose, that is, that each knowingly and intentionally engaged in tumultuous and violent conduct consciously, voluntarily and not inadvertently or accidentally"); *Douglas*, 319 F. Supp. at 711 (dismissing a constitutional challenge to Louisiana's riot act, but noting that it was reasonable to assume Louisiana courts would require more than mere presence to convict a person of rioting in order to protect constitutional rights).

207. H.B. 1 § 15, 2021 Leg., 123d Sess. (Fla. 2021).

208. *Dream Defenders*, 559 F. Supp. 3d at 1283 (noting that under the law it was "unclear" what it meant to "participate" in a violent public disturbance and so can criminalize protected "expressive activity" like remaining at the "scene of a protest turned violent to film the police reaction").

Still, even where courts have required something more than "mere presence" to be convicted of rioting,[209] it is far too easy for the government to claim that a protester was engaging in a riot because they were perceived to support those who engage in property destruction or violence because they were part of the same demonstration.[210] Further, whether or not the government actually arrests protesters, the fear of arrest or prosecution based on these broad rioting definitions can easily chill the First Amendment rights of nonviolent demonstrators.[211]

2. The Threat of Violence

Given concern over the potential violence of crowds, it is common for anti-riot laws to create criminal liability for conduct that does not result in physical harm or property damage but rather just its threat.[212] Yet, nonviolent protests are often rambunctious and confrontational, and so definitions of rioting that include merely the threat of violence or property destruction can provide law enforcement wide latitude to arrest peaceful protesters and create confusion for demonstrators.

In many states, rioting does not explicitly require violent conduct but rather only the threat of force or violence or just "tumultuous" conduct.[213] In other states, "violent and tumultuous"

209. *Id.*

210. *Matthews*, 419 F.2d at 1193 (Wright, J., dissenting) (finding that the "majority's requirement that a person 'aid or encourage' the violence . . . offers no substantial guarantee of protection to an innocent, non-violent participant in the demonstration.").

211. NAACP v. Button, 371 U.S. 415, 433 (1963) ("The threat of sanctions may deter their exercise [of First Amendment freedoms] almost as potently as the actual application of sanctions.").

212. Indeed, as one court found "[p]ersonal injury or violence to any individual or damage to property is not an essential element of the crime of riot." Commonwealth v. Hayes, 209 A.2d 38, 41 (Pa. Super. Ct. 1965). That said, many traditional common law interpretations required that members of a crowd engage in violence. *See* BLACKSTONE, *supra* note 101, at 146 ("A riot is where three or more actually do an unlawful act of violence.").

213. *See, e.g.*, ARK. CODE ANN. § 5-71-201 (2021) (defining a riot to include engaging in "tumultuous or violent conduct"); CAL. PENAL CODE § 404 (West 2022) (defining rioting to include "any threat to use force or violence, if accompanied by immediate power of execution"); D.C. CODE § 22-1322 (2022) (defining rioting to include "tumultuous and violent conduct or the threat thereof [that] creates grave danger of damage or injury to property or persons").

conduct has been interpreted to include "threatening" conduct.[214] For example, the Oregon Supreme Court found that "[g]iving the [anti-riot] statute a fair reading in the light of the common definitions of the terms of 'tumultuous,' 'violent,' and 'conduct', we conclude that the statute refers to physical activity that reasonably is perceived by others as threatening an imminent breach of the peace."[215] Meanwhile, a New York state court interpreted "tumultuous and violent conduct"[216] in the state's riot statute to include conduct that is "designed to connote frightening mob behavior involving ominous threats of injury, stone throwing or other such terrorizing acts."[217] These types of interpretations, though, lead to malleable readings of what constitutes "violent and tumultuous conduct" that can create criminal liability for rioting even when there is not actual violence but instead just conduct that is perceived to create the danger of violence.

Historically, there have been numerous instances of persons being convicted for rioting for conduct that involved no actual violence or property destruction.[218] For example, in 1954, workers in a labor dispute in Ohio were initially convicted of rioting for blocking a road and refusing to disperse. The court found that, even though there was no violent conduct that day, because several in the group or "their sympathizers and confederates" had engaged in violence and property destruction earlier in the week, this created the danger of violence.[219] More recently, an activist that opposed the construction of the Dakota Access pipeline in 2017 was convicted for rioting for engaging in passive re-

214. *See, e.g.*, McMahon, *supra* note 10 (providing an expansive cataloguing of state court judgments that interpreted what type of force, violence, or terrorizing conduct were necessary for rioting).

215. State v. Chakerian, 938 P.2d 756, 760 (Or. 1997).

216. N.Y. PENAL LAW § 240.08 (Consol. 2022).

217. People v. Winston, 314 N.Y.S.2d 489, 493 (Monroe Cnty Ct. 1970).

218. *See, e.g.*, State v. Woolridge, 40 S.E.2d 899, 912–14 (W. Va. 1946) (overturning a conviction for rioting that resulted from conflict between dueling union organizers because "no blows were struck", no one was injured, and the battle was largely confined to words even though they did not disperse when commanded by police.); State v. Albert, 184 S.E.2d 605, 609 (S.C. 1971) (upholding conviction for rioting of armed student demonstrators who took over library administration building although no one was injured and no property damaged).

219. The conviction was reversed on appeal. State v Smith, 121 N.E.2d 199, 201 (Ohio Ct. App. 1954).

sistance by locking arms with other protesters when police attempted to arrest them.[220] The government argued that by locking arms the protesters "create[d] a risk of injury" to law enforcement or fellow protesters when the police had to pull them apart, although the activist's conviction was later overturned.[221]

Despite some states having a permissive definition of rioting that allows for rioting without actual violence, legislators, courts, and prosecutors have at other times set a higher bar. For example, some states' anti-riot statutes require actual force or violence (not just its threat),[222] some courts have interpreted common law definitions of rioting to require actual violence,[223] and other courts have interpreted statutory requirements for "violent and tumultuous" conduct to require actual violence, not merely its threat.[224] In many cases, anti-riot acts also qualify what types of threats of violence constitute rioting. For example, Arizona, California, and Oklahoma require that any threat of force or violence be accompanied by "immediate power of execution."[225]

The Supreme Court's constitutional jurisprudence has created dueling standards for which types of threatening conduct at a gathering may be constitutionally protected and which may

220. State v. Bearrunner, 921 N.W.2d 894, 895 (N.D. 2019).

221. Brief of the Appellee at 16, *Bearrunner*, 921 N.W.2d 894 (N.D. 2019). (No.30-2017-CR-00251) (2018), https://www.ndcourts.gov/supreme-court/dockets/20180258 [https://perma.cc/VY5T-RKCV]. The North Dakota Supreme Court later overturned the conviction. *Bearrunner*, 921 N.W.2d at 898 ("Bearrunner's act of locking arms and resisting arrest with other protesters does not rise to the commonly understood definition of violence. Here, it was law enforcement that was required to use force to overcome the protesters' non-compliance.").

222. *See, e.g.,* 720 ILL. COMP. STAT. § 25.1 (West 2022); IOWA CODE § 723.1 (2022).

223. *See, e.g.*, Heard v. Rizzo, 281 F. Supp. 720, 739–40 (E.D. Pa. 1968), *aff'd mem.*, 392 U.S. 646 (1968) (finding that the common law interpretation of rioting in Pennsylvania required persons to engage in an act of violence and to be acting with common intent).

224. *See, e.g.*, Carmichael v. Allen, 267 F. Supp. 985, 996 n.10a (N.D. Ga. 1967) (finding in interpreting "violent and tumultuous conduct" in the Georgia riot statute that the Georgia act "has been limited by several holdings of the Georgia courts solely to acts of violence by two or more persons acting in concert").

225. *See* ARIZ. REV. STAT. ANN. § 13-2903 (2022); CAL. PENAL CODE § 404 (West 2022); OKLA. STAT. tit. 21 § 1311 (2022).

not.[226] In *Cantwell v. Connecticut*, the U.S. Supreme Court in 1940 observed that "[w]hen clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order, appears, the power of the state to prevent or punish is obvious."[227] This is one of the most explicit invocations by the Supreme Court of the state's ability to address the threat of a riot. However, today, courts rarely use the "clear and present danger" test[228] as it has been supplanted by new First Amendment standards.[229]

Another option available to judges for determining what threatening conduct is constitutionally protected was articulated in *Brandenburg v. Ohio*, in which the Supreme Court in 1969 found that the government can only ban inflammatory speech if it is "directed to inciting or producing imminent lawless action" and that the speech is "likely to incite or produce such action."[230] While courts still widely rely on *Brandenburg*, they have generally applied its imminence requirement in the context of speech rather than assembly.[231]

Instead, in recent years, federal courts have generally applied the "true threat" test when judging what threatening conduct can be criminalized by rioting offenses. In *Virginia v. Black*, in 2003, the Supreme Court found that "true threats" are not constitutionally protected and "encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals."[232] The Court continued that

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226. For a discussion of the application of standards to cases involving the freedom of assembly, see Inazu, *supra* 181, at 37–41.

227. Cantwell v. Connecticut, 310 U.S. 296, 308 (1940).

228. *Id.*

229. Versions of it though were used in the past. *See* United States v. Jeffries, 45 F.R.D. 110, 118 (D.D.C. 1968) (finding that under the D.C. Riot Act, "tumultuous and violent conduct, or the threat thereof" involves "frightening group behavior," which, at the very least, "has a clear and apparent tendency to cause force or violence to erupt and thus create a grave danger of damage or injury to property or persons").

230. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

231. Inazu, *supra* note 181, at 40 ("Few courts have recognized that the First Amendment's imminence requirement applies to both speech and assembly."); *But see* United States v. Matthews, 419 F.2d 1177, 1185 (D.C. Cir. 1969) (interpreting the D.C. Riot Act's requirement that a threat creating a "grave danger of damage or injury to property or persons" must "be clearly serious and if not occurring immediately then it must be very imminent."). The *Matthews* court did not quote *Brandenburg*, which was decided the same year.

232. Virginia v. Black, 538 U.S. 343, 344 (2003).

"[t]he speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats protects individuals from the fear of violence and the disruption that fear engenders."[233] In upholding the federal anti-riot act's provision banning threatening conduct, the Fourth Circuit, in *United States. v. Miselis*, held that such "threats of violence" contemplated under the act should be considered outside protected speech under "the doctrine of true threats."[234] The Fourth Circuit went on to find that "the doctrine of true threats . . . 'protects individuals' from even 'the possibility that threatened violence will occur,'" although the court conceded that the threat would need to create a "grave danger" of damage to property or injury to others.[235] In 2021, the Ninth Circuit also relied on the "true threats" doctrine to uphold the federal crime of rioting.[236]

As such, when faced with rioting laws that include threatening conduct, a court might apply the "clear and present danger" test, *Brandenburg's* imminence requirement, or the "true threat" doctrine. It is unclear which of these standards should hold sway and, while the "true threat" test seems to be the currently favored approach by the federal courts, it does not provide clear guidelines for law enforcement and demonstrators to interpret. For example, common protest chants like "Stand up! Fight back!" or "No justice, no peace!" or coordinated marching by protesters can be interpreted, and may even be intended by some demonstrators, to intimidate law enforcement and others. This can create ambiguity when judging which potentially threatening forms of expression are constitutionally protected and which are not.

Complicating the analysis further is the question of the magnitude of the threatened harm necessary to constitute a riot. The U.S. Supreme Court has been criticized for not more fully defining what is and is not a protected "peaceful" assembly under the First Amendment.[237] For example, if three individuals

233. *Id.*

234. United States v. Miselis, 972 F.3d 518, 540 (4th Cir. 2020).

235. *Id.* (citing R.A.V. v. City of St. Paul, 505 U.S. 377, 388 (1992)).

236. United States v. Rundo, 990 F.3d 709, 719 (9th Cir. 2021) (rejecting a constitutional challenge to the federal riot act's rioting definition by finding that a "threat" under the Act means a "true threat" and "involve[s] subjective intent to threaten").

237. Tabatha Abu El-Haj, *What Does the Constitutional Right of Assembly Protect? What Counts as "Peaceable"? And Who Should Decide?*, JUST SEC. (June 9, 2020), https://www.justsecurity.org/70653/what-does-the-constitutional-right-of-assembly-protect-what-counts-as-peaceable-and-who-should-decide

kick over a trash can during a larger protest, that would seemingly trigger the offense of rioting in some states, as it constitutes multiple individuals engaged in property destruction.[238] Courts have taken differing views on what constitutes violence that amounts to rioting, with some holding mere shoving and pushing by a crowd[239] or an isolated assault does not constitute rioting,[240] while others have found someone who had picked up abandoned looted goods on a street had engaged in rioting.[241] The standard for determining how much violence or property destruction qualifies as a riot is vital for determining what type of threatening conduct would constitute a riot. As Justice Brandeis in his *Whitney* concurrence indicated, "even imminent danger cannot justify resort to prohibition of . . . [the freedoms of speech and assembly] unless the evil apprehended is relatively serious."[242] Yet the Supreme Court has largely been quiet on this issue, leaving open the question whether even minor threats, like threatening to shove a person or break a window, would meet a threshold of harm high enough to constitute rioting.

[https://perma.cc/V72F-JYM6] ("[T]he frequent use of catch-all public order offenses to control peaceful demonstrations, as a practical matter, devolves the decision of what is 'peaceful' to law enforcement.").

238. For example, Connecticut defines rioting to include engaging with six or more individuals in "tumultuous and violent conduct" that "recklessly . . . creates a grave risk of causing public alarm." CONN. GEN. STAT. § 53a-175 (2022). Arguably kicking over a trash can is violent conduct and can cause public alarm.

239. *See* Territory v. Kaholokula 37 Haw. 625, 642–43 (1947) (finding that shoving and pushing along with menacing language in a labor dispute did not constitute rioting).

240. *See* People v. Edelson 7 N.Y.S.2d 323, 324–35 (N.Y. King's Cnty. Ct. 1938) (dismissing rioting charges for picketing where in a commotion a foreman's car was damaged and the foreman assaulted, because rioting charges should not be applied to a brief disturbance).

241. *See* United States v. Matthews, 419 F.2d 1177, 1188 (Wright, J., dissenting) ("[The majority] holds that one who, though acting independently and non-violently, picks up apparently abandoned looted goods has 'engaged in' a riot because his conduct 'aids or encourages' the violence and tumult which the statute expressly punishes."). For yet another standard, see Wash. Mobilization Comm. v. Cullinane, 566 F.2d 107, 120 (D.C. Cir. 1977) ("It is the tenor of the demonstration as a whole that determines whether the police may intervene; and if it is substantially infected with violence or obstruction the police may act to control it as a unit.").

242. Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

The crime of rioting without actual violence, coupled with a lack of clear consensus among courts about what types of threatening conduct are constitutionally protected, creates significant ambiguity over what constitutes a riot in many jurisdictions. Where rioting is understood to include just "threatening" action it encourages law enforcement to engage in "preventative policing,"[243] where they rely on their judgment about what future acts members of a crowd may take.[244] Encouraging police to make these judgment calls can lead to arbitrary and discriminatory enforcement.[245] Further, it can confuse demonstrators. Some individuals may decide not to attend a nonviolent but confrontational or rowdy protest because they believe the demonstration might be perceived as threatening and so they could be potentially charged with rioting.

3. The Vagaries of Incitement

The crime of incitement is aimed at stopping a person from corrupting someone else to commit a crime and is one of the most contested of the inchoate crimes.[246] In the United States, the crime of incitement to riot often includes criminalizing those who "urge" or "encourage" a riot.[247] These definitions have recently

243. Morgan, *supra* note 150, at 1692 ("In jurisdictions where disorderly conduct stems from conduct *likely to* result in police disruption, police officers may intervene before any actual disruption.").

244. Inazu, *supra* note 181, at 7 (arguing that in enforcing unlawful assembly, as with other inchoate crimes, police are "forced to rely on judgments and inferences about future acts").

245. Morgan, *supra* note 150, at 1692 ("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.").

246. Joseph Jaconelli, *Incitement: A Study in Language Crime*, 12 CRIM. L. & PHIL. 245, 248–50 (2018) (describing theoretical justifications for the crime of incitement).

247. *See* ALA. CODE § 13A-11-4 (2022); ARK. CODE § 5-71-203 (2021); CAL. PENAL CODE § 404.6 (West 2022); COLO. REV. STAT. § 18-9-102 (2022); CONN. GEN. STAT. § 53A-178 (2022); D.C. CODE § 22-1322 (2022); GA. CODE ANN. § 16-11-31 (2022); KAN. STAT. ANN. § 21-6201 (2022); KY. REV. STAT. ANN. § 525.040 (West 2022); MICH. COMP. LAWS § 752.542 (2022); MONT. CODE. ANN. § 45-8-104 (2021); N.Y. PENAL LAW § 240.08 (Consol. 2022); N.C. GEN. STAT. § 14-288.2 (2022); N.D. CENT. CODE § 12.1-25-01 (2021); OKLA. STAT. tit. 21, § 1320.2 (2022); S.D. CODIFIED LAWS § 22-10-6 (2022); TENN. CODE ANN. § 39-17-304 (2022).

come under particular scrutiny from federal courts for being unconstitutionally overbroad and vague.[248] Indeed, police and prosecutors have repeatedly used incitement to riot provisions to target those who are arguably just advocating for less popular opinions or criticizing the police through provocative speech or actions.

The crime of incitement to riot provides broad powers to law enforcement to arrest those whom they deem to have violated the offense. Arrests can stop or undermine protests, and can have serious economic and legal consequences for those targeted.[249] During the Civil Rights Movement, charges of inciting a riot were frequently used to arrest Black people who were perceived to create potential conflict with whites by attempting to integrate segregated facilities in the Jim Crow South, like buses and airport restaurants.[250] During protests for racial justice in 2020, a number of individuals were arrested for incitement to riot.[251] In one controversial instance, an activist in St. Louis was arrested by the FBI for posting about a "red action" online that he was organizing, a term used by organizers to describe protests that might lead to arrests or confrontations with the police.[252] In another incident, a comedian in Alabama was charged with inciting a riot for asking a crowd to remain nonviolent but implying that they could tear down a local confederate monument.[253]

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248. See *infra* notes 272–275 and accompanying text (describing circuit court opinions striking down parts of the federal incitement to riot definition).

249. *See, e.g.*, Eisha Jain, *Arrests as Regulation*, 67 STAN. L. REV. 809, 820–25 (2015) (describing the diverse economic and social impacts of being arrested).

250. Dream Defenders v. DeSantis, 559 F. Supp. 3d 1238, 1250 (N.D. Fla. 2021) ("Florida's anti-riot laws were used to suppress activities threatening the state's Jim Crow status quo.").

251. *See* Cyrus Farivar & Olivia Solon, *FBI Arrests of Protesters Based on Social Media Posts Worry Legal Experts*, YAHOO!NEWS (June 19, 2020), https://news.yahoo.com/fbi-trawled-facebook-arrest-protesters-151200987.html [https://perma.cc/MBE7-SQ3S] (describing a number of arrests for conspiracy to riot resulting out of social media posts during 2020 Black Lives Matter protests).

252. *Id.* The charges were later dropped.

253. *See* Carol Robinson, *Jermaine "Funny Maine" Johnson's Inciting Riot Charge Dismissed*, BIRMINGHAM REAL TIME NEWS, (June 17, 2020) https://www.al.com/news/birmingham/2020/06/jermaine-funnymaine-johnsons-inciting-riot-charge-dismissed.html [https://perma.cc/JU9H-4L29]. In a similar incident, two protesters were arrested for inciting a riot in New Orleans for helping topple and dump into the Mississippi river a statue of a slave owner during a Black Lives Matter protest. A magistrate judge later found no probable cause for arresting the defendants. *See* Chris McCrory, *2 Charged with Inciting a Riot for Throwing John McDonogh Statue in Mississippi River*, 4WWL (June

Courts have traditionally given police wide latitude in such arrests. For example, in 2018, a U.S. District Court in Florida dismissed an unlawful arrest claim for incitement to riot arising out of celebrations over the 2013 NBA Championship.[254] After reviewing video evidence of the incident that led to the arrest, in which the plaintiff shouted, "we ain't going home tonight," and "don't take this bullshit from them," Judge Darrin Gayles stated that he found it "questionable whether the Individual Defendants had probable cause to arrest Plaintiff for inciting a 'riot.' . . . However, because the bar is so low, the Court is compelled to find arguable probable cause for the arrest."[255]

Incitement to riot provisions also provide extensive leeway to prosecutors. For instance, the federal government brought federal incitement to riot charges against activists who had helped organize anti-Vietnam War activities during the 1968 Democratic Convention where police and protesters then clashed.[256] The trial of the "Chicago Seven" gained national publicity as the defendants seemed linked not by any conspiracy but rather by a "shared radical critique of U.S. government and society."[257] The government presented evidence that while planning the protests the activists had discussed their intentions to incite confrontations with the police, while the defense presented evidence of unprovoked attacks by the police on protesters.[258] The jury found five of the defendants guilty of incitement to riot.[259] On appeal, the Seventh Circuit reversed the convictions, finding, among other irregularities, that the trial judge had been openly hostile toward the defendants.[260]

Incitement charges have also been used in other types of cases that have not gained nearly the public attention of the "Chicago Seven" and are particularly likely to be brought when

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14, 2020), https://www.wwltv.com/article/news/local/orleans/2-charged-statue-toppling/289-284c6891-9775-4013-ba59-ae5e8d20aaaf [https://perma.cc/2D6B-YVA3].

254. Alexandre v. City of Miami, No. 16-23064-CIV-GAYLES/OTAZO-REYES, 2018 WL 2463904 (S.D. Fla. 2018).

255. *Id.* at *3.

256. *See* BRUCE A. RAGSDALE, THE CHICAGO SEVEN: 1960S RADICALISM IN THE FEDERAL COURTS 4 (2008) (describing the case of the "Chicago Seven," protestors charged with inciting a riot at the 1968 Democratic Convention).

257. *Id.*

258. *Id.* at 6.

259. *Id.* at 8.

260. *Id.* at 8–9.

crowds confront the police. For example, in a case from Pennsylvania in 1965, a defendant was convicted for leading cheers directed at the police who were trying to get a crowd to disperse.[261] He shouted, "What are the policemen doing here?" and led the crowd in chanting "We want freedom. We want justice," which the court found led the crowd to grow in size "to a point where it was uncontrollable" and "the natural result of it would be to cause a riot and was sufficient to show that the appellant was guilty of inciting to riot."[262]

Incitement to riot charges have also, on occasion, been used to allow for a "heckler's veto," in which the government bans speech because they fear it may inspire violence by third parties against the speaker. For example, in 2002, the Criminal Court of the City of New York allowed incitement to riot charges to go forward against a defendant who shouted into a crowd shortly after 9/11 that more police and firefighters should have died and so, according to the court, used inflammatory language that was calculated to cause unrest in the crowd.[263] In *Feiner v. New York*, the U.S. Supreme Court in 1951 upheld the conviction of a protester for incitement to riot for disparaging the American Legion, President Truman, and the police under a "clear and present danger" test.[264] Chief Justice Vinson, writing for the Court, found the application of the incitement to riot provision was a valid exercise of "the interest of the community in maintaining peace and order on its streets" because they thought the protester's speech might instigate a riot.[265] In dissent, Justice Douglas argued that, in arresting the defendant, the police were responding to an audience that threatened violence against an unpopular speaker, but that "[i]t is against that kind of threat that speakers need police protection."[266]

However, later decisions by the Court have seemed to follow closer to the spirit of Douglas's words of caution about the need to protect protesters from a heckler's veto.[267] For example, in

261. Commonwealth v. Hayes, 209 A.2d 38, 40–41 (Pa. Super. Ct. 1965).

262. *Id.* at 41.

263. People v. Upshaw, 741 N.Y.S.2d 664, 666–69 (N.Y. Crim. Ct. 2002) (emphasizing the importance of the context of the recent attack on 9/11).

264. Feiner v. New York, 340 U.S. 315, 317, 320 (1951).

265. *Id.* at 320.

266. *Id.* at 331.

267. Indeed, even at the time, other Supreme Court precedent cut against the heckler's veto. *See* Terminiello v. Chicago, 337 U.S. 1, 4 (1949) (noting that "a function of free speech under our system of government is to invite dispute.

1969, in *Gregory v. City of Chicago*, the Supreme Court found unconstitutional the police's use of a "breach of peace" statute to disperse protesters pushing for more rapid desegregation because they feared "hecklers observing the march were dangerously close to rioting."[268] Circuit courts have also followed suit. For instance, in 2016, the Sixth Circuit ruled unconstitutional a county's actions to stop self-proclaimed Christian evangelicals from protesting an Arab festival in Dearborn, Michigan, because the officials feared that their anti-Islam rhetoric would lead to violence and incite a riot.[269]

Criticism about the overbreadth of the definition of incitement to riot has recently found new traction in the federal courts. The federal anti-riot act bans someone who travels in or uses interstate commerce to "incite" a riot or "organize, promote, encourage, participate in, or carry on a riot."[270] The act further defines these two provisions to include "urging" or "instigating" other persons to riot as long as such "urging" or "instigating" is not just the "mere oral or written" advocacy of ideas or expression of belief "not involving advocacy of any act or acts of violence or assertion of the rightness of, or the right to commit, any such act or acts."[271]

Two circuit courts have recently found parts of this federal definition unconstitutional—both in cases involving members of the white supremacist Rise Above Movement, which had been charged with inciting a riot.[272] In 2020, the Fourth Circuit found that the incitement provision of the federal anti-riot act "sweeps

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It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.").

268. Gregory v. City of Chicago, 394 U.S. 111, 120 (1969); *see also* Edwards v. South Carolina, 372 U.S. 229, 238, 244 (1963) (finding conviction of 187 Black college and high school students for breaching of the peace had violated the First Amendment when police had arrested them because they feared a confrontation with a "hostile" crowd of white onlookers).

269. Bible Believers v. Wayne County, 805 F.3d 228, 248 (6th Cir. 2015) ("A review of Supreme Court precedent firmly establishes that the First Amendment does not countenance a heckler's veto.").

270. 18 U.S.C. § 2101.

271. 18 U.S.C. § 2102.

272. United States v. Miselis, 972 F.3d 518, 540–41 (4th Cir. 2020); United States v. Rundo, 990 F.3d 709, 720 (9th Cir. 2021). There is a longer history of using incitement to riot charges to target white supremacists. *See* State v. Cole, 107 S.E.2d 732 (N.C. 1959) (upholding incitement to riot charge for assembling, with firearms, with the intent to preach racial dissension and terrorize others during a Ku Klax Klan meeting).

up a substantial amount of speech that retains the status of protected advocacy under *Brandenburg* insofar as it encompasses speech tending to 'encourage' or 'promote' a riot . . . as well as speech 'urging' others to riot or 'involving' mere advocacy of violence."[273] Similarly, in 2021, the Ninth Circuit found that the federal anti-riot act's incitement provisions that banned someone from promoting, encouraging, or urging a riot, or mere advocacy of violence, violated *Brandenburg*.[274] Unlike the Fourth Circuit, the Ninth Circuit also found that the federal anti-riot act's language prohibiting "organiz[ing]" a riot also violated *Brandenburg*.[275] These two recent judgments create a circuit split, as in 1972 the Seventh Circuit upheld a challenge to the incitement provision of the federal anti-riot act that explicitly invoked *Brandenburg* in a case that involved an appeal by one of the "Chicago Seven."[276] How this circuit split is decided will have significant repercussions as at least sixteen states, where statutory formulations of incitement to riot explicitly include language that covers those who "urge" or "encourage" others to riot, and so would also be susceptible to constitutional challenge.[277]

In sum, incitement to riot provisions can easily chill the conduct of activists and protest organizers who fear liability or harassment under the offense for organizing protests or engaging in provocative speech. This fear is not ungrounded as laws banning

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273. *Miselis*, 972 F.3d at 530.

274. *Rundo*, 990 F.3d at 720 (finding that the incitement provisions of the federal anti-riot act do not violate the First Amendment except insofar as they prohibit "speech tending to 'organize,' 'promote,' or 'encourage' a riot, and § 2102(b) expands the prohibition to 'urging' a riot and to mere advocacy").

275. *Id.* at 717.

276. *See* United States v. Dellinger, 472 F.2d 340, 360–64 (7th Cir. 1972) *cert. denied*, 410 U.S. 970 (1973) (interpreting language of incitement to riot provision to meet requirements of *Brandenburg*, including finding that "urge" in the Act does not mean mere persuasion, but "pressing" someone to a certain course); *see also* Nat'l Mobilization Comm. v. Foran, 411 F.2d 934, 938 (7th Cir. 1969) (finding that the federal anti-riot act's provisions are not an encroachment on free speech in a case decided before *Brandenburg*); *In re* Shead, 302 F. Supp. 560 (N.D. Cal. 1969) (dismissing a *Brandenburg* challenge to the incitement to riot provision of the federal anti-riot act); United States v. Hoffman, 334 F. Supp. 504, 509 (D.D.C. 1971) (rejecting a free speech challenge to the incitement to riot provision of the federal anti-riot act); United States v. Betts, 509 F. Supp. 3d 1053, 1053–54 (C.D. Ill. 2020) (finding the district court is bound to follow *Dellinger* in upholding constitutionality of incitement to riot under the federal anti-riot act).

277. *See supra* note 247 (listing states with incitement to riot offense whose definition covers those who "urge" or "encourage" a riot).

incitement to riot provide wide discretion to law enforcement and prosecutors that can easily be used in a politicized manner.

C. UNEVEN, POLITICIZED, AND RACIALIZED ENFORCEMENT

Rioting offenses are relatively rarely used, but when they are, it is often in contexts that make it more likely they will be enforced in a politicized manner, such as during political protests.[278] Overbroad rioting and incitement to riot offenses provide law enforcement and prosecutors broad latitude. As such, one's chances of facing rioting charges can potentially vary markedly depending on the issue one is protesting, one's race, or on the "personal predilections" of local law enforcement and prosecutors.[279]

There has been a long history of the seemingly politicized or racialized use of rioting laws. This can involve the apparent targeting of dissenting or controversial voices, such as the felony rioting arrest of Representative Attica Scott or the trial of the "Chicago Seven" for incitement to riot.[280] It can also involve the nonapplication of these laws. For instance, in the aftermath of the Tulsa Race Riot of 1921, not a single white Tulsan was convicted of rioting or spent any time in jail for any offense, even though a group of white Tulsans attacked and devastated the city's Black community.[281]

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278. There is no national data on how often rioting offences are used to arrest or prosecute individuals. However, some jurisdictions do attempt to document this data. For example, between January 2012 and August 2020 there were 241 cases filed for rioting in Washington D.C. Of these, 234 were in 2017 and resulted primarily from the J20 protest during President Trump's inauguration. Letter from Taylor Tarnalicki, Research Analyst, District of Columbia Sentencing Commission, to Author (Oct. 5, 2020) [hereinafter Sentencing Commission Letter] (on file with author); *see* Adler-Bell, *supra* note 200 (describing the extent of cases filed in response to the J20 protests).

279. Smith v. Goguen, 415 U.S. 566, 575 (1974) ("Statutory language of such a standardless sweep allows policemen, prosecutors, and juries to pursue their personal predilections."); *see infra* notes 283–285 and accompanying text (cataloguing data showing that police are more likely to treat left-wing, anti-police brutality, and majority-Black protests as riots).

280. *See* Robinson, *supra* note 5 (describing arrest of Representative Scott); RAGSDALE, *supra* note 256 (detailing politicized nature of the trial of the Chicago Seven for incitement to riot).

281. *See* SCOTT ELLSWORTH, DEATH IN A PROMISED LAND: THE TULSA RACE RIOT OF 1921, at 66, 70, 97 (1992) (noting estimates of the number of fatalities from the riot ranged from twenty-seven to over 250, and the Red Cross estimated over a thousand residences were destroyed during the riot, but no white Tulsan was ever sent to prison).

Riots often develop in response to police aggression against protesters,[282] but this effect is felt unevenly as protests have a history of being policed differently depending on who is protesting. For example, studies have found that law enforcement has historically been more likely to aggressively police left-wing protests,[283] anti-police brutality protests,[284] and protests that are predominantly Black,[285] including by more often using force or arresting these protest participants. As such, certain protests may be more likely to result in arrests for rioting because police conduct against particular demonstrations is more likely to result in confrontation, and police and prosecutors may be more likely to bring rioting charges against these same groups. While there is limited data on who is arrested for rioting, that which exists shows that in at least some jurisdictions Black people are disproportionately arrested.[286]

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282. *See* Barker, *infra* note 302 and accompanying text (describing how law enforcement's actions can provoke violence from protesters).

283. *See* Maggie Koerth, *The Police's Tepid Response to the Capitol Breach Wasn't an Aberration*, FIVETHIRTYEIGHT (Jan. 7, 2021), https://fivethirtyeight.com/features/the-polices-tepid-response-to-the-capitol-breach-wasnt-an-aberration [https://perma.cc/RW6W-ELYK] (citing data from ACLED that found between May 1 and November 28, 2020, authorities were more than twice as likely to attempt to break up a left-wing than a right-wing protest). In those situations when law enforcement chose to intervene, they used force thirty-four percent of the time with right-wing protests compared with fifty-one percent for the left.) *Id.*

284. *See* Heidi Reynolds-Stenson, *Protesting the Police: Anti-Police Brutality Claims as a Predictor of Police Repression of Protest*, 17 SOC. MOVEMENT STUD. 48, 49, 56–57 (2017) (using data from over 7,000 protest events between 1960 and 1995 in New York to show that police were twice as likely to show up at demonstrations against police brutality). They then either used force or made arrests in about half of these protests, compared to a third for other protests. *Id.* at 59.

285. *See* Christian Davenport, Sarah A. Soule & David A. Armstrong II, *Protesting While Black? The Differential Policing of American Activism, 1960 to 1990*, 76 AM. SOC. REV. 152, 168 (2011) (examining 15,000 protest events between 1960 and 1990 to show that, compared to other groups, predominantly Black protests are more likely to attract a police presence and, when there is a police presence, there are disproportionately more arrests and use force and violence).

286. *See, e.g.*, LEGIS. SERVICES AGENCY, FISCAL NOTE OF SF 534, 6 (Mar. 10, 2021), https://www.legis.iowa.gov/docs/publications/FN/1216392.pdf [https://perma.cc/M5XP-VUBZ] (finding that in Iowa in FY 2020, the racial breakdown of those imprisoned for rioting was "29.0% Caucasian and 71.0% African American," even though "Caucasians and African Americans made up 89.9% and 4.1% of the Iowa adult population, respectively," and so any strengthening of rioting laws "would lead to a racial impact if trends remain constant").

Such critiques of the marked variations in law enforcement response to different kinds of protests have been pointed to as a reason to limit the breadth of rioting definitions. In a dissent from an opinion upholding Washington, D.C.'s anti-rioting law from a vagueness challenge in 1969, D.C. Circuit Court Judge Wright noted that numerous studies had shown that the race riots of the period were "in large measure due to the abuse of discretion by law enforcement officials" against Black people.[287] Yet, in upholding the D.C. anti-riot statute enacted to deal with these riots Wright warned the majority that it "would once again countenance virtually unbridled discretion on the part of police and prosecutor."[288]

Indeed, prosecutors have extensive latitude to bring rioting charges, which can lead to striking differences in treatment. For example, in 2017, the Justice Department charged over two hundred individuals with rioting offenses during demonstrations that resulted in relatively minor property damage in Washington, D.C. on President Trump's Inauguration Day.[289] However, despite more violence and property destruction, the Justice Department did not charge anyone with rioting in 2021 when President Trump's rallygoers stormed the U.S. Capitol in an attempt to stop the certification of Joe Biden as president.[290]

The potential for the politicization of the use of anti-rioting legal measures is worsening. The United States saw a wave of bills introduced after the national protests for racial justice in 2020 whose provisions strengthen or expand anti-rioting measures.[291] For example, in Oklahoma legislation enacted in 2021, the state created new criminal fines for organizations that are found to have "conspired" with individuals who riot, incite a riot, refuse to aid in the arrest of a rioter, or remain at the scene of a riot after being ordered to disperse.[292] In Tennessee, a law

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But see Sentencing Commission Letter, *supra* note 278, at 6 (indicating that of the 241 individuals charged with rioting in Washington D.C. between January 2012 and August 2020, 204 were white, ten were Black, and twenty-seven were of unknown race).

287. United States v. Matthews, 419 F.2d 1177, 1195 (D.C. Cir. 1969) (J. Wright, dissenting).

288. *Id.*

289. *See* Bell, *supra* note 200 (describing prosecution of those involved in the J20 protests).

290. *Capitol Breach Cases*, *supra* note 34.

291. *See* ICNL Tracker, *supra* note 8.

292. *See* H.B. 1674, § 3, 58th Leg. Reg. Sess. (Okla. 2021).

enacted in 2020 requires anyone convicted of "inciting" or "urging" a riot pay restitution for any property damage caused by the riot.[293] And Florida's controversial 2021 anti-riot law not only made rioting a felony but also created a new offense of aggravated rioting that increases the penalty to fifteen years in jail if the riot consists of twenty-five or more persons or, through the "threat of force," endangered the safe movement of a vehicle on a public roadway.[294]

Laws like these undercut the freedom of assembly through expansive language and the threat of life-altering penalties. They have also already led to claims of disparate treatment. For example, when protesters against the Cuban government, who are perceived to be politically aligned with the governor of Florida, blocked highways in July of 2021, they were generally allowed to protest freely without arrest.[295] However, critics claimed that similar protests that blocked highways in 2020 by Black Lives Matter protesters were met with more aggressive policing and, under Florida's newly enacted anti-rioting law, would have faced serious felony charges.[296] This fear of disparate policing helped lead federal district court Judge Walker to issue a preliminary injunction against the offense of rioting in the new Florida law.[297] He noted that the intent of the anti-rioting law was "to empower law enforcement officers against those who may criticize their legal authority" and that when Florida Governor DeSantis "promised to have a ton of bricks rain down on" those who violated the law he was "using a threat of selective enforcement as his rain clouds."[298]

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293. *See* S.B. 5, § 13, 111th Gen. Assemb., 2d Sess. (Tenn. 2020).

294. *See* H.B. 1, § 15(3), 2021 Leg., 123d Sess. (Fla. 2021).

295. *See* John Kennedy & Antonio Fins, *Florida Gov. Ron DeSantis Straddles Tough New Law as Cuba Protests Block Highways*, SARASOTA HERALD-TRIB. (July 14, 2021), https://www.heraldtribune.com/story/news/politics/state/2021/07/14/desantis-calls-cuba-black-lives-matter-protests-much-different-situations/7965540002 [https://perma.cc/WW63-9W9A] (describing perceived nonapplication of the recently enacted anti-rioting law to protests against the Cuban government, compared to government crackdowns on Black Lives Matter protests).

296. *Id.*

297. Dream Defenders v. DeSantis, 559 F. Supp. 3d 1238, 1282 (noting the Florida anti-riot law "criminalizes and encourages arbitrary and discriminatory enforcement").

298. *Id.*

IV. RE-ENVISIONING THE CRIME OF RIOTING

Building off of this Article's critique of anti-riot legal measures, this Part recommends the elimination of the criminal offenses of rioting and incitement to riot. Recognizing that this may currently be politically infeasible in many jurisdictions, it also provides a framework for how policymakers can better tailor these criminal statutes to minimize the risk of their abuse.

A. ELIMINATING THE CRIME OF RIOTING

There is no doubt that the government has a clear interest in addressing the problem of rioting.[299] As Part I.B detailed, group violence can be more destructive than individual violence and more difficult for law enforcement to control. Yet even though rioting creates significant—and sometimes unique—challenges, this does not justify a separate criminal offense of rioting or incitement to riot. Indeed, as Part III.A described, the core conduct that rioting is trying to combat—group violence or property destruction—is already unlawful and there is little evidence that rioting or incitement to riot offenses actually deter rioting. And as Parts III.B and Part III.C argued, there is substantial evidence that the crimes of rioting and incitement to riot have been used in a manner that undermines the rights of nonviolent protesters and activists.

Given this context, states and the federal government are better off eliminating rioting and incitement to riot as criminal offenses altogether. In doing so, government can turn to a variety of other tools to prevent and control rioting.

One important strategy is addressing the root causes of rioting. For example, after the race riots of the 1960s and 1970s, the final report of the National Commissions on the Causes and Prevention of Violence recommended "providing political and social justice," and "protect[ing] the rights of free speech and peaceable assembly and the right to petition the government for redress of grievances."[300] It also highlighted the need for strong channels for peaceful protest and mechanisms of democratic responsiveness and accountability to ensure that grievances were properly heard before they led to violence.[301]

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299. Cantwell v. Connecticut, 310 U.S. 296, 308 (1940) (recognizing that "[w]hen [there is] clear and present danger of riot . . . the power of the State to prevent or punish is obvious.").

300. *See Report of Violence Commission*, *supra* note 17, at 68–69.

301. *Id.* at 76–77.

Since many riots result out of confrontations with the police, how law enforcement approaches crowds or protests can have a significant impact on whether rioting occurs. For example, experts have called on law enforcement to stop policing protests in a militarized manner, and to restrict the use of less lethal weapons, like tear gas or rubber bullets, which can lead to hostility from crowds and trigger rioting.[302] Further, de-escalation tactics by law enforcement have been shown to be effective in many circumstances to defuse potentially violent situations.[303]

Where de-escalation fails or is unavailable as a strategy, police can arrest those in a crowd they have probable cause to believe violated a law, such as by engaging in violence or property destruction.[304] To address violence by a group, police can order a crowd to disperse, if appropriate, and, after providing opportunity to disperse, arrest those who fail to comply.[305] To assist in crowd control, the government also has the ability to call in additional law enforcement from other jurisdictions or, in extreme circumstances, the National Guard.[306] Finally, in exceptional situations, governments have the power to impose curfews to respond to widespread violence or property destruction.[307]

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302. *See* Kim Barker, Mike Baker & Ali Watkins, *In City After City Police Mishandled Black Lives Matter Protests*, N.Y. TIMES (Mar. 20, 2021), https://www.nytimes.com/2021/03/20/us/protests-policing-george-floyd.html [https://perma.cc/4P5R-629H] (finding that, in reviewing the response of police departments to racial justice protests in 2020, investigations found police were aggressive, wore riot gear, and used less lethal weapons in an indiscriminate manner, frequently leading to confrontations with protesters); Kornfield et al., *supra* note 183 (quoting policing expert that law enforcement "often show up to crowd control events that are not yet riots and handle them as if they were riots").

303. Maggie Koerth & Jamiles Lartey, *De-escalation Keeps Protesters and Police Safer. Departments Respond with Force Anyway*, FIVETHIRTYEIGHT (June 1, 2020), https://fivethirtyeight.com/features/de-escalation-keeps-protesters-and-police-safer-heres-why-departments-respond-with-force-anyway [https://perma.cc/ZZL7-7PPA] (describing common types of de-escalation tactics for tense protests, their effectiveness, and barriers to their implementation).

304. See Clancy, *supra* note 194 (describing the probable cause standard).

305. Washington D.C. has legislated when and how police can disperse crowds in order to better protect the freedom of assembly and ensure crowds are only dispersed when it is necessary. *See* First Amendment Rights and Police Standards Act of 2004, No. 15-352, § 107, 52 D.C. Reg. 2296, 2300–01 (Mar. 11, 2005.

306. Sternlicht, *supra* note 178.

307. Pye & Lowell, *supra* note 157.

These alternative approaches provide many tools by which the government can respond to group violence without relying on the offenses of rioting or incitement to riot.[308] This is not to say that rioting can never be useful as a legal term. For example, the existence of a riot could potentially be used as criteria for when to disperse a crowd, when a governor can declare an emergency or call in the National Guard, or when law enforcement can use less lethal weapons in crowd control. However, in the end, given other available tools, the offenses of rioting and incitement to riot do not substantially help address stopping riots, while at the same time they have a history of undermining First Amendment rights.

B. MINIMIZING THE RISK OF ABUSE

While this Article argues for eliminating rioting and incitement to riot as criminal offenses altogether, given the political salience of the danger of rioting in the public imagination, many policymakers may be unlikely to vote for eliminating either one or both of these offenses, at least in the near future. In jurisdictions with this political reality, policymakers should instead work to better target these crimes. It may be most politically feasible to undertake such reforms during periodic reviews of the criminal code or immediately after the abuse of anti-riot laws. This Section considers five strategies to target these measures.

1. Require Underlying Unlawful Conduct

Jurisdictions should amend their rioting offenses to ensure that a person is liable for rioting only if they themselves engage in an underlying offense involving violence or property destruction as part of a larger group engaged in such conduct. Mere presence at a riot should not be enough to convict a person of rioting. As Judge Wright noted in his dissent in *United States v. Matthews*, which upheld D.C.'s anti-rioting law, "the only way to protect legitimate [First Amendment] activity is to insure that

308. Notably, these tools have their own possibility for abuse. For example, there was criticism that curfews used during racial justice protests in 2020 to help control violence and property destruction unnecessarily chilled speech and intimidated activists. Clara Neupert & Jim Malewitz, *In Wake of Wisconsin's Racial Justice Protests, Curfew Tickets Raise Equity and Speech Questions*, WIS. WATCH (Apr. 24, 2021), https://wisconsinwatch.org/2021/04/curfew-tickets-equity-speech [https://perma.cc/ZSX3-N8EH].

our laws focus precisely and exclusively on violent conduct and on its perpetrators and not beyond."[309]

One of the more recent attempts to better target the offense of rioting is Washington, D.C.'s proposed Revised Criminal Code Act of 2021.[310] Under the proposed code, one is liable for rioting if one "knowingly commits or attempts to commit a criminal bodily injury, taking of property, or damage to property"[311] and is "reckless as to the fact seven or more other people are each personally and simultaneously committing or attempting to commit a criminal bodily injury, taking of property, or damage to property, in the area reasonably perceptible to the actor."[312] In this way, the revised code would require those liable for rioting to commit an underlying violent offense.

While the Washington, D.C. proposal is just one potential model for better targeting the offense of rioting, it presents an attractive alternative because it removes the possibility that a person can be held liable for rioting for just being part of a group in which others are engaging in violence or property destruction. It also removes ambiguous language about being liable for rioting for being part of a group that "threatens" others and instead requires that a person either actually engage in violence, property destruction, or looting, or attempt one of those crimes.[313] In other words, one cannot be guilty of rioting under the legislation unless one is also guilty of another relatively serious crime.

2. Increase the Minimum Size

Currently, many riot statutes require only a group of three persons for rioting, and some just two.[314] However, with the required crowd being so small, these rioting acts can encompass a

309. 419 F.2d 1177, 1188 (D.C. Cir. 1969).

310. *See* Revised Criminal Code Act of 2021, § 22A-5301, Council B. 24-0416, 24th Council, Reg. Sess. (D.C. 2021) https://ccrc.dc.gov/node/1562051 [https://perma.cc/8ZUF-4KBY].

311. *Id.*

312. *Id.*

313. *Compare* D.C. CODE § 22-1322, (2022) (defining a riot as a group of five or more persons who cause "tumultuous and violent conduct or the threat thereof"), *with* Revised Criminal Code Act of 2021, § 22A-5301, Council B. 24-0416, 24th Council, Reg. Sess. (D.C. 2021) (containing no language regarding threat of another crime).

314. *See*, *e.g.*, GA. CODE ANN. § 16-11-30 (2022) (defining rioting as "[a]ny two or more persons who shall do an unlawful act of violence or any other act in a violent and tumultuous manner . . . ."); COLO. REV. STAT. § 18.9-101(2) (2022) (defining rioting as an assemblage of three or more persons).

small fight or a three-person armed robbery that takes place in a public area.[315] Most sociological conceptions of rioting envision a significantly larger group.[316] Additionally, the 1714 British Riot Act defined rioting as requiring twelve or more people, as did some earlier U.S. state statutes that defined how public officials were required to respond to a riot.[317] A higher threshold for the number of persons involved in a riot—as well as requiring that they all engage in unlawful conduct—helps ensure that rioting laws are not used against small groupings that most would not consider a riot, or against larger crowds, such as a protest, where only two or three individuals are engaged in violent or destructive conduct. For example, the proposed reforms to the D.C. code require that, for a riot, at least eight individuals simultaneously engage in covered unlawful conduct.[318]

3. Eliminate Felony Rioting

In many jurisdictions, rioting is a felony crime or there is a felony level to the offense.[319] This is in addition to any felony penalties an individual may face for any underlying criminal conduct they may have committed, such as property destruction or violence. If the offense of rioting is to be retained, felony rioting should be eliminated.

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315. *See* Richard Schmechel, Exec. Dir., *Testimony for October 15, 2020 Hearing B23-0723, the "Rioting Modernization Amendment Act of 2020,"* D.C. CRIM. CODE REFORM COMM'N, 27 (Oct. 15, 2022), https://ccrc.dc.gov/sites/default/files/dc/sites/ccrc/publication/attachments/Written-Testimony-for-October-15-2020-Hearing-on-B23-0723-Rioting-and-B23-0882-Comprehensive-Policing-and-Justice-Reform.pdf [https://perma.cc/UX3D-KYXE] (applauding the effort to raise D.C.'s definition of rioting from five to eight people in order to reduce unnecessary overlap between rioting and more common offenses).

316. *See* Wilkinson, *supra* note 67, at 330 (commenting on the "mismatch between the legal definitions of riot and many of our sociological and theoretical conceptions" which envision riots involving thirty, forty, fifty, or more people).

317. *See* 1714 RIOT ACT, *supra* note 94("[I]f any persons to the number of twelve or more, being unlawfully, riotously, and tumultuously assembled together . . ."). Up until 2004, Rhode Island had allowed officials to read the state's riot act to command dispersal of a group of twelve or more "being armed with clubs or other weapons" or thirty or more who are "unlawfully, routously, riotously, or tumultuously assembled." Act of July 3, 2004, ch. 336, 2004 R.I. Pub. Laws 1947 (repealing 11 R.I. GEN. LAWS §§ 11-38-1 through 11-38-4).

318. Revised Criminal Code Act of 2021, § 22A-5301, Council B. 24-0416, 24th Council, Reg. Sess. (D.C. 2021).

319. *See*, *e.g.*, 18 PA. CONS. STAT. ANN. § 5501 (2022) (making rioting a third degree felony); N.Y. PENAL LAW § 240.06 (Consol. 2022) (defining rioting in the first degree as a felony).

It is debatable whether a person should face a more severe penalty for committing a criminal offense in the context of a riot than in another context. On the one hand, the person arguably deserves greater punishment because the overall effect of the riot can have larger social harm and engaging in violence or property destruction during a riot may encourage others to also join.[320] On the other hand, because there is some evidence that one is more susceptible to committing unlawful conduct when others are doing so in a crowd, this is a potential mitigating factor, meaning one perhaps deserves less punishment than if one committed the same unlawful act outside a riot.[321] The argument in this Article to eliminate rioting as an offense implicitly assumes that there is little reason to punish those who commit a crime during a riot more than the maximum allowed for the underlying offense.

Where the crime of rioting is retained but acts as a type of penalty enhancement for underlying unlawful conduct there are good reasons not to make it a felony. It seems like excessive punishment when the underlying offense is already being punished, sometimes as a felony itself. Further, and perhaps more importantly, there is a danger in the context of protests that the availability of felony rioting can incentivize "charge stacking" by prosecutors, potentially forcing even those who may be innocent of the charged crimes to accept a plea to a lesser offense to avoid the risk of being convicted of felony rioting.[322]

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320. *Rioting Modernization Amendment Act of 2020: Hearing on B23-0723 Before the Comm. On the Judiciary & Pub. Safety*, 23d Council (D.C. 2020) (statement of Richard Schmechel, Executive Director, Criminal Code Reform Commission), https://lims.dccouncil.us/downloads/LIMS/44484/Hearing_Record/B23-0723-Hearing_Record1.pdf [https://perma.cc/JN5B-45JB] (providing justifications for why unlawful conduct deserves greater punishment in the context of a riot as well as counterarguments).

321. *Id.*

322. For a discussion of charge stacking, see *States Have Put 54 New Restrictions on Peaceful Protests Since Ferguson*, PRESSNEWSAGENCY (June 5, 2020), https://pressnewsagency.org/states-have-put-54-new-restrictions-on-peaceful-protests-since-ferguson [https://perma.cc/EU6U-4CVM] (quoting Mara Verheyden-Hilliard, the Executive Director of the Partnership for Civil Justice Fund: "When you have mass movements and a lot of people in the street, you see false arrests and heavy-duty charge stacking to get people to plead to lesser charges.").

4. Narrow Incitement

If a jurisdiction does not eliminate the offense of inciting a riot, it should at least narrow it to meet the requirements of *Brandenburg*, as recently interpreted by the Fourth and Ninth Circuits.[323] In particular, lawmakers should eliminate definitions of incitement to riot that include "encouraging" or "urging" others to riot, which can capture constitutionally protected speech that involves either general advocacy or boisterous words that are not likely to actually cause a riot. Instead, jurisdictions should require that the offense of incitement to riot only apply in contexts where speech is "directed to inciting or producing imminent lawless action" and that speech is "likely to incite or produce such action."[324]

5. Scrutinize Related Anti-Riot Measures

Finally, states should examine the impact and necessity of other powers and liability rules triggered by rioting. For example, laws like the one recently enacted in Oklahoma, which creates criminal fines for organizations that "conspire" with individuals who fail to disperse at a riot, or aid and abet rioters, are so vague that they can easily chill First Amendment protected conduct.[325] Similarly, recently enacted laws in Florida, Iowa, and Oklahoma that create new liability protections for those who hit "rioters" with their vehicle, or who otherwise injure or kill "rioters" can encourage violence by the public against protesters who are viewed as "rioters."[326] Such liability protections can not only chill peaceful protest but seemingly return the country closer to

323. *See* United States v. Miselis, 972 F.3d 518, 540 (4th Cir. 2020); United States v. Rundo, 990 F.3d 709, 719 (9th Cir. 2021).

324. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

325. *See* Okla. H.B. 1674 § 3, 58th Leg., Reg. Sess. (Okla. 2021).

326. *See* H.B. 1, § 18, 2021 Leg., 123d Sess. (Fla. 2021) (creating an affirmative defense that limited civil liability for those who injure or kill persons who they believe are "acting in furtherance of a riot"); S. FILE 342, § 51, 89th Gen. Assemb. (Iowa 2021) (providing civil immunity for a driver who exercises "due care" and injures someone participating in a protest or riot if they are blocking traffic in a public street); H.B. 1674, § 2, 58th Leg., Reg. Sess. (Okla. 2021) (providing civil and criminal immunity for a driver who injures or kills a person while fleeing a "riot" if they were exercising "due care").

a more lethal period for riots in the United States when different social groups squared off against each other in the streets.[327]

CONCLUSION

While the government has a compelling interest in preventing and addressing riots, the criminal offenses of rioting and incitement to riot do not advance this aim. Instead, these offenses unnecessarily duplicate existing law that already bans violence and property destruction and expand criminal liability in ways that provide government broad discretion. This discretion has a history of abuse and confusion, undermining the constitutional rights of activists, protesters, and others. In response, states and the federal government should eliminate or, at the very least, better target these crimes.

327. *See supra* Part I.A (discussing the history of rioting in the United States including heightened violence from the early nineteenth to early twentieth century, in part because rioting often consisted of violence between social groups in this period).