

U.S. PROGRAM BRIEFER

The Many Problems with Anti-Rioting Laws

While the government has a legitimate interest in combatting riots, every state already has laws on the books that protect people and property from violence. There is little evidence that anti-rioting laws deter rioting or provide law enforcement with effective tools to stop it. In fact, three states have [no anti-rioting law](#) at all and over half have [no incitement to riot offense](#).

Instead, anti-rioting laws have a history of abuse, allowing government to bring charges with extreme penalties against protesters, politicians, and other Americans engaged in protected First Amendment activity. They can also lead to [costly lawsuits](#) that sap state coffers and waste taxpayer money. These laws should either be better targeted or eliminated.

1. Overbroad anti-rioting laws can cover peaceful protesters and bystanders.

Anti-rioting laws are often written in an overbroad manner that can capture people who do not engage in any property damage or violence. For example, in 2020, a Kentucky State Representative was [arrested for felony rioting](#) during a racial justice protest after someone in a crowd she was near threw a flare into a public library. By making individuals liable for others' unlawful conduct, many anti-rioting laws [violate](#) the Constitution's ban on "guilt by association", which the Supreme Court has [found](#) is "a philosophy alien to the traditions of a free society."

2. Sweeping anti-rioting laws can criminalize expressive activity where no violence occurs.

Many anti-rioting laws do not require that any violence or property damage actually take place, but allow authorities to declare a riot based on the mere threat of violence or damage. For example, in 2017, an activist was convicted of rioting after [engaging in passive resistance](#) by locking arms with other protesters when police attempted to arrest them.

3. Anti-rioting laws give authorities undue discretion, enabling abuse.

Overbroad anti-rioting laws allow police and prosecutors to enforce them in a selective manner, and they have long been used to target individuals on political, racial, or other basis. Consider these two recent choices by prosecutors to either enforce or not enforce the federal anti-riot act:

- On January 6th, 2021, hundreds of Trump supporters stormed the U.S. Capitol, causing significant property damage and injuring dozens of law enforcement. The Justice Department prosecuted over 700 of those involved, often for serious offenses, but declined to prosecute any for rioting, despite having sufficient evidence. If those who had stormed the Capitol had been prosecuted for rioting, the charges could have covered many more people who were involved, and they could have faced decades in prison.
- During President Trump’s inauguration on January 20th, 2017, a handful of anti-Trump protesters engaged in property destruction elsewhere in the city. Approximately 200 protesters, the vast majority of whom did not engage in any property destruction themselves, were charged by the Justice Department with felony rioting, conspiracy to riot, and aiding and abetting a riot. If convicted, they would have faced over 60 years in jail. While most protesters were either acquitted or saw their charges dropped, they had to put their lives on hold for over a year during the judicial process.

4. The offense of incitement to riot can easily cover protected First Amendment activity.

The crime of incitement to riot frequently criminalizes “urging” or “encouraging” a riot. Historically, the crime of incitement has been used to punish dissenting voices, from opponents of slavery to the Chicago Seven. Incitement to riot provisions:

- ***Encourage a “heckler’s veto.”*** During the Civil Rights Movement, charges of inciting a riot were often used to arrest Black people who attempted to integrate segregated facilities in the Jim Crow South by police who cited fears that they would provoke violence by segregationists. More recently, the Sixth Circuit ruled that authorities acted unconstitutionally when they forced Christian evangelicals to stop protesting an Arab festival in Dearborn, Michigan, based on fears their anti-Islam rhetoric would incite a riot.
- ***Enable politicized use.*** Protesters at a Trump campaign rally in 2016 sued then-candidate Donald Trump for inciting a riot after he yelled “get ‘em out of here,” and Trump supporters then roughed up the protesters. The case was

ultimately dismissed by a circuit court, but not until after two years of litigation. The 2020 racial justice protests saw seemingly politicized use of incitement provisions as well. For example, 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.

- ***Are unconstitutionally overbroad.*** In 2020, the [Fourth Circuit](#) found that the incitement provision of the federal anti-riot act covered a “substantial amount” of protected speech to the extent that it encompasses speech tending to “encourage,” “promote,” or “urge” a riot. In 2021, the [Ninth Circuit](#) agreed, finding the provision failed the Supreme Court’s *Brandenburg* test, which holds that advocacy can be punished only if it “is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”

5. The overbreadth of anti-rioting laws is exacerbated by related offenses.

When sweeping anti-rioting laws are paired with crimes like conspiracy to riot or aiding and abetting a riot, their scope is expanded even further. For example, during the January 20th demonstrations in Washington, DC, in 2017, protesters were charged with “conspiracy to riot” and “aiding and abetting a riot” merely because they engaged in coordinated activity, such as [wearing the same-colored clothing](#). This allowed prosecutors to claim that those present at the protest should be collectively liable for all property destruction that occurred. Similarly, in the 2020 [Fourth Circuit decision](#) finding key provisions of the federal anti-riot act unconstitutional, the court detailed how the statute would allow for highly attenuated prosecutions, such as charging someone for “aiding” a person who “urges” a riot. These types of charges provide the government enormous power to target political voices with which it disagrees through retaliatory arrests or selective prosecutions.