RETHINKING THE CRIME OF RIOTING

Nick Robinson[*]

ABSTRACT

The fear of riots has long loomed large in the public imagination. This fear is, at least partly, justified. Riots can present unique challenges both in the harm that they can cause and the government's ability to control them. However, from the American colonies to the Civil Rights era, there is also a history of members of largely non-violent social movements being tarred as "rioters".

This use of the label of rioting to undermine dissent is not just a political problem, but also a legal one, and it has once again reemerged. While the Black Lives Matter protests of 2020 were overwhelmingly nonviolent, in the year that followed state lawmakers pointed to violence that did occur to introduce legislation in over half of U.S. states that would strengthen or expand rioting offenses. This wave of new anti-rioting legislation has been criticized as an attempt not to address violence, but rather to target and intimidate peaceful protesters.

Despite the prominence of rioting in U.S. history, the criminal offenses of rioting and incitement to riot have been strikingly understudied. In order to help fill this gap and to better situate this recent surge of legislation, this article provides the first systematic analysis and critique of these crimes in the U.S. It traces how these offenses are rooted in an English common law heritage where the crime of rioting was a blunt tool that the government frequently used to suppress political and religious dissent. It then shows that although today U.S. anti-rioting legal measures vary considerably by jurisdiction, in an age of mass protest movements they can often undermine the freedom of peaceful assembly.

The core offense of rioting–violence or property destruction by individuals as part of a group–is already unlawful under other parts of the criminal law. Many rioting offenses though expand criminal liability to those who engage in no violence themselves, but are simply part of a crowd that is "rioting" or create liability for conduct that only threatens property destruction or violence. Meanwhile, incitement to riot provisions can frequently capture merely provocative speech. These crimes against rioting

[*] Senior Legal Advisor at the International Center for Not-for-Profit Law. I would like to thank Amy Marshak, Bobbi Elaine-Strang, Doug Rutzen, Elly Page, Emilia Pierce, Jane Chong, John Inazu, Mara Verheyden-Hilliard, Patrice Sulton, Richard Schmechel, Robert Post, and Yvonne Tew for feedback on or conversations about this article. All errors and opinions are my own.

provide law enforcement wide discretion–a discretion which has a history of being used in a politicized and racialized manner.

Government has a clear interest in stopping riots. However, this article argues that given a range of other tools available for this goal and the history of these crimes being used against nonviolent protesters, jurisdictions are better off eliminating the offenses of rioting and incitement to riot altogether. Where that is politically infeasible, it lays out a framework to better target these crimes to minimize the risk of their abuse.

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, the only Black female member of

[1] *See* Elizabeth Joseph, *Kentucky's only Black female legislator arrested in Breonna*

the Kentucky legislature, was navigating past lines of police in riot gear towards a nearby church to comply with a looming curfew, when someone broke a window and threw a flare into a public library (it did not start a fire).[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 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, over sixty such bills were introduced 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

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Taylor protest, CNN (Sept. 26, 2020), https://www.cnn.com/2020/09/26/us/attica-scott-arrest-breonna-taylor-protest/index.html (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 Protests*, COURIER JOURNAL, (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/ (quoting Shameka Parrish-Wight who was also arrested along with Scott).

[5] See, e.g., Nick Robinson, *Breonna Taylor 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 (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 56 (2021) (finding that 97% of the Black Lives Matter protests that took place in the summer of 2020 were nonviolent).

[7] For a discussion of the introduction of this legislation and its characteristics, see, *infra* Part II(B) and III(C).

[8] ICNL U.S. Protest Law Tracker, https://www.icnl.org/usprotestlawtracker/ (searching Tracker issues for "riot" laws from June 1, 2020 to Dec. 31, 2021) [hereinafter ICNL Tracker].

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 U.S., 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 disturb 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 U.S., riots have been associated with violence of very different character and motivation. The Boston Tea Party was a riot,[12] so were mob lynchings of Black Americans in the Jim Crow South,[13] as were the race riots of the 1960s and 1970s.[14] The U.S. has seen anti-Catholic riots, anti-Chinese, and anti-Native American.[15] There have been riots in the name of labor rights or gay rights or against the involvement of the U.S. in war.[16] Violence during riots has been directed at destroying or

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[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 (describing criticisms of anti-protest bills including those related to rioting).

[10] There have been relatively few studies of any type of anti-riot legal measures in the U.S. For two notable exceptions to this lack of analysis, see, Margot Kaminski, *Incitement to Riot in the Age of Flash Mobs*, 81(1) UNIV. OF CINC. L. REV. 1 (2013) (providing an extensive analysis of incitement to riot statutes in the United States) and Martin McMahon, *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 cataloguing of state court judgments that interpret what types of force, violence, or terrorizing conduct is necessary for rioting).

[11] Commentators have defined rioting in a broad array of ways. *See*, e.g., PAUL A. GILJE, RIOTING IN AMERICA (1999) (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." Id. at 4); CHENOWETH, *supra* note 6 at 53 ("A riot is simply a disturbance by a crowd.").

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

[13] *Id*. at 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] *Id*. at 25, 66-69, 77-79, 123-130 (detailing nativist riots against ethnic and religious minority groups).

[16] *Id*. at 116-123, 167-168, 170 (describing riots arising out of labor, gay riots, and anti-war movements).

looting property, 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 and property destruction that can overwhelm the capacity of government to respond.[18] At the same time though 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 connotated 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 U.S. has its roots in English anti-riot acts and common law of the 16th, 17th, and 18th centuries, and many U.S. anti-rioting provisions still mirror 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 not just to quell violence by crowds, but also broader protests against government policies.[21]

While government has 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]

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[17] *See* FINAL REPORT OF THE NATIONAL COMMISSION ON THE CAUSES AND PREVENTION OF VIOLENCE (1969), https://www.ojp.gov/pdffiles1/Digitization/275NCJRS.pdf [hereinafter REPORT OF VIOLENCE COMMISSION] (". . . [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." *Id*. at 57).

[18] *See infra* Part I(B) (describing the challenges rioting presents government).

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

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

[21] *Id*.

[22] *See infra* note 166 to 168 and accompanying text (discussing the sections of the California penal code that outlaw violence or property destruction by individuals).

[23] For a discussion of which states do and do not have rioting and incitement to riot offenses *see* discussion in *infra* Part II(B). *See* also Marvin Zalman, *The Federal Anti-Riot Act and Political Crime: The Need for Criminal Law Theory*, 20(4) VILLANOVA L. REV. 897,

Although legal definitions of rioting in the U.S. vary considerably by state, they often broaden liability beyond other existing criminal law in a manner that can capture nonviolent conduct, including 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 its threat.[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 to advocating for strengthening rioting and incitement to riot laws to respond to rising fears about political violence in the United States, but ultimately government is better off relying on a range of other tools.[30] 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, 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

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911 (1975) (describing how the federal anti-riot act, enacted in 1968, was designed to supplement preexisting state anti-riot measures).

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

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] *See infra* Part III(C) (discussing use of anti-rioting laws against anti-war demonstrators, environmentalists, and racial justice activists).

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

[30] Rachel Kleinfeld, *The Rise of Political Violence in the United States*, 32(4) J. OF DEM. 160 (2021) (describing concerns about rising political violence in the U.S.).

[31] For a discussion of alternative tools to combat rioting see *infra* Part IV(A).

[32] *Id.*

[33] See Keith L. Alexander, *Prosecutors break down charges, convictions for 725*

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, they have been prosecuted for 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 U.S. 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 U.S., showing 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 and 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.

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 this use of force 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]

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arrested so far in Jan. 6 attack on U.S. Capitol, WASHINGTON POST (Dec. 31, 2021), https://www.washingtonpost.com/politics/2021/12/31/capitol-deadly-attack-insurrection-arrested-convicted/ (detailing charges brough to date against Capitol "rioters").

[34] Capitol Breach Cases, Justice Department, https://www.justice.gov/usao-dc/capitol-breach-cases (listing prosecutions brought by Justice Department against those that breached the Capitol on January 6, 2021).

[35] Alexander, *supra* note 33 (common offenses included assault, resisting arrest, and entering a restricted building).

[36] *See, e.g.*, Benjamin S. Case, *Riots as Civil Resistance: Rethinking the Dynamics of "Nonviolent" Struggle*, 4(1) J. OF CIVIL RESISTANCE 9 (2018) (arguing that in some situations riots can be strategically and morally appropriate).

[37] *See* Eric Shuman et al., *Does Violence Within a Nonviolent Social Movement Help or Hurt the Movement? Evidence from the 2020 Black Lives Matter Protests* (2021), https://psyarxiv.com/4m79q/ (finding that violent protests did make it more likely conservatives in liberal areas would support policy goals of movement). But see Omar Wasow, *Agenda Seeding: How 1960s Black Protests Moved Elites, Public Opinion, and Voting*, 114(3) AM. J. OF POL. SCI 638 (2020) (finding race riots in the 1960s and 1970s

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, U.S. policymakers should view this international experience as a warning about how anti-rioting laws in the U.S. could be even further abused. It should also add urgency to U.S. reform efforts in order to help build global momentum for a better approach.

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 U.S. 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 for the government to address these challenges does not necessarily require separate anti-rioting offenses. 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

Riots in the U.S. are historically highly varied. Riots have been undertaken by marginalized groups as well as politically dominant ones, and they can vary considerably in their level of their violence or property

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 and 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 (describing use of rioting charges against pro-democracy Hong Kong demonstrators); Hannah Ellis Peterson, *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 (detailing criticism of Delhi police for charging human rights advocates with inciting riots in Feb. 2020).

destruction.[39] Despite these differences, from a historical perspective, rioting in the U.S. can be broadly categorized into three periods.[40]

The first historical era of rioting starts in the colonial period, passes through the American Revolution, and ends in the early 19th century. During this period, riots were often used as a tool by communities against an unresponsive government or outsiders.[41] The Boston Tea Party and Boston Massacre were only two "riots" amongst many similar showdowns between colonists and imperial power.[42] As Paul A. Gilje has written, during this time those who participated in riots were generally deferential towards colonial elites and violence was highly ritualized–such as by humiliating individuals through effigy processions, tarring and feathering British officials, or breaking windows or tearing down buildings.[43] As a result, these riots were relatively less violent[44] and were often seen as a useful check (within limits) on the tyrannical practices of government.[45]

The second era of U.S. rioting can roughly be delineated as starting in the early 19th century, traversing the Civil War, and ending in the middle of the twentieth century.[46] As the traditional social hierarchy of the 18th century broke down, different social groups–whether based on race, ethnicity, or class–engaged in conflict against each other in riots that resulted in widespread and often much more severe violence.[47]

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[39] *See* GILJE, *supra* note 11 at 2-3 (describing range of motivations for rioting in the U.S.).

[40] This typology is adopted from Paul Gilje, who demarcated rioting in the U.S. 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 (". . .while group violence in the 1960's 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.").

[41] *See* GILJE, *supra* note 11 at 35-36.

[42] *Id*. at 45-51 (describing the political context of riots during the era leading up to the U.S. Revolution).

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

[44] *Id*. at 10. Notably, there was often significantly more violence towards Native Americans during rioting in this period. *Id*. at 25 (describing violence by the Paxton boys in Pennsylvania who killed 20 Native Americans in the mid-1760s).

[45] *Id*. at 20-21. See also, C. EDWIN BAKER, HUMAN LIBERTY & FREEDOM OF SPEECH (1989) (describing how American colonists understood popular uprisings and mobs as a necessary evil to address the abuses of government. *Id*. at 183); John Philip 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 (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).

[46] *See* GILJE, *supra* note 11 at 10.

[47] *Id*. at 10.

Race played a central role in these riots. Before the Civil War, White mobs would assault free Blacks in the North when they were viewed as being too assertive (such as not making way for Whites on the sidewalk)[48] and free Blacks would riot in response to being attacked or in opposition to slavery.[49] 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.[50] Between 1882 and 1937 there were over 5,000 lynchings in the United States, frequently by mob crowds.[51] In the first quarter of the 20th century there was a series of major urban race riots, including in Atlanta, St. Louis, and Tulsa, which were often sparked by Blacks organizing to fight back against violence and intimidation by Whites.[52]

This period also saw significant rioting between other social groups. Nativists would clash with the Chinese, Irish, Germans, Catholics, Mormons and others in lethal riots throughout the 19th century.[53] Workers also frequently rioted based on labor grievances, often directing violence towards scabs or strike breakers.[54] And concern over anarchist and communist infiltration into the labor movement helped justify police violence against workers that could lead to violent confrontation, such as at the Haymarket riot of 1886.[55]

The third era of rioting in the U.S. can be broadly outlined from the 1940s to the present. During this period, rioting became less violent towards persons (although property destruction could still be extensive), and grievances were frequently directed not towards other social groups, but rather towards government.[56] Many riots were sparked by confrontations

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[48] *Id*. at 88-90.

[49] *Id*.

[50] *Id*. at 94-100.

[51] *Id*. at 101. See also, IDA B. WELLS, *"Lynch Law in America" (1900*), IN THE LIGHT OF TRUTH: WRITINGS OF AN ANTI-LYNCHING CRUSADER 396-397 (2014) (discussing the "unwritten law" that justified mob violence against blacks in the South and elsewhere in the U.S.). Not all lynchings in this period were of Blacks. For example, between 1849 and 1902 there were about 300 lynchings in California of which around 200 were of Asians. JEAN PFAELZER, DRIVEN OUT: THE FORGOTTEN WAR AGAINST CHINESE AMERICANS 54 (2007).

[52] *See* GILJE, *supra* note 11 at 108-115.

[53] *Id*. at 66-69, 123-130 (describing a range of ethnic and religious riots during the 19th century).

[54] *Id*. at 116-121 (describing national railroad strikes in 1877, 1886, and 1894 that resulted in rioting that also sometimes pitted ethnic groups against each other).

[55] *Id*. at 131.

[56] *Id*. at 144. See also, Barbara Rhine, *Kill or Be Killed?: Use of Deadly Force in the Riot Situation*, 56 U. CAL. L. REV. 829 (1968) (noting that the race riots in the U.S. in the 1960s differed from earlier race riots "which were characterized by offensive action of white mobs against Negroes." *Id*. at 830.); THOMAS SUGRUE, SWEET LAND OF LIBERTY: THE FORGOTTEN STRUGGLE FOR CIVIL RIGHTS IN THE NORTH (2008) (arguing that during

between law enforcement and Black Americans. For example, violence against Blacks by law enforcement was a common driver behind the race riots of the 1960s and 1970s[57] and riots in Los Angeles in 1992, Cincinnati in 2001, Ferguson in 2014, Baltimore in 2015, and in a number of cities across the country in the summer of 2020.[58] However, rioting in this period also had other motivations. For example, there were riots in opposition to the Vietnam War,[59] in outrage over the police's treatment of the gay community,[60] over injustices created by global trade,[61] in response to prison conditions,[62] and a riot at the U.S. Capitol over claims of a stolen Presidential election.[63]

While it can be useful and appealing to categorize riots in the U.S. 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.[64] This may signal a return to a period where rioting, and political violence more generally, is directed not primarily towards grievances with the government, but rather between groups within U.S. society.

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the riots of the 1960s that "most of the casualties were the result of law enforcement actions against blacks, not black violence against the police or white bystanders. . . . and [riots] resulted primarily in property damage or destruction." *Id*. at 326).

[57] *Id*. at 325-27 (discussing how race riots of 1960s "generally began with a police incident, targeted property, not people, though rarely if ever 'white dominated institution'….and did not spread into white neighborhoods.").

[58] *See* generally, ELIZABETH HINTON, AMERICA ON FIRE: THE UNTOLD HISTORY OF BLACK REBELLION AND POLICE VIOLENCE SINCE THE 1960S (2021) (chronicling police violence sparking Black rebellion after the 1970s. *Id*. at 229-308).

[59] *See* GILJE, *supra* note 11 at 162-169 (discussing violence connected with anti-Vietnam War protests).

[60] *Id*. at 170 (describing Stonewall riot of 1969).

[61] *See* Gene Johnson, *WTO protests in Seattle 20 years ago helped change progressive politics*, LA TIMES (Nov. 29, 2019), https://www.latimes.com/world-nation/story/2019-11-29/wto-protests-in-seattle-20-years-ago

[62] 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?* THE ATLANTIC (Dec. 12, 2013), https://www.theatlantic.com/magazine/archive/2013/12/have-a-safe-riot/354671/ (documenting decline of prison riots between 1970s and 2013).

[63] *See* David Bauder, *Riot? Insurrection? Words Matter When Describing the Capitol Siege*, ASSOCIATED PRESS (Jan. 14, 2021), https://apnews.com/article/donald-trump-capitol-siege-riots-media-8000ce7db2b176c1be386d945be5fd6a (describing Jan. 6, 2020 attack of U.S. Capitol as a riot).

[64] *See* Robert O'Harrow Jr., Andrew Ba Tran, & Derek Hawkins, *The rise of domestic extremism in America*, WASHINGTON POST (April 12, 2021), https://www.washingtonpost.com/investigations/interactive/2021/domestic-terrorism-data/ (describing surge in political violence in the U.S. against other Americans driven primarily by the far-right, but also to a lesser extent the far-left).

A litany of explanations has been provided about why there was a decline in riots, and particularly their level of violence against persons, 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;[65] a government that more actively addressed civil rights or labor concerns, including through greater intervention by the federal government to protect minorities;[66] less polarization within society;[67] and greater political power for minorities and increasingly diverse police forces.[68] Strikingly, stronger or revised anti-riot acts are generally not proposed as a reason for the decline in violent riots during this period and, indeed, as will be explored in Part II, in many states the criminal offense of rioting has remained little changed since the 18th century.[69]

B. The Challenge of the Riot

Riots can vary considerably in size and their 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.[70] Riots can cause widespread loss of life, injury, and property destruction. As the last section described, group violence also has a history of being used by dominant groups to target marginalized communities or has

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[65] *See* GILJE, *supra* note 11 at 175-176 (describing how by the 1960s public protests became a legitimized form of expression).

[66] *See* Steven I. Wilkinson, *Riots*, 12 ANNU. REV. POLIT. 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 …").

[67] *See* GILJE, *supra* note 11 at 144 (describing how Americans became more alike during this period).

[68] J. SAMUEL WALKER, MOST OF 14TH STREET IS GONE: THE WASHINGTON, DC RIOTS OF 1968 (2018) (arguing that race riots decreased after the 1960s and 1970s because, among other reasons, Blacks gained political power and police departments hired more Blacks Id. at 131-132).

[69] *See infra* Part II(B) (describing how many U.S. states base their rioting definitions off of 18th century English common law).

[70] *See* Kaminski, *supra* note 10 at 76 (noting "mobs" can be violent and are difficult for law enforcement to control.); People v Cipriani, 18 Cal App 3d 299 (1971, 2d Dist) (*"*The law prohibiting riots is . . . based upon the need to prevent the combined effect of concurring violent acts of individuals." *Id.* at 307).

been part of hate crimes.[71] In other words, riots can cause not only significant harm to individuals and property, but also more broadly to a community's social fabric.

Second, some of the social science and psychology literature indicates that witnessing group violence may then make it more likely that individuals in a crowd will engage in violence themselves.[72] Under the theory of "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.[73]

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.[74] 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 curfews.[75]

These features of riots are all reasons that the state has a clear interest in controlling rioting and may often have to deploy additional tools to do so.[76] As such, riots can indeed be different than other types of violence or property destruction. While important to foreground these features of rioting, as will be argued in Part III(A) and Part IV(A) of this article, it is important to note that these differences do not by themselves necessarily 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 connotated with "rioting" has frequently been politically weaponized. Tim Newburn has observed "rioting" is a pejorative

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

[72] Kaminski, *supra* note 10 at 76 (". . . at least one strand of crowd psychology, deindividuation, suggests that mobs themselves cause the people in them to do bad things."); Wilkinson, *supra* note 66 at 338-339 (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).

[73] *Id*.

[74] Kaminski, *supra* note 10 at 76 ("mobs threaten existing social structure").

[75] For more on these measure see *infra* Part IV(A).

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

term "often used by states or by others in powerful positions to label events of which they disapprove and consider illegitimate."[77] Meanwhile Erica Chenoweth has explored how the term has been used "to demean and delegitimize social movements using peaceful if confrontational approaches."[78]

The U.S. 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 "riots" although 97% of the protests took place without violence or property destruction.[79] 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.[80] And even before U.S. Independence, in the 1760s, 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".[81]

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 events.[82] Those who used "civil disorder" adopted "a social scientific term, ostensibly neutral", while "disturbance" implied "a disruption of an otherwise tranquil state of affairs".[83] Meanwhile, "'uprising' . . . suggested a spontaneous upsurge of protest or violent expression or discontent, something with political content", and a "'rebellion' described a deliberate insurgency against an illegitimate regime".[84] Finally, "'riot", which was the most common term used in the period, described "seemingly senseless, inarticulate expression of violence or rage–that observers

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[77] Tim Newburn, *The Causes and Consequences of Urban Riot and Unrest,* 4 ANNUAL REV. OF CRIMINOLOGY 53, 54 (2021).

[78] CHENOWETH, *supra* note 6 at 55.

[79] *Id*. at 56.

[80] Dr. Martin Luther King Jr., *The Other America* (speech), April 14, 1967, https://www.crmvet.org/docs/otheram.htm.

[81] *The Examination of Dr. Benjamin Franklin in the British House of Commons Relative to the Repeal of the American Stamp Act in 1766, in the Works of Benjamin Franklin*, VOL. IV LETTERS AND MISC. WRITINGS 1763-1768, https://oll.libertyfund.org/title/bigelow-the-works-of-benjamin-franklin-vol-iv-letters-and-misc-writings-1763-1768 (Franklin argued in response that "The 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 . . ." *Id*. at 199).

[82] SUGRUE, *supra* note 56 at 334.

[83] *Id*.

[84] *Id*.

continued to use because of its imprecision and its association with mobs and irrationality."[85]

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.[86] In contrast, those attempting to minimize the violence have labeled it a "largely peaceful protest" and even a "civil rights march".[87]

Because of the political salience of the label of "rioting" it arguably creates additional importance to how "rioting" is legally defined: first, because a legal finding of rioting can support a similar political claim, and, second, because 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.

II. THE DEVELOPMENT OF THE CRIME OF RIOTING

This Part begins by describing how early English anti-rioting laws, that served as a model for later U.S. law, were blunt tools that were used to not only address group violence, but also broader dissent. It then traces the history of rioting criminal offenses in the U.S. from the early Republic to the present day, including showing how contemporary U.S. rioting offenses are still heavily influenced by this earlier English heavy-handed 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 12 or more people to assemble with the intent to change the laws of the Kingdom if they refused to disperse after being ordered to do so.[88] In a similar measure, to

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[85] *Id*. *See* also, HINTON, *supra* note 58 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.")

[86] *See* Bauder, *supra* note 63 (describing different terms used to reference the U.S. Capitol attack in 2021).

[87] *Id*.

[88] 3 & 4 Edw. VI. c. 5 (1549), https://babel.hathitrust.org/cgi/pt?id=pst.000017915519&view=1up&seq=192 [hereinafter 1549 Riot Act]; *See* also, Frances Webber, *Six Centuries of Revolt and Repression*, 15

help prevent large groups of aggrieved people from gathering, the newly restored monarchy of Charles II enacted the Tumultuous Petitioning Act of 1661 that banned any group larger than ten from appearing in person to petition either Parliament or the King.[89]

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:

> "[A] tumultuous disturbance of the peace, by three persons, or more, … with an intent mutually to assist one another. . . in the execution of some enterprise of a *private nature*, and afterwards actually executing the same in a violent and turbulent manner, to the terror of the people. . ."[90] (emphasis added)

Hawkins went on to describe how the "private nature" of a riot might include a "private quarrel".[91] He explained that "wherever the intention of such an assembly was to address public grievances", such as to "pull down all inclosures", "reform religion", or remove "evil counsellors from the king", it was not a riot, but rather "levying war against the king" and so "high treason".[92]

The Riot Act of 1714, enacted by the British Parliament, did not make a distinction between rioting for a private or public purpose.[93] However, it, like many earlier English statutes,[94] punished rioting with death, making clear how tightly restricted public assemblies could be at the time.[95] Besides outlawing participating in a riot that destroyed property like a building or

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HALDANE BULLETIN 6 (1981), https://www.jstor.org/stable/44744889?seq=1 (describing context of the passage of the Riot Act of 1549 and its reenactment by Queen Mary and Queen Elizabeth. *Id*. at 6).

[89] 13 Charles II 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/. *See also*, Mark Knights, *The Gordon Petition and Riots*, UK Parliament Committees, Sept. 20, 2019, https://committees.parliament.uk/committee/326/petitions-committee/news/99303/the-gordon-petition-and-riots/ (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).

[90] WILLIAM HAWKINS, A TREATISE OF THE PLEAS TO THE CROWN 155 (1716), https://books.google.com/books?id=C-TlAAAAMAAJ&printsec=frontcover#v=onepage&q&f=false.

[91] *Id*. at 157.

[92] *Id*. at 515.

[93] Anno primo George II I. Stat. 2. C. 5., https://www.gutenberg.org/files/8142/8142-h/8142-h.htm [hereinafter 1714 Riot Act].

[94] *See, e.g.*, 1549 Riot Act, *supra* note 88.

[95] 1714 Riot Act, *supra* note 93 (declaring that those convicting of rioting "shall suffer death . . . without benefit of clergy").

church,[96] 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.[97] 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.[98] This authority to disperse crowds the government found "riotous" became a helpful tool for officials who wished to break up demonstrations against government policies.[99]

Rioting was viewed in England as an offense not against persons or property, but against the more nebulous "public peace".[100] It was understood to be one of three interconnected and escalating offenses; namely, unlawful assembly, rout, and rioting. 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."[101] 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."[102] 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."[103] In other words, an unlawful assembly was a gathering with an unlawful goal; a rout involved the gathering taking some step towards 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, but 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

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[96] *Id*. at Art. IV.

[97] *Id*. at Art. I.

[98] *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 (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.*, 1549 Riot Act, *supra* note 88 (requiring those to disperse within an hour of reading of the official proclamation).

[99] *See* Webber, *supra* note 88 at 7 (describing how the Riot Act of 1714 was in constant use throughout the 19th century against riots protesting government policies).

[100] *See, e.g.* WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS ON ENGLAND IN FOUR BOOKS, Vol. 2 (1893), https://oll.libertyfund.org/title/sharswood-commentaries-on-the-laws-of-england-in-four-books-vol-2#lf1387-02_label_2912 (placing the offense of rioting in a Chapter on offenses against the public peace. *Id*. at 142).

[101] *Id*. at 146.

[102] *Id*.

[103] *Id*. at 146-147.

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' arrest, the collection of evidence, and how to try the accused.[104] This legislation also made clear to local officials that they did not just have the power to intervene against a riot, but a duty.[105] For example, the Riot Act of 1411 imposed fines on local justices of the peace who failed to detain rioters.[106] The 1714 Riot Act called on the public to assist officials in putting down rioters.[107] 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.[108] Finally, it made inhabitants of the hundred, a local administrative unit, liable for compensation of anyone whose property was damaged during a riot.[109]

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 not only outlawed, and often punished by death, participating in a broad range of gatherings that were viewed to be violent and tumultuous, but also focused on quelling riots by providing extensive powers to, and enforceable 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 a relatively weak state, and so in need of blunt tools of coercion against both rioters, or potential rioters, and its own officials.

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[104] *See* Justice of Peace Act of 1361 (34 Edw 3 c 1), https://www.legislation.gov.uk/aep/Edw3/34/1 (providing justices of the peace the power to detain and try "rioters"); Riot Act of 1411 (13 Henry 4 c.7), https://statutes.org.uk/site/the-statutes/fifteenth-century/1411-13-henry-4-c-7-the-riot-act/ [hereinafter 1411 Riot Act] (providing rules to local officials for investigating riots); Riot Act of 1414 (2 Hen 5 Stat. 1 c. 8), https://babel.hathitrust.org/cgi/pt?id=pst.000017915526&view=1up&seq=206 [hereinafter 1414 Riot Act] (providing justices of the peace and other officials the power to arrest, collect evidence, and try rioters); HAWKINS, *supra* note 90 at 158-166 (providing details about how officials are to respond to riots).

[105] *Id.* at 158, 165-166 (describing duty of local officials to suppress a riot).

[106] *See* 1414 Riot Act, *supra* note 104 (imposing fine of "an hundred pounds" on justices of the peace who did not enforce the statute).

[107] *See* 1714 Riot Act, *supra* note 93 at Art. III (describing how non-officials could be "commanded" to assist officials to quell a riot).

[108] *Id*. (declaring that all officials and those assisting them "shall be freed, discharged, and indemnified" if they injure or kill those participating in a riot); but *see* Webber, *supra* note 88 at 7 (noting that despite the indemnity provision of the 1714 Riot Act that there was confusion over magistrates' powers and they were tried for murder arising out of riots three times during the 18th century).

[109] *See* 1714 Riot Act, *supra* note 93 at Art. VI.

B. U.S. Evolution

Anti-riot legal measures in the U.S. have been significantly shaped by their English roots. U.S. state judges in the early Republic generally drew directly from the common law to define "rioting", as well as impose duties on officials to quell riots.[110] Even today, many states rely on the common law to define rioting[111] or have statutory definitions of rioting that would be very familiar to Blackstone or Hawkins.[112] That said, the offense has evolved in many states, creating distinct approaches to defining the crime. Significantly, rioting in the U.S. that challenges government policies is not legally understood to be treason as it was during certain periods in English history,[113] even if U.S. politicians and others do sometimes label rioters as treasonous.[114]

During codification of state law in the 19th 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

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[110] *See, e.g.,* Commonwealth vs. Hamilton Runnels, 10 Mass. 518 (1813) (relying on William Hawkins definition of rioting); Respublica v. Montgomery, 1 Yeates 419 (1795) (citing to William Hawkins as an authority for the duty of officials to respond to riots); State v. William Stalcup, 23 N.C. 30 (N.C. 1840) (citing to William Hawkins definition of rioting).

[111] *See, e.g.,* Schlamp v. State, 891 A.2d 327, 335 (Md. 2006) ("Rioting is punishable at common law, although most states now have statutes to address it.").

[112] *See, e.g.*, *infra* note 116 (describing how Georgia's definition of rioting is similar to Blackstone's definition).

[113] Commentators on the common law in the U.S. were careful to note that in the U.S., 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, A TREATISE ON THE CRIMINAL LAW OF THE UNITED STATES, VOL. II (1880), https://babel.hathitrust.org/cgi/pt?id=mdp.35112104975794&view=1up&seq=360&skin=2021 ("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." *Id*. at 344).

[114] 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'*, WASHINGTON 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. Marvin Zalman has described how "[t]here is evidence that the conservative [Congressional] supporters of the federal 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 at 23 at 915.

act in a violent and tumultuous manner."[115] This language closely mirrored Blackstone's definition of rioting, and the contemporary Georgia statutory definition of rioting remains very similar.[116]

Like in the English common law, riot provisions in U.S. states were generally codified as an offense against the public.[117] 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.[118] Also, like in England, rioting was commonly classified as part of a series of crimes that included unlawful assembly and rout.[119] Today though only a handful of states have the offense of rout.[120]

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 to rescue a prisoner.[121] 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, while rioting in the first degree requires participating with over ten persons and that during the riot a person other than one of the participants is injured or there is substantial property damage.[122]

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[115] The Penal Laws of the State of Georgia **§** 201 (1833), in Thomas R.R. Cobb, *1851 Cobb's Digest (Vol. 2)*, HISTORIC GEORGIA DIGESTS AND CODES 811 (1851), https://digitalcommons.law.uga.edu/ga_code/14/.

[116] *See* BLACKSTONE, *supra* note 100 at 146 (defining the crime of rioting at "[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 Code Ann. §16-11-30 (2010), defines rioting as "Any 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." *Id.*

[117] *See, e.g.*, JOEL PRENTISS BISHOP, COMMENTARIES ON THE CRIMINAL LAW 324v(1872), https://babel.hathitrust.org/cgi/pt?id=chi.42387340&view=1up&seq=355 (listing rioting in a chapter under "Protection to the Public Order and Tranquility").

[118] *See* Kaminski, *supra* note 10 ("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." *Id.* at 14).

[119] *See, e.g.*, The Penal Code of California Penal Code §§ 404, 405, and 407 (1872), https://babel.hathitrust.org/cgi/pt?id=uc2.ark:/13960/t9x067b09&view=1up&seq=209&skin=2021 (defining the offenses of unlawful assembly, rout, and riot).

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

[121] *See* The Penal Code of the State of Texas, Art.'s 367-269 (1857), https://babel.hathitrust.org/cgi/pt?id=nyp.33433007054772&view=1up&seq=7&skin=2021.

[122] *See* N.Y. Penal Law §240.05 (defining rioting in the second degree); N.Y. Penal Law

Several states increase the penalty for rioting if the person convicted of rioting was armed with a dangerous weapon[123] and it is not uncommon for states to have a separate offense, and penalties, for rioting in prison.[124]

Incitement to riot was not a common offense in early U.S. statutes or common law understandings. For example, a survey of three major treatises on U.S. criminal law of the late 19th century find no mention of an offense of "incitement to riot", even while they describe the offense of rioting in significant detail.[125] That said, the offense was seemingly occasionally prosecuted in the 19th 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.[126] By the 20th century states began adding the offense of inciting a riot to their criminal code, and today at least 22 states, Washington DC, 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).[127] Incitement to riot has also been recognized as part of the common law in some states,[128] even though 19th century U.S. common law commentators and English common law

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§240.06 (defining rioting in the first degree).

[123] *See, e.g.*, N.C.G.S. §14-288.2 (2017) (increasing the penalty for rioting in North Carolina to a felony if the person participated in the riot with a dangerous weapon).

[124] *See, e.g.*, Mont. Code. Ann. §45-8-103(3) (creating a heightened penalty for engaging in an act of violence during a riot in a correctional facility); Colo. Rev. Stat. §18-8-211 (creating a separate riot offense for rioting in a correctional institution).

[125] *See* BISHOP, *supra* note 110 at 324-328 (describing the offense of rioting, but not incitement to riot); WHARTON, supra note 113 at 342-352 (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 147-150 (1905), https://babel.hathitrust.org/cgi/pt?id=coo.31924020159467&view=1up&seq=7&skin=2021&q1=incite (describing the crime of rioting, but not incitement to riot).

[126] *See Boston Minister Tried for Inciting a Riot*, MassMoments, https://www.massmoments.org/moment-details/boston-minister-tried-for-inciting-a-riot.html (describing indictment and trial of Theodore Parker).

[127] *See* AL Code §13A-11-4; Ariz. Rev. Stat. Ann. §13-1207 (applying only to prisoners who commit assault to incite a riot), AR Code §5-71-203; CA Penal Code §404.6; Colo. Rev. Stat. §18-9-102; Conn. Gen. Stat §53a-178; FL Stat. §870.01; GA Code Ann.. §16-11-31; Kan. Stat. Ann. §21-6201; KY Rev. Stat. Ann. §525.040; LA Rev. Stat. Ann. §329.2; Mich. Comp. Laws §752.542; Mont. Code. Ann. §45-8-104; N.Y. Penal Law §240.08; N.C. Gen. Stat. §14-288.2; N.D. Cent. Code §12.1-25-01; 21 OK Stat. 21 §1320.2; RI Gen. Laws §11-38-5 (applicable only to a person who incites a riot at a correctional institution), S.C. Code §16-5-130 (creating the crime of "instigating" a riot); SD Codified Laws §22-10-6 (creating the crime of "encouraging" a riot); TN Code Ann. §39-17-304; VA Code Ann. §18.2-408; DC Code §22-1322; 18 U.S. Code §2101.

[128] *See, e.g.* Lynch v. State, 2 Md. App. 546 (1967) (upholding common law incitement to riot conviction against white nationalists); Commonwealth v. Hayes, 209 A.2d 38 (Pa. Super. Ct. 1965) (upholding common law incitement to riot conviction against defendant for leading cheers against police).

interpreters like Hawkins and Blackstone did not explicitly recognize the offense.[129]

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 endeavour to suppress a riot" and they are protected by law in so doing.[130] 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.[131] While most of these provisions imposing duties to quell riots have not survived, some have, even if they are rarely used. For example, in Massachusetts and West Virginia the criminal code still allows local officials to command the public to assist in repressing riots.[132] 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.[133]

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[129] *See supra* note 125 (surveying how three leading US commentaries on the criminal law in the 19th century did not directly reference incitement to riot); See also, BLACKSTONE, *supra* note 100 at 142-153 (defining the crime of rioting, but not incitement to riot); HAWKINS, *supra* note 90 at 161-167 (defining the crime of rioting, but not incitement to riot). 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* (1795) 36 Geo.III, c.8., https://web2.uvcs.uvic.ca/courses/lawdemo/DOCS/SMA.htm

[130] Respublica v. Montgomery, 1 Yeates 419, 421 (1795).

[131] Compare 1411 Riot Act, *supra* note 104, with Sections §§1-4 of *An act for the suppression and punishment of Riots, Routs, and unlawful assemblies* (Passed Dec. 4, 1786), in THE REVISED CODE OF THE LAWS OF VIRGINIA 556 (1819), https://babel.hathitrust.org/cgi/pt?id=hvd.hxh5ui&view=1up&seq=642&skin=2021&q1=riot.

[132] *See* W. VA. Code §61-6-4 (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. L. Ch. 4. §269(1) (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.").

[133] *See* 53 PA Cons. Stat. §16662 ("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 . . .").

In response to race riots during the 1960s and 1970s, several states and the federal government enacted anti-riot legislation.[134] 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.[135] 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 does result in, damage or injury to property or person.[136] 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 fire fighter 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".[137] 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.[138]

As of today, states have adopted broadly 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 (i.e. Nebraska, Wisconsin, and Wyoming) they do not have the crime at all.[139]

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[134] *See, e.g.*, Michigan Act 302 of 1968 (enacting Michigan anti-riot act), Pa. P.L. 1482, No. 334 (1972) (enacting Pennsylvania anti-riot act); Zalman, *supra* note at 23 at 911 (describing how federal anti-riot act was enacted in response to race riots).

[135] *Id*. at 912 ("The anti-riot bill functioned as a source of compromise which led to the passage of the 1968 Civil Rights Act").

[136] *See* 18 U.S. Code §2102(a). Enacted as part of Public Law 90-284.

[137] See, Public Law 90-284, chapter X (chapter on "civil obedience").

[138] *See, e.g.*, Mo. Rev. Stat. §574.070; Mont. Code Ann. §45-8-109; S.C. Code Ann. §16-8-20; TN Code Ann. §39-17-314. 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/ (describing how over the past year the Justice Department had turned to the charge of "civil disorder" over 125 times against protesters).

[139] 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 §16-5-130; W.V. Code §61-6-6; 13 V.S.A. §902 (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. 7 M.L.E. Criminal Law §3; Miss. Code Ann. §99-1-3; N.M. Stat. Ann. §30-1-3; 11 R.I. Gen. Laws §11-1-1. Through caselaw Massachusetts also recognizes criminal common law. *See* Commonwealth v. Carter, 481 Mass. 352, 364 (2019) (describing

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 caselaw from their state.[140]

Second, sixteen states and Washington D.C, have drawn on elements of the common law, particularly as exemplified by 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".[141] 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",[142] while others require that this conduct create a danger to persons or property.[143]

Third, in eleven states rioting is defined, in part, as a group that engages in "force or violence".[144] 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."[145] Some require that this conduct disturb the public peace[146] and others that it violates the law.[147]

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how the state recognizes criminal common law for certain offenses). Nebraska, Wyoming, and Wisconsin have explicitly abolished common law crimes through statute or caselaw and do not have a statutory crime of rioting. *See* State v. Ryan, 543 N.W.2d 128, 145 (1996) (Gerrard J., dissenting) ("There are no common-law crimes in Nebraska."); Wyo. Stat. Ann. §6-1-102 (abolishing criminal common law crimes); Wisc. Stat. §939.10 (abolishing criminal common law crimes).

[140] *See, e.g.*, Schlamp v. State 390 Md. 724 (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 (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 (Fla. 1975) (citing to an earlier Florida Supreme Court decision that defines rioting and citing to William Hawkins. *Id*. at 752).

[141] Ala. Code §13A-11-3; Alaska Stat. §11.61.100; Ark. Code §5-71-201; Colo. Rev. Stat. §18.9-101(2); Conn. Gen. Stat. §53a-175; D.C. Code §22-1322; Ga. Code Ann. §16-11-30; Ind. Code Ann. §35-45-2; Ky. Rev. Stat. Ann. §525.010(5); La. Rev. Stat. Ann. §14:329.1; N.H. Rev. Stat. Ann. §644.1; Nev. Rev. Stat. §203.020; N.Y. Penal Law §§240.05-240.06; N.D. Cen. Code §12.1-25-01; Or. Rev. Stat. §11.015; Tenn. Code Ann. §39-17-301(3); Utah Code §76-9-101; D.C. Code §22-1322.

[142] *See, e.g.*, Conn. Gen. Stat. §53a-175; N.H. Rev. Stat. Ann. §644.1.

[143] *See, e.g.*, Ky. Rev. Stat. Ann. §525.010(5); D.C. Code §22-1322.

[144] Ariz. Rev. Stat. Ann. §13-2903; Cal. Penal Code §404; 720 Ill. Comp. Stat. §25.1 (Illinois criminalizes "mob action" instead of "rioting"); Idaho Code Ann. §18-6401; Iowa Code §723.1; Kans. Stat. Ann. §21-6201; Minn. Stat. §609.71; Mo. Rev. Stat. §574.050; Okla. Stat. tit. 21 §1311; S.D. Codified Laws §22-10-1; Va. Code Ann. §18.2-405.

[145] *See, e.g.*, Ariz. Rev. Stat. Ann. §13-2903; Cal. Penal Code §404; Idaho Code Ann. §18-6401; Okla. Stat. tit. 21 §1311; S.D. Codified Laws §22-10-1.

[146] *See, e.g.*, 720 Ill. Comp. Stat. §25.1; Kans. Stat. Ann. §21-6201.

[147] *See, e.g.*, Iowa Code §723.1; Mo. Rev. Stat. §574.050.

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.[148]

Finally, another six states have a hodge-podge of definitions, but generally require a group engage in "violence" or its threat.[149]

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.[150] 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.[151] For some states, only these two steps are required for a rioting conviction.[152] 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, creating public alarm, or that members of the group intend to violate the law.[153]

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

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[148] *See* Del. Code Ann. Tit 11§1302; Haw. Rev. Stat. §711-1103; Me Rev. Stat. Ann. Tit. 17A §503; N.J. Stat. Ann. §2C:33-1; Ohio Rev. Code Ann. §2917.03; 18 Pa. Cons. Stat. Ann. §5501. For a critique of "disorderly conduct" as a criminal offense, see, Jamelia Morgan, *Rethinking Disorderly Conduct*, 109(5) CAL. L. REV. 1637 (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).

[149] *See* Florida Stat. **§**870.01; Mich. Comp. Laws **§**752.541; Mont. Code Ann. **§**45-8-103; N.C. Gen. Stat. §14-288.2(a); Tex. Penal Code **§**42**.**04, Wash. Rev. Code. §9A.84.010 (defining an offense of "criminal mischief" that is similar to rioting).

[150] For example, 720 Ill. Comp. Stat. §25.1 requires only two persons to participate in a "mob action" *id*., while Tex. Penal Code §42.04 requires that a person knowingly participate with seven or more persons in a riot. *Id*.

[151] 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 **§**42**.**04.

[152] 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.

[153] *See*, e.g., Ariz. Rev. Stat. Ann. §13-2903 (requiring that the group "disturb the public peace"); Ala. Code §13A-11-3 (requiring the group create grave risk of creating "public terror or alarm"); Haw. Rev. Stat. §711-1103 (requiring that members of the group intend to commit a felony).

emergency and call in the National Guard.[154] Emergency powers in different states can also trigger a range of other powers that have been used during riots, such as for declaring curfews[155] or suspending the sale of alcohol or firearms.[156] 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.[157] And in 2020 the state of Oregon enacted legislation that banned law enforcement from using tear gas "except in circumstances constituting a riot".[158]

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.[159] These new laws include increased felony penalties for rioting and incitement to riot,[160] new expanded definitions of rioting and aggravated rioting,[161] mandatory minimum sentences for rioting,[162] requirements that those convicted of rioting or inciting a riot pay restitution for damage caused during a riot,[163] and new liability protections for those who hit "rioters" with their vehicle or otherwise injure or kill them.[164] As will be discussed in the next Part, this latest wave of anti-riot legislation has generated renewed

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[154] 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. *Id*. at §1.

[155] A. Kenneth Pye & Cym H. Lowell, *The Criminal Process During Civil Disorders*, 5 DUKE L. J. 1021 (1975) (describing how once a state of emergency it is common for officials to be able to declare a curfew. *Id*. at 1037).

[156] *Id*. at 1024 (describing how once a state of emergency 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 4th Amendment*, 81(3) HARVARD L. REV. 625 (1968) (describing house to house search in Plainfield, New Jersey, for firearms by National Guard and local law enforcement without warrants, but acting under authority of Governor's emergency declaration after riots in Newark).

[157] *See, e.g.*, Colo. Rev. Stat. §18-9-105; Cal. Penal Code §409.

[158] *See* Oregon H.B. 4208 (2020). Washington state enacted similar legislation in 2021 that restricted the use of tear gas to riots, hostage situations, and barricaded subjects. Washington H.B. 1054 §4 (2021).

[159] ICNL Tracker, *supra* note 8 (searching by issue "riot" and date between 7/1/20 and 11/1/21).

[160] *See* Florida H.B. 1, §15 (2021); Tennessee S.B. 451, §1 (2021).

[161] *See* Florida H.B. 1 §15 (2021); Tennessee S.B. 451, §1 (2021). For a short analysis of these laws, see ICNL Tracker, *supra* note 8.

[162] *See* Arkansas H.B. 1508, §7 (2021).

[163] *See* Arkansas H.B. 1508, §7 (2021); Oklahoma H.B. 1674, §3 (2021); Tennessee S.B. 5, §13 (2020).

[164] *See* Florida H.B. 1, §18 (2021); Iowa SF 342, §51 (2021); Oklahoma H.B. 1674, §2 (2021).

concern about how overbroad and highly punitive anti-rioting measures can chill the right to peaceful assembly.[165]

III. A CRITIQUE OF ANTI-RIOT LEGAL MEASURES

The first section of this Part argues that rioting laws are unnecessary as 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 provides 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.[166] It is unlawful for an individual to commit assault or battery or destroy property whether or not they are part of a group.[167] It is also illegal to engage in a variety of other types of conduct associated with rioting, including trespass, larceny, arson, unlawfully obstructing roadways, or failure to obey police orders (including a failure to disperse order).[168] 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".[169] That said, the core offense of incitement,

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[165] *See* Ashcroft v. Free Speech Coalition, 535 U.S. 234 (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." *Id*. at 255).

[166] For example, the California Penal Code criminalizes a variety of crimes against the person and against property. Cal. Penal Code §§ 25-653.

[167] *See, e.g.* Cal. Penal Code §§240-248, 594.

[168] *See, e.g.*, Cal. Penal Code §§552-558, 484-502, 450-457, 647, and 416.

[169] D.C. Criminal Code Commission, Testimony on the Rioting Modernization Amendment Act of 2020 7 (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 [hereinafter DC Commission Testimony] (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).

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.[170] As such, the crime of incitement to riot either replicates existing law or arguably expands it in a manner that is 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.[171] 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 to riot charges, despite resulting in the prosecution of hundreds of individuals, many for serious crimes.[172]

There is little evidence that the crimes of rioting or incitement to riot actually deter rioting or provide law enforcement with needed tools to stop it. While there is poor historical data on incidents of rioting, analyzing data compiled by 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.[173] Further, few have argued that the presence or absence of these anti-rioting offenses are responsible for the decline in rioting that was witnessed in the 20th century.[174] 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.[175]

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

[171] For a discussion of which states do and do not have rioting offenses, see, *supra* note 139 and see *supra* note 127 for a list of states with the offense of incitement to riot.

[172] See, Capitol Breach Cases, *supra* note 34.

[173] ACLED documented 1,023 incidents of rioting in the U.S. 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 (21 cases). Nebraska is .59% of the population and made up .68% of rioting in this period (7 cases). Wyoming is .17% of the population and made up 0% of rioting in this period (0 cases). ACLED, Data Export Tool, https://acleddata.com/data-export-tool/ (data and analysis on file with author).

[174] *See supra* Part 1(A) (discussing other proposed reasons for the decline in riots and violence at riots in the 20th century and noting that stronger rioting laws are not commonly proposed as a reason for this decline).

[175] *See generally*, OTTO KERNER ET AL., REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS (1968). See also, Pye & Lowell, *supra* note 155 at 595-597 (critiquing the Riot Commission for proposing an approach to rioting that treats

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 rapidly call-in reinforcements.[176] They also have more modern policing tools, such as frequently having access to video footage of violence or property destruction, that allow for them to more easily assign individual culpability either in the moment or after the fact. In this context, broad rioting laws, which in their most charitable reading 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, have even less justification today than in the past.[177]

B. The Danger of Expanded Criminal Liability

Despite the core offense of rioting already being 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 criminalize being part of a group that is rioting in order 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

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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).

[176] 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 24 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.

[177] For a similar argument about eliminating certain unlawful assembly laws, *See* John Inazu, *Unlawful Assembly as Social Control*, 64 UCLA L. REV. 2, 47 (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).

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 caselaw 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.[178] As such, a broad interpretation of rioting can leave those in a crowd confused about their potential criminal lability. 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).[179]

Historically, many states have adopted the position that one can be convicted for rioting for being part of a larger group that is rioting whether or not one is engaged in violence or property destruction oneself.[180] 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 resist in its suppression, or one is prima facie considered a rioter.[181] Many anti-riot statutes can also be read to create liability for those who are merely part of a larger gathering that is then determined to be a riot. For example, in North Dakota one is guilty of rioting if one "engages" in a

[178] Commonwealth v Frishman, 235 Mass 449 (1920) ("It was not necessary to a conviction [for rioting] to prove that the persons who took part in the parade were commanded to disperse …"); Chapman v State, 257 Ark 415 (1974) (finding that the failure of law enforcement officials to order a crowd of over 200 blacks to disperse did not convert a riot into a lawful assembly); Carr v. District of Columbia, 587 F.3d 401 (D.C. Cir. 2009) ("we 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." *Id*. at 409).

[179] *See* Meryl Kornfield et al., *Swept up by police*, WASHINGTON POST (Oct. 23, 2020), https://www.washingtonpost.com/graphics/2020/investigations/george-floyd-protesters-arrests/ (describing how after the 2020 racial justice protests a number of protesters sued for wrongful arrest and claiming that "police are using anti-rioting laws to restrict free speech").

[180] See, e.g., WHARTON, *supra* note 113 (Finding that if one is present at a riot and not actively suppressing it then it is prima facie inferred that you are participating. *Id*. at 345); State v Albert 257 SC 131 (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." Id. at 138).

[181] Commonwealth v. Merrick, 65 Pa. Super. 482 (Pa. Super. 1917) ("In 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 . . . ." *Id*. at 483). See also, Commonwealth v Hayes (1965) 205 Pa Super 338 (1965) (reiterating 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." *Id*. at 339).

riot, whether or not one actually engages in violent conduct oneself,[182] while in South Carolina one can be guilty of rioting by being "personally present" at a riot.[183]

That said, other states take a different approach, making clear that the prosecutor has to demonstrate the defendant was not just merely 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.[184] 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.[185]

In several states those engaged in "rioting" have to act in concert,[186] and this has also been read into some state common law interpretations of rioting.[187] For example, in South Dakota the offense of rioting requires that one has to be "acting together and without authority of law" with three other persons to cause injury or damage to property.[188] That said, a common purpose has 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 were part of an unpermitted protest promoting socialism, chanted similar slogans, and waved red flags, and so shared a "common purpose".[189]

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.[190] For example,

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[182] *See* N.D. Cent. Code §12.1-25-01.

[183] *See* S.C. Code Ann. §16-8-20.

[184] *See* Haw. Rev. Stat. §711-1103.

[185] *See* Or. Rev. Stat. §11.015**;** N.Y. Penal Law §240.06. *See* also, People v Morales, 158 Misc 2d 443 (1993, City Crim Ct) (dismissing charge of rioting against defendant because the New York riot law requires that an individual must actually engage in tumultuous and violent conduct themselves. *Id*. at 445).

[186] Several states require that those in a riot act together. *See, e.g.* Ariz. Rev. Stat. Ann. §13-2903; Cal. Penal Code §404; Idaho Code Ann. §18-6401; Okla. Stat. tit. 21 §1311**.**

[187] *See* Commonwealth v Frishman 235 Mass 449 (1920) (finding that under the common law to be convicted of rioting one does not have to engage in violence, but act in "concert" with others to accomplish an unlawful purpose. *Id*. at 449).

[188] S.D. Codified Laws §22-10-1.

[189] *See* Commonwealth v Frishman 235 Mass 449 (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 in a public street without permission and in violation of law. . ." *Id*. at 453).

[190] *See* Thomas K. Clancy, *What Constitutes an Arrest within the Meaning of the Fourth*

as described in the Introduction of this article, 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.[191] 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.[192] 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 a group of dozens of demonstrators for rioting who were protesting President George W. Bush's second inauguration of whom some had engaged in property destruction.[193] The Court held that the police had reasonable belief to arrest all of the members of the crowd because the protesters operated as a "unit"[194] and so individualized probable cause was unnecessary.[195]

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 200 protesters were arrested during demonstrations over President Trump's inauguration on January 20th, 2017 after a handful of protesters had engaged in property destruction.[196] The members of the group were charged with felony rioting, "conspiracy to riot", and aiding and abetting a riot.[197] 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.[198] Instead, the U.S. Assistant Attorney

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Amendment, 48 VILLANOVA L. REV. 129 (2003) (providing an overview of the jurisprudence around defining probable cause for an arrest).

[191] *See* Joseph, *supra* note 1.

[192] *See* Robinson, *supra* note 5 (describing arrest of Texas protesters).

[193] *See* Carr v. District of Columbia, 587 F.3d 401, 403-404 (D.C. Cir. 2009) (describing the context of the mass arrest for rioting).

[194] Carr, 587 F.3d at 408 (D.C. Cir. 2009) ("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.").

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

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

[197] The United States v. Gabriel Mielke et al., Sept. 14, 2017 (Order of Judge Lynn Leibovitz), https://dcist.com/story/17/09/15/judge-denies-motions-to-dismiss-rio/

[198] *Id*. at 10-11

cited protesters' collective chanting and wearing of similar clothing as evidence of collective action and a "conspiracy to riot".[199]

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."[200] Further, some anti-rioting provisions are so vague that they could potentially be challenged on their face for overbreadth for creating a type of guilt by association and chilling the freedom of assembly.[201]

Indeed, courts have, at times, expressed skepticism towards the claim that simply being part of a group at a riot can make one liable for rioting.[202]

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[199] See Indictment in United States v. Nathaniel H. Jaffe et al., April 3, 2017, https://s3.documentcloud.org/documents/4356009/J20-Superseding-Indictment.pdf (describing indictment for rioting of all named defendants in part because wore same black clothing and cheered "Whose Streets, Our Streets" after destruction of property. *Id*. at 23, 29). After an initial group of the demonstrators were acquitted by a jury in 2018, prosecutors later dropped all charges. Bell, *supra* note 196.

[200] NAACP v. Claiborne Hardware, 458 U.S. 886, 920 (1982).

[201] That said, vagueness challenges have traditionally not been successful against rioting definitions. *See, e.g.,* US v. Jeffries 45 F.R.D. (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 A2d 162 (1969, Del Sup) (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." *Id*. at 167); Douglas v. Pitcher, 319 F. Supp. 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. Ron DeSantis, Case No.: 4:21cv191MW-MAF (N.D. Fla., 2021) (order granting preliminary injunction), https://static1.squarespace.com/static/54179ca4e4b0b0c7bc710d3d/t/613a8c6b97161d55e73ef6aa/1631226988959/Preliminary+Injunction+Order.pdf [hereinafter "Dream Defenders preliminary injunction] (finding merit to vagueness challenge against new Florida rioting definition).

[202] *See, e.g.,* U.S. v. Charles Matthews, 419 F.2d 1177 (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." *Id*. at 1185); Douglas v. Pitcher, 319 F. Supp. 706 (E.D. LA 1970) (dismissing

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.[203] A Federal District Court in September 2021 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".[204]

Still, even where courts have required something more than "mere presence" to be convicted of rioting, 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 since they were part of the same demonstration.[205] 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.[206]

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.[207] Yet, nonviolent protests are often rambunctious and confrontational and so definitions of rioting that include merely the threat of violence or property destruction can

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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. *Id*. at 711).

[203] Florida H.B. 1, §15 (2021).

[204] Dream Defenders preliminary injunction, *supra* note 201 at 76 (Walker, J.) (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." *Id*. at 76).

[205] Matthews, 419 F.2d at 1193 (D.C. Cir. 1969) (J. Skelly Wright dissenting) (finding that the majority's requirement that to be liable for rioting a person "aid or encourage" violence "offers no substantial guarantee of protection to an innocent, non-violent participant in the demonstration).

[206] 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.").

[207] 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. Merrick,* 65 Pa. Super. 482 (1917). That said, many traditional common law interpretations required members of a crowd engage in violence. *See* BLACKSTONE, *supra* note 100 at 146 ("[a] riot is where three or more actually do an unlawful act of violence.").

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.[208] In other states, "violent and tumultuous" conduct has been interpreted to include "threatening" conduct.[209] 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."[210] Meanwhile, a New York state court interpreted "tumultuous and violent conduct" 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."[211] 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 conduct that is just 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.[212] For example, in 1954, workers in a labor dispute in Ohio were initially convicted of rioting for blocking a road and refusing to disperse because earlier in the week several in the group or "their sympathizers and confederates" had engaged in violence and property destruction thereby creating the danger of violence, even though there was no violent conduct that day.[213] More recently, an activist that opposed the building of the Dakota Access pipeline in 2017 was convicted for rioting for engaging in passive

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[208] *See, e.g.,* AR Code §5-71-203 (defining a riot to include engaging in "tumultuous or violent conduct"); Cal. Penal Code §404 (defining rioting to include ". . . any threat to use force or violence, if accompanied by immediate power of execution"); D.C. Code §22-1322 (defining rioting to include "tumultuous and violent conduct or the threat thereof [that] creates grave danger of damage or injury to property or persons").

[209] *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).

[210] State v. Chakerian, 938 P.2d 756, 760 (1997).

[211] People v. Winston, 64 Misc.2d 150, 153 (1970).

[212] *See, e.g.*, State v. Woolridge, 129 W. Va 448 (W.Va. 1946) (overturning 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. *Id*. at 474); State v Albert, 257 SC 131 (1971) (upholding conviction for rioting of armed student demonstrators who took over library administration building although no one was injured and no property damaged).

[213] The conviction was reversed on appeal. State v Smith, 97 Ohio App 86 (1954).

resistance by locking arms with other protesters when police attempted to arrest them.[214] The government had 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 (the activist's conviction was later overturned).[215]

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),[216] some courts have interpreted common law definitions of rioting to require actual violence,[217] and other courts have interpreted statutory requirements for "violent and tumultuous" conduct to require actual violence, not its threat.[218] 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".[219]

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 not.[220] 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."[221] This is one of the most explicit invocations by the Supreme Court of the state's ability to address the threat

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[214] North Dakota v. Bearrunner, 2019 ND 29 (N.D.2019).

[215] State of North Dakota v. Bearunner, Brief of the Appellee 16 (2018) available at https://www.ndcourts.gov/supreme-court/dockets/20180258. The North Dakota Supreme Court later overturned the conviction. Bearrunner, 2019 ND 29 ("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.").

[216] *See, e.g.,* Ill. Comp. Stat. §25.1; Iowa Code §723.1**.**

[217] *See, e.g.,* Heard v. Rizzo, E.D. Pa., 281 F. Supp. 720, *affirmed 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. *Id*. at 739-740).

[218] *See, e.g.,* Carmichael v. Allen, N.D. Ga., 267 F. Supp. 985 (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." *Id*. at 996, FN10a).

[219] *See* Ariz. Rev. Stat. Ann. §13-2903; Cal. Penal Code §404; Okla. Stat. Tit. 21 §1311.

[220] For a discussion of the application of either the Brandenburg or Cantwell standard to cases involving the freedom of assembly, see, Inazu, *supra* note 177 at 37-41.

[221] Cantwell v. Connecticut, 310 U.S. 296, 308 (1940).

of a riot, but today the "clear and present danger" test is rarely used by courts as it has been supplanted by new First Amendment standards.[222]

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 speech is "likely to incite or produce such action".[223] While *Brandenburg* is still widely relied on by courts, they have generally applied its imminence requirement in the context of speech rather than assembly.[224]

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."[225] The Court continued that "The 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 . . . ."[226] In upholding the federal anti-riot act's provision banning threatening conduct, the 4th circuit in *U.S. v. Miselis* in 2020 held that such "threats of violence" contemplated under the act should be considered outside protected speech under "the doctrine of true threats".[227] The 4th circuit went on to find that the "true threats" doctrine 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

[222] Versions of it though were used in the past. See, United States v. Jeffries, 45 F.R.D. 110 (1968) (finding that under the D.C. Riot Act that "tumultuous and violent conduct, or the threat thereof," involves "frightening group behavior" that 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." *Id*. at 118).

[223] Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

[224] Inazu, *supra* note 177 at 40 ("Few courts have recognized that the First Amendment's imminence requirement applies to both speech and assembly."); But see, U.S. v. Matthews, 419 F.2d at 1185 (D.C. Cir. 1969) (interpreting the D.C. Riot Act's requirement that a threat create 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." However, not quoting *Brandenburg* that was decided the same year. *Id*.)

[225] Virginia v. Black, 538 U.S. 343, 344 (2003).

[226] *Id*.

[227] United States v. Miselis, 972 F.3d 518, 540 (4th Cir. 2020);

or injury to others.[228] In 2021, the 9th circuit also relied on the "true threats" doctrine to uphold the federal crime of rioting.[229]

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 what 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.[230] For example, if three individuals 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.[231] Courts have taken differing views on what constitutes violence that amounts to rioting, with some holding mere shoving and pushing by a crowd[232] or an isolated assault does not constitute rioting,[233] while in other cases courts have found someone who had

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[228] United States v. Miselis, 972 F.3d 518, 540 (4th Cir. 2020) (citing *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992)).

[229] United States v. Rundo, No. 19-50189 (9th cir. 2021) (rejecting a constitutional challenge to the federal riot act's rioting definition by finding that a "threat" under the Act meant a "true threat" and "involve[s] subjective intent to threaten" *Id*. At 19).

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

[231] For example, Connecticut defines rioting to include engaging with two or more individuals in "violent and tumultuous conduct" that recklessly creates a grave risk of creating public alarm. Arguably kicking over a trash can is violent conduct and can cause public alarm. *See* Conn. Gen. Stat. §53a-175.

[232] *See* Territory v Kaholokula 37 Hawaii 625(1947) (finding that shoving and pushing along with menacing language in a labor dispute did not constitute rioting).

[233] See People v. Edelson 7 NTS2d 323 (1938) (dismissing rioting charges for picketing where in the commotion a foreman's car was damaged and the foreman assaulted as rioting charges should not be applied to a brief disturbance).

picked up abandoned looted goods on a street had engaged in "rioting".[234] The standard for determining how much violence or property destruction constitutes a riot though is vital for determining what type of threatening conduct would constitute a riot. As Justice Brandeis in his concurrence in *Whitney* indicated, "even imminent danger cannot justify resort to prohibition of . . . [the freedoms of speech and assembly] unless the evil apprehended is relatively serious."[235] Yet, the Supreme Court has largely been quiet on this issue leaving open the question whether even minor threats, like threatening to push or shove a person or break a window, would meet a threshold of harm high enough to constitute rioting.

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" where they rely on their judgment about what future acts members of a crowd may take.[236] Encouraging police to make these judgment calls can lead to arbitrary and discriminatory enforcement.[237] 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.[238] In the U.S. the crime of incitement to riot often includes

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[234] *See* U.S. v. Matthews, 419 F.2d at 1188 (D.C. Cir. 1969) ("[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." (J. Wright, dissenting)). For yet another standard *See* Washington 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.")

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

[236] Inazu, *supra* note 177 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.").

[237] Morgan, *supra* note 148 at 54 ("Such preventative policing measures may lead to arbitrary discriminatory enforcement where notions of disorder, or the risk of disorder, and criminality are linked to discriminatory norms.").

[238] Joseph Jaconelli, *Incitement: A Study in Language Crime*, 12 CRIM. LAW AND PHILOSOPHY 245 (2018) (describing theoretical justifications for the crime of incitement).

criminalizing those who "urge" or "encourage" a riot.[239] These definitions have recently come under particular scrutiny from federal courts for being unconstitutionally overbroad and vague.[240] Indeed, incitement to riot provisions have been repeatedly used 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 they deem violate the offense. Arrests can stop or undermine protests and have serious economic and legal consequences for those targeted.[241] During the Civil Rights Movement charges of inciting a riot were frequently used to arrest Blacks who were perceived to create the potential for conflict with Whites by attempting to integrate segregated facilities in the Jim Crow South, like buses and airport restaurants.[242] During protests for racial justice in 2020 a number of individuals were arrested for incitement to riot.[243] In one controversial instance, an activist in St. Louis was arrested by the FBI for describing 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.[244] In another incident, a comedian in Alabama was charged with inciting a riot for asking a crowd to remain nonviolent, but inferring that they could tear down a local confederate monument.[245]

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[239] *See* AL Code §13A-11-4; AR Code §5-71-203; CA Penal Code §404.6; CO Rev. Stat. §18-9-102; Conn. Gen. Stat §53a-178; GA Code Ann.; §16-11-31; Kan. Stat. Ann. §21-6201; KY Rev. Stat. Ann. §525.040; Mich. Comp. Laws **§**752.542; Mont. Code. Ann. § 45-8-104; **N.**Y. Penal Law §240.08; N.C. Gen. Stat. §14-288.2; N.D. Cent. Code §12.1-25-01; 21 OK Stat. 21 §1320.2; S.D. Codified Laws §22-10-6; TN Code Ann. §39-17-304; DC Code §22-1322**.**

[240] *See infra* notes 264 to 269 and accompanying text describing circuit court opinions striking down parts of the federal incitement to riot definition.

[241] See, e.g., Eisha Jain, *Arrests as Regulation*, 67(4) STANFORD L. REV. 89 (2015) (describing the diverse economic and social impacts being arrested can have).

[242] Dream Defenders preliminary injunction, *supra* note 201 at 1-3 (Wright, J.) (describing how "Florida's anti-riot laws were used to suppress activities threatening the state's Jim Crow status quo" *Id*. at 3).

[243] *See* Cyrus Farivar and Olivia Salon, *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 (describing a number of arrests for conspiracy to riot resulting out of posted social media posts during 2020 Black Lives Matter protests).

[244] The charges were later dropped. *Id*.

[245] *See* Carol Robinson, *Jermaine "Funny Man" 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 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

Courts have traditionally given police wide latitude in such arrests. For example, in 2018, the Southern District of Florida dismissed an unlawful arrest claim for incitement to riot arising out of celebrations over the 2013 NBA Championship.[246] 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 Devin 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."[247]

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 had then clashed.[248] The trial of the "Chicago Seven" gained national publicity as the defendants seemed linked not by any conspiracy, but rather because of a "shared radical critique of U.S. government and society."[249] The government presented evidence that during planning meetings for 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.[250] The jury found five of the defendants guilty of incitement to riot.[251] On appeal the Seventh Circuit reversed the convictions, finding, among other irregularities, that the trial judge had been openly hostile towards the defendants.[252]

Incitement charges have been used in a wide range of other types of cases as well that have not gained nearly the public attention of the "Chicago Seven", and are particularly likely to be brought when 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. He shouted "What are the policemen doing here?"[253] and

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owner during a Black Lives Matter protest. A magistrate 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 14, 2020), https://www.wwltv.com/article/news/local/orleans/2-charged-statue-toppling/289-284c6891-9775-4013-ba59-ae5e8d20aaaf

[246] Alexandre v. City of Miami, Case No. 16-23064-CIV-GAYLES/OTAZO-REYES (S.D. Fla. Jun. 1, 2018).

[247] *Id*.

[248] *See* BRUCE A. RAGSDALE, THE CHICAGO SEVEN: 1970S RADICALISM AND THE FEDERAL COURTS 4 (2008) (describing the case of the Chicago Seven).

[249] *Id*.

[250] *Id*. at 6.

[251] *Id*. at 8.

[252] *Id*. at 8-9.

[253] Commonwealth v. Hayes, 209 A.2d 38, 342 (Pa. Super. Ct. 1965).

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 was such action that 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."[254]

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.[255] 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.[256] 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.[257] 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."[258]

Later decisions by the Court though have seemed to follow closer to the spirit of Douglas' words of caution about the need to protect protesters from a heckler's veto.[259] For example, in 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."[260] Circuit courts have also followed suit. For instance, in 2016,

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[254] *Id*. at 343.

[255] People v Upshaw, 190 Misc 2d 704, 706 (Crim Ct, NY County 2002) (emphasizing the importance of the context of the recent attack on 9/11).

[256] Feiner v. New York, 340 U.S. 315 (1951).

[257] *Id*. at 320.

[258] *Id*. at 331.

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

[260] Gregory v. City of Chicago, 394 U.S. 111, 120 (1969). *See* also, Edwards v. South Carolina, 372 U.S. 229 (1963) (finding conviction of 187 black college and high school students for breaching of the peace had violated the First Amendment when police had

the 6th 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.[261]

Criticism about the overbreadth of the definition of incitement to riot have 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".[262] 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 or the rightness of, or the right to commit, any such acts."[263]

Two circuit courts have recently found parts of this federal definition unconstitutional–both in cases involving members of the white supremacist Rise Above Movement who had been charged with inciting a riot.[264] In 2020, the Fourth Circuit found that the incitement provision of the federal anti-riot act "sweeps up a substantial amount of speech that retains the status of protected advocacy under *Brandenburg's* imminence requirement 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. . . ."[265] Similarly, in 2021 the 9th 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*.[266] Unlike the 4th Circuit, the 9th circuit in addition found that the federal anti-riot act's language prohibiting "organiz[ing]" a riot also violated *Brandenburg*.[267]

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arrested them because they feared a confrontation with a "hostile" crowd of White onlookers. *Id*. at 238, 244).

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

[262] 18 U.S. Code §2101.

[263] 18 U.S. Code §2102.

[264] United States v. Miselis, 972 F.3d 518, 540 (4th Cir. 2020); United States v. Rundo, No. 19-50189 (9th cir. 2021). There is a longer history of using incitement to riot charges to target white supremacists. *See* State v Cole 249 NC 733 (1959), cert den 361 US 867 (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).

[265] Miselis, 972 F.3d at 530 (4th Cir. 2020).

[266] United States v. Rundo, No. 19-50189 (9th cir. 2021) (finding that the incitement provisions of the federal anti-riot act do not violate the First Amendment except insofar as the prohibit "speech tending to 'organize,' 'promote,' or 'encourage' a riot, and § 2102(b) expands the prohibition to 'urging' a riot and to mere advocacy." *Id*. at 19).

[267] *See* United States v. Rundo, No. 19-50189, 15 (9th cir. 2021).

These two recent judgments create a circuit split as in 1972 the 7th circuit had 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".[268] How this circuit split is decided will have significant repercussions as at least 16 states' statutory formulation of incitement to riot explicitly includes language that covers those who "urge" or "encourage" others to riot and so would also be susceptible to constitutional challenge.[269]

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 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.[270] 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

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[268] *See* United States v. Dellinger, 472 F.2d 340, 360-364 (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. *Id*. at 362). *See* also, National Mobilization Committee v. Foran, 411 F.2d 934 (1969) (finding that the federal anti-riot act's provisions are not an encroachment on free speech in case decided before *Brandenburg*. *Id*. at 938); In Re Shead, 302 F.Supp. 560 (N.D. Cal. 1969) (dismissing *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 free speech challenge to incitement to riot provision of the federal anti-riot act); United States v. Betts, Case No. 20-20047 (C.D. Ill. Dec. 28, 2020) (finding the district court is bound to follow *Dellinger* in upholding constitutionality of incitement to riot under the federal anti-riot act. *Id*. at 1-2).

[269] *See supra* note 239 (listing states with incitement to riot offense whose definition covers those who "urge" or "encourage" a riot).

[270] 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 DC. Of these, 234 were in 2017 and resulted primarily from the J20 protest during President Trump's inauguration. District of Columbia Sentencing Commission, *RE: Anti-Riot Statute* 2 (Oct. 5, 2020) [Hereinafter Sentencing Commission Letter] (letter on file with author).

depending on the issue one is protesting, one's race, or on the "personal predilections" of local law enforcement and prosecutors.[271]

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.[272] 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.[273]

Riots often develop in response to police aggression against protesters,[274] 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,[275] anti-police brutality protests,[276] and protests that are predominantly Black,[277] including by being more likely to use force or

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[271] 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.")

[272] *See* Robinson, *supra* note 5 (describing arrest of Representative Scott); RAGSDALE, *supra* note 249 (detailing politicized nature of the trial of the Chicago Seven for incitement to riot).

[273] *See* SCOTT ELLSWORTH, DEATH IN A PROMISED LAND: THE TULSA RACE RIOT OF 1921 66 (1982) (noting estimates of the number of fatalities from the riot ranged from 27 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. *Id*. at 66, 70, 97).

[274] *See* CHENOWETH, *supra* note 6 at 56 (describing how law enforcement's actions can provoke violence from protesters).

[275] *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/ (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 34 percent of the time with right-wing protests compared with 51 percent for the left.)

[276] *See See* Heidi Reynolds-Stenson, *Protesting the police: anti-police brutality claims as a predictor of police repression of protest*, 17(1) SOCIAL MOVEMENT STUDIES 48 (2017) (using data from over 7,000 protest events from 1960 to 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).

[277] *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, 152 (2011) (examining 15,000 protest events between 1960 and 1990 to show that compared to other groups that predominantly Black protests are more likely to attract a police

arrest 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 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 Blacks are disproportionately arrested.[278]

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's D.C.'s anti-rioting law from a vagueness challenge in 1969, Federal Appeals Court Judge Skelley 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 Blacks.[279] 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."[280]

Indeed, prosecutors have extensive latitude to bring rioting charges, which can lead to striking differences in treatment. For example, in 2017 over 200 people were charged by the Justice Department with rioting offenses during demonstrations that resulted in relatively minor property damage in Washington D.C. on President Trump's Inauguration day.[281] However, despite more violence and property destruction no one was charged by the Justice Department 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.[282]

The potential for the politicization of the use of anti-rioting legal measures is becoming worse. The U.S. saw a wave of bills introduced after

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presence and, when there is a police presence, disproportionately more arrests and use force and violence).

[278] *See, e.g.*, LEGISLATIVE SERVICES AGENCY, FISCAL NOTE OF SF 534 (March 10, 2021), https://www.legis.iowa.gov/docs/publications/FN/1216392.pdf (finding that in Iowa in 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." *Id*. at 6). But *see* Sentencing Commission Letter, *supra* note 270 at 6 (indicating that of the 241 individuals charged with rioting in Washington D.C. between January 2012 and August 2020, 204 were White, 10 Black, and 27 of unknown race).

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

[280] *Id*.

[281] *See* Bell, *supra* note 196 (describing prosecution of those involved in the J20 protests).

[282] Capitol breach cases, *supra* note 34.

the national protests for racial justice in 2020 whose provisions strengthen or expand anti-rioting measures.[283] For example, in Oklahoma in 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.[284] In Tennessee, a law enacted in 2020 requires anyone convicted of "inciting" or "urging" a riot pay restitution for any property damage caused by the riot.[285] 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 25 or more persons or through the "threat of force" endangered the safe movement of a vehicle on a public roadway.[286]

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.[287] 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.[288] 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.[289] 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."[290]

IV. RE-ENVISIONING THE CRIME OF RIOTING

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[283] *See* ICNL Tracker, *supra* note 8.

[284] *See* Oklahoma H.B. 1674, §3 (2021).

[285] *See* Tennessee S.B. 5, §13 (2020).

[286] *See* Florida H.B. 1, **§**15(3) (2021).

[287] *See* John Kennedy and Antonio Fins, *Florida Gov. Ron DeSantis straddles tough new law as Cuba protests block highways*, SARASOTA HERALD-TRIBUNE (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/ (describing dueling political reactions to protests against the Cuban government and perceived nonapplication of the recently enacted anti-rioting law).

[288] *Id*.

[289] Dream Defenders preliminary injunction, *supra* note 201.

[290] *Id*. at 73.

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 crimes 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.[291] 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 mean a separate criminal offense of rioting or incitement to riot is justified. 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 Part 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 or 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 tackling societal inequalities that helped spark those riots through measures like better access to education and employment.[292] 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.[293]

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 or so quickly use less lethal

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

[292] REPORT OF VIOLENCE COMMISSION, *supra* note 17 at 76-77.

[293] *Id.*

weapons, like tear gas or rubber bullets, which can lead to hostility from crowds and trigger rioting.[294] Further, de-escalation tactics by law enforcement have been shown to be effective in many circumstances to defuse potentially violent situations.[295]

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 engaging in violence or property destruction.[296] In order 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.[297] 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.[298] Finally, in exceptional situations governments have the power to impose curfews to respond to widespread violence or property destruction.[299]

These alternative approaches provide many tools by which the government can respond to group violence without needing to rely on the offenses of "rioting" or "incitement to riot".[300] 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

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[294] *See* Kim Barker et al., *In City After City Police Mishandled Black Lives Matter Protests*, NY TIMES (March 20, 2021), https://www.nytimes.com/2021/03/20/us/protests-policing-george-floyd.html (finding that in reviewing the response of police departments to racial justice protests in 2020 that investigations found police were aggressive, wore riot gear, and used less lethal weapons in an indiscriminate manner frequently leading to confrontations with protesters); Kornfield, *supra* note 179 (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.").

[295] Maggie Koerth & Jamiles Lartey, *De-escalation Keeps Protester 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/ (describing common types of de-escalation tactics for tense protests, their effectiveness, and barriers to their implementation).

[296] See Clancy, *supra* note 190 (describing the probable cause standard).

[297] 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 at §107.

[298] Sternlicht, *supra* note 176.

[299] Pye & Lowell, *supra* note 155 at 1037.

[300] 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 and Jim Malewitz, *In wake of Wisconsin's racial justice protests, curfew tickets raise equity and speech questions*, WISCONSIN WATCH (April 24, 2021), https://wisconsinwatch.org/2021/04/curfew-tickets-equity-speech/

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 offense 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 Skelly Wright noted in his dissent in *U.S. v. Matthews*, which upheld D.C.'s anti-rioting law, ". . . the only way to protect legitimate [First Amendment] activity is to ensure that our laws focus precisely and exclusively on violent conduct and on its perpetrators and not beyond…."[301]

One of the more recent attempts to better target the offense of rioting is Washington DC's proposed Revised Criminal Code Act of 2021.[302] Under the proposed code one is liable for rioting if the person "knowingly commits or attempts to commit a criminal offense bodily injury, taking of property, or damage to property"[303] and are "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."[304] In this way, the revised

[301] U.S. v. Matthews, 419 F.2d at 1188 (D.C. Cir. 1969).

[302] *See* Revised Criminal Code Act of 2021, §22A-5301 https://ccrc.dc.gov/node/1562051 [hereinafter "Proposed DC Riot Act"].

[303] *Id*.

[304] *Id*.

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.[305] 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.[306] However, with the required crowd being so small, these rioting acts can capture a small fight or a three person armed robbery that takes place in a public area.[307] Most sociological conceptions of rioting envision riots being a significantly larger group, and 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.[308] 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

[305] Compare generally D.C. Code §22-1322 to Proposed DC Riot Act, *supra* note 302.

[306] *See*, e.g., Ga. Code Ann. §16-11-30 (defining rioting as "Any 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) (defining rioting as an assemblage of three or more persons).

[307] *See* DC Commission Testimony, *supra* note 169 at 27 (noting that too small a number required for rioting can capture a small mutually agreed upon street fight or armed robbery).

[308] *See* Wilkinson, *supra* note 66 at 330 (commenting on the "mismatch between the legal definitions of riot and many of our sociological and theoretical conceptions" which envision riots involving 30, 40, 50, or more people); 1714 Riot Act, *supra* note 93 ("if 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 12 or more "being armed with clubs or other weapons" or 30 or more who are "unlawfully, routously, riotously, or tumultuously assembled." Rhode Island H. 8296 (2004), http://webserver.rilin.state.ri.us/BillText04/HouseText04/H8296.pdf.

example, the proposed reforms to the DC code requires that for a riot at least eight individuals simultaneously engage in covered unlawful conduct.[309]

3. Eliminate Felony Rioting

In many jurisdictions rioting is a felony crime or there is a felony level to the offense.[310] 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.

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.[311] 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.[312] The argument in this article to eliminate rioting as an offense entirely 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 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 in order to avoid the risk of being convicted of felony rioting.[313]

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[309] Proposed DC Riot Act, *supra* note 302.

[310] See, e.g., 18 Pa. Cons. Stat. Ann. §5501 (making rioting a 3rd degree felony); N.Y. Penal Law §240.06 (defining rioting in the first degree as a felony).

[311] Richard Schmechel, Testimony for the October 15, 2020 Hearing on B23-0723, the "Rioting Modernization Amendment Act of 2020", available at https://lims.dccouncil.us/downloads/LIMS/44484/Hearing_Record/B23-0723-Hearing_Record1.pdf (providing justifications for why unlawful conduct deserves greater punishment in the context of a riot as well as counterarguments).

[312] *Id*.

[313] For a discussion of charge stacking, see *States Have Put 54 New Restrictions on Peaceful Protests Since Ferguson*, PRESS NEWS AGENCY (June 5, 2020), https://pressnewsagency.org/states-have-put-54-new-restrictions-on-peaceful-protests-

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 4th and 9th circuits.[314] 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 more 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".[315]

5. Scrutinize Related Anti-Riot Measures

Finally, states should also examine the impact and necessity of other powers and liability rules triggered by rioting. For example, laws like the one recently enacted in Oklahoma that creates criminal fines for organizations that "conspire" with individuals that fail to disperse at a riot or aid and abet rioters are so vague that they can easily chill First Amendment protected conduct.[316] Similarly, recently enacted laws in Florida, Iowa, and Oklahoma that create new liability protections for those who hit "rioters" with their vehicle or otherwise injure or kill them can encourage violence by the public against protesters who are viewed as "rioters".[317] Such liability protections not only can chill peaceful protest, but seemingly returns the country closer to a more lethal period for riots in the U.S. when different social groups squared off against each other in the streets.[318]

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since-ferguson/ (quoting Mara Verheyden Hillard, the Executive Director of the Partnership for Civil Justice Fund, that "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.")

[314] *See* Miselis, 972 F.3d (4th Cir. 2020); Rundo, No. 19-50189 (9th cir. 2021).

[315] Brandenburg, 395 U.S. at 447.

[316] *See* Oklahoma H.B. 1674 §3 (2021).

[317] *See* Florida H.B. 1, §18 (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"); Iowa SF 342, §51 (2021) (providing civil immunity for a driver who exercises "due care" if injure someone participating in a protest or riot if they are blocking traffic in a public street); Oklahoma H.B. 1674 §2 (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").

[318] *See supra* Part I(A) (discussing the history of rioting in the U.S. including heightened violence from the early 19th to early 20th century, in part because rioting often consisted of violence between social groups in this period).

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 being abused or creating 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.