ARTICLES

WHEN "RIOT" IS IN THE EYE OF THE BEHOLDER: THE CRITICAL NEED FOR CONSTITUTIONAL CLARITY IN RIOT LAWS

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ABSTRACT

In the twenty-first century, American streets are frequently filled with passionate protest and political dissent. Protesters of diverse backgrounds range from those waving flags or lying on the ground to re-enact police killings to those carrying lit torches or hand-made weapons. This Article addresses how, as between such groups, it may initially seem clear which has a propensity to engage in violent riots, but too often, "rioter" is in the eye of the beholder, with those both regulating and reporting on riots defining the term inconsistently. And ironically, while police brutality is often the subject of protests, non-violent protesters who take their outrage to the streets are frequently met with police decked out in militarized riot gear who engage in disproportionate heavy-handedness culminating in mass arrests, including of the non-violent protesters. The irony is compounded when the police turn a blind eye to comparatively violent counter-protesters, some of whom were the actual instigators of the violence for which comparatively non-violent protesters were later blamed and labeled "rioters."

This Article documents conflicting descriptions of the same protests either as riots or not, both by media sources and even by court opinions. The Article explains how the problem of inconsistent interpretations of "riot" is rooted in and aggravated by the unclear and overbroad language of a substantial number of riot laws. Whether due to sloppy drafting or less benign reasons (as may be the case with riot laws granting immunity to those who drive vehicles into crowds of protesters), such flawed legislation endangers the liberty and potentially even lives of protesters. A misplaced comma can thus potentially become a matter of constitutional crisis, as poorly drafted legislation risks violating due process prohibitions on vague laws that foster discriminatory or arbitrary enforcement, First Amendment prohibitions on overbroad laws that chill and punish constitutionally protected expression.

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To address the problem of inconsistent and unclear riot laws, this Article engages a comparative analysis of litigation in which riot statutes have been challenged as unconstitutional. Correspondingly, the Article also catalogs dozens of state statutes that remain on the books despite being dangerously vague or overbroad in a variety of respects. The Article proposes various specific revisions legislators should make to constitutionally flawed legislation, while also making substantive suggestions for those challenging the laws. Fundamentally, riot laws must provide sufficiently clear standards that unambiguously limit the potential prosecution of "rioters" to those with intent to commit imminent violence. Riot laws must carefully, clearly, and precisely define their key terms and delineate the intent requirements and requisite violent conduct to constitute rioting, rather than risk being struck down as unconstitutional.

While there is a strong governmental interest in protecting public safety, even that interest does not excuse laws that fail to clearly define what constitutes unlawful rioting, resulting in sweeping dragnets that ensnare non-violent and violent protesters alike. It is imperative that when history has its eyes on these unfolding chapters of political dissent and division, what it records is a respect for constitutional rights, not a continued pattern of those in power violating the rights of passionate, but non-violent, protesters.

INTRODUCTION

> *Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burnt women. . . . Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. To courageous, self-reliant men, with confidence in the power of free and fearless reasoning . . . the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression. Such must be the rule if authority is to be reconciled with freedom.*
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> —Justice Louis Brandeis[1]

We have entered a new chapter in American history in which witches burned at the stake have been replaced by civil rights protesters hit by cars, the drivers subsequently protected by laws that allow them to drive into those deemed to be

1. Whitney v. California, 274 U.S. 357, 376–77 (Brandeis, J., concurring).

"rioters."[2] While the meaning of "rioter" can consequently have grave significance, statutory definitions of "riot," unfortunately, do not always provide clear guidance. Riot statutes are often so vague and overbroad as to threaten the constitutional rights of those who might be made criminals under them, an issue that should be of concern to those of all political stripes, from Black Lives Matter protesters to passionate pandemic-era Trump supporters and vaccination opponents. With the stakes as high as they are for those who may be swept up in dragnets of mass arrests and "riot" prosecutions, it is incumbent upon those who arrest and prosecute protesters as "rioters" and those who draft laws and policies restricting protests and criminalizing rioters to be consistent and clear in their definitions of what a "rioter" even is.

So what, precisely, *is* a riot? Over the years, lawmakers have grappled with that question and answered it inconsistently through laws purporting to define "riot" and criminalize conduct falling within that category. Attempts to legislatively define "riot" in a clear and coherent manner have often fallen short of that goal. In Florida, for example, a criminal statute enacted in 2020 that defines "riot" was successfully challenged as unconstitutionally vague and overbroad.[3] In response to challenges to the statute, the defendants in *Dream Defenders v. DeSantis*, including Florida Governor Ron DeSantis, responded that the law was not in fact unclear because "'riot' has a common meaning that will inform an ordinary person's reading."[4]

Does it, though?

The *Dream Defenders* court explained that there are some activities that may clearly fall within a commonly understood meaning of "rioting."[5] On the one hand, "[t]ossing Molotov cocktails at the police station with 10 of your best friends is clearly rioting."[6] On the other hand, some statutes purporting to define "riot" are so ambiguous that they leave unclear, for example, whether violent intent or conduct are elements required for a criminal conviction. In the face of those ambiguous statutes, courts should not be expected to "ignore the plain text of the statute and blithely proclaim that 'everyone knows what a riot means,'" to the detriment of those potentially subject to its criminal penalties,[7] as well as to democracy itself.[8]

As this Article details, the lack of legislative clarity in defining "riot" and "rioter" has resulted in inadequate guidance to those potentially subject to

2. The most egregious example is a Florida statute that provides an affirmative defense more generally, in contrast with Iowa and Oklahoma statutes that excuse liability only where the driver was acting unintentionally or exercising due care. *See* FLA. STAT. § 870.07(1) (2021); IOWA CODE §§ 723.1, 321.366A (2021); OKLA. STAT. tit. 21, § 1320.11 (2021); *see also infra* notes 113–18 and accompanying text.

3. *See generally* Dream Defs. v. DeSantis, 559 F. Supp. 3d 1238, 1282–83 (N.D. Fla. 2021) (striking down Florida HB1 as unconstitutional due to its ambiguous language and propensity to include constitutionally protected expression in its sweep).

4. *Id.* at 1271.

5. *Id.*

6. *Id.*

7. *See id.* at 1279.

8. *See infra* Part IV.B (discussing constitutional law literature addressing the fundamental importance of social conflict and protest in a constitutional democracy).

prosecution, as well as inconsistent descriptions—from media accounts to court opinions—as to what conduct can fairly be considered riotous in the first place. The resulting harms of conflating non-violent protesters with rioters not only include unjust mass arrests and prosecution, but also the facilitation of broader attacks on those seeking to exercise their constitutional rights to speech and assembly.

Ironically, in recent years, some of those who have stoked violence or property damage at protests have been caught trying to blame protesters for the violence they themselves instigated.[9] With such literal gaslighting functioning as a metaphoric Molotov cocktail sabotaging what started as non-violent protests, the true nature of the non-violent protests is obfuscated. In the depiction of street protests, the lines too easily blur between instigator and victim, between non-violent protester and violent rioter. Similarly blurred is the appropriate role of law enforcement, who at times initiate and escalate the violence and then arrest the innocent bystanders.[10]

In order to provide more context to the detrimental impact that ambiguous "riot" definitions can have, Part I will describe the inconsistent manner in which a series of protests that exploded across the United States in the twentieth and twenty-first centuries have been described by both media and courts.[11] In both media accounts and court opinions, descriptions vary dramatically as to which types of behavior can fairly be described as riotous, and which protesters should be described as criminally accountable for civil unrest.[12] Although not a comprehensive catalog or full description of all historically significant modern protests, which could fill voluminous tomes,[13] this snapshot of protests, ranging from the 1999 World Trade Organization ("WTO") protests to the evolution of the Black Lives Matter movement to the January 6, 2021, protests and insurrection, will focus on the contrasting manner in which those events, which involved a mix of both peaceful and violent

9. *See, e.g.*, Lois Beckett, *'Boogaloo Boi' Charged in Fire of Minneapolis Police Precinct During George Floyd Protest*, THE GUARDIAN (Oct. 23, 2020), https://www.theguardian.com/world/2020/oct/23/texas-boogaloo-boi-minneapolis-police-building-george-floyd; Jaclyn Peiser, '*Umbrella Man' Went Viral Breaking Windows at a Protest. He Was a White Supremacist Trying to Spark Violence, Police Say*, WASH. POST (July 29, 2020), https://www.washingtonpost.com/nation/2020/07/29/umbrella-man-white-supremacist-minneapolis/; *see also infra* notes 74–82 and accompanying text.

10. *See, e.g.*, Ivey DeJesus, *Police–Not Protesters–Instigate Violent Clash at Saturday's George Floyd Protests*, PENNLIVE PATRIOT-NEWS (June 1, 2020, 5:40 PM), https://www.pennlive.com/nation-world/2020/06/police-not-protesters-instigated-violent-clash-at-saturdays-george-floyd-protest-participants-say.html; Matthew Dessem, *Police Erupt in Violence Nationwide*, SLATE (May 31, 2020, 1:37 AM), https://slate.com/news-and-politics/2020/05/george-floyd-protests-police-violence.html; Michael Sainato, *'They Set Us Up': US Police Arrested over 10,000 Protestors, Many Non-Violent*, THE GUARDIAN (June 8, 2020) https://www.theguardian.com/us-news/2020/jun/08/george-floyd-killing-police-arrest-non-violent-protesters; *see also infra* notes 294–303 and accompanying text.

11. *See infra* Part I.

12. *See infra* Part I.

13. For example, of historic significance but not addressed herein are the "Occupy" movement protests; protests in the Pacific Northwest following the 1999 WTO protests; protests against President Trump, including in reaction to his reported "grab them by the pussy" comments; protests by opponents of mask mandates during the Covid-19 pandemic; various Marches on Washington, from racial justice-oriented marches to LGBTQ-rights marches; and other protests that transpired in recent decades.

protesters and actions, have been reported.[14] The inconsistent descriptions of those protests, by both media and even judges on the same bench, in turn, demonstrate how "riot" is often in the eye of the beholder.[15] Part I will shed light on the striking differences in how the participants in such events have been viewed and labeled as well, which in turn affects whether they are treated as criminal "rioters" or as peaceful, law-abiding activists.[16]

With the stakes as high as they are, and in light of dangerously inconsistent approaches in determining whether any given protester is a "rioter," it is incumbent on lawmakers to provide clear parameters defining which type of behavior amounts to criminal rioting. In the face of increased political protests of tumultuous tenor, legislatures across the country have enacted riot laws, sometimes following the model of the Federal Riot Act and sometimes adopting substantially different definitions of "riot," as detailed in the Appendix to this Article.[17] Unfortunately, rather than clarify the meaning of "riot," too often riot laws contribute to the confusion, due to poorly drafted language.[18] Part II describes resulting constitutional challenges to federal and state riot statutes, which have often been brought on either vagueness or overbreadth grounds, or a combination of the two, with varying success.[19]

In conjunction with detailing riot definitions from thirty-one states and Washington, D.C. in the Appendix to this Article, Part III details how the vast majority of riot statutes across the country contain similar or additional infirmities that make them vulnerable to constitutional challenge.[20] Part IV identifies ways to improve flawed riot legislation.[21] Absent such remedial measures, unconstitutional riot legislation will continue to harm those exercising their rights to free speech and assembly, open the laws up to constitutional challenge, and potentially stain the records of legislators. Consequently, this Article alternatively provides guidance to future litigants seeking to bring constitutional challenges to vague and overbroad riot statutes.[22]

Ultimately, the problem with vague and overbroad riot statutes is greater than a matter of linguistics. At this historic moment, our streets are increasingly filled with passionate cries for life-and-death causes, including the resistance against a long-standing pattern of deadly violence by police against unarmed people of color.[23] When those who non-violently protest police brutality are met with disproportionate force and even lethal violence in response,[24] it is a poignant illustration of the importance of this issue, both to civil rights protesters and non-violent protesters speaking

14. *See infra* Part I.A–C.
15. *See infra* Part I.
16. *See infra* Part I.
17. *See infra* app.
18. *See infra* Part II.C, III. .
19. *See infra* Part II.C.
20. *See infra* Part III.
21. *See infra* Part IV.A–B.
22. *See infra* Part IV.C.
23. *See infra* Part I.B.
24. *See infra* Part I.B; *see also infra* notes 318–20 and accompanying text.

out for other causes as well. It is imperative that riot laws enacted purportedly to protect nonviolent members of the public *actually* protect members of the public, including nonviolent protesters. Instead, riot laws across the country increasingly authorize vigilante or even deadly violence against protesters or give unfettered discretion to police, even while potentially rendering peaceful protesters felons.[25]

Although valid public safety concerns must be taken into account, as addressed in Part IV and literature described therein, balanced against those policy interests is the need to differentiate between non-violent protesters and violent rioters.[26] Keeping that distinction front and center ensures that our laws protect, rather than suppress, peaceful but passionate political dissent. Part IV also identifies a body of constitutional and civil rights law scholarship addressing how the protection of political dissent and social movement conflict furthers our constitutional democracy, rather than threatening it.[27] As a nation that values free political discourse, we must be fiercely vigilant in guarding against laws that would criminalize and sweep up legitimate political dissent and protest along with violent criminal behavior.

I. THE EVOLVING FACE OF PROTESTS: HOW DIFFERING DEPICTIONS OF TWENTIETH AND TWENTY-FIRST CENTURY PROTESTS ILLUSTRATE THAT "RIOTER" IS IN THE EYE OF THE BEHOLDER

"*Whose streets? OUR streets!!!*"

— Common chant at recent street protests in the United States.[28]

In the annals of history, the streets of American cities have too often been stained with bloodshed from the meeting of political protest with violent police response, as well as with heated backlash from counter-protesters. The civil rights movements of the 1960's rose up from lunch counters and city buses and spilled out onto the streets, as a generation of Americans fought back like never before against the ongoing systemic racist oppression that continued long after slavery had formally been abolished, only to be replaced with Jim Crow laws, segregation,

25. *See infra* notes 113–19 and accompanying text.

26. *See infra* Part IV.A–C.

27. *See infra* Part IV.B.

28. *See, e.g.*, Baude v. Leyshock, 23 F.4th 1065, 1070 (8th Cir. 2022); Garcia v. Does, 779 F.3d 84, 88 (2d Cir. 2015); United States v. Chrestman, 521 F. Supp. 3d 1107, 1110 (D. Kan. 2021); Haber v. City of Portland, No. 3:17-CV-01827-JR, 2020 WL 7129596, at *16 (D. Or. Dec. 4, 2020); Gonzalez v. City of New York, No. 14 CIV. 7721 (LGS), 2016 WL 5477774, at *1 (S.D.N.Y. Sept. 29, 2016); *see also* Anne Ryman, *A Gladiator, an Olympian and a Shaman: Here Are People with Ties to Arizona Who Face Charges in Capitol Riot*, USA TODAY (Jan. 6, 2022, 9:01 AM), https://www.usatoday.com/story/news/local/arizona/2022/01/06/jan-6-capitol-riot-arizona-qanon-shaman-klete-keller/9082112002/ (reporting that the chant was used by the Proud Boys on January 6); AJ Willingham, *How the Iconic 'Whose Streets? Our Streets!' Chant Has Been Co-opted*, CNN (Sept. 20, 2017, 9:26 AM), https://www.cnn.com/2017/09/19/us/whose-streets-our-streets-chant-trnd/index.html (reporting that the chant was used by police officers in St. Louis, Missouri, as they responded to protests).

and other government-sanctioned subjugation of people of color.[29] Among the most graphic images and disturbing moments from that era of peaceful nonviolent civil rights protests being met with violence are those of the then twenty-five-year-old John Lewis, who nearly died after a state trooper beat him mercilessly with a billy club on what became known as "Bloody Sunday."[30] On that shameful day in Selma, Alabama, Lewis and six hundred peaceful civil rights protesters marching across the Edmund Pettus Bridge were met with gruesome police brutality.[31] As subsequently reported, "[d]eputies on horseback charged ahead and chased the gasping men, women and children back over the bridge as they swung clubs, whips and rubber tubing wrapped in barbed wire. Although forced back, the protestors did not fight back."[32] In addition to being assaulted with horrific violence at the hands of state troopers, the peaceful protesters were assaulted verbally and emotionally by onlookers who cheered the beatings on.[33] As ugly and traumatic a day in history as Selma's Bloody Sunday was, it also marked an important turning point for the civil rights movement: because the violent assault by law enforcement officers against peaceful civil rights marchers was captured on film and widely viewed across the country, it sparked a growing outcry against such state-sanctioned violence, along with public support for civil rights, including the passage of the Voting Rights Act.[34]

One might think, however wishfully, that law enforcement officers with racist or excessively violent inclinations would have learned from the outcry to Bloody Sunday that our nation will not countenance police brutality against civil rights protesters. If not motivated by conscience, one might hope they would at least be more careful and measured in their responses to protesters when there is a possibility their brutality could be captured on camera. To the contrary, however, police brutality continued through the end of the twentieth century and into the twenty-first, as increasingly documented through videos captured by witnesses.[35] A turning point in the increased visibility of police brutality on the streets came in 1991, when three Los Angeles Police Department ("LAPD") officers were caught on video by a community member who lived across the street, a video then widely viewed around the world, brutalizing Rodney King—beating him "over fifty-three times and kicking him seven

29. *See* Christopher W. Schmidt, *Divided by Law: The Sit-Ins and the Role of the Courts in the Civil Rights Movement*, 33 LAW & HIST. REV. 93, 93–102 (2015).

30. *See* Sydney Trent, *John Lewis Nearly Died on the Edmund Pettus Bridge. Now it May Be Renamed for Him*, WASH. POST (July 26, 2020, 11:10 AM), https://www.washingtonpost.com/history/2020/07/26/john-lewis-bloody-sunday-edmund-pettus-bridge/; Christopher Klein, *How Selma's 'Bloody Sunday' Became a Turning Point in the Civil Rights Movement*, HIST. CHANNEL (July 18, 2020), https://www.history.com/news/selma-bloody-sunday-attack-civil-rights-movement.

31. Klein, *supra* note 30.

32. *Id.*

33. *See id.*

34. *Id.*; Voting Rights Act of 1965, 52 U.S.C. §§ 10101–10702.

35. *See, e.g.*, Joanna Stern, *They Used Smartphone Cameras to Record Police Brutality—and Change History*, WALL ST. J. (June 13, 2020, 12:01 AM), https://www.wsj.com/articles/they-used-smartphone-cameras-to-record-police-brutalityand-change-history-11592020827; Matt Taibbi, *Are Cell Phones Changing the Narrative on Police Shootings?*, ROLLING STONE (Apr. 9, 2015), https://www.rollingstone.com/politics/politics-news/are-cell-phones-changing-the-narrative-on-police-shootings-72206/.

times."[36] The blows to King included baton blows to his head so severe that his face was fractured in fifteen places and split open, with fluid from his brain flowing into the cavities of his crushed sinuses.[37] The beatings continued until King lay motionless, after which several officers "dragged him across the asphalt to the side of the road, leaving him face down, hog-tied, and moaning in his own blood and saliva."[38]

Rodney King's beating was far from the first such incident of police brutality, but it marked a turning of the tide in citizen journalism capturing such beatings on video, making it increasingly impossible for Americans to ignore the violence people of color in the United States face all too frequently at the hands of police. In the twenty-first century, civilians continued to witness and document on video ongoing policy brutality, including a disturbing number of police killings of unarmed people of color.[39] Those witnesses have fought back by filming it on their cell phones, documenting beyond dispute some of the worst instances of police brutality.[40]

Just as the filming of Bloody Sunday galvanized outraged Americans last century, the civilian recording of police brutality has more recently mobilized a new generation of anti-racism protesters to take to the streets and push back against too many centuries of unchecked violence against people of color in this country. A half century after Bloody Sunday, the protests may be inspiring, but other parallels are disheartening. As documented herein, while today's anti-racism protesters have been largely nonviolent in their street actions, as in the 1960's, they have been met with violence from counter-protesters, and from the very police charged with protecting the public but too often conflating peaceful protesters with the rioters.[41]

When law enforcement ensnares peaceful protesters along with violent rioters in mass arrests and employs militaristic responses to street protests, they are not alone in conflating the two. From media accounts to court opinions, "rioter" is often in the eye of the beholder. Whether someone is described as a "rioter" or merely as a "protester" may turn on a largely subjective valuation. A few such instances of dramatically different depictions of the same events, described alternatively as "riots" by some sources, or merely "protesters" by others, are detailed below.

A. The Eyes of History: Who Tells the Story?[42] *Conflicting Judicial Accounts of the 1999 WTO Protests*

One set of recent protests illustrating such blurred lines is the 1999 World Trade Organization ("WTO") protests. In November 1999, downtown Seattle, Washington,

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36. Laurie L. Levenson, *The Future of State and Federal Civil Rights Prosecutions: The Lessons of the Rodney King Trial*, 41 UCLA L. REV. 509, 516, 519 (1994) (citations omitted).

37. *Id.* at 519–20 (citations omitted).

38. *Id.* at 520–21 (citations omitted).

39. *See* Stern, *supra* note 35; Taibbi, *supra* note 35.

40. *See* Taibbi, *supra* note 35.

41. *See infra* Part IV.B.

42. LIN-MANUEL MIRANDA, *History Has Its Eyes on You*, *from* HAMILTON: AN AMERICAN MUSICAL (Hamilton Uptown, LLC 2015) ("Let me tell you what I wish I'd known / When I was young and dreamed of

exploded with civil unrest in the form of massive street protests targeting the first ever WTO conference to be held in the United States, a conference to be attended by representatives from 134 WTO-member nations and the President of the United States.[43] The protesters' opposition to the WTO was grounded in concerns that the WTO prioritizes globalization at the expense of democratic self-determination and local economic autonomy of developing nations, human rights, the protection of children against exploitative child labor, the health and safety of laborers more generally, environmentalism, and animal welfare.[44]

A number of WTO protesters were violent and caused substantial disruption and threats to persons and property.[45] Prior to the protest, individuals who were never identified broke windows in downtown clothing stores and threw Molotov cocktails into the building.[46] A day before the conference was scheduled to start, the protest activity intensified. Some protesters spray-painted buildings, broke windows, and threw rocks at police officers.[47] One masked protester caught on videotape trumpeted a movement of "50,000 people that really care" and proclaimed:

> I'm hoping that we can come out here, and get crazy and fucking up shit [sic] . . ., that every city in the world knows that it can't host the WTO conference and it better give control of the city back to the people or that city's going to be torn to pieces.[48]

Menotti v. City of Seattle further described the events as follows:

> Those protestors who chose to use violence to disrupt the WTO's conference used an array of weapons, devices, and tactics to obstruct the conference. The disruption of normal city life was so extreme in some locations that it bordered on chaos. Police officers in contemporaneous reports said that they saw protestors carrying bottles filled with flammable liquids, locking down intersections by forming human chains from lightpost to lightpost, breaking windows at retail stores, overrunning and looting small retail stores, and jumping on cars.[49]

Violence broke out between protesters and the police, who responded with tear gas and other weapons.[50] Some violent protesters set fires in streets and dumpsters, blocked fire trucks from entering the area, attacked WTO delegates and prevented

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glory / You have no control / Who lives, who dies, who tells your story / I know that we can win / I know that greatness lies in you / But remember from here on in / History has its eyes on you").

43. *See* Menotti v. City of Seattle, 409 F.3d 1113, 1120 (9th Cir. 2005).

44. *See* Susan Tiefenbrun, *Free Trade and Protectionism: The Semiotics of Seattle*, 17 ARIZ. J. INT'L & COMP. L. 257, 273–74 (2000).

45. *See Menotti*, 409 F.3d at 1120.

46. *Id.*

47. *Id.* at 1120–21.

48. *Id.* at 1121.

49. *Id.* at 1121.

50. *Id.* at 1122.

them from attending the conference venues, and in one case pulled a garbage truck driver from his vehicle to be attacked on the downtown streets.[51] A Seattle City Council report described the Seattle streets as transformed into "seeming war zones."[52]

The above descriptions come from the majority opinion of *Menotti v. City of Seattle*, a case addressing, and ultimately rejecting, constitutional challenges to subsequent police action taken to stop the Seattle protests.[53]

In contrast, however, the partial concurrence of Judge Richard Paez in *Menotti* describes the protests quite differently. Accusing the majority opinion of omitting crucial facts in its portrayal of a "city in crisis," the concurrence cited evidence in the record demonstrating that

> the decision to declare a state of emergency and to impose the police perimeter around the downtown area was *not* made in direct response to the violence and vandalism. That decision instead followed the realization that many of the peaceful protestors from the large, well-organized labor march would not be leaving Seattle.[54]

Perhaps one of the most troubling omissions from the majority opinion's factual depiction of the events on the streets of downtown Seattle was the following testimony from Assistant Seattle Police Chief Edward Joiner, as described by the concurrence: "Making the decision to impose the police perimeter, the City drew no distinction between peaceful protestors and those likely to cause violence—Joiner, for example, testified that during this process, the concept of peaceful and non-peaceful protestors 'merged.'"[55]

Charging the majority opinion with a less than accurate portrayal of what actually happened on the streets of Seattle during the WTO protests, Judge Paez further wrote in his concurrence: "[A]lthough I do not suggest that the violence confronting the City was insignificant, the majority's account exaggerates its pervasiveness. The ARC Report, for example, noted that even according to the highest estimates, only 'well under one percent' of the demonstrators in Seattle engaged in acts of vandalism or violence."[56]

Unfortunately, some readers of the *Menotti* opinion may stop reading at the end of the majority opinion. Those readers will thus never learn of the critical fact that the Seattle police swept up constitutionally protected speech along with unprotected conduct, with a vast majority of peaceful protesters lumped together with a rogue violent minority. The majority improperly ignored this fact—a fact that should have been deemed central to a constitutional overbreadth analysis.[57]

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51. *Id.* at 1122–23.
52. *Id.* at 1123.
53. *Id.* at 1120–23, 1156.
54. *Id.* at 1159–60 (Paez, J., concurring in part and dissenting in part).
55. *Id.* at 1160.
56. *Id.*
57. *See generally infra* Part II.A.

B. Racial Justice and Tensions: From Black Lives Matter Protests to White Nationalist Responses

Mirroring the dramatically different ways in which the same events were described by the majority and Paez opinions in *Menotti*, media accounts of protests have also differed in tone in recent years, with the same protests described by some media sources as riots and by others in more benign terms. This phenomenon of "riot" being in the eye of the beholder has taken on particularly poignant and painful dimensions in the context of anti-racism protests against police brutality, and the counterprotests and police responses to those protests.

The Black Lives Matter movement, only the most recent of civil rights movements to transform American streets into stages of revolutionary racial-justice-focused history making, had its formal birth on the streets of Ferguson, Missouri in the aftermath of the police killing of Michael Brown.[58] The image of eighteen-year-old Michael Brown's body, left on the streets of Ferguson for over four hours after being gunned down and killed by police, sent shock waves across the country.[59] Unfortunately, that was just one incident in a string of brutal police killings in a short period of time surrounding the Michael Brown killing. For example, other police killings of unarmed black men between July 2014 and July 2015—Eric Garner, Eric Harris, John Crawford, Samuel DuBose, Walter Scott and Freddie Gray—and of even an unarmed child, Tamir Rice, subsequently drew worldwide attention and outrage.[60]

The spate of police killings across the country also drew the scrutiny of the Department of Justice, which for several years stepped up its investigations and implementation of reports and recommendations for desperately needed police reform in the face of the American epidemic of deadly police brutality against unarmed people of color.[61] The widely reported police killings of unarmed black civilians, often captured by cell phone videos taken by onlookers, illuminated gut-wrenching questions about abuse of lethal power by police in this country, inspiring passionate nationwide protests.[62]

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58. *See* Jay Caspian Kang, *"Our Demand Is Simple: Stop Killing Us,"* N.Y. TIMES MAG. (May 4, 2015), http://www.nytimes.com/2015/05/10/magazine/our-demand-is-simple-stop-killing-us.html.

59. *See* Nancy C. Marcus, *From Edward to Eric Garner and Beyond: The Importance of Constitutional Limitations on Lethal Use of Force in Police Reform*, 12 DUKE J. CONST. L. & PUB. POL'Y 53, 59–60, 67–69 (2016) ("Nationwide, in the scant fifty-four police shootings between 2005 and 2015 that actually resulted in the indictment of the police officers involved in the shootings, all but two of the victims of police shootings were black, and half of those cases involved unarmed suspects who were shot in the back." (citing Kimberly Kindy & Kimbriell Kelly, *Thousands Dead, Few Prosecuted*, WASH. POST (Apr. 11, 2015), https://www.washingtonpost.com/sf/investigative/2015/04/11/thousands-dead-few-prosecuted/)).

60. *See id.* at 58–67, 77–84 (chronicling the police killings of unarmed black men and Tamir Rice during that one year period, and urging reinstated focus on constitutional limitations on deadly police force in police training).

61. *See* Nancy C. Marcus, *Out of Breath and Down to the Wire: A Call for Constitution-Focused Police Reform*, 59 HOW. L.J. 5, 30–33 (2015); POLICE EXEC. RSCH. F., CIVIL RIGHTS INVESTIGATIONS OF LOCAL POLICE: LESSONS LEARNED 1 (2013), https://www.policeforum.org/assets/docs/Critical_Issues_Series/civil%20rights%20investigations%20of%20local%20police%20-%20lessons%20learned%202013.pdf.

62. *See* Marcus, *supra* note 61, at 8–9, 11, 18–21, 23, 41.

In the years that followed, despite a number of reform efforts (many of which President Trump reversed upon taking office)[63] the police brutality against unarmed people of color continued, seemingly unabated.[64] That violence, in turn, was met by outrage from people across the country that itself escalated over the years, culminating in a heated cauldron of fury in the midst of the first year of the COVID-19 pandemic.

In 2020, as many Americans were stuck at home while weathering the worst of the pandemic, they had more time to bear witness to and absorb the horror of the killing of their neighbors of color by those sworn to serve and protect us all. Several months into the pandemic, masses of outraged people began venturing out of their homes, risking health and even life to protest some of the latest police killings—including that of George Floyd, who died when a white police officer crushed him with his knee digging into Floyd's neck for nine and a half minutes, callously ignoring Floyd's repeated cries that he could not breathe until Floyd took his last breath.[65]

The 2020 Black Lives Matter protests that exploded across the country in the aftermath of what was just the latest in an epidemic of police killings of unarmed black men, while deeply passionate in tone, were largely peaceful in fact.[66] A study by *The Washington Post* of 7,305 protests in cities and towns across the United States between May and June of 2020, involving millions of protesters, found not only that the thousands of protests that occurred that summer were largely peaceful, with low levels of violence and property destruction, but also that "most of the violence that did take place was, in fact, directed against the Black Lives Matter protesters."[67] More specifically, the collected data demonstrated that during those protests, 96.3 percent involved no police injuries or property damage, and 97.7 percent involved no

63. *See* Ed Pilkington, *Trump's Scrapping of Obama-Era Reforms Hinders Police Reform*, THE GUARDIAN (June 7, 2020), https://www.theguardian.com/us-news/2020/jun/07/police-consent-decrees-trump-administration-oversight.

64. *See, e.g.*, PHILIP M. STINSON, SR. & CHLOE A. WENTZLOF, POLICE INTEGRITY RSCH. GRP., ON-DUTY SHOOTINGS: POLICE OFFICERS CHARGED WITH MURDER OR MANSLAUGHTER, 2005-2019 (2019), https://www.bgsu.edu/content/dam/BGSU/health-and-human-services/document/Criminal-Justice-Program/policeintegritylostresearch/-9-On-Duty-Shootings-Police-Officers-Charged-with-Murder-or-Manslaughter.pdf (tracking data from 2005 to 2019 for nonfederal officers arrested for murder or manslaughter from an on-duty shooting, and documenting that the majority of victims are people of color); *id*. ("When looking at the cases of the 104 officers who were charged with murder of [sic] manslaughter resulting from an on-duty shooting, 12 (11.5%) involved a victim who was actually armed with a gun when they were shot and killed by the police."); *see also* A.J. Rael, *Shifting the Culture: What the United States Can Learn from European Policing Practices*, 30 TUL. J. INT'L & COMP. L. 195, 198 (2022) (identifying a series of police killings of unarmed black people from 2015 to 2020, including but not limited to Sandra Bland, Freddie Gray, Atatiana Jefferson, Stephon Clark, Philando Castille, Alton Sterling, Breonna Taylor, and George Floyd).

65. *See* Eric Levenson & Aaron Cooper, *Derek Chauvin's Body Camera Video Shows His Reaction Just After George Floyd Left in an Ambulance*, CNN (Mar.ch 31, 2021, 9:57 PM), https://www.cnn.com/2021/03/31/us/derek-chauvin-trial-george-floyd-day-3/index.html.

66. *See* Erica Chenoweth & Jeremy Pressman, *This Summer's Black Lives Matter Protesters Were Overwhelmingly Peaceful, Our Research Finds*, WASH. POST (Oct. 16, 2020, 6:00 AM), https://www.washingtonpost.com/politics/2020/10/16/this-summers-black-lives-matter-protesters-were-overwhelming-peaceful-our-research-finds/.

67. *Id*.

injuries to police, bystanders, or participants.[68] Despite data to the contrary, the Trump Administration described those protests as "over 100 days of violence and destruction in our cities."[69]

However, false claims that peaceful Black Lives Matter protests were in fact "riots" continued to proliferate across the media, beginning with the Black Lives Matters' earliest protests in the aftermath of Michael Brown's killing[70] and continuing in subsequent coverage. A 2021 *New York Post* article headline announced, "BLM leader threatens 'riots, fire, bloodshed' in NYC if Eric Adams gets tough on crime,"[71] while *The U.S. Sun* proclaimed, "ESCAPING JUSTICE Hundreds of BLM rioters, looters and vandals have charges DROPPED despite destruction from violent protests."[72]

These conflicting news accounts beg the question of whether some narrative-creators are too quick to paint angry people of color and their defenders as "rioters." An additional layer of irony lies in the fact that Black Lives Matter protesters were seldom the instigators of violence; rather, counter-protesters (or even the police themselves)[73] instigated the violence. For example, the 2020 protests in Minneapolis were widely reported as involving vandalism and rioting by Black Lives Protesters, including reports of a police station being set on fire.[74] President Trump poured more fuel on the fire, "calling demonstrators 'thugs' and threatening, 'when the looting starts, the shooting starts.'"[75] Not only did violent rhetoric from the President not help, but it was soon revealed that Ivan Hunter, a member of the far-right "Boogaloo Boi" extremist group intent on using national protests to escalate

68. *Id.*

69. *Id.*

70. *See* Eliott C. McLaughlin, *Fatal Police Shooting in Missouri Sparks Protests*, CNN (Aug. 11, 2014, 12:13 AM), https://www.cnn.com/2014/08/10/justice/missouri-police-involved-shooting (quoting Ferguson Police Chief Thomas Jackson's characterization of the protests as "border[ing] on riot conditions").

71. Jesse O'Neil & Julia Marsh, *BLM Leader Threatens 'Riots, Fire, Bloodshed' in NYC if Eric Adams Gets Tough on Crime*, N.Y. POST (Nov. 11, 2021, 2:03 AM), https://nypost.com/2021/11/11/blm-leader-hawk-newsome-threatens-riots-after-sit-down-with-eric-adams/.

72. Aliki Kraterou, *Escaping Justice Hundreds of BLM Rioters, Looters and Vandals Have Charges Dropped Despite Destruction From Violent Protests*, U.S. SUN (June 20, 2021, 7:13 PM), https://www.the-sun.com/news/3123181/hundreds-blm-rioters-looters-vandals-charges-dropped/.

73. *See, e.g.*, Chenoweth & Pressman, s*upra* note 66; Isaac Stanley-Becker, *White Instigators to Blame for Mayhem in Some Protests, Local Officials Say*, WASH. POST (June 1, 2020, 8:50 PM), https://www.washingtonpost.com/national/protests-white-instigators/2020/06/01/b916bd98-a426-11ea-bb20-ebf0921f3bbd_story.html ("[L]ocal officials have noted that black protesters have struggled to maintain peaceful protests in the face of young white men joining the fray, seemingly determined to commit mayhem."); *see also infra* Part IV.B.

74. *See, e.g.*, Gabe Gutierrez, David K. Li & Dennis Romero, *Minneapolis Police Precinct Burns as George Floyd Protests Rage; CNN Crew Arrested*, NBC NEWS (May 29, 2020, 10:29 AM), https://www.nbcnews.com/news/us-news/protests-looting-erupt-again-minneapolis-area-following-death-george-floyd-n1216881; Jon Jackson, *More Than 1,500 Minnesota Businesses Damaged in George Floyd Protests, Expect to Take Years to Rebuild*, NEWSWEEK (June 1, 2021, 3:18 PM), https://www.newsweek.com/businesses-year-after-floyd-1596610 (describing protests as riots); Trevor Hughes, *For Minneapolis Protest Leaders, No Apologies Over Muscular Demands for Police Reform*, USA TODAY (Apr. 24, 2021, 5:04 PM), https://www.usatoday.com/story/news/nation/2021/04/24/george-floyd-supporters-minneapolis-unapologetic-protests/7336797002/ (describing protests as riots).

75. Gutierrez et al., *supra* note 75.

violence, helped set the police station on fire.[76] Hunter was charged with crossing state lines to participate in a riot, after he was caught on video firing a semi-automatic weapon into the station while posing as a civil rights protester shouting "Justice for Floyd!"[77] Hunter was no lone wolf among right-wing counter-protesters showing up to stoke racial conflict and violence for which civil rights protesters would be blamed. On July 28, 2020, Mitchell Carlson, an associate of the white-supremacist prison gang Aryan Cowboys, was identified as the "Umbrella Man," made infamous for initiating the destruction and riots in Minneapolis during the George Floyd protests.[78] Carlson was caught on film smashing in windows of an Autozone store, which set into motion the subsequent looting and arson of the store.[79] As a police arson investigator averred in an affidavit, "[t]his was the first fire that set off a string of fires and looting throughout the precinct and the rest of the city."[80] Until Carlson's actions, the affidavit continued, "the protests had been relatively peaceful. The actions of this person created an atmosphere of hostility and tension. Your affiant believes that this individual's sole aim was to incite violence."[81]

In the years leading up to those protests, reminiscent of the Bloody Sunday violence against peaceful protesters last century, other recent protests also illustrated such a contrast between peaceful protests and violent responses thereto. For example, anti-racist actions at times took the form of protesters passively lying on the ground to reenact police killings of unarmed people of color,[82] even while the comparatively vitriolic and violent white supremacist backlash counterprotests against civil rights protests took murderous turns. For example, in 2017, images of torch-bearing white supremacists screaming racist chants in Charlottesville, Virginia, fueled both literal and metaphoric fires, fires stoked by President Trump's refusal to condemn the white supremacists even after one of them drove his car into a group of civil rights protesters, striking and killing a young woman, Heather Heyer.[83]

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76. Beckett, *supra* note 9.

77. *Id.*

78. *See* Julie Wernau, *Minneapolis Police Identify Man Suspected of Inciting Violence*, WALL ST. J. (July 28, 2020, 5:36 PM), https://www.wsj.com/articles/minneapolis-police-identify-man-suspected-of-inciting-violence-11595972184; Peiser, *supra* note 9.

79. *See* Wernau, *supra* note 78; Peiser, *supra* note 9.

80. *See* Sara Sidner, *Minneapolis Police Identify 'Umbrella Man' Who Helped Incite George Floyd Riots, Warrant Says*, CNN (July 29, 2020, 11:56 PM), https://www.cnn.com/2020/07/28/us/umbrella-man-associated-white-supremacist-group-george-floyd/index.html.

81. *Id.*

82. *See* Micah Luxen, *When Did 'Die-Ins' Become a Form of Protest?*, BBC NEWS (Dec. 9, 2014), http://www.bbc.com/news/blogs-magazine-monitor-30402637.

83. *See* Ben Jacobs & Oliver Laughland, *Charlottesville: Trump Reverts to Blaming Both Sides Including 'Violent Alt-Left'*, THE GUARDIAN (Aug. 16, 2017), https://www.theguardian.com/us-news/2017/aug/15/donald-trump-press-conference-far-right-defends-charlottesville; *see also* David Caplan & Kevin Dolak, *Torch-Wielding White Nationalists March on University of Virginia Ahead of Massive Rally*, ABC NEWS (Aug. 12, 2017, 2:40 AM), https://abcnews.go.com/US/torch-wielding-white-nationalists-march-university-virginia-ahead/story?id=49172793.

The violent "Unite the Right" rally had been planned by white supremacist groups who traveled across the country after weekends of combat training, to protest the removal of a statute of Confederate general Robert E. Lee from Charlottesville's Emancipation Park.[84] One court subsequently described the events of August 11, 2017, in Charlottesville as one in which hundreds of white nationalists joined together "for a torch-lit march on the campus of the University of Virginia . . . [where] the torch-bearers chanted slogans such as 'Blood and soil!' and 'Jews will not replace us!'" as they marched to a statue of Thomas Jefferson on the campus grounds "where they confronted a smaller group of student counter-protesters bearing a banner that read, 'VA Students Act Against White Supremacy.'"[85] In the shadow of Thomas Jefferson's statue, white supremacists attacked the civil rights counter-protestors with their tiki torches.[86]

The next day, things took an even more violent turn, culminating in murderous bloodshed. On the morning of August 12, the day of the long-planned "Unite the Right" rally, violence soon erupted between the white nationalists and counter-protesters, prompting police to order a state of emergency and clear the park.[87] Even after the dispersal order, however, white supremacists continued to engage in violence, including a clash near Emancipation Park "in which they 'collectively pushed, punched, kicked, choked, head-butted, and otherwise assaulted' a group of counter-protestors, and 'not in self-defense.'"[88]

Bookending the Trump presidency in a sense was, on the one end, the image of torch-bearing white nationalists bearing down on Charlottesville and on the other end, the January 6, 2021, attack on the U.S. Capitol by furious and out-of-control Trump supporters hoping to stop the peaceful transition of power from one president to the next, the first ever such attack on the Capitol. As with the Charlottesville attack, those who broke into the Capitol on January 6 included a number of angry Trump supporters carrying Confederate flags and others later identified as members of the far-right Proud Boys group and of other neo-Nazi and extremist groups.[89] While white supremacist violence is a longstanding part of American history, in the four years bookmarked by the 2017 Charlottesville attack and the 2021 Capitol insurrection, the White House was occupied by a man who

84. *See* United States v. Miselis, 972 F.3d 518, 526 (4th Cir. 2020); *see also* Emily Behzadi, *Statues of Fraud: Confederate Monuments as Public Nuisances*, 18 STAN. J. C. R. & C.L. 1, 10, 42 (2022).

85. *Miselis*, 972 F.3d at 526–27.

86. *Id.* at 527.

87. *Id.*

88. *Id.* (citing case record).

89. *See* Sabrina Tavernise & Matthew Rosenberg, *These Are the Rioters Who Stormed the Nation's Capitol*, N.Y. TIMES (May 12, 2021), https://www.nytimes.com/2021/01/07/us/names-of-rioters-capitol.html; *see also* Caleb Ecarma, *The Eerie Charlottesville Echoes of Trump Supporters' Capitol Coup*, VANITY FAIR (Jan. 7, 2021), https://www.vanityfair.com/news/2021/01/charlottesville-echoes-trump-capitol-coup ("Others in the crowd . . . chant[ed] 'Fight for Trump' as they mobbed up the Capitol steps with impunity, many waving 'Make America Great Again' and Confederate battle flags.").

not only refused to unconditionally condemn white supremacist violence on the streets and sanctuaries of America, but even at times appeared to encourage it.[90]

C. Protest, Riot, or Insurrection? The January 6, 2021, Attack on the U.S. Capitol

In the January 6 attack on the Capitol, while some protesters respected the boundaries of police barricades and the marbled Capitol walls, others broke into the Capitol building and engaged in atrociously destructive conduct, some even smearing feces in the Capitol's hallways, urinating on the floors, and violently attacking Capitol Police officers.[91] One Capitol Police Officer subsequently suffered two strokes and died of "natural causes"; another officer was stabbed in the eye with a flagpole by a protester who was a former member of the U.S. Army Special Forces.[92] Many of those who broke into the Capitol that day carried firearms and other weapons.[93]

The violent attack on the Capitol was widely described as a "riot" and "insurrection" by mainstream media sources from the *New York Times*[94] to the *Wall Street Journal*[95] and *Forbes*[96] to *USA Today*.[97] However, other news sources refused to label as "rioters," let alone insurrectionists, those who broke into and desecrated the Capitol, while violently attacking Capitol Police who tried to defend the Capitol.[98]

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90. For an analysis of Donald Trump's actions during his presidency in which he used his bully pulpit to encourage the white nationalist movement that formed a significant part of his base, actions that amount to his serving as a symbolic mascot of white supremacy, see Darren Lennard Hutchinson, *Continuous Action Toward Justice*, 37 J.L. & RELIGION 63, 64–65 (2022).

91. *See* Carl Campanile & Yaron Steinbuch, *Rioters Left Feces, Urine in Hallways and Offices During Mobbing of US Capitol*, N.Y. POST (Jan. 8, 2021, 12:18 PM), https://nypost.com/2021/01/08/rioters-left-feces-urine-in-hallways-and-offices-during-mobbing-of-us-capitol/; Peter Hermann & Spencer S. Hsu, *Capitol Police Officer Brian Sicknick, Who Engaged Rioters, Suffered Two Strokes and Died of Natural Causes, Officials Say*, WASH. POST (Apr. 19, 2021, 3:46 PM), https://www.washingtonpost.com/local/public-safety/brian-sicknick-death-strokes/2021/04/19/36d2d310-617e-11eb-afbe-9a11a127d146_story.html.

92. *See* Hermann & Hsu, *supra* note 91; *New Video Shows Former Special Forces Stabbing Officer with Flagpole on January 6*, MSNBC (July 21, 2021), https://news.yahoo.com/video-shows-former-special-forces-163745373.html.

93. *See* Michael S. Schmidt & Luke Broadwater, *Officers' Injuries, Including Concussions, Show Scope of Violence at Capitol Riot*, N.Y. TIMES (July 12, 2021), https://www.nytimes.com/2021/02/11/us/politics/capitol-riot-police-officer-injuries.html; *see also* Hutchinson, *supra* note 90, at 67.

94. *See* Tavernise & Rosenberg, *supra* note 89.

95. *See* Andrew Duehren & Brianna Abbott, *At Least Three Lawmakers Test Positive for Covid-19 After Capitol Attack*, WALL ST. J. (Jan. 12, 2021, 5:03 PM), https://www.wsj.com/articles/at-least-three-lawmakers-test-positive-for-covid-19-after-capitol-attack-11610473977.

96. *See* Sarah Hansen, *Lawmakers Sheltering During Capitol Riot May Have Been Exposed to Coronavirus*, FORBES (Jan. 10, 2021, 1:00 PM), https://www.forbes.com/sites/sarahhansen/2021/01/10/lawmakers-sheltering-during-capitol-riot-may-have-been-exposed-to-coronavirus/?sh=6daf22f73c79.

97. *See* Bart Jansen, *Judge: Federal Civil Suits Against Trump for Inciting Jan. 6 Riot at Capitol Can Go Forward*, USA TODAY (Feb. 18, 2022, 4:41 PM), https://www.usatoday.com/story/news/politics/2022/02/18/trump-lawsuits-capitol-riot/9203315002/.

98. *See* Eric Deggans & David Folkenflik, *A Look at How Different U.S. Media Outlets Covered the Pro-Trump Riot on Capitol Hill*, NPR (Jan. 7, 2021, 4:03 PM), https://www.npr.org/2021/01/07/954562181/a-look-at-how-different-u-s-media-outlets-covered-the-pro-trump-riot-on-capitol-.

An indictment following the January 6, 2021, attack on the Capitol described it as follows: "Congress was attacked by a crowd that breached barriers erected by the United States Capitol Police and entered the Capitol by breaking windows and ramming open doors, forcing the evacuation of members of Congress and the halting of the Joint Session [of Congress] until later that evening."[99] Some of the defendants prosecuted as a result moved to dismiss the indictment in *United States v. Nordean*.[100] The *Nordean* court detailed the defendants "[d]ismantling police barricades, and [s]torming past those barricades and law enforcement officers in efforts to disrupt the proceedings at the Capitol; and obtaining entry into the Capitol building as a result of damage to windows and doors that otherwise would have precluded entry."[101] The indictment also detailed violent rallying cries in the aftermath of the election accompanying the planning of the January 6 attack on the Capitol, including statements on social media and elsewhere such as: "It's time for fucking War if they steal this shit" and "We tried playing nice and by the rules, now you will deal with the monster you created" and "Hopefully the firing squads are for the traitors that are trying to steal the election from the American people."[102] The challenged indictment further detailed how the defendants "violently disassembled" metal barriers, which were "trampled by the crowd," and forcibly entered the Capitol building, disrupting Congress's efforts to count the presidential election vote.[103] Ultimately, the indictment recounted, "almost '81 members of the Capitol Police and 58 members of the Metropolitan Police Department were assaulted,'" and the Capitol building itself "suffered millions of dollars in damage—including broken windows and doors, graffiti, and residue from pepper spray, tear gas, and fire extinguishers deployed both by crowd members who stormed the Capitol and by Capitol Police officers trying to restore order," as the Defendants "'celebrated the events' of that day."[104]

Elsewhere in the indictment, though, although the *Nordean* case did not involve formal Riot Act charges, the defendants were nonetheless referenced as "rioters."[105]

Inconsistent descriptions within media accounts exemplify the strikingly different terminology used to describe the same day's events. Jake Tapper of CNN referred to those who committed acts of violence on January 6 as "terrorists," while, in contrast, NewsMax TV's Sean Spicer (former press secretary for Donald Trump) referred to the same events as "mischief."[106] As NPR's David Folkenflik explained, television networks scrambled to pinpoint the right language to describe the day's events:

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99. United States v. Nordean, 579 F. Supp. 3d 28, 37 (D.D.C. 2021).
100. *Id.* at 36–37.
101. *Id.* at 37 (internal quotation marks omitted).
102. *Id.* at 38.
103. *Id.* at 39 (internal quotation marks omitted).
104. *Id.* (internal quotation marks omitted).
105. *Id.*
106. *See* Deggans & Folkenflik, *supra* note 98.

> I think that you saw them initially talking about protesters because the day started with a protest, right? And then it moved to people who were starting to move on the Capitol. And they were trying to figure out—you know, to anticipate where it would go without being hyperbolic about it. And suddenly, these people became, essentially, a mob that were storming or laying siege or sacking, ultimately, the U.S. Capitol building … . [Y]ou saw debates play out in newsrooms, including our own. Are they protesters still? Are they insurrectionists? Are they rioters? How do you do this?[107]

To be fair, not all who were at the Capitol that day deserve the same label. Just like a peaceful Black Lives Matter protester would be loath to be lumped together with those who commit property damage and looters (who are frequently just as likely to be outsider right-wing agitators as civil rights protesters), so may peaceful January 6 protesters wish not to be painted with the same broad brush as those who were violent, who interfered with the peaceful transition of power, and who desecrated the hallowed halls of Congress.

When additional details about the January 6 insurrection were revealed in 2022 Congressional hearings, the split narratives by media covering the issue continued. While mainstream media generally had settled on "rioters" as the appropriate description of those who broke into the Capitol,[108] Fox News primetime hosts continued to reframe the January 6 events in different terms. Sean Hannity, for example, reportedly described the attack on the Capitol as paling in comparison to the Black Lives Matter protests during the summer of 2020.[109] For perhaps other reasons, even the prosecutors bringing charges against January 6 defendants have shied away from labeling them "rioters": as of two years after the attack, none of the charges brought the defendants have included Federal Riot Act charges.[110] Instead, January 6 defendants have been charged under other federal statutes, including charges for Entering and Remaining in a Restricted Building; Disorderly and Disruptive Conduct in a Restricted Building; Violent Entry and Disorderly Conduct in a Capitol Building; Parading, Demonstrating, or Picketing in a Capitol

107. *Id.*

108. *See, e.g.*, Richard Cowan, Patricia Zengerle & Moira Warburton, *Six Takeaways from Thursday's Jan. 6 U.S. Capitol Riot Hearing*, REUTERS (July 22, 2022, 12:45 PM), https://www.reuters.com/world/us/two-takeaways-thursdays-jan-6-us-capitol-riot-hearing-2022-07-22/; *Jan. 6 Hearing to Focus on Trump's Actions During Riot,* CBS NEWS (July 21, 2022), https://www.cbsnews.com/video/jan-6-hearing-to-focus-on-trumps-actions-during-riot/; *Jan. 6 Hearings Highlights: Committee Examines Trump's Actions During Riot*, NBC NEWS (July 21, 2022, 11:48 PM), https://www.nbcnews.com/politics/live-blog/january-6-committee-hearings-live-updates-day-8-rcna36739.

109. *See* Andrew Lawrence, *As the US Watched the January 6 Hearing, Fox News Showed Outrage – at Biden Getting Covid*, THE GUARDIAN (July 22, 2022), https://www.theguardian.com/us-news/2022/jul/21/fox-news-january-6-hearing-biden-covid.

110. *See* U.S. DEP'T OF JUST. *Capitol Breach Cases*, U.S. ATT'Y'S OFF. D.C., https://www.justice.gov/usao-dc/capitol-breach-cases (last visited Jan. 26, 2023). Perhaps the reason Federal Riot Act charges have not been brought is because the Department of Justice opted for more certain, easy convictions without having to wrestle with constitutional challenges, which could be a risk of charging defendants under a riot law, in light of the litigation detailed in the following section of this Article. *See infra* Part II-III.

Building; Knowingly Entering or Remaining in any Restricted Building or Grounds without Lawful Authority; Obstruction of Justice/Congress; Civil Disorder; Assaulting, Resisting or Impeding Certain Officers; Impeding Passage Through the Capitol Grounds or Buildings; and various weapons charges.[111]

Perhaps a consensus will never be reached on the proper label for those who broke into the U.S. Capitol. Such are the questions that persist in public discourse, in the media, and even in the courts as appropriate labels and means of distinguishing between protesters, rioters and insurrectionists remain a matter of debate. The differing descriptions of the events of, and participants in, the January 6 Capitol attack is another example of how "rioter" is all too often in the eye of the beholder.

II. CONSTITUTIONAL PROBLEMS WITH AND CHALLENGES TO VAGUE AND OVERBROAD RIOT LEGISLATION

In response to protests and riots that have taken place in recent years, whether focused on racial injustice, political election results, or other issues, legislatures have at times enacted riot legislation that defines and criminalizes riotous conduct.[112] As discussed below, riot legislation too often suffers from the infirmity of being vague and overbroad. In its most extreme form, such legislation has implicitly condoned violence against protesters. For example, Florida now shields from civil liability those who harm participants in a "riot," including by injuring or even killing protesters deemed to be "rioters";[113] Iowa shields from civil liability those who drive their cars into protests (or "riots") as long as they exercise "due care";[114] and Oklahoma exempts drivers who unintentionally injure or kill protestors from both civil and criminal liability as long as they exercise "due care" and were "fleeing from [the] riot" to protect themselves.[115]

These new laws raise the stakes significantly, illustrating another reason why clear legislative definitions of "riot" are more important than ever. In a growing number of states, whether or not something is designated a "riot" can determine, in essence, whether someone who drives their car into a protest can get away with killing a peaceful protester. As one commentor discussing the Oklahoma law

111. *Id*.

112. *See* Reid J. Epstein & Patricia Mazzei, *G.O.P. Bills Target Protesters (and Absolve Motorists Who Hit Them)*, N.Y. TIMES (June 16, 2021), https://www.nytimes.com/2021/04/21/us/politics/republican-anti-protest-laws.html.

113. FLA. STAT. § 870.07(1) (2021) ("In a civil action for damages for personal injury, wrongful death, or property damage, it is an affirmative defense that such action arose from an injury or damage sustained by a participant acting in furtherance of a riot.").

114. IOWA CODE § 321.366A (2021) (A vehicle driver "who is exercising due care and who injures another person who is participating in a protest, demonstration, riot, or unlawful assembly or who is engaging in disorderly conduct and is blocking traffic in a public street or highway shall be immune from civil liability for the injury caused by the driver of the vehicle.").

115. OKLA. STAT. ANN. tit. 21, § 1320.11 (2021) ("A motor vehicle operator who unintentionally causes injury or death to an individual shall not be criminally or civilly liable . . . if . . . the motor vehicle operator was fleeing from a riot . . . under reasonable belief that fleeing was necessary to protect the morot vehicle operator from serious injury or death; and . . . [t]he motor vehicle operator exercised due care.").

exclaimed: "They are targeting groups of protesters who are just wanting to use their freedom of speech, passing bills that will intimidate them in the hopes of keeping people from using their [F]irst [A]mendment rights, passing bills that decriminalize the murder of protesters, which is absolutely insane."[116]

To call the stakes of such legislation a serious matter of life or death is no exaggeration. The idea of cars plowing into civil rights protesters is not far-fetched; there were over a hundred documented cases of protesters being hit by vehicles in 2020 alone.[117]

As such, even the more common legislation that merely criminalizes or defines riots can put the lives of peaceful protesters in peril when viewed together with legislation allowing people to kill participants in protests deemed to be "riots."[118]

Other riot legislation that is comparatively facially benign nonetheless also poses substantial dangers. When it is poorly drafted and overly vague or sweeping, anti-riot legislation creates difficulties and dangers for law enforcement officers charged with enforcing the statutes, civilians attempting to make sense of laws that could criminalize their protests, and courts attempting to interpret the laws and reconcile them with constitutional mandates. The remainder of this Article discusses the constitutional issues raised by such riot laws.

A. A Brief Overview of Constitutional Vagueness and Overbreadth Doctrines

The expression of political dissent without fear of criminal reprisal is essential for a constitutional democracy to thrive. It is a well-established First Amendment principle that the most contentious and divisive political protests, particularly those in public squares and streets,[119] should be accorded the highest degree of protection, not criminalized and conflated with actions that cross the line into constitutionally unprotected violence.[120] Consequently, courts have long recognized that, even if it could generate unrest, such speech is generally protected against censorship or punishment.[121] Emphasizing this principle in *Terminiello v. Chicago*, a case in which the Supreme Court struck down a disorderly conduct ordinance as unconstitutional, the Court explained that:

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116. Alexandra Villarreal, *New Oklahoma Law Targets Protesters While Protecting Drivers Who Hit Them*, THE GUARDIAN (Apr. 22, 2021), https://www.theguardian.com/us-news/2021/apr/22/oklahoma-law-protesters-drivers (quoting Adriana Laws, founder of the Collegiate Freedom and Justice Coalition).

117. *See Analysis of US Anti-Protest Bills,* INT'L CTR. FOR NOT-FOR-PROFIT L. (last visited Jan. 12, 2022), https://www.icnl.org/post/news/analysis-of-anti-protest-bills?location=&status=&issue=&date=; *see also* Grace Hauck, *Cars Have Hit Demonstrators 104 Times Since George Floyd Protests Began*, USA TODAY (Sept. 27, 2020, 6:55 PM), https://www.usatoday.com/story/news/nation/2020/07/08/vehicle-ramming-attacks-66-us-since-may-27/5397700002/.

118. *See supra* notes 113–17 and accompanying text.

119. *See* Perry Educ. Ass'n. v. Perry Loc. Educators' Ass'n, 460 U.S. 37, 45–46 (1983).

120. *See* Edwards v. South Carolina, 372 U.S. 229, 235–238 (1962) (The First and Fourteenth Amendments "do[] not permit a State to make criminal the peaceful expression of unpopular views."); *id.* at 236 (distinguishing peaceful protest from a situation involving "violence or threat of violence"); *see also* R.A.V. v. City of St. Paul, 505 U.S. 377, 422 (1992) (Stevens, J., concurring) ("Core political speech occupies the highest, most protected position.").

121. *See* Terminiello v. Chicago, 337 U.S. 1, 4–5 (1949).

> [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. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea . . . . There is no room under our Constitution for a more restrictive view. For the alternative would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups.[122]

Although the *Terminiello* decision's "clear and present danger" standard for the constitutional evaluation of free speech infringements has since been supplanted by the *Brandenburg v. Ohio* "imminent lawless action" test,[123] the principles invoked in the above passage distinguishing between constitutionally protected non-violent protest and unprotected violence remain important. Even advocacy of violence in the form of abstract teaching and speech is protected by the Constitution unless "such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[124]

Civil rights protesters have historically relied on constitutional protections for expressions of political dissent, trusting with their very lives that such principles will stand firm against authoritarian abuse.[125] It has not been much more than a half century since the early 1960's, when civil rights protesters took to the streets to protest segregation, redlining, and other systemic racial injustices that proliferated across the country.[126]

Such protests, from the streets of Selma to dime store lunch counters in other southern towns, at times culminated in heavy-handed police responses to civil rights protests, which were subsequently the subject of Supreme Court litigation. One such case, *Edwards v. South Carolina*, was brought by 187 Black high school and college students who were arrested and convicted of breach of the peace after engaging in a peaceful, orderly protest in which they entered onto the South Carolina State House grounds with placards containing messages such as "I am proud to be a negro" and "Down with segregation," while singing the Star Spangled Banner and other patriotic and religious songs.[127] The Supreme Court granted the students' constitutional challenges to their convictions, concluding that the breach of the peace statute in that case infringed on the petitioners' free speech, free assembly, and

122. *Id.*

123. Brandenburg v. Ohio, 395 U.S. 444, 447–48 (1969).

124. *Id.*

125. *See generally* Stewart Jay, *The Creation of the First Amendment Right to Free Expression: From the Eighteenth Century to the Mid-Twentieth Century*, 34 WM. MITCHELL L. REV. 773, 972–1016 (2008) (discussing free expression during the Civil Rights Movement and the Vietnam War).

126. *See id.*; *see also* Schmidt, *supra* note 29, at 93–97, 102–29 (explaining the role of the law in the Civil Rights Movement).

127. 372 U.S. 229, 229–33 (1963).

freedom to petition for redress of their grievances.[128] Consequently, when regulations of speech sweep so broadly as to result in the chilling of protected speech, such regulations can be struck down as constitutionally overbroad.[129]

As fundamental as the First Amendment is in protecting the rights of peaceful (if passionate) political protesters, the Due Process guarantees of the Fifth and Fourteenth Amendment are just as critical. It is well-established that a law violates Due Process when it is "so vague that it fails to give ordinary people fair notice" of the prohibited conduct, or when its lack of clear standards invites discriminatory or arbitrary enforcement.[130] For example, the Supreme Court concluded in two McCarthy era cases that criminal statutes failing to adequately define a "subversive organization," the members of which were subject to prosecution, were unconstitutionally vague.[131] Similarly, in *Smith v. Goguen*, the Supreme Court struck down as unconstitutionally vague a statute that criminalized treating the American flag "contemptuously."[132] The Court explained, quoting a law review note, that "[w]hat is contemptuous to one man may be a work of art to another."[133] The Court held that the statute was consequently unconstitutional, because it failed to provide clear enough guidance as to how "contemptuously" should be defined for the purpose of identifying what conduct amounts to criminally prohibited treatment of the United States flag.[134] Importantly, in *Goguen*, the Court also affirmed that statutes with the propensity to reach First Amendment-protected expression are subject to a particularly strict standard.[135]

In another case addressing the void for vagueness doctrine, *Kolender v. Lawson*, the Supreme Court struck down as vague an anti-loitering statute that required individuals who were caught wandering on the streets to produce "credible and reliable" identification.[136] The Court explained that the meaning of "credible and reliable" was too vague to provide sufficient minimal guidelines such that it "vest [ed] virtually complete discretion in the hands of the police to determine" who

128. *Id.* at 235.

129. *See* Gooding v. Wilson, 405 U.S. 518, 522 (1972) ("[T]he statute must be carefully drawn or authoritatively construed to punish only unprotected speech and not be susceptible of application to protected expression."); *see also* United States v. Stevens, 559 U.S. 460, 473 (2010).

130. Johnson v. United States, 576 U.S. 591, 595 (2015) (citing Kolender v. Lawson, 461 U.S. 352, 357–58 (1983)); *see, e.g.,* Hill v. Colorado, 530 U.S. 703, 732 (2000); Grayned v. City of Rockford, 408 U.S. 104, 108–09 (1972); City of Chicago v. Morales, 527 U.S. 41, 56 (1999).

131. *See* Dombrowski v. Pfister, 380 U.S. 479, 492–94 (1965); Baggett v. Bullitt, 377 U.S. 360, 362, 366–68 (1964).

132. 415 U.S. 566, 567–69 (1974).

133. *Id.* at 573 (quoting Note, *Constitutional Law—Freedom of Speech—Desecration of National Symbols as Protected Political Expression*, 66 Mich. L. Rev. 1040, 1056 (1968)).

134. *Id.* at 573–76, 581–82.

135. *Id.* at 573; *see also* FCC v. Fox Television Stations, Inc., 567 U.S. 239, 253–54 (2012) ("When speech is involved, rigorous adherence to those requirements is necessary to ensure that ambiguity does not chill protected speech."); Winters v. New York, 333 U.S. 507, 509 (1948) ("It is settled that a statute so vague and indefinite, in form and as interpreted, as to permit within the scope of its language the punishment of incidents fairly within the protection of the guarantee of free speech is void, on its face, as contrary to the Fourteenth Amendment.").

136. 461 U.S. 352, 353–54 (1983).

might be subject to the law's criminal penalties.[137] Similarly, in *City of Chicago v. Morales*, the Court struck down as unconstitutionally vague a loitering statute with troublingly unclear language that prohibited remaining in "any one place with no apparent purpose."[138] As the Court explained, the meaning of "apparent purpose" itself was far from apparent, lacking the clarity that due process demands.[139]

First Amendment protections against overbroad legislation have often been intertwined with Fifth or Fourteenth Amendment due process protections against vague laws, with courts recognizing that vagueness and overbreadth are interrelated concepts. Such laws can be simultaneously unconstitutionally overbroad and vague, or, in other words, constitutionally infirm due to "[o]verbreadth from indeterminacy," as the Eleventh Circuit has described the hybrid doctrine.[140] Quoting a long line of Supreme Court precedent, the Eleventh Circuit explained, "[t]he overbreadth and vagueness doctrines are related in that 'a court should evaluate the ambiguous as well as the unambiguous scope of the enactment . . . [since] ambiguous meanings cause citizens to "'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked."'"[141]

Indeed, in the seminal *Brandenburg v. Ohio* per curiam decision, the Supreme Court struck down on both First and Fourteenth Amendment grounds an Ohio Criminal Syndicalism Statute, enacted in 1919, with language that prohibited, among other things, "voluntarily assembl[ing] with any society, group, or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism."[142]

In *Coates v. City of Cincinnati*, the Supreme Court struck down as violating both the First and Fourteenth Amendments a city ordinance that made it "a criminal offense for 'three or more persons to assemble . . . on any of the sidewalks . . . and there conduct themselves in a manner annoying to persons passing by."[143] Writing for the Court, Justice Potter Stewart explained that legislation is unconstitutionally vague when, rather than specifying a comprehensible standard, it requires guesswork by persons of common intelligence seeking its meaning and allows for enforcement that may depend entirely on the subjective feelings of law enforcement (in that case, "whether or not a policeman is annoyed").[144]

In a sense, *Coates* is a particularly easy case, in that whether something is "annoying" is obviously a subjective determination, rendering legislation that

137. *Id.* at 358.

138. 527 U.S. 41, 51, 56–57 (1999).

139. *Id.* at 56–60.

140. Am. Booksellers v. Webb, 919 F.2d 1493, 1505 (11th Cir. 1990).

141. *Id.* at 1505–06 (quoting Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc., 455 U.S. 489, 494 n. 6 (1982)).

142. Brandenburg v. Ohio, 395 U.S. 444, 444–45 (1969) (quoting Ohio Rev. Code. Ann. § 2923.13); *id.* at 447 ("From 1917 to 1920, identical or quite similar laws were adopted by 20 States and two territories").

143. 402 U.S. 611, 611 (1971) (quoting then-existing Section 901—L6, Code of Ordinances of the City of Cincinnati (1956)); *id.* at 616.

144. *Id.* at 614.

depends on that term's interpretation unconstitutionally vague. However, *Coates* also has substantial significance for subsequent challenges to riot statutes, due to Justice Stewart's admonition in that case that vague statutes are particularly problematic when they also affect free assembly and association, writing that the problem with the ordinance in that case "lies not alone in its violation of the due process standard of vagueness. The ordinance also violates the constitutional right of free assembly and association. Our decisions establish that mere public intolerance or animosity cannot be the basis for abridgment of these constitutional freedoms."[145]

In contrast with each of these cases in which plaintiffs were successful in constitutional challenges, the Supreme Court in *Hill v. Colorado* rejected a constitutional challenge by anti-abortion "sidewalk counsel[ors]" to a state statute that created a one-hundred-foot buffer zone around medical facilities, including abortion clinics.[146] More specifically, the law prohibited coming within eight feet of patients and others near the clinics, "for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person."[147] The Court rejected the petitioners' overbreadth and vagueness arguments, dismissing the contention that the meanings of "protest, education, or counseling," the statutes' consent requirements, and the meaning of "approaching" within eight feet of another, were unclear.[148] Ruling that the statute provided a requisite scienter requirement and had clear terms, the Court concluded, "[t]he likelihood that anyone would not understand any of those common words seems quite remote."[149] In ruling that the statute in that case was not unconstitutionally vague, the Court quoted from its 1972 *Grayned v. City of Rockford* decision, in which it had explained "because we are '[c]ondemned to the use of words, we can never expect mathematical certainty from our language.'"[150]

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145. *Id.* at 615 (citing Street v. New York, 394 U.S. 576, 592 (1969); Cox v. Louisiana, 379 U.S. 536, 551–53 (1965); Edwards v. South Carolina, 372 U.S. 229, 238 (1963); Terminiello v, Chicago, 337 U.S. 1 (1949); Cantwell v. Connecticut, 310 U.S. 296, 311 (1940); Schneider v. New Jersey, 308 U.S. 147, 161 (1939)).

146. 503 U.S. 703, 707–08, 730–33 (2000).

147. *Id.* at 707 n.1 (quoting Colo. Rev. Stat. § 18–9–122(3) (1999)).

148. *Id.* at 730–33.

149. *Id.* at 732.

150. *Id.* at 733 (quoting Grayned v. City of Rockford, 408 U.S. 104, 110 (1972)). Ironically, while mathematical certainty may not be required, every riot statute nonetheless contains precise mathematical enumerations in defining what may constitute a riot. For example, out of the thirty-one states and the District of Columbia which have enacted statutory definitions of riot, part of that definition sets forth a minimum number of persons who must be involved (along with other factors) before a gathering becomes a "riot": two set the number at two or more (California, Idaho); five set the number at two or more plus another who joins them (Arizona, Delaware, New Hampshire, Pennsylvania, Utah); nine set the number at three or more (Colorado, Iowa, Louisiana, Minnesota, North Carolina, Ohio, South Dakota, Tennessee, Virginia), as does the Federal Riot Act; one sets the number at three or more plus another who joins them (Florida); three set the number at four or more plus another who joins them (New Jersey, New York, Ohio); four and the District of Columbia set the number at five or more (Kansas, Kentucky, Michigan, North Dakota); six set the number at five plus another who joins them (Alabama, Alaska, Hawai'i, Indiana, Maine, Oregon); and one sets the number at seven plus another who joins them (Texas). See Appendix for citations and the text of these statutes.

Both federal and state riot statutes have been subject to constitutional challenges across the country.[151] Some of those cases, discussed below, may provide helpful guidance for those seeking to either engage in (i.e., civil rights activists and their attorneys) or avoid (i.e., legislative drafters) future constitutional challenges to riot statutes.

B. Twentieth Century Constitutional Challenges to the Federal Riot Act

1968 was a traumatic year in American history, marked by the assassinations of Martin Luther King, Jr., and Robert Kennedy. Streets, college campuses, and political conventions were rocked that year by passionate protests, following "on the heels of what has been deemed the 'long, hot summer of 1967,' in which," as one federal court described, "more than 150 cities across 34 states witnessed riots stirred by issues such as racial injustice and the war in Vietnam."[152]

It was during that era, "not unlike our own, marked by a palpable degree of social unrest,"[153] that the United States Congress enacted the riot provisions of the Civil Rights Act of 1968 (the "Federal Riot Act").[154] Almost immediately, the Federal Riot Act was challenged in cases arising out of "[t]he turbulence that lingered throughout 1968."[155]

The Federal Riot Act consisted of two sections. The first, codified at 18 U.S.C. § 2101, criminalized the use of interstate commerce or travel with intent to incite a riot; organize, promote, encourage, participate in, or carry on a riot; commit any act of violence in furtherance of a riot; or aid or abet a riot.[156] The second, codified at 18 U.S.C. § 2102, defined "riot" as follows:

> (a) As used in this chapter, the term "riot" means a public disturbance involving (1) an act or acts of violence by one or more persons part of an assemblage of three or more persons, which act or acts shall constitute a clear and present danger of, or shall result in, damage or injury to the property of any other person or to the person of any other individual or (2) a threat or threats of the commission of an act or acts of violence by one or more persons part of an assemblage of three or more persons having, individually or collectively, the ability of immediate execution of such threat or threats, where the performance of the threatened act or acts of violence would constitute a clear and present danger of, or

151. This Article does not purport to be a comprehensive catalogue of challenges to state riot statutes. Rather, it focuses on the evolving body of case law addressing the constitutionality of the Federal Riot Act, and on the particularly substantive and thorough decision in *Dream Defenders v. DeSantis*, 559 F. Supp. 3d 1238 (N.D. Fla. 2021) which addressed the recent Florida riot statute.

152. United States v. Miselis, 972 F.3d 518, 527–28 (4th Cir. 2020) (quoting MALCOLM MCLAUGHLIN, THE LONG, HOT SUMMER OF 1967 (2014)).

153. *Id.* at 527–28.

154. *Id.*; *see also* Civil Rights Act of 1968 § 104(a), 18 U.S.C. §§ 2101–02.

155. *Miselis*, 972 F.3d at 528.

156. 18 U.S.C. § 2101.

> would result in, damage or injury to the property of any other person or to the person of any other individual.[157]

Soon after its enactment, civil rights activists who were concerned about its sweeping and vague language and the effect that could have on their ability to continue speaking out about critical social justice issues challenged the law in court. However, as described below, they were largely unsuccessful in their initial challenges. In a series of twentieth-century vagueness and overbreadth challenges to the Federal Riot Act, none of which were ultimately decided by the Supreme Court, federal courts consistently upheld the Federal Riot Act as constitutional.[158]

In *National Mobilization Committee to End the War in Viet Nam v. Foran*, a group of Viet Nam protesters unsuccessfully challenged the constitutionality of the Federal Riot Act in the U.S. Court of Appeals for the Seventh Circuit.[159] Their challenge appeared to concede the constitutionality of many of the most substantial portions of the Federal Riot Act, including the definitions section.[160] The sole vagueness challenge, which the court rejected, was to the phrase in Section 213(a)(1) of the Act describing "technique capable of causing injury or death to persons," which the plaintiffs argued could include self-defense or sporting activities; the court rejected that alleged vagueness as ignoring the clear intent requirement in the statute, which would not apply to self-defense or innocent sporting games.[161] The plaintiffs also challenged the statute on the grounds that they feared their "mere presence in a crowd, some of whom might be performing acts of violence, could be considered participating in a riot."[162] Once again, however, the court rejected their argument as failing to account for the fact the Federal Riot Act had an express intent requirement.[163]

In a subsequent Seventh Circuit case, *United States v. Dellinger*, the court again addressed the constitutionality of the Federal Riot Act, this time in the form of constitutional challenges brought by 1968 Democratic National Convention protesters who had been prosecuted under the Federal Riot Act.[164] Noting that plaintiffs raised issues not brought by the *Foran* plaintiffs, the Seventh Circuit nonetheless upheld the Act's constitutionality, but only on overbreadth grounds; there was no

157. *Id.* § 2102.

158. *See, e.g.*, *Miselis*, 972 F.3d at 528 (collecting cases in which courts addressed constitutional challenges to the Federal Riot Act through 2020, including United States v. Dellinger, 472 F.2d 340 (7th Cir. 1972); United States v. Hoffman, 334 F. Supp. 504 (D.C. Cir. 1971); *In re* Shead, 302 F. Supp. 560 (N.D. Cal. 1969), *aff'd sub nom.* Carter v. United States, 417 F.2d 384 (9th Cir. 1969)); *see also* Nat'l Mobilization Comm. to End the War in Viet Nam v. Foran, 411 F.2d 934, 939 (7th Cir. 1969). Each of these cases is discussed in the following paragraphs.

159. *Foran*, 411 F.2d at 935, 939.

160. *Id.* at 937–38.

161. *Id.* at 937.

162. *Id.* at 938.

163. *Id.*

164. 472 F.2d 340, 348, 354 (7th Cir. 1972).

vagueness challenge addressed in *Dellinger*.[165] The court methodically parsed the text of the Act and concluded that it was not overbroad in violation of the First Amendment, but rather targeted destructive actions in appropriate furtherance of community safety concerns.[166] The *Dellinger* decision was subsequently followed by the United States District Court for the Central District of Illinois decision in *United States v. Betts*, in which the court rejected similar constitutional challenges, explaining it was bound by the *Dellinger* decision.[167]

During that same period of time, other decisions on the Federal Riot Act's constitutionality were issued by lower courts. In *United States v. Hoffman*, a case brought by Abbie Hoffman challenging his Riot Act indictment, the United States District Court for the District of Columbia, without much substantive discussion, rejected Hoffman's constitutional challenges, which it described as amounting to "examples of legislative history and hypothetical situations which defendant contends would result in unconstitutional applications of those criminal provisions."[168] Although the court described one of the constitutional challenges implicating free speech and assembly concerns, it did not describe an overbreadth challenge specifically or a vagueness challenge.[169] Likewise, though the plaintiffs in a different federal district court case, *In re Shead*, did raise overbreadth and vagueness challenges, those challenges were based on what was plainly a misreading of the Federal Riot Act as prohibiting mere advocacy of violence, thus rendering their constitutional challenges infirm.[170]

C. Twenty-First Century Constitutional Challenges to Riot Statutes

1. Twenty-First Century Challenges to the Federal Riot Act

In contrast with the string of unsuccessful challenges to the Federal Riot Act brought in the twentieth century, challenges brought in the twenty-first century have been slightly more successful. In a trio of cases brought by members of white supremacist groups challenging the Act, as described below, the federal courts did not grant the vagueness challenges brought, but the overbreadth challenges were partially successful.

a. *United States v. Daley*

On August 11, 2017, as previously described, torch-bearing white nationalists descended with vitriol and violence upon the campus of the University of Virginia and streets of Charlottesville, Virginia, culminating in the killing of a young civil

165. *Id.* at 354–64.
166. *See id.*
167. 509 F. Supp. 3d 1053, 1059–63 (C.D. Ill. 2020).
168. 334 F. Supp. 504, 509 (D.D.C. 1971).
169. *See id.*
170. 302 F. Supp. 560, 566–67 (N.D. Cal. 1969).

rights activist.[171] Among those alleged to have engaged in the violence in Charlottesville were Californian members of the "Rise Above Moment" ("RAM"), a white supremacist "alt-right" organization with members who espouse racist, white supremacist, anti-Semitic views and promote violence in furtherance of those views.[172] Following the bloodshed on the University of Virginia campus, members of the white supremacist RAM organization were indicted for violating the Federal Riot Act and challenged their indictments on a number of grounds, including constitutional overbreadth and vagueness.[173]

In their vagueness challenge, the white supremacist defendants argued that the Federal Riot Act's definitions of "riot," "organize, promote, encourage, participate in, or carry on a riot," and "incite a riot" were vague, while also contending that the Act's intent requirement was unconstitutionally vague.[174] As to the alleged lack of clarity regarding the required timing of intent under the statutory text, the defendants suggested that intent at the time of overt acts, as opposed to at the time of interstate travel, might not be required.[175]

Rejecting the defendants' intent argument, the district court, while questioning whether the argument even raised a vagueness challenge, followed other cases in which federal courts had interpreted the statute as requiring proof of a defendant's intent at both temporal junctions.[176] The court further rejected the argument that specific terms in the Act were unconstitutionally vague, explaining that the terms did not require the imposition of entirely subjective judgments without any statutory definitions, settled legal meanings, or narrowing context.[177]

In their overbreadth challenge, the white supremacist defendants argued that the Federal Riot Act violated the First Amendment by equating organized assemblies with violence.[178] The court disagreed, due to the Riot Act's limited reach, "only regulat[ing] either violence committed in furtherance of a riot or the unprotected incitement or instigation of a riot[,]" coupled with the Act being narrowly tailored by its criminal intent requirements, thus requiring more than mere advocacy or peaceful assembly for criminal prosecution.[179] Consequently, the court concluded the Act was not unconstitutionally overbroad under the First Amendment.[180]

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171. *See supra* Part II.B.

172. *See* United States v. Daley, 378 F. Supp.3d 539, 545 (W.D. Va. 2019).

173. *Id.* at 545–47.

174. *Id.* at 548, 551.

175. *Id.* at 548.

176. *Id.* at 551–52, 551 n.13 (citing United States v. Markiewicz, 978 F.2d 786, 813 (2d Cir. 1992); United States v. Dellinger, 472 F.2d 340, 393–94 (7th Cir. 1972); United States v. Hoffman, 334 F. Supp. 504, 509 (D.C. Cir. 1971)).

177. *Id.* at 549–50 (citing United States v. Williams, 553 U.S. 285, 306 (2008)).

178. *Id.* at 552.

179. *Id.* at 554.

180. *Id.* at 555.

b. *United States v. Miselis*

United States v. Miselis is another case in which white supremacist defendants who had participated in the notorious "Unite the Right" rally in Charlottesville challenged the Federal Riot Act, on both overbreadth and vagueness grounds this time.[181] Beating *Daley* to the Circuit Court level, *Miselis* was decided by the Fourth Circuit Court of Appeals, which, although rejecting the vagueness challenges of the white supremacist defendants, granted in part their overbreadth challenge.[182]

As to the vagueness challenges, the *Miselis* court walked through the specific elements of the Riot Act's definition of "riot" and explained how each of the four elements was described in the statutory text with sufficient specificity to adequately define the conduct that constitutes a "riot," rejecting other vagueness arguments brought by the defendants in that case as well.[183] As to the overbreadth challenge, in contrast, the Fourth Circuit explained that although the "incitement" category of speech at the core of the Federal Riot Act's prohibitions has never been accorded protection under the First Amendment, particularly following *Brandenburg*, the Act's prohibition of speech tending to "encourage," "promote," or "urg[e]" rioting and speech "'involving' mere advocacy of violence" nonetheless "sweeps up a substantial amount of speech that remains protected advocacy under the modern incitement test of *Brandenburg v. Ohio*."[184] Because First Amendment jurisprudence allows for specific overbroad passages of a statute to be severed from the remainder of the statute, however, the court only invalidated the Federal Riot Act as to those severable provisions of the statute, leaving the remainder intact.[185]

c. *United States v. Rundo*

In *United States v. Rundo*, the Ninth Circuit Court of Appeals, in a per curiam opinion, once again addressed the constitutionality of the Federal Riot Act in a challenge brought by members of the RAM white supremacist organization.[186] On appeal, the Ninth Circuit's focus was explicitly on an overbreadth challenge, not vagueness, addressing solely the white supremacists' contention that the Federal Riot Act violated the First Amendment because, they argued, "it prohibits advocacy that does not incite an imminent riot."[187]

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181. 927 F.3d 518, 525 (4th Cir. 2020). In addition to charges for their violence in Charlotteville, the defendants also faced charges for their involvement in rallies involving violent attacks on counter-protesters in Huntington Beach, California, and Berkeley, California. *Id*. at 526–27.

182. *See id*. at 525–26, 535–38, 540–41.

183. *See id*. at 544–46.

184. *Id*. at 525–526 (citing Brandenburg v. Ohio, 395 U.S. 444 (1969); and then citing 18 U.S.C. §§ 2101–2102)).

185. *See id*. at 526.

186. 990 F.3d 709, 712–13 (9th Cir. 2021).

187. *Id*. at 713.

More specifically, the court in *Rundo* examined the language in the statute prohibiting conduct that included "encourage[ing,]" "incit[ing,]" or "promot[ing]" a riot and, agreeing in part with the defendants, concluding that the conduct described by such terms could, in fact, include mere advocacy of a riot, in violation of the First Amendment.[188] As the *Mirelis* court had, the court in *Rundo* consequently severed those portions of the Act, preserving the remainder of the Act as constitutional rather than invalidating the Act as a whole.[189]

Furthermore, the court in *Rundo* did not agree with the defendants that the Act's definition of "riot" itself was similarly unconstitutional.[190] Rather, the court explained that the provision of the statute was clear in prohibiting only acts of violence and threats that rise to the level of "true threats" (due to the subjective intent requirement of the federal statute), which are not protected by the First Amendment.[191] There was no vagueness challenge to the "riot" definition in *Rundo*.

2. Florida Riot Statute Challenge: *Dream Defenders v. DeSantis*

a. The *Dream Defenders* Opinion

Standing in contrast with *Rundo* is a more recent federal district court case, *Dream Defenders v. DeSantis*, in which the script was flipped, this time the plaintiffs being civil rights activists in Florida, [192] in contrast with the white nationalists who challenged the riot statute in *Rundo*. In *Dream Defenders*, unlike in *Rundo*, the plaintiffs were successful in having a statutory riot definition declared unconstitutional on vagueness grounds, with its enforcement enjoined.[193] A cynical court watcher might surmise that the different result was dictated by the palatability of the plaintiffs, with courts more sympathetic to civil rights protesters than to white nationalists, but in truth, the two cases differed in other fundamental ways as well: the statutes being challenged were different,[194] and the grounds upon which they were challenged were expanded to include an explicit vagueness challenge in *Dream Defenders*,[195] not just the type of overbreadth challenge that had been brought in *Rundo*.

The *Dream Defenders* case came about in 2021, after Governor Ron DeSantis signed into law a new Florida riot statute ("HB1" or the "Florida riot statute")[196]

188. *See id*. at 716, 719.
189. *Id*. at 720–21.
190. *Id*. at 719.
191. *Id*. (citations omitted).
192. *See* Dream Defs. v. DeSantis, 559 F. Supp. 3d 1238, 1253 (N.D. Fla. 2021).
193. *See id*. at 1250–51, 1288–89.
194. *Compare id*. at 1251 (challenging Florida state law criminalizing rioting), *with Rundo*, 990 F.3d at 712–13 (challenging the Federal Riot Act).
195. *See Dream Defs*., 559 F. Supp. 3d at 1251.
196. *See id*. at 1250; *see also* FLA. STAT. § 870.01(2) (2022); Tom Hudson & Andrea Perdomo, *Anti-Riot or Anti-Speech? HB1 Becomes Law in Florida; Earth Day and Florida's Environment*, NPR (Apr. 23, 2021, 4:43 PM), https://www.npr.org/templates/story/story.php?storyId=990316009.

following a summer of pandemic-era "Black Lives Matter" civil rights protests and turmoil after the murder of George Floyd.[197] The new Florida riot statute defined "riot" as follows:

> A person commits a riot if he or she 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, resulting in:
>
> (a) Injury to another person;
>
> (b) Damage to property; or
>
> (c) Imminent danger to another person or damage to property.[198]

Prior to the enactment of the new legislation, the only definition of "riot" in Florida's criminal code had been located not in any statutory text, but rather in the form of a common law definition that "restricted the offense of rioting to one where 'three or more persons acted with a common intent to mutually assist each other in a violent manner to the terror of the people and a breach of the peace.'"[199]

In 2021, Governor DeSantis signed HB1 into law, replacing the common law definition of "riot" with the new statutory definition. The new definition no longer defined "riot" in terms of a group of three or more people acting with criminal intent, but also referenced a fourth person who joins such a gathering, raising questions about who, as between the original trio and the fourth person, may be criminally charged as a rioter.

Whatever the legislature's intent in enacting the statute, it surely did not intend to draft a statute so unclear that it would be found unconstitutional in court, but that is what subsequently happened.[200] Following the enactment of the HB1, the plaintiffs, comprised of civil rights organizations, collectively called Dream Defenders, that had historically been involved in political actions and demonstrations protesting police violence, confederacy statues,[201] and other forms of structural racial inequality, immediately sought an injunction to stop its enforcement.[202] The Dream Defenders challenged the statute on the grounds that the statute was both unconstitutionally overbroad in violation of the First Amendment and unconstitutionally vague in violation of the Due Process Clause of the Fourteenth

197. *See Dream Defs.*, 559 F. Supp. 3d at 1250.

198. § 870.01(2).

199. *Dream Defs.*, 559 F. Supp. 3d at 1251 (quoting State v. Beasley, 317 So. 2d 750, 753 (Fla. 1975)); *see also Beasley*, 317 So. 2d at 753 (rejecting vagueness challenge to common law riot definition and explaining, "[w]e believe that citizens understand the term 'riot' to mean a group acting defiantly and unlawfully in a violent manner").

200. *See Dream Defs.*, 559 F. Supp. 3d at 1250–51, 1288–89.

201. For comprehensive discussion of how (and why) Confederate statues and monuments have been the focal point of racial justice protests across America, see Behzadi, *supra* note 84, at 3–12.

202. *Dream Defs.*, 559 F. Supp. 3d at 1251, 1253–57.

Amendment.[203] Organizations advocating for minority groups filed suit against the Governor and argued that the statute's vague language would invite discriminatory enforcement.[204]

A comparison of the text of the common-law riot definition with the text of HB1 reveals the vagueness problem with HB1. Where the prior common-law definition described riot in terms of violence intended by a group of at least three people,[205] the 2021 statute added reference to a fourth person who "willfully participates" in a violent disturbance that involves "three or more persons, acting with common intent."[206]

The new definition's additional reference to a fourth person, as well as its new insertion of a comma separating the intent element from those people it modifies, begs the question of *which* people are required to have intent to be convicted of willful participation in a riot. The definition leaves unclear whether the "common intent" clause in HB1 modifies only the original trio, or whether a fourth person who joins a protest where the trio is also present, whether directly joining that particular group of people or not, must also be shown to have violent intent before being convicted of criminal riotous conduct.[207] In other words, the statute is ambiguous as to whether a non-violent protester with *innocent* intent who joins a protest that later involves three people with *violent* intent could be convicted of willfully participating in a riot, no matter how temporally, geographically, or philosophically distanced the fourth (peaceful) person was from the three violent people, the only pertinent common link between the violent trio and the fourth person being that they all at some point were involved in the same protest.[208]

The lack of clarity as to the meaning of "willfully participates" and as to whom the intent clause modifies leaves open the possibility that an innocent peaceful protester could be criminally charged for violence intended and committed by others that occurs hours later, or blocks away from where the peaceful protester stood hours before among the protest's earlier more peaceful contingent, with no clue she could be criminally charged for the actions of violent protesters, or even of counter-protesters acting in direct opposition to her own intents and actions.

The court in *Dream Defenders* described the problematic ambiguity of the "willfully participates" phrase in the following terms:

> Although both Governor DeSantis and Sheriff Williams argue that the phrase "willfully participate" is commonly understood, neither party offers an actual definition. Is it enough to stand passively near violence? What if you continue protesting when violence erupts? What if that protest merely

203. *Id*. at 1251.
204. *Id*. at 1260.
205. *See* State v. Beasley, 317 So. 2d 750, 753 (Fla. 1975).
206. Fla. Stat. § 870.01(2) (2022).
207. *See Dream Defs*., 559 F. Supp. 3d at 1271–79.
208. *See id*.

> involves standing with a sign while others fight around you? Does it depend on whether your sign expresses a message that is pro- or anti-law enforcement? What about filming the violence? What if you are in the process of leaving the disturbance and give a rioter a bottle of water to wash tear gas from their eyes? . . . A "violent public disturbance" raises similar questions. Is a violent public disturbance a peaceful protest that later turns violent? Is it a protest that creates an imminent risk of violence? Do the violent actions of three people render an otherwise peaceful protest of 300 people a violent public disturbance? Does a rowdy group of Proud Boys or anarchists have veto power over peaceful protests under this definition?[209]

As to the statute's failure to clearly identify who, as between the riotous triad and the fourth person who joins a protest, has to share the common violent intent, the court rejected the defendants' contention that the statute included "an exception for a person who merely 'attend[s]' a violent demonstration."[210] Instead, the court explained, "the plain text of the statute, which separates a person from an assembly of three or more persons sharing that intent," suggests that someone without requisite criminal intent could nonetheless be criminally charged.[211]

Such were the fundamental problems with the new riot statute raised by the plaintiffs challenging it and addressed at length by the court in *Dream Defenders*.

In support of their injunction request, the plaintiffs provided documentation from numerous affected groups depicting a history in Florida of disproportionately heavy-handed treatment of civil rights protesters by police in the past, even as civil rights protesters had to defend themselves against violent counter-protesters driving cars into them or pulling guns on them. [212] The plaintiffs further documented, through undisputed evidence, how law enforcement officers in the past had turned a blind eye toward the comparatively violent actions of agitators, while instead targeting civil rights protesters with heavy-handed policing.[213] Among many statements recounted by the court evidencing a history of discriminatory enforcement, the court described one declaration, for example, depicting an event "where 'a white supremacist counter protester [sic] . . . attacked a protester by kicking and spitting on them,' but '[e]ven though the incident was witnessed by police officers, nothing was done until protesters chased the counter protestor [sic] and demanded that police officers arrest him."[214] The plaintiffs further documented how their speech was chilled by

209. *Id*. at 1272 (footnote omitted).

210. *Id.*

211. *Id.*

212. *Id*. at 1253–57. Including a declaration from Dream Defender's co-director describing the experiences of Dream Defenders members, a declaration from a founding board member of the nonprofit The Black Collective, a declaration from the CEO and founder of Chainless Change, a declaration from a Black Lives Matter community organizer, declarations from NAACP officers, and a declaration from the founder and President of Northside Coalition of Jacksonville. *Id*.

213. *See id*. at 1253–57, 1262.

214. *Id*. at 1262 (citation to record omitted).

the enactment of HB1, with members attesting to their fears of being unfairly arrested if they continued to attend protests after the bill's enactment.[215]

Although defendant Governor DeSantis attempted to rebut claims of chilled speech by pointing out that after the bill was enacted, for example, there was still a gathering of Black people at a Juneteenth celebration, the *Dream Defenders* court forcefully rejected that argument,[216] describing itself as "perplexed" that DeSantis would conflate the celebration of a national holiday by members of Black communities with a political protest organized by the specific organizations in that case.[217]

The history documented by the plaintiffs of Florida law enforcement's propensity to turn a blind eye toward violent white supremacists while being comparatively heavy-handed in militarized responses toward more peaceful civil rights protesters[218] underscores the point that in cases like *Dream Defenders*, the very trauma that drove protesters to the streets—police brutality against unarmed, nonviolent people of color—then repeats itself on the streets as the police continue engaging in such brutality, this time in response to the very civil rights protesters speaking out against such violent police tactics. For the legislative branch to help facilitate such abuses of power, no matter how unwittingly, compounds the inequitable forces of injustice against victims of systemic oppression. It is imperative for courts to step in and right such wrongs.

And that is what the court did in *Dream Defenders*. The opinion, filled with strikingly strong candor, including calling out disingenuous contorted arguments and legislative drafting,[219] began by documenting a troubling history in Florida of riot statutes being used to target civil rights activists and suppress their efforts to engage in peaceful sit-ins challenging segregation.[220] "What's past," the court lamented, "is prologue," as it confronted the questionable constitutionality of the new definition of "riot" written by the Florida legislature in response to Black Lives Matter era protests.[221]

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215. *Id*. at 1256–62, 1267.

216. *Id*. at 1259–60.

217. *Id*. at 1260 (criticizing DeSantis' apparent implication that all Black people and the events they organize are fungible for purposes of legal analysis). The court noted that it observes Juneteenth as a holiday, as do other courts, and described DeSantis' perplexing defense in the following terms:

> [T]he Governor has conflated a community celebration of a federal holiday commemorating the end of slavery with a protest . . . It should go without saying that a public gathering of Black people celebrating "Black joy" and release from bondage does not automatically equate to a protest—or something that the Governor apparently implies should be chilled by the new riot law if Plaintiff Chainless Change's claimed injury is to be believed.

Id.

218. *See id*. at 1253 (citing *Police Break Up Black Lives Matter March in Tallahassee; TCAC Leaders Arrested*, WFSU (Sept. 5, 2020, 7:15 PM), https://news.wfsu.org/wfsu-local-news/2020-09-05/police-break-up-black-lives-matter-march-in-tallahassee; *Activists Renew Calls for Charges Against Tally19 to be Dropped*, WCTV (Jan. 12, 2021, 5:59 PM), https://www.wctv.tv/2021/01/12/activists-renew-calls-for-charges-against-tally19-to-be-dropped/).

219. *See id*. at 1258–61, 1272–79.

220. *Id*. at 1249–50.

221. *Id*. at 1250.

In the *Dream Defenders* opinion, Florida's troubling history of discriminatory policing of civil rights protesters was not only pertinent to the plaintiffs' justiciability and injunctive relief arguments establishing injury, but it was also relevant for purposes of establishing their substantive constitutional claims. As the court ultimately concluded, the Florida riot statute was unconstitutionally vague because it was so lacking in clear meaning and enforcement standards that it could result in multiple subjective interpretations and discriminatory enforcement, toward which the police had already shown a propensity.[222]

"Given that a vague law does not give a would-be protestor any notice about what the law criminalizes, and that the person may be punished for constitutionally protected activity given the law's potentially overbroad scope," the court warned in *Dream Defenders*, "a reasonable person, as the declarations in this case make clear, would censor his own speech rather than risk arrest and time in jail."[223] HB1 thus not only unfairly pins such individuals between a painful rock and hard place, but also simultaneously implicates and violates both the First Amendment and Fourteenth Amendment rights of protesters. Rejecting the defendants' arguments, including that "riot" has a clear ordinary meaning,[224] the court explained that because the text of HB1 left unclear whether a protester had to "merely avoid sharing a common intent to assist two others in violent and disorderly conduct, or if she had to avoid participating in any public event where such violent and disorderly conduct could occur," it was unconstitutional.[225]

In rejecting the defendants' arguments in *Dream Defenders*, the court was not gentle in its rebuke, observing, "[d]efendants' proposed interpretation strains the rules of construction, grammar, and logic beyond their breaking points, and requires this Court to ignore the plain text of the statute and blithely proclaim that 'everyone knows what a riot means.'"[226]

Although just a district court opinion, the *Dream Defenders* opinion warrants a rather large footnote in the annals of historically significant and powerful federal court opinions addressing critical constitutional and civil rights issues. The opinion forcefully illustrates the important role the judiciary can play in checking and balancing the powers both of the legislative and executive branches, while fiercely guarding against unconstitutional violations of individual rights. *Dream Defenders*, while also a celebration of grammar and textual preciseness, complete with sentence diagrams and in-depth discussions of grammatical rules,[227] is about much more than that. The opinion's description of the potential harms resulting from the unclear wording of Florida's HB1 exemplifies how a misplaced comma—which in another context may amount to only a trivial matter of

222. *Id.* at 1253–57, 1281–82, 1284.
223. *Id.* at 1267.
224. *Id.* at 1271–79.
225. *Id.* at 1281–82.
226. *Id.* at 1279.
227. *Id.* at 1271–79.

grammatical imperfection—in the context of criminal law can become a matter of constitutional crisis.

b. Unsuccessful Invocation of *Dream Defenders* by January 6 Capitol Attack Defendants

In a case brought against a number of individuals involved in the January 6, 2021, attack on the U.S. Capitol, the defendants unsuccessfully cited *Dream Defenders* in a vagueness and overbreadth challenge to their indictments under 18 U.S.C. § 231(a)(3) for "obstruct[ion] and interfere[nce] with law enforcement officers engaged in their official duties to protect the Capitol and its occupants from those who had unlawfully advanced onto Capitol grounds."[228] The court rejected that challenge.

Although the U.S. District Court for the District of Columbia acknowledged that both the federal statute and the Florida statute at issue in *Dream Defenders* included words describing a "public disturbance involving acts of violence by assemblages of three or more persons, which causes an immediate danger of or results in damage or injury to the property or person of any other individual," the court opined that, "there the similarities end."[229] As to the overbreadth challenge, the court explained, for example, that "Section 231(a)(3) does not criminalize 'participat[ing]' in a civil disorder, which could 'consume [] vast swaths of core First Amendment speech.' . . . It prohibits 'act[s]' that 'obstruct, impede, or interfere,' which do not."[230] The court also noted that the federal statute under which the January 6 defendants were charged was different from the Florida riot law, which violated the First Amendment in its overbroad sweep that went beyond criminalizing "*actively* joining in violent or destructive conduct."[231]

While it remains to be seen how *Dream Defenders* may be invoked in future challenges, its unsuccessful invocation by alleged January 6 insurrectionists illustrates that even after that decision, it may be an uphill battle for riot statutes to be challenged on vagueness and overbreadth grounds. Legislative drafters may shield the laws they write from being struck down as unconstitutional with sufficiently clear terms that do not criminalize comparatively innocent and constitutionally protected conduct.

III. OTHER STATE RIOT STATUTES VULNERABLE TO CONSTITUTIONAL ATTACK FOR VAGUENESS OR OVERBREADTH

Among the thirty-one states, along with the District of Columbia, with statutes defining the criminal offense of "riot,"[232] the vast majority of statutes could be

228. United States v. Nordean, 579 F. Supp. 3d 37, 37, 58 n.15 (D.D.C. 2021).

229. *Id* at 58 n.15.

230. *Id*. (citing *Dream Defs*., 559 F. Supp. 3d at 1284) (contrasting 18 U.S.C. § 231(a)(3) with the Florida riot statute at issue in *Dream Defenders*).

231. *Id.* (emphasis added).

232. *See* App.

vulnerable to constitutional challenge on vagueness or overbreadth grounds. Although Florida's is the only statute with its particular vagueness problems grounded in misplaced modifiers and other unclear wording issues specific to that statute, as detailed in the *Dream Defenders* case, it is not alone in having text so ambiguous or sweeping that it implicates due process and First Amendment concerns.

A. Problematic, Vague, and Overbroad "Tumultuous" Terminology

For example, the riot definition statutes in Alabama,[233] Alaska,[234] Colorado,[235] Kentucky,[236] New York,[237] North Dakota,[238] Oregon[239] and Tennessee,[240] along with that in the District of Columbia,[241] could be subject to vagueness and overbreadth challenges for defining "riot" in terms of "violent" and "*tumultuous*" conduct (emphasis added). A plain meaning definition of "tumultuous," the first definition of the word by *Merriam-Webster* dictionary, is "loud, excited, and emotional," with the dictionary listing "tumultuous applause" as an example of the word's applied meaning.[242] Thus, a vagueness challenge could be made on the grounds that, in determining whether the statute applies to them, those engaging in tumultuous applause might be left with no guidance or clarity from the statutory language as to whether they are risking criminal prosecution for doing so. The fact that in each of those statutes, "tumultuous" is paired with "violent" might be the saving feature of the statute, but the vagueness of "tumultuous" could still encourage law enforcement in overly heavy-handed treatment of protesters, who in turn may have their speech chilled rather than appear too "tumultuous."

B. Problematic Intent Language (or Lack Thereof)

Some of the above-mentioned states, along with others, have enacted riot definition statutes with another constitutional problem more akin to that addressed in *Dream Defenders*: the lack of clear mens rea, or intent, language. A number of statutes, including those in Alaska,[243] California,[244] Idaho,[245] Kansas,[246] Kentucky,[247]

233. ALA. CODE § 13A-11-3(a) (2022).
234. ALASKA STAT. § 11.61.100(a) (2022).
235. COLO. REV. STAT. § 18-9-101(2) (2022).
236. KY. REV. STAT. ANN. § 525.010(5) (West 2022).
237. N.Y. PENAL LAW § 240.05 (McKinney 2022).
238. N.D. CENT. CODE § 12.1-25-01 (2021).
239. OR. REV. STAT. § 166.015(1) (2022).
240. TENN. CODE. ANN. § 39-17-301(3) (2022).
241. D.C. CODE § 22-1322 (2022).
242. *Tumultuous*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/tumultuous (last visited Nov. 27, 2022).
243. ALASKA STAT. § 11.61.100(a) (2022).
244. CAL. PENAL CODE § 404 (West 2022).
245. IDAHO CODE § 18-6401 (2022).
246. KAN. STAT. ANN. § 21-6201(a) (2022).
247. KY. REV. STAT. ANN. § 525.010(5) (West 2022).

and Louisiana,[248] on their face have no intent requirement at all, which renders them even more problematic than if they merely had unclear intent requirements. By lacking a mens rea element at all, such statutes in essence make rioting a strict liability criminal offense, which potentially renders them not only overbroad in violation of the First Amendment, but also flies in the face of the long-established principle that "[t]he existence of a mens rea is the rule of, rather than the exception to, the principles of Anglo–American criminal jurisprudence."[249]

Other states have enacted statutes that contain unclear intent requirements. Some of the statutes that define riots in terms of "tumultuous and violent conduct" compound the vagueness problem of the unclear "tumultuous" wording with language like that in section 13A-11-3(a) of the Alabama Code, which provides: "A person commits the crime of riot if, with five or more other persons, he wrongfully engages in tumultuous and violent conduct *and thereby* intentionally or recklessly causes or creates a grave risk of public terror or alarm."[250] By definitionally linking the mens rea requirement to the actus reus element, and an unclear actus reus element at that, the language in those statutes in essence lacks a stand-alone mens rea element altogether, suggesting that where the actus reus element is satisfied, the mens rea element is automatically satisfied as well. Such a circular and independently vacuous definition of mens reas is arguably worse than no mens rea requirement at all.

C. Problematic Lack of Distinction Between Violent and Non-Violent Conduct

Perhaps even worse are those statutes that do not confine the criminalization of expression and conduct to that which is actually violent in nature. While many state statutes limit "riot" prosecutions to those involved in violence, others, such as the riot statutes in Delaware,[251] Hawai'i,[252] Indiana,[253] New Hampshire,[254] Ohio,[255] and Texas[256]—and not even counting those statutes that criminalize intent to commit or invocation of violence without an "imminence requirement," or that seem to conflate violence against people with any form of property destruction—may be deemed overbroad in violation of *Brandenburg*. The Supreme Court has long affirmed that legislation failing to distinguish between passionate advocacy, even advocacy of violence itself, and actual violent behavior "impermissibly intrudes upon the freedoms guaranteed by the First and Fourteenth Amendments. It sweeps

248. LA. STAT. ANN. § 14:329.1 (2022).

249. *See Dennis v. United States*, 341 U.S. 494, 500 (1951).

250. ALA. CODE § 13A-11-3(a) (2022) (emphasis added); *see also* N.Y. PENAL LAW § 240.05 (McKinney 2022) (using identical "and thereby intentionally or recklessly creates" wording); OR. REV. STAT. § 166.015(1) (2022) (same).

251. DEL. CODE ANN. tit. 11, § 1302 (2022).

252. HAW. REV. STAT. § 711-1103 (2022).

253. IND. CODE § 35-45-1-2 (2022).

254. N.H. REV. STAT. ANN. § 644:1(I)(c) (2022).

255. OHIO REV. CODE ANN. § 2917.03(A) (West 2022).

256. TEX. PENAL CODE ANN. § 42.02(a)(3) (West 2021).

within its condemnation speech which our Constitution has immunized from governmental control."[257]

D. Problematic Conflation of Minor Misdemeanors with More Serious Criminal Conduct

Similarly, another category of statutes with language that might be vulnerable to overbreadth constitutional challenge are those that link the definition of "riot" to the commission of a mere misdemeanor, without further limiting language. For example, the Delaware Code describes an intent requirement in its riot definition as "intent to commit or facilitate the commission of a felony or misdemeanor."[258] Statutes in New Jersey,[259] Ohio[260] and Pennsylvania[261] have similar language. The problem with defining riot in terms of intent to commit a misdemeanor, without further qualification or limiting language, is that those statutes could severely penalize people, in many cases even imposing a felony penalty,[262] even when they had only the intent to commit a misdemeanor, and even a misdemeanor as minor and non-violent in nature, for example, as intending to cross the street to attend a peaceful protest in a manner that might be considered jaywalking could be severely penalized.[263] Professor Abu El-Haj has pointed out that too many statutes tie prohibited assembly to the "overuse of broad, catchall crimes, such as disorderly conduct," despite the fact that the Supreme Court has held on numerous occasions "that it is unconstitutional for government officials to use crimes such as disorderly conduct, breach of the peace, or obstructing public passage to suppress constitutionally protected assemblies."[264]

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257. Brandenburg v. Ohio, 395 U.S. 444, 448 (citing United States v. Robel, 389 U.S. 258 (1967); Keyishian v. Board of Regents, 385 U.S. 589 (1967); Elfbrandt v. Russell, 384 U.S. 11 (1966); Aptheker v. Sec'y of State, 378 U.S. 500 (1964); Baggett v. Bullitt, 377 U.S. 360 (1964); Yates v. United States, 354 U.S. 298 (1957); De Jonge v. Oregon, 299 U.S. 353 (1937)).

258. DEL. CODE ANN. tit. 11, § 1302 (2022).

259. N.J. STAT. ANN. § 2C:33-1(a)(1) (West 2022) ("With purpose to commit or facilitate the commission of a crime . . . .").

260. OHIO REV. CODE ANN. § 2917.03(A)(1) (West 2022) ("With purpose to commit or facilitate the commission of a misdemeanor, other than disorderly conduct . . . .").

261. 18 PA. CONS. STAT. § 5501(1) (2022) ("[W]ith intent to commit or facilitate the commission of a felony or misdemeanor . . . .").

262. *See* DEL. CODE ANN. tit. 11, § 1302 (categorizing riots as Class F Felonies); *see also* N.J. STAT. ANN. § 2C:33-1(a) (categorizing riots as crimes of the third or fourth degree); 18 PA. CONS. STAT. § 5501 (categorizing riots as felonies of the third degree).

263. *Cf.* Richardson v. Ramirez, 418 U.S. 24, 75 n.24 (1974) (Marshall, J., dissenting) (identifying minor criminal provisions such as "seduction under promise of marriage, or conspiracy to operate a motor vehicle without a muffler . . . . vagrancy . . . breaking a water pipe . . . jaywalking or traffic" to argue the Constitution cannot be read to authorize disenfranchisement for the commission of any crime)

264. Tabatha Abu El-Haj, *Defining Peaceably: Policing the Line Between Constitutionally Protected Protest and Unlawful Assembly*, 80 MO. L. REV. 961, 976–77 (2015) (citing Brown v. Louisiana, 383 U.S. 131, 133 (1966) (Fortas, J., plurality opinion); Cox v. Louisiana, 379 U.S. 536, 552, 558 (1965); Edwards v. South Carolina, 372 U.S. 229, 235 (1963)).).

E. Other Vague and Overbroad Unclear Language

Yet other state riot statutes may find themselves subject to constitutional challenge for other potential problems related to vague or overbroad language. For example, the text of section 723.1 of the Iowa Code begins: "A riot is three or more persons assembled together in a violent and disturbing manner . . . ."[265] Such language is disturbingly unclear as well as overbroad. "Disturbing" is such a subjective term that it could capture the smallest of annoyances—for example, a musical perfectionist being annoyed by the off-key pitch of someone singing a song about peace and reconciliation—and elevate it, under a plain reading of the text, to an element of a crime. Under the plain text of that statute, a person could, perhaps, be criminally charged with rioting for engaging in minor conduct that another person of unusually judgmental or prudish character might find "disturbing," such as engaging in subjectively offensive but constitutionally protected speech.

IV. MOVING FORWARD: RECONCILING COMPETING INTERESTS IN THE PREVENTION AND REMEDIATION OF CONSTITUTIONAL INFIRMITIES IN RIOT LAWS

Each of the statutes described above is ripe for re-evaluation by state legislators or, if they are not appropriately revised, constitutional challenge in court. Future riot legislation should be drafted carefully with an eye toward not repeating past legislative drafting mistakes. Legislators who care about the constitutionality of the laws they enact should both consider revising the laws to address each of the problems discussed above and also be mindful of avoiding such legislative drafting problems in the future. Although it would be ideal for legislators in states that have recently enacted laws immunizing from liability motorists who drive their cars into crowds of protesters[266] to start by repealing those vigilante-authorizing, life-endangering statutes[267] (while leaving in place existing self-defense laws that can still apply when protesters truly are posing a violent threat),[268] that is probably too much to hope for. Legislators passing such legislation are no doubt fully aware of the disturbingly dangerous nature of those laws, having explicitly written into

265. IOWA CODE § 723.1 (2022).

266. *See supra* notes 113–18 and accompanying text.

267. Attorney General Merrick Garland has warned of laws authorizing vigilante tactics, in the context of a Texas law allowing vigilante citizen enforcement of abortion bans, TEX. HEALTH & SAFETY CODE ANN. §§ 171.201-171.212 (2021), saying one need not "think long or hard to realize the damage that would be done to our society if states were allowed to implement laws that empower any private individual to infringe on another's constitutionally protected rights in this way." *See* Marcia Coyle, *The U.S. Supreme Court and Vigilantes*, NAT'L CONST. CTR.: CONST. DAILY (Sept. 10, 2021), https://constitutioncenter.org/blog/the-u.s-supreme-court-and-vigilantes.

268. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 63(1) (AM. L. INST. 1965) ("An actor is privileged to use reasonable force . . . to defend himself against unprivileged harmful or offensive contact or other bodily harm which he reasonably believes that another is about to inflict intentionally upon him."); William L. Prosser, *Transferred Intent*, 45 TEX. L. REV. 650, 655 (1967) (describing self-defense privilege that has evolved from criminal law roots to tort law application).

them the possibility of people intentionally engaging in life-threatening assaults without being held responsible for the injury and death they cause.

However, in revising and drafting riot laws, it is not an unreasonable expectation that legislators should not just strive for legislation that passes constitutional muster, but should also be cognizant of the human lives impacted by legislation and the broader principles at issue. The need for textual clarity and a scope that does not sweep up constitutionally protected speech and assembly into a dragnet of excessive policing are critical considerations in the drafting and revision of riot statutes, but so are the important policy interests and principles implicated by those laws. The remainder of this Article addresses how legislators can reconcile competing policy interests while avoiding legislative drafting pitfalls in the drafting and revision of riot laws.

A. Learning from Past Legislative Drafting Mistakes

The language of riot laws should always be carefully written to avoid ambiguity and overbreadth in the many forms such constitutionally problematic issues may arise. Taking cues from *Dream Defenders v. DeSantis* and challenges to the Federal Riot Act, legislatures should be careful to define terms to identify precisely what conduct is criminalized, and to clearly designate the level of intent and who must have intent to be legally considered and swept up in mass arrests as rioters.[269] Taking further cues from *United States v. Miselis*, legislatures should also reconsider whether to even designate such actions as "promoting," "encouraging," and "urging" certain conduct as within the scope of riot statutes where such criminalized speech lacks a requisite relationship to criminal conduct.[270] "Indeed, because mere encouragement is quintessential protected advocacy," the court in *Miselis* explained, "the Supreme Court has recognized that '[t]he mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it.'"[271] Similarly, "because earnestness and persistence don't suffice to transform such forms of protected advocacy into speech that is likely to produce imminent lawless action, *Brandenburg* renders the purposes of 'urging' others to riot overbroad" as well.[272]

Those drafting and revising riot laws and those challenging potentially unconstitutional riot laws should all be cognizant of the factors underlying different results in past challenges to riot statutes. For example, the *United States v. Rundo* and *Miselis* cases, like *Dream Defenders*, involved overbreadth challenges to riot definitions but with opposite results: in *Rundo* and *Miselis*, the Federal Riot Act's definition of "riot" survived constitutional challenges, while in *Dream Defenders*, the Florida statute's definition of "riot" did not. The different results are best understood by reference to the significantly different text of the statutes. While the Federal Riot Act defines riot as "a public disturbance involving . . . an act or acts of

269. 559 F. Supp.3d 1238, 1271–73 (N.D. Fla. 2021).
270. *See* 972 F.3d 518, 537–39 (4th Cir. 2020).
271. *Id.* at 536 (quoting Ashcroft v. Free Speech Coal., 535 U.S. 234, 253 (2002)).
272. *Id.* at 538.

violence by one or more persons part of an assemblage of three or more persons, which act or acts shall constitute a clear and present danger of . . . damage or injury to the property of any other,"[273] in *Dream Defenders*, HB1 left critical terms unclear and modifiers misplaced to the point of rendering it unconstitutionally vague whether someone must have intent to commit wrongdoing to be convicted under the statute or could be convicted merely for joining, with peaceful intent and actions, a protest that included a more nefarious trio of wrongdoers.[274]

In contrast, the Federal Riot Act at 18 U.S.C. § 2102(a) describes both the prohibited conduct and intent in terms of an individual acting in concert with a group of three or more persons,[275] rather than using language that could result in an innocent, non-violent protester being deemed equally guilty of rioting as a group of violent agitators. Thus, while the Fourth Circuit in *Miselis* was able to conclude that the Federal Riot Act's definition of "riot" is not unconstitutionally vague, in part because it specifies that "the act or threat of violence constituting the public disturbance must be committed by someone *who forms part of* a group of at least three people,"[276] and the Ninth Circuit in *Rundo* concluded that the "riot" definition is not overbroad, the federal district court in *Dream Defenders* came to the opposite conclusion due to the unclear wording in HB1.[277]

The exactitude with which both *actus reus* and *mens rea* elements in riot statutes are written can either make such statutes vulnerable to constitutional challenge or save them from being struck down in such challenges.

B. The Reconciliation of Competing Policy Considerations

In addition to being mindful of the most minute details in legislative drafting to ensure that riot statutes are sufficiently clear and confined in scope, legislators should also consider, more broadly, the policy concerns implicated by riot legislation. Whether remedying flawed riot laws or crafting new ones, competing policy concerns must be weighed with an eye toward achieving a fair and workable balance between the various and critically important principles and societal interests at stake.

In the context of overbreadth challenges to criminal statutes, the Supreme Court has emphasized the need for an appropriate balance between competing social costs. On the one hand, for example, the threat of enforcement of an overbroad law deters people from engaging in constitutionally protected speech, inhibiting the free exchange of ideas. In such a case, the "actions of a few rogue individuals could effectively criminalize the protected speech of" countless law-abiding and

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273. 18 U.S.C. § 2102.

274. *See Dream Defs*., 559 F. Supp. 3d at 1271–79, 1282–84; FLA. STAT. § 870.01(2) (2022).

275. 18 U.S.C. § 2102(a).

276. *Miselis*, 972 F.3d at 545 (citing 18 U.S.C. § 2102(a)) (emphasis added).

277. *Compare* United States v. Rundo, 990 F.3d 709, 719 (9th Cir. 2021) *with Dream Defs*., 559 F. Supp.3d at1282.

peaceful protesters.[278] In *Edwards v. South Carolina*, the Supreme Court explained that the First Amendment (as applied to states through the Fourteenth Amendment) "does not permit a State to make criminal the peaceful expression of unpopular views."[279] The *Edwards* Court quoted *Stromberg v. California* in emphasizing that "[t]he maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system."[280]

On the other hand, as the Court has recognized, it is of critical importance that legislators and law enforcement be empowered to protect public safety through criminal laws appropriately targeting violence and other conduct that poses an imminent danger of harming others.[281] Indeed, it has been argued, the importance of protecting society against mob-driven violence is not just a matter of good policy, but is a matter of constitutional imperative. Susan Kuo writes, for example, of the government's constitutional duty to protect society from mob violence,[282] with government owing to its people, even as a matter of due process, both "prevention of riots and the preservation of social stability."[283] The need to treat riots with particularly strong policing may be justified by scientific studies and evidence "that 'group contagion' during a riot causes participants spontaneously and impulsively to act in socially unacceptable ways," thus increasing the danger to those in striking distance of a riot.[284]

Such competing policy considerations are similarly in tension with one another in the context of vague laws. On the one hand, those engaged in political speech expressing deeply held values of cultural and political significance must be reasonably enough informed that they can clearly delineate the point at which expressive conduct loses its protection and crosses the line into prohibited conduct. As a matter of fundamental fairness and justice, the law must provide adequate notice of those it would subject to criminal penalty. Otherwise, democratic participation and dissent would be chilled, as "[u]ncertain meanings inevitably lead citizens to 'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked."[285] As one federal court observed: "'A vague law is no law at all,' . . . and certainly neither is one that can lead to multiple opposing interpretations. That type of law is simply 'a trap for the innocent.'"[286]

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278. *See Dream Defs.*, 559 F. Supp. 3d at 1284.

279. Edwards v. South Carolina, 372 U.S. 229, 237 (1963).

280. *Id.* at 238 (quoting Stromberg v. California, 283 U.S. 359, 369 (1931)).

281. *See* United States v. Williams, 553 U.S. 285, 292 (2008).

282. *See* Susan S. Kuo, *Bringing in the State: Toward A Constitutional Duty to Protect from Mob Violence*, 79 IND. L.J. 177, 183 (2004).

283. *Id.* at 196.

284. *See* Note, *Feasibility and Admissibility of Mob Mentality Defenses*, 108 HARV. L. REV. 1111, 1126 n.34 (1995).

285. Grayned v. City of Rockford, 408 U.S. 104, 109 (1972) (quoting Baggett v. Bullitt, 377 U.S. 360, 372 (1964)).

286. Dream Defs. v. DeSantis, 559 F. Supp. 3d 1238, 1281 (N.D. Fla. 2021) (quoting United States v. Davis, 139 S. Ct. 2319, 2323 (2019); and then quoting United States v. Cardiff, 344 U.S. 174, 176 (1952)).

Inexact legislative drafting is not a benign matter with insignificant consequences. To the contrary, what might in other contexts be a matter of benignly bad writing, in a criminal law context can rise to the level of the denial of fundamental constitutional rights. One misplaced comma in a criminal statute could have all the gravity of a sharp-edged weapon unfairly wielded against an innocent person caught in a dragnet of formidable obscurity. As the Supreme Court explained in *Grayned v. City of Rockford*:

> Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute 'abut[s] upon sensitive areas of basic First Amendment freedoms,' it 'operates to inhibit the exercise of [those] freedoms.' Uncertain meanings inevitably lead citizens to "steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked.[287]

Not only are due process notice and fairness concerns paramount, but so is the critical importance of checking excessive police powers against tendencies to enforce the law in biased or arbitrary manners. As the Supreme Court has explained, criminal statutes may not allow law enforcement officers to conduct a "standardless sweep . . . to pursue their personal predilections."[288] Rather, laws must "establish minimal guidelines to govern law enforcement,"[289] guidelines that adequately ensure that the exercise of discretion by law enforcement interpreting those laws does not rise to the level of an arbitrary or discriminatory "unjustified impairment of liberty."[290] Without such safeguards, some members of the Court have admitted, "a police officer, acting in bad faith, might enforce the ordinance in an arbitrary or discriminatory way."[291] In *Smith v. Goguen*, the Court elaborated, "[w]here inherently vague statutory language permits such selective law enforcement, there is a denial of due process."[292]

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287. 408 U.S. at 108–09 (citations omitted).
288. Kolender v. Lawson, 461 U.S. 352, 358 (1983) (quoting Smith v. Goguen, 415 U.S. 566, 575 (1974)).
289. *Goguen*, 415 U.S. at 574.
290. City of Chicago v. Morales, 527 U.S. 41, 58 (1999).
291. *Id.* at 111 (Thomas, J., dissenting).
292. *Goguen*, 415 U.S. at 576.

The very dangers the Supreme Court warned about last century have reared their head in ugly ways in this century. In the context of recent anti-racism protests, while often spearheaded by peaceful civil rights leaders, the passionate but largely peaceful implorations of those seeking an end to police brutality and institutionalized racism are too often met with violence not just by counter-protesters, but ironically, also by the very police whose oppressive tactics were the subject of the original peaceful protests.[293] Even while blaming the protesters for violence, in many instances it was the police themselves who initiated or escalated the violence, only to be met by remarkable restraint by peaceful protesters.[294] One group of researchers caught on video over three hundred instances of alleged police misconduct during protests in the aftermath of George Floyd's killing in Minneapolis.[295] Another group gathered over a thousand reports of police brutality and abuses of power at protests following George Floyd's death through open-source reporting by volunteers.[296]

Following the George Floyd protests on the streets of Minneapolis between May 25 and June 7, 2020 and the troubling response to those protests by law enforcement, the Minneapolis Department of Public Safety commissioned an external review of Minnesota's response to the "civil unrest," which was defined in the report's opening footnotes as "a prolonged period of civil disturbance," which, in turn, was defined as "a gathering that constitutes a breach of the peace or any assembly of persons where there is a threat of collective violence, destruction of property, or other unlawful acts."[297] The review of the law enforcement response to the George Floyd civil unrest in Minnesota employed research methods that, the report explained, incorporated data from various sources, including "1) a literature review, 2) a media review, 3) a review of state documents and interviews with state personnel, 4) interviews with key informants, 5) focus groups with affected groups … and 6) review from a law enforcement expert with expertise in managing civil disturbances."[298]

In its final assessment, the study concluded that the most problematic actions taken by law enforcement in response to the "civil unrest" included belated and poorly-placed multi-agency command center ("MACC") operations with inadequate leadership and coordination; inconsistent training and rules of engagement; failure to consistently follow standards promoting accountability; flawed operations logistics and intelligence gathering and sharing; and the fact that "[o]n several occasions, law

293. *See* DeJesus, *supra* note 10; Dessem, *supra* note 10 (documenting recordings of police in several cities apparently initiating violence and injuring peaceful protesters and reporters).

294. Chenoweth & Pressman, *supra* note 66.

295. *See* Tara Law, *'It's Obvious There's a Cultural Rot' : Activists Collect Hundreds of Examples of Alleged Police Misconduct in One Public Spreadsheet*, TIME (June 6, 2020), https://time.com/5849839/police-brutality-george-floyd-protests-spreadsheet/.

296. *See* 2020POLICEBRUTALITY, https://incidents.846policebrutality.com/ (last visited Jan. 8, 2023).

297. ANNA GRANIAS, RYAN EVANS, DANIEL LEE, NICOLE MARTINROGERS, EMMA CONNELL & JOSE VEGA, AN EXTERNAL REVIEW OF THE STATE'S RESPONSE TO THE CIVIL UNREST IN MINNESOTA FROM MAY 26–JUNE 7, 2020 1 n.1 (2022), https://dps.mn.gov/divisions/co/Documents/dps-external-review-report.pdf.

298. *Id*. at 15.

enforcement did not successfully differentiate between lawful and unlawful protesters."[299] As one government official interviewed for the report commented:

> It didn't look like there was a de-escalating objective. It felt like it was a 'we're going to dominate and do what we want to do because we've got the biggest guns and the most amount of people and that's it.' . . . Everybody . . . was lumped into one. You would think that trained military officers will be able to differentiate peaceful demonstrators. And peaceful doesn't mean that they're quiet and meek. Peaceful means not busting sh**. You would expect a more sophisticated approach and response, particularly given that it took a few days to get on the ground.[300]

The report noted that even journalists were subjected to unlawful detention, arrest, and inappropriate use of crowd dispersal methods by law enforcement.[301] As a result of such law enforcement responses, including tactics that were often perceived as escalating tensions, it was further documented that "[c]ommunity members felt abandoned by law enforcement agencies" and that "some perceived racism and discrimination in these gaps in law enforcement presence."[302]

As legal scholars have addressed, the strong public interest in protecting street protests is of particular import when considering that protests serve as important vehicles for political change, compensating for limited access to electoral politics in particularly vulnerable and disempowered communities.[303] Thus, as Professor Abu El-Haj has written, especially in the context of protests against excessive police violence, laws restraining political speech and assembly[304] must not grant excessive discretion to police already under scrutiny for bias-driven excessive use of force. If the very authorities who are the subject of protests for their violent treatment of people of color are the same ones given unfettered discretion to enforce riot statutes against those protesting their past abuses, that would amount to heavily-armed foxes guarding a hen house.

Other scholars have addressed the important role of social protest in the protection of our constitutional democracy. For example, Professor Reva Siegel has described how social movement conflict plays a fundamental role in contributing to "constitutional culture" itself, being an engine of important constitutional change in society.[305] Rather than threaten our constitutional democracy, Siegel

299. *See id.* at 2–3.

300. *Id.* at 34 (quoting anonymous government official).

301. *Id.* at 4.

302. *Id.* at 5.

303. *See* Abu El-Haj, *supra* note 264, at 980–83.

304. For a comprehensive discussion of the relationship between constitutionally protected speech and assembly in the contexts of protests generally, and, more specifically, of recent peaceable anti-racism protests and the less-than-peaceable police response to those protests, see *id.*

305. *See generally* Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 Cal. L. Rev. 1323 (2006) (discussing how social movements become

explains, it is the dynamic interaction through deliberate engagement between citizens and officials that sustains constitutional authority.[306] Building upon a substantial body of constitutional literature addressing that interplay, she writes: "When constitutional culture can harness the energies of social conflict, agents of deeply agnostic views remain engaged in constitutional dispute, speaking through the Constitution rather than against it."[307] While there is a social contract governing political social conflict that sets as an ultimate limitation the use of actual violence, Siegel explains that short of violence, even unlawfulness through civil disobedience has historically played a central role in the evolution of civil and constitutional rights in this country.[308] Siegel suggests, "[t]he universe of strategies a movement promoting change through persuasion, rather than coercion, might employ is in fact quite broad, and often includes forms of procedurally nonconforming, socially disruptive, and unlawful conduct that draws attention to the movement's claims."[309]

More recently, Professor John Inazu has addressed the unconstitutionality of unlawful assembly statutes more specifically (while also addressing the overlap between riot statutes and unlawful assembly statutes).[310] Although the Supreme Court has not addressed freedom of assembly claims for several decades, Inazu observes, its failure to do so is in tension with the fact that both speech and assembly should be accorded First Amendment protections.[311] He explains that "both

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an important part of constitutional culture, specifically with regard to sex discrimination and the Equal Protection Clause of the Fourteenth Amendment).

306. *See id*. at 1327.

307. *Id*. Examining the role of social movement conflict as an agent of constitutional law evolution in the context of the Equal Rights Amendment, Siegel connects her constitutional culture scholarship to a broader body of literature, including the work of William Eskridge, whom she quotes as writing, "The power of the women's movement was such that the Court felt impelled in the 1970s to rule unconstitutional most invidious sex discriminations. Because the women's movement did shift public norms to a relatively anti-discrimination baseline, it was able to do through the Equal Protection Clause virtually everything the ERA would have accomplished had it been ratified and added to the Constitution." *Id*. at 1334 (quoting William N. Eskridge, Jr., *Channeling: Identity-Based Social Movements and Public Law*, 150 U. PA. L. REV. 419, 502 (2001)); *see also id*. at 1328 n.13 (identifying other constitutional law literature addressing social movements and constitutional change). For other constitutional law literature addressing social movements and constitutional change, see generally Jack M. Balkin, *How Social Movements Change (or Fail to Change) the Constitution: The Case of the New Departure*, 39 Suffolk U. L. Rev. 27 (2005); Jack M. Balkin & Reva B. Siegel, *Principles, Practices, and Social Movements*, 154 U. Pa. L. Rev. 927 (2006); Tomiko Brown-Nagin, *Elites, Social Movements, and the Law: The Case of Affirmative Action*, 105 Colum. L. Rev. 1436 (2005); William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 Mich. L. Rev. 2062 (2002); William E. Forbath, *Why Is This Rights Talk Different from All Other Rights Talk? Demoting the Court and Reimaging the Constitution*, 46 STAN. L. REV. 1771 (1994); Risa L. Goluboff, '*We Live's in a Free House Such as It Is*': *Class and the Creation of Modern Civil Rights*, 151 U. PA. L. REV. 1977 (2003); James Gray Pope, *Republican Moments: The Role of Direct Popular Power in the American Constitutional Order*, 139 U. PA. L. REV. 287 (1990).

308. Siegel, *supra* note 305, at 1352–56.

309. *Id*. at 1356.

310. John Inazu, *Unlawful Assembly as Social Control*, 64 U. CAL. L. REV. 2, 7–9 (2017).

311. *Id*. at 37–41.

speech and assembly run along a spectrum that ranges from entirely peaceful expression and activity to that which threatens imminent violence. As Justice Holmes famously wrote, '[e]very idea is an incitement.'"[312] Because both speech and assembly "can peacefully express 'unpopular views,' 'invite dispute,' and 'stir[] people to anger' without lapsing into violence," courts should do a better job extending First Amendment protections to non-violent assembly as well as speech.[313]

With those principles in mind, statutory clarity in riot legislation is essential to dissuade heavy-handed arbitrary or discriminatory law enforcement, not just against comparatively peaceful protesters in general, but especially against those protesters engaged in legitimate constitutional dissent but whom police might be predisposed to treat unfairly.

On the other hand, law enforcement officers must be accorded *some* degree of discretion in order to make the often split-second judgment calls that must be made in the line of duty, including when necessary to protect public safety.[314] It is well-established that law enforcement officers have an important and legitimate role to play in protecting public safety. The Supreme Court has explained that "[t]he role of a peace officer includes preventing violence and restoring order."[315] From a law enforcement perspective, as Professor Tabatha Abu El-Haj has noted in the context of street protests:

> [O]utdoor assemblies pose substantial risks to public safety. The specter of disorder and violence may be greatest when the people taking to the street are disgruntled and insist on staying out into the night, but some risk of violence to persons and property is always present, arising as it does out of the very nature of assembly—a crowd out of doors being policed by government officials. Moreover, all outdoor assemblies, however peaceful, are inconvenient in modern cities.[316]

The actions of law enforcement officers in the midst of tumultuous and chaotic civil unrest must also be viewed in light of the fact that they are acting under heightened tensions and the need to make split-second judgments about appropriate use of crowd dispersal tactics and force, as opposed to allowing for protests to continue unabated. "[D]ue to the chaotic nature of the crowds and their lack of prior information," for example, on the streets of Minneapolis during the heated George Floyd protests in May and June of 2020, "it was difficult for law

312. *Id*. at 40 (quoting Gitlow v. New York, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting)).

313. *See id*. (quoting Cox v. Louisiana, 379 U.S. 536, 551-52 (1965)).

314. *See* Graham v. Connor, 490 U.S. 386, 396–97 (1989); Rockwell v. Brown, 664 F.3d 985, 991 (5th Cir. 2011) (quoting *Graham*, 490 U.S. at 396–97). *But see* Anna Lvovsky, *Rethinking Police Expertise*, 131 YALE L. J. 475, 526–27 (2021) (questioning appropriateness of such deference to officers making split-second decision based on necessity alone, without additionally requiring an element of law enforcement expertise as part of the deference calculus).

315. Brigham City v. Stuart, 547 U.S. 398, 406 (2006).

316. Abu El-Haj,*supra* note 264, at 964–65 (footnotes omitted).

enforcement to differentiate between those causing destruction and those peacefully attempting to protect their neighborhood."[317]

While acknowledging such tensions, those who examined, for example, the police response to civil unrest in Minneapolis following the police killing of George Floyd, concluded that the judgment calls made by law enforcement officers in such circumstances sometimes fall woefully short of appropriately distinguishing between violent unlawful actors and peaceful protesters.[318] Too often, law enforcement officers employ grossly excessive force against even those protesters who are lacking in culpability:

> Identifying agitators and violent actors among a large crowd of lawful protesters can be challenging. Many accounts from media reports and community members of public order tactics claimed that they were used on or targeted at individuals who were peacefully protesting. A publicly circulated social media video captured law enforcement officials firing foam marking rounds at individuals standing on a porch in South Minneapolis . . . Law enforcement teams used crowd control tactics, including chemical munitions, to move crowds while enforcing laws, including the ordered curfew . . . . According to some reports, these tactics were used even after city officials communicated with community residents and leaders that it was OK for them to be outside protecting their community. And some accounts claim that these tactics were used indiscriminately on residents who acted peacefully to protect their homes and community, even after violent actors had dispersed.[319]

These tensions must be reconciled and clearly addressed in any legislation that purports to ward against violent riots while still respecting the fundamental protections necessarily accorded to fierce, passionate, but non-violent public dissent on our nation's streets.

C. Concluding Recommendations for Improving Riot Legislation

To resolve these competing policy concerns and ensure that riot statutes are constitutionally sound, being both unambiguous and confined in scope, in addition to sidestepping those specific legislative drafting pitfalls already addressed, riot legislation must in a broader sense clearly differentiate between rioters who should be subject to criminal prosecution and comparatively innocent, non-violent protesters.

As the external review of the Minnesota's response to the civil unrest explained, addressing the competing First Amendment protections versus public safety

317. GRANIAS ET AL., *supra* note 297, at 34.
318. *See id.* at 33–34.
319. *Id.*

protections, "[w]hile the police have an obligation to protect the First Amendment rights of law-abiding protesters, they are also tasked with maintaining public safety during periods of civil unrest."[320] To that end, the ultimate recommendations of the external review following the 2020 Minneapolis protests included the following:

1. Inform and support development and compliance with law enforcement standards, model policies, and training to be used consistently among law enforcement agencies across the state.
2. In general, use a tiered response to address situations of civil unrest that involve both lawful and unlawful protesters.
3. Differentiate peaceful protesters from those engaging in unlawful activities.[321]

It is important to note, as the report does, that not all unlawful conduct should be treated as riotous conduct warranting heavy-handed police tactics: "It is best practice for law enforcement to tolerate some disruption (to keep peace rather than enforcement of *all* laws) and communicate to protestors that their objective is to ensure safety and protect the protestors' legal right to free speech and peaceful assembly."[322] The report elaborated on this point in its discussion of the recommendation of differentiating between peaceful protesters and those engaging in unlawful activities. For example, the report cited empirical studies demonstrating that "[c]rowds consist of distinct social identities. A group of 'outside agitators' may, for instance, infiltrate an initially peaceful protest to incite violence."[323] With those considerations in mind, the authors of the report recommended that, in differentiating between peaceful and unlawful demonstrators, police be judicious and cautious in deciding whether to engage in mass arrests that could sweep up peaceful along with unlawful demonstrators; engage in differentiation tactics to identify and only penalize the instigators of violent and unlawful conduct; and communicate clearly with protesters.[324]

The authors of the report presented its recommendations with the wishful statement, "[o]ur hope is that DPS, local (city and county) and state agencies, and other jurisdictions can use this report to prepare and plan for effective responses to civil unrest in the future."[325] Indeed, communities, legislators, and other policy makers beyond Minneapolis would be well-served in studying the findings and recommendations of the Minnesota report.[326]

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320. *Id.* at 14.

321. *Id.* at 6.

322. *Id.* at 37 (emphasis added).

323. *Id.* at 38 (first citing EDWARD MAGUIRE & MEGAN OAKLEY, POLICING PROTESTS: LESSONS FROM THE OCCUPY MOVEMENT, FERGUSON AND BEYOND (2020); then citing Stephen Reicher, Clifford Stott, Patrick Cronin & Otto Adang, *Integrated Approach to crown Psychology and Public Order Policing*, 27 POLICING 558 (2004)).

324. *Id.* at 38–39.

325. *Id.* at 6.

326. *See id.* at 6–7; *see also id.* at 19 (suggesting that report findings should guide those in jurisdictions outside Minnesota as well).

Consistent with First Amendment restrictions on punishing speech absent imminent threats of violence, the "tiered response" recommendation suggested that police not treat protesters as "rioters" by donning riot gear unless the police are under imminent threat by the protester and consequently actually need and intend to use weapons against them.[327]

In the context of revising and improving riot legislation specifically, the above recommendations should be taken into account.[328] To the extent legislators even deem riot statutes to be necessary, despite other criminal statutes already in place prohibiting violence, they might consider as model legislation implementing a tiered approach similar to Minnesota's riot statute, which offers tiered levels of penalties, depending on whether a weapon is involved.[329]

Whether adopting a tiered approach or not, legislators drafting or revising riot laws might also consider treating violence against persons as constituting a higher offense than damage to property. To the extent riot penalties are tied to property damage, riot laws should specify which *type* of property damage is felonious. Similarly, those legislatures that persist in tying felony "riot" penalties to group engagement of "unlawful" activities should similarly be more deliberate and specific as to which *types* of unlawful activities could render a group of protesters felonious "rioters." Without such distinctions, kicking a garbage can over, for example, could be treated as felonious to the same extent as breaking into a jewelry store and engaging in looting. In its October 16, 2020, report, the Washington Post, employed such helpful differentiations in its methodology for evaluating the violence that did (and did not) occur during anti-racism protests in the summer of 2020, advising:

> [U]sing several measures to evaluate protest behavior offers a better assessment than the blanket term "violence." For example, we disaggregate property destruction from interpersonal violence. We analyze separately the number of injuries or deaths among protesters and police. And we are thinking about how gathering even finer-grained data in the future could help further assign precise responsibility for violent acts.[330]

This approach could, and perhaps should similarly be followed by those drafting and revising riot definitions.

In addition to adding meaningful distinctions in riot definitions between different degrees of unlawfulness and between personal and property violence,

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327. *Id*. at 37.

328. This article only addresses a narrow subset of recommendations in the report: those which are most directly helpful to the evaluation and revision of riot legislation to better differentiate between peaceful and violent unlawful protesters in riot laws. However, the report also contains other recommendations for improved responses to civil unrest more generally that are also worthy of consideration. *See id*. at 26–73.

329. *See* MINN. STAT. § 609.71 (2022).

330. Chenoweth & Pressman, *supra* note 66.

legislation should also distinguish between violence committed *by* protesters and *against* protesters. Legislation cannot be so ambiguous as to leave open the possibility that non-violent protesters get caught up in dragnets, punished for actions of violent rioters merely because they had joined the same protest, no matter how far removed in time or place. Distinctions must be drawn both between peaceful protesters and those who actually instigate any violence, considering that counter-protesters or even police themselves are too often the instigators of violence against peaceful protesters. If a statute is ambiguous as to those points, that could render it unconstitutional, as HB1 was ruled unconstitutional in *Dream Defenders*.[331]

A starting point in more clearly differentiating between peaceful and unlawful protesters might be through a careful consideration of the Ninth Circuit's conclusion in *Rundo*, addressing what it viewed in that case as an appropriate balance:

> We recognize that the freedoms to speak and assemble which are enshrined in the First Amendment are of the utmost importance in maintaining a truly free society. Nevertheless, it would be cavalier to assert that the government and its citizens cannot act, but must sit quietly and wait until they are actually physically injured or have had their property destroyed by those who are trying to perpetrate, or cause the perpetration of, those violent outrages against them. Of course, the government cannot act to avert a perceived danger too soon, but it can act before it is too late. In short, a balance must be struck. *Brandenburg* struck that balance, and the Act [in following severance of unconstitutional provisions] adheres to the result.[332]

Brandenburg v. Ohio is certainly a starting point (and a constitutionally mandated one), establishing limiting principles in constitutional jurisprudence that draw a firm, clear line between protected passionate advocacy and unprotected violent conduct or incitement of imminent violence. Statutes that punish those who merely "voluntarily assemble" with those advocating unlawful conduct, as in *Brandenburg*,[333] or "willfully participate" in protests at which an assembly of people may have violent intent, as in *Dream Defenders*,[334] risk being deemed unconstitutional.

As the Fourth Circuit in *Miselis* explained, the determination of whether a riot statute violates the First Amendment in its overbreadth comes down to whether it merely prohibits the type of incitement delineated in *Brandenburg* as directed to and likely to produce *imminent* lawlessness, or whether it crosses the line into sweeping into its prohibitive reach "*mere* or 'abstract' advocacy."[335] The "mere

331. *See* Dream Defs. v. DeSantis, 559 F. Supp. 3d 1238, 1283–84 (N.D. Fla. 2021).

332. United States v. Rundo, 990 F.3d 709, 721 (9th Cir. 2021) (citing Brandenburg v. Ohio, 395 U.S. 444, 447 (1969)).

333. 395 U.S. at 448–49.

334. *See Dream Defs.*, 559 F. Supp. at 1271–72, 1282.

335. United States v. Miselis, 972 F.3d 518, 533 (4th Cir. 2020) (discussing *Brandenburg*, 395 U.S. at 445–50, and subsequent cases interpreting *Brandenburg*).

abstract teaching of the moral propriety . . . [of] a resort to force and violence[] is not the same as preparing a group for violent action and steeling it to such action."[336] The distinction between divisive and vitriolic advocacy, even advocacy of violence, and incitement of imminent violence is a critical distinction particularly in the context of protests and riots. Following the lead of *Miselis,* rather than treat the First Amendment incitement doctrine as separate and distinct from the overbreadth doctrine, courts and legislatures alike should honor First Amendment boundaries in limiting permissible riot statute prohibitions to only that expressive conduct and speech that actually rises to the level of incitement.[337]

Protesters engaging in the most important of speech—political dissent—must, under our most longstanding principles of free speech and assembly demarking the liberties essential to a free democracy, be allowed such expressions, no matter how passionate and divisive, in public fora. Riot legislation must allow not only 'whose streets? Our streets!' chants but even more passionate outcries such as "we'll take the fucking street later."[338] In contrast with passionate protesters, the law itself and those who enforce it must be dispassionate and discerning enough to distinguish such speech from violent actions.

Ultimately, there must be a clear distinction between merely *disruptive* actions and actually violent actions.[339] Our constitutional democracy, after all, was founded not on tepid, polite, whispered requests to please not tax us without representation anymore. We are a passionate people and a country that celebrates vigorous dissent, including dissent that spills out onto the city streets like tea into the Boston Harbor. Riot laws should reflect those principles. Where tensions exist between competing principles of protected political dissent and the need for public order, clear limiting principles must be defined and clearly reflected in our laws.

Each of these limiting principles should be taken into consideration in the future drafting and revision of riot statutes.

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336. *Id.* (quoting *Brandenburg*, 395 U.S. at 447–48).

337. *Id.*

338. Hess v. Indiana, 414 U.S. 105, 107–09 (1973) (per curiam) (reversing disorderly conduct conviction of individuals who cried out "we'll take the fucking street later" during an anti-war demonstration, differentiating between expressions of desire to engage in destructive conduct "at some indefinite future time" and inciting imminent harm).

339. For a discussion of how even disruptions that rise to the level of "riot" are part of the American tradition, see Abu El-Haj, *supra* note 264, at 967–72. Abu El-Haj writes:

> The bottom line is that disruptive, angry demonstrations are no less part of the venerable American tradition of public protest from the Boston Tea Party to the recent Occupy movement than the nonviolent marches led by Martin Luther King that we have come to idealize, many of which also included moments of rioting. It is not a gross exaggeration to suggest that "[t]he United States was born amid a wave of rioting."

Id. at 969 (quoting PAUL A. GILJE, RIOTING IN AMERICA 1 (Harvey J. Graff ed., 1996))

D. Concluding Recommendations for Litigators Challenging Riot Statutes

Finally, when legislators fail to fix unconstitutional laws, the judiciary can be the final check and balance against unconstitutional riot statutes, with litigation an ultimate remedy. The following recommendations may be of guidance to future litigants considering constitutional challenges.

First, as with any litigation, those claims that are brought forward need to be carefully crafted and supported. For example, in *In re Shead*, the plaintiffs' constitutional challenges to the Federal Riot Act failed, being based on what was a misreading of the Act.[340] In *Foran,* plaintiffs were similarly unsuccessful in challenging the Act, after they brought forward only overbreadth, not vagueness, challenges,[341] as were the *Rundo* plaintiffs unsuccessful when challenging the "riot" definition solely on overbreadth grounds the following century.[342]

Second, although those twentieth century challenges to the Federal Riot Act might indicate that the best predictor of success is the presence of a clear vagueness challenge, challenges to the Act brought the following century might indicate otherwise. For example, in *Miselis*, the challenge to the Federal Riot Act on overbreadth grounds was successful, but the vagueness challenge was not.[343] In *Rundo*, at least some of the plaintiffs' overbreadth challenges were successful, despite vagueness not being an issue considered by the Ninth Circuit at all.[344]

Litigants might consider that past constitutional challenges to the Federal Riot Act have failed when only one type of claim was brought.[345] Rather than be constrained by a false choice between vagueness or overbreadth, they can bring both types of claims, which actually complement each other, similar to the double helix symbiotic due process and equal protections at play in other Fourteenth Amendment cases.[346] Ultimately, when feasible, the strongest case may be made through a both/and rather than an either/or approach, including by reference to the

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340. 302 F. Supp. 560, 565–67 (N.D. Cal.), *aff'd sub nom.* Carter v. United States, 417 F.2d 384 (9th Cir. 1969).

341. Nat'l Mobilization Comm. to End War in Viet Nam v. Foran, 411 F.2d 934, 937-39 (7th Cir. 1969).

342. United States v. Rundo, 990 F.3d 709, 719, 721 (9th Cir. 2021).

343. *See supra* Part II.C.1.b.

344. *See supra* Part II.C.1.c.

345. See *supra* Part II.C.2 (comparing *Rundo* and *Dream Defenders*); *see also* United States v. Dellinger, 472 F.2d 340, 354–64 (7th Cir. 1972); *Foran*, 411 F.2d at 934.

346. *See* Laurence H. Tribe, Lawrence v. Texas*: The "Fundamental Right" That Dare Not Speak Its Name*, 117 Harv. L. Rev. 1893, 1898 (2004) ("[D]ue process and equal protection, far from having separate missions and entailing different inquiries, are profoundly interlocked in a legal double helix."); *see also* Nancy C. Marcus, *Beyond* Romer *and* Lawrence*: The Right to Privacy Comes Out of the Closet*, 15 COLUM. J. GENDER & L. 355, 382 (2006) (describing how some "Fourteenth Amendment cases [have] applied a 'double helix' analysis, merging due process and equal protection" (quoting *id.* at 1898; and then citing Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992); Turner v. Safley, 482 U.S. 78 (1987); Zablocki v. Redhail, 434 U.S. 374 (1978); Moore v. City of E. Cleveland, 431 U.S. 494 (1977); Eisenstadt v. Baird, 405 U.S. 438 (1972); Loving v. Virginia, 388 U.S. 1 (1967); Griswold v. Connecticut, 381 U.S. 479 (1965); Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535 (1942)).

"[o]verbreadth from indeterminacy" doctrine.[347] On that point, litigants may find guidance in *Dream Defenders*, where the potent force of a symbiotic due process and First Amendment challenge seemed particularly evident, with the court ultimately holding that because the Florida riot statute was unconstitutionally vague as to its applicability, it was also unconstitutionally overbroad.[348]

Third, just as due process and First Amendment claims may complement each other, and litigants could be well-served in bringing both types of claims against vague statutes, to the extent they invoke First Amendment principles, they should similarly bear in mind that political protests implicate not just free speech rights, but also free assembly. The Supreme Court has recognized a limiting principle where expressive conduct, and not just pure speech, is being regulated, explaining that "where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep."[349]

As Professor Abu El-Haj has written, the Black Lives Matter and anti-racism movement of the twenty-first century sets the stage for revisiting the freedom of assembly doctrine:

> [T]he recent protests against the frequency with which unarmed African Americans die as a result of police officers' actions illustrate the serious consequences that flow from the Supreme Court's failure to appreciate that the First Amendment identifies a particular form of conduct—public assembly—for separate constitutional protection.[350]

Bemoaning how contemporary Supreme Court jurisprudence "collapses the right of assembly into the freedom of speech" and "leav[es] protestors feeling that First Amendment protections are weak and lower courts confused about how to decide what level of public disruption the Constitution requires officials to tolerate," Abu El-Haj suggests that Black Lives Matter protests "provide a unique opportunity to consider why outdoor assembly remains a valuable form of political participation, even in the digital age, and why it deserves more robust constitutional protections."[351]

Ultimately, a successful constitutional challenge will not only engage in careful textual analysis, but will also elevate the humanity of protesters and those invoked in their pleas to "#SayTheirNames."[352] It is important to nurture, not stifle, community involvement and political participation, including in the context of the most heated and even disruptive street protests. Such protections of political dissent are

347. *See* Am. Booksellers v. Webb, 919 F.2d 1493, 1505 (11th Cir. 1990).

348. *See* Dream Defs. v. DeSantis, 559 F. Supp. 3d 1238, 1282–84 (N.D. Fla. 2021).

349. Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973); *see also* Hill v. Colorado, 530 U.S. 703, 732 (2000) (quoting *Broadrick*, 413 U.S. at 615).

350. Abu El-Haj, *supra* note 264, at 963.

351. *Id.*

352. *See* #SAYTHEIRNAMES, https://sayevery.name/ (last visited Nov. 23, 2022).

particularly important when the stakes are as critical as bringing an end to the American epidemic of violence against people of color, including at the hands of those sworn to serve and protect.

Words are important, doctrine is compelling, but the most important thing of all is that everyone, including legislators and lawyers, not lose sight of the humanity of those seeking social justice through passionate protest. Black Lives *do* Matter, and those who support Black Lives, or any other cause for that matter, with passionate but non-violent outcries and actions, must be allowed to engage in the political dissent on the streets, not criminalized and left to die in the streets like Michael Brown.

CONCLUSION

No matter how uncomfortable any given message or volume of vitriol in non-violent protests might make those in power feel, sweeping and overbroad riot laws are both an unnecessary and unconstitutional response to passionate, political dissent. Although the Supreme Court has held that the rigor of "mathematical certainty" in statutory text is not a requirement,[353] there is a middle ground between mathematical precision and dangerous open-endedness that perpetuates abuse of power. In a world mired with uncertainty and instability, the revision of riot laws is an area in which clarity is both overdue and essential. There are critical reasons underlying constitutional prohibitions on vague and overbroad statutes, particularly when freedom of speech and assembly are at issue.

Today, as throughout American history, the streets are the stage for some of the most profound and politically important discourse and dissent. Rather than fear disruption and diverse passions among our polity, conscience and constitutional principles alike require that those crafting laws that criminalize protests as "riots" must proceed with great care, protecting rather than persecuting non-violent protesters who risk losing liberty and life when taking to the streets with their pleas for justice. "Riot" must no longer be a subjective designation, largely in the eye of the beholder, but must be clearly defined within constitutional parameters that honor the essential role that political dissent plays in the very protection of our constitutional democracy.

353. Grayned v. City of Rockford, 408 U.S. 104, 110 (1972).

APPENDIX: TEXTUAL COMPARISON OF RIOT STATUTE DEFINITIONS OF "RIOT"[354]

Federal Riot Statute 18 U.S.C. § 2102(a)	As used in this chapter, the term "riot" means a public disturbance involving (1) an act or acts of violence by one or more persons part of an assemblage of three or more persons, which act or acts shall constitute a clear and present danger of, or shall result in, damage or injury to the property of any other person or to the person of any other individual or (2) a threat or threats of the commission of an act or acts of violence by one or more persons part of an assemblage of three or more persons having, individually or collectively, the ability of immediate execution of such threat or threats, where the performance of the threatened act or acts of violence would constitute a clear and present danger of, or would result in, damage or injury to the property of any other person or to the person of any other individual.
Alabama ALA. CODE § 13A-11-3(a) (2022)	A person commits the crime of riot if, with five or more other persons, he wrongfully engages in tumultuous and violent conduct and thereby intentionally or recklessly causes or creates a grave risk of public terror or alarm.
Alaska ALASKA STAT. § 11.61.100(a) (2022)	A person commits the crime of riot if, while participating with five or more others, the person engages in tumultuous and violent conduct in a public place and thereby causes, or creates a substantial risk of causing, damage to property or physical injury to a person.

354. This chart lists only riot definitions within general riot statutes, not statutes specific to riots in detention facilities, *see, e.g.,* COLO. REV. STAT. § 18-8-211 (2022); other statutes similarly criminalizing protests but that do not use "riot" terminology, *see, e.g.*, WASH. REV. CODE § 9A.84.010 (2022) ("criminal mischief"); or case law with common law definitions. For a partial list of state cases addressing common law definitions, see *What Constitutes Riot Within Criminal Law*, 49 A.L.R. 1135 (1927).

Arizona ARIZ. REV. STAT. ANN. § 13-2903(A) (2022)	A person commits riot if, with two or more other persons acting together, such person recklessly uses force or violence or threatens to use force or violence, if such threat is accompanied by immediate power of execution, which disturbs the public peace.
California CAL. PENAL CODE § 404 (West 2022)	(a) Any use of force or violence, disturbing the public peace, or any threat to use force or violence, if accompanied by immediate power of execution, by two or more persons acting together, and without authority of law, is a riot. (b) As used in this section, disturbing the public peace may occur in any place of confinement. Place of confinement means any state prison, county jail, industrial farm, or road camp, or any city jail, industrial farm, or road camp, or any juvenile hall, juvenile camp, juvenile ranch, or juvenile forestry camp.
Colorado COLO. REV. STAT. § 18-9-101(2) (2022)	"Riot" means a public disturbance involving an assemblage of three or more persons which by tumultuous and violent conduct creates grave danger of damage or injury to property or persons or substantially obstructs the performance of any governmental function.
Delaware DEL. CODE ANN. tit. 11, § 1302 (2022)	A person is guilty of riot when the person participates with 2 or more persons in a course of disorderly conduct: (1) With intent to commit or facilitate the commission of a felony or misdemeanor; or (2) With intent to prevent or coerce official action; or (3) When the accused or any other participant to the knowledge of the accused uses or plans to use a firearm or other deadly weapon.
District of Columbia D.C. CODE § 22-1322 (2022)	(a) A riot in the District of Columbia is a public disturbance involving an assemblage of 5 or more persons which by tumultuous and violent conduct or the threat thereof creates grave danger of damage or injury to property or persons.

	(b) Whoever willfully engages in a riot in the District of Columbia shall be punished by imprisonment for not more than 180 days or a fine of not more than the amount set forth in § 22-3571.01, or both.
Florida FLA. STAT. § 870.01(2) (2022)	A person commits a riot if he or she 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, resulting in: (a) Injury to another person; (b) Damage to property; or (c) Imminent danger of injury to another person or damage to property.
Hawai'i HAW. REV. STAT. § 711-1103 (2022)	(1) A person commits the offense of riot if the person participates with five or more other persons in a course of disorderly conduct: (a) With intent to commit or facilitate the commission of a felony; or (b) When the person or any other participant to the person's knowledge uses or intends to use a firearm or other dangerous instrument in the course of the disorderly conduct.
Idaho IDAHO CODE § 18-6401 (2022)	Any action, use of force or violence, or threat thereof, disturbing the public peace, or any threat to use such force or violence, if accompanied by immediate power of execution, by two (2) or more persons acting together, and without authority of law, which results in: (a) physical injury to any person; or (b) damage or destruction to public or private property; or (c) a disturbance of the public peace; is a riot.
Indiana IND. CODE § 35-45-1-2 (2022)	Sec. 2. A person who, being a member of an unlawful assembly, recklessly, knowingly, or intentionally engages in tumultuous conduct commits rioting, a Class A misdemeanor. ["Unlawful assembly," in turn, is defined as "an

	assembly of five (5) or more persons whose common object is to commit an unlawful act, or a lawful act by unlawful means." IND. CODE § 35-45-1-1 (2022)"].
Iowa IOWA CODE § 723.1 (2022)	A riot is three or more persons assembled together in a violent and disturbing manner, and with any use of unlawful force or violence by them or any of them against another person, or causing property damage. A person who willingly joins in or remains a part of a riot, knowing or having reasonable grounds to believe that it is such, commits a class "D" felony.
Kansas KAN. STAT. ANN. § 21-6201(a) (2022)	Riot is five or more persons acting together and without lawful authority engaging in any: (1) Use of force or violence which produces a breach of the public peace; or (2) threat to use such force or violence against any person or property if accompanied by power or apparent power of immediate execution.
Kentucky KY. REV. STAT. ANN. § 525.010(5) (West 2022)	"Riot" means a public disturbance involving an assemblage of five (5) or more persons which by tumultuous and violent conduct creates grave danger of damage or injury to property or persons or substantially obstructs law enforcement or other government function.
Louisiana LA. STAT. ANN. § 14:329.1 (2022)	A riot is a public disturbance involving an assemblage of three or more persons acting together or in concert which by tumultuous and violent conduct, or the imminent threat of tumultuous and violent conduct, results in injury or damage to persons or property or creates a clear and present danger of injury or damage to persons or property.
Maine ME. REV. STAT. tit. 17-A, § 503(1) (2022)	A person is guilty of riot if, together with 5 or more other persons, he engages in disorderly conduct; A. With intent imminently to commit or facilitate the commission of a crime involving physical injury or property damage against persons who are not participants; or

	B. When he or any other participant to his knowledge uses or intends to use a firearm or other dangerous weapon in the course of the disorderly conduct. [Section 501-A, in turn, defines "disorderly conduct" with specificity. ME. STAT. tit. 17-A, § 501-A (2022)].
Michigan MICH. COMP. LAWS § 752.541 (2022)	Sec. 1. It is unlawful and constitutes the crime of riot for 5 or more persons, acting in concert, to wrongfully engage in violent conduct and thereby intentionally or recklessly cause or create a serious risk of causing public terror or alarm.
Minnesota MINN. STAT. § 609.71 (2022)	Subdivision 1. Riot first degree. When three or more persons assembled disturb the public peace by an intentional act or threat of unlawful force or violence to person or property and a death results, and one of the persons is armed with a dangerous weapon, that person is guilty of riot first degree and may be sentenced to imprisonment for not more than 20 years or to payment of a fine of not more than $35,000, or both. Subdivision 2. Riot second degree. When three or more persons assembled disturb the public peace by an intentional act or threat of unlawful force or violence to person or property, each participant who is armed with a dangerous weapon or knows that any other participant is armed with a dangerous weapon is guilty of riot second degree and may be sentenced to imprisonment for not more than five years or to payment of a fine of not more than $10,000, or both. Subdivision 3. Riot third degree. When three or more persons assembled disturb the public peace by an intentional act or threat of unlawful force or violence to person or property, each participant therein is guilty of riot third degree and may be sentenced to imprisonment for not more than one year or to payment of a fine of not more than $1,000, or both.

New Hampshire N.H. REV. STAT. ANN. § 644:1(I) (2022)	A person is guilty of riot if: (a) Simultaneously with 2 or more other persons, he engages in tumultuous or violent conduct and thereby purposely or recklessly creates a substantial risk of causing public alarm; or (b) He assembles with 2 or more other persons with the purpose of engaging soon thereafter in tumultuous or violent conduct, believing that 2 or more other persons in the assembly have the same purpose; or (c) He assembles with 2 or more other persons with the purpose of committing an offense against the person or property of another whom he supposes to be guilty of a violation of the law, believing that 2 or more other persons in the assembly have the same purpose.
New Jersey N.J. STAT. ANN. § 2C:33-1(a) (West 2022)	Riot. A person is guilty of riot if he participates with four or more others in a course of disorderly conduct as defined in section 2C:33-2a: (1) With purpose to commit or facilitate the commission of a crime; (2) With purpose to prevent or coerce official action; or (3) When he or any other participant, known to him, uses or plans to use a firearm or other deadly weapon.
New York N.Y. PENAL LAW § 240.05 (McKinney 2022)	A person is guilty of riot in the second degree when, simultaneously with four or more other persons, he engages in tumultuous and violent conduct and thereby intentionally or recklessly causes or creates a grave risk of causing public alarm.
North Carolina N.C. GEN. STAT. § 14-288.2(a) (2022)	A riot is a public disturbance involving an assemblage of three or more persons which by disorderly and violent conduct, or the imminent threat of disorderly and violent conduct, results in injury or damage to persons or property or creates a clear and present danger of injury or damage to persons or property. [Subsequent subsections pair mens rea "willfulness" requirement with varying degrees of penalty].

North Dakota N.D. CENT. CODE § 12.1-25-01 (2021)	"Riot" means a public disturbance involving an assemblage of five or more persons which by tumultuous and violent conduct creates grave danger of damage or injury to property or persons or substantially obstructs law enforcement or other government function.
Ohio OHIO REV. CODE ANN. § 2917.03 (West 2022)	(A) No person shall participate with four or more others in a course of disorderly conduct in violation of section 2917.11 of the Revised Code: (1) With purpose to commit or facilitate the commission of a misdemeanor, other than disorderly conduct; (2) With purpose to intimidate a public official or employee into taking or refraining from official action, or with purpose to hinder, impede, or obstruct a function of government; (3) With purpose to hinder, impede, or obstruct the orderly process of administration or instruction at an educational institution, or to interfere with or disrupt lawful activities carried on at such institution. (B) No person shall participate with four or more others with purpose to do an act with unlawful force or violence, even though such act might otherwise be lawful. (C) Whoever violates this section is guilty of riot, a misdemeanor of the first degree. [Section 2917.11 of the Ohio Revised Code, in turn, defines "disorderly conduct" with specificity. OHIO REV. CODE ANN. § 2917.11 (West 2022)].
Oklahoma OKLA. STAT. tit. 21, § 1311 (2022)	Any use of force or violence, or any threat to use force or violence if accompanied by immediate power of execution, by three or more persons acting together and without authority of law, is riot.
Oregon OR. REV. STAT. § 166.015(1) (2022)	A person commits the crime of riot if while participating with five or more other persons the person engages in tumultuous and violent conduct and thereby intentionally or recklessly creates a grave risk of causing public alarm.

Pennsylvania 18 PA. CONS. STAT. § 5501 (2022)	A person is guilty of riot, a felony of the third degree, if he participates with two or more others in a course of disorderly conduct: (1) with intent to commit or facilitate the commission of a felony or misdemeanor; (2) with intent to prevent or coerce official action; or (3) when the actor or any other participant to the knowledge of the actor uses or plans to use a firearm or other deadly weapon.
South Dakota S.D. CODIFIED LAWS § 22-10-1 (2022)	As used in this chapter, any intentional use of force or violence by three or more persons, acting together and without authority of law, to cause any injury to any person or any damage to property is riot . . . .
Tennessee TENN. CODE. ANN. § 39-17-301(3) (2022)	"Riot" means a disturbance in a public place or penal institution as defined in § 39-16-601 involving an assemblage of three (3) or more persons whether or not participating in any otherwise lawful activity, which, by tumultuous and violent conduct, creates grave danger of substantial damage to property or serious bodily injury to persons or substantially obstructs law enforcement or other governmental function . . . .
Texas TEX. PENAL CODE ANN. § 42.02 (West 2021)	(a) For the purpose of this section, "riot" means the assemblage of seven or more persons resulting in conduct which: (1) creates an immediate danger of damage to property or injury to persons; (2) substantially obstructs law enforcement or other governmental functions or services; or (3) by force, threat of force, or physical action deprives any person of a legal right or disturbs any person in the enjoyment of a legal right. (b) A person commits an offense if he knowingly participates in a riot. (c) It is a defense to prosecution under this section that the assembly was at first lawful and when one of those assembled manifested an intent to engage in conduct enumerated in Subsection (a), the actor retired from the assembly. (d) It is no defense to prosecution under this section

	that another who was a party to the riot has been acquitted, has not been arrested, prosecuted, or convicted, has been convicted of a different offense or of a different type or class of offense, or is immune from prosecution.
Utah UTAH CODE ANN. § 76-9-101 (West 2022)	(1) An individual is guilty of riot if the individual: (a) simultaneously with two or more other individuals engages in violent conduct, knowingly or recklessly creating a substantial risk of causing public alarm; (b) assembles with two or more other individuals with the purpose of engaging, soon thereafter, in violent conduct, knowing, that two or more other individuals in the assembly have the same purpose; or (c) assembles with two or more other individuals with the purpose of committing an offense against a person, or the property of another person who the individual supposes to be guilty of a violation of law, believing that two or more other individuals in the assembly have the same purpose.
Virginia VA. CODE ANN. § 18.2-405 (2022)	Any unlawful use, by three or more persons acting together, of force or violence which seriously jeopardizes the public safety, peace or order is riot.