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### Incitement to Riot in the Age of Flash Mobs

Margot E. Kaminski

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## INCITEMENT TO RIOT IN THE AGE OF FLASH MOBS

*Margot E. Kaminski\**

“[B]y collective effort individuals can make their views known, when, individually, their voices would be faint or lost.”<sup>1</sup>

*“You know I have always made a study of the psychology, sociology of mob reaction. It is exemplified out there . . . . Those mobs are chanting; that is the caveman’s chant. They were trained to do it. They were trained this afternoon. They are being led; there will be violence.”*<sup>2</sup>

“No one would have the hardihood to suggest that the principle of freedom of speech sanctions incitement to riot.”<sup>3</sup>

*As people increasingly use social media to organize both protests and robberies, government will try to regulate these calls to action. With an eye to this intensifying dynamic, this Article reviews First Amendment jurisprudence on incitement and applies it to existing statutes on incitement to riot at a common law, state, and federal level. The article suggests that First Amendment jurisprudence has a particularly tortuous relationship with regulating speech directed to crowds. It examines current crowd psychology to suggest which crowd behavior, if any, should as a matter of policy be subject to regulation. It concludes that many existing incitement-to-riot statutes are both bad policy and unconstitutional under Brandenburg v. Ohio.<sup>4</sup> The article consequently suggests that courts should be careful in the application of these statutes, and states should be hesitant to build upon existing incitement-to-riot statutes to regulate new media.*

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\* Executive Director of the Information Society Project at Yale Law School, Research Scholar and Lecturer in Law at Yale Law School. Many thanks to Jack Balkin, Bryan Choi, James Grimmelman, Navid Hassanpour, Robert Post, and Jed Rubenfeld for helpful comments and suggestions. Special thanks to Matthew Cushing for his invaluable edits, especially at the early stages.

1. Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290, 294 (1981).

2. Terminiello v. City of Chi., 337 U.S. 1, 21 (1949) (Frankfurter, J., dissenting) (quoting Father Terminiello’s speech to the Christian Veterans of America) (emphasis in original).

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

4. 395 U.S. 444 (1969).

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## I. INTRODUCTION

In the past year, social media has spawned both revolutions and robberies.<sup>5</sup> Governments have consequently tried to create new laws to regulate this behavior.<sup>6</sup> The law most worth examining, however, is not new. Many states already criminalize incitement to riot, and the federal anti-riot statute criminalizes the use of interstate commerce to incite riot.<sup>7</sup> No survey of these laws or the underlying riot statutes currently exists that analyzes them under the First Amendment.<sup>8</sup>

This Article reviews existing definitions of riot and incitement to riot under common law, state statutes, and federal statutes, and creates a taxonomy of the constitutional problems that arise. It aims to alert courts to the problems inherent in existing state and federal statutes, and to encourage states to avoid using these statutes as a basis for regulating social media. Existing statutes are particularly ill-suited to dealing with how people assemble in the age of the flash mob.

Incitement-to-riot statutes present a fascinating First Amendment problem because they implicate not one, but two protected freedoms: freedom of speech and freedom of assembly. Banning incitement to riot is dangerous because if the ban is overbroad, it can restrict not just speech, but the means by which people assemble. Incitement to riot differs from the usual fact patterns for freedom of assembly cases in that

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5. See Bill Wasik, *Riot: Self-Organized, Hyper-Networked Revolts—Coming to a City Near You*, WIRED, Dec.16, 2011, [http://www.wired.com/magazine/2011/12/ff\\_riots/all/](http://www.wired.com/magazine/2011/12/ff_riots/all/).

6. See Jane E. Kirtley, *Privacy Protection and Related Developments in Internet Law*, in COMMUNICATIONS LAW IN THE DIGITAL AGE 2011 212–13 (2011).

7. See, e.g., Federal Anti-Riot Act, 18 U.S.C. §§ 2101, 2102 (1996).

8. To my knowledge, nobody has examined the substance of state anti-riot laws or incitement-to-riot laws and how they differ. A 1985 American Law Report annotation compiled state cases to examine what constitutes sufficiently violent conduct to establish the crime of riot in state courts, but did not reach other elements of the crime, such as intent or the number of persons involved. It also did not address incitement to riot. See generally Martin J. McMahon, Annotation, *What Constitutes Sufficiently Violent, Tumultuous, Forceful, Aggressive, or Terrorizing Conduct to Establish Crime of Riot in State Courts*, 38 A.L.R.4th 648 (1985).

the central question revolves around how violent or disorderly a crowd may be before it loses First Amendment protection. Incitement to riot thus provides an opportunity for a new discussion of what peaceable freedom of assembly means.

The second half of this Article shifts from a discussion of the constitutionality of these statutes to a discussion of crowd behavior and the justifications used for regulating crowds. Government regulation of crowds stems from fundamental understandings—and misunderstandings—of the nature of crowd activity. Regulation reveals a tension between conflicting understandings of the nature of crowds. On the one hand, the crowd can represent the tyranny of the majority against a minority; on the other, it can be a way for the powerless to protest the powerful. Governments should not be able to claim that they are protecting individuals against the majority when in fact they are protecting the status quo against collective action by less powerful individuals.

Thus, the second half of this Article examines both how legislators and courts understood crowds in the past and how we understand them now. This Part suggests that we need to reevaluate how crowds are regulated. It examines the role of new media and ask whether it changes the calculation. This Article closes by proposing a model incitement-to-riot statute that takes *Brandenburg* into account and is backed by a more current understanding of crowd behavior.

People assemble for many reasons: for performance, for protest, and for communication with their government. Often, the most effective feature of a large gathering is that it visibly demonstrates collective power, which sometimes creates fear. State riot laws that are based on regulating the mere creation of fear or “public terror” thus strike at the heart of the power of assembly. They are also likely unconstitutional under the First Amendment.

Now is a particularly opportune time to rethink existing statutes on incitement to riot and the underlying offense of riot. Many existing statutes are overbroad and sweep in innocuous activity. One does not have to look at their application to social media to see that these statutes are overbroad; however, the use of social media for both democratic organization and destructive purposes makes the scope of these statutes a more pertinent and pressing issue.

## II. THE RISE OF FLASH MOBS

In January 2012, both *Time Magazine* and *Wired Magazine* celebrated the previous year as a year of revolutions started on the internet. *Time*’s “Person of the Year” was *The Protester: from the Arab Spring to*

*Athens, from Occupy Wall Street to Moscow.*<sup>9</sup> *Wired* published an article entitled *Riot: How Social Media Fuels Social Unrest*.<sup>10</sup>

The internet is a strikingly useful tool for organizing or creating crowds. The phenomenon of the “flash mob” emerged in the early 2000s, when improvisational comedy groups began using public space for spontaneous performances by large groups of people brought together online.<sup>11</sup> Flash mobs occur when a leader calls for a crowd to appear at a location, usually to perform some act. A flash mob has several features: the announcer usually does not know the full membership of the crowd; the crowd is told the time, place, and, sometimes, the purpose of the gathering; and the crowd acts on the announcement with no apparent incentive.<sup>12</sup>

At first, the flash mob served as comedy or lighthearted social commentary, with large groups meeting to dance silently in public areas, shop for a love rug, or freeze in place in Grand Central Station.<sup>13</sup> But as early as 2002, it became apparent that flash mobs could be effectively employed for political purposes. In that context, they have been referred to as “smart mobs.”<sup>14</sup> Flash mobs have been used for political activism in the United States, to stage protests against Russian Prime Minister Vladimir Putin, and to protest the totalitarian regime in Belarus.<sup>15</sup> More recently, dissidents employed flash mob tactics during the Arab Spring. Thousands of Iranians organized via Twitter in 2009 to protest the elections, and more than 50,000 people gathered in Tahrir Square in Egypt in 2010. Many of those who appeared were informed of the gatherings through social media tools such as Twitter or Facebook.<sup>16</sup>

The same tools that make it easier to organize collective performance art or start a revolution, however, have increasingly been used for committing group crimes. In cities across the United States, and more

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9. Kurt Andersen, *The Protester*, TIME, Dec. 14, 2011, [http://www.time.com/time/specials/packages/article/0,28804,2101745\\_2102132\\_2102373,00.html](http://www.time.com/time/specials/packages/article/0,28804,2101745_2102132_2102373,00.html).

10. Wasik, *supra* note 5.

11. A comedic performance art group named Improv Everywhere formed in 2001 to carry out “missions” in public places, with some involving volunteers who were not a member of the group; Improv Everywhere claims that its acts are not flash mobs. See IMPROV EVERYWHERE, <http://improveverywhere.com/faq/> (last visited Dec. 30, 2012). Bill Wasik has often been credited with the creation of the term “flash mobs.” Clay Shirky, HERE COMES EVERYBODY: THE POWER OF ORGANIZING WITHOUT ORGANIZATIONS 165 (2008); see also Wasik, *supra* note 5.

12. See generally Wasik, *supra* note 5.

13. Shirky, *supra* note 11, at 165. For an example of a performance in Grand Central Station by the group Improv Everywhere, see *Frozen Grand Central*, IMPROV EVERYWHERE (Sept. 28, 2012, 3:16 PM), <http://improveverywhere.com/2008/01/31/frozen-grand-central/>.

14. See HOWARD RHEINGOLD, SMART MOBS: THE NEXT SOCIAL REVOLUTION (2002).

15. Shirky, *supra* note 11, at 166.

16. Daniel Tovrov, *Flash Mobs: 5 Biggest Flash Mobs of All Time*, INT’L BUS. TIMES Aug. 24, 2011, <http://www.ibtimes.com/articles/203118/20110824/flash-mob-biggest-flash-mobs-ever.htm>.

recently, in the United Kingdom,<sup>17</sup> social media have been used to organize mobs for the purpose of committing crimes. These “flash mobs,” as news media have been describing them, use flash mob tactics to overwhelm local police forces and shop owners by announcing a potential robbery. In 2010 and 2011, flash mobs were reported in Illinois, Maryland, Massachusetts, Minnesota, Nevada, New Jersey, New York, Ohio, Pennsylvania, Washington, D.C., and Canada.<sup>18</sup>

There has been some pushback on the assumption that these events were started through social media. District of Columbia (D.C.) police have said that they have no evidence that the group robberies in the D.C. area were organized through social media.<sup>19</sup> In Ohio, it also appears that some of the violence did not begin as a flash mob, though it may have been exacerbated by social media once the violence started.<sup>20</sup> The investigation into one of the Maryland group robberies the media had termed a flash mob found that the thieves had hatched their plan on a

17. See generally Wasik, *supra* note 5 (discussing the UK riots and their link to social media); see also Tovrov, *supra* note 16 (“Thanks mostly to BBM, the BlackBerry instant messaging service, youth all over the country began amassing in commercial centers, breaking into stores and destroying everything in their path. For the first three days, destruction and chaos ruled over police and order. People set fire to cars, buses and buildings, and groups of masked kids robbed people in restaurants and on the street. Five people were killed over five days, in incidents that have been deemed murder.”).

18. See Ian Urbina, *Mobs Are Born as Word Grows by Text Message*, N.Y. TIMES, Mar. 24, 2010, <http://www.nytimes.com/2010/03/25/us/25mobs.html>; Miguel Bustillo & Ann Zimmerman, ‘Flash Mobs’ Vex Retailers, WALL ST. J., Oct. 21, 2011, <http://online.wsj.com/article/SB10001424052970203752604576643422390552158.html>; Matt Diener, *Flashmob Flash-Robs Lingerie Store in Washington, D.C.*, TECHNORATI, July 26, 2011, <http://technorati.com/technology/article/flashmob-flash-rops-lingerie-store-in/>; Brandon Cooper, ‘Flash Mob’: Thieves, Like Locusts, Clean Out Store, THE COLUMBUS DISPATCH, Dec. 19, 2011, [http://www.dispatch.com/content/stories/national\\_world/2011/12/19/flash-rob-thieves-like-locusts-clean-out-store.html](http://www.dispatch.com/content/stories/national_world/2011/12/19/flash-rob-thieves-like-locusts-clean-out-store.html); ‘Flash Mob’ Robs Maryland 7-Eleven in Less Than a Minute, Police Say, CNN, Aug. 16, 2011, <http://edition.cnn.com/2011/CRIME/08/16/maryland.flash.mob/> [hereinafter CNN]; *Chicago Flash Mobs: Police Superintendent Vows Crackdown, Rep. Rush Takes Exception*, HUFFINGTON POST, June 7, 2011, [http://www.huffingtonpost.com/2011/06/07/chicago-flash-mobs-police\\_n\\_872730.html](http://www.huffingtonpost.com/2011/06/07/chicago-flash-mobs-police_n_872730.html); Stan Donaldson, *Flash Mobs: Cleveland Heights Fair Violence was Catalyst for Crackdown*, CLEVELAND.COM, Dec. 19, 2011, [http://blog.cleveland.com/metro/2011/12/flash\\_mobs\\_cleveland\\_heights\\_f.html](http://blog.cleveland.com/metro/2011/12/flash_mobs_cleveland_heights_f.html); ‘Flash Mobs’ on the Rise, NACS ONLINE, May 9, 2011, <http://www.nacsonline.com/NACS/News/Daily/Pages/ND0509113.aspx>; Debra Black, ‘Flash Mobs’ Invade Canada, THE STAR.COM, Aug. 5, 2011, <http://www.thestar.com/news/canada/article/1034739--flash-mobs-invade-canada?bn=1>; *Thieves Use Facebook and Twitter to Co-ordinate ‘Flashmob’ Raid of Victoria’s Secret Store*, DAILY MAIL, July 26, 2011, <http://www.dailymail.co.uk/news/article-2018835/Facebook-Twitter-used-plan-flashmob-raid-Victorias-Secret-store.html>.

19. Cooper, *supra* note 18 (“D.C. police, who also have had to deal with some thefts labeled as flash-mob robberies, said they have no evidence that social media was used in any recent group crimes, spokeswoman Gwendolyn Crump said.”).

20. Donaldson, *supra* note 18 (“But what happened in Cleveland Heights in June does not fit the popular definition of a flash mob, The Plain Dealer has learned. Unlike in other cities, no general call to gather appears to have spread on Facebook or Twitter . . . And it’s not to say that social media played no role in what happened. When the violence began, police have found, teens were buzzing about it in real time via Twitter and Facebook, rapidly spreading word of the disturbance and likely exacerbating it.”).

bus.<sup>21</sup>

After a year of flash mob-associated violence, the term flash mob has taken on a different meaning. “Mob” is no longer a tongue-in-cheek designation.<sup>22</sup> It has now taken on the connotations of its original definition: “a large or disorderly crowd; *especially*: one bent on riotous or destructive action.”<sup>23</sup>

Some governments have taken action by targeting the resulting physical assembly. Philadelphia, for example, has imposed a 9:00 p.m. curfew on young people to prevent large late-night gatherings.<sup>24</sup> In New Jersey, flash mob participants have been charged with disorderly conduct or the obstruction of public passages.<sup>25</sup> In March 2012, Virginia state police arrested thirty-one protestors out of a group of 1000 people who showed up at the state capitol to protest a bill that would require women to have an ultrasound before having an abortion.<sup>26</sup> The protestors were not violent; the police claimed they were called in because the group was “getting really large and we didn’t want things to get out of hand.”<sup>27</sup>

Other governments have monitored, shut down, or regulated social media instead of or in addition to regulating the resulting physical assembly.<sup>28</sup> In northwest England, two men were jailed for inciting riot after the London violence and robberies in the summer of 2011.<sup>29</sup> In San Francisco, cell phone and mobile internet service were blocked in the public transportation system, the BART, to prevent protests.<sup>30</sup> In Philadelphia, the FBI monitors social-networking sites for flash mob activity.<sup>31</sup> Many towns have set up task forces to address flash mobs.<sup>32</sup>

At least one government has recognized that there are already existing statutes addressing both aspects of flash mob behavior: riot and incitement to riot. In 2011, Cleveland City Council Members proposed an emergency ordinance, Section 605.091, “prohibiting the improper use

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21. Wasik, *supra* note 5.

22. *See id.*

23. MERRIAM-WEBSTER DICTIONARY (1981).

24. *See Urbina, supra* note 18.

25. Kirtley, *supra* note 6, at 212.

26. Cassie Murdoch, *Things Get Ugly in Virginia as Riot Police Crack Down on Pro-Choice Protesters*, JEZEBEL, Mar. 5 2012, <http://jezebel.com/5890406/things-get-ugly-in-virginia-as-riot-police-crack-down-on-pro-choice-protesters>.

27. *Id.*

28. *See Kirtley, supra* note 6, at 212–13.

29. CNN, *supra* note 18.

30. Alexia Tsotsis, *BART Shuts Down Cell Service to Thwart Rumored Protests, Gets Actual Protests (and Has to Close Stations)*, TC, Aug. 15, 2011, <http://techcrunch.com/2011/08/15/bart-shuts-down-cell-service-to-thwart-rumored-protests-gets-actual-protests/>.

31. Urbina, *supra* note 18.

32. Kirtley, *supra* note 6, at 212.



of social media to induce persons to commit a criminal offense.” The ACLU protested, and the Cleveland mayor vetoed the initial proposed ordinance.<sup>33</sup> In December 2011, however, Cleveland adopted a revised version of the ordinance that lists “electronic media devices” as criminal tools used to incite riots.<sup>34</sup> The mayor did not sign the revised ordinance, because he claimed the provisions “mirror state laws already in place.”<sup>35</sup> The new Section 605.011 bans incitement to riot, and adds computers and cellular telephones to a list of items that can be considered criminal tools when used illegally.<sup>36</sup>

The back-and-forth over the Cleveland ordinance is a window onto how existing incitement-to-riot laws might be used to target the organizers of flash mobs. A state or municipality with existing riot statutes and incitement-to-riot statutes might assume, like Cleveland, that it can sweep social media into the existing offense.

The problem is that many existing incitement-to-riot statutes are likely unconstitutional. However, they have either not been aired before courts or have been misread.

### III. HYPOTHETICALS

Before reviewing existing statutes, it is worth getting a sense of what is at stake if the law sweeps too broadly. It may seem entirely reasonable to have a law against inciting a riot. The Supreme Court itself said in dicta that “[n]o one would have the hardihood to suggest that the principle of freedom of speech sanctions incitement to riot . . . .”<sup>37</sup> But that comment depends on a limited understanding of incitement, and a limited understanding of riot. If “riot” is defined broadly—which it often is—and “incitement” is not defined at all—which it often is not—then incitement to riot can sweep in innocuous or even socially beneficial activity.

If a person tweets, “Let’s meet all 70 of us in Times Square in 5 minutes to rob a bank,” it is reasonable for a government to desire to punish that speech. If the tweet happens, and the robbery in fact occurs, the tweet could be evidence of a number of things: direct participation in the robbery, aiding and abetting the robbery, or conspiracy to commit the robbery. In fact, there is no real need to go after the speaker for a

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33. Pat Galbincea, *Flash Mob Ordinances Become Law in Cleveland Minus Mayor Frank Jackson’s Signature*, CLEVELAND.COM, Dec. 12, 2011, [http://blog.cleveland.com/metro/2011/12/flash\\_mob\\_ordinances\\_become\\_la.html](http://blog.cleveland.com/metro/2011/12/flash_mob_ordinances_become_la.html).

34. *See id.*

35. *Id.*

36. Thomas Ott, *Cleveland Again Targets Social Media Role in ‘Flash Mobs’*, CLEVELAND.COM, Dec. 6, 2011, [http://blog.cleveland.com/metro/2011/12/cleveland\\_again\\_targets\\_social.html](http://blog.cleveland.com/metro/2011/12/cleveland_again_targets_social.html).

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

crime of incitement to robbery or incitement to riot, because the speaker's involvement in the robbery could be punished through other means. But the author of the tweet could also constitutionally be punished for incitement to riot if the tweet calls for a large number of people to gather together to commit an unlawful act of force or violence, is likely to be understood as calling for riot, and that riot is imminent and likely to occur.<sup>38</sup>

If, by contrast, a person tweets only "meet in Times Square next month," things become more complicated. First, there is no underlying crime contemplated on the face of the message. Second, because there is no number of people mentioned, it is not clear that the speaker intends a large group to form. Third, there is no indication that the speaker himself will be present. Fourth, the time frame mentioned—"next month"—gives adequate time to police to prepare for responding to the gathering, so regulating the tweet itself is less justified and probably unconstitutional.

Let us imagine that the speaker just wants to convene a small meeting between friends, but in fact the tweet goes viral, a group of seventy people convenes in response to it, and a riot begins. A vague incitement-to-riot statute could sweep into its purview the speaker who does not intend for a riot to occur. It risks using the benefit of hindsight to create after-the-fact penalties for innocent speech.

An incitement-to-riot law based on a broad definition of riot creates a different problem. If a person tweets: "Larry and Curly, let's meet in Times Square in 5 minutes and get rowdy," they might be liable under existing incitement-to-riot statutes. This is because many states criminalize gatherings of as few as two or three people under their riot statutes. Calling for more than two people to show up somewhere and in some way disturb the public peace, then, could constitute a crime under an incitement-to-riot statute that defines riot too broadly.

The way to prevent such over-expansive enforcement is to more carefully define both riot and incitement to riot. When most of us think of "riot," we think of large crowds that cause damage, like the UK riots of 2011. But the statutory and common-law definitions of riot often include surprisingly small gatherings that do not cause physical damage at all. Supreme Court doctrine controls the definition of incitement, requiring intent, and that the lawless acts be both imminent and likely to occur. Many incitement-to-riot statutory schemes do not require intent, imminence, or likelihood of riot.

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38. See generally *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

## IV. THE STATUTES

Nearly all states have statutes addressing riot, and many have statutes on inciting riot. There are two steps involved in examining an incitement-to-riot statute. First, we can look at how the statute defines “incitement.” This entails examining whether the statute includes any language on the imminence of the riot, or the likelihood that the riot will occur. The required intent is important, too. This examination gives rise to a more traditional *Brandenburg* analysis that considers whether the incitement portion of the statute by itself maps onto current First Amendment doctrine on incitement. This is where most courts have found problems with existing incitement-to-riot laws, if they have found problems at all.

Second, incitement-to-riot statutes are based on the underlying crime of riot. The underlying definition of “riot” in a number of states is likely unconstitutional because it violates freedom of assembly. A law that bans large assemblies that are physically harmful or destructive is likely constitutional. Many state riot laws, however, do not define “riot” in this way. In fact, many state riot statutes ban surprisingly small assemblies that do no more than create public fear, rather than cause physical harm.

Before applying First Amendment jurisprudence, this Part reviews and categorizes existing laws on both incitement to riot and the underlying crime of riot.

A. *Incitement to Riot*

Incitement to riot is a statutory crime in many states, as well as under federal law.<sup>39</sup> Some states have common-law incitement to riot, rather than a statute.<sup>40</sup> There is no Model Penal Code section on incitement to riot, so the variation between states is fairly broad.

There are roughly five kinds of incitement-to-riot statutes, with additional variations within the five categories. The most basic kind of incitement-to-riot statute simply criminalizes committing an act “that urges other persons to riot.”<sup>41</sup> South Carolina criminalizes “instigating,

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39. See, e.g., KAN. STAT. ANN. § 21-6201(b) (2011); LA. REV. STAT. ANN. § 329.2 (2011); MONT. CODE ANN. § 45-8-104(1) (2009); N.C. GEN. STAT. § 14-288.2 (2011). See also 18 U.S.C. § 2101 (2006).

40. See generally *State v. Beasley*, 317 So. 2d 750 (Fla. 1975); *Commonwealth v. Hayes*, 209 A.2d 38 (Pa. Super. Ct. 1965).

41. See, e.g., MONT. CODE ANN. § 45-8-104(1) (2009). Montana’s statute also explains that the act “may not include the mere oral or written advocacy of ideas or expression of belief that does not urge the commission of an act of immediate violence.”

promoting, or aiding [a riot],”<sup>42</sup> and New York makes it a crime when a person “urges” other people to commit the statutory definition of “riot.”<sup>43</sup> I group these statutes together because they do not on their faces define incitement or an equivalent term.<sup>44</sup>

A second, directly related incitement statute is the Federal Anti-Riot Act. The Federal Anti-Riot Act, enacted in 1968, bans interstate travel or the use of interstate commerce, including the mail, with intent to incite a riot and an overt act done for that purpose.<sup>45</sup> Like the first type of statute discussed above, the Federal Anti-Riot Act does not define incitement. But it differs from statutes that simply criminalize inciting to riot, because it requires the use of interstate commerce. Courts have addressed the Federal Anti-Riot Act in varying ways, and for the most part have upheld its constitutionality; I discuss these further below.

A third type of incitement-to-riot statute defines incitement on its face as including the clear and present danger test. A number of state legislatures have recognized that current First Amendment doctrine requires that for the speaker to be punished, the unlawful act must be imminent.<sup>46</sup> The Arkansas, California, Georgia, Kansas, and North Dakota statutes thus all contain language requiring that incitement create a clear and present danger of something, ranging from riot more generally, to physical harm caused by the riot.<sup>47</sup> The Arkansas statute, for example, states that a person commits the offense of inciting riot if he knowingly “urges others to participate in a riot under circumstances that produce a clear and present danger that they will participate in a riot.”<sup>48</sup> The Georgia statute similarly criminalizes urging others to riot “under circumstances which produce a clear and present danger of a riot . . . .”<sup>49</sup> Kansas criminalizes urging others to riot “under

42. S.C. CODE ANN. § 16-5-130 (2011).

43. N.Y. PENAL LAW § 240.08 (2012).

44. A number of state courts have recognized that to be constitutional, incitement must be defined in a way that conforms to Supreme Court doctrine. Thus, in New York, the court in *People v. Tolia* held that the elements of intent and “clear and present danger” must be read into the statute for the incitement-to-riot statute to be constitutional. In Louisiana, the court in *State v. Douglas* read in willfulness and immediacy. North Carolina clarified in *State v. Brooks* that only advocacy of imminent lawless action can come within the purview of the incitement to riot statute. An Oklahoma court recently held that criminalizing incitement to riot is constitutional if it is construed to apply to speech that meets the clear and present danger test. And a Tennessee court restricted the statute’s scope to conduct both directed at inciting and producing imminent lawless action, and likely to produce such action.

45. 18 U.S.C. § 2101 (2011).

46. See *Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969).

47. ARK. CODE ANN. § 5-71-203 (2012); CAL. PENAL CODE § 404.6 (West 2012); GA. CODE ANN. § 16-11-31 (2012); KAN. STAT. ANN. § 21-6201(b) (2011); N.D. CENT. CODE § 12.1-25-01 (2011).

48. ARK. CODE ANN. § 5-71-203.

49. GA. CODE ANN. § 16-11-31.

circumstances which produce a clear and present danger of injury to persons or property or a branch of the public peace.”<sup>50</sup>

A fourth kind of incitement to riot focuses on likelihood of a riot rather than imminence. Pennsylvania, which has common law incitement to riot, neglects to address how soon a riot might occur, but instead requires that it must be likely to occur as an outcome of the speech. A defendant is guilty of inciting a riot in Pennsylvania if the language used would naturally lead or urge other people to engage in conduct that would create a riot.<sup>51</sup>

Finally, some states criminalize incitement to riot only in the context of an already occurring riot, or a riot that is about to occur. For example, South Dakota and Virginia criminalize directing persons participating in a riot to commit acts of force or violence.<sup>52</sup> Colorado punishes inciting a group to “engage in a current or impending riot,” or giving commands “in furtherance of a riot.”<sup>53</sup>

States also vary in how they address requisite intent for incitement to riot. In California, one must intend to cause a riot.<sup>54</sup> It is not clear, however, that one has to intend for that riot to be imminent. By contrast, in Kansas, the inciter must only knowingly urge others to engage in riot, under circumstances that produce a clear and present danger of a breach of the public peace.<sup>55</sup> The inciter need not intend for the riot, or the resulting damage, to occur. Similarly, Montana’s statute requires purposely and knowingly committing an act that urges riot, rather than intending to urge riot.<sup>56</sup> This could penalize a person who knowingly sends out a tweet calling only for people to gather, if that gathering actually results in a riot. New York contains no intent requirement at all, penalizing urging to riot.<sup>57</sup> Georgia strangely requires that the speaker have intent to riot, not intent to urge others to riot.<sup>58</sup> Nevada criminalizes willfully publishing or knowingly circulating any book or other printed matter, in any form, inciting the commission of any crime.<sup>59</sup> This cannot be constitutional, since (1) the willfulness attaches to publication or circulation, rather than the incitement of the crime, and (2) there is no mention of imminence or likelihood at all. There are further First Amendment problems with this

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50. KAN. STAT. ANN. § 21-6201(b).

51. *Commonwealth v. Hayes*, 209 A.2d 38, 39 (Pa. Super. Ct. 1965).

52. S.D. CODIFIED LAWS § 22-10-6 (2011); VA. CODE ANN. § 18.2-408 (2011).

53. COLO. REV. STAT. § 18.9-102(1) (2012).

54. CAL. PENAL CODE § 404.6 (2011).

55. KAN. STAT. ANN. § 21-6201(b) (2011).

56. MONT. CODE ANN. § 45-8-104(1) (2009).

57. N.Y. PENAL LAW § 240.08 (2012).

58. GA. CODE ANN. § 16-11-31(a) (2012).

59. NEV. REV. STAT. § 203.040 (2011).

kind of liability for publishers.<sup>60</sup>

### *B. But What is a Riot?*

Examining these five kinds of incitement-to-riot statutes and the kind of intent they require gives a general idea of how broadly incitement to riot can vary. But it does not show the whole picture. If we limit the examination of incitement-to-riot statutes to the definition of the word incitement, in the way most courts have tended to address them,<sup>61</sup> we miss First Amendment problems that arise based on the underlying definition of riot.

The crime of riot in many states is not limited to large gatherings that cause destruction or harm. Riot often does not require a large group; many states operate on the common law idea that “three’s a crowd.” Additionally, in many states, riot is a crime that is already a step removed from any actual harm.

Inciting a riot differs from inciting somebody to rob a bank, because the definition of the underlying crime of riot has First Amendment implications as well. In many states, the definition of riot itself impinges on freedom of assembly. Additionally, inciting a riot differs from inciting somebody to rob a bank because the underlying definition of riot is often based on the creation of a risk or threat of harm, rather than physical damage. While inciting somebody to rob a bank can result in direct harm (the bank robbery), inciting a riot can mean that you spur others to in turn create a risk of harm, rather than harm itself.

Under an incitement-to-riot scheme based on this kind of riot statute, police would be empowered to go after a speaker for calling for a gathering that creates a risk of harm, rather than calling for a gathering the purpose of which is to harm somebody or something. The incitement-to-riot standard that defines riot as a gathering that creates a risk of harm allows police to conjecture, before a crowd is actually gathered, that a speaker will, by assembling a crowd, create a risk of harm. This gives too much leeway to the government in determining when a risk will or will not be created. As one federal court has noted, the “imminence of danger or of unlawful activity depends upon the *immediate* circumstances surrounding the expression, including the content of expression, size and makeup of the speakers and audience,

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60. See, e.g., *Winter v. G.P. Putnam’s Sons*, 938 F.2d 1033, 1036 (9th Cir. 1991). But see, e.g., *Rice v. Paladin Enters.*, 128 F.3d 233, 253 (4th Cir. 1997).

61. See, e.g., *People v. Tolia*, 214 A.D.2d 57, 63–64 (N.Y. App. Div. 1995); *State v. Douglas*, 278 So.2d 485, 487 (La. 1973); *State v. Brooks*, 215 S.E.2d 111, 117 (N.C. 1975); *Price v. State*, 873 P.2d 1049, 1051 (Okla. Crim. App. 1994).

and the sufficiency of the police presence.”<sup>62</sup> While it may be constitutional to allow police to stop the threat of harm created by an already existing crowd, it is not constitutional to allow them to arrest a speaker for intentionally calling for what police perceive to be a risky situation, rather than for calling for harm itself. I call this type of problem, where the underlying definition of riot is based on risk rather than harm, an attenuation problem, because the speaker’s speech and intent are several steps removed from any real physical danger.

This Part therefore begins discussion of incitement to riot by outlining the parameters of the legal definition of the underlying crime of riot. Where that definition is based on minor harm only, or a threat or risk of harm, it creates problems for criminalizing incitement to riot.

I begin by looking at the common law definition of riot and the associated crimes of unlawful assembly and rout. Then, I outline a classification system for assessing the different kinds of state riot laws and address the Model Penal Code’s definition of riot, which forms the basis for a number of state statutes. Finally, I discuss how the Federal Anti-Riot Act compares to state laws.

### 1. Common Law Riot

Rioting is punishable at common law,<sup>63</sup> although most states now have statutes to address it.<sup>64</sup> In England, the crime arose from at least four Parliamentary enactments promulgated in 1328, 1549, 1553, and 1714.<sup>65</sup>

In its earliest manifestations, riot was associated with treason, when the tumultuous activity of crowds threatened the King.<sup>66</sup> Over time, it became an offense against the public peace.<sup>67</sup> These origins are important because one of the fundamental problems with current riot statutes is the treatment of riot as an offense against the public peace rather than a crime involving actual violence or damage.

The common law typically required an assembly of only three people

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62. *KKK v. MLK Worshippers*, 735 F.Supp. 745, 749 (M.D. Tenn. 1990) (striking down a parade permit ordinance as unconstitutional because it allowed too much latitude for discriminatory denial of a permit, limiting denial to parades that create a “clear and present danger of imminent lawless activity” where the permit was applied for 45 days before the parade date).

63. *See, e.g., United States v. McFarlane*, 26 F. Cas.1088, 1088 (C.C.D.C. 1804).

64. *See Schlamp v. State*, 891 A.2d 327, 335 (Md. 2006) (describing the common law crime of riot).

65. *Id.* at 331 (citing REEVES, *HISTORY OF THE ENGLISH LAW* 487 (1829); WILLIAM BLACKSTONE, *LAWS OF ENGLAND* 146–48 (1769)).

66. *Id.*

67. *Id.*

for a riot, a surprisingly small number.<sup>68</sup> Riot was part of a trio of related escalating offenses. The first such offense was unlawful assembly; the second, rout; and the third, riot.<sup>69</sup> Blackstone defines unlawful assembly as an assembly “when three, or more, do assemble themselves together to do an unlawful act . . . .”<sup>70</sup> A rout occurs “where three or more meet to do an unlawful act . . . and make some advances towards it.”<sup>71</sup> A riot occurs “where three or more actually do an unlawful act of violence . . . or even do a lawful act . . . in a violent and tumultuous manner.”<sup>72</sup>

Most states now criminalize both “unlawful assembly” and “riot,” but no longer criminalize “rout.”<sup>73</sup> State legislative commentary indicates a slight variation on Blackstone’s taxonomy. Unlawful assembly proscribes assembly for the purpose of engaging in riot,<sup>74</sup> or with the intent to carry out a common purpose in such a manner as to cause nearby persons to fear a breach of the peace.<sup>75</sup> Rout consists of an act towards the unlawful purpose, without its completion.<sup>76</sup> Riot is the culmination of the two offenses, resulting in force and violence that threatens someone publicly.<sup>77</sup>

This definition of riot differs from Blackstone because it fails to mention the performance of a lawful act in a tumultuous manner. This variation is significant, because it is at the heart of the problem with many current riot statutes. As mentioned, riot, rout, and unlawful

68. MINN. STAT. ANN. § 609.705 advisory committee’s cmt. (West 1963) (citing 2 Wharton’s Criminal Law § 853 (1957)).

69. ALA. CODE § 13A-11-3 cmt. (2012) (explaining that “Alabama statutes are set out in traditional common law order: unlawful assembly (former § 13-6-220), rout (former § 13-6-221), and riot (former § 13-6-222).”); *see also* MINN. STAT. ANN. § 609.705 advisory committee’s cmt. (West 1963) (“The common law recognized three crimes: (1) unlawful assembly, (2) rout, and (3) riot.”); MONT. CODE ANN. § 45-8-103 criminal law commission cmt. (“The common-law misdemeanor, ‘unlawful assembly,’ was a gathering of three or more persons with the common purpose of committing an unlawful act. When an act was done toward carrying out this purpose, the offense was ‘rout.’ The actual beginning of the perpetration of the unlawful act became ‘riot.’”); *Schlamp*, 891 A.2d at 331 (“Unlawful assembly, rout, and riot covered a progression of activity.”).

70. BLACKSTONE, *supra* note 65, at 146.

71. *Id.*

72. *Id.*

73. *See, e.g.*, MINN. STAT. ANN. § 609.705 advisory committee’s cmt. (West 1963) (“Statutes now generally govern and rout has usually been eliminated as a separate crime”); MONT. CODE ANN. § 45-8-103 criminal law commission cmt.; *But see* CAL. PENAL CODE § 406 (West 2010) California still has rout as a common law crime.

74. N.Y. PENAL LAW § 240.10 cmt. (McKinney 2012).

75. MINN. STAT. ANN. § 609.705 advisory committee’s cmt. (West 1963).

76. *Id.* (“Rout was an assembly’s act toward putting its unlawful purpose into effect but not yet completing it.”); ALA. CODE § 13A-11-3 cmt. (2012) (rout contains “activity in furtherance of the plan which occurs between the unlawful assembly and riot, usually the physical movement of the potential rioters.”).

77. *E.g.*, MINN. STAT. ANN. § 609.705 advisory committee’s cmt.; ALA. CODE § 13A-11-3 cmt.



assembly were originally designed to protect the public peace. The public peace is defined as “that tranquility enjoyed by a community when good order reigns amongst its members.”<sup>78</sup> Common law alternatively refers to these offenses as offenses done *in terrorem populi*, offenses that create public terror.<sup>79</sup>

Because the original goal of regulating riot was to protect the public peace, riot under Blackstone’s definition includes acts that are not themselves unlawful, but that are executed “in a violent and turbulent manner to the terror of the people.”<sup>80</sup> This understanding has made its way into many state statutes. At least one court has decided that it is possible to have a riot even if no people are actually shown to be terrified, as long as the violent and turbulent acts tend to terrify the public.<sup>81</sup>

Common-law riot and many of its statutory derivatives are based on the idea that the government should be able to protect the public from fear. Large crowds often inherently cause fear or create disturbances. Courts have justified the regulation of riot by explaining that the presence of a large crowd can itself make an otherwise innocent action violate the public peace.<sup>82</sup> The threat of riot more generally arises “because of the plurality of actors and potential uncontrollability of a mob.”<sup>83</sup>

Thus, at the heart of the original definition of “riot” there lies a particular understanding of the nature of crowd action and the impact it can have. Assessing the size of a crowd for purposes of determining the potential for control (or lack thereof) by police or potential damage caused is likely constitutionally permissible. But assessing the size of a crowd for determining whether the public might fear it is not.

Viewed from a First Amendment perspective, the definition of riot founded on public peace is troubling. The creation of fear or public discomfort is often part of the goal of large gatherings and is an essential element of freedom of assembly. Assembly, in fact, works as a tool of expression because it often creates discomfort in the general public. Part VI(A) (on freedom of assembly) will return to this question of whether protection of the public peace is a constitutionally acceptable goal.

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78. MINN. STAT. ANN. § 609.705 advisory committee’s cmt. (citing non-Minnesota cases).

79. William Hawkins, A TREATISE OF THE PLEAS OF THE CROWN 515 (8th ed. 1824).

80. MINN. STAT. ANN. § 609.705 advisory committee’s cmt.

81. See, e.g., *Briscoe v. State*, 240 A.2d 109, 112–13 (Md. Ct. Spec. App. 1968).

82. See, e.g., *Commonwealth v. Donoghue*, 63 S.W.2d 3, 5 (Ky. App. 1933) (“[A] riot . . . derives its indictability from the plurality of persons concerned . . .”).

83. Clark & Marshall, A TREATISE ON THE LAW OF CRIMES § 9.09 (7th ed. 1967).

## 2. State Laws

Riot statutes are usually included within a statutory framework of related statutes aimed at penalizing the disruption of public order. In many states, the same statutory chapter frequently houses laws criminalizing disorderly conduct, fighting words,<sup>84</sup> and disruption or disturbance of a funeral service.<sup>85</sup> Many other statutes under these chapters have been found unconstitutional, such as the disorderly conduct statutes addressing breach of the peace.<sup>86</sup>

Despite the relatively clear common law origins of the crime of riot, state anti-riot laws differ substantially along a number of dimensions. Nobody has examined in detail what these differences entail, or what their significance might be under the First Amendment.<sup>87</sup>

First, states vary in how many people are required for an assembly to be considered a riot. Second, they vary greatly in what activity the assembly must engage in, from mere threats to actual violence. Third, states differ in the amount of injury or damage required. And fourth, they differ in the level of required knowledge or intent.

### *a. The Number of People Required*

One of the justifications for anti-riot measures is that actions or intentions that might not be harmful when performed by an individual are harmful when performed by a large group.<sup>88</sup> This is the reasoning behind an early Kentucky case that recognized that conspiracy to use violence in the context of a riot “derives its indictability from the plurality of persons concerned . . . .”<sup>89</sup> Many states, however, define the crime of riot as requiring only a small number of people. It cannot be the case that those state laws that define riot as involving as few as two or three people protect against harms specific to large gatherings, since they criminalize even small assemblies.

The minimum number of people required for an assembly to be considered a riot varies from a mere two people<sup>90</sup> to seven people.<sup>91</sup>

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84. See N.Y. PENAL LAW § 240.20 (McKinney 2012).

85. N.Y. PENAL LAW § 240.21 (McKinney 2012).

86. See, e.g., *Edwards v. South Carolina*, 372 U.S. 229, 234–35 (1963) (examining South Carolina’s definition of “breach of the peace” and finding it to be unconstitutionally broad).

87. To my knowledge, nobody has examined the substance of state anti-riot laws and how they differ. A 1985 American Law Report annotation compiled state cases to examine what constitutes sufficiently violent conduct to establish the crime of riot in state courts, but did not reach other elements of the crime, such as intent or the number of persons involved. See generally McMahon, *supra* note 8.

88. See *infra* Part IV(B).

89. *Commonwealth v. Donoghue*, 63 S.W.2d 3, 5 (Ky. App. 1933).

90. See, e.g., NEV. REV. STAT. § 203.020 (2011).

Four states require only two people for a gathering to eligible to be a riot.<sup>92</sup> The bulk of states require a minimum of three people under statute or at common law.<sup>93</sup> The next most prevalent requirement is a minimum of five people.<sup>94</sup> Four states require six people,<sup>95</sup> and only two states require at least seven people for a gathering to come within the purview of the riot law.<sup>96</sup> The small size of the required gatherings is interesting, and even surprising, because one justification for regulating riot, discussed above, is the understanding that a large crowd creates additional risk—either of harm, or of a breach of the peace. But two or three or even five people is not a large crowd.

One of the other ways in which riot statutes vary is the amount of harm required. The discrepancies in the number of people required for a riot might be understandable if states with lower numerical requirements criminalized the group's conduct only when it caused actual harm, while the states with higher numerical requirements penalized the larger group for creating a heightened risk of harm due to larger numbers. This would prevent smaller groups from being over-penalized for merely gathering. Massachusetts law provides an example of this type of reasoning: the state allows officials to disperse a group of five people if they are armed, and ten people if they are not armed.<sup>97</sup>

Unfortunately, most states do not follow this reasoning. Georgia penalizes the performance of a lawful act if it is done in a “violent and tumultuous manner,” even though Georgia requires only two people for

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91. *See, e.g.*, CONN. GEN. STAT. § 53a-175 (2012).

92. CAL. PENAL CODE § 404 (2012); GA. CODE ANN. § 16-11-30 (2012); 720 ILL. COMP. STAT. 5/25-1 (2012); NEV. REV. STAT. § 203.070 (2011).

93. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-2903 (2012); ARK. CODE ANN. § 5-71-201 (2012); DEL. CODE ANN. tit. 11, § 1302 (2012); IOWA CODE § 723.1 (2012); LA. REV. STAT. ANN. § 14:329.1 (2011); MINN. STAT. § 609.71 (2012); N.H. REV. STAT. ANN. § 644:1 (2012); N.C. GEN. STAT. § 14-288.2 (2012); OKLA. STAT. tit. 21, § 1311 (2012); 18 PA. CONS. STAT. ANN. § 5501 (2012); S.D. CODIFIED LAWS § 22-10-1 (2011); TENN. CODE ANN. § 39-17-301(3) (2012); VT. STAT. ANN. tit. 13 § 902 (2012); VA. CODE ANN. § 18.2-405 (2011); WASH. REV. CODE § 9A.84.010 (2011).

94. *See, e.g.*, D.C. CODE § 22-1322 (2012); IND. CODE ANN. § 35-45-1-2 (2012) (defining rioting as recklessly, knowingly, or intentionally engaging in tumultuous conduct while being a member of an “unlawful assembly,” defined in § 35-45-1-1 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”); KAN. STAT. ANN. § 21-6201 (2012); MONT. CODE ANN. § 45-8-103 (2011); N.J. STAT. ANN. § 2C:33-1 (2012); N.Y. PENAL LAW § 240.05 (McKinney 2012) (riot in the second degree); N.D. CENT. CODE § 12.1-25-01 (2011) (defining “riot,” criminalized in § 12.1-25-03); OHIO REV. CODE ANN. § 2917.03 (2011).

95. ALA. CODE § 13A-11-3 (2012); ALASKA STAT. ANN. § 11.61.100 (2012); HAW. REV. STAT. § 711-1103 (2012); ME. REV. STAT. ANN. tit. 17A, § 503 (2011).

96. CONN. GEN. STAT. § 53a-175 (2012); MO. REV. STAT. § 574.050 (2010).

97. MASS. GEN. LAWS ch. 269, § 1 (2012). By common law, Massachusetts requires the presence of three or more people for a riot. *See* Commonwealth v. Runnels, 10 Mass. 518, 520 (1813); Commonwealth v. Porter, 67 Mass. 476, 480 (1854); Commonwealth v. Gibney, 84 Mass. 150, 152 (1861).

a riot.<sup>98</sup> California, which also requires only two people for riot, penalizes any threat of force or violence, if accompanied by immediate power of execution.<sup>99</sup> Of the states that require two people for a riot, only one—Illinois—explicitly requires the actual use, rather than the threat of, illegal force or violence.<sup>100</sup> There is no recognition that the “gathering” of only two people probably does not exacerbate otherwise legal activity to the point of creating a heightened risk of harm, or even public terror.

Thus, even if one accepts the prevention of public fear as a constitutional goal (which I do not), penalizing a gathering of two people for performing a lawful act in a “tumultuous manner” cannot be justified by saying that crowd dynamics require more regulation than individual actions.

### *b. The Group’s Actions*

This brings us to a second dimension of riot statutes: variations in the nature of the activity the group must engage in for the gathering to be considered a riot. State anti-riot laws range from penalizing the use of force or violence, to penalizing creation of the risk of violence, to penalizing mere disorderly conduct.

A 1985 American Law Report annotation examined what conduct is required to establish the crime of riot. The annotation reviewed case law, but did not look at the underlying statutory language.<sup>101</sup> Nonetheless, its observations are useful as a starting point. The annotation observed that some courts require that alleged acts must be unlawful.<sup>102</sup> Other courts established two kinds of riot: those consisting of unlawful acts and those consisting of lawful acts done in a violent and tumultuous manner.<sup>103</sup> Some courts required both tumult and violence,<sup>104</sup> while others noted that the strength of defendants’ numbers made it unnecessary to show even noise, boisterousness, or tumult.<sup>105</sup>

The statutes themselves clarify these standards. State anti-riot statutes require one of the following for a gathering to be considered a riot: the use of force or violence, engagement in “tumultuous and violent

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98. GA. CODE ANN. § 16-11-30 (2012).

99. CAL. PENAL CODE § 404(a) (2012).

100. 720 ILL. COMP. STAT. 5/25-1(a) (2012).

101. McMahon, *supra* note 8, § 1[a] (noting that “[s]ince relevant statutes are included only to the extent that they are reflected in the reported cases within the scope of this annotation, the reader is advised to consult the latest enactments of pertinent jurisdictions.”).

102. *Id.* § 4[a].

103. *Id.* § 4[b].

104. *Id.* § 5[a].

105. *Id.* § 5[b].

conduct,” participation in disorderly conduct, the threat of force or violence, or the threat of tumultuous and violent conduct.

Only a handful of state laws define riot as involving, at minimum, the actual use of force or violence by the gathered group. Virginia bans assembly with the “unlawful use . . . of force or violence which seriously jeopardizes the public safety, peace or order . . . .”<sup>106</sup> Missouri bans the group violation of any criminal law with force or violence.<sup>107</sup> Iowa bans groups “assembled together in a violent manner, to the disturbance of others, and with any use of unlawful force or violence by them or any of them . . . .”<sup>108</sup>

A number of states define riot not as requiring the use of force and violence, but as involving group engagement in “tumultuous and violent conduct.”<sup>109</sup> It is not entirely clear what this means. It may just be another way of describing the use of force and violence, or it might describe the lesser misdeed of being an unruly crowd.

For example, at one end of the spectrum, Indiana understands tumultuous conduct as the use of actual force or violence, defining it as conduct that results in or is likely to result in serious bodily injury to a person or substantial property damage.<sup>110</sup> At the other end of the spectrum, Connecticut appears to understand tumultuous conduct as frightening conduct rather than physically harmful conduct, penalizing riot in the first degree where the use of tumultuous conduct recklessly causes or creates a grave risk of public alarm.<sup>111</sup> Maryland courts similarly penalize assembling “in such a violent or turbulent manner as to terrify others.”<sup>112</sup>

The statutory use of “force and violence” may initially have been understood not to be referring to physical force, and thus was synonymous with “tumultuous conduct.” For example, when the Virginia statute bans the unlawful use of force or violence that seriously jeopardizes the public peace, it may in fact be referring to disorderly conduct and not force as we traditionally understand it. A 1920 case in Massachusetts, *Commonwealth v. Frishman*, explained that “[i]f

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106. VA. CODE ANN. § 18.2-405 (2012).

107. MO. REV. STAT. § 574.050 (2012).

108. IOWA CODE § 723.1 (2012).

109. See ALA. CODE § 13A-11-3(a) (2012); ALASKA STAT. § 11.61.100(a) (2012); ARK. CODE ANN. § 5-71-201(a) (2012); IND. CODE § 35-45-1-2 (2012); MASS. GEN. LAWS ch. 269, § 1 (2012); NEV. REV. STAT. § 203.070 (2011); N.D. CENT. CODE § 12.1-25-01 (2011); TENN. CODE ANN. § 39-17-301(3) (2012); *Cohen v. State*, 195 A. 532, 534 (Md. 1937).

110. IND. CODE § 35-45-1-1 (2012) (defining “Tumultuous Conduct” as “conduct that results in, or is likely to result in, serious bodily injury to a person or substantial damage to property”).

111. CONN. GEN. STAT. § 53a-175(a) (2012) (“A person is guilty of riot in the first degree when simultaneously with two 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.”).

112. *Cohen*, 195 A. at 534.

defendants were acting in concert with others for a common unlawful purpose, that is, by force and violence to march or parade on a public street without permission . . . it was not necessary, to constitute a riot, that all should commit some physical act.”<sup>113</sup> In Massachusetts at least, the mere disorderly gathering of the group, with a physical act by one or more member of the group, is sufficient to constitute a riot, even when “force or violence” is a statutory element of the crime.

Several state anti-riot laws mirror the Model Penal Code by banning group participation in a “course of disorderly conduct.” However, those states add an intentionality requirement to the action so that they do not ban disorderly conduct alone. Instead, they require that the disorderly conduct be performed with the intent to do something, such as commit a felony,<sup>114</sup> commit or facilitate a misdemeanor,<sup>115</sup> intimidate an official, or obstruct a function of government.<sup>116</sup> These states also ban group participation in disorderly conduct, where a participant uses or plans to use a firearm or other deadly weapon, or knows that another participant plans to use a weapon.<sup>117</sup>

A surprising number of states penalize the mere threat of force or violence, rather than actual force or violence.<sup>118</sup> In Arizona, California, Kansas, and Oklahoma, that threat must be accompanied by the immediate power of execution, but there is no requirement that execution in fact be likely.<sup>119</sup> For example, the Arizona statute defines riot as including when a “person . . . threatens to use force or violence, if such threat is accompanied by immediate power of execution, which disturbs the public peace.”<sup>120</sup> In California and Minnesota, the force that is being threatened must also be unlawful.<sup>121</sup> In Minnesota, the requirement of immediate power of execution of such a threat has been read into the statute by courts.<sup>122</sup> In Washington and Minnesota, the threatened use of force must be against another person or property.<sup>123</sup>

Three states penalize the threat of tumultuous and violent conduct

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113. 126 N.E. 838, 840 (Mass. 1920).

114. *See, e.g.*, 18 PA. CONS. STAT. ANN. § 5501.

115. *See, e.g., id.*

116. *See, e.g.*, OHIO REV. CODE ANN. § 2917.03(A)(1)–(3).

117. *See, e.g.*, DEL. CODE ANN. tit. 11, § 1302 (2012).

118. ARIZ. REV. STAT. ANN. § 13-2903 (2012); CAL. PENAL CODE § 404 (2012); KAN. STAT. ANN. § 21-6201 (2012); MINN. STAT. § 609.71 (2012); MONT. CODE ANN. § 45-8-103 (2011); OKLA. STAT. tit. 21, § 1311 (2012); S.D. CODIFIED LAWS § 22-10-1 (2011); WASH. REV. CODE § 9A.84.010 (2011).

119. ARIZ. REV. STAT. ANN. § 13-2903; CAL. PENAL CODE § 404(a); KAN. STAT. ANN. § 21-6201(a)(2); OKLA. STAT. tit. 21, § 1311.

120. ARIZ. REV. STAT. ANN. § 13-2903.

121. CAL. PENAL CODE § 404(a); MINN. STAT. § 609.71.

122. *State v. Winkels*, 283 N.W. 763, 764 (Minn. 1939).

123. *See* WASH. REV. CODE § 9A.84.010(1).

instead of a threat of force or violence.<sup>124</sup> However, these states require that the threat of tumultuous and violent conduct create a clear and present danger (or grave danger) of “injury or damage” to persons or property.<sup>125</sup>

*c. The Injury or Damage Required*

States vary in how many people are required for a riot—from two to seven—and what those people must do once assembled—from threatening tumultuous conduct, to engaging in disorderly conduct, to committing physical violence. The next dimension across which states vary is in the kind of injury or damage required from the group conduct, if any.

State requirements range from a risk of disturbance to the public peace, to the actual disturbance of the public peace, to physical injury and property damage. The damage requirement is perhaps the most important distinction between riot statutes, because it indicates whether the statute is based on preventing a breach of the public peace or on preventing harm to other people or property.

Starting with the highest bar to prosecution, at least two states require physical injury or property damage. In New York, riot in the first degree requires “physical injury or substantial property damage” to result from tumultuous and violent conduct causing a risk of public alarm.<sup>126</sup> In Iowa, the use of unlawful force or violence must be against another person or cause property damage.<sup>127</sup> Virginia penalizes the unlawful use of force or violence that “seriously jeopardizes the public safety, peace or order.”<sup>128</sup> Even though Virginia does not explicitly state that it requires injury or damage, it might be implied because it requires the use of force or violence. But as discussed above, “force or violence” under common law sometimes in fact means disorderly conduct. One hopes that a current court would interpret the phrase more strictly to

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124. D.C. CODE § 22-1322(a) (2012); LA. REV. STAT. ANN. § 329.1 (2011); N.C. GEN. STAT. § 14-288.2(a) (2011) (penalizing “disorderly and violent conduct”).

125. D.C. CODE § 22-1322(a) (2012); LA. REV. STAT. ANN. § 329.1 (2011); N.C. GEN. STAT. § 14-288.2(a) (2011).

126. N.Y. PENAL LAW § 240.06 (2012) (a person is guilty of riot in the first degree when he “[s]imultaneously with ten or more other persons, engages in tumultuous and violent conduct and thereby intentionally or recklessly causes or creates a grave risk of causing public alarm, and in the course of and as a result of such conduct, a person other than one of the participants suffers physical injury or substantial property damage occurs”).

127. IOWA CODE § 723.1 (2012) (“A riot is three or more persons assembled together in a violent manner, to the disturbance of others, and with any use of unlawful force or violence by them or any of them against another person, or causing property damage.”).

128. VA. CODE ANN. § 18.2-405 (2012) (“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.”).

mean actual physical violence.

Several courts have agreed, however, that neither property damage nor personal injury is necessary for a conviction for riot.<sup>129</sup> Some states require only the creation of a risk of physical injury or property damage, while others require even less: a threat of injury or damage, without a likelihood that the threat will actually be executed. The last category of statutes requires no risk of damage or threat of damage—just a risk of public alarm.

A number of states do not require that the group actually cause damage; rather it must only create a *danger* of physical injury or property damage.<sup>130</sup> Some of these laws require likelihood of damage to person or property;<sup>131</sup> others require a substantial risk of damage;<sup>132</sup> others require a “grave danger” of damage;<sup>133</sup> and others require a clear and present danger of damage.<sup>134</sup>

Several states do not require damage or a risk of damage. These states require that the group disturb public peace through a threat of force or violence without a requirement that the threat be likely to be acted on. Thus, although at first reading these statutes may look like they require force and violence, they in fact require only an actionable threat that disturbs the public peace. Arizona penalizes a threat of force or violence that disturbs the public peace when that threat is accompanied by immediate power of execution.<sup>135</sup> But Arizona does not state that the threat must in fact be likely to be acted on, or must cause a reasonable fear of bodily harm.<sup>136</sup> Minnesota similarly criminalizes the disturbance of the public peace by a “threat of unlawful force or violence to person or property.”<sup>137</sup> Courts in Minnesota have added in a requirement that the threatener have the immediate power of execution, though like Arizona they did not add the requirement that it

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129. See McMahon, *supra* note 8, § 3[a].

130. See ALASKA STAT. § 11.61.100(a) (2012); D.C. CODE § 22-1322(a) (2012); LA. REV. STAT. ANN. § 329.1 (2011); N.C. GEN. STAT. § 14-288.2(a) (2011); N.D. CENT. CODE § 12.1-25-01 (2011); TENN. CODE ANN. § 39-17-301(3) (2012).

131. IND. CODE § 35-45-1-1 (2012) (defining “Tumultuous Conduct” as “conduct that results in, or is likely to result in, serious bodily injury to a person or substantial damage to property”).

132. ALASKA STAT. § 11.61.100(a).

133. D.C. CODE § 22-1322(a); N.D. CENT. CODE § 12.1-25-01; TENN. CODE ANN. § 39-17-301(3).

134. LA. REV. STAT. ANN. § 329.1; N.C. GEN. STAT. § 14-288.2(a). MONT. CODE ANN. § 45-8-103(1) (2011) (prohibits disturbing the public peace by threatening to commit an act of violence, where that threat presents a clear and present danger of damage to property or injury to persons).

135. ARIZ. REV. STAT. ANN. § 13-2903 (2012) (“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.”).

136. See *Virginia v. Black*, 538 U.S. 343, 360 (2003).

137. MINN. STAT. § 609.71 (2012).



be likely that the threat will be acted on and damage will in fact be done.<sup>138</sup>

A number of states penalize group actions that create only a risk of public alarm.<sup>139</sup> In Arkansas and New Hampshire, the risk of public alarm must be “substantial,”<sup>140</sup> but this does not mitigate the problem. Because they are so problematic, these statutes are outlined individually below.

In Arkansas, a “person commits the offense of riot if, with two (2) or more other persons, he or she knowingly engages in tumultuous or violent conduct that creates a substantial risk of: (1) Causing public alarm,” among other things.<sup>141</sup> In Arkansas, a person can be penalized under this riot statute by being part of a three-person gathering and knowingly engaging in tumultuous conduct that creates a risk of public alarm.

In Alabama, 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.”<sup>142</sup> On a facial reading, this statute criminalizes gathering as a six-person group, and “wrongfully” engaging in “tumultuous and violent” conduct, recklessly creating a grave risk of public alarm. A 1981 Alabama criminal case narrowed the scope of this statute slightly by explaining that “tumultuous and violent conduct” means more than loud noise or disturbance, describing such conduct as ominous threats of injury, stone throwing, or other terrorizing acts.<sup>143</sup> The court also explained, however, that the statute requires only conduct that causes a grave risk of terror, and where the nature of the conduct is calculated to cause terror it may be a riot even if only one person was in fact terrified.

In Connecticut, a “person is guilty of riot in the first degree when simultaneously with six 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.”<sup>144</sup> This is potentially more

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138. *See* *State v. Winkels*, 283 N.W. 763, 764 (Minn. 1939).

139. ALA. CODE § 13A-11-3(a) (2012); ARK. CODE ANN. § 5-71-201(a)(1) (2012); CONN. GEN. STAT. § 53a-175(a) (2012); N.H. REV. STAT. ANN. § 644:1(2012); N.Y. PENAL LAW § 240.05 (McKinney 2012).

140. ARK. CODE ANN. § 5-71-201(a)(1); N.H. REV. STAT. ANN. § 644:1.

141. ARK. CODE ANN. § 5-71-201(a)(1).

142. ALA. CODE § 13A-11-3(a).

143. *Campbell v. City of Birmingham*, 405 So.2d 65, 67 (Ala. Crim. App. 1981). The court noted that a lawful assembly may become an unlawful assembly due to a concerted intention to break the peace. *Id.* at 68.

144. CONN. GEN. STAT. § 53a-175(a); N.Y. PENAL LAW § 240.05 (“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

encompassing than the Arkansas statute, because it requires only recklessness rather than knowledge. New York has a similar riot statute. However, like the Alabama statute, the Connecticut and New York statutes link “tumultuous *and* violent conduct” where the Arkansas statute describes them as distinct things: “tumultuous *or* violent.” Remember that riot in the first degree in New York does contain a requirement of “physical injury or substantial property damage,” implying that riot in the second degree does not.

In New Hampshire, a person is guilty of riot if “he engages in tumultuous or violent conduct and thereby purposely or recklessly creates a substantial risk of causing public alarm.”<sup>145</sup> New Hampshire courts have recognized that this statute is problematic, and read into the statute a requirement that the crowd intentionally embark on concerted criminal (unlawful) action.<sup>146</sup> The statute could not apply to peaceable assemblies with minor incidental breaches of law by some of the participants.<sup>147</sup>

This final category of damage—a risk of public alarm—is the most problematic category, because of the tension between freedom of assembly and public fear. Whether these statutes are unconstitutional violations of freedom of assembly likely depends on how “tumultuous and violent conduct” is defined. Part VI(A) (freedom of assembly section) addresses this further.

#### *d. The Level of Knowledge or Intent*

The last significant variation in state riot statutes is the variation in the level of knowledge or intent required by participants. A number of states have no mention of the level of intent required, so the presumption is that the required intent is recklessness.<sup>148</sup> Several states explicitly require only recklessness.<sup>149</sup> On the other hand, a number of states require action “with intent” or “with purpose.” For example, the category of states that require only disorderly conduct require that disorderly conduct be committed with the intent to commit a felony, or

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alarm.”).

145. N.H. REV. STAT. ANN. § 644:1 (2012).

146. *See* State v. Albers 303 A.2d 197, 201 (N.H. 1973) (decided under prior law).

147. *Id.*

148. *See, e.g.,* ALASKA STAT. § 11.61.100(a) (2012); KAN. STAT. ANN. § 21-6201 (2012). *See* MODEL PENAL CODE §2.02(3) (2011) (“When the culpability sufficient to establish a material element of an offense is not prescribed by law, such element is established if a person acts purposely, knowingly or recklessly with respect thereto.”).

149. *See* ARIZ. REV. STAT. ANN. § 13-2903 (2012); ALA. CODE § 13A-11-3(a) (2012); CONN. GEN. STAT. § 53a-175(a); 720 ILL. COMP. STAT. 5/25-1(a) (2012); IND. CODE § 35-45-1-2 (2012); N.H. REV. STAT. ANN. § 644:1; N.Y. PENAL LAW § 240.05.

commit or facilitate a misdemeanor, or prevent or coerce official action.<sup>150</sup>

A number of states require knowledge. Tennessee penalizes a person “who knowingly participates in a riot.”<sup>151</sup> Washington penalizes a person who knowingly uses or threatens to use force.<sup>152</sup> Arkansas confusingly penalizes knowingly engaging in tumultuous or violence conduct that creates a substantial risk of one of three outcomes; but it is not clear if the knowledge must extend to the outcome, or only the participation in the tumultuous conduct.<sup>153</sup> And the above-mentioned category of states that penalize disorderly conduct with intent also penalize disorderly conduct with mere knowledge where that knowledge is that a participant plans to use a firearm or other deadly weapon.<sup>154</sup>

In some states, the riot statute makes it explicit that the intent must be shared by the whole group. In Georgia, for example, participants in a riot must have a shared intent to do an unlawful act of violence, or some other act in a violent and tumultuous manner.<sup>155</sup> In South Dakota, participants must be “acting together.”<sup>156</sup> In Louisiana, persons must be acting together or in concert.<sup>157</sup> Maryland requires that participants be “assembled to carry out a common purpose.”<sup>158</sup> These joint intent questions go to the issues raised by the Supreme Court in *NAACP v. Claiborne*,<sup>159</sup> on whether a person can be liable for actions of the group as a whole. Presumably, *NAACP* requires shared intent in order for one individual in a group to be liable for the actions of another individual.

### 3. Model Penal Code

Under the Model Penal Code, a person is guilty of riot “if he participates with [two] or more others in a course of disorderly conduct: (a) with purpose to commit or facilitate the commission of a felony or misdemeanor; (b) with purpose to prevent or coerce official action; or (c) when the actor or any other participant to the knowledge of the actor uses or plans to use a firearm or other deadly weapon.”<sup>160</sup> A number of

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150. DEL. CODE ANN. tit. 11, § 1302 (2012); HAW. REV. STAT. § 711-1103(1) (2012); N.J. STAT. ANN. § 2C:33-1 (2011); 18 PA. CONS. STAT. ANN. § 5501 (2012).

151. TENN. CODE ANN. § 39-17-302(a) (2012).

152. WASH. REV. CODE § 9A.84.010(1) (2011).

153. ARK. CODE ANN. § 5-71-201(a) (2012).

154. See, e.g., HAW. REV. STAT. § 711-1103(1)(b); 18 PA. CONS. STAT. ANN. § 5501.

155. GA. CODE ANN. § 16-11-30 (2012).

156. S.D. CODIFIED LAWS § 22-10-1 (2012).

157. LA. REV. STAT. ANN. § 329.1 (2011).

158. *Cohen v. State*, 195 A. 532, 534 (Md. 1937).

159. 458 U.S. 886 (1982).

160. MODEL PENAL CODE § 250.1 (2011).

states have adopted the Model Penal Code's formulation essentially verbatim,<sup>161</sup> or with only small changes.<sup>162</sup>

Disorderly conduct itself is an offense under the Model Penal Code, under section 250.2. Its definition includes acting with a purpose "to cause substantial harm or serious inconvenience" after reasonable warning or request to desist.<sup>163</sup> So, to commit riot under the Model Penal Code and statutes based on the Model Penal Code, one must engage in tumultuous behavior that recklessly creates a risk of public inconvenience, with the purpose of committing a felony or misdemeanor, or with the purpose of preventing or coercing official action, or with the knowledge that another participant plans to use a deadly weapon.

#### 4. The Federal Anti-Riot Act

In 1968, one year before *Brandenburg* was decided, Congress enacted the Federal Anti-Riot Act.<sup>164</sup> The Anti-Riot Act differs from state riot laws in that it does not criminalize rioting itself. Instead, it criminalizes interstate travel or the use of interstate commerce, including the use of mail, telephone, or radio, with intent to do one of four things: (A) incite a riot; (B) organize, promote, encourage, participate in, or carry on a riot; (C) commit any act of violence in furtherance of a riot; or (D) aid or abet any person in inciting, participating in, or carrying on a riot, with an overt act for that purpose.<sup>165</sup>

Despite the fact that federal law does not criminalize rioting itself, it does define "riot."<sup>166</sup> Consistent with the common law definition, Congress defined "riot" as a public disturbance involving an assemblage of three or more persons.<sup>167</sup> To be a riot, that public disturbance must involve either an act of violence or a threat of the commission of an act of violence.<sup>168</sup> For a threat of violence to constitute riot, the group of people must individually or collectively have the ability to immediately execute the threat with actual violence.<sup>169</sup> That act of violence must in turn either result in damage or pose a clear and present danger of

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161. See, e.g., DEL. CODE ANN. tit. 11, § 1302 (2012); 18 PA. CONS. STAT. ANN. § 5501 (2012).

162. See, e.g., ME. REV. STAT. ANN. tit. 17A, § 503 (2011) (excluding from the definition of riot disorderly conduct with purpose to prevent or coerce official action).

163. MODEL PENAL CODE § 250.2 (2011).

164. 18 U.S.C. §§ 2101, 2102 (2011).

165. 18 U.S.C. § 2101.

166. See 18 U.S.C. § 2102.

167. 18 U.S.C. § 2102(a).

168. *Id.*

169. *Id.* § 2102(a)(2).

damage or injury.<sup>170</sup>

This definition, like many of the state law definitions of riot, contains both a clearly unproblematic description of riot and a more problematic version. One can imagine an unproblematic scenario involving three or more people assembling to create a public disturbance involving an act of violence that damages or injures property or a person. The more problematic scenario involves three or more people creating a public disturbance by threatening to commit an act of violence that would not actually damage anything or anyone but could create a clear and present danger of damage. The threat must be backed up by at least one person's ability to immediately execute it. However, the statute says nothing about the intent of the other members of the group if only one person is making the threat, and it says nothing about the likelihood that the violence would be committed, only the individual's ability to carry it out.

This definition of riot is made more problematic by the fact that what federal law actually bans is not the riot itself, but interstate travel or interstate communication with intent to incite a riot, organize a riot, or aid and abet a person in inciting a riot. A number of courts have considered the constitutionality of the Anti-Riot Act; these cases will be discussed below.<sup>171</sup>

### *C. Examples of Potentially Problematic Statutes and Statutory Schemes*

The potential constitutional problems with incitement to riot occur on three planes. The first is in the definition of incitement, where the statute might not contain an adequate definition of the elements of incitement, or any definition at all. The Supreme Court in *Brandenburg* explained that for a state to constitutionally criminalize incitement to an unlawful action, the speech must be "directed to inciting or producing imminent lawless action and [be] likely to incite or produce such action."<sup>172</sup> Many states do not include these requirements. The second potential constitutional problem is in the definition of riot, which might itself violate freedom of assembly. And the third occurs as a combination of the two statutes: where incitement to riot might present a statutory scheme in which speech is attenuated from actual harm. The third problem leads to two key questions about *Brandenburg*: first, whether it applies to "lawless" action, or to harmful action, and second, how the imminence standard applies to a harm that itself contains an

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170. *Id.* § 2102(a)(1)–(2).

171. *See* Part VI(E), *infra*.

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

imminence standard.<sup>173</sup>

### 1. Incitement Definition Problem

Kentucky's incitement-to-riot statute is an example of a statute that fails to include any definition of the term "incitement," and thus fails to include on its face the First Amendment's requirements. The Kentucky statute states that a "person is guilty of inciting to riot when he incites or urges five (5) or more persons to create or engage in a riot."<sup>174</sup> There is no mention of imminence, likelihood, or intent. In fact, Kentucky goes further than many states, and is explicit in the legislative history that it does not require even a clear and present danger test. The 1974 Kentucky legislative commentary explains that "urging creates a grave danger of property damage, personal injury, or substantial obstruction of governmental function. It is felt that this standard protects the freedom of speech without allowing the situation to develop to the point where there is a clear and present danger of riot."<sup>175</sup>

Note that the Federal Anti-Riot Statute, like Kentucky, also does not on its face contain any of the elements of "incitement" required by the First Amendment.

### 2. Riot Might Violate Freedom of Assembly

Arkansas's riot statute is an example of a statute that may violate freedom of assembly because it penalizes tumultuous conduct that causes public alarm, rather than physically violent conduct that causes physical harm. In Arkansas, "a person commits the offense of riot if, with two (2) or more other persons, he or she knowingly engages in tumultuous or violent conduct that creates a substantial risk of . . . causing public alarm," among other things.<sup>176</sup> Courts in New Hampshire narrowed a similar statute to intentional criminal action, recognizing the problems in the breadth of the definition.<sup>177</sup>

A second type of riot statute that might present problems for freedom of assembly is the kind regarding threats of violence rather than violence itself. Arizona penalizes a threat of force or violence that disturbs the public peace when that threat is accompanied by immediate power of

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173. The transferability of imminence is at issue in the Federal Anti-Riot Act cases.

174. KY. REV. STAT. ANN. § 525.040(1) (2012).

175. KY. REV. STAT. ANN. § 525.040 LRC committee's cmt. (1974).

176. ARK. CODE ANN. § 5-71-201(a)(1) (2012).

177. See N.H. REV. STAT. ANN. § 644:1 (2012); *State v. Albers*, 303 A.2d 197, 201 (N.H. 1973) (decided under prior law).

execution.<sup>178</sup> In 1976, an Arizona court found this definition neither vague nor overbroad.<sup>179</sup> The question presented is whether “peaceable assembly” means assembly that is not violent (an assembly where violence is merely threatened is not in fact yet a violent assembly), or assembly that does not even threaten violence. This is actually somewhat of an open question under Supreme Court doctrine.

### 3. The Combination of Incitement and Riot Attenuates from Actual Harm

The third type of problematic statute creates an additional layer of attenuation between the call for action and any actual harm. There are four types of harm attenuation that result from combining incitement to riot with the different underlying definitions of riot. The problem arises because of the combined statutory scheme, not necessarily because either element is itself unconstitutional.

The first type of attenuation occurs when riot is defined to include a threat of harm. The second type occurs when riot is defined as creating a risk of harm. The third type is when riot is defined as causing public alarm (which, as mentioned, is itself likely an unconstitutional violation of freedom of assembly). The fourth type of attenuation concerns the Model Penal Code scheme, which defines riot as disorderly conduct with intent.

Attenuation is problematic because it requires guesswork by the government about the potential risk in a situation that does not yet exist. The crime of inciting a group to commit violence is potentially worth preventing. But when a person calls for a group to gather and police are asked to determine if the call creates a risk of harm, that gives too much discretion to police, because without an actual gathering they lack the necessary information about whether the risk will be real—including the adequacy of police presence, the number of people present, and the rowdiness of the actual crowd.

#### *a. Riot Based on a Threat of Harm*

Four states have an underlying definition of riot based on creating a threat of harm, rather than harm itself: Kansas, Louisiana, Montana, and

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178. ARIZ. REV. STAT. ANN. § 13-2903 (2012) (“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.”).

179. *See* State v. Urias, 553 P.2d 1230, 1232 (Ariz. Ct. App. 1976).

North Carolina.<sup>180</sup> Of these states, Louisiana's statute is perhaps the best bad example, since the other states have attempted to mitigate the damage.<sup>181</sup>

Louisiana defines inciting to riot as follows: "Inciting to riot is the endeavor by any person to incite or procure any other person to create or participate in a riot."<sup>182</sup> A court read in the requirement that incitement to riot include both willfulness and immediacy.<sup>183</sup> The underlying definition of riot in Louisiana 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.<sup>184</sup>

Read in the most problematic way, this statute criminalizes an assemblage which by the imminent threat of tumultuous and violent conduct creates a clear and present danger of injury or damage to persons or property. So inciting to riot in Louisiana, without further narrowing by courts, can consist of wilfully inciting an imminent assembly to an imminent threat of tumultuous conduct that itself creates a clear and present danger of damage. The three levels of imminence—the assembly is imminent, the threat of tumultuous conduct is imminent, and the danger of damage posed by the threat is imminent (or clear and present)—mean that the actual call for action is three imminences removed from real damage. Louisiana courts have upheld this definition

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180. See KAN. STAT. ANN. § 21-6201(b) (2011); LA. REV. STAT. ANN. § 329.2 (2011); MONT. CODE ANN. § 45-8-104(1) (2009); N.C. GEN. STAT. § 14-288.2 (2011).

181. Kansas bans incitement to riot "under circumstances which produce a clear and present danger of injury to persons or property or a branch of the public peace." KAN. STAT. ANN. § 21-6201(b). The Montana legislature tried to limit the Montana incitement statute's scope by explaining that the "act or conduct may not include the mere oral or written advocacy of ideas or expression of belief that does not urge the commission of an act of immediate violence." MONT. CODE ANN. § 45-8-104(1). This sentence may be adequate to make Montana's laws constitutional if the requirement that incitement "urge the commission of an act of immediate violence" apply to all incitement, not just "mere oral or written advocacy of ideas or expression of belief," because a person calling for an assembly is not merely advocating ideas or expressing a belief. See *id.* North Carolina's incitement law requires that the riot have actually resulted in property damage or personal injury, but contains no language requiring that the inciter have intended that damage to be caused when he or she incited the riot. See N.C. GEN. STAT. § 14-288.2(e) ("Any person who willfully incites or urges another to engage in a riot, and such inciting or urging is a contributing cause of a riot in which there is property damage in excess of fifteen hundred dollars (\$1,500) or serious bodily injury, shall be punished as a Class F felon."). A North Carolina case, *State v. Brooks*, reads a requirement that the inciter advocate imminent lawless action into North Carolina's incitement statute, but again riot itself can be considered lawless action so this does not mitigate the problem caused by defining riot as including threats. See 215 S.E.2d 111, 118 (N.C. 1975).

182. LA. REV. STAT. ANN. § 329.2 (2011).

183. *State v. Douglas*, 278 So.2d 485, 487 (La. 1973).

184. LA. REV. STAT. ANN. § 329.1 (2011).



despite overbreadth and vagueness challenges.<sup>185</sup>

*b. Riot as a Risk of Harm*

The second type of attenuation from harm occurs when the underlying riot statute contains a definition of riot that encompasses the creation of a risk of harm. Colorado, Kentucky, Arkansas, and Tennessee all include risk of some kind of harm in their definition of riot.<sup>186</sup>

In Tennessee, riot is “a disturbance in a public place . . . involving an assemblage of three (3) or more persons 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 . . . .”<sup>187</sup> A person who incites a riot simply “incites or urges three (3) or more persons to create or engage in a riot.”<sup>188</sup> A Tennessee court found this statute not overbroad, construing it to cover only conduct directed to inciting or producing imminent lawless action. But this ignores the underlying problem with defining riot itself as risk-based. If “riot” is lawless action, then inciting riot would be constitutional under this standard, no matter the definition of riot, and notwithstanding any attenuation.<sup>189</sup>

*c. Riot as Public Alarm or a Risk of Public Alarm*

As discussed, a number of states define riot as the creation of public alarm or a risk of public alarm. Arkansas penalizes “the offense of riot if, with two (2) or more other persons, he or she knowingly engages in tumultuous or violent conduct that creates a substantial risk of: (1) Causing public alarm . . . .”<sup>190</sup> Incitement to riot in Arkansas is defined as “knowingly: (1) [b]y speech or conduct urg[ing] others to participate in a riot under circumstances that produce a clear and present danger that they will participate in a riot . . . .”<sup>191</sup> Leaving aside for a moment

185. *Douglas v. Pitcher*, 319 F. Supp. 706, 713 (E.D. La. 1970).

186. *See* COLO. REV. STAT. § 18-9-102(1); *see also* *People v. Bridges*, 620 P.2d 1, 4 (Colo. 1980); KY. REV. STAT. ANN. § 525.040, LRC committee’s cmt. (1974) (“‘Riot’ is defined as 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 government function.”); ARK. CODE ANN. § 5-71-201 (2012); TENN. CODE ANN. § 39-17-304(a).

187. TENN. CODE ANN. § 39-17-301(3) (2012).

188. TENN. CODE ANN. § 39-17-304(a).

189. *See* *Original Fayette Cnty. Civic & Welfare League, Inc. v. Ellington*, 309 F. Supp. 89, 94 (W.D. Tenn. 1970).

190. ARK. CODE ANN. § 5-71-201(a)(1).

191. ARK. CODE ANN. § 5-71-203 (2012).

the fact that the underlying riot statute might violate freedom of assembly, the statutory scheme of incitement to riot penalizes a gathering of three or more people that creates a clear and present danger that the group will knowingly engage in tumultuous conduct that itself creates a risk of causing public alarm.

#### *d. Model Penal Code Riot*

The fourth problematic category of incitement statutes are those based on the Model Penal Code definition of riot, which penalizes disorderly conduct with the intent to commit a felony or intent to prevent or coerce official action. Criminalizing incitement to this kind of riot is troubling because of *Brandenburg*'s requirement of the inciter's intent. This creates a nesting, not of speech acts, but of intent: the inciter must intend that the listeners perform disorderly conduct with their own intent to do a proscribed thing. Thus, prosecuting a statute of this kind would involve showing the inciter's intent to cause intent.

Pennsylvania is the only clear example of this category. Pennsylvania bases its definition of riot on the Model Penal Code, criminalizing disorderly conduct with intent to commit or facilitate a misdemeanor or felony, or with intent to prevent or coerce official action. Pennsylvania has common law incitement to riot, defined as course or conduct by use of words, signs, or language or any other means by which one can be urged on to action as would naturally lead or urge other men to engage in or enter upon conduct which if completed would make a riot.<sup>192</sup>

This definition presents a paradox under *Brandenburg*: Pennsylvania criminalizes urging another person to perform disorderly conduct with intent to commit or facilitate a misdemeanor, and *Brandenburg* requires that such urging be intentional. Thus, to be liable for incitement to riot in Pennsylvania, an inciter would have to intend to cause intent, but not the felony or misdemeanor itself. This is like inciting an inchoate crime.<sup>193</sup>

### V. THE FIRST AMENDMENT: INCITEMENT AND THE TREATMENT OF CROWDS

Incitement to riot touches on two First Amendment protections: freedom of speech and freedom of assembly. This Part explains how First Amendment theory justifies protecting speech that calls somebody

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192. See *Commonwealth v. Hayes*, 209 A.2d 38, 39 (Pa. Super. Ct. 1965).

193. When police do this, it is considered entrapment. See MODEL PENAL CODE § 2.13 (2011).

to action, and how it justifies protecting assembly. It outlines the history of First Amendment jurisprudence on incitement and explains the current doctrinal standard for incitement in *Brandenburg v. Ohio*.<sup>194</sup> It then turns to peaceable freedom of assembly—not the familiar time, place, and manner test, but cases that concern the conduct of those assembled. Because riot does not involve the traditional question of time, place, and manner restriction, it presents an opportunity for an alternate discussion of what freedom of assembly really means.

### A. First Amendment Theory and Incitement

The Supreme Court established a First Amendment standard governing incitement that should constrain all incitement-to-riot statutes.<sup>195</sup> This Subpart examines the theory behind granting First Amendment protection to speech that incites action. A number of theories can be used to justify such First Amendment protection. Which theory a court applies can affect the scope of protection afforded that speech.<sup>196</sup>

Under the “marketplace of ideas” theory, speech is protected so that an individual can gather information and weigh competing ideas on the path to determining the truth.<sup>197</sup> A second theory has been described as a theory of democratic self-governance, which protects the process of governance and the establishment of democratic legitimacy.<sup>198</sup> A third rationale, the “safety valve” theory, argues that speech should be protected because that protection allows catharsis for those who are dissatisfied.<sup>199</sup> A fourth rationale focuses on individual liberty.<sup>200</sup> Advocacy of unlawful action can be protected under any of these theories, but the scope of its protection might change.<sup>201</sup>

*Brandenburg* was a short per curiam decision, and it is thus difficult

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194. 395 U.S. 444 (1969).

195. *Id.*

196. See Robert Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, 88 CAL. L. REV. 2353, 2363 (2000) (explaining that “[a]lmost from its inception, First Amendment doctrine has been caught in the crossfire between these two theories of freedom of speech”).

197. See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); JOHN STUART MILL, ON LIBERTY 32–35 (2001).

198. *Id.*

199. See THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 7 (1970); Steven Shiffrin, *Defamatory Non-Media Speech and First Amendment Methodology*, 25 UCLA L. REV. 915, 949 (1978).

200. C. Edwin Baker, *The Process of Change and the Liberty Theory of the First Amendment*, 55 S. CAL. L. REV. 293, 293 (1982).

201. But see Martin H. Redish, *Advocacy of Unlawful Conduct and the First Amendment: In Defense of Clear and Present Danger*, 70 CAL. L. REV. 1159, 1163–65 (1982) (arguing that none of the First Amendment rationales protect advocacy of unlawful action).

to determine which First Amendment theory the Court applied. In the absence of clear direction from the Court, it is worth examining whether different theories might protect a call to action in different ways.

The marketplace of ideas theory can be understood as more strongly protecting those ideas that are valuable as part of a pursuit of truth, or as Robert Post describes them, ideas with a “truth-seeking function.”<sup>202</sup> Under this theory, speech that calls for action would be more strongly protected if it has a truth-seeking function. However, such speech often does not service such a function. Thus, the marketplace of ideas does not strongly protect speech that calls to action, unless that action itself in some way involves debate or the propagation of a point of view.

The Meiklejohnian theory of democratic self-governance protects the communicative processes that are necessary for citizens to make informed and intelligent voting decisions.<sup>203</sup> This theory appears more protective of speech that calls people to action, since such calls are an important part of the process of democratic governance. However, this interpretation would protect only that speech that calls for action related to self-governance. Furthermore, Meiklejohn’s version of self-governance interprets the First Amendment as shielding the public from the “mutilation of the thinking process of the community,”<sup>204</sup> and requires the state to distinguish between abusive and non-abusive, and high and low value speech.<sup>205</sup> If the call to action contains low value speech, or fails to contain high value speech, the state could justifiably intervene as neutral moderator to protect political process from abuse.

An alternate version of democratic self-governance provides stronger and broader protection for a call to action. American courts, in practice, often use what Post calls the “participatory” theory of democratic self-governance, which focuses on the legitimization of democracy by protecting individual autonomy against regulations of public discourse.<sup>206</sup> This theory protects individual engagement in public discussion unless the government can show significant harm. Under this version of democratic self-governance, as long as the call to action in some way involves public discussion, it should receive protection, absent a showing of significant harm.

The safety valve theory provides perhaps the most protection for advocacy of action. As long as the action is not harmful, it should be protected as a way of allowing people to freely express themselves so

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202. Post, *supra* note 196, at 2363–66.

203. *Id.* at 2367.

204. ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 26, 27 (1960) (emphasis omitted).

205. Post, *supra* note 196, at 2368.

206. *Id.* at 2369.

that they do not become frustrated with oppressive governance and revolt.

A final, libertarian rationale argues that it does not matter whether theory provides a rationale for protecting speech. The focus should be on not restricting the rights of individuals, arguing that “assuming no . . . danger, it is simply not appropriate for society to censor free and open discourse.”<sup>207</sup>

Thus, under a marketplace of ideas theory and Meiklejohnian self-governance theory, one would have to look at the value of the speech. But under Post’s participatory theory, the safety valve theory, and a libertarian rationale, what matters is not the value of the speech, but whether there is a significant harm that is worth preventing. The latter three theories justify affording protection to most speech that incites action, absent a showing that a real and significant harm will occur. The details of this protection—how serious the harm must be, how likely the speech is to actually cause that harm—are what the Supreme Court struggled with for decades, before alighting on the *Brandenburg* standard.

### *B. First Amendment Theory and Assembly*

Freedom of assembly has an even more complicated relationship with First Amendment theory than incitement.<sup>208</sup> C. Edwin Baker points out that First Amendment analysis is often based on a speech–conduct dichotomy that “immediately relegates assemblies, which are obviously conduct, to a lesser constitutional status than speech.”<sup>209</sup> However, assembly itself is in fact directly protected by the First Amendment. In part because of the speech–conduct dichotomy, this protection of assembly is hard to square with traditional First Amendment theories.

Under the marketplace of ideas theory, some assemblies are important for expressing ideas, but most are not. This is because assemblies occur for many reasons, few of them directly having to do with conversation or the propagation of specific ideas. Thus, it is hard to link most assemblies with the pursuit of truth. Therefore, most assemblies would not be protected under a traditional version of the marketplace of ideas. Generally, the focus of the marketplace of ideas rationale is on preventing censorship, so restrictions on assemblies that do not focus on content often appear constitutionally adequate. This is why time, place, and manner restrictions that are content-neutral are generally accepted

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207. Redish, *supra* note 201, at 1164.

208. See generally C. Edwin Baker, *Unreasoned Reasonableness: Mandatory Parade Permits and Time, Place, and Manner Regulations*, 78 NW. U. L. REV. 937 (1983).

209. *Id.* at 941.

by courts.<sup>210</sup>

Meiklejohnians would almost certainly not see a value in strong protection for assemblies. The important concern for Meiklejohn “is not that everyone shall get to speak, but that everything worth saying shall be said.”<sup>211</sup> Thus, under this theory, assemblies can be restricted as long as alternate channels of communication are available.

Under Post’s version of democratic self-governance, however, assemblies should achieve higher First Amendment protection. Assemblies go to the heart of democratic legitimacy because they create a forum through which government can be directly responsive to public discourse. Restricting assemblies would restrict public discourse, and delegitimize government by preventing those with the least traditional access to governance from communicating. The Supreme Court has used this rationale to protect freedom of assembly.<sup>212</sup> The Supreme Court has also used the safety-valve rationale on multiple occasions to justify protection of freedom of assembly. The Court has pointed out that if peaceful meetings cannot occur, revolution may result.<sup>213</sup>

There is another way of understanding the First Amendment that provides protection to assemblies. Jack Balkin theorizes that the First Amendment enables and protects cultural democracy; individuals should be able to participate in the culture that in turn defines them.<sup>214</sup> Assembly is one mode of participation in public culture.

Before the internet, when the primary means of addressing the public was top-down media such as newspapers or television, public assembly was one of the few ways individuals could participate in the crafting of public culture. The internet is in some ways the virtual version of physical assembly. The Supreme Court in fact recognized this “street corner” aspect of online culture in *Reno v. ACLU*.<sup>215</sup> Thus both in-person and online assembly are particularly important if the goal of the

210. *Id.* at 944.

211. Meiklejohn, *supra* note 204, at 26.

212. *See, e.g., Terminiello v. City of Chi.*, 337 U.S. 1, 4 (1949) (observing that “it is only through free debate and free exchange of ideas that government remains responsive to the will of the people and peaceful change is effected”).

213. *See De Jonge v. Oregon*, 299 U.S. 353, 365 (1937) (“The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government.”); *see also NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 912 (1982) (“Through speech, assembly, and petition—rather than through riot or revolution—petitioners sought to change a social order that had consistently treated them as second-class citizens.”).

214. *See* Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1 (2004).

215. *See* 521 U.S. 844, 854 (1997).

First Amendment is cultural democracy. This is the case regardless of whether the assembly concerns high value or low value speech.

Assemblies are also strongly protected under a theory of individual liberty. “Any individual who is restricted—legally prevented from assembling—has her liberty abridged.”<sup>216</sup> The collection of individuals in an assembly is protected by each individual’s right to assemble.<sup>217</sup>

Baker theorizes six principles concerning assembly that stem from the theory of individual liberty. Two of his principles are more pertinent to discussion of assembly as it relates to regulation of riot. Baker explains that the government abridges freedom of assembly when it imposes restrictions that turn on the fact that the thing being regulated is an assembly. Often, riot statutes are justified by the number of persons involved rather than secondary conduct that produces actual harm. This suggests that, under Baker’s understanding of freedom of assembly, riot statutes that are justified based on numbers rather than actions are unconstitutional.

Baker also discusses the nature of acceptably regulable activity in the context of freedom of assembly. He explains that the government cannot outlaw the strategic disruption of everyday life just because it is a disruption.<sup>218</sup> As part of the freedom of assembly, “people should have the right to use the peaceful presence of their bodies to interfere non-violently with others’ everyday activities.”<sup>219</sup> That interference is part of the power of freedom of assembly.<sup>220</sup> Thus, even if the assembly “forcibly interfere[s] with others’ activities,” it should be protected as long as it is nonviolent.<sup>221</sup> Baker draws the line at any physical attack on, destruction of, or injury to people or property.<sup>222</sup>

Conduct that occurs while individuals are assembled should be subject to at least the same rules as individual conduct. Thus, if a disorderly conduct or breach of the peace statute is unconstitutional as applied to individuals, it must also be unconstitutional as applied to an assembly. Baker is correct that basing one’s regulation of crowds on the theory that multiple numbers causes bad things to happen goes against the idea of having a First Amendment right of assembly. This is the

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216. Baker, *supra* note 208, at 985.

217. *Id.* at 988–89.

218. *Id.* at 979.

219. *Id.* at 980.

220. *Id.* at 980 n.110 (“An important aspect of the right of assembly may be its protection of the power of people who feel oppressed and ignored to impose costs on government and society. A key democratic feature of peaceable assemblies, as opposed to the instruments of violence, is that their capacity to cause disruption and inconvenience is directly related to the number of supporters and participants.”).

221. *Id.* at 981.

222. *See id.* at 982.

case even if one does not get into a discussion of the expressive value of assembly itself.

This perspective would require courts addressing riot statutes to reject the inclusion in those statutes of lawful conduct done in an unlawful way. It would also require courts to reject the regulation of spoken threats in riot statutes where they are not true threats.<sup>223</sup> It is not clear how many riot statutes refer to threats as speech versus threats as conduct.

If one cannot be arrested for waving one's arms on a street, one should not be subject to arrest for waving one's arms in the company of others. Baker provides a similar example: if one cannot be arrested for walking down the street, one should not be able to be arrested for walking in tandem with three other people.<sup>224</sup> If, however, one can be arrested for hitting somebody, one can be arrested for hitting somebody with three other people.

The difficulty arises when what is involved is less tangible. If one can be arrested for assault—for intentionally placing somebody in immediate apprehension of harmful bodily contact—one can be arrested for doing the same with three people. But if the individual crime requires a showing of intent to cause apprehension, or an intent to do the act that causes apprehension, then the crime involving the group must require the same intent for each individual, and not disperse the intent across a group. The group crime also cannot change the target of the threat to the general public rather than an individual.<sup>225</sup> Allowing the public peace to be the target of the threat prevents the disruption that is an inherent part of the power of freedom of assembly. When disruption is balanced against the right of assembly, the right of assembly should prevail.

### *C. First Amendment Theory and Incitement to Riot*

Incitement to riot involves both incitement and assembly. When speech is a call to assemble, regulators should be mindful of justifications for protecting both the call itself and the assembly, through protection of the call. Across First Amendment theories, considerations of both individual autonomy and protection for larger political process

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223. See generally *Virginia v. Black*, 538 U.S. 343 (2003).

224. Baker goes further than I find necessary to go, at least in this paper, and concludes that thus permits should not be required for parades. See generally Baker, *supra* note 208.

225. See, e.g., ARIZ. REV. STAT. ANN. § 13-2903 (2012) (“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.”).



argue that calls to gather should be particularly protected under the First Amendment. Protecting a call to gather legitimizes the political process by providing a forum for public discussion outside of existing political strictures. It preserves individual autonomy against overzealous state regulation. And it often directly (through advocacy) or indirectly (through the chosen venue of the protest or the size of the crowd) brings points of view into public discourse that otherwise would remain unexamined. Like the internet—and often now with the aid of the internet—assembly enables participation in the formation of public culture by people who are not in possession of broadcast media.

#### *D. First Amendment Incitement Doctrine*

The previous Subpart addressed First Amendment theories for protecting incitement, assembly, and incitement to riot. This Subpart addresses how courts have applied such theories, outlining existing First Amendment jurisprudence on incitement.

Speech entwined with action presents one of the most challenging and well-known First Amendment problems. The Supreme Court famously addressed incitement to unlawful action in *Brandenburg v. Ohio*, but the tortuous history of First Amendment jurisprudence on incitement up to that point indicates the difficulty of the problem.

##### *1. Incitement Before Brandenburg*

Before *Brandenburg*, the Supreme Court struggled with whether and how to protect speech that calls to action. The basis of this struggle concerned just how likely and imminent the result of the speech must be for the speech to be regulable.

The earliest incitement cases arose against widespread fear of the rise of Bolshevism in Russia. In 1919, the Supreme Court addressed advocacy of illegal action in three cases: *Schenck v. United States*,<sup>226</sup> *Frohwerk v. United States*,<sup>227</sup> and *Debs v. United States*.<sup>228</sup> In *Schenck*, the Court famously reasoned that the First Amendment “would not protect a man in falsely shouting fire in a theater and causing a panic,” and articulated the “clear and present danger” test, which allowed the government to prohibit speech that created a clear and present danger of a substantive evil Congress had a right to prevent.<sup>229</sup>

In *Frohwerk* and *Debs*, the Court developed the “bad tendency” test,

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226. 249 U.S. 47 (1919).

227. 249 U.S. 204 (1919).

228. 249 U.S. 211 (1919).

229. *Schenck*, 249 U.S. at 52.

which ignored the imminence of the bad action and looked instead to the speech's "natural tendency and reasonably probable effects."<sup>230</sup> The Court applied this bad tendency test to uphold convictions in *Abrams v. United States*<sup>231</sup> and *Gitlow v. New York*.<sup>232</sup> In 1927, the Court in *Whitney v. California* used the bad tendency test to affirm the conviction of a member of the Communist Labor Party after that member signed a resolution.<sup>233</sup>

As early as 1919, Justice Holmes observed significant problems with the bad tendency test and urged re-adoption of the clear and present danger test.<sup>234</sup> Justice Brandeis's concurrence in 1927 in *Whitney* also urged a return to assessing the immediacy of the danger incurred by the speech at issue.<sup>235</sup>

In the 1930s and 1940s, it appeared that the Court might shift to the clear and present danger test.<sup>236</sup> But in 1951, in *Dennis v. United States*, the Court retreated,<sup>237</sup> proposing a balancing test of "whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."<sup>238</sup> This test did not mention imminence of the action; the more 'evil' the speech was, the less the court needed to consider the probability of its actual occurrence. Justice Douglas dissented, reiterating the importance of imminence.<sup>239</sup>

In *Yates v. United States*,<sup>240</sup> the Court clarified that *Dennis* had not "obliterated the traditional dividing line between advocacy of abstract doctrine and advocacy of action."<sup>241</sup> However, the Court did not discuss whether imminence was required.<sup>242</sup>

Several cases in the 1960s prefigured what is now the established doctrine on incitement.<sup>243</sup> Then, in 1969, the Court held in *Brandenburg v. Ohio* that government may not restrict advocacy of illegal action unless it "is directed to inciting or producing imminent lawless action

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230. *See Debs*, 249 U.S. at 216.

231. 250 U.S. 616 (1919).

232. 268 U.S. 652 (1925).

233. *See* 274 U.S. 357 (1927).

234. *Abrams*, 250 U.S. at 627–30 (Holmes, J., dissenting).

235. *Whitney*, 274 U.S. at 374–77 (Brandeis, J., concurring).

236. *See, e.g., DeJonge v. Oregon*, 299 U.S. 353 (1937); *Herndon v. Lowrey*, 301 U.S. 242 (1937); *Bridges v. California*, 314 U.S. 252 (1941).

237. 341 U.S. 494 (1951) (plurality opinion).

238. *Id.* at 510.

239. *See id.* at 581–91.

240. 354 U.S. 298 (1957).

241. *Id.* at 320.

242. *See id.* at 324–25.

243. *See generally* *Noto v. United States*, 367 U.S. 290 (1961); *Bond v. Floyd*, 385 U.S. 116 (1966); *Watts v. United States*, 394 U.S. 705 (1969) (per curiam).

and is likely to incite or produce such action.”<sup>244</sup>

## 2. *Brandenburg v. Ohio*

*Brandenburg* addressed the conviction of a Ku Klux Klan leader under the Ohio Criminal Syndicalism statute. *Brandenburg* addressed Ohio’s Criminal Syndicalism Act,<sup>245</sup> which banned advocating “crime, violence, or unlawful methods of terrorism as a means of accomplishing political reform” and banned gathering with the purpose of teaching criminal syndicalism.<sup>246</sup>

The accused spoke at a rural Ku Klux Klan rally that was covered by a Cincinnati television station. He stated to those assembled that “if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it’s possible that there might have to be some revengeance taken.”<sup>247</sup> He also announced a march on Congress.

The Court held that the First Amendment protected this speech, explaining that the statute “purports to punish mere advocacy and to forbid, on pain of criminal punishment, assembly with others merely to advocate the described type of action.”<sup>248</sup> The Court famously held that speech that advocates action cannot be regulated unless it “is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”<sup>249</sup>

Despite its conciseness, the *Brandenburg* test contains multiple elements. It requires intent on the part of the speaker: the speech must be “directed to inciting” action.<sup>250</sup> It requires that a listener be present who is able to clearly understand and follow through on the speaker’s intent.<sup>251</sup> It dictates that the state can regulate such speech only when the possible action is both likely and imminent. Thus, even if the speaker intends to incite action, and the listener understands that speech as incitement, the state cannot regulate the call to action unless the action is both imminent and likely to occur.

Any statute regulating incitement to riot as incitement would have to address the speaker’s intent, how likely it is that an audience would understand that intent, the imminence of the action, and the likelihood of

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244. 395 U.S. 444, 447 (1969) (per curiam).

245. OHIO REV. CODE ANN. § 2923.13 (1919) (originally enacted as OHIO REV. CODE ANN. § 2923.56 (repealed 1974)).

246. *Brandenburg*, 395 U.S. at 456 n.3.

247. *Id.* at 446.

248. *Id.* at 449.

249. *Id.* at 447.

250. See *Hess v. Indiana*, 414 U.S. 105, 109 (1973) (per curiam) (noting that speech cannot be regulated unless the speaker’s “words were intended to produce, and likely to produce” the outcome).

251. *Id.* at 107–09.

the occurrence of illegal activity.

It appears at first glance that the Supreme Court's analysis of incitement ends with *Brandenburg* and one case affirming it.<sup>252</sup> In *Hess v. Indiana*, the appellant was convicted of disorderly conduct for shouting "[w]e'll take the fucking street later" or "[w]e'll take the fucking street again" at an antiwar demonstration.<sup>253</sup> The Court held that since Hess's statement was not directed to any person, it could not be incitement and was protected under the First Amendment.<sup>254</sup> The Court emphasized the importance of the speaker's intent, and the imminence and likelihood of illegal action.<sup>255</sup>

### 3. Questions after *Brandenburg*

Despite its clear language, *Brandenburg* leaves a number of doctrinal gaps. There are at least four areas of tension in First Amendment jurisprudence that *Brandenburg* failed to clearly address.<sup>256</sup> Three of these questions have direct relevance for any analysis of incitement-to-riot statutes: how courts should treat indirect advocacy of unlawful action, what *Brandenburg* means by imminence, and what kind of substantive harm *Brandenburg* seeks to prevent.

The Supreme Court has never addressed whether there should be a distinction between direct and indirect advocacy of unlawful action.<sup>257</sup> In *Masses Publishing Co. v. Patten*, Judge Learned Hand insisted that only direct advocacy, where the speaker clearly urges the listener to do an unlawful act, should be punished.<sup>258</sup> This view of advocacy would protect statements that might lead another to commit a crime but do not directly advocate it. For example, a person shouting "the man in that jail tortured and killed my mother" in front of a mob outside a jail would be protected by the First Amendment under this view.<sup>259</sup> The implication for incitement to riot is that if only direct advocacy may be banned, and the speaker calls for assembly but does not call for anything else to happen, then that speech would be protected regardless of whether riot ensues.

*Brandenburg* does not clearly address whether the First Amendment grants heightened protection to indirect advocacy. *Brandenburg* states

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252. *See id.*

253. *Id.* at 107.

254. *Id.* at 108–09.

255. *Id.*

256. Redish, *supra* note 201, at 1176–78.

257. *Id.* at 1178.

258. *See* 244 F. 535, 540 (S.D.N.Y. 1917), *rev'd*, 246 F. 24 (2d Cir. 1917).

259. Redish, *supra* note 201, at 1179.

that unlawful incitement must be “directed to inciting or producing imminent lawless action,” but it is not clear if “directed to” means that the speech must explicitly mention the specific unlawful act.<sup>260</sup> It is unlikely that *Brandenburg* allows for regulation of only direct advocacy, however. *Brandenburg* appears to focus, like previous Supreme Court cases, on the resulting harm. Significant harm can emerge from intentional but indirect advocacy when it is directed to an audience that is likely to understand it as advocacy.<sup>261</sup>

The second relevant doctrinal ambiguity that *Brandenburg* fails to resolve is what imminence means. Does imminence mean that the act must occur within seconds? Minutes? Hours?

*Brandenburg*’s imminence requirement may in fact be extremely temporally strict.<sup>262</sup> When a person speaks to a crowd and moves that crowd to violence that police are unable to control, that person may be arrested for incitement to riot under *Feiner v. New York*.<sup>263</sup> *Feiner* and subsequent cases suggest that the crowd must be excited, and the police must find the crowd uncontrollable, before the speaker can be arrested; therefore, merely speaking to the crowd is not enough to show imminence. *Feiner* is still good law, and other courts that have referred to *Feiner* focus on the fact that members of the audience had begun voicing physical threats.<sup>264</sup>

The most significant ambiguity in *Brandenburg* is whether the case allows government regulation of incitement to all “lawless action,” or only to significantly harmful or violent lawless action. The problem emerges because *Brandenburg* balances free speech against protection from harm. It cannot be the case that all unlawful acts produce the same amount of harm with respect to that balance. Many relatively harmless acts can be illegal, such as jaywalking, or parading without a permit.

In earlier versions of the clear and present danger test, it did not matter what the evil was, as long as Congress had the power to prevent it.<sup>265</sup> But in *Bridges v. California*, the Court applied the clear and present danger test and stated that “the substantive evil must be extremely serious . . . before utterances can be punished.”<sup>266</sup> In his concurrence in *Whitney*, Justice Brandeis wrote that “even imminent danger cannot justify resort to prohibition of those functions essential to

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

261. See, e.g., Susan Benesch, *Vile Crime or Inalienable Right: Defining Incitement to Genocide*, 48 VA. J. INT’L L. 485 (2008).

262. See G. Robert Blakey & Brian J. Murray, *Threats, Free Speech, and the Jurisprudence of the Federal Criminal Law*, 2002 B.Y.U. L. REV. 829, 874 n.133 (2002).

263. 340 U.S. 315 (1951).

264. See, e.g., *Jones v. Parmley*, 465 F.3d 46, 57 (2d Cir. 2006).

265. Redish, *supra* note 201, at 1178.

266. 314 U.S. 252, 263 (1941).

effective democracy, unless the evil apprehended is relatively serious.”<sup>267</sup> The Court’s test in *Dennis* similarly examined the seriousness of the threatened harm.<sup>268</sup>

It is unclear whether *Brandenburg* incorporates these previous observations that the incited action must be serious, in addition to unlawful. However, in deference to the strength of First Amendment protection, the burden should be on those who want to establish that *Brandenburg* does not import the previously existing seriousness requirement. The *Brandenburg* test itself refers to advocacy of the potentially broad category of “lawless action.”<sup>269</sup> And the indictment in *Brandenburg* under the Ohio Criminal Syndicalism statute was for advocating “crime” in addition to violence.<sup>270</sup>

Even within *Brandenburg*, the Court suggests that the harm anticipated is more than just lawless action and includes an understanding that the action must be harmful or serious in addition to being unlawful. In a footnote to the *Brandenburg* incitement test, the Court referred to its decision in *Yates v. United States*<sup>271</sup> concerning the advocacy of the forcible overthrow of the government and tendency to produce “forcible” action rather than merely “lawless” action.<sup>272</sup> And in the paragraph following the incitement test, the Court quoted *Noto v. United States* for the proposition that the advocacy of “force and violence, is not the same as preparing a group for violent action and steeling it to such action.”<sup>273</sup> These two references place the *Brandenburg* incitement test in the context of advocacy of force or violence, not advocacy of any small unlawful action Congress has chosen—and is permitted—to ban.

Courts should thus interpret *Brandenburg* as containing the implicit requirement that “lawless action” be limited to serious lawless action. As Redish observes, “Society’s interest in suppressing speech is simply not as strong where the speech advocates only minor transgressions.”<sup>274</sup> Society should be more willing to risk speech suppression when the substantive evil being prevented involves force or violence, rather than illegally walking on the grass.<sup>275</sup> Thus, for example, *Brandenburg* should not allow states to criminalize incitement to a permitless protest,

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267. *Whitney v. California*, 274 U.S. 357, 377–78 (1927) (Brandeis, J., concurring).

268. *See Dennis v. United States*, 341 U.S. 494, 542–46 (1951).

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

270. *Id.* at 447 n.3.

271. 354 U.S. 298 (1957).

272. *Brandenburg*, 395 U.S. at 448 n.2.

273. 367 U.S. 290, 297–98 (1961).

274. Redish, *supra* note 201, at 1179.

275. *Id.* at 1180.

unless the permit requirements prevent a serious harm. The harm caused by a permitless protest, except in rare exceptions, would likely be too *de minimis* for the state to be able to reach the speaker calling for the action, even if that action is imminent and likely to occur.

*E. First Amendment Doctrine on Assembly, and the Hostile Crowd Doctrine*

Incitement to riot is additionally restricted by the First Amendment's protection of freedom of assembly: the right of the people to peaceably assemble. What that freedom means, however, is surprisingly underexplored.

The Supreme Court has most often addressed freedom of assembly with respect to time, place, and manner regulations. However, riot statutes deal with disruption of public order; not time, place, and manner regulations. They are unusual in this regard, because they combine elements of disorderly conduct statutes with targeting assembly.<sup>276</sup>

The difficulty with riot statutes arises because of a difficulty inherent in the right of assembly: assemblies are never merely communicative, but occupy a physical space. Baker explains that communication is only one aspect of assembly: "People assemble and associate in order to generate and exercise power, to do things, to engage in activities that are valued in themselves, to engage in activities that often give the people involved an exhilarating sense of power and self-actualization, and to engage in the extraordinary as a way to challenge and change the ordinary and the routine."<sup>277</sup>

Baker thus suggests, and I agree, that restrictions on the right of assembly must be narrow, in appreciation for all of the conduct that assembly rightfully contains. Restriction on assembly can and should be limited as much as possible to preventing actual or attempted force and violence.<sup>278</sup>

Whether the Supreme Court agrees with this is a difficult question to answer. It turns on how one understands "peaceable" assembly: as all conduct that is nonviolent, or conduct that is orderly, calm, and nondisruptive. These are two very different understandings of the term "peaceable." Which one courts choose will have extraordinary implications for freedom of assembly.

The closest the Supreme Court has come to analysis in this area is its creation of the hostile crowd doctrine, which suggests that peaceable means nonviolent, not nondisruptive. The hostile crowd doctrine

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276. See TIMOTHY ZICK, *SPEECH AND SPACIAL TACTICS* (2006).

277. Baker, *supra* note 208, at 948.

278. *Id.* at 982.

suggests that when a speaker causes a crowd to react, regulation cannot occur until that crowd is in fact stirred to actual violence. The Court in fact explicitly connected hostile crowd doctrine to freedom of assembly in the 1992 case of *Forsyth County v. Nationalist Movement*.<sup>279</sup>

### 1. Freedom of Assembly

Freedom of assembly has a fairly long doctrinal history. As early as 1937, the Court in *De Jonge* explained that states could not punish “mere participation in a peaceable assembly and lawful public discussion.”<sup>280</sup> However, in *Cantwell v. Connecticut*, an early fighting words case, the Court noted that the state may regulate the time and manner of solicitation “in the interest of public safety, peace, comfort or convenience.”<sup>281</sup> The Court stated that the state is permitted to regulate when clear and present danger of riot, disorder, or interference with traffic upon the public streets appears.<sup>282</sup>

The Court’s usual discussion of freedom of assembly has been about time, place, and manner, and alternate channels of communication.<sup>283</sup> I do not intend to review that analysis here. Because the focus of this paper is on the regulation of riot, this Subpart examines the scope of First Amendment protection for activity once an assembly has convened.

In 1949, in *Cole v. Arkansas*, the Court addressed an Arkansas unlawful assembly statute and suggested, but explicitly did not decide, that the First Amendment freedom of assembly might protect assembling peaceably even when somebody else in the group commits violence.<sup>284</sup> The Court explicitly found that it was constitutional for a state to convict a person of “promoting, encouraging and aiding an assemblage the purpose of which is to wreak violence.”<sup>285</sup>

In *Feiner*, the Court considered the boundary at which police might interfere with a crowd’s behavior. The Court upheld *Feiner*’s conviction of disorderly conduct for breach of the peace where the crowd he

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279. 505 U.S. 123 (1992).

280. *De Jonge v. Oregon*, 299 U.S. 353, 365 (1937).

281. *Cantwell v. Connecticut*, 310 U.S. 296, 307 (1940).

282. *Id.* at 308.

283. See, e.g., *Cox v. New Hampshire*, 312 U.S. 569, 575 (1941); *Hague v. Comm. for Indus. Org.*, 307 U.S. 496 (1939); *Grayned v. City of Rockford*, 408 U.S. 104, 115 (1972); *Heffron v. Int’l Soc’y for Krishna Consciousness*, 452 U.S. 640, 641 (1981).

284. 338 U.S. 345, 352 (1949) (“[W]e are not called upon to decide whether a state has power to incriminate by his mere presence an innocent member of a group when some individual without his encouragement or concert commits an act of violence. It will be time enough to review such a question as that when it is asked by one who occupies such a status.”).

285. *Id.* at 353.



addressed had grown “restless and there was some pushing, shoving and milling around.”<sup>286</sup> Even though the Court continuously references incitement to riot, *Feiner* was in fact convicted of disorderly conduct, a different offense. *Feiner* spoke from a loudspeaker on top of a car and urged his crowd to “rise up in arms and fight for equal rights.”<sup>287</sup> At least one person in the crowd threatened violence, and *Feiner* twice refused to stop speaking when an officer requested that he stop.

The Court was explicit that *Feiner* was arrested not because of the officers’ views of his speech, but because his speech “actually engendered” a dangerous reaction by the crowd.<sup>288</sup> The Court cited *Cantwell* for the proposition that “[w]hen clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order, appears, the power of the State to prevent or punish is obvious.”<sup>289</sup>

The Court noted in *Feiner* that speech to a crowd is protected only up to a point. When “the speaker passes the bounds of argument or persuasion and undertakes incitement to riot,” police may intercede “to prevent a breach of the peace.”<sup>290</sup> Judge Frankfurter wrote a concurring opinion that the police had “interfered only when they apprehended imminence of violence.”<sup>291</sup> But the majority opinion in *Feiner* appears to grant the state broad latitude for regulating crowd behavior when it threatens the public safety, peace, or order.

Fourteen years later, however, in *Edwards v. South Carolina*, the Court moved away from this deferential position and protected orderly protests when the state’s interest was not as high. The Court overturned a conviction for common law breach of the peace, where civil rights protesters walked single file or two abreast “in an orderly way,” caused no obstruction of traffic, and threatened no violence.<sup>292</sup> Explaining that a state cannot “make criminal the peaceful expression of unpopular views,”<sup>293</sup> the Court examined South Carolina’s definition of “breach of the peace” and found it to be unconstitutionally broad. The march had not produced “violence or threat of violence on their part, or on the part of any member of the crowd watching them.”<sup>294</sup>

Two years later, in *Cox v. Louisiana*, the Court addressed another

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286. *Feiner v. New York*, 340 U.S. 315, 317 (1951).

287. *Id.*

288. *Id.* at 320.

289. *Id.* (citing *Cantwell v. Connecticut*, 310 U.S. 296, 308 (1940)).

290. *Id.* at 321.

291. *Nietmoko v. Maryland*, 340 U.S. 268, 289 (1951) (Frankfurter, J., concurring).

292. *Edwards v. South Carolina*, 372 U.S. 229, 230–31 (1963).

293. *Id.* at 237.

294. *Id.* at 236.

protest case.<sup>295</sup> Cox had led some 2000 students protesting against discrimination and segregation to assemble peaceably at the state capitol building. He was convicted of three offenses under state law: disturbing the peace, obstructing public passages, and picketing before a courthouse. Cox had told officers “that they would march by the courthouse, say prayers, sing hymns, and conduct a peaceful program of protest;”<sup>296</sup> an officer twice asked him to disband, and he refused. The protest was held 101 feet from the courthouse and did not obstruct the street. The Sheriff tolerated the protest until Cox appealed to students to sit in at segregated lunch counters. This call prompted “muttering” and “grumbling” by white onlookers.<sup>297</sup>

The Court found that there had been no indication the students had ever been hostile, aggressive, unfriendly, or “disorderly;”<sup>298</sup> and that while the atmosphere of the white audience had become “tense,” there was no indication that any member of the white group threatened violence.<sup>299</sup> This made the situation a “far cry from the situation in *Feiner*.”<sup>300</sup> The Court thus found Louisiana’s disturbing the peace statute unconstitutionally broad and impinging on Cox’s rights of free speech and free assembly. Citing *Terminiello*, the Court concluded that speech must be protected even “when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.”<sup>301</sup>

The next case to address assembly was *Brandenburg* itself. In *Brandenburg*, the statute banned gathering with purposes of teaching criminal syndicalism. The Court found it was unconstitutional “to forbid, on pain of criminal punishment, assembly with others merely to advocate the described type of action.”<sup>302</sup>

After *Brandenburg* was decided in 1969, the Court continued to address issues of crowd regulation. Two years later, in *Coates v. City of Cincinnati*, the Court found a Cincinnati ordinance unconstitutionally violative of freedom of assembly and association when it criminalized the assembly of three or more persons on a sidewalk conducting themselves “in a manner annoying to persons passing by.”<sup>303</sup> The Court explained that the ordinance was unconstitutionally vague and

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295. 379 U.S. 536 (1965).

296. *Id.* at 540.

297. *Id.* at 543.

298. *Id.* at 547.

299. *Id.* at 550.

300. *Id.* at 551.

301. *Id.* at 551–52.

302. *Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969).

303. *Coates v. Cincinnati*, 402 U.S. 611, 611 (1971).

overbroad because “[c]onduct that annoys some people does not annoy others.”<sup>304</sup> While the city could prevent people from blocking sidewalks, obstructing traffic, littering, committing assaults, or other behavior, it must do so through specific ordinances. The Court concluded that past decisions “establish that mere public intolerance or animosity cannot be the basis for abridgment of these constitutional freedoms.”<sup>305</sup>

The classic case cited for protection of freedom of assembly, *NAACP v. Claiborne*, is actually rather conservative in its holding when compared to some of the earlier cases.<sup>306</sup> *Cole* had already suggested in 1949 that peaceable assembly might be protected where somebody else in a group, but not the accused, committed violence. The Court in *NAACP* held that a speaker, Charles Evers, could not be held liable for damages created by other people in a Mississippi boycott of several hundred people that lasted for several years. The Court carefully emphasized the political nature of the assembly, observing that “expression on public issues has always rested on the highest rung of the hierarchy of First Amendment values.”<sup>307</sup> It acknowledged repeatedly that while political assembly is protected, violence is not.<sup>308</sup> Then, it noted the attenuation between Evers’s speech and any acts of violence, which occurred “weeks or months” after his speech.<sup>309</sup>

None of these conclusions add to the existing doctrine on when crowd action moves outside of being “peaceable” and may be regulated. Where *NAACP* does add doctrine is its evidentiary requirements that when an individual is accused on the basis of actions by other people in the same group, “it is necessary to establish that the group itself possessed unlawful goals and that the individual held a specific intent to further those illegal aims.”<sup>310</sup>

More recent cases address the scope of acceptable restrictions on gatherings. In 1988, in *Boos v. Barry*, the Court found unconstitutional a District of Columbia statute banning display of signs bringing foreign government into disrepute within 500 feet of an embassy.<sup>311</sup> Buried within this case, which found direct regulation of the signs unconstitutional, the Court found the “congregation clause” of the

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304. *Id.* at 614.

305. *Id.* at 615.

306. *See generally* *NAACP v. Claiborne*, 458 U.S. 886 (1982).

307. *Id.* at 913 (citing *Carey v. Brown*, 447 U.S. 455, 467 (1980)).

308. *Id.* at 916–18.

309. *Id.* at 928.

310. *Id.* at 920.

311. 485 U.S. 312, 329–34 (1988).

statute constitutional.<sup>312</sup> This finding altered what until then looked like a clear rule that breach of the peace statutes were generally unconstitutional.

The “congregation clause” in *Boos* allowed police to arrest individuals for failure to disperse a congregation of three or more people standing within 500 feet of an embassy. The Court held that the original statute was problematic because it “applies to *any* congregation within 500 feet of an embassy for *any* reason and because it appears to place no limits at all on the dispersal authority of the police.”<sup>313</sup> However, the Court of Appeals had narrowed the congregation clause to apply “only when the police reasonably believe that a threat to the security or peace of the embassy is present.”<sup>314</sup> This narrowing of the statute to “groups posing a security threat” and the fact that the congregation clause was “site specific” to within 500 feet of an embassy made it constitutional and not vague, unlike the earlier breach of the peace statutes rejected in other cases.<sup>315</sup>

After *Boos*, then, it is clear that not all breach of the peace statutes are unconstitutional. It remains unclear, however, where the dividing line is between sufficiently tailored breach of the peace statutes and unconstitutional infringements on the freedom of assembly.

## 2. Hostile Crowd Doctrine

The line between peaceful assembly and violent behavior is not clearly drawn in freedom of assembly cases. However, another line of related doctrine provides additional guidance. Although the Supreme Court has not addressed incitement to riot, its doctrine on the regulation of crowds that grow hostile towards a speaker is instructive. The “hostile crowd doctrine” addresses when police might step in to prevent a crowd that is hostile to a speaker from boiling over into violence. The Supreme Court has declared that it is unconstitutional to stop a speaker because the audience is becoming hostile, unless the crowd actually becomes violent or disorderly. The same boundary might be applied to incitement to riot.

In 1949, in *Terminiello v. City of Chicago*, the Court emphatically declared that it was unconstitutional to convict a speaker of breach of the peace for speech that “stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance . . . .”<sup>316</sup>

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312. *Id.* at 313.

313. *Id.* at 330.

314. *Id.*

315. *Id.* at 331.

316. 337 U.S. 1, 3–4 (1949).

*Terminiello*, which protected an anti-Semitic speaker to the Christian Veterans of America, laid the groundwork for a number of later cases holding that governments may not try to predict an audience's reaction when choosing to regulate speech, or let a hostile audience determine when a speaker should be shut down. Instead, states must wait until disorder or violence in fact arises.

As discussed, only two years later in *Feiner*, the Court upheld a conviction of disorderly conduct for breach of the peace where the crowd had grown "restless and there was some pushing, shoving and milling around."<sup>317</sup> However, in *Edwards v. South Carolina*, the Court found that where a civil rights march had not produced "violence or threat of violence on their part, or on the part of any member of the crowd watching them," the speech was protected by the First Amendment and was thus distinguishable from the situation in *Feiner*.<sup>318</sup> This later reading of *Feiner* appears to restrict its holding to violent and imminently violent behavior.

The most recent relevant Supreme Court case on crowd behavior is *Forsyth County v. Nationalist Movement* in 1992.<sup>319</sup> *Forsyth* combined an assembly case—concerning a parade permit—with hostile crowd doctrine. In *Forsyth*, the Court considered a facial challenge to an ordinance allowing a permit administrator to adjust the fee of a parade permit. The Court found the statute to be overbroad because it impermissibly delegated authority to the administrator. The Court found that the statute was not content-neutral because the administrator could adjust the permit fee based on his guess that the crowd might react more heavily to a given protest.<sup>320</sup> The relevance to incitement to riot is that *Forsyth* affirmed that "[s]peech cannot be . . . burdened . . . simply because it might offend a hostile mob."<sup>321</sup> This reiterates the earlier holdings in *Terminiello*, *Edwards*, and *Cox*.

As Part IV of this article discussed, state riot statutes prohibit a variety of crowd behavior, some of which is attenuated from any actual violence to persons or harm to property. The riot statutes themselves might not be constitutional. But more significantly, when the Supreme Court has examined the relationship between a person addressing a crowd and bad behavior by that crowd, it has emphasized that the crowd must do more than merely exhibit anger or hostility for that speech to be

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

318. *Edwards v. South Carolina*, 372 U.S. 229, 236 (1963).

319. 505 U.S. 123 (1992). Note that while it might appear that *Snyder v. Phelps* would have addressed these issues, that case was concerned with whether the speech was about a matter of public concern, and defamation liability, not crowd reaction. See generally *Snyder v. Phelps*, 131 S. Ct. 1207 (2011).

320. *Forsyth Cnty.*, 505 U.S. at 134.

321. *Id.* at 134–35.

constitutionally regulable.

The next subpart extrapolates from the above cases to create a framework for evaluating the constitutionality of incitement-to-riot statutes that ban incitement to action that does not rise to actual violence.

### 3. Summary of Doctrine on Freedom of Assembly and Hostile Crowds

The Court's case law recognizes that sometimes a large gathering of people is constitutionally protected, while at other times a crowd's behavior takes it outside the scope of that protection. From these cases, the following rules emerge.

It is clearly unacceptable for a statute to regulate purely peaceful assembly for political purposes.<sup>322</sup> More generally, it is unacceptable to regulate the "peaceful expression of unpopular views," whether or not those views are political in nature.<sup>323</sup>

On the other hand, it is clearly acceptable for a statute to regulate violence or incitement to violence.<sup>324</sup> Regulation of force that causes damage is probably analogously permissible.<sup>325</sup>

When speech produces reactions falling between violence and peace, regulation is more complicated. On the one hand, it is unconstitutional for a state to regulate speech because it (1) offends dignity,<sup>326</sup> (2) is outrageous,<sup>327</sup> (3) "stirred people to anger, invited public dispute, or brought about a condition of unrest,"<sup>328</sup> or (4) annoys.<sup>329</sup> These standards for regulating speech are unconstitutional because they are inherently subjective, and it is important to have "adequate breathing space" for freedoms protected by the First Amendment.<sup>330</sup>

But these categories of regulations are also unconstitutional because there is a sense that the underlying reaction to the speech is just not harmful enough. In other words, "mere public intolerance or animosity cannot be the basis for abridgment of these constitutional freedoms."<sup>331</sup>

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322. *See De Jonge v. Oregon*, 299 U.S. 353, 363–65 (1937); *NAACP v. Claiborne*, 458 U.S. 886, 913 (1982).

323. *See Edwards v. South Carolina*, 372 U.S. 229, 237 (1963).

324. *See, e.g., id.* at 236 ("There was no violence or threat of violence on their part, or on the part of any member of the crowd watching them."). *See also Claiborne*, 458 U.S. at 933 ("The use of speeches, marches, and threats of social ostracism cannot provide the basis for a damages award. But violent conduct is beyond the pale of constitutional protection.").

325. *See Claiborne*, 458 U.S. at 933.

326. *Boos v. Barry*, 485 U.S. 312, 322 (1988).

327. *Hustler Magazine Inc. v. Falwell*, 485 U.S. 46, 556 (1988).

328. *Terminiello v. City of Chicago*, 337 U.S. 1, 5934 (1949).

329. *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971).

330. *Boos*, 485 U.S. at 322.

331. *Coates*, 402 U.S. at 615.

Here, the Supreme Court presents more muddled doctrine. A threat to public order may be acceptably regulated if it is crafted for a particular site or context that makes clear what activities are being disrupted.<sup>332</sup> But at the same time, the Court has recognized a number of times that that common-law breach of the peace is too broad.<sup>333</sup> In *Cox*, the Court appeared to contrast violence with well-controlled and orderly crowd behavior, suggesting that only violence or a threat of violence may be regulated, and that orderly and well-controlled crowds should be protected.<sup>334</sup> There is presumably a category of disorderly conduct that slips between these two poles, and it is not clear whether freedom of assembly protects the behavior that is not violent but also is not orderly.

This struggle to define the scope of regulable activity that results as a reaction to speech is highly pertinent to analysis of incitement-to-riot statutes. Many state statutes penalize “violence” that does not cause actual injury, suggesting that they penalize crowd disorder rather than violence in a physical sense. Some statutes penalize a threat of force that causes a threat to public peace.<sup>335</sup>

The appropriate way to resolve this question is to err on the side of protecting speech. Because *Brandenburg* is founded on balancing free speech against the State’s interest in protecting other citizens, it should apply only to incitement to lawless action that causes some kind of serious harm. Incitement to, say, jaywalking should be protected by the First Amendment and not be subject to a *Brandenburg* test for determining whether the lawless action is imminent and likely to happen.

More recent analysis of the 1951 incitement-to-riot case, *Feiner*, supports the view that *Brandenburg* requires that the speech produce serious harm. Even though *Feiner* contemplated an immediate threat of “riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order,” courts have since interpreted it as applying primarily to incitement of violence.<sup>336</sup>

The Second Circuit, for example, described *Feiner* as a public gathering that “threatened to escalate into racial violence,” where the

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332. *Boos*, 485 U.S. at 332 (finding the disturbance of public peace statute in *Grayned* acceptable because “[i]t is crafted for a particular context and given that context, it is apparent that the ‘prohibited quantum of disturbance’ is whether normal embassy activities have been or are about to be disrupted”).

333. *See, e.g.*, *Gooding v. Wilson*, 405 U.S. 518, 526 (1972); *Cox v. Louisiana*, 379 U.S. 536, 551 (1965).

334. *Cox*, 379 U.S. at 550 (noting that the crowd had “rumblings” and atmosphere became “tense” because of the “mutterings” “grumbling” and “jeering” from the white group, but “[t]here is no indication, however, that any member of the white group threatened violence”).

335. *See, e.g.*, MONT. CODE ANN. § 45-8-104 (2009).

336. *Feiner v. New York*, 340 U.S. 315, 320 (1951).

speaker was arrested not only because of the crowd's threatened violence but because he defied police orders to cease and desist.<sup>337</sup> The Tenth Circuit explained that in *Feiner* the speaker urged that his black audience "rise up in arms and fight."<sup>338</sup> And a Kentucky district court recently explicitly linked incitement to riot to incitement to violence, explaining that "the Court must also consider the context of the speech to determine whether it was inherently likely to cause a violent reaction, thus inciting a riot."<sup>339</sup>

Thus *Feiner* can be read through *Brandenburg* to allow the state to arrest a speaker who incites imminent, likely, and serious violent action. But it would not mean that the state can arrest a speaker who incites imminent, likely and merely lawless action where that lawless action is something *de minimis* such as jaywalking.

Even if one is not convinced by this argument and finds *Brandenburg* to apply to all lawless action, it cannot be the case that incitement to a threat or risk is constitutional. The Supreme Court has required on numerous occasions some actual reaction from the crowd, not a risk of a reaction, for speech to a crowd to be regulated. *Brandenburg* might alternatively mean that states can regulate direct incitement to jaywalking where jaywalking is imminent and likely, but it cannot mean that states can constitutionally regulate direct incitement to a risk of jaywalking where a risk of jaywalking is imminent. The Supreme Court's jurisprudence on balancing the First Amendment against a risk of harm requires that police be able to immediately assess the harm on the ground, not predict what harm might occur in the future.<sup>340</sup> Giving police the discretion to assess future harm caused by speech increases the likelihood that speech will be banned based on preexisting prejudices against its content.

## VI. CONSTITUTIONALITY OF RIOT AND INCITEMENT TO RIOT

A number of incitement-to-riot statutes are unconstitutional. Some violate freedom of assembly in their underlying definition of "riot," by defining riot as a risk of public alarm through tumultuous and violent conduct. Others violate the First Amendment's protection of speech that incites action, by failing to include the *Brandenburg* requirements. Those requirements, however, might be read into a statute by a court—and many courts, in fact, have at least read a clear and present danger

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337. *Jones v. Parmley*, 465 F.3d 46, 57 (2d Cir. 2006).

338. *Cannon v. City of Denver*, 998 F.2d 867, 873 (10th Cir. 1993).

339. *World Wide St. Preachers' Fellowship v. City of Owensboro*, 342 F. Supp. 2d 634, 639 (W.D. Ky. 2004).

340. *Forsyth*, 505 U.S. at 134.



test into incitement-to-riot statutes. Third, a number of state statutes create a scheme where the call to action is remote from any actual harm. I have called this problem harm attenuation, and believe it cannot be constitutional under *Brandenburg*, both because sometimes the harm is too remote (not imminent) and because sometimes the anticipated harm is *de minimis* (not actual violence or force).

### *A. When Riot Violates Freedom of Assembly*

There are two types of underlying riot statutes that might directly violate freedom of assembly. The first concerns the creation of a risk of public alarm, and the second contains threats of violence rather than actual violence.

#### 1. Tumultuous Conduct and Public Alarm

The first type of statute that may violate freedom of assembly is the type that penalizes creating a risk of public alarm through tumultuous conduct. One example of this type is Arkansas's riot statute, which penalizes riot if a person, with two or more other persons, knowingly engages in "tumultuous or violent conduct" that creates a "substantial risk" of "causing public alarm."<sup>341</sup> Where courts have not narrowed "tumultuous or violent conduct" to apply only to actual violence, this definition is probably unconstitutional.

Regulating group conduct based on anticipated public animus is likely unconstitutional for two reasons. First, it bases the evaluation of harm on public reaction rather than objective harm. In *Coates*, the Supreme Court concluded that "mere public intolerance or animosity cannot be the basis for abridgment of these constitutional freedoms."<sup>342</sup> Similarly, in *Terminiello*, the Court declared that it was unconstitutional to convict a speaker of breach of the peace for speech that "stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance . . . ."<sup>343</sup> Thus, it is probably unconstitutional to base a riot statute on banning the creation of "public alarm." Conduct that disturbs or alarms the public is often an element of assembly, and may even be an important part of the freedom to assemble.

Second, because this type of statute is based on the risk of public alarm rather than the actual creation of public alarm, it allows police the discretion to determine whether the public will in fact be alarmed instead of proving that a person has, in fact, been alarmed. Giving

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341. ARK. CODE ANN. § 5-71-201(a)(1) (2012).

342. *Coates v. City of Cincinnati*, 402 U.S. 611, 615 (1971).

343. *Terminiello v. City of Chi.*, 337 U.S. 1, 3 (1949).

police the discretion to predict how a crowd might react is not appropriate and is likely unconstitutional. In *Forsyth*, the Supreme Court found that the administrator could not be given the discretion to adjust a permit fee based on his guess that the crowd might react more heavily to a given protest.<sup>344</sup>

Riot statutes that are founded on tumultuous conduct with no requirement that the conduct actually harm somebody or something, and with the only harm described being a risk of public alarm, are likely unconstitutionally violative of the freedom of assembly.

The 1985 American Law Report annotation on incitement to riot noted a pattern in court interpretations of public alarm statutes: where force or violence has not in fact occurred, courts have found terror to the populace to be a necessary element of the crime of riot.<sup>345</sup> Unless public terror and public alarm are construed to include an act of violence or physical harm, or to be physically limited to a specific site,<sup>346</sup> this type of definition of riot is likely unconstitutional.

## 2. Threats of Violence

A second type of riot statute that might present problems for freedom of assembly is the kind that addresses threats of violence, rather than violence itself. This presents a more difficult problem than statutes that penalize merely causing public alarm, because real violence is at least part of the equation. An example of this kind of statute is Arizona's riot statute, which penalizes a threat of force or violence that disturbs the public peace when that threat is accompanied by immediate power of execution.<sup>347</sup> As mentioned, an Arizona court found this definition neither vague nor overbroad.<sup>348</sup>

The question presented by this statute is whether "peaceable assembly" means assembly that is not violent, or assembly that does not even threaten violence. This conflict stems from defining riot as a group version of the crime of assault. Presumably, if one may arrest an individual for assault, one may arrest a group for assault. Assault is usually defined as intentionally placing a person in apprehension of

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344. *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 134 (1992).

345. McMahon, *supra* note 8, § 3[a].

346. *Boos v. Barry*, 485 U.S. 312, 331 (1988).

347. ARIZ. REV. STAT. ANN. § 13-2903 (2012) ("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.").

348. *See State v. Urias* 553 P.2d 1230, 1232 (Ariz. Ct. App. 1976).

immediate harmful or offensive contact.<sup>349</sup> Arizona's riot statute imports at least one element of assault by requiring the threat of violence to be followed by an immediate power of execution.

However, this restriction alone is inadequate. Arizona's riot statute does not require a target for the threat of force or violence; it merely states that the threat of force or violence must disturb the public peace. This shift of the target of the threat from an individual who is in apprehension of imminent harmful conduct, to the "public peace" which risks getting disturbed, makes the statute possibly unconstitutional for the same reasons discussed above: states cannot ban speech that causes mere public animosity (even where that animosity is stirred up by a threat of violence), and states cannot ban speech based on a prediction of the public reaction to it without examining the facts on the ground. The definition of riot based on public annoyance, disturbance, or alarm again must be unconstitutional under *Coates*.<sup>350</sup> Additionally, this type of riot statute might not meet the First Amendment standard for "true threats," where the threat concerned involves speech rather than physical action. In *Virginia v. Black*, the Supreme Court created a standard for "true threats," which occur where the speaker "directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death." The speaker need not actually intend to cause the harm. This type of riot statute, however, does not have a victim or group of victims, and does not include an intent requirement or a threshold of harm.

A related Supreme Court case on threats also suggests that this type of statute violates freedom of assembly. In *Boos*, the Court allowed police to arrest assemblies "only when the police reasonably believe that a threat to the security or peace of the embassy is present."<sup>351</sup> But the Court's reasoning in *Boos* suggests that two additional elements must be present for a threat-based statute to not violate freedom of assembly. First, the statute was narrowed to "groups posing a security threat to the embassy," which is a more precise physical target than the amorphous "public peace." Second, the congregation clause was "site specific" to within 500 feet of an embassy, which made it not vague and thus constitutional.<sup>352</sup> Arizona's threat-based definition of riot is not site-specific, and does not contain an individual target, just the public peace.

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349. BLACK'S LAW DICTIONARY (9th ed. 2009) (defining "assault" as the "threat or use of force on another that causes that person to have a reasonable apprehension of imminent harmful or offensive contact; the act of putting another person in reasonable fear or apprehension of an immediate battery by means of an act amounting to an attempt or threat to commit a battery").

350. See *Coates v. City of Cincinnati*, 402 U.S. 611, 615 (1971).

351. *Boos v. Barry*, 485 U.S. 312, 317 (1988).

352. *Id.* at 331.

Notably, New Hampshire courts recognize that this type of statute was problematic, and read into their similar statute a requirement that the crowd intentionally embark on concerted criminal action.<sup>353</sup>

### *B. Brandenburg and Incitement to Riot: The Definition of Incitement*

Under *Brandenburg*, any incitement-to-riot statute would have to address the speaker's intent, the likelihood that an audience would understand the speech, the imminence of the action, and the likelihood that the illegal activity would occur.

Kentucky's incitement-to-riot statute fails to include any definition of the term "incitement," and thus fails on its face to include the requirements under the First Amendment.<sup>354</sup> There is no mention of imminence, likelihood, or intent.

A number of courts have recognized this problem, and interpreted "incitement" to include a clear and present danger test. For those courts, however, the addition may still be inadequate because it does not fully import *Brandenburg*.<sup>355</sup> The clear and present danger test does not discuss the connection between the speaker and the listener. If the speaker speaks hastily and a crazy listener happens to act on that speech, the clear and present danger test might still allow the speaker to be penalized. But the *Brandenburg* test requires that the speaker's speech itself be understandable as incitement, and be likely to cause the action.

### *C. Brandenburg and Incitement to Riot: The Attenuation Problem*

The third constitutionality problem with incitement-to-riot statutes is admittedly the most challenging to address. Where riot is defined not as force and violence, but as a threat of tumultuous conduct, I believe that incitement to riot is too removed from actual harm to be constitutional. Rather than creating a likelihood of imminent harm, the speaker creates a likelihood of an imminent threat of conduct that itself in turn creates a clear and present danger of actual harm. This scheme represents a nesting of speech-act prohibitions, each of which has to be closely examined for constitutionality. It likely sweeps in a wide range of First Amendment-protected activity, without the justification that state action is needed to protect some person or thing from harm. One should therefore not be criminally punished for inciting somebody to in turn merely create a risk or a threat (unless, arguably, that threat is a "true

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353. *State v. Albers* 303 A.2d 197, 201 (N.H. 1973) (decided under prior law).

354. KY. REV. STAT. ANN. § 525.040(1) (2012).

355. *See, e.g., People v. Upshaw*, 741 N.Y.S.2d 664 (N.Y. Crim. Ct. 2002).

threat” under *Virginia v. Black*).<sup>356</sup>

This attenuation problem creates unconstitutional statutory schemes for two reasons: the harm is both *de minimis* and too remote. Where the harm is itself a risk, it does not reach *Brandenburg*’s implicit requirement of serious lawless action—not just lawless action. Just as one should not be criminalized for inciting somebody to jaywalk, even if the jaywalking is likely to occur, one should not be criminalized for inciting somebody to create a risk of harm or risk of public alarm. One is inciting somebody to create a risk—not the harm itself.

The second reason is that the harm is too remote, being doubly attenuated from the speech. The speaker does not himself pose a threat of force and violence; the speaker merely poses a threat of creating, in turn, a threat of force and violence. Several Supreme Court cases mention attenuation as a problem. In *NAACP*, the court noted the attenuation between Evers’s speech and any acts of violence, which occurred “weeks or months” after his speech.<sup>357</sup> Because of the attenuation, the violence was not sufficiently connected to the speech. Also, attenuation gives too much discretion to the police to determine when a risk might occur. As mentioned, in *Forsyth*, the Court found that an administrator could not adjust the permit fee based on an in-advance guess that a crowd might react strongly.<sup>358</sup>

Under *Brandenburg*, imminence is a requirement of incitement. It cannot be the case that one can be penalized as a speaker for creating an imminent threat of an imminent harm. The double imminence does not itself add up to imminence, because it adds in a layer of time. If a person tweets “gather in Times Square,” the state should not be able to punish that speech because the state assesses both that the speech is likely to create an imminent gathering and that a gathering in Times Square itself is likely to create imminent harm. The state should be permitted to penalize the speech only when the speech itself, not the gathering created by the speech, is intended and likely to cause imminent harm.

Courts appear to have noticed this attenuation problem, as well, as a number of states have developed case law that restricts these definitions. In Arkansas, the court in *Chapman v. State* read the statute to prohibit incitement to riot only where there was a clear, present, and immediate

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356. This analysis may change if the threat is a “true threat,” under *Virginia v. Black*, where the “speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals” and intends to place the victim “in fear of bodily harm or death.” 538 U.S. 343, 344 (2003).

357. *NAACP v. Claiborne*, 458 U.S. 886, 928 (1982).

358. *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 134 (1992).

danger of acts of force or violence.<sup>359</sup> Tennessee construes incitement as covering only conduct directed to inciting or producing imminent lawless action and thus found it not overbroad.<sup>360</sup> And Kentucky, while lacking related case law, is guided by a 1974 legislative commentary on the incitement statute which clarifies that riot is “intended to be applied to disorderly demonstrations which threaten harm and which clearly exceed the limits of free expression.” However, the fact that Kentucky bases its definition of riot on the threat of harm preserves the problem of incitement to riot based on a risk-of-harm standard rather than an actual harm standard.

#### *D. Incitement to Riot Under the Federal Anti-Riot Act*

As discussed in the previous Subpart, the Federal Anti-Riot Act does not ban riot itself, or, strictly speaking, incitement to riot. It does, however, ban travel or the use of interstate commerce, including the mail, with intent to incite a riot, and an overt act done for that purpose.<sup>361</sup> Thus, using Twitter to communicate between states with the intent to incite riot could be a violation of the Federal Anti-Riot Act. Incitement to riot is not further defined under the statute, although it is limited by § 2101(b) to not include “the mere oral or written (1) advocacy of ideas or (2) expression of belief, not involving advocacy of any act or acts of violence or assertion of the rightness of, or the right to commit, any such act or acts.”<sup>362</sup>

Again, *Brandenburg* requires (1) intent by the speaker; (2) the existence of a listener who would understand the speech as inciting the action;<sup>363</sup> (3) the likelihood that the action will happen; and (4) the imminence of the action.<sup>364</sup> The Anti-Riot Act states that the speaker must intend to incite a riot.<sup>365</sup> It contains no mention, however, of the existence of a listener, any likelihood that the riot will happen, or imminence of harm.

Like some of the state laws examined above, the Anti-Riot Act defines riot in a way that creates another layer of First Amendment concerns. Riot is federally defined as a public disturbance involving an assemblage of three or more persons, with a threat of the commission of

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359. *Chapman v. State*, 516 S.W.2d 598, 599 (Ark. 1974).

360. *Original Fayette Cnty. Civic & Welfare League, Inc. v. Ellington*, 309 F. Supp. 89, 94 (W.D. Tenn. 1970).

361. 18 U.S.C. § 2101 (2011).

362. 18 U.S.C. § 2102(b) (2011).

363. *See Hess v. Indiana*, 414 U.S. 105, 108 (1973) (per curiam).

364. *Brandenburg v. Ohio*, 395 U.S. 444, 448–49 (1969).

365. 18 U.S.C. § 2101(b).

an act of violence.<sup>366</sup> Thus, the Anti-Riot Act resembles those state laws that penalize incitement of an assembly that itself in turn threatens violence. This, again, means that the call for riot can be a step away from actual harm, and that additional step of threat can be a second instance of speech.

Where the Anti-Riot Act does define riot in terms of violence, it includes violence that creates the danger of damage, rather than actual damage. The federal version of riot presents the same problems raised in some state laws: the speaker calling for a riot may be creating an imminent, likely riot, but not imminent or likely harm.

### *E. Constitutionality of the Federal Anti-Riot Act*

A number of courts have considered the constitutionality of the Anti-Riot Act. The Seventh Circuit considered it twice, first before *Brandenburg* in *National Mobilization Committee to End the War in Viet Nam v. Foran*,<sup>367</sup> and then several years later in *United States v. Dellinger*.<sup>368</sup> A district court in the Northern District of California considered its constitutionality in *In re Shead*,<sup>369</sup> but the Ninth Circuit in *Carter v. United States* decided that the appellants from *In re Shead* did not have standing to challenge the statute's constitutionality.<sup>370</sup> A district court in D.C., referring to these other cases, cursorily held that the statute was constitutional.<sup>371</sup> For our purposes, the two Seventh Circuit cases of *Foran* and *Dellinger*, and the California district court case of *In re Shead* are the most elucidating.

The Seventh Circuit's decision in *Foran* was the first case to analyze the constitutionality of the Anti-Riot Act. *Foran* was decided before *Brandenburg*. Five plaintiffs sought a declaratory judgment that the 1968 Anti-Riot Act was unconstitutional on its face and as applied. The court concluded that on its face, the Anti-Riot Act was not so vague as to be unconstitutional, and the court did not consider whether the Act might be misapplied.<sup>372</sup>

The plaintiffs in *Foran* alleged that the statute extended to cover guilt by association, loss of control over a peaceful assembly, and strict liability for the acts of anyone joining an intended peaceful demonstration. The Seventh Circuit rejected these arguments, reasoning

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366. 18 U.S.C. § 2102(a).

367. 411 F.2d 934 (7th Cir. 1969).

368. 472 F.2d 340 (7th Cir. 1972).

369. 302 F. Supp. 560 (N.D. Cal. 1969).

370. *Carter v. United States*, 417 F.2d 384, 386 (9th Cir. 1969).

371. *See United States v. Hoffman*, 334 F. Supp. 504 (D.D.C. 1971).

372. *Foran*, 411 F.2d at 938.

that the statute required intent to engage in one of the prohibited overt acts, and thus would not extend to innocent participation in a demonstration.<sup>373</sup> The court concluded that “the federal government has a strong interest in preventing violence to persons and injury to their property, and when clear and present danger of riot appears, the power of Congress to punish is obvious.”<sup>374</sup> The Seventh Circuit in *Foran* did not, however, reach whether the Act is constitutional where riot consists of a threat of violence rather than actual violence, or risk of damage rather than damage itself.

In *In re Shead*, a California district court agreed with *Foran* that Section 2101 was constitutional.<sup>375</sup> Although this case was later affirmed by the Ninth Circuit in *Carter* (with a decision not to reach the statute’s constitutionality for lack of standing), *In re Shead* is still worth examining because it is one of few examples of detailed analysis of the statute’s terms.<sup>376</sup> Despite agreeing with *Foran*, the court noted that “*Brandenburg* may require a further discussion of the constitutionality of 18 U.S.C. § 2101 . . . .”<sup>377</sup> The court succinctly summarized the statute as follows:

Congress has made it a crime if there is an intent to promote a riot at the time of use of interstate or foreign facilities and at that time or thereafter, the additionally-required overt acts are committed. This intent must be to promote, and the overt acts must be committed for the purpose of promoting, the disturbances defined in 18 U.S.C. § 2102(a) . . . .<sup>378</sup>

*In re Shead* addresses two arguments against the constitutionality of Section 2101. The first concerns the link between incitement and the definition of riot. The court reasoned that “[i]f the disturbances promoted or threatened constitute a clear and present danger, the overt acts themselves which are committed for that purpose, necessarily must also constitute a clear and present danger.”<sup>379</sup> Thus, the court concluded, the inclusion of clear and present danger in the statute’s definition of riot sufficiently limits the conduct condemned by the Anti-Riot Act to the *Brandenburg* standard.

This view is mistaken for two reasons. First, it mistakenly exports imminence from the act being incited (riot) to the link between incitement and the action being incited (the damage referred to in the definition of riot). The statute bans inciting acts of violence that in turn

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373. *Id.*

374. *Id.* at 939.

375. *In re Shead*, 302 F. Supp. 560, 564 (N.D. Cal. 1969).

376. *See Carter v. United States*, 417 F.2d 384, 386 (9th Cir. 1969).

377. *In re Shead*, 302 F.Supp. at 565.

378. *Id.*

379. *Id.* at 566.



create the clear and present danger of damage. This is not equivalent to banning the incitement of imminent and likely violence. In other words, incitement of violence that is not itself likely or imminent does not create a clear and present danger of damage, even where the violence, if it were to occur, would itself create a clear and present danger of damage.

Second, as discussed at great length above, the Anti-Riot Act defines “riot” to include threats. These do not actually create a clear and present danger of damage. The statute’s definition of “riot” in fact includes “threats of the commission of acts of violence . . . where the performance of the threatened act or acts of violence would constitute a clear and present danger of . . . damage or injury to the property of any other person or to the person.”<sup>380</sup> Under this definition of riot, the disturbance promoted does not actually constitute a clear and present danger of anything. Riot constitutes a threat that, if acted on, would constitute a clear and present danger of damage. This means that incitement to that threat does not itself create a clear and present danger; it creates a threat that *if acted on* would result in an act that would constitute a clear and present danger. But there is nothing in the federal definition of riot that requires that threat to be likely to be performed.

The plaintiffs in *In re Shead* also argued that the language in Section 2102(b) means that the statute unconstitutionally prohibits mere advocacy of violence. The district court disagreed. It held that the “double negative” excluding “advocacy of violence” from exceptions to the incitement statute did not bring all “advocacy of violence” into the statute’s purview. Moreover, it held that Section 2102(b) in fact results in the “total exclusion [from the statute] of expression not involving advocacy of violence, whether or not the intent and required overt acts fall within the coverage of 18 U.S.C. § 2101(a), 2102(a).”<sup>381</sup>

The Seventh Circuit returned to the Anti-Riot Act some years later in *United States v. Dellinger*.<sup>382</sup> The Seventh Circuit agreed to revisit the statute despite *Foran* because *Brandenburg* had been decided in the interim, the defendants raised new issues not raised in *Foran*, and because the Act “operates in an area where there is substantial potential for abridgment of expression . . . .”<sup>383</sup>

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380. 18 U.S.C. § 2102(a) (2011).

381. *In re Shead*, 302 F. Supp. at 566. I disagree with this analysis, because there are two categories mentioned in subparagraph (b): (1) “[mere] advocacy of ideas or . . . expression of belief” and (2) “advocacy of any act or acts of violence or assertion of rightness of [violence].” 18 U.S.C. § 2102(b) (2011). This doesn’t get rid of all acts that incite a riot that are not mere advocacy of ideas or expression of belief, such as, for example, advocacy to threaten. But this reading may be a way of making the statute constitutional.

382. 472 F.2d 340 (7th Cir. 1972).

383. *Id.* at 354–55.

For the first time in a case addressing the Anti-Riot Act, the Seventh Circuit explained that restrictions on riot could be problematic under the First Amendment. The court wrote that:

[R]ioting, in history and by nature, almost invariably occurs as an expression of political, social, or economic reactions, if not ideas. The rioting assemblage is usually protesting the policies of a government, an employer, or some other institution, or the social fabric in general, as was probably the case in the riots of 1967 and 1968 which are the backdrop for this legislation. A second reason is that a riot may well erupt out of an originally peaceful demonstration which many participants intended to maintain as such.<sup>384</sup>

Because of these substantial First Amendment concerns inherent in prohibiting riot, and because the defendants in *Dellinger* in fact were being prosecuted based on speeches they had given, the court explained that the “removed expression must have a very substantial capacity to propel action, or some similarly entwining relationship with it.”<sup>385</sup>

Thus, the Seventh Circuit in *Dellinger* asked “whether, properly construed,” the Anti-Riot Act “punishes speech only when a sufficiently close relationship between such speech and violent action is found to exist.”<sup>386</sup> The court held that the Act did punish only sufficiently entwined speech, and thus was constitutional.<sup>387</sup>

The Seventh Circuit reached this conclusion based on three prongs of analysis. First, it construed “incitement” as “sufficiently likely to propel the violent action to be identified with action.”<sup>388</sup> Second, it held that the definition of riot was “enough of an assault on the property and personal safety interests of the community so that participation in a riot or intentionally and successfully causing a riot can be made a criminal offense.”<sup>389</sup> And third, the court addressed that same “double negative” in Section 2102(b) concerning the exclusion of advocacy of violence from the exceptions to incitement, and concluded that rather than bringing “mere advocacy” of violence into the scope of the statute, which would indeed be unconstitutional, the language of Section 2102(b) was meant to forestall a defense that advocacy to violence is always excluded.<sup>390</sup>

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384. *Id.* at 359.

385. *Id.*

386. *Id.* at 360.

387. *Id.* at 355.

388. *Id.* at 360.

389. *Id.* at 361.

390. *Id.* at 363 (reasoning that “propelling speech will include advocacy of acts of violence and assertion of the rightness of such acts, and intended that the challenged phrase forestall any claim by such speaker that in that context such advocacy and assertion constitute mere advocacy of ideas or expression of belief excluded under (1) and (2)”).

I retain the same criticism of the link made between the definition of riot and incitement as I have outlined at great length above. The Seventh Circuit was wrong that incitement, as defined by the Anti-Riot Act, is sufficiently entwined with action to be identified with that action rather than protected as speech. The federal definition of incitement to riot includes inciting other people to create a mere threat of action, rather than inciting other people to actually do damage. I also do not read the Anti-Riot Act as requiring real harm to occur; it requires only that the assembled group be able to act on its threat, which, if acted upon, would create a clear and present danger of damage. Thus, the Anti-Riot Act's prohibitions are so attenuated from actual harm as to be unconstitutional.

The Seventh Circuit in *Dellinger* evinced significant trepidation about its holding. The court ran through several hypothetical scenarios that it found particularly problematic. It explained that:

We do not pretend to minimize the first amendment problems presented on the face of this statute. In one hypothetical application, the statute could result in punishment of one who, having traveled interstate, or used the mail, with intent to promote a riot, attempted to make a speech or circulate a handbill for the purpose of encouraging three people to riot. Arguably the statute does not require that the speech, if made, or the handbill, if circulated, succeed in any substantial degree in encouraging the audience to riot. Arguably a frustrated attempt to speak or circulate would not achieve the constitutionally essential relationship with action in any event. Arguably the statute does not require that a speech or handbill succeed in producing a riot or bringing the persons addressed to the brink of a riot, prevented only by some intervening and superseding force, and arguably no less degree of propelling of action by speech or handbill will suffice, even though intent to succeed must also be proved. Although we reject these arguments, in part as constructions of the statute, and in part as grounds for declaring it void, we acknowledge the case is close.<sup>391</sup>

Thus, the federal Anti-Riot Act remains a problematic means to prosecute speakers who call for a group to assemble.

## VII. ARE MOBS SPECIAL?

At the heart of the common law definition of riot lies an understanding of crowds as inherently disruptive and uncontrollable. Although flash mobs are a recent occurrence, mobs and their associated problems are not. There is a longstanding history in the United States of both mob activity and government fear of mob behavior. The actual

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<sup>391</sup> *Id.* at 362.

nature of crowds, however, does not support this fear.<sup>392</sup>

This Part first shows that there is a historical relationship between understandings of crowd psychology and First Amendment theory. It then explains why anti-riot laws exist, and provides policy suggestions as to what a good anti-riot law might do.

The first Subpart discusses the history of U.S. intellectuals' understanding of mob behavior, and how it influenced the development of First Amendment theory. The second Subpart moves from history to social psychology. The field of crowd psychology emerged in the 1890s, describing crowds as naturally anarchic.<sup>393</sup> More recent social psychology pushes back against this normative conclusion, describing instead two factors that lead certain crowds to mob violence: legitimacy and perception of power.<sup>394</sup> Other work suggests that crowds in general act no differently than a group of individuals.<sup>395</sup> By contrast, network theory explains that under certain circumstances, crowds can behave differently than individuals, because crowds can lead to swarming behavior after they reach critical density.<sup>396</sup>

This Part concludes that if governments regulate crowds at all, regulation should be based on the reality of crowd behavior, not a historical fear of mob action.

#### *A. The Historical Relationship Between Crowd Psychology and First Amendment Theory*

Intellectuals' perceptions of how crowds behave have influenced the development of First Amendment theory. In *Fear of the Mob and Faith in Government in Free Speech Discourse, 1919–1941*, legal historian Richard W. Steele tracks the development of First Amendment law

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392. Baker, *supra* note 208, at 981–82 (“There is a deeply engrained view of collective or mass behavior as being irrational, fickle, violent, undirected, and contagious. This view may influence the tendency in legal thought to assume a need to restrict the range of assemblies that receive protection. Nevertheless, historical studies consistently reject this vision of the “crowd.” Increased historical awareness implicitly supports the propriety of protecting a broader range of assemblies. Historians apparently find that what we might call a disruptive assembly—usually described as a “mob” or a “crowd” depending on one’s value commitments—is usually quite rational in its choice of targets for the application of force. Also, although the assembled people occasionally destroy property, these studies find that the crowd or mob, in stark contrast to the authorities who respond, seldom kill or injure other people. Typically, the crowd’s use of force and violence seems restrained.”).

393. GUSTAVE LE BON, *LA PSYCHOLOGIE DES FOULES* (1895).

394. See Wasik, *supra* note 5.

395. Cf. David Schweingruber & Ronald T. Wohlstein, *The Madding Crowd Goes to School: Myths about Crowds in Introductory Sociology Textbooks*, 33 TEACHING SOC. 136, 144 (2005).

396. See John Seabrook, *Crush Point*, NEW YORKER, Feb. 7, 2011, [http://www.newyorker.com/reporting/2011/02/07/110207fa\\_fact\\_seabrook?currentPage=all](http://www.newyorker.com/reporting/2011/02/07/110207fa_fact_seabrook?currentPage=all) (citing John J. Fruin, *The Causes and Prevention of Crowd Disasters* (Mar. 1993) (unpublished manuscript), available at <http://www.crowdsafe.com/>).

between the World Wars.<sup>397</sup> Steele explains that free speech theory was developed based on intellectuals' views about crowd behavior. As intellectuals changed their view about the nature of crowds, they changed their theory of what government should be able to do with respect to speech regulation.

Americans have not always conceived of crowds as bad. In colonial times, Americans believed that mobs occurred only because of abuse of power by the government.<sup>398</sup> Popular uprisings were "an evil . . . productive of good."<sup>399</sup> In 1768, the conservative Thomas Hutchinson stated that "[m]obs, a sort of them at least, are constitutional."<sup>400</sup>

Around the beginning of the twentieth century, however, American social and political thinkers became deeply concerned with the danger of mob rule.<sup>401</sup> Gustave Le Bon's *The Crowd*, a popular book in the era, depicted groups as more easily moved to gullibility and irrationality than individuals.<sup>402</sup> Jurist Roscoe Pound observed that in the United States, crowd mentality manifested in Americans' tendency toward the vigilante mob.<sup>403</sup>

By the first decade of the twentieth century, the emerging national elite began to see vigilantism as dangerous. A Senate committee investigated vigilante activities in Colorado in 1904,<sup>404</sup> and Congress attempted, but failed, to outlaw lynching in 1922.<sup>405</sup> The Supreme Court addressed vigilantism in *Moore v. Dempsey* in 1923, upholding the duty of the federal judiciary to intercede in a state trial to determine if the outcome had been shaped by mob intimidation.<sup>406</sup>

Free speech theory developed in part against the backdrop of this fear

397. Richard W. Steele, *Fear of the Mob and Faith in Government in Free Speech Discourse, 1919–1941*, 38 AM. J. LEG. HIST. 55 (1994).

398. Baker, *supra* note 208. According to Pauline Maier, an historian writing about the period, colonial Americans expressed the view that "Mobs and Tumults never happen but thro' oppression and a scandalous Abuse of Power." People recognized that popular uprisings, by bringing popular feelings to the attention of public authorities, were "an evil . . . productive of good." Occurring most often under free governments, these uprisings "could be interpreted as 'Symptoms of a strong and healthy Constitution.'" Thus, Maier concluded that "popular uprisings benefited from a certain presumptive acceptability that was founded in part on colonial experience with mass action." She even quotes "the conservative Thomas Hutchinson" as saying in 1768 that "[m]obs, a sort of them at least, are constitutional." *Id.* at 980.

399. *Id.*

400. *Id.*

401. Steele, *supra* note 397, at 56–57.

402. Baker, *supra* note 208, at 981 n.112.

403. See ROSCOE POUND, CRIMINAL JUSTICE IN AMERICA 11, 123–24 (1930).

404. Steele, *supra* note 397, at 57.

405. Robert M. Cover, *The Left, The Right and the First Amendment: 1918–1928*, 40 MD. L. REV. 349, 356 (1981).

406. 261 U.S. 86, 92 (1923).

of vigilantism. The American Bar Association promulgated a property rights-based civil libertarianism to defend individual wealth against assaults by the masses.<sup>407</sup> On the other side of the political spectrum, intellectuals feared the growth of a collective “intolerant spirit” evidenced by the Ku Klux Klan, the prohibition movement, and efforts to stamp out evolutionism, resulting in a need to limit the power of majorities.<sup>408</sup>

Harvard professor Zechariah Chafee, Jr. situated free speech with respect to mob behavior.<sup>409</sup> Free expression both protected minority speech from the dictates of the majority, and provided a safety valve for complaints that could otherwise develop into rebellion.

Steele points out that the Supreme Court First Amendment cases of the time generally stemmed from actions performed by state and local governments.<sup>410</sup> States were seen as either instruments of mass hysteria, or as unable to deal with wrongs rooted in mass intolerance.<sup>411</sup> A 1931 Yale Law Journal article discussing freedom of speech noted that states failed to protect men from violence and mobs.<sup>412</sup>

By 1939, federal authority had become the avowed locus of the protection of free expression from popular repression.<sup>413</sup> The Justice Department investigated the intimidation of coal miners in Kentucky,<sup>414</sup> and the Criminal Division established a special unit to address civil rights violations.<sup>415</sup>

As protection of free expression consolidated in federal hands, the intellectual conception of mob mentality changed. In the 1930s, Steele argues, the success of fascism and Nazism shifted intellectual thinking about mob behavior. Instead of fearing local majorities who would suppress the minority view, intellectuals began fearing the “human herd[’s]” capacity to be led into revolution.<sup>416</sup> As Steele puts it, “the masses were not congenitally evil, just infinitely malleable.”<sup>417</sup> The

407. Steele, *supra* note 397, at 57.

408. *Id.* at 59–60.

409. Zechariah Chafee Jr., *Freedom of Speech*, 17 NEW REPUBLIC 67 (1918). See also Zechariah Chafee Jr., *Freedom of Speech in War Time*, 32 HARV. L. REV. 932 (1919); ZECHARIAH CHAFEE JR., FREEDOM OF SPEECH (1920).

410. Steele, *supra* note 397, at 64.

411. *Id.* at 65.

412. See Comment, *The Supreme Court’s Attitude Toward Liberty of Contract and Freedom of Speech*, 41 YALE L. J. 262, 267 (1931).

413. Steele, *supra* note 397, at 68–69.

414. See JOHN W. HEVENER, WHICH SIDE ARE YOU ON? THE HARLAN COUNTY COAL MINERS, 1931–39, at 150–53 (1978).

415. Henry Schweinhaut, *The Civil Liberties Section of the Department of Justice*, 1 BILL RTS. REV. 206, 206 (1940).

416. Steele, *supra* note 397, at 70.

417. *Id.* at 71.

“charismatic leader” was now the threat, not the vigilante mob itself.<sup>418</sup> Orson Welles’s famous War of the Worlds prank cemented this understanding of crowd behavior by creating mass panic through a radio broadcast,<sup>419</sup> and a number of treatises on the topic appeared, by authors such as Peter Drucker, Waldo Frank, McGeorge Bundy, and Lewis Mumford.<sup>420</sup>

Days after Germany’s 1939 assault on Poland, Attorney General Frank Murphy announced his intention to curb intolerance and protect deserving minorities—by dealing with “un-American” activities that might rouse fascist mob behavior.<sup>421</sup> The ABA’s Bill of Rights Committee, which had previously been concerned with protecting civil liberties to protect property rights, now supported expanding federal police surveillance.<sup>422</sup> Steele observes that by 1941, leftist intellectuals such as historian George Mowry supported federal protection from fascism by cracking down on the Right.<sup>423</sup> Max Lerner similarly concluded that the greater danger to minorities was not from the federal government, but from local vigilantism.<sup>424</sup> This sentiment extended to civil libertarians: Roger Baldwin, the founder of the ACLU, developed cordial relations with FBI director J. Edgar Hoover, although he did express reservations about Hoover’s authority to compile a list of potential subversives.<sup>425</sup>

Steele’s detailed description of the development of intellectual thought on free expression between the World Wars evinces a historical relationship between conceptions of mob behavior and understanding of what role government should play. In the 1920s, theorists believed that crowds led to anarchic behavior and repressive majority rule through vigilante justice. Therefore, theorists at the time thought minority speakers should be protected from the excesses of crowd repression. Consistent with this understanding, a number of states have anti-vigilante approaches to riot laws, with explicit prohibitions of lynchings,<sup>426</sup> and make cities liable for damage that occurs when they

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418. *Id.* at 72.

419. See HADLEY CANTRIL, *THE INVASION FROM MARS, A STUDY IN THE PSYCHOLOGY OF PANIC* (1940).

420. Steele, *supra* note 397, at 72–73.

421. *Id.* at 74–75.

422. See generally John E. Mulder, *Changing Concepts of Civil Liberties*, 1 BILL RTS. REV. 95 (1941).

423. Steele, *supra* note 397, at 75.

424. Max Lerner, *Discussion*, in *WAR AS A SOCIAL INSTITUTION* 184, 187–88 (1966).

425. See Steele, *supra* note 397, at 76, 80.

426. See, e.g., W. VA. CODE § 61-6-7 (2012) (the Red Man’s Act of 1882), *invalidated by* State v. Postelwait, 239 S.E.2d 734 (W. Va. 1977); W. VA CODE § 61-6-12 (2012) (defining mob as those “assembled for the unlawful purpose of offering violence to the person or property of anyone supposed to have been guilty of a violation of the law, or for the purpose of exercising correctional or regulative

fail to prevent vigilante justice.<sup>427</sup>

In the late 1930s, against the rise of fascism, theorists instead saw crowds as herds that were compelled not of their own accord, but by charismatic leaders. Under that understanding of how mobs form and behave, theorists thought government should repress the speech that leads to crowd formation, rather than protect individual speech done in front of the crowd.

Although no scholar has analyzed this dynamic after World War II, understandings of mob behavior clearly influenced the development of the Federal Anti-Riot Act in the 1960s. The Federal Anti-Riot Act was enacted in response to civil disorders of the 1960s.<sup>428</sup> It was “based on the premise that riots are caused by roving bands of agitators who escape across state lines before they can be apprehended by local authorities.”<sup>429</sup> The bill was styled on the House floor as “a weapon against an alleged Communist-inspired anarchy sweeping the country.”<sup>430</sup>

This historical relationship between U.S. society’s understanding of crowd behavior and the regulation of speech is more complex than a dichotomous understanding that mobs are good when they are peaceful and political but bad when they are violent and consisting of low value speech. The fundamental understanding of what a mob is matters when it comes to figuring out the boundaries of acceptable governmental regulation.

### *B. Current Crowd Psychology*

Understanding how a mob works—whether it is inevitably anarchic, or harmless but prone to following calls to violence—is crucial to making sense of whether and how to regulate riots. If crowds are inevitably anarchic, it would be logical to regulate all in-person gatherings over a certain size. If crowds are usually harmless, but become violent in the face of a charismatic leader, then it would be more effective and less harmful to regulate the speaker who calls for a crowd to form, and directs that crowd towards violence. Leaving aside the

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powers over any person or persons by violence, and without lawful authority”). Georgia law punishes:

[A]ssembly of two or more persons, without authority of law, for the purpose of doing violence to the person or property of one supposed by the accused to have been guilty of a violation of the law, or for the purpose of exercising correctional or regulative powers over any person by violence . . . .

GA. CODE ANN. § 16-11-33(2) (2012).

427. W. VA. CODE § 61-6-12 (2012).

428. Comment, *Riot Legislation: A Tale of Two Eras*, 68 NW. U.L. REV. 976, 976 (1973).

429. *Id.* at 976–77.

430. *Id.* at 978.



First Amendment for a moment, this Subpart attempts to wade through crowd psychology to understand how and why riots occur.

Crowd psychology emerged as a discipline in the 1890s, when Gustave Le Bon wrote a famous treatise called *The Crowd*.<sup>431</sup> Other scholars wrote about crowd behavior as early as the 1840s.<sup>432</sup> Le Bon argued that in crowds, individuals disappear into the mental unity of the whole. In the 1950s, American social psychologist Leon Festinger named this process of self-effacement “deindividuation.”<sup>433</sup> American social psychologist Philip Zimbardo took up studies of “deindividuation” in the 1970s, famously performing the Stanford Prison Experiment of 1971.<sup>434</sup>

“Deindividuation” theorizes that through anonymity, crowds allow individuals to eschew societal norms, and consequently crowds naturally tend towards a state of anarchy and senseless violence. More recent studies show how a group self-selects towards increasingly violent behavior, as individuals who do not agree with group goals leave and are replaced by those who do. This version of crowd psychology provides much justification for government regulation of crowd dynamics, since most crowds under this analysis would be likely to disobey laws and cause harm.

However, the “deindividuation” theory, also referred to as “contagion” theory because it posits that crowds transform individual people, has prompted much disagreement. Even introductory sociology textbooks limit or reject deindividuation.<sup>435</sup> Several other theories have emerged to explain crowd behavior offering differing observations about how crowds behave.

Convergence theory argues that crowd behavior is based not on transformation of its members but on a shared self-conception and a shared set of grievances.<sup>436</sup> Research by Clifford Stott suggests that riots occur not because individuals anonymously disappear into a crowd, but because individuals identify with each other, and frame that identity

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431. See LE BON, *supra* note 393; see also HENRI FOURNIAL, *LA PSYCHOLOGIE DES FOULES* (1892); GABRIEL TARDE, *LES LOIS DE L'IMITATION* (1890); GABRIEL TARDE, *LA LOGIQUE SOCIALE* (1895); GABRIEL TARDE, *L'OPINION ET LA FOULE* (1903).

432. See CHARLES MACKAY, *EXTRAORDINARY POPULAR DELUSIONS AND THE MADNESS OF CROWDS* (1841).

433. Festinger, L., Pepitone, A. & Newcomb, T., *Some Consequences of De-Individuation in a Group*, 47 J. ABNORMAL & SOC. PSYCHOL. 382 (1952).

434. See Philip G. Zimbardo, *The Human Choice: Individuation, Reason, and Order Versus Deindividuation, Impulse, and Chaos*, in 17 NEB. SYMPOSIUM ON MOTIVATION (W.T. Arnold & D. Levine eds., 1969).

435. Schweingruber & Wohlstein, *supra* note 395, at 144.

436. See Sam Parkovnick, *Contextualizing Floyd Allports's Social Psychology*, 36 J. HIST. BEHAV. SCI. 429 (2000).

in conflict with authority figures such as the police.<sup>437</sup> Critics of convergence theory point out that it (arguably incorrectly) assumes that crowds engage in unanimous or mutually inclusive behavior.<sup>438</sup>

A third perspective, called the emergent-norm perspective, defines collective behavior as “social behavior in which usual conventions cease to guide social action and people collectively transcend, bypass, or subvert established institutional patterns and structures.”<sup>439</sup> This perspective posits that crowds behave with more spontaneity than individuals. Special spontaneity of crowd behavior, however, has been refuted by a number of studies.<sup>440</sup>

In 2005, David Schweingruber and Ronald T. Wohlstein argued that sociology textbooks should do away with overarching theories of crowd behavior entirely, and look instead to empirical research that has been done on how crowds actually behave.<sup>441</sup> They explain that critical thinking about crowds has shifted from seeing them as suggestible, emotional, and irrational to seeing them as “shaped by the same forces that shape other social behavior.”<sup>442</sup>

Basing their analysis on work by Carl Couch in 1968<sup>443</sup> and Clark McPhail in 1991,<sup>444</sup> Schweingruber and Wohlstein debunk seven myths about crowd behavior: irrationality, emotionality, suggestibility, destructiveness, spontaneity, anonymity, and unanimity. The myth of irrationality claims that crowds cause people to lose their ability to engage in rational thought; for example, causing panic.<sup>445</sup> However, research into emergency dispersal has shown that people in crowds in dangerous situations don’t panic, but instead are guided by social relationships and exhibit altruistic behavior.<sup>446</sup> The myth of emotionality claims that people in crowds are more governed by their emotions.<sup>447</sup> Both Couch’s 1968 work and a 1987 study by Turner and Killian argue that emotions are in fact present in many social interactions, and crowds are not exceptional in this regard.<sup>448</sup>

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437. See Wasik, *supra* note 5.

438. See CLARK MCPHAIL, *THE MYTH OF THE MADDING CROWD* 71 (1991).

439. RALPH H. TURNER & LEWIS M. KILLIAN, *COLLECTIVE BEHAVIOR* 3 (3d ed. 1987).

440. See generally CHARLES TILLY, *FROM MOBILIZATION TO REVOLUTION* (1978); Michael J. Rosenfeld, *Celebration, Politics, Selective Looting and Riots: A Micro Level Study of the Bulls Riot of 1992 in Chicago*, 44 SOC. PROBS. 483 (1997); Carl J. Couch, *Collective Behavior: An Examination of Some Stereotypes*, 15 SOC. PROBS. 310 (1968).

441. See Schweingruber & Wohlstein, *supra* note 395, at 146.

442. *Id.*

443. Couch, *supra* note 439, at 310.

444. MCPHAIL, *supra* note 437.

445. Schweingruber & Wohlstein, *supra* note 395, at 138.

446. *Id.*

447. *Id.*

448. See *id.* See also TURNER & KILLIAN, *supra* note 438, at 13.

The third myth is that people in crowds are more likely to obey others. No research supports this conclusion. The fact that crowds usually do not disperse when ordered to by authorities suggests that the myth of suggestibility may in fact be incorrect.<sup>449</sup> The fourth myth claims that people in crowds are more likely to be violent. Couch argued that in clashes between crowds and authorities, the authorities in fact commit more violence than the crowds.<sup>450</sup> Research has shown that crowd violence is rare,<sup>451</sup> and is often carried out by small groups within the gathering.<sup>452</sup> Police interaction with crowds may in fact spur crowd violence where it wouldn't otherwise occur.<sup>453</sup>

No research has demonstrated that crowd behavior is more spontaneous than individual behavior.<sup>454</sup> In fact, studies have shown that many crowds require planning or rely on "repertoires of collective action" that are understood by other members of the culture, such as strikes or boycotts.<sup>455</sup>

Deindividuation relies in large part on the idea that people in crowds are anonymous and thus unaccountable for their behavior, which allows them to do things they otherwise would not do. A number of studies have noted that crowds are not composed of anonymous individuals, but of small groups that know each other well.<sup>456</sup> Anonymity may exist vis à vis authority figures, but not with respect to other members of the crowd.<sup>457</sup> Presumably, then, social norms would still be enforced between these individuals. Individuals gather not because they seek to benefit from anonymity, but because of the social links and common goals they share.

The myth of unanimity claims that crowds act in unison. Research has shown that crowds in fact contain alternating and varying individual and collective actions, with unanimous or near-unanimous behavior being rare and short-lived.<sup>458</sup>

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449. See Schweingruber & Wohlstein, *supra* note 395, at 139.

450. *Id.* at 139.

451. *Id.*

452. Clifford Stott & Stephen Reicher, *Crowd Action as Intergroup Process: Introducing the Police Perspective*, 28 EUR. J. SOC. PSYCH. 509, 516–17 (1998).

453. See generally Patrick F. Gillham & Gary T. Marx, *Complexity and Irony in Policing and Protesting: The World Trade Organization in Seattle*, 27 SOC. JUST. 212 (2000).

454. Schweingruber & Wohlstein, *supra* note 395, at 139.

455. See generally Charles Tilly, *Contentious Repertoires in Great Britain, 1758–1834*, 17 SOC. SCI. HIST. 253 (1993); Rosenfeld, *supra* note 439; Couch, *supra* note 439, at 319.

456. See, e.g., Adrian F. Aveni, *The Not-so-Lonely Crowd: Friendship Groups in Collective Behavior*, 40 SOCIOMETRY 96 (1977).

457. *Id.*

458. See generally McPhail, *supra* note 437; Clark McPhail & David Schweingruber, *Unpacking Protest Events: A Description Bias Analysis of Media Records with Systematic Direct Observations of Collective Action—The 1995 March For Life in Washington D.C.*, in ACTS OF DISSENT: NEW

So what do crowds actually look like? Much research has been done about the assembling and dispersal process, and the composition of crowds.<sup>459</sup> Temporal availability and spatial access are both important. People usually assemble with small groups of companions within the crowd. Crowds may be subdivided into different categories based on features such as level of organization; political demonstrations differ from “prosaic crowds.”<sup>460</sup>

One feature of crowds that has been confirmed as unique to crowd as opposed to individual behavior is the tendency to “swarm.” Soccer games and rock concerts in particular have generated deadly crowds, where participants die of “compressional asphyxia” from the pressure of people swarming around them.<sup>461</sup> These crushes are not produced by “panic,” which evidence does not support, but by “crazes”—people moving towards something they want, rather than away from something they fear.<sup>462</sup> Swarms require large numbers, or high density. At critical densities, crowds change from collective behavior (such as avoiding each other on a busy street) to failing to behave collectively. Unlike ants, humans cannot transmit information about the physical dynamics of a crowd across a swarm.<sup>463</sup> Individuals at the back of a crowd have no feedback that they are injuring those in the front.

In this particular feature of crowd behavior, there is actually an argument for allowing incitement: having leaders can prevent a swarm, because everybody looks to the leader for communication about the group. As long as the leader is outside of the crush and visible, the swarm might be prevented.

### *C. What an Anti-Riot Law Should Address, Given Current Understanding of Crowds*

Legislators should consider crowd psychology in determining the goals of any anti-riot laws. In practice, anti-riot legislation arises from a longstanding tradition of fear of mob behavior, and from outdated common law traditions.<sup>464</sup>

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DEVELOPMENTS IN THE STUDY OF PROTEST (1998).

459. Schweingruber & Wohlstein, *supra* note 395, at 146.

460. *Id.* at 147.

461. Seabrook, *supra* note 395 (citing John J. Fruin, *The Causes and Prevention of Crowd Disasters* (Mar. 1993) (unpublished manuscript), available at <http://www.crowdsafe.com/>).

462. *Id.*

463. *Id.* (citing Dirk Helbing, *Pedestrian, Crowd, and Evacuation Dynamics*, *ENCYCOPEDIA COMPLEXITY & SYSS. SCI.* (2010)).

464. Baker agrees, and points out:

The major scholarly impetus for the rejection of Le Bon’s views and of the psychologists’ and sociologists’ disparaging treatment of the crowd or mob has resulted

Leaving First Amendment considerations aside for a moment, the following paragraphs outline (1) the harm, specific to riots, that legislators want to prevent; and (2) the features of a statute that, with a basis in crowd psychology, could prevent or punish riots. Current legislation does not map onto what we know about crowd behavior.

Mobs are harmful for a number of reasons. First and foremost, they can actually become violent or destructive. Second, mobs can overwhelm the police, making enforcement more difficult. Third, by their nature, mobs threaten existing social structure. Fourth, at least one strand of crowd psychology, deindividuation, suggests that mobs themselves cause the people in them to do bad things.

When a mob actually causes harm, clearly the direct perpetrators of that harm should be punished. Whether that punishment should be extended to the whole of the mob is another story. Deindividuation would suggest that the entire crowd is responsible for the anarchic crowd mentality, so the entire crowd should be punished for being present when the bad acts occur. Conversely, convergence theorists see mobs as being made of like-minded individuals and would therefore hold each individual accountable only for his or her own acts and intent. A third approach is possible: multiple studies show that a mob is in fact made out of small groups of people who know each other well, suggesting that it might be fair to punish the people within that immediate small group, rather than the whole of the crowd.

The other categories of possible harm—overwhelming the police, threatening social structure, and exacerbating the tendency of members to do crimes—suggest that mobs or riots might be punished for existing as a gathering in large numbers, whether or not an act of violence takes place. This suggestion is dangerous from a First Amendment perspective, because it brings exercise of the right of assembly into collision with regulating mob activity.

Deindividuation theorists would presumably punish assemblies of a certain size, under the theory that large crowds inevitably lead to bad behavior. Legislators relying on deindividuation theory could be more careful, and punish large crowds that appear to be kicking out more moderate members as they unify towards bad anarchic behavior. Such laws could refer to the common intent of those present.

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from historians' study of actual crowds. The foundational work is that of George Rude. Although these historians emphasize the need to study the behavior of crowds in their social and historical context, they repeatedly find the crowd to be rational in its choice of both ends and means and consistently find its behavior to be oriented around some legitimizing norm. In the years since these ground breaking studies, these conclusions and the rejection of Le Bon's view of the crowd have been both affirmed and extended in a rich body of historical literature focusing on Great Britain and the United States.

Baker, *supra* note 208, 982 n.114 (citing a variety of sources).

Convergence theorists instead believe that crowds are not innately bad, but may give rise to bad behavior under certain conditions. Both legitimacy and power are required for crowds to turn violent.<sup>465</sup> If legislators are convinced by convergence theory, they might look to evidence that the mob is going after the police or otherwise legitimizing itself by countering existing social structure. For evidence of internal belief in the mob's power, they again might look to the size of the gathering, or presence of weapons.

Numbers therefore are important under several theories of crowd behavior. For deindividuation theorists, a large crowd is required for people to feel adequately anonymous and unrestrained by social strictures. For convergence theorists, a large number is required for a crowd to believe it has the power to act. For those researching swarming patterns, a high density of bodies is necessary for a swarm to take place. Nobody, however, has estimated what that critical number might be.

This presents what philosophers call the sorites paradox, which arises when it is difficult to determine the boundaries of a concept. For example, it is unclear at which point a collection of individual grains becomes a heap. This could lead to the false conclusion that a collection of grains can never become a heap.<sup>466</sup> Similarly, it may be impossible to identify the precise number of people at which a group gathering becomes a crowd capable of swarming, but we may still believe that mobs, as such, exist. Thus, states must struggle with determining the number of people that gives rise to dangerous crowd behavior.

As discussed above, Schweingruber and Wohlstein convincingly argue that crowds may just be an example of multiple individuals acting at the same time, with no additional characteristic imputed by the crowd's existence. Under this understanding, crowds should be regulated only if one would regulate an individual doing the same activity. Numbers should not matter, except with respect to how hard it would be to police multiple individuals acting at the same time. This view is in line with Baker's theory of freedom of assembly, outlined above, in which Baker explains that states cannot regulate an assembly for doing something where they would not regulate an individual for doing that same thing.

Similarly, Schweingruber and Wohlstein argue that crowds are no more susceptible to acting on command than individuals. This suggests that incitement-to-riot statutes should regulate actual harm caused by crowd behavior, not the interaction between a speaker and a crowd.

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465. See Wasik, *supra* note 5.

466. See Dominic Hyde, *Sorites Paradox*, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY (1997), available at <http://plato.stanford.edu/entries/sorites-paradox/>.

Incitement to riot should not be based on a myth that speaking to a large assembly is more likely to produce action than speaking to an individual.

State riot statutes apply to surprisingly small groups of people. They contain no language about crowd density, the one factor research supports may contribute to harm caused specifically by crowds. Instead, state statutes rely on dated misunderstandings—that allowing people to assemble in groups increases the chance that collective behavior will become anarchic and riotous. As a matter of policy, rather than constitutional theory, this is a mistake and overregulates behavior that may not lead to harm at all.

### VIII. DO NEW MEDIA MATTER?

There have been a number of claims that the internet and social media have changed the ways in which crowds gather. The question is whether these features require either a change in the *Brandenburg* standard, or additional regulation specifically targeting online communication. I believe they do not. Claims about internet exceptionalism include the following: the internet breeds extremism; the internet allows people to tap into a “mega-underground” of niche participants; the internet allows for a larger scale of people to be reached in a “cyber cascade”; the internet allows for a greater diversity of geographic origin; the internet allows for greater speed and spontaneity; and the internet makes crowd dispersal impossible.

Cass R. Sunstein claims that by its nature, online communication breeds extremism.<sup>467</sup> Groups of like-minded people become more extreme in their collective views as they talk amongst themselves,<sup>468</sup> and Sunstein asserts that the internet, more than other media, allows these groups to filter what content they receive and create an echo chamber. From a crowd psychology perspective, this means that groups have pre-selected for identity, which preemptively contributes to both their sense of legitimacy and the deindividuation of individuals within the group, causing them to be more likely to disregard social strictures and commit violence.

However, Sunstein’s assertion about online fragmentation has been widely contested. Yochai Benkler, for example, describes an internet where “clusters of moderately read sites provide platforms for vastly greater numbers of speakers,” and those clustering sites are often of general interest rather than extremist views.<sup>469</sup> A 2004 Pew study

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467. CASS R. SUNSTEIN, *REPUBLIC.COM 2.0* 69 (2007).

468. *Id.* at 60, 61.

469. *Id.* at 114 (quoting YOCHAI BENKLER, *THE WEALTH OF NETWORKS: HOW SOCIAL*

similarly concluded that many Americans learn about competing views online.<sup>470</sup> Moreover, Sunstein himself notes that this process of self-reinforcement is by no means limited to the internet as medium; special interest radio, television, and even newspapers, can produce the same effect.<sup>471</sup> The claim that communication breeds extremism is no more applicable to the internet than to other existing media, and consequently requires no change in *Brandenburg*.

Related to this idea of the echo chamber is the claim that the internet allows niche groups to form that would be too costly to assemble in real life. This claim has real substance, but it is not clear that it should affect *Brandenburg* analysis. The idea stems from Chris Anderson's idea of the "long tail," which argues that the enormous size of the online customer base ensures that online retailers will provide goods to a niche market that is not worth serving offline.<sup>472</sup> Similarly, people with niche political interests can find each other online, where it would have been too costly for them to gather in person.<sup>473</sup> Bill Wasik refers to these large niches as "mega-undergrounds," and suggests that many flash mobs occur because underground niche groups feel a need to publicly identify themselves in person.<sup>474</sup> This may accurately describe a new feature of online behavior, but it does not in itself indicate a new reason to regulate or a need for a new method of regulation. The fact that group members can find each other more effectively does not lead to a conclusion that government should regulate them more.

However, a related feature of online communication is its ability to reach huge numbers of people, and one can more convincingly argue that this feature requires a reassessment of the incitement standard. Sunstein explains that the internet reaches "hundreds, thousands, or even millions," referring to the quick accumulation of mass communication as a cyber "cascade."<sup>475</sup> Wasik's mega-undergrounds differ from past niche groups in that they are "mega." These groups also gather from a much more geographically diverse area than past crowds did.<sup>476</sup> The size of a crowd may have implications for *Brandenburg*'s application to incitement to riot, as it has implications for how much damage a crowd

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PRODUCTION TRANSFORMS MARKETS AND FREEDOM 242 (2006)).

470. JOHN HARRIGAN, ET AL., THE INTERNET AND DEMOCRATIC DEBATE, PEW INTERNET (2004), available at [http://www.pewinternet.org/~media/Files/Reports/2004/PIP\\_Political\\_Info\\_Report.pdf.pdf](http://www.pewinternet.org/~media/Files/Reports/2004/PIP_Political_Info_Report.pdf.pdf).

471. See SUNSTEIN, *supra* note 467, at 71.

472. See generally CHRIS ANDERSON, THE LONG TAIL (2006).

473. Cf. SUNSTEIN, *supra* note 467, at 111.

474. Wasik, *supra* note 5.

475. SUNSTEIN, *supra* note 467, at 83.

476. Wasik, *supra* note 5 (explaining that the 1960s American riots were localized, where at the recent Enfield riots in the United Kingdom only 60 percent of participants came from the local borough, while 40 percent commuted in from elsewhere).



might cause.

But *Brandenburg* contains no mention of the impact on the size of a group of listeners on First Amendment analysis; and other cases protected assemblies of over 2000 people, suggesting that size, in fact, does not matter.<sup>477</sup> Additionally, incitement-to-riot statutes already penalize groups as small as three to ten people, suggesting that the internet's ability to reach masses has no impact on the potential applicability of existing laws any more than it impacts constitutional standards. The legal question raised is not a *Brandenburg* question but a question of court interpretation of incitement-to-riot statutes: will an online speaker need to intend to reach a crowd of a particular size, or can he or she be held liable merely for speaking to the online community more generally, with the understanding that the speech is likely to reach a large number of individuals? Because of the small numbers involved in most incitement-to-riot statutes, this will likely be an insignificant question, because most people could be found to have the specific intent to reach more than three other people with online speech.

The most significant claim about internet exceptionalism concerns the speed of communication. This might impact *Brandenburg*'s imminence requirement. Wasik celebrates the fact that flash mobs are often "highly spontaneous; the crowd is told where they were going and what they will do there only minutes beforehand."<sup>478</sup> If groups can form so quickly that police cannot react, there might be an argument for ignoring the imminence requirement and allowing regulation before the call to arms happens. This, however, is exactly why *Brandenburg* has an imminence standard: the further back from actual harm regulation gets, the more it impinges on free expression.

Paradoxically, the other imminence issue raised by online communications is that a speaker might announce a gathering too far in advance, and thus put him or herself outside of *Brandenburg*'s range of imminence entirely. A number of scholars have bemoaned the *Brandenburg* imminence requirement in the context of instruction manuals and hit lists.<sup>479</sup> This concern does not have anything to do with the internet as a medium, since publication of plans or hit lists as books and pamphlets raise the same problems. *Hess* appears to address this issue, reasoning that the state cannot regulate the "advocacy of illegal

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477. See *Cox v. Louisiana*, 379 U.S. 536, 539 (1965).

478. Wasik, *supra* note 5.

479. See, e.g., S. Elizabeth Wilborn Malloy & Ronald J. Krotoszynski, Jr., *Recalibrating the Cost of Harm Advocacy: Getting Beyond Brandenburg*, 41 WM. & MARY L. REV. 1159 (2000); O. Lee Reed, *The State Is Strong but I Am Weak: Why the "Imminent Lawless Action" Standard Should Not Apply to Targeted Speech that Threatens Individuals with Violence*, 38 AM. BUS. L. J. 177 (2000).

action at some indefinite future time.”<sup>480</sup> But if a person advocates an action at a definite future time, it is not clear how imminent that future time must be for *Brandenburg* to allow regulation.<sup>481</sup> This is not a question of changing *Brandenburg*; it is a question of its application, and how courts choose to interpret the imminence requirement.

*Brandenburg* suggests that when action is advocated far enough in advance, police can prepare for it and avert danger through preparation; therefore, suppression or punishment of non-imminent speech is not allowed. It is only when the danger is so imminent that police cannot prepare themselves that regulation of incitement is justified. This analysis does not change when the communication is made online. In fact, online communication is centralized, often searchable, and not ephemeral, which makes it easier for police to track calls to action and respond to them than it was in the days of pamphleteering.<sup>482</sup>

One final point about the nature of social media is that it may be harder to disperse crowds when they have communication devices. Wasik points out that in the UK riots, the “mob” often physically split into smaller groups that remained connected via their Blackberries.<sup>483</sup> This concern should be addressed by *Brandenburg*, however. If a crowd splits up and members continue to wander the area, but they message each other indicating that they should immediately meet again to conduct violence, that messaging in the heat of the moment might be properly regulated as incitement. Otherwise, the problem of the “virtual mob” leads into tricky territory. If physical masses are what contribute most to damaging crowd behavior, then it is not justifiable to regulate people as crowds or riots once they physically disperse.

There are also features of online media that make them less threatening to government. Molly Beutz Land, for example, notes an inverse relationship between broad mobilization and meaningful participation, arguing that as activist groups reach larger numbers online, the depth of the participation of each individual person drops.<sup>484</sup> This relationship happens in part because of the growth of size of the movements. Political scientist Navid Hassanpour has observed that the relationship between social media and the Arab Spring in Egypt is complicated; people went outside to protest in part because the

480. *Hess v. Indiana*, 414 U.S. 105, 108 (1973).

481. *See infra* Part V(D)(3).

482. *See* HOWARD RHEINGOLD, *SMART MOBS: THE NEXT SOCIAL REVOLUTION*, at ch. 8 (2002) (“The same technologies that can amplify cooperation also have the potential to intensify surveillance.”).

483. Wasik, *supra* note 5 (“Today, by contrast, a crowd’s power is amplified by the fact that its members can never really get separated. A crowd that’s always connected can never really be dispersed. It’s always still out there.”).

484. Molly Beutz Land, *Networked Activism*, 22 HARV. HUM. RTS. J. 205, 215 (2009).

government shut down the internet, not because somebody called for organization to occur.<sup>485</sup> Malcolm Gladwell rather famously commented that the internet in fact lulls people into complacency rather than spurring them to action.<sup>486</sup>

In conclusion, there are a number of features of new media that appear particularly worrisome to regulators. These features can contribute to activism.<sup>487</sup> They might also contribute to genocide.<sup>488</sup> However, these features should not inspire a change in the *Brandenburg* standard, as many of are the same issues that exist in other media such as print, radio, or television. In the case of incitement to riot, there should be no change in *Brandenburg* to reflect the rise of flash mobs.

#### IX. THE CONNECTION BETWEEN NEW MEDIA AND ASSEMBLY

Assembly is one mode of participation in public culture. Before the internet, when the primary means of accessing the public was top-down media such as newspapers or television, public assembly was one of the few ways individuals could participate in crafting public culture. The internet is in some ways the virtual version of physical assembly.<sup>489</sup> Thus both in-person and online assembly are particularly important if the goal of the First Amendment is cultural democracy, regardless of the content of the assembly.

#### X. MODEL LAW

This paper closes by attempting to outline a constitutional and proportionate incitement-to-riot statute. Under *Brandenburg*, the incitement portion of the statute must contain intent, imminence, likelihood, and an audience likely to understand the command. I also incorporate lessons from more recent crowd psychology, suggesting as a matter of policy that the regulation should be of a larger group that is more likely to swarm. Congress itself once proposed raising the number of people required for riot from three to five, though the bill did not

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485. See Noam Cohen, *In Unsettled Times, Media Can Be a Call to Action, or a Distraction*, N.Y. TIMES, Aug. 28, 2011, <http://www.nytimes.com/2011/08/29/business/media/in-times-of-unrest-social-networks-can-be-a-distraction.html>.

486. Malcolm Gladwell, *Small Change: Why the Revolution Will Not Be Tweeted*, NEW YORKER, Oct. 4, 2010, [http://www.newyorker.com/reporting/2010/10/04/101004fa\\_fact\\_gladwell](http://www.newyorker.com/reporting/2010/10/04/101004fa_fact_gladwell).

487. See generally Buetz Land, *supra* note 484 (suggesting the benefits of online organization for activist efforts).

488. See Susan Benesch, *Vile Crime or Inalienable Right: Defining Incitement to Genocide*, 48 VA. J. INT'L L. 485 (2008).

489. See *Reno v. ACLU*, 521 U.S. 844 (1997).

pass.<sup>490</sup> Below, I propose that a more reasonable base number might be fifteen. The following language could constitute a model incitement to riot statute:

A person is guilty of inciting to riot when he or she clearly and intentionally urges [15] or more people to imminently and collectively engage in force or violence that damages property or injures people, at a time and place and under circumstances where such force or violence is imminent and likely to occur.

The act or conduct may not include the mere oral or written advocacy of ideas or expression of belief that does not urge the commission of an act of immediate violence.

Alternatively, one could set up a statutory regime that redefines the underlying crime of riot. Riot could be defined as a gathering of a certain number of people that, as common law required, involves the use of force or violence—not the mere threat or risk of force or violence. This underlying definition could require actual damage. Riot and incitement to riot could thus alternatively be defined as follows:

A person commits the crime of riot if, intentionally with [15] or more other persons, he or she engages in force and violence and thereby causes injury to persons or damage to property.

A person commits the crime of incitement to riot when he or she clearly and intentionally urges [15] or more persons to immediately riot, at a time and place and under circumstances where such riot is imminent and likely to occur.

## XI. CONCLUSION

Public gatherings can be highly threatening to governments, as seen over the past year. They are also essential to democracy, legitimizing government by allowing direct public participation in policy making. Prohibiting public gatherings or a call to public gatherings can itself lead to revolution, as crowds legitimize their behavior by reacting to overly strong state authority. Flash mobs and flash mobs are new phenomena, but intellectuals' understandings of mob action have influenced the development of First Amendment jurisprudence since its inception. This article calls for a reevaluation of our understanding of mobs, and awareness of the prejudices we operate under when writing legislation to control crowds.

The United States is home to the most speech-protective law in the world. As legislators and courts deal with the inevitable backlash to

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490. See Comment, *Riot Legislation: A Tale of Two Eras*, 68 NW U. L. REV. 976, 984–85 (1973).

flash mobs, they must reexamine existing incitement-to-riot statutes to ensure compliance with the First Amendment. They must do so with the same understanding the Supreme Court had back in 1937: that it is imperative to “preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government.”<sup>491</sup>

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491. *De Jonge v. Oregon*, 299 U.S. 353, 365 (1937).