COMMENTS

GROUP LIABILITY AND RIOT ACTS: CAN A NON-OPPONENT WIELD A HECKLER'S VETO?*

I. INTRODUCTION

In the fight for liberty, the government plays both sides: it defends its citizens against those who would oppress them but yields its own power to leave room for freedom.[1] From January 2017 until July 2018 the Department of Justice pursued a prosecution in the District of Columbia that blurred those roles and threatened the right to protest in the nation's capital.[2] The defendants were more than two hundred protestors who were arrested in a police corral or "kettle" during President Trump's inauguration.[3] Of those, a handful were tried.[4] At the

* Owen Healy, J.D. Candidate, Temple University Beasley School of Law, 2020. I would like to thank Professor Laura Little and David Nagdeman for invaluable feedback and ideas. Others who have contributed to this Comment include Brandon Matsnev, who offered editing and feedback, and Jeffrey DeLucca, Peter Hyndman, Professor Craig Green, Professor Andrea Monroe, and Professor Lauren Ouziel, who offered discussion and advice.

1. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 323–24 (Peter Laslett ed., Cambridge at the Univ. Press 1960) (1689) ("*[T]he end of Law* is not to abolish or restrain, but *to preserve and enlarge Freedom*: For in all the states of created beings capable of Laws, *where there is no Law, there is no Freedom*. For *Liberty* is to be free from restraint and violence from others . . . .").

2. *See, e.g.*, Keith L. Alexander, *Federal Prosecutors Abruptly Dismiss All 39 Remaining Inauguration Day Rioting Cases*, WASH. POST (July 7, 2018), https://www.washingtonpost.com/local/public-safety/federal-prosecutors-abruptly-dismiss-all-remaining-inauguration-day-rioting-cases/2018/07/06/d7055ffe-7ee8-11e8-bb6b-c1cb691f1402_story.html [http://perma.cc/S7DB-XZ5K]; Paul Duggan & Keith L. Alexander, *Amid Questions About the Line Between Free Speech and Rioting, Trial To Begin in Inauguration Day Protest*, WASH. POST (Nov. 19, 2017), http://www.washingtonpost.com/local/trafficandcommuting/amid-questions-about-the-line-between-free-speech-and-rioting-trial-to-begin-in-inauguration-day-protest/2017/11/18/d90b4f9e-cbb4-11e7-b0cf-7689a9f2d84e_story.html [http://perma.cc/6FT7-88UN]; Jaclyn Peiser, *Journalist Swept Up in Inauguration Day Arrests Faces Trial*, N.Y. TIMES (Nov. 14, 2017), http://nyti.ms/2hyhSEW [http://perma.cc/YE42-F5BM]; Ryan J. Reilly, *Inside the Trial That Could Determine the Future of Free Speech in America's Capital*, HUFFINGTON POST (Dec. 10, 2017, 6:00 PM), https://www.huffingtonpost.com/entry/protesting-dc-trump-inauguration-trial_us_5a1e1e84e4b0d724fed48d32 [http://perma.cc/RE8S-QKZ8]; Timothy Zick, Opinion, *Protests in Peril*, U.S. NEWS & WORLD REP. (Nov. 20, 2017, 1:00 PM), https://www.usnews.com/opinion/civil-wars/articles/2017-11-20/prosecuting-inauguration-day-protesters-puts-free-speech-in-peril [https://perma.cc/45AW-7D77].

3. Peter Hermann, *ACLU Sues D.C. Police over Arrests During Inauguration Disturbance*, WASH. POST (June 21, 2017), https://www.washingtonpost.com/local/public-safety/aclu-sues-dc-police-over-arrests-during-inauguration-disturbance/2017/06/21/91316cd0-503f-11e7-b064-828ba60fbb98_story.html [http://perma.cc/725L-Z3FV].

4. Alexandra Yoon-Hendricks, *Prosecutors Dropping Remaining Charges Against Trump Inauguration Protestors*, N.Y. TIMES (July 6, 2018), https://nyti.ms/2KVOL83 [http://perma.cc/8A66-5PMJ].

heart of the legal battle were a decades-old riot statute, a dearth of interpretive precedent, and a lone Civil Rights-era case purporting to dictate an ominously broad riot law for the District of Columbia.[5]

Had the prosecution produced a conviction, it would have forced a court to decide whom the government may constitutionally hold accountable for criminal acts incident to a political protest. Although it was undisputed that acts of property destruction and vandalism occurred along the marchers' path, the Justice Department conceded that many of those on trial did not commit such acts themselves.[6] Yet it argued that by choosing to remain in the crowd despite the property destruction and vandalism, the defendants participated in a riot.[7] In the end, every case that the Justice Department put before a jury ended in an acquittal or mistrial.[8] But jury verdicts are not legal precedent, and the following question therefore remains open: In a future protest, may the government attempt to hold an entire city block accountable for the acts of a small crowd?[9] May the government criminalize a bystander, a journalist, or an otherwise-innocent marcher, if her presence knowingly, though not intentionally, contributes to the disorder by making it easier for perpetrators to blend in with the crowd? If not, what rule of law separates the person who comes to D.C. to riot from the one who is swept up in events beyond her control?

This Comment seeks to answer two questions. First, how did the Justice Department come to believe that it had the authority to prosecute riots so broadly—is the riot law of D.C. unique, or would such a prosecution have been viable under the laws of other American jurisdictions? Second, did the prosecution offend the constitutional rights of the people involved, and if so, how? Although the Justice Department's tactics received criticism in the media for their unfairness and deleterious effect on free speech,[10] are those criticisms grounded in a principle of constitutional law that would constrain future prosecutors from attempting the same feat?

---

5. See *infra* Part II.B for a discussion of D.C.'s riot statute.

6. *See* Transcript of Trial at 70, United States v. Macchio, No. 2017 CF2 1183 (D.C. Super. Ct. Nov. 20, 2017) [hereinafter Transcript of Trial, Nov. 20, 2017] (opening statement of Jennifer Kerkhoff, attorney for the prosecution) ("I'll be very clear: We don't believe the evidence is going to show that any of these six individuals personally took that crowbar or that hammer and hit the limo or personally bashed those windows of that Starbucks in."); Sean Rossman, *Free Speech or Destruction: First Trump Inauguration Protesters Go on Trial*, USA TODAY (Nov. 20, 2017, 5:24 PM), https://www.usatoday.com/story/news/nation-now/2017/11/20/free-speech-destruction-first-trump-inauguration-protesters-go-trial/882512001/ [http://perma.cc/ABV9-944H] ("Kerkhoff admitted [that] evidence during trial likely wouldn't show any of the six [defendants] breaking windows or doing damage individually.").

7. Transcript of Trial, Nov. 20, 2017, *supra* note 6, at 70 (opening statement of Jennifer Kerkhoff, attorney for the prosecution).

8. Neal Augenstein, *234 Arrests, 0 Jury Convictions: DC Police Chief Calls for New Law After Inauguration Riots*, WTOP (D.C.) (July 16, 2018, 9:14 AM), https://wtop.com/inauguration/2018/07/234-arrests-0-jury-convictions-d-c-police-chief-calls-for-new-law-after-inauguration-riots/ [http://perma.cc/UE39-HNRJ].

9. In fact D.C. Chief of Police Peter Newsham has already suggested amending the statute to make it easier for prosecutors to secure convictions in cases like this one. *Id.*

10. See *supra* note 2 for examples of articles criticizing the Justice Department's actions.

As to the first question, I argue that the Justice Department's view of D.C.'s riot statute is unusual, both historically and nationally, in that it justified the Department's seeking to hold an entire crowd responsible for the acts of a few members. As to the second question, I argue that the prosecution was offensive for the same reasons we find "heckler's veto" laws offensive[11]—namely, that the prosecution sought to use the destructive acts of a few individuals to silence the speech of others. Furthermore, I argue that the obstacle to recognizing that broad riot laws produce a heckler's veto has been that vandals and nonviolent marchers often purport to join the crowd for a common cause, making the label heckler feel inappropriate. I show, however, that the practical and doctrinal concerns that underlie the heckler's veto have little to do with ideology: a private veto becomes no less offensive merely because the person wielding it and the person suffering it happen to be ideologically aligned. The Constitution should prevent the Justice Department from attempting a second time what it tried in 2017.

II. OVERVIEW

On November 8, 2016, Donald Trump was elected President, and on January 20, 2017, he was sworn into office.[12] President Trump's inauguration was met by protests in Washington, D.C.[13] Around midmorning, police arrested approximately 230 protesters in a corral or kettle at 12th and L streets.[14] A subsequent indictment charged 209 people with rioting under the D.C. Code.[15] The statute,[16] enacted in 1967,[17] was last interpreted authoritatively in 1969.[18] Through this statute, the Justice Department sought to hold accountable arrestees whose relationship with the alleged rioting amounted to nothing more than voluntary presence.[19] The prosecution ultimately produced a series of acquittals and mistrials, with no jury willing or able to accept the Justice Department's theory.[20] On July 6, 2018, prosecutors voluntarily dismissed all charges against the defendants still awaiting trial.[21]

---

11. A "heckler's veto" occurs when a law punishes a speaker for the violent opposition her speech provokes, thereby allowing hecklers to shut down her ability to speak. *See infra* Part II.A.1.

12. David A. Fahrenthold et al., *Donald Trump Is Sworn In as President, Vows To End 'American Carnage'*, WASH. POST (Jan. 20, 2017), https://www.washingtonpost.com/politics/trump-to-be-sworn-in-marking-a-transformative-shift-in-the-countrys-leadership/2017/01/20/954b9cac-de7d-11e6-ad42-f3375f271c9c_story.html [http://perma.cc/WAX9-SZQB].

13. *Id.*

14. *See* Natasha Lennard, *In the J20 Trials, the Feds Said They Went After "Bad Protesters." That Just Means Another Crackdown on Dissent.*, INTERCEPT (July 14, 2018, 8:00 AM), https://theintercept.com/2018/07/14/inauguration-protest-prosecutions/ [http://perma.cc/6Y3N-7XVZ].

15. *See* Indictment, United States v. Mielke, No. 2017 CF2 1149 (D.C. Super. Ct. Feb. 8, 2017).

16. D.C. CODE ANN. § 22-1322 (West 2018).

17. Act of Dec. 27, 1967, Pub. L. No. 90–226, § 901, 81 Stat. 734, 742 (codified as amended at D.C. CODE ANN. § 22-1322).

18. United States v. Matthews, 419 F.2d 1177 (D.C. Cir. 1969).

19. See *infra* Part II.A.2 for a discussion of the prosecution of the Inauguration Day arrestees.

20. Augenstein, *supra* note 8.

21. Motion To Dismiss Without Prejudice, United States v. Mielke, No. 2017 CF2 1149 (D.C.

Below, I summarize the events of President Trump's inauguration and the prosecution of the more than two hundred marchers arrested in the kettle.[22] These facts illuminate the rights at stake under the D.C. law. Next, I describe how the riot statute became law in D.C., including the contemporaneous social unrest that motivated Congress to enact it and how many in society viewed those events as mindless violence rather than purposeful rebellion.[23] Finally, I describe how these views influenced subsequent judicial interpretation of the riot statute and created a definition of rioting that sweeps in people whom the law would never before have viewed as criminals.[24]

A. The 2017 Inauguration Day Protest and Prosecution

1. The Events of January 20, 2017

Most protests during the 2017 inauguration were peaceful,[25] but vandalism and property damage did occur.[26] Videos posted online depict some aspects of the morning's events before and after police corralled the crowd.[27] In some scenes, a group of protesters, dressed in black, march through the street carrying signs.[28] At times, individuals in the group engage in acts of vandalism, such as breaking windows,[29] dragging newspaper stands into traffic,[30] spray-painting

Super. Ct. July 6, 2018); Yoon-Hendricks, *supra* note 4.

22. *See infra* Part II.A.

23. *See infra* Part II.B.

24. *See infra* Part II.C.

25. *See* Fahrenthold et al., *supra* note 12.

26. Colin Moynihan, *The Ongoing Legal Battle over the "Black Bloc" Inauguration Day Protest*, NEW YORKER (June 21, 2017), https://www.newyorker.com/news/news-desk/the-ongoing-legal-battle-over-the-black-bloc-inauguration-day-protest [http://perma.cc/4F5Y-ZQ6J].

27. *E.g.*, euronews (in English), *Live Footage—Violent Protests Erupt in Washington Ahead of Donald Trump's Inauguration*, YOUTUBE (Jan. 20, 2017), https://youtu.be/8LlWRa7Pxa8 [http://perma.cc/P9Q9-WSDR]; Free Hugs Project, *Trump Inauguration Protests and Riots Washington D.C.*, YOUTUBE (Jan. 23, 2017), https://youtu.be/idBwMN0E9Qg [http://perma.cc/MS7J-8TYJ]; JustPoliceVideos, *Police Video of Inauguration Day Riots/"Peaceful Protest"*, YOUTUBE (July 17, 2017), https://youtu.be/XuOQvJHx8UY [http://perma.cc/J83R-9J25]; KPIX CBS SF Bay Area, *Inauguration Protest: Raw Video of Washington Demonstration at Trump Inauguration*, YOUTUBE (Jan. 20, 2017), https://youtu.be/HOYIFiFI5oM [http://perma.cc/ZJ6F-JZAA]; Lex Shoots, *Anti Fascist Black Bloc DC*, FACEBOOK (Jan. 20, 2017), https://www.facebook.com/LexShoots/videos/607761272768228/ [http://perma.cc/99GW-ZLPU]; NBC News, *Inauguration Protesters Surrounded by Police in D.C. / NBC News*, YOUTUBE (Jan. 20, 2017), https://youtu.be/QghtZ5WnOXw [http://perma.cc/NQ6J-GJLN]; Radio Free Europe/Radio Liberty, *Inauguration Protest in Washington Turns Violent*, YOUTUBE (Jan. 20, 2017), https://youtu.be/cGUCq5fpMGo [http://perma.cc/S5TZ-GRZ9]; Rebel Media, *Raw: Violent Anti-Trump Protest near Inauguration*, YOUTUBE (Jan. 20, 2017), https://youtu.be/dO2H_yT9A0U [http://perma.cc/CTF7-EJP4]; SHUTTERSHOT45, *Anti-Trump Agitators Fight with D.C. Police at Inauguration, Throw Bricks, Hit with Flash Bangs*, YOUTUBE (Jan. 22, 2017), https://youtu.be/MsgUmRQNiBA [http://perma.cc/9GKN-V375]; Tim Pool (@Timcast), *Live: Protester Smashing Windows in DC Now*, PERISCOPE (Jan. 20, 2017), https://www.periscope.tv/w/1nAJEMdXpPAJL [http://perma.cc/9R57-KFWY].

28. *E.g.*, Lex Shoots, *supra* note 27, at 0:26, 1:54.

29. *E.g.*, euronews (in English), *supra* note 27, at 3:14; Lex Shoots, *supra* note 27, at 8:50, 11:16, 16:45, 22:39; Radio Free Europe, *supra* note 27, at 0:00; Rebel Media, *supra* note 27, at 0:45.

walls,[31] or throwing projectiles at lines of police officers.[32] During some of these acts, people can be heard cheering.[33] During others, marchers in the middle of the street appear oblivious or indifferent to acts of vandalism along the edges.[34] Police respond to the vandalism, but they do not arrest individual perpetrators; instead, police guide vandals into a crowd with others on the street.[35] Eventually, lines of officers enclose a group and prevent them from leaving the space of confinement.[36] A subset of the group, mostly dressed in ordinary clothes and some wearing the green cap associated with the National Lawyers Guild,[37] plead unsuccessfully with police to let them out of the corral.[38] Some videos show a group of protesters counting down and charging the police line.[39] Most of that group appear to escape and an officer can be heard saying, "Where'd they break the line, and where are they heading?"[40] Everywhere, people are filming.[41]

These videos show that destructive acts were committed during these protests, at least some of which were criminal. The videos also show that the people who broke windows shared the street with people who appear to have been marching peacefully. My concern is with that latter group, and whether the government may constitutionally hold peaceful protestors accountable for destructive acts taking place beside them on the street.

2. The Prosecution

A superseding indictment returned on April 27, 2017,[42] listed twenty-one acts of violence or vandalism: lighting fireworks,[43] breaking windows,[44] pulling newspaper stands and trash cans into the street,[45] spray-painting public property,[46] damaging an ATM,[47] throwing a chair at a police officer,[48] charging a

30. *E.g.*, Lex Shoots, *supra* note 27, at 5:48; SHUTTERSHOT45, *supra* note 27, at 8:38, 9:53.

31. *E.g.*, Lex Shoots, *supra* note 27, at 9:52.

32. *E.g.*, SHUTTERSHOT45, *supra* note 27, at 8:30, 11:10, 15:20.

33. *E.g.*, Lex Shoots, *supra* note 27, at 5:20, 16:45.

34. *E.g.*, *id.* at 7:48, 8:50, 17:32; Rebel Media, *supra* note 27, at 0:45, 3:00.

35. *E.g.*, Radio Free Europe/Radio Liberty, *supra* note 27, at 0:40–1:08.

36. *E.g.*, Lex Shoots, *supra* note 27, at 20:50.

37. NAT'L LAWYERS GUILD, LEGAL OBSERVER TRAINING MANUAL 3 (2003).

38. *E.g.*, NBC News, *supra* note 27, at 0:00; Tim Pool, *supra* note 27, at 17:00.

39. *E.g.*, JustPoliceVideos, *supra* note 27, at 1:08; Lex Shoots, *supra* note 27, at 33:30; Rebel Media, *supra* note 27, at 7:00; Tim Pool, *supra* note 27, at 14:45.

40. *E.g.*, JustPoliceVideos, *supra* note 27, at 1:55.

41. *E.g.*, euronews (in English), *supra* note 27, at 0:22; JustPoliceVideos, *supra* note 27, at 5:20; SHUTTERSHBOT45, *supra* note 27, at 0:44, 1:06, 3:04.

42. Superseding Indictment, United States v. Mielke, No. 2017 CF2 1149 (D.C. Super. Ct. Apr. 27, 2017).

43. *Id.*, Count One, ¶ 7.

44. *Id.*, Count One, ¶¶ 8, 11, 12, 14, 16–20, 23, 27, 30, 34.

45. *Id.*, Count One, ¶ 9.

46. *Id.*, Count One, ¶¶ 10, 16.

47. *Id.*, Count One, ¶ 25.

48. *Id.*, Count One, ¶ 32.

line of officers,[49] and assault.[50] The indictment associated ten names (out of 212 charged)[51] with specific acts of vandalism or destruction.[52] The indictment also alleged that all defendants wore "dark colored clothing" and masks in order to "conceal their identities in an effort to prevent law enforcement from being able to identify the individual perpetrators of violence or destruction."[53] It further alleged that members of the group aided those individuals who committed "violent and destructive acts" by allowing them to "hide" in the crowd.[54]

The indictment charged six crimes: rioting under D.C.'s riot statute,[55] inciting to riot under the same statute,[56] conspiracy to riot under D.C.'s conspiracy statute,[57] destruction of property,[58] assault on a police officer,[59] and assault on a police officer while armed.[60] The alleged object of the conspiracy was to "engage in a public disturbance to damage, destroy, or deface property located in the District of Columbia."[61]

In November and December of 2017 the first six defendants were tried.[62] In its argument to the jury, the Justice Department conceded that none had personally committed violent or destructive acts.[63] Instead, the Department argued that the "group [was] a riot" and that the defendants made a deliberate decision to remain in the group.[64] One by one, the Department's lawyers traced the moments where each defendant passed up an opportunity to dissociate and walk away.[65] That decision, in the Department's view, constituted their active participation in the riot.[66]

The jury acquitted the six defendants of all charges on December 21, 2017.[67] Following the acquittals, the Justice Department dropped charges against most

---

49. *Id.*, Count One, ¶ 36.

50. *Id.*, Count One, ¶ 14.

51. *See id.*, Count One, ¶ 1.

52. *Id.*, Count One, ¶¶ 14, 17–19, 23, 30.

53. *Id.*, Count One, ¶ 3.

54. *Id.*, Count One, ¶ 39.

55. *Id.*, Count Two (citing D.C. CODE ANN. § 22-1322(b) (West 2018)).

56. *Id.*, Count One (citing D.C. CODE ANN. § 22-1322(d)).

57. *Id.*, Count Three (citing D.C. CODE ANN. § 22-1805a).

58. *Id.*, Counts Four through Nine (citing D.C. CODE ANN. § 22-303).

59. *Id.*, Counts Ten & Eleven (citing D.C. CODE ANN. § 22-405(b)).

60. *Id.*, Counts Twelve through Fourteen (citing D.C. CODE ANN. §§ 22-405(c), -4502).

61. *Id.*, Count Three.

62. Rossman, *supra* note 6.

63. Transcript of Trial, Nov. 20, 2017, *supra* note 6, at 70 (opening statement of Jennifer Kerkhoff, attorney for the prosecution).

64. *Id.*

65. Transcript of Trial at 43–79, United States v. Macchio, No. 2017 CF2 1183 (D.C. Super. Ct. Dec. 14, 2017) [hereinafter Transcript of Trial, Dec. 14, 2017] (closing statement of Rizwan Qureshi, attorney for the prosecution).

66. Transcript of Trial, Nov. 20, 2017, *supra* note 6, at 70–71.

67. Sam Adler-Bell, *Jury Acquits First Six J20 Defendants, Rebuking Government's Push for Collective Punishment*, INTERCEPT (Dec. 21, 2017, 5:10 PM), https://theintercept.com/2017/12/21/j20-trial-acquitted-inauguration-day-protest/ [https://perma.cc/GU9B-S3N7].

of the remaining defendants, but continued to prosecute those it considered most culpable.[68] At the next trial, the Justice Department again failed to secure a conviction.[69] A month later, on July 6, 2018, the Department voluntarily dismissed charges against all of the remaining defendants, ending its one-and-a-half-year attempt to hold peaceful marchers accountable for violent or destructive acts occurring nearby.[70]

B. The D.C. Riot Statute

The heart of the Inauguration Day protest prosecution—and the reason the Justice Department was able to charge so broadly—was D.C.'s riot statute.[71] This Part describes the historical events that motived the statute's passage,[72] how Congress responded through legislation,[73] and how the historical events motivated the unusually broad judicial interpretation that still governs today.[74]

1. Motivating Events

The 1960s were a violent time in the United States for a variety of reasons. First, from 1930 to 1960 racial segregation deepened in American cities.[75] Legal barriers prevented black residents from achieving equal access to the housing market, and attempts to break through those boundaries were met with mob violence by white residents.[76] Second, the changing economy was eroding black neighborhoods' means of financial support.[77] Black residents moved from the South to northern cities to work in industry, but by the 1960s manufacturing was on the decline and factories were disappearing.[78] Cities lost thousands of jobs

68. Sean Rossman, *U.S. Drops Charges Against 129 Inauguration Day Protesters*, USA TODAY (Jan. 18, 2018, 5:59 PM), https://www.usatoday.com/story/news/nation-now/2018/01/18/drops-charges-against-129-inauguration-day-protesters-trump/1046324001/ [http://perma.cc/6KMU-R559].

69. Keith L. Alexander, *Second Inauguration Day Trial Ends with No Conviction of Four Defendants*, WASH. POST (June 7, 2018), https://www.washingtonpost.com/local/public-safety/second-inauguration-day-trial-ends-with-no-conviction-of-four-defendants/2018/06/07/b2284674-6a75-11e8-bea7-c8eb28bc52b1_story.html [http://perma.cc/Y4HB-SEHN]. The jury acquitted one defendant of all charges. *Id.* It acquitted two defendants of some charges, while deadlocking on other charges against those defendants. *Id.* It did not reach a verdict on any charges for the fourth defendant. *Id.*

70. Yoon-Hendricks, *supra* note 4.

71. D.C. CODE ANN. § 22-1322 (West 2018).

72. *See infra* Part II.B.1.

73. *See infra* Part II.B.2.

74. *See infra* Part II.B.3.

75. *See, e.g.*, Albert J. Mayer & Thomas F. Hoult, *Race and Residence in Detroit*, *in* A CITY IN RACIAL CRISIS: THE CASE OF DETROIT PRE- AND POST- THE 1967 RIOT 3, 3–5 (Leonard Gordon ed., 1972) (discussing racial segregation during this time period in Detroit); THOMAS J. SUGRUE, THE ORIGINS OF THE URBAN CRISIS: RACE AND INEQUALITY IN POSTWAR DETROIT 257 (1996) (same).

76. *See, e.g.*, *Eyes on the Prize: Two Societies (1965–1968)* (PBS television broadcast Jan. 22, 1990) [hereinafter *Eyes on the Prize*] (depicting aspects of the Chicago Freedom Movement and the 1967 Detroit race riot).

77. *See, e.g.*, MAX ARTHUR HERMAN, SUMMER OF RAGE: AN ORAL HISTORY OF THE 1967 NEWARK AND DETROIT RIOTS 38–41 (2013) (discussing deindustrialization and job discrimination during this time period in Newark, New Jersey).

78. *See, e.g.*, *id.* at 38–39 (discussing this phenomenon in Newark, New Jersey); Lily Rothman,

and consequently thousands of residents.[79] Those who were unable to leave faced substandard city services and poorer quality of life.[80] They suffered random, unprovoked police abuses.[81] One black minister in Detroit wrote that the city's black population had "grown weary of being the eternal afterthought of America."[82]

The United States in 1964 saw riots in Philadelphia[83] and New York,[84] followed by the Los Angeles Watts Riot in 1965.[85] The violence reached its climax in the summer of 1967.[86] The first nine months of that year saw 164 civil disturbances.[87] The worst of these, the Detroit and Newark riots, appeared in the national consciousness as "disasters,"[88] episodes of "murder and mayhem."[89] Their effect on those cities can be seen to this day as "empty lots, burnt out buildings, [and] abandoned homes."[90]

Contemporaneous comments on the 1967 riots describe them as mindless violence rather than purposeful rebellion. President Johnson pushed the Kerner Commission, which was studying the violence, to avoid any suggestion that the riots had a political message[91] and characterized them as "crimes" rather than

---

What We Still Get Wrong About What Happened in Detroit in 1967, TIME (Aug. 3, 2017), http://time.com/4879062/detroit-1967-real-history/ [http://perma.cc/9GDN-5FEB] (discussing the same in Detroit).

79. *See, e.g.*, S. Burlington Cty. NAACP v. Mount Laurel, 336 A.2d 713, 723–24 (N.J. 1975) (discussing this phenomenon in Camden, New Jersey); HERMAN, *supra* note 77, at 39 (discussing the same in Newark, New Jersey); *Population of Detroit, MI*, POPULATION.US, https://population.us/mi/detroit/ [http://perma.cc/8KYT-PCS6] (last visited Nov. 1, 2018); *Population of Newark, NJ*, POPULATION.US, https://population.us/nj/newark/ [http://perma.cc/H2PR-CX5X] (last visited Nov. 1, 2018).

80. *Mount Laurel*, 336 A.2d at 724; HERMAN, *supra* note 77, at 39.

81. *See, e.g.*, *Eyes on the Prize*, *supra* note 76, at 33:58.

82. Charles W. Butler, *Message to the Open Occupancy Conference*, *in* A CITY IN RACIAL CRISIS: THE CASE OF DETROIT PRE- AND POST- THE 1967 RIOT, *supra* note 75, at 32, 33.

83. History Making Prods., *The Philadelphia Race Riot of August 1964*, PHILA. INQUIRER (Aug. 28, 2013, 6:43 PM), http://www.philly.com/philly/blogs/TODAY-IN-PHILADELPHIA-HISTORY/The-Philadelphia-race-riot-of-August-1964.html [http://perma.cc/6ANY-PQKG].

84. *Harlem Riots (1935, 1943, 1964)*, 1 ENCYCLOPEDIA OF AFRICAN AMERICAN SOCIETY 401–02 (Gerald D. Jarynes ed., 2005).

85. *Watts Riot*, 2 ENCYCLOPEDIA OF AFRICAN AMERICAN SOCIETY 870 (Gerald D. Jarynes ed., 2005).

86. *Relating to the Prohibition of Riots and Incitement to Riot in the District of Columbia: Hearing on H.R. 12328 et al. Before Subcomm. No. 4, H. Comm. on the District of Columbia*, 90th Cong. 9 (1967) [hereinafter *H. Comm. Hearing*] (statement of Ala. Rep. Tom Bevill).

87. KERNER COMMISSION, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 3 (1967), https://www.ncjrs.gov/pdffiles1/Digitization/8073NCJRS.pdf [http://perma.cc/ALH8-LGTF].

88. HERMAN, *supra* note 77, at 210.

89. *Id.* at 1.

90. *Id.* at 209.

91. MALCOLM MCLAUGHLIN, THE LONG, HOT SUMMER OF 1967: URBAN REBELLION IN AMERICA 22–23 (2014); *see also Study Finds Summer Riots Caused by Poverty, Not Race*, BAY STATE BANNER (Bos.), July 13, 1967, at 9.

"protests."[92] These were not the "'typical' riot," but "unusual, irregular, complex, and unpredictable social processes";[93] "spontaneous";[94] "the poor, under-privileged, the weak, and the uneducated" moved to violence by "professional agitators."[95] Although these characterizations may have been racially charged glosses that denied minorities the capacity for political agency,[96] they would prove influential in undermining the concept of riot as a concerted, intentional crime.[97] Common law rules based on common intent and concert of action would be hard to apply in a world where rioters were viewed as too mindless to show intent and too disorganized to exhibit concert of action. The parts that follow describe this transition from the old to the new concept of rioting.

2. Congress's Response

The horror of the Detroit and Newark riots spurred Congress to action. The potential for a riot in the capital was particularly alarming because D.C. was the seat of the nation's government and its public image would impact the international image of the United States.[98] There were also perceived legal deficiencies with the existing D.C. riot law: in 1967, if the crime of rioting in D.C. existed at all, it existed as a common law crime.[99] But there was a fear that statutes codifying related crimes such as disorderly conduct might be interpreted to displace the common law[100] and that prosecution under these statutes would be "indirect[]" and inefficient.[101] Additionally, there was uncertainty as to whether incitement to riot was even a crime at common law (and therefore in

92. MCLAUGHLIN, *supra* note 91, at 22–23.

93. KERNER COMMISSION, *supra* note 87, at 3. Polling at the time showed that white Americans' attitudes aligned with the Kerner Commission's message that the riots were purposeless violence unrelated to racism. Dean Harper, *Aftermath of a Long, Hot Summer*, SOCIETY, July/Aug. 1965, at 7, 9 ("Only 12 percent of the whites cited grievances as a cause of the riots or indicated sympathy with the situation of the Negro.").

94. HERMAN, *supra* note 77, at 38.

95. *H. Comm. Hearing*, *supra* note 86, at 7 (statement of Va. Rep. Joel T. Broyhill, Member, H. Comm. on D.C.).

96. *See* MCLAUGHLIN, *supra* note 91, at 22–23 (arguing that the Kerner Commission's characterization of the riots was inaccurate and politically motivated).

97. *See infra* Part II.B.3.

98. *H. Comm. Hearing*, *supra* note 86, at 6 (1967) (statements of S.C. Rep. John L. McMillan, Chairman, H. Comm. on D.C., and Va. Rep. William L. Scott).

99. *See Relating to the Prohibition of Riots and Incitement to Riot in the District of Columbia: Hearing on S. 2474 Before the Subcomm. on the Judiciary, S. Comm. on the District of Columbia*, 90th Cong. 3 (1967) [hereinafter *S. Comm. Hearing*] (statement of Fred M. Vinson, Jr., Assistant Att'y Gen. of the United States); *H. Comm. Hearing*, *supra* note 86, at 8, 20 (statements of Va. Rep. Joel T Broyhill, Member, H. Comm. on D.C., and Fred M. Vinson, Jr., Assistant Att'y Gen. of the United States).

100. *See H. Comm. Hearing*, *supra* note 86, at 8 (statement of Va. Rep. Joel T Broyhill, Member, H. Comm. on D.C.).

101. *S. Comm. Hearing*, *supra* note 99, at 4 (statement of Fred M. Vinson, Jr., Assistant Att'y Gen. of the United States).

D.C.).[102] Because at least some in Congress believed the 1967 riots were the work of outside agitators, it was important that incitement itself be a crime so that D.C. could punish the most culpable actors.[103]

The text of what would become D.C.'s riot statute was drafted by the Justice Department.[104] The Department told Congress that its aim was to mirror the common law while "moderniz[ing] the law and tak[ing] cognizance of the First Amendment."[105] It also addressed Congress's desire to target outside agitators by making incitement of large riots a felony (whereas merely engaging in the riot would be a misdemeanor).[106] The statute, as enacted, read in part:

> (a) A riot in the District of Columbia is a public disturbance involving an assemblage of five or more persons which by tumultuous and violent conduct or the threat thereof creates grave danger of damage or injury to property or persons.
>
> (b) Whoever willfully engages in a riot in the District of Columbia shall be punished . . . .[107]

This definition remains the law in D.C. today.[108]

3. Judicial Interpretation

Only a handful of cases have interpreted the D.C. riot statute.[109] Of these, only *United States v. Matthews*[110] is binding on D.C. trial courts.[111] On April 4,

---

102. *See id.* (statement of Fred M. Vinson, Jr., Assistant Att'y Gen. of the United States) (arguing that "[t]he District of Columbia needs a law specifically covering" rioting); *see also* Sellers v. Sheriff of Orangeburg Cty, 200 S.E.2d 686, 688 (S.C. 1973) (discussing whether incitement to riot is a crime at common law and concluding that it is not).

103. *See H. Comm. Hearing*, *supra* note 86, at 20–21 (statement of Fred M. Vinson, Jr., Assistant Att'y Gen. of the United States) ("We feel that those who incite riots which are serious should be subject to more severe penalties than are provided in the common law.").

104. *S. Comm. Hearing*, *supra* note 99, at 3 (statement of Fred M. Vinson, Jr., Assistant Att'y Gen. of the United States).

105. *Id.* at 5 (statement of Fred M. Vinson, Jr., Assistant Att'y Gen. of the United States).

106. *Id.* at 4–5 (statement of Fred M. Vinson, Jr., Assistant Att'y Gen. of the United States).

107. Act of Dec. 27, 1967, Pub. L. No. 90–226, § 901(a)–(b), 81 Stat. 734, 742 (codified as amended at D.C. CODE ANN. § 22-1322).

108. D.C. CODE ANN. § 22-1322 (West 2018).

109. Carr v. District of Columbia, 587 F.3d 401 (D.C. Cir. 2009); United States v. Bridgeman, 523 F.2d 1099 (D.C. Cir. 1975); United States v. Matthews, 419 F.2d 1177 (D.C. Cir. 1969); United States v. Jeffries, 45 F.R.D. 110 (D.D.C. 1968).

110. 419 F.2d 1177 (D.C. Cir. 1969).

111. The D.C. Superior Court is the District's trial court. *Superior Court*, D.C. COURTS, https://www.dccourts.gov/superior-court [http://perma.cc/Y8SJ-2NL5] (last visited Nov. 1, 2018). Before 1971, the United States Court of Appeals for the District of Columbia Circuit (an Article III court) acted as the District of Columbia's highest court. M.A.P. v. Ryan, 285 A.2d 310, 312 (D.C. 1971). In 1971, Congress transferred that role to the D.C. Court of Appeals. *See* District of Columbia Court Reorganization Act of 1970, Pub. L. No. 91–358, § 111, 84 Stat. 475, 475–76 (effective Feb. 1, 1971) (codified as amended at D.C. CODE ANN. § 11-101 to -2501). This meant that Article III courts could no longer issue authoritative interpretations of D.C. statutes. *M.A.P.*, 285 A.2d at 312.; *see* D.C. CODE ANN. § 11-102, -301(1). The law did not apply retroactively, so decisions of the United States Court of Appeals that predate the switch are treated as binding precedent, as if they had been issued by the current high court. *See M.A.P.*, 285 A.2d at 312. Therefore, *Matthews* remains binding authority

1968, James Earl Ray assassinated Dr. Martin Luther King, Jr. in Memphis, Tennessee,[112] and an ensuing period of unrest provided the first test of D.C.'s new law. That night, Charles Matthews was arrested in connection with the looting of a liquor store, and he was later tried and convicted of rioting based on those allegations.[113] At trial, Matthews insisted that he was walking down the street minding his own business but stopped to collect a bag of looted bottles lying by the wayside.[114] He requested an instruction that would have required the jury to acquit him of rioting should it find that he never entered the store.[115] The trial judge did not give that instruction, and Matthews was convicted.[116] Matthews then appealed his conviction based on the denial of the instruction,[117] the denial of his motion for judgment of acquittal,[118] and the constitutionality of the D.C. riot statute.[119]

The *Matthews* court was familiar with the statute's legislative history,[120] and its opinion echoed Congress's feelings toward the Detroit and Newark riots. The court described the 1967 riots as "mindless, insensate violence and destruction unredeemed by any social value and serving no legitimate need for political expression."[121] They were "spontane[ous]" and lacked a "purposeful joining together."[122] And the D.C. riot statute was "directed to disorders unrelated to political demonstrations."[123] The court therefore felt that the riot statute must be broadened beyond its historical limits in order to reach the riots at the heart of Congress's focus.[124]

The trial judge's jury instruction defined the guilty relationship between Matthews and the riot as "participat[ion] in the public disturbance on purpose," meaning that Matthews "knowingly and intentionally engaged in tumultuous and violent conduct consciously, voluntarily and not inadvertently or accidentally."[125]The appellate court, however, took a different view of Matthews's actions. It considered his act of larceny (picking up bottles from a yard) to be an act encouraging others to commit violence and understood this to be engaging in the riot.[126] This was so, in its view, because picking up looted

for the D.C. Superior Court. Conversely, *Carr v. District of Columbia*, 587 F.3d 401 (D.C. Cir. 2009), and *United States v. Bridgeman*, 523 F.2d 1099 (D.C. Cir. 1975), were both decided after 1971 and thus are not binding authority for the D.C. Superior Court.

112. ARTHUR G. NEAL, NATIONAL TRAUMA AND COLLECTIVE MEMORY 147–48 (1998).
113. *Matthews*, 419 F.2d at 1178.
114. *Id.* at 1178–79.
115. *Id.* at 1179–80.
116. *Id.* at 1178–80.
117. *Id.* at 1182.
118. *Id.*
119. *Id.* at 1180.
120. *Id.* at 1180 n.5, 1181 n.8, 1182 n.9.
121. *Id.* at 1182.
122. *Id.* at 1180 n.5.
123. *Id.* at 1182 n.9.
124. *See id.* at 1180 n.5.
125. *Id.* at 1185.
126. *Id.* at 1183.

goods had an inherent tendency to "contribute[] to the tumult and promote[] new violence."[127] The appellate opinion did not discuss the element of willfulness, but in a footnote the majority expressed some satisfaction that the trial judge's instruction adequately contained the crime because it required that the defendant's act be "knowing and intentional."[128] Yet the appellate court also found that Matthews's own testimony fit that description[129]—despite the fact that his testimony was that he picked up stray bottles for no reason other than that they were there.[130] It appears, therefore, that the appellate court understood the willfulness element to be a willfulness to do the act, not a willfulness to encourage violence. Thus, *Matthews* interpreted the D.C. riot statute to mean that one who, knowing himself to be in a riot, does a voluntary act that adds to the tumult and promotes new violence has engaged in the riot.[131] The facts that he was there for another purpose, that he acted on his own, and that he did not interact or coordinate with the other rioters were insufficient to reverse the guilty verdict.

Over a passionate dissent,[132] the majority assured its audience that the decision would not raise First Amendment concerns because Matthews had committed a clearly unprotected act by taking liquor bottles from the yard.[133] The court also noted that its decision was narrow and should be read to reach no more than "one who knowingly participates in the looting phase of a riot," not mere "passive observers."[134] It understood, however, that by removing common purpose from the crime, it was creating a law that was broader than those that had existed prior.[135] The consequences of this breadth are explored in the following section.

III. DISCUSSION

The Justice Department's recent effort to wield the D.C. riot statute against a crowd of street protesters was not only wrong, but dangerously so. Below, I describe the First Amendment right at stake and show how it rests on the same concerns as the long-recognized heckler's veto.[136] Although the concept of the heckler's veto comes from constitutional law, the analysis that underlies it—although not by that name—has long been a part of the criminal law against rioting, dating back to its common law formulation and shaping its definition.[137] Next, I show how the Justice Department's view of D.C.'s riot law runs afoul of

127. *Id.* at 1183–84.

128. *Id.* at 1184 n.11.

129. *Id.*

130. *See id.* at 1178–79.

131. *See id.* at 1183–84.

132. *Id.* at 1186–97 (Wright, J., dissenting).

133. *Id.* at 1183 (majority opinion) (noting that prohibiting looting was clearly within Congress's power).

134. *Id.* at 1184 n.11.

135. *Id.* at 1180 n.5.

136. *See infra* Part III.A.

137. *See infra* Part III.B.

these principles and threatens the First Amendment rights of future protesters in DC.[138] Finally, I show how a future D.C. appellate court could undo the Department's errors by interpreting the D.C. riot statute to align with the historical definition of that crime.[139]

A. The First Amendment Right at Stake

Below, I explore the problems with laws that make one person's ability to speak contingent on another person's conduct. First, I discuss the classic formulation of this problem: the heckler's veto.[140] I then show how cases have turned the heckler's veto around to find a First Amendment problem in a law that restricts speech based on the violent acts of supporters rather than hecklers.[141] I then rationalize such a rule in two ways: first in terms of the practical ability of people to speak effectively when they must bear the risks of group association,[142] and second in terms of the values of truth-finding, self-government, and personal autonomy that underlie free speech in general.[143]

1. The Problem of Violent Opposition

Although the government may restrict speech through narrowly tailored, content-neutral laws that serve a "significant governmental interest,"[144] it "may not suppress lawful speech as the means to suppress unlawful speech."[145] So, the government may not criminalize speech "simply because it might offend a hostile mob."[146] Thus, peaceful protesters "are not chargeable with the danger, unprovoked except by the fact of the constitutionally protected demonstration itself, that their critics might react with disorder or violence,"[147] and a protest may not be ordered to disperse merely because it "attract[s] a crowd and necessitate[s] police protection."[148] A law that violates this rule is known as a heckler's veto because it allows a person to silence the speech of others through force of law.[149]

---

138. *See infra* Part III.C.

139. *See infra* Part III.D.

140. *See infra* Part III.A.1.

141. *See infra* Part III.A.2.

142. *See infra* Part III.A.3.

143. *See infra* Part III.A.4.

144. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (quoting Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984)).

145. Packingham v. North Carolina, 137 S. Ct. 1730, 1738 (2017) (quoting Ashcroft v. Free Speech Coal., 535 U.S. 234, 255 (2002)); *see also* U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble . . . .").

146. Forsyth Cty. v. Nationalist Movement, 505 U.S. 123, 135 (1992).

147. Brown v. Louisiana, 383 U.S. 131, 133 n.1 (1966).

148. Cox v. Louisiana, 379 U.S. 536, 551 (1965) (quoting Edwards v. South Carolina, 372 U.S. 229, 237 (1963)).

149. *See* Brett G. Johnson, *The Heckler's Veto: Using First Amendment Theory and Jurisprudence To Understand Current Audience Reactions Against Controversial Speech*, 21 COMM. L.

Forsyth County v. Nationalist Movement[150] is illustrative of this dynamic. There, would-be marchers launched a facial challenge to an ordinance that allowed county officials to vary the charge of a parade permit based on the likely cost of police protection.[151] The Supreme Court invalidated the ordinance as an impermissible prior restraint on expression,[152] concluding that expected cost was a proxy for the virulence of opposition—and hence for the message of the would-be marchers.[153] The Court thus held that "[l]isteners' reaction to speech is not a content-neutral basis for regulation."[154]

Forsyth County thus shows the three actors that create a heckler's veto: a speaker, a violent group or individual, and a law that ties the first two together. The law connects the speaker and the violent actor not through proximity or even physical attack but through attribution: a law effects a heckler's veto if it imputes the choices of a violent group onto a nonviolent group.[155] In *Forsyth County*, this imputation was achieved by making a marcher seeking a permit pay for the cost of protecting the march against outsiders.[156]

Forsyth County also shows that the harm is not just that such a law will suppress speech but that it will do so in a way that is not content neutral.[157] Protesters and counterprotesters do not meet by accident: they meet because of, not in spite of, each other's messages. The Court's opinion illustrated this dynamic with an example: before Forsyth County enacted its ordinance, civil rights leader Hosea Williams led a March Against Fear and Intimidation through the county, only to be forced off the street by the violent attacks of white nationalists.[158] Under the ordinance, Williams himself would have borne the cost of policing the march simply because his own ideas were "unpopular with bottle throwers."[159] A heckler's veto law thus creates an environment where people may speak on some topics but not others.[160]

2. The Problem of Violent Support

The Supreme Court has also limited the government's ability to punish a speaker for the acts of her supporters. Below, I describe how the Court has

---

& POL'Y 175, 180 (2016).

150. 505 U.S. 123 (1992).

151. *See Forsyth Cty.*, 505 U.S. at 124.

152. *See id.* at 130–36.

153. *See id.* at 134–35 ("Speech cannot be financially burdened, any more than it can be punished or banned, simply because it might offend a hostile mob.").

154. *Id.* at 134.

155. *Cf.* Brown v. Louisiana, 383 U.S. 131, 133 n.1 (1966) ("Participants in an orderly demonstration in a public place are not chargeable with the danger, unprovoked except by the fact of the constitutionally protected demonstration itself, that their critics might react with disorder or violence.").

156. *Forsyth Cty.*, 505 U.S. at 134.

157. *Id.*

158. *Id.* at 125–26.

159. *See id.* at 134.

160. *See id.*

defined those limits and explain how they stem from the same underlying fears of private suppression that underlie the heckler's veto.[161] For this reason, I suggest that the Court's violent support cases can be read as prohibiting riot laws that act as a "supporter's veto."[162]

The government may not punish a speaker for the violent acts of his supporters or associates unless the person specifically intended for the violent acts to occur.[163] For example, in *NAACP v. Claiborne Hardware Co.*,[164] the Supreme Court held that Alabama could not, consistent with the First Amendment, make organizers of a civil rights boycott civilly liable for violent or intimidating tactics that some participants used to enforce compliance.[165] To allow the civil judgment would have amounted to a supporter's veto, because it would have converted the unlawful acts of a few participants (whom the organizers could not control) into a ban on the whole operation. Instead, a violent act may only be attributed to a speaker who "specific[ally] inten[ds]" to further the violence.[166]

The Supreme Court explained in *Herndon v. Lowry*[167] that the specific intent rule of violent support is necessary to give a speaker a meaningful choice to stay within the law.[168] Herndon concerned a conviction for "incit[ing] insurrection,"[169] in which the defendant was a recruiter for the Communist Party and possessed revolutionary literature,[170] but against whom there was no evidence that his work for the Party was for violent or revolutionary aims.[171] The Court explained that if the mere fact that one of the defendant's recruits might someday fight against the government could make the defendant himself a criminal, his obedience to the law would require an "exercise of prophesy."[172] This would make it impossible for a person to "attack[] existing conditions" or "agitate[] for a change" without exposing himself to criminal liability should another, independent actor take that message and turn it into something violent.[173]

---

161. As another author has recently observed, the similarity between violent opposition and violent support can be used to borrow ideas in the opposite direction. *See* Timothy E. D. Horley, Essay, *Rethinking the Heckler's Veto After Charlottesville*, 104 VA. L. REV. ONLINE 8, 22–23 (2018).

162. Anonymous Comment to *U of Florida Rejects Request for White Supremacist To Speak*, INSIDE HIGHER ED (Aug. 16, 2017), http://disq.us/p/1lesrcw [http://perma.cc/J6PA-52WK].

163. *See* Scales v. United States, 367 U.S. 203, 229 (1961) (noting that a conviction under a similar statute requires "clear proof that a defendant 'specifically intend[s] to accomplish [the aims of the organization] by resort to violence'" (alterations in original) (quoting Noto v. United States, 367 U.S. 290, 299 (1960))).

164. 458 U.S. 886 (1982).

165. *Claiborne Hardware*, 458 U.S. at 918–20.

166. *Id.* at 920.

167. 301 U.S. 242 (1937).

168. *See Herndon*, 301 U.S. at 263–64.

169. *Id.* at 243.

170. *Id.* at 247–48.

171. *See id.* at 253.

172. *See id.* at 262.

173. *See id.*

The above decisions showed that the First Amendment should not, and cannot, treat violent opposition differently than violent support. It is no more (or less) acceptable, from a First Amendment perspective, to punish a person because someone who shares her views throws a brick than to do the same because someone who opposes her views does so. As a practical matter, both obstruct self-expression. But, even if it were practicable to make such a distinction, it would be a distinction based on viewpoint and would therefore raise yet another First Amendment complication.[174] Suppose a group of protesters march in perfect tranquility but their opponents throw rocks and bottles: Should a person approaching the scene and wishing to peacefully hold a sign be treated differently depending on which message the sign conveys? One side might indeed be more worthy of support, but that distinction is more meaningful if the law permits it rather than compels it.[175]

Even if the law could treat a supporter and an opponent differently, distinguishing between the two is not always easy. Political groups from Vietnam War protesters to President Trump supporters have claimed that responsibility for violence at their rallies rests with unwanted outsiders hijacking the forum's publicity—or even, in some cases, looking to sabotage the group's reputation.[176]

Finally, the Supreme Court has not distinguished the heckler's and supporter's vetoes. In *Schneider v. New Jersey*,[177] the Court held that a city could not ban all leafleting merely because some recipients discarded the papers on the street.[178] The opinion made no mention of whether the litterers were supporters or opponents of the leafleters.[179] It was enough that the leafleters were being

174. *See* Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829 (1995) (explaining that laws that regulate viewpoint are "egregious" restrictions on speech).

175. *Cf.* Texas v. Johnson, 491 U.S. 397, 419 (1989) ("[O]ur toleration of criticism . . . is a sign and source of our strength.").

176. *See, e.g.*, *Critics of 'Extreme' Tea Partiers Showed Little Interest in Bush-Bashers*, FOX NEWS (Dec. 23, 2015), http://www.foxnews.com/politics/2010/04/05/critics-extreme-tea-parties-little-threatening-bush-bashers.html [http://perma.cc/WM2W-QKBM]; Avinash Kunnath, *Anarchists, Not Cal Students, Responsible for Violence in UC Berkeley Protests*, CAL. GOLDEN BLOGS (Feb. 2, 2017, 1:38 AM), https://www.californiagoldenblogs.com/2017/2/2/14482840/anarchists-uc-berkeley-violence-protests-california-golden-bears [http://perma.cc/NR47-APDM]; Robert Levering, *How Anti-Vietnam War Activists Stopped Violent Protest from Hijacking Their Movement*, WAGING NONVIOLENCE (Mar. 7, 2017), https://wagingnonviolence.org/feature/vietnam-antiwar-protests-weathermen-resist-black-bloc/ [http://perma.cc/QJ6T-F5YC]; Candace Smith, *The White Nationalists Who Support Donald Trump*, ABC NEWS (Mar. 10, 2016, 2:53 PM), http://abcnews.go.com/Politics/white-nationalists-support-donald-trump/story?id=37524610 [http://perma.cc/5KF3-UMUE]. Although perhaps an extreme example, President Trump lamented that not all who attended Charlottesville's violent Unite the Right rally were ill-intentioned. Maxwell Tani, *'Not All of Those People Were Neo-Nazis': Trump Blames Both Sides in Charlottesville Protests and Melts Down at the 'Alt-Left'*, BUS. INSIDER (Aug. 15, 2017, 4:36 PM), http://www.businessinsider.com/trump-charlottesville-neo-nazis-alt-left-2017-8 [http://perma.cc/92NS-WEBU]. Even the 2017 Inauguration Day protests were alleged to be the target of sabotage. Bethania Palma, *Progressive Group Claims To 'Sting' Sting Video Maker James O'Keefe*, SNOPES (Jan. 25, 2017), https://www.snopes.com/news/2017/01/18/dueling-stings/ [http://perma.cc/8K8L-QLP3].

177. 308 U.S. 147 (1939).

178. *See Schneider*, 308 U.S. at 162.

179. *See id.* at 153–165. Zechariah Chafee, who was involved in the litigation, thought it

held responsible for litter they did not themselves create.[180]

Therefore, when analyzing whether a law impermissibly allows one person to silence another, a heckler's veto and a supporter's veto should rise and fall by the same standard.[181] The question should be not whether a person is being held responsible for the acts of someone with whom she agrees or with whom she disagrees but whether she intends by her conduct to further the crime.[182] Any more tenuous connection would allow mischievous individuals to take the law into their own hands by controlling what may be said.

3. The Supporter's Veto as a Practical Impediment to Group Advocacy

Violent opposition and violent support are of practical First Amendment concern because they make group association risky. Association is necessary for effective political dialogue, because groups speak more clearly than individuals.[183] The Supreme Court has therefore guarded associations against laws that threaten their members. In *NAACP v. Alabama ex rel. Patterson*,[184] for example, the Court held that, absent "a controlling justification," a trial court could not compel a political organization to turn over member lists in civil discovery.[185] The opinion spoke of speech being "enhanced by group association"[186] and described the discovery order as "likely to affect adversely" the ability of the NAACP to carry out its advocacy.[187] The opinion therefore represented not just a right to speak, but a right to speak effectively through group action.[188]

The Supreme Court's recent decision in *Citizens United v. FEC*[189] showed that a right to effective group advocacy still shapes how the government may respond to a speaker's choice to speak through a group rather than as an individual.[190] Specifically, *Citizens United* rejected the "antidistortion" rationale

significant that the litterers were political opponents of the leafleters (and may even have intentionally littered the papers as an excuse to shut the project down). ZECHARIAH CHAFEE, JR., FREE SPEECH IN THE UNITED STATES 424 (2d ed. 1967). However, the Supreme Court apparently did not consider this fact relevant in its decision because it made no reference to it. *See Schneider*, 308 U.S. at 153–65.

180. *Schneider*, 308 U.S. at 162.

181. *See* Horley, *supra* note 161, at 13 (noting the similarity and arguing that a common standard should underlie both).

182. *Id.*

183. *See* Roberts v. United States Jaycees, 468 U.S. 609, 622 (1984) ("An individual's freedom to speak . . . could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed.").

184. 357 U.S. 449 (1958).

185. *Patterson*, 357 U.S. at 460–66.

186. *Id.* at 460.

187. *Id.* at 462–63.

188. *See id.* at 460.

189. 558 U.S. 310 (2010).

190. *See* Transcript of Oral Argument at 82–83, United States v. Mielke, No. 2017 CF2 1149 (D.C. Super. Ct. Jul. 27, 2017) (argument by Veronice Holt, defense counsel) (drawing an analogy between the associational rights in street marches and those at issue in *Citizens United*). *See generally* Wayne Batchis, Citizens United *and the Paradox of "Corporate Speech": From Freedom of Association*

for restricting speech—that the government may quiet speech that is too powerful in order to even the playing field.[191] As Chief Justice Roberts noted in his concurrence, the antidistortion rationale meant nothing more than that the government could restrict people from speaking through business associations simply because they were too effective.[192] The Court also found that alternatives to corporate speech were inadequate because they were "burdensome" and "expensive,"[193] and that alternative channels of communication were inadequate to cure a statute that restricted speech in society's "most salient media."[194]

The problem that the supporter's veto poses for group association is that the larger the group, the greater the risk that at least one member will act violently. Likewise, the more public the meeting place—such as the "traditional public forum" of the open streets[195]—the harder it is for the group to control who is present within its perimeter.[196] An overly broad law, therefore, tends to make association itself a legal gamble.[197] This is a burden that can be avoided only by choosing to speak alone or not at all. If not justified by a sufficiently compelling interest, such a burden cannot stand as a constitutional restriction on association.[198]

4. Explaining the Supporter's Veto Through First Amendment Values

Liberty is "both . . . an end and . . . a means," and deeper values motivate our desire to preserve speech.[199] One such motivation is to find truth through discussion rather than physical conflict[200] because "once force is thrown into the argument, it becomes a matter of chance whether it is thrown on the false side or the true."[201] The supporter's veto is an act of force: its victory or defeat bears no relation to the quality of its message. This is true even when the violent actor is an honest supporter of the innocent bystander. The two may find themselves in

to Freedom of the *Association*, 36 N.Y.U. REV. L. & SOC. CHANGE 5 (2012) (describing—and criticizing—the "expressive association" foundations of *Citizens United*).

191. *Citizens United*, 558 U.S. at 349–56.

192. *Id.* at 382 (Roberts, C.J., concurring).

193. *Id.* at 337 (majority opinion).

194. *Id.* at 353.

195. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45–46 (1983).

196. Consider, for example, the Tea Party's failed attempt to expel a neo-Nazi contingent from its Phoenix, Arizona, rally in 2010. Dawn Teo, *Video: Scuffle Ensues when Neo-Nazis Unfurl Hitler Flag at Tea Party Rally*, HUFFINGTON POST (Dec. 6, 2017), https://www.huffingtonpost.com/dawn-teo/video-scuffle-ensues-when_b_358152.html [http://perma.cc/VES3-7A8X].

197. *See* THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 411 (1970) (noting that conspiracy law makes it "dangerous for any individual to participate in a campaign or demonstration that in the course of its unfolding may give rise to some violation of law").

198. *See* Buckley v. Am. Constitutional Law Found., 525 U.S. 182, 206 (1999) (Thomas, J., concurring).

199. *See* Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring), *overruled in part by* Brandenburg v. Ohio, 395 U.S. 444 (1969).

200. *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market . . . .").

201. CHAFEE, *supra* note 179, at 31.

the same march because they are equally enlightened or equally misguided, but if the violent act of one shuts down the protected speech of the other, it will not matter which explanation is the case.[202]

Another purpose of the First Amendment is to preserve self-government.[203] Although a law that permits a supporter's veto does not prohibit criticism of public officials, it erodes self-government in a more subversive way. The supporter's veto gives legal force to the actions of a handful of private individuals in derogation of neutral laws passed by a democratic majority. The violent supporters can make their associates criminals and, in so doing, control who may and may not speak in public places. If "we, acting as an unorganized and irresponsible mob, may drive into submission ourselves acting as an organized government," self-government itself falls apart.[204] This is precisely the danger of the supporter's veto.

Lastly, free speech is a component of personal autonomy.[205] It is partly "the autonomy to choose the content of [one's] own message"[206] and partly the freedom to choose consciously against criminal speech—to not be made an inciter of violence or insurrection against one's intentions.[207] The supporter's veto erodes this autonomy because it forces a person to adopt violence against her will—to be, in the eyes of the law, part of a riot that she never intended to join and of which she may not even approve. The choice to refrain from violence expresses, if nothing else, that peace is preferable to fighting.[208] The supporter's veto takes that choice away and, in so doing, takes away the autonomy of free speech.

The supporter's veto therefore attacks the very heart of what the First Amendment is meant to protect.[209] Its prohibition says that the government may

---

202. *Cf.* LARRY NIVEN ET AL., FALLEN ANGELS 357 (1991) ("No cause is so noble that it won't attract fuggheads.").

203. *See, e.g.*, Garrison v. Louisiana, 379 U.S. 64, 75 (1964).

204. *See* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 12 (1948).

205. *See generally* Susan J. Brison, *The Autonomy Defense of Free Speech*, 108 ETHICS 312 (1998).

206. Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc., 515 U.S. 557, 573 (1995).

207. *See* Herndon v. Lowry, 301 U.S. 242, 262 (1937).

208. *See, e.g.*, Martin Luther King, Jr., Nobel Lecture: The Quest for Peace and Justice (Dec. 11, 1964) (transcript available at https://www.nobelprize.org/nobel_prizes/peace/laureates/1964/king-lecture.html [http://perma.cc/Q2A9-HRK7]) ("[P]eace represents a sweeter music, a cosmic melody that is far superior to the discords of war.").

209. Some scholars have argued that fairness alone should limit vicarious liability to cases where the culpable link is sufficiently strong. *E.g.*, Dennis J. Baker, *Collective Criminalization and the Constitutional Right To Endanger Others*, 28 CRIM. JUST. ETHICS 168, 178 (2009); *see also* Alex Kreit, *Vicarious Criminal Liability and the Constitutional Dimensions of* Pinkerton, 57 AM. U. L. REV. 585, 586 (2008) (suggesting that the Due Process Clause limits co-conspirator liability that is based on *Pinkerton v. United States*, 328 U.S. 640 (1946)). Such a theory would be incompatible with strict vicarious liability offenses—which the Supreme Court expressly approved in *United States v. Park*, 421 U.S. 658, 673–74 (1975). *See* Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 687–88 (1974) (holding that forfeiture may constitutionally be applied to "lessors, bailors, or secured creditors who are innocent of any wrongdoing"). Although *Scales v. United States*, 367 U.S. 203 (1961), applied the

not suppress vicariously what it would lack the power to prohibit directly, nor may it employ private censors to substitute for public ones.[210] Such a rule is both necessary and appropriate in light of First Amendment values.

B. Exploring the Right Through the Common Law of Rioting

These concerns are not new, nor are they limited to constitutional law. The criminal law has long recognized that group criminality must have sensible outer limits, and these limits appear in the common law definition of the crime of rioting.[211] Those limits have been applied to protect freedom of assembly in what today would be called heckler's veto situations.[212]

1. The Common Law Crime of Rioting

A riot under the common law is a tumultuous assembly of three or more persons, who, with intent to mutually assist one another if opposed, act violently and turbulently, to the terror of the public.[213] It exists as a separate crime in recognition of the unique danger posed by collective violent action.[214]

Like the First Amendment cases cited above, the common law crime of rioting provides a rule for who may be considered part of the criminal assembly. That rule is the element of mutual intent.[215] Even though only a subset of the group might perform acts of violence, any member who shares the criminal intent—to defend the riot with violence—will be guilty of the crime.[216] On the other hand, merely being present in a riot—even deliberately—is not criminal in itself.[217] The common intent, among those who share it, makes the violent act of one attributable to all[218] and makes participation in the group a crime.[219] The

---

Due Process Class to hold that the government may not criminalize mere membership in an association, speech and association were factually implicated. *Scales*, 367 U.S. at 225. The supporter's veto is qualitatively different than the above arguments: its evil is not unfairness but its effect on free expression. Its prohibition does not constitutionalize the law of aiding and abetting nor does it second-guess the government's judgment of how best to prohibit nonspeech evils.

210. *But cf. Park*, 421 U.S. at 673–74.

211. *See infra* Part III.B.1.

212. *See infra* Part III.B.2.

213. 1 WILLIAM HAWKINS, PLEAS OF THE CROWN Ch. 65, § 1 (P.R. Glazebrook ed., London Prof'l Books Ltd. 1973) (1721).

214. Schlamp v. State, 891 A.2d 327, 332 (Md. 2006) (citing WILLIAM L. CLARK & WILLIAM L. MARSHALL, A TREATISE ON THE LAW OF CRIMES § 9.09 (7th ed. 1967)). This mirrors the purpose of conspiracy. *See* MODEL PENAL CODE § 5.03 cmt. at 387 (AM. LAW INST., Official Draft and Revised Comments 1985) ("[Conspiracy] is a means of striking against the special danger incident to group activity . . . .").

215. *See* 2 EMLIN MCCLAIN, A TREATISE ON THE CRIMINAL LAW AS NOW ADMINISTERED IN THE UNITED STATES § 995 (Chicago, Callaghan & Co. 1897).

216. *See Schlamp*, 891 A.2d at 332 ("[T]he true gravamen of the offense was planned and deliberate violent or tumultuous behavior . . . , for that is what made the entire group, rather than just the actual and direct perpetrators of the violent or tumultuous behavior, guilty of the offense."); 2 MCCLAIN, *supra* note 215, § 995.

217. 2 MCCLAIN, *supra* note 215, § 995.

218. 2 JOSEPH SHAW, THE PRACTICAL JUSTICE OF PEACE, AND PARISH AND WARD OFFICER

common law crime of rioting therefore has two dimensions: the riot, and the defendant's relationship to it. Each must be present to complete the offense.

With few exceptions, the common law's rule that intentional presence at the scene of a riot is not a crime remains the law in the United States. The traditional riot-plus-participation structure is codified by statute in several states,[220] and cases in most states that have addressed the issue have held that mutual intent to assist the violence is required because it is the definition of participation.[221] Most other states either use the Model Penal Code formulation,[222] in which riot is predicated on disorderly conduct and therefore on the defendant's personal disorderly acts,[223] or use statutory language that places the individual defendant

137 (6th ed. 1756); *see also* People v. Judson, 11 Daly 1, 19 (N.Y. Ct. Com. Pl. 1849) ("To courageous minds there is a fascination from the very presence of danger, and a distinction must be carefully drawn between those who were mere lookers-on and those who were stimulating and encouraging the riot.").

219. 2 MCCLAIN, *supra* note 215, § 995.

220. *See* CAL. PENAL CODE §§ 404–405 (West 2018); COLO. REV. STAT. ANN. §§ 18-9-101(2), -104 (West 2018); IOWA CODE ANN. § 723.1 (West 2018); KY. REV. STAT. ANN. §§ 525.010(5), -.020(1) (West 2018); LA. STAT. ANN. §§ 14:329.1, -.7 (West 2018); MINN. STAT. ANN. § 609.71 (West 2018) (using the phrase "each participant"); N.C. GEN. STAT. ANN. § 14-288.2(a)–(b) (West 2018); N.D. CENT. CODE ANN. §§ 12.1-25-01, -03 (West 2018); OKLA. STAT. tit. 21, §§ 1311–1312 (West 2018); S.D. CODIFIED LAWS §§ 22-10-1, -6 (West 2018); TENN. CODE ANN. §§ 39-17-301(3), -302(a) (West 2018); TEX. PENAL CODE ANN. § 42.02 (West 2018); WASH. REV. CODE ANN. § 9A.84.010 (West 2018).

221. People v. Bundte, 197 P.2d 823, 829 (Cal. Dist. Ct. App. 1948) ("[I]f the defendants and their associates . . . cooperated and acted together for the unlawful purpose of using force and violence to disturb the public peace, they would . . . be guilty of a riot . . . ."); Symonds v. State, 89 P.2d 970, 974 (Okla. Crim. App. 1939) (holding that rioting requires an "intent mutually to assist against lawful authority"); State v. Bad Heart Bull, 257 N.W.2d 715, 719 (S.D. 1977) (defining riot as "a group crime requiring proof of a common or mutual criminal intent"). Washington's older statute required a "willingness to assist," State v. Moe, 24 P.2d 638, 639 (Wash. 1933), and a recent case under Washington's new statute suggested without deciding that that rule was still valid, *see* State v. Montejano, 196 P.3d 1083, 1085 (Wash. Ct. App. 2008) (holding that the *Moe* definition of rioting is implicit in the new statute's use of the word "actor"). Iowa requires that the defendant personally use violence. Williams v. Osmundson, 281 N.W.2d 622, 624 (Iowa 1979). In Minnesota, one unpublished opinion vaguely referred to intent but did not clarify what the object of the intent must be, instead citing to an older case in relation to the common law "common purpose." State v. Witherspoon, No. A12-1247, 2013 WL 3284272, at *3 (Minn. Ct. App. July 1, 2013) (quoting State v. Winkels, 283 N.W. 763, 764 (Minn. 1939)). A North Carolina court gave "engage" its ordinary meaning, but noted that "mere presence at the scene of a riot may not alone be sufficient to show participation in it." State v. Mitchell, 429 S.E.2d 580, 582 (N.C. Ct. App. 1993) (quoting State v. Riddle, 262 S.E.2d 322, 325 (N.C. Ct. App. 1980)). No published cases have interpreted Kentucky's or North Dakota's statutes. No published cases have interpreted Tennessee's riot statute, though some have interpreted the related incitement statute. *See, e.g.*, State v. Russell, 10 S.W.3d 270, 276–77 (Tenn. Crim. App. 1999).

222. MODEL PENAL CODE § 250.1(1) (AM. LAW INST., Official Draft and Revised Comments 1980) (stating that an individual "is guilty of riot . . . if he participates with [two] or more others in a course of disorderly conduct" when various aggravating factors are present (alteration in original)).

223. *See* DEL. CODE ANN. tit. 11, § 1301 (West 2018); HAW. REV. STAT. ANN. § 711-1101 (West 2018); ME. REV. STAT. ANN. tit. 17-A, § 501-A (West 2018); N.J. STAT. ANN. § 2C:33-2(a) (West 2018); OHIO REV. CODE ANN. § 2917.11 (West 2018); 18 PA. STAT. AND CONS. STAT. ANN. § 5503 (West 2018); *see also* State v. Teale, 390 P.3d 1238, 1244 (Haw. 2017) (holding that the tumultuous behavior constituting disorderly conduct must be "personal to the offender" and does not include conduct that "merely . . . prompts others to respond in a disruptive or chaotic manner"); Commonwealth v. Herr, 6 Pa. D. & C.4th 155, 159 (Ct. Com. Pl. 1990) (holding that mere presence is insufficient and that the

as the violent actor and therefore excludes mere presence in a group from falling within the crime.[224] Only a handful of state cases show a broader definition.[225] Americans today therefore largely enjoy the freedom that they have historically enjoyed under the common law: the freedom to be present in a violent group—whether for curiosity, journalism, demonstration, or merely to go about their day—so long as they do not purposefully contribute to the violence.

Another point that can be said in favor of the traditional definition of rioting is that it is robust. Prosecutors have wielded it against some of the worst riots in history.[226] The *Matthews* court was therefore incorrect that only a broader law would reach the riots of the 1960s.[227] The government's legitimate interest in suppressing violence can be and has been met for hundreds of years: a broader riot law that restricts speech is therefore unlikely to be narrowly tailored to that end.

"essential element of [a] riot is group action").

224. *See* ALA. CODE § 13A-11-3(a) (West 2018); ALASKA STAT. ANN. § 11.61.100(a) (West 2018); ARIZ. REV. STAT. ANN. § 13-2903(A) (West 2018); ARK. CODE ANN. § 5-71-201(a) (West 2018); CONN. GEN. STAT. ANN. § 53a-175(a) (West 2018); MO. REV. STAT. § 574.050(1) (West 2018); MONT. CODE ANN. § 45-8-103(1) (West 2018); N.H. REV. STAT. ANN. § 644:1(I) (West 2018); N.Y. PENAL LAW § 240.05 (McKinney 2018); OR. REV. STAT. ANN. § 166.015(1) (West 2018); UTAH CODE ANN. § 76-9-101(1) (West 2018); *see also* State v. Cox, 879 P.2d 662, 668 (Mont. 1994) (pointing to the defendant's specific act of violence to show that he committed the crime of rioting); People v. Morales, 601 N.Y.S.2d 261, 262 (Crim. Ct. 1993) (finding that the defendant's statements, though they might have *encouraged* riotous behavior by others, were not themselves "violent and tumultuous conduct" and therefore did not amount to the crime of rioting).

225. In Colorado, the actus reus is "engage" and the mens rea is "knowingly," though in the case so holding, the defendant personally used violence. *See* People v. Bridges, 620 P.2d 1, 4 (Colo. 1980). Louisiana and Texas use the riot-plus-participation approach with some form of the verb "participate," *see* LA. STAT. ANN. § 14:329.7(A); TEX. PENAL CODE ANN. § 42.02(b), but have a scope of participation that may extend to mere presence. The Louisiana Supreme Court held that a person could be guilty of rioting for standing in a group that later turned violent, even though he left before violence started. State v. Beavers, 394 So. 2d 1218, 1225 (La. 1981). In Texas, the breadth of participation is implied by the text of the statute, because it states that a defendant who withdraws from an initially peaceful group at the first sign of violence has an affirmative defense, which could only matter if remaining in a violent group were otherwise criminal. *See* TEX. PENAL CODE ANN. § 42.02(c). One Texas case confirmed that the level of intent is "knowing" that others are committing violence. Faulk v. State, 608 S.W.2d 625, 631 (Tex. Crim. App. 1980). One Missouri case held that being "present and cognizant of the unlawful acts being committed by" others will suffice and that there is a "duty to dissociate." State v. Mast, 713 S.W.2d 601, 604 (Mo. Ct. App. 1986).

226. *People v. Judson*, 11 Daly 1 (N.Y. Ct. Com. Pl. Sept. 1849), concerned the Astor Place Riots, *Judson*, 11 Daly at 1, "one of the worst riots in American history," which resulted in more than twenty deaths and more than one hundred arrests, NIGEL CLIFF, THE SHAKESPEARE RIOTS 208, 240–41 (2007). *R v. Vincent* (1839) 173 Eng. Rep. 754, concerned the Newport Rising, *see Vincent*, 173 Eng. Rep. at 754, a political insurrection in which soldiers killed several insurgents, whose leaders were "tried for treason, condemned, and sent for transportation," *see* J. A. Cannon, *Newport Rising*, *in* OXFORD REFERENCE (Robert Crowcroft & John Cannon eds., 2d ed. 2015). *Commonwealth v. Daley*, 2 Clark 361 (Pa. Ct. Quarter Sessions 1844), concerned the deadly Philadelphia Nativist Riots, *see Daley*, 2 Clark at 361; Elizabeth M. Geffen, *Violence in Philadelphia in the 1840s and 1850s*, 36 PA. HIST. 381, 400–01 (1969). *Commonwealth v. Campbell*, 89 Mass. (7 Allen) 541 (1863), concerned the Boston Draft Riot, *see Campbell*, 89 Mass. (7 Allen) at 541, in which at least eight people were killed, *see* William F. Hanna, *The Boston Draft Riot*, 36 CIV. WAR HIST. 262, 268 (1990).

227. *See* United States v. Matthews, 419 F.2d 1177, 1180 n.5 (D.C. Cir. 1969).

Finally, an attractive feature of the common law definition is that it contains the same element of specific intent that the First Amendment imposes through cases like *Claiborne Hardware*.[228] This similarity is not accidental.[229] Although the crime of rioting evolved in a society that lacked constitutional freedom of speech, it was nevertheless a society that valued liberty.[230] The interaction between the breadth of riot law and the extent of expressive freedom has long been recognized.[231] Where there is no judicial review of legislative acts, the extent of liberty and the boundary of the criminal law are the same question.[232] And so the common law of rioting produced a rule that would separate legitimate public assembly from dangerous public violence, and the First Amendment, seeking the same ends, produced the same rule.[233]

The coincidence between modern First Amendment law and the common law of riot shows that the First Amendment rule is historically grounded in a traditional understanding of what may be considered criminal and what must be tolerated as free.[234] It is therefore appropriate to view the First Amendment rules from cases such as *Claiborne Hardware* as providing a constitutional cap on the breadth of riot laws.[235] This will respect the traditional balance between free speech and public order that the common law has struck for centuries.

2. The Crime of Rioting Meets Violent Opposition

The common law of rioting confronted violent opposition in *Beatty v. Gillbanks*,[236] a case frequently offered to illustrate the adverse relationship between poorly aimed prosecution and the liberty of public meeting.[237] The Salvation Army, in 1882, would march through the streets of Weston-super-

228. See *supra* Part II.A for a discussion of these cases.

229. *See* Richard E. Stewart, *Public Speech and Public Order in Britain and the United States*, 13 VAND. L. REV. 625, 635–37 (1960).

230. *See id.* at 625–26.

231. *See, e.g.*, *Vincent*, 173 Eng. Rep. at 756; Clifford v. Brandon (1809) 170 Eng. Rep. 1183, 1185–86; A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 269–73 (8th ed. 1915).

232. *See* Stewart, *supra* note 229, at 625–26.

233. *See id.* at 648–49.

234. *Cf. id.* (noting the similarity between common law of rioting and First Amendment rules relating to "speech that leads to disorder"). *But see* Bridges v. California, 314 U.S. 252, 264–65 (1941) (holding that the First Amendment was meant to offer a greater freedom of speech than was available under the common law).

235. *Cf.* Defendants' Motion To Dismiss the Indictment at 28, United States v. Mielke, No. 2017 CF2 1149 (D.C. Super. Ct. May 30, 2017) (arguing that the defendants should not be prosecuted merely because "some members of [the] group may have participated in conduct . . . that itself is not protected" (omission in original) (quoting NAACP v. Claiborne Hardware Co., 458 U.S. 886, 908 (1982))).

236. (1882) 9 QBD 308.

237. *See, e.g.*, CHAFEE, *supra* note 179, at 160–61; DICEY, *supra* note 231, at 269–73; David Williams, Beatty v. Gillbanks, *in* THE NEW OXFORD COMPANION TO LAW (Peter Crane & Joanne Conaghan eds., 2008) ("The underlying importance of the case is that it presumes in favour of those going about their lawful business and acts as a reminder of the desirability of achieving a sensible balance between public order and freedom of expression.").

Mare, England, gathering followers for attendance at religious services.[238] Some local residents, "antagonistic to the Salvation Army and its processions," formed a "Skeleton Army" to resist the marches with force.[239] After a few repetitions of these clashes, town officials declared the Salvation Army's marches unlawful.[240] The officials' theory was that the Salvationists, presumed to intend the natural and probable results of their actions, must have intended what was by then obvious: that their marches caused riots.[241] Assembling in the street to march for salvation was, therefore, assembly for an unlawful purpose, and a crime.[242]

The court rejected this logic.[243] It could not accept that the riots were a legal consequence of the Army's march.[244] Although it was factually true that the marches caused violence, it was too dangerous to allow a "lawful act" to be made criminal only because the actor "knows that his doing it may cause another to do an unlawful act."[245] Absent the critical link of intent, the Army's assembling was no crime.[246] The *Beatty* court therefore used the common purpose element of rioting to separate lawful marchers from unlawful rioters despite their mutual presence in the same public street.[247]

But *Beatty* did not stop there. The court went on to define, in its view, the proper role of government in protecting freedom through enforcement. The violence would end "when the Skeleton Army . . . come to learn . . . that they have no possible right . . . to obstruct the Salvation Army in their lawful and peaceable processions."[248] Yet by turning the law against the Salvationists, the Skeleton Army "assumed to itself the right to prevent [the Salvationists] from lawfully assembling together."[249] The case thus presented the dual nature of the criminal law in guarding and suppressing freedom: when turned against those

238. *Beatty*, 9 QBD at 308–09.

239. *Id.* at 309–10; *see also* Chris Hare, *The Skeleton Army and the Bonfire Boys, Worthing, 1884*, 99 FOLKLORE 221, 222–23 (1988).

240. *See Beatty*, 9 QBD at 310, 312.

241. *See id.* at 311–12.

242. *See id.* at 312–13.

243. *See id.* at 313.

244. *See id.* at 313–14.

245. *See id.* at 314.

246. *See id.* at 314–15.

247. *See id.* at 313–15; *see also* GLANVILLE WILLIAMS, TEXTBOOK OF CRIMINAL LAW 86 (2d ed. 1983) ("The reason for the limitation [in *Beatty*] is partly the result of our notion of responsibility, which we attribute to the immediate wrongdoer, not to the innocent party who merely foresees the wrongdoing. It would be an intolerable extension of criminal responsibility if people who were exercising their lawful rights and liberties were to be made responsible for the acts of deliberate mischief-makers.").

248. *Beatty v. Gillbanks*, [1882] All ER 559, 563. Similarly, in *Schneider v. New Jersey*, 308 U.S. 147 (1939), the Supreme Court held that a town could not prohibit all leafleting merely because some recipients discarded papers on the ground, observing, "There are obvious methods of preventing littering. Amongst these is the punishment of those who actually throw papers on the streets." *Schneider*, 308 U.S. at 162; *see also* MEIKLEJOHN, *supra* note 204, at 8–9 ("[A free government] must . . . be more powerful than any one of its citizens, than any group of them. . . . Self-government is nonsense unless the 'self' which governs is able and determined to make its will effective.").

249. *Beatty*, 9 QBD at 314.

who act violently, the law protects freedom, but when turned on those standing nearby, the law aides the rioters in suppressing it.[250] The key to liberty, in the court's view, was not lax enforcement but precise enforcement. Or—in the words of *Claiborne Hardware*—"precision of regulation."[251] A municipality faced with disorder in the streets may find it expedient to suppress freedom rather than to draw the fine lines that are required to protect it, but *Beatty* held that such expediency should not cross into rules of criminal law.[252]

There is a remarkable similarity between the criminal law against rioting as expressed in *Beatty* and the Supreme Court's heckler's veto cases such as *Forsyth County*. Although the two derive from separate and discrete sources of law, the concern for liberty is the same. In both, the fear is that a hostile audience might assume for itself the power to outlaw speech that it does not like. In both, the police have an opportunity to protect the forum rather than shut it down.[253] And, in both, preservation of the forum can be maintained only through a principled distinction between a violent rioter and a peaceful bystander.

Above, I argued that limiting how the government may hold a speaker accountable for the unintended acts of associates protected core First Amendment values.[254] In the common law of rioting, the values are the same: *Beatty* was concerned with ensuring that the Salvationists' message not be subject to unofficial censorship, that the Skeleton Army not usurp the public function of regulating access to the streets, and that the intent to cause violence not be imputed to the Salvationists against their will.[255] That the outer boundary of the crime of rioting bears some relation to political liberty has not been lost on judges sitting on riot cases,[256] and it was likewise observed by Justice Black that attempts by Parliament to extend the crime of rioting beyond its traditional boundaries likely motivated the adoption of the First Amendment.[257] A law that

250. *Cf.* Hague v. CIO, 307 U.S. 496, 516 (1939) ("[U]ncontrolled official suppression . . . cannot be made a substitute for the duty to maintain order . . . .").

251. NAACP v. Claiborne Hardware Co., 458 U.S. 886, 916 (1982) (quoting NAACP v. Button, 371 U.S. 415, 438 (1963)).

252. For a discussion of *Beatty* and other cases holding that "police officials cannot make suppression of free speech and assembly ' . . . an easy substitute for the performance of their duty to maintain order,'" see Ruth McGaffey, *The Heckler's Veto: A Reexamination*, 57 MARQ. L. REV. 39, 58 (1973) (omission in original) (quoting Cottonreader v. Johnson, 252 F. Supp. 492, 497 (M.D. Ala. 1966)).

253. *See* Forsyth Cty. v. Nationalist Movement, 505 U.S. 123, 125–26 (describing how, after mob violence shut down Hosea Williams's first march, three thousand state police and National Guardsmen protected the second, at a cost of $670,000); *Beatty*, 9 QBD at 310, 312–13.

254. *See supra* Part III.A.4.

255. *See Beatty*, 9 QBD at 313–15.

256. *See e.g.*, R v. Vincent (1839) 173 Eng. Rep. 754, 756 ("There is no doubt that the people of this country have a perfect right to meet for the purpose of stating what are, or even what they consider to be, their grievances. That right they always have had, and, I trust, always will have; but in order to transmit that right unimpaired to posterity, it is necessary that it should be regulated by law, and restrained by reason.").

257. Bridges v. California, 314 U.S. 252, 265 & n.9 (1941) (noting that the First Amendment was partly a response to efforts by Parliament to encroach on the freedom of assembly through statutes such as the Riot Act of 1714, 1 Geo., st. 2, c. 5). Justice Black's draft opinion (written as a dissent to

extends rioting beyond its common law limits, like the D.C. riot statute, should therefore be viewed with suspicion.

C. D.C. After 2017: The Future of the Right To Protest in the Capital

The Justice Department's willingness to aggressively wield a broad riot law changes the environment in which public speech operates.[258] It attempts to redefine activities so far considered legitimate public participation as illegal acts of violence. Even more concerning, the Justice Department's decision to use conspiracy charges in conjunction with the broad riot statute risks shifting the inquiry further from the participants' actual desire for violence to the content of their message and the character of their associates. Together, these factors change the test of rioting from one of individual responsibility to one of group association.

As an example, in the summer of 1966, civil rights leaders led what was widely viewed as a risky and provocative march for nondiscriminatory housing through the all-white Chicago neighborhood of Cicero.[259] As expected, some three thousand residents poured in to wave swastikas and throw bricks, overwhelming the small group of some two hundred and fifty marchers.[260] Under the Justice Department's theory of rioting, the marchers—whose very act of marching added to the tumult and promoted new violence—would be rioters.[261] The D.C. statute has no means of separating marchers from countermarchers because no element of mutual intent connects the individual to either group.[262] Once a fight erupts, all who remain—knowing their presence to exacerbate the violence—are guilty of a crime.[263] Moreover, the effect of such a law on the racist countermarchers is also not beyond reproach: although we might feel disgusted by the racist mob, it is not the role of the law to foreclose all debate by making the display of a swastika or other hate symbol criminal.[264]

---

what was then the majority) quotes extensively from 1 HENRY THOMAS BUCKLE, HISTORY OF CIVILIZATION IN ENGLAND (1884), on the absurdity of allowing a magistrate, through the Riot Act, to control who may and may not meet in public places. Hugo Lafayette Black, Bridges v. California (draft dissent), at 7 n.11 (1941) (on file at the Library of Congress, Hugo Lafayette Black Papers, Box 266, Folder 6).

258. *See, e.g.*, Jonathan Blanks, *In Trump's America, Dissenters Beware*, DEMOCRACY (Dec. 18, 2017, 3:57 PM), https://democracyjournal.org/arguments/in-trumps-america-dissenters-beware/ [http://perma.cc/DW72-HJ2M] ("Should [the government's efforts] become precedent even temporarily, anyone who comes to protest in D.C., where protests are commonplace, would potentially be at risk of prosecution due solely to their physical proximity to criminal acts by others. The financial and personal costs associated with fighting federal charges could threaten some of the bedrock freedoms of speech and assembly in our nation's capital.").

259. *Eyes on the Prize*, *supra* note 76, at 22:40.

260. *Id.*; retromanstv, *Racial Tension in Cicero 1966*, YOUTUBE (Jan. 24, 2016), https://www.youtube.com/watch?v=fvJiwrrY2sQ [http://perma.cc/G32R-ZE65].

261. *See supra* Part II.B.3.

262. *See supra* Part II.B.3.

263. *See supra* Part II.B.3.

264. *See* Transcript of Trial, Nov. 20, 2017, *supra* note 6, at 70–71 (opening statement of Jennifer Kerkhoff, attorney for the prosecution).

Fast-forward to 2017. Rather than tread lightly in this sensitive area, the Justice Department doubled down on its effort to reshape protest law by charging all of the defendants with conspiracy,[265] a tool that could in future cases silence debate before it starts.[266] Any riot law could support a conspiracy charge, and this would normally reflect a reasonable policy choice: the government need not wait for blood to spill before stopping violence in its tracks. But *Matthews* changed the equation by broadening the scope of rioting and therefore the associated crime of conspiracy.[267] If it is criminal to exacerbate the disorder of a violent crowd by being present in it,[268] it is criminal to organize a march where rioters—even uninvited rioters—are expected to attend. And, although the organizers may have no desire for violence, their plan to persist in their march when violence materializes means that they intend to engage in a riot, and so merely organizing the march is a crime.[269]

There is an additional problem with the Justice Department's view of conspiracy to riot. When the criminal aspect of a conspiracy hinges on the future acts of others, the focus necessarily shifts from the alleged conspirators' personal desire for violence to the character of the group and the conspirators' awareness of it.[270] The problem is analogous to the defect the Supreme Court found in the *Forsyth County* ordinance. That ordinance required the county to assess the cost of police protection before a march took place.[271] This meant that the county

265. *See supra* notes 55–61 and accompanying text.

266. Conspiracy to riot can operate before the fact because the crime occurs the moment an agreement is formed (and an overt act committed); the prosecution need not wait for the conspiracy to achieve its objective. *See* Boyle v. United States, 556 U.S. 938, 950 (2009).

267. United States v. Matthews, 419 F.2d 1177, 1183–84 (D.C. Cir. 1969). The mens rea of conspiracy incorporates the mens rea of the underlying criminal object. United States v. Feola, 420 U.S. 671, 696 (1975). More fully, conspiracy involves two mental states: an intent to conspire and an intent to accomplish the underlying objective. United States v. Ferrarini, 219 F.3d 145, 154–55 (2d Cir. 2000) (quoting United States v. Lanza, 790 F.2d 1015, 1022 (2d Cir. 1986)). For a thorough discussion of the mens rea with respect to the objective, see *United States v. Mitlof*, 165 F. Supp. 2d 558, 563–68 (S.D.N.Y. 2001). For a discussion of how *Matthews* broadened the crime of rioting, see *supra* Part II.B.3.

268. *See* Transcript of Trial, Nov. 20, 2017, *supra* note 6, at 70–71 (opening statement of Jennifer Kerkhoff, attorney for the prosecution).

269. Similar concerns were raised about an Arizona bill under debate at the time of President Trump's inauguration. Howard Fischer, *Arizona Senate Votes To Seize Assets of Those Who Plan, Participate in Protests that Turn Violent*, ARIZ. CAP. TIMES (Feb. 22, 2017), https://azcapitoltimes.com/news/2017/02/22/arizona-senate-crackdown-on-protests/ [http://perma.cc/N8CU-KGME].

270. *Cf.* Margot E. Kaminski, *Incitement To Riot in the Age of Flash Mobs*, 81 U. CIN. L. REV. 1, 13–14 (2012) ("[An] 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. . . . 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."); Steven R. Morrison, *Conspiracy Law's Threat to Free Speech*, 15 U. PA. J. CONST. L. 865, 882 (2013) ("In pursuing inchoate offenses, less actual conduct means that the government must increasingly rely on speech to be simultaneously the agreement, overt act, evidence of these elements, and evidence of mens rea.").

271. Forsyth Cty. v. Nationalist Movement, 505 U.S. 123, 134 (1992).

therefore did not measure actual violence but instead used the marchers' views to estimate the level of controversy.[272] By implementing the ordinance as a prior restraint, the county shifted the focus away from violence and onto speech that attracts violence.[273] The same would apply under the D.C. statute: to decide whether a planned march was a conspiracy to riot, a prosecutor would assess the content of the march to predict who was likely to attend, thus determining whether violence—even unwanted violence—was likely to take place.[274]

As with rioting itself, broad conspiracy law would disrupt activities that have so far been considered legitimate public debate. While universities deliberate whether to permit controversial speakers in the face of violent protests,[275] the prospective invitees are, under *Matthews*, committing conspiracy to riot by agreeing to be present at and contribute to a scene of mayhem.[276] In the days leading to the Cicero march, Chicago's sheriff, fearing the backlash, threatened to seek an injunction if Dr. King would not call it off.[277] Under *Matthews*, the city could have skipped the injunction and arrested Dr. King just for planning it.[278] And when Jason Kessler, who had organized a deadly white-nationalist rally in Charlottesville, Virginia, sought a permit for an anniversary event, the City of Charlottesville rejected his application because it was by then apparent that his rallies generated chaos.[279] Under *Matthews*, the city could have arrested him on the basis of his application alone.[280] The rule that "[l]isteners' reaction[s]" may not serve as a basis for restraining speech[281] would disappear. The crime of conspiracy to riot therefore represents a dramatic shift—not only in the government's ability to prevent speech but also in the factors by which police, prosecutors, and jurors must judge whether a planned march constitutes an illegal riot.

D. Saving D.C.'s Riot Statute

All is not lost. A future D.C. appellate court can preserve the government's interest in having a riot law while respecting free speech.[282] It can do this even

272. *See id.*

273. *See id.*

274. *Cf.* David. B. Filvaroff, *Conspiracy and the First Amendment*, 121 U. PA. L. REV. 189, 241–45 (1972) (exploring the similarities and differences between conspiracy to commit a speech-related crime and prior restraint by an administrative body); Kaminski, supra note 270, at 13–14 (noting that prosecutors must engage in similar speculation with respect to incitement-to-riot crimes).

275. *See, e.g.* Joseph Russomanno, *Speech on Campus: How America's Crisis in Confidence Is Eroding Free Speech Values*, 45 HASTINGS CONST. L.Q. 273, 279 (2018).

276. *See supra* Part II.B.3.

277. Donald Janson, *Sheriff Asks Dr. King To Call Off Cicero March*, N.Y. TIMES, Aug. 23, 1966, at 35.

278. *See supra* Part II.B.3.

279. *See* Maggie Astor, *White Nationalists Want To March Again. Charlottesville Says No.*, N.Y. TIMES (Dec. 12, 2017), https://nyti.ms/2l544TJ [http://perma.cc/RG5X-Q76H].

280. *See supra* Part II.B.3.

281. Forsyth Cty. v. Nationalist Movement, 505 U.S. 123, 134 (1992).

282. *See infra* Part III.D.1.

without overruling *Matthews*.[283]

1. Preserving the Government's Interest

It must first be acknowledged that the government has a compelling interest in suppressing violence[284] and that laws narrowly tailored to that end may, consistent with the First Amendment, restrict speech.[285] For any breach of the D.C. riot statute, at least one person must commit "tumultuous and violent conduct,"[286] and thus at least one person must fall outside the Constitution's protection.[287] It does not follow, however, that the government may justify its prosecution of all individuals by reference to the acts of one, nor does it follow that a broad riot law will further the government's interest more effectively than a narrow one. The government's compelling interest justifies that it be allowed to have a riot law, but it is necessary to look elsewhere to discern the permissible scope.

Defending its prosecutorial choices in a January 2018 court filing, the Justice Department wrote of the Inauguration Day protests, "It was a riot."[288] That position misunderstood the structure of riot law. Rioting under the D.C. statute, as under the common law, is a two-dimensional crime: it has depth (the severity of disorder needed to make "tumult[] and violen[ce]") and breadth (the scope of participation that associates an individual with the violent crowd).[289] Amidst the broken glass and overturned newspaper stands on D.C.'s streets,[290] the Justice Department's position that a riot occurred was reasonable. But this went only to one element—depth. The troubling part of the Justice Department's prosecution, and the reason it provoked media attention, was its breadth.[291] The Justice Department believed that the D.C. statute was so broad that to remain in the street with the rioters was a crime.[292] No reference to the severity of the destruction can support the view that such breadth is appropriate.

---

283. *See infra* Part III.D.2.

284. Dennis v. United States, 341 U.S. 494, 509 (1951) ("[I]f a society cannot protect its very structure from armed internal attack, it must follow that no subordinate value can be protected.").

285. Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984) (explaining that restrictions on expressive conduct "are valid provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.").

286. D.C. CODE ANN. § 22-1322(a) (West 2018).

287. NAACP v. Claiborne Hardware Co., 458 U.S. 886, 916 (1982) ("The First Amendment does not protect violence.").

288. Government's Notice of Intent To Proceed at 3, United States v. Mielke, No. 2017 CF2 1149 (D.C. Super. Ct. Jan. 18, 2018).

289. *See* D.C. CODE ANN. § 22-1322. See *supra* Part III.B.1 for a discussion of the common law crime of rioting.

290. *See supra* Part II.A.1.

291. *E.g.*, Duggan & Alexander, *supra* note 2. Tellingly, the Justice Department consistently speaks of *a riot* (the group), rather than *rioting* (the act). *See, e.g.*, Transcript of Trial, Dec. 14, 2017, *supra* note 65, at 64 (closing argument of Rizwan Qureshi, attorney for the prosecution) ("She was aware this was a riot.").

292. *See supra* notes 63–66 and accompanying text.

The logical fallacy of the Justice Department's position was that it assumed a wider prosecution would deter more violence. *Beatty* teaches that the opposite is true.[293] A wider prosecution gives violent actors a power they never had before: the power to turn the Constitution on and off.[294] Would the Skeleton Army have rioted in the streets of Weston-super-Mare had they known that their effort would be futile? Effective enforcement of riot laws comes not from broad application but aggressive discrimination[295]: the more precisely the government separates rioters from peaceful marchers, the less power it conveys to the former and the more freedom it leaves to the latter.[296] D.C.'s riot statute is not calibrated to this end, and so the government's interest in suppressing violence cannot justify its suppression of speech.

2. Narrowing *Matthews* to Its Facts

The D.C. Court of Appeals can save the riot statute by narrowing *Matthews* on statutory grounds.[297] This avenue remains open because *Matthews* was wrong as a matter of statutory interpretation and its unique facts support its precise holding without resort to a broader rule. A future court should therefore adopt the traditional definition of rioting as the law of the District of Columbia.

The D.C. riot statute codified a common law crime.[298] "[W]hen a statute covers an issue previously governed by the common law, [courts] interpret the statute with the presumption that Congress intended to retain the substance of the common law . . . ."[299] The statute mirrors the two-part structure of the common law and various state statutes[300]: a definition of "riot" and a prohibition on "engag[ing]" in a riot, where engaging is not defined.[301] It is therefore

293. *See supra* Part III.B.2.

294. *See supra* Part III.A.4.

295. *See* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 916 (1982) ("'[P]recision of regulation' is demanded." (quoting NAACP v. Button, 371 U.S. 415, 438 (1963)). Fox Business Network's Stuart Varney offered an insightful comment on police response to the violence: instead of pepper spray, "spray some dye" on the people breaking windows. *Protesters Storm D.C. Streets Smashing Windows*, FOX BUS. (Jan. 20, 2017), https://video.foxbusiness.com/v/5290565946001/ [http://perma.cc/DQZ3-EYHB]. While the suggestion that police should run around spraying paint at people may be a bit silly, the message that the police had options other than corralling rioters and marchers alike into one crowd is worth taking. If prosecutors later found it hard to tell the two apart, that was a problem of the government's own making.

296. *See supra* notes 248–251 and accompanying text.

297. *Cf.* Citizens United v. FEC, 558 U.S. 310, 374 (2010) (Roberts, C.J., concurring) ("If there were a valid basis for deciding this statutory claim in Citizens United's favor (and thereby avoiding constitutional adjudication), it would be proper to do so.").

298. *See* Act of Dec. 27, 1967, Pub. L. No. 90–226, § 901, 81 Stat. 734, 742 (codified as amended at D.C. CODE ANN. § 22-1322); Gertman v. Burdick, 123 F.2d 924, 928–29 (D.C. Cir. 1941) (noting that Maryland common law remained in force in D.C. at the time); Schlamp v. State, 891 A.2d 327, 330 (Md. 2006) (noting that rioting is a common law crime in Maryland).

299. Samantar v. Yousuf, 560 U.S. 305, 320 n.13 (2010).

300. *E.g.*, State v. Urias, 553 P.2d 1230, 1231 (Ariz. Ct. App. 1976) (interpreting Arizona's then-effective riot statute); Williams v. Osmundson, 281 N.W.2d 622, 623–27 (Iowa 1979) (interpreting IOWA CODE ANN. § 723.1 (West 2018)).

301. D.C. CODE ANN. § 22-1322(a)–(b) (West 2018).

reasonable to conclude that "engage" in the D.C. statute denotes the degree of participation necessary to constitute the common law crime. This would be consistent with testimony from the Justice Department (which drafted the law) that it intended to follow the common law with minor alterations.[302]

The legislative history reveals three goals for the statute: (1) to fill a legislative gap where the force of the common law was in doubt,[303] (2) to clarify the authority of D.C. police to arrest rioters,[304] and (3) to criminalize incitement to riot.[305] The first two goals would be satisfied by codification alone, removing doubt as to the displacement of the common law and grounding the arrest authority of the police in a numbered code section. The third goal was satisfied when Congress created the crime of incitement.[306] The *Matthews* court thought it had to satisfy a fourth goal: it viewed the 1967 riots as being of a different character than riots of the common law era, so it concluded that the statute must be read broadly to cover them.[307] As discussed above, this view of the 1967 riots is susceptible to criticism. But even if accurate, whether it is wise to extend riot law to novel areas is a policy question best left to Congress.[308]

I have argued above that the D.C. statute as interpreted in *Matthews* violates the First Amendment.[309] The traditional definition of rioting, by contrast, has a history of surviving constitutional attack.[310] The crime's age adds clarity to its language and saves it from being vague or overbroad.[311] In light of

---

302. *S. Comm. Hearing*, *supra* note 99, at 5 (statement of Fred M. Vinson, Jr., Assistant Att'y Gen. of the United States) ("[This bill] incorporates the basic thrust of the common law statutes found in many jurisdictions and at the same time modernizes the law and takes cognizance of the First Amendment."); *H. Comm. Hearing*, *supra* note 86, at 16 (statement of Fred M. Vinson, Jr., Assistant Att'y Gen. of the United States) (same).

303. *See H. Comm. Hearing*, supra note 86, at 10 (statement of John B. Layton, Chief, Metropolitan Police Department, District of Columbia).

304. *See S. Comm. Hearing*, supra note 101, at 16–17 (statement of John B. Layton, Chief, Metropolitan Police Department, District of Columbia).

305. *See H. Comm. Hearing*, *supra* note 86, at 20 (statement of Fred M. Vinson, Jr., Assistant Att'y Gen. of the United States); *see also* United States v. Bridgeman, 523 F.2d 1099, 1113 (D.C. Cir. 1975) ("The language and legislative history of section [22-1322] reflect an interest in preventing not only spontaneous street demonstrations but also in proscribing riot and even incitement to riot, an offense whose coverage under the common law was uncertain.").

306. *See* Act of Dec. 27, 1967, Pub. L. No. 90–226, § 901, 81 Stat. 734, 742 (codified as amended at D.C. CODE ANN. § 22-1322).

307. *See* United States v. Matthews, 419 F.2d 1177, 1180 n.5 (D.C. Cir. 1969).

308. *Cf., e.g.*, Oncale v. Sundowner Offshore Servs., 523 U.S. 75, 79 (1998) ("[I]t is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.").

309. *See supra* Part III.C.

310. *See, e.g.*, Territory v. Kaholokula, 37 Haw. 625, 637 (1947); Williams v. Osmundson, 281 N.W.2d 622, 624 (Iowa 1979); Commonwealth v. Abramms, 849 N.E.2d 867, 876 (Mass. App. Ct. 2006). "[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988).

311. *Cf.* Shenfield v. City Court of Tucson, 443 P.2d 443, 448 (Ariz. Ct. App. 1968) ("These words have such inherent and historical meaning as to give sufficient warning of the proscribed

all the foregoing factors—the statutory text, Congress's goals, the legislative history, the presumption of retaining the substance of the common law, and the desirability of avoiding constitutional doubt—the correct reading of the D.C. riot statute is as a codification of the common law crime of rioting.

It is possible, however, to read *Matthews* narrowly so that D.C. may adopt the traditional definition of rioting without overruling precedent. Matthews's requested jury instruction—that the defendant could not be found guilty of rioting if he did not enter the liquor store[312]—was properly denied because physical presence was not an element of rioting under the D.C. statute.[313] His motion for judgment of acquittal was properly denied because testimony that he partook in looting was sufficient to show purposeful violent conduct.[314] Finally, he conceded that he stole liquor bottles, putting his conduct outside the reach of the First Amendment.[315] Should the D.C. riot statute ever come again before D.C.'s highest court, the full breadth of *Matthews* need not apply; its damage can be corrected and the traditional definition of rioting installed as the law of D.C.

IV. CONCLUSION

Two facts are apparent about the Justice Department's failed efforts to prosecute the Inauguration Day protestors. First, it is apparent that such a broad riot prosecution is an anachronism in American law, possible only through an unusually broad riot statute forged in reaction to (what was perceived by some as) an era of mindless and purposeless violence. Second, it is apparent that the Justice Department's efforts have allowed a handful of vandals to silence an entire street, turning the riot statute into an impermissible heckler's veto. Fortunately, the tools exist to solve both problems: it is possible to separate the individual from the group and abide by a law that is simultaneously hostile to violence and protective of peace, even when these forces congregate on the same street. The tools of the common law crime allow this, and they are the appropriate response to the problem that the Justice Department has created.

---

conduct . . . .").

312. *Matthews*, 419 F.2d at 1179–80.

313. D.C. CODE ANN. § 22-1322 (West 2018).

314. *See Matthews*, 419 F.2d at 1182. The defendant's acquittal for burglary was insufficient to render the verdict fatally inconsistent. *Id.* Although the appellate court looked past the alleged inconsistency to consider the defendant's version of the facts, *id.* at 1183, this was unnecessary in light of its holding that the verdict could stand on the prosecution's evidence.

315. *Id.* at 1183.